IN THE MINING WARDEN'S COURT
AT ST LEONARDS

J A BAILEY, CHIEF MINING WARDEN

WEDNESDAY 27 MARCH 2002

CASE NO. 2001/4

ROBERT KEVIN SEARLE	**(Complainant)**
v.	
PRIMO SELLA	**(First Defendant)**
CLAUDIO SELLA	**(Second Defendant)**

APPEARANCES AT HEARING:

Complainant:	Mr W Browne, Solicitor of Browne Jeppesen & Sligar
Defendants:	Ms A Russell of Counsel instructed by Mr D Cleverley, Solicitor of Waterford Ryan

HEARING DATES: 4th and 5th July 2001 at Lightning Ridge
21st and 22nd February 2002 at Coonamble

DECISION

HANDED DOWN IN ABSENCE OF PARTIES

On 2nd February 2001 Robert Kevin Searle filed a praecipe against Primo Sella (First Defendant) and Claudio Sella (Second Defendant). On 14 June 2001 Robert Kevin Searle, the Complainant, filed an amended praecipe seeking the following relief:

(a) A taking of accounts in relation to all transactions in relation to the partnership dealings between the parties.
(b) That each of the Defendants pays the Plaintiff the sum of $10,667.63 total being $21,335.26.
(c) An order that the Defendants do all things and sign all documents to give full effect to the orders of the court and in the event of any party failing to do any act or sign any document then the Registrar or the Chief Mining Warden's Court at Lightning Ridge be empowered to do such acts and sign such documents.
(d) Any other orders this Honourable Court deems fit.
(e) Costs.

Evidence was received in the matter at Lightning Ridge Court House on the 4th and 5th July 2001 and at the Coonamble Court House on the 21st and 22nd February 2002.

The following facts are not in dispute:

- Robert Searle entered into an agreement with Primo Sella and Claudio Sella to mine opal by the open cut method on Mineral Claim number 15871.
- Mineral Claim 15871 was registered to Florence May Searle, in the evidence referred to as May Searle.
- May Searle was to receive 10% of the gross proceeds of any opal extracted under the agreement from Mineral Claim 15871.
- Work on the claim under the partnership had ceased by late 1996 and the open cut was rehabilitated before December 1996.
- On the 16th March 1998 the Complainant paid to Claudio Sella money received from the last sale of opal extracted from the claim pursuant to the agreement.

The dispute in this matter arises between the Plaintiff and the Defendants over the terms of the agreement and, in particular, the manner of payment of expenses in the mining project.

The Complainant, Robert Kevin Searle gave evidence that the agreement with each of the Defendants was as follows: the Defendants would receive 20% each, Mr Searle's wife, being the claim holder, would receive 10% and the balance of 50% of the proceeds would go to Mr Searle, being the Mine Manager. The arrangement, according to Mr Searle, was that he would cut the opal and that Primo and Claudio Sella were to work the claim. Mrs Searle took no active role in the working of the claim. If Primo Sella was not working the claim he would not receive proceeds of any opal won during that point of time. Mr Searle indicated that a discussion took place with Claudio Sella on one occasion and there was an agreement to give Primo Sella 10% of the opals that were extracted in Primo Sella's absence at that time. Mr Searle indicated that there were only two occasions when Primo Sella did not receive a percentage from opals won from the claim.

Concerning expenses, it is Mr Searle's evidence that the Sella brothers were each to pay 20% of the expenses in relation to the mining project. Mr Searle indicated that if Primo Sella or Claudio Sella had purchased fuel or contributed some expenses to the workings of the claim, during the absence of Mr Searle, Mr Searle would reimburse those expenses. He said he reimbursed those expenses at that point of time "so at the end of the day all the expenses came out on the percentage basis".

Exhibit 15 was a document tendered by the Defence and headed "To Mr Claudio Sella final payment. Berlin Project". That document makes reference to the sale of an opal referred to as the "Flame of Berlin". It indicates that it was sold for $40,000 and that 20% of that, which is $8000, was payable to Mr Sella. There is a deduction of $4000 for a caravan which was owed by Claudio Sella to the Complainant. The amount given to Claudio Sella on that occasion was $4000.

It is of interest to note, the following phrase appears at the bottom of the document above the signature of the Complainant: "This ends Berlin Project". The document is dated 16th March 1998.

Mr Searle indicated to the court that following the payment of that final sum to Claudio Sella, Claudio Sella approached him shortly thereafter and complained that he had received the wrong amount. Mr Searle said there were no other approaches by Claudio after that. This evidence is consistent with that given later by Claudio Sella, wherein, he admits that he approached and complained to Mr Searle on one occasion only concerning an incorrect payment to him. That was following the final payment after the sale of the "Flame of Berlin".

Cross-examination of the Complainant saw no movement by Mr Searle on the agreement details concerning this project.

Extensive time was spent in cross-examination of Mr Searle concerning documents which were subsequently tendered and marked exhibits 16 to 21 inclusive. Those documents were hand written by Mr Searle and related to the claim which was being mined pursuant to the subject agreement. Each exhibit appears to be calculations for a specific month during which work took place on the claim. The left hand side appears to have details of opals that were sold together with payment of certain monies to the Complainant's wife and to each of the Defendants. On the right hand side there generally appears to be expenses which were paid during that month. Mr Searle denied that this was an accurate working out of expenses and proceeds under the agreement which he had entered with the Defendants. He was adamant that these documents were merely a practice for him so that he could determine which would be the most beneficial way to do the accounts, for the benefit of all parties.

Mr Searle denied that he had given these exhibits to Claudio and Primo Sella at the same time as he gave them their share of the proceeds of the sale of opal.

Under cross-examination Mr. Searle indicated that he had kept the proceeds of some equipment which he sold at the conclusion of the working of the mine because he had purchased that equipment himself and needed the money for the rehabilitation of the claim.

Mr Searle was questioned as to why, when he reimbursed the Sellas' for money which they expended, such as fuel, he reimbursed the full amount. He replied: "Because that is what they paid". He was then asked:

Q: But they had to pay 20%?

A: The expenses were going to be sorted out at the end of the claim. Even after we had finished mining there still had to be rent paid on the puddling side.

Q: But you did not ask for expenses until four years after?

A: Yes, I wasn't going to worry about it.

Q: Well, why did you?

A: I was looking through the books and I thought they should pay something.

Florence May Searle, the wife of the Complainant, gave evidence that she was present at Glengarry Camp, when the agreement was reached. She supports the evidence of her husband in saying that each of the Defendants was to get 20% of the proceeds of the mining. She said they always got 20% when opal was sold except on those occasions when Primo was not working, he would get nothing.

She said her husband paid all of the expenses and she did not hear any agreement between the parties concerning those expenses.

Mrs Searle was shown exhibits 16 to 21 inclusive and conceded that it was her husband's handwriting and indicated that she saw him write these documents. When questioned about exhibit 17 she indicated that it was an account for the agreement. Further on when being questioned about exhibit 19 she made the comment: "He was very particular to put everything down".

Mrs Searle was then questioned about the accounts as follows:

Q: Did you ever see the book in which the accounts were done in?

A: Yes.

Q: What happened to the book?

A: It's in my husband's brief case as far as I know.

And further on, it was said:

> Q: This is a carbon copy, was the original given to the Sellas when your husband kept a copy?
>
> A: I assume so, Kevin had a copy of everything he did.

Noel John Burke was the last witness for the Complainant. Mr Burke is a qualified accountant and gave evidence that he was responsible for the preparation of the document which is exhibit 12 before the court. Exhibit 12 is a handwritten 8 page document which is headed "Berlin Claim No. 15871" and contains details of opals sold and expenses incurred. This document outlines the expenses of each Defendant as being $10,667.73, which is owing to the Complainant. He prepared this document from a book which was given to him by Mr Searle. He said he basically used that book to get the expenses in some type of legible order. The book was given back to Mr Searle at the same time when the document exhibit 12 was handed to him.

Under cross-examination Mr Burke said that the books, which were exhibits 2, 3 and 4 in the case before the court, were not the books that were handed to him for the purpose of the preparation of exhibit 12.

Mr Burke was unable to indicate the type of book that was given to him by Mr Searle, other than it was not a carbon copy, but an original. Further, that he was given a book and no receipts were given to him.

The books which are red in colour and exhibits 2, 3 and 4 in this case were tendered by Mr Searle on the basis of being an accurate record of the expenses which were incurred when the agreement existed with the two Defendants to mine Mineral Claim 15871. It was quite clear after the cross-examination of Mr Searle that the red books tendered to the court were prepared by him well and truly after work had been completed on Mineral Claim 15871. Having regard to the evidence of Mr Burke, it is quite clear, that exhibits 2, 3 and 4 were prepared after Mr Burke had prepared exhibit 12 from a different book.

One wonders, as to the accuracy of the details which are set out in exhibits 2, 3 and 4, having regard to the fact that there could very well have been, a number of similar

books or documents prepared by Mr Searle from original sources such as receipts. It would appear from the evidence that there ought to have been a carbon copy of a book from which pages were extracted, those pages forming exhibits 16 to 21. Mr Burke did not have access to the carbon copies of those documents when he prepared his summary of expenses for Mr Searle. The book used by Mr Burke appears to be no longer available. The question is posed as to what book was utilised by Mr Burke and what documents were utilised by the Complainant to prepare exhibits 2, 3 and 4. The evidence before the Court leads one to an assumption that original figures were transposed into a book and subsequently copied from that book to one or more other books during the period in which an agreement was reached to mine this claim and when the matter came before the Court. One might then speculate as to the accuracy of the figures which are outlined in exhibits 2, 3 and 4 and also exhibit 12 before the Court.

Primo Sella gives evidence of an agreement existing which is quite different to that as outlined in evidence by Mr Searle. Primo Sella says 10% of the gross proceeds were to go to Mrs Searle and then once expenses were taken out the balance would be split equally among Primo Sella, Claudio Sella and Kevin Searle.

Primo Sella said that there was a change in the middle of 1995 when he was not always working in the claim. He said from then on he received 10% of the gross proceeds of the sale of opal, the same amount that Mrs Searle received. He said that expenses were then taken out and the remainder was split equally two ways between Claudio Sella and Kevin Searle.

He gave evidence that when he received the money from Mr Searle it was accompanied by a document which indicated a break-up of expenses and proceeds. He said he received it at the same time that he received an envelope containing money. He was not sure whether the document was inside the envelope or merely accompanied the envelope. He said that a document was received each time he received proceeds from the sale of opal. Those documents were subsequently tendered to the court and marked exhibits 16 to 21 inclusive.

Primo Sella gave evidence that he saw Mr Searle prepare those documents. It was in a book and there was a carbon copy therein. The only record that Primo Sella has of proceeds being received under the agreement is the documents which were marked exhibits 16 to 21. Primo Sella did not challenge Mr Searle concerning those figures and indicated to the Court: "he seemed to be doing the right thing".

When cross-examined about exhibits 16 to 20 Mr Primo Sella denied that he found them in the caravan when it was finally purchased in 1998.

Claudio Sella gave evidence as to an agreement existing between the parties and his evidence was consistent with that of his brother Primo.

Claudio Sella said that the agreement they had made in 1994 was altered in 1995 around about July or August. He said a conversation took place at the Lightning Ridge Bowling Club between himself, Kevin Searle and May Searle. At the time Primo Sella was in Victoria. Kevin Searle apparently brought up the subject, according to Claudio Sella, and Kevin Searle said that Primo Sella should drop back to 10% because he was away a lot. "Kevin Searle said Primo was entitled to 10% because Primo was part owner of equipment that was being used. I said to him that it was fine by me."

Claudio Sella disputed the version put forward by Kevin Searle in his evidence and he was adamant that the arrangement at that point of time was that Primo would obtain 10% of any proceeds when he was not working on the claim. He gave evidence of opal being found in one instance when Kevin Searle had been playing golf. He indicated that Mr Searle got his normal percentage on that occasion even though he was not working when the opal was extracted.

Claudio Sella gave evidence that when the partnership was dissolved he asked Kevin Searle as to whether he had enough money to close the open cut. Mr Searle replied to him: "Yes it's been in the kitty, everything is all right".

There was a dispute between the parties in respect to an opal found on the claim which was about 15 carats in size. Claudio Sella, along with Primo Sella, gave

evidence that the stone was given to Kevin Searle to cut and polish. The Defendants gave evidence that they were present when Mr Searle was grinding the stone down and they observed that a little chip broke off. They both gave evidence that they returned to Victoria and contacted Mr Searle upon their return. Mr Searle indicated in that telephone call that the stone fell apart. Mr Searle's evidence in respect to this, is that both Primo and Claudio Sella were present at the time when he was grinding the stone and it fell to pieces in front of their eyes.

The following exchange took place in cross examination concerning that stone:

Q. What did you say?

A: Nothing – what can you say?

Q: You were upset?

A: I was.

Q: You thought that you were cheated?

A: Yes.

Q: You were happy?

A: There was nothing else that I could have done.

Nothing can be done in this case insofar as accounting for that particular stone which Mr Searle alleges fell apart when he was grinding it. The evidence however, highlights the difference in the recollection of events between the Complainant and the Defendants. The evidence of the Defendants was that they trusted Mr Searle. The thoughts or feelings of the Defendants are not evidence that Mr Searle acted improperly with this opal that he alleges fell to pieces. The Defendants do not make a claim for a certain amount of money, being their percentage under the agreement, for that particular stone. Consequently, there appears to be no reason as to why the Defendants would put an incorrect version before the court in respect of the loss of this particular opal.

In his submissions Mr Browne conceded that Mr Searle's recollection was not perfect. Time since these matters occurred has certainly not assisted him. However the defence, it was submitted, rests solely upon what is contained in exhibits 16 to 20.

Although I accept that submission, it is apparent that the defence is also relying on their own reaction upon receipt of the proceeds each month. By that I mean, their acceptance (a) that the money given to them was in accordance with the document which they say was handed over with the cash and (b) that each payment of money together with the calculations on the documents, exhibits 16 to 20, was in accordance with their belief of the agreement with Mr. Searle.

There was only one instance in the evidence, and this is agreed upon by both parties, when Claudio Sella did not accept payment as being in full satisfaction of the agreement. That was when he received the final payment, being proceeds of the sale of the opal referred to as the "flame of Berlin".

The last payment to Claudio Sella was a payment of 20% of the proceeds of the sale of the opal "Flame of Berlin". That 20% was in accordance with what Kevin Searle said the arrangement was between himself and the defendants; yet it is the only time that a complaint was made by the defendants as to an underpayment.

Another interesting facet of the evidence is, that Mr. Searle, when handing over the final payment, also handed over the written document, exhibit 15, which outlined details of sale price and the percentage owing to Claudio Sella (after deducting the cost of the caravan). Why would the complainant suddenly resort to handing over documentation with the cash, particularly when he denies handing over exhibits 16 to 20 with prior payments? The defendants want the court to accept the answer to that question to be "because he always handed over documentation with payments" [relying also upon the evidence of Mrs. Searle, when she assumed her husband gave a copy of records that he kept to the defendants]. The complainant wants the court to accept that this was a "one off" situation simply because, as he notes at the bottom of the document, "this ends Berlin project".

The phrase "this ends Berlin project" raises another question, what does it mean? Insofar as the defendants are concerned, it literally means the final action concerning the project. Claudio Sella gave evidence that he asked Mr. Searle, after they decided to stop mining the claim, if he had enough money to close the open cut, to which Mr. Searle replied: "yes, it's been in the kitty, everything is all right". Before the "Flame

of Berlin" was sold, the claim had been rehabilitated and the bond money returned. Consequently, the handing over of money for his share of the sale of the "Flame of Berlin" and the note which constitutes exhibit 15, as far as the defendants are concerned, was the end of everything insofar as the claim was concerned. Mr. Searle wants the court to accept that the phrase only meant the end of the dividing of the proceeds.

The red covered books of accounts, exhibits 2, 3 and 4, set out details in accordance with what the Complainant says was the agreement between the parties. Regrettably, those books are not original documents; the original documents were not tendered to the court. The same can be said about the document prepared by Mr. Burke, exhibit 12. The documents from which Mr. Burke prepared that exhibit were not before the court.

The courts traditionally place weight upon documents which are contemporaneous and original, the only original and somewhat contemporaneous documents before the court are exhibit 15 and exhibits 16 to 20.

There is one other document which indicates some confusion on the part of the complainant, that is the letters from the complainant which are attached to exhibit 14. Each letter is the same, there is no indication there that Primo Sella receives any less money due to the fact that he did not work the claim on occasions.

In considering all of the evidence before me, I find, on the balance of probabilities, that the agreement entered between the parties before the court was in accordance with that put forward by the defendants, that is, Mrs Searle, the claimholder, was to receive 10% of the proceeds of the sale of opals extracted, following that expenses were to be deducted and the remaining money was to be split equally among Kevin Searle, Primo Sella and Claudio Sella. The only alteration to that was that Primo Sella's share would be reduced to 10% of the gross proceeds on those occasions when he was not working the claim. Whenever that occurred, Kevin Searle and Claudio Sella would each receive 50% of the remaining money after expenses had been extracted.

The defendants put nothing independent to the court in respect to the amount of expenses incurred during the partnership. They relied upon the figures in exhibits 16 to 20. The total of those expenses appears to be $61,590, however, exhibit 12 indicates expenses to be a lesser amount, that is $53,338.

Relying upon exhibits 16 to 20, Claudio Sella received a total amount of $20,800, whilst Primo Sella received $18,630. Claudio Sella subsequently received another $4000 from the "Flame of Berlin" (after $4000 had been deducted for the purchase of the caravan from Kevin Searle).

I investigated a number of scenarios, each one excluding the "Flame of Berlin" payment as well as the reduced payments to Primo Sella when he was not working the claim, in attempting to reconcile the various figures which were presented to the court, they are outlined as follows:

SCENARIO 1:

Utilising both the figures and the agreement as submitted by Mr. Searle.

Opal sold	183,150	
20% to each defendant	36.630	each
expenses for each defendant	10,667	each
Therefore profit to each defendant	25.963	each

SCENARIO 2:

Utilising the figures submitted by Mr. Searle and the agreement submitted by Defendants.

Opal sold	183,150	
Mrs. Searle 10%	18,315	
Sub balance	164,835	
LESS expenses	53,339	
Net profit	111,496	
Divided equally among three	37,165	profit for Primo Sella and Claudio Sella.

SCENARIO 3

Utilising the figures accepted by the Defendants as outlined in exhibits 16 to 20*

Opal sold	114,850
Mrs Searle 10%	11,485
Sub balance	103,365
LESS expenses	61,590
Net profit	41,775
Divided equally among three	13,925 profit each Primo & Claudio Sella**

* the accuracy of these figures is in doubt, some speculation was utilised in deciphering the meaning of some of the entries.

** this is a theoretical figure, assuming the figures above are correct and ignoring the fact that when Primo Sella only received 10% of the gross sales, this significantly altered the final profit figure for each party. In actual fact, accepting the entries as to payment to each of the defendants, Primo Sella received $18,630 and Claudio Sella received $20,800.

In accepting the evidence of the defendants that they each respectively received $18,630 and $20,800, IF scenario 1 above was correct, then Claudio Sella is owed $5,163 and Primo Sella is owed $7,333. IF scenario 2 is correct, Claudio Sella is owed $16,365 and Primo Sella is owed $20,800.

The acceptance of scenario 1 would be in accordance with the evidence given to the court by the Complainant, thus, if this is accepted, each defendant owes the complainant the sum of $10,667.63 each. This would appear to agree with the contents of the letter dated 7th January 2000, which Mr Searle sent to each defendant (part of exhibit 14). What is not explained, however, is the fact that the amount outlined in the letter as being allegedly paid to Primo Sella is the same as that paid to Claudio Sella – which challenges the statement made by Mr Searle that Primo Sella did not receive his percentage when he was not working.

On the evidence before the court, I cannot accept the figures given by the Complainant, as represented in the red books, exhibits 2, 3 and 4 and the figures prepared by Mr. Burke, exhibit 12. Consequently, reliance will be placed upon

original documents written out by the complainant, that is, exhibit 15, together with exhibits 16 to 20.

In accepting the evidence of the defence, there are three areas which require attention. Firstly, the appropriate reconciliation following the sale of the "Flame of Berlin", secondly the reconciliation following the rehabilitation of the claim and the refund of the bond money and thirdly, the distribution of the mining equipment which belonged to the partnership.

Concerning the sale of the "Flame of Berlin", which grossed $40,000. In accepting what the defendants say concerning the agreement, and the fact that this opal was found when Primo was not working the claim, the money ought to have been divided as follows:

To Mrs. Searle $4,000

To Primo Sella $4,000

There would be no deductions for expenses, as all mining and rehabilitation was finalised some 2 years prior to the sale of this opal.

To Claudio Sella $16,000

To Kevin Searle $16,000

The sum of $4,000 owing for the caravan should be deducted from Claudio Sella's share.

This leaves an amount outstanding to Primo Sella of $4,000 and as Claudio Sella has already received $4,000 in cash, the amount outstanding to him is $8,000.

The rehabilitation and the refund of the bond is a little more difficult to reconcile. That is because I have difficulty in accepting the figures put forward by the Complainant. The difficulty I have in accepting the figures is not hard to understand if one studies the exhibits. For example, the red book exhibit 4, on page 2 has an entry "Joe Delforce fill in claim at Angledool $600" I have difficulty in accepting that this refers to claim 15871 at Berlin Rush. Also, that same exhibit has entries on page 8 which is headed "August 1996 Berlin", which appear to refer to rehabilitation of the claim. The total expended according to that page is $3,100. Exhibit 12, prepared by Mr. Burke, has a page headed "August 96" which appears to be for the same matter. However, the figures are different in some instances, the total on

exhibit 12 coming to $4,340. Another concern about both of those pages is the entry "Prospect of claim", one would have expected that all prospecting of this claim was well and truly finished by the time the defendants entered into the agreement with Mr. Searle.

In not accepting the figures of the complainant for rehabilitation, it would be unjust to speculate that the $3,000 which was appropriated to the bond from the expenses, as outlined in exhibit 16, was not expended in the rehabilitation process. Consequently to conclude that there ought to be a refund to the defendants would be mere speculation.

The third aspect requiring consideration is the distribution of equipment purchased by funds and expenses of this partnership. In relation to the wet rumbler, the following exchange took place with the complainant when under cross examination:

> Q: Sir I put to you that you owe the Sella's in fact a third of the wet rumbler?
>
> A: Look the wet rumbler is on site and if they can use it and they want it they can have it. I don't want it, to me it's just a commitment and it's costing me just to sit there, they can have the damn thing, I don't want it.
>
> Q: you owe them a third of the proceeds of the dry rumbler?
>
> A: No that was used in rehabilitation of the claim. What it was, that was sold is sold in Berlin ---
>
> Q: Sold and used for rehabilitation was it?
>
> A: No and the money was used to square up the blokes that filled the claim in.
>
> Q: For the rehabilitation?
>
> A: Well yeah.

It appears from that evidence that any equipment sold went into rehabilitation and the wet rumbler, if the defendants want it, apparently is available for their collection. I will leave it to the parties to decide the fate of the wet rumbler.

On the balance of probabilities, in settling the accounts of the partnership, I am satisfied that no money is owing to the complainant by the defendants, however, the

complainant owes the defendants money following the sale of the opal referred to as the "Flame of Berlin"

Accordingly, the complainant is to pay the first defendant, Primo Sella, the sum of $4,000 and the second defendant, Claudio Sella, the sum of $8,000.

A Wardens Court has a discretion, under the provisions of S.317 *Mining Act 1992* to award costs. I can see no reason why the successful party in this case should not be awarded costs. At the conclusion of the hearing in court, each party indicated it was their desire that I make a determination as to the quantum of costs. I have received from the solicitor for the defendants, a document described as a "copy of our client's costs in this matter". In the letter attached to that document, it is stated, inter alia, "At this time, they are not challenged nor accepted by the Plaintiff." I have not received any correspondence on the matter from the Complainant.

Under Rule 15 of the wardens court rules, any costs in the warden's court is to be determined by reference to the scales of costs applicable in the District Court. Following upon the Legal Profession Act amendments and the deletion of scale of costs for hearings, any costs awarded have to be reasonable in all the circumstances.

I have studied the document forwarded by the Solicitor for the defendants and in the exercise of my discretion I propose to make an order that the Complainant pay the defendants costs in the amount of seventeen thousand dollars ($17,000.00).

CONCLUSION

In accounting for all transactions in relation to the partnership between the Complainant, Robert Kevin Searle and the Defendants, Primo Sella and Claudio Sella, I make an order that the Complainant is indebted to Primo Sella, the First Defendant, to the sum of $4,000 and to Claudio Sella, the Second Defendant, to the sum of $8,000.

I further order that the Complainant pays the Defendants' costs in the sum of seventeen thousand dollars ($17,000).