IN THE WARDENS COURT
AT SOUTHERN CROSS

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56.

BETWEEN: NEWT PTY. LTD. PLAINTIFF.

- and -

HUGH FREDERICK DAVID LAVERY

- and -

SHIRLEY KATHLEEN ROSINA LAVERY

- and -

STANLEY JAMES LAVERY DEFENDANTS.

BEFORE: WARDEN G.N. CALDER

FOR THE PLAINTIFF: MR A. CAMP
FOR THE DEFENDANTS: MR T. PERCY

The plaintiff seeks forfeiture of Mining Lease 77/5 upon the single ground that the defendants have not complied with the prescribed expenditure requirements for the year ended 20 March 1987.

The plaint was lodged on 9 June 1987. A summons was duly issued on 10 June 1987 and subsequently served on the three defendant tenement holders on 13 July 1987. A joint defence lodged at the Registry on 22 July 1987 simply stated that there had been compliance "with the expenditure requirements in respect of Mining Lease 77/5".

The departmental record (exhibit "A") disclosed that Mining Lease 77/5 had been granted to the defendants jointly in March 1983. The expenditure year for purposes of the legislation runs from 21 March in any year to 20 March in the following year. The annual expenditure required by the Act is $10,000. The record shows that as at the date of the filing of the defence herein no report on operations on the tenement had ever been lodged by the tenement holders for any of the years ended 20 March 1984 to 1987 inclusive. This was a blatant breach of the provisions of S.82(1)(c) and Regulation 32.. No excuse

was offered at any time for such breach. On 9 September 1987 a report in the prescribed form (form 5) was lodged at the principal registry of the Department in Perth. That report should have been lodged within 60 days of 21 March 1987. It was thus lodged some 3½ months late. It was accompained by a letter to the Director General of Mines signed by one of the tenement holders "(requesting) that the attached report be accepted". No application was made to the Warden for an extension of time to be granted pursuant to S.104 to allow late lodgement of the report.

The hearing of the plaint took place before me at Southern Cross on 1 October 1987. Mr Camp appeared for the plaintiff and Mr Percy for the three defendants. I heard evidence and submissions and reserved my decision.

For the plaintiff evidence was given by Mr Granich. I find he is reasonably experienced in the physical aspects of mining, having been involved in the use of Machinery and plant on mining sites for about 6 years. He is familiar with Mining lease 77/5 having first inspected it in 1985. He formed the impression from its general appearance then that no work had been done on the tenement for a considerable time. He had visited the site periodically, approximately every 2-3 months until the time the plaint was lodged. He conceded, however, a belief that one mulloch pile near a 20 foot deep shaft would have been about 12-18 months old. He estimated the quantity of material in the pile to be about "two wheelbarrows". A winch on the site appeared to have had very little use. On one visit, he could not say when, he had noticed some apparently recently broken quartz rocks. During the year in issue he saw a ladder going down the 20 foot shaft which had not been there when he first visited the site. He went down the shaft and saw some signs of recent workings on the wall of the shaft - that he said was in about April 1987. At that

time he also noticed some vehicle tracks. In August 1987 he saw someone had done some surface sampling. He agreed that the shaft had been cleared out to a small extent.

The plaintiff called Mr Geidans a well qualified and experienced self employed geologist. I accept as true the contents of his curriculum vitae (exhibit "E"). I find that mining lease 77/5 was, as at 30 September 1987 in the condition described in his report, tendered in evidence (exhibit "F").

I find that his description of the shaft and other diggings and workings on the tenement is as he has described in evidence. I include in that finding his opinion as to the limited nature of digging and sampling which has been carried out on the shaft walls. I find that approximately five household buckets of material had been taken from the walls of the shaft within a reasonable period prior to 30 September 1987. I also find, based upon his report and his evidence that on the surface, on top of older piles of mulloch had been placed fresher material. I accept his estimate that the total volume of such fresh material did not exceed 1 cubic metre. In cross examination he considered that it would be difficult to state accurately the age of such material within 6 or 18 months. I will return later to a consideration of Mr Geidan's conclusion expressed on page 6 of exhibit "F". I find that his sketch of the shaft on page 7 of his report is accurate in its description of the general shape of the relevant features indicated thereon.

Two of the tenement holders gave evidence. Mr Hugh Lavery gave his evidence in the presence of Stanley Lavery who subsequently said in the course of giving his own evidence that what Hugh Lavery had said in evidence was true and correct. I was not impressed favourably

by Hugh Lavery. I found his evidence to be to some degree contrived in the sense that it appeared to be designed to suit the task which he believed he had rather than flowing freely and naturally in response to the questions which he was asked. It was also, in my view, given with the contents of the form 5 (exhibit "B") which he had lodged very much in mind.

I accept his evidence that at Easter 1986 the three tenement holders, together with other family members went to the tenement and stayed there for some three nights and three and a half days (Good Friday until Easter Monday). Hugh Lavery's wife, sister and two brothers accompained the tenement holders. I find that during those days some work was done on the tenement. I find that Mrs Shirley Lavery, the tenement holder did some of the cooking assisted by her daughter and daughter in law. I do not accept that she worked 12 hours a day in "cooking and camp supervision" as stated by Hugh Lavery in evidence. Bearing in mind that she was assisted by her 17 year old daughter and her daughter in law and that the cooking and related cleaning work was for only 7 people I consider that no more than 8 hours a day while camped on the tenement could be reasonably attributed to such work by Shirley Lavery while actually on the lease. While I am satisfied that Shirley Lavery was present on the tenement over the whole period I find she did no work other than cooking and associated "housework" at the campsite. She, however, was not engaged in any "mining" as such on the tenement in my view.

I do not believe the evidence given by Hugh Lavery that both he and his father worked 12 hours a day on the tenement on Friday, Saturday and Sunday together with his two brothers. I do not accept his evidence that during that time 2 cubic metres of material was removed from the shaft. I prefer and accept the evidence of Mr Geidans

that no more than 1 cubic metre of fresher material was spread about on the surface near the shaft and that in addition the equivalent of about five household buckets of material had been removed from the walls.

I am satisfied that the fresher material on the surface seen by Mr Geidans had been removed from the shaft by the tenement holders and their family at Easter 1986. I do not believe, however, that it took the two brothers of Hugh Lavery three and a half 12-hour days to remove such a small amount of material. I am not prepared to find that S.J. Lavery and Hugh Lavery and his two brothers worked any more than an eight hour day in actual "mining" operations on the site on the days from Friday to Monday afternoon inclusive. In making that finding I take into account the fact that there were four adult men and one 17 year old girl engaged in the hauling of only about 1 cubic metre of material to the surface, the dollying and panning of it and some collection of rock samples. The material brought to the surface was loose material lying on the bottom of the shaft and did not involve any work in hard rock except perhaps the small amount collected from the side wall. I consider that Hugh Lavery exaggerated the amount of "supervision" carried out by both himself and his father, however, I find both were, for the time I have mentioned above, engaged in "mining" work on the site.

I accept Mr Stanley Lavery's evidence that he visited the tenement once each month during the year in issue. He drove up there in the van, registered number 60D 795 which is referred to in exhibit "B", and camped in the van for 3-3½ days each time on the site. During that time he used what he called a "loaming method" of investigating the surface of the tenement. His system was to dig holes to a depth of about 30 cm at regular intervals in lines radiating out from the

shaft. He would then take samples home to Perth and dolly and pan them. No records were kept of results obtained. I accept he spent 3-4 hours a week in such operations at home. I accept his evidence that it cost about $50 to travel up to the site and back. At the time, however, on each trip he also spent 3 to 3½ days on another tenement held by him alone. I accept his evidence in preference to that of Hugh Lavery that the trip from Perth to Bodallin takes about 4½ hours and not 6 hours each way.

Hugh Lavery said in evidence that in July 1986 paid $2,000 to his brother to fit out the van referred to as "site van" on exhibit "B" so as to make it more suitable for camping. He said the van was now with his brother in Coolgardie with the brother. He said he expected it to be "ready" within a month or so and that he planned to leave it permanently on the site. I do not believe that last matter. Lavery gave evidence which was corroborated by Mr Granich and Mr Geidans that they did not leave their winch on site with any rope or handle nor did they leave their other equipment behind. The reason given by him was because it would be stolen. The site is only a short distance off Great Eastern Highway and not far from C.B.H. grain bins. Further, it would appear from Mr Stanley Lavery's evidence that the van was used by him for travelling to and from the subject tenement and his separate tenement. It has never been left permanently on the site and the inference I draw from Mr Stanley Lavery's evidence is that he was keeping the van in Perth during the subject year to be available for his trips to the tenement.

I my opinion, whatever happened to the $2,000 given to Hugh Lavery's brother it was not expended in connection with "mining on the lease" for the relevant year.

It is my opinion that time spent in travelling to and from the lease

does not constutute time spent "in mining on the lease itself" for purposes of Regulation 31 and cannot therefore form the basis of a claimable expenditure item in lieu of wages not paid for purposes of that Regulation. I therefore find that the time during which Hugh and Stanley Lavery can be said to have been engaged in mining on the lease itself for purposes of Regulation 31 is only 8 hours on each of the Friday, Saturday, Sunday and Monday. Travelling time and time spent packing and unpacking at home and working at home dollying or panning do not in my opinion come within the provisions of Regulation 31. I am of the opinion that none of her travelling time nor the work of cooking, cleaning and the like performed by Shirley Lavery comes within Regulation 31. I find that for purposes of Regulation 31 no more than 32 hours each should be attributed to both Hugh and Stanley Lavery for work performed on the lease over Easter 1986. The amount of $12 per hour claimed for work done seems rather high however it was not challenged and in the absence of evidence contradicting that of Hugh Lavery I will adopt it for the present. At that 64 hours of "deemed" wages for the two men constitutes a total of $768 for the Easter 1986 period. Stanley Lavery's work at home, dollying and panning amounts to approximately 200 hours, which at $12 per hour amounts to $2,400. He was not paid for that and in my opinion it was not work done "on the lease itself" for purposes of Regulation 31 and therefore not allowable as an item of deemed expenditure. In respect of his monthly sampling done on site 11 times during the year in question I consider that I should accept the amount of 220 hours work claimed. That is consistent with Stanley Lavery's evidence that he spent 3 or so days each month on the lease doing the work he described. At $12 per hour that amounts to $2,640 deemed expenditure.

I accept that the cost of fuel used in travelling to the site is allowable for purposes of Regulation 31 and that the amount claimed in item 1 of exhibit "B" is reasonable, namely a total of $232. I also accept that the tools and equipment referred to in evidence by Hugh Lavery were acquired and used and that the amount claimed of $162 is reasonable.

Item 4 in the expenditure section of exhibit "B" in my opinion was clearly intended to deceive the department. I find the total amount stated ($2,628) was actually paid to Stanley Lavery by Hugh Lavery, but that it was not in truth "wages". I infer from the evidence that the four cheques which were paid to him were to cover some of his expenses in, travelling, preparing ladders and other equipment, collecting equipment and materials. I have considerable reservation in accepting that any of the amount claimed was genuinely paid as an item of expenditure for purposes of Regulation 31. There was however very little cross examination of either Hugh or Stanley Lavery on the point. At the claimed rate of $12 per hour the amount of $2,628 represents 219 hours of work. That is another 4 hours per week for every week of the year. Given the very limited expenditure claimed on "tools and equipment" (namely $102) and given the limited type of work done both at Easter 1986 and during the year I do not believe that Stanley Lavery would have spent sufficient to justify a payment of "wages" of $2,628 even if such were an allowable expenditure for purposes of Regulation 31. There was no real evidence as to how that amount was made up. The money could not have been reimbursement for tools and equipment or supplies as that was claimed under a separate heading. I am prepared to accept that in part it could have covered the actual cost of Stanley Lavery's travelling eleven times to Bodallin on his monthly visit. The cost of fuel for such trips was, I accept,

about $50 per time. As the purpose of each trip was to visit both the subject tenement and the other tenement which he held alone I consider only half of the total fuel costs of $550 should be allowed, namely $275. I do not consider it unreasonable to concede that a further amount of up to $500 may have been incurried by him in living expenses while camping on and travelling to and from the lease and in travelling around Perth acquiring materials, supplies and the like.

I consider that no allowance can be made for any payment made to him for hours spent in working on ladders or travelling around acquiring equipment and the like away from the lease. It is my opinion that as a general rule payments which are made between joint tenement holders of the type claimed in item 4 as "wages" for time incurred in work are not payments which constitute expenditure for purposes of Regulation 31. A single holder could not pay himself "wages" and then claim it as expenditure under the first limb of Regulation 31. The second limb of Regulation 31 is designed to make a reasonable allowance for work done by the holder, but that is only for work done on the lease itself, not when off the lease. I therefore consider that the most which can be said of the amount set out in item 4 is that some of that amount should be allowed, not as "wages" but rather as representing the out of pocket expenses of Stanley Lavery as I have mentioned above. Accordingly, in lieu of the amount of $2,628 claimded as "wages", I am prepared to find, on the basis I have mentioned previously, that expenditure of the nature suggested by me was incurred by Stanley Lavery for purposes of the first limb of Regulation 31 amounting to $775 in all.

I consider the stated expenditures of $80 on stationary and office equipment and $150 on camp supplies should be accepted for purposes of Regulation 31.

The total amount of allowable expenditure then which I consider should be accepted for purposes of Regulation 31 is this $4,787. That is less than half of the required expenditure of $10,000. It is my finding, therefore, that the tenement holders have failed to comply with the requirements of the legislation related to the lease by not expending the prescribed amount thereon during the year in question. The short-fall of over $5,000 is substantial. The circumstances of the case are that for the three years prior to the year in question there is no evidence that there was expenditure of the required $10,000 per annum totalling $30,000. No reports were filed as required – another breach of the legislation. The form 5 referred to in evidence was filed several months late and only when this hearing was imminent. I n addition it was not a true account of expenditure.

While the work done by the tenement holders falls within the definition of "mining" contained in the Act it is very limited and is more in the nature of prospecting. I consider, however, that what they have been doing falls within that definition of mining and that it is not open to me to say, as I was invited to by counsel, that "mining" for purposes of Regulation 31 requires more than what was done. As Mr Percy, rightly, in my opinion said, the Act is not aimed only at large scale, well organized miners with access to large amounts of finance and sophisticated equipment.

I reject Mr Camp's submissions in relation to S.82(1)(d) where he suggested the Warden has a power to recommend forfeiture of his own motion as soon as he becomes aware of the breach of the conditions of a lease.

I consider that I must only look to the powers and procedures and considerations set out in S.98, in the context in which they appear in the section and in the Act as a whole.

I must ask whether or not the non-compliance is in the circumstances of the case of "sufficient gravity" to justify forfeiture. I must be satisfied that the Act has not been complied with to a material degree. Is the breach trivial or of a minor nature or does it tend to go against the basic implied or express purpose of the legislation. I consider I am entitled to look at factors other than the non-expenditure itself.

The policy of the Act I believe to be one which seeks to ensure that holders of Mining tenements are able to and in fact do work their tenements with a view to ultimate recovery of any economic deposits of minerals. It is a policy which is also designed to discourage holders from simply acquiring a tenement and not performing their statutory obligation thus defeating the policy of active exploitation of the State's mineral reserves.

In the present case the absence of evidence of expenditure of the prescribed degree in previous years, the lack of reporting as prescribed in all years, the large shortfall in established expenditure for the year in question and the very limited nature of work done during the year in question and during the life of the lease so far all combine to lead me to the view that the non-compliance is in the circumstances of sufficient gravity to justify forfeiture.

For the above reasons I recommend that the lease be forfeited.

G.N. CALDER, SM
WARDEN