
JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	ARIA PROJECTS PTY LTD v AUSTRALIA STONE GROUP PTY LTD [2023] WAMW 7
CORAM	**:**	WARDEN T W McPHEE
HEARD	**:**	21 February 2023
DELIVERED	**:**	20 April 2023
FILE NO/S	**:**	Application for Forfeiture 631211
TENEMENT NO/S	**:**	Affecting Explorations Licence 08/2907
BETWEEN	**:**	ARIA PROJECTS PTY LTD (Applicant) AND AUSTRALIA STONE GROUP PTY LTD (Respondent)

Catchwords: *Application for forfeiture, election by respondent not to lead evidence, effect of a bare Form 5.*

Legislation:

- *Mining Act 1978* (WA) (the Act): Sections 62(1), 68(3), 96(1)(b), 98(1), 98(4A)

- *Mining Regulations 1981* (WA) (the Regulations): Regulations 21(1), 156

Result: ***1) Application successful;***
2) Recommendation to the Minister that the Exploration Licence be forfeited;
3) Programming Orders made.

Representation:

Counsel:

Applicant	:	Mr Lawton
Respondent	:	Mr Chandler

Solicitors:

Applicant	:	Lawton MacMaster
Respondent	:	Lawton MacMaster

Cases referred to:

- ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd*** (unreported, FCt SCt of WA; Library No 7427; 16 December 1988)
- ***Kimberly Minerals Ltd v Spinifex Abrasives Pty Ltd*** [2020] WAMW 13
- ***Re Heaney; Ex Parte Flint v Nexus Minerals NL*** (Unreported, WASC, Library No 970065, 26 February 1997)
- ***Bronsan v JSW Holdings*** [2011] WAMW 8
- ***W Van Blitterswyk v Balangundi Gold*** [2021] WAMW 8
- ***Exmin Pty Ltd v Australian Gold Resources Pty Ltd*** [2005] WAMW 7
- ***Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd*** [2004] WAMW 17
- ***Bowtoff Pty Ltd v McKnight*** (Volume 11 Folio 20, Leonora Warden's Court, 4 April 1996)
- ***Morellini v IPT Systems Ltd*** [2002] WAMW 8
- ***Bazzo v Robert Michael Kirman And William James Harris As Joint And Several Liquidators Of Whitby Land Company Pty Ltd (In Liquidation) ACN 115 233 193*** [2021] WASCA 170 (17 September 2021)

- ***Commissioner of State Revenue v Abbotts Exploration Pty Ltd*** [2014] WASCA 211; (2014) 48 WAR 300
- ***Nova Resources NL v French*** (1995) 12 WAR 50
- ***Nudrill Pty Ltd v La Rosa*** [2010] WASCA 158 (4 August 2010)
- ***BHP Steel (Rp) Pty Ltd t/a BHP Reinforcing Products v Abb Engineering Construction Pty Ltd*** [2001] WASCA 294 (25 September 2001)
- ***Kuhl v Zurich Financial Services Australia Ltd*** [2011] HCA 11; (2011) 243 CLR 361 (Kuhl), [63]-[64]
- ***Australian Securities and Investments Commission v Hellicar***; [2012] HCA 17; (2012) 247 CLR 345 (Hellicar), [165]-[167], [232]
- ***Re Day*** [2017] HCA 2; (2017) 91 ALJR 262
- ***AC Minerals Pty Ltd v Cowarna Downs Pty Ltd*** [2022] WAMW 22
- ***Onslow Resources Ltd v Hon William Joseph Johnston MLA In his Capacity As Minister For Mines And Petroleum*** [2021] WASCA 151 (23 August 2021)
- ***West Australian Prospectors & Anor v Summit Ventures Ltd*** [2022] WAMW 9
- ***Jones v Dunkle*** (1959) 101 CLR 298

Reasons for Decision

1 I have before me application for forfeiture number 631211, (the Application).

2 The Application relates to Exploration Licence 08/2907 (the Tenement) and is opposed by the Respondent, the holder of the Tenement.

3 The Applicant says that there is evidence to demonstrate inactivity upon the Tenement, in addition to an argument the Form 5 filed by the Respondent cannot be relied upon, due to an absence of any reasonable detail.

4 The Respondent says that I can rely on the Form 5 information as it is drafted, and there is otherwise insufficient evidence to impugn it to the requisite extent, being a prima facie case of non-compliance.

5 The matter was listed to be heard on 21 February 2023 and proceeded on that day. Each party was represented by counsel, and I reserved my decision.

6 The Respondent made a formal election that no evidence would be called.

7 In broad terms I have found for the Applicant.

8 My reasons for doing so are set out below. As a result of those reasons, I propose to make the following Orders, though I will hear from the parties as to the final form of those Orders:

a. The Application for forfeiture should succeed; and,

b. I recommend to the Minister that the Tenement ought be forfeited; and,

c. Consequential programming Orders are made.

Background

9 The Tenement is located in the vicinity of Glenflorrie Station, a remote location in the Pilbara region of North West WA. It remains at the time of hearing, a valid tenement[1].

10 The Tenement is close to a further existing tenement, being M08/513. That further tenement is held and worked by the Applicant.

11 There was uncontested evidence that both the Tenement and the Applicant's tenement, were accessible by a road running from the North East of both, where there are camps located for the personnel attending both sites. Those camps are about 500m apart.

12 It is not in dispute that the Tenement was subject to an expenditure obligation of $20,000.00, for the period 24 May 2020 – 23 May 2021 (the Relevant Period).

13 On 1 July 2021, the Respondent lodged the requisite Form 5 (the Form 5) with the Department of Mines, Industry Regulation and Safety (the Department). The Form 5 lodged for the Relevant Period was placed into evidence[2]. It is to be noted that the document produced is the publicly available document, excluding some parts, including the attestation.

14 In the Form 5, $20, 390 of expenditure was claimed. Of that sum, $18,429.00 was said to be placed in dispute by the Applicant, with the balance accepted as being compliant, being rent and rates payable.

15 The substantive detail of Form 5 in dispute, is as follows:

[1] Exhibit 5
[2] Affidavit of Mr Henessey (Exhibit 1) Annexure HRH2

Category	Sub-Category	Amount Claimed
A. Mineral – Exploration Activities	Other: Consultant	$1,785.00
	Other: Exploration Expenses – Management	$594.00
	Other: Travel, Accommodation & Phone	$114.00
	Other: Fuel & Oil	$54.00
	Other: Postage	$23.00
	Other: Printing & Stationary	$56.00
	Other: Repairs & Maintenance	$78.00
	Other: Staff Training & Welfare	$16.00
	Other: Storage Costs	$108.00
	Other: Subscriptions	$108.00

	Other: Telephone & Internet	$38.00
	Other: Wages / Salaries / Superannuation	$11,455.00
E Administration / Overheads	Other: Administration & Overheads	$4000.00
Total		$18,429.00

16 No further detail than that provided above, as found in the Form 5 was forthcoming about the expenditure claimed.

17 It will also be noted that both sides of this dispute appear to be represented by the same firm of solicitors. That is not the first time that has occurred and is the legacy of a merger between two firms.

18 Counsel appearing for both parties indicated that there was no actual conflict arising, due to the adoption of appropriate information barriers, and warranted to me that their instructions were that the respective clients were aware of the perception of conflict and consented to the matter proceeding.

Evidence

19 The following documentary material was adduced into evidence.

Exhibit No.	Detail	Tendered By
1	Affidavit of Hayden Richard Henessey affirmed 11 May 2022	Applicant

2	Affidavit of Rhonda Elle May Spano sworn 10 February 2023	Applicant
3	Affidavit of Sebastian Philip Saldo, affirmed 10 May 2022	Applicant
4	Affidavit of Nicholas Saldo affirmed on 16 May 2022	Applicant
5	Register for tenement E08/2907 dated 21 February 2023	Applicant
6	Affidavit of Rhonda Elle May Spano sworn 12 April 2023	Applicant
7	Affidavit of Huajie Wang sworn 20 March 2023, in respect of leave to be heard in the absence of an officer.	Respondent

20 In addition to the above, the brothers Messers Soldo gave evidence in person and were cross examined. I provide some further detail of that evidence immediately below.

21 Both men gave similar evidence. The tenor of their evidence was directed toward establishing that there was no observable activity upon the Tenement in the relevant year.

22 Both men gave evidence that they had not observed any activity at what they said was the camp of the Respondent which was situated to the North of their camp, which itself was North East of the Tenement, and the tenement worked by the Applicant.

23 The evidence was that the Respondent's personnel would have to travel on a common road from their camp to the Tenement, and would have been observed.

24 The evidence of the brothers Soldo was also sought to be relied upon to establish that they had not seen anyone travelling from the camp area to the Tenement.

25 Evidence was given by both that the access road they used ran from both camps toward the area of their holding, and that of the Applicant. They had not seen anyone enter the Tenement in the periods they had been observing.

26 Both gave evidence in cross examination that there was another access road to the Tenement, however, they considered it was not used.

27 Mr Nicholas Soldo gave evidence in re-examination that in his opinion that road was not used, as it was overgrown. Further evidence was given by him that the grading of the road to which the additional access road joined, indicated that it was not used. This was because of a windrow, which I understood to mean a berm or mound running parallel immediately adjacent to the road, being (Mr Nicholas Soldo said) the spill from the grader used to grade the road surface, which effectively created an ongoing barrier between the other access road and the road frequented from the camps.

28 That evidence was not challenged. I accept it as an observation of the state of the relevant road adjacent to the alternative access and find that the alternative access road was not utilised.

29 I otherwise accept the entirely consistent evidence of the brothers Soldo, that they had not observed any activity on the Tenement, or the camps, or on the roads, at the time that they attended.

30 The evidence was that they attended for a period of approximately 10 months in the year on a fly in fly out roster of 3 weeks on, 1 week off. It was said in Affidavit of Mr Sebastian Saldo (and not challenged) that the

area was not able to be worked in December – March each year, given the heat and other climactic conditions.

31 The opinion that it would be unlikely that other people would attend the area in the more difficult climatic months is not direct evidence of observations, though strongly suggests the Applicant conducted no activity on the Tenement in the Relevant Period not observed by the brothers Soldo.

32 That is because the brothers Soldo gave evidence that they attended the area for a significant portion of the Relevant Period, and proffered a reasonable explanation for their absence on the remaining period. That explanation was not challenged.

33 As a result, on consideration I am comfortable coming to a view at this point, that prima facie there was no physical attendance upon the Tenement by the Respondent in the Relevant Period.

34 I accept the brothers Soldo's evidence that there was no visit by the Respondent's personnel or their agents to the Tenement on the periods of time that the brothers Soldo were in attendance on their tenement, and am prepared to accept that a prima facie case is established for an inference that there was no attendance upon the Tenement by the Respondents personnel or agents in the Relevant Period.

35 I accept their evidence that there was another access road, though that it was not used, and evidenced as such by the overgrowth and the windrow.

36 The documentary evidence is also worthy of some comment.

37 Mr Henessey's Affidavit annexed documentation, being a number of previous expenditure reports, and the pertinent Form 5, tenement searches and ASIC company search material.

38 The ASIC search material reveals that the Respondent's directors as at 11 May 2022[3] were a Mr Huajie Wang, with a registered address in China, and a Michael Elliott, with a registered address in Brisbane. A company secretary, a Lulu Shao had a registered address in WA.

39 Ms Spano's Affidavit, which was filed seeking to adduce evidence of the publicly available information in respect of ground disturbance. It came in the form of reports from the Departments Environmental Assessment and Regulatory System, which relevantly, demonstrated no change in ground disturbance in the Relevant Period.

40 Precisely what that actually means was not clear in evidence before me, however I accept that it is a reporting obligation upon the Respondent to report ground disturbance.

41 I note at this point that Ms Spano produced a further Affidavit, after the hearing at my direction, as the documents annexed to the filed copy lacked clarity. That was Exhibit 6, which for all intents and purposes was identical to the content of Exhibit 2.

42 I accept the evidence of Ms Spano and Mr Henessey, in terms of the records sought to be relied upon. I make some comments on the inferences to be drawn from those documents below.

43 For reasons set out in more detail below, I also directed that the Respondent file an Affidavit for the purposes of addressing the default of Regulation 156 of the Regulations. No director or authorised officer of the Respondent attended the hearing, and no leave was sought (at least initially) to proceed in the absence of an officer.

44 As a result, the Affidavit of Mr Huajie Wang was filed on 20 March 2023, for the purposes of seeking leave to not attend after the event. That

[3] See Annexure HRH6 of Exhibit 1

Affidavit is Exhibit 7. Blame for the non-attendance was placed squarely at the feet of the solicitors in question.

45 At the hearing, when questioned as to the absence, counsel appearing for the Respondent stated that his instructions were that the Respondent clients were "in the North". Mr Huajie Wang's evidence was that he was in China and was not informed as to the requirement to attend.

46 No reference in Mr Wang's Affidavit was made to the location of any other officer, merely that a further director, a Shiqing Du, was not involved in day to day operations. Why that meant that director could not attend was not explained.

47 The situation is most unsatisfactory and I make some further comments on the issue below.

48 The final point to note is that the Applicant sought an adverse inference be drawn, pursuant to ***Jones v Dunkle*** (1959) 101 CLR 298 (***Jones v Dunkle***) in respect of the absence of any evidence by the Respondent. I address that issue below as well.

Applicable Law

49 Pursuant to section 96(1)(b) and 98(1) of the Act, the Warden has jurisdiction to hear an Application for forfeiture.

50 There was no dispute as to the fact of my jurisdiction to address the Application.

51 What follows a successful application in respect of an exploration licence, is either the imposition of a fine, or in the event it is considered that the circumstances of the failure are of sufficient gravity, a recommendation may be made to the Minister to forfeit the tenement pursuant to section 98(4A) of the Act.

52 Once a prima facie case of forfeiture is established, then prima facie the Act contemplates forfeiture unless the Respondent is able to establish a reason why the tenement ought not be forfeited, see ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd*** (unreported, FCt SCt of WA; Library No 7427; 16 December 1988) (Italo). See also ***Re Heaney; Ex Parte Flint v Nexus Minerals NL*** (Unreported, WASC, Library No 970065, 26 February 1997) (***Re Heaney***).

53 In ***Kimberly Minerals Ltd v Spinifex Abrasives Pty Ltd*** [2020] WAMW 13, Warden O'Sullivan (as he then was), at [60] – [69] set out a summary of principles generally applicable to forfeiture applications.

54 I gratefully adopt that summary without repeating it.

55 Relevantly, the Applicant bears an onus to adduce evidence that establishes the expenditure conditions of an exploration licence have not been met: ***Italo***, ***Re Heaney***.

56 Also relevant in respect of the consideration of the issues to be determined, are the following decisions of Wardens, with the reasons I have referred to them immediately below.

57 The Applicant relied upon ***Bronsan v JSW Holdings*** [2011] WAMW 8 and ***W Van Blitterswyk v Balangundi Gold*** [2021] WAMW 8 for a proposition that a Form 5 was required to have a degree of detail to be considered compliant.

58 The Respondent relied upon ***Bowtoff Pty Ltd v McKnight*** (Volume 11 Folio 20, Leonora Warden's Court, 4 April 1996) (***Bowtoff)***, ***Exmin Pty Ltd v Australian Gold Resources Pty Ltd*** [2005] WAMW 7 (***Exmin)***, ***Morellini v IPT Systems Ltd*** [2002] WAMW 8 (***Morellini) and Rivergold Exploration Pty Ltd v Resource Mining Corporation Ltd*** [2004] WAMW 17 (***Rivergold)*** as examples where applicants for

forfeiture had not met the standard of proof required, and the matter had been dismissed on a no case to answer submission by the respondent.

59 I make further comments in respect of those authorities below.

60 The nature of the case also requires a degree of consideration of what 'prima facie' means, as the Applicant is required to show prima facie, non-compliance.

61 In ***Bazzo v Robert Michael Kirman And William James Harris As Joint And Several Liquidators Of Whitby Land Company Pty Ltd (In Liquidation) ACN 115 233 193*** [2021] WASCA 170 (17 September 2021), per Buss P, Tottle AJA:

> a. *88 The term 'prima facie' has various shades of meaning in particular statutory contexts. However, the ordinary meaning of 'prima facie ' is 'on the face of it' or 'as appears at first sight without investigation'. See North Ganalanja Aboriginal Corporation v The State of Queensland.[5]*
> b. *89 The notion of a 'prima facie case', where a person to whom an examination summons has been issued seeks to inspect the affidavit relied upon by the eligible applicant who applied for the summons, connotes that the person must establish that, if the evidence before the court remains as it is, there is a probability that the person will prove that the examination summons was issued for an improper purpose or involves an abuse of the court's process.*

62 The 'shades of meaning' in my view, in this case, necessarily import the overarching purposes of the Act, as determined in well known cases such as ***Commissioner of State Revenue v Abbotts Exploration Pty Ltd*** [2014] WASCA 211; (2014) 48 WAR 300, and ***Nova Resources NL v French*** (1995) 12 WAR 50, where Per Rowland J (with whom Kennedy and Pidgeon JJ agreed) at 57:

a. *"The objects and aims (of the Act) have existed generally in all mining legislation throughout Australia for many years. In recent times, new forms of tenements have been introduced to support these objects. The primary object, so far as it impacts on this case, is to ensure as far as practicable that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration. It is made available subject to reasonably stringent conditions and if these, including expenditure conditions, show that the purposes of the grant are not being advanced, then the Act and regulations make provision for others who have an interest in those purposes on that land to apply for forfeiture so they may exploit the area."*

63 Also relevant to my analysis of the matter, are the principles associated with a determination by a Respondent in a civil matter, to decline to call evidence.

64 In this respect, ***Nudrill Pty Ltd v La Rosa*** [2010] WASCA 158 (4 August 2010), and ***BHP Steel (Rp) Pty Ltd t/a BHP Reinforcing Products v Abb Engineering Construction Pty Ltd*** [2001] WASCA 294 (25 September 2001) are applicable. I did not understand the reasoning in those authorities to be in dispute, and the Respondent was content to make a formal election when called upon to do so, and in so doing, formally declined to lead any substantive evidence.

65 In terms of the requirements of a case based on inferential reasoning, the Respondent referred to the High Court in ***Kuhl v Zurich Financial Services Australia Ltd*** [2011] HCA 11; (2011) 243 CLR 361 (Kuhl), [63]-[64] and ***Australian Securities and Investments Commission v Hellicar***; [2012] HCA 17; (2012) 247 CLR 345 (Hellicar), [165]-[167], [232]. The reasoning falling from those authorities is not in dispute.

66 The Respondent also referred to the following passage from the High Court in ***Re Day*** [2017] HCA 2; (2017) 91 ALJR 262, [15]-[18], (citations omitted):

a. *[15] However, the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether an issue has been proved to the reasonable satisfaction of the tribunal. Where, as here, fraud is alleged, "reasonable satisfaction" is not produced by inexact proofs, indefinite testimony, or indirect inferences. This does not mean that the standard of persuasion is any higher than the balance of probabilities. It does mean that the nature of the issue necessarily affects the process by which the reasonable satisfaction is reached.*

b. *[16] Why? There is a conventional perception that members of society do not ordinarily engage in fraudulent conduct and a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

c. *[17] The nature of the allegation requires, as a matter of common sense, the careful weighing of testimony, the close examination of facts proved as a basis of inference and, on appeal, a comfortable satisfaction that the tribunal reached both a correct and just conclusion.*

d. *[18] The tribunal must feel an actual persuasion of the occurrence or existence of a fact before it can be found. Where direct proof is not available and satisfaction of the civil standard depends on inference, "there must be something more than mere conjecture, guesswork or surmise" – there must be more than "conflicting*

inferences of equal degrees of probability so that the choice between them is [a] mere matter of conjecture". An inference will be no more than conjecture unless some fact is found which positively suggests, or provides a reason in the circumstances particular to the case, that a specific event happened or a specific state of affairs existed."

67 It is also not in dispute that the expenditure claimed, must, as a result of the requirements of section 62(1) and 68(3) of the Act read with Regulation 21(1) of the Regulations, be in in respect of mining or in connection with mining on the lease to be compliant.

Analysis

68 The real question in this matter is whether the evidence before me, amounts to prima facie proof of non-compliance. In ***Re Heaney*** per Kennedy J:

a. *"Once the Form 5 was admitted as a statement against interest, the matters in it favourable to the respondents case were also in evidence, and the Magistrate was entitled to treat the whole of the document as evidence of the truth of its contents. So much was rightly conceded by senior counsel for the applicant. The weight to be given to the various part of the document was a matter for the Warden*"

69 The evidence of the brothers Soldo, at its highest as accepted, mean that there was no activity upon the Tenement in the Relevant Period.

70 That by itself is not immediately fatal to the Respondent. As counsel for the Respondent quite rightly pointed out, claimable expenditure is not limited to physically being upon the tenement, and there is nothing in the Form 5 which compels, or frankly even suggests, a view that the expenditure asserted occurred on the Tenement in this case.

71 Having regard to ***Italo***, I note the following at p14:

a. *"In a case of a plaint for forfeiture on the ground of non-compliance with the expenditure conditions the plaintiff is required to prove a negative. The expenditure conditions under the mining act 1978 replaced the labour conditions under the mining act 1904. In relation to that Act, the tenement could be placed under observation and evidence given of a lack of relevant activity or a lack of personnel carrying out any relevant activity. Expenditure conditions stand on a different footing. They may be complied with by desk studies of data gathered from earlier work on the tenement which may mean that in any particular period, no actual work would be observed on the tenement. In such circumstances any expenditure not reported to the Department and recorded on the register constitutes expenditure within the knowledge of the defendant. In the case of failure to comply with expenditure conditions the legislation contemplates forfeiture. Hence, upon prima facie proof of noncompliance, 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."*

72 The other documentary evidence, at first glance, suggests further concerns, detailing as it does, formal information which suggests a lack of activity upon the Tenement in question, in particular given the documentary evidence adduced by Ms Spano.

73 However, in light of the position that compliant expenditure may occur off the Tenement, each of the discreet parts of the evidence led by the Applicant excluding the Form 5, when considered in isolation, are

insufficient of themselves to warrant a prima facie view that the Form 5 may be impugned in the manner sought.

74 However, having reached a view that there was, prima facie, no physical activity upon the Tenement in the relevant year, which I do, what is then left is to consider is the impact of the Form 5 (as a discreet piece of evidence) of itself, and also in context of a consideration of the whole of the evidence of the case.

75 It was not in dispute that in order to establish compliant expenditure, it is necessary to establish from the evidence that there is a connection between the expenditure claimed and mining, or was otherwise in connection with mining.

76 The Respondent's position was that that connection was able to be shown, by reference to the words in the instructions associated with the relevant form in the Regulations, being some of the conclusionary words used in the Respondents Form 5 and nothing further.

77 The Respondent's argument, when distilled, was that the Form 5 must be taken to be accurate and in connection with mining, as it is a Form 5 filed for the purposes of the Act.

78 Reliance was placed upon the notion that in the absence of direct evidence of irregularity, it ought be determined to be a representation that the amounts claimed, were claimed under headings in respect of mining, and thereby satisfactorily demonstrated the necessary connection.

79 When put in that manner, I consider it may be said that the Respondent was seeking to lift itself up by its own bootstraps.

80 More relevantly, that view, in my opinion, is inconsistent with the binding view of Kennedy J referred to above. I am required to assess what weight to give the individual parts of the Form 5.

81 When regard is had to the content of the Form 5 in this matter, it is simply not possible to come to a view as to what the claimed expenditure relates to.

82 The Respondent also referred to ***Bowtoff, Morellini, Exmin*** and ***Rivergold***, in support of its legal submission, that the evidentiary burden of the Applicant had not been discharged.

83 ***Bowtoff*** does not assist the Respondent. The decision in that case turned on a view that the Applicant's burden had not been met, due to the paucity of the evidence relied upon, which at its highest, amounted to an incomplete inspection of the tenement in question on 2 days out of a year. Further, it appears from the reasons of the learned Warden Malone, that in cross examination, the Applicant's only witness appeared to concede that the relevant claimed works might have happened on the tenement. It is not analogous to the case before me.

84 ***Morellini*** does not assist the Respondent. In that case, the learned Warden Calder expressed a view (at [21]) which I have adopted in this case, of the view expressed by Kennedy J. Again, in ***Morellini***, in my opinion the outcome turned on its facts, rather then the adoption of any kind standard requiring certain types of evidence to be led. It is not analogous to the case before me.

85 ***Exmin*** does not assist the Respondent. The Applicant in that case (per Warden Calder at [9]) called no oral evidence and tendered only 3 tenement register searches. The learned Warden's assessment of that evidence is found at [26], wherein he expresses a view that the evidence did not rise to the necessary level. In the circumstances presented in that case, that is not surprising. It is not analogous to the case before me.

86 ***Rivergold*** does not assist the Respondent. It was relied upon by the Respondent in a similar vein, however again, is not a determination which

establishes a threshold of the type of evidence which must be led. That would be an erroneous proposition. The relevant determination is to be made on an assessment of the whole of the evidence presented in the case. The learned Warden Calder in ***Rivergold***, was not satisfied that there was prima face evidence of non-compliance (per Warden Calder at [36]).

87 As indicated, Counsel for the Respondent submitted that the fact that it was in a Form 5, must mean that sufficient connection was shown, and the instructions in the Regulations do not require anything further than what was in place.

88 I reject the first part of that submission.

89 In my view the fact that information is contained in the Form 5, does not in and of itself compel a conclusion that the requisite status of being related to or in connection with mining is met. If that were so, Justice Kennedy would not have made the relevant comment about weight referred to above.

90 Given the reasoning of his Honour Justice Kennedy, it is appropriate to consider the meaning of "*prima facie*", as relevant to this context.

91 My view is that at first glance, it appears that the Form 5 sums are not able to be determined to be associated or connected with mining. I do not determine they misleading for the same reason, there is simply no evidentiary basis to conclude either way.

92 Thus the relevant issue is not so much whether it is possible to lodge what might be described as a bare Form 5, as in my view it plainly is. The level of detail provided is entirely a matter for the party lodging the form.

93 An absence of detail however, will necessarily result in concerns as to whether by itself it is able to be relied upon to establish that the

expenditure claimed (in terms of the dollar figures) is sufficiently connected with mining in the absence of any other evidence.

94 Thus the question from a practical perspective is really whether it is sufficient to rely upon in and of itself in any given case, in the event it is challenged, or whether it might be prudent to buttress the content of the conclusions expressed in the Form 5 with the underlying evidence. That question is relevant, as the determination made has consequences in a forfeiture application.

95 As a result in this case, by itself, this particular Form 5 before me is prima facie unable to be determined to be a representation that the content of it is adequately able to be said to be in connection with mining in the required manner.

96 It is therefore of no weight in respect of its content.

97 Considering ***Italo*** and ***Re Heaney***, I consider it is open to me to determine what weight to give the Form 5, in isolation, and then consider what the impact of that view is upon the balance of the case being sought to be made.

98 In this case I give the Form 5 no weight at all. It does not inform me, the Department, nor any other person, to any particular degree as to what has occurred upon the Tenement or in association with it.

99 As indicated, that is not to say that I determine it to be misleading, I do not. I am simply not persuaded that it demonstrates the necessary connection with mining.

100 I pause at this juncture to note the decision of Warden Wilson in ***Bronsan v JSW Holdings*** [2011] WAMW 8 applied Kennedy J by expressing a view that there was a need for detail. I consider that his Honour the learned Warden there (and indeed similarly the learned Warden Ayling in

W Van Blitterswyk v Balangundi Gold [2021] WAMW 8, were seeking to explain why it was that they came to the view to give the Form 5 statement in those cases, no weight.

101 I do not consider that his Honour Warden Wilson was setting out to impose a general rule that the Form 5 must have a particular level of detail, failing which it is to be regarded as somehow misleading or invalid.

102 The question rather, as in this case, is does the evidence before me rise to the level of a prima facie case for non-compliance. When I consider that no weight can be given to the bare Form 5, and the evidence of the brothers Saldo, and the other documentary evidence, I consider that it does. As a result, the proper construction of the Form 5, is as a series of vague conclusions, expressed by the individual who made it, which provides no capacity to determine the necessary connection.

103 As a result, and considering all of the evidence together, I am satisfied that there is a prima facie case of non-compliance in this case.

104 I am fortified in my view as above, by a consideration of the consequences of accepting the submissions of the Respondent. On the Respondent's case, bare, conclusionary descriptive words in a form 5 are sufficient to establish that the sums claimed were in connection with mining, irrespective of the absence of detail permitting any kind of inference to be drawn as to precisely what the expenditure is.

105 Accepting that valid expenditure may not be publicly visible (in the sense of being off tenement), and completely unable to be checked, or monitored, it is necessarily the case, that a respondent which then leads no evidence, could always resist a forfeiture application on the basis a bare form 5 might refer to non publicly visible expenditure, and that the

applicant has failed to discharge its burden in seeking to reach a level of prima facie non-compliance.

106 That is necessarily the case as if the bare statements in a form 5 were said to perhaps relate to off tenement expenditure, no applicant for forfeiture could ever lead any evidence sufficient to displace the reliance on a bare, conclusionary form 5 made with a suggestion that the expenditure might have occurred in a way which was not visible.

107 That bar, as pitched by the Respondent in this case, is far too high, and does not properly reflect the notion of a prima facie case in the context of the forfeiture regime of the Act, discounting the necessary shades of meaning relevant to the Act I have referred to above.

108 It might be said that my view as expressed in ***AC Minerals Pty Ltd v Cowarna Downs Pty Ltd*** [2022] WAMW 22 at [42]-[52], is inconsistent with a view here that I would not be prepared to rely upon the attestation accompanying every from 5. However in my view that is not so; it is a completely different context to a question of marking out or other observable compliance issue.

109 An oath of compliance in respect of marking out may be tested. The other party may inspect the workings of the marking out. In respect of a form 5, the attestation is not made available to the public, and if the content of the form 5 is expressed as bare conclusions with no identifying particulars, no evidence could ever displace the suggestion that the claimed expenditure might have been in connection with mining, off tenement in a manner unknown to any other party.

110 In the words of the Court of Appeal in ***Onslow Resources Ltd v Hon William Joseph Johnston MLA In his Capacity As Minister For Mines And Petroleum*** [2021] WASCA 151 (23 August 2021) at [53]:

a. *"The construction contended for by the appellant [in this case, the Respondent] in the present case would not only allow non-compliance with the legislative regime to be overlooked or excused by officers of the executive government; the appellant's construction would require it.*"

111 The approach advocated for by the Respondent would very quickly render the *inter partes* forfeiture regime of the Act sterile in effect.

112 If such an approach is to be held to apply, it will not be so held by me.

A Jones v Dunkel Inference

113 The Applicant in this matter, also seeks an adverse inference pursuant to the application of the principle in ***Jones v Dunkle***.

114 In ***West Australian Prospectors & Anor v Summit Ventures Ltd*** [2022] WAMW 9 at [226] – [244] I set out the relevant principles and note the similarities with this matter.

115 In this matter, the words of the full court in ***Italo*** are also applicable, per curiam at p18:

a. *"In other words the court is entitled to use the fact of the defendants silence to draw the inference which is favourable to the plaintiff where if contrary evidence existed it would be easy for the defendant to produce it. Had the defendant called evidence "very little might have been enough", for the case is one where the facts can hardly have been within the knowledge of the plaintiff and muyst have been peculiarly within the knowledge of the defendant"*

116 Mr Heng was a director of the Respondent as at the date of the hearing. Mr Heng referred to a second director Shiqing Du. Mr Heng deposed for the purposes of the compliance with my direction that he was in China.

He remains a director at the time of the hearing. He is in the camp of the Respondent, and could plainly have given evidence in support of the Respondents position on the matter most in issue, namely whether the sums claimed in the Form 5 had sufficient connection with mining.

117 However, irrespective of whoever was a director, it was open to the Respondent to call evidence in support of the conclusions expressed in the Form 5.

118 No explanation was given for the determination of the Respondent to decline to call evidence at all, and in the circumstances presented, in my view the only inference open is that that determination was a tactical one.

119 As a result, I consider I am entitled to draw an inference that evidence the Respondent might have called in respect of the Form 5, would not have assisted it.

120 In my view the adverse inference gives me a degree more confidence in coming to the view as to the weight to afford the Form 5 that I do and have expressed above.

Consequences

121 The remaining question is one of consequences.

122 Considering my reasons above, my finding is that the expenditure claimed on the tenement which I accept is only that admitted by the Applicant, being the relevant sums for rent and rates.

123 The balance of the claimed expenditure has not occurred in a manner consistent with the Act.

124 The Applicant, it its submissions, referred to ***Italo*** and moved for an order that forfeiture be recommended.

125 The Objector did not address the issue of consequences in its submissions. No submission was made that in the event the application was made out, then a financial penalty should apply rather than a recommendation for forfeiture.

126 In the circumstances where the Respondent has elected to not call any evidence, in my view it is appropriate to reach a view on the material before me as to the appropriate consequences.

127 In my view, the appropriate consequence is a recommendation for forfeiture. There is nothing in evidence before me to displace the prima facie position as required by ***Italo***. The non-compliance I have determined is of sufficient gravity to warrant forfeiture.

128 In terms of procedural fairness, the Respondent has had an opportunity to be heard on all matters and has made a tactical decision to decline to call evidence. It placed its defence of the Tenement squarely behind the shield of a bare form 5. It made a formal election to decline to call evidence and is bound by that election.

129 Any submission that a fiscal penalty ought be applied rather than forfeiture, would be bereft of any evidentiary foundation, and be contrary to ***Italo*** in principle.

130 I decline to provide the Respondent with a further opportunity to be heard, as it would serve no purpose.

131 The Application succeeds, and forfeiture should be recommended.

Final Comment on Compliance with Regulation 156

132 Regulation 156 requires attendance of a party at a hearing, or to obtain the grant of leave to be excused. The Regulation is framed in a manner which creates an imperative for attendance at the hearing by either the party, or an authorised person.

133 Whatever else might have been the intent of the regulation, in a summary jurisdiction with a very heavy caseload, it is imperative that matters going to substantive hearing are able to be managed efficiently. The capacity for solicitors and counsel appearing to seek urgent instructions is a necessary part of that process.

134 In this case, Mr Heng deposed that he did not appear, as he was not informed of that requirement by his solicitors. That, in the ordinary course, would not be a sufficient basis to be excused.

135 In the particular circumstances of this case however, rather than delay the resolution of the matter, I am prepared to grant the necessary leave for the absence in question.

136 Practitioners in the jurisdiction should ensure that steps are taken to secure the appropriate attendance or seek leave to be excused for some good reason, well in advance of the substantive hearing.

137 In my view, leave not to attend ought be limited to unexpected events or exceptional circumstances given the provision is drafted in the imperative for parties to appear.

Conclusion & Orders

138 The Application should succeed, and the Tenement be recommended for forfeiture.

139 The parties are directed to confer and provide a Minute of Final Orders, or alternatively, competing Minutes with any other consequential applications and submissions, within 14 days of the date of these reasons.

140 I am grateful to counsel appearing and their instructors for their assistance in the matter.

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Warden Tom McPhee

20 April 2023