
JURISDICTION : MINING WARDEN

TITLE OF COURT : BEFORE THE WARDEN

LOCATION : PERTH

CITATION : DORMER FAMILY TRUST v BARACUS P/L & ANOR
[2012] WAMW 33

CORAM : WILSON M

HEARD : 31 AUGUST 2012

DELIVERED : 5 OCTOBER 2012

FILE NO/S : OBJECTIONS KR 563 to 566/112 & KR 583 to 584/112

TENEMENT NO/S : APPLICATION FOR EXPLORATION LICENCES 08/2368
to 08/2371

BETWEEN : Dormer Family Trust
ABN 54 523 915 697
(Applicant)
v
Baracus Pty Ltd
(1st Objector)
&
Ilmenite Resources Pty Ltd
(2nd Objector)

Catchwords:

Application - Exploration Licences – Interlocutory Application – Amend Name of Applicant – Capacity to Apply for Mining Tenement – Misnomer of Party – Validity of Application – Person – Family Trust

Legislation:

Mining Act 1978 (WA): s. 57(1), s. 58(1)(b), s. 59(6)(b), s. 142

Interpretation Act (WA): s. 5

Rules of Supreme Court 1971(WA): O. 21 r.5(2) & (3)

Result:

The Interlocutory Application to Amend lodged by Mr & Mrs Dormer affecting the applications for the E's is dismissed.

The applicant for the E's is not "person" within the meaning of s. 57(1) of the Act by operation of s. 5 of the Interpretation Act. The applicant for the E's does not have the capacity to make the applications for the E's.

Representation:

Counsel:

Applicant	:	Mr D Chandler
First Objector	:	Ms S Bhalla
Second Objector	:	Mrs CA McKenzie

Solicitors:

Applicant	:	DLA Piper Australia
First Objector	:	Lawton Gillon
Second Objector	:	McKenzie & McKenzie

Case(s) referred to in judgment(s):

Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd [2010] WASCA 132

Beacon Funds Management Ltd v Kevan & anor [2000] WASC 274

Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 173 CLR 231

Jackson Gold Mining Ltd v Murchison Exploration Pty Ltd [2002] WAMW 27

Case(s) also cited:

Denk Lik Assets Co Ltd v East Kimberley Diamond Corporation Pty Ltd & anor [2003] WAMW 24

Background

1. Applications for Exploration Licences 08/2360 to 08/2371 ("the E's") were lodged with the Mining Registrar in Perth in the name of the "Dormer Family Trust ABN 54 523 915 697".
2. Baracus Pty Ltd lodged objections to all of the E's. Ilmenite Resources Pty Ltd lodged objections to some of the E's. One of the grounds of Objections by Baracus and Ilmenite is the validity of the E's being lodged in the name of "Dormer Family Trust ABN 54 523 915 697".
3. The Dormer Family Trust ABN 54 523 915 697 sought to lodge Applications to Amend the name of the applicants for the E's to "*Martin Matthew Dormer and Penelope Anne Dormer as trustee for the Dormer Family Trust ABN 54 523 915 697*". The registration of the Applications to Amend was not progressed by the Mining Registrar at Karratha because of the grounds of the Objections by Baracus and Ilmenite.
4. Mr Martin Matthew Dormer and Mrs Penelope Anne Dormer as trustee for the *Dormer Family Trust* have made an Interlocutory Application seeking the name of the applicant for the Applications be amended to "*Martin Matthew Dormer and*

Penelope Anne Dormer as trustee for the Dormer Family Trust ABN 54 523 915 697.” Mr & Mrs Dormer rely upon the provisions of s. 142(1) of the Mining Act (“the Act”) relating to the power of the warden to allow amendments to an application for “*misnomers and inaccurate descriptions of any person or place or any process or document.*”

5. Baracus and Ilmenite object to the orders sought by Mr & Mrs Dormer in the Interlocutory Application.
6. Mr & Mrs Dormer state in their submissions it is not in dispute between all parties to the Interlocutory Application that *The Dormer Family Trust ABN 54 523 915 697* is not a “person” for the purposes of s. 57(1) of the Act, by operation of s. 5 of the Interpretation Act.

The Issues

7. Mr & Mrs Dormer submit there are two issues to be determined:
 - a. Whether the Warden has the power to amend the description of the applicant for Exploration Licences 08/2368 to 08/2371 under s. 142 of the Act; and,
 - b. If the Warden does have power to amend, whether the Warden ought to exercise his discretion to do so.

Does the Warden have Power to Amend the Description of the Applicant?

8. Mr & Mrs Dormer submit that despite the fact they admit the *Dormer Family Trust* is not a “person” for the purposes of s. 57(1) of the Act, by operation of s. 5 of the Interpretation Act, it does not make the applications for E’s void ab initio. That is so they submit because an application for the E’s does not need to be made in accordance with the provisions of the Act for the E’s to be granted. In support of that proposition, Mr & Mrs Dormer rely upon the decision of Her Honour Justice McLure in *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd [2010] WASCA 132* at para [50] – [51].
9. I accept the *Dormer Family Trust* is not a “person” for the provisions of s. 57(1) of the Act, by operation of s. 5 of the Interpretation Act but is as described by counsel for Ilmenite, “*the Dormer Family Trust is not a legal entity... merely the enforceable obligations of a trustee to the beneficiaries pursuant to the Trust Instrument*”
10. I do not agree, nor accept, the contention of Mr & Mrs Dormer that an application for the E’s does not have to be made in accordance with the Act to be granted by the Hon. Minister. In the *Yarri Case (supra)*, Her Honour Justice McLure stated it was a pre-condition for the exercise of the power of the Hon. Minister under s. 57(1) of the Act to grant an exploration licence that there is ‘the application of any person’ (see: [42]). Her Honour said the statutory indications in the language and framework of the Act pointed to that conclusion. Further, Her Honour also concluded the power to grant an exploration licence is expressly conditioned on two matters, firstly, there

being an application of any person and, secondly, the receipt by the Hon. Minister of a recommendation of the Mining Registrar or the Warden.

11. Therefore, in my opinion, before application for an exploration licence can be dealt with by either the mining registrar or the warden pursuant to the powers contained within s. 59 of the Act the application for an exploration licence must be made by a 'person.'
12. The ability of the Hon. Minister to grant an exploration licence that is non-complaint with the Act referred to by McLure J in paras [51] - [52] of the **Yarri Case (supra)** is the consequence of express power of the s. 59(6)(b) of the Act that can only be exercised when the application for an exploration licence is made by any "person" and then only after the mining registrar or the warden has made their recommendation. Accordingly, on a plain and ordinary meaning of the language of s. 57(1) of the Act, the Hon. Minister has no power, notwithstanding s. 59(6) of the Act, to grant an application for an exploration licence to any thing or entity other than a 'person'. Further, there appears to be no where in the Act that contemplates any application for, objection to, grant of, or obligation in respect to, a mining tenement that can be made and/or determined other than through a 'person'. That 'person' is, in my opinion, a person within the meaning of s. 5 of the Interpretation Act.
13. The submission by Mr & Mrs Dormer that the name of the '*Dormer Family Trust*' can be amended by the warden pursuant to the provisions of s. 142 of the Act is not accepted. The provisions of s. 142(1) of the Act relates to misnomers or inaccurate descriptions of the any person in any proceedings. The *Dormer Family Trust* is not a "person" as has been accepted by the applicants in their submissions. The provisions of s. 142(1) of the Act simply does not apply to any other entity that does fall within the meaning of a 'person' pursuant to s. 5 of the Interpretation Act.
14. In any event, I do not accept the name of the '*Dormer Family Trust*' was at the time the applications for the E's were lodged by Mr Dormer with the Mining Registrar done so by a misnomer or inaccurate description.
15. The issue of the amendment of the name of a party to a proceeding was considered by Master Sanderson in ***Beacon Funds Management Ltd v Kevan & anor [2000] WASC 274*** in the context of an application to amend the name of a party to a proceeding pursuant to O. 21 r. 5(2) and (3) of the Rules of the Supreme Court. Master Sanderson referred to the decision of the High Court in ***Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 173 CLR 231*** in particular to the decision of His Honour Justice McHugh. In determining the appeal should be dismissed, McHugh J said (at 262):

"The statement of claim in the present case does not indicate that Bridge sued Grand because it believed that Grand was the carrier but was mistaken as to the name of the carrier. To the contrary, the allegation in par 3 that Grand was 'the owner of the vessel' at all material times indicates that Bridge

intended to sue Grand because it believed that Grand was the owner of the vessel. The correctness of that conclusion was confirmed by the affidavit of Bridge's solicitor who swore that he 'was concerned to preserve Bridge Shipping's rights against the owner of such vessel'.

Bridge made no mistake as to the description of the party which it wished to sue. It intended to sue the owner and it did so. Bridge's mistake was not one of misnomer, clerical error or misdescription. Nor was it one where, intending to sue a person whom it identified by a particular description, it was mistaken as to the name of the person who answered that description. The mistake which Bridge made was that it believed that it had rights against the owner of the vessel. But that was not a mistake 'in the name of a party.'

16. Master Sanderson went on to say at [20]:

*'It is important, I think, when attempting to apply the reasoning in the **Bridge Shipping** decision to this case, to be entirely clear what was decided by the Court in the **Bridge Shipping** decision. This can perhaps be summed up by the concluding paragraph in the judgment of Toohey J. His Honour said (at 252):*

"The application was not to correct a mistake in the name of a party by substituting another person as a party; it was an application to substitute a person who ought to have been joined as a third party in the first place."

The reason why the Court reached this conclusion is not difficult to see. When the writ was issued, it was thought that the proper party was Grand. It was intended, when the third party notice was issued, to sue Grand. It was later discovered that the proper party to be sued was Rainbow. Viewed in that light, it could not possibly be said that there was a genuine mistake as to the name of the party. There was a genuine mistake as to which company ought to have been sued.'

17. Applying the principles raised by Master Sanderson in the **Beacon Case (supra)** to this case, I find the decision by Mr Dormer to lodge the application for the E's in the name of the '*Dormer Family Trust*' was not, in my opinion, a misnomer, inaccurate description or, for that matter, a clerical error of the name of the trustees of the '*Dormer Family Trust*'. It was a deliberate decision by Mr Dormer to lodge the applications for the E's in the name of the '*Dormer Family Trust*', done so without regard to the provisions of s. 57(1) of the Act and without any understanding of the legal implication an application made in such manner may have or the likely effect of rendering the applications for the E's beyond being informal.
18. I find support for that view in the statement pursuant to s. 58(1)(b) of the Act made by Mr Dormer and dated 1st March 2012 (annexure MMBD 4) that described himself as "on behalf of the *Dormer Family Trust*". Mr Dormer did not describe himself nor did he sign the applications for the E's as the "trustee of the *Dormer Family Trust*". It is simply incorrect to say the application for the E's was signed by

Mr Dormer on behalf of the trustee of the *Dormer Family Trust*. There is no indication contained within the applications for the E's as to who were the trustees of the *Dormer Family Trust*.

19. I give no weight to the content of the affidavits dated 3 August 2012 sworn by Mr & Mrs Dormer in support of the Applications to Amend or the Certificate of Trustees Determination dated 3 August 2012 signed by Mr & Mrs Dormer. The Certificate of Trustees Determination dated 3 August 2012 evidencing the decision by Mr & Mrs Dormer to make application for the E's on behalf of the '*Dormer Family Trust*' is dated some 5 months after the difficulties faced by the use of the name of the applicant for the E's. The affidavits of both Mr Dormer & Mrs Dormer state the applications for the E's was made by them as trustees of the '*Dormer Family Trust*'. If that was so it is surprising. The applications for the E's and the statement pursuant to s. 58(1)(b) of the Act were not prepared in a manner that reflected that position by Mr & Mrs Dormer.
20. I do not accept it could be reasonably identified by reference to the Perth telephone book that the trustees of the '*Dormer Family Trust*' are Mr & Mrs Dormer. That the name Dormer appears in the telephone book at the same address as the address given on the applications for the E's does not establish or could it be commonly known that Mr & Mrs Dormer are the trustees of the '*Dormer Family Trust*'. The trustee of a trust could be any corporate being or any natural person. A trustee of a trust could be people unassociated to the name of the trust. It was the case that Mr Dormer identified himself as acting on behalf of the '*Dormer Family Trust*' in the statement lodged pursuant to s. 58(1)(b) of the Act. As indicated earlier, Mr Dormer has made no reference in any aspect of the application for the E's that he is a trustee of the '*Dormer Family Trust*'.
21. In ***Jackson Gold Mining Ltd v Murchison Exploration Pty Ltd [2002] WAMW 27*** the applicant for the grant of an exploration licence was made in the proposed name of a corporation that was registered three days after the application for the exploration licence was lodged. The warden found the application for the exploration licence was made without legal capacity and void ab initio. The basis of the wardens decision was the Act contemplated the applicant for a mining tenement would be a 'person' who had legal capacity. The decision in ***Jackson Gold (supra)*** was followed in ***Denk Lik Assets Co Ltd v East Kimberley Diamond Corporation Pty Ltd & anor [2003] WAMW 24***.

Conclusion

22. In the circumstances of this case and for the reasons expressed it is not necessary to deal with the second question raised by Mr & Mrs Dormer.
23. I find the application by Mr & Mrs Dormer is not one to correct a misnomer, inaccurate description of a person or to rectify an informality in the application for the E's rather it is an application to substitute the name of an applicant who has no legal capacity to apply for or be granted the E's with that of the name of a person or

person's that is a legal entity with capacity to apply for and be granted the E's in accordance with the provisions and intentions of the Act.

24. I find the applicant for the E's is not "person" within the meaning of s. 57(1) of the Act, by operation of s. 5 of the Interpretation Act. I also find the applicant, the '*Dormer Family Trust ABN 54 523 915697*' does not have the capacity to make the applications for the E's.
25. I dismiss the Interlocutory Application to Amend lodged by Mr & Mrs Dormer.

