

JURISDICTION : MINING WARDEN, WESTERN AUSTRALIA

TITLE OF COURT : OPEN COURT

LOCATION : LEONORA

CITATION : JOHNSON'S WELL MINING NL
NEWMONT DUKETON PTY LTD
AND
RICHARD ANTHONY BAYLISS
[2003] WAMW 22

CORAM : SHARRATT, S.M.

HEARD : 14 AUGUST 2003

DELIVERED : 18 DECEMBER 2003

FILE NO :

TENEMENT NO : E38/1184, E38/1191 AND E38/1192

BETWEEN : JOHNSON'S WELL MINING NL
NEWMONT DUKETON PTY LTD
AND
RICHARD ANTHONY BAYLISS

Catchwords:

EXEMPTION –APPLICATION FOR EXTENSION OF TIME
PRACTICE AND PROCEDURE – TIME – EXTENSION OF -
APPLICATION FOR EXEMPTION

Legislation:

Mining Regulations 1981, reg 54, reg 104

Result:

That the time for lodgement of the applications for exemption dated 12 August 2003 and received by the Mining Registrar at Leonora on 14 August 2003, be extended to 18 December 2003.

Representation:

Counsel:

Plaintiff: Mr T. Kavenagh

Defendant: Mr A. Jones

Solicitors:

Plaintiff: BHK Legal

Defendant: Gardens Lawyers

Cases also cited:

Johnsons Well Mining NL & Ors. v Angelopoulos (2002 WAMW 22)

Molopo Australia Ltd v Eastern Gold NL [1989] WAR 270.

Peko Exploration Ltd v GHK Mining Pty Ltd, unreported; SCt of WA: Library No 970613; 14 November 1997.

Great Boulder Mines –v- Bailey: Great Boulder Mines Ltd v Bailey (unreported, Perth Warden’s Court, 24 March 2000).

Jadetex Minerals Pty Ltd v Povey (2000 WAMW 4)

DECISION ON APPLICATION FOR EXTENSION OF TIME TO LODGE EXEMPTION APPLICATIONS

THE APPLICATION

1 Johnson's Well Mining NL (JWM) and Newmont Duketon Pty Ltd lodged applications for extensions of time to lodge further exemption applications in respect of 3 Exploration Licences: E38/1184, E38/1191 and E38/1192 ("the Tenements").

2 These further exemption applications sought are for the reporting years ending 25 April 2002, 25 April 2002 and 29 June 2002 respectively. The respondent has lodged complaints seeking forfeiture against the Tenements on 13 December 2002, 12 November 2002 and 12 November 2002 respectively.

3 These three complaints have not yet been heard. The ground upon which forfeiture is sought in each case is non-compliance with the expenditure condition.

4 In each complaint, the year of the alleged non-compliance is the same year in respect of which JWM and Newmont Duketon have made the application for extension of the period within which an exemption application may be made.

5 JWM is the registered holder of the Tenements. Pursuant to an agreement dated 26 April, 2002 between Newmont Duketon and JWM, Newmont Duketon agreed to purchase an interest in and assume management of a large number of tenements including the Tenements.

6 Applications were lodged with the Department of Industry and Resources for Certificates of Exemption in respect of the Tenements for the relevant reporting year. Statutory declarations in support of each application were lodged at the same time. These applications were lodged on 14 June 2002, 14 June 2002 and 02 August 2002 respectively.

7 These applications were within the time specified in the Regulations.

8 By letters dated 18 September 2002, 27 February 2003 and 27
December 2002 the Department indicated it's intention to recommend to
the Minister that he refuse the exemptions sought.

9 These Departmental letters sought further submissions in support of
the exemption application within 30 days from the date of the letters.

10 These submissions were duly supplied by the applicant.

11 The Department gave notice by letters dated 12 May 2003, 23 June
2003 and 23 June 2003 that the Exemption Applications were refused.

12 To an onlooker and in my opinion the Department in taking 12
months to consider the exemption applications failed to act with
expedition.

THE OLD APPLICATIONS

13 The old applications were by way of the form 18 prescribed by the
Regulations.

14 In that form space is provided for an applicant to detail reasons for
exemption.

15 Limited space is provided for in that form so an applicant must be
both succinct and type in small letters.

16 For each of the 3 old applications the applicant typed:

“In accordance with Sections 102(2)(b) – that time is required to
review exploration data in the Duketon Belt and plan further exploration,
102(3). Please see Annexure “A”.
Annexure “A” in each case cited in essence;

1. That during the expenditure year Johnsons Well was responsible for
management of the tenement.
2. That Johnsons Well had pursued an agreement with ACM.
3. That ACM had acquired a majority interest in the Tenements.
4. The Tenement is part of a project.
5. ACM Mines has access to capital to complete exploration work plans
on the Tenement.

17 S102(2) Mining Act lists reasons for which a certificate of exemption
may be granted. They are listed a – h.

18 S102(3) Mining Act provides that, “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.

19 In these old applications for exemption the applicants relied in part
on 102(2)(b) Mining Act; the full citation of that section the Form 18’s
was incomplete. In each of the 3 applications missed out were the words
“...or mining or raise capital therefore” (the underlying is mine).

20 In paragraph 24 of her affidavit the tenement manager Jennifer
Falvey who prepared the old applications swears that she intended to rely
on the full scope of S102(2)(b) Mining Act.

21 She “did not intend to circumscribe the reference to 102(2)(b) so as
to exclude reliance on the ground that time was required to raise capital
for future exploration.

22 The omission of an explicit reference to the words “or raise capital
therefore” was merely an “administrative error”.

23 Ms Falvey also prepared statutory declarations in support of the old
applications. In her supporting statutory declaration she cites in more
detail the majority acquisition of the tenements by ACM and the fact that
negotiations took place during the reporting year.

24 In paragraph 9 she asserts in purported support of her S102(2)(b)
ground;

25 “In order to comply with its expenditure obligations in relation to the
Tenements, Johnson’s Well Mining commenced negotiations with ACM
with a view to ACM acquiring an 80% interest in the Tenements and
responsibility for management of tenements and meeting expenditure
commitments in respect of the Tenements. Time was thus required during
the reporting year for JWM and ACM to negotiate an agreement to
provide for the provision for funds to enable further exploration of the
Tenements”.

THE NEW APPLICATIONS

26 The new applications were received by the Department by letter
dated 12 August 2003. The Applicant if successful seeks that the new
applications be accepted for lodgement on 14th August 2003, the date of
the hearing in Leonora.

27 The new Applications for Exemption differ from the old applications
in that they raised the “time to raise capital” ground;

28 (g) Time was required by Johnsons Well Mining NL to negotiate an
agreement with Newmont Duketon Pty Ltd to raise capital for further
exploration or mining on the tenement – section 102(2)(b), alternatively
S102(3).

29 It thus squarely includes the words “to raise capital for further
exploration” as a grounds for consideration.

SUBMISSIONS

30 I received oral submissions from both parties in relation to the
application on the day of the hearing.

ON BEHALF OF THE APPLICANT

31 The only evidence led by either party was the affidavit of Jennifer
Falvey. Mr Jones submitted that that evidence justified an extension of
the period within which to lodge the new applications on the basis of the
“administrative error” of Ms Falvey.

32 His argument was that because the old Form 18 application did not
cite all of the words of subsection 102(2)(b) in full and omitted the words
“or raise capital therefore”. The Minister in considering whether to allow
the exemption may have taken the view that he was not allowed to take
into account anything contained in Jennifer Falvey’s accompanying
statutory declaration relating to the need for time to raise capital for
exploration.

33 He draws this argument by analogy and cites the case of Peko Exploration
Ltd v GHK Mining Pty Ltd, unreported; SCT of WA : Library No 970613;
14 November 1997 :

*“The legislative provisions relating to the use of the forms identified are
designed to ensure that when applications for exemption and forfeiture
come before the Warden, the issues are properly defined. The various
forms are, of course, not pleadings, strictly speaking, but they fulfil a
similar purpose. Proper compliance with the forms results in the issues
being crystallised and the parties involved being given reasonable notice
of the case each has to meet. As with pleadings, the parties are informed
about the matters which are truly in dispute, they become able to prepare
properly for the hearing, and the admissibility of the evidence at the
hearing is thereby facilitated”.*

34 and Great Boulder Mines –v- Bailey: Great Boulder Mines Ltd v Bailey (unreported, Perth Warden’s Court, 24 March 2000):

“I do not consider that the statutory declaration is a document which forms part of the application for exemption although the requirement to lodge it arises out of the lodgement of an application for a certificate of exemption”.

35 as persuasive authority for the proposition that statutory declarations are not part of an exemption application.

36 From these legal propositions he argues reasonable cause has been raised because

- (1) The “new” application has raised good grounds for exemption.
- (2) This “new” ground has either not been raised or its not clear it has been raised.
- (3) If the Department had followed the law it would not have been able to contemplate the “new” ground.
- (4) It was always meant to be raised.

37 Mr Jones also argues that upon Departmental refusal of the exemption application the applicant has acted promptly in lodging the new application within 2 months.

38 He cites Johnsons Well Mining NL & ORS –v- Angelopoulos 2002 WAMW 22, a case decided by Warden Calder as persuasive authority for the proposition that reg. 104 Mining Regulations empowers a Warden to extend the period within which an application for exemption may be lodged; even a subsequent application for reasonable cause in the right circumstances.

The Respondent

39 Mr KAVENAGH submitted that in effect the new application does not put before the Minister or the Warden any new information.

40 He argues that because S102(3) Mining Act was raised in the old Form 18 application then the failure to cite the words “or raise capital therefore” did not stop the Minister from considering that ground because S102(3) allows a Minister to grant an exemption “for any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such an exemption”.

41 He argues in effect that there is little difference between the old application and the new application and that no new ground is revealed.

42 He points to the similarity between the statutory declaration before the Minister and the one sworn 17 April 2003.

43 Mr Kavenagh also asked me to consider the new exemption application's chances of success, which he submits are slim.

44 He pointed out the history of the tenements and the failure of the tenement holder to expend money on the tenements previously and the failure of the previous year's exemption application. He asked me to note that the mere fact that a new entity now controls the tenements should not be a significant factor in any consideration for either the Minister or the Warden.

45 Mr Kavenagh also submitted that much time had passed since the end of each of the relevant reporting years which were 25 April 2002, 25 April 2002 and 29 June 2002 and that prejudice would accrue to his client who has lodged complaints for forfeiture as a result of the passing of time.

THE LAW

46 Nowhere in the Mining Act or Regulations is it expressly stated that a holder of tenement may re-apply for the grant of a certificate of exemption once the previous application has been determined.

47 The applicant relies on the general power given to a Minister or Warden by regulation 104, Mining Regulations, which states.

48 "The time required by these regulations for any act to be done by the applicant for, or holder of any mining tenement may be extended by the Minister or a Warden, as the case requires, for reasonable cause, proof of which lies on the applicant or holder".

49 The time required in relation to an application for a certificate of exemption is prescribed by regulation 54(1a) Mining Regulations and may be made within 60 days of the end of the relevant expenditure year.

50 It seems then from a jurisdictional viewpoint that I have the power to extend the 60 day period set by regulation 54(1a) Mining Regulations.

51 What is the effect of the Minister having already determined a prior
exemption application for the same expenditure year?

52 In Johnsons Well Mining NL v Angelopoulos (2002) WAMW 22,
Warden Calder expressed the view that reg 104 had effect to empower a
Warden or Minister to extend the period within which an application for
exemption may be lodged, notwithstanding the fact that an earlier
certificate of exemption in relation to the same expenditure year had been
put before the Minister and refused.

53 I respectfully agree with the learned Warden and adopt his views in
that regard expressed in that case and Jadetex Minerals Pty Ltd v Povey
2000 WAMW4.

54 Whether or not such an application is successful is a matter which
must be decided in the context of all the circumstances which are relevant
to the reasons for which the application is made. I find it convenient to
have recourse to the Respondent's arguments in turn.

55 As I consider these arguments I am of course mindful that the
Applicant bears the burden of proof in this application.

56 It is for him to convince me both that there is a "reasonable cause"
for extension of time and that it is appropriate in all the circumstances that
I do so.

57 1. That the Minister has already decided the application and the new
application puts nothing before him that is new.

58 I will call this the "functus officio" argument. Should a subsequent
application be not distinguishable in respect of the issues to be considered
and dealt with by the Warden or Minister then it would raise the
application of principles surrounding the doctrine of "functus officio" and
I should refuse to entertain it.

59 I am of the view however that the ground sought to be put before the
Minister, namely time was required by Johnsons Well Mining NL to
negotiate an agreement with Newmont Duketon Pty Ltd to raise capital
for further exploration on the tenements was not properly put before the
Minister.

60 I am persuaded by Mr Jones that the failure of Ms Falvey to type in
the words "or raise capital therefore" had the effect that the Minister was
unable to properly take into account those parts of the supporting statutory
declaration that related to that ground.

61 Regulation 54(1b) requires that a copy of the Form 18 be posted on
the Notice Board at the office it was lodged at.

62 The supporting affidavit is required to be lodged but not required to
be posted. The reason the Form 18 grounds are publicly displayed is so
that potential objectors or plaintiffs for forfeiture may see for themselves
the grounds relied on by any applicant and using that knowledge gauge
whether any forfeiture plaint is worth the cost and effort.

63 Should an applicant introduce grounds in the supporting statutory
declaration not disclosed in the Form 18 it would be defeating of the
perceived integrity of the self-policing policy of the legislation if this
Minister took into account those undisclosed grounds in his deliberations.

64 Information set out on a Form 18 is not strictly speaking pleadings
but serves a like purpose.

65 A Form 18 informs the parties of the matters at issue and like
pleadings any evidence purported to be led that exceeds the bounds of the
S102 matters contained in the Form 18 should not with respect be
properly used by the Minister.

66 2. That evidence of time required to raise capital reason was before the
Minister through the S102(3) grounds.

67 I reject the argument put forward by Mr Kavenagh that the time
required to raise capital ground put before the Minister was properly under
S102(3) Mining Act which was set out as a ground on the old application.

68 S102(3) by its very terms can only deal with reasons “not amongst
those set out in subsection 2”. As time to raise capital is a reason set out
in subsection 2 of 102 Mining Act then evidence relating to that reason
can not be introduced pursuant to S102(3) Mining Act.

3. The new exemption application will have little chance of success if I
allow the period of time for lodgement to be extended.

69 I am of the opinion that an enquiry into the substance of the
application would be warranted and do not accept that my enquiry should
be limited to merely answering the question “was the period of extension
sought reasonable”.

70 I do recognise however that this is only one facet of and not the main
focus of the enquiry I must enter into.

71 Mr Kavenagh argues the tenements were not in good standing prior
to the relevant expenditure year and that the fact that responsibility for the
72 tenements was transferred to another entity during that year means that an
exemption certificate is unlikely to be granted anyway.

72 I am of the opinion that the new ground sought to be put before the
Minister is a good ground and that if the Department had followed the law
that ground has not properly been put before the Minister and as a ground
should not have formed part of his deliberations in considering the
73 exemption.

73 The “administrative error” of Ms Falvey’s was clearly a mistake or
oversight on her part because the ground of time being required to raise
capital was clearly adverted to in the supporting statutory declaration.

74 Failure to include a genuine ground in an exemption application due
to a typing error or mistake is in my opinion is a classic sufficient reason
for a subsequent application.

75 A Warden’s role in an application for a certificate of exemption is an
administrative one.

76 These proceedings are administrative.

77 It is important that the minister has before him all the relevant
information when he makes a decision whether to grant a certificate of
exemption or not.

78 The error made by Ms. Falvey was to leave out 4 words on the Form 18.

79 The applicant has discharged his persuasive burden of showing that it
may be the case that because of the error the Minister did not apply his
mind to the “time is required to raise capital” ground.

80 Time lapsed between the old application and the new application and
prejudice.

81 The respondent in this application lodged complaints for forfeiture on 13
December 2002, 12 November 2002 and 12 November 2002 in relation to
these tenements. The Minister issued a notice of refusal of the old
applications on 12 May 2003, 23 June 2003 and 23 June 2003.

82 The old applications were lodged on 15 April 2002, 13 June 2002
and 13 June 2002.

83 The new applications were dated 12 August 2003.

84 The respondents lodged their complaints for forfeiture at a time when the applications for exemptions were before the Minister and 5 or 6 months before the Minister had decided to refuse the old applications.

85 It is proper for me in deciding whether the applicants have “reasonable cause” to consider the position of a plaintiff for forfeiture such as the Respondent.

86 At the time of lodging the complaints for forfeiture the Minister had not decided whether to grant a certificate of exemption or not.

87 Although these new applications were made well over a year after the old applications it must be remembered that these applications were not dealt with by the Minister until 365 days after they were lodged and were not received by the Applicants until after that date.

88 The Applicants lodged their new applications after receiving notice of refusal of the old applications 59, 43 and 43 days later.

89 There has been something of a failure by the Applicants after assuming management and control of the tenements to ensure that all steps were taken that could reasonably be taken to have protected the tenements from forfeiture due to expenditure non-compliance and due to inadequate applications for exemption being placed before the Minister that did not cite on the Form 18 that time was required to raise capital.

90 The new applications could have been raised and put before a Warden at any time after lodgement of the old application.

91 Prior to the Minister determining the old applications no attempt was made by the Applicants to check the basis upon which the Minister was being asked to exercise his discretion and even after notification of the refusal to issue the exemption certificate was received by the applicants it took 59, 43 and 43 days for them to lodge the new applications.

92 In regard to the general principles regarding the balancing of competing interest when considering an application for a late and subsequent application for an exemption application. I respectfully adopt the reasoning of Warden Calder in Angelopoulos (Supra) at p18:

93 *“In that context, the prescribing of a time for the lodgement of an exemption application is a significant aspect of the self-policing legislative policy of the Act and Regulations. The holders of tenements*

owe it to the public, who may have an interest in their tenements or the ground the subject of the tenements, to ensure that applications for exemption are made, and thus recorded in the public register, within the prescribed time. If that is not done, whether because of negligence or ignorance or by design, and where applications for extension of the lodgment period are subsequently made and granted, there is a real potential to diminish the actual and perceived integrity of the self-policing policy of the legislation which includes not only a general right to any person to plaint for forfeiture but also includes the incentive created by the legislation to tenement holders to not put their tenements at risk by noncompliance with the legislation. In my opinion, Wardens and the Minister should adopt an approach to the granting of extensions of time prescribed, particularly where noncompliance with the prescribed period is something which is recorded in the public register and particularly where forfeiture proceedings based upon expenditure non-compliance have already commenced, which is not seen to and which does not condone or encourage late lodgment. Having said that, however, it is important to not lose sight of the fact that the criterion specified in reg 104 for the granting of the extension by the Minister or Warden of the time required for an act to be done is “reasonable cause”. I consider that whether a cause is “reasonable” or not requires a taking into account of not only the position of the applicant for the extension, but also the position of potentially affected persons such as a plaintiff for forfeiture. The reasonableness of the cause, I consider, must be assessed in the light not only of the circumstances of the applicant but also in the context of the Act and Regulations and what is seen to be the intention of Parliament in respect of the whole of the legislation and in respect of those parts of the legislation which have required that the relevant act be done within a particular time. The length of time, which is prescribed, for that act to be done is also something which in that context may be taken into account when giving consideration to the granting of an extension pursuant to reg 104. A cause may be more reasonable, for example, than in a case where the prescribed time is relatively long, such as 8 months. It must be said, however, that the regulation does not specify as a criterion for the granting of an extension of time that the period of time for which the extension is sought is itself “reasonable”. The applicant for the extension must establish that there is a “reasonable cause” for the granting of the extension”.

There has been something of a failure by the Applicants after assuming management and control of the tenements to ensure that all steps were taken that could reasonably be taken to have protected the tenements from forfeiture due to expenditure non-compliance and due to

inadequate applications for exemption being placed before the Minister that did not cite on the Form 18 that time was required to raise capital.

95 This application is not on all fours with the case of Angelopoulos (Supra) where the application was refused.

96 This is a case not where the draughtsperson neglected to claim a ground in either the Form 18 or the supporting declaration but where 4 words were accidentally left off the recitation of a sub-section on a form which should have had the drastic effect of meaning that the material in the supporting statutory declaration could not be taken into account by the Minister.

97 Such an accidental omission would not be noticed readily until it came to the attention of someone well versed in knowledge of mining law.

98 I acknowledge that the acceptance of this late application will mean that there is a possibility that the Respondent may lose a chance of a successful plaint for forfeiture should the Minister issue a certificate of exemption to the new application.

99 I note that the plaints were lodged before the Minister had made a decision on the old applications for exemption and not in reliance upon his refusal of that application. The new application simply allows the rectification of a slip or omission out of time.

100 I am of the opinion that the successful use of Regulation 104 to allow a subsequent application so long after the expiry of the relevant expenditure year must be a rare event.

101 I am persuaded however that this case is one of these rare events.

102 I accept the application for extension of time.

103 In order to allow the applications to proceed in accordance with the time constraints imposed by regulation 54, Mining Regulations, I order as follows:

104 That the time for lodgement of the applications for exemption dated 12 August 2003 and received by the Mining Registrar at Leonora on 14 August 2003, be extended to 18 December 2003.