IN THE MINING WARDEN'S COURT
HOLDEN AT SYDNEY
SITTING AT SUTHERLAND
ON 3RD APRIL 1992
BEFORE J L McMAHON,
CHIEF MINING WARDEN

GEOFFREY ROSE v PETER HENDERSON

BENCH:

The hearing which I have conducted over recent days was instituted by Geoffrey Rose, the Director-General of the Department of Mineral Resources (the complainant) against Peter Henderson, a property owner of lands called Henley Downs in Victoria Park Road, The Oaks (the defendant). The cause of action was initially an application by the complainant for an Injunction under Section 144(4) of the Mining Act, restraining the defendant from preventing access to a borehole which had been sunk on his land on behalf of the complainant in furtherance of an Authorisation granted under the Coal Mining Act. The application was granted on an ex parte basis on 13th March 1992 and has been directed to continue to run in accordance with the law until 12th April 1992. I had directed service of all documents upon the defendant and that the matter be listed within that period. It has proceeded on an urgency basis at Katoomba and Moss Vale Court Houses in addition to here at Sutherland.

The application lodged by the complainant also sought an order allowing all works to be undertaken to stop the escape of water from the borehole and to rehabilitate the land.

The Coal Mining Act of 1973 and the Mining Act of 1973 are like pieces of legislation, although there are some differences. The predominant Act is the Mining Act which provides, among other things, for the grant of titles to explore for or mine for minerals other than petroleum, coal or shale while

the Coal Mining Act makes provision for the exploration for or mining for petroleum, coal or shale. The names of the titles granted under the respective Acts are different. The Mining Act refers to an authority which can include an exploration licence, mining lease or mining purposes lease, and provision is also made for the grant of a claim, while the Coal Mining Act titles are authorisations and concessions, which can be an exploration permit or a coal lease. Authorisations are primary exploration type titles as envisaged by Sections 20 and 21A. By Part X of that Act certain provisions of the Mining Act are adopted including facilities for the issue of injunctions covering authorisations and concessions. Separate provisions are made in both Acts, coincidentally under Part VIII of each, for compensation.

The evidence shows that Authorisation No 6 which has been renewed from time to time was granted to the complainant for the purpose of prospecting for coal and that a number of boreholes were sunk by or on behalf of the complainant in furtherance of this requirement under the authorisation. All boreholes were numbered for the purposes of identification and one of the boreholes is DM Picton DDH1 which was sunk, on what became the defendant's property, in 1982. Mr Whitbread, a local resident then and now, called by the defendant, gave evidence that he recalls this hole once sunk and subsequently sealed of showing signs of moisture seeping from it, this being evident at time of severe drought with what he called some green pick - new shoots of grass - around the borehole in the then otherwise dry land.

The defendant purchased the property in 1984 and his solicitors brought to his attention the fact of the existence of a coal exploration borehole on it, as disclosed by their searches prior to purchase. Latterly he had observed

water coming from it, and became concerned. He had contacted personnel from the Department of Mineral Resources, resulting in a Mr John Scarborough carrying out an inspection of the hole. Subsequently correspondence was engaged in between the defendant and the Department, copies of most of which are now exhibits before me. Suffice is to say that initially the Department denied responsibility, as evidenced by exhibit 16 which is a letter dated 22nd August 1991, but later in an undated letter exhibit 12 but which was obviously despatched after 30th August 1991, whilst not admitting liability, offered properly to seal and rehabilitate the borehole, to establish appropriate machinery in the location, to remove the existing casing, to cement and block the borehole to a depth of approximately 80 metres, and to repair any surface disruption caused by the operation. The defendant at all times asserted that the complainant's Department's denial of responsibility was inappropriate. There is in evidence a further letter, exhibit 3, dated 30th January 1992 in which Mr A Galligan who described himself as Director (Coal) indicated to the defendant that the Department would accept his "counter offer" for work at the borehole site on certain terms, which apparently were accepted, in the light of exhibit 13 which was a letter from Mr B Mullard, the Chief Geologist (Coal & Petroleum) dated 3rd February 1992, which engaged a company called McDermott Drilling Pty Ltd for the purposes of work to be done at the site of the borehole. There is evidence of an agreement between the complainant's department and defendant, the basis being exhibit 2, a letter from the defendant dated 16th January 1992 and exhibit 3 accepting the counter offer in exhibit 2.

It is clear from this correspondence that the parties had finally agreed that the Department could cause the borehole to be cleared by removing the existing casing, recasing, with pressure grouting of the hole and fitting a borehead to the extent that the activities would allow for a water bore to be

established for stock purposes on the defendant's property adding obvious value to it. The defendant was also to have some financial in-put to the project, for the recasing, cementing and borehead applicance.

Work commenced in accordance with the agreement and apparently continued for some time. Mr Mullard has given evidence along with Mr Alder, a Senior Geologist with the Department, that an insurmountable problem arose in respect of the proposed work and construction arrangements. Both Mr Mullard and Mr Alder have sworn that the sides of the drillhole continued to collapse and whilst an attempt had twice been made to place casing, that is, PVC cylinders, into the hole to stabilise it, because of the poor condition of the hole the intended purpose in drilling and rehabilitating the hole with the intention of creating a water bore for the defendant became impossible. While some of the badly corroded old interior casing had been removed, the contractors found it impossible to remove the majority of it. Original quotes and estimates for the work were a total of $7,000 to be expended over 7 days but over a period of 5 weeks the cost had ballooned to $40,000 with still no apparent possibility of the objective being achieved. McDermott Drilling Pty Ltd was instructed to cease operations.

These factors were brought to the attention of the defendant and a disagreement arose with personnel from the Department in respect of what was to happen next. The defendant expressed obvious concern about the agreement, and also about pollution from the water coming from the hole and from the badly corroded interior steel casing originally left and now still remaining in the hole. The defendant required the work to be continued in furtherance of the agreement but the complainant wrote personally to the defendant in a letter of 11th March 1992, exhibit 6, indicating that in his view and on legal advice the agreement had been frustrated by reason of the conditions existing at the borehole.

There is now some dispute as to what was said between Messrs Mullard and Alder, on the one hand, and the defendant on the other as to the developing problem with the borehole. The defendant has denied preventing personnel for or on behalf of the complainant entering the land but Messrs Mullard and Alder say that the conversations with the defendant were to the effect that access was denied to them excepting for the purpose of establishing a water bore on the land and for them to enter otherwise would make them and others trespassers. Whatever the situation was, Messrs Mullard and Alder swore affidavits which supported the application for the issue of the ex parte injunction.

At the hearing which I conducted, the defendant sought not only to raise the issue as to whether the injunction should have been granted and whether or not it should be continued, in effect, by making the order allowing work to be undertaken to stop the escape of water, but also specific performance of the agreement, a requirement for the Department to enter proper negotiations or do the work or to pay him the sum of $45,000 to allow him, the defendant, to do the work; in addition to compensation.

No court documents were filed by the defendant, notwithstanding his statement initially on the morning of 24th March that he intended to file them and only when I reminded him at the morning tea adjournment and again pressed him at the luncheon adjournment on that day did he seek to lodge in Court an application for orders. This document was unsigned and upon it no process has issued. I then ruled that I would deal only with the application for the order to allow works to be undertaken to stop the escape of water from the borehole and to rehabilitate the land, and on 25th March 1992 advised the defendant that he should seek informed legal advice as to the proper course to be followed in either the Warden's Court or in other jurisdictions to pursue the

rights that he perceived he had in respect of the matter. Notwithstanding the ruling, even in his final address to me, the defendant renewed his claim for specific performance, damages and compensation.

During the period of the ex parte injunction some work has been done on the hole but expert evidence is that further work, particularly rehabilitation still has to be done.

The ex parte injunction granted by me is due to expire on 12th April 1992 and evidence which I have suggests that if there is still water emanating from the borehole it will require further sealing by the use of concrete, the utilisation of pumps to clear the area and then subsequent rehabilitation. I am of the view that this course is the only reasonable one in the circumstances and that the defendant will persist in an attitude of allowing work to be done only in furtherance of the objective to create a water bore for him. I propose therefore to extend the injunction for a period of 3 months from 12th April 1992 to allow the complainant or those acting on his behalf to carry out the work. An injunction is attached.

At the conclusion of the hearing both sides asked for costs, that is Mr Krstic on behalf of the complainant sought that the defendant pay the costs of the proceedings and the defendant sought that the complainant meet his costs. Normally in proceedings of this nature, costs follow the event so the defendant here would be ordered to pay costs, but by Section 111 of the Coal Mining Act costs are at the discretion of the Warden. In the totality of the circumstances here, especially in view of the fact that a hole was sunk on land which later became the defendants and through no apparent fault of the defendant it has exuded water, I direct that the parties pay their own costs.