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**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : BROSANAN v LAPELERIE [2021] WAMW 14

**CORAM** : WARDEN J O'SULLIVAN

**HEARD** : 17 September 2019 & 29 July 2021

**DELIVERED** : 23 August 2021

**FILE NO/S** : Application for Forfeiture 537850

**TENEMENT NO/S** : Mining Lease 51/863

**BETWEEN** : **ALLAN NEVILLE BROSANAN**  
(Applicant)

AND

**ALAIN LAPELERIE**  
(Respondent)

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*Catchwords:* Application for forfeiture, reg 96C(4)(b) of the *Mining Regulations 1981 (WA)*, costs associated with acquisition, unpaid work.

**Legislation:**

- *Mining Regulations (1981) (WA) regs 31 & 96C*
- *Mining Act 1978 (WA) ss 8 & 82*

**Cases referred to:**

- *Bakarra Pty Ltd v Juler Pty Ltd* unreported; Perth Warden's Court; 17 December 1991 noted 10 AMPLA Bull 13
- *Barristers' Board of Western Australia v Tranter Corp Pty Ltd* [1976] WAR 68
- *Bothranch Pty Ltd v Monitronix Ltd* (1989) 15 ACLR 35
- *Cazaly Iron Pty Ltd v Minister for Resources* [2007] WASCA 58
- *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* unreported; FCt Sct of WA; del 16 December 1988; Library No.7427
- *Commission of New South Wales v Murray More (NSW) Pty Ltd* (1975) 6 ALR 271
- *Craig v Spargos Exploration NL* unreported, Kalgoorlie Warden's Court; 22 December 1986
- *Ex parte Flint v Nexus Minerals NL*; unreported FCt Sct of WA; Lib No 970065; del 26 February 1997
- *Forrest & Forrest Pty Ltd v The Honourable Richard Marmion, Minister for Mines and Petroleum* [2017] WASCA 153
- *Mohammadi v Bethune* [2018] WASCA 98
- *Pochi v Minister for Immigration and Ethnic Affairs* [1979] 36 FLR 482
- *Re His Honour Warden Calder SM and Another; Ex parte Lee* (2007) 14 WAR 289
- *Re Warden Calder; Ex parte Brosnan (No.2)* [2012] WASC 214
- *Richmond v Opaltrend Nominees* unreported Perth Warden's Court; 7 October 1999; AMPLA Bulletin VOL 14 No.1
- *Rose v Goldtime Australia Pty Ltd* [2004] WAMW 8
- *Woiner v Asia Oil & Minerals and Another* unreported Kalgoorlie Warden's Court; 15 April 1991

***Result:***

Application for Forfeiture 537850 is dismissed

***Representation:***

*Counsel:*

Applicant	:	Mr G H Lawton
Respondent	:	Mr T J Kavenagh

*Solicitors:*

Applicant	:	Lawton McMaster Lawyers
Respondent	:	Kavenagh Legal

## Introduction

- 1 Mr Lapelerie has held Mining Lease 51/863 (M51/863) since 17 July 2007. M51/863 is subject to a condition that the tenement holder expend or cause to be expended in mining or in connection with mining, \$20,000 each year.<sup>1</sup> The tenement year in question runs from 17 July 2017 to 16 July 2018 (the Expenditure Year).
- 2 On 11 September 2018, Mr Lapelerie lodged an operations report (Form 5) certifying that he had spent \$31,331.07 on or in connection with mining.
- 3 Mr Brosnan applies for the forfeiture of M51/863.<sup>2</sup> He advances two contentions. The first involved an alleged conversation between a third party and Mr Lapelerie.
- 4 The content of the alleged conversation was set out in Mr Brosnan's statement, however, the third party neither provided a statement nor an affidavit, nor was he called to give evidence.
- 5 The relevant parts of Mr Brosnan's statement were the subject of an objection. Ultimately, I ruled that this evidence was inadmissible.
- 6 Although the rules of evidence do not apply to these proceedings, given the significance of this evidence together with the fact it could not be tested, I concluded that this evidence could not be characterised as logically probative hearsay.
- 7 In my view, such a course is consistent with the following observations made by Brennan J in *Pochi v Minister for Immigration and Ethnic Affairs*:<sup>3</sup>

*The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that "this assurance of desirable flexible procedure does not go*

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<sup>1</sup> See s 82(1)(c) *Mining Act 1978* (WA) & reg 31 *Mining Regulations 1981* (WA).

<sup>2</sup> Responsibility for the delay in finalising this matter rests entirely with me, with some assistance from various Covid lockdowns, not with the parties.

<sup>3</sup> *Pochi v Minister for Immigration and Ethnic Affairs* [1979] 36 FLR 482; 492.

so far as to justify orders without a basis in evidence having rational probative force", as Hughes C.J. said in **Consolidated Edison Co. v. National Labour Relations Board** [1938] USSC 176; (305 U.S. 197 at p.229). To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J. pointed out, though in a dissenting judgment, in **The King v. War Pensions Entitlement Appeals Tribunal; ex parte Bott** [1933] HCA 30; (1933) 50 CLR 228 at p.256:

*"Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence.' Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice.' "*

That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence. Diplock L.J. in **Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore** [1965] 1 Q.B. 456 at p.488 said:

*"These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue."*

- 8 Mr Brosnan's second contention concerned an agreement between Mr Lapelerie and Donald Frederick Ward to carry out work on the tenement. Mr Brosnan argues that the cost of the work carried out as a consequence of this agreement is not claimable expenditure. The only evidence of the arrangement between Mr Lapelerie and Mr Ward is that set out in their respective affidavits.
- 9 As Mr Brosnan's statement only contained evidence going to the first contention and as that had been ruled inadmissible, he could not establish a prima facie case

unless he could put into evidence the affidavits of Mr Lapelerie and Mr Ward which confirmed the existence and terms of the agreement.

- 10 As a consequence, Mr Brosnan sought to read into evidence as part of his case both affidavits.
- 11 That course was opposed by Mr Lapelerie and as a consequence the proceedings were adjourned to enable both parties to file written submissions.
- 12 Ultimately, I held that the affidavits of Mr Lapelerie and Mr Ward could be read into evidence as part of Mr Brosnan's case, on the basis that, if required, both witnesses could be cross-examined by Mr Kavenagh, counsel for Mr Lapelerie. On making that ruling, I indicated an intention to publish my reasons together with the substantive reasons in this matter.

### **The Preliminary Ruling**

- 13 The starting point is that an affidavit does not become evidence in the proceedings merely as a consequence of having been filed.<sup>4</sup> An affidavit only becomes evidence in the proceedings when the applicant or another party has read it into court or the court rules that it be taken as read.<sup>5</sup> The term 'read' denotes a statement or conduct demonstrating reliance on the affidavit or part thereof.
- 14 A party has no obligation to read an affidavit which he or she has filed.<sup>6</sup> Nonetheless, his or her opponent may read it, whereupon counsel for the party who filed the affidavit is entitled to cross-examine the deponent.<sup>7</sup>
- 15 Consistent with the principles referred to above, that procedure was followed in this proceeding.

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<sup>4</sup> *Cazaly Iron Pty Ltd v Minister for Resources* [2007] WASCA 58.

<sup>5</sup> Civil Procedure Western Australia; 36.2.5.

<sup>6</sup> *Bothranch Pty Ltd v Monitronix Ltd* (1989) 15 ACLR 35; 7.

<sup>7</sup> *Barristers' Board of Western Australia v Tranter Corp Pty Ltd* [1976] WAR 68 at 67.

## The Issue

16 Having read into evidence the affidavits of Mr Lapellerie and Mr Ward as part of his case, Mr Brosnan is bound to accept that the work referred to therein was carried out. It is also not in dispute that the work undertaken by Mr Ward of itself exceeds the minimum expenditure commitment. If, as Mr Brosnan asserts, the work attributed to Mr Ward is not claimable, expenditure on M51/863 would not meet the minimum commitment.

17 The central issue in these proceedings is the characterisation of the work undertaken by Mr Ward and whether it can be taken into account for the purpose of calculating expenditure.

18 Paragraph [4] of Mr Ward's affidavit<sup>8</sup> says:

*I have been working in partnership with Alain Lapellerie. I am not paid by [Lapellerie] for doing any work in relation to mining lease 51/863 (Tenement) but am earning an interest in the Tenement. We have a verbal gentleman's agreement that I will assist Lapellerie in the exploration of the Tenement in exchange for a 34% interest in the Tenement.*

19 A paragraph in similar terms appears in the affidavit of Mr Lapellerie.<sup>9</sup>

20 Mr Brosnan argues that the expenditure attributable to work carried out by Mr Ward by which he is earning an interest in the tenement pursuant to a verbal gentleman's agreement can not be claimed as expenditure because it is contrary to reg 96C(4)(b).<sup>10</sup>

21 He also argues that the work carried out by Mr Ward is not paid work and is therefore not actual expenditure.<sup>11</sup>

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<sup>8</sup> Affidavit of Donald Frederick Ward sworn 8 March 2019; [4].

<sup>9</sup> Affidavit of Alain Lapellerie sworn 13 March 2019; [5].

<sup>10</sup> As it is not contended by Mr Brosnan that the agreement between Mr Lapellerie and Mr Ward is not a legally binding agreement, I have not considered that question.

<sup>11</sup> Applicant's Written Submissions; 3 May 2019; [13]

## The Legislative Framework

22 Section 82 of the *Mining Act* deals with the covenants and conditions that apply to a mining lease. It materially provides:

- (1) *Every mining lease shall contain and be subject to the prescribed covenants by the lessee and in particular shall be deemed to be granted subject to the conditions that the lease shall -*
  - (b) *use the land in respect of which the lease is granted only for mining purposes in accordance with this Act;*
  - (c) *comply with the prescribed expenditure conditions applicable to such land unless partial or total exemption therefrom is granted in such manner as is prescribed.*

23 The expression ‘expenditure conditions’ is defined in s 8(1) of the *Mining Act* as follows:

*‘expenditure conditions’ in relation to a mining tenement means the prescribed conditions applicable to a mining tenement that require the expenditure of money on or in connection with the mining tenement or the mining operations carried out thereon or proposed to be so carried out.*

24 Regulation 31(1) and (1b) relevantly provide:

### **31. Expenditure condition**

- (1) *The holder of a mining lease shall expend or cause to be expended in mining on or in connection with mining on the lease not less than \$100 for each hectare or part thereof of the area of the lease with a minimum of \$10 000 during each year of the term of the lease; but if the holder is directly engaged part-time or full-time in mining on the lease itself then 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 shall be deemed to have been expended:*

*Provided that where the area of a mining lease does not exceed 5 ha the minimum annual expenditure shall be \$5 000.*

...

- (1b) *The specific provisions in regulation 96C, relating to allowable expenditure and non-allowable expenditure for the purposes of calculating expenditure under a lease, apply when calculating expenditure under this regulation.*

*(emphasis added)*



- 25 Regulation 31 is the sole source of a tenement holder's obligation in relation to mining related expenditure.<sup>12</sup>
- 26 The failure to comply with the expenditure condition absent an exemption gives rise to a risk that the tenement will be forfeited.<sup>13</sup>
- 27 Regulation 96C of the *Mining Regulations 1981 (WA)* sets out specific examples of allowable and non-allowable expenditure for the purpose of calculating expenditure.<sup>14</sup>
- 28 Regulation 96C provides:

**96C. Specific expenditure provisions**

- (1) *The cost of an Aboriginal heritage survey conducted on 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.*
- (1a) *The cost of an Aboriginal heritage survey conducted on land while the land was the subject of an application for a mining tenement may be used in the calculation of expenditure expended on, or in connection with, mining on that mining tenement during the first year of its term.*
- (2) *The cost of any rehabilitation activities carried out on land disturbed by mining operations on a mining tenement may be used in the calculation of expenditure expended on, or in connection with, mining on the mining tenement.*
- (2a) *Annual tenement rent (including the rent for the first year of the term of the mining tenement) and local government rates 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.*
- (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.*

<sup>12</sup> *Re His Honour Warden Calder SM and Another; Ex parte Lee* (2007) 14 WAR 289; 298.

<sup>13</sup> See s 98(4A) of the *Mining Act*.

<sup>14</sup> See *Mining Regulations*; reg 31(16).

- (3a) *The cost of cutting and polishing minerals for use as samples may be used in the calculation of expenditure expended on, or in connection with, mining on the mining tenement.*
- (3b) *The cost of an aerial survey may be used in the calculation of expenditure expended on, or in connection with, mining on any mining tenement that is located wholly or partly within the boundaries of the survey when those boundaries are projected onto the surface of the Earth.*
- (3c) *The reference in subregulation (3b) to an aerial survey includes an aerial survey conducted in respect of land while the land was the subject of an application for the mining tenement concerned.*
- (3d) *Where the cost of an aerial survey is used in the calculation of expenditure for more than one mining tenement, the cost is to be apportioned between the mining tenements in such a way that the total expenditure claimed does not exceed the cost.*
- (3e) *For the purposes of subregulations (3b) and (3d) the cost of an aerial survey comprises —*
  - (a) *the cost of acquiring data, in the air and on the ground, during the period in which the aerial survey is conducted; and*
  - (b) *the cost of processing that data to produce fully corrected, point-located digital data stored on an appropriate computer-compatible medium.*
- (4) ***The following costs and payments cannot be used in the calculation of expenditure expended on, or in connection with, mining on the mining tenement —***
  - (a) ***the cost of marking out mining tenements;***
  - (b) ***any costs associated with the acquisition or sale of mining tenements;***
  - (c) *research activities not directly related to a specific tenement;*
  - (d) *compensation payments made in respect to the mining tenement.*

*(emphasis added)*

## **Forfeiture: General Principle**

- 29 As the Full Court observed in *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd*:<sup>15</sup>

*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.*

- 30 As E Heenan J held in *Re Warden Calder; Ex parte Brosnan (No.2)*<sup>16</sup> 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.*

- 31 In *Craig v Spargos Exploration NL*, Warden Reynolds<sup>17</sup> remarked:

*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.*

- 32 Further, in *Rose v Goldtime Australia Pty Ltd*<sup>18</sup> 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*

<sup>15</sup> *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* unreported; FCt Sct of WA; del 16 December 1988; Library No.7427 at 15.

<sup>16</sup> *Re Warden Calder; Ex parte Brosnan (No.2)* [2012] WASC 214 at [87].

<sup>17</sup> *Craig v Spargos Exploration NL* unreported; Kalgoorlie Warden’s Court; 22 December 1986; 6.

<sup>18</sup> *Rose v Goldtime Australia Pty Ltd* [2004] WAMW 8.

*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.*

- 33 As a general principle the emphasis should be on the nature and extent of the non-compliance and not on future proposals.<sup>19</sup>

### **Costs associated with acquisition**

- 34 The focus of Mr Brosnan's submissions were directed to reg 96C(4)(b) which expressly excludes 'any costs associated with the acquisition or sale of mining tenements'.
- 35 As I understand Mr Brosnan's argument the work carried out by Mr Ward is a cost associated with the acquisition of a 34% share of M51/863 and therefore cannot be taken into account in calculating expenditure because of reg 96C(4)(b).
- 36 The arrangement between Mr Lapellerie can variously be described as an acquisition by Mr Ward and a sale by Mr Lapellerie. Either way, reg 96C(4)(b) prohibits any costs associated with the acquisition or sale being included as expenditure for the purposes of reg 31.
- 37 Mr Brosnan's contention raises questions both as to the proper construction of the reg 96C(4)(b) and the way in which the agreement between Mr Lapellerie and Mr Ward is characterised.
- 38 The principles of statutory construction were summarised by the Court of Appeal in *Mohammadi v Bethune*<sup>20</sup>:

31. *The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of construction of an instrument, has regard to*

<sup>19</sup> *Majeel v Schilda*; unreported Warden's Court; 1998 noted 7 AMPLA Bull 146.

<sup>20</sup> *Mohammadi v Bethune* [2018] WASCA 98; [31]-[34].

context. As Kiefel CJ, Nettle and Gordon JJ recently explained in *SZTAL*:

*The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*

32. *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.*
33. *The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials.<sup>[61]</sup> The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.*
34. *Discernment of statutory purpose is particularly significant in cases, commonly encountered, where the constructional choice presented is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'. In such a case, the choice 'turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies'. As we will explain later in these reasons, we think this is such a case.*

39 In considering the meaning of a provision not only should regard be had to the language used but also the objects of the legislation and the mischief to which the provision under consideration is directed.

40 One of the 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. It is also an object of the

*Mining Act* that, in general, the holder of a mining tenement should carry out the relevant mining activity on the mining tenement.<sup>21</sup>

41 Those provisions of the *Mining Act* and *Regulations*, to which I have already referred, concerning the obligation to expend and the risk of forfeiture for non-compliance are directed at promoting the objects outlined above.

42 It is against that background that the preferred construction of reg 96C(4)(b) must be considered.

43 Regulation 96C(1)-(3e) covers a myriad of expenses. The general theme is directed to encouraging mining, whilst acknowledging there are costs involved in holding a tenement, conducting Aboriginal heritage surveys and carrying out rehabilitation.

44 As Kennedy J observed in *Re Heaney; Ex parte Flint v Nexus Minerals NL*:<sup>22</sup>

*It is important for the present purposes to note that the expenditure does not have to be on mining, as such, to satisfy the terms of [reg 31]. It may be 'in connection with' mining. The words 'in connection with' are words of wide import and, as with the words 'connected with', and, subject to the context in which the words are used are capable of describing a spectrum of relationships ranging from direct and immediate to the tenuous and remote – Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 115 ALR, at 10-11; Berry v Federal Commissioner of Taxation (1953) 89 CLR 65.*

45 Bearing in mind that the words 'connected with' are capable of capturing a wide range of activities, reg 96C seeks to clarify some of the costs which are and are not claimable.

46 Absent the prohibition in reg 96C(4)(b), any costs associated with the acquisition or sale of mining tenements may well have been claimable as expenditure given expenditure need only be 'in connection' with mining.

<sup>21</sup> *Forrest & Forrest Pty Ltd v The Honourable Richard Marmion, Minister for Mines and Petroleum* [2017] WASCA 153; [96].

<sup>22</sup> *Ex parte Flint v Nexus Minerals NL*; unreported FCt SCT of WA; Lib No 970065; del 26 February 1997; 4.

47 Having regard to the subparagraphs of reg 96C(4), it appears that none of them involve mining, nor of themselves are they sufficiently facilitative of mining to justify their characterisation as expenditure for the purposes of reg 31(1). Acquiring a tenement and holding it without developing it is as a general rule discouraged.<sup>23</sup> Similarly, selling a tenement does not involve developing it, hence the costs associated with the sale are also not claimable.

48 The ordinary meaning of the word ‘associated’ in reg 96C(4)(b) is defined to mean:

1. ‘To connect by some relation, as in thought.
2. To join as a companion partner or ally.
3. To unite; combine: coal associated with shale.’<sup>24</sup>

49 In my view, the inclusion of the word ‘associated’ in s96C(4)(b) is intended to expand the operation of the sub regulation to include for example, legal fees. I do not understand it to exclude the cost of the acquisition or sale itself from its operation.

50 The word ‘cost’ in reg 96C(4)(b) is not defined. Its natural and ordinary meaning is ‘the price paid to acquire, produce/accomplish or maintain anything: the cost of a new car is very high.’<sup>25</sup>

51 In *Richmond v Opaltrend Nominees Pty Ltd*,<sup>26</sup> Warden Calder remarked:

*I am of the opinion that although the word “money” is used in the definition of expenditure conditions in section 8(1) of the Act and that, although Regulation 15 is expressed in terms by which there is express reference to amounts of money, the underlying purpose of those provisions in particular and of all provisions of the Act in general which relate to expenditure conditions is to ensure that appropriate activities are carried out either*

<sup>23</sup> *Craig v Spargos Exploration NL* unreported, Kalgoorlie Warden’s Court; 22 December 1986.

<sup>24</sup> Macquarie Dictionary Online.

<sup>25</sup> Macquarie Dictionary Online.

<sup>26</sup> *Richmond v Opaltrend Nominees* unreported Perth Warden’s Court; 7 October 1999; AMPLA Bulletin Vol 14 No.1; 16.

*directly in mining or exploring or prospecting on the ground, or in connection with activities which are associated with mining or exploring or prospecting. That is to say, the primary objective is the undertaking of activity and not merely expenditure. The spending of money is the means by which that primary objective of activity is sought to be achieved. I consider that in such a context the use of the word "expend", which introduces the concept of "spending" as part of the notion of "expenditure", should not be seen as doing more than providing a description of the means by which a value can be attributed to qualifying activity, such activity being, of itself, the means which Parliament has adopted of trying to ensure that a certain level of mining or exploration or prospecting or work genuinely connected thereto is carried out on or in respect of each tenement during each expenditure year. It seems to me that the purpose of Parliament in prescribing a monetary amount as it has done in Regulations 15, 21 and 31 should be seen as being designed and intended to quantify in some way the amount of activity which is to be carried out in respect of a mining tenement using a simple, readily understood and fairly readily applied and examinable criterion and using a common, well-known standard, namely, money. It is difficult to contemplate how that purpose could be achieved other than by using a monetary amount given the vast range of ways in which activities which will promote mining exploration and prospecting may be carried out.*

52 His Honour went on to observe:<sup>27</sup>

*The mischief at which the expenditure conditions and the requirements of the Act and Regulations are aimed is the mischief of tenement holders gaining control of ground by means of the grant of a tenement and then failing to advance the objects of the Act by not engaging in any work of other activity on or in respect of the ground covered by the tenement.*

53 Warden CD Roberts in *Woiner v Asia Oil & Minerals and Another*<sup>28</sup> (*Woiner*) also emphasised that the focus of the legislation is on expenditure taking place not the means by which it is incurred:

*Regulation 31 is not concerned with exactly how expenditure is caused to be incurred. That expenditure might be so caused by directing another to incur it by entering into a tribute agreement with that other, by entering into an option agreement with that other, by entering into a sale agreement with that other, by entering into a joint venture agreement with that other, by*

<sup>27</sup> *Richmond v Opaltrend Nominees Pty Ltd* unreported Perth Warden's Court; 7 October 1999, AMPLA Bulletin Vol 14 No.1; 18 & 19.

<sup>28</sup> *Woiner v Asia Oil & Minerals and Another* unreported Kalgoorlie Warden's Court; 15 April 1991; 15.



*entering into a farm-in agreement with that other etc. The point is that but for the holder entering into any of those agreements the expenditure would not have been incurred and that the holder has thereby 'caused' that expenditure to be so incurred.*

- 54 In my view, the introduction of reg 96C(4)(b) in 1999 (after *Woiner*) does not diminish the force of his Honour's comments.
- 55 A literal interpretation of reg 96C(4)(b) results in the monetary value of work that would otherwise be characterised as expenditure on mining or in connection with mining being excluded from the calculation of expenditure because that work is treated as a cost associated with the acquisition or sale of the tenement.
- 56 Such an interpretation is inconsistent with the primary objects of the *Mining Act* to which I referred earlier. Regulation 96C(4)(b) is concerned with excluding the costs associated with acquiring or selling a tenement as the acquisition or sale of a tenement itself is too remote or tenuous to be considered expenditure 'on mining or in connection with mining'. Treating work done on the tenement as a cost associated with the acquisition or sale of a tenement disincentives the very thing (work) which regs 31 and 96C(4) seek to encourage.
- 57 In my view, reg 96C(4) focuses on the nature of the activity in relation to which costs have been attributed.
- 58 Whether the costs attributed to that activity are claimable depends on whether the costs expended on that activity are considered expenditure "in mining or in connection with mining".
- 59 The arrangement between Mr Lapellerie and Mr Ward appears to be caught by reg 96C(4)(b) if the monetary value of the work is characterised as a cost associated with an activity (ie the acquisition or sale of a tenement) as that is not an activity sufficiently connected to mining to constitute claimable expenditure.
- 60 In my view, that characterisation does not accurately reflect the true nature of the agreement between Mr Lapellerie and Mr Ward. In reality it is the acquisition

or sale that is the means of payment or cost attributable to the activity (ie the work carried out on the tenement).

- 61 Viewed in this way reg 96C(4)(b) has no application to the arrangement between Mr Lapellerie and Mr Ward.
- 62 Costs have not been incurred to facilitate an activity that reg 96C(4)(b) deems to not be sufficiently connected to mining. On the contrary, costs have been incurred in the form of buying or selling a tenement or part thereof to pay for work on the tenement. Such an arrangement is entirely consistent with the objects of the legislation and is in no way inconsistent with the operation of reg 96C(4)(b).
- 63 Reg 96C(4)(b) is not concerned with the acquisition or sale of a tenement being used as a means of payment for work carried out on a tenement. It is only concerned to prevent costs associated with the acquisition or sale of a tenement, which of themselves are not in connection with mining, being included as expenditure on or in connection with mining for the purposes of reg 31.
- 64 As the Court of Appeal recognised in *Mohammadi v Bethune*<sup>29</sup> where the provision in question gives rise to a range of constructional choices none of which are wholly ungrammatical or unnatural, the choice turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies.
- 65 Where two meanings are open it is proper to adopt that meaning that would avoid consequences that appear irrational and unjust.<sup>30</sup>
- 66 In my view, while attractive in its simplicity and not wholly ungrammatical, it would be, for the reasons I have explained, irrational and unjust to adopt the construction (or characterisation) advanced by Mr Brosnan.

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<sup>29</sup> *Mohammadi v Bethune* [2018] WASCA 98; [34].

<sup>30</sup> *Commission of New South Wales v Murray More* (NSW) Pty Ltd (1975) 6 ALR 271; 282.

### **Unpaid Work**

- 67 Mr Brosnan also contends that as the work carried out by Mr Ward was not paid work, it cannot be considered expenditure for the purposes of the *Mining Act*.
- 68 I assume that this is a reference to Mr Ward as yet not having either been paid for the work or realising a 34% share of the tenement consistent with the agreement with Mr Lapellerie.
- 69 While it is unclear precisely how much work Mr Ward will need to undertake to secure a 34% share of the tenement, the fact remains that work he has done gives rise to a liability.
- 70 The incurring of a liability is sufficient to qualify as expenditure whether or not any money has changed hands.<sup>31</sup>

### **Sufficient Gravity**

- 71 In the event that the construction of reg 96C(4)(b) and/or the characterisation of the agreement between Mr Lapellerie and Mr Ward I have applied are incorrect, it follows that M51/863 will have been under expended.
- 72 Should that be the case, Mr Brosnan argues that work carried out by Mr Ward cannot be considered in determining whether the breach of the expenditure conditions is of sufficient gravity to justify forfeiture.
- 73 He says that if the legislature has deemed that these costs are not claimable, they should be ignored.
- 74 In my view, work has been carried out on this tenement that exceeds the minimum commitment. Even if I am wrong as to the construction of reg 96C(4)(b), I have some doubt that the word “costs” in reg 96C(4)(b) was intended to include the monetary value of work done.

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<sup>31</sup> *Bakarra Pty Ltd v Juler Pty Ltd* unreported; Perth Warden’s Court; 17 December 1991 noted 10 AMPLA Bull 13.

- 75 Against that background, I am not satisfied the breach is of sufficient gravity to justify forfeit of the tenement.
- 76 Having come to that view, I need not consider further the Program of Works (POW) dated 1 June 2021 and the approval of the POW dated 15 June 2021 which were of limited weight in any event.

**Conclusion**

- 77 Application for Forfeiture 537850 is dismissed.



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Warden J O'Sullivan

23 August 2021