WARDEN'S COURT
New South Wales

Citation:	Ross Slack-Smith v. Mineral Claim Holders on the property known as "Muttabun"
Hearing dates:	18th September 2008
Date of Decision:	18th September 2008
Jurisdiction:	Mining
Place of Decision:	Lightning Ridge
Judgment of:	J. A. Bailey, Chief Mining Warden
Decision:	Applicants to pay Respondents Costs
Catchwords:	Costs; Withdrawal of Application; Assessment of Compensation
Legislation Cited:	Mining Act 1992; Civil Procedure Act 2005; Uniform Civil Procedure Rules 2005
Cases Cited:	Oshlack v Richmond River Council(1998)193CLR 72;White ACT (In liquidation) v GBWhite[2004]NSWSC 303.

File number: 2008/22

Representation: Mr W. Browne Solicitor of Browne Jeppesen & Sligar for Applicant

Mr. L Moore Solicitor of Moore & Co appears for Respondents

Reasons for Decision

On 9 May 2008 an application was received from Mr Ross Slack-Smith, requesting the court assess compensation in respect of all mineral claims on the property "Muttabun" which is in the Lightning Ridge Mineral Claims District. This application was lodged pursuant to the provisions of Section 266 Mining Act 1992.

The application was set down for a directions hearing on 5 June 2008. The applicant notified potential respondents to the application by way of public newspapers.(See S.272 Mining Act 1992)

At the directions hearing, Mr W Browne Solicitor appeared on behalf of the applicant and Mr. L Moore Solicitor appeared on behalf of some 65 claimholders. In that respect he was instructed by the Lightning Ridge Miners' Association.

The matter was stood over for further directions on 5th August 2008, with an understanding the parties would meet during the interim to attempt to resolve the matter.

There was no resolution between the parties and consequently subpoenas were issued by the respondents, returnable on the 5th August. Although a subpoena was issued by the Respondents to the Applicant, Mr. Slack-Smith did not produce any documents under that subpoena, due to, it was said "lack of time".

On 5 August 2008 Mr Browne solicitor appeared once again for the applicant and by leave, the respondents were represented by Ms M O'Brien of the Lightning Ridge Miners' Association. The Court was informed that the Respondents had engaged an expert who had visited the property and that his written report was expected either that day or the next.

Mr Browne expressed his concerns that he was having difficulties obtaining experts to prepare reports within a reasonable time and sought leave to withdraw on the grounds that it would be quite some time before his client would be in a position to proceed.

I refused to allow the matter to be withdrawn, principally on the ground that a lot of court time and money had been expended by the parties to this point and to revisit on another occasion would mean further expense and wasted court time.

Directions were made for the filing of reports and the matter set down for hearing on the 30th September and 1st October 2008, with a mention for review on 18th September 2008.

In accordance with directions made on 5th August 2008, the respondents filed a report from WHK Ivey, dated 11 August 2008. That report estimated the grazing losses incurred by the applicant due to mining activities on "Muttabun" to be assessed at $2.73 per mineral claim.

The applicant, through his solicitor, notified the Mining Registrar by letter of 11 September 2008 that he would be seeking leave to withdrawn the matter on the next occasion. The letter indicated that Mr Slack Smith was "unable to obtain the requisite valuations", that the application "was lodged without legal advice and prematurely".

When the matter came before the court on 18 September 2008 for review, Mr Browne Solicitor represented the applicant and Mr. L. Moore Solicitor represented the respondents. Leave was sought to withdraw the matter and the respondent consented, subject to an application for costs.

In summary, Mr. Moore's submissions on the question of costs were:

- Although the court has power to award costs, there is a convention within this court that no application is made for costs in compensation assessment applications
- This case is not a "normal" case
- It was necessary to expend money to obtain an experts report as the Applicant was going to challenge any subpoena issued by the Respondents in an attempt to ascertain the possible compensable loss of the applicant

Mr Moore submitted that unlike normal cases under this section, there is in place already an arrangement whereby Mr. Slack Smith (and other landholders within the Lightning Ridge Mineral Claims District) obtain a sum of money for compensation for each mineral claim registered on the property. In Mr. Slack Smith's case it is $30 per claim.

This application, submitted Mr Moore, is tantamount to an application for additional compensation. Mr. Slack Smith is maintaining the status quo in respect of the current arrangement. He submitted that the only reason the applicant has withdrawn is that once obtaining the expert report of Mr Ivey, he realised the current arrangement is more than generous. Mr. Brown challenged that submission, indicating that Mr. Slack Smith was wanting to withdraw on the prior court date before receiving the report from the respondents. Mr Moore then produced a letter dated 1 September, received directly from Mr Slack Smith, indicating the matter was going to proceed on the date listed by the Court.

Mr Moore said that his client has expended $11,176 for the experts report and that it was a necessary expense having regard to the way in which the case was proceeding.

Mr Brown challenges the claim for costs. He cited the convention in this court for such applications, however conceded that this is not the "norm". He challenged the view expressed in the report filed by the respondent, indicating that the views were open to a challenge in a court situation.

He denied the reason for withdrawing because of the view expressed in the report. He submitted that it was impossible to obtain an alternative report within time before the listed court hearing date, nor within any reasonable time in the near future. For that reason the matter was withdrawn.

Mr Brown submitted that if the matter went to a hearing, there would not be, if convention followed, any application for costs. That submission may or may not be true; one cannot speculate what might have occurred on another date. Certainly, from the courts experience, applications for additional compensation, that were not successful, have been met with costs orders against the applicants. Those costs orders upheld on appeal.
There is no challenge by the parties that the court has jurisdiction to consider costs, it is then the discretion of the court. This discretion, as Mr. Moore submitted, must be exercised judicially and in accordance with the ordinary powers of courts to make costs orders.

Section 317 of the Mining Act 1992 provides:

> **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.**

It is clear that there is a wide discretion in relation to the granting of costs in matters under the Mining Act 1992.

Although this court is not bound by the Civil Procedure Act 2005 and Rules hereunder, they may certainly be used as a guide in determining as to whether or not to grant costs under the Mining Act 1992.

What is being sought here is the professional costs of Mr Moore together with the costs of obtaining the report of Mr. Ivey.

The law concerning costs has changed considerably over the past 10 years. For instance, some years ago in criminal proceedings, if a criminal charge against a defendant were withdrawn, the court would have no jurisdiction to consider a question of costs. With amendments to legislation, the court has express powers to now consider costs upon withdrawal of a criminal charge.

The Civil Procedure Act and Rules have a general theme running through them that court cases are to be conducted so that there is a "*just, quick and cheap resolution*". Practice directions in all jurisdictions have, in some instances, put a cap on any party/party costs awarded. All of these matters lend to the fact that all parties before courts must ensure they proceed on the best advice, otherwise might find themselves at the wrong end of a costs order by a court.

The general rule in civil matters is that there is a presumption that costs follow the event. However, in this instance, the matter has not been dealt with on its merits. The taking of evidence has not commenced, the only material placed before the court is that of an expert, filed on behalf of the respondents. That has not been admitted into evidence at this stage, however, there is a view expressed in that document which suggests an outcome to the applicant that would fall far short of the current compensation, which has been struck, between landholders and the miners within the Lightning Ridge Mineral Claims District.

The views in that report are challenged by Mr Brown and I have no doubt that there may be another "expert" who would be able to file a report which would be more generous in its assessment of compensation.

However, that is not the issue here. The fact is that Mr Slack Smith filed an application for compensation. The matter was adjourned to allow the parties time to confer and possibly reach an agreement. I am not privy to what occurred during those discussions, nor aware of any offers that may have been made by either side, what is clear is that no agreement was reached. What is also clear is that the applicant, prior to the matter being adjourned to allow the parties to confer, gave an undertaking to the court that the status quo concerning compensation should remain during the interim. In other words, mining is still continuing on "Muttabun" and Mr. Slack-Smith is receiving compensation at the rate of $30 per claim.

Although both parties were required to furnish expert reports, only the respondents have done so. The applicant now wishes to withdraw. The question arises as to whether the respondent should bear their costs of this application to date.

The Respondents have consented to the withdrawal. However, it could have urged the court to continue with the proceedings, well knowing on what is available at this point of time will be an advantage to the respondents, and ultimately an order may be made by the court wherein the Respondents pay less compensation to Mr Slack Smith than is currently paid.

If that was the position, the Respondents might very well request their costs on the basis that "costs follow the event", particularly, if it is the case, after offers of settlement were made.

Why then, the question must be posed, should a respondent be required to expend monies to challenge an application and then be left in a position where it is unable to place any evidence before a court in support of its case? I do accept the submission of Mr Moore that in the circumstances the respondent was placed in a position where it was required to obtain an experts opinion.

The High Court in *Oshlack v Richmond River Council(1998) 193 CLR 72*, when considering costs, referred to *the particular circumstance of a case involving some relevant delinquency.* The meaning of *delinquency* in this context was explained in *White ACT (In liquidation) v GB White[2004] NSWSC 303*, by Justice McDougall: *"some relevant delinquency" does not mean moral delinquency or some ethical shortcoming, but delinquency bearing a relevant relation to the conduct of the case.*

The application was filed by Mr Slack Smith on his own behalf. The application gives no indication of a Solicitor being involved. It was only at Court on 5th June 2008 that the court became aware of him being legally represented.

In the letter of 11 September 2008, Mr Browne states, inter alia, "It is clear the application was lodged without legal advice and prematurely." Mr Brown re-iterated that today. The letter also states that the applicant was unable to obtain the requisite valuations.

With the greatest respect to Mr Slack Smith, one would have thought that he would have sought expert opinions as to the possibly compensation that ought to be payable, before making application. He then would have been in a position to seek legal advice as to whether there was

any likelihood of success before lodging the application. This type of procedure would be the prudent approach prior to commencing all litigation before courts.

Such procedure is not unusual, in a recent matter before me, one of the parties filed all of its expert reports on the first listing of the case. It was obvious those reports were obtained prior to lodging the application.

Mr Slack Smith clearly did not follow this type of procedure. Why then should the respondents be "out of pocket" due to that? By not following such procedure, one might very well say that there was "some relevant delinquency" on the part of the applicant that bears "a relevant relation to the conduct of the case". In other words, it appears Mr Slack-Smith has lodged an application without considering, inter alia, the likelihood of success.

I do not see why the Respondents should have to bear their costs in this instance. Having regard to the circumstances of this matter, in exercising my discretion under the provisions of S.317 Mining Act 1992, I propose to award costs to the Respondents.

Those costs will be the respondent's party/party legal costs, together with the costs for obtaining the report of WHK Ivey, dated 11 August 2008.

CONSEQUENTLY, I MAKE THE FOLLOWING ORDER:

THE APPLICANT IS TO PAY THE RESPONDENT'S COSTS AS AGREED. IF NO AGREEMENT, THE COSTS ARE TO BE ASSESSED ON THE BASIS OF PARTY/PARTY COSTS AND THE COSTS OF THE PREPARATION OF THE REPORT OF WHK IVEY DATED 11 AUGUST 2008.