
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : MELVILLE v FLINDERS CANEGRASS PTY LTD
[2019] WAMW 6

CORAM : WARDEN J O’SULLIVAN

HEARD : 30 January 2019

DELIVERED : 29 April 2019

FILE NO/S : Application for Special Prospecting Licences 58/1754,
58/1755, 58/1756, & 58/1757

TENEMENT NO/S : Exploration Licences 58/236 & 58/282

BETWEEN : **BRIAN ANTHONY MELVILLE**
(Applicant)

AND

FLINDERS CANEGRASS PTY LTD
(Proposed Objector)

Catchwords: *Special Prospecting Licence; interlocutory application
to extend time to object.*

Legislation:

- *Mining Regulations (1981) (WA) regs 137, 146, 152, 153, 154*
- *Mining Act 1978 (WA) ss70 & 162B*

Result:

1. *The Interlocutory Application to extend time to object is dismissed.*

Representation:

Counsel:

Applicant	:	Mr TJ Kavenagh
Proposed Objector	:	Mr DR Chandler

Solicitors:

Applicant	:	Kavenagh Legal
Proposed Objector	:	All Mining Legal Pty Ltd

Cases referred to:

- *Bermingham v Corrective Services Commission of New South Wales*
(1988) 15 NSWLR 292

Introduction

- 1 On 3 August 2017 Mr Melville applied for Special Prospecting Licences 58/1754, 58/1755, 58/1756 and 58/1757 (the SPL Applications).
- 2 On 19 October 2017 Flinders Mines Limited objected to the SPL Applications on the basis that if the applications were granted it would cause undue detriment to the underlying tenements (Exploration Licences 58/236 and 58/282).
- 3 On 2 November 2018 Mr Melville lodged an Interlocutory Application seeking an order that the objections by Flinders Mines be dismissed or, in the alternative, Flinders Mines not be heard in relation to the SPL Applications.
- 4 The basis of Mr Melville’s Interlocutory Application was that Flinders Mines is not the underlying tenement holder and therefore could not argue, in accordance with s70(5) of the *Mining Act 1978 (WA)*, that the SPL Applications would result in undue detriment “to the exploration being carried on by the holder of the primary tenement.”
- 5 On 8 November 2018 the underlying tenement holder, Flinders Canegrass Pty Ltd, lodged an Interlocutory Application seeking that time to object to the SPL Applications be extended to 8 November 2018 and the proposed objections and particulars of objections in attachments “A” to “E” stand as the objections and particulars.
- 6 Flinders Canegrass also lodged an application to extend time to object with the Department of Mines, Industry Regulation and Safety (DMIRS) which, in the ordinary course, is to be determined by the Warden responsible for the mineral field in which the ground the subject of the SPL Applications sits.
- 7 On 30 January 2019 both the Melville and Flinders Canegrass Interlocutory Applications were called on for hearing in Perth.
- 8 Flinders Mines did not oppose the orders sought in Mr Melville’s Interlocutory Application. As a consequence orders were made by consent that Flinders Mines

not be heard in relation to the SPL Applications and that it pay Mr Melville's costs of the Interlocutory Application.

- 9 The Flinders Canegrass Interlocutory Application proceeded to hearing on the basis that it had requested its application to extend time lodged with DMIRS await the outcome of this hearing.
- 10 Self-evidently, if the Interlocutory Application lodged by Flinders Canegrass succeeds, the application lodged with the DMIRS would fall away.
- 11 The question posed by the Interlocutory Application lodged by Flinders Canegrass is whether an application to extend time to lodge an objection can be the subject of an interlocutory application in accordance with reg 152(1)(b) of the *Mining Regulations 1981 (WA)*.

The Statutory Framework

- 12 Section 70 of the *Mining Act* acknowledges that the holder of the primary tenement to which an application for a special prospecting licence relates can object.
- 13 Regulation 146 of the *Mining Regulations* provides:

“146. Making an objection

(1) An objection shall be in the form of Form 16.

(2) An objection shall be made within —

(a) where the application being objected to is for a mining tenement relating to private land —

(i) 21 days of the day on which the person was served with a copy of notice required to be given under section 33(1); or

(ii) 35 days after the day on which the application is lodged,

whichever period ends later; or

(b) *in any other case — 35 days after the day the application being objected to is lodged,*

or such further period as the warden considers reasonable.

(emphasis added)

(3) *The objector shall serve a copy of the objection on the applicant as soon as practicable after the objection is made.*”

14 Section 162B of the *Mining Act* also provides a general power to extend 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.*”

15 Regulation 152(1) sets out the interlocutory orders and directions available to the Warden for the purposes of controlling and managing proceedings:

“(1) *In addition to any other power of the warden to make an interlocutory order or give a direction in this Part, a warden may, at any stage of proceedings, do all or any of the following for the purposes of controlling and managing the proceedings —*

(a) *make an order that proceedings be heard and determined at another place if—*

(i) *the warden is satisfied that the proceedings could more conveniently or fairly be heard and determined at the other place; or*

(ii) *the parties consent to the proceedings being heard and determined at the other place;*

(b) *extend the time for complying with any regulation in this Part or any order made by the warden (even if the time for complying has expired), or shorten it;*

(c) *adjourn or bring forward a hearing to a specified date;*

(d) *stay any proceedings, either generally or until a specified date;*

(e) *consolidate proceedings;*

(f) *hear 2 or more proceedings on the same occasion;*

- (g) *hold a hearing by audio link or video link (as those terms are defined in the Evidence Act 1906 section 120);*
- (h) *allow a party to amend its application, objection, response or particulars under regulation 144;*
- (i) *dispense with any interlocutory proceedings;*
- (j) *as to the hearing of any interlocutory application —*
 - (i) *direct the parties to confer in order to identify the issues between them and resolve as many as possible before the hearing and to identify the issues to be heard; and*
 - (ii) *direct the parties to file and exchange memoranda before the hearing in order to identify the issues to be heard;*
 - (k) *expedite the listing of proceedings for a substantive hearing if the warden is of the opinion that a party has frivolously or vexatiously instituted or defended proceedings or that the party's case otherwise has no merit;*
 - (l) *do anything else that in the warden's opinion will or may facilitate proceedings being conducted and concluded efficiently, economically and expeditiously."*

(emphasis added)

16 In accordance with reg 153(1):

*"(1) A **party** may make an application for an order or direction of the warden by lodging and serving it in the form of Form 36A."*

(emphasis added)

17 There are two important features of the statutory regime concerning interlocutory applications. First, reg 152(1) speaks in terms of the Warden "at any stage of proceedings" exercising any of the enumerated powers therein.

18 Second, reg 153(1) provides "a party may make an application for an order or directions."

19 Regulation 137(1), which appears in Part VIII of the *Mining Regulations* along with regs 146, 152 and 153 defines a "party" to mean a "party to proceedings."

20 The term "proceedings":

“(b) when used in Division 3, means proceedings relating to an application under Part IV in relation to which an objection has been lodged; and

(c) otherwise means proceedings under this Part.”

- 21 Regulation 137(2) relevantly provides that for the purposes of this Part, proceedings are taken to have commenced when an objection has been lodged.
- 22 Mr Melville contends that an interlocutory application can be made “at any stage of proceedings.” Proceedings are only commenced when an objection has been lodged. There are no proceedings on foot between Mr Melville and Flinders Canegrass without time having first been extended to lodge an objection. Moreover, the objection by Flinders Mines is a separate proceeding to which Flinders Canegrass is not a party.
- 23 Mr Melville contends that as Flinders Canegrass has not lodged an objection, there is no proceedings on foot and Flinders Canegrass is not a party. As only a party to a proceeding can lodge an interlocutory application, there is no jurisdiction to hear the application lodged by Flinders Canegrass.
- 24 Flinders Canegrass argue that the terms “party” and “proceedings” must be interpreted to mean “proposed party” and “proposed proceedings” otherwise there is no procedure whereby a proposed objector can advance its application to extend time as provided by reg 152(1)(b).
- 25 According to Flinders Canegrass reg 146 falls within Part VIII and reg 152 provides the procedure for the exercise of the powers in Part VIII via interlocutory applications. Thus it would create an anomaly if the power to extend time in reg 152(1)(b) was not available to extend the time to object in reg 146(2), given reg 152(1) applies in addition to any other power of the Warden to make an interlocutory order or give a direction in that Part.
- 26 Mr Melville says there is no anomaly resulting from the fact that there is no power for an application to extend time in accordance with reg 146(2) to be the subject of an interlocutory application pursuant to reg 152(1)(b).

27 Mr Melville points to the fact that reg 146(2) itself provides the power to extend time thus recourse to reg 152(1)(b) is not required. This is evident from the final words of the reg 146(2):

“... or such further period as the Warden considers reasonable.”

Can Flinders Canegrass Extend Time to Lodge an objection via an Interlocutory Application?

28 As is conceded by Flinders Canegrass, the ability to lodge an interlocutory application rests on the words “party” and “proceedings” being construed to mean “proposed party” and “proposed proceedings.”

29 Necessarily, such a construction requires that words be impliedly inserted into the definition of “party” and “proceedings” in reg 137(1).

30 In *Bermingham v Corrective Services Commission of New South Wales*¹, McHugh JA identified three conditions that must be satisfied before words can be implied:

- 1) The court must know the mischief with which the Act was dealing.
- 2) The court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved.
- 3) The court must be able to state with certainty what words the legislature would have used to overcome the omission if its attention had been drawn to the defect.

31 In my view, the purpose of reg 152(1) is to regulate the conduct of parties to proceedings. There is no reason to believe it was a legislative oversight to have excluded proposed objectors from access to the powers in reg 152(1).

¹ (1988) 15 NSWLR 292 at 302


- 32 It is not the case that unless Flinders Canegrass can lodge an interlocutory application invoking the power in reg 152(1)(b), there is no power to extend the time to object.
- 33 Neither party agitated for a construction that resulted in Flinders Canegrass being unable to lodge an application to extend time with the DMIRS to be dealt with by the Warden in the Murchison Mineral Field.
- 34 Regulation 146(2) itself empowers the Warden to extend time to object even though no procedure is prescribed for the purposes of advancing such an application. That fact of itself does not establish the existence of any legislative oversight. Section 162B provides a general power to extend time. It too does not prescribe a procedure. As has been the practice, those applying to extend time simply write to the Warden through the DMIRS. This is consistent with the objective that the Warden is to act with as little formality as possible (see reg 154(1)(a)).

The Merits

- 35 In light of the conclusion that Flinders Canegrass cannot bring an interlocutory application to extend time to object under reg 152(1)(b), the application to extend time is to be determined by the Warden responsible for the Murchison Mineral field. In the circumstances, it would not be appropriate for me to express a view as to the merits of the application.

Conclusion

- 36 The Interlocutory Application lodged by Flinders Canegrass on 8 November 2018 is dismissed.
- 37 There is liberty to apply with respect to costs.



Warden J O'Sullivan

29 April 2019