

FORREST & FORREST PTY LTD v WILSON & ORS (P59/2016)

Court appealed from: Court of Appeal of the Supreme Court of
Western Australia [2016] WASCA 116

Date of judgment: 7 July 2016

Date special leave granted: 10 November 2016

The issues in this appeal concern the proper construction of s 74, s 74A and s 75 of the *Mining Act 1978 (WA)* ('the Act') as it stood prior to the commencement of the *Mining Amendment Act 2012 (WA)*. The primary issue is whether the failure to lodge, at the time of the application for a mining lease or at all, a mining operations statement or a mineralisation report pursuant to s 74(1)(ca)(ii) deprives the Mining Warden of jurisdiction to make a recommendation to the Minister under s 75 of the Act.

On 28 July 2011 applications for mining leases were lodged by the second and fourth respondents. Neither a mining operations statement nor a mineralisation report was lodged with the relevant applications. On 1 September 2011, the appellant lodged objections to the applications, which related to land within the boundaries of a pastoral lease held by the appellant. A few months after the applications were lodged, a mineralisation report for each application was lodged, but mining operations statements were never lodged. The first respondent ('the Warden') heard the applications in December 2012. In a report delivered on 31 January 2014, the Warden recommended to the Minister that he grant the applications subject to conditions. The appellant applied to the Supreme Court to quash the recommendations of the Warden. The application was dismissed by Allanson J.

The appellant appealed to the Court of Appeal (McLure P, Newnes and Murphy JJA). The main issue in the appeal was whether the lodgment of the documents specified in s 74(1)(ca)(ii) was an essential condition that must be satisfied in order to enliven the Warden's jurisdiction to hear the application under s 75(4) and then make a recommendation under s 75(5) of the Act.

The Court held that: (1) the requirement in s 74(1)(ca)(ii) of the Act, that the mining operations statement and mineralisation report be lodged contemporaneously with the application, was not a condition precedent to the existence of the jurisdiction of the Warden to hear the application; (2) non-compliance with the requirement to lodge the s 74(1)(ca)(ii) documents contemporaneously with the application did not otherwise invalidate the Warden's hearing or recommendations; and (3) the failure to lodge a mining operations statement at all did not invalidate the Warden's hearing or recommendations.

The Court gave three reasons for their decision. First, they noted that courts are ordinarily reluctant to characterise a fact or legislative criterion as jurisdictional because it has the automatic and inevitable consequence of invalidity of all that follows. In this case, the consequences would be that (1) the Warden's recommendation would be void; (2) the lack of a recommendation would deprive the Minister of the power to grant or refuse the application; and (3) the applicant would

have to start from scratch by lodging a new application and accompanying payments and documents under s 74(1). The additional delay, gridlock in the administration of the Act and other prejudice were significant factors.

Second, the statutory expression *'shall be accompanied by'* applies to the requirements in s 74(1)(b) (payment of the prescribed rent) s 74(1)(c) (payment of the prescribed application fee) and s 74(1)(ca)(i) (lodgment of a mining proposal). It could be inferred that the statutory expression was intended to have the same meaning when used within the same, or contextual, provisions. Having regard to the variety in the nature of the requirements and the serious consequences of non-compliance however minor or technical, there was no justification in principle or purpose for concluding that contemporaneous lodgment was a condition precedent to the mining registrar or the Warden making a recommendation.

Third, the statutory expression *'if an application for a mining lease is accompanied by the documentation in section 74(1)(ca)(ii)'* in s 74A(1), s 75(2a), s 75(4a) and s 75(8) did not require a conclusion that compliance with the requirement in s 74(1)(ca)(ii) was jurisdictional. The statutory expression was descriptive, not prescriptive and it meant in effect 'when an application for a mining lease must be accompanied by the documents in section s 74(1)(ca)(ii)'. That conclusion is mandated by the statutory text and context.

The grounds of appeal include:

- The Court erred in law in concluding that the requirement to lodge a mineralisation report at the time an application for a mining lease is lodged, as specified in s 74(1)(ca)(ii) of the act is not a condition precedent to the existence of jurisdiction in the Director, Geological Survey to prepare a report under s 74A(1) of the Act or the jurisdiction of the warden to hear an application under s 75(4) of the Act.

The respondents have filed submitting appearances. The Attorney-General for the State of Western Australia has been granted leave to appear amicus curiae.