

IN THE MINING WARDEN'S COURT

HOLDEN AT LIGHTNING RIDGE -

28TH OCTOBER, 1980.

JUDGMENT

MILANOVIC v. PETROVIC

CASE NO. 37 OF 1980

This has been the hearing of a complaint under Section 133(h) of the Mining Act. The complainant Milanovic has claimed that the defendant Petrovic has failed to honour an agreement entered into between them on or about April, 1978 and alleges that the defendant owes him some \$5,000.

The matter had originally been listed well over 12 months ago but owing to difficulties with legal representation I was requested from time to time to adjourn it until, on 16th April, 1980 it was commenced, was part heard on that day, was then adjourned to 12th August, 1980 when I concluded the hearing. From that day I adjourned the matter on the basis of a reserved decision until today. On the two hearing dates Mr. Hohmes, solicitor, appeared for the complainant while Mr. Corry, solicitor, appeared for Mr. Petrovic on 16th April, but on 12th August Mr. Corry's place was taken by Mr. Baldwin of the same firm.

The complainant has given evidence to the effect that he and the defendant had entered into an oral agreement to mine Claims 8767 and 8768 at Lightning Ridge and that all opal won from these areas be divided equally between them. He complained that having won a quantity of opal from the claims the partnership had retained the stones until 25th August, 1978 when a claim was made on the defendant by the complainant for his share and it was found that some of the stones were missing.

I am asked to affirm the validity of the partnership agreement, to require the defendant to account for all opal won during the partnership from the two claims during the currency of the agreement, to require the defendant to

account for all opal retained by him and to order the defendant to refrain from selling or otherwise disposing of the subject opal until further order of the court. It was also asked that the court order the defendant to surrender to the complainant his share of the opal won, or its value which was put at \$5,000.

There is no doubt on the evidence that the two parties had a mining undertaking in the Lightning Ridge area and that there were some agreements in relation to the splitting of the proceeds. It is further clear that at some stage prior to them coming in dispute in August, 1978 the defendant had paid the complainant a sum of \$350 which it is suggested were the proceeds of some of the opal sales. The complainant suggests that the partnership had come upon opal in the mine and that as Mr. Petrovic, the defendant, lived in a house, as against the complainant's residence, which was a caravan, it was agreed between the parties that for safety reasons Mr. Petrovic would keep possession of the opal. It is suggested by the complainant that he had proceeded to Sydney at some time before the partnership was dissolved and that he left the stones in the possession of the defendant and that when he returned, while there were some stones of lesser value still in the defendant's possession, the best stones were missing. In subsequent evidence the complainant suggested that the stones totalled eleven that were missing and that in particular two of them were of outstanding quality. Produced in the court as an exhibit were several cut opals which were contained in a small round tin and which are now in the custody of the Registrar of the court. Also produced was a large plastic bag which appeared to me to contain common patch which was of little value.

Each party has called several witnesses and with two exceptions, I have found myself wary of the evidence of these witnesses.

A factor in the complainant's evidence is that on his returning from Sydney he found the valuable stones missing but I note the evidence from two opal cutters, in particular, Mr. Albert Shields and Mr. Julius Dietzius both of whom could be said to be reasonably independent of the parties. All their other witnesses

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I find, in one way or another, had some interest with either one or the other of the parties. The two cutters have given evidence which, it seems to me, is of considerable significance. Mr. Shields has sworn that the parties had come to him with a coffee bottle of opal chips in it asking whether or not it was possible to cut any stones out of the chips. In fact Mr. Shields was able to cut two small stones but the remainder of the chips, he said were "rubbish" - an obvious expression for common potch of no value. Mr. Dietzius is the person who cut the stones which are contained in exhibit 3, the small round tin. He had been approached by the parties and conducted the rubbing and cutting process on their behalf. The evidence given by Mr. Shields is to the effect that when both of the parties approached him to cut stones Milanovic, the complainant, made no complaint to him about the opals which he now says are missing. One would have thought that if Milanovic had felt aggrieved at that stage he would have registered his feelings in some way with the cutter and subsequently to Mr. Dietzius or made some comment about the situation which has now led to these proceedings before me.

It is possible that the partnership did in fact mine good quality opals and that there has been no accounting for the opals by the defendant, that is, they have disappeared either while in his custody or with someone else, or from the possession of <sup>other persons</sup> ~~someone else~~ while in their custody with the defendant's permission, but not the complainant's. This possibility is suggested by the evidence of Mrs. Borkovich. But possibility is not good enough and while the complainant strongly suggests that he has been cheated, I need more than a suggestion - in fact I need satisfactory proof - to come to the drastic conclusion that the defendant ought to produce opals as described by the complainant, or should pay their value - to the extent of \$5,000. I am of the view that on the evidence I cannot find that it is proved that the defendant ought to account either in actual stones or in value to the complainant as the complainant suggests.

There is, however, the tin of opals, exhibit 3. There is some evidence of valuation but rather than accept that valuation, which was done in court, I am of the opinion that the most appropriate court for the court to follow is

to have the defendant, who produced those opals, dispose of them by sale within three months of today's date and pay one half of the proceeds of that sale to the complainant. For the purposes of identification of the stones I desire that the Registrar count them in the presence of both parties prior to the defendant being allowed to depart from the court premises with the stones in his possession, and that if necessary the complainant attend on sale of the stones.

As to the complaint I find as follows -

1. That there was a valid partnership between the complainant and defendant.
2. That the defendant by production of the opals, exhibit 3, and the bag of potch, exhibit 1, has accounted to the court for opal proved to me to have been won from the partnership during the currency of that agreement.
3. That the defendant, following identification procedures in the presence of the complainant conducted by the Registrar, take the exhibits 1 and 3 from the precincts of the court and sell the opals, exhibit 3, within three months of today's date. It seems to me that it would be near pointless to require the defendant to attempt to sell the potch, exhibit 1, which on the evidence is worthless.
4. Having found as in (3), I do not propose to make any orders as to  
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5. requests 4 and 5 in the complaint; and
6. In the light of the above orders made I am of the view that the parties should pay their own costs but should either practitioner wish to argue the matter further I am willing to make a formal finding thereon.
7. *No order as to costs.*