

IN THE MINING WARDEN'S COURT HOLDEN

AT NOWRA ON 25TH SEPTEMBER, 1980

AND

IN THE MINING WARDEN'S COURT HOLDEN

AT SYDNEY ON 8TH OCTOBER, 1980

A. H. WELCH

(Applicant)

v.

H. K. COOPER

(Respondent)

Application for Assessment of Compensation

Mr. Nutt of the firm of Deane & Deane & Nutt, Solicitors, appears for Mr. Cooper. Mr. Welch appears in person, unrepresented.

Proceedings recorded by sound recording equipment operated by Mr. S. Hohnen, Department of Attorney General and of Justice.

Commenced Court House, Nowra, 25th September, 1980, part heard. Adjourned to Chief Warden's Court, Sydney, 8th October, 1980. At Chief Warden's Court, 8th October, 1980 assessment made - see herein.


CHIEF WARDEN.

8th October, 1980.

IN THE MINING WARDEN'S COURT HOLDEN

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AT SYDNEY ON 8TH OCTOBER, 1980

BEFORE J.L. MCMAHON, S.M.

CHIEF MINING WARDEN.

A. H. WELCH

(Applicant)

v.

H. K. COOPER

(Respondent)

Application for Assessment of Compensation

BENCH: This has been the hearing of an application under part VIII of the Mining Act, 1973, as amended wherein the applicant, Mr. A. H. Welch, has sought this court's assessment of compensation in respect of land which he owns in the parish of Mogendoura, county of St. Vincent, and over which the respondent, Mr. H. K. Cooper, has been granted by His Excellency, the Governor, of New South Wales, a lease under the Mining Act, which is entitled "Mining Lease Number 748 (Act 1973)".

Evidence has been adduced that Mr. Welch owns 12 acres of land which is part only of the total area of mining lease 748. The lease also covers some Crown land in respect of which Mr. Welch has no title and indeed he conceded in the witness box that he had no grazing rights to that adjacent Crown land. I am therefore looking at the assessment which would be applicable to his land which has an area of 12 acres only.

The evidence adduced shows that Mr. Cooper was granted a mining lease for 21 years from 27th June, 1979. Rent was assessed to the extent that at this stage he is paying the sum of \$62.50 to Mr. Welch. This of course is a sum which is due to Mr. Welch, the land owner, arising like royalties by statute and should have no effect upon the assessment of compensation at which this court must arrive. This court, in dealing with the amount of compensation which I propose to assess intends to disregard the annual rent of \$62.50 per annum, which is payable by Mr. Cooper to Mr. Welch in respect of the time since the lease was granted in June, 1979.

In evidence before me, Mr. Welch, the applicant, has based his claim on some five matters and I propose to set these out and also to refer so far as they are applicable, to section 124(1)(b) of the Mining Act which is part of the legislation dealing with assessments of compensation. The five points upon which Mr. Welch relies are firstly, that he has been deprived of his surface rights and uses to the land. He says that there is a forest on the land, and while this forest at the moment is hardwood, it could be converted to being a softwood one and the fact that his use has been deprived, has adversely affected him financially. He has then referred to a matter of erosion. He says that several roads have been upgraded by the miner, that is, Mr. Cooper, or someone on Mr. Cooper's behalf to such an extent, that their level has been lowered below the level of the surrounding and surface soil. This means that water uses the tracks and roadways as the beds of streams in times of heavy rain and he feels that he should be recompensed in respect of that particular activity by the lease holder. Again, on the subject of erosion, and this is Mr. Welch's third point, he has complained that there has been the creation of certain banks and channels in the adjacent Crown land and these have been running to a natural gully which goes onto his property and these gullies have created further problems in respect of erosion and will continue to do so. He feels that at the moment, there is a very deep wash or gully there and it will get deeper as time goes by.

His fourth point is that the crushing plant of the proposed operation is only some 300 yards from his residence. He feels that this plant existing as it does in close proximity to his house, depresses the value of his land. He says in effect, that if he were to attempt to sell his land, he would not expect to receive an amount of money from any proposed purchaser which would be as high as what he would have otherwise received if the plant had not been there. He has referred in respect of this particular depression of values to the noise created by machinery operation such as a compressor and motors and has also referred to breaches, or possible breaches, by the miner of the Clean Waters Act. He has also referred to the Clean Air Act and the Noise Nuisance Act.

The fifth point, and I have already indicated at the close of the evidence at Nowra to the parties that I was of the view that I had no jurisdiction in respect of this particular matter, was the claim by Mr. Welch that the proposed crushing plant be prohibited and prevented from being operated on weekends and public holidays. Mr. Welch says that he is entitled to the same sort of protection as any other person in the community has, and any other person in the community of course, he says, is not bound to put up with machinery operating on weekends and public holidays.

Finally, Mr. Welch has sought legal costs in respect of the drafting of an agreement which he claimed was put before the respondent Mr. Cooper and not acceded to by Mr. Cooper.

The provision of the law in which a warden may make an assessment of compensation is section 124(1)(b) to the Mining Act which is attracted by section 122, which refers to a party being entitled to make an application to a warden for compensation to be assessed and that compensation can be that which has been suffered, or likely to be suffered, in respect of the grant of an authority or the exercise of the rights conferred by the Mining Act or the authority itself on the registered holder of the authority.

Section 124(1)(b) has some six headings under which the warden shall operate in order to assess compensation. These are as follows:-

- (1) 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.
- (2) Deprivation of the possession or use of the surface of land or any part of the surface.
- (3) Severance of land from other land of the owner or occupier of that land.
- (4) Surface rights of way and easements.
- (5) Destruction or loss of, or injury to, or disturbance of, or interference with, stock on land.
- (6) All consequential damages.

Bearing in mind the five points advanced by Mr. Welch to support his application, it seems to me that he has raised grounds which can come under the Deprivation Clause, that is Clause 2; perhaps the destruction or loss, or injury or disturbance of stock on land cannot be considered because it is clear from the evidence that there have been no grazing activities conducted on this land and perhaps Clause 1, damage to the surface of land would be that covering the erosion problem which Mr. Welch has raised. In relation to the depression of the value of his land, it seems to me that the only heading under which this can fall is that under clause 6 - all consequential damages.

I think that the points apart from the final one, that is, the prohibition of the operation of the plant, are valid ones, but here again I am inclined not to accept the value as placed upon these activities by Mr. Welch in that he says that he feels that he is entitled to the sum of \$500 per annum as being appropriate compensation for these things. He says in effect that this figure can be a current figure, but ought to be reviewed every two years, but should not be less than \$500 per annum.

On the other hand, when a question about figures in dollars and cents was put to Mr. Cooper by myself in the witness box, he conceded that as far as he was concerned a figure of \$50 per annum was appropriate; I got the distinct impression that he was giving this figure with considerable reluctance and that impression was confirmed when I heard what Mr. Nutt his solicitor had to say in Mr. Nutt's final address because Mr. Nutt in effect submitted that the application would have to be refused or ought to be dismissed.

Now, I have had produced in evidence a series of photographs which indicate that the surface of the land is natural bushland, heavily timbered in parts, through which on fairly hard ground has been placed a series of tracks. Frankly I cannot see where Mr. Welch's claim for compensation to the extent of \$500 per annum is justified when one looks at these photographs. One must bear in mind that this is, as I have said, natural bushland and scrub in the country, heavily timbered, and steep in parts and I think to require a miner in this situation to pay the sum of \$500 per annum would be too much to ask and unreasonable in the circumstances. I say that, bearing in mind that even Mr. Welch concedes that the land is of no value for grazing purposes and indeed he says that the land cannot be said to be agricultural land within the meaning of the Mining Act and, notwithstanding that this part of the State has been going through a particularly dry spell in relation to rainfall. One cannot get away from the fact that this is land which is not really being greatly disturbed by the operations and activities of the miner.

Having said that, one must not lose sight of the fact that a citizen, namely Mr. Welch has had his land encroached upon by another party, by reason of a grant of a mining lease by the Crown. It is not as though Mr. Welch has gone along willingly in relation to this lease, although I note the evidence which Mr. Welch had to concede that at some stage in the past he did sign for Mr. Cooper a development consent application which went to the appropriate local government body. It seems to me that the activities of the miner in respect of this particular land are limited to merely using the tracks within Mr. Welch's land to gain access to the mine and Mr. Cooper has conceded that he has placed a blade, attached to either a tractor or bull-dozer over these tracks, with a view to levelling them out, to permit easier access. Of course, this is the very thing in respect of which Mr. Welch has complained, but here again I do not think that ^{that} has done very much

damage or is likely to do a great deal of damage to the surface of the land, bearing in mind the nature of the land, and the fact that Mr. Welch himself has the use of the tracks in the meantime. Persons who come onto the land of Mr. Welch for the purpose of logging activities have had, and will continue to have, benefit of the same tracks. In the circumstances I feel that I ought to reduce quite considerably the claim by Mr. Welch for \$500 per annum. I think a more appropriate figure in the circumstances would be \$10 per acre per annum. I am conscious of the fact that it is as he has claimed, that his land is being encroached upon, but these activities are those which are conducted mainly on adjacent Crown land. As to the noise factor Mr. Welch should seek legal advice so that appropriate action can be taken under the governing state legislation.

In the circumstances I propose to direct that the sum of \$120 per annum be payable by the lease holder to the land owner in respect of his activities on the land owned by the applicant Mr. Welch, that this figure be designed to cover the matters raised by Mr. Welch. However, I would envisage that there may be other matters in respect of which Mr. Welch may feel justified in complaining, especially in view of the evidence by Mr. Cooper that he proposes in some six months or two years time to come to the area to live permanently and therefore I would propose to make the amount of \$120 per annum be made payable from 27th June, 1979 until 26th June, 1981 on or about which date either party may make an application for a further assessment of compensation. It will be then up to a warden to make a further assessment if he considers it appropriate. The question of inflation and any other matters which either party might see fit to bring before the court could then be argued before a warden. The assessment of \$120 per annum is made in respect of only two years of the 21 years governing the period of the lease.

I make the following order. Compensation is assessed at \$120 per annum from 27th June, 1979. It is to be payable in respect of the period completed, that is, to 26th June, 1980 within seven days from today, direct to the land owner and in respect of the period 27th June, 1980 until 26th June, 1981, it is to be paid within a period of three months from today, 8th October, 1980, again direct to the land owner.

In relation to costs, there is provision in the Mining Act, and in particular section 146 which deals with the question of costs and I am of the view that costs can be awarded under the Mining Act. That view is supported by the provisions of a section within part VIII, namely Section 125(1)(c), which provides that the court may adjourn a hearing on such terms as to costs and otherwise as the court thinks fit. However, Mr. Nutt has appeared as a solicitor for Mr. Cooper the respondent and Mr. Welch has appeared unrepresented. In the circumstances I propose to make no order as to costs.