RELEVANCE OF PREVIOUS EXEMPTION AND EXPENDITURE IN APPLICATIONS FOR EXEMPTION*

Haoma Mining NL v Tunza Holdings Pty Ltd & Anor [2006] WASCA 19

Mining Act 1978 (WA) – Expenditure requirements – Applications for exemption –s102(2)(b) and s102(3) – Construction of s103 and s102(4) – Whether Warden may take into account previous failures to meet expenditure requirements the subject of certificates of exemption.

For the fourth time in nine years the Supreme Court of Western Australia has considered the Warden's decision relating to objections by Tunza Holdings Pty Ltd ("Tunza") to applications for exemption from expenditure by Haoma Mining NL ("Haoma"). The Court of Appeal recently dismissed an application by Haoma for orders quashing the Warden's recommendation to the Minister that applications for exemption from expenditure conditions be refused[1]. The decision raises the issue of the construction of s 102(4) and 103 of the *Mining Act 1978* (WA) ("Act") and the scope of the Warden's enquiry into the circumstances of previous grants of certificates of exemption by the Minister.

Background

In 1984 Haoma entered into a joint venture agreement with Consolidated Gold Mining Areas NL ("CGMA"). The joint venture covered a number of prospecting licences, of which Haoma was the registered proprietor (the "Linden Tenements"). Haoma held approximately 60 percent interest in the joint venture. In 1993 a receiver was appointed in respect of CGMA's undertaking. Pursuant to the joint venture agreement, Haoma exercised its option to purchase CGMA's interest. A dispute over the purchase price ensued and was referred to an arbitrator.

In 1994 Haoma applied for certificates of exemption from the expenditure requirements relating to the Linden Tenements on the grounds that, until the dispute with CGMA was resolved, Haoma was unable to make plans to explore the tenements. No objections to the applications were lodged, and the applications were dealt with administratively. Certificates of exemption issued. In 1995 Haoma again applied for certificates of exemption from its expenditure obligations. Tunza filed notices of objection and plaints for forfeiture of the tenements. The matter came before the Warden for hearing in July 1997. At this time the dispute over the value of CGMA's joint venture interest had not been resolved.

Legislative Framework

The Act enables a holder of a mining tenement to apply for a certificate of exemption from the annual expenditure requirements attached to a mining tenement. Sections 102(2) and (3) set out the reasons upon which a certificate of exemption may be granted. Section 102(4) provides that when consideration is given to an application for exemption "regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof". Section 103 provides that upon grant of certificate of exemption the holder of the mining tenement is relieved, to the extent specified in the certificate,

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1 *Haoma Mining NL v Tunza Holdings Pty Ltd & Anor* [2006] WASCA 19 ("*Haoma v Tunza No. 4*.")

from his obligations under the expenditure conditions relating to the mining tenement. Whether s 103 affects the scope of the inquiry under s102(4) had not been considered by the Supreme Court and has practical consequences in administrative proceedings before the Warden[2].

Previous Decisions of the Warden and the Full Court

This dispute has had a "vexed history"[3] involving four decisions by the Warden and three successful applications to the Full Court for prerogative relief. At the first hearing before the Warden in 1997, Haoma's principal submission was that the dispute with CGMA amounted to a dispute as to title of the Linden Tenements and that grounds for the grant of an exemption under s102(2)(a) of the Act were made out. The Warden recommended that the Minister grant certificates of exemption[4]. Tunza successfully applied to the Full Court for orders quashing the Warden's first decision[5]. The Full Court held that the dispute between Haoma and CGMA was one as to value, and not one as to title of the tenements.

In May 1998 the Warden made a second decision and recommended that the applications be refused[6]. He found that Haoma had led no evidence to satisfy a grant of exemption under s102(2)(b) of the Act, and considered himself lacking capacity to make a recommendation to the Minister in respect to s102(3) of the Act. Haoma successfully applied to the Full Court to quash the Warden's decision[7].

In October 1999 the Warden made his third decision and recommended to the Minister that the applications for exemption be refused[8]. Haoma applied for the third time to the Full Court for prerogative relief, and was again successful[9]. The Full Court found that the Warden had failed to address the merits of Haoma's applications under s102(2)(b) and s102(3). In this regard, the Court noted that the Warden's decision made no mention "as to whether or not there might have been good reason for the lack of expenditure, for example, previous exemptions [and] the dispute between the joint venturers".

In September 2003 the Warden made his fourth decision[10]. The Warden found that Haoma had not produced sufficient evidence to support its reliance on s102(2)(b), and, having regard to the "background of the tenements", a recommendation to the Minister for the grant of exemptions under s102(3) was not warranted. With respect to s102(4), the Warden took into account prior shortfalls in expenditure by Haoma which were subject of certificates of exemption. The Warden concluded that s102(4) was of "no assistance" to Haoma, and was in fact "damning" of its application. Haoma sought orders quashing the Warden's fourth decision.

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2 See for example *St Ives Gold Mining Company Pty Ltd & Ors v Hawks & Anor* [2005] WAMW 19 at [187].

3 Justice Steytler at [1].

4 *Tunza Holdings Pty Ltd v Haoma Mining NL*, Warden's Court, Perth, 9 May 1997, Warden Heaney.

5 *Re Warden Heaney; Ex parte Tunza Holdings Pty Ltd v Haoma Mining NL* (1997) 18 WAR 420.

6 *Tunza Holdings Pty Ltd v Haoma Mining NL*, Warden's Court, Perth, 21 May 1998, Warden Heaney.

7 *Re Heaney SM; Ex parte Haoma Mining NL v Tunza Holdings Pty Ltd*, unreported; FCt SCt of WA; Library No 980738; 18 December 1998; see T Kavenagh, *'Exemption from Expenditure Conditions: Obligations of Warden to Consider all Grounds of Application'*, (1999) 18 AMPLJ 13.

8 *Tunza Holdings Pty Ltd v Haoma Mining NL*, Warden's Court, Perth, 11 October 1999, Warden Heaney.

9 *Haoma Mining NL v Tunza Holdings Pty Ltd* [2001] WASCA 123.

10 *Tunza Holdings Pty Ltd v Haoma Mining NL* [2003] WAMW 12.

Decision of the Court of Appeal

The first issue raised by the application to the Full Court was whether the Warden failed to consider, the evidence of the dispute as to value of the tenements between Haoma and CGMA when considering s 102(2)(b) and s 102(3). The Court found that the Warden had not fallen into error in reaching his conclusion and had taken into account the evidence.

The second issue raised by Haoma was whether the Warden had impermissibly taken into account the failure to meet past expenditure requirements when there had been in existence certificates of exemption, or whether he had erred in taking these failures into account without having regard to the fact and circumstances of the prior exemptions.

Haoma's first contention in this regard was that previous shortfalls in meeting prescribed expenditure conditions cannot be taken into account by the Warden when the Minister has issued certificates of exemption relieving the holder from its expenditure obligation (i.e. the shortfalls have been "permitted by certificates"). The Court considered three alternative constructions of the phrase "regard shall be had to the current grounds to which exemptions have been granted" in s102(4) of the Act, including (the third) that the phrase should be read as requiring that regard be had to those of the current grounds relied upon for exemption as have previously resulted in the grant of an exemption or exemptions in respect of the tenement under consideration. The Court considered this construction the most tenable. Steytler P said:

> I can see nothing untoward in a construction which requires that, in considering an application for exemption, regard must be had to current grounds which have previously resulted in exemptions. The legislature may well have thought that the fact of a prior exemption on the same grounds was especially relevant. So, for example, it might, depending on the circumstances, indicate that, as a matter of consistent decision making, a similar exemption should be given. Alternatively, the fact of repeating applications based upon the same ground might cast doubt on the ability, or willingness, of the tenement holder to satisfy the prescribed conditions attaching to the grant of the tenement.[11]

In the Court's view, the effect of s 102(4) is that not only can previous expenditure be taken into account, it *must* be taken into account where the same ground for exemption is relied upon for a further exemption. Steytler P went on to say:

> the fact that s 102(4) requires that consideration must be given to the current grounds upon which exemptions have previously been granted (and, importantly, also to work done and money spent on the tenement by its holder), does not mean that the decision-maker *may* not have regard to other matters, including previous failures to meet prescribed expenditure which where subject of certificates of exemption granted upon different grounds to those raised in the current application. If the previous failures are reasonably considered to be relevant to the question whether a further certificate of exemption should issue, there is, as I read the section, nothing in it which prevents them from being taken into account.[12]

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11 *Haoma v Tunza No 4* at [60].
12 *Haoma v Tunza No 4* at [61].

Haoma's second contention in relation to s 102(4) was that taking into account shortfalls in expenditure, which are the subject of previous certificates of exemption, when the Warden is contemplating an adverse recommendation on a subsequent application for exemption, undermines the operation of s103 and s96(2a) of the Act. This was rejected by the Court As to s 103, which deals with the effect of the grant of a certificate of exemption, the Court said:

> the effect is not undermined because the exemption might later be looked at, in the context of a fresh application, for the purpose of considering whether or not there is, in all the circumstances, an unwillingness, or inability, to explore or mine the tenement within a reasonable timeframe.[13]

The Court held it was open to the Warden to take into account prior shortfalls in expenditure by Haoma even though exemptions had been granted in respect of them regardless of the grounds upon which the exemptions were granted. It was proper to do so in the context of the enquiry as to whether there was "any other reason for the grant of a certificate of exemption" under section 102(3) of the Act. It would not have been open to the Warden to ignore the fact of previous exemptions when considering Haoma's subsequent applications for exemption.

Implications

The Court's refusal to read down section 102(4), in light of section 103, has confirmed the relevance of the prior history of expenditure on a mining tenement and previous applications for exemption by the tenement holder. The Warden may consider previous grants of exemption, regardless of the grounds upon which they were granted, and where the same grounds are relied upon in a current application the Warden must take this history into account. This may, depending on the circumstances, assist an objector to an application for exemption or the tenement holder. For example, it is open for the Warden to inquire whether a repeated claim that "more time is required to evaluate work done on the tenement" has any credibility. Conversely, the decision suggests that previous grounds of exemption such as those granted on the basis that a tenement contains an uneconomic mineral deposit, is part of a project or that there are difficulties in obtaining approvals to commence mining, may provide good reasons why, as a matter of consistent decision making, a certificate ought to be granted.

WARDEN'S POWERS UNDER THE 1904 MINING ACT[*]

Precious Metals Australia Ltd v Western Mining Resources Ltd [2006] WAMW 6 (Warden Richardson SM), 12 April 2006)

Extension of time – Powers of Warden and Registrar – Objections – 1904 Act

Background

This decision concerned an application by Precious Metals for extension of time to lodge an objection under the repealed *Mining Act 1904* (WA) (1904 Act) and *Mining Regulations 1925*

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13 *Haoma v Tunza No 4* at [64].

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