Decision

The Warden refused to order Bentonite to provide security for costs.

Reasoning

Bentonite contended the Warden was sitting in a court of law and that accordingly the provisions of s1335 of the Corporations Law could be invoked. Section 1335(1) provides that: "Where a corporation is a plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may ..." require the company to provide security for the defendant's costs.

Bentonite argued that the Warden in determining the applications for forfeiture was conducting a "legal proceeding" of the type referred to in s1335. It also contended it was irrelevant whether or not the Warden was exercising an administrative function.

The Warden relied upon his decision in *Greater Australian Gold NL v Linda Latham* (referred to above) where the Warden held that he had no jurisdiction or power under the Mining Act 1978 or s1335 of the Corporations Law to award costs arising out of any application for the grant or forfeiture of a mining tenement.

In summary the Warden held that he was not sitting in the Warden's Court, or to any court to which s1335 made reference and that in exercising the relevant functions he was not performing a judicial function but, rather, was acting purely administratively although in a judicial manner.

Order

The application for security for costs was dismissed with no order as to costs.

EXEMPTION FROM EXPENDITURE REQUIREMENTS

St Barbara Mines Ltd & Golden Shamrock Mines v Michael Joseph Foley*
(Unreported, Warden sitting in open court, 22 May 1998)

application for exemption from expenditure provisions – s 82 (1) of the Act – Meaning of the term "project" – whether mining tenement formed part of a "project" for the purposes of s 102 (2)(h) of the Act – meaning of "Expenditure" or "Expend" – whether expenditure on "prospecting" and "exploration" could be considered when assessing "aggregate expenditure" for the purposes of s 102 (2)(h) of the Act - s 102(3) and (4)

Facts

St Barbara Mines Ltd & Golden Shamrock Mines applied for an exemption for the whole of the prescribed expenditure requirement for the year ending 4 October 1996 in relation to Mining Lease 51/334 on the grounds that:

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* Tim Kavenagh, Partner, Corser & Corser, Perth.

The mining tenements are comprised within a project involving more than one tenement and that expenditure on the tenements comprised in that project would have been such as to satisfy the expenditure requirements in relation to the tenements concerned had the aggregate expenditure been apportioned in respect of the various tenements comprised in the project. That further time is required to fully evaluate the tenements.

Michael Joseph Foley objected to the grant of the application for exemption.

Decision

The Warden G.N. Calder SM recommended to the Minister that the application for exemption be refused on the following grounds:

1. that the subject tenement did not fall within the definition of "project";

2. that the actual aggregate expenditure rather than notional expenditure was to be examined. The Warden considered the total actual expenditure in the past on the subject tenement viewed as a proportion of the total required expenditure was small and there was little likelihood that there would be compliance with the prescribed expenditure requirement in the future.

Reasoning

(i) *Expenditure*

After considering *Strange v Pietsch* and *Australian Eagle Oil Co NL v Pawson and Cavan* the Warden found that if the actual cost to the tenement holder of the work done during the relevant year on the tenement in question is shown to be less than the amount claimed based upon "standard charges" within the mining industry (other than for the personal labour of an individual tenement holder) then for the purposes of assessing whether or not the expenditure requirement has been complied with, the figure against which that assessment must be made is the figure arrived at after a calculation of the actual or real out of pocket cost to the tenement holder, and is not a figure arrived at merely by ascribing a value to the work done based upon industry or any other standards.

In determining that actual expenditure rather than notional expenditure was to be examined when ascertaining whether the expenditure requirement had been met the Warden relied on s 8 of the Act and Regulation 31(1) which referred to the expenditure of money rather than "moneys worth".

The Warden conceded that the requirement of actual expenditure "would not preclude the valid claiming of "expenditure" for purposes of the Act and Regulations based upon evidence which established the actual cost to a corporation of a particular operation, even though a specific and identifiable payment may not have been made."

The Warden considered that the interpretation of "expend" would have equal application to the expenditure conditions which attach to exploration licences contained in Regulation 21 and to the expenditure conditions which attach to a prospecting licence as contained in Regulation 15(1).

The Warden considered that the proviso contained in regulation 31(1), which took into account work done by a holder in person on the tenement, would not have application to any form of corporate entity as the

use of the word "he" in the regulation was indicative of an intention that the proviso was applicable only to an individual person.

(ii) *Aggregate Expenditure – section 102(2)(h)*

The Warden found that it was not the intention of s 102(2)(h), and nor was it expressly stated or implied, that any distinctions be drawn between the type of expenditure or the type of tenement upon which the expenditure was expended for the purposes of assessing aggregate expenditure. However, he stated that in exercising their powers under s 102 of the Act, the Minister or the Warden may well form the view in a particular case that the imbalance of expenditure amounts as between the different types of tenements within a project is a justification for refusing a grant of a certificate of exemption.

In determining that s 102(2)(h) encompassed all types of expenditure the Warden found that it was of significance that Regulations 15(1), 21(1) and 31(1) all stated that expenditure shall be "in mining or in connection with mining" on the licence or lease. "Mining" was defined very broadly in s 8 (1) and includes, inter alia, "prospecting and exploring for minerals, and mining operations."

(iii) *Project – section 102(2)(h)*

The Warden found that the word "project" was not defined in the Act or Regulations. He considered that it should therefore be given its ordinary, everyday meaning applied to the context in which it is used. After considering *Western Gulf Oil and Mining Ltd, Southern Goldfields Ltd and Cord Holdings Ltd and Australian Eagle Oil Co NL*, the Warden found that "project" as it appeared in s 102 (2)(h) involved the notion that the implementation of or the carrying out of or the execution of the plan or scheme has commenced and was more than merely an idea or speculation. The capacity of the holder to finance and otherwise implement and manage or control the project were considered relevant.

The Warden found that an intention to eventually commence mining operations or to eventually explore or prospect when the time and money were available was not the same as saying that there was a "project" within the meaning of "project" in s 102(2)(h) of the Act as such an intention could not be said to amount to a "plan, draft or scheme" to mine or explore or prospect the tenement.

The Warden considered the decision of Warden Heaney SM in Austalian Eagle Oil Co NL delivered on 12 January 1996 and disagreed with Warden Heaney's conclusion that the approval of combined mineral exploration reports under section 115A of the Act conferred project status under s 102(2)(h).

(iv) *Section 102 (4)*

The Warden considered that it was incumbent upon the Warden, when considering an application for exemption, to comply with the provisions of s 102 (4) and to have regard to the matters mentioned therein. In exercising this power the Warden is entitled to have reference to the records of the Department including records in relation to the tenement which have not been tendered in evidence.

(v) *Section 102 (3)*

The Warden considered that it was part of the role of the Warden in considering applications for exemption to include in the report to the Minister any finding of fact, together with any views which the Warden may have which may bear upon the question as to whether or not there are any other reasons

which, in the opinion of the Minister in the exercise of his discretion in s 102 (3) of the Act, would be sufficient to justify the granting of the exemption.

DUTIES OF DIRECTORS AND SHAREHOLDERS OF A JOINT VENTURE COMPANY*

Japan Abrasive Materials Pty v Australian Fused Materials Pty Ltd & Ors
((1998) 16 ACLC 1, 172)

corporations Law - true construction of agreement between shareholders in joint venture company - agreement provides for shareholders to nominate directors - dispute as to whether resolution approved by directors - whether duty of directors is to act in accordance with best interests of company or appointing shareholders - whether fiduciary duties of directors attenuated by agreement - whether conduct of directors or shareholders constituted breach of shareholders agreement - whether directors breached their fiduciary duties and the Corporations Law - whether directors acted in bad faith.

Facts

Australian Fused Materials Pty Ltd ("AFM"), a joint venture company, was established to operate an industrial plant in Western Australia. AFM's shares are equally held by three joint venturers. Each joint venture party appointed two directors to the Board of the company.

The relationship between the joint venturers was governed by a Shareholders Agreement ("Agreement").

Pursuant to clause 4.10 of the Agreement, a resolution of the Board or of a general meeting of the company required a unanimous vote if the resolution concerned a major expansion of the production capacity of the plant or a major modification to the plant.

A dispute arose between the plaintiff, Japan Abrasive Materials Pty ("JAMP") and the other joint venturers (the second and third defendants, respectively Doral Advanced Materials Pty Ltd ("DAMP") and ACAP Australia Pty Ltd ("ACAP")) as to whether unanimous approval had been given by the Board to a proposal to expand the company's activities and plant.

JAMP sought a declaration that unanimous approval had not been given to the proposal. It also argued that its two directors had not approved the proposal, a permanent injunction to restrain the company from taking any further action to implement the expansion project should be granted.

DAMP and ACAP contended that the Board had as a fact, given its unanimous approval to the proposal. They counter-claimed that the conduct of JAMP:

- amounted to a breach of certain provisions of the Agreement, the Corporations Law of Australia ("Law") and the directors' fiduciary duties; and
- was motivated by bad faith.

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* Juliet Biggs, Solicitor, Mallesons Stephen Jaques, Perth.