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**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : ONSLOW PREMIUM SANDS PTY LTD v K PLUS  
S SALT AUSTRALIA PTY LTD [2019] WAMW 8

**CORAM** : WARDEN J O'SULLIVAN

**HEARD** : 4 & 5 September 2018

**DELIVERED** : 14 May 2019

**FILE NO/S** : Application for Restoration 502887;  
Objection 504699

**TENEMENT NO/S** : Exploration Licence 08/2333

**BETWEEN** : **ONSLOW PREMIUM SANDS PTY LTD**  
(Applicant)

AND

**K PLUS S SALT AUSTRALIA PTY LTD**  
(Objector)

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*Catchwords:*

*Restoration; prior history of tenement management; expert  
evidence.*

**Legislation:**

- *Mining Act 1978 (WA)* s97A & 115A
- *Mining Regulations 1981 (WA)* reg 96C
- *State Administrative Tribunal Act 2004 (WA)* s32

**Result:**

1. *It is recommended that Application for Restoration 502887 be refused.*

**Representation:**

*Counsel:*

Applicant	:	Mr TJ Kavenagh
Objector	:	Mr MF Gerus

*Solicitors:*

Applicant	:	Kavenagh Legal
Objector	:	Mining Access Legal

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**Cases referred to:**

- *Re Minister for Resources; Ex-parte Cazaly Iron Ore Pty Ltd* (2007) 34 WAR 403
- *Hayes Mining Pty Ltd v Tantalum Australia NL* [2006] WAMW 9
- *Carnegie Gold Pty Ltd. v McKenna and McClaren* [2015] WAMW 17
- *R v Toohey; Exparte Northern Land Council* (1981) 151 CLR 170
- *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24
- *Medical Board of Australia v Woollard* (2012) 82 SR (WA) 347
- *R v The War Pensions Entitlement Appeal Tribunal and another; ex parte Bott* (1933) 50 CLR 228
- *Rodrigues v Telstra Corporation Ltd* [2002] FCA 30
- *BRGM Nominees Pty Ltd v Hake* Unreported; Kalgoorlie Mining Warden; 26 October 1988; noted at AMPLA Bull 17

**Publications:**

- Cross on Evidence 8<sup>th</sup> Australian ed, 2010; Justice JH Heydon

## **Introduction**

1. Exploration Licence 08/2333 was automatically forfeited on 8 March 2017 because the penalty imposed for late payment of rent was not paid by the due date.
2. The tenement holder, Onslow Premium Sands Pty Ltd (“Onslow”), seeks restoration of E08/2333. K Plus S Salt Australia Pty Ltd opposes the application for restoration.

## **Background**

3. Lawrence Richard Hargrave applied for E08/2333 on 29 September 2011.<sup>1</sup> E08/2333 was granted on 5 August 2015.<sup>2</sup>
4. On 14 September 2015 Mr Hargrave transferred E08/2333 to Onslow.<sup>3</sup>
5. Mr Hargrave is a director of Onslow and the sole shareholder of Lawhar Enterprises Pty Ltd which owns 50% of the shares in Onslow.<sup>4</sup>
6. Mr Hargrave is also a director of Golden Mile Milling Pty Ltd (“GMM”). Lawhar Enterprises Pty Ltd holds 60% of the shares in GMM.<sup>5</sup>
7. GMM and Onslow share the same business premises. GMM holds eight tenements and Onslow had only one; E08/2333.<sup>6</sup>
8. From September 2015 to December 2015 Onslow’s accountants, Wall Business Services, was authorised to send any correspondence relating to E08/2333 directly to GMM.<sup>7</sup>

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<sup>1</sup> Affidavit of Lawrence Richard Hargrave; sworn 20 October 2017 (Hargrave Affidavit) at [5]

<sup>2</sup> Hargrave Affidavit at [9]

<sup>3</sup> Hargrave Affidavit at [13]

<sup>4</sup> Hargrave Affidavit at [1]

<sup>5</sup> Hargrave Affidavit at [4]

<sup>6</sup> Affidavit of Shannon Terrence McMahon; affirmed 29 March 2018 at 1.1.3 & 1.1.4

<sup>7</sup> Hargrave Affidavit at [15]

9. As Onslow had no employees until February 2017, GMM staff dealt with all matters relating to E08/2333 including utilising the Lakewood Mill as a base to organise exploration activities and expenditure for E08/2333.<sup>8</sup>
10. In October 2015 the agreement with Wall Business Services was terminated and thereafter Pat Leighton Accountants provided accounting services to Onslow. Wall Business Services was notified of the appointment of Pat Leighton Accountants in or around January 2016.<sup>9</sup>
11. On 25 May 2016 Onslow's registered office was updated to Pat Leighton FCA, 77 Maritana Street, Kalgoorlie WA 6430.<sup>10</sup>
12. The Department of Mines and Petroleum (now the Department of Mines, Industry Regulation and Safety ("DMIRS")) was not advised Onslow had changed its registered office.<sup>11</sup>
13. In August 2016 Mr Hargrave was made aware that correspondence for E08/2333 was going to the wrong address.<sup>12</sup> Mr Hargrave testified (although there is no mention of this in his affidavit) that he tasked solicitors McKenzie & McKenzie with sorting out the problem with correspondence. Whatever took place, there is no evidence the instructions, if any, to McKenzie & McKenzie were followed up. Nor is there any evidence anyone from Onslow attended Wall Business Services to collect any mail or that a request was made of the DMIRS to provide copies.
14. On 2 October 2016 Adrian John Horne, an engineer engaged by GMM, attended the DMIRS Kalgoorlie registry in relation to an unrelated matter. He was advised that Onslow had not submitted its annual expenditure report (Form 5) by the due date.<sup>13</sup>

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<sup>8</sup> Hargrave Affidavit at [16]

<sup>9</sup> Hargrave Affidavit at [17] & [18]

<sup>10</sup> Hargrave Affidavit at [19]

<sup>11</sup> Hargrave Affidavit at [22]

<sup>12</sup> t/s Mr Hargrave; 4/9/18 at [56]

<sup>13</sup> Affidavit of Adrian John Horne; sworn 33 February 2018 (Horne Affidavit) at [7] & [8]

15. On 8 November 2016 Mr Hargrave was advised, whilst visiting the DMIRS Kalgoorlie Registry on an unrelated matter, that the rent for E08/2333 was overdue.<sup>14</sup>
16. Mr Hargrave issued a cheque to the DMIRS from the GMM account for the rent (\$4,662.00) whilst at the Registry.<sup>15</sup>
17. There is no evidence Mr Hargrave checked to see if GMM had sufficient funds available before the cheque was issued.
18. On 14 December 2016 Mr Hargrave was advised that M26/367 (a GMM tenement) had been forfeited for non-payment of a fine.<sup>16</sup>
19. Mr Hargrave could not remember the exact reason but assumed it was non-payment of a fine.<sup>17</sup>
20. On or around 15 December 2016, Mr Horne advised Mr Hargrave that correspondence from the DMIRS for GMM and Onslow was still being sent to Wall Business Services.<sup>18</sup>
21. On 15 December 2016 a Form 30, Application to Amend, was lodged with the DMIRS amending Onslow's address.<sup>19</sup>
22. On 19 December 2016 Onslow received a letter from the DMIRS advising that the rent for E08/2333 remained overdue.<sup>20</sup>
23. On 20 December 2016 Mr Hargrave visited the DMIRS Registry in Kalgoorlie and was advised the rental payment he attempted to make on 8 November 2016

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<sup>14</sup> Hargrave Affidavit at [23]

<sup>15</sup> Hargrave Affidavit at [26]

<sup>16</sup> t/s 4/9/18; Mr Hargrave; at [26]

<sup>17</sup> t/s 4/9/18; Mr Hargrave; at [29]

<sup>18</sup> Hargrave Affidavit at [28]; t/s 4/9/18; Mr Horne at 70

<sup>19</sup> Hargrave Affidavit at [29]; LH7

<sup>20</sup> Hargrave Affidavit at [32] & LH8

had not cleared and the rent remained overdue.<sup>21</sup> The cheque had been dishonoured due to insufficient funds.<sup>22</sup>

24. Mr Hargrave issued another cheque from GMM's account then and there.<sup>23</sup> Yet again there is no evidence Mr Hargrave made any inquiry as to whether GMM had sufficient funds.
25. On 4 January 2017 Mr Hargrave, whilst visiting the DMIRS Registry in Kalgoorlie, was advised the rent payment for E08/2333 had again not cleared.<sup>24</sup>
26. After checking that GMM had sufficient funds, Mr Hargrave immediately issued a third cheque.<sup>25</sup>
27. On 23 January 2017 Onslow received a letter from the DMIRS stating that the mineral exploration report for E08/2333 had not been lodged by 18 October 2016 as required.<sup>26</sup> The time for lodgment was extended to 23 February 2017 which was complied with.<sup>27</sup>
28. In January 2017, Pat Baldock and Katherine Baldock took urgent compassionate leave.<sup>28</sup> Mr Baldock is described by Mr Hargrave as an accounts administrator but he is also the General Manager of GMM.<sup>29</sup> Mrs Baldock provides administrative support to Mr Baldock.<sup>30</sup>
29. During the 2 months that Mr and Mrs Baldock were on leave, Kate Simmons was the sole member of staff working in administration for GMM and Onslow.<sup>31</sup>

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<sup>21</sup> Hargrave Affidavit at [34]

<sup>22</sup> Hargrave Affidavit at [27]

<sup>23</sup> Hargrave Affidavit at [35]

<sup>24</sup> Hargrave Affidavit at [37]

<sup>25</sup> Hargrave Affidavit at [38]

<sup>26</sup> Hargrave Affidavit at [39]

<sup>27</sup> Hargrave Affidavit at [40]

<sup>28</sup> Hargrave Affidavit at [41]

<sup>29</sup> Hargrave Affidavit at [25]

<sup>30</sup> t/s Mr Hargrave; 4/9/18 at [67]

<sup>31</sup> Hargrave Affidavit at [42]

According to Mr Hargrave “Ms Simmons struggled to meet all of the administrative demands during the period of Mr and Mrs Baldock’s leave”.<sup>32</sup>

30. Mr Hargrave<sup>33</sup> was cross-examined about Ms Simmons:

***“Q And you say in your affidavit that you had instructed Ms Simmons to ensure all financial correspondence was placed in the age payable tray so it was actioned immediately?”***

***A Yes, she – that’s correct.***

***Q That’s right***

***A Yes***

***Q ... so when did you instruct her?***

***A That was just part of the admin. I didn’t instruct her, but that was part of what Catherine Baldock would have done with her.***

***Q So you didn’t instruct her?***

***A On that particular – on how to – that was part of the process of what was done at the mill. Yes***

***Q So your recollection is that you didn’t do it.***

***A I’m not the admin assistant. No.***

***Q So you didn’t give her any instructions.***

***A She would have had instructions, but not directly ---***

***Q But you didn’t give her any instruction?***

***A Not directly from me, no.***

***Q And you didn’t give her any instructions, but you knew she was struggling – she was struggling at the time?***

***A Because both Pat and Catherine, who work with her, was had a – couldn’t be at work at the time, yes.***

***Q Yes, but she was struggling. And she was the only person in the office?***

***A Yes, she was.***

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<sup>32</sup> Hargrave Affidavit at [44]

<sup>33</sup> t/s 4/9/18, Mr Hargrave at 65-67

...

*Q Is it your evidence she was struggling to meet her requirements for the job at the time?*

*A She had a lot more, because Catherine wasn't there. She had a lot more workload.*

*Q She had a lot more to do?*

*A Yes.*

*Q And she was the only person in the office.*

*A That's correct*

*Q And she was employed by Golden Mile Milling.*

*A That's correct.*

*Q And you were in the office too.*

*A Yes, I was.*

...

*Q And so Mr Horne wasn't there?*

*A Well, Adrian worked in his office. Yes.*

*Q So he was there at the time?*

*A He was at the office, yes. Yes.*

*Q All right. And Mr Burrows was there at the time as well?*

*A Yes, I think he was. Yes.*

*Q And you didn't go looking through Mr Baldock's in trays?*

*A No."*

*(emphasis added)*

31. Mr Baldock returned to work around mid-March 2017. On or around 17 March 2017,<sup>34</sup> Mr Baldock provided Mr Hargrave with a letter from the DMIRS dated

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<sup>34</sup> Hargrave Affidavit at [45]



10 March 2017 confirming E08/2333 had been forfeited at midnight on 8 March 2017 due to non-payment of a penalty imposed for late payment of rent.<sup>35</sup>

32. The letter from the DMIRS refers to a notice sent to Onslow on 2 February 2017 advising that a penalty of \$482.00 had been imposed by the Minister for late payment of rent and if it was not paid by 8 March 2017, E08/2333 would be forfeited automatically.<sup>36</sup>
33. Mr Baldock advised Mr Hargrave that he subsequently searched his office and located the letter from the DMIRS dated 2 February 2017 in his tray for non-urgent matters.<sup>37</sup>
34. Ultimately, a new software package was developed and Gilbert Francis Burrows, a geologist employed by GMM, was instructed to take over tenement administration with a view to ensuring the errors and omissions are not repeated.<sup>38</sup>

### **The Law**

35. Section 97A of the *Mining Act 1978 (WA)* provides:

*"Subject to subsection (2), where a mining tenement is forfeited under or by virtue of section 96, 96A or 97 a person who was, immediately prior to the forfeiture, the holder of the tenement concerned may apply for the mining tenement to be restored to him and the forfeiture cancelled."*

36. The Warden's role is to make a recommendation to the Minister (s97A(7)(b)).
37. Section 97A is an unfettered power, there being no criteria specified to which the Minister is required to give consideration.
38. As a consequence, whether the power in s97A ought to be exercised calls for a consideration of whether the grounds relied on justify restoration of the

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<sup>35</sup> Hargrave Affidavit at [46]

<sup>36</sup> Hargrave Affidavit at [27]; LH12

<sup>37</sup> Hargrave Affidavit at [47]; LH13

<sup>38</sup> Hargrave Affidavit at [54]-[56]

tenement having regard to the subject matter, scope and purpose of the *Mining Act*<sup>39</sup>.

39. In *BRGM Nominees Pty Ltd v Hake*<sup>40</sup> Warden Reynolds set out what has since been accepted as the relevant principles:

*"The Act is silent on the matters to be taken into account when determining whether a mining lease should be restored or not. Without wishing to be exhaustive it seems to me that consideration should be given to the explanation for the non-payment of the rent, the degree of the lack of care, if any, on the part of the holder in attending to the payment of the rent and the existence of any special circumstances.*

*...*

*In my opinion the decision whether to restore or not would involve the weighing of the considerations mentioned. As a matter of general principle at the outset none of those considerations should be given any greater priority than any other. The facts of each particular case will determine where the emphasis should be placed. Where there is no good explanation, a gross lack of care and no special circumstances then restoration should be refused. Where there is no good explanation and a gross lack of care it may be appropriate for the tenement to be restored if there are special circumstances. It may not be necessary for any special circumstances to exist where the holder is able to provide some good explanation for the non-payment of the rent or show that the non-payment was not the result of any lack of care on his part.*

*When determining whether any special circumstances exist, the Court should give consideration to the length of time that the holder had held the tenement, the expenditure incurred in any years prior to the date upon which the rent became payable, whether the holder had delineated an ore body, whether the holder had caused the necessary arrangements to be made for a mining operation to commence, whether the holder was actually carrying out a mining operation on the tenement, the size of any planned mining operation or existing mining operation and generally the prejudice that would be suffered by the holder if the tenement was not restored. Whether special circumstances exist or not depends of course on the facts in each particular case. "*

40. One of the key issues that emerged during the hearing concerned how the test propounded by Warden Reynolds in *BRGM* is to be interpreted.

<sup>39</sup> See *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Gibbs CJ at 186; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39

<sup>40</sup> unreported; Kalgoorlie Mining Warden; 26 October 1988; noted at *AMPLA Bull* 17

41. The test laid down by Warden Reynolds in *BRGM* calls for a two stage approach. First, consideration is to be given to the explanation for non-payment and the degree of lack of care. Second, if there is no good explanation and a gross lack of care, the tenement is only to be restored if there are special circumstances.
42. If it is established that there was some good explanation for the non-payment or shown that the non-payment was not the result of any lack of care, then the tenement is recommended for restoration and there is no need to examine if special circumstances exist.
43. The termination of the inquiry after stage one appears to represent an acknowledgement that a tenement holder who can demonstrate there was some good explanation or no lack of care, should not be at risk of losing its tenement.<sup>41</sup>
44. Onslow contends that as E08/2333 was forfeited for non-payment of the penalty (not non-payment of rent), then the question as to whether there was a good explanation or no lack of care is confined to an examination of how it was that the penalty was not paid on time, in preference to examining all the circumstances, leading up to the forfeiture of E08/2333 including those related to the non-payment of rent.
45. Onslow's argument, as I understand it, is that whatever may have happened so far as the late payment of rent is concerned, if there is a good explanation for the failure (ie non-payment of the penalty on time) that resulted in forfeiture or the non-payment did not involve a lack of care, then the tenement should be restored and there is no requirement to establish special circumstances. Onslow relies on Warden Maughan's decision in *Carnegie Gold Pty Ltd v McKenna and McClaren*.<sup>42</sup>
46. K Salt on the other hand argue that the non-payment of rent and the subsequent penalty are intrinsically related, in that one led to the other. Accordingly,

<sup>41</sup> *Re Minister for Resources; Ex-parte Cazaly Iron Ore Pty Ltd* (2007) 34 WAR 403 at [23]

<sup>42</sup> [2015] WAMW 17

whether there was a good explanation and no lack of care involves a consideration of the entirety of the circumstances resulting in the forfeiture of the tenement.

47. In my view, the test in *BRGM*, in referring to “a good explanation or no lack of care”, is drawing a distinction between two states of affairs. If, for example, a tenement holder’s default is a result of a bank error involving no fault on behalf of the tenement holder, whatever the events leading up to the default, it should not lose its tenement.<sup>43</sup> Similarly, if a tenement holder has a suitable system of tenement management in place that has been shown to be effective in ensuring compliance, an isolated failure may well be characterised as involving no lack of care. Even a diligent and prudent tenement holder can make a mistake.
48. Critically, so far as the degree of lack of care is concerned, the default is not a consequence of a systemic failure or a failure by the tenement holder to take its obligations seriously.
49. By contrast, where the default is a consequence of a flawed system or no system at all, it is capable of being characterised as involving a lack of care.
50. What may appear to be an isolated failure involving no lack of care may take on a different complexion once it is established that the tenement holder routinely makes errors in its tenement administration and has failed to take steps to remedy the situation. This is particularly so where errors of the same kind are made repeatedly.
51. There may, of course, be situations in which a tenement holder with a poor history of compliance draws a line in the sand and demonstrates that it now takes its obligations seriously by implementing a suitable system of tenement management and ensuring that that system is adhered to. Despite the poor

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<sup>43</sup> See for example *Carnegie Gold Pty Ltd v McKenna and McClaren* [2015] WAMW 17 at [32]-[33]

history, the error itself may be characterised as involving no lack of care, the tenement holder having taken all reasonable steps.

52. The determination of whether a default involves a lack of care often has more to do with the circumstances in which the error occurs than the nature of the error itself. It is for this reason that the same error may be demonstrative of a lack of care in one case but involve no lack of care in another. Each case will of course depend on its own facts.

**Was there a gross lack of care?**

53. In my view, there is no question that if the circumstances giving rise to the non-payment of rent are taken into account, there was a gross lack of care in this case. Onslow repeatedly failed to resolve the problems with receiving correspondence from the DMIRS on which it seemed totally reliant for information as to the management of its tenement. On a number of occasions Onslow only became aware it was in default because Mr Hargrave or Mr Horne serendipitously happened to visit the Kalgoorlie registry of the DMIRS.
54. The procession of errors that resulted in the rent being overdue was exacerbated by the fact that Mr Hargrave wrote two cheques without checking whether there were sufficient funds in the GMM account. As a consequence both cheques were dishonoured.
55. In addition, as the following exchanges indicate, Onslow had no system of tenement management:

***Mr Hargraves*** <sup>44</sup>

*Q* There was no database to record key dates with respect to the tenements.

*A* Well Adrian [‘Horne’] was managing that.

...

<sup>44</sup> t/s; 4/9/18 Mr Hargrave at [62] & [63]

*Q The records of the tenements and the key anniversary dates?*

*A Well, Adrian would have known all that.*

*Q You had no system of promptly complying with Onslow's and GMM's obligations under the Mining Regulations?*

*A Yes, I had Adrian.*

*Q At the time there was no system in place whatsoever?*

*A Well, you put people who are professional to handle the matters, and because he was, you know because he was a mining geo and a lawyer, and covered a lot of facets in his degree, I felt like he was capable.*

...

*Q And so your evidence is you relied on him [Mr Horne]?*

*A Well, at that point of time he was the tenement manager. Yes.*

**Mr Horne**<sup>45</sup>

*Q And so when you were engaged [by GMM] at the time you weren't engaged as a tenement manager?*

*A No.*

*Q And you weren't engaged as a geologist?*

*A No.*

*Q And that's because you have no qualifications in geology?*

*A No formal qualifications.*

*Q And you have no qualifications relevant to tenement management.*

*A No.*

...

*Q So you weren't instructed to act as a tenement manager on behalf of Golden Mile Milling?*

*A No. I didn't have a job description. I had a constant stream of people coming to my door asking me technical questions, like they would say, 'Can you handle this', 'can you do this', 'can you work this out'. And some things ended up on my desk by default.*

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<sup>45</sup> t/s 4/9/18; Mr Horne at [71] – [77]

...

*Q And so during your time as a consultant to Golden Mile Milling how many tenements did you manage?*

*A I didn't actually manage any of them.*

*Q You didn't manage them?*

*A No. I did work in relation to them, but I didn't manage them.*

*Q In relation to the mining tenements of Golden Mile Milling, was it your responsibility to ensure that there was compliance with the Mining Regulations?*

*A In part, yes.*

*Q And so that compliance related to the filing of Form 5's, operations reports?*

*A I wasn't – well, I don't think anyone was responsible, but I – that was something ended up by default.*

*Q And why did it end up with you by default?*

*A Because no one else was doing it. If something was brought to my attention I invariably tried to resolve the matter in however it had to be done.*

*Q ... by default you would be the person who prepared the draft Form 5's; is that right?*

*A It was never sort of said, but I ended up doing that.*

*Q And in relation to matters such as the payment of rent, that is, the rental under the Mining Act for the mining tenements, was that a matter you were responsible for?*

*A No. If I received any correspondence I normally handed it to the admin department of the accounts payable department, and then it was out of my hands.*

*Q And so you had no formal instructions in relation to the tenements of Golden Mile Milling?*

*A No.*

*Q No formal instructions in relation to the tenement of Onslow Resources?*

*A No.*

...

*Q Onslow Premium Sands, you were aware of it?*

*A I was aware that we owned it, but that was all, basically. I didn't know what the anniversary dates were, because I had never seen any paperwork of it.*

*Q And I think in your affidavit you say at all critical times you weren't aware of the anniversary dates?*

*A That's right.*

*Q You weren't aware of when the Form 5 was due?*

*A No.*

*Q You weren't aware of the address. You weren't aware of anything?*

*A No."*

56. As I apprehend Onslow's argument the error that caused the forfeiture of E08/2333 is of a different character to those that resulted in the non-payment of rent by the due date. In addition, howsoever the late payment of rent arose, by the time the failure to pay the penalty occurred, Onslow had resolved the problems with receiving correspondence from the DMIRS and had in place a system to ensure financial correspondence was actioned immediately. Thus the failure to put the letter from the DMIRS dated 2 February 2017 in the correct tray ought to be characterised as involving no lack of care.
57. In my view, the evidence does not support the characterisation advanced by Onslow.
58. First, Mr Hargrave's, having sworn an affidavit saying he had instructed Ms Simmons, acknowledged in cross-examination that this was not true. Nor does Mr Hargrave say he heard Mrs Baldock instruct Ms Simmons or suggest that Mrs Baldock (or Ms Simmons) told him she had done so.
59. As neither Mrs Baldock nor Ms Simmons gave evidence, there is no evidence as to what, if any, instructions Ms Simmons received. Mr Hargrave's assumption as to the instructions Ms Simmons received is just that.



60. Second, Ms Simmons was required to take on the administrative duties previously undertaken by both Mr and Mrs Baldock.
61. Third, despite the fact Mr Hargrave was aware Ms Simmons was struggling under the workload, there is no evidence she was provided with any supervision or assistance, even though Mr Hargrave, Mr Horne and Mr Burrows were working in the office at the time.
62. Fourth, Onslow had only recently (19 December 2016) informed the DMIRS of the correct address to which correspondence was to be sent. Thus it could not be said, as at January 2017, that Onslow had established a system of tenement management that had been demonstrated to be effective. In reality while Onslow had solved one problem it had created another.
63. Fifth, Mr Hargrave was aware that M26/367 had been forfeited in December 2016, for non-payment of a penalty. He was, therefore, on notice that a fine would be forthcoming and of the consequence if it was not paid on time.
64. Mr Hargrave's affidavit seeks to portray a situation whereby the error occurred through no fault of Onslow in that Ms Simmons, having been properly instructed, made an error.
65. As I have pointed out, there is no evidence as to what, if any, instruction Ms Simmons received. Moreover, Onslow seems unwilling to accept it was responsible for the fact that Ms Simmons was struggling to do the work of two people without assistance. In the circumstances it is hardly surprising she may have made an error.
66. Even ignoring the events that caused the rent to not be paid on time, it cannot be said there is a good explanation for the failure attributed to Ms Simmons nor does the error represent an isolated failure of an otherwise suitable system of tenement management that had been shown to be effective. The circumstances of this case are unlike those in *Carnegie Gold* where the tenement holder endeavoured to

pay the penalty by the due date but through no fault on its part the bank made an error.

67. Accordingly, I am satisfied that the failure to pay the penalty by the due date involved a gross lack of care on Onslow's behalf.

### **Special Circumstances**

68. Warden Reynolds in *BRGM* points to a number of matters that are relevant to the question of whether special circumstances exist. Although the list is not exhaustive, it includes:

- (1) the length of time that the holder had held the tenement;
- (2) the expenditure incurred in any year prior to the date upon which the rent became payable;
- (3) whether the holder had delineated an ore body;
- (4) whether the holder had caused the necessary arrangements to be made for a mining operation to commence;
- (5) whether the holder was actually carrying out a mining operation on the tenement;
- (6) the size of any planned mining operations or existing mining operations; and
- (7) generally the prejudice that would be suffered by the holder if the tenement is not restored.

69. The matters identified by Warden Reynolds seem to be directed to eliciting the extent of any prejudice likely to be suffered by the tenement holder and to what extent the tenement holder has taken steps to actively develop the tenement and is thereby promoting the objects of the *Mining Act*. Obviously, the longer the

tenement holder has held the tenement and the more money expended on it, the greater the prejudice if the tenement is not restored.

70. Onslow points to a number of matters in support of the proposition that special circumstances exist.

*The Form 5 and expenditure claimed*

71. Onslow maintains that the Form 5 reported expenditure of \$79,757.62 is well in excess of the minimum required (\$36,000).<sup>46</sup>
72. Onslow say further that given the claimed expenditure is well above the minimum there is no utility in conducting a minute examination of the expenditure as would occur in an application for forfeiture.<sup>47</sup>
73. K Salt says that the expenditure is both exaggerated and not claimable so as to render the Form 5 misleading.<sup>48</sup>
74. In my view, a tenement holder who puts forward the meeting or exceeding of its expenditure obligations as a special circumstance, must expect the items claimed in the Form 5 to be scrutinised. I can see no reason in principle why an objector is not entitled to test the veracity of the information in the Form 5; the tenement holder having put it in issue.
75. In the event it is demonstrated that either the minimum requirement was not met or at least that the Form 5 is misleading, that may not only negate expenditure as a special circumstance but it may, in an appropriate case, be a matter that weighs against restoration of the tenement.
76. Restoring the tenements of those who are recklessly indifferent to whether an item of expenditure is claimable or otherwise deliberately misrepresent

<sup>46</sup> Onslow's written submissions at [17d]

<sup>47</sup> Onslow's written submission at [17d]

<sup>48</sup> K Salt's written submissions at [76]

information in a Form 5 does not promote the objects to the *Mining Act* let alone the effective administration of the *Mining Act* by the DMIRS.

77. So far as this case is concerned, a number of items of expenditure in the Form 5 were challenged. While K Salt did not advance a specific amount as reflecting the total amount of expenditure that was properly claimable, it says it is clear that substantially less than \$79,757.62 is claimable having regard to the following observations:

(a) Legal expenses (\$25,000) expended in acquiring E08/2333 are not claimable expenditure. Regulation 96C(4) provides:

*“The following costs and payments cannot be used in the calculation of expenditure expended on, or in connection with, mining on the mining tenement -*

- (a) the cost of marking out mining tenements;*
- (b) any costs associated with the acquisition or sale of mining tenements;*
- (c) research activities not directly related to a specific tenement;*
- (d) compensation payments made in respect to the mining tenement.”*

*(emphasis added)*

K Salt says that while prior to the hearing Onslow conceded legal expenses were not claimable; the fact remains that Onslow included this as an item of expenditure when it lodged its Form 5.

(b) Travel and accommodation of \$14,363.71 is claimed. This includes various trips by Neil Jones and Benjamin Jones.

Neil Jones is a director of GMM (GMM has an interest in Onslow).<sup>49</sup> Benjamin Jones is a property fund manager in London.<sup>50</sup>

K Salt argues that having regard to the limited evidence provided concerning the trips referred to in paragraphs [33]b(i) – (viii) of Mr Horne’s

<sup>49</sup> Horne Affidavit at (33b(i))

<sup>50</sup> Horne Affidavit; at (33b(ii))

Affidavit, it has not been established that these expenses, so far as they relate to Neil and Benjamin Jones, are claimable.

For example, \$7,077.76 is claimed for Benjamin Jones to fly to Perth to have discussions with Mr Hargrave. There is no evidence as to the purpose or nature of those discussions.

Similarly, \$601.00 is claimed for Neil Jones to fly from Perth to Kalgoorlie because he was interested to see whether a project could be established on E08/2333.

K Salt referred to various other trips by Neil and Benjamin Jones without any explanation as to the purpose of each trip.

- (c) Geological expenses of \$3,200 are claimed for a geological review carried out by Mark Sampson.<sup>51</sup> K Salt points to the fact no report was produced nor was there any evidence as to what was in it.
- (d) Environmental, Engineering and Metallurgy accounts for \$37,266. This represents costs associated with work done by Mr Horne through his company Hornepros Pty Ltd.<sup>52</sup>

According to K Salt at least 7 days of work carried out by Mr Horne was devoted to considering the viability of a sustainable aquaculture project.<sup>53</sup> This, K Salt says, is not claimable expenditure as it was not on or in connection with mining.

- (e) Additional items such as survey maps (\$2,500) and technical books (\$1,000) are also not claimable according to K Salt as the purpose of the survey and the purchase of the books related to the aquaculture project.<sup>54</sup>

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<sup>51</sup> Horne Affidavit; at [33bx]

<sup>52</sup> Horne Affidavit; at [33c]; AH1

<sup>53</sup> Horne Affidavit; at [33c (vi)]

<sup>54</sup> t/s Mr Horne at 89 & 90

***Changes to Onslow's tenement management***

78. Onslow argues that it has now resolved its tenement management problems given Mr Burrows has taken on that task.
79. K Salt contend there is no formal agreement directly with GMM and that Mr Burrows is a geologist with no experience in tenement management.

***Lodgement of the mineral exploration report***

80. Onslow says that in order to lodge the mineral exploration report required by s115A of the *Mining Act*, Mr Burrows undertook a review of available historical data, the results of testing by Mr Horne and market and infrastructure research and investigation undertaken by Mr Horne and Mr Hargrave.<sup>55</sup>
81. K Salt point out that Onslow was obligated to lodge a mineral exploration report and that even then the report was lodged nearly 5 months out of time and after forfeiture proceedings were commenced.

***Mr Burrow's geological analysis and plans to produce a mineralisation report***

82. Onslow rely on a number of observations made by Mr Burrows:<sup>56</sup>
- the land the subject of E08/2333 has the potential for an industrial sands project;
  - five separate heavy mineral deposits were identified in 1969 and 1970;
  - a total tonnage of 217 m tonnes of industrial sands, including mineral sands existing on the land the subject of the Licence, an inferred resource could be calculated and an industrial sands project is commercially viable;

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<sup>55</sup> Onslow's written submissions at [17f]

<sup>56</sup> Affidavit of Gilbert Francis Burrows; sworn 22 February 2018 at [25]-[31]

- A volume of 144,932,557 cubic metres was calculated by Minecomp using Surpac Software to combine the digital outline from aerial mapping with the Shuttle Radar Topography Mission; and
  - Onslow has plans to produce a mineralisation report and supporting statement with a view to apply for a mining lease.
83. K Salt in turn points to the fact that many of the opinions expressed by Mr Burrows were preliminary in nature. Mr Burrows agreed that further work was required to establish the suitability of material for customers, the offtake quantities required, shipping parameters, the logistics of getting material to a port, and loading and transporting by ship.<sup>57</sup>
84. K Salt refer also to the fact that Mr Burrows conceded:
- (a) that a scoping study including investigating environmental and native title issues needed to be done; and<sup>58</sup>
  - (b) that the work done by Mr Horne in relation to concrete and construction and shipping was general research and non-geological in nature.<sup>59</sup>
85. K Salt argues there is no evidence of designs or conceptual plans.<sup>60</sup>
86. Mr Burrows said that he had identified the size of the industrial sands and its grade.
87. K Salt argue that Mr Burrows conceded he is not qualified in accordance with the JORC Code <sup>61</sup> to make that assessment. Nor is there any evidence that Mr Burrow was the beneficiary of a waiver.

<sup>57</sup> t/s 5/9/18; Mr Burrows at [107]-[108]

<sup>58</sup> t/s 5/9/18; Mr Burrows at [110]

<sup>59</sup> t/s 5/9/18; Mr Burrows at [111]

<sup>60</sup> t/s 5/9/18; Mr Gerus at [162]

<sup>61</sup> JORC Code means the Australasian Code for Report of Exploration Results, Mineral Resources and Ore Reserves prepared by the Joint Ore Reserves Committee of the Australasian Institute of Mining and Metallurgy, the Australian Institute of Geoscientists and the Minerals Council of Australia as in force from time to time (see s74(7) of the *Mining Act*).

88. K Salt also takes issue with whether Mr Burrows' evidence meets the standard of expert evidence in accordance with the principles set down by the State Administration Tribunal of Western Australia (SAT) in *Medical Board of Australia v Woollard*.<sup>62</sup>
89. Onslow argues that the principles adopted by SAT in *Woollard* do not apply to a warden acting administratively. Onslow says that s32 of the *State Administration Tribunal Act 2004 (WA)* (*SAT Act*) is framed in different terms to reg 154 of the *Mining Regulations*. In addition, SAT was sitting as an administrative appeal unlike a warden acting administratively.
90. Mr Burrows' affidavit refers to Shuttle Radar elevation data from Geoscience Australia being used to create 1,627,710 data points which were then used to create a topographic contour surface map.<sup>63</sup>
91. Using Google Earth Imagery, Mr Burrows says he defined the accurate limits of the coastal sands dune sheet of the land. That information together with surface topography using Geoscience Australia topographical data derived from Shuttle Radar Topography Mission (SRTM), enabled a calculation to be made of the total volume of dune sand by Minecomp, a Kalgoorlie based survey and mine planning consultants.<sup>64</sup>
92. According to Mr Burrows, Minecomp used Surpac software to combine the digital outline from aerial mapping with the SRTM topographic surface to calculate a volume of 144,932,557 cubic metres. Mr Burrows expressed the opinion that based on his study and experience, this estimate is reasonable.<sup>65</sup>

***Other expenses and the time taken to progress the tenement to grant***

93. Onslow says it took it nearly 4 years and \$25,000 in legal expenses to secure E08/2333.

<sup>62</sup> (2012) 82 SR(WA) 347

<sup>63</sup> Burrows Affidavit at [25i]

<sup>64</sup> Burrows Affidavit at [25j]

<sup>65</sup> Burrows Affidavit at [25k]



94. K Salt argues that Onslow's assertions as to the work done are not supported by evidence. Moreover, Onslow tried to claim it as expenditure even though it did not comply with reg. 21 of the *Mining Regulations*.
95. Onslow also rely on Mr Horne's accommodation costs. While Onslow says these costs were not advanced as expenditure on or in connection with mining, they are an expense nonetheless.

### **Previous Non-compliance**

96. A further question that arose in these proceedings concerned the relevance of previous non-compliance.
97. K Plus argues that in the event it is established there is a lack of care, previous non-compliance should be taken into account when considering whether special circumstances militate in favour of restoration.
98. Onslow, whilst conceding its compliance has been less than ideal, say that GMM underwent a rapid expansion and substantial growth in 2016. Onslow also contends that as appropriate procedures have now been implemented, little weight should be given to previous non-compliance.
99. K Plus rely on the decision of Warden Auty in *Hayes Mining Pty Ltd v Tantalum Australia NL*<sup>66</sup> as authority for the proposition that previous non-compliance is a relevant consideration in determining if special circumstances exist.
100. *Hayes Mining* concerned an application for restoration for non-payment by the due date of a penalty imposed for late lodgment of the Form 5. Warden Auty having expressed general agreement with the test laid down by Warden Reynolds in *BRGM*, declined to follow the two stage approach recommended therein.<sup>67</sup>

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<sup>66</sup> [2006] WAMW 9

<sup>67</sup> At [42]-[43]

101. Although Warden Auty expressly considered the degree of lack of care, her Honour did so in the context of addressing whether special circumstances exist.<sup>68</sup>
102. As a consequence it appears that Warden Auty's reference to "no system of checking compliance" and the "Form 5's are misleading" relate to there being a gross lack of care<sup>69</sup> even though her Honour goes on to find there are no special circumstances.
103. In my view, a tenement holder's history of tenement management is a relevant factor when considering whether special circumstances support restoration of the tenement.
104. Just as a good record may weigh in favour of restoration, a poor record may provide support for the view that a tenement holder who has demonstrated an unwillingness or inability to meet its obligations should not have its tenement restored.
105. As Warden Reynolds made clear in *BRGM* the matters relevant to the question of whether special circumstances exist are not exhaustive. The weight given to a tenement holder's history of tenement management will of course depend on what is revealed by that history and the strength or weakness of the other matters to be considered.
106. A review of Onslow's tenement management history reveals that in addition to not paying the rent and the subsequent penalty by the due date, the Annual Mineral Exploration Report for E08/2333 was not filed within the prescribed period.
107. Furthermore, Onslow's failures must be viewed in a context where GMM itself, who was purportedly managing E08/2333, has a history of poor compliance, including the restoration of M26/367 on 23 June 2017

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<sup>68</sup> At [43]

<sup>69</sup> At [53]

108. GMM has received a number of forfeiture notices in relation to four tenements it holds.<sup>70</sup>

**Do special circumstances exist?**

109. In my view Onslow has not established special circumstances exist for the following reasons:

- (1) The fact that Onslow has now implemented a system of tenement management is not a special circumstance. I do not see how a tenement holder finally taking steps to do what the legislation requires can constitute a special circumstance. The same analysis can be applied to the lodgment of the mineral exploration report, particularly when that report was lodged nearly 5 months late.
- (2) The expenditure recorded in the Form 5 is substantially less than the reported \$79,757.62. I accept the general proposition advanced by Onslow that on occasion honest mistakes will be made as to what is or is not expenditure “on or in connection with mining”.

However, in this case Onslow claimed \$25,000 in legal expenses expended in acquiring E08/2333 when it was clearly not claimable. Regulation 96C(4) expressly excludes “any costs associated with the acquisition or sale of mining tenements”.

This is not an item of expenditure about which there could have been any legitimate confusion. At best Onslow failed to properly investigate whether this item was claimable.

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<sup>70</sup> P26/4150 - Forfeiture 527866; 13/04/18 for non-compliance with reporting requirements.  
P26/4048 - Forfeiture 523608; 16/02/18 for non-compliance with rent requirements  
M26/367 - Forfeiture 492351; 17/08/16 for non-compliance with reporting requirements  
M26/242 - Forfeiture 478940; 15/12/15 for non-compliance with rent requirements  
- Forfeiture 498555; 20/12/16 for non-compliance with rent requirements  
- Forfeiture 499855; 20/01/17 for non-compliance with reporting requirements  
(Mining Tenement Register Search; P26/4150; P26/4048; M26/367 & M26/242)

In addition to legal expenses there are a number of other items of expenditure that are not claimable including travel and accommodation for Neil and Benjamin Jones, geological expenses attributed to Mark Sampson, the work carried out by Mr Horne related to aquaculture together with the survey and purchase of technical books.

- (3) Limited on ground work had been carried out on E08/2333. This was confined to soil samples taken by Mr Horne.
- (4) Although I accept that five separate heavy mineral deposits were defined in 1969 and 1970, Mr Burrows' geological analysis and plans to produce a mineralisation report is general in nature with further work to be done in relation to a number of items.

One of the relevant matters identified by Warden Reynolds in *BRGM* concerns whether the tenement holder has delineated an ore body. Although Mr Burrows may have conceded he is not qualified to express an opinion for the purposes of the JORC Code, he is a qualified geologist who is capable of expressing an expert opinion on the subject. In my view the level of precision in identifying the resource and the experience of the geologist expressing the opinion are matters that go to weight.

So far as Mr Burrows' expert opinion as to size of the industrial sands is concerned, particular reliance is placed by K Salt on the decision of the SAT in *Woollard*.<sup>71</sup>

In *Woollard*, SAT had cause to consider what principles ought to be applied to purported expert evidence given s32 of the *SAT Act* provides that SAT is not bound by the rules of evidence and is to act according to equity, good conscience and the substantial merits of the case.

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<sup>71</sup> (2012) 82 SR (WA) 347

SAT<sup>72</sup> referred to the remarks of Evatt J in *R v The War Pensions Entitlement Appeal Tribunal and another; ex-parte Bott*<sup>73</sup> to the effect that the rules of evidence are not to be ignored as of no account and represent an attempt made through many generations to evolve a method of inquiry best calculated to prevent error and illicit the truth.

Evatt J commented that although the rules of evidence do not bind, every attempt must be made to administer substantial justice.<sup>74</sup>

In summarising the conditions for admissibility of expert opinion evidence, SAT<sup>75</sup> referred to Justice Heydon in *Cross on Evidence*:<sup>76</sup>

*“[t]he expert must identify the assumptions of primary fact on which the opinion is offered ... The opinion is not admissible unless evidence has been, or will be, admitted whether from the expert or from some other source which is capable of supporting findings of primary fact which are sufficiently like those factual assumptions to render the opinion of the expert of ... value (the basis rule).”*

Justice Heydon<sup>77</sup> went on to observe that the basis rule does not require any fact to be proved – it requires only that there be evidence admitted or to be admitted, capable of sustaining findings of fact having some correspondence with the expert’s factual assumption.

In *Woollard*, SAT found that:

*“Although the Tribunal is not bound by the rules of evidence, in order for expert evidence to be of value and accepted by the Tribunal, primary facts sufficiently like the factual assumptions upon which the expert evidence is based must be found by the Tribunal.”*

In *Woollard*, a doctor called by Dr Woollard purported to provide an expert opinion on a procedure carried out by Dr Woollard. The doctor based his opinion on three assumptions which were rejected by the

<sup>72</sup> At [85]

<sup>73</sup> (1933) 50 CLR 228 at 256

<sup>74</sup> At 256

<sup>75</sup> At [86]

<sup>76</sup> 8<sup>th</sup> Australian ed, 2010; Justice JH Heydon

<sup>77</sup> At [29045]

Tribunal. As a consequence even though the Tribunal was not bound by the rules of evidence, it found the doctor's evidence to be of no probative value.

As I pointed out earlier Onslow argues that the principles in *Woollard* do not apply because SAT was hearing an appeal and the legislative regimes are different. The first thing to notice is that *Woollard* involved an allegation by the Medical Board as to Dr Woollard's conduct as a medical practitioner. It was not an appeal from a decision of the Medical Board.

Second, the difference in the terminology between the two pieces of legislation is in my view, insignificant. Section 32(4) of the *SAT Act* says "The Tribunal may inform itself on any matter as it sees fit", whereas reg 154(1)(d) of the *Mining Regulations* says "... the Warden may inform himself or herself of any matter in any manner he or she considers appropriate."

The fact that the *Mining Regulations* adopt a more flexible procedure than a court does not justify decisions made without a basis in evidence having probative force.<sup>78</sup>

The issue in this case is more fundamental than that in *Woollard* where SAT rejected the assumptions on which the doctor's opinion relied.

In this case Mr Burrows' opinion is based on calculations carried out by Minecomp. Mr Burrows' opinion rests on the accuracy of Minecomp's methodology as to which there is no evidence.

Against that background Mr Burrows' opinion rests on assumptions that are not the subject of evidence.

Even if I am wrong and Mr Burrows' opinion as to the size of the resource should be accepted, it would not have produced a different outcome. In

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<sup>78</sup> *Rodrigues v Telstra Corporation Ltd* [2002] FCA 30 per Kiefel J at [25]

the end the fact remains that limited work has been done to develop the resource.

- (5) The non-claimable expenditure (legal expenses and Mr Horne's accommodation) together with the time it took to acquire E08/2333 do not constitute special circumstances when all the circumstances of this case are taken into account.
- (6) The history of tenement management supports the view that Onslow (and GMM) have not approached the obligations under the *Mining Act* in a diligent and prudent manner.

### Conclusion

110. For the reasons set out above I recommend that Application for Restoration 502887 be refused.

  
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Warden O'Sullivan

14 May 2019