

JURISDICTION : MINING WARDEN

TITLE OF COURT : OPEN COURT

LOCATION : PERTH

CITATION : KENNEDY v REIF & ANOR [2012] WAMW 11

CORAM : WILSON M

HEARD : 23 JANUARY 2012

DELIVERED : 27 APRIL 2012

FILE NO/S : APPLICATIONS FOR FORFEITURE 360745 &
363313

TENEMENT NO/S : AFFECTING MINING LEASES 30/119 & 30/145

BETWEEN : PAUL JAMES KENNEDY
(Applicant)

V

HERMAN FRIEDRICH REIF
&
ANNELIESE HOPPMANN
(Respondents)

Catchwords:

Application – Forfeiture – Mining Lease – Non-compliance with expenditure – Claim for expenditure in wrong expenditure year – Sufficient grounds to warrant forfeiture – Allocation of expenditure between mining leases – Authorisation of person to mine – Liquidation of company authorised to mine

Legislation:

Mining Act (1978) WA: s. 98(1), s. 98(4), s. 98(9), s. 118A

Mining Regulations (1981) WA: r. 15(1a), r. 21(1aa), r. 31(1a), r. 96C (4) (b)

Result:

Application for Forfeiture of M 30/119 is dismissed

Failure to comply with expenditure requirements for M 30/145 is proven. In the circumstances of the case, the non-compliance is not of sufficient gravity to warrant a recommendation to the Hon. Minister to forfeit M 30/145. Penalty of \$2,000.00 imposed against the holders of M 30/145. The penalty of \$2,000.00 to be paid within 45 days pursuant to s. 98(9) of the Act and the sum of the penalty to be paid to the Applicant pursuant to s. 98(4)(b) of the Act.

Representation:

Counsel:

Applicant : Mr P Olivier
Respondents : Mr G Lawton

Solicitors:

Applicant : Talbot Olivier
Respondents : Lawton Lawyers

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

Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported, WASC, Full Court, 16 December 1988, SCL 7427)

Bakarra Pty Ltd v Juler Pty Ltd (unreported, Perth Warden's Court, 17 December 1991, noted 10 AMPLA Bull 13)

Richmond v Opaltrend Nominees (unreported, Perth Warden's Court, 7 October 1999)

Downe v Milling & ors [2011] WAMW 7

Case(s) also cited:

Nil

Background

1. Paul James Kennedy (“the Applicant”) makes application for the forfeiture (“the Application”) of two mining leases being M 30/119 & M 30/145 (“the Leases”) registered to Herman Friedrich Reif (“Mr Reif”) and Anneliese Hoppmann (“Ms Hoppmann”).
2. The Applicant alleges Mr Reif and Ms Hoppmann have failed to comply with the expenditure conditions for the Leases in the expenditure year ending on 12 August 2010 in respect to M 30/119 and in respect to the expenditure year ending 11 January 2011 for M 30/145.
3. The Leases are located adjacent to mining lease M 30/71 (“M 30/71”) jointly owned by the Applicant and another person. The minimum annual expenditure required to be expended in the relevant expenditure years by Mr Reif and Ms Hoppmann upon M 30/119 is \$10,000.00 and on M 30/145 is \$11,200.00.
4. Mr Reif and Ms Hoppmann filed with the Department of Mines and Petroleum (“DMP”) the “Annual Operations Report - Expenditure on Mining Tenement”, more commonly known as the Form 5 (“the Form 5’s”), for the Leases claiming they had met the minimum expenditure requirements.
5. The Form 5 for M 30/119 was initially filed on or about 30 August 2010 for the expenditure year ending 12 August 2010 claiming expenditure totalling \$10,600.00 comprising of 15 days metal detecting at \$300.00 per day totalling \$4,500.00 and 15 days of loaming, panning, sampling, dollying, dry blowing at \$300.00 per day totalling \$4,500.00. A further amount of \$1600.00 was claimed for fuels and oils.
6. An Amended Form 5 for M 30/119 was filed with DMP on an unknown date for the same expenditure year claiming an additional sum of \$32,000.00 had been expended in conducting a ground magnetometer survey (“the Survey”) and for the payment of annual tenement rent and rates of \$2,162.10. In total, Mr Reif and Ms Hoppmann claim to have expended on M 30/119 in the expenditure year ending 12 August 2010 the sum of \$44,762.10.
7. The Form 5 for M 30/145 was filed with DMP on or about 20 January 2011 and claims expenditure for the expenditure year ending 11 January 2011 of \$35,482.00 comprising of the Survey costing \$32,000.00 and annual tenement rent and rates of \$3,482.00. In total Mr Reif and Ms Hoppmann

claim to have expended on M 30/145 in the expenditure year ending 11 January 2011 the sum of \$35,482.00.

8. The Applicant contends in his Amended Statement of Particulars filed for each of the Leases that he regularly attended in and around the Leases during the relevant expenditure years and saw no evidence of any person or persons on or around the Leases that were carrying out work or evidence of work having been carried out on the Leases as claimed by Mr Reif and Ms Hoppmann.
9. The Applicant contends that Mr Reif and Ms Hoppmann have not complied with the expenditure conditions in the expenditure years on the Leases as claimed. In the alternate, the Applicant contends the expenditure claimed by Mr Reif and Ms Hoppmann is not expenditure which was expended or caused to be expended by or on behalf of Mr Reif and Ms Hoppmann in mining or in connection with mining on the Leases.
10. Accordingly, the Applicant submits that Mr Reif and Ms Hoppmann have failed to comply with the expenditure conditions upon which the Leases were granted under the provisions of the Mining Act (“the Act”) and the failure to meet the expenditure conditions is of sufficient gravity to warrant the forfeiture of the Leases.

Applicants Evidence

11. The Applicant relies upon evidence contained within two affidavits filed by him in these proceedings. The first affidavit was sworn on 25 May 2011 and the second affidavit was sworn on 22 September 2011. The Applicant also gave sworn oral evidence at the hearing of the Application.
12. In the affidavit of 25 May 2011, the Applicant stated that during an 18 month period between 12 July 2009 and 11 January 2011 he personally attended upon M 30/17 located directly to the west of the Leases on at least 1 to 2 occasions every week. During that time period, the Applicant deposed he did not see any work being undertaken on the Leases. The Applicant stated he had been informed through letters from lawyers for Mr Reif and Ms Hoppmann the Survey had been conducted on the Leases about 6 to 20 October 2009. The Applicant stated he does not recall seeing any people on the Lease or any evidence of the work claimed to have been carried out being conducted on the Leases during that time.
13. By way of correction, the Applicant in his affidavit of 22 September 2011 deposes that during the period 6 to 20 October 2009 he was working in the Meekatharra area. Notwithstanding that the Applicant deposed that immediately before and after those dates he was working on M 30/71, and did not see any activity or evidence of activity on the Leases.

14. In his oral evidence, the Applicant stated he was working in the Murchison area during the period 6 to 20 October 2009. When he returned from working in the Murchison he drove through the Leases and did not observe any signs consistent with the Survey having been conducted on the Leases.
15. The Applicant further deposed in his affidavit of 22 May 2011 that, through his solicitor, he sort to obtain details of the Survey from a company called Westland Securities Pty Ltd (“Westland”). From information he obtained the Applicant said he understood Westland had gone into liquidation. In the course of attempting to obtain details of the Survey the Applicant stated he arranged for a member of his staff to contact HLB Mann Judd (Insolvency WA) who had been appointed the receiver of Westland. The Applicant said he attempted to communicate, through his lawyer, with the former directors of Westland, Mr Ian Jackson (“Mr Jackson”) and Mrs Vicki Jackson in an attempt to obtain copies of any invoices for the Survey that may support the expenditure on the Leases as claimed by Mr Reif and Ms Hoppmann in the Form 5’s. At the time of swearing the affidavit of 22 September 2011 the Applicant said no supporting documentation for the Survey had been forthcoming from Mr Jackson, Mrs Jackson, Mr Reif, Ms Hoppmann or any other source.
16. In cross-examination, the Applicant conceded that between the dates of 6 and 20 October 2009 he was not on or about either the Leases or M 30/71. The Applicant also conceded he had no knowledge of the cost of the Survey. Further, the Applicant stated he had no knowledge whether the amount claimed as having been expended on the Leases or the work alleged to have been conducted on the Leases by Mr Reif and Ms Hoppmann in the Form 5 is true or otherwise.
17. In re-examination, the Applicant said he returned from the Murchison through the Leases on or about 25 or 26 October 2009. He said he did not see any signs of activity on the Leases and would have expected to have seen truck tracks or flagging tape. The Applicant said he is always looking for things and being aware of his surroundings but did not notice anything. The Applicant in response to a question by counsel for Mr Reif and Ms Hoppmann as to what it was he was looking for on the Leases said “I did look but I can’t say that I saw anything, sir.”

Mr Reif’s Evidence

18. Mr Reif gave evidence in this matter by way of a Statement of Evidence dated 30 November 2011 and oral evidence. Mr Reif has a long history of working in the mining industry. He has worked as a miner, surveyor and as a driller. He has been the holder of mining tenements in the area of the Leases

for a long time and has previously worked the ground that comprises the Leases with others.

19. In summary, the evidence of Mr Reif was that in 2008 he met with Mr Jackson who expressed an interest in entering into a joint venture agreement to mine for gold on the Leases. Discussions took place over a period of time and numerous visits were made by both of them to the Leases.
20. Mr Reif said that Mr Jackson wished to acquire an appropriate modular mill to recover sufficient gold from the Leases to recoup the cost of the mill. To that end Mr Reif said Mr Jackson travelled to the United States of America to source a mill. Mr Jackson also wanted to confirm the resource on the Leases to prepare further costing and plans for mining on the Leases. As a result, Mr Reif said Mr Jackson arranged for the Survey to be conducted on the Leases between 6 and 20 October 2009 while he was in New Zealand.
21. Shortly after the Survey was conducted Mr Reif said he became aware Westland was in financial difficulties. As a result of those financial difficulties the preparation of the results for the Survey were delayed. Mr Reif said the results of the Survey he received showed the Survey was conducted in October 2009.
22. In December 2010, Mr Reif said he received from Mr Jackson information regarding the costs of the Survey. However, he had already prepared the Form 5 for M 30/119 in September 2010 claiming expenditure of \$10,600.00 comprised substantially of metal detecting he had conducted on that lease. An amended Form 5 for M 30/119 was lodged by Mr Reif in February 2011 claiming the cost of the Survey as he had by then received from Mr Jackson details of the cost of the Survey.
23. Mr Reif said he lodged a Form 5 for M 30/145 on 24 January 2011 and claimed half of the cost of the Survey together with the cost of rent and rates. The cost of his prospecting was not claimed by him as he believed the annual expenditure requirements had been met for M 30/145.
24. In cross-examination, Mr Reif could not explain differences in the dates he received the results of the Survey between January 2010, as contained in his lawyer's letter, and December 2010. However, he said he received a disk with the results of the Survey in January 2010 and then asked Mr Jackson if he could be given a printed copy of the Survey results. He said he received the printed survey results later in the same year.
25. Mr Reif denied the suggestion he lodged the amended Form 5 for M 30/119 as a result of being served with the Application for Forfeiture of M 30/119. He said the amended Form 5 for M 30/119 was lodged to reflect the money spent on that tenement by Mr Jackson.

26. Mr Reif said in cross-examination that Ms Hoppmann, Westland and he intended to enter into a written joint venture agreement to mine the Leases. As a result of that intention, Mr Jackson and Mr Reif attended upon the Leases on a few occasions. Further, Mr Reif said of the discussion he had with Mr Jackson no written joint venture agreement had been entered into but it had been discussed that Mr Reif would receive 10% of gold produced, the Leases would remain in the names of Mr Reif and Ms Hoppmann, nothing had been finalised about what would happen if one of the parties were to die nor was anything discussed about checking the book pertaining to the amount of gold recovered from the Leases. According to Mr Reif, things that were agreed with Mr Jackson were done so by the shake of the hand as they are honest people.
27. Mr Reif said he paid the rent and rates for the Leases. Further, the Survey was conducted, according to Mr Reif, as a consequence of Mr Jackson suggesting it needed to be done to gather all of the information on the Leases. Mr Reif stated nothing was authorised by him in writing for Mr Jackson or Westland to be spent or carry out work on the Leases.

Mr Jackson's Evidence

28. Mr Jackson gave oral evidence in this case. He also produced a statement of evidence dated 5 December 2011. In his statement of evidence, Mr Jackson said in about 2009 he entered into an oral agreement on behalf of Westland with Mr & Mrs Reif to enter into a joint-venture agreement to conduct mining operations on the Leases. He said the first step in the plan to conduct mining operations on the Leases was to undertake the Survey of the Leases. The estimated cost of the Survey was at least \$64,000.00.
29. According to Mr Jackson, the purpose of the Survey was to delineate the ore body within the boundary of the Leases so an open cut pit could be planned. Mr Jackson stated, in his statement of evidence, that he conducted the Survey on the Leases between 6 and 20 October 2009 with the assistance of at least 4 people who were on site at all times and up to 4 other people who were on site on as required basis.
30. Mr Jackson annexed to his statement of evidence copies of some photographs taken of people working on the Leases and at the camp that had been established for the purposes of conducting the Survey between 6 and 20 October 2009.
31. Mr Jackson stated that on 17 December 2010 he sent a brief statement of the costs invested by Westland in the conduct of the Survey to Mr Reif to enable those costs to be claimed in the Form 5 Report for the Leases.

32. According to Mr Jackson, on 28 June 2010, Westland went into liquidation. Mr Jackson said the documents relating to the Survey were not immediately available to him after Westland went into liquidation as they were then held by the liquidators. Copies of some of the invoices for the Survey were attached to the statement of evidence of Mr Jackson. Mr Jackson said he provided a copy of the Survey plan to Mr Reif on or about 24 October 2010 and a copy of the Survey was given to Mr Reif on 17 December 2010.
33. In cross-examination, Mr Jackson said he had visited the Leases with Mr Reif and on the information he had been provided with decided it was sufficient to be involved in a project to develop the Leases. The agreement was that Westland would provide the working capital and with the assistance of the drill results they would work on a plan to use surplus earthmoving equipment belonging to him to mine the Leases.
34. Mr Jackson said the percentage of production of gold from the Leases that was to be paid to Mr Reif was never agreed with Mr Reif. However, there was, according to Mr Jackson, discussions with Mr Reif about various percentages that may be paid. Mr Jackson said it was agreed that Westland, Mr Reif and Ms Hoppmann would enter into a formal written joint venture agreement after the Survey results were completed as they would assist in determining where the work was to start in the mining of the Leases.
35. According to Mr Jackson, even if the Survey results were poor there was sufficient information from the drill results to either continue a drilling program or alternatively to aim at other specific drill targets. Mr Jackson confirmed he had received no written authority from either Mr Reif or Ms Hoppmann to carry out the Survey.
36. Mr Jackson said he was not aware that details of the cost of the Survey that had been borne by Westland had to be provided to Mr Reif to claim as part of the yearly expenditure commitment for the Leases.

Submissions

37. Counsel for Mr Reif and Ms Hoppmann submitted the minimum expenditure conditions for each of the Leases had been met for the respective expenditure years. It was further submitted by counsel for Mr Reif and Ms Hoppmann that the evidence of the Applicant that he was not present on M 30/71 during the period the Survey was conducted and could not say the Survey had not been conducted as claimed in the Form 5's leaves the case for the Applicant in tatters.
38. The photographs produced by Mr Jackson clearly show people on ground that is said to be the Leases. Those people were there it is submitted to assist

in conducting the Survey during the period 6 to 20 October 2009. That evidence was not challenged by the Applicant.

39. Mr Reif and Ms Hoppmann submit there is no obligation on the holder of a mining tenement to claim all of the expenditure incurred on a mining tenement in an expenditure year. In the case of M 30/119, a Form 5 was lodged for the expenditure year ending 12 August 2010 on about 30 August 2010 claiming expenditure of \$10,600.00 being the expenses associated with metal detecting and fuel. It is submitted that amount of expenditure is sufficient for the purposes of satisfying the expenditure condition for M 30/119 in the expenditure year ending 12 August 2010. However, an amended Form 5 for M 30/119 for the same expenditure year was lodged claiming one half of the cost of the Survey and the annual rents and rates.
40. Further, in respect to M 30/145 the amount of the Survey was claimed for the expenditure year between 12 January 2010 and 11 January 2011 that being a period outside of the expenditure year in which the Survey was conducted. That is so because, it is submitted, the costs associated in the conduct of the Survey were not revealed until after the close of the expenditure year it was incurred. When the cost of the Survey became known it was claimed as expenditure by Mr Reif and Ms Hoppmann in the Form 5 for the next expenditure year.
41. It was submitted by Mr Reif and Ms Hoppmann there is no question whether there was an intention to mine the Leases. Further, the evidence clearly shows a nexus between the intention to mine and the mining on the Leases evidenced by the conduct of the Survey that was part of the agreement between Mr Reif, Ms Hoppmann and Westland.
42. There is no reason at law, it is submitted, why the cost of the Survey could not be divided between equally between the Leases. If it is the case the expenditure claimed by Mr Reif and Ms Hoppmann on the Leases is found to have been insufficient to meet the expenditure conditions, it is submitted, the non-compliance was technical and account should be had of the prior conduct in meeting expenditure conditions and the Leases should not be recommended for forfeiture.
43. Counsel for the Applicant acknowledges in his submissions the discrepancy in the dates during which the Applicant said he was at M 30/71 is telling on his case. However, it should not be fatal to his case as on his return he travelled through the Leases and did not observe any signs of activity consistent with the conduct of the Survey.
44. The Applicant submits regard should be had to the facts of the case that point to the arrangement between Mr Reif, Ms Hoppmann and Westland as being characterised as not a joint venture arrangement to mine but rather

Westland conducting the Survey to decide if it wished to enter into a joint venture arrangement. Thus, submits the Applicant, the costs incurred by Westland in the conduct of the Survey were in fact acquisition cost incurred by Westland to determine if it wished to enter into an agreement with Mr Reif and Ms Hoppmann which are not capable of being claimed as expenditure on the Leases pursuant to r. 96C (4) (b) of the Mining Regulations.

45. The evidence in support of this submission by the Applicant is that no money was paid by Mr Reif or Ms Hoppmann for the Survey, there was no written agreement to carry out mining on the Leases, there was no settled arrangement regarding the percentage of production that would be paid to Mr Reif and Ms Hoppmann, no arrangement was in existence concerning inspections of books of records or what was to occur on the death of one of the parties and the records of the costs incurred by Westland in conducting the Survey were not passed on to Mr Reif to enable him to claim it as expenditure in the year it was incurred. This all points to the fact submits the Applicant to the conclusion there was no intention that the cost of the Survey was to be claimed as expenditure on the Leases as it was incurred by way of an acquisition cost in ascertaining if Westland would enter into a joint venture agreement to mine the Leases.
46. The Applicant also submits the Act did not intend that expenditure on the Leases could be claimed in an expenditure year after it was incurred.

Findings of Fact

47. I accept the evidence of Mr Jackson that he was present when the Survey was conducted on the Leases between 6 and 20 October 2009. I also accept the photographs and the invoices produced by Mr Jackson are supportive of the Survey having been conducted on the Leases as claimed.
48. I accept the evidence of Mr Jackson that Westland incurred the sum of \$64,100.00 in conducting the Survey upon the Leases.
49. Further, I accept the evidence of both Mr Jackson and Mr Reif that an oral arrangement had been entered into between Mr Reif and Ms Hoppmann and Westland, through Mr Jackson, that they would together mine the Leases. I am satisfied from the evidence of Mr Reif the agreement was sealed by a handshake with Mr Jackson with little formality as they trusted one another's word. I also accept that Mr Reif, being an older prospector, conducts his business that way.
50. I accept the evidence of Mr Reif and Mr Jackson that the conduct of the Survey and the drill results would form part of a plan to advance towards mining on the Leases. I do not accept the submission of the Applicant the

Survey was part of the acquisition costs incurred by Westland to determine if it wished to participate with Mr Reif and Ms Hoppmann in the mining of the Leases.

51. I do not accept the submission of the Applicant the delay in providing the details of the cost of the conduct of the Survey by Westland to Mr Reif was because Westland conducted the Survey to determine if it wished to enter into a joint venture agreement with Mr Reif and Ms Hoppmann to mine the Leases. I find upon the evidence of Mr Jackson that because of the liquidation of Westland he had difficulties in accessing documentation comprising invoices and receipt and the details of the survey from the liquidator to enable him to provide those details to Mr Reif. I also accept the evidence Mr Jackson that he was not experienced in mining and genuinely did not understand the importance of providing to Mr Reif details of the cost incurred in the conduct of the Survey to enable those costs to be claimed as part of meeting the annual expenditure requirements for the Leases.
52. I find Mr Reif is not experienced in completing the Form 5's for the Leases. That is demonstrated by the fact he relied on his wife to assist him in completing that task.
53. I find upon the evidence of Mr Reif that he conducted prospecting activity by metal detecting on M 30/119 in the expenditure year ending 12 August 2010 to which he ascribed a value of \$9,000.00 and further expended a sum of \$1,600.00 on fuel as claimed in the Form 5. That was not challenged by the Applicant.
54. I do not accept the evidence of the Applicant that he looked but did not see any signs of the Survey. The evidence of the Applicant is that he drove through the Leases on his return from the Meekatharra area and looked but did not see any signs of trucks or flagging tape. The evidence of the Applicant was he was not aware the Survey had been conducted upon the Leases on his return from the Meekatharra area. I do not accept the Applicant was in fact looking for signs of the Survey having been conducted when he drove through the Leases. I find he may have been looking at the Leases but not specifically for any signs of the Survey having been conducted.

Conclusion

55. The Applicant bears the onus of proof to prove that Mr Reif and Ms Hoppmann have failed to comply with the expenditure conditions for the Leases in the expenditure years in question. (see: **Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported, WASC, Full Court, 16 December 1988, SCL 7427)**).

56. The actual payment of accounts for expenditure incurred on a mining tenement is not required to be made within an expenditure year before the holder of the mining tenement can claim the expenditure so incurred. (see: **Bakarra Pty Ltd v Juler Pty Ltd (unreported, Perth Warden’s Court, 17 December 1991, noted 10 AMPLA Bull 13)**). The term “expend” does not require actual payment simply the incurring of the liability to pay for the expenditure is sufficient. (see: **Richmond v Opaltrend Nominees (unreported, Perth Warden’s Court, 7 October 1999)**).
57. In my opinion, the intention of the Act and Regulations is that expenditure incurred on a mining tenement in an expenditure year must be claimed in the Expenditure Report, Form 5, for the same year in which it was incurred. That is so, in my opinion, because such an intention provides certainty as to quantum of expenditure on a mining tenement in the Form 5 in an expenditure year and limits any attempts to “fudge” claims of expenditure by either back dating expenditure claims to a previous year or years or the withholding of claims of past expenditure into a new expenditure year in an attempt to defeat the self policing nature of an applications for forfeiture.
58. Regulations 15(1a), 21(1aa) and 31(1a) of the Mining Regulations provide exceptions to this requirement. Relevant to this matter is r. 31(1a) of the Mining Regulations that states:
- “31 (1a) Expenditure incurred under sub-regulation (1) during the month in which the anniversary date of the commencement of the term of the lease occurs may be treated by the holder as expenditure incurred in either the year immediately preceding that anniversary date or the year starting from such date.”*
59. In my opinion, the provision of r. 31(1a) of the Mining Regulations provides the only manner in which claims for expenditure can be made in the year it was not incurred.
60. Accordingly, the amount of \$32,000.00 claimed by Mr Reif and Ms Hoppmann for the Survey on M 30/145 is not compliant with the requirement of the Act and Regulations because it is claimed as expenditure incurred in the expenditure year commencing on 12 January 2010 and ending on 11 January 2011 when that expenditure was incurred during the previous expenditure year ending 11 January 2010. The provision of r. 31(1a) of the Regulations does not apply as the anniversary date for M 30/145 is 12 January in each year. It is not the case, in my opinion, the expenditure claimed by Mr Reif and Ms Hoppmann is lost to them rather it should be shown as having been incurred in the correct year in which it was incurred.
61. The circumstances of this case reveal some of the difficulties that may be encountered by the holders of mining tenements in completing the Form 5

Expenditure Reports. If expenditure is incurred in accordance with the Act and Regulations it should be claimed in the expenditure year it was incurred even if the invoice or account has not been received or paid by the holder of the mining tenement. In my opinion, the obligation falls upon the holder of the mining tenement to ensure supporting documentation for expenditure claimed to have been incurred on a mining tenement is available to be produced if the expenditure claimed is challenged.

62. The difficulties faced by Mr Reif and Ms Hoppmann was aggravated by them not promptly seeking copies of the invoices or records for the Survey until the application for forfeiture was lodged by Mr Kennedy. By that time, access to the records of Westland had become significantly more difficult by the fact Westland had gone into liquidation and the documents were then in the hands of a third party.
63. In respect to M 30/119, I find the expenditure for the Survey of \$32,000.00 has been correctly claimed in the Form 5 in the expenditure year it was incurred.
64. I do not accept the provisions of s. 118A of the Mining Act apply to this case. The provisions of s. 118A of the Act, in my opinion, are not mandatory but rather discretionary given the use of the word “may”. The circumstances of this case are very different to those in **Downe v Milling & ors [2011] WAMW 7**. In this case, Mr Reif and Ms Hoppmann dealt with and authorised the conduct of the Survey on the Leases directly with a representative of Westland. Both, Mr Reif and Ms Hoppmann were aware of the conduct of Westland on the Leases. In **Downe v Milling & ors (supra)** there was no evidence that the holder of the mining tenement had authorised, either directly, impliedly, or through a third party for the third party to conduct mining operations on the mining tenement.
65. I do not consider the approach by Mr Reif and Ms Hoppmann in dividing in half the expenditure of approximately \$64,000.00 incurred on the Leases in the conduct of the Survey and allocating it equally to each of M 30/119 & M 30/145 as being unreasonable in the circumstances. The mining operations on the Leases appear to be unsophisticated and treated by Mr Reif and Ms Hoppmann, it would seem, as if they are the one lease. Mr Reif relies on the help of others to assist him in meeting his reporting obligations for the Leases and the development of plans he and Ms Hoppmann have for the Leases. The Leases are next to each other and are, relatively speaking, of not dissimilar size. In those circumstances, short of performing some mathematical calculation based on either size, that may not take into account degrees of difficulty associated with the terrain or additional time to perform the Survey from M 30/119 to that taken on M 30/145, or other various

reasons it seems to me an equal division of the expenditure incurred between the Leases is entirely, in the circumstances of this case, reasonable.

66. The problem that is now faced by Mr Reif and Ms Hoppmann, given my finding that the expenditure of \$32,000.00 for the Survey was claimed in the incorrect expenditure year, is that expenditure incurred in the expenditure year ending 11 January 2011 for M 30/145 falls below the minimum expenditure required by the Act of \$11,200.00. The Form 5 for M 30/145 corrected as noted above reveals expenditure of only \$3,482.00, being annual tenement rent and rates, for the expenditure year ending 11 January 2011. In those circumstances, I find, Mr Reif and Ms Hoppmann did not expend any amount on or in mining operations on M 30/145 in the expenditure year ending 11 January 2011 other than to pay the annual rent and rates.
67. I do not accept the evidence of Mr Reif that he didn't claim for all the work he has done on M 30/145. Given Mr Reif said he is aware he is obliged to meet minimum expenditure conditions for the Leases in each expenditure year it defies logic he would not claim all of the expenditure he was entitled to claim in the Form 5 for M 30/145 that he has caused to have expended. Not to claim all of the expenditure Mr Reif says he has expended or caused to have expended on M 30/145 in the expenditure year ending 11 January 2011 simply exposes that lease to forfeiture.
68. Accordingly, I find Mr Reif and Ms Hoppmann are in breach of their expenditure obligations for M 30/145 in the expenditure year ending 11 January 2011.
69. I am obliged, pursuant to s. 98(1) of the Act, to consider whether the failure to comply with the expenditure conditions for M 30/145 is of sufficient gravity to recommend to the Hon. Minister forfeiture of that lease. The onus falls upon Mr Reif and Ms Hoppmann to satisfy me the circumstance of the failure to comply are not of sufficient gravity to justify forfeiture. I am entitled, pursuant to s. 98(4) of the Act, in lieu of a recommendation to the Hon. Minister for forfeiture of M 30/145 to impose a penalty not exceeding \$10,000.00 or to impose no penalty at all.
70. In considering the circumstances of the case, it is apparent that Mr Reif and Ms Hoppmann have since the grant of the Leases always complied with their minimum expenditure conditions on the Leases. It can be implied that they also have a plan to develop the Leases. That is evidenced by the fact they have drill results from a past drill program conducted on the Leases and now have the results of the Survey. The drill results and the Survey are significant information that will assist them in progressing the mining of the Leases. I am satisfied had it not been for the liquidation of Westland and

with the help of Mr Jackson the mining of the Leases would more probably than not have commenced.

71. I am satisfied the failure by Mr Reif and Ms Hoppmann to meet the minimum expenditure conditions for M 30/145 in the expenditure year ending 11 January 2011 was linked to the liquidation of Westland rendering their plans to mine futile and placed them in a position that the Survey was then in the hands of a receiver and difficult to obtain. However, I note that the receiver for Westland was appointed in about mid June 2010. There was evidence presented that explained why no application for exemption from the expenditure condition was made for M 30/145 for the expenditure year in question or why Mr Reif or Ms Hoppmann did not expend or cause to expend in mining operations on M 30/145 the amount so required to have been spent in the period of about 6 months that was left before the expenditure year ended.
72. Notwithstanding the above, I find in respect to M 30/145 that in the whole circumstances of the case the failure to comply the expenditure conditions is not of sufficient gravity to justify a recommendation to the Hon. Minister that M 30/145 be forfeited. However, it is appropriate, in the circumstances of the case, to impose a penalty upon Mr Reif and Ms Hoppmann pursuant to s. 98(4)(a) of the Act of \$2,000.00 in lieu of a recommendation for forfeiture of M 30/145. The penalty is to be paid within 45 days pursuant to s. 98(9) of the Act. The sum of the penalty imposed is to be paid to the Applicant pursuant to s. 98(4) (b) of the Act.
73. The application by the Applicant for the forfeiture of M 30/119 is dismissed.