

IN THE WARDEN'S COURT
HOLDEN AT SYDNEY
ON 12TH AUGUST, 1986,
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

STOJAN MILINKOVIC AS AGENT FOR MILAN MILINKOVIC
v.
VICTOR BORKOVIC AS AGENT FOR GEORGE MILJOKOVIC

BENCH:

By two Complaints dated 21st and 22nd October, 1985, respectively, Stojan Milinkovic proceeded against Victor Borkovic arising out of a dispute which the parties were having concerning Claim No. 10560 at Lightning Ridge and an adjacent Claim No. 11049. On 22nd October, 1985 Mr. Borkovic issued similar proceedings against Mr. Milinkovic. By consent of both parties, I have heard the Complaint of Mr. Milinkovic of 21st October, 1985 with the Complaint by Mr. Borkovic of 22nd October, 1985. That of Mr. Milinkovic of 22nd October has not been proceeded with at this time.

Although the evidence has been somewhat lengthy and some of the matters in these proceedings have been complex the issue is simple. The questions are whether Claim No. 10560 encroaches upon or is encroached upon by Claim 11049 and if so what shape each of them should be. It is common ground that both claims which are in the New Chum field at Lightning Ridge are very close to each other.

For an understanding of this matter I feel it first necessary for me to lay down some description of the procedure to be adopted by a person wishing to register a claim, the legal provisions contained in the Mining Act as to the application for the registration of, the renewal of, and the transfer of claims. Exemptions and cancellation of claims provisions are contained in Sections 27 to 37A of the Mining Act but some reference will be made to those provisions too. Put into practice, the law is that in any Mining

Division (and there are some 16 Mining Divisions contained in the State of New South Wales of which Lightning Ridge is one), no person shall have ~~no~~ more than two registered claims. Claims normally have a dimension of 50 metres by 50 metres but may be irregular in shape to make them fit into an area which, because of terrain or the existence of other claims on adjacent sides, may not permit of a rectangular shape. If a person desired to register a claim the procedure would be for him to choose by inspection of the earth itself a likely site for opal prospecting operations. He would, if it were apparent that no one was working the area nor had any claim registered over it, place posts at each of the angles of the land and formally take possession of it (Regulation 13). The applicant would then prepare or have prepared with the assistance of a person skilled in so doing, a properly measured plan using as a reference point one of the many grid points existing in the field at Lightning Ridge. The plan should show all measurements and of course should set out the shape of the proposed area. Armed with that, the applicant could attend the Registrar's office and on the Registrar doing a check of his records and being satisfied on them as to the availability of the land, would accept the plan and an application from the applicant with a fee. He would forthwith issue a Certificate of Title. If an area sought to be the subject of a claim is found on the Registrar's records to already be the subject of a claim the Registrar should not register it. (Section 29(1)(a) and there are other prohibitions against registration contained in that section), or if there were any conflict, he would send out the Mining Occupations Officer to do a physical check in the field. Irrespective of when a claim is registered it ran until the next expiry date which is a date common to all claims. Up to the end of 1980 the expiry date was 31st December each year but on 22nd February, 1981 I take judicial notice of the fact that the administration of the Department of Mineral Resources made a policy decision which made all claims expire on 30th June each year thenceforth.

Provision is made for renewal of the registration of the claims in Section 31 of the Act. Briefly it required that an application for renewal should be lodged with the Registrar within one month before expiry and on payment of the prescribed fee renewal should be granted. In the case of any claim which was not the subject of an application for renewal as at the expiry date, whether it be 31st December before 1981 or 30th June after that year, the claim would lapse thereby making it available to any other person who might seek to make application for new registration. Provision is made in Section 33 for a claim to be transferred during its period of registration, subject to the two claim ownership restriction.

Section 14 of the Act provides for the appointment, among other personnel, of a Mining Registrar. While the duties of a Registrar are not set out in the Act nor Regulations to it, it is a commonly accepted practice of which I take judicial notice that a Registrar has neither the authority nor the qualification to attend to any matter arising in the field. His duties are and should be restricted to clerical and administrative practice only and he should rely upon assistance given him by Mining Occupations Officers or District Inspectors of Mines (and they are now called Regional Mining Officers and Regional Mining Engineers).

I have felt it necessary to set out the above matters in view of the evidence which has come forward from witnesses in these proceedings.

Mr. Stojan Milinkovic gave evidence through an interpreter and deposed that in July or August, 1979 he had marked out and pegged a claim in the name of his son Milan Milinkovic. Subsequently registration took place of that claim which was given the number 10560. Mr. Milinkovic Snr. has sworn that he was aware that a person called Brown owned a claim nearby and that it had a number 2136. Prior to registration of Claim 10560 Mr. Milinkovic had

spoken to Mr. Brown, (which I might say is not an unusual occurrence to discuss positioning of pegs before seeking to register a claim). Mr. Milinkovic has sworn that there were no other pegs on the claim when he had registered it. I gather from his evidence that registration of Claim 10560 had been renewed from time to time prior to expiry up until these proceedings and it is still a current claim. Mr. Milinkovic swore that in approximately 1983 he was approached by Mr. Borkovic for permission to erect a post within the area of Claim 10560, upon which could be placed a sign indicating whether or not a business being conducted nearby by Mr. Borkovic was "open" or "closed". Mr. Milinkovic stated that he himself had erected the post. Nothing further was heard from Mr. Borkovic until July, 1985 when Mr. Milinkovic heard that Mr. Borkovic was making a claim to some of the land comprised in Claim 10560 and had placed some credence upon the existence of the sign post.

It is now a matter of evidence that the business which Mr. Borkovic has established is a drive-in mine which is on Claim 11049. His evidence is that the business has over a period of years attracted some 10,000 patrons to his establishment. Mr. Milinkovic has said in evidence, as shown in Exhibit 1, that at all times Claim 10560 was rectangular in shape and that Claim 2136 which was succeeded by Claim 11049 was triangular in shape. Mr. Borkovic and his witness, Mrs. Brown, have asserted that the opposite applies.

Mr. Milinkovic called Mr. Graham McDonald who had some experience in preparation of survey plans and he has confirmed the preparation of the plan which was submitted to the Registrar and upon which Claim 10560 was registered. Mr. McDonald recalled that a person Spider Brown had a triangular claim which adjoined Claim 10560. Mr. Radamire Babic gave

evidence that his belief was that the claim of Mr. Milinkovic had four pegs and that Spider Brown's claim was triangular. Mr. Milinkovic stated that he had been aware that since June of last year there had been attaching to the post which held the "open" or "closed" sign, a claim registration form indicating some claim by Mr. Borkovic of ownership of land adjacent to the post.

Mr. Thomas Pomfret gave evidence concerning the shape of Mr. Milinkovic's claim having worked for him on it as being "sort of rectangular" and stated that that of Mr. Borkovic was a narrow strip although he did not think that it was as distinct as a triangle.

For Mr. Borkovic, Mrs. Petrina Brown gave evidence of having known of a claim registered in the New Chum area. It had, prior to being taken over by Mr. Borkovic, been registered in her name but had earlier been in the name of Anthony Brown although she was not able in chief to identify the number of the claim which Mr. Brown and then she held. In cross examination she agreed that it had the number 2136. She had held it until 1979 when some agreement had been made with Victor Borkovic for him to purchase it. She had been absent with her husband from Lightning Ridge until after the expiry date (which would have at that time been 31st December) but when she had returned to Lightning Ridge in January, arrangements had been made for Mr. Borkovic to register the claim. She felt that the year was 1979 or 1980, and it is now a matter of record that Claim 11049 was registered on 7th January, 1980 in the name of Victor Borkovic. She said in evidence that she knew that Mr. Milinkovic had an adjacent claim and that he had had plans to obtain possession of her claim.

Mrs. Brown deposed that at a time prior to Mr. Borkovic taking over the claim, she and her husband attended the offices of the Registrar at

Lightning Ridge and spoke to a man called Damien who after consulting maps had gone with them to the New Chum field and had placed into position a 4th peg thereby purporting to give Claim 2136 four corners and not three corners as it had previously. The peg which she said was inserted by this person whom she referred to as a surveyor was said to be in the same position as the peg which now bears the "open" or "closed" sign. When pressed about this evidence, Mrs. Brown could not identify who the person was who had earlier told her that the claim should be four-cornered and her later evidence shows that she had not been present when the person Damien had placed the fourth peg into position. She was giving evidence only of what she had been told by her husband. On expiry of the registration of Claim 2136, it is obvious that Claim 11049 was issued to Mr. Borkovic in its place and the latter believed he was entitled to have a four-cornered area. Registration of Claim 11049 has since been renewed by Mr. Borkovic since he took it up and last year Mr. Borkovic sank some shafts on it on the disputed area to which he says Mr. Milinkovic raised no objection. It was only in October last year when the matter came to a head that he became aware that Mr. Milinkovic was claiming that the area which was held under Claim 11049 was only triangular. The evidence of Mr. Borkovic is that when he purchased the claim from Mrs. Brown (brought about by the failure of Mrs. Brown to re-register Claim 2136 and his taking up of it on 7th January, 1980) the claim was rectangular and that he had lodged when he had sought the registration of Claim 11049 an appropriate plan in the form of a rectangle.

It is a matter of deep concern that searches of the Registrar's office have failed to produce either the original documents as to Claim 10560 or 11049 nor indeed as to Claim 2136. It is apparent that they have been either mislaid or perhaps putting a more sinister interpretation on their absence, they have been destroyed or taken away.

Mrs. Brown was asked during her evidence as to the present whereabouts of her husband whose action in seeking to have Claim 2136 brought to a rectangular shape would have been most relevant to the proceedings. She replied that Mr. Brown, her husband, was not at Court at Coonamble and on the day she gave evidence was working at Lightning Ridge. Furthermore, no explanation was sought to be given on behalf of Mr. Borkovic as to the whereabouts or otherwise of a former Registrar at Lightning Ridge whose Christian name was Damien but of whom I am aware has now resigned from the N.S.W. Public Service. For instance the person Damien was entitled to be given the opportunity to answer any suggestion of any impropriety on his behalf. It is a matter of comment that if he did proceed into the field such an action was apparently outside his authority to do so. On the other hand, the absence of the evidence of Mr. Brown might suggest complete innocence on behalf of the person Damien, but I have not had the benefit of his evidence, one way or the other.

I have had produced to me as exhibits a series of location sheets commencing in 1973 as to the positioning of Claims 2136 (subsequently 11049) and Claim 10560. Clearly up to 1977 the sheets show a situation which is confirmatory of the evidence of Mr. Milinkovic but it is noted that on the 1986 location sheets there is no record at all as to the existence of either of these claims but it is hoped that once the within finding is published, that the positioning of the two claims will be clarified firstly by physical inspection and then by plotting on location sheets.

I find that the evidence taken in its entirety is indicative that Claim 10560 is in the form of a rectangle and the claim of Mr. Borkovic, Claim 11049, is in the form of a triangle. I have become fortified in that conclusion by the absence of any evidence from Mr. Brown who was apparently available to give evidence, nor any evidence about attempts to arrange for the attendance at Court

of the person Damien.

Mr. Milinkovic in his Complaint of 21st October, 1985 sought that Claim 11049 be declared null and void insofar as it overlaps Claim 10560 and I feel on the evidence justified in making that order. I so do. Mr. Borkovic in his Complaint suggested that Claim 10560 encroached upon his Claim 11049 but surprisingly in his evidence said that there was no such encroachment. In any case I declare that there was and is an encroachment and that Claim 10560 is the predominant claim and Claim 11049 subservient to it. Mr. Borkovic had originally sought Claim 10560 be declared null and void to the extent that it encroached upon Claim 11049 but that application is refused.

I turn now to the question of costs. The matter was an involved one requiring both solicitors, Mr. Mockler for Mr. Milinkovic and Mr. Borosh for Mr. Borkovic, to attend court on two occasions and doubtless to have conferences with clients and witnesses. Furthermore, it is clear that Mr. Mockler engaged the Department of Mineral Resources in correspondence and Mr. Borosh communicated with the current Registrar at Lightning Ridge. In matters of this type costs go with the verdict and in the circumstances I order Victor Borkovic to pay to the Registrar of the Court at Sydney for payment to Stojan Milinkovic the sum of \$860 as his costs. He is allowed two months in which to pay.