

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : BLACK RANGE MINING PTY LTD v MESA
MINERALS LIMITED [2018] WAMW 15

CORAM : WARDEN J O'SULLIVAN

HEARD : 13 September 2018

DELIVERED : 28 September 2018

FILE NO/S : Applications for Forfeiture 506070 and 506071

TENEMENT NO/S : M46/237 and M46/238

BETWEEN : **BLACK RANGE MINING PTY LTD**
Applicant

AND

MESA MINERALS LIMITED
First Respondent

AUVEX RESOURCES PTY LTD
Second Respondent

Catchwords: Application to extend time to lodge applications for exemption; turn on own facts.

Legislation:

- *Mining Act 1978 (WA) ss82 and 162B*
- *Mining Regulations 1981(WA) reg 32*

Result:

Application to extend time refused.

Representation:

Counsel:

Applicant : Mr B Dalitz
First Respondent : Mr S Penglis and Mr T Masson
Second Respondent : Mr S Penglis and Mr T Masson

Solicitors:

Applicant : DLA Piper
First Respondent : Ensign Legal
Second Respondent : Ensign Legal

Cases referred to:

- *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR
- *Jackamarra v Krakouer* (1998) 195 CLR 516
- *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* (2007) 34 WAR 403
- *Forti v Regency Mines Australasia Pty Ltd* [2014] WAMW 23
- *Rose v Goldtime Australia Pty Ltd* [2004] WAMW 8

1. The applicant has initiated forfeiture proceedings against the respondents in relation to M46/237 and M46/238.
2. The respondents now seek leave to extend the time to apply for an exemption from expenditure and if necessary, leave to adduce expert evidence in support of the application to extend time.
3. The relevant history, which is not in dispute, is summarised as follows:-
 - i. The reporting year for both M46/237 and M46/238 ended on 6 November 2016. The respondents had 60 days thereafter to lodge the Form 5 Operations Reports for each tenement and apply for an exemption from expenditure in the event the minimum commitment for each tenement had not been met.
 - ii. On 16 December 2016 the respondents lodged the required Operations Report claiming that \$77,430.00 was spent on M46/237 (the minimum commitment being \$73,000.00) and \$85,984.00 on M46/238 (the minimum commitment being \$80,000.00).
 - iii. On 10 May 2017 the applicant lodged applications seeking the forfeiture of both tenements on the basis that they were under-expended. In the event the applications for forfeiture are successful, the applicant would be given priority in acquiring the ground the subject of the tenements.
 - iv. On 24 May 2017 the respondents lodged a response denying that the minimum commitment for each tenement had not been met.
 - v. On 14 July 2017 the respondents received the applicant's particulars which prompted the respondents to review the expenditure claimed, although the precise date(s) on which the review took place is not clear.
 - vi. Following the review, the applicants believed that the minimum commitment for both tenements had been met.

- vii. On two occasions, 4 August 2017 and 25 August 2017, the respondents failed to comply with an order to provide particulars of their response to the forfeiture applications.
 - viii. On 25 August 2017 the respondents lodged an application for summary dismissal of the applications for forfeiture.
 - ix. On 11 October 2017 the respondent withdrew the application for summary dismissal
 - x. After receiving external legal advice in relation to the matter between 24 October 2017 and 7 November 2017, further work was undertaken in preparation for the provision of particulars by the respondent.
 - xi. As a result of that further work, it was determined that the expenditure claimed for M46/237 and M46/238 is less than the minimum commitment.
 - xii. On 13 November 2017 the respondents lodged an application to extend time to apply for exemptions from expenditure.
 - xiii. As at 13 November 2017 an extension of time of 313 days is required to lodge the exemptions.
 - xiv. On 1 February 2018 the respondents lodged particulars of their response to the forfeiture applications. Annexed to the particulars are what purports to be substituted operations reports which claim that \$30,076.55 was spent on M46/237 and \$39,251.51 was spent on M46/238. A comparison of the original and substituted operation reports reveals that the notable omission is “geological reconnaissance”.
4. The extent of the respondents’ explanation for the failure to accurately report the expenditure and the reason for the delay in identifying the error is set out in paragraphs 3 v, vi, x, and xi above.

The Law

5. Section 162B of the *Mining Act 1978 (WA)* 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.*

6. While s162B is drafted in broad terms and is unfettered, it is a discretion that is to be exercised having regard to the subject matter, scope and purpose of the *Mining Act*.¹

7. While each case is to be considered having regard to its individual circumstances and merits, factors commonly taken into account include the length of the delay, the reason for the delay and the prejudice to the parties.²

8. Kirby J in *Jackamarra v Krakouer*³ observed:

The first rule is that there are no rigid rules. Procedural discretions, such as those in question here, are typically expressed in very wide language. In the exercise of such discretions, courts should not be trammelled by a rigid set of rules, whether called guidelines or principles, which would impede the application of rules of court with the flexibility needed to do justice in the particular case. This is why it is impossible to lay down fixed and binding rules for the exercise of discretions to enlarge time. Of necessity, each case must depend upon its own particular circumstances.

Nevertheless, it is useful to keep in mind a number of considerations which have commonly been taken into account. The starting point for the exercise of any power granted under legislation is the ascertainment of the terms of the grant and a consideration of the purposes for which the power has been afforded. Thus, if a rule requires that 'special reasons' or 'special circumstances' be shown as a pre-condition to a procedural indulgence, this will indicate a need to demonstrate circumstances out of the ordinary. But where, as is usually the case (and is the case here), the discretion is

¹ *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Gibbs CJ at 186.

² *Forti v Regency Mines Australasia Pty Ltd* [2014] WAMW 23 at [5]

³ (1998) 195 CLR 516 at [66]

conferred in unlimited terms, the question for the decision-maker is whether it would be just in all the circumstances to grant or refuse the application. Necessarily, the indulgence is not granted as of course. It is for the party seeking to persuade the decision-maker to show that it should be granted. Such persuasion will usually depend upon the provision of an acceptable explanation of how the time default occurred. Neither a party nor its legal advisers may simply assume that a request for an extension of time will always be acceded to. Inherent in the grant of a discretionary power is the assumption that it will sometimes be refused.

...

The party seeking indulgence bears the burden of persuading the decision-maker to grant its request. A consideration relevant to that exercise is whether the case is arguable. If it is hopeless, unarguable or bound to fail, the request for an extension of time will be refused. However, this is basically because to grant it would be futile.

...

In Esther Investments, the Full Court of the Supreme Court of Western Australia embraced, as relevant to applications for an extension of time, the four ‘major factors’ which had been identified in Palata Investments Ltd v Burt & Sinfield Ltd, viz, the length of the delay, the reasons for the delay, whether there is an arguable case and the extent of any prejudice to the respondent.”
(footnotes omitted)

Is there an arguable case?

9. As is apparent from the passage from *Jackamarra* to which I referred whether the party seeking to extend time has an arguable case is also a relevant consideration.
10. If it is apparent the substantive case is not arguable, then granting an extension of time would be futile.
11. In considering whether time should be extended it is generally the case that there is “*limited material and argument*” as to the merits. To avoid applications to extend time turning into a full rehearsal of the substantive hearing an assessment of the merits is carried out in a “*rough and ready way*”.⁴

⁴ *Jackamarra* per Brennan CJ & McHugh J at [9]

12. I must bear in mind that the parties are not expected to argue the merits in the course of an application to extend time as elaborately as if arguing the substantive matter.⁵
13. Based on the material provided it is difficult to ascertain the basis on which it is said that the respondents are entitled to an exemption under s102(3).
14. Even taking into account the report of Mr Allan Earl, commissioned after the reporting year, I have difficulty reconciling how exemptions under s102(2)(e) and s102(2)(f) can be pursued simultaneously. Section 102(2)(f) presupposes that it is economic to mine the tenements whereas s102(2)(e) does not.
15. A further question arises as to why the respondents purported to exceed the minimum commitment for tenements they now say are uneconomic.
16. Notwithstanding my misgivings as to the grounds of exemption and the force of the applicant's observations, given the low threshold, I am unable to conclude that the respondents' applications for exemption are so devoid of merit as to be unarguable.
17. However, whether an arguable case exists is but one of the matters to be taken into account in considering whether to extend time.

The Length of the Delay and the Explanation

18. There is no question that a delay of 313 days is very significant. Given the length of the delay it calls into sharp focus the explanation for that delay.
19. The respondents rely on the affidavit of Jemimah May Pullin sworn 10 November 2017 to explain the delay.
20. Ms Pullin's affidavit, while acknowledging the length of the delay, does not identify the nature of the mistake or how or why the mistake was made when the Operations Reports were first lodged. Nor does the affidavit disclose who

⁵ *Jackamarra* per Brennan CJ & McHugh J at [9]

completed the Operations Reports or what, if any, proper enquiries were made prior to the lodgement of the Operations Reports.

21. The relevance of this information is significant in that it enables an assessment to be made as to whether the mistake was deliberate or occurred because of a systemic failure, inexperience, inadvertence, ignorance or a gross lack of care.
22. There is of course a difference between mere inadvertence and a complete failure to properly undertake the task of examining what expenditure is legitimately claimable or, worse still, a deliberate misrepresentation. For present purposes I have no idea which it is.
23. It is fundamental to any application to extend time that the party seeking an indulgence candidly explain the circumstances that resulted in the mistake and the reason for the delay. It is difficult to evaluate the reason for the delay absent information as to the nature of the mistake and how it came about.
24. That obligation has particular significance where an application is made to extend time to lodge an application for an exemption.
25. The accurate completion of operation reports is a central feature in the administration of the *Mining Act*. It is a document on which to those who administer the *Mining Act*, including the Minister, rely to determine whether the expenditure conditions to which the grant of a tenement is subject has been complied with. It is also information that facilitates the self-regulatory nature of the *Mining Act*.
26. The importance of the Operations Report being accurately completed is evident from the requirement that the tenement holder or agent must certify that the summary of mineral-exploration and/or mining activities constitutes a true statement of the operations carried out and moneys expended on the mining tenement during the reporting year.

27. Regulation 32(2) of the *Mining Regulations 1981(WA)* provides that a person who, in a report required under s82(1) of the *Mining Act*, gives information that the person knows is false or misleading in a material respect commits an offence.
28. It is implicit that an Operations Report not be submitted without proper enquiry being made as to the activities carried out and the money expended.
29. The respondents have also failed to explain why it took so long to identify and correct the mistake. Ms Pullin's affidavit says only that a review was done on receiving the applicant's particulars on 14 July 2017.
30. It would seem, therefore, that even after the application for forfeiture was lodged on 10 May 2017, all that occurred was the lodging of a response declaring the minimum expenditure commitment has been met.
31. There is no evidence that any review of the Operations Reports took place between 10 May 2017 and 14 July 2017 despite the respondents being on notice the Operations Reports were under challenge.
32. The respondents' position is not assisted by their failure to comply with orders to provide particulars by 4 August 2017 and 25 August 2017 respectively. Had the respondents complied, it is possible the deficiencies in the Operations Reports may have been identified earlier.
33. Furthermore, the respondents lodged an application for summary dismissal on 25 August 2017 which was subsequently withdrawn on 11 October 2017.
34. The summary dismissal application was withdrawn before the receipt of external legal advice that resulted in further work being undertaken.

Prejudice

35. The respondents advance a number of arguments in support of the general proposition that they will suffer prejudice if an extension of time is not granted.

36. First, the respondents say that the statutory obligation to meet the prescribed minimum expenditure and apply for an exemption are matters between the tenement holder and the State. Accordingly.⁶

“Absent a good reason to deprive a tenement holder of the opportunity to engage in the statutory regime governing the rights and obligations of the tenement holder and the State, no obstacle (or third party) ought to stand in the way.”

37. Even if exemption applications are fundamentally matters between the tenement holder and the State, s102(5) expressly acknowledges that an objection may be lodged to an application for exemption. Where, as here, applications for forfeiture are on foot and the applicant will clearly oppose the applications for exemption in the event leave to extend time was granted, it is difficult to see why the interests of the applicant should be ignored.

38. The respondents argue that if they are unable to prosecute their application for an exemption, the tenements will be at risk of forfeiture. Forfeiture of the tenements will have obvious implications for the respondents and its shareholders and creditors.

39. The respondents also point to the fact that there has been no previous failure on the part of either of the respondents to meet the minimum expenditure requirements for the tenements.

40. The failure to secure an exemption is not fatal in that it renders a tenement susceptible to forfeiture; it does not mean the tenement will be forfeited. A further hearing is required to determine that question.

41. Furthermore, past compliance with the expenditure requirements can also be taken into account in determining the gravity of the breach for the purposes of the forfeiture proceedings.

42. The applicant says that the delay in lodging the application for exemption (together with the delay occasioned by the failure to provide particulars in the

⁶ Respondents' Submissions; 14 March 2018; at [31]

forfeiture proceedings and the lodging and withdrawal of the summary dismissal application) has caused it prejudice.

43. In particular, the applicant says that the delay works to its disadvantage in that the respondents have had the benefit of further time to strengthen their case on gravity given the scope of the enquiry as to gravity includes matters arising between the end of the expenditure year and the hearing.⁷

Conclusion

44. The question as to whether in the exercise of discretion time should be extended involves a consideration of a number of factors.
45. As I observed earlier, I have proceeded on the basis that the respondents have an arguable case. I also accept they will suffer some prejudice in that the tenements will be at risk of forfeiture. However, it is not possible to say at this point whether forfeiture of the tenements will occur.
46. On the other hand, the delay in this case is very significant, the explanation provided is patently inadequate and the delay has the potential to disadvantage the applicant.
47. In my view, even were I to ignore the prejudice to the applicant, the length of the delay together with the inadequate explanation cannot be overlooked.
48. While each case will of course depend on its own facts, I have some doubt that, absent a good explanation, it promotes the objects of the *Mining Act* for a tenement holder (or its agent) to certify in the Operations Report that the minimum commitment has been met, only to seek to extend time to lodge an application for exemption when confronted with an application for forfeiture.
49. A tenement holder is allowed a considerable time (60 days) upon the expiry of the reporting year to make proper enquiries before lodging the Operations Report.

⁷ *Rose v Goldtime Australia Pty Ltd* [2004] WAMW 8 at [43]

50. If applications to extend time are granted without an adequate explanation being provided as to why the Operations Report is inaccurate and the reason for the delay, it has the potential to encourage a practice whereby proper enquiries need only be made in the event that there is an application for forfeiture (i.e. the Operations Report is under challenge).
51. The application to extend time is refused.



Warden J O'Sullivan

28 September 2018