IN THE WARDENS COURT
HELD AT PERTH
WESTERN AUSTRALIA

Complaint No. 5H/934

Date Heard :
Date Decision Delivered : 24 February 1995

BEFORE : PAUL M HEANEY S.M.

B E T W E E N :

WARWICK JOHN FLINT

Plaintiff

and

NEXUS MINERALS N.L. (formerly DRY CREEK MINING N.L.)

Defendant

REASONS FOR DECISION

APPEARANCES :

Mr G Lawton appeared for Plaintiff.
Mr Hawkins appeared for Defendant.

On the 28 October 1993 the Plaintiff **Warwick John Flint** filed Plaint No. 5H/934 against the Defendant **Nexus Minerals N.L. (formerly Dry Creek Mining N.L.)**. The Plaintiff claimed that "the Expenditure conditions of the Mining Act, Section 98, 1978 have not been complied with by the holder of E/L 70/463" and asks that the Warden recommends to the Minister for Minerals and Energy that Exploration Licence 70/463 be forfeited and prior right to apply for the ground be granted to the Plaintiff.

The anniversary date of Exploration Licence 70/463 was the 24 July 1993 and pursuant to Section 98 (2) of the Mining Act the Plaintiff had 8 months from that date to file his plaint. There is no dispute that the Plaint was filed within that 8 month period which expired on 24 March 1994.

On 6 May 1994 on its application the Defendant was granted an order that the Plaintiff was to provide particulars of its claim within 14 days. These particulars of claim dated 19 May 1994 were subsequently served upon the Defendant. They do not appear to have been filed at the Wardens Court. These particulars of claim state as follows:

> "The Plaintiff claims that the defendant has failed to comply with the expenditure conditions imposed by Regulation 21 of the Mining Act Regulations for the year 24 July 1992 to 23 July 1993 on Exploration Licence 70/463 in breach of Section 62 of the Mining Act"

These particulars of claim were filed 6 weeks after the expiration of the 8 month period which ended on the 24 March 1994.

This Plaint is listed for hearing on 9 March 1995 but the matter was brought before me on 10 February 1995 by the Defendant who seeks the following orders:

1) That the Plaint be struck out on the basis that the Particulars provided on 19 May 1994 are not sufficient.

2) Further, or in the alternative, the provision of particulars on 19 May 1994 is barred by the expiration of the limitation period provided for in Section 98(2) of the Mining Act and the Plaints should be struck out for not disclosing a sufficient cause of action.

Section 98 (1) of the Mining Act provides that

"Where the requirements of this Act are not being complied with in respect of the expenditure conditions applicable to an exploration licence or a mining lease any person may apply to a Warden for the forfeiture of such licence or lease as provided in this section.

Section 98 (2) provides that:

An application for forfeiture under this section shall be made during the expenditure year in relation to which the requirement is not complied with or within 8 months thereafter in such form and manner as may be prescribed and shall be accompanied by the prescribed fee.

In respect of the first order sought the Defendant relies on the case of **SAVAGE v TECK EXPLORATION LIMITED** Appeal No 22 of 1988. At page 5 of his judgment Malcolm C.J. states:

"By forfeiture Plaints which were filed on the 11th September 1986 it was alleged that "the respondent has not complied with the expenditure requirements in respect of the P.Ls". No particulars were provided indicating in what respect these had been a failure to comply or when.

While the rules of pleading may have no application with respect to an application for forfeiture, the defendant in each proceedings is clearly entitled to know with some degree of certainty what grounds are alleged as the basis for the application".

At page 6 of his judgment the Chief Justice goes on to say:

"In my opinion ..... it would be necessary to specify in respect of what year and by what amount it was alleged that there was a failure to comply with the expenditure requirements".

When we were here last Mr Lawton sort to distinguish that case on its facts and suggest that it does not apply to this case where the facts are different. The above words of the Chief Justice appear to me to be setting out a general principle and the facts of that case were subject to that principle as are the facts of this case. The relevant facts of the two cases are in reality very similar. In this case before me the allegation was that "the expenditure conditions of the Mining Act have not been

complied with by the holder of E/L 70/463" whilst the allegation in that case before the Chief Justice was that the respondent "has not complied with the expenditure requirements". Both allegations fail to specify in respect of what year and by what amount it was alleged that there was a failure to comply with the expenditure requirements.

The particulars of claim dated 19 May 1994 whilst they specify the relevant year they do not state by what amount there was a failure to comply with the expenditure requirements and thus the requirements of the general principle enunciated by the Chief Justice in Savage's case are still not satisfied.

The defendant argues further that the particulars dated 19 May 1994 are statute barred by the rule of practice in Weldon v Neal (1887) 19 QBC 394. In that case at p.395 Lord Esher M.R. stated:

> "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment would be barred by the Statute of Limitations, it would be allowing the Plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which as a general rule would be in my opinion, improper and unjust."

Clearly this rule of practice would prohibit the document of 19 May 1994 being allowed to amend the initial defective plaint even if it had that effect by virtue of its wording.

It has been suggested that Section 142 (2) can and should be applied by myself to amend the defective complaint.

Section 142 (2) provides that:

> "No proceedings under this Act shall be dismissed or vitiated by any informality, but a mining registrar and a warden respectively have power at any time to amend all defects and errors in any proceedings whether there is anything in writing to amend or not."

I am of the opinion that I should not exercise my discretion to allow the acceptance of the document of 19 May 1994 to constitute an amendment of the Plaint. Firstly I do not think it does because it does not specify by what amount it was alleged that there was a failure to comply with the expenditure requirements. Secondly the defect in the original Plaint I would have thought was more than a mere informality and thirdly I do not think that Section 142(2) should be used to overcome the practice rule of Weldon v Neal.

It should be appreciated that Plaints under the Mining Act initiate proceedings which place a defendant in jeopardy of suffering a financial penalty or having its property forfeited. Plaints should not be laid until the Plaintiff has the necessary evidence to support the plaint. They should not be used as fishing expeditions where the plaint in general terms is filed within the 8 month period with the particulars or details to be ascertained later or as in this case after the 8 month period.

It has further been suggested that given the way this matter has proceeded to this point the defendant is not estopped from opposing an application to amend. I am unable to accept this argument. All the defendant has done is prepare itself to defend itself on what it assumed was the plaintiff's case but without ever declaring or suggesting that it was not going to rely on this threshold issue.

Accordingly I am of the opinion that Plaint 5H/934 by Warwick John Flint should be dismissed.