

**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : DAMPIER SALT LIMITED v DAYLIGHT WA PTY LTD [2020] WAMW 6

**CORAM** : WARDEN J O'SULLIVAN

**HEARD** : 8 November 2019

**DELIVERED** : 12 March 2020

**FILE NO/S** : Applications for Exemption No. 527363

**TENEMENT NO/S** : Mining Lease 47/243

**BETWEEN** : **DAMPIER SALT LIMITED**  
(Applicant)

AND

**DAYLIGHT WA PTY LTD**  
(Objector)

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*Catchwords:*

*Application for exemption from expenditure; objection withdrawn; turns on own facts*

***Legislation:***

- *Mining Act 1978 (WA) s 42, 102 & 103*

***Result:***

Recommendation that Application for Exemption 527363 in relation to Mining Lease 47/243 be granted.

***Representation:***

***Counsel:***

Applicant : Mr A J Papamatheous  
Objector : Mr T J Kavenagh

***Solicitors:***

Applicant : Allens  
Objector : Kavenagh Legal

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***Cases referred to:***

- *Haoma Mining NL v Tunza Holdings Pty Ltd & Anor* (2006) 31 WAR 270

## Introduction

1 On 9 April 2018 Dampier Salt Limited lodged Application for Exemption 527363, in relation to Mining Lease 47/243.

2 On 11 April 2018 Daylight WA Pty Ltd lodged Objection 527658.

3 On 8 November 2019 Daylight withdrew its objection. There are no other objectors.

4 The question that followed concerned whether, given the objection was withdrawn, the application for an exemption should proceed to a hearing before the warden or should be dealt with by the Minister's delegate as if there had been no objection.

5 Notably, s 102(5) of the *Mining Act 1978* (WA) says:

“(5) *An application for exemption –*

(a) *where an objection to the application is lodged, shall be heard by the warden; but*

(b) *otherwise, shall be forwarded to the Minister for determination by the Minister”.*

6 While there is no question that an objection was lodged, which triggered a referral to the warden, that objection is no more.

7 Section 102(5) is to be contrasted with s 42(3) which deals with objections to prospecting licences:

“(3) *Where a notice of objection –*

(a) *is lodged within the prescribed time; or*

(b) *is not lodged within the prescribed time but is lodged before the mining registrar has granted or refused the prospecting licence under subsection (2) and the warden is satisfied that there are reasonable grounds for late lodgment,*

*and the notice of objection is not withdrawn, the warden shall hear and determine the application for the prospecting licence on a day appointed by the warden and may give any person who has lodged such a notice of objection an opportunity to be heard.”*

8 It may be that the difference in language between the two sections represents an intention on the part of the legislature that once an objection to an application for exemption is lodged, the application falls to be considered by the warden even if the objection is withdrawn.

9 Both parties endorsed such an approach, primarily it would seem, on the basis that s 102(5) refers expressly to the lodgement of the objection activating the warden's jurisdiction, rather than the maintenance of the objection as provided for in s 42(3).

10 I have proceeded on that basis.

### **The Grounds of Exemption**

11 Dampier Salt relies on s 102(2)(f) which provides that a certificate of exemption may be granted on the basis:

- (a) *“that the ground the subject of mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation”.*

12 Alternately, Dampier Salt relies on s 102(3) which says:

- (a) *“Notwithstanding that the reasons given for the application for exemption are not amongst those set out in subsection (2), a certificate of exemption may also be granted for any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemption.*

Section 102(4) is also relevant; it provides:

- (b) *“When consideration is given to an application for exemption regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof.”*

13 As s 103 makes clear if the Minister grants the application for exemption, the tenement in question is not susceptible to forfeiture for the period of exemption.

## The Evidence

14 The evidence supports the following findings of fact:

- (a) Dampier Salt carries on salt mining extraction and operations at Dampier;<sup>1</sup>
- (b) The process by which salt is extracted involves seawater being transferred into ponds where through evaporation from sun and wind it is formed into a dense brine. The brine is then transferred to crystallization ponds where over a period of 12 months it crystallizes into salt crystal forming a layer about 30cm thick whereupon it is harvested.<sup>2</sup>
- (c) The salt ponds are divided by levees which are necessary barriers to separate the salt ponds and to protect them from sea water.<sup>3</sup>
- (d) The levees are at least half a metre high, on average 1 kilometre in length and are either 3-4 metres wide (if they traversed by light vehicles) or over 8 metres wide (if they are traversed by heavy haulage vehicle).<sup>4</sup>
- (e) The levees are formed from a composite of granite and clay, finer quality clay and rock armour.<sup>5</sup>
- (f) M47/243 was applied for in 1990 to access clay materials needed for Dampier Salt's operations.<sup>6</sup>
- (g) The existence of a clay reserve is recorded in a Departmental [Department of Mines, Industry Regulation and Safety as it is now known] record in 1993.<sup>7</sup>
- (h) In 2011 geotechnical testing carried out by Landcorp noted the existence of the clay reserve.<sup>8</sup>
- (i) In 2018 GHD Pty Ltd undertook laboratory testing that confirmed the existence of a substantial clay reserve.<sup>9</sup>
- (j) Substantial and expensive repair works to the Dampier Salt's operations have been necessary as a consequence of damage caused by cyclones

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<sup>1</sup> Affidavit of Valeriy Redko affirmed 4 October 2018 (Redko Affidavit).

<sup>2</sup> Redko Affidavit [6]-[11].

<sup>3</sup> Affidavit of Donald Cyril Clark affirmed 4 October 2018 (Clark Affidavit).

<sup>4</sup> Clark Affidavit [6]-[11].

<sup>5</sup> Clark Affidavit [6]-[11].

<sup>6</sup> Affidavit of Brent Patrick Mark Tobin sworn 4 October 2018 (Tobin Affidavit).

<sup>7</sup> Redko Affidavit; VR-4 (page 62).

<sup>8</sup> Affidavit of Andrzej Adam Wiszniewski sworn 4 October 2018 (Wisznieski Affidavit).

<sup>9</sup> Affidavit of Danica Jayne Goodbody affirmed 3 October 2019 (Goodbody Affidavit).

and flooding in the Pilbara region.<sup>10</sup> Clay has been required for repairs to the salt ponds, sea-walls and levees.<sup>11</sup>

- (k) In 2006 the damages caused by three sequential cyclones cost \$15m to repair.<sup>12</sup>
- (l) Dampier Salt spent \$80m repairing its Port Hedland operations following cyclone damage in 2008.<sup>13</sup>
- (m) To Dampier Salt's knowledge there is no known clay resource in appropriate proximity to its operations of sufficient quality and quantity (other than M47/243)<sup>14</sup> to carry out repairs on the levees.
- (n) Dampier Salt's operations deliver significant benefits to the State including:
  - (i) Royalties (to 31 December 2018, government royalties were approximately \$3.4m);<sup>15</sup>
  - (ii) Employment, including regional employment in the Pilbara (to 31 December 2018, employee benefit expenses were approximately \$46m);<sup>16</sup>
  - (iii) Substantial export income, with total revenue to 31 December 2018 from sales mostly to Asia of approximately \$336m.<sup>17</sup>

### **Section 102(3)**

15 As the application of s 102(2)(f) requires more detailed consideration and there is no contradictor, I propose to consider the application having regard to s 102(3).

16 In my view, without deciding the point, even if s 102(2)(f) does not apply, there is merit in Dampier Salt's application such that it is sufficient to justify an exemption.

17 To deny the exemption would expose Dampier Salt to the risk that it cannot sustain its operations in the event of a cyclone. The evidence establishes that cyclones and the resultant tidal surges have necessitated that Dampier Salt use

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<sup>10</sup> Clark Affidavit [13]-[27]; Wiszniewski Affidavit [17]-[38]; AW7.

<sup>11</sup> Wiszniewski Affidavit; [25]-[27].

<sup>12</sup> Wiszniewski Affidavit; [17], [22].

<sup>13</sup> Wiszniewski Affidavit; [35]-[38].

<sup>14</sup> Wiszniewski Affidavit.

<sup>15</sup> Goodbody Affidavit; DG-3; 170.

<sup>16</sup> Goodbody Affidavit; DG-3; 169.

<sup>17</sup> Goodbody Affidavit; DG-3; 168.

considerable quantities of clay to rebuild and maintain the levees. It is common knowledge that cyclones are a regular occurrence in the north of Western Australia. Importantly, the grant of an exemption in the circumstances of this case is consistent with the objects of the *Mining Act*, which is to promote mining.

- 18 This is not a case where the tenement holder is warehousing a tenement. This is an unusual situation in which M47/243's only real purpose is to maintain Dampier Salt's operations. Seemingly, there is no intention to mine the tenement in its own right for the purpose of selling the clay.

### **Section 102(4)**

- 19 In *Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*,<sup>18</sup> the Court of Appeal considered the meaning of s 102(4). Having examined three possible constructions Steytler P<sup>19</sup> concluded:

*"I can see nothing untoward in a construction which requires that, in considering an application for exemption, regard must be had to current grounds which have previously resulted in exemptions. The legislative may well have thought that the fact of a prior exemption on the same ground was especially relevant.*

*So for example, it might, depending on the circumstances, indicate that, as a matter of consistent decision making, a similar exemption should again be given. Alternatively, the fact of repeated applications based upon the same ground might cast doubt on the ability, or willingness, of the tenement holder to satisfy the prescribed conditions attaching to the grant of the tenement".*

- 20 As is evident from this passage s 102(4) is a double edged sword; it may work for or against the tenement holder.
- 21 In this case the fact that previous Ministers have seen fit to grant exemptions on the basis that M47/243 is required to maintain Dampier Salt's operations supports the view that Dampier Salt should be able to continue to organise its

<sup>18</sup> *Haoma Mining NL v Tunza Holdings Pty Ltd & Anor* (2006) 31 WAR 270.

<sup>19</sup> *Ibid*; [60] with whom Wheeler & Pullin JA agreed.

affairs on the basis that it is relieved of the obligations to actively mine M47/243 each year.

**Conclusion**

22 For the reason outlined above I recommend that the Hon. Minister grant Dampier Salt exemptions from expenditure conditions in the amount of \$23,900 for M47/243 in each of the years ending 27 February 2018 to 2022.



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Warden J O'Sullivan

12 March 2020