

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : GLEN ALLAN PROUDE v RETENTION
RESOURCES PTY LTD [2020] WAMW 23

CORAM : WARDEN J O'SULLIVAN

HEARD : 25 August 2020

DELIVERED : 9 December 2020

FILE NO/S : Application for Special Prospecting Licence 47/1926;
Objection No.558598

TENEMENT NO/S : Exploration Licence 47/3797

BETWEEN : **GLEN ALLAN PROUDE**
(Applicant)

AND

RETENTION RESOURCES PTY LTD
(Objector)

Catchwords: Special Prospecting Licence; Undue Detriment; Turns on
own facts.

Legislation:

- *Mining Act 1978* (WA) ss 8, 29(2), 30, 105, 118, 56A, 70(2), 70(5) & 104(3)
- *Mining Regulations 1981* (WA) reg 64(6)

Result:

Special Prospecting Licence 47/1926 is refused

Representation:

Counsel:

Applicant : Mr T J Kavenagh
Objector : Ms M K Watts

Solicitors:

Applicant : Kavenagh Legal
Objector : M Watts Legal

Cases referred to:

- *Clarke v Ryan* (1960) 103 CLR 486
- *Jones v Dunkel* (1959) 101 CLR 298
- *Levy & Lowe v Bronze Wing Gold NL* del 20 August 1999, Vol 14 No. 4
- *McKay v Commission of Main Roads* [2009] WASC 353
- *Morley v ASIC* (2010) 274 ALR 205
- *Ritz Hotel v Charles of the Ritz (No. 7)* (1987) 14 NSWLR 104
- *Wolfgang Michael Lorentz v Navigator Mining Pty Ltd* [2013] WAMW 23

Introduction

- 1 On 14 July 2019, Glen Allan Proude (“Mr Proude”) applied for a Special Prospecting Licence 47/1926 (the “SPL Application”) over land the subject of an Exploration Licence 47/3797 (“the Existing Tenement”) held by Maria Resources Pty Ltd (“Maria Resources”).
- 2 On 18 July 2019, Maria Resources lodged Objection 558598 (the “Objection”) on the following grounds:
 - (1) the Objector is the holder of the Existing Tenement;
 - (2) the SPL Application is within the boundaries of the Existing Tenement;
 - (3) the grant of the SPL Application will cause undue detriment to the activities being carried out, or proposed to be carried out, on the Existing Tenement;
 - (4) further, or in alternative, the SPL Application does not comply with the *Mining Act 1978* (WA) and *Mining Regulations 1981* (WA).¹
- 3 On 25 September 2019, Retention Resources Pty Ltd (“Retention”) became the registered holder of the Existing Tenement, replacing Maria Resources as the Objector in these proceedings.

The Statutory Framework

- 4 Pursuant to s 70(1) of the *Mining Act 1978* (WA) (the “Mining Act”), a special prospecting licence for gold can be granted over land that is already the subject of an existing tenement.
- 5 Section 70(5) of the *Mining Act* provides that the warden may refuse the application for the special prospecting licence on the ground that prospecting for gold on the land to which the application relates would result in undue detriment to the exploration being carried on by the holder of the existing tenement.

¹ Particulars of Objection 8 November 2019.

6 Alternatively, the warden may recommend the application to the Minister who may refuse the application or, subject to the Act, grant it as provided in subsection (6) which includes the power to impose conditions.

The Law

7 In *Levy & Lowe v Bronze Wing Gold NL*,² Warden Calder identified the question posed by s 70(5) of the *Mining Act* to be:

[w]hether or not the granting of the special prospecting licence, with appropriate conditions, could be made without the prospecting which that grant would allow resulting in undue detriment to the [exploration] being carried out by the primary tenement holder, and if the answer to that question is in the negative the Warden should refuse the application.

8 In considering the question outlined above, Warden Calder made reference to a number of matters that are incumbent on the warden to take into consideration:³

- (a) *the exploration, if any, which has been done in the past on the tenement, whether by the current holder or by a previous holder;*
- (b) *the use, if any, which the primary tenement holder has made of the results of such previous exploration;*
- (c) *the exploration work which the primary holder has in the past carried out and which the primary tenement holder has planned to carry out in the future on the whole of the primary tenement;*
- (d) *the work, if any, which has previously been carried out and which is planned to be carried out on or in the vicinity of the ground the subject of the special prospecting licence application;*
- (e) *the likelihood or otherwise of the primary tenement holder carrying out any proposed work, which could properly include a consideration of the present or future capacity of the primary tenement holder, both technical and financial, to carry out proposed work, which could properly include a consideration of the present or future capacity of the primary tenement holder, both technical and financial, to carry out proposed exploration operations;*

² *Levy & Lowe v Bronze Wing Gold NL*; Perth Wardens Court, del 20 August 1999, Vol 14 No. 4.

³ *Ibid*; 13 & 14.

- (f) *the nature of the application for the special prospecting licence in terms of the area applied for and the size of the area applied for relative to the size of the primary tenement;*
- (g) *the proximity of the ground applied for to work done or proposed to be done by the primary tenement holder;*
- (h) *the nature and extent of the work proposed to be done by the applicant; and*
- (i) *the present and future technical and financial capacity of the applicant to prospect for gold.*

The Evidence

- 9 Mr Proude is a part-time prospector with 9 years' experience.⁴
- 10 On 12 June 2019, Mr Proude travelled to the land the subject of the SPL Application where he identified an area of interest which is the subject of this application (the Affected Area).⁵
- 11 Mr Proude intends to prospect on the land for 4 years including excavating to a depth of 50m if his equipment allows him to do so and he can locate payable quantities of gold.⁶
- 12 Mr Proude's answers to the request for further and better particulars reveals that, depending on the prospectivity of the land, he will not remove more than 500 tonnes of material (the prescribed amount) without the prior written approval of the Minister.
- 13 The SPL Application covers an area of 9.5645 hectares which encroaches on 0.09% of the Existing Tenement.⁷
- 14 Retention called Anees Louis Sabet ("Mr Anees Sabet"), who is the director of New Frontier Resources Pty Ltd ("NFX"), an exploration company which

⁴ Affidavit of Glenn Allan Proude sworn 14 November 2019 (Proude affidavit); [3].

⁵ Proude affidavit; [6].

⁶ ts; 11 & 12; Proude affidavit; [19].

⁷ Affidavit of Yvette Marie Collins affirmed 11 February 2020; [5].

focuses on exploring for conglomerate gold systems in the Pilbara. Retention is part of the NFX group of companies.⁸

15 Mr Anees Sabet's evidence can be summarised as follows:

- NFX's initial interest in the tenement came from the work done by previous owners, Strategic Resources/Maria Resources, who had undertaken exploration that clearly showed potential for a structural/ orogenic/ mesothermal gold system. This posed great interest to NFX as it is quite unique for that part of the Pilbara or the Fortescue stratigraphy.⁹
- From inception (July 2017) to date, NFX group has spent approximately \$2.3 million on tenement expenditure including exploration and rent expenditure and approximately \$3m on tenement and rights acquisitions.¹⁰
- The strategic approach to the Exploration Licence consisted of gathering information from historical reports, performing stream sediment sampling and utilising Remote Vision Pty Ltd ("Remote Vision") analysis to create initial targets for field reconnaissance.¹¹
- NFX have approved further exploration programmes with a budget of \$200,000 for the next tenement year. Remote Vision will be engaged to implement the programmes.¹²

16 Retention also called Adib Olinga Sabet ("Mr Adib Sabet"), who is the director and founder of Remote Vision. The main service offered by Remote Vision is the provision of mineral prospect targeting through remote sensing.¹³

17 Mr Adib Sabet's evidence can be summarised as follows:

⁸ Statement of Anees Louis Sabet; 13 February 2020; [1].

⁹ t/s 25/08/20; 23. Statement of Anees Louis Sabet; [9].

¹⁰ Statement of Anees Louis Sabet; [8].

¹¹ Statement of Anees Louis Sabet; [10].

¹² Statement of Anees Louis Sabet; [13].

¹³ Statement of Adib Olinga Sabet; 12 February 2020 [5].

- Remote sensing is the analysis of datasets that are gathered off the ground. Datasets include ASTER satellite imagery and radiometric data gathered from aircrafts. It applies its purpose-built proprietary algorithms to identify surface targets which are areas that should be visited and sampled.¹⁴
- Remote Vision has been commissioned by Retention to develop a systematic plan for exploring for gold mineralisation on the Existing Tenement, which includes the Affected Area.¹⁵
- During the first expenditure year of the Exploration Licence, \$53,924.59 of the reported expenditure related to mineral-exploration activities. This expenditure was in excess of almost \$30,000 the minimum expenditure requirement.¹⁶
- The work undertaken during the first expenditure year included:¹⁷
 - (a) a review of historical data via an extensive open file database;
 - (b) a stream sediment sampling programme which resulted in 66 stream samples;
 - (c) a soil sampling programme which resulted in 43 soil samples; and
 - (d) a rock sampling programme which resulted in 85 rock samples.
- Subsequent to Retention acquiring the Existing Tenement, he has overseen, inputted into, or taken part in the following exploration activities across the Existing Tenement:¹⁸
 - a) between May 2019 to October 2019 a desktop review of historical data which indicated a widespread prospectivity across the tenement;

¹⁴ Statement of Adib Olinga Sabet; [5].

¹⁵ Statement of Adib Olinga Sabet; [7].

¹⁶ Statement of Adib Olinga Sabet; [10].

¹⁷ Statement of Adib Olinga Sabet; [11].

¹⁸ Statement of Adib Olinga Sabet; [14].

- b) between 15 to 21 July 2019 helicopter mapping of gold prospects which identified prospective corridors;
 - c) from 15 to 21 July 2019 stream sampling programme took 249 samples from 83 locations of the tenement;
 - d) from 18 to 20 September 2019 grab sampling programme resulted in more than 93 rock chip samples;
 - e) from 21 to 26 October 2019 grab sampling programme resulted in more than 250 rock samples;
 - f) remote sensing analysis; and
 - g) at the end of Nov/start of December 2019 ground based rock sampling program.
- The stream campaign identified strong gold anomalism across the entire length of the tenement, with high grades in numerous locations; including streams surrounding the Affected Area.¹⁹
 - The following activities are proposed for 2020 in the Affected Area:²⁰
 - a) Heritage surveys of the entire Affected Area with the relevant traditional owners at the start of April/May.
 - b) Soil and rock sampling programme to identify drill target areas to be completed in April.
 - c) Trenching of four proposed costeans to define the orientation of quartz veins and allow for sampling.

¹⁹ Statement of Adib Olinga Sabet; [9].

²⁰ Statement of Adib Olinga Sabet; [20].

- Retention has applied and had approved POW 83076, which will allow for drilling within the affected prospective corridor and the Affected Area.²¹

Disposition

- 18 The starting point is to recognise that the essential question in these proceedings is whether prospecting for gold on the land to which the application for a special prospecting licence relates would result in undue detriment to the exploration being carried on by the holder of the Existing Tenement.
- 19 It is clear from the evidence that Mr Proude's interest in the Affected Area is genuine and that he has the means both financially and technically to prospect for gold.
- 20 It is also clear that, where possible, he intends to take full advantage on the rights afforded him should the SPL Application be granted.
- 21 Mr Proude's interests are, however, not the only concern. The legislation acknowledges that the interests of the primary tenement holder take primacy. As a consequence, an SPL may be refused if it would result in undue detriment to the exploration carried on by the primary tenement holder.
- 22 This directs attention to whether the primary tenement holder has demonstrated a genuine interest in the land the subject of the SPL application and, if so, the extent to which the applicant's prospecting for gold would interfere with the primary tenement holder's exploration in that area.
- 23 Mr Proude objected to parts of the evidence of Mr Adib Sabet and Mr Anees Sabet on the basis that as neither is a qualified geologist they are not entitled to express an expert opinion.
- 24 After considering the totality of the evidence, even were I to exclude all of the passages to which objection was taken, it is clear that considerable work has been

²¹ Statement of Adib Olinga Sabet; [20(c)].

undertaken in identifying targets on the Existing Tenement (including the Affected Area) and that Retention intends to further investigate those targets by sampling and drilling.

25 The evidence of Mr Adib Sabet is particularly significant. His evidence was that he started research and development into mineral prospecting through remote sensing in October 2017 which resulted in him founding Remote Vision in June 2018. Mr Adib Sabet has applied his research and technology in other cases.²²

26 It is apparent from the following extract from Mr Adib Sabat's testimony that he was directly involved with much of the exploration carried out by Retention:-

And the work that's referred to in your statement and the future work that you refer to in your statement, who's intended to do that work or who did that work and who's intended to do the future work?---Well, a lot of this exploration work on the ground was done by myself and New Frontier employees. So I would go to all the field – field trips.²³

...

Yes. All right. In relation to paragraph – in relation to that same map, your evidence---?---Yes, sir.

---is that some grab samples were done and six of those were on the land the subject of the [SPL] application and they're shown in purple with a white circle?---That – that is correct.

Yes. And they're the ones referred to in paragraph 14(d) of your statement and you go back to---?--- (indistinct)

---14(d)?---Thank you, sir. I will do that. Yes, sir.

Who took those samples?---I did.²⁴

27 Importantly, Mr Adib Sabat was present at all the field trips and took samples from the Affected Area himself.

28 In light of the conclusion in [24] above, strictly speaking it is unnecessary to address the admissibility of every passage that was the subject of objection.

²² ts; 32.

²³ ts; 39.

²⁴ ts; 31.

Nonetheless, in deference to some of the matters raised on Mr Proude's behalf, I make the following observations.

29 Objection was taken to the opinion evidence that 'undue detriment' to the Existing Tenement had been established.

30 In my view, as the question of undue detriment is the ultimate issue in these proceedings and is for the Court to determine, I have had regard to the evidential foundation for such a conclusion rather than the opinions of witnesses.

31 Objection was also taken to the following paragraph from Mr Adib Sabat's Statement on the basis it was expert evidence:

*Surface disturbance within the Affected Area may destroy or significantly diminish the value of any surface data that could be captured and analysed.*²⁵

32 The basis of the exclusionary rule is that a witness is not to give an opinion on matters calling for the special skill or knowledge of an expert unless the witness is an expert in such matters.²⁶

33 The question that remains is whether a witness needs to be an expert to give opinion evidence that disturbing the soil in an area may undermine the reliability of any surface samples taken from that area in the future?

34 In my view, such an opinion involves no more than the application of common sense. This much is evident from Mr Adib Sabat's explanation when testifying:

*It is hard to know if the sample you are looking at is from push to ground. Has the dirt been moved from here to 100 metres away ...*²⁷

35 Although the rules of evidence do not apply to these proceedings, it does not follow that the rules of evidence are to be completely ignored.

²⁵ Statement of Adib Olinga Sabat; [28].

²⁶ JD Heydon, Cross on Evidence 10th Ed; [29005].

²⁷ ts; 35.

- 36 The fact that the rules of evidence do not apply does not mean that witnesses are free to offer opinions about matters in relation to which they have no expertise. Ultimately, opinion evidence of that kind carries no weight.
- 37 In proceedings of this kind the focus shifts to the weight to be attached to certain evidence rather than a pre-occupation with whether evidence is admissible or inadmissible.
- 38 Nevertheless, whether it is a question of weight or admissibility, ultimately some assessment must invariably be made as to whether a witness expressing an opinion that calls for special skill or knowledge, possesses the requisite expertise.
- 39 In my view, it would be going too far to state as a rule that all opinions that touch on geological matters can only be provided by a qualified geologist.
- 40 In order to be admissible (or carry any weight) an expert opinion must be in a field of specialised knowledge in which, or the relevant part of which, the witness demonstrates that by reasons of specialised training, study or experience he or she has become an expert.²⁸ In some cases the necessary knowledge may be obtained by experiment and observation.²⁹
- 41 Mining is one of those fields of endeavour in which a number of those involved have no formal qualifications but have many years of experience and in some cases have undertaken their own informal study.
- 42 While greater weight may attach to the evidence of a qualified geologist, it does not mean that a witness is necessarily excluded from expressing an opinion about matters that are within their expertise. There is a category of admissible ‘expert’ evidence which consists of a generalisation from observed facts within the personal experience of witness in a field outside ordinary lay experience.³⁰

²⁸ *McKay v Commission of Main Roads* [2009] WASC 353; [3]-[5].

²⁹ *Clarke v Ryan* (1960) 103 CLR 486.

³⁰ *Ritz Hotel v Charles of the Ritz (No. 7)* (1987) 14 NSWLR 104; 105.

- 43 Obviously, the more technical the evidence, the more likely the person offering the opinion will require the appropriate formal qualifications.
- 44 Mr Proude also submitted that I ought to draw an adverse inference against Retention on the basis that it did not call the geologist, Mr George Marhey, it had engaged. It is said that I should infer that Mr Marhey's evidence would not have assisted Retention. A similar submission was made concerning the failure to produce the Annual Technical Report (ATR) due by 1 September 2019. I note that Retention did not acquire the Existing Tenement until 25 September 2019. The ATR is referred to in the Director Geological Survey and Resource Strategy's report dated 15 September 2019 in any event.³¹
- 45 The rule in *Jones v Dunkel*³² is discretionary. It is not the case that every unexplained failure to call a witness or produce a document must result in an adverse inference. Each case will turn on its own facts. Moreover, if the case of the party who fails to call a witness is otherwise proved, the inference that the absent witness would not assist the party's case does not detract from that proof.³³
- 46 Also, as was pointed out by Retention, a key issue is whether it has carried out exploration in or around the Affected Area and intends to do so in the future. Evidence as to those two things need not only come from a geologist.
- 47 According to Retention, even if its plans are misguided, if it nonetheless intends to carry out exploration in the Affected Area in the future, that is all that matters.³⁴
- 48 I do not accept this proposition in its entirety. I have some doubt that a tenement holder who is unable to point to the foundation for its belief that an area is worthy of exploration, could be said to genuinely hold that belief.

³¹ Exhibit 2.

³² *Jones v Dunkel* (1959) 101 CLR 298.

³³ *Morley v ASIC* (2010) 274 ALR 205; [634].

³⁴ ts; 46.

- 49 That observation is, however, not relevant to the present application. Retention has carried out a significant amount of exploration on the Existing Tenement. It is also apparent that Retention, through Remote Vision, has carried out exploration in and around the Affected Area. Importantly, Retention has identified targets in an adjacent area to the Affected Area that are to be the subject of further sampling and drilling.
- 50 As I have endeavoured to explain, that evidence, even without the portions to which objection is taken, is sufficient, in my view, to establish that the prospecting for gold Mr Proude has in mind on the land the subject of the SPL Application, would result in undue detriment to the exploration being carried on by Retention.
- 51 To his credit Mr Proude conceded that the drilling he intends to carry out would interfere with the drilling being carried out by Retention in the event it intends to drill in the same place.³⁵
- 52 In addition to undue detriment, Retention also resisted the SPL Application on a number of other grounds, including occupational health and safety issues, the location and storage of machinery and access routes.
- 53 In my view, had it been necessary to do so, consideration could have been given to resolving these issues by the imposition of conditions. However, in light of my finding as to the substantive issue, there is no need to further consider these issues.

³⁵ ts; 12 & 13.

Conclusion

54 The SPL Application is refused.



Warden J O'Sullivan

9 December 2020

