

DATE: 20TH DECEMBER, 1978.

KENNETH JOHN MURPHY AND OTHERS .V.

ROY FRANCIS JOHNSTONE

BENCH:-

This has been a hearing of a Summons under Section 133 of The Mining Act, 1973, wherein the complainants Kenneth John Murphy, Harold Luker, Gorman Long, William Searle and Robert Curtiss have requested certain orders be made in their favour and against Roy Francis Johnstone, the defendant.

It is a matter of record that the complainants sought the orders other than in the sequence in which they appear on the summons and in revised sequence namely Orders 8, 7, 4, 9, 10 and 11. The complainants have requested that the issues be determined accordingly. Certain variations were allowed to some of the particulars in the summons, as are more fully set out in the transcript. The remaining orders which were sought in the summons have not been proceeded with.

Summarised, the revised summons requests that the defendant be ordered to sign a form in respect of mining aid granted to a company of which the defendant and at least two of the complainants were directors, that the defendant be ordered to pay ~~the sum of~~ the sum of \$5,000.00, that the defendant be ordered to take up certain shares in the company, that damages be assessed as a result of the defendant's refusal to sign the document referred to above and that the Court determine all questions arising between the parties and that the costs in the proceedings be payable to the complainants.

The history of the matter is that Mr. Kenneth John Murphy, one of the complainants, was the holder of Gold Lease No. 103 in the Braidwood district in southern New South Wales. Close by was another Gold Lease No. 102 held by the defendant Mr. Johnstone. There had been some litigation between Mr. Johnstone and Mr. Murphy wherein Mr. Johnstone had sought Gold Lease No. 103 for himself pursuant to the provisions of Section 124A of the Mining Act, 1906, but after those proceedings were instituted the parties came to an agreement whereby both leases would be worked to the proposed joint benefit of both parties. That agreement was reduced to writing on the 19th December, 1975, involving Mr. Murphy, Mr. Johnstone and another man called Harold Luker one of the other complainants, who had equal shares with Mr. Murphy in certain other pending applications. The agreement, which is Exhibit 5, provided for a feasibility study on GL102 and subject to that producing a satisfactory result the parties would "jointly arrange such prospecting, financing and other organisation" as was necessary properly to mine and develop GL's 102

might obtain within a two mile radius of GL102 which contained a shaft called the Alma Shaft. Provision was made in Exhibit 5 for voting, namely that each of the three parties to the agreement would be entitled to one vote and that if the parties were not in unanimous agreement as to whether or not the feasibility study result was satisfactory a majority vote would decide the issue. There was further provision in Exhibit 5 for the agreement to remain in force unless the parties agreed to desolve it by unanimous agreement or a majority vote as between themselves, in which case, again, the parties would be entitled to one vote. There were certain other provisions in the agreement as to each of the three parties holding a 25% interest with the remaining 25% being offered for sale or syndicated to raise finance, and for a refund of expenses to Messrs Murphy and Luker in the event of the feasibility study on GL102 providing a satisfactory result.

That agreement was registered with the Minister for Mines on the 7th September, 1977, in accordance with Section 107 of The Mining Act.

It is safe to conclude that the feasibility study proved to be satisfactory, in the opinion of Mr. Murphy and Mr. Johnstone.

Meetings took place in connection with the partnership and some doubts arose as to the legal responsibility of persons seeking to obtain an interest in the outstanding 25 per cent portion of the project. It was subsequently decided to form a company and on the 5th January, 1977, Alma Mining Company Pty. Limited was incorporated. The Memorandum and Articles of Association of this company is Exhibit 9 showing certain A, B & C class shares together with unclassified shares. However, after incorporation of the company, GL102 and GL103 were still and remain held by Mr. Johnstone and Mr. Murphy respectively, although under different title numbers.

Evidence discloses that company meetings were held, there being hand written minutes before me and while Mr. Johnstone, the defendant, was not initially appointed as a Director, after certain representations by him such appointment was made. Certain other parties, namely Messrs Searle, Curtiss and Long, the other complainants, also became either directors or shareholders of the company.

Some mining was conducted and about \$500 worth of gold was won. However, according to the evidence of Mr. Murphy a fault was encountered in the main shaft wherein the quartz containing the gold appeared to run out with a resultant loss in production. Two men were employed on the project which initially necessitated dewatering and cleaning out before blasting and mining.

Such activities consumed the funds of the company and at a meeting of Directors attended by Messrs Murphy and Luker on the one hand, and Mr. Johnstone, on the other, conducted on the 7th August, 1977, it was proposed that each of these three men should sell 10 of their shares at \$1,000 per share or the best price available in order to raise finance.

The defendant, Mr. Johnstone, signed the minutes of that meeting of the 7th August, 1977. It was proposed that five each of the ten shares be sold initially and that the monies be lent to the company by way of unsecured loan. Evidence was adduced that in accordance with that motion the complainants, Messrs Murphy and Luker sold one half of the 10 nominated shares, each obtaining the sum of \$5,000 for such sale and that they advanced to the company the total of \$10,000 so realised. It is plain on the evidence that while Mr. Johnstone moved the motion and was party to the procedure, which resulted in the agreement reached at the meeting of the 7th August, 1977, and in fact signed the minutes of that meeting, he failed to sell such shares and has continued to do so since the date of that meeting now over 12 months ago. This failure it was claimed by Mr. Murphy has led in major part to the present difficulties between the parties.

In 1977 the company applied for and was granted mining aid by the Department of Mines to the extent of some \$17,000. This money went towards maintaining the operations on the mine. Subsequently a second application was lodged and was approved, this time in respect of some \$27,000, notification of such approval being conveyed to the parties on the 12th January, 1978. The Department of Mines required the signatures of Messrs Johnstone, Luker and Murphy and although Mr. Johnstone signed documents in relation to the first grant, since notification of the availability of the second, Mr. Murphy has consistently refused to make available the appropriate signed document to permit the grant of such financial aid to be forthcoming for the mining project. When this became apparent to the Department of Mines the Minister for Mines and Energy on the recommendation of the Prospecting Board cancelled the approval for the second lot of aid on the 28th June, 1978.

As a result of lack of funds and the dispute between the parties mining ceased in January, 1978. Since then certain equipment on site which has been subjected to the elements has deteriorated and the mine shaft has become watered up and therefore inaccessible. For work to re-commence it will be necessary for dewatering to take place after the equipment has to be made safe, especially that relating to electrical circuitry.

Mr. Johnstone, in evidence, while agreeing that he had signed the minutes of the 7th August, 1977, stated that the reason why he had failed to sell his shares as indicated in the minutes was that he had received no satisfactory explanation about the expenditure of monies and had been denied access to the mine so that he could inspect for himself the shafts, drives and equipment to satisfy his own curiosity as to such expenditure. In addition he complained, with some obvious justification, of inability to attend the directors' meetings and of not/^{being} kept informed as a result, he said, of what was going on with the company. It seems that most directors' meetings were held on a week day at around 7.30 p.m. at Brockvale and as a bus driver employed in the Engadine district Mr. Johnstone did not complete his duties

until 6.45 p.m. making it impossible for him to attend. He complained also about lack of notice of the meetings although certain matters were put to him in cross examination which tended to show that notices had been forwarded to Mr. Johnstone as to the proposed meetings.

It was in that cross examination that Mr. Johnstone conceded that if he were to be able to inspect the mine, even at that stage, that he would give consideration to releasing the document agreeing to accept the mining aid and would make his five shares available for sale in accordance with the minutes of the 7th August, 1977. He required no inspection of the books of account of the company stating that if he were able to inspect the mine in the presence of an adviser, an electrical expert and the District Inspector of Mines he could readily assess the extent of expenditure which was said to have taken place over the months that the project had been operating. Such an inspection would require dewatering and Mr. Johnstone undertook to pay for the dewatering and any attendant services from his own pocket.

On the application of Mr. Johnstone's Counsel and with the consent of Mr. Salier, Mr. Murphy's attorney, the matter was adjourned for mention on the 21st September, 1978, at 10 a.m., so that the dewatering and inspection could take place between 2nd August and 21st September. What happened between the hearing dates 1st and 2nd August and the 21st September is now a matter of sorry conjecture. Mr. Johnstone sent two men, a Mr. Watts and a Mr. Mogelli to Braidwood on or about 24th August, 1978, to make preliminary arrangements for his visit the following week; he had also arranged for the District Inspector of Mines to visit the mine on 4th September. When Watts and Mogelli interviewed the person who had the necessary keys in his possession, a Mr. Halfweez, the latter refused to give them those keys, or to release equipment until he had some documentation from Mr. Murphy, notwithstanding that Murphy had previously been in touch with Halfweez advising him of Mr. Johnstone's impending visit. Later Halfweez again refused to assist Mr. Johnstone who had personally attended the mine site, apart from handing him a key to a shed, and even neglected to tell Mr. Johnstone that was another key in the shed to some machinery. Halfweez at no time gave Mr. Johnstone the keys to the other equipment.

Apart from sending Watts and Mogelli to the site and arranging for the attendance of the District Inspector of Mines, Mr. Johnstone himself had attended with two other men who had technical knowledge of mining equipment, namely a Mr. Ray Munn and a Mr. Mark Hill, in addition to Mr. Johnstone's own adult son.

It is clear that these new difficulties arose during the time that there was a Telecom dispute which effectively paralysed the telephone system in Australia, but notwithstanding this, and even attempting to understand the situation that Mr. Halfweez found himself in, in view of the prior arrangements that were made and the undertakings given in Court, the whole incident is a remarkable demonstration of stubbornness and evasiveness, the result of which has been an additional days court hearing and the need for determination of matters by this court, which matters could well have been easily settled between the parties, with the application of a little common sense, communication and compromise.

As might be gathered, the whole exercise of arranging the inspection was futile.

Dealing with the particulars in the complaint Mr. Hastings has raised the question about this court's power to deal with these matters. As to the jurisdiction of the court to make orders, Mr. Hastings submitted that some orders sought for example, No. 8 and No. 4, are outside the jurisdiction of the Warden's Court.

The venture is a mining one and partners namely Murphy, Luker and Johnstone had entered into an agreement in connection with a mine. Reference to the provisions of Section 133 of the Act reveals power within the Warden's Court for example to adjudicate upon:-

- (e) any demand for debt or damages arising out of, any contract of or specific performance of any contract relating to, prospecting or mining, or to any claim or authority;
- (l) the partition, sale, disposal or division of any mining property, or the proceeds thereof, held by two or more persons having conflicting interests therein, but also paragraph
- (m) any question or dispute arising as to the working or management of land subject to a claim or an authority.

It is a matter of common ground that GL's 102 and 103 are titles within the meaning of Section 6 of the Act.

Apart from certain provisions, for example, Section 134, which set a jurisdictional limit wherein if the parties consent the Warden's Court decision shall be final, there is no monetary limit put on any matter which can be determined in the Warden's Court.

The Act gives the Court power to grant specific performance - Section 133 (e) and injunction - Section 144 in matters related to mining, and by Section 168

authorises the imposition of a monetary penalty, if any order other than one for payment of money, has been disobeyed. The spirit of the Act, I believe is captured in Section 138 (1) which provides for adjournment or amendment of the proceedings "to determine the real question in controversy between the parties" notwithstanding that the summons does not show the substance of the facts constituting the complaints.

There could be envisaged circumstances in which the internal workings of a company involved in a mining venture would not be within the jurisdiction of the Warden's Court, for example, where a take-over bid is made and a dispute arises as to entitlement to shares; but the circumstances of each case, in my view, have to be taken on their individual facts and in this matter the mine was being worked, Mr. Johnstone has declined to sign a document and had agreed by resolution to sell some shares, and has done neither, and a direct consequence of this action, was that work ceased. This is directly connected with mining and of the nature of the sort of thing that the Warden's Court has jurisdiction to hear, although such jurisdiction would not be exclusive. I am satisfied therefore that the Court has the power to deal with all matters in dispute as set out in the complaint which are being proceeded with.

There is not a great deal of dispute as to the facts. Mr. Johnstone simply says that he wants to know where his money has gone before he signs any document to do with mining aid or deals with his shares. He says that he did not know what was going on, because he had no notice of directors' meetings and this was the reason why he has taken the course adopted. On the other hand Mr. Murphy wants the mining aid approved so that once and for all the parties can see where they are going and what prospects there are for the future as to whether or not it will be economical to re-commence mining.

The action taken by Mr. Johnstone, Mr. Murphy claims, has caused the venture to founder and only the expenditure of further monies and re-opening the mine will determine its future.

In the whole of the circumstances I am of the opinion that some of the orders sought should be made but that others ought not be made, for the reasons set out.

Taking them in the revised sequence - No. 8 the order that Mr. Johnstone sign any documents relative to mining aid - the agreement, Exhibit 5, provided for a joint arrangement for prospecting, financing and other organisations. There is no provision made in that agreement for what would occur in the case of any dispute arising between the parties nor as to how

that dispute could be resolved. Provision is merely made in Clause 4 for dissolution of the agreement itself by majority vote. It seems to me that any arrangement made by the parties that they sign any document, for example, would have to be joint for it to be effective and could not be enforced in the absence of unanimity.

It is clear that Mr. Johnstone along with Messrs Murphy and Luker signed the earlier document relative to the first grant of mining aid but on my interpretation of the agreement there was no legal obligation upon anyone to sign any subsequent document because of the presence of the word "jointly" in Exhibit 5; because of this I decline to make any order as sought in paragraph 8.

As to paragraphs 7 and 4 in the revised sequence it seems to me proper that these should be taken together as payment of the \$5,000 would necessarily mean the taking up of the shares. There is no doubt that Mr. Johnstone took part in the transaction which led to the resolution of 7th August, 1977, which sanctioned Messrs Murphy and Luker selling their shares each to the value of \$5,000 and taking up the other shares. Mr. Johnstone has not disputed that he attended the meeting of the 7th August, 1977, nor indeed that he moved the motion and was a signatory to the minutes of that meeting which recorded that his motion was carried. I am of the view that Mr. Johnstone had a legal obligation to sell the shares as the other two men had done to this stage and accordingly orders 7 and 4 will be granted.

Order No. 9 in the revised sequence requests that the Court assess damages. There is little evidence before me as to what damages were incurred apart from the likelihood, which has not been disputed, that because work ceased in January, 1978, the plant and equipment which have been exposed to the weather have deteriorated; in particular the electrical circuitry would require overhaul before being put again into operation. In view of the scantiness of the evidence of actual expense for overhaul and the absence of evidence in relation to damages actually suffered, or their quantum, I am reluctant to attempt to make any award on damages and therefore decline to do so.

In relation to Order No. 10, this requests the taking of accounts and the signing of such documents as the Court deems appropriate to determine finally all questions in dispute between the parties. Mr. Salier in final address said that he did not think anything specific was sought excepting matters which may have been overlooked in the prior requests for orders. I cannot see where any other general order needs to be made nor indeed any specific order and in the circumstances I decline to grant Order No. 10.

As to Order No. 11 - costs - it is correct that Mr. Johnstone has been found to be legally at fault in not paying the \$5,000 and taking up the shares; but the fact is that there were other matters in which I have declined to make the orders sought, and in view of this and the turn of events which occurred in relation to Mr. Johnstone's proposed inspection in early September, 1978, I am of the view that the most equitable course for the Court to adopt in the exercise of my discretion would be to order that the parties pay their own costs.

Any orders made will be in favour of Mr. Murphy only. I have heard no evidence from Harold Luker, William Searle, Robert Curtiss nor Gorman Long in this matter and I am not satisfied that any order that I make should be in favour of, or against, these persons.

In the circumstances the following verdict is made against Roy Francis Johnstone as defendant on the suit of Kenneth John Murphy only. That Mr. Johnstone pay to Alma Mining Co. Pty. Limited the sum of \$5,000 as he undertook to do so on 7th August, 1977, in exchange for 800 "C" Class shares in Alma Mining Co. Pty. Limited presently held by the said Roy Francis Johnstone. It is further ordered that the said Roy Francis Johnstone take up the shares allocated to him by the said Alma Mining Co. Pty. Limited within 28 days of today's date on the same basis as Kenneth John Murphy and Harold Luker. Payment of the \$5,000 to take place within fourteen days.

The exhibits to be returned.