IN THE WARDEN'S COURT
HOLDEN AT SYDNEY
ON 19TH JUNE, 1987
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

McCORMACK v. BERRELL

BENCH:

This has been the hearing of an application under Part VIII of the Mining Act for an assessment of compensation in respect of lands owned by Roderick James Berrell and Claire Yvonne Berrell which are affected by Mining Lease No. 661 held by Thomas John McCormack. At the hearing, Mr. Berrell (the respondent) appeared on his own behalf and on behalf of his wife, Claire Yvonne Berrell, and Mr. McCormack (the applicant) was represented by Mr. R.P. Goodyer, Solicitor of Inverell.

The lease document which is Exhibit 1, showed that on 18th October, 1978 there was granted to the applicant, Mining Lease No. 661 for a period of twenty-one years to mine for sapphire and zircon. Rent was required to be paid to the landowner, and the applicant was required to lodge a security deposit of $3,000 to ensure compliance with the conditions of the lease, including those relating to rehabilitation of areas which had been disturbed by mining. Significantly, the lease was granted for some 32 hectares of land on the property "Sundowner" which at the time of the grant was owned by persons Brian Bede McCormack and Daniel Thomas McCormack, whom I assume from the evidence were not unsympathetic to the application for the lease and its subsequent grant.

The problem which is now before the Court had its roots in the sale by those lastmentioned persons of "Sundowner" to the respondent as evidenced by the Contract for Sale of Land which is Exhibit 4, which transaction was entered into on 5th August, 1981. The respondent, who along with his wife, was the

purchaser named in that contract, has readily admitted his full knowledge of the existence of the lease over "Sundowner" at the time of the purchase and agreed in the witness box that that aspect could have been taken into account when the purchase price of $58,000 was being negotiated. However, nowhere has the applicant suggested that the purchase price was not a fair and marketable one, bearing in mind the nature of the property.

Compensation has never been assessed by the Warden nor is there evidence before me of an agreement as to compensation, although a document which I consider to be unsatisfactory and to which the respondent objected, was sought to be tendered by the applicant, indicating some form of agreement between the applicant and one of the original owners. In his usual competent fashion, Mr. Goodyer did not press the tender and the document was not admitted into evidence.

The applicant has sought to say that there are a number of factors why compensation should be minimised. These are that the respondent knew of the existence of the lease at the time of his purchase, that although the respondent has claimed a poor return from the lease he has in fact received $800 per annum rental and has still been allowed to graze cattle on the area. Another factor is that the applicant has contended that he is bound to restore the area after mining and the security deposit is evidence to ensure that that is done. It is contended further that there has been a minimum of disruption of operations of the management of the property and there is no evidence of loss of livestock. Furthermore, the evidence is that within the 32 hectares, the applicant only requires to mine an area of some 4.45 hectares (11 acres) and therefore the respondent is getting rental based on the whole of the lease area when in fact only about 4.45 hectares is required.

On the other hand, the respondent has contended that "Sundowner" is being encroached upon by the applicant and that in effect his land is not his own. He has claimed that it is inequitable that strangers to his land should be permitted a return and make such obvious profits. The respondent has said that he has worked hard to get the land and that now it is in a "big mess" caused by the mining and he should not have to bear that without some monetary return.

The applicant was permitted to give evidence about his opinion about the value of the land the subject of the lease on "Sundowner" and has compared its value with an adjoining property "Taveuni". The applicant has suggested that the land on "Taveuni" would be valued at $220 per acre for the cultivated land and $100 per acre for the uncultivated areas and that the land at "Taveuni" is of better quality than the land the subject of the lease on "Sundowner". An agreement for sale of "Taveuni" executed between strangers to this matter but dated 3rd February, 1987 is Exhibit 7. The purchase price was $90,000 for 82.94 hectares but that contained considerable improvements and of course was executed some seven years or so after Exhibit 4. The respondent has produced in evidence Exhibit 9 which is a certificate from Mr. Murray McIntyre, a real estate agent, that the land on "Sundowner" consists of heavy black soil with a small portion of lighter soil which would favourably run one breeding cow and a calf over each two hectares annually showing a return of $300 per calf on present day values and an average annual return of $270 per calf over the past 5 years.

There is no evidence before the Court of the D.S.E. (dried sheep equivalent) (but evidence as to values is forthcoming from the applicant and the respondent who can be said to be without real qualification) nor as to the nature of

improvements, grasses or crop potential of the land. In this regard, the only qualified evidence as to value comes from Mr. McIntyre. In addition to their evidence the owner of a neighbouring property, Mr. Brian Douglas Johnson, also a grazier, has given evidence, among other things, of the value of the land on "Taveuni" and that it is comparable generally with the land on "Sundowner". Furthermore, he has said that the 32 hectares over which the lease stands, is the best land on "Sundowner". Mr. Johnson's other evidence related to assisting the respondent on two occasions in pulling calves from bogs in and around the mine site by means of a tractor and about deficiences in a bare 2 strand barbed wire fence intended to protect stock from mined areas which he considered to be not stockproof. In this regard, I can only agree that if it is contended that a 2 strand barbed wire fence keeps stock out then this itself as a fence is inadequate for that purpose. Mr. Johnson could not remember when he had assisted to pull the calves out of the bog. He referred to other occasions when he had seen holes filled in with topsoil with the subsoil placed back on the top and other occasions where he had seen piles of rocks placed in on the top of topsoil. Generally, he had heard the respondent express concern about the operation of the mine.

In this matter I am required under the Mining Act to assess compensation in accordance with the dictates of Part VIII and in particular Section 124(1)(b). This reads:

> "Where compensation is by this Act directed to be assessed by the warden the assessment -
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> (b) 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 -
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> (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;"

I am unable to look, for instance, at the claim by the respondent as to why he should be not the recipient of some of the "heaps" to use his expression of money being taken out of the area by the applicant as this aspect is clearly one not which I can take notice, nor for instance can I look at hardship of a landowner, nor indeed for that matter the hardship or financial bouyancy of an applicant in assessing compensation. It seems to me however that I should not overlook the fact that a landowner who buys property in the full knowledge that there is a mining title over it, cannot be heard to complain with the same vehmence as one who is ignorant of that fact. On the other hand the clear onus rests upon a title holder generally to comply with the Mining Act and Regulations and in particular with the terms of a mining title, in this case a lease over property to ensure that the lease remains on foot and in this regard evidence that stock have entered the mined area through the fence, gives me cause for concern.

I turn to Section 124(1)(b). There is little evidence before me as to the various paragraphs in that legislation above quoted applicable to this matter. I must be cognisant of Section 124(1)(d) that is that the assessment of compensation should not exceed in amount the market value for other than mining purposes of the land and the improvements thereon.

To accept Mr. McIntyre's evidence on calf value, one would say that compensation could be $150 per hectare per annum on current values and so compensation annually could be 32 being the number of hectares multiplied by $150. This it seems to me would be an inordinately high amount of compensation to be paid, bearing in mind as Mr. Goodyer has pointed out that the area will eventually be rehabilitated, that much of the area is still being grazed and all that the applicant is doing is mining the area, an activity of which the respondent was aware when he purchased the land. Furthermore, although the lease was granted in 1978, the applicant says that he only commenced to mine it effectively in 1986. The value of the land might well be in excess of $150 per hectare (Mr. McIntyre's annual basis) or $250 per hectare (the applicant's assessment for uncultivated land or $550 per hectare for cultivated land) but it seems to me that these aspects are matters which I am only to give consideration bearing in mind the terms of Section 124(1)(d). I feel that I should arrive at a figure comensurate with the activities of the applicant upon the land, bearing in mind the dictates of Section 124(1)(b) even though there is a paucity of evidence under these heads.

The Mining Act talks about an assessment by a Warden and an assessment it shall be, because of the lack of evidence. In my opinion a more appropriate basis would be to say that compensation can be worked out on the basis of the number of hectares involved, irrespective of whether the applicant has mined, is mining, or intends to mine particular areas. The mining lease entitles the mining to take place as it has in the past and doubtless could in the future, notwithstanding the applicant's present stated intention.

In the whole of the circumstances I think it appropriate to say that the respondent as the landowner is entitled to the sum of $10 per hectare per

annum in respect of compensation, intended to take into account all the matters as laid out in Section 124(1)(b). As the compensation has never before been assessed, there will be arrears of compensation to be paid which I direct be paid directly between the parties on the following basis: compensation for the year 18th October, 1986 to 17th October, 1987 be paid on or before 17th October, 1987 in the sum of $320. The total arrears of compensation from say 17th October, 1981 (being the first anniversary date of the grant of the lease after the purchase by the respondent) to 18th October, 1986 are assessed at $1,600 (being $320 x 5). There is to be paid on 17th October, 1987 an additional sum of $160 representing one tenth of the arrears. Thereafter on the anniversary of that date, viz. 18th October each year, the sum of $320 together with $160 is to be paid by the applicant directly to the respondent until the arrears which were due as at 18th October, 1986. A variation in the $320 per annum may be allowed from the 1987/1988 year in accordance with the Consumer Price Index.

Section 146 of the Act allows me to award costs in proceedings such as the one before the Court but in the circumstances I consider the award of professional costs to be inapplicable and the parties are to pay their own costs.