JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION :

CORAM : WARDEN A MAUGHAN

HEARD : On the Papers

DELIVERED : 29 January 2018

FILE NO/S : Application for Exploration Licence 15/1562
            Apollo Phoenix Resources Ltd (1st Applicant)

            Application for Exploration Licence 15/1563
            Jindalee Resources Ltd (2nd Applicant)

LEASE NO/S : E15/1562, E15/1563

BETWEEN : Apollo Phoenix Resources Ltd
           (1st Applicant)

           AND

           Jindalee Resources Ltd
           (2nd Objector)

Legislation:

- Mining Act 1978
- Mining Regulations
- Interpretation Act 1994
- Public and Bank Holidays Act 1972 (WA)

Cases referred to:

Result:

1. Ballot to be held.

Representation:

Counsel:

1st Applicant : Tim Masson,
2nd Applicant  : Shannon McMahon

Solicitors:

1st Applicant : Ensign Legal
2nd Applicant : McMahon Mining Title Services Ltd
REASONS FOR DECISION

Introduction

1  In order to understand the dispute which has arisen in relation to the above two Applications for an Exploration Licence some understanding of the background is required:-

i. An outright surrender E15/1392 (a surrendered tenement) was lodged on Friday 23 September 2016

ii. Apollo Resources Pty Ltd ("Apollo") lodged Application E15/1562 electronically via the Department of Mines and Petroleum ("DMP") Minerals Titles Online (MTO) after 4.30 pm on Friday 23 September 2016 over the surrendered tenement ("the Apollo application").

iii. Monday 26 September 2016 was a Queens Birthday public holiday and all offices of the Mining Registrar (all mining registries), except for Karratha, were closed.

iv. MTO records the Apollo application as being received at 8.30 am on Tuesday 27 September 2016.

v. MTO records Application E15/1563, being lodged by Jindalee Resources Ltd, at 8.44.14am on Tuesday 27 September 2016 over some part of the surrendered tenement ground ("the Jindalee application").

2  Apollo submits that the Apollo application was lodged first in time and ought be granted priority.

3  Jindalee submits that the Apollo application and the Jindalee application were both received within the prescribed time (see below) and the Mining Act requires that both applications be subject to a ballot.
The parties have agreed that the issue between them can be resolved on the papers and for the purpose of determining the issue I have received detailed submissions from:-

i. McMahon Mining Title Services Pty Ltd on behalf of Apollo Phoenix Resources Pty Ltd 25/11/2016

ii. Ensign Legal, on behalf of Jindalee Resources Ltd, 28 April 2017.

The Statutory framework

S105A(1) of the *Mining Act* provides, interalia:-

“(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.

(3) Where in respect of any land the warden is satisfied that 2 or more applicants complied with the initial requirement in relation to their applications at the same time or within a prescribed period, priority shall, unless written agreement is concluded by the applicants and lodged in the prescribed manner and within the prescribed time, be determined by ballot conducted by the warden on a date to be determined by the warden and notified to the applicants”.

Regulation 70BD(2) provides:-

“For the purpose of s105A(3) the prescribed period for an application is the period starting at 4.30 pm on a working day and ending at 8.45 am on the next working day”.

S162(2)(ea) of the *Mining Act* states that the regulations may:-

“(ea) provide for matters relating to the lodgement, in electronic form, of mining tenement documents;

(eb) provide for the time at which a mining tenement document is to be taken to have been lodged;”
S162(3A) of the *Mining Act* provides that an application for a mining tenement is a "mining tenement document".

S58(1)(a)(d) of the *Mining Act* provide that an Application for an Exploration Licence "shall be in the prescribed form" and "shall be lodged in the prescribed manner.

Regulation 59A(2) provides:

"For the purposes of any provision in the Act that requires a document to be lodged in the prescribed manner, the document is to be lodged at any mining registrar’s office”.

Regulation 59B(2) of the Mining Regulations states:

"Subject to the requirements of the Department’s website and this regulation, a person may lodge a mining tenement document electronically by lodging an electronic version of it by means of the Department’s website”.

Regulation 59B(3) provides:

"A mining tenement document that is lodged electronically after 4.30 p.m. on a working day and before 8.30 a.m. on the next working day is to be taken to have been lodged at 8.30 a.m. on that next working day”.

MTO has terms and conditions that are published on the website. The terms and conditions include:

"Official receipt of forms, transactions and instructions.

You understand and agree that any forms, transactions or instructions lodged using MTOL will only be formally and officially received by the Department during normal business hours of the Department of Mines and Petroleum located in Perth. The normal business hours for the Department of Mines and Petroleum in Perth are:

Monday to Friday 8.30 am – 4.30 pm WST (excluding Perth, Western Australia public holidays).

Any form of transaction or instruction received outside of these hours will be considered submitted but will be formally and officially received at 8.30 am on the next business day”.

Regulation 2 provides that a working day:

"Means a day on which any Mining Registrar’s office is open for business”.

Jindalee Resources Ltd And Apollo Phoenix Resources Pty Ltd
Within the same paragraph that regulation is prefaced by the use of the words “unless the contrary intention appears”.

It is not disputed that Monday 26 September 2016 was a public holiday in Western Australia, being the Queen’s Birthday public holiday. However Karratha Mining Registrar’s office was open for business because Karratha observed the Queen’s public holiday on 1 August 2016 pursuant to the definition of a public holiday in the Interpretation Act 1994 read in conjunction with sections 5, 8(1) and 8(2) of the Public and Bank Holidays Act 1972 (WA) and the Government Gazette (8 April 2016) which declared that:-

“Instead of Monday 26 September 2016, Monday 1 August 2016 is to be the celebration date of the anniversary of the birthday of the reigning Sovereign in 2016 in the Karratha Local Government District”.

It is apparent from the above that the question arises – where the Mining Registry in Karratha is open on a day when the Perth Registry is closed what effect, if any, is there on the timing of the lodgement of documents via MTO?

There exists a legal maximum applicable to statutory construction which is that the general cannot detract from the specific. The rule will only be detracted where there are two inconsistent provisions which cannot be reconciled as a matter of ordinary interpretation.

Within this scenario:-

a  R.59A(2) is a general provision that allows for documents to be lodged at any mining registrar’s office;

b  R.59B is a specific regulation providing for lodgement of documents via the department’s website, being MTO;

c  R.59B(2) makes lodgement via the MTO subject to the requirements of the department’s website.
19 The regulations in relation to the use of the department’s website provide a specific calculation of time applicable to the lodgement of documents via that website. Those conditions clearly state that documents can only be lodged “during the normal business hours for the Department of Mines & Petroleum in Perth”.

20 In my view, therefore, both applications are deemed to have been lodged on Tuesday 27 September 2016 and a ballot is required.

Warden Andrew Maughan

29 January 2018