

**IN THE MINING WARDEN'S COURT
HELD AT SYDNEY
ON TUESDAY 30TH SEPTEMBER 1997
J A BAILEY, CHIEF MINING WARDEN**

CASE NO. 1997/31

Ross SLACK-SMITH (Complainant)

v.

Felix MONCH (First Defendant)

Robert MONCH (Second Defendant)

This is a claim by Ross Slack-Smith for:-

- (a) a declaration as to the equity the Complainant has in claims 30613 and 27302.
- (b) an order that the dirt won from those claims and presently stockpiled on claims numbered 30755, 26083 and 26084 be washed under the supervision of a person nominated by the Lightning Ridge Opal Miners Association.
- (c) that opal from the dirt washed in accordance with (b) above be valued.
- (d) a declaration as to the value of the share of the complainant in the opal referred to in (c) above and in the proceeds of opal won from the claims since
- (e) an order that the defendants do all such things and sign all such documents as to give full effect to the orders of the court and in the event of any party failing to do any act or sign any document then the Registrar or Chief Wardens Court at Lightning Ridge be empowered to so do such acts or sign such documents
- (f) such other orders as this Honourable Court may deem fit.

The action commenced with the Complainant requesting an urgent injunction under the provisions of the Mining Act, 1992.

Following the presentation of evidence from the complainant and from one of the defendants, Mr. Felix Monch, The following facts were either not in dispute or were determined by me:

1. A verbal agreement existed between one Neil Lohse and the complainant, such agreement being that the complainant would receive 25% of the proceeds from claim 27302, such claim then being registered in the name of Neil Lohse.

2. The agreement was that no payments would be made by the complainant towards the costs of working the claim
3. The agreement was reached on the basis of the complainant allowing the registration of the said claim which is located along the "fence line" of the property owned by the complainant.
4. The defendant Felix Monch, worked the claim in conjunction with Neil Lohse.
5. The defendant Felix Monch paid Lohse 50% of the proceeds of the claim after mining expenses had been deducted.
6. Neil Lohse then paid 50% of what he received to the complainant.
7. The amount paid to the complainant by Lohse was "intermittent payments of \$300 or some small amount". Such payments continued until Mr. Lohse died.
8. Upon the death of Neil Lohse, the defendant Felix Monch became the claimholder of claim No. 27302 and the defendant Robert Monch became the claimholder of claim 30613.
9. Claim 30613 was a claim which was also on the "fence line" of the property owned by the complainant - the registration of the claim was subject to the approval of the complainant, and subject to the complainant obtaining 25% of the proceeds of the mining of such claim.
10. Mr. Felix Monch worked both claim 27302 and 30613.
11. Mr. Felix Monch subsequently made payments direct to the complainant, in respect of proceeds from both claim 27302 and 30613.
12. Following a phone call from the complainant, challenging payments made to him, the defendant Felix Monch on 17th June, 1997, wrote to the complainant, offering to give him half of the claim 27302 on the condition that no further percentage payments would be made.

The following matters are in dispute:

- a) whether the agreement for 25% of the proceeds to be made to the complainant was net or gross proceeds of profits.
- b) whether the proceeds paid to the complainant since the time when the defendants were the claimholders, were in fact 25% of either the net or gross proceeds.

Evidence from Ross Slack-Smith was that he was approached by a person Molyneaux at some point of time in the early 1990's. It was put to the complainant that if he allowed Lohse to register a claim on the fence line, he, the complainant, would receive 25% of the proceeds. Although Mr. Slack-Smith indicated he did not want any

proceeds, it was upon insistence that he agreed to accept 25% of the proceeds. Mr. Slack-Smith told the court that because the percentage payable to him was so low, that he would not be expected to pay any mining costs. He indicated that he was to get 25% of the gross proceeds.

When Mr. Slack-Smith was reminded that his affidavit filed in support of his request for an injunction outlined that he was to receive 25% of the net proceeds, he answered by stating he did not read the affidavit before signing it.

No evidence was produced to show that the amounts he received from Mr. Lohse was in fact 25% of the gross proceeds, indeed the only inference that can be drawn from Mr. Slack-Smith's evidence is that he was receiving an amount which he assumed was 25% of the gross proceeds.

Mr. Felix Monch paints a different picture as to the proceeds. When Mr. Lohse was alive, according to Mr. Monch, the complainant was receiving 25% of the net proceeds.

It is the evidence of Felix Monch that since the claims have been registered in his name and in the name of his son, Robert Monch, that payments to Mr. Slack-Smith have been made at the rate of 25% of the net proceeds.

Mr. Monch gave evidence of small amounts of opal being found on the claims. He has not mined them continually, but has mined them in conjunction with other claims he holds, such claims having no association with Mr. Slack-Smith. He tells the court that when he found a pocket of opal, he would deduct his expenses and then give Mr. Slack-Smith opals to the value of 25% of the proceeds remaining.

Other than the oral evidence of the only two witnesses mentioned above, no other evidence was produced to the court to indicate what the agreement was concerning the proceeds.

I accept the evidence of Mr. Monch that all payments made to the complainant, whether they be received from Neil Lohse or from Felix Monch, were payments made on a percentage basis after the deduction of the mining expenses.

That being so, I can assume that Mr. Lohse understood the agreement to be 25% of the net proceeds and further that Mr. Felix Monch understood the agreement to be 25% of the net proceeds.

On the evidence before the court, I cannot be satisfied, on the balance of probabilities, that the agreement between the complainant and the defendant was other than the complainant receive 25% of the net proceeds of opals won from claims 27302 and 30613.

The next matter in dispute was the amount of opal being won from claims 27302 and 30613 since the defendants have been claimholders.

Mr. Slack-Smith did not place a figure on the amount he received in payment when Mr. Lohse was alive. His evidence, as I outlined above, was that he received intermittent payments of \$300 or some small amount, that was of course from one claim only, 27302, this being over a period of about 18 months.

So far as payments since the death of Mr. Lohse, he received a payment from Monch in opals, he sold the same for \$9,000. Mr. Monch had put a price of \$15,000 on those opals. On a further occasion, he received opal and the best price he could get was \$5,000., although Mr. Monch put a price of \$8-9,000 on the opal.

Nothing else was received, until a telephone call by the complainant in June, 1997. The complainant complained about no payments for some 2 years, Mr. Monch indicated on the phone nothing was available to be paid out. After a heated discussion he received the note dated 17th June, 1997 (exhibit 2 in the case), offering one half of one of the claims to be transferred over to Mr. Slack-Smith on the basis that he (the complainant) would no longer receive percentage payments.

Mr. Slack-Smith gave evidence of surrounding claims, in which he has an interest, has won opals to the extent of \$3 million in one instance and \$1 million in the other instance. On the basis of that, he tells the court there is a high likelihood that a high yield should be forthcoming from claims 27302 and 30613. Although he conceded that there is ample anecdotal material in the Lightning Ridge area which indicates that some claims may yield millions of dollars of opal and adjoining claims will yield no opal of commercial value at all.

Mr. Slack-Smith wishes the court to transfer both claims to him, on the basis that he has not be paid by Mr. Monch his 25% of the proceeds. He wants the court to accept that he has been "short changed" by Mr. Monch to such an extent that he is now entitled to have both claims.

The complainant can only rely upon the evidence of Mr. Felix Monch to support his claim of not being paid 25% of the proceeds. Mr. Monch, other than opals that were sent to the complainant with the letter of 17th June, 1997, has only made two payments to Mr. Slack-Smith. Mr. Monch was cross examined vigorously as to his mining of the claims and as to what opal had been won.

The evidence of Mr. Monch is that very little opal has been won, and that only two significant pockets have been located. He deducted his expenses and paid 25% of the balance, in opals, to Mr. Slack-Smith.

No records are kept by Mr. Monch as to opals found. The only record kept by Mr. Monch as to expenses is dockets kept in respect of some expenses, such as machinery and motor vehicle repairs. Fuel expenses are paid monthly after the receipt of an account. In calculating expenses, Mr. Monch indicated he would move from the subject claims back to other claims in which the complainant had no interest, then after working them for a while, return to the subject claims. No record is kept of the time spent on each claim. However, expenses are worked out, it would appear, by

averaging his total expenses (which, on the evidence, must be estimated) on the basis of the time he spent working on each claim.

The calculation of expenses is at best a very crude estimation. According to Mr. Monch, it could very well be that some expenses have not been included. Submissions from the complainant is that there is a likelihood that expenses have been overestimated. The evidence is such that it would be impossible to rule one way or the other.

As to the amount of opal won from the claims, it is not disputed that the majority of work performed by Mr. Monch is by way of hand pick, once he ascertains the possibility of opal by digging a drive with the use of a pneumatic jackhammer. His mining method is very slow. Puddling is done after a large stockpile is made. He may only puddle once or twice per year, and then puddle up to 15 loads at a time. He gives evidence that very little opal is extracted in the puddling process, if lucky up to one or two thousand dollars each time. This is usually utilised in expenses. No payments have been made to Mr. Slack-Smith following puddling.

He, like Mr. Slack-Smith, believes there is good opal on the subject claims, mainly because of the opal found in adjoining claims. It is for that reason that he continues to go back to the claims, notwithstanding he has other claims he can mine. He tells the court that what he has extracted, he has given 25% to Mr. Slack-Smith after he has taken his expenses.

Since his letter of 17th June, 1997, he admits under cross examination that he has won opal to the value of about \$12-15,000 from the two claims. He sold some opal which he valued at \$8,000, for \$4,000. He couldn't get a better price and had to sell to obtain money to continue mining. He now has opal left, which he values at \$4-7,000. However, if the market is still lower than his estimates, he would only receive \$2-3,500 for those opal which are left.

Many questions were put to Mr. Monch concerning his pricing of opals - for it was with this pricing that he determined the value of the 25% payable to the complainant. It was quite clear from the evidence that the value placed upon the opals by Mr. Monch was an overvalue compared to the price actually obtained on the then current market. However, no matter what the accuracy of Mr. Monch's pricing, it makes, on a percentage factor, no difference whatsoever.

For the complainant to be successful in this aspect, it is necessary for the court to infer from the evidence, that Mr. Monch's lack of records as to the production from the claims, that adjoining claims produced rich minerals, that his estimates of expenditure being so "wild" that it must be that Mr. Monch is either reckless in determining what he has obtained from the claims or alternatively, is dishonest in what he received, consequently, more opal has been won from the claims than indicated by Mr. Monch.

Mr. Slack-Smith has chosen to enter into an agreement which is not in writing, has a condition interpreted by the opposing party differently to the way in which he interprets it and has done nothing, such as attending tail-outs etc, which would ensure

the integrity of Mr. Monch is not doubted. And although Mr. Monch's recording of opals won and his recording and estimation of expenditures certainly leave a lot to be desired, nothing in the evidence before the court would lead me to conclude on the balance of probabilities that Mr. Monch has made payments under the agreement which was less than the 25% as per the agreement.

Accordingly, as to the interest which the complainant has in claims 30613 and 27302, I declare he is entitled to 25% of the net profits obtained.

Regrettably, it is now apparent that there is no longer a trust which should be existing between partners of a mineral claim. To leave the "arrangement" as it was before the 17th June, 1997, would lead to an intolerable situation which could only result in further disputes between the parties in future. So an order must be made which would enable the complainant to receive 25% of the benefit of the claims. The only way in which that could practicably be done is to divide the claims.

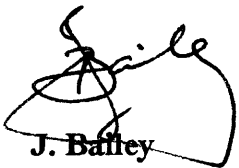
The parties were given the opportunity to settle this matter before I adjourned to consider my decision. An intimation was given that the only workable solution would be the splitting up of the claim(s). The parties were unable to settle. I now propose to resolve this matter by way, inter alia, by breaking up a claim.

Nothing has been put forward as to the wishes of the complainant, other than both claims be transferred to him - to do so would be inequitable. The suggestion by the defendant is to halve claim 27302, no doubt this would be acceptable to him. Any other division of the 2 claims by 25% may or may not be acceptable to the parties and they have not submitted any suggestion of a break up on that basis. Accordingly, it is my decision that the only equitable ruling can be the breaking up of the claims on the basis put forward by the defendant.

The order of the court is:

- (a) Claim 27302 is to be transferred from Felix Monch to Ross Slack-Smith. Such claim is to be divided diagonally, so that the portion to be transferred is that portion which has one of its side adjoining the fence and one of the other sides adjacent to claim 30755.
- (b) The complainant is to have no interest in claim 30613
- (c) Opal dirt from claims 27302 and 30613, which is presently stockpiled on claims numbered 30755, 26083 and 26084 is to be washed under the supervision of a person nominated by the Lightning Ridge Opal Miners Association.
- (d) Any opal from the dirt washed in (c) above be valued by a person nominated by the President of the Lightning Ridge Opal Miners Association, or a nominee of such president.

- (e) The opals obtained from claims 27302 and 30613 which are presently held by Felix Monch be valued by a person nominated by the President of the Lightning Ridge Opal Miners Association, or a nominee of such President.
- (f) The Complainant is entitled to 25% of the net value of the opals valued in (d) and (e) above together with a sum which represents 25% of the net money received by Mr. Monch upon the sale of opals extracted from the subject claims since 17th June, 1997.
- (g) It is further ordered that the defendant do all 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 do any act or sign any document, then the Mining Registrar, Lightning Ridge is empowered to do such acts or sign such documents.
- (h) The injunction granted on 7th July 1997 is hereby lifted.



J. Bailey
Chief Mining Warden

**Copy: Mining Registrar
Lightning Ridge**