IN THE WARDEN'S COURT
HOLDEN AT SYDNEY
ON 6TH DECEMBER 1991
BEFORE J L McMAHON,
CHIEF MINING WARDEN

NOEL THOMAS RYAN (first complainant) &
ROBERT JAMES PARKER (second complainant)
v
GEOFFREY McFADDEN (first defendant) &
KATHLEEN SHARON MACK (second defendant) &
JOHN McFADDEN (third defendant)

BENCH:

By way of Praecipe for the Issue of Summons dated 12th August 1991, the complainants sought that there be issued against the defendants an injunction restraining the defendants from operating registered Claim 27493 in the Lightning Ridge Mining Division. That was the immediate relief sought. By way of final relief the complainants further sought specific performance of a contract said to have been entered into between the parties which had been the subject of a variation to include the second defendant.

On 13th August 1991 an injunction was issued in accordance with the request for immediate relief and the matter was stood over until 10th September from which date it was adjourned for hearing on 20th November 1991 with an undertaking being given by all parties that the claim be not worked in the meantime. A full hearing took place on 20th November during which the first complainant gave evidence about a contract that he had entered into with the first defendant in about August 1990 whereby it had been agreed between them that they would work towards the extraction of opal on areas including on Claim 27493, that they would share all profits and would equally share the expenses both on a 50/50% basis. I might here add that such an agreement is not uncommon in the Lightning Ridge mining fields and a further frequent occurrence is that the parties to such agreements do not commit their rights and obligations to paper, working only on the basis, as appears to have occurred in this matter, on a handshake agreement.

The first complainant has given evidence that he made available for use in furtherance of the partnership which he said existed between himself and the first defendant a truck which was bigger than the defendant's truck, and an excavator/loader. He had also supplied some finances and he produced as exhibits 1 and 2 original documents, exhibit 1 being fuel accounts and exhibit 2 being a telephone account which the first complainant swore had been paid by him on behalf of the partnership. Certainly the telephone account exhibit 2 was issued in the name of J W McFadden, the first defendant and while the fuel accounts are issued in the name of the first complainant it is apparent on the face of many of the documents in exhibit 1 that the first defendant was instrumental in ordering fuel on the first complainant's fuel account. The first complainant has sworn further that in about May 1991 the second complainant was allowed into the partnership by mutual consent, that is to say with the approval of both the first complainant and the first defendant. It seems that the second complainant was in a position to have holes drilled on the claim and as a result holes were put down and from the evidence of both complainants it is clear that the second complainant paid at least the sum of $1,100 towards the digging of three bore holes. For this activity, it was agreed that the second complainant would receive 10% of the proceeds and would, accordingly, be liable for 10% of the costs. There is evidence before the court however that at a later time between the parties it was further mutually agreed that the second complainant's share would be increased to 20% because the second complainant was actually performing work on Claim 27493. Again, none of these arrangements has been evidenced in writing.

With this outline of the facts the defendants do not take major issue. It is clear that the first defendant controlled a number of claims and Miss Mack, the second defendant was put forward as a claim holder for one of those claims

which happened to be 27493. This practice is quite a common one at Lightning Ridge, mainly brought about by the existence of Section 30(2) to the Mining Act which prohibits in effect one person from holding more than two claims in the one Mining Division. Therefore, if a single individual seeks to control more than two claims he or she commonly obtains the use of the name of another person to circumvent Section 30(2). The second defendant gave clear evidence about this situation, and all along throughout the hearing it was not disputed by any party that the second defendant had the standing of really a trustee or agent for the first defendant.

The role of the third defendant is not as clear cut. He gave evidence that he was part of the arrangement where a number of persons worked on a number of sites all with the idea of extracting opal, and opal had in fact been extracted from Claim 27493. This was productive of some funds although the first complainant readily conceded in questions which I asked him that no books of accounts were kept as to receipts or expenditure. Again, unfortunately, this is a common practice at Lightning Ridge.

In respect of some of the opal extracted from the said claim, there had been some attempt to sell it and it was suggested that the parties rendezvous in the Sydney area with a view to attending upon a Jewish gentleman who it was said may purchase some of the stones. Difficulty and dispute had arisen between the parties as to the value of the stones. There was some suggestion that they were worth in the vicinity of $20,000 but other evidence had the figure as low as $5,000 but I accept that it was agreed that the parties should aim for approximately $16,000 for a particular parcel of stones. When they attended the Sydney area they were unable to find the Jewish gentleman and they went looking for other buyers and ended up in the premises of an Asian gentleman who had made an observation that one stone may be worth in the vicinity of

$3,000. However it seems, on the evidence, that that person had no authority to make a firm offer in this figure and finally the parties were unable to effect a sale. It was these circumstances, coupled with the earlier difficulties and disputes between the parties which led the first defendant to conclude that the partnership was at an end. He said that after the parties had been unable to effect the sale in the presence of the Asian gentleman they had a dispute in Pitt Street, Sydney. There is in the evidence some conflict as to what exactly was said, the first complainant stating that the first defendant had said that he wished to take the stones to the North Coast with a view to selling them but the first defendant disputed this and said that he had asked the first complainant who had possession of the stones for them to be given for sale to the first defendant. It is clear that the first complainant and the second complainant, walked off up Pitt Street and would not discuss the matter further with the defendants. The first defendant has said that therefore he concluded that the partnership was at an end and when he returned to Lightning Ridge the first defendant and the third defendant commenced to arrange for work to be done on the Claim 27493 excluding the complainants. There is no doubt that the first complainant had had a conversation with the third defendant whom he referred to as "Butch" who had told him that he was no longer included in the partnership and there was other conversation of a vulgar nature during which the first defendant had told the first complainant that he should leave the claim.

In the whole of the circumstances it seems to me clear that there was a partnership, the furtherance of which occurred when the first complainant and the second complainant carried out work or provided equipment with a view to extraction of opal, or paid money out and I take it from the evidence of the first defendant that he does not really dispute this factor. His main complaint is that the complainants were unco-operative in respect of the sale of opal

in Sydney and because of their lack of co-operation he considered their part in the partnership to be at an end.

Unfortunately the law relative to partnerships (Partnership Act 1982) does not support the defendants' stance. While a partnership may be formed by oral agreement, for an undefined time and may be terminated in certain circumstances, if actions are taken by the respective partners in furtherance of the partnership, as has occurred in this case, then termination of the partnership must take place, unless it is with the consent of all parties, by the giving of notice of intention to dissolve the partnership (Sections 26 & 32(c)). Such did not occur in this matter and I am satisfied that the partnership existed and continues. I find that the first complainant and the first defendant are entitled to 40% each of the proceeds of the opal produced on Claim 27493 and the second complainant is entitled to the remaining 20%. Likewise, their respective responsibilities in relation to the meeting of costs shall be in the same percentages. I recognise however that the parties may have real difficulty working together and the claim might well have to be disposed of by way of sale. In the circumstances, the parties are allowed until 6th March 1992 to dispose of Claim 27493 after which date if it is not disposed of, I empower the Registrar to act as transferor of the claim to any person including any party to these proceedings who may present as a buyer for a price considered by the Registrar to be reasonable.

On the question of costs, Mr Browne, Solicitor has appeared for the complainants, the defendants being unrepresented. I am of the view that the complainants are entitled to their appropriate professional costs which I assess in this matter as $890. This amount is to be paid by either the first defendant or the second defendant, or jointly between them in equal shares, on or before 6th March 1992.