IN THE MINING WARDEN'S COURT
HELD AT SYDNEY IN THE STATE
OF NEW SOUTH WALES
THURSDAY 23RD DECEMBER 2005
J.A. BAILEY CHIEF MINING WARDEN

CASE NO. 2004/46

Mate ANIC	Complainant
v.	
Josip BOSNJAK	First Defendant
Slavica BOSNJAK	Second Defendant

S.313 Injunction and other relief

Appearances:

Mr. Hagan, Solicitor, appears for and with the complainant
Second Defendant appears in person unrepresented
No appearance of First Defendant

Hearing Date: 8th December 2004 at Lightning Ridge

DECISION
(handed down in the absence of the parties)

Following the request by the Complainant, Mate Anic, an injunction was issued under the provisions of section 313 of the *Mining Act 1992* prohibiting the First and Second Defendant from dealing with Mineral Claim No 7717 in the Lightning Ridge mineral claims area. The final relief, which was sought by the Complainant, is as follows:

1. A declaration as to the nature of the Complainant's interest and any other interests in the claim.
2. A declaration as to the nature of all transactions and/or dealings in relation to the claim from the 18th July 2001 to the present date.
3. An order that all opal in the possession of or already sold by each and everyone of the Defendants which was won from Claim No 7717 be accounted for and the proceeds of sale and/or the opal be returned to the Complainant.
4. An order that the current holder of the claim do all such things and sign all such documents to transfer the claim to the Complainant.
5. An order that the Defendant do all such things and sign all such documents to give full effect to the orders made by this honourable court and in the event of any party failing to do any act or sign any documents that the Registrar of the Chief Mining Warden's Court at Lightning Ridge be empowered to do such act or sign such documents.
6. Costs:

The matter has come before the Warden's Court on a number of occasions, and as the injunction under the provisions of section 313 of the *Mining Act 1992* was due to expire by effluxion of time prior to the matter being finalised, an injunction was granted by consent under the provisions of section 312 of the *Mining Act 1992*, such injunction expiring on the 5th October 2005 unless sooner varied or discharged.

The matter came before the Warden's Court at Lightning Ridge on the 8th December 2004. On that occasion Mr Hagen, Solicitor, appeared for and with the Complainant, the Second Defendant, Slovica Bosnjak, appeared in person unrepresented and the First Defendant, Josip Bosnjak, was not before the court. The First Defendant is the son of the Second Defendant.

Both the Complainant and the Second Defendant gave evidence under oath and were subjected to cross examination. From that evidence the following facts were found by the court on the balance of probabilities or alternatively, are not disputed by the parties:

- Mineral Claim No. 7717 was registered in the name of the Second Defendant on the 16th March 2001.

- Mineral Claim No. 7717 is termed a "Residential Claim".

- Mineral Claim No. 7717 had been purchased from the previous claim holder for the price of $36,000.

- The Complainant paid $21,000 towards that purchase price on the 6th December 2000.

- The Second Defendant paid $15,000 towards the purchase on the 13th September 2000.

- Both the Complainant and the Second Defendant put further money and/or labour into the claim to raise the standard of the residence which was constructed on the claim. The value of the contributions by each party is a matter in dispute.

- On the 18th July 2001 a Deed of Assignment was entered by both the Complainant and the Second Defendant. This deed was in respect of Mineral Claim No. 7717. Apart from definitions and interpretations and matters of a general nature, the main thrust of the deed is outlined in clause 3 which reads as follows:

> **3. Assignment of Ownership of Improvements on Mineral Claim.**
>
> **3.1 Bosnjak agrees that Anic owns jointly with her all improvements on the lease in equal shares.**

3.2 **Bosnjak agrees that in the event of her death that Anic retains his ownership of his share of all improvements on the mineral claim, and all rights, entitlements and obligations which are attached to his ownership of his share of the improvements on the mineral claim.**

3.3 **Bosnjak acknowledges Anic's ownership of half share of improvements on the mineral claim is established by Anic having paid for improvements on the claim including the building of the residence on the claim and the value of such improvements is equal to Anic's share of the improvements on the claim.**

3.4 **Bosnjak agrees to renew the lease as and when required by the terms of the lease and to abide by the conditions of the lease.**

- It is significant to note that the deed was drawn up by a Solicitor and nothing therein expressly indicates that one party was currently owing the other party any money in respect of the purchase of that mineral claim.

- The valuation of the improvements on Residential Mineral Claim No. 7717 as at April 2004 was $45,000.
- On the 21st April 2004, Mineral Claim No. 7717 was sold by the Second Defendant to the First Defendant for the price of $45,000; the mineral claim was transferred to the First Defendant on that date. It is due to expire on the 30th June 2007.
- Notwithstanding the assertions by the Complainant in his Affidavit of the 23rd August 2004 that the Second Defendant has extracted opal from the claim, I find no evidence to support that assertion whatsoever.
- The Second Defendant offered to the Complainant, through a letter from Waterford Ryan, Solicitors, dated the 6th May 2004, the sum of $24,150 as settlement for his portion of the sale of Mineral Claim No. 7717.
- Subsequent offers have to be made to the Complainant by the Second Defendant in the sum of $30,000. These offers have been rejected by the Complainant, both prior to court and during the court proceedings.

I refer now to the dispute over the price obtained for the sale of the residential claim. In giving his evidence in chief Mr Anic indicated to the court that he had received an offer for the claim for $95,000. When cross examined on this point Mr Anic replied at one point of time "She told me he sold it for $90,000 and she would pay me $45,000, but I got a letter from a solicitor wanting to pay a half of $45,000."

The following exchange took place following that:

Q. Did she say she sold it for $90,000?

A. I have a witness. She said it was for sale for $95,000 and that she sold it for $90,000.

Q. You misunderstood?

A. I did not misunderstand.

I note in documents filed with the initiating action there is a statutory declaration by a person named Ante Cugura, declaring that: " Slavica Bosnjak said three or four times that she already sold the camp for $90,000." This person was not called to give evidence before the Warden's Court. Naturally such a document is not admissible.

There was no evidence produced to the court by Mr Anic other than his oral evidence asserting what was told to him by the Second Defendant concerning the sale of the camp site. This evidence is to be weighed against the evidence of the Second Defendant as to what she informed the court as to the sale price. Her evidence is supported by a valuation certificate, which was not challenged by Mr Anic, setting the value of the property at $45,000. Furthermore, Exhibit 19 tendered to the court is an application for transfer of a mineral claim. That application states therein that $45,000 was paid in consideration for the transfer and there is a note at the bottom of that form indicating that $677.50 stamp duty which was the applicable rate for $45,000 was paid on transfer of the mineral claim.

Although there is a challenge, verbally, as to the price that the Second Defendant obtained for the mineral claim, there is no challenge to the valuation certificate that was tendered to the court, placing the value at half the price which Mr Anic suggests

the Second Defendant obtained for the sale of the mineral claim. Coupled with this evidence and the fact that when there was an attempt towards the end of the proceedings to have the party settle the matter, Mr Anic refused any settlement on the basis that the property be transferred to him and he pay 50% of the $90,000 which he suggested it was valued at to the Second Defendant. I gained an impression from that that Mr Anic did not believe himself that the property was worth $90,000.

Having regard to all of those matters as I indicated earlier in relation to the facts that I have found I am satisfied on a balance of probabilities that the property was in fact sold by the Second Defendant to the First Defendant for the sum of $45,000.

A lot of time was spent in relation to the amount of money that each of the parties had spent in relation to improving the residence on Mineral Claim No. 7717. It is not possible for the court to determine the exact sum which was spent by each party. There are challenges to the evidence of each as to the exact amount spent, even the production of receipts in one name or another is challenged as to who in fact supplied the money in respect of the particular receipt. From Mr Anic's point of view he spent $33,684 – that total is disputed by the Second Defendant. Slovica Bosnjak tells the court that she in fact contributed $21, 627 to the residence. If both are to be accepted as to the amount that they put into the structure, that is a total of $55,311. If that is to be accepted, or even an amount of money around that figure, it is quite clear having regard to the unchallenged valuation certificate before the court, that there is a gross over capitalisation of the residence on this mineral claim.

The evidence is such in relation to the contributions made by each party that I am unable to determine on a balance of probabilities the exact amount contributed by each party.

It is Mr Anic's evidence that the Second Defendant's contributions towards the original purchase of the mineral claim was never fully met. He tells the court that there is an outstanding balance of $3,000 from her. Her evidence under oath is that the amount was in fact paid. Although evidence is a little conflicting in so far as she indicated that she did pay an additional $5,000 after the original $15,000. I am assuming that she was mistaken as to the $5,000 because clearly there was only

$3,000 outstanding. As to whether or not that amount has been paid, I rely upon the Deed of Assignment which was prepared, as I said earlier, by a solicitor. There is no indication on that deed that there was any outstanding money payable by the Second Defendant to Mr Anic. One may infer that if the parties were drawing up a legal document as to this particular mineral claim and that money was indeed outstanding at that point of time that there would have been some reference to it. On a balance of probabilities I find that the Second Defendant has paid the outstanding $3,000.

Mr Hagan submitted that the mineral claim was held by the Second Defendant on trust for Mr Anic on the basis that they had equal shares in any improvements on the claim. He submitted that there appears to be a separate collateral agreement that all costs in respect of the property would be paid on a 50/50 basis. He further submitted that if there was no collateral agreement then Mr Anic would be entitled to a quantum merit percentage of what he expended on the residence, or alternatively there was an implied term that he would receive the benefit of 50% of any work that was expended on the property. He submitted that there was a resulting trust to Mr Anic in respect of the cost expended on that residential claim.

At this point of time I will refer to the document which is Exhibit 12 in the proceedings and headed "Deed of Assignment". What is relevant are the following two clauses:

3.1 Bosnjak agrees that Anic owns jointly with her all improvements on the lease in equal shares.

3.3 Bosnjak acknowledges Anic's ownership of half share of improvements on the mineral claim is established by Anic's having paid for improvements on the claim including the building of the residence on the claim and the value of such improvements is equal to Anic's share in the improvements on the claim.

It appears that 3.3 specifies that no matter what money is expended by Mr Anic on the property, the expenditure by him establishes his share in the mineral claim.

However, notwithstanding that clause in Deed of Arrangement, one looks at the letter from Waterford Ryan, Solicitors, which forms part of Exhibit 1 in the proceedings. That letter makes an offer from the Second Defendant to the Complainant in a sum of

money which appears to have been calculated from the figures which are set out in Exhibit 17 which was tendered to the court by the Second Defendant. Although I don't agree with the mathematical calculation of the sum, it is quite clear that that offer there by the Second Defendant includes not only 50% of the proceeds of the sale of the mineral claim but also 50% of the difference in the expenditure outlaid by each party in respect of improvements to the property. One can infer from that there was indeed a collateral agreement quite separate to the Deed of Arrangement in respect of the money expended by the parties in improving the property.

I concur with the submission of Mr Hagan in respect of the obligation of the Second Defendant not to act in conflict of the interest of Mr Anic concerning the sale of the mineral claim. However, I cannot conclude on the evidence before the court that the Second Defendant did act in conflict of Mr Anic's interest in the claim. It is quite clear that both parties were interested in selling the mineral claim and that it was on the market for that purpose.

I don't propose to go behind the reasons for the issue of the Apprehended Violence Order other than to state that it is a fact that an order was issued in the local court to protect the Second Defendant against the Complainant on the 14th January 2004. The orders are those of a generic nature and there is nothing in those orders that would prevent Mr Anic from communicating with the Second Defendant or indeed from residing with her on the residential claim. I note that Exhibit 15, which is the valuation of the Residential Mineral Claim No. 7717, was prepared after an inspection on the 7th April 2004 and Exhibit 19 indicates that the transfer of the mineral claim took place to the First Defendant on the 21st April 2004. It appears from the evidence that the transfer to the First Defendant took place without the express consent from Mr Anic. However, I accept that both Mr Anic and the Second Defendant were anxious to sell the subject mineral claim and that in relation to that sale which was for the price as indicated was the value placed upon it by the valuer, I cannot see that that action in that sale was in conflict of the interest of the interest of Mr Anic. I can infer that there was an implied consent to sell it for the best price available; there is no other evidence before the court of any other person wanting to buy the mineral claim at that particular point of time for a price greater than the $45,000 which was offered and given by the First Defendant.

In the final relief which was sought by the Complainant there was set out two proposed resolutions. In considering those itemised matters there were some 14 different matters itemised in relation to the final relief in the suggestions for resolution. Many of those matters itemised are repeated on more than one occasion so it is not 14 separate suggestions as to the claims made by the Complainant. I do not propose to go through those matters one by one but I will refer generally to the relief sought and the suggestions for resolution before I come to a determination as to what orders will be made.

The first matter sought in relation to the final relief is a declaration as to the nature of the Complainant's interests and any other interests in the claim. From what I have indicated above it is quite clear that the parties were to have equal share of the proceeds and any profits from this venture and I also have found that there will be a sharing of 50% each of the expenses to improve the structures on the claim.

It appears to me no justifiable reason or practical reason as to why the claim which is currently held by the First Defendant should be transferred to the Complainant. Furthermore it would appear to be futile if some orders were made that the subject claim be put onto the open market and sold again; from the evidence before the court I have some grave reservations as to whether or not it would sell within a reasonable period of time and no guarantee, having regard to the state of the market at present, from my general knowledge in hearing matters of a similar nature in court in recent times, that any sale would bring forward a price which is greater than the one that the First Defendant paid for the claim.

The claim by the Complainant for an occupation fee from the Second Defendant has no basis. Although it is suggested in the documentation which outlines the proposed resolution that the Complainant was excluded from the residence on the claim there has been no evidence to indicate that that was the fact. Furthermore, there is no evidence at all as to any agreement either expressed or implied, in the oral evidence, the "deed of agreement" or otherwise, that the Second Defendant would be paying an occupation fee to the Complainant in relation to these premises.

Nothing has been put to the court which would persuade me to make an order to take from the First Defendant his rights under the claim; on what has been presented to the court he was a bona fide purchaser. I cannot see that he was holding that claim on a resulting trust for the benefit of the Complainant.

Clearly the only practical resolution to this matter is that the Complainant should receive 50% of the proceeds of Mineral Claim 7717 and that an appropriate adjustment be made in respect of the contributions that have been made to improve the residence on the claim by both the Complainant and the Second Defendant. As I said earlier, it is difficult for the court to determine the exact amount that each of the parties contributed in the refurbishment of the structure on Mineral Claim 7717. I am not saying that either one of them has deliberately lied to the court about their contributions. When money was expended it would not have been in each of their minds that they must keep an accurate record of this in case it would end up in court. With the passage of time recollections as to exactly what occurred at what point of time can naturally be hazy and indeed incorrect. As I said earlier, the accuracy of the figures put forward leave some doubt in the court's mind. For instance Exhibit 7 which attributes to the money paid by the Complainant after the initial cheque for the purchase of the claim, refers to four items, the transfer fee, the stamp duty, the mining lease for five years and the annual shire fee for four years; there are no receipts to support those matters. There are receipts however, tendered by the Second Defendant (Exhibit 13) in the name of S. Bosnjak and it is a transfer fee, stamp duties and so forth in relation to the matter. So I have some reservations in relation to the stamp duty and the transfer fee which was attributed to Mr Anic. There are further exhibits tendered by the Second Defendant which clearly are receipts in her name in relation to payments made to the Walgett Shire Council and further payments to the Mining Registrar concerning the continuation of the registration of the subject claim. So in considering those matters there are some grave reservations in relation to the first four amounts listed in Exhibit 7. Those matters come to a total of $1,820.

Concerning Exhibit 8, there Mr Anic is claiming for the hours that he spent in working on the claim, on the face of it charging at the rate of $14 per hour. If he were a trades person that came in to do that work it would be a reasonable expenditure. However, I know of no agreement where the parties were going to cost their labour and put that sum of money into the equation in the event of the claim being sold.

Furthermore, although there has been some suggestion by Mr Anic that the Second Defendant did nothing fruitful in relation to enhancing the premises, I am satisfied that she put some time into enhancing the premises and there is an unknown quantity of hours and it would be unjust to weigh in the quantity of hours which are requested by Mr Anic and not give any consideration whatsoever to the time put into the project by the Second Defendant. As I said initially, there does not appear to be any agreement whatsoever that there would be a costing in relation to time put into the project. Consequently I do not propose to consider that figure which is outlined in Exhibit 8.

If one looks at Exhibit 7 and the item called an "inverter" which was attributed to payment by Mr Anic, it was conceded in evidence that he paid 50% of that so there was another reduction of $250 from that exhibit. If one then adds up that exhibit excluding the first four items as I mentioned earlier in the 50% of the "inverter", one then comes up with a figure of $31,614 expended by Mr Anic. So as I said earlier, there may be some grave reservations about some of the other items but in putting the evidence in its best light I come up with that figure as distinct from that figure of $33,684 which was originally put up in Exhibit 7. If one puts into the equation the amount spent by her according to the Second Defendant of $21,627 that leaves a difference of $9,987, half of that difference being $4,993.50. If one then adds to that figure the 50% of the sale price which is an additional $22,500 one then comes up with a figure for Mr Anic of $27,493.50. That figure is greater than the amount of $24,150 as offered to him from Waterford Ryan, Solicitors, on the 6th May 2004 but it is less than the figure of $30,000 which has been suggested by the Second Defendant as the figure which she has offered to the Complainant to settle this matter but he rejected the same.

As I have said a number of times, it is difficult to come up with an accurate figure as to the contribution of either of the parties. In relation to a final determination of this matter it appears that the only just resolution is for the First Defendant to retain title to the claim, and the Second Defendant is to pay the Complainant his share in the interest of the claim. I propose to make an order that the Second Defendant pay the Complainant the sum of $30,000. The reason why I reached that figure was because I accept that was an offer that was made by the Second Defendant to the Complainant

(See Exhibit 18) to settle this matter. However in making that order I accept that it is a sum which appears to be greater than that figure which would have ordinarily been payable to the Complainant but I am doing that on the basis that I propose to make an order, having regard to all the circumstances, that each party pay their own costs of these proceedings.

AN ORDER IS MADE THAT THE SECOND DEFENDANT, SLOVICA BOSNJAK, PAY THE COMPLAINANT, MATE ANIC, THE SUM OF THIRTY THOUSAND DOLLARS ($30,000) ON OR BEFORE 23 JANUARY 2005.

THERE IS NO ORDER AS TO COSTS.

THE INJUNCTION ISSUED ON 6 OCTOBER, 2004, UNDER THE PROVISIONS OF s312 OF *MINING ACT 1992* (NUMBERED 2004/49) IS HEREBY DISCHARGED.