



Précis Paper

Mining and Resources Law - Appeal - Estoppel

This discussion includes judicial review, rules of statutory interpretation, right to reasons for a decision, issue estoppel and Anshun estoppel. Although it's about the *Mining Act 1992* (NSW) this discussion is of general interest.

Discussion Includes

- Exploration permits under the *Mining Act 1992* (NSW)
- Judicial review of decisions to issue exploration permits
- The rules regarding withdrawal of applications for exploration permits
- The interpretation of Acts that are based on rules and documents
- Rule 59 of the *Uniform Civil Procedure Rules 2005* (NSW) and the right to reasons from a decision maker
- Issue estoppel and Anshun estoppel in judicial review proceedings

Précis Paper

Mining and Resources Law - Appeal - Estoppel

1. In this edition of BenchTV, Timothy Hale SC (Barrister) and Luke Waterson (Barrister) primarily present on the NSW Court of Appeal (Beazley P; Macfarlan & Gleeson JJA) decision in *Gold & Copper Pty Limited v The Hon. Chris Hartcher, Minister for Resources & Energy, Special Minister* [2015] NSWCA 57 which considered judicial review and statutory construction in the context of administrative law. Mr Hale SC and Mr Waterson were counsel for the successful First Respondent, the Hon. Chris Hartcher (Minister for Resources & Energy), in this case (*'the focus case'*).
2. The presentation also examines three earlier related cases. The first of these cases (*'Case 1'*) is the decision of the NSW Land and Environment Court (Pain J) in *Gold and Copper Resources Pty Limited v Minister for Resources and Energy* [2013] NSWLEC 66. This case concerned the Minister's first renewal decision regarding exploration licence 'EL 3856'. The second case (*'Case 2'*) is the NSW Land and Environment Court (Biscoe J) decision in *Gold and Copper Resources Pty Ltd v Newcrest Mining Ltd* [2014] NSWLEC 148. This case concerned the Minister's second renewal decision regarding EL 3856. However, as Gold & Copper argued the same unsuccessful grounds for relief in Case 2 as in Case 1, the Minister sought to dismiss Gold & Copper's proceedings as an abuse of process based on Issue and Anshun estoppel. Justice Biscoe's decision in *Case 2* was subsequently appealed to the NSW Court of Appeal in *the focus case*. These three cases (*the focus case, Case 1, and Case 2*) all concern the same Newcrest exploration licence (EL 3856).
3. The third case (*'Case 3'*) is *Gold & Copper Resources Pty Ltd v Minister for Resources and Energy (No 2)* [2014] NSWLEC 30 (Pain J) which concerned the Minister's renewal of a different Newcrest exploration licence (EPL 1024). However, the facts and circumstances surrounding this licence (EPL 1024) are very similar to those of the aforementioned Newcrest exploration licence (EL 3856).

Factual Background

4. Newcrest Operations Limited (*'Newcrest'*) held exploration licences (EL 3856 and EPL 1024) in the area of Orange, NSW to explore gold and copper. Mr Hales SC notes that an exploration licence allows the holder to go onto land, which they may not own, to prospect for minerals. Should the prospector then find there is capacity for a commercial mine, they may apply for a mining lease. Approximately two months prior to the expiration of these Newcrest licences, Newcrest sought to renew both licences under the *Mining Act 1992* (NSW). Under section 113 of the *Mining Act*, there is only a small window of opportunity for Newcrest to apply to renew these licences.

SECTION 113:

Applications for renewal

- (1) *The holder of an authority may, from time to time, apply for the renewal of the authority.*
 - (2) *An application for the renewal of an authority must be lodged with the Secretary within the period set out below:*
 - (a) *in the case of the renewal of an exploration licence or an assessment lease-within the period of 2 months before the licence or lease ceases to have effect, or*
 - (b) *in the case of the renewal of a mining lease for 1 year or less-within the period of 2 months before the lease ceases to have effect, or*
 - (c) *in the case of the renewal of a mining lease for more than 1 year-not earlier than 5 years and not later than 1 year before the lease ceases to have effect.*
5. Mr Hale SC states that under s 113(2)(a), Newcrest may lodge a renewal application up to two months prior to licence expiration, but no later than one month. Newcrest had lodged their initial application for a two year licence renewal within this period. However, following the lodgement of this initial application, the NSW Department of Primary Industries (*'the Department'*) suggested that Newcrest apply for a longer renewal period of five years as this would be of greater benefit to the government. Newcrest agreed to the Department's suggestion and sent the Department a new front page for their renewal application specifying a period of five years. However, this new front page was sent after the closing period for renewal. Despite this, the Minister approved the 5 year application.
6. The Appellant, Gold & Copper Resources Pty Ltd (*'Gold & Copper'*), had lodged exploration licence applications over the same land prior to Newcrest's renewal applications. Therefore, they believed that if Newcrest's renewal applications were invalid, they would be next in line to receive the exploration licences. Thus, Gold & Copper were seeking to void the Minister's decisions to renew Newcrest's licenses.
7. In the course of their discussion, the presenters discuss the following three issues:
 - a. The Minister's allegedly invalid decision to renew licence EL 3856. This issue was examined by the Court in *Case 1* and *the focus case*.
 - b. The supervisory jurisdiction of the NSW Supreme Court to hear cases concerning jurisdictional error after the statutory limitation period for judicial review has expired. This issue arose in *Case 3* concerning EPL 1024.
 - c. Gold & Copper's right to reasons for the Minister's decision where the proceedings were improperly commenced by summons with invalid grounds. This issue was examined by the Court in *Case 2* and *the focus case* regarding EL 3856.

8. In *Case 1*, Gold & Copper challenged the Minister's decision in March 2011 to renew exploration licence 3856 for the entire area of the land. Under s 114(6) of the *Mining Act*, renewal of exploration licences must not exceed half the area of the original land unless the Minister, through his delegate, is satisfied that 'special circumstances' exist that justify the renewal of the licence over a larger area. Gold & Copper claimed that the Minister was not satisfied these special circumstances existed. Mr Hale SC notes that the purpose of this special circumstances provision is to encourage prospectors to make full use of the exploration licence so that they do not lose half the area of the land upon expiry of the licence.

SECTION 114:

Power of decision-maker in relation to renewal applications

- (6) *The area of land over which an exploration licence may be renewed is not to exceed half the area over which the licence was in force when the application for renewal was made unless the decision-maker is satisfied that special circumstances exist that justify renewal of the licence over a larger area.*
9. The trial judge, Justice Pain, found there was insufficient evidence that the Minister, through his delegate, had properly considered the existence of these special circumstances. Therefore, Justice Pain held the Minister did not possess the necessary satisfaction. He consequently set aside the renewal and remitted the matter back to the Minister's delegate for reconsideration.
10. Furthermore, on the last day of the hearing, Gold & Copper made an application to amend their pleadings to also claim that the Minister had no power to renew the licence as Newcrest submitted an invalid application because the new application front page was sent after the closing period for renewal. Gold & Copper argued this constituted a new application which was out of time and therefore could not be the subject of a valid renewal. In relation to the initial application, Gold & Copper argued that there was either no application for renewal or that the application had somehow been withdrawn or abandoned through the removal of the old front page. However, Justice Pain rejected Gold & Copper's application to amend the pleadings to include this argument given its lateness in the proceedings.
11. Following *Case 1*, the Minister's delegate made the same decision to renew the licence for the entire area of the land (*the second renewal decision*). Though, on this occasion, the delegate gave proper consideration to the special circumstances to justify his satisfaction under the aforementioned section.

12. In *Case 2*, Gold & Copper commenced proceedings challenging the Minister's *second renewal decision*. Justice Biscoe in *Case 2* only looks at Issue 3, discussed below, and does not address Gold & Copper's aforementioned argument concerning the invalidity of the Minister's renewal decision based on Newcrest's withdrawn application. However, this argument was considered by the NSW Court of Appeal in *the focus case*, on appeal from *Case 2*.
13. In *the focus case*, the NSW Court of Appeal dismissed Gold & Copper's argument that Newcrest's initial renewal application had somehow been withdrawn or abandoned following the submission of the new front page. In making this decision, the Court considered s 130 of the *Mining Act*. This section evidences the need for withdrawals to be in writing, signed by the applicant, and lodged with the Secretary. The notice of withdrawal is subsequently publicised in government gazettes, similar to a renewal or grant.

SECTION 130:

Withdrawal of application

- (1) *An application or objection in relation to the grant, renewal, transfer or cancellation of an authority may be withdrawn by means of a notice of withdrawal signed by the applicant or objector and lodged with the Secretary and ceases to have effect when the notice is lodged.*
 - (2) *The withdrawal of an application or objection under this section is irrevocable.*
14. Gold & Copper argued that s 130 is not the only method of withdrawal, asserting that withdrawal can also be affected through a more informal unwritten method. However, the Court rejected this argument and instead accepted the Minister and Newcrest's submission that withdrawals can only be made in accordance with s 130. To hold otherwise would create uncertainty, especially in relation to third party rights. It would also be inconsistent with the general scheme and tenor of the *Mining Act*. Mr Waterson felt these reasons were quite influential in the Court's decision that there was no withdrawal of the initial application. Hence, the Court held the Minister's decision was based on a valid renewal application by Newcrest.

Issue 2: Supervisory Jurisdiction of the NSW Supreme Court

15. Under s 137(1) of the *Mining Act*, the decision to renew a licence cannot be challenged more than 3 months after the notice of renewal grant is published in the Gazette. However, Gold & Copper commenced the proceedings in *Case 3* long after this 3 month period. This case challenged the Minister's decision to renew EPL 1024.

SECTION 137:

Limitation of challenges to decisions with respect to authorities

- (1) *The cancellation of an authority, or the grant or refusal of an application for an authority or the renewal or approval of the transfer of an authority, cannot be challenged in any legal proceedings commenced later than 3 months after the date on which notice of the cancellation, grant or refusal is published in the Gazette.*
16. Gold & Copper referred to the High Court of Australia decision in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 ("*Kirk*") to argue that s 137 was unconstitutional as it denied the NSW Supreme Court its supervisory jurisdiction to review for jurisdictional error. A jurisdictional error is either an error of law or an error in a factual finding whose existence is a condition precedent to jurisdiction. Gold & Copper argued that the Minister's decision to approve an invalid application satisfied the latter category of jurisdictional error. Therefore, they argued that enforcing the 3 month time limit in this case would be unconstitutional and the provision could not apply as per *Kirk*. Ultimately, the Court did not determine this issue and dismissed the appeal on other grounds.
17. Although the Court did not elaborate on the NSW Supreme Court's supervisory jurisdiction, the case nonetheless raises interesting and pertinent questions, such as: whether a privative provision which applies for a period of time (e.g. 3 months) in fact deprives a Supreme Court of the supervisory jurisdiction it has in determining jurisdictional error? Alternatively, is such a provision merely a limitation period and nothing more? Mr Waterson notes that whilst it is unfortunate the Court did not provide its opinion on these matters, he believes these are significant questions destined for the High Court at some stage.
18. David Lloyd QC notes that in the past the Court of Appeal has permitted legal challenges beyond the time limitation period in cases where the "Hickman principle" had been allegedly infringed. These cases include *Vanmeld Pty Limited v Fairfield City Council* (1999) 46 NSWLR 55, *Lesnewski v Mosman Municipal Council* (2005) 138 LGERA 207, and *Maitland City Council v Anambah Homes Pty Limited* (2005) 64 NSWLR 695. The Hickman principle is a principle of statutory construction which allows seemingly incompatible statutory provisions, such as privative clauses, to be reconciled with the constitutional jurisdiction of the Courts. However, Enid Campbell and Matthew Groves explain the importance of time limitation periods for review of executive decisions in that they provide certainty to public authorities and third parties regarding the legal validity of a decision.

Issue 3: Right to reasons where proceedings improperly commenced via summons

19. In *Case 2*, Gold & Copper challenged the Minister's *second renewal decision*. The grounds for review were the same grounds that Justice Pain addressed for the first renewal decision in *Case 1*, being Gold & Copper's argument that Newcrest's initial renewal application had been withdrawn or abandoned following the submission of the new front page.
20. Gold & Copper commenced these proceedings in *Case 2* by way of summons under Part 59 of the *Uniform Civil Procedure Rules 2005* (NSW) ("*UCPR*"). Rule 59.4 states that the summons must specify the relief sought and the grounds on which relief is sought.

RULE 59.4:

Content of summons

The summons must state:

- (a) *the orders sought, and*
 - (b) *if there is a decision in respect of which relief is sought:*
 - (i) *the identity of the decision-maker, and*
 - (ii) *the terms of the decision to be reviewed, and*
 - (iii) *whether relief is sought in respect of the whole or part only of the decision and, if part only, which part, and*
 - (c) *with specificity, the grounds on which the relief is sought.*
21. However, Newcrest argued that the grounds for relief specified in Gold & Copper's summons should be struck out as they were the same grounds that were previously rejected by Justice Pain in *Case 1*, resulting in an Issue Estoppel and Anshun Estoppel. Given this Issue and Anshun Estoppel, Newcrest moved a motion to summarily dismiss the proceedings for an abuse of process.
22. The Court (Justice Biscoe) accepted Newcrest's argument that the grounds for relief specified in the summons raised an Issue and/or Anshun Estoppel. Ordinarily, this would have also resulted in the proceedings being dismissed for an abuse of process. However, Gold & Copper argued that the proceedings should not be dismissed so that it could obtain reasons for the Minister's decision under the *UCPR* r 59.9.

RULE 59.9:

Special procedure where public authority is defendant

- (1) *This rule applies to proceedings for judicial review in which relief is sought in relation to a decision of a public authority.*

- (2) *The plaintiff may, within 21 days of commencing proceedings against a public authority or within such other time as the court may direct, serve on the public authority a notice requiring the public authority to provide to the plaintiff:*
 - (a) *a copy of the decision, and*
 - (b) *a statement of reasons for the decision.*
 - (3) *A statement of reasons for the decision must:*
 - (a) *set out findings on material questions of fact, and*
 - (b) *refer to the evidence or other material on which those findings were based, and*
 - (c) *explain why the decision was made.*
 - (4) *If:*
 - (a) *the public authority does not comply with a notice under this rule within 14 days of service, or*
 - (b) *the plaintiff has not served a notice within the time prescribed by subrule (2),*
the plaintiff may apply to the court for an order that the public authority provide the plaintiff with a copy of the decision and a statement of reasons for the decision.
- 23. Gold & Copper successfully persuaded Justice Biscoe that the proceedings should not be dismissed so that it could exercise its right to obtain reasons for the Minister's second renewal decision. This would allow Gold & Copper to assess if it could plead alternative grounds to the ones that were struck out. Justice Biscoe accepted Gold & Copper's argument despite holding that the proceedings were now essentially a fishing expedition to find alternative grounds. In doing so, Justice Biscoe rejected the Minister's argument that the Court's power to make an order for reasons under r 59.9(4) is only limited to proceedings that were properly commenced by summons with valid grounds.
- 24. This decision of Justice Biscoe was subsequently appealed to the NSW Court of Appeal in *the focus case*. However, Gold & Copper did not appear at the appeal hearing concerning this issue. This created additional difficulty for the Minister in persuading the Court of Appeal since there was no contradictor.
- 25. The following two arguments were raised by the Minister on appeal:
 - (1) Rule 59.9(4) assumes that the Court's power to order reasons requires a complying summons, that is, one in which there are valid grounds. Whilst the Court of Appeal held there was much force in this argument, it felt it inappropriate to address this issue in Gold & Copper's absence since there was no contradictor.
 - (2) Judge Biscoe incorrectly concluded there was no abuse of process despite finding there was an Issue Estoppel and Anshun Estoppel. The Court of Appeal accepted this argument, holding that Issue Estoppel and Anshun Estoppel are merely species of an abuse of process. Consequently, the Court of Appeal found that Judge Biscoe erred

and should not have allowed the proceedings to remain. He should have either dismissed the proceedings or alternatively stayed them.

26. Mr Waterson contrasted the limited right to reasons of an applicant under r 59.9 to the free standing right to reasons available to an applicant at the Commonwealth level under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR"). He argued that if Gold & Copper's submissions regarding r 59 were accepted, r 59 would essentially become a free standing right to reasons, similar to the ADJR, even though it was clearly only meant to apply once proceedings had been validly commenced. Mr Waterson believes this argument ultimately found some favour with the Court.

BIOGRAPHY

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Timothy Hale SC was called to the NSW Bar in 1980. He was appointed Senior Counsel in NSW in 1999 and Queen's Counsel in WA in 2000. He has a broad practice in New South Wales and across Australia with an emphasis on property, administrative law and defamation.

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Luke Waterson was admitted as a Lawyer in 1992 and called to the NSW Bar in 2011. He has Masters in Law from the Australian National University. His primary practice is in commercial law, telecommunications and broadcasting, administrative law, constitutional law, valuation and compensation.

BIBLIOGRAPHY

Focus Cases

'The Focus Case': *Gold & Copper Resources Pty Ltd v The Hon Chris Hartcher, Minister for Resources & Energy, Special Minister* [2015] NSWCA 57

'Case 1': *Gold and Copper Resources Pty Limited v Minister for Resources and Energy* [2013] NSW LEC 66.

'Case 2': *Gold and Copper Resources Pty Ltd v Newcrest Mining Ltd* [2014] NSWLEC 148

'Case 3': *Gold & Copper Resources Pty Ltd v Minister for Resources and Energy (No 2)* [2014] NSWEC 30

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_composite/benchmark_27-03-2015_weekly_civil_law_review.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5507a438e4b0b29802dc2f8d>

Cases

Kirk v Industrial Court of New South Wales (2010) 239 CLR 531
Vanmeld Pty Limited v Fairfield City Council (1999) 46 NSWLR 55
Lesnewski v Mosman Municipal Council (2005) 138 LGERA 207
Maitland City Council v Anambah Homes Pty Limited (2005) 64 NSWLR 695

Legislation

Mining Act 1992 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)