THE WARDEN'S COURT
HELD AT PERTH
WESTERN AUSTRALIA

PLAINT NO'S. 126/956 TO 128/956

DATE HEARD: 22/01/97
DATE DECISION DELIVERED 04/04/97

BEFORE: P M HEANEY WARDEN

NEVILLE WILLIAM ARCHIE COLE

Plaintiff

- and -

DAVID JONES ROBERTS

Defendant

REASONS FOR DECISION:

APPEARANCES:

MR G. LAWTON appeared for the plaintiff.

MR M. RENNIE appeared for the defendant.

In this matter the Plaintiff Neville William Archie Cole (Mr Cole) has filed three Plaints for forfeiture of Prospecting Licences 38/2479, 38/2480 and 38/2481 held by David Jones Roberts (Mr Roberts).

The three tenements are contiguous and each has the anniversary date of 14 February 1996.

In respect of each of the three tenements the Plaintiff claims that, the holder Mr Roberts has not complied with the expenditure requirements under the Mining Act for the year ending 14 February 1996, and seeks an order for forfeiture and a prior right to mark out a mining tenement over the subject land.

The three tenements are not of uniform size and accordingly the minimum expenditure for each is different. The minimum expenditure for Prospecting Licence 38/2479 is $3,320, for Prospecting Licence 38/2489 $4,360 and for Prospecting Licence 38/2481 $4,800. The Form 5 expenditure is stated to be $13,643, $8,047 and $19,860 respectively and the holder at trial indicated that the actual expenditure was $16,590, $21,945 and $24,150 respectively.

The tenement holder Mr Roberts when dealing with these three tenements, as they are contiguous, appears to have dealt with them as 1 block. He and other defence witnesses gave evidence of exploration and mining activities in respect of these three tenements as 1 block. No specific activity was allocated to a specific tenement. Likewise he has not allocated specific expenditure to specific tenements but has worked out a total expenditure figure and divided this amount amongst the three tenements simply in proportion to the size of each tenement.

Section 50 of the Mining Act 1978 provides that:

> 'During the currency of a prospecting licence the holder thereof shall comply with the prescribed expenditure conditions relating thereto unless in accordance with this Act total or partial exemption therefrom is granted'.

Regulation 15 of the Mining Act 1978 provides that:

1. The holder of a prospecting licence shall expend or cause to be expended in mining or in connection with mining on the licence not less than $40.00 for each hectare or part thereof of the area of the licence with a minimum of $2,000 during each year of the term of the licence, but if the holder is directly engaged part-time or full-time in mining on the licence itself, then an amount equivalent to the wages he would otherwise be entitled to if similarly employed elsewhere in the district shall be deemed to have been expended.

   (1a) expenditure incurred under Sub-regulation (1) during the month in which the anniversary date of the commencement of the term of the licence occurs may be treated by the holder as expenditure incurred in either the year immediately preceding that anniversary date or the year starting from such date.

.../2

Section 115A of the Mining Act provides that:

2. The holder of a mining tenement shall file a mineral exploration report or cause a mineral exploration report to be filed:

   (a) in conjunction within an operation report in such circumstances as one set out in the guidelines.

   (b) .....

3. The Minister may, under the guidelines, approve of arrangements for combined mineral exploration reports to be filed for 2 or more mining tenements and mineral exploration reports can be filed under these arrangements despite the requirements of Subsection (2)(a) for them to be filed in conjunction with operation reports.

4. The Minister may, under the guidelines cancel arrangements referred to in Subsection 4.

Section 115A deals with the situation where the Minister grants or cancels what is known as 'Project Status' to a group of two or more tenements. Apart from the grant of 'Project Status' affecting reporting conditions it also has significance in respect of expenditure requirements insofar as Section 102(2)(h) provides that:

> 'A certificate of exemption [from expenditure conditions] may be granted for any of the following reasons;
>
> (h) that the mining tenement is comprised within the project involving more than one tenement, and that expenditure on a tenement or tenements comprised in that project would have been such as to satisfy the expenditure requirements in relation to the tenement concerned had that aggregate expenditure been apportioned in respect of the various tenements comprised in the project'.

What the defendant Mr Roberts appears to have done in this case is treat these three tenements as part of a 'project' (and it may well be that he was entitled to do so) and pursuant to this he has simply allocated the total expenditure on the three tenements to each of the three tenements individually based on their respective size without any consideration to the actual expenditure on each individual tenement. And it is this 'allocated' and not actual figure which he puts forward as his defence to these three individual plaints.

.../3

I don't think that Mr Roberts can successfully defend these plaints by using allocated rather than actual figures. He would be entitled to adopt this approach if he was making an application for exemption pursuant to Section 102(2)(h) but there would appear to be no scope to use it as a means to defend these three for forfeiture in respect of the three separate prospecting licences. As Mr Roberts counsel Mr Rennie stated at paragraph of the defendants outline of submissions. 'It is necessary for the Warden to consider evidence in each case and to reach a determination in each case'.

The reality is that whilst there was a plaint in respect of each individual tenement the defendant did not present his defence in such a manner as to enable the Court 'to consider the evidence in each case and to reach a determination in each case'. At page 55 of the transcript the defendant Mr Roberts stated:

> 'I calculated all the expenditure and time spent on the tenements, the total amount, and calculated the monetary amount and applied it ... because I didn't separately [note] that 'Today I was going to be prospecting or doing work on one particular tenement', I allocated the total costs for my expenditure on these three tenements on the basis of the proportion they had to each other of the hectares. For example the smallest one was 82 so it got a smaller percent than the full size one which was 120 hectares'.

For the above reasons I am of the opinion that each of these three plaints has been made out, because the defendant Mr Roberts has not shown that in respect of each individual tenement he has fulfilled his expenditure requirements. The total amount which Mr Roberts was required to expend was $12,480. For reasons which I will subsequently refer to, I am satisfied that well above that amount has been expended or caused to be expended by Mr Roberts in total in respect of these three tenements but this is of no assistance to Mr Roberts in defence of these plaints.

The plaints for forfeiture in respect of the three tenements were brought pursuant to Section 96 of the Mining Act 1978, which provides as follows:

(1) The Warden may upon the application of:

a) .....

b) any person

made in the prescribed form and in the prescribed manner make an order for forfeiture of any prospecting licence ...

.../4

(2) An order for forfeiture may be made in relation to a mining tenement to which Subsection (1) applies if

a) .....

b) any term or condition to which the mining tenement is subject, including any condition referred to in Section 46 or Section 50 is not complied with:

(ba) .....

c) .....

But an order shall not be made under Subsection (1) unless the Warden is satisfied that the requirements of this Act in relation to such mining tenement have not been complied with in a material respect and that the matter is of sufficient gravity to justify the forfeiture of the mining tenement.

3. A Warden, as he thinks fit in the circumstances of the case, as an alternative to making an order under this section for forfeiture of such mining tenement may:

a) impose a penalty upon the holder of the mining tenement, not exceeding $5,000;

b) award the whole or any part of the amount of any such penalty to the applicant;

c) impose no penalty on the holder.

In this matter evidence was given in the course of the defence case which was said to be expenditure by the holder himself namely Mr Roberts and expenditure that the Mr Roberts caused to be expended.

.../5

Mr Roberts evidence his own expenditure I found to be unsatisfactory. Mr Roberts is an accountant and at one time in his career worked in the Australian Taxation Office. In respect of these tenements he kept meticulous records of his expenditure however these records were clearly kept for the purpose of tax deductions as distinct from records being kept for the purpose of adhering to the expenditure conditions of his prospecting licences. The end result of this, and this is the extent that his evidence was unsatisfactory, was that this Court was presented with a mass of evidence of Mr Roberts expenditure relating to the three tenements a proportion of which was remote indeed from expenditure in mining or in connection with mining as is required by Regulation 15 of the Mining Act. Two examples of this were firstly, the cost of parking his vehicle outside the Mines Department Office while he was inside checking records or obtaining information in respect of the tenements and secondly he claimed costs for a full days labour of his whilst he unpacked, cleaned and changed the tyres of his vehicle which he took on a trip to the tenements. Both of these 'expenses' may well have been tax deductions but they seem to be remote in the extreme from expenditure in mining or in connection with mining on the three relevant tenements.

It is not satisfactory evidence for Mr Roberts to simply produce his records kept for taxation purposes and ask the Court to extract therefrom expenditure required pursuant to Regulation 15. I don't intend or need to go through that exercise as, for reasons I will state later, I am of the opinion that monies spent by Comet Gold NL (Comet) were more than sufficient to satisfy the requirements of Regulation 15, insofar as total expenditure is concerned.

I also found Mr Roberts evidence, relating to the payment of $2,500 to Mr George Lee, to be unsatisfactory.

Mr Roberts claimed a payment of $2,500 which he made to Mr George Lee as being 'expended in mining or in connection with mining' Mr Lee owns a late model gold detector and on Mr Roberts evidence he paid Mr Lee $2,500 to do some gold detecting on the tenements. Mr Lee indicated in his evidence that he used his gold detector on the tenements for three and a bit days but found nothing. In cross examination it was revealed that it was Mr Lee who introduced Mr Roberts to Comet which was a public company looking for tenements to purchase and which subsequently entered into a option agreement with Mr Roberts. Mr Lee conceded that the money he received from Mr Robert was a combination fee for metal detecting and introductions.

Turning to the issue of 'the holder causing expenditure in mining or in connection with mining' it is clearly the defence case that by entering into an option agreement with Comet, Mr Roberts caused expenditure to be made in mining or in connection with mining.

.../6

This issue has been looked at in two relatively recent Warden's Court cases. The first case I will mention was referred to me by Mr Lawton for the Plaintiff to support his argument that all expenditure made by Comet must be disallowed. In the case of Flint and Nova Resources Perth Warden's Court, 30 March 1994 Warden French stated:

> 'The amount allocated under the heading search Equipment Rentals' was an estimate of work performed by a third party who was considering a possible joint venture with the Defendant. I was not an expense caused to be expended by the defendant.
>
> Although I accept that the enquiries made on behalf of Search Equipment Rentals with a view to negotiating a joint venture would have incurred expense, this was undertaken by them for the purpose of enquiry rather than expenditure incurred in mining or in connection with mining. There was no obligation on the part of Search Equipment Rentals to make their findings available to the Defendant, nor was there any obligation on the part of the Defendant arising out of the work performed by Search Equipment Rentals during the course of their enquiry. The enquiry mainly involved an assessment of data provided by the Defendant and re-sampling to confirm findings already made. Mr Williams the mining consultant for Search stated that the purpose of the work was to ascertain whether they would get involved in a joint venture.

The second case was referred to me by Mr Rennie to support his argument that expenditure made Comet should be allowed. This case is WOINER & ASIA OIL MINERALS AND A1 CONSOLIDATED GOLD NL. Kalgoorlie Warden's Court 15 April 1991 VOL 7 FOL 22. This case deals with Regulation 31 which deals with expenditure conditions in respect of a mining lease and it commences 'The holder of a mining lease shall expend or cause to be expended in mining or in connection with mining not less than ....' which is the exact same wording which commences Regulation 15. At page 14 of his judgement Warden Roberts states:

> 'It is important to note that this regulation was amended by Government Gazette No. 140/90 on the 16 November 1990 by the addition of the words 'or cause to be extended' prior to the amendment it was incumbent upon tenement holder to expend certain minimum amounts on their tenements but now the section has been widened or liberalised to allow the tenement holder simply to cause to be expended certain minimum amounts. Such an amendment in my view may have been made to avoid the problems arising in the case of STANGE V PIETSCH whereby certain expenditure items were not allowed in strict conformity with the then worded Regulation 31.

.../7

The main issue is whether the second defendant can show that it caused the minimum expenditure by the syndicate. The meaning of cause must be construed having regard to the policy of the Act. In STRANGE V PIETSCH it was held that the policy of the Act is that tenements not be neglected and that the ground not be simply held for some purpose other than the exploration of valuable mineral deposits. I accept the defendants submission that the word cause in the context of Regulation 31 interpreted consistently with the policy of the Act is concerned with the ultimate effect that the tenements be worked and that in this sense the amendment to Regulation 31 makes it clear that the obligation is not that the expenditure requirements be met in person but that it is the responsibility that is personal to the tenement holder.

Regulation 31 is not concerned with exactly how expenditure is caused to be incurred. That expenditure might be so caused by directing another to incur it by entering into a tribute agreement with that other, by entering into an option agreement with that other, by entering into a sale agreement with that other, by entering into a joint venture agreement with that other, by entering into a farm-in agreement with that other etc. The point is that but for the holder entering into any of those agreements the expenditure would not have been incurred and that the holder has thereby 'caused' that expenditure to be so incurred. It is not necessary that the particular arrangement obligate the other person to undertake the expenditure. Even if it did and if that other person did not undertake the expenditure then it would be the holder that would be exposed to the risk of forfeiture.

It is worth noting the comments of Warden Reynolds in CRAIG V SPARGOS whereby he held 'there is nothing in the Act or Regulations requiring the lessee of a mining lease to carry out mining operations or comply with the expenditure requirements in person. It is the responsibility that is personal to the lessee not the actual expenditure. The lessee satisfies the requirement of the Act and Regulations by procuring another person to mine or expend money 'It must be borne in mind that this decision pre dated the amendments to Regulation 31 whereby a more strict interpretation applied. It is now clear that the expenditure requirement is not personal expenditure by the holder. Further, it doesn't matter how the tenement holder 'caused' expenditure to be incurred'.

Generally I would accept Warden Roberts statement of the law although I would accept Warden French's comments that if 'The enquiry mainly involved an assessment of data provided by the defendant and re-sampling to confirm findings already made' then it may not be expenditure that satisfies the requirements of Regulation 15.

.../8

In this matter before me evidence was given of an option agreement entered into by Mr Roberts with Comet Gold NL. This appears to be a standard option agreement with Clause 1, providing for Comet to pay a deposit; Clause 2 allowing Comet to undertake due diligence on the tenements and obtain all assistance, data and information from Mr Roberts and Clause 3 deals with the payments to be made to Mr Roberts should Comet elect to exercise its option to purchase.

There can be no doubt that pursuant to this option agreement Comet expended monies 'in mining on or in connection with mining' on the three relevant tenements. Also I appreciate the likelihood that some of the expenditure by Comet was a duplication merely confirming findings already made by Mr Roberts. The issue for this Court to decide is to what extent within the relevant period, the expenditure of Comet pursuant is to Regulation 15.

One of the witnesses for the defendant was Mr Robert Oswald Jones a geological consultant and the managing director of Comet Gold NL. He gave evidence to the effect that he first came into contact with Mr Roberts in September, October 1995 at which time they discussed an option or some agreement relating to the relevant tenements. These discussions culminated in Comet securing a two month option period to do due diligence on the tenements. This two month period was to the end of January 1996 when Comet would make up its mind to pull out or to go on further with an agreement. In his evidence for Mr Jones indicated that prior to the end of February 1996 Comet had expended $24,000. A document produced into evidence as exhibit 17 states that the precise amount was $24,001.86. Mr Jones in his evidence (as recorded on the transcript from page 133 onwards) gives a detailed account of what was done up to the end of February 1996. It is difficult to assess to what extent if any the work done by Comet in the process of performing its due diligence was a mere duplication of work previously done by Mr Roberts.

In the course of his evidence Mr Jones told of a drill and soil sampling programme undertaken by Comet that would appear not to be a duplication of any work carried out previously. This evidence of Mr Jones was confirmed by a Mr Anthony Roy Cooper who was actually involved in the drill and soil sampling programme. It appears that these samples were sent to laboratories and analysed for 16 or 17 elements. The costs of this programme would appear to be genuine expenditure in mining or in connection with mining. The cost of this programme alone being in the vicinity of $20,000 is considerably in excess of the $12,480 required to be expended in total on the three tenements. So even though, for reasons stated earlier I have found the three plaints to be proven it is clearly not a case which calls for the forfeiture of the three tenements. In the case of PACMINEX (OPERATIONS) PTY LTD V AUSTRALIAN (NEPHRITE) JADE MINE PTY LTD 1974 7 SASR 401 Mr Justice Wells stated:

.../9

'The court must 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 .... 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 upon it, but also the event 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...

The order is not to be made unless 'the matter is of sufficient gravity'; that is not language apt to limit the grounds 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'.

- It is clear from the evidence that the matter is not of 'sufficient gravity' to justify the forfeiture as the holder has expended more than the requirement, he just simply has not been able to allocate specific expenditure to specific tenements.

Having indicated that I do not think that forfeiture is appropriate the alternative penalties are a fine of up to $5,000 or no penalty at all.

I am of the opinion that this is a situation when no penalty at all should be applied.

At page 149 of the transcript Mr Jones gave evidence that subsequent to the soil sampling programme in the following months after the anniversary date a drilling programme costing just under $50,000 was undertaken by Comet. Again this is well in excess of the minimum expenditure required in respect of the three tenements.

The option agreement entered into between Mr Roberts and Comet sets a large purchase price for Comet should they elect to exercise their option to purchase. They have demonstrated a preparedness to spend large amounts of money in the 'due diligence' exercise.

Mr Roberts the tenement holder has clearly caused to be expended far in excess of his requirement under Regulation 15. I am of the opinion that he is taking his duties as a tenement holder seriously and accordingly should not be seen to be suffering any penalty for by virtue of the fact that plaints were found to have been proven.

WARDEN
PM HEANEY