

**IN THE MINING WARDEN'S COURT  
AT GULGONG**

**J A BAILEY, CHIEF MINING WARDEN**

**THURSDAY 4 SEPTEMBER 2003**

**CASE NO. 2003/16**

**GREG MANUSU (Complainant)**

**v.**

**FAYE MARY WINCH (First Defendant)  
PETER SMITS (Second Defendant)**

**APPEARANCES AT HEARING:**

Complainant: Mr W Browne, Solicitor of Browne Jeppesen & Sligar

First Defendant No appearance

Second Defendant: Appears in person unrepresented

**Evidence heard at Lightning Ridge on 5 August 2003**

**DECISION**

**HANDED DOWN IN ABSENCE OF PARTIES**

Following the issue of an urgent injunction at the request of the Complainant, this matter came before the Warden's Court at Lightning Ridge on Tuesday 5<sup>th</sup> August 2003.

The dispute before the court on that date was the final relief which was sought by the Complainant:

- (a) A declaration that the Complainant has an equitable interest in Claim 19410
- (b) A declaration that a contract exists for the purchase of the claim 19410 by the Complainant
- (c) That on the Complainant paying the balance of the purchase, i.e. the sum of \$1000 to the Defendants or into the mining court on behalf of the Defendants, shall do all such things and sign all such documents to give full effect to the orders of the court and in the event of any party failing to act to sign any document then the Registrar of the Chief Mining Warden's court at Lightning Ridge to empowered to do such action and sign such documents under any order His Honourable court sees fit.
- (d) Costs.

At the hearing on 5<sup>th</sup> August 2003 the Complainant was represented by Mr W Browne Solicitor. There was no appearance of Faye Mary Winch, the First Defendant and the Second Defendant, Peter Smits, appeared in person unrepresented. Mr Smits informed the court that although Faye Mary Winch was the registered owner of Mineral Claim 19410, he had an equitable interest in that claim and furthermore that she had indicated to him that he was to represent her interest at the court hearing.

The following facts which were put before the court were not in dispute:

- The Complainant negotiated with the Second Defendant (who was representing the First Defendant) to purchase Mineral Claim 19410.
- As the Complainant had not completed a mining course, the transfer could not be made to him forthwith.
- The Complainant paid the Second Defendant the sum of \$400.00 as a deposit on the said claim, on the 1<sup>st</sup> October 2001.

- The balance of \$1000 has not been paid by the Complainant to the Second Defendant.
- There has been no transfer of the said claim from the First Defendant to the Complainant. The Complainant was purchasing this claim for the purpose of constructing a residence thereon.
- The Complainant subsequently purchased an adjoining residential claim and constructed a residence thereon.

The principal dispute in this matter is whether or not the Complainant indicated to the Second Defendant that he desired to terminate the contract between them.

The Second Defendant, Mr Smits, gave evidence that, following the payment of the deposit, he became aware that the Complainant was building a residence on another claim. Mr Smits gave evidence that he challenged the Complainant who informed him that he would get the rest of his money (to finalise the contract between them). Mr Smits went on to inform the court that the Complainant arrived at his home and spoke privately with him and said words to the effect: "Sorry to disappoint you, but I have found another claim". Mr Smits went on to say that the Complainant told him not to worry about the deposit and furthermore would he keep this conversation confidential from the Complainant's wife.

In support of this aspect of the evidence, the Second Defendant's wife gave evidence of the occasion when the Complainant turned up at her home and spoke privately outside with Mr Smits. She informed the court that she had previously not spoken with the Complainant but due to the fact that he had delayed settling this verbal contract, she went to the bedroom window to listen to the conversation that was taking place. She informed the court that she expected to hear another excuse from the Complainant as to why he was not forthcoming with the balance of the Contract. She said that she overheard the Complainant say to her husband that he was sorry for messing us about and he could not go through with the deal. She also gave evidence that Mr Manusu stressed that he didn't want his wife to find out about this conversation.

Concerning that evidence which was put forward on behalf of the defence, the Complainant denied that there was ever any conversation with Peter Smits concerning the termination of the agreement which existed between them. To support his statement he produced to the court two personal diaries, one from the year 2001 and the other from the year 2002. Mr Manusu informed the court that these diaries are kept by him and are noted on a daily basis as to all significant matters which occur concerning him or significant events which might occur throughout the world.

These diaries were tendered to support the evidence of Mr Manusu that on two occasions only did Mr Smits come to his house; the first occasion was Tuesday 11<sup>th</sup> September and the second and last occasion was October 1<sup>st</sup>. Mr Manusu indicated that on no other occasion did Mr Smit come to his house. This was to rebut the evidence given by Peter Smits that he had attended Mr Manusu's residence on several occasions in an attempt to finalise the contract for the sale of Mineral Claim 19410.

It was the 1st October that the \$400 deposit was paid to Mr Smits. That was on a Monday and the Court heard evidence and the diary also indicates that the obligatory mining course which was undertaken by the Complainant was completed by him on Wednesday 26<sup>th</sup> September.

In his evidence Mr Manusu indicated that he would have paid the full amount for the claim on the 1st October but for the fact that it was a Public Holiday and he did not have the extra \$1000 in cash which was owing. He gave evidence that he was able to settle the contract at any time after the completion of the mining course. One of the last things the Complainant said in evidence-in-chief was "I'm still ready and able to complete the transfer of the claim".

In perusing the Complainant's diary from Tuesday 2<sup>nd</sup> October 2001 it would appear that for each day after that date, certainly up until Monday 15<sup>th</sup> October, the Complainant was in the Lightning Ridge District. One would expect that there was very little if anything preventing him from going to the bank and extracting the balance of the \$1000 owing under this contract. I note that on Monday 15<sup>th</sup> October there is a note that \$1000 was paid to Roy Cooper for a claim transfer which apparently was part of a total sum of \$29,750. There is a note in the diary that reads

as follows: “This is a very good location, very good deal for us, house position is number 1”.

An entry which was drawn to the attention of the court was that which appeared on Monday 12<sup>th</sup> August 2002 which indicates: “Peter Smits pour concrete this morning”. The evidence from Mr Manusu was his observations on that day of a concrete pour by Mr Smits on Mineral Claim 19410. It was the following day 13<sup>th</sup> August 2002 when an alleged incident took place between Mr Manusu and Mr Smits. That incident is referred to in the affidavit of the Complainant, in particular paragraphs 5 and 6. I will refer in more detail to that evidence later.

Mr Smits spent some time perusing the two diaries that were tendered to the court and I have also perused those diaries since the case concluded. It would appear to be correct that there is no entry there concerning the termination of the contract which existed between Mr Manusu and Mr Smits. In giving evidence concerning that termination regrettably Mr Smits was vague as to the exact time when that occurred.

The issue to be determined by the court is which party is correct in relation to this contract. Is Mr Manusu correct and the contract is still on foot or is Mr Smits correct and the contract has been terminated?

On behalf of the Complainant it was submitted there are no entries in the diary concerning the termination of the contract and the evidence from the Complainant is that all significant matters are entered therein. On that point I note that the entry on the 13<sup>th</sup> August 2002 in the Complainant’s diary has the following: Speak to Peter Smits, he ordered me off the claim that I have paid \$400 on, threatened to hit me with iron post and said will not pay me money “get off my claim, cunt now go”. In his affidavit in support of the injunction the following appears at paragraph 6: “He said words to the effect: “You are not going to get any of this mining claim fuck off cunt” and then raised an iron bar and walked towards me. He then hit me with his clenched fist.”

The aspect of the striking with the clenched fist was the subject of many questions under cross-examination. The Complainant was adamant that it did indeed take place.

It is noted however, that this was not significant enough for an entry of the striking to appear in the diary on the 13<sup>th</sup> August 2002. It is also noted that the diary entry on the 13<sup>th</sup> August of the incident is extremely similar to the version of the incident given by Peter Smits in the witness box. Mr Smits gave evidence of the incident prior to him having access to the diaries of the Complainant.

Two conclusions that can be drawn in respect of the discrepancy which exists between the diary entry of the 13<sup>th</sup> August 2002 and paragraph 6 of the Complainant's Affidavits are:

Firstly, the Complainant is wrong in relation to his affidavit and his evidence concerning a striking by the Second Defendant.

Secondly, if the Complainant is not wrong about the striking then the accuracy of his diary entries as to "significant events" is flawed.

Criticism was made of the evidence of Peter Smits wife whose only role in relation to all of this was to eavesdrop on a crucial piece of evidence concerning the alleged termination of the contract. The Complainant wants the court to dismiss her evidence as being fanciful and that she merely came forward to put that evidence before the court to support her husband. It was also submitted that it may be an unusual coincidence that the only conversation overheard by her was the crucial matter which supports her husband's case. But a coincidence such as this does not in itself necessarily mean that it cannot be true.

It is clear from the evidence that the Second Defendant is not what is colloquially referred to as "flushed with funds". The \$400 paid on deposit has been spent and there have been occasions since then when the Second Defendant has not been in a position to pay that money back. On the other hand the Complainant wants the Court to accept that he has always been in a position to pay off the balance and settle the contract. It therefore begs the question as to why Mr Smits who, since the 1st October 2001, appears to have had no benefit for not completing the contract, would come before the court to indicate that the contract has been terminated. It is true that at the moment he is partly through constructing a residence on that claim for his daughter

but that appears to have commenced almost twelve months after the \$400 deposit was paid to him by the Complainant. If Mr Smits was wanting a residential claim for a residence for his daughter, the settlement of the contract would give him sufficient funds to buy another residential claim and have further money left over, which he appears to be in need of.

Another question which is of some concern to the court is why didn't Mr Manusu insist upon the settlement of this contract soon after the deposit was paid on the 1<sup>st</sup> October 2001? It would appear that the first action taken by the Complainant to enforce this contract after the deposit was paid occurred when he completed an affidavit in April of 2003. That affidavit was utilised to initiate these proceedings. This was an action that was taken some 18 months after the deposit was paid.

There is a lot of weight in the submission by the defence that Mr Manusu had found a residential claim which was a "better deal" than Mineral Claim 19410 and consequently that is the reason as to why he wanted this contract terminated.

Another question which is of some concern is why would the Second Defendant commence constructing a residence upon a claim which he was aware was the subject to a Contract of Sale?

Considering all those matters it would appear that the actions of the Complainant are such where one could be satisfied on a balance of probabilities that he had rescinded a Contract to purchase this mineral claim. Furthermore the actions of the Second Defendant were such that one can conclude that he was of the opinion that the contract for the sale of Mineral Claim 19410 no longer existed.

The other dispute between the parties on a factual issue in this matter is as to whether or not the contract was for \$1,400 or \$1,500.

Having regard to the evidence of the witnesses and in particular the documentary evidence by way of exhibit 1, which was the receipt for the deposit paid which indicated that the contract was for \$1,400 I conclude that the contract for the transfer of Mineral Claim 19410 was an oral contract for the sum of \$1,400.

In conclusion I find that the Complainant Gregory Manusu has no equitable interest in Mineral Claim 19410. Consequently he has no right to request specific performance of the oral contract that was made between Gregory Manusu and the Second Defendant.

The other aspect to be determined by the court is the position concerning the \$400 deposit that was paid. There is no evidence as to any mention of a deposit when the contract was made and no evidence, either orally or written at the time of the payment of the deposit as to the position concerning that deposit. The only evidence before the court is that of the Second Defendant and his wife concerning the conversation he had with the Complainant when he terminated the contract. In accepting that evidence of the Second Defendant, Mr Manusu voluntarily abandoned his rights to a refund of the deposit.

Accordingly I make the following orders:

- (a) **I MAKE A DECLARATION THAT THE COMPLAINANT HAS NO EQUITABLE INTEREST IN MINERAL CLAIM 19410.**
- (b) **I DECLARE THAT THE CONTRACT WHICH WAS EXISTING FOR THE PURCHASE OF MINERAL CLAIM 19410 BY THE COMPLAINANT IS NO LONGER ON FOOT.**
- (c) **THERE IS NO RIGHT TO SPECIFIC PERFORMANCE OF THE FORMER CONTRACT BETWEEN THE COMPLAINANT AND PETER SMITS CONCERNING MINERAL CLAIM 19410.**
- (d) **I MAKE NO ORDER AS TO COSTS.**