IN THE MINING WARDEN'S COURT
OF NEW SOUTH WALES
HELD AT LIGHTNING RIDGE
ON WEDNESDAY 5 OCTOBER 2005
J. A. BAILEY, CHIEF MINING WARDEN

2005/18

APPLICANT/COMPLAINANT	JOHN WILLIAM MC GEOUGH
v	
FIRST DEFENDANT	LORETTA MOLYNEUX
SECOND DEFENDANT	TORKILD NEXO

INJUNCTION AND COMPLAINT

APPEARANCES ON 6 SEPTEMBER 2005

Mr. W. Browne, Solicitor of Browne, Jeppersen & Sligal for and with Complainant.

Mr. R.J. Chesworth by leave as agent for and with the First and Second Defendants.

APPEARANCES ON 5 OCTOBER 2005

Mr. W. Browne, Solicitor of Browne, Jeppersen & Sligar for and with the Complainant.

Ms. L. Molyneux, First Defendant, appears unrepresented, on her own behalf and for the Second Defendant,

together with Mr T. Kelly, Mine Manager.

DECISION

An injunction was granted on the 1st August 2005 prohibiting the Defendants from taking any action in respect of mining mineral claims 52620 and 52621 which are within the Lightning Ridge Mineral Claims district.

THE COMPLAINT

The Complainant sought the following "final relief".

a. A declaration of the Complainant's interest in the claims.
b. A taking of accounts in relation to all transactions in relation to the claims.
c. 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 act or sign any document then the Registrar or the Chief Mining warden's Court at Lightning Ridge be empowered to do such acts and sign such documents.
d. Any other orders this Honourable Court deems fit.
e. Costs.

The matter came before the Warden's Court at Lightning Ridge on the 6th September 2005. Mr W Browne, Solicitor, who appeared representing the Complainant, at the commencement of the proceedings sought and was granted leave to amend prayer "a" of the final relief sought, as follows: "A declaration that the Respondents' interest in mineral claims 52620 and 52621 is invalid". Mr Browne indicated that what he was seeking from the court was a ruling that the First and Second Defendants' applications for those mineral claims were in fact invalid.

Leave was granted for Richard Chesworth to appear on behalf of the First and Second Defendants. Mr Chesworth is the person who has been nominated by Mr Nexo as the mine operator on the application which was dated the 19th July 2005.

THE EVIDENCE

The Complainant, John William McGeough, was the first witness to give evidence in the proceedings. He adhered to the contents of his affidavit which was dated the 29th July 2005 and which was utilised for the purposes of obtaining the injunction

which was granted on the 1st August 2005. He gave further oral evidence in support of his claim. His evidence may be summarised as follows:

- Mr McGeough was the registered holder of claims and has been for about 15 years over the areas which are now known as Mineral claims 52620 and 52621.
- He failed to renew the claims which expired on the 30th June 2005 due to the fact that he had insufficient money.
- On the 1st July 2005 he attended the office of the Mining Registrar, Lightning Ridge, with the purpose of renewing those claims. He had obtained some money from his wife when she received her pension payment. The office was not opened on the 1st July and he returned on Monday 4th July.
- He was informed that the claims could not be renewed because the area was subject to an opal prospecting licence, (OPL).
- On the 4th July, Mr McGeough, together with Roman Hruby went to the claims to peg them out. The final pegging out was performed on the 9th July.
- Mr McGeough went to register the claim on the 20th July and was informed that the claims had been registered by the Defendants the previous day.
- Mr McGeough was adamant that he had pegged those claims in accordance with the provisions of the *Mining Act 1992* and the regulations thereto.

Roman Hruby was the next witness for the Complainant. He gave evidence that he went with Mr McGeough on the 4th July to assist him in marking out the claims. His evidence was that he performed the digging of the trenches. He also informed the court that he returned to the area with Mr McGeough on the 9th July to place some rocks in lieu of trenches, which were unable to be dug around one particular peg.

He gave evidence that he has no financial interest in the claim whatsoever and merely went there to assist Mr McGeough.

Mr Hruby together with Mr McGeough had indicated that on the 9th July when they returned to the claim area, there was a shaft cover missing, it had been there on the 4th July. Both gave evidence that they attended to covering that particular shaft.

Matthew Collins, the Deputy Mining Registrar, Lightning Ridge was the final witness for the Complainant. Through him the "*application for a mineral claim*" lodged by Mr Nexo and the "*application for a mineral claim*" lodged by Ms Molyneux were tendered to the court and marked Exhibits 4 and 5 respectively.

Timothy Patrick Kelly gave evidence for the Defendants. He is the person nominated by Loretta Molyneux as the mine manager in her application for a mineral claim.

He informed the court that on the 20th June 2005 whilst in the area known as Frankstone III he formed an opinion that the two areas which are subject to this dispute appeared to be abandoned. He said that at that point of time there were three unsecured shafts on one claim and the other claim looked as if it had never been worked.

Following his enquiries with the Department of Mineral Resources he indicated that he decided to wait until the OPL had expired.

On the 19th July he informed the court that he and Mr Richard Chesworth attended the area, surveyed the claims, put in a possession notice and submitted the applications, duly signed by each of the Defendants, for registration. Following that, Mineral Claim 52620 was registered to Torkild Christian Nexo and Mineral Claim 52621 was registered to Loretta Molyneux.

Under cross examination he said that fresh trenches were dug and that existing pegs, other than one, were utilised. A fresh Notice of Possession was placed on the appropriate peg and furthermore he was adamant that there was no recent prior pegging out of the claim.

Although Torkild Christian Nexo and Loretta Molyneux were at the court proceedings, they did not give evidence. However it is clear from the cross examination of Mr Kelly that they had no role in marking-out the claim and they had no role in respect of the service of the notice upon the landholder in accordance with Section 177 of the *Mining Act 1992.*

Tony Huskinson was the second witness for the Defendants and he gave evidence of visiting the claims on the 23rd July with Tim Kelly. His role was to simply clean up the rubbish on the claim and to place some hole covers over unsecured shafts. He had not attended the area prior to the 23rd July and could give no evidence as to its prior condition.

THE SUBMISSIONS

In his submissions to the court, Mr Browne urged the court not to accept the evidence of Mr Kelly in respect of the marking-out of the claim and to accept the evidence of the Complainant in relation to the marking out. The second point that Mr Browne was relying upon was the false statutory declaration which accompanied each *application for a mineral claim* which was lodged with the Mining Registrar by each of the Defendants. In particular he referred to the fact that each Defendant declared and affirmed in the statutory declaration

"that I have:

1. *Marked-out the area sought in the manner prescribed by regulation 25 of the Mining Regulation 2003.*
2. *Served on every affected landholder a notice (a copy of which is attached) in accordance with Section 177 of the Mining Act 1992."*

It was Mr Chesworth's submission on behalf of the Defendants that the provisions of Section 226(3) of the *Mining Act 1992* does not assist the Complainant whatsoever. He further submitted that the Complainant has no equitable or legal interest in the claims and that Section 232(2) gives exclusive right to the Defendants to mine for opals.

With the greatest respect to Mr Chesworth, his reference to those sections concerned opal prospecting licences, not mineral claims. I am assuming that he was referring to Section 190(6) of the *Mining Act 1992* and also to those other various sections of the Act, such as Section 195 which grants specific rights to a holder of a mineral claim and those other provisions which prohibit persons from entering upon such claims and from mining such claims.

THE MARK-OUT

Section 176 of the *Mining Act 1992* and the Regulations thereto provide the manner in which an area must be marked-out prior to the application being lodged for a mineral claim. Both parties in this proceeding have indicated under oath that they have vast experience in mining and have marked-out the particular claims in accordance with the *Mining Act 1992* and *Regulations*. Photographs were tendered to the court in respect of the mark-outs, I must say that it is impossible for the court to determine from those photographs as to whether or not the trenches were of the required length and depth. It certainly appears that the steel star pickets are projecting at least 1 metre above the ground.

When Mr Kelly was cross examined as to the depth of the trenches dug, he replied: "six inches". He was unable to put that into a metric measurement. The present requirement for the depth of a trench, in accordance with Regulation 25, is *at least 150 millimetres.* In accordance with a scale I have observed, the imperial measurement of 6 inches is equivalent to 152 millimetres. So the depth of 6 inches would be in accordance with Regulation 25.

The court did not attend the area to view the mark-out. Not one witness was broken down when challenged as to the correctness of the mark-out.

Accordingly, on the evidence which as been produced to the Court, I must conclude, on the balance of probabilities, that the mark-out of the particular claims were in fact in accordance with the *Mining Act 1992* and the Regulations thereunder.

There is nothing in the *Mining Act 1992* which gives priority to any person who marks out a claim first in time. The priority to an individual is determined by the lodgement of the application for a mineral claim with the Mining Registrar. There is nothing that has been placed before this court which would suggest that the two Defendants were not the first in time in relation to lodging an application for mineral claims over the subject areas. That being so, the Complainant may only seek relief if it is determined that the applications by the Defendants for the mineral claims were invalid.

THE FALSE APPLICATION

There are two matters, in the documents headed **Application for a Mineral Claim,** which the Complainant relies upon to support his case. Firstly, point 5 of the form, where the Applicant is to reply to the following:

DATE and TIME area marked out in accordance with Regulation 25.

The second matter is the statutory declaration which appears at the bottom of the form. Mr Browne submits that the details in item 5 are incorrect and that the statutory declaration is false.

Concerning item 5 of the application and the aspect of the mark-out, a date and time was inserted in the appropriate place on each form. It is clear that item 5 of the application makes no reference to the fact that the applicants themselves personally marked-out the area. The only way in which the Complainant may be successful on that point is if the court determines that there was no mark-out at all made on behalf of, or by, the Applicants. On the evidence before the court, I am satisfied on the balance of probabilities that there was a mark-out in accordance with the Act and Regulations prior to the lodgement of the application for mineral claims by each of the Defendants. Consequently it is determined that nothing in item 5 of the application would invalidate the application.

The next matter is the aspect of the statutory declaration which was signed by each Applicant. It is clear that what was submitted by Mr Browne is correct, that is, that each individual person who signed as applicant did not in fact personally mark-out the area, nor serve a notice upon the landholder. Yet each statutory declaration specifically says: "that I have:" and then it goes on to say "marked-out the area" and "served the requisite notice".

A strict interpretation of that statutory declaration would mean that it is clearly false.

To determine as to whether or not that error which appears in the statutory declaration nullifies the application, one must consider the context in which the statutory declaration is sitting in the application.

The statutory declaration attests to two matters; firstly, the marking out of the area and secondly the service of notice upon the landholder. The statutory declaration concerning the serving of notice is a requirement pursuant to S.178(2)(f) of the Act. It provides:

> **178 Application for granting of mineral claim**
>
> (2) An application:
>
> (f) must be accompanied by a copy of the notice served on the landholder of the land concerned under section 177 and a statutory declaration to the effect that the notice was so served.

There appears to be no provision in the *Mining Act 1992* for the applicant him or herself to provide a statutory declaration, as to the marking-out of the area, with the application. It is assumed that the statutory declaration has been inserted on the pro-forma application form for administrative expediency. In other words, to give comfort to the Mining Registrar, as to compliance with the Act and Regulations, when the application is being considered; thus obviating the need for the Registrar to physically check each claim area prior to granting a mineral claim.

However, whether the statutory declaration which accompanies each application is in compliance with the Act or simply for administrative expediency, one must look at the purpose of such declaration. It's only purpose must be to assist the registrar when the application is being considered. What the Registrar needs to know at that point of time is whether the *Mining Act 1992* and the regulations thereunder, have been complied with insofar as the marking-out of the area and notification to the landholder. What is important is that the obligations under the Act and Regulations have been complied with in respect of the subject application. The fact that the obligations were not physically met by the Applicant him/herself, may not necessarily be of a great concern to the Registrar.

There is provision in the Act for a Mining Registrar to waive minor procedural matters.

Section 210A of the *Mining Act 1992* provides:

> **210A Waiver of minor procedural matters**
>
> (1) A Mining Registrar may grant or renew a mineral claim even though the applicant has failed to comply with a requirement of this Act or the regulations:

a) As to the manner in which the mineral claim has been marked out, or
b) As to the time within which anything is required to be done, or
c) As to the details to be contained in any notice served, lodged or caused to be published by the applicant, or
d) As to the particulars to accompany any application, or
e) As to the furnishing of declarations and other information by the applicant.

(2) This section does not authorise a mining registrar to grant or renew a mineral claim in the case of an applicant who has failed to comply with such a requirement unless the mining registrar is satisfied that the failure is unlikely:

(a) to adversely affect any person's rights under this Act or the regulations or
(b) to result in any person being deprived of information necessary for the effective exercise of those rights.

It can be seen from this section that the Registrar is not able to waive minor procedural matters if there is a competing application. From the evidence in this matter, there was no competing application filed at the time the Mining Registrar considered the application and granted mineral claims 52620 and 52621.

The court should now place itself back into the time of the lodging of these applications on the 19th July 2005 and place itself in the position of the Mining Registrar at that particular time. Assuming the Mining Registrar had the knowledge that the court currently has, the Registrar would be confronted with a situation where he had no competing applications to the current two applications before him; that he had an indication that the requirements of the Act in respect of marking-out and serving a notice upon the affected landholder had been met. He would also be aware that although those requirements had been met, they were met by the persons nominated as the mine operator, not personally by the Applicant. The question then arises as to whether the Registrar would issue a mineral claim to the Applicants? In regard to the provisions of Section 210A(1)(a) and (c) of the *Mining Act 1992* it would appear reasonable in all the circumstances for the Mining Registrar to waive the minor procedural matter, that is the error which obviously appears in the statutory declaration.

There is one other matter that Mr Browne referred to in his submissions and that is the fact that the Applicants for these particular mineral claims appear, on the face of it, to have no interest in the particular claim, other than being the claim holder. Mr Browne

submitted that this is contrary to the spirit of the legislation which permits a claim holder to hold two claims only within the Lightning Ridge Mineral Claims District. Mr Browne submitted that it is obvious in this case, as well as many other cases before this court, that the applicants are merely named on the application for the purpose of Mr Kelly and Mr Chesworth getting around the legislation. He said it is inappropriate for that to occur and the court should do something about it.

Over a number of years it has become clear that persons were being utilised as "pawns" by miners in becoming claim-holders and having no interest whatsoever in mining for opals. To that end the Mining Registrar has done whatever is possible to eliminate the practice.

I can only consider the present matter before the court. On item 15 of the applications, Richard Chesworth (in respect of MC 52620) and Mr Timothy Kelly (in respect of MC 52621) have been nominated as "Mine Operator". I am aware of the practice of only granting claims to those who have attended and passed the Mine Safety course conducted at Lightning Ridge. Notwithstanding the fact that the applicants did not take an active role in the mark-out or the service of the notice on the landholder, nothing has been presented to the court to indicate that the applicants, as they then were, did not have a genuine interest in the claims.

There is nothing in this case which would enable the court to make a determination as to an impropriety concerning the applicants.

In considering all of the matters that have been placed before the court in this case, I am of the opinion that the application which has been lodged before the Mining Registrar, Lightning Ridge, is not in error to such a degree that the court ought to make a declaration that the Respondents' interest in the claim in invalid.

Consequently the Relief sought in respect of that is refused.

Also sought in the final Relief was the taking of accounts in relation to all transactions concerning the claims. From the evidence before the court the Respondents have done nothing in relation to mining the claim prior to the imposition of the injunction.

From that point of view and also from the point of view of the failure of the Complainant to be successful in the first Relief sought, there is no need for any determination to be made by the court concerning that particular Relief.

The Relief sought is in this particular matter is not granted.

COMPLAINT DISMISSED

I will now hear submissions from the First and Second Defendant as to whether or not any costs ought to be awarded to them.

MR. KELLY: This case has been very expensive, but we won't be making any application for costs.

BENCH: THERE WILL BE NO ORDER FOR COSTS

I note that the injunction which was issued on 1st August 2005 has now expired by the effluxion of time.