

**IN THE MINING WARDEN'S COURT
AT SYDNEY IN THE STATE OF
NEW SOUTH WALES
ON TUESDAY 22ND MAY, 2007
J. A. BAILEY,
CHIEF MINING WARDEN**

2006/72

**SHERRIF SANCAR - (Complainant)
v
ARTHUR EDWARD KEMP - (Defendant)**

MINERAL CLAIM 51437

**APPEARANCES AT HEARING AT LIGHTNING RIDGE ON 1ST AND 2ND
MAY, 2007.**

COMPLAINANT:

Mr W. Browne, solicitor of Browne, Jeppeson & Sligar.

DEFENDANT:

Appears in person unrepresented

DECISION DELIVERED IN ABSENCE OF PARTIES ON 22ND MAY, 2007.

Following an application by Sherrif Sancar, an Injunction under the provisions of Section 313 of the Mining Act 1992 was issued on the 26th October, 2006 restraining the Defendant, Arthur Edward Kemp, from certain actions within Mineral Claim 51437.

The final relief which was sought in that application for the Injunction was as follows:

- a) A declaration of the Complainant's interest in the claim via taking accounts in relation to all transactions in relation to the claim;
- b) The Defendant do all such things and all such documents to give effect to the orders of the Court in the event of any failure to act or sign any documents then the Registrar of the Chief Mining Warden's Court at Lightning Ridge be empowered to do such acts and sign such documents and any other documents or any other orders this Honourable Court deems fit;
- c) Costs.

The matter was heard at the Warden's Court, Lightning Ridge on the 1st and 2nd May, 2007. An exhibit of the proceedings was a certificate under Section 219 of the Mining Act 1992. It sets out the history of the area which is now referred to as Mineral Claim No. 51437. The document firstly indicates that it was registered as Mineral Claim 18867, in the name of Frank Mackaway, on the 2nd April, 1989. Subsequent to the expiration of that claim, it was once again repegged and registered as Mineral Claim 48530, in the name of Peter Alyuz, on the 15th April, 2002. That particular claim expired and was reregistered as Mineral Claim No. 50262, in the name of Tony Balsdon on the 11th June, 2003. Once again, after it had expired, it was then re-registered in the name of Mr Peco Sekrevski as Mineral Claim 51437 on the 7th July, 2004. It was that particular claim which was then transferred to the Defendant in these proceedings, Mr Arthur Kemp, on the 19th June, 2006.

In giving evidence, Mr Sherrif Sancar informed the court that he has had an equitable interest in each of those claims which are mentioned in Exhibit 1. He informed the

Court that Mineral Claim 51437 in the name of Peko Sekrevski was in fact his claim and he merely had Mr Sekrevski holding it for him from the period of the 7th July, 2004 until it was transferred to Mr Kemp on the 19th June, 2006.

This assertion of Mr Sancar was supported by Mr Terry Balsdon, who gave evidence that he was the registered claim holder of the same area from the 11th June, 2003 until the 30th June, 2004; it was then Mineral Claim 50262. Mr Balsdon gave evidence that he held that claim during that period of time in partnership with Mr Sancar. He said there was the “usual agreement of 50/50”. The reason he had the claim, he said, was because Mr Sancar already had 2 claims in his name and that he (Mr Balsdon) only had one claim at that time.

Mr Balsdon informed the Court that when the claim lapsed on the 30th June, 2004, he was “overcommitted” and had to relinquish the claim. He informed Mr Sancar of that.

The document which is Exhibit 1 indicates that Mr Balsdon was the claim holder at the time in which he informed the Court.

In giving evidence, Mr Sancar relied on the Affidavit which he filed in relation to the application for an Injunction under the provisions of Section 313 of the Mining Act of 1992.

Paragraph 2 of the Affidavit states: “I was approached by Arthur Edward Kemp, and he said words to the effect of “I will work your claim and provide you with half of the proper costs of any mineral taken from that claim. We will each pay half of the outgoings. I am also prepared to put the claim in my name as a name”.”

Mr Sancar gave evidence of attending the office of the Mining Registrar at Lightning Ridge together with Mr Kemp and the then claim holder, Mr Sekrevski. This was for the purpose of having claim No. 51437 transferred over to Mr Kemp. Mr Sancar informed the Court, and this is not challenged by Mr Kemp, that he handed over \$140 in relation to the transfer of the claim, to Mr Kemp who then utilised that money,

together with some of his own to transfer the claim into the name of Arthur Edward Kemp.

Whilst Mr Sancar was mining the claim, there was an incident involving the digger. Mr Sancar's version of that is that he (Mr Sancar) told Mr Kemp to secure the digger to the roof. Mr Sancar indicated that the securing of the digger was not done and the digger fell and hit Mr Sancar on the shoulder. The version of that event from Mr Kemp is quite different. He informed the Court that the digger had to be moved, could not be secured to the roof while it was being moved and that, furthermore, it did not strike Mr Sancar because Mr Kemp moved swiftly to push Mr Sancar away from the digger as it fell.

It would appear that there was another dispute between the parties as to whether or not there should be a prosecution for an encroachment upon the claim by an adjoining landholder.

As to who was right and who was wrong in relation to the disputes outlined by each of the parties, is not important for the determination of this case. The fact is that it is quite clear from hearing from both parties, that they are unable to continue to work together in a partnership.

Mr Kemp denies that there was ever any "partnership" as such. It is Mr Kemp's version of events that he was simply "employing" Mr Sancar to assist him in mining the claim and, furthermore, he was to pay him 20% of proceeds of any opal won.

On the other hand, Mr Sancar is adamant that this was an arrangement between him and Mr Kemp wherein he would transfer the claim to Mr Kemp and they would both mine it on the basis that they would each receive 50% of the proceeds.

When questioned, there is no doubt that there was no written agreement concerning any arrangements between the both of them. Furthermore, it would appear that any oral arrangements between them was lacking in clarity. Mr Kemp concedes that, as far as he was concerned, there was no mention of paying Mr Sancar 20% of the proceeds but he wanted the Court to accept that there was an inference there that he

would pay Mr Kemp and that Mr Kemp ought to be aware of that inference. Mr Sancar, on the other hand, is adamant that he said to Mr Kemp that this was a “50/50” arrangement.

Mr Kemp conceded that he did not mention 20% to Mr Sancar because, according to Mr Kemp, he intended to see how Mr Sancar performed as a worker in the mine before he was going to mention any percentage to Mr Sancar. Mr Kemp denied that there was any conversation with Mr Sancar concerning a 50/50 arrangement with him.

I am satisfied on the evidence before the Court, that there was no opal won from Mineral Claim No. 51437 while Mr Sancar and Mr Kemp were working it. I am also satisfied that there was no opal won from that claim from the point of time when Mr Sancar was forbidden to go near the claim until the point of time when an Injunction was issued against Mr Kemp.

That being so, there is no need to make any determination concerning the proceeds of opal that may have been won from that particular Mineral Claim. The only matter to be determined is as to whether or not Mr Sancar has an interest in the claim.

A critical issue in determining this matter is the question as to whether or not Mineral Claim No. 51437 when held by Mr Peko Sekrevski was held by him on behalf of Mr Sancar. Mr Sekrevski was not called before the Court by either party to give any evidence. Although no formal explanation has been put to the Court, I can infer from comments made from the bar table that he was unable to be located. However, there is evidence that Mr Terry Balsdon, who was a claim holder immediately before Mr Sekrevski, held that claim on behalf of Mr Sancar.

I accept the evidence given by Mr Sancar that he had an interest in each of the registered claims which have previously been held over the area which is now subject to Mineral Claim 51437, since at least the time indicated on Exhibit 1 which is the 2nd April, 1989.

That being so, one wonders as to why Mr Sancar would arrange for the Mineral Claim to be transferred to Mr Kemp without any encumbrances whatsoever.

Mr Sancar gave evidence that he had an arrangement working with Mr Kemp on a claim at Coocoran 2 years ago. According to Mr Sancar, the arrangement was then that they would work on a 50/50 basis. According to Mr Sancar, it was on that basis because he said "... it was my claim, your machinery and I pay the costs". In respect of that, Mr Kemp indicated that it was a 30/70 arrangement at Coocoran. Evidence was given by both parties as to various arrangements which have existed in respect to other claims and other people within the Lightning Ridge area. A common theme running through those suggestions of what arrangements were made between parties was that the person who had the machinery would receive 70%; 30% would go to the other party if that other party was a claim holder and, if not a claim holder, then that other party would give 10% to the claim holder and 20% to the person working the claim with the person who owned the machinery.

From my experience in dealing with matters within the Lightning Ridge area, that may very well be a common type of percentage which exists in some circumstances. However, it is certainly not uncommon that people work claims on a 50/50 basis in the Lightning Ridge area. The issue here however, is not what is the general practice within the Lightning Ridge district, but what was the arrangement between the two parties before the Court.

Mr Kemp was adamant when he first gave evidence that he made no comment to Mr Sancar as to what percentage would be paid to Mr Sancar. He indicated quite clearly that a payment of 20% was "inferred". Yet, when Mr Kemp gave evidence for the second time on Day 2 of the proceedings, he was adamant that they had an arrangement wherein the machine owner would receive 70%, the Mining Assistant would receive 20% and the claim holder 10%. In other words, Mr Kemp being the claim holder and the machine owner, would receive 80% and Mr Sancar 20%. I have some difficulty reconciling those two versions which Mr Kemp put before the Court.

As I indicated earlier, there was no opal won whilst these two gentlemen were working with each other and no opal won by Mr Kemp after Mr Sancar was put off the claim. Consequently, I do not have to make any determination as to

arrangements between them in respect of any proceeds won from the claim. It comes down to a question of what, if any equity, Mr Sancar has in the claim as it stands at the moment.

A portion of Exhibit 2 in the proceedings is important. The "Application for Transfer of a Mineral Claim" clearly indicates that the "consideration for transfer" was a "gift" not involving any money. That being so, why then would Mr Sancar, if he had no interest in the claim in question, go to the trouble of convincing the then claimholder, Mr Peter Sekrevski, to transfer the claim to Mr Kemp? Also, one might ask why would Mr Sekrevski transfer a claim to Mr Kemp without receiving any consideration whatsoever?

Of all the possible answers to those two questions, one is led inexorably back to the fact that Mr Sancar did in fact have an interest in the claim and that he was arranging the transfer to Mr Kemp, so that both of them could mine the claim and share an interest in the proceeds.

On the evidence before the court, I cannot accept Mr Kemp's version that Mr Sancar was in attendance at the Registrar's office during the transfer simply so that he may gain "employment" with Mr Kemp to mine the claim.

The claim is in the name of Mr Kemp and I accept that it was transferred to him at the request of Mr Sancar who then had an interest in that particular claim. I accept, on the balance of probabilities, that the transfer of the claim to Mr Kemp was on the basis that Mr Sancar would retain a 50% interest in the claim itself.

That being so, I make a determination that Sherrif Sancar has a 50% interest in Mineral Claim 51437. It is quite clear that the parties cannot work together with each other in respect of that particular claim and the only just and equitable way to resolve this issue is to split the claim into a 50/50 portion. The parties discussed this possible outcome when they were at Court and it was agreed that if the Court were to make a decision such as this, the claim should be divided down the middle and that Mr Kemp would retain the north-west 50% of that claim, that is that portion of the claim that

abuts Mineral Claim 48833. Consequently, Mr Sancar would then have 50% of the claim which abuts Mineral Claim 53564.

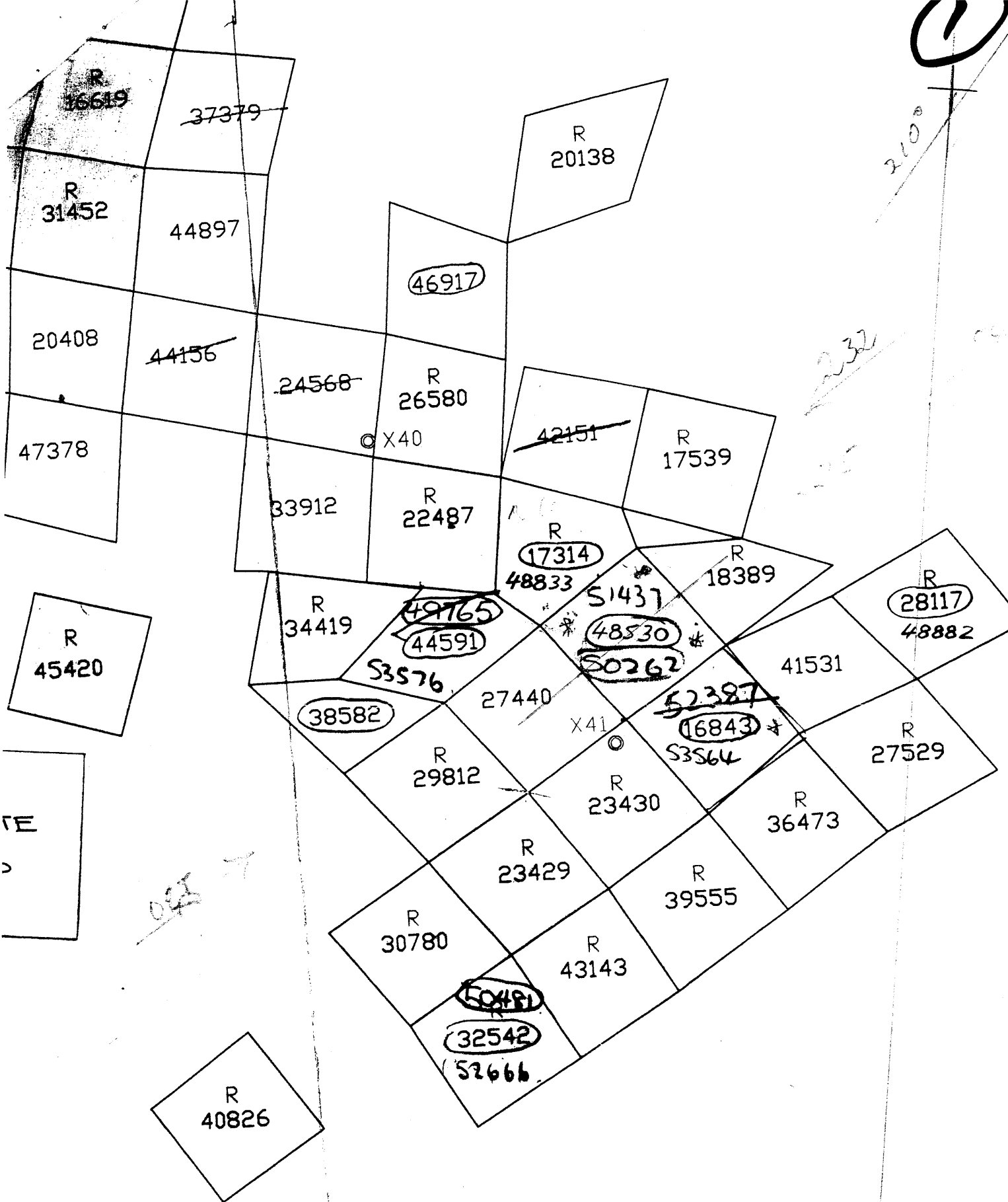
A DECLARATION IS MADE THAT SHERRIF SANCAR HAS AN INTEREST IN 50% OF MINERAL CLAIM 51437 (THE REMAINING 50% INTEREST IS HELD BY ARTHUR EDWARD KEMP).

So that Mr Sancar may realise his interest, IT IS ORDERED that Arthur Edward Kemp do all things necessary to have mineral claim 51437 divided evenly so that he retains the north-west portion of the claim, thus allowing Sherrif Sancar to register that area which consists of 50% of Mineral Claim 512437 and is the south-east portion.

Furthermore, if Mr Kemp fails to do what is necessary to give effect to the above order, then the Mining Registrar, Lightning Ridge, is hereby empowered to do all such acts and sign such documents as are necessary to put the order into effect.

So that no confusion exists as to how the claim should be divided, a plan is attached to this order, the green shaded portion is that portion which is to be registered to Mr Kemp, whilst the yellow portion is that portion which should be registered to Mr Sancar.

J. A. Bailey
Chief Mining Warden



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SIDENCE AREA