[2022] WAMW 24

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	TAVANTH SINGH SANDHU v TRISTAN DAVID OWEN [2022] WAMW 24
CORAM	**:**	WARDEN T MCPHEE
HEARD	**:**	3 November 2022
DELIVERED	**:**	3 November 2022
FILE NO/S	**:**	Application for Security for Costs, Interlocutory Application Ancillary Document No: 2152199
TENEMENT NO/S	**:**	Application for Forfeiture in respect of Mining Lease M 25 / 0092
BETWEEN	**:**	TAVANTH SINGH SANDHU (Applicant) AND TRISTAN DAVID OWEN (Respondent)

Catchwords: Application for Security for Costs, relevant factors, unpaid costs order, in person litigant.

Legislation:

- *Mining regulations 1981* (WA) (the Regulations): Regulation 167, 168
- *Corporations Act* 2001 (Cth): Section 1335
- *Rules of the Supreme Court 1971* (WA) Order 25

Result: ***(1) The Interlocutory Application is granted in part;***
(2) The Respondent is to provide the sum of $8,000.00 by way of security for costs in accordance with Regulation 167(2), within 14 days of this Order;
(3) In the event Order 2 is not complied with, the matter is the subject of a stay, until such time as Order 2 is satisfied, or until further Order;
(4) In the event Order 2 is complied with, the Applicant have liberty to apply for further tranches of security, by way of a further Interlocutory Application;
(5) Consequential programming orders are made; and
(6) The Interlocutory Application is otherwise dismissed.

Representation:

Counsel:

Applicant	:	Mr Kavenagh
Respondent	:	Ms McKenzie

Solicitors:

Applicant	:	Kavenagh Legal
Respondent	:	McKenzie & McKenzie

Cases referred to:

- ***Owen v Sandhu*** [2020] WAMW 3
- ***Owen v Sandhu*** [2021] WAMW 15
- ***Owen v Sandhu*** [2021] WAMW 18
- ***Westonia Earthmoving Pty Ltd v Cliffs Asia Pacific Iron Ore Pty Ltd*** [2013] WASC 57 (28 February 2013)
- ***Glenn Alan Haythornthwaite v Siberia Mining Corporation Pty Ltd*** [2016] WAMW 11
- ***Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2022] WAMW 13

Summary

1 This dispute arises from an application for forfeiture number 592130 dated 10 December 2020 (the Application). In that matter, the applicant (Mr Owen) seeks the forfeiture of a mining lease held by the respondent (Mr Sandu).

2 The respondent to the Application, now applies for security for costs, by way of an interlocutory application dated 14 June 2022 (the Interlocutory Application).

3 These reasons concern only the Interlocutory Application, and I will refer to the parties as the Applicant (Mr Sandu) and Respondent (Mr Owen) to the Interlocutory Application.

4 The Applicant says that there is a real and substantial risk that if it succeeds upon resisting the Application that it will be put to irrecoverable expense. He says there are good reasons for the making of the Order, most pertinently, the fact of outstanding costs orders owed by the Respondent to the Applicant.

5 The Respondent opposes the Application and says there is not a proper basis to make any such Order.

6 The Interlocutory Application was heard on 3 November 2022, and I reserved my decision.

7 For the reasons which follow, the Applicant should succeed.

Background

8 The following information is taken from the documentary materials tendered, and is not in dispute.

9 The Applicant and the Respondent appear to be two parties locked in a series of bitter disputes. There are several matters which appear to have gone to hearing:

a. ***Owen v Sandhu*** [2021] WAMW 15;

b. ***Owen v Sandhu*** [2020] WAMW 3;

c. ***Owen v Sandhu*** [2021] WAMW 18.

10 The current dispute concerns control of a mining lease located in the Goldfields, with the Applicant defending a further forfeiture application by the Respondent.

11 The Applicant has previously succeeded in a major dispute between the parties, staving off the Respondents application for forfeiture relating to a different tenement. As a result of that, a costs order was made against the Applicant.

12 That success though cannot be relied upon to inform a view as to the merits of the underlying case here. The new matter must be determined on its merits.

13 In another of the disputes referred to above, the Respondent fought off an application for security for costs by the Applicant, which was largely brought on the basis of an attack upon the credit of the Respondent, falling from concerns expressed in an earlier decision. Following that success, it seems, the Respondent surrendered the tenements underlying it.

14 As indicated, most relevantly to this matter, there is a costs orders that arises from the first dispute I have mentioned, which was assessed on 31 May 2022, as requiring a payment of $103,820.31 by the Respondent.

15 That assessment was the subject of a challenge by the Respondent, with that challenge being recently determined by Warden Wilson on 25 October 2022. The result of that determination was that the sum payable was $98,123.89.

16 This Interlocutory Application was made after the initial assessment of costs, but prior to the decision of Warden Wilson.

17 It is not in dispute now, that the sum ordered to be paid is $98,123.89, nor is it disputed that it has not been paid.

18 Further, I note that on 21 September 2022 as part of the review dispute, Warden Wilson made an Order requiring the (in this matter) Respondent, to pay the Applicant (in this matter) $396.00. That Order has not been met.

The Interlocutory Application

19 The Interlocutory Application is made pursuant to Regulation 167 of the Regulations.

20 The Interlocutory Application is supported by the following Affidavits:

a. Mr Timothy Kavenagh dated 14 June 2022 (TK-1); and

b. Second Affidavit of Mr Timothy Kavenagh dated 1 November 2022 (TK-2).

21 In brief terms the Applicant advances a case to suggest that the Respondent has no freehold property which might be able to be the subject of a claim for costs, and has not adduced any evidence of any cash holdings.

22 The Applicant adduced evidence in TK-1 that the Respondent had an interest of some kind in a number of registered mining tenements. Those tenements have some value, though the precise extent of the Respondent's interest, and the value, is not known.

23 In TK-2, there was evidence that a number of those tenements which the Respondent had an interest, had been transferred to a third party.

24 The detail of the transfers was not in evidence before me.

25 The Applicant says the Respondent has not adduced any detailed evidence of its tenure holdings, nor the nature of the interest claimed, nor any evidence of the value of the tenements save for an assertion of their value.

26 Finally, the Respondent has not deposed at all to the circumstances detailed in the TK-1 and TK-2, pertaining to the outstanding costs orders owed to the Applicant. Those facts something of an anchor of anxiety that the Respondent either cannot or won't, meet any costs order made.

The Respondent's Position

27 The Respondent opposes the application for security for costs.

28 The Respondent relies upon an Affidavit dated 26 October 2021 (TO-1), sworn the substantive matter. He also relies upon an Affidavit sworn 1 August 2022 (TO-2) in opposition to the Application and relies upon his deposed interests in a number of other tenements (identified in the TO-2), so as to advance a case to suggest that no security for costs order should be made.

29 In paragraph 1 of TO-2, the Respondent deposed to the fact he was the registered holder of shares in the list of tenements contained in paragraph 11 of TK-1.

30 I note that P16/3281 and P16/3282 are referred to at items 9 and 10 of paragraph 11 of TK-1.

31 TO-2 was sworn on 1 August 2022. TK-2 suggests that P16/3281 and P16/3282 were registered as transferred on 16 June 2022.

32 The inconsistency is not explained.

33 The Respondent deposes to the history of dispute between the parties, and at Paragraph 9-10 of TO-2, details what appears to be the basis of the dispute in the Application, namely that the Applicant claims a certain sum of expenditure for metal detecting, the veracity of which appears to be in contention, on the basis of the Respondents personal inspection of the ground on 4 occasions in a tenement expenditure year.

34 The Respondent seems to seek to rely on the decision of the learned Warden Hills-Wright in ***Owen v Sandhu*** [2020] WAMW 3, where it was determined that the claimed metal detecting expenditure of the Applicant did not occur, to establish that the similar claimed expenditure on the current lease, also did not occur.

35 As I have said, the determination of the application for forfeiture underlying this matter must be made on its merits.

36 The Repsondent's primary contention, properly understood, was that it would be oppressive to make an order for security for costs in this case, as the strength of the Respondents case was significant, and in the alternative, there was evidence that there were sufficient assets available to meet any costs order.

37 The fact of the existing unmet costs orders were dealt with by suggesting the decision of Warden Wilson in which the costs orders were made, was the subject of judicial review, which should be considered to be significant.

38 Notwithstanding that submission, no evidence was placed before me from the Respondent as to the outstanding costs orders, and why, as at the date of the hearing, they had not been met.

39 No evidence of the judicial review application was put before me.

Applicable Law

40 The Application is brought pursuant to Regulation 167 of the Regulations.

41 Regulation 167 says as follows:

> *167. Security for costs*
>
> a. *(1) A warden may, on application made by a respondent in proceedings under Division 2, order an applicant in the proceedings to give security for costs.*
>
> b. *(2) If an order is made under subregulation (1), moneys comprising the security are to be paid to the Director General of Mines who shall hold the money and disburse it in accordance with any order of the warden.*

42 It was submitted to me and I accept, that the power to make an Order for security for costs is an unfettered one, having regard to the circumstances presented.

43 That is not to say that the discretion should be exercised without regard to any existing principles, and it must be the case that the power has to be exercised judiciously.

44 There is a considerable body of law in respect of the doctrines associated with security for costs.

45 When considering an Application for security for costs in the Supreme Court of Western Australia made pursuant to section 1335(1) of the *Corporations Act 2001* (Cth), his Honour Justice Edelman (as his Honour then was), in ***Westonia Earthmoving Pty Ltd v Cliffs Asia Pacific Iron Ore Pty Ltd*** [2013] WASC 57 (28 February 2013), at [5]–[6] said as follows (footnotes omitted):

> a. *The question, therefore, is whether this Court should exercise its discretion to award security for costs. The discretion has been described as 'unfettered', but it must be exercised 'judicially', by reference to established principles. The factors which have developed to guide the discretion broadly strike a balance between the interests of the plaintiff corporation in conducting litigation to protect or enforce its rights and the interests of a defendant in not being exposed to the prejudice of being unable to recover costs if it is successful.*
>
> b. *Depending on the circumstances, various factors may have different strength and effect on the exercise of the discretion to award security for costs. The most commonly cited, nonexclusive, factors include the following, most of which I extrapolate from the cases footnoted:*
>
> i. *the strength and bona fides of the plaintiff's case;*
>
> ii. *the likelihood of the plaintiff being unable to pay the defendant's costs;*
>
> iii. *whether the plaintiff's impecuniosity was caused by the defendant's conduct which is the subject of the claim;*

iv. *whether the application for security is oppressive;*

v. *whether the award of security would deny an impecunious applicant a right to litigate;*

vi. *whether there are persons standing behind the plaintiff who were likely to benefit from the litigation;*

vii. *whether the persons standing behind the plaintiff have offered any security or personal undertaking to be liable for the costs, and if so, the form of such an undertaking;*

viii. *whether the applicant was in substance a plaintiff or the proceedings were defensive in the sense of directly resisting proceedings already brought or seeking to halt the defendant's self-help procedures;*

ix. *whether the application for security had been brought promptly;*

x. *whether the applicant has any rights which it can exercise against assets of the plaintiff to satisfy an order for costs in its favour; and*

xi. *any factors relating to the public interest.*

46 The matter comes before me sitting administratively. As a result, care must be taken when seeking to rely upon statements of principle which may not be appropriate in the different jurisdictional setting.

47 In addition, there is a textual difference between section 1335 of the *Corporations Act 2001*, and Regulation 167 of the Regulations.

48 The aforementioned provision contains an express constraint on the exercise of the discretion, namely the need for the applicant in question to demonstrate by way of credible evidence that there is a risk that a costs Order will not be met.

49 There is no such express limitation in the wording of Regulation 167 of the Regulations that I can see, which is couched in the broadest possible terms.

50 In my opinion however, there can be no doubt that the exercise of the discretion granted by the use of the word "may" in Regulation 167, must be undertaken in a principled manner, and the ability to demonstrate an unwillingness or inability to pay is a necessary and relevant consideration.

51 It follows that in my view, the long-established approach to such applications, most helpfully (with great respect) summarised by his Honour Justice Edelman as detailed above, is the correct and preferable approach to the consideration of when a Warden may impose an Order for Security for Costs pursuant to Regulation 167 of the Regulations.

52 In addition, I note a similar approach and discussion was undertaken by the learned Warden Hall in ***Glenn Alan Haythornthwaite v Siberia Mining Corporation Pty Ltd*** [2016] WAMW 11, at [14]–[25].

53 I must however here note, with great respect to his Honour, that I departed from the view he expressed in [20] of that decision, in ***Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2022] WAMW 13.

54 In my opinion however, that does not otherwise impact upon the analysis undertaken by Warden Hall in respect of the principles to be applied on a security for costs application, which is an approach entirely consistent with the approach of his Honour Justice Edelman I have already described.

55 I do also note in particular, in respect of this matter, Warden Hall's discussion in respect of the effect of Order 25 of the Rules of the Supreme Court, which militates to a degree against the making of security for costs orders against natural persons who might be impecunious.

56 Such applications may be oppressive. As a general proposition, which I also adopt and consider applicable, natural persons ought not be closed out from the

protection of the courts simply as a result of their adverse financial position. A broader consideration of the facts and circumstances must be made.

57 It follows from that discussion, that in order to come to a view as to the appropriateness or otherwise of an order for security in this matter, I am required to give consideration to the matters referred to above.

58 In this case, those matters of particular note are as follows:

a. The application for security is brought some 18 months after the commencement of the proceedings;

b. The Respondent is a natural person, and his financial position is relevant;

c. The Respondent is properly regarded as the attacker in this matter, seeking the forfeiture of a tenement held by the Applicant;

d. The Respondent has two established liabilities to the Applicant, in the sum of $98,123.89 and $396.00, which remain outstanding; and

e. The strength and bona fides of the parties respective cases.

Determination of this Matter

59 I note that the review of the Mining Registrars assessment on costs was completed on 25 October 2022.

60 Much was made by the Respondent in written submissions of the delay between the commencement of the proceedings, and the commencement of the Interlocutory Application.

61 In the ordinary course, such a submission would be entirely appropriate.

62 This case however, is not the ordinary case. The Interlocutory Application was made following the determination of Warden Wilson and the making of the larger Order. The Interlocutory Application was made after that date, and may

also be said to have be made in manner consistent with lessons from Warden Maughan's earlier decision on security for costs.

63 Counsel for the Respondent's submissions in this respect, advanced a proposition that the parties ought behave in a static manner, and could not rely on subsequent events to inform the position. I reject that submission completely, noting in so doing that the Respondent sought to (properly) rely on the fact of the hearing of the judicial review application in April 2023 as a basis to decline the Interlocutory Application. The discretion is broad, and factual matters from before and after the date of the making of any such application are potentially relevant.

64 In this case, the Applicant having failed in an earlier application for security for costs in a different matter, kept his powder dry in this matter until the factual circumstances previously faced had altered in his favor.

65 That was a wise determination, and thus the real question in respect of the delay, is whether the Applicant brought the Interlocutory Application promptly, once the orders for costs had been made. There can be no doubt that he did. The delay is adequately explained and reasonable in the circumstances.

66 When considering this matter in light of the principles applicable, and the evidence, the question is really one of whether the Respondent, as a natural person, ought to be put to the burden of an order for security for costs, on the basis that he has not met two costs orders owed to the Applicant, made following a similar kind of dispute.

67 I note in this respect that it cannot be said that the Applicant is seeking to improperly enforce the other costs orders in this proceeding; the Interlocutory Application seeks the provision of only $15,000.00 in security for this matter.

68 In essence, the Applicant says the Respondent already has outstanding liabilities to it arising from a similar struggle over control of a tenement, which have not

been met, and ought not be permitted to attack a further tenement held by the Applicant without a degree of security.

69 There is force in that submission in the circumstances of this case.

70 No evidence was adduced by the Applicant as to why the costs orders have remained unmet. Debtors must meet their obligations, and it is not a sufficient answer, given from the bar table, that a review of Warden Wilsons decision has been commenced. No evidence of that was before me, and most relevantly, there is no suggestion that a stay of any prior Orders of Warden Wilson has been sought.

71 No evidence was placed before me as to the reason for the non-payment, save to suggest the fact that the final Order from Warden Wilson being made only recently, somehow diluted the obligation. It does not.

72 As a result, in those circumstances I am satisfied that there is a risk that any costs orders made in this matter, may not be met. I come to that view largely on the basis of the fact of the unpaid costs orders in the other matter.

73 Further, considering the case at the early stage I am, the Respondent's case is supported, at least as presented to me on this Application, by assertions of credit, or lack thereof, from other matters.

74 There is currently very little else advanced in the way of an evidentiary position in either TO-1 or TO-2, nor for that matter, on the part of the Applicant. Counsel for the Respondent sought to suggest that the fact there was no evidence on foot by the Applicant, could be relied upon to come to a view of the strength of Respondent's case.

75 That is simply not so in this case. No orders have been made requiring the provision of evidence in the substantive matter by the Applicant.

76 In any event, I make no determination on the relative strengths of the cases, however at this stage the evidentiary position seemingly to be taken, could certainly be stronger for both parties.

77 Competing allegations of adverse credit are made which I cannot determine on this Interlocutory Application.

78 Suffice to say the position is neatly summarised by the learned Warden Maughan in ***Owen v Sandhu*** [2021] WAMW 18 at [10] in a different dispute, with a striking similarity to this one:

> *There has been a history of litigation between the parties and, in particular, I have been referred to:*
>
> > *(i) The judgment of Warden Hills-Wright in Owen v Sandhu [2020] WAMW 3, wherein his Honour made adverse comments as to the credit of Mr Sandhu;*
> >
> > *(ii) The judgment of Warden Wilson, Owen v Sandhu [2021] WAMW 15, wherein his Honour made adverse findings as to credit of Mr Owen.*

79 In this matter, the merits of the underlying application are not able to be assessed in any meaningful manner at this stage, for largely the same reasons set out by Warden Maughan in ***Owen v Sandhu*** [2021] WAMW 18 at [10]–[18].

80 Thus, the matter of concern for me becomes one of oppression, and whether the Interlocutory Application is being used to deny an impecunious applicant the right to litigate, or is otherwise oppressive.

81 On the first issue, there is evidence that the Respondent does not hold real property. There is not any evidence of readily accessible funds.

82 In TO-2 the Respondent deposes to the possession of shares or interests in existing tenements, being of some value (said to be $300,000) however there is

limited detail of those assets, and the purported interest in them. As a result, I am unable to come to any satisfactory view on their realizable value, should the need arise, save to accept there is some value in the held mining tenements.

83 I remain concerned by the apparent discrepancy in the tenement holdings of the Respondent I have outlined above, though cannot, in the absence of the witnesses come to a concluded view on what consequences flow from that. At the hearing, it was not pressed by the Respondent that the statements in TO-2 which I have referred to, were accurate.

84 On balance for the purposes of this Interlocutory Application, the evidence before me does not support an inference that the Respondent is impecunious. It does however, it supports an inference that the Respondent is unwilling to make the ordered payments.

85 The onus is on the Applicant to establish an evidentiary basis to ground the Interlocutory Application, and in my view, that onus is met by the fact of the unmet costs orders.

86 I consider there is a reasonable basis to call into question the willingness of the Respondent to meet any costs order made.

87 I note in this respect, even the smaller of the two outstanding sums of $396.00 ordered to be paid forthwith on 21 September 2022, remains unpaid.

88 Whilst "*forthwith*" suggests the immediate, it is perhaps not so clear as that, see for example Logan J at [8] – [11] in ***CXXXVIII v Commonwealth of Australia*** [2019] FCAFC 54 (3 April 2019), though the context of Warden Wilson's Order of 21 September 2022 suggests a sooner rather than later approach was called for.

89 I will add, that were that the only outstanding costs order, I would be unlikely to come to a view it was appropriate to make a security for costs order in a different matter.

90 Nevertheless, and most relevantly, the effect of Regulation 168 is plain; those two sums ordered are payable by the Respondent to the Applicant and are recoverable, and one of them is a significant sum.

91 In finalising a view on the matter, the key issue for me, similarly to the view expressed by the learned Warden Maughan in ***Owen v Sandhu*** [2021] WAMW 18 at [21(ii)] of that decision, is the fact in this matter now of the unpaid costs orders, without any explanation given.

92 At the hearing, counsel for the Respondent advanced a submission that the fact there was an application for judicial review on foot was of significant moment.

93 It was not suggested by the Respondent that the fact of the review (the detail of which was not placed in evidence before me on this Interlocutory Application) operated as a stay, and it was conceded that no stay of the Orders of Warden Wilson making the initial unassessed costs order had been sought.

94 I was told from the bar table, that the judicial review application had been made in March 2022, which was before the initial assessment of the learned Mining Registrar on costs, and well prior to the review of that assessment by Warden Wilson, ultimately determined on 25 October 2022.

95 It was open, at any time after the commencement of the judicial review proceeding (and remains open), for the Respondent to seek a stay of the costs order, which, given it was an order following what I was told was a 5 day hearing, was always likely to result in a sizeable sum being payable, when the assessment process was undertaken. No such application has been made.

96 That appears to have been a tactical determination, the result of which is that the Respondent now faces a security for costs application in this matter, with the assessed sums being outstanding, with the judicial review of the relevant decision (I was told) scheduled for April of 2023.

97 It is the case that the Applicant could take steps to enforce those owed sums, however on balance in this matter, in my view the Applicant should not be placed to the expense of defending the relevant tenement, with the costs sums outstanding, and have to commence recovery proceedings without a degree of comfort as to security in this matter.

98 That, coupled with the clear fact that the Applicant is advancing a positive case attacking the Respondents tenure in this matter, and by inference seeking to possess it himself, is a sufficient basis to make an order for security for costs in this particular case.

99 It also follows that the factual situation presented to me is starkly different to that presented to Warden Maughan, and as a result, I arrive at a different view.

Quantum

100 The Objector sought the sum of $15,000, which is arrived at by reference to a draft bill of expected costs. No challenge is made to that sum, though I consider I must come to a view myself.

101 The draft bill appears to relate to costs already incurred, and the expected costs of the Interlocutory Application pressed to hearing.

102 In my view the quantum to be ordered must be an assessment based on the events to date, and the expected trajectory of the matter, with a view to providing a degree of comfort to the Respondent that if they are able to obtain a costs order, that it will be substantially met. In my view it is not required to reflect an indemnity, and indeed, giving the balancing of interests required in this case, should not be an indemnity.

103 I am assisted in this respect by reference to Schedule 4 of the Regulations, which I incorporate by reference, and attach hereto as Annexure A.

104 The matter is currently at an early stage. It was commenced in December 2020. The Respondent (Mr Owen) has put on some evidence in the substantive matter.

The Applicant (Mr Sandu) has not yet, though has not been ordered to. As a result, some additional particulars, evidence and submissions will have to be attended to by the parties.

105 Having regard to the scale of costs in accordance with which an Order might be made, and so as to strike the balance between providing appropriate comfort to the Applicant in the particular circumstances, but not stifle the capacity of an in-person litigant to utilise the Court's processes, the appropriate course is to order a sum for security, whilst granting leave to the Applicant to seek additional tranches should it become necessary.

106 The initial tranche shall be in the sum of $8,000, having regard to the sums said to have been expended to date, and the anticipated future costs of the matter if conducted in an efficient manner. I have come to this view also having regard to items (2)–(7) of Schedule 4.

107 I note also the sums referred to in Schedule 4, are the "maximums". The case, as it is before me at least, is not a complex one at all and it should be able to be case managed efficiently. It is difficult to see how the maximums would be claimable.

108 It should also be noted by the Respondent that the fact of the Order made on this occasion should not give rise to an expectation that there will be further tranches imposed as a matter of course.

109 The final point to note is that the Applicant, in the Interlocutory Application, sought in effect a springing order that if the security to be ordered was not paid, that the Application be dismissed.

110 It is not appropriate at this juncture to make such an Order. The Applicant is a natural person, and ought be provided with an opportunity to meet the requirements to be set, without a springing order hanging over his head.

111 I will however make a direction pursuant to Regulation 170 that the Application be listed for mention only on 27 January 2023, so as to assess the position at that date.

Conclusion and Orders

112 As a result of the above I make the following Orders on the Interlocutory Application:

(1) The Interlocutory Application is granted in part;

(2) The Respondent is to provide the sum of $8,000.00 by way of security for costs in accordance with Regulation 167(2), within 14 days of this Order;

(3) In the event Order 2 is not complied with, the matter is the subject of a stay, until such time as Order 2 is satisfied, or until further Order;

(4) In the event Order 2 is complied with, the Applicant have liberty to apply for further tranches of security, by way of a further Interlocutory Application;

(5) Consequential programming orders are made; and

(6) The Interlocutory Application is otherwise dismissed.

113 I will hear the parties if they wish as to the costs of the Interlocutory Application, and to that effect, the parties should provide competing Minutes and short submissions within 7 days, following which the matter will be listed as might be required, or alternatively, dealt with on the papers if the parties consent to that course.

114 Finally, I also vacate the hearing listed for 4 November 2022, as upon the publication of these reasons, it is not necessary, save if one of the parties wishes to be heard on the form of final orders.

_____

Warden T McPhee

3 November 2022

Annexure A

Schedule 4 of the Mining Regulations

Table — Scale of costs

Item		Time	Fee earner	Maximum amount $
1.	Commencing proceedings —			
	(a) Application or objection, including instructions			396
	For each additional respondent			55
	(b) Particulars (including preparation and lodgment)	8 hour	SL	3 168
2.	Response —			
	(a) Lodging a response			198
	(b) Particulars (including preparation and lodgment)	8 hours	SL	3 168
3.	Disclosure —			
	Giving additional disclosure where ordered by the warden	3 hours	JL	891
4.	Inspection —			
	Inspection and giving inspection	per hour	JL	297
5.	Interlocutory applications —			
	Proceedings and/or responses to applications (including all documentation and preparation for hearing)	1 day preparation ½ day hearing	C	4 785
	Note: In relation to the above, if the proceedings do not commence and settle or adjourn on the day of the hearing then the Assessing Officer shall allow such amount as is reasonable in the circumstances.			
6.	Applications and attendances before the warden	1 hour	SL	396
7.	Offers of settlement, notices, practice directions, applications, declarations, memoranda, affidavits —			
	(a) Offers of settlement	2 hours	SL	792
	(b) Acceptance of offer of settlement	2 hours	SL	792
	(c) Other notices referred to or required by regulations or practice directions not otherwise specified in this scale			143
	(d) Preparation lodging and service of affidavits and statutory declarations not otherwise provided for	per hour	SL	396
	(e) Drawing and serving of interlocutory orders (where ordered or required)	2 hours	JL	594
8.	Getting up —			
	Preparation for hearing (includes work reasonably and necessarily undertaken prior to commencement of proceedings)	50 hours	SL	19 800

Item		Time	Fee earner	Maximum amount $
9.	Hearing —			
	(a) Fee on brief for Counsel i.e. first day of hearing and preparation	2 days preparation 1st day of trial	C	7 975
	(b) Fee on brief for Senior Counsel i.e. first day of hearing and preparation (where 2 or more Counsel are certified for)	2 days preparation 1st day of trial	SC	13 200
	(c) Counsel fee for the second and each successive day of hearing		C	3 190
	(d) Counsel fee for Senior Counsel for second and each successive day of hearing (where 2 or more Counsel are certified for)		SC	5 280
	(e) Instructing lawyer attending hearing, where certified for	per hour	JL	297
	(f) Clerk attending hearing			
	Note: In relation to paragraphs (a)-(f) if —			
	(1) The hearing lasts less than 2 hours; or			
	(2) The hearing does not commence and settles or adjourns on the day of the hearing,			
	then the Assessing Officer shall allow such amount as is reasonable in the circumstances.			
	(g) Attending on reserved determination	per hour	SL	396
10.	Mention hearings	per hour	SL	396
11.	Determinations —			
	(a) Settling and extracting determination —			
	(i) with appointment	1 hour	JL	297
	(ii) without appointment	0.5 hours	PL	198
	(b) Issue of certified copy of determination			143
12.	Enforcement —			
	Lodgment of an application to enforce a determination pursuant to *Civil Judgments Enforcement Act 2004*			198
13.	Registration of determinations —			
	Registration of determinations including those under *Service and Execution of Process Act 1992* (Commonwealth)			198
14.	Assessment of costs including drawing bill —			
	(a) Lodgment of bill of costs			55
	(b) Drawing bill of costs, copies and service		SL	Such amounts as are reasonable in the circumstances
	(c) Making an objection to a bill			
	(d) Assessment of costs (including the time spent in preparing for the assessment)			

Item		Time	Fee earner	Maximum amount $
15.	Copying — Photocopies where necessary, including of documents for which allowance is otherwise made in this scale	per page		1.00
16.	Review by warden of a decision of a mining registrar			Amount calculated in accordance with item 5
17.	Accounts and inquiries — Attending on taking accounts, inquiries		SL	Such amounts as are reasonable in the circumstances
18.	Other work — (a) Time reasonably spent by a lawyer on work requiring the skill of a lawyer (of the standing indicated) but not covered by any other item or (b) Time reasonably spent by a lawyer, or by a clerk or paralegal of a lawyer, on work not covered by any other item or by paragraph (a)	per hour per hour	SC SL C JL SC SL C JL PL	528 396 319 297 143
19.	Disbursements — In addition to the fees and charges allowed under this Schedule — (a) As between lawyer and client, a lawyer may charge and be allowed disbursements necessarily or reasonably incurred; and (b) As between party and party, a party may be allowed disbursements necessarily or reasonably incurred.			
20.	Allowances for witnesses — The amount of any costs to be paid in respect of work done by a lawyer in conducting any proceedings in a case may include a reasonable allowance for — (a) witnesses called because of their professional, scientific or other special skill or knowledge; and (b) witnesses called other than those covered in paragraph (a). In fixing an allowance for witnesses under paragraph (b) including the applicant and respondent, the Assessing Officer may have regard to the amount of salary, wages or income (if any) actually lost by the witness.			

[Clause 3 inserted: Gazette 9 Mar 2007 p. 917-20; amended: Gazette 15 Jan 2010 p. 136; 4 Feb 2011 p. 393-5; 11 Sep 2015 p. 3746-8.]