IN THE MINING WARDEN'S COURT
HOLDEN AT SYDNEY
ON 7TH DECEMBER 1990
BEFORE J L McMAHON,
CHIEF MINING WARDEN

MARGARET JEAN CAVE (Complainant)

v

KEITH BYRNE (first defendant) and TONY MORGILLO (second defendant)

The within proceedings are taken under Sections 144 and 133 of the Mining Act in that the complainant has sought as immediate relief that an injunction be issued against the first defendant preventing him from working or disposing of Claim 23164 - the number of which is important - in the Lightning Ridge Mining Division of this State and by way of final relief the complainant sought that she be declared to have a 50% equitable interest in the same claim. When the matter came on for hearing an order was made amending the proceedings to add the name of the second defendant and a further order was made allowing the proceedings to be amended so that the complainant was further seen to be seeking:

(a) a dissolution of the partnership with the second defendant;

(b) an order partitioning any mining claim held by the partnership; and

(c) an order for accounting for work done and opals sold pursuant to the partnership.

Like most of the matters arising in the Warden's Court, Lightning Ridge, this matter is not without its aspects of intrigue and vagueness. From time to time I have, in attempting to resolve disputes and give judgments and verdicts in cases, lamented the fact that often substantial financial arrangements and commitments are entered into between parties, none of which is evidenced by

any written document whatsoever. Apart from the frustration of trying to sort out problems which arise under these deals after many months from the transactions there is the obvious fact that cogent and compelling evidence could has been forgotten or otherwise suffers from the ravages of time - much of which could have been saved by a simple contemporaneous document. I am therefore again handicapped in having to decide yet another matter involving a partnership and a contract only on oral evidence.

The complainant lives at Glen Innes although she has connections with the Lightning Ridge mining fields. One of her sisters is married to Mr James Taylor who was the holder in 1989 of what has been loosely termed in the evidence as an "OPB" which is an opal prospecting block. The provisions of the law are that opal prospecting licences are granted for a period of twenty-eight days to enable prospectors to place exploratory drillholes at random on fairly large areas, thereby to attempt to ascertain the presence, or otherwise, of viable opal. It is also a provision of the law that on the expiry of the twenty-eight days or shortly before that, persons may apply for the registration of claims. Under the Mining Act claims are small areas, usually 50 metres by 50 metres and by virtue of Section 30(2) one person may hold a maximum of only two claims in any mining division. For this reason should an area be seen to be attractive, the holder of the opal prospecting licence would be understandably anxious to ensure that as many persons in the same or in similar interests to his own would register claims.

Mr Taylor's OPL covered land in an area called the Coocoran Field and another field nearby called Molyneux's Rush. Information came to the complainant through her sister that claims could be registered by the complainant and she formed the intention of travelling from Glen Innes to Lightning Ridge in order to do this. She had had a discussion with the first and second defendants prior to departure and while some of the details of this discussion are in dispute,

the general arrangement is not, that is, that if the complainant with her adult son, Reginald - called in the evidence Danny - would journey to Lightning Ridge and register claims. The first and second defendants under some arrangement or another, details of which will be discussed later, would work or cause to be worked, those claims.

Registration of claims in the names of the first and second defendants would obviously present some difficulty for it seems that Mr Taylor might well have raised some objection to that course but the same objection apparently did not find itself raised if his sister-in-law, the complainant, and her son were to seek claims. In this regard, therefore, it is obvious that had there been no family relationship between the complainant and Mr Taylor it could very well be that the defendants would not have even found themselves entitled to any sort of interest either legal or equitable in the claim the subject of this dispute.

Although I am here concerned with Claim 23164, of necessity, two other claims have been mentioned in evidence. They were given the numbers 23165 and 23208.

The Registrar's registration documents regarding Claims 23164, 23165 and 23208 are exhibits 1, 3 and 2 respectively. Those documents indicated that Claims 23164 and 23165 were registered in the name of the complainant on 29th September 1989 and Claim 23208 was registered in the name of Reginald John Cave, the son of the complainant, on the same date. Exhibit 1 also shows that by transfer of 9th November 1989 the complainant transferred Claim 23164 by way of "gift" to Antonio Christopher Morgillo, the second defendant, and a similar transfer for the same consideration took place on the same date from the complainant's son to the second defendant in relation to Claim 23208. Claim 23165 remains

registered in the name of the complainant. In relation to Claim 23164, exhibit 1 also shows that the registration of that claim was transferred by the second defendant to the first defendant on 17th May 1990, again the consideration of which was said to be "gift" and the first defendant renewed the registration of it until 30th June 1991. Claims 23165 and 23208 are in the Coocoran Field - called at times in the evidence "the bottom claims" whereas Claim 23164, the one in contention, is said to be some 200 metres away in the Molyneux's Rush field - called in the evidence at times "the top claim".

There is some vagueness in the evidence before the Court as to the precise arrangements between the parties, the complainant saying that she received only $100 which was intended to meet the cost of registration while both defendants say in evidence that the complainant was paid $250 for this purpose. It is apparent that claims cost $125 each to register and I must say that the evidence of the defendants as to the amount of money paid by the defendants to the complainant rings true and I am not satisfied that the complainant only received $100. In any case her efforts went towards registration of three and not two claims. There is further vagueness as to who was to work the claims. Certainly, the complainant was not to be involved in this activity but her evidence is that initially it was intended that there be a three way split in the costs of and proceeds from the claims being one share for the second defendant, one for the complainant and the remaining share being the costs, which were to be shared jointly, of running the undertaking. One of the initial conditions was that it was intended to arrange for the complainant's son, Reginald, to also work the claims and he was to receive some percentage of the proceeds. Approximately three weeks after registration of the three claims, the two defendants, together with another man called Roger Cameron, and Reginald Cave journeyed to Lightning Ridge and commenced working the bottom claims, that is Claims 23165 and 23208. Their efforts went largely unrewarded, both

defendants in evidence referring to a lot of hard work with little return. The two defendants returned to Glen Innes and had a discussion with the complainant in relation to problems which had arisen on site as to persons who asserted that they had rights to enter upon the claims. It was suggested by the complainant in evidence that she had been told by the second defendant that a man called Tilleo was one of these trouble-making persons and that another man called Eddie Morgan was also causing trouble on site and she said in evidence that the second defendant had suggested to her that in view of her absence from the actual claim sites, the best way to assert ownership of the claims was for the complainant to transfer the title of the bottom claims to him, i.e. the second defendant. In this regard it is apparent on the evidence that the complainant and her son signed documents headed "Transfer of a Claim" in blank. The complainant says that it was her intention to transfer the bottom claims to the second defendant and at no stage did she intend to transfer the top claim, 23164, to either the second defendant or indeed by subsequent transfer to the first defendant.

It is now obvious that the bottom claims were unproductive but valuable opal stone has been recovered from the top Claim 23164 and it is this latter claim which, of course, is in dispute. At the close of the proceedings on 1st November 1990 I extracted certain undertakings from the parties in relation to opal which was already in possession of either of the defendants or another person who had received some stones on consignment. There is every reason to believe that future mining activities on Claim 23164, on the evidence, will produce additional valuable opal stone - hence this dispute.

The version of the arrangement by the defendants with the complainant, according to the defendants is somewhat different. Firstly they agree that they attended the bottom claims and worked very hard without much success and that

subsequently the top claim has produced viable opal. However, their assertion is that the complainant in attending the site initially with her son and registering the three claims had said that all she wanted for that action was a new Holden Jackaroo off-road vehicle, the value of which was around $33,000. Anything forthcoming over and above that, by implication, would belong to the defendants. The defendants have said that in the presence of the complainant they had discussed the complainant's request for the vehicle and the comment had been made between them that the value of the vehicle was small price to pay, bearing in mind that one stone could produce in excess of $30,000. The complainant says that she made mention of a Holden Jackaroo vehicle but it was not in this context at all, that is gifting to the defendants all other proceeds of the claims, she had simply commented in effect that if they did any good, one of the things she would do would be to buy a Holden Jackaroo. Again, the evidence of the defendants has the ring of truth about it and I am fairly certain on the evidence that at the initial stages of the arrangement, the situation was that the complainant had said that for her actions in registering the claims in her and her son's names, that a new Holden Jackaroo might well be her full reward. It is noted however that at this time she has not been the recipient of any such consideration and it is also noted from the evidence of exhibit 7 that the defendants have incurred expenses to the extent each, they say, of $38,000 in working the claims. In that regard, therefore, I believe that even allowing for a certain amount of obvious boosting of the defendants' list of expenses as in exhibit 7, that the absence of the Holden Jackaroo, it could reasonably be said that the claim for the Holden Jackaroo is cancelled out by the list of expenses as in exhibit 7.

The defendants say in effect that it was intended at all times by the complainant to transfer to them the title to the top claim 23164 but I have difficulty in accepting this in the light of certain other factors which have

been thrown up by the evidence. There is firstly the evidence from another sister of the complainant, a Mrs Coral Chapman. Mrs Chapman is obviously younger than the complainant and she says that the first defendant had called in to see them at her residence at Glen Innes and showed them some opals. According to Mrs Chapman, the first defendant said "big sister will never want for anything", meaning the complainant. He also added "it looks as though Mrs Cave will get more than a four wheel drive". That evidence is confirmed by the first defendant himself when he says in talking to the witness Mrs Chapman and her mother called Mrs Cutmore he had commented that Mrs Cave would never want for anything again but he qualified that by saying that this was "if we struck it". In other words, he was saying that if the project were successful the complainant would be placed in a satisfactory financial position. Furthermore, Mrs Cutmore says that she also had a conversation with the first defendant and was showed stones by him, two of which were very valuable, one of a weight of 17 carats and another of about 11 carats and he made the comment to Mrs Cutmore "it looks like old Jean won't want for much money while opals are coming out like this". Mrs Cutmore is the mother of the complainant and Mrs Chapman.

While the evidence of these persons has to be looked at in the light of the fact that they are of close family relationship to the complainant, nevertheless when it is taken with the evidence of the first defendant it can be acceptable to the extent that the first defendant made such a statement along these lines and even allowing for his subsequent disclaimer in evidence that he was only making this comment on his own behalf and did not intend to bind the second defendant, nevertheless it is an indication of a state of mind at least of the first defendant that at the time that he made it he believed that the complainant would be entitled to much more than the value of the four wheel drive Jackaroo vehicle which the defence now asserts to be a fact.

Apart from the evidence of Mrs Cutmore as to the value of the stones, there is also evidence from Mr Arthur Chapman who witnessed the sale by the sons of the first defendant of some opal on site to some opal buyers and there is also some evidence from the same witness that he had seen the two stones, one of 17 and the other of 11 carats to which I have earlier referred. In addition, there is evidence of a Gina Grevabac who has an independent opal cutter has cut stones for the first defendant, one of which had a weight of 40 carats, another 11½ carats and another of 12 carats. While it is obvious the stones would have to be independently looked at and valued, values vary from time to time depending on markets, demand, supply and particular characteristic of stones, nevertheless in the light of the evidence, stones of considerable value have been forthcoming from Claim 23164.

Coupled with that evidence is the evidence from a Mr John Attwater who holds a claim at the Coocoran Field some 80 to 100 metres away from Claim 23164. He has deposed that of recent times, including the time over which the injunction was running, there have been visits to the claim at night time and in the early hours of the morning by the sons of the first defendant. It was suggested by the first defendant that his sons were overlooking the claim to keep out undesirables but again the evidence of Mr Attwater does not reflect favourably on the first defendant.

The second defendant while relying upon the assertion that the complainant only sought a new vehicle has also said that if the complainant's son were to accompany them to Lightning Ridge then the deal would have been a 25% each split, that is to say between the son of the complainant, and the two defendants and Mr Roger Cameron. He says that although the son came initially to Lightning Ridge with the two defendants their work could not be carried out because of

flood waters and when he returned to Glen Innes he did not reappear at Lightning Ridge to continue the arrangement. By implication, therefore, the second defendant asserts that because the complainant's son did not fulfil his part of the deal, then the arrangement would have to be considered to be cancelled. The second defendant's evidence that he was in fact getting "a lot of flak" from Mr Taylor and the person Tilleo and another person called Eddie Morgan and he says that it was the top Claim 23164 that he wanted to protect and so put it into his own name. This was pointed out, the second defendant says, to the complainant and she along with her son had readily signed the blank transfer forms, the details of which were inserted by the Registrar. The Registrar was not called as a witness but I take it from implication that the Registrar would have only inserted the numbers of the claims that he had been told by the person presenting the transfer to him, that is, the second defendant. In this regard therefore I accept the evidence of the complainant in predominance of the evidence of the two defendants, that is to say that at this time the blank transfer forms were signed, it was believed by the complainant that she was transferring the bottom claims, and not Claim 23164.

Another question here is was there a partnership? I believe that the totality of the evidence suggests that there was. Certainly at least the first defendant concedes that there would be no interest at all of himself or the second defendant in the claims had it not been for the family relationship between the complainant and the holder of the OPL and in the light of the fact that it is clear that she signed the form in blank intending to continue the arrangement, I find myself in the position, again on the evidence, of being satisfied on the balance of probabilities that I should declare her to have a 50% interest in Claim 23164 on the basis of a partnership which was created, existed and still exists.

Section 133 of the Act, by paragraph (h) empowers the Warden's Court to make an order in relation to all questions arising between partners, and paragraph (n) also empowers the Warden's Court to determine all suits and actions as to "all rights claimed in, under or in relation to a claim or authority, or a purported claim or authority". Clearly I have jurisdiction to make other dissolution orders sought, however it seems to me that while I could order a dissolution of the partnership, the problem would arise as to the partition of not only the subject Claim 23164 but also the other two claims which are not the subject of this hearing, and as the registration and transfer of claims is often a matter for the Registrar administratively, I feel that I am without power to direct, in this case, that partition. For this reason, I do not order any dissolution of a partnership but I order that the claim be worked by the complainant, on the one hand, and the two defendants, on the other, on the basis that each side is to share in equal amounts, that is the complainant 50% and the two defendants 50% jointly of the future expenses of working Claim 23164 with each side getting in equal terms 50% proceeds from the said claim. In order to facilitate this activity, the complainant should make appropriate arrangements to have a representative on site to keep a full and proper record of extraction and production costs and related figures which should be checked at regular intervals by the defendants or either of them or their representative. The proceeds of the stones held as exhibits 4, 5 and 5A and comprised in exhibit 6 and described in exhibit 8 when sold are to be divided also in equal shares, that is to the complainant 50% and to the two defendants jointly in 50%, which order is also to apply to those stones which may have been hitherto sold by reasons of the court's temporary order of 1st November 1990. The defendants are to pay the costs of the complainant in this matter, bearing in mind that three days were involved, that is one at Katoomba and two at this court, which I assess in the sum of $5,200 and I direct that this sum be paid to the Registrar of the court for the complainant within six months from today.

As a general comment, I place on record the following matter. As each side now has a 50% interest in Claim 23164 there should be a genuine attempt by them to exist with each other on an amicable basis and it will not be for either side to place any restriction on who is to work the claim, it being the responsibility of the respective sides to establish proper labour accounting and working safeguards. Further litigation in this court or indeed any other court should be avoided as so much time and expense is involved in hearings. As a matter of common sense, the parties ought to try to get along together to pursue the common aim and purpose of extracting opal which appears, on the evidence that I have heard, to be present in some abundance in Claim 23164.