

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : KML No 2 PTY LTD v JINDALEE RESOURCES LIMITED [2018] WAMW 17

CORAM : WARDEN J O’SULLIVAN

HEARD : 15 May 2018

DELIVERED : 22 November 2018

FILE NO/S : Application for Exploration Licence 47/3545;
Objection No. 494245

TENEMENT NO/S : M47/343, E47/2472 & M47/342

BETWEEN : **KML No 2 PTY LTD**
(Applicant)

AND

JINDALEE RESOURCES LIMITED
(Respondent)

Catchwords: *Priority; surrender of land subject to forfeiture, exploration licences; s100 & s105A of the Mining Act 1978 (WA)*

Legislation:

- *Mining Act 1978 (WA) ss57, 101, 105A*
- *Mining Regulations 1981 (WA)*
- *Mining Amendment Bill (No.2) 1991*

Result:

1. *Application for Exploration Licence 47/3545 by KML No 2 Pty Ltd has priority with respect to land the subject of now surrendered M47/343.*

Representation:

Counsel:

Applicant : Mr D Chandler
Respondent : Mr B Dalitz

Solicitors:

Applicant : All Mining Legal Pty Ltd
Respondent : DLA Piper

Cases referred to:

- *Brewer v O'Sullivan [No.2] [2017] WASC 269*
- *Rosanne Holdings Pty Ltd v Parker [2001] WAMW 12*
- *Birmingham v Corrective Services Commissioner of New South Wales (1988) 15 NSWLR 292*
- *Pawson v Director General, Department of Mines & Petroleum [2012] WAMW 13*
- *Rockdale Capital Pty Ltd v Gondwana Resources Ltd [2008] WAMW 12*
- *Mineral Evaluation Network Pty Ltd v Brosnan [2002] 32*
- *Rosanne Holdings Pty Ltd v Parkes [2001] WAMW 12*
- *Hunter Resources v Melville (1988) 164 CLR 234*

1. KML No 2 Pty Ltd has lodged an application for Exploration Licence 47/3545 over block 971c. Jindalee Resources Limited has objected, it having lodged an application for Exploration Licence 47/3535 over block 971c in addition to two other blocks. The question for determination as a preliminary point is which of these applications has priority.
2. I am grateful to the parties for lodging a Statement of Agreed Facts. The resolution of this case depends upon the application of various provisions of the *Mining Act 1978 (WA)* to the Agreed Facts.

The Agreed Facts

3. Global Strategic Metals NL held:
 - (i) M47/343 which was granted in respect of portions of 4 graticular blocks (Hamersley Range 971b, 971c, 971g and 971h); and
 - (ii) E47/2472 which was granted in respect of 3 graticular blocks (Hamersley Range 899x, 971c and 971d) (but excluding the land the subject of M47/342 and M47/343 held by Global Strategic Metals NL).
4. On 8 June 2016 KML lodged an application for forfeiture in respect of M47/343 held by Global Strategic Metals.
5. At 15:45:38pm on 4 August 2016 Global Strategic Metals' surrender of M47/343 was registered. At the time M47/343 was surrendered it was the subject of an application for forfeiture by KML.
6. At 15:51:59pm on 4 August 2016 Global Strategic Metals' surrender of E47/2472 was registered. At the time E47/2472 was not the subject of an application for forfeiture.

7. At 8:41:48am on 5 August 2016 Jindalee lodged application for E47/3535 in respect of 3 graticular blocks (Hamersley Range 899x, 971c and 971d) (but E47/3535 cannot be granted in respect of the land the subject of M47/342).
8. Application E47/3535:
 - (i) complies with the *Mining Act* and the *Mining Regulations 1981 (WA)*; and
 - (ii) includes part of the land formerly the subject of surrendered M47/343 and 100% of the ground formerly the subject of surrendered E47/2472.
9. On 8 August 2016 the Department of Mines and Petroleum issued KML a notice pursuant to s100(1)¹ of the *Mining Act* in respect of the ground formerly the subject of surrendered M47/343.
10. At 12:29:29pm on 18 August 2016 KML lodged application E47/3545 in respect of 1 graticular block (Hamersley Range 971c) (but E47/3545 cannot be granted in respect of the land the subject of M47/342).
11. Application E47/3545:
 - (i) complies with the *Mining Act* and *Regulations*; and
 - (ii) includes part of the land formerly the subject of surrendered M47/343 but also includes that part of graticular block Hamersley Range 971c formerly the subject of surrendered E47/2472.
12. On 22 September 2016 Jindalee lodged an objection to application E47/3545.

The Legal Framework

13. The area of land in respect of which an exploration licence may be granted shall be a graticular block or blocks (see s57(2)).

¹ Section 100(1) of the *Mining Act* provides that an applicant for forfeiture has a right of priority of 14 days in the event the tenement is surrendered.

14. Where an application for an exploration licence is made with respect to one block, the land in respect of which the licence is granted may comprise part of the block if the rest of the block consists of land that is unavailable for exploration (see s57(2c)).
15. For the purposes of subsection (2c) land is unavailable for exploration if that land is, or was when the application for the exploration licence was made, the subject of a current mining tenement (other than a miscellaneous licence (see s57(2e))).
16. **Where the land in respect of which an exploration licence is granted comprises or includes part of a block, no other exploration licence shall be granted in respect of that block or any part of that block (see s57(2h)).**
17. Sections 100(1) and 105A(1) of the *Mining Act* relevantly address how priority is determined:

100. Applicant to have priority for marking out and applying for surrendered or forfeited licence or lease

- (1) *Where an exploration licence or a mining lease that is the subject of an application for forfeiture under section 98 is surrendered (other than by way of a conditional surrender or a surrender under section 26A or 65) before the application is finally dealt with under section 98(4A) or 99(1), the applicant for forfeiture has, from the date on which the surrender is registered until the expiry of a period of 14 days after the date of being served with written notice of the surrender by an officer of the Department, a right in priority to any other person to mark out or apply for, or both, a mining tenement upon the whole or any part of the land that was the subject of the surrendered licence or lease.*

105A. Priorities between applicants for certain tenements

- (1) *Subject to section 111A, where more than one application is received for a mining tenement (other than a miscellaneous licence) in respect of the same land or any part thereof, the applicant who first complies with the initial requirement in relation to his application has, subject to this Act, the right in priority over every other applicant to have granted to him in respect of that land or part the mining tenement to which his application relates.*
- (2) *In subsection (3) **applicant** means an applicant for a prospecting licence, exploration licence, mining lease or general purpose lease.*

The parties' contentions

18. The parties accept, and I agree, that the special right of priority under s100(1) prevails over the general right of priority under s105A.² Accordingly, Jindalee accepts that if KML has a special right of priority, under s100(1), then KML's application is first in time.
19. Jindalee argue, however, that the special right of priority must first be enlivened. Jindalee says this occurs when the application for a mining tenement is made:
- (a) by the applicant for forfeiture of the surrendered tenement;
 - (b) during the period commencing on the surrender and expiring on 14 days after being served with the notice of surrender; and
 - (c) upon the whole or any part of the land that was the subject of the surrendered tenement.
20. Jindalee contends that the outcome of this matter depends on the proper construction of the third limb of s100(1). It says that the tenement application must be made "upon" the whole or any part of the land that was the subject of the surrendered tenement.
21. Jindalee says further that:
- i. When "upon" is used in relation to the "whole or any part of the land that was the subject of the surrendered licence or lease", it imposes a spatial limitation. An application for a tenement upon the land must be on,³ over, or respect of that land. It cannot extend beyond the land.⁴
 - ii. If the legislature intended to give a special right of priority to a tenement applicant who applies for a tenement upon land that merely includes the

² see KML's Submissions; 10 April 2018 at [23] & Jindalee's Submissions; 26 April 2018 at [12]

³ Macquire Dictionary

⁴ *R v Gatti* [1997] 2 Qd R 481 per Lee J at 504

whole or any part of the land that was the subject of the surrendered tenement, s100(1) would have said so.

22. Jindalee points to numerous Warden's decisions⁵ and the second reading speech to the *Mining Amendment Bill (No.2) 1991 (WA)* in support of a construction of s100(1) that confines its operation to the surrendered or forfeited ground.
23. Finally, Jindalee says that if it were to lose priority merely because a negligible area of that block was the subject of a surrendered tenement it would unjustifiably undermine the first in time principle.
24. In addition, were KML to be given a special right of priority to additional land that was not the subject of the surrendered tenement it would go well beyond the reward needed to incentivise applicants for forfeiture.
25. Jindalee does not contend that by including additional land to that which was surrendered, KML's application is invalid.
26. On the contrary, Jindalee says that KML cannot rely on the priority afforded by s100(1) because its operation is confined only to "whole or any part of the land" that was surrendered.
27. As I understand Jindalee's argument, KML having applied for additional land to that which was surrendered, have not activated s100(1). This, Jindalee says, is because once additional land is included in the application, s100(1) no longer applies to any of the land, even the surrendered land.
28. KML argues it has priority because of the operation of s100(1) which affords a right of priority to the applicant for forfeiture of a tenement that is surrendered.

⁵ *Pawson v Director General, Department of Mines & Petroleum* [2012] WAMW 13 at [1]; *Rockdale Capital Pty Ltd v Gondwana Resources Ltd* [2008] WAMW 12 at [63]; *Mineral Evaluation Network Pty Ltd v Brosnan* [2002] 32 at [8] & *Rosanne Holdings Pty Ltd v Parkes* [2001] WAMW 12 at [14]

29. This period of priority runs from the date the surrender is registered until 14 days after KML was notified of the surrender. There is no dispute that KML's application E47/3545 was lodged within the priority period.
30. KML says further that it accepts that s100(1) does not apply to the additional land but it still affords priority so far as the surrendered land is concerned.
31. According to KML as soon as the surrender was registered in relation to the land the subject of its forfeiture application, it had priority. Once it had priority over part of Block 971C, Jindalee's application was second in time.
32. KML contends that it had no choice but to include the additional land in its application because ss57(2) and (2C) require that an application for an exploration licence be for a block.

Who Has Priority?

33. In the ordinary course of events by the operation of s105A, the party that is first in time, is afforded priority in having its application considered.
34. In this instance Jindalee was first to lodge its application for the ground the subject of E47/3535 which includes Block 971c.
35. The situation is complicated in this case by the fact that, KML had applied for forfeiture of M47/343 which formed part of Block 971c. M47/343 was surrendered before Jindalee applied for E47/3535. As a consequence KML's 14-day priority period commenced before Jindalee applied for E47/3535.
36. The situation is further complicated by the fact that KML's application for E47/3545 includes land in addition to that which formed part of the surrendered M47/343. This is because KML was required to apply for a block (see s57(2)&(2c)).
37. Both parties agree that the right of priority afforded by s100(1) prevails over that provided by s105A. Ordinarily, as KML has priority over only the surrendered

ground (M47/343), Jindalee would have priority, by virtue of s105A, over any other ground that was open for mining in relation to which it was first in time.

38. There are, however, some peculiar aspects to this case that render that outcome impossible.
39. By virtue of s57(2h) it is clear that there can only be one exploration licence granted per block. It follows, therefore, that whichever exploration licence has priority, it operates as a bar to the other. Which application has priority rests on the preferred construction of s100(1).
40. As Pritchard J observed in *Brewer v O'Sullivan No.2*:⁶

“The principles governing the construction are well established. The task of statutory construction begins and ends with the words used, but those words must be considered within the context, which includes the legislative history, and the general purpose and policy of the provisions.”

(footnotes omitted)

41. In *Rosanne Holdings Pty Ltd v Parker*,⁷ Warden Calder discussed the object and purpose of s100:

14 It is well accepted that it was the intention of Parliament, in enacting those provisions of the Mining Act which allow any person to object to the grant of a mining tenement, or to object to the grant of a certificate of exemption or to make application for the forfeiture of mining tenements because of non-compliance with the expenditure conditions which attach to such tenements, to encourage self-regulation and “private policing” within the mining industry. By that means (but not only by that means) Parliament has sought to achieve its overall objective of ensuring that the mineral wealth of the State is exploited in an ordered and controlled and continuous manner and that the ground in which such mineral wealth is located is not simply held by tenement holders who are unwilling or unable for good reasons to prospect or explore or mine the ground the subject of mining tenements. The expenditure conditions, which are imposed upon every tenement and which must be complied with except where a certificate of exemption is granted, are an important element of that legislative objective. The provisions of s 100, whereby an applicant for forfeiture may, where surrender or forfeiture of a tenement occurs following the lodging of a plaint for forfeiture, gain a marking out or application priority are one means whereby both self-regulation and self-policing are

⁶ [2017] WASC 269 at [155]

⁷ [2001] WAMW 12 at [14]

encouraged. The self-regulation, from the point of view of the tenement holder, arises in the form of an incentive to avoid the risk of a forfeiture application by complying with the expenditure requirements or, alternatively obtaining a certificate of exemption. The self-policing aspect arises in the form of the incentive given to the interested third party in the form of the potential to gain a priority right to mark out or apply for a tenement over the forfeited ground. Both of those incentives, that is, to the tenement holder and to the interested third party, are very important and significant ingredients in the overall legislative scheme. In the interpretation of the legislation it is essential to keep those important objectives in mind and to ensure that their value and effectiveness is not undermined in such a way as to lessen or negate their capacity to achieve the intended objectives. It is important to ensure that the integrity of the legislative scheme and objectives are preserved and seen by those involved in the mining industry to be preserved.

42. In considering the competing constructions of s100(1) advanced by the parties the starting point is recognition that the applicant for forfeiture of a tenement that is ultimately surrendered is entitled to be rewarded for their efforts with priority. Such an outcome promotes the objects of the *Mining Act* and encourages self-regulation which is essential to the operation of the legislative scheme.
43. In this case KML's right to priority arose immediately the surrender of M47/343 was registered. Section 100(2) is intended and designed to remove any element of competition during the 14 day priority period. That is part of the incentive held out to applicants for forfeiture.⁸
44. If s100 is validly invoked, Jindalee's application E47/3535 does not have priority.
45. The essential question is whether by applying for land additional to the surrendered land, KML did not validly invoke s100 and thereby priority is decided in accordance with s105A. If KML cannot rely on s100, Jindalee is first in time and has priority.
46. In my view, Jindalee's construction must be rejected for the following reasons.
47. First, the ordinary meaning of the words "upon the whole or any part of the land that was the subject of the surrendered licence or lease" in s100(1), when

⁸ *Rosanne Holdings Pty Ltd v Parker* [2001] WAMW 12 at [19]

considered in context, convey that priority only extends to the surrendered land. If additional land is applied for, s100(1) does not apply to that land.

48. That construction is consistent with the objects on the *Mining Act* in that a special right of priority under s100(1) applies to the surrendered land leaving priority with respect to the additional land to be determined in accordance with s105A.
49. In this way the two sections not only operate harmoniously but achieve an outcome that is fair to those competing for the land.
50. Second, sometimes the words just mean what they say⁹. I can find nothing in the language used in s100(1) or the *Mining Act* when read as a whole to support the view that once an application includes additional land to the surrendered land, s100(1) is not invoked and priority with respect to the surrendered land is lost.
51. To conclude otherwise would mean that an applicant who applies during the priority period and has otherwise lodged a valid application would lose priority.
52. Such a construction is inconsistent with the objects of the *Mining Act* which is to reward those who are first in time.
53. Third, nothing in the cases relied on by Jindalee or the second reading speech to the *Mining Amendment Bill (No. 2)* supports the construction that s100(1) is not invoked if an application includes additional land to the surrendered land.
54. Fourth, had the legislature intended s100(1) to operate in the way contended by Jindalee the word “only” would need to be inserted after the word “upon” in the third last line of s100(1). Not only does the section make perfect sense without the addition of the word “only” but its inclusion would undermine the evident purpose of the section rather than enhance that purpose.¹⁰
55. Fifth, bearing in mind an applicant for an exploration licence must apply for a block, if Jindalee’s construction were accepted, any time the surrendered land

⁹ *Hunter Resources v Melville* (1988) 164 CLR 234 per Toohey J at 256

¹⁰ *Birmingham v Corrective Services Commissioner of New South Wales* (1988) 15 NSWLR 292 per McHugh JA at 302

includes only part of a block, s100(1) would not apply. If s100(1) is confined in its operation to tenement applications that only included surrendered land, it would not apply to applications for exploration licences at all unless all the land open for mining in the block was surrendered.

56. There is no reason in principle or policy supporting such an outcome. This is particularly so when a construction that protects the special right of priority an applicant has over part of a block is consistent with the objects of the *Mining Act*.
57. Sixth, the fact that once an exploration licence is granted no other exploration licence can co-exist in the same block does not provide any foundation to suggest that s100(1) should not apply in the usual way.
58. While that outcome is unfortunate so far as Jindalee is concerned, it is consistent with the objects of the *Mining Act*. If only one exploration licence can be granted in any one block, then KML's special right of priority means it is first in time.

Conclusion

59. KML's application for E47/3545 has priority with respect to land the subject of the now surrendered M47/343.



Warden J O' Sullivan
22 November 2018