

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : CHRISTOPHER GENE RYAN v GERARD VICTOR BREWER

CORAM : WARDEN A MAUGHAN

HEARD : On the Papers

DELIVERED : 7 April 2017

FILE NO/S : Application for Prospecting Licence 39/5625 and
Objection 489845

TENEMENT NO/S : P39/5625

BETWEEN : **CHRISTOPHER GENE RYAN**
(Applicant)

AND

GERARD VICTOR BREWER
(Objector)

Catchwords: *Application for Prospecting Licence - Overlapping
tenements – Excision from Grant, Marking Out, Turns
on Own Facts*

Legislation:

- *Mining Regulations 1981*
- *Mining Act 1978*

Cases referred to:

- *Kreplins and Golding v Holden* (1989) 8AMPLA Bull 19
- *Wescombe v Barrick Gold of Australia Ltd* [2009] WAMW16
- *Ex parte Egypt Holdings Pty Ltd v Esso Exploration* (1988) Case 24 Volume S1
- *Ex parte Atkins and Egypt Holdings* (1987) Case 20 Volume S1
- *Pratt –vs- Parker and CRA Exploration Pty Ltd* (1984) Case 6 Volume S1
- *Lynton James Downe v Kathleen Anne Major* (Coolgardie Wardens Court 4 December 1992)

Result:

1. *Application granted.*

Representation:

Counsel:

Applicant : N/A
Objector : N/A

Solicitors:

Applicant : Self
Objector : Lawton Lawyers

REASONS FOR DECISION

Introduction

1 By application dated 30 May 2016 Christopher Gene Ryan (“Ryan”) seeks
Prospecting Licence 39/5625.

2 That application is objected to by Gerard Victor Brewer (“Brewer”)

3 The parties consented to the objection being dealt with on the papers without a
substantive hearing.

4 The following facts appear not to be an issue:

(i) The applicant marked out application for Prospecting Licence 39/5625
at 3:14 hours on 27 May 2016.

(ii) The applicant’s Form 20 described the marking out in the following
terms:

“Datum: AGM Coordinates GDA94, at approximately 396052mE,
6787851mN

Boundary: Then approx. to 394972mE; 6787851mN Then approx. to
394846mE; 6789687mN Then approx. to 396036mE; 6789697mN
Then back to datum 396052mE; 6787851mN”

(“the marked out area”)

(iii) At the time the marking out was undertaken, P39/5625, containing
12 hectares, was live within the boundaries of the marked out area.

5 The boundaries of the marked out area show an area marked out to be
209.55 hectares, if the 12 hectares of P39/5499 is included.

6 Section 59(1) of the *Mining Regulations 1981* provides:

59. Manner of marking out tenement (Act s. 105)

(1) *Land in respect of which a person is seeking a mining tenement shall,
except where other provision is expressly made, be marked out —*

(a) *by fixing firmly in the ground —*

- (i) *at or as close as practicable to each corner or angle of the land concerned; or*
 - (ii) *if there is an existing survey mark at a corner or angle of the land concerned, as close as practicable to the survey mark without moving, changing or otherwise interfering with the survey mark,*
a post projecting at least 1 m above the ground; and
- (b) *subject to subregulation (3), by either —*
- (i) *cutting 2 clearly identifiable trenches; or*
 - (ii) *placing 2 clearly identifiable rows of stones,*
each at least 1 m long from each post in the general direction of the boundary lines; and
- (c) *then by fixing firmly to one of the posts as the datum post, notice of marking out in the form of Form 20.*

7 Regulation 59(1)(e) requires a notice of marking out in the form of a “Form 20”.

8 Regulation 90 of the *Mining Regulations* provides:

90. Forms to be completed in accordance with directions

A form prescribed by these regulations shall be completed in accordance with such directions as are specified in the form as so prescribed.

9 Item (e) of the Form 20 requires a description of the boundaries and further that the “description is to be identical to that included in Form 21 – Application for a Mining Tenement – when lodged”.

10 The Objector submits that the description included in the Form 20 the applicant includes “all of the ground within those described boundaries”. Further it is submitted that a true description of the boundaries should have included the reference to P39/5499 being excluded from the application.

11 The Objector further submits that as a consequence of the non-exclusion of P39/5499 the area sought to be granted for the prospecting licence as “demonstrated on Quick Appraisal” shows an area of 209.55 hectares.

12 The *Mining Act 1978* provides at section 40(2):

“40(2) *The area of land in respect of which any one prospecting licence may be granted shall not exceed 200 ha.*”

13 It is submitted that the area applied for is therefore in contravention of section 40(2) and ought to be refused.

14 For his part the applicant submits:

“The Applicant correctly affixed to the Datum post correctly filled out Form 20 on 27 May 2016. On 30 May 2016 at Kalgoorlie DMP the Applicant lodged an Application for Mining Tenement Form 21 (P39/5625) together with a “map of the area applied for” – ANNEXURE 1. It can be seen from this map the area of the tenement excludes live tenement P39/5499 (12 hectares) – ANNEXURE 2. The area of ground applied for is 197 hectares. In any case it is the DMP that checks the application for encumbered areas for exclusion. The application was accepted together with the appropriate fee for 197 hectares.”

15 Submission made by Mr Ryan reflects the submission made by the Applicant in *Kreplins and Golding v Holden* (1989) 8AMPLA Bull 19. Mr Kreplin submitted “that the application could be made on condition that all other existing tenements had been exercised”. His Honour Warden Brown expressed the following obiter views on the subject:

“It is my understanding that there has developed a practice whereby ground the subject of existing tenement is excised from the terms of any grant of application for ground which overlaps the existing tenement. There is no reference to “excision” in the Act and Regulations. Although section 76 clearly provides that mining leases may be granted for part only of the ground applied for, there is no equivalent provision for prospecting licences.

To examine this practice one starts at section 18 of the Act which provides:-

“18. All Crown land, not being Crown land that is the subject of a mining tenement, is open for mining and as such is land –

(a) where any person may set up pegs or otherwise mark out the land pursuant to section 104 in connection with an application for a mining tenement;

- (b) where the holder of a Miner's Right may do the things authorized by section 20; and
- (c) which may be made the subject of an application for a mining tenement,

subject to and in accordance with this Act.”

The question under consideration is whether an applicant can lawfully mark out an area of land which includes land which is already the subject of a mining tenement. In my view section 18 on a plain reading says that Crown land which is the subject of an existing mining tenement is not open for mining.

Because section 104 is specifically mentioned in section 18 I do not accept that section 104 can be interpreted to mean that any land can be entered for the purpose of marking out. If ground is not open for mining then it cannot be marked out by anyone else.

I find support for this view in the wording of the Regulations which clearly anticipate that ground may be applied for in various shapes. In particular the terms of Regulations 92 are significant, ie

“92. The shape of a mining tenement other than a miscellaneous licence or one marked out pursuant to regulation 61 shall be in the form of a rectangle, but if the presence of boundaries of mining tenements, other boundaries or nature features make it necessary or desirable to vary this shape, each side of the tenement shall be a straight line and where possible at right angles to an adjacent side or parallel to an opposite side.” (my underlining).

In my view the direct reference to the presence of other boundaries which make it necessary to vary the shape from a rectangle indicates that legislative draftsman accepted that over pegging was not permitted. The final words of Regulation 92 while difficult to apply in practice are not inconsistent with the view I have taken.

When one looks at Regulation 59 closely its opening words, “Land in respect of which a mining tenement is sought shall ... be marked out in the following manner”, do not convey any suggestion that any land can be marked out if a mining tenement is not sought over that land. Again the reference to “corner or angle” in paragraph (a) suggests that non-standard areas may need to be marked out in accordance with the Act and Regulations.

Accordingly, although many Applicants probably have followed a well-established practice of marking out a large rectangular area with an expectation that land not open for mining will be excised, I consider that an application for a prospecting licence has not been marked out in accordance with the Act and Regulations if it clearly involved marking out over existing tenements, other than miscellaneous licences.”

16 The issue was also considered by Warden Malone in *Lynton James Downe v Kathleen Anne Major* (Coolgardie Wardens Court 4 December 1992). In that decision Warden Malone summarised a number of relevant prior decisions including the aforementioned dicta of Warden Brown in *Kreplins*. The cases considered include:

"In Pratt –vs- Parker and CRA Exploration Pty Ltd (1984) Case 6 Volume S1 Pidgeon J said:

"I would consider it would be contrary to the whole intent of the Act and the procedures contemplated by the Act to say that an application was invalid by reason of a very small portion of it containing an area that has already been granted under the Act and to state that that deprived the Minister power of granting an application in respect of the remainder. Such an interpretation would have the effect of making applications a game of chance as an applicant may lose priority if his application had to be refused because it was found there was some technical defect in the area of land."

In Ex parte Atkins and Egypt Holdings (1987) Case 20 Volume S1 Brinsden J. said:

"It seems to me perfectly plain that a mining tenement not being crown land within the meaning of Section 18, while it remains in force, is not open to being the subject of marking out of another mining tenement pursuant to Section 105 and the Regulations, except to the limited extent contained in Section 49. Section 49 avails only to the holder of a prospecting licence the right to apply for and have granted to him one or more mining leases or one or more general purpose leases or both in respect of any part or parts of land the subject of the prospecting licence."

In that same case Kennedy J. said:

"By Section 18, all crown land, not being crown land that is the subject of a mining tenement is open for mining and, as such is land – (a) where any person may set up pegs or otherwise mark out the land pursuant to Section 104 in connection with an application for a mining tenement ... Subject to and in accordance with this Act. It must follow that, for so long as crown land is the subject of a mining tenement, it is not open for any person to mark out that land ... It also follows that, save and except that, immediately after the land once again became open for marking out, the applicant placed a duly completed Form 20 upon a datum post, what was claimed by the applicant to have constituted marking out was done at a time when the land was not open for marking out."

In the same case Olney J. said:

“In my opinion the clear meaning of Section 18(a) is that only land which is open for mining can be marked out in connection with an application for a mining tenement and it must follow that land which is not open for mining may not be marked out for that purpose.”

*In **Ex parte Egypt Holdings Pty Ltd and Esso Exploration** (1988) Case 24 Volume S1 Burt CJ in referring to Section 18 said:*

“It does not advert to marking out at all. In my opinion the Wardens survey of the legislation is correct. If the applicants arguments be accepted it would mean that once a mining tenement was granted, the land the subject thereof would cease to be open for mining to anyone, including the tenement holder ... All that Section 18 means is that, where crown land is the subject of a mining tenement, no other person may set up pegs or otherwise mark out the land.”

In that same case Wallace J. said:

“If a person wishes to mark out crown land then he must bring himself within Section 18 unless he can point to some other section of the Act which permits him to mark out crown land which is a mining tenement.”

- 17 Following the consideration of the above cases Warden Malone reached the following conclusions in **Downe v Major** (Supra);

THE LEGISLATION

Section 18 says:

“All Crown land, not being Crown land that is the subject of a mining tenement, is open for mining and as such is land –

- (a) Where any person may set up pegs or otherwise mark out the land pursuant to Section 104 in connection with any application for a mining tenement “ ...*
- (c) which may be the subject of an application for a mining tenement,*

subject to and in accordance with this Act.”

Section 104(1) says:

“Subject to this Act, for the purpose of marking out any land and posting notices of any land in connection with an application for a mining tenement, any person or his servant or agent may –

- (a) enter and re-enter from time to time on any land with such assistance as he thinks fit;*

- (b) *enter and re-enter from time to time on any land with such assistants as he thinks fit;*
- (c) *do all such things as may be necessary for the purpose of marking out the land, and posting notices thereon.”*

Section 117(1) provides that:

“... (no) grant of any mining tenement has the effect of revoking or injuriously affecting any existing mining tenement” ...

and 117(2) provides:

“... each such grant of a mining tenement shall be deemed to contain an express reservation of the rights to which the holder of the existing mining tenement is entitled.”

Section 44 provides that a Prospecting License may be granted in respect of all or part of the land to which application therefore relates.

DECISION

I am not satisfied on the evidence that the datum's are situated within the existing tenements.

That finding is sufficient to dispose of the matter but I wish to comment on the possibility of it having been definitively established that the datum were within the existing tenement.

I respectfully disagree with the views of Warden Brown in Kreplins case, and with supportive dicta in other cases. I prefer the view of Pidgeon J.

It will necessarily be the case that where there is intensive pegging that pegs will be placed on the existing tenements of others.

In my view it matters not whether that peg is the datum or other peg.

Boundaries disputes are resolved by survey and by the operation of Section 117.

It seems to me to be a most undesirable situation that whole tenements could be struck down by a minor encroachment.

The well-established practice of excising existing tenements has much to commend it and reflects in my view the intention of the legislation.

Although I can understand that land already the subject of an existing tenement cannot be “marked out” I believe Section 18 can be properly read down so as to provide that while areas of existing tenements may be physically encroached upon, that is not the “marking out” contemplated by the Act and is permissible to the extent that the boundaries are subject to the

excision of existing tenements and definitively established only upon survey.”

- 18 In *Wescombe v Barrick Gold of Australia Ltd* [2009] WAMW16, without any reference to *Kreplins* or *Downe* the Warden Benn refused an application for a prospecting License where the datum peg had been placed on the existing mining tenement some hundreds of metres away from land that was open for mining.
- 19 I adopt the reasoning of Pidgeon J in *Pratt’s* case and Warden Malone in *Downe’s* case. It is clear from the Form 21 that the land sought by the Applicant excludes, as it must, that area covered by E39/5499.
- 20 In addition to the legislative provisions considered by Warden Malone in *Downe’s* case I also refer to the provisions of sections 42, 43 and 44 of the *Mining Act* which relevantly provide:

“42 Determination of application for prospecting licence

- (1) *A person who wishes to object to the granting of an application for a prospecting licence shall lodge a notice of objection within the prescribed time and in the prescribed manner.*
- (2) *Where no notice of objection is lodged within the prescribed time, or any notice of objection is withdrawn, the mining registrar may —*
- (a) *grant the prospecting licence if satisfied that the applicant has complied in all respects with the provisions of this Act;*
or
(b) refuse the prospecting licence if not so satisfied.
- (3) *Where a notice of objection —*
- (a) *is lodged within the prescribed time; or*
(b) is not lodged within the prescribed time but is lodged before the mining registrar has granted or refused the prospecting licence under subsection (2) and the warden is satisfied that there are reasonable grounds for late lodgment,
and the notice of objection is not withdrawn, the warden shall hear and determine the application for the prospecting licence on a day appointed by the warden and may give any person who has lodged such a notice of objection an opportunity to be heard.

43. Prospecting licence not to include land already subject of mining tenement

- (1) *Where an application for a prospecting licence relates to land that is, or was when the application was made, the subject of a mining tenement, any prospecting licence granted in respect of that application shall not include that land.*
- (2) *Subsection (1) does not apply in relation to a special prospecting licence granted under section 56A, 70 or 85B or a prospecting licence granted in respect of an application under section 56B or a reversion licence application.*

44. Power to grant prospecting licence over all or part of land in application

Subject to section 43, a prospecting licence may be granted in respect of all or part of the land to which the application therefor relates”.

21 Section 42 refers to the grant of a Prospecting License and when read in conjunction with sections 43 and 44 leads to the conclusion that it is open upon consideration of grant of the application, to excise from the area marked out, an area subject to an existing mining tenement including a prospecting licence (refer s8 *Mining Act* for definition of “mining tenement”)

22 In my view Mr Ryan was entitled to mark out the tenement in the manner in which he did but would have been well advised to have made a notation on the Form 20 that the land the subject of P39/5499 was excluded. This would have:

- (i) avoided any confusion as to exactly what ground was being applied for;
- (ii) would have resulted in his application clearly being for an area of land below the 200 hectares prescribed section 40(2) of the *Mining Act*;
- (iii) (iii) avoided any doubt that his application would have been compliant with the requirement that the Form 21 is in identical terms to the Form 20.

23 In this instance the Form 21 annexed a map of the area sought and makes reference to the area sought being 197 hectares, and thus compliant with that s40(2) of the Act. There is no suggestion that the external boundaries described on the Form 20 and Form 21 are other than identical.

24 The application should therefore be granted.



WARDEN A MAUGHAN
7 April 2017