IN THE WARDEN'S COURT
HOLDEN AT SYDNEY
5TH NOVEMBER, 1975.

BEFORE J.L. McMAHON, ESQ.,
CHIEF MINING WARDEN.

IN THE MATTER OF

FRANK GILLHAM

-v-

LEONARD JOHN CLARKE AND FREDERICK RICHARD CLARKE.

BENCH :- On 9th September, 1974, the complainant Frank Gillham caused to be issued against the defendants Leonard John Clarke and Frederick Richard Clarke a summons under Section 130 of the Mining Act, 1973. This summons set out that the complainant sought an order for specific performance and damages, particulars of which were annexed. Those particulars were :

" 1. By an agreement in writing dated the 29th day of December 1972 (hereinafter called the first contract) between the Complainant and the Defendants the Defendants represented themselves as the registered proprietors of all the shares in certain goldmining leases which they agreed to sell to the Complainant for valuable consideration.

2. By a further agreement in writing dated the 29th day of December 1972 (hereinafter called the second contract) the Defendants represented themselves as the registered proprietors of all of the shares in goldmining leases No.98 situated at Bathurst goldfield and agreed to sell all their said interests to the Complainant for valuable consideration.

3. The representations by the Defendants in both the said contracts were false and the Complaint was induced thereby to pay to the Defendants the sum of six thousand Dollars in respect of the first contract and one thousand Dollars in respect of the second contract.

" 4. Of the nine lease areas which the Defendants contracted to sell to the Complainant the Defendants have since the date of the said contracts become the registered proprietors of only one namely S.L.645 and this lease they have refused to transfer to the Complainant.

5. The second named Defendant represented to the Complainant that permission to work had been granted in respect of the area covered by S.L.645 and the Complainant was thereby induced to leave his home in Western Australia and move with plant and equipment to New South Wales for the purpose of carrying out work on the said leased area.

6. The Complainant has carried out work on and adjacent to the area of S.L.645 the benefit of which has accrued to the Defendants.

7. The Complainant therefore claims:

(a) That the Defendants be ordered to transfer to the Complainant S.L.645 in part performance of the first contract.

(b) That the Defendants be ordered to pay to the Complainant the sum of one thousand Dollars ($1,000) paid under the second contract.

(c) Alternative to (a) that the Defendants pay the sum of six thousand Dollars ($6,000) to the Complainant.

(d) Further alternative to (a) the sum of Twenty two thousand four hundred Dollars ($22,400) being the amount expended by the Complainant on plant equipment and site improvements $23,900 less the resale value of plant on the present market of $1,500.

(e) The sum of Fifteen thousand Dollars ($15,000) for wages lost by the Complainant."

During the final address by the attorney for the complainant the particulars of claim were changed in that claim 7(d) was amended so that the sum of $15,736.92 replaced the figure

.../3

of $22,400 and the sum of $17,236.92 replaced the figure of $23,900.

At the Inquiry Mr. P.G. Fitz-Gibbon, Solicitor, appeared for the complainant, while appearing for the defendants was Mr. B.L. Larbalestier of Counsel instructed by Beston & Riordan, Solicitors.

The bases of the action were Exhibits 4 and 5. These take the form of agreements executed between the plaintiff and the defendants. It is necessary initially to outline a brief history of the matters as I understand them.

In July or September, 1972, a businessman from Victoria, Mr. Gerald Gold, desired to acquire interests in gold mines. To this end he placed advertisements in newspapers throughout the Commonwealth and in reply to those placed in Western Australian newspapers the defendant, Frederick Richard Clarke, made contact with Mr. Gold in relation to a mine at Bathurst in New South Wales. At that stage in September, 1972, the complainant Mr. Gillham was acting merely in an advisory capacity but had had prior dealings with Mr. Gold and in particular had been associated with him in a mining venture in Indonesia.

Discussions took place with Mr. F.R. Clarke and his brother L.J. Clarke on the one hand and Mr. Gillham on the other, and it was finally agreed that Mr. Gillham would pay to L.J. Clarke the sum of $1,000 which money belonged to Mr. Gold as expenses in pegging certain areas for mining purposes in the Bathurst district. In addition to that on the same day in September, 1972, also following some discussion a further sum of $1,000 which also belonged to Mr. Gold was paid by Mr. Gillham to the Clarkes as a "holding fee" on a mine called the 'Hill Top' in the Sofala district near Bathurst. Exhibits 39 and 40 evidence these payments. Exhibit 40 indicated that the holding period would last for some two (2) months to 29th November, 1972, and thereafter a separate agreement between the parties would be executed.

There is no evidence to show that any agreement was executed shortly after 29th November, 1972, but around 12th December, 1972, Mr. Gold found himself in financial difficulties as a result of increased activities by the Victorian Police (he distributed pornographic literature) and had to withdraw from the arrangements. It is clear then that he assigned to Mr. Gillham without apparent cost his interests under the two agreements of the 29th September, 1972, and informed the Clarkes of this fact.

On 29th December, 1972, further discussion having taken place between the Clarkes and Mr. Gillham the two agreements (Exhibits 4 and 5) were executed between the Clarkes on the one hand and Mr. Gillham on the other. Mr. Gillham paid to each of the Clarkes a cheque for $2,500. Other matters took place on the 8th January, 1973, and early in March, 1973, which will be referred to later; but on the 29th March, 1973, Mr. Gillham who had been a resident of Western Australia moved to Bathurst with the stated intention of conducting mining activities. As no mining leases were granted over the subject areas nor had there been any consent granted to mine pending the application for such leases, Mr. Gillham confined his activities only to cleaning up the area and de-watering.

Mr. Gillham attended to the de-watering and preparation activities expending not only his own funds but those of Dr. Kitson, who is mentioned later, during the major part of 1973. On the 24th November, 1973, the Clarke Brothers attended Mr. Gillham's residence which was then at Wattle Flat near Bathurst and discussed further payment under the agreements (Exhibits 4 and 5). On that same day Mr. Gillham ceased work on the mine where he had been de-watering. On 26th November, 1973, a special lease no. 645 was granted to the Clarkes in response to their application no. 484. On 26th December, 1973, the Clarkes by letter (Exhibit 21) made a demand for payment of the sum of $8,000 of Mr. Gillham. By reply dated 10th January, 1974, Mr. Gillham declined payment (Exhibit 20) indicating that in his opinion the next payment was due on the

.../5

26th May, 1974. Correspondence then took place between solicitors for the parties, which correspondence is Exhibits 11 to 19 inclusive.

A further meeting had taken place during the year of 1972 which was to have considerable effect upon the relationship between the complainant and the defendants. In that year Mr. Gillham met a medical practitioner called Leonard Richard Kitson and subsequently there was an agreement between these two men. Dr. Kitson had from then onwards until April, 1974, paid to Mr. Gillham several thousand dollars on the basis that Dr. Kitson would share in the profits of the gold mining venture. After disagreements between Mr. Gillham on the one hand and the Clarke Brothers on the other, Dr. Kitson withdrew his financial support for Mr. Gillham and subsequently has made an arrangement to purchase lease no. 645. The transfer of this lease has been lodged with the Mines Department but that Department has declined to cause it to be registered because of the pending litigation.

The above is a brief summary which sketches an outline of the circumstances of this matter which are not in dispute, but it is necessary now to examine more closely the evidence and exhibits.

The agreements which are Exhibits 4 and 5 were signed by the parties voluntarily. They appear to have been executed on the same day namely 29th December, 1972, and as to the need for separate agreements, bearing in mind that the wording excepting for certain numbers is identical, it seems that the 'Hill Top' mine described as lease no. 98 in Exhibit 5 had been applied for separately to that of certain other titles described in Exhibit 4. Mr. Gillham explained the reason for the separate agreements by saying that the Clarkes wanted the consideration under Exhibit 4 to be $50,000 and that under Exhibit 5 to be only $20,000 to ensure that a third party received only a share of the $20,000 and not of the $50,000. That third party was named Keith Bertram who was not called to give evidence.

Of the authorship of Exhibits 4 and 5 I feel it safe to say that they were created by Mr. Gillham using old forms of leases and other legal documents pertaining to mining which he had in his possession and he had drafted clauses from those into the agreements (Exhibits 4 and 5). Mr. Gillham agreed that he had come forward with the forms of the lease and that they were typed by a person called Marsh. At page 352 of the transcript he confirmed that they had been prepared in the office of a person called John Summerville Smith, and on the following page Mr. Gillham agreed that the agreements had been from a similar type of agreement which had been altered appropriately.

Both Exhibits 4 and 5 in Clause 2 contain a schedule setting out various dates six months apart with payment to be made on those dates. They contain a provision that 2½% of all gold recovered was to be paid to the Clarkes at all times regardless of whether the areas were sold subsequently by the purchaser, Mr. Gillham, and the final paragraph of Clause 2 provides "This agreement will become operative from the date when approval is granted by the New South Wales Claims Department for mining operations to commence."

There is no mention in that last mentioned clause and the schedule of payments as to what the state of affairs would be if mining operations were approved over only one of the "leases" and not of the remainder.

Clause 3 of the agreements provides that possession of the "leases" shall be given by the vendors and taken by the purchaser from the date of the agreements viz. 29th December, 1972, while Clause 4 contains a covenant by the vendor with the purchaser that the "leases" are free from all encumbrances, liens and charges of any description.

The Clarkes were in no position at all to give Mr. Gillham possession and their covenant for freedom from encumbrances was

.../7

worthless. In fact the "leases" in the agreement (Exhibit 4) that are numbered 484, 233, 116, 218, 219, 106 and 119 were not leases at all nor was "lease no. 98 the subject of agreement (Exhibit 5) a lease. I set out herein the factual situation in relation to the origin of the numbers :-

484. This was an application for a gold mining lease made on the 13th October, 1972, by Mr. L.J. Clarke with Mr. F.R. Clarke subsequently named as nominee with the original applicant.
Special lease no. 645 was granted as a result of application no. 484 for 20 years to the Clarkes on the 26th November, 1973. That lease is still current and is referred to throughout the evidence as the "Big Oakey".

233. This was a surrendered gold mining lease to which the Clarkes had no title excepting that the former lease area itself of 233 was included within the overall area of the land which was the subject of the application no. 484, as mentioned above.

218
and
219. The same situation applied to these numbers as to 233 above.

116. This was an application for authority to prospect made on the 26th September, 1972, by Mr. L.J. Clarke at the instance of Mr. Gold. This application was refused on the 12th July, 1974, and is within an area known as "Hill End".

106. This was an application for authority to prospect made by Mr. L.J. Clarke on the 23rd October, 1971. This was refused on the 15th June, 1973, and is also within the area known as "Hill End".

118. This was an application for authority to prospect made by Mr. L.J. Clarke at the instance of Mr. Gold on the 12th October, 1972, and which was refused on the 12th July, 1974. This also was included in the area known as "Hill End".

119. This was an application for authority to prospect made by Mr. L.J. Clarke at the instance of Mr. Gold on 12th October, 1972. This application was granted on the 12th November, 1973, and the authority to prospect was cancelled on the 30th August, 1974. This area was known as the "Dead Horse".

98. This was an application for authority to prospect made on the 16th October, 1971, by Mr. L.J. Clarke but apparently not at the instance of Mr. Gold. This application was granted and the authority to prospect expired on the 13th September, 1974. This area was known as the "Hill Top".

As can be seen from the above, nos. 233, 218 and 219 were part and parcel of lease application no. 484 and have been subsequently covered by a valid lease no. 645. However their insertion in the agreement (Exhibit 4) was merely repetition.

The backgrounds of the parties are interesting. Mr. Gillham and Mr. L.J. Clarke are each men of considerable experience in mining while Mr. F.R. Clarke while he has worked as a miner is a Detective Sergeant in the police force of Western Australia. It seems that the Police authorities in that State are aware of this matter (Mr. Gillham was one informant) and have taken no adverse action. As at the date that the agreements were signed, Mr. F.R. Clarke who purported to agree to sell certain titles to Mr. Gillham had no rights at all to do so because it was not until the next month that his brother Mr. L.J. Clarke communicated with the Mines Department to have Mr. F.R. Clarke included in the various titles as nominee. However, Mr. F.R. Clarke has deposed that an oral agreement existed between his brother and himself which gave him a half share which he sought to convey.

It seems to me necessary to examine the various types of titles under the Mining Act 1906 as amended, which legislation has

now been repealed but which operated as at all relevant dates for the purpose of this matter. That Act by Section 17 provided that a person could apply for an authority to prospect over crown lands. As the name indicated a successful applicant could merely prospect and not mine on such lands. It was provided by sub-section 8 that such an authority could be issued for a period of 12 months but that it could be further renewed for a further period not exceeding 12 months. On the other hand it was provided at Section 23 et.seq. that a lease could be granted over crown land, the conditions of such lease were within the discretion of the Governor and Section 38 provided that it should be granted for a term not exceeding 20 years. It was also provided by Section 28 that pending the granting of a lease the Minister could give consent to mine, on certain conditions.

I have been at pains to set out these provisions because Mr. Gillham has sworn in evidence that as at the date that he executed the agreements Exhibits 4 and 5 he was not conversant with New South Wales Mining law but was working from what he thought to be the state of the law as existed in Western Australia. At page 48 of the transcript he outlined the state of the law in Western Australia and suffice for me to say that with one or two small corrections his statement as to the law of Western Australia set out on that page is correct i.e. that a person may apply for a prospecting area or a gold mining lease but if he applies for a prospecting area he is able if over crown lands to have it granted for a period of 12 months with a further right to renewal for 6 months. During the pendency of the approval for the prospecting area he may apply for a gold mining lease but prior to such application must promptly peg the area and on application submit a conditional surrender of his prospecting area title. On receipt of the application there is provision for a thirty day period during which objections may be lodged and then hearing is arranged before a Mining Warden.

The land at Bathurst the subject of this matter is Crown land.

.../10

Although Mr. Gillham claimed that he did not know how the New South Wales mining laws operated, at no time did he claim that he understood "leases" to mean anything other than the right within the holder to conduct mining activities and further at no time did he claim that he understood "authority to prospect" or "prospecting area" to be anything other than a right within the holder to conduct prospecting activities and not to mine.

Notwithstanding that the agreements provide that the operation of them would commence from the date of approval for mining operations to commence, and obviously they could not commence on the 1st January, 1973, because all parties were in Western Australia, Mr. Gillham on execution of the agreements gave to the Clarkes two cheques totalling $5,000 in accordance with the first entry on the payment schedule contained in Clause 2 in Exhibit 4. As to the first entry in the payment schedule in Exhibit 5 this sum the Clarkes agreed had already been paid to them for they appropriated with Mr. Gillham's consent, and it seems with the acquiesance of Mr. Gold, one of the sums of $1,000 which had been paid to them on the 29th September, 1972, to which I have previously referred. Mr. Gillham's cheques for $2,500 each could not be cashed by the Clarkes forthwith because he post-dated those cheques. As it transpired Mr. L.J. Clarke cashed his cheque for $2,500 on 22nd January, 1973 and Mr. F.R. Clarke cashed his for the same amount on the 5th June, 1973. So at this stage the Clarkes are holding $5,000 under Exhibit 4 which sum originated from Mr. Gillham, and there is no evidence to suggest that the money came from anywhere other than Mr. Gillham's own funds.

Having signed the agreements on 29th December, 1972, Mr. Gillham travelled to New South Wales in early January, 1973, and came to the New South Wales Mines Department with Mr. L.J. Clarke on the 8th January, 1973. At that department Mr. L.J. Clarke inquired of an officer in the presence of Mr. Gillham as to the time that it would take for approval to be granted to mine

and it seems that that officer informed Mr. Clarke that there would be a delay of some months. The fact of this visit is also confirmed in a Mines Department file which is Exhibit 45 wherein a note is made, signed twice by Mr. L.J. Clarke, to the effect that he attended the Mines Department on the 8th January, 1973 - he later agreed that it was the 8th and not the 10th as he had previously claimed - requesting urgent consent to mine the area as he had equipment being transported from Western Australia to mine the area and that an agreement had been made with a West Australian company to work the area. The further note on the file is that it was established that the area applied for (which was under special lease appn. 484) was a surveyed portion and that Mr. Clarke stated that all pegs were intact. He was informed that the Warden's Bailiff would inspect the area at a later date to confirm these facts, and due to that fact (that it was a surveyed area and that pegs were in place) a lease may be granted in satisfaction of the application and not consent to mine pending the lease. So it is clear that while the agreements dated 29th December, 1972, (Exhibits 4 and 5) speak of areas as being "leases" as early as the 8th January, 1973, Mr. Gillham was on notice that no lease existed and that he had no right to mine on the areas which he had purported to purchase. He sought at that stage not to rescind the agreements.

As to Mr. Gillham's claim that the misrepresentation to him by the Clarkes induced him to execute the agreements (Exhibits 4 and 5) and to put him in the position where he was seemingly buying leases which have been found subsequently not to exist, the Clarkes have a different version of what took place prior to execution of the agreements. On page 381 of the transcript Mr. F.R. Clarke said that after Mr. Gillham had said that he would pick out a form of agreement and prepare it "appropriate to the occasion", and when he had seen the first draft Mr. L.J. Clarke had complained to Mr. Gillham about the use of the word "leases". Mr. F.R. Clarke then continued his evidence and said that Mr. Gillham had said "Look don't worry about that". An old Mines

Department map was then perused. Mr. Clarke deposed that that map was 50 years old and showed the numbers of old leases 233, 218 and 219. He said that Mr. Gillham had counted them and other leases showing the run of strike and said "I do not want the leases. What I want you to do is to carry out my diamond drilling programme and where I want to apply for a lease you apply for a lease". Mr. F.R. Clarke replied "Yes that is right but we intend to put two more paragraphs in these agreements." These paragraphs Mr. F.R. Clarke then said were inserted, firstly that the requirements of the New South Wales law applied to the agreements and, secondly that they would not become operative until approval was granted by the New South Wales Mines Department to commence mining operations. He was asked what Mr. Gillham had said about the numbers that were inserted, and Mr. Clarke replied that 233, 218 and 219 were part of application 484 for the "Big Oakey" area and were shown on the maps which had been shown to Mr. Gillham and Mr. Gillham had accepted this and the two new paragraphs prior to execution of the agreements.

At page 520 of the transcript Mr. L.J. Clarke claims that the agreement (Exhibit 4) related only to the "Big Oakey" mine and that Mr. Gillham had added the other numbers himself. Mr. Clarke continued "I pointed out to him that these were not leases as he stated here and they were not in relation to the "Big Oakey" mine and as far as I was concerned I pegged them for Gerry Gold and they were reverted back to us in a previous agreement with Gerald Gold but he failed to meet his obligation on 12.12.72 and then these areas that we had pegged would revert back to us and become our obligation." He was further asked at page 521 "Did you supply similar information in relation to some of the other areas as well?" He replied "I supplied a scanty bit of information about "Hill Top" because a lot of these old mines go back many many years and the records are lost and some were destroyed in a big fire that occurred many many years ago in the Mines Department and you can not get a full report, but the

only one carried out was the "Big Oakey".

At page 543, Mr. L.J. Clarke said in relation to the inclusion of the numbers in the agreements "I pointed out to Mr. Gillham that those numbers that he had indicated there, 106, 116, 118 and 119, were the areas he had got me to peg for Gerald Gold? I said they were not leases and he replied, yes, I know. He said, I would not know how many leases I would want on the area. I said you understand that as regards the other numbers, 233, 218 and 219, they are the old measured portions which (you) he already had a map of and they were obvious what they were, two old extinct leases. They go to make up the application 484. That is the only reason why I am prepared to sign this if this is acceptable between us." I said I know what they are and I have got to peg them. He said, "That is O.K. Nobody would fail to understand a thing like that".

Therefore, on the oral evidence, while Mr. Gillham claims that he believed the "leases" in the agreements (Exhibits 4 and 5) were in fact leases at the time of the execution of the agreements the evidence from the Clarke Brothers is that he was informed otherwise.

Mr. Gillham contends that he returned to Western Australia having been told on the 8th January, 1973 that there was no permission to mine and that early one morning in March of 1973 Mr. F.R. Clarke had called at Mr. Gillham's home and made the following comment "Are you there, Frank? She's through mate, you can go and get stuck into it. Can I cash my cheque?" This statement is confirmed by Mrs. Gillham. Mr. Gillham maintains that this statement having been made to him by one of the vendors under the agreements he understood that to mean that he could move his family and mining plant from Western Australia to Bathurst and commence mining operations. He proceeded to move, arriving in Bathurst on 29th March, 1973. Mrs. Gillham having disposed of her business commitments and leasing her home in Western Australia

.../14

prior to this.

Now as to this statement by Mr. Gillham that he was informed that permission to mine was approved by Mr. F.R. Clarke on that morning in March, 1973, in Western Australia, Mr. F.R. Clarke has said that in fact he called at the Gillham home one morning in March, 1973, and did in fact make a statement to Mr. Gillham about the mine. At pages 386-387 of the transcript, Mr. F.R. Clarke outlined that his brother had made inquiries of the Mines Inspector at Bathurst, Mr. Collins, and that that officer had given permission for preparatory work to be undertaken in respect of the mine in order that when the authority to mine came through the lease would be ready for mining operations to commence. Mr. F.R. Clarke continued his evidence thus "When I called my brother (and obtained the information that I have just set out) I was on my way up to work and on the way back I called in to Gillhams place. I thought Mr. and Mrs. Gillham were still in bed and I said "There is no worries, she's through. Everything will be all right. See you tonight." Mr. F.R. Clarke then gave evidence about a telephone conversation that he then had with Mr. Collins, the Mines Inspector, and it was to the effect that Mr. Collins would be recommending that the lease would be granted. Then in the evening of the same day Mr. F.R. Clarke had again called at the Gillham house and told Mr. Gillham what had transpired and gave him an outline to the effect that Mr. Collins had prohibited the breaking of ore but had simply permitted preparatory work. Mr. Clarke deposed at page 388 of the transcript that Mr. Gillham had said "That is good enough for me".

It is a fact that Mr. F.R. Clarke had telephonic conversations with the Mines Inspector, Mr. Collins at Bathurst, and at pages 193-194 of the transcript Mr. Collins made reference to a telephone call although he could not remember the date.

So there is confirmatory evidence of telephonic communication between Mr. F.R. Clarke in Western Australia and the Mines Inspector, Mr. Collins at Bathurst, prior to Mr. F.R. Clarke

.../15

informing Mr. Gillham to the effect of which both Mr. Gillham and Mr. Clarke deposed.

After he arrived in Bathurst in March, 1973, Mr. Gillham set about the preparatory work of cleaning up the mining area and general de-watering. He had from time to time obtained funds from Dr. Kitson and with the assistance of these together with his own contributions of money and work proceeded he says to place a road into the mountain side down to the "Big Oakey" mine on lease application 484. He said in evidence that he was continually inquiring of the Clarkes as to when he could commence mining activities. So it is clear that not only was he on notice from the 8th January, 1973, that the "leases" could not be mined but he was also aware after he had arrived in Bathurst that he had no right to mine. At no stage during these times did he ever seek to rescind the agreements.

In evidence Mr. Gillham claimed that it was the failure of the Clarkes to present him with a viable mine from which he could obtain a cash flow which had caused the venture to founder. But it is clear that having become aware of the facts that the mine could not be worked as a gold mine he still continued to work on the site in preparation activities and spent not only his own funds but those of Dr. Kitson.

As to the amounts expended Mr. Meakin, an accountant, was called to give evidence. He had been asked by Mr. Fitz-Gibbon to carry out an audit of Mr. Gillham's books of account and having done so gave evidence of what he had found. As far as the records which the Gillhams kept correctly recorded the transactions, the monies received were accounted for in the mining venture or for sustenance in connection with it. These included wages. The Exhibit No. 32 is Mr. Meakin's breakdown of the financial dealings in respect of the venture. In summary the effect of Mr. Meakin's evidence upon me was that I conclude that while the accounts were arithmetically correct he was not able properly to identify

recipients of certain cheques. For example, on occasion cheque butts were not endorsed - pages 272 and 273 of the transcript - and could have been negotiated by any one - page 270, cheques for petrol purchased need not have been for that commodity at all - page 276, and some entrees for personal expenditure may have been for mining purposes - page 288.

Mr. Meakin's assessment of the expenditure made by Mr. Gillham from the contributions received from Dr. Kitson and from his own funds are set out in Exhibits 34 and 35. In particular the second page of Exhibit 34 sets out the following summary.

SUMMARY OF BANK DEPOSITS AND BANK ACCOMMODATION

Total amount from Dr. Kitson	$13,330.00
Total amount from Gillham	$14,314.04
Overdraft accommodation	$ 5,000.00
Excess in overdraft accommodation as at 4.11.74	$ 2,110.47
	$34,754.51

Mr. Gillham at page 54 of the transcript deposed that Dr. Kitson had advanced him approximately $13,000 in connection with the mining venture while Dr. Kitson at page 240 of the transcript said that this figure would have been more correctly in the vicinity of $15,000. It seems also that there was overdraft accommodation of some $5,000 which had been exceeded by an additional $2,000 approximately.

It was in November, 1973, that special lease no. 645 was granted in response to application 484 and it was in the same month that Mr. Gillham ceased working on the mine site. Subsequently he refused to make further payments under the agreements.

After Mr. Gillham had ceased working on the site he made an application to the Minister for Mines to forfeit lease no. 645 because of non-compliance with labour conditions. He agrees that he did this in order to obtain the title to the lease and because the Clarkes had misrepresented to him in the contracts that they had the title to leases which in fact turned out not to be leases.

However it is obvious that Mr. Gillham himself had performed work on the area the subject of special lease no. 645 and he would have been aware of this fact when he made the application. No action was taken on his application. The unsuccessful complaint in regard to labour conditions however was made by Mr. Gillham to the Department of Mines during the very period referred to immediately hereafter during which the Clarke Brothers, Dr. Kitson and Mr. Gillham were negotiating with a view to settlement of the matter.

Notwithstanding the fact that there had been disputes between Mr. Gillham on the one hand and the Clarkes on the other and that Mr. Gillham had refused to make further payments (as indicated by Exhibit 20), in February or April, 1974, the parties further negotiated towards a settlement in the matter. A draft agreement which is now Exhibit 24 was prepared by solicitors and a meeting was arranged at the surgery of Dr. Kitson so that the Clarkes and Mr. Gillham could attend there with the doctor for the purpose of signature. However while that meeting took place the agreement was not executed and it is now common ground that the reason for the failure by Mr. Gillham to execute that agreement was his claim that the Clarkes had pegged out another area adjacent to special lease no. 645 upon which a dam was constructed and where water was available. Mr. Gillham claimed that this was another attempt by the Clarkes to make the working of the lease impossible. The Clarkes on the other hand replied that their application in respect of an area adjacent to lease no. 645 and upon which a dam wall was constructed was merely made to acquire the rights to the water and that it would have been transferred to Mr. Gillham and Dr. Kitson free of any further charge. Whatever the case, Mr. Gillham refused to sign the draft agreement and it has remained unexecuted. Dr. Kitson gave evidence and said in regard to that agreement that he had been prepared to sign it and that it came as some surprise to him that Mr. Gillham did not know that the special lease 645 did not include the dam area.

.../18

Dr. Kitson, having financed Mr. Gillham over 1973 and for the early months of 1974, in about April, 1974, withdrew payment of funds to him. It was then that Dr. Kitson commenced negotiations with the Clarkes and it seems that those negotiations had come to fruition because the Clarkes have contracted to sell the lease no. 645 to Dr. Kitson with a mortgage back by him to the Clarkes. Of Mr. Gillham Dr. Kitson says that initially he had considerable faith in him but it was only after being frustrated in his attempts to get Mr. Gillham to account for monies received and for expenditure and being supplied with only vague reports that he ceased financing Mr. Gillham. Subsequently Dr. Kitson approached the New South Wales Police and Mr. Gillham was subjected to an investigation by detectives from the Fraud Squad including Detective Sergeant Collins. Their file on that investigation is Exhibit 26 and it would appear that no court proceedings have been instituted as a result of that investigation. Additionally the Clarkes had approached the Bathurst Police in regard to some missing mining equipment and Detective Raynor having investigated the matter it seems concluded that it was one for civil action and again no police proceedings were instituted against Mr. Gillham. During his evidence Dr. Kitson also complained that Mr. Gillham had improperly sold a caravan, the purchase of which he, Dr. Kitson, had financed in connection with the mining venture.

It is a basic part of Mr. Gillham's case that when he signed the agreements (Exhibit 4 and 5) he firmly believed that he was buying valid leases and nothing less than leases. Further that when he discovered on the 8th January, 1973, that the areas could not be mined and having returned to Western Australia the statement by Mr. F.R. Clarke that the lease was "through" brought him to believe that he could commence mining operations and that that is why he moved himself and his family from Western Australia to Bathurst. However there are certain parts of the evidence

which indicate that Mr. Gillham knew that the "leases" prior to execution of the agreements (Exhibits 4 and 5) were not leases at all.

At page 93 of the transcript he was asked :

"Q. If you didn't think the numbers that were there (in the agreements Exhibits 4 and 5) were prospecting numbers when you arrived there what did you think they related to? A. I was told that applications had been made for leases.

Q. For 6,000 acres? You don't honestly say that you thought that 6,000 acres had been applied for by way of a lease? A. Each authority to prospect was supposed to have at least one gold mining lease on it. That was my terms and my contract with the Clarkes.

Q. And when you arrived here did you say to them where, on the prospecting application areas, have the leases been pegged?

A. No I did not.

Q. Because at all times you knew that that had not been done?

A. How do I know?

Q. Because you say those prospecting areas were to have had on them a lease application made is that right? When did you believe that had to be done? A. They told me that was being done forthwith.

Q. Then that was after 29th December, 1972, was it? A. No that was before that Agreement was signed. They said that they made application for these areas on the day they signed that Agreement.

Q. You thought then that these numbers related to applications for leases is that what you say? A. Certainly.

Q. Do you think there is a difference between an application for a lease and a lease? A. An application or a granted lease?

Q. Yes? A. Well certainly."

And then at page 94, having been shown Exhibits 4 and 5, Mr. Gillham replied to a further question about them "When this agreement was signed I believed they were all leases and it states in there they were all leases signed by the Clarkes."

Further at page 140 of the transcript when being

questioned about Exhibit 5 Mr. Gillham said that he believed that no. 98 which is the subject of Exhibit 5 was a granted authority to prospect. When he was further questioned he moved ground and said that the Clarkes had represented to him that no. 98 was a lease.

Again at pages 355, 356 and 357 the following questions were asked of Mr. Gillham and he gave the answers as set out :

"Q. I asked you a very simple question. Did you believe the areas that were pegged for Mr. Gold to be included in the areas referred to in the agreements of the 29th December, 1972?

A. At the time, I did not know what areas were to be included or whether they put them in or not.

Q. You did not inquire?

A. All I knew -

Q. What then did you think you were buying?

A. I thought I was buying gold mining leases, numbered so and so as handed to me by Mr. Clarke.

Q. Were they the same areas?

A. They were different when I went to Bathurst. I did not know whether they were all the areas or some of them.

Q. And for that you were willing to pay $70,000?

A. I would be prepared to go ahead with it.

Q. And then we find, some four days later, after you entered into this agreement, you were the recipient of this letter from Mr. Gold. What areas do you think that related to or do you not know again? (Exhibit 2).

A. That meant that he relinquished any rights or anything that he had in the Bathurst area to me.

Q. You had no idea what those areas were?

A. Of course I did, because the Clarkes had already given me the numbers in the agreement.

Q. When did they give you the numbers that the letter refers to?

A. That the letter refers to?

Q. What other letters do you think I may have mentioned?

"A. Any rights and leases of gold and other minerals in the Bathurst area.

Q. What did you think that referred to?

A. I knew.

Q. When did you find out what it was?

A. When did I find out what it was?

Q. When did you find out what it was?

A. After I came here from Western Australia.

Q. On which date?

A. -

Q. Did you not say that you knew what the areas were when you signed that agreement on the 29th December, 1972?

A. I told you previously -

Q. Did you or did you not know what areas were referred to in the agreement and what areas had been pegged as at the time of the signing of the agreement of the 29th December, 1972? Did you say that or not?

A. The areas I knew were the areas that I have said before.

Q. As at the signing of the agreement of the 29th December, 1972 have you said that you knew the areas that the Clarkes had pegged for Mr. Gold?

A. I do not know actually. The numbers were handed to me.

Q. Did you or did you not say that when you entered into those agreements dated the 29th December, 1972, which referred to areas 116, 106, 119 and 118, did you not say whether they were part of those areas that had been pegged?

A. I took them as roughly part of the same as for Mr. Gold.

Q. As at the 29th December, 1972?

A. Yes.

Q. They guessed?

A. I did not actually guess.

Q. Did you know?

A. Well, I took Det. Clarke's word for it.

Q. They were the same areas that had been pegged for Mr. Gold, is that right?

"A. No.

Q. What is the case then?

A. The answer is that he handed me the bundles of numbers and the numbers were included in the agreement.

Q. I am speaking of areas and not numbers. Do you understand that? Do you realise that the areas that I referred to by the numbers you said you knew what areas they were? Did you know what they were at the time of the entering of the agreement on the 29th December, 1972?

A. I knew where they were but I did not know what they were.

Q. You had no idea what they were? What did you think they were?

A. I had an idea what they were.

Q. Did you know what they were or what did you think they were?

A. I thought they were gold mining leases.

Q. Did you know where they were?

A. Not all of them.

Q. Which ones did you think they were?

A. At that time, 98 and 484."

Subsequently at page 359 Mr. Gillham was asked when referring to the series of numbers as set out in Exhibits 4 and 5 :

"Q. So those are the ones that you wanted to have transferred to you from Gold. Is that right? And that is what you believed happened by that letter (Exhibit 2). Is that right?

A. They are the ones that finally were handed to me by Clarkes as I have stated several times.

Q. Because at the date of signing those agreements you knew very well that the areas 106, 116, 118 and 119, those four areas had already been transferred to you as far as you were concerned?

A. From Mr. Gold?

Q. Yes.

A. Well he had given me the right to negotiate matters with the Clarkes.

Q. Did not you get some transferred to you from Mr. Gold? Did not the question come into your mind 'What is Mr. Gold transferring to

.../23

"me? Didn't it occur to you?
A. Yes it did.
Q. What did you think Mr. Gold was transferring to you?
A. Whatever rights he had."

It must not be overlooked that Mr. Gillham had acted in an advisory capacity for Mr. Gold in the initial stages when Mr. Gold had sought interests in gold mining leases and that Mr. Gillham must have been aware that the Clarkes had pegged out some areas at Bathurst for Mr. Gold under that original commission. In addition to the evidence that I have already quoted and to that observation, Dr. Kitson at page 250 deposed that there was no doubt in Mr. Gillham's mind that the "leases" in the agreements were not gold mining leases, and at page 252 of the transcript he has sworn that Mr. Gillham had told him that there would be a waiting period before mining could commence, and that Mr. Gillham knew this from the outset.

The suggestion from the evidence given by Mr. Gillham is that he was an innocent party at the signing of the agreements, Exhibits 4 and 5, and that he did not know that the titles described as "leases" were in fact not leases at that time. I find it is difficult to accept that to have been the case. I accept on the other hand that the nos. 218, 219 and 233 which were shown as gold mining leases in Exhibit 4 were in fact on old maps which had been seen by Mr. Gillham prior to execution of Exhibit 4 and that as the Clarkes had recently pegged out areas at Bathurst on behalf of Mr. Gold Mr. Gillham must have at least suspected that these were the very areas which he was purchasing from the Clarkes.

Even if the Court were prepared to accept that Mr. Gillham did not know that the "leases" were not leases there is evidence to show that he became aware shortly after the execution of the agreements i.e. on the 8th January, 1973, as to the deficiency in title. As I have said he sought not to rescind the agreements notwithstanding the fact that he was told

.../24

on the 8th January, 1973, that he could not mine on the areas and in spite of the fact that they cast upon him a liability to pay $70,000, some $5,000 of which he had paid to the Clarkes at execution of the agreements and had given a further credit for $1,000.

As to the versions of what took place in March of 1973 when Mr. F.R. Clarke called at the Gillham home I find that Mr. Clarke's statement as to what took place is the more acceptable of the two. It has been confirmed by evidence that Mr. Collins had given authority to commence preparatory work in the nature of cleaning up and de-watering, and it has also been confirmed that Mr. Clarke had telephone conversations with Mr. Collins. Even so, if the Court were to accept Mr. Gillham's version that Mr. Clarke had told him that morning in March of 1973 in Western Australia that approval had been given to commence mining operations, one wonders why Mr. Gillham once he had come to New South Wales and found that he could not mine, but could only do preparatory work and de-watering, did not immediately go to the Clarkes and rescind the agreements, otherwise complain or seek legal advice about his position. His only reaction however was to install himself and his family and proceed with only preparatory and de-watering work, expending considerable monies in the process. One could be forgiven for thinking that the reason why he made no complaint or took no rescission action at that time was because he understood the position before he left Western Australia that when he came to New South Wales and arrived in the Bathurst area he could not conduct mining activity but could merely do preparatory and de-watering work.

Mr. Gillham has seen fit to commence these proceedings and claims specific performance and damages from the Clarke Brothers. Certainly the hands of the Clarke Brothers are by no means clean in the light of the fact that they executed the agreements Exhibits 4 and 5 which told deliberate untruths.

.../25

I find however on the preponderence of evidence that it is more likely than not that when Mr. Gillham signed the agreements he knew that the leases described therein were not leases in that they could not be mined. However the fact that the agreements should tell the untruths which are obvious from a reading of them must have a bearing on the result of this matter.

Having so held I now turn to the agreements. Dealing firstly with Exhibit 4, it is apparent that Mr. Gillham paid to the Clarkes two cheques each of $2,500 which funds came from his own resources and which the Clarkes have now retained.

As at the date that Mr. Gillham paid the $5,000 to the Clarkes the contracts by my interpretation had not commenced. I base my opinion on the clause contained in Exhibit 4 which is to the effect that the agreement would not commence until approval was granted by the New South Wales Claims (sic) Department for mining operations to commence. It is common ground that mining operations were not approved until 26th November, 1973, when lease no. 645 was granted. Therefore Mr. Gillham could not have been put into possession as at the date of execution of the agreements and of course the Clarkes had no leases to convey to

.../26

Mr. Gillham as at that date. While the Conveyancing Act, 1919 as amended by Section 55 speaks of the right of a purchaser to recover a deposit it is obvious from a reading of that Act that the Warden's Court is not a "Court " which can exercise a discretion under that Section.

Notwithstanding that fact, I am of opinion that Mr. Gillham should have returned to him the deposit which he paid. In fact, he has received nothing of value from the agreements and the Clarkes have given evidence to the effect that had no lease been granted over the area, the deposit which Mr. Gillham had paid would have been returned to him. Therefore in all the circumstances it seems to me just and equitable that the deposit which he paid should be returned.

Having so decided I turn then to the remainder of the claim which is supported by Exhibit 4.

Having indicated that the deposit should be returned it ought to follow that specific performance should not be granted, and while this is the case, it will be discussed later. As to the question of other damages however, having held that Mr. Gillham is entitled to receive the $5,000, it seems to me that any other expenditure must be his own responsibility. I cannot see how he can properly support his claim under Exhibit 4 by saying that he was induced by Mr. F.R. Clarke in March, 1973 to move from Western Australia to Bathurst. He was made aware that the "leases" could not be worked in early January, 1973 and chose then to continue with the matter. True it is that in March, 1973 there was a conversation between Mr. Gillham and Mr. F.R. Clarke about moving from Western Australia to Bathurst but I find as a fact that that conversation was to the effect that Mr. Gillham could move to Bathurst only on the basis of his doing preparatory work and

not carrying out mining activities. In other words I find that Mr. Gillham's action in spending money not only of his own but also of Dr. Kitson was because he sought to take no action to terminte that agreement and the Clarkes should not be called upon to reimburse such expenditure.

As to claim 7(a) in the summons that the Clarke brothers be specifically ordered to transfer to Mr. Gillham lease number 645 I note Mr. Fitz-Gibbon's comment in his final address that there would be little or no use in asking for specific performance. It is apparent on the evidence that Mr. Gillham failed to make the second payment under the schedule of payments in Exhibit 4. It is also apparent from the evidence that he was relying for that second payment on a viable cash flow from the mine and it is obvious now that he has not been working the mine. I feel therefore that no purpose would be served by my ordering specific performance, and I decline to do so.

Still on the subject of Exhibit 4, Claim 7(c) sets out that the claimant requires the defendants to pay $6,000. It seems to me, for the reasons that I have above set out, that this figure should be $5,000 and I propose to make an order against each defendant in this sum.

As to Claims 7(d) as amended and 7(e), these mention amounts expended for plant, equipment, site improvements and for wages. It is obvious from the evidence that amounts were expended by Mr. Gillham from his own funds as well as from those of Dr. Kitson under these headings but I am of opinion that Mr. Gillham's activities in spending these monies is is own responsibility. Such opinion is arrived at for the reasons set out above. Therefore, in regard to claims 7(d) and 7)e), I make no order in favour of the complainant.

Reverting to Exhibit 5, by Claim 7(b) Mr. Gillham claims payment of the sum of $1,000 from the Clarkes. This was in

...28

respect of the credit that the Clarkes gave him in regard to money that originally he paid to the Clarkes on behalf of Mr. Gold. While there is correspondence in the exhibits and oral evidence which indicate that Mr. Gold sought to transfer all his interests to Mr. Gillham, I have serious doubts that Section 12 of the Conveyancing Act had been complied with in relation to the assignment of the debt of $1,000 owed by the Clarkes to Mr. Gold. I would feel therefore that Mr. Gillham's claim to the $1,000 is in-secure. However further factors have important bearing on Exhibit 5. Unlike Exhibit 4 which had New South Wales stamp duty paid on it, Exhibit 5 had been the subject of no payment of New South Wales Stamp duty. I comment that while it was executed out of the State of New South Wales, it related to property within this State and it therefore appears to have been caught by the terms of Section 29 of the Stamp Duties Act, 1920, as amended.

Again, exhibit 4 was registered with the New South Wales Mines Department. Exhibit 5 was not. Section 109 of the Mining Act, 1906 as amended which legislation was in force until 29th March, 1974, provided by sub-section 4(b) that any transfer etc. was required to be lodged for registration, had no force or effect until it was registered under that section. I would feel that had Mr. Gillham believed that Exhibi5 related to a lease he might well have found it prudent to register it in accordance with Section 109. The Mining Act, 1973 which repealed the 1906 Act contains no identical provision but Section 107 provides that unless the Minister approves the transfer of an authority or any instrument giving a legal or equitable interest in an authority, it shall have no force or effect. Exhibit 5 was not approved as envisaged by Section 107.

I would feel therefore that the matters which I have above set out make it inappropriate for me to make any order in favour of the complainant in relation to Claim 7(b) and I therefore decline to do so.

.../29

I find formally for the complainant in the sum of $5,000 and I now seek to hear addresses firstly as to the period for payment and secondly on the question of costs.

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