2007 WAMW 3

JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	OPEN
LOCATION	**:**	KALGOORLIE
CITATION	**:**	DURHAM -v- HODGES
CORAM	**:**	AUTY SM
HEARD	**:**	11 JUNE 2007
DELIVERED	**:**	22 JUNE 2007
FILE NO	**:**	PLAINT KA 02/067
TENEMENT NO	**:**	MINING LEASE 25/271
BETWEEN	**:**	CLINTON VICTOR JUDE DURHAM
		AND
		RODNEY CHARLES HODGES

Catchwords:
Plaint for forfeiture

Legislation:

Mining Act 1978

Result
Plaint dismissed

Representation:

Counsel:

Plaintiff	:	Self represented
Defendant	:	Carmel McKenzie of McKenzie and McKenzie

Solicitors:

Plaintiff	:	Self represented
Defendant	:	Carmel McKenzie of McKenzie and McKenzie

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

Case(s) also cited:

PLAINT FOR FORFIETURE KA02/067 IN RESPECT TO MINING LEASE 25/271

BACKGROUND

1 This case concerns a plaint lodged pursuant to section 98 of the Mining Act 1978 by Clinton Durham over Mining Lease 25/271, presently held by Rodney Charles Hodges. The plaint is made within time (section 98 (2) Mining Act 1978).

2 It is alleged by Durham that Martin Fitzgerald, the former holder of the tenement in the expenditure year 5/3/2005- 5/3/2006 failed to expend as required pursuant to the Mining Act 1978.

3 There is no application for exemption from expenditure as Rodney Hodges, the present holder of the tenement and the defendant in these proceedings asserts that the expenditure requirement has been met by the previous, now deceased, holder Martin Fitzgerald.

The plaintiff's submissions

4 Durham's grounds for alleging that the expenditure has not been met are that

- in the previous years a remarkably similar amount of expenditure was claimed and, by way of contrast, this was not the case in respect of another tenement (GML 25/1415) where expenditure amounts ranged from $20000 (in 1983) to $13278 (in 2000);
- the inference to be drawn from the replication of expenditure amounts in relation to ML 25/271 is that the claimed expenditure for the year 2005-2006 is spurious; and
- the plaintiff supports his plaint with argument that in the time that he, the plaintiff, resided in Kalgoorlie (he has been resident in Broome for the last five years) he observed no work being done on the tenement under plaint.

5 In respect of the first of these arguments Durham asks the tribunal to infer that as the expenditure amounts claimed in the years 2006, 2005, 2004, 2003 are all claimed to be $13,000 the Form 5 is false (see Mining Tenement Register printout exhibit 1). The holder of the tenement in those years by Martin Fitzgerald.

The Plaintiff's Evidence

6 The plaintiff, Durham, gave evidence that he had not attended the tenement in the 2005-2006 expenditure year so he had no personal observations to make as to the manner or method of exploitation of the tenement (or lack of it) by the previous holder, Martin Fitzgerald, in the year under plaint.

7 Durham gave evidence that when he inspected the tenement some five years ago (when he resided in this region) the plant he observed on the tenement was in very poor condition and he found no evidence of the then holder residing there.

8 As this evidence is not recent it is my view that it is of little utility in respect of the plaint before the tribunal in relation to the 2005-2006 expenditure year. This is particularly so when viewed in the light of the evidence of Hodges, the present holder (see below).

9 Durham referred this tribunal to the history of the tenement and his plainting of it in the past. There has been a previous hearing and determination by a Mining Warden in which it was recommended that the tenement by forfeited on the basis of non-expenditure. That recommendation was not adopted by the Minister and the previous holder, Martin Fitzgerald, retained the tenement. The plaintiff Durham asks the tribunal to have regard to that history in making a recommendation in this plaint.

10 The plaintiff called no other witnesses.

The evidence of the present holder, Hodges

11 Hodges was the only witness called for the defence and he tendered a statement through his solicitor.

12 Hodges also filed some photographs of work being undertaken at the tenement (exhibits B, C, D). His evidence was that he purchased the tenement from Martin Fitzgerald on 11 May 2006, some two months after the end of the relevant expenditure year.

13 Martin Fitzgerald has since died. The form 5 compiled by him for the expenditure year 2005-2006 was in evidence.

14 It is true that the claim as to expenditure for that year bears similarities to the expenditure claimed in the years before.

15 Hodges evidence was that he purchased the tenement for $15000 which monies included $10000 for plant and equipment, loader, excavator and drill rig. Hodges evidence was that he inspected the tenement after purchase and observed that there were a 'number of relatively fresh workings which indicated ongoing prospecting and/or metal detecting' and there was a significant amount of plant and mining equipment on the tenement.

16 In cross examination by the plaintiff Hodges agreed that the equipment was in poor condition but he remedied this by repairs.

17 Hodges addressed the particular claims in Martin Fitzgerald's 2005-2006 Form 5, contested by the plaintiff Durham, in the following manner:

Fitzgerald claimed 30 days metal detecting @ $100 per day. There was evidence of ongoing metal detecting work and the sum of $250 per day

for metal detecting is reasonable. As Martin Fitzgerald has claimed $100 per day in the Form 5 this is regarded as a 'very moderate rate'.

Fitzgerald claimed 200 samples @ $10 = $200. Hodges argued that if this related to assays conducted by the holder, which he believed it did, this is a moderate rate and it is the going rate for cash payments for assays.

Fitzgerald claimed prospecting – 20 days @ $100 per day = $2000. Hodges stated there was substantial evidence of ongoing loaming and dolly pot activity with numerous loaming heaps and old workings all of which evidenced on-going exploration and prospecting

Fitzgerald claimed for plant and equipment hire – 30 days @ $150 per day = $4500. Hodges stated that plant and equipment was located on the lease and this was acquired on the transfer. This plant included a loader, excavator, drill rig and other mining plant. Hodges gave evidence that a metal detector would cost $5000 and the going rate for hire out was $250 per week. He also stated that a generator was a necessary part of the plant and a vehicle was required for travel to and from the tenement which is 55 kilometers from Kalgoorlie.

Fitzgerald claimed fuel and oil for 30 days @ $50 per day = $1500. In Hodges' view this was a reasonable rate for running a generator and fueling vehicles.

18 Hodges also stated that since he had acquired the tenement after the conclusion of the relevant expenditure year he had worked the tenement and kept it in good standing with the relevant authorities. He undertook the following:-

- He registered his interest with the Department,
- He compiled and submitted a low impact mining operation application with the Department within a week of the acquisition of the tenement,
- This application was approved,
- The necessary bond was paid,
- An inspection survey was required by the Department and this has also been undertaken as at 18 September 2007,
- He is working the tenement full time with his uncle Edward Hodges,
- He has spent $23,250 on man hours in low impact mining,

- Geologists have cost $5600,
- Bulldozer and excavators costs are assessed at $20,200,
- Repairs and equipment are valued at $17,512.46,
- Mobile welding has also been costed at $2400.

19 Hodges also stated that he was carrying on systematic scraping of the tenement and also deep lead alluvial prospecting. The leads contain alluvial gold.

20 On the basis of this evidence the new holder is keeping the tenement in good standing and complying with the requirements of the Mining Act 1978.

DETERMINATION

21 There is no real or specific evidence before this tribunal that the previous tenement holder failed to expend as required by the Mining Act and Regulations in the relevant expenditure year.

22 The inference which the plaintiff asks the tribunal to draw, that the claimed expenditure (2005-2006) is spurious, is not, on the actual evidence before this tribunal, capable of being drawn. It is incumbent upon a plaintiff to establish non-compliance to the civil evidence burden of proof on the balance of probabilities. The plaintiff has failed to do so.

23 The plaint is without foundation and I am satisfied that the plaint should be dismissed.