

IN THE WARDEN'S COURT
HELD AT PERTH

DATES OF HEARING: November 23 & 24, 1989
 December 18, 1989
 February 2, 1990

DATE DECISION DELIVERED: 12.4.90

BEFORE: P.G. Thobaven S.M. Warden

BETWEEN:

Aztec Mining Co. Ltd

Applicant

and

Johanna Investments Pty Ltd

Objector

APPEARANCES:

Mr Stevenson for Applicant.
Mr Lawton for Objector.

RESERVE DECISION

1. Matter in Dispute:

Aztec Mining Co. Ltd has applied for Prospecting Licence No's 20/1184-97 located at Cue in the Murchison Mineral Field and Johanna Investments Pty Ltd has lodged Objection No's 35/889 to 48/889. Aztec pegged the ground on August 17, 18 and 19, 1988. On September 21, 1988 the objections were lodged claiming that the ground was not marked out in compliance with the Mining Act and secondly that there had been an interference with the marking out of the objector. This last objection was not proceeded with. I might add that the second objection refers to Section 106 of the Act and if the objector was relying upon that section he probably has claimed redress in the wrong jurisdiction.

The grounds of objection which were finally settled upon can be broken up into three groups as follows:-

Objections 1-11; 13; 14 relate to marking out i.e. trenches, rows of stones, and whether corner pegs have been placed in the angle of the trenches or stones.

Objections 12; 15-19 relate to overpegging and claim that the land is not available for pegging.

Objections 20-22 claim that the Form 21's were not put on the appropriate datum pegs.

The applicant claims that all of the licences were properly marked out, that there is no overpegging that would deny them the land, and that the papers were placed on the appropriate pegs.

This is the third Warden's Court hearing involving these parties over this piece of ground.

2. Witnesses:

2.1 Robin Christopher Cooper was the person who did the ground work for the Objector. He visited the area on August 24, 1988 to place papers on some datum pegs. He does not know how he became aware of the present applications, but as they were not lodged until August 26, 1989 and therefore had no formal publicity before then, I assume that the way he became aware of the peggings, was on this visit. He spent only a couple of hours there, and obviously he did not go over the peggings closely then. He returned to the scene on several occasions but it was not until June 29, 1989 and thereafter that he made measurements, took photographs, dug trenches and generally gathered the evidence which was presented to the Court.

This person has an interest in the outcome of these proceedings. Previously there had been court proceedings over this ground, which had been unsuccessful for him. At present although he is not a member of Johanna he still stands to benefit through that Company paying his accounts.

In the witness box he gave his evidence in chief reasonably well, but after viewing the video and under cross examination, his value was weakened.

He was the only witness for the objector, there being no corroboration as to his evidence, despite knowing the importance of the matters in dispute.

2.2. Charles William Parker was the contract surveyor employed by the applicant company. He cannot be seen to be independent because as a surveyor he must of necessity be seen to be doing the right thing. His presentation was forthright. He obviously understood the importance of the situation. The others in his party worked at his direction.

On August 25, 1989 he went back with Alan Jones, one of his surveyors, to inspect the area in view of the objections and a video was prepared of the scene. At that time, he did not have all of the grounds of objections which were subsequently relied on in Court. On August 25, 1989 he identified the peggings from the field books. That particular video tape was lost and therefore on November 20, 1989 he went back and made the video which was subsequently used in the Court proceedings.

He gave evidence of what he found on these visits which confirmed the peggings and the nature and standard of those peggings.

His description of what he found leaves no room to argue that the peggings were defective.

2.3 Alan William Jones was one of the surveyors employed by Parker. He is experienced at pegging and worked with Mike Jones. He described what they did and the nature of the ground which they covered. He compiled his own field book which was referred to in evidence. These were notes made as part of his employment, and as each measurement was taken. He described the problems that they had with digging

trenches, which was related to the dryness of the ground, being clay and rocks. On a visit he made to the area in July 1989, which was after there had been rain, the ground was softer than before. Subsequently he checked his marking out again.

He gave his evidence reasonably well.

2.4 James Ray Farmer was the other person who marked out the ground. Parker gave him instructions and he kept a field book in which he recorded the measurements. He had marked out in the area before, he had worked with Parker for some time and had marked out in excess of one hundred mining tenements. He has been marking out over the last four years. When pegging this ground he was with a Mr Ryan and a Mr Archibald. He has not been back to inspect the marking out and had not had the opportunity to study his field book nor had he seen the video of marking out. Generally he gave his evidence well, but because he had not had the same opportunities as Parker and Jones there were some matters he couldn't recall precisely.

3. Conclusion:

3.1 The strength of the evidence and whose version is to be believed

This relates to Objections 1-11; 13; 14.

The objector relies upon several brief visits to the area and then with the visit commencing on June 29, 1989 he gathered the material, that was put to the Court. The nature of that evidence and material related to the location of trenches, the use of trenches and stones and overpegging.

The applicant relies upon the evidence from Parker, Jones and Farmer. Jones and Farmer made field notes at the time and were therefore contemporaneous. The notes were used to later confirm the location of the pegs by the recorded height, the particular trench, a row of stones and the length, depth and location from the particular

pegs. Bought into Court was a video tape of the marking out, and this showed the pegs, trenches and rows of stones.

The quality of the video was not good, but there was ample material for me to get a good idea of the quality of pegging in respect to the trench locations and the pegs.

The visual material produced by the objector were a number of photographs showing different areas but not all of the areas under consideration. Unfortunately photographs at particular angles do not give such a good view as does a video.

As to the strength of the witnesses, in the end, in part Mr Cooper could not be so definite about his contentions as he was at the outset.

A general complaint by the objector was that the pegs were not in the angle of the trenches/stones. Having seen the video and the layout of the land, and the congestion around some areas, I am satisfied the pegs are in the angle of the trenches.

As to the measurements of the pegs, trenches/stones, I am prepared to accept what Mr Parker and the members of his crew had to say as to the measurements. Those measurements conform with the requirements and there is no ground for objection there.

Another general complaint was that Parker and his crew did not use trenches at nominated points, where Cooper was able to dig trenches. It must be remembered that Parker pegged in August 1988. I was told the ground then was hard. Efforts were made to dig, which is confirmed by the observations of Cooper, but the ground was too hard in parts. In those areas stones were used. There were other areas where trenches could be dug and that did happen. Given this set of circumstances, I accept that Parker's crews were genuine in their endeavours to dig trenches.

When Cooper tried to dig trenches about ten months later he was able to do so. One obvious explanation is that there had been rain in the intervening period. What effect that had precisely, I am unable to quantify. From the video it was also fairly clear that some of the trenches when inspected in November 1989, that had been dug in July 1989 clearly showed rock like material which I would not have expected a person to cut a trench in.

The regulations does not give a point at which one can decide to change from digging a trench to using rocks. I consider one should use the test of reasonability. Given that, from the evidence of Jones and Farmer I consider they met that test and I find there is no ground to complain about for the alternate use of rocks.

Objections 1-11; 13-14 are dismissed.

3.2 Overpegging and the land is not available

This relates to Objections 12; 15-19

Mr Lawton submitted to me that there had been instances of overpegging and the ground was not available for pegging and therefore the relevant tenements should not be granted.

Section 18 states in part "..... not being Crown Land that is the subject of a mining tenement". The definition of a "mining tenement" seems to me to be clear enough, in that it means granted mining tenements.

Therefore, the purposes of present application, before the land would not be able to be pegged it must be granted land.

The tenements which the objectors say are affected are as follows:-

Prospecting Licence 20/750,
Prospecting Licence 20/1103,
Prospecting Licence 20/1147,
Prospecting Licence 20/1149,

Prospecting Licence 20/1150,
Prospecting Licence 20/1151, and
Mining Lease 20/153

Mr Cooper wanted to tell me what tenements were in force, but I do not accept that line of evidence. The only evidence I would accept as being reliable would be from the holder who has a title document, a Mines Department official who has access to the register, or a search of the title.

There being no evidence of that nature in respect to Prospecting Licence 20/750, the contention is dismissed.

Prospecting Licence 20/1103 is a special prospecting area and therefore the underlying land is available.

Prospecting Licence 20/1147 has still not been granted.

Prospecting Licence 20/1149 was granted on 15 March 1989 which is after the date of this pegging.

Prospecting Licence 20/1150 has still to be granted.

Prospecting Licence 20/1151 has still not been granted.

Mining Lease 20/153 - There is no evidence of the title however I am prepared to make further comment on this. Mining Lease 70/153 appears to be identical to Mining Lease 20/56 which is shown as being surveyed. The evidence in this case was that Sons of Gwalia when pegging used star pickets, but because of its location such a peg in respect to Mining Lease 20/153 can only be an intermediate peg. Objection 12 relates to overpegging on the North boundary of Mining Lease 20/153, the peg being 6'-8' inside the star picket. The problem with the evidence, as far as the objector is concerned is that if Sons of Gwalia applied for Mining Lease

20/153 identical to Mining Lease 20/56, whether the star picket is on the boundary or not. Flowing from that is whether or not Aztec has gone onto Mining Lease 20/153. I am not prepared to draw the conclusion that it has.

Further, the description clearly shows that it is the intention to go to the boundary of Mining Lease 20/56 and to follow the boundaries.

These grounds of objection are dismissed.

3.3 Placing of the Form 21's on the Datum Pegs

This particular area has a lot of activity in it and I have no doubt that parties other than the applicant and objector have an interest in the ground.

The objector puts to me that based on his information gained ten months after the pegging, that the wrong papers had been put on the appropriate pegs by the applicant, shortly after pegging.

The papers were found to be on the wrong pegs by Parker after Cooper had seen them.

From recollection there was no evidence that Cooper checked the Marking Out papers with the Form 21's, but he may have.

It was put forward that because the papers were on the wrong pegs, this is the reason why Cooper got the pegs and trenches mixed up at the relevant corners.

I do not dismiss out of hand the contention that the papers may have been put on the wrong pegs by Aztec, but because of the effluxion of time, and the interest in the area, then the likelihood of others having knowingly or unwittingly changed the papers is greatly increased. I consider it would be an unreliable conclusion for me to draw that Aztec put the wrong papers on the wrong pegs.

3.4 Overall Summary

The objector's case fails because evidence was not obtained as soon as possible after the pegging, and the effluxion of time has tended to weaken the strength of the evidence. It must be remembered that the Warden is considering the pegging in this sort of case and evidence contemporaneous to the pegging is vital.

No order as to costs

F. Buchanan Esq. 12/4/90