

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : 2017 WAMW 20

CORAM : WARDEN J O'SULLIVAN

HEARD : On the Papers

DELIVERED : 14 September 2017

FILE NO/S : Application to Extend Time 505282; Application for Restoration 502527

TENEMENT NO/S : Exploration Licence 20/778

BETWEEN : **ANTHONY JOHN CAMPBELL**
(Applicant)

AND

ALLARROW PTY LTD
(Respondent)

Catchwords: *Application for Extension of time to serve an application for restoration – turn on own facts.*

Legislation:

- *Mining Act 1978 ss97A, 162B*
- *Mining Regulations 1981*

Cases referred to:

- *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170
- *Fonti v Regency Mines Australasia Pty Ltd* [2014] WAMW 22
- *Molopo Australia v Eastern Gold NL* [1989] WAR 270
- *Guyana Mxolisi v Elizabeth Dewar* [2017] WAMW 2
- *Gold & Mineral Resources Pty Ltd v Petrie & McMurdo* [2013] WAMW 13
- *Ratnam v Cumarasamy* (1964) 3 ALL ER 933
- *Kioa v West* (1985) 159 CLR 550
- *Lightrange Pty Ltd v Bond* [2017] WAMW 12
- *Forrest & Forrest v Wilson* (2017) HCA 30

Result:

Application to extend time to serve the application for Restoration refused.

Representation:

Applicant : In Person
Respondent : Ms S Winton

Solicitors:

Applicant : In Person
Respondent : Mining Access Legal

Introduction

- 1 On 20 October 2016 the Applicant lodged a Form 5 for Exploration Licence 20/778 (“E20/778”) for the year ending 15 July 2016.
- 2 On 15 February 2017 E20/778 was automatically forfeited for non-payment of the penalty imposed for failing to lodge the Form 5 on time.
- 3 On 16 February 2017 the Respondent lodged application E20/919 with respect to part of the land the subject of E20/778.
- 4 On 13 March 2017 the Applicant lodged an online application for the restoration of E20/778 (“Restoration”).
- 5 The Applicant was required to serve the application for Restoration on the Respondent within 14 days.
- 6 On 26 April 2017 (some 29 days late) the Applicant served a copy of the application for Restoration on the Respondent and lodged an application to extend time (“the Application”).
- 7 By letter to the Department of Mines and Petroleum (“DMP”) dated 9 May 2017 the Respondent objected to the Application.
- 8 On 23 May 2017 the Respondent lodged an objection to the application for Restoration.
- 9 On 13 June 2017 the matter Application came before Warden Scutt in the Carnarvon Warden’s Court. It became apparent during the course of that hearing that the Applicant was contending he relied on advice provided by Fiona Kaye Munro, the Mount Magnet Mining Registrar (“the Registrar”) that he had done all he was required to do so far as progressing his application for Restoration was concerned. Warden Scutt made programming orders which, inter alia, included that the Application be dealt with on the papers.

10 In the course of these proceedings I have been provided with the following documents:-

Applicant's Documents:

- (a) Application for Restoration (502527) dated 13 March 2017;
- (b) Applicant's Chronology received on 13 June 2017;
- (c) Applicant's affidavit sworn on 10 July 2017; and
- (d) Applicant's email to the Registrar dated 14 July 2017.

Respondent's Documents:

- (a) Objection to the Application for Restoration dated 13 April 2017;
- (b) Letter from Respondent dated 9 May 2017;
- (c) Letter from Respondent dated 10 July 2017;
- (d) Letter from Respondent dated 14 July 2017.

11 I have also received an affidavit from the Registrar sworn on 23 June 2017.

The Law

12 Section 162B of the *Mining Act 1978* ("the Act") relevantly provides:

"162B. Extension of prescribed period or time

- (1) *If this Act provides for something to be done within a prescribed period or a prescribed time, the Minister or a warden may, in a particular case, extend the period or the time for doing the thing.*
- (2) *The power in subsection (1) may be exercised whether or not the prescribed period has ended or the prescribed time has passed".*

13 The discretion to extend time in s. 162B of the Act is unfettered. A statutory power that is unfettered must still be exercised in a manner consistent with the subject matter, scope and purpose of the statute¹. As Warden Zempilas

¹ *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Gibbs CJ at p186 and *Kioa v West* (1985) 159 CLR 550 per Brennan J at p619

observed in *Fonti v Regency Mines Australasia Pty Ltd*² factors relevant to the exercise of the discretion are:

- (a) the circumstances which give rise to the application for an extension of time;
- (b) the legislative intent, objects and policy of the Act; and
- (c) whether any prejudice will be suffered if the extension of time is or is not granted.

- 14 The legislative intention of the time restriction to serve a party who has marked out the ground the subject of an application for restoration is to ensure that the status of the land is resolved expeditiously. Subject to certain exceptions land that is suitable for mining should be mined so that the mineral wealth of the State is exploited.
- 15 Consistent with comments by Brinsden J in *Molopo Australia v Eastern Gold NL*³, prejudice to the party opposing the application to extend time does not merely mean that proceedings will remain on foot in the event the application to extend time is granted. Rather, the question is whether by reason of the effluxion of time beyond the prescribed time limit there, for some other reason, might be prejudice.
- 16 The Applicant bears the onus of proof to satisfy the Warden that the period of the extension sought is reasonable.⁴

The Applicant's Position

- 17 The Applicant concedes he did not lodge the Form 5 for 2016 by the due date.
- 18 With respect to not paying the penalty imposed on time, thereby resulting in the forfeiture of E20/778, the Applicant says that:

² [2014] WAMW 22 at [5]

³ [1989] WAR 270 at 271

⁴ *Gold & Mineral Resources Pty Ltd v Petrie & McMurdo* [2013] WAMW 13 at [15]

- (a) sometime after 9 November 2015 he moved from Scarborough to Gwelup;
- (b) on 9 November 2015 he registered a one-year mail redirection at the Karrinyup Post Office;
- (c) in June 2016 he lodged an online Form 5 for M20/292 which included the Gwelup address;
- (d) on 20 October 2016 he lodged online the Form 5 for E20/778 which included the Gwelup address;
- (e) on 9 November 2016 his mail redirection ceased. He understood he had notified all third parties of his address and could collect any remaining mail from his previous residence;
- (f) on 23 January 2017 he received an email from Ms Taylor from the DMP advising that a penalty notice with respect to E20/778 had been returned to the DMP marked "*return to sender – left address/unknown*". The email itself did not state that E20/778 would automatically be forfeited on 16 February 2017 on non-payment of the fine. Whilst acknowledging he received the email and attached letter from the DMP on 23 January 2017, he said that it was received on his mobile phone whilst in regional Western Australia and he could not open the attachment. Upon returning to Perth (on a date unspecified) he did not recall the email and did not see it on his computer;
- (g) on 12 March 2017 he was advised by the occupant of his previous residence that there was mail waiting for him. That same day he collected his mail and found a notice marked "*registered mail to be collected*". Upon seeing the notice he was reminded of the letter from the DMP that was returned to sender (attached to the email of 23 January 2017) he was unable to open. He immediately returned home, found the email on his computer and opened the attachment. Attached was the letter dated

11 January 2017 from Ms Harrop from the DMP stating he had to pay a late lodgement fine of \$720.00 by 15 February 2017 or E20/778 would be automatically forfeited;

(h) on 12 March 2017 he emailed the DMP seeking to restore E20/778; and

(i) on 13 March 2017 he paid the fine of \$720.00 and lodged an online application for Restoration.

19 The Applicant maintains that he was unaware of his obligation to serve a copy of his application for Restoration on the Respondent. In particular, the Applicant says that when he lodged his application online on 13 March 2017 he was in regional Western Australia. He acknowledged receiving an email from the Registrar on 14 March 2017 but says he could not open the attached letter via his mobile phone. The letter informed the Applicant that his application had been listed for hearing. The letter also included the following extract:

“Attached for your use are the following documents:-

A copy (or copies) of the original Application for Restoration to serve within 14 days after the Application for Restoration was lodged on any person who has since the forfeiture made application for a mining tenement in respect of the land or any part of the land to which the Application for Restoration relates, as required by S97A(4) ... ”

20 The letter goes on to say that the Applicant should check Tengraph daily as applications may have been marked out shortly after forfeiture but not lodged for up to 10 days from marking out.

21 According to the Applicant, as he was unable to access the letter, he telephoned the Registrar on 14 March 2017 and asked if there was anything else he was required to do. The Applicant says that the Registrar told him there was nothing else unless he wished to add to his application. The Registrar in her affidavit does not expressly remember the conversation but does not dispute that such a conversation may have taken place.

- 22 On 19 April 2017 the Applicant received a copy of the Objector's objection. The Applicant acknowledges that paragraph (c)(9) refers to his failure to serve the application for Restoration. The Applicant says that he read section 97A(4) of the Act and as soon as possible on 26 April 2017 served a copy of the application for Restoration on the Respondent.
- 23 The Applicant also relies on a letter from Dr Craig Berg, Gwelup Medical Centre dated 29 June 2017 that says the Applicant has recently been suffering from a stress related illness that has affected his concentration and attention. According to Dr Berg this has affected his ability to complete "*some necessary paperwork relating to mining tenements*".

The Respondent's Position

- 24 The Respondent raises a number of arguments in response to the Application:
- (a) little weight should be given to the Applicant's argument that he could not open the attachment to the email from the Registrar dated 14 March 2017. As the tenement holder it was the Applicant's responsibility to inform himself of the regulatory requirements, not the Registrar. Furthermore, the Applicant should have made some further effort to promptly access the document;
 - (b) the letter from Dr Berg supports the proposition that the Applicant's health problems mean he is not in a position to fulfil his obligations as a tenement holder;
 - (c) the Applicant has a history of non-compliance in addition to the failure to serve the application for Restoration by the due date including:
 - (i) not lodging the Form 5 due by 13 September 2016 until 20 October 2016;
 - (ii) not paying the penalty for failing to lodge the Form 5 on time which was due on 15 February 2017 and paid on 13 March 2017; and

- (iii) the failure to pay rent and lodge the Form 5 on time for the year ending 15 July 2015;
- (d) the Respondent says further that the Applicant's failure to comply with the programming orders made in relation to this matter and his history of non-compliance demonstrate a flagrant disregard for the regulatory requirements and are indicative of the likelihood that he will continue not to comply in the future; and
- (e) the Respondent has incurred further substantial legal costs in pursuing its application for E20/919. To allow the Application and allow the application for Restoration to proceed would continue to cause the Respondent to incur costs.

The transcript of proceedings before Warden Scutt

25 The transcript of the proceedings before Warden Scutt on 13 June 2017 explores the circumstances giving rise to the Applicant's substantive application (Restoration) as well as the Application. While I am not here concerned with determining the Applicant's substantive application, the history does provide some context in considering the Applicant's explanation for failing to serve the Respondent within time. With respect to the failure to lodge the Form 5 for 2016 on time the Applicant said:

- *"I didn't know I had to lodge a Form 5 for an EL. No one ever told me so."⁵ ...*
- *"So part of, obviously, Ms Winton's group's case was that I was negligent at some stage in lodging a Form 5 correctly, but again, I must admit I never knew I had to do that."⁶*
- *"Everything else that I do in my world people send you emails or notices and you pay them or you have a time to pay them. If you forget to pay them, they send you a reminder. I received nothing. So*

⁵ At pg6

⁶ At pg7

I didn't even know this existed until I first received the first forfeiture notice which I then (indistinct) up.”⁷

- “... unfortunately, in the last 12 to 18 months I've had a harrowing experience in business. I've had to turn from an accountant to a builder. I've had two ex-friends rip me off over \$600,000 and I'm working 17 hours a day to rectify the situation and save everything. I've got – I shifted house in November '15”.

26 With respect to the failure to change his address the Applicant said:

“But the problem is (sic) that, as I said, I changed my address in May 16. I additionally lodged another Form 5 in November 16 and **at no stage did anyone tell me** that I needed to change any other information on my address. Unfortunately, - yes – it is in (sic) the Act that you've got to do a Form 30 and a stat dec.”

27 The transcript also documents the following exchanges between Warden Scutt and the Applicant:

- Warden: And you were entrusted with the responsibility of maintaining (sic E20/778). Is that essentially it? And you weren't aware of your ... obligations in that regard”.

Mr Campbell: I wasn't aware. No. **No-one ever told me anything.** I mean they just dumped it on me”.⁸

- Warden: “It does seem to me though, Mr Campbell, that at the end of the day you didn't look at the provisions of the Act and weren't aware”

Mr Campbell: “Correct.”⁹

- Warden: “Had you turned your mind to it, you could have looked at the relevant provisions of the *Mining Act* at the time. That's a fair comment, I think.”

Mr Campbell: “Well, it is, but I didn't think I needed to because that's why I rang Fiona Munro (the Registrar) up and spoke to her about and asked is there anything else I needed to do.”

Warden: “Was that before or after you lodged your application?”

Mr Campbell: “No. That was after I lodged the application.”

- Warden: “So the point I'm simply making, Mr Campbell, is you could have looked at the *Mining Act* on or about the time you were doing your

⁷ At pg 7

⁸ At pg 6

⁹ At pg 16

application. For whatever reason you didn't. Is that – that's a fair comment, I think, is it not?"

Mr Campbell: "Well possibly, but I say no because I rang her up to find out what I needed to do ... because I needed to put these forms in. I did that. I put these forms in. And then after lodging them (indistinct) have you got the forms? Yes. You've got them. Is there anything I further I need to do? No. You don't need to do anything. So you know, I'm stuck here. I can't read anything on my phone. I can't access anything. **I have to rely on professionals who do this every day because I don't have access to this.** If I had had access to it because (indistinct)."¹⁰

- Warden: "It seems to me it's not a case where it would have been impossible for you to access the *Mining Act*. Rather, that it's not something that you turned your mind to because you spoke to the Registrar about it."

Mr Campbell: "**Well, that would divert me away from looking at anything else.** And the fact that I'm working 17 hours a day. I know I'm harping on it, but it's complete distraction when someone rips you off \$600,000.00 and your whole life and everything you worked for is all at risk because of – you trusted somebody and you're stuck in this country town trying to the best you can."¹¹ (my emphasis)

Should the applications to extend time be granted?

28 There are a number of observations that can be made about the Applicant's conduct in this case:

- (i) the Applicant has not offered any explanation for failing to lodge the Form 5 for 2016 on time other than to say no one told him he needed to do so;
- (ii) it appears that at no time prior to the penalty for late lodgment of the Form 5 being imposed, did the Applicant comply with the obligations to provide the DMP with a statutory declaration confirming his change of address, as he was required to do. This explains why the DMP did not send correspondence to his new address;
- (iii) having been fined for failing to lodge a Form 5 on time in 2015, the Applicant should have been well aware:

¹⁰ At pg 17 & 18

¹¹ At p18 & 19

- (a) of the obligations to lodge the Form 5 for 2016 on time;
 - (b) that unless time to lodge the Form 5 was extended (as a consequence of him applying for an extension) he would be fined; and
 - (c) non-payment of the fine by the due date would result in automatic forfeiture;
- (iv) notwithstanding the evident serious consequences that would flow from a failure to lodge the Form 5 for 2016 on time, with respect to which he ought to have been aware, it seems that the Applicant relied entirely on the DMP sending him correspondence to remind him of his obligations;
- (v) notwithstanding the problems the Applicant encountered in accessing emails via his mobile phone when in rural Western Australia that contributed to the automatic forfeiture of E20/778, he took no steps to remedy the situation and now relies on the same explanation for failing to serve the Respondent with the application for Restoration;
- (vi) interestingly, the Applicant's letter to the DMP dated 12 March 2017¹² contains the following instruction:
- "Could you please ... commence the process to prevent forfeiture immediately?"*
- The Applicant seemed unable to appreciate that it was not the responsibility of the DMP to commence proceedings on his behalf;
- (vii) similarly, so far as the application for Restoration was concerned, the Applicant relied on the Registrar (during a telephone call) to tell him he needed to serve the application on the Respondent when there is no evidence the Applicant told the Registrar he could not access the letter emailed to him on 14 March 2017. Nor did he request that she read it to

¹² Attachment E to the Applicant's affidavit dated 10 July 2017

him.¹³ In the circumstances, the Registrar had no reason to suppose that the Applicant had not read the letter which set out what he was required to do. Her statement that the Applicant was not required to do anything further must be viewed in context; and

(viii) the Applicant was not prepared to devote time to finding out what his obligations under the Act or Regulations were because it distracted him from dealing with other pressing issues in his life.

29 The Applicant's own representations demonstrate that he has taken virtually no steps to inform himself of his obligations as a tenement holder. This includes securing a copy of the Act. More importantly he does not accept any personal responsibility for finding out what those obligations are. The Applicant seems to operate under the misapprehension that the DMP is there to tell him what to do and then remind him when to do it.

30 As Warden Maughan remarked in *Lightrange Pty Ltd v Bond*¹⁴ tenement holders are obliged to know and comply with the obligations in the Act. As with most licensing schemes with the benefits bestowed by the licence come the burden of compliance. I would have thought that having failed to lodge a Form 5 in 2015 (and 2016) on time and been fined the Applicant may have gained some appreciation of his obligations.

31 The fact that the Applicant was suffering from a stress-related illness around the time he lodged his application for Restoration does not provide an adequate explanation for the failure to serve the Objector on time.

32 As is evident from the way the tenement has been managed this is not an isolated incident nor is it an aberration. A stress-related illness (of recent duration) may explain why an otherwise diligent tenement owner has slipped up on this occasion. That, however, is not this case.

¹³ The transcript of proceedings before Warden Scutt on 13 June 2017 reveals that the Applicant provided varying accounts of his conversation with the Registrar on 14 March 2017, however none of those accounts were repeated in his affidavit sworn on 10 July 2017

¹⁴ [2017] WAMW 12 at [45]

- 33 Nor am I satisfied that the Applicant's financial difficulties over the last 18 months provide a suitable explanation. This is not a case where the tenement holder has done his best in trying circumstances. As is evident from the transcript of the Applicant's discourse with Warden Scutt, the problem is attitudinal. Notwithstanding all that has happened, the Applicant still fails to demonstrate an appreciation of his obligations as a tenement holder.
- 34 The failure in this case occurred because the Applicant was either unwilling or unable to accept that he is responsible for managing the tenement. This includes reading the Act and Regulations to ascertain what his obligations are and ensuring he can access correspondence.
- 35 As Brinsden J observed in *Molopo*¹⁵ the legislation provides for some flexibility so far as late lodgement in this case service is concerned to accommodate inadvertence. However, the Applicant's failure in the circumstances of this case cannot be described as mere inadvertence.
- 36 In considering the Application it is also appropriate to consider any prejudice that arises upon the grant or refusal of the Application.
- 37 Self-evidently, if the Application is refused the application for Restoration falls away.
- 38 In the event that the Application is granted, the application for Restoration will proceed and there is a risk that application may ultimately be granted. As was pointed out in *Molopo*¹⁶ the prospect that the proceedings will remain on foot if time is extended is not a relevant consideration when determining whether to extend time. The relevant question is whether because of the delay of 29 days, the Respondent has suffered any prejudice.
- 39 No doubt the Respondent has sustained some prejudice in the sense that it has gone to the trouble of marking out and lodging an application for the ground in

¹⁵ At p271

¹⁶ Per Brinsden J at 271

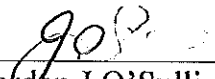
question. The Respondent has also suffered some prejudice in that the resolution of its application (E20/919) has been delayed by 29 days. .

Conclusion

- 40 The time restrictions imposed by the Act and Regulations exist for a reason. If those time restrictions are to mean anything, then it is incumbent on an applicant seeking to extend time to demonstrate that in all the circumstances the discretion should be exercised in his or her favour.
- 41 By any measure the Applicant has not offered a satisfactory explanation for failing to serve the Respondent within time.
- 42 As I have already outlined in some detail, the Applicant is not an otherwise diligent tenement holder who has found himself in this position through misadventure or inadvertence. On the contrary, the failure to serve the Respondent within time is representative of a systemic failure on the part of the Applicant to properly manage the tenement.
- 43 Mining is a serious business that carries onerous obligations. It is not a hobby in which a tenement holder is only required to engage when he or she feels like it or when other commitments permit.
- 44 Where, as in this case, the circumstances giving rise to the late service of notice demonstrate a failure to accept responsibility for managing a tenement, it is difficult to identify a basis upon which to grant the Applicant an indulgence.
- 45 It is also important not to lose sight of the fact that a fundamental object of the Act is to encourage mining for the benefit of the State. The public interest is best served by the expeditious exploitation of the State's mineral resources. That requires land suitable for mining to be made available as soon as possible. It is not in the public interest that the resolution of disputes over tenements is delayed because time restrictions are not adhered to.

46 Ultimately, I have concluded that time to serve the Respondent should not be extended. In coming to that conclusion I am acutely aware that the Applicant's restoration application is now at an end. That outcome must, however, be considered in a context where the Applicant's explanation is completely without merit and he truly is the "author by his own misfortune".¹⁷ It must also be acknowledged that the Respondent has suffered some delay pending the resolution of the Applicant's restoration application and expended time and money in marking out and making application for the ground the subject of these proceedings.

47 To find otherwise would be to give precedence to the prejudice suffered by the Applicant above all other relevant considerations, including that his explanation is completely lacking in merit, the prejudice suffered by the Respondent and the objects of the Act.


Warden J O'Sullivan

14 September 2017

¹⁷ See *Forrest & Forrest v Wilson* (2017) HCA 30 at [77]