JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : [2016] WAMW 17

CORAM : WARDEN A MAUGHAN

HEARD : In Chambers

DELIVERED : 21 July 2016

FILE NO/S :

TENEMENT NO/S : ML27/174

APPLICANT : ANTON DAY

Catchwords: Application for restoration, non-payment of fine, turns on own facts

Legislation:

- *Section 97A of Mining Act 1978*
- *Mining Regulations 1981*

Cases referred to:

- ***BRGN Nominees Pty Ltd v Hake*** (unrecorded Kalgoorlie Wardens Court, 26 October 1988 noted at 8 AMPLA Bull 17)

Result:

Application for restoration recommended.

Representation:

Counsel:

Applicant : Self

REASONS FOR DECISION

Background

1. By application dated 14 September 2015 the applicant seeks restoration of Mining Lease 27/174 which was forfeited on 25 May 2015.

2. The forfeiture arose as a result of non-payment of a fine imposed for non-compliance with an expenditure requirement pursuant to section 82(1) *Mining Act* and regulation 22 of the *Mining Regulations* – non-lodgement of a Form 5 Operations Report.

3. The last day for lodgement of the Form 5 was 60 days after the anniversary date of the tenement (1 November 2014) being 31 December 2015. The Form 5 was lodged on 23 March 2015 together with a submission from the applicant.

4. The applicant was fined $1560.00 for the non-lodgement of the Form 5 and was given until 25 May 2015 to pay. The applicant was informed of the fine and the requirement to pay by a letter sent by registered post. The letter was dated 23 April 2015.

5. On 29 May 2015 the applicant was informed that ML27/174 had been forfeited for non-payment of the fine. The fine was subsequently paid on 15 September 2015.

6. As per regulation 51D of the *Mining Regulations* an application for restoration must be made within 30 days of the forfeiture of the tenement in this case by 24 June 2015.

7. On 26 May 2015 an application for a prospecting license of 27/2230 was lodged by Northern Star (Kanowna) Limited over the same ground. The objection period for the application closed on 30 June 2015.

8. The applicant's application for restoration was lodged 83 days late. He sought and was granted an extension of time to lodge the application by the Warden on 2 October 2015.

9. On 21 October 2015 an objection to the application for restoration was lodged by Northern Star (Kanowna) Pty Ltd on the basis that:

> "Grounds for application for restoration 475360 (Application) are insufficient to justify the grant of the application, the application has been lodged outside of the time prescribed for lodgement and the applicant has not complied with the provisions of the *Mining Act 1978* and the *Mining Regulations 1981*."

10. The objection was withdrawn by Kanowna by letter to the Department of Mines dated 29 June 2016.

The Law

11. Section 97A of the *Mining Act* provides:

> ***"97A. Application for restoration of mining tenement after forfeiture***
>
> *(1) Subject to subsection (2), where a mining tenement is forfeited under or by virtue of section 96, 96A or 97 a person who was, immediately prior to the forfeiture, the holder of the tenement concerned may apply for the mining tenement to be restored to him and the forfeiture cancelled.*
>
> *(2) Where the forfeiture was occasioned by non-compliance by the holder with an expenditure condition applicable to the tenement and results from an application made by a person, not being a person acting on behalf of the Department, subsection (1) does not apply.*
>
> *(3) An application under subsection (1) —*
>
> *(a) shall be in the prescribed form and made within the prescribed time; and*
>
> *(b) shall be lodged in the prescribed manner; and*
>
> *(c) shall be accompanied by the prescribed application fee,*
>
> *and the applicant shall at the request of the warden furnish such other information, or such evidence in support thereof, as the warden may require but the warden shall not require information*

or evidence relating to assays or other results of any testing, sampling or other mining operations that the applicant may have carried out on the land the subject of the application.

(4) Within 14 days after the lodging of such an application under subsection (1), the applicant shall serve such notice of the application as may be prescribed on any person who has since the forfeiture made application for a mining tenement in respect of the land or any part of the land to which the application relates and on such other persons as may be prescribed.

(5) An application under subsection (1) shall be heard by the warden on a day appointed by him.

(6) A person who desires to object to the granting of an application made under subsection (1) shall lodge within the prescribed time and in the prescribed manner a notice of objection and he may be heard by the warden in opposition to the granting of the application.

(7) On the hearing of an application made under subsection (1) the warden —

(a) in a case to which section 96 applies, shall determine the application and make such order as he thinks fit and may —

(i) grant the application and restore the mining tenement to the former holder; or

(ii) grant the application and restore the mining tenement to the former holder subject to such further or other conditions as the warden may specify; or

(iii) refuse the application;

and

(b) in any other case, shall as soon as practicable thereafter transmit to the Minister for his consideration the notes of evidence and any maps or other documents referred to therein, and his report recommending the granting or refusal of the application together with his reasons for the recommendation.

(8) On receipt of notes of evidence and any maps or documents transmitted to him pursuant to subsection (7), the Minister may grant or refuse the application for restoration of the mining tenement, as he determines and whether the warden recommends the granting of the application or the refusal thereof, and may impose on a mining tenement so restored such further or other conditions as the Minister may specify."

[Section 97A inserted by No. 100 of 1985 s. 71; amended by No. 37 of 1993 s. 26; No. 39 of 2004 s. 64; No. 12 of 2010 s. 35.]

12. In the case of this application the Warden's role is to make a recommendation to the Minister. After receiving the recommendation the Minister may grant or refuse the application for restoration.

13. The relevant principles applicable to applications for restoration were carefully examined by the Warden in ***BRGM Nominees Pty Ltd v Hake*** (unrecorded Kalgoorlie Wardens Court, 26 October 1988, noted 8 AMPLA Bull 17) ("BRGM").

14. BRGM is helpfully summarised in "Hunt on Mining Law of Western Australia (5th Edition, 2015, Hunt, Kavanagh and Hunt).

15. The learned authors therein helpfully summarised the position in BRGM in the following terms:

> *"... the Warden said that in determining whether a mining lease should be restored, consideration should be given to the applicant's explanation for the non-payment of rent, the degree of lack of care on part of the holder in attending to payment of rent and the existence of any special circumstances. As a matter of general principle, at the outset none of these considerations should be given any greater priority than any other. The facts of each particular case will determine where the emphasis should be placed. The Warden said that when determining whether any special circumstances exist, the court should give consideration to the length of time that the holder has held the tenement, the expenditure incurred in any years before the date upon which the rent became payable, whether the holder had delineated an ore body, whether the holder had caused the necessary arrangements to be made for a mining operation to commence, whether the holder was actually carrying out a mining operation on the tenement, the size of an planned mining operation or existing mining operation and generally the prejudice that would be suffered by the holder if the tenement was not restored. Whether special circumstance exists or not depends on the fact in each particular case."*

16. In BRGM the Warden found that non-payment of rent resulted from gross lack of care on the part of the tenement holder. The Warden then considered whether there were any special circumstances. He found that considerable work had been undertaken on the tenement and a treatment plant was under construction. Thus he concluded that special circumstances did exist and the Warden recommended to the Minister the mining lease be restored.

17. Whilst most of the reported cases dealing with restoration have arisen following forfeiture of a tenement because of failure to pay rent in my view the principles are equally applicable to the present circumstances where the forfeiture arose due to the non-payment of a fine.

The Evidence

18. By undated letter, tendered to the Department of Mines on 15 July 2016, the applicant consented to the application being dealt with in Chambers without the need for a substantive hearing.

19. In the presentation the application is made on the following grounds:

> "I never received eny forfit notice I have owned this lease for 14 years and would like to own it there for."

20. The applicant supported the application with a Statutory Declaration dated 14 September 2015 stating:

> "I never received a Forfeit notice as I am working up the north west I haven't been home for 5 months as a I had a 30 year Relashinship Break up and my mail hasen't Been Passed on to me I have owned The lease for 14 years and if I knew it was Beening forfited I would of Done something About it streat away."

MINING TENEMENT REGISTER

21. The Search for Mining Lease 27/174 ("MTRS")discloses:

    (i) The applicant has held the lease since 7 November 2001;

    (ii) The following expenditure has been incurred on the lease since 2001:

Expenditure/Exemptions			
Year	**Minimum Expenditure**	**Expenditure Lodged**	**Total Expenditure**
2015	$2,917.00	14/09/2015	$15,460.00
2014	$5,000.00	27/03/2015	$16,240.00
2013	$5,000.00	03/04/2014	$14,220.00
2012	$5,000.00	05/10/2012	$ 8,800.00
2011	$5,000.00	25/10/2011	$ 7,700.00
2010	$5,000.00	12/10/2010	$25,940.00
2009	$5,000.00	20/10/2009	$ 6,730.00
2008	$5,000.00	05/03/2009	$21,000.00
2007	$5,000.00	18/10/2007	$ 5,900.00
2006	$5,000.00	05/01/2007	$17,200.00
2005	$5,000.00	02/11/2005	$11,900.00
2004	$5,000.00	03/11/2004	$10,800.00
2003	$5,000.00	05/11/2003	$15,500.00
2002	$5,000.00	07/11/2002	$11,900.00
2001	$5,000.00	26/09/2001	$ 5,981.00

(iii) There has been a history of non-compliance with the Act and Regulations:

(a) on 24 July 2007 $50.00 was paid being a penalty imposed for the late lodgement of a Form 5 pursuant to section 97(5) of the *Mining Act*;

(b) on 8 June 2009 $1200.00 was paid being a penalty imposed for non-compliance with expenditure conditions (section 97(5) of the *Mining Act*;

(c) on 19 February 2014 forfeiture proceedings were commenced for non-compliance with the reporting requirements namely the non-lodgement of a Form 5. By order dated 10 June 2014 the Minister ordered that no penalty be imposed;

(d) 9 February 2015 forfeiture proceedings were commenced for non-compliance with reporting obligations namely non-lodgement of a

Form 5. By order dated 22 April 2015 the Minister ordered that the penalty of $1560.00 be paid. That is the penalty the subject of these proceedings.

Conclusions

22. The applicant has provided an explanation for the late payment of the fine. Whilst I have some scepticism, in view of the history of non-compliance, in respect of the explanation I am not prepared to dismiss the explanation when there is no contrary evidence before me.

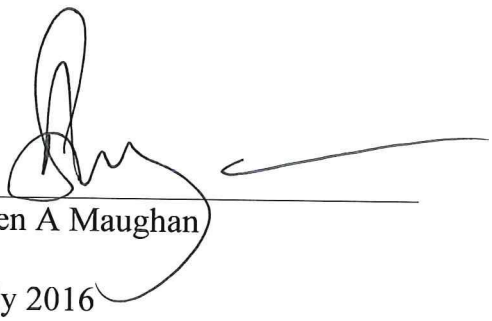
23. It is clear from the mining tenement registered search that the applicant has historically met his expenditure requirements in recent times by amounts approaching three times the minimum expenditure requirement.

24. The MTRS discloses that the work done on the tenement in the reporting year 2013-2015 has been actual prospecting. This indicates that the intention of the Mining Act, namely the exploitation of the mineral wealth of the tenement, is being met by the applicant.

25. Without in any way binding any future recommendations in respect of the tenement the applicant ought to be on notice that he needs to strictly comply with his obligation under the *Mining Act* and *Regulations* in the future.

RECOMMENDATION

26. The application is recommended for grant by the Minister.



Warden A Maughan

21 July 2016