IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)
HELD AT PERTH)

No. of 1986

IN THE MATTER of a special case stated by the Warden of the South West Mineral Field pursuant to Section 146 of the Mining Act 1978 as amended

B E T W E E N:

REYNOLDS AUSTRALIA ALUMINA LTD., THE SHELL COMPANY OF AUSTRALIA LTD., B.H.P. MINERALS LTD. and KOBE ALUMINA ASSOCIATES (AUSTRALIA) PTY. LTD.

Applicants

-and-

GLENMORE NOMINEES PTY. LTD.

Objector

Case stated by the Warden of the South West Mineral Field in respect of an Application by the Applicants for a mining lease pursuant to Clause 3(2) of the Second Schedule to the Mining Act, 1978 as amended.

C A S E

1. On 25th November, 1983 the Applicants as holders of inter alia Mineral Claims 6166H, 6167H and 6168H lodged Application Number 70/113 for a mining lease ("the Application").

2. On 10th February, 1984, the Objector lodged Objection Number 59H/84 to the Application. On 11th June 1986 the Objector sought and was granted leave to amend the grounds of its Objection ("the Objection").

3. The following facts were agreed by the Applicants and the Objector:-

(a) On or about 21st April, 1975 Kenora Park Farm Pty. Ltd.:-

(i) was the registered owner and occupier of Williams Locations 6449, 6450, 8535, 9289, 5134, 5013, 387 and 388 ("the Land");

(ii) entered into an agreement in writing with Alwest Pty. Ltd. ("Alwest") and its assigns ("the Agreement") in respect of Mineral Claims 6166H, 6167H and 6168H ("the Mineral Claims).

(b) The Minister for Mines approved the grant of the Mineral Claims on 10th July, 1975 subject inter alia to the terms and conditions of the Agreement.

(c) The Mineral Claims affect the Land.

(d) On or about 29th August, 1979 the Objector became the registered owner and occupier of the Land.

(e) At all times the Land has been land under cultivation as defined by Section 29 of the Mining Act 1978 ("the Act") and Section 140 of the Mining Act 1904 ("the repealed Act").

4. On 11th June, 1986 I heard, as a preliminary issue, the questions arising from Paragraph 5 of the Objection where it is said that the consent in writing of the Objector to the grant of the Application had not and would not be given and that, further or alternatively, no consent in writing had been given under the repealed Act in respect of the Land.

5. It was contended by the Applicants that:-

(a) the grant of the Mineral Claims carried with it the presumption that the owner and occupier of

the Land had consented to their grant;

(b) in any event, the Agreement can fairly be construed as a consent to the grant of the Mineral Claims;

(c) pursuant to Clause 2A of the Second Schedule to the Act, the consent contained in the Agreement is applicable to the Application for the purposes of Section 29 of the Act and accordingly the Applicants are entitled to rely on the Agreement to obtain the grant of the Application and it is not necessary for the Applicants to obtain a further consent in writing from the landholder and occupier;

(d) (i) the provisions of Clause 2A should be construed as being applicable to applications pursuant to Clause 3 as the mischief intended to be redressed by Clause 2A was that all holders of mineral claims would have had their tenements placed in jeopardy if they needed to obtain a fresh consent;

(ii) to construe Clause 2A as having no application to applications made pursuant to Clause 3 would result in an absurdity as it would mean that all holders of mineral claims would have their tenements placed in jeopardy.

6. It was contended by the Objector that:-

(a) the presumption that arises from the grant of the Mineral Claims will be rebutted if it can be

shown that there was no written consent. The Agreement is concerned with the granting of a right of access for carrying out reconnaissance drilling activities. It merely contains an acknowledgment that compensation was to be paid in the event of mining, with the amount of such compensation to be agreed or, in default of agreement, to be determined by the Warden. Nothing in the Agreement is sufficient to constitute it as a written consent and the Applicants concede that there is no other document that is a written consent;

(b) Clause 2 of the Second Schedule to the Act provides for certain leases to become mining leases. Clause 2A provides that a consent given under the repealed Act to a tenement granted on private land shall be taken to be applicable to the mining tenement that the tenement under the repealed Act becomes. As such, Clause 2A is to be applied to the provisions of Clause 2. It can have no application to the provisions of Clause 3 dealing with applications for a mining lease by the holder of a mineral claim because, under Clause 3, the mineral claim does not become anything: it expires;

(c) even if Clause 2A could be applied to Clause 3, Clause 2A simply provides that the consent shall be taken to be applicable to the mining tenement. The words "shall be taken to be applicable" mean less than "deemed". The words authorize the

Warden to apply the consent to the mining tenement in the absence of the owner or occupier of the land indicating to the Warden that he does not, in fact, consent to the tenement;

(d) (i) Clause 2A was introduced to redress the mischief that would be caused if the owners or occupiers of private land challenged, on the basis that no consent had been given, the miners' right to the mining leases that the leases referred to in Clause 2 had become;

(ii) to construe Clause 2A as having no application to applications made pursuant to Clause 3 would not result in an absurdity. Any attempt to convert the mineral claims to a mineral lease under the repealed Act would also have required a fresh consent.

7. I was referred to the following cases by Counsel for the Applicants :-

(a) McLean Bros. & Rigg Ltd. -v- James Grice (1906) 4 CLR 835 at pages 848-851;

(b) Wilmers Trusts Wingfield -v- Moore (1910) 2 Ch. 111 at pages 118 and 119.

QUESTIONS

8. The questions for the opinion of the Supreme Court are:-

(a) is the Agreement a consent given under the

repealed Act for the purposes of Clause 2A?

(b) does Clause 2A of the Second Schedule to the Act empower me to recommend for grant pursuant to Clause 3 thereof a mining lease where a consent has been given under the repealed Act to the mineral claim previously held by the applicant for the mining lease and the owner or occupier objects to the grant of the mining lease and refuses to consent to its grant?

DATED the Sixteenth day of July 1986.

R F Rasmussen

Warden of the South West Mineral Field.

THIS Case is filed by Robinson Cox, Solicitors for the Objector whose address for service is Level 27, 140 St. George's Terrace, Perth. Tel: 426 8444. Ref: DM.
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