[2007] WASCA 161

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	RE HIS HONOUR WARDEN CALDER SM & ANOR; EX PARTE LEE & ANOR [2007] WASCA 161
CORAM	**:**	McLURE JA PULLIN JA BUSS JA
HEARD	**:**	15 MARCH 2007
DELIVERED	**:**	1 AUGUST 2007
FILE NO/S	**:**	CIV 1691 of 2006
MATTER	**:**	An application for writs of *mandamus* and *certiorari* against His Honour WARDEN CALDER SM exercising jurisdiction pursuant to the *Mining Act 1978* in respect of plaint for forfeiture 10/45 affecting Mining Lease 52/743 held by HORSESHOE GOLD MINE PTY LTD EX PARTE GEORGE FRANCIS LEE WARWICK JOHN FLINT Applicants AND HIS HONOUR WARDEN CALDER SM First Respondent HORSESHOE GOLD MINE PTY LTD Second Respondent

Catchwords:

Mining law - Compliance with expenditure condition - Meaning of "in connection with mining" in reg 31 - Whether includes expenditure subsequent to mining - Meaning of "mining operations"

Legislation:

Mining Act 1978 (WA), s 8(1), s 70B, s 70C, s 70E, s 70H, s 82, s 84, s 97, s 102
Mining Amendment Act 1993 (WA)
Mining Amendment Act 2004 (WA)
Mining Regulations 1981 (WA), reg 31, reg 96C

Result:

Order nisi discharged

Category: A

Representation:

Counsel:

Applicants	:	Mr M McCusker QC & Mr N P Gentilli
First Respondent	:	No appearance
Second Respondent	:	Mr C L Zelestis QC & Mr M F Gerus

Solicitors:

Applicants	:	Jackson McDonald
First Respondent	:	State Solicitor for Western Australia
Second Respondent	:	Blakiston & Crabb

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

Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280
Re Heaney; Ex parte Flint v Nexus Minerals NL, unreported; FCt SCt of WA; Library No 970065; 26 February 1997
Re Nanaimo Community Hotel Ltd [1944] 4 DLR 638

1 **McLURE JA**: The applicants apply for writs of *certiorari* and *mandamus* in relation to a decision of Warden Calder SM made on 15 June 2006 dismissing the applicants' plaint for forfeiture of mining lease 52/743 ("the mining lease").

2 The applicants were unsuccessful in their claim that the holder of the mining lease, Horseshoe Gold Mine Pty Ltd (the second respondent), had failed to comply with the expenditure conditions for the mining lease for the year 27 September 2003 to 26 September 2004 ("the expenditure year"). Under reg 31 of the *Mining Regulations 1981* (WA) ("the Regulations") the second respondent was required to expend $98,700 in that year. The Regulations are made under the *Mining Act 1978* (WA) ("the Act"). Regulation 31 materially provides:

> "(1) The holder of a mining lease 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 …
>
> (1b) The specific provisions in regulation 96C, relating to allowable expenditure and non-allowable expenditure for the purposes of calculating expenditure under a lease, apply when calculating expenditure under this regulation."

3 Allowable expenditure under reg 96C includes annual tenement rent and local government rates, administration and land access costs and aboriginal heritage and aerial survey costs.

4 The Horseshoe mine is on the mining lease. Gold was mined from the open cut Horseshoe mine and processed by a carbon-in-pulp (CIP) plant. As the pit deepened, there was an increase in copper content in the ore. Gold processing ceased and copper processing commenced. Extractive mining and processing operations at the mine ceased in May 1994. Thereafter, the mine went on care and maintenance. Mining operations on the ground the subject of the mining lease had commenced in 1946.

5 The mining lease was granted on 27 September 2000. It replaced mining leases and general purpose leases on which were situated the mine site, low grade stockpiles, waste dumps, tailings dams, a camp site and associated infrastructure.

6 The second respondent was a wholly-owned subsidiary of Grange Resources Ltd ("Grange"). Grange employed two couples (Mr and Mrs Sivwright and Mr and Mrs Coumbes) to live and work on the mining lease. For most of the expenditure year they alternated on a three weeks on / three weeks off basis. The applicants refer to the employees as "caretakers". For the sake of convenience, I will describe them in that way without intending to reflect any judgment on the scope of their duties. There was no mining or processing plant and equipment left on the mining lease. However, there was a camp site comprising about 12 dongas, a kitchen, an entertainment area and a swimming pool. Included in the second respondent's claimed expenditure of approximately $241,000 in the expenditure year were payments for caretaker wages, camp costs, freight costs, motor vehicle expenses and communication costs. It was common cause below that there was claimable expenditure of $34,653 in the expenditure year comprising rent and rates and the cost of environmental reports relating to rehabilitation and water quality and supply.

7 The Warden found that the second respondent had expended or caused to be expended in connection with mining on the mining lease an amount of approximately $241,000 in the expenditure year. He continued (at [93]):

> "I am satisfied that the duties of and the work performed by the Sivwrights and the Coumbes went considerably beyond merely living on the tenement and keeping an eye on the ground and the facilities thereon. Their duties related to obligations that arose out of conditions that attached to the tenement, for example, ensuring the safety of the pit and its surrounds and ensuring by preservation and repair of bunds that no environmental damage was sustained either by water run-off generally or by escape of harmful material from the tailings dams. They included monitoring and maintenance of the water supply in respect of which annual reports were required, inspecting and maintaining bores, pipes, pumps and tanks connected with the water supply, regular general inspection of the lease, in particular the mine site, inspection and monitoring of the tailings dams, monitoring of bore water levels, recording rainfall and reporting regularly to Grange … Additionally, the keeping of some mine site records and arranging for the purchase and delivery of supplies and parts that are utilised at the campsite. The tenement holder had an ongoing environmental obligation pursuant to the terms of the [mining]

> lease and the work of the Sivwrights and the Coumbes was reasonably connected with that obligation."

8 The Warden also found (at [97]) that "the tenement holder simply has no plans at all concerning the mine other than to hold on to the tenement. That has been its intention and purpose from the time extractive and processing operations ceased in 1994".

Grounds of challenge

9 The order *nisi* was granted on seven grounds which largely overlap. At the hearing before this Court the applicants confined their challenge to the proper construction of the words "in connection with mining" in reg 31 and their capacity to apply to the facts found by the Warden. They contended that:

> "(1) expenditure subsequent to *'mining'* as defined in the Act (and not in connection with an intended resumption of *'mining'*) … is not '*in connection with mining*' for the purposes of reg 31 upon the proper construction of that regulation; alternatively
>
> (2) if expenditure subsequent to *'mining'* as defined in the Act (and not in connection with an intended resumption of *'mining'*) … can be '*in connection with mining*' for the purposes of reg 31, then upon the proper construction of that regulation, the connection must be direct and immediate rather than tenuous and remote and the intentions of the tenement holder must be taken into account in classifying the expenditure."

10 The applicants contended that the proper course in this case was for the second respondent to apply for exemption from the expenditure condition or for a retention licence. At the hearing of the application the applicants sought leave to add an additional ground in the following terms:

> "The Warden erred in law in holding that the expenditure incurred in connection with a mining operation which ceased in 1994 on a lease which terminated in 2000 was expenditure in connection with mining on mining lease 52/743."

The scheme of the Act and Regulations

11 Significant amendments were made to the Act by the *Mining Amendment Act 2004* (WA) which was assented to on 3 November 2004.

Applications for a mining lease must now be accompanied by a mining proposal or a mineralisation report (s 74(1)(ca) of the Act). It was accepted by the parties that the amendments made by this legislation had no application to the determination of the issues in this case.

12 Section 82 of the Act deals with the covenants and conditions of a mining lease. It materially provides:

> (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 -
>
> (b) use the land in respect of which the lease is granted only for mining purposes in accordance with this Act;
>
> (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.

13 The expression "expenditure conditions" is defined in s 8(1) of the Act as follows:

> "'**expenditure conditions**' in relation to a mining tenement means the prescribed conditions applicable to a mining tenement that require the expenditure of money on or in connection with the mining tenement or the mining operations carried out thereon or proposed to be so carried out"

14 That definition, which is wider than the expenditure condition prescribed in reg 31, refers to a "mining tenement" which is defined in s 8(1) to mean a prospecting licence, exploration licence, retention licence, mining lease, general purpose lease or a miscellaneous licence granted under the Act and includes the specified piece of land in respect of which the mining tenement is so granted.

15 "Mining" is defined in s 8(1) to include fossicking, prospecting and exploring for minerals, and mining operations. The latter expression is defined as follows:

> "'**mining operations**' means any mode or method of working whereby the earth or any rock structure stone fluid or mineral

bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted or refined or dealt with for the purpose of obtaining any mineral therefrom whether it has been previously disturbed or not and includes -

(a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral;

(b) operations by means of which salt or other evaporites may be harvested;

(c) operations by means of which mineral is recovered from the sea or a natural water supply; and

(d) the doing of all lawful acts incident or conducive to any such operation or purposes".

16 Under s 102 of the Act, the holder of a mining tenement may be granted a certificate of exemption totally or partially exempting the mining tenement from the prescribed expenditure conditions relating thereto. In respect of a mining lease, the exemption can be for a period of up to five years. Section 102(2) sets out the grounds on which exemption may be granted. It materially provides:

"(2) A certificate of exemption may be granted for any of the following reasons -

(a) that the title to the mining tenement is in dispute;

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

(c) that time is required to purchase and erect plant and machinery;

(d) that the ground the subject of the mining tenement is for any sufficient reason unworkable;

(e) that the ground the subject of the mining tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future or that at the relevant time

> economic or marketing problems are such as not to make the mining operations viable;
>
> (f) that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation;
>
> (g) that political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is, or subject to conditions that are, for the time being impracticable … "

17 Section 84 of the Act deals specifically with conditions for prevention or reduction of injury to land. It materially provides:

> "(1) On the granting of a mining lease, or at any subsequent time, the Minister may impose on the lessee reasonable conditions for the purpose of preventing or reducing, or making good, injury to the natural surface of the land in respect of which the lease is sought or was granted, or injury to anything on the natural surface of that land or consequential damage to any other land."

18 Under s 84A as it stood at the relevant time, the Minister had the power to require the holder of a mining lease to lodge security for compliance with conditions imposed under s 84 in relation to the lease. A mining lease is liable to forfeiture for breach of a covenant or condition to which the lease is subject (s 97).

19 Finally, reference must be made to a retention licence. Its purpose is explained in the second reading speech relating to amendments made by the *Mining Amendment Act 1993* (WA). The Minister said:

> "This Bill also introduces a new title, to be called a retention licence, which will be an intermediate form of tenure between the exploration licence and the mining lease. Its primary purpose will be to provide secure tenure, for a limited time, to enable an explorer to hold an identified mineral resource which is not a commercially viable proposition in the short term but for which there is a reasonable prospect for development in the longer term. From time to time deposits are identified for which no further exploration or mining is warranted in the short

> term. The identified resource may be sub-economic or cannot be mined for some other reason. In these circumstances the current mining tenements are inadequate. The exploration licence is for the exploration of the ground for mineral resources; it is not a holding title, and the mining lease is inappropriate and too expensive. A less expensive title is needed with a work program determined by the Minister after taking into account economic, technological and policy factors."

20 Under s 70B of the Act, the Minister may grant to the holder of a primary tenement (defined to include a mining lease) a retention licence in respect of the whole or any part of the land the subject of the primary tenement on such terms and conditions as the Minister considers reasonable.

21 Section 70C(1)(f) provides that an application for a retention licence must be accompanied by a statutory declaration made by the applicant to the effect that -

> (i) there is an identified mineral resource in the area in respect of which the licence is sought; and
>
> (ii) mining of that identified mineral resource is for the time being impracticable for one or more of the reasons referred to in subsection (2).

22 Section 70C(2) provides:

> "For the purposes of subsection (1)(f)(ii) mining of an identified mineral resource may be impracticable because -
>
> (a) the identified mineral resource is uneconomic or subject to marketing problems although that resource may reasonably be expected to become economic or marketable in the future;
>
> (b) the identified mineral resource is required to sustain the future operations of an existing or proposed mining operation; or
>
> (c) there are existing political, environmental or other difficulties in obtaining requisite approvals."

23 The maximum term of a retention licence is five years (s 70E). Under s 70H(1)(d), every retention licence is deemed to be granted

subject to the holder of the licence complying with the expenditure conditions (if any) applicable to the land. Section 70H(2) gives the Minister the power at any time to cancel or vary such expenditure conditions. At this time there is no prescribed expenditure condition for a retention licence. It is unnecessary for the purposes of these proceedings to determine whether a retention licence can coexist with the primary tenement.

The conditions of the mining lease

24 Under condition 18 of the mining lease, measures to protect the environment had to be carried out generally in accordance with documents titled:

> "• '385 Pit South Waste Dump' dated January 1990;
>
> • 'Horseshoe Mine Joint Venture - Tailings Dam Extension Proposal and Support Document, Notice of Intent' undated but received July 1993;
>
> • Correspondence titled 'Horseshoe Project' dated 17 August 1993".

25 Although the documents referred to were not adduced in evidence it is apparent that the measures to protect the environment identified in those documents continued to apply to the mining lease (granted in 2000) and related to mining operations previously conducted thereon. There was no challenge below to the validity of condition 18 or the other conditions of the mining lease that obliged the second respondent to rehabilitate those aspects of the site affected by the mining operations that ceased in 1994. Indeed, the applicants conducted their case before the Warden on the basis that no significance was to be attached to the grant of the mining lease in 2000.

26 On the mining lease there are a number of waste dumps, low grade stockpiles and floatation tailings storage facilities, in particular, a CIP tailings storage facility covering approximately 9 hectares and a copper floatation storage facility covering approximately 16 hectares. There are five monitoring bores around the tailings storage facilities. The water level and quality of the water in the five monitoring bores and two ground water bores are required to be regularly tested for contamination and be the subject of an annual report pursuant to condition 22 of the mining lease. Further, drainage earthworks constructed around the mine and plant sites had to be maintained to prevent contaminated water run off.

27 It is also a condition of the mining lease that the second respondent provide security in the sum of $307,500 for due compliance with the environmental conditions of the mining lease.

The evidence and the findings

28 The parties disagree as to the finding made by the Warden about the second respondent's intentions regarding future mining or mining operations on the mining lease. In those circumstances it is necessary to refer to the evidence and to the Warden's findings.

29 There was geological evidence from Mr A Nutter, Grange's technical director, that there were in-ground and stockpile copper resources on the mining lease. The stockpile resources were in the floatation tailings and waste dumps. According to Mr Nutter, the price of copper was a significant economic factor affecting the exploitation of the resource. In September 2003 his view was that it was not worth looking at mining the in-ground resource because of the very low grades of copper and high extraction costs. However, as at August 2004 there was a good chance that a profit could be made from the stockpile resource, although before any extractive processes could commence, a feasibility study was necessary. Four studies had been undertaken since 1994 in respect of the low grade stockpiles. The economics of establishing a small operation to treat the low grade stockpiles was evaluated during 1996 to 1998 pursuant to a joint venture with Electrometals Mining. The studies involved assessment of a number of different processing techniques, including a novel process developed by Electrometals Mining. A pre-feasibility study completed in April 1998 concluded that development at that time could not be justified due to the low copper price and high risk.

30 In 1998 Grange entered into a partnership with a small group of investors. In 2003 a pre-feasibility study on establishing a leaching operation on site to process the floatation tailings and low grade stockpiles was completed. The study showed the proposed project to be complex relative to its modest size and to have a high risk profile. The partnership decided against proceeding with the project and the partnership was dissolved in November 2003. Mr Nutter gave evidence that by 2004 Grange's objective was to rehabilitate the waste dumps but leave the low grade tailings in such a state as would enable them to be readily processed in the future. Grange retained Mr Martinick to prepare a draft environment rehabilitation plan and to prepare costings for the rehabilitation work. Following Mr Martinick's review, Grange made provision in its accounts for $1 million for rehabilitation work. Mr Nutter

had been advised by the relevant government department that it proposed to increase the security bond under the mining lease to $1.06 million. At the time of trial, Grange's objective was to introduce a partner under a joint venture arrangement in order to develop an operation on site to treat the stockpiles and the tailings and to progressively rehabilitate the site and thus reduce the bond. The Warden addressed these matters at [94] of his reasons as follows:

> "Regulation 31 does not require that there be a present and on-going mining operation for there to be allowable expenditure. The legislation creates obligations on tenement holders that continue beyond the cessation of extractive and processing operations on tenements and include, in particular, environmental obligations. Mr Nutter said that it was inappropriate to simply close down the mine in 1994 and immediately proceed to comply with environmental obligations to the extent that there was completed closure of the mine. That was so because of the presence on the tenement of the remaining resource that it was then thought may later be assessed as being mineable. In my opinion that was a reasonable position to adopt at the time. I am satisfied that he therefore instructed Mr Martinick to proceed on the basis that Mr Martinick's report should indicate where environmental rehabilitation work of a complete mine closure type should be undertaken and to also identify those parts of the tenement in respect of which there was potential for further mining to be undertaken and in respect of which it would not be appropriate to undertake closure-type environmental work."

31 It is apparent from the final sentence of this paragraph that the Warden found that the second respondent contemplated the possibility of future mining operations on the mining lease. He described that (at [153]) as an expression on the part of Grange of nothing more than a hope that a mining operation would be commenced, which was consistent with the history of the tenements since 1994. He continued (at [154]):

> "It has not been established that there is any proposed mining operation to be undertaken on … Horseshoe. It cannot be said that there is a likelihood that there will ever be any such operation carried out by Grange or by any other person. It cannot be said that there is anything beyond a mere possibility that there will be a future operation."

32 The finding at [97] set out above that the second respondent had no plans at all concerning the mine is to be seen in the light of the Warden's reasons at [94], [153] and [154] that there was a possibility of a future mining operation.

33 The Warden also concluded (at [97]) that the work done by the Sivwrights and Coumbes and the expenditure incurred in connection with that work was properly within reg 31 because it was work done and expenditure incurred in connection with the mining operation "that ceased in 1994 but in respect of which the tenement holder had ongoing statutory obligations to fulfil". There is no challenge to the finding at [93] that the expenditure in the relevant year was in connection with the fulfilment of conditions of the mining lease, in particular, the second respondent's environmental obligations.

The construction of reg 31

34 It was not in dispute that the proper construction of reg 31 and its capacity to apply to the facts found in this case raised questions of law: ***Collector of Customs v Agfa-Gevaert Ltd*** (1996) 186 CLR 389 at 395.

35 Under reg 31, the expenditure must be *in* mining on the mining lease or be *in connection with* mining on the mining lease. The reference to "mining lease" in the opening line of reg 31 is to the legal instrument. The subsequent reference to "lease" in the expression "expended … on the lease" is to the land the subject of the legal instrument.

36 The applicants did not contend that reg 31 required that there be actual mining, or expenditure on mining, on the tenement during the expenditure year. Such a proposition is inconsistent with the language of reg 31 and with unchallenged authority in this jurisdiction: ***Re Heaney; Ex parte Flint v Nexus Minerals NL***, unreported; FCt SCt of WA; Library No 970065; 26 February 1997. Kennedy J said in that case (at 4):

> "It is important for the present purposes to note that the expenditure does not have to be on mining, as such, to satisfy the terms of [reg 31]. It may be 'in connection with' mining. The words 'in connection with' are words of wide import and, as with the words 'connected with', and, subject to the context in which the words are used, are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote - see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 115 ALR, at 10-11. See also *Berry v Federal Commissioner of Taxation* (1953) 89 CLR 65,

> at 658-659, and *Australian National Railways Commission v Collector of Customs (SA)* (1985) 8 FCR 26, at 269, 275-277. In the present context, the words 'in connection with' can readily extend to matters leading up to mining - see *Johnson v Johnson* [1952] P 4, at 50-51, and *Nanaimo Community Hotel Ltd v Board of Referees* [1945]) [*sic*] 3 DLR 22, cited in *Claremont Petroleum NL v Cummings* (1992) 110 ALR 23, at 280."

37 McFarlane J in the Canadian case of ***Re Nanaimo Community Hotel Ltd*** [1944] 4 DLR 638 (approved on appeal) said at 639:

> "One of the very generally accepted meanings of 'connection' is 'relation between things one of which is bound up with or involved in another'; or again 'having to do with'. The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase 'having to do with' perhaps gives as good a suggestion of the meaning as could be had."

38 As stated by Kennedy J in ***Flint***, what is a sufficient connection depends upon the context in which the words are used and, I would add, the scope and purpose of the Act: ***Collector of Customs v Pozzolanic Enterprises Pty Ltd*** (1993) 43 FCR 280. The Federal Court in ***Pozzolanic*** was considering the construction of the *Customs Act (1901)* (Cth) and the *Excise Act (1901)* (Cth) and whether fuel used for trucks delivering feed was "other operations" connected with the rearing of livestock for the purposes of the Act. The Federal Court said (at 288 - 289):

> "The words 'connected with' are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote. As Sheppard and Burchett JJ observed in *Australian National Railways Commission v Collector of Customs (SA)* at 378, the meaning of the word 'connection' is wide and imprecise, one of its common meanings being 'relation between things one of which is bound up with, or involved in, another' … The range of relationships to which the words apply for the purpose of the Act depends upon a judgment about that purpose."

39 It is significant that none of the Act, Regulations or conditions of the mining lease oblige the second respondent to carry out mining operations (or indeed mining) on the lease. Regulation 31 is the sole source of a tenement holder's obligation in relation to mining-related expenditure.

The policy behind the expenditure conditions and the system of forfeiture for non-compliance therewith is that a minimum level of expenditure must be incurred on or in connection with the mining tenement in each year of its term.

40 The applicants contended that the expenditure incurred or caused to be incurred by the second respondent was not incurred "on mining" and could only be incurred "in connection with mining" if at the time it was incurred there was an intention to engage in mining on the mining lease. In the absence of such an intention, expenditure subsequent to mining was outside the scope of reg 31.

41 The second respondent's submissions as to the proper construction of reg 31 may be summarised as follows. First, the expenditure in question must relate to the land (ground) the subject of the mining lease. Secondly, the expenditure will be for the provision of goods or services (for convenience compendiously referred to as activities). Thirdly, regard should be had to the nature and purpose of the activity the subject of the expenditure in determining whether it is in connection with mining. Fourthly, it is not necessary that there be current active mining, or an intention to carry out mining, on the mining tenement in the relevant expenditure year. This flows, it is said, from the nature of mining where there is often a long lead time before it is possible to form a definitive intention to carry out mining operations and an intention can be frustrated by activities beyond the tenement holder's control. Fifthly, if the purpose of an activity is to assist, investigate, assess or facilitate future possible mining **and** the nature of the activity is such that it is reasonably capable of contributing to such assistance etc, then that purpose and nature will supply the nexus between the expenditure and mining. Sixthly, mining operations do not cease when the process of extraction and processing ends. Managing the consequences of mining, including rehabilitation, and the possibility of future mining are within the definition of mining, alternatively within par (d) of the definition of mining operations or, in the further alternative, are in connection with mining.

42 The word "mining" in propositions 4, 5 and 6 appear from the context to be an intended reference to "mining operations" as distinct from fossicking, prospecting or exploring for minerals. The first three propositions are non-contentious. The last three are not. I propose to start with the sixth proposition which depends on the meaning of mining.

43 Managing the consequences of a mining operation is clearly not fossicking, prospecting or exploring for minerals. Further, it is not within

the general definition of mining operations or the particular activities identified in pars (a), (b) or (c) of that definition. The matters in pars (a), (b) and (c) concern particular aspects of an active mining operation and par (d) should in my opinion be read *ejusdem generis* with the preceding paragraphs. That is, the acts to which par (d) refers must be incidental or conducive to existing (active) mining operations as that expression is generally defined.

44 The second respondent does not rely on any particular meaning of mining that goes beyond the inclusive statutory definition. Moreover, there is nothing in the natural and ordinary meaning of the term which would encompass managing the consequences of mining operations that had permanently ceased. It follows that managing the consequences of mining operations in those circumstances is not mining for the purposes of reg 31.

45 The remaining question is whether expenditure for the purpose of managing the consequences of a mining operation is "in connection with mining". I propose to confine my consideration to a narrower formulation of the question which reflects the factual findings made by the Warden. That question is whether, following the cessation of mining operations and in the absence of any intention to conduct future mining, expenditure for the purpose of complying with conditions of the mining lease is capable of being "in connection with mining". It is apparent from the authorities to which I have earlier referred that the expression "in connection with" can readily extend to expenditure on matters subsequent to and consequential upon the specified thing (in this case, mining operations). I see no basis in the language or purpose of the Act and Regulations to read down the expression "in connection with" to exclude such matters. There is no challenge in this case to the validity of the conditions of the mining lease which the Warden held continued to apply after the cessation of mining operations. In those circumstances the appropriate course is to proceed on the basis that they are valid without determining the issue. Accordingly, as the Act contemplates the continuation of a mining lease after the cessation of mining operations, it would be wrong to read down the expression "in connection with" to exclude expenditure incurred subsequent to the cessation of mining. The rationale and purpose of a retention licence and exemption from expenditure conditions do not apply to the close down phase after the cessation of mining operations.

46 It follows that I accept the correctness of the second respondent's fourth proposition; namely that it is not necessary that there be current

active mining or an intention to carry out mining in the relevant expenditure year for there to be claimable expenditure under reg 31. There is merit in the approach reflected in the fifth proposition advanced on behalf of the second respondent. For example, expenditure incurred on the pre-feasibility studies undertaken in the period from 1996 to late 2003 for the purpose of determining whether to recommence mining operations in the form of processing the low grade tailings on the mining lease is, in my view, expenditure in connection with mining notwithstanding the absence of an intention to mine. However, it is unnecessary in this case to determine the correctness of the detail of the proposition, including in particular, the identification of the activity as "possible future mining" instead of mining. If approved, it is likely to be seen as governing the extent or degree of connection required between expenditure and mining. This is not a case which requires exploration of the outer limits of the connection. The expenditure in question was for employees to live on site and that was reasonably required to enable the second respondent to fulfil its obligations under the mining lease.

47 At the hearing before this Court the applicants did not press their grounds challenging the finding that the expenditure was in connection with the fulfillment of the conditions of the mining lease. This no doubt is a reflection of the very significant hurdles in identifying any reviewable error of law. In those circumstances, it is unnecessary to address the second respondent's claim that any expenditure not connected with fulfillment of the conditions was claimable expenditure because it related to the possibility of future mining operations. Moreover, it is implicit in the Warden's findings that the activities connected with fulfillment of the conditions of the mining lease justified the employment of full-time staff at the mine site, in which case any incidental activities directed to maintaining the site would not undermine the Warden's finding.

48 Where, as found in this case (at [93] and [97]), the expenditure was incurred in the performance of conditions of the mining lease that survive the cessation of mining operations, the connection between the expenditure and mining is direct and immediate rather than tenuous or remote. The Warden did not err in concluding that the expenditure satisfied the requirements of reg 31.

49 The remaining matter is the applicants' application for leave to add an additional ground to the effect that the expenditure on the mining lease that was in connection with mining operations conducted on earlier and surrendered mining tenements (albeit covering the same ground) could not be expenditure in connection with the mining lease. I would refuse leave

to add this ground. The parties conducted the hearing before the Warden on the basis that the mining lease was a consolidation of the earlier tenements and that this had no impact on the issues arising for determination. If that issue had been raised below, evidence could have been adduced as to the content of the documents referred to in condition 18 of the mining lease which expressly applied to that lease. If the documents confirm the assumption on which the trial and this appeal was conducted, the proposed ground would in substance be a challenge to the validity of condition 18 and other conditions of the mining lease obliging the second respondent to rehabilitate those aspects of the ground affected by the mining operations that had ceased. As noted earlier, the applicants did not expressly challenge the validity of the conditions in this Court or below. They made no submissions on the subject, not even to address whether there was an arguable case. They should not be permitted to raise it at this late stage.

50 Accordingly, I would refuse leave to add the additional ground and order that the order *nisi* be discharged.

51 **PULLIN JA**: I agree with McLure JA.

52 **BUSS JA**: I agree with McLure JA.