IN THE MINING WARDEN'S COURT
HOLDEN AT INVERELL
BEFORE J. L. McMAHON, ESQUIRE
CHIEF MINING WARDEN
4TH JULY, 1979

MILLER v PAY & ORS

DECISION

BENCH: These are a series of actions under the Mining Act, 1973. The parties to the proceedings are Mrs Ada Mearl Miller on the one hand and Mr William Leigh Vivers, Mr Kevin Pay and two companies in which these men have respective interests, namely Kings Plains Pty Limited and Blue Gem Contractors Pty Limited. The actions are as follows:

(1) An application by Mrs Miller for assessment of compensation,
(2) an application by Mrs Miller for the removal of a dam,
(3) an application by Messrs Vivers and Pay and the two companies for further time to pay monies arising out of a previous judgment of this court, and
(4) an application by Mrs Miller for a right of way.

It is common ground that Mrs Miller is the lessee of mining lease number 68 over Crown land, of which in the main Mr Vivers holds some title under the Crown Lands Consolidation Act. Mr Vivers and his company have entered into contractual agreements with Mr Pay and his company to mine for sapphires on other lands and Mr Pay comes into this action with his company, by reason of being joined as a party along with Mr Vivers and Kings Plains Pty Limited.

Dealing firstly with the question of assessment of compensation, the lessee under mining lease 68 having applied to this court for assessment of compensation payable to the occupier of such Crown lands. The lease was granted on 25th September, 1975 over some five and a quarter acres or some 2.09 hectares. It is apparent that while the lease is now almost four years old, the lease holder has not worked the area continuously. The reason for this is briefly that there has been friction between Mr Vivers and his partner Mr Kevin Pay on the one hand, and Mrs Miller on the other, resulting in other litigation.

Pursuant to Section 122, subsection 4 the leaseholder ought not mine the area until the compensation is assessed. Section 124(1)(b) sets out the criteria under which an assessment of compensation is made. The criteria is as follows:

(i) damage to the surface of land, and damage to the crops, trees, grasses or other vegetation on land, or damage to buildings and improvements thereon, being damage which has been caused by or which may arise from prospecting or mining operations;

(ii) deprivation of the possession or of the use of the surface of land or any part of the surface;

(iii) severance of land from other land of the owner or occupier of that land;

(iv) surface rights-of-way and easements;

(v) destruction or loss of, or injury to, or disturbance of, or interference with, stock on land; and

(vi) all consequential damages;

The lessee, Mrs Miller has described how she has worked the area by pick and shovel process, excavating to a depth of about four feet, taking wash away for processing. As a rule she has been backfilling from one excavation to the preceding one. As a general comment I can say that the operation is a small one indeed. She claims that her activity on the site has done very little damage. However it is clear from her own evidence that Mrs Miller has contracted with others to work her lease for her and in future those contractors will be using a backhoe, bulldozer and a truck for carting wash from one point to another. She feels that around one third of the area of five acres will be mined. She is of the opinion that any surface disturbance will be restored by natural reseeding within some six months, stating that her contractor intends to backfill as he goes, thereby working on only one excavation at a time.

Without advancing any real justification for her conclusion Mrs Miller feels that a fair compensation would be $4 per acre per annum.

The occupier, Mr Vivers has given evidence of a cultivation and pasture improvement programme in which the said area of five acres was involved. It is part of the paddock called Coggins of 250 acres approximately within a property called Kings Plains of 5,300 acres. Significantly, he feels that the fact of the mining activity will render the 5 acres useless for his purposes as a grazier. He is of the opinion that the bulldozing alone, to restore the surface as at the present time, would cost around $1,500. In Coggins, Mr Vivers currently runs 92 head of cattle and 300 sheep. The mining operation would not prevent access to watering of these animals, but Mr Vivers has, justifiably, in my view, expressed some concern about the possibility of disturbance to stock by noisy machines and danger to them in falling down holes and excavations.

When asked by me, he felt that compensation for each acre should be in the vicinity of $35 per acre per annum.

While he concluded that he may be denied the use of the five acres, he did envisage that cattle may graze on some of it. In view of Mrs

Miller's statement that two thirds of it would not be used for mining, this appears to be reasonable. However, oddly, then Mr Vivers advanced that he would like the area fenced, no doubt to prevent stock being endangered or disturbed even though obviously the fence would thereby prevent grazing. He was unwilling to say what the compensation ought to be if the area were required to be fenced by the lessee, even if this court had the power, I might observe, to so order in these proceedings. I think therefore I must put aside as irrelevant for the purpose of this exercise the question of Mr Vivers' request of Mrs Miller for fencing and work on his figure which he required without taking fencing into consideration.

Mr Kevin Pay's evidence inter alia was to the effect that the excavations on the lease were deeper than what Mrs Miller said they were and therefore posed a much greater problem to stock than admitted to by Mrs Miller.

So there it is. On the one hand the lessee says that $4 per acre per annum is a reasonable figure and one that she is prepared to pay. On the other hand the occupier says that the figure should be $35 per acre per annum. There can be no denying that any mining activity on the grazing property potentially can pose a nuisance and can be disturbing to stock on that property and otherwise cause inconvenience. To Mrs Miller's credit, there was another plant working in close proximity to her lease, and it is advanced on her behalf that the mining activity already being conducted there disturbs the area and that her own activity therefore would do little to add to that.

There has seemed to be, even on her own evidence, some disturbance to grasses. I think, for instance, that it would take longer than six months for an area to regrass, or even a set of seasons, that is twelve months. It might well take four to five years, once the topsoil and seed bed is disturbed, before the area gets back to its former vegetative nature. For this the occupier, in my view, needs compensation. The occupier has been deprived, on his evidence, of the use of much of the land although here again I would baulk at concluding, as Mr Vivers did, that it is rendered useless by this and other mining. The severance of the land from the remainder of the property is a factor although in these proceedings not significant. There is no surface right of way or easement as envisaged by the section to be considered.

As to the question of destruction of or disturbance to stock, there is some peril to stock on the lease especially with the movement of machinery and vehicles and bearing in mind the propensity of some beasts, especially cattle, to be inquisitive. As to consequential damages, I am of the opinion that the preceding matters are sufficient to cover all aspects in this application.

I think that Mr Vivers' figure is closer to the mark as to the future, although if one were to take $35 per acre per annum over the whole of his property of 5,300 acres, the resulting figure would be well in excess of $150,000 and Mr Vivers agrees that the gross return from Kings Plains over the last few years was less than $100,000 per year. However, this land is very close to a stream and one would expect that it would be well to the fore as far as production is concerned, in comparison with the remainder of the property.

If one were to look at Mr Vivers' figure therefore of $35 per acre per annum in another light, then it would seem to be more realistic on present day values. For example, it would not be unreasonable to expect that one breeding cow could be carried on approximately five acres of land. On present day values, her calf would be expected to return between $100 to $200. True it is, that there is considerable room for criticism as to the application of this comment as a criteria, and I do not adopt it as an absolute guide but it shows that a figure of around $175 is closer to the mark than a figure of $20 per annum.

I am of the opinion therefore that $173 per year is a reasonable figure for me to adopt as compensation bearing in mind that the whole area may not be used. I direct that it be paid by quarterly instalments in advance to the occupier and such payments to be made by 31st October and subsequent quarterly periods from that date. Payment is to be made to the Registrar of the court to be paid out by him on application by the occupier. So much for the future.

As far as compensation is concerned for the earlier time since the granting of the lease, there is evidence of earlier restricted usage by the lessee and I think that compensation for the past, in view of that restricted use, should be lesser, especially in view of the undisputed fact that there has been little or no mining taking place over the last twelve months because of litigation.

I think that a fairer figure therefore in respect of the past would be $20 per acre per annum for the period since the lease was granted in September, 1975. The compensation therefore will be $105 per annum for the four years up to 25th September, 1979, a total of $420 is therefore due to be paid by her, that is Mrs Miller, as at 25th September, 1979 and I order that that sum be paid by her to the Registrar of the court on or before that day. So much for the compensation question.

I turn now to the matter of the removal of the dam. It is obvious that there had been some confusion as to the boundaries of the lease. Mrs Miller says that until litigation, previously undertaken was decided, she did not know precisely the boundaries of her lease and it seems obvious from the evidence of both Mr Vivers and Mr Pay that there was also some confusion in their minds.

There had been some earlier conversation between Mrs Miller and Mr Vivers as to a survey being had over the area, but no survey was ever carried out until the prospect of oncoming litigation had forced each party to obtain surveys. The lease having been granted in 1975, this dam was constructed in 1976 by Mr Pay. Since then he has used it for mining purposes, for the plant in which he is operating on Kings Plains. It is not used for agriculture. Now the applicant, Mrs Miller says that she saw the dam being constructed, but because of her doubt about the lease boundary she did nothing to prevent it being placed on the land. However, now that the courts have given their decisions as to the lease and in view of the fact that the part of the dam is obviously on her lease, she would want it removed.

There are two reasons for this she says. Firstly, there is the prospect of her own contractor requiring to put onto the land a sapphire processing plant. This plant needs to be on what she terms high ground so it would be above flood level. The dam and its wall which encroaches upon her lease stand on the only high land which exists on the lease as far as she is concerned and there is nowhere else on the lease for the plant to be placed, she maintains. The other reason is more cogent it seems to me. Mrs Miller says that she feels that there is sapphire wash under the wall of the dam, which encroaches upon her lease and she wants to be able to mine it, as she would otherwise be entitled to do, subject to the lease document.

Mr Vivers and Mr Pay do not deny the encroachment of the dam and its wall in part on the lease although they dispute the extent to which it encroaches. They point to seven main factors as I understand them, in maintaining the dam should be left as it is. These are:

> firstly, the fact that there has been general confusion as to the boundaries at the time of construction;
> secondly, the fact that no survey was done by the lease-holder or by the Department of Mines;
> thirdly, the fact that it had taken so long for the lease-holder to complain about the existence of the dam;
> fourthly, the cost of removal of the dam;
> fifthly, their suggestion that no sapphires lie under the wall of the dam anyway and that therefore the removal of it would be a pointless exercise;
> sixthly, the land where the dam encroaches upon the lease is not really high ground and at least on one occasion since 1976 the whole area has been flooded; and
> seventh and lastly the fact that Mr Dawson, Mr Miller's contractor is able to process sapphire wash elsewhere.

I have already referred to the confusion which had culminated in the boundary question being litigated in both this court and before the Supreme Court. Whatever the reason for the confusion, it seems to me that the lessee having been granted a lease by the Crown over Crown land, that she was, in my view under no obligation to have a survey conducted for the purpose of clarifying the occupier's rights, and in my view, therefore cannot be said for the reason of her failure to have a survey done, that she has now forfeited her rights to relief in having the dam removed. Similarly, the existence of the confusion itself, is in itself no reason, in my view, why the court should not order removal of the dam. The lessee has explained her failure to take action to request removal of the dam. This was the pending proceedings in this court and in the Supreme Court in respect of other matters, it being now a matter of record that His Honour, Mr Justice Lee handed down his decision as recently as 27th April this year. Today being 4th July, I do not think that the lessee can be said to have slept on her rights and thereby by reason of her inactivity lost her chances of obtaining relief under the Act. It is true that to remove the dam would cost a large sum of money, Mr Pay saying he used three scraping machines and a D8 unit to construct it and his estimation of cost of removal is $3,000 approximately.

Mrs Miller on the other hand would be willing to let the dam remain standing if she were to be paid $7,000 for the value of sapphire under the dam wall. Mr Vivers, when this figure was put to him and he was invited by me to superimpose upon her figure of $7,000, his own figure, felt that there should be no cost to Kings Plains Pty Limited or Blue Gem Contractors Pty Limited because he and his partner and their companies had already lost out all the way, to use his expression, especially in view of his contention also that there were no sapphires under the dam wall on the lease area.

As to the suggestion by Messrs. Vivers and Pay that no gemstones would be found under the dam wall, mainly because of the existence of rock, this might well be the case, although I gather from the vehements of the complainant, that she is anxious to mine the area. Surely the risk involved in mining, both financial and otherwise is either hers or her own partners, she has been granted a lease to mine and I am of the view, in relation to this argument, that she ought to be able to exercise the rights that she has under that lease. A similar comment can be made about Mrs Miller's claim as to the high ground and Mr Pay's contention that it will be flooded and any plant placed on this spot will be saturated. Here again this is a matter for her and her partner. It is apparent that Mr Dawson, the partner, is able to process wash elsewhere, but this obviously involves trucking the material away and of course bringing material back and it seems to me that the miner ought to be able to process his mineral bearing earth in close proximity to the extraction site wherever possible and convenient.

In all the circumstances I cannot see any real merit in the arguments for the respondents.

I turn now to the legal submissions made by Mr Collins. As to the matters of law put to me by Mr Collins, I am not dealing with these matters as a court of equity. However, I am bound to do so fairly and to exercise any discretion that I might have under the Act judicially. The discretion is a wide one, it seems to me, for the Act permits the Warden to make many orders, not only in respect of payment of moneys but also as regards the depositing of minerals, the removal of things, the use of water and various other matters. I think that one must look at Section 142 with Section 133 to give an overall picture of a Warden's discretion and power. For example I am of the view that Section 142 relates in part to Section 133(d) and by subsection 3 of Section 142 the court may, if it deems necessary, order that a complainant be put into possession of land, and any buildings, fixtures, implements, goods and chattels be removed from that land. Therefore if I were satisfied to the civil standard that there were matters arising out of a particular hearing which demonstrated fault on the part of a defendant, I could make an appropriate order but if also there were shown to be a fault also on the part of the complainant, it would be within my power and discretion to decline to make an order in favour of that complainant or to adjust any order made in his favour depending on the fault on both sides to fit the just requirements of the circumstances.

I do not think that there is any need in these proceedings to decline to make an order for the complainant. True it is that she did not know where the boundaries of the lease were, but now the boundary question has been litigated and it is clear that there is encroachment through no fault of her own. On the other hand there was confusion in the mind of Mr Pay when he constructed the dam as to where the boundary was. This confusion was not the fault of Mrs Miller and I can only comment that Mr Pay having seen fit to construct the dam in obvious close proximity of another's lease, the onus was upon him to do so in a fashion so that there was no encroachment. I feel bound to make an order that the dam be removed. I reject the contentions of the defence in the matter but I note Mr Collins' submission as to the time required to remove the dam.

I order that the dam be removed from the area of mining lease number 68 to the satisfaction of the District Inspector of Mines and at the expense of the respondents. I further order that the work be completed within four months from today, it being obvious that Mrs Miller has other areas upon which to work in the meantime.

I turn then to the question of the time to pay applications. The verdict of this court was delivered almost to the day twelve months ago and no moneys have been paid into the court in respect of that verdict excepting of course the necessary deposits required under the rules of the Supreme Court relevant to stated cases. Of course, the appeal which went to the Supreme Court, meant some delay in payment and until 27th April, 1979, the parties did not know

their position. The applicants themselves, at the original hearing before the Warden's Court, last July, sought and obtained orders for $1,000 per month. I think the stage has been reached where, as a minimum, the $1,000 per month ought to be enforced and as it is not put to me on behalf of the applicants that there is any hardship, in the circumstances I think that $1,000 per month at the very least is satisfactory.

The applicants are ordered to pay instalments as follows: an instalment of $1,000 within 24 hours from the present time, thereafter a further instalment of $1,000 to be paid on or before 18th July, 1979 and an additional instalment by 1st August, 1979. Thereafter instalments to be paid on 1st of each month in the sum of $1,000 until the judgment debt is paid.

As to the question of right of way, I note the right of way, there being no dispute as to this matter as applied for, such to be marked out by the District Inspector of Mines or the Mining Occupations Officer on my behalf in the presence of Mr Vivers and Mrs Miller and in accordance with the regulations of the Mining Act and in particular Regulation 40. I direct the lessee, Mrs Miller to pay rent in the sum of $2.50 per annum and compensation in the sum of $2.50 per annum to the land occupier. The first of such payments to be made on or before 1st September, 1979.

Now I don't know whether that is clear gentlemen as to what has been ordered. Are there any questions at all?

COLLINS: A question in relation to the first payment of $1,000. We trust we can get the amount credited.

BENCH: Yes. I had that in mind. I think it was $800 and I would anticipate that an authority could be forthcoming from your clients for the Registrar of the court to pay that to Mrs Miller. It would need of course to have added to it an extra $200.

COLLINS: And also the question of certain of the costs of Mrs Miller's solicitor to be taxed in that respect, payments would be made after a certain period of time when presumably those costs would be taxed?

BENCH: Yes. I would have thought that would be the case.

COLLINS: Otherwise there would have to be a stay until taxing.

BENCH: Well I wouldn't anticipate any problem about that Mr Collins. I would have thought that the matter could be resolved as at the actual final date of payment which would be some date in October in effect. It is now early in July.

COLLINS: Oh that should be satisfactory.

DIXON: If I can manage to get my bill of costs completed by then Your Worship.

BENCH: Yes, I hope so Mr Dixon.

DIXON: On the question of costs in these proceedings Your Worship, I would make application on behalf of Mrs Miller that her costs for these present proceedings be awarded in her favour.

BENCH: Would you like to indicate to me what your costs are likely to

be and also to Mr Collins and his clients, and bearing in mind that you haven't the situation of having to call any witnesses apart from your client.

DIXON: Well it has involved almost two full days here in court Your Worship. I'd be prepared to assess my costs at $400 in those circumstances. That's $400 total Your Worship.

BENCH: Is there anything on that Mr Collins. Do you want to get some instructions about it?

COLLINS: Well Your Worship, we'd submit that in this matter that the two matters which were litigated were dealt with one day each and that in respect of the compensation matter that there be no order as to cost of the awards in that matter. An assessment was required for the miner to continue her mining operations and she has now made an application complying with the Act and the matter has been dealt with in accordance with that inquiry. We ask that no costs be awarded in respect of the compensation matter. In respect of the application for removal of the dam, costs usually do follow the event and obviously the applicant in this matter has been successful. However, there have been matters before Your Worship which we would submit indicates that our - the defendants in that matter acted reasonably and there were a series of errors by all parties concerned and that that in itself was a matter applicable to the question of cost, in that costs under the circumstances may be - may not be awarded in matters where both parties were acting in good faith through a mistake as to exact nature of boundaries. And that in all events this matter has now been determined and there should be no more matters or applications before the court and in the circumstances, each party bear their own costs in both matters.

BENCH: Yes, thank you Mr Collins. Of course there were more than two matters before the court. I think in the circumstances that the person, Mrs Miller ought to be awarded costs for both days and in respect of all matters. I assess costs in these proceedings beforethe court on 3rd July and 4th July, 1979 at total $400, and I direct that such costs be paid on or before 1st September, 1979.

The last matter of course is this injunction matter Mr Collins. Do you want to mention that at this stage?

COLLINS: No, that matter may be withdrawn Your Worship.

BENCH: Is there any comment you want to make about that Mr Dixon?

DIXON: No.

BENCH: I note that the application for injunction is withdrawn.

COLLINS: Your Worship, could you be able to have the order prepared just so we can - I've got written notes of it, but just to ensure that I have got the correct notes?

BENCH: I don't know whether we can do it today, but it can be done within probably a fortnight Mr Cooper, would that be too much to ask?

COOPER: (Monitor) Two weeks.

BENCH: Just the orders.. I would like a copy of the within orders for the parties within a fortnight.