CASE NOTES

QMC REFMAG PTY LIMITED & ORS V ANGEL[1]

Susannah Sage and Dr. John R. Forbes*

Powers of Queensland Mining Warden - late objection – appellate review

A recent case in the Rockhampton District Court has confirmed the wide jurisdiction of the Queensland Wardens Court under the *Mineral Resources Act* 1989 (Qld) ("the Act") to make determinations on any matters coming before it. It also considers the circumstances which justify the interference of the District Court, in the exercise of the Mining Warden's broad powers to make orders, on appeal.

QMC Refmag Pty Limited, QMC (Kunwarara) Pty Limited, Queensland Metals Corporation Limited v Bruce Angel arose from two applications to the Mining Warden in relation to the lodgement of objections to an application for the grant of a Mining Lease with the mining registrar under s 260 of the Act.

FACTS

Under s 252 of the Act, the steps taken by the mining registrar following the lodgement of an application for the grant of a mining lease include:-

- Confirmation that applicant is eligible to apply and has complied with Act;
- Issue of Certificate of Application of ML (endorses last objection day no earlier than 28 days after issue);
- Providing copies of Certificate to possible affected parties;
- Advertisement of Certificate in newspaper circulating in relevant mining district at least 14 days prior to last objection date.

Section 254 provides that if an owner affected by the application gives the mining registrar a written request for a conference within seven days after receiving a signed certificate of application for a mining lease stating the things the owner wants to discuss about the application, the registrar must call a conference about the application, to occur before the last objection day. Finally, under s 260, following the conference the land owner may lodge an objection within 7 days of the conference or the last objection day whichever is later.

This case arose from circumstances (described by the presiding District Court Judge Britton as "rather peculiar") in which a conference held between a miner and landowner was not correctly convened and

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1 District Court, Rockhampton, DC99/207, 9 July 1999.

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therefore a formal objection lodged within 7 days of the conference, but outside the last objection day, was claimed by the miner to be invalid.[2]

The Mining Warden who heard the case, Warden Windridge, decided that the application should be readvertised, which in practice would involve a reissue of the certificate of application in order to allow the landowner the chance to validly lodge an objection. The Warden concluded that the "spirit and intent" of s 254 was to resolve the issues surrounding applications in a timely and non-legal atmosphere, and that in this case the registrar had made a bona fide attempt to bring the parties together. He expressed the opinion that a speedy and effective resolution could be negotiated given the amount of goodwill held by the parties who had had a good working relationship for some time. He considered that the rights of the landowner would be protected and the delay to the miner would be minimal if the application was readvertised.

Judge Britton upheld the order of the Warden dismissing the applicant's claim that the order was not within the power of the Wardens Court. His Honour further discussed the Warden's broad powers to make determinations and whether there were any circumstances where the District Court would interfere in the exercise of this discretion.

ISSUES

Does the Mining Warden have the power to order the application be *readvertised* to "protect the rights of the landowner"?

The Warden's decision referred to s 253(1)(b) of the Act giving the registrar power to reissue a certificate of application "because compliance with the (original) certificate is impracticable". The Warden also mentioned ss 363(4) and 376(1) although he did not discuss their impact on the matter before him.

In discussing the submissions of the applicant and respondent on appeal, Judge Britton discussed the powers conferred by these provisions.

Section 363 is the section of the Act which confers the substantive jurisdiction of the Wardens Court. Subsection 363(4) is in the following terms:-

> "The jurisdiction of a Wardens Court includes jurisdiction to take cognisance of and determine all claims and interests arising in any proceeding before it, both legal and equitable, and in the exercise of its jurisdiction a Wardens Court shall have power to grant equitable remedies."

Subsection 363(6) further provides:-

> "In relation to any matter within its jurisdiction (or in relation to any matter which a Wardens Court considers necessary to determine to establish its jurisdiction) a Wardens Court may grant such remedy and relief as it thinks just and is in accordance with law, including equitable remedy and relief."

Section 376 further sets out the powers of the Wardens Court and at subsection 376(1)(l) provides:

> "In all matters within its jurisdiction a Wardens Court shall have power to—

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2 See discussion below.

...

(l) generally make such orders, determinations or assessments and give such judgements;

...

as it thinks fit for the purpose of effectively disposing of any matter before it according to the merits of the case."

The District Court found as follows:-

- Although there was no express provision of the Act, the power of the Mining Warden to order the readvertising was within the wide powers under s 376(1)(l);
- There is no necessity for the Mining Warden to make any order in respect of the reissue of a certificate of application, as this is an administrative process which would give effect to the order for re-advertisement, valid by virtue of s 363(6);
- In making the order to readvertise it is proper for the Warden to act pursuant to s 253(b) as compliance with the previous certificate is rendered impossible.

Judge Britton held that the language of a statutory grant of jurisdiction should not receive a narrow construction and that "it must be taken to have all the powers that are necessary to permit it to act effectively within the jurisdiction conferred".

If the Wardens Court has a broad discretion to make determinations, what if any circumstances will justify the intervention of the District Court on appeal?

The decision of Judge Britton confirms the general principle that the District Court will not intervene on appeal from the Wardens Court to overturn a determination made by the Warden, where the order in question complies with the following general principles:-

- The order is in line with intention of the Act;
- The Wardens Court assisted in its administrative function by hearing from the one party most closely and adversely affected by the proposed mining lease;
- The consequences of delay (time and expense) to applicant due to effect of order are minimal;
- The risks involved to applicant due to effect of the order are minimal (ie limited possible objectors);
- The order does not materially and adversely affect the applicant's substantive rights;
- The order provides relief by reversing a material and adverse effect on the respondent's substantive rights.

The case confirms that the Act does not prescribe the powers of the Mining Warden to make determinations, but rather confers a broad capacity to make decisions in relation to matters within his

jurisdiction, even where provisions of the Act have been breached.[3]

The decision is not the subject of appeal.

FURTHER DISCUSSION

Late objections and hard cases

Every now and then ss 260 and 268 of the *Mineral Resources Act*, relating to objections to lease applications, throw up a really "hard case". This is hardly surprising, because they deal with a perennial tension between miners and landowners in absolute terms. Section 260 of the Act provides that:

> "An entity may on or before the last date fixed for the receipt of objections lodge with the mining registrar an objection ..."

Section 268(4) provides:

> "The Wardens Court shall not entertain an objection to an application [not] duly lodged in respect of the application."

A late objection is clearly one that is not "duly lodged". The Act does not enable the Warden or anyone else to extend the time for lodgement, although the Act itself extends time in special cases, one of which is mentioned above. Courts have no implied or inherent power to relax a strict time limit set by statute.[4] Such limits are not mere matters of procedure but rules defining the jurisdiction of the court.[5]

There are several cases in which the time limit in s 260 has been rigidly enforced.[6] But in a few others Mining Wardens have found more or less convincing ways of circumventing it. In 1989 Warden Killeen dealt with a late objection with which he sympathised by sending it on with his report to the Minister[7] without "entertaining evidence in relation to it at the inquiry".[8]

In another case Warden Windridge faced a serious dilemma; a late and therefore invalid objection came from a responsible public authority alleging that the proposed mine would pollute the water supplies of the large industrial town of Gladstone.[9] Once again the statutory command to hear no evidence was obeyed, but this time the Warden not only referred the objection to the Minister, he also took it into account in recommending that the application be rejected. Consequently an objection not "duly lodged" was

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3 It will be interesting to note the application of this principle to the interpretation of the Act by the new Land and Resources Tribunal which will assume the role of the Wardens Court in Queensland shortly.

4 *Moxham v McDonald* (1874) 4 QSCR 41; *Moore v Downey* [1955] QWN 34; *Proctor v Jetway Aviation* [1982] 2 NSWLR 264; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 69 ALJR 778.

5 *David Grant & Co Pty Ltd v Westpac Banking Corporation*, above.

6 *Re Tarack Pty Ltd (Applicant) and Initiating Explosive Systems Pty Ltd (Objector)*, Brisbane, 7 November 1995; *Re Austex Mining NL and Or (Caboolture Shire Council and Ors Objectors)*, Brisbane, 7 November 1995; *Re Barry Griffith Clark (Applicant) and Council of Redland Shire and Anor (Objectors)*, Brisbane 6 November 1995, all unreported. See notes in (1996) 15 AMPLA Bulletin 3; (1993) 12 AMPLA Bulletin 5.

7 See s 269 of the Act.

8 *Re Great Boulder Holdings*, Wardens Court, Bowen 15 March 1989.

9 *Re Shannon and Others (Applicants) and Gladstone Area Water Board (Objector)*, unreported, Brisbane 8 May 1992, Warden Windridge SM.

influential although the applicant miner did not have a full opportunity to answer it. The principles of natural justice now apply to inquiries as well as to tribunals which "hear and determine", but the procedure adopted in the Gladstone case was not tested by way of judicial review.

By the same token the rigidity of s 268(4) can work against an objector who does object in time. When the time for objections expires, objections properly lodged cannot be amended, but it appears that there is no counterpart of s 268(4) to prevent applicants from amending their documents, perhaps in a deliberate attempt to forestall the objector. There is no direct authority in point, but if this is the true position it could well be unfair to an objector who has sedulously followed the rules. Indeed an objector found himself in this position in a case that reached the Supreme Court in 1997[10], but there it was unnecessary to decide whether (and if so, how) the time limit could be relaxed to enable the objector to "re-plead".

Is there a new way out for meritorious late objections?

A new way of dealing with meritorious late objections may emerge from the decision of the Warden in *Re QMC Refmag Pty Ltd & Ors.*[11] QMC sought an order striking out a landowner's objections on the ground that they were lodged three weeks after the time for objections had expired. The landowner answered that time was automatically extended by the operation of ss 254 and 260 of the Act.

It was common ground that the objections were lodged 3 weeks after the normal time limit expired, but within 7 days of a purported "registrar's conference". However, QMC contended, as a matter of law, that no proper registrar's conference had taken place; therefore the "conference exception" did not apply, and the objections were clearly out of time. The factual basis of that argument was that, although the parties did in fact meet before the registrar, the objector's request for a conference was not in proper form. It was not a "written request stating the things that the owner want[ed] to discuss" but merely an oral request, without any specification of the topics for discussion.

The Warden accepted this submission and found that the objections were not duly lodged. But that was not the end of it. The Warden's sense of justice was troubled by two considerations:-

- that the registrar may have inadvertently misled the landowner by treating his informal request as sufficient; and

- that on 21 September 1998 a senior officer of the Mines and Energy Department stated in writing: "The holding of the conference was commenced before the last objection day ended[12] and accordingly complies with the provisions of the Act and with the Department's normal procedures."

In these circumstances the Warden did not think that the objector's delay should be fatal, but he did not resort to the cases, mentioned above, in which a blind eye was turned to sub-section 268(4) in fairness to the objector, or (in the Gladstone case) as a matter of public interest.

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10 *Wall v Mining Warden at Emerald & Ors*, unreported, 29 April 1997, Supreme Court of Queensland, Rockhampton, Demack J.

11 Warden Windridge, Brisbane 9 November 1998. I am indebted to Mr Roger North, solicitor, who referred me to this case.

12 This part of the statement was factually correct.

Instead, a solution to this hard case was found in an order that the application for the lease should be re-advertised. The Warden found jurisdiction to make the order for re-advertising in a combination of ss 363(4) and 376(1) of the Act.

As the District Court Judge later remarked, without explaining his comment, the Warden did not state "what relevance he considered s 363(4) might have had to the matter he was considering." Perhaps it was the Warden's view that "equitable" in s 363(4) confers a discretion to act "in accordance with equity and good conscience" or, in plain language, to do whatever seems to be fair. However, it is submitted that "equitable" is here confined to its meaning as a term of art.

Right of appeal

A threshold question in this case was whether the Warden's decision was administrative rather than judicial, and if administrative, whether appeal was actually available. On the basis of an earlier District Court decision[13] and without further discussion Britton DCJ held that the appeal was competent, but it may be a moot point. Mining Wardens have a unique miscellany of administrative and judicial functions.

A lease application inquiry is an administrative function despite the reference to the Warden's "Court" in s.269(1).[14] On the other hand the sections dealing with appeals to the District Court are in Part 10, which is concerned (so far as is relevant here) with the Warden's judicial powers, that is with a "court" in the true sense. Nevertheless, the Warden may be called on to make a determination in the course of an administrative inquiry, for example, on the validity of an objection, and it is arguable that he then puts on his judicial hat for the moment. Further (or in the alternative) there is a suggestion in the Act,[15] albeit obscure, that some administrative actions of the Wardens Court are after all appellable. These questions await resolution by a higher authority. The decision of a District Court on appeal from the Warden's is "final and conclusive" (s 384(6)) but that formula does not exclude judicial review for error of law.[16] There is also provision for stating a case for the opinion of the Supreme Court on any question of law arising on an appeal.[17]

Conclusion

The substantive question in this case was whether the Warden has power to order that a lease application be re-advertised? Britton DCJ answered "Yes", finding the power in a conjunction of sections 363 and 376[18]. Britton DCJ concluded:-

> "In all the circumstances I am of the view that the order for re-advertising was clearly within the power of the Wardens Court. The matter which was before the Wardens Court was clearly a matter

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13 *Department of Natural Resources v Monto Resources Pty Ltd*, unreported, 13 December 1996, McGill DCJ.

14 *R v Mining Warden at Herberton; ex parte Le Grand* [1971] QWN 36.

15 Section 383(8)(b) exempts from appeal recommendations of the Wardens Court, as well as "finding[s] upon which the Governor in Council or the Minister may exercise a discretion". This is either an otiose provision (since administrative acts are generally not subject to a judicial appeal), or it implies that administrative decisions not mentioned in s 383(8) are appellable.

16 *Hockey v Yelland* (1984) 157 CLR 124 at 130, 139, 142; *R V Medical Appeals Tribunal; ex part* Gilmore [1957] 1 QB 574 at 583; *R v Cth Court of Conciliation and Arbitration; ex parte Whybrow & Co* (1910) 11 CLR 1.

17 Section 386.

18 See discussion above

> which was within its jurisdiction and that being so [it] was empowered under s 376(1)(l). It seems to me also that by virtue of s 363(6) the Wardens Court was entitled to grant such remedy and relief as it thought fit and was in accordance with law and that the making of the order for re-advertising could properly be regarded as being authorised by that sub-section. it does not appear to me to be necessary for there to be any express grant of [that] power."

The decision came down to a lawful exercise of the Warden's discretion, and there was no reason to intervene, considering that there "may have been some confusion on the part of the mining registrar which may have caused the respondent to act in a way in which he was prejudiced" [sic].

This approach offers a better way of dealing with hard cases arising under ss 260 and 268(4) than devices hitherto tried.[19] While it may involve some delay and trouble to the applicant, and incidentally enable other late and less meritorious objectors to enjoy a second chance, it does give the miner and the original objector a full opportunity to present their cases to the Warden's inquiry, without the charade of treating the objections as non-existent at the hearing but then passing them on, with or without comment, to the Department of Minerals and Energy.[20]

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19 For example, in *Re Great boulder Holdings, Wardens Court,* Bowen 15 March 1989, and *Re Shannon and Others (Applicants) and Gladstone Area Water Board* (Objector), unreported, Brisbane 8 May 1992, Warden Windridge SM.

20 It is noted that, although this was not done in the present case, the Warden could also require a late objector who is treated as a special case to pay the miner's costs of and incidental to the re-advertising. For the power of the Warden to make costs orders, including those relating to "the hearing of applications and objections", see s 368(1).