- even if expenditure by Mt Grace could be taken into account, the expenditure included payments to Mr Walsh. If he was being paid a salary at the same time, the Warden believed that time spent by Mr Walsh could not be properly charged out to Mt Grace as expenditure in connection with the tenements; and

- the activities of Mr Walsh on the tenements appeared to have been undertaken so as to present the tenements in an attractive light for prospective purchasers or joint venturers. Even if this was accepted as expenditure on mining or in connection with mining, it was not made or caused to be made by the tenement holder.

Order

The plaints were upheld and orders for forfeiture made.

PLAINTS FOR FORFEITURE

Neville William Archie Cole v David Jones Roberts*
(Unreported, Perth Warden's Court, 4 April 1997)

plaints for forfeiture - whether holder had complied with expenditure conditions – evidential burden – no penalty - s50, s96, s115A, reg 15 *Mining Act 1978* (WA)

Facts

The plaintiff filed three plaints for forfeiture of three prospecting licences held by the defendant. The plaintiff claimed that the defendant had not complied with the expenditure requirements and sought an order for forfeiture and a prior right to mark out a mining tenement over the subject land.

The Decision

- The Warden held that, in total, the defendant had caused to be expended far in excess of his requirement under regulation 15.

- However, the defendant was unable to show the expenditure which was actually expended on each individual tenement. Accordingly, the Warden concluded that the plaints had been proven.

- The Warden was of the opinion that the defendant took his duties as tenement holder seriously and, therefore, should not be seen to be suffering any penalty by virtue of the fact that the plaints were proven.

The Reasoning

Allocation of expenditure

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* Caroline Hayward, Solicitor, Mallesons Stephen Jaques, Perth.

The defendant treated the three tenements as part of a "project" and simply allocated the total expenditure on the three tenements based on their respective size, without any consideration to the actual expenditure on each individual tenement.

The Warden considered that the defendant could not defend the plaints by using allocated rather than actual figures. The defendant would only be entitled to adopt this approach if he were making an application for exemption pursuant to section 102(2)(h).

The plaints

The Warden was of the opinion that each of the three plaints had been made out because the defendant had not shown that in respect of each individual tenement he had fulfilled his expenditure requirements.

Expenditure claimed

The Warden considered that the following expenses claimed by the defendant were not expenditure on mining or in connection with mining:

- cost of parking his vehicle outside the Department of Minerals and Energy while he was inside checking records or obtaining information in respect of the tenements;
- cost for a full day's labour of his while he unpacked, cleaned and changed the tyres of his vehicle which he later took on a trip to the tenements; and
- payment to a person for metal detecting on the tenements and for introducing the defendant to a company which was looking for tenements to purchase.

The Warden also considered an option agreement between the defendant and Comet Gold NL. The Warden held that there was no doubt that pursuant to this option agreement, Comet expended monies "in mining on or in connection with mining on" the three relevant tenements.

Order

The plaints were proven but no penalty was applied.

Tunza Holdings Pty Ltd v Haoma Mining NL
(Unreported, Perth Warden's Court, 9 May 1997)

objections to applications for exemptions from expenditure conditions - whether title to tenements is in dispute - s102(2)(a), s102(2)(b), s102(3) *Mining Act 1978* (WA)

Facts

This matter involved applications for exemption from expenditure conditions by Haoma Mining NL ("Haoma") in respect of three prospecting licences. Objections to the applications were lodged by Tunza Holdings Pty Ltd ("Tunza") and Tunza also lodged three plaints against each of the prospecting licences.

The applications for exemption were sought pursuant to section 102(2)(a), 102(2)(b) and 102(3). Basically, Haoma maintained that title to the relevant tenements was in dispute pursuant to a joint venture agreement it entered into with Consolidated Gold Mining Areas NL ("CGMA").

In 1993, a receiver and manager was appointed of CGMA, who became the "defaulting joint venturer" under the joint venture agreement. Haoma, as the "non-defaulting joint venturer", exercised its option to purchase the participating interest of CGMA. However, the purchase was delayed because the valuation of CGMA's participating interest was in dispute and arbitration had not been finalised.

The Decision

The Warden held that title to the tenements was in dispute and accordingly, he recommended that exemptions be granted.

The Reasoning

Dispute as to title

Tunza argued that there was no dispute in respect of the title to the tenements but a dispute in respect of the valuation of the tenements. Tunza argued that title to the relevant tenements was, and had always been, in the name of Haoma.

However, the Warden was of the view that potential existed for the dispute to affect the title because an unfavourable valuation may require Haoma to elect to allow the termination provisions of the joint venture agreement take their course, in which case Haoma would only end up with an approximately 60% interest in the title.

Previous exemption

Another factor of significance to the Warden was that Haoma applied for and was granted exemption from expenditure conditions in respect of the same tenements during the previous year. Haoma's previous application was also based on the fact that title to the tenements was in dispute. The Warden did not suggest that, if an application based on certain grounds is successful one year, then it will be automatically successful in following years. However, the Warden noted that it would be an unusual situation if a particular dispute was sufficient grounds to support an application for one year but it was not sufficient to support an application the following year.

Expenditure on other joint venture tenements

Tunza argued that the application was only in respect of three tenements. Haoma did not apply for an exemption from expenditure for other tenements, also the subject of the joint venture, because expenditure commitments had been met. Tunza pointed out that the title dispute had not prevented Haoma from spending money on other tenements.

In reply, Haoma argued that spending money, even though the title was in dispute, was an indication that it had a genuine interest in conducting exploration in respect of the project. The Warden accepted this argument.

Order

The Warden was satisfied that the applicant had made out its case and recommended that the applications be granted.

David Jones Roberts v William Robert Richmond*
(Perth Warden's Court, Judgement Delivered 10 March 1997)

plaint for forfeiture – non-compliance with expenditure requirements – evidential burden – substantial shortfall – false and misleading information – forfeiture – s96, reg15 *Mining Act 1978* (WA)

Facts

The plaintiff lodged four plaint for forfeiture of prospecting licences pursuant to s 96 of the *Mining Act* 1978 (the "Act"). The plaintiff alleged that the defendant had not complied with expenditure requirements relating to the four prospecting licences.

Regulation 15(1) requires the holder of a prospecting licence to expend a minimum of $40 for each hectare or part thereof of the area of the licences. That regulation also allows the holder if he is directly engaged part-time or full-time in mining on the licence itself to claim as expenditure an amount equivalent to the wages he would otherwise be entitled to if similarly employed elsewhere in the district.

Decision

The Warden referred to C*ommercial Properties v Italo Nominees Pty Ltd* (Unreported Full Court of the Supreme Court of WA December 1988) as authority for the proposition that once the plaintiff has made out a prima facie case for forfeiture the evidential burden is then on the defendant to the satisfy the Warden that the case is not of sufficient gravity to justify forfeiture.

The Warden then went through the various heads of expenditure claimed by the defendant. It was the plaintiffs case that the expenditure claimed by the defendant on all four tenements was not claimed in compliance with the act and regulations.

Travelling Time

The defendant claimed expenditure at the rate of $300 per day for his time whilst sitting in his motor vehicle travelling to and from the tenements. The Warden stated at page 8, "in my firm opinion no account can taken of this item. The defendant has not incurred any liability to another party and expended anything at all to satisfy such a liability. He has not expended anything". The Warden goes on to say at page 8, "sitting in a motor travelling to and from a tenement is obviously not direct engagement part-time or full-time in mining a licence itself".

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* Damien Criddle, Mallesons Stephen Jaques, Perth.

Vehicle Hire

The defendant claimed as expenditure vehicle hire in respect of three of the prospecting licences, at the rate of $150 per day. The defendant gave evidence that he hired his own vehicle to himself, and claimed as expenditure the amount he would otherwise have had to pay if he had hired the vehicle. The Warden stated at page 9 that, "the idea of hiring your own vehicle to yourself is obvious nonsense". His Worship found that a tenement holder cannot claim any amount for notional hire of his or her own vehicle.

Field Assistant

The defendant claimed as expenditure an amount of $300 per day for a field assistant in respect of three of the prospecting licences. In actual fact the field assistant in question was a party to a tribute agreement with the defendant which authorised him to prospect on land the subject of the tenements held by the defendant. The party in question was entitled to retain any gold found for himself. The defendant attempted to explain the $300 per day claim for field assistant on the basis that the party assisting him obtained an equivalent amount of money in the form of gold. The Warden found that "an amount equivalent to the monetary value of gold found and kept by a tributer pursuant to a tribute agreement with the tenement holder is no expenditure and there is no statutory provisions that enables it to be treated as such".

Research

The defendant claimed $300 per day for research on each of the tenements. The Warden stated that this item should be excluded because the defendant did not actually spend anything and regulation 15(1) did not entitle him to claim what he may have otherwise have been required to pay to some third party for research. The Warden stated at page 11, "research by the holder does not fall within the meaning of the words 'if the holder is directly engaged part-time or full-time in mining on the licence itself' as provided in regulation 15(1)". The Warden went on to say that the defendant was not qualified in any event to carry out any meaningful research.

Inspection

The defendant claimed $300 per day for his own time in inspecting two of the tenements. The Warden found that as the defendant was actually being instructed by a third party on how to prospect on the tenements this did not qualify as "mining on the licence itself". The Warden found that the defendant was at best being educated on how to go about carrying on mining on the licence. He disallowed the expenditure that extent.

Fuel/Field Supply/Accommodation

The defendant made various claims for food and fuel supplies. The Warden disallowed these on the basis that he was not satisfied the defendant expended any money on food in excess of which he would have ordinarily have spend had he not been on one of the tenements. The Warden also disallowed any expenditure for fuel on the basis that he was not satisfied the defendant spent any money on fuel in connection with tenements. His Worship found that the defendant visited other places when he did travel to any of the tenements.

Office Administration/Backup/Typing/Phone/Fax

The defendant claimed as expenditure the above costs. The Warden found that these were expenses necessarily incurred by all businesses in the running of an office. He found there was no evidence of any mining on the tenements to which these expenses could be related. He therefore disallowed them in taking into account expenditure required by regulation 15(1).

Geological Report/Input

The defendant claimed various amounts for geological reports and aeromagnetic interpretation on the tenements. The Warden accepted that a geologist had rendered accounts to the defendant for professional services falling into this category, but he would not allow this as expenditure because he was not satisfied the defendant had paid and satisfied any such accounts.

Accordingly, the Warden discounted the expenditure on each of the four tenements. He was satisfied that the required expenditure had not been met resulting in a substantial shortfall. The Warden went on to conclude that merely because there has been a substantial shortfall in expenditure does not mean the tenements should necessarily be forfeited. He stated at page 16 that, "any shortfall needs to be weighed together with all other factors concerning expenditure in mining on or in connection with the mining on a tenement and the holders reason or reasons for failing to satisfy the minimum required expenditure".

Order

His Worship concluded that in this case, each of the tenements should be forfeited. The Warden found that the defendant had filed form 5's which in every case provided false and misleading information. He stated however that forfeiture is not to be used as a means to punish someone for providing false and misleading information on such a form. In this case his Worship found that the extent of the misleading information provided by the defendant indicated to him that the defendant had little or no regard for the expenditure requirements of the Act and regulations, and it was his Worship's opinion that such an attitude weighed in favour of forfeiture.

David Jones Roberts v William Robert Richmond*
(Perth Warden's Court, Judgement Delivered 26 May 1997)

plaint for forfeiture – costs – jurisdiction – discretion of warden – s96, 132, 134 *Mining Act 1978* (WA)

Facts

The Warden had previously heard and determined four plaints for forfeiture of prospecting licences. The questions of costs in that matter were adjourned pending further submissions.

Reasoning

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* Damien Criddle, Mallesons Stephen Jaques, Perth.

Jurisdiction

Section 96 of the *Mining Act* 1978 (the "Act") deals with applications for forfeiture of prospecting licences. The defendant submitted that s 96 sets out the totality of the powers that can be exercised in respect of a plaint for forfeiture of a prospecting licence. He submitted that there is a distinction between "the Warden" and "the Warden's Court". His submission was to the effect that any discretion to award costs is limited to the Warden's Court and that as a plaint for forfeiture is heard by a Warden there is no power in the Warden to award costs.

Warden Reynolds determined that a Warden's Court jurisdiction can be construed to include "jurisdiction to hear and determine generally all rights claimed relating to any matter in respect of which jurisdiction is under any provision of this Act conferred upon the Warden". His Worship decided that s 132(1) brings an application to "the Warden" for forfeiture of a prospecting licence within the jurisdiction of "a Warden's Court".

Discretion of Warden

The Warden then considered the interaction between s 134(1) and s 96(5). Section 96(5) provides for the Warden to award costs if the applicant fails to proceed with his forfeiture application. He considered section 134(1) gives a Warden's Court the power to make orders on specified matters, and generally, and for awarding or apportioning costs in any such proceedings. Section 134(2) provides that the costs of proceedings in the Warden's Court under the Act shall be in the discretion of the Warden but no order for the payment of costs of another person shall be made against an application of a person making an objection unless the application for objection is frivolous or vexatious.

The Warden concluded that s 134(2) is to be read disjunctively. The costs of the Warden's Court are in the discretion of the Warden unless an application or objection has been made, in which case they can only be awarded if the application or objection is frivolous or vexatious. Warden Reynolds was of the view that the reference in s 134(2) to "an applicant or a person making the objection" did not include an applicant or respondent in proceedings for forfeiture of a mining tenement including a prospecting licence. The Warden ruled that s 134(2) is in no way inconsistent with the provisions of s 96(5) of the Act and that s 96(5) does not apply to the case where a Warden hears and determines an application for forfeiture on its merits. It was the Warden's view that s 134(2) and s 96(5) supplement each other.

No double penalty

The defendant further submitted that, because the Warden has the power to impose a monetary penalty under s 96 as an alternative to an order for forfeiture, and award that penalty to the applicant, that any additional costs order will in fact be a double penalty for the defendant. Warden Reynolds rejected this submission. His Worship said "a monetary penalty should not be and should not be seen to be a means of compensating an applicant/plaintiff for costs".

Refresher fee

In addition the applicants sought a refresher fee pursuant to regulation 128(3)(ii), in respect of each time counsel had to get the case up afresh. The Warden refused this on the basis that the estimates of time for

the hearing including those by the representatives of the applicant were "horribly wrong", and any refresher fee would be totally inappropriate.

Decision

The Warden decided that he does have the power in his discretion to award costs on hearing and determining a plaint for forfeiture of a prospecting licence.

APPLICATION FOR MINING LEASE

Western Collieries Limited and The Griffin Coal Mining Company Limited V Stephen Mcmahon and Dean Guest*
(Perth Warden's Court, Judgement Delivered 11 July 1997)

application for mining lease – encroachment on underlying tenement – objections – undue prejudice – *Collie Coal (Western Colleries) Agreement Act 1979 (WA)*

Facts

This case involved applications for mining leases 12/15 and 12/16. Western Collieries Limited objected to both applications and Griffin Coal Mining Company Pty Ltd objected to application for mining lease 12/15. Western Collieries' grounds for objection were:

1. The objector is the lessee of ML262SA.

2. The application encroaches upon a portion of ML262SA.

3. The grant of the application would cause detriment.

4. Exploration activity (i.e. drilling) by the applicant could be detrimental to future mining operations.

Griffin Coal objected to application for ML12/15 on the basis that the application included its heavy duty road and 40m on either side of it. Griffin Coal submitted that the 40m buffer zone was required for safety reasons.

The underlying tenement, ML262SA is held by Western Collieries pursuant to the *Collie Coal (Western Collieries) Agreement Act* 1979. Clause 21(4) of the Agreement Act allows persons other than the company to apply for mining leases and other tenements in respect of the area subject to ML262SA for minerals other than coal. This is subject to the Minister for Minerals & Energy determining that such grant or registration will not unduly prejudice or interfere with the operation of the Western Collieries.

Decision

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* Damien Criddle, Mallesons Stephen Jaques, Perth.