JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : 2017 WAMW 16

CORAM : WARDEN J O'SULLIVAN

HEARD : On the Papers

DELIVERED : 4 August 2017

FILE NO/S : 500847 & 500848

TENEMENT NO/S : Applications for Restoration affecting Mining Leases 80/520 and 80/528

First Applicant : **PEAK ENVIRONMENTAL PTY LTD**

Second Applicant : **MARTINJINNI PTY LTD**

Catchwords: *Restoration – forfeiture for non-payment of fine – no substantial lack of care on tenement holder's part – recommendation made – turns on own facts.*

Legislation:

- *Mining Act 1978*

Cases referred to:

- ***BRGN Nominees Pty Ltd v Hake*** (unreported, Kalgoorlie Warden's Court, 26 October 1998) Noted 8 AMPLA Bulletin 17

Result:

1. Restoration recommended.

Representation:

1st Applicant	:	In Person
2nd Applicant	:	In Person

REASONS FOR DECISION

Introduction

1 On 7 February 2017 Peak Environmental Pty Ltd applied for the restoration of mining lease M80/520.

2 On 7 February 2017 Martinjinni Pty Ltd applied for the restoration of mining lease 80/528.

3 There is no objection lodged in relation to either application. On 26 May 2017 Warden Maughan ordered that in the absence of any objections the applications are to be dealt with on the papers.

4 Although the mining leases in question are held by different entities, as they are both operated by Mark Northover and Simone Rushby and both applications rely on the affidavit of Mr Northover, for convenience, I elected to deal with them together.

5 Mr Northover is a director of Martinjinni Pty Ltd. Michelle Rhodes is a director of Peak Environmental Pty Ltd. Ms Rhodes has confirmed that Mr Northover is authorised to act in relation to reporting and compliance matters.

6 In undertaking that task I have the following papers before me –

i. 7 February 2017 – Applications for Restoration 500847 & 500548;

ii. 10 February 2017 – Mining Tenement Register Search for Mining Lease 80/520;

iii. 29 May 2017 – Affidavit of Mark Northover;

iv. 22 June 2017 – Mining Tenement Register Search Mining Lease 80/528;

v. 25 July 2017 – Affidavit of Michelle Rhodes.

Background to Forfeiture

7 Mr Northover's affidavit attests to the following facts:

i. Together with Ms Rushby he operates both tenements;

ii. Both tenements are limestone leases located approximately 50km from Kununurra. The tenements were granted in 2003;

iii. These tenements together with a third (not the subject of these proceedings) play a significant part in he and Ms Rushby's livelihood and contribute to their overall financial viability;

iv. Up until 2012, both tenements had excellent reporting and compliance records;

v. Up until 2011, the tenements were operated out of Kununurra. However, because of the economic situation he and Ms Rushby began working for the local Shire in extremely remote locations, for periods of up to 5 – 6 months;

vi. As a small operation it was not economically possible to maintain an office in Kununurra. As a consequence the tenements were managed from the sites where he and Ms Rushby were located. Only limited satellite internet was available at these locations and visits to Kununurra were infrequent. Mail was monitored by family members and forwarded by email when possible;

vii. Over the past 12 months he and Ms Rushby had been stationed at the abandoned Ellendale Mine. A series of mail redirections had been set up, however, the mail service in the Kimberley is erratic and slow. In particular there were issues with business mail redirections;

viii. In November 2016 the reporting of expenditure was missed for both tenements and penalties were imposed. Ultimately, the Form 5 for each

tenement was lodged on 20 December 2016. The fines were due to be paid by 27 January 2017, however he and Ms Rushby only became aware of that fact on 7 February 2017 when they returned to Kununurra from the Ellendale Mine. Both penalties were paid on 7 February 2017.

The Law

8 The relevant principle with respect to applications for restoration are set out in ***BRGN Nominees Pty Ltd v Hake*** (unreported, Kalgoorlie Warden's Court, 26 October 1998, Noted 8 AMPLA Bulletin 17) at pages 3 – 5:

> *"The Act is silent on the matters to be taken into account when determining whether a mining lease should be restored or not. Not wishing to be exhausted it seems to me that consideration should be given to the explanation for the non-payment of the rent, the degree of lack of care, if any, on the part of the holder in attending to the payment of the rent and the existence of any special circumstances.*
>
> *In my opinion the decision whether to restore or not would involve the weighing of those considerations mentioned. As a matter of general principle at the outset none of those considerations should be given any greater priority than any other. The facts of each particular case will determine where the emphasis should be placed. Where there is no good explanation, a gross lack of care and no special circumstances then restoration should be refused. Where there is no good explanation and a gross lack of care it may be appropriate for the tenement to be restored if there are special circumstances. It may not be necessary for any special circumstances to exist where the holder is able to provide some good explanation for the non-payment of the rent or show that the non-payment was not the result of any lack of care on its part.*
>
> *When determining whether special circumstances exist, the court should give consideration to the length of time that the holder had held the tenement, the expenditure incurred in any years prior to the date upon which the rent became payable, 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 any planned mining operating or existing mining operation and generally the prejudice that would be suffered by the holder if the tenement was not restored. Whether special circumstances exist or not depends of course on the facts in each particular case".*

9 Having considered the contents of Mr Northover's affidavit I am satisfied there is a good explanation and no gross lack of care on behalf of the tenement holders. It is clear that attempts were made to ensure that correspondence was

received once it was not viable to maintain an office in Kununurra. It is also apparent that steps were immediately taken to remedy the situation upon realising that fines had been imposed and had not been paid by the due date.

10 Significantly, I am also satisfied, given the absence of any objection to the applications, that there is no prejudice to any other party in the event the applications are granted.

11 In considering whether special circumstances exist the following matters are relevant:

i. The applicants have held the tenements since 2003;

ii. So far as M80/520 and M80/528 are concerned, the expenditure requirements have been met every year since the licence was granted. In the last three years on average expenditure has been at least double the minimum required;

iii. The leases play a significant part in Mr Northover and Ms Rushby's ability to earn a living and overall financial viability.

Conclusion

12 Having regard to the circumstances outlined above, restoration of tenements M80/520 and M80/528 is recommended.

Warden J O'Sullivan

4 August 2017