

IN THE WARDEN'S COURT)
)
HELD AT KALGOORLIE)

Heard: 13.05.87
Delivered: 13.05.87
Ex Tempore

IN THE MATTER of
application for
~~Proposing Sublease~~
~~No. 64/867~~ and
Objection No. 64/867
thereto.

BETWEEN:

JO-ANN HORBURY

Applicant

and

WESTERN MINING
CORPORATION LIMITED

Objector

AND

IN THE MATTER of
application for
~~Mining Lease~~
~~No. 73/867~~ and
Objection No. 73/867
thereto.

BETWEEN:

WESTERN MINING
CORPORATION LIMITED

Applicant

and

JO-ANN HORBURY

Objector

*Register entries completed
20.8.87*

Mr. Percy instructed by Blakiston & Co appeared for Horbury.
Mr. Van Hatten instructed by Freehill Hollingdale and Page
appeared for Western Mining Corporation Limited.

*RO
File at P 26/1184
Copies at M 26/122*

2.

REASONS FOR DECISIONEX TEMPORE

I'll give some brief reasons now and reserve the right to write out a full written decision if called upon by either party.

There are two competing applications for ground that was formally the subject of a Prospecting Licence held by Western Mining. The Prospecting Licence application by Jo-Ann Horbury is for Prospecting Licence 26/1184 Objection 64/867 has been filed objecting to the application and the basis of the objection is that the applicant could not have marked out the ground or commence to mark out the ground when the ground was open for mining. The objector, Western Mining Corporation seeks that I deal with its application for Mining Lease 26/122 which was marked out at 11.36 am on the 17th of September, 1986. It requests that I deal with that application prior to dealing with application for Prospecting Licence 26/1184. It submits that I should do that firstly because the Prospecting Licence was marked out at a time when the ground was not open for mining and further because Western Mining Corporation forwarded documentation to the Mining Registrar seeking a renewal of the Prospecting Licence. Correspondence was forwarded to the Mining Registrar prior to the expiration of the Prospecting Licence then held by Western Mining Corporation. However, through no fault of Western Mining Corporation the application for renewal

and the accompanying documents were not received by the Mining Registrar but were rather returned to Mr Keddy, the late Mr Keddy who worked for Western Mining Corporation.

Immediately upon receipt of the envelope that contained the application for renewal and other papers Mr Keddy contacted Mr Stewart the Corporate Lawyer for Western Mining Corporation. The application for the Mining Lease 26/122 was applied for without delay. Western Mining had previously held an interest in the ground pursuant to the Prospecting Licence and it submitted that considering all the circumstances that the Mining Lease should be put before the Minister before any decisions made by me on this Application for the Prospecting Licence.

In relation to Western Mining Corporation perhaps some general comments at the outset would be appropriate in this case. First of all Western Mining Corporation is without question a major producer and explorer. The contribution by Western Mining Corporation to the economy in this State, and in particular the Goldfields is very significant.

From my experience as a Warden, Western Mining Corporation is very professional. Its presentation of material put before me in my capacity as Warden is usually both competent and comprehensive. Any reasonable person would hold some sympathy for Western Mining Corporation in this instance. If an application is posted to the Mining Registrar then in my view having regard to the importance of an application for renewal, perhaps it would be prudent

that the Mining Registrar be telephoned several days before the expiry day to confirm whether or not the application for renewal has been received, and if not then the applicant should cause an application to be delivered to the Mining Registrar. Now it may be that such instances of failure of delivery are rare but in my view a good system assumes some failures may occur and procedures should be put in place to remedy any such failures. This sort of application is a particularly important one and in my view some system could be justified to contact the Mining Registrar several days before the expiry just to confirm whether or not the letter has been received.

Section 105A of the Mining Act talks about rights in priority. I've previously mentioned in the case of HANNANS GOLD and DIXON that Section 105A does not distinguish between one sort of mining tenement and another. Section 105A does not apply simply in a situation where there is a Prospecting Licence application in competition with another Prospecting Licence application or on the other hand a situation where there's a Mining Lease application in competition with a Mining Lease application. It applies where the two applications are for different sorts of tenements. For example if the two applications are for a Prospecting Licence, in the first instance and a mining lease in the second instance. So clearly in this situation where I'm confronted with a competing Prospecting Licence application and a Mining

Lease application, Section 105A of the Act applies.

I have previously said that Midnight pegging is an emotive expression. Some people choose to exercise their rights under the Mining Act more vigorously than others. So be it. My duty under the Act and Regulations in this situation does not require me to make any judgement on Midnight pegging. What I'm required to do in this situation is to first of all determine whether the applicant has marked out the ground the subject of the application in accordance with the Act and Regulations.

Secondly if the applicant has complied with the marking out provisions then was the marking out done when the land was open for mining, and if both of these first two requirements are met then one would then look to see whether the applicant has complied in all other respects with the express and implied provisions of the Mining Act and Regulations.

Now in this particular situation it's clear that the Prospecting Licence is first in time. It's also clear that the applicant has via her agent or agents marked out in accordance with the Act and Regulations. The case of SILLCOCK and BIDDLE has been referred to. I find no problem with someone filling out the notice of marking out prior to fixing it to the post. Of course the particulars as provided on the notice must be correct. In this instance I'm satisfied that they are.

I'm satisfied, having heard all of the evidence and in particular the evidence of Mr HAIGH that marking out commenced after the expiry of the Prospecting Licence held by Western Mining. I'm also satisfied that the marking out was done within the time as provided on the notice of marking out. The usual way of affixing the notice of marking out to the post is by placing it in a plastic bag and tying it on the post with ribbon. Now in this situation Mr HAIGH and or Mr BIERBERG have devised a system to substantially reduce the amount of time it takes to affix the notice of marking out to the post. Also in this situation a large hammer was used to affix the post into the ground. The hammer is a heavy one. The ground at the particular spot was loamy. It's been described as alluvial. I've also been told that the ground has been disturbed because of either the placement of the survey mark, the peg at the corner, or the construction of the track. It seems to me that the evidence of Mr HAIGH and Mr BIERBERG that two strikes on top of the post were required and that was the extent of it, it should be accepted.

In my view the matters raised by Western Mining about the problem with the mail are not matters that I can take into account. In my view it's not open for me under the legislation to move to the Mining Lease and make a recommendation on that before I deal with the Prospecting Licence because the Prospecting Licence is the application that is first in time. Accordingly it seems to me

that the objection should be dismissed and that this application should be granted.

WARDEN Is there anything arising out of that Mr Percy?

PERCY No.

WARDEN Mr Van Hatten?

VAN HATTEN No Sir.

WARDEN Well in that case Objection 64/867 is dismissed and application for Prospecting Licence 26/1184 is granted. Mr Van Hatten can final orders be made in respect of the Application for the Mining Lease today?

VAN HATTEN Sir I doubt that any orders can be made as I understand the procedure is now to make a report to the Minister. I would suspect that pre-empting anything your Worship would be inclined to recommend that the lease - there having been nothing against the ground other than the land perhaps being the subject to another tenement - that subject of land being available the lease be granted. In other words your recommendation that all of the requirements of the Act and Regulations have been complied with. But coupled with that an observation that an application for a PL in respect of the same land has been

VAN HATTEN
(Continuing)

granted. In other words, recommending that the lease be granted if there is any land available and observing that in your opinion there probably isn't. I think that would be more appropriate than a blanket recommendation of refusal.

WARDEN

Do you wish to say anything to that Mr Percy?

PERCY

I would have thought Sir that effectively it should be recommended for refusal because essentially there is simply a very major impediment. There's no ground available.

WARDEN

Well what I propose to do Mr Van Hatten is simply recommend it for Refusal. It's not a situation where there are two unsurveyed areas and perhaps there's a degree of overlap that there may be separate and distinct portions that form the subject of one application but not the other. Each of the two applications before me applied for what was surveyed ground so that I can't see that there's any problem or any prejudice to Western Mining now if it's recommended for refusal. I can't see what other ground would be available.

VAN HATTEN

Sir I was simply submitting that the recommendation reflect merits of the matter

VAN HATTEN
(Continuing)

that is having carried out investigations you're indicating to the Minister that you're satisfied that Western Mining marked out and applied for the land in accordance with the requirements - did everything that was required but at the end of the day just transpired that there was no land available.

WARDEN

Well I'll do that and in addition to that I'll have my reasons on the Prospecting Licence application typed and a copy to accompany the Mining Lease file.

VAN HATTEN

I please your Worship.

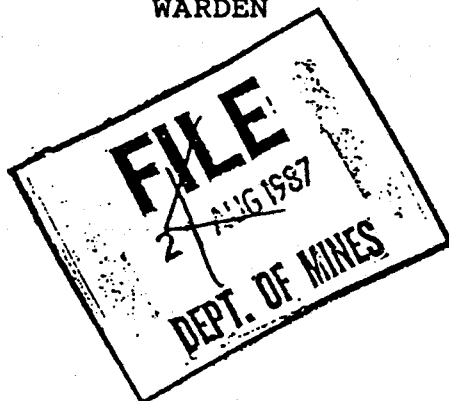
WARDEN

Thank you Gentlemen.

D. J. Reynolds

D. J. REYNOLDS S.M.

WARDEN



Pair claim lease was pegged in 3 seconds

ON THE wet evening of September 10, four parties waited to peg a mining claim 25km south of Kambalda because the prospecting licence was due to expire at midnight.

The centre of attention was a piece of circular plastic owned by surveyor Russell Haigh that supposedly would allow him and his partner Bill Beerburg to peg the claim in three seconds.

Haigh and Beerburg were representing Beerburg's girlfriend, Miss Joanne Horbury.

When midnight struck, Beerburg hammered in the peg and Haigh slipped on the plastic holding the claim papers to to peg the claim before the others.

This incident led to a Warden's Court hearing yesterday between Miss Horbury and Western Mining Corporation, the previous licence holder.

The question before Warden Denis Reynolds was: Did Haigh and Beerburg peg the claim in four seconds?

Haigh, a surveyor of Collins Street, Kalgoorlie, said the pair used atomic time broadcast over short wave radio to judge the hour.

"We practiced pegging and it took us about three seconds," he said.

"I allowed one second so I would say it took about four seconds to peg the claim."

The hearing is continuing.

UP Tenement Under Please?

RD File on A 26/1184

28-5-87