JURISDICTION	:	MINING WARDEN
LOCATION	:	PERTH
CITATION	:	KIMBERLEY MINERALS LTD V SPINIFEX ABRASIVES PTY LTD [2020] WAMW 13
CORAM	:	WARDEN J O'SULLIVAN
HEARD	:	15 October 2019; Supplementary Submissions 12 and 19 November 2019
DELIVERED	:	20 May 2020
FILE NO/S	:	Applications for Forfeiture 539004
TENEMENT NO/S	:	Mining Lease 04/455
BETWEEN	:	**KIMBERLEY MINERALS LTD** (Applicant)
		AND
		SPINIFEX ABRASIVES PTY LTD (First Respondent)

Catchwords: *Application for forfeiture; non-compliance with expenditure conditions; adjournment*

Legislation:

- *Mining Act 1978* ss 82(1)(c), 98(4A), 98(4B), 102(2), 102(3) &103
- *Mining Regulations (1981) (WA)* reg 31(1) & 96C(3)

Cases referred to:

- ***AON Risk Services Australia Ltd v Australian National University*** [2009] HCA 27
- ***Cauldron Energy v Beijing Joseph Investment Co Ltd*** [2016] WASC 22
- ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd***; unreported FCt SCt of WA; del 16 December 1988; Lib No 7427
- ***Craig v Spargos Exploration NL***; unreported; Kalgoorlie Warden's Court; 22 December 1986
- ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153
- ***Lightrange v Bond*** [2017] WAMW 12
- ***Mawson West Ltd & Anor v Scervman Holdings Pty Ltd*** [2010] WAMW 10
- ***Nova Resources NL v French*** (1995) 12 WAR 50
- ***Pawson v Northwestern Mining Co Pty Ltd & Anor*** [2013] WAMW 8
- ***Rose v Goldtime Australia Pty Ltd*** [2004] WAMW 8
- ***Snook v Registrar of the Fines Enforcement Registry*** [2019] WASCA 204
- ***Wells v Powell*** (1971) SASR 313
- ***Ziverts v City of Albany*** [2018] WASC 283

Result:

Forfeiture of Mining Lease 04/455 is recommended

Representation:

Counsel:

Applicant	:	Ms M K Watt
Respondent	:	In Person

Solicitors:

Applicant	:	M Watt Legal
Respondent	:	In Person

Introduction

1 Kimberley Minerals Ltd (Kimberley) lodged an application seeking the forfeiture of M04/455 which is currently held by Spinifex Abrasives Pty Ltd (Spinifex). The application is based on the alleged failure by Spinifex to comply with the expenditure conditions for the reporting year 21 July 2017 to 20 July 2018.

2 The matter was set down for hearing on 15 October 2019. On 14 October 2019, Mr Lawrence Molloy, a director appearing on behalf of Spinifex, lodged an application to adjourn the hearing.

3 On 15 October 2019, after hearing from both parties, I refused the adjournment application and indicated that I would publish my reasons together with my reasons in the substantive application.

The Adjournment Application

The Law

4 The principles concerning adjournments are well established. In ***Ziverts v City of Albany***[1], Pritchard J (as she then was) acknowledged that adjournments are granted if it is expedient in the interests of justice to do so. Her Honour adopted the following passages from Mitchell J (as he then was) in ***Cauldron Energy v Beijing Joseph Investment Co Ltd:***[2]

> *The discretion to grant or refuse an adjournment must also be exercised consistently with the obligation of the court to determine disputes in a manner which is procedurally fair. However, it is well established that this does not require that a party be given an unlimited opportunity to present a case or defence. What is required is that the parties are provided with a sufficient opportunity to present their cases. A party who is given a sufficient opportunity to present their case, and who fails to take advantage of that opportunity without reasonable cause, cannot complain that they have been denied procedural fairness because the court has declined to provide a further opportunity to do so.*
>
> *In considering whether determination of litigation is just, regard must be had to the interest of other parties to the litigation and other litigants in other*

[1] [2018] WASC 283.
[2] [2016] WASC 22 [135]-[138].

> *cases. Speed and efficiency, in the sense of minimum delay and expense, are aspects of the just resolution of proceedings.*
>
> *Considerations of speed and efficiency cannot detract from the requirement that a party to litigation be given sufficient opportunity to present their case. However, where a party has been given a sufficient opportunity to present their case then a decision about an adjournment to provide further opportunity must take account of the injustice to the other parties which may follow from the delay, expense*
>
> ...
>
> *...I bear in mind the requirement that the Court is to consider whether an adjournment of the trial is expedient in the interests of justice. In determining what is just in the determination of litigation, whether a party has been given a sufficient opportunity, or will have a sufficient opportunity, to prepare for and present their case, does not require that they be given an unlimited amount of time. The question in the end, taking all of the circumstances into account, is whether a party will have a sufficient opportunity to prepare for and present their case.*

Background

5 On 5 April 2019, Mr Molloy appeared on Spinifex's behalf and programming orders were made including that Spinifex file and serve any outline of the submissions, affidavits, statements of evidence and book of documents by 4 June 2019.

6 Mr Molloy had filed a document titled "Statement of Particulars" on 27 February 2019 and a further document with the same title on 2 May 2019. Both documents included various factual assertions and included documentation on which Spinifex intended to rely. No witness statements or affidavits were filed.

7 As at 4 June 2019, the date set for compliance with the orders made on 5 April 2019, nothing further was filed.

8 On 21 June 2019, Mr Molloy yet again appeared for Spinifex at the mention hearing at which time he intimated he still wished to file further evidence and sought to explain why he had not done so by 4 June 2019. Mr Molloy made a number of assertions from the bar table none of which were supported by any evidence.

9 Mr Molloy was told he would need to lodge an application requesting to extend time together with an affidavit explaining the delay and why he needed further time. The purpose of programming orders was explained to Mr Molloy. He was also advised to lodge the application sooner rather than later and that he would have to live with the consequences in the event he did not do so. A date for the substantive hearing was set for 15 October 2019.

10 No application or affidavit addressing the matters raised on 21 June 2019 was lodged between 21 June 2019 and 15 October 2019.

11 At 3:35 pm on 14 October 2019 (the day before the hearing) Mr Molloy lodged an application requesting that the hearing be adjourned to January 2020. He also lodged additional documentation together with copies of some documents that had been provided previously.

12 The application advanced two reasons for which the adjournment was sought.

13 First, Mr Molloy had sustained an injury to the right side of his abdomen on the evening of 9 October 2019.

14 Second, there are a number of witnesses Mr Molloy wished to call to give evidence.

15 A third ground was added at the commencement of the hearing concerning the desire to engage Mr Newton, a lawyer, who attended the hearing with Mr Molloy.

16 I will deal with each of these grounds in turn.

(A) *Mr Molloy's Injury*

17 In support of this ground Mr Molloy produced a medical certificate dated 10 October 2019.

18 The medical certificate says only that Mr Molloy is receiving medical treatment and for the period 10 October 2019 – 20 October 2019, he is unfit to attend court.

19 The medical certificate does not indicate:

(i) what Mr Molloy told the doctor;

(ii) the injury or illness for which Mr Molloy is receiving treatment;

(iii) what sort of examination was undertaken (ie x-ray, MRI etc);

(iv) Mr Molloy's prognosis;

(v) what treatment he received or should receive (ie was Mr Molloy prescribed pain relief and, if so, what kind?);

(vi) Mr Molloy's level of function (ie can he walk, sit, stand, write and talk). Nor whether the injury or illness or medication, if any, that was prescribed, has affected his cognitive ability or memory; or

(vii) precisely what it was about Mr Molloy's condition that rendered him unfit to attend court.

20 In my view, the medical certificate was patently inadequate. It is entirely conclusory in nature and provides no foundation upon which I was able to make an informed assessment as to whether Mr Molloy was physically or mentally able to present his case.

21 With the greatest respect, I cannot be expected to simply take the doctor's word for it. Ultimately, it is for the court to determine if an adjournment is justified.

22 Mr Molloy was able to show me the bruising on the right side of his abdomen. He said this injury was sustained in a fall.

23 Mr Molloy described his injuries as:

> *Cracked rib – the shoulder – and the head. And it's – makes me not able to concentrate for short periods of time. Okay. And then I go woozy.*

24 I note that this description is at odds with the description in the adjournment application lodged on 14 October 2019 which says he has an injury to the right

side of his abdomen and makes no mention of a fractured rib or any injury to the shoulder or head.[3]

25 After further inquiry, Mr Newton indicated[4] that he had been able to have an intelligent conversation with Mr Molloy and take instructions from him. Mr Newton also said that although he was not representing Mr Molloy, he was prepared to assist him as a McKenzie friend.

26 In my view, there was nothing before me to indicate that with some modification to the procedures, Mr Molloy was incapable of properly representing Spinifex's interests. To that end I advised Mr Molloy that he was free to remain seated if need be and that in the event he felt his concentration was waning, he would be granted a short adjournment. I also took into account that Mr Newton would be providing him with assistance. At the conclusion of the hearing Mr Molloy was given the opportunity to provide written closing submissions.

(B) *Lodging Further Evidence of Expenditure*

27 In addressing this ground Mr Molloy had to confront the fact that he had been on notice since 12 September 2018 that Spinifex's claimed expenditure was to be scrutinised.

28 Mr Molloy was also required to confront the fact that he had not complied with the programming orders made on 5 April 2019.

29 Moreover, Mr Molloy had not explained why he had not taken the opportunity afforded him on 21 June 2019 to file an affidavit explaining his non-compliance and setting out why further time was required to file witness statements or affidavits. The medical certificate filed on 14 October 2019, to which I referred earlier, did not address this issue.

---

[3] I note that in a subsequent medical certificate from a second doctor dated 23 October 2019 filed with Mr Molloy's written closing submissions, there is also no mention of a fractured rib or an injury to the head or shoulder.

[4] ts; 14

30 Mr Molloy attempted to explain his inaction by reference to his apparent ill health during the mention hearing on 21 June 2019 which purportedly resulted in him being unaware of what he was required to do.

31 In the transcript of the mention hearing on 21 June 2019, Mr Molloy makes no mention of being unwell or not understanding what is being said. On a number of occasions during the mention hearing Mr Molloy acknowledges he understands what he is required to do.

32 The difficulty with this ground was compounded by the fact that Mr Molloy did not produce any medical evidence on 15 October 2019 in support of the proposition that he was incapable of understanding the proceedings on 21 June 2019 because of ill health.

33 When confronted with this difficulty Mr Molloy conceded, "I slipped up in not getting it done."[5]

34 In the end result no evidence was produced that Mr Molloy was unwell on 21 June 2019 or, in support of the assertions made by Mr Molloy on 21 June 2019 as to his non-compliance with the programming orders made on 5 April 2019.

35 So far as Mr Molloy's intention to produce further evidence is concerned, I make the following observations.

36 The reporting year ended on 21 July 2018. Spinifex then had 60 days to lodge the Form 5. This is the period prescribed by the legislation to enable a tenement holder to collate and calculate its expenditure.

37 On this occasion Spinifex lodged its Form 5 for M04/455 1 month (ie 20 August 2018) after the end of the reporting year and thus did not take advantage of the full 60 days.

[5] ts; 6.

38 Mr Molloy certified on the Form 5 that the information provided constitutes a true statement of the operations carried out and moneys expended on M04/455 during the 2017/2018 reporting period.[6]

39 Nothing in the wording of the certification or the instructions accompanying the Form 5 suggest that the tenement holder need only include enough expenditure to satisfy the minimum commitment.

40 Against that background it is somewhat surprising that Spinifex's Response filed 21 September 2018 in the forfeiture proceedings said:

> *The expenditure conditions were totally satisfied with the joint venture partners to also provide supplementary expenditure, other grounds to be added when data is at hand.*

41 If, as required, Mr Molloy had collated and calculated all of Spinifex's expenditure on M04/455 when certifying that the information on the Form 5 was correct, why did the Response forecast that there was further expenditure to be included? The Response also implies the expenditure conditions were 'totally satisfied" indicating that some calculation or reconciliation had been done at that time.

42 Surely, if more time was required to collate all of the expenditure, Mr Molloy would at least have used the entire 60 days provided for in the legislation.

43 Ultimately, it came to pass that on 7 October 2019, nearly 14 months after the expiry of the 60 day prescribed period, Mr Molloy lodged a supplementary Form 5 including additional expenditure.

44 The reference by Mr Molloy throughout the course of the forfeiture proceedings to the need to adjourn the proceedings to produce further evidence relates to material that should already have been collated for the purpose of lodging the Form 5 within 60 days of the end of the reporting year.

[6] Spinifex's Further and Better Particulars (annexed to Ex 5) confirm Mr Molloy completed the Form 5.

45 Moreover, having regard to the Further and Better Particulars[7] filed by Mr Molloy and the content of the Supplementary Form 5,[8] it is apparent that this further evidence would have been of no assistance.

46 As is discussed in more detail later in these reasons, marketing expenses are not allowable expenditure.[9]

47 In summary:

a. Mr Molloy failed to adequately explain why he needed an adjournment to collect further evidence;

b. If Mr Molloy had properly completed the Form 5 by the due date, he should already have collated all of the relevant items of expenditure and should not have had needed an adjournment; and

c. The additional evidence identified by Mr Molloy was not claimable expenditure in any event.

(C) *Engaging Mr Newton*

48 As I mentioned earlier Mr Newton attended the hearing with Mr Molloy on 15 October 2019. Mr Newton explained that he was still considering whether to represent Spinifex.

49 Mr Newton confirmed that as he had not seen all the documentation until 11 October 2019, he was not in a position to proceed today (even if he decided he would represent Spinifex).

50 It was originally suggested that as a consequence of his accident on 9 October 2019, Mr Molloy formed the view he could not represent Spinifex and had attempted to engage Mr Newton at late notice[10].

---

[7] An attachment to Ex 4.
[8] An attachment to Ex 5.
[9] ***Lightrange v Bond*** [2017] WAMW 12; [33].
[10] ts; 8.

51 However, further discourse[11] revealed that Mr Molloy had approached Mr Newton about a month before the hearing but as outlined above had not provided all the documentation to Mr Newton until recently.

52 Bearing in mind this matter had been on foot since 12 September 2018, Mr Molloy had had ample opportunity to brief Mr Newton.

Prejudice

53 As I have already explained, any prejudice to which Spinifex was subjected so far as the failure to lodge witness statements and affidavits and brief Mr Newton in a timely manner was never satisfactorily explained and supported by evidence.

54 So far as Mr Molloy's accident is concerned, any prejudice, as I have also explained, was appropriately remediated by allowing him to take breaks as required and the assistance provided by Mr Newton. Mr Molloy was also given the opportunity to file written closing submissions.

55 As a postscript, nothing I observed during the hearing suggested that Mr Molloy was not able to coherently make submissions, cross-examine and give evidence. On one occasion whilst being cross-examined he said he was tired. However, when offered the opportunity to take a break, Mr Molloy declined.

56 On the other hand, Kimberley, like any litigant, was entitled to have the matter determined within a reasonable time and have the matter proceed to hearing on the designated date. Furthermore, as Ms Watt explained, her client had travelled from Paraburdoo for the hearing. It follows that if an adjournment was granted, representatives for Kimberley would suffer the inconvenience of having to attend a further hearing in Perth. In addition, there are the cost implications of getting the matter up for a second time.

57 There is also a public interest in the matter proceedings so that M04/455 does not remain in dispute for an extended period. The public interest is also manifested

[11] ts; 7 & 11.

in the case management principles designed to ensure, among other things, that court time is not wasted[12].

Conclusion

58 Applying the principles applicable to considering applications for adjournments including the prejudice likely to be suffered by each of the parties, I am not satisfied any of the three grounds advanced by Mr Molloy on Spinifex's behalf have merit. Accordingly, I concluded it is not in the interests of justice to grant the adjournment.

The Forfeiture Application

The Objects of the Mining Act

59 In ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum***[13] the Court of Appeal referring to ***Nova Resources NL v French***[14] summarised to the objects of the *Mining Act*:

> *One of the recognised primary objects of the Mining Act is to ensure, as far as practicable, that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration subject to reasonably stringent conditions. However, that is not its only object. Other objects or purposes identified by the courts include:*
>
> *1 identifying circumstances in which a tenement holder will be allowed to hold a mining tenement without mining or giving it up for others who may wish to actively mine the land;*
>
> *2 protecting tenement holders who have defaulted in compliance with the Act in some minor respect, or because of some circumstances beyond the control of the tenement holder, against loss of the tenement.*
>
> *3 providing that, in general, the holder of a mining tenement should carry out the relevant mining activity on the tenement.*
>
> *(footnotes omitted)*

[12] ***Snook v Registrar of the Fines Enforcement Registry*** [2019] WASCA 204; [29] citing ***AON Risk Services Australia Ltd v Australian National University*** [2009] HCA 27.
[13] ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153; [96]-[97].
[14] ***Nova Resources NL v French*** (1995) 12 WAR 50.

Forfeiture: General Principles

60 Every mining lease[15] is granted subject to the obligation to comply with the prescribed expenditure conditions applicable to such land unless an exemption is granted.[16]

61 If an exemption is granted, the subject tenement is not susceptible to forfeiture.[17]

62 In ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd*** [18] the Full Court said:

> *In the case of failure to comply with expenditure conditions the legislature 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.*

63 The words "in the circumstances of the case" involve:

> *[a] broad and comprehensive spectrum of considerations not limited to any one criteria and not identifying any one or other criteria as being determinative.*[19]

64 In ***Craig v Spargos Exploration NL,*** Warden Reynolds[20] remarked:

> *Subsection 98(5) thus impresses upon the Warden the necessity of considering, not only the non-compliance and facts directly bearing upon it, but also 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. The whole policy of the Act is that a tenement holder unable to explore for or exploit mineral resources of a tenement should give way for some other person to do so. The Act encourages exploration and mining activity and discourages a tenement holder from going to sleep on his rights and obligations.*

---

[15] Except some that are subject to a State Agreement which provides otherwise.
[16] See ss82(1)(c) & 102(2) & (3) of the *Mining Act 1978* (WA).
[17] See s103 of the *Mining Act 1978.*
[18] ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd*** unreported; FCt SCt of WA; del 16 December 1988; Library No.7427; 15.
[19] ***Re Warden Calder; Exparte Brosnan (No.2)*** [2012] WASC 214; [87].
[20] ***Craig v Spargos Exploration NL*** unreported; Kalgoorlie Warden's Court; 22 December 1986; 19.

65 Further, in ***Rose v Goldtime Australia Pty Ltd***[21] Warden Edwards said it was permissible to:

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

66 As Rowland J observed in ***Nova Resources NL v French***[22]:

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

67 The degree of proof required in an application for forfeiture is proof on the balance of probabilities with due regard being had to the fact that the forfeiture of potentially valuable or valuable property is involved.[23]

68 In the event the warden finds there has been a failure to comply with the expenditure conditions, the warden may recommend the forfeiture of the lease or impose a penalty not exceeding $10,000 as an alternative to forfeiture or dismiss

---

[21] ***Rose v Goldtime Australia Pty Ltd*** [2004] WAMW 8.
[22] ***Nova Resources NL v French*** (1995) 12 WAR 50; 58 (Kennedy & Pidgeon JJ agreeing).
[23] ***Craig v Spargos Exploration NL***; unreported; Kalgoorlie Warden's Court; 22 December 1986; 12; see also ***Wells v Powell*** (1971) SASR 313.

the application.[24] Where a penalty is imposed, the warden may award the whole amount of the penalty or part thereof to the applicant.[25]

69 The warden is not to recommend forfeiture of the lease unless satisfied that the non-compliance is, in the circumstances of the case, of sufficient gravity to justify forfeiture.[26]

The Form 5 Operations Report

70 Pursuant to s 82(1)(c) of the *Mining Act* and 31(1) of the *Mining Regulations* the minimum amount which Spinifex was required to expend on M04/455 per year is $41,600.00.

71 The Form 5 Operations Report lodged on 20 August 2018 set out the following items of expenditure:

(i)	$26,250.00	Exploration Activity
(ii)	$17,279.20	Tenement Rates and Rent
(iii)	$8,320.00	Administration Overheads
	$51,867.20	TOTAL

72 Although Spinifex's total is inaccurate by a small amount ($18) on its face the Form 5 represents that there has been compliance with the expenditure condition.

73 The summary of Mineral Exploration and/or Mining Activity that forms part of the Form 5 provides:

- Monthly marketing Arena, Consultant geologist travel etc
  15 days @ $1750.00/day $26,260.00
- Annual Tenement Rent and Rates $17,279.20

[24] s98(4A) of the *Mining Act 1978.*
[25] s98(4B) of the *Mining Act 1978*
[26] s98(5) of the *Mining Act 1978.*

- Administration and Overheads $8,320.00
- Total expenditure $51,867.20

74 Apart from the amount claimed for annual tenement rent, Kimberley challenges all of the expenses claimed by Spinifex. I will deal with each category of expenditure in turn.

(A) *Marketing and Project Finance Costs*

75 There was evidence led by Kimberley that an inspection of M04/455 revealed that no ground disturbing work had taken place during the relevant reporting period.[27]

76 Mr Molloy confirmed that no ground disturbing work has been carried out since the mining lease was granted (21 July 2015)[28] and that in each of the Form 5s that had been lodged since then, including the Form 5 the subject of these proceedings, the expenses claimed were predominantly marketing project finance costs.[29]

77 Mr Molloy explained that:

> *... beyond when you have a JORC resource to find, it's not necessary to go back to the site to do any further on-ground work. It's a total waste of effort.*
>
> *... you only can proceed by going to marketing programs, financial programs, to advance the project to completion.*[30]

78 As I foreshadowed earlier, expenditure on raising capital is not claimable expenditure.[31] Indeed if it was, it would not be included as a ground of exemption from expenditure.[32] To the extent that Mr Molloy asserted the Form 5 includes

---

[27] Statement of Darren Michael White; 30 April 2019; [8]-[17].
[28] Mining Tenement Summary Report: M04/455; see Affidvit of Yvette Marie Collins; affirmed 23 April 2019 (Collins Affidavit); YMC 1.
[29] ts; 53 & 62.
[30] ts; 62.
[31] ***Lightrange v Bond*** [2017] WAMW 12; [33].
[32] See s102(2)(b) of the *Mining Act.*

"predominantly marketing project finance costs" no evidence of any other costs under this item of expenditure were produced.

79 Accordingly, in my view, the $26,260.00 allocated to this item of expenditure is not claimable.

80 Putting to one side the question as to whether it is possible to lodge a Supplementary Form 5, which I doubt, the additional expenditure allocated to this item in the purported Supplementary Form 5 lodged on 7 October 2019 relates to project finance costs and therefore suffers from the same fate.

(B) *Administrative Expenses*

81 Regulation 96C(3) of the *Mining Regulations* provides:

> *(3) Administration and land access costs relating to land which is the subject of a mining tenement may be used in the calculation of expenditure expended on, or in connection with, mining on the mining tenement, but only up to 20% of the minimum commitment, or 20% of the total expenditure on the mining tenement, whichever is the greater amount.*

82 Of the total expenditure claimed $8,320.00 related to administration and overheads. This amounts to exactly 20% of the minimum expenditure requirement for M04/455 for the relevant reporting year.

83 Mr Molloy's evidence in relation to the claiming of administrative expenses was as follows:

> *Ms Watt:* *So am I to take it that you sort of said the Mining Act says you can have up to 20 per cent, so you've said 20 per cent was expended?*
>
> *Mr Molloy:* *As far as I am aware of yes. Yes.*
>
> *Ms Watt:* *But you didn't actually look at the expenses that you've incurred in terms of administration, you just sort of went, the Mining Act says 20?*
>
> *Mr Molloy:* *Just that because the internal admin was far in excess of the 20 per cent.*
>
> *Ms Watt:* *But you didn't do a calculation?*

Mr Molloy: *I didn't do a formal calculation. No. Of all of the etcetera, it was just what was the allowable minimum 20 per cent.*

84 The exchange set out above exposes two problems for Spinifex. First, as Warden Calder observed in ***Mawson West Ltd & Anor v Scervman Holdings Pty Ltd***:[33]

> *If there was no expenditure on administration or overheads which can be directly or indirectly attributed to a tenement, then nothing can be claimed. If the actual amount of any such expenditure is less than 20 percent of the aggregate amount of allowable expenditure or other activities, then 20 percent of that other expenditure may not be claimed for administration or overheads. The holder may only claim actual expenditure.*

85 Second, no evidence was led to substantiate the amount claimed. The obligation to keep records to which all tenement holders are subject is explained by Warden Wilson in ***Pawson v Northwestern Mining Co Pty Ltd & Anor***:[34]

> *The condition of grant of any mining tenement that requires compliance with minimum expenditure conditions and the reporting of that expenditure places upon the holder of the mining tenement an obligation to maintain legible and accurate records sufficient that it can provide in accordance with its obligations an annual report of allowable expenditure that is readily ascertainable, accurate and justifiable.*

(C) *Rent and Rates*

86 Mr Molloy was unclear when testifying whether all the shire rates had been paid and whether receipts had been provided. It follows that only the $7,321.60 paid in rent is claimable.

Is the non-compliance of sufficient gravity to justify forfeiture?

87 Having ascertained that Spinifex has not complied with the expenditure conditions, the next question is whether that non-compliance in the circumstances of this case is sufficient to justify the forfeiture of M04/455.

88 As was made clear by the Full Court in ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd.***[35] upon prima facie proof of non-compliance the plaintiff

---

[33] ***Mawson West Ltd & Anor v Scervman Holdings Pty Ltd*** [2010] WAMW 10; [53].
[34] ***Pawson v Northwestern Mining Co Pty Ltd & Anor*** [2013] WAMW 8; [59].
[35] ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd***; unreported FCt SCt of WA; del 16 December 1988; Lib No 7427; 15.

likewise establishes a prima facie case for forfeiture and the evidentiary burden then shifts to the defendant to satisfy the court that the case is not otherwise of sufficient gravity to justify forfeiture.

89 I am mindful also that although in an application for forfeiture the degree of proof is on the balance of probabilities, due regard must be had to the fact that the forfeiture of potentially valuable or valuable property is involved.[36]

90 In my view, the non-compliance in the circumstances of this case is of sufficient gravity to justify forfeiture of M04/455 (in preference to a fine) and cannot be characterised as trivial or technical[37] for the following reasons:

(1) so far as the reporting year the subject of these proceedings is concerned, only $7,321.60 of the $41,000.00 minimum requirement has been verified.

(2) Spinifex has held M04/455 since 21 July 2015. Since that time no ground disturbing work has been undertaken;

(3) having regard to the Form 5s lodged for each respective reporting year, all of them rely heavily on marketing project finance costs38. If those costs are excluded, then M04/455 has been under-expended in each year Spinifex has held M04/455;

(4) Spinifex has not applied for or received an exemption from the expenditure requirements in any of the years it has held M04/455;39 and

(5) the assertion by Mr Molloy40 that Spinifex has a joint venture partner is entirely speculative. Mr Molloy's evidence was:

> *"We don't have to seek any further joint venture parties. We've got a funding package, essentially approved by an organisation in Sydney. And that is in the final stages of being granted. We've got a budget to*

[36] ***Craig v Spargos Exploration NL***; unreported Kalgoorlie Warden's Court; del 22 December 1986; 19.
[37] ***Nova Resources NL v French*** (1995) 12 WAR 50; 58.
[38] Collins Affidavit; Annexures YMC2; YMC3 & YMC4.
[39] Collins Affidvit; YMC1.
[40] ts; 55.

> *the Capital Group for $35million. And they're currently working their way through that process right now."*

To secure finance of $35m it is reasonable to expect that detailed plans setting out the future development of M04/455 would have been provided to the prospective joint venture partner. No such plan was produced in the course of these proceedings.

In addition, no correspondence related to or documents concerning any joint venture were produced. If as Mr Molloy asserts, the joint venture "is in the final stages of being granted", this is surprising.

91 As is evidenced by subparagraphs (1) to (4) of [90] above, Spinifex has demonstrated an unwillingness or inability to comply with its obligations as a tenement holder. Even if Mr Molloy was not being deliberately dishonest and was simply ignorant as to the law in completing the Form 5 and not applying for an exemption, that ignorance weighs against Spinifex in considering issues of gravity[41].

Spinifex's Written Closing Submissions

92 Notwithstanding that Mr Molloy acknowledged that the written closing submissions he intended to file on Spinifex's behalf were not to include any further evidence, facts or documents[42], further material of that nature accompanied the closing submissions. This included a second medical certificate and letter to ASIC and the Legal Practice Board.

93 Not only was there no application to adduce further evidence but the additional material was not relevant. As a consequence I have not had regard to it.

[41] ***Lightrange v Bond*** [2017] WAMW 12; [45].
[42] ts; 86.

Conclusion

94 For the reasons set out above it is recommended that the Minister forfeit M04/455.

Warden J O'Sullivan

20 May 2020