JURISDICTION	:	MINING WARDEN
TITLE OF COURT	:	OPEN COURT
LOCATION	:	PERTH
CITATION	:	SMITH -v- BROSNAN [2006] WAMW 21
CORAM	:	CALDER M
HEARD	:	19 OCTOBER 2006
DELIVERED	:	5 DECEMBER 2006
FILE NO/S	:	APPLICATION FOR PROSPECTING LICENCES 52/1126, 52/1127
TENEMENT NO/S	:	PROSPECTING LICENCES 52/1126, 52/1127
BETWEEN	:	DANNY SMITH (Applicant) AND ALLAN NEVILLE BROSNAN (Objector)

Catchwords:

APPLICATION - For tenement - Person - Existence of applicant
EVIDENCE - Existence of party
EVIDENCE: - Onus of proof – existence of party
MINING TENEMENT - Objection to grant - Existence of Applicant
OBJECTION - To grant a tenement - Existence of Applicant
PERSON - Applicant for granted tenement - Existence of person
PROSPECTING LICENCE - Application for - Objection to - Existence of Applicant

Legislation:

Mining Act 1978 (WA), s 40 (1), s 42(3)

Result:

Applications 52/1126 & 52/1127 for grant of tenement both refused.

Representation:

Counsel:

Applicant	:	Mr A J N Aristei
Objector	:	Mr G H Lawton

Solicitors:

Applicant	:	Summerslegal
Objector	:	Lawton Lawyers

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

Striker Resources NL v Benrama Pty Ltd [2001] WAMW 7
Tortola Pty Ltd v Saladar Pty Ltd [1985] WAR 195

CALDER M

APPLICATIONS FOR GRANT OF PROSPECTING LICENCES 52/1126 & 52/1127

THE PROCEEDINGS

1 Application 52/1126 for the grant of a prospecting licence was lodged at the Mining Registry in Meekatharra on 9 February 2006. The application is made in the name of "*Danny Smith*" ("the Applicant") of "*PO Box 1039, Willagee Central, WA, 6156*". The application was lodged in February 2006 at the Meekatharra Registry. Application 52/1127 also in the name of "*Danny Smith*" and showing the same postal address as 52/1126 was lodged on the same date and at the same registry as 52/1126. Each of applications 52/1126 and 52/1127 is the subject of an objection to grant lodged by Allan Neville Brosnan ("the Objector"). Each of the two objections sets out three grounds for objection which are identical in each case, namely:

> "*(1) the Application has not been marked out and applied for in accordance with the provisions of the Mining Act 1978 (as amended) and the Mining Regulations thereunder.*
>
> *(2) the Application is not in the public interest in terms of section 111A of the Mining Act 1978 (as amended).*
>
> *(3) the Application is a nullity in that it has been made in the name of a non-existent person.*"

2 Concerning the public interest ground and the "non-existent" ground, the Objector provided particulars. It is said in the particulars that it is not in the public interest to grant a tenement to a party in circumstances where the tenement has not been marked out in accordance with the Act and Regulations or at all, that the tenement has not been applied for in accordance with the provisions of the Act and Regulations, that the tenement has been marked out and applied for in a breach of s 45(2) and that the application has been made in the name of a fictitious applicant. Concerning ground 3 of the objection, the particular provided by the Objector is that there is no person by the name of Danny Smith who made the application.

THE EVIDENCE

3 At the outset of the hearing counsel for the Objector conceded that, in accordance with the Act and Regulations, the lodgment of the two tenement applications had been advertised and that all service requirements of the legislation connected with the making of the application had been complied with. The Objector did not oppose the production of a copy of documents copied from the Web site of the Western Australian Electoral Commission that indicate that there is an enrolment in the Western Australian electoral roll in the name of Danny Smith, born 25 August 1981 and enrolled for the electoral district of Yokine. That document was tendered in evidence.

4 The Objector conceded during the course of evidence given by Mr Phillip Richards, a surveyor, as to the marking out of the ground applied for in respect of the two tenement applications that that witness did mark out the tenements on the date specified in the respective applications and that he did so in accordance with the physical marking-out requirements of the legislation.

5 On behalf of the Applicant, Mr Richards said in evidence that he had been approached by an agent with whom he had had previous dealings to mark out the subject tenements in the name of Danny Smith. He said that he simply took the agent's word for it that there had been a request by a person named Danny Smith for the tenements to be marked out. I am satisfied that the tenements were marked out in accordance with the Act and Regulations by Mr Richards insofar as I find that he complied with the physical marking-out requirements, including completion of the Forms 20 and 21 in each case.

6 Mr Richards said, and I accept it as proved, that having marked out the tenements, he then instructed another agent whom he had frequently used to lodge the Form 20's on his behalf. He said that the document entitled "Document Transmittal" (exhibit 11) was sent to the Mining Registrar in Meekatharra, together with both Form 21's, a plan and a cheque for the fees on application. He said that although the transmitted document is endorsed with his name, he did not send it personally to the Registrar. He said that he sent the document together with the Form 21's and plans to his agent, Russell Evans, in Meekatharra and that Evans subsequently lodged all documents that had been sent to him by Richards, together with the cheque that Evans had received from the person who had initially instructed Mr Richards to mark out the tenements in the name

of Danny Smith as applicant. Mr Richards said that he never saw that cheque. I am satisfied that that account by Mr Richards is correct.

7 During cross-examination Mr Richards said that he had become aware from documentation obtained from DOIR that it had been recorded that a 14-day priority right to mark out the ground that Mr Richards marked out had been obtained in the name of Danny Smith.

8 The Applicant did not give evidence in person or otherwise and did not call any witnesses.

SUBMISSIONS

The Applicant

9 In answer to the grounds upon which the applications were objected to counsel for the Applicant submitted that the evidence established that the ground applied for had been correctly marked out. I have found that in the case of each tenement the ground was correctly marked out by Mr Richards. Counsel also submitted that it had been established by the evidence that the application had been made in accordance with the requirements of the Act and Regulations. I find that there has been compliance in that regard in that I find that the applications were lodged in the prescribed form and within the prescribed time, that the applications were advertised as required by the legislation and that all persons upon whom it was necessary to serve copies of the applications were served in the form and manner and within the time prescribed.

10 Concerning grounds 2 and 3 of the objections, the Applicant submitted that the provisions of s 111A of the Act have no application in that the provisions of that section give no power to a Warden to refuse to grant a prospecting licence. He submitted that in determining an application for the grant of a prospecting licence there was no role for the Warden in respect of s 111A. In that regard counsel relied upon the decision of Brinsden J in ***Tortola Pty Ltd v Saladar Pty Ltd*** [1985] WAR 195 where his Honour said, in effect, that in considering applications for a prospecting licence, the Warden's role is limited to a consideration of whether or not the formal requirements of the legislation have been complied with.

11 Concerning the third ground of objection, namely, that the applications were each a nullity in that each had been made in the name of a non-existent person, the Applicant submitted that there is no evidence

that the Applicant is a non-existent person. It is submitted that, having asserted it, the Objector undertook to prove the non-existence of the Applicant and that that evidentiary burden has not been discharged. It is further submitted that, in any event, there is nothing about any of the various forms and other documents produced in evidence that suggests in any way that the Applicant does not exist. It is said that the extract of birth and the copy of the extract from the electoral roll that were tendered are consistent with the existence of a person named Danny Smith and are supportive of the fact of the existence of Danny Smith, the Applicant.

12 Counsel for the Applicant argues that it is not the law that in every case that comes before a court or other tribunal it is necessary as a fundamental part of its case for each party to prove that that party exists. He said that he is not aware of any case law to support that proposition and says that it is not the law that must be applied in the present matter. He did concede, that the Warden could not grant a prospecting licence in the name of a non-existent person. He said, however, that an applicant for a tenement does not have even a mere evidentiary burden to discharge in connection with proof of the applicant's existence. On the contrary, it is submitted, in a case where the non-existence of the applicant is raised by the objector, the objector must, at least, call evidence and discharge an onus of proof in that regard. In any event, it is submitted that existence or non-existence of a party is simply not sufficiently connected to the process of grant to constitute a matter of formal requirement that, pursuant to ***Tortola***, the Warden is limited to considering.

The Objector

13 The Objector produced no evidence.

14 The Objector submitted that, in connection with ground 3 of its objection, its position is simply that the tenements were marked out in the name of a fictitious person and that therefore the application is a nullity. It is said that it is a basic formality as to whether an applicant exists and that the onus is firmly on the Applicant to establish that existence. It is said that in this case, because the Objector has expressly challenged the existence of the Applicant, that requires the Applicant to discharge that onus of proof.

15 The Objector submits that the Applicant has not been taken by surprise in that it has always been a basic part of the Objector's case that Danny Smith, the Applicant, did not and does not exist. It is said that, knowing of that allegation, if the application has been made by or on

behalf of a person who does exist, such a person not having been called to give evidence to identify himself and to connect himself with the application and with the other documents that were tendered in evidence, it is open to the Warden to draw an adverse inference from such failure. It is submitted that it would be a relatively simple matter to discharge the onus of proof of existence and that if admissible evidence were presented, it would be very difficult for the Objector to contradict such evidence.

16 Counsel noted that there is nothing to connect the Applicant with the person named in the birth extract and the electoral roll extract other than the same name. He notes that in different documents different addresses appear; for example, the application for the tenement shows a post office box as an address, the security document form lodged for each tenement shows a residential address in Milligan Street, Perth and the material from the electoral office shows an address in Dianella.

17 Concerning s 111A, counsel for the Objector said that that is an issue that is secondary to the issue of non-existence that is raised in the objection. It is submitted, however, in respect of s 111A, that it could not be in the public interest for a tenement to be granted to a non-existent person. As to any role of the Warden which might be derived from s 111A in connection with the determination of an application for the grant of a prospecting licence, the Objector makes reference to the decision of ***Striker Resources NL v Benrama Pty Ltd*** [2001] WAMW 7. That is a matter where I concluded (111 to 122) that it is open for the Warden, when hearing an application for the grant of a miscellaneous licence, to give consideration to matters which may attract the operation of the provisions of s 111A. In that particular case it was unnecessary for me to determine whether or not the Warden could refuse to grant a miscellaneous licence for the reason that the Warden considered that it was not in the public interest in accordance with s 111A for the tenement to be granted.

18 The Objector also referred to the provisions of s 40 of the Act which say that a warden may on the application of any "*person*" grant to that "*person*" a prospecting licence.

CONCLUSIONS

19 Subsection 40(1) of the Act says:

"*Subject to this Act, the mining registrar or the warden, in accordance with section 42, may, on the application of any person, grant to that person a … prospecting licence …*".

20 Subsection 42(3) of the Act says:

"*An applicant for a prospecting licence shall at the request of the mining registrar or warden furnish such further information in relation to his application, or such evidence in support thereof, as the mining registrar or warden may require but the mining registrar or warden shall not require information or evidence relating to assays* ('etc') …".

21 In my opinion, regardless of any questions or issues concerning onus of proof or standards of proof, it is a fundamental requirement that before the Warden or the Registrar exercises the power under subs 40(1) to grant a prospecting licence the Warden or Registrar must be satisfied that the grant will be to a legal entity, whether corporate or a private individual or otherwise, that is taken at law to exist. It would be entirely contrary to and inconsistent with the legislative intention of the Act for a grant to be made in the name of a private person or corporation that did not exist. In the present case that means it would be beyond the power of the Warden or the Registrar to grant a tenement in the name of Danny Smith where no person named Danny Smith has in fact applied for the grant of the prospecting licences.

22 To refuse to grant a prospecting licence as a consequence of not being satisfied that the application has been made by or on behalf of an existent person, can be said to be consistent with public policy as contemplated by s 111A, but it would not be correct to say, however, that it could only be because of such contemplated public policy that such an application should be refused. It would be against the policy of the Act, generally and regardless of s111A, to grant such an application because, for example, of the provisions of the Act which enable monetary penalties to be imposed for non-compliance with the provisions of the Act, including non-compliance with expenditure requirements, provisions that require payment of royalties and other obligations that are imposed by the legislation on a tenement holder. It is also important for the proper implementation of the legislative policies of the Act that the Minister and officers of DOIR and of other relevant instrumentalities or departments, for example, the Department of the Environment, are aware of the identity of those who hold mining tenements and upon whom important enforceable duties and obligations are imposed by Parliament.

23 Concerning the provisions of subs 41(3) of the Act, to which reference is made by the Objector, I am of the opinion that it would be open to a Warden or to a Registrar under that subsection to require an applicant to furnish information or evidence tending to establish the existence of an applicant. I do not consider, however, that there is any duty on either a registrar or a warden to take that course in every case. Where an application is made for the grant of a tenement by an applicant whose identity or existence has become an issue, whether by way of objection or otherwise, before the Warden or Registrar, then, if the applicant is aware of that issue and does nothing to address it or addresses it inadequately, in my opinion, that is simply a matter in respect of which it can only be said that the applicant is put at risk by the applicant's own conduct and that such a failure may lead to refusal of grant on the basis that the Warden or Registrar is not satisfied as to the existence of or as to the true identity of the applicant.

24 In expressing my reasons in this matter was limited to the terminology used by the parties, the "existence" or "non-existence" of the Applicant. I consider that were an application to be made and that in the application for the tenement a name of a person or corporation has been used but the named person or corporation is unaware of and has not consented to or in any way authorised the use of their name, then, if a Warden or Registrar were not satisfied that, in that sense, the name of the purported applicant had been lawfully used, the Warden or Registrar would be justified in refusing to grant the tenement.

25 In respect of the provisions of s 111A of the Act, it is my opinion that for the reasons I stated in ***Striker Resources*** (*supra*) it would be open to the Warden, if the Warden were satisfied that an application had been made in circumstances where the Warden was either satisfied that the named Applicant did not exist or had not consented to or authorised the making of the application, to defer a determination of the application while the matter was referred to the Minister for purposes of the Minister giving consideration to the exercise of the Minister's discretion under s 111A.

26 Although the issue was not raised before me at the hearing of this matter, it would seem that if a Warden were satisfied that an application for grant of a prospecting licence were made in the name of a non-existent person or purported to be made in the name of a person that had not consented or authorised and did not wish the application to be made, then it is arguable that such a procedure would amount to an abuse of process which the warden should prevent.

27 I am not satisfied in this case that there is or was in existence a person named Danny Smith by whom or on behalf of whom or with whose knowledge or authority or consent applications 52/1126 or 52/1127 were marked out or applied for.

DETERMINATION OF THE APPLICATIONS

28 For all of the above reasons the application for the grant of prospecting licences P52/1126 and P52/1127 are refused.