IN THE MINING WARDEN'S COURT
HOLDEN AT INVERELL
BEFORE J.L. MORTON
CHIEF MINING WARDEN
13TH JULY, 1978

MILLER v PAY & ORS

This has been the hearing of complaints under Section 133 of the Mining Act, 1973 made by Mrs. Ada Mearl Miller, the lessee under a Mining Lease of crown land, against various defendants named in the complaints. The complaints and subsequent summonses request the determination of the area dimension and boundaries of the lease and that recompense be ordered by the court against the defendants in favour of the complainant for past encroachment on the area of the lease.

Before an attempt is made to make any order for payment of money or other recompense it has been agreed by all parties that the court should determine the boundaries of the lease and in particular the southern boundary for it is on this issue that the subsequent matters depend, and indeed, if the court were to make such a determination, the parties would then be in a better position to decide their next course of action. For this reason the within judgment is delivered, although evidence on the other issues of alleged encroachment and recompense has not been fully adduced by either side.

On 19th July, 1971, Mrs. Miller made an application for a mining lease of crown lands. She described the area of some six acres with a datum post at the west angle of the land and is distant south to the creek in an easterly direction from the datum post. The dimensions of the area were said to be 60 chains by one chain. The within description taken from the application, Exhibit 1, is by no means clear in its terms apart from the fact that some six acres were required. However, no objection has been taken to the form of the application, as such.

As a result of that application, His Excellency the Governor granted Mining Lease No. 68 to Mrs. Miller. The grant took place on 25th September, 1975, and is for a period of twenty one years. Certain changes were made as

between the application and the granted lease, one being that the lease was granted under the Mining Act 1973, the 1906 Act having been repealed, but the transitional clauses of the 1973 Act having made appropriate provision for applications to continue. Another change was that while some 6 acres were applied for, the lease was granted over an area of "about 2.09 hectares". Why there was an obvious difference between the area as applied for being six acres and that granted, being 2.09 hectares, which when reconverted to imperial measures is around five and a quarter acres is not clear, nor has any attempt been made during evidence to explain it.

The description of the land as demised read as follows "all that piece or parcel of land containing by admeasurement about 2.09 hectares and more particularly described and delineated in the plan annexed hereto". Annexed to the lease was a plan in two parts, the first setting out an extract from what was obviously a large scale map, and the second in reduced scale giving more details than the former. There was included in that part the following verbal description "between the points A and B the subject area is bounded by the right bank of Kings Plains Creek. The land between the right bank and the centre thread of Kings Plains Creek is excluded to the intent that the lease shall not extend "ad medium filum aque"." The second part of the plan also showed dimensions and survey bearings in relation to all sides excepting the southern side which side went from points A to B. Beneath the southern side there is sketched what appears to represent Kings Plains Creek.

The primary issue in this matter is what was meant in the description of the area demised and to what extent the lease covers lands abutting Kings Plains Creek, that is, when the right bank of the creek is mentioned, what does that mean?

One would have thought that an obvious answer would have been for the parties to employ a competent surveyor to settle the boundaries of the lease; but each side has employed a surveyor and these gentlemen, Mr. Smith who was called on behalf of Mrs. Miller and Mr. Angel, who gave evidence in the case for the defendants cannot agree as to dimensions; nor indeed can they agree as to what the banks of a stream are.

Dealing with their respective opinions from a professional point of view as to what is the bank of a stream, Mr. Smith has said that it means that part of a river limited by the bed of the stream, and bed being that part of the stream which contains a normal stream flow. I take it from that that Mr. Smith means that the bank of a stream commences from the water's edge at a time when weather and seasonal conditions are said to be normal, that is in neither flood nor drought conditions.

On the other hand, Mr. Angel has said that his opinion is that the banks of a stream mean the extremities of it when it is flowing full but not overflowing. I would take it from his opinion that he would over-pass the edge of the water in normal times but would take the bank as commencing at some point when the stream was carrying an excessive amount of water, but not when it is in flood.

A number of authorities have been quoted to me by counsel, and a perusal of those learned decisions has been of some assistance to me. That of the High Court of Australia Lanyon and Canberra Washed Sand 1966 115 CLR 342 discusses the so called ad medium filum aquae rule and Lords Case 14 E.R. 991. Additionally, I have had the benefit of reading Kingdom and Hutt River Board 25 N.Z. L.R. 145 in particular at 157 and 158, and extracts of the two English cases of Monmouthshire Canal and Hillof 1859 and North Level Commissioners and River Welland Catchment Board of 1937. A further English decision seen, citing as it does an American case of Howard and Ingersoll, namely Jones and Mersey River Board 1957 3 All E.R. 375, contains a judgment in which Lord Jenkins said when construing the English Land Drainage Act, "When a land drainage Act refers to the banks of a river, one supposes that the banks referred to are those banks which are material from the land drainage point of view, that is to say, the banks that contain the river. Once one comes to that conclusion, obviously the word banks cannot be limited to the slope or vertical face where those banks actually meet the river, but must include, as I have said, the land adjoining or near to the river, to the extent to which it serves to contain the river." So from what Lord Jenkins said, it is plain that he understood banks to include land near to but not necessarily abutting the water. However a note of warning must be sounded, for the Court of Appeal

was there dealing with a matter of compensation for dredging material deposited over some two and a quarter acres of agricultural land adjoining a river, and as Lord Parker put it at 382 "a bank is not used in a drainage Act in the sense in which it is often used".

Turning to New South Wales legislation, it being clear that the land the subject of the lease is crown land, portion of it having beenheld under Road Permit by one of the defendants Mr. William Leigh Vivers, by Section 235A of the Crown Lands Consolidation Act "bank" means the limit of the bed of any lake or river, "river" is defined as including any stream of water whether perennial or intermittent, flowing in a natural channel and any affluent, confluent, branch, or other stream into or from which the river flows" and "bed" means "the whole of the soil of any lake or river including that portion thereof which is alternately covered and left bare as there may be an increase or diminution in the supply of water and which is adequate to contain it at its average or mean stage without reference to extraordinary freshets in time of flood or to extreme droughts".

Other factors have been raised and it is necessary for me to examine them. The area is expressed as about 2.09 hectares and it is obvious from the evidence from Mr. Surveyor Smith that working on data that he had, and the description in the plan annexed to the lease that something more than 2.09 hectares can be found within the bounds of the land therein described. In fact his assessment is 2.97 hectares in all, or 2.5 hectares if one were to deduct an area of land hatched in brown on his own plan, which is Exhibit 3, said to be the subject of the present mining activity. Mr. Surveyor Angel, again working on data made available to him, but excluding the lease plan, which he points out has calculated measurements on at least three angles and scale measurements on only one, but taking bearings from nine different angles and using ascertainable road pegs as references, believes that the area of the lease is 2.168 hectares. Mr. Angel's conclusion therefore is much closer to the 2.09 hectares than Mr. Smiths. I would here reiterate that Mr. Angel, in arriving at his conclusion, applied his definition of banks to the lease and excluded for the purpose of his calculation the intermediate ground between the normal water's edge and a discernible bank, referred to in evidence as the high bank.

It seems to me however that if the southern boundary of the lease could be ascertained as being either from the edge of the water of Kings Plains Creek, as in normal seasonal times, or from the so called High Bank, or from some other definable line, then determination of the other boundaries of the lease by surveyors is not an impossible task, albeit difficult, in view of the obvious variations in the edge of the creek and other natural factors of movement of earth as deposed to by Mr. Vivers, to which I shall shortly refer. Certainly, such definition is not fraught with problems of the same magnitude as that envisaged by the court in Mineral Deposits v Lynch 78 W.N. 948, which dealt with fluctuation of a boundary because of an ocean tide. The other aspect of the variation between the measurements of the area by the surveyors which brings itself to my attention is the fact that the area is described as "about 2.09 hectares" although I must say that a variation in the area as assessed by Mr. Angel would appear to be permissible under the definition of the word "about" whereas Mr. Smith's assessment of almost 3 hectares or 2.5 hectares, might well be said to go beyond the permissible latitude described in the authorities on the meaning of the word "about".

However, I am of opinion that once the southern boundary is defined it is then a matter of surveyors measurement to assess and determine the other boundaries, working from the data available, including the plan annexed to the lease.

Over the years a stream can change course. This is a natural phenonomen, and about the changes since 1974 I have heard from Mr. Vivers, who has the creek deviating since that year by means of about a twenty feet intrusion into the southern bank and a building up or depositing by some ten feet in width on the northern or right bank. I contrast his evidence with that of Mr. Arentz who had worked on the area in 1966 and who says that there had been no course change in the creek since 1966. I accept the evidence of Mr. Vivers who as the owner of adjacent land has known the area for the whole of his lifetime of 48 years. However, notwithstanding the accepted change in creek course and taking into account his evidence referred to 1974 and not 1975, in which latter year the lease was granted, I am of the view that the area

of Mrs. Miller's lease could have been ascertained by surveyors on grant of the lease. The fact that it had not been is not, in my view, such that the lease must now be said to have been intended to commence from a more stable line, that is the high bank away from the edge of the creek, as contended on behalf of the defendants. Is it therefore possible for a person to have a lease granted for a period of time to have the area of the lease increased by the activities of nature? It seems that this might be so, although I notice that since 1974 the increase has only been some ten feet. But what if Mrs. Miller had been granted her lease on the southern side of the creek? Could she be heard to complain that her lease has been eroded in four years to the extent of some twenty feet. I would conclude that any complaint she might make in this regard would be met by all concerned with the answer that this has been caused by a function of nature and there is nowhere from which redress can be obtained, provided, of course, such erosion was caused only by natural activity. So it seems to me, that it would be unnecessary to require that the more stable line of the high bank is essential from which to take the southern boundary of her lease.

The "ad medium filum aquae" rule is that a description of a parcel of land bounded by non tidal river is to be construed prima facie as including so much of the river bed as lies between the bank and the middle line of the stream./ In the grant of Mining Lease No. 68, the Crown deliberately excluded the operation of that rule, requiring that the southern boundary of the lease be the right bank of Kings Plains Creek. So what was the intention of the Crown when granting the lease? Was it intended that between the middle line of the stream and the high bank there should be a buffer area to which the lessee had no title, or was the southern boundary of the lease to be at some other line, other than the edge of the water? If it was intended that it should be other than the edge of the water, nothing has been said in the lease to give effect to this intention.

The underlining is mine.

This leads me to conclude that the very fact that the ad medium filum aquae rule was mentioned and excluded, that it was intended by the crown in granting

this lease to Mrs. Miller to grant her title from the edge of the water i.e. the edge of the bed as it exists in normal times. I am fortified in coming to this conclusion by the definitions in the Crown Lands Consolidation Act, to which I have previously referred.

From those definitions, and applying common knowledge to the make up of a stream, it can be said in this context that a stream is comprised of two main features, that is a bed and banks. The bed is the base or area of land over which water could be expected to flow either permanently or intermittently, but not just when there are floods or extreme droughts. The bed is bounded by banks, which, in my view, commence, for the purposes of the ad medium filum aquae rule in this matter, from the water's edge, again in times of normal seasonal conditions and not only during floods or extreme droughts.

I am of the view, that when the land was demised to Mrs. Miller, it was intended that the crown grant to her a title under the Mining Act from the right hand edge of the waters of Kings Plains Creek in normal seasonal conditions and not merely in times of floods or extreme droughts. From the evidence of Mr. Vivers, it is not impossible to ascertain this line, and as I have said, once it is decided as being this line, appropriate measurements could be taken to ascertain definitely, within normal surveying practice, the other boundaries of the lease.

Having found what the intention was, I conclude, so all concerned may know clearly the opinion that I here express, that the southern boundary of Mrs. Miller's lease is the edge of the water as it exists in normal seasonal times and not in times of floods or extreme droughts.

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AFTER CONCLUSION OF ALL EVIDENCE

JUDGMENT

BENCH: It has been proved that the defendants encroached upon the complainant's lease and extracted sapphire bearing earth, called wash from it. The defendant, Mr. Pay, says that some 840 yards were extracted and produces figures to show that the total receipts therefrom were some $10,105 and total expenses are $6,656.14, leaving a profit of some $3,448.86, which it is said on behalf of the defendants should be the recompense.

Mr. Dawson, a witness for the defendants says that negotiations took place between himself and the complainant in about April of this year, and that he thought the sum of $12,000 then offered was a reasonable figure, although he could not raise the funds. Of course the $12,000 was for him to take over the lease in effect. Later the figure was reduced to something in the vicinity of $5,000 which offer came from the complainant at a time when it is said that her area was being encroached upon by the defendants. Mr. Dawson in his evidence assessed the yield at around $10 per yard.

Mr. Campagner, a further witness for the defendants says his tests showed a yield of around $3 per yard.

The complainant had sworn earlier in the proceedings that out of the two small test areas, each of 1 yard capacity, she received some $235 and $313 respectively, and that any recompense ordered has to be in the light of the yield that she claims was then forthcoming. So there is a marked divergence between the evidence of the complainant as to value, and that on behalf of the defendants.

It is clear, of course, that this wash has been processed and it is gone, less the sapphires, so any deposit of it for examination is out of the question. Again the figures which Mr. Pay has produced are his firm's own figures

BENCH: made up after cash transactions during which no written record is made. On the other hand the complainant's sample was a very small one indeed, and therefore open to criticism because of its size.

I would emphasise that any figure that the Court arrives at therefore has to be by means of assessment only. I would have wished that I had more evidence on which to base a finding, but the evidence that I have before me, of course, is all that I can rely upon.

I think that if the Court, notwithstanding the scantiness of the evidence, assesses the value of the sapphire wash at something close to what Mr. Dawson says, but without overlooking the evidence of Mr. Campagner that a reasonable figure can be arrived at. This figure that I arrive at is $8 per yard. In view of the fact that some 840 yards were extracted, a total is $6,720, and because of the evidence of extraction costs I assess that cost at 25%. So from $6,720 there will be subtracted $1,680 which is the 25% of it, leaving a figure of $5,040 by way of recompense.

ADDRESSES AS TO VERDICT AND COSTS

In the light of all the evidence I am of the view that there should be a joint and several judgment against each of the defendants, that is against Kevin Pay, William Vivers and the two companies, Blue Gem Contractors Pty. Limited and Kings Plains Pty. Limited.

Further, I am of the view that the verdict having gone in favour of the complainant that the complainant's costs ought to be paid by the defendants. Costs are to be taxed.

A stay of proceeding is granted for twenty eight days.

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