EAR/30
15th September, 1987

SECTION 144 INJUNCTION HEARING

CLAIM NOS. 17820 AND 17886

PRODHOMME

- v -

BALDERSON AND HUGHES

DECISION

BENCH: This has been an action under section 144 and 133 to the Mining Act wherein the complainant Richard John Balderson, the first complainant and Don Hughes, the second complainant proceeded against Daniel Prodhomme, the defendant, for an injunction to restrain the defendant, his agents, employees or contractors from working or disposing of claims 17820 and 17886 in the Lightning Ridge mining division and further by recent amendment to the pleadings. The complainants sought that the court declare that each be recognised as having a third share, that is, an equitable interest in the two claims pursuant to the partnership agreement between them and the defendant and the claims be sold within one month and that partnerships accounts be taken and the proceeds thereof be divided equally between each complainant and the defendant. Finally, costs were sought by the complainants against the defendant.

For all intents and purposes this is a classic dispute over the ownership of claims which frequently arises in the Lightning Ridge mining division. The evidence is that the three parties at different times were working on the claims and that variable opal was found, certainly in respect of one of the claims. Now the complainant suggests that they were recognised as equal partners by the defendant at the outset of the enterprise and when opal was discovered the defendant, it is said by the complainants, refused to recognise their status. On the other hand the defendant has said that there was never such a relationship or partnership existing between himself on the one hand and the complainants on the other that monies which were said to be paid to him by the complainants were never accepted on the basis of it being or those being in furtherance of the partnership agreement and that statements attributed to him which were evidentiary of a partnership agreement simply were not made by him. Needless to say there was never any writing to evidence the relationship between the parties.

I have on occasion in the past, from time to time in matters of this sort attempted ad nauseam to implore miners to reduce their affairs to writing when undertaking enterprises so that in the event of a dispute at least some confirmation or otherwise can be produced. Again, sadly, my comments have been ignored.

A further complication is that both the complainants have difficulty in expressing themselves orally and unfortunately the first complainant was almost inarticulate in the witness box. Neither was able to give any firm evidence as to dates and there was a general vagueness forthcoming from their evidence as to who said what and the circumstances of the conversation. However each has asserted that he is entitled to a one third share of the undertaking and has produced a number of witnesses to support that contention.

The first complainant swore that there had been a discussion among himself, the second complainant and the defendant wherein it was agreed

BENCH: (contd) ...that they would go mining at a new opal field called Sheep Yard. He agreed to do so. He had earlier received a telephone call from the defendant in which the defendant had offered some furniture for sale to him, the first complainant, for some $500 or $600. He had paid the defendant this money and that money was used by the defendant, the first complainant said, to work on the claims. For all intents and purposes again that appears to be a different transaction altogether but, be that as it may, on the same day as this transaction the first complainant says that he had owned a V8 motor which was for sale. He had asked the second complainant to take the motor to Coonamble to try and sell it. The second complainant had done that and obtained $400 for the motor which the second complainant, the first complainant said, had given to the defendant for the purpose of sinking a hole down on the claim. Subsequently the first complainant said the defendant had approached him to go and work on the mine and on one weekend, the exact date the first complainant could not recall, he together with the second complainant had been out on the claim site. Some agrument had developed between the first complainant and the defendant and the defendant had gone to another area nearby where he was assisting another person called German Joe to sink a hole. The two complainants were working on the subject claim with the first complainant above ground and the second complainant underground and on that Sunday of the weekend variable opal was discovered and a conversation was had with the defendant who then took the stones away to be cut.

The next day, on the Monday, the first complainant met the defendant and there were present several other witnesses, according to the evidence that I have heard, including a Mr. McLeod and a Mr. Chris Cahill. During a conversation which the first complainant says he had with the defendant the first complainant had said the defendant had offered him $15,000 to $20,000 as a payout of his share of the partnership. Mr. Browne has made much of the vagueness of this offer for indeed had such a sum been offered it is obvious that the offeree would have been willing only to accept the larger amount. Be that as it may the first complainant had declined the offer and communicated a willingness to work on on the claims. Subsequently, further argument erupted and that week the complainants attended the office of the mining registrar where the applications for injuctions were lodged.

The second complainant has given similar evidence stating that he had purchased the furniture and had given the defendant $500 for the lot. Subsequently he had gone to Coonamble with the motor owned by the first complainant and had sold the motor and handed the proceeds, $400, to the defendant to further the mining operation. The second complainant has given evidence about working underground on the weekend, previously deposed to and of having discovered the opal. When he showed the opal to the defendant the defendant said, quote, that's the stuff we want, unquote. The second complainant said the defendant had said to him privately that he should not tell the first complainant about the discovery of the stones. The second complainant swore that he had not carried out these instructions and in fact told the first complainant about the discovery. Further, the second complainant said that some of the stones were cut and sold and that he received a total of $600 in cash from the defendant. He had given $250 of that to the first complainant and had kept $250 himself and the remainder of $100 was then returned to the defendant to further the mining operation. The second complainant further swore that on a subsequent Friday the defendant had given him another $150, being the proceeds of two other opal sales that had taken place. Furthermore the defendant had given him a bag with opals in it which the defendant has said was worth $6,000 which the second complainant had subsequently had valued at $1,500 only. It was this parcel of opals which was tendered as an exhibit before me.

BENCH: (contd) In addition to the evidence from the first and second complainants, Elizabeth Peters, the de facto wife of the second complainant, has given evidence about the purchase of the furniture and said the purchase price was $800 saying there was a TV set also included, the value of which was $300 over and above the initial $500. She was also present when the defendant had given the sum of $800 which she subsequently agreed to be $400 as furthering the partnership agreement to mine the area which sum was the proceeds of the sale of the motor. The motor had been previously owned by the first complainant which had been sold, with his approval, by the second complainant and the second complainant had given the defendant the $400.

Rodney Joseph Hughes, called in the evidence, Cherry Hughes, the brother of the second complainant swore that he had a conversation with the defendant and in that conversation the defendant had acknowledged that he was in a partnership with the second complainant. He had been initially involved in the picking of the two claims and had been instrumental in obtaining money from German Joe in order that the claims be pegged. German Joe had received the proceeds of the money which the first complainant had obtained from the sale of the motor and some of that was then returned to the defendant in order that the registration of the subject claim that is to say, 17886 could take place. Cherry Hughes had said that he had asked German Joe for the money back and had received part of it and had passed it on to the defendant. He said that he had seen the second complainant working on the claim on the Saturday or Sunday when the discovery was made and there had in fact been a jackjammer and compressor borrowed by the complainants...

BENCH: (contd) ...from Cherry Hughes in order that the work could be carried on. Mr. Douglas Fernando swore that he had been present when the defendant had said that he had two partners one of whom was Ricky Balderson and the other was Donny Hughes. These are respectively the first complainant and the second complainant. He had overheard the defendant say that he was going to get the money from the first complainant in respect of the sale of a motor. However he had never heard a conversation between the two complainants and the defendant on the occasion that he had had the conversation with the defendant. He had assisted the defendant in placing a hoist on one of the claims the subject of the complaint in this matter.

Mr. Norman Leslie Pearson was refreshingly specific as to dates and said that on the 2nd April, 1987 the defendant had come to his camp, some drilling on one of the claims had brought up some opal and Mr. Pearson said that the third had told him not to tell the first complainant about the opal. The defendant had called the first complainant the idiot. Subsequently on the 6th April, 1987 he had met the defendant on the road and had been shown some opal by the defendant and again the defendant had asked Mr. Pearson not to tell the first complainant about the opal. Subsequently the first complainant had come along the road and Mr. Pearson had walked away as he knew there was going to be an argument and he did not want to get involved.

Mr. Colin Matsun swore that he had overheard a conversation between the first complainant and the defendant. He had been present when the defendant had shown him some opal along with other persons, Norman Pearson and Chris Cahill, Rex McLeod and Gary Collett. Mr. Matsun was not able to say what the argument between the defendant and the first complainant was over and Mr. Rex McLeod had given evidence similarly about the conversation he having overheard it. The defendant had showed him a tin containing some opal and one of the group had said, is Ricky here, meaning the first complainant to which the defendant had replied, no he is in town working and I'm going to pay him out of the mine. And he says that the defendant was pretty wild with the first complainant for not being there. Mr. McLeod was fairly certain that he had heard the defendant mention $20,000 as being the payment-out figure.

Mr. Christopher Cahill gave evidence about some conversation having overheard him. There was some dispute over some opal or something and he said that he together with Mr. McLeod and Mr. Matsun were setting up camp when the defendant drove up and showed them the opal which was in a tobacco tin. The defendant had said that he was looking for the first complainant to have a bit of a row with him and split the partnership. He was going to give the complainant $20,000 and used the expression (quote) to piss him off (unquote).

Mr. Allan Hall has given evidence of hearing a conversation in the form of an argument in which the defendant had said that he did not want the first complainant as a partner. He had overheard the first complainant say that he wanted to be a partner. Thirdly, he had seen the two complainants working on the claims which he believed to be the property of the partnership. His evidence of course was attributed as it was attacked in cross-examination as coming from a person who Mr. Hall acknowledged was related to one of the complainants and was a friend of the first complainant. He had seen 32 stones produced by the defendant.

For the defence the defendant has said that he holds the two claims. He agreed that the complainants worked on claim 17820 but only of

BENCH: (contd) ...a weekend and said that the original deal between himself and the two complainants was in respect only of that claim 17820. There had been some also casual working on 17886. He said that the first defendant had lived at his house virtually rent free for a period of 18 months and he had agreed to work for the defendant in order to cut the rent out as it were after paying only 2 weeks' rent. Later the defendant had said that he had German Joe, Shnitzenbaumer drill two holes for him which German Joe did in effect for nothing and it was these which the defendant claimed was eventually used by the complainants to get access underground to claim 17886. It was in that claim of course which the second complainant had found the opal while the first complainant had been above ground because the first complainant said that he was scared of the ladder.

Significantly the defendant agrees that he gave each complainant $300 because he says he was afraid of what the first complainant might do, he having felt that the first complainant may shoot him. He said oddly that of the $600 he had kept $100 back which he says now he wanted as fees for cutting of opals. The defendant has agreed that the second complainant discovered opal which cut to about eighteen stones. He gave fifteen of those to the second complainant because he heard a rumour which the first complainant was circulating or had been attributed to the first complainant saying that in effect the first complainant was in shares with him and he wanted in effect by giving the opals away to buy him out. The defendant has brought himself of course in giving his evidence in direct conflict with what appears to be independent evidence from the plaintiffs in the form of Mr. Cahill, Mr. Pearson, Mr. McLeod and Mr. Matsun who have deposed as I have said of the conversation which the defendant had as to buying the first complainant out and showing him the opal. He says in effect strangely that he does not even know Mr. McLeod and Mr. Matsun and had not even seen them before. The defendant has agreed that the two complainants have been and are one-third partners with him in claim 17820, the so called bottom claim which appears not to have been terribly productive of opals, but not the defendant says as to claim 17886 which has obviously produced the opals. He said that he paid the complainants money simply because he was feared, but he said he did not go to the police about being scared for himself personally although he made some complaint to the police officers in order to protect his house.

In this matter the complainants have given some evidence and of course called numerous witnesses and likewise the defence has called numerous witnesses. The first of those defence witnesses apart from the defendant himself was Mr. Gregory Pardy an opal cutter and he swore that he cut only twenty-two stones for the defendant, being four stones on the first occasion and eighteen on the second occasion. At the time the defendant had complained about a dispute that he was having with the complainants and he says the defendant was confused. He had been friendly with the complainant for years and significantly in chief Mr. Pardy was not able to recall or could not bring his mind to make a mention of the defendant making any comment to him about being scared or afraid. He said simply that the defendant was confused. It is noted however that in cross-examination he said that the defendant was very frightened that the first complainant may shoot him.

Mr. Joseph Shnitzenbaumer who is also known as German Joe has sworn of having been asked to drill two holes down the claim which was in the gully and I assumed from that that is claim 17820. He had drilled one hole which it would seem was not hopeful and then there was insufficient money held

BENCH: (contd) ...by or on account of the defendant to put the other hole down and then it would seem Mr. Shnitzenbaumer in his experience as a driller had indicated to the defendant that that was not the place to drill and there was another spot perhaps of better prospects. That advice had been given to the defendant and the defendant was then left in the situation where he has had insufficient funds to pay for the second hole and then at the direction of Mr. Shnitzenbaumer's boss, Mrs. Fuller, some of the money was then used by the defendant to register a claim which I assume is 17886. The witness had said that he had drilled on that claim and he had believed that the arrangement was the defendant would offside for him on the drilling rig to assist in payment for the sinking of that hole on 17886. This the defendant had done having worked with Mr. Shnitzenbaumer the witness had seen the first complainant and the second complainant working on the claim, that is 17886, and had then advised the defendant to get back to his claim immediately and in effect see what was going on. This it would seem was on the occasion when the opal was found.

The evidence of the witness is consistent with the evidence of the complainants although Mr. Shnitzenbaumer was adamant that the defendant had said that he was in that claim 17886 on his own with no partners.

Mrs. Doris Fuller the owner of the rig had confirmed the evidence of Mr. Shnitzenbaumer but adds the defendant has said that he had no partners in claim 17886. He had said that on several occasions. I do not reject what Mr. Shnitzenbaumer and Mrs. Fuller say, but of course clearly the evidence of what the defendant said to them is self-serving for it seems it would have been clear at the time that it was said the defendant was having trouble with the first complainant as to the first complainant's assertion that he was a partner in both claims not just in one.

Now Mrs. Patricia Huckstepp a further defence witness has sworn of having helped the defendant who was short of money and lent him a generator. Another person called the Swede who I assume was Mr. Brandtzaeg-Sand has also given evidence...

BENCH: (contd) ...and Mrs. Huckstepp has said that that person had given the defendant food and in effect Mr. Shnitzenbaumer and Mrs. Fuller had lent him ladders. Mrs. Huckstepp says the defendant is very gullible, very kind and a generous hearted person who can be intimidated. Mr. Brandtzaeg has sworn that he had been in a situation where he'd observed the defendant and had noted that the defendant was never flush with money in effect and had even given him money and he said $200 himself to help the defendant carry on.

Now the defendant has called these witneses who are witnesses of integrity, that is Mr. Shnitzenbaumer and Mrs. Fuller in particular who have deposed that the defendant had said that he was in claim 17886 on his own without partners. Mrs. Huckstepp likewise has deposed the defendant being in need of help and she and the other friends had lent him the generator, food, ladders and so on and Mr. Brandtzaeg-Sand has even deposed us to the loan of the money. The implication from the latter is that the defendant would certainly not be in the position to go around offering anybody $15-20,000 as he is said to have done to buy anyone out of anything. Now clearly this matter has elements of conflict in it. The complainants and their several witnesses have deposed of not only a conversation but also payment of monies in furtherance of what they say is a partnership agreement. Furthermore this is agreed to by the defendant that he in fact paid the monies and gave opals. Furthermore the witnesses Mr. Cahill, Mr. McLeod and Mr. Matsun say without any equivocation that the defendant had said that he would buy the first complainant out. The defendant says that this is not so, no such conversation ever took place and his interest in the first complainant was simply to get from the first complainant some recompense for his occupation of his home which he had occupied virtually rent free.

Notwithstanding what the defendant and his witnesses say and notwithstanding about the vagueness of the complainants' evidence, that is the complainants themselves, I feel in this matter that bearing in mind the onus of proof which is on the balance of probabilities I should accept the correctness of the complainants contentions and in effect reject that of the defendant without again as I say reflecting on Mr. Fuller or Mr. Shnitzenbaumer.

I do this on the basis as I have said of the oral evidence of the witnesses called by the complainants, that is Mr. Pearson, Mr. Matsun, Mr. McClelland and Mr. Cahill, all of whom have given evidence and the evidence has not been reduced at all as to its weight about this conversation of the defendant. Why would these persons come to court and say that this conversation took place when it did not? I find myself therefore in the situation bearing in mind the predominance of evidence that I should find for the complainants.

Well now let me say this to you gentlemen, that I accept the situation to be as it is. I could make an order to continue the injunction for twelve months from today. I could make an order unless agreement is reached that the claims be sold say within six months from today, and that accounts be taken and then the proceeds be distributed in one third equal share to the two complainants on the one hand and the defendant on the other. It follows from that of course gentlemen that I would find formally that the claims are owned in third equal share partnerships by the three parties.

I am willing however if the parties can reach some agreement to leave the matter stand in the list so that some discussion can take place because it is fairly obvious that if one is forced into the situation of selling something one would not get what one would be entitled to if one were selling it off without coercion. So in the circumstances I am willing if there is some

BENCH: (contd) ...other way around it so that the parties can work amicably together I am willing to let the matter stand so you can have some discussion about it because I am not anxious to force them to sell if there is some other way. I will leave the matter in the list.

ADJOURNMENT

ON RESUMPTION

BENCH: Mr. Sligar.

SLIGAR: Yes Your Worship, after a discussion with Mr. Browne in the interests of both parties we would ask Your Worship if the matter can be adjourned until Friday week in the hopes that some agreement can be reached between the parties in that time as to what should be done with the claim.

BROWNE: Your Worship that's the situation as I understand it and we would ask you to make an order at that time in chambers if no agreement has been reached then Your Worship sees most suitable.

BENCH: Very well. I would just like to say to the parties that if the matter can be possibly agreed to between you you should try to agree. Now to give you a simple example if one has a car to sell and one is forced to sell it because of illness or something or other if you are lucky enough to sell it, you sell it, you just about give it away. Now if I order you that this claim be sold that's probably what will happen and it will be sold for a lot less than what it's actually worth or what you'd get for it if you were given time to hang onto it. On the other hand of course if you can't come to some agreement well I'll make the orders and they would simply be that the claim be sold but within six months. I don't want to have to do that, I don't want to put any pressure on anybody and that's why I am putting the matter over at this stage to 25th September.

SLIGAR: The matter of costs, do you wish to deal with it now?

BENCH: Yes, I'll hear you on the question of costs.

SLIGAR: And also Your Worship the matter of these opals that are here. If Mr. Browne and his client have no objection I will keep them in my custody until--

BROWNE: I'd have no objection to that course of action Your Worship.

SLIGAR: Thank you Your Worship. In relation to costs my application is the following, the matter has been at court for three days. On the first occasion I was here solely for this purpose, it was marked not reached at a period of 2 o'clock, that's three hours in court Your Worship and that the Orana regional law society rate of $100 an hour. On the last occasion that it was at court it was here for a full day which is five hours of hearing time at the same rate, and today I was here for other purposes this morning so I'd only be asking three hours for that. Your Worship there were also the preparation of affidavits that were filed to the original injunction which I would assess at an hour and conferences with witnesses which in fairness to my friend I should only assess at two hours and I would be seeking $200 for that. Your Worship in relation to witnesses' expenses Rex McLeod and Mr. Hughes are the only people who are deriving employment and Mr. Balderson is recently bounded by--

BENCH: When you say Mr. Hughes do you mean--

SLIGAR: Sorry, Don Hughes. Mr. Hughes is paid $64 a day, he's lost three days work. Mr. Balderson has only lost one days work because he wasn't employed prior to today, he earns $100 a day for the work he is currently doing. Mr. McLeod, I asked him on the last occasion he was only seeking travelling expenses Your Worship. The same with Mr. Pearson, Rodney Hughes, Mr. Cahill, Mr. Hall, Mr. Fernando. Your Worship Mr. Hughes and Mr. Fernando did travel to the court together so there would only be one lot sought for those people, Rodney Hughes that's correct Your Worhsip, and also travelling expenses for Mr. Don Hughes who has travelled from Walgett on each occasion. Your Worship my inclination is that it's fifty miles either way from where Mr. Hughes, Mr. Fernando, Mr. Hall reside. I had...

SLIGAR: (contd) ...assessed that at 35 cents per kilometre, whether there is a different rate which brings the matter to $46 per trip each made two trips. Mr. Hughes made three trips Your Worship which is the same distance. Mr. McLeod - I'm having some difficulty remembering who I called Your Worship.

BENCH: Mr. Rex McLeod was one, Chris Cahill--

SLIGAR: Mr. Mantum Your Worship. It appears Sheep Yards is the same distance from Lightning Ridge as what Walgett is Your Worship and solves the problem. Mr. Hall only made one trip Your Worship, that was on today and Your Worship it was also necessary to issue subpoenas for six of those witnesses, there's a copy of this.

BENCH: How much is the figure?

SLIGAR: $90 Your Worship.

BENCH: Is anything on that expenses Mr. Browne.

BROWNE: No Your Worship I've made assessments all along and there's nothing I'd object to on any question.

BENCH: Alright thank you gentlemen, I'll prepare us to allow the question of - make in effect an order as to costs in accordance with section 146 at the appropriate time.

ADJOURNED TO 25TH SEPTEMBER, 1987

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