[2022] WAMW 17

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	KALLENIA MINES PTY LTD v PAUL ROBERT CHURCH [2022] WAMW 17
CORAM	**:**	WARDEN CLEARY
HEARD	**:**	9 May 2022
DELIVERED	**:**	26 July 2022
FILE NO/S	**:**	Application for Forfeiture 593621
TENEMENT NO/S	**:**	Prospecting Licence 59/2027
BETWEEN	**:**	Kallenia Mines Pty Ltd (Applicant) AND Paul Robert Church (Respondent)

Catchwords: *Application for forfeiture; non-compliance with expenditure condition; calculation of value of time spent on tenement*

Legislation:

- *Mining Act 1978* (WA) Section 96, 96C
- *Mining Regulations 1981* (WA) Regulation 15(1)

Result: No under expenditure
Application dismissed

Representation:

Counsel:

Applicant	:	T Kavenagh
Respondent	:	R Gillon

Solicitors:

Applicant	:	Kavenagh Legal
Respondent	:	Lawton Gillon

Cases referred to:

- ***Blackfin v Mineralogy*** [2013] WAMW 19.
- ***Commercial Properties Pty Ltd & Anor v Italo Nominees Pty Ltd*** (Full Court of Supreme Court of WA) 16 December 1988 Lib No 7427.
- ***Craig v Spargos Exploration NL***, unreported, Kalgoorlie Warden's Court, 22 December 1986, noted in (1986) 6 AMPLA Bull 73.
- ***Ex parte Haoma North West NL*** (unreported, SC(WA), Pidgeon, Nicholson and Walsh JJ, No 1754/1992, 24 November 1992, BC9200892) noted in (1992) 12 AMPLA Bull 17.
- ***Flint v Brosnan*** [2002] WAMW 20.
- ***Flint v Brosnan & Anor*** [2002] WAMW 21.
- ***Forrest & Forrest Pty Ltd v Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 425.
- ***In the Application for Restoration of late Mining Lease 45/1135 by Kenneth Bacon*** [2012] WAMW 19.
- ***North v Elzac Mining P/L & Anor*** [2012] WAMW42.
- ***Nova Resources NL v French*** (1995) 12 WAR 50.
- ***Nunn v Carnicellie*** (unreported; Southern Cross Warden' Court) 10 AMPLA Bull 63, 29 November 1990.
- ***Pawson v Northwestern Mining Co. P/L & Another*** [2013] WAMW 8.
- ***Radovanovic and McLarty v GH White Wardong Nominees Pty Ltd*** (unreported, Mt Magnet Warden's Court, 8 November 1989) noted in (1990) 9 AMPLA Bull 51.
- ***Re Heaney; Ex parte Flint v Nexus Minerals NL***, unreported; FCt SCt of WA; Library No 970065; 26 February 1997.
- ***Re His Honour Warden Calder SM & Anor; Ex Parte Lee & Anor*** [2007] WASCA 161; (2007) 34 WAR 289.
- ***Richmond v Opaltrend Nominees Pty Ltd*** (unreported) Perth Warden's Court, 7 October 1999.
- ***Savagev Teck Explorations Ltd*** unreported, Coolgardie Warden's Court, 20 September 1987, 4, noted in 7 AMPLA Bull 2.
- ***Van Blitterswyk v Balagundi Gold Pty Ltd*** [2021] WAMW 8.

BACKGROUND

1. On 11 January 2021, Kallenia Mines Pty Ltd applied for forfeiture of prospecting licence 59/2027 held by Paul Robert Church. Kallenia alleged Mr Church failed to comply with expenditure conditions of the lease for the year ending 10 November 2020. The application was made within the 8 months from the end of the relevant spending year.[1] Kallenia holds exploration licence 59/2292 which completely surrounds Mr Church's tenement.
2. It is a condition of Mr Church's lease that Mr Church spend a minimum of $2,000 per year in mining on or in connection with mining on the tenement. On 4 January 2021 Mr Church filed the Form 5 'Operations Report' (**Form 5**), showing an expenditure of $3,034.50 as follows:

   Prospecting and/or small scale mining activities:

   (a) General prospecting Activities

Metal detecting: days worked: 8 @ $250	$2,000.
Loaming, panning, sampling dollying, dry-blowing: No. of days worked: 2 @ $250	$500
Fuel, oils etc:	$175
Field Supplies:	$250
(b) Annual Tenement Rent and Rates	$29.50
(c) Administration and Overheads	$80.

3. Kallenia's application for forfeiture contended that no activity in mining or in connection with mining occurred on the tenement, and therefore Mr Church had not expended or caused to be expended in mining or in connection with mining the minimum sum required. Mr Church's case was that he had spent the 10 days from 20-29 November 2019, prospecting on the tenement, and spent money on other items.

[1] Section 96(2a) *Mining Act*.

THE LEGISLATIVE REGIME

Policy of the Act

4. Under the *Mining Act 1978* WA (the Act), various mining tenements may be granted, including prospecting licences. Prospecting licences, like other tenements, are subject to expenditure conditions. If the expenditure conditions are not met, an application may be made for forfeiture of the licence.

5. In ***Nova Resources NL v French***, in relation to the policy of the Act, the Court said:[2]

> *The primary object, so far as it impacts on this case [an application for forfeiture], 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 made available subject to reasonably stringent conditions and if these, including expenditure conditions, show that the purposes of the grant are not being advanced, then the Act and regulations make provision for others who have an interest in those purposes on that land to apply for forfeiture so they may exploit the area. There is power for a tenement holder to seek exemption from complying with certain conditions for cause, and one assumes that it is not only for record purposes that a Form 5 must be filed each year.*

6. The system of applications for forfeiture enables the industry to a large degree to be self-regulating. The policy seeks to ensure that holders of tenements can, and in fact do, work the ground with a view to ultimate recovery of any economic deposit of minerals. The Act attempts to discourage holders from acquiring tenements and not performing their statutory obligations in relation to them.[3] Tenements are regularly forfeited for non-compliance with expenditure conditions.[4]

7. In ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum***, the Court of Appeal noted that the primary object identified in

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[2] ***Nova Resources NL v French*** (1995) 12 WAR 50, 57 - 58 (Rowland J, with whom the other judges agreed).

[3] ***Radovanovic and McLarty v GH White Wardong Nominees Pty Ltd*** (unreported, Mt Magnet Warden's Court, 8 November 1989) noted in (1990) 9 AMPLA Bull 51.

[4] ***Ex parte Haoma North West NL*** (unreported, SC(WA), Pidgeon, Nicholson and Walsh JJ, No 1754/1992, 24 November 1992, BC9200892) noted in (1992) 12 AMPLA Bull 17.

Nova Resources was not the only object of the Act. The court said that other objects or purposes identified by the courts include (footnotes omitted):[5]

(a) identifying circumstances in which a tenement holder will be allowed to hold a mining tenement without mining or giving it up for others who may wish to actively mine the land;

(b) protecting tenement holders who have defaulted in compliance with the Act in some minor respect, or because of some circumstances beyond the control of the tenement holder, against loss of the tenement;

(c) providing that, in general, the holder of a mining tenement should carry out the relevant mining activity on the tenement.

8. Therefore, the policy of the Act is that a tenement holder unable to explore for or exploit mineral resources of a tenement should give way for 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.[6]

Expenditure conditions

9. The expenditure conditions for a prospecting licence are prescribed in reg 15 of the *Mining Regulations 1981* WA, with specific expenditure conditions set out in reg 96C.

10. Reg 15(1) prescribes:

(a) a minimum expenditure amount required per hectare, and

(b) if the tenement holder is engaged themselves in mining on the tenement, then they may claim an amount equivalent to the remuneration the holder would be entitled to if engaged under a contractual arrangement in similar mining activity elsewhere in the district.

11. There is no requirement that the expenditure be across the year; it may be in one particular period, at any time of the year.[7]

[5] ***Forrest & Forrest Pty Ltd v Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 425 [96].
[6] ***Craig v Spargos Exploration NL***, unreported, Kalgoorlie Warden's Court, 22 December 1986, noted in (1986) 6 AMPLA Bull 73.
[7] ***Savagev Teck Explorations Ltd*** unreported, Coolgardie Warden's Court, 20 September 1987, 4, noted in 7 AMPLA Bull 2.

Forfeiture of a mining lease for failing to comply with expenditure conditions

12. Kallenia applied for forfeiture pursuant to section 96 of the Act. That section allows applications to be made for forfeiture of prospecting licences where expenditure conditions have not been met.

13. Generally, in any forfeiture application, irrespective of the section under which application is made, where there has been prima facie failure to comply with expenditure conditions, the legislation contemplates forfeiture. Hence, upon prima facie proof of non-compliance, there is likewise a prima facie case for forfeiture. However, there must not be a recommendation of forfeiture unless the circumstances of the case are of sufficient gravity to justify forfeiture of the lease.[8]

14. While the holder of a mining tenement has no burden to establish in a forfeiture application that the minimum expenditure obligations have been met, the Form 5 does not of itself prove that the minimum expenditure conditions have in fact been met.[9] Cogent evidence of the lack of activity on the tenement, if accepted by the warden, may be sufficient to establish and satisfy that no or insufficient expenditure has occurred. If that is the case, or where the expenditure claimed is off-site expenditure which is not obvious from on-site activity, the holder of the tenement would be obliged to produce evidence in rebuttal of that cogent evidence, where the applicant's evidence suggests that the expenditure claimed in the Form 5 has not been met.[10] That is not to say that any evidence produced by the respondent will be sufficient to satisfy that burden; it too must be credible and reliable.

DETERMINATION AS TO EXPENDITURE AND ACTIVITY

Evidence from Kallenia

15. The applicant relied on evidence from two witnesses.

Logan Emrys Barber

16. Mr Barber's evidence in chief was in the form of an affidavit sworn by him on 12 May 2021, which became exhibit 2. At the time of swearing his affidavit Mr Barber was an employee of Resource Potential Pty Ltd as a consultant geologist and exploration manager. He was also a consultant to the applicant. As at 12 May 2021 he had had over 10 years' experience as a geologist, working in multiple commodities and on multiple projects,

[8] ***Commercial Properties Pty Ltd & Anor v Italo Nominees Pty Ltd*** (Full Court of Supreme Court of WA) 16 December 1988 Lib No 7427.
[9] ***North v Elazac Mining P/L & Anor*** [2012] WAMW 42 [23].
[10] ***North v Elazac Mining P/L & Anor*** [2012] WAMW 42 [24].

focusing on exploration in remote areas. He deposed to having a sound understanding of on ground and desk top exploration activities and procedures. At the time of giving evidence he was employed by Global Lithium Resources.

17. While he was part of a team undertaking exploration on Kallenia's tenements, he was asked by the director of the applicant to examine the land the subject of prospecting licence 59/2027. He did so on 2 September 2020. He did not observe any recent activity. It was his opinion that the last drilling was most likely conducted in 1999 to 2000, because the collars there were unlabelled, old and brittle. There were coals from a fire on the land and old yellow containers and court trays.

18. On 25 September 2020 he crossed over the land the subject of prospecting licence 59/2027 to reach another tenement. Neither was there then any sign of recent activity. He again examined the tenement on 9 December 2020. He walked a grid of the land, tracking where he walked by a GPS. The download of the tracking placed over a map of the tenement was produced as annexure to his affidavit LB5. Again he says there was no sign of recent activity.

19. Mr Barber was of the view that signs of prospecting, exploration or mining activity usually include:

    (a) geochemical soil sampling holes brackets filled or unfilled brackets in some kind of grid pattern;
    (b) Rock chip samples removed;
    (c) ground disturbance;
    (d) fresh flagging tape;
    (e) tracks of quad bikes, four-wheel-drive vehicles or heavy vehicles;
    (f) excavations or costeans;
    (g) cleared drill pads;
    (h) rows of drill bags and loose drill cuttings or rock chips;
    (i) drill collars and evidence of drilling mud or water;
    (j) drilling sumps;
    (k) rubbish left behind;
    (l) fresh metal detecting halls; and
    (m) freshly broken rocks and soil disturbance.

20. In cross-examination Mr Barber said that his exploration work had been in gold, iron ore and lithium. He had undertaken field activities such as many different types of drilling, soil sampling and rock sampling. He said that he spent most of his time in the field. He has also used a metal detector. He said that if a metal detector had been used over some

days at certain times on the tenement you would expect to see at least shallow pits. These pits would be detected even 10 months after they were dug and can in fact be seen, in his opinion, for years as there would not be enough movement of topsoil to fill in any holes and for there to be no signs at all.

21. He said that when walking on the tenement there was good vision across the tenement and it was easily walkable. He agreed that perhaps it would not be possible to see tracks from a distance on the tenement. He felt that his walking of the tenement on 9 December 2020 would have provided him with a good overall view of the tenement as he walked to and from almost each boundary and across the tenement, as can be seen in LB5.
22. He was also of the view that 10 days on such small ground was a significant and unusually large amount of time for the size of the tenement. As the tenement was relatively small ground, the ten days spent suggests significant effort. He would have thought that by somebody spending that effort on that ground, it was yielding good finds. The ground would not be expected, in his view and experience of the area, to produce many nuggets and accordingly the effort that would be needed to achieve finds would mean that there would have been a significant amount of digging and movement of earth, particularly if someone spent that long on the tenement.

Mufaro Hillary Mutika

23. Mr Mutika's evidence in chief was in the form of an affidavit sworn by him on 12 May 2021, which became exhibit 1. At the time of swearing his affidavit Mr Mutika was an employee of Resource Potentials Pty Ltd as a senior technical consultant. At the time of giving evidence he was employed by Global Lithium, as a Field Operations Coordinator, which required him to oversee projects in the areas of budget and deadlines.
24. He has formal qualifications in mining and exploration, commerce, Information Systems Management and business.
25. Mr Mutika was of the view that signs of prospecting, exploration or mining activity usually include:
    (a) labelled wooden or steel posts or pegs, fresh pin flags or geochemical soil sampling holes brackets filled or unfilled brackets in some kind of grid pattern;
    (b) ground disturbance;
    (c) fresh flagging tape;
    (d) tracks of quad bikes, four-wheel-drive vehicles or heavy vehicles;
    (e) excavations or costeans;
    (f) cleared drill pads;

(g) rows of drill bags and loose drill cuttings or rock chips;

(h) drill collars and evidence of drilling mud or water;

(i) drilling sumps;

(j) rubbish left behind;

(k) fresh metal detecting holes; and

(l) freshly broken rocks and soil disturbance.

26. Relevant to the question of work on the ground, Mr Mutika traversed prospecting licence 59/2027 on 3 August 2020 and 8 January 2021. On the 3 August visit he was there to see if the drillers belonging to his company on a neighbouring tenement had performed their work. He saw no sign of recent activity. The annexure MHM5 to his affidavit dated 12 May 2021 shows the tracks as recorded by a GPS which he took. It appears that Mr Mutika traversed almost directly across the lower quarter of the tenement and back again on the same track and then from that track travelled almost to the boundary at the upper end of the tenement and back again on the same track, within the first half of the tenement. On neither visit did he see any sign of "recent"[11] activity.

27. In cross examination he said that his work with Resource Potentials saw him carry out work in planning and in the field, management of all technical equipment, GPS work and map generation, surveys, planning, sampling and data management of drilling, remote camps set up and assistance with occupational safety and health plans. This work included the purchase, collection and delivering of all consumables needed for field exploration, going to site, collecting samples and planning. His fieldwork included soil sampling, picking up samples and performing the drills. He also recorded drilling data and picked up samples. Soil sampling, he said, involves a type of metal detecting that is, looking at the soil.

28. While he agreed that his experience was in exploration and not in prospecting, he had seen people performing metal detection although he had never performed it himself. He had seen people metal detecting at a distance. He knew that a lot of people who he had worked with used metal detectors. He agreed that he had heard that some metal detectors did not require holes to be dug but he had no real experience in them.

29. Mr Mutika gave evidence that he traversed the tenement by driving and walking. The tenement was not large and he used the main track. He said that he could see a long way across the tenement from the track. He agreed, however, that there were trees and shrubbery on the tenement and that in some places you would not be able to tell that metal

[11] Affidavit of Mufaro Hillary Mutika sworn 12 May 2021 [11].

detecting had occurred. He agreed that there was a good chance that there had been rain between when the tenement owner said that he had worked the tenement and when Mr Mutika had attended the tenement, however he did not keep weather records.

30. When he was there in January 2021 he noted that two trenches had been dug from the corner of the tenement and a Form 20 was there.

Evidence from the respondent

Paul Robert Church

31. Mr Church gave evidence, his affidavit sworn on 21 July 2021 forming the basis of his evidence in chief, and becoming exhibit 5, and he was cross examined. He owns a business as a grounds maintenance contractor. He has also been employed at a gold mine as a geological field assistant and as a mill operator. After work at the Tuckabianna Gold Mine he worked as a full-time prospector in and around Cue and Mount Magnet from 1997 to 2004, after which time he moved to Geraldton. He has a Miner's Right issued in Mount Magnet in 1994. He currently has one live tenement, being the prospecting licence the subject of this application, having previously held an exploration licence and a number of prospecting licences. He holds a prospecting licence and a licence to take water, obtained in 2018, over the land.

32. From his time on the licence he knows that the area is "quite often" subjected to very strong winds and heavy rains. Annexure PC11 to his affidavit is the Bureau of Meteorology records for the rainfall for 2019 and 2020 at Melangata Station, which is 16km from the tenement. The records show that in November 2019 there was no rain at that station and in December there was 9.6 mm. On 13 January 2020 there was 14 mm and another 4.4 mm over the next two days. Further, between 1 January 2020 and 25 September 2020 there was 120.2mm of rain, and then to 9 December 2020, a further 11mm.

33. In November 2018 he undertook a shallow core drilling program on the tenement using handheld equipment. He used a home-made drill with a diamond core. It was handheld but motorised and created minimal surface disturbance. He did not have a program of works because he had been told by the Department that if he was undertaking hand drilling he would not require a permit. He acknowledged that one of the conditions of his license was that all surface holes drilled for the purpose of exploration were to be capped, filled or otherwise made safe immediately after completion. He said he drilled six holes and capped them on the surface. He used large rocks and therefore he felt that anyone looking for the holes would not have seen them easily. On that trip he took photos of the equipment and the vehicle and caravan he used and they were annexed to his affidavit as PC2.

34. Mr Church marked the spot where he camped on that trip on exhibit 3, and he agreed that the items found by Mr Barber on 2 September 2020, and photographed and annexed as LB3 and LB4 to Mr Barber's affidavit were coals and items he left at that camp site in 2018.

35. He then prospected on the licence from 20 November 2019 through to and including 29 November 2019, accompanied by Ronald Osborne of Geraldton. They travelled to the tenement in Mr Church's vehicle and Mr Osborne took with him his own equipment that included a metal detector and a small tent in which he slept.

36. Mr Church said that on the 2019 trip he took a Mine Lab SDC2300 metal detector which is a compact, collapsible detector with an 8 inch coil. He said that the detector is extremely sensitive to small pieces of gold in the top 50 mm of soil and most of the targets he recovered were with a simple small plastic scoop without the need to dig. A photograph of the scoop was annexed to his affidavit as PC3. This photo was not taken at the time of the November 2019 trip. Photographs of holes he has dug on the licence were annexed to his affidavit as PC4, although he could not recall when those photographs were taken and acknowledged he did not think they were taken on the November 2019 trip. Mr Church refills holes he has dug, and attempts to minimise ground disturbance, both due to environmental concerns, but also to minimise others seeing where he has been prospecting. He does not leave rubbish at the site.

37. He wears smooth-soled boots when prospecting, and did so on the November 2019 trip, a picture of which were annexed to his affidavit as PC6, although this photo was not taken at the time of the November 2019 trip.

38. During the November 2019 trip he prospected for not less than 10 or 12 hours each day. He stopped to sleep and prepare and eat meals. While his activities mainly involved metal detecting he also did some loaming. He said he and Osborne spent most of their time on that trip in the Northern section of the tenement in an area downhill from the best historical drill results, being subject to a high level of transported topsoil movement in wet conditions. A photograph of that area, taken by Mr Church in May 2021 is annexure PC5 to his affidavit. He and Mr Osborne camped on an old north-south gridline.

Ronald James Osborne

39. Ronald James Osborne gave evidence by affidavit, which became exhibit 4. He was not required for cross examination. He has a Miner's Right, obtained in Meekatharra in 1986. He has experience in dry blowing and metal detecting, and from 2000 to 2002 worked full

time as a prospector. Despite employment in other industries, between 2009 and 2017 he continued to prospect, and continued to do so after retirement in 2017.

40. Relevant to this matter, Mr Osborne said:

(a) He was contacted by Mr Church in or around November 2019 and he was asked to accompany Mr Church on a prospecting trip to Mr Church's mining tenement North of Yalgoo later that month;

(b) Mr Church asked to him to try to dowse in search of water;

(c) They travelled in Mr Church's vehicle, Mr Church picking him up on 20 November;

(d) They camped on an old grid line, he in a tent and stretcher;

(e) He prospected for about 8 hours per day with a Minelab SD2300, mostly north of the camp, close to Mr Church, who prospected for longer than he did each day, with his own detector;

(f) They did not light a fire because the weather was warm, and they cooked on a gas burner;

(g) They returned to Geraldton on 29 November.

CREDIBILITY AND RELIABILITY OF WITNESSES

41. Mr Church's credibility was tested. It is necessary for me to assess the credibility and reliability of the evidence of each witness and thereby determine the weight to be given to the respective witness' evidence. In determining credibility, I am assessing the honesty of the witness. In determining reliability, I am assessing whether the witness has given an accurate account of what happened. A witness may be honest but not reliable due to factors such as circumstances affecting memory.

42. In assessing credibility I have considered whether the evidence of a witness is consistent with the evidence of other witnesses whose evidence I have accepted. If a witness' evidence is inconsistent, that is a factor that I can take into account in assessing the evidence of that witness. If the evidence given by a witness has been consistent on significant matters, that may be a factor that supports determination that the witness is telling the truth.

43. I have had regard to the demeanour of each of the witnesses in assessing their evidence. I must be mindful that some witnesses, understandably, may feel apprehensive when giving evidence in a court room and this may affect the witness' demeanour and therefore, should not necessarily reflect on their credibility.

44. I am able to accept all or part of the evidence of a witness or disregard all or part of the evidence of a witness. I am mindful that the evidence of a witness is the answers that are given in response to a question and not the question itself.

45. It was put to Mr Church that there was no evidence of activity on the tenement not because he wore smooth-soled boots, did not leave rubbish, effectively hid his activities from others and only dug shallow holes, but because he did not go to the site in November 2019, or at all in that year. He denied the proposition. I note the photos taken in 2018 attached to Mr Church's affidavit show a neat site, with no rubbish. They do show tyre tracks, but I do not have any information as to the permanency or otherwise of those tracks over time. I note these photos were taken in 2018 so before Mr Church knew there was to be an application for forfeiture.

46. Mr Church said that he found approximately 8 g of gold on the 2019 trip. He cannot recall on which days finds were made. He has not sold any gold recently, and therefore did not have recent invoices to show that he had, for example, in 2019, found any gold on his prospecting licence.

47. I accept that while I have been provided with some rainfall figures, I do not know of the rainfall on the actual tenement ground, or how the amount of rainfall at the nearby station effects the tenement, or how rainfall itself effects the tenement, however, I also accept that it is likely that there was some rain between November 2019 and when Mr Barber and Mr Mutika attended the site, and that from general living experience, rain can obliterate or disguise tracks and other markings in dirt, especially made when dry.

48. It was put to Church that there were no photos of the November 2019 trip because he did not go to the tenement at that time. He denied that proposition but did not explain why he did not take photos on that trip where he took photos at other times.

49. It was put to him that he had not prepared a program of works in relation to the shallow core drilling program he undertook in November 2018 because he had not done any such works, however, his explanation that the department had told him that if it was hand drilling he would not need a permit substantiated by a program of works was not countered.

50. Exhibit 6 is the Form 5 for the year November 2017 to November 2018. It was pointed out to Mr Church that he had reported in the operations report four days' metal detecting and seven days' loaming. There was no reference to drilling. Further, Exhibit 7 was the Form 5 for the year November 2018 to November 2019. In that report he claimed three days metal detecting and eight days looming. Again there was no report of a drilling program. His explanation was that he had noted that there was, in the electronic Form 5, no particular

category for drilling. He said that he spoke to the Department and was told that there was no category for hand drilling so he should put it in the category of "loaming, panning, sampling, dollying, dry blowing." When he was asked why he simply did not include the drilling in the category of "Other activities (specify)" he said that in the electronic format there was no opportunity to write into the form a description of those 'other activities,' nor was there a specific box for a monetary amount. It appears, in my view, that the "Other activities" notation is actually a heading that refers to the three categories underneath that heading, being "plant and equipment hire", "fuel, oils, etc" and "Field supplies." Mr Church said none of them fitted the description of a drilling program either. Church maintained in re-examination that he did include the program in the Form 5, however, it was not specifically referred to because of the set out of the form and the inability to electronically amend the fields.

51. Each of these matters put to Mr Church was to a considerable extent, therefore, explained by him and he was not significantly shaken in relation to those matters on cross examination. Each of the explanations, and his evidence and many of the responses, appear to be a reasonable response to the propositions put to him in relation to him not attending the site or the lack of activity noted by Mr Barber and Mr Mutika, and I therefore give them some weight in support of his credibility.

52. In support of his expenditure during the relevant year, Mr Church gave evidence that he purchased $9000 of plant and equipment for use on the prospecting licence, including a "jaw-crusher, knudson concentrator and associated equipment" from Tony Wilton. He produced what he said was a copy of the receipt for the payment of $9000. That was annexure PC8 to his affidavit. The date of the receipt is 23 June 2020 and, as was pointed out to Mr Church in cross examination, it appears that the receipt was photographed while still in its receipt book.

53. The expenditure had not been reported in the Form 5 for the 2019/2020 year. Mr Church claimed that he had inadvertently made no reference to the equipment purchase on the Form 5. Neither, he accepted, had he made mention of the purchase or referred to any receipt in the particulars responding to the application for forfeiture, filed on his behalf on 3 May 2021. He accepted in cross examination that the receipt itself for the items had been created after May 2021 but he maintained that he paid the $9000 in the relevant expenditure year.

54. While the date of receipt is 23 June 2020, Mr Church produced 3 bank statements, being Exhibit 8, which showed that the following payments were paid to Tony Wilton:

    (a) 16 December 2019: $2,000

(b) 20 January 2020: $2,000 and

(c) 23 June 2020: $5,000

55. Although the receipt is made out to Mr Church, the bank statements are in the name of Express Maintenance Services (WA) P/L. Mr Church explained that he made 3 payments to Mr Wilton and agreed that they were from the bank account of his maintenance company, however, he said that he was the sole director of the company and there was only one share in the company, held by him. He purchased the equipment intending to use it to process dirt from the lease and he reiterated that this was his only lease. The equipment, at the time of hearing, was in his shed, which I assume he meant was in Geraldton. He said in evidence that Mr Wilton had not wanted to produce a receipt, but he ultimately, however, did. He said that as he had already completed the minimum time he believed was necessary to work the lease, he did not think to add the equipment purchase in the Form 5 for that year.

56. There are some difficulties in accepting the purchase of the equipment as relevant expenditure in the relevant year. It was not explained satisfactorily why the receipt has been photographed while still in the book, and it is incongruous that Mr Church did not include the expenditure in the relevant Form 5, given the amount of the expenditure, nor tell his lawyer about the purchase until after his particulars were filed and served, given the challenge to his expenditure in that year. The receipt was not acquired until after May 2021, almost a year after the final payment was made to Mr Wilton, and after the application for forfeiture was commenced. It is the maintenance services business which has purchased the equipment and while it may be that Mr Church is of the view that he and the company are 1, they are, legally, 2 separate entities, the prospecting licence being in the name of Mr Church personally.

57. Mr Church's evidence was that he purchased the equipment "through that year [2019/20]" and that he did not return to the tenement until May 2021. It seems, from the bank records, that the equipment was purchased sometime around 15 December 2019, shortly after he returned from his one and only trip to the tenement in that expenditure year, although only partial payment was made then. Mr Church's evidence was silent about when he took delivery of the equipment and he did not give evidence that he either took that equipment with him in May 2021, or at any other time, or used it at any other time. While there may not be a requirement for purchased plant and equipment, purchased in connection with

mining, to be used in the relevant year,[12] that appears to be a large expenditure for a small prospecting licence, and for it to sit in a shed, apparently unused, for, possibly, a considerable amount of time, and apparently forgotten about even for a time during an application for forfeiture.

58. Given the questions over the issuing of the receipt, the entity purchasing the equipment, the lack of use of the purchase, and the failure to add the purchase in the Form 5 or report it until well into these proceedings, and I am not satisfied that I can place any weight on Mr Church's evidence that he purchased, or caused the purchase of, the equipment, to be used in connection with mining on the prospecting licence in the relevant year.

59. A consequence of my rejection of that evidence is the question of whether that means that I cannot, in its entirety, rely on his evidence as being honest. I have weighed the consequences of the evidence of the equipment purchase with the other factors relevant to assessing a witness's credibility, such as in general his ability to answer questions in cross examination, his demeanour and whether there is any corroboration to any of his evidence.

60. Mr Osborne's evidence was to corroborate Mr Church's evidence that he went to the tenement for the length of time claimed. The applicant submitted that I could place little to no weight on the evidence of Mr Osborne because he did not give particulars of exactly where he went when he said he went with Mr Church to Mr Church's tenement. I am of the view that I can place weight on the evidence of Mr Osborne. While it is the case that he was not specific about the coordinates and did not give any other distinguishing features of the tenement, Mr Church gave evidence that he only had 1 live tenement, to which he travels and on which he prospects, and Mr Osborne gave the general direction of the tenement as being north of Yalgoo. From the annexures MHM2 and MHM5 to Mr Mutika's affidavit I note that the tenement is in the Yalgoo Shire. I accept that Mr Osborne went to the tenement the subject of these proceedings, and therefore place weight on his evidence.

61. Mr Osborne was specific about the dates on which he travelled with Mr Church, which accorded with the dates Mr Church gave as the dates on which they travelled to the tenement. Given Mr Osborne was not controverted on his knowledge of those dates, I accept his evidence as to those dates as being reliable. While it could be said that the dates on which he travelled is only a small part of the evidence of Mr Church, what flows from that corroboration is that I accept that they both travelled to the tenement when Mr Church

[12] ***Re Heaney; Ex parte Flint v Nexus Minerals NL***, unreported; FCt SCt of WA; Library No 970065; 26 February 1997 and ***Re His Honour Warden Calder SM & Anor; Ex Parte Lee & Anor*** [2007] WASCA 161; (2007) 34 WAR 289.

said they did. Mr Osborne explained how they worked the tenement. This gives Mr Church some credibility and reliability as to going there at all, and, adds weight to his evidence regarding what he did on the tenement during that time.

62. Mr Mutika attended the tenement 9 and 14 months after the 9 days Mr Church said he spent on his tenement. Mr Barber traversed the prospecting licence 10 months after Mr Church said he had been on his tenement. While I accept their evidence as to signs of prospecting, exploration or mining activity, Mr Church explained why the relevant items were not present or could not be seen if they were present when the witnesses traversed the tenement, as I have outlined elsewhere in these reasons. Having weighed the reasonableness of those reasons, and the other factors which I have outlined are relevant to assessment of a witness's credibility and reliability, I am not persuaded that I cannot rely on Mr Church's evidence in relation to those factors.

63. Accordingly, while I accept the credibility and reliability of the applicant's witnesses, I also accept that Mr Church travelled to his tenement from 9 to 29 November 2019 and that he spent time prospecting with a Mine Lab SDC2300 metal detector. Other than Mr Osborne's evidence that he spent less time each day prospecting, there has been nothing put before me which suggests that Mr Church's claim that he prospected for not less than 10 or 12 hours each day is unreasonable and I therefore accept as reasonable his estimation of those hours.

RECORDED EXPENDITURE

64. I must still be satisfied that the figures contained in the Form 5 have been expended, or are reasonable valuations of expenditure.

Fuel

65. Annexure PC10 to the affidavit of Mr Church is a receipt for fuel which Mr Church says he purchased to travel to the tenement and to operate his generator there. That is in the sum of $194.92. I am unable to make out the date on the receipt. I note that in the Form 5 there is a claim for $175 for fuel and oils. I am therefore not satisfied that Mr Church spent $194.92 on fuel, however having to travel to the tenement and back in his vehicle, I accept that $175 is a reasonable sum to have spent and I am satisfied that that is the sum spent on that time.

Field supplies

66. Mr Church has claimed $250 for Field Supplies in the Form 5. No receipt has been provided by Mr Church as to that amount and nor did he give evidence about that amount,

or how it was incurred. I note that the Form 5 asks for expenditure on "Field supplies (food consumables, etc.)." Given the absence of any evidence, I am unclear whether the field supplies are food or some other type of supplies, and, if food, whether they were consumed on the tenement. Other than saying he only stopped to sleep or prepare and eat meals[13] Mr Church did not refer to field supplies, or, in particular, food.

67. I note that other wardens have taken the view that food and accommodation are 'normal living expenses' and are as such not claimable, not satisfying the guidelines set out in ***Re His Honour Warden Calder SM & Another; Ex parte Lee & Another***.[14] For example, Warden Wilson rejected claims for the purchase of food in ***Flint v Brosnan***,[15] ***Pawson v Northwestern Mining Co. P/L & Another***,[16] ***In the Application for Restoration of late Mining Lease 45/1135 by Kenneth Bacon***,[17] and ***Blackfin v Mineralogy***,[18] relying on a decision of Warden Calder in ***Nunn v Caricellie***.[19] Relying on those decisions, Warden Ayling has also found that, at least where incurred off-site, claims for food (and accommodation) are non-allowable expenses, as they are "normal, day to day living expenses."[20] In ***Pawson*** and ***Flint*** it seems that the food rejected as claimable was consumed on the tenement.

68. However, as I have said, it is not clear that the field supplies claimed are food, or other consumables. Further, neither the amount claimed nor the nature of the field supplies was challenged by the applicant. I note the following notation on the Department's standard Form 5:

> *I certify that the information on pages 1 and 2 and in Attachment 1 "Summary of Mineral-Exploration and/or Mining Activities" or Attachment 2 "Summary of Prospecting and/or Small Scale Mining Activities" constitutes a true statement of the operations carried out and monies expended on this mining tenement during the reporting period specified.*

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[13] Affidavit [15].
[14] ***Re: His Honour Warden Calder SM & Another; Ex parte Lee & Another*** [2007] WASCA 161.
[15] ***Flint v Brosnan*** [2002] WAMW 20.
[16] ***Pawson v Northwestern Mining Co. P/L & Another*** [2013] WAMW 8.
[17] ***In the Application for Restoration of late Mining Lease 45/1135 by Kenneth Bacon*** [2012] WAMW 19.
[18] ***Blackfin v Mineralogy*** [2013] WAMW 19.
[19] ***Nunn v Carnicellie*** (unreported; Southern Cross Warden' Court) 10 AMPLA Bull 63, 29 November 1990.
[20] ***Van Blitterswyk v Balagundi Gold Pty Ltd*** [2021] WAMW 8 [58], citing ***Blackfin v Mineralogy*** [2013] WAMW 19.

69. Mr Church electronically signed the form on 4 January 2021.

70. Staying on the tenement for 9 days would require some consumables. Absent any challenge, the onus being on the applicant to show that there was an under expenditure, or that the expenditures claimed did not occur, I am not satisfied that the claim for $250 for field supplies is not a truthful claim, or is not a claim satisfying the criteria in reg 15. I accept that $250 is a reasonable amount for consumables in the circumstances of this case.

Rent and Administration

71. Annexure MHM2 of Mr Mutika's affidavit shows that the rent payment for the 2021 year was $29.50. I also accept as reasonable the claim of $80 for administration and overheads.

Value of the respondent's attendance and metal detecting on the tenement

72. As I have found, I am satisfied that Mr Church attended and worked on the tenement for 10 days. He has estimated his time as being at $250 per hour, with 8 days of metal detecting and 2 days of loaming. While an allowable claim, the applicant submitted that there was no evidence that would satisfy me of the remuneration that Mr Church "would be entitled to if engaged, under a contractual arrangement, in similar mining activity elsewhere in the district," as is required by reg 15(1).

73. Regulations 15(1) and 31(1) are relevantly in the same terms. They deem an amount spent, and therefore claimable as expenditure, for the time the tenement holder has directly mined on the licence itself. Previously disputes have arisen about the valuation of that remuneration, or 'wages' as regs 15 and 31 were drafted prior to amendment in 2003.

74. In ***Flint v Brosnan***[21] and ***Flint v Brosnan & Another***[22] a dispute arose before Warden Wilson about whether prospectors for gold in the district in which the tenements were, were paid any 'wages' at all, there being evidence in both matters from both the plaintiff and defendant, and in a previous Leonora matter commented on but not named, that prospectors engaged to assist the tenement holder were generally allowed to keep a portion of their find as payment for their work. Therefore, the argument was, they were not paid 'wages.' Flint gave evidence in the first matter that if a person was to be paid to metal detect, they would be paid at labourer's rates, between $15 and $16 per hour, or about $150 per day.[23] Brosnan gave evidence in that matter that he thought his time on the

[21] ***Flint v Brosnan*** [2002] WAMW 20.
[22] ***Flint v Brosnan & Anor*** [2002] WAMW 21.
[23] ***Flint v Brosnan*** [2002] WAMW 20 [13].

tenement was worth $350 a day, and he would expect to pay a casual labourer $25 per hour.[24]

75. The Warden rejected both parties' evidence as to what wages they would expect to be paid if they were to be paid for metal detecting in the district. Further, he found that in that district, those engaged in metal detecting were not paid 'wages' at all, but were paid by retaining a proportion of the gold they recovered.

76. In the second of the matters, heard second but, apparently, delivered at the same time as the first,[25] Flint produced into evidence an extract summary of the minimum rates of pay pursuant to the *Minimum Conditions of Employment Act 1993*, although his Form 5 had recorded wages of $350 a day. He agreed a trade's assistant would be paid about $25 per hour.[26] Brosnan had apportioned he and the other defendant different amounts for the same work, due to one being more experienced than the other.[27] Brosnan testified that he had previously worked as a field assistant and was paid $200 per day, but on his tenements he did not pay anyone to metal detect, allowing them to keep a portion of their finds.[28] Again the Warden found that in that district, wages were not paid for metal detecting,[29] and he rejected Flint and Brosnan's evidence about what they ascribed to their value in dollar terms.[30]

77. However, this left the Warden in a difficult position: having found that wages would not be paid in the district for metal detecting, either on an exploration or prospecting licence, he acknowledged the purpose of regs 15 and 31, relying on comments made by Warden Calder in ***Richmond v Opaltrend Nominees Pty Ltd***.[31] Warden Calder was of the opinion that a person performing work on a tenement ensures that appropriate activities are carried out directly in mining or exploration or prospecting, or in connection with those activities. According to Warden Calder, the primary objective of the legislative regime being the undertaking of activity, and not merely expenditure itself, the attribution of a dollar figure for work done in expenditure provisions is "merely the means by which a value can be attributed to qualifying activity."[32]

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[24] ***Flint v Brosnan*** [2002] WAMW 20 [17].
[25] See ***Flint v Brosnan*** [2002] WAMW 20 [29] – [30].
[26] ***Flint v Brosnan & Anor*** [2002] WAMW 21 [10].
[27] ***Flint v Brosnan & Anor*** [2002] WAMW 21 [11].
[28] ***Flint v Brosnan & Anor*** [2002] WAMW 21 [15].
[29] ***Flint v Brosnan & Anor*** [2002] WAMW 21 [26] and [29].
[30] ***Flint v Brosnan & Anor*** [2002] WAMW 21 [33].
[31] ***Richmond v Opaltrend Nominees Pty Ltd*** (unreported) Perth Warden's Court, 7 October 1999.
[32] ***Richmond v Opaltrend Nominees Pty Ltd*** (unreported) Perth Warden's Court, 7 October 1999, 16, cited in ***Flint v Brosnan & Anor*** [2002] WAMW 21 [28].

78. Accordingly, Warden Wilson was of the view that as he was satisfied in both matters before him that metal detecting had been performed on the tenements by the tenement holder, some figure had to be attributed to the value of the work; he saw it as unfair, and not in accordance with the principles of the mining legislative regime that simply because wages would not have been paid to someone metal detecting in the district, the tenement holder could not claim as expenditure, that work. Having rejected the parties' evidence as to their opinions of their value in performance of their own work, he turned to the other evidence before him, being the evidence of what the minimum wage was at the time. There being no evidence to the contrary, he found as reasonable the attribution of the minimum wage to the work done in those cases.[33] He reiterated that view in the earlier Flint matter and applied the same mechanism to determine the value of the work.[34] He also noted that shifts of 12 hours are common in the mining industry.[35]

79. In ***Pawson v Northwestern Mining Co. Pty Ltd & Anor***[36] Pawson disputed that, relevantly, representatives of Northwestern had spent the nominated time on the tenement, metal detecting and pushing up dirt. The tenement holder had died during the expenditure year and her daughter was administering the estate, including responding to the application for forfeiture. Evidence was given by someone who assisted the tenement holder with welding and repair work. He also metal detected with the tenement holder, and was entitled to keep any gold he found in payment for his repair and welding work.[37] The evidence the Warden heard about the dollar amount to be attributed to the work of the tenement holder was that she had claimed $40 per hour in the Form 5 based on what others had claimed for that work.[38] The Warden confirmed that tenement holders engaged in metal detecting are entitled to claim expenditure for their time, and that a method of determining that amount may be based on the *Minimum Conditions of Employment Act (1993)* WA. By this time, the relevant regulations had been amended to take out reference to wages, and substitute 'remuneration.' This did not appear to alter the Warden's views held in the ***Flint*** matters. Again, it appears the Warden was of the view that, in the absence of any other reasonable evidence, or evidence to the contrary, the attribution of a value to the metal detecting performed, if so found, is the 'minimum wage.'[39] While it does not appear from the

[33] ***Flint v Brosnan & Anor*** [2002] WAMW 21 [36].
[34] ***Flint v Brosnan*** [2002] WAMW 20 [30]-[38].
[35] ***Flint v Brosnan*** [2002] WAMW 20 [38].
[36] ***Pawson v Northwestern Mining Co. Pty Ltd & Anor*** [2013] WAMW 8.
[37] ***Pawson v Northwestern Mining Co. Pty Ltd & Anor*** [2013] WAMW 8 [33].
[38] ***Pawson v Northwestern Mining Co. Pty Ltd & Anor*** [2013] WAMW 8 [22].
[39] ***Pawson v Northwestern Mining Co. Pty Ltd & Anor*** [2013] WAMW 8 [62].

Warden's written reasons for decision that the relevant portion of the *Minimum Conditions of Employment Act (1993)* WA were put before him in ***Pawson***, nevertheless, he had regard to the relevant minimum wage under the Act, and applied that amount to a claim for metal detecting and pushing up dirt, having found that activity had occurred.

80. Mr Church did not call evidence nor give evidence about what one could expect as remuneration under a contractual agreement for metal detecting in the district, and I was not taken to the current relevant provisions of the *Minimum Conditions of Employment Act (1993)* WA. He did elicit evidence from Mr Barber and Mr Mutika about their experience in values for work done in the area.

81. Mr Barber said:

- His work had involved field activities, including different types of drilling, soil and rock sampling. Most of the time he is in the field.
- He has employed field assistants, who have assisted him in his sampling work, and junior geologists. They were either full or part time employees, few if any being contractors.
- In the current market, it was his view that a contractor performing that type of work would be paid approximately $300-$320 per day.

82. Mr Mutika said:

- His experience was in exploration, rather than prospecting, and while he had seen people metal detecting, he had not done so himself. Many people he works with metal detect. He likened soil sampling to metal detecting.
- Previous to his current employment he planned and carried out field work. In December 2017 he was paid $200 per day as a field assistant, which consisted of soil sampling, picking up or collecting the samples and "doing the grids." If there was drilling, he, as a field assistant would record the drilling data and pick up the drilling samples.
- He agreed with the proposition that this consisted of the most basic work.
- He then moved to being paid a salary of $124,000 per year, which in gross terms, roughly amounts to $500 per day. This was a promotion, and incorporated him assisting in the planning of field work, as well as doing the field work itself.
- He did this in and around the area in which P 59/2027 is situated.
- He had never been paid for metal detecting.

83. The applicant objected to the reception of that evidence from Mr Barber and Mr Mutika on the basis of relevance. It said that to be relevant, the evidence needed to be about:

- Metal detecting, although in legal argument it accepted that this was not strictly required under the regulation,
- In the district
- By someone on contract.

84. Alternatively, it said that the evidence was of such little weight that I should pay little regard to it, and it certainly did not go to the extent of satisfying me of the remuneration Mr Church would be entitled to, had he been engaged pursuant to some contractual arrangement, in similar mining in the district.

85. Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue. Evidence may support the drawing of inferences on questions of fact. Inferential reasoning is not speculation. Inferential reasoning is the drawing of a logical deduction from the proven facts. The respondent submitted that while there had not been evidence produced about metal detecting, on contract, in the district, I could draw inferences from Mr Barber and Mr Mutika's evidence as to what they had been paid, or paid others.

86. In the cases I have reviewed at [74] – [79] Warden Wilson was asked to engage in an exercise of comparing others who metal detected, and to determine what the tenement holder could claim as expenditure for his time detecting, when those other metal detectors in that district were not reimbursed with cash. By virtue of the situations in those cases, he was not given a comparison of other work that was not metal detecting. He rejected each of the respondent's estimates of what that deemed expenditure should be valued at, but that left the court in the position that while the Warden had accepted that the time had been spent on the tenement, and therefore that the time was deemed expenditure, the Warden had no direct evidence before him of what a person in that district could expect to be paid if otherwise engaged by contract to perform similar work, when, in fact, he found that generally those assisting or working with tenement holders were not paid in cash.

87. In the matters before Warden Wilson, as it is in this case, it is the tenement holder who is claiming for the tenement holder's time, not the time of an assistant. The Warden rejected the suggestion that he could not therefore apportion a value to the time because those who have assisted the tenement holder were not paid in cash. In his view to not apportion a value would be unfair. In the ***Flint*** matters he was provided with, and reverted to, the minimum wage, having found that metal detecting could attract at least that remuneration. In ***Pawson*** he reverted to the minimum wage without it being in evidence before him.

88. Consistent with Warden Wilson's approach in the ***Flint*** matters and ***Pawson***, evidence about wages or remuneration a person may expect to receive does not have to be directly

given nor called by the respondent; it can be elicited through other witnesses, or inferred from other evidence. Also consistent with the Warden's approach, the question of the value of likely remuneration is not confined to a direct comparison with other metal detecting work. Warden Wilson made an assessment of the type of work performed, generally assessable against other commensurate types of work, and their expected remuneration. I can see no factual or legal reason to depart from Warden Wilson's views or method. I am persuaded by the fact that, when it is the applicant's burden to satisfy the warden that expenditure has not occurred, once the warden finds that that burden has not been discharged, the applicant would nevertheless succeed if the respondent had not specifically called its own evidence of remuneration of other metal detectors, in the district, on contract. It would be unfair that even where the respondent has successfully opposed the application as to time spent on the tenement, they nevertheless fail in resisting the application for forfeiture for not calling any such evidence, which may not, in fact, exist, as Warden Wilson found.

89. Determining a dollar figure for that work requires a determination of what a person such as the tenement holder would be entitled to in similar mining activity in the district if they were being paid, in a dollar amount, for it. "Similar" is defined in the Shorter Oxford English Dictionary as "having a resemblance or likeness; of the same nature or kind." Therefore, the items do not have to be the same, just of the same nature. In reverting to the minimum wage, Warden Wilson appeared to consider that metal detecting is, generally, similar to work which attracts the minimum of what the community believe should be paid for work at all.

90. Mr Mutika agreed with the proposition that soil sampling was basic work. Mr Church described his metal detecting as using a detector so sensitive that it picked up small pieces of gold in the top 50mm of soil. As a result, he generally only used a small plastic scoop, without the need to dig,[40] or only dug relatively shallow holes.[41] Annexure PC4 to his affidavit is photos of holes he generally digs. Some are no deeper than a footprint would make in mud, others appear deeper.

91. Mr Mutika was not asked to describe what he meant by "pick up" or "collect." However I infer from his general descriptions of his work in the field, which I accept, that he was likening the collection of soil samples to work that was not particularly difficult, either physically or technically, given he did not use words that suggested there was any effort in that collection or picking items up, and as he spoke of being promoted, leading him to

[40] Affidavit of Paul Robert Church sworn 21 July 2021 [14].
[41] Affidavit of Paul Robert Church sworn 21 July 2021 [16].

the more technical work of planning, which gave him more responsibility. I accept therefore that soil sampling, and particularly picking up or collecting samples, is similar to metal detecting, as Mr Church described what he did on the tenement.

92. Mr Church has claimed 2 days for loaming, panning, sampling, dollying, dry-blowing. He said that when he was not metal detecting, he was loaming.[42] Loaming is defined as washing the loam (soil) from the foot of a hill until the increasing number of gold grains leads to the load.[43] I consider that that too is similar to soil sampling, and the collection of soil samples.

93. Mr Barber spoke of payments in the current climate, Mr Mutika to payments in 2017. Mr Mutika was on contract when he earnt $200 per day for the field work, but Mr Barber referred to wages earnt by someone employed, which were significantly higher. The terms of the regulations are "engaged, under a contractual arrangement." Employees are engaged under a contractual arrangement – a contract of employment. I am not satisfied that the legislature requires a 'contractor rate' as compared to a 'wage'; the words used may mean someone who is working on the tenement, whether under a contract of employment or on a casual contract basis, just not someone who is performing one-off or sporadic cash work, or the type of work and payment, for example, performed and received by the witness in ***Pawson***. In this case, however, a determination of that issue is not required. Mr Mutika spoke of being paid on contract, and not receiving a salary as an employee would. Further, employee rates are surely a guide, although a guide only, and therefore of less weight, to what a contractor, who is paid more to account for the lack of leave and other benefits, may attract.

94. Both referred to their experience of work in the relevant district, although they did not use that term: each of them had gained that experience through work on the adjoining tenements to the respondent's, hence their ability to form an opinion on whether there had been any work done in the relevant year on Mr Church's tenement. Given their evidence relates to similar work done in the district, at least some of that work being on contract, I am of the view that their evidence is relevant.

95. I am also of the view that their evidence carries sufficient weight to provide me with a basis to determine a reasonable valuation of Mr Church's expenditure on the tenement in the relevant year. In the Form 5 Mr Church has claimed $250 per day. He said, and I accept, given Mr Osborne's evidence about his and Mr Church's working hours that he worked 10-12 hours per day. Given Mr Mutika's evidence is from 2017, and, given Mr

[42] Affidavit of Paul Robert Church sworn 21 July 2021 [15].
[43] Shorter Oxford English Dictionary.

Barber's evidence, it appears rates of pay have increased, and the work done was towards the end of 2019, it is my view that the $250 per day claimed, for 10-12 hour days, for metal detecting and loaming, is a reasonable sum for Mr Church to have claimed. Given I accept that he spent the days claimed on the tenement prospecting, that deems his expenditure on that item to be $2,500.

DETERMINATION

96. Given that the expenditure value of the number of days Mr Church worked on the tenement alone exceeds the minimum required expenditure of $2,000, and there were additional expenditure amounts which I have accepted, I am not satisfied that the respondent has failed to comply with his expenditure conditions.
97. Accordingly, there being no under expenditure, the application is dismissed.

Warden

27 July 2022