[2024] WAMW 31

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	**IN THE MATTER OF RE PETER JOHN PAS AND ANOR [2024] WAMW 31**
CORAM	**:**	WARDEN T MCPHEE
HEARD	**:**	21 June 2024
DELIVERED	**:**	15 July 2024
FILE NO/S	**:**	641961Application for Restoration
TENEMENT NO/S	**:**	Mining Lease 09/109
BETWEEN	**:**	**PETER JOHN PAS** (First Applicant) AND **TAMAS KAPITANY** (Second Applicant)

Catchwords: Application for restoration, turns on its own facts, appropriateness of the quantum of fines imposed as a deterrent.

Legislation:

Mining Act** 1978 (WA) (the Act)**: s97, 97A

Result: ***Recommendation for Restoration***

Representation:

Counsel:

Applicant	:	Mr Masson with Mr Holler
Objector	:	N/A

Solicitors:

Applicant	:	Ensign Legal
Objector	:	N/A

Cases referred to:

- ***BRGM Nominees Pty Ltd v Hake*** (unreported Kalgoorlie Warden's Court 26 October 1988 Volume 5, Folio 16)
- ***Clive Patrick Palmer & Ors v Western Australian Gold Resources Pty Ltd*** [2024] WAMW 28
- ***Onslow Resources Ltd v Hon William Joseph Johnston MLA In his Capacity As Minister For Mines And Petroleum*** [2021] WASCA 151
- ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2
- ***Forrest & Forrest v Wilson*** [2017] HCA 30; (2017) 262 CLR 510
- ***In the matter of Applications for Forfeiture Re Lachlan James Brown and Others*** [2024] WAMW 29

Introduction & Summary

1 I have before me an application for restoration of M09/109 (the Application).

2 The Application is brought in response to the forfeiture of the tenement M09/109 (the Tenement) on 10 January 2022, as a result of non-payment of a penalty pursuant to section 97 of the Act.

3 On 22 February 2022, the Applicants (who are joint tenement holders), made the Application pursuant to section 97A of the Act.

4 The Application was previously the subject of an objection, however that objection did not proceed further, as a result of non-compliance with directions made. The Objection was dismissed pursuant to Regulation 139 on 10 May 2024.

5 Nevertheless the Application proceeded before me as a result of the requirements of Act.

Evidence in Support

6 The Applicant relied on the following materials in support of the Applications:

a. Affidavit of Tamas Kapitany dated 19/12/2023, which was received as Exhibit 1;

b. Affidavit of Darren McAulay dated 21/12/2023 , which was received as Exhibit 2;

c. Affidavit of Martin Socklich dated 21/12/2023 , which was received as Exhibit 3;

d. Affidavit of Patrick Gospar dated 21/12/2023; which was received as Exhibit 4.

Summary of the Position

7 The Tenement is held by Mr Kapitany, and Mr Pas (the Applicants). The Tenement itself is located in the North of WA.

8 The Tenement Holders are resident in regional Victoria. The Applicants conduct a gemstone and crystal mining operation upon the Tenement.

9 The Tenement has been held since 2008.

10 In the period prior to forfeiture, the tenement search records show reported expenditure on the tenement of $405,769.77. The minimum required expenditure for that same period was $140,000.00

11 The records also show a number of instances of non-compliance. As described in paragraph 20 of the Applicants submissions:

a. On 21 July 2010, a notice for non-payment of rent was issued. However, this notice was removed on the same day after the Restoration Applicants almost immediately paid its outstanding commitment;

b. on 21 July 2010, a notice for non-compliance with expenditure conditions was issued. This led to a $180.00 fine, which was paid eight days later;

c. on 20 November 2015, 14 November 2017 and 12 February 2018, three notices for non-compliance with royalty provisions were issued. However, the Minister did not impose a penalty following any of these notices; and

d. on 7 August 2019, a notice for non-compliance with royalty provisions was issued. The Minister imposed a penalty of $183.04, which the Restoration Applicants paid within eleven days.

12 Mr Kapitany, in his Affidavit, provides a degree of evidence in relation to the matters referred to immediately above.

13 Most relevantly to this Application, is the event of non-compliance leading to this matter.

14 That was a delay in the payment of a fine for the late payment of royalties. That delay resulted in the forfeiture of the tenement. The fine in question was $534.96.

15 That fine was required to be paid on 16 February 2022. That fine was paid on 22 February 2022. As it was late, the Tenement was forfeited.

16 The Applicants provide an explanation for the non-payment of the fine on time, in that it was said there was a difficulty with the mail delivery to their regional Victorian home, arising as a result of Covid issues.

17 Evidence was provided, which I accept, that demonstrated that an individual (Mr Gospar) attended the post office to which the relevant notice was sent, on multiple occasions in the time period when the post in question was said to have arrived. It not was delivered to the post office until 21 February 2022, and was collected on 22 February 2022.

18 The fine was paid late, however that did not prevent the forfeiture process.

19 The Applicants make the Application on the basis that there is a reasonable explanation for the omission to make the required payment on time, and that the omission does not rise to the level of gross carelessness.

20 The Applicants also make submissions asserting special circumstances. The tenement was held for a period of 14 years before its forfeiture and made expenditure in excess of the required amounts.

21 The Applicants also carry out educational activities on the Tenements.

Applicable law

22 The law relevant to Applications for Restorations is set out in section 97A of the Act.

23 That provision provides that the holder of a mining tenement which is forfeited by the Department can apply for the mining tenement to be restored, and the forfeiture cancelled. It is said in sub-section (1) as follows:

a. *"Subject to sub-section (2) where a mining tenement is forfeited under or by virtue of section 96, 96A or 97 a person who was immediately prior to the forfeiture the holder of the tenement concerned may apply for the mining tenement to be restored to him and the forfeiture cancelled."*

24 It is submitted to me and I accept, that the role of the Warden in a restoration proceeding in relation to a mining lease, is to make the recommendations to the Minister as to whether the restoration application should be refused or approved and the ultimate decision, therefore remains with the Minister.

25 There is no dispute about that.

26 There is no guidance in the Act or the Regulations as to what may be considered by the Warden in deciding whether or not to recommend the ground for restoration application.

27 Unsurprisingly, it follows that the relevant approach to take, is to seek to examine all of the circumstances of the case presented and come to a view as to whether or not there is a reasonable and just explanation for the failure which has resulted in the forfeiture, and secondly whether that failure ought be cured.

28 That proposition, is borne out in the authority of ***BRGM Nominees Pty Ltd v Hake*** (unreported Kalgoorlie Warden's Court 26 October 1988 Volume 5, Folio 16) at pages 3-5 which says as follows:

a. "*The Act is silent on matters to be taken into account when determining whether a mining lease should be restored or not. Not wishing to be exhausted it seems to me that consideration should be given to the explanation for non-payment of rent, the degree of lack of care if any on*

> *the part of the holder when attending to payment of the rent, and the existence of any special circumstances."*

29 I note recently, in ***Clive Patrick Palmer & Ors v Western Australian Gold Resources Pty Ltd*** [2024] WAMW 28, the learned Warden Maughan reaffirmed that approach.

30 In my opinion the decision whether to restore or not would involve the weighing those considerations mentioned.

31 As a matter of general principle at the outset, none of those considerations should be given any greater priority than the other. The facts of each particular case will then determine where the emphasis should be placed.

32 Where there is no good explanation, a gross lack of care and no special circumstances then restoration should be refused.

33 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.

34 I consider that where there is a good explanation for the omission, and no gross lack of care in respect of it, I consider that it may (subject to the consideration of the other particular facts in the matter), be appropriate to recommend a restoration.

35 Those principles are not in doubt and have been applied in other matters where an application for a restoration of licenses has been made.

36 In the circumstances of this case, I have described above the factual circumstances giving rise to the applicant's tenure of the mining tenement.

37 In the particular circumstances, in my opinion, it is not appropriate to classify, the error that was made by the applicant, as arising from a gross lack of care, or indeed a lack of care as it pertained to the collection of the post at all.

38 Relevantly, In the particular circumstances presented, I do not accept that the failure which is frankly accepted on the part of the Applicants, amounts to a gross lack of care. It is not a contumelious disregard of the obligations arising from the Mining Act, rather it is an error which occurred following difficulties in the postal arrangements which were in place during the Covid affected period.

39 I accept the evidence proffered that Mr Gospar attended the post office repeatedly in the period when that post ought to have been delivered.

40 I accept the evidence that the relevant registered post was not delivered on time. On the evidence before me, I am satisfied on the balance of probabilities that there was a delay in the provision of the post, which occurred as a result of the impact of Covid restrictions on the postal system to more remote areas at the relevant time.

41 It follows that there is a reasonable explanation for the failure to make the relevant payment on time.

42 There is no gross lack of care in respect of the particular incident, in respect of which there was forfeiture.

43 The final point to note in this section is that the evidence proffered in support of a notion of special circumstances, does not rise to that level. There is insufficient detail of the educational activities, for them to be considered a special circumstance of any weight, impacting upon the determination required.

Other relevant considerations?

44 Having regard to the nature of the tenement record, there is a history of non-compliance events. I have referred to the list above.

45 It is noted that the penalties involved in those incidences of non-compliance, are very slight, ranging from decisions involving no financial penalties at all, to a maximum penalty of $534.96.

46 The precise detail of those non-compliant events is not completely clear. Counsel for the Applicant made a submission that the inference to be drawn from either the decision to impose no fine at all, or very modest fines, was a compelled inference that the non-compliance was of a very minor nature.

47 They appear to be events of delays in the making of payments of rent and royalties, and non-compliance with expenditure provisions.

48 With significant reservations, I am prepared to accept the submission of counsel, in this case.

49 I say with significant reservations, as the quantum of fines imposed by the Minister or Department in this matter, and indeed in other matters on my observation, is something of an unknown process.

50 The rationale for the determination of the quantum of fines imposed by the Department for non-compliance was not placed before me, if indeed it is known by the Applicant.

51 What is clear though, is that despite a number of fines being imposed, and a number of instances of non-compliance being recorded, the sort of behavior giving rise to the non-compliance events did not seem to change. The events of non-compliance continued to occur over a rather sustained period.

52 The most striking example of that may be seen having regard to paragraph 11(c), and 11(d) above, when taken with the additional fact of the final fine imposed, being the $534.96. When those matters are unrolled, the following state of affairs presents:

a. On 20 November 2015 there was noncompliance with royalty provisions, for which no fine was imposed.

b. On 14 November 2017 there was noncompliance with royalty provisions, for which no fine was imposed.

c. On 12 February 2018 there was noncompliance with royalty provisions, for which no fine was imposed.

d. On 7 August 2019 there was noncompliance with royalty provisions, for which a fine of $183.04 was imposed.

e. And finally, on 12 February 2022 there was noncompliance with royalty provisions, for which a fine of $534.96 was imposed.

53 The position presented is that it was not until the 4th occasion of non-compliance with royalty provisions, that a fine was imposed. Even then, that fine was $183.04.

54 A fifth event of non-compliance resulted in what was no doubt regarded by those imposing it, as a far stiffer penalty, of $534.96. With respect to those persons who decided the quantum, that is a very modest fine in the circumstances. That is particularly so, it seems to me, in circumstances where the non-compliance related to royalty provisions. The importance to the State of compliance with royalty provisions, is self-evident.

55 Further, the repeated non-compliant conduct of the same character, a rather troubling state of affairs in and of itself, also leads inexorably to the consideration whether it is correct to express a view that any non-compliance, may be considered to be minor or of no moment. I rather suspect that the answer to that proposition is no.

56 Such a proposition seems to sit in conflict with what may be regarded as a line of cases commencing with ***Forrest & Forrest v Wilson*** [2017] HCA 30; (2017) 262 CLR 510 (***Forrest & Forrest v Wilson)***, ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2 and ***Onslow Resources Ltd v Hon William Joseph Johnston MLA In his Capacity As Minister For Mines And Petroleum*** [2021] WASCA 151 (23 August 2021).

57 In ***Forrest & Forrest v Wilson*** at [65] per Kiefel CJ, Bell, Gageler & Keane JJ:

a. *[T]he public interest is not well served by allowing non-compliance with a legislative regime to be overlooked or excused by the officers of the executive government charged with its administration. To permit such a state of affairs might imperil the honest and efficient enforcement of the statutory regime, by allowing scope for dealings between miners and officers of the executive government in relation to the relaxation of the requirements of the legislation. One can be confident that such a state of affairs was not intended by the Act.*

58 It hardly need be stated, that the imposition of no penalties at all for non compliant events, simply cannot have a either a specific or generally deterrent effect.

59 Further, in my view it appears to foster the development of a culture of non-compliance, as appears demonstrated in cases like the one before me here.

60 Similarly too, given the evidence of expenditure on the tenement was significant ($405,769.77 over the life of the Tenement, well in excess of the $140,000), the imposition of fines of the quantum as imposed in this matter, are really properly characterized (politely) as nominal, and most relevantly, could not be said in any way, to be an incentive or regulatory mechanism able to alter the non-compliant behavior.

61 This case bares out that the fines imposed did not in fact result in any change in behavior, until an actual forfeiture occurred.

62 The fines imposed by the Minister and or the Department are not amenable to control by me.

63 However, I consider it worth pointing out, that the imposition of no or nominal fines for a range of non-compliant acts is not likely to alter the behavior of those parties who act in a non-compliant manner.

64 Certainly from my perspective as a Warden, in light of the manner of the development of the law following ***Forrest & Forrest v Wilson*** [2017] HCA 30; (2017) 262 CLR 510, in my view it is appropriate to consider afresh the assessment of the appropriate quantum of fines imposed by the Court, in light of the nature of the matters brought into stark relief (for me at least) in this application.

65 I am further emboldened in the expression of these views by the recent decision of the learned Warden Maughan in ***In the matter of Applications for Forfeiture Re Lachlan James Brown and Others*** [2024] WAMW 29, where his Honour expressed the view that the fines previously and commonly imposed were inadequate.

66 In particular, I consider the comments of his Honour at [7] – [11] of that decision, in respect of sentencing, are apposite to a consideration of the matters relevant to the exercise of a discretion as to the appropriate quantum of a fine to impose upon a party for non-compliance with the requirements of the Act.

67 His Honour, belling the cat, determined in that matter to impose fines which are, by any measure, significantly greater than those imposed previously for similar conduct.

68 With very great respect I agree completely with his Honour's view as expressed.

69 None of those issues however are determinative of this case.

70 This application succeeds because I have accepted the explanation for the event of non-compliance. Were it not for that evidence, which demonstrated to me that the Applicant was not truly at fault for the ultimate forfeiture, and would have paid the fine on time had it been received, the history of non-compliance would have been a very steep hill for the Applicant to overcome, irrespective of the nominal nature of the fines imposed.

71 In this respect, and noting the error made arose from established Covid restrictions, this matter would seem to have rather unique characteristics, which is to the ultimate benefit of the Applicants.

72 In this case there ought to be a recommendation for the restoration of the Tenement.

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Warden T W McPhee
15 July 2024