

IN THE WARDEN'S COURT
HOLDEN AT SYDNEY
ON TUESDAY, 21ST JUNE, 1983
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

FRANK SOVER & YVONNE SOVER v. JOSEPH SASVARY.

JOSEPH SASVARY v. FRANK SOVER & YVONNE SOVER.

BENCH:

This has been the hearing of Complaints under Section 133 of the Mining Act, 1973. The respective parties have filed cross actions against the other and for the purpose of convenience and with the consent of the parties I have heard both matters together. Again for convenience I shall refer to Frank Sover and Yvonne Sover as the complainants and Joseph Sasvary as the defendant.

The matters arise out of a mining undertaking in the opal fields at Lightning Ridge and relate in particular to registered Claim No. 14030 at that centre. I take judicial notice that the State of New South Wales is divided up into mining divisions for the purposes of the Mining Act, 1973 and that this claim is in the Lightning Ridge Mining Division. Section 30, subsections (2) and (3), provide that unless a claim has devolved to a person by operation of law he shall not be registered as the holder of a claim when he already has two claims in a mining division.

Some of the facts are in dispute and it has been necessary for me to make a finding of fact as best I can on the evidence which has been adduced. I find as a fact that on 28th September, 1982 the female complainant became the registered holder of Claim No. 14030. I find as a fact that prior to that registration the defendant had together with a person called Radomir Babic marked out the claim by means of placing a datum post in position as required by the Act. I find that it was the defendant's intention to register the claim in his wife's name but then some difficulty arose because his wife was not present and then it was agreed between the two complainants on the one hand and the defendant on the other that the claim would be registered in the female complainant's name. I find further that within a few hours of registration the male complainant and the defendant commenced to work on the claim and on some days subsequent to 28th September had continued to work on the claim, with some breaks, until 22nd October, 1982. After that date, again with some breaks, the defendant worked on the claim until litigation was commenced and I granted an injunction under Section 144 of the Mining Act freezing all work on the claim which has remained unworked to the present time. I find as a fact that there was an agreement between the parties that the complainants and the defendant should be partners and that initially they should have a third partner, a Mr. Belcic. I find as a fact that prior to the male complainant and the defendant entering into this arrangement the male complainant and Mr. Belcic had been in partnership but that on

commencement of the working of Claim No. 14030 it was agreed between the parties that their rights, obligations and profits on the undertaking in respect of this claim should be 20% for Mr. Belcic, 40% for the complainants and 40% for the defendant. I find also that after the discovery of some opal and the division of money from proceeds of the sale of that stone that Mr. Belcic's share was reduced from 20% to 15% following which Mr. Belcic left the undertaking and withdrew from the partnership. I find as a fact that the partnership continued on a 50/50 basis between the complainants and the defendant. I find as a fact that no record was made in writing of these transactions excepting the document, exhibit 5, which is a small piece of paper bearing the handwriting of the female complainant wherein a division of profits is indicated and showing what I accept to be a distribution of funds between the complainants and the defendant and Mr. Belcic.

In their original complaint dated 25th November, 1982 the complainants alleged that there had been an agreement between the parties and that this had been on an equal share basis. They also alleged that opal having been won from the claim by the defendant he neglected to divide up an equal share of the opal and they sought that the court order the defendant to account for all opal won and to surrender the complainants' share of the opal. By complaint of the same date the defendant alleged that the female complainant was a nominee only and that he and the male complainant had agreed to work the claim on a share basis. He also alleged that at the end of September, 1982 approximately, the male complainant had dissolved the partnership by walking off the claim but had recommenced to work on the claim for approximately four days subsequent to which he again left the claim stating that he was going to mine at another area.

The defendant sought an order that the claim was to be the property of the partnership agreement (sic), that the court find that the partnership was dissolved on 26th October, 1982 and that the complainants have no right to the opal won since that date and that the defendant be determined as the rightful owner of the claim. Both sides were represented by Counsel being Mr. Terracini for the complainants and Mr. Bathurst for the defendant. At the initial hearing on 16th March, 1983 at Walgett Mr. Terracini indicated that on instructions he was abandoning the grounds set out in his clients' complaint and was relying on the provisions of Section 23C of the Conveyancing Act. This section reads:-

"23C. (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol -

- (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

- (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
- (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts."

He argued that because rights which the defendant enjoyed were an interest in land and a declaration of trusts respecting land, the transaction should have been recorded in writing and that if no writing existed then by reason of the operation of Section 37 of the Mining Act, the female complainant being the registered holder of the claim had exclusive rights and no successful action could be maintained against her by the defendant. Section 37 of the Act provides:-

"37. (1) Subject to subsection (2), a claim when, and for so long as it remains, registered, confers, subject to this Act and to the conditions of the claim, on the registered holder of the claim -

- (a) the exclusive right to prospect and mine for minerals in the claim area;
- (b) the right to erect buildings, structures and machinery in the claim area for purposes connected with the prospecting for or mining of minerals in the claim area and the right to remove any such building, structure or machinery;
- (c) the right to exercise in the claim area any rights in the nature of easements;
- (d) the right to construct and use in the claim area works for mining purposes, being purposes connected with the prospecting for or mining of minerals in the claim area; and
- (e) while following the occupation of a miner or a prospector, the right to procure and remove from the claim area for mining or mining purposes any timber, stone or gravel.

(2) Nothing in this Act shall be construed as authorising the registered holder of a claim to disregard the provisions of any Act, ordinance or regulation prohibiting, regulating or restricting, or having the effect or prohibiting, regulating or restricting, the exercise by the registered holder of any right conferred on him by this Act or by the registration of the claim."

Section 37 gives the registered holder of a claim rights and in particular the exclusive right to prospect and mine for minerals on the claim area. Mr. Terracini likened it to the indefeasibility provisions of the Real Property Act conveyed by the registration of title. It seems to me however that while Section 37 gives the registered holder some exclusive rights that does not prevent him from entering into some partnership arrangement with another person or other persons with a view to the claim being worked. Further, having considered Section 30 I am of the view that while that section prohibits a person from holding any more than two registered claims in a particular mining division, it would not prevent a person who already holds two registered claims from entering into some partnership agreement with the registered holder of another claim, provided he was not recorded as the registered holder. I feel that if the legislature had intended to provide that the holder of two registered claims should not partake of an interest in any other claims it would have said so. Further had the legislature intended that Section 37 have the same effect as the indefeasibility provisions of the Real Property Act again it would have said so. The Mining Act is silent as to these aspects. There is no provision for the registration of encumbrances on titles such as those provided in the Real Property Act and it seems to me clear that the registered holder of a claim can contract with others and be liable to prosecution by others should he breach his contract and that he could not successfully raise the provisions of Section 37 in such an action, as has been done in this matter.

I note that in his complaint the defendant by paragraph (c) sought that the court order that he be determined as the rightful owner of the claim. If rightful owner in that complaint meant registered holder that obviously could not be granted as Section 30 would be breached, at least at the time of registration on 28th September, 1982 because the evidence is that the defendant already held two registered claims at that time. However in his final address Mr. Bathurst for the defendant indicated that his client was not seeking such an order but that he had instructions from his client to seek that the court order that the female complainant be regarded as holding the claim on trust for the partnership during the period of the partnership and on determination of the partnership on trust for the defendant or alternatively that the female complainant held it and continued to hold it on trust for the partnership and as the partnership has been determined the asset be dealt with on dissolution of the partnership. On the other hand Mr. Terracini in his final address indicated that while the complainants were unable to substantiate the claim in respect of the opal or the value of the opal won by the defendant the female complainant be nevertheless adjudged to be the registered holder and therefore the owner of the claim, and that the defendant be excluded.

I turn then to a determination of the question as to whether or not a claim being a title under the Mining Act is an interest in land. A claim area is defined in Section 6 of the Act as meaning an area of land over which a claim is registered under Part IV and Part IV sets out the procedure for the registration of claims, disposal of them and other matters pertaining to their renewal, transfer, suspension of conditions and other matters. A claim is a title under the Mining Act giving the registered holder the rights as set out in Section 37 which is the exclusive right to prospect and mine for minerals in the claim area. A claim cannot be granted over any land that is not Crown land. The regulations to the Mining Act and in particular Regulation 13 et. seq. provide among other things for the marking out of claims and specify that in normal circumstances a claim shall not be greater in size than 50 metres by 50 metres or its area shall not exceed 2,500 square metres. So it is clear that a claim is a title and an interest connected to an area of land.

Considerable legal discussion has, over the years, taken place as to the status of mining titles. Land is defined in Section 3 of the Real Property Act. 1900, as being:-

"Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description or any estate or interest therein, together with all paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted."

and it will be noted that mine and minerals are included in that definition. The High Court of Australia by majority decision in 1973 in the matter of Adamson and others v. Hayes and others (130 CLR 276) held that a mineral claim under the Western Australian Mining Act constituted land within the meaning of the definition of land in Section 7 of the Western Australian Property Law Act which has a provision not dissimilar to the definition contained in Section 3. The New South Wales Mining Act of 1906 which was replaced by the 1973 Act contained specific provision in regard to the nature of a title under that Act. It provided by Section 129 subsection 1 that:-

"129. (1) Every tenement or share or interest in a claim, and any right, title, or interest acquired or created under this Act, or any Act hereby repealed, or the regulations with respect to any tenement, shall be deemed and taken in law to be personal property, and shall not be of the nature of real estate, and may be disposed of during the lifetime of the holder, and

shall on his death descend or devolve on intestacy or by will as personal property, subject to this Act and the regulations."

This provision was not repeated in any way in the 1973 Act. In *ex parte Henry re Commissioner of Stamp Duties* (1963 80 WN (NSW) 435) the New South Wales Supreme Court when referring to a licence to mine granted by a private landowner said that such a licence was more than a mere licence, that is, it was a *profit a prendre* and stated that while the grant of a *profit a prendre* did not of itself give a grantee any proprietary right until minerals were won the court was satisfied that the right which had been granted to take the mineral was a proprietary right. The court there commented that a *profit a prendre* was an incorporeal hereditament lying in grant and I note that Section 7 of the New South Wales Conveyancing Act provides that incorporeal hereditament comes within the definition of land. The question as to whether rights to mine granted by the Crown as a claim could constitute an interest in land was considered in *ICI Alkali (Australia) Pty. Ltd. v. Federal Commissioner of Taxation* (1979 53 ALJR 220). The High Court held that the finding of Mr. Justice McInerney of the Supreme Court of Victoria was correct when he held that a lease to mine was a leasehold interest in land and I take it from a reading of that case that the High Court concluded that a mining lease under the Victorian Mining Act, which is not dissimilar to the New South Wales legislation, is a lease of land and that the possibility of a landlord and tenant relationship between the Crown and the lessee arose having as its character the entering into possession and the payment of rent over a specified term.

While the registered holder of a claim does not have a period of years over which he can claim title against the Crown as in the case of a mining lease granted pursuant to Section 53 of the Act, along with other titles, it is apparent from a reading of Part IV of the Act and the regulations applicable to claims that the holder of a claim on payment of the prescribed fee and on fulfilling all the pre-conditions is entitled to a certificate of title and may hold the claim for mining purposes for a period of 12 months. Subject again to certain conditions that claim can be renewed at 12 monthly intervals, again on payment of a fee and the fulfilling of certain conditions. On the basis of the decisions which I have cited, in view of the absence of a Section 129 provision from the 1973 Act and because of the nature of the title of a claim held, I hold as a matter of law that a claim is an interest in land as would be envisaged by Section 23 of the Conveyancing Act, 1919.

I have already found as a matter of fact that a partnership existed between the complainants and the defendant and another person who was Belcic, Belcic having subsequently left the partnership but the partnership then finally continued between the complainants on the one hand and the defendant on the other on an equal share basis. The status of the female complainant has to be examined. While it is obvious that she was not a working unit of the partnership and that she had no obligations or entitlements to meet the expenses and to receive the profits of the undertaking separate from her husband, it is clear that she by reason of her marriage to the male complainant had been set up by the partnership to become the registered holder for the purposes of furthering the intentions of the partnership, that is to mine for opal.

In these circumstances is it necessary where the aims of the partnership have clearly included in them the intention of acquiring an interest in land within the meaning of Section 23C of the Conveyancing Act for the fact of acquisition of land to be in writing? General research that I have conducted indicates that a partnership formed for the purpose of acquiring among other things an interest in land does not attract Section 23C. Two Victorian cases of *Kilpatrick v. Mackay* (1878 4 VLR(E) 28) and *Ford v. Comber* (1890 16 VLR 540) support the contention that land acquired for the purpose of the partnership does not have to be the subject of any writing where the transaction is between the partners. It is only where the partnership deals with an external entity in respect of land transactions that the need for writing has to be fulfilled. In an English case, *Forster v. Hale* (1800 5 Ves. Jun. 308, reported also 31 ER 603) it was stated that "the subject being an agreement for land, the question then is, whether there was a resulting trust for the partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact, that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence, upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership". By New South Wales statute it is provided in Section 22 of the Partnership Act that where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between heirs of a deceased partner and his executors or administrators as personal or movable and not real or heritable estate.

So it seems clear that this claim being an interest in land having been acquired by the partners in connection with their partnership and has therefore become partnership property, has to be treated as personal property and not real estate.

The decision in Forster v. Hale contains reference to the creation of a resulting trust for the partnership so that if one partner holds property in his name which is to be considered partnership property then he will hold it on trust for his fellow partners. All the circumstances in this matter point to the creation of a resulting trust in the female complainant who held it for the partnership on that basis.

Section 23C specifically excludes the creation or operation of resulting, implied or constructive trusts from the need for writing. I am of the view that the resulting trust held by the female complainant on behalf of the partnership did not need to be evidenced in writing.

Currently the situation as disclosed by the evidence is that the claim is not being worked and that the partnership as at a date in late October, 1982 was dissolved. I am of the view that notwithstanding such dissolution that it is proper for me to say that the property which is the claim remains partnership property of the complainants and the defendant on an equal share basis.

Section 54A of the Conveyancing Act provides as follows:-

- "(1) No action or suit may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or suit is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.
- (2) This section applies to contracts whether made before or after the commencement of the Conveyancing (Amendment) Act, 1930, and does not affect the law relating to part performance, or sales by the Court.
- (3) This section applies and shall be deemed to have applied from the commencement of the Conveyancing (Amendment) Act, 1930, to land under the provisions of the Real Property Act, 1900."

I have found as a fact that work proceeded to be carried out by each of the partners under the agreement and in my opinion that part performance is sufficient to exclude the operation of Section 54A. One further aspect is that in making their complaint the complainants have recited the agreement between the parties to mine for opal. Section 54A does not state when the memorandum or note in writing is to be made and I am of the view that this complaint itself being signed by the complainants is sufficient to satisfy the requirements of Section 54A.

I find in this matter that the female complainant holds Claim No. 14030 in the Lightning Ridge Mining Division as a resulting trustee for the partnership in equal shares and that it is partnership property which now needs to be the subject of sale or disposal as other like property needs to be treated on dissolution of the partnership. By Section 39 of the New South Wales Partnership Act, partnership property on dissolution has to be applied to payment of debts and liabilities and thereafter any surplus should be applied in payment of what might be due to the partners after deducting what might be due to them by the firm. There has been no application made as far as is known to the Supreme Court to wind up the business and affairs of the partnership but I would be of the view that it may be better for all concerned if the claim were sold. On such sale the proceeds are to be applied as provided for by Section 39, and any division of proceeds should be made on the basis that 50% go to Mr. and Mrs. Sover and 50% go to Mr. Sasvary.

I formally find for Mr. Sasvary in the complaint which Mr. and Mrs. Sover have against him and I find for Mr. Sasvary in the complaint which he has against Mr. and Mrs. Sover. It follows from what I have concluded that the suit by the complainants is dismissed and I decline to order that the claim be regarded as being exclusively that of the female complainant.

One practical problem which exists in this matter is that the claim is due to expire on 30th June, 1983 and it would need to be renewed before that date for registration to continue beyond it. Normally the registered holder may apply for a renewal and it is clear that in this matter Mrs. Sover is in that position. Therefore it is possible, should she fail to renew the registration, that the rights of Mr. Sasvary would lapse unless the Court were to intervene. In the circumstances to give effect to the determination which I have made in this matter and within the spirit of the Mining Act I desire that the Registrar not re-register the claim in any interest other than that of the complainants or the defendant in this matter within a period of fourteen days after 30th June, 1983. This order will permit Mr. Sasvary to have fourteen days to approach the Registrar himself, should the claim not be renewed.

The matter is now to be listed at some time convenient for the parties for the question of costs to be canvassed. I would be of the view however that the complainants should pay the defendant's costs.

I am also of the opinion that the time for appeal should commence only after the matter is finally concluded, that is when costs are formally awarded.