IN THE WARDEN'S COURT SYDNEY
ON 19TH FEBRUARY 1993
BEFORE J L McMAHON
CHIEF MINING WARDEN

ZC MINES PTY LTD (TRADING AS PASMINCO MINING)
V
MINERALS MINING & METALLURGY LIMITED & ANOTHER

BENCH:

The within judgment is the result of a hearing conducted at the Warden's Court Broken Hill on 12th and 13th January 1993 into an action by ZC Mines Pty Ltd trading as Pasminco (the complainant) against Minerals Mining & Metallurgy Limited and Poseidon Mining Investments Pty Ltd (the defendants) which action was based on the operations of two Acts of Parliament, namely the Mines Inspection Act 1901 and the Mining Act 1973. The Mines Inspection Act by Section 50 lays down a procedure whereby the owner of a mine which is in need of draining because of the entry of water can seek a contribution from the owner of another mine towards the cost of that drainage. The procedure laid down for such actions is said in Section 50 to be under the Mining Act 1973 although that latter Act has now been repealed by the 1992 Mining Act. However, the action was commenced before that repeal and by virtue of the Interpretation Act 1987, actions commenced under repealed legislation continue to be dealt with as if the legislation had been not repealed.

The Mines Inspection Act, by Section 50 makes the following provision in subsection (1):

> "The owner of any machinery for drainage, whether erected before or after the commencement of this Act upon or near to any quartz reef or other mineral lode or any alluvial lead or other deposit containing any mineral other than coal or shale, may require the owner of any mine the workings of which have reached the natural water-level drained by such machinery to contribute a fair share of the total expense of draining or drawing the water from the mines drained by such machinery."

So the essential ingredients are that the complainant must be the owner of the machinery, that the mine must be upon or near any quartz reef or other mineral lode or any alluvial lead or other deposit containing any mineral other than coal or shale, that the claim must be made against the owner of the other mine, the workings of which have reached the natural water level, and that there be some expense incurred arising out of the draining or drawing of the water.

At the present time quantum is not in issue, only liability. It was between the parties admitted that the defendants or either of them have been the owners of No 7 shaft on Mining Leases in the South Mine at Broken Hill from 13th October 1972 until the present time, that that shaft was located upon or near a quartz reef or other mineral lode or any alluvial lead or other deposit containing mineral other than coal or shale, and that No 7 shaft, has been drained by the machinery contained within the shaft. It has been taken without it being said that that draining activity has incurred expense on behalf of the operators of the machinery.

The drainage activity was initially in accordance with, and ancillary to, a Joint Venture agreement signed between the parties, or their predecessors in title in March 1983. Annexed to that agreement was a list of the machinery dated 18th June 1982.

What is in issue here is whether the complainant is the owner of the machinery for drainage and whether the natural water-level as envisaged by the section has been reached.

As to the second of these questions I had the benefit of a comprehensive report from a company AGC Woodward Clyde Pty Ltd, a principal of which Mr Steven Hancock, a Senior Principal Hydrologist, gave evidence. His evidence was largely undisputed by the defendants

and although his inspection was only a follow up to an earlier inspection and conclusions by another senior hydrologist, Mr Hatley also of the same company, I am satisfied on the totality of the expert evidence that Mr Hancock formed an independent conclusion and that the natural water-level has been reached for the purposes of Section 50.

The defendants, through Mr James Morris, disputed liability. He had previously worked for the complainant from 1944 until 1983 when he left their employ. He became Managing Director of Minerals Mining & Metallurgy Limited in 1986. He also had experience working for Poseidon Mining Investments Pty Ltd. His knowledge of the arrangements is therefore extensive, having seen it operate from both sides.

The effect of his evidence is that the agreement signed in 1983 between ZC Mines and MMM towards the joint venture provided that drilling costs would be shared and that the defendants would permit the complainant to dewater the shaft at the complainant's costs but using the defendants' machinery which the complainant agreed was to be maintained by the complainant at the complainant's expense. The joint venture agreement which contains many other details as to responsibilities, rights and obligations, is contained, with other material, in exhibit 6D tendered before me by consent. The material includes a list of items of equipment for drainage owned by the defendants. The effect of the agreement was that the complainant would lease from the defendants those items of equipment in respect of which there would be an annual payment of $200,000, payable monthly. On the other hand, the defendants agreed that they would purchase from the complainant for the sum of $175,000 per annum also payable monthly, the water which had been pumped from the shaft. Off-setting the second payment against the first then all that would be

required would be the payment of $25,000 per annum on a monthly basis by the complainant to the defendants.

Clause 16(4) of the agreement provided that the complainant "shall maintain in good order and condition the No 7 shaft, the pump, pump column, and all equipment therein and ancillary thereto to the mining lease, and the No 6 fan". In order to do this the complainant was permitted by agreement access to the shaft at all times.

Contained elsewhere in exhibit 6D were a number of minutes prepared by Mr Morris which I rule are inadmissible by reason of their being only his opinion or summation of conferences or discussions which were had between the respective parties, which could be said to be self-serving. However there were a number of letters which passed between the parties after the signing of the Joint Venture agreement and these are admissible.

By letter dated 23rd October 1986 the complainant wrote through its Chief Consultant, Mr Mackenzie proposing among other things the deletion of Clause 16(4) and a further re-negotiation of other conditions and by reply of 3rd November 1986 Mr Morris advised the complainant that by reason of their letter of 23rd October 1986 it was apparent to Mr Morris that the legality of Clause 16(4) which required the maintenance of the equipment, was being questioned. He rejected that questioning but suggested that the parties undertake further detailed and frank discussion. Again there is a minute recorded by Mr Morris of 18th December 1986 which sets out his recollection of what took place at a meeting between personnel from both organisations but that is rejected as evidence by reason of the fact that the complainant had had no chance to agree or otherwise to the conclusions reached in it. However by further letter of 1st October 1987 to the complainant, Mr Morris made mention that the

complainant had advised that it intended to withdraw from the joint venture as from 31st December 1987 and that they considered their obligations under Clause 16(4) would cease from that date. That letter referred to the need for an inspection of the equipment before 31st December 1987.

A further note of 21st December 1987 by Mr Morris is deemed inadmissible but a letter of 17th December 1987 by the complainant to the defendants referred to a meeting of 17th December 1987 and that the complainant wished to operate No 7 shaft after 31st December 1987 "when the joint venture agreement terminates". It went on to say "the purpose is to prevent water build up while a drainage drive approximately 160m long from No 16 level ZC to the No 7 shaft is in progress" and "If you are agreeable we intend to operate the No 7 shaft, winder, pumps on various levels, and the No 6 shaft <u>at our expense</u> in the same way and under the same reimbursement formula as was used in the joint venture agreement. It is our intention to complete the drainage connection and vacate the shaft as soon as practicable". The underlining is mine. The letter then proposed a continuation of the arrangement on a month by month basis until 30th June 1988 "at the latest". To this letter came a brief reply of 24th December 1987 from the defendants to the complainant indicating agreement to the proposal.

There was subsequent correspondence where notification of intention on a monthly basis was given and then by letter dated 24th May 1991, the defendants wrote to the complainant indicating that as the defendants' operations had been placed on a "care and maintenance basis" the defendants were no longer in a position to purchase the water pumped from the No 7 shaft and sought payment of $200,000 per annum in accordance with the previous agreement. The complainant replied on 17th July 1991 referring to the $200,000 sought and

reminding the defendants that the usage fee was agreed to be $25,000 per annum, the monthly payments of which would be $2,083.33. By letter of 21st August 1992 the defendants indicated agreement to the figure of $25,000 per annum payable on a monthly basis. Some payments were made under this arrangement.

Mr Paul Thomas Gardner, the Superintendent Technical Support & Strategic Planning for Pasminco, gave evidence that he had been employed by the complainant for some 26 years. He was asked in the witness box to compare lists of equipment, one list having been prepared by himself as representing some of the items which were in the No 7 shaft and used for draining of water from it. He said that in keeping with the maintenance programme much of the machinery in the shaft had been replaced either in total or partially by the complainant as it was a necessary function to keep it operational but that some other equipment had been introduced by the complainant to upgrade the electrical system. This evidence in my opinion shows that the complainant engaged in an activity beyond mere maintenance of the defendants' equipment and sought by the introduction of other items of more capable equipment to improve the electrical system. During the completion of his evidence I asked him the following question:

Q. Can you point to any item on exhibit 5 which you say were introduced by ZC Mines which served to upgrade the electrical system?
A. Welding outlet, this is under the 1500 level, one welding outlet, one 150 horsepower starter. On the 2000 level one cutler hammer 200 horsepower starter, one cutler hammer 400 horsepower starter. On the 2200 level, one cutler hammer 40 horsepower starter and on the 2400 level, one unmentionable, one spcrecanhertz and shower starter. They were put in for the express purpose to upgrade the electrical system.

This indicates, as I have said, introduction of additional equipment by the complainant.

A supervisor for the complainant, Mr Raymond John Quinn who was in charge of fixed plants, i.e. the maintenance of pumps, gave evidence

about the maintenance and overhauling of the equipment during the currency of the joint venture. Many items of the equipment had had all their components replaced to the extent that if the replacement parts had been removed the outer shells or casings would be the only remaining part of the original item. Some items had been overhauled on several occasions and there were exchanges of one item for another. The whole purpose of this exercise was to stop the water from flooding the shaft, it being apparent also that the moisture had a detrimental effect on the equipment necessitating frequent maintenance. It seems to me however from Mr Quinn's evidence that the complainant while introducing new or replacement parts into the equipment, was merely acting in accordance with the requirements upon it to maintain the equipment in good order and condition.

The Complaint also talks about the excavation of a drive from the No 16 level of the complainant's operations to the subject No 7 shaft of the defendants' operations, the installation of an open drain in that drive on the No 16 level, drainage boreholes from No 16 to No 20 level and from No 20 level to No 22 level, to connect into the existing underground drainage network and the necessary development on No 20 level for establishment of those drainage boreholes, requesting contribution by the defendants towards costs associated with removal of the water to the surface. There is, it seems to me, insufficient evidence in respect of those additional matters for me to say that there can be an expressed or implied agreement by the defendants to contribute towards the cost of these facilities; however to consider them I turn to additional correspondence between the parties.

On 9th October 1986 as evidenced by a letter - part of exhibit 6D - from the defendants to the complainant it was made plain to the complainant following an apparent request by the complainant that the

defendants contribute towards the replacement cost of the rising main in No 7 shaft, that the defendants had no intention of contributing towards that cost. By further letter of 24th May 1991 an earlier suggestion that the complainant intended to construct a drainage drive along the No 16 level to enable the removal of water using the complainant's facilities was referred to by the defendants, and the complainant was asked whether that work had been completed. It is apparent that the answer to that question was to the negative.

I cannot see where this aspect of the complaint has been substantiated by the evidence.

There is unchallenged evidence that the defendants owned the original machinery which was to be used by the complainant and maintained by it pursuant to the joint venture agreement. Subsequently, for a variety of reasons, one of which was obviously economical, the parties agreed that even though the joint venture had been formally terminated, still to carry on with the arrangements on a monthly basis and for practical purposes. In the light of the formal termination of the joint venture agreement this new arrangement was in fact a new agreement after 31st December 1987 whereby the operation would be carried on at the expense of the complainant. The responsibility for maintenance, overhaul, upgrading, replacement and purchase of equipment whether it related to the defendants' equipment or newly acquired equipment to make the operation of dewatering more efficient was that of the complainant.

In the circumstances I hold that the for the purposes of Section 50 of the Mines Inspection Act to the extent that the equipment belonging to the defendants and leased by the complainant was maintained by the complainant, that the complainant is not the owner of the equipment. Furthermore that insofar as the complainant

introduced additional equipment into the operation in the form of an upgrading rather than maintenance, the complainant by reason of its undertaking contained in the letter of 17th December 1987 to operate the equipment "at our expense" forfeited any claim under the section. I formally find for the defendants on the question of liability and will now hear submissions as to costs.

I FORMALLY DECLINE TO MAKE AN ORDER UNDER SECTION 50(3) OF THE MINES INSPECTION ACT.