

**IN THE MINING WARDEN'S COURT
NEW SOUTH WALES**

J A BAILEY, CHIEF MINING WARDEN

FRIDAY 9 MARCH 2001

CASE NO. 2001/6

LIGHTNING RIDGE MINERS' ASSOCIATION LTD

v.

**TREVOR HUDSON
DEPARTMENT OF MINERAL RESOURCES
WILLIAM W POWELL**

BENCH: THE REQUEST FOR A DECLARATION, AS SET OUT IN THE APPLICATION FOR FINAL RELIEF DATED 21 FEBRUARY 2001 AND AS AMENDED IN COURT ON THE 7TH MARCH 2001, IS HEREBY REFUSED.

THE INJUNCTIONS ISSUED AGAINST TREVOR HUDSON, THE DEPARTMENT OF MINERAL RESOURCES AND WILLIAM W POWELL DATED 21 FEBRUARY 2001 ARE HEREBY DISCHARGED UNDER THE PROVISIONS OF SECTION 312 (2) OF THE MINING ACT 1992.

Matter heard at Lightning Ridge on 7th March 2001

JUDGMENT DELIVERED 9TH MARCH 2001

**IN THE MINING WARDEN'S COURT
NEW SOUTH WALES**

J A BAILEY, CHIEF MINING WARDEN

FRIDAY 16 MARCH 2001

CASE NO. 2001/6

**LIGHTNING RIDGE MINERS'
ASSOCIATION LTD**

(Complainant)

v.

**TREVOR HUDSON
DEPARTMENT OF MINERAL
RESOURCES
WILLIAM W POWELL**

(First Defendant)

(Second Defendant)

(Third Defendant)

APPEARANCES AT HEARING:

Complainant:	Mr B Morris of Counsel
First Defendant:	Mr L Moore, Solicitor of G P Evans & Englert
Second Defendant:	No appearance
Third Defendant:	Appears in person unrepresented

**Matter heard at Lightning Ridge on 7 March 2001
Decision delivered on 9 March 2001**

REASONS FOR DECISION

HANDED DOWN IN ABSENCE OF PARTIES

On 21 February 2001 Robert John Barrett issued process for an urgent injunction under Section 313 *Mining Act 1992*, to be issued against three Defendants – Trevor Hudson, Department of Mineral Resources, William W Powell. That same process also sought final relief of the granting by the Warden's Court of a declaration.

An urgent injunction was issued on 21 February 2001 and the matter was listed for hearing in the Warden's Court at Lightning Ridge.

In the affidavit supporting his application, Mr Barrett indicates he is a member of the Lightning Ridge Miners' Association Ltd.

FACTS

The facts are not in dispute. The history of this matter is outlined in the following paragraphs.

A new opal prospecting area was created in the Narran Warrambool Reserve. Subsequent to that Opal Prospecting Block 160 was created. This was over part of a property known as Roxburgh, such property the subject of Western Lands Lease No. 7952 - the leaseholder being P W W Powell.

Opal Prospecting Block 160 can be divided into two areas, one called the East Plain Paddock and the other called the West Plain Paddock.

On 27 January 1993, Mr P W W Powell wrote to the Lightning Ridge Mining Board, making application for what he referred to as "a rolling reserve" on the two paddocks subject to Opal Prospecting Block 160. What he required was that mining continue on the East Plain Paddock until that area was mined out, then the West Plain Paddock be opened to mining. This would enable him to better manage his grazing and farming of the area covered by Opal Prospecting Block 160. In his letter he asked "for the granting of a reserve for a five to ten year period over West Plain".

A letter dated 25 May 1993 from the Lightning Ridge Miners' Association Ltd to the Interim Lightning Ridge Mining Board, recommended that "a rolling exemption be

approved” as requested by Mr Powell. The letter outlined conditions which ought to be stipulated.

Following a meeting of the Lightning Ridge Mining Board in May 1993, a letter from the Lightning Ridge Mining Board was forwarded to Mr Powell stating, inter alia, the following:

“I am pleased to advise that the Board supported the application and recommended to the Department of Mineral Resources that as a matter of policy, claims not be granted within the area of the reserve applied for, but subject to the following provisions:

- The reserve area covers only the ‘Western Plain Paddock’,
- There is to be no fixed term for the reserve (to be considered a ‘rolling’ reserve),
- The ‘Western Plain’ area may be swapped with the ‘Eastern Plain’ paddock at some future time, by agreement between the farmer and industry, through the Board,
- The Lightning Ridge Miners’ Association will seek to confirm the agreement in writing with yourself and that such an agreement is to be lodged with the Board.

On advice of the Department, the matter will rest with the Mining Registrar, Lightning Ridge, for implementation and if there are any further questions arising with this issue, you should contact Mr Jeff Inman at the Lightning Ridge office.”

Exhibit 4, a map of Opal Prospecting Block No. 160 prepared pursuant to *Section 225 Mining Act 1992*, has a red line drawn on it which dissects the block, dividing it into two areas on a ratio of approximately 1/3 to 2/3. On the smaller portion of the block the following words are written in pencil: **“East Plain Paddock”**

On the other side of the plan are the words also in pencil, **“West Plain Paddock”**. Appearing underneath these words in pencil and with a circle around them, is the following: **“Reserve for Mining No Claims See Jeff”**

An agreement was then drawn up between the Lightning Ridge Miners' Association Ltd and P W Powell, "Roxburgh".

That agreement was signed by a Director of the Lightning Ridge Miners' Association Ltd on 27 May 1993 and by P W Powell on 28 May 1993. The wording of the agreement is slightly different from the conditions set out in the letter to Mr Powell from the Lightning Ridge Mining Board. The agreement is as follows:

- “1. A rolling exemption, for no fixed period of time, be placed over an area or paddock that is an Opal Prospecting Block, in OPA3, in the Narran-Warrambool Reserve.
2. The exempted area may be changed to any other area or paddock that is an OPB on the property known as "Roxburgh".
3. The area applied for as a rolling exemption at this point in time will be the paddock known as West Plain, OPB number
4. All other paddocks known as Malabar, Little Ridge, Hurleys, Ram, East Plain, Bottom Plain, Front, Bore and Bottom Bore will all be placed into the OPB system under the conditions placed on them by the LRMA and the Department of Mineral Resources.”

Mr Trevor Hudson made application for an Opal Prospecting Lease over the West Plain Paddock of Opal Prospecting Block 160 and tendered to the Mining Registrar a letter (marked exhibit 3) from P W W Powell dated 16 February 2001 which states, inter alia:

“I hereby give permission for the lifting of the policy Reserve on the paddock known as West Plain, OPB NO 160. All previous agreements are therefor nullified. With the commencement of prospecting and mining the said area is to come under the full jurisdiction of the Mining Act.”

An Opal Prospecting Lease was subsequently granted to Mr Hudson. Following that grant, an injunction was issued and the dispute came before the Warden's Court at Lightning Ridge on 7 March 2001.

It should be noted that the Third Defendant, William W Powell, is the same person referred to in other documents as P W W Powell and P W Powell.

THE HEARING

At the Court hearing, Mr B Morris of Counsel represented the Complainant, Robert John Barrett. Mr L Moore, Solicitor represented Trevor Hudson. The occupier of the subject land, Mr P W Powell, appeared unrepresented. The Department of Mineral Resources did not appear at the hearing, but forwarded a letter with various suggestions as to what the Department believed to be a fair and equitable way to lift the reserve area.

The legal representatives of both the Complainant and the Defendant Hudson were perplexed at the contents of that letter and were critical of the non-appearance of, who they saw as, an important party to the proceedings. Both expressed a desire to have the author of the letter present to be cross-examined. However, having regard to the urgency of this matter and obvious delay that would be caused, they did not press their request.

The evidence produced to the court was mainly documents from the files of the Lightning Ridge Miners' Association Ltd, the Lightning Ridge Mining Board and the Mining Registrar. The only witness to give evidence was Mr Robert John Barrett. Mr Barrett is currently a committee member of the Lightning Ridge Miners' Association Ltd. He indicated under cross-examination that he was not a member of the Association in 1993 when the Agreement was signed with Mr Powell. He was asked who he thought had breached the agreement. He replied that "the agreement was between Powell and the Lightning Ridge Miners' Association Ltd, and the Lightning Ridge Miners' Association Ltd hadn't breached it". He was asked whether Trevor Hudson was in breach of the agreement and he answered in the negative.

Mr Barrett was asked how he will suffer an irreparable loss by what has happened. He replied that as the Opal Prospecting Lease Application did not go to ballot, he did not have an opportunity to get into the ballot.

Mr Barrett was then asked:

Q: So specifically, it is your loss of an opportunity to participate in a ballot?

A: That's how I see it.

Mr Barrett agreed that the rolling exemption was for no fixed time and agreed that "nothing was stated suggesting that another agreement must be signed to fix a time."

AMENDMENTS TO COMPLAINT

To obviate any concerns as to the locus standi of Mr Barrett, his name was deleted as the Complainant in the proceedings and by consent in lieu thereof "The Lightning Ridge Miners' Association Ltd" became the Complainant.

By consent, Mr Morris amended the wording of his final relief sought, so that it reads:

"A declaration enforcing the agreement between the Lightning Ridge Miners' Association Limited and P W Powell that as set out in the letter from Secretary Manager of Lightning Ridge Miners' Association, Graham Terrey dated 25th May 1993 and that the area be considered a policy reserve until three months after notice of the arrangements are made between the Lightning Ridge Miners' Association, the Lightning Ridge Mining Board and P W Powell or his successors in title."

SUBMISSIONS

Mr Morris submitted to the court that he acknowledged a "Policy Reserve" has no legal basis. He did not challenge the right of Mr Hudson to apply for an Opal Prospecting Lease, nor the legality of the granting of the Opal Prospecting Licence to Mr Hudson. He said between 1993, when the agreement was reached and when Mr Hudson made application, other persons were not granted Opal Prospecting Licences over the West Plain Paddock. Mr Morris submitted that this area was "tied up" from 1993 on the application of Mr Powell until recently when Mr Powell withdrew the application. Mr Morris said that what occurred with Mr Hudson went against a principle that existed for a number of years - that all miners had an opportunity to go in a ballot for an Opal Prospecting Lease over an area and that such a system gives procedural fairness in obtaining the use of the land.

Mr Morris submitted that this past practice of going to ballot has now seen a change in policy where Mr Powell can nominate who can prospect – this is contrary to the spirit of the Mining Act. Mr Morris said a policy reserve area, supported by the Department of Mineral Resources and the Lightning Ridge Mining Board is a policy that gives orderly fashion. Mr Powell has sought to take advantage of the “quarantine” period, but now, without reference to others, states in his letter: “All previous agreements are therefore nullified.”

Mr Morris submitted that the actions in this case amount to an Equitable fraud. He cited from the 1975 edition of the text on Equity by *Meagher Gummow & Lehane*, at P358 and an extract of a speech of Lord Cairns LC in **Hughes’** case:

“If parties have entered into definite and distinct terms involving legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties”.

The text goes on to state:

“The reason why enforcement will not be allowed in equity is, it is suggested, simply because it would be fraudulent to do so.”

Mr Morris went on to say:

“This court has to protect the equitable interests of the Complainant.”

Mr Moore submitted that the 1993 agreement is an executed contract. It finished in 1993 and consequently the court does not have the power to give the final relief sought.

It is the Department of Mineral Resources he said, that can exempt land from the Opal Prospecting Block system, not parties to a private agreement. There is no power in the Act for expressly giving any individual the right to create a reserve.

He went on further to say that there is no law that provides for a landholder in an agreement with the Lightning Ridge Miners' Association Ltd, to quarantine property from the provisions of the *Mining Act*. If land is to be excluded for specific reasons, it requires an executive Act of the New South Wales Government to bring it about. (See Section 367 of the *Mining Act 1992*). No laws allow private negotiation to place land outside the reach of the Act, especially for a time that could be perpetual.

Mr Moore argued that the wording of the 1993 agreement states that it is "for no fixed period of time" - if that amounted to a perpetuity, it would be void ab initio, as it would put minerals in that area out of reach of the public forever, which is contrary to public policy. The only interpretation that can be put on the 1993 agreement, due to the fact that it had no legal capacity to exempt land from the *Mining Act* or the *Western Lands Act*, is that the parties were co-operating with the Department of Mineral Resources to exempt land for the time being. The agreement can be no more and no less than that.

Mr Powell requested that a reserve be granted for a period of 5 to 10 years and the Interim Lightning Ridge Mining Board recommended that a reserve be granted. Mr Moore submitted that what is clear from all the documents before the court is that the people knew they had no power to exempt land. They made an agreement to create a reserve and left it to the Department of Mineral Resources.

Mr Moore re-iterated that there is nothing in the 1993 agreement that remains to be performed - the agreement was over and done with when the Department of Mineral Resources created a policy reserve without any fixed period of time. The court cannot grant specific performance of something that has already been performed.

Mr Moore submitted that the **High Trees** case, which involves the principle of Equitable Estoppel, applies to the enforcement of a legal right. There is no legal right in this agreement. Also, Mr Hudson was not a party to the agreement.

CONCLUSION

I concur with Mr Moore when he said that although the Department of Mineral Resources is able to create policy concerning the *Mining Act 1992*, it cannot create a policy which places itself outside the provisions of the Act.

The creation of a “policy reserve” has no statutory basis. If the West Plain Paddock of OPB 160 is to be designated as a reserve, it must be done by following the statutory pathway provided for in Section 367 of the *Mining Act 1992*.

There is no equitable fraud in the circumstances of this case. Mr Powell, it could be said, has indirectly caused the creation of the policy reserve; but he is not going back on his position, as the request by Mr Powell was for the creation of a reserve for a period of 5 to 10 years. The letter of Mr Powell of 16 February 2001, is approximately 8 years from the date of his request and consequently is in accordance with the time span requested by him in 1993. Mr Hudson was not a party to the agreement and consequently he cannot be involved in any equitable fraud. The remaining Defendant, the Department of Mineral Resources, was merely implementing, by way of policy, an agreement between two other parties. There is no equitable fraud on the part of the Department of Mineral Resources. It was legally bound to process the application by Mr Hudson for an Opal Prospecting Licence. There is no suggestion that the Registrar did not exercise his discretion in a proper manner when he granted the Opal Prospecting Licence to Mr Hudson.

The necessity to amend the relief sought shows that the Complainant, in hindsight, is aware of the inadequacy of the agreement of 1993, in respect of details concerning termination of the same. What in essence is being asked of the court is to grant relief by way of declaration which would rectify the inadequacy of the 1993 agreement. I know of no principle in equity where estoppel is available, in the circumstances of this case, for this purpose.

Accordingly, the relief sought is not granted.