JURISDICTION	:	MINING WARDEN, WESTERN AUSTRALIA
TITLE OF COURT	:	OPEN COURT
LOCATION	:	PERTH
CITATION	:	COOPER v ARIMCO MINING PTY LTD [2000] WAMW13
CORAM	:	CALDER SM
HEARD	:	9 NOVEMBER 2000
DELIVERED	:	7 DECEMBER 2000
FILE NO/S	:	PLAINT 1/990
TENEMENT NO/S	:	M 63/202
BETWEEN	:	ROBIN CHRISTOPHER COOPER Plaintiff AND ARIMCO MINING PTY LTD Defendant

Catchwords:

EXPENDITURE\ non-compliance\mining lease\forfeiture\inferences
FORFEITURE\mining lease\expenditure non-compliance
MINING LEASE\forfeiture\expenditure non-compliance
PLAINT\forfeiture\expenditure non-compliance\lodgement before end of expenditure year

Legislation:

Mining Act (WA) 1978, s.98

Result:

Forfeiture of mining lease recommended

Representation:

Counsel:

For the plaintiff	:	Mr M. Workman
For the defendant	:	Not represented

Solicitors:

For the plaintiff	:	Michael Workman, Lawyer
For the defendant	:	Nil

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

Nil

Case(s) also cited:

Nil

CALDER SM:

WARDEN'S REPORT AND RECOMMENDATION TO THE MINISTER

THE PROCEEDINGS

1 On 16 August 1999 plaint 1/990 was lodged with the mining registrar at Norseman by Robin Christopher Cooper ("the plaintiff"). The defendant named in the plaint was Arimco Mining Pty Ltd ("Arimco"). The plaint seeks forfeiture of mining lease 63/202 ("M63/202"). The alleged basis for the forfeiture application is that:

> *"The Defendant has not complied with the Expenditure Conditions of the Mining Act 1978 in relation to Mining Lease M63/202 for the period 5 September 1998 to 7 May 1999 and from 8 May 1999 to the present; for the Year Period Ending 4 September 1999; …"*

2 Following service by means of registered mail upon Arimco at its registered address on 19 November 1999 correspondence was received by the mining registrar at Norseman in the form of a letter on the letterhead of "Vagar International Ltd" and purportedly signed by Allan Blood "authorised representative" In the letter reference was made to plaint 1/990 and it was stated that Vagar International Ltd ("Vagar") had acquired M63/202 from Arimco. The Warden at Kalgoorlie subsequently fixed 29 March 2000 as the date for the hearing of the plaint. On 28 March a facsimile of a letter of even date was received by the Mining Registrar at Norseman. The letter purported to be signed by Allan Blood and was on the letterhead of Vagar. It indicated that there was an intention to defend the plaint, although no notice of intent to defend had been lodged. It indicated that Mr Blood, due to a medical condition, would be unable to attend at the hearing before the warden on 29 March 2000 and suggested that the plaintiff could present his case on that day and that Vagar be permitted to present its case at the court's convenience. On 29 March the matter was called before Warden Woods who made the following order:

"1. Within ten (10) days Vagar International Pty Ltd do file and serve an application and written submission relating to:

(a) being joined as a Defendant in the proceedings;

(b) an extension of time within which to file a Notice of Defence in the proceedings together with an Affidavit in support and Minute of Proposed Notice of Defence.

2. The application referred to in paragraph 1 be heard in the Kalgoorlie Wardens Court on Tuesday, 18 April 2000 at 10.00 am.

3. The hearing of Plaint 1/990 be adjourned to Norseman Wardens Court on Wednesday, 17 May, 2000 at 10.00 am.

4. As a condition of the adjournment of plaint 1/990 Vagar International Pty Ltd and/or the Defendant do pay to the Plaintiff the sum of $3050.60 being:

(a) being the cost of the Plaintiff's Counsel's air fares from Perth to Kalgoorlie and return $465.60

(b) the cost of the Plaintiff's travel costs from Perth to Norseman and return $375

(c) the cost of the Plaintiff's Counsel's accommodation in Kalgoorlie during the evening of 28-3-2000 $120

(d) the cost of the Plaintiff's accommodation in Kalgoorlieduring the evening of 28-3-2000 $90

(e) the Plaintiff's legal costs incurred for the adjourned Hearing on 29-3-2000 $2000

TOTAL $3050.60

4. *If payment of the amount ($3050.60) specified in paragraph 4 is not received on or before the close of business on 14 April, 2000 by the Plaintiff's Solicitors, Michael Workman, 283 Roberts Road, Subiaco, WA,*

> *6008, then the application referred to in paragraph 1 will not proceed and the hearing on 17 May, 2000 will proceed at Norseman Wardens Court on an undefended basis."*

3 On the warden's file in this matter she noted that on 18 April, at Kalgoorlie, no parties were in attendance, that her order of 29 March 2000 had not been complied with and that the matter was "*listed for hearing 17/5/2000 Norseman Wardens Court undefended matter*". Subsequently, on the warden's file in this matter, she noted that she had adjourned plaint 1/990 to the Perth Wardens Court for a hearing date to be set. That was done following the receipt of correspondence from Mr Workman, on behalf of the plaintiff, Freehill Hollingdale and Page, on behalf of Vagar, and Ferrier Hodgson, chartered accountants, the joint and several receivers and managers of Arimco, all of whom consented to the transfer of the proceedings to Perth. At the first mention day of this matter before me in Perth on 21 July 2000 Mr Workman appeared for the plaintiff. Mr Peter Delfante appeared as agent for Vagar. There was no appearance by Arimco. On that day the matter was listed for hearing in Perth before me on 9 November 2000. Notification, by way of letter dated 24 July 2000, of the hearing date was sent to Arimco at care of Ferrier Hodgson, to Jackson McDonald, barristers and solicitors, who had previously notified the registrar that they acted for the receivers and managers of Arimco, to Vagar at care of Freehill Hollingdale and Page, and to Mr Cooper, the plaintiff. Between that date and the hearing date, namely, 9 November 2000, no communication was received by the registrar or the warden's clerk from Vagar, Jackson McDonald, Freehill Hollingdale and Page or Ferrier Hodgson.

4 No application by Vagar to be joined as a defendant was ever made to me nor, so far as I am aware, to any other mining warden.

5 At the commencement of the hearing of plaint 1/990 before me on 9 November 2000 Mr Workman appeared on behalf of the plaintiff. There was no appearance by the defendant Arimco and no other person made application to appear at the hearing. The hearing of the plaint proceeded ex parte before me on that date.

THE EVIDENCE

6 Mr Workman began by tendering a number of documents.

7 Exhibit A was a certified copy of the register for M63/202. On the basis of the contents of that document I find that M63/202 was transferred to Arimco in 1992 and that title in the tenement was transferred to Vagar on 29 March 2000 (Exhibit G). On that latter date caveat 691H/990, lodged on behalf of Arimco, was recorded. I also find that the annual minimum amount of expenditure prescribed for the purposes of the expenditure condition in respect of M63/202 is $77,500 and has been that amount since the tenement was first granted in 1989. The A13 report in exhibit A indicates that expenditure claimed for the year ended 4 September 1999 was $128,493 and that for the year ended 4 September 1998 $4444 expenditure was claimed and an exemption certificate in the amount of $73,056 was granted. The report A13 indicates that from the year ending 4/9/92 (being the year in which Arimco acquired the tenement) until the year ended 4 September 1999, the total value of certificates of exemption granted was $348,572. During those same years the total of the prescribed minimum expenditure (subject, of course, to the grant of a certificate of exemption) was $620,000. Although the report A13 shows that certificates of exemption for the years ended 4 September 1991, 1992, 1993, 1994 were granted on 28 August 1991, I proceed upon the basis that that is a data entry error.

8 In exhibit A it is noted that on 3 November 1998 plaint 1/989 was lodged. That plaint was subsequently withdrawn on 4 February 1999 meaning that between the period 3 November 1998 and 4 February 1999 the expenditure requirement was suspended (regulation 52). Similarly, when plaint 1/990 was lodged on 16 August 1999, being 3 weeks prior to the end of the expenditure year in respect of which it was alleged there had been non-compliance, the expenditure requirement for that remaining period was pro rata dispensed with pursuant to regulation 52.

9 On 29 October 1998 a form 5 report on operations on M63/202 for the year ended 4/9/98 was lodged (exhibit B). Mr Workman also produced a certified copy of the form 5 report for the same tenement for the year ended 4 September 1999 which was lodged at the registry on 12 November 1999 (exhibit C). The form 5 for the year ended 4/9/98 claimed total expenditure of $4444. The form 5 for the year ended 4 September 1999 claimed a total expenditure on the tenement during the year in question of $128,493. That total amount was made up of $115,777 for mineral-exploration activitities, $10,076 for annual tenement rent and rates and $2640 for administration/overheads. The amount of $115,777 for mineral-exploration activities was further particularised as consisting of “metalurgical + furnace testing on bulk samples of concentrate $5776.50” and “pre-feasibility study $110,000.” The annual

tenement rent and rates total of $10,076 was separated into two component amounts, namely, $7982.50 and $2093.38.

10 On the basis of exhibit D, namely, a letter signed by an officer of the Department of Minerals and Energy ("the Department") and addressed to "the warden in Perth", I find that no annual mineral-exploration report had been lodged with the department for the years ending 4 September 1988 and 1999 respectively for M63/202.

11 Exhibit E, being a company extract in respect of Arimco prepared by the Australian Securities and Investment Commission, satisfies me that from 15 March 1999 a receiver manager had been appointed in respect of the company and that from 7 March 1999 a liquidator had been appointed. Exhibit E discloses that since 1987 many charges, both fixed and floating, have been registered against the company, the latest being two which were registered on 12 May 1998 in favour of N.M. Rothschild and Sons (Australia) Ltd.

12 Upon the basis of evidence produced by the plaintiff I am satisfied that Vagar is not a registered Australian company having an Australian company number and that it is not a registered foreign company.

13 On 29 March 2000 the transfer of M63/202 from Arimco to Vagar was registered by the department. On 17 February 2000 transfer 1486H/990 had been lodged at the registry. The transfer stated that the consideration was "Pursuant to a Sale and Royalty Agreement between Arimco Mining Pty Ltd and Vagar International Ltd, dated October 2, 1998." The plaintiff tendered exhibit H(1), namely, a "SALE AND ROYALTY AGREEMENT" dated October 2, 1998 between Arimco and Vagar. The document contained a definition for purposes of the agreement of "tenement", namely, "Mining lease M36/202". I proceed upon the basis that the numbers 3 and 6 have been reversed in order and should read "63" and that the tenement referred to is in fact the tenement the subject of the plaint now before me.

The sale and royalty agreement contains no provision for payment of a specified amount as purchase price for the tenement. The consideration is expressed to be payment by Vagar to Arimco of a royalty as set out in clause 8 of the document. The document includes (clause 6.1) an express undertaking by Arimco to Vagar that "*…until Vagar becomes the registered holder of the Tenement Arimco will deliver to Vagar copies of any notices received by Arimco from the Department in respect of the Tenement.*" It appears that the agreement contains no other clause

whereby Arimco has any other obligation which it must comply with prior to completion of the agreement as contemplated by the agreement. There is no express warranty or undertaking within the agreement whereby Arimco agrees to or is otherwise required to meet the expenditure requirements, as a condition of the contract, prior to completion. Under clause 4.3, immediately after completion, Vagar is obliged to use its best endeavours to obtain approval for and registration of the transfer of the tenement and "*…must in all respects comply with the Act in respect of the Tenement.*" At clause 13.1 of the document, under the heading "Notices", is set out the name and address of "Allan Blood", Australian Representative, 16 Kings Park Avenue, Crawley, WA, 6009 as being a person to whom notices which must be given pursuant to the sale and royalty agreement may be given.

14 Evidence was given on behalf of the plaintiff by Mr Weaver. I find that Mr Weaver is a chartered accountant employed by Ferrier Hodgson in whose employ he has worked for the last 8 years. His supervisor is Gary Trevor whose signature he is extremely familiar with. Mr Weaver has been directly involved in the administration of Arimco from 15 March 1999, when it was first placed into receivership, until the present time. It is his signature which appears on behalf of the transferor on transfer number 1486H/990 (exhibit G). I accept Mr Weaver's evidence that the signature of Gary Trevor, his supervisor, appears on that transfer immediately above that of Mr Weaver. I find that both men were authorised to sign the transfer on behalf of the transferor. Mr Weaver said in evidence that he had spoken to Mr David Otterman the senior exploration manager for Arimco. I note that, at clause 13.1 of the sale and royalalty agreement, the name and address "*David Otterman Exploration Manager…*" also appears together with that of Mr Blood as being a person upon whom notices may be served pursuant to the agreement and that Mr Otterman's name appears under the heading "Arimco" and that Mr Blood's name appears under the heading "Vagar". I am satisfied that the David Otterman to whom Mr Weaver spoke and the David Otterman referred to in the agreement (exhibit H1) are one and the same person. Mr Weaver did not give a date upon which he spoke to Mr Otterman, however, I am satisfied that it would have been after the date of receivership, namely, 29 March 2000 and, therefore, also after the date of registration of the transfer which was 29 March 2000. Mr Otterman told Mr Weaver that from the date of execution of the agreement (2 October 1998) Arimco had not expended anything on the tenements but that rental and any other expenditure had been attended to by Vagar. Mr Weaver said, and I accept his evidence, that since the appointment of the receiver the receiver had not spent any funds in connection with expenditure on

M63/202. Nor, I find, has the receiver lodged any documents in respect of the tenement with the Department other than a caveat.

15 I find that on the morning of the hearing before me, namely, 9 November 2000, Mr Weaver received from Mr Allan Blood, as a consequence of telephone conversations which occurred between the two men on 8 November, a document entitled "Scoping Feasibility Study of the Medcalf Iron Vanadium and Titanium Resource – An assessment of the economic and physical requirements to allow exploitation of the resource". The document was dated January 2000. It contained no reference to M63/202.

16 In the course of the hearing Mr Workman made reference to several items of correspondence and wished to have me take into account matters of fact concerning those items. I gave him leave to file an affidavit annexing those documents which I undertook, upon receipt of the affidavit, to take into account in considering the plaint hearing. On 13 November 2000 an affidavit of Mr Workman sworn 10 November and annexing 17 letters was received at the registry. I am in receipt of that affidavit and the annexures. They will become exhibit K. I accept the contents of the affidavit of Mr Workman as being true and correct. Mr Workman's affidavit canvasses some of the matters to which I have already made reference earlier in my report.

CONCLUSIONS

17 I find that from the time Arimco entered into the sale and royalty agreement (exhibit H1) on 2 October 1998 it had no intention to itself expend any further funds on M63/202. Within a month of the signing of the agreement forfeiture plaint 1/989 was lodged against the tenement. That plaint remained undetermined until it was withdrawn on 4 February 1999. During the 3 months prior to withdrawal of the plaint the expenditure obligation ceased – reg 52. 19 days before the end of the same expenditure year the plaint now before me was lodged (16 August 1999) by Mr Cooper. There was, therefore, no expenditure obligation for the remaining 19 days of the tenement year. There was thus no expenditure requirement for a total of 94 days while plaint 1/989 existed and 19 days after plaint 1/990 was lodged, a total of 113 days during the subject expenditure year. The sale and royalty agreement did not require Arimco to comply with the expenditure conditions up to or beyond the date of completion of the agreement. There was no obligation, pursuant

to the agreement, upon Vagar to comply with the expenditure requirements prior to the date of completion of the agreement. The receiver was appointed in March 1999 and I am satisfied, upon the basis of the evidence of Mr Weaver, that it was never the intention of the receiver to expend any funds upon the tenement. I find that the receiver was aware at all material times after the receivership commenced of the existence of the sale and royalty agreement and worked towards its completion and towards the transfer of the tenement which was ultimately registered on 29 March 2000.

18 There is nothing before me to substantiate the claimed expenditure of $128,843 (exhibit C – form 5 for year ended 4/9/99) other than the recording within the search of M63/202 (exhibit A) in the report A13 where it is noted that on 5 October 1999 payment of annual rental of $7982.50 was received. The document, which I am satisfied Mr Weaver received from Mr Blood and which made reference in its heading to a feasibility study made no reference to M63/202. That document was not placed before me. Further, no report as required by section 115A of the Mining Act, namely, a mineral exploration report pursuant to subsections (2) and (3) has been lodged for the subject year.

19 I am satisfied that at all material times Mr Blood was authorised to represent and act as an agent for Vagar in all matters connected with these proceedings and to instruct legal counsel to act on behalf of Vagar. I am satisfied that Mr Vagar was and had for some time been aware that the hearing of the plaint was to be on 9 November 2000.

20 In all of the circumstances, including the non-appearance of either Arimco or Vagar, it is open to me to draw the inference that neither Arimco or Vagar was in a position to produce evidence to support the claimed expenditure set out in the form 5 for the year in question (Exhibit C) other than payment of the annual rental. In the circumstances I draw that inference.

21 As a consequence of the two plaints which were in existence for a total of 113 days during the relevant expenditure year, the prescribed expenditure was reduced pro rata. 113 days represents 31 per cent of the year. 31 per cent of the prescribed expenditure for the year of $77,500 is $23,993 meaning that the tenement holder was required to spend a minimum of $53,507 on the tenement subject to the granting of any certificate of exemption. No certificate of exemption has been applied for in respect of the expenditure year ended 4 September 1999. Mr Workman produced a schedule of expenditure claimed on the tenement for the years

1990 to 1998 inclusive which indicated that only 18 per cent of the minimum expenditure had been claimed as expenditure. In that respect I note that in only one year, namely, 1996, did the claimed expenditure exceed the minimum required subject to any exemption expenditure. Excess claimed expenditure was approximately $4000. I also note that for five of those years an exemption of 100 per cent of the prescribed expenditure was granted, that for the year ended 4 September 1998 exemption of $75,056 was granted and that for the year ended 4 September 1997 exemptioni of $43,000.16 was expended. It should also be noted, however, that Arimco did not become registered as a tenement holder until 16 January 1992.

22 I find that during the expenditure year the subject of the complaint, namely, that ending 4 September 1999, no more than $7982, being the statutory rental paid to the Department, was expended on M63/202. Of the adjusted (regulation 52) minimum prescribed expenditure for the tenement during the year in question of $53,507 only $7982 was expended leaving a shortfall of $45,525 or 85 per cent.

23 I therefore find that the holder of the tenement during the expenditure year the subject of the plaint, namely, Arimco, failed to comply with the expenditure condition applicable to M63/202. I am satisfied that the non-compliance with the expenditure requirement is, in the circumstances of the case, of sufficient gravity to justify forfeiture of the tenement and that it would not be appropriate, as an alternative to forfeiture, to either impose a monetary penalty or to dismiss the plaint pursuant to the provisions of section 98(4)(a).

RECOMMENDATION

24 I recommend to the Minister that M63/202 be forfeited.