

JURISDICTION : MINING WARDEN

TITLE OF COURT : OPEN COURT

LOCATION : MEEKATHARRA

CITATION : FLINT -v- BROSNAN

CORAM : WILSON SM

HEARD : 20 JUNE 2002

DELIVERED : 31 OCTOBER 2002

FILE NO/S : PLAINTS 49 TO 52/012

TENEMENT NO/S : E 52/1404 & P 51/1643, 2180 & 2373

BETWEEN : WARWICK JOHN FLINT
(Plaintiff)

AND

ALLAN NEVILLE BROSNAN
(Defendant)

Catchwords:

Application - Complaint - Exploration licence
Application - Prospecting licence - Complaint
Forfeiture - Exploration licence - Expenditure conditions
Expenditure conditions - Prospecting licence - Forfeiture

Legislation:

Mining Regulations (WA) 1981, r. 15(1), 21(1) and (3).

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Result:

Plaint 51/012 against PL 51/2180 dismissed

Plaints 49, 50 & 52/012 upheld. Recommend EL 52/1404 be forfeited and PL 51/ 1643 & 2373 be forfeited.

Representation:

Counsel:

Plaintiff:	In person
Defendant:	In person

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

Jones v Dunkel (1959) 101 CLR 298

Nunn v Carnicellie, unreported; Southern Cross Warden's Court; 10 AMPLA Bull 63; 29 November 1990

Flint v Brosnan and anor [2002] WAMW 21

Case(s) also cited:

Nil

1 On 21 January 2002, Warwick John Flint ("the Plaintiff") lodged with the Mining Registrar, Meekatharra four Complaints being 49 to 52/012 ("the Complaints") alleging that Allan Neville Brosnan ("the Defendant") failed to comply with the expenditure conditions in respect to Exploration Licence 52/1404 ("the EL") and Prospecting Licences 51/1643, 2180 and 2373 ("the PL's").

2 The Plaintiff seeks a recommendation to the Hon. Minister that the EL and the PL's be forfeited.

3 The relevant details in respect to the EL and the PL's the subject of the Complaints is as follows.

Plaint 49/012 - Exploration Licence 52/1404

4 The EL was granted to the Defendant on 18 November 1999. The expenditure year ends on 17 November in each year. The minimum annual expenditure required on the EL is \$15,000. The Plaintiff says that

the Defendant failed to comply with the expenditure conditions for the year ending 17 November 2001 (“the EL Expenditure Year”).

- 5 The Defendant filed with Department of Mineral and Petroleum Resources (“DMPR”) a Form 5 Operations Report ("Form 5") stating that he expended in the EL Expenditure Year a total of \$24,571 that consisted of the following:

(a) Metal-detecting		
	Number of days worked	
	43 days at \$350 per day	\$15,050
(b) Loaming, panning, sampling, dollying, and dry-blowing		
	20 days at \$350 per day	\$ 7,000
(c)	Fuels, oils	\$ 1,100
(d)	Field supplies	\$ 920
(e)	Annual Tenement Rates and rent	\$ 301
(f)	Administration/overheads/native title	\$ 200
TOTAL EXPENDITURE		<u>\$24,571</u>

Plaint 50/012 - Prospecting Licence 51/1643

- 6 This PL was granted to the Defendant on 12 November 1991. The expenditure year ends on 11 November in each year. The minimum annual expenditure on this PL is \$6080. The Defendant filed with DMPR a Form 5 that states he expended \$2588 in the expenditure year ending 11 November 2001. The expenditure during that year consists of the following:

(a) Metal-detecting		
	Number of days worked	
	3 days at \$350 per day	\$1050
(b) Loaming, panning, sampling, dollying, and dry-blowing		
	2 days at \$350 per day	\$ 700

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(c)	Fuels, oils	\$ 160
(d)	Field supplies	\$ 100
(e)	Annual Tenement Rates and rent	\$ 378
(f)	Administration/overheads/native title	<u>\$ 200</u>
TOTAL EXPENDITURE		<u>\$2588</u>

Plaint 51/012 - Prospecting Licence 51/2180

- 7 The Plaintiff offered no evidence in respect to this Plaintiff during the conduct of the hearing. Accordingly, Plaintiff 51/012 affecting Prospecting Licence 51/2180 will be dismissed.

Plaint 52/012 - Prospecting Licence 51/2373

- 8 This PL was granted to the Defendant on 3 August 2000. The expenditure year ends on 2 August in each year. The minimum annual expenditure required on this PL is \$2000. The Defendant filed with DMPR a Form 5 that states he expended \$2557 in the expenditure year ending 2 August 2001. The expenditure claimed by the Defendant is as follows;

(a) **Metal-detecting**

Number of days worked 8 days at \$250 per day		\$2000
(b)	Fuels, oils	\$ 140
(c)	Field supplies	\$ 200
(d)	Annual Tenement Rates and rent	\$ 117
(e)	Administration/overheads/native title	<u>\$ 100</u>
TOTAL EXPENDITURE		<u>\$2557</u>

9 The Plaintiff gave evidence that he has been involved in the mining industry since 1954 and has expertise and experience in the mining industry. I accept that the Plaintiff has expertise in the mining industry.

10 Further, the Plaintiff gave evidence that he considered the expenditure claimed by the Defendant to be "rubbery". The Plaintiff indicated that for metal-detecting the Defendant claims from year to year such amount as he deems is appropriate to meet the minimum expenditure requirements. As an example, the Plaintiff said that in the expenditure year in question in each of these matters the Plaintiff has claimed the sum of \$350 per day for his work. The previous year he claimed \$250 per hour.

11 The Plaintiff contends that the amount claimed per hour by the Defendant for metal-detecting is not in accordance with the wages a person would be paid for this type of work if employed similarly in the district. The Plaintiff says that the industry standard for metal-detecting is that the person metal detecting is given one half of the value of the gold recovered and remainder given to the mining tenement holder. In other words, the Plaintiff says that a person is not paid wages to metal-detect on any person's mining tenement within the industry.

12 The Plaintiff in his evidence referred to the Defendant's appearance before the Leonora Warden's Court in March of 2001 wherein the Plaintiff said that the Defendant gave evidence on behalf of another person that he does not employ people to metal-detect on any of his mining tenements, rather he pays to them one half of the gold recovered from metal detecting.

13 The Plaintiff said that if a person was to be paid to metal detect on a mining tenement, then they would be paid at labouring rates between \$15 and \$16 per hour. The Plaintiff rejected that a labourer would be paid \$350 per day but, rather, would expect the sum of \$150 per day or thereabouts would be paid as wages.

14 The Plaintiff said that he could not prove that the days stated in the Form 5's lodged with DMPR by the Defendant as having been spent on the EL and PL's by the Plaintiff were not in fact spent. The Plaintiff said that the amount claimed was in essence, too high and not in accordance with industry standard for the district as provided in **r. 15(1), 21(1) and (3) of the Mining Regulations (WA) 1981**. That was, in essence, the Plaintiff's case in respect to the Plaints.

- 15 The Defendant gave evidence in relation to this matter. The Defendant testified that he carried out the work on each of the EL and PL's as described in the Form 5's lodged with DMPR. In respect to the EL, the Defendant produced an invoice from Buckingham Redevelopment for the hire of a backhoe and rock-breaker for work conducted on the EL between 2 and 16 February 2001 being \$350 per day for 14 days, a total of \$4900. The Defendant said that one would have to pay at least \$250 per day for someone to work on a backhoe.
- 16 Of considerable relevance to these proceedings was confirmation by the Defendant that he does not know of anyone within the mining industry who pays a person to metal-detect on their mining tenements. The Defendant confirmed the evidence given by him in the Leonora Warden's Court in was 2001. The Defendant said that metal-detecting is normally done on the basis that any gold found is shared equally between the mining tenement holder and the person metal-detecting. Further, the Defendant said, in respect to dry-blowing, any gold recovered is divided generally as to 10 per cent to the mining tenement holder and 90 per cent to the dry-blower operator.
- 17 The Defendant was cross-examined by the Plaintiff in respect to the fuel and food the Defendant claimed to have expended by the Defendant upon the EL and PL's in his Form 5's. The Defendant said he could not produce to the Court the fuel receipts, being purchased fuel from Shell. Further, the Defendant said that he did not keep a logbook of the activities that he carried out on the EL and the PL's. The Defendant said in cross-examination that he had never heard of anyone in the mining industry being paid to metal-detect. Some debate then ensued as to what the Defendant thought he was worth to be paid for working the mining industry. The Defendant said he was worth \$350 per day. The Defendant said that he would expect to pay casual labour about \$25 per hour. He said that he had not paid anyone for a long time to work for him.
- 18 The Plaintiff put to the Defendant that the figures contained in the Form 5's are simply made up for the purposes of complying with the expenditure provisions of the **Mining Act and Mining Regulations**. The defendant denied that was the case. When asked by the Plaintiff to produce receipts to verify the sums of money claimed by the Defendant to have been expended on fuel and food, the Defendant could not.
- 19 The only receipt produced into evidence by the Defendant was for the hire of the backhoe and rock-breaker used on the EL.

20 The Defendant said in evidence that he buys a lot of fuel and divides it between the mining tenements by dividing the days worked by the fuel purchased. He said that that was the industry standard. That, in essence, was the evidence given by the Defendant in this matter.

21 The obligation to satisfy me that there has been a failure to comply with the expenditure conditions rests with the Plaintiff.

22 I accept the evidence of the Plaintiff as credible and not seriously challenged by the Defendant. I do not accept the evidence of the Defendant as being particularly credible or convincing. The Plaintiff has not produced any direct evidence that the time the Defendant claims in his Form 5's he spent working on the EL and the PL's did not occur. Accordingly, I am not satisfied that Brosnan did not spend the time on the EL and PL's as stated in his Form 5's. Having said that, it is of concern that the Defendant could not produce any documentary evidence to identify the days or times that he spent metal-detecting, loaming, panning or doing the other work claimed to have been carried out or produce any receipts for fuel or food that he claims to have purchased.

23 It is clearly to the advantage of the Defendant in circumstances such as these to be able to produce appropriate documents to support expenditure claimed when challenged by a Plaintiff or otherwise risk an adverse inference being made as described in **Jones v Dunkel (1959) 101 CLR 298**.

24 I do not accept the Defendants evidence that he purchased the food claimed in each of the Form 5's. The expenditure claimed for food is not, in my opinion, allowable for the same reasons described in **Nunn v Carnicellie, (unreported; Southern Cross Warden's Court) 10 AMPLA Bull 63, 29 November 1990** as it amounts to no more than normal living expenses. In any event, when challenged by the Plaintiff, the Defendant was unable to produce any receipts to support such expenditure. I find that the food claimed by the Defendant as expenditure for the EL and PL's is not an allowable expenditure item.

25 Similarly, the Defendants inability to produce any supporting receipts, invoices or log books for work claimed to have been carried out and fuel purchased when challenged the Plaintiff leads me to draw the inference that the Defendant did not expend anything on fuel as claimed in the Form 5's. In any event, I find the evidence of the Defendant as to how he calculated the amount of fuel claimed to have been expended on the EL and PL's to be ridiculous given that he could not produce any

receipts or other supporting documentation. The Defendant's evidence in that regard smacked of an attempt by him to fabricate figures to meet in the Form 5's the minimum annual expenditure for each of the EL and PL's. Accordingly, I find that the fuel claimed by the Defendant was not expended upon the EL and PL's as claimed.

26 The evidence given by both the Plaintiff and the Defendant clearly establishes that the mining industry does not pay wages to people to metal-detect rather, payment occurs on the basis that any gold recovered is shared equally between the holder of the mining tenement and the person metal detecting.

27 Clearly, the claims by the Defendant in the Form 5's that for his metal detecting activity on the EL and PL's he would received between \$250 to \$350 in wages per day if similarly employed in the mining industry in the district is totally unsustainable upon the evidence.

28 I do not accept either the Plaintiff's or the Defendant's evidence as to their opinions as to what they would be paid in wages for metal detecting if similarly employed in the district. The evidence of both the Plaintiff and the Defendant in this regard is no more than guesses and speculation and certainly not supported by any evidence produced by either of them.

29 I have recently dealt with the same issues in a similar matter involving both the same Plaintiff and Defendant. I refer to the matter of **Flint v Brosnan and anor. [2002] WAMW 21.**

30 There is nothing in respect to the value to be ascribed to the activity of metal detecting and loaming, panning etc that I have been required to consider in the evidence of the matter now before me or heard in the submissions that have been made to me that persuades me to reach anything but the same conclusion and for the same reasons that I reached in **Flint v Brosnan and anor (Supra).**

31 I find that the activities of metal detecting, loaming and panning etc as described in the Form 5 is activity in connection with prospecting and exploring. Further, I find that for such activity carried out in the district wages are not paid, but any gold recovered is divided between the mining tenement holder and the person working upon the mining tenement.

32 That being the case, the tenement holder would not be entitled to claim expenditure for any activity upon the mining tenement, as there has been no money expended. That would create an unfair situation in that the aims and intentions of the **Mining Act and Regulations** would be

complied with but no amount of expenditure would be ascribed to the activity of metal detecting and loaming and panning etc carried out by the holders of the mining tenement.

33 I do not accept the evidence of either the Plaintiff or the Defendant as to what they consider the wages that would be paid to a person similarly employed in the district for metal detecting and panning and loaming etc. In my opinion the amounts offered by the Plaintiff and the Defendant are no more than guesses.

34 The evidence of the Defendant that he would be paid between \$250 and \$350 per day to metal detect or/and pan, loam etc is not sustained upon his own evidence that he would not pay anyone to do those tasks on his mining tenements and also flies in the face of his prior evidence to the Warden's Court in Leonora in March 2001.

35 I find that the Defendants evidence in respect to the amount that he considers he would be paid for the work referred to above totally unbelievable. I am concerned that the Defendant has completed a number of Form 5's in this matter claiming that he would be paid between \$250 and \$350 per day to carry out the activities referred to above when he has given evidence before another Warden's Court that he would not pay any wages for the same work.

36 Accordingly, I can draw no other inference in such circumstances than the Defendant has sort to circumvent the expenditure requirements of the **Mining Act and Regulations** by claiming higher rates of wages than even he or the industry would pay for the same type of activity.

37 Notwithstanding the above, the Plaintiff did not challenge that the Defendant has not conducted the number of days of activity claimed. Rather as has been said earlier, the Defendant has challenged the value of the wages claimed by the Defendant for the work conducted on the EL and the PL's.

38 For the reasons previously stated and in the absence of evidence to the contrary by either the Plaintiff or the Defendant, and for the reasons given by me in **Flint v Brosnan and anor (Supra)**, I find that the amount to be ascribed to the activity conducted by the Defendant upon the EL and the PL's should be that provided for under the provisions of the **Minimum Conditions of Employment Act 1993**.

39 The amount payable for an adult is \$10.43 per hour. Given that shifts of 12 hours are common in the mining industry in the district it is

appropriate that the sum of \$125.00 per day be ascribed for the activity carried out by the Defendant.

40 Accordingly, I find that the value of the expenditure carried out by the Defendant upon the EL is as follows:

Exploration Licence 52/1404

a. Metal Detecting

43 days @ \$125.00	\$ 5375.00
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b. Loaming etc

20 days @ \$125.00	\$ 2500.00
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c. Annual Tenement rates and Rent	\$ 301.00
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d. Administration	<u>\$ 200.00</u>
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Total Expenditure	<u>\$ 8376.00</u>
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41 The shortfall by the Defendant in meeting the statutory minimum expenditure requirement is \$ 6624.

42 I have not allowed the amount claimed for the hire of the backhoe in accordance with the invoice produced by the Defendant. I am perplexed that the expenditure for the backhoe hire has not been claimed on the Form 5. Further, I do not accept the evidence of the Defendant that he expended \$4900 on backhoe hire and then would have to pay an additional \$250 per day for an operator. Put simply, the Defendant's evidence concerning this alleged expenditure is not credible and defies logic given that it is not specifically claimed in the Form 5 and that it is a significant sum. I do not accept that the amount for backhoe hire was expended.

43 I find that the amount expended in respect to the PL's is as follows:

Prospecting Licence 51/1643

a. Metal Detecting

3 days @ \$ 125.00 per day	\$ 375.00
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b. Loaming etc

2 days @ \$125.00 per day	\$ 250.00
c. Annual Tenement Rent and Rates	\$ 378.00
d. Administration etc.	<u>\$ 200.00</u>
Total Expenditure	<u>\$ 1203.00</u>

The shortfall in the minimum annual expenditure is \$ 4877.00.

44 **Prospecting Licence 51/2373**

a. Metal Detecting

8 days @ \$125.00 per day	\$ 1000.00
b. Annual Tenement Rent and Rates	\$ 117.00
c. Administration	<u>\$ 100.00</u>
Total Expenditure	<u>\$ 1217.00</u>

44 The shortfall in the minimum annual expenditure is \$ 783.00.

45 The shortfall in the minimum annual expenditure for each of the EL and the PL's is, in my opinion, significant. The circumstances in which the shortfall occurred have been outlined above.

46 I have been far from impressed by the evidence of the Defendant in regard to his calculations of the wages that would be paid to someone similarly employed in the industry in the district and lack of any records for the work he claims to have carried out on the EL and the PL's.

47 The manner in which the Defendant gave his evidence regarding these matters has caused me to conclude that the Defendant has attempted to defeat the expenditure requirements of the Mining Act and Regulations. In my opinion, that only goes to aggravate the failure to comply with the minimum annual expenditure for the EL and the PL's.

48 For those reasons I would make the following orders:

- a) Plaint 51/012 against Prospecting Licence 51/2180 be dismissed;
- b) Plaint 49/012 against Exploration Licence 52/1404 be upheld and recommend to the Hon. Minister that Exploration Licence 52/1404 be forfeited;

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- c) Complaint 50/012 against Prospecting Licence 51/1643 is upheld and that Prospecting Licence 51/1643 be forfeited.
- d) Complaint 52/012 against Prospecting Licence 51/2373 is upheld and that Prospecting Licence 51/2373 be forfeited.