IN THE WARDEN'S COURT
HELD AT SOUTHERN CROSS & NORTHAM

ON THE 25th February, 1988 : 13th May, 1988 :
1st August, 1988 : 12th December, 1988

BETWEEN: HORACE JOSEPH STRANGE — APPLICANT

- and -

MICHAEL PIETSCH — DEFENDANT

BEFORE: WARDEN G.N. CALDER, SM

FOR THE APPLICANT: Mr Johnson

FOR THE DEFENDANT: Mr Percy

The applicant herein, Mr H.J. Strange seeks an order for the forfeiture of Gold Mining Lease 77/4879, the "Derwent Jack" on the ground of failure to comply with the statutory expenditure requirements for the 1986 expenditure year. From 24 January 1986 the registered lessees of the Derwent Jack have been Michael Pietsch and Leslie Harrison. The amount of expenditure required by the Mining Act ("the Act") and the Mining Regulations (the "Regulations") - section 92(1)(c) and Reg 31 - is $10,000.

For purposes of Reg 32 the lessees of the Derwent Jack lodged a "report on operations on mining tenement", which was in the

prescribed form 5, for the Derwent Jack in respect of the year ended 31 December 1986. That report was tendered in evidence. It stated, in summary, that the operations had consisted of sampling, mapping and drilling. An attachment filed with the form 5 consisted of a more detailed "summary of expenditure". It was stated therein that a total of $12,810 had been expended over the year in question. That total was made up of "general prospecting" entailing 3 "man days" at a cost of $150, amounting to $450, 2 "man days" of geological studies amounting to $640, costeaning and pitting amounting to $1,940 consisting of 2 "man days" of labour input at $120 per day and $1,700 for machinery costs, and amount of $7,880 for 280 metres of R.C. drilling and $1,900 for 2 days hire of an air track and compressor.

It is the submission of the applicant that in fact during the year in question no work was done on the ground on the Derwent Jack and that, in effect, the form 5 report was false.

The principal witness for the applicant was Mr H.J. Strange himself. In essence, his evidence was that he had been extensively involved in prospecting work on and around the Derwent Jack for a number of years prior to 1986 and that he had been involved in a joint venture with other prospectors in 1986 on a tenement adjoining the Derwent Jack. He said that because of his having held a prior unregistered interest in the Derwent Jack and because of his continuing general interest in the tenement he had always paid particular attention to it after agreeing to sell it in 1982 to Mr Pietsch. He gave evidence of his having very frequently visited the tenement between 1983 and 1986 inclusive. Without going into

any particular detail as to what he said, I am unable to accept that those visits occurred with anything like the frequency suggested by the applicant. I do not accept that he spent most of that time living in Bullfinch. I am satisfied from the evidence of those witnesses who gave evidence in that regard, namely Mrs Hockley, Mr Williamson, Mr Kozyrski, Mr Chapman, Mr Bergsma that Mr H.J. Strange did not live as he said "mostly in Bullfinch" during the period 1983 to 1986, and I am also satisfied that he was not actively involved in prospecting on leases adjoining the Derwent Jack during 1986. I accept that at various times during 1983 to 1986 Mr H.J. Strange did go on to the Derwent Jack. I also accept that he was, during 1985 and 1986 after transfer of the Derwent Jack to Pietsch and Harrison, still interested in the tenement.

The evidence given by Mr H.J. Strange in relation to the extent of the inspections done by him on the Derwent Jack during 1986 was insufficient to convince me on the balance of probabilities that he would "necessarily", as he was in effect putting it, have seen the six drill holes which were extensively referred to in evidence. An inspection of the tenement by me during the proceedings revealed that the description given in evidence by the applicant was very misleading. Contrary to what he had said, one could not see "from one end to the other without any trouble" nor could one "see the whole tenement from almost anywhere (one) stopped". There was in my opinion a sufficient amount of scrub on the surface, combined with a hilly topography as would have concealed from anything but a very close inspection of the whole tenement the six holes in question together with signs of removal of up to

200 tonnes of laterites and other schist type material from the surface or out of existing pits or workings on the tenement. Mr H.J. Strange's evidence was such that it left me unconvinced that had the six holes been drilled in 1986 and the 200 tonnes of material removed from three other areas on the tenement as is now claimed by Mr Pietsch, he could not have failed to notice them.

Mr Pietsch's evidence was that he drilled six R.C. holes in March 1986 in the positions shown on exhibit 1. He said that he also removed 200 tonnes of material from the tenement using a loader and truck in April of 1986. His evidence in relation to the drilling of the six holes was corroborated by the evidence of the witness Glazer who said that he had been present while all six holes were drilled and that he had worked as a driller's offsider in the drilling of all six. Glazer gave evidence that the holes were drilled in 1986. Mr Pietsch's evidence in relation to the removal of approximately 200 tonnes of surface material from the tenement and the analysis of that material at Parker Range was supported by the evidence of his brother, Mr Eran Pietsch.

The applicant had called expert witnesses to counter the anticipated evidence of Mr Pietsch. Their evidence in summary was to the effect that based upon their individual experience and upon inspection of the tenement, as a whole, and the six holes and relevant pits, in particular, it was apparent that the six holes had been only recently drilled and that it was unlikely that 200 tonnes of material had been removed. Mr Pietsch called expert witnesses to contradict those experts called by the applicant. Whilst I accept that witnesses

called by the applicant were all very experienced in their respective fields and that their opinions were formed bona fide on the basis of their expertise, I also formed the same conclusion in relation to the evidence of the expert witnesses called by Mr Pietsch.

In conclusion the evidence called by the applicant has failed to satisfy me that I should reject the evidence of Mr Pietsch, his brother and Mr Glazer as to the nature of the work done on the tenement and as to the timing of that work, namely during 1986. I am satisfied on the balance of probabilities that the work said to have been done by the joint tenement-holder Mr Pietsch was in fact done.

S.82(1)(c) of the Mining Act provides for compliance with "expenditure" conditions. It does not make any reference to "work" per se. During the course of evidence it emerged that the work done on the tenement had been "paid for" in different ways, and that where persons other than Mr Pietsch had actually worked on site their wages had not been paid for directly by either of the tenement holders.

Regulation 31(1) 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 engage 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".

What I must now consider is whether the "holder" of the Derwent Jack spent any money and if so what amount, during 1986 for purposes of Reg 31.

At all material times Mr Pietsch had control of a drilling company, referred to in evidence as "Hardrill". Hardrill had a considerable amount of drilling equipment and employed various numbers of men in different capacities. Mr Pietsch also worked for Hardrill. I have no doubt that all of the six holes in question were drilled using Hardrill's equipment and employees (one of whom was Glazer). I have no doubt that all expenses associated with the drilling of those six holes were in fact met by Hardrill and that no payment was ever made, no sought, nor expected to be made by the co-tenement holders to Hardrill for those expenses. I accept that each of the holes was about 45 metres deep and that $25-$30 per metre was a reasonable average overall drilling cost. The equipment and labour used to drill the holes was, however, simply used when it would otherwise have been doing nothing for Hardrill. Glazer's wages and those of the driller (Robinson) were thus paid by their employer company, Hardrill, and not by Mr Pietsch.

I am also satisfied that Mr Pietsch's brother, who assisted in the carting of the ore to Parkers Range and its crushing there was not

paid for his services by Mr Pietsch. Mr Pietsch did not pay any money for the treatment of the 180-200 tonnes taken from the Derwent Jack. I accept his evidence that a rate of around $30 per tonne would have been a reasonable charge for that treatment.

In evidence Mr Pietsch referred to the fact that "we" hired a truck and loader to dig up the material from the Derwent Jack and transport it to Parkers Range. The invoice for that hiring is made out to "Mr Michael Pietsch". It is for a total amount of $7,612 and is made up of three weeks hire of a truck at $875 per week, 3 weeks hire of a loader at $1,250 per week, $645 delivery charges and $592 for damages. I am satisfied that the $7,612 was paid but not by Mr Pietsch personally. In any event, work on the Derwent Jack with the loader and truck only took two days. The machines were used on other tenements in which Mr Pietsch had interests. At most only a fraction of that cost could be properly attributed to work on the Derwent Jack. That fraction could be no more than the equivalent of 2 days out of 21 which would amount to $725. That maximum allowance of $725 also includes a pro-rate allowance for the damage claimed. On the evidence it was unclear precisely where the machine was working when that damage occurred.

The form 5 lodged in respect of the 1986 year claimed that the amount expended was $12,180. The attached "summary of expenditure" claimed a number of separate expenditures for labour and drilling costs and hire costs. I accept that Pietsch himself worked at least one day on the drilling and two days with the loader on the Derwent Jack and that an allowance of $120 daily for that pursuant to Reg 31(1)

should be made. It was unclear from the evidence how many other days Pietsch worked on the tenement personally in "mining on the lease itself" for purposes of Reg 31(1) and I am not able to simply guess or estimate any further amount equivalent to wages for which he could be given credit pursuant to the Regulation.

Mr Pietsch gave evidence that the $640 for "man days" under the heading "geological studies" was not in fact an outgoing. The work to which the amount relates had, I find, been done more or less "as a favour" by a geologist. There was no payment made. That amount is not expenditure for purposes of S.82.

For reasons I have mentioned above the amount of $1,700 said by Mr Pietsch in evidence to have been for loader hire, is excessive. I consider that $725 is the most that could be properly claimed in respect of the hire of both the loader and the trucks.

While I accept that an air track rig and compressor were used for 2 days on the Derwent Jack and did cost $950 daily I have no doubt that Mr Pietsch did not personally pay that amount for it. Accordingly the amount of $1,900 claimed in respect thereof is not within Reg 31(1).

On the evidence before me there is no suggestion that the amounts of expenditure which were met by Hardrill were in any way met in order to offset any debts due by Hardrill to either of the tenement holders, nor to discharge any other liabilities or obligations then due to the tenement holders by Hardrill. Accordingly it cannot in respect of such amounts be said that the tenement holders have

"expended" those amounts by in effect releasing Hardrill from paying such amounts to them in consideration of Hardrill meeting those expenses. Mr Pietsch did mention in evidence that because of previous work he had done on the Mount Buffalo plant (which I accept) his "partner" in Karlrich Mining had not charged him for treating the material taken from the Derwent Jack. I am not satisfied however, that such work as had been done at Mount Buffalo had been done by Mr Pietsch in a personal capacity and not by Hardrill or by some other organization and I am therefore not satisfied that the obligation or liability or whatever it was that Mr Pietsch's partner in Karlrich felt was owed in respect of that work was owed personally to Mr Pietsch.

From the absence of any evidence related to any role played by the co-tenement holder, Mr Harrison, I draw the inference that he expended no funds during the year in question on the tenement.

For the above reasons I conclude that the evidence discloses that the only "expenditure" incurred on the Derwent Jack by the tenement holders which falls within Reg 31(1) was the 3 days on site work performed personally by Mr Pietsch as mentioned above. Allowing $120 per day that only amounts to $360.

This application is brought pursuant to S.98 of the Act.
S.98 says:-

(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.

(2) Not relevant.

(3) Not relevant.

(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), 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.

(4)(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) 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.

In the present case I have found certain facts established by the evidence on the balance of probabilities. Those facts so proven show that there was work done on the Derwent Jack during 1986 which consisted of the drilling of six reverse circulation holes each of approximately 45 metres depth, the removal to and treatment at

Parkers Range of between 180 and 200 tonnes of surface or near surface material, and two days of work by a geologist (Mr Trudinger) and some two days work done by an air track rig. That work was not paid for by Mr Pietsch or Mr Harrison (the co-tenement holder) either directly or indirectly. The evidence has only established that Mr Pietsch should be allowed a "credit" under Reg 31(1) for 3 days personal labour on the tenement itself totalling $360.

I am satisfied that a considerable amount was actually expended in relation to the Derwent Jack in 1986 by companies or partnerships with which Mr Pietsch was closely related and in respect of which he had total or partial control. I infer from the evidence that he was entitled to share in any profits made and distributed by an such companies or partnerships. I am satisfied that, in relation to Hardrill, it was at the direction of Mr Pietsch that the company incurred expenditure by way of labour costs and machinery and plant operational costs on the Derwent Jack. Although neither Mr Pietsch nor Mr Harrison together (directly or indirectly) personally incurred expenditure in excess of $360 (Mr Pietsch's 3 days labour) for purposes of Reg 31, nevertheless a considerable amount was actually expended during 1986 "in mining on or in connection with mining on the lease...".

I accept the evidence that the treatment of the material at the Parkers Range plant would have cost in the vicinity of $6,000. I accept that the cost pro-rata of the loader and truck hire on the lease was approximately $725. I accept that Glazer worked on the lease for five days - at $12 an hour for a 10 hour day that represents a labour expenditure of $600 for Glazer and $480 for Robinson.

Mr Pietsch's brother worked for two 10 hour days on the lease in April. That represents (at the same hourly rate) $240. I accept that $25 per metre would be a reasonable charge for the six R.C. drill holes. Total drilling in respect thereof was about 270 metres amounting in total to $6,750. I accept that two days work by the geologist Mr Trudgen at $320 per day represented the "going rate" at the time. That amounts to $640. I also accept that the air track and compressor would have cost $950 a day for two days amounting to $1,900. I was not presented with specific details of the cost of cartage of the material to Parkers Range from the Derwent Jack. I do not propose to try and estimate its value. It is sufficient to acknowledge its existence as a cost relating to "mining" on the Derwent Jack.

It is clear from the above that the lease was during the year in question the subject of expenditure in excess of the minimum $10,000 requirement. It was being worked and to that extent the obvious policy contained in S.82 of the Act was being fulfilled. That policy includes the legislative purpose and intention that tenements are not neglected and that ground is not to be simply held for some purpose other than exploitation of any valuable mineral deposits by the holders. This is particularly so with mining leases.

Given that policy and given the findings I have made it is my view that this is not a case where I should recommend that forfeiture should occur. I am not, for purposes of S.98(5) satisfied that the non-compliance is of sufficient gravity to justify forfeiture of the lease. I am satisfied that Mr Pietsch has the future capacity of

work the lease and incur expenditure in accordance with the legislation. I accept his evidence as to the work done since 1986 on the lease.

It is my opinion that the imposition of a fine in the circumstances would be inappropriate. Accordingly the application for forfeiture is dismissed.

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G.N.CALDER, SM

25th May 1989