

1998/52

**IN THE MINING WARDEN'S COURT  
AT ST LEONARDS  
J A BAILEY, CHIEF MINING WARDEN  
FRIDAY 26<sup>TH</sup> FEBRUARY 1999**

<u>CASE NO.</u>	<u>PARTIES</u>	<u>CAUSE OF ACTION</u>
1998/	Ross Mining NL Capricornia Prospecting Pty Ltd Timbarra Gold Mines Pty Limited  v.	Section 312 Injunction ML 1386 ML 1426
53	Alex Mark Barrett	
54	Nicholas Robert Bloore	
55	Austin Challis	
56	Michelle Charalambous	
57	Amber Lee Davies	
58	Justin Anthony Ednie-Brown	
59	William Reynolds Eykamp	
60	Melanie Farmers	
61	Thomas Ben Fox	
62	Vanessa Fraser	
63	Zev Freidlaender	
64	Lawrence Sadiq French	
65	Eleanor Hester Mary Gash	
66	Jane Hammond	
67	Barry William Hudson	
69	Neil James Johnston	
70	Bridget Diane Kelly	
71	Christian Leigh Kennedy	
72	Benjamin David Kleidon	
73	Mehmet Kochan	
74	Adam Steele Lester	
75	Katherine MacFarlane	
76	Samuel John MacFarlane	
77	Peter McCurley	
78	Shamus Joshua Moore	
81	Eva Rainow	
82	Karen Therese Reilly	
83	Caroline Jane Reynolds	
84	Craig Allen Rich	
85	Daniel Nicholas Robertson	
86	David Salerno	

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1998/	Ross Mining NL Capricornia Prospecting Pty Ltd Timbarra Gold Mines Pty Limited	Section 312 Injunction ML 1386 ML 1426
	v.	
87	Damala Rainow Scales	
88	Milena Unanyntji Scales	
89	Garry Ashley Shearman	
90	Anne Simpson	
91	Mark Joseph Sinclair	
92	Paul Joseph Smith	
93	Peter James Stanford	
94	Reuban Styles	
95	Sean Hayden Terrill	
96	Tara Thurrowgood	
97	Todd John Trundell	
98	Darren Samuel Turner	
99	John Henry Van Den Hoorn	
100	Jennifer Anne Vella	
101	Michael William Witt	
102	Jeremy Allen Wray	
1999/		
1	William John Austin	
2	Robert William Barton	
3	Damien Rex Beckmann	
4	Kara Blanchett	
5	Phillip Harris	
6	Nicholas James Kelly	
7	Peter William Kilpatrick	
8	Shannon Frances Martin	
9	Jean-Simon Mercier	
10	Dimitri Beaumont Pinney	
11	Bradley James Rankin	
12	Matthew Grant Saxton	
13	Mark Perrin Shattock	
14	Christopher Peter Smith	
15	David Smith	
16	Matthew John Steinndl	
17	Martin Western	
18	Kim Wilson	

HEARING DATE: 11<sup>th</sup> February 1999

JUDGMENT

These are matters wherein 3 complainants, who are involved in gold mining pursuant to ML 1386 and ML 1426, make application under the provisions of S.312 for injunctions against 65 individuals.

All matters were heard together, with the 65 defendants being represented by Mr. S. Bolt, Solicitor and the complainants being represented by Mr M Brennan Solicitor.

At the conclusion of evidence given at the Tenterfield Court House on the 11<sup>th</sup> February 1999 I reserved my decision. On the 15<sup>th</sup> February 1999 I announced that the applications for injunctions against each of the 65 defendants were granted and I indicated that my written reasons would be prepared within two weeks. Those reasons are now given as follows:

Factually, not much is in dispute. The complainants' reasons for the applications being that prior incidents have occurred wherein persons are attempting to prevent mining taking place and there are fears that if an injunction is not granted against each defendant, further disruptive and perhaps dangerous incidents will occur. The defendants' case hinged basically on whether or not the warden's court has the power to issue injunctions in the terms sought, having regard to the factual situation as it exists.

The Complainants sought an injunction prohibiting each defendant from:

1. Entering any part of the land at Timbarra Plateau near Tenterfield which is subject to Mining Lease 1386 or Mining Lease 1426;
2. Entering or travelling upon any part of the Timbarra Road between its intersection with the Bruxner Highway and its intersection with the western boundary of Mining lease 1386 during the time in which that road is closed pursuant to section 115 of the Roads Act 1993 unless earlier issued with an authority by Tenterfield Shire Council which authorises the named defendant to travel along the closed road;
3. Doing any act which interferes with, impedes, obstructs or damages in any way whatsoever any vehicle or machinery of any kind which is located on ML 2386, ML 1426 or on Timbarra Road, Tenterfield;
4. Interfering with, obstructing, threatening, intimidating or assaulting in any way whatsoever any person who is on ML 1386, ML 1426 or the Timbarra Road, Tenterfield.

Section 312 of the Mining Act, 1992 is relied upon by the complainants, the relevant parts of that section are:

- (1) If an application is made to a Warden's Court by a person claiming to hold a legal or equitable interest in any land subject to an authority or mineral claim, or in any property, the court may, on such terms as to costs or otherwise as it may consider just, grant an injunction restraining any specified person:
  - (a) from encroaching on, occupying, or using or working the land or property, or
  - (b) from seeking, washing out, extracting or removing any earth or minerals from the land, or
  - (c) from selling or disposing of or otherwise interfering with the property, or
  - (d) from doing any act that may affect the interest concerned in the whole, or any part, of the land or property.
- (2) An injunction remains in force for the period specified in the injunction, unless it is sooner discharged.

### **The Facts Relied Upon**

The defendants have been involved in protests against the mine. All of the defendants have been arrested by the police concerning incidents involving the protests. Not all of those arrested were charged. Those that were charged have been either:

- (a) convicted, but not of all offences as charged
- (b) had charges dismissed
- (c) had charges withdrawn, or
- (d) currently are on conditional bail pending hearing of charges.

The dismissal or withdrawal of charges were not the result of the inability of the prosecution to identify the individual.

Some of the incidents which have occurred, as outlined in evidence given by Mr. J. J. Lawton, Executive Director of Ross Mining are:

- A blockade on 22nd October 1998 so that employees could not get to the site, necessitating the mining company in leasing a helicopter for the day to ferry the employees in and out of the mine area. This involved a cost to the mining company of \$5000 for the day.
- Due to activities of the protesters/defendants, the mining company are required to employ security guards and dog handlers. The numbers vary from 6 to 20 at any one time. The security measures have not, to a large degree, been able to prevent disruption to the mining site.

- On two different occasions in 1998 the security patrols were subjected to lead sinkers being fired at them by means of a "shanghai". A windscreen was damaged and an indentation caused to a part of a vehicle.
- Tripods were inserted into the roadway on 17th or 18th January, 1999, denying access to the mine by some employees; these were removed by the police.
- As recently as a week before the hearing, two trespasses were observed within the mine site, dressed in army fatigues.
- Newspaper photographs show protesters at the site wearing balaclavas.
- There have been arrests and a conviction for an assault against an employee, within the confines of the mining site.
- The Timbarra Direction Action group, via a media release, dated 29th November, 1998 and headed "**Timbarra Gold Mine: Environmentalists to block cyanide delivery**" stated, inter alia, *Two protesters have dug themselves underground beneath the mine site, halting mine operations with a "zapping" protest technique never seen before in Australia.*
- Many incidents have occurred, such as damage to property, trespassing etc., which have not resulted in people being arrested, due to lack of ability to identify those responsible.
- The defendants admitted, through their solicitor in court, that they intend to stop the mine proceeding, on environmental grounds.
- The incidents are of such a concern to Mr. Lawton that his company issued a circular to his employees advising that the company may not be in a position to fully guarantee the safety of its workforce and giving employees an opportunity to be released from any relevant employment obligations.

A concern of Mr Lawton's is that if the current situation continues, it will pose a grave environmental threat when cyanide is being transported onto the site. The delivery of the cyanide has been delayed due to both the weather and delays occasioned by the defendants in interrupting the mining company in preparing to bring the mine into full working capacity.

Mr Lawton conceded under cross examination that to date nothing has been prevented from entering the site, but delays have been occasioned, by incidents such as protesters locking themselves onto machinery being conveyed onto site.

## THE DEFENCE CASE

No evidence was called on behalf of the defence. Tendered to the court to support their submissions were court documents showing a charge being dismissed; notification from the NSW Police Service indicating a number of charges will be

withdrawn; court papers showing a conviction which has been appealed to the District Court and a number of bail undertakings in respect of 26 of the defendants, with a condition *that the defendant not go on Timbarra Road or Nutshell Road or any free hold or lease hold property adjoining the said roads.*

One defendant has been convicted and placed on a deferred sentence under the provisions of Section 558 Crimes Act 1900. The period of the recognizance is 18 months and one condition thereof is that the defendant is not to come within 20 kms of the mine site.

## **COURTS JURISDICTION AND POWER**

The court's power to grant injunctions is set out in section 312. The defendants do not challenge the court's jurisdiction. The defence submission is that the court should exercise its discretion and these injunctions should not be issued. The submission is based principally upon the fact that the criminal law is available to remedy any matters which may arise at the mining site, citing a general principle that injunctions will not be granted to restrain a criminal act unless the criminal sanctions are exhausted.

There is nothing in the Mining Act outside the provisions of S.312, by way of definition or otherwise, which gives guidance to the criteria in granting injunctions. The common law and particularly those more recent cases cited before the court must be used to guide the interpretation of S.312.

Halsbury's Laws of England, third edition, volume 21, at pg 355, states at paragraph 745: "**Threatened invasion of legal right.** Where a plaintiff has established that he has a right which has been infringed and that further infringement is threatened to a material extent, he is entitled to an injunction to restrain such threatened infringement upon the ordinary principles upon which the Court acts in granting injunctions." A number of authorities are then cited. The paragraph goes on to state: "an injunction may be granted to restrain the commission of an apprehended or threatened act, on the ground that the act, if done, will violate the plaintiff's legal right, if he can show a strong case of probability that the apprehended mischief will in fact arise". Once again, there is a wealth of authorities cited for that proposition.

Reference was made in submission to **Peek v. NSW Egg Corporation (1986)6NSWLR1**. In that case Kirby P. outlined 6 reasons for and exceptions to the general rule that injunctions will not be granted to restrain a criminal act unless the criminal sanctions are exhausted.

1. The integrity of criminal courts and the desirability of avoiding interference by other courts in matters which are committed by law to the criminal courts.
2. In a statutory offence, if it was the intention of the legislature to provide the facility of injunctive relief, it readily could have done so.

3. Breach of an injunction may give rise to punishment greater than that prescribed for a breach of a provision of legislation; injunctive relief should not become a means of introducing by orders of a court more drastic punishment, which Parliament has expressly failed or declined to provide.
4. Different rules, onus of proofs and procedures exist in criminal and civil trials. If criminal trials are brought into courts of Equity, it could undermine the careful protection afforded over centuries to criminal trials.
5. The undesirability of multiplication of litigation, of concurrent proceedings in different jurisdictions which involve, in substance, the same subject matter.
6. Where the criminal law which it is sought to enforce is itself laid down by statute, it will sometimes be plain that the legislature intended the statutory provision to constitute a complete code of the remedies and sanctions to be applied in respect of breaches.

This case must be considered in the matter before me, notwithstanding the injunction sought is not one in equity, but one created by statute.

In **Vincent v. Peacock** ([1973] N.S.W.L.R.)466 the court of appeal overruled a judges refusal to grant an injunction on discretionary grounds. The court held that the plaintiff was entitled to an injunction unless special circumstances existed. The court looked at alternate remedies, such as prosecutions under the Summary Offences Act, indicating some of the acts complained of were outside the scope of that Act. It went on to state: *It is, in our opinion, incorrect to regard proceedings of a criminal kind as an alternative remedy to an injunction in the Court of Equity. Alternative remedies are remedies which compensate the plaintiffs for the wrongs done to them, and proceedings of a criminal kind do not do this. The plaintiffs do not receive the fine (if any) which may be inflicted.*

In this instance, any penalties imposed by courts following convictions of persons arrested at the mine site will not compensate the mining company at all. Furthermore, having regard to the fact that some 35 charges will be withdrawn, "due to a technicality", highlights the fact that the criminal law appears inadequate to assist the mining company with the difficulties they are occasioning with the defendants.

Mr. Bolt submitted that the complainants have failed to establish that these defendants have been guilty of any offence and they have chosen these defendants only on the basis they have been arrested. He said the complainants were adopting a "scattergun" approach, and have not established that the defendants have been guilty of any offence. None of the defendants, however, gave evidence to challenge the concerns of Mr. Lawton. This court must proceed on the basis that the defendants will be doing their utmost best to prevent the complainants going about their legitimate business of mining.

Reference was made by Mr Bolt to the decision of Windeyer J in **Forestry Commission of NSW v. Aimann & Ors, Supreme Court, Equity Division, 18 June**

1993. The matter concerned persons engaging in activities to interrupt logging procedures in what is known as the Closed Area of the Bulga and Dingo State Forests.

Although both an interlocutory and a permanent injunction was sought, the decision is concerned only with the question of the granting of an interlocutory injunction. The facts were that people were actively engaged in interrupting logging in a State Forest and were arrested for being in a restricted area under the Forestry Regulation Clause 15A, or for resisting or hindering police, under the Crimes Act. They were placed upon conditional bail which basically prohibited them from entering the subject area.

There were a number of defendants involved in those proceedings, the evidence against some being stronger than the evidence against others. In respect of some of the defendants, His Honour said, *I am in no way convinced that the criminal law will fail or should fail to prevent unauthorised activities in connection with the forestry regulation or criminal law or otherwise.* His Honour used his discretion not to issue an interlocutory injunction against those defendants.

In respect of others, who were on bail conditions, His Honour was of the view the situation could be controlled by the police. Being satisfied the criminal law was effective in the circumstances, exercised his discretion and did not issue an interlocutory injunction. As to the joining of a number of defendants to the action, he stated: *There has to be a basis for the granting of an injunction rather than just joining persons as defendants and then saying that an injunction will not hurt them.*

Reference was made to a scattergun approach when His Honour said, *It would not be an appropriate use of the powers of this court to grant injunctions to assist in the enforcement of the law in this way thereby encouraging an uncontrolled scattergun approach to joining defendants.*

In finally refusing all of the claims for interlocutory relief, he said:

*It is, I think, clear that in the first instance it is the task of the plaintiff and the police to enforce the forestry regulation, and of the police to deal with other breaches of the law; and that public good and order requires more to be done by reinforcement.*

Mr. Bolt submitted there is ample provision within the criminal law to overcome the difficulties being occasioned by the mining company. He cited S.175A of the Mining Act 1992, which, he said, was specifically designed to overcome Clause 1 of the sought injunction. Regrettably, S.175A is of no comfort to the complainants. That section, which is in Part 9 of the Mining Act, refers to unlawful entry to the site of a **mineral claim**. The complainants are not the holders of a mineral claim, they are the holders of a **mining lease** under Part 5 of the Act. S.175A has no relevance to the area covered by ML 1386 and ML1426.

He further cited S.115 of the Roads Act 1993. History has shown that a prosecution under that section was flawed by a technicality, resulting in some 35 other charges being withdrawn. The difficulty, apparently from exhibit 11, is the wording of signs and plotting the exact location of the area subject to the section. I am not confident



that future attempts to restrict these defendants by the utilisation of S.115 of the Roads Act 1993 will be successful.

Another submission was that an avenue open to the complainants was S.296(d) of the Mining Act 1992, which grants jurisdiction to a Warden's Court to hear matters relating to *trespass or encroachment on, or injury to, land subject to an authority or mineral claim, or interference with, or injury to, any mining improvement*. However, this would allow the warden's court to hear any complaint by the complainants concerning those matters. It is a matter which could only be civil in nature, wherein, perhaps the complainants could claim damages from a defendant. But this is for past events. The complainants are seeking an injunction to prevent events occurring. I do not see S296(d) of the Mining Act 1992 being of assistance to the complainants nor do I consider it to be a persuasive matter when exercising my discretion as to whether or not injunctions should issue.

Mr. Bolt also cited S.201 and S.545B of the Crimes Act 1900. Before considering those submissions, it is necessary to refer to occurrences after the hearing was adjourned. At the conclusion of evidence on 11th February, 1999 at Tenterfield, I reserved my decision until 15th February. Upon arriving at my chambers on the 15th, I read a fax transmission from Mr. Brennan, received at 5.34pm on 12th February, 1999. The complainants now sought injunctions in narrower terms, that is, in lieu of the four terms as outlined above, they sought the following two terms:

1. encroaching on any part of the land at Timbarra Plateau near Tenterfield which is subject to Mining Lease 1386 or Mining Lease 1426;
2. doing any act that may affect any improvements, including plant and equipment, which are owned or used by Ross Mining NL, Capricornia Prospecting Pty Limited or Timbarra Gold Mines Pty Limited and which are located on the land at Timbarra Plateau near Tenterfield which is subject to Mining Lease 1386 or Mining Lease 1426.

A copy of that transmission had been forwarded to Mr. Bolt. Before I determined the matter, I gave Mr. Bolt the opportunity to make any further submissions, which he did by fax that same day. In essence Mr. Bolt relied upon the submissions he made at the court at Tenterfield and in addition objected to the ambiguous nature of the new Clause 2.

It could very well be that the new clause 2, if breached, could bring an allegation under the provisions of S.201(c) or (d). But clause 2 is wider than that and encompasses situations which could occur which would not be possible to bring prosecutions under Section 201.

It is also possible that the new clause 2 could even bring an allegation under S.545B(1)(b)(iii) if a court were to determine that "plant and equipment" in clause 2 could be interpreted as "tools" in S.545B. On the other hand an allegation under S.545B may find itself foundering in technical difficulties in the similar way the prosecutions under the Roads Act failed.

## DISCRETION AS TO THE GRANTING OF INJUNCTIONS

I am satisfied that the joining of these 65 defendants by the complainants are quite different from those defendants that were joined in the matter of **Forestry Commission of NSW v. Aimann & Ors**. The complainants have not adopted an *uncontrolled scattergun approach*.

Furthermore, I am satisfied that each of the 65 defendants have in fact been involved in activities which have infringed the legal right of the complainants pursuant to ML1386 and ML1426. Also, I am satisfied that further infringement to those rights, by the 65 defendants, are threatened to a material extent.

I am not satisfied that any legislation under the criminal law will be an effective substitute for clause 1 sought by the mining company. There is no reason as to why I should not exercise my discretion and grant the injunction in terms of clause 1 as sought.

Although I have conceded that parts of clause 2 may be able to be enforced by the provision of criminal sanctions, the clause affords wider protection than certain aspects of the criminal law. Furthermore, if there is any protection by the criminal law, it could not be considered as an alternate remedy for the complainants. I do not consider that the 6 reasons outlined by Kirby P (as he then was) in **Peeks** case are impediments to the granting of injunctions in the terms sought by clause 2; in particular, reason 3 in **Peeks** case is not relevant, as a breach of clause 2 of an injunction will not see punishment greater than punishment which may be imposed for convictions under S.201 or 545B of the Crimes Act, 1900.

Consequently, I propose to issue injunctions against each of the 65 defendants in the following terms:

1. encroaching on any part of the land at Timbarra Plateau near Tenterfield which is subject to Mining Lease 1386 or Mining Lease 1426;
2. doing any act that may affect any improvements, including plant and equipment, which are owned or used by Ross Mining NL, Capricornia Prospecting Pty Limited or Timbarra Gold Mines Pty Limited and which are located on the land at Timbarra Plateau near Tenterfield which is subject to Mining Lease 1386 or Mining Lease 1426.