

JURISDICTION : MINING WARDEN

TITLE OF COURT : BEFORE THE WARDEN

LOCATION : PERTH

CITATION : LAKE HILLMAN MINING P/L v H B BRADY CO P/L
& ANOR [2012] WAMW 20

CORAM : WILSON M

HEARD : 8 MARCH 2012

DELIVERED : 31 AUGUST 2012

FILE NO/S : APPLICATION FOR FORFEITURE SC 14/091

TENEMENT NO/S : MINING LEASE 77/39

BETWEEN : Lake Hillman Mining Pty Ltd
(Applicant)

v

H B Brady Co Pty Ltd
(1st Respondent)

&

Keith Jackson
(2nd Respondent)

Catchwords:

Application – Forfeiture – Refusal by Hon. Minister to grant Exemption – Contract for sale of Mining Lease – Successive Exemptions granted for 16 years – Failure to Comply with Expenditure Requirements for in Year of Sale – Veracity of Sale Agreement – Failure to Lodge Transfer Document

Legislation:

Mining Act 1978 (WA): s. 102(2) (a) to (h), s. 102(3)

Result:

Recommend to the Hon. Minister that Mining Lease 77/39 be forfeited.

Representation:

Counsel:

Applicant : Mr G Lawton
Respondent : Mr A Camp

Solicitors:

Applicant : Lawton Lawyers
Respondent : Alan Camp

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

Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported, WASC, FC 16 December 1988, SCL 7427

Craig v Spargos Exploration NL (unreported, Wardens Court, 1986, noted in 6 AMPLA Bull 73)

Majeed v Briggs and Schulda (unreported, Wardens Court, 1988, 7 AMPLA Bull 146)

Rose v Goldtime Australia Pty Ltd [2004] WAMW 8

Pacminex (Operations) Pty Ltd v Australian (Nephrite) Jade Mines Pty Ltd (1974) 7 SASR 401

Case(s) also cited:

Richmond v Ynema [2004] WAMW 14

Taylor v Calegari [2005] WAMW 2 and 3

Knopke v Stella Blast NL [2005] WAMW 31

Brosnan v Flint [2003] WAMW 16

Brosnan v Flint [2003] WAMW 18

Background

1. On 10 January 2010, Lake Hillman Mining Pty Ltd (“Lake Hillman”) lodged application for Forfeiture (“the Application”) of Mining Lease 77/39 (“Lease”) held by HB Brady Co. Pty Ltd (“HB Brady”). The Application alleges that HB Brady failed to comply with the minimum expenditure conditions for the Lease for the expenditure year ending 11 December 2009 (“the Expenditure Year”). The minimum expenditure required to be expended upon the Lease by HB Brady for the Expenditure Year was \$24,500.00.
2. The expenditure claimed by HB Brady in the Expenditure Year is \$ 8,658.00. Therefore the shortfall in expenditure by HB Brady in the Expenditure Year was \$ 16,742.00.
3. On 4 January 2010, HB Brady lodged an application for Exemption from Expenditure (“the Exemption”) for the Lease for the Expenditure Year. The Exemption was heard on 9 November 2010 and a recommendation made to the Hon. Minister on 4 March 2011. That recommendation can be found in *HB Brady Co P/L v Lake Hillman Mining P/L [2011] WAMW 2*. The recommendation to the Hon. Minister was the Exemption for the Expenditure Year for the Lease should be refused. On 24 October 2011, the Hon. Minister refused to grant the Exemption by HB Brady for the Expenditure Year for the Lease.
4. On 22 December 2011, an application was made by HB Brady to join Mr Keith Jackson (“Mr Jackson”) to the proceedings to give evidence on the nature of an agreement his company, Western Agricultural Lime Company (“WALCO”), had with HB Brady for the purchase of the Lease. That application was granted on the same date. The Application was listed for hearing on 8 March 2012. The evidence received in the hearing of the Exemption is deemed to be evidence in the Application.
5. At the hearing of the Application, Lake Hillman did not seek to call any further evidence and relied upon the evidence it produced in the Exemption. Mr Jackson gave evidence in the Application. HB Brady called Mr Rodney Malcolm Cousins (“Mr Cousins”) to give evidence in the Application.

Evidence for Lake Hillman in the Application

6. Lake Hillman did not call any further evidence in the Application and relied upon the evidence previously given by its witness Mr Robert Nixon (“Mr Nixon”). Lake Hillman also relied upon the failure by HB Brady to be granted the Exemption for the Lease by the Hon. Minister to prove that HB Brady had failed to comply with the minimum expenditure in the Expenditure Year. The only matter in issue from the perspective of Lake Hillman was whether the failure by HB Brady to comply with the minimum expenditure conditions was

of sufficient gravity to warrant a recommendation to the Hon. Minister that the Lease be forfeited.

Evidence for the HB Brady in the Application

7. Mr Jackson was called by HB Brady to give evidence in the Application. The evidence in chief of Mr Jackson consisted of a witness statement the content of which he verified to be true. In that statement, Mr Jackson said he has been in partnership with his three brothers, who were all farmers, under the name of WALCO in the business of extracting and/or selling lime and gypsum to farmers for some 30 years. He explained the purpose of lime as it is used in the agricultural industry.
8. He also explained the basis of the use of gypsum in the agricultural industry. However, Mr Jackson said he did not have a source of supply of gypsum available and either purchases gypsum and then make arrangements for its transport from the Eastern Wheatbelt of the State or refers potential purchasers to other suppliers.
9. Mr Jackson stated if his business had access to a deposit of gypsum they would be able to backload gypsum to the South-West after carting lime to the Eastern Wheatbelt and that would make the business more viable by reducing freight costs and would complement the client base with another service.
10. WALCO operates from his farm in Pemberton and employs some 10 staff. Mr Jackson stated that WALCO operates a mine near Point D'Entrecasteux on Mining Lease 70/48 and extracts lime on a property near Albany. Mining Lease 70/48 is surrounded by highly sensitive areas and national parks. Mr Jackson said WALCO has been able to successfully work within that area with no difficulty for some 30 years. The machinery and equipment currently operated by WALCO is capable of being converted to process gypsum.
11. Mr Jackson stated WALCO made an offer to HB Brady to purchase the Lease by letter dated 16 June 2009. That offer was made only after he had made enquiries to ascertain the Lease had been held by HB Brady as a reserve lease as backup for the manufacturing of building products. Mr Jackson said he was satisfied the Lease was in good order and standing from enquiries he made with DMP and from what he had been told by HB Brady.
12. Mr Jackson said he noted the Lease had been consistently exempt from expenditure conditions on the basis it was a reserve lease. Mr Jackson said HB Brady had applied for an exemption for only one year and not five years in 2008 because the primary lease had been sold and HB Brady had expected to sell the Lease within that year. He noted a one year exemption was granted by the Hon. Minister in those circumstances.
13. The offer made by WALCO to purchase the Lease was for \$20,000.00 with payment being made by two instalments being one of \$15,000.00 before 27

November 2009 and the balance due before 30 June 2010. The payment of \$15,000.00 was paid but the final sum of \$5,000.00 has not been paid as the Application was lodged.

14. It was not until about October 2009 that Mr Jackson said he had discussions with Mr Cousins regarding him joining WALCO, as he could see the need to have someone with the experience of Mr Cousins to assist them in the expansion of WALCO. Mr Jackson said he also considered he would need other local expertise and invited Mr Bill Rose to join WALCO. On 17 November 2009, a company called Gypsum Producers WA Pty Ltd (“GPWA”) was registered comprising of his brothers, Mr Rose, Mr Cousins and him each of whom would participate equally and into which the Lease would be transferred.
15. The transfer document (“the Transfer”) to give effect to the sale and purchase of the Lease from HB Brady to WALCO was executed by GPWA on 27 November 2009. According to Mr Jackson's statement, the Transfer for the Lease was not lodged with the DMP as advice had been received from DMP that could not occur until the Exemption was granted.
16. Mr Jackson said the Lease was purchased by WALCO because it provided an immediately available source of gypsum without the delays of pegging a new deposit, having to deal with issues such as native title and other approvals and there was a severe lack of available gypsum resources in the area. A comprehensive mining plan was prepared by WALCO to develop the Lease.
17. In cross-examination, Mr Jackson said he had known Mr Cousins since about the beginning of 2009 when he went to investigate some work in cleaning up waste gypsum at the back of the HB Brady premises in Bayswater. He later became aware, but could not state the exact date, the Lease was available for sale and he asked if he was able to put in an offer to purchase it. In fact, Mr Jackson said he cannot recall if he was told a precise date by which the offer had to be with HB Brady but it was implied that they needed them move fairly fast.
18. Mr Jackson denied he was told of any previous offers that had been received by HB Brady for the purchase of the Lease. He further said he arrived at the offer price of \$20,000.00 as a consequence of his experience in the cost of mining the mining lease at Point D’Entrecasteux and information he had received from Mr Cousins over a period of five or six weeks but could not recall the precise date.
19. Mr Jackson said a letter was later received by WALCO from HB Brady dated 6 July 2009 advising that WALCO’s offer had been accepted. Mr Jackson said he was aware of the obligation to meet annual expenditure requirements but did not know the anniversary date of the Expenditure Year for the Lease despite having investigated the status of the Lease with DMP.

20. It was Mr Cousins who prepared the Transfer for the Lease according to Mr Jackson. However, Mr Jackson was not able to recall when the Transfer was in fact prepared other than to say it occurred sometime during the process of organising payment for the Lease.
21. The evidence in chief of Mr Cousins was by way of a witness statement. Mr Cousins stated he had for many years been the accountant and company secretary of HB Brady. From 2008 through until the date of his witness statement in February 2012, Mr Cousins said he was the sole executive officer of HB Brady and was in charge of the day to day running of its business and finances. The business of HB Brady had over a period of time been wound down.
22. According to Mr Cousins, as part of the winding down process, HB Brady sought to sell the Lease, it having been held for many years as a reserve lease to other primary lease from which it mined gypsum for the purpose of its plaster manufacturing business in Bayswater. HB Brady did not wish to give away or surrender the Lease but rather sell it and recoup some of the expenditure it had incurred by holding the Lease as a reserve lease.
23. In holding the Lease as a reserve lease, Mr Cousins said HB Brady had obtained successive exemptions from expenditure condition from the Hon. Minister. In 2008, HB Brady applied for an exemption from expenditure conditions for the Lease for one year as it had an expectation that the Lease would then be sold. In applying for the exemption, Mr Cousins stated the same grounds of Exemption had been relied upon as had been submitted in previous years. It was not the intention on the part of HB Brady to mislead the Hon. Minister when the application for the Exemption was made based on grounds that were no longer applicable to the Lease.
24. An offer was made to HB Brady by WALCO for the purchase of the Lease. At a meeting of the board of HB Brady on 17 June 2009 the offer to purchase the Lease made by WALCO was accepted. Mr Cousins stated the purchase price for the Lease was \$20,000.00. WALCO paid, according to Mr Cousins, the sum of \$15,000.00 before the 27 November 2009 but has not paid the remaining \$5,000.00 despite it being due on 30 June 2010.
25. In about mid-September 2009, Mr Cousins said he began an association with WALCO when he was asked to assist it with its expansion programme through a subsidiary company it intended to establish called Gypsum Producers WA Pty Ltd. At that time, Mr Cousins stated he was employed only part-time by HB Brady and had informed the owners of HB Brady of the offer to work with WALCO or GPWA.
26. In cross-examination, Mr Cousins said he first met Mr Jackson in about 2008 when he was working at the HB Brady's site in Bayswater. He said he subsequently became involved with WALCO and GPWA in mid to late

October 2009 as a company secretary. That was later clarified to be as the company secretary and a director. That appointment was before the Transfer was signed transferring the Lease from HB Brady to GPWA.

27. Mr Cousins denied he had not advised Mr Nunn the Chairman and Managing Director of HB Brady of his involvement with WALCO and GPWA at the time of the signing of the Transfer. According to Mr Cousins, he had advised Mr Nunn in a telephone conversation before he became involved with WALCO and GPWA and that must have “slipped his mind” when Mr Nunn gave evidence in the Exemption application that he was not aware of the involvement. Mr Cousins said he had also told the prior chairman of HB Brady, Mr Alan Wilkinson, of his involvement with WALCO and GPWA.
28. Mr Cousins admitted he was the author of the letter written to Mr Jackson advising him that WALCO had been successful in the purchase of the Lease. He denied he had informed Mr Jackson verbally of that fact before the letter of 6 July 2009.
29. Mr Cousins was asked if he knew why Mr Nixon, a director of Lake Hillman, had been informed that his offer to purchase the Lease had to be with the board of HB Brady by 12 June 2009 when the offer from WALCO was dated the 16 June 2009. According to Mr Cousins, he assumed the offer from WALCO was late, although accepted by the board of HB Brady. Mr Cousins denied he made any recommendations to the board of HB Brady as to which offer should be accepted for the purchase of the Lease.
30. According to Mr Cousins, he was instructed by the board of HB Brady to finalise the sale of the Lease at the earliest opportunity for a price of \$20,000.00 to be paid by a payment of \$15,000.00 by the end of July 2009 and the balance of \$5000.00 by 30 June 2010. Mr Cousins was unable to explain why the payment of \$15,000.00 was not made by the end of July 2009 save that he believed WALCO had not finished their due diligence of the Lease. The due diligence consisted of the Lease being encumbrance free and WALCO conducting a final inspection of the Lease to ascertain there had been no unauthorised mining activity by others on the Lease in recent months. Mr Cousins said this variation to the agreement was negotiated verbally with the agreement of the board of HB Brady.
31. By 27 November 2009, Mr Cousins acknowledged HB Brady had received the \$15,000.00 from WALCO. Despite the requirement for the final payment of \$5,000.00 and some delays in the final inspection of the Lease by WALCO the Board of HB Brady were prepared to transfer the Lease to WALCO. As a consequence, Mr Cousins prepared the Transfer and it was signed by him for HB Brady and Mr Jackson for GPWA.

32. Mr Cousins said the application for the Exemption was lodged on the grounds of keeping the Lease in reserve, particle size not being suitable for use etc in similar terms to previous granted exemptions for the Lease.
33. The Transfer was not lodged with DMP because Mr Cousins said he was informed by officers of DMP the transfer could not occur until 'issues of free title had been complied with. It was put to Mr Cousins that it wasn't HB Brady's task to seek the Exemption at that time and he had reached an agreement with Mr Jackson for HB Brady to apply for the Exemption so GPWA didn't have to spend any money in the Expenditure Year. That was denied by Mr Cousins.
34. Mr Cousins did not agree the conditions on the WALCO offer to purchase the Lease were to ensure the Lease was encumbrance free and there had been no unauthorised mining on the Lease was different to that pleaded in the Response by HB Brady that there was needed "time to verify the extent of the deposit, and the quality of the gypsum."
35. The mining plan for the Lease was developed, according to Mr Cousins, by Mr Jackson with some help from him. Mr Cousins seemed to be somewhat confused over what period of time the mining plan was developed. According to Mr Cousins, the mining plan was developed over the best part of the year from when the offer to purchase the Lease was first lodged with HB Brady in July 2009 until November 2009.
36. It was also put to Mr Cousins that in a statutory declaration dated 22 December 2009 made in support of the Exemption he claimed negotiations were continuing for the sale of the Lease and the interested party required time to carry out feasibility studies and economic evaluations before final commitment to the sale. According to Mr Cousins, those comments were a reference to the conditions agreed that the Lease would be encumbrance free and that no unauthorised mining had taken place on the Lease prior to transfer.
37. No evidence was called by Lake Hillman in respect to the Application. In summary, that was the evidence called in the Application.

The Law

38. In *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported, WASC, FC 16 December 1988, SCL 7427* the Full Court confirmed the onus of proof rests with the applicant for forfeiture to adduce evidence of failure to meet expenditure requirements. Where failure to comply with expenditure conditions is established by the applicant for forfeiture the Act contemplates forfeiture. Upon the applicant for forfeiture establishing failure to comply with expenditure conditions the evidential burden shifts to the holder of the mining tenement to satisfy the Warden the case is otherwise not of sufficient gravity to

justify a recommendation to the Hon. Minister for forfeiture of the mining tenement.

39. As a consequence of the refusal by the Hon. Minister to grant the Exemption for the Expenditure Year for the Lease, I find Lake Hillman established that HB Brady has failed to comply with the minimum expenditure conditions for the Lease. It follows that a prima facie case for a recommendation for the forfeiture of the Lease is established. The onus rests upon HB Brady to satisfy the Warden that, on the balance of probabilities, the failure to comply with the minimum expenditure conditions for the Lease in the Expenditure Year is not of sufficient gravity to warrant a recommendation to the Hon. Minister for forfeiture of the Lease.
40. In *Craig v Spargos Exploration NL (unreported, Wardens Court, 1986, noted in 6 AMPLA Bull 73)* the Warden said of the matters to be considered before establishing the non-compliance is of sufficient gravity to order forfeiture the following:

“Subsection 98(5) thus impresses upon the warden the necessity of considering, not only the non-compliance and the facts directly bearing upon it, but also the events leading up to the non-compliance, the conduct of the parties and the actual and potential consequences of the non-compliance and of the forfeiture is sought, have regard throughout, to the object and policy of the Act. The whole policy of the Act is that a tenement holder unable to explore for or exploit mineral resources of a tenement should give way to some other person to do so. The Act encourages exploration and mining activity and discourages a tenement holder from going to sleep on his rights and obligations.”

41. Whether the future plans by the holder of a mining tenement is a reason to establish that non-compliance with minimum expenditure requirements is not of sufficient gravity to justify forfeiture has been considered in a number of cases. In *Majeed v Briggs and Schulda (unreported, Wardens Court, 1988, 7 AMPLA Bull 146)* the Warden was noted to have paid little regard to a proposed exploration program by the defendant, having noted the plaintiff had the will and financial resources to work the ground and as a general principle, the emphasis should be on the nature and extent of non-compliance and not on future proposals. However, in *Rose v Goldtime Australia Pty Ltd [2004] WAMW 8* the warden noted she could *“take into account plans which the tenement holder may have for the future concerning the tenement but in doing so would, in all cases, be obliged to assess the reasonableness of such plans and the likelihood of their ever been carried out.”* A similar approach was adopted by the Warden in *Richmond v Ynema [2004] WAMW 14*.

The Issues

42. The issues in the Application focus around the fact that HB Brady has previously been granted exemptions by the Hon. Minister from complying with

expenditure requirements for the Lease for approximately 16 out of the last 17 years on the basis the Lease was a reserve lease to a primary lease located elsewhere. The failure of HB Brady to obtain the Exemption for the Expenditure Year was in essence the only default on its part in meeting its obligations under the Act. However, the failure to obtain the Exemption for the Expenditure Year was because the grounds claimed for the Exemption were not reflective of the true reasons the Exemption was sought. Some of the grounds upon which the Exemption was sought were simply not applicable and the remaining grounds were either not reflective of the true situation that then prevailed and were in fact misleading or non-existent.

43. Lake Hillman submits the conduct of HB Brady toward the purported sale of the Lease to WALCO was questionable, given the evidence of its witnesses, and the cavalier manner in which the Exemption was sought intended to thwart the requirements of the Mining Act. In those circumstances, Lake Hillman submits the imposition of a penalty of up to \$10,000.00 in lieu of a recommendation for forfeiture of the Lease to the Hon. Minister would not be a sufficient outcome where the advantage of expending nothing on the Lease would be more financially advantageous than complying with the expenditure conditions.
44. HB Brady submits it is entitled to have a reasonable time in which to sell the Lease it has otherwise kept as a reserve lease to its primary mining operations for many years with the sanction of the Hon. Minister by the granting of exemptions from expenditure conditions for the Lease. HB Brady further submits it should be entitled to bring the sale of the Lease to WALCO or GSWA to its conclusion in accordance with its contract of sale. This is not a case, submits HB Brady, where there has been a gross overstatement of expenditure or some sort of dishonest understatement of expenditure. This is simply a case, submits HB Brady, of an attempt by it to sell the remaining asset of HB Brady to another party at the conclusion of its mining operations on another mining tenement. There is nothing in the circumstances of this case, submits HB Brady that would warrant the forfeiture of the Lease when this is the only year in some 17 years that it has failed to obtain the Exemption from compliance with expenditure conditions.

Findings of Fact

45. I find the evidence of both Mr Jackson and Mr Cousins regarding the circumstances surrounding the sale of the Lease has done little to allay the previous finding made in the Exemption proceedings of the nature of the purported sale of the Lease. According to Mr Nunn, the whole sum of the purchase price for the Lease had been paid prior to the signing of the Transfer to give effect to the transfer of the Lease from HB Brady to GPWA. Both Mr Cousins and Mr Jackson state, there remains the final payment of \$5,000.00 to

be paid to finalise the terms of the agreement for the sale of the Lease. I find the final payment of \$5000.00 on the sale of the Lease has not been paid by WALCO.

46. The evidence from Mr Jackson regarding the detail of the events after the acceptance of the offer from WALCO to HB Brady for the purchase of the Lease was to say the least lacking in detail and clarity. It may well be the case that Mr Jackson operates in business on the basis of a hand shake. However, his evidence in cross examination of important evidence dealing with dates and events during the transaction he was negotiating with HB Brady through WALCO was vague and lacking in detail. It was surprising given Mr Jackson said he needed to jog his memory by reference to his diary and other notes he had made on a number of occasions that he failed to bring those documents with him.
47. Further, I do not accept that Mr Jackson conducted searches of the Lease at DMP. He did not know fundamental information such as anniversary dates of the Lease. Evidence that Mr Jackson said he was told by DMP officers that the Transfer could not be lodged with DMP later became Mr Cousins had been told by DMP. The preparation of the mining plan was, according to Mr Cousins, a joint effort between Mr Jackson and Mr Cousins rather than Mr Jackson having prepared it. I find upon the evidence of Mr Jackson that he relied almost wholly upon the actions, information and advice of Mr Cousins in respect to the purchase of the Lease.
48. I found the evidence of Mr Cousins to be evasive and lacking in candour and credibility. It is extraordinary that something as fundamental as whether the final payment in a contract for the sale of the last remaining asset of HB Brady could be in dispute between the Chairman and the company secretary. Further, I accept that Mr Nunn was genuinely surprised when shown the Transfer for the Lease signed by Mr Cousins and when later shown that Mr Cousins had an interest in the very company to which the Lease was sold by HB Brady. I find the reaction of Mr Nunn to that revelations was more than something that had “slipped his mind” as suggested by Mr Cousins.
49. It is not believable that Mr Cousins held the view that Mr Jackson through WALCO or GPWA required time to carry out a feasibility study and economic evaluation on the Lease before a final commitment was made to the purchase of the Lease was the same as ensuring the Lease was encumbrance free and to confirm no unauthorised mining had occurred upon the Lease. There was no need to do so as all the information regarding the Lease was available to Mr Cousins from the position he held with HB Brady. Further, the delay in the signing of the Transfer and the payment of the \$15,000.00 on November 2009 was the consequence of delays occasioned, according to Mr Jackson, by

WALCO carrying out the due diligence and ensuring the Lease had not been recently mined.

50. Further, I find there was never any issue concerning the Lease being subject to issues of free title. The Lease was registered to HB Brady and had been so for many years. All that needed to occur was for the Lease to be transferred from HB Brady to WALCO or GPWA.

Conclusion

51. What is clear from the facts in this case is that HB Brady has for many years enjoyed the benefit of extended periods in which the Hon. Minister has been prepared to allow it to be exempt from its obligation to meet expenditure conditions on the Lease. The mineral wealth within the Lease has never been exploited by HB Brady since it was acquired.
52. It is submitted by HB Brady that the Mining Act contemplates that after mining operations end the holder of the mining tenement will have time within which to dispose of the mining tenement. That it says is demonstrated by the Hon. Minister granting various exemptions from expenditure conditions for the Lease after the primary mining operations on another mining tenement ended and was sold.
53. With respect I do not agree. The policy of the Mining Act is to exploit the mineral wealth of the State. The Mining Act requires the holder of a mining tenement to demonstrate it is exploiting the mineral wealth of the State by providing details of the work it completes on the mining tenement and the money it has expended in completing the work in each year..
54. The Mining Act also provides for the Hon. Minister to grant exemptions from meeting the minimum expenditure requirement where it can be demonstrated by the holder of the mining tenement that one or more of the circumstances provided by the provisions of s. 102(2)(a) to (h) of the Mining Act exists. None of those provisions make any mention of allowing time for the sale of the mining tenement following the end of mining operations on another mining tenement. Section 102(3) of the Mining Act empowers the Hon. Minister with a general and wide discretion to grant an exemption in his or her discretion for any reason he or she considers sufficient to justify an exemption from expenditure conditions. Such reason may be to allow the orderly and timely sale of a mining tenement by the holder.
55. There is an obligation and expectation upon the holder of a mining tenement when seeking the indulgence of the Hon. Minister to consider the grant of an exemption from expenditure conditions, or for that matter when reporting expenditure upon a mining tenement in a Form 5, to provide information that is accurate and does not mislead. The possible consequences of providing information that is inaccurate or tends to mislead or is in fact false has been

well illustrated in a number of cases including *Majeed v Briggs and Schulda*, *Rose v Goldtime Australia Pty Ltd*, *Taylor v Calegari* [2005] WAMW 2 and 3 and *Knopke v Stella Blast NL* [2005] WAMW 31.

56. Since about 2006, HB Brady has intended to sell the Lease, initially to generate cash flow when it suffered financial issues due to a declining local plaster board industry and later in 2007 when it sold its plasterboard business in Bayswater. Several attempts have been made by HB Brady to sell the Lease but it seems from the evidence called by HB Brady it did not take up the interest to purchase the Lease expressed by various potential purchasers including Lake Hillman.
57. That placed upon HB Brady the obligation to maintain the Lease in good standing by paying rent and rates and complying with expenditure obligations or obtaining exemption from doing so from the Hon. Minister. The evidence in this case indicates the grounds upon which some of the recent exemptions from complying with expenditure conditions were either obtained from the Hon. Minister or applied for by HB Brady tended to be misleading and lacked candour. It followed the Exemption sought for the Expenditure Year was recommended by the warden be refused and it was refused by the Hon. Minister.
58. I have considered the circumstances of the breach of the expenditure obligation upon the Lease by HB Brady, the facts and events that have lead up to the breach, the conduct of HB Brady in the period leading up to the sale of the Lease and the actual and potential consequences forfeiture of the Lease may have upon HB Brady. I have also considered and had regard to the policy and objects of the Mining Act. (*Pacminex (Operations) Pty Ltd v Australian (Nephrite) Jade Mines Pty Ltd* (1974) 7 SASR 401).
59. In *Surina Pty Ltd v Belcrest Corporation Ltd* (unreported, *Wardens Court*, 1987, 6 AMPLA Bull 111) the warden concluded the assessment of sufficient gravity to justify forfeiture should be made having regard to the state of the mining industry, particularly at the time of the non-compliance. I find the evidence of Mr Nixon established there was a healthy demand in 2009 for land that contained commercial supplies of gypsum to mine for use in the agricultural industry.
60. The final payment by WALCO or GPWA for the purported sale of the Lease has not been made to HB Brady and is some 2 years late. The Transfer of the Lease from HB Brady to GPWA has not been lodged with DMP by HB Brady, WALCO or GPWA when evidence suggests the parties were prepared to lodge the Transfer before final payment. The events that lead to the purported sale of the Lease from HB Brady to GPWA raise questions whether there was a sale of the Lease at all. These matters lead me to conclude it is unlikely the plans by

HB Brady to conclude the sale of the Lease will come to fruition in the foreseeable future or at all.

61. The failure by HB Brady to comply with the expenditure conditions in the Expenditure Year is, in my opinion, serious when viewed in the perspective of the existing buoyant demand for deposits of gypsum to mine in the years leading up to the purported sale of the Lease, that HB Brady had a number of opportunities to sell the Lease in the years since 2006 when it was clear to HB Brady the Lease was no longer needed for its business operations but chose not to accept the offers, that HB Brady held the Lease for some 17 years as a reserve lease to its mining operations on another lease and had Exemption from compliance with expenditure conditions for the Lease for all but one of the 17 years it has held the Lease.
62. The policy and intention of the Mining Act is to encourage the exploitation of the mineral wealth of the State. Holders of mining tenements who fall asleep on their obligations under the provisions of the Mining Act, or who are unable or unwilling to exploit the mineral wealth within any mining tenement held by them should, in a timely and efficient manner, dispose of the mining tenement by sale or surrender or face the prospect of action for the forfeiture of the mining tenement.
63. The policy and intention of the Mining Act is not encouraged, in my opinion, where the holder of a mining tenement who is no longer able or willing or has the means, to exploit the mineral wealth that may be within the mining tenement fails to act in a timely and efficient manner to dispose of the mining tenement by sale or transfer to a person who has the capacity to exploit the minerals on the mining tenement. If the disposal of the mining tenement by transfer or sale cannot occur efficiently and within a reasonable time by the holder of the mining tenement and the Hon. Minister is not prepared to extend any exemption from expenditure conditions the holder should surrender the mining tenement and thereby open the land to mining by persons who may be able to exploit the minerals contained within the mining tenement.
64. The holder of a mining tenement when challenged to demonstrate by an application for forfeiture for non-compliance with expenditure conditions the gravity of the non-compliance is not such to warrant forfeiture must demonstrate, amongst other things, to the Hon. Minister its conduct in holding the mining tenement is occasioned by activity on their part that is timely and reasonable such that they have attempted to comply with the policy and the intention of the Mining Act.
65. In this case HB Brady has taken advantage of the Exemptions from expenditure conditions for the Lease granted to it by the Hon. Minister over many years. When finally confronted by the requirement to dispose of the Lease has failed to do so efficiently or in a timely manner. The inability of HB Brady to

conclude the purported sale of the Lease in some 2 years, in circumstances in which on its face the purported sale appears simple, in an environment of significant demand for land containing known reserves of agricultural gypsum and against the background of a lengthy period of exemptions from expenditure from expenditure conditions granted by the Hon. Minister for the Lease makes the circumstances of the non-compliance by HB Brady grave in deed.

66. I find that despite of the existence of the purported sale of the Lease by HB Brady to GPWA and any difficulty that may be occasioned to HB Brady if the Lease is forfeited by the Hon. Minister the circumstances of the non-compliance with expenditure conditions by HB Brady is of sufficient gravity to warrant a recommendation for forfeiture. The imposition of a fine in lieu of a recommendation for forfeiture is, in my opinion, inappropriate as it would be more cost effective for HB Brady to fail to comply with the expenditure conditions and pay the fine for the breach of the expenditure condition than to met its statutory obligation in respect to expenditure. (see: *Brosnan v Flint [2003] WAMW 16* at page 7 and *Brosnan v Flint [2003] WAMW 18* at page 4).
67. Accordingly, for those reasons I recommend to the Hon. Minister that Mining Lease 77/39 held by HB Brady be forfeited.