

**IN THE MINING WARDEN'S COURT  
AT ST LEONARDS**

**J A BAILEY, CHIEF MINING WARDEN**

**THURSDAY 15 FEBRUARY 2001**

**CASE NO. 1999/135**

**EDWARD RANDALL HUDSON**

**v.**

**JOSEPH WOPENKA  
PHILLIP JAMES MYERS  
MARGARET ELIZABETH WARD  
JENNY WOPENKA**

**APPEARANCES AT HEARING OF 23 JANUARY 2001:**

Complainant: Mr W Browne, Solicitor of Browne Jeppesen & Sligar

Defendants: Mr J Wopenka appears in person unrepresented.  
Mr Phillip Myers appears in person unrepresented  
and as agent for Margaret Elizabeth Ward.  
Jenny Wopenka appears in person unrepresented.

**HEARING DATES:** 22 November 2000 at Lightning Ridge  
23 November 2000 at Lightning Ridge  
23 January 2001 at Lightning Ridge

**DECISION**

**HANDED DOWN IN ABSENCE OF PARTIES**

In this matter an urgent ex parte injunction, under the provisions of *Section 313 Mining Act 1992*, was issued on 16<sup>th</sup> November 1999, following the filing of a praecipe by the Complainant. That same praecipe sought, inter alia, the following final relief:

- A declaration as to the Complainant's interest in Mineral Claim numbers 43943, 43167 and 43168.
- A taking of accounts in relation to all transactions in relation to the Mineral Claims.
- An order that the Defendants do all such things and sign all such documents to give full effect to the orders of the Court and in the event of any party failing to do any act or sign any document then the Registrar of the Chief Warden's Court at Lightning Ridge be empowered to do such acts and sign such documents.

This matter first came before the court on 14<sup>th</sup> December 1999 and was adjourned on a number of occasions due to serious illness of some of the parties. Evidence was first received at Lightning Ridge on 21 and 22 November 2000 and was finalised on 23<sup>rd</sup> January 2001.

The following facts were not in dispute:

- Edward Hudson and Joseph Wopenka had been in a mining partnership for about 5 years prior to the injunction being issued.
- The partnership saw three phases. Initially Malcolm Holland was part of a three person partnership. After Mr Holland left, Mr Wopenka and Mr Hudson were in the partnership together, on a 50% basis each, both expenses and profits. In late 1998, a person named Hans-Jorgen Bauar who is also known as "Ted" joined the partnership. "Ted" lives in Germany and rarely visits Lightning Ridge. With Professor Bauar in the partnership, he paid all fuel costs and the three shared equally all other costs and profits.

- In 1998 the agreement, when Mr Holland was in the partnership, was that Mr Holland provide the hoist and compressor, Mr Wopenka supply the agitator and truck, and Mr Hudson supply the rest. Apparently Mr Holland had financial difficulties concerning the hoist and Mr Hudson ultimately supplied the hoist.

## **EXPENSES**

Following Mr. Hudson's wife falling ill, Mr. Hudson was away from the claims for "about 33 weeks over a couple of years". Mr. Hudson ran out of money and Mr. Wopenka carried all of the mining costs, which were to be paid back by Mr. Hudson when opal was found.

Mr Hudson's outstanding debt to Mr Wopenka is one of the issues to be determined in this case. Both parties produced a number of different receipts for expenses incurred during the partnership. Not all expenses have been documented; it is impossible to determine an exact figure of the expenses on the documents that have been produced. The court must place reliance upon the only other evidence, that is, the oral evidence of the parties.

Mr. Hudson told the court that Mr. Wopenka told him he was owed \$12,000 for those costs and Mr. Hudson told the court: "I didn't dispute that. It was left at that."

Later in cross-examination when he was asked about the amount owing, Mr Hudson said: "We were partners and friends, Joe said the figure was about \$12,000 and he added 'there was three for the bogger'. I certainly wasn't going to dispute those figures". At another point of time, Mr Hudson indicated that he had done nothing to check the accuracy of the figure that was quoted.

When Mr Browne, Solicitor, was making final submissions on behalf of Mr Hudson, I confirmed that Mr Hudson gave the abovementioned evidence about his debt to Wopenka. After conferring with Mr Hudson, Mr Browne acknowledged that was the Figure given in evidence but then submitted "we believe that the figure of \$12,000 was exaggerated. We believe a sum of \$3,000 to \$4,000 is generous".

There is a vast difference between \$3,000 and \$12,000. If Mr Hudson believed that the figure of \$12,000 was exaggerated when he gave evidence, one would have expected he would have made some comment about the sum of \$12,000 other than twice indicating that he wasn't going to dispute the figure and once stating that he did nothing to check the accuracy of that amount.

When Mr Hudson was being cross-examined he was asked whether he owed Mr Wopenka money, to which he replied "What I owed him he got out of the opal. I don't know how much was sold."

On the evidence placed before the court, I can only accept Mr Hudson's evidence that he owed Mr Wopenka \$12,000 for expenses incurred during the partnership.

### **BOGGER**

Although it is clear as to how the costs were to be paid in respect of each of the partnerships that Mr Wopenka and Mr Hudson were involved in, the parties appear to be silent as to apportioning costs of equipment supplied by each person. It can only be assumed that if an individual supplied equipment for mining within the partnership, that individual who supplied the equipment would retain the equipment at the conclusion of any partnership and the capital expenditure of each partner is not taken into account when expenses are shared.

The only dispute that is existing between Mr Hudson and Mr Wopenka, involving equipment, concerns the bogger. Mr Hudson informed the court that he had purchased a bogger for mining the claims and that he was paying it off to a finance company. In exhibit 4 he has outlined what he paid for his equipment that was used in mining. He has indicated that he paid a sum of \$11,200 for the bogger, this sum includes interest.

It is not disputed that \$3000 was outstanding on the bogger and that Mr Hudson did not have the finances to pay the finance company for that final instalment. Mr Wopenka paid the \$3000.

Mr Wopenka has indicated to the court that he now owns the bogger and he produced a letter from CBFC Limited, which states, inter alia: "We acknowledge receipt of your payment of \$3000 to purchase the abovementioned equipment". That letter which was marked exhibit 17 goes on to say: "Please note sale is on an as is, where is, basis and we have no further interest in the equipment."

Mr Wopenka wants the court to accept that exhibit 17 gives complete rights of the bogger to him and that Mr Hudson should not be considered to have any interest in it at all.

I cannot accept that proposition. I can infer from exhibit 17 that CBFC Limited exercised its rights over the bogger when Mr Hudson had defaulted on loan repayments. I can also then infer that a payment by a third party, of the balance outstanding, is considered by the finance company to be a sale of the bogger to that third party.

In the circumstances of this case, however, I cannot accept that Mr Wopenka can stand outside the partnership, take advantage of Mr Hudson's impecuniosity and negate any payments, made by Mr Hudson for the bogger, as being payments made towards Mr Hudson's contribution of equipment to the partnership.

Mr Hudson gave evidence as follows:- "At no stage did Joe ever say that he had purchased my bogger. He said, I'll never take the bogger."

The agreement was that Mr Hudson would supply a bogger to the partnership, which he did. Mr Wopenka had paid other expenses of Mr Hudson during the partnership, with a view to balancing the accounts when there was an opal find. The payment by Mr Wopenka of the outstanding \$3000 for the bogger is a matter which is to be considered as a \$3000 expense which Mr Hudson must account for to Mr Wopenka. When Mr Wopenka was being cross-examined about the bogger he was asked as to its whereabouts and he replied that he did not know. He was asked when was the last time he knew where it was, to which he replied: "When Hudson put on the injunction". Question: "Where was it then?" Answer: "At the campsite. Question:

“Your bogger disappeared then?” Answer: “Yes”. Question: “How did it disappear?” Answer: “I let it”. The bogger, being equipment supplied for mining within the partnership, should be returned to Mr Hudson, subject to the balancing of accounts.

## **PROFITS**

According to the evidence of Mr Hudson, when Mr Holland was in the partnership, \$39,200 in opal was extracted. Mr Wopenka sold \$35,000 worth and \$4,200 worth was sold locally by Mr Hudson and Mr Holland when Mr Wopenka was in the Philippines. Mr Hudson informed the court that he kept a record of that in a yellow book, which he kept as his own personal diary. The book was marked exhibit 3 in the proceedings.

Exhibit 3 is a 128-page exercise book, of which 5 pages contain entries which commence on 25 July 1997 and continue to 18 December, after which the words “XMAS SHUT DOWN” appear. On perusing the scant details on the pages of that book, I have been unable to see any single entry or combination of entries which indicates that \$4,200 was obtained from the sale of opals. I do not, however, have any reason to believe other than what Mr. Hudson states concerning the opals he and Mr. Holland sold.

In giving evidence as to the amount of opal sold Mr Hudson produced some documents before the court, particularly exhibit 3 and exhibit 2. Exhibit 2 is an incomplete document concerning a number of matters but it indicates that a total of \$3,800 was received for the sale of six individual opals. Exhibit 3 is an exercise book which dates from July 1997 and there is a daily notation of the amount of soil moved from the claim and details as to other matters that may have occurred. On the right hand side there is a figure for the amount received from the sale of opals. Between July 1997 and the end of that year there was a total of \$38,880 worth of opals sold.

On the last written page of exhibit 3 there are a number of figures written down with a total of \$78,460 appearing at one instance. In his oral evidence before the court Mr Hudson said that that was the total amount that was received from the opal. He

indicated further that there was one outstanding stone which Mr Hudson said was valued at \$42,500 and furthermore that Mr Wopenka was offered \$24,000 for it. Mr Hudson told the court that he informed Mr Wopenka that he should not accept anything less than \$30,000 for that stone.

Mario Ikasavic, opal dealer, gave evidence concerning an offer that he made to Mr Wopenka for an opal about a year prior to giving evidence. Mr Wopenka did not accept the offer which Mr Ikasavic indicated was either \$23,000 or \$24,000. Later in giving his evidence Mr Wopenka indicated that he was offered \$23,000. Mr Ikasavic gave evidence of another person putting a value of \$15,000 to \$16,000 on the same stone.

Mr Ikasavic was asked whether buying and selling opal in Lightning Ridge was a competitive industry. He replied that it was "cut-throat".

Mr Wopenka indicated that that particular stone had offers on it as low as \$4000. He told the court that he eventually accepted \$7000 for that stone. He informed the court that once any offer is made in Lightning Ridge for an opal and that offer is rejected by the seller, the opal dealers ring each other and all subsequent offers are less than the prior one. Mr Wopenka indicated that he needed to sell the opal and he could not get any more than \$7000 for it. There is no challenge to the fact that Mr Ikasavic had offered him \$23,000 for that same stone.

Mr Hudson informed the court that he approached Mr Ikasavic, informed him he was a partner of Mr Wopenka and questioned him about this opal. Mr Hudson went on to say: *Mario said Joe insisted it was worth \$30,000. Joe offered it around town and one buyer rang Mario and told him he was a fool to offer \$24,000 ... I said 'if I bring it in today, what would you give me', Mario said, \$20,000''*. Mr Hudson was asked when this conversation took place and he indicated "*I think February 2000*". He then informed the court that the partnership had ended in September 1999.

When questioned as to whom he sold the opal to for \$7000, Mr Wopenka was unable to give a name but thought it was a dealer who had come from the Gold Coast. He

told the court that he had no receipt for the sale of the opal and that this is a common practice within Lightning Ridge.

The Complainant produced a witness who gave evidence that he saw Mr Wopenka visit an opal buyer in Lightning Ridge in early November 1999. The Complainant wishes the court to accept this circumstantial evidence to infer that Mr Wopenka actually sold opal on that occasion and has not accounted to Mr Hudson for it. Mr Wopenka gave evidence that he visited the opal buyer simply to show the buyer photographs of Mr Wopenka's children.

On the evidence before the court I cannot be satisfied when Mr Wopenka was seen to enter the premises of an opal buyer in November 1999, that he sold opal which was the proceeds of the partnership with Mr Hudson.

Mr Wopenka was cross-examined as to his current position concerning his assets. He indicated that he does trade with opal dealers and that he is currently a pensioner. He owns his home together with his wife and there is no mortgage on it. When questioned as to whether he owns any other property he indicated that he purchased a block of flats about 14 months ago, and there is no mortgage on that property. He indicated that his wife had no separate income and that the money for the purchase of the block of flats was obtained as a result of a fishing trawler that was sold by his brother who subsequently died. It would appear that Mr Wopenka inherited the money from his brother. There are four flats in the block; three of which are rented and one is utilised by Mr Wopenka.

Mr Wopenka produced in court some small plastic bags, which contained some opal. He was asked whether that was all the remaining opal which belonged to the partnership, to which he replied in the affirmative. He was asked, Question: "Where is the rest?" Answer: "There is none". Question: "Isn't there buckets full?" Answer: "No."

Mr Wopenka's evidence is that the only other opal won from the claims was coloured patch that could best be used to make a coffee table top.



Mr Wopenka said that the values placed by Mr Hudson upon those opals produced in court were unrealistic and some he would not attempt to sell in Lightning Ridge for the fear of damaging his reputation. Mr Wopenka said all the opals he had in court were worth about \$100.00. Mr Hudson offered him that amount of money for those opals in court and a deal was struck there concerning those stones.

Alma Rose Hicks gave evidence on behalf of the Complainant that in the winter of 1999 at the Newtown Caravan Park, Mr Hudson and Mr Wopenka were at Mr Hudson's caravan and had just come home from work. She said that they had a lot of opal in the rough and that one piece in particular had "a nice lot of colour on it". She said that the opal was in a bucket and the bucket was about half full. She told the court that Mr Hudson had one stone cut which he showed her and it was about 9 or 10 carats.

Although the evidence creates a suspicion that Mr Wopenka has other opals which have not been accounted for, on the evidence before the court I cannot be satisfied on the balance of probabilities that he has retained or disposed of any other opals, other than those he has given evidence about, won from any claim in which he was in partnership with Mr Hudson.

### **CO-DEFENDANTS**

Phillip James Myers appeared before the court on his own behalf and also as agent for Margaret Elizabeth Ward. Mr Myers and Margaret Ward became defendants in this matter because they were the claimholders of three claims, being Mineral Claim 43943 which is currently in the name of Phillip Myers and Mineral Claims 43167 and 43168 which is currently in the name of Margaret Ward. Mr Myers gave evidence that these three claims were purchased from Joseph Wopenka and a sum of \$2000 was paid to Mr Wopenka for those claims by Mr Myers.

Mr Myers indicated that no work had been performed on those claims having regard to the fact that an injunction was issued on them shortly after he purchased them. Mr

Myers indicated that he would have no objection to any or all of the claims being handed back as long as he received the purchase price.

The Defendant, Jenny Wopenka, the wife of Joseph Wopenka gave evidence as to her involvement or more importantly her lack of involvement in relation to the partnership existing between Mr Hudson and her husband. She informed the court that she had registered one claim, which is Mineral Claim 43943, for her husband but had no dealings with the mining. Although she has a joint account with her husband she knows nothing about what is put into that account or taken out of that account for mining purposes. She advised the court that on one occasion she gave Mr Hudson \$250 but that was not from the sale of any opal. It was merely an act of charity on her part because Mr Hudson's wife was very ill and Mr Hudson wanted to take his wife out for dinner in Sydney. She said the \$250 on that occasion had nothing to do with any mining business. There is no evidence to suggest she has any interest in the partnership of her husband and Mr Hudson.

### **SUBMISSIONS**

It was submitted on behalf of Mr Hudson that opal to the amount of \$39,000 has not been accounted for by Mr Wopenka. That figure included a sum of \$23,000 which is the opal that Mr Wopenka had valued by Mario Ikasavic. It was submitted that the court couldn't accept that Mr Wopenka sold that for a far lesser sum of \$7000. It was submitted that the court couldn't accept that unsupported oral evidence of Mr Wopenka that he sold this opal for a price, which created a large gap between the value and the sale price. Mr Wopenka is unable to back up his oral evidence and he cannot recall to whom he sold the opal.

The Complainant is asking for his one-third interest in the \$39,000 that is unaccounted for. He is also asking for one of the claims which belonged to the partnership and which has now been disposed of to Margaret Ward or Phillip Myers. He requests the return of his bogger and acknowledges that the Complainant must pay the \$3000, which was paid by Mr Wopenka, back to Mr Wopenka. Mr Hudson also seeks the return of a welder and an inflatable boat. These matters were covered in the cross-examination of Mr Wopenka and there appears to be no objections.

In regard to the return of a claim back to Mr Hudson, Mr Hudson has indicated that he would prefer to have mineral claim 43168 returned to him. Mr Myers indicated there would be no objections from him as long as he was compensated for the cost of purchasing that claim.

Mr Wopenka submitted that he in fact purchased the bogger and Mr Hudson has no interest in it. Nothing at all is owing to Mr Hudson as Mr Wopenka has been paying all recent expenses and opal sales have gone towards wiping out that debt.

### **CONCLUSIONS**

On the evidence before the court, I am satisfied on the balance of probabilities as to the following:

- Mr Wopenka has not accounted for opal sales to the value of \$39,000, of which \$13,000 is owing to Mr Hudson.
- Mr Hudson owes Mr Wopenka the sum of \$12,000, being his share of expenses which have been paid by Mr Wopenka.
- Mr Wopenka has in his custody, or knows the whereabouts of, the bogger which was used in the mining venture.
- Mr Hudson has the right to possession of that bogger, subject to him paying \$3,000 to Mr Wopenka.
- Mr Wopenka has disposed of Mineral Claims 43168, 43167 and 43943, which belonged to the partnership, without the consent of Mr Hudson.
- Mr Hudson is entitled to one-third of those claims.
- The defendant Myers is to transfer Mineral Claim 43168 to Mr Hudson.
- Mr Wopenka is to pay Mr Myers \$667.00, being a refund of the sale price of Mineral Claim 43168.
- Mr Wopenka is to return a welder and inflatable boat to Mr Hudson.
- Mr Wopenka has no other opal of any value that needs to be accounted for.

**ACCORDINGLY, IT IS HEREBY ORDERED:-**

**JOSEPH WOPENKA TO PAY EDWARD HUDSON THE SUM OF \$1,000  
BEING OUTSTANDING PROFITS NOT ACCOUNTED FOR.**

**JOSEPH WOPENKA TO RETURN THE BOGGER TO EDWARD HUDSON**

**UPON THE RETURN OF THE BOGGER, EDWARD HUDSON IS TO PAY  
JOSEPH WOPENKA \$3,000.**

**PHILLIP MYERS TO TRANSFER MINERAL CLAIM 43168 TO EDWARD  
HUDSON, JOSEPH WOPENKA TO PAY FOR ANY TRANSFER FEES.**

**JOSEPH WOPENKA TO PAY \$667.00 TO PHILLIP MYERS, BEING  
REFUND OF THE SALE PRICE OF MINERAL CLAIM 43168.**

**JOSEPH WOPENKA TO RETURN WELDER AND INFLATABLE BOAT TO  
EDWARD HUDSON.**