Clauses excluding consequential loss will have very broad operation and will operate to exclude almost all loss that extends beyond direct contractual damages. Consequential loss includes (as specifically noted by Nettle JA) liability for profits lost or expenses incurred as a result of the breach.

WESTERN AUSTRALIA

FORFEITURE: ANOMALOUS ITEMS OF EXPENDITURE FOR COMPLIANCE WITH MINING LEASE CONDITIONS*

Richmond v Ynema [2007] WAMW 19, Perth Warden's Court, Warden GN Calder SM, 26 November 2007

Relevant Background

The plaintiff lodged plaints for forfeiture over some mining leases (M80/291 and M80/309), which lay around 23 kilometres south of Old Halls Creek. The plaints alleged non-compliance with expenditure conditions during expenditure years that ended in 2003. M80/291 is located completely within M80/309.[1]

With respect to M80/291 the plaintiff argued that certain 2003 works were never done, claimed expenditure for air fares, accommodation and inspection is expenditure that was not in connection with mining or mining operations, that false expenditure claims were made in the 2003 expenditure year and that metal detecting is not a claimable item of expenditure. These were said to be of sufficient gravity to justify forfeiture,[2] having regard also to alleged non-compliance in previous years.

In respect of M80/309 the plaintiff said that none of the claimed 2003 work was done, that there was a false claim of expenditure for the 2003 year and that salvaged plant, geological supervision and care and maintenance, metal detecting and the construction of an external access road and an external alluvial plant were not claimable items. These were said to be of sufficient gravity to justify forfeiture, having regard also to alleged non-compliance in previous years.

The defendant denied in each case that there was a failure to comply with expenditure conditions, relying upon the amounts claimed in the Form 5 reports for the 2003 expenditure years concerned and said, in any event, that failure to comply with such conditions was not of sufficient gravity to justify forfeiture.

Worthy of particular note was the forfeiture of M80/309 on 24 January 2003 and its restoration to the current owner (the defendant) on 11 July 2003, which created an issue as to whether the expenditure requirement covered the period of the forfeited lease.

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1 This had a special significance in that certain expenditures could be said to be apportioned between the various tenements: see evidence of Mr Barnes ([2007] WAMW 19 at [102]).

2 Which also included the allegations of failure to comply with 2001 and 2002 expenditure year requirements, subject to an earlier interlocutory dispute with respect to particulars in the plaint: *Richmond v Ynema* [2004] WAMW 14.

Held

The Warden first had to decide a technical point concerning the authority of *Askins v Supersorb Minerals NL*[3] and pro-rata expenditure requirements for periods of time between the forfeiture and restoration of the tenements in the expenditure year concerned. His Honour held that the only interpretation of the legislation open to him was one that required a pro-rata expenditure calculated in accordance with *Mining Regulations 1981* (WA), reg 31 but based upon the expenditure condition not having application during the period when the tenement was forfeited.

Having dealt with that issue, the Warden said it was still necessary to consider what, if any, expenditure was incurred during the expenditure year. The Warden held that the Plaintiff could not prove, on the balance of probabilities, that the Defendant did not expend the minimum required amounts for the subject year for both tenements. The Plaintiff provided insufficient evidence to draw inferences against the Defendant as to the values of the alluvial plant being constructed off the tenement site (using salvaged equipment and other materials from the Defendant's stockpile). The Warden refused to speculate as to those matters and the alleged non-expenditure on administration and overheads costs and also that, generally, there was less expenditure than claimed.

The road that was constructed from Old Halls Creek to the site of the tenements was specifically found to be necessary and reasonable expenditure. The Warden examined much evidence of alternative routes and natural barriers. His Honour said:[4]

> "I find that it was necessary and reasonable to construct the new road because of the unsuitability of all other known access routes from the point of view of distance, convenience, security and, most importantly, the general unsuitability of the known routes because of their unreliability, the nature of the terrain and their relative lack of permanence."

With respect to the "salvaged" trommel that was found on a track along the way to the tenements from Old Halls Creek, the Warden said:[5]

> "The mere fact that the trommel was salvaged from other equipment that had been left, apparently abandoned, and in respect of which neither the Defendant nor any other person associated with the subject tenements had any rights of ownership or use does not necessarily mean that it had no value or no particular value where it lay before it was salvaged or that it had no value or no particular value upon being salvaged or that it had no value or no particular value after having work done on it and after having been incorporated in the alluvial plant."

The Warden dismissed both plaints for forfeiture.

Observations and Implications

The decision has implications for the diversity of items that may count as expenditure for mining lease expenditure requirements.

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3 [2004] WAMW 9.
4 [2007] WAMW 19 at [139].
5 Ibid at [142].

First, the findings by the Warden that an external road, which was the most convenient means of accessing the tenements concerned, was necessary and reasonable expenditure "*in connection* with mining operations *on the mining lease*" (emphasis added), may be of some interest.[6] The result of this case seems to be that such words permit a linking of any related activity to mining on the lease, even if such activities themselves are not being undertaken on the geographic location of the lease. This could be of particular interest to owners of multiple, or groups of, tenements, that wish to distribute *reasonable* expenditure of *necessary* access infrastructure across multiple tenements' expenditure requirements.

Second, the reliance upon found or uncollected goods as "expenditure" also presents an interesting question.[7] The trommel in this case was simply found on a road on the way to the tenements from Old Halls Creek. The Defendant expended nothing in any transaction with any other person or entity to acquire it. It is difficult to see how it could be considered expenditure. One must accept that the Warden found that the salvaged item still had a value. But this does not mean the Defendant spent anything on it, or incurring any legally binding obligation to pay,[8] to call it "expenditure".

Lastly, unless there are plaints for forfeiture in the Warden's Court from before 9 March 2007,[9] the comments in this case on the *Askins v Supersorb* point are only of historical interest. On that date, reg 53 of the *Mining Regulations 1981* (WA) commenced operation and it provides guidance on this issue for a more structured approach to pro-rata assessments.

EXTENSION OF TIME FOR OBJECTION RAISING TOWN PLANNING ISSUES: AMENDMENT OF OBJECTION*

Shire of Serpentine-Jarrahdale v Iluka Resources Ltd [2008] WAMW 6

Amendment of objection to grant of tenement – New grounds – Amendment of objection said to offend rule in Weldon v Neal – Planning issues relevant to objection to grant of tenement – Extension of time for lodgment of objection to grant of tenement – Sections 59(1), 59(4), 111A, 120 and 142(4) of the Mining Act 1978 (WA) – Regulation 67 (since repealed and replaced) of the Mining Regulations 1981 (WA)

Overview

On 3 April 2008 Warden Calder delivered a decision in the Perth Warden's Court concerning applications by the Shire of Serpentine-Jarrahdale (Shire) to extend time to lodge an objection to the grant of an exploration licence to Iluka Resources Ltd (Iluka) and to amend that proposed objection.

Warden Calder granted the application to extend the period for lodgment of objection and also allowed the amendment to the objection.

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6 The phrase "in connection with" is, in itself, a topic of some recent controversy: *Re Calder SM; Ex parte Lee* (2007) 34 WAR 289.

7 Putting aside any potential applicability of Pt VII of the *Disposal of Uncollected Goods Act 1970* (WA) or the *Criminal and Found Property Disposal Act 2006* (WA).

8 *Richmond v Opaltrend Nominees Pty Ltd* (unreported, Perth Warden's Court 7 October, 1999).

9 The Warden held that reg 53 does not act retrospectively ([2007] WAMW 19 at [121]), so it may still apply to pre-amendment plaints for forfeiture.

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