

WESTERN AUSTRALIA

APPLICATION FOR EXEMPTION FROM EXPENDITURE – APPLICATION TO AMEND THE REASONS FOR EXEMPTION TO RAISE NEW ISSUE *

Great Boulder Mines Limited v David John Bailey

(Perth Warden's Court, 7 April 2000)

Background

In April 1999, Great Boulder Mines Limited ("GBM") applied for a certificate of exemption from expenditure conditions, in respect of a mining lease. In May 1999, the Full Court in *Re: Warden Calder SM; ex parte St Barbara Mines Limited*¹ delivered its reasons for decision which gave the term "project" a broad meaning for the purposes of exemptions under s 102(2)(h) of the *Mining Act 1978* (WA) ("the Act"). As a result of the *St Barbara* decision, GBM sought to amend its application for exemption pursuant to s 142 of the Act to rely on a new issue: the project exemption provision. The application to amend was opposed by David John Bailey ("the objector") who had lodged an objection to the application for exemption.

Meaning of "proceedings" in the context of s 142 of the Act

The objector contended that s 142 did not apply to applications for exemption from expenditure conditions under s 102(5) of the Act because s 142 was limited to civil proceedings conducted in the Warden's Court. Warden Calder noted that Part VIII of the Act refers to matters that are relevant to the Warden's Court as well as the Warden in open court (see for example records of evidence under s 137). The Warden reasoned that as s 142 made no reference to the Warden's Court and referred only to "any proceedings", the powers conferred by s 142 applied to the exercise by the Warden of *any* powers vested in the Warden.

Do the powers in ss 142(2) and 142(4) stand alone?

The objector contended that the only type of amendment contemplated by s 142(4) was an amendment to correct a defect or error permitted by s 142(1) or s 142(2). The Warden accepted GBM's submission that s 142(2) and s 142(4) were to be applied independently of each other so that amendments may be permitted to raise a new issue in proceedings such as exemption applications. In reaching that conclusion, Warden considered ss 142(1) and 142(2) to be "saving and preserving" provisions and stated that:

- Section 142(1) applies to misnomers or inaccurate descriptions where there is no need for an amendment to be made. In these cases, the Warden is entitled to overlook the inaccuracy, as long as the proper description can be ascertained.
- Section 142(2) is directed at informalities, which amount to defects or errors (which include omissions).

* Mark Gerus and Fiona Mondello, Clayton Utz, Perth.

1 [1999] WASCA 25 (Unreported, Full Court 21 May 1999). See case note (2000) 19 AMPLJ 70.

The Warden held that s142(4) is directed at different categories or types of amendments. Warden Calder referred and followed his earlier decision in *WMC Resources Ltd v Gardner*² In that decision he expressed the view that in applications for exemption the Warden would need to hear all the reasons which the applicant claims are relevant and as many relevant circumstances as will assist in formulating a recommendation to the Minister. Further, to determine the “real question in issue” it was necessary to:

- examine the nature of the application, action, suit or proceeding;
- enquire as to what it is that the Warden is being asked to do; and
- look to the documents, forms or pleadings lodged and determine (in the context of the initiating document) what matters are in issue between the parties.

The Warden reiterated that in order to determine the real question in issue it may be necessary to allow new issues to be introduced, provided no party is unfairly prejudiced and s142(4) is not used to overcome a failure to commence proceedings within prescribed time periods.

The objector also submitted that an amendment to the exemption application was not possible as it is limited by the contents of the statutory declaration required by r54(3) of the *Mining Regulations* 1981 (which sets out the reasons in favour of granting the exemption). The Warden stated that the statutory declaration is not intended to circumscribe the application for exemption and does not form part of the application. The Warden suggested that a failure to lodge a statutory declaration would not invalidate an application for exemption and the only purpose served by it is to assist in the determination of the application where there is no objection (and, therefore, no requirement for a hearing in open court).

Decision

The Warden allowed the amendments on the basis that they were necessary to decide the real question in issue between the parties – whether the Applicant is entitled to the certificate of exemption. Indeed, the Warden saw himself as directed by the language of s142, in mandatory terms, to allow the amendments. The Warden dismissed any suggestion of procedural or substantive prejudice to the objector. Rather, there would be significant prejudice to the applicant if the amendments were not allowed.

EXEMPTION FROM EXPENDITURE CONDITIONS– PROJECT EXEMPTION – S102(2)(b) MINING ACT 1978 (WA)*

WMC Resources Limited v Glen Alan Mackie

(Kalgoorlie Warden's Court, Warden Woods, 17 April 2000)

WMC Resources Limited ("WMC") applied for a certificate of exemption from expenditure conditions in respect of a mining lease. The grounds for the application included that the mining lease was part of a

2 Unreported, Perth Warden's Court 21 August 1998. The decision was subject to an application for judicial review in *Re: His Worship Calder SM: ex parte Gardner* [1999] WASCA 28, but not on the issue of the Warden's power under s142. See (1999) 18 AMPLJ 125.

* Mark Gerus, Clayton Utz, Perth.