

JURISDICTION : MINING WARDEN

LOCATION : KALGOORLIE

CITATION : OWEN v SANDHU

CORAM : WARDEN A HILLS-WRIGHT

HEARD : 10 June 2019 & 12 December 2019

DELIVERED : 10 February 2020

FILE NO/S : Application for Forfeiture No. 516938
Exploration Licence 16/458

BETWEEN : **TRISTAN DAVID OWEN**
(Applicant)

AND

TANVANTH SINGH SANDHU
(Respondent)

Catchwords: *Application for forfeiture, alleged non-compliance with expenditure conditions – whether non-compliance of sufficient gravity to justify forfeiture in the circumstances of the case – turns on own facts.*

Legislation:

- *Mining Act 1978, s62, s98*
- *Mining Regulations 1981, r21*

Cases referred to:

- *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* Unreported; FCt Sct of WA; del 16 December 1988; Library No. 7427
- *Re Warden Calder; Ex-parte Brosnan* (2012) WASC 214
- *Craig v Spargos Exploration NL* Unreported; Kalgoorlie Wardens Court; 22 December 1986
- *Rose v Goldtime Australia Pty Ltd* (2004) WAMW 8
- *Pawson v Northwestern Mining Pty Ltd* (2013) WAMW 18

Result:

1. *Recommendation to the Minister that Exploration Licence 16/458 be forfeited*

Representation:

Counsel:

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| Applicant | : | Ms K Samiotis (10 June 2019) Ms C McKenzie (12 December 2019) |
| Respondent | : | Mr T Kavenagh |

Solicitors:

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| Applicant | : | McKenzie & McKenzie |
| Respondent | : | Kavenagh Legal |

Introduction

1. Tanvanth Singh Sandhu (the Respondent) holds Exploration Licence 16/458 and has done so since 4 September 2014.
2. It is a condition of the grant of E16/458 that, unless granted an exemption, the Respondent expend \$15,000 on or in connection with mining during the reporting year ending 3 September 2017 (the 2017 reporting year).
3. The Respondent lodged a Form 5 Operations Report on 30 October 2017 claiming expenditure for the 2017 reporting year in the sum of \$16,548 on or in connection with mining. The Respondent says he conducted 16 days metal detecting on the tenement and, save for rates, rent and administration costs, the expenditure incurred by him was in connection with that metal detecting.
4. There is no dispute that the activity of metal detecting, together with the reasonable costs of travelling to and from a tenement and any expenditure on machinery, accommodation or communications in connection with metal detecting constitute valid expenditure ‘on or in connection with mining’.
5. The central dispute concerns whether metal detecting was conducted by the Respondent on E16/458 with the frequency claimed, or at all.
6. Tristan David Owen (the Applicant) claims there is a *prima facie* case for forfeiture on the basis of non-compliance with the expenditure conditions. The Applicant relies upon three primary grounds:
 - i. On-the-ground inspections made by the Applicant in 2017 reveal no evidence of 16 days metal detecting having been carried out in the 2017 reporting year, as claimed by the Respondent;
 - ii. The Respondent has failed to produce sufficient supporting documentation to substantiate the items of claimed expenditure on the Form 5 Operations Report;

- iii. The rate of \$686 per day claimed by the Respondent for metal detecting is excessive having regard to an amount equivalent to the wages the Respondent would otherwise have earned if similarly employed elsewhere in the district.

The Legislative Framework.

7. Section 62(1) of the *Mining Act 1978* (the Act) states that during the currency of an exploration licence the holder shall comply with the prescribed expenditure conditions unless, in accordance with the Act, total or partial exemption is granted.
8. The Respondent was not granted and nor did he seek an exemption from expenditure.
9. Regulation 21(1) of the *Mining Regulations 1981* (the Regulations) sets out what the holder of an existing exploration licence shall expend, or cause to be expended, in mining on or in connection with mining on the licence during each year of the term of the licence.
10. Regulation 21(3) provides:

“If during a particular year of the term of an exploration licence or any period referred to in subregulation (1c), the holder of the licence is directly engaged part-time or full-time in mining on land the subject of the licence, an amount equivalent to the remuneration that the holder would be entitled to if engaged, under a contractual arrangement, in similar mining activity elsewhere in the district is to be deemed to have been expended during that year or period, as the case requires.”

11. One of the primary objects of the Act is to ensure that land with a known potential for mining, or land that is worthy of exploration, is made available for those purposes. The above regulation recognises mining activity itself, and not merely expenditure *per se*, as a means by which a value can be attributed to the activity.
12. Section 98 of the Act provides:

“98. Application for forfeiture on other grounds

- (1) *Where the requirements of this Act are not being complied with in respect of the expenditure conditions applicable to an exploration licence or a mining lease, any person may apply for the forfeiture of such licence or lease as provided in this section.*
- (2) *An application for forfeiture under this section shall be made, during the expenditure year in relation to which the requirement is not complied with or within 8 months thereafter, in such form and manner as may be prescribed and shall be accompanied by the prescribed fee.*
- (3) *The application for forfeiture shall be heard by the warden.*
- (4A) *When the warden finds that the holder of an exploration licence or lessee of the mining lease has failed to comply with such requirements as are mentioned in subsection (1), the warden may recommend the forfeiture of such licence or lease, or impose a penalty not exceeding \$10 000 as an alternative to the forfeiture or dismiss the application.*
- (4B) *Where a penalty is imposed under this section the warden may award the whole amount of the penalty or any part thereof to the applicant.*
- (5) *A recommendation shall not be made under subsection (4A) unless the warden is satisfied that the non-compliance with such requirements is, in the circumstances of the case, of sufficient gravity to justify the forfeiture.*
- (6) *As soon as practicable after the hearing of the application the warden shall forward to the Minister the notes of evidence, with a report and the warden's recommendation, if any, on the application and the Minister may, before acting on the recommendation, require the warden to take such further evidence or rehear the application as the Minister directs.*
- (7) *No exploration licence or mining lease shall be forfeited for non-compliance by the holder or lessee thereof with the expenditure conditions, if the holder or lessee satisfies the Minister that the non-compliance therewith has been occasioned by a strike.*
- (8) *If the applicant fails to proceed with his forfeiture application, the warden may award the holder or lessee such sum for costs and expenses as he thinks fit.*
- (9) *Where any penalty imposed by a warden as an alternative to forfeiture under subsection (4A) is not paid within the time specified by the warden, or within 30 days after the penalty is imposed where no other time is specified, the warden shall make a recommendation to the Minister as to whether or not the licence or lease should be forfeited."*

13. Relevantly, s100 of the Act provides that if an exploration licence the subject of an application for forfeiture is ultimately forfeited by the Minister, the applicant for forfeiture is afforded a right of priority to any other person to mark out or apply for, or both, a mining tenement upon the whole or any part of the land that was the subject of the forfeited licence.

Forfeiture - General Principles

14. As the Full Court observed in *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd*:¹

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

15. In *Re Warden Calder; Ex-parte Brosnan* (No. 2)² Heenan J stated that the words ‘in the circumstances of the case’ involve:

“A broad and comprehensive spectrum of considerations not limited to any one criterion and not identifying any one or other criteria as being determinative.”

16. In *Craig v Spargos Exploration NL*, Warden Reynolds remarked (as to what was then the relevant section):³

“Subsection 95(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.”

17. As to the object and policy of the Act, Warden Reynolds also said in *Craig v Spargos Exploration NL*:

¹ Unreported; FCtSCT of WA; delivered 16 December 1988; Library No. 7427 at [15]

² 2012 WASC 214 at [87]

³ Unreported; Kalgoorlie Wardens Court; 22 December 1986 at [6]

“The whole policy of the Mining Act is that a tenement holder unable to explore for or exploit mineral resources of a tenement should give way to 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.”

18. As to whether any non-compliance with expenditure conditions is of sufficient gravity to justify forfeiture, in *Rose v Goldtime Australia Pty Ltd*⁴ Warden Edwards said it was permissible to:

“...take 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 year the subject 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, which 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 their ever being carried out.”

19. Only if the Applicant demonstrates that the Respondent did not comply with the conditions of the licence, namely that the minimum amount was not expended during the 2017 reporting year, will he have established a *prima facie* case for forfeiture. It would then be necessary for the Respondent to demonstrate that, in the circumstances, his non-compliance with the expenditure condition was not of sufficient gravity to justify forfeiture of E16/458.

The Applicant's Evidence

20. The Applicant is a self-employed prospector and has been involved in the mining industry since 2008. He has prospected in the Kalgoorlie area for several years. He became interested in the Coolgardie mineral region and first travelled to the Dunnsville area in January 2017.
21. He began monitoring the Respondent's tenement in August 2017.⁵

⁴ (2004) WAMW 8

⁵ Exhibit 1, affidavit of Tristan David Owen sworn 5/9/2018, at [10]

22. Between 15 August 2017 and 13 October 2017 the Applicant traversed parts of the tenement on five occasions:-

- i. The first was on 15 August 2017 with his prospecting partner, Gordon Gray. He accessed the tenement by utility forcing a track through from the north to the south of the tenement. It can be noted that the area traversed on this date (marked by a blue line on Exhibit 5) is not close to the area where the Respondent claims to have conducted his metal detecting 'in and around the creek bed' to the south and south-east of the land the subject of SPL16/3083;
- ii. The second occasion was on 18 September 2017 when he accessed the tenement by utility from an 'old track around the south-west of the tenement'. He was again with Mr Gray and they stopped at an area near SPL16/3083, looking for access to what is now P16/3089;
- iii. The third occasion was on or around 25 September 2017 when he accessed the tenement by utility using the same track as on 18 September 2017. The second and third traverses are represented by an orange line on Exhibit 5;
- iv. The fourth occasion was when he visited the tenement on 9 October 2017 with Mr Paul Simmonds. He drove his utility but was forced to abandon it, after which he and Mr Simmonds traversed parts of the tenement on a quad-bike while 'trying to access vacant Crown land'. This traverse is represented by a yellow line on Exhibit 5;
- v. The fifth occasion was on 10 October 2017 when he met with a group of other prospectors, including a Mr Paul Larwood, and pushed through from Larwood's prospecting licence P16/3028 to a prospective area of ground

on the tenement (namely the land the subject of SPL16/3083).⁶ This traverse is represented by a green line on Exhibit 5.

23. Between 15 August and 10 October 2017, when traversing the tenement either by utility, quad-bike or on foot, he saw no evidence of any recent prospecting or exploration activity on the tenement.⁷
24. During his first visit on 15 August 2017 the Applicant entered the tenement from the north, travelling south, and attempted to locate vacant Crown land (now P16/3090 and P16/3089). He accessed the tenement through an old track however could find no signs of any other tracks and as the bush was too thick to push through he stopped and traversed 'areas of the tenement' on foot by walking 50-100 metres apart to look for further tracks.⁸ On this occasion he didn't travel to the east of what is the blue line marked on Exhibits 5 and 9.⁹
25. During his second visit on 18 September 2017 the Applicant accessed the tenement from the south via an old rough track which was overgrown and in the Applicant's opinion had not been driven on for a year or more.¹⁰ The Applicant said if any vehicles had used that track within a year or more the salt bush would have been flattened or at least far smaller in size than what he observed. It can be noted the Respondent does not say he used this track to access the tenement.
26. The Applicant travelled down the same track on 25 September 2017 as he did on 18 September 2017 (marked in orange on Exhibit 5 and Exhibit 9).
27. On 9 October 2017 the Applicant accessed the tenement on a quad-bike with Mr Simmonds from a south-west direction, taking a path close to the track taken on both 18 and 25 September 2017. During this trip the Applicant says he did not see any recent prospecting or exploration activity or any vehicle tracks other

⁶ Exhibit 1, at [16]

⁷ Exhibit 1, at [20]

⁸ Exhibit 1, at [27]

⁹ t/s p42

¹⁰ Exhibit 1, at [35]

than those he had previously made on 18 and 25 September 2017. He and Mr Simmonds headed toward a prospective area of ground being SPL16/3083.

28. On 10 October 2017 the Applicant met up with another group of prospectors, including Mr Larwood. He met the group at Mr Simmonds' camp. He says he reached a verbal agreement with Mr Larwood to obtain shares in the prospecting licences they applied for in exchange for showing them the prospective area on the tenement that Mr Simmonds had shown him the day prior on 9 October 2017 (namely SPL16/3083).¹¹
29. A camp was set up on Mr Larwood's prospecting licence 16/3028. The Applicant says Mr Larwood showed him a text on 10 October 2017 which Mr Larwood said was from the Respondent to the effect that 'I give authority to Paul and his party to prospect E16/458' (the Respondent's tenement).¹² The Applicant denied Mr Larwood told him he did not have authority from the Respondent to prospect on the tenement.
30. The Applicant says that he, together with Mr Larwood and the others, accessed the ground subsequently forming SPL16/3083 by pushing a track through Mr Larwood's prospecting licence 16/3028 to the prospective area (marked as a green line on Exhibit 5). They then detected in that area between 11 and 13 October 2017. The Applicant pegged SPL16/3083 on 18 October 2017.¹³
31. The Applicant did not identify any vehicle tracks in that area other than those made by his own traverses across the creek. He believed 16 trips by the Respondent would have left visible tracks and damage to vegetation.
32. The Applicant lodged his application for SPL16/3083 on 19 October 2017 to which the Respondent objected on 23 November 2017.

¹¹ Exhibit 1 [53]

¹² Exhibit 1 [54]

¹³ Exhibit 1 [57]

33. Between 24 October 2017 and 24 January 2018 he carried out at least another 10 traverses throughout the tenement taking him several days on each occasion however he found no evidence of recent prospecting activity.¹⁴ He estimates since 2017 to the hearing date he'd visited the tenement 50-60 times to prospect pursuant to s40E permits, including in areas in and around the creek bed. The creek bed 'was laden with ironstone' and gave many false signals. He expected that if a person was metal detecting in that bed there would be evidence of many holes dug in order to disprove false signals. He found no evidence of holes being dug in or along the creek bed.¹⁵
34. As a consequence of the Respondent's affidavit sworn 3 October 2018 (in which the Respondent sets out by way of distance, direction and reference points where he travelled during his two metal detecting trips in November 2016 and May 2017 respectively), the Applicant swore a second affidavit, the purpose of which was to follow the directions said to have been taken by the Respondent, then take photographs and make observations.¹⁶
35. He undertook this task on 13 November 2018. The Applicant says that if the Respondent's reference points are correct he was in fact undertaking metal detecting not on E16/458 but on a tenement that now belongs to the Applicant.
36. The Applicant says given his visits to the tenement area he would have been able to identify signs of 16 days of metal detecting if that had occurred, but saw none. He has been able to return to areas where he had dug holes three years earlier and still seen the hole. He did see some holes (marked B on Exhibit 9) but said they were more than a year old and had decomposed leaf litter in them. These holes were not close to any creek bed. The creek bed evident on Exhibit 11 is about 400m to the south-east (and within a kilometre overall) of SPL 16/3083. He did detect for a few days in and around the creek bed in late 2017, following

¹⁴ Exhibit 1 [60]-[64]

¹⁵ t/s 24, 70-73

¹⁶ Exhibit 2, affidavit of Tristan David Owen sworn 19 November 2018

lodgement of SPL16/3083, and examined the creek bed for signs of metal detecting.

37. He accepted in cross-examination that of the 13 different kinds of activity referred to in his affidavit that would reveal signs of prospecting or exploration, a number wouldn't necessarily be left as a result of simply detecting for metal. For example, fresh flagging tape, corner peg maintenance, drilling sumps and cleared drill pads would not be evident.
38. However he maintained that vehicle tracks from quad-bikes or four-wheel drives and possibly freshly broken rocks from rock sampling would be evident. Saltbush would be damaged and trampled. Rainfall may wash away tracks but would not re-establish bushes. Previously dug holes, even when filled in, would be evident.
39. The Applicant ruled out the possibility that signs of metal detecting would have disappeared from the Respondent's trips in November 2016 and May 2017 (a period of approximately 10-11 months and 4-6 months later respectively, given the Applicant's observations in August 2017 and more relevantly in October 2017).
40. The Applicant denied that his application for forfeiture lodged on 25 October 2017 was the result of being upset at seeing work done by Mr Larwood on E16/458 in the area of SPL 16/3083 (after he had shown that prospective ground to him). He was upset that the deal was changed with Mr Larwood in that they were supposed to peg Prospecting Licences P16/3089 and P6/3090 together. He confirmed his belief that the Respondent was involved in that deal and was to get 20% out of it however accepts that he didn't discuss that personally with the Respondent. He was later advised that in future he should receive handwritten permission from an underlying tenement holder before undertaking any prospecting.

41. The Applicant had carried out metal detecting work for other people before in the Goldfields district during ‘basically the whole of last year’, on the commercial basis of an agreement with the tenement holder as to a split of any gold found.¹⁷ It would be done in the cooler months from April through to October.
42. However in relation to the need for a tenement holder to comply with expenditure conditions he said generally speaking the charge out rate would be \$30-40 per hour for an 11-hour day (that is, up to \$440 per day). He clarified in cross-examination that that is not an amount he would expect to receive personally for detecting on behalf of another, but an amount that could be accounted for expenditure purposes.
43. He had never undertaken any contractual arrangement whereby he received as much as \$686 per day for metal detecting.

Evidence of Paul John Simmonds

44. Mr Simmonds’ statement was tendered¹⁸ and he gave oral evidence during the hearing.
45. He is the registered holder of mining tenements in the Dunnsville area and has been prospecting and otherwise involved in the mining industry since 1981. He has spent the last 20 years prospecting around the area of E16/458 and recalled visiting the area ‘a number of years ago’ and finding gold in the vicinity of the tenement.
46. On 9 October 2017 he offered to take the Applicant out to look for a prospective area where he had found gold some years earlier. He travelled behind the Applicant on a quad-bike. They accessed the tenement from the south, initially along the east-west fence line. As the terrain was too rough for the Applicant’s

¹⁷ t/s 11-13

¹⁸ Exhibit 12, statement of Paul John Simmonds dated 28 August 2018

vehicle they both then travelled on the back of Simmonds' quad-bike. They took a path marked with a yellow line on the map (Exhibit 5).¹⁹

47. He saw no recent tracks left by any vehicles in or around that path and he did not see any recent signs of prospecting or exploration activity in or around the path. Eventually they found the prospective area that he had remembered which was within E16/458 but less than 100m from the boundary shared with some vacant Crown land (the prospective area was later applied for by the Applicant, being SPL16/3083).
48. In his oral evidence Mr Simmonds said that on the occasions he had undertaken metal detecting on his own tenements or 'worked for tribute' a standard rate across the board would be in the vicinity of \$40 per hour. Working on his own tenements he has worked 10 or up to 12 hours per day between July-October, though he suggested November was too hot.
49. In terms of visible evidence of prospecting activity he would expect to see wheel marks from traffic and footprints. Usually if a hole is dug it is then filled in but one can still tell there has been a hole even after new rain, because the holes sink.
50. He had never claimed \$686 per day for metal detecting on his own tenements or come across any Form 5 Operations Reports that claimed near or above that rate. The highest rate he had seen was about \$40 per hour or \$400 per day.
51. On the Exhibit 11 map Mr Simmonds was asked to mark the approximate route he and the Applicant took on 9 October 2017. It is to be noted that according to the marking he made they did not travel near or around the creek bed area to the south or south-east of SPL 16/3083, nor indeed in the vicinity of SPL 16/3083. They were gone for about 4½ hours and although the Applicant got off the quad-bike and walked at times, Mr Simmonds didn't because he didn't like to leave footprints revealing potential areas of interest to others.

¹⁹ Exhibit 12, para 14 (contains reference to Track 3 on the marked up map which is the 'yellow line')

52. During their traverse on 9 October 2017 he did not see any vehicle tracks at all or any signs of ground disturbance. Because the area has a lot of ‘greenstone and is very soft any weight imprints on the ground’. In his experience you would see marks after a year if someone had been there.
53. He was shown some photographs from the Respondent’s affidavit (TS4-TS9) and asked if he recognised that area but said he couldn’t as it could be anywhere out there and he didn’t specifically recognise those areas as ones he took the Applicant to on 9 October 2017.
54. From his traverse of the tenement with the Applicant on that day he didn’t identify any signs that 16 days of metal detecting had been carried out within the previous year and said he would expect to have seen marks on the ground or dead or dying salt bush, even after rain.

Evidence of the Respondent

55. The Respondent tendered a copy of his affidavit sworn 3 October 2018²⁰ and gave oral evidence.
56. In preparation for the forfeiture hearing the Respondent travelled to the tenement on 30 September 2018 and took a series of photographs marked TS2-TS9 showing areas of interest.
57. He took the same route to his tenement on two prospecting trips during the reporting year ending 3 September 2017.
58. The trips involved six days of metal detecting between 3 and 8 November 2016 and 10 days of metal detecting between 11 and 20 May 2017. In total the 16 days of metal detecting was carried out by him ‘in and around the creek bed’ on E16/458.²¹

²⁰ Exhibit 13, Affidavit of Tan Vanth Singh Sandhu sworn 3 October 2018

²¹ Exhibit 13, at [16]

59. The Form 5 Operations Report showing total expenditure on prospecting in the sum of \$16,548.00 is comprised of the following:-
- (a) \$10,976.00 consisting of 16 days metal detecting at \$686 per day, which is what the Respondent believes to be what someone carrying out metal detecting in the district could charge under a contractual arrangement;
 - (b) \$524.00 for travelling to and from the tenement in November 2016 and May 2017;
 - (c) \$1,897.00 accommodation comprised of the cost of hiring a caravan and generator during the two prospecting trips;
 - (d) \$368.00 for telecommunications which is an estimate of the costs of his telephone whilst on the tenement during the two trips;
 - (e) \$1,148.00 in machine and other repairs comprising the cost of repairing his trailer and the handle on his metal detector during the May 2017 trip;
 - (f) \$567.00 for diesel fuel for both trips to the tenement;
 - (g) \$430.00 for rates;
 - (h) \$388.50 for the tenement rent;
 - (i) \$250.00 for administration fees.
60. The Respondent presented invoices related to the amounts referred to at subparagraphs (c), (e), (f), and (g) above. The expenses at (e) and (g) are accompanied by receipts confirming payment.
61. No oral evidence was adduced by way of further examination-in-chief.
62. In cross-examination the Respondent said he had eight or nine other tenements in the vicinity of E16/458 which he has held for a similar period of time. He didn't use a GPS when travelling to the tenement in November 2016 or May 2017 to ensure he was detecting on his own tenement, nor did he when he

retraced his steps for the purposes of preparing his affidavit in September 2018. He says he knows the tenement well and was sure he was prospecting in the creek bed which is south of the area of SPL16/3083.

63. On each of the 16 days he prospected he would have a lunch break on the hill which is on the northern-most section of the SPL, but each night would stay at Steve Axon's campsite about 80 km away. He did all the metal detecting during the two trips in the creek bed area but none in the SPL area. In September 2018 he didn't take any photographs of the areas where he had conducted his metal detecting, only areas where he accessed the tenement and 'camped' on the hill. Photograph TS6 depicted that area.
64. He would work each day for 12 hours. He would have noted the days that he prospected in his diary. His diary was back in Perth. He didn't produce it for the hearing. He agreed that he had produced no receipts of bank statements establishing payments made in the region or specifically for purposes attributable to his metal detecting activities and that the invoices for caravan, generator hire and fuel purchase do not establish that he was on the tenement during the periods claimed. He said he wasn't asked to produce these records, such as credit card statements. He said he didn't think he needed to.
65. The Respondent claimed that his invoice for diesel fuel in the sum of \$567.00 covers fuel he used during his November 2016 trip and that he set aside the remainder at Mr Axon's camp for use in his May 2017 trip. He said he kept it to the side and specifically only used it in relation to E16/458 and not for any of the other tenements he had in the vicinity, although he agreed he had visited his other tenements between November 2016 and May 2017.
66. He agreed he had not produced any bank statements or receipts in relation to his travel, caravan and generator hire, fuel purchase, or telecommunications. When asked how he calculated the sum of \$368.00 for telecommunications he said he did it according to an apportionment depending on the number of days he spent on the tenement, however he couldn't remember what rate he applied or how he

did the calculation. He agreed he produced no records in relation to his phone use during this period. He acknowledged that expenditure related to the phone would have to be in mining or in connection with mining rather than relate to personal calls, for example, however he couldn't remember what calls were made or what the calls related to. At best, he speculated that he might have called his tenement agent or he might have rung Steve Axon. He did not know what calls he made.

67. In relation to the tax invoice for 'repairs to trailer and machine as required' in the sum of \$1148.00, when asked why the trailer expenditure was specific to E16/458 he responded 'Why not'? He then accepted that he didn't know how the trailer related to the tenement. The repairs to the machine related to his metal detector which had needed the handle fixed 'whilst I was on the tenement in May 2017'. The invoice is dated 13 May 2017 (during his claimed 10-days of metal detecting that month). He said Mr Axon took six or seven hours to fix the handle. He accepted that would have been a period of time during which he was not able to detect on his tenement that day.
68. The Respondent accepted that the 16 days metal detecting he claims includes the time taken to travel from his Perth home to Mr Axon's campsite and then to the tenement, and the days he returned from the tenement to Mr Axon's and then returned to Perth. The trips to Perth and back were in a four-wheel drive towing a caravan which he estimated took about seven hours, and then another hour from Mr Axon's camp to the tenement. He then did 10-12 hours of prospecting a day. He denied that at age 66 he would be too tired to travel that distance and then prospect for 10-12 hours during the same day. He said he got up very early when travelling from Perth and left late when returning to Perth.
69. When asked what records he kept of his detecting activities and how he knew he worked a 12-hour day on the claimed days he said that he had noted this in his diary which was 'back in Perth'. He would need to check his diary to confirm

dates that he had detected himself on his other nearby tenements which are the subject of separate forfeiture applications by the Applicant.

70. As a previous practicing accountant and having several tenements the Respondent was aware of the requirements of a Form 5 and knew that if the Department sought to audit his expenditure more than an invoice might be required. He said he wasn't asked to produce records such as credit card statements, his diary or other records and that there was nothing provided which positively established that he was in the region of the tenement or that he had purchased provisions in Coolgardie, for example, during the relevant periods. He would have paid various expenses either by cash or credit card.
71. He would have gone to greater lengths to find receipts or produce records, such as his diary, if he knew they were required.
72. The Respondent was cross-examined extensively on the metal detector that he used. He denied it was heavy, weighing about 4-5 kg with a harness. It was about 10 years old. He accepted it was better used for finding 'shallow gold'. He has since learnt that the metal detector was not good for detecting in a creek bed and he accepted he is not very good at using the metal detector. He said 'I may be bad at it'.
73. When asked about the various settings on the detector and how the detector was set up for use the Respondent's evidence was vague and unclear. He accepted that he wasn't a technical expert and wasn't sure what the settings were for. He suggested he didn't do any alterations on the settings at all and after saying there were three or four settings he acknowledged that there were perhaps only two; one was for volume but he couldn't remember what the other setting was for. He said that he had sold that detector and he couldn't remember how the settings worked or how many there were. When it was suggested to him that it would be unlikely that he could use the detector on at least 16 different dates without adjustment to the suitability of the conditions he then said that Mr Axon would tune his detector for him back at the campsite, and when the proposition was put

that the detector needs to be tuned in the environment where the detecting is occurring he then said that Mr Axon would sometimes come to the tenement.

74. He could not now remember where the green 'ground balance' button was on the metal detector as he had sold it but accepted it would have to be turned on every time he used it. He agreed it was difficult to detect for metal in a creek bed and that in hindsight a different detector not designed for shallow ground was appropriate for a creek bed, but he wasn't that familiar with metal detectors and he had found some nuggets using that detector. He agreed it was worth less than \$1000.00.
75. The Respondent was cross-examined about the 'Statement to Accompany Exploration Licence Application' in relation to the tenement dated 29 January 2014.²² He acknowledged that the Year 1 proposed exploration program, which proposed \$15,000.00 would be expended on surface sampling and assays, did not occur and has not since occurred. He accepted that the Year 2 proposed expenditure of \$20,000.00 on AC drilling did not occur and has not since occurred. There was a program of works for the tenement approved in November 2017²³ and more recently aero-magnetics had been undertaken. He accepted that the purpose of an exploration licence was to locate an ore body with a view to progress to a conversion to a mining lease however said that metal detecting was a precursor to further exploration work.

Findings - Applicant

76. I find the Applicant was thorough in his assessment of the tenement and his observations of significant areas of the tenement, including the creek bed where the Respondent claims to have done all his metal detecting. His interest in the area generally manifests in his search for, and subsequent application for, nearby prospecting licence applications and application for SPL16/3083. He traversed areas of the tenement on several occasions, both before and after lodging his

²² Exhibit 7

²³ Exhibit 10

forfeiture application, by vehicle and on foot. Importantly, this included the creek bed areas, where he also prospected pursuant to a s40E permit. His evidence that due to the geology of the area he got many false signals in the creek bed which he had to disprove by digging, yet he saw no on the ground evidence of digging at all other than his own, I found was cogent, logical, honest and largely unchallenged. His evidence as to signs of vehicle tracks, plant damage and digging being evident, even after rainfall events and the passage of 6-12 months or more, was based on significant and demonstrated experience, was cogent and logical and furthermore was corroborated by Mr Simmonds. Mr Simmonds had 40 years of experience, 20 of which were in the same region.

77. I find the Applicant decided to lodge his forfeiture application on 24 October 2017 because he was ‘a bit gutted’,²⁴ and believed he’d been ‘played’ by Mr Larwood and the Respondent. He obtained legal advice and after reviewing the Form 5 formed the view there was no evidence of 16 days of metal detecting. To the extent his sense of being ‘played’ provided a motive for seeking forfeiture, I do not find that the Applicant was dishonest in his evidence. The apparent reversal of the agreement, to the extent it provided a motive, certainly encouraged the Applicant to continue to search the tenement for signs of activity and pursue his forfeiture application vigorously.
78. To the extent the Applicant asserted the Respondent was ‘late in paying his rent’ and late in lodging his Form 5, which he accepted was inaccurate, I do find those statements revealed a tendency by the Applicant to attempt to establish other aspects of non-compliance by the Respondent. The Applicant was cross-examined about a program of work approval for use of ground disturbing equipment²⁵ which gave approval to use ground disturbing equipment for prospecting as outlined in a program of work application on E16/458 addressed to Mr Larwood. When the proposition was put to him that there was nothing wrong with doing work on the exploration licence using the machinery

²⁴ t/s 23

²⁵ Exhibit 10

photographed by the Applicant in December 2017 and January 2018 he asserted that there was because they did not have a program of work for it. He said he was sure about that because the tenement register showed an excess tonnage application being made and then withdrawn. He was apparently confused between the approval for the use of ground disturbing equipment by letter dated 23 November 2017 and the application for excess tonnage which was then withdrawn. His later assertion in cross-examination that he didn't say it was improper for the work to be done was inconsistent with his earlier evidence.²⁶

79. In my view the matters set out in the paragraph above reveal a misunderstanding of information set out in the mining tenement register search for E16/458. In relation to the program of works it was a misunderstanding as to the ambit of that approval and the application for, and subsequent withdrawal of, the excess tonnage recorded on the register search. Where late payment of rent and late lodgement of the Form 5 is concerned it appears the Applicant has noted from the register search that extensions of time were sought in respect of both matters. However that extensions of time were sought does not indicate the Form 5 was late nor that the rent for the relevant year was late. I find these were genuine misunderstandings by the Applicant rather than deliberate attempts to be mischievous, but nevertheless in respect of these matters I find that the Applicant was endeavouring to establish other aspects of non-compliance by the Respondent where, in reality, there was no such non-compliance.
80. Taking these matters into account, I was nevertheless impressed by the detail and thoroughness of the Applicant's evidence. As to his observations on the ground generally, and specifically in the creek bed area, I found his evidence credible and reliable. I accept his evidence that in the areas where the Respondent said he travelled and detected there was no evidence of 16 days metal detecting or 32 occasions of travel by 4WD into and out of the area or near where he 'camped on the hill' above the SPL area. I find that there would have been signs of vehicle

²⁶ t/s 56 and 59

tracks, damage to vegetation and evidence of previously dug holes had there been 16 days metal detecting as claimed.

81. There was inconsistency in the evidence given by Simmonds as to where he travelled on the tenement with the Applicant on 9 October 2017. In his statement he agrees he says he took the same route as on the map marked by the Applicant (by a yellow line), albeit unlike the Applicant he did not get off the quad bike and walk around. However when asked by reference to Exhibit 11 to mark the approximate route that he took with the Applicant on 9 October it is apparent that that route does not encompass anywhere close to either the creek bed where the Respondent said he conducted his metal detecting nor the area of the SPL. His oral evidence was at the least inconsistent with his statement in this regard. Then when shown photographs TS 3 to TS 9 (photographs of the area on the hill and around the SPL) Simmonds was not able to recognise any of those areas saying 'it could be anywhere out there to be honest'.
82. Given the inconsistency with Simmonds' evidence there is a significant limit to the extent to which his observations corroborate the Applicant's observations as to signs, or the lack thereof, of metal detecting activity in or around the specific area claimed to have been worked by the Respondent. However as to his evidence generally that signs of detecting activity do remain after the passage of time I accept his evidence as credible and reliable.

Findings - Respondent

83. I did not find the evidence of the Respondent impressive or convincing; to the contrary, I found several aspects of his evidence evasive, vague and unreliable. He was on occasions non-responsive to questions counsel were entitled to ask. I found his claim of ignorance as to the usefulness of source documents, particularly in the context of this forfeiture proceeding, to be contrived. Overall I am not satisfied he was a credible or an honest witness.

84. The Respondent has held several mining tenements for several years and is well aware of expenditure requirements and of the need to substantiate relevant expenditure. Furthermore, as a former qualified accountant, he is well aware of the importance of documents that substantiate or tend to substantiate that expenditure.
85. The Respondent was clearly on notice as to what assertions the Applicant would make in these proceedings. He was on notice by way of Regulation 144 particulars forecasting an assertion of a limited amount of activity and a dispute that 16 days of metal detecting was conducted by him. He was on notice by way of the Applicant's outline of submissions lodged 8 months in advance of the hearing asserting same, and explicitly disputing the veracity of the information in the Form 5. He was on notice by way of the Applicant's statements of evidence and opening address and oral evidence during the first day of the hearing on 10 June 2019, during which counsel for the Applicant specifically set out that one of their grounds related to the Respondent's failure to produce sufficient supporting documentation to substantiate items of claimed expenditure.
86. Despite these sources of notice, despite being represented by very experienced counsel, and despite the Respondent giving evidence in December 2019, 6 months after the Applicant gave his evidence, he then asserted, in a somewhat flippant manner, and only in response to a question during cross-examination as to the existence of any record or note he kept of his hours of metal detecting, that his note was his affidavit. Then, apparently for the very first time, he said he noted his hours of metal detecting in his diary which was 'back in Perth'. In giving this answer the Respondent was in effect asserting that his diary was the source document recording the periods he spent detecting on the tenement. He did not say it was lost or destroyed, simply that he had not thought to bring it with him.

87. His explanation for the lack of any source documents such as credit card statements or bank statements, or receipts or phone records, or his diary for that matter, which explanation was to the effect that he was not asked to produce the records and that he would have gone to greater lengths to find them if he knew he needed them, beggars belief. I found his responses insincere. It would clearly be to the advantage of the Respondent in these circumstances to produce any appropriate documents to support the expenditure claimed when under challenge, yet he has not done so. They are not documents out of his possession or control. His late claim to possessing a diary which records the very subject matter the Applicant disputes, namely the dates and times of metal detecting, is implausible at best. His background as an accountant and experience with respect to expenditure requirements, especially in the context of the procedural history of this application, put into sharp focus his failure to produce such records.
88. That failure in my view gives rise to an inference of the kind referred to in *Jones v Dunkel* to the effect that the evidence, if produced, would not have assisted the Respondent. Furthermore, that I can draw with greater confidence any inference unfavourable to the Respondent should the evidence be capable of casting light on whether that inference should properly be drawn.
89. The Respondent was simply unable to explain how, by way of apportionment, he calculated the telecommunications expenditure for the tenement. He could in no meaningful sense substantiate this claim, nor did he attempt to do so.
90. The Respondent, when pressed, was unable to state how repairs to the trailer related to allowable expenditure on the tenement at all. It is a matter of concern that the Respondent was prepared to claim \$1148 for 'machine and other repairs' without knowing whether one of the 2 matters the invoice related to, being trailer repairs, was even relevant expenditure. His initial response of 'why not' to the question how the trailer expenditure actually related to the tenement was glib, and was but one example of his vague and at times evasive evidence. It was not a matter of the Respondent forgetting how the trailer expenditure related to the

tenement; he simply did not know how it did. There was no attempt made by the Respondent to then clarify what portion of the \$1148 invoice related to repairs to the trailer as opposed to repairs to the handle of his metal detector. Nor was any explanation sought or offered as to why the claim as to this expenditure in the Form 5 was then positively re-confirmed in his Regulation 144 particulars²⁷ and then again in his sworn affidavit²⁸.

91. As to the rate of \$686 per day claimed for metal detecting on his own tenement, the Respondent gave no evidence whatsoever as to the basis upon which he believed that amount was equivalent to the remuneration he would be entitled to if engaged in similar mining activity elsewhere in the district. There was no evidence given by him as to the source of his belief or any knowledge he had as to whether that rate was accepted or common for metal detecting elsewhere in the district. In his affidavit the Respondent stated that where facts were not within his personal knowledge but he believed them to be true he had identified the source of his information and belief. However neither in his affidavit nor in his oral evidence was there any attempt to identify any source of information or belief that \$686 per day was an amount equivalent to the remuneration he would be entitled to if engaged under a contractual arrangement in similar mining activity elsewhere in the district. Furthermore, no attempt was made to explain why the Respondent claimed \$686 per day for metal detecting during the 2017 reporting year, whereas in his Form 5 for the 2016 reporting year in relation to the very same tenement he claimed \$500 per day for metal detecting. There was no explanation for that significant increase.
92. I find Simmonds had considerable experience in the district and was well qualified in light of that experience to give reliable evidence as to the charge out rates for metal detecting under a contractual arrangement. The Applicant had less experience in the district however his experience was recent and included metal detecting for others. I accept as honest and reliable the evidence of the

²⁷ Respondent's Regulation 144 Statement at para 8

²⁸ Exhibit 13. Respondent's affidavit at para 16(e)

Applicant and Simmonds to the effect that the accepted charge out rate in the district for metal detecting is between \$30-40 per hour, or \$330-440 per day based on an 11 hour day. Ultimately that evidence was not challenged by the Respondent.

93. I find the Respondent's claim of \$686 was not only excessive but was apparently made without any reasoned or legitimate basis by reference to his experience, knowledge or other identified source of information or belief. I find the reasonable inference to be drawn in these circumstances is that the amount claimed was not believed by the Respondent to be the 'going rate' for metal detecting, but rather was determined by him in an effort to establish compliance with expenditure requirements.
94. I did not find credible the Respondent's evidence that he had stored the excess diesel fuel at Mr Axon's camp in the intervening 6 months between November 2016 and May 2017 solely in relation to his work on the tenement, in circumstances where he accepted he was engaged in work on his other tenements in the vicinity during that period.
95. I found the Respondent's evidence that he was engaged in metal detecting over the full 16 days for 10–12 hours each and every day, in apparent justification for the claimed rate of \$686 per day, to be unreliable and untrue. There was no reference in his Regulation 144 particulars nor in his affidavit to his diary or to the question of how many hours per day he metal detected on the tenement. It was during cross-examination he claimed working a 12 hour day. Yet he acknowledged that his travel from Perth to the tenement and back was included in the 16 days. He also acknowledged that for 6–7 hours of one of those days the detector was being repaired and could not be used by him. I do not accept as true that the Respondent drove from his Mosman Park home with a caravan to Axon's camp in the Coolgardie area, a journey of at least 7 hours, where he then unhitched his trailer, then drove for another hour to the tenement and then conducted as much as 12 hours metal detecting. I don't accept that he would

have done 10-12 hours metal detecting during any of the 4 days he was, in addition, travelling for at least 8 or more hours to and from his home to the tenement during the claimed periods. Nor do I accept that he detected for 10-12 hours when his detector was out of commission for 6-7 hours. I found his evidence in this regard to be exaggerated and implausible.

96. Although the Respondent accepted that he did not have technical proficiency with respect to the metal detector he was using, his evidence as to his use and knowledge of the detector itself, not only with respect to its technical aspects but its basic functioning, was vague and unconvincing and in my view inconsistent with the volume of its use claimed by him. Despite that detector having been sold I find it unlikely that after usage of it over at least 16 days at 10–12 hours per day he would not be more knowledgeable as to its tuning, nor forget where, for example, the green ‘ground balance’ button was. His evidence that Axon would adjust the detector back at the camp was an apparent attempt by the Respondent to deal with cross-examination to the effect that the detector needed adjustment, given he admitted he never adjusted it himself. When it was then pointed out to him that the tuning needed to occur in the same environment it was actually being used, the Respondent then in turn adjusted his evidence by stating Axon would sometimes come to the tenement. This evidence demonstrated the degree to which the Respondent tended to add details to his version of events when challenged, such as the existence of his diary recording his hours of metal detecting.
97. I also find it highly unlikely that the Respondent would be engaged for such lengthy periods of time in metal detecting on one of several tenements that he possesses, in a creek bed, where he acknowledges that the style of detector he was using was old, not particularly valuable, where he had no skill or proficiency in its use and the machine itself was not appropriate for the detection of gold in creek beds in any event, being the only area where he claims to have detected.

98. Overall I found the Respondent's evidence to be unreliable, vague and in several aspects simply implausible. He was not a credible witness. His demeanour was defensive and I found several aspects of his evidence to be conclusory and declaratory in nature whilst lacking in detail. He stated that he 'knew his tenements' but demonstrated he had a poor recollection of events and was not able by reference to maps, for example, to particularise with any degree of clarity which route he took to enter the tenement on the 16 occasions claimed. Whilst the Respondent was not argumentative he had a tendency not to address the question asked but simply restate his own position and tended to respond in absolute terms to the effect, for example, that he knew he was on the right area when detecting because it was his lease, without being able to explain or demonstrate via any of the maps tendered what route he took. On no occasion did he have a GPS.
99. Although the Respondent returned to the tenement on 30 September 2018 for the purpose of preparing his statement for the hearing, and knowing where he claims to have metal detected in the creek bed over 16 days, he presented no photographs at all depicting any of those areas in the creek bed where he claims to have detected.

Has the Applicant Proven Non-Compliance with Expenditure Conditions?

100. I accept as honest and accurate the evidence of the Applicant as to his observations on the tenement, specifically the absence of any signs of metal detecting or activity consistent with metal detecting in the creek bed areas to the south-east and south-south-east of the SPL, or to evidence of vehicle tracks or damage in the areas in and around the SPL. I accept as reliable his evidence that had there been metal detecting conducted, and certainly had there been 16 days of metal detecting conducted, in the area of the creek bed, and had there been vehicle ingress and egress on 32 occasions as claimed, there would be some on the ground evidence observable, even after a period of 6-9 months had elapsed. I accept the Applicant's evidence that there were no such signs. I accept the

Applicant's evidence that as a consequence of the works done pursuant to the Program of Work by Larwood on the SPL, he utilised his s40E permit rights to closely examine along the creek bed area as he could not prospect within 100 metres of those works. I accept the evidence of the Applicant and Simmonds that there would have been visible signs had metal detecting occurred, as claimed, and there would have been visible signs had vehicle movements occurred as claimed.

101. I do not accept as reliable or as true the Respondent's evidence that he conducted 16 days of metal detecting for 10-12 hours per day. I do not accept that the Respondent has conducted any metal detecting on the tenement as claimed during the 2017 reporting year. Aside from rates, rent and administration costs (total \$1068) I find that the information provided on the Form 5 is demonstrably false. Whilst the 'accommodation expenses' related to caravan and generator hire may well have been borne, I find they were not related to E16/458.
102. The Applicant has satisfied me, on the balance of probabilities, that there is a *prima facie* case for forfeiture as the Respondent has failed to comply with its obligation to meet the minimum expenditure amount of \$15,000. I find the shortfall is very significant.

Is the Non-Compliance of Sufficient Gravity to Justify Forfeiture?

103. I bear in mind the principles set out at paragraphs 14-19 above, including the need for the Respondent to demonstrate that, in the circumstances, the non-compliance is not of sufficient gravity to justify forfeiture.
104. According to the Exhibit 7 exploration proposal, the Respondent had planned to implement a drill program in the second reporting year ending September 2016, dependent on the results from assays and sampling during the first reporting year ending September 2015. The Form 5 for 2015 reveals that of the total expenditure of \$17,879 an amount of \$7,879 related to wages and salaries and \$3,570 for equipment hire. Whilst the first year proposal was to conduct surface

sampling and assays it is clear from the evidence and the Form 5 that no general prospecting or small scale mining activities were conducted. The Form 5 for the second reporting year ending September 2016 reveals 14.59 days of metal detecting at \$500 per day (total \$7,295) and field supplies in the sum of \$6,146. The Form 5 for the reporting year ending September 2018 reveals 12 days metal detecting at \$686 per day (total \$8,232) and plant hire in the sum of \$9,600. The Respondent points to the work done by Larwood arising out of the Program of Work in late 2017/2018, and to recent aero-magnetics.

105. The Respondent acknowledges that the proposed sampling and drilling did not occur in the first or second year and has not to date occurred.
106. A significant portion of expenditure on the tenement has been in relation to metal detecting. I have found that the rate claimed of \$686 per day in the 2017 reporting year is excessive and unjustified. Whilst the Applicant has not sought to bolster its case for forfeiture by seeking to prove non-compliance with expenditure conditions in years previous to or subsequent to the 2017 reporting year, nevertheless the amounts claimed for the activity of metal detecting both in the 2016 and 2018 reporting years are, consistent with my findings in relation to the 2017 reporting year, excessive. However I have not been invited to find, nor do I find based on inferences drawn from proven primary facts, that there was non-compliance in other reporting years.
107. The location and timing of the scraping and detecting work done by Larwood pursuant to the Program of Work I find was precipitated by the Applicant showing that prospective area to him in October 2017. It was the Applicant's interest in that area that triggered action by the Respondent.
108. Whilst any work done and expenditure accrued on a tenement both before and after the relevant expenditure year is relevant in determining whether any non-compliance is of sufficient gravity to justify forfeiture, it is to be noted that expenditure requirements are ongoing.

109. Regrettably, I have concluded not only that the Respondent did not conduct metal detecting in the 2017 reporting year as claimed, but that the Form 5 contains untrue and misleading information. I find that the Form 5 was lodged in an effort to circumvent the expenditure conditions and that such conduct is grave in the context of a statutory scheme in which self-policing pursuant to the lodgement of expenditure reports is such a fundamental component. The clear policy of the Act is to ensure that holders of mining tenements are able to and in fact do work their tenements. It is a policy designed to discourage holders from simply acquiring a tenement and not performing their statutory obligations, thereby defeating the policy of active exploitation of mineral deposits.
110. In my view a monetary penalty would not be sufficient in these circumstances. Consistent with a number of authorities, in my view the lodgement of a misleading and untrue Form 5 is a significant factor justifying a recommendation of forfeiture.²⁹
111. In all the circumstances, such is the gravity of the Respondent's non-compliance that forfeiture of E16/458 is appropriate in preference to the imposition of a monetary penalty.
112. Accordingly I recommend that the Minister grant Application for Forfeiture No. 516938.



Warden A Hills-Wright

10 February 2020

²⁹ *Pawson v Northwestern Mining Pty Ltd* (2013) WAMW 18 at 90, and see cases referred to in *Hunt on Mining Law in Western Australia*, Fifth Edition 2015 at p191