WESTERN AUSTRALIA

PLAINT FOR FORFEITURE AND OBJECTION TO APPLICATION FOR EXEMPTION*

Synergy Equities Group Ltd v Morellini ([2003] WAMW 21, Warden Calder SM, Perth Warden's Court, 6 February 2004)

Mining Act 1978 – Consideration of Warden's power and obligations where certificate of exemption issued before hearing of objection completed and recommendation transmitted to Minister – Effect of the purported grant of exemption on the plaint –Proof of contents of register

Synergy Equities Group Limited (formerly IPT Systems Pty Ltd) (Synergy) brought applications (Applications) to dismiss a plaint (Plaint) for forfeiture of a mining lease M70/816 (Mining Lease) and an objection lodged by the plaintiff to the application for a certificate of exemption in relation to the Mining Lease (Objection). The Applications were brought on the basis that a certificate of exemption had been granted for the whole of the amount of exemption applied for in relation to the Mining Lease for the relevant expenditure year.

The plaintiff/objector opposed the Applications on the basis that the certificate was purportedly granted prior to the hearing of the Objection and without the Warden making a recommendation or transmitting his report and notes to the Minister as required by s 102 of the *Mining Act* (Act) Section 102 (relevantly) says:

> "(5) An application for exemption –
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> (a) where an objection to the application is lodged, shall be heard by the Warden in open court; but
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> (b) otherwise, shall be forwarded to the Minister for determination by the Minister.
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> (6) The Warden shall as soon as practicable after the hearing of the application transmit to the Minister for his consideration the notes of evidence and any maps or other documents referred to therein and his report recommending the granting or refusal of the application and setting out his reasons for that recommendation.
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> (7) Where the Warden finds that the reasons given by the holder of the mining lease are sufficient to justify the granting of a certificate of exemption and so recommends, or if the Minister is satisfied whether or not a recommendation is made by the Warden, the Minister may grant a certificate of exemption in an amount not exceeding the amount required to be expended in respect of the mining lease in the period of 5 years from the commencement of the year to which the application relates."

Section 103 of the Act says:

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> "Upon the granting of a certificate of exemption pursuant to section 102 or section 102(a), the holder of a mining tenement to whom it is granted shall be deemed to be relieved, to the extent, and subject to the conditions specified in the certificate, from his obligations under the prescribed expenditure conditions relating to the mining tenement."

Facts and Evidence

The Plaint was lodged on 26 September 2001 for the expenditure year ending 12 August 2001. On 9 October 2001, Synergy lodged an application for exemption in relation to the Mining Lease for that expenditure year.

The Plaint and Objection (together with an additional plaint in relation to M70/815) were heard together on 17 and 18 January 2002. On 22 February 2002, Warden Calder found that Synergy had no case to answer in relation to M70/815 and dismissed that plaint ("Decision").[1] The Warden expressly refrained from making any final ruling on the no case submission in relation to the Plaint, pending the determination by the Minister of the exemption application. The Warden had not transmitted a report or other stipulated material in relation to the Objection.

The Department of Minerals & Petroleum (Department) purportedly granted an exemption on 13 December 2002. The Warden found that the relevant Departmental officers had not appreciated from a reading of the Decision that the hearing before the Warden had not been completed or that there had been no report or recommendation concerning either the Plaint or the exemption application.

The solicitor for the plaintiff/objector then made submissions to the Director, Mineral Titles that the grant was in error, and requested that the Minister withdraw the grant. He was informed by the Department that legal advice confirmed that the grant was "a nullity for want of jurisdiction" and it was intended to amend the Departmental records to show that the certificate had not been granted.

At the hearing of the Applications, the Warden admitted affidavit evidence annexing further register extracts in relation to the Mining Lease. The most recent of the extracts showed a miscellaneous entry under "dealings" identifying that the certificate was issued in error and the Minister intended to determine the exemption application after receiving the Warden's recommendations.

The parties agreed that the Warden sitting as an administrative tribunal considering an application to dismiss had a discretionary power to admit further evidence. The Warden considered that the further evidence was fresh evidence materially relevant to the Applications as it demonstrated that the Minister had reconsidered the issue of the certificate and acknowledged that the Warden's role had not been completed prior to the issue of the certificate.

Submissions

Synergy argued that a valid certificate of exemption had been signed by an authorised officer relieving the tenement holder from its expenditure obligations such that there was no basis for the Plaint to succeed. Further, the power of the Minister to grant a certificate of exemption was not predicated on compliance with the requirements in s 102 in relation to the Warden's duties.

The plaintiff/objector submitted that the performance of the Warden's duties under s 102 was necessary, mandatory and an essential pre-condition to the valid exercise of the discretion by the Minister to grant a certificate. The circumstances of the case were such as to displace the prima

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[1] *Morellini v IPT* [2002] WAMW 8, 22 February 2002, Warden Calder SM.

facie evidence of the purported certificate and register extract showing the grant of the exemption application.[2]

Reasoning

Scheme of the Act

The Warden reviewed the provisions of the Act and regulations in relation to exemption applications and the administrative function of the Warden sitting in open court. He concluded that applicants and objectors had a right to present evidence, to cross-examine witnesses and to make submissions in open court before the Warden makes any decision, determination, report or recommendation. This included applications for forfeiture and for exemption.

Warden Calder considered the decision in *Hot Holdings Pty Ltd v Creasy*[3] and its relevance to the determination of an application for exemption. In *Hot Holdings*, the High Court found that the Minister could not exercise the power to grant or refuse an application for an exploration licence or mining lease (under then ss 57 and 71 of the Act) to which an objection had been made, prior to the Warden transmitting a report and other specified material to the Minister.

Section 102 does not contain statutory provisions directly analogous to the above sections. However, s 102(6) requires the Warden to transmit material "for the Minister's consideration". The Warden found that these words imposed an obligation upon the Minister of the same type as that found to exist by the High Court in *Hot Holdings* in relation to exploration licences or mining leases. Accordingly, the Minister was obliged to receive, become aware of, and give due consideration to, the stipulated material in determining the exemption application.[4]

That is, it is an essential pre-condition to the grant of a certificate of exemption to which an objection has been lodged, that the Warden has completed the hearing and the Minister has received and given consideration to the stipulated material.

Delegation

The Warden found that the Minister had, pursuant to s 12(1) of the Act, delegated his power under s 102 of the Act to specified Departmental officers. However, the Warden found that there was insufficient evidence that the certificate had been signed by or on behalf of such delegates.

Departmental Practice

The Warden said that it was inappropriate for Departmental officers to make a "recommendation" to the Minister after the Warden has transmitted a report and recommendation under s 102(6). The Warden found that the Departmental practice of receiving such further information appeared to fly in the face of the transparency, fairness and application of the rules of natural justice intended to be conveyed by the system of open court hearings under the Act.[5] Not all of the specified material was on the file and further comment by the Director, Geological Survey, was taken into account in considering the exemption application, without a further hearing in relation to this evidence.

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2 Counsel referred to and relied upon *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* (Unreported, SCWA, 16 December 1988 at pp 15-23).

3 (1996) 185 CLR 149.

4 This reasoning is consistent with the decision of the Full Court in *Re Minister for Mines; Ex Parte Roberts* [1999] WASCA 133 at [36] per Malcolm CJ, Pidgeon and Ipp JJ concurring.

5 See *Re Minister for Mines; Ex Parte Roberts* [1999] WASCA 133 per Malcolm CJ, Pidgeon and Ipp JJ concurring.

The Warden considered that there would be occasions where there would be an obligation to give every party an opportunity to comment or to be heard in respect of every matter that is intended to be taken into account by the Minister/delegate. These occasions should be determined in view of the hearing process, which allows parties to address relevant matters and filters the matters to be considered by the Minister.

Validity of Certificate

The Warden was not asked to make, and could not have made, any declaration concerning the validity of the certificate, as he was sitting in an administrative capacity under the *Mining Act*.

As the grant had not been expressly revoked, cancelled or rescinded, the Warden could not deal with the forfeiture and expenditure applications as if the exemption had not been granted.

Proof of Grant of Exemption

The Warden rejected the submission that the certified copy of the register was conclusive proof of the grant of the exemption application and the certificate. Although the Warden considered that the register extract was admissible as a "business record" for the purposes of s 79B of the *Evidence Act*, it was not conclusive evidence that the certificate was issued in accordance with the law.[6]

Further, s 103 was subject to the provisions of ss 55 and 59(2) of the *Interpretation Act 1981*. The Warden considered that it was open to the Minister or his delegate to revisit the decision and correct the error in the future.

The notation in the register as to the view of the Minister was found not to be a further exercise or performance of the Minister's duties under s 102. The register remained evidence of the grant of a certificate of exemption.

Conclusions

The Warden refused the Applications. In doing so, he expressed doubt as to his power to dismiss plaints or objections.[7]

The Warden found that the objector was entitled to have the Minister consider the Objection in accordance with the Act and regulations. The actions of the Minister and his delegates, circumventing the relevant statutory procedures, did not have the effect that the Warden was no longer obliged to comply with his or her statutory duties. The Warden was required to complete the hearing and to transmit the specified material to the Minister in accordance with s 102.

The application to dismiss the Plaint was refused for similar reasons. The Warden considered that he was required to fulfil his statutory duties in relation to the Plaint pursuant to s 98, which should await the determination of the exemption application according to law.

This decision highlights that the contents of the register, or even a certificate of exemption, are not conclusive evidence that an exemption has been granted. Such a grant is always susceptible to challenge in judicial proceedings in the Supreme Court (subject to relevant limitation periods). However, in this case, the Warden confirmed that it was appropriate to look behind the prima facie evidence of the register or certificate, to the circumstances of the purported grant. This decision

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6 The Warden reached the same conclusion in relation to a register extract that had been certified by a Mining Registrar under s 161(3).

7 See *Quartz Water Leonora v Ashwin* [1999] Vol 14, No 8 at 15; *Ruby Well v Brosnan* (6 March 1998); Vol 13, No 7 at 7, per Warden Calder SM, particularly in view of the object of the objection process, being to alert the Minister to matters which might be seen as in the public interest.

should be borne in mind when acquiring tenements to which an exemption appears to have been granted. It may be prudent to make some inquiries as to the regularity of the grant. This is consistent with the view that the system of registration and the maintenance of the register under the Act[8] only confers a "limited indefeasibility" and that it is not sufficient for a purchaser of a tenement to simply rely on the register.[9]

Further, the findings and comments of the Warden as to the dealings of the Department in relation to this exemption application may encourage challenges to the grant of exemption applications on the grounds of denial of natural justice and procedural fairness. However, such challenges will need to be based on the factual circumstances of each case.

THE *CONTAMINATED SITES ACT 2003* (WA)*

Introduction

The *Contaminated Sites Act 2003* (WA) (Act) was finally passed by the Parliament of Western Australia after several years of development and was assented to on 7 November 2003. It has not yet been proclaimed.

The Act creates a regime for the identification, reporting, management and remediation of contaminated land. It is the most comprehensive legislation of its type in Australia.

The new regime will have practical and legal consequences for, amongst others, companies operating in the mining, oil and gas industry.

Overview

The Act casts a broad net as to who are responsible for all or part of the cost of rehabilitating contaminated land. Retrospective liability for remediation can be imposed.

The object of the Act is to protect human health and the environment[1]. It does so by requiring the identification of contaminated sites so they can be recorded on a public database[2]. It gives the Crown the ability to place a Memorial on the title of any contaminated land[3]. It facilitates management and remediation of contaminated sites[4] and sets out notification procedures so no one should acquire a contaminated site without knowing it is contaminated[5]. The Act requires sites posing a threat to human health to be cleaned up.

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8 See particularly section 116(2) of the Act which provides that, except in the case of fraud, a mining tenement granted or renewed shall not be impeached or defeasible by reason of any informality prior to the grant or renewal and does not have to inquire into the circumstances of registration; see also s 103A(4).

9 M Hunt, *Mining Law in Western Australia* (Federation Press, 2001) at pp 205-206.

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1 Section 8 of the Act.

2 Section 11 of the Act.

3 Section 58 of the Act.

4 Parts 3 to 5 of the Act.

5 Section 68 of the Act.