
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : TRISTAN DAVID OWEN v TAVANTH SINGH
SANDHU 2021 WAMW 18

CORAM : WARDEN A MAUGHAN

HEARD : 11 October 2021

DELIVERED : 18 October 2021

FILE No'S : APPLICATION FOR FORFEITURE No. 540784-
540787

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

AND

TAVANTH SINGH SANDHU
(Objector)

Catchwords: *Application for Forfeiture – Application for Security for
Costs – Turns on Own Facts*

Legislation:

Cases referred to:

- *Haythornthwaite v Siberia Mining Corporation Pty Ltd* [2016] WAMW 11
- *Owen v Sandhu* [2020] WAMW 3
- *Owen v Sandhu* [2021] WAMW 15

Result: *Application refused*

Representation:

Counsel:

Applicant : Ms C McKenzie
Objector : Mr T Kavenagh

Solicitors:

Applicant : McKenzie McKenzie Lawyers
Objector : Kavenagh Legal

Background

- 1 The substantive proceedings involve an Application for Forfeiture by Tristan David Owen (the Applicant) against certain exploration licences and mining leases held by Tavanth Singh Sandhu (the Respondent).
- 2 By application dated 21 September 2021 the Sandhu seeks security for costs against the Owen. The amount sought is approximately \$82,000.00.
- 3 Each of the parties have filed affidavits in support/opposition to the application. The affidavit of Ms McKenzie dated 7 October 2021 was redacted by consent for reasons unnecessary to set out herein. Each party had the opportunity to make submissions before me on 11 October 2021. I've also had the benefit of a list of authorities provided by the Applicant.
- 4 The law in relation to cost applications and in particular applications for security for costs is set out in the reasons of Warden Hall in *Haythornthwaite v Siberia Mining Corporation Pty Ltd* [2016] WAMW 11 at [14]-[25] inclusive.
- 5 No issue was taken with his Honour's summary of the law and in those circumstances I adopt and incorporate his Honour's summary into these reasons.
- 6 At [25] of his reasons his Honour expressed the following:-

[25] In my view, following these established guidelines, the relevant factors relating to the exercise of the discretion to order security for costs in this case are:

- i. *Whether the application for security for costs has been brought promptly;*
- ii. *The prima facie merits (strength and bona fides) of Mr Haythornthwaite's application for forfeiture and whether it has a reasonable prospect of success;*
- iii. *What property within the jurisdiction may be able to satisfy an order for costs against Mr Haythornthwaite;*

- iv. *Whether the normal processes of the Court would be available within the jurisdiction for enforcement of any order for costs made against Mr Haythornthwaite; and*
- v. *Whether the application for security for costs is oppressive in the sense that it is being brought to deny an impecunious applicant (Mr Haythornthwaite) the right to litigate.*

Background

- 7 These proceedings were commenced in October 2018.
- 8 A hearing was conducted before Warden O’Sullivan on 9, 10 and 11 June 2021 at which time all the evidence in the Application for Forfeiture was adduced by the parties. His Honour reserved his decision but for reasons which transpired post hearing, his Honour recused himself from delivering Reasons for Decision.
- 9 As a consequence the matter is scheduled for a further hearing in this court on 17-21 January 2022 inclusive.
- 10 There has been a history of litigation between the parties and, in particular, I have been referred to:-
- (i) The judgment of Warden Hills-Wright in *Owen v Sandhu* [2020] WAMW 3 wherein his Honour made adverse comments as to the credit of Mr Sandhu;
 - (ii) The judgment of Warden Wilson, *Owen v Sandhu* [2021] WAMW 15, wherein his Honour made adverse findings as to credit of Mr Owen.
- 11 Against that background it falls for me to decide the application for security for costs on the basis of the criteria set out above and I propose to do so in the numeric order identified by Warden Hall.
- 12 It is convenient to consider the first of those two numeric issues simultaneously for reasons which will become apparent, namely, was the application for security for costs brought promptly and what are the prima facie merits (strengths and

bona fides) of Mr Owen's Application for Forfeiture and what are its prospects of success?

13 The application for security for costs was made by Mr Sandhu on 21 September 2021. The application was brought shortly after Warden Wilson handed down his decision in *Owen v Sandhu* [2021] WAMW 15. As was explained by Mr Kavenagh on behalf of Mr Sandhu in *Sandhu*, the adverse findings against Mr Owen were the catalyst for the bringing of the application.

14 Mr Kavenagh submitted that:

- i) The adverse findings against Mr Owen, as set out above;
- ii) Mr Owen's demonstrated history of non-compliance (albeit in my assessment relatively minor) with his obligations under the *Mining Act* were sufficient to ground a finding that his prospects of success in the present proceedings were limited.

15 As to timing, the application was clearly brought late in the proceedings. As to the merits of Mr Owen's position one might have expected that following the first hearing before Warden O'Sullivan that Mr Sandhu would have been in a favourable position to have assessed Mr Owen's prospects of succeeding. No application for security for costs was forthcoming.

16 The submission that the application has no merits based on Warden Wilson's findings as to credit with respect to Mr Owen ignores, in my view:

- i) That a Warden hearing these proceedings will form his own views as to his credit;
- ii) It is difficult to make an assessment as to the credit of a witness upon the mere reading of their affidavits.
- iii) That whilst the proceedings before me and the proceedings before Warden Wilson were "somewhat related" different issues of fact will be required to

be determined and it is evident on their face that different evidence will be called.

17 On the basis of my assessment of the evidence, albeit preliminary, at this point in time I could not make a finding that Mr Owen's application is without any merit.

18 As to the issue of whether Mr Owen has any assets in the jurisdiction, Mr Kavenagh's affidavit dated 21 September 2021 filed in support of the application for security of costs satisfies me:-

- i) Mr Owen has no interest in land registered with Landgate;
- ii) That as of late January 2021 he had been employed as a "Excavation Operator";
- iii) That he was (is) the holder of certain mining tenements.

19 In his affidavit dated 7 October 2021 Mr Owen testified:

3. Since being granted the tenements I have conducted a significant amount of exploration works on those tenements. I have received a significant amount of gold from those tenements. The tenements have a significant value which would be in excess of \$300,000.00.

20 Mr Owen's affidavit goes no further into his income or expenditure, assets or liabilities. His broad assertion as to the value of his tenements can, in my view, only be given a very limited weight.

21 Notwithstanding the above observations there is no evidence before me that Mr Owen has:

- i) Failed to pay any fines imposed by the Department/Warden due to his aforementioned defaults;
- ii) Failed to comply with any costs order made against him in previous proceedings.

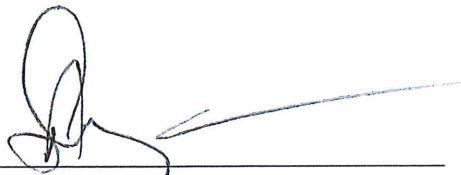
iii) Failed to satisfy any judgment entered against him in this or any other jurisdiction

22 Given the above assessment I am unable to conclude that the normal process of the court would not be available within the jurisdiction to enforce any order for costs made against Mr Owen.

23 In light of the above findings it is not necessary for me to make any finding, one way or another, as to whether the application for security for costs is oppressive in the sense that it is being brought to deny an impecunious Applicant the right to litigate.

24 In my view, the Application for Security for Costs should, at least for present purposes, be denied.

25 Costs of the application shall be reserved.



Warden A Maughan
18-10-21

