| | | |
|---|---|---|
| **JURISDICTION** | : | MINING WARDEN |
| **LOCATION** | : | KALGOORLIE |
| **CITATION** | : | PASCOE V BULLSEYE MINING LIMITED [2018] WAMW |
| **CORAM** | : | WARDEN A HILLS-WRIGHT |
| **HEARD** | : | 25 September 2018 |
| **DELIVERED** | : | 28 June 2019 |
| **FILE NO/S** | : | Application for Special Prospecting Licence 37/8880-S and Objection 497800 |
| **TENEMENT NO/S** | : | Exploration Licence E37/1017 |
| **BETWEEN** | : | **WILLIAM BARRY PASCOE** (Applicant)<br><br>AND<br><br>**BULLSEYE MINING LIMITED** (Objector) |

*Catchwords:* *Application – Special Prospecting Licence over Exploration Licence – Objection – Undue Detriment – Turns on own facts*

***Legislation:***

- *Mining Act 1978 s70*

***Cases referred to:***

- ***Levy & Lowe v Bronze Wing Gold NL*** (unreported, Perth Warden's Court, 7 May 1999, noted AMPLJ 217)
- ***Holcim (Australia) Pty Ltd v AMG (WA) Pty Ltd*** [2015] WAMW 9

***Result:***

1. *Application for Special Prospecting Licence 37/8880 is refused.*

***Representation:***

*Counsel:*

| | | |
|---|---|---|
| Applicant | : | Ms C McKenzie |
| Objector | : | Mr T Masson |

*Solicitors:*

| | | |
|---|---|---|
| Applicant | : | McKenzie & McKenzie |
| Objector | : | Ensign Legal |

---

**Background**

1. On 1 November 2016 Barry William Pascoe ("the Applicant") lodged an application for a Special Prospecting Licence 37/8880-S (the "SPL application") over land the subject of an Exploration Licence, E37/1017.

2. E37/1017, also known as St Francis, has been held since 2014 by Bullseye Mining Limited ("the Objector").

3. The objection was lodged on 29 November 2016, with further particulars of objection lodged on 2 August 2017.

4. The initial grounds of objection state, relevantly, that grant of the SPL would be likely to unduly prejudice and interfere with the rights of the Objector and injuriously affect the rights held by the Objector.

5. The further particulars state that exploratory and reserve drilling is anticipated to commence in September 2017 at St Francis, and it is believed shallow mineralisation exists, that is, within the first 50 metres from the surface. Grant of the SPL will adversely impact on the economic viability of the St Francis deposit. The particulars further state that there will be undue interference by way of physical interference on the movement of the Objector's vehicles, machinery and equipment which will impact on the Objector's rights to enter and re-enter the land, explore for minerals and for related purposes, and to excavate, extract or remove mineral bearing substances from the land.

**The Legislative Framework**

6. Section 70(1) of the *Mining Act 1978* (WA) provides that a special prospecting licence for gold can be granted over land that is already the subject of an exploration licence.

7. Pursuant to s70(5) a warden may refuse the application for a special prospecting licence on the ground that prospecting for gold on the land to which the

application relates would result in undue detriment to the exploration being carried on by the holder of the primary tenement.

8. Alternatively, a warden may recommend the application to the Minister who in turn may refuse the application or, subject to the Act, grant it with conditions.

**Geological Survey**

9. Pursuant to s70(4) of the Act a report was obtained from the Executive Director Geological Survey, dated 9 March 2017, which states, relevantly:

> *The application for P37/3880-S affects E37/1017 which was granted in 2010. The licence forms part of the Melrose gold project (C65/1995). E37/1017 is in two parts and the special prospecting licence covers an area within the southern part of E37/1017.*
>
> *Mineral Exploration Reports on the Melrose Project have been submitted annually. The project contains a gold resource at Bungarra and several other gold prospects. The prospects are all to the north of P37/8880-S with the closest being about 5km away.*
>
> *Work within E37/1017 seems to have been restricted to historical data reviews and exploration planning. No sampling or drilling seems to have been done since grant. Regional soil sampling, which would have covered the relevant area, was planned but never carried out.*
>
> *In respect to E37/1017, the current holder has carried out further data reviews, research and validation of historical drill-hole data. The most recent report states that it is planned to successively explore the known gold prospects within the project. None of the prospects are within, or close to, the area of P37/8880-S.*
>
> *The Mineral – Exploration Report for 2016 is not due until 31 March 2017.*

**The Law**

10. In ***Levy & Low v Bronze Wing Gold NL***[1] Warden Calder identified the relevant factors when considering an application for a special prospecting licence over an underlying tenement. Warden Calder was dealing with an underlying prospecting licence, however substituting therefore an exploration licence, those factors include;

    i. The exploration, if any, conducted on the tenement in the past, whether by the current holder or a previous holder;

    ii. The use, if any, which the tenement holder has made of the results of previous exploration;

    iii. The exploration which the tenement holder has planned to carry out in the future on the whole of the tenement;

    iv. The exploration which has been carried out or which is planned to be carried out in the vicinity of the ground the subject of the special prospecting licence;

    v. The likelihood of the tenement holder carrying out the proposed exploration which includes a consideration of the holder's present and future technical and financial capacity to do so;

    vi. The size and nature of the SPL application and the proximity of the ground to work done or proposed to be done by the tenement holder;

    vii. The bona fides of the Applicant which includes a consideration of the Applicant's present and future technical capacity to prospect for gold.

11. Warden Calder said where both parties had presented evidence and submissions it was unhelpful to determine whether the Applicant bore the onus of establishing

[1] ***Levy & Lowe v Bronze Wing Gold NL*** (unreported, Perth Warden's Court, 7 May 1999, noted 18 AMPLJ 217)

there will be no undue detriment or whether the Objector bore the onus of establishing that there will be undue detriment. The correct approach is for the Warden to ask, having taken into account all the relevant materials properly before the Warden;

> *"whether or not the granting of the special prospecting licence, with appropriate conditions, could be made without the prospecting which that grant would allow resulting in undue detriment to the [exploration] being carried out by the primary tenement holder, and if the answer to that question is in the negative the Warden should refuse the application".*[2]

12. I respectfully agree with the views expressed by Warden Calder. I also agree that the where s70(5) states "would" result in undue detriment that means that it is not enough to conclude merely that it would be likely that undue detriment would result, but rather that there will be undue detriment.

**The Evidence**

13. In his affidavit the Applicant says from his own inspection of the ground the subject of his application there was no evidence of recent prospecting or exploration. He intends to carry out prospecting work using a small digger or excavator. Most of the area could only be excavated to a depth of 20-30cm, with some areas to be excavated to a depth of 10 metres. He would work the area during winter and the cooler months and anticipates he would complete the work within 4 years. His accommodation would be temporary and he would remove any infrastructure and equipment after each 'campaign'. His infrastructure and equipment won't create any impediments to free movement and access by the Objector and there would be no need for the Objector to remove his infrastructure or equipment. The total area the subject of his application is 10 hectares, lying at the southern extremity of the underlying tenement.

[2] ***Levy & Lowe v Bronze Wing Gold NL,*** at 13.

14. In his oral evidence the Applicant said he would only need a couple of winters to complete the work and he would only need to excavate to a depth of 3-5 metres over an area less than a hectare, and only to 30cm over an area of less than 5 hectares. He would work the ground for 4 months per year. He says he doesn't intend to excavate deeper than 5m because the Objector's report says mineralisation starts at 5 metres.

15. In submissions made following the evidence the Applicant agreed to conditions that any licence be confined to 2 years and to a maximum depth of 5 metres. The former concession removes the possibility that the Applicant could apply for a mining lease for gold over the area pursuant to s70(8) of the Act. The latter concession ameliorates the impact on the economic viability of the St Francis deposit by way of shallow excavation and gold extraction hindering the start-up potential of an open pit mining operation.

16. Dariena Mullan is the Director and Principal Geologist of the Objector. In her affidavit she states that Bullseye's North Laverton Gold Project (NLGP) is located on the Dingo Range Greenstone Belt. Bullseye acquired several mining tenements on the Dingo Range in January 2014 and since that time has purchased tenure along the Belt in an effort to consolidate the NLGP and extend the potential mining life of the newly discovered gold project.

17. There have been extensive drilling programs including 11,025 metres at Bungarra in 2014. Bungarra is now the subject of a mining lease. A further 20,890 metres were drilled in 2015 at Boundary and Stirling which led to two further open pits now the subject of a further mining lease. Maps were tendered which shows the location of ore deposits identified at Boundary, Stirling, Neptune, Bungarra and Hurleys. The gold mineralisation at the NLGP is controlled by regional shear zones and secondary and tertiary dilational structures. St Francis (E37/1017) is located along the main gold mineralisation structural shear zone and further along strike from Bullseye's newly discovered gold deposits. Given the gold soil geochemical footprint along the structural

corridor, including at St Francis, St Francis ranks as a priority 1 exploration target for Bullseye.

18. The economics of the NLGP reveal that further deposits could be mined under a toll treatment processing solution. As exploration continued Bullseye could see the potential for significant further gold mineralisation within a 10-20 kilometre radius, including at St Francis. A successful exploration within that range would not only increase the scale of the NLGP but support an on-site gold processing plant.

19. In 2016/2017 Bullseye carried out an extensive MMI geochemical soil sampling campaign consisting of 5,521 samples, including 1,050 samples at St Francis. Further discoveries at Neptune and Hurleys were a direct result of Bullseye's regional soil sampling geochemical programme at the NLGP. In light of these new discoveries the project economics revealed that the NLGP is too big for the neighbouring toll treatment options and is approaching the scale to require its own on-site processing plant.

20. St Francis was identified by Bullseye as a highly prospective area as a result of extensive historical data review. On 22 May 2017 Bullseye applied for a programme of work for St Francis. Pursuant to the programme of work Bullseye proposes to drill up to 1,256 drill-holes, to commence on 1 September 2017 and be completed by 30 September 2020.

21. A number of maps were tendered showing the location of the structural shear zones and Bullseye's tenements together with maps indicating the proposed programme of work and the spaced drill-holes over St Francis, including the area applied for by the Applicant.

22. Bullseye's NLGP data set reveals that there is shallow mineralisation accounting for a high percentage of the overall mineralisation. Shallow mineralisation has two major benefits, namely it mitigates against the prohibitive upfront capital cost to dig off the over-burden and also achieves early cash flow from mining of

the shallow mineralisation and associated improved strip ratios. These economic benefits significantly mitigate against two major prohibitive obstacles to any new mining venture, namely the start-up capital requirement and the justification of the large start-up capital requirement by the prolonged duration of the mining operation. Grant of the SPL means the shallow mineralisation considered together with the project economics would effectively sterilise the deeper subsurface mineralisation and potentially have significant impact on the open-pit design and economics of the remaining ore bodies surrounding the SPL. The rights to the first 50 metres of subsurface in the proposed SPL is integral to Bullseye in achieving an economic resource at St Francis.

23. The area covered by the SPL is wholly within St Francis and will affect future drilling and development by Bullseye. Bullseye intends to carry out a close spaced drill programme where holes will be spaced at 20 x 20 metres or tighter and will require sumps. An RC drill pad is 30 x 15 metres, sumps are 3 x 1 metre, with a bag laydown area of 20 x 5 metres. On a 20 metre drill spacing, the required dimensions overlap and will create an expansive operational footprint exceeding three kilometres in length and one kilometre in width. This operational footprint includes the land affected by the SPL. Photographs were tendered showing the operational footprint of drilling programmes at the Objector's other tenement at Boundary.

24. In terms of the project economics of the NLGP the viability of a newly discovered open pit directly depends upon the depth of mineralisation and minable grade. The greater the volume of barren or depleted over-burden (waste soil) sitting above the St Francis deposit increases the cost of extraction. Shallow excavations and gold extraction above St Francis, as would occur if the SPL were granted, would significantly hinder the start-up potential of any open pit at St Francis.

25. A mining tenement register search of St Francis was tendered. Since holding the exploration licence Bullseye has expended greater than the minimum required.

In 2017 the minimum expenditure was $50,000.00 with a total expenditure reported in the sum of $79,949.00. The mineral-exploration report for 2016 or 2017 was not tendered at the hearing.

26. In her oral evidence Ms Mullan expanded upon the impact of the Applicant's proposed activities on operational space and safety. A drill rig requires a 30 x 15 metre drill pad as RC rigs are operated with three trucks. Drill-hole samples are stored in bags with each bag representing one metre drilled. The bags take up a further 20 x 5 metres of operational space. Sumps also have to be dug to contain rising water which adds to the surface area required to run the drill program. From previous experience, when sumps were filled back in issues were caused with drill rigs, which are very heavy, becoming bogged and sinking due to insufficient compaction of the previously dug soil and the pneumatic legs on the drill rigs designed to stabilise the rig also sink. This results in an unstable environment for the rig which can cause not only bogging of the rig but blow-out issues in and around the collars of the drill holes as the rig is in operation. On soil that is not compacted there can be gaps around the collar of the drill which further creates open holes which can be dangerous for those operating the rig. Issues of operational space are particularly acute where tighter space drill patterns are required. The operational space issues and the detrimental impacts of prior disturbance of the ground on compaction raise a conflict in terms of the practicalities of running both the Applicant and Objector's programs on the land.

27. In cross-examination Ms Mullan denied that the program of works was lodged in order to thwart the SPL application. She agreed the drill program at St Francis did not get underway in September 2017, however that was because in June/July of that same year results from other drilling were obtained and it was at that stage that Bullseye's directors held the view that the resource identified at other tenements within the NLGP held by Bullseye was much bigger than first thought and that further capital had to be raised for a larger drill program. When further capital was raised there were hostile takeover proceedings during which Bullseye was prohibited by conditions that restrict the company from raising further

capital or spending money, such as on drilling contracts. Ms Mullan denied that there were any capital issues restricting the capacity of Bullseye to undertake the program of work at St Francis or Bullseye's exploration generally; other entities were vying for the rights to inject capital into the company in a bid for control of the company. It was anticipated drilling would occur in late 2018.

28. She described having 100% confidence that Bullseye had the funding to conduct the exploration proposed at St Francis.

**Evidence in Relation to Further MMI Sampling**

29. In her oral evidence Ms Mullan described in some detail the nature of MMI soil sampling. MMI (mobile metal ion) is a method of sampling where soil is taken from close to the surface of the ground which can then be used to analyse the nature of the rock at significantly greater depths. 1,050 such samples had been obtained from St Francis during the year 2016/2017, however Ms Mullan could not be precise as to when those samples were taken. Because MMI sampling is very sensitive and measures ions in parts per billion, and because it is soil at the surface which is taken in order to measure the profile at greater depth, any disturbance at the surface by means of excavation can disturb the profile. The results will not correlate well with other results previously taken and different data sets can no longer be usefully compared. In summary, it would taint the analysis of the area.

30. What emerged for the first time in Ms Mullan's examination-in-chief was that further MMI soil sampling was required at St Francis.

31. There was no reference to the need for further MMI soil sampling in the detailed particulars of objection lodged on 2 August 2017. Whilst there was reference in the affidavit of Ms Mullan lodged on 4 April 2018 to 1,050 MMI samples taken at St Francis, there was no mention in that comprehensive affidavit of there being a need for further MMI sampling at St Francis. Ms Mullan's evidence was that MMI sampling was a precursor to drilling and a program of works for 1,256

holes to be drilled at St Francis was lodged in May 2017. Exhibits were tendered displaying the proposed drill-hole patterns on the two graticular blocks within St Francis, which include a drill-hole pattern of 50 x 50 metres over the area the subject of the SPL application. There was no reference in the written submissions of the Objector handed up at the conclusion of the evidence to the need for future MMI sampling. Ms Mullan accepted that there was no reference to it in her affidavit and suggested that it would have just been inferred from Bullseye's perspective as required ongoing work.

32. In light of the attention to detail evident in the particulars of objection and affidavit of Ms Mullan I find it unlikely that she would have overlooked reference to the issue of future MMI soil sampling on the precise area the program of work relates to and which overlies the SPL application area. She acknowledged that they already had MMI results from that area together with all of the historical geochemical signature at St Francis which she described in her evidence as being enough already to substantiate mineralisation in that area. Ms Mullan accepted in cross-examination that Bullseye's main issue was the detriment that would arise from active excavation on the land with the co-existence of the Objector's drill rigs in terms of both operational space and reduced soil compaction issues.

33. In any event, in my view, given there was no reference to future MMI sampling in any of the particulars lodged nor in the affidavit of Ms Mullan, it would be procedurally unfair to have regard to that evidence. The Applicant had no forewarning as to that evidence and therefore was deprived of the opportunity to call evidence to rebut the need for further MMI sampling or to rebut that further sampling would create undue detriment to the exploration being carried on.

34. Programming orders had been made to the effect that the evidence in chief of the witnesses was to be tendered by statements of evidence or by affidavit. However this category of evidence went well beyond the expansion or clarification of

matters related to the grounds of objection raised either in the particulars of objection or Ms Mullan's affidavit.

35. In closing the Objector submitted that the issues needed to be determined on the evidence that is presented on the day, and cited ***Holcim (Australia) Pty Ltd v AMG (WA) Pty Ltd***[3] as authority for the proposition that a party cannot have its case confined to the particulars lodged following evidence having been lodged. However that case dealt with the terms of s142(4) of the Act which concerns the making of amendments as may be necessary for determining the real question in issue between the parties. That case was decided in the context of an interlocutory application to amend having been lodged by a party, objected to by the other party and then ruled upon by the warden prior to any substantive hearing taking place. The present case is quite distinct. There was no application either prior to or during the hearing to amend the particulars, with the consequence that the Applicant was denied the opportunity to effectively respond to that issue.

**Conclusion**

36. Putting aside the issue of the need for future MMI soil sampling, the Objector has satisfied me that grant of the SPL would result in undue detriment to the exploration being carried on by the primary tenement holder and there are no appropriate conditions which would alleviate that detriment.

37. I am satisfied that the Applicant's proposed activities, taking into account his concession that he will excavate over parts of the SPL to a maximum depth of 5 metres and would seek the licence for only two years, would plainly conflict with the interests of the Objector. The proposed drilling and the significant operational footprint of the Objector's proposed activities cannot safely and practically be conducted. I am satisfied that the Applicant's proposed activities will present physical limitations on the movement of the Objector's vehicles,

[3] (2015) WAMW 9

machinery and equipment, particularly where the area of land over which the application is made is an area where the Objector proposes, by virtue of geochemical and historical data, to perform a close spaced drilling pattern. I am satisfied, based on the evidence of Ms Mullan, that a close spaced drilling pattern creates an expansive operational surface footprint exceeding 3km in length and 1km in width, which includes the land affected by the application.

38. Furthermore, I am satisfied that disturbance of the ground over the relevant area will lead to compaction issues which will in turn have a detrimental impact in terms of the efficiency and safety of plant and personnel conducting the proposed drilling program. In my view there is no condition that could be imposed which would overcome these impacts.

39. I am satisfied that the Objector had identified the area of St Francis as one of interest well before the Applicant lodged his application. Whilst work on the tenement prior to November 2016 was confined to historical data reviews and exploration planning, it was a goal of Bullseye, as is apparent from their mining proposal dated 20 June 2016, to explore the surrounding areas within the NLGP over the next five years to identify further potential deposits beyond Bungarra, Boundary and Stirling. Baseline surveys had been done which were within the earlier mining proposal that also covered the ground at St Francis.

40. The Objector's exploration at the NLGP has been progressive and completed in stages. It is a significant project. The project has a planned sequence of development. This is not a case, in my view, where the Objector has only demonstrated interest in the land the subject of the SPL application to ward off the Applicant. In surrendering several blocks compulsorily on E37/1017 in 2016, pursuant to s65 of the Act, the Objector chose to retain the two blocks in relation to which the program of works applies.

41. Despite the program of work not commencing in September 2017, nor likely to be completed by what was initially the anticipated completion date of September 2020, I am satisfied that there were two main reasons why that drilling has not

commenced. The prospectivity of the NLGP lead to a decision for a more significant amount of capital of $20m to be raised for exploration drilling, and then hostile takeover proceedings have effectively thwarted the Objector's capacity to undertake the proposed works within the anticipated timeframe.

42. However, I am satisfied that the Objector does have the capital and technical ability to undertake the proposed exploration and that it intends to do so. The Objector is not devoid of funds; rather, there is a dispute as to who is to provide those funds and assume control of the company.

43. There is no dispute that the Applicant has the knowledge, resources and experience to undertake the kind of work that he proposes on the ground. Unfortunately, the area of his application relates to ground already identified as a priority target by the Objector.