IN THE WARDEN'S COURT

HELD AT SOUTHERN CROSS

HEARD ON THE 28th SEPTEMBER 1989 PLAINT NO.3/889

BETWEEN:

DENBRIDGE HOLDINGS PTY LTD PLAINTIFF

AND

HARRIS GOLD N.L. & MURRAY RESOURCES LIMITED DEFENDANT

BEFORE: WARDEN G.N. CALDER

REASONS FOR DECISION

I delivered my judgement in this matter orally on 28th September 1989. I then undertook to furnish written reasons for my decision which I now publish. The applicant herein, Denbridge Holdings Pty Ltd (Denbridge) seeks an order for forfeiture of prospecting licence 77/1185 held by Harris Gold N.L. (Harris) and Murray Resources Limited (Murray) on the basis of the alleged non-compliance by Harris and Murray with the prescribed expenditure condition. The application is made pursuant to S.96 (1) of the Mining Act 1978 (The Act).

The application for forfeiture was made within the time allowed by S.96 (2A). Service of the Summons in respect of the plaint was effected on 22nd June 1989. A hearing date of 31st August 1989 was set. On 30th August 1989 a "Notice of Defence" form was lodged at the office of the Mining Registrar at Southern Cross. The grounds of defence stated that "the previous joint venture between Harris Gold N.L. and Denbridge Holdings Pty Ltd not being able to meet its obligations. Murray Resources has expended some funds on the property over the past 6 months and has negotiated a joint venture with a major company. In addition the Plaintiff has offered to withdraw the plaint if we agree to bear our own costs (copy enclosed) and the defendant claims that Denbridge withdraw the plaint and that costs are paid totally by Denbridge." The defence was lodged out of time (See Reg, 26), however Mr Kavanagh did not take the point and I permitted late lodgement.

The expenditure year in respect of which the application was made ended on 30th October 1988. The minimum amount of expenditure required by the legislation in relation to P.L. 77/1185 was $8000, the area of the tenement being 200 hectares (See Section 50, Reg. 15 (1).)

On the date set for hearing neither Harris nor Murray

appeared by counsel or otherwise. The applicant was represented by Mr Kavanagh and the hearing proceeded ex parte. Mr Kavanagh acting for the Plaintiff called no evidence. He tendered a copy of a search of the Mines Department register in respect of P.L. 77/1185. That document (Exhibit A) stated that the application for the tenement had originally been received on 26th September 1985, that the licence was granted on 31st October 1985 to one Taylor and was transferred on 7th October 1987 to Harris and Murray. Exhibit A gave no indication at all of any amount having been expended in respect of P.L. 77/1185 for the year ended 30th October 1986, that is to say the first year of the tenancy. It states that in respect of the year ended 30th October 1987 an exemption of part of the prescribed expenditure, amounting to $3495, was granted. It further states that for the year ended 30th October, 1988 exemption from the prescribed expenditure condition was refused. Exhibit A states that for the year ended 30th October 1987 $4505, (out of $8000 prescribed by Reg.15) was expended on the tenement and that for the year ended 30th October, $1659 (out of $8000 prescribed as a minimum expenditure by Reg.15) was expended on the tenement.

The plaintiff relied upon the contents of the register and the absence of any evidence contradicting or casting doubt upon it's contents and upon the non-

appearance of the defendant tenement holders to ground and substantiate its claim for an order of forfeiture of the tenement. The basic submission was that the contents of the register were prima facie evidence of the contents thereof. Reliance was placed upon S.69 A of the Evidence Act.

It was submitted that it could and should in the circumstances be inferred from the lack of any relevant information on the register relating to expenditure for the year ended 30th October 1986 that the tenement holders had not filed the work and expenditure report required by the Act (S.51, Reg.16, form 5). It was further submitted that for the years ended 30th October 1986, 1987 and 1988 respectively there should have been an amount of $24000, expended on the tenement, subject of course to the exemption granted in respect of the year ended 30th October, 1987, yet the register disclosed a substantial shortfall in expenditure of about $18000 before the exemption and of about $15500 after making allowance for the exemption.

The respondent relied upon the principles set out in the joint judgment of the whole court in the unreported decision of Commercial Properties Pty Ltd and Australian United Gold N.L. v Italo Nominees Pty Ltd. Full Court, Supreme Court of Western Australia (Malcolm C.J., Pidgeon J., Nicholson J.J.) No. 2131

of 1988. (herein after referred to as "Commercial Properties".)

In my opinion the plaintiff is justified in his submission relating to the application of the principles set out in Commercial Properties to the present case. At page 15 of their reasons for judgment their Honours said:

> ".... upon prima facie proof of non-compliance, 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."

The Court then went on at pages 16 to 18 and made reference to three leading authorities on the matter of circumstances in which certain inferences may be drawn from the failure of a party to proceedings to give evidence and the nature of the inference which may be so drawn. On page 18 the Court said:

> "In other words the court is entitled to use the fact of the defendant's 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 must have been peculiarly within the knowledge of the defendant: cf Hampton Court Limited -v- Crooks (1957) 97 C.L.R. 367 at p.371 per Dixon J."

At page 19, the Court said:

"Where the plaintiff has established a prima facie case on an issue and the defendant has called no evidence, as the House of Lords has held, only the most favourable inference to the plaintiff should be drawn from the plaintiff's case: Ross v Portland Cement [1964] 1 W.L.R. 768 at p.775; and O'Donnell v McKenzie [1967] S.C. 63. In this particular case the unexplained failure of the defendant to call evidence left only one inference open, namely that there had been no compliance with the expenditure conditions on each of the prospecting licences."

In the present case, applying the principles set out in Commercial Properties to the material before me I make the following findings. First, that the register and the certified copy thereof tendered in evidence is prima facie evidence that the tenement was granted on 30th October, 1985 for 2 years and then extended for a further 2 years. Second, that no form 5 work and

expenditure report was lodged for the year ended 30th October 1986. Third, that partial expenditure exemption was granted for the year ended 30th October 1987 and that an expenditure exemption was applied for but refused for the year ended 30th October 1988. Fourth, that of the total prescribed minimum expenditure for the years ending 30th October 1986 to 1988 inclusive only $6164 was expended, although an exemption of $3495 was granted. Therefore of the $20105 actually required to have been spent after allowing for the exemption, less than one third was in fact expended on the tenement. I also find that expenditure for the year ended 30th October 1988 was not more than $1659. That can only be described as a substantial shortfall.

Regulation 15 (1) in setting out the expenditure condition in respect of prospecting licences uses the term "not less than" when fixing the rate per hectare. In line with the reasons for decision given by the majority in Melville -v- Hunter 1988, High Court of Australia, it is my opinion that any expenditure which is less than $40 per hectare where there has not been "in accordance with this Act total or partial exemption therefrom," (See S.50) constitutes a non-compliance with S.50 of the Act and provides a ground for an application for forfeiture made pursuant to S.96 (2) (b) regardless of how small the amount of expenditure

shortfall is.

Once the non-compliance with S.50 has been proved the Warden must consider the question arising out of the provisions of S.96 (2) namely whether or not there has been non-compliance "in a material respect and that the matter is of sufficient gravity to justify forfeiture of the mining tenement.

In "Commercial Properties" at page 22 the Court said:

> "Failure to comply with expenditure conditions is contemplated by the statute itself as of sufficient gravity to justify forfeiture. This is apparent from S.96(7) which provides that a prospecting licence shall not be forfeited for non-compliance with the expenditure conditions where that has been occasioned by a strike. In such a case the onus of proof of that is on the holder."

In my opinion an unexplained failure to spend more than $1659 out of the required $8000, whether looked at in isolation or in the context of the overall expenditure record of having expended only, $6164 out of a required amount of expenditure of $20105 is a non-compliance "in a material respect" and further is "of sufficient gravity" to justify an order of forfeiture of the prospecting licence.

For the above reasons it is ordered that prospecting licence no. 77/1185 is forfeited.

COSTS

It is my opinion that neither party is entitled to costs. I consider that when acting pursuant to S.96 of the Act the Warden is acting administratively and is not sitting in the Wardens Court. S.96 makes no express reference to the venue in which the hearing is to be conducted and does not in my view imply that the venue is the Wardens Court. The term "warden" is defined in S.8 of the Act in terms which do not necessarily imply that any reference to a Warden always means a Warden sitting in a court, or more particularly in the "Wardens Court".

In my opinion the use of the words " in the Warden's Court" in form 33, the form prescribed by Reg.48 for the making of applications for forfeiture does not have the significance which the plaintiff has submitted that it has. Form 33 is also the prescribed form for the commencement of all "Civil proceedings in the Warden's Court". (See Reg. 121, and S.132,134,135). It is also the form prescribed for applications for forfeiture of exploration licences, mining or general purpose leases, made pursuant to S.98 of the Act (See Reg. 48). I have recently ruled in the matter of Strange -v- Pietsch in

separate reasons for decision related to costs in proceedings arising under S.98 that proceedings under S.98 of the Act were administrative in nature (Those reasons were delivered on 9th November,1989. Southern Cross plaint No.1/878). I have no hesitation in stating that the fact that the form prescribed for commencement of proceedings pursuant to S.98 includes the words "in the Wardens Court" does not govern the issue of whether or not the proceedings are in the Wardens Court. Indeed the use of the words "in the Wardens Court" in form 33 appear to conflict with subsection 98 (3) which says that the proceedings under S.98 are, to be heard "in open court" which I perceive to be a different venue to the "Wardens" Court.

It is my view that the prescribed use of form 33 by regulations 48 and 121 is a matter of mere drafting convenience and does not mean that applications made under S.96 are in the Wardens Court. I consider that the inclusion in the first Schedule of Form 15 pursuant to Reg.49 simply recognizes the administrative practice of the Department to make several forfeiture applications in respect of different tenements at the same time. It is convenient and sensible that that be permitted, particularly where the reason for forfeiture is identical in each case, namely non-payment of rent and where the applicant is also identical in each case. It is of interest to note, however, that unless it can

be said that those who are mentioned in S.96 (1) (a) can be said to be "any persons" for purposes of S.96 (1) (b) that the Minister, the Registrar, or the Authorised Officer may not be able to plaint for forfeiture upon any ground other than non-payment of rent which is the sole ground mentioned in form 15.

It is my opinion that the only power to award costs arising out of proceedings commenced pursuant to S.96 is that set out in S.96 (5) which says:

> "If the applicant fails to proceed with his forfeiture application the warden may award the holder of the mining tenement such sum sum for costs and expenses as the warden thinks fit.

Clearly S.96 (5) have no appreciation.
I consider that S.134 of the act, which relates expressly to "a Warden's Court" has no application to proceedings conducted upon a S.96 application for forfeiture. In any event there was no "objection" before me which could be said to be "frivilous or vexatious" for purposes of S.134.

In my decision as to costs given in the case of Strange -v- Pietsch (after setting out the provisions of S.98 (8) of the Act) I said at Page 6:

> "It is my opinion that it was the intention of the

legislation that that be the only situation where costs are awarded where action has been taken under S.98 of the Act. It is of interest, and in my view supportive of that interpretation of S.98 to note that S.96 (5) relating to applications for forfeiture of prospecting or miscellaneous licences, contains an identical provision. In my opinion those two subsections coupled with provisions of S.132 (2) wherein costs in the "Warden's Court" in the applicable proceedings are limited to instances of "frivolous or vexatious" applications provide an indication that the legislation has the intention of limiting the risk to genuine objectors or applicants of incurring awards of large costs against them following institution of bona-fide but unsuccessful applications or objections. I think that is consistent with what I perceive to be a generally accepted view that Parliament has intended that in many areas such as marking out and expenditure the mining industry is expected to be "self policing" and that that legislative intent and policy would be very effectively blunted and even defeated were the industry's genuine private policemen only able to proceed to apply or object under the threat of potentially crippling costs in the event of failing to succeed.

I consider those comments have equal application in the present case.

For the above reasons it is my opinion that I have no power to award costs to the successful plaintiff in this case but that even if I did have power pursuant to S.134 (2) to award costs because I was in fact sitting in the Wardens Court, the conditional provisons contained in S.134 (2) would exclude the plaintiff from an award of costs.

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Graeme Calder

Warden, Yilgarn.

NORTHAM WA 6401

27th December 1989