

IN THE MINING WARDEN'S COURT
HOLDEN AT SYDNEY
ON 27TH AUGUST, 1979
BEFORE J. L. McMAHON ESQUIRE
CHIEF MINING WARDEN

BINI AND ANOTHER v REITTERER

JUDGMENT

BENCH: The following matters have been heard by consent of all parties and will be determined together.

1. Section 133(h) Complaint dated 26th June, 1979 by Joseph Bini against Paul Reitterer concerning both Claims 1107, 1110.
2. Section 133(a)(e)(h)(n) and Section 146 - Complaint dated 11th July, 1979 by Paul Reitterer against Joseph Bini first defendant and Violet Gawthorpe second defendant concerning both Claims 1107 and 1110.
3. Section 144 - Application for Injunction dated 2nd July, 1979 by Violet Gawthorpe against Paul Reitterer in regard to Claim 1107.
4. Section 144 - Application for Injunction dated 2nd July, 1979 by Violet Gawthorpe against Paul Reitterer in regard to Claim 1110.
5. Section 144 - Application for Injunction dated 11th July, 1979 by Paul Reitterer against Violet Gawthorpe in regard to Claim 1107.
6. Section 144 - Application for Injunction dated 11th July, 1979 by Paul Reitterer against Violet Gawthorpe in regard to Claim 1110.

By further consent some additional grounds have been added to the firstmentioned complaint, such grounds being set out in the transcript of the proceedings.

The dispute between Mr Bini and Mrs Gawthorpe on the one hand and Mr Reitterer on the other arises out of the working and ownership of two claims which are numbered 1107 and 1110 within the Lightning Ridge Mining Division in northwestern New South Wales. Up until the 27th June, 1979 on which date he sought to transfer the claims to Mrs Gawthorpe Mr Bini was the registered holder of the claims. On the 21st December, 1978 Mr Bini and Mr Reitterer had signed before a Justice of the Peace a Statutory Declaration which attempted to set out their contractual relationship in the form of a partnership in respect of the claims and either on the 15th or 18th June, 1979 Mr Bini served upon Mr Reitterer a Notice of Intention to terminate the partnership in accordance with the provisions of 32(c) of the Partnership Act 1892.

Notwithstanding the apparent simple nature of the Statutory Declaration which has been tendered as exhibit 1 and of the Notice of Termination of Partnership, exhibit 2, the matter is complicated by the language of exhibit 1 when an attempt is made to interpret the intentions of the parties as to the terms of the contract of partnership and because of the number of other individuals who had been brought in mainly by Mr Reitterer over a period of approximately six months since the partnership was formed. Those individuals on the evidence were working on the claims on a percentage basis, although on occasions the quantum

of the percentage is in dispute as indeed are the nature of some amounts which these individuals say were received. Further it is clear that while these individuals were employed on some percentage basis Mr Reitterer from time to time paid out amounts of money on their behalfs realised from the sale of opal from the claims.

I shall attempt to resolve the dispute between the parties, to make some assessments as to what was paid out in relation to the value of the opal won, and then an order for damages together with a declaration as to the future relationship of the parties and the rights to the claims.

By exhibit 1 - the partnership agreement - Joseph Bini and Paul Reitterer agreed that Bini was the owner of the claims and that Paul Reitterer would allow the partnership to use his mining plant during the continuation of the partnership but that such plant would remain the property of Reitterer although the partnership would pay for all petrol or fuel used by the partnership and for all repairs, registration or insurance in respect of the plant. Clause 3 provided that the net profit of the business should be divided equally with a similar equal requirement to meet the losses of the partnership including losses of capital. Clauses 4, 5 and 6 provided as follows:

"If either partner is unable or unwilling to contribute his half share of labour to the operations of the partnership for any period in excess of one week the partners shall on mutual agreement employ some other person to carry out the work for him on a percentage basis set by the partner who is unable or unwilling to contribute his share of the labour.

As soon as is practicable after the 1st of January, 1980 the partners shall make up an account up to the end of the 12 months of partnership of all liabilities, profits or losses of the partnership and the same shall be binding on them unless some manifest error shall be found by them within 3 months, in which case the same shall be rectified.

In case of death of either partner the following people will carry out the mining operation for the full term of the contract:

for Joseph Bini his mother Irene Bini of 95 View Street, Annandale, Sydney;
for Paul Reitterer his niece Elisabeth Reitterer of 16 Kaolin Street, Lightning Ridge; under the same conditions as under clause 4, where either partner is not able or not willing to carry out his share of manual labour."

From the evidence of Joseph Bini he purchased the claims in September, 1978 and following some initial discussion exhibit 1 was executed. Thereafter Bini and Reitterer worked for some days, apparently not exceeding seven on the claims without finding opal and after that time Bini decided to go to Sydney and in accordance with clause 4 of exhibit 1 another person was brought in.

This person's name was Peter Wouters and under the agreement Reitterer was to receive 50% of profits and have a similar responsibility for expenses, Bini 30% of profits with similar responsibility for expenses and Wouters the remaining 20% of profits and similar responsibility for expenses. Bini proceeded to Sydney and received no communication from Reitterer until around Anzac Day in April, 1979 when Bini returned to the claims and found Wouters gone from the claims and Reitterer working with two other men one called Boris Apostolovich (called in the evidence Mr Boris) and another man called Michael. Bini returned to Sydney after one or two days. It is not clear from the evidence whether Bini raised objection to the absence of Wouters and the presence of Boris and Michael but it is apparent that he did make inquiry of Reitterer as to how much had been won from the claims and had been told some \$800 all of which had gone in expenses. Michael was not called as a witness but Wouters and Boris were. Wouters gave evidence that he had received a total of \$500 from Reitterer in respect of his activities on the claims. Boris said in evidence that he was to receive the same as Wouters i.e. 20% of profits and that the total that he had received out of his activities on the claim was \$700. He felt that Michael was on a 25% share although Reitterer on page 69 of the transcript says that this figure was 20%. Whatever the situation it is clear that Michael was paid an amount of money after he left the project and this figure I accept to be \$200.

With the exception of writing a letter to which no reply was received, from Anzac Day until around the middle of June, 1979 Bini made no attempt to communicate with Reitterer. Around 13th June Bini returned to the area and on either the 15th or 18th served Reitterer with the Notice of Termination of Partnership, exhibit 2. The uncertainty as to the date of service of notice is caused by evidence that on the 15th June the notice was initially served upon Reitterer but then after discussion with the Mining Registrar, Mr O'Carrigan, the notice was returned to the server, Bini. However on the 18th June it was re-served upon Reitterer.

On the afternoon of 15th June, a Friday, Bini and Reitterer had the discussion with Mr O'Carrigan at the Registrar's office. During that discussion Reitterer agrees that he told Bini and the Registrar that he currently held about \$4000. worth of opal which had been extracted from the claims. Subsequently Bini and Reitterer had left the Registrar's office and had gone to Reitterer's home where the opal had been viewed. Reitterer gave evidence that this opal is still in his possession as at the date of hearing.

Another man called Rudi Shuster worked on the claims with Mr Reitterer over a period of some 4 weeks. He swore that he was on a 30% or $\frac{1}{3}$ proportion of all opal won from them and at the present date Mr Shuster has received only \$78. He believes himself entitled to $\frac{1}{3}$ of some \$3000. worth of opal which Shuster says has yet to be sold. Reitterer on page 72 of the transcript said that Shuster's percentage was 25%. After Shuster left the employment of Reitterer

Shuster stated that he was approached by Reitterer and offered to work on a 40% basis with another 40% going to Reitterer and 20% going on machinery costs. Shuster deposed that he rejected the offer. Reitterer swore that this offer was never made to Shuster. During Shuster's final days working for Reitterer another man called Charlie whose correct name is Drago Jurisek was employed. Charlie received amounts similar to that paid to Shuster namely \$78. The man Charlie was called to give evidence in Reitterer's case and swore that since he had worked for Reitterer after Shuster's departure from the project he, Charlie, and Reitterer had found no saleable opal. It is a major point in Reitterer's case that Reitterer is in debt to Charlie to the extent of some several hundreds of dollars, both Reitterer and Charlie claiming that Charlie has financed the working of the claims over the last six to eight weeks. Reitterer also stated in his defence, and he produced receipts to support his case, that he had been forced to sell some mining equipment namely a hoist for \$450, a puddler with Fordson Diesel Tractor for \$1200, a rumbler for \$750, electric welder oxy-acetylene equipment for \$200 and a household Kenwood Mixmaster for \$150 and a conveyor for \$500, to maintain the project. The replacement costs of these items Mr Reitterer swore, was substantial e.g. the puddler to be rebuilt would cost \$2500 and a rumbler \$3500.

Reitterer produced documents showing expenditure for fuel namely super petrol, standard petrol, oil and distillate and for some repairs to the mining equipment totalling \$1968.92 as exhibit 5, and additional documents evidencing expenditure to the extent of \$536.98 as exhibit 6, for replacement parts to the mining plant. All this Reitterer said were necessary costs incurred in maintaining the project and in searching for opal on the claims. There was, as also evidenced by a document, exhibit 7, a further shaft sunk for which Reitterer paid \$200.

From a survey on the evidence of Wouters, Boris and Shuster then it seems apparent that Wouters received \$500, Boris \$700, Shuster \$78, with an additional promise of \$1000 approximately. Although the extent of expenses is set out in the evidence it is not clear how much Reitterer retained for himself but it is clear on the evidence that Bini has received nothing. Reitterer argued that because he had the running of the project including the necessity of running the project to maintain machinery, to employ men, to convey them to and from the site, to provide food and drink and to sell the opal, that all the proceeds from the opal sales had gone in expenses, with the exception of the \$4000 worth approximately that he holds.

Bini gave evidence of having purchased the claims and then subsequently leaving the area after he had properly employed Wouters in accordance with paragraph 4 of the agreement and that he gave no further authority for the employment of Boris, Michael, Shuster, Charlie or other persons on the claims.

Reitterer argued that because Bini had seen Boris and Michael working on the claims during his visit around Anzac Day that it could be taken that he had acquiesced in their employment but Bini says that this was not so.

I am inclined to accept the evidence of Bini that he gave no approval in retrospect for the employment of Boris, Michael, Shuster or Charlie and that the only person employed on the claims with Bini's authority was Wouters. I further accept the evidence that Reitterer did attempt to make a private arrangement with Shuster whereby the latter would receive 40% of takings. To this extent therefore I find that Reitterer in employing Boris, Michael, Shuster and Charlie did so in breach of the agreement, exhibit 1.

A surprising feature of this matter has been the apparent lack of interest until it turned sour of Bini who having paid out substantial sums of money, and on his own evidence, being unemployed in Sydney he was content to visit the area only twice in the six months of operation and to write only one letter. One would have thought that a more prudent course would have been for him to show greater concern about the running of the project. I must take this factor into account therefore in coming to a conclusion in the matter.

The complaint by Bini dated 26th June, 1979 requests in effect that Reitterer be ordered to account for all opal won during the currency of the agreement. There is evidence of a book of accounts having initially been maintained which I would have expected may have been some indication as to receipts and expenditure. This book is missing and Reitterer implies that Bini had known something about its disappearance. Bini denies responsibility stating that when he left Lightning Ridge he gave to Reitterer a key to the safe where the book was held. It is therefore impossible for anyone to say precisely how much opal was won from the claim, and one is left to look simply at the evidence of all witnesses to come to an assessment of the value of opal with a view to determining this matter.

It seems to me that Reitterer is guilty of a breach of contract in failing to notify Bini about the change in personnel. I would have thought also it would have been desirable for him notwithstanding Bini's apparent inactivity to have let Bini know what was going on. On Reitterer's evidence there have been substantial expenses namely in fuel, the loss of capital in having to sell the mining equipment, in replacement parts, and in sinking the additional shaft, but I do not accept Reitterer's evidence which infers that all proceeds from the mine went in expenses together with the proceeds of the sale of equipment and the loans from Charlie.

I think a just and equitable arrangement in the matter would be for the court rather than to even attempt the impossible exercise in taking accounts is to make some order as to damages and I propose to do so, setting out the basis upon which the order is made. I think this is in accordance with the spirit of Section 133(h) of the Act.

As far as Bini is concerned if the court accepts the quantum of payments to other individuals and their respective percentages one can assess Bini's percentage and therefore a figure in dollars that he would be entitled to. For example,

if the percentage was 50, 20 and 30 in the Reitterer, Wouters and Bini arrangements and if Wouters received \$500, then Bini could be said to be entitled to \$750. Similarly if Boris received \$700 then Bini could be said to be entitled to \$1050. I disregard Michael's, because it is clear that the \$200 paid to him was also duplicated by a payment of \$200 to Boris. As to Shuster, if he received \$78 on a basis which I accept to be 30% then Bini's remainder is \$52 on the premise that Reitterer was entitled to 50% and Bini the remaining 20%. There is, of course, the remaining opal which may be worth around \$4000 of which, if the court find in Bini's favour, he would be entitled to some share: and I assume that from this opal Shuster would also expect to receive his \$1000 approximately.

So I total \$750, \$1050, and \$52 and arrive at a figure of \$1852. I add to that the sum of \$1000 which I assess should be Bini's share of the outstanding unsold opal, bearing in mind his lack of activity.

I order therefore that in lieu of directing Reitterer to surrender Bini's share of the opal that Reitterer pay to Bini the sum of \$2852 within one month from today.

A further factor arising in this matter is the validity or otherwise of the Partnership Agreement, exhibit 1, the question as to whether or not the partnership could be terminated before January, 1980 and further whether Mrs Gawthorpe as a transferee with notice of Reitterer's claim to title of the areas should be restrained in favour of Mr Reitterer in working the area.

Notwithstanding the simple nature of the agreement, exhibit 1, it is evidenced in writing, signed by both parties in front of a witness and sets out the relationship one with the other. As a matter of strict interpretation of the law of contract I find that it is a valid agreement.

Reitterer argued that by reason of the contents of the agreement, exhibit 1, that Bini had no rights to attempt to terminate as at June, 1979. It seems to me however that this argument cannot be supported by an interpretation of the document. Clause 5 of the document commences "As soon as is practicable after 1st January, 1980 the partners shall make up an account up to the end of the 12 months of partnership of all liabilities, profits and losses of the partnership..." Nowhere else in the document is a period of time mentioned and in particular it is not expressed as being for a fixed period of time as envisaged by Section 32 of the Partnership Act. All that paragraph 5 means is that an accounting is to take place after 1st January, 1980. I note the words in clause 6 which relates to the death of either partner which contain reference to "the full term of the contract" but in my view the contract would be capable of being for a term without that term being fixed. I am of the view therefore that the notice of dissolution of contract, exhibit 2, was validly given and as at the date of service which I determine to be 18th June, 1979 the contract is at its end.

If the contract was at an end as at 18th June, 1979 and because Mr Bini was still the owner of the claims it was within his power to sell his rights to the claims on an unencumbered basis to Mrs Gawthorpe. I hold therefore that the conveyance of the claims to Mrs Gawthorpe was valid and that she is entitled to have Reitterer restrained from further entering on to the claims, with the proviso that he would be given one month in which to remove his machinery therefrom. Similarly I decline to grant Reitterer's application for injunction against Mrs Gawthorpe to restrain her from entering the claims.

As to Mr Bini's complaint of 26th June, 1979 I make the following orders:-

1. The partnership agreement between Joseph Bini and Paul Reitterer is found to be a valid partnership agreement.
2. The court approves the dissolution of the partnership by reason of service of the Notice of Dissolution on 18th June, 1979. It follows that there is no necessity for the court to make an order dissolving the partnership pursuant to Section 35 of the Partnership Act as sought by Mr Bini in his amended Ground 2.
3. In view of the confusion as to accounting procedures and records kept in respect of receipts and expenditure from the claims I decline to order Reitterer to account for opal won from the claim during the currency of the agreement.
4. Similarly, as to Ground 4 I decline to order Reitterer to refrain from selling or disposing of the opal from claims 1107 and 1110 during the currency of the agreement and
5. similarly as to Ground 5 I make no order that Reitterer surrender to Bini Bini's share of that opal.

In lieu of making orders for 3, 4 and 5 as set out I direct that Paul Reitterer pay to the Registrar of this court within one month from today the sum of \$2852.

6. As to Ground 6 of Bini's complaint that relative to costs, I postpone determination of costs for the time being.

As to Reitterer's complaint dated 11th July, 1979 against Bini and Gawthorpe I order -

1. The Partnership Agreement is found to be valid.
2. That the transfer of the claims from Bini to Gawthorpe is not subject to Reitterer's existing rights to work the claims until 1st January, 1980, or any other future date.
3. I decline to order Bini or Gawthorpe their agents or employees or any person claiming through or under them from working on the claims until 14th January, 1980 or any other date.
4. I decline to make any order for damages in favour of Reitterer against Bini.
5. The question of costs is deferred.

As to the applications under Section 144 by Violet Gawthorpe against Paul Reitterer relative to claims 1107 and 1110 I grant an injunction for a period of three months against Paul Reitterer at the instance of Violet Gawthorpe prohibiting Reitterer his agents or servants from encroaching upon or working the claims with the exception of Reitterer his agents or servants removing his plant or machinery from the claims which he may do within one month from today.

In relation to Reitterer's applications under Section 144 for an injunction against Mrs Gawthorpe I decline to order that injunction.

In relation to the question of costs, the hearing of the matter occupied two full days in Sydney. It was necessary for the party Bini to bring witnesses from Lightning Ridge as of course it was necessary for Mr Reitterer to bring one witness. I am of the opinion that they should follow the event and that those which are taxed by the Registrar in favour of Mr Bini and Mrs Gawthorpe should be paid by Reitterer. In the absence of agreement as to the quantum of costs I direct that the costs of Mr Bini and Mrs Gawthorpe be taxed and that they be paid by Reitterer.