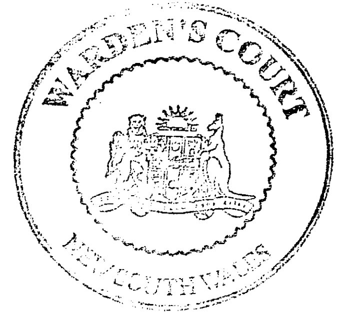

IN THE WARDEN'S COURT
AT SYDNEY, IN THE STATE OF
NEW SOUTH WALES
ON TUESDAY, 1ST APRIL, 2008

2008/09 & 11

PARTIES:

2008/09	-	MELONAS, Mark Francis & MELONAS, Judith Ann	
		v	
		HANKEY, James -	1st Defendant
		NSW Department of Primary Industries -	2nd Defendant

2008/11	-	MELONAS, Judith Anne	
		v	
		Mining Registrar, Lightning Ridge -	1st Defendant
		HANKEY, James -	2nd Defendant

APPEARANCES AT HEARING AT WALGETT ON 12th March, 2008:

Mr L. Moore, solicitor, appears for Complainant(s)
Mr S. Shepherd of Counsel, instructed by Stewart Armstrong, solicitor, appears for NSW Department of Primary Industries & the Mining Registrar, Lightning Ridge.
Mr J. Hankey, appears in person unrepresented.

DECISION

Handed down at Sydney in the absence of the parties.

On the 11th February 2008 the complainants made a complaint seeking an urgent injunction and other relief, against James Hankey and NSW Department of Primary Industries.[case 2008/09] On 3 March 2008, the Complainant laid a further complaint [hereinafter referred to as the second complaint] and summons against the Mining Registrar Lightning Ridge and James Hankey.[case 2008/11] The second complaint sought relief by way of an injunction pursuant to S.312 Mining Act 1992 and other relief, including, inter alia,

- A declaration pursuant to Section 296(o) Mining Act 1992 that the refusal by the First Defendant on or about 22 January 2008 to accept the Complainant's application for renewal of Mineral claim 53119 is invalid.
- A declaration pursuant to Section 296(o) Mining Act 1992 that the granting by the First Defendant of Mineral claim 54957 on or about 4 February 2008 to the Second Defendant is invalid.
- An Order pursuant to Section 296(o) directing the First Defendant to cancel Mineral claim 54957 belonging to the Second Defendant in accordance with Section 203(g) Mining Act 1992.

It must be remembered that in the second complaint, the first defendant was nominated as the Mining Registrar, Lightning Ridge, the second defendant being James Hankey.

In respect of the first matter, an injunction under the provisions of S.313 Mining Act 1992 was issued as requested.

Both matters came before the Warden's Court at the court house Walgett on Wednesday the 12th March 2008. Mr L Moore Solicitor appeared on behalf of the Complainant; Mr S. Shepherd of Council appeared on behalf of the NSW Department of Primary Industries and the Mining Registrar, Lightning Ridge. Mr James Hankey appeared unrepresented.

It was agreed that both matters be dealt with together, although in practice only the second complaint was pursued.

The following facts were either not in dispute or found by the court:

1. Judith Anne Melonas is the claimholder of mineral claim 53119
2. Judith Melonas, for reasons outlined below, failed to renew that claim
3. James Hankey, after mc 53119 had lapsed, applied for and was ultimately granted mineral claim 54957 over the area that was formerly mc 53119.

The first issue the court was to determine was whether the Mining Registrar, Lightning Ridge refused to accept the application of Judith Anne Melonas to renew mineral claim 53119. After hearing all of the evidence, Mr. Moore conceded that the complainant had not established, on a balance of probabilities, that this issue had been proved. I agree with Mr Moore's concession. The complainant's evidence in respect of this is important, from the point of view of costs. For that reason I will outline briefly the evidence in respect of this issue.

The affidavit filed by Judith Anne Melonas in respect of that matter is at odds with her evidence before the court. She explains the reason for the discrepancy in her affidavit and gives evidence that the following in fact happened:

- She is the claimholder of 2 mineral claims that she holds, it appears, on behalf of her two sons. She has no idea of the mineral claim numbers.
- She was told by one of her sons to go to the office of the Mining Registrar Lightning Ridge and "re-register the claim" which was due to expire.
- She attended the office of the Mining Registrar seeking to sign documentation to renew her claim.
- At the time, there was another claim, mc 51824, which was held as pending subject to satisfactory rehabilitation of a claim at "Dead Bird"
- Judith Melonas was given a document to sign, by a clerk in the Registrar's office, concerning MC 51824, wherein she was agreeing to the conditions of that mineral claim. She was then told that the claim would be held in pending and that it would be re-registered once the rehabilitation was done on the cancelled claim at "Dead Bird".
- Judith Melonas left the Registrar's office, apparently a little confused and rang her sons concerning the matter.

- An application to re-register mc53119 was never lodged with the mining registrar, that claim eventually expired.
- Judith Melonas admits she never completed the application to re-registrar the subject claim and never paid the fee; although she did write a cheque which was subsequently destroyed by her.
- Her usual practice is to go to the office of the Registrar and have someone fill in the application for her which she signs.
- Even at the time of giving evidence she had no idea of the numbers of the two mineral claims she held.

The next issue pursued by the Complainant is that Mineral Claim 54957, issued to James Hankey was invalid. The complainant relies upon the marking out of the claim by Mr Hankey and the errors existing in the application subsequently lodged by him.

There was a challenge to the marking out, insofar as it was alleged the notice, required to be affixed to the northernmost corner post or picket, in accordance with Regulation 25 of Mining Regulation 2003. It was alleged that either the notice was not affixed at the appropriate time or if it was, it was not marked in accordance with the Regulation.

The complainant's evidence is that some time shortly after Mr. Hankey says he marked out the area, Mr. Mark Melonas observed that there was no possession notice on the claim

I accept the evidence of Mr. Hankey, which he supports with photographic evidence, that he did in fact attach a possession notice to the northeast peg and that it had been removed when he went back to the claim area. He subsequently re-attached another notice with additional details as to the measurements and the claim number and date of grant.

The complainant challenges that possession notice in respect of "the dimensions of the land over which the proposed claim has been marked out"[1].

The original notice(which is now missing) clearly shows in the photograph in exhibit 1 that Mr Hankey marked the dimensions as 48.5m x 46.5m x 48.5m x 46.5m On the second notice he attached, he noted the dimensions as 48.5m x 46.5m

The Mining Registrar, Deborah Gail Knee, gave evidence of measuring the area on 25 February 2008 and it was 48.2m in lieu of 46.5m on one side and 48.7m in lieu of 48.5 on another side.

Mr Moore submitted that the notation of the dimensions by Mr Hankey was erroneous, both on his first and second notice and accordingly was not in compliance with the Regulation. That non compliance, Mr Moore submitted, ought to have been sufficient reason for the Registrar to refuse the application pursuant to the Mining Act 1992[2].

The issue is whether an error existing on the Notice in respect of dimensions is sufficient to invalidate the application placed before the Registrar. The Registrar did express an opinion in the witness box that it was of an insignificant nature and consequently she chose to take no action in relation to the discrepancy in the dimensions.

It is necessary at this point of time to look at the provisions of Clause 25 of Mining Regulation 2003 to determine what is the purpose of that particular clause. In considering that clause, together with the Mining Act 1992, it would appear that the principal reason for inserting this in the regulation is to make people aware of what particular area is actually a claim, or marked out for the purpose of applying for a claim over that area.. When people are aware of the claim area, they do not trespass on that area and they do not attempt to peg a claim over that area or a portion thereof. It is clear that the provision of the need to project the steel star picket or post at least one metre above the ground is to make it obvious. There is then the need to dig trenches at least 150mm in depth or, if that is not practical, to create stone walls at

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[1] See Mining (General) Regulation 25

[2] Section 190(1)(b)

least 150mm in height. The purpose for that need is to ensure that both the elements and/or animals do not easily eradicate such markings so that people will be aware that there is a mineral claim there and the directions it follows. The necessity of the notice to be attached to the appropriate star picket or post is to indicate to individuals, among other things, the dimensions over which the proposed claim has been marked out. The purpose of this could only be to indicate to people, in those areas which are heavily wooded or thickly shrubbed, the location of various pickets or posts in relation to one which may be readily seen.

Although Clause 25 makes reference to matters such as posts having a diameter of "at least 75 mm", it also refers to trenches and stone walls being "at least 150 mm". I accept that there is a need to comply strictly with those provisions, in other words, if a trench was 140mm that would not be adequate. By the insertion of the words "at least" it is clear the Act requires a definite minimum measurement. However, in relation to the dimensions of the land which is to be written on the notice which is to be affixed pursuant to sub-clause 5 of Clause 25, no such preciseness exists. Having regard to the purpose for which this measurement must be inserted, I do not see that a slight discrepancy, which exists in this situation, would be critical to any mineral claim application.

There was reference during the proceedings as to whether the notice adequately described the dimensions by the insertion of 48½ x 46½ metres or whether it ought to read 48½ x 46½ x 48½ x 46½ metres. If one looks at sub-clause 9 of Clause 25, it refers to the area proposed to be a mineral claim ought to be marked out "square or rectangular in shape". That being so, I can see no confusion in anyone looking at the notice on this particular occasion which has the numbers: 48½ x 46½ metres.

Another challenge to the validity of the mineral claim is the fact that when the application was lodged with a survey, the survey was incorrect. Mr Moore submitted that in those circumstances, the application lodged by Mr Hankey ought not to have been pended and that it ought to have been returned and accepted only when a correct survey was lodged.

From my understanding, there is no specific requirement in the Act or regulations concerning the survey, it is merely an administrative practice which has been put in there as a requirement for individuals who lodge an application, so that it may be plotted on the plans or maps that are held by the Mining Registrar at Lightning Ridge. I can see no reason as to why the application of Mr Hankey ought not to have been accepted and pended at the time when he lodged the application in the office of the Mining Registrar.

Nothing has been placed before the court which would satisfy me, on a balance of probabilities, that Mineral Claim 54957 which was granted to the 2nd Defendant by the Mining Registrar on or about the 4th February 2008 is invalid. Consequently, there is no valid reason for this court to make an order that the Registrar cancel mineral claim 54957.

ACCORDINGLY, THE RELIEF SOUGHT IN THE SECOND COMPLAINT(CASE 2008/11) IS NOT GRANTED. THAT COMPLAINT IS DIMISSED.

AS THE REFLIEF SOUGHT IN THE FIRST COMPLAINT (CASE 2008/09) IS NOT PURSUED, THAT COMPLAINT IS DISMISSED.

With the dismissal of the Complaints against the 1st and 2nd Defendants, the question now arises as to the consideration of costs. I have heard submissions from the parties concerning costs and have been urged in the circumstances, by the Complainant, not to award costs against the Complainant. The 1st Defendant has urged the court to award professional costs against the Complainant, principally on the ground the Complainant has not established its complaint against the 1st Defendant and the 1st Defendant ought to be awarded its costs.

The awarding of cost in a Warden's Court is a matter of discretion and it is a matter of principal that in civil matters, costs follow the event. There may very well be circumstances however, where a court would not award cost to a successful party.

The Second Defendant was not legally represented and sought no professional costs.

In considering the evidence that was placed before the court and the submissions put before the court by the parties, I propose to make an order that:

THE COMPLAINANT (Judith Anne Melonas) TO PAY THE PROFESSIONAL COSTS OF THE 1ST DEFENDANT (Mining Registrar, Lightning Ridge) AND THAT THOSE COSTS BE AS AGREED OR TO BE ASSESSED.

IT IS FURTHER ORDERED THAT THE INJUNCTION ISSUED PURSUANT TO S.313 MINING ACT 1992 ON 11 FEBRUARY 2008 (Case 2008/09) IS HEREBY DISCHARGED.

J. A. Bailey
Chief Mining Warden