

**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : ELEMENT 25 LIMITED v RIDLEY [2020]  
WAMW 8

**CORAM** : WARDEN J O'SULLIVAN

**HEARD** : 6 November 2019

**DELIVERED** : 27 March 2020

**FILE NO/S** : Objection 526861

**TENEMENT NO/S** : Application for Mining Lease 52/1074

**BETWEEN** : **ELEMENT 25 LIMITED**  
(Applicant)

AND

**CHANDRA LOUISE RIDLEY**  
(Objector)

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*Catchwords:* *Interlocutory application – jurisdiction – adequacy of statement pursuant to s74(1a) of the Mining Act 1978 (WA) – summary dismissed - request for further information.*

**Legislation:**

- *Mining Act 1978 (WA) ss 73 & 74*
- *Mining Regulations (1981) (WA) reg 152*

**Cases referred to:**

- *R v Clarke* [1969] 2 ALL ER 1008
- *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510

**Result:**

1. *Grounds 1 and 2 are dismissed. Ground 3 is granted.*

**Representation:**

*Counsel:*

Applicant : Mr G H Lawton  
Objector : Mr A G Jones & Mr M T Roberts

*Solicitors:*

Applicant : Lawton Lawyers  
Objector : DLA Piper

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**Introduction**

1 On 23 February 2018 Element 25 Ltd applied for Mining Lease 52/1074.<sup>1</sup>

2 On 29 March 2018 Ms Chandra Ridley, the holder of the pastoral lease on which the ground the subject of the application is partly situated, lodged an objection.<sup>2</sup> By interlocutory application, filed on 13 June 2019, Ms Ridley seeks the following orders:

- (1) the Application be refused on the basis that the Warden has no jurisdiction to hear the Application because the document which accompanied the Application was not a statement in accordance with subsection 74(1)(ca)(ii) of the *Mining Act 1978* (WA) because it did not set out the information required under subsection 74(1a) of the *Mining Act 1978* (WA);
- (2) alternatively, the Application be summarily dismissed under regulations 152(1)(l) and (k) of the *Mining Regulations 1981* (WA) on the basis that the Application is premature and the Applicant's plans in respect of the land are so uncertain that:
  - (a) the Applicant is not able to demonstrate that it requires access to all of the land the subject of the Application for the conduct of mining operations; and
  - (b) the Objector will be denied procedural fairness because it is not possible to properly assess the impact of the Application on the Objector in order that the Objector can be heard;
- (3) alternatively:
  - (a) the orders for the Objector to file and serve any evidence by 7 June 2019 be vacated;
  - (b) pursuant to subsection 74(2) of the *Mining Act 1978* (WA), the Applicant file and serve a further affidavit attaching a copy of the report of its pre-feasibility study once published; and
  - (c) the Objector file and serve any evidence within 4 weeks of the filing and serve the report of the pre-feasibility study by the Applicant under order 3(b) above.

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<sup>1</sup> Affidavit of Justin Colin Brown; sworn 29 March 2019; (Brown affidavit) [7].

<sup>2</sup> Brown affidavit; [14].

3 During the course of the hearing Mr Lawton, on Element 25's behalf, indicated that he would consent to Order 3 if, Orders 1 and 2 were withdrawn. Mr Jones, for Ms Ridley, was prepared to abandon Order 2, but believed he could not concede Order 1 as it relates to jurisdiction. As a consequence all three of the orders sought need to be determined.

### The Statutory Framework

4 Section 74(1)(ca)(ii) of the *Mining Act* relevantly provides:

(1) *An application for a mining lease –*

...

(ca) *shall be accompanied by –*

...

(ii) *a statement in accordance with subsection (1a) and a mineralisation report prepared by a qualified person ...*

*Subsection (1a) provides that:*

(1a) *The Statement referred to in subsection (1)(ca)(ii) and (iii) shall set out information about the mining operations that are likely to be carried out in, on or under the land to which the application relates including information as to –*

(a) *when mining is likely to commence; and*

(b) *the most likely method of mining; and*

(c) *the location, and the area, of land that is likely to be required for the operation of plant, machinery and equipment and for other activities associated with those mining operations.*

5 In section 74(7) the term “likely” is defined as meaning “reasonably likely having regard to the information available to the Applicant when the Application is made”.

**Order 1: Jurisdiction: The s 74(1a) Statement**

- 6 Element 25 lodged a Mining Supporting Statement with its application for M52/1074. Section 1 of the Mining Supporting Statement notes that this document is intended to serve as a Mining Statement in accordance with s74(1)(ca)(ii) of the *Mining Act*.
- 7 Ms Ridley takes issue with the answers provided by Element 25 to all three questions posed by s 74(1a). Ms Ridley relies on the statement by the majority of the High Court in *Forrest & Forrest Pty Ltd v Wilson*<sup>3</sup> that when a statute providing for the disposition of interests in resources of a State prescribes a mode of exercise of the statutory power, that mode must be followed and observed.
- 8 The purpose of a s 74(1a) statement is to inform, in general terms, any interested party, such as a pastoralist, as to what mining activities are proposed and when mining is anticipated to commence.
- 9 As s 74(7) makes plain the information provided when the application is lodged need only address what is reasonably likely having regard to the information available at the time.
- 10 The information in the s 74(1a) can be utilised by an interested party to determine whether there is a reasonable basis on which to object.
- 11 The inclusion of the word “likely” in s 74(1a) requires that sufficient planning has been undertaken so that the application is not entirely speculative. As Ms Ridley points out, this is consistent with the observation of the majority in *Forrest & Forrest v Wilson*<sup>4</sup> that the owners and occupiers of land the subject of an application should not be troubled unnecessarily or prematurely by half-baked proposals. If an applicant is

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<sup>3</sup> *Forrest & Forrest Pty Ltd v Wilson* [2017] 262 CLR 510; [64].

<sup>4</sup> *Forrest & Forrest Pty Ltd v Wilson* [2017] [86]

unable to answer the questions posed in s 74(1a), the application is premature.

- 12 In my view, assessing the adequacy of a s 74(1a) statement is to be approached in a practical way bearing in mind it is completed by those working in the mining industry not parliamentary draftspersons. The question is not be approached by focusing on every infelicity of language but whether the statement conveys the necessary information prescribed by s 74(1a).
- 13 The failure to expressly use the word “likely” is not fatal so long as the form of words used convey the necessary information.<sup>5</sup> Nonetheless, adhering to the language used in the statute is desirable as it avoids the semantic exercise which I am now required to undertake.
- 14 Element 25’s s 74(1a) Statement is set out in such a way that each of the questions in sub-paragraphs (a), (b) and (c) of s 74(1a) are used as headings. Self-evidently, the paragraphs that follow are intended to represent an answer to those questions.

(a) *When is mining likely to occur?*

- 15 Ms Ridley points to the following passage from Element 25’s answer to question (a) as evidence that Element 25 at no stage says when it is likely mining will occur:

*Montezuma is currently completing (sic) a scoping study to evaluate the Butcherbird project. Current indications are that it will be **possible** to commence mining in 2020-2021. At this stage in the evaluation the project will support a 20+ year mine life.*

*(emphasis added)*

- 16 Moreover, Ms Ridley says that the use of the word “possible” falls short of likely.

<sup>5</sup> *R v Clarke* [1969] 2 ALL ER 1008; 1010

17 The essential question is whether, in accordance with s 74(1a), Element 25 has set out information as to “when mining is likely to commence”.

18 In purporting to answer that question the key words are –

*current indications are that it will be possible to commence mining in 2020 – 2021.*

19 According to the Macquarie Dictionary<sup>6</sup> the word “possible” has two meanings:

(1) *that may or can be, exist, happen, be done, be used;*

(2) *that may be true or a fact, or perhaps be the case, as something concerning which one has no knowledge to the contrary.*

20 The Shorter Oxford English Dictionary<sup>7</sup> includes a number of meanings of the word “possible”:

*A 1 Adjective 1 Expr. Capability: that may or can exist, be done, or happen; that is in a person’s power, that one can do, exert use. b That can be or become (what is denoted by the noun); potential.*

2. *Able to do. rare.*

3. *Expr. Contingency: that may be or may be conjectured to be (though not known not to be); that is perhaps true or a fact; that perhaps exists. b philosophy. Logically conceivable; not excluded from existence by being logically contradictory or against reason. c That perhaps is or will be (what is denoted by the noun).*

4. *Able to deal with, get on with, or consider suitable, tolerable, reasonable opp. Impossible adjective*

5. *Math. Of a number; real opp. Impossible adjective.*

21 The Cambridge Dictionary online ascribes the following meaning to “possible”.

*possible adjective (can achieve)*

*A1 able to be done of achieved, or able to exist*

<sup>6</sup> 2<sup>nd</sup> Ed; 1991; Griffin Press Limited

<sup>7</sup> 5<sup>th</sup> Ed; 2003; Oxford University Press

*A2 as much, quickly, soon, etc. as something can happen or be done.*

*Possible adjective (not certain)*

*B1 that might or might not happen.*

22 Having regard to the definitions of possible set out above, in my view, Element 25's s 74(1a) statement, so far as it relates to sub-paragraph (a), is adequate.

23 Element 25's answer must be considered in a context where it immediately follows the question posed and is intended to answer the question as to when mining is likely to commence.

24 Although the word possible has a number of meanings, on this occasion it is preceded by the word "will" in preference to "may". The phrase "it will be possible", when considered in light of the question posed, conveys that mining is likely to commence in 2020-2021. This is in preference to "it may be possible" being used to indicate it might or might not happen.

***(b) The most likely method of mining***

25 Ms Ridley relies on the following passage from Element 25's answer to question (b):

*It is envisioned that the mineralization at the Butcherbird project will be mined via two open pits, in the east and west of the Yanneri Ridge deposit.*

(emphasis added)

26 Ms Ridley says that the words envisioned is insufficient to indicate the most likely method of mining.

27 In my view, this submission ignores a subsequent passage that says:

*the open pits will be mined via conventional drill/blast & load/haul mining activities.*

(emphasis added)

28 Ms Ridley also points to the sentence that follows:



*The opportunity to use less costly mining techniques such as scrapping or continuous miners will be evaluated as part of PFS process.*

29 This sentence, according to Ms Ridley, contradicts Element 25's assertion that the open pit will be mined by conventional drill/blast and load/haul mining activities.

30 In my view, Element's answer to question (b) is sufficient. The word "will" is more definitive than "likely". Accordingly, there can be no doubt that Element 25 have met the threshold.

31 The reference to evaluating the use of less costly mining techniques must be considered in a context where the likely method of mining is based on the information available at the time of the application (see s 74(7)). The statement that other options are being considered, in no way detracts from Element 25's earlier representation as to the likely method of mining to be used.

32 The fact that an applicant forecasts that further evaluation may give rise to some variation to the method of mining proposed in no way renders the s 74(1a) Statement inadequate at the point in time when the statement was completed.

*(c) The location and area of land required*

33 Ms Ridley contends that the 74(1a) Statement does not specify the location and area that is likely to be required for **each item** of plant, machinery and equipment as required by s74(1a)(c).

34 Contrary to Ms Ridley's contention, s 74(1a)(c) does not require that level of detail. It is sufficient that the map identify the likely location and area required for the operation of plant, machinery and equipment.

35 A further complaint by Ms Ridley is that the area of land the subject of the application includes areas of land that are not required for any infrastructure at all.

- 36 Section 74(1a)(c) requires only that the applicant identify the likely locations and areas of land to be used for the various purposes stated therein.
- 37 There is no requirement at the application stage that the applicant relinquish any area of land the subject of the application that has not been set aside for one of the purposes in s74(1a)(c).
- 38 As s 73(1) makes plain the area of land in respect of which a mining lease is granted may be less than the area of land in respect of which the mining lease is sought.
- 39 For these reasons, I am satisfied that Element 25 has complied with s74(1a)(c) of the *Mining Act*.

**Order 2: Summary Dismissal**

- 40 Ms Ridley argues that Element 25's application ought to be dismissed in accordance with reg 152(1)(k) and(l) of the *Mining Regulation 1981 WA* which provide:

*“(1) In addition to any other power of the warden to make an interlocutory order or give a direction in the Part, a warden may, at any stage of proceedings, do all or any of the following for the purpose of controlling and managing the proceedings –*

...

*(k) expedite the listing of proceedings for a substantive hearing if the warden is of the opinion that a party has frivolously or vexatiously instituted or defended proceedings or that the party's case otherwise has no merit;*

*(l) do anything else that in the warden's opinion will or may facilitate proceedings being conducted and concluded efficiently, economically and expeditiously.”*

- 41 The basis of Mr Ridley's application for summary dismissal is twofold:

- (a) Element 25 is not able to demonstrate that it requires access to all of the land the subject of the application for the conduct of mining operations; and
- (b) Ms Ridley will be denied procedural fairness because it is not possible to properly assess the impact of the application on the pastoral lease in order that she can be heard.

42 In my view, neither of these grounds has any merit. So far as ground (a) is concerned it ignores the fact that at the application stage an applicant is only required to indicate what land is likely to be used. (see 74(7)).

43 Ground (a) also ignores s 73(1) of the *Mining Act* which acknowledges that the land in respect of which a mining lease is granted may be less than the area of land in respect of which the lease is sought.

44 With respect to ground (b), any denial of procedural fairness is capable of remedy before the objection is heard by requiring Element 25 to provide to Ms Ridley a copy of the pre-feasibility study. As Mr Jones acknowledged the production of the pre-feasibility study<sup>8</sup> will likely provide Ms Ridley with the detail she requires.<sup>9</sup> This issue is picked up by Order 3 of Ms Ridley's application.

**Order 3: Section 74(2) of the *Mining Act***

45 Section 74(2) provides:

*(2) The applicant shall at the request of the mining registrar or warden furnish such further information in relation to the application, or such evidence in support thereof, as the mining registrar or warden may require but the mining registrar or warden shall not require any information or evidence relating to assays or other results of any testing or sampling that the applicant may have carried out on the land the subject of his application.*

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<sup>8</sup> JORC Code; 2012 Ed; [39]

<sup>9</sup> ts 12

- 46 I note that there is no specific requirement that an applicant produce its pre-feasibility study. Moreover, s 74(2) says nothing about the documents requested by the warden being provided to an objector. However, if it is a document to which the warden has regard in considering the objection, procedural fairness would require that it be disclosed to the objector.
- 47 Alternatively, reg 152(1)(1) says the warden can “do anything else that in the warden’s opinion will or may facilitate proceedings being conducted and concluded efficiently, economically and expeditiously.”
- 48 Correspondence between parties attached to an affidavit<sup>10</sup> filed in the course of these proceedings reveals an ongoing dialogue concerning the specifics of Element 25’s application. Mr Jones explained that since the application was lodged there have been changes. He also submitted that the lack of detail had made it difficult to address the impact of the application by way of an agreement.
- 49 During the hearing I observed that Ms Ridley was seeking conditions that are well in advance of the standard conditions imposed in applications of this kind.
- 50 Nonetheless, in my view, there is merit in Mr Jones’ argument that the pre-feasibility study will provide sufficient detail for Ms Ridley to gain a fuller appreciation of what Element 25’s operations will ultimately look like. I am satisfied that in the circumstances that prevail in this case, it may facilitate the proceedings being resolved more efficiently economically and expeditiously if the pre-feasibility study is made available to Ms Ridley.
- 51 Mr Lawton, quite properly, raised the prospect that the pre-feasibility study may contain financial details and other commercially sensitive information that will need to be redacted. Mr Jones raised no objection.

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<sup>10</sup> Supplementary Affidavit of Matthew Thomas Roberts; affirmed 17 July 2019.

52 As the pre-feasibility study had not been completed as at the date of the hearing, I will hear from parties as to the timing of its production and the programming of the orders that follow.



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Warden J O'Sullivan

27 March 2020

