Warden Calder also commented on onus of proof in a plaint for forfeiture. The Warden held that the onus of proof is borne by the Plaintiff, who must show that the tenement holder has failed to comply with the expenditure obligation on the balance of probabilities. Warden Calder found that McKnight failed to discharge the onus of proving non-compliance with the expenditure condition and the plaint was dismissed.

RESTORATION OF FORFEITED TENEMENT*

Karrilea Holdings Pty Ltd [2007] WAMW 7 (Open Court, Perth, heard 21 December 2006, delivered 9 March 2007)

Mining Act 1978 – Application for restoration of forfeited tenement – Criteria for restoration – Whether special circumstances exist

Facts

Karrilea Holdings Pty Ltd (the Applicant) applied to have restored to it Prospecting Licences 57/934-6, 57/938-9 and 57/942 (the Tenements). The Tenements were forfeited pursuant to s 96 of the *Mining Act 1978* (WA) (the Act) by the Warden on 20 June 2006 for non-compliance with the expenditure condition for the 2004-2005 expenditure year.

An application for the restoration of the Tenements was made pursuant to s 97A(1) of the Act. Two affidavits were lodged in support of the application.

The Applicant submitted that there were special circumstances to justify the restoration of the Tenements. The Tenements were part of the Applicant's Manindi Project: $267,696.00 had been spent on exploration on the project area, and it was anticipated that another $250,000 would be spent for the next 12 months. Both amounts exceeded the aggregate minimum prescribed expenditure requirements for the tenements within the Manindi Project. The Applicant was also undertaking active exploration in the area, had identified several prospective zones, and had commissioned design and costing work for processing operations and plant design on the project area to extract zinc. Due to the inadvertence of the Applicant's tenement manager, these significant factors were not brought to the Warden's attention at the hearing of the Applicant's objection to the applications for forfeiture. As such, the Applicant argued that the non-compliance with the expenditure conditions was not of sufficient gravity to justify forfeiture, and even if it was of sufficient gravity, it was open for the Warden to impose a fine in lieu.

Held

According to s 97A of the Act, where a mining tenement is forfeited under s 96, the former holder of the tenement may apply for it to be restored and the forfeiture cancelled. Although objections under s 97A(6) of the Act may be made against the application for restoration, no objections were made in this case. On hearing of an application for restoration, the Warden may make such orders as he thinks fit, and may either:

- grant the application and restore the tenement to the former holder;

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* Tim Kavenagh BJuris, LLB, Special Counsel, and Vivian Chung BA LLB (Hons), Mallesons Stephen Jaques, Perth.

- grant the application and restore the tenement, subject to further conditions as the Warden may specify; or
- refuse the application (s 97A(7) of the Act).

Warden Calder noted that the Act is silent on the matters that should be taken into account when determining whether a tenement should be restored or not. Warden Calder did, however, accept that one criteria that may be considered in determining an application for restoration is whether any 'special circumstances' exist. He approved Warden Reynolds' statements in *BRGM Nominees Pty Ltd v Hake, Saggers and Grabham*[1] (BRGM case) on the issue of restoration of tenements and held that the approach in the BRGM case was not limited to cases of forfeiture due to non-payment of rent. In the BRGM case, Warden Reynolds held that:

> 'Where there is no good explanation, a gross lack of care and no special circumstances then restoration should be refused. Where there is no good explanation and a gross lack of care, it may be appropriate for the tenement to be restored if there are special circumstances. It may not be necessary for any special circumstances to exist where the holder is able to provide some good explanation for the non-payment of the rent or show that the non-payment was not the result of any lack of care on his part.
>
> When determining whether any special circumstances exist, the court should give consideration to the length of time that the holder had held the tenement, the expenditure incurred in any years prior to the date upon which the rent became payable, whether the holder had delineated an ore body, whether the holder had caused the necessary arrangements to be made for a mining operation to commence, whether the holder was actually carrying out a mining operation on the tenement, the size of any planned mining operation or existing mining operation and generally the prejudice that would be suffered by the holder if the tenement was not restored.'

Warden Calder recognised that the Applicant would suffer significant detriment if the tenements were forfeited due to the failure of the tenement manager to submit material information regarding the Tenements. The Warden was also satisfied that on the basis of the information contained in the affidavits regarding the incurred and proposed expenditure, and proposed developments of the Tenements as part of the Manindi Project, restoration was justified. The Tenements were restored to the Applicant.

In making his decision, Warden Calder commented on the nature of the hearing of an application for restoration on the basis of 'special circumstances'. It was held that a consideration of whether there are special circumstances or not does not include a review of the decision the Warden who ordered forfeiture. This is because in most cases where 'special circumstances' are argued, the applicant will have to demonstrate that there are circumstances that were relevant at the time the forfeiture order was made but not brought to the Warden's attention, or that special circumstances have arisen since then.

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[1] Delivered 26 October 1988 at Kalgoorlie - Volume 5 Folio 16.

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