IN THE WARDEN'S COURT)
)
HELD AT COOLGARDIE)

Heard: 18.06.87

Delivered: 18.06.87

IN THE MATTERS OF
Plaints Nos. 23-25/867
seeking forfeiture of
mining tenements Nos.
16/1137, 16/1138 and
16/1222 respectively.

BETWEEN: SURINA PTY. LTD.

Plaintiff

and

BELCREST CORPORATION LTD.

Defendant

AND: IN THE MATTER OF
Plaint No. 26/867
seeking forfeiture of
mining tenement No.
16/10.

BETWEEN: SURINA PTY. LTD.

Plaintiff

and

BELCREST MINERAL
EXPLORATION LTD.

Defendant

Mr. Hunt instructed by Collison Hunt and Richardson appeared for the Plaintiff.

Mr. Kerford instructed by Dwyer and Thomas appeared for the Defendants.

.../2

REASONS FOR DECISIONS

WARDEN D.J. REYNOLDS S.M.:

Mining tenements Nos. 16/1137, 16/1138 and 16/1222 (""G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222" respectively") were all gold mining leases under the Mining Act 1904 as amended and they were all in force immediately before the commencement date of the Mining Act 1978 as amended ("the Mining Act"). They are now all deemed to be mining leases under the Mining Act [(See Clause 2(1) of the Second Schedule to the Mining Act)]. Mining tenement No. 16/10 ("M. 16/10") is a mining lease granted under the Mining Act.

The particulars of claim on the three plaints seeking forfeiture of the mining leases, formerly the old gold mining leases, are drafted in identical terms as follows:

> "The Defendant has not complied with the expenditure conditions relating to _____ in that no work has been done on the tenement for the expenditure year ending 31.12.86, no report for that expenditure year under Section 82 has been filed and no exemption under Section 102 has been obtained."

The particulars of claim on plaint No. 26/867 seeking forfeiture of M. 16/10 is in similar terms, the only difference being the expenditure year. The expenditure year for M. 16/10 ended on the 13.02.87. The Defendants deny that they have breached the expenditure provisions and in any event say that forfeiture is not justified.

Section 98 of the Mining Act contains the relevant provisions on the forfeiture of a mining lease. Subsections

(1) to (5) inclusive provide as follows:

"98. (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) An application for forfeiture under this section shall be made during the expenditure year in relation to which the requirement is not complied with or within 8 months thereafter in such form and manner as may be prescribed and shall be accompanied by the prescribed fee.

(3) The application for forfeiture shall be heard in open court by the warden.

(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) of this section, 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.

(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) of this section 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."

(my underlining)

In Craig -vs- Queen Margaret Gold Mines NL & Spargos Exploration NL I discussed the various legislative provisions and the principles applicable to applications for forfeiture and so I don't propose to discuss them once again in this decision.

Although all of these plaints were heard together as a matter of convenience, it must be remembered that it is necessary to examine whether there is a breach of the expenditure conditions in each particular case and if so whether there is sufficient gravity in that particular case to justify forfeiture.

Regulation 31 of the Mining Regulations 1981 as amended provides as follows:

"31. (1) 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:

.../5

Provided that where the area of a mining lease does not exceed five hectares the minimum annual expenditure shall be $5 000.

(2) If a mining lease is surrendered then a pro-rata reduction of the amount to be expended will apply in respect of each whole quarterly period from the date of surrender to the next anniversary date of the commencement of the term of the lease."

(my underlining)

G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222 each have an area of 9.7 hectares. M. 16/10 has a surveyed area of 107.35 hectares. Accordingly, the minimum expenditure on each old G.M.L. is $10,000 and on M. 16/10 is $10,800.

The Plaintiff called three witnesses in all. One of them, AJNS STEINNOCKEL ("STEINNOCKEL"), gave evidence that the only work carried out in 1986 on any of the four tenements was some bulldozing. This was carried out in April, 1986 and only on M. 16/10.

STEINNOCKEL is the holder of old gold mining lease No. 16/1253 ("G.M.L. 16/1253"). This tenement is also deemed to be a mining lease under the Mining Act pursuant to Clause 2(1) of the Second Schedule. It is commonly known as "Premier South" and comprises an area of 9.7 hectares. It is completely located within the boundaries of M. 16/10. STEINNOCKEL says that he was working on his tenement for some time when the bulldozing was carried out on M. 16/10. He also says that

of a total of about 4 days spent in the area bulldozing, the operator spent 2 days bulldozing on G.M.L. 16/1253 and STEINNOCKEL ordered him off his tenement and directed him to M. 16/10. He described the operator as having a "picnic" approach to the work.

ANTONIO BELCASTRO ("BELCASTRO") is a director of Beltech Corporation Ltd which is the new name for Belcrest Corporation Ltd. He gave evidence that the bulldozing cost $14,600. He did not supply any corroborative evidence of this. The Plaintiff produced two invoices from Bell Bros. Earthmoving for bulldozing carried out for Beltech Corporation Ltd in April 1986. These invoices total $7720 and not $14,600. The total number of hours on the invoices is 90 hours.

I accept the evidence of STEINNOCKEL and I find that the number of hours on the invoices is excersive, the total cost of bulldozing was $7720 not $14,600 and further that not all of the expenditure for the bulldozing can be attributed to M. 16/10 because the operator spent two days on G.M.L. 16/1253 held by STEINNOCKEL.

The bulldozing work consisted of filling in old costeans. This work was carried out on the order of the District Inspector of Mines. The purpose of the work was to rehabilitate the ground and to make the area safe.

It was submitted by Counsel for the Plaintiff that expenditure on bulldozing was not "on or in connection with mining" as provided in Regulation 31. Section 8(1) of the

.../7

Mining Act defines "mining" and it is defined to include inter alia mining operations. The words "mining operations" are defined in Section 8(1) as follows:

> ""mining operations" means any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted or refined or dealt with for the purpose of obtaining any mineral therefrom whether it has been previously disturbed or not and includes -
>
> (a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral;
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> (b) operations by means of which salt or other evaporites may be harvested;
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> (c) operations by means of which mineral is recovered from the sea or a natural water supply; and
>
> (d) the doing of all lawful acts incident or conducive to any such operation or purposes;."
>
> (my underlining)

In my opinion rehabilitation of the environment is an integral part of a properly planned mining operation. Expenditure for the bulldozing on M. 16/10 is therefore expenditure as provided in Regulation 31. The evidence clearly establishes that no other expenditure was incurred

on M. 16/10 for the year ending the 13.02.87.

The evidence also clearly establishes that no expenditure whatsoever was incurred on any of G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222 for the year ending 31.12.86. As required by Section 98(1) the Plaintiff has proved in all four cases that "the requirements of this Act" are not being complied with in respect of the expenditure conditions."

It is now necessary to examine each case and determine whether the non-compliance with the expenditure conditions is, "in the circumstances of the case, of sufficient gravity to justify the forfeiture."

BELCASTRO said that Belcrest first became involved in the Kunanalling area in 1982 when one of its companies entered into a joint venture agreement. One of the joint venturers was STEINNOCKEL. The aim of the joint venture, managed by Kunanalling Alluvials Pty Ltd, was to produce alluvial gold. At that time the land the subject of M. 16/10 was the subject of mineral claim 16/1446. That mineral claim and G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222 were all included in the joint venture. The joint venture came to an end in 1983 and Kunanalling Alluvials Pty Ltd is currently in liquidation.

According to BELCASTRO, the Belcrest company put $125,000 into the joint venture. His evidence does not provide any detailed breakdown of this amount however, I note that it included the costs of acquisition of mining tenements and

machinery. The liquidation has not yet been finalised.

The Plaintiff called HARVEY DAVIES ("DAVIES"), a consultant geologist who was retained by Belcrest in late 1983 and early 1984. DAVIES visited the Kunanalling area in November 1983 and carried out some gridding. He was to supervise a drilling programme planned on the tenements from the 14.03.84 to the 14.04.84. However, the 14 hole drilling programme was reduced to 4 because of mechanical problems with the drilling rig. Of these 4 holes, only 3 were on tenements included in these plaints. DAVIES said that 2 holes were drilled on G.M.L. 16/1138 and 1 hole on G.M.L. 16/1137. He believes that the fourth hole was drilled on STEINNOCKEL'S tenement G.M.L. 16/1253.

The total length drilled was about 400 metres. The drilling costs alone would have amounted to about $8,000 and DAVIES estimated that the total drilling programme would have cost somewhere in the range of $15,000 to $20,000. I note that the reduced programme did not include any drilling on M. 16/10 and G.M.L. 16/1222. DAVIES returned to the area on the 10.06.87 and traversed all four tenements thoroughly. He says that no further exploration work has been carried out on any of the tenements since the drilling programme in April, 1984. This confirms the observations of STEINNOCKEL that no work other than the bulldozing has been carried out. When BELCASTRO was cross examined, he conceded that to his knowledge no funds were expended on any of the tenements

for the periods 01.01.85 to the 31.12.85 and the 14.02.85 to the 13.02.86.

BELCASTRO says that in 1984 a total of $60,000 was expended on the four tenements. He said that he obtained this figure from the audited accounts of one of the Belcrest companies. The audited accounts may well have included expenditure not strictly "on or in connection with mining." BELCASTRO cannot tell me how the sum of $60,000 was made up. Having heard and accepted the evidence of STEINNOCKEL and DAVIES, I do not accept that a total of $60,000 was expended on or in connection with mining on all four tenements in 1984.

From all of this it can be concluded that since 1983, no exploration has been carried out on G.M.L. 16/1222 and M. 16/10, only 2 exploratory drill holes on G.M.L. 16/1138 and only 1 exploratory drill hole on G.M.L. 16/1137. This is grossly inadequate.

The Defendants have pleaded that if they have not complied with the expenditure conditions then that is the result of a dispute concerning its title and so the non-compliance was justified.

On the 12.12.84 STEINNOCKEL sought an injunction to prevent M. 16/10 from being registered in favour of Belcrest Mineral Exploration Ltd. STEINNOCKEL says that he purchased M. 16/10 from FRANCIS JOHN JARVIS ("JARVIS") and EDWARD ROBERT MUTZIG ("MUTZIG"). STEINNOCKEL says that he had only one

instalment of $2,000 to pay to JARVIS and MUTZIG to complete his purchase of M. 16/10. STEINNOCKEL alleges that an officer of Belcrest Mineral Exploration Ltd called on JARVIS and MUTZIG to sign a transfer of M. 16/10 in its favour when it was known that they had sold the tenement to STEINNOCKEL. This plaint was eventually dismissed on the 22.01.86 and the Defendant, Belcrest Mineral Exploration Ltd has remained on the register as the holder.

Regulation 52 of the Regulations provides as follows:

"52. It shall not be obligatory on the holder of any mining tenement to comply with the expenditure conditions thereof after a plaint claiming forfeiture has been lodged until 7 days after the determination thereon."

The plaint by STEINNOCKEL seeking injunctive relief was in respect of M. 16/10 only. Therefore, the Defendant, Belcrest Corporation Ltd, cannot rely on Regulation 52 to excuse any non-compliance with the expenditure conditions on G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222 during the currency of the plaint, namely from the 12.12.84 to the 22.01.86, which includes the whole of the 1985 expenditure year. It should also be noted that the plaint was dismissed prior to the commencement of the expenditure year ending the 13.02.87 for M. 16/10.

The Defendants have also produced copies of Writs of Summons issued out of the Registry of the Supreme Court of Western Australia on the 12.06.86. Both Writs have a brief

endorsement of claim and seek specific performance or alternatively damages. The Plaintiff in one alleges that the Defendant, Belcrest Mineral Exploration Ltd, is in breach of an agreement for sale dated the 11.12.84 in respect of M. 16/10. The Plaintiffs in the other allege that the Defendant, Beltech Corporation Ltd, is in breach of an agreement for sale dated the 11.12.84 in respect of G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222.

The Defendants have not given any evidence concerning the alleged agreements the subject of the Supreme Court proceedings. There is no evidence of any efforts by the Defendants to expeditiously resolve any title disputes to avoid legal proceedings. There is a delay of about 18 months between the date of the alleged agreements and the date of filing of the Writs. There is no explanation for this delay. There is no evidence of the current position of the legal proceedings. I do not know whether all parties to those proceedings have attended to pleadings and interlocutory matters in an expeditious manner and if the Plaintiffs have not, then whether the Defendants have taken appropriate action.

Further, the Defendants herein have not given any evidence of any exploration programme, drilling or otherwise, scheduled for these four tenements that had to be postponed as a result of the Supreme Court proceedings.

.../13

BELCASTRO agreed that in December 1984 the Defendants were involved in negotiations with other companies to sell these four tenements. He also said "I guess funds were not spent because of the title problem." These are the only tenements the Defendants have in the Goldfields and yet BELCASTRO has not visited any of them since 1984 and he cannot recall the last occasion when an employee of the Defendants visited any of them.

The Defendants have also failed to lodge reports with the Department of Mines as required by Section 82(1)(e) of the Mining Act for the expenditure years in issue. Further, they failed to apply for an exemption on any of the four tenements as provided in Section 102 of the Mining Act. One would have thought that if the Defendants were genuinely concerned about their security of title then they would have made applications for exemptions. There is no good reason given by the Defendants for such failure.

I am of the opinion that after the failure of Kunanalling Alluvials Pty. Ltd. and the problems associated with the drilling programme in 1984 which was not completed, the Defendants were keen to either sell their interests or be carried by a joint venture partner. The existence of legal proceedings has proved convenient to the Defendants and they have injustifiably relied on such proceedings in an attempt to avoid the worst possible consequence of these plaints for forfeiture.

.../14

In my opinion the assessment of whether or not there is sufficient gravity to justify forfeiture is one that should be made having regard to the state of the mining industry particularly at the time of the non-compliance. The healthy state of the gold mining industry has resulted in an acute shortage of what may be generally described as potentially prospective land. When such land becomes open for mining then there is often fierce competition to first comply with "the initial requirement" as provided in Section 105A of the Mining Act. If tenement holders holding land for gold go to sleep on their rights and obligations in times like these then they put their title at risk.

Immediately before the commencement of the hearings I allowed the Defendants to lodge notices of defence pursuant to Regulation 126 of the Regulations. This was done to avoid any injustice. Thereafter it was up to the Defendants to decide what evidence, if any, they wished to call.

I am mindful that in these sorts of cases a defendant does not carry any onus of proving compliance for the plaint to be dismissed. It is not for a defendant to make up any deficiency of evidence on the part of a plaintiff. However, once a plaintiff has put evidence before a Warden that supports some positive inference then one would expect a defendant to give some evidence on the point.

All of these cases are highlighted by the paucity of evidence from the Defendants. In Jones -vs- Dunkel (1959) 101 C.L.R. 298, the High Court considered the issue of the

drawing of inferences where a defendant who may have been able to explain facts upon which an inference was sought to be drawn failed to give any evidence.

At pages 320, 321 Windeyer J. quoted a passage from Wigmore on evidence:

> "The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot be fairly made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

I am of the firm opinion that sufficient gravity exists in all of these cases to justify forfeiture and I make recommendations accordingly.

CONCLUSIONS:

1. The expenditure conditions for all of G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222 for the year ending 31.12.86 and for M. 16/10 for the year ending 13.02.87 have been breached.

.../16

2. Sufficient gravity exists to justify the forfeiture of and recommendations are hereby made for the forfeiture of all of G.M.L. 16/1137, G.M.L. 16/1138 and G.M.L. 16/1222 and M. 16/10.

D.J. REYNOLDS S.M.

WARDEN