IN THE WARDENS COURT - MARBLE BAR
HELD AT PORT HEDLAND

HEARD 19TH JULY 1993
DELIVERED 13TH AUGUST 1993
AT MARBLE BAR

In the matter of Plaint No.s 1/923 and 2/923
applying for forfeiture of Mining Leases
45/370 and 45/371.

BETWEEN:

RODNEY JOHN O'BRIEN (PLAINTIFF)

and

TERN MINERALS NL (FIRST DEFENDANT)
IAN DOUGLAS MARTIN (SECOND DEFENDANT)
ARTHUR ROBERT O'NEIL (THIRD DEFENDANT)

Mr T.B. Bannerman appeared for the Plaintiff

Mr G.H. Lawton appeared for the Defendants

REASONS FOR DECISION

WARDEN F CULLEN SM

On the 21st December 1992 the plaintiff Mr RJ OBrien lodged two plaints in the Wardens Court at Marble Bar being 1/923 and 2/923 claiming non compliance of expenditure condition for mining lease 45/370 and 45/371 both for the period 6th May 1991 and 5th May 1992 and the relief sought being forfieture of the two mining leases and that the plaintiff have prior rights to mark out and apply for the said ground covered by the leases.

On the 15th April 1993 the Defendant company lodged Notice of Defence for each plaint on the ground that compliance with the expeniditure conditions had been expended and would be proved and costs were claimed against the Plaintiff.

Form 5 in accordance with Mining Regulations 32 had been filed on the 1st May 1992 claiming expenditure of $53,740.00 for the year 1992 when the minimum amount of expenditure was $34,900.00 for Mining Lease 45/371 and a total expenditure of $39,880.00 when the minimum amount of expenditure was $11,900.00 for Mining Lease 45/370. These figures are part of the Department of Minerals and Energy records and are contained in certified copies from the Registrar of Mining Leases for the particular leases under review.

I heard evidence on behalf of the Defendants from Mr Anton Bryon Billis the tenements Manager for Tern Minerals he stated he was the Managing Director of the Company from 1985 - 91 he gave evidence of visits to the tenements 45/370 and 45/371. Evidence was also given that work was done at the site around Christmas 1991 when Mr Peter Stephen Thomas set up equipment and 5 to 10 tonnes an hour of material was being treated. Evidence was also given of a more recent visit on which numerous photos

were taken of the 1991 scrapping and processing programme of that year by Mr Thomas. Mr Billis outlined the basis for the submissions regarding expenditure and in his view the work which was carried out over a five month period could conservatively be estimated at $1000.00 a day. There was no direct expenditure by Tern Minerals over the period and he allowed $250.00 a day in his estimate.

The form 5s were prepared by estimates which were on the conservative side. However Mr Billis did say that he did not ask Mr Thomas directly as to the money spent. There was also an unsigned agreeement between Tern Minerals and Mr Thomas to allow him to work the ground. The agreement was mentioned by Mr Thomas who gave evidence that there was an agreement to look for alluvial gold and he found some having processed 1500 tonnes. He extraced he said, $14,000.00 worth of gold. Mr Thomas stated he went to the lease in April 1991 until October 1991. He stated Mr Billis had spoken to him about the costs for the five month period for the form 5 expenditure. Mr Thomas stated that the work he had done was on the borderline between the two leases and it was not 50% work on each of them. He stated that he had spent about $15,000.00 over the five month period and $6000.00 upgrading the road.

The Plaintiff also gave evidence as to his experience in preparing reports for the preparation of Form 5s, having had the responsibility between 1985 and 1988 for some 360 tenements. In November 1992 he visited the ground and made notes as to what he saw and when he returned home he enhanced the notes. He had seen the form 5's before his visit.

Mr O'Brien described his visit to the ground in question 85 kilometres NE of Nullagine and the track access by 4 wheel drive only and it took one hour to travel 12 kilomtres. There had not been improvements to the access road.

He found evidence of some processed material which he estimated to be no more than 500 tonnes. The visit to the lease was with Mr Robert Dansie of Montana, USA a mining consultant, who in an affidavit sworn in Montana, corroborates the observations of Mr O'Brien.

This application for forfeiture is under S98 of the Mining Act for failing to comply with expenditure conditions during the year May 1991 - May 1992. It was put to me by the counsel for the Defendant that, the work was not carried out by the tenement holder ie Tern Minerals, however, I was asked to look at Mr Thomas' evidence globally and invited to consider what a reasonable estimate was, the expenditure of $150,000.00 being the effect of the expenditure during the relevant period. I was urged to consider what is the spirit and intention of the Act, in this case the tenements were being worked, someone was on the tenements. The value was, that Thomas was relied upon for the expenditure as opposed to actual expenditure, and he spent $15,000.00 on the tenement, removing an amount of alluvial gold. It was put that the term "the holder of a tenement" should be interpreted in what was termed as "loose as possible" a manner. The case of Scott -v- Myers & Moir, Leonora, Wardens Court, Kalgoorlie, in which it was held that a person who has an unregistered interest in a tenement (an equiptable interest arising from a sales agreement) can join in proceedings on an application for forfeiture, and on the opposite end of the spectrum the case of Spindler -v- Harapeet~~eners~~ Cue, Wardens Court where a husband doing work on a tenement for his wife was considered work by the holder.

I was asked to find that in the circumstances of this case Mr Thomas had an equitable interest in the leases. I was also referred to the case of Strange -v- Pietsch, Wardens Court Decision, volume 6, folio 12 in which it was held that the "holder" of a tenement not having expended the cost

of work done, including labor and machinery hire was not expenditure which satisfied the provisions of S98 and regulation 31. Further held however that as the third party had spent in excess of the expenditure requirement then in all the circumstances as the policy of the Act in ensuring leases were being "mined" was being carried out, neither forfeiture nor a fine were appropriate despite a technical failure to comply with the expenditure conditions.

It was put on behalf of the Defendant that the tenements in any event were being worked not abused and that Mr Billis's expenditure figure exaggerated.

On the other hand the plaintiffs argument is that on the evidence I cannot be satisfied as to the expenditure and that on the evidence there is a considerable short fall and that Mr Thomas is not the "holder" and there was no obligation on him to expend in the contract between the parties. It was conceded there was some expenditure, but not sufficient. It was submitted that the gravity of the non compliance was sufficient to make the recommendation to the Minister.

I accept the evidence of Mr O'Brien as to his observations and estimation as to the work carried out on the leases and in doing so it follows that the expenditure levels have not been obtained. I do not accept the estimate of Mr Thomas as to the amount of material processed or the work carried out as to the access road.

An important policy of the Mining Act 1978 is that the holder of a mining tenement "<u>actively explore</u>" and if such exploration proves up a mineral resource, then actively mine it.

The whole tenor of the Act is to encourage exploration and mining activity and discourages tenement holders for going to sleep on there rights and obligations. The forfeiture provisions are part of the overall spirit and intention of the Act to encourage exploration and mining.

S98(5) applies to the forfeiture of mining leases as is the position in this case.

I have to be satisfied that there has been non compliance and further that there is sufficient gravity to justify forfeiture.

The degree of proof required in this type of application is proof on the balance of probabilities, due regard being had to the fact that the forfeiture of potentially valuable or valuable property is involved.

I must determine having examined the evidence before me whether there has been a non compliance.

I am of the view that on the evidence before me that there has been a non compliance and the estimates made by Tern Minerals of the work done by Mr Thomas were over exaggerated. In any event I am of the view that the spirit and purpose of the Act is not encompassed by the intervention of a third party like Mr Thomas. Mr Thomas's interest in the leases was confined to alluvial gold on his own account and had no bearing on the overall intentions or aspirations of Tern Minerals use of the ground for the exploration for gold other than alluvial, that they were willing to give away. Companies should not hide behind third parties and then provide estimates which are inflated.

Having determined the first question I am now to look at the other statutory provision of sub Section (4) of S98.

> When a mining Warden finds that a lessee of a mining lease has failed to comply with such requirements (in this case no compliance), the Warden may recommend the forfeiture of such lease or impose a penalty as an alternative to the forfeiture or dismiss the application.

> Subsection (5) states:- A recommendation shall not be made under subsection (4) ... unless the Warden is satisfied that the non compliance with such requirements is, <u>in the circumstances of the case, of such gravity to justify the forfeiture.</u>

I have examined the authorities with respect to the gravity of the breach justifying the forfeiture. Hence, upon primafacie proof of non-compliance the evidentiary burden is on the defedant to satisfy me that the case is not of sufficient gravity to justify forfeiture. Ex parte commercial properties -v- Iralo Nominees Pty Ltd.

The words "sufficient gravity" were considered and determined in Pacminex (operation) Pty Ltd -v- Australian (Nephxite) Jade Mines Pty Ltd (1974) 7 SASR401.

That case examines the provisions of the South Australian Act which have additional consideration however Wells J P412 said.

> The Court must next be satisfied that the "matter" is "of sufficient gravity to justify the forfeiture of the claim". The "matter" referred to, in my opinion, is not equivalent to the breach proved. If it was, the word "breach" would have been used instead. The word

"matter" was chosen, in my view, to impress upon the Court the necessity of considering, not only the breach and the facts directly bearing upon it, but also the events leading up to the breach, the conduct of the parties and the actual and potential consequences of the breach and of the forfeiture sought, having regard, throughout, to the object and policy of the Act. In this connection, the word "sufficient" must especially be borne in mind and its full implications recognized: whatever may be urged in support of the existence of a residual discretion, the language of Subsection (2) speaks of the Court's being satisfied that the matter is of sufficient gravity to justify forfeiture, and, to my mind, the implication of that language is that the order will naturally follow the finding that the Court is so satisfied. Such an implication would not, perhaps, be carried if what was being laid down was a minimum degree of irregularity that represented the bounds of an exemption from liability to forfeiture. But that is not the case here. The order is not to be made unless "the matter is of sufficient gravity"; that is not language apt to limit the bounds of an exemption; rather does it represent a final and comprehensive set of circumstances, the establishment of which, to the Court's satisfaction, points the way in which the Court should go".

Subsection 98(5) of the Act uses the words "in the circumstances of the case". The inclusion of these words require the Warden to consider circumstances other than the non compliance itself. The words "in the circumstances of the case" were used for the same reason as the word "matter" was used in the South Australian legislation.

Subsection 98(5) thus impresses upon the Warden the necessity to consider, not only the non compliance and the facts directly bearing

upon it, but also the 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. The whold 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.

In Surina Pty Ltd -v- Belcrest Corporation Ltd I expressed the view that the assessment of whether or not there is sufficient gravity to justify forfeiture is one that should be made having regard to the state of the mining industry particularly at the time of the non compliance. The healthy state of the gold mining industry has resulted in an acute shortage of what may be generally described as potentially prospective land. If tenement holders holding land for gold go to sleep on their rights and obligations in times like these then they put their title at risk.

I should make the important qualification that if the state of the gold mining industry was sick, it would not follow that forfeiture would not be ordered or recommended. On a practical level there may not be so many applications for forfeiture in such times but it must be borne in mind that in such times the objects and policies of the Act would not alter.

Although the above cases are in relation to the South Australian Mining Act they are in my view of relevance here.

I have also considered the West Australia Case of General Gold ResourcesNL -v- Minefields Mount Mulgine Ltd heard in the Mount Magnet Wardens Court in December 1991. I am of the same view that the policy of the Act is

that there is active exploration and development of the mineral potential of the State is to be fostered and promoted and the mere holding of tenements which have the effect of tying the States resources is to be discouraged. I am on the evidence before me able to find given all the circumstances that there is matters of sufficient gravity to warrant the forfeiture of the two leases.

The behaviour of Tern Minerals in holding the lease for five years and not engaging in bona fide exploration is in effect against the spirit of the Mining Act and is simply sitting on the lease over a long period of time.

I will be recommending to the Minister forfeiture of the leases - 45/370 and 45/371.

The plaintiff also applied to be given the prior rights to mark out and apply for the forfeiture lease. That provision is contained within S100 and does not require nor can it be covered by an order from me.

F CULLEN SM
WARDEN
MARBLE BAR

13TH AUGUST 1993