
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : ANDREW JAMES HAWKER v AUSTRALIAN
COPPER HOLDINGS PTY LTD [2022] WAMW 14

CORAM : WARDEN T W McPHEE

HEARD : 9 May 2022

DELIVERED : 18 May 2022

FILE NO/S : Objections 591814 – 591817

TENEMENT NO/S : Applications for Prospecting Licences 08/774 – 08/777

BETWEEN : **ANDREW JAMES HAWKER**
(Applicant)

AND

AUSTRALIAN COPPER HOLDINGS PTY LTD
(Objector)

Catchwords: *Application to no longer hear an Objection, Special
Prospecting Licence, Prospecting Licence, No prejudice,
concession as to proper basis for objection.*

Legislation:

- *Mining Act 1978 (WA)* (the Act) s 42, 70, 70(9a),
- *Mining Regulations 1981 (WA)* (the Regulations) Reg. 154(1)

Result: ***1) Application dismissed.***

2) Directions made for submissions on consequential orders.

Representation:

Counsel:

Applicant	:	Mr Banda
Objector	:	Mr Masson

Solicitors:

Applicant	:	Bennett & Co
Objector	:	Ensign Legal

Cases referred to:

- *Aquila Steel Pty Ltd v Corker* [2021] WAMW 11
- *Barclay Mowlem Construction Ltd v Dampier Port Authority & Anor* [2006] WASC 281 (30 November 2006)

REASONS FOR DECISION

Introduction

- 1 In this matter I made a determination that the Applicant's application dated 9 February 2022, heard on 9 May 2022 should be dismissed.
- 2 I indicated at the completion of that hearing that I would give short reasons in due course and these are those reasons.
- 3 I have before me an interlocutory application dated 9 February 2022 by the Applicant (the Application).
- 4 The substance of the Application is drafted in the following manner:
 - (1) *Objections 591814, 591815, 591816 and 591817 (the Objections) lodged by Australian Copper Holdings against the applications for Special Prospecting Licences 08/0774, 08/0775, 08/0776 and 08/0777 be dismissed on the grounds that:*
 - (i) *the objections were made by ACH the former holder of the primary tenements;*
 - (ii) *the objections were lodged after ACH ceased to be the holder of the primary tenement; and*
 - (iii) *a person or entity other than the holder of the primary tenement is not permitted to file an objection against an application for a Special Prospecting Licence pursuant to section 70(3) of the Mining Act 1978 (WA) the application is resisted by the Objector.*
- 5 Noting that the application for a Special Prospecting Licence is dated 3 November 2020 and the objections are dated one month later, it may be said that this matter is at an early stage.

- 6 In the underlined proceeding, programming orders had been made to progress the matter, however that program had been interrupted by the filing of this Application.

Jurisdiction

- 7 The statutory basis for making the interlocutory application seeking a dismissal was not identified in the interlocutory application documentation.
- 8 In effect though, looking at the substance of the Application, and after hearing submissions from Counsel for the Applicant, it is clear that it seeks orders that the objections be dismissed summarily.
- 9 In this regard I took it to mean that it was advanced by the Applicant that the objector ought no longer be heard in relation to its objections.
- 10 In this respect I note the issue has been given some recent consideration in the matter of *Aquila Steel Pty Ltd v Corker* [2021] WAMW 11 per Warden O’Sullivan at paragraph 27:

*“The language of s 42(3) makes it clear that the warden is not required to hear every objection. This is consistent with the observations made by Franklyn J in **Re Warden Heaney; Ex parte Serpentine-Jarrahdale Ratepayers’ and Residents’ Association (Inc) (Re Warden Heaney)** as to the operation of s 75(4) which is identical in its terms to s 42(3):*

There is nothing in the Act which imposes any other qualification or any limitation on the right of a person to object by lodging an application. Prior to the amendment, the objection having been lodged, the objector was entitled to be heard. There is now no such entitlement and whether the objector is given the opportunity to be heard is a matter for the exercise of discretion by the Warden. The discretion is to give the objector an opportunity to be heard and not one to hear him. Thus there is no “right” to be heard.”

- 11 It is noteworthy in my opinion that in that particular matter Warden O’Sullivan (as he then was) was tasked with addressing an objection by an individual seemingly with an interest (of some sort), in a pastoral lease, objecting to a tenement application.

- 12 That is not this case.
- 13 This matter started life as an objection to an application for a Special Prospecting Licence.
- 14 In any event from a jurisdictional perspective, there is no dispute that I have the capacity to deal with the matter on the basis that its in effect an application to decline to hear the objector's objection any further.

The Applicant's Position

- 15 It is necessary to consider the particular circumstances presenting in order to understand the nature of the argument advanced by the Applicant. The Applicant's position is a somewhat difficult one.
- 16 In very broad terms the application for a Special Prospecting Licence was made on 3 November 2020.
- 17 Almost immediately after that application had been lodged (in terms of matters of minutes) the underlying tenement expired.
- 18 It follows that the underlying tenement expired at the end of 3 November 2020.
- 19 The objection lodged by the Respondent, was lodged on 3 December 2020 some one month later.
- 20 It is not in dispute before me relevantly that section 70 of the Act applies to the underlying application. In particular section 70(9a) applies to a case where the underlying tenement has expired.
- 21 I set out that provision below:

(9a) Where, before the determination of an application for a special prospecting licence in respect of land, the primary tenement is surrendered or forfeited or expires, the application is, by virtue of this subsection, converted into an application for a prospecting licence in respect of that land and the provisions of this Act relating to such applications apply accordingly.

- 22 Relevantly for the purpose of the application before me that meant that the application filed by the applicants for a Special Prospecting Licence, was by the operation of section 70(9a) of the Act transmuted into an application for a Prospecting Licence upon the expiration of the underlying tenement.
- 23 It is in this context that the Applicant says that the objection can have no prospect of success, because it is framed in a manner which is consistent with it being only able to be construed as an objection to an application for Special Prospecting Licence.
- 24 That view is based entirely on the use of the phrase “*The applicant for this special prospecting application...*” in the body of the objection form, in 2 of the 3 grounds put.
- 25 Those words are relied upon by the Applicant to assert that in truth it is an objection to a Special Prospecting Licence, not an objection to a Prospecting Licence.
- 26 Nothing else was relied upon to seek to convince me to construe the form in the manner advocated for.
- 27 The Applicant contends, that given it is no longer an application for Special Prospecting Licence, the objection should be dismissed. In effect, it is said that the objection is incompetent as that phrase is used in a pleading sense.
- 28 That at least, is what I understood the effect of the Applicants position to be.

The Respondent’s Position

- 29 The Respondent’s position is that the objection as filed, is a valid objection for the purposes of the application for a Prospecting Licence.
- 30 Furthermore, the Respondent says, if necessary, that the net effect of section 70(9a) of the Act, is to transmute the entirety of the relevant proceedings from

being an application for a Special Prospecting Licence into an application for a Prospecting Licence. Necessarily, that includes any objection filed.

31 As I understood the position, in the relevant objection form, the Respondent advances, in broad terms, three grounds:

- a. That the initial application was not served as required;
- b. The application relied upon the improper use of confidential materials;
- c. The application does not conform with the requirements of the Act.

32 The Respondent's position in relation to the objection which had been filed, is frankly that the three grounds filed give rise to a proper and valid objection to the tenement application made by the Applicant, and the Respondent is entitled to be heard on them.

33 I note also, that particulars of the objection were provided on 14 January 2022.

Disposition

34 In my opinion the Application must be dismissed.

35 The written submissions filed by both parties sought to embark upon a detailed discussion about the jurisdictional basis and peculiar effect of the position created, arising from the passage of time between the filing of the application, the subsequent expiration of the underlying tenement, and then the filing of the objection.

36 I consider I do not need to determine those matters on the Application.

37 At its heart, it was put by the Applicant, that because the objection properly construed an objection to a Special Prospecting Licence, it should be dismissed as having no capacity to succeed.

38 In this regard the Applicant contended that the detail of the objection could only be construed as being an objection to a Special Prospecting Licence.

- 39 So it followed on the Applicant’s reasoning, that because the Special Prospecting Licence application had been transmuted into a Prospecting Licence Application, the objection filed, construed as a Special Prospecting Licence objection, could not possibly succeed.
- 40 With due respect to counsel for the applicant advancing that submission I simply do not agree.
- 41 The language used in the objection could be clearer and more precise, however in my opinion the three basis referred to above are the grounds currently relied upon, and arise from the relevant document. Further, the form is able to be construed as an objection to a Prospecting Licence.
- 42 There is nothing in the form of the document which suggests it is limited to being an objection to an application for a Special Prospecting Licence, and indeed, the form expressly refers in the heading, to it being an objection pursuant to section 42 of the Act.
- 43 At the hearing before me, the Respondent made submissions that grounds one and two of the objection may be construed as being entirely consistent with the case being put.
- 44 I note at this juncture, that solicitors now on the record for the Respondent did not appear to have prepared the objection, which, on their face, appear to have been prepared by the Respondent itself, which would account for the slightly difficult language used.
- 45 In any event, the position of the Respondent as I understood it, in my opinion, does align properly with the form of the objection, and on their face, give rise to a valid basis for an objection, when considered at this early stage of the proceeding.
- 46 That is simply because when having regard to the form of the objections filed by the Respondent, a copy of which may be found at AJH6 in the Affidavit of

Andrew James Hawker filed on 9 February 2022 in support of the Application, it is plain that the objection is a valid objection to a prospecting licence.

47 Contrary to the initial position taken, upon being pressed Counsel for the Applicant indeed conceded that the objection as it appeared before me, was an objection that could be construed as being an objection to a prospecting licence.

48 The highest that the Applicant could ultimately contend, is that the use of the words “*this Special Prospecting Licence*” in grounds 1 and 2 meant that it had to be regarded as an objection to a Special Prospecting Licence.

49 I reject that submission. Ground 1 appears to raise a concern as to the service requirement of the original application when it was made. That may well develop into a jurisdictional ground, though that remains to be seen. It is certainly not so clearly untenable as to warrant summary dismissal at this stage.

50 Ground 2 appears to raise a public interest type ground, suggesting that some alleged improper behaviour of the Applicant is a proper basis to object. That position is a more difficult one for the Respondent to take, and will require detailed particulars and evidence, however is not so clearly untenable as to warrant summary dismissal at this stage.

51 Further, upon being pressed, Counsel for the Applicant accepted that there was a reasonable basis, at least in terms of validity at first instance, arising as an objection to the Prospecting Licence, as referred to in ground 3 of the objection form.

52 As the Respondent’s counsel readily accepted, a bare ground of objection that the application does not comply with the *Mining Act*, is not a proper basis to object. However, in those circumstances the proper and reasonable course is to call for particulars.

53 Indeed, that is what occurred in this matter and particulars were filed by the Respondent. The Applicant said at the hearing before me that those particulars

may be inadequate, and did not give rise to a basis for an objection, as they raised only a jurisdiction ground. I reject that submission at this stage.

54 In response to questions from the bench, counsel for the Applicant also sought to explain the position by indicating that in the view of the applicant the objection ought to be amended to properly reflect what they considered to be the true nature of the objection.

55 That may well be so, and the objection may benefit from some revision and consideration, however is not material to the question before me today.

56 The precise formulation of the objection as it may proceed to trial, is a different matter and one that involves the need for conferral between the parties and the exchange of particulars.

57 It was in this context that a question was directly put to the Counsel for the Applicant as to whether or not properly construed, the concerns being outlined, was really request for further and better particulars. It was in my opinion conceded that that was the proper characterisation of the nature of the case being advanced before me on 9 May 2022.

58 In my opinion, that means that in effect the Applicant has elevated a concern about the detail of particulars, to a point where it considered that it formed a sound basis to bring an application that the objection ought no longer be heard.

59 That was an ambitious position to take, to say the least.

60 I express that view, particularly in light of the failure on the part of the Applicant to express those concerns in detail to the Respondent, in correspondence and conferral.

61 It was conceded by Counsel for the Applicant, that no correspondence was placed before me indicating the ventilation of those concerns with the Respondent.

- 62 In answer, as indicated, Counsel for the Respondent, outlined the basis of the position being adopted by his client that there was no difficulty with the wording of objection 1 and 2, and that they were both a proper basis to advance an objection.
- 63 This was on the basis that it was said by the objector, that the Ground 1 as referred to related to the failure to serve following the filing of the original application as a Special Prospecting Licence. That matter of fact is not in dispute, namely that the original application as filed was for a Special Prospecting Licence, and that it was not served.
- 64 The impact of that, in the context of section 70(9a) of the Act, remains to be seen, suffice to say that the position taken by the Respondent does not appear to me at this stage to be manifestly unarguable. Neither are grounds 2 or 3 of the objection so clearly untenable as to warrant summary dismissal at this stage.
- 65 Given the manner in which the Application was pressed, I express no view at this time, as to the detail of the particulars provided being adequate (or not), as those matters were not the basis of the Application.

Conclusion & Orders

- 66 In summary, I reject the submission that the objection form as filed must be construed as an objection only to a special prospecting licence. It is no such thing and may do the work required of it as an objection to a prospecting licence.
- 67 I will add, it is trite to say that the purpose of the form of the objection is to clearly identify and articulate the objectors position.
- 68 Whilst it is not appropriate to import the principles applying in a judicial setting to an administrative context in a wholesale fashion, in my opinion the comments of his honour Chief Justice Martin in *Barclay Mowlem Construction Ltd v Dampier Port Authority & Anor* [2006] WASC 281 (30 November 2006) at [4]

– [9] are applicable (particularly given the effect of Regulation 154(1) of the Regulations) to the sort of arguments raised by the Applicant in this matter:

- a. *4 It is, I think, important when approaching an issue of that kind to bring to mind the contemporary purposes of pleadings. The purposes of pleadings are, I think, well known and include the definition of the issues to be determined in the case and enabling assessment of whether they give rise to an arguable cause of action or defence as the case may be, and apprising the other parties to the proceedings of the case that they have to meet.*
- b. *5 In my view, the contemporary role of pleadings has to be viewed in the context of contemporary case management techniques and pre-trial directions. In this Court, those pre-trial directions will almost invariably include; firstly, a direction for the preparation of a trial bundle identifying the documents that are to be adduced in evidence in the course of the trial; secondly, the exchange well prior to trial of non-expert witness statements so that non-expert witnesses will customarily give their evidence-in-chief only by the adoption of that written statement; thirdly, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourthly, the exchange of chronologies; and fifthly the exchange of written submissions.*
- c. *6 Those processes leave very little opportunity for surprise or ambush at trial and, it is my view, that pleadings today can be approached in that context and therefore in a rather more robust manner, than was historically the case; confident in the knowledge that other systems of pre-trial case management will exist and be implemented to aid in defining the issues and apprising the parties to the proceedings of the case that has to be met.*
- d. *7 In my view, it follows that provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and apprising the parties of the case that has to be met, the Court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the Court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.*
- e. *8 Most pleadings in complex cases, and this is a complex case, can be criticised from the perspective of technical pleading rules that evolved in a very different case management environment. In my view, the*

advent of contemporary case management techniques and the pre-trial directions, to which I have referred, should result in the Court adopting an approach to pleading disputes to the effect that only where the criticisms of a pleading significantly impact upon the proper preparation of the case and its presentation at trial should those criticisms be seriously entertained.

- 69 As a result of my view above, it will be apparent that I do not consider that it is necessary to embark upon a detailed consideration of the precise manner in which the effect of section 70(9a) of the Act impacts upon the filing times of the relevant objection in this case. That issue may well arise on another day.
- 70 The final thing to note is that in this case it is not said that the objector has no standing to object to the application for a prospecting licence. Indeed, Counsel for the applicant expressly conceded that the Respondent could file a new objection, seeking an extension of time to lodge an objection in a form which might meet the perceived requirements of the Applicant.
- 71 Furthermore, the Applicant was unable to point to any prejudice that might flow from the applicant taking such a course. That result however would be an inefficient use of the resources of the Warden's Court, and the parties, and is not to be encouraged, even were there a substantive basis for the concerns expressed by the Applicant.
- 72 As a result, in all of the circumstances before me it does appear that this is an application for summary dismissal which is entirely premature.
- 73 It is not appropriate to summarily determine and dismiss an objection, and in so doing determine the rights of the objecting party, in a case such as this one, unless it is plain and apparent that the objection is incompetent, vexatious, or there are no prospects of success.
- 74 This matter is not such a case.

- 75 As a result, in all of the circumstances presented I dismissed the Application on 9 May 2022 and indicated to the parties that I would hear them as to costs.
- 76 To that end I directed that the matter be placed into the list on 27 May 2022 not before 12 o'clock, and that any submissions as to costs be filed prior to 27 May 2022.



Warden Tom McPhee

18 MAY 2022