THE WARDEN'S COURT
HELD AT PERTH
WESTERN AUSTRALIA

DATE HEARD: 20.11.96
DATE DECISION DELIVERED: 07.02.97

BEFORE: PM HEANEY WARDEN

DAVID JONES ROBERTS

OBJECTOR/PLAINTIFF

- and -

MT GRACE GOLD MINING NL

APPLICANT/DEFENDANT

REASONS FOR DECISION

MR N. GENTILLI appeared for the objector/plaintiff.

MR G. LAWTON appeared for the applicant/defendant.
This is an Application for Exemption No. 186/956 in respect of Mining Lease 80/194 for the year ending 21 January 1996. The applicant is Mt Grace Gold Mining NL (Mt Grace) and the objector is David Jones Roberts (Roberts).

This hearing also dealt with Plaint No. 11/956 in respect of the abovementioned Mining Lease 80/194. The Plaintiff in this matter is the same David Jones Roberts and defendant is the tenant holder Mt Grace Gold Mining NL.

Both the application for exemption and the plaint were heard together however the application for exemption needs to be finalized before consideration can be given to the plaint.

Section 82(1)(c) of the Mining Act 1978 provides that:

"Every Mining Lease shall contain and be subject to the prescribed covenants by the lessee and in particular shall be deemed to be granted subject to the conditions that the lessee shall:-

c) comply with the prescribed expenditure conditions applicable to such land unless partial or total exemption therefrom is granted in such manner as is prescribed."

Regulation 31 of the Mining Regulations 1981 provides that:

"The holder of a mining lease shall expend or cause to be expended in mining or in connection with mining on the lease not less than $100 for each hectare or part thereof of the area of the lease with a minimum of $10,000 during each year of the term of the lease ....."

There is no dispute that the required expenditure for the year ending 21 January 1996 was $85,900.

In this case application for exemption is made pursuant to Sections 102(2)(b), 102(2)(g) and 102(3) of the Mining Act.

Section 102(2) provides that:

"A certificate of exemption may be granted for any of the following reasons:-

b) that time is required to evaluate work done on the mining tenement, to plan future exploration or mining or raise capital therefore,

g) that political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is for the time being impracticable";
Section 102(3) provides that:

"a certificate of exemption may also be granted for any other reason which may be prescribed or which in the opinion of the minister is sufficient to justify such exemption".

The Form 5 filed by the applicant in this matter indicates that the total expenditure for the relevant period was $41,464 so the exemption is sought for an amount of $44,436.

Of the $41,464 said to have been spent $25,764 relates to Mr Lederer’s Wages for 200 man days at $120 per day plus 1,800 litres of fuel at 98c per litre purchased by Mr Lederer and used by him. $9,000 of the said expenditure relates to “negotiating tribute agreement, office studies 18 days at $500 per day”. $3,000 relates to “mobilising plant and equipment ready to treat alluvials. $3,700 relates to “sampling Creek Systems for alluvial deposits $2,200 and three days site inspection at $500 per day $1,500.”

Pursuant to its application for exemption and in defence to the plaint the applicant called two witnesses, Mr John Francis Walsh and Mr Jacob Lederer.

Mr Walsh, a geologist, was the managing director of the applicant during the relevant period of this application. His evidence was that the applicant received the transfer of Mining Lease 80/194 in February 1995 along with other contiguous leases. He also indicated that the lease is located on a pastoral lease owned by an Aboriginal Corporation. His first contact with Mr Lederer was in early 1995 when he visited the site. Mr Lederer expressed some interest in acquiring an interest in the lease, as he had been living on the lease for several years. An agreement was entered into by the two and is dated the 23 July 1995. The agreement took the form of Mr Walsh writing to Mr Lederer setting out the arrangements with a section at the bottom whereby Mr Lederer signed his name indicating his acceptance of the terms and conditions. The letter dated the 11 July 1995 state as follows:

Dear Jacob

I have talked to Matt Duncan and he has agreed that you can treat the alluvial at Dockerell.

We would be happy for you to go ahead under the following conditions:

1. 10% royalty on all gold recovered.
2. All expenditure receipts made available to Mt Grace to help cover Mines Department Form 5 Expenditure Reports.

.../3
3. Standard Mines Department Notice of Intent completed and approved before any alluvial operations commence.

4. All details of grade recovery and reef bearing gold anomalies made available to Mt Grace monthly.

5. Lodgement of security document prior to commencement of operations.

6. Depth limit bed rock.

7. Six months notice by Mt Grace to cancel this agreement.

Mr Lederer accepted these terms and conditions by signing his name on the 23 July 1995.

Prior to entering into this agreement, in May 1995 Mr Walsh went to the site of the tenements because “we were going to start a fairly substantial exploration program”. The trip involved the expense of flying up to Kununurra, hiring a car and staying at a hotel in Halls Creek. At page 15 of the transcript he said that the purpose of the trip was for me to go up on the ground, see what access there was, what access we would need to be providing ... a stream geochemistry .... with a view that we’d be drilling on some targets there before the end of the year”. He indicated that at the time he was being paid by Mt Grace at the rate of $600 per day. At page 16 of his evidence Mr Walsh indicated that he made a further visit to the site in late September early October; “I just wanted to go and have a look at it and see that there was something being done up there. Re-familiarise myself with the tenement and just see what was happening up there”. On this occasion he spent three days on site camping out.

In the Form 5 an allowance was made for “three days site inspection at $500 per day”.

At page 17 of the transcript Mr Walsh was asked what happened to the plans relating to the tenement. He responded as follows:

“... I had Jacob there then under his agreement. ... He was doing the stream geochemistry approach for me, and the company was offered a very advanced project at Nullagine and the board then decided that we could put Mt Dockerell, from the company’s point of view, on hold for a while, while we actively pursued Nullagine, which we thought would have had an operating gold mine on by … September/October this year”.
In respect of the issue of Native Title Mr Walsh indicated that Mt Grace had received a notice of a Native Title Claim concerning one of its surrounding exploration licences but not the tenement the subject of these proceedings. At page 20 of the transcript he said “I would certainly be nervous about going ahead with a major exploration program knowing that there was a Native Title Claim there”.

In cross examination Mr Gentilli referred Mr Walsh to Clause 2 of his agreement with Mr Lederer. Clause 2 provided that Mr Lederer was to make available to Mt Grace, all expenditure receipts for the purposes of the Form 5, Mr Walsh indicated that such receipts were provided but could not be located to be able to be produced in Court.

In respect of the Native Title Claims Mr Walsh indicated that this was received in October 1996 and in respect of another tenement. The significance of this evidence is, of course, that the claim was made well after the relevant year with which this application is concerned and not in respect of the tenement involved in this case.

Mr Walsh’s attention was drawn to the Financial Statements Mt Grace Gold mining for the years ending 30 June 1995 and 30 June 1996. In both reports the following statement appeared:

“... as at the date of these financial statements, the directors are not aware of any Native Title Claim, or proposals for claims, having been made over any ground in which the company currently has an interest”.

Mr Walsh’s attention was also drawn to several quarterly reports of Mt Grace Gold Mining NL and in particular its Mt Dockerell tenements.

At page 2 of the report dated 31 December 1994 it was stated that “All available exploration data is being collated and examined. An exploration program is being drawn up so that work can begin after the end of the wet season when the site becomes accessible”.

The report dated 31 March 1995 at page 1 states:

“No field work is possible until after the wet season ends”.

The report dated 30 June 1995 state at page 1:

“A program of soil geochemistry followed by drilling is planned for the next quarter. Agreement has been reached with another party to treat the alluvials on the tenements for a gross 5% gross royalty to Mt Grace”.
Also in the June Report was the following paragraph:

"Agreement has been reached for Mt Grace to purchase two properties 15km east of Nullagine where previous drilling has outlined a resource .... for a total of 109,983 contained ounces of gold. An extensive R C Drill program is planned for the next quarter to extend this resource and upgrade it to reserve status”.

In the report dated 30 September 1995 nothing is mentioned in respect of the Mt Dockerell tenements.

The report dated 31 December 1995 commences with the statement:

"The focus of the company has continued to be centred around the Golden Gate Project in Nullagine Western Australia which was acquired in July 1995”.

Again in this report no mention is made in respect of the Mt Dockerell tenements.

The final report dated 31 March 1996 is the last report relating to the relevant period for these proceedings. This report concentrates on the Golden Gate Project near Nullagine and for the third quarter in a row no mention is made of the Mt Dockerell tenements.

A letter dated 17 July 1995 was shown to Mr Walsh. This was a letter to the Director of Mineral Titles in support of an application for exemption affecting Mining Lease 80/194 for the year ending January 1995.

At paragraphs 3 & 4 of that letter Mr Walsh stated:

"Since Mt Grace acquired the tenements, I have received all of Maldon’s documents, discussed the area at length with Barnes, Vanderplank and others and devised a work program and budget for 1995. Our work program will consist of mapping stream and soil geochemistry and R C drilling.

Lederer, in 1995 will obtain necessary Mines Department approvals to commence alluvial mining operations on the lease with Mt Grace’s approval ....”

The latter paragraph makes reference to Mr Lederer doing alluvial mining on the tenement. This was referred to in Mr Walsh’s agreement with Mr Lederer wherein Condition 1 provided for a “10% royalty on all gold recovered” by Mr Lederer. At page 33 of the transcript Mr Walsh conceded that during the relevant year Mt Grace received no gold from Mr Lederer.
The final point to be made in respect of Mr Walsh’s evidence relates to Condition 5 of the agreement between himself and Mr Lederer. Condition 5 provides that:

“... All details of grade recovery and reef bearing gold anomalies made available to Mt Grace monthly ...”

At page 17 of the transcript Mr Walsh indicated that prior to the end of 1995 he had received some reports from Mr Lederer but that no use had been made of these reports.

The second witness for the applicant Mr Jacob Lederer described himself as a prospector who had been working and living on the relevant tenement for seven years. During that period he had applied to the various owners for alluvial rights and when Mt Grace took over the tenement he asked Mr Walsh for the alluvial rights. These rights were subsequently granted by way of the agreement signed by Mr Lederer on the 23 July 1995. He indicated that he worked on the tenement 8 hours per day, every day, sampling trying to locate ore bodies, and that he spent $14,000 on machinery and $5,000 on a new generator for the running of the camp. He confirmed that it was his work of 200 days at $120 per day (a total of $24,000) which was referred to on the Form 5, and that it was his “... diesel” at 98° per litre that was also referred to on the Form 5. However he went onto say that this “... diesel” was used to run the camp and drive the vehicle into town.

At page 42 of the transcript Mr Lederer was asked what Mr Walsh did on his journeys to the site. Mr Lederer said “... We go and drive around. I show him all the sites, all workings and things like that and Mr Walsh spent couple of days on his own driving and checking the area”.

In cross examination Mr Lederer said that his camp was his home and that he used the generator to run this camp/home. At page 47 of the transcript he gave evidence that during the relevant period for these proceedings he found no gold and accordingly gave no gold to Mt Grace; also that during the year he was paid no wages or living expenses at all by Mt Grace and survived by using his own money. At page 48 of the transcript he said that during the relevant period be sent no expenditure receipts to Mt Grace and nor did he send any reports to Mt Grace. By contrast to this evidence Mr Walsh said that he did receive receipts but couldn’t find them and that he did receive reports but had made no use of them.

The evidence given by Mr Walsh and Mr Lederer in its totality fails to support the expenditures referred to in the Form 5. Some of the expenditure is doubtful and the great majority of it simply does not fit the criteria set out in Section 82 (1)(c) of the Mining Act and Regulation 31 of the Mining Regulations.
The first item namely $3,700 for general prospecting is made up of $2,200 for sampling creek system for alluvial deposits and $1,500 for three days site inspection. Presumably it was Mr Lederer who did sampling. The only evidence we heard of this was from Mr Lederer who said he took 50 samples per day every day. We had no evidence what was done with these samples, no reports as to where they were taken from, no assay reports, Mr Lederer found no gold amongst these samples and was paid nothing by Mt Grace for his efforts. I am unable to accept that $2,200 or any amount of creek sampling was carried out by Mr Lederer on behalf of Mt Grace.

It appears that the $1,500 site inspection was conducted by Mr Walsh. On the evidence he appears to have done no more than look at the site for three days. This could not constitute $1,500, “expended is mining on or in connection with mining on the lease”.

An amount of $3,000 was claimed under the heading of mining or development. The applicant indicated on the Form 5 that this money was spent “mobilising plant and equipment ready to treat alluvials”. There appears to be no evidence at all as to what this related to and I am unable to accept this as a genuine expense.

An amount of $9,000 was claimed under the heading of overheads and was said to relate to “negotiating tribute agreement, office studies 18 days at $500 per day”. Presumably the tribute agreement referred to was the agreement between Mt Grace and Mr Lederer. This agreement is very simple and basic and would not have taken up much of Mr Walsh’s time. In respect of the 18 days at $500 per day for Mr Walsh’s office studies, in the evidence we saw none of the results of Mr Walsh’s efforts.

By far the largest claim on the Form 5 was under the heading of other costs and included $24,000 for 200 days work by Mr Lederer at $120 per day. This is quite simply a false claim because Mr Lederer was paid nothing by Mt Grace during the relevant year.

The second entry under the heading of “other costs” was for $1,764 for “fuel for diesel”. There simply is no evidence that any of this fuel was “expended in mining or in connection with mining on the lease”. It appears to have been used by Mr Lederer to run his generator for his campsite and his vehicle. Furthermore, Mr Grace never reimbursed Mr Lederer for this fuel so it can’t be said to be an expense incurred by the applicant Mt Grace.

Having heard the evidence and having related it to the Form 5 it would appear that the only entry which has any credibility is the “overheads”. Although I doubt that an amount of $9,000 would be appropriate.
In respect of the application for exemption, exemption was sought for an amount of $44,436 on the assumption that the expenditure was $41,464. Having come to the conclusion that the actual expenditure was in fact much less than that and at the very most $9,000 the exemption sought would be for over $77,000.

The exemption application was stated by the applicant to be pursuant to Section 102(2)(b), 102(2) g and 102(3).

In respect of Section 102(2)(b) the applicant says that “time is required to evaluate work done on the tenement, to plan future exploration or mining”. It is very clear from the evidence of Mr Walsh that the reason things came to a standstill was because “...the company was offered a very advanced project at Nullagine, and the board decided that we could put Mt Dockrell...on hold for a while, while we actively pursued Nullagine”.

In February 1995 the applicant took title to the relevant tenement. Throughout the relevant year no more work was done on the tenements that produced reports or required any valuation. Mr Lederer appears to have done nothing or very little in furtherance of mining on the tenement. Anything that was required to be evaluated to plan future exploration or mining was available in February 1995. They had all year to attend to that and perhaps to some extent Mr Walsh did attend to it, but time or lack thereof was not the factor which prevented this exercise from being completed it was clearly the new project at Nullagine that caused Mt Grace to lose interest in the Mt Dockrell project.

The applicant has not made out its ground for exemption pursuant to Section 102(2)(b).

In respect of Section 102(2)(g) Mr Lawton for the applicant made the following point at the bottom of page 5 of his submissions.

“...It is submitted that the general concern in relation to the standing of an Aboriginal Community where a mining lease is located on the community’s pastoral lease puts this tenement in a special category where particular care needs to be exercised by the tenement holder. Such a fact justifies the grant of an exemption...”.
I am unable to accept this proposition. Holders of mining tenements take the tenements as they are with all the associated difficulties but with the obligation to fulfil expenditure requirements. I don’t think one can apply for or take possession of a mining tenement and then seek exclusion from the expenditure requirements on the basis that it is located on a pastoral lease of an Aboriginal Community. If the tenement is on a pastoral lease of an Aboriginal Community and this is of such a concern to the tenement holder that he is not prepared to fulfil his expenditure requirements then I would have thought he would be required either not to apply for the tenement or not purchase such a tenement and to leave it for someone else who is prepared to meet the expenditure requirements.

Also I think that the comment made in the Financial Statements of Mt Grace mining for the years ending 30 June 1995 and 30 June 1996, that “the directors are not aware of any Native Title Claim or proposals for claim having been made over any ground in which the company currently has an interest” is an indication that the question of Native Title Claims was not a concern during the relevant period. A subsequent Native Title Claim made in respect of adjoining tenements could not have influenced the tenement holders expenditure considerations during the relevant year.

For this reason the applicants claim for exemption pursuant to Section 102(2)(g) should also fail.

Application for exemption was also made pursuant to Section 102(3) of the Mining Act which allows the Minister for any reason to grant an exemption. I could find nothing in the evidence presented to me which I consider should be brought to the Minister’s attention for the purpose of exercising his discretion.

Accordingly, I will be recommending to the Minister that this application for exemption should be refused.

PAUL M HEANEY
WARDEN