IN THE MINING WARDEN'S COURT, LIGHTNING RIDGE,
HOLDEN AT LIGHTNING RIDGE AND WALGETT,
12TH JULY, 1983
BEFORE J.L. McMAHON.

JOSEPH KRKOSKA & ERIC RONGE

v.

PHILIP PEARL, MICHAEL DEROUET & CHRIS CHENCEREL

By complaint under Section 133 of the Mining Act, 1973 made to the Mining Registrar at Lightning Ridge on 18th May, 1983, Eric Ronge complained that by reason of the construction of a dam and the operations of mining processing on Claim Nos. 6844 and 6845 held by one Philip Pearl, Claim No. 5356 held by Michael Hayek was adversely affected by flooding. Mr. Ronge sought that the court order that the dam be filled in and no mining operations including damming of water be allowed on Claim Nos. 6844 and 6845, that an order for compensation for loss sustained by reason of the injury be made, and compensation be assessed by the Court and that an injunction be granted preventing further mining operations on the claims.

Earlier Joseph Krkoska who, evidence subsequently disclosed, was in the employ of Mr. Ronge had made an application under Section 144 of the Act for an injunction to issue to restrain mining operations on the claims. I declined to grant the injunction but adjourned the matter to a special sittings of the Warden's Court at Lightning Ridge on 25th May, 1983. Mr. Ronge's complaint under Section 133 was then listed by the Registrar at that court on the same day and by consent I have embarked upon a hearing of all matters.

When the matters were called Mr. Michael Hayek who was the person who had authorised Mr. Ronge to make the complaint appeared in person. The respondent called Michael Derouet and Chris Chencerel who stated in an affidavit dated 5th April, 1983 that they were authorised by Mr. Pearl in this matter. No objection was made to these appearances. Mr. Baldwin, Solicitor of Walgett appeared for the latter two people and indicated that he also had instructions to appear for Mr. Pearl but that if Mr. Pearl was required to give evidence it may be necessary for him to take further instructions in view of Mr. Pearl's absence overseas.

The evidence was that Mr. Krkoska had been working in the area for some nine years. In 1980 three vertical shafts were sunk on Claim No. 5356 with a view to mining activities. When the first of the holes was sunk in January, 1980 it was found to be "mostly dry" as were found to be the other areas where the two other holes were later sunk.

From the evidence it is apparent that a wall had been constructed on Claim Nos. 6844 and 6845 in such a fashion that water was dammed up. Further an expanse of water had existed caused by an old mining excavation not carried out by any of the parties. A mining inspector called Freeland was asked to attend the area in late 1979 and had given a direction to Derouet and Chencerel to widen the wall which they had constructed to prevent seepage. This work was done. In December, 1980 however after some heavy rain, the dam collected water and Mr. Krkoska claimed that the three holes which had been sunk earlier that year on Claim No. 5356 became affected by water to such an extent that they had to be pumped out. Mr. Krkoska stated that this water had seeped in from the dam. He stated that there was no trouble with water in the holes on Claim No. 5356 until water had filled up the dam on Claim Nos. 6844 or 6845. He excluded in his evidence the possibility of water coming from any other source with the exception of that which might enter the hole from falling directly from the sky.

The holes were dewatered but after further rainfall in January 1981 the holes became again affected by water.

When the January rains had caused water to go into the holes, Mr. Krkoska stated that he complained to the defendant, Mr. Chencerel. He stated that at that time Mr. Chencerel was working on the dam and Mr. Krkoska had said that he had said to him, "Chris we are getting water in the holes for the second time. Can't you do something?" He stated in evidence that Mr. Chencerel had replied "We will see". Subsequently Mr. Chencerel had employed a bulldozer and had constructed an artificial wall to stop the water from the dam flowing in the holes. This gave some temporary alleviation of the problem but in April, 1981 further rain fell causing water to fill the holes and again

Chencerel employed a bulldozer to strengthen the wall. Pumping then took place to dewater the holes. Mr. Krkoska stated that at this stage because of the continual presence of water the holes became very muddy and dangerous and he had to desist from working. Notwithstanding the dewatering there was a further occasion when the water seeped back into the holes and because of the dangerous nature of the holes and the fact that they were continuing to fill with water after being pumped out, Mr. Krkoska stated that he considered it useless to pump any more water from them at that time.

Later, no doubt because of the continuing dry conditions, water had ceased to be a problem and in January, 1983 Mr. Krkoska stated that the water was pumped out of the holes, the dam at that stage being almost completely empty. Mr. Krkoska stated however that because of the continual presence of water over almost three years it had been impossible immediately to work in the holes. On the most recent occasion the holes were found to be dry on 15th February, 1983 and he had started work on 21st February. Following some rain on 21st and 22nd February, water started to come back into the holes. Mr. Krkoska repeated that water had only started to be a problem after the dam was filled up and the holes were affected by the water coming only from the dam. During the time when Mr. Krkoska was giving evidence he said that there was something like 13 feet of water in the holes. In cross examination by Mr. Baldwin, Solicitor for the respondents, Mr. Krkoska denied that the complaint was a means which he and the complainant was using to obtain possession of the claims held by the respondents. He denied also that if the dam had not been there the holes would still have flooded and stated that the seepage always existed when the dam was filled.

Mr. Hayek, on whose behalf the complaint was lodged and who is herein called the complainant, stated that prior to the dam being constructed above his claim, no problem existed with water on that side of the area and only since the water storage was done in an unsafe manner has he started to have problems. Three times he said the holes had been pumped out at considerable expense and time wastage but since they were dewatered they filled up. Only when the dam on the respondents' area was dry was water not a problem. He felt that the

seepage comes from the floor of the dam and would be almost impossible to find short of draining the dam and thereby removing the source of the water. He stated that he was claiming that the respondents had built up their dam, disregarding present proper practice and ignoring the rights of adjoining claim holders. He said that his holes had been so sunk that there was sufficient collar around them to prevent surface water running in and that the problem subterrainly was seepage. He claimed approximately $6,000 for work done already to the area and unspecified damages to the loss of property. He thought the extra cost now of open cutting would be in the vicinity of $8,000 to $10,000, and that if the present seepage problem could not be solved he would suffer damages which he anticipated to be $100,000. In cross examination Mr. Hayek agreed that he had paid a person called Jim Silman only $300 for the claim but that it was now worth $100,000. He had stated that there had been no profit from the claim and therefore no taxation payable by him. Further, he had rejected an offer of $50,000 for the claim prior to it being flooded. He was shown an agreement which he had signed with Jim Silman on 19th December, 1979 but could not remember signing that document. He could not say whether it had been specified that use could be made of the water on Claim No. 5356. His particularisation as to the $6,000 total cost was queried. He spoke about the cost of shaft sinking, pumping and dewatering, compensation for Krkoska, the cost of replacement of worn out pumps, two of which were used and a total of $900 for initial re-opening of the mine. He agreed that $6,000 had been a rough estimate and he was unable to itemise it exactly but that he would leave it to the court to decide. He stated that he would welcome a guarantee that the seepage should be stopped.

When he produced the taxation returns for the partnership for the financial year ended 30th June, 1981 and a printout of the balance sheet, and profit and loss account of the partnership which was prepared for 30th June, 1982 taxation return it was obvious that the partnership had operated at a loss for taxation purposes. Income for 1981 was said to be $2,382 and for 1982 $1,213. The value of a claim in each return was set at $850. I am conscious of the fact that these figures were prepared by accountants for

the purposes of legally minimising a taxable income, but in my opinion they are nonetheless an indication of the profit and value of the partnership's title. It is also now in evidence that a person called Dean had sold the subject claim to Mr. Silman for $700 and that Mr. Silman had in turn sold it to Mr. Hayek's firm for $300.

A miner working on the site when the three holes were drilled in 1980, Mr. Zaroni, swore that the holes were dry, and his evidence is confirmatory to that of Mr. Krkoska and Mr. Hayek.

Two officials, Mr. William McConville and Mr. Raymond Cox, respectively Mining Occupations Officer and District Inspector of Mines, swore that the subject area had been inspected by them. Mr. McConville had made a statement about the water in the area and had concluded that the flooding of three holes on Claim 5356, called in his statement, 6846 and Mining Purposes Lease 106, called in his statement MPL No. 46, was caused by seepage of water from areas which appeared to be Claims 6844 and 6845. Mr. McConville was careful to emphasise that he possesses no technical qualification, and was simply expressing a common sense point of view. His evidence however was confirmed by Mr. Cox, who is a graduate Mining Engineer. Mr. Cox had prepared a document which was tendered as exhibit 4, and which indicated the level of the water in the respective areas. He expressed the considered opinion that the water had seeped from Claim 6845 to the lower land. There had obviously been no hydrological dye or mild radio active test to ascertain scientifically the origin of the water. Mr. Cox was of the view that once the shafts had been flooded, de-watered and then flooded again, that danger would be likely to exist in that the walls could subside.

For the defence Mr. Chris Chencerel gave some history of the matter. He confirmed the depression in the land prior to his taking over the claim with Mr. Derouet, the construction of the wall, the visit by Mr. Inspector Freeland, and the subsequent construction of a strengthened wall. Subsequently when the dam so formed by the extended wall filled with water,

Mr. Krkoska had complained to him about the water seeping into the holes. He stated that every time he received a complaint, he had tried to fix the seepage. This was particularly so after the fall of heavy rain. He had even offered to de-water the holes but was informed that Mr. Krkoska would pump it out himself and charge him $55 per hour for that activity, an amount which Mr. Chencerel thought to be unreasonable. He stated that he desired to stop the seepage and had taken the action to do this in the form of widening the wall, and offering to de-water.

Mr. Jozef Strzelecki was the driller who sunk the first and second of the three holes. He gave evidence which contradicted that of Mr. Krkoska and Mr. Zaroni, for he said that the first hole, when it was sunk, was found to contain so much water that in his opinion, the shaft could not be worked.

However, on the whole of the evidence I find as a fact that water does seep from the dam on the claims numbering 6845 and 6844 and that it finds its way, into the three shafts on Claim 5356 and onto Mining Purposes Lease No. 106. But there the matter does not end.

Mr. Baldwin disputed the claim for damages, stating that there was no evidence that damage had been done by the escaping water, in that there were no actual losses. He pointed to the fact that even since I commenced the hearing of this matter in May, 1983, the complainant has obtained the title to a further claim which is a small triangle of land at closer distance to the offending claims of the defendants than the one carrying the three holes. Further he says that by virtue of the evidence of the taxation returns these claims are worth nothing like the value placed upon them by the complainant. I would accept however that the presence of water in the holes on the claim of the complainant and on the Mining Purposes Lease. No. 106, would cause damage, and were the situation one of strict liability, or where negligence is proved, the complainant would be entitled to an award together with favourable consideration of the other orders that he seeks.

There is however, an important aspect of the Law of Tort, which, it seems to me, applies in this matter. The so called principle of Rylands v. Fletcher, a decision of Mr. Justice Blackburn in 1866, and confirmed by the House of Lords in England shortly thereafter goes as follows: that a "person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." This matter arose because the defendants who were mill owners constructed a water reservoir on their land for the purpose of supplying water to their factory. However, on the site there was a disused shaft of an abandoned mine, but owing to the negligence of constructing engineers, this shaft was not discovered until water had broken into it, and flooded the plaintiff's adjoining mine through communicating passages. The House of Lords, in 1868, in dealing with an appeal from Mr. Justice Blackburn's decision confirmed what His Honour had decided, but added that it applied only to damage due to non-natural uses of land. By quaint coincidence the House of Lords gave as examples two mining cases, in one, the defendant's normal operations resulted in the flooding of a neighbouring mine, through gravitation, while the other was a case where seepage was caused by pumping of water to a higher level. It would be significant in my opinion that in the first of these matters, that is the one where the flooding take place through gravitation that the defendants were held not to be liable and the second of the matters because it was a non-natural user and the defendant was held to be liable where pumping had taken place.

In this particular matter there is some dispute as to whether or not the waters have accumulated on the defendants' claim by natural process, being part of a water course. Obviously there is run off from surrounding lands, the water gathering in a depression caused by an earlier mining activity to which none of the persons currently before the court were parties. The initial accumulation of the water, therefore, I find to be natural, the construction of the wall and the further widening of it, being caused by a

desire to dam it and then an attempt by the defendants to stop seepage.

The accumulation of water for irrigation is a proper method of using land in an ordinary way, at least in a proclaimed irrigation area. Water is desirable for the proper conducting of a mining operation of the type and nature taking place at Lightning Ridge. It is a mining community and one of the activities is called "puddling", that is the washing of the soil from the host earth of opals. I think therefore that in addition to being a natural accumulation of water, this use of damming is "ordinary" for the purposes of the land in which it lies.

Now I have heard evidence not only from Messrs. Krkoska and Hayek but also from Mr. Inspector Cox that water in these shafts may cause danger in that when it is subsequently removed there may be a likelihood of cracking and caving in, thus constituting a peril to anyone foolhardy enough to venture down them to clean the holes out or attempt to extract opal. One of the authorities which I have studied talked of "exceptional peril to others". Further it has been held that water, whether in reservoirs or drains, can be a peril to others and in this regard I refer to the New Zealand case of Simpson v. A.G. (1959 NZLR 546). On the other hand for water to accumulate in a depression, caused by earlier mining operations, is a perfectly natural and usual thing to happen, and it seems to me that in order for the complainant to succeed on the basis of the Rylands and Fletcher rule, I would have to be satisfied that there is an extraordinary user of the land, and the water in the present circumstances constitutes a danger.

Having considered these matters, while it is open for me to conclude that the water in this present case could cause a danger, and I so do, I am not satisfied that there is an extraordinary user of the land, and in the circumstances there will be no application of the Rylands and Fletcher strict liability rule in this matter.

That leads me to an examination of whether the complainant can prove

negligence against the defendants. While Mr. Hayek has in his case given an expression of an opinion that the wall was not constructed properly nor of satisfactory materials to prevent seepage, I have received no technical evidence that this is the case. I would think that as a matter of normal approach, an earthen wall on a slope would be liable to seep, if the material from which it is made is of porous quality or is loose and untamped. I have heard evidence of a so called biscuit band, and on my eight years experience at Lightning Ridge am aware that this is a strip or level of light shale like stone. There is evidence before me that it conducts water, and I accept that to be the case. Mr. Cox, the most technically academically qualified of the witnesses, did not express any opinion about the efficiency of the wall, and I gained the impression that he was of the opinion that it would be difficult to identify the point or points from which the water seeped from the defendants' dam to the complainants' properties, and just because water seeps away is not necessarily a reason why negligence should be presumed. On the whole of the evidence I can find no negligence on the part of the defendants. It follows that I decline to order that the dam be filled in, nor direct the mining operations to conclude, nor direct the damming of the water to cease, nor make any order for compensation, and I refuse the application for the injunction.

I would add that while he was in the witness box, Mr. Chencerel indicated that he had received advice from the New South Wales Soil Conservation Service with a view to treatment of the dam to prevent seepage. I would expect that this action be followed with expediency. I note also that Mr. Hayek made mention of an open cut operation which may be proposed, and would indicate to him that if, and only if, his claims fall within an area where I may grant a permit under Regulation 22 to the Act, and subject to technical advice that I would receive, I would give favourable consideration to an application for such a permit. Such application would need to be made to the Registrar.