IN THE WARDEN'S COURT
HOLDEN AT GOULBURN
ON 28TH MARCH, 1984
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

R.T. TOOHEY

v.

A.S. EXPLORATION VENTURES PTY. LTD. &
SELTRUST MINING CORPORATION PTY. LTD.

This has been the hearing of an application for the determination of compensation pursuant to Part VIII of the Mining Act, the applicant being Australasian Mining Title Services Pty. Ltd. on behalf of A.S. Exploration Ventures Pty. Ltd. and Seltrust Mining Corporation Pty. Ltd. The land the subject of the application is covered by Exploration Licence No. 1257 which covers in part some of the property held under Western Lands Lease by Mr. Richard Thomas Toohey (the respondent) who occupies the property "Oakdale", near Broken Hill in western New South Wales. The Exploration Licence expired in November, 1983 but now some 63 prospecting licence applications have been lodged covering almost the same area which by reason of the operation of Section 72A to the Mining Act preserved the exploration licence until such time as the prospecting licence applications are finally dealt with. While the exploration licence covers some 251 square kilometres, some 13,000 hectares of "Oakdale" is affected by it. "Oakdale" is 270 square kilometres or 27,020 hectares in size.

At the hearing, the two exploration companies were represented by Mr. L. Moore, Solicitor, while Mr. G. Thompson, Solicitor, appeared for the respondent. Mr. R. Harrison appeared on behalf of Australasian Mining Title Services Pty. Lt

It is common ground that at times over the last three years the exploration licence holders or attendent companies have conducted exploratory activities over certain lands of "Oakdale". These activities have taken the form of the sinking of diamond, percussion or rotary airblast drill holes. The evidence shows that on 26th February, 1980 a document in the form of an agreement as to compensation was signed between A.S. Exploration Ventures (therein called Auselex) and the respondent relative to Exploration Licence No. 1257. The terms of that agreement as to compensation, the agreement having been tendered as Exhibit 5, are herein set out:-

"1. Subject to the provisions of the Act and authority Auselex shall pay and the occupier shall accept an amount calculated in accordance with the following rates as the amount of compensation payable for any loss suffered or likely to be suffered as a result of the grant of the authority to Auselex or the exercise of rights conferred on Auselex by the Act or the authority provided always that the amount of compensation payable in accordance with the said rates shall not exceed $1,000.00

$20 per diamond or percussion drill hole

$0-20 per square metre of land surface disturbed in prospecting operations on land other than cultivated land.

$0-40 per square metre of land surface disturbed in prospecting operations on cultivated land.

2. Notwithstanding the foregoing provision the parties agree that in the event of actual loss by the occupier exceeding in value the amount calculated in accordance with the preceding clause then the parties shall, at the request of the occupier, negotiate to determine an agreed amount of compensation for loss in fact suffered by the occupier in lieu of that calculated in the preceding clause and in default of agreement the matter may be directed to a warden for assessment.

3. This agreement shall be effective for the term and currency of the authority granted to Auselex."

It is a notorious fact that for four years up until recently the State of New South Wales including the Broken Hill district was the subject of severe drought which has substantially reduced pastoral activities, limited incomes and strickened stock. On the view which I took of "Oakdale" I witnessed the carcasses of animals on the respondent's property which it was said had died of starvation during the drought. It was put to me on behalf of the respondent and by Mr. McCormick, Pastoral Inspector, that the property being so relatively small, constituted only a minimal home maintenance area and that any activity such as those of drillers on it which reduced the amount of available land for grazing purposes and caused inconvenience would be sufficient to make the operation of grazing it unviable. There can be no doubt that there are larger properties in the vicinity but whether exploratory operations of the type carried out would have such dire effects of making "Oakdale" unviable or seriously reducing the income from it, in my opinion, still remain to be proved.

It will be noted that the agreement sets out a rate per diamond or percussion drill hole and a rate per square metre on both cultivated and uncultivated land.

The applicants in this matter are obviously relying on the provisions of Clause 2, by reason of a statement by the parties that they are unable to agree as to an amount of further compensation. While the applicants rely upon Clause 2 for the founding of my jurisdiction, the respondent has claimed in effect that Exhibit 5 should be set aside under the Contracts Review Act and that therefore compensation should be assessed. The Mining Act provides that the parties may agree as to an amount of compensation but if they do not the Warden may assess it and further that on the Warden being asked to assess compensation and the parties subsequently agreeing, the Warden shall accept their agreement as being his determination of compensation. Section 126 further makes provision for additional compensation in certain circumstances.

Turning to Mr. Thompson's submission that Exhibit 5 could be set aside under the Contracts Review Act, I am not satisfied that this is the case. The parties obviously agreed to a certain arrangement existing and Mr. Toohey has accepted moneys from Auselex which have been paid on their behalf since the signing of Exhibit 5 and in my opinion there is nothing in the evidence firmly to justify setting the agreement aside on the basis that it was unjust or otherwise falls within the scope of the Contracts Review Act. The other interesting aspect of that particular submission is that the Warden's Court is not a court within the meaning of that Act. There will be no setting aside of Exhibit 5.

In relation to my function in this matter therefore I believe that the provisions of Clause 2 set out a basis for a Warden to determine compensation adopting as I do the philosophy to be found in Section 126, that is, that compensation having been paid and there is actual further loss proved, additional compensation can be forthcoming. I propose therefore to proceed with the assessment of compensation.

Exhibit 6 sets out the amount of moneys paid to the respondent since the operations under the exploration licence commenced and I set out herein those moneys.

11/12/80	837	Rab holes @ 50 cents	$418.50	
				$418.50
31/7/81 (or thereabouts)	358	Rab holes @ 50 cents	$179.00	
	9	percussion holes @ $20	$180.00	
				$359.00
16/5/82	130	Rab holes @ 50 cents	$ 65.00	
	* 15	percussion holes @ $20	$300.00	
	2	diamond drill holes @ $20	$ 40.00	
		diamond drill rig on site for 10 weeks @ $5 per week	$ 50.00	
				$455.00
	*	includes two diamond drill precollars. (each hole incurred a charge of $20 for percussion and a further $20 for the diamond section).		
	Total	as per compensation agreement		$1,232.50
		Additional Compensation		
8/12/81		Compensation for deprivation of use of land		$1,000.00
	Total	payments		$2,232.50
	1	Water Bore (Part payment for water used)		$2,000.00
				$4,232.50

It will be noted that the last entry of $2,000 was not an actual payment out, and this is explained as follows:-

The applicant has claimed that further benefits flowed to the respondent by reason of the sinking by it on his behalf of a water bore and there is no doubt that a bore of some 33 metres was sunk by the company in a position where water could be obtained but whether that sinking could be represented by the giving of a credit of $2,000 is open to doubt. While the respondent claimed that sinking of the bore would cost in the vicinity of $3 per metre I accept as being more appropriate the evidence of Mr. Crossing who has the cost of the sinking of a bore of the nature as put down on the respondent's land as being in the vicinity of $10 per metre. Therefore I believe a credit of some $330 is more appropriate than $2,000 in respect of the borehole, so to the figure of $2,232.50 in Exhibit 6 can be added the sum of $330.

The applicant, through Mr. Christie, a Lands Administration Officer with Seltrust, and Mr. John Higginbotham, a geologist with Seltrust, has conceded that work has taken place on "Oakdale" at different times commencing in December, 1981 but that there was a break in operations on at least some occasions until August, 1983 following upon a hearing on 28th July, 1983 when I granted an Injunction against the respondent restraining him from interfering with the operations of the applicant. From early August, some operations continued and when it was necessary to sink the drillholes, drillers camped on site and several personnel such as geologists were in attendance. Vehicles used in the drilling activity consisted of those required to give access to and to map the area and those which were required to convey the drilling apparatus. In all I have totalled some eight months since 1981 when exploration activities under the subject licence took place. The respondent claimed that the drilling rigs had beaten down and in fact killed vegetation along the many gridlines and on the view which I took in order to understand the evidence I witnessed even at this stage depressions in the vegetation which, by and large, everybody considered has been as a result of the movement of vehicles. Further it was conceded by personnel from the applicants that drillers had left marks on the surface following the completion of drilling operations and again on the view I saw the results of diamond, percussion and R.A.B. drills and saw where rainfall

had washed waste material which had been brought from the subsurface and left around the tops of the holes. I noted a large number of marker pegs on "Oakdale" which although easily avoided, still are encroachments upon the property.

There was a dispute as to what took place during a conversation after the court hearing before me in July between Mr. Christie and the respondent and it is fairly obvious that the respondent resented the suggestion that he had no need to move sheep arising out of a proposal that Seltrust return to "Oakdale" to continue exploratory operations. Confusion has arisen in relation to that conversation for both the respondent and his solicitor, Mr. O'Brien, have given evidence to the effect that Mr. Christie had given an undertaking to pay additional compensation. Mr. Christie on the other hand has sworn that this did not occur and that during the conversation he merely asked that the respondent get in touch with him to set out any additional claims for compensation. I make no finding in respect of the conversation. It is obvious that additional claims were made on behalf of the respondent by Mr. O'Brien which were rejected and if anything is to be learned from this episode is that negotiations as to compensation should always be conducted in writing, if there has been previous friction between the parties.

The respondent at all times has complained of lack of notice from the company and inconvenience which he has been caused by reason of the operation, saying that even when he moves ewes which are lambing that this can result in losses. Through his evidence runs the thread of a complaint that the compensation which he has received is insufficient and that he requires more. On the other hand, the applicant through Messrs. Christie and Higginbotham has implied that the claim for additional compensation by the respondent is unreasonable and out of proportion with the damage done.

In dealing with a matter of assessment of compensation a Warden must be guided, inter alia, by the provisions of Section 124(1)(b). These are:

"Where compensation is by this Act directed to be assessed by the Warden the assessment -

shall, except where the assessment is to be made for the purposes of section 117A(14) or 123, be of the loss caused or likely to be caused by -

(i) damage to the surface of land, and damage to the crops, trees, grasses or other vegetation on land, or damage to buildings and improvements thereon, being damage which has been caused by or which may arise from prospecting or mining operations;

(ii) deprivation of the possession or of the use of the surface of land or any part of the surface;

(iii) severance of land from other land of the owner or occupier of that land;

(iv) surface rights-of-way and easements;

(v) destruction or loss of, or injury to, or disturbance of, or interference with, stock on land; and

(vi) all consequential damages; "

As can be seen Section 124(1)(b) speaks of loss caused or likely to be caused by the various activities and so a Warden must attempt to assess the future likely loss in addition to any loss that has already been suffered. Although Section 126 refers to an assessment having been made in accordance with Section 124 in providing that an assessment of compensation may be made for "further loss", significantly future loss is not mentioned, and as I have said in view of the attitude of the parties I am willing to make a further assessment in the spirit of Section 126, subject to my being satisfied that it is justified.

I accept the evidence that has been given on behalf of the applicant by Mr. Higginbotham and by Mr. McCormick on behalf of the respondent as to what area of land of "Oakdale" has been affected by the activities conducted under the subject exploration licence. Mr. Higginbotham came to the conclusion that .6 of 1% of "Oakdale" was affected whereas Mr. McCormick, a trained Pastoral Inspector with the Western Lands Commission has said that some 35 sheep areas have been lost on "Oakdale" by reason of exploration activities. Mr. McCormick was unwilling to say what the value was of a sheep area which he described as an area necessary to sustain one sheep over one average year.

He gave evidence of it taking up to 25 years for vegetation which had been destroyed or knocked down by the drilling activities and wheels of vehicles to recover completely. He felt that there would be inconvenience to a landowner because it was necessary for him to change his normal programme for stock, an erosion problem could be caused and there would be difficulty with dust created which caused contamination to vegetation which would be the feed available and which would then be less palatable to stock. In relation to this last comment I accept the evidence of Mr. Clark that dust affected vegetation is less attractive to stock than that which is not so affected. He added that feeding habits of stock could be disrupted as could their watering patterns and that lambing ewes could mis-mother. In cross examination it was put to Mr. McCormick as to what acreage 35 sheep areas represented and he replied that it was 280 hectares, something less than .8 of 1% of the total of "Oakdale's" land mass. Later he conceded that this figure could more properly be .6 of 1%.

So it seems from the evidence that Mr. Higginbotham and Mr. McCormick were close in their estimates as to what land was affected or use lost by the exploration activities. No evidence was given as to valuation of the land but I accept that while at the moment it is under lush grass because of the heavy rains which happily have led to the breaking of the drought it is normally fairly arid country carrying salt bush and blue bush and annual grasses only, the latter blowing away when they dry off during the hot summer which prevails. While the area is huge by standards of property areas in the eastern part of the State, the evidence is that at 27,020 hectares it is not as large as surrounding properties and certainly not big by standards in the western division.

Unfortunately there is little or no evidence in dollars as to what the loss suffered by the respondent is and I am left to do a mathematical calculation to assess compensation. It is obvious that the land will slowly rejuvenate and even during the inspection there were signs of some regrowth on the

affected areas. Although Mr. McCormick said that it would take 25 years for the land to recover, that is, for it to be back to what it was before it was disturbed, I do not expect that it will take that long for its recovery for useful grazing purposes, and I am of the opinion that within 15 years all signs detrimental to grazing purposes of the exploration will have disappeared.

It is common practice within the mining industry for experienced holders of exploration licences to agree to pay and for prudent land holders to agree to accept, certain amounts per borehole or per square metre of land disturbed. Doubtless, account is taken by the land holder of the factors which cause him inconvenience and which otherwise affect the property arising out of mining or exploration activities. So to depart from this standard is unwise provided satisfactory evidence is given as to an amount per borehole or per square metre which the property is worth. Unfortunately in these proceedings no evidence has been forthcoming on these factors and as I have said there is little evidence of valuation and no evidence of the value of stock held on the respondent's property.

The respondent has said that he runs 4,500 sheep and there is also the suggestion that cattle are run on "Oakdale". I accept therefore that one sheep can be carried on every 4.8 hectares or 12 acres on "Oakdale" and if 35 sheep areas are affected then 168 hectares or 420 acres will be affected over the first year which is .063 of "Oakdale". Land values fluctuate and so does the price of stock but if I accept the evidence of Mr. McCormick that 35 sheep areas are affected, and these I take to be D.S.E. (dry sheep equivalent) which is an accepted standard in the pastoral industry, and that under normal conditions a dry sheep could be expected to return $14 net per year then the sum of $490 for the first year would be lost by reason of the activities of the applicant. This of course would diminish for following years because the land would gradually recover to the time 15 years hence when near complete recovery could be expected to take place so that the loss to the respondent would be then nil. So at $490 for the first year this figure could be reduced to nothing at the end of 15 years and I do the following calculation to show what the total

amount of loss would be likely to be at the end of 15 years:-

$$490 \div 15 = 32.6^{r}$$

1 to 15 years totals 120 units

$$32.6^{r} \times 120 = 3919.9^{r}$$ say $3,920

One matters occurs to me and that is that there is no basis in the evidence for the figure of $14 per dry sheep as being the annual net rate of likely return to a sheep owner. Like land values and stock prices, stock profits vary depending of course on seasons, demands and market conditions. I believe $14 per annum to be a reasonable figure based on my experience as a Mining Warden dealing as I do with matters of assessment of compensation both inside and outside the western division of the State. As I have observed in earlier judgments and as implied by Mr. McCormick in his evidence, figures in relation to these matters are estimates only; indeed the Mining Act in Part VIII speaks of determinations of compensation by agreement between parties or assessment of compensation by a Warden and my figures which are the basis of the calculation, are reasonable assessments which have to be made inspite of the absence of evidence.

It could be argued of course that no account has been taken of price fluctuations or inflation which are likely to occur over the next 15 years. On the other hand the respondent, if I order the total amount to be paid within the near future, could expect use of the money over the 15 years for interest purposes and I think it would be fairer to both sides to require payment at an early date. So compensation on the basis of this calculation is $3,920. I turn to Section 124(1)(b) and I am of the view that paragraphs (i) and (ii) can be covered by this assessment. As far as paragraph (iii) is concerned, that is, severence, this is a property where there is very great room for movement and I cannot see where any compensation could flow to a land holder because there would be no loss caused or likely to be caused by the explored land being severed from other lands. I also am of the view that paragraph (iv), surface rights of way, can safely be included in the assessment that I have set out.

In relation to destruction or loss etc. of stock under paragraph (v), there is evidence from the respondent and other witnesses that there could be suffered some loss of lambs and other damage such as when stock are driven away from watering places. Certainly I am of the view that paragraph (v) is not covered by the assessment of $3,920 that I have made above. Unfortunately no evidence was given in dollars as to stock loss but again applying my experience as a Mining Warden to these matters I am of the view that over eight months the sum of $200 would be adequate recompense under paragraph (v). I make that assessment.

I have already commented upon the existence of numerous pegs which still stand on the land. These are being left in position so that if further exploration is required, easy identification can be made of holes that have been sunk. The pegs however are easy to push over and easy to avoid and I am of the view that the possibility of injury to stock or humans is minimal. In relation to the pegs I feel that the sum of $100 is satisfactory compensation.

I turn then to paragraph (vi), all consequential damages. Mr. Thompson in his final submission to me which he together with Mr. Moore submitted in writing, made mention of what he called the "Blot on the Title", that is to say the fact that a mining title exists over this grazing land derogates or diminishes the unrestricted use of the land by the respondent and indeed I take it by any other users.

In a matter of Clutha Development Pty. Ltd. v. Yeomans (Warden's Court, Sydney, on 5th August, 1981) this court considered the claim for compensation on the basis that a landowner proposed to subdivide land for sale but that there was a problem obtaining sales because of the possibility of exploratory drilling for coal on the land. He sought compensation for this and called a real estate expert from Richardson and Wrench Pty. Ltd. to substantiate his claim. On the other hand his opponent called a real estate valuer whose opinion differed from that of the real estate expert. I concluded that it was more likely than not that prospective purchasers of the subject land in normal circumstances would in fact be deterred by the possibility of drilling taking place on the basis

that the average purchaser would be looking for a retreat type situation and would not be at all impressed by the possibility of his overlooking drilling rigs. On the other hand, other factors came into calculation and these were the difficulties that the land holder was experiencing in obtaining funds because of high interest rates and a real problem with zoning. In the circumstances in that particular matter not being satisfied that the loss was a consequential damage, I disallowed the claim on the possibility of compensation for loss of sales.

While a purchaser of any land of limited acreage would be most keen to avoid any restriction arising out of a title under the Mining Act I cannot see where any prospective purchaser of land at Broken Hill would be similarly concerned. Prospecting and mining takes place in various forms in that district and a potential purchaser should not be unreasonably surprised to find some title under the Mining Act existing over any land that he is considering purchasing at Broken Hill. Further I cannot see where the actual title itself or potential titles in the form of prospecting licences can be the subject of compensation payable to the holder of the Western Lands Lease or the owner of freehold land. These are titles arising out of an Act of Parliament. I would therefore disallow any compensation in relation to the so-called "Blot on the Title".

One aspect occurs to me under paragraph (vi) and that is the possibility that the respondent would have to exercise supervisory activities over the drillers and there may be some inconvenience caused by this. No doubt he would be concerned as to what they were up to. In the circumstances I would propose to allow the sum of $200 for supervisory activities.

I am mindful of the fact that Mr. Thompson, a solicitor of many years standing, in his final submissions claimed on behalf of his client compensation on one basis of between $332,000 and $420,000 and in the form of $30,000 compensation on another. Having examined the matter objectively I cannot see in all the circumstances where any of these figures or anything like them, is justified.

I assess compensation herein as follows:-

$3,920	for 35 sheep areas
$ 200	possible stock losses
$ 100	pegs
$ 200	supervision
$4,420	TOTAL

From that is to be deducted $2,562.50 which has been already paid, leaving $1,857.50. I direct that that amount be paid by the applicant to the Registrar, Broken Hill, within three months from today for payment out to the respondent.

I am aware that quite a number of land holders and exploration companies have been awaiting the decision in this matter in the hope that agreement between them could be concluded. As I have said in the past, borehole and square metre rates have been accepted by parties generally who are normally at arms length and I see no reason why this practice, if satisfactory to experienced exploration companies and to prudent land holders, should not continue even though seldom is Section 124 (nor indeed Section 98 of the Coal Mining Act) ever mentioned. Certainly it is a means by which a reasonably easy check can be made by either party on activities. Applying then as I do the total of $4,420 compensation to "Oakdale", bearing in mind that properties and conditions vary from place to place and season to season, I would be of the view that reasonably general figures for agreement for exploration purposes on "Oakdale" would have been $35 per diamond or percussion drill hole; 85¢ per rotary airblast holes; 35¢ per square metre of land disturbed other than cultivated land, and 70¢ per square metre of land disturbed on cultivated land. These figures could be in addition to any work done by the applicant on behalf of the respondent utilising equipment that is available.

I come now to the question of costs. Section 146 gives a Warden a discretion and over the nine years that I have been Chief Mining Warden I have generally exercised that discretion in compensation hearings in directing that the parties pay their own costs. Without laying down any hard and fast rule, I depart from this practice only when it is obvious that a particular party had been at the least unreasonable in forcing the other party to court. I do not see any unreasonableness in the actions of either party in this matter and in the circumstances I direct as to the compensation question that the parties pay their own costs.

As to the injunction proceedings before me in July of last year, the question of costs was reserved until such time as this compensation question was resolved. Mr. Moore in his final submissions has set out that costs to his client in connection with the injunction proceedings were $3,272.60 but has submitted that there be a formal order for costs in $25. I adopt a different approach to injunction proceedings on the question of costs because normally, clearly, one of the parties is at fault and as a matter of practice I have awarded costs. In the circumstances I make an order that the respondent, Mr. Toohey, pay the sum of $25 to the Registrar as costs of the complainant in the injunction proceedings heard by me at the Warden's Court, Broken Hill, on 28th July, 1983. Such amount to be paid by Mr. Toohey within one month from today. I have noted in respect of the Section 133 Complaint against Mr. Toohey that Mr. Moore has indicated that he has instructions to ask leave to withdraw that complaint and in the circumstances then the papers are marked "Complaint Withdrawn, Summons Dismissed. No order as to costs".