WARDEN'S COURT
New South Wales

Citation:	Moolarben Coal Mines Pty Limited, Moolarben Resources Pty Ltd, Australia Moolarben Coal Pty Limited v. Ulan Coal Mines Limited. Mining Lease No. 1605; Mining Lease No. 1606
Hearing dates:	17 October 2008 at Newcastle
Date of Decision:	21 October 2008
Jurisdiction:	Mining
Place of Decision:	Sydney
Judgment of:	J A Bailey, Chief Mining Warden
Decision:	Application for Costs Granted
Catchwords:	Costs; Indemnity; Party/Party

Legislation Cited:	Mining Act 1992; Land Acquisition (Just Terms Compensation) Act 1991; Civil Procedure Act 2005
Cases Cited:	Banno & Anor v. Commonwealth of Australia & Anor(1993) 81 LGERA 34; Pastrello v RTA (2000) 110 LGERA 223; Latoudis v. Casey (1990) 170 CLR 53; smec Testing Services Pty Ltd v Campbelltown City Council (2000) NSWCA 323
File number:	2008/16; 2008/18
Representation:	Mr Withers of Counsel instructed by Mr B Tobin Solicitor of Sparke Helmore for Applicant Mr Beasley of counsel instructed by Mr. P Holland of MinterEllison for Respondent

This is an application for the respondent to pay the applicant's costs in respect of two matters wherein an application was made pursuant to S.265 of The Mining Act 1992 to determine compensation pursuant to Mining Lease 1605 and Mining Lease 1606.

On the 30th July, 2008, the court handed down a determination in respect of that claim and awarded the sum of $580,223.28 as compensation to Ulan Coal Mines Limited in respect of ML 1605 and ML 1606.

Before proceeding to the submissions put forward in this matter, it is beneficial if a chronology of events is outlined:

11 March, 2008:	Applicant offers $950,000 as Compensation under Part 13, Mining Act 1992.
14 April, 2008:	Application lodged pursuant to S.265 of The Mining Act 1992.
8 May, 2008:	Directions hearing at Mudgee, together with a view of the site. Open offer of $950,000 renewed by the applicant to expire at 4.p.m. the day before the first day of hearing of the matter.
17 June, 2008:	Return of Subpoenas and further Directions following non-compliance with some of the Directions of 8th May, 2008.
30 June, 2008:	Hearing of Notice of Motion to vacate Hearing date.
7-11 July, 2008:	Hearing of the S.265 application. Court advised Respondent has not taken up the offer of $950,000 compensation
30 July, 2008:	Decision handed down.
17 October 2008:	Notice of Motion re costs

SUBMISSIONS:

Mr Withers submitted that the applicant was entitled to its cost and not only that, it was entitled to its cost on an indemnity basis for the majority of the time. He submitted that the applicant was clearly the prevailing party; the court awarded compensation of $580,000 whereas the respondent was seeking $9.6 million. He indicated that the applicant would not be entitled to indemnity costs unless there was some unreasonableness on behalf of the respondent. He pointed out that the majority of the respondent's evidence was filed on the 4th July, indicating that if the applicant had received it earlier, it could have pointed out that much of its evidence was irrelevant.

Mr Withers submitted that the vast amount of their claim was rejected by the court and furthermore, that the court rejected the evidence of Mr Irwin in relation to his opinion as to the market value of the subject land. He referred to the fact that the court made some negative comments about the claim for the offset in salinity.

In written submissions by Mr Withers he said the respondent's rejection of the offer of $950,000 entitles the applicant to indemnity costs as from the date when the offer was made which was the 11 March, 2008. He submitted the respondent's rejection of the offer was unreasonable on the basis that the offer was

1. Unconditional.
2. Made at the outset of the case.
3. Remained open from the commencement and during the Hearing and was substantially greater than the amount ultimately offered by the court.

He submitted that the respondent was unreasonable in the circumstances in that it ought to have known that it had no real prospect of success and, secondly, conduct of the party of the proceedings caused unreasonable delay and expense. Furthermore, it was unreasonable in that:

1. It rejected the offer to settle.
2. It relied upon "special value" evidence, which was rejected by the court.
3. It filed the majority of its evidence, two days before the Hearing date.

In the final submissions, he put to the court that if Ulan had accepted the offer of 11th March, 2008, the preparation and conduct of the week long hearing would not have been necessary and, consequently, it would be entitled to costs on the indemnity basis from the 14th April, when the application was filed.

Mr Beasley submitted that these were not ordinary civil proceedings and that the usual rules concerning costs do not have any application in this matter. He referred to *Banno & anor. vs. The Commonwealth of Australia & anor. (1993) 81 LGERA 34* and stressed that this is not a case which will be dealt with on the basis of the ordinary principles. He further referred to *Pastrello vs. Roads & Traffic Authority of NSW (2000)* NSW LEC 209. Page 225 wherein the court said: "*There needs to be a strong*

justification for awarding costs against an applicant where the effect of making that order is to erode the benefit of the just compensation recovered as a consequence of the court's determination. It is only in special cases where the court will deprive the owner full benefit of the compensation which is fair and just in the circumstances of the case". Mr Beasley went on to say that if costs were awarded in favour of Moolarben, it would be giving compensation to Ulan on the one hand and taking it in the other.

He urged the court to exercise great caution when considering its discretion when awarding costs in this case.

Mr Beasley submitted that the usual practice in this Court is that costs are not awarded in respect of matters under S.265. That is correct. The principal reason being in most cases the mining company does not seek costs. One can understand that there may be a number of reasons as to why costs are not sought. Firstly, they may not be sought as the mining company may be in a far better financial position than the landholder; Secondly, it may be a commercial decision on behalf of the mining company to encourage good will between itself and the landholder.

That general practice does not apply to all matters, there have been instances where the mining company sought costs and, in exercising its discretion, costs have been awarded against landowners. Each matter must be considered on its own merits. There have been situations where it was argued that the landholder is not in a financial position to meet the costs that were sought.

The fact that in this case the landholder is itself a mining company makes no difference in considering costs, naturally there has been no suggestion that the landholder would not be in a financial position to meet any costs.

LEGISLATION:

317 Costs may be allowed

(1) The costs of all proceedings under this Act before a warden (whether in a Warden's Court or otherwise) are in the discretion of the warden and the amount of such costs may be determined by the warden or taxed, as the warden may direct.

(2) The reference in subsection (1) to costs includes a reference to an arbitrator's costs in relation to a hearing under Division 2 of Part 8.

As can be seen by the section, there is a very wide discretion in respect of the awarding of costs by a Warden. A Warden's court is not bound by the *Civil Procedure Act 2005* and must rely upon common law in respect to the question of costs.

I agree with the submission of Mr Beasley when he referred to the matter of *Latoudis v Casey (1990)* 170 CLR 534, wherein it was indicated that costs are compensatory in nature and are not meant to be punitive. Mr Beasley submitted that Ulan was not being unreasonable when it rejected Moolarben's offer. He made reference to the fact that the validity of the mining leases were being challenged in the Court of Appeal at that point of time and that the ruling of the Court of Appeal, which was delivered after the Warden's Court decision on compensation, could have meant that Mining Leases 1605 and 1606 were void. However, the intervention of legislation in the New South Wales Parliament legitimised those two leases.

There is an inference in that submission that as the Court of Appeal decision was pending, it was reasonable for Ulan to pursue the question of compensation in the Warden's Court. With respect, I cannot accept that submission. Even if there had been an agreement as to compensation, and even if the leases were ultimately declared to be void, any agreement to compensation would be nullified and if compensation had, in fact, been paid, it would have been refundable. So no matter what may or may not have occurred, the proceedings in the Warden's Court were only brought about due to a lack of agreement between the parties.

Mr Beasley made reference to the *Land Acquisition (Just Terms Compensation) Act, 1991.* He submitted that there is some analogy between these compensation proceedings under the *Mining Act 1992* and proceedings concerning a disposed land owner under the Land Acquisition Act. He cited *Banno v Commonwealth of Australia (1993) 81 LGERA 34* AT PAGE 53: *Moreover, if this was ordinary litigation, the Commonwealth might reasonably expect to obtain an order that he applicants pay its cots. But this is not ordinary litigation.* In reply to that submission, Mr Withers pointed out that matters under the Land Acquisition Act are dealt with on the basis that the Government had taken away the land from the landholder forever; whereas, in respect to these proceedings, the mining company has the use of Ulan's land for a period of 21 years at which point of time the land will return back to Ulan in a rehabilitated state.

I will consider now the provisions of Section 272 Mining Act 1992:

272 Assessment of compensation

(1) The assessment of compensation payable under this Part:

(a) must be made in the manner prescribed by the regulations, and

(b) must not be made until notice in the approved form:

(i) has been published in a newspaper circulating generally in the State and in one or more newspapers circulating in the locality in which the land concerned is situated, or

(ii) has been served on each person who appears to a warden to be interested in the assessment, and

(c) must not exceed in amount the market value (for other than mining purposes) of the land and the buildings, structures and works situated on the land.

(2) Any compensation agreed on or determined under Subdivision M or P of Division 3 or Division 5 of Part 2 of the Commonwealth Native Title Act for essentially the same act as an act in respect of which compensation is to be assessed under this Part must be taken into account in the assessment of compensation for the act under this Part.

I can be seen by Subsection 1(c) that there is a ceiling to any compensation, which is set at *"the market value (for other than mining purposes) of the land"*. Ulan placed a market value of $9.67m on the property, as it was used as a buffer zone for noise and dust. That was what constituted the claim for $9.67m. The Act expressly indicates a market value *for other than mining purposes.* To use the land as a buffer zone is

clearly using it for mining purposes. That claim was doomed to fail and did in fact fail.

In all the circumstances, the claim by Ulan for the sum of $9.67 million has been the market value of the land for the purpose of a buffer zone is and was in my opinion, an unreasonable claim. Court time and expense of the parties should nto have been expended.

The other valuation placed upon the land by Ulan's expert, was a value of $1.75 million for rural purposes. This was to be compared with the sum of $615 for rural purposes by Moolarben's expert. At the end of the day, the court accepted that there was some error in respect of both opinions. It might be said that both parties were entitled to test each other's witnesses as to the reasons why they placed such valuations upon the land and consequently court proceedings were required for that to be done.

There was discrepancy in respect to other items put before the court by experts from either side and, in final submissions, the parties conceded that the court ought to award costs in respect of those matters by "splitting the difference" [although the amount put forward by Ulan was awarded]. It is clear that in matters such as that where there is a discrepancy between respective experts, that the only way in which to resolve those matters often, is by subjecting the witnesses to questions in the court room situation.

Part of the compensation ultimately awarded in respect of damage to buildings and structures. There was no offer initially by Moolarben to Ulan in respect of that respective heading as such. However, the offer of $950,000 in total would certainly have covered the amount that was ultimately awarded by the court for damage to buildings and structures.

There is another matter which I should mention. Ulan sought compensation in the sum of $674,059 for land tax; on the basis that what is now rural land would be rated

in the future as mining land and the sum sought would have to be paid by Ulan. Some time was taken up in court by this issue.

The suggestion that a landholder would have to pay increased land tax as the result of a mining company being on its land was abhorrent to me at the time. Due to an undertaking by Moolarben to meet such costs if they arose, I gave no further thought to the issue. However, after my decision I made one phone call and was assured that any increased land tax created due to a mining lease would be forwarded direct to the mining company.

The question is posed as to why Ulan simply didn't make a phone call in respect of this issue rather than airing it in court. I can understand Ulan not being satisfied with a reply to a phone call, however, if evidence was filed in accordance with directions, there would have been time for the parties to discuss this issue and if need be, Moolarben give an undertaking. With more care and thought this issue should not have taken up valuable court time and expense to the parties.

Another issue in which the Respondent was not successful was its claim for compensation as the loss of the land for its Salination Offset Program. As Mr Withers submitted, the court made some negative comments about that claim. That was another issue which ought not to have been aired in court, and with proper consultation between the parties may not have been.

In the matter of *Smec Testing Services Pty Ltd v. Campbelltown City Council(2000) NSWCA 323* at paragraph 37 the court said: *In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure.*

In considering all of the matters placed before the court, I find that there were some matters in this case which were pursued by the Respondent which ought not to have been. The failure to accept the offer made by the Applicant necessitated in further expenses to both the Applicant and the Respondent.

The fact that any award of costs will diminish to some degree the compensation awarded is a matter to be seriously considered. However, it is trite to say that the landholder was adequately legally represented and ought to have been aware of all of the ramifications of embarking upon a contested hearing, particularly in regard to the offer that was made by the Applicant.

In exercising my discretion I propose to award costs to the applicant. The question now arises as to whether it should be indemnity costs from the 14th April 2008 until the conclusion of the court hearing, or some other basis.

It is my estimation that the five day hearing would have been halved if the respondent had not pursued those matters which I have considered either unnecessary, futile or unreasonable.

The following scenario must then be considered:

1. The Respondent files its evidence on time in accordance with the courts direction
2. Meaningful negotiations take place between the parties
3. The Respondent realises the offer made is more than adequate
4. The Respondent accepts the offer
5. No court case ensues.

Consequently, I propose to award costs to the applicant on a party/party basis from the date of filing the application (14 April 2008) until the commencement of the court hearing. Costs are to awarded on an indemnity basis from that day (7 July 2008 until 11 July 2008). Each party can meet their own costs from that point of time

The following order is made:

RESPONDENT TO PAY THE APPLICANTS COSTS ON A PARTY/PARTY BASIS FROM 14 APRIL 2008 AND ON AN INDEMNITY BASIS FROM 7 TO 11 JULY 2008. THOSE COSTS TO BE AGREED BETWEEN THE PARTIES OR IF NO AGREEMENT TO BE ASSESSED.