

**IN THE WARDENS COURT AT LEONORA Delivered 10.3.97
HELD AT PERTH**

PLAINT NO'S. 56/945 - 59/945

B E T W E E N

DAVID JONES ROBERTS

PLAINTIFF

- and -

WILLIAM ROBERT RICHMOND

WARDEN D J REYNOLDS SM

REASONS FOR DECISION

Before me for determination are four complaints each seeking the forfeiture of a particular prospecting licence. The four prospecting licences the subject of the complaints are Prospecting Licences 38/2364, 38/2460, 38/2461, and 38/2462 ("the Tenements"). The tenements are all proximate to one another in the Duketon area of the Mt. Margaret Mineral Field.

The four complaints were lodged with the mining registrar at the Leonora registry on 2 December 1994. The plaintiff's claim is the same on all four complaints namely that the defendant has not complied with the expenditure commitments relating to the particular prospecting licence in that no work has been done on the tenement since it was granted, no reports under section 51 has been filed and no exemption under Section 102 has been obtained.

Plaint No . 56/945 relates to Prospecting Licence 38/2364. The expenditure year in question came to an end on 15 September 1994. The tenement has an area of 174 hectares and a minimum expenditure requirement of \$6,960.

Plaint No. 57/945 relates to Prospecting Licence 38/2460. The expenditure year in question came to an end on 7 September 1994. It has an area of 199 hectares and a minimum expenditure requirement of \$7,960.

Plaint No. 58/945 relates to Prospecting Licence 38/2461. The expenditure year in question came to an end on 7 September 1994. It has an area of 120 hectares and a minimum expenditure requirement of \$4,800.

Plaint No. 59/945 relates to Prospecting Licence 38/2462. The expenditure year in question came to an end on 7 September 1994. It has an area of 184 hectares and a minimum expenditure requirement of \$7,360.

While all four complaints were heard together it is necessary to consider the relevant evidence in each particular case and make a separate determination in respect of each particular case.

Relevant provisions of the Mining Act 1978 as amended ("the Act") and the Regulation's thereto ("the Regulations") are as follows:-

Section 96

- (2) An order for forfeiture may be made in relation to a mining tenement to which subsection (1) applies if -
 - (a) the prescribed rent or royalty in respect thereof is not paid in accordance with this Act;

- (b) any term or condition to which the mining tenement is subject, including any condition referred to in section 46 or section 50, is not complied with; or
- (ba) a report required under Section 51 or 115A in relation to the mining tenement is not filed in accordance with this Act;
- (c) the holder of the mining tenement is convicted of an offence against this Act,

but an order shall not be made under Subsection (1) unless the warden is satisfied that the requirements of this Act in relation to such mining tenement have not been complied with in a material respect and that the matter is of sufficient gravity to justify the forfeiture of the mining tenement.

- (3) A warden, as he thinks fit in the circumstances of the case, as an alternative to making an order under this section for forfeiture of such mining tenement may -
 - (a) impose a penalty upon the holder of the mining tenement, not exceeding \$5,000;
 - (b) award the whole or any part of the amount of any such penalty to the applicant if the applicant is not the Minister, a mining registrar or an officer of the Department authorised in writing by him; or
 - (c) impose no penalty on the holder.

Regulation

15. (1) The holder of a prospecting licence shall expend or cause to be expended in mining on or in connection with mining on the licence not less than \$40.00 for each hectare or part thereof of the area of the licence with a minimum of \$2,000.00 during each year of the term of the licence, but if the holder is directly engaged part-time or full-time in mining on the licence 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.

Onus of proof

Commercial Properties v Italo Nominees Pty Ltd (unreported Full Court of the Supreme Court of Western Australia delivered 16th December 1988, Malcolm C J, Pidgeon and Nicholson JJ) carries the following passage which deals with the onus of proof in cases such as these:-

“In the case of failure to comply with expenditure conditions the legislation contemplates a forfeiture. Hence, upon prima facie proof of non-compliance, we consider the plaintiff likewise establishes a prima facie case for forfeiture. Thus in such circumstances, the evidentiary burden is on the defendant to satisfy the Warden that the case is otherwise not of sufficient gravity to justify forfeiture.”

The Evidence

I find the plaintiff to be an honest and reliable witness. I accept his evidence that he went to the Duketon area and inspected the tenements in September 1993, April 1994 and October 1994. I find that his inspections were thorough and accurately revealed no sign of any mining having been carried out on any one of the tenements within the years in issue. The plaintiff's evidence provides prima facie proof of non-compliance with the minimum expenditure requirements in each and every case.

The defendant gave evidence and called evidence. During the course of his evidence he sought to rely on items and amounts of expenditure as provided on Forms 5, expenditure reports, lodged for each and all four of the Tenements. All of these Form 5 documents were lodged after all of the complaints were lodged and beyond the time limit for lodgement as provided in Regulation 16(1) of the Regulations.

Set out hereafter are each and all of the Forms 5 for each and all of the four tenements in issue.

Tenement Number: P38/2364

SUMMARY OF OPERATIONS AND EXPENDITURE FOR PERIOD ENDED:

15/9/94

General Prospecting

Inspection of property 1 day

Metal detecting - 10 days

Subtotal expenditure for General Prospecting

Owner
Days

Amount

1.0

300.00

10.0

3,000.00

11.0

3,300.00

Overheads

Photocopying/general reference work

Research Mines Dept - 3 days

Geological report/aero mag interpretation

Communications

Subtotal expenditure for Overheads

3.0

150.00

900.00

500.00

40.00

3.0

1,590.00

Other Costs

Travelling time - 2 days

Field supplies/accommodation

Field Assistant - 2 days (@ \$300/day)

Fuel/oil

Subtotal expenditure for Other Costs

Total expenditure for P38/2364

2.0

600.00

232.00

1,200.00

460.00

2.0

2,492.00

16.0

7,382.00

Tenement Number: P38/2460

SUMMARY OF OPERATIONS AND EXPENDITURE FOR PERIOD ENDED: 7/9/94

General Prospecting

Inspection of property 1 day

Owner Metal detecting - 8 days

Subtotal expenditure for General Prospecting

Owner
Days

Amount

1.0

300.00

8.0

2,400.00

9.0

2,700.00

Overheads

Telephone calls/postage/fax

Research 1 day

Office admin./backup

Geological input

Subtotal expenditure for Overheads

1.0

300.00

300.00

500.00

500.00

1.0

1,600.00

Other Costs

Travelling time - 2 days

Car Hire 11 days @ \$150/day

Fuel/food/accommodation)

Subtotal expenditure for Other Costs

Total expenditure for P38/2460

2.0

600.00

1,650.00

1,420.00

2.0

3,670.00

12.0

7,970.00

Tenement Number: P38/2461

SUMMARY OF OPERATIONS AND EXPENDITURE FOR PERIOD ENDED: 7/9/94

	Owner Days	Amount
General Prospecting		
Metal detecting - 5 days @ \$300/day 2 men	5.0	3,000.00
Subtotal expenditure for General Prospecting	5.0	3,000.00
Overheads		
Geological input		300.00
Office admin.		100.00
Purchase of data		40.00
Research - half day	0.5	150.00
Subtotal expenditure for Overheads	0.5	590.00
Other Costs		
Fuel/food/accommodation		530.00
Car hire		750.00
Subtotal expenditure for Other Costs		1,280.00
Total expenditure for P38/2461	5.5	4,870.00

Tenement Number: P38/2462

SUMMARY OF OPERATIONS AND EXPENDITURE FOR PERIOD ENDED: 7/9/94

	Owner Days	Amount
General Prospecting		
Metal detecting - 7 days @ \$300/day 2 men	7.0	4,200.00
Subtotal expenditure for General Prospecting	7.0	4,200.00
Overheads		
Geological input		500.00
Office admin./typing/phone/fax		450.00
Research - 1 day	1.0	300.00
Subtotal expenditure for Overheads	1.0	1,250.00
Other Costs		
Fuel/food/accommodation		1,000.00
Car hire		1,050.00
Subtotal expenditure for Other Costs		2,050.00
Total expenditure for P38/2462	8.0	7,500.00

I now propose to comment on various items of expenditure provided in these Form 5 documents.

Travelling Time

Counsel for the defendant has submitted that the reasonable costs of travelling to and from a mining tenement including fuel, maintenance and vehicle hire is allowable expenditure. It is necessary to consider exactly what it is that a tenement holder is claiming in respect of travel. For Prospecting Licences 38/2364 and 38/2460 and under the description of "Travelling Time" the defendant has claimed expenditure at a rate of \$300.00 per day for his own time when sitting in his motor vehicle travelling to and from the tenement.

In my firm opinion no account can be taken of this item. The defendant has not incurred any liability to another party and expended anything at all to satisfy such a liability. He has not expended anything. Regulation 15(1) does not entitle him to claim an amount equivalent to wages he would otherwise be entitled to because sitting in a motor vehicle travelling to and from a tenement is obviously not direct engagement part-time or full-time in mining on a licence itself.

I note that the defendant has claimed an amount for travelling time in respect of Prospecting Licences 38/2364 and 38/2460 and has not done so at all in respect of Prospecting Licences 38/2461 and 38/2462. Obviously if the defendant located himself on the land the subject of Prospecting Licences 38/2461 and 38/2462 as he said he did then he would have had to travel there. It is also my firm opinion that the defendant has invented some items of expenditure and then used them selectively as required to meet the expenditure requirement in each case and travelling time is one such example.

Vehicle Hire

The defendant has claimed expenditure for vehicle hire in respect of Prospecting Licences 38/2460, 38/2461 and 38/2462. The fact of the matter is that the defendant did not hire any vehicle from any other party at all. Further, the defendant did not pay any other party \$150.00 per day or any amount at all in respect of vehicle hire.

The defendant gave evidence that he hired his own vehicle to himself and claimed as expenditure an amount equivalent to the amount he would otherwise have been required to pay for its hire. The idea of hiring your own vehicle to yourself is obvious nonsense.

I find that regulation 15(1) supports the view that for the purpose of expenditure a tenement holder cannot claim any amount at all for notional hire of his or her own vehicle whether the amount is equivalent to a reasonable hire charge for a vehicle of a similar type and condition or at all. Further and in any event I find that any prospecting the defendant may have done on land the subject of the tenements did not involve the use of any vehicle. There is no reason to believe and conclude that any metal detecting done by the defendant on Prospecting Licence 38/2364 was done any differently to that on any of the other tenements and yet I note that no vehicle hire is claimed on Prospecting Licence 38/2364 whereas it is on the others.

The provisions on the Forms 5 for Prospecting Licences 38/2460, 38/2461 and 38/2462 for vehicle hire are all false. This is another example of the defendant inventing expenditure and selectively applying it.

Field Assistant

The defendant has claimed expenditure at the rate of \$300.00 per day for a field assistant in respect of Prospecting Licences 38/2364, 38/2461 and 38/2462.

I find as a fact that for the respective years in question the defendant was a party to a tribute agreement with one Czak whereby Czak was authorised to prospect on land the subject of tenements held by the defendant including the Tenements. The agreement provided that if Czak located gold he could extract it and kept it for himself. Czak was required to notify the defendant of all gold found by him together with details of where it was found.

Czak said that he and a friend located a little more than three ounces on Prospecting Licence 38/2364. He shared the gold with his friend. Czak also said that he found a little more than three ounces on Prospecting Licence 38/2461 and close to four ounces on Prospecting Licence 38/2462. The defendant allowed Czak to keep the gold that he found on these three tenements.

Given that Czak found gold the defendant did not actually pay him \$300.00 per day or any amount of money at all per day for the days that Czak metal detected on the land the subject of these tenements. The defendant's Forms 5 in respect of these three tenements wherein he provided that he expended \$300.00 per day for a field assistant are all false. During the course of the hearing the defendant attempted to explain these falsehoods by claiming that Czak obtained an equivalent amount of money in the form of gold for the metal detecting carried out by him.

The evidence does not support this explanation. There is no evidence of the amount of gold found by Czak on any one particular day. Further, the evidence of Czak on the amounts of gold found by him and the number of days for a field assistant provided on the respective Forms 5 are not consistent with such explanation. I have already mentioned that Czak shared some of the gold with a friend. Further again, the gold found by Czak was not converted by him to money until March 1995 which was after all four anniversary dates for the expenditure years in issue for the Tenements. Further again and in any event an amount equivalent to the monetary value of gold found and kept by a tributer pursuant to a tribute agreement with a tenement holder is not expenditure and there is no statutory provision that enables it to be treated as such.

Research

The defendant has claimed expenditure at the rate of \$300.00 per day for research on each and all of the Tenements. According to the defendant most of this research was conducted on material in searches obtained from the Department of Minerals and Energy and at a time when he was overseas.

The primary reason why this item should be excluded in every case is because the defendant did not actually expend anything and regulation 15(1) does not entitle him to claim any amount equivalent to what he may have otherwise have been required to pay to some other party for such research. Research by the holder does not fall within the meaning of the words "if the holder is directly engaged part-time or full-time in mining on the licence itself" as provided in regulation 15(1).

Further and in any event I do not believe that the defendant spent the time he says he did on research for each one and all of the Tenements. Further again the defendant is not appropriately qualified to carry out any meaningful and worthwhile research. Further again there is no evidence of any mining to which any such research actually relates.

Research is another example of the defendant inventing expenditure and then using it selectively to create the impression that the minimum required expenditure in each and every case has been satisfied.

Metal Detecting and Daily Rate

The defendant has claimed a daily rate of \$300.00 for metal detecting on all of the tenements. The Forms 5 provide that the defendant used a metal detector for 10 days on Prospecting Licence 38/2364, 8 days on Prospecting Licence 38/2460, 5 days on Prospecting Licence 38/2461 and 7 days on Prospecting Licence 38/2462.

While I am satisfied that the defendant spent some time metal detecting his credibility is so lacking that I do not accept that he did so for the number of days that he has claimed he did on each and all of the Tenements.

There is evidence before me from Foster and Barnes, both Geologists, on the amount of wages payable for field work in the Duketon area where the Tenements are located. The evidence of Foster is that \$300.00 per day would be payable to a person who supplied his or her own vehicle. Without any vehicle expenses a daily rate of about \$200.00 to \$225.00 could be payable to an experienced person. Foster said that he would bill out a field assistant within this range. Barnes gave evidence that a rate of \$200.00 to \$300.00 per day could be payable and that the amount may be more in summer than winter. He said that in 1993 he was probably charging a bit less than \$45.00 to \$50.00 per hour for his own time. Therefore \$300.00 per day for a non-qualified person to metal detect would have been extremely excessive.

On the evidence I find that a wage of no more than \$200.00 per day would have been payable to a person for carrying out metal detecting in the Duketon area during the time in issue. It should also be appreciated that when considering what amount would equate to wages he would otherwise be entitled, the defendant did not actually assist any qualified person. Lack of qualified supervision would negate the worth of metal detecting from a tenement holder's point of view.

I have already expressed the finding that a vehicle was not used for the purpose of metal detecting on any one of the Tenements and so nothing more need be said about a vehicle in the context of wages otherwise payable.

Inspection

The defendant has claimed expenditure at the rate of \$300.00 per day for his own time inspecting Prospecting Licence 38/2364 for one day and Prospecting Licence 38/2460 for one day. The fact of the matter is that Barnes, a qualified Geologist, spent two days on one or more of the tenements teaching the defendant how to use a magnetometer and make written and meaningful field notes. The defendant therefore was not "mining on the licence itself". At best he was being educated and preparing himself to carry out mining on the licence itself. Accordingly these inspections and the amounts claimed in respect of them should not be taken into account when determining the amount of actual expenditure on Prospecting Licences 38/2364 and 38/2460.

Fuel/Field Supplies/Accommodation

These items of expenditure have been provided on all four Forms 5. The Form 5 for Prospecting Licence 38/2364 has field supplies/accommodation as a separate item to fuel/oil. The other three Forms 5 provide one global figure for fuel/food and accommodation. I do not believe that the defendant incurred any accommodation expenses. I find that he camped on either one of the tenements or at Czak's campsite at Marshall Pool which is west of Duketon. Further, I am not satisfied on the evidence that the defendant expended any amount of money on food in excess of that which he would have ordinarily spent had he not been on any one of the Tenements. Further again and in respect of fuel I am not satisfied that the defendant expended any particular amount on fuel in connection with mining on any one of the tenements. I also find that the defendant incorporated visits to other places when he travelled to any one of the Tenements.

Accordingly these items and the amounts claimed in respect of them should not be taken into account when determining the amount of actual expenditure.

Office Administration/Backup/Typing/Phone/Fax

The defendant has claimed expenditure items as described above on one Form 5 or another. On the evidence, none of these items are “in mining on or in connection with mining on the licence” as provided in regulation 15(1).

There are expenses in running offices for all types of businesses no matter what the particular nature of the business may be. Just because the nature of the business is mining does not of itself mean that all office expenses are expended in mining on or in connection with mining on a mining tenement(s). Further, there is no evidence of any mining on any of the Tenements, actual or proposed, to which any such items relate.

Accordingly these items and the amounts claimed in respect of them should not be taken into account when determining the amount of actual expenditure.

Geological Report/Input

The defendant has claimed expenditure of \$500.00 for geological report/aero-magnetic interpretation on Prospecting Licence 38/2364, \$500.00 for geological input on Prospecting Licence 38/2460, \$300.00 for geological input on Prospecting Licence 38/2461 and \$500.00 for geological input on Prospecting Licence 38/2462.

The defendant says that all of the geological reporting and input claimed related to services provided by Barnes, a geologist. I accept that Barnes rendered some accounts to the defendant for professional services falling into this category but I do not accept that the defendant paid and so satisfied any such account during the respective expenditure years in issue.

Summary and Conclusions

I do not propose to consider any other items of expenditure claimed by the defendant because in my opinion I have made more than a sufficient number of findings to properly determine each and every one of the four complaints.

Even if I accepted the number of days that the defendant claims to have metal detected on each and all of the tenements (which I do not) the shortfall in expenditure on each and all of the Tenements would be substantial. Applying a rate of \$200.00 per day for the respective number of days metal detecting as claimed by the defendant and deleting amounts in respect of the items that I have commented upon and found should not be taken into account gives rise to the following:

Prospecting Licence 38/2364

The amount of expenditure claimed of \$7382.00 should be discounted by \$5382.00 resulting in expenditure of \$2000.00. This resultant expenditure represents a shortfall of \$4960.00 from the minimum required expenditure of \$6960.00 for this tenement.

Prospecting Licence 38/2460

The amount of expenditure claimed of \$7,970.00 should be discounted by \$6,370.00 resulting in expenditure of \$1,600.00. This resultant expenditure represents a shortfall of \$6,360.00 from the minimum required expenditure of \$7,960.00 for this tenement.

Prospecting Licence 38/2461

The amount of expenditure claimed of \$4,870.00 should be discounted by \$3,870.00 resulting in expenditure of \$1,000.00. This resultant expenditure represents a shortfall of \$3,800.00 from the minimum required expenditure of \$4,800.00 for this tenement.

Prospecting Licence 38/2462

The amount of expenditure claimed of \$7,500.00 should be discounted by \$6,100.00 resulting in expenditure of \$1,400.00. This resultant expenditure represent a shortfall of \$5,960.00 from the minimum required expenditure of \$7,360.00 for this tenement.

It can be noted from these figures that the claimed expenditure is only nominally in excess of the minimum statutory requirement. I have already expressed the view that the shortfall of expenditure on all of the tenements is substantial. This is so even when applying the number of days for metal detecting as claimed by the defendant which as a matter of fact I do not accept.

I wish to make it clear that in my opinion it is not proper to exercise the discretion whether to forfeit, fine or impose no penalty with a view that any shortfall in excess of a particular percentage of the minimum required expenditure must necessarily result in a forfeiture. Any shortfall needs to be weighed together with all other factors concerning expenditure in mining on or in connection with mining on a tenement and the holders reason or reasons for failing to satisfy the minimum required expenditure. It may be that in a particular case notwithstanding a substantial shortfall the appropriate outcome may be something other than forfeiture when such shortfall is weighed together with other factors. Such is not the case on any one of these four complaints.

In Pacminex (Operations) Pty Ltd v Australian (Nephrite) Jade Mine Pty Ltd (1974) 7 SASR 401 His Honour Mr Justice Wells said in relation to an identical provision in South Australia:

"The court must... 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... 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...

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".

In addition to the substantial shortfall of expenditure on each and all four of the tenements, the defendant has filed Forms 5 which in every case provides false and misleading information. Forfeiture is not to be used as a means of punishment for providing false and misleading information on such a form. The point that arises from the extent of the defendant's false and misleading conduct in each and all four of the matters before me when considered singularly and as a whole is that he has little or no regard for the expenditure requirements of the Act and Regulations. In my opinion such an attitude is a factor that weights in favour of forfeiture. Apart from the defendant having done some metal detecting the evidence does not support any other finding favourable to him that could and should be weighed with the above two factors when exercising the discretion in each and all four of these cases.

In my opinion in each and all four of these cases the expenditure requirements have not been complied with in a material respect and the matter is of sufficient gravity to justify forfeiture.

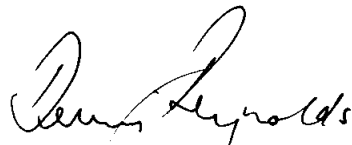
For all of these reasons I determine that each one and all of Prospecting Licences 38/2364, 38/2460, 38/2461 and 38/2462 should be forfeited and I propose to make orders accordingly.

Order

At 9.46am on 10 March 1997:

1. Prospecting Licence 38/2364, and
2. Prospecting Licence 38/2460, and
3. Prospecting Licence 38/2461, and
4. Prospecting Licence 38/2462,

are all forfeited.



D J REYNOLDS SM
WARDEN