JURISDICTION	:	MINING WARDEN
TITLE OF COURT	:	OPEN COURT
LOCATION	:	PERTH
CITATION	:	NEWMONT DUKETON PTY LTD & ORS -v- ANGELOPOULOS [2006] WAMW 20
CORAM	:	CALDER M
HEARD	:	20 – 22 FEBRUARY 2006, 30 JUNE 2006
DELIVERED	:	8 DECEMBER 2006
FILE NO/S	:	APPLICATIONS FOR EXEMPTIONS 69/012, 72/012, 73/013, 621/012 PLAINTS FOR FORFEITURE 3-5/012, 13-14/012, 31/001, 1/023
TENEMENT NO/S	:	EXPLORATION LICENCES 38/1105, 1112-1115, M38/303
BETWEEN	:	REGIS RESOURCES NL GENETIC TECHNOLOGIES LTD NEWMONT DUKETON PTY LTD (Applicants/Defendants) AND STEFANOS ANGELOPOULOS (Objector/Plaintiff)

Catchwords:

EXEMPTION - Justified in Minister's opinion - General
EXEMPTION - Time required - Raise capital
EXEMPTION - Uneconomic deposit - General

EXPENDITURE - Exemption - Justified in Minister's opinion
EXPENDITURE - Time required - Raise capital
EXPENDITURE - Exemption - Uneconomic deposit
EXPENDITURE – Non-compliance - Penalty in lieu of forfeiture
FORFEITURE - Penalty in lieu
PENALTY - Expenditure conditions non-compliance - In lieu of forfeiture

Legislation:

Mining Act 1978 (WA), s 102(2)(b), s 102(2)(e), s 102(3), s102(4)

Result: *1. Grant of exemption recommended for E38/1105, E38/1112, E38/1115, M38/303*

2. Penalty of $10000 imposed in lieu of forfeiture on all plaints.

Representation:

Counsel:

Applicants/Defendants	:	Mr R M Edel
Objector/Plaintiff	:	Mr T J Kavenagh

Solicitors:

Applicants/Defendants	:	Gadens Lawyers
Objector/Plaintiff	:	Corser & Corser

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

Case(s) also cited:

Nil

CALDER M

REPORT AND RECOMMENDATION OF THE WARDEN FOR THE MINISTER IN RESPECT OF:

APPLICATIONS FOR EXEMPTION CONCERNING E38/1105, E38/1112, E38/1115, M38/303

PLAINTS FOR FORFEITURE OF E38/1105, E38/1112, E38/1113, E38/1114, E38/1115 M38/303

THE PROCEEDINGS

Applications for certificates of exemption have been lodged in respect of exploration licences E38/1105 (exemption sought $11,780), E38/1112 (exemption sought $12,340), E38/1115 (exemption sought $15,670) and M38/303 (exemption sought $85,341). For the exploration licences the subject expenditure year in each case ended during 2001; for M38/303 the subject expenditure years ended 14 November 2001. To each exemption application an objection has been lodged. For all four tenements it is claimed that the reason for which an exemption certificate should be granted is that during the subject expenditure year time was required to raise capital for future exploration or mining and to plan future exploration or mining. For all four tenements a further reason for which it is said a certificate of exemption should be granted is that pursuant to subs 102(3) there is reason which in the opinion of the Minister is sufficient to justify such exemption. In respect of only M38/303 it is said that a further reason to grant a certificate of exemption is that the ground the subject of the tenement contained a mineral deposit which, during the subject year, was uneconomic but which may reasonably be expected to become economic in the future. Alternatively, it is claimed that a reason for the granting of the exemption for the year in question for M38/303 is that at the relevant time economic problems existed that were such as to not make mining operations on that tenement viable.

The Plaints for Forfeiture

2 The plaints seek the forfeiture of the four abovementioned tenements in respect of which applications for certificates of exemption have been

made. In each case the basis upon which forfeiture is sought is non-compliance with the expenditure condition. Two of the plaints for forfeiture relate to M38/303. Plaint 31/001 is for the expenditure year ended November 2000, in respect of which an application for a certificate of exemption was previously refused by the Minister. Plaint 1/023 is in respect of M38/303 for the year ended November 2001 which is the same year for which the current application for exemption is made. Exploration licences E38/1113 and 1114 have also been plaintied for forfeiture on the ground of non-compliance with the expenditure condition for the expenditure year ending in 2001. The Minister has previously refused to grant certificates of exemption in respect of those two tenements for that same expenditure year.

THE EVIDENCE

The Corporate Background

3 The Applicants/Defendants, Regis Resources NL, Genetic Technologies Ltd and Newmont Duketon Pty Ltd, have all been the subject of a change of name during the period that is relevant to the plaints and the exemption applications. Regis Resources NL ("Regis") was formerly Johnson's Well Mining NL ("JWM"); the change of name occurred in August 2004. Genetic Technologies Ltd ("Genetic") was formerly Duketon Goldfields Ltd ("Duketon Goldfields"). The change of name occurred in August 2000. Newmont Duketon Pty Ltd ("Newmont Duketon") was formerly ACM Mines Pty Ltd ("ACM"). Its name was changed in May 2003. The parent company of Newmont Duketon Pty Ltd is Newmont Australia Ltd, formerly Normandy Mining Ltd.

4 There are current joint-venture arrangements in existence between Newmont Duketon (as ACM) and Regis (as JWM). The joint-venture agreement between ACM and JWM related to the Duketon Project. There is an exploration joint-venture heads of agreement dated 15 December 1998 and there is the Rosemont-Duketon farm-in and exploration joint-venture agreement also dated 15 December 1998.

5 The tenements that were the subject of the heads of agreement consisted of some tenements owned wholly by JWM and some tenements in respect of which a third party had an interest. ACM was entitled to earn a 50 per cent interest in those tenements that were 100 per cent owned by JWM and a 50 per cent interest in the interest that JWM held in those tenements in which a third party had an interest. Of the tenements

the subject of the plaints only M38/303 was wholly owned by JWM. Under the farm-in and exploration joint-venture agreement JWM managed the Duketon Project between 1998 and the end of 2001. From 1 January 2002 until 2 February 2006 ACM was the manager of the project and Regis managed it from 3 February 2006. I am satisfied that, pursuant to both of those agreements, all of the tenements comprised in the Duketon Project have been dealt with by the parties to the agreements as an amalgamated commercial enterprise.

Evidence of the Applicants/Defendants

6 In addition to evidence produced in respect of the abovementioned general background, the Applicants/Defendants called witnesses to give evidence concerning relevant geological, economic, financial and corporate factors.

7 Mr Lee is and has been the corporate secretary of Regis since 1998. His responsibilities have included organisation of board and shareholder meetings, dealing with joint-venture partners on behalf of Regis and ASX compliance. His involvement in the latter included preparation of and drafting of annual company reports, including, in particular, the chairman's report. His involvement in that regard included review of exploration reports and of directors' reports. Annual reports produced for the period from 1995 to 1998 state that in total, for the period 1995 to 1998 inclusive, $31.048 million was spent on exploration.

8 Mr Lee produced the December 1998 exploration joint-venture heads of agreement. He said that he had negotiated most of the terms of the agreement with Newmont Duketon (as ACM). He said that there had been no replacement agreement for that heads of agreement and that it was still a current operative agreement as between Newmont Duketon and Regis. He said that the minimum expenditure required on all of the subject tenements was in excess of $2 million and that ACM was obliged to spend $5 million over five years. The effect of the agreement, he said, was that in any given year expenditure by ACM may not necessarily cover the minimum expenditure requirement, in which case Regis would be obliged to fund the balance in any such year.

9 Mr Lee produced a chart of gold prices for the material period which indicated that in July 1999 the price of gold was $252.80 an ounce. He said that at such a low price it was very difficult to raise capital, particularly for what could be described as relatively minor operations. He said that in May 1998 Regis undertook a rights issue in an attempt to

raise $20 million. Only about $6.7 million was subscribed and, of that, $4 million was subscribed on the proviso that that money be used to repay loans that had been made to Regis by Gutnick companies.

10 Mr Lee said that in 2002 Regis attempted another issue and raised only about $250,000. At that time Regis owed Newmont Duketon over $20 million which was secured by the project tenements. He said that because of the security that Newmont Duketon held over those tenements, namely, a floating charge, it was impossible for Regis to use those tenements as security to raise further loan funds. He produced Regis's annual report for 2000 in which it is stated that the company sustained an operating loss of $12.5 million during that year and that accumulated losses then amounted to $45.11 million. In that same document it is reported that the company's cash asset was only $16,000.

11 The annual report that he produced for the following year indicated an operating loss for that year of $7.6 million and a total cash asset of only $53,000. At the time it was, he said, extremely difficult for Regis to meet its share of the project expenditure commitments. As a consequence, Regis and Newmont Duketon held discussions for the purpose of giving consideration to the restructuring of Regis's debts with Newmont and the possibility of Newmont taking over some of Regis's mining commitments pursuant to the heads of agreement. Those discussions, he said, began near the end of 2000 and continued throughout 2001. Mr Lee said that it was not until early 2003 that the discussions led to an in-principle agreement. By then Regis owed $22.26 million, which included $5.6 million in accumulated interest. That debt was repayable in 2001.

12 At the same time as negotiations with Newmont Duketon were progressing Regis was engaged in other financial dealings and negotiations with the Normandy Group, with companies controlled by Mr Gutnick and with Mr Gutnick in person. There were also dealings and discussions which Regis was involved in concerning Astro Mining and Normandy, Normandy and Great Central Mines and AWA Administration. Finally, in 2002, agreement was reached whereby Newmont Duketon was to get an 80 per cent interest in the Rosemont tenement, an 80 per cent interest in the Part A tenements referred to in the heads of agreement and an 80 per cent interest in the interest held by Regis in the Dogbolter tenement. Newmont Duketon also was granted royalty rights and the first right of refusal over whatever interest Regis held in any of the Duketon Project tenements. Significantly, Newmont

Duketon was to immediately take over the management and control of the joint venture.

13 It had also been agreed with Mr Gutnick that Gutnick would take over $12.8 million of the debt owed to Normandy by Regis, thus relieving Regis of approximately 50 per cent of its total debt to Normandy Duketon. Normandy forgave the balance of that debt that, through Newmont Duketon, Regis owed to Normandy. Further, Regis no longer had any responsibility for exploration expenditure for the whole of 2002. That agreement is reflected in a deed entered into in April 2002. Mr Lee said that the effect of the agreement was that Regis would be free-carried during 2002 in respect of its remaining 20 per cent interest in the tenements and that from 2003 Regis was to be responsible for funding its 20 per cent share of the expenditure commitment.

14 It was the evidence of Mr Lee that, as a consequence of the parties reaching agreement in that manner, exploration again commenced on the tenements with Newmont Duketon managing the operations and Regis being kept informed of what was being done and spent.

15 In respect of the Dogbolter tenement (M38/303), Mr Lee said that exploration undertaken by Regis in mid to late 1998 had included work done on that tenement. He said that it was his understanding that there was a deposit containing 82,000 ounces of gold on the tenement but that from his understanding of reports and discussions, it did not constitute a sufficient deposit to justify expenditure on stand-alone infrastructure and that it was therefore necessary to find a major project in the area to which M38/303 could become a satellite feeder. Evidence was given by other witnesses in connection with the economic potential of the deposit on M38/303. Mr Lee, however, said that his experience in the development of other gold prospects and his general experience in the industry caused him, as a public officer of Regis, to believe that a deposit of around 500,000 ounces needed to be established before it could be considered viable to build a stand-alone operation which, he suggested would cost between $30 million and $50 million for plant and infrastructure alone.

16 Concerning the Rosemont tenement (M38/343), Mr Lee said that it was the intention of the joint-venture parties that the deposit on that tenement be explored and identified to the point where the partners would be able to commence mining operations on the tenement. He gave evidence to the effect that from 1997 to 2002 inclusive approximately $12.5 million had been spent in work on the ground and on desk studies in

order to identify the resource to a level where mining could then be undertaken.

17 During cross-examination Mr Ellis agreed that the annual reports of Regis for 2000-2001 indicated that the company held an interest in or had responsibilities in respect of 503 tenements, including some mining leases. That number included interests in the Northern Territory and in Victoria. He agreed that in respect of all of those tenements there was an obligation that money be expended and that by the end of 2000 Regis, in effect, had no money. He agreed that by September 2001 Regis did not employ any staff and that it had in fact never employed any as AWI had been engaged to provide staff on a contractual basis. It was the responsibility of AWI, pursuant to its contracts with Regis, to arrange for preparation and filing of Form 5 expenditure reports and to generally manage the tenements.

18 Mr Anthony Ryall was called by the Applicants/Defendants. He is an independent consulting geologist with considerable relevant experience and, I find, is amply qualified to give the evidence and to express the opinions that he did. The Applicants/Defendants also called Mr Alan Blair who is a relevantly qualified mining engineer with some 20 years' experience in that field. He too was amply qualified and experienced to give the evidence and express the opinions that he did. Mr Ryall and Mr Blair compiled a joint report in July 2002 entitled "Newmont Australia Duketon Belt Review of Gold Resources". That report became an exhibit.

19 In his evidence Mr Ryall said that his brief was to review the resource estimates that had been done by Regis in respect of the Rosemont (M38/343) and Moolart Well (E38/348) tenements for Newmont Duketon to assess the accuracy of those estimates and to review the exploration strategies of Regis. Having done that, he was to then make a recommendation as to future exploration. He wrote the majority of the report; Mr Blair did the optimisation studies. All of the resource estimations and the geological exploration aspects of the report were done by Mr Ryall. Mr Blair then applied economic factors to that data for purposes of his pit optimisation conclusions.

20 Mr Ryall said that his method of estimating a resource on M38/303 (Dogbolter) of 87,000 ounces complied with the JORC standards. He concluded that it was unlikely that further drilling adjacent to the inferred resource would reveal an increase in the size of that resource. For purposes of preparation of the review of the gold resource Mr Ryall was given access to the raw data in the possession of Regis. He was requested

to do a validation of that database. He said in relation to the Dogbolter tenement that if there were any errors in the data, they were minor. The data consisted of records of drilling activities. He said there were no more than 12 or 15 points that caused any concern to him and that there was nothing overly significant in any of them. He agreed during cross-examination that the 40-metre drill spacing that had been undertaken on the tenement was not enough to justify an "indicated" level of assessment and that if that was to be considered, in-fill drilling would need to be done.

21 Mr Blair is an independent mining engineering consultant. He is experienced in open pit and underground feasibility study preparation, project evaluation, project auditing and project management. His expertise also includes mine planning and design and open pit optimisation assessments. He said that pit optimisation is a way of determining how to most efficiently mine an open pit deposit. That is done by taking a resource model and processing it and inputting cost and recovery data. He said that the result is that an optimised shell is obtained that will define a preliminary mining inventory. He said that during the process a number of different shells are produced from which it is possible to ascertain a net present value. Those values are graphed and what appears to be the best result is then selected. He said that the pit optimisation outcome is the start of the mining design process.

22 Mr Blair said that two options specified by Newmont Duketon were looked at. One was the establishment of operating plant at or close to the Rosemont deposit and the alternative was to look at trucking ore to the Bronzewing mine about 200 kilometres away. He said the latter assessment included an assumption that there would be nothing to prevent treatment being undertaken at Bronzewing but that he had not been told that that could in fact occur. He said that the estimated cost of processing ore taken from the Dogbolter resource to Rosemont was approximately $15 per tonne and that the Bronzewing alternative worked out at approximately $40 per tonne. The Rosemont option cost estimate did not, however, include any allowance for plant capital cost at Rosemont.

23 Mr Blair said that the cost per tonne of production has a significant effect on the economic cut-off grade for extractive operations. At Rosemont, he said, the operator could afford to drop the cut-off grade below that which would be viable for the Bronzewing option and that, therefore, the Rosemont option would have the effect of more gold being recovered. He said, however, that further modelling and feasibility studies must be undertaken before any decision could be made to mine the

Dogbolter resource which has only been assessed as inferred. He said that he would not expect the predicted outcomes to change significantly after such further studies were done. He said that he concluded that if the Rosemont option were the chosen one, then profits would be nearly double that of the Bronzewing option. He expressed the opinion that the variation in gold prices between 2001 and 2002 would not have made any significant difference to his conclusions.

24 Mr Blair did not attempt to validate the original data that had been used by Mr Ryall and himself in their review. He said that that was not his function and that he dealt with the mining side of things, whereas Mr Ryall dealt with the geology to which the data related. He agreed in cross-examination that he had not been asked to give consideration to any option other than the suggested Bronzewing and Rosemont alternatives. He said that he was not aware of any other location within 200 kilometres of Dogbolter where ore from Dogbolter could be treated. He said he did not know whether the ore could be treated as Leonora.

25 In terms of actual figures Mr Blair said that at a gold price of $A575 an ounce if the ore was hauled to Bronzewing a net operating cash flow of $4 million to $4.5 million would result from mining 104,000 tonnes at 8.3 grams a tonne. For the Rosemont option he said that there would be a net operating cash flow of about $9,000,000 that would result from the mining of 265,000 tonnes at 4.35 grams a tonne.

26 The next witness called by the Applicants/Defendants was Mr Plyley. He was the general manager of the Bronzewing mill between October 2000 and December 2002. He has had extensive managerial experience in mining. He said that while he worked as the general manager of Bronzewing he was responsible for monitoring and increasing the net returns from gold production. He was the senior person based at the mine. It was his evidence that during the 1999 to 2000 production year at Bronzewing the capacity of the Bronzewing mill to process ore had been significantly diminished as a result of a number of things, including in particular the failure of a chute due to the collapse of a stope backfill barricade which resulted in three deaths and including to the hardness of rock being encountered.

27 He said that for the 2000 and 2001 financial year production increased from the previous year from 1.671 to 1.8 million tonnes. He said that the design capacity of the mill was 2,000,000 tonnes per year. He said that during 2000 and 2001 there were plans to increase ore production at Bronzewing. It had been assessed that the underground

operations at the mine were not operating efficiently and that other ore sources had been identified. He said that he had instructed the mill operators to look at increasing the capacity to accommodate the anticipated increased production. He said that if he had been approached during the 2000 to 2001 production year to process ore from elsewhere, he would have refused because of the expectation for increased production at Bronzewing.

28 He said that, in addition to processing of the ore that was to be mined, there was at Bronzewing a low-grade stockpile that was available for processing through the mill. He also said that it was his experience that where a toll-treatment arrangement is entered into to treat ore from another source that there is always a long negotiation, that it can be difficult to reach agreement about how and when the toll-treated ore is to be dealt with and that it may even require some plant modification to treat the imported ore. He said it was his belief that, in any event, Bronzewing had no capacity to undertake a large toll-treatment operation. Mr Plyley said that Bronzewing was closed after he left, he believes towards the end of 2003. He said it was closed basically because it had run out of ore reserves.

29 Mr David Walker, the managing director of Regis, also gave evidence. He is a very experienced geologist with considerable merchant banking experience connected with mining projects. That expertise extends to resource analysis, profitability assessment and performance assessment. He also has experience in corporate capital raising and general stockbroking. He became managing director of Regis in mid-2004 and has responsibility for all operations of the company of a technical, administrative and exploration nature. He is directly concerned with the day-to-day management of the company and has access to all of its past records.

30 He gave evidence of how Regis earned its interest in M38/303. He gave evidence of the expenditure that had been incurred on that tenement by Regis. Mr Walker gave evidence of a complete change of the board of management whereby management of the joint venture was taken over with himself, Mr Foley, Mr Rose and Mr Lamont as directors. That new management team, he said, brought considerable financial, administrative and exploration experience with it. He gave evidence that between 2003 and 2006 funds of $17 million had been raised and that those funds had been and were being used for exploration and administration with the majority of the funds being spent on projects, in particular the Duketon Project. He said at the time of the restructure Regis owed $25 million to

the Gutnick organisation and that, as part of the restructure, that debt had been discharged and that Regis at present has no debts at all except those incurred in day-to-day operations and has no interest-bearing debts.

31 Mr Walker said that following the restructuring the first priority was to negotiate with Newmont Duketon mining with a view to restructuring the joint venture, with Regis taking a greater role in the active participation of the development of the tenements in order to progress the project. A minute of understanding was subsequently entered into by Newmont and Regis. Regis undertook pursuant to that minute of understanding to expend $10 million. The minute of understanding has subsequently evolved into a formal agreement. Pursuant to the agreement, from February 2006 Regis has taken responsibility for all matters connected with the Rosemont joint venture. By that date Regis had spent $5.5 million pursuant to the memorandum of understanding and agreement. Its exploration budget on the project to the middle of 2006 was $3.2 million and he anticipated that a total of $4.4 million in all would be spent on the Duketon Project.

32 Concerning E38/348 (Moolart Well) Mr Walker said that expenditure during 2003 had been $541,000, for 2004 $1.4 million and for 2005 $1.578 million. At the time of hearing he said that Regis believed that possibly within 12 months there could be an operating mine on the tenement. He said that the process of mine design and economic evaluation of the resource had commenced and that there had been some positive initial responses so far. He said that as at February 2006 Regis had cash available in excess of $4.4 million which was the projected expenditure for the first six months of 2006. He said that cash at hand at that time was $5.52 million. He also gave evidence that in addition to its cash reserves Regis had access to significant equity and debt funds. He said that it would be necessary to raise capital for the Moolart Well project and that the company was at present putting together options that would be looked at over the next 12 to 18 months in respect of Moolart Well.

33 He said that it had always been the case in his experience that if a major gold deposit was developed, then smaller deposits in the vicinity of the major deposit would also be developed. He said that the exploration program in relation to Moolart Well had been increased within the last 12 months and that the joint venturers had prioritised the development of a stand-alone plant located at Moolart Well rather than Rosemont. The increased exploration had included revisiting areas of past exploration and, since 2002, a drilling program had been undertaken and low-level

feasibility studies progressed. After Regis took over exploration in mid-2002 further drilling had been undertaken in the last half of that year and over 300 holes had been drilled. That drilling had resulted in a resource upgrade. Golder and Associates Pty Ltd, a specialised resource evaluation company, had produced that resource evaluation update. Modelling of the Moolart Well resource by Dr Khosrowshahi estimated that indicated and inferred resources could yield just over 1,000,000 ounces of gold. Mr Walker said that studies that would be conducted in respect of Moolart Well included optimised pit shells, metallurgical, geotechnical, hydrological, pit design and crushing, processing and milling.

34 Mr Walker also gave evidence concerning the Dogbolter tenement. He described that as one of several satellite deposits to Moolart Well. He said that it contains a significant gold deposit that could be exploited through a mill located at or near Moolart Well and that a profit would be generated. He said that the Dogbolter tenement was an important aspect of the plans to develop a stand-alone plant at Moolart. He said, however, that it was uncertain at present what portion of the Dogbolter deposit could be economically developed but that studies were being or would be undertaken to assess that. One important aspect of the relationship between Dogbolter and Moolart, he said, was that there were two types of ore at Moolart and there was the potential to jointly process Moolart and Dogbolter ore thereby achieving greater utilisation of the treatment plant by blending. Further studies were necessary, however, before there could be any certainty about extractive operations being carried out on Dogbolter.

35 During cross-examination Mr Walker said that he did not know how many tenements were held by the Applicants/Defendants and that he did not know the total aggregate minimum expenditure obligation that all of those tenements together carried. He said that of the $11 million raised in January 2006, $4.5 million had been paid to Newmont Duketon and that $600,000 had been used for Departmental bond commitments taken over from Newmont. He said that fees of between $400,000 and $500,000 had been paid in order to raise the $11 million. When it was put to him that Regis only had $4.396 million and not $5.52 million cash available, he said that that was a figure about which he was not certain. However, he said it was probably correct. That amount had been supplied in amended particulars provided by the Applicants. He said that it would be necessary for another capital-raising exercise to be undertaken during 2006.

36 Mr Brammell, the group administrator for Newmont Australia Limited, the parent company of Newmont Duketon, gave evidence for the Applicants. He is an experienced geologist and tenement manager. He is responsible for maintaining records of agreement entered into by Newmont Australia and associated entities. He is responsible for the upkeep of tenement data and for joint venture compliance monitoring. He gave evidence of how tenement data and joint-venture obligations, including expenditure on tenements, are maintained and monitored, including those in respect of the Regis joint venture. He is familiar with the Duketon Project tenements and agreements connected with them, in particular the Rosemont joint venture and what he called the regional joint venture. He confirmed that Regis assumed management responsibilities in February 2006 and that he has a role on the joint-venture committee which includes, in particular, monitoring expenditure compliance.

37 He prepared and tendered in evidence a document (exhibit 41) showing that the Duketon Project contained approximately 95 granted tenements and that there were approximately 160 pending applications for tenements, some of which are exploration licences and some are mining lease applications which can be reverted. All of those tenements, he said, are subject to joint-venture arrangements. He produced a further document (exhibit 42) for the purpose of the hearing. It shows all of the tenements that are in the project and their aggregate expenditure for the years 2003 to 2005. That document showed that for each of those years the aggregated minimum expenditure requirement on the Duketon Project tenements was exceeded. In the latter two years aggregated claimed expenditure was more than double the minimum requirement. In the course of giving his evidence Mr Brammell produced other documents that he had prepared based on the accounting systems maintained by the Newmont Group. He produced Form 5's for the years 2002 to 2005 for E38/1112, 1113, 1114, 1115 and M38/303. He gave evidence in broad terms as to the accounting methodology used to prepare the material from which he had produced the documents that he tendered in evidence.

38 Mr Jens Balkau, who is currently the general exploration manager for Regis, gave evidence of the exploration history on the tenements and of the plans of Regis for future exploration. He is a well-qualified geologist. He has responsibility for the Duketon Project which, in essence, consists of the joint venture between Regis and Newmont. He did not commence working with Regis until February 2006. He began work there by familiarising himself with historical data connected with work and expenditure on the tenements and with the joint-venture

arrangements. He has been involved in or been responsible for the planning of future activities connected with the subject tenements.

39 In evidence he said that, in respect of E38/1105 for the whole of 2006, surface sampling and some drilling was to be undertaken, for E38/1112 drilling of 1200 metres was planned, for E38/1113 some 3000 metres of drilling is proposed, for E38/1114 drilling of 900 metres is proposed and for E38/1115 a total of 800 metres of drilling is to be undertaken. The objective of the drilling on E38/1112 - 1115 is to try and identify extensions of the neighbouring Brightstar mineralisation. On Dogbolter some 2300 metres of drilling is proposed, together with associated assaying and metallurgical studies. In addition, some rehabilitation is to be undertaken. It is also proposed that there be assessment of whether it may be economic to process Dogbolter ore through a plant located at Moolart Well. He said that since the plaints were lodged work had been done on heritage issues and on aeromagnetic interpretation on M38/303 (which led to the view being formed that that tenement was too small to develop as a stand-alone operation). He said that planned future work would be undertaken as soon as and if the subject tenements survived the applications for forfeiture.

Evidence of the Objector/Plaintiff

40 Mr Angelopoulos, the Objector/Plaintiff, is a very experienced drilling contractor and consultant in of Western Australia. He did not give any evidence about work done on the ground on any of the subject tenements. His evidence was mainly confined to his own drilling experience around the Duketon belt and to the drill logs that he had kept in connection with that drilling and to the use that he had made of those logs in targeting the tenements that he plainted for forfeiture. He did not give any evidence which sought to contradict the evidence of the witnesses who were called on behalf of the Applicants/Defendants as to the history of work and expenditure on the subject tenements.

SUBMISSIONS

The Applicants/Defendants

41 It is submitted that time was required by Regis to raise capital for future exploration and mining because of its difficult financial position before and during the subject reporting years. Its difficulties arose from the large amount of debt and interest owed to Newmont Finance which

was payable in 2001, its accumulated losses of $53 million, it only having $53,000 cash in the bank during the 2001 financial year, its minimum expenditure commitment of $2.89 million for the 2001 expenditure year and facing a minimum expenditure requirement of $2.97 million for the 2002 financial year.

42 The Applicants/Defendants rely upon to the evidence of Mr Lee that it was extremely difficult during the period 2000 to 2002 for junior explorers to raise capital for exploration and upon his evidence of the low price of gold during the subject years. It is said that those difficulties are manifested by its attempted rights issue in 2002 which raised a mere $50,000 and did not cover the cost of the exercise. It is said that, as a consequence, during the subject reporting years Regis negotiated with Newmont Duketon for the latter to become manager of the joint venture and to take responsibility for expenditure commitments. The negotiations also related to the issue of how to deal with Regis's debts of $20 million and because of the nature and number of interrelated debts and the large number of interconnected contractual arrangements between various parties, negotiations were long and complex.

43 The Applicants/Defendants rely upon what they say is the relatively short time, in all of the relevant the circumstances, that it took for Normandy Duketon and Regis to reach agreement by January 2002 which had the effect that Regis's $20 million debt was effectively cleared and Regis no longer had the obligation to manage the joint venture or the responsibility for expenditure compliance. It is submitted that Regis acted reasonably by entering into the long negotiations that it undertook in order to achieve the outcome. It is said that the outcome of the ultimate agreement with Newmont Duketon was that the tenements were to be managed by Newmont Duketon which had ample capacity, financial and otherwise, and the intention to explore the Duketon Project tenements and ample resources to comply with the mining expenditure commitments. It is said that that capacity and intention is manifested by expenditure commitments having been exceeded in subsequent years.

44 In relation to M38/303 (Dogbolter), the Applicants/Defendants say that the evidence clearly establishes that, applying the JORC Code criteria, there is a resource estimate of 87,000 ounces of gold which is unlikely to be increased in size by further exploration drilling and that such an inferred resource is evidence of the presence of a mineral deposit on the tenement for purposes of par 102(2)(e) of the Act but is too small to financially support a stand-alone extractive mining operation.

45 Reliance is placed upon the evidence of Mr Blair who said that, with gold at a price of $A575 per ounce, if the ore from Dogbolter had been taken to Bronzewing and treated there, a net operating cash flow of $4 to $4.5 million would be realised and that if it was carted to and processed at a proposed plant at Rosemont, the net operating cash flow would be $9 million with much more ore being mined and processed. That latter figure did not take into account the capital cost of building the treatment plant at Rosemont. The context in which the evidence was given, however, was that carting ore from Dogbolter would only occur if it was viable to construct the plant at Rosemont for the purpose primarily of processing ore mined at Rosemont in respect of which a stand-alone plant at Rosemont was justified. It is said that the intention of the joint venturers was that Rosemont would provide the major resource deposit and Dogbolter a satellite resource. That is why, it is said, $12.6 million was spent by the joint venture in connection with M38/343 for the five years up to the end of 2002. Concerning the Bronzewing processing option for the Dogbolter ore, the Applicants/Defendants point to the evidence of Mr Plyley which was to the effect that that was a most unrealisable option at all material times.

46 It is then noted by counsel that since undertaking extensive drilling at Moolart Well during 2004 and 2005 the joint venturers had decided that any stand-alone plant that was built should be located at Moolart Well rather than Rosemont. Reference is also made to the Golder report which addressed the potential of the deposit on E38/348. That report by Dr Khosrowshahi concluded that indicated and inferred resources on the tenement together amounted to 1,000,000 ounces. It is noted that at the time when the joint venture initially began to contemplate the development of a processing mill in the Duketon area it was considered by Regis that a stand-alone plant could only be viable in the context of a 1,000,000 ounce gold resource.

47 It is said that it is the intention of the joint venturers to undertake extensive studies and analysis of E38/348 and of the Dogbolter deposit and that the latter has become more significant because of Regis's plans for a stand-alone mill at Moolart. It is said that there is a significant possibility that the plant will be established at Moolart and unlikely that a plant would be established at Rosemont. Dogbolter is closer to Moolart than to Rosemont.

48 Concerning expenditure generally, it is submitted that the evidence given on behalf of the Applicants/Defendants should be accepted as it was not challenged by the Objector/Plaintiff. Much emphasis is placed on the

expenditure incurred by the Applicants/Defendants since the subject expenditure years. It is noted that for the five exploration licences minimum required expenditure for the years after the subject expenditure year has been $3333 on each tenement and actual expenditure has been: for E38/1105 $56,437, for E38/1112 $121,852, for E38/1113 $226,800, for E38/1114 $89,408 and for E38/1115 $47,526.

49 It is noted that for M38/303 minimum required expenditure for that same period was $56,408 and actual expenditure $199,436. It is further noted that between 1994 and 1998 Regis expended over $31 million on exploration on the Duketon Project and that the joint venturers' expenditure on the Duketon Project for the years 1999 to 2005 has been, respectively for each year, $3.123 million, $1.724 million, $618,400, $2.339 million, $3.796 million, $4.48 million and $5.87 million. It is observed by counsel that those figures are not challenged. It is also noted that in each year since 2000 the joint venturers have increased their expenditure on the Duketon Project and that there has been considerable expenditure incurred even while the tenements have been subject to the forfeiture plaints. It is said that the evidence establishes that Regis, which began to manage the tenements in February 2006, has already developed future exploration plans.

50 The complete restructuring of Regis in late 2004 in both management and shareholdings is said to be significant and means that funds have been and will continue to be available to continue with the development of the tenements.

The Exemptions

51 The Applicants/Defendants rely upon the provisions of para 102(2)(b) of the Act in respect of E38/1105, E38/1112, E38/1115 and M38/303. It is said that the evidence clearly demonstrates that Regis took positive and successful steps during and after the expiration of the subject tenements' expenditure years to remedy the difficult financial position that it had been in leading up to and during the expenditure year and that, as a consequence, all of those tenements are now subject to contractual arrangements and obligations connected with the expenditure condition which have had the overall effect that since the subject expenditure year not only have the expenditure commitments been met but they have been significantly exceeded.

52 It is said that the expenditure history in respect of those tenements since the agreement that was entered into on 11 January 2002 whereby

Newmont Duketon became responsible for the Duketon Project tenements amply demonstrates not only that there is capacity to meet the minimum expenditure requirement but that there has been and is an ongoing intention to exceed the minimum expenditure requirements and to ensure that the potential of the tenements is achieved. It is also argued that the evidence demonstrates that Regis has the technical resources to achieve those objectives and that its intention is to apply that technical capacity to appropriate development of the tenements. Counsel for the Applicants/Defendants submits that there is uncontested evidence that Regis has the ability and the intention to finance construction of a processing plant at Moolart Well which, in turn, will mean that the potential of the deposit at Dogbolter will be properly exploited.

53 The Applicants/Defendants submit that the low price of gold between 1998 and 2002 was a significant factor in not only being unable to raise capital, whether equity or debt, but also in establishing the potential viability of the known deposits. It is said, in effect, that it was inevitable that the negotiations which ultimately resulted in the agreement being reached would be relatively long and difficult because of the complexity of the existing contractual relationships between the parties involved in the negotiations, including, in particular, the extent of debt that Regis had accumulated and the desirability of achieving a resolution whereby the heavy burden of that debt, which was at the time payable immediately, could be overcome. That, of course, was in the context of the significant expenditure condition obligations that Regis was faced with for the following expenditure year.

54 The Applicants/Defendants rely upon the provisions of par 102(2)(e) of the Act in connection with M38/303 (the Dogbolter tenement). Reliance is placed upon both limbs of the paragraph, namely, that, firstly, an exemption may be granted where the tenement contains a mineral deposit that is uneconomic and which may reasonably be expected to become economic in the future and, secondly, that the ground contains a mineral deposit and that at the relevant time there are economic or marketing problems that have the effect that mining operations are not viable.

55 The Applicants/Defendants submit that there is uncontradicted evidence that M38/303 contains an inferred resource of 87,000 ounces and that it is not large enough to support a stand-alone plant. It is submitted that there is no reason to reject the evidence concerning the nature and extent of the deposit of Dogbolter or to not accept that it is properly to be categorised as an inferred resource under the JORC Code. Counsel points

to the extensive examination carried out on behalf of the Applicants/Defendants of the historical data related to the tenement and the modelling based on that examination.

56 It is submitted that up until relatively recent times the intention of the joint venturers was to construct a processing plant at Rosemont (M38/343) and to cart ore from Dogbolter to there. That, it is said, was preferable to the possibility of taking ore from Dogbolter to Bronzewing because, although the latter may have been profitable it would have resulted in lower cash flows. It is submitted that, in any event, it is highly unlikely that had Bronzewing been approached with a request to process Dogbolter ore that the request would have been rejected. In that regard reliance is placed upon the evidence of Mr Plyley.

57 It is said that now that the joint venturers have discovered the extent and value of the deposit at Moolart Well and plan to construct a stand-alone plant there it is reasonably likely that it will be economic to cart ore from Dogbolter to Moolart Well for processing at the joint venturers' plant. In that context it is said that the requirements of the first limb of par 102(2)(e) have been fulfilled, in particular that the deposit on M38/303 was uneconomic during 2001 but now, in the light of the proposed plant at Moolart Well, may be said to be reasonably expected to become economic in the future.

58 Concerning the second limb of par 102(2)(e), the Applicants/Defendants submit that "viable" in the English Oxford Dictionary is defined as meaning "able to maintain a separate existence". It is said that the evidence establishes that although there is a deposit of 87,000 ounces, which is an inferred resource, on M38/303, it would never have independently supported a stand-alone extractive mining and processing operation. They point to the historically low gold prices during the period 1998 to 2002, to the unlikelihood of having been able to reach agreement with Bronzewing for Dogbolter ore to be processed at Bronzewing's plant, the absence of any other plant at which the Dogbolter ore could be economically processed after taking cartage costs into account, including at the nearby Rosemont deposit, and submit that any or all of those factors in combination meant that at the material time economic and marketing problems meant that ‘mining operations’, (as defined in s 8), in that context being extractive operations, were not viable.

59 It was also submitted that to build a processing plant on M38/303 at a cost of between $30 million and $40 million was not viable in view of

the small size of the deposit. Counsel also notes that the second limb of par 102(2)(e) does not require the tenement holder to establish future economic viability; although it is submitted that, in any event, it is reasonably likely that, because of the proposed development of Moolart Well and the establishment there of a plant, in the future M38/303 will be economically viable. An essential part of the background to all of counsel's submissions in connection with economic viability and marketing or economic problems is that there has been a significant and relatively sustained increase in the price of gold since 2002.

60 The Applicants/Defendants rely upon the provisions of par 102(3) in the event that the Minister is not satisfied that the circumstances of the case bring them within the provisions of subs 102(2)(b) or 102(2)(e) respectively. It is submitted that if the Applicants/Defendants do not come within the provisions of subs 102(2), then the same evidence which was relied on in respect of par 102(2) may be relied upon to justify a grant by the Minister of exemption under par 102(3). In particular, the Applicants/Defendants point to the precarious financial position of Regis prior to and during the subject expenditure years, to the reasonableness of engaging in negotiations which ultimately successfully concluded in the arrangements that have existed since early 2002 whereby ample technical and financial capacity is available to develop the tenements and whereby there is a clearly demonstrated intention on the part of Regis to bring that technical and financial capacity to the tenements in a way that it entirely consistent with the objectives of the Act.

61 Reliance is placed upon the reported expenditure since the agreement was reached and the amounts by which aggregate expenditure on the Duketon Project has exceeded minimum expenditure requirements. It is also noted that every year since 2000 the joint venturers have increased total expenditure on the project. The point is also made that despite the presence of the plaints and the statutory moratorium on expenditure, the joint venturers have continued to expend funds on the plainted tenements. It is said that the joint venturers have demonstrated a genuine intention to optimise the exploitation of all of the tenements. It is submitted that the evidence of expenditure since 2002 is uncontested and that there is no reason to doubt its accuracy.

62 Counsel has submitted that, although no exemption is sought on the basis of par 102(2)(h), nevertheless, the evidence establishes that the subject tenements are, in reality, dealt with by the Applicants/Defendants on the basis that there is and has been an ongoing "project" of which they are all a part.

63 Concerning par 102(4), the Applicants/Defendants argue that work and expenditure on the subject tenements that has been undertaken and incurred by the joint venturers since the subject expenditure years, which includes extensive analysis and interpretation of historical data, extensive regolith mapping, independent resource assessment and reporting, extensive soil sampling and drilling, aeromagnetic work and rehabilitation demonstrates the commitment of the joint venturers to development of the tenements, both in the past and for the future, and that such work and expenditure and commitment is something that must be favourably viewed by the Minister.

The Plaints

64 As to the plaints, the Applicants/Defendants submit that the Form 5 reports are *prima facie* evidence that the expenditure claimed during the subject expenditure year on each of the tenements was in fact incurred. It is noted that the Objector/Plaintiff has not contested the contents of the relevant Form 5's. It is submitted that, therefore, the Minister should proceed on the basis that the claimed expenditure was incurred.

65 The Applicants/Defendants submit that the Objector/Plaintiff has led no evidence concerning the gravity of the expenditure non-compliance. They point to the circumstances in which the expenditure non-compliance occurred, namely, the difficult financial position of Regis, the existence of the uneconomic mineral deposit on M38/303, the absence of any real possibility that ore from M38/303 could have been processed at Bronzewing or anywhere else, the nature of and the reasonableness of the steps taken by Regis to extract itself from its dire financial position prior to and during the subject expenditure years, the demonstrated technical and financial capacity of the joint venturers to comply with their obligations under the Act, not only from 2002 to the time of the hearing but into the future, the detailed and extensive planning for exploration and development of the tenements that has emerged from the evidence and which is based on a thorough analysis and assessment of past data and of the potential for the development of Moolart Well, in particular, which will enhance the economics of the Duketon Project as a whole.

66 The Applicants/Defendants submit that it has not been demonstrated that in all of the relevant circumstances the expenditure non-compliance is of sufficient gravity to justify forfeiture or the imposition of a financial penalty in lieu. It is submitted that if the Warden is of the view that the

plaints should not be dismissed, then it is appropriate that a monetary penalty be imposed in lieu of forfeiture.

Objector/Plaintiff

67 The Objector/Plaintiff submits that the provisions of subs 102(4) must be kept in mind when giving consideration to the evidence. Subsection 102(4) says:

> "*When consideration is given to an application for exemption, regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof.*"

68 It is said that the subsection requires a consideration of all previous exemptions granted in respect of a tenement. It is also submitted that in relation to M38/303 consideration must be given to the fact that the Minister refused to grant a certificate of exemption for the year ending in November 2000 and that the reasons for which exemptions were granted for the years ending in November 1997, 1998 and 1999 should also be taken into account. It is noted that the Applicants/Defendants produced no evidence of the grounds upon which the exemptions for those three years were granted and it is said that an inference that is adverse to them should be drawn from their failure to produce such evidence.

69 It is noted that the Applicants/Defendants failed to produce the statutory declarations that should have been filed in support of the exemption applications that are now before me. Again it is said that an adverse inference should be drawn. In each case it is said that the adverse inference that should be drawn is that the evidence about the ground upon which the previous exemptions were granted and the statutory declarations lodged in respect of the current exemption applications would not have assisted the Applicants/Defendants' case: ***Jones v Dunkel*** (1959) 101 CLR 298.

70 In the same vein it is also noted that much of the Applicants/Defendants' evidence relates to what Newmont Duketon and Regis have done, but the question is asked: *"Why is it that Genetic, being the registered holder of 21 per cent of the mining lease, could not itself have complied with the expenditure conditions?"* It is said that the Warden should draw an inference that the uncalled evidence on that issue would not have assisted the Applicants/Defendants' case.

71 Concerning the applications for exemption, insofar as the Applicants/Defendants rely upon par 102(2)(b), it is said that the Applicants/Defendants carry the burden of proof, that the applications in respect of E38/1105, E38/1112 and E38/1115 are in relation to the first year of the term of each of those tenements and that in respect of those tenements there is no evidence that there has been any relevant work done in respect of which time is required in order to evaluate that work. It is said that an application for exemption should rarely be granted in respect of the first year of an exploration licence on the basis that time is required to plan future exploration because to do so would be inconsistent with s 58 of the Act. That is because, it is said, s 58 requires the application for the grant of such a tenement to be accompanied by a statement specifying the proposed method of exploration and the details of a program of work; that is to say, the grantee must have planned what exploration was to take place before the application was made.

72 It is submitted that the granting of an exemption under par 102(2)(b) in respect of the first year of the life of an exploration licence would be inconsistent with the legislative policy of requiring an applicant to have already planned a work and expenditure program and a method of exploration. It is further said that, as it has been established that there has been no work done on those tenements within the relevant year, it cannot seriously be suggested that the holders could be contemplating mining such that time is required to plan mining.

73 The Objector/Plaintiff further argues that it would be extremely rare for an exemption to be granted in respect of the first expenditure year of an exploration licence on the basis that time is required to raise capital because to do so would be inconsistent with s 58 of the Act which requires the applicant to furnish a statement of financial resources at the time when the application for grant is made. It is said that it is implied from s 58 that grant of an exploration licence should only be made to an applicant who has demonstrated that he has the financial capacity required to meet the expenditure condition of the licence.

74 Concerning par 102(2)(b) in connection with M38/303, the Objector/Plaintiff submits that, the Minister having refused to grant an application for exemption for the year ended 14 November 2000, when claimed expenditure was $28,039, it would be incongruous for an exemption to be granted in respect of the following year where claimed expenditure is only $11,359, of which $10,956 was for rent, and where there has been no evidence of any change in circumstances from the first year to the second year.

75 Concerning the application of par 102(2)(b) to all of the tenements, it is said that it is not a reason to justify the grant of a certificate of exemption that Regis and Newmont Duketon were negotiating an agreement to secure the provision of capital when both of those parties were tenement holders and each had a primary obligation to comply with the minimum expenditure requirements under the Act. It is said that the evidence does establish that Regis did not have the financial resources to so comply, however, Newmont Duketon did have adequate resources and therefore, Newmont Duketon being a joint holder, did not need time to raise capital.

76 The Objector/Plaintiff submits that the expert opinions expressed in the Ryall and Blair report as to the nature of the mineralisation on M38/303 should be rejected because the facts upon which they were founded were not proved by admissible evidence, that they "inherited a wire-framed model", an estimate conducted by one of the applicants based upon data provided by one of the applicants and that although Ryall made his own estimate, the data on which he based the estimate was supplied by one of the applicants. It is said that the content of the data constituted facts which needed to be proved and that there was no evidence to establish the primary facts constituted by the data.

77 It is also said that the information that the applicant provided to Blair and Ryall was not validated by the experts – it had not been part of their brief to do so - and no attempt was otherwise made to validate the information. It is noted that the report itself recommends (20) that validation of the database and it is submitted that if the data has not been validated, then, presumably, it is invalid.

78 As to the meaning of "deposit" in par 102(2)(e), the Objector/Plaintiff submits that it means an Ore Reserve as defined in the JORC code. In that regard, reference is made to the evidence of Mr Blair (T105) that under the Code mineralisation cannot be called a reserve until technical feasibility and economic viability of it is established. It is said that the evidence in this case is that the deposit is only an inferred mineral resource under the JORC Code. It is further argued that if there is a deposit as contemplated by para 102(2)(e), then it has not been established that the deposit is uneconomic. Reference is made to the evidence that mining of the deposit on M38/303 and carting it to Bronzewing could have produced an operating cash flow and that it follows, therefore, that the evidence is not to the effect that the deposit was uneconomic at the material time and therefore no exemption could be granted under the second limb of par 102(2)(e).

79 In any event, it is submitted that if it is found that there is a deposit and it was uneconomic, then the evidence does not establish that the deposit on the mining lease may reasonably be expected to become economic in the future or at the relevant time, economic or marketing problems were such that mining operations were not viable. It is said that the Applicants/Defendants' amended particulars do not establish a basis for exemption under par 102(2)(e) but, rather, are relevant to subs (102)(3).

80 Particular reference is made to pars 40 to 54 of the amended further and better particulars of the exemption applications. It is noted that, *inter alia*, it is said (par 42) that since November 1998 until the present time it has been the objective of the Joint Venture to "*discover and delineate sufficient resources ... to make it economically viable to construct a gold-processing mill in the Duketon area ... to process ore from the Duketon Project, including the Dogbolter resource and ... Rosemont ...*". It is submitted, the commercial objective of the joint venturers has been to make it economically viable to build a plant and process ore. It is noted that it is conceded (par 49) that if the high-grade ore had been mined and processed through Bronzewing, a significantly lower profit than would be achieved if that same ore was previously processed through the proposed Rosemount mill and therein conceded that part of the mining lease resource could have been economically mined and processed. Paragraphs 40 to 54, generally, it is said, describe why the deposit was not mined but do not say that it would have been uneconomic to mine the deposit in part at least.

81 When the provisions of subs 102(3) of the Act are being considered by the Warden and the Minister, it is submitted, as the subsection applies only to reasons "*... not amongst those set out in subsection (2) ...*", then, no application having been made in the present case for the reason set out in par 102(2)(h) (project), it is not appropriate that any submission that an exemption should be granted so that the tenements can remain part of the "Duketon Project" should be entertained. It is similarly argued that because there is no application pursuant to par 102(2)(f) (ore required to sustain future operations of an existing or proposed operation), then, likewise, any argument that the exemption should be granted so that M38/303 can remain part of the Duketon Project should also be rejected.

82 It is submitted that many assertions made in the amended further and better particulars of exemption have not been established by the evidence; examples are: the allegation (par 34) that as at 31 January 2006 Regis has $4.39 million cash available to it, the assertions of witnesses that are not

supported by other admissible evidence as to the resources in the Duketon region other than at Dogbolter and Moolart and the hearsay nature of the basis of the report of Dr Khosrowshahi. It is also said that the material that was produced concerning the presence of a deposit at Moolart is unsatisfactory and that it would be open for a finding to be made that it was not possible to be satisfied that there was such a deposit.

83 Counsel points to the evidence of Mr Walker in particular. Mr Walker said that as of 3 February 2006 cash of $5.5 million was available to Regis. However, he was unable to explain other evidence to the effect that as at 31 January 2006 Regis had $4.39 million available. Reference is also made to the document produced by Mr Walker, namely, Download of Expenditure on Dogbolter by Johnson's Well (exhibit 31), which purported to establish that $1.99 million had been spent, whereas, it is said, a cursory examination of the document suggests that it is not correct. It is noted, for example, that there is no entry for 2003 and 2004 and that the entry for 2006 is negative. In cross-examination Mr Walker simply presumed that they were zero entries and did not know. Further, it is noted that he conceded that non-claimable expenditure amounts had been included. It is also observed that the schedule was inconsistent with reported expenditure. It is submitted that in the light of that evidence no reliable finding could be made of how much Regis had spent on claimable expenditure on the Dogbolter tenement. It is also said that Mr Walker's evidence that Moolart Well is likely to be an operating goldmine with an established plant within 12 months of the hearing should not be accepted as there is no evidence that any economic parameters have been applied to any of the deposits that are alleged to exist in the Duketon Project, meaning that it could not be accepted on the basis of the evidence that there is even a possibility of that occurring within that 12-month period.

84 It is denied that, as asserted in par 29 of the amended further and better particulars, there is any "exploration plan" on the basis that what is an exploration plan is described in par 25(n) as being "*Development of preliminary exploration plan in respect of the tenements formulated on the basis of the evaluation ...*", that is to say, it is a plan that is yet to be developed. I note that after evaluation, which is defined in par 25(b), appears "- *completed in April 2002*". The Objector/Plaintiff observes that Mr Balkau, who had only been employed with Regis for three weeks, produced a proposed work program that related only to the tenements that were the subject of the forfeiture plaints and not to other tenements within that group of tenements that had been previously been granted combined reporting status. It is suggested that it might be believed that the program was only prepared for purposes of the plaints and the observation is made

that during cross-examination he conceded that the program would only be put into operation if the tenements are not forfeited. It is said that, therefore, little weight should be attributed to the proposed work program. A similar qualification was placed by Mr Balkau on the work program that had been prepared for M38/303.

85 It is suggested by the Objector/Plaintiff that even though the Bronzewing plant may not have been able to be utilised during 2000-2001 to treat Dogbolter ore, it is not evident why the ore was not treated at Bronzewing in 2003 when the plant there closed because of lack of ore reserves.

86 Concerning the plaints for forfeiture, the Objector/Plaintiff relies upon the dicta of the Full Court in ***Commercial Properties v Italo Nominees***, unreported; FCt SCt of WA; 16 December 1988 where the Court said (15):

> "*In the case of failure to comply with expenditure conditions the legislation contemplates forfeiture. Hence, upon prima facie proof of non-compliance, we consider the plaintiff likewise establishes a prima facie case of forfeiture. Thus, in some circumstances, the evidentiary burden is on the defendant to satisfy the Warden that the case is otherwise not of sufficient gravity to justify forfeiture.*"

87 In relation to the plaints for forfeiture of M38/303 (for 2000), E38/1113 and E38/1114 it is submitted that, there being no evidence of expenditure having been complied with during the subject expenditure year and the Minister having in the case of each of those tenements for the subject expenditure year refused to grant a certificate of exemption, the evidentiary burden is on the Applicants/Defendants in each case to satisfy the Warden that the case is not of sufficient gravity to justify forfeiture.

88 Concerning the plaint for forfeiture of M38/303 for the 2001 expenditure year and concerning plaints for forfeiture of E38/1105, E38/1112 and E38/1115, it is said that if the Minister refuses the exemption applications for the 2001 expenditure year, then, likewise, the same evidentiary burden will fall upon the Applicants/Defendants. In respect of the issue of sufficient gravity to justify forfeiture, the Objector/Plaintiff identifies three reasons asserted by the Applicants/Defendants as demonstrating that the non-compliance is not of sufficient gravity to justify forfeiture.

89 The first of those reasons is that time was required to raise capital because of the difficult financial position of Regis and Regis being insufficient funds to comply with its expenditure obligations. The Objector/Plaintiff says that that reason has no validity because both Regis and Newmont Duketon were the tenement holders and even if Regis had no financial capacity to fulfil the expenditure obligation, then Newmont Duketon has been held out by the Applicants/Defendants as having ample financial capacity to do so. The Objector/Plaintiff submits, in effect, that the evidence produced by the Applicants/Defendants shows that at all material times Newmont Duketon, itself a joint tenement holder, had the capacity to comply with the expenditure obligation or for the minimum required expenditure to raise capital the year in question. Put simply, it is said that Newmont Duketon did not need time to raise capital and therefore Regis didn't either.

90 The Objector/Plaintiff says that the second reason for which the Applicants/Defendants say that non-compliance is not of sufficient gravity to justify forfeiture is that the negotiations between Regis and Newmont Duketon did not conclude until after the end of the respective expenditure years, namely in 2002, thereby giving full management to Newmont Duketon and that it was not until then that Newmont Duketon agreed to acquire the majority interest in the Duketon Project – including all of the subject tenements and that it was not until 2003 that Newmont Duketon became the registered holder of 80% of E38/1105, 1112, 1113, 1114 and 1115 and 79% of M38/303. It is said that that is not a valid excuse for non-compliance because each of them as tenement holders had a primary obligation to comply with the expenditure conditions.

91 The Objector/Plaintiff says that the third reason that the Applicants/Defendants say that non-compliance is not of sufficient gravity is that the joint venturers have undertaken significant work and expenditure since the end of the subject expenditure years on the plainted tenements. It is said that the statements to that effect contained in the amended particulars of defence are not of themselves established facts. In that regard it is said that there is no evidence of the work particularised in par 25 of the amended particulars except for subpar (e). Subparagraph (e) refers to the resource assessment and report of Mr Ryall in relation to M38/303 dated July 2002. It is submitted that there may have been some secondary evidence in reports such as annual reports where the same facts are recorded but there is no direct evidence about such matters.

92 As to pars 26 to 28 of the amended defence, concerning claimed expenditure on the plainted tenements as against the minimum required

expenditure for each year from 2002 to 2005 inclusive – taking into account the pro-rata reduction because of the plaints - together with total reported expenditure on the whole of the Duketon Project, it is said that the best that can be said about the contents of those paragraphs is that the tenement holders have recorded that stated amounts were spent but that no primary documentation such as invoices or bank records was produced to support that statement of record by the tenement holders. The effect of that, it is said, is that the Objector/Plaintiff has been unable to test the evidence.

93 Concerning par 29 of the amended defence (planned future activities) the Objector/Plaintiff notes that the work program produced by Mr Balkau was produced after he had been with Regis for only three weeks and, further, it is noted that the work program Mr Balkau produced only relates to the exploration licences the subject of the plaints and not the other tenements within that group of tenements that had been granted combined reporting status. It is suggested that the program was prepared purely for the purposes of the hearing. In relation to the work program produced by Mr Balkau for M38/303, reference is made to Mr Balkau's evidence which was that the document had been prepared previously by others and that he had reviewed and updated it.

94 Concerning pars 31 to 33 (changes in 2004 to the board and share holding of Regis) the Objector/Plaintiff says that a change in the directors of one of the Applicants/Defendants is no excuse for non-compliance with the expenditure requirements because the corporation always had the primary obligation to comply with the expenditure condition. It is similarly said, in relation to pars 35 and 36 of the amended defence (changes to corporate contractual obligations), that the internal arrangements between the Applicants/Defendants is no excuse because of the primary obligation that each of them had to comply with the expenditure condition.

95 Counsel for the Objector/Plaintiff also notes the difference between the evidence of Mr Walker and Mr Brammell as to the number of tenements held or applied for in connection with the Duketon Project.

96 In relation to pars 39 to 44 of the amended defence (resource on M38/303 and development and processing options) the Objector/Plaintiff submits that if the Applicants/Defendants thought they could process ore from M38/303 through a plant at Rosemont or Moolart or elsewhere, they should have maintained their original application for exemption under par 102(2)(f). In that regard I note that it was never suggested directly or

indirectly in the evidence that M38/303 contained ore that was required to sustain future operations at Moolart or Rosemont.

97 Concerning the evidence given on behalf of the Applicants/Defendants in connection with plans to construct plant, initially at Rosemont and subsequently at Moolart Well instead of Rosemont, it is said that Mr Walker said that the Applicants/Defendants may not even have to build a plant at Moolart. It is submitted that if no plant is constructed, then ore from Dogbolter will remain in the ground. It is submitted that the evidence shows that the Applicants/Defendants are unable to establish that there will be a plant or mill constructed in the Duketon area which could process ore from M38/303. It is observed that despite the lack of a mill or plant in the areas other tenement holders have been able to mine a tenement next to M38/303

98 As to the evidence that the Applicants/Defendants intend to mine by the end of 2006, it is observed that at present, in respect of Moolart, they only hold an exploration licence and mining of the type that is said will commence is not permitted on an exploration licence. It is noted by counsel that exhibit 36 shows that 67 conversion applications were lodged in May 1996 but no evidence has been led as to the progress of those applications towards grant as mining leases.

99 Finally, it is submitted that there are a number of matters relating to the conduct of the Applicants/Defendants in the course of the hearing of the plaints and exemption applications and leading up to the hearing that should be the subject of comment by the Warden in the report to the Minister. Those matters are the Applicants/Defendants having consented to directions on 9 July 2004 and then applying to set aside those directions in 2005 (***Johnson's Well Mining v Angelopoulos*** [2005] WAMW 9), failing to produce reports of expert witnesses by the date ordered by the Warden, failing to produce the expert's report on Moolart Well within a reasonable time after it had been created and bearing in mind that at least an interim report existed, failing to produce the "interim report" on which Regis's announcement to the ASX was made on 24 January 2006, numerous attempts to lead opinion evidence without having complied with directions given by the Warden in July 2004 and April 2005 and, finally, failing to commence a strike-out application by 19 May 2006 as required by the Warden's orders made on 20 April 2006.

100 In response to the Objector/Plaintiff's closing submissions the Applicants/Defendants lodged further written submissions. I will not expressly address all of those submissions. In connection with the

submissions of the Objector/Plaintiff concerning par 102(2)(b) which made reference to the ground of exemption that time is required to evaluate work done on the tenement or to plan future exploration, it is noted that the exemptions are not sought for the reasons either that time was required to evaluate work or that time was required to plan exploration or mining. It is disputed that, as submitted by the Objector/Plaintiff, an application for exemption for the first year of an exploration licence would rarely be granted on the basis that time is required to raise capital because that would be inconsistent with s 48 is without legal or logical foundation. It is also pointed out that E38/1105, E38/1112 to E38/1115 inclusive were granted two years after they were applied for and that the work program and statement of financial capacity was current at the time when the applications were made but not current at the time of grant in mid-2000. In that regard it is said that the evidence demonstrates the capacity for gold explorers to raise capital deteriorated significantly during that period of time. It is also noted that the evidence shows that Regis had otherwise spent $11.7 million in exploration on Duketon Project tenements for the year ended 30 June 1998.

101 In summary, it is said that Regis had the capacity to carry out the work program when the tenements were applied for but by the time they were granted its financial situation had deteriorated significantly. It is said that, in any event, when an application is made on the basis of par 102(2)(b), it must always be considered on its merits and that there is no blanket rule such as the Objector suggests.

102 Concerning the submission of the Objector/Plaintiff that Newmont had the financial capacity to comply with the expenditure condition during the relevant expenditure year and that, being a tenement holder itself, had a primary obligation to comply with the condition, the Applicants/Defendants say that the Warden should not ignore contractual arrangements between tenement holders and that it is reasonable in all the circumstances to grant an exemption on the basis that the tenement holder with the contractual obligation to meet expenditure commitments required time to raise capital and that each of the tenement holders took action to ensure that the expenditure commitments would be met in the future.

103 The Applicants/Defendants dispute the Objector/Plaintiff's interpretation of par 102(2)(e), namely, that there are three limbs to the paragraph. The Applicants/Defendants say that there are only two limbs.

CONCLUSIONS

104 Detailed submissions were made on behalf of the parties concerning the nature and the substance of evidence given by witnesses called on behalf of the Applicants/Defendants. In particular it was submitted by the Objector/Plaintiff that little or no weight should be given to evidence of experts where their opinions were based upon data much of which was not formally tendered in evidence and therefore not subject to cross-examination. Submissions were also made by the Applicants/Defendants concerning the rule in ***Browne v Dunn*** insofar as it was contended that the Objector/Plaintiff sought to make submissions about matters in respect of which there had been no evidence produced or about matters that had not been raised in material filed in association with the plaints or objections and that, therefore, the Applicants/Defendants had not had the opportunity to prepare properly in order to counter those submissions.

105 What should be said about those aspects of the evidence is that it must be kept in mind that these are administrative proceedings and they are intended to be a forum where issues and arguments and evidence that the Minister may give consideration to in finally determining the applications for exemption and the applications for forfeiture are raised. The Minister would not be bound by such rules of evidence and, in my opinion, the Warden is not so bound. In practice Wardens conducting hearings under the *Mining Act* generally have regard to such rules of evidence in order to facilitate the orderly and expeditious hearing and conclusion of proceedings. Ultimately what is being raised by the parties before me is a combination of the requirement that procedural fairness be extended to all parties and that when determining the weight to be given to the evidence, the Warden should take into account those aspects about which commentary has been made by the parties.

106 In the present case I am satisfied that although much of the data that the expert witnesses relied upon in expressing their opinions was not formally tendered in evidence and was therefore not the subject of cross-examination, nevertheless their opinions were derived from a systematic and structured recording and assessment of the results of past activities by or on behalf of the tenement holders on or in connection with the subject tenements. The data, insofar as it has been revealed in evidence, directly or indirectly, appears to be of a nature that those engaged in the mining industry would normally create for the purposes of

recording the type of and the costs of relevant activities and the results thereof in connection with exploration or mining that has been carried out or is proposed to be carried out on the subject tenements. None of the matters to which evidence of the expert witnesses was directed or the data upon which they relied has been the subject of evidence given by or on behalf of the Objector/Plaintiff. It did not appear to me that either the opinions expressed or the data upon which those opinions are based was inherently improbable or otherwise unbelievable or flawed.

107 The evidence concerning the dire financial state of Regis at the material time is uncontradicted. I am satisfied that it has been sufficiently accurately portrayed by the evidence for it to be accepted as correct. There is, in my opinion, no room for there to be any reasonable doubt that Regis, in its own right, had a far from sufficient availability of funds to comply with the expenditure conditions in respect of any of the plainted tenements. That is not to say that sufficient finance may not have been able to have been provided from another source in the form of or connected with the joint venturers who, at all material times pursuant to the December 1998 joint-venture heads of agreement, had a significant interest in the preservation of the subject tenements having contributed, directly or indirectly, extensive funds to the Duketon Project.

108 The decision by all of the joint-venture parties to engage in long and complex financial negotiations that resulted in the 2002 agreement that resolved the financial burden of Regis in connection with its joint-venture partners and with Normandy, Gutnick and others with the joint venturers knowing that the expenditure conditions for the subject tenements would not be complied with during the relevant year is a serious matter that must be of concern to the Minister. It has not been demonstrated that no course other than that which was undertaken was either open to the parties or reasonable in the circumstances.

109 I accept, however, that at the material time, it was extremely difficult for junior explorers such as Regis to raise capital. That difficulty was due in large part to the low prevailing gold price. In the case of Regis, the difficulty was compounded by its large outstanding debts together with the significant expenditure obligations that it had pursuant to the joint-venture agreement. What the agreement that was reached in 2002 did achieve was, however, of considerable importance to the joint venturers and, in my opinion, enhanced the potential for all of the subject tenements to be dealt with in a manner consistent with the objectives of the Act. That potential has begun to be realised, in my opinion, and has been evidenced by the expenditure that has been undertaken since the

agreement was concluded. I am also satisfied that the subsequent managerial restructuring of Regis and the agreement recently achieved in February 2006 is another important factor to be considered by the Minister in relation to both the exemptions and the forfeiture applications.

110 I am satisfied that Regis and the joint venturers now have the capacity and the future intention to continue to explore and assess the subject tenements and, in doing so, to comply fully in the future with the expenditure obligations. I am satisfied that the Form 5's that are in evidence for the subject years and for the subsequent years are correct. Once again, there was no contradictory evidence from the Objector/Plaintiff and no apparent reason for any justifiable doubt existing about their general accuracy and overall credibility.

111 Concerning the submissions of the Objector/Plaintiff to the effect that it could never be appropriate for a certificate of exemption to be granted under par 102(2)(b) for the first year of the term of an exploration licence, while I agree that that may be an important consideration, it is not necessarily determinative of the issue. In the present cases grant of the subject tenements occurred approximately two years after application lodgement and I am satisfied that intervening economic factors, governed principally by the sustained low price of gold and the consequential impact of that upon the availability of investment funding for gold exploration and mining, being matters beyond the control of the joint venturers and of Regis, had the effect that it was not possible for Regis to raise the capital that it needed.

112 Given those adverse factors arising from the low price of gold and the reluctance of investors to provide capital, the means of achieving statutory compliance requirements by Regis by re-negotiating joint-venture participators' obligations and by resolving the very heavy existing debt burden of Regis to Normandy and to Gutnick and to others can be more readily seen as a reasonable course to have been followed. The capacity, legal and financial, of the other joint venturers to simply provide sufficient funds to Regis during the subject years and to then later try and overcome poor financial Regis's situation by whatever means were then most appropriate was not addressed in any detail in evidence.

113 In my opinion, time was required, as contemplated by par 102(2)(b), for Regis to raise capital to plan for future exploration on the exploration licences for which exemption is now sought. Without capital Regis was unable to finance any exploration activities, including desk studies or

work on the ground that would have enabled it to comply with the minimum expenditure condition.

114 Concerning subs 102(4), the requirement placed upon the Warden and the Minister is to have "*regard*" to the current grounds on which exemptions have been granted and to work done and money spent on the tenement by the holder. The decision of the Supreme Court in ***Haoma v Tunza*** [2006] WASCA 19 is only concerned with the first limb of subs (4), namely, "*current grounds upon which exemptions have been granted*". The Court of Appeal gave no consideration to the meaning of "work done" or to the meaning of "money spent". In my opinion, "work done" and "money spent" should not be read down to include only work done or money spent either during the subject expenditure year or only work done or money spent prior to the subject year or a combination of those two periods of time. Subsection 102(4) requires in my opinion that the Warden and the Minister have regard to all work done and money spent on the subject tenement during the period that the holder has held the tenement up to and including the time when the exemption application is before the Warden for hearing, and, in the case of the Minister, up until final determination by the Minister.

115 Subsection 102(4) appears in the context of a legislative expression of the need, as a general principle, for there to be an obligation on every tenement holder to spend at least the prescribed minimum amount on or in connection with the tenement in order that the mineral exploration and extraction potential of the tenement is advanced but where it is also recognised that there will be circumstances where to insist that unless the expenditure obligation is complied with, the tenement will be lost would be unfair and unreasonable to a particular tenement holder in respect of a particular tenement and may, in some circumstances, have the consequence of defeating the legislative objective of enabling and encouraging mineral exploration and extractive mining operations. Section 102 expressly recognises the desirability of exemption from the expenditure condition obligation being available to tenement holders in the circumstances contemplated by s 102. That recognition and desirability is expressed extremely broadly; in particular in subs 102(3) where the Minister is given a wide discretion that is probably limited only by the overriding objectives of the legislation and by government policy. I consider that to read down subs 102(4) in any manner that could limit or qualify the discretion of the Minister under subs 102(3) would be contrary to the express terms of subs 102(3) whereby the Minister is empowered

for "*... any other reason ... which in the opinion of the Minister is sufficient to justify such exemption*", to grant a certificate of exemption.

116 Subsection 102(4) is a provision that is, in my opinion is mandatory; regardless of what reason the Warden or the Minister is giving consideration to in connection with an application for exemption and regardless of what either the Warden of the Minister consider may be sufficient justification for the granting of an exemption, the Minister and the Warden must both have regard to all of the matters specified in subs 102(4). In my opinion, the Warden, in conducting the hearing of an exemption application and in making the report and recommendation to the Minister under s 102, must have regard to those same matters as the Minister is required to have regard to. The location of subs 102(4) before subs 102(5) and (7) supports that conclusion, as does the inclusion of the requirement in subs 102(4) as a discrete provision rather than, for example, it having been inserted after subs 102(5) and (6) (both of which direct the Warden) and in a context where it could have been taken as being a direction for the Minister only. Further, the "filtering role" of the Warden that s 102 contemplates for the assistance of the Minister could not be fully achieved if the Warden could not have regard to what is required by subs 102(4).

117 The evidence of expenditure on the exploration licences for which exemption is sought is contained in the evidence tendered at the hearing – principally in the form of previous and subsequent Form 5's. For the expenditure years the subject of the exemption applications it is claimed that expenditure was as follows:

E38/1105:	$8220 out of a minimum required $20,000 (approximately 41 per cent)
E38/1112:	$7660 out of a minimum required $20,000 (approximately 38 per cent)
E38/1115:	$4330 out of a minimum required $20,000 (approximately 22 per cent)
M38/303:	$11,359 out of a minimum required $64,460 (approximately 17 per cent)

118 The evidence satisfies me that, since the subject expenditure years, expenditure on or in connection with E38/1105 has been approximately $56,000, for E38/1112 it is approximately $122,000, for E38/1115 it is approximately $47,000 and for M38/303 it is approximately $199,000. It

is significant that in all cases, because of the plaints against those tenements, reg 52 has had the effect that for each of the three full expenditure years since the lodgement of the plaint the annual amount required to be expended was reduced to nil and that there was also a reduction of the minimum expenditure requirement for the three exploration licences to an amount of $3333 from $20,000 and for M38/303 to $56,408 from $64,466 for the year during which the respective plaints were lodged. I consider that it is open to the Minister to give weight for the purposes of the application of subs 102(3) and subs 102(4) that there has been expenditure in excess of the minimum prescribed amount, after taking into account the *pro rata* reduction under reg 52, and, further, to take into account that in respect of E38/1112 for one of those subsequent years the expenditure claimed exceeded the non-reduced expenditure requirement and that for M38/303 it was exceeded in two of those subsequent years.

119 The uncontested evidence of expenditure on the approximately 97 tenements that constitute the "Duketon Project" between 1999 and 2005 of approximately $21 million is indicative, in my opinion, of a genuine overall commitment by the joint venturers to the proper exploitation of the tenements within the group, although it does not necessarily follow that the same commitment can be taken to apply to every tenement within the project. By referring to "project" it should not be taken that I have given any consideration to the provisions of par 102(2)(h), namely, the "project" reason for exemption. That paragraph is concerned with aggregate expenditure on tenements that comprise a project for purposes of the paragraph. That is not to say, however, that neither the Warden nor the Minister, in giving consideration to an application for exemption based on either subs 102(3) or any of the paragraphs of subs 102(2), other than (h), cannot take into account, where it is appropriate to do so, the fact that the tenements the subject of the exemption application may be tenements within a group of tenements that, in the broad sense, is dealt with by the tenement holders as a single project. In my opinion, it would be open and proper for both the Warden and the Minister in such circumstances to receive evidence about and give consideration to, as part of the discharge of their respective duties under s 102(2), other activities of the tenement holder in connection with the project as a whole where such activities may have a bearing upon the outcome of the application for exemption for a particular tenement or for a number of tenements that are part of the project.

120 In my opinion, it is open on the evidence before me for the Minister, pursuant to subs 102(3), to grant each of the exemptions sought on the

basis of the demonstrated ongoing commitment of the joint-venture partners to genuinely endeavour to explore all of the subject exploration licences for which exemption is sought and on the basis that, in the context of the minimum expenditure requirement for each of those tenements, there has been significant expenditure since the lodgement of the plaints and up to the present time.

121 In respect of M38/303, I am satisfied that there is a "deposit" for purposes of par 102(2)(e) located on the mining lease. I am satisfied that at the material time it was a deposit that was uneconomic for purposes of the paragraph but that it may reasonably be expected to become economic in the future.

122 The evidence satisfies me, on the balance of probabilities, that there is a gold-bearing mineral deposit on M38/303 of the size and quality described by the witnesses of the Applicants/Defendants based upon the data utilised by those witnesses. The evidence in that regard was not contradicted and, in my view, should not as was suggested by the Objector/Plaintiff be attributed, little or not weight. It was not inherently improbable or untrue or flawed. I have no reason based upon the evidence before me to assess it as being untrue or incorrect.

123 I do not interpret par 102(2)(e) as requiring the applicant for exemption to establish that the subject "deposit" is an "Ore Reserve" as defined in the JORC Code. I agree with the submission of the Applicants/Defendants that, given that the JORC Code says that an ore reserve means an "economically mineable" part of a deposit, such an interpretation being applied to par 102(2)(e) would create a self-contradiction that would mean that no exemption could ever be granted for the reason provided for in par 102(2)(e). In any event, I am still of the opinion that I expressed in ***ITP Systems Ltd v Morellini*** [2002] WAMW 5 at 74, namely:

> "*Concerning par 102(2)(e), it should be borne in mind that the guideline which is expressed in peremptory terms as to the JORC classification of the deposit and as to the contents of s 115A reports is not what s 102(2)(e) says. There is a risk in my opinion that the guideline will generate an approach to assessment which is too inflexible.*"

124 "Mineral deposit" is not defined In the Act or Regulations. "Minerals" is defined in the Act as "*... naturally occurring substances ... obtainable from any land by mining operations*". "Deposit" is not defined

in the Act. In the Shorter Oxford English Dictionary it is said to mean: "*In Mining, an accumulation of ore ...*". It is similarly defined in the Macquarie Dictionary. "Ore" is defined in the same dictionary as: "*A native mineral containing a precious or useful metal in such quantity, etc, as to make its extraction profitable*". It is defined in the Macquarie Dictionary as: "*metal-bearing mineral or rock ... esp. when valuable enough to be mined*".

125 I can see no reason why those dictionary definitions cannot be utilised and no reason to not find that "mineral deposit" should be given its natural, everyday, ordinary usage meaning in par 102(2)(e) and to conclude that it is sufficient for the applicant for exemption to demonstrate that there is a deposit of material on the subject tenement that contains a potentially mineable metal to which the other criteria provided for in par 102(2)(e) must be applied - ie, future economic potential or viability of mining operations in the specified circumstances of the economy or marketing.

126 In my opinion, the evidence establishes the existence on M38/303 of a mineral deposit for purposes of par 102(2)(e).

127 In respect of the first limb of par 102(2)(e), pursuant to which the Minister must be satisfied that at the material time the deposit was "uneconomic", it is my opinion that the word "uneconomic" is not to be applied in an absolute sense to mean that in no circumstances, long or short term, could any financial or other profit or gain be directly or indirectly achieved by conducting exploration or mining activities or activities connected therewith on or in connection with the subject tenement. "Economic" has a very broad and non-specific meaning. For example, in the Macquarie Dictionary it is defined, *inter alia*, as "*pertaining to the production and distribution and use of income and wealth*". In the context of an application for exemption in respect of a mining lease it can be taken to include a meaning that is connected to notions of net profitability. That is how it was approached by both parties before me and I will confine my considerations to that aspect.

128 I consider that it is not the purpose or intention of the legislation that par 102(2)(e) is to be unavailable to a tenement holder unless the holder satisfies the Minister that in no circumstances could any monetary net profit, no matter how small, have been achieved during the relevant period.

129 The expenditure condition for a mining tenement does not require expenditure of any more funds than the prescribed minimum amount. There is no express requirement to expend such an amount as will optimise the potential of the tenement during any particular period. It is no ground for forfeiture that less than an amount that would produce optimal results in terms of establishing or realising the full potential of a tenement was not expended. The legislation recognises that there is a practical limit on every holder as to how much money is, firstly, available and, secondly, can be sensibly and usefully spent on a tenement in any one year. The expenditure condition does not require that money be expended for no other reason than to meet the expenditure obligations regardless of the circumstances - that is why s 102 is in the Act.

130 I am of the view that, when considering an application for exemption, where the application relies upon par 102(2)(e), the Minister and the Warden should look at more than the question of simply whether a net profit could have been achieved. What may be taken into account, for example, is the impact that a particular course of conduct may have. In the present case there was a strong submission on the part of the Objector/Plaintiff that the higher-grade ore on M38/303 could have been mined and a net profit of around $4 million achieved. I am satisfied, however, even if that were the case that if the higher-grade ore had been mined, it could not have been processed on site and would have had to have been carted a considerable distance for treatment but, much more significantly, I am satisfied that the extraction of the higher-grade ore would have significantly diminished, if not removed entirely, the possibility that the remaining lower-grade ore could ever be mined profitably thereafter.

131 There is a need for the legislation to be interpreted and applied in a manner that recognises the desirability of allowing a degree of flexibility for a tenement holder to develop and pursue in a commercially reasonable manner the holder's commercial objectives and plans to ultimately derive an optimal financial gain from its expenditure and activities on the tenement. If such an important incentive is removed or a sufficient element of uncertainty surrounds those objectives and incentives, then it is likely that the legislative objectives of appropriate and timely and optimal exploitation of the State's mineral resources will be adversely affected.

132 For those reasons, par 102(2)(e) must be interpreted to acknowledge and allow for that essential element of commercial discretion on the part of tenement holders and their commercial partners, including partners (and others) providing capital. In assessing the applicability of

par 102(2)(e) to a particular tenement holder for a particular tenement, it is appropriate for the Warden and the Minister to take into account the nature of the subject deposit and its "economic" status in the context of other actual or planned activities of the holder whether as an individual holder or as part of a joint venture or other cooperative business arrangement connected with the subject tenement. Such activities may include activities on other tenements in respect of which, in conjunction with the subject tenement, the tenement holder or the holder and the holder's business partners or financers may have commercial objectives that include expenditure and activities that are connected as between the subject tenement and the other tenements in respect of which they have an interest.

133 In the case of M38/303 I am satisfied that while a net operating profit of around $4 million could possibly have been achieved if the higher-grade ore from the deposit had been extracted and treated at Bronzewing, it was more likely that if all of that higher-grade ore and much of the lower-grade ore were to be treated at, for example, a plant at Moolart Well or Rosemont, then a significantly greater cash flow of around $9 million would have been the result. Both calculations of net operating profit in that regard that were canvassed in the evidence and in submissions, it should be said, relied upon a considerable number of untried assumptions. I am satisfied that during the year ended November 2001 the Applicants/Defendants held a genuine and reasonable belief that the deposit at the nearby Rosemont tenement would support and justify the construction of a treatment plant at that site and that the a greater gold production potential of M38/303 would be realised by the extraction of both high and low-grade ore for treatment at Rosemont than could be realised by utilising Bronzewing – if Bronzewing was in fact available. Since then work and studies have revealed that a stand-alone plant should be developed at Moolart Well instead of Rosemont. There has been claimed expenditure of around $3.5 million on the Moolart Well tenement for the years ended 2003 to 2005 inclusive and I accept that it is a better commercial proposition for the plant to be located there rather than at Rosemont and that the potential to optimise the production of gold from M38/303 is at least as good as for Moolart Well as it was assessed to be for Rosemont.

134 In the sense that I have discussed it above, I am of the opinion that at the material time M38/303 contained a deposit that was uneconomic in that it was not commercially appropriate to mine it then but that because of the potential for ore from the deposit to be treated at a plant to be built in the future (as was then planned) at Rosemont, the deposit, during the

expenditure year in question, could then reasonably be expected to become economic in the future and, because of the planned, and in my opinion reasonably likely, construction of a plant at Moolart Well, it can now be said that the deposit on M38/303 is one that may reasonably be expected to become economic in the future. I am satisfied that, as reported, there is a resource of around 1,000,000 ounces of gold on the Moolart Well tenement and that such a resource would justify the construction of the proposed plant.

135 In any event, I am satisfied that it is highly unlikely that any ore from M38/303 would have been accepted for processing at Bronzewing during or subsequent to the expenditure year in issue or even that an agreement to do so could have been entered into or achieved in principle with Bronzewing during the subject expenditure year.

136 Concerning the second limb of par 102(2)(e), I consider that "viable" in the context means "commercially viable". It does not necessarily mean, as the Applicants/Defendants submitted, "able to maintain a separate existence". In the present case I have no hesitation in concluding that the quantity and quality of the established gold source on M38/303 could not support a stand-alone extractive and treatment operation. Such a combined operation would not have been commercially viable. I am also of the opinion that it was not viable to, in effect, quite probably sterilise the remaining low-grade ore that would be left after extracting high-grade ore from the tenement. In my opinion, it is not intended that the legislation have such an effect, that is to say, it is not intended that subs 102(2)(e) should not have application in a situation where it may be "viable" in the sense that a net operating profit may be achievable, to mine part of a deposit immediately but to leave in the ground ore that is of a lower grade but in respect of which there is a reasonable possibility that in the future that lower-grade ore may be profitably extracted provided it is extracted and treated in conjunction with the extraction and treatment of the higher-grade ore.

137 In the present case there was and is a genuine and likely further alternative that will achieve a better commercial outcome for the tenement holder and will better achieve the legislative objective of optimal exploitation of valuable minerals. In my opinion, it can properly be said that, for purposes of subs 102(2)(e), it was not viable in all of the circumstances, because of the more desirable option of waiting for the plant to be developed, initially on the Rosemont tenement and subsequently the Moolart Well tenement to have simply commenced extractive mining operations on M38/303, without having entered into any

agreement for processing to be undertaken at either Bronzewing or any other place, and to have, in effect, taken the view that the lower-grade ore would, potentially, be sacrificed in order to achieve a relatively significantly lower net operating profit than could potentially be achieved by waiting for the then planned plant to be constructed at Rosemont.

138 In the light of the evidence, I perceive that what the Applicants/Defendants are saying, in effect, is that the reason justifying exemption for M38/303 for the year in question is because of the potential in the future to optimise profit by extracting both high and low-grade ore and having it treated at the Rosemont plant when that plant was constructed. I consider, however, that the evidence does not establish that it was because of the low price of gold or other external economic or marketing problems that the expenditure was not incurred and that any non-viability of conducting mining operations was, essentially, not connected to the price of gold or marketing conditions, although the price of gold, in particular, would have had some bearing. For those reasons I do not consider that the second limb of subs 102(2)(e) has been made out.

THE PLAINTS FOR FORFEITURE

139 It is appropriate to separate the tenements that have been plainted for forfeiture into two categories – those in respect of which there is no pending application for exemption, the Minister having previously refused to grant an exemption, namely, exploration licences E38/1113, E38/1114 and M38/303 (for the year ending in 2000), and those in respect of which there is a pending application for exemption for the same year of expenditure upon which the plaints are based, namely, exploration licences E38/1105, E38/1112, E38/115 and M38/303 (for the year ending in 2001).

140 In the case of those tenements in respect of which the Minister has already refused to grant a certificate of exemption for the same year that is the subject of the plaints for forfeiture the relevant Form 5's that have been lodged claim an amount of expenditure that is less than the prescribed minimum amount. There is in those circumstances a *prima facie* case for forfeiture established in respect of those tenements, namely, E38/1113, E38/1114 and M38/303 for the relevant expenditure year. What remains to be considered is whether or not in all of the relevant circumstances the expenditure non-compliance is of sufficient gravity to justify forfeiture.

141 In relation to M38/303, relevant circumstances are the expenditure history before, during and after the subject expenditure year ending in November 2001. Activity history is a relevant circumstance. The reason for non-compliance is relevant. The expenditure history in connection with M38/303, up to the present time, includes a total prior claimed expenditure of approximately $1.9 million against an aggregate minimum expenditure requirement of $967,000 (without allowing for granted exemptions), together with granted exemptions for four years during that period when less than the prescribed minimum was claimed as expenditure, together with the refusal of the Minister to grant a certificate of exemption in the amount sought, namely, $68,661, for the year ended November 2000. Since the year ended November 2001 and up until the year ended in 2005 claimed expenditure has totalled over $199,000 with a total minimum expenditure obligation, after reduction allowed by reg 52 because of the lodgement of the plaint, of only $56,408.

142 The Applicants/Defendants had no statutory obligation to continue to undertake expenditure on M38/303 during the period after the plaint was lodged. I am satisfied on the evidence that in the expenditure years since lodgement of the plaint work and expenditure of a type that is contemplated by the expenditure condition has occurred on and in connection with M38/303 even though the tenement has been at risk of forfeiture and even though no expenditure was required for three of those years. During the expenditure year ended November 2001, which year is the subject of one of the plaints for forfeiture, there is an undetermined exemption application and there is claimed expenditure of $11,359 out of $64,466 required after the reg 52 *pro rata* reduction.

143 Other relevant circumstances in this case are the resolution by January 2002 of the difficult financial position of Regis, the entering into of the joint-venture heads of agreement in April 2006, the implementation of the terms of that agreement, the managerial and shareholding re-structuring of Regis, the demonstrated continuing commitment of the Applicants/Defendants to compliance with the expenditure condition in respect of not only M38/303 but the other plainted tenements and the likelihood of development of a treatment plant at Moolart Well which will be able to treat both the high and low-grade ore from M38/303. Further, the future exploration plans that were canvassed in evidence appear to be genuine and reasonable. The evidence satisfies me that adequate funding has been and will be available to meet and exceed the minimum expenditure obligations on M38/303 in the foreseeable future.

144 In respect of E38/1113 and E38/1114, where the Minister refused to grant a certificate of exemption, the post-plaint history of expenditure is that on E38/1113 there has been expenditure of $226,800 and for E38/1114 expenditure as revealed in the Form 5's is $89,408. In each instance, because of the effect of reg 52, required minimum expenditure was only $3333, being for the period that had already passed during the expenditure year in which the plaints were lodged.

145 In the subject expenditure year, claimed expenditure for E38/1113 was $10,172, approximately 50 per cent of the prescribed minimum, and for E38/1114 it was $8147, approximately 40 per cent of the prescribed minimum. Claimed expenditure for the following year on E38/1113 is $20,984, for the next year $169,622 and, for the year ended May 2005, $26,022. That is, for those three years the minimum expenditure amount that would have been required had there not been any plaint against the tenement was exceeded.

146 For E38/1114 the amount of $53,839 is claimed for the year ended June 2004. That is well over the prescribed minimum. For the expenditure years ended in June 2003 and 2005 approximately 60 per cent and 70 per cent respectively of the prescribed minimum of $20,000 was expended. For the expenditure years ended 2001 for those two exploration licences, that being the year in respect of which the Minister refused to grant an exemption, the amount of claimed expenditure was $2345 out of a $20,700 minimum for E38/1113 and $407 out of a minimum of $20,000 for E38/1114.

147 Subsequent to the expenditure years that are the subject of the plaints for forfeiture, claimed expenditure on E38/1113 and E38/1114 has, in aggregate, exceeded the minimum that would have been required had no plaint for forfeiture been lodged against the tenement.

148 The other circumstances that I referred to in connection with M38/303 are also relevant; in summary, the resolution of Regis's financial position, the re-structuring of Regis, the implementation of the joint-venture agreement, the demonstrated ongoing commitment to expenditure compliance and the potential of Moolart Well.

151 In respect of the plainted tenements where the application for exemption has yet to be determined by the Minister, namely, E38/1105, E38/1112, E38/1115 and M38/303 (for the year ended November 2001), I have recommended the grant of an exemption certificate in each case. Should the Minister grant the certificate, then I consider that the plaints

should be dismissed as the holder will be deemed to be relieved of the relevant expenditure condition obligations upon such grant - s 103.

152 If the exemption certificates are not granted by the Minister, then the same circumstances that I have outlined in respect of the tenements for which exemptions have previously been refused must be considered. In respect of each of the three exploration licences the prior expenditure history is as follows. For E38/1105, up to the year ended May 2001, the first year of life of the tenement, claimed expenditure is $8220 out of $20,000 minimum requirement. For 2002 to 2005 inclusive, because of the reg 52 reduction, minimum required expenditure was only $3333 and total claimed expenditure for those four years is $56,437. For E38/1112 the minimum required expenditure was $3333 and claimed expenditure is $121,852. For E38/1115 the minimum required expenditure for the four years was also $3333 and $47,526 has been claimed.

153 In all cases the claimed expenditure has not been contradicted by any other evidence or otherwise contested. I have no reason to doubt its general accuracy and I proceed on the basis that it is correct. What the claimed expenditure amounts for all of the plainted tenements show is that for the expenditure years that follow those years that are the subject of the plaints total claimed expenditure has significantly exceeded the minimum expenditure obligation in every case in aggregate despite the potential for forfeiture and despite there being no, or relatively low, minimum expenditure obligation following lodgement of each plaint.

154 I infer that a discrete commercial decision was made by the joint venturers that the expenditure condition would not be complied with fully during the plainted year because to provide sufficient funding to Regis during that year was considered to be commercially inappropriate until what they deemed to be a suitable resolution of the financial position of Regis was achieved. That discrete decision was made knowingly and those responsible for it were aware that the tenements would be thereby placed at risk of forfeiture. What has happened, however, is that during the years since the plaints were lodged the expenditure policy objectives of the legislation have in reality been achieved in that the required expenditure, albeit after the reduction allowed for in reg 52, has been exceeded in every such year for every plainted tenement. I cannot speculate that would have been the outcome had there been no plaint lodged against all or any of the tenements.

RECOMMENDATION

155 In my opinion it is not the case that in all of the circumstances it has been established in respect of any of the plainted tenements that the non-compliance with the expenditure condition is of sufficient gravity to justify forfeiture.

156 In respect of each of those tenements, however, a *prima facie* case for forfeiture because of expenditure non-compliance has been clearly established. In each case, however, because of the non-compliance, in the circumstances, not being of sufficient gravity to justify forfeiture, I am precluded from recommending forfeiture.

Penalty

157 Concerning those tenements for which no exemption application is before me, namely, E38/1113, E38/1114, M38/03 for the year ended November 2000, the Minister having previously refused exemption, I am of the opinion that, in each case, it is appropriate that a penalty of $10,000 be imposed and that that penalty be paid to the Objector/Plaintiff. The decision by the joint venturers and Regis to not fund Regis by alternative means pending the final agreement that was reached in 2002 was a deliberate commercial choice. I infer that alternatives were considered but put aside in favour of what was perceived to be a commercially less risky outcome. The loss of the tenements or the possibility of a penalty of up to $10,000 was a risk that was, however, knowingly taken by Regis and the other joint venturers.

158 In respect of the remaining tenements, namely, E38/1105, E38/1112, E38/1115 and M38/303 (concerning the year ended November 2001), if the Minister grants, in the case of any such tenement, an exemption certificate in the amount applied for, then there should be no penalty imposed under subs 98(4). If the Minister does not grant an exemption at all or does not grant it for an amount that is the amount applied for, having the effect that in each case there will have been an expenditure non-compliance, a penalty ought to be imposed.

159 I therefore in respect of E38/1105, E38/1112, E38/1115 and M38/303, if, and only if, the Minister refuses to grant an exemption in the full amount sought, impose a penalty of $10,000 for the expenditure non-compliance and in each case such penalty is to be paid to the Objector/Plaintiff. Although it appears that I am imposing what may be termed an uncertain liability on the Applicants/Defendants and what may

be termed a conditional penalty, it appears to me that because I am, at the same time, making a report and recommendation for the Minister in respect of the exemption applications and the plaints, that unless I withhold my decision on the plaints until after the Minister has determined the exemption applications, that is an appropriate way to proceed. It would certainly not be proper of me to say that because I am forwarding the plaint and exemption reports and recommendations at the same time to the Minister, the Applicants/Defendants should not be made the subject of any penalty or that the Objector/Plaintiff should be deprived of the opportunity to have a penalty awarded to him and of the potential, should any such penalty not be paid in the manner required, to lose the opportunity of obtaining a prior right to mark out the ground the subject of the tenements.