

IN THE WARDEN'S COURT

OF NEW SOUTH WALES

AT SYDNEY

5 AUGUST 2005

J. A. BAILEY, CHIEF MINING WARDEN

2005/15

SYDNEY GAS (CAMDEN) OPERATIONS PTY LTD (APPLICANT)

v

ALAN GATENBY, LESLEY GATENBY,

LYNDEN GATENBY

(RESPONDENTS)

APPEARANCE AT HEARING OF 12 JULY 2005

Mr J. Kelly SC instructed by Mr Scott Gibson, Solicitor, appears for the Applicant

Mr T F Hughes QC, with Mr Mark Southwick of Counsel instructed by

Mr Tony Davis, Solicitor, appears for and with the Respondents

APPEARANCES ON 5 AUGUST 2005

Mr Scott Gibson, Solicitor, appears for the Applicant

Mr Mark Southwick of Counsel instructed by Mr Tony Davis, Solicitor, appears for

and with the Respondents

**REASONS FOR AND DETERMINATION
OF NOTICE OF MOTION**

The matter to be determined by the court at this point of time is the Notice of Motion which was filed on the 4th July 2005. There are four matters which are being sought:

1. An Order pursuant to S.115(n)(ii) of the *Petroleum (Onshore) Act 1991 (NSW)(The Act)* determining and declaring that the provisions of Part 4A of the Act have no application to the carrying out of any petroleum mining operations under a petroleum production lease issued under the Act, including any petroleum mining operations carried out by the Applicant on the land contained in Lot 12 in DP606991 (“the Respondent’s land”) under Petroleum Production Lease No. 1 dated the 2nd September 2002 (“PPL1”) and Petroleum Production Lease No. 4 dated the 6th October 2004 (“PPL4”).
2. An Order pursuant to S.115(n)(ii) of the Act determining and declaring that the Applicant, in its capacity as the holder of PPL1 and PPL4, is entitled to access to the Respondent’s land for the purpose of exercising the rights conferred upon it pursuant to Section 41 of the Act.
3. An Order pursuant to S.115(n)(ii) of the Act determining and declaring that the Warden’s Court has jurisdiction to hear and determine the question of the terms upon which the Applicant may exercise its entitlement to access the Respondent’s land during the terms of PPL1 and PPL4, and for the purpose of determining the Applicant’s application for assessment of compensation dated the 26th April 2005.
4. Such further or other Order as the court thinks fit.

Other than a reference in an affidavit by Mr Scott Gibson, to a conversation he had with Mr Alan Gatenby, the facts in this matter are not in dispute. Mr Gibson was cross examined in relation to the conversation he said took place between himself and Mr Alan Gatenby and was adamant that it took place. Mr Alan Gatenby when giving evidence, denied that he had ever spoken to Mr Gibson.

As to whether or not that conversation took place is of no importance in so far as the court requiring to look at the notice of motion.

The other important facts which are not in dispute in respect of this matter is that the Applicant Sydney Gas (Camden) Operations Pty Limited had an exploration licence under the provision of the *Petroleum (Onshore) Act 1991* which covered an area which included the property owned by the Respondent. At no time whilst the Applicants had that exploration licence did they enter upon the Respondent’s land, nor did they attempt to negotiate any access arrangements with the Respondents. The

Applicants are now the holders of PPL1 and PPL4 which incorporates the Respondent's property. It is the wish of the Applicant to enter upon the Respondent's property for the purposes of constructing a gas extraction well so that gas beneath the Respondent's property may be extracted and linked up with other gas flows within PPL1 and PPL4. An application for compensation has been lodged by the Applicants and is currently pending before the court, however if and when compensation is assessed by the court, there is no access agreement or arrangement concerning the Applicant entering upon the Respondent's land.

In support of the notice of motion, Sydney Gas accepts that the provisions of Section 69A of the Act does not apply to production leases. The Applicant relies upon firstly the conditions which are set out in both of the production leases which they have. Mr Kelly quoted from the first page of the Petroleum Production Lease and particularly that part which says: "...the Minister in pursuance of the provisions of the Act does hereby demise and lease to the leaseholder all that piece and parcel". He further referred to the Schedule of Conditions of the production leases and submitted that the obligations placed upon the leaseholder are such that it must carry with it access to the land.

It was then submitted on behalf of the Applicant that Section 41 of the Act gives the exclusive right to the holder of the lease to conduct mining operations etc. It was submitted that it would be absurd to confer these rights and obligations upon a leaseholder and then to deny entry to carry out the same.

SECTION 41 of the *Petroleum (Onshore) Act 1991* provides:-

41 Rights of holder of production leases

The holder of a production lease has the exclusive right to conduct petroleum mining operations in and on the land included in the lease together with the right to construct and maintain on the land such works, buildings, plant, waterways, road, pipelines, dams, reservoirs, tanks, pumping stations, tramways, railways, telephone lines, electric powerlines and other structures and equipment as are necessary for the full enjoyment of the lease or to fulfil the lessee's obligations under it.

Reference was made to S115 of the *Petroleum (Onshore) Act 1991* which provides, inter alia:-

115 Jurisdiction of court

- (1) For the purposes of this Act, a Warden's Court has jurisdiction to hear and determine all proceedings relating to any of the following matters:
 - (n) all questions and disputes which may arise;
 - (i) between holders of petroleum titles, or
 - (ii) between holders of petroleum titles and landholders.

It was submitted that Section 115, in particular Sub-Section (n)(ii) gives the court quite wide powers to make any determinations concerning access to the property. It was further submitted that the court would not be able to make a proper determination in respect of compensation without having regard to what was reasonably necessary to effect access to the property to undertake the relevant rights and obligations under the lease.

The attack upon the notice of motion comes principally in two forms, with a third matter to be considered.

It was submitted on behalf of the Respondents that access to the property by the Applicants falls to be determined in one of two ways. First of which is at the stage where the exploration licence has been sought and granted. It was submitted that upon receipt of an exploration licence the provisions of Part 4A of the Act then apply. Arrangements ought to have been made at that point of time between the Applicant and the Respondent for appropriate access arrangements.

The second way in which access may be determined is pursuant to the provisions of Section 105 of the *Petroleum (Onshore) Act 1991*. Mr Hughes submitted that the provision of Section 105(1) of the Act is the only way in which access may be obtained at this particular time, having regard to the fact that no action was taken concerning access when the Applicant was a holder of an exploration licence over land which incorporated that land of the Respondent.

Section of the 105 *Petroleum (Onshore) Act 1991* provides:

105 Easements and rights of way over lands under petroleum title

- (1) The Minister may on such terms as the Minister thinks just grant for joint or several use such easements or rights of way through, on or over the land comprised in a petroleum title as are necessary or appropriate to the development or working of that land or of any lands comprised in other petroleum titles.
- (2) The Minister may from time to time vary or revoke any grants under this Section.

Mr Hughes submitted that he did not concur with the interpretation placed upon Section 41 by the Applicant. He informed the court that to interpret Section 41 as giving the holder liberty at large to enter and carry out any of the matters described in Section 41 would involve wrenching Section 41 out of its context. He submitted, quite correctly, that Section 41 must be looked at in context of the Act itself. He said that it is important to note the provisions of the section and to note the Applicant is entitled to carry out such works "...as are necessary for the full enjoyment of the lease...". He submitted that Section 41 is based upon an assumption that the holder of a lease has an access right given under that particular lease.

A third matter that the Respondent referred to was the fact that Integral Energy, which has an easement over a portion of the Respondent's property, is in fact a relevant "landholder" pursuant to the definition in Section 3 of the Act, and as such ought to be a party to this application. When Mr Hughes cross examined Mr Gibson as to this aspect, Mr Gibson indicated that the Applicant is constantly in touch with Integral Energy and invariably there is some agreement with that organisation concerning Sydney Gas operating under any production or exploration title.

In response to that submission Mr Kelly submitted that there is no basis to join Integral Energy at this point of time. He indicated that agreements can be reached with Integral Energy and that Sydney Gas, the holder of a superior right to that of Integral Energy, and those rights are not subservient to any easement holder. He indicated that if there are any issues between Sydney Gas and Integral Energy, they may be determined at some other point of time.

I agree that Integral Energy is a relevant landholder under the definition which exists in Section 3 of the *Petroleum (Onshore) Act 1991*. However, in relation to the matter before the court it is principally an application for compensation in respect of Sydney Gas and the existing Respondents Alan Gatenby, Leslie Gatenby and Linden Gatenby. The notice of motion was brought before the court as an ancillary proceeding to the principal application for compensation. I can see no reason at this point of time to adjourn these proceedings so that arrangements may be made for Integral Energy to be joined as a party to this notice of motion. However, it may be at some other point of time when considering the aspect of access to the Gatenby property, that Integral Energy may be interested to have some input in relation to that in so far as any operations of Sydney Gas may affect the easement which is held by Integral Energy over the Gatenby property.

One other issue raised by Mr Hughes on behalf of the Respondent was the aspect of Section 72 of the Act. In particular he referred to the evidence given by Mr Alan Gatenby as to the sowing of olive trees in March and May of this year on an area of his property which appears to intersect with a proposed access road which the Applicant has noted on Annexure C2 of the affidavit filed before the court of Mr Gibson. I accept the fact that Section 72 may be breached if Sydney Gas constructs a roadway on the area which is highlighted in document Annexure C2. That however, is not a matter which should be considered by this court in respect of the notice of motion; it is a matter which can be considered at some other point of time and when access is granted to Sydney Gas.

If one looks at the provisions of Section 41 in the context of the whole Act it is quite clear that although the production lease gives the right to the leaseholder to enter upon any land subject to that lease, entry may only be in accordance with the provisions of the Act.

As an analogy to the present circumstances existing, a sister Act, the *Mining Act 1992*, has similar provisions concerning exploration licences and leases. Under the *Mining Act 1992* upon the grant of an exploration licence, access arrangements and compensation may be determined, if not agreed, by arbitration. Once a mining lease is granted, provision is then made for compensation, if not agreed, to be assessed by a

Warden's Court. There are also provisions in that Act for rights of way to be granted, if not agreed, by a Warden subject to an inquiry. Section 164, *Mining Act 1992* concerning rights of way, is more detailed and express than the broad provisions of Section 105 of the *Petroleum (Onshore) Act 1991*, where the Minister may grant an easement or right of way.

The *Mining Act 1992* and the regulations thereunder expressly itemise specific matters which can be attended to by a Warden in respect of rights of way, including compensation in those circumstances. Section 105 of the *Petroleum (Onshore) Act 1991* provides that the Minister may "on such terms as the Minister thinks just" grant a right of way etc.

One of the issues in this notice of motion, in particular Prayer 3, is the jurisdiction of the court under S.115 and the jurisdiction of the Minister under S.105 of the Act, in particular what does the phrase "on such terms as the Minister thinks just" mean? It is not the role of this court at this point of time to answer that question, other than to say it cannot mean the Minister has the power to determine compensation, otherwise what would be the purpose of S.108(2) of the *Petroleum (Onshore) Act 1991*.

It is of interest also to note the provisions of S.116, it provides:

The Minister may direct the Warden to hold an enquiry **on oath in open court** with reference to any matter affecting any title, easement or right of way granted under this Act or **any application for** any such title, easement or **right of way**.

Clearly, the section in this instance is specifically referring back to S.105, as well as general matters affecting any title.

S.115(n) provides a very wide jurisdiction to a Warden's Court in respect of disputes and questions arising between petroleum title holders and landholders. However, having regard to Sections 105 and 116, it is clear that the jurisdiction of S.105 must be pursued before resorting to relief under Section 115.

It would be expected that with express powers of variation and revocation, that the Minister would cover every necessary aspect of rights of way or easements.

Consequently, the implementation of S.115, for the purpose of access to properties, would be rare.

One of the rare events is touched upon in Prayer 3 of the notice of motion, which has two arms. The second arm concerns access to land “for the purpose of determining the Applicant’s application for assessment of compensation.” It may well be that any right of way or easement granted under S.105 may not grant access to areas which may be necessary to access only for the purpose of the question of compensation. By way of example, monitoring equipment may need to be placed in one area of the property, well away from any mining operations, remain in that area for some time and then be removed. To that end, I am of the opinion that S.115 grants jurisdiction to a Warden’s Court to make appropriate orders concerning access to land subject to a Petroleum Production Lease and to any land injuriously affected, or likely to be so affected, for that purpose. In that regard, it may be in some circumstances that the jurisdiction will not be contingent upon the prior implementation of S.105.

Having regard to the matters placed before the court I make the following findings:

- That Sydney Gas, as holders of PPL1 and PPL4 has a right to enter upon the land of the Respondents for the purposes of exercising their rights and obligations under each of the leases.
- That Sydney Gas is required before exercising their rights under S.41 of the *Petroleum (Onshore) Act 1991* to obtain an appropriate easement or right of way through on or over that land in accordance with the provisions of Section 105 of the *Petroleum (Onshore) Act 1991*.
- That Sydney Gas has a right to apply to a Warden’s Court under the provisions of Section 115(n)(ii) of the *Petroleum (Onshore) Act 1991* for the purposes of dealing with any questions and disputes that may arise concerning their rights to access the Gatenby property in respect of matters not attended to under S.105 of the Act.

- That Sydney Gas has the right under the provisions of Part 11 of the Act, apply to this court for compensation.

There appears to be nothing preventing the court from assessing compensation without knowing the access arrangements. However, in determining the “loss caused or likely to be caused” as the result of the operations upon the land, a more accurate figure will be assessed if the court is aware of the access arrangements. Consequently, a more accurate figure will lead to less likelihood of an application being made for additional compensation under the provisions of Section 111 of the *Petroleum (Onshore) Act 1991*.

To that end it would be prudent to have in place a right of way under the provisions of Section 105 before finalising the assessment of compensation.

Returning now back to the four prayers which were outlined in the Notice of Motion filed. In respect of the first prayer, it is quite clear that the provisions of Part 4A of the *Petroleum (Onshore) Act 1991* does not apply to a petroleum production licence and only applies to a prospecting title. So in conclusion, that prayer must be granted.

Concerning Prayer 2, it is clear that the provisions of Section 41 of the Act give an entitlement of access by the leaseholder to the Respondent’s land. However, that access is not at large and unfettered. Any access to the land must be subject to any terms and conditions that have been imposed on any easement or right of way that may be granted by the Minister pursuant to Section 105 of the Act.

In relation to the third prayer, the jurisdiction under the provisions of Section 115(n)(ii) of the Act is limited to dealing with relevant matters which are in dispute concerning access for compensation purposes, which are not or will not be covered by any grant under the provisions of S.105 of the *Petroleum (Onshore) Act 1991*.

Concerning Prayer 4, the general matter which is “such further or other orders as the court thinks fit”. The only other issue raised is that concerning Integral Energy. I don’t propose to say anymore about that topic, other than it is not necessary to make any orders concerning that organisation.

ACCORDINGLY, THE COURT MAKES THE FOLLOWING ORDERS:

PRAYER 1 in the notice of motion GRANTED.

PRAYER 2 in the notice of motion GRANTED, **with a proviso that the right under the provisions of S.41 of the *Petroleum (Onshore) Act 1991* is subject to any right of way or easement granted under S.105 of the Act.**

PRAYER 3 in the notice of motion DENIED. In lieu thereof, the following order is made: **That the Warden's Court has jurisdiction under the provisions of Section 115(n)(ii) of the *Petroleum (Onshore) Act 1991*, to give directions as to access to property, the subject of a Petroleum Production Lease, for the purposes of the leaseholder conducting examinations and/or surveys pursuant to an application for compensation to be assessed by the Warden's Court.**