

WESTERN AUSTRALIA

WARDEN'S DECISIONS

JURISDICTION OF WARDEN DETERMINING FORFEITURE

*Greater Australian Gold NL and Linda Latham**

(Unreported, Warden sitting in open court held at Perth, 26 June 1998)

application for forfeiture - application for exemption - mining lease - costs - warden sitting in the Warden's Court or as the Warden's Court - warden acting administratively or judicially - nature of power and duty - application of jurisdiction, powers and functions of the Warden's Court - s13, s41, s42, s91, s95, s96, s98, s102, s111A, s132, s134, s138 Mining Act 1978 (WA)

Facts

On 4 September 1995 Linda Latham ("Latham") lodged a plaint seeking forfeiture of a mining lease held by Greater Australian Gold NL ("GAG").

On 27 October 1995 GAG lodged an application for exemption from expenditure conditions for the tenement year ended 29 August 1995. Latham objected.

On 7 November 1997 having heard evidence in support of the application for exemption and objection, the Warden published in open court his report to the Minister for Mines recommending that a certificate of exemption be granted.

On 3 December 1997 the Minister issued a certificate of exemption, exempting the mining lease from the shortfall in expenditure for the tenement year in question.

On 16 April 1998 the Warden dismissed Latham's application for forfeiture as a consequence of the Minister's grant of the certificate of exemption. GAG then sought an order for costs against Latham in respect of the application for forfeiture and the exemption application. Written and oral submissions were subsequently made by both parties.

GAG argued that the application for forfeiture and the exemption application were heard by the Warden sitting in the Warden's Court and exercising the jurisdiction of the Warden's Court which was given to the court by s132 of the Act. GAG also contended that in dismissing the forfeiture plaint and recommending the grant of a certificate of exemption the Warden was exercising the powers given to the Warden's Court by s134 of the Act.

Decision

The Warden held that in determining the application for forfeiture and the exemption application he was not sitting as a Warden's Court. Accordingly, the provisions of Part VIII of the Act which relate to the jurisdiction, powers and functions of the Warden's Court do not apply. Therefore the Warden held he had

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no power to make a costs order arising out of an application for forfeiture or an exemption application or any objection to such applications.

The Warden also determined (obiter) for the same reasons that the Warden has no power to make costs orders in relation to applications and objections to the grant of mining tenements. It was also held (obiter) that the Warden has no power to make an order for security for costs arising out of applications and objections for mining tenements, forfeiture or exemptions.

Reasoning

The issue is whether the Warden has jurisdiction to award costs when hearing applications and objections concerning forfeiture of mining tenements or the grant of certificates of exemption. The Warden analysed previous Warden's Court decisions, Supreme Court decisions and the relevant provisions of the Mining Act 1978 (WA).

The Warden considered several conflicting decisions handed down by different Wardens since 1989. Some Wardens adopted the view that there is a clear distinction between a Warden's Court and Warden sitting in open court. Some Wardens stated that a Warden sitting in open court was performing an administrative function with a duty to act judicially, whereas a Warden's Court was concerned solely with a judicial function under the Act. The conflict in the various Warden's decisions concern whether the Warden in determining applications for the grant of mining tenements or applications for forfeiture had jurisdiction to award costs. Different results were obtained, notwithstanding agreement on the distinction between a Warden and the Warden's Court because different views were reached on the proper construction of the Act and the function of the Warden at the relevant time.

The Warden also considered various decisions of the Supreme Court of Western Australia, although none expressly concerned the issue of whether or not a Warden hearing and determining applications of the kind referred to have power to award costs. Relevant decisions which commented upon the nature of the function of the Warden are considered.

In particular the Warden referred to Ipp J in *Re: Warden Boothman SM and in Re: Minister for Mines ex parte Peko Exploration Ltd and GHK Mining Pty Ltd* (Full Court WA Supreme Court, unreported, lib No. 970613, CIV 1381/1997, delivered 14 November 1997) where His Honour noted that:

Whether or not the Warden was sitting as an inferior court or as an administrative tribunal, he was entitled to make orders in regard to the admissibility of evidence...

The Warden also considered that the Full Court of the Supreme Court of Western Australia in *Re: Warden Burton SM; ex parte Roberts* (unreported, lib No 970676, CIV 1739/1997, published 4 December 1997) did not decide whether the Warden when hearing an application for forfeiture was sitting in "the Warden's Court" and nor was the question answered whether, when performing such duties, the Warden has any power to make an order for discovery against any party.

The Warden then considered the relevant provisions of the Mining Act 1978. The Warden noted that "Warden's Court" does not appear in any of the sections of the Act which gives the Warden power to grant or make recommendations to the Minister for the grant of mining tenements or where the Warden is empowered to either order or recommend forfeiture. The Warden held that the fact that a Warden has power to "grant" an application does not mean that it follows the function being performed should be characterised as being judicial. The Warden considered several features of the functions of Wardens and

distinguished these against the usual powers of a court of law. For example the Warden considered it was not consistent with a judicial function to have a discretion whether or not to hear an objection i.e. to determine the parties to the proceedings. He also noted that the words "open court" are not used in Part VIII of the Act, apart for one exception which requires all proceedings in a Warden's Court to be in open court.

In summary the Warden held that all of the functions of the Registrar, the Warden and the Minister which are contained within Parts I to V of the Act are administrative or ministerial and are not judicial. For the reasons discussed the Warden considered that none of those functions are embraced by the relevant provisions in Part VIII entitled "Administration of Justice".

The Warden noted however that notwithstanding the above view, it was still open to the Warden to adopt the same procedures provided for by the Act for matters in the Warden's Court even though the proceedings were not being heard "in the Warden's Court". The Warden held that if the Warden is sitting in an administrative capacity then the Warden has power to direct and control the procedures necessary for the determination of the matter.

Conclusion

In summary the Warden held that he was not sitting in the Warden's Court when dealing with applications for mining tenements, the forfeiture of mining tenements or for certificates of exemption, and any objections concerning such applications. The Warden concluded that the provisions of Part VIII of the Act did not apply and therefore he had no power to make any costs orders.

In expressing his conclusion the Warden stated his opinion that it was not the intention of parliament that parties who bona fide applied for forfeiture or who opposed the grant of tenements or certificates of exemption should be discouraged from doing so as a consequence of the potential to have costs awarded against them. He regarded the self regulation within the mining industry provided for by the Act as an important part of the scheme of the legislation and the intention of parliament that be so.

PLAINTS FOR FORFEITURE AND SECURITY FOR COSTS

Moment Pty Ltd and Bentonite (Australia) Ltd*

(Unreported, Warden sitting in open court held at Perth, 25 June 1998)

application for forfeiture of mining leases - application by defendant for security for costs and stay of proceedings pending payment - s1335 Corporations Law

Facts

On 7 October 1997 Moment Pty Ltd ("Moment") lodged complaints for forfeiture of three mining leases held by Bentonite (Australia) Ltd ("Bentonite").

Bentonite applied by motion for an order that Moment pay \$6,000 into court as security for Bentonite's costs and an order that the complaint be stayed pending such payment.

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