AT THE WARDEN'S COURT, NARRANDERA
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN,
ON 10TH APRIL, 1986.

MELOCCO PTY. LIMITED (COMPLAINANT)
v.
SMITHERS & MENHENNITT (DEFENDANTS)

BENCH:

This has been the hearing of an application under Section 144 to the Mining Act, 1973, by and on behalf of Melocco Pty. Limited, currently the registered holder of a Mining Lease over lands which are privately owned by the defendants, Barry Haughton Smithers and William Stanislaus Menhennitt, which has been given the number 1208. A photo copy of the lease is partly Exhibit 1 in these proceedings and the document speaks for itself. Suffice is to say that it was granted in 1967 for a period of twenty years so it is not due to expire until 1987. The original grantee by the Governor was Loveridge and Hudson Pty. Ltd. but a transfer to the complainant company was effected firstly to Melocco Bros. Pty. Ltd. in October, 1978 and then to Melocco Pty. Ltd by name change in November, 1983. Granite is the substance being mined by way of open cut quarry operations.

The matter came first before me last month when an ex parte injunction was issued under Section 144(4) on the basis of an approach from Murphy & Maloney, Solicitors of Sydney and which was followed by an affidavit from the State Manager of the complainant company, Mr. Hurst.

Mention was made in that affidavit of the use of a shotgun and preventing the complainant from entry upon the lease and these factors, along with others, prompted the issue of the ex parte injunction, although I then made the matter returnable within the month of the injunction and I have spent all of today on it.

Today I have heard evidence from both parties. There can be no doubt that the complainant conducts several quarries. Its registered office is in Sydney - obviously no quarry is there - but I have heard evidence of another quarry in Mudgee and the subject one at Tocumwal which is the one furtherest away from the home of Mr. Cameron, the company's quarry manager.

It is also clear that the complainant had employed under contract at the Tocumwal site one Jack Martin. I gather from the evidence that he had been there for some years. One of the defendants who was living locally at Tocumwal had become suspicious of the activities of Mr. Martin and he communicated with Mr. Cameron who attended the quarry. It became apparent that Mr. Martin had stolen the substance being quarried in dimension block character, in spalls and even as decomposed granite and had fraudulently sold or disposed of it, to his own profit to persons who in respect of that particular transaction were not customers of the complainant.

As to Mr. Martin's activities, the defendants in correspondence numbered in Exhibits 8 to 11 asked for royalties on the granite taken and the complainant asked for information. On the one hand the complainant says that it cannot pay royalties on minerals the extent of which it does not know, and the receipts of which it does not have, and therefore how can it assess what is payable, while the defendants, on the other hand, say that Martin was the complainant's man, as their contractor and therefore the complainant is responsible for mal-administration, or worse, of the quarry. The defendants felt under no obligation to supply the information sought to the complainant.

As a result of the complainant's inquiries, Mr. Martin had had his services terminated. Since that date the quarry has not been mined and it was the desire of the complainant now to start mining again because it has now a pressing contract to fulfil. The defendants on the other hand say that the complainant is in default of its lease conditions and because of that they want work under the lease to not resume and to not take place until the lease expires next year.

It was the action by the defendants in physically excluding the complainant's agents which has brought the matter to court.

The defendants refer to six matters to support their contention. There is firstly the undisputed fact that rental is in arrears. There can be no doubt on a mathematical calculation the complainant is in arrears. The second point is the non-payment of royalties because of the actions of Mr. Martin in relation to the missing material. The third point is the failure of the complainant to keep the area of the lease and its surrounds clean - contrary to the terms of the lease. The fourth point is the failure by the complainant to work the lease, and again the compliance with labour conditions is a term of all leases and failure to comply may be a reason for cancellation. The next point is failure by Mr. Martin to pay due regard to the fences - for there is evidence that he drove a large machine over one and Mr. Menhennitt had to reconstruct it, and lastly that Mr. Martin had been not closing gates and had been cutting locks. In this regard, the defendants suggest that the complainant had breached terms contained in the Annexure "A", paragraph 6(a) to the lease.

I take them in order that I have quoted them.

As I have said there is no doubt that the rent is in arrears. However, it is clear some rent has been paid each year and it is obviously either a mistaken calculation or an oversight which leaves some $300 owing, some $1900 having already been paid over the three or perhaps four years. I would regard it as essential that all due rent be paid within one week from today, but as far as that being a factor in these circumstances in concluding that non-payment of rent is fatal to the lease, I must regard it as not being the case.

As to the royalties, clearly an impasse has been reached between the parties. According to Mr. Hurst, the defendants not until today gave details of the persons who were recipients under Mr. Martin's surreptitious dealings. He contends that this information should have been forthcoming from the defendants - I make no finding on this matter one way or the other - but I say this - notwithstanding the responsibility of an employer for the actions of all employees or in this case a principal and a contractor, should that contractor act dishonestly without the knowledge of the principal, Courts are, and in my opinion should be, very reluctant to lay blame for such activity at the doorstep of the principal. The defendants might well say that they are being asked to bear the burden of Martin's illegal activity and that may, in one sense, be true. But where a person acts dishonestly I do not see my role to interpret the lease as placing upon the lessee a strict and onerous liability. I decline therefore to make any adverse finding on any unpaid royalty.

Again, as to the failure by the complainant to keep the area clean, true it is that it bears the responsibility. Bearing in mind that the evidence from Mr. Cameron is that at one stage the area was cleaned up - I expect

and require that should the lease continue it will be again cleaned up, but the debris in my view is not a ground for adverse action.

Failure by the complainant to work the lease has clearly arisen out of the dispute which has occurred between the parties and as to the fences and open gates and cut locks, I do not consider that those grounds are sufficient for adverse action.

I think the matter boils down to this. The defendants, Messrs. Smithers and Menhennitt purchased the property four years ago well knowing of the existence of the lease - indeed Mr. Smithers used to cart from it. On the evidence, the decomposed granite then attracted them commercially, but now because of over supply of that, dimension stone is the better proposition. Clearly the defendants want the area so that they can mine all the granite irrespective of its character and they now seek to take advantage of the illegal actions of Mr. Martin to do so.

On the other hand, the complainant has a legal interest as envisaged by Section 144. It holds a lease granted by the Governor. While there have been omissions and failures on its part, I am firmly of the view tha they should be permitted to work without interruption on the area the subject of the lease. At the same time, I would require that my comments in respect of the rental and cleaning the area up be noted and appropriate action taken by the complainant.

I would add this. Some mention has been made as to what is or what is not granite for the purposes of this lease. This is a geological question and in view of my experience in attempting to determine the question as to whether a substance is granite or granite gneiss, I would propose in the

absence of any scientific evidence, to make no finding as to that. I note however, Mr. Hurst's statement that his company is not interested in the decomposed material.

In the circumstances I propose to grant an injunction along lines similar to the ex parte one herein to commence at the expiration of that earlier order and to remain in force for the currency of the lease.

There have been issues which can be said to have been determined in the favour of the complainant and an order for costs is appropriate, with some allowances for the issues proved by the defendants.

The defendants are to pay the costs of the complainant in the sum of $480 on or before 9th June, 1986.