IN THE MINING WARDEN'S COURT HOLDEN

AT ARMIDALE ON 23RD APRIL, 1971.

BEFORE J. L. McMAHON, S.M., MINING WARDEN

B.R. HAMMOND & J.H. GIBSON

v.

A.V. BARKER

WARDEN. By application bearing date 4th September, 1968 Messrs. John Hughes Gibson and Barry Rayner Hammond, applied for suspension of labour conditions over a portion described as number sixty four, parish of Teara, county of Clarke. The form of the application indicated that substantial expenditure had been incurred and reasonable time was required to make necessary arrangements and further in what appears to be ground (2), that over one thousand tons of ore had already been mined, and a market could not be found for it.

By notice of objection to suspension of labour conditions, dated 23rd September, 1968 Mr. A. V. Barker, who described himself as the Managing Director of Lithgow Smelters Pty. Ltd., indicated that he objected to that application, and referred to the attached schedule which set out the grounds of his objection. These were, firstly that the ore referred to in the application did not belong to the applicant, secondly the ore was at that time the property of and had been mined by Lithgow Smelters Pty. Ltd. in accordance with an agreement, thirdly, that the applicant Gibson had wrongfully removed portion of the ore and, lastly, that Gibson had wrongfully offered the ore for sale.

The last ground also mentioned an injunction granted to Gibson at the Warden's Court, Armidale on 19th January, 1968.

The hearing of the application and the objection to it has taken place over four sitting days. Mr. Cassidy of counsel appearing for Barker, Mr. Morrow appearing for Gibson and Mr. Lee of counsel appearing for Hammond. I think it safe to say that the men Gibson and Hammond appeared before the court with similar interests and their adversary was Barker.

The application has been made under Section 113 and subsections 3 and 4 appear to be the pertinent law. Shortly, subsection 3 empowers the Warden to grant a suspension for up to six months, and subsection 4 empowers him under paragraph (a) to grant a suspension in respect of a claim or lease for up to 6 months and paragraph (b) further entrusts him to be able to recommend to the Minister a suspension to such extent as he thinks fit, in respect of a lease.

There is sufficient proof before the court that the formalities in relation to the posting of notices upon the claims, and outside the Warden's office, have been complied with. Mr. Cassidy has raised no issue as to these matters.

Some argument has taken place as to whether or not a Warden has a discretion once he is satisfied by evidence on oath in open court that the grounds or anyone of them have been made out to support an application to suspend labour conditions, mining operations or both. It is suggested that "may" in the subsections means "shall" but I can see no reason to determine this question one way or the other on the facts in this case, but I would comment that I lean towards the view that in fact "may" does mean "shall" once the Warden is satisfied by evidence in open court.

It has become a factor in this case as to who may apply for a suspension, and who may object to that application. Suffice to say at this stage that under the Mining Act a lease had been granted by the Minister to Gibson, Hammond and Barker, and that now one of those lessees through a company with which he is closely associated, has seen fit to lodge an objection against his co-lessees. Section 113(1) prescribes that not less than one half of the holders of a claim or lease, if more than one, may make an application to suspend and the final paragraph of subsection (2), indicates that any person may lodge an objection. The question is, does "any person" include a co-lessee?

There is, of course, authority for the contention that a co-lessee may bind the others even though the others have not and might not have given specific sanction for the co-lessee's actions, but I cannot see how the matter before the court is affected by this authority, in the face of the provisions of section 113. Because the section permits not less than one half of the holders to make application to suspend, it could follow that there would be other lessees who need not and would not want to join in the application. The section by prescribing "any person" does not qualify it in any way, and surely if a co-lessee were discontent with such an application to suspend or if he were convinced of the incorrectness or bad intention of it, his hands would not be tied because of his status as a co-lessee. I hold therefore that it is proper for Mr. Barker to lodge theobjection, as an alternative to pursuing an action elsewhere.

However in this case, as I have said, it is not Mr. Barker himself, as a co-lessee, who has lodged the objection but it is Lithgow Smelters Pty. Ltd. In evidence (page 120) when examined as to the nature of the company, Lithgow Smelters Pty. Ltd., Mr. Barker has sworn that this company is a fully owned subsidiary of A.V.B. Holdings Pty. Limited, and further, that the shareholders of Lithgow Smelters Pty. Ltd. were A.V.B. Holdings Pty. Limited with 90 per cent of the shares, and the remainder being held by Mr. Barker's sister. In regard to A.V.B. Holdings Pty. Limited,

Mr. Barker has described this as a family company, and the shareholders are Mr. Barker, his wife, and their children. Can it be said that the objector is one of the co-lessees? The whole of the objection has flowed from Mr. Barker and it is clear from the sworn evidence that his sister, his wife and some children are in the background. However, as I have concluded, "any person" as used in the section includes a co-lessee, the fact that Mr. Barker is quite obviously the real objector, even though legally not one hundred per cent in the same interests as the objecting company and has that company as a front in the objection, is not fatal to the validity of the objection.

The portion described as Number 64 in the suspension application dated 4th September, 1968, ought more properly be described as Mineral Lease No. 5688, being portion of earlier Mineral Lease No. 64. There is no dispute as to this.

From the evidence Mr. Gibson had commenced mining this area some time in the early 1950's (page 66) and had later around 1957 been joined in partnership by Hammond (page 71). Subsequently they joined forces with Mr. Barker (page 71) and the lease was re-granted in the names of the three men. It is clear that from the time of their association they entered into agreements to pursue the extraction of minerals from the area. By what seems to have been the final agreement, dated 13th July, 1964, which is Exhibit 2, Barker agreed with Hammond and Gibson that he would have exclusive rights to mine 30,000 tons of prill ore and 8,000 tonnes of mill ore, over the ensuring five years, and no more, although he was entitled to a 2 year extension if unable to get the prill ore out through circumstances beyond his control. Barker agreed to pay royalties to Hammond and Gibson and he further covenanted at paragraph (d) of Clause 3, to fulfil all labour conditions during the term of the agreement, and by Clause 3(i) not to assign or sublet without previous written consent of Gibson or Hammond, which consent was not to be unreasonably or arbitrarily withheld.

So the court has the undisputed evidence that as at 13th July, 1964 the three men agreed that Barker was to be the operator of the mine. This agreement was stamped and for all intents and purposes because there is no evidence to the contrary, I conclude that as at the date of its signing and for the five years then following, with a further option of two years, in certain circumstances, at the date of the signing, all parties were content to enter into the rights, duties and obligations purported to be bestowed or imposed by the agreement. However, all is not as it seemed, because it was signed in respect of a mine, or more properly a mineral lease. Certain doubts have now properly been raised as to its legal effectiveness.

Section 109(2) provides that every instrument affecting any lease under the Mining Act, must be lodged with the Mines Department for registration and by paragraph (b) of subsection 4 to that section, any such instrument required to be lodged for registration, shall not have any force or effect until it is so registered. Oddly, the new section 109 which incorporated these provisions, took effect from 6th March, 1964 in just sufficient time to catch the signing of the agreement in July, 1964.

Legally then the agreement appears to have had no force or effect until registered. Looking at it in the light of the intentions of the parties when they signed it, however, the Court sees the three parties and Mr. Barker's company, A.V.B. Holdings Pty. Limited, which was also a party to the agreement, willing to enter into a contract binding upon themselves. It could have been registered with the Department at any time and in fact this took place on 19th May, 1970. It was, quite clearly, under the agreement, Mr. Barker's duty to fulfil all labour conditions or to have "in hand" a suspension application, and at page 103 of the evidence he concedes that he was responsible and that he took no action (page 106).

It is further clear that there had been a suspension application granted some six months before the period the subject of this contested application, that is from 8th March, 1968, for a period of six months. Mr. Barker (page 120) says that it was in his interests to have this application granted. Towards the end of that suspension period however, on 30th August, 1968, he wrote a letter to Hammond and Gibson, copy of which is now in evidence as Exhibit 3. It refers to the previous suspension which was then almost completed and in the final paragraph he told them "please notify me in writing if it is your intention to apply for the suspension on this occasion also". It has been suggested to me that the wording of this portion of Exhibit 3 is such that a reasonable inference may be drawn that Barker also wanted the suspension as at 30th August, 1968. I find that I cannot draw such an inference. He was simply asking the others that he be notified.

Mr. Barker says that he lodged the objection some 24 days after he wrote Exhibit 3. He says that inspite of the agreement Exhibit 2, under which he was responsible for suspension applications, Gibson and Hammond had previously approached him for information to apply for the suspension and they undertook to do so. Although he wrote Exhibit 3, to Gibson and Hammond, there had in fact been an application lodged apparently without him being notified, for it was left for him to see some article in the advertisements in the Sydney Morning Herald, and to see the notice of the application on the Notice Board outside this Court for him to find out about this application. He says (page 119) that he also noticed that some ore had been removed from the stockpile at the mine.

The Court notes that Barker claims to have mined on this lease from 1964, after the agreement was signed, until July or August, 1967 and that when he ceased there was some 600 tons of ore stored on the mine-site and some 200 tons stored at the Armidale Railway yard (page 92). He implies that he was the one who had the substantial expenditure and claims it is his ore which Gibson claimed in the application that could not be marketed.

There is evidence that some difficulty was being experienced in 1968, in marketing the ore. Mr. Hammond (page 13) Mr. Gibson (page 31) says he had an injunction issued against him for twelve months over this period restraining him from going near the mine, and Mr. Barker (foot of page 101) all indicate marketing difficulties. Now there has been further evidence adduced by all parties as to efforts made since then to sell the ore, and it is obvious that The Sulphide Corporation Pty. Limited at Boolaroo and the Electrolytic Zinc Company of Australia Limited at their Risdon Works are apparently interested, now. Further evidence of the difficulties being experienced was the sworn evidence by Mr. Barker in proceedings at this court on 16th May, 1969, when he referred to the stockpiled ore which could not be sold (page 21 of that file, Exhibit 5).

As to earlier proceedings, the history of the lease with the dealings and frictions between the parties has been lengthy and involved. The earlier court actions between the parties which have become apparent from the evidence are:

1. Injunction granted to Barker against Gibson and Hammond on 25th February, 1965, restraining them in respect of the lease.

2. Injunction granted to Gibson against Barker in 1967 restraining him from entering on what is known as M.L. 305, which adjoins M.L. 5688, and which gives access to the latter lease.

3. Prosecution by Barker of Gibson under Section 117 of the N.S.W. Crimes Act for larceny of certain property from the mine-site, which belonged to Lithgow Smelters Pty. Limited. Gibson was discharged from the Information on 15th May, 1969.

4. Injunction refused Lithgow Smelters Pty. Limited against Gibson and Hammond on 16th May, 1969.

There is still pending after the conclusion of this matter:-

A. Complaint laid by Barker under Section 124A of the Mining Act against Gibson and Hammond in respect of month from 9.9.69 to 10.10.68 for non-compliance of labour conditions.

B. A further application by Gibson and Hammond for suspension of labour conditions, received 19th October, 1970; and

C. A further objection to that application by Barker, dated 23rd October, 1970.

The litigation between these parties strikes me as having many of the features of Hydra the water snake of Greek Mythology fame.

There has arisen between Barker and Gibson a situation where they do not speak to each other (page 42). In regard to the agreement, Exhibit 2, and the reasons for its breakdown, the Court cannot and does not attempt to find an answer. Gibson claims that he did not receive all the royalties due from Barker (page 48) and Barker swears that he paid them in full (page 95). Further a dispute arose as to what was prill ore and what was to be classified as mill ore, and further in what position it was to be weighed (page 51).

Mr. Barker and Mr. Gibson both seem to have involved themselves in difficulties regarding payments of royalties to the Mines Department. Mr. Barker says that in effect, over the last decade, he is the only one who has mined there. Messrs. Gibson and Hammond point to the agreements which they have signed with Mr. Barker as an explanation for this, but now say that they have machinery which, although scattered at various places at the moment, could be gathered (pages 21 and 35) and brought to the mine and be put to work to produce the ore. Mr. Hammond (at page 25) tells his intention of having a company go public with a view to obtaining capital for the venture.

Both Mr. Cassidy and Mr. Morrow have put to me that some principles of equity ought to apply in this case. I do not agree. I am bound by the Mining Act.

It seems to me that the agreement, Exhibit 2, is an important factor in this case. Now it may be that up to 19th May, 1970 this agreement was unenforceable at law; if this is so, it would appear that Barker may have difficulties in enforcing his claims to the ore as at September, 1968. It may be enforceable now. But nevertheless the parties at the date they signed it intended to do certain things. Mr. Barker was to attend to suspension applications. He says now that Gibson and Hammond approached him and sought to do this once and he let them attend to it. They tried to do it again, and he objected . One might well ask, however in regard to the second application, what else were they expected to do? There had been disputes and court cases,

letters between solicitors (see Exhibit 21) and bad feeling. What attitude would a Warden have adopted had a fourth party lodged a complaint under Section 123A alleging non-compliance with labour conditions. Barker, Gibson and Hammond would then have found themselves defending to retain the lease, but would the court's attitude be sympathetic to Gibson and Hammond, if it were clear that the complaint was proved? It seems to me that the Court might well feel that the agreement was something between the partners and if it were not honoured that would be unfortunate but the lease ought to be recommended to be forfeited.

Turning to Mr. Barker's objections, I make no decision one way or the other as to the ownership of the ore, but I think it proper to comment that the application for suspension ought not be refused merely because ownership of some stockpiled ore referred to in this application, is claimed by Mr. Barker or his company.

Nor do I think it an objection sufficient enough to be fatal to the application that Mr. Barker claimed that Mr. Gibson had wrongfully removed the ore and offered it for sale, nor that the injunction granted to Gibson against Barker in regard to M.L. 305 is cogent enough to prevent the granting of the application. This of course was to prevent access to the mine across M.L. 305.

I have concluded after careful consideration and after hearing sworn evidence in open court that I can be satisfied by that evidence that the grounds set out in the application by Messrs. Gibson and Hammond have been made out. The objections lodged by Mr. Barker or his company are over-ruled. I grant a suspension of labour conditions for a period of six months which period is to commence at the conclusion of the suspension granted at this court in 1968 and which expired on or about 8th September, 1968.

The question of costs is to be adjourned, if necessary, to be argued later. I would now add, for the information of the parties, while not closing the argument on costs, that now that I have had a chance closely to examine the situation that I have serious doubts as to my power in proceedings of this nature to award costs. Nevertheless if the parties so wish it, the matter will be adjourned for possible argument on this aspect.