REGULATION 67, SECTIONS 59 & 111A — EXPLORATION LICENCE 70/905

FOLIO 20

IN THE WARDEN'S COURT
HELD AT PERTH

BEFORE: P.G. Thobaven S.M. Warden

DATE HEARD: 20 December 1989

DATE DELIVERED: 15 February 1990

BETWEEN

BERKLEY ARROW PTY LTD

Applicant

AND

CONLAN MANAGEMENT PTY LTD

Objector

APPEARANCES:
Mr Edmands for Applicant
Mr Wallace for Objector

RESERVE DECISION

1. Matter in Dispute

Berkley Arrow Pty Ltd has made application for Exploration Licence 70/905 situated at Kalbarri, by Objection No 202H/890 Conlan Management Pty Ltd opposes the making of a recommendation to the Minister.

The matter has been bought up to consider the competence at law of the objection.

1.1. Applicant's Case

1.1.1.

Rebuttal of the Objector's application seeking leave to lodge a late objection.

1.1.2.

The applicant contends that the nature of the Objection is such that the proceedings should have commenced by way of a plaint in so much of the objection that relates to earlier agreements.

.../2

1.2. Objector's Case

1.2.1

The objector seeks leave to lodge an objection after the 30 day objection period. The application was lodged on 25 May 1989. the objection period ended on 24 June 1989 and Objection No 202H/890 was lodged on 19 October 1989.

1.2.2.

The grounds of objection are:-

1) Arising out of a number of agreements certain parties exchanged information and certain actions were taken. The information was confidential and its use was to be limited. The objector claims that "the applicant has acted in bad faith and in breach of its fiduciary duty in making the application and using confidential information improperly obtained from Conlan Management Pty Ltd for its benefit. In the premise it would not be just and equitable for the application to be granted"; and further, "In the alternative if the application were to be granted the objector claims that the applicant holds the Exploration Licence as constructive trustee for and on behalf of it pursuant to the terms of the agreement made on or about 18 April 1989 referred to herein".

2) "The applicant has not complied with the marking out provisions contained in the Mining Act and Regulations and in particular, but without limitation has not complied with the provisions of Section 54(4) in that it has failed to serve notice on Conlan Management Pty Ltd as an occupier of the land".

3) "The application encroaches upon Murchison House Pastoral Lease which is held by Murchison House Pastoral Company Pty Ltd. The applicant has not complied with the provisions of the Mining Act relating to service of notices on the pastoral lessee and in particular, the provisions of Sections 58(4) and 118".

4) In oral submissions, it was put that the Minister may have regard to policy and therefore the Warden may have regard to those matters also. The allegation here is that confidential information has been used by the applicant and as a matter of policy the Minister should not allow such happenings in the industry.

5. In further oral submissions it was contended that because of Section 111A, the Minister can refuse to grant an application on the grounds of "Public Policy".

2. Material Before the Court

2.1. Applicant's Material

The applicant gave a written submission of 13 pages and oral replies to the objector's submissions.

2.2. Objector's Material

The objector relied upon an affidavit supplied by Anne Margaret Conlan plus oral submissions.

The admission of the applicant's affidavit was objected to on the grounds that the material contained in it, was irrelevant. No issue was taken as to the procedures required to be taken in order to have the affidavit admitted. My later conclusions cover the contents of the affidavit.

3. Submissions

3.1. Applicant's Submissions

3.1.1.

The objection has been lodged 117 days after the close of objections. The following principles were held to apply on this point, as expressed in Molopo Australia Ltd. v Eastern Gold N.L. (W.A. Full Court 21 December 1988).

1. The Warden should in that circumstance ask himself whether "the period of extension sought (is) reasonable rather than was there reasonable cause for the extension" (Brinsden J at page 2).

2. "The Warden would have to consider, inter alia, the reasons advanced for the extension and also whether, if the extension is granted, the interest of the applicant would be adversely affected (Brinsden J of at page 3)".

3. It would be proper "for the Warden to have regard to the substance of the objection in determining whether a period of more than 30 days was reasonable. He would be entitled for example to take into account in this case the fact that one of the grounds of objections is that Section 69 of the Act has been contravened. It might be thought to be appropriate to have that issue fully explored in advance proceedings before the application is granted (Kennedy J at page 5)". In this present case I should consider the nature of the objection when deciding the issue of the extension of time.

3.1.2.

The objector is claiming that there have been breaches of fiduciary duty and breaches of trust.

I was referred to a number of passages of decisions of Warden Reynolds S.M. outlining the function of the "Warden sitting in Open Court"; the "Warden's Court"; and the function of a Warden in relation to an application and objection.

Section 132 was referred to and the fact that proceedings under that Section are held in a Warden's Court, and further that those proceedings are judicial and not administrative. In the case of administrative actions, there are no rights conferred upon the objector.

The applicant submits that because the objector seeks a finding of breach of fiduciary duty and breach of trust against the applicant, a finding which would surely attach liability to the applicant.

It is further submitted that the Warden hearing an objection has a duty to act judicially in the sense that there is a duty to the parties to act fairly in relation to the hearing - that does not mean that a Warden when hearing an objection is exercising a judicial function.

The applicant refers to Regulation 121(1) - "Except as provided in Section 135 of the Act, all civil proceedings in the Warden's Court shall be commenced by plaint in the Form No 33 in the first Schedule", and further that the breaches referred to should be dealt with as civil proceedings in the Warden's Court under Section 132 of the Act and not by way of objection. Therefore the objection is procedural incompetent (as far as it relates to fiduciary duty and breach of trust).

.../7

The applicant further submits that the Warden is to ensure that the requirements of the Act have been met and then to make a recommendation to the Minister, based on whether those requirements have been met. If the objector's proposals were followed then the Warden would be making a recommendation for refusal on the the basis of an alleged breach of fiduciary duty and trust. The alleged breach would have nothing to say about whether the formal requirements of the Mining Act had been complied with and also poses the problem of what would the Warden show on the recommendation if the objector's claim was successful. Would it be that the recommendation should show that the applicant hold the Exploration Licence as a constructive trustee for or on behalf of the objector. This is but one permutation. To quote the written submission, "Surely such a result could not have possibly been contemplated by Parliament in enacting the relevant provisions of the Act. It could not be suggested that the Minister must decide on whether a constructive trust is to be imposed".

3.1.3

In oral submissions in reply, the applicant raised the points:-

1) Following Tortola v Saladar, it is not appropriate for the Warden to consider the merits of the objection. (i.e. equitable nature).

.../8

2) Due to separation of powers, the Minister could not be asked to determine matters of law. This subject matter is private law. The subject matter in dispute between the parties is not public policy upon which the Minister should exercise his discretion.

3) Section 111A is irrelevant.

3.2 Objector's Submissions

3.2.1.

The reason for the late lodgement of the objection was as outlined in the affidavit. Kalbarri Resources had applied for Exploration Licence No 70/771 on 18 August 1988. The present applicants had lodged an objection to that application. Kalbarri Resources then intended not to proceed with that application and in the meantime the present applicant applied for the ground. On 18 October 1989 Anne Margaret Conlan became aware of the intended withdrawal of the application by Kalbarri Resources. She immediately instructed her solicitors to lodge an objection to protect her interests. Because of this history the Warden should allow the late objection to proceed.

3.2.2.

Under the Mining Act, 1904 the enquiry by the Warden was to enquire if the applicant had acquired title by taking possession and hence the application of

Haslett v Rasmussen. By the Mining Act, 1978 the title is acquired by grant. By the application of Tortola v Salada the enquiry is as to whether the application complies with the Act.

3.2.3.

By Section 111A the Minister can take into account the public interest. The Minister in the public interest could exercise his discretion and refuse the application on the grounds that it is against the public interest to allow information gained confidentially to be used to gain a title. "Public interest" as discussed by Jacobs, J in Sinclair v Mining Warden at Maryborough 1975 AL JR page 172 should apply.

3.2.4

In the interest of the industry, people should not mark out and apply for land when confidential information has been obtained.

3.2.5.

The Warden should hear this evidence so that the Minister can consider it.

3.2.6

There is no restriction on who may lodge objection (Sec 59). By Section 134 the Warden's Court has power to determine objections and make declarations as to trusts.

.../10

4. Conclusions

4.1

As to the extensions of time during which the objector should lodge objections I am prepared to accept the contents of the affidavit of Anne Margaret Conlan in which she states that it was not until 18 October 1989 that she became aware of the situation arising out of the earlier Warden's Court proceedings. Given the backgroud I consider the extension sought is reasonable.

4.2

As to items 10 and 11 of the objection relating to notices to Conlan Management Pty Ltd and Murchison House Pastoral Company Pty Ltd, in the absence of a formulated arguement on the merits of the objections, I consider they should he heard.

4.3

As to the allegations relating to the agreement as outlined in 1.2.2. above I conclude that the part of the objection (items 1-9) should be struck out on the grounds that the objection is not the appropriate procedure to have the subject matter dealt with. I come to that conclusion because:-

4.3.1

The Warden's function on an application is to enquire as to whether or not all the necessary requirements have been met and if so, in this case make an appropriate recommendation to the Minister.

.../11

4.3.2

The hearing of the objection is not judicial proceedings, but a Warden acting judicially. If the matter is dealt with by way of a plaint, all of the procedures and resulting orders could be made. If the matter is dealt with by way of objection all of the appropriate orders could not be made, as the Warden by Section 59 is required to transmit the matter to the Minister for his final determination. By Section 132 the Warden makes final decisions which can be appealed against in the Supreme Court. To have the matter which is properly the province of the civil law determined by the Minister is not in the spirit of the Act. Further it would amount to the final determination of the subject matter being decided Ministerially instead of judicially.

4.3.3.

The Objector still has a right to proceed by way of plaint in the Warden's Court, to have the law of equity supply a remedy. The objector does not appear to lose its right of action and remedies on the grounds that items 1-9 of the objection are not dealt with by way of objection.

4.4.

I now consider the matter of "public interest". The decision in Sinclair v Mining Warden at Maryborough in respect to "public interest" has to be

.../12

dealt with carefully as the legislation that the case dealt with required the Warden to consider "the public interest". That is not the same structure as the Mining Act, 1978. The term could have application under Section 111A but the Warden has no part to play in making the decision under Section 111A. The decision by the Minister to apply Section 111A does not envisage the Warden making a recommendation for its use.

Under Section 59 when dealing with applications the Warden is to recommend for granting or refusal. The Warden may submit a report to the Minister and I suppose canvas therein the matter of the use of Section 111A but there appears to be no power to make a recommendation in respect to Section 111A.

4.5.

These proceedings are to be adjourned to a specific date for the hearing of the application and the remaining objections.