[2022] WAMW 10

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	WEST AUSTRALIAN PROSPECTORS PTY LTD (1st Applicant) AND KIM ANTHONY McLAREN (2nd Applicant) v SUMMIT VENTURES LIMITED (Respondent) [No 2] [2022] WAMW 10
CORAM	**:**	WARDEN T W McPHEE
HEARD	**:**	29 April 2022 & On the Papers
DELIVERED	**:**	9 May 2022
FILE NO/S	**:**	Application for Forfeiture: 566833 and Application for Forfeiture: 566844
TENEMENT NO/S	**:**	Mining Lease 77/450
BETWEEN	**:**	**WEST AUSTRALIAN PROSPECTORS PTY LTD** (1ST Applicant) **KIM ANTHONY MCLAREN** (2ND Applicant) AND **SUMMIT LIGHT VENTURES LIMITED** (Respondent)

Catchwords: *Application to re-open on the motion of the Warden, following administration error. Further submissions filed but not passed to the Warden prior to the publication of reasons. Recommendation not sent to the Minister, not functus officio.*

Legislation:

- *Mining Act 1978* (WA) (the "Act") s98
- *Interpretation Act* 1984 (WA) s55

Result: ***1) Matter re-opened;***

2) Submissions considered, determination of matter as detailed in the reasons of 26 April 2022 affirmed.

Representation:

Counsel:

First Applicant	:	Mr Lawton
Second Applicant	:	Mr Kavenagh
Respondent	:	Ms Watts

Solicitors:

First Applicant	:	Lawton MacMaster
Second Applicant	:	Kavenagh Legal
Respondent	:	Watts Legal

Cases referred to:

- ***Hawks & Anor v Shadmar Pty Ltd & Anor*** [2004] WASC 252
- ***Hancock Prospecting Pty Ltd v Hancock*** [2013] WASC 290 (6 August 2013)
- ***Lowes v AMACA Pty Ltd (Formerly James Hardie & Co Pty Ltd)*** [2011] WASC 287 (12 July 2012)
- ***Smith v New South Wales Bar Association*** [1992] HCA 36; (1992) 176 CLR 256 (13 August 1992)

Introduction

1 On the 26th of April 2022, I published reasons for decision in this matter (the Primary Reasons).

2 In those Primary Reasons I indicated that the parties had not availed themselves of the leave to file additional written submissions by 1 April 2022.

3 It appears that statement was in error. Subsequent to the publication of my reasons, the parties contacted the Department of Mines Industry Regulation and Safety (the Department) to advise that submissions had been filed by the 2nd Applicant and the Respondent within the requisite timeframe, as had a letter from the 1st Applicant, which made an express admission.

4 As a result of what can only be described as an administrative error those submissions were not passed to me prior to the publication of my reasons, and were not located following a query from me to the Department in advance of the publication of my reasons, as to whether they were filed or no.

5 I was informed that the further submissions had been sent by email to the Department, and not formally filed. It appears the emails were missed.

6 On 27 April 2022, after the publication of my Primary Reasons, I was informed of the administrative error.

7 I was also provided with a copy of the further submissions of the parties.

8 I did not at that time consider them, rather I directed the Mining Registrar to write to the parties with a proposed course of action which included me considering the Further Submissions if that course was agreed.

9 At that time also, I confirmed with the Registrar that the recommendation made by way of my Primary Reasons of 26 April 2022, had not at that time been transmitted or otherwise sent to the Minister, as required by section 98(4A) of the Act.

10 I took the decision at that time, to maintain the status quo, to direct the Registrar to refrain from sending the recommendation, until I considered that the parties had been given an opportunity to be heard on the proposed course of action.

11 At a directions hearing on 29 April 2022, I was informed by counsel for all parties that consent was given to the proposed course of action. I also held in abeyance, or stayed, the direction in paragraph [356] of the Primary Reasons until further order.

12 That proposed course of action was that I could re-open the matter, as a result of the prejudice caused to the parties by the inadvertent failure to pass submissions they had made, to me.

13 Following the provision of that consent, I gave detailed consideration to the submissions, and have formed the view that I can deal with the matter by way of the publication of these supplementary reasons.

14 In summary, and having considered the submissions by all parties, I do not consider it necessary to alter the views expressed in my Primary Reasons, or the conclusions I reached.

15 In the circumstances, which are unfortunate and regrettable, it is appropriate to provide some additional detail as to the reason I come to the view expressed immediately above, which I do below.

Functus Officio & Reopening

16 The first matter to consider is whether I retain jurisdiction to consider the submissions, having published a decision and provided reasons.

17 The nature of the underlying matter was as an application for forfeiture. The outcome arrived at, in the Primary Reasons, was a recommendation to the Minister that the tenement in question be forfeited.

18 As indicated, the recommendation was not provided to the Minister, following the revelation of the error in question.

19 Considering section 98(4A), 98(5) and 98(6) of the Act together, I consider that I retain sufficient jurisdiction to consider reopening the matter for the limited purpose of giving consideration to the submissions, which were not received as a result of the administrative error described above.

20 In this respect I again note that the recommendation has not yet been provided to the Minister.

21 I also note in this regard the proscription of the provision of the recommendation, pursuant to section 98(5) of the Act, such that:

> a. *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.*

22 In the circumstances presented here, I have been provided with copies of submissions, which I had granted the parties leave to provide, which however I had not considered when formulating my recommendation.

23 As a result, I consider that it would be erroneous for me to convey the recommendation to the Minister, without having given consideration to those submissions. In my opinion that would be akin to not permitting a party to be appropriately heard.

24 On a practical level, I am fortified in this view by the effect of section 98(6) of the Act, which permits the Minister to direct the Warden to, in effect, reconsider the application.

25 In the very particular circumstances presented, I consider that were the recommendation to forfeit conveyed without considering the further submissions provided, the Minister would inevitably return the matter to me for

consideration in light of the submissions, considering the long established filtering role of the warden.

26 In addition, I note further support for the proposition may also be found in section 55 of the *Interpretation Act* 1984 (WA).

27 I am also fortified in my view by the decision in ***Hawks & Anor v Shadmar Pty Ltd & Anor*** [2004] WASC 252, per Le Miere J at [82]:

a. *"The power of a court to reopen or reconsider its decisions has no application to the decision of the warden. It might be argued that the warden, acting administratively, has implied power to reconsider his decisions. Whatever the position may have been before the Minister acted upon the warden's recommendation, the warden does not have such a power after the Minister has so acted. The provisions of ss 98, 99, and 100(2) of the Act indicate that the power of the warden is spent when it has been acted upon by the Minister and is not available to be exercised from time to time. The warden is then functus officio and any attempt to re-exercise the power is ultra vires.*"

28 As I have indicated, in this case, the recommendation had not gone to the Minister, and remains therefore, within my reach.

29 On the question of the appropriateness to reconsider or reopen in the circumstances (or not), I will add I am guided by the sorts of approach detailed in ***Hancock Prospecting Pty Ltd v Hancock*** [2013] WASC 290 (6 August 2013), ***Lowes v AMACA Pty Ltd (Formerly James Hardie & Co Pty Ltd)*** [2011] WASC 287 (12 July 2012) and ***Smith v New South Wales Bar Association*** [1992] HCA 36; (1992) 176 CLR 256 (13 August 1992).

30 In short, I consider it is in the interest of justice and the efficient conduct of proceedings, for me to reopen the matter for the limited purpose proposed.

31 I consider that it is important to note that it is my view that I retain sufficient statutory jurisdiction to reopen, given the recommendation has not been conveyed to the Minister.

32 Had the recommendation been conveyed to the Minister, I do not consider it likely that I would have formed the view that I retained any jurisdiction to reopen, irrespective of the merits of the discretionary considerations.

The 1st Applicant's Letter

33 Relevantly, by letter dated 1 April 2022, the 1st Applicant made an express admission as to a portion of the administrative expenses claimed. That was in the sum of $1,276.73.

34 It will be apparent from my Primary Reasons at paragraphs [53] – [54], that I indicated that I considered that the administrative costs of $1,303.00 as claimed by the Respondent, was not in contention.

35 As a result, whilst there is a disparity in the admission and the quantum claimed by the Respondent, that disparity is of no moment. The Primary Reasons approached the question of gravity of the breach, by providing the Respondent with the benefit of the administration costs as claimed.

36 Accordingly, the admission made by the 1st Applicant can have no baring on the conclusion reached in that respect and is otherwise immaterial.

The 2nd Applicant's Submission

37 The 2nd Applicant's Submission were dated 1 April 2022. Relevantly, submissions were made on the following matters:

a. Inconsistency in the case presented;

b. The Power of Attorney;

c. The Authority to Prospect;

d. The terms of the Authority to Prospect;

e. Preparation of Form 5;

f. The photographs and the Metadata;

g. Inferences;

h. Regulation 31;

i. Admissions.

38 I do not intend to traverse the entirety of the submissions made. This is because, in respect of the matters referred to above, I arrived at the conclusions sought by the Applicant, independent of the Further Submissions. Having now considered the 1st Applicant's additional submission, I do not feel compelled to amend or alter any of the reasoning I expressed.

39 I will note that the heading "h", provided a further basis for the view expressed in respect of that particular issue. It will be noted from my Primary Reasons, that I was not satisfied from an evidentiary position as to the nature of the work conducted so as to come to a view as to any value to be imposed. As a result, the issue referred to in paragraphs 40 – 42 of the 1st Applicant further submission did not arise, though in my opinion is plainly correct.

40 The final point to note is that the 2nd Applicant also made an express admission as to a portion of the administrative expenses claimed. That was in the sum of $1,276.73.

41 In this respect, the position is no different to that described above in respect of the 1st Applicant's admission.

The Respondent's Submission

42 The Respondent's further submission, dated 1 April 2022 (the Further Submission), was a detailed, and considered submission, which is of significant assistance.

43 The thrust of the submissions addressed the matters which occupied the majority of the Primary Reasons and were structured under a number of helpful headings. In the circumstances, I address each matter below, utilising broadly the same headings, detailing the thrust of the submission, and my views on same.

Scope of the Applicant's contentions

44 During the course of the hearing, the Respondent indicated a concern that the case being put by the Applicants was a broader than that contained in the particulars.

45 I understood that to be a complaint about the attack made on the absence of the power of attorney, and the difficulties associated with authorisation which flowed from that.

46 That issue was ventilated in submissions at the hearing. The Respondent's case, was entirely dependent on establishing that Mr Taylor had the necessary authority to undertake the claimed works.

47 It follows that it cannot be considered to be unfair, for the Applicants to have focused submissions on the consequences of what was alleged to be a faulty authority.

48 Further, I do not consider that it is unfair to the Applicant, that issues arose as to the reliability and accuracy of the statements of Mr Taylor in the Affidavit, in circumstances where he sought to adduce material he had no knowledge or understanding of.

49 I will add, that there is inevitably, a degree of departure from stated cases during the course of any hearing, which necessarily follows from the testing of evidence in cross.

50 The important issue is whether any such departure creates a circumstance where a party is unfairly surprised, or it becomes apparent that a deliberate ambush has been perpetrated.

51 I do not consider that the Respondent was taken by surprise in this case, and in any event, no adjournment sought during the course of the hearing.

52 As a result, I do not accept the submission that the attack on Mr Taylor's evidence in the form of the asserted sums in the relevant letter, was impermissible, nor any other matter.

53 In the Primary Reasons, I expressed a view that the evidentiary position advanced by the Respondent in respect of those matters was insufficient for me to come to a satisfactory view as to what had occurred. I remain of that view.

Section 118A Authorisation

54 The Further Submission advances a contention that the Taylor Authority (as described in the Primary Reasons) could not be impugned by the Applicants.

55 Having considered the Further Submission, in my opinion the views I have expressed on this topic, in the Primary Reasons, remain applicable.

56 For the reasons outlined in the Primary Reasons, I do not accept the central thrust of the Respondent's Further Submission, that the Taylor Authority may be accepted on its face.

57 With due respect to the submissions made at hearing, and in the Further Submission, for the reasons outlined in the Primary Reasons I do not accept the contentions advanced by the Respondent.

58 I will add also, again for the reasons outlined in the Primary Reasons, that I do not consider that the answer lies in referring to Form 31. Having considered the Further Submissions in this respect, I have nothing to add to the views expressed in the Primary Reasons.

The Effect of the Authority

59 I accepted in the Primary Reasons, that I could potentially take into account the activities of Mr Taylor even in the absence of a valid section 118A Authority.

60 The difficulty outlined in the Primary Reasons was that I did not consider the evidentiary position supported the assertions of work and value of Mr Taylor, for the reasons set out in the Primary Reasons. I remain of those views.

What Section 118A authorises in terms of Expenditure

61 Again, I accepted, in the Primary Reasons, that I could potentially take into account the activities of Mr Taylor even in the absence of a valid section 118A Authority, or with it.

62 Again, the difficulty outlined in the Primary Reasons was that I did not consider the evidentiary position supported the assertions of work and value of Mr Taylor, for the reasons set out in the Primary Reasons. I remain of those views.

Quantum of Expenditure

63 In the Primary Reasons I expressed a view that on my consideration of the case, the issue of rates and rents as claimed, and administration costs, was not in dispute.

64 Those sums were, for the purposes of my consideration of the gravity of the breach, taken into account in a manner favourable to the Respondent.

65 In respect of the Further Submissions of the Respondent in respect of the value of the activity said to be undertaken by Mr Taylor, again, I consider that the

Primary Reasons sufficiently address that issue, the determination of which, largely turned on the expression of my view as to the Taylor Authority, and what I regarded was the evidentiary deficiencies of the Respondent's position generally.

Technical Breach

66 The Respondent's Further Submission under this heading asserted that the Respondent was acting in good faith, and that it may be regarded as a technical breach. This may be considered to be a submission as to gravity seeking to compel the imposition of a fine, rather than forfeiture in the event of a breach being found.

67 As will be apparent from the Primary Reasons, I do not consider the circumstances support a construction that the failure to meet the expenditure obligations in this case amounts to a technical breach.

68 I remain of the views expressed in the Primary Reasons.

Modest Failure to Expend

69 I accept the submission that it is a modest failure when regard is had to the pecuniary figure in isolation. That failure taken in a vacuum may have been of insufficient gravity to warrant a forfeiture.

70 However, as set out in the Primary Reasons, and having regard to the whole of the circumstances presented to me in evidence, I expressed a view in the Primary Reasons that the gravity of the failure when coupled with the surrounding circumstances and the position and conduct of the Respondent toward the tenement, warranted a forfeiture. I remain of that view, as hard a view as it may be.

Acting in good faith

71 The Further Submission made here seeks to again submit that the breaches occurred in good faith on the part of all concerned, and ought result in a fine rather than forfeiture.

72 As indicated above, I do not consider the circumstances support a construction that the failure to meet the expenditure obligations in this case amounts to a technical breach.

73 I remain of the views expressed in the Primary Reasons, and in particular, the views expressed in respect of the position being taken by the Respondent, as detailed in the financial information placed before me, and referred to in the Primary Reasons.

74 The submission under this heading advances an argument to suggest that a finding ought to have been made that the Respondent was acting to maintain the tenement in good standing. In the Primary Reasons I came to a different view, and the Further Submission does not compel me to alter that view.

Conclusion

75 I do not consider it necessary to resile from my decision, or the content of my Primary Reasons, in light of the Further Submissions of the Respondent, or the submissions of either Applicants.

76 Having come now to that view, I will now also restate the position outlined in [356] of the Primary Reasons, namely that any party seeking any further or consequential order, is to file and serve a Minute of Proposed Orders, within 7 days of the publication of these supplementary reasons, with an accompanying short submission in support.

77 In the event material is received in respect of the above, the matter is to be placed in the list for mention, on 27 May 2022, not before 12 O'clock.

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Warden T W McPhee

9 May 2022