IN THE WARDEN'S COURT SYDNEY
ON 23RD DECEMBER 1992
BEFORE J L McMAHON
CHIEF MINING WARDEN

ROSS STEPHEN MARTIN & JOYCE MARGARET MARTIN (Complainants)
v
AUSTRALIAN GRANODIORITE LIMITED (IN LIQUIDATION) (Defendant)

The Mining Act 1992 which became operative from 21st August 1992 contains in Part 15 provision for the establishment of Warden's Courts which by virtue of Section 296 therein vests in the Warden's Court jurisdiction to hear and determine proceedings in relation to a list of matters there set out. Section 296 is the successor to Section 133 of the Mining Act 1973, repealed by the 1992 Act.

The within action was taken under Section 296 wherein the complainants (the Martins) sought a declaration in respect of a private mining agreement (PMA) against the defendant (AGL). The Complaint made under Section 301 requested that a declaration be made by the Warden's Court that the PMA signed between the parties was no longer of any force or effect and that it will be held to be no longer binding upon the Martins. The Martins set out in the Complaint the following grounds as being the bases of the Complaint:

"(a) The Private Mining Agreement dated 19 February 1986 and which expired on 18 February 1991 has come to an end.

(b) The Defendant Company continued to be in fundamental breach of the said Private Mining Agreement as it never applied for development consent with the local government authorities and therefore, never received any formal approval for the mining of granite.

(c) There has been no bona fide mining activities carried on on the land the subject of the Private Mining Agreement since 25 February 1988."

The evidence disclosed that the parties had signed the PMA on 19th February 1986 which described the Martins as the "optionor" and AGL as the "company". In the preamble in the PMA by paragraph B, AGL was said to be "engaged in the business of the exploration and mining of a variety of minerals including, without limitation, granite throughout the State of New South Wales". By the actual agreement, paragraph 1, the Martins granted to AGL the sole, exclusive and irrevocable right, licence and option exercisable at any time during the Option Period to purchase and remove deposits of granite etc from within the land of the Martins. The Option Period was described at paragraph 2.1 as being as follows:

"The Option shall be for an initial period of Sixty Months/5 Years commencing on the date hereof PROVIDED THAT the Company shall have the right, in its discretion, to extend the Option for a further period commencing on the expiration of the said initial period, which initial period and extension thereof hereunder are hereinafter called "the Option Period".

In paragraph 2.2, consideration was agreed at $50 but by paragraph 4 the Martins were to receive 2.5% of the value of the minerals won from the land. There was a proviso to paragraph 4 which has no bearing on this matter, by paragraph 6.1 at 6.1.1, it was agreed that AGL had certain rights of exploration with the proviso that AGL "shall obtain all necessary consents, approvals and authorities for the doing of certain acts of exploration ..." and by paragraph 7.1 it was provided as follows:

"The Company hereby covenants and agrees with the Optionor that, in so far as it is permitted by law and the Act, the Company shall in its own

name or on behalf of the Optionor as agent (for the purposes only of this Deed) perform and otherwise observe all terms and conditions relating to the Land or to the use or occupation thereof as may be required pursuant to the Act or any authority or licence granted to the Company in respect of the whole or any part of the Land."

By paragraph 9, it is provided:

"This Deed is subject in its entirety to all such approvals, consents, registrations and requirements as may be required pursuant to the provisions of the Act or any other legislation, regulations, statements or guidelines of the Commonwealth of Australia or the State of New South Wales. The approvals, consents and registrations referred to herein shall be obtained by and at the expense of the Company."

The PMA contained no rights within the Martins to terminate the agreement but allowed AGL, by paragraph 8.2, provision for termination of it on 30 days notice in writing.

To say the least, the PMA was poorly drafted and contains a number of vague and uncertain provisions.

The evidence disclosed as deposed to by Mrs Joyce Margaret Martin, and witnesses Ernest Henry Cullen and Michael William Cullen (having been involved with AGL as Chairman and Director, and Director, respectively, of AGL) that quarrying for granite had taken place on the Martin's property in accordance with the agreement from 1986 but was ceased in February 1988. According to Mrs Martin from then onwards valuable equipment was left on site and over a period of time as confirmed by diary notes that she had made, various third parties had attended the property and removed these items, apparently in accordance with a claim of right which those third parties perceived that they had. Neither Mr Cullen disputed the fact of the removal of the items nor was it disputed that prior to 18th February 1991 there was served upon AGL a notice of termination of the PMA at the instance of the Martins. Neither Mr Cullen

also disputed that work had not been carried on after February 1988. Neither also disputed that no approach had been made to the Temora Shire Council for development consent as suggested in ground (b) of the Complaint.

Mr Ernest Henry Cullen stated in his evidence and that was confirmed by the evidence of his son, Michael William Cullen, that it was the duty of Mr Ross Stephen Martin, one of the complainants, in his own role as a director of AGL, to attend to the application to the Temora Shire Council for development consent. It was suggested on behalf of the Martins that this was not the case and that it was encumbent upon AGL to make its own application. It might be noted that while Mr Martin had been a director of AGL it seems clear that there had been a considerable amount of friction between himself and the Cullens, Mr Ernest Henry Cullen having suggested at one stage that Mr Martin had said that anyone entering the property from AGL may be threatened by Mrs Martin with the use of a firearm. It was part of the defence of AGL however that Mr Martin, as a director of AGL, had the role of applying for development consent.

Called as the first witness in the complainants' case was Mr Stephen Claude Carmichael, the Shire Engineer and Town Planner for the Temora Shire Council. Mr Martin deposed of having visited the site of the quarry in October or November 1990 and having seen a number of granite blocks and mining equipment present. The Local Environmental Plan for the Temora Shire Council, according to Mr Carmichael, provided that any mining operation in its area be the subject of a development application and it is on record by way of Exhibit 3 that following that visit to the

site by Mr Carmichael, the Shire Clerk for the Temora Shire Council on 13th November 1990 had written to AGL in the following terms:

"I refer to quarrying operations which have been carried on during recent times on the above property. You are hereby advised that this land is zoned Rural 1a under Council's 1987 Local Environment Plan. Therefore Council's consent is required for any proposed development concerning quarrying or mining. As no development application has been received or approved for this site by Council, you are advised that work of any nature on the site constitutes an illegal activity.

If any further activity is carried out on site without development approval the powers of the Environmental Planning and Assessment Act will be used to deal with the illegal activity."

By way of reply of 17th December 1990 by Exhibit 4, Mr Michael Cullen had indicated as follows:

"Australian Granodiorite Limited intends to recommence quarrying operations on the above property following a Supreme Court hearing between AGL and a company that had entered into a joint venture with AGL. The hearing is set down for the 13th May 1990 (sic).

Prior to recommencement of operations on the above property, AGL intends to make application for all/any necessary approvals." This correspondence is signed "Michael W Martin".

In the light of this correspondence, one wonders as to the validity of the claim by the Cullens that Mr Ross Martin was responsible for the lodgment of any development application.

Further evidence in the matter was given by Mr Christopher Joseph Brophy, the Regional Inspector of Mines whose headquarters are at Wagga Wagga, who had visited the site on two occasions, the first being in November 1989 and the second in November 1991. On the first visit he had seen a large amount of mining equipment present and a large number of granite blocks which had been extracted lying around and on the second visit, some two years later had noted that the equipment was missing, except for a mobile crane which was still on site. Mrs Martin

subsequently gave evidence that the mobile crane had been required to remain on site by the Commonwealth Development Bank, one of the creditors of AGL, which organisation subsequently made arrangements for its removal. It is clear from the evidence of Mr Brophy that no mining activity was taking place as at the date of either of his inspections.

The effect of the evidence on behalf of AGL given by the two Mr Cullens is that AGL had believed that it had entered into a joint venture agreement with another organisation which other organisation had given certain undertakings as far as finance was concerned which undertakings were not subsequently honoured. These involved, among other things, the advancement or guaranteeing of several million dollars for the extraction and sale of granite not only on the property of the Martins but also at other sites in the district. The Cullens have therefore claimed in effect that because of the reneging by the other organisation in the joint venture agreement then AGL was put in an impossible position to pursue the PMA with the Martins because, among other things, some of the mining equipment had to be sold to meet legal expenses and some of it had been re-possessed by creditors. AGL or persons or organisations in the same interests as AGL had launched a Supreme Court action against the other organisation which it was considered was the joint venturer. This was the action referred to by AGL in Exhibit 4. That action however was unsuccessful notwithstanding a hearing and subsequent appeal to the NSW Court of Appeal. Mr Ernest Henry Cullen said in evidence that the way the initial hearing was conducted has now been reported by him to the Independent Commission Against Corruption.

Mr Ernest Henry Cullen agreed in evidence that the circumstances which led up to what he said was the failure by the other organisation to

honour its obligation under what he considered to be the joint venture agreement had nothing to do with the Martins although there was the suggestion put to Mrs Martin when she was in the witness box that she had attended a secret meeting of some nine shareholders of AGL held at Temora during the period while the Supreme Court action was pending. When she was cross examined by Mr Murray for AGL, she had difficulty remembering precisely what was discussed at that meeting although she said that the main tenor of it was that the nine minor shareholders wished to find out what was going on with AGL because it had no information forthcoming from the Cullens. It was suggested to her that the main purpose of the meeting at the instance of a Mr Taupy from the other party in the Supreme Court action, was to undermine AGL by making access to the property the subject of the PMA difficult or perhaps impossible. She denied that contention. I have difficulty accepting her evidence that she had problems with her memory as to the full effect of the meeting and what was discussed at it.

Mr Michael William Cullen gave evidence that when he had taken prospective customers to the site he had been orally abused by Mr Ross Martin who had made the circumstances difficult to the extent that any prospective customers lost interest in the project, or joining in it as possible joint venturers. He said that he had been obstructed by Mr Martin and there was mention of the use of the firearm. However, on the totality of the evidence as to these incidents, bearing in mind the fact that AGL had not worked the quarry since early 1988, because of other circumstances, I cannot see where the obstruction by Mr Martin at a subsequent date contributed to the difficulties which AGL experienced at the earlier time.

One of the grounds upon which it was sought for me to declare that the PMA had come to an end was that paragraph 2.1, the so-called option period paragraph, was void for uncertainty, it being submitted by Mr Granleese for the Martins that in Australia at least more precise details are required in an option agreement. It seems to me that on the basis of my reading of paragraph 2.1 and some research which I have done that had all other things been left as they were when the agreement was signed and no other problems developed that paragraph 2.1 gave AGL the right in its discretion to extend the option for a period for the whole of the life of AGL, at the same percentage as specified in Clause 4. I decline to make any declaration on the basis that the option period paragraph is void for uncertainty.

It was put to me further by Mr Granleese that the Temora Shire Council's requirements for a development application should have been complied with and therefore failure by AGL to apply was fatal to the efficacy of the PMA. On the other hand, Mr Murray argued that because it may be suggested that there was no need for a development application being lodged by reason of the fact that it had been suggested that the area affected was under 2.5 hectares, then failure to apply was not fatal to the agreement. I have already mentioned the evidence of Mr Carmichael who has made it plain that it is a requirement of the Temora Shire Council's Local Environmental Plan that any mining activity be the subject of a development application. I accept that evidence. Having done that I turn to the agreement and see that as AGL did not make any development application, nor caused one to be lodged, then that failure could have put AGL in breach of the law and liable to have its activities ceased. The whole project might well have been put in jeopardy by this omission. That would have a direct and adverse effect

upon the Martins who had the interest of obtaining a percentage of 2.5 of the value of the granite won. I am of the view that the failure to make a development application is fatal to the agreement.

One further matter referred to is paragraph (c) of the Complaint and this was that no bona fide activities had been carried out under the PMA since February 1988. That fact is not in dispute. While there is no mention or undertaking in the PMA that AGL would carry on mining activities it is clear from paragraph B in the preamble that AGL was engaged in these activities and therefore it is an implied term of the agreement that these activities would be pursued thus generating income for the Martins. Mr Ernest Henry Cullen has agreed that it was not the fault of the Martins that work came to a halt. This, also, in my opinion, is a basis for the Court to declare the PMA to be at an end.

In the totality of the evidence before me I declare that the private mining agreement called an Option Deed dated 19th February 1986 between the Martins and AGL being the parties before me no longer has any force and effect and is no longer binding upon the Martins.

Section 317 provides jurisdiction for the award of costs which are in my discretion. They may be taxed but in the circumstances I propose to make an award today, without taxation being necessary. The matter is a complex one but it could have been protracted had it not been for the practical approach adopted by both Mr Granleese and Mr Murray. It would have required consideration of the terms of the PMA plus other documents and necessitated the attendance by Mr Granleese of one full day in court with considerable antecedent preparation. In the circumstances I order

AGL to pay costs for the Martins which I assess at $2,700 and I allow AGL two months to pay.