JURISDICTION	:	MINING WARDEN
TITLE OF COURT	:	OPEN COURT
LOCATION	:	PERTH
CITATION	:	ANGELOPOULOS -v- REGIS RESOURCES NL & ORS [2006] WAMW 15
CORAM	:	CALDER M
HEARD	:	20-22 FEBRUARY 2006 & 30 JUNE 2006
DELIVERED	:	8 DECEMBER 2006
FILE NO/S	:	PLAINTS FOR FORFEITURE 3-5, 13-14/012, 31/001, 1/023
TENEMENT NO/S	:	EXPLORATION LICENCES 38/1105, 38/1112-38/1115, M38/303
BETWEEN	:	STEFANOS ANGELOPOULOS (Plaintiff) AND REGIS RESOURCES NL, GENETIC TECHNOLOGIES LTD, NEWMONT DUKETON PTY LTD (Defendants)

Catchwords:

PLAINT - For forfeiture - Abuse of process
PLAINT - For forfeiture - Strike-out application
PRACTICE AND PROCEDURE - Abuse of process - Confidential information
PRACTICE AND PROCEDURE - Abuse of process - Warden's powers

PRACTICE AND PROCEDURE - Dismissal – Abuse of process - plaint for forfeiture
PRACTICE AND PROCEDURE - Strike-out application Abuse of process - Plaint for forfeiture -

Legislation:

Mining Act 1978 (WA), s 98, s 102(2) (b), s 102(2) (e), s 102(3)

Result: *Application for strike out of plaints refused.*

Representation:

Counsel:

Plaintiff	:	Mr T J Kavenagh
Defendant	:	Mr R M Edel

Solicitors:

Plaintiff	:	Corser & Corser
Defendant	:	Gadens Lawyers

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

Andela v Normandy Bow River Diamond Mine Ltd [2002] WAMW 6
Australian Broadcasting Corporation v Lenah Game Meats (2001) 208 CLR 199
BP Refinery (Westernpoint) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266
Exmin Pty Ltd v Australian Gold Resources [2002] WAMW 30
Faccenda Chicken Limited v Fowler [1986] 1 All ER 617
Julie Breen v Cholmondeley W Williams [1995] HCA 63
Prince Jefri Bolkiah v KPMG [1999] 2 AC 222
Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd [2005] WASC 255
Re Calder; Ex parte Gardner (1999) 20 WAR 525
Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd [2005] WAMW 14

Smith Kline & French Laboratories (Aust) v Secretary, Department of Community Services and Health (1990) 22 FCR 73

CALDER M

APPLICATION TO STRIKE OUT PLAINTS FOR FORFEITURE:

THE PROCEEDINGS

1 Stefanos Angelopoulos ("the Plaintiff") has lodged plaints for forfeiture of exploration licences 38/1105, 1112 to 1115 and Mining Lease 38/303 ("M38/303") for expenditure years ending, in each instance, during 2001 and for M38/303 for the expenditure year ending during 2000 as well as 2001. The joint defendants to the plaints are Regis Resources NL, Genetic Technologies Ltd & Newmont Duketon Pty Ltd ("the Defendants") Applications for exemption for exploration licences 38/1105, 1112 to 1115 have been lodged in respect of those same expenditure years by the joint holders of those tenements. An application for exemption has also been made in respect of M38/303 for the 2001 expenditure year. The Plaintiff has objected to all of those exemption applications.

2 A joint hearing of all of the applications for exemption and of all the plaints for forfeiture took place on 20 to 22 February 2006. At the conclusion of the hearing of the evidence the hearing was adjourned to enable an expert report to be filed and served and for closing submissions.

3 The Defendants subsequently filed an application to strike out all of the plaints upon the basis that they are all an abuse of process. The parties have now made submissions concerning the strike-out applications, the applications for exemption and the plaints for forfeiture.

4 It is appropriate that I deal first with the applications to strike out the plaints.

5 It is necessary for me to give close consideration to the evidence that is relevant to my ascertaining whether or not any factual basis exists for a conclusion to be reached as to whether the plaint proceedings constitute an abuse of process.

Evidence Relevant to the Claim of Abuse of Process

6 The relevant evidence consists of the oral evidence given by the Plaintiff and his affidavit in opposition to the strike-out applications. The

affidavits of Lisa Bowyer and David Walker were lodged on behalf of the Defendants in support of the strike-out application.

7 The Plaintiff is a very experienced drilling consultant and drilling contractor. He began working as a drilling contractor in 1984 and continued up until about 1994 when he then began working as a drilling consultant. It appears from his evidence that his work as a consultant has not been full-time since then. The amount of work that he has obtained in that capacity has fluctuated according to fluctuations in the mining industry. He sold his drilling equipment in 1996.

8 From about 1986 onwards he kept what he called "log books" showing some particulars of contract drilling that he had undertaken. His "log books" were in fact his invoice book. From those books he is able to establish what rigs had been used, how fast the holes had been drilled, what length of PVC pipe had been used, drill hole angles, hardness of the material being drilled and whether or not particular ground was easy to access. The logs were produced in evidence. The particulars that are contained in those logs are minimal.

9 The Plaintiff said that he used the log books as part of the process whereby he made a decision about where to look for ground over which he might obtain a mining tenement. In 1999 he was looking for such land. He said that he checked his logs to see what might be a good area to try and peg and concluded that the Duketon belt was a good area from a drilling point of view. He said that he checked for available ground and it was clear that there was none available in that area. He said, in effect, that he realised that no work was being done in that area but nothing was being surrendered or expiring and that it was clear to him that the only way he would be able to obtain any ground was by plainting for forfeiture. He said that he "checked through" companies that he knew had gone to "dot com". I think it is reasonably well known that a number of companies, whose interests had been in mining, at about that time, changed direction to information technology and became known colloquially as "dot com" companies. The Plaintiff said that one such company was Duketon Goldfields which had become Genetic Technologies Ltd in 2000. He ascertained that Genetic Technologies was registered as the holder of tenements in the Duketon belt. He said he then searched the expenditure information that was available at DOIR in connection with those tenements and that, as a result of what he found in that source, he issued his plaints.

10 The Plaintiff had been to the Duketon area on seven occasions between 1986 and 1989. In 1986 he carried out contract drilling for Golconda Minerals at Reicher's Find. In 1989 he drilled in that area for BHP over a period of about four weeks. The total amount of time that he spent in the area was at least six weeks.

11 When in the Duketon belt, he had drilled on the former M38/409 in an area called Swanson's Well. In 1989, for BHP, he carried out drilling operations on E38/1110. He never did any work for anyone other than BHP and Golconda in the Duketon area.

12 During cross-examination the Plaintiff said that he believed that the information that he had recorded in his log books was not confidential and that his contracts with BHP and Golconda did not contain any confidentiality clause.

13 In his affidavit dated 23 June 2006 the plaintiff referred to annexed copies of correspondence between himself and BHP in connection with the drilling that he had done for BHP. The letters are dated between March 1985 and October 1991. The letters related to contractual arrangements between himself and BHP during that period. None of them contain any mention of confidentiality. I am satisfied there were no other relevant documents connected with those contractual arrangements apart from his invoices. I find, that he did no drilling at any time in ground covered by any of the plainted tenements and that the closest location from the Dogbolter tenement (M38/303) at which he drilled was about 30 kilometres. I accept his evidence that the Duketon belt is over 100 kilometres in length.

14 In his affidavit, the plaintiff said that he could not identify any single tenement or a single tenement-sized area from his drilling logs and that the location of any particular drill hole cannot be determined from his log. I accept his evidence in that regard. He said that he was only able to ascertain the "drillability" of an area by which, he said, he meant accessibility and difficulty of drilling. He says that when he said, during his cross-examination, that he had "*... looked through the companies that I knew from my drilling first, as in my invoice books, simply because I could picture what the ground was and I could recall exactly from the invoices what the drilling had been ...*" (T22/2/06 at 1.59, line 42), he meant, by referring to "ground", the surface conditions to be encountered in gaining access to the site. I am satisfied that that is the case but I am also satisfied that that was not all that he could recall as a consequence of information that was recorded in his log books.

15 The Plaintiff has denied in his affidavit that he gained any information as to the prospectivity of the areas where he had drilled and noted that he had not drilled on ground the subject of the tenements now plainted. He estimates that E38/241 is approximately 75 kilometres north of the Dogbolter tenement. He disputes that the information as to whether the rate of the drilling that he undertook was fast or slow and what drill bit was used is confidential information and says that, in any event, that type of information is not in practice treated as confidential within the industry. He denies that he acquired any information that he would identify as being "exploration information" as is alleged in the Defendants' written submissions. He says that when carrying out drilling activities in the Duketon belt and also elsewhere in the Goldfields he was not particularly interested in obtaining information as to the prospectivity of an area. What he was interested in, he said, was achieving efficiency and reliability in his operations because his income was determined by how many metres he drilled and, further, he was entitled be paid irrespective of whether results obtained were highly prospective or not. What did concern him, he said, was the physical accessibility of the locations where he drilled and the "drillability" or otherwise of the rock to be drilled. He said that in that regard he referred to his drill logs to attempt to identify areas that were good to drill, by which he meant places that can be reached without having to traverse, for example, sand dunes or very rough country. He said the Dogbolter tenement is a good example of a relatively easily accessed tenement, being close to a good road, and it can be driven into without difficulty.

16 Counsel for the Defendants drew the Plaintiffs' attention to M38/409 and E38/1110. In the course of asking the Plaintiff questions about those tenements in connection with and as part of questions intended to ascertain whether or not the Plaintiff had drilled on ground the subject of those tenements, counsel for the Defendants framed a number of questions in a leading fashion in that they effectively invited the Plaintiff to agree with the proposition that was contained within the questions, namely that he had drilled on ground now the subject of those tenements.

17 The Plaintiff did not in fact expressly concede that he had drilled on either of the tenements. In his affidavit in opposition to the strike-out application he appears, however, to concede that the two areas where he had done drilling in the Duketon belt had been correctly identified as areas within M38/489 and M38/1110. He did not dispute that assertion by the Defendants'. He noted, however, that M38/409 has not yet been granted but is an application to convert E38/379 to a mining lease. He also noted that E38/379 had originally been applied for by Ashton

Goldmines Pty Ltd in July 1990 and had passed through many hands before being registered in the names of two of the Defendants. He observed that M38/1110 has not been granted but is another undetermined application to convert E 38/1436 to a mining lease. E 38/1436 was applied for by Johnson's Well Mining in 2001. The Plaintiff annexed to his affidavit searches of the tenements that have just been mentioned.

Evidence on Behalf of the Defendants/Applicants

22 In support of the strike-out application the Defendants tendered the affidavit of Lisa Bowyer sworn 30 May 2006 and the affidavit of David Walker sworn 6 June 2006.

23 Ms Bowyer is a tenement consultant who, since 1994, has been assisting the Defendant Regis in the management of the tenements that comprise the Duketon belt, including in particular the plainted tenements. She is very familiar with the history of the tenements, including, in broad terms, the contractual relationship between the Defendants, transfers of tenements and interests in tenements to and between the Defendants, various changes of name of each of the Defendants, together with some aspects of historic records of drilling undertaken in the Duketon belt by the Plaintiff. I accept as correct her affidavit evidence in those matters. It was not challenged in any way by the Plaintiff.

24 The evidence establishes a corporate continuity over the material period of time in connection with the three Defendants and also establishes a continuity of connection between the relevant corporate entities and the ground that is now the subject of the plaints. In each case that relevant continuity extends through the period when the Plaintiff was drilling for BHP and Golconda in the Duketon belt up until the present time.

25 At par 17 of her affidavit Bowyer purports to express an opinion or a belief, said to be based upon her experience of working in the mining industry and from a review of the transcript of evidence of the Plaintiff and a review of his drill logs that he obtained certain information which she then sets out. I consider that it is not appropriate for her to express an opinion of that nature. She is, in effect, commenting about a matter that is for the Warden or the Minister to determine and, in any event, I do not consider that her experience as set out in her affidavit is a sufficient basis to express the beliefs that she has.

26 I am satisfied that, as stated in Bowyer's affidavit, the Plaintiff did drill in the areas that she has mentioned. Those areas are as follows. In May and June 1986 the Plaintiff drilled on E38/70 for Golconda Exploration Pty Ltd. The annexure to her affidavit, being part of Golconda's annual report for 1986 to 1987, does not indicate where the drilling took place on the tenement.

27 Exploration licences E38/191-192, held by Newmex Exploration, were, during 1990, the subject of a joint-venture agreement between Newmex and BHP Gold. During 1990 the Plaintiff drilled 117 holes which totalled 2385 metres for the joint venture. Those two tenements are in the south-western portion of the Duketon belt. The joint venture was known as the Mulga Queen Joint Venture.

28 During the 12-month period ended 30 June 1990, the Plaintiff was one of four drilling contractors engaged to drill for BHP Goldmines Ltd on a number of tenements. Those tenements were E38/188 - 189, 241, 290 to 291, 295 to 297, 308 and 353; all were then registered to BHP Goldmines Ltd. The annual report of BHP in connection with those tenements, known collectively as the North Duketon Project, does not specify which of the 278 holes that were drilled were drilled by the Plaintiff, and does not identify on which tenement or tenements any of the four contractors drilled.

29 The fourth area where it has been established that the Plaintiff carried out drilling is on E38/188, apparently during 1990, for BHP Goldmines Ltd. It is unclear whether that report, part of which is annexed to Bowyer's affidavit (LB7), is not in fact a report specifically in respect of E38/188 and is part of the basis upon which the earlier document, namely, the annual report for the North Duketon Project for the period ending 30 June 1990 (LB6), was prepared. If that is the case, then that exhibit to Bowyer's affidavit does indicate that the Plaintiff did drill on E38/188. The report indicates, however, that three other contractors drilled on the same tenement during the same period. The report does not identify how many of the stated 147 drill holes were drilled by the Plaintiff or by any other contractor, nor does it indicate where the Plaintiff may have drilled on the tenement.

30 Bowyer annexed two maps to her affidavit. One, named "A & J Drilling", shows the areas to which the four reported drilling activities undertaken by the Plaintiff relate together with the tenements which comprised the Duketon project. E38/70 (Golconda) occurs towards the southern end of the Duketon belt. Its eastern border appears to pass

through M38/409. Exploration Licences 38/191- 192 (Mulga Queen) are, generally, to the west of E38/70 and adjoin one another. The tenements the subject of the BHP Goldmines Ltd report extend from what may be broadly described as slightly south of the centre of the belt and up to the northern extremity of the Duketon belt. M38/1110 appears to be contained with E38/241 and is towards the northern end of the Duketon belt and in the centre of the belt.

31 In relation to the report of Golconda concerning E38/70, Ms Bowyer says, and I accept her evidence as true, that although some drill hole information is available to the public from DOIR records, that information is recorded in what she describes as "local co-ordinates" which means co-ordinates on a grid produced by the company conducting the drilling and that there is no conversion to the Australia Geodetic Datum (AGD) grid available on the public record, which means that the actual location of the drill holes to which the Plaintiff's drill logs relate remains confidential. It is said that, therefore, it is not possible merely from accessing the information that is available in the public domain to identify where holes were drilled.

32 Exploration Licence 38/70 was surrendered in March 1993, after the time when the Plaintiff carried out drilling work for Golconda. Prior to the surrender of E38/70 some of the tenements that now cover the area to which E38/70 related were once held by Aurora and transferred to one or more of the Defendants. E38/379 was granted in 1990 to Aurora and then transferred to Genetic with registration of the transfer occurring in 1995. M38/319 was granted in 1991 and transferred to Aurora in 1993 and then to Regis in 2000. M38/195 was granted following surrender of part of E38/70 in 1988. The grant was to Golconda. Mining lease 38/238 was granted to Golconda in 1989. M38/280 was granted to Golconda in 1990. M38/195, 238 and 280 were all converted to M38/343 in 1993. M38/343 was granted to Aurora and was subsequently transferred to Regis in 2000. M38/237 was granted to Golconda in 1989 and sold to Regis, Regis becoming the registered holder in 2000. M38/237 is one of the tenements that the Plaintiff has plainted for forfeiture.

33 Concerning the Mulga Queen report in respect of E38/191 - 192, Ms Bowyer notes that the information contained in the report is on the public record and that the report is not confidential. I have not seen the whole report as only two pages of it were annexed to her affidavit. I therefore do not know to what extent there is any detailed information concerning the drilling that was undertaken. I note, however, that on page 5, which is annexed, the number of holes, the total number of metres

of drilling and the type of drilling rig are all mentioned. Further, it is noted that two-metre samples were piled on the ground and composite samples were taken using a 55ml PVC tube (spear). In any event, Ms Bowyer concedes that the information in the report being on the public record is therefore not confidential.

34 Concerning the reports in respect of the North Duketon Project, which consists of nine exploration licences, Ms Bowyer observes that all of those tenements except E38/241 have been surrendered and that both reports were obtained from DOIR and are on the public record and the information therein is therefore not confidential. She notes that E38/241 has been partially surrendered and has been reduced in size from 192 km² when granted to its present size of 12 km². She says that the drilling and exploration data in respect of the part of E38/241 that has not been surrendered has not been placed on the public record. She also observes that in relation to the surrendered portion of E38/241 the drill hole information on the public record is recorded in "local co-ordinates" and that no conversion to the AGD grid is available to the public and that, therefore, the actual location of the drill holes is not a matter of public record. It is claimed by her that to the extent that exploration drilling information is not on the public record it is confidential and commercially valuable to Regis. She states, generally, that mining information, including exploration and drilling information, is treated as confidential property which, when a tenement is sold, is part of the asset that is sold with the tenement.

35 The Defendants lodged the affidavit of Mr David Walker sworn on 6 June 2006 in support of the strike-out application. Mr Walker is a geologist with over 20 years' experience in exploration mining and project development. He is the managing director of Regis. Mr Walker says that in the mining industry exploration and drilling information is treated as confidential information having commercial value and that it is standard practice in the industry when drilling contractors are engaged that it is insisted that any confidential information that the driller obtains in the course of drilling is not to be disclosed to any third party or used for any purpose other than for purposes intended by the contractual arrangement with the driller. He says that it is his experience that exploration drilling contractors who were drilling in the late 1980's and early 1990's knew that such information was confidential. He said it is the practice of Regis to strictly limit the purpose for which confidential information may be used and that unauthorised use of confidential information is prohibited. He says that it is the practice of Regis to require all employees and contractors to enter into an agreement preventing disclosure and misuse of

confidential information. Annexed to his affidavit is a portion of the standard consultancy contract used by Regis in connection with obligations rising out of knowledge obtained of confidential information. Also annexed is a portion of Regis's current standard contract for drillers which defines and restricts the use and disclosure of confidential information. Mr Walker has also annexed a portion of three different consultancy contracts used by Regis during the late 1980's to early 1990's concerning the same subject matter. Those annexures are consistent with the material contained in the rest of his affidavit.

SUBMISSIONS ON THE STRIKE-OUT APPLICATION

For the Defendants

36 The factual material upon which the Defendants rely consists of the drilling logs compiled by the Plaintiff when he was drilling for Golconda and BHP in areas within the Duketon belt and the subsequent use that he made of that information to assist him to determine the "drillability" of the areas to which his logs relate in the course of determining tenements that would be the subject of his plaints for forfeiture. It is said by the Defendants that it should be found that the first step taken by the Plaintiff in determining which tenements would be the subject of his plaints for forfeiture was for him to go to those drill records. It is said that the information contained in the drill logs enabled him to make judgments as to the prospectivity of the areas in question, that is to say, according to the defendants, as to the likelihood of there being gold mineralisation in the plainted ground. It is said that he knew that that is why the drilling was undertaken by Golconda and BHP and that the Plaintiff knew the exact location of the drilling that he had undertaken.

37 It is also said by the Defendants that the Plaintiff used information that he obtained from geologists. In his written submissions Mr Edel, for the Defendants, referred to a passage in the cross-examination of the Plaintiff (T2/2/2006, page 161, line 40, to page 162, line 3) and said that the Plaintiff had admitted that the Plaintiff had received information beyond what was in his logs from having conducting drilling.; for example, from observing and talking with geologists. My assessment of the evidence is that he did not make those admissions. All he said was that, as put to him by counsel, often there would be a geologist present while drilling was being undertaken, that the geologist would be sampling what came from the holes and inspecting it and making notes about it. He did not admit anything about information in that context. All he did admit

was that, in all his years of drilling, for 16,000 hours, he had only twice encountered visible gold in drill samples. He said that he would not have made a note of that in his drill log but that if he was asked where that happened, he could say what the area was. He did not admit, and nor is there any evidence to the effect, that in any of the drilling undertaken by him for Golconda or BHP in the Duketon area he had observed gold in the drill samples.

38 Counsel for the Defendants conceded that the Defendants could not say how many holes the Plaintiff had drilled on any tenement other than on E38/70 where he was the only contractor engaged during the reported year of 1986-1987. He also conceded that, of all the holes that were drilled on other tenements where the Plaintiff was only one of the drilling contractors engaged, it had not been established where or how many holes the Plaintiff had drilled. That is correct, and it should also be said that the number of holes drilled by the Plaintiff has not been established as a percentage of the total drilled by all contractors.

39 The Defendants submit that all of the exploration and drilling information that arose from the work undertaken by the Plaintiff now belongs to Regis and is confidential. In his submissions counsel has traced the connection of present and past tenements to the ground on or near which the Plaintiff drilled. There is no evidence which contradicts the corporate and tenement relationships identified by the Defendants and I proceed on the basis that the submissions concerning those connections are correct. They are consistent with the tenement searches that have been tendered in evidence.

40 It is said by the Defendants that by its very nature the information contained within the Plaintiff's drill logs is confidential and obviously so and that it would have been known by the Plaintiff that it was confidential and known that he had no right to make any use of it beyond what use it could be put to for purposes of the drilling contracts that he entered into with Golconda and BHP. It is conceded that there is no evidence that there was any express contractual obligation created in the relevant drilling contracts that he entered into at the material time.

41 Concerning the use made by the Plaintiff of the information contained in his log books, the Defendants point to his evidence (T -162 first numbered, line 20) where he said that he was looking for ground and that he checked all of his old drilling logs to see what would be a good area to peg around and (T -162 second numbered, line 25) where he said

that "good areas were the Duketon belt". Reference is also made to where the Plaintiff said in evidence (T -159second numbered, line 42):

> "*I looked through the companies that I knew from drilling first, as in my invoice books, simply because I could picture what the ground was and I could recall exactly from the invoice books what the drilling had been.*" Further, (T second page 162, line 25):
>
> "(the drill logs) ... *was part of the information that you used to make a decision on where you should try to obtain ground. Is that correct?---Yes.*
>
> *You decided that as a result of using that material, you wanted to have a look at somewhere round Kalgoorlie or Duketon. Is that right?---Yes.*"

42 It is submitted that the evidence establishes that the information used by the Plaintiff to decide where to plaint is confidential information owned by the Defendants and that he has misused it and breached the obligation of confidence that he owed to the Defendants.

43 In regard to the law concerning misuse of confidential information, counsel submits that three elements are normally required to establish a breach of confidence, namely, the information must have the necessary quality of confidence about it, the information must have been imparted in circumstances importing an obligation of confidence and there must have been unauthorised use of that information to the detriment of the party disclosing the information – see ***Australian Broadcasting Corporation v Lenah Game Meats*** (2001) 208 CLR 199 at 222 per Gleeson CJ.

44 It is submitted that in order to satisfy the first of those criteria the information must not be public and there must be a degree of secrecy. In respect of the second criterion, namely, the circumstances in which the information was imparted, it is said that an objective test must be applied in determining whether those circumstances created an obligation of confidence. It is said that such an obligation arises when a reasonable person in the shoes of the recipient of the information would have realised that the information was being provided in confidence – ***Smith Kline & French Laboratories (Aust) v Secretary, Department of Community Services and Health*** (1990) 22 FCR 73 at 96 and 98.

45 It is submitted that actual detriment need not be established because the obligation that arises is to respect confidence and not merely to restrain from causing detriment to the disclosing party. The duty of the

recipient is to keep the information confidential and to not use it or to make any use of the information or cause any use to be made of it by others, otherwise than for the plaintiff's benefit, without the consent of the plaintiff, it is submitted – ***Prince Jefri Bolkiah v KPMG*** [1999] 2 AC 222 cited in ***Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd*** [2005] WASC 255, par 17. In any event, it is argued, in this case the information has resulted in a detriment flowing to the Defendants, namely that it was used as the basis for the lodgment of the plaints for forfeiture. Counsel also cites ***Re Calder; Ex parte Gardner*** (1999) 20 WAR 525 in support of the proposition that proceedings under the *Mining Act* should not be used to disclose confidential information. In that regard counsel makes reference to subs 58(3) which provides, in effect, that a warden may not require disclosure of material relating to assays or other results of testing or sampling.

46 The Defendants do not argue that there is a total ban on the use of every piece of information and knowledge that a person such as the Plaintiff may derive from carrying out drilling operations. It is conceded that what may be described as the acquisition of general knowledge and experience is not something that is confidential and protected. It is submitted that in this case, however, the material recorded by the Plaintiff in his drill logs cannot be categorised merely as general knowledge and experience and, further, it is now being used to the significant detriment of the Defendants. Counsel agreed that the information in the drill logs was not the only factor that led to the plaints being issued but said that it was a very significant factor in that exercise.

47 Concerning abuse of process, the Defendants submit that courts have a general concern with the administration of justice and with the basic need to preserve confidence in the judicial system and that in administrative proceedings before a warden the Warden should be concerned to ensure that the relevant processes are used properly, honestly, in good faith and in accordance with the policy considerations behind the *Mining Act*. It is said that the use of such processes under the Act to further a breach of confidential information or in a manner that is inconsistent with policy objectives of the Act is not a proper use of the Warden's resources. It is said that a Warden should not be compelled by an applicant for forfeiture to continue to hear an application that is based on circumstances that amount to an abuse of process.

48 The Defendants submit that, like a court, a Warden sitting administratively has a power to strike out or set aside a proceeding that has been determined to be an abuse of process. It is said that that power is

part of the functions performed by the Warden under the Act which, although they are administrative in nature, require the Warden to act judicially. Such a power is said to be a component of the Warden's inherent power to control proceedings and of the implied powers that are necessary for the exercise of the Warden's jurisdiction. Previous decisions of wardens where the power to strike out plaints for forfeiture has been exercised are cited – ***Exmin Pty Ltd v Australian Gold Resources*** [2002] WAMW 30; ***Andela v Normandy Bow River Diamond Mine Ltd*** [2002] WAMW 6; ***Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd*** [2005] WAMW 14.

49 It is also submitted by the Defendants that the Warden's power to strike out or stay proceedings is enlivened when the proceedings are contrary to the public interest. In the present case it is said that the misuse of the confidential information by the Plaintiff is contrary to the policy behind the *Mining Act* and that, in all the circumstances, the Plaintiff should not be allowed to derive advantage from his wrongdoing. It is said that it is fundamentally unfair to allow contractors such as the Plaintiff to use confidential information against holders of tenements.

On Behalf of the Plaintiff

50 It is submitted that the unchallenged evidence of the Plaintiff establishes that he first identified the Duketon belt as an area of interest and he then selected tenements to plaint. Reference is made to his evidence to the effect that apart from small areas on the fringes of mineral fields there was no ground available, that he knew from discussions with a geologist and other people in the industry that the industry was "going down" and that no work was being done but no ground was becoming available. He said that from that it was clear to him that the only way to get into some good ground was to plaint tenement holders, that had not complied with the expenditure conditions. He said that in order to do that the first thing he did was to check through companies that he knew that had gone to the "dot-com people". He gave as examples Nexus Minerals that became IPT Systems and Goldminco and said that another one of those "dot com" companies was Duketon Goldfields which had become Genetic Technologies in 2000. He said, in effect, that it appeared reasonable to him to assume that if a company became a technology company or a communications company, it would be quite hard for it to conduct what he considered to be appropriate exploration "on the side". He said that, therefore, he checked what tenements Duketon Goldfields held and that is when he came across the Dogbolter tenement and the

whole Duketon area and then, through the Mines Department's computer, began to access data with regards to expenditure and other items and thus narrowed his search pretty much down to the area that he wanted to target. Reference is also made to his evidence (T 162 first numbered, line 20) where, after saying that in 1999 the industry was in a continuous downturn, he said "*... so I was looking for ground and for that I re-checked all my old drilling logs to see what would be a good area to peg ground*". He then went on to say that he had drilled quite a few areas and tenements and said that there were places where you do not want to go if your expertise is drilling, and gave the examples of Menzies and Coolgardie, saying that they were difficult jobs. He then said, when asked where he decided to go (line 28), "*Well, good areas were the Duketon belt. There were good areas around Kalgoorlie from a drilling point of view.*" That passage immediately preceded those parts of the evidence that I have just referred to where he spoke of checking with a geologist about the state of the industry and observing that no work was being done but no ground was becoming available.

51 In the light of that evidence, it is submitted on behalf of the Plaintiff that the reason that the Plaintiff consulted his logs was to identify or recall areas where, to his knowledge and within his expertise and general experience, he knew that drilling was difficult, for example, Menzies and Coolgardie - and he identified or recalled other areas, including Duketon and areas around Kalgoorlie where drilling was not difficult. It is said that, having identified large general areas where drilling was not difficult, the Plaintiff turned his mind to companies that had left mining for the "dot-com" boom and that after that he then consulted DOIR records to see whether he could identify tenements liable to be plainted due to expenditure non-compliance. It is submitted that as a result of the information sourced from DOIR he first became aware of the Dogbolter tenement.

52 It is submitted that the evidence of the Plaintiff demonstrates that he used his general knowledge as an experienced drilling contractor in combination with DOIR public information to select tenements for plainting.

53 Concerning the affidavit of Bowyer, it is observed by counsel that in par 17 she says that from her experience in the industry and by reviewing the transcript and reviewing the drilling logs she believes that by working as a drilling contractor the Plaintiff obtained information, either by it being provided to him or by his own observations, in relation to the areas that he drilled, as to location of drill holes, whether the holes were AC,

RAB or diamond, the depth of the holes, the spacing and frequency of the holes, the total of the metres drilled, the nature of the sampling and the prospectivity of the area. It is submitted, however, that, in the drill logs there is no mention of the location of the holes or of the nature of them or the depth or the spacing or the nature of the sampling or of prospectivity. It is said that the only one of those things that she specified that is contained in the logs is the total of the metres drilled.

54 It is noted that in his evidence the Plaintiff said that the closest he drilled to Dogbolter (M38/303) was 30 kilometres and that that is consistent with the plans introduced into evidence by Bowyer (annexures L8 and L10). Counsel for the Plaintiff summarised the Plaintiff's arguments into two propositions; firstly, that the information said to have been obtained by the Plaintiff and said to have been confidential has not been sufficiently identified and, secondly, that, in any event, the Plaintiff targeted the plainted ground through public information.

55 Concerning the law related to the strike-out application, the Plaintiff began by referring to ***Julie Breen v Cholmondeley W Williams*** [1995] HCA 63, 21 November 1995 and submitting that Brennan CJ said, in effect, that information is not "property" and that, insofar as equity may intervene to protect against disclosure of certain kinds of information, such equitable jurisdiction has its basis in the notion of an obligation of conscience arising from the circumstances connected to the obtaining or communication of the subject information.

56 The Plaintiff submits that the essential rationale of the obligation of conscience is one of fairness: to refrain from reaping what one has not sown. It is argued that in cases in which an obligation of confidence is said to arise by implication in a contract it is necessary to ask whether any such implication is reasonable. That is the first part of the five-part test in ***BP Refinery (Westernpoint) Pty Ltd v Hastings Shire Council*** (1977) 180 CLR 266 at 283. It is said that the information must have been confidential at the time when it was first disclosed to the party being accused of the breach and that it must have still been confidential at the time of the alleged breach.

57 Counsel referred to ***Faccenda Chicken Limited v Fowler*** [1986] 1 All ER 617 at 619 where Neill LJ, in speaking of the need to achieve a balance between competing interests said:

"*In these two appeals it will be necessary to consider the interaction of three separate legal concepts.*

(1) The duty of an employee during the period of his employment to act with good faith towards his employer; this duty is sometimes called the duty of fidelity.

(2) The duty of an employee not to use or disclose after his employment has ceased any confidential information which he has obtained during his employment about his employer's affairs.

(3) The prima facie right of any person to use and to exploit for the purposes of earning his living all the skill, experience and knowledge which he has acquired in the course of previous periods of employment."

58 The Plaintiff also relies upon Ricketson, *"Intellectual Property - Cases Materials and Commentary"* (Butterworths, 1989 at 512 to 513):

"*Once the employment ends a different set of obligations cuts in. The employee may now use any information without breaching the duty of fidelity, so long as it has been properly acquired. Sales officers or managers, for example, may call on their perfectly natural recollections as to the names and needs of their former employer's customers in order to compete for those customers' business, either in their own right or in the service of another employer ... The employer is not, however, bereft of protection during the post-employment period. Employees are bound, on the principles discussed in the previous chapter, by a duty of confidentiality which is distinct from that of fidelity and which remains binding even after the termination of the employment relationship. Consistently with these principles, however, the duty of confidentiality is only breached by the misuse of secret information. Where the employer has made no particular effort to prevent the information from freely circulating within or outside the enterprise, a claim against an employee who remembers that information and subsequently uses it will fail ... Moreover, there is a clear judicial trend to resist granting injunctions where the Court feels it would be impracticable to expect the employee to be able to refrain from using the employer's secrets while continuing legitimately to exploit their own 'no-how' - the stock of knowledge, skill and*

> *experience built up by working over a long period of time ... The point has almost been reached where so long as workers merely take information in their head having made no special effort to acquire it in the first place they can virtually claim to 'own' it for future purposes, so limited have the employer's remedies become.*"

59 As counsel for the Plaintiff notes, the Plaintiff was not an employee of any of the Defendants or of any of those for whom he did the drilling, namely, Golconda or BHP. He was an independent contractor. It is said that it was open to those who engaged him to include in their contract with the Plaintiff express provisions of confidentiality and non-disclosure of information described for that purpose in the contract. That was not done. It is submitted that, therefore, in the absence of any restrictive covenant of a contractual nature and with the Plaintiff having been an independent contractor and not an employee, it is impossible to say that the Plaintiff owed Golconda or BHP or any of the Defendants or any other person any legal or equitable duty to not make use of the knowledge he gained in the course of the drilling that he carried out. It is also said that it is impossible in the circumstances to define with appropriate precision exactly which items of knowledge gained by the Plaintiff in the course of his drilling, if any, were capable of attracting the requisite characteristic of secrecy. It is said that the general assertions in Mr Walker's affidavit to the effect that exploration and drilling information tends to be treated as confidential is of no assistance to the Defendants.

CONCLUSIONS

61 My assessment of the Plaintiff is that he was a credible witness. He gave his evidence in a straightforward manner with little hesitation, without elaboration and without any apparent exaggeration. His manner of expression was simple and unsophisticated. However, he was an intelligent witness and I was satisfied that at all times he understood the purpose for which questions were asked of him, both by his own counsel and by defence counsel. His approach to his work as a drilling contractor was very pragmatic and uncomplicated. The contents of the invoices that

he prepared, not only for BHP and Golconda at the time that is material but also for other drilling undertaken by him elsewhere, is minimal.

62 In each invoice there appears the name and address of the client, the general "area" of the drilling, the name of the driller, the number of the rig, the date of drilling, the total number of metres drilled on each day, the total number of metres of PVC pipe that was used and a calculation of the total cost of drilling based on a specified drilling rate per metre that varies according to the type of drilling as well as a total cost of PVC pipe used based on a specified cost per metre. There is no mention in those pages of the log books that I was referred to of any mining tenement and, with one exception, there is no description of how to get to the place where the drilling was undertaken.

63 I am satisfied that when compiling the logs he had no real interest in the prospectivity of the area or in results of sampling and analysis of material obtained by his drilling and that, essentially all that was of interest to him was how many metres he drilled.

64 I find that from his general knowledge the plaintiff initially decided where to go and he knew that the Duketon belt was a good area in which to try and obtain ground and that there were good areas around Kalgoorlie from a drilling point of view. I find that when his check of the availability of ground in the Duketon belt revealed that there was no ground except on the fringes and that from checking with a geologist and other people in the industry it was clear to him that the industry was going down, that no work was being done, that no ground was becoming available he decided that, "*... the only way to get into some good ground was to plaint someone that had not expended the money or wasn't able to do anything about his tenement*". He then looked for companies that had "*... gone to the dot-com..*". He said that Duketon Goldfields was one such company, having become Genetic Technologies in 2000. He said, in effect, that he believed that if a company had become a technology company, it would be hard for the company to carry out exploration on the side the way he knew it. He said that he therefore checked the Duketon Goldfields tenements and that is when he first came across the Dogbolter tenement and the whole area and that then, through Mines Department records, he accessed expenditure data and thus narrowed it pretty much down to the area where he wanted to go. I find that is the methodology and sequence that he applied to his endeavour to find ground over which to apply for grant of mining tenements in what was for him a drillable location where he could best exploit his experience and capability in drilling operations.

66 In assessing the Plaintiff's evidence-in-chief, insofar as it related to the use by him of the invoices, it is important to keep in mind that the questions that he answered concerning the steps that he took in order to decide which tenements to plaint were not asked in the context of there having been anything in the conduct of the proceedings to that stage that suggested that there would be any issues raised in respect of any confidentiality that may have attached to the information that he had recorded in the invoices and any breach of any such confidentiality. In the absence of any such context care must be taken in attributing too much weight to matters of the detail of such evidence and of the manner, including direct and indirect references to sequence, in which it emerged.

67 It was during cross-examination of the Plaintiff that the matter of the confidentiality of the contents of the invoices was first expressly raised. It was raised in a manner that, in my opinion, did not alert the Plaintiff to the potential for confidentiality to have become the issue that it has now become in these proceedings and which did not alert him to the need to consider in answering the questions asked of him whether or not it was desirable or necessary to include in his answers more detailed information in respect of matters that may have a bearing upon a determination of whether or not there was an element of confidentiality attached to the information that he acquired from carrying out the relevant drilling operations and whether there had been a breach of any confidentiality obligation that was a breach of a type that could lead to his plaints being dismissed as constituting an abuse of process.

68 I am not suggesting that cross-examination was in that respect in any way inadequate or improper or unfair. It was not. I infer that until the Plaintiff gave his evidence the Defendants were unaware that the subject information had been used in the manner described. I am not suggesting that even if counsel for the Defendants had asked the Plaintiff questions which had resulted in there being in the evidence of the Plaintiff more precision or detail of the type that I have just mentioned being given by him in evidence, the Plaintiff would have appreciated the potential significance and consequences from a legal point of view. In any event, given that counsel for the Defendants had clearly flagged the potential for there to be submissions about such legal matters, counsel for the Plaintiff had an opportunity during re-examination to explore such issues, if he thought it necessary to do so, but did not do so.

69 In the light of the matters that I have just mentioned I consider that although defence counsel did ask the Plaintiff several questions directly and expressly related to the matter of confidentiality, there was nothing

about the manner of the questioning which made it self-evident or would have made it evident to the Plaintiff that some of the things that I have just mentioned were of significance. He (T 163 - first numbered - line 7) simply put to the Plaintiff that the information was confidential and the Plaintiff said in response that it is not information that *"helps you to find gold.*" It was then put to him again that it was information that is confidential to the company that employed him and he said that it was not. He agreed that he had not obtained the permission of BHP or Golconda to use that information and repeated that, in any event, you cannot find gold by looking at the invoices. It was later put to him (T 170, line 1) that he should have checked with the owners of the tenements on which he had drilled to see if it was permissible to use the information that he had acquired. He answered "no" to that proposition and said that he did not check anyway. He repeated again that the information was not useful to find gold.

71 The evidence of the Plaintiff contains indications as to the sequence in which he undertook different aspects of the inquiries that he made that led to him identifying the tenements that he plainted. When he first mentioned in examination-in-chief that he was looking for ground and that he re-checked all his logs, he did not say that that was the first step that he took. He did later say the first thing that he did was to check through the companies that he knew and then made reference to "dot-com" companies that had transferred their focus from mining to communications technology and he specifically mentioned Duketon Goldfields that had become Genetic Technologies.

72 During cross-examination (T 159 - second numbering - line 39 to page 160, line 16) he was asked what he meant by that answer. It was put to him that what he had said was that he had looked at the companies that he knew and one of them was Duketon Goldfields, now Genetic Technologies and asked whether that was right. That implied that when he said he checked through the companies that he "knew", he meant companies that he knew had gone to "dot com", including Duketon Goldfields. His response to counsel's answer was, however, "... *looked through the companies that I knew from my drilling first, as in my invoice books, simply because I could picture what the ground was and I could recall exactly from the invoice books what the drilling had been*". He then said that those companies were BHP and Golconda.

73 Counsel for the Defendants made express reference in his written submissions to that passage in cross-examination and submitted that the Plaintiff had there admitted that he was able to match the information

contained in the invoice books with the location on the ground. In his subsequent affidavit of 23 June 2006, the Plaintiff addressed that matter and said that by referring to "ground" he had meant the surface conditions to be encountered in gaining access to the site. He, in effect, denies that he was able to match the information in the invoices with the location on the ground.

78 The onus is upon the Defendants in this matter to demonstrate that the Plaintiff's process for selecting ground to be plainted included the use of confidential information. I am not satisfied that, in his conduct as set out in the passages of evidence that I have just referred to, the Plaintiff was utilising any more than what could be described as general knowledge obtained from his wide experience in drilling in the areas that he had mentioned, that is, Menzies, Coolgardie, Kalgoorlie, Duketon. What he outlined there is what might be described as broad general awareness as to where ground existed where drilling operations would or would not prove difficult. It is not even clear from the evidence that he needed to or did refer to his drill logs for that purpose. It would be unlikely, given his long experience, that he would have needed to do either.

79 During cross-examination (T 159 - second numbering - line 40 to T page 160, line 20) he was asked questions about his evidence-in-chief where he said that he had looked at companies that he knew. It was put to him that he had said in his evidence-in-chief that he had looked at companies that he knew and one of them was Duketon Goldfields, now Genetic Technologies. His response was that he had looked through companies that he knew from the drilling first and he explained immediately thereafter that the companies that he had known through drilling were BHP and Golconda. He said that he had looked through the companies that he knew from drilling, being those that were in his invoice books, "*... simply because I could picture what the ground was ...*". In the same sentence he went on to say "*... and I could recall exactly from the invoice books what the drilling had been*". I am satisfied that what he was saying, in effect, was that he independently recalled having drilled for Golconda and BHP in the Duketon area and that he could independently picture the ground where he had drilled, "ground" meaning what he said in par 15 of his affidavit of 23 June 2006, namely, surface conditions to be encountered in gaining access.

80 Immediately after having made, during cross-examination, that comment about the companies that he knew from drilling, and in the same sentence, the Plaintiff went on to say that he could recall exactly from the

invoice books what the drilling had been. By that he meant, I find, amount of PVC used, depth of holes and type of bit used (which things were directly recorded), together with information that he was able to draw indirectly by interpreting what was written there, namely, at what rate the holes were drilled, how hard the material that was being drilled may have been and how difficult the physical drilling of the holes may have been. He did not derive any information as to the prospectivity of any of the ground drilled from the information in the logs. He did not derive from the logs any information as to accessibility. In any event, in my opinion accessibility in the sense used by the Plaintiff is not a matter of information that could be said to be generally of a confidential nature. It is, in my opinion, something which is a matter of general, non-secret information in respect of which no obligations arise towards a former employer or contractual principal.

81 From the passages that I have just mentioned it appears to me that the Plaintiff was saying nothing more than that he recalled, as a matter of general non-confidential knowledge and information that had accrued to him in the normal course of his contracting operations, that there were tenements over ground in areas such as Menzies and Coolgardie where he would not go as a driller because of their poor "drillability" and that there were other areas around Kalgoorlie and Duketon where the "drillability" of such ground was such as made it sensible and appropriate that a person with his particular expertise, that is, drilling, would seek to pick up ground. Having arrived at that point and in that context, I am satisfied that his use of the information in the log books enabled him to confirm his general recollections of the Duketon area. That was only a small part of the procedure followed by him in deciding what tenements he should plaint for forfeiture.

82 It is, in my opinion, significant that there was no express provision, written or otherwise, in any of the agreements that the Plaintiff entered into with either Golconda or BHP that any of the information that he obtained in the course of the drilling operations was confidential or, in particular, that the material that he recorded in his invoices or drill logs was confidential. I accept the evidence of Mr Walker in his affidavit that confidentiality clauses were common and their use was known within the industry at the material time. However, I do not conclude from his evidence that the absence of any such confidentiality provisions was unusual, nor that it was understood and accepted as a matter of broad industry practice that even where there was no express provision of that nature, such provisions were always implied in respect of material of the type recorded by and referred to by the Plaintiff. That is not to say that it

was not the law at the material time that obligations of confidentiality did not arise in respect of information obtained in the course of employment or other contractual engagement or that it would never have been understood by contractors such as the Plaintiff that obligations of confidentiality arose in the absence of such provisions.

83 The use that the Plaintiff made of the subject information and whether it was confidential and whether that use amounted to any breach of confidentiality must be assessed in a context that includes the fact that a major and well-established operator in the mining industry, namely, BHP, did not, in its contractual arrangements with the Plaintiff, attempt to identify in the relevant agreements with the Plaintiff whether any information obtained by him was confidential and be disclosed or otherwise used by the Plaintiff except in accordance with permission given by BHP.

84 It is also of significance that the Plaintiff's drill logs did not enable him to identify the precise location of any of the sites where he drilled and, in any event, the evidence has not established that he drilled anywhere closer than 30 kilometres away from one of the plainted tenements, namely, M38/303 (Dogbolter).

85 The evidence is insufficient to enable me to conclude on the balance of probabilities that the Plaintiff, in using the information in the log books in the manner and for the purpose that he did, was making use of confidential information in respect of which he owed a duty of confidentiality to either BHP or Golconda or to any of the Defendants and it is insufficient to show that there has been any breach of confidentiality and thus insufficient to support the application to strike out his plaints.

86 The application to strike out the plaints is refused.