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| **JURISDICTION** | : | MINING WARDEN |
| **TITLE OF COURT** | : | OPEN COURT |
| **LOCATION** | : | PERTH |
| **CITATION** | : | DOWNE v MILLING & REGAL RESOURCES & ANOR [2011] WAMW 7 |
| **CORAM** | : | WARDEN WILSON M |
| **HEARD** | : | 10 DECEMBER 2010 |
| **DELIVERED** | : | 22 JULY 2011 |
| **FILE NO/S** | : | APPLICATION FOR FORFEITURE 328228 |
| **TENEMENT NO/S** | : | MINING LEASE 31/67 |
| **BETWEEN** | : | LYNTON JAMES DOWNE<br>(Applicant)<br><br>v<br><br>PHILLIP SCOTT MILLING<br>(1st Respondent)<br><br>and<br><br>REGAL RESOURCES LTD<br>(2nd Respondent)<br><br>and<br><br>WILD ACRE METALS LTD<br>(3rd Respondent) |

*Catchwords:*

Mining Lease – Application for Forfeiture – Expenditure Conditions

Forfeiture – Non-compliance with Expenditure Conditions – Allowable expenditure

Expenditure - Acquisition Costs – Sale and Purchase of Mining Tenement

Non-Compliance with Expenditure – Acquisition Costs – Forfeiture

Registered Holder – Failure to Register Transfer of Holder – Obligations of Holder

*Legislation:*

**Mining Act 1978 (WA)** s. 8, s. 79, s. 82(1)(b) & (c), s. 84C, s. 103C, s. 103F, s. 118A
**Mining Regulations 1981 (WA)** r. 31(1), r. 75(a), r. 84C, r. 96C(4)(b)

*Result:*

Non-Compliance with Expenditure Conditions by Registered Holder of Mining Lease proven by the Applicant.
Penalty of $5,000 imposed upon registered holder in lieu of recommendation for Forfeiture to Hon. Minister. The whole sum of the penalty of $5,000.00 be paid to the Applicant.
The 1st, 2nd and 3rd Respondents pay the costs of the Applicant to be assessed if not agreed.
**Representation:**

*Counsel:*

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| Applicant | : | Mr G Lawton |
| 1st Respondent | : | No appearance |
| 2nd & 3rd Respondent | : | Mr M Gerus |

*Solicitors:*

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| Applicant | : | Lawton Lawyers |
| 1st Respondent | : | Nil |
| 2nd & 3rd Respondent | : | Blakiston & Crabb |

**Case(s) referred to in judgment(s):**

*Finesky Holdings Pty Ltd v Minister for Transport for Western Australia [2002] WASCA 206*

*Re: His Honour Warden Calder SM & anor; Exparte Lee & anor [2007] WASCA 161*

*Roberts v Hugill (unreported, Mt Magnet Warden's Court, 26 February 1997 and noted in 16 AMPLJ 115)*

*Mawson West Ltd & anor v Saruman Holdings Pty Ltd [2010] WAMW 10*

*Grange Resources Ltd v Lee [2006] WAMW 8*

**Case(s) also cited:**

*Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (Unreported WASC Full Court 16 December 2 1987 SCL 7427),*

*Craig v Spargos Exploration NL (Unreported Warden's Court 1986, Noted 6 AMPLA Bull 73)*

## Background

1. Lynton James Downe ("the Applicant") seeks by way of Application for Forfeiture ("the Application") that Mining Lease 31/67 ("the Lease") be forfeited. The Applicant alleges Phillip Scott Milling ("Mr Milling") the registered holder of the Lease has failed to comply with expenditure conditions for the year ending 29 May 2009 ("the Expenditure Year"). The amount of the expenditure relevant to the Expenditure Year is $32,800 per annum ("the Expenditure Condition").

2 Mr Milling became the registered holder of the Lease on 11 August 1998. On 13 December 2004, Mr Milling entered into a sale and purchase agreement ("the Milling Sale Agreement") for the Lease with Regal Resources Limited ("Regal"). A signed Form 23 ("Transfer Document") was executed and handed to Regal. Regal misplaced the Transfer Document and never took steps to seek a replacement or duplicate Transfer Document from Mr Milling and then lodge it with the Department of Mines and Petroleum ("DMP").

3 On 17 June 2008, Regal entered into an Option for a Joint Venture Agreement ("the Option") with Wild Acre Metals Limited ("Wild Acre") in relation to a proposed mining project that includes the Lease. The proposed mining project is located at Yerilla situated to the east of Kookynie in the North Eastern Goldfields ("the Yerilla Project"). The Yerilla Project consists of about 18 Prospecting Licences and the Lease.

4 On or about 31 August 2009, Wild Acre and Regal agreed to terminate the Option and entered into an agreement for the sale and purchase of the Lease, subject to Regal obtaining inter alia, "clear title" to the Lease ("the Regal Sale").

5 In November 2009, Regal obtained a new Form 23 ("the New Transfer") executed by Mr Milling to transfer the Lease to Regal. Regal executed the New Transfer for the transfer of the Lease to Wild Acre.

6 At the time of the hearing of the Application the Regal Sale is subject to an appeal against the amount of the assessment of stamp duty.

7 It is upon this basis that Wild Acre and Regal were joined to the Application as the 2nd & 3rd Respondents.

**The Issues**

8 The Applicant says that Mr Milling is the registered holder of the Lease. As such, the Applicant says it is Mr Milling who is responsible for compliance with the Expenditure Conditions for the Expenditure Year.

9 Further, the Applicant says Mr Milling failed to respond to the allegation of non-compliance with the Expenditure Conditions, was late in filing the Form 5 Expenditure Report ("the Form 5") and, on the evidence, he expended nothing upon the Lease.

10 Given the history of the sale of the Lease, the Applicant submits the party responsible for the Lease during the Expenditure Year is Mr Milling. The Applicant submits apart from annual rent and council rates there is no evidence of any allowable expenditure being incurred during the Expenditure Year by either Mr Milling, Regal or wild Acre.

11 The Applicant further submits the expenditure claimed on the Lease in the Form 5 was incurred by or on behalf of Wild Acre and is not allowable expenditure as:

- Wild Acre was not obliged to spend any amount on the Lease, and,

- The expenditure was predominately for the purposes of Wild Acre acquiring the Lease and/or providing a report for an Australian Securities Exchange ('ASX") listing and is therefore not allowable expenditure.

12 The Applicant further submits the history of compliance with the Expenditure Condition for the Lease by the Mr Milling is poor. As such the Warden upon being satisfied there has been non-compliance with the Expenditure Condition on the Lease for the Expenditure Year should recommend the Lease be forfeited.

13 Regal & Wild Acre submit in response that despite the historical issues associated with the various sale agreements and ownership of the Lease both Regal and Wild Acre were entitled to expend on the Lease and did in fact expend on the Lease on behalf of Mr Milling.

14 Further, Regal and Wild Acre say any expenditure by Wild Acre claimed to have been made on the Lease was the consequence of the Option and involved the reviewing and validating exploration data obtained from various sources and is expenditure on or in connection with mining and is an allowable expenditure under the provisions of the Mining Act and Regulations.

15 The amount claimed in the Form 5 is claimed by both Regal and Wild Acre to be accurate, is not false despite mathematical errors and is in fact an under reporting of expenditure on the Lease during the Expenditure Year.

16 Both Regal and Wild Acre say there is no basis upon which the Application can succeed as there is a history of substantial expenditure on the Lease and future plans exist for further significant expenditure on the Lease.

## Evidence from the Applicant

17 The Applicant relies upon his oral evidence and the content of an affidavit sworn by him on 28 September 2009 in support of the Application.

18 The Applicant is a prospector and mining tenement manager who has lived and worked in the Kalgoorlie and Coolgardie areas for about 14 or 15 years. There is no dispute he has extensive experience in management of mining tenements.

19 Mr Milling is an acquaintance of the Applicant. The Applicant was aware that Mr Milling entered into the Sale Agreement for the Lease with Regal in about 2004.

20 Since about the late 1990's the Applicant said he has visited the Lease on a number of occasions. Since the Applicant lodged the Application he has further attended upon the Lease in August/September 2009, February 2010 and again in May 2010.

21 It was the observation of the Applicant that the Lease has had no work undertaken near the old shafts for about 5 to 10 years. In 2008, the Applicant observed some mullock was pushed into heaps and some was carted away.

22 Since the Application was lodged, and as recently as in 2010, the Applicant said he observed signs of some sampling on the Lease demonstrated by the erection of pegs with flagging tape. The pegs and flagging tape were not on the Lease prior to him lodging the Application.

23 The Applicant said the history of the Lease became known to him from conversations he had with Mr Milling and from announcements made by Regal to the ASX that he has tracked.

24 The announcements to the ASX by Regal show, according to the Applicant, the following:

- On 4 March 2008, a quarterly report indicates no field work was undertaken by Regal except at Menzies.
- On 14 March 2008, in a half yearly report Regal remained silent on all of its projects and expressed concern as to its ability to continue as a going concern.
- On 30 June 2008, the Option with Wild Acre is announced with Wild Acre to spend money on the Yerilla Project when it is a listed company on the ASX.
- On 1 October 2008, Regal announced a technical review is to occur during the year with no additional field work at the Yerilla Project. The Applicant claims this review has been claimed as expenditure in the Form 5 for the Expenditure Year. The primary cost is geological consultants. Regal has no funds to expend on the review. Further, Regal had entered into an agreement with Wild Acre as part of the acquisition of the Lease and other tenements that fall under the agreement.
- On 31 October 2008, a quarterly report by Regal remains silent on the Yerilla Project.

- On 22 December 2008, Regal announced an acquisition of a coal to liquid petroleum technology and was changing its focus from mining with a resultant change of ownership of the company.
- On 31 January 2009 in a quarterly report Regal announced a consulting geologist had carried out a desk top study and field appraisal to recommend an exploration program. The Applicant says this statement is suspect as the Option had been entered into with Wild Acre and it was Wild Acre that was required to conduct the work on the Lease. The Applicant says this work was completed by Wild Acre as part of its due diligence for the acquisition of the Yerilla Project and other tenements.
- On 16 March 2009, Regal announced in its 2008 half yearly report its concern that it maybe unable to continue as a going concern.
- Between 16 March 2009 and 31 July 2009, Regal is silent about the Yerilla Project.
- On 29 September 2009, Regal announces it has entered into a deed of sale to dispose of the Yerilla Project to Wild Acre.

25 In his evidence in chief the Applicant was shown the Form 5. In his opinion, based upon his knowledge of the Lease and what he had seen in announcements from Regal, the Applicant did not consider the claims of $22,745.00 for Mineral-Exploration Activities and $5,971.51 for Administration/Overheads were allowable expenditure.

26 The Applicant said he was of the opinion the two amounts claimed are sums expended by Wild Acre for the purpose of preparing a prospectus for a public IPO or for a due diligence in purchasing the Lease. Those two items of expenditure were not, in the opinion of the Applicant, spent on the Lease or related to the Lease itself.

27 The amounts claimed in the Form 5 as expenditure for annual tenement rent and rates are the only allowable expenditure in the opinion of the Applicant.

28 The Applicant said Mr John Jordan ("Mr Jordan") from Regal had telephoned him on a number of occasions. During one of those conversations the Applicant said he advised Mr Jordan he knew Mr Milling. The Applicant told Mr Jordan he was concerned the Lease was in danger of being forfeited and Mr Milling had no idea of that fact.

29 In the discussion with Mr Jordan, the Applicant said he was accused by Mr Jordan of lodging the Application on behalf of Mr Milling. That was denied by the Applicant. However, the Applicant said if he was successful in the Application he would "look after" Mr Milling.

30 According to the Applicant, it was Mr Jordan who advised him of the intention of Wild Acre to purchase the Lease.

31 The Applicant said he spoke to Mr Milling and advised him he was intending to lodge the Application. According to the Applicant Mr Milling responded by saying "it is better someone you know than someone you don't." Mr Milling expressed concern to the Applicant he would loose his rights to royalty payments under the terms of the Milling Sale Agreement.

32 In cross examination, the Applicant said he had monitored the Lease on the DMP website for about 10 days, from about 11 August 2009, prior to lodging the Application. He saw that Mr Milling was still registered as the holder of the Lease and he was surprised as he was of the opinion Mr Milling had sold the Lease sometime earlier.

33 As a result of what he had seen on the DMP website, the Applicant said he telephoned Mr Milling and asked him about the Lease. In that telephone conversation the Applicant said he was told by Mr Milling he had sold the Lease to Regal but couldn't get it out of his name. The Applicant further said that Mr Milling told him he considered Regal were in default of the Milling Sale Agreement and Mr Milling wanted the Lease back.

34 A copy of the Milling Sale Agreement was provided to the Applicant by Mr Milling. Mr Milling raised some issue with the Applicant over the interpretation of the rights of Mr Milling to take alluvial gold from the Lease and whether the Milling Sale Agreement was in fact a concluded agreement.

35 Further, the Applicant said he would not see Mr Milling disadvantaged by the lodging of the Application in the event he was to be successful in this Application.

36 The Applicant said he considers there is no such thing as a "friendly plaint". He denied he told Mr Jordan he would look after Mr Milling in the event he was successful in the Application. Rather, the Applicant said he would make sure Mr Milling "was not disadvantaged". Further, the Applicant said he would not withdraw the Application even if his time was paid for or Mr Milling's royalty payment under the Milling Sale Agreement was protected.

37 The rights of Mr Milling to receive a royalty payment in the Milling Sale Agreement was acknowledged by the Applicant to be protected by a deed of assignment and assumption and consent as between Regal, Wild Acre and Mr Milling. The Applicant acknowledged he had seen that document. He also agreed the amount of money paid to Mr Milling was substantial and Mr Milling stood to receive a substantial amount more if the Lease went into production.

38 The Applicant acknowledged if he was successful in the Application he would be able to apply for the ground the subject of the Lease, but would still "look after" Mr Milling.

39 Before lodging the Application, the Applicant acknowledged attending upon the Lease with a Mr Michael Gallea ("Mr Gallea") and Mr Milling. The purpose of the visit, in about August/September 2009, was to look at other tenements nearby to the Lease and to help Mr Milling assess how much alluvial material Mr Milling would be able to treat on the Lease. Some grab samples were taken from the Lease by Mr Milling.

40 The Applicant said the intention of Mr Milling was to treat mullock that had accumulated on the Lease and other tenements nearby. The Applicant and Mr Milling had discussions about how the mullock could be treated but when they arrived at the Lease a substantial quantity of mullock, estimated to be about 20,000 tonnes, had been removed from the Lease.

41 The Applicant was challenged about the content of his affidavit in which he says mullock was pushed into piles and carted away in 2008. He acknowledged he had not been to the Lease for 5 or 10 years and had been told by the pastoralist this is what had occurred.

42 According to the Applicant, Mr Gallea and the Applicant again visited the Lease and other tenements in about May 2010. The Applicant acknowledged he had a written agreement with Mr Gallea to assist in the funding of the Application. The Applicant denied Mr Milling has any interest in the agreement between Mr Gallea and the Applicant.

43 The Applicant said he had not discussed or entered into any agreement with Mr Milling about the Lease in the event he is successful in the Application. However, the Applicant said he had a discussion with Mr Milling's wife about the Lease and told her there is no agreement regarding the Lease between him and Mr Milling. According to the Applicant this conversation took place about three months ago.

44 The Applicant acknowledged that desk top evaluations for the purposes of planning an exploration program, attending a mining tenement for the purposes of identifying drill holes, and examination of publically available information on past mining and exploration on tenements are all legitimate expenditure on mining tenements.

45 A resource of some 131,000 tonnes of ore at about 5.09 grams per tonne was announced by Regal as a result of its research through the public file held by the DMP and was noted by the Applicant as having been seen by him.

46 That was in summary the evidence called by the Applicant in the Application.

**Evidence for Regal and Wild Acre**

47 Deborah Lord ("Ms Lord") holds a Bachelor of Science Degree (Geology) with Honours. Ms Lord is a principal consultant in geology at SRK Consulting (Australia) Pty Ltd and has worked for more than 20 years in the mineral exploration industry across a range of geological environments and commodities.

48 Ms Lord confirmed she affirmed an affidavit relevant to the Application on 19 November 2010 ("the Affidavit"). Ms Lord was not cross-examined and her affidavit was received into evidence.

49 In her affidavit, Ms Lord stated on 9 June 2008 she was contacted by Mr Grant Mooney ("Mr Mooney"), a director of Wild Acre. Mr Mooney requested he meet with her to discuss conducting the preparation of an independent geological review ("the Review") of Wild Acre's prospective mining projects. Mr Mooney informed Ms Lord that Wild Acre wished to list on the ASX and required a competent persons report for the listing.

50 On 10 June 2008, Ms Lord stated she attended a meeting with Mr Grant Downie ("Mr Grant Downie") and Mr Alan Downie ("Mr Alan Downie") both of whom are directors of Wild Acre. Ms Lord stated she was informed by Mr Grant Downie that Wild Acre required the Review of two mineral assets in the Eastern Goldfields of Western Australia. Specifically, Ms Lord was referred to the Quinn's Project and the Yerilla Project. Ms Lord stated she was informed Wild Acre had entered into the Option with Regal in respect to the Yerilla Project and were negotiating the purchase of the Quinn's Project. Ms Lord said she was further informed Regal was the tenement holder with whom Wild Acre proposed to joint venture with the Yerilla Project.

51 Mr Alan Downie informed Ms Lord he had a significant amount of material for the Quinn's Project he would pass onto her as he had been working on that project for about 2 years. However, he told Ms Lord he was not familiar with the Yerilla Project and was in the process of compiling data from various sources.

52 As a result of that meeting Ms Lord entered into an arrangement with Wild Acre to provide the Review. A field trip to the Quinn's and Yerilla Projects was arranged with Ms Lord for the week beginning 23 June 2008.

53 Without going into the details of what then transpired Ms Lord flew to Kalgoorlie on 23 June 2008. The following day she travelled with Mr Alan Downie to Leonora. Ms Lord said from Leonora she travelled out to the Quinn's and Yerilla Projects, including the Lease, where she gathered various information of a geological and technical nature for the preparation of the Review. Ms Lord returned to Perth on the evening of 25 June 2008.

54 Between 28 June 2008 and about 2 December 2008, Ms Lord reviewed and analysed data she had gathered or had given to her and also prepared various computer modellings of the geological data she obtained relevant to the Quinn's and the Yerilla Project, including the Lease.

55 According to Ms Lord the Yerilla Project, including the Lease, had been underexplored and there were a significant number of surface workings present suggesting the potential for mineralisation. Mr Alan Downie prepared a proposed exploration programme and budget for both the Quinn's ad Yerilla Project for Ms Lord to review.

56 Ms Lord concluded in the Review the proposed exploration programme and budget prepared by Mr Alan Downie was appropriate to test the potential of the identified targets.

57 At various times between 18 June and 28 August 2008, Ms Lord issued invoices to Wild Acre for her work on the Review for the total sum of $36,196.78. Those invoices were paid by Wild Acre.

58 Mr Alan Downie is the Executive Director (Technical) of Wild Acre and holds a Bachelor of Applied Science Degree in Mining Geology. He also has about 25 years experience working as a geologist with various exploration and mining companies in Australia. Mr Alan Downie produced into evidence two affidavits sworn by him on 19 November 2010 and 9 December 2010.

59 Mr Alan Downie stated in his affidavit of 19 November 2010 he has managed Wild Acre's exploration work from November 2007. He also reports and provides technical advice to the board of Wild Acre on potential acquisitions and reviews data for new projects or other mining opportunities.

60 In November 2007, Mr Alan Downie said he became aware Regal was interested in disposing of a number of its existing mining projects. He also said he was initially interested in the Mt Korong project as he had some prior exposure to that project in the 1980's.

61 Mr Alan Downie later became aware Regal had entered into an agreement with another mining company to dispose of the Mt Korong project. He was then introduced to the Yerilla Project, including the Lease, and was provided with various data and technical reports.

62 The Yerilla Project comprised of the Lease and a group of other tenements over a contiguous 11 kilometres of greenstone belt that was prospective for gold and nickel. Wild Acre had recently entered into an arrangement with another mining company for a similar project and Mr Alan Downie considered the Yerilla Project would fit into Wild Acres objective of building a strong tenement position in the Eastern Goldfields.

63 Mr Alan Downie said he was aware Wild Acre entered into the Option with Regal for the Yerilla Project and it included the Lease. Mr Alan Downie said he understood from Mr Mooney that Wild Acre would undertake some work on the Lease during the term of the Option and that Regal had authorised Wild Acre to do so.

64 Shortly after entering into the Option in about June 2008, Mr Alan Downie contacted a Mr Peebles of Regal and requested he forward various information on the Yerilla Project and the Lease to him. That information did not arrive until about 3 September 2008. Some issue existed within various staff at Regal about the intention to enter into a joint venture with Wild Acre. Accordingly, Mr Alan Downie said he did not expect to receive any further information from Regal.

65 Mr Alan Downie said he set about obtaining as much information he could on the Yerilla Project through publically available sources such as WAMEX, drill hole data, geological maps and other useful information. That information was reviewed by Mr Alan Downie in a desk top study and placed in a form usable by Wild Acre in the future.

66 During the Expenditure Year, Mr Alan Downie said he attended to a number of other tasks associated with the Yerilla Project including the Lease. Those

other tasks included the appointment of and giving various instructions to Western Tenement Services ("WTS") for the management of the Lease, preparation of exploration budgets and exploration programmes for the Lease, preparation and lodgement of annual technical report for the Lease and the giving of instructions to Ms Lord and accompanying her to the Lease for the purposes of preparation of the Review.

67 Mr Alan Downie said he was responsible for approving any expenditure on the Yerilla Project including the Lease. In the early part of the Expenditure Year any money expended was allocated by project not by tenement. Therefore expenditure was only allocated between the Yerilla and Quinn's projects.

68 According to Mr Alan Downie, the filing of the Form 5 was undertaken by WTS. On or about 7 April 2009, Mr Alan Downie said he was contacted by WTS and advised of the last date for the lodgement of the Form 5 with DMP. However, Mr Alan Downie said he was away working on another project and sent the information for the Form 5 to WTS on his return to Perth on 18 August 2009. On 19 August 2009, some discussion took place between him and a representative of WTS in respect to the expenditure claimed in the Form 5 by Wild Acre. Eventually on 20 August 2009, the Form 5 was lodged by WTS with the DMP.

69 The amount of each item of expenditure claimed in respect to the Lease was broken down and explained by Mr Alan Downie in his affidavit of 19 November 2010. It is not helpful at this time to deal with each of the amounts claimed. Further amounts of expenditure not taken into account in the Form 5 were alluded to by Mr Alan Downie in his oral evidence.

70 Future plans for the Yerilla Project were referred to by Mr Alan Downie in his affidavit. Again for the purposes of the Application, at this time, it is not helpful to go into those matters.

71 In the affidavit of 9 December 2010, Mr Downie outlined further work he completed on the Yerilla Project including the Lease. It is again unnecessary at this time to go into the detail contained in that affidavit.

72 Mr Alan Downie was cross-examined about the content of both of his affidavits. He said he didn't keep timesheets for the work he did but made entries in a diary.

73 Due to the severe economic downturn and the global financial crisis in 2008, Mr Alan Downie said Wild Acre was prevented from listing on the ASX.

For the same reason Wild Acre was contemplating not entering into the purchase of the Lease

74 The due diligence was to be carried out by Wild Acre within 7 days of entering into the Option with Regal. Mr Alan Downie said he received little information from Regal in that time. Accordingly, he travelled to the Lease on 23 June 2008 to familiarise himself with the Lease. The following day he travelled to Kalgoorlie and collected Ms Lord before returning to the Lease. The main focus of the field trip was, according to Mr Alan Downie, the gathering of detail for the Yerilla Project.

75 Mr Alan Downie said Wild Acre undertook the due diligence process to determine whether or not Wild Acre would proceed with the purchase of the Yerilla Project including the Lease.

76 The allocation of the 50/50 split in the cost of the Review in the Form 5 was made by Mr Alan Downie. He said he thought Ms Lord would have to spend more time of the Yerilla Project than the Quinn's Project. Accordingly, despite the Quinn's Project covering more ground than the Yerilla Project he simply divided the cost of the Review into half and allocated that between each project.

77 The due diligence conducted by Wild Acre was according to Mr Alan Downie conducted for the preparation of a prospectus for a potential IPO.

78 In re-examination, Mr Alan Downie said it was Mr Mooney who was responsible for the corporate and commercial matters associated with Wild Acre.

79 Mr Mooney is the executive chairman and company secretary of Wild Acre. He holds a Bachelor of Business degree majoring in accounting. Over the last 15 years, Mr Mooney has worked in various corporate positions predominately in the mining sector. On 19 November 2010, Mr Mooney swore an affidavit in opposition to the Application.

80 In March 2008, Mr Mooney said he had a discussion with a director of Regal, Mr Sklenka, and expressed the interest of Wild Acre in negotiating a joint venture of the Yerilla project.

81 According to Mr Mooney, Wild Acre at that time did not have sufficient funds for the outright acquisition of the Yerilla Project but did possess the technical expertise and some modest funds sufficient to progress the Yerilla Project to an ASX listing and thereby be able to raise additional funds.

82 Mr Mooney said he was keen for Wild Acre to achieve an interest in the Yerilla Project by way of a farm-in arrangement in a joint venture agreement conditional upon an ASX listing and raising funds.

83 On 10 June 2008, a draft letter agreement, the Option, was prepared by Wild Acre. A meeting between Mr Mooney and Mr Sklenda was held and Mr Mooney said he made it clear to Mr Sklenda that Wild Acre was prepared to undertake preliminary exploration over the Yerilla Project prior to ASX listing as it was important for Wild Acre to have knowledge of the geology, prospectivity and data sets relevant to the Yerilla Project before commencing an extensive exploration programme.

84 At the time of that discussion with Mr Sklenda, Mr Mooney said he was concerned if for any reason Wild Acre was unable to raise the capital required or the fund raising was delayed and Wild Acre was unable to keep the Lease in good standing that Regal would commence legal proceeding against Wild Acre for breach of contract.

85 According to Mr Mooney, Mr Sklenda agreed Regal would remain responsible for the expenditure condition of the Yerilla Project prior to listing and Wild Acre was authorised to do any work it liked on the Lease but must report any work completed on the tenements to Regal for inclusion in the Form 5 for the Lease.

86 On 17 and 18 June 2008, Wild Acre and Regal respectively signed the Option. In summary, the terms of the Option provided as follows:

a) Payment by Wild Acre of $2,000.00 as a fee to enter into the Option,

b) Within 7 days of executing the Option, Wild Acre pays $10,000.00 to Regals. During the 7 day period Regal to provide to Wild Acre all available data for review,

c) No later than 31 October 2008, Wild Acre would apply to the ASX for conditional admission to the official list of ASX,

d) Within 7 days of listing on ASX, a joint venture would commence and Wild Acre would pay to Regal $10,000.00 for reimbursement of past rent and rates on the Yerilla Project. Wild Acre would then become responsible for keeping the Yerilla Project tenements in good standing,

e) Within the 1st year of the commencement of the joint venture Wild Acre shall spend not less than $150,000.00 on exploration on the Yerilla Project and not less than $500,000.00 during the first 2 year of the joint venture Wild Acre was to earn an 80% interest in the Yerilla Project. Upon Wild Acre spending $500,000.00 it can then choose to withdraw from the joint venture.

87 On or about 25 June 2008, Wild Acre paid to Regal a cheque for $10,000.00 being the fee required to be paid within 7 days of the execution of the Option.

88 Mr Mooney said that in August and September 2008 various events occurred that impacted on the financial sectors of the world and became known as the Global Financial Crisis ("GFC"). The impact of the GFC resulted in great difficulty in obtaining money for various projects.

89 Mr Mooney said it became apparent to Wild Acre in about October 2008 that raising capital to advance the listing of Wild Acre on the ASX was not capable of being achieved within the time limits of the Option.

90 Accordingly, Wild Acre approached Regal in October 2008 and sought to renegotiate the terms of the Option. Regal agreed to extend the terms of the Option until 31 March 2009 upon Wild Acre paying to Regal and extension fee of $2,000.00. That fee was paid to Regal on 16 October 2008.

91 In March 2009, Wild Acre was of the opinion the effects of the GFC had not subsided sufficiently that it could seek listing on the ASX. Mr Mooney said a decision was then made by Wild Acre to seek a further extension of the terms of the Option until 31 August 2009.

92 The extension of the Option was agreed by Regal on 18 March 2009, subject to Wild Acre paying the fee of $4,906.00 being the fee payable to the DMP for the extension of the term of the Lease for a further 21 years from 21 April 2009 to 29 May 2030. That fee was paid by Wild Acre on 1 April 2009. Accordingly, the Option was extended by Regal until 31 August 2009.

93 Mr Mooney said in or about June 2009 it was considered by Wild Acre more prudent for Wild Acre to purchase the Yerilla Project rather than to enter into a joint venture with Regal and farm in over a period of time.

94 As a result of a public announcement by Regal that it intended to divest itself of its exploration interests, Mr Mooney said Wild Acre approached Regal and sought to purchase from Regal the Yerilla Project including the Lease.

95 On 1 July 2009, Mr Mooney said he was informed by Regal it had agreed to sell the Yerilla Project including the Lease to Wild Acre. On 31 August 2009, the Regal Sale Agreement was executed for the sale of the Yerilla Project on the consideration :

1. Cash payment of $5,000.00 on settlement to Regal,
2. A royalty payment to Regal to a maximum of $500,000.00 on all gold recovered from the Yerilla project,
3. A further cash payment of $25,000.00 to Regal upon listing of Wild Acre on the ASX.

96 In December 2009, the payment of the $5,000.00 was paid by Wild Acre to Regal. It is noted annexure "GJM 21" would suggest the payment of the $5,000.00 did not occur until 4 January 2010.

97 Mr Mooney states in his affidavit of 19 November 2010, he was in possession of a further signed transfer of the Lease from Mr Milling to Regal and a signed transfer of the Lease from Regal to Wild Acre. Subject to the resolution of an appeal by Wild Acre against an assessment of stamp duty the Transfer Document and the New Transfer will be lodged by Wild Acre with DMP.

98 Technical information for geological evaluation that was given to Wild Acre by Regal was described by Mr Mooney as "limited". Wild Acre relied upon publically available information it was able to obtain from various sources.

99 Mr Mooney said if Wild Acre were to list on the ASX to raise capital to undertake an exploration programme an independent technical review would be required for the prospectus.

100 Accordingly, Ms Lord was engaged by Wild Acre to complete an independent review of the Quinn's and Yerilla Projects. On 2 December 2008, Wild Acre received from Ms Lord the Review.

101 On 7 April 2009, Mr Mooney said he was made aware by WTS that the Form 5 for the Lease for the Expenditure Year was to be lodged with the DMP by 29 May 2009. A copy of that letter was forwarded by Mr Mooney to Mr Alan Downie.

102 Mr Mooney said Wild Acre was not strictly responsible for lodging of the Form 5 under the terms of the Option. However, Mr Mooney said it was in the interests of Wild Acre to ensure the Form 5 was lodged with DMP.

103 On 13 August 2009, Mr Mooney said he was again contacted by WTS who informed him the Form 5 for the Lease had not been lodged and was now overdue. Mr Mooney said he contacted Mr Alan Downie who was working away from Perth and asked him to attend to the matter.

104 On 20 August 2009, Mr Mooney said WTS advised him it had received a Notice of Intention to Forfeit the Lease from DMP for failure to lodge the Form 5. The following day instructions were given to WTS by Wild Acre to submit to DMP the Form 5. The Form 5 was lodged with DMP on 20 August 2009. A fine was issued by DMP for late lodgement of the Form 5 in lieu of forfeiture of the Lease.

105 It is not helpful, at this stage, in assessing the issues associated with the Application to deal with whether there has been non compliance with the Expenditure Conditions or the matters raised in paragraphs 205 to 237 of Mr Mooney's affidavit. They may be matters relevant to other considerations later.

106 That is in summary the evidence relied upon by Regal & Wild Acre in response to the Application. Mr Milling did not participate in these proceedings.

**Regal & Wild Acre's Submissions**

107 In summary, Regal & Wild Acre submit the expenditure claimed in the Form 5 for the Expenditure Year is expenditure caused to be expended in mining or in connection with mining operations by the registered holder of the Lease. It is further submitted by Regal and Wild Acre, that subject to the express provisions of the Mining Act and Regulations, the court should not be concerned with how the expenditure was caused to be incurred so long as the expenditure leads up to mining. Accordingly, the words "in connection with mining" should be given a wide import and can be readily extended to matters leading up to mining such as the preparation of a geological report.

108 In those circumstances it is submitted, where geological reports are directly concerned with advancing mining on the Lease the cost incurred should be regarded as expenditure for the purpose of meeting the Expenditure Conditions. In that regard reference has been made to ***Re: His Honour Warden Calder SM & anor; Exparte Lee & anor [2007] WASCA 161.***

109 Regal & Wild Acre do not dispute that, during the Expenditure Year, Mr Milling personally did no work and incurred no expenditure in connection with mining on the Lease. However, Regal & Wild Acre submit, pursuant to

the Milling Sale Agreement, Regal were authorized by Mr Milling to cause expenditure to be incurred in mining on or in connection with mining operations on the Lease. Clause 9 of the Milling Sale Agreement states:

> ***"9. Purchaser to Keep Tenement in Good Standing***
>
> *(a) The Purchaser shall be responsible for maintaining the Tenement in good standing from the date of this agreement until;*
>
> *the Completion Date; or*
>
> *the Agreement terminating in accordance with clause 4.4.*
>
> *(b) Maintaining the Tenement in good standing shall include but is not limited to:*
>
> *(i) paying all applicable rates and rents; and*
>
> *(ii) completing all statutory work and reporting requirements."*

110 It is further submitted by Regal & Wild Acre that upon the execution of the Option, the terms of the Option granted to Wild Acre authority to expend on the Lease in connection with mining on or in connection with mining operations during the Expenditure Year. In any event it is submitted it was in Wild Acres interest to ensure the Lease remained in good standing so as to protect Wild Acre's future interest in the Lease. Regal and Wild Acre further submit the Option authorized Wild Acre to access and conduct work on the Lease in order to commence preparation of its future exploration program.

111 The expenditure by Wild Acre on the preparation of the Review by Ms Lord, the work by Mr Alan Downie in preparing drill hole data, the production of topographical and tengraph maps, the reviewing of historical data and preparation of an exploration program on the Lease can be characterize as being incurred in connection with mining.

112 Regal and Wild Acre submit such an approach is consistent with the test approved by Her Honour Justice McLure in ***Re: His Honour Warden Calder SM & anor; Exparte Lee & anor,*** that expenditure incurred "in connection

with mining" should be regarded as allowable expenditure to meet the Expenditure Conditions by Regal.

113 Regal and Wild Acre submit expenditure of the nature incurred by Wild Acre should not to be categorized as expenditure incurred in acquisition of the Lease and therefore not allowable expenditure pursuant to r. 96C(4)(b) of the Mining Regulations.

114 Regal and Wild Acre further submit the apportionment of expenditure claimed in the Form 5 is a fair apportionment of expenditure as between the Quinn's and Yerilla Projects in which Wild Acre held an interest, notwithstanding the errors identified by Mr Mooney. In any event, the expenditure claimed excludes many expenses Wild Acre say is allowable as expenditure on the Lease but have not been claimed.

**Applicants Submissions**

115 The Applicant submits the person responsible for compliance with the Expenditure Condition for the Lease is Mr Milling. The Applicant further submits pursuant to the Milling Sale Agreement the Expenditure Conditions were to be met by Regal. However, as the Milling Sale Agreement was never concluded by the registration of the Transfer Document the legal obligation to meet the Expenditure Condition for the Lease remained with Mr Milling.

116 Further, the Applicant submits the Milling Sale Agreement does not provide any power for Regal to delegate its obligation to meet the Expenditure Condition for the Lease to Wild Acre.

117 Accordingly, there is no evidence according to the Applicant that Regal or Mr Milling authorized Wild Acre to expend any amount on mining or in connection with mining operations on the Lease during the Expenditure Year.

118 Any amount claimed by Wild Acre, submits the Applicant, was incurred by Wild Acre to determine if Wild Acre would acquire the Lease or for the purpose of publishing the Review in the prospectus to raise capital by way of an IPO to assist in the acquisition of the Lease.

119 The Applicant submits the Option or the Milling Sale Agreement do not authorize Wild Acre to expend any money on the Lease. Accordingly, the Applicant submits any money expended by Wild Acre, with the exception of

the rates and rent, is not an amount that is allowable expenditure on mining or in connection with mining or mining operations on the Lease.

**What is the amount of the Expenditure Condition?**

120 It is not in dispute between the Applicant and the 2nd & 3rd Respondents the amount of the Expenditure Condition for the Expenditure Year is $32,800.00. The Form 5 shows the amount of the claimed as expended on the Lease for the Expenditure Year is $35,829.07.

**Who is the Registered Holder of the Lease?**

121 Relevant to this matter is the necessity to determine who the registered holder of the Lease is. The determination of this issue is pivotal in establishing upon whom the obligation to meet the Expenditure Conditions rests.

122 Counsel for Regal & Wild Acre submit the "holder" of a mining tenement is the same as the "registered holder" variously referred to in the Mining Act and Regulations. Counsel for the Applicant submits the registered holder is Mr Milling despite the various transactions that have occurred between Mr Milling and Regal and Wild Acre.

123 No precise definition of the term "holder" or "registered holder" appears in the Mining Act or Regulations. In ***Roberts v Hugill (unreported, Mt Magnet Warden's Court, 26 February 1997 and noted in 16 AMPLJ 115)*** Warden Packington said:

> *"The word "holder" is not defined in the Act. It seems to me, however, that the general scheme of the Act makes it clear that the "holder" of a mining tenement within the meaning of the Act must be the person shown in the Register as the successful applicant in the first instance for that tenement or as the registered transferee."*

124 I agree with the comments of Warden Packington. However, I think, the determination of who is the registered holder of a mining lease has its origin, relevant to this matter, in the grant of the mining lease by the Minister. Section 79(1) of the Mining Act provides ;

> **"79. Approval of application**
>
> (1) Where a person has applied for a mining lease and has been notified in writing by or on behalf of the Minister that the Minister has granted the mining lease to which the application relates, the applicant shall be deemed to be the holder of the lease comprising the land in respect of which the lease is granted as from the date of the written notification."

125 Upon the grant of a mining lease by the Minister, the applicant for the grant of the mining lease becomes the holder of the mining lease. The name of the holder of the mining lease is then entered in a Register created by s. 103F of the Mining Act:

> **"103F. Register**
>
> (1) The Director General of Mines is to cause a register to be compiled and maintained.
>
> **(2) The register is to contain such particulars, relating to mining tenements and applications for mining tenements, as are prescribed.**
>
> (3) The register may be compiled and maintained in such form as the Director General of Mines determines.
>
> (4) A person may, on payment of the prescribed fee, obtain at the Department at Perth or at the office of the mining registrar —
>
> (a) a copy of an entry in the register relating to any mining tenement or application for a mining tenement; and
>
> (b) subject to such requirements, if any, as are prescribed, a copy of a dealing or other instrument recorded in the register."

126 The particulars that are required to be contained in the Registrar are prescribed by r. 84C of the Mining Regulations and state:

> **"84C. Content of register**
>
> The register is to contain the following particulars —
>
> (a) in relation to an application for a mining tenement —
>
> (i) the particulars shown on the prescribed form of application; and
>
> (ii) the approval of the application and the terms and conditions of that approval, or the refusal or withdrawal of the application, as the case may be;
>
> (b) in relation to a mining tenement —

(i) all rental payments;

(ii) moneys expended or deemed to be expended in mining on or in connection with mining on the tenement;

(iii) particulars of exemptions;

(iv) particulars of dealings and other instruments affecting the tenement that are required to be entered in the register under the Act;

***(v) the name of the registered holder and the number of shares held;*** and

(vi) the surrender, forfeiture or other cancellation of the tenement;

(c) such other particulars relating to a mining tenement or an application for a mining tenement as the Director General of Mines considers necessary.

127 Accordingly, in my opinion the holder of the mining lease upon registration in the Registrar becomes the registered holder of the mining lease.

128 The grant of a mining lease by the Honourable Minister and the consequent registration of the name of the holder in the Registrar creates rights, imposes obligations, and is subject to covenants and conditions under the provisions of the Mining Act and Regulations.

129 Pursuant to s. 82 of the Mining Act the grant of a mining lease is subject to statutory covenants and conditions. Relevant to these proceedings and the issue of who is the registered holder of the Lease the provisions of s. 82 of the Mining Act states:

**"82. Covenants and conditions of lease**

(1) 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 —

(a)……..

(d) not transfer or mortgage a legal interest in such land or any part thereof without the prior written consent of the Minister, or of an officer of the Department acting with the authority of the Minister;

130 The registered holder of a mining lease is therefore not entitled to transfer any land the subject of the mining lease without the prior written consent of

the Honourable Minister or an authorized officer of DMP acting with the authority of the Honourable Minister.

131 Section 8 of the Mining Act defines a "dealing" to include a transfer of a mining tenement. Regulation 75 of the Mining Regulations relevantly provides the manner in which a dealing by way of a transfer of a mining tenement is to occur:

> **"75. Transfer of tenement**
>
> Unless otherwise provided in the Act or these regulations the holder of a mining tenement may apply to transfer the whole of it or an interest in it by lodging a transfer in the form of Form 23 with the prescribed fee, but —
>
> (a) every transfer shall be accompanied by the instrument of lease or licence (if issued) and a security similar to that required under section 26, 52(1), 60(1), 70F(1) or 84A(1) in respect of the lease or licence; and….."

132 Section 103C of the Mining Act provides the manner in which "dealings are to be lodged for registration and the effect of failing to register dealing" will have on a mining tenement.

> **"103C. Registration**
>
> ***(1) This section applies to the following instruments —***
>
> ***(a) a dealing;***
>
> (b) a discharge of a mortgage of a legal interest in a mining tenement;
>
> (c) a withdrawal of an application for a mining tenement;
>
> (d) a surrender under section 26A, 65 or 95;
>
> (e) a tax memorial;
>
> (f) a withdrawal of memorial.
>
> ***(2) An instrument to which this section applies is to be***
>
> ***(a) lodged for registration in the prescribed manner and prescribed form; and***
>
> ***(b) accompanied by the fee (if any) prescribed in respect of the instrument.***
>
> ***(3) Only an instrument to which this section applies may be registered.***
>
> (4) The registration of an instrument is to be effected by an authorised officer.

> (5) Subject to section 122D(1), an authorised officer is, unless section 103D applies or the regulations otherwise provide, to enter in the register the time and date of the lodgement of an instrument as the time and date of registration.
>
> (6A) If a tax memorial is registered a notice stating that the memorial has been registered is to be sent by certified mail to the holder of the mining tenement against which the memorial is registered.
>
> (6) Neither the Minister nor an authorised officer is concerned with the effect any instrument lodged under this section may have at law other than for the purposes of this Act.
>
> (7) The acceptance of an instrument for registration does not give to it any priority (other than in so far as registration may be taken to be constructive notice), force, effect or validity that it would not have had if this section had not been enacted.
>
> ***(8) A dealing does not pass any legal estate or interest in a mining tenement or in any way charge or encumber a mining tenement until it is registered in accordance with this section."***

133 Accordingly, the lodgment of a transfer of an interest form in accordance with provisions of the Mining Act and Regulations is in fact a request for the consent of the Honourable Minister to allow the transfer of the mining lease. The consent to the transfer of the interest in the mining lease is affected when either the Honourable Minister him or herself consents or an authorized officer of DMP registers the transfer of the interest in the mining lease in the Register.

134 Upon registration the registered holder of the mining lease will change and with it will pass all rights, covenants, conditions and other obligations under the Mining Act and Regulations.

135 The issue of whether an unregistered dealing, such as the transfer of ownership of the Lease between Mr Milling and Regal, can pass any legal estate or interest in a mining tenement was dealt with by His Honour Justice Steytler in ***Finesky Holdings Pty Ltd v Minister for Transport for Western Australia [2002] WASCA 206***. The court in that case held, inter alia, that any dealing not registered was not effectual in passing any interest in the mining tenement until such time as it was registered.

136 Whilst the various provisions of the Mining Act and Regulations dealt with in ***Finesky*** have now been amended or repealed they have been replaced with other legislative provisions, referred to above that, in my opinion still require the registration of any dealing to transfer, in this matter, any legal estate or interest in the Lease from Mr Milling to either Regal or Wild Acre.

137 That is not to say that parties cannot enter into contracts and other legally binding arrangements in respect to mining tenements or in this case the Lease. Such transactions can create legally enforceable relations between the parties. However, they cannot pass any legal interest or estate in a mining tenement until registered according to the Mining Act and Regulations.

138 The evidence in this case is, and I so find, clear in that there has been no attempt to register the transfer arising out of the Milling Sale Agreement or any consequent transfer arising out of the contract for the sale of the Lease as between Regal and Wild Acre.

139 Accordingly, for those reasons the failure of Mr Milling, Regal or Wild Acre to lodge for registration with DMP the various transfers of interests in the Lease between the parties has the effect that no legal interest or estate in the Lease has passed from Mr Milling to Regal or Wild Acre.

140 For those reasons, I find the registered holder of the Lease during the Expenditure Year is Mr Milling.

**Who is Responsible for Meeting the Expenditure Condition for the Lease?**

141 The grant of a mining tenement, in this case the Lease, creates rights, imposes obligations, and is subject to covenants and conditions under the provisions of the Mining Act and Regulations.

142 One of those conditions is the requirement for the holder of the mining lease to comply with the prescribed expenditure conditions. The provisions of s. 82 of the Mining Act that states:

> **"82. Covenants and conditions of lease**
>
> (1) 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 —
>
> (a)……..

(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;

143 It is of note that the provisions of s. 82 (1) of the Mining Act refers to the "lessee" as being subject to the prescribed condition attaching to the mining lease. In my opinion the term "lessee" is a reference to the registered holder of the mining lease. The mining lease is a lease between the Minister for Mines and the registered holder. The holder of the mining lease is upon registration in the Register the registered holder of the mining lease and is thereby the "lessee" of the mining lease.

144 The details of the expenditure conditions under s. 82 of the Mining Act are prescribed by r. 31 of the Mining Regulations that states:

> **"31. Expenditure condition**
>
> (1) **<u>The holder of a mining lease</u>** shall expend or cause to be expended in mining on 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; but if the holder is directly engaged part-time or full-time in mining on the lease itself then an amount equivalent to the remuneration that the holder would be entitled to if engaged, under a contractual arrangement, in similar mining activity elsewhere in the district shall be deemed to have been expended:
>
> Provided that where the area of a mining lease does not exceed 5 hectares the minimum annual expenditure shall be $5 000."

145 The provisions of s. 82 of the Mining Act and r. 31 of the Mining Regulations place an express statutory obligation upon the "holder" or the "registered holder" of the mining lease to expend or cause to be expended on or in connection with mining on the mining lease the prescribed amount under the Mining Regulations. I do not consider the provisions of s. 82 of the Mining Act can be read in any other way than in its plain and ordinary meaning.

146 Accordingly, I find the registered holder of the Lease, Mr Milling, is responsible for compliance with the Expenditure Conditions on the Lease in the Expenditure Year.

**<u>Did the Holder Expend or Cause to be Expended in Mining on or in Connection with Mining on the Lease the Required Expenditure?</u>**

147 There is no issue between the parties, and I so find, that Mr Milling, the registered holder of the Lease, did not expend personally any amount in mining on or in connection with mining on the Lease in the Expenditure Year.

148 Despite the registered holder of a mining lease being responsible for meeting the prescribed expenditure conditions, the Mining Act and Regulations provides for the registered holder of a mining lease to authorise in writing a third party, subject to conditions, to carry on mining on the mining lease. The provisions of s. 118A of the Mining Act provide that expenditure incurred by the third party in mining on a mining lease will be regarded as expenditure on the mining lease.

149 The provisions of s. 118A of the Mining Act, that came into effect on 10 February 2006, state:

> **"118A. Tenement holder may authorise mining by third party**
>
> (1) In this section —
>
> ***authorisation*** means an authorisation under subsection (2).
>
> (2) The holder of a prospecting licence, exploration licence or mining lease (the ***relevant tenement***) may, by instrument in writing, authorise another person to carry out mining of a kind authorised by the relevant tenement on the land the subject of the relevant tenement.
>
> (3) An authorisation may be given subject to conditions specified in the authorisation.
>
> (4) Mining carried out under an authorisation is to be regarded for the purposes of this Act as mining carried out by the holder of the relevant tenement.
>
> ***(5) Expenditure on or in connection with mining carried out under an to be regarded for the purposes of the prescribed expenditure conditions referred to in section 50, 62 or 82(1)(c) as expenditure by the holder of the relevant tenement.***
>
> (6) The giving of an authorisation does not affect the duties or obligations of the holder of the relevant tenement under this Act."

150 Relevant to the Application is whether the terms of the Milling Sale Agreement complied with the provisions of s. 118A of the Mining Act and authorized Regal to expend in mining on or in connection with mining upon the Lease.

151 The provisions of s. 118A of the Mining Act were considered by Warden Calder in ***Mawson West Ltd & anor v Saruman Holdings Pty Ltd [2010] WAMW 10***. That case dealt with the sale of an application for an exploration licence that was yet to be granted and some subsequent administrative errors that occurred relevant to filing of expenditure reports following grant.

152 The document of agreement for the sale of the exploration licence in ***Mawson West Ltd & anor v Saruman Holdings Pty Ltd*** was a letter agreement which outlined briefly the terms of the sale. Warden Calder after considering the terms of the letter agreement concluded it was the intention of the registered holder of the exploration licence to authorize the purchaser to carry out mining on the tenement.

153 Further, Warden Calder went on to say:

> *"It seems that the purpose of s 118A is to not deny the holder of a mining tenement credit, for the purpose of compliance with the expenditure condition, for the value of work done on the tenement by a person authorized by the holder to do it. Section 118A means that there can be no argument as to whether or not, for the purpose of (in the case of an exploration licence) reg 21, the holder "caused" the expenditure. If work is done by a person other than the holder and that is authorized in accordance with subs 118(2) (sic), the expenditure qualifies as expenditure for purposes of the expenditure condition without more provided, of course, that the work was in respect of an activity that is on or in connection with mining on the tenement.*
>
> *In any event, s 118 (sic) is not a mandatory requirement and does not mean that expenditure that is otherwise allowable but that is not done pursuant to a s 118A(2) authorisation cannot fulfil the expenditure condition for the tenement holder. It is not an offence to not give written authorization under s 118A.*
>
> *Regulation 21 says that the holder of an exploration licence is to expend or cause to be expended the prescribed amount of money during each year on the tenement. The holder may "cause" allowable expenditure to be incurred*

> *by another person in respect of an exploration licence without there being any written authority at all. Section 118A does not affect the operation of reg 21 in that regard."*

154 Warden Calder went on to further say:

> *"Further, even if the effect of s 118A is that work and expenditure on a tenement by a person other then the holder where the holder has not, in writing, authorized the carrying out of work is that the expenditure may not be claimed as expenditure by the holder, the Minister would not be precluded from taking into account such expenditure for purposes of determining the exemption application. In such cases it could be said that the policy of expenditure and development was being advanced even though it was not being advanced in accordance with specific provisions of the legislation."*

155 The Milling Sale Agreement consisted of a deed of sale that provided at clause 9 for Regal to maintain the Lease in good standing, including "completing all statutory work and reporting requirements" from the date of the agreement until it became unconditional.

156 The phrase "completing all statutory work and reporting requirements" is somewhat unclear and is not defined within the Milling Sale Agreement. However, from the evidence in this case I find it to mean that Regal was required by Mr Milling to meet the Expenditure Condition on the Lease and lodge with the DMP all reports required under the provisions of the Mining Act and Regulations.

157 I find clause 9 of the Milling Sale Agreement authorised Regal to do all things necessary to comply with the Expenditure Conditions until the Milling Sale Agreement was completed. The authority granted by Mr Milling to Regal is a wide authority and by implication permits Regal to have others expend in mining on or in connection with mining upon the Lease on its behalf.

158 In those circumstances I find that Regal were authorized by Mr Milling under the terms of the Milling Sale Agreement to engage another party, in this case Wild Acre, to cause expenditure on the Lease during the Expenditure Year. The question remains in the circumstances of this case

whether the expenditure incurred by Wild Acre and claimed in the Form 5 is expenditure that may be used in the calculation of expenditure on or in connection with mining on the Lease in the Expenditure Year.

**Is the Expenditure Claimed by Wild Acre on the Lease during the Expenditure Year Allowable Expenditure?**

159 Not all expenditure on a mining tenement is capable of being used for the calculation of expenditure in an expenditure year.

160 The provisions of r. 96C(4)(b) of the Mining Regulations provides that certain costs and payments cannot be used in the calculation of expenditure expended on, or in connection with, mining on a mining tenement and states:

> **"96C Specific Expenditure Provisions**
>
> (4) The following costs and payments cannot be used in the calculation of expenditure expended on, or in connection with, mining on the tenements –
>
> (a) The cost of marking out mining tenements;
> (b) any costs associated with the acquisition or sale of mining tenements;
> (c) research activities not directly related to a specific tenement;
> (d) compensation payments made in respect to the mining tenement."

161 Relevant to this matter is whether the expenditure claimed by Wild Acre was expenditure that could be characterized as in mining on or in connection with mining on the Lease or whether it was expenditure that falls within the provisions of r. 96C(4)(b) of the Mining Regulations and was incurred by Wild Acre as part of the acquisition costs for the Lease.

162 The Option between Regal and Wild Acre consisted of a letter, drafted by Wild Acre, setting out the terms of a conditional option to enter into a joint venture agreement to explore and develop the Yerilla Project including the Lease.

163 The express written terms of the Option do not contain any clause or clauses in which Regal authorizes or requires Wild Acre to expend in mining on or in connection with mining any amount upon the Yerilla Project including the Lease until the Option is exercised by Wild Acre and the Commencement Date occurs.

164 The "Commencement Date" that being defined in clause 2 as:

> *"**Condition Precedent**: The Joint Venture shall commence within 7 days of ASX granting WAM conditional admission to the Official List of ASX which shall not be later than 31 October 2008 **("Commencement Date")**."*

165 Clause 7 of the Option provides for Wild Acre to keep the Lease in good standing from the Commencement Date and states:

> *"From the Commencement Date, WAM shall keep the Tenements in good standing."*

166 The evidence of Mr Mooney was the Commencement Date was extended on a number of occasions at the request of Wild Acre due to the effects of the Global Financial Crisis. Mr Mooney said it was not until 31 August 2009 the Option was terminated by Regal and Wild Acre and a further agreement for the sale and purchase of the Lease entered into by Regal and Wild Acre. The date of 31 August 2009 falls outside the dates that comprise the Expenditure Year.

167 The reason Wild Acre claimed the expenditure in the Form 5 for the Expenditure Year was addressed by Mr Mooney at paragraphs 68 to 77 of his affidavit of 19 November 2010.

168 Mr Mooney deposed in his affidavit the following:

> "68. *At this stage, Wild Acre did not have the funds for an outright acquisition of the Yerilla Project. It had modest funds and geological skills to progress the project during the lead up to a listing on ASX by which it could raise funds.*
>
> 69. *Therefore I considered the way to secure an interest in the Yerilla Project was by way of a farm in and joint-venture conditional upon the ASX listing and fundraising by Wild Acre.*
>
> 70. *In all around May 2008 I provided Gordon with a draft letter agreement setting out the terms of a proposed joint-venture.*
>
> 71. *On 10 June 2008 I met with Gordon to discuss the draft letter agreement.*

72. *At this meeting I told Gordon that Wild Acre was prepared to undertake a preliminary exploration over the Yerilla Project prior to ASX listing as it was important for Wild Acre to have knowledge of the geology, prospectivity, and datasets relevant to the project before commencing an extensive exploration programmme.*

73. *Prior to Wild Acre listing on the ASX and raising funds for exploration I was reluctant for Wild Acre to enter into any agreement which provided expenditure obligations for Wild Acre.*

74. *I was concerned that if for any reason Wild Acre were unable to raise the capital it required or the raising was delayed, and it was unable to keep M 31/67 in good standing, RER would commence proceedings against Wild Acre for breach of contract.*

75. *I raised this is concern with Gordon Sklenka and informed him about the proposed listing of Wild Acre.*

76. *Gordon agreed that RER would remain responsible for the expenditure obligations of the Yerilla Project tenements prior to listing, and that Wild Acre was authorised to do any work it liked on the tenement but that it must report any work completed on the tenements to RER for inclusion in the Form 5 for M 31/67.*

77. *I wanted to ensure the Yerilla Project tenements were kept in good standing so that Wild Acres opportunity to explore the tenements was protected."*

169 Regrettably, this evidence of Mr Mooney suggests a view existed on the part of Regal and Wild Acre that any expenditure by Wild Acre on the Yerilla Project including the Lease in pursuit of the terms of the Option was able to be claimed to meet the Expenditure Condition for the Expenditure Year on the Yerilla Project including the Lease.

170 I do not accept the view held by Mr Mooney. I find the expenditure incurred by Wild Acre occurred in the course of it undertaking "due diligence" in evaluating the Yerilla Project including the Lease for the purpose of possible acquisition and determining whether to exercise the Option.

171 I find the report of Ms Lord was authorized by Wild Acre with the intention of gaining a better understanding of the commercial potential of the Yerilla

Project, including the Lease, with the intention to use that information for any subsequent capital promotion by way of an IPO. I find the costs incurred by Wild Acre on the Yerilla Project including the Lease, was done so in the course of the process of acquisition of the Yerilla Project, including the Lease, and as such is not expenditure allowable under the provisions of r. 96C(4)(b) of the Mining Regulations.

172 The work of Ms Lord was authorized by Wild Acre to occur during the 7 days it was entitled to review data held by Regal. It is of note that according to Ms Lord she was first approached by Mr Mooney on 9 June 2008 to discuss an independent geological review of Wild Acres prospective projects as Wild Acre was considering seeking listing on the ASX.

173 At the meeting between Ms Lord, Mr Mooney and Mr Alan Downie on 10 June 2008, Ms Lord said she was asked to provide an independent geological analysis and review on 2 projects. They were the Quinn's Project which Wild Acre was negotiating the purchase and the Yerilla Project, which included the Lease. Ms Lord said she was informed Wild Acre had entered into an option agreement with Regal for a proposed farm in and joint venture. That meeting was held some 7 days prior to the execution of the Option on 17 June 2008.

174 The evidence of Mr Alan Downie was the purpose of his attendance at the Yerilla Project, including the Lease, was part of the "due diligence" process and occurred during the 7 day period in which Wild Acre was able to review data from Regal. I find the material gathered by Mr Alan Downie during the "due diligence" process by attending at the Yerilla Project, including the Lease, and all other material that he either gathered from other sources or compiled himself and was then subsequently submitted to Ms Lord occurred in connection with the evaluation of the Yerilla Project, including the Lease, and was for the purpose of possible acquisition and subsequent capital investment promotion.

175 The terms of the Option were such that Wild Acre was able at any stage prior to the Commencement Date, having conducted "due diligence" declined to seek listing on the ASX and walked away.

176 I find the purpose of the work completed by Ms Lord, Mr Mooney and Mr Alan Downie between 10 June 2008 and 31 August 2009 in respect to the Yerilla Project, including the Lease, was directly related to its acquisition. To acquire any interest at all in the Yerilla Project including the Lease, Wild

Acre was required to obtain provisional listing on the ASX before it was obliged to spend on the Lease.

177 In **Grange Resources Ltd v Lee [2006] WAMW 8,** His Honour Warden Calder said in dealing with the question of whether expenditure was incurred in mining or in connection with mining when the sole purpose of the expenditure was to enable the prospective purchaser to decide whether to purchase rights to access and treat copper ore on the tenement the following:

> *"In my opinion, Grange did nothing more than to permit Mr Hull and Murchison Copper to enter the tenement. That is not "causing" work to be carried out or expenditure to be incurred by the person to whom the permission is given (Nova Resources NL v French (1995) 12 WAR 50). The work done and expenditure incurred by Mr Hull and Murchison Copper, I find, was done for the sole purpose of enabling Mr Hull and Murchison Copper to decide whether or not to seek to acquire rights, by purchase or otherwise, to access and treat copper ore for the purposes of a mining operation to be undertaken by Murchison or Mr Hull on Green Dragon and to try and attract investors to Murchison Copper on the tenement. That was expenditure not in connection with mining but, rather, in connection with tenement evaluation for the purpose of possible acquisition by Mr Hull and Murchison Copper of Green Dragon and subsequent capital investment promotion In Murchison Copper. In my opinion, the mere fact that activities and expenditure of the type undertaken by Mr Hull and by Murchison Copper may have resolved in better than then existed presentation of existing knowledge or even in some additional knowledge being gained about the commercial potential of the tenement is not sufficient to characterise that expenditure as being expenditure for the purposes of reg 31."*

175. I find the circumstances in which Wild Acre found itself in in respect to be Option was almost identical to the circumstances in **Grange Resources v Lee**. I do not accept the evidence of Mr Mooney, Mr Alan Downie or Ms Lord that the expenditure claimed by Wild Acre can be characterised as being expenditure in mining on or in connection with mining on the Yerilla Project, including the Lease.

176. I also do not accept the submission by Regal and Wild Acre that regard should be had to the decision in **Re: His Honour Warden Calder Ex parte Lee and anor (2007) 34 WAR 289** in which Her Honour Justice McClure outlined a 6 point test to establish if expenditure could be characterised as "in mining on or in connection with mining". In my opinion, the evidence in

this case demonstrates the purpose for which the report of Ms Lord was prepared and the activities of Mr Alan Downie at the Yerilla Project, including the Lease, were steps associated with tenement evaluation for the purpose of possible acquisition, gaining knowledge of the commercial potential of the tenement and to use the information for potential capital investment promotion. These activities simple cannot be characterized as in mining on or in connection with mining.

177. Further, in enacting r. 96C(4) of the Mining Regulations, Parliament has recognized certain activities it does not considers advances the intentions of the Mining Act to exploit the mineral wealth of this State. Parliament has chosen to prohibit the use of cost and payments of those prescribed activities from use in the calculation of expenditure on or in connection with mining.

178. Accordingly, for those reasons the following expenditure claimed by Wild Acre in the Form 5 is expenditure not capable of being used for the calculation of meeting the Expenditure Conditions on the Lease in the Expenditure Year:

| | | |
|---|---|---|
| **A. Mineral-Exploration Activities** | | |
| Salaries | $ 4,250 | |
| Field Supplies | $ 178 | |
| Vehicle Expenses | $ 100 | |
| Fuel | $ 75 | |
| Drafting | $18,079 | $22,745.00 |
| | | |
| **E. Administration and Overheads** | | |
| Administration and overheads | | $ 5,971.51 |
| | | |
| **Total** | | $28,716.51 |

179. The amount claimed for annual tenement rent and rates totalling $7,112.56 is allowable expenditure on the Lease in the Expenditure Year.

180. The Applicant bears the onus to establish on the balance of probabilities that Mr Milling has failed to comply with the Expenditure Condition for the Expenditure Year. Upon the evidence, I am satisfied that the Applicant has discharge their obligation and I find Mr Milling has failed to comply with Expenditure Condition for the Expenditure Year.

181. I find the shortfall in complying with the Expenditure Condition for the Lease in the Expenditure Year is $25,687.44.

**Should the Lease be Forfeited?**

182. In **Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported, WASC, Full Court, 16th December 1988, SCL** 7427 the court held that in the event the Applicants satisfy the Court the Respondent has failed to comply with the Expenditure Conditions for the Lease the Applicants establish a prima facie case for the forfeiture of the Lease. In such circumstances the evidentiary burden then falls on the Respondent to satisfy the Warden the case is otherwise not of sufficient gravity to justify forfeiture of the Lease.

183. In **Craig v Spargos Exploration NL (Unreported, Wardens Court, 1986, noted 6 AMPLA Bull 73**) the warden held that when he was satisfied that there had been a failure to comply the expenditure conditions that he was then required to consider whether the non-compliance with the Expenditure Condition, is in the circumstances of the case, of sufficient gravity to justify forfeiture, before the warden recommends forfeiture.

184. In considering the circumstances of the case the warden in **Craig v Spargos Exploration** said that in considering whether to order forfeiture he should take into account the non-compliance and the facts directly bearing upon it, the events leading up to the non-compliance, the conduct of the parties and the actual and potential consequences of the non-compliance and a forfeiture sought have regard throughout to the objects of policies of the Mining Act.

185. The circumstances of the non-compliance in this case are somewhat unusual. By virtue of the Milling Sale Agreement, the responsibility for complying with the Expenditure Condition was "assigned" to Regal.

186. A reading of the Form 5 would indicate that Regal appears to have complied with the Milling Sale Agreement to keep the Lease in good standing. Regrettably, it would appear on the evidence that when Regal changed it focus from mining in Western Australia to pursue mining in other places it was either unable or unwilling to continue to maintain the Lease in good standing.

187. At that time Wild Acre began to show interest in the Lease and other associated projects in the near vicinity and entered into the Option with the intention to eventually acquire an interest in the Lease and develop a mine.

188. Unfortunately, Mr Milling and Regal have failed to ensure the necessary paperwork associated with the transfer of the Lease was lodged with the

DMP. The evidence of the Applicant and Mr Mooney suggests that Regal lost the Transfer Document some years before Wild Acre showed an interest in the Lease. Despite being aware the Transfer Document had been lost Regal did little, if anything to rectify that problem.

189. The consequence of the lack of action by Regal in remedying the loss of the Transfer Document and then registering the change in ownership of the Lease with the DMP is that Mr Milling remains at law responsible for ensuring compliance with the Expenditure Condition for the Lease.

190. The interest shown in the Lease by Wild Acre and the mining it has embarked upon August 2009 is, in my opinion, cannot go unrecognised. The evidence that Wild Acre has concluded a purchase and sale agreement of the Lease with Regal, has successfully listed on the ASX, has also raised sufficient capital by way of an IPO and has put in place, if not begun, and exploration program on the Quinn's and Yerilla Projects including the Lease is significant.

191. If the Lease were ordered to be forfeited significant difficulty would be placed upon Wild Acre. That difficulty could result in significant issues arising between Mr Milling and Regal into which Wild Acre would also be drawn despite Wild Acre's actions in attempting to rectify the issues that arose before its involvement with the Lease.

192. The conduct of Mr Milling and particularly Regal in ignoring their obligations under the Mining Act and Regulations should not be overlooked. Private contractual arrangements between various parties associated with mining tenements cannot ignore the requirements of the Mining Act and Regulations. As this case demonstrates the desire of parties to secure ground upon which to mine should occur in an ordered fashion and in a manner that all parties ensure compliance with the Mining Act and Regulations is not overlooked. Such oversights may potentially result in the forfeiture of the very ground that the parties seek to secure.

193. Upon the evidence it is fair to say that despite the existence of the Milling Sale Agreement, the conduct of Regal in failing to replace the Transfer Document after it was misplaced or lost and then register it with the DMP and attempting to pass its obligations under the Milling Sale Agreement to Wild Acre before Wild Acre had any obligation under the Option in no small way contributed to the failure to meet the Expenditure Condition.

194. Notwithstanding that, the obligation to comply with the Expenditure Condition for the Lease remained with Mr Milling despite the private contractual arrangements he entered into with Regal.

195. The evidence of the Applicant indicates Mr Milling was aware of the failure of Regal to lodge the Transfer Document with DMP. Despite that the evidence reveals Mr Milling did little if anything to rectify that and thereby ensure he was no longer the registered holder of the Lease.

196. I do not consider this is a case in the whole of its circumstances, including a history of past compliance and at times non-compliance with the Expenditure Condition and the work that has been done by Wild Acre since the acquisition of the Lease that warrants a recommendation to the Honourable Minister for forfeiture of the Lease.

197. However, in my opinion the circumstances that have unfolded since the Milling Sale Agreement have culminated in the Application and warrant the imposition of a penalty. Regrettably the registered holder of the Lease, Mr Milling, has despite being notified of these proceedings elected not to participate in or give or call evidence. He did not attend court on the day of the hearing of this matter. I am satisfied he is aware of these proceedings and is similarly aware of the potential outcomes of the Application.

198. In those circumstances, I order the registered holder of the Lease pay a penalty of $5,000.00 as an alternative to making an order recommending forfeiture of the Lease

199. I order the whole amount of the penalty of $5,000.00 be paid to the Applicant.

200. I also order Mr Milling, Regal and Wild Acre pay the costs of the Applicant to be assessed if unable to be agreed.