IN THE MINING WARDEN'S COURT
AT ST LEONARDS

J A BAILEY, CHIEF MINING WARDEN

FRIDAY 6 APRIL 2001

CASE NO. 2000/28

HAROLD JOHN HENSEN	(Complainant)
v.	
GEOFFREY NEIL KEITH SHIELDS	(First Defendant)
FRANCIS JAMES O'BRIEN	(Second Defendant)
NORMA SHIELDS	(Third Defendant)
Keith SHIELDS	(Fourth Defendant)
DAVID O'BRIEN	(Fifth Defendant)

APPEARANCES AT HEARING:

Complainant:	Mr W Browne, Solicitor of Browne Jeppesen & Sligar
First Defendant:	Appears in person unrepresented
Second Defendant:	No appearance
Third Defendant:	No appearance
Fourth Defendant:	Appears in person unrepresented
Fifth Defendant:	No appearance

Evidence heard at Walgett on 28 March 2001

DECISION

HANDED DOWN IN ABSENCE OF PARTIES

Following an application which was made on 10 August 2000 an Injunction was issued at the request of Harold John Hensen, against Geoffrey Neil Keith Shields and four other Defendants, prohibiting them from, inter alia, working claims registered numbers 44496, 44937 and 44930 in the Lightning Ridge Mining District. In that same application by Mr Hensen for an Injunction, the following final relief was sought:

(a) A declaration of the Complainant's interest in Claims Nos. 44496, 44937 and 44930 in the Lightning Ridge Mining District.

(b) A taking of accounts in relation to all transactions relation to the Claims numbers. 44496, 44937 and 44930.

(c) An order that the Defendants do all such things and sign all such documents to give full effect to the orders of the Court and in the event of any party failing to act or sign any document, then the Registrar or the Chief Warden's Court at Lightning Ridge be empowered to do such acts and sign such documents.

(d) Any other orders this honourable deems fit.

(e) Costs.

Following a number of adjournments for various reasons evidence was received in relation to the matter at Walgett Court House on 28 March 2001.

The first witness to give evidence was the Complainant, Harold John Hensen. Mr Hensen in giving evidence expanded upon the affidavit which he filed with his application for an Injunction on 10 August 2000. Mr Hensen met the First Defendant, Geoffrey Neil Keith Shields, when he (Mr Hensen) had trouble with a generator. Mr Shields assisted in getting the generator working and indicated to Mr Hensen that he had 23 claims in the new area and asked Mr Hensen if he was interested in working with him.

It was in a subsequent conversation with Mr Shields that Mr Shields indicated to Mr Hensen that he had decided to "put me down a hole". An agreement was reached that Mr Hensen would supply the equipment, fuel and running expenses and would receive 70% of any opal won from the claim and Mr Shields would receive 30%.

Mr Hensen's equipment was moved into Mineral Claim 44496 and he informed the court that after he had been working for about three hours on that claim, he was approached by Mr Geoffrey Shields and told: "All the opal goes to me or Keith. If you get caught with $100 worth of opal it will be $100,000". Mr Hensen informed the court that he was not sure as to what that meant, but he said it could have meant that if he kept back opal worth $100, Geoffrey Shields would say that he had opal worth $100,000. In relation to that conversation Mr Shields informed the court when he gave evidence, that what he meant was that "if you tell anyone you got $100 worth of opal out of a claim rumour will get around that it is $100,000". He was suggesting that Mr Hensen not inform anyone about any strikes that were made. On the evidence before me, I can only conclude the statement meant what Mr Shields said it meant.

Mr Hensen continued with his evidence informing the court he found very little opal in Mineral Claim 44496. He said he was working at a level of about 34 ft on that claim but was aware that an adjoining claim was being worked at a 46 ft level and from that claim about $400,000 was extracted in 3½ weeks.

Mr Hensen indicated that after he finished working Mineral Claim 44496, Mr Geoffrey Shields sent him over to work on Mineral Claim 44930, which is in the name of the Fifth Defendant, David O'Brien. He indicated he extracted about $12,000 worth of opal from that claim and Mr Hensen received $8,400.

There was some work done by Mr Hensen on Mineral Claim 44937. It was only about three hours work. He was helping Keith Shields bell-out that claim. Mr Hensen indicated in the affidavit that it was his belief that the next claim he would be working was 44937.

Mr Hensen informed the court about an argument which he had with Mr Shields concerning the sale of opal. Mr Hensen believed the opal to be worth $8,000 whereas Mr Shields indicated it was worth only $4000. Mr Hensen said: "I had a go at him about his attitude and an argument developed. I said to him: 'Do you think I'm an idiot'? To which he replied: 'Yeah' ".

Mr Hensen told the court of one instance where he was given an opal, which was estimated to be $35,000 in value, by Mr Shields for the purpose of sale. Mr Hensen said he took a gamble and purchased it informing Geoff Shields he had received $50,000 for it. This money was handed over and regrettably for Mr Hensen, the opal ended up being damaged and worth only about $5000. Mr Hensen informed the court that that was his problem and he was not trying to seek any benefit from Mr Shields in respect of it.

After working on Mineral Claim 44930 for two to three weeks Mr Hensen came upon an opal which was a red-on-black. When he took it to show Mr Shields, Mr Shields looked at it and said to him "Pack up and piss off". Mr Hensen said to him "What do we do with this" indicating the red-on-black. He said he left it with Mr Shields to sell but to date he has not received anything for that opal. Mr Hensen said it was his understanding that there were a total of 23 claims that he could have worked on with Mr Shields and in fact he worked on the first claim for about five weeks and four or five weeks on the second claim. His work on the third claim was only for a number of hours.

Mr Hensen supplied the equipment and the fuel and has kept a record of expenses and he has estimated, in his affidavit, that he had spent about $3000 in the first five weeks of working there. He indicated he has not done a calculation of the total expenses incurred by him because under the agreement there was to be no claim made by him upon Geoffrey Shields for those expenses.

Mr Hensen said that he is aware that once the Injunction expired work commenced on the claim that he was in, but he is unaware as to whether any opal has come from that claim.

He said the last opal that he gave Mr Shields, the red-on-black, was estimated by Bill O'Brien to be worth about $3000 or $4000 in the rough.

In conclusion Mr Hensen said he believes that Mr Shields owes him for the 23 claims he should be mining with Mr Shields. He said he has not received 70% of the $3000 to $4000 for the last opal he gave Mr Shields, and furthermore, although Mr Shields

did account to him for the sale of the last parcel of opal sold for $4000, he believes that it was sold by Mr Shields for more than that amount.

Geoffrey Neil Keith Shields gave evidence that he is not in dispute with many of the matters raised by Mr Hensen, although he is of the opinion that his dates were wrong. As the dates are not important I am not going to venture into that area.

In relation to the agreement, Mr Shields informed the court he told Mr Hensen that he would put him down a claim and if there was nothing coming from that claim he would be moved to another claim. He said: "there was never any mention of working 20 odd claims. It was one claim at a time."

The next area in dispute is that Mr Shields denies he told Mr Hensen that all the opal had to be sold by Mr Shields. He informed the court that he (Mr Shields) said to Hensen he was to "show me or Keith all the opal". He went on to say the usual arrangement is that the person who has the highest percentage in the agreement sells the opal.

Although nothing hinges on this point, I must say that from my experience in hearing cases of this nature in the Lightning Ridge area, the "usual experience" is that all parties to the agreement are present when opal is sold.

The other area in dispute is that Mr Shields denies that he removed Mr Hensen from one claim and put him in another claim. Mr Shields informed the court that when Mr Hensen reached the 9-inch hole in Mineral Claim 44496, "he just stopped. I then said to him: 'I suppose we have to find another claim' ". Mr Shields informed the court that the following day Mr Hensen had removed all his gear from the claim and that his hand was forced and he had to find another claim for Mr Hensen. Mr Shields said when Mr Hensen was mining Mineral Claim 44930, Mr Hensen was very reluctant to show him any opals that were won from that claim.

Mr Shields said he was having dinner in the Club one night with his wife when Mr Hensen approached him and told him that he knew someone who was willing to pay $50,000 for an opal. Mr Shields replied, "What mug would give you that". Mr

Shields said he did receive his share of $50,000 for that opal and was very happy with it. He said from that point on the relationship between he and Mr Hensen deteriorated.

Mr Shields informed the court that Mr Hensen forced his way down Mineral Claim 44937. He said there was no way he ever suggested Mr Hensen would be involved with that claim.

Mr Shields concedes Mr Hensen has not received his share of the last opal that was sold, his share being $1,500. He said the reason why the money was not handed over was because an injunction was issued at the request of Mr Hensen.

Mr Shields informed the court the agreement was terminated with Mr Hensen because Hensen was "not doing the right thing".

Mr Shields was questioned under cross-examination as to whether Mr Hensen was a good miner. He replied, "No, he would move a lot of dirt but he threw out opal with the dirt. The 'noodlers' kept following him around".

It was put to Mr Shields that he never told Mr Hensen the agreement was on the basis that Mr Shields could terminate it as he pleased. Mr Shields replied that if Hensen was not doing the job properly, "he goes". Mr Shields agreed he has sold some opal in the presence of Mr Hensen and some opal when Mr Hensen was not there. Mr Shields conceded the only opal sold by Mr Hensen was "the one he stuffed up".

When asked about a record of the sale of opals, Mr Shields indicated that he does not keep any records.

When questioned about the termination of the agreement between himself and Mr Hensen, Mr Shields said that the agreement could be terminated "whenever we want it to". I took that to mean whenever the Defendants wanted to. Mr Shields indicated he saw this as a "share employee". He indicated he did not pay any wage to Mr Hensen, Mr Hensen came under no award, no workers compensation is paid for him and group tax is not deducted. Mr Shields was asked whether Mr Hensen was his own

contractor, to which Mr Shields replied, "no, it was on similar lines as a share farmer". Mr Shields admitted there was no mention of a share farming type of agreement with Mr Hensen.

Two other witnesses gave evidence on behalf of the defence, Keith Shields and Jim Baxter. Neither could throw any light on the agreement that was reached between Geoffrey Shields and the Complainant.

The submission on behalf of the Complainant is that this is a mining partnership and, at the very least, the partnership should exist in respect of the claims that have been worked.

It was submitted that it is clear that Mr Hensen understood the agreement would go on until there was mutual agreement as to how and when it should end.

It was submitted on behalf of the Complainant that when Mr Hensen went to Mr Shields with the red-on-black opal it would appear it was the first time that they were "on to something". It was at that point of time that Shields asked Mr Hensen to leave. Mr Browne submitted this agreement could not be terminated in the manner in which Mr Shields chose to, and that Mr Hensen is entitled to 70% of the opals which are extracted from the claims in which Mr Hensen worked and also for his share, which is $1500, of the last opal extracted by Mr Hensen.

It was submitted by Mr Shields that there was no partnership agreement and there was nothing to show that there ever was. He said no money changed hands and no documents were drawn up. Mr Shields said he was entitled to terminate the agreement due to the fact that a lot of opal was thrown away with the clay dirt by Mr Hensen. He submitted that he cannot prove it but he just knows "he threw out a hell of a lot of opal".

Mr Shields is not disputing that he owes Mr Hensen $1,500 but disputes that he is entitled to any of the claims.

CONCLUSIONS

In the text "The Law of Partnership in Australia and New Zealand" by P F P Higgins, LLB (Law Book Company 1963), Chapter 1 commences as follows:

> *The tendency of persons to form themselves into associations with the purpose of achieving some object more effectively than it could be achieved by one person acting alone is one of the oldest and one of the few immutable characteristics of the human race.*

At page 41 of that text, under the heading **Formalities of the Contract,** the following appears:

> *Whether, in the absence of an express agreement, a partnership contract can be inferred from the conduct of the parties is purely a question of fact depending upon the joint and not the individual intention of the parties. That is to say, the intention is not to be determined by an examination of the private intentions of each party but is to be ascertained as a matter of the probable inference to be drawn from the conduct and actions, throughout the whole course of their dealings with each other.*

Nothing has changed since 1963, as the 7th edition of the book, published in 1996, contains the same text.

Section 1 of the *Partnership Act, 1892*, states, inter alia:

1. **Definition of Partnership**
   (1) Partnership is the relation which exists between persons carrying on a business in common with a view of profit.

Section 2 of that Act sets out a number of rules which must be regarded to determine whether or not a partnership exists.

In my opinion the facts of this case point to a conclusion that a partnership exists between Mr Hensen and Mr Shields. However, Mr Shields is adamant that this working arrangement was not a partnership. It is interesting to note the case of *Kin Sing v. Won Paw & Others (1862) 1 W & W (L) 303*, a decision from the Victorian

Supreme Court. The facts of that case were that the Plaintiff was possessed of a share of a mining claim and received the profits accruing to such share; but that the Defendants refused any longer to acknowledge him as a partner and kept him out of possession of his share and profits thereof. At page 306 of that case, the court said:

> *We are of opinion that the mere circumstance of the Defendants' refusing to acknowledge the Plaintiff as their partner (no time being specified for the continuance of the partnership) did not necessarily operate as a dissolution.*

However, for the purpose of this case, it matters not if it was a partnership or whether it was a contractual agreement. What is to be determined is whether Mr Shields has the right to terminate the agreement at his discretion.

If one were to accept what Mr Hensen said in relation to the agreement, it would be that the agreement was to mine some 23 claims. Mr Shields disputes that there was any suggestion that Mr Hensen would be mining 23 claims. When giving evidence Mr Shields, commenting about Mr Hensen ceasing work on Mineral Claim 44496 said, "I said I suppose we'll have to find another claim". He then went on to say that because Mr Hensen had removed the gear from the claim, he was forced to find another hole for Mr Hensen.

It was submitted by Mr Browne that if the agreement could be terminated at will by Mr Shields, why didn't Mr Shields terminate the agreement when Mr Hensen stopped working on Mineral Claim 44496. It can be inferred that it was not an agreement to terminate at will.

Mr Browne submitted that this mining partnership was for a period, at least for the time it takes to work out the claim.

Mr Hensen was supplying his equipment, paying for fuel and repairs and was performing all of the physical work on Mineral Claims 44496 and 44930. Mr Shields took no part in the physical operations of mining the opals. His role was restricted to the sale of opals, sometimes in the absence of Mr Hensen. In the absence of any agreement as to how this partnership may be terminated, I cannot infer from the facts

which surround the circumstances of this case, that it could be terminated unilaterally by Mr Shields.

Without any corroborative evidence I cannot infer that the agreement was to mine 23 individual mineral claims.

I conclude that the agreement existing between Mr Shields and Mr Hensen was for Mr Hensen to mine any claim which he was requested to by Mr Shields. Consequently I find that the agreement involved the mining by Mr Hensen of Mineral Claim 44496 and 44930 wherein Mr Hensen was to supply equipment, fuel and labour and in return would receive 70% of the proceeds of opal won from those claims. I find that Mr Shields cannot terminate this agreement at will.

Mr Shields concedes that $1500 is owing to Mr Hensen from the proceeds of the sale of opals won from those claims but furthermore I find that Mr Hensen is entitled to 70% of opals that remain within those claims.

As it would not be practical for Mr Hensen and Mr Shields to continue on a working relationship, it will be necessary to divide those two claims on a 70/30 basis.

When a possibility of splitting claims was raised with the parties at the conclusion of the case, both parties indicated they would prefer the northern portion of Mineral Claim 44496, and the eastern portion of Mineral Claim 44930. That being so the equitable solution is to split Mineral Claim 44496 on a north/south axis, with 70% being transferred to Mr Hensen and the remaining 30% being registered in the name of the current claim holder, Geoffrey Shields. Mineral Claim 44930 is to be split on an east/west axis with 70% being transferred to Mr Hensen with 30% remaining with the current claim holder, David O'Brien (Fifth Defendant).

COSTS

The Complainant has requested costs in this matter. Mr Shields opposed any costs being awarded against him. Costs are always a discretionary matter and I take into account that when the matter first came before the court Mr Shields was legally represented but this matter could not proceed because of the absence of Mr Hensen.

Although that may not have been the only reason as to why it could not proceed, it is a matter I take into account in relation to the question of costs. The case has a history of being adjourned, which was not the fault of Mr Shields. Having regard to the history of this matter, in exercising my discretion, I do not propose to make any order for costs.

Accordingly, I make the following orders:

(1) **The First Defendant, Geoffrey Neil Keith Shields, is indebted to the Complainant, Harold John Hensen in the sum of $1,500.00.**

(2) **Mineral Claim 44496 is to be divided on a north/south axis, with 70% of the claim being registered in the name of the Complainant, Harold John Hensen, or his nominee, with 30% of the claim being retained by the current claim holder, Geoffrey Neil Keith Shields, the First Defendant.**

(3) **Mineral Claim 44930 is to be divided on an east/west axis, with 70% of the claim being registered in the name of the Complainant, Harold John Hensen, or his nominee, with 30% of the claim being retained by the current claim holder, David O'Brien, the Fifth Defendant.**

(4) **I declare that the Complainant, Harold John Hensen, has no interest in Mineral Claim 44937.**

(5) **I direct that the Defendants do all such things and sign all such documents to give full effect to orders (2) and (3) above and in the event of any party failing to act or sign any document, then the Mining Registrar at Lightning Ridge is hereby empowered to do such acts and sign such documents.**

(6) **There are no orders as to costs.**

(7) **The orders of the court are to be complied with within one month from today.**

(8) **The parties are to pay their own costs in respect of putting into effect orders (2) and (3).**