IN THE WARDEN'S COURT
HOLDEN AT LIGHTNING RIDGE
ON 1ST MAY, 1990
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN

JOHNSTON v. CRAMER

This has been the hearing of two Complaints under Section 133 of the Mining Act, 1973 which have explored the relationship between the parties before the court. Those parties are Mr. Phillip Johnston whom for the purposes of description I call the complainant and Mrs. Katherine Cramer who merely for want of a description is called the defendant. It should be noted that Mrs. Cramer had proceeded as a complainant against Mr. Johnston in the second matter before me.

By praecipe for the issue of a summons dated 26th June, 1989 the complainant sought an injunction against the defendant restraining her from working or disposing of two claims in the Lightning Ridge Mining Division which are numbered 21008 and 21009, as immediate relief, and as final relief, that the complainant be declared to have a 50% equitable interest in those two claims. By application dated the following day the defendant sought that there be an injunction issued restraining the complainant likewise. Subsequently, Mr. Scragg for the complainant had sought and had been granted leave to amend the proceedings so that the complainant was said now to seek by way of further relief, in addition to the matters sought to be the subject of relief in his original application, a declaration/order that the complainant be entitled to 75% of the net profit from Claims 21008 and 21009 "including the opal dirt about" which evidence had already been given. A further order sought was that the court award damages to the complainant in respect of the period 30th June, 1989 until 30th August, 1989 on the basis that the complainant was deprived of the use of mining equipment which was received back on 30th August, 1989.

An order for further damages was sought for a broken hoist, and in respect of a truck which was said to have been damaged which had contained on its tray opal dirt, together with the cost of replacement of keys to the same truck, replacement of a petrol pump on the same vehicle and the further costs of replacement of a necessary section of a hoist ladder. That amendment was granted without objection.

The whole of the activity in this matter revolves around Claim 21009 as no work appears to have been done on Claim 21008. Initially injunctions were issued preventing the parties from working the claims but during the extended hearing I have made temporary orders including requiring the holes on Claim 21009 to be filled to prevent improper access.

I have been assisted considerably throughout the hearing by learned counsel for both parties, Mr. Scragg for the complainant, and Mr. Rickard for the defendant. I set out in chronological order the sequence of events as disclosed by the evidence. Some matters were in dispute as to those events and I made comments upon that where necessary.

By way of background, the evidence shows that the complainant was an experienced miner having been in or about the opal mining industry at Lightning Ridge for approximately 10 years. The defendant and her husband are Queenslanders and had initially come merely to Lightning Ridge for holidays with their teenage daughter in 1988. The defendant is an able bodied woman but unfortunately her husband is confined to a wheelchair, this having been the case for many years which of course included the relevant period for the purposes of this matter. Both defendants were on invalid pensions and neither was experienced in mining. The chronology of the events is as follows:-

June 1988: The defendant and her husband and daughter visited Lightning Ridge. They met the complainant casually at a mining field called The 4 Mile which as the name suggests is some 6 kilometres or so from the township of Lightning Ridge. They engaged him in conversation and he demonstrated to them the various aspects of opal mining. Later during the same visit, with his assistance, they found an opal which was subsequently sold for $2,300 and they shared the proceeds of this with the complainant, having paid a cutter 10% of the sale price. During the same visit a claim was registered in the name of the defendant at The 4 Mile near where the complainant said he had a claim and the complainant gave her an axle for use in mining. During the same visit they found further opals worth $300. They had brought with them a caravan in which they had lived while at Lightning Ridge. They had left it parked on the site of the claim registered in the defendant's name, and returned to Queensland.

October 1988: The defendant and her husband came to Lightning Ridge and found their caravan broken into and some property in the form of a television set and other goods stolen. The complainant indicated that after it had been broken into he had moved the caravan to near his own claim for protection. During the October trip no further opal mining took place on the claim at The 4 Mile but the parties had a conversation about another field which is some 70 kilometres away from Lightning Ridge at a place called Glengarry. Glengarry is the site where the Claims 21008 and 21009 the subject of these proceedings is situated. The parties drove to Glengarry in the complainant's vehicle. According to the complainant, during the trip to Glengarry some discussion took place as to what shares would be held by them should the defendant and her husband commence mining there but both the defendant and her husband say that there was only general conversation. I should here add that Glengarry is in the near vicinity of another centre called Grawin which

is also in the near vicinity of an opal field which was given the name "The Sheepyards". At that time there had been a rush on at The Sheepyards with considerable justified interest being shown by opal miners in taking out new claims at that centre.

At The Sheepyards area the parties had looked around, had had a meal and inspected piles of opal dirt from which opal colour could be seen. It was at that time that the defendant decided that she wished to take up claims at that area and with the assistance of the complainant two claims were surveyed and pegged. These are Claims 21008 and 21009 and they were subsequently registered in the name of the defendant. In addition, the complainant pegged an adjacent Claim 21033 which was subsequently registered in his name. The parties then returned to The 4 Mile and the defendant attended the Mining Registrar's office, cancelled the registration of her 4 Mile claim and registered Claims 21008 and 21009. It is not clear on the evidence when the complainant registered Claim 21033 but in view of the sequence of the numbers it is apparent that it would not have been very long in time after the first two claims.

14th October 1988: A document, exhibit 1, was signed by the parties. It is in the form of an agreement and reads as follows:

> "An agreement between (1) P. Johnston, PO Box 73 (2) K. Cramer Box 143 Millmerrin (3) Geoff Cramer, Box 143 Millmerrin.
>
> That we (1) (2) (3) agree to prospect and work Claims No 21008 - 21009 - 21033 on a share of profit basis as follows:
>
> D.A. Johnston 10% for compressor
> P. Johnston 45%
> K. Cramer 22½%
> G. Cramer 22½%
>
> Also any irrepairable (sic) dispute to be solved by each claim being split into 3 parts and such parts to be decided (ownership) by toss of a coin."

It is signed by each of the three parties, that is, the complainant and the defendant and her husband.

The caravan was moved from The 4 Mile and parked upon either Claim 21009 or 21008. During that trip in October the defendant and her husband arranged for a driller to put down a small test hole and the defendant paid the sum of $100 for that. Later the defendant engaged a Mr. Noel Saggers to put down a large hole some 90 cms in diameter and the defendant paid the sum of $540 to Mr. Saggers for that. Some extra expense was incurred for explosives which had to be used to break through some solid rock before the drill could complete its work. Also during the same trip in October a further conversation took place between the complainant and the defendant and her husband and the evidence suggests that in pursuance of exhibit 1 the complainant agreed to work the three claims over a two or three monthly period. The sequence of the events as far as the drilling of the holes is concerned and the creation of exhibit 1 may well not be as I have set out - the evidence does not enable me to be clear about it. However, it is not vital to a determination in this matter, it being apparent that in furtherance of an oral discussion between the parties, exhibit 1 came into being as an intention by each of them to place on record and in writing their respective rights, obligations and responsibilities. After the signing of exhibit 1 the complainant brought his truck, a compressor which belonged to D.A. Johnston, the brother of the complainant and hoist which he owned from The 4 Mile to Claim 21009. The defendant descended the large hole with the complainant and did some work on the claim over a few days. Subsequently the defendant and her husband returned to Queensland.

12th November 1988: The defendant was arrested by Queensland Police and charged with two criminal offences of arson alleged to have been committed in the State of Queensland. Although this fact has had no adverse impression upon me it is nevertheless part of the sequence of events and has some bearing on the attitude of the defendant and her husband as to her future availability to be able to work the claims. The defendant said in the witness box that her arrest had followed her destruction by means of fire of the house and another building of a man who had taken her teenage daughter away and had supplied her with the drug heroin. The defendant was allow bail in respect of the matters and she was later convicted and imprisoned for the offences.

Approximately mid November 1988: Exhibit 2, which was a letter from the defendant and her husband to the complainant came into existence. It reads as follows:

> "Dear Phil
>
> Just a few lines to let you know we will be down on the 4th Dec. as we can't come sooner as Tricia has to sit for her H.S.C. if by any chance you decide to leave let us know one week before so we can pick up the caravan seeing as we are not there to help we will get 25 per cent of any thing you find but when we are there we get 45 per cent.
>
> So start finding plenty of opal see you in Dec.
>
> If you have any good news Ring us."

Apparently also in mid November 1988 the husband of the defendant and his father aged 80 attended Glengarry and stayed for approximately one week during which an awning was built for the caravan. They took no part in mining activity but were shown some pieces of opal by the complainant who had said that he had won them from Claim 21009. They returned to Queensland. Clearly at that stage the defendant and her husband were in breach of any obligation to work the claims and the effect of exhibit 1 enabling them to receive 45% could then be said to be at an end.

24th November 1988: The defendant and her husband returned to Glengarry. At that time exhibit 3 came into existence which reads as follows:

> "I Kate & Geoff Cramer authorise P. Johnston to act on our behalf regarding Claims 21008 - 21009 i.e. prospect and mine & renew. The claims are owned 50% P. Johnston and 50% K. & G. Cramer. K. & G. Cramer to receive 25% of any profit as result of mining."

This document is signed by the defendant and by her husband.

The circumstances which gave rise to the creation of this document are somewhat in dispute. The complainant swears that the defendant and her husband had come from Queensland to collect their caravan and take it back to Queensland to sell it. This evidence although denied by the defendant but conceded by her husband, has the ring of truth about it because the husband of the defendant says that they needed to realise cash for their assets in view of the expected expenses relative to the criminal charges laid against the defendant.

The defendant and her husband connected the caravan to their vehicle and had left Glengarry and proceeded towards Grawin on their way to Queensland and were caught up with by a vehicle driven by the complainant who said in evidence that the reason why he pursued them was that he did not have a contract with them at the time. The complainant says that he went firstly to the husband of the defendant who read the document and signed it and then handed it across to his wife who also read it and she signed it and returned it to the complainant. There was some suggestion in the evidence of the defendant that she did not have her glasses on at the time as they were in the glovebox of the car and further evidence from both the defendant and her husband that the complainant had merely told them that all that they were being asked to sign was an authority to renew the registration

of the claims - nothing more. Nevertheless the document exhibit 3 purports to say, that it is an agreement between the parties as to a percentage of the proceeds of the Claims 21008 and 21009, after an agreement by the parties of 50% joint ownership of the claims with the complainant on the one hand and the defendant and her husband on the other, after an authority vested in the complainant by the defendant and her husband to act by way of prospecting, mining and renewal of registration. This document, exhibit 3, is the most important document in the proceedings.

20th January 1989: The complainant wrote an unsigned letter to the defendant and her husband with which he enclosed a copy of exhibit 3. That letter is exhibit D13 and there is no evidence that the defendant and her husband did not get these documents, and indeed they conceded that the copy of Exhibit 3 was at their home. Further there is no evidence that they then or later raised any objection to the terms of exhibit 3 with the complainant until June 1989.

25th January 1989: Exhibit 4 was written to the complainant by the defendant and her husband in which the sentence reads "Kate went to court yesterday and she will be sentenced on 27th February. She looks like getting 3 years" and later "We will come down and see you .... tomorrow week".

Early February 1989: The defendant and her husband attended Glengarry and were there for about seven days. The complainant showed them some opal which he had mined from Claim 21009 which was hidden in his caravan. There were some 39 stones which they saw. The defendant and her husband did no work on the claim and returned to Queensland.

Mid February 1989: The complainant sent money orders totalling $2,500 to the defendant and her husband.

Mid March 1989: The defendant was sentenced to three months imprisonment.

19th April 1989: Letter written by husband of defendant to the complainant, exhibit 6 acknowledging receipt of the $2,500.

26th April 1989: Defendant released from prison after serving seven weeks.

17th or 24th May 1989 approximately: Complainant wrote Exhibit 17 to the husband of defendant advising that it was only six weeks to renewal time.

May 1989 later: Defendant and her husband returned to Glengarry after her release from prison. They observed another 90 cm hole down on Claim 21009 and the complainant showed them a 45 carat opal stone which he had recovered. On this trip the defendant accompanied the complainant underground and recovered four large pieces of opal which are depicted in a photograph exhibit 14. Two other letters, namely exhibits 15 and 16 were written but as they are undated there is no evidence to show the sequence in which they were received having been written by the complainant to the defendant and her husband. However it is obvious, from the wording of them, that the relationship between the parties at that stage had not soured.

Late June 1989: The defendant and her husband attended Glengarry. There is some dispute as to what then took place between the parties. The defendant and her husband each say that the complainant had ordered them off the claims and told them to go into a motel in town as the claims belonged to the complainant. The defendant and her husband say that they

objected to this stating to the complainant that the claims were theirs and ignored his request to leave, and parked their caravan on site. The complainant on the other hand says that on their arrival at the scene he was challenged by the husband of the defendant who told him he was "finished". He says he remonstrated with them saying he was a 50% share partner and that he had a right to stay but he says that the defendant said to him that the claims were in her name and they were her property and he was to go away. The complainant says that he warned the defendant and her husband about the consequences of that and that they could all end up with nothing. However the complainant left the site and when he returned the next day the drillers who had been working on the claim under his arrangements had been ordered by the defendant to leave.

26th June 1989: The complainant attended upon the Mining Registrar at Lightning Ridge and signed the praecipe for the issue of a summons in the Warden's Court against the defendant for breach of the partnership agreement.

27th June 1989: Defendant sought similar relief from the Warden's Court.

5th July 1989: Injunctions issued by me against each party following short appearances at the Warden's Court.

There is other evidence of matters having occurred. The complainant agrees that once the defendant and her husband had removed their caravan from the area he had purchased for the sum of $3,500 another caravan and had acquired a new hoist and an opal cutting machine from the proceeds of the sale of the opals from the claims. Another witness, Mr. Peter O'Rourke who was

called for the defendant, has been the caretaker of the claims in their absence and had generally assisted them by employing a blower (mined ore removing machine in similar style to a giant sized vacuum cleaner) and arranging for holes to be filled. It is also clear from the evidence of the defendant that on the occasion when she had gone underground with the complainant she had seen mined out cavities which she described as a ballroom which had the dimensions as to one cavity of 25' to 30' long x 8' x 6' high and a further cavity of 15' x 8' x 6'. This has not been refuted by the complainant. It is also apparent from the evidence that the complainant has in his possession an opal of 45 carat weight and he estimated the value of that to be $27,000 on the basis of it being worth $600 per carat. There is further evidence from him that he had entrusted another person called Pardy with the four pieces of opal that are depicted in the photograph exhibit 14 but three of them did not cut satisfactorily and some evidence from the complainant suggests that Mr. Pardy could not find the fourth piece of opal and he had refrained from asking him its whereabouts as the complainant thought it to be worthless. There is further evidence from the complainant that he had entrusted another person called Porter with a parcel of opals, the value of which was some $50,000 to take to America to attempt a sale. Evidence from the defendant is that she received $2,500 by way of money order and also some fourteen pieces of opal some of which has been made up into jewellery while others were produced in court as exhibit D21. These were returned to the defendant. The value of these stones is estimated on the evidence to be between $10,300 and $12,000.

There is also evidence that the defendant herself made up another document exhibit 22 which was a list of expenses incurred. It is significant that of document, the defendant said initially in the witness box she did not

write it but that it was written by her husband but when he entered the witness box he denied this and said it was in his wife's handwriting and this later assertion was agreed by Mr. Rickard, the defendant's counsel, to be a fact. That document exhibit 22 sets out particulars of expenses but includes three claim registration fees, that is 3 x $75 and I glean from that that the defendant was taking into account the fee for registration of Claims 21008, 21009 and 21033. This would accord with the terms of exhibit 1 to confirm the original intention of the parties to work under an ownership and proceeds sharing arrangement.

The evidence from the defendant and her husband is advanced to support their contention that while there was an agreement to work the claims between the defendant and the complainant on a percentage basis at no stage was there any agreement as to ownership, or if such an agreement was signed then it was brought about by the situation that the defendant and her husband were novices in the activity of opal mining and the complainant was an experienced opal miner. Apart from the defendant suggesting that she did not have her glasses on when she signed exhibit 3 and therefore could not read it, the husband of the defendant says that he signed it after his wife had done so and this is somewhat supported by the placement of the signatures on the document, i.e. the defendant's signature appears before that of her husband - after she had nodded to him that it was O.K. to sign it. The husband of the defendant says that he read only the first four lines of it, that is the authority to renew the registration of the claim part and did not read anything in respect of the ownership of the claim or the percentages as to working arrangements.

This whole contention I cannot accept for the following reasons. Firstly exhibit 3 is signed by the defendant and her husband. Secondly it is clear from exhibit 1 and exhibit 22 and the conduct of the defendant that the parties had an intention that they share ownership of claims with the complainant. Thirdly, the complainant by letter of 20th January, 1989 exhibit D13 had forwarded a copy of exhibit 3 to the defendant and her husband and it was not until June 1989 that they had raised any contest in relation to ownership. Fourthly, that while the defendant and her husband say that they believed that all they were signing in exhibit 3 was an authority for the complainant to act on their behalf in relation to renewal, bearing in mind that the defendant believed that she may have been in prison at the time of renewal on 30th June, 1989, it was still then known by the defendant and her husband that they would be attending Glengarry between the time that exhibit 3 was signed, 24th November 1988 and the time that the defendant had to go to court on the criminal charge. It would have been reasonably known by the defendant and her husband that the question of renewal would have been hardly relevant in November 1988 bearing in mind that the registration of the claims did not expire until 30th June next following.

I am satisfied that the situation was that the defendant was uncertain in respect of her future. She had been told by her legal advisors that she would receive a minimum prison term of three years. She was willing to allow the complainant on the basis of exhibit 3 a 50% = 50% ownership to the two claims and a 75% = 25% percentage working arrangement in the period of that uncertainty. Once that uncertainty had been removed by reason of the short period of imprisonment which she received, she then decided to attempt to establish absolute ownership to the claims and enforce it on the basis that they were registered in her name.

I am satisfied that the defendant and her husband knew exactly what they were signing on 24th November, 1988 (exhibit 3) and that the court should give effect to the intention of the parties.

In interpreting exhibit 3 there is an obligation not only upon the defendant and her husband but also as far as working and keeping accounts are concerned, upon the complainant. The situation with the complainant is by no means as it should be. For a person such as the complainant to be so long on site and to make cavities the dimensions of which I have already referred to and which have not been contested, indicates to me that he would not have been working simply for the exercise of it all and that there have been in fact valuable stones forthcoming from the claim. Even on the evidence before the court there is between $77,000 and $107,000 of opals in existence for which no accounting has been made to the defendant. The problem which the court has of course is firstly a denial or some vagueness by the complainant as to some of these matters and secondly an almost complete absence of any satisfactory accounting records, figures or procedure which would permit of any reasonable mathematical calculations. I am left therefore to make an intelligent guess at what the value is of the opals which have been won from Claim 21009. I am satisfied on the evidence that there is in existence stones to the value of between the above figures. A certainty and conclusion in litigation has to be reached and I arrive at a nett figure of $80,000 as being the value of stones which the complainant holds as having been obtained from Claim 21009.

True it is that the defendant with the benefit of legal advice did not seek to make any amendment to her pleadings, as indeed the complainant did, to accommodate any assessment of value of opals but in arriving at the

assessment I take into account the spirit of Section 133 of the Mining Act where it empowers a Warden to make various orders on actions relative to the extensive list of mining disputes and circumstances which can and do arise.

In interpreting this matter I find that exhibit 3, a simple document, sets out what the parties intended to be the position at the time that they signed it, that is to say that the two Claims 21008 and 21009 be owned 50% by the complainant and 50% by the defendant and her husband jointly with the proviso that the defendant and her husband receive 25% of any profit as a result of mining and the complainant 75%. While there is no list of expenses which the complainant incurred in respect of the winning of the opals, the value of which I have assessed at $80,000 I find for the purpose of the exercise that figure to be a nett figure, that is after payment of extraction expenses I am of the view that of the $80,000 the defendant is entitled to a clear $20,000.

In relation to the amended claim which the complainant sought to bring forward after the commencement of the proceedings I cannot see on the evidence where any damages can flow to him as a result of the articles damaged or material missing from the truck. It occurred while the complainant was absent but without the benefit of evidence to show that the defendant did it or caused it to be done I am unable to make any order favourable to the complainant.

I make the following findings and declarations:-

1. Claims 21008 and 21009 are the property of the registered holder and her husband on the one hand in one 50% share and the complainant on the other hand in one 50% share.

2. The complainant is entitled to work the said claims and the profit from them is to be divided as follows: 75% to the complainant and 25% to the defendant with extraction expenses being shared and met in the same proportion.

3. In order to facilitate this activity, the complainant shall keep full and proper record of extraction costs and production figures.

4. The equipment purchased by the complainant, i.e. the hoist and the opal cutting machine, and the caravan shall be the property of the complainant.

5. The complainant is to pay through the Registrar of this Court to the defendant the sum of $20,000 and I allow him six months in which to do that, bearing in mind that the opals have yet to be sold.

6. Opals currently held by the defendant in the form of jewellery or loose stones are to be retained by the defendant.

7. Subject to order 3 hereof, opals currently held by the complainant are to be retained by the complainant.

8. The defendant is to pay the costs of the complainant in this matter bearing in mind that five days were involved with counsel at the hearing together with two mention days with solicitors, which I assess at $8,950. I direct that this sum be paid by the defendant to the Registrar of this court for the complainant within a period of six months from today and the complainant may make a deduction of his costs from the payment ordered in order 5.

As a general comment I place the following matter on record. As each side now has a 50% interest in the two claims there should be a genuine attempt by them to exist with each other on an amicable basis. Further litigation in this court should be avoided as so much time and expense is involved in hearings. As a matter of common sense the parties ought to try and get along together to pursue the common aim and purpose of extracting opal which appears, on the evidence which I have heard, to be present with some abundance in at least one of these claims.