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**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** :

**CORAM** : WARDEN A MAUGHAN

**HEARD** : 28-30 JUNE 2015

**DELIVERED** : 14 AUGUST 2015

**FILE NO/S** : APPLICATION FOR FORFEITURE MINING  
LEASE 47/223

**TENEMENT NO/S** : Mining Lease 47/223

**BETWEEN** : DONALD KIMBERLEY NORTH  
(Applicant)

AND

WESTERN METALS PTY LTD  
(Respondent)

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*Catchwords:*      *Application for Forfeiture – Failure to meet Expenditure  
condition – Expenditure not connected with mining.*

**Legislation:**

- *Mining Regulations 1981*
- *Mining Act 1978*
- *Magistrates Court (Civil Proceedings) Act 2004*
- *Evidence Act 1906*

**Cases referred to:**

- *Blackfin Pty Ltd v Mineralogy Pty Ltd* [2013] WANW 19
- *Cameron v Taylor* (Wardens Court 1988 Volume 4, Folio 10)
- *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* (unreported WASC, FC, 16 December 1998)
- *Flint v Levissianos and Anor* [2003] WAMW13
- *Jones & Connell v Sanidine N/L (unreported Kalgoorlie Wardens Court 15-12-87)*
- *Newmont Duketon Pty Ltd v Angelopolous* [2005] WAMW 1
- *Nova Resources NL v French* (1995) 12 WAR 50
- *Nunn v Carnicellie and Others* (unreported, Southern Cross Wardens Court 29-11-90)
- *PGN Exploration Pty Ltd v Taipan Resources NL* [2003] WAMW4 at 20
- *Roslyn v Meridian Mining Limited* [2011] WASC43
- *Telferscott Nominees Pty Ltd v Golf Western Corp Pty Ltd and Anor* [2009] WAMW4 GST

**Result:** It is recommended a fine of \$10,000 is imposed on the Respondents, to be paid within 30 days to the Applicant

**Representation:***Counsel:*

Applicant : Mr Percy QC and Mr Kavanagh  
: Ms Lendich

*Solicitors:*

Respondent : Hunt & Hunt  
: DLA Piper

**Background:**

- 1 Western Metals Pty Ltd (“Western Metals”) is the holder of Mining Lease 47/233, “Weerianna” (“the lease”). The lease was granted on 27 December 1989 and was transferred to Western Metals on 14 May 2007. The lease has an area of 109.5 hectares.
- 2 By Application for Forfeiture, the Applicant, Donald Kimberley North (“North”), seeks forfeiture of the lease on the basis that the respondent failed to comply with expenditure conditions for the year ending 27 December 2013.
- 3 For the financial year ending 27 December 2013 Western Metals was required to expend a minimum of \$9166.67 on or in connection with the mining on the lease (“the expenditure condition”).
- 4 North holds mining leases contiguous to the lease and is the quintessential jealous neighbor. Indeed, North has made two previous applications for forfeiture on the lease in relation to the years ending 27 December 2008 and 27 December 2012, both of which were withdrawn.
- 5 The applicant contends:-
  - (i) The amount required to be expended was not expended.
  - (ii) That any work done that was in relation to the acquisition of the lease by Artemis.
  - (iii) The non-compliance and the history of breaches, is of sufficient gravity to justify forfeiture.
- 6 For its part, the respondent contends:-
  - (i) That Western Metals did comply with the expenditure conditions; and
  - (ii) In the event that I make a finding that the expenditure conditions were not met (which is denied) then an order for forfeiture ought not follow

as the breach (if any) was not sufficient gravity to warrant the making of such an order.

### **The law**

- 7 s82(1)(c) of the *Mining Act (1978)* (“the Act”) provides that every mining lease shall be deemed to be granted subject to conditions that the Lessee shall:-

*“Comply with the prescribed expenditure conditions applicable to such land unless partial or total exemption therefrom is granted in such a manner as is prescribed.”*

- 8 The prescribed expenditure conditions are found in Regulation 31 of the *Mining Regulations 1981* (Regulations) which provides:-

*“The holder of a mining lease shall expend, or cause to be expended, in mining or in connection with mining on the lease not less than \$100 for each hectare or part thereof” of the area of the lease with a minimum of \$10,000 ... .”*

- 9 The expenditure for lease for the year in question was \$9,166.67. This is below the minimum normally required for a lease of the size of that which is disputed in these proceedings. There was an automatic exemption applicable to the lease as a consequence of the application of Regulation 52 of the *Regulations* for the relevant financial year. That regulation provides;

*52. Reduced expenditure where forfeiture complaint lodged*

*Notwithstanding regulations 15(1), 21(1) and (1b) and 31(1), where an application under section 96(1)(b) or 98(1) is lodged, a pro rata reduction in the annual amount to be expended in respect of the mining tenement applies for each whole month from the date of lodgment to the date of determination of the application.*

- 10 S98 of the Act provides:-

*(1) Where the requirements of this act are not being complied with in respect of the expenditure conditions applicable to an Exploration Licence or a Mining Lease, any person may apply for the forfeiture of such licence or lease as provided in this section;*



- (2) *An application for forfeiture under this section shall be made, during the expenditure year in relation to which the requirement is not complied with or within 8 months thereafter, in such form and manner as may be prescribed and shall be accompanied by the prescribed fee;*
  - (3) *The application for forfeiture shall be heard by the Warden;*
  - (4A) *When the Warden finds that the holder of an exploration license or lessee of the mining lease has failed to comply with such requirements as are mentioned in (1), the Warden may recommend the forfeiture of such license or lease, or impose a penalty not exceeding \$10,000.00 as an alternative to the forfeiture or dismiss the application;*
  - (4B) *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;*
  - (5) *A recommendation shall not be made under (4)(A) unless the Warden is satisfied that the non-compliance with such requirement is, in the circumstances, the case, of sufficient gravity to justify the forfeiture.*
- ....”

- 11 The forfeiture system enables the industry, to a large degree, to be self-regulated. The policy of “forfeiture” seeks to ensure that holders of tenements are able to, and in fact do, work the ground with a view to ultimate recovery of economic deposit of minerals. This principle was endorsed by the Full Court in *Nova Resources NL v French* (1995) 12 WAR 50 where it was said:-

*“The primary object [of the act] insofar as it impacts on this case is to ensure that as far as is practicable the land which is either known potential or mining or is worthy of exploration will be made available for mining or exploration. It is made available subject to reasonably stringent conditions and if these, including expenditure conditions, show that the purpose of the grant are not being advanced then the act of regulations make provisions for others who have an interest in those purposes on the land to apply for forfeiture so they may explore the area”.*

- 12 Wardens are often called upon to decide what is meant by, “expended, in mining on or in connection with mining on a tenement”. Mining operations are widely defined. S8(1) of the Act provides:-

- (a) *“Mining operations means any mode or method of working whereby the earth or any rock structure, stone, fluid, or mineral-bearing substance, may be disturbed or moved, washed, shifted, crushed, leached, roasted, distilled, evaporated, smelted, combusted, or refined or dealt with for the purpose of*

*obtaining any mineral or processed mineral resource therefrom whether it has been previously disturbed or not and includes:-*

- a) removal of over-burden by mechanical or other means and the stacking, deposit, storage, and treatment of any substance considered to contain any mineral;*
- b) operation by means of which salts or other evaporates may be harvested;*
- c) Operations by means of which minerals recovered from the sea or natural water supply, and;*
- d) Operations by means of which processed mineral resources produced and recovered, and;*
- e) The doing of all acts, incidents, or conducive to any such operation or purpose.*

13 The following have been held to have been “expended, in mining on or in connection with mining on a tenement” -

- (i) Money expended on desk studies and data review including planning of future work ***Commercial Properties Pty Limited v Italo Nominees Pty Limited*** (unreported WASC, SC, FC, 16 December 1998, SCL 7427);
- (ii) A review of previously accumulated data ***PGN Exploration Pty Ltd v Taipan Resources NL*** [2003] WAMW 4 at 20;
- (iii) Tenement administration costs - Regulation 96C(3) of the *Regulations 1981*;
- (iv) Field trips including:
  - (a) Flights for a field trip ***Nunn v Carnicellie and Others*** (unreported Southern Cross Wardens Court 29-11-90);
  - (b) Fuel costs and vehicle hire • ***Nunn v Carnicellie and Others*** – supra.
  - (c) Accommodation costs ***Jones & Connell v Sanidinie Pty Ltd*** unreported Kalgoorlie Wardens Court 16-12-87;
  - (d) Food costs ***Telferscott Nominees Pty Ltd v Golf Western Corp Pty Ltd and Anor*** [2009] WAMW 4 GST.

- 14 The incurring of a liability is sufficient to qualify as expenditure – it is not necessary that cash itself changed hands *Flint v Levissianos and Anor* [2003] WAMW13.
- 15 The language of Regulation 3 of the Regulations does not exclude a payment made for a service to be provided the following expenditure year from being an amount expended in connection with mining on the lease *Roslyn v Meridian Mining Limited* [2011] WASC 43 per Allanson J at 52.
- 16 Specifically excluded from expenditure are costs of, marking out mining tenements, **acquisition or sale**, (my emphasis) non-tenement specified research, and compensation payments, Regulation 96C(4) of the *Mining Regulations 1981*.
- 17 In *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* (unreported WASC, FC, 16 December 1998) the Full Court confirmed the onus of proving the respondent has failed to comply with expenditure obligation rests with the applicant. If the applicant establishes non-compliance the evidentiary burden rests upon the respondent to show that non-compliance is not of sufficient gravity to justify forfeiture, stating:-

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

#### **The Rules of Evidence**

- 18 The Warden is not bound by the rules of evidence – Regulation 154(1)(c) of the Regulations.

“Whilst not bound by the rules of evidence, Wardens generally adopt procedures which are consistent with such rules, thereby acknowledging that in most instances justification for such rules lies in common sense, convenience, orderliness and, most importantly, fairness – *Newmont Duketon Pty Ltd v Angelopolous* [2005] WAMW 1.



**Applicant's Evidence**

- 19 The Applicant tendered an affidavit by James Michael Hunt (Hunt) dated 20 November 2014 and called evidence from three witnesses, Donald Kimberley North (North), Gerald Patrick Sheridan (Sheridan) and Jamie Dean Duffield (Duffield).
- 20 Hunt's affidavit annexes numerous documents. Where relevant I will refer to these in my decision.
- 21 North gave evidence in the form of statements dated 20 November 2014 and 12 February 2015 together with oral testimony.
- 22 He testified that he's the holder of various tenements in the vicinity of the lease. He travels past and through the lease at least three times a week.
- 23 He testified that during the expenditure year in question he had not seen on the lease and he did not observe any evidence of work being done or having been done on the lease.
- 24 He testified that in the event the lease is forfeited he will apply for a mining tenement and develop the tenement with his other tenements.
- 25 When cross-examined Mr North agreed that when driving past the lease he would only have observed it for approximately 5 minutes. He agreed that if drilling had occurred on the lease there would be an obligation to rehabilitate the ground once the drilling work had been completed. He agreed that if driving past the lease it would not be possible to see the entirety of the lease from the roadway due to its topography.
- 26 He testified in August 2012 he met Ms Kay Trinder on the lease. He was in company with Duffield. He did not exit his car he did not inspect tool boxes or Ms Trinder's vehicle. He testified that he did not see Ms Trinder or her companion Mr Sutherland working on the lease. He did not see Mr Sutherland



- on the lease in February of 2014. He agreed that he did not observe Mr Clent on the lease on 26 August 2013.
- 27 He denied that there had been auger sampling done on the lease in 2012. He has based his denial on the fact that there was no observable evidence of it as he passed the lease.
- 28 Sheridan gave evidence in the form of statements dated 20 November 2014 and 12 February 2015 together with oral testimony
- 29 He testified he is employed by Welcome Exploration Pty Ltd which is owned by North. In the course of his employment he has had cause to drive past the disputed lease two or three times a week. He testified that he'd never seen anyone on the lease carrying out exploration work.
- 30 When cross-examined he confirmed that he was a fly in fly out worker, generally working a 3 week on 1 week off shift. In his week off he would spend time at his home in Nedlands in the metropolitan area of Perth.
- 31 He explained that auger drilling was a type of exploration involving sampling at shallow depths and that the drilling could be done by a unit attached to the rear of a four wheel drive vehicle. He confirmed that it was a common practice to refill the sand removed by the bit of the auger when drilling was completed.
- 32 He agreed that in the weeks that he wasn't working for Mr North or before 1 October 2012 when he commenced employment, he was unable to comment on any work that was done on the lease.
- 33 He also agreed that the entire lease could not be viewed from a single point on adjoining roadways due to the topography of the ground.
- 34 He gave evidence that between 17 and 18 December 2014 he carried out some work on a tenement owned by Mr North which is approximately two kilometres from the disputed tenement. He did not see any work being done on the disputed

tenement. He agreed that he arrived on the North tenement at 5am and left at 9 or 10am and would not have observed workers outside of those hours.

- 35 Duffield gave evidence in the form of statements dated 20 November 2014 and 12 February 2015 together with oral testimony. He is employed by North West Sand & Gravel and has been for 14 years. The company is owned by North.
- 36 He is a mobile plant operator and in the course of his employment he drives past the disputed lease two or three times a week.
- 37 He prepared for and engaged in sampling programs on nearby North tenements during 2013 and never saw anyone working on the disputed lease. His timesheet indicated he worked on 11-19 April 2013, 20 and 23 May 2013 and 20 August 2013.
- 38 He also carried out metal detecting on the nearby tenement 6-10 times during the relevant year. He saw no disturbance on the disputed lease.
- 39 He said that he saw Kay Trinder and Mr Sutherland on the disputed lease in August 2012 and had a discussion with them about what they were doing. He could not recall getting out of the car. He remained in the company of Ms Trinder and Mr Sutherland for approximately 10 minutes.
- 40 He agreed that he was working on the adjacent lease with Mr Sheridan on 17 and 18 December 2014. He agreed that they worked between 5am and 9am daily he did not observe anyone on the disputed tenements.

### **The Respondent's Evidence**

- 41 Western Metals called five witnesses Warrick James Clent ("Clent"), Guy Adrian Robertson ("Robertson"), Kieran Vaughan Whittock, Michael Trevor Sutherland ("Sutherland") and Edward Clinton Mead ("Mead").
- 42 The respondent first called Guy Adrian Robertson (Robertson). He produced an affidavit dated 15 January 2015 and gave oral evidence.

- 43 He is the Chief Operating Officer of Artemis Resources Limited (Artemis) the sole director of Karratha Metals Pty Ltd (Karratha) which is wholly owned by Artemis and has been a director of Western Metals Pty Ltd since the 26<sup>th</sup> of June 2014. He testified that Artemis is the ultimate holding company of the respondent. M47/223 forms part of the West Pilbara Project targeting gold and base metals. The respondent is the registered holder of M47/223 and was required to expend not less than \$11,000.00 on or in connection with mining on the lease for the reported year ended the 27<sup>th</sup> of December 2013. It is conceded this figure is wrong.
- 44 Pursuant to an agreement dated the 26<sup>th</sup> of June 2014 Karratha Metals acquired 51% of the shares in the respondent. An option to acquire a further 29% of the shares in the respondent was subsequently exercised on the 17<sup>th</sup> of December 2014.
- 45 Prior to the acquisition by Karratha Metals Pty Ltd the respondent was a wholly owned subsidiary of Exchange Minerals registered in Sharjah United Arab Emirates.
- 46 Robertson swore that upon review of the Respondent's company documents and following discussion with Max Heinz (Heinz), a director and company secretary of the Respondent he believed that on the 23rd of April 2013 Mr Heinz had written to Australian Royalties Corporation Pty Ltd (ARC) and instructed them to continue to manage exploration and mining activities on M47/223 with a view to ensuring the expenditure requirements were met including during the reporting year ending 27<sup>th</sup> of December 2013. Pursuant to the aforementioned arrangement ARC was authorised to incur costs in respect to exploration and mining on M47/223 and those costs were to be charged to the respondent and settled annually. The respondent accounts for the reported year ending the 27<sup>th</sup> of December 2013 was offset against money due and owing on a loan ARC had taken out with Exchange Metals, the respondent's parent company prior to the acquisition by Karratha. Robertson agreed Heinz was available to be called as a



witness. He was unable to produce the original. He produced no metadata confirming the date of its creation.

- 47 Mr Robertson's affidavit set out the below table of expenditure for M47/223 for the reported year ended the 27<sup>th</sup> of December 2013.

Description	Amount	Date of Invoice
<b>Mineral exploration Activities – Battery Sands Feasibility Program (October to December 2013)</b>		
Battery Sands Program – meeting in October 2013 and preparation of feasibility study completed December 2013	\$6,815.46	20 December 2013
		23 December 2013
Battery Sands Program – 50% deposit for sampling program for 2013/2014	\$3,081.50	20 December 2013
<b>Sub-total</b>	<b>\$9,896.96</b>	
<b>Mineral Exploration Activities – Gold Prospectivity Assessment (February to August 2013)</b>		
Desktop work	\$2,020.51	5 March 2013
		1 July 2013
		1 July 2013
		12 August 2013
		4 October 2013
Field trip – attendance on M47/223	\$561.70	4 October 2013
Field trip – flights	\$226.13	1 October 2013
Field trip – vehicle hire and fuel	\$480.93	1 October 2013
Field trip – accommodation and taxi	\$209.14	1 October 2013
Field trip – food	\$364.17	1 October 2013
<b>Sub-total</b>	<b>\$3,862.58</b>	
<b>Rent and Rates</b>		
Tenement Rent	\$1,694.00	27 December 2012
Shire of Roebourne Rates for 1 July 2013 to 30 June 2014	\$1,150.19	22 July 2013
<b>Sub-total</b>	<b>\$2,844.19</b>	
<b>Administration and Overheads</b>		
Tenement management fees	\$1,156.25	7 April 2013
		21 May 2013
		14 June 2013
Other overheads – share of head office, accounting and administration costs	\$1,043.75	Various



Sub-total	\$2,200.00	
Total	\$18,803.73	

48 This table, he testified, accords with the Form 5 save and except for an adjustment for incorrectly claimed travel costs.

49 The cost claimed in the Form 5 were as follows:-

Description	Amount
Mineral exploration activities	\$14,890.20
Mining Activities	Nil
Aboriginal Heritage Surveys	Nil
Annual Tenement and Rates	\$2844.19
Administration/Overheads	\$2,200.00
TOTAL	\$19, 934.39

The mineral exploration activities were further broken down to:

Description	Amount
Soil and rock chip sampling	\$2,000.00
Weerianna Sampling Program	\$7,896.96
Geological Consulting	\$4,993.24

50 Of the amounts claimed in the above schedule and Form 5, the claim for rates and taxes is not disputed by the applicant.

51 Mr Robertson was shown a document headed “Weerianna Project M47/223 Auger Sampling Geochem June 2012”. That document bears the name Artemis Resources in the bottom right hand corner. Mr Robertson says that the work subject of that document was not done for Artemis Resources. He confirmed that Artemis was not doing any drilling in the Pilbara at the time. Additionally Mr Robertson was shown an Artemis Resources Limited invoice to Australian Royalties Corporation showing:

“Recharge ARC expenses paid by ARB for August 2013”.

He explained that this was for work which would have been done by either Warwick Clent or Kieran Whittock and they would have used a credit card that related to Artemis Resources and the cost would then be analysed and allocated back to ARC in the event that they belonged to ARC. He said that this practice may well have occurred in respect to other tenements.

- 52 On these matters I found his evidence unconvincing.
- 53 He agreed that Artemis Resources had commissioned a prospectivity report on the Weerianna Gold Project. That report is dated the 17th of November 2014. He testified that it would have been some time after June 2014, once Western Metals had been purchased by Artemis, that the report was commissioned. He agreed that Artemis had also commissioned a report “Weerianna Gold Project Project Evaluation” in June 2011 at a time when Artemis was looking to acquire another project. Artemis did not proceed with that proposed purchase at the time as it was deemed uneconomical to do so – this despite ProMet Engineers, in June 11, valuing the lease at between \$9.4m and \$11.6m (see Clent’s affidavit) and Artemis having an option to acquire 80% of the lease for \$3m in cash and shares.
- 54 When cross-examined Mr Robertson agreed there was a discrepancy between his affidavit and the Share and Sale Purchase Agreement in respect to the amount that Karratha Metals paid in purchasing shares in Western Metals.
- 55 Mr Robertson agreed that prior to its acquisition by Karratha Metals the respondent was wholly owned in the United Emirates by Exchange Metals. His contact with Exchange Metals was an individual named Michael Shemessian.
- 56 He agreed that when Karratha entered the agreement to purchase the lease, the lease was subject to a plaintiff. He said that the sale agreement enabled Karratha to reverse the transaction in the event that the tenement might be lost in that plaintiff. He testified that Karratha had advice that the plaintiff was likely to be unsuccessful. He denied that during the calendar year of 2013 Artemis

maintained an ongoing interest in the tenement or there remained only a “background” interest in acquiring the tenement. This was despite his evidence that Artemis had acquired the nearby “Legend” tenements in June 2012 and “Carlow Castle” tenement and that they, together with the disputed tenement, were the ‘jewels in the crown of Artemis’ ‘West Pilbara Project’.

- 57 He agreed that as of the 24<sup>th</sup> of April 2013 Western Metals and ARC shared the same business address at Level 10, 1 Margaret Street, Sydney.
- 58 He agreed that an entry from the table of expenditure extracted from his affidavit, namely Battery Sands Program \$6815.46, does not appear in the Form 5. An additional item Battery Sands Program 50% deposit for sampling \$3081.50 again does not appear in Form 5. He pointed out that the sums claimed for the Battery Sands Program (\$9896-96) was identical to the sum claimed for Soil and Rock Chip Sampling plus Weerianna Sampling Program in the Form 5 (\$9896-96). I don’t accept Mr Robertson’s attempt to explain this as simply the use of interchangeable terms. The manner in which he gave this evidence was unconvincing in my view. The sum claimed for the Soil and Rock Chip does not match the description on the corresponding account rendered by Keystone Minerals, namely invoice 302705 “Preparation Meeting – Warwick Clent – Perth 22-10-13 x 0.5 day, Program Planning and Examination of Reports x 1.5 day”.

These descriptions are clearly, in my view, not consistent and no explanation is given as to how these ‘company records’ (being the invoices) were so erroneously described in the Form 5.

- 59 He disagreed that the work done by Mr Sutherland in relation to the Battery Sands Program was work done in contemplation of the purchase of the lease by Artemis.
- 60 He denied the suggestion that any work done during the latter part of 2013 was really in relation to the potential purchase of the lease by Artemis.



- 61 A correct detailed Form 5 is important in terms of public policy. As observed in *Brosnan v JSW Holdings Pty Ltd* [2011] WANW 8:

*“The task of completing the Form 5, in my opinion, goes further than merely reporting the amount of expenditure, in an expenditure year on the mining lease. The holder of a mining lease is required not only to show the amount expended in dollar value but must also provide sufficient particulars of the activity undertaken on the mining lease such that the Honourable Minister can determine the annual expended was “in mining or in connection with mining operations” on the mining lease.*

*It is not the case, the plain reading of the Mining Act or Regulations, that the Honourable Minister should be required to speculate or infer whether the expenditure claimed by the holder of a mining lease in a Form 5, was expended in connection or in connection with mining operations on the mining lease”.*

- 62 Mr Robertson’s evidence goes in no way to satisfy me that the work conducted under the “Battery Sands Program” is work that could properly be described as soil and rock chip sampling and/or Weerianna Sampling Program.
- 63 Robertson was shown a portion of the affidavit of Warwick Clent dated 14 January 2015 which, at paragraph 16, contained the following:

*“In my role with MMC, and in the discharge of my responsibility to keep M47/223 in good standing, on 10 July 2013 and 21 August 2013 I conducted a desktop review of the following exploration data held by ARC on its database in respect of M47/223 in order to assess the future liability of future exploration of gold from M47/223 and to prepare for that data to be presented to prospective purchasers of M47/223”.*

In explanation, he said that Warwick Clent would not have been reporting to him in relation to that work. He would have been reporting to Exchange Minerals and to ARC.

- 64 Mr Robertson was shown an invoice for an airfare for a trip that Mr Clent took to Melbourne on 10 July 2013. That trip was paid for by Artemis Resources. He denied that the trip was in relation to the proposed purchase of the tenement by Artemis.
- 65 He agreed with the suggestion put to him by counsel for the Applicant that various items of expenditure claim for applications for forfeiture in respect of the



disputed tenement would not be expenditure on mining during the year in question. They are invoices dated 7 April, 21 May and 14 June 2013 rendered by Anderson Tenement Management to ARC and paid for by ARC. A total of \$1,156.25. I agree these are ‘quasi legal fees’, not fees related to or corrected to mining as that term, if defined by s8(1) of the Act. Further, any account paid by ARC pre-dating 24 April 2015 is not expenditure for reasons which follow.

- 66 Mr Whittock swore an affidavit dated 22 April 2015 and gave oral testimony.
- 67 Mr Whittock testified that between February 2013 and January 2015 he was employed by Mining Management Consultant Pty Ltd (MMC) as a consultant geologist. In that role he provided geological consultant services to various mining company clients of MMC. One of those mining companies was Australian Royalties Corporation Pty Ltd (ARC). He conducted a historical exploration data review in respect of M47/223 and spent 3 days the 19<sup>th</sup>, 20<sup>th</sup> and 22 February 2014 reviewing that data. This was work pre-dating the Heinz letter.
- 68 He additionally conducted a site visit to M47/223 on 17 and 18 December 2014 in company with Mr Edward Mead who he understood to be the exploration manager for Artemis Resources Limited.
- 69 He confirmed that when he started work at Mining Management Consultants the majority of his work was done from Artemis Resources and he used an email address provided by them for all of his activities. He agreed that he prepared the annual report for the tenement for the period December 2012 to December 2013. He agreed in cross-examination he completed no sampling on the tenement during his field visit. He agreed that he had not been told of any sampling done during the relevant financial year. When asked by counsel for Artemis Resources whether the following questions:

*C: “I suggest to you that you didn’t do anything new in relation to the evaluation of this. You simply regurgitated existing work”.*

W: *"To some extent, yes".*

- 70 He was not aware of any sampling done by Mr Sutherland during the relevant period (September 2012) he was not aware of any soil or rock chips sampling program conducted during the relevant financial year.
- 71 He denied that he was employed by Artemis although he agreed that the majority of work that he was doing at the time was for Artemis Resources. He was aware that during the 2013 they, that is Artemis, were intently interested in the lease. He agreed that most of the evaluation work that was done on the lease was in fact done with "the view to Artemis taking it over ultimately."
- 72 Mr Sutherland gave evidence in affidavits dated 16 January 2015 and 21 April 2015 together with oral evidence.
- 73 Mr Sutherland is a miner and explorer with over 25 years' experience in the industry in Australia and overseas since 1996 he testified into actively being involved in several exploration projects in the Pilbara region including in respect of M47/223.
- 74 He and Ms Kay Trinder are partners in Keystone Minerals Australia (Keystone) a partnership business which specialises in mineral exploration and project manager. They are lifetime partners. On or about the 17th of September 2012 he and Ms Trinder went to M47/223 to undertake some small scale prospect activities pursuant to an agreement between Ms Trinder and Mr Shemessian of Exchange Minerals, whom he understood to have an interest in, the respondent Western Metals Pty Ltd.
- 75 During the visit in September 2012 he took some samples from two sites of historical gold production on M47/223 for the purposes of evaluating if gold extraction from battery sands was feasible.
- 76 In July 2013 he and Ms Trinder approached Mr Michael Shemissian with the recommendation they conduct a feasibility study into processing the historical gold tailings. Between July and October 2013 he worked up a proposal for

Keystone to undertake a feasibility study and met with Mr Warwick Clent on the 22<sup>nd</sup> of October 2013 to discuss Keystone's proposal. He understood Clent was managing exploration on the lease.

77 On or about 30 October 2013 Keystone was further instructed by Mr Shemessian to undertake the proposed feasibility study. On the 20<sup>th</sup> of December 2013 Keystone was further instructed by Mr Kieran Whittock, whom he testified was a consultant geologist to the Respondent, to proceed with Keystone's recommendation to undertake an auger sampling program. Invoices were rendered by Keystone on the 20<sup>th</sup> of December 2013 (\$2,200.00) 20<sup>th</sup> December 2013 (\$3,389.65) (being a deposit on account of future works) and on the 23<sup>rd</sup> December 2013 (\$5,297.00). Mr Sutherland swore that each of those invoices had been paid. The evidence established they were paid by ARC. Despite his testimony that he required a 50% deposit before commencing work he agreed that had not occurred with either of his other two rendered invoices. He denied the 'deposit' was rendered at the request of the Respondent to shore up 2013 expenditure.

78 In February 2014 Keystone commenced the field work involved with the recommended auger sampling program. Prior to completion of the program Mr Whittock instructed Keystone to suspend the program pending the outcome of an application for forfeiture 446831 in respect of M47/223 (affidavit 16 January 2015) and alternatively by a cyclone (oral testimony).

79 He agreed that his partner Ms Trinder had plaited 47/223 in 2012. He was unable to say what the purpose of the plaint was. He denied discussing the plaint with her. He was asked whether the plaint was a friendly plaint the purpose of which was to enable the whole of the tenement to have expenditure conditions suspended. This denial was unusual given his stated lack of knowledge of the existence of the plaint until its settlement. Mr Sutherland confirmed that in return for dropping the plaint his partner received prospecting rights on M47/223. His testimony in this regard is unsatisfactory. I do not accept that he



had no knowledge of his life and business partner's complaint – a complaint involving the core area of their mutual business.

- 80 He agreed that his primary purpose for attending the disputed lease in September 2013 was for a camping rather than doing any work. He says he took approximately 20 samples. He confirmed that he was eventually paid for his visit. He denied that he had prepared his report “just to justify a bit of expenditure on the tenement”. He was aware of Artemis's interest in the tenement.
- 81 Mead's evidence was adduced through an affidavit dated 20 April 2015 and oral testimony. Mr Mead testified that he was engaged by Artemis Resources as consultant on the 1<sup>st</sup> of May 2014. On the 31<sup>st</sup> of December 2014 he became a non-executive director of Artemis.
- 82 He testified that he attended a field trip on M47/223 on the 17<sup>th</sup> and 18<sup>th</sup> of December 2014. It is his view that a person would be able to conduct activities on land the subject of M47/223 without observation from either the boundaries of M47/223 or the land the subject of M47/223 if the person observing:
- (i) was not proximate to the person conducting activities;
  - (ii) was observing at a different time to the person conducting the activities; and or
  - (iii) was conducting other activities at the same time as observing such as driving a vehicle or conducting a sampling program which distracted them from their observation.
- 83 As a consequence of his observations and inspections undertaken on the 17<sup>th</sup> and 18<sup>th</sup> of December 2014 and a review of existing exploration data, Whittock and he had commenced formulating a further exploration plans in respect of M47/223.
- 84 He agreed that he had not seen any evidence of an auger drilling that might have been done during 2012.



- 85 Clent testified via affidavits dated 14 June 2015 and 15 April 2015 and gave oral testimony
- 86 He testified that most of 2013 to January 2014 he was employed by Mining Management Consultants Pty Ltd (“MMC”) to provide to geological consultant services to various mining companies. During his time with MMC, MMC were engaged by Australian Royalties Corporation Pty Limited to provide geological consultant services in respect of numerous tenements managed by ARC including M47/223, the lease.
- 87 During the reporting year ending December 2013 he undertook the following work in connection with M47/223:
- (i) Liaising with Keystone Minerals in respect of the feasibility of processing of historical gold tailings..
  - (ii) Undertaking an assessment of gold prospectivity of M47/223 as a whole.
- 88 In discharging that responsibility between the 10<sup>th</sup> of July 2013 and 25<sup>th</sup> of August 2013 he conducted a desktop review of the exploration data held by ARC on its database and conducted a field ground trip of approximately 5½ hours duration on the 26<sup>th</sup> of August 2013.
- 89 He denied that his report produced as a result of his aforementioned review and field trip was almost an exact duplicate of the due diligence report prepared for Artemis by Andy Border on 5 July 2011 which is attached to the affidavit of Clent sworn 14 January 2015.
- 90 My review of those reports would show that very minimal alterations were made save and except for the additional details in relation to his field visit on 26 August 2013.
- 91 It is submitted by the Applicant that the report adds virtually nothing to the geological knowledge of the lease. That is a submission with which I respectfully agree.

- 92 Clent agreed that he had recommended the Battery Sands Feasibility program on the basis of the report of Mr Sutherland and Ms Trinder. He indicated that he was not aware of Artemis's interest in purchasing the tenement.
- 93 He agreed he had prepared the Form 5 for the expenditure year in question but had done so from company records rather than personal knowledge. He had no recall of the "Soil and Rock Chip Sampling" nor the "Weerianna Sampling Program".

**What is the effect of the Heinz Letter dated the 24<sup>th</sup> of April 2013**

- 94 The applicant submits that how a respondent meets its obligations is a matter for it. In reliance it cites the decision *Flint v Levissianos and Anor* [2003] WAMW13 where the Warden found that the holder had caused his partner to incur the expenditure and that this was sufficient to compliance. The Warden stated:

*"What the Act requires is that a tenement be explored and or mined and it makes the holder of that tenement responsible to ensure that this purpose is met. Any private arrangements to ensure that this responsibility, reached in the scheme of the Act requires certain expenditure, is met are a matter for the holder of the tenement. There is clearly a business arrangement between the defendant and Mr Pascue which is probably in the nature of a partnership."*

- 95 The respondent says it met its expenditure obligations in part through a private arrangement with ARC
- 96 Following the decision in *Flint* the *Mining Act* was amended to include section 118A. That section provides:

**"118A. Tenement holder may authorise mining by third party**

(1) In this section —

**authorisation** means an authorisation under subsection (2).

(2) The holder of a prospecting licence, exploration licence or mining lease (the **relevant tenement**) may, by instrument in writing, authorise another person to carry out mining of a kind authorised by the relevant tenement on the land the subject of the relevant tenement.

- (3) *An authorisation may be given subject to conditions specified in the authorisation.*
- (4) *Mining carried out under an authorisation is to be regarded for the purposes of this Act as mining carried out by the holder of the relevant tenement.*
- (5) *Expenditure on or in connection with mining carried out under an authorisation is to be regarded for the purposes of the prescribed expenditure conditions referred to in section 50, 62 or 82(1)(c) as expenditure by the holder of the relevant tenement.*
- (6) *The giving of an authorisation does not affect the duties or obligations of the holder of the relevant tenement under this Act”.*

97 In my view it was the legislature’s clear intent that any previously referred to “private arrangement” with respect to the incurring of expenditure should now be reduced to writing as contemplated by section 118A(2). Absent that authorisation expenditure could not otherwise be met by way of a private arrangement. If I accept the Hines’ letter is admissible the effect of doing so would be to enable any expenditure incurred by ARC on behalf of the Respondent, post-dating the authority, to be considered expenditure for the purposes of the *Mining Act*. This becomes important because some of expenditure claimed for the expenditure year relates to the period before the 24<sup>th</sup> of April 2013. It was submitted by the Applicant and I accept that any expenditure, that pre-dates the 24 April 2014, is not expenditure for the purpose of the *Mining Act*, unless there exists a written authority covering the period. No such authority was produced.

98 The Applicant challenges the admission of the Heinz letter into evidence on the basis that:

- (i) The original letter was not produced; and
- (ii) The letter was not produced by its author Mr Heinz.
- (iii) It is otherwise hearsay

99 The respondent says the letter ought to be admitted as a business record pursuant to section 79C(2)(a) of the *Evidence Act* 1906.



100 I do propose to admit the Heinz letter as evidence in these proceedings. It is a business record of Western Metal Pty Ltd and can be tendered as such through Mr Robertson, a director of that company.

101 In summary, no expense incurred by Australian Royalties Corporation Pty Ltd prior to 24 March 2015 are “expenses” for the purpose of these proceedings.

### **The Acquisition Argument**

102 The Respondent says it is taken by surprise by this argument. The Respondent however declined to make an application for an adjournment and I propose to proceed on the basis of evidence adduced.

103 In relation to the proposed acquisition of the disputed tenement by Artemis, the Respondent’s position is that the expenditure was incurred for this purpose and relies upon the direct evidence of Whittock and the following:

- i) Artemis held an option (2011) for 45 days to acquire an 80% interest in the lease for \$3m and shares. The option was not exercised;
- ii) Artemis’ interest in the lease was renewed in June 2012 following the acquisition of Legend tenement portfolio;
- iii) Artemis eventually purchased the lease which became part of the ‘Jewels in the Crown’ of the West Pilbara Project. The evidence of Clent that he was carrying out work in relation to a potential purchase of the tenement, and;
- iv) Says therefore it is fanciful to suggest that Artemis had no interest in the expenditure year in question.

104 The Respondent says that the evidence does not establish that any expenditure was for Artemis in relation to their investigation to purchase of shares in the Respondent and it relies upon:

- i) Artemis’ interest in the lease was terminated in 2011 as the lease was deemed to be uneconomic.

- ii) Robertson's direct evidence that Artemis was not pursuing interest in the lease in 2013 and did not commission any work in respect of it in that year.

105 I do not accept that Artemis' interest in the tenement waived between 2011 and 2014. It was clearly pursuing other tenements (Legend and Carlow Castle) during this period and it is established from the evidence that the disputed tenement is central to the economic viability of the West Pilbara Project. In those circumstances I cannot and do not accept Mr Robertson's evidence that Artemis was not interested in the tenement during the disputed expenditure year.

106 Whilst there may be no direct evidence that Artemis was a prospective purchaser of the disputed tenement during the relevant years, there is clear evidence on the basis of the testimony of Mr Clent that the tenement was being prepared for potential sale – I find, on the basis on its interest in 2011 and eventual purchase in 2014, that Artemis was a prospective purchaser.

### **Battery Sand**

107 In relation to the Battery Sands Feasibility, the following sums are claimed for work done post 24 March 2015:

- |       |             |  |
|-------|-------------|--|
| (i)   | \$ 2,220.00 | (including gst) for a meeting, research and planning activities exhibit 5;   |
| (ii)  | \$ 5,297.00 | (including gst) for work done on instruction from the respondent between October 2013 and December 2013 preliminary to feasibility study including a report exhibit 5; |
| (iii) | \$ 3,389.65 | (including gst) deposit for the conduct of sampling program required for the feasibility study which was commenced but not completed in 2014.                          |
|       | \$10,886.65 | TOTAL  |
| (iv)  | \$ 2,844.19 | Rates and taxes (undisputed)   |
|       |             | \$13,750.84 GRAND TOTAL  |

108 In relation to the Battery Sands Feasibility studies, the problem, in my view, is numerous for the Respondent:

- i) Firstly, Sutherland testified that the purpose of the Feasibility Study was “for Keystone Minerals to ‘get work’ on doing the actual proper Feasibility Study”. In my view, the feasibility study would not constitute expenditure on mining or in connection with mining, rather it is expenditure of a third party contractor. It was done at the request of Mr Shemissian/Exchange Minerals. How that ought equate to expenditure by the Respondent is not adequately explained, in my view.
- ii) Secondly, I do not accept Mr Sutherland to be an honest witness in view of observation made about his evidence. I do not accept that the ‘deposit invoice’ was a usual course of business but rather was an attempt to shore up expenses for the expenditure year in question. In my view the date of the invoice relative to the end of expenditure year is telling.
- (ii) Thirdly, whilst seen to be on the lease, Sutherland was not seen to be working. No evidence of his work on the lease is corroborated.
- iv) Finally, and not definitively, although the Mining Act does not distinguish between good exploration and bad exploration, in my view there comes a point, as is submitted by the Applicant, where the expenditure is so “perfunctory and/or useless” as the cost of it not valid expenditure. In this regard I respectfully considered the comments of Warden Reynolds in *Majeed Pty Ltd v and Harry George Shulda* Perth Wardens 9 March 1988 wherein the following observation was made:

*“The Warden, when determining whether a holder has complied with the expenditure provisions, should not concern himself with the efficacy of exploration and expenditure. The Warden should look at the nature of expenditure and the amount of expenditure and not whether the money has been well spent. If the Warden found that the expenditure was incurred, “in mining, on or in connection with mining on” then such expenditure must be taken into account when*



*determining whether the holder has complied with the expenditure provisions or not”.*

109 Bearing in mind that one of the primary purposes of the *Mining Act* is to ensure that the resources of the State are properly utilised, *Nova-supra*, and following from that, that expenditure is incurred to ensure that real or potential resources – simply do not sit idle. It cannot, in my view, be the case that expenditure which does nothing to advance that position meets the legislative criteria. In my view, Mr Sutherland’s report/recommendation had such little value that it could not reasonably be considered valid expenditure. The lack of value is recognised by reason of the fact that it’s not even referred to in Clent’s subsequent Prospectivity Report, nor Whittock’s Annual Report to the Department of Mines and Petroleum.

### **Office Overheads**

110 Office overheads are claimable as expenditure. The amount claimed in the Form 5 ought be allowed. I reject the Applicant’s suggestion no administration was conducted during the requisite year. It clearly, *inter alia*, instructed ARC to manage some of the regulatory obligations – that in itself being administration. The sums claimed are modest.

### **Desktop studies**

111 Any of the amounts claimed for work done before the Heinz letter are not claimable, as previously stated.

112 Furthermore, I find that the work done by Clent was done in respect to the ultimate purchase of the tenement by Artemis. He testified that he did his desktop review in order to assess the future viability a gold exploration from M47/223 and compare that data to be presented to a prospective purchaser. The restriction in Regulation 96c(4)(b) is not just in relation to an acquisition. The restriction also applies to a sale.

- 113 The fact that expenses associated with the trip were paid on an Artemis credit card adds to the immediately preceding conclusion. I do not accept Mr Robertson's explanation that this was the usual practice. I prefer to take the view that if an Artemis credit card was being used to pay for expenses then that supports the proposition that the work being done was for Artemis' benefit.
- 114 Furthermore, in relation to the food and accommodation expenses claimed as part of the table of expenses produced by Robertson, I refer to His Honour Warden Wilson's decision in *Blackfin Pty Ltd v Mineralogy Pty Ltd* [2013] WANW 19 wherein he held that food and accommodation expenses are normal day-to-day expenses and not claimable as expenditure for the purposes of the mining act.

### **Reasons For Decision**

- 115 In my view, for the reasons stated above, the Applicant has discharged his burden of satisfying me that the Respondent has not met his expenditure obligations, having expended only a Rents and Rates of \$2,844.19, and Administrative Cost \$1,043.75.

### **Penalty**

- 116 Having been satisfied that there has been failure to comply with the expenditure conditions, it falls to me to decide whether I should:

- I recommend to the Minister that the lease be forfeited
- II impose a penalty not exceeding \$10,000

- 117 S98(5) of the Mining Act provides that a recommendation for forfeiture shall not be made unless the Warden is satisfied that the non-compliance, in this case expenditure conditions is, in the circumstances of a case, of sufficient gravity to justify the forfeiture.

118 In *Craig v Spargos Exploration NL* (unreported Wardens Court 1986), the Warden pointed out that:

*“(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 the object and policy of the act.*

*The policy of the Act is that previously stated is that the tenement holder are unable or unwilling to explore or exploit mineral resources of a tenement should give way to some other person to do so”.*

- i) The Applicant submits that the Respondent failed to comply with the Warden’s directions in the proceedings with the potential consequences of non-compliance is potentially prejudicial to the parties but also prejudicial to the public person and having had the court’s time wasted if matters are not able to proceed. The latter did not occur in this particular instance.
- ii) That the Warden should have little regard for the fact that Artemis may be prejudiced by the forfeiture of the lease, it having purchased the lease after forfeiture proceedings were on foot.
- iii) That little weight should be given to the exploration proposed to be conducted on the lease by Artemis and that the intention to carry out work in the future is of little weight, *Cameron v Taylor* (Wardens Court 1988 Volume 4, Folio 10).
- iv) The lodgment of a false Form 5 supports the ascertain that the lease should be forfeited, *Rose v Goldtime Australia Pty Ltd* [2004] WANW 8 per Warden Edwards. I am not persuaded the preparation of the Form 5 involved deliberate dishonesty.
- v) That the imposition of a fine is not an appropriate penalty because Western Metals can effectively choose to pay a fine rather than comply with the expended condition.



119 It is submitted that in the circumstances of this case there, if there is a finding of non-compliance, forfeiture is the appropriate determination.

120 The Respondent submits:

- i) The annual reported expenditure over the life of the tenement is well in excess of the expenditure commitment and in each year there has been compliance with the expenditure commitment.
- ii) That the relevant tenement now 80% owned by Karratha Metals, which is wholly owned by Artemis
- iii) Artemis has plans for the development of the tenement along with the rest of its landholding in the West Pilbara region, namely its West Pilbara Project. That the tenement is critical to Artemis' plans for development of the West Pilbara Project. It has most significant inferred mineral resources and over half of the inferred resources of Artemis' West Pilbara Project is essential to allow Artemis to exploit the tenements so that may be done with the economic efficiency that comes with economies of scale. In this respect the aggregation of the Weerianna resource, together with Carlow Castle and other geographically approximate, geologically contiguous resources, is necessary in order for Artemis to prove up a significant and economically viable resource.
- iv) If the tenement is forfeited then Artemis will not be able to pursue its exploration planned for the West Pilbara Project with the substantial investment to date - approximately \$3.9m – will be wasted, *North v Legend Mining Ltd KNL No. 2 Pty Ltd* [2014] WANW 9 that the Applicant has no concrete plans for explanation of the resource.

121 In my view, weighting each of these matters up, the non-compliance is not of a sufficient gravity to recommend forfeiture of the tenement. I draw this conclusion primarily on the basis of my view that the consequences of forfeiture outweigh the nature of the non-compliance. Artemis, a third party to these

proceedings, stands to lose a valuable tenement, which on the basis of Robertson's evidence, they are in a position to exploit.

**Order**

A fine of \$10,000 is imposed on the Respondents, to be paid within 30 days to the Applicant.



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Andrew Maughan

Warden

August 2015