IN THE MINING WARDEN'S COURT
AT ST LEONARDS

J A BAILEY, CHIEF MINING WARDEN

WEDNESDAY 2 OCTOBER 2002

CASE NO. 2002/19

RODNEY HERBERT LUMMIS
STUART MARCHANT
ROBERT GEORGE IMRIE

v.

WAYNE STUART NEWTON
H P W "Bill" POWELL

APPEARANCES AT HEARING:

Complainants:	Mr L Moore, Solicitor of Evans Englert
Defendants:	Mr M Bozic of Counsel, instructed by Mr Peter Long, Solicitor of Long Howland Houston

HEARING DATES: 23 July 2002 and 5 September 2002 at Lightning Ridge

DECISION

HANDED DOWN IN ABSENCE OF PARTIES

On 19 June 2002, following upon the filing of a request, by the complainants, an urgent ex parte injunction was issued against the defendants. The complainants also sought an order from the court that the defendants *remove existing levee banks, located on their respective properties "Malabar" and "Morella", Walgett, that cause or are likely to cause interference with the operations of the wet puddler situation on Mineral Claim No 48221.*

The matter was heard before the Warden's Court at Lightning Ridge on 23rd July 2002 and 5th September, 2002.

The complainants are partners in a mining venture, in particular wet puddling, on a site which is located upon the property occupied by the defendant Wayne Newton. The defendant H P W "Bill" Powell is the occupier of adjacent land.

The defendant Newton occupies land which is the subject of part of Western lands Lease 4663 and covers an area of 6862 hectares. Mr. Newton took over managing the property upon his fathers death in 1971 and has been on that property ever since, except for a period of 6 years.

Mr. Powell is the lessee of Western Lands Lease 77 and occupies an area of 4208 hectares.

The relevant facts surrounding this matter are not in dispute and may be summarised as follows:

6 June 2000	Lodgement by the complainant Marchant of a "Review of Environmental Facts for Puddling Operations in Lightning Ridge"
4 August 2000	Letter from defendant Newton to Stuart Marchant, stating, inter alia: *I intend to strenuously object to such an application*
18 October 2000	Confirmation by Land and Water Conservation Department that the soil in the subject area is suitable for the purposes of wet puddling of opal dirt

30 October 2001	Opinion by an Environment Officer, Department of Mineral Resources, that wet puddling operations are not likely to significantly affect the environment.
17 December 2001	Mineral Claim number 48221 granted to Rodney Herbert Lummis
20 December 2001	Approval granted to Rodney Lummis to wet puddle on mineral claim number 48221.

The complainants had completed constructing the wet puddling site in February 2002. The construction included a dam for the catchment of water for processing purposes and a silt dam, the latter of which was fenced. At this time, there was no other earth constructions nearby.

The defendant Wayne Newton, within a week or two after the complainants had finished their construction work, constructed what has been referred to as "drains" adjacent to mineral claim 48221. One of the drains is constructed upon the property of the defendant Powell, near a dividing fence, the other drains are on Mr. Newtons property.

All of these drains have the effect of directing water away from the dam constructed by the complainants on mineral claim 48221.

Water collected in these drains ultimately run into a dam which has been constructed, by Mr Newton, a few hundred metres from mineral claim 48221. This dam was constructed some time after the construction of the drains.

The drain which was constructed on Mr. Powell's land was in fact constructed by Mr. Newton with Mr. Powell's consent. Mr. Powell appears to gain no benefit from that drain.

Since the construction of the drains, there has been one heavy downpour of rain, said to be a "one in a hundred years" event. The flow of water in the drains was of such a capacity that one of the earth drains was broken at a point immediately adjacent to the

dam which was constructed on mineral claim 48221 and consequently, virtually filled that dam with water.

Pending the determination of this matter, the parties agreed to each make alterations to the drains in question to ensure that each obtains a share of water if any rain falls during the interim.

Submissions put forward on behalf of the complainants principally rely upon the rights of a mineral claim holder under the *Mining Act 1992*. Reference was made to the provisions of S.373 *Mining Act 1992* which states:

> **373. Obstruction etc of holder of authority etc**
> A person must not, without reasonable excuse, obstruct or hinder the holder of an authority, a mineral claim or an opal prospecting licence from doing any act which that holder is authorised by this Act to do.
> Maximum penalty: 100 penalty units.

Although the defendants are not being pursued for breach of that section, it was submitted that they have in fact breached the spirit of the section in constructing the drains so as to deprive the complainants of the right to collect natural run-off water on their mineral claim.

It was not disputed that the *Mining Act 1992* makes no provision as to the rights of any claim holder over run off water on land which is not the subject of an authority.

Both parties made reference to various sections of the *Water Management Act 2000*, each party seeking to rely upon one or another section to support its claim.

The following sections of the *Water Management Act 2000* were cited:

> **3. Objects**
> The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular:

(e) to provide for the orderly, efficient and equitable sharing of water from water sources,

(h) to encourage best practice in the management and use of water.

5. Water management principles

3) In relation to water sharing:

(a) sharing of water from a water source must protect the water source and its dependent ecosystems, and

(b) sharing of water from a water source must protect the basic landholder rights of owners of land, and

(c) sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b).

9. Act to be administered in accordance with water management principles and State Water Management Outcomes Plan

(1) It is the duty of all persons exercising functions under this Act:

(a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and

(b) as between the principles for water sharing set out in section 5 (3), to give priority to those principles in the order in which they are set out in that subsection

53. Harvestable rights

(1) An owner or occupier of a landholding within a harvestable rights area is entitled, without the need for any access licence, water supply work approval or water use approval:

(a) to construct and use a dam for the purpose of capturing and storing rainwater run-off, and

(b) to use water that has been captured and stored by a dam so constructed,

in accordance with the harvestable rights order by which the area is constituted.

It should be noted that the land subject to this matter is within the Western Lands Division and consequently, harvestable rights do not apply to the land. [***Farm Dams Assessment Guide***. NSW Department of Land and Water Conservation. p3].

393. Abolition of common law riparian rights.

Any right that the owner of riparian land would, but for this section have at common law with respect to the flow of any river, estuary or lake through or past the land, or to the taking or using of water from any such river, estuary or lake, is hereby abolished.

Mr. Moore, Solicitor for the complainants, made submissions covering the following points:

- The decision of **Mayor of Bradford v. Pickles (1895) AC 587,** is no longer binding as S.393 of the *Water Management Act 2000* abolished riparian rights.
- The subject drains clearly intended to interfere with water going into the mineral claim – consequently breaching the spirit of S.373 *Mining Act 1992*, unless there was a reasonable excuse for so doing.
- There is a compelling inference that the defendants did not act with a reasonable excuse
- There is evidence from the outset that the defendant Newton objected to the actions of the complainants and the construction of the drains was a positive move to prevent the complainants operating the site
- The defendants occupy the land subject to a Western Lands Lease, wherein the rights to the minerals on those lands are reserved in the Crown, who in turn have the right to grant authorities to others to extract such minerals, pursuant to the *Mining Act 1992.*
- Both the leaseholders and the mineral claim holders have rights and obligations, it is clear they must both work together.

On the other hand, the submissions of Mr. Bozic of Counsel, on behalf of the defendants were:

- Nothing in section 195 *Mining Act 1992* gives the complainants the right to surface water run-off
- Section 212 *Mining Act 1992* gives the complainants right to access to water which is on a mineral claim; but this matter involves water outside the mineral claim area
- Norhing in the schedule of conditions to the mineral claim gives the complainants the right to water outside the mineral claim area
- No breach of Section 373 *Mining Act 1992* has occurred, as the defendants were acting reasonably in constructing drains to conserve water during a drought
- Riparian rights may have been abolished by the *Water Management Act 2000* but the common law right concerning run off rain water has not been abolished
- Section 53 *Water Management Act 2000* gives the right to the defendants to harvest rain run off water, within limits, but this does not apply to these lands in the Western Division
- The defendants right to use rain water run off is not directly dealt with by either the *Mining Act 1992* nor the *Water Management Act 2000,* consequently, the rights and obligations are dealt with at common law
- The common law concerning surface water is applicable, **Xuereb v. Viola, Supreme Court NSW 2.2.1990** contains a useful summary of applicable cases
- The defendants have done nothing illegal in constructing the drains.
- The complainants have no right, at common law or by statute, to surface water from the defendants' property
- The defendants are not required to gratuitously assist the effective performance of the mining activity. Failing to do so does not hinder or obstruct the mining.

There is nothing to suggest that the *Mining Act 1992* and the *Water Management Act 2000* cannot stand side by side. The purpose of the Mining Act is to "Make provision with respect to prospecting for and mining minerals." As expressed in Section 3 of the Water Management Act, the purpose of that Act is inter alia, "to provide for the orderly, efficient and equitable sharing of water from water sources."

The Defendants, in making their submissions concerning the Common Law, referred to two texts, the first being Wisdom AS: ***The Law of Rivers and Water Courses***, 4th edition 1979. The second being Fisher D. E, ***Water Law***, LBC Information Services 2000. The essence of those submissions was that each author emphasised the unqualified right of a landowner to collect surface water on his land.

Mr Bozic tendered the case of **Xuereb v Viola (1990) Aust. Torts Report 81-012**, indicating that there is a useful summary of pertinent Common Law cases applicable to this matter. That case summarises, in particular, **Acton v Blundell (1843) 152 ER 1223, Chasemore v Richards (1859) 11 ER 140, Mayor of Bradford v Pickles (1893) AC 587.**

Mr Moore, solicitor for the Complainants, made reference to and relied upon, particularly the decision in **Mayor of Bradford v Pickles**, in so far as he submits, that this case has now been overridden by the *Water Management Act 2000.*

The Common Law cases referred to above are concerned principally with the riparian rights of landholders. As to whether or not riparian rights are involved in this matter is a matter of contention. Mr Bozic in his submissions distinguishes between three different situations:

(i) Rivers and Streams

(ii) Water Courses

(iii) Surface Water

He submits that this matter concerns surface water.

Much has been mentioned by both parties concerning "riparian rights". The phrase is succinctly explained in **Young & Co v Bankier Distilliary Co (1893) AC 691**, where Lord Macnaghten at p698 made the following statement:

> *"A riparian proprietor is entitled to have the water of his stream on the banks of which his property lies, flow down as it is accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors and to such further use, on their part in connection with their property as may*

be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream in its natural flow without sensible diminution or increase and without sensible alteration in its character or quality."

Some of the cases referred to by the parties may be summarised as follows:

Acton v. Blundell – plaintiff had a well on his property. Defendants sank a coal pit on adjacent land .. water in well diminished...laws governing rivers and streams not applicable – inconvenience to neighbour is *damnum absque injuria* that is, a hurt which inflicts no actionable wrong.

Chasemore v. Richards – plaintiff used water from river to drive his mill. That water was interrupted by a well sunk by the defendant. Held the plaintiff had no right to the water percolating through the soil and consequently no cause of action to prevent the defendant from interfering with the supply of the water so percolating.

Mayor of Bradford v. Pickles – plaintiff extracted water from a spring and a stream; the defendant sank a shaft on his land, diminishing the amount of water in the spring and stream. Held the defendant was entitled to do as he had.

The author of the text ***Water Law***, D. E Fisher, comments upon the conclusions reached in **Chasemore.v Richards** on p.73: "the riparian doctrine recognises a mutuality of interest among all riparian proprietors. ... On the other hand the doctrine enabling interference with underground and surface water percolating or flowing indiscriminately acknowledge no mutuality of interest. It is based fundamentally upon the right of the owner of the surface of the land to act in an absolute and unrestricted manner in relation, not only to the land, but to everything physically associated with the land including water".

The author goes on to say: "Lord Wensleydale, of course, was unique in seeking to create a test of what is reasonable by way of limiting the exercise of the right." The author is referring of course to the comment by Lord Wensleydale, after agreeing that

the defendant had a right to obtain the underground water by sinking a well, but being the one member of the House of Lords in qualifying that right by going on to say:

> *"...it seems right to hold, that he ought to exercise his right in a reasonable manner, with as little injury to his neighbours' rights as may be."*

In **Gartner v. Kidman[1961-1962]108CLR12** Windeyer J made the following comments, at p 49, concerning surface water and the rights between the higher proprietor and the lower proprietor:

> *"He may recover damages from, or in appropriate case obtain an injunction against, the proprietor of the higher land who is, for any of the reasons given above, liable to an action because he has concentrated or altered the natural flow."*

And further:

> *"He may put up barriers....if he uses reasonable care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour".*

Dixon C.J. concurred with those comments.

Windeyer J in this case appears to be reflecting the view of Lord Wensleydale in **Chasemore's** case, that is, no matter what the rights may be, a landowner ought to exercise those rights in a reasonable manner, without injury to the neighbour.

One wonders whether the legislature had these comments in mind when enacting S.3(e) of the *Water Management Act 2000.*

There appears to be some grey areas as to what is riparian water and what is not. The Privy Council matter of **Stollmeyer v. Trinidad Lake Petroleum (1918)AC485** concerned run off rain water which ran into a network of ravines and then flowed into a permanent defined channel. It was held to be a river, notwithstanding it ran dry at times during the year and was not fed by springs or other means other than run off rain water. It was held that the landholders abutting that "river" had riparian rights. Lord Sumner said, at page 491:

"When the general legal tests, which decide the question whether a watercourse is such that the water in it is the subject of riparian rights, have been applied correctly,...the conclusion is one of fact not lightly to be interfered with,.."

The facts in the matter now before the court are quite different from the run off rain water which channeled into what was determined to be a river in **Stollmeyer's** case. In considering the facts in this case with the facts in the common law cases which have been cited above, I concur with Mr Bozic when he submitted that this case involves surface water, consequently, none of the parties before the court have any riparian rights.

It falls now to determine whether the common law applies, as submitted by Mr. Bozic, or whether statute law is applicable.

Considering the fact that riparian rights do not apply in this matter, then if the common law did apply, and **if** the *Mining Act 1992* and the *Water Management Act 2000* **did not** apply, then the defendants would have an unfettered right to construct those drains upon their property.

However, to determine whether *S.373 Mining Act 1992* and/or *S.3 Water Management Act 2000* applies, one should turn to *S.33 Interpretation Act 1987*, which states:

"In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object."

In the decision of **Mills v. Meeking and another 169 CLR 214**, the High Court was considering the South Australian equivalent of S.33 and Dawson J stated, at p.235:

> *"The approach required by s.35 needs no ambiguity or inconsistency; it allows the Court to consider the purposes of any Act in determining whether there is more than one possible construction."*

When the *Water Management Act 2000* was introduced on its second reading to Parliament on 22nd June 2000 the Minister for Agriculture and Minister for Land and Water Conservation, Mr. Amery, said that the Act was "to provide better ways of ensuring the equitable sharing and wise management of the State's water" [Hansard 22 June 2000 p 7498].

Notwithstanding that the *Water Management Act 2000* has expressly abolished riparian rights and has not expressly covered the surface water which is applicable in the facts of this case, in considering the object of the Act, it is clear that the harvesting of this surface water must be done by the defendants in a manner which would promote the spirit outlined in Section 3 of the Act:

> *"...to provide for...equitable sharing of water from water sources..."*

Consequently, I find that the construction of the drains adjacent to the mineral claim site is contrary to the provisions of Section 3 of the *Water Management Act 2000.*

Whereas it may appear that this determination conflicts with the comments by D E Fisher, as to the rights to surface water, in his text ***Water Law***, it must be remembered that text was written before the introduction of the *Water Management Act 2000.*

Does S.373 *Mining Act 1992* have any influence in this matter? The complainants submitted that this is not a situation where the defendants are being brought before the court for breaching this section. If I am to understand the submission, the court is being asked to imply that the defendants have unreasonably breached the spirit of the section, for the following reasons:

1. The defendant Newton advises the complainants in writing that he intends *"to strenuously object to such application"* when he first learns of the complainants' intention.
2. The defendant Newton has a total of 6862 hectares upon which he could construct a new dam.
3. The defendant Newton constructs drains for a dam immediately adjacent to the 2 hectare site of the complainants' mineral claim.
4. Those drains are constructed within one or two weeks of the completion of the complainants' earth works.
5. The defendant Newton constructed the drains and dam without any consultation with an expert as to the best place on his land to place a new dam.

The defendant Newton's evidence is that the prevailing drought conditions required him to construct a dam to capture further water for his livestock, consequently, he said, his actions were necessary and reasonable.

In the absence of expert evidence indicating the appropriateness of the placement of these drains, I find on the balance of probabilities that the spirit of S.373 *Mining Act 1992* has been breached.

I do not, however, consider that the complainants need to reply upon the *Mining Act 1992* to obtain their remedy; the breaching of Section 3 of the *Water Management Act 2000* would be sufficient.

It comes now to an appropriate remedy for the complainants. The remedy sought is the *"removal of existing levee banks...that causes or are likely to cause interference with.."* It is now clear that Mr Newton is entitled to construct drains to capture run off water, however, the capture of the water is to be done within the spirit of Section 3 of the *Water Management Act 2000,* in other words the run off water must be shared equitably with the complainants' needs.

Consequently, it is not necessary for the defendants to completely remove all of the drains which have been constructed around mineral claim 48221.

Nothing has been put to the court by the parties as to how alterations may be made of the existing drains to ensure that there is an equitable distribution of run off water. I am reluctant to make final orders without giving the parties to right to be heard in this respect. It is noted that on 23 July 2002, the parties undertook to the court to perform certain works upon the drains pending the finalisation of the matter – thus ensuring each obtained a portion of any run off water during the interim. It may be that those alterations were adequate to give an equitable sharing of the water, or it may be that further alterations are required. I propose to make a general order concerning the drains at this point of time. If the parties are unable to resolve the nature of the alterations, it will be necessary to re-list this matter for further submissions and the making of a more specific order. Any request to re-list the matter must be in writing and within 28 days of this date.

Concerning costs, I can see no reason why costs should not be a matter of course and I propose to make an order accordingly.

AN ORDER IS MADE THAT THE DEFENDANTS ARE TO MAKE NECESSARY ALTERATIONS TO DRAINS WHICH THEY CONSTRUCTED WITHIN THE VICINITY OF MINERAL CLAIM 48221 TO ENSURE THAT THE COMPLAINANTS OBTAIN AN EQUITABLE SHARE OF RUN OFF WATER WITHIN THE VICINITY.

THE DEFENDANTS ARE TO PAY THE COMPLAINANTS COURT COSTS OF $130.00 AND PROFESSIONAL COSTS AS AGREED BETWEEN THE PARTIES. IF NO AGREEMENT IS MADE WITHIN 28 DAYS, EITHER PARTY MAY MAKE APPLICATION FOR THE COSTS TO BE ASSESSED UNDER THE PROVISIONS OF THE LEGAL PROFESSION ACT 1987.