Extended
Reg 31.

IN THE WARDENS COURT
HELD AT SOUTHERN CROSS

ON THE 25th DAY OF October 1990

PLAINT 21/890

BEFORE: Mr G.N. CALDER, SM **WARDEN**

BETWEEN:

Kurt Louis NUNN

PLAINTIFF

and

Eric Bernard CARNICELLI
Colin Lloyd HUGHES
Robert thomas PENNS
Frank Ronald WESTON
Harold Thomas WRIGHT

DEFENDANTS

FOR THE PLAINTIFF: Mr McSweeney
FOR THE DEFENDANTS: Mr Percy

IN THE MATTER OF: Plaint 21/890

APPLICATION FOR FORFEITURE
Effecting Mining Lease 77/230

Number of Pages: 9

This is an application for forfeiture of mining lease ("the tenement") 77/230 for breach of the expenditure requirements related to the lease for the year ended 20th March 1990 ("the expenditure year").

It was the contention of the applicant, Mr Nunn that during the expenditure year no work at all was done on the lease. It is my conclusion after listening to all of the evidence that work was in fact carried out on the lease during the expenditure year. I find that the plaintiff Mr Nunn simply did not inspect the tenement with sufficient thoroughness to discover the work which was done.

I accept the evidence of Mr James who was called on behalf of the defendants that between 26th March 1989 and 31st March 1989 he drove a bulldozer on the tenement and did work with it on the tenement. I find that the work he did consisted of widening and deepening existing costeans, assisting his employer Mr Penns, one of the defendants, in the taking of samples, re-claiming topsoil and overburden, ripping, filling. I find that he worked a total of 53.75 hours and that his hourly rate of pay was $11.00. He was paid a total of $591.25 for that work.

I find that at different times during the period from 22nd March 1989 to 2nd April 1989 the defendant Penns was also working on the tenement supervising James (in the sense of telling him where to use the bulldozer) and also taking samples and generally investigating the tenement.

I find that Mr Penns is a business man who uses the name "Foremost Equipment" as a trading name. His business is that of a contractor for exploration and mining work involving, inter alia, the hire of heavy earthmoving equipment to miners. I find that in 1987 and 1988 consteans and some other excavation work had been done on the tenement either by Mr Penns personally or by people whom Mr Penns had engaged or instructed to do the work. In February 1989 he was contracting in areas close to the tenement. I find that on Wednesday and Thursday 22 and 23rd March he spent a total of six hours on the tenement inspecting it in preparation for work on the tenement with a bulldozer which he owned. I find that he took the bulldozer to the tenement on 26th March 1989 and did some bulldozing work on the tenement in the existing trenches. I find that from then till 2nd April 1989 he was present and working on the tenement for the hours set out in exhibit "J" - that is a total of 43 hours.

I find that at the time the hourly rate he was charging for hire of the bulldozer was $120 when contracting to a nearby mining company.

I find that it took two hours to "walk" the bulldozer to the tenement on 26th March. I accept the evidence of Mr Penns that it took 2½ hours to "walk" it from the tenement to another site for work on the other site. I therefore find that total "walking" time for the bulldozer to and away from the site was 4½ hours. I find, on the basis of Mr Penns' and Mr James' evidence and the contents of exhibit "K" that the bulldozer was worked on the tenement itself for 69.75 hours.

I find that on 5th July 1989 Mr Penns, together with the defendant Colin Hughes and a Mr Woods, who is Mr Penns father in law, flew from Perth to Marvel Loch in an aircraft hired and paid for by Mr Penns. The hire cost was $3,330. On 5th July, upon arriving at Southern Cross, about 15 minutes was spent flying over the Marvel Loch Southern Cross area - included in that time was some time spent flying over the actual lease. Mr Penns said that at the time he believed that his father in law had some interest in putting money into the partnership of leaseholders. On that day a hire vehicle was taken to the lease and some time spent there. I find that on that occasion Mr Penns and those with him simply "looked over" the tenement. Mr Penns also attended to some other business matters in the area which were unrelated to the tenement.

Mr Penns has claimed $250 for the cost of one other air fare to Southern Cross on the basis that he flew many times to the area during the year and that of the total of almost $9,000 spent on air fares the cost of one out of about thirty five air trips could be justi_ably attributed to work on the lease. The cost of a return air fare in the relevant period was $250.

In about January 1990 Mr Hughes, one of the defendants came to the tenement with his son. He collected a few samples but in reality nothing was done on the tenement. He did nothing apart from look around with his son, take the samples and take a few photos. He drove up from Perth in his own vehicle. Mr Hughes has no experience in

mining.

Mr Penns has itemised in exhibits "H", "J", "K", "L" and "M" the amounts claimed to have been spent on the tenement during the expenditure period; the total claimed is $13,682.80.

Before considering the particular items and amounts claimed as expenditure on the lease I should refer to the legislation.

By section 82(1)(c) of the Mining Act (1978) ("The Act") the holder of a mining lease is obliged to "comply with the prescribed expenditure conditions applicable to (the lease) unless partial or total exemption therefrom is granted..." no such partial or total exemption has been granted. Regulation 31(1) of the Mining Regulations 1981 ("the Regulations") says:-

> " 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 5 hectares the minimum annual expenditure shall be $5,000.

The size of the tenement is 9.6 hectares. Minimum expenditure required is therefore $10,000.

Mr Penns has claimed $1,496 for his own time spent in working on the lease and travelling to and from it and for vehicle travelling costs. He has attributed nine hours to travelling time. It has been held in a number of previous decisions given by Wardens in this state that such time is not an expense of the type required by regulation 31(1) (See for example my own decision in Newt -v- Lavery, Southern Cross Registry in 1987). I adhere to that view. In relation to item 1 on exhibit "H", therefore, only 43 hours may be claimed as an item towards prescribed expenditure.

In relation to the hourly rate of $20.00 claimed by Mr Penns it should be noted that regulation 31(1), insofar as it allows a tenement holder to claim an amount for his own labour, uses the terminology "...an amount equivalent to the wages he would otherwise be entitled to if similarly employed elsewhere in the district...". Mr James was paid $11.00 per hour for driving the bulldozer. Mr Penns was not in my opinion doing anything more highly specialised than Mr James. He has no specialised or geological or other techincal qualifications or expertise. I see no reason why I should not conclude that $11.00 per hour was the going rate for the type of work done by him.

In relation to item 1 of exhibit "H" I find that the defendants may claim towards prescribed expenditure 43 hours of labour by Mr Penns valued at $11.00 per hour which amounts to $473. I accept that reasonable travel expenses incurred in travelling to the tenement are allowable expenses. I find that Mr Penns travelled in his motor vehicle to the lease from Perth on 23rd March 1989 and returned to Perth on 26th March 1989 - a total distance of 800 kilometres which he has claimed. I accept a rate of 57¢ per kilometre is a reasonable rate. The defendants may therefore claim expenditure of $456 for that item.

In item 2 of exhibit "H" there is a claim for expenditure of $470 which relates to the trip to the lease from Perth undertaken in January by Mr Hughes and his son. Based upon the evidence I have no doubt that no "mining" as defined by the Act was done on the site of the lease by Mr Hughes and that his trip was essentially just to have a look at the subject of his investment and to show it to his son. That item is not allowable.

In the light of the evidence which is before me I accept that $115 per hour claimed as expenditure on the lease for use of the bulldozer is allowable. There was nothing in the evidence to contradict that rate as being the cost to Mr Penns of the use of his bulldozer. Closer cross examination may have revealed a non-allowable "profit margin" in that hourly rate however that did not emerge and I have no basis for assuming that the hour rate of $115 did include such an element.

Similarly, there is no evidence as to whether or not the $115 includes an element related to the use of the driver provided by Mr Penns. Again, however there is no basis in the evidence for assuming that it does. I do not consider that the 2.5 hours claimed specifically on exhibit "H" for "walking" the bulldozer off the tenement and to another unrelated job site is allowable. The "walking" time when the bulldozer was taken to the tenement is in my opinion allowable. In exhibit "K" the defendants have claimed 74.25 hours use of the bulldozer. I would allow 71.75 hours at $115 per hour which amounts to $8,193.75.

The costs of maps is not in my opinion expenditure on mining on the lease or in connection with mining and is not allowable. The $34.80 claimed in exhibit "H" is therefore not allowed.

In exhibit "H" the defendants claim expenditure of $245 for the use by Mr Penns of a grader. That machine had been hired by Mr Penns for a two week period for another job unrelated to the tenement. The cost of daily hire was I find paid for by him and would have been paid for, whether the grader was used on the tenement or not, as a cost related to that other job. It is therefore not allowable as a being part of prescribed expenditure on the te ement.

The grading was done off the lease but was done to "touch up" an access way to the lease. That can properly be said to be "in connection with mining on the lease". I am satisfied that the daily hire charge for the grader did not include fuel and that Mr Penns would have spent

about $40 on fuel and about $40 by way of depreciation on the cutting edge off the grading which was his obligation to maintain at his expense when the grader was being used. I therefore allow $80 in respect of use of the grader.

I consider that the air charter fee of $1,665 claimed in exhibit "H" is not allowable. I am satisfied on the evidence that the purpose of the aircraft charter was in the nature of a flight to show a potential investor in the project what the lease looked like and what was there. That is not an expenditure purpose for which contemplated by regulation 31.

I accept that a hire vehicle paid for by Mr Penns was used for seven days on the tenement and that the rate stated for daily hire of $50 is reasonable and allowable for purposes of regulation 31.

I do not consider that accommodation and meals of $250 is allowable. These are normal living expenses and do not really relate to mining in the sense required by regulation 31.

I consider that the one air fare of $250 claimed as is on the basis of being one of thirty five trips to the area is reasonable in the circumstances as explained in evidence by Mr Penns.

In conclusion I find that the evidence discloses that Mr Penns, on behalf of the defendants, incurred expenditure which is acceptable for

purposes of regulation 31 amounting to $9,702.

In my opinion, while falling amost $300 short of the required expenditure of $10,000, the failure to comply with the prescribed expenditure requirement is, in the circumstances of the case, and for purposes of subsections (4) and (5) of section 98 of the Act, not of sufficent gravity to justify forfeiture. The shortfall of $300 is relatively small and I find that the present partners Mr Penns and Mr Hughes are genuine in their desire to generally comply with the legislation and to work the lease.

I consider that there should be no forfeiture of the tenement.

In the circumstances I do not consider it appropriate that any penaly be imposed.

The plaint is therefore dismissed.

G.N. CALDER, SM
WARDEN

29th November 1990