

**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : DONALD KIMBERLY NORTH v ARMADA  
MINING PTY LTD

**CORAM** : WARDEN MAUGHAN

**HEARD** : 14-15 SEPTEMBER 2015

**DELIVERED** : 6 NOVEMBER 2015

**FILE NO/S** : AFF 427132 and 427555

**TENEMENT NO/S** : E47/1745 & E47/1746

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

AND

ARMADA MINING PTY LTD  
(Respondent)

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Catchwords:

Application for Forfeiture – Turns on own Facts.

Legislation:

- *Mining Regulations* 1981 (WA)
- *Mining Act* 1978 (WA)
- *Aboriginal Heritage Act* 1972 (WA)

Cases referred to:

- *North v Armada Mining Limited* [2014] WANW 10
- *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* (unreported WASC, FC, 16 December 1988, SCL 7427, Noted 8 AMPLA Bull 62)
- *Flint v Nexus Minerals NL* (unreported – Full Court of Supreme Court of WA 26-2-97)
- *Craig v Spargos Exploration NL* (unreported, Wardens Court 1986, noted 6 AMPLA Bull 73)

## Result:

1. Armada is fined the sum of \$10,000.00 to be paid to the Applicant within 30 days.

**Representation:***Counsel:*

Applicant	:	Mr T Percy QC and Mr T Kavenagh
Respondent	:	Mr A Jones

*Solicitors:*

Applicant	:	Hunt and Humphry
Respondent	:	DLA Piper

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### **Background**

- 1 Armada Mining Pty Ltd (Armada) has been the holder, since June 2012, of Exploration Licences 47/1745 and 47/1746. (the exploration licence).
- 2 Artemis Resources Ltd (Artemis), through a corporate network, is the ultimate holding company of Armada.
- 3 For the year ending 15 May 2013 (2013 expenditure year) Armada was required to expend or cause to be expended on or in connection with mining on the exploration licences pursuant to Regulation 21 of the *Mining Regulations* 1981 (WA) (regulations):
  - a. In respect of E47/1475 a minimum of \$63,000
  - b. In respect of E47/1746 a minimum of \$105,000
- 4 Armada's further amended Statement of Particulars dated 17 September 2015 assert that the amount of expenditure incurred in the expenditure year were relevantly:
  - a. In respect of E47/1745 \$24,078.48. On the Armada's case a shortfall of \$38,921.19.
  - c. In respect of E47/1746 a total of \$40,419.16. On Armada's case a shortfall of \$64,580.84.
- 5 Armada lodged an application for exemption from expenditure for the exploration licences in relation to the 2013 expenditure year on 12 July 2013 (exemption application). The Applicant (North) objected to the exemption application. On 8 May 2014, Warden Tavener recommended the exemption application be refused: *North v Armada Mining Limited* [2014] WAMW 10.
- 6 The Minister for Mines and Petroleum refused the exemption application on 29 December 2014.

- 7 On 15 July 2013 North lodged an Application for Forfeiture of E47/1746. On 23 July 2013 North lodged an Application for Forfeiture of E47/1745. North claims that the respondent has failed to comply with the expenditure conditions and asks for the exploration licences to be forfeited.

### **The Law**

- 8 S62(1) of the Mining Act 1978 (Mining Act) provides:

*“During the currency of an exploration licence the holder thereof shall comply with the prescribed expenditure conditions relating thereto, unless, in accordance with this act total or partial exemption therefrom is granted”.*

- 9 S98 of the Mining Act provides:

**“98. Application for forfeiture on other grounds**

*(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 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.*

*(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 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.*

*(6) As soon as practicable after the hearing of the application the warden shall forward to the Minister the notes of evidence, with a report and the warden’s recommendation, if any, on the application and the Minister may, before acting on the recommendation, require*



*the warden to take such further evidence or rehear the application as the Minister directs.*

*(7) No exploration licence or mining lease shall be forfeited for non-compliance by the holder or lessee thereof with the expenditure conditions, if the holder or lessee satisfies the Minister that the non-compliance therewith has been occasioned by a strike.*

*(8) If the applicant fails to proceed with his forfeiture application, the warden may award the holder or lessee such sum for costs and expenses as he thinks fit.*

*(9) Where any penalty imposed by a warden as an alternative to forfeiture under subsection (4A) is not paid within the time specified by the warden, or within 30 days after the penalty is imposed where no other time is specified, the warden shall make a recommendation to the Minister as to whether or not the licence or lease should be forfeited”.*

- 10 It follows that it is necessary for me to first consider whether the holder has complied with the expenditure conditions. If it is not possible to make such a finding I may:
  - a. Recommend to the Minister that the licence be forfeited.
  - b. Impose a penalty not exceeding \$10,000, or
  - c. Dismiss the application pursuant to s98(4A) of the *Mining Act*.
- 11 In making a decision whether to fine or forfeit I must consider whether the non-compliance with the expenditure obligation is, in the circumstances of the case, of sufficient gravity to justify forfeiture.
- 12 ***In Commercial Properties Pty Ltd v Italo Nominees Pty Ltd*** (unreported WASC, FC, 16 December 1988, SCL 7427, Noted 8 AMPLA Bull 62) the Full Court confirmed that the onus of proving that Armada has failed to comply with expenditure obligations rests with North. If North establishes non-compliance the evidentiary burden rests upon Armada to show that the 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 prima 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 on the defendant to satisfy the warden that the case is otherwise not of sufficient gravity to justify forfeiture”.*

- 13 North called no evidence in relation to non-compliance. North relies on the Form 5 as establishing only a minor amount of expenditure by Armada.
- 14 In Re: Heaney; ex parte *Flint v Nexus Minerals NL* (unreported Full Court of the Supreme Court of Western Australia, 26 February 1997, it was held:

*“Once Form 5 was admitted into evidence as a statement against interest, the matter is favourable to the respondent’s case. Where also in evidence, and the Magistrate was entitled to treat the whole of the document as evidence of the truth of its contents. So much was rightly conceded by senior counsel for the applicants. The weight to be given to the various parts of the document was a matter for the Warden”.*

- 15 North challenged the amount claimed for rates in each Form 5 filed by Armada in respect of E47/1475 and E47/1746. The evidence, in my view, establishes that the amounts claimed were less than the amounts actually incurred.

The discrepancy, in terms of determining whether the gravity of the non-compliance warrants forfeiture is, in the scheme of things non-determinative – the discrepancies in light of the amount of non-compliance are so minor as to not warrant, in my view, further comment. In any event the amount of under-expenditure by Armada, as pleaded or as claimed in the Form 5’s, is significant in terms of quantum.

- 16 In *Craig v Spargos Exploration NL* (unreported, Wardens Court 1986, noted 6 AMPLA Bull 73) the Warden stated;

*“S98(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”.*

- 17 The policy of the *Mining Act* is that tenement holders who are unable or unwilling to explore or exploit the mineral resources of a tenement should give way to some other person to do so. The Mining Act encourages exploration and

mining activities and discourages tenement holders from going to sleep on their rights and obligations. *Craig*, (supra) per Warden Reynolds, at page 17.

18 North tendered the following affidavits in support of its case:

- 1 Affidavit of James Michael Hunt 17 April 2015
- 2 Affidavit of James Michael Hunt 24 June 2015
- 3 Affidavit of Gerald Patrick Sheridan 22 June 2015
- 4 Affidavit of Gerald Patrick Sheridan 22 June 2015

19 North contended:

- I That the Respondent had not met its expenditure commitment on the leases for the 2013 expenditure year.
- II That once non-expenditure is established it is of sufficient gravity to justify forfeiture and I should not be persuaded otherwise by Armada.

20 It can be gleaned from documents annexed to Mr Hunt's affidavit that the expenditure which Armada claims, in its Form 5 Operation reports lodged with the Department of Mines and Petroleum, for the expenditure year dated 15 May 2010, 2011, 2012, and 2013 are as follows:-

E47/1745

Year	Expenditure Commitment	Total Expenditure Claimed	Amount Under Expended	Actual Exploration Expenditure	Administration, Rent and Rates
2013	\$63,000.00	\$26,516.00	\$36,484.00	\$3,326.00	\$23,190.00
2012	\$63,000.00	\$23,028.00	\$39,972.00	\$986.00	\$22,042.00
2011	\$42,000.00	\$23,124.00	\$18,876.00	\$7,794.00	\$15,330.00
2010	\$42,000.00	\$16,411.00	\$25,589.00	\$1,951.00	\$14,460.00
<b>Total</b>	<b>\$210,000.00</b>	<b>\$89,079.00</b>	<b>\$120,921.00</b>	<b>\$14,057.00</b>	<b>\$75,022.00</b>



E47/1746

Year	Expenditure Commitment	Total Expenditure Claimed	Amount Under Expended	Actual Exploration Expenditure	Administration, Rent and Rates
2013	\$105,000.00	\$41,771.00	\$63,229.00	\$3,121.00	\$38,650.00
2012	\$105,000.00	\$37,723.00	\$67,277.00	\$986.00	\$36,737.00
2011	\$70,000.00	\$19,328.00	\$50,672.00	\$8,652.00	\$10,676.00
2010	\$70,000.00	\$30,951.00	\$39,049.00	\$6,851.00	\$24,100.00
<b>Total</b>	<b>\$350,000.00</b>	<b>\$129,773.00</b>	<b>\$220,227.00</b>	<b>\$19,610.00</b>	<b>\$110,163.00</b>

21 In these four expenditure years exemptions were sought. The exemptions were granted in the years ended 15 May 2010 and 2011 but refused by the Minister in the years ended 15 May 2012 and 15 May 2013. The Applicant submits that the above tables show that most of the expenditure incurred by the Respondent is on administration, rents, and taxes, and that there has been very little money expended on actual exploration.

22 In its opening, Mr Jones, for Armada:

*“We now elect to proceed on the basis that the applicant has, by its case, both established non-compliance with the expenditure conditions and discharged the onus of proof, but in doing so they have also tendered evidence of the expenditure claim in the Form 5 report.*

*Now that is of relatively minor significance in the outcome of this case, as my friend has said, and we concede, the claimed expenditure is extremely modest. We’re talking very small sums of money compared to the expenditure commitment. And, however, there were a number of factual and legal disputes in - that could potential arise, and arose on the party’s submissions in relation to that expenditure”.*

23 By electing to proceed in the above manner, the only issue which falls to be determined by me is whether the gravity of the non-compliance is sufficient to make a recommendation for forfeiture or whether I should fine, or dismiss that application.

24 In relation to the issue of gravity Armada claim effectively, that:



- I It should not be sanctioned for non-compliance because it could not reasonably be expected to do ground-disturbing work in circumstances where it could not get heritage clearance. Armada submits that they had to make an election between doing ground disturbing work and taking the risk of penalties under the Aboriginal Heritage Act and/or liabilities for interference with Native Title Rights and interests. Alternatively, not to do ground-disturbing work because of the aforementioned risks and run the risk that it would be sanctioned for non-compliance with expenditure conditions.

In essence Armada argues, in mining parlance, that it was, “between a rock and a hard place”.

- II That the forfeiture of these particular two tenements, E47/1745 and E47/1746 would be disproportionately prejudicial having regard to the nature of the non-compliance in that it would adversely impact upon the exploration and development of the entire West Pilbara Project (of which these tenements form part).

25 Armada called the following evidence:

Nicholas Rhys Davies, whose affidavit dated 19 May 2015, was tendered. He also gave viva voce evidence.

Mr Edward Clifton Mead, whose affidavit dated 26 May 2015, was tendered. He also gave viva voce evidence.

Mr Guy Andrew Robinson, whose affidavits dated 4 June 2015 and 10 July 2015 were tendered into evidence (parts of the affidavits were not relied upon by Armada). He also gave viva voce evidence. Mr Robinson was at all material times the CEO of Artemis and the sole director of Armada.

The affidavit of Jemimah May Mills dated 15 September 2015 was tendered.

### **The Heritage Argument**

- 26 It's not disputed that the subject tenements fall within an area where the Ngarluma people hold Native Title rights. Included in those rights is a right to protect and care for sites and objects of significance to the Ngarluma people. Such sites are identified on the disputed tenements.
- 27 In February 2012 Artemis instructed Mr Davies of DLA Piper Solicitors to assist in negotiations with the Ngarluma Aboriginal Corporation (NAC) for a heritage agreement in respect to the tenements comprising the West Pilbara Project, including the subject tenements. At the time Armada acquired the subject tenements, no such agreement was in place.
- 28 Artemis continued progressing negotiations, albeit on the basis of the Applicant's submission in a tardy manner, throughout the reporting year and was unable to reach agreement with the NAC until October 2013 with an agreement ultimately being executed on 5 December 2014.
- 29 At least from February 2012, when it received a letter from NAC, Armada ceased doing ground-disturbing work (including low impact four-wheel-drive mounted auger drilling and rock chip sampling) on the tenements comprising the West Pilbara Project in the absence of a heritage agreement. By its letter, NAC had objected to such work being done.
- 30 It was Armada's position during the reporting year that it could not conduct ground-disturbing exploration on the subject tenements as it would have exposed itself to unacceptable risk of liability:
- I In contravention of s17 of the *Aboriginal Heritage Act* 1972 (WA) and/or
  - II For compensation for interference with Native Titles under the *Native Title Act* 1993 (Commonwealth) or *Mining Act* 1978 (WA).
- 31 On the basis of historic 'mining records' Armada had formed the view that the next step in exploration was to conduct 'RC drilling' – a ground-disturbing work.

- 32 Mr Davies, Senior Associate from the firm of DLA Piper, who were instructed to negotiate the Aboriginal Heritage Agreement on behalf of Armada (and its related entities) denied that the Applications for Forfeiture in respect of these tenements garnered a sense of urgency in respect of the concluding of the negotiations when there had been a period of indolence in the preceding years. Mr Davies' view was that NAC had adopted an unreasonable position in relation to negotiations.
- 33 Mr Davies confirmed that he was aware that there was no legal prohibition to someone drilling on a mining tenement without heritage agreement but agreed that "you did so at your own peril". I take the peril to be a reference to the penalties/compensation which may flow from the aforementioned legislation.
- 34 The conclusion of Mr Davies' evidence, I ask the following question of him:

*"What's the option to your client where those negotiations stop and NAC adopts a position which they are not prepared to move?"*

In response, Mr Davies stated:

*"... It's a difficult situation, particularly with determined native title holders because you – the Federal Court has made a determination that these are the people for the area and that they have the cultural knowledge and that they are the ones you have to speak to in relation to the sites. So I made that analogy before saying, look, it's unlike commercial negotiations because if you're going to hold on to your tenements, you have to deal with them in one form or another. You're essentially left with a choice where you either have to surrender the tenure or seek to effectively circumvent the native title holders and conduct activities at your own risk, and those risks include the potential for offences under the Aboriginal Heritage Act, the sort of more extensive compensation liabilities and the other issues we've been - been talking about. So while it's true to say that they don't have a veto, it's – it's a pretty difficult situation and it lends itself to a lot of uncertainty, particularly because in response if a group becomes aware of you doing activities, they will send you letters of the kind we've looked at, they will often object to statutory approvals, whether there environmental or otherwise, and in certain circumstances they will go public. So a number of these bodies have – make a – make quite a point of going to newspapers and seeking to generate adverse publicity, including by going to shareholders and that sort of thing. It's a – it's a – it's a difficult situation. What was unique to this one is that NAC, up until Melissa Egan's involvement, had been so absolute in their position that we were really between a rock and a*



*hard place. It wasn't until Melissa's involvement that it – that it broke open”.*

### **The West Pilbara Argument**

35 E47/1745 and E47/1746 are, Armada submits, an integral part of the West Pilbara Project with potential to host economic resources in combination with E47/1797 (Carlow Castle) and M47/223 (Weerianna).

36 Artemis has incurred approximately \$3.5m acquiring Armada and planning for the future exploration of the West Pilbara Project. It has funds available to it to continue exploration on the project which have been raised through:

I A rights issue;

II Entering into a convertible note agreement for a \$2m facility.

37 Artemis have now completed negotiating procuring the execution of a project-wide Heritage Agreement with NAC. Additionally, it has engaged Mr Ed Mead as a consultant in the role of Exploration Manager with responsibility for developing and managing an exploration plan in respect of the entire project.

38 Mr Robinson conceded in cross-examination:

I That Artemis was an exploration company

II That Artemis had not “produced anything at all in the time that he has been CEO” stating:

*“We’re an exploration company”.*

III That Artemis has not paid any state royalties in respect of anything during the time that he has been Chief Executive Officer.

39 Mr Robinson also testified that Artemis would be divesting itself of certain other assets to enable it to focus its attention on the West Pilbara Project.

40 When asked by North’s counsel whether, if the forfeiture proceedings were successful, Artemis/Armada would continue with the West Pilbara Project, Mr

Robinson indicated that was a decision for the board and it would be inappropriate for him to comment.

41 He did however express the view:

*"It would create a very significant problem. They are two of the largest tenements within the West Pilbara Project. It would be the largest land mass across the project, with some of the key VTEM anomalies and prospects in the project".*

42 Counsel for North took Mr Robinson to paragraph 125 of his affidavit dated 4 June 2015 which states:

*"It is my belief, because E47/1745 and E47/1746 are integral to the West Pilbara Project, if E47/1745 and E47/1746 are forfeited:-*

*125.1 Artemis will not be able to pursue its commercial objectives and exploration plan in respect to the West Pilbara Project;*

*125.2 The work that Artemis has undertaken in respect to the West Pilbara Project and E47/1745 and E47/1746 (E47/1746), and the substantial investment that Artemis has made in the West Pilbara Project will be wasted".*

43 Counsel asked whether he maintained that view to which Mr Robinson responded, "Yes".

### **Conclusions**

44 On the basis of the matters raised I conclude:-

- I That Armada Mining Pty Ltd failed to meet its expenditure obligations for the expenditure year on the subject tenements for the 2013 expenditure year.
- II Mindful of Warden Tavener's findings in recommending refusal of exemption in *North v Armada Mining* 2014 WAMW 10, namely:

*"The fact that Armada has been negotiating since March 2007 mitigates his finding that there has been a genuine and concerted effort to negotiate and finalise an agreement with the NAC. No appreciable progress has been since June 2010. Since Mr Clent took over negotiations in 2013 there had been some email exchanges, an occasional meetings, and limited progress; no material*

*was produced to explain the nature of the negotiations particularly when such negotiations were time critical, it being the fifth year of the lease”.*

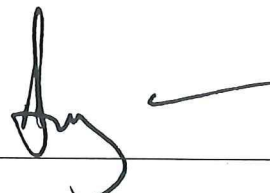
I find, with respect, the situation has changed since Warden Tavener handed down his decision in that the heritage agreement with NAC is now executed and the delay for reaching that position better explained. Armada were in a difficult situation by reason of the compromising position summarised in paragraphs 25 to 32 of these reasons. That situation in and of itself, in my view, would not provide a ground for avoiding forfeiture. Armada's failure to obtain a heritage agreement in a timely manner is not, in my view, satisfactorily explained. That the agreement has finally been obtained, in the face of these proceedings, is too coincidental, such that adverse comment ought not flow.

- 45 I am not told of any impediments now facing Artemis/Armada in the progression of the West Pilbara Project.
- 46 The subject tenements are critical to the economic viability of the West Pilbara Project and that forfeiture of those tenements would be disproportionate to the failure to expend.
- 47 In all the circumstances, I do not propose to make a recommendation for forfeiture to the Minister. In lieu thereof, a fine of \$10,000.00 is imposed.

### Orders

I make the following order:

1. Armada is fined the sum of \$10,000.00 to be paid to the Applicant within 30 days.

  
Warden Maughan