[2020] WAMW 19

JURISDICTION	:	MINING WARDEN
LOCATION	:	KALGOORLIE
CITATION	:	OWEN v SANDHU [2020] WAMW 19
CORAM	:	WARDEN E L O'DONNELL
HEARD	:	31 July 2020
DELIVERED	:	Orally on 28 August 2020, Published 16 October 2020
FILE NO/S	:	Interlocutory Applications affecting Applications for forfeiture 569410 and 569411
TENEMENT NO/S	:	Exploration Licences 16/393 and 16/396
BETWEEN	:	TRISTAN DAVID OWEN (Applicant) AND TANVANTH SINGH SANDHU (Respondent)

Catchwords:

Interlocutory Application – Applications for forfeiture – Summary dismissal of applications for forfeiture – Powers of summary dismissal under the *Mining Act 1978* and *Mining Regulations 1981*

Legislation:

Mining Act 1978 (WA) s. 42, 91, 98, 98(3), 98(6), 98(4A), 102, 102(5), 102(5)(a), 102(6)

Mining Amendment Act 2004 (WA)

Mining Regulations 1981 (WA) r. 137, 139, 148, 152, 152(1)(l), 152(1)(k), Part IV and Part VIII

Result:

Applications refused

Representation:

Counsel:

Applicant	:	Ms C McKenzie
Respondent	:	Mr C Shanahan SC and Mr T Kavenagh

Solicitors:

Applicant	:	McKenzie and McKenzie
Respondent	:	Kavenagh Legal

Case(s) referred to in decision(s):

Carnegie Gold Pty Ltd v Maughan [2018] WASC 366
In Re Malley SM; Ex Parte Gardner [2001] WASCA 29
Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd [2004] WAMW 17
Strother v Tavener [2016] WASC 85
Zanthus Resources Pty Ltd v Mineralogy Pty Ltd [2014] WAMW 20

1. In this case, the Applicant Owen brings Applications 569410 and 569411 for forfeiture of two exploration licences – 16/393 & 16/396 – which are held by the Respondent Sandhu. The applications are made under s 98 of the *Mining Act 1978* (WA) (**the Act**).

2. The Respondent has made an interlocutory application for the summary dismissal of those applications for forfeiture. The interlocutory application came on for hearing before me as a warden sitting in open court on 31 July 2020.

3. On 28 August 2020, I delivered ex tempore reasons for refusing the interlocutory application. This is an edited version of those reasons.

4. The first issue to be determined is a critical threshold question – namely, whether or not I have any power to order summary dismissal of these applications for forfeiture. As to that issue, the Applicant contends that I do not have any such power. The Respondent's counsel had not turned his mind to this the question, until about a day and a half before the hearing, when he realised that the Applicant was challenging the basis of any such power. He did however make extensive oral submissions at the hearing.

5. In considering whether or not I have any power to order summary dismissal of the proceedings, it is necessary to identify what type of proceedings I am dealing with. An application for forfeiture under s 98 of the Act is a Part IV proceeding. As such, it falls within the administrative functions of the warden. The regulations governing Part IV proceedings are found in Part VIII of the *Mining Regulations 1981* (WA) (**the Regulations**), commencing at regulation 137.

6. The Respondent referred to three potential sources of a power to summarily dismiss the Application:

    a. Regulation 152 of the Regulations;
    b. Section 98 of the Act – although the argument as to s98 was only raised after the lunch break and appeared to be an afterthought; and
    c. Case law in which the Courts have recognised that "no case" submissions may be made in proceedings before the warden.

"No case" submissions

7. I will dispense with that last argument first. There is no doubt in my mind that "no case" submissions may properly be made, both in proceedings before the warden exercising administrative functions, and in cases before the Warden's Court. The case law referred to by the Respondent establishes as much – see, for example, ***Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd***.[1] But the authorities which discuss "no case" submissions in the context of an application for forfeiture clearly refer to "no case" submissions made *after* the Applicant for forfeiture has led his or her evidence at the hearing contemplated by s 98. A "no case" submission made in that context is not analogous to the summary dismissal of a proceeding, which by its nature precludes one party from putting its evidence before the court or, in this case, the warden.

Section 98 itself

8. With respect to s 98 of the Act, there is a reference to dismissal of a forfeiture application in subsection (4A). However, that subsection contemplates dismissal of the application even *after* a finding that the holder of an exploration licence has failed to comply with such requirements as are mentioned in subsection (1) – in other words, after a hearing in which such failure has been determined. It is not concerned with any type of summary dismissal and to suggest otherwise is to completely misconstrue s 98(4A). That subsection cannot assist the Respondent in this application.

Regulation 152

9. The Respondent relied most heavily upon regulation 152, which sets out the general powers of the warden in relation to interlocutory orders and directions.

10. Regulation 152 appears in Part VIII of the regulations, which as I have mentioned commences at r. 137 and concerns proceedings before a warden under Part IV of the Act. An application for forfeiture is made under s 98 of the Act and is a proceeding under Part IV of the Act, so certainly regulation 152 is applicable to these proceedings.

11. Regulation 152 provides:

> A warden may, at any stage of proceedings, do all or any of the following for the purposes of controlling and managing the proceedings.

[1] ***Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd*** [2004] WAMW 17.

12. What follows is a list of what are essentially case management actions that a warden may take. The list is not exhaustive. It is clearly designed to give the warden powers to ensure that proceedings run smoothly. Regulation 152(1)(l) provides a broad power to "do anything else that in the warden's opinion will or may facilitate proceedings being conducted and concluded efficiently, economically and expeditiously". Specifically, the Respondent's submission was that regulation 152(1)(l) encompasses a power to summarily dismiss an application for forfeiture.

13. Read in context, I am unable to accept that regulation 152(1)(l) encompasses such a power. As I have said, regulation 152 gives the warden a list of case management powers. The ability to summarily dismiss an application is not such a power. I also take the view that regulation 152(1)(k) would be superfluous if 152(1)(l) meant that a case could be dismissed. Reg. 152(1)(k) contemplates that even where a 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, a substantive hearing will still take place – albeit on an expedited basis. In the case before me, I am asked to conclude that the applications for forfeiture have no merit. On that basis, reg. 152(1)(k) indicates that if I agreed with that submission, I could expedite the listing of proceedings for a substantive hearing. It does not suggest that I could dismiss proceedings without a hearing.

14. In any event, in my view the submission that reg. 152(1)(l) provides a power to summarily dismiss an application for forfeiture is contrary to the weight of authority and must be rejected. I say this even in view of the one decision that appears to say otherwise – namely, ***Zanthus Resources Pty Ltd v Mineralogy Pty Ltd***.[2] In that case, Warden Wilson said:[3]

> The Warden has power pursuant to r. 152(1)(l) & (k) of the regulations to summarily refuse an application for a mining tenement.

15. The warden did not explain why he took that view. However, the parties to that case had agreed that the interlocutory applications were to proceed by way of a summary judgment application and not a preliminary issues hearing; and further, they had agreed that the applications should be dealt with on the papers. In view of those agreements, the case is already distinguishable from the one before me.

[2] ***Zanthus Resources Pty Ltd v Mineralogy Pty Ltd*** [2014] WAMW 20.
[3] ***Ibid.,*** in one sentence at [15].

16. In *Zanthus* (supra), notwithstanding there was no substantive hearing (which might be considered to be contrary to ss 91 and 42 of the Act), the Warden nonetheless considered the evidence in detail, by considering the affidavit evidence. More importantly, he did so with the agreement of the parties.

17. The Applicant for forfeiture before me does not agree that I ought to proceed by way of a summary judgment application, and does not agree that I ought to proceed on the papers. In those circumstances, I cannot see how I can disregard the clear intent of the Act to hear and receive evidence (indicated by the words "shall hear the application" in s 98) on the basis of a regulation which is aimed at management of proceedings – not dismissal of them (reg. 152(1)(l)).

18. In ***Strother v Tavener***,[4] Pritchard J explained as follows:[5]

> A forfeiture application is heard before a warden. Section 98 of the Act contemplates that the warden will hold a hearing and receive evidence on the application. As soon as possible after the hearing, the warden is required to forward to the Minister any notes of evidence at the hearing, together with a report and the warden's recommendations as to the determination of that application. If the warden finds that the lessee of a mining lease has failed to comply with the expenditure conditions applicable to the lease, the warden may recommend that the Minister declare the lease forfeited, or impose a penalty, or dismiss the forfeiture application. After receiving the recommendation of the warden, the Minister may, as he or she thinks fit, do any of these things.
>
> A warden who hears a forfeiture application does so in the exercise of administrative power conferred by the Act, rather than in the exercise of any judicial power. The Act draws a clear distinction between the exercise of administrative functions by a mining warden, and the exercise of judicial functions by the Warden's Court.

19. The *Mining Amendment Act 2004* (WA) sought to clarify the difference between the warden acting in an administrative capacity when sitting in open court, and sitting in the warden's court. As the explanatory memorandum to the Amendment Act explained:

> At present the Act empowers a warden with both administrative and judicial powers, however the *Mining Act 1978* is unclear as to when and in what circumstances a warden acts judicially as opposed to acting in an administrative capacity, and as distinct from the role of the Warden's Court. Inconsistent terminology used

[4] ***Strother v Tavener*** [2016] WASC 85.
[5] ***Ibid.***, [33]-[34].

> throughout the Act further clouds the issue. What powers a warden has impacts on such issues as to whether costs may be awarded to parties to a dispute and in what circumstances, the issue of subpoenas and summons for witnesses and in what instances security for costs may be ordered. [Part 9] therefore amends the Act to distinguish between the roles of the warden and Warden's Court and provides for the warden's separate powers and functions to be prescribed in the regulations.

20. Specifically referring to the amendment of section 98, the explanatory memorandum said:

> Subclause (1) (amending s98(1)) removes the reference to applying to the warden for forfeiture of a tenement as application is made to the Department. Subclause (2) (amending s98(3)) removes the words: "in open court" to reflect that a warden determining a plaint for forfeiture is acting administratively, not in the warden's court. Subclause (3) (amending s98(9)) removes reference to an "order" by a warden to better reflect the administrative role envisaged.

21. With respect to determining a Part IV proceeding without a substantive hearing, in his paper entitled WESTERN AUSTRALIAN WARDEN'S COURT CHANGES – 2007,[6] Tim Kavenagh notes that pursuant to the *Mining Amendment Act 2004*:

> The warden is now empowered to determine a proceeding without a substantive hearing – reg. 139. The warden may order a non-complying party to pay the costs occasioned by the non-compliance or determine the proceedings without a substantive proceeding. In an application for forfeiture this must mean forfeit, or recommend the forfeiture of the tenement, impose a penalty, impose no penalty or dismiss the application. The warden may make such a determination if there has been a failure to comply with a requirement of 'this Part', namely Part VIII.

22. Regulation 139 is entitled "Default determination" and falls within the part of the Regulations dealing with proceedings before the warden under Part IV of the Act. An application for forfeiture brought under s 98 of the Act, as has been done by the Applicant Owen in this case, is a proceeding under Part IV of the Act. Therefore, if any regulation is explicitly going to allow default determination of that application, it will be regulation 139.

[6] WESTERN AUSTRALIAN WARDEN'S COURT CHANGES – 2007 (2007) 26 ARELJ (Australian Resources and Energy Law Journal).

23. ***Strother v Tavener*** (supra) was a case in which the warden had dismissed a forfeiture application without a substantive hearing, pursuant to regulation 139 of the *Mining Regulations*. In her decision reviewing the warden's dismissal of the case in that manner, Justice Pritchard said:[7]

> [I]t is appropriate to mention r 139 of the Regulations (on which the learned Warden relied to make the Dismissal Decision). In the event that a party does not comply with a requirement of pt VIII of the Regulations (which contains the procedure set out above for making and serving forfeiture applications, and the procedure for making and serving applications for exemption and objections thereto), r 139 gives the warden a discretion to determine the proceedings in question without a substantive hearing. Regulation 139 relevantly provides:
>
> (1) Except as provided in the Act, if a party does not comply with a requirement of this Part, a summons or an interlocutory order or direction of the warden, the warden may –
> (2) ...
> (3) (b) determine the proceedings without a substantive hearing.

24. Justice Pritchard found that the warden had acted correctly pursuant to regulation 139 in *Strother's case*, because there had been a failure to comply with regulation 148, which deals with the requirements for service of documents.

25. I note also that regulation also empowers the warden to determine proceedings without a substantive hearing if a party does not comply with a summons or an interlocutory order or direction of the warden.

26. The application for default determination or summary dismissal which came before me on 31 July 2020 was *not* brought under regulation 139, and it has not been argued before me that there has been a failure to comply with a requirement of Part VIII of the regulations; or non-compliance with a summons, an interlocutory order or direction of the warden.

27. In the absence of any argument under reg. 139, the Respondent has been left with the arguments I have already mentioned as to a power derived from some other source. In considering the Respondent's arguments, it has been helpful to consider some

[7] ***Strother v Tavener***, supra fn 4, [40].

decisions of the Supreme Court in which warden's decisions in Part IV proceedings have been judicially reviewed.

28. ***Carnegie Gold Pty Ltd v Maughan***[8] concerned the judicial review of a case in which a warden had recognised the statutory obligation to hear an application for exemption under s 102, but nonetheless determined that a substantive hearing was not necessary. An application for exemption from expenditure conditions which is brought under s 102 of the Act is analogous to an application under s 98 in that it is also a Part IV proceeding, and the wording of s 102 is very similar to the wording of s 98.

29. The warden in *Carnegie Gold* considered, in effect, that it was not open to Carnegie Gold to seek an exemption when it had claimed to have met the expenditure conditions. He said that, regardless of what further grounds might be argued by the applicant, the Minister would have to refuse the applications for exemption, as a matter of law; therefore, in his view, no substantive hearing was required.

30. In considering whether that decision was open to judicial review, Justice Archer said:[9]

> The second issue raised by the application for judicial review is whether the warden was required to hear the exemption applications and the objections to the exemption applications.
>
> The answer is yes. Where an exemption application is made as prescribed, and an objection is lodged, s 102(5)(a) requires the warden to hear the application. This is clear from the words in s 102(5)(a) itself – 'shall be heard'. It is reinforced by the requirement that the warden must send to the Minister, with his recommendation 'the notes of evidence and any maps or other documents referred to therein'.

31. At [105]-[106] her Honour added the following observations:

> Section 102 makes it clear that, in hearing an exemption application, the warden's role is to provide to the Minister, for the Minister's consideration, the warden's notes of evidence and any documents referred to in the evidence and a report recommending the grant or refusal of the application. Section 102 expressly contemplates a hearing in which evidence is received. The warden must give

[8] ***Carnegie Gold Pty Ltd v Maughan*** [2018] WASC 366.
[9] ***Ibid.,*** [102]-[103].

attention to the merits of the reasons upon which the exemption is sought. The warden is required to hold an inquiry to gather the evidence of the application and the factors relating to the objection, and provide that to the Minister with the warden's recommendation.

Accordingly, where an exemption application has been made by the holder of a mining tenement, and an objection is lodged, the warden is required to hear *the merits* of the exemption application. The warden is required to allow the parties to adduce relevant evidence in the hearing in relation to each of the grounds put forward in support of the exemption application and the grounds for the objection. The warden is required to give the parties an opportunity to make submissions on those grounds. The warden is required to accord procedural fairness during the hearing.

32. Her Honour referred to the case of ***In Re Malley SM; Ex Parte Gardner***,[10] in which (as part of the Full Court of the Supreme Court) Parker J said:[11]

> In the particular case of a Warden considering an objection to an application under s 102, *and under similar provisions*, if the result arrived at in *Gardner No 1* is thought not to strike the most appropriate balance between the competing interests and considerations, a suitable way of correcting the position for such cases may prove to be readily available by appropriate use of the regulation making powers, in particular s 162(1) and s 162(2)(a). In this respect it is to be noted that s 102 (and the other similar provisions) *expressly contemplates a hearing of an objection by the Warden in open court, at which hearing evidence is to be received* (*emphasis added*).

33. In the same case, McKechnie J said:[12]

> The requirement in the *Mining Act* for the Warden to sit in open court, to receive evidence and to make notes of evidence all point to an inquiry by the Warden to gather the evidence of the application and the factors relating to the objection before forwarding it to the Minister for decision.

34. Section 98(3) contains those same words as appear in s102(5) – i.e., "shall be heard" – denoting that the application for forfeiture shall be heard by the warden. In addition, like s102(6), s98(6) requires the warden, as soon as practicable after the hearing of the application, to forward to the Minister the notes of evidence, with a report and the warden's recommendation, if any, on the application. Like s 102, s 98

[10] ***In Re Malley SM; Ex Parte Gardner*** [2001] WASCA 29 (***Gardner No 2***).
[11] ***Ibid.,*** [50].
[12] ***Ibid.,*** [98].

expressly contemplates a hearing in which evidence is received. Surely, therefore, the warden must give attention to the merits of the reasons upon which the forfeiture is sought. The warden cannot do this if he or she summarily dismisses the application.

35. Section 98(6) does not seem to be predicated on a finding that a licence holder has failed to comply with its expenditure requirements. Even after a successful "no case" submission, or a hearing of both cases in which the warden concluded that there was no failure to comply, the warden would still forward notes of evidence with a report to the Minister. It appears to me that the interaction of the warden with the Minister is what the Act requires. The use of the words "the warden's recommendation, if any" in s98(6) suggests to me that the evidence and a report ought to be sent to the Minister even where the warden is no recommendation for forfeiture and, indeed, even where the warden has dismissed the application as permitted by s98(4A). If I am correct in this, then it fortifies the view that proceedings in the warden's administrative functions are designed to be carried out effectively in conjunction with the Minister. A summary dismissal of proceedings would frustrate this aim and be contrary to the Act's intentions.

36. Justice Archer's observations with respect to procedural fairness in an application under s 102 in the *Carnegie Gold* case apply equally to an application under s 98. Her Honour said:[13]

> In addition, s 102(5)(a) itself requires that a warden dealing with such an application actually 'hear' the application.
>
> Accordingly, in my view, a warden dealing with an application for an exemption where an objection has been lodged must conduct a hearing and must, among other things, ensure that the parties are aware of the relevant issues.

37. In my view, the same considerations must apply to an application for forfeiture, given the similarity of the wording of s 98. In order to accord procedural fairness to the parties, a hearing must be conducted.

38. In my view, the weight of authority on proceedings under Part IV of the *Mining Act* clearly requires a warden sitting in open court to conduct a hearing, take evidence and consider the merits of the case, before sending notes of evidence and a report to the

[13] ***Carnegie Gold***, supra fn 8, [121]-[122].

Minister. No doubt in an unmeritorious case, the hearing will be relatively brief. But the warden in such a case is exercising an administrative function which has a necessary link to the Minister in that the Minister is the person who may ultimately make an order for forfeiture. In those circumstances, any power to summarily dismiss an application or determine it on a default basis must be explicit. The warden possesses no inherent jurisdiction either in the exercise of his or her administrative functions in open court, or when sitting in the Warden's Court.[14]

39. Absent a successful application based on regulation 139, in my view neither the statutory regime nor the case law provides a basis for summary dismissal of an application brought under s 98 of the Act. Consequently, I cannot dismiss the applications. I am not of the opinion that the Applicant's case has no merit and so I can see no reason to expedite the listing of proceedings for a substantive hearing on that basis.

40. As I have determined that I have no power to summarily dismiss the applications, there is no need for me to consider the merits further at this stage.

E. O'Donnell

Warden E L O'Donnell

16 October 2020

[14] See ***Gardner No 2***, supra fn 10 at [99] per McKechnie J.