[2007] WAMW 20

JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	WARDEN IN OPEN COURT
LOCATION	**:**	MOUNT MAGNET
CITATION		RAYMOND TILBURY V CITIC NICKEL AUSTRALIA PTY LTD (2007) WAMW 20
CORAM	**:**	RICHARDSON M
HEARD		23 AUGUST 2007; FINAL SUBMISSION RECEIVED 7 SEPTEMBER 2007
DELIVERED	**:**	14 DECEMBER 2007
FILE NO/S	**:**	PLAINT NOS MM 14-18/067 and ME 23/067
TENEMENT NO/S	**:**	ELs 20/563-567 and 51/1073
BETWEEN	**:**	RAYMOND A TILBURY Plaintiff And CITIC NICKEL AUSTRALIA PTY LTD Defendant

Catchwords:

Expenditure conditions – compliance – project status – joint venture

Legislation:

Mining Act (WA) 1978
Mining Regulations (WA) 1981, regs 15, 21

Result:

Plaints dismissed.

Representation:

Counsel:

Plaintiff	:	Mr G Lawton
Defendants	:	Mr M McKenna

Solicitors:

Plaintiff	:	Lawton Lawyers
Defendant	:	Hunt & Humphry

Case(s) referred to in judgment(s):

Case(s) also cited:

INTRODUCTION

Raymond Tilbury ("the Plaintiff") has lodged six plaints against Citic Nickel Australia Pty Ltd ("the Defendant") seeking forfeiture of exploration licences 20/563-7 and 51/1073. Each of the subject exploration licences is registered in the name of the Defendant, and each

is a part of a group of tenements known as the Yarrabubba Project. There is one further tenement in the Yarrabubba Project, being exploration licence 51/1027 ("E51/1027").

The Plaintiff alleges in each of the plaints that the Defendant has failed to comply with the expenditure conditions imposed by Regulation 21 of the *Mining Regulations* 1981 in the expenditure year ending in 2006, and that such failure is of sufficient gravity to justify forfeiture. In response to each plaint, the Defendant has lodged a Notice of Defence claiming the expenditure requirement has been met. The Plaintiff has filed particulars, claiming in respect of expenditure disclosed in each relevant Form 5 that :

"(1) the work giving rise to the expenditure claimed in each instance where the claim relates to work done was not done;

(2) other than the claimed expenditure in respect of rates and rent, no expenditure was made or incurred;

(3) in the event that expenditure was made or incurred it was not made or incurred in mining or in connection with mining on the tenement;

(4) expenditure in respect of administration and overheads is not claimable where there had been no mining on the tenement."

Each of the plainted tenements was in its first year of grant. Relevant details of the plainted tenements are as follows:

Plaint No.	Tenement No.	Anniversary Date	Required Expenditure	Claimed Expenditure
14/067	E20/563	18 April 06	$63,000.00	$66,258.00
15/067	E20/564	18 April 06	$63,000.00	$64,343.00
16/067	E20/565	18 April 06	$63,000.00	$63,870.00
17/067	E20/566	18 April 06	$63,000.00	$64,590.00

18/067	E20/567	25 July 06	$20,000.00	$20,496.00
23/067	E51/1073	20 July 07	$63,000.00	$64,710.00

The project status of the plainted tenements and E51/1072 (the Yarrabubba Project) was approved by the Department of Industry and Resources ("DOIR") on 28 December 2005. The tenements have combined reporting status under s 115A(4) of the *Mining Act* 1978, and Citic Nickel accounts for the plainted tenements together with E51/1072 as a project.

Evidence in relation to the plaints was heard on 23 August 2007 at Mount Magnet. The Plaintiff filed closing submissions on 31 August and submissions in reply were filed by the Defendant on 7 September 2007.

THE EVIDENCE

The Plaintiff's evidence

The only witness appearing for the Plaintiff was Mr Tilbury himself.

Mr Tilbury referred to the prospectus of Impact Minerals Ltd dated 16 October 2006 and the reference therein to a group of tenements known as the Yarrabubba Project. The prospectus states that the Yarrabubba Project covers an area of 1,320 square kms and is up to 40 km from east to west and up to 50 km from north to south. The Yarrabubba tenements are the subject of a joint venture between Citic Resources Australia Pty Ltd (the parent company of Citic Nickel Australia Pty Ltd), Aurigen Pty Ltd (a wholly owned subsidiary of Impact Minerals Ltd), MDA Investments Pty Ltd, Spar Resources Pty Ltd, Teddy Tech Pty Ltd, and John Rowntree. There is a joint venture management committee whose membership includes representatives of all the joint venture participants.

Mr Tilbury noted that the prospectus states that Citic Resources earned a 40% interest in this joint venture "by spending more than $250,000 in the 12 month period from 19 April 2005".

Mr Tilbury said he enquired of DOIR as regards the Yarrabubba tenements and found that an application for a 100% exemption as well as a Form 5 had been lodged for each tenement for the 2006 expenditure year. The certified register search of each tenement discloses that a Form 5 (showing expenditure in excess of the expenditure requirement) was lodged on 6 June 2006, and that an application for exemption was lodged on 8 June 2006 and later withdrawn on 21 July 2006.

Mr Tilbury said he obtained a map and the coordinates of the flight plan of an aerial survey of the plainted tenements from Fugro Airborne Surveys Pty Ltd. The flight plan covered ground over and beyond the area of the plainted tenements, and included the area of E51/1072 (the unplainted tenement in the Yarrabubba Project) and part of some tenements not held by Citic Nickel. Mr Tilbury said that approximately 73% of the area flown over was the plainted tenements and the rest was other tenements of which the largest portion was E51/1072.

Mr Tilbury said that he accepted that some work was done on the plainted tenements by way of an aerial survey, but said he doubted whether a field trip was carried out. He based this allegation on "my observations of driving that area" for 4 weeks in "late October last year" (presumably in 2006) when, he says, he saw no evidence of any work on the plainted tenements. Mr Tilbury also said that, on the basis of what a "friend in mining" had said to him, the administration costs on the plainted tenements were excessive. Further, Mr Tilbury questioned whether Citic

Resources had earned its 40% interest in the joint venture by spending more than $250,000 in the 12 month period from April 2005 (which covers the expenditure year for the plainted tenements other than E20/567), as claimed in the prospectus. He said "it may have been spent … I just question whether it was spent on the tenements or not … I think it may have been spent elsewhere." (T22)

The Defendant's evidence

Dr Michael Jones gave evidence. He is a geologist; the managing director of Impact Minerals Ltd; and a director of Lithofire Pty Ltd, a company that provides consultant geological services. Dr Rod Fripp, also a geologist, is the other of two directors of Lithofire Pty Ltd.

Dr Jones said that Impact Minerals Ltd is the operating manager of the Yarrabubba Project joint venture and carries out the decisions of the joint venture's management and technical committees. Prior to the listing of Impact Minerals Ltd in November/December 2006, the decisions of the committees were carried out by Lithofire Pty Ltd. Dr Jones is a member of both the management and technical committees of the joint venture.

Dr Jones said the "work done on the Yarrabubba tenements in the year ending 2006 was primarily airbourne geophysical surveys with attendant analysis of the data obtained and planning of further work. That analysis was also undertaken in the context of existing information obtained by others, including Western Mining and Acclaim. I had a primary responsibility for planning and procuring the work done in relation to the tenements and also the interpretation of the data. The principal contribution of Citic in the relevant tenement year was to attend to the payment of sums to external service providers (such as Fugro Airborne

Surveys Pty Ltd and Lithofire Pty Ltd) and to provide administrative assistance, including the accounting and necessary legal advices. Further, in accordance with an understanding of all participants in the joint venture, technical work done by myself and others was to be charged at a discounted rate or not charged at all. In return, administration activities undertaken by Citic were not to be charged to the joint venture albeit that it had been incurred. The reason for this was that the intent of the joint venture was to ensure that the expenditure of Citic for the purposes of joint venture contribution was to be mainly financial. Accordingly, the sum of the invoices in relation to the Yarrabubba tenements underestimates the expenditure actually incurred." (T28-29)

By way of example of uncharged work done, Dr Jones said he reviewed about nine reports obtained from the Geological Survey of WA "in which regard there was a significant amount of existing information to analyse." (T29) He said the area had undergone significant historical exploration in the seventies and nineties for uranium. The analysis of this material took about three and a half to four days of his time and Dr Jones did not invoice any of that time. He said part of that work was assessing what existing data needed to be digitised for further analysis.

Dr Jones said the flight plan of the aerial survey extended beyond the area of the Yarrabubba tenements for several reasons. There was a one km overfly over the borders of the project area in order to get data right up to the boundary of the tenements. And the surveyors flew over a larger area to the north east of the Yarrabubba tenements because there was a geological structure running through the tenements to the north, and the joint venture wanted information on that structure. At the time, these tenements adjoining the Yarrabubba tenements were unpegged. This

aerial survey conducted by Fugro Airborne Surveys Pty Ltd cost $164,616 inclusive of GST.

Dr Jones said consultancy services were provided to the joint venture by a number of geologists. The work done by them included undertaking a field visit for the purpose of geological survey and analysis, analysing geophysical data received from Fugro and planning further work. The field trip was undertaken between 19 and 24 October 2005 (that is, 12 months prior to the visit of Mr Tilbury). As well as Dr Jones, Mr Jim Xiao, Dr Rod Fripp, and Dr John Ferguson went on the field trip. They drove over the whole area and took magnetic susceptibility readings, observed geological features and discussed and planned the development of the Yarrabubba Project. Mr Jim Xiao is a geologist working for Citic Resources Australia Pty Ltd. Dr John Ferguson is also a geologist and Spar Resources Pty Ltd is his company.

Dr Jones said accounts were rendered to Citic Nickel in relation to the field trip, and for geological analysis and reports, by Lithofire Pty Ltd (Dr Jones and Dr Fripp), Spar Resources Pty Ltd (Dr Ferguson) and Citic Resources Australia Pty Ltd (Mr Jim Xiao). He said that Citic Resources contributed to the joint venture by paying the tenement management accounts and providing administration services. He said that Citic Resources and Lithofire Pty Ltd incurred overhead costs attributable to the Yarrabubba Project. In the case of Lithofire Pty Ltd, relevant overhead costs were about 5% of the total overhead costs of Lithofire Pty Ltd, that is, about $3,500.

Dr Jones said he provided information to Tenement Administration Services (TAS) for the preparation of the Form 5s, but he did not prepare

them. TAS prepared the Form 5s and Applications for Exemption. He said he did not instruct TAS to apply for 100% exemptions and could not explain why it did so.

Mr Alex Xiong gave evidence. He is employed as a Manager – Project Development by Citic Resources Australia Pty Ltd, the parent of Citic Nickel Australia Pty Ltd. Mr Xiong said Citic Nickel Australia Pty Ltd did not have any employees and all of its work was done by employees of Citic Resources Australia Pty Ltd.

Mr Xiong said Citic Nickel procured work to be done in relation to the Yarrabubba tenements in the 2006 expenditure year. He was the person at Citic Resources with day to day responsibility on behalf of Citic Nickel for the joint venture. Mr Xiong said the work procured by Citic Nickel was the planning of an aerial survey; the engagement of Fugro Airborne Surveys Pty Ltd to undertake the aerial survey; analysis of the information obtained from Fugro; a field trip; the planning of further work; and the management of the joint venture and its tenements. Mr Ziong said he participated in joint venture meetings and had a role in planning to whom the work was delegated. He said he saw all accounts and where appropriate recommended their payment.

Mr Xiong said that initially "only direct administration was recorded and Form 5s were lodged on that basis. We noted a shortfall in expenditure and directed Tenement Administration Services (TAS) to make an application for exemption to expenditure in relation to each tenement. They advised us that GST had not been included, some technical work had been omitted and that it was allowable to claim administration expenses calculated at up to 20 % of the overall expenditure

requirement." (T59) He said that Citic Nickel then lodged Form 5s claiming administration costs of 15% of the total expenditure together with other costs previously omitted, and the exemption applications were not proceeded with.

Numerous documents and invoices were tendered through the Defendant's witnesses in support of expenses said to have been incurred in relation to the Yarrabubba tenements in the 2006 expenditure year. Some documents referred to expenses for which payment had been made and others related to expenses which were not paid in the 2006 expenditure year, that is, for which no money changed hands in that year.

SUBMISSIONS

The Plaintiff accepts that an aerial survey was carried out on the plainted tenements, and so some work was done and claimable expenditure incurred in the 2006 expenditure year. However, he alleges that other expenditure claimed on the Form 5s is falsely claimed in that it was not for work in mining or in connection with mining on the plainted tenements.

Specifically, the Plaintiff challenges whether the total cost of the aerial survey is attributable to the plainted tenements as part of the survey was flown over non plainted tenements. The Plaintiff contends that the expenditure designated as "Technical and Data" on the Form 5s is the cost of the aerial survey, and nothing else, and that the amount claimed on each subject Form 5 is greater than the cost of the aerial survey for that tenement. The total amount claimed as "Technical and Data" for the plainted tenements is $156,109.24. However, as the plainted tenements were only 73 % of the area flown over during the survey, the Plaintiff

says only $109,544.67 should be claimed as "Technical and Data" for the plainted tenements, being 73% of $149,651.20 (the total cost of the aerial survey less GST).

The Plaintiff says that GST should not be included as part of the cost of the aerial survey, or in any other amounts claimed as Form 5 expenditure. He submits that it is not a claimable item of expenditure because "it is not expenditure on mining or on mining on the tenement as required by Reg 21" and "the tenement holder mining company does not actually 'spend' that money, because it can claim a refund of GST paid."

Somewhat inconsistently, the Plaintiff also says that there could only be a "small claim for consulting relating to the alleged field trip, all of the other expenditure, if made, constituted administration which is limited to 20% of genuine expenditure claimed." The Plaintiff notes there was no evidence produced of the "Fees and Permits" claimed in the Form 5s.

The Plaintiff refers to members of the joint venture, for example, Spar Resources Pty Ltd by way of Dr Ferguson, invoicing the joint venture for services provided. He contends that this is not claimable expenditure as the joint venture member is a part owner of the tenements – by virtue of being a participant in the joint venture. He says such arrangements are "internal arrangements and not genuine expenditure. To allow otherwise would mean that a part owner can be given credit for expenditure in respect of his or her interest where in fact he or she, rather than making payment is receiving a payment."

Finally, the Plaintiff says that if money does not change hands in the expenditure year, then the relevant unpaid expense is not claimable in that

year. Various of the Defendant's expenses were not paid in the relevant expenditure year and are therefore, in the Plaintiff's submission, not claimable expenditure for the purpose of the expenditure requirement in issue.

The Defendant submits that it has lodged Form 5s for each of the plainted tenements showing full expenditure as required under the legislation, and that no evidence has been produced to show that any element of the Form 5s is false. The Plaintiff now concedes that some work was done on the subject tenements in that at least an aerial survey was carried out. The Defendant submits that there was work other than the aerial survey done on and in relation to the plainted tenements. It says there was both a joint venture management and technical committee; that those committees delegated work to others; and that the work was done. The Defendant says the issue before the court is not whether the Form 5s were filled out correctly.

The Defendant says the evidence of the Plaintiff is that work was done but he (the Plaintiff) is not really convinced that it justifies the Form 5s that were lodged for the plainted tenements. The Defendant says it has established that it has met its expenditure obligations. It says work was done with a view to developing the potential resource of the Project tenements. Much of the work was not specifically attributable to a tenement but all was attributable to the Yarrabubba Project. Accordingly, the expenditure was dealt with globally and apportioned to the Project tenements.

The Defendant submits that the aerial survey was conducted in a manner that was necessary to capture relevant data in relation to the Project

tenements; to understand a geological structure that trends through the tenements to the north; and did not occur over any other tenements owned by the Defendant. It was work "in connection with" exploration of the Project tenements.

The Defendant points to DOIR's policy in support of its contention that GST is a claimable expense, and refers to the DOIR Mineral Title Update Issue 24. Furthermore, the Defendant says that work done is relevantly expenditure whether or not money changes hands, and in that regard refers to *Richmond v Opal Trend Nominees Pty Ltd*, 7 October 1999, Warden Calder.

The Defendant says that the fact that work is done by a joint venture participant does not detract from the fact that it is work in mining or in connection with mining for the purposes of a Form 5. For example, as regards the work of Dr Jones, who invoiced Citic Nickel through his company Lithofire Pty Ltd, the Defendant says Dr Jones made technical presentations to the joint venture's technical and management committees about work that had been done and that needed to be done to explore and define the potential resource of the Project tenements. It says the words "in connection with" mining are wide in their meaning and extend to work and matters leading up to mining, as was the case here. It refers to *re Warden Heaney: ex parte Flint v Nexus Minerals NL*, FCWASC, 26 Feb 1997, per Kennedy J in this context.

CONCLUSIONS

In order to succeed in his plaint, the Plaintiff must prove on the balance of probabilities that there has been no compliance with the expenditure conditions on the plainted tenements.

The Defendant made much of the issue that the Plaintiff had provided particulars which asserted that 'no work' had been done on the plainted tenements, and that, having taken that position, the Plaintiff could not then argue for anything less than 'no work'. Of course, it was conceded by the Plaintiff during the hearing that work by way of an airborne survey was carried out by the Defendant during the relevant expenditure year, and thus the 'no work' position could not succeed. In any event, in my view, argument in relation to an alternative position of insufficient work to meet the expenditure requirement was foreshadowed in paragraph 3 of the Plaintiff's particulars. Accordingly I have considered the alternative case.

I accept the Defendant accounted for its costs on a project basis and consider that to be appropriate in terms of allocating costs for its Form 5s. As regards the aerial survey, the Defendant has apportioned the total cost over each of the tenements in the Yarrabubba Project. Part of that cost includes the cost of overflying the Yarrabubba tenements. The reasons for overflying the tenements were explained by Dr Jones, and I accept the need to overfly in order to gain full information. It seems to me to be clearly part of the exploration process, thereby enabling assessment and planning for future development or otherwise of the tenements. In my view, the total cost of the aerial survey should be apportioned to the Project tenements, including the GST.

I consider the GST to be part of the cost incurred and required to be paid for the aerial survey, and for any other relevant goods and services, and accordingly expenditure in mining or in connection with mining, irrespective of whether a tax credit is later obtained. Whether the GST is

later refunded is a separate issue and does not take away from its nature as an item of expenditure.

I do not agree with the submission that a joint venture participant, as a part owner of a tenement, can not charge the joint venture for his professional services. In my view, the legislation envisages such situations and allows for such expenditure. For example, Reg 15 of the *Mining Regulations* 1981, in dealing with expenditure conditions, provides for a holder of a tenement who is engaged in mining on the tenement to claim "an amount equivalent to the wages he would otherwise be entitled to". Furthermore, I do not consider that money must change hands before the related expenditure is claimable as part of the expenditure requirement, and agree with Warden Calder's conclusion in *Opaltrend* (supra) on this point.

There was no satisfactory explanation as regards the filing of the Applications for Exemption. On the face of the certified register search for each plainted tenement, a Form 5 meeting the full expenditure requirement was filed two days prior to an Application for Exemption, the sequence of makes little sense in terms of explanations given to the court. The search confirms that the Applications for Exemption were later withdrawn. I have made my decision without needing to put an explanation to this matter. I do not accept that there was anything about the Exemptions which suggest that any expenditure was falsely claimed

There has been no compelling evidence from the Plaintiff that the expenditure claimed by the Defendant has not been incurred. The Plaintiff's evidence as regards the field trip was given on the basis of observations made by the Plaintiff some 12 months after the field trip was

said to have occurred. The Plaintiff was unlikely to have been able to detect whether the work claimed had or had not been carried out in any event.

I am satisfied that substantial expenditure, beyond the cost of the aerial survey, was in fact incurred on the plainted tenements in the 2006 expenditure year. I find there was initial planning and research; a field trip; data analysis; preparation of technical reports; and the planning of further exploration and development in relation to the plainted tenements. These were all expenditures in mining or in connection with mining. Administration and overhead costs were also incurred. Although I am not, and can not given the accounting practices used, able to put an exact figure on the expenditure in relation to each tenement, I am satisfied that work carried out on the plainted tenements was well beyond that accepted by the Plaintiff. I am further satisfied that the value of that work was of an amount sufficient to meet the expenditure requirements on the subject tenements.

ORDERS

I order the Plaints be dismissed.