IN THE WARDEN'S COURT)
HELD AT KALGOORLIE)

Heard: 28.10.86
11.12.86
12.12.86

Delivered: 22.12.86

Plaint No. 1/867

BETWEEN: KEVIN CRAIG

Plaintiff

DECISION RE BONA FIDE EXPENDITURE

and

SPARGOS EXPLORATION NL
and QUEEN MARGARET GOLD MINES NL

Defendants

Mr. R. Cannon instructed by Okeby and Ginbey appeared for the Plaintiff.

Mr. P. Bogue instructed by Smyth and Thomas appeared for the Defendants.

REASONS FOR DECISION

WARDEN D.J. REYNOLDS S.M.

On the 19.08.86 the Mining Registrar, Kalgoorlie, received Plaint No. 1/867 by the Plaintiff, KEVIN CRAIG ("CRAIG"). The Plaint claimed as follows:

"the Defendant has not complied with the expenditure conditions relating to Mining Lease 29/2 in that the amounts required to be expended on mining or in connection with mining on the tenement have not been so expended for the year ending 21st December 1985 and no exemption under Section 102 has been obtained."

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The relief sought is set out on the face of the Plaint as follows:

"The Warden recommend to the Minister forfeiture of mining lease 29/2."

The Defendants, SPARGOS EXPLORATION NL ("SPARGOS") and QUEEN MARGARET GOLD MINES NL ("QUEEN MARGARET"), applied for mining lease 29/2 ("M.L. 29/2") on the 16.04.82.

M.L. 29/2 was granted commencing on the 22.12.82. M.L. 29/2 comprised the same land as that which formerly comprised various gold mining leases and mineral claims under the Mining Act 1904 and which were held by the defendants. M.L. 29/2 therefore represented a rationalisation of the land as a mining lease under the Mining Act 1978 as amended ("the Act"). M.L. 29/2 has an area of 382.86 hectares.

The Mt. Ida mine is located on M.L. 29/2. The Mt. Ida mine used to be called the Timoni mine but nowadays it is referred to as the Mt. Ida mine. The mine is in a district called Copperfield. The mine has a history dating back to early this century. It also has a history of producing gold in its early days.

The mine was held by Lake View and Star for some time until it closed down in 1966. CRAIG first became involved in the mine in 1972 when he held a Tribute Agreement with Lake View and Star which enabled him to work the mine. No gold had been produced from the mine between the years 1966 and 1972.

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For six months during 1972 CRAIG worked underground in the south shaft of the mine and along with three others, recovered 840 fine ounces of gold from about 1000 tonnes of ore. This work caused the Menzies State Battery to reopen and during the six months, up to 13 men were employed at the Battery to treat the ore taken from underground at the mine. CRAIG ceased working at the mine after six months because it was or became uneconomic at the royalty rate previously agreed. Parts of the mine were flooded and dewatering the mine was very expensive.

Several years later Lake View and Star ceased to hold any interest in the mine and disposed of the head frame, power house and other equipment to a scrap metal merchant. In 1978 CRAIG travelled to the area with the idea of taking up the land. He found that a Mr. Davies had been there a day earlier and taken it up.

A syndicate was then formed to purchase the tenements from Mr. Davies. The syndicate, known as the Mt. Ida Syndicate, consisted of SPARGOS (50 percent), CRAIG (20 percent), Richard Ladyman (15 percent) and James Keogh ("KEOGH") (15 percent). CRAIG was directly involved in purchasing items of plant and equipment for the syndicate. QUEEN MARGARET was floated in 1979 and the individual members of the syndicate vendored their interests in the tenements and the plant and equipment to QUEEN MARGARET. The end result was SPARGOS and QUEEN MARGARET each holding a 50 percent interest in the Mt. Ida mine and the land immediately about it together with the plant and equipment.

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CRAIG then entered into a two year employment contract with Minplex Resources Pty Ltd which was the management company for SPARGOS and QUEEN MARGARET. During 1979 and 1980 SPARGOS and QUEEN MARGARET pursued a vigorous programme to dewater the mine and refurbish the shaft. CRAIG was then and still is highly experienced in dewatering mines. His duties in 1979 and part of 1980 included dewatering the mine, refurbishing the shaft and clearing access to the 4 and 5 levels and gaining access to the 6,7 and 8 levels. However, he didn't remain at the Mt. Ida minesite. He was sent to another mine at Bulong to dewater it.

When CRAIG was at Bulong, the SPARGOS/QUEEN MARGARET joint venture continued working on the 4 level and carried out a surface drilling programme to the north of the mine site. Costeaning and diamond drilling were also undertaken.

It is clear on the evidence that 1980 and 1981 were very busy years. The north and south shafts were both opened up. The plant was designed to treat 20,000 tonnes of ore per annum and it was hoped to prove up a reserve of 100,000 tonnes. KEOGH referred to this in his evidence and there is also mention of it in the 1980 Annual Report of SPARGOS.

KEOGH also gave evidence that the cost of redevelopment became far more expensive than initially thought. The grades were not economic and there were pockets in the 4 and 5 levels that were too dangerous to work in. This may have been the result of or compounded by the fact that the mine was previously flooded. Timber swells in water. When a mine is dewatered, air then gets to the timber causing it to shrink and this in turn can allow a considerable amount of rock movement.

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The Chairman's Address in the 1981 Annual Report of QUEEN MARGARET set out inter alia:

"Disappointing development grades were obtained from the No. 4 level North Section at Mt. Ida and this led to the postponement of the development on the No. 6 level. Decreased revenue derived from the battery sands tailings retreatment operation ($A800,000) during 1981, also placed unnecessary pressure on corporate liquidity at a time when the company most needed these funds.

The 1981 Mt. Ida Joint Venture income eventually proved too small to maintain the vigorous development necessary to place the venture on an economic footing and the underground operation of the mine was suspended in January, 1982. The company consequently is in difficulty with its involvement in this project because of the North Section's inability to carry sufficient ore grade reserves at current gold price levels."

KEOGH gave evidence that in round figures, about $7,000,000 had been spent on the Mt. Ida mine comprising about $1,700,000 for plant and equipment and about $5,300,000 for dewatering and exploration. I will refer later to amounts of expenditure when examining the evidence of BERNARD McGUINESS ("McGUINESS") an accountant employed by Minplex Resources Pty Ltd.

In 1982 CRAIG negotiated a Tribute Agreement with SPARGOS and QUEEN MARGARET. In all there were four Tribute Agreements and CRAIG eventually vacated the Mt. Ida mine in March 1984. One of the conditions of the initial Tribute

Agreement was that CRAIG maintain and service all underground pumps and to assist to maintain the power house and compressors.

This was important to SPARGOS and QUEEN MARGARET for the on going treatment of tailings located in the Mt. Ida area and about 8 kilometres north east of the Mt. Ida mine. They needed water to treat the tailings and the only water available in any great quantity was located at the 1000 foot level of the Mt. Ida mine.

When CRAIG was acting under the Tribute Agreements he treated about 2090 tonnes of ore for about 1460 ounces. He had another 4 men working with him and once again he kept the Menzies State Battery going at full capacity. CRAIG gave evidence that he paid a total of $161,590.00 to SPARGOS and QUEEN MARGARET in royalties pursuant to the Tribute Agreements and that he and his fellow workers earned for themselves a total of $193,055.00. CRAIG sought a further Tribute, however, the parties were unable to negotiate any further agreement. CRAIG then left Mt. Ida once again.

Before CRAIG left the mine and after, SPARGOS and QUEEN MARGARET employed a caretaker to live on site to ensure that none of the plant and equipment was stolen.

In July 1986 CRAIG noticed the headframe from Mt. Ida on the back of a truck in a yard in Kalgoorlie. He subsequently went back to the mine site in October 1986 and noticed that all of the plant and equipment had been removed. There was a kato machine doing some costeans and

some gridding had been done. Other than that it was clear to him that no work had been done at the mine since he had left. He later located the bulk of the plant and equipment at another mine near Kambalda. SPARGOS and QUEEN MARGARET concede that the plant and equipment was removed and that a lot of it was sold.

During the hearing two videos were shown. The first was a promotional video for QUEEN MARGARET. It showed some exploration and development at the Mt. Ida mine. The second was made shortly before the hearing and it showed the mine site and the immediate surrounding area. The mine had ceased operation and there was no longer any workforce on site.

The expenditure year the subject of the Plaint is the 22.12.84 to the 21.12.85 inclusive.

McGUINESS gave evidence that the SPARGOS/QUEEN MARGARET joint venture expended $113,060.00 on M.L. 29/2 for the year ending 31.12.85. There seemed to be no issue taken that this was the amount of expenditure relied upon for the year ending 21.12.85 and so I will proceed on that basis. Using the figures given in evidence by McGUINESS, I calculate a total of $112,960.00. This small discrepancy is of no consequence. He gave the following breakdown:

Item	$
1. Depreciation	63,811.00
2. Wages	14,784.00
3. Generator Hire	2,888.00
4. Fuel	3,855.00
5. Food	2,340.00

Item	$
6. Hardware	1,564.00
7. Motor (Caretaker)	770.00
8. Administration	2,475.00
9. Stationary	145.00
10. Insurance	608.00
11. Loss on sale	15,976.00
12. Rents, Rates, Sundry	3,744.00
TOTAL:	$112,960.00

Section 82(1)(c) of the Act provides as follows:

"82. (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 -

(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."

The expenditure conditions applying to mining leases are prescribed in Regulation 31 of the Mining Regulations 1981 as amended ("the Regulations"). Regulation 31(1) provides as follows:

"31. (1) The holder of a mining lease shall expend 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 wages he would otherwise be entitled to if similarly employed elsewhere in the district shall be deemed to have been expended:

> Provided that where the area of a mining lease does not exceed five hectares the minimum annual expenditure shall be $5,000."

As previously mentioned, M.L. 29/2 has an area of 382.86 hectares. At a rate of $100.00 for each hectare or part thereof the expenditure requirement can therefore be calculated to $38,300.00. The amount of $10,000.00 provided in Regulation 31(1) is expressed as a minimum not a maximum. If it was a maximum then the expenditure requirement on M.L. 29/2 would calculate back to $10,000.00. However, given that it is a minimum, the required expenditure on M.L. 29/2 is $38,300.00.

Section 98 of the Act is the relevant provision on forfeiture of a mining lease. Subsections 98(1) to 98(5) are particularly relevant and they provide as follows:

> 98. (1) Where the requirements of this Act are not being complied with in respect of the expenditure conditions applicable to an exploration licence, a mining lease or general purpose lease, any person may apply to the warden for the forfeiture of such licence or lease as provided in this section.
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> (2) An application for forfeiture under this section shall be made during the expenditure year in relation to which the requirement is not complied with or within 8 months thereafter in such form and manner as may be prescribed and shall be accompanied by the prescribed fee.

(3) The application for forfeiture shall be heard in open court by the warden.

(4)(a) When the warden finds that the holder of an exploration licence or lessee of the mining lease or general purpose lease has failed to comply with such requirements as are mentioned in subsection (1) of this section, the warden may recommend the forfeiture of such licence or lease, or impose a penalty not exceeding $500 as an alternative to the forfeiture or dismiss the application.

(b) Where a penalty is imposed under this section the warden may award the whole amount of the penalty or any part thereof to the applicant.

(5) A recommendation shall not be made under subsection (4) of this section unless the warden is satisfied that the non-compliance with such requirements is, in the circumstances of the case, of sufficient gravity to justify the forfeiture."

(my underlining)

The first thing to note is that the Plaint was made within time. Subsection 98(2) requires such plaints to be made during the expenditure year or within 8 months thereafter. In this instance the end of the expenditure year was the 21.12.85 and the Plaint was made on the 19.08.86, two days before the expiration of the 8 month period.

The degree of proof required in an application for forfeiture of a mining tenement is proof on the balance of probabilities, due regard being had to the fact that the forfeiture of potentially valuable or valuable property is involved (see Wells v Powell (1971) S.A.S.R. 313 and followed in Mines Exploration Pty Ltd v Mills and Timmins (1971) 2 S.A.S.R. 464).

The first question to answer is whether or not the defendants have failed to comply with the expenditure conditions. To answer this question it is necessary to determine whether each item of expenditure as stated by McGUINESS is "in mining on or in connection with mining on the lease."

A significant amount of the expenditure was for depreciation of plant and equipment. Each of the Plaintiff and the Defendants called an accountant to give evidence on the meaning of depreciation. Mr. Kollosche of Arthur Andersen & Co was called by the Plaintiff. He said that depreciation is not a cash expenditure and that it is not money spent. He agreed that depreciation is an expense in practical terms for the purpose of the Income Tax Assessment Act. Mr. Brayshaw of Bentley & Co was called by the Defendants. He did not agree with the proposition that depreciation is not a cash expenditure. He would label depreciation as monetary expenditure.

There was, however, no real divergence in their views on what I consider to be the most relevant aspect of depreciation so far as the Act is concerned. Mr. Killosche

said that depreciation is the allocation of the cost of an asset. It is a means of allocating previous money spent. Mr. Brayshaw said that depreciation had a usage as a time function.

In this instance the Defendants have depreciated plant and equipment. They have allocated the expense over a period of time, in this instance, years. In my opinion it would have been legitimate for them to claim the whole of the cost of the plant and equipment as expenditure for the purposes of the Act in the year that they purchased it and took possession of it. They are not entitled to claim depreciation as expenditure for the purposes of the Act in subsequent years.

The object and policy of the Act is to explore and mine land for the mutual benefit of the holder and the State. To allow depreciation as an item of expenditure for the purposes of the Act would fly in the face of the object and policy of the Act. It is legitimate to show depreciation as an expense for the purposes of the Income Tax Assessment Act. To get the true picture of the operation of a business you should take depreciation into account. Depreciation is a legitimate entry on a profit and loss statement. Depreciation is not however expenditure for the purposes of the Act.

I shall now examine the various expenses for the care taker. These include wages, generator hire, fuel, food, hardware and motor vehicle expenses. It is necessary to examine the role of the caretaker.

The Plaintiff called the caretaker, Mr. Homewood. He said that he didn't do any maintenance on any plant and equipment. During the time that he was there, SPARGOS and QUEEN MARGARET were not carrying out any production, drilling or costeaning. He was simply there to keep people away from the mine and to prevent any stealing. KEOGH agreed that the caretaker did not have a lot to do and that his principal role was to prevent pilfering.

Clearly it was prudent from a commercial point of view for the Defendants to employ a caretaker. However, the fact of the matter is that the caretaker had nothing to do with mining or in connection with mining. There may well be circumstances where caretakers expenses can be claimed as expenditure for the purposes of the Act. In such a circumstance it would be likely that a mining operation was in progress or temporarily closed down. In the present instance, however, the caretakers expenses are not incident or conducive to a mining operation and accordingly are not expenditure for the purposes of the Act.

I shall now examine the loss on the sale of fixed assets. An amount of $15,976.00 is claimed under this heading. This is clearly not expenditure for the purposes of the Act. First, the total cost of the fixed assets would be expenditure for the purposes of the Act in the year that they were purchased. To allow loss on sale as expenditure would result in an amount being allowed twice. Secondly,

and in any event, to allow such an item would be contrary to the object and policy of the Act.

I now turn to rental for the lease. Subsection 82(1)(a) provides that the lessee shall pay the rents due under the lease at the prescribed time and in the prescribed manner. As previously mentioned Subsection 82(1)(c) provides that the lessee shall comply with the prescribed expenditure conditions. The provision of rental and expenditure conditions in two separate and distinct parts of Section 82 is a clear indication that rental is not to be regarded as an item of expenditure for the purposes of the Act.

The provisions of Section 39 of the Act confirm this interpretation. Section 39 provides as follows:

> "39. Where the owner of any private land is granted a mining tenement on an application made under section 38 he shall comply with the terms and conditions of the mining tenement and in particular the expenditure conditions applicable thereto, but no rent or royalty shall be payable by the owner with respect to the land the subject of the mining tenement or in respect of any mineral won therefrom."

Thus the rental of $2298.00 is not expenditure for the purposes of the Act. I am also of the opinion that Local Government rates are not expenditure for the purposes of the Act. There was also an expense claimed of $535.00 for geology work, however McGUINESS could not say what was

actually done. In the normal course, evaluation and assessment carried out by a geologist would be expenditure for the purposes of the Act, however in this instance there is simply insufficient evidence to enable me to make any such conclusion. Thus the total amount of $3744.00 claimed as expenditure for rent, rates and geology work is rejected as expenditure for the purposes of the Act.

Lastly, there is also insufficient evidence to justify a conclusion that the amounts stated by McGUINESS for administration, stationary and insurance are expenditure for the purposes of the Act. Presumably some administration would have been necessary to organise and supply the caretaker. Given that the caretaker's expenses are not items of expenditure for the purposes of the Act, it follows that the administrative cost associated with the caretaker is not an item of expenditure for the purposes of the Act.

I therefore conclude that for the expenditure year 22.12.84 to the 21.12.85 inclusive, SPARGOS and QUEEN MARGARET failed to expend any amount in mining on or in connection with mining on the lease, M.L. 29/2. They have therefore failed to comply with the expenditure conditions as required.

Having reached such conclusion, the provisions of Subsection 98(5) of the Act now require me to decide whether the non-compliance with the expenditure requirement is, in the circumstances of the case, of sufficient gravity to justify forfeiture.

A similar provision, including the words "sufficient gravity", was interpreted by the Court in Pacminex (Operations) Pty Ltd v Australian (Nephrite) Jade Mines Pty Ltd (1974) 7 S.A.S.R. 401.

The Pacminex case examined Section 69 of the South Australian Mining Act. The relevant parts of Section 69 provided as follows:

"69. (1) The Warden's Court may upon application by any interested person make an order for forfeiture of any mineral claim or precious stones claim.

(2) An order shall not be made under Subsection (1) of this Section unless the Court is satisfied that the requirements of this Act in relation to the claim have not been complied with in a material respect and that the matter is of sufficient gravity to justify the forfeiture of the claim."

In a much quoted passage at page 412, Wells J stated as follows:

"The court must first be satisfied that the requirements of the Act in relation to the claim have not been complied with "in a material respect". In determining that issue the court will naturally have regard to the regulations invoked, to the circumstances immediately relevant to the alleged non-compliance, and, in particular, to whether the breach is something more than merely trivial or technical. The court must next be satisfied that the "matter" is "of sufficient gravity to justify the forfeiture of the claim". The "matter" referred to, in my opinion, is not equivalent to the breach proved. If it was, the word "breach" would have been used

instead. The word "matter" was chosen, in my view, to impress upon the court the necessity of considering, not only the breach and the facts directly bearing upon it, but also the events leading up to the breach, the conduct of the parties and the actual and potential consequences of the breach and of the forfeiture sought, having regard, throughout, to the object and policy of the Act. In this connection, the word "sufficient" must especially be borne in mind and its full implications recognized: whatever may be urged in support of the existence of a residual discretion, the language of sub-s. (2) speaks of the court's being satisfied that the matter is of sufficient gravity to justify forfeiture, and, to my mind, the implication of that language is that the order will naturally follow the finding that the court is so satisfied. Such an implication would not, perhaps, be carried if what was being laid down was a minimum degree of irregularity that represented the bounds of an exemption from liability to forfeiture. But that is not the case here. The order is not to be made unless "the matter is of sufficient gravity"; that is not language apt to limit the bounds of an exemption; rather does it represent a final and comprehensive set of circumstances, the establishment of which, to the court's satisfaction, points the way in which the court should go."

Subsection 98(5) of the Act uses the words "in the circumstances of the case". The inclusion of these words require the Warden to consider circumstances other than the non-compliance itself. The words "in the circumstances of the case" were used for the same reason as the word "matter" was used in the South Australian legislation.

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 sought, having 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 for 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.

In my opinion, the events leading up to the non-compliance, in this particular case, are significant in determining "sufficient gravity". McGUINESS stated that a total of $4,900,000.00 was expended on operating and development costs. This amount should be compared with the expenditure requirement of $38,300.00 per annum.

As mentioned, a decision was made in January 1982 to cease development of the Mt. Ida mine. During 1982 and until March 1984 CRAIG worked the mine under various Tribute

Agreements. It is clear from the evidence that during this period of time CRAIG must have incurred a considerable amount of expenditure. CRAIG treated about 2090 tonnes of ore for about 1460 ounces of gold and paid royalties of $161,590.00. CRAIG and his four workers received a total of $193,055.00 for themselves. CRAIG says that he did not make a profit from the Tributes.

That CRAIG did all of this work is of course a circumstance that is favourable to him. Ironically, all of CRAIG'S work is a circumstance that is also favourable to the Defendants, SPARGOS and QUEEN MARGARET. Whether or not CRAIG initiated the Tribute Agreements, the fact of the matter is that SPARGOS and QUEEN MARGARET entered into them. There is nothing in the Act or Regulations requiring the lessee of a mining lease to carry out mining operations or comply with the expenditure requirements in person. It is the responsibility that is personal to the lessee, not the actual expenditure. The lessee satisfies the requirements of the Act and Regulations by procuring another person to mine or expend money.

Prior to the Plaint, the Defendnats secured Dr. Barnes to assist them in developing a fresh programme of exploration on M.L. 29/2. This programme sought to prove up open pit reserves in particular in the north west corner of M.L. 29/2. In July 1986 the Defendants commenced negotiations with the tenement holder of the tenement adjoining the north west corner, to purchase the adjoining tenement to better

facilitate such programme. Also in June and July 1986 a total of $310,000.00 was budgeted for exploration on M.L. 29/2 including costeaning, shallow drilling and diamond drilling. The Mt. Ida mine represents only about 20 percent of the total area of M.L. 29/2.

The existence of such an exploration programme and the commencement of such negotiations prior to the Plaint are "circumstances of the case". The exploration expenditure of $213,000.00 incurred in September and October 1986 is corroborative of there being an exploration programme in existence prior to the Plaint. However, the actual expenditure itself was incurred after the Plaint and in this instance I attach no weight to it.

There was a great deal of evidence on the plans and proposals of the respective parties for the land comprising the lease. CRAIG is an experienced and competent miner and planned to extract parcels of ore from the mine. He was primarily concerned with the mine but said that once a cash flow was established he would explore other areas of the lease. The defendants were pursuing exploration in an attempt to prove up an open pit or pits. Whether CRAIG could do what he planned at a profit is not a matter with which I need concern myself. I only need concern myself with what he proposed to do.

Section 100 of the Act provides a right in priority to mark out and/or apply to the applicant on whose application resulted in an order for forfeiture. The policy

of this section is to maintain a certain level of exploration or mining activity within the State's mining areas and the Warden should not overlook the implications of this section when examining the "circumstances of the case". However, Section 98 of the Act does not create an entrepreneurial battle field. The Warden in each case should put the evidence on future plans and proposals in proper perspective. In this regard the comments of Wells J. in Taylor and Schultz v North Flinders Mines Ltd (Supreme Court of South Australia 76 L.S.J.S. 225) are relevant.

At page 225 Wells J stated as follows:

"The substantial body of evidence and argument devoted to the respective plans and proposals of the two companies must be reviewed; but although it would be an unusual case of this kind in which such plans and proposals could altogether be excluded from consideration, it should clearly be understood that a Warden's Court is under no obligation to treat the comparative merits of each as decisive of the question of whether the matter is of sufficient gravity. If a Warden's Court embarks upon such a review, it must keep steadily in mind what is the issue to which such material is being treated as relevant. It is the gravity of the "matter" that is decisive and, for the purpose of assessing that gravity, a Court must treat

the objects and policies of the Act, and the bearing that the non-compliance and an order for forfeiture would have on those policies, as of prime importance. Of course, if it appeared, for example, that the organisation and future of the claim-holder was such that it was unlikely that it would fail to repeat what, ex hypothesi, was a minor or adventitious breach; or if it appeared that the party claiming forfeiture was manifestly incapable of abiding by the labour conditions and was unlikely to succeed in an application to have those conditions suspended, a Warden could well regard those circumstances as appreciably affecting the outcome. But the tail must not be allowed to wag the dog. "The matter" that is to be of sufficient gravity is not, as I pointed out in the Pacminex case (supra, at page 412) identical with the non-compliance; but what lies at the heart of "the matter" are the non-compliance, and the reasons for it, and, the consequences and implications of it. The non-compliance is not to be treated as a bare condition precedent, the fulfilment of which opens the forensic floodgates to the entrepreneurs and the commercial augurs. What the Act ordained should be a limited enquiry cannot be expanded beyond its due and lawful bounds."

That nearly all of the past exploration and development was focused on the Mt. Ida mine and that CRAIG intends to work the mine is no reason to favour CRAIG. The mine represents only about 20 percent of the area of the lease

and its life is limited. It has not been shown that there is anything basically wrong with what SPARGOS and QUEEN MARGARET propose to do. CRAIG'S evidence that it would be impossible to open cut because the vein was narrow, applied only to the Timoni lode and not the lease as a whole. To refuse to recommend forfeiture having regard to these circumstances would not in my opinion stultify or frustrate the objects and policy of the Act.

Although the non-compliance was for the total amount of the required expenditure, in my opinion the non-compliance in the circumstances of the case is not of sufficient gravity to justify forfeiture.

Subsection 98(4)(a) provides that the Warden "may" recommend forfeiture. Upon a finding that the lessee has failed to comply with the expenditure conditions, does the Warden have a discretion to recommend forfeiture whether or not the non-compliance is, in the circumstances of the case, of sufficient gravity to justify forfeiture?

In my opinion, Section 98 of the Act is a legislative provision by which a power is conferred upon a Warden coupled, once certain facts or matters are established to the Warden's satisfaction, with a duty to exercise that power. Thus, when and only when the Warden is satisfied that first, there has been a failure to comply with the expenditure conditions, and secondly, that the non-compliance is, in the circumstances of the case, of sufficient gravity to justify forfeiture, the Warden is required to recommend forfeiture.

Given that I have concluded that the non-compliance is, in the circumstances of the case, not of sufficient gravity to justify forfeiture, it is therefore not open to me to recommend forfeiture. I must now decide whether to impose a fine or dismiss the application.

In this instance the non-compliance was total. Section 102 of the Act entitles a tenement holder to apply for an exemption from the prescribed expenditure conditions. The Defendants did not adopt this course. There was a significant period of delay by the Defendants in recommencing plans for M.L. 29/2. In the circumstances I consider the maximum fine appropriate. Also, in the circumstances, I consider that the Defendants should pay the Plaintiff's costs of the application. The ground of the Plaint has been proved. Further, prior to the hearing, the Plaintiff gave notice to the Defendants that if they could show him evidence of expenditure in mining on or in connection with mining on the lease, he would withdraw the Plaint.

FINDINGS AND ORDERS:

1. There are findings that:
   (a) the Defendants failed to comply with the expenditure conditions for M.L. 29/2,
   (b) the non-compliance is, in the circumstances of the case, not of sufficient gravity to

justify forfeiture,

2. the Defendants are fined the sum of $500.00,

3. the Defendants pay the Plaintiff's costs of the application to be taxed on the highest scale or as mutually agreed.

Denis Reynolds.

D.J. REYNOLDS S.M.
WARDEN