JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CORAM	**:**	Warden K Tavener
HEARD	**:**	24th & 25th February 2014, 8th May 2014, 1st August and 7th August 2014
DELIVERED	**:**	24th October 2014
FILE NO/S	**:**	Application for Forfeiture In respect of Exploration Licence E47/1797
BETWEEN	**:**	**DONALD KIMBERLEY NORTH** Applicant And **LEGEND MINING LTD** First Respondent And **KML NO 2 PTY LTD** Second Respondent

Catchwords:

Application - Forfeiture – Failure to Comply with Expenditure Conditions - Sufficient Gravity of Failure to Comply – Work Conducted in next Expenditure Year – Future Plans

Legislation:

Mining Act 1978 (WA) s 62 (1), s. 98, 118A
Mining Regulations 1981 (WA), regs. 21, 139

Result:

A fine of $10,000 is imposed on the Respondents, to be paid within thirty days of this decision to the Applicant.

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

Richmond v Sub-Sahara Resources NL [2006] WAMW 14
Brosnan v Flint & Sorna (2003) WAMW 16
Brosnan v Flint [2003] WAMW 18
Commercial Properties Pty Ltd v Italo Nominees Pty Ltd unreported, Sup Ct WA, F. Ct 18/12/1988; Lib 7427
Craig v Spargos Exploration NL Warden's Court Leonora; 22 Dec.1986, Vol.2, Fol.23
Finesky Holdings Pty Ltd v Minister for Transport (WA) [2002] WASCA 206.
Mawson West Ltd v Saruman Holdings Pty Ltd (2010) WAMW 10
Rose v Goldtime Australia Pty Ltd & Ors [2004] WAMW 8
Richmond v Ynema [2004] WAMW 14

Case(s) also cited:

Kennedy v Reif [2012] WAMW 1
North v Elazac Mining P/L and Ors [2012] WAMW 42
North v Legend Ltd and KML No. 2 Pty Ltd [2014] WAMW 14

Representation:

Counsel:

Applicant:	Mr T. Kavenagh
First and Second Respondent:	Mr A. Jones

Solicitors:

Applicant:	Hunt & Hunt
First and Second Respondent:	DLA Piper

1. On the 8th May 2014, Legend Mining Pty Ltd and KML No. 2 Pty Ltd were found not to have complied with expenditure conditions in respect of Exploration Licence E47/1797[1]. This decision should be read in conjunction with the previous decision concerning the subject tenement.

2. For clarity, the First Respondent has no interest in the outcome of these proceedings, save that it holds shares in the parent company of the Second Respondent. It is the Second Respondent which has the beneficial ownership of the tenement and management control of the tenement. For convenience, the tenement holder is referred to as the Respondents.

3. Consideration must now be given as to whether the circumstances are of sufficient gravity to justify the forfeiture of the tenement or the imposition of an alternative penalty.[2]

4. The matter has been prolonged due to the filing of additional material and interlocutory responses; regard has only been given to that material which complies with the interlocutory decision concerning the admission of evidence after the hearing. Information concerning the contemporaneous status of negotiations with the Ngarluma Aboriginal Corporation (NAC) has been permitted as that issue is reportable to the Minister and relevant to any forfeiture decision.

5. Upon a finding of non-compliance the onus is on the tenement holder to satisfy the Warden the circumstances of the case are not of sufficient gravity to justify forfeiture.

6. In *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* [3], Malcolm CJ said:

> *"In the case of failure to comply with expenditure conditions the legislation contemplates forfeiture. Hence, upon a prima facie proof of non-compliance, we consider the plaintiff likewise establishes a prima facie case for forfeiture. Thus, in such*

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[1] North v Legend Ltd and KML No. 2 Pty Ltd [2014] WAMW 14

[2] ***98. Application for forfeiture on other grounds***

(4A) When the warden finds that the holder of an exploration licence or lessee of the mining lease has failed to comply with such requirements as are mentioned in subsection (1), the warden may recommend the forfeiture of such licence or lease, or impose a penalty not exceeding $10 000 as an alternative to the forfeiture or dismiss the application.

(5) A recommendation shall not be made under subsection (4A) unless the warden is satisfied that the non-compliance with such requirements is, in the circumstances of the case, of sufficient gravity to justify the forfeiture.

[3] unreported, Sup Ct WA, F. Ct 18/12/1988; Lib 7427, at p 15

> *circumstances, the evidentiary burden is on the defendant to satisfy the warden that the case is otherwise not of sufficient gravity to justify forfeiture."*

7. In *Craig v Spargos Exploration NL*[4]**,** Warden Reynolds said:

> "*Subsection 98(5) thus impresses upon the Warden the necessity of considering not only the non-compliance and the facts directly bearing upon it, but also the events leading up to the non-compliance, the conduct of the parties and the actual and potential consequences of the non-compliance and of the forfeiture sought, having regard throughout to the object and policy of the Act.*

8. The non-compliance with the expenditure requirements in any previous year in the life of a tenement is relevant to the issue of sufficient gravity. [5] In *Rose v Goldtime Australia Pty Ltd & Ors* [6], the Warden commented that section 95(5):

> "… *enable (d) the Warden to take into account things which have occurred and have affected the tenement or the tenement holder not only during the year the subject of the plaint, but, in addition, during any material period prior to the commencement of the plaint then before the Warden. Likewise I consider that the Warden may also properly take into account matters connected with the tenement and the tenement holder that have arisen between the end of the tenement year the subject of the plaint and the hearing of the plaint. The Warden may also take into account plans which the tenement holder may have for the future concerning the tenement but in doing so would, in all cases, be obliged to assess the reasonableness of such plans and the likelihood of their ever being carried out.*"

Further, the Warden expressed the view[7]:

> *I do not consider that this is a case where it is appropriate to impose a penalty pursuant to the provisions of Section 98(4)(a) in lieu of forfeiture. My reasons for coming to those views are as follows. I do not consider the breach of the expenditure condition to be trivial or technical. It is aggravated by the lodgement of the false Form 5. The second and third defendants, although not a party to the lodgement, in my view did not carry out their duties as tenement holders with due diligence.*

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[4] unreported; Warden's Court Leonora; 22 Dec.1986, Vol.2, Fol.23
[5] Richmond v Ynema [2004] WAMW 14, per Warden Calder
[6] [2004] WAMW 8, para43
[7] *Rose v Goldtime Australia Pty Ltd & Ors* [2004] WAMW 8, para43

9. Objection was also taken to certain accounting figures cited in the affidavit of Ms Mills as reported by Mr Robinson. As noted, this material was taken into account where it did not offend the ruling.

10. The Respondents were not permitted to adduce material which was subject to the interlocutory ruling. Objection was taken to secondary evidence being adduced, such as the contents of the Maynard report. Insofar as the additional affidavit addressed forfeiture only, weight was be given to such material by broadening the relevant information base upon which the Minister could exercise the statutory discretion. Such a process, however, does not provide a means by which a party can remedy, retrospectively, problems from the hearing. Later, untested material cannot be accorded the same weight as material subject to adversarial scrutiny.

11. The Respondents, at the hearing, adopted a minimalist approach to the adduction of material before the court. Subsequently, the Respondents have sought to introduce a significant amount of material addressing the issues in contest which were considered in the light of the above comments. Time and cost could have been avoided through a more responsive presentation in the first instance.

Respondents' Submissions

12. The Respondents submitted, in respect of the Maynard Report, that the tendered index suggested Carlow Castle was a resource estimate. The Artemis Annual Report which was admitted into evidence, contained announcements to the Australian Stock Exchange. Included in the Report was the following statement:

> *Additionally, Artemis issued a maiden JORC compliant mineral resource report from Al Maynard & Associates, based on historic drill information, at the Carlow Castle south prospect for internal use for drill planning of future exploration programs. The Carlow Castle south prospect was found to contain a JORC inferred mineral resource of 418,000 tonnes at an average grade of three grams per tonne.*

13. Consequently, there was reliable secondary evidence as to the content of the Maynard report. The existence of the resource is a fundamental cornerstone of the Respondents' case and, it was submitted, should not be forfeited as it is of considerable value.

14. Counsel for the Respondent acknowledged, in respect of Mr. Robinson's affidavit, there was some confusion due to the inconsistency of language regarding the expenditure on mining. It was argued mining is defined to include exploration, and exploration includes non-ground-disturbing exploration. Here, there was no mining, only exploration so the only item being recorded was exploration-related expenditure.

15. The Respondent did not undertake ground-disturbing exploration, as it lacked an agreement with the Ngarluma Aboriginal Corporation. So the presented data, which is evidence of expenditure 'on or in connection with mining', is the same data for exploration and in relation to non-ground-disturbing exploration. The lack of specificity in the reports weighed against the Respondents at the hearing.

16. It was submitted Mr North did not obtain authority from the registered holder to do work on the subject lease nor did he have a permit. In the context of the gravity inquiry, it was submitted that in assessing the imposition of a penalty or forfeiture it is necessary to have regard to matters that relate to the applicant. It was submitted the Applicant's conduct in issuing, and prosecuting, the proceedings is relevant. Under section 98(4B) it says:

> *Where a penalty is imposed under this section the warden may award the whole amount of the penalty, or any part thereof, to the applicant.*

17. It was submitted a Warden can only exercise the discretion to penalise, if consideration is given to matters relating to the Applicant. In this case, it was submitted, Mr North does not deserve the tenement because he has engaged in unlawful exploration. The competing policy objectives are whether the Respondents should be sanctioned for not undertaking lawful exploration and whether the applicant should be rewarded for undertaking unlawful exploration.

18. In my view the behaviour of an applicant is relevant as to any benefit the applicant may receive, but does not determine the penalty to be imposed. A Warden can recommend, for example, the forfeiture of a tenement for non-compliance, and then advise the Minister that the applicant, because of his behaviour, should not be able to enforce certain rights or be paid a penalty.

Whether the Non-compliance was of sufficient gravity to justify forfeiture?

19. The Respondent chose to limit the evidence it adduced in the hearing, citing, amongst other matters, confidentiality issues. It is a risk to approach forfeiture hearings in that manner when there are adequate processes available to cover confidentiality.

20. The Respondent relied on a number of mitigatory factors. The first factor was the difficulty in reaching agreement with the Ngarluma Aboriginal Corporation (NAC) and so could not procure the heritage surveys or conduct exploration. Consequently, there were limitations on what the Respondents could do to comply with their expenditure

commitments. In particular, they could not conduct ground-disturbing work. It was submitted they should not be sanctioned for not conducting ground-disturbing work; there is a tolerance limit on such a proposition.

21. There had been some expenditure on the subject tenement, as opposed to no expenditure; quarantining the particular expenditure was a challenge for the Respondents. It is accepted the Respondents had commissioned the Maynard's report (the index only being tendered during the hearing) and there had been a site visit by Mr Reid (although that report was not produced and there was no confirmation of the work done). Mr Clent and Mr Whittock collected some (untested) rocks, took photographs at the tenement as well as completing limited desktop work. It was said those activities were all that could be undertaken within the stated limitations.

22. It was submitted the Warden should acknowledge the uncertainty as to whether the Respondent may have expended on the tenement. Three large elements – the Maynard report, the Reid report and administrative costs - should be taken into account in any sanction decision as it is likely some of the expenditure was in connection with mining. Had there been no expenditure, or a token amount, forfeiture would have been almost inevitable.

23. The Respondents' previous solicitors bore some responsibility, it was submitted, in relation to the way that those proceedings were conducted, especially by not tendering the Maynard report or seeking confidentiality directions.

24. The matter of disproportionate penalty was raised due to the high value of the tenement, as it hosts the Carlow Castle mineral resource. The tenement is approximately a third of the market capital of Artemis. Its forfeiture would be an onerous outcome. The impact on the Second Respondent and its parent company Artemis would extend beyond its forfeiture. This exploration licence is a key part of the West Pilbara project and forfeiture would disrupt the project and nullify previous expenditure. It was said significant efforts have been invested in securing a deal with the NAC, developing an exploration plan, undertaking resource estimates, raising capital and preparing to explore. The disruption would impact on economies of scale, in terms of the synergies, with multiple resources on adjacent tenements.

25. The key issue, according to the Respondents, was the real risk forfeiture would disrupt exploration which would otherwise proceed and reward the Applicant for conducting unlawful exploration (although that issue is not one upon which a ruling could be made without the proper processes).

26. The agreement with the NAC remains subject to NAC board approval. The Respondents need a heritage agreement in order to avoid breaching the Aboriginal Heritage Act, although the Aboriginal Heritage Act does not prevent exploration but includes an offence of disturbing a site. The conduct of ground-disturbing work, such as drilling, would have exposed the Respondents to prosecution under section 17 of the Aboriginal Heritage Act and claims for compensation.

27. The Respondents' solution when confronted by the NAC's intransigence was to limit their mining activities. The Respondents place themselves in a position whereby it could be suggested, by an unkind observer, that the delay was not properly addressed as it was convenient and useful. Mr Clent said he had an inconsequential meeting with the new NAC lawyer, despite the agreement being time critical, and Mr Robertson's lack of engagement in the negotiation process support that observation.

28. The Respondents submitted an agreement was not reached because the NAC adopted an unreasonable position on key principles, under the previous legal adviser, and was unwilling to compromise. The Respondents outlined those principles as including the requirement to pay significant sums of money for limited returns. The NAC sought, before exploration and before the nature and economic assessment of the mined commodity had been done, an agreement as to royalty. It was said the NAC wanted to move away from the negotiation process under the Native Title Act, which could not be accepted by a mining company. Other problems included vetos contained in heritage agreements and demands to conduct heritage surveys for non-ground-disturbing work.

29. The negotiations progressed until those points crystallised and then halted. When the NAC appointed a new legal representative there was an indication of compromise, but still delays. The Respondents did not have unlimited time in dealing with the tenement. The parties were deadlocked for a number of years (four or five) until the NAC recently compromised.

30. Mr Robinson testimony did not contain substantive negotiation details and he appeared to have little knowledge of that activity. He had, for example, limited contact with the current NAC lawyer. No explanation was provided as to why Mr Rhys Davies (who did provide a detailed affidavit on this issue) was not called at the hearing to give evidence.

31. As to financial capacity, the Respondents possessed adequate funds as at 30 June 2014 ($750,000) and later raised $629,000 by way of the rights issue; those funds exceeded its aggregate expenditure commitment. There was a series of ASX announcements whereby the Respondents stated its intention to undertake particular exploration, although there is no drill program in respect of the Carlow Castle resource.

32. The Respondent refuted the suggestion it had intentionally filed a false, inaccurate and misleading Form 5 report to defeat the forfeiture application. Rather, Mr Robinson accepted that there may have been a misallocation of some of the funds relating to that site visit by the two geologists.

Applicant's Response

33. The Applicant relied upon their original submissions made on the 25 February 2014 and the onus shifting to the Respondents. The question of the unlawful exploration is irrelevant, it was submitted, as there was no evidence to support that proposition. At its highest, Mr Sheridan removed a few rocks. Even if relevant it should be given so little weight that it would not have any bearing on the determination.

34. The Warden may take into account matters which have occurred since the end of the tenement year and future plans. The applicant submitted that the failure of the Respondents to expend the minimum amount required[8], in the years 2010, 2011 and 2012 indicates the licence should be forfeited as the Respondent has not been carrying out exploration on the licence. After the first year, 2009, there was no evidence of activity. In 2010 only $7,792 was spent, but there was an exemption. Similarly, in 2011 there was an exemption, after spending $11,501. In 2012 $9,290 was spent but the exemption application was refused on 17 February 2014.

35. The policy of the Mining Act is that a tenement holder unable to explore for or exploit mineral resources of a tenement should give way to an active holder. It was submitted that Artemis and KML should not be able to 'buy their way out' of the past history of the licences. Further, the real intention of KML or Artemis is to concentrate not on the West Pilbara Project, of which the subject tenement forms part, but on the Eastern Hills Antimony Project. Artemis has elected not to spend money on those tenements, but to warehouse those tenements, and spend money on other tenements.

8

Year	Expenditure Commitment	Total Expenditure Claimed	Amount Under Expended	Actual Exploration Expenditure Claimed
13	$30,000.00	$40,256.00	-	$32,071.00
12	$30,000.00	$9,290.00	$20,710.00	$986.00
11	$20,000.00	$11,501.00	$8,499.00	$5,284.00
10	$20,000.00	$7,792.00	$12,208.00	$2,303.00
09	$20,000.00	$58,824.00	-	$47,823.00
Sum	**$120,000.00**	**$127,663.00**	**$41,417.00**	**$88,467.00**

36. The maximum fine is $10,000 which, it was submitted, is inappropriate as a tenement holder could choose to breach its statutory obligations and accept a fine. Such a result would not support the policy of the Mining Act.[9] The approach to be taken by a Warden's court was expressed by Rowland J to be:

> *where it is found by the Warden that a breach of the expenditure conditions has been established, which the Warden considers is a material breach which would justify the making of a forfeiture order or recommending a forfeiture order, the Warden should so order unless there are other considerations which would tend to support some other disposition of the application to forfeit. Clearly, non-compliance with the provisions of the Act and regulations for the purposes of this type of application needs to be more than trivial or technical. What amounts to a material breach, will be for the Warden to decide in each case. I have given this perhaps overly long preamble because the Act and regulations concerning this particular matter, although primarily concerned with the action or inaction of the tenement holder, gives to the applicant for forfeiture pre-emptive rights so that, in giving consideration as to whether any process is an abuse of process, it must be borne in mind that an applicant for forfeiture has a lawful and legitimate expectation that, if successful, he will be eligible to gain a benefit."*

37. It was submitted Mr North has a lawful and legitimate expectation he will be granted the priority right to the tenement so that it can be explored and mined.

38. As to the native title negotiations, there is still no agreement. On the 17 February 2014, the Minister refused an exemption application for the previous tenement year. The exemption application had been made on the basis that the tenement holder had not been able to negotiate a heritage agreement with the Ngarluma. The Minister has already said Legend has had enough time to reach agreement.

39. Mr Davies, in relation to E47/1797, said there were nil registered sites. There was nothing of significance which has held up exploration on the ground. There has already been exploration on the ground at Carlow Castle and at old workings throughout the area.

40. The form 5 was alleged to be false as the Respondents claimed Mr Whittock worked four days on the tenement. In cross-examination he knew at least one day was not claimable as he went to the Mount Clement project. Yet all his time was allocated to the subject tenement.

[9] Brosnan v Flint [2003] WAMW 18

41. The lodgement of a false, misleading or untrue form 5 is a serious matter and is may contribute towards a recommendation for forfeiture. In *Pawson and Northwestern Mining Proprietary Limited* (2013) WAMW 18, at [90] it was stated, by Warden Wilson:

> *In my opinion, the lodgement of false, misleading or untrue form 5s is a serious matter, as it has real potential to undermine the self-policing intentions of the Act. Such conduct should be seen as a very serious matter and should be regarded as a significant factor in determining whether any non-compliance with prescribed minimum expenditure on a mining tenement is of sufficient gravity to warrant a recommendation for forfeiture to the Minister.*

42. Falsity, though, requires deliberateness as opposed to inadvertence or mistake. In this case, there was a mis-statement of the work assigned to Mr Whitlock and it is accepted that little in situ work was done on the tenement. However, as discussed, reports had been commissioned, although of restricted evidentiary weight.

43. In terms of sufficient gravity, Mr Mead, in his affidavit, confirmed the West Pilbara project land had not been the subject of significant ground-disturbing activities since 2005. The Respondents did provide an explanation for that situation, the contentious negotiations, which improved their position relative to the Respondent in the Pawson decision.

44. The Applicant identified errors by the Respondent in dealing with this tenement such as incorrectly seeking to surrender a portion of the tenement (in May 2014), filing of documents which included incorrect minimum expenditure condition and incorrect inferred resources results. It was submitted the plans put forward by Artemis were inconsistent, as between Mr Mead and Mr Robinson. In particular, Mr Mead's plan did not mention Carlow Castle. In Mr Robinson's affidavit it stated if the rights issue was not fully subscribed – which happened – then $150,000 would be spent drilling at Carlow Castle.

45. As a general principle following section 98, the emphasis is on the nature and extent of non-compliance and not on future activities. Once non-compliance is found then a warden needs to determine whether the non-compliance is of sufficient gravity to justify forfeiture in the circumstances of the case.

46. Mr Robinson's testimony was that Artemis expended $250,000 to $500,000 every three months. Artemis undertook a rights issue on 26 June which was underwritten to an extent of $542,255, to raise $1.27 million. Only $542,000 was raised, and it was suggested Artemis is in a precarious position requiring it to borrow from the underwriter.

Further, at the time of announcing the rights issue, Artemis has $751,000 in cash. However, it has substantial liabilities including the stamp duty on the option agreement of $172,000 and a recent purchase of tenements for $96,000, excluding duty. The minimum expenditure on the West Pilbara project is $694,194 a year.

47. Artemis has projects at Eastern Hills, Mount Clement and Yandal with minimum expenditure conditions. The Respondent, it was submitted, is selling assets to maintain a viable cash position. Further, Artemis declared it would spend $120,000 on exploration, from 1 July 2014 to 30 September, which is insufficient to finance their plans.

Respondents' Reply

48. Artemis invests in exploration projects and so there is no basis for an inference tenements were sold because of financial difficulty. Further, there is no basis for inferring expenditure during this quarter will be mirrored in following quarters. The draft exploration plan says there is no drill program in respect of Carlow Castle; it has not been designed and no adverse inference can be drawn from that fact. The resource estimate has been announced in accordance with the ASX Listing Rules.

49. The Respondent is waiting for the Ngarluma heritage agreement to be executed after which there will be a heritage survey. The Respondent needs to obtain an approved program of work which cannot be undertaken in the current financial quarter. Artemis does not need current banked funds for exploration over the next 12 months; in the usual course of business funding is sought on a needs basis.

50. The West Pilbara Project has not been the subject of significant ground-disturbing exploration since the determination of the Ngarluma/ Yindjibarndi native title application in 2005. NAC had advised successive tenement holders they must cease exploration until a heritage agreement is in place, subject to the *Aboriginal Heritage Act* 1972 (WA). It was submitted successive tenement holders had experienced difficulties in negotiating a heritage agreement 'on reasonable terms' with the NAC (although not Mr North).

51. On the 1 May 2014, Mr Clent was replaced by Mr Ed Mead as exploration manager. On the 24 June 2014 he presented a draft exploration program for E47/1797, which is to be presented to the board of Artemis.

52. Artemis has aggregated tenements in the area and purchased shares in other mining companies, seeking economies of scale and facilitating the raising of capital to fund exploration. Artemis has incurred costs for the West Pilbara project, with the implication that a proportion of those

funds were applied to E47/1797 (in addition to the Maynard report); there was no specific allocation of money to the subject tenement.

53. The Respondents submitted Artemis should be permitted to retain the land as the non-compliance was due to it being unable to properly substantiate expenditure. It has the capacity to raise exploration funds and better use the land then the Applicant. The loss of the tenement will undermine the underwriting agreement and the development of the entire West Pilbara project. Further, the loss would render otiose the work done, and money expended, on the West Pilbara project.

Findings

54. I am satisfied that there is *prima facie* proof of non-compliance with the expenditure conditions and therefore a *prima facie* case for forfeiture. The only issue is whether the defendants have discharged the onus that there is not sufficient gravity to warrant forfeiture. The element of "sufficient gravity" relates to the discretion vested in the Warden under s.98 of the Act. Failure to comply with expenditure conditions is contemplated by the statute itself as being of sufficient gravity to justify forfeiture.

55. Section 98(5) provides that a mining lease shall not be forfeited for non-compliance with the expenditure conditions unless the Warden is satisfied that the non-compliance is, in the circumstances of the case, of sufficient gravity to justify forfeiture. The section requires consideration not only the non-compliance and the facts directly bearing upon it, but also the events leading up to the non-compliance. Weight must be given to the conduct of the parties, the actual and potential consequences of the non-compliance and of the forfeiture sought, within the statutory framework of the objects and policy of the Act.

56. The Warden may properly take into account matters connected with the tenement and the tenement holder, which have arisen between the end of the tenement year the subject of the plaint and the hearing of the plaint. The Warden may also take into account plans which the tenement holder may have for the future concerning the tenement but in doing so would, in all cases, is obliged to assess the reasonableness of such plans and the likelihood of their ever being carried out.

57. On the subject tenement there was minimal activity over the time in which it has been held. The Respondents have not carried out any significant ground disturbing exploration since 2005. The Respondents have spent money on the West Pilbara project; however it is difficult to identify the amount of money spent on E47/1797. The non-compliance

with the expenditure requirement, including any previous year in the life of a tenement, is relevant to the issue of sufficient gravity. [10]

58. The Respondents did not explore the subject tenement with sufficient vigour, as required by the Act, due to a negotiation impasse. Mr Clent, on his trip, had a preliminary meeting with the NAC after the tenement had been held for a number of years. There was a need for greater urgency or a coherent explanation, at the hearing, as to why the progress in negotiations was so dilatory in nature. The practice of seeking exemptions has intrinsic risk and should have prompted an increased focus on the tenement.

59. At this time there has not been a formal agreement with the NAC and, concomitantly, no intrusive exploration work. Overall, the work done over the years consists of the Maynard Report being commissioned, a review of aero-magnetic and electromagnetic surveys, some scoping work and the previous geologist took some photographs and collected a few rocks which were not tested.

60. The Respondents have plans but there is a presently a shortage of allocated funds to E47/1797. The draft exploration plan provided by Mr Mead does not provide for any drilling in the Carlow Castle. There has been no evidence as to the financial position of Legend. KML is financially dependent on Artemis. Artemis has a significant number of tenements, with attendant expenditure obligations and an assessed unpaid duty of $172,541.95.

61. This matter was made unduly complicated, requiring additional costs and time, due to the failure to adduce relevant material at the hearing. There was little evidence concerning work done or the breakdown of administrative costs, although some material was contained within the exhibits. It is accepted that at least a proportion of the disallowed expenditure was claimable, however it was not possible determine the precise amount. Such a position, where there has been some unquantified expenditure, reduces the impetus to forfeit the tenement.

62. I consider this is a case where it is appropriate to impose a penalty pursuant to the provisions of Section 98(4A). My reasons for coming to that conclusion is that although I do not consider the breach of the expenditure condition to be trivial or technical, the finding of non-compliance was based on the Respondents being unable to identify how much had been expended on the particular tenement; I accept there had been expenditure on the tenement. Had there been no expenditure, or a false Form 5 presented, a forfeiture order would have been granted.

[10] Rose v Goldtime Australia Pty Ltd WAMW 8

63. The Respondents lodged a Form 5 which lacked clarity and was disingenuous which was not rectified during the hearing. Had the Respondent chosen to present, for example, the full Maynard Report (with confidentiality protection) and called Mr Reid to testify this matter may have been resolved at an earlier stage.

64. The Respondents were dilatory in negotiating an agreement with the NAC; an agreement is imminent, in November the court has been informed. The Respondents now have inchoate plans, being without a drilling program, which required funding. It is understood funds will be raised in due course to implement those plans; if that does not occur within a reasonable timeframe, there being no further known barriers to exploration, the tenement will be at risk.

65. An order for forfeiture has not been made primarily based on the nature of the non-compliance, as enunciated, and that the forfeiture of E47/1797 would be disproportionately prejudicial to the Respondents. Forfeiture would result in the loss of a valuable tenement which hosts mineral resources and cause a significant loss on previous, related, expenditure.

66. In this case, it was submitted, Mr North does not deserve the tenement because he has engaged in unlawful exploration. I do not agree with that submission, as the Applicant did not interfere with the land, in any practical sense, to such an extent that would support the offence.

Result

67. A fine of $10,000 is imposed on the Respondents, to be paid within thirty days of this decision to the Applicant.