

LAND COURT OF QUEENSLAND

CITATION: *Starr v Appleton* [2009] QLC 0060

PARTIES: Geoffrey Dennis Starr
(applicant)
v.
Victor John Edward and Janet Anne Appleton
(respondents)

FILE NO: MLC00252/2007, MLC00253/2007, MCC00254/2007,
MLC00028/2008 and MLC00029/2008

DIVISION: General Division

PROCEEDING: Application for rehearing of compensation

DELIVERED ON: 1 May 2009

DELIVERED AT: Brisbane

HEARD AT: Emerald

MEMBER: Mr SJ Keim SC

ORDER:

- 1. That the application of Geoffrey Dennis Starr for leave for a rehearing of the determination of compensation made by Mr Scott dated 17 June 2008 is refused.**
- 2. That the respondents, Victor John Edward Appleton and Janet Anne Appleton, have 14 days from the date of these orders to file and serve any submissions on the question of costs additional to the matters traversed in paragraph 7 of their submissions dated 21 February 2009 (exhibit 16 in the proceedings);**
- 3. That the applicant, Geoffrey Dennis Starr, have 14 days from the date of receiving the submissions of the respondents to file and serve any submissions on the question of costs;**
- 4. That the respondents, Victor John Edward Appleton and Janet Anne Appleton, have 7 days from the date of receiving the submissions of the applicant to file and serve any submissions in reply on the question of costs;**

5. That the determination of the issue of costs is adjourned pending receipt of the parties' submissions.

CATCHWORDS: Application for leave for a rehearing; parties not expecting matter to proceed to a hearing on the merits; issue of consent; issue of disadvantage.

APPEARANCES: The applicant appeared in person.
Mr S Lynch for the respondents.

SOLICITORS: The applicant acted for himself.
The respondents: Wonderley and Hall, Solicitors

[1] The applicant, Geoffrey Dennis Starr ("Mr Starr") is the holder of certain mining tenements over the cattle grazing property, "Miclere", held by the respondents, Victor John Appleton and Janet Anne Appleton ("Mr and Mrs Appleton").

[2] On 21 April 2008, Mr Scott, a Member of the Land Court, heard the compensation determination which had been referred to the Court.¹ On 17 June 2008, Mr Scott handed down his decision.² The formal orders made by Mr Scott were:

"1. Compensation is determined in the amount of One Thousand and Forty-Five Dollars (\$1,045) per annum;

2. The applicant is to pay compensation of One Thousand and Forty-Five Dollars (\$1,045) per annum yearly in advance, with the first payment due within two months from notification of renewal of the mining leases and mining claim by the Mining Registrar."³

[3] On 29 July 2008, Mr Starr filed an application for a rehearing of the compensation determination. The application which contains a number of annexures is a bulky document.⁴ The "facts, circumstances or other relevant matters" on which Mr Starr's application was said to be based in the application, essentially, involve a claim of a failure to provide natural justice. Mr Starr stated that the matter was only set down for a mention but that it became a full hearing of the merits of the compensation matter without his knowledge or consent. Mr Starr said that he was disadvantaged because he had been prevented from adducing expert evidence which was said to be annexed to the application.⁵

¹ The transcript of that hearing is exhibit 6 before me.

² Mr Scott's reasons for decision are exhibit 7 before me.

³ See exhibit 8 in these proceedings which was a notification sent to Mr Starr.

⁴ See exhibit 9 in these proceedings.

⁵ The expert evidence was said, in an attached statement of Mr Starr, to be a publication called *The Economics of Beef in Central Queensland*, by Mark Best an economist from the Department of Primary Industries and Fisheries; *Calculating cost of production for your beef enterprise* published by Meat & Livestock Australia;

[4] The jurisdiction to rehear matters is created by s.12 *Land Court Act 2000* ("the Act") which provides as follows:

"12 Power to rehear matters

(1) A party to a proceeding who is dissatisfied with the Land Court's decision may apply to the court for leave to have the matter reheard.

(2) The application must be made within 42 days after the order containing the decision is made by the court.

(3) If the application is granted, the matter must be reheard, if practicable, by the member who gave the decision on which the rehearing is sought."

[5] The section creates a discretion to grant leave to have the matter reheard but provides little guidance as to the grounds on which leave may be granted may be granted. The indication in subs.12(3) of the Act that the person who gave the original decision should, if practicable, rehear the matter makes it clear that the application for the grant of leave is a separate process to the rehearing, itself.

[6] In *Townsville City Council v Chief Executive, Department of Main Roads* [2005] QCA 226, an application for leave to have a matter reheard had been refused at first instance but granted by the Land Appeal Court. The decision of the Land Appeal Court was appealed to the Court of Appeal where the leading judgment was delivered by Keane JA. Among the matters said by his Honour to be relevant to the exercise of the discretion are the following:

" The discretion conferred by s.12 of the Act is conferred to avoid an unjust outcome of proceedings before the Land Court and to ensure that the decision of the Land Court reflects the true merits of the case as between the parties. It must be exercised in accordance with that purpose. This is especially so in light of s 7 of the Act which instructs the Land Court to exercise its jurisdiction according to "equity, good conscience and the substantial merits of the case."⁶

In my opinion, where there is reason to suppose that the outcome of the rehearing may substantially affect the parties in terms of the ultimate result, then the possibility of injustice in the sense of a decision which does not reflect the "substantial merits of the case" if leave is not granted, inevitably emerges as a consideration material to the exercise of the discretion conferred by s 12 of the Act. It may be that, in the circumstances of a particular case, considerations of justice require that the desirability of a "perfect" outcome give way to the practical consideration that "justice delayed is justice denied"; and, in some cases, the conduct of the applicant may have been so egregious as to lead to a refusal of a rehearing without considering the impact of the resolution of the issue sought to be reagitated. But to say this is merely to acknowledge that the discretion falls to be exercised as a matter of balancing competing considerations having regard to all relevant circumstances. Generally speaking, the likely impact of the alleged error on the outcome of the case will be a consideration relevant to that balancing exercise.⁷

Queensland Drought Situation as at 13th May 2008, published by the Department of Primary Industries and Fisheries; the *Code of Environmental Compliance for Mining Lease Projects*, published by the Environmental Protection Agency and the Department of Mines and Energy; and a *Tasman Goldfields Prospectus*.

⁶ Paragraph 37 of the reasons of Keane J.

⁷ Paragraphs 44-45 of the reasons of Keane J.

Further, and contrary to the claimants' submissions, it seems to me to be wrong to approach the operation of s 12 as if a favourable exercise of the discretion is subject to a condition precedent that the kind of misapprehension which might attract the grant of leave under s 12 cannot be one which was due to a mistake on the part of a party or its legal advisers. I have noted that the learned Member did not regard the conduct of the case by the resuming authority as "tactical". It may readily be accepted that the extent to which a party is more or less culpable for allowing the misapprehension to arise may affect the exercise of the discretion conferred by s 12⁸ but, in my respectful opinion, proof of an entirely blame-free error by a party is not a *sine qua non* of the exercise in that party's favour of the discretion conferred by s 12 of the Act.⁹

It is desirable to make it clear that the circumstance that s 12 is to be found in a statute which also provides for an appeal, confirms that the availability of an appeal is not a consideration decisive, or even always relevant, with respect to the grant of leave. In *Autodesk Inc v Dyason (No 2)*¹⁰ Brennan J, speaking of the general jurisdiction of an inferior court to recall an erroneous judgment before it has been perfected, noted that in some cases "it may be preferable to recall an unperfected but erroneous judgment rather than allow it to stand until it is quashed on appeal.

Section 12 of the Act permits the Land Court to prevent the perpetuation on appeal of the kind of unsatisfactory situation which arose before it in this case. Apart from the practical consideration that, in some cases, the parties may not have the financial capacity to mount an appeal, s 12 recognizes the power of the Land Court to ensure, independently of correction on appeal, that its decisions are just.

To say this is not to say that finality in litigation is not an important consideration that properly informs the exercise of the Land Court's discretion under s 12. It is simply to say that the desirability of finality cannot control the exercise of a discretion, the very existence of which recognizes that a further hearing at first instance may be desirable notwithstanding the availability of an appeal. Finality must sometimes give way to achieve a just decision on the substantial merits of the case. And even where an appeal is to be pursued, a case like the present affords a good example of a situation where the advantages of the Member who heard the case recognized by s 12(3) may be utilized to remove false issues or misunderstandings from the case before it proceeds upon appeal.¹¹

I emphasize that the discretion is to be exercised having regard to the particular circumstances of each case. I conclude that in the circumstances of the present case, the Land Appeal Court did not err in the exercise of its discretion."¹²

[7] It is clear from the cited passages that a failure for some reason to have a hearing on the merits is a factor that will militate in favour of an order for a rehearing. While the reasons for the failure will be relevant to the exercise of the discretion, it is not necessary that the party seeking the rehearing is blameless in the cause of the failure to have the merits fully determined. The availability of an appeal should not impinge on the exercise of the discretion. Often, in fact, a good argument on appeal may not be available because of the failure of the merits to be properly canvassed in the first hearing. Last, the circumstances of the particular case must be addressed on each application for a rehearing.

⁸ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 168 - 169. *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at 215.

⁹ Paragraph 49 of the reasons Keane J. Note that footnotes are in the original.
¹⁰ (1993) 176 CLR 300 at 308.

¹¹ Paragraphs 64-66 of the reasons of Keane J.

¹² Paragraph 67 of the reasons of Keane J.

[8] In *Nevis Pty Ltd & Others v. Chief Executive, Department of Main Roads* [2002] QLAC 48, the decision at first instance to refuse a rehearing was overturned concerning only one of a number of issues. In their decision, the Land Appeal Court gave a general endorsement to a number of statements of principle taken from cases based on a “rehearing provision” in earlier legislation. The statement of principles is set in the passage as follows:¹³

"The learned Member considered the legislative history of statutory provisions allowing for rehearing by the Land Court and relevant authorities, before concluding at para [10] of her reasons that the following principles remained applicable to an application for rehearing under s 12(1) of the Act:

- An application for rehearing must be considered on its merits (*Jobin-Décor v Valuer General* (1991) AV90-205 (unreported) at 2). (*Citation inserted*)
- The Land Appeal Court is the court established by law for reviewing the proceedings and decisions of the Land Court (*Jobin-Décor* at 3).
- It is for the applicant to establish a substantial basis for the grant of an order for rehearing (*Jobin-Décor* at 2).
- A rehearing would be appropriate in cases where inadvertently one or other party has led evidence which was later found to be incorrect (*Jobin-Décor* at 2).
- A rehearing may be appropriate where errors of substance can be identified after the decision has been given (*Cousin v Department of Lands* (1998) AV94-559 (unreported) at 2; *Re Applications (2) for a Rehearing* (1993) V92-64 and V92-65 (unreported) at 3 and 4 referring to *Re Alexander's Appeal* (1901-1902) 2 CLLR 189 at 190).
- A rehearing will be granted where an injustice would occur if an appellant were put to an appeal when an appellant for reasons of accident, infirmity or misfortune has been denied an opportunity to present a case to the Land Court (*Re Applications (2) for Rehearing* at 3 and 4).
- A rehearing will not be granted on the basis that the applicant says that there are matters which were not stressed by him or her on the hearing (*Jobin-Décor* at 2).
- A rehearing is not the appropriate action if the application constitutes no more than a plea for reconsideration of the evidence already before the court (*Cousin* at 2; *Re Applications (2) for a Rehearing* at 3 and 4)."

Was the Hearing on the Merits a Surprise?

[9] Mr Starr's claim that the hearing before Mr Scott proceeded without his "knowledge or consent" can be tested in much of its detail by reference to records of the previous hearing.

[10] Mr Starr placed emphasis on the form of the "Court Notice" which was forwarded to the parties advising of the hearing on 21 April 2008.¹⁴ It was labelled "For Mention" at the top right corner of the page. The document referred to the proposed date and place of the hearing and went to describe the anticipated process as "... the above-mentioned matter

¹³ Taken from the reasons for decision of the Land Appeal Court at paragraph 10.

¹⁴ The Court Notice is attached to and forms part of exhibit 10, Mr Starr's submission filed 16 February 2009.

will be brought before the Court for **Mention with a view to managing the hearing and disposal of the appeals**. It is proposed to conduct an inspection of the subject property prior to the Mention. ... After the inspection, the matter will resume at the Court House for Mention." (Emphasis in the original)

[11] Mr Starr, in his submission dated 12 February 2009,¹⁵ stated that he had briefed his solicitor, Mr. Ian Haig to represent him at the full Court hearing. He stated that he had discussed the notice of hearing document with Mr Haig who told Mr Starr that it was not necessary for Mr Haig to be present; that Mr Starr did not need to bring in his evidence, that day, and that Mr Starr and Mr Haig could discuss what evidence would be necessary after the mention hearing.¹⁶

[12] I am satisfied that, prior to attending that day, Mr Starr did not expect the matter to proceed to a hearing. I am satisfied that Mr Starr discussed the notice with his solicitor.¹⁷ What is noticeable, however, is that Mr Haig's involvement in the matter up to that point in time, as evidenced by the documents filed, was negligible. Exhibit 5 in these proceedings (dated 20 February 2008); and exhibit 2 in these proceedings (forwarded on 11 April 2008), each being documents prepared for the hearing on the first occasion, appear to have been written and put together by Mr Starr.¹⁸ Mr Starr also acted at all stages for himself on the rehearing application. I am not satisfied that it was necessarily the case that Mr Starr would have engaged Mr Haig had the matter been adjourned on 21 April 2008 and not proceeded to a full hearing before Mr Scott on that day. Equally, I am not satisfied that, when Mr Starr stated in exhibit 10 that he had "briefed" Mr Haig for the full hearing, that that was literally correct. The prospect of Mr Haig appearing may have been discussed but I am not satisfied that Mr Haig had been engaged to appear and provided with all relevant information.

[13] Mr Appleton, in an affidavit read in these proceedings,¹⁹ stated that his understanding from the Court Notice that there would be a site inspection; a general consultation to see if the matter could be resolved between the parties; and, if the matter did not resolve, the Court would reconvene to determine how to dispose of the matter. Mr Appleton

¹⁵ Exhibit 10: Mr Starr's submissions contained much testimony and his oral evidence contained much by way of submission. In accord with s.7 of the Act which directs the Court not to be unduly technical approach and to be governed by the principles of "equity and good conscience and the substantial merits" I have ignored any deficiencies in the technical approach of any of the parties.

¹⁶ See also exhibit 11, dated 25 February 2009, at page 1 (paragraph c under the heading "Facts").

¹⁷ Exhibit 17 before me is a copy of a phone bill printout showing a call by Mr Starr to Mr Haig at 9.06am on 9 April 2008.

¹⁸ Also, exhibit 3 before me, dated 21 April 2008 (the day of the hearing), a reply to an earlier submission by Mr. and Mrs. Appleton was produced by Mr Starr.

¹⁹ Exhibit 13, paragraph 12.

understood that this might "include the holding of a court hearing on that day or having the matter adjourned to another day".

[14] Mr Mayne (a non-lawyer), who appeared for Mr. and Mrs. Appleton before Mr Scott, endorsed Mr Appleton's view although he thought that any subsequent hearing (after the site visit and reconvening) was more likely to be a "more formal mediation type conference".²⁰

[15] Although neither Mr Appleton nor Mr Mayne was sought by Mr Starr to be cross-examined before me, I am inclined to the view that Mr Appleton's recollection has the benefit of hindsight. I am of the view that neither Mr Appleton nor Mr Mayne expected a full hearing, that day, and that a formal mediation was the most that anybody expected before the parties reconvened at Claremont Courthouse on the afternoon of 21 April 2008. Along with Mr Starr, both men were taken by surprise by what happened that afternoon. Mr Starr has expressed a similar view in his submissions before me.²¹

Was the Applicant Denied his Rights?

The Hearing

[16] The transcript of the hearing before Mr Scott is exhibit 6 in these proceedings. At the top of page 2, the following exchange takes place:

"Mr Scott: This matter was mentioned for management and possible disposal. It seems to me that the parties understand each other's view of the various issues that are here and each has evidence to address those various issues. What I propose is if the parties agree that we go ahead and hear the evidence. If it transpires that one party is disadvantaged because there's a particular and significant piece of evidence that isn't available today then we'll deal with that at the end of the day. Do you agree with that Mr Starr?

Mr Starr: Yes sir.

Mr Scott: Mr Mayne?²²

Mr Mayne: Yes sir."

[17] The transcript then shows Mr Scott assisting Mr Starr to place his statement into evidence.²³ The same thing then occurred with Mr Starr's response to the statement of Mr Appleton.²⁴ Generally, Mr Scott assisted both non-lawyers who were presenting the respective cases with procedural guidance how to proceed at each relevant step.

[18] Mr Scott proceeded to ask Mr Starr to clarify aspects of his evidence in his statement and response statement. When Mr Starr asked if he could introduce new evidence,²⁵ Mr Scott repeated his statement that, if there was a problem with evidence not being available, it

²⁰ Affidavit of Derek Mayne, exhibit 14 in these proceedings, paragraph 7.

²¹ For example, see exhibit 11, page 2, paragraphs h and i.

²² Mr Mayne appeared for and gave expert valuation evidence on behalf of Mr. and Mrs Appleton.

²³ Exhibit 6, page 2.

²⁴ Exhibit 6, page 3, lines 25-40.

²⁵ Exhibit 6, page 7, at about line 40.

"can be done later on".²⁶ Mr Starr then proceeded to introduce oral and documentary evidence about Miclere consisting of category VII and VIII land.²⁷ Mr Starr went on to give evidence on the carrying capacity of the land (relying on Departmental officers he had recently spoken to); the improvements he had made to the property for mining purposes; and that the cattle were not disturbed by underground explosions and were generally tamer as a result of mining going on on the property.²⁸

[19] The cross-examination by Mr Mayne went for 10 pages of transcript. The exchanges appear to have got heated at times.²⁹ However, Mr Starr appeared to have no difficulty in using the questions asked of him to articulate his own arguments and provide the Court with further information. Mr Scott intervened to tell the questioner (Mr Mayne) that he could not get evidence in by asides made within the questioning.³⁰

[20] At the conclusion of the cross-examination, Mr Scott asked Mr Starr whether he wanted his (Mr Starr's) wife to give evidence.³¹ Mr Scott gave Mr Starr a chance to confer with his wife before he made a decision on that question.³²

[21] Presumably, after a short pause, the following exchange appears in the transcript:

"Mr Scott: That's your case, then?"

Mr Starr: Thank you, sir.

Mr Scott: Is there anything that you feel disadvantaged in terms of not being able to get evidence about?

Mr Scott: No sir."

[22] Mr Mayne's evidence in chief occupies about 5 pages of transcript.³³ Mr Scott provided similar assistance to Mr Mayne as he did to Mr Starr in terms of having his statement become an exhibit in the proceedings. It is also noticeable, however, that Mr Scott asked questions probing the basis on which Mr Mayne had arrived at various figures supporting the compensation claim of Mr. and Mrs. Appleton.

[23] The cross-examination of Mr Mayne by Mr Starr occupied some twenty-seven pages.³⁴ Mr Starr had some difficulty distinguishing between legitimate questions to the witness and statements or submissions. The questioning strayed into matters that were irrelevant at times. Mr Scott provided assistance to keep the process on track. Mr Starr did obtain answers that were useful to his case, particularly, on the subject of surface area mining

²⁶ Exhibit 6, page 7, line 40 – page 8, line 5.

²⁷ See the exhibits introduced at exhibit 6, page 9, lines 20-30.

²⁸ The evidence in chief was completed at exhibit 6, page 13, line 30.

²⁹ For example, see Mr Scott's comment at the top of page 22 of exhibit 6.

³⁰ Exhibit 6, page 22, lines 25-35.

³¹ Exhibit 6, page 23, lines 5-10.

³² Exhibit 6, page 23, lines 19-21.

³³ Exhibit 6, pages 24-29.

³⁴ Exhibit 6, pages 29-46.

leases versus underground mining only leases. Mr Scott did, on one occasion, indicate to Mr Starr that the Court was required to vacate the premises by 5.00pm and that this should be kept in mind in conducting the cross-examination.³⁵ Mr Starr does not appear, from the transcript, to have felt constrained as a result.

[24] Mr Starr was given the opportunity and chose to give some further evidence which related to having been required, on past occasions, to carry out remedial work on an existing mining lease.³⁶ Mr Scott intervened on the basis that this additional evidence was not relevant as it related to land other than that being considered in the matter before him.

[25] Mr Mayne summed up his clients' case, briefly.³⁷ Mr Starr made a short final address.³⁸

[26] Then the following exchange occurred:

"Mr Scott: Thanks very much gentlemen, are you happy to leave it to me to decide this issue?

Mr Starr: Yes sir.

Mr Scott: You don't feel disadvantaged at this stage?

Mr Starr: No sir.

Mr Scott: My decision is reserved ..."

Conclusions Based on Reading the Transcript

[27] The distinct impression that emerges from the transcript is that, although Mr Starr had not expected a hearing on the merits to proceed on 21 April 2008, he freely accepted that process. He appears to have freely participated, from the beginning, on the condition that he could bring extra witnesses on another day if, at the end of the day, he felt he needed to.

[28] The transcript suggests that Mr Starr felt sufficiently comfortable to give his evidence; make his points; and conduct a reasonably effective cross-examination.

[29] Certainly, Mr Scott assisted both Mr Mayne and Mr Starr to present the respective cases, effectively. The transcript suggests no conduct of an intimidatory or overbearing nature on the part of Mr Scott.

[30] At the end of the hearing, Mr Starr indicated, without any qualification, that he was happy for Mr Scott to proceed to determine the matter on the basis of the evidence placed before him, that day.

Reasons For Decision

[31] The reasons for decision and order of Mr Scott are contained in exhibit 7 before me.

³⁵ Exhibit 6, page 40, lines 15-20.

³⁶ Exhibit 6, pages 46-47.

³⁷ Exhibit 6, page 48, lines 20-30.

³⁸ Exhibit 6, page 48, line 44 – page 49, line 10.

- [32] Mr Scott accepted Mr Mayne's evidence as to carrying capacity of the land. He rejected the hearsay evidence of experts given through Mr Starr recounting in evidence his conversations with those experts. (This hearsay evidence appears to not relate specifically to the land the subject of the leases and appeared to relate to the quality of land in that general vicinity.) He rejected Mr Mayne's evidence as to the cost of maintaining roads on the basis of evidence by Mr Starr that the roads were gazetted roads.³⁹ Mr Scott accepted evidence from Mr Starr that the cattle would become accustomed to the mining activity on the land and not be frightened off the whole of the mining lease areas. He accepted a difference between a lease allowing surface mining and a lease involving underground mining only. However, he rejected as arbitrary that only the area affected by the surface area leases should be considered for compensation. Mr Scott rejected Mr Mayne's figures for lost value of the land on the basis that the land would be rehabilitated but accepted that, even after rehabilitation work was completed, "it would not be probable that rehabilitation would return the land to its original condition and potentiality".⁴⁰
- [33] Mr Scott said that he preferred "Mr Mayne's approach to the assessment of compensation to that of Mr Starr but consider that Mr Mayne's figures are too high for the reasons already stated".⁴¹
- [34] Mr Scott did not provide a break-up of the figures in the same way as Mayne had set out his figures. However, the figure assessed of \$950 per annum is just over 50% of Mr Mayne's claim of \$1,820 per annum. To this, Mr Scott added the compulsory (minimum) amount pursuant to s.281(4)(e) *Mineral Resources Act 1989* to arrive at a final assessment of \$1045 per annum compensation.

Conclusions from Reading the Reasons

- [35] It appears from a reading of the transcript and the reasons that Mr Scott took a properly critical approach to the claims for compensation by Mr. and Mrs. Appleton. While he accepted much of Mr Mayne's evidence, where Mr Mayne's figures were not supported by evidence, Mr Scott trimmed back the claims and adopted a common sense approach to arriving at the correct figure.
- [36] It also appears that, while not all of Mr Starr's propositions were accepted, Mr Scott was clearly assisted by Mr Starr's conduct of his side of the hearing. For example, Mr Scott's finding with regard to cattle becoming accustomed to activity on a mine site is an

³⁹ This immediately reduced the possible amount of compensation by \$420 or nearly a quarter. See the amounts claimed in paragraph 7 of exhibit 7.

⁴⁰ Exhibit 7, paragraph 20.

⁴¹ Exhibit 7, paragraph 24.

example where the bulk of what Mr Starr said was accepted. Mr Scott appears also to have accepted most of Mr Starr's evidence that rehabilitation would be carried out on the site despite finding that some remnant effect on value would still occur notwithstanding the rehabilitation having been done.

[37] The clear indication from having read the reasons and the transcript is that Mr Scott conducted a very fair hearing with the consent of the parties. Mr Starr does not appear to have been aware of any disadvantage suffered by him and expressed himself to be contented at the beginning, during and at the end of the process.

[38] Mr Scott's reasons indicate a similarly fair approach. He has attempted to address only the matters that were relevant to his task. He seems to have assessed the evidence, carefully, rejecting some and being assisted by some of the evidence provided, respectively, by both Mr Starr and Mr Mayne.

[39] There is no basis, from a reading of the reasons, for concluding that Mr Scott decided the matter otherwise than on the true merits of the case.

Mr Starr's Complaints Before Me

[40] As well as the material in the exhibits 9, 11 and 15, Mr Starr gave oral evidence before me. He was assisted in giving this evidence by his wife, Mrs. Regina Starr who conducted the examination in chief by asking questions of Mr Starr.

[41] Much of this evidence repeated what was contained in the exhibits. However, Mr Starr sought to supplement exhibit 6, the transcript of the hearing before Mr Scott, by stating that Mr Scott had prevented Mr Starr from obtaining assistance from his wife as to one of the written submissions (about which Mr Scott was asking questions) and got Mr Mayne to assist instead.⁴² This correction of exhibit 6 is the only alleged error in the transcript about which Mr Starr was sure in his evidence.

[42] This correction does not appear to be strongly disputed by Mr. and Mrs. Appleton and I am prepared to accept that Mr Starr did make some attempt to ask his wife a question at that point in the hearing and was prevented from doing so by Mr Scott. There is no basis, however, for thinking that that action on the part of Mr Scott was other than proper and no reason for thinking that such intervention constituted any form of unfairness in the hearing before Mr Scott. I am not satisfied, either, that Mr Starr felt any disadvantage at the time that that occurred.

[43] There are other parts of Mr Starr's oral evidence that I am unable to accept. At page 22, line 8, Mr Starr states that he "still didn't realise it was a full court case". I am satisfied

⁴² The passage is at exhibit 6, page 4, lines 20-30. Mr Starr gives this evidence mainly at page 21 of the transcript of the hearing before me ("the transcript").

from the exchange at page 2, lines 1-15 of exhibit 6 (set out in full above)⁴³ that Mr Starr was very much aware from that point on that the matter had become a hearing for Mr Scott to decide the issues in dispute and had progressed beyond a mere mention.

[44] It also seems that Mr Starr's statement that he couldn't talk to his Mrs. Starr "throughout the whole matter" is also inaccurate.⁴⁴ I have already referred to the point in the hearing, at the end of Mr Starr's evidence, where he was asked whether he wished to have his wife give evidence. As Mr Starr left the witness box, Mr Scott said: "You go back to the Bar table, discuss with your wife whether she ought to give any further evidence?"⁴⁵ On the same page,⁴⁶ Mr Starr denies that Mr Scott suggested that Mrs. Starr be called as a witness. It is also clear that Mr Scott raised the prospect of Mrs. Starr giving evidence. He said: "Do you wish your wife to give evidence? Do you want to talk to her about that first?"⁴⁷

[45] Mr Starr also stated that Mr Scott awarded \$400 compensation for damage "that I might be going to do to the property when it was an historic mining site anyway".⁴⁸ The quantum of this amount (for loss of land value) appears to involve a misunderstanding of Mr Scott's decision. Mr. and Mrs. Appleton had claimed \$498 per annum for lost value. Mr Scott's finding took into account rehabilitation but was to the effect that there would be some lasting impact to the property. Mr Scott appeared to have assessed compensation for loss of production in the sum of \$551.76.⁴⁹ He assessed the total compensation (under the various heads of claim) at \$950.⁵⁰ This means that the difference between the total amount and the amount for loss of production is approximately \$398. This was made up of administration claimed at \$281 and loss of land value claimed at \$498.⁵¹ It follows that, even if the claim for administration was only allowed in the sum of \$100 per year, the amount allowed for loss of land value would have been below \$300. It is most unlikely, therefore, that that part of the award which related to loss of land value was in the sum of \$400 per annum, the amount upon which Mr Starr based many of his complaints and arguments.

[46] At page 33 of the transcript,⁵² Mr Starr makes a long statement contradicting his answer on the previous page⁵³ where Mr Starr had said (referring to his answer to Mr Scott): "I

⁴³ See paragraph 16 of these reasons.

⁴⁴ Transcript, page 26, line 25.

⁴⁵ Exhibit 6, page 23, lines 20-22.

⁴⁶ Transcript, page 26, line 18.

⁴⁷ Exhibit 6, page 23, lines 7-8.

⁴⁸ Transcript, page 27, lines 1-7.

⁴⁹ Exhibit 6, paragraph 17.

⁵⁰ Exhibit 6, paragraph 24.

⁵¹ Exhibit 6, paragraph 7. Note that the whole of the claim for maintenance of access was disallowed.

⁵² Transcript, page 33, line 39 – page 34, line 20.

was indicating I didn't really want to participate any further and everything was fine". The effect of the long statement was that Mr Starr had simply been intimidated and confused and said that he did not feel disadvantaged just to get the whole case over so that he could get out of there and ring his solicitor.

[47] I do not accept that Mr Starr's claims that he was intimidated and unable to express his true opinions are accurate. The transcript shows no sense of intimidation, whatsoever. Mr Starr went on to conduct an energetic and, if not concise, effective cross-examination of Mr Mayne and again expressed his satisfaction with the hearing just before the Court adjourned. I am of the view that, when Mr Starr told Mr Scott that he did not feel disadvantaged, he meant and felt what he told Mr Scott.

[48] Mr Starr gave the impression in argument before me that one of the disadvantages he suffered was because the Court ran out of time at the end of the day and Mr Starr was not given the opportunity promised at the beginning of Mr Scott's hearing to adjourn and call more evidence later.⁵⁴ By way of example, he stated "And at the end of the day we were ... to discuss the points and then we said we're running out of Court time, everybody go home now. That's it."⁵⁵

[49] As is clear from the discussion above of the hearing before Mr Scott, Mr Scott did mention during Mr Starr's cross-examination of Mr Mayne that the Court had to vacate the hearing room by 5.00pm.⁵⁶ However, as I have set out above,⁵⁷ Mr Scott, at the end of the hearing, gave the parties a further opportunity to say whether they were happy for him to proceed to decide the case without further evidence being called. There is no sign that the need to vacate the Court room fore-shortened the discussion at this point or prevented Mr Starr from expressing any concerns he had about the completeness of the evidence or otherwise at that point. I do not accept that Mr Starr was otherwise than content with the state of the evidence when the hearing before Mr Scott concluded. Any concerns about those matters have arisen subsequent to that point.

[50] Under questioning by me, Mr Starr indicated that his argument that there should be a rehearing centred on two issues: the fact that he did not expect the proceedings, that day, to be anything other than a mention and that Mr Scott was wrong in assessing \$400 for compensation for loss of land value in circumstances where Mr Starr was under an

⁵³ Transcript, page 32, lines 30-35.

⁵⁴ See extract from transcript before Mr Scott set out at paragraph 16 above.

⁵⁵ Transcript, page 50, lines 5-10.

⁵⁶ See paragraph 23 of these reasons.

⁵⁷ See paragraph 26 of these reasons.

obligation (and bonded to the Environmental Protection Agency) to rehabilitate and restore the land.⁵⁸

[51] As I have indicated earlier in these reasons, I am satisfied that Mr Scott conducted the hearing before him, fairly, and Mr Starr consented to the hearing proceeding and to Mr Scott proceeding to decide the matter.

[52] Also, as I have indicated above in my analysis of Mr Scott's reasons, there is no basis for criticizing the approach of Mr Scott to the evidence and the issues he had to decide. This applies as much to his method of dealing with the question of compensation for loss of land value as it does to other aspects of his reasons. He fully understood that the land would be rehabilitated but was satisfied, nonetheless, that some "nominal" impact on value would still result.

[53] Accordingly, the two central bases relied on by Mr Starr do not, in my opinion, provide any proper basis to grant leave for a rehearing.

Other Considerations

[54] The authorities cited earlier make it clear that it may be proper to grant leave for a rehearing even though the applicant for a rehearing may have contributed to the fact that the previous hearing amounted to a failure to determine the merits of the case justly.

[55] I was concerned, therefore, to address the question whether, even though Mr Starr had freely agreed to the hearing proceeding to a merits determination, an injustice may, nonetheless, have occurred. The same consideration applied to the fact that Mr Starr was content, at the end of the day, to allow Mr Scott to proceed to determine the matter.

[56] The concern was particularly associated with the possibility that there were expert witnesses who would have been available had the hearing not proceeded before Mr Scott on 21 April 2008. This issue had, in fact been raised in Mr Starr's application where he had stated:⁵⁹ "... I was denied the opportunity to produce my evidence and witnesses ... and I was denied the opportunity on the ... expert testimony evidence and witness on beef economics, gross profit margins on beef production and carrying capacities".

[57] Mr Starr attached various documents relevant to beef production⁶⁰ to his application for leave for a rehearing. However, this appears to have been no more site specific than the hearsay evidence which Mr Scott rejected at the hearing.⁶¹

⁵⁸ For example, see transcript, page 49, lines 10-20.

⁵⁹ Exhibit 9, page 3.

⁶⁰ See note 5 above. The documents (not all of which related to cost of beef production) included *The Economics of Beef in Central Queensland*, by Mark Best an economist from the Department of Primary Industries and Fisheries; *Calculating cost of production for your beef enterprise* published by Meat & Livestock Australia; *Queensland Drought Situation as at 13th May 2008*, published by the Department of Primary Industries and Fisheries; the *Code of Environmental Compliance for Mining Lease Projects*. published by the Environmental Protection Agency and the Department of Mines and Energy

- [58] Later in that same exhibit, there is a reference to "recent inquiries at DPI & F with Mr. Ken Murphy at Rockhampton and Mr. Ross Dodt at Mackay regarding carrying capacities have advised ..."62
- [59] Mr Murphy was one of the experts whose hearsay opinions had been conveyed to the Court and relied upon by Mr Starr in the hearing before Mr Scott.63 Mr. Dodt does not appear to have been mentioned in the hearing before Mr Scott.
- [60] Mr Starr, however, had not produced, on the hearing before me, any statement or other document identifying a specific expert witness and the evidence that that witness might have given to the Court if the hearing had not proceeded on 21 April 2008 and had been set down for hearing at a later time.
- [61] I raised my concern with Mr Starr that he had not produced evidence before me to support this aspect of his application. The subsequent discussion continued for some time.64 The end result of that discussion seems to have been that Mr Starr had no witnesses that would have been available on an adjourned hearing. He mentioned an expert who was reluctant to give testimony.65 This seems to have been a reference to a Mr Chamberlain who is discussed in more detail in exhibit 10, Mr Starr's reply submission.66 Mr Chamberlain, obviously, did not fall into the category of willing witness available to support Mr Starr's case on carrying capacity.67
- [62] In response to my questioning him on this point, Mr Starr appeared to express an intention not to continue with his claim that he had been deprived of calling expert witnesses by the fact that the trial (which he expected to be a mention only) had proceeded, that day, to a full hearing on the merits.68
- [63] In the circumstances, I have concluded that the evidence does not disclose any proper basis for a rehearing arising out of Mr Starr being prevented from calling expert witnesses who would have assisted his case on the original hearing of the compensation determination. As mentioned, I have come to this conclusion irrespective of whether any such possible disadvantage had been contributed to by actions of Mr Starr in agreeing to the matter being determined by Mr Scott on 21 April 2008.

61 Exhibit 7, reasons, paragraph 15.

62 Exhibit 9, statement – page 3, paragraph m.

63 Exhibit 6, page 10, lines 1-10.

64 See pages 47-51 of the transcript.

65 Transcript, page 48, lines 40-45.

66 See page 1 of exhibit 10.

67 This appears to be confirmed at transcript, page 59, lines 35-45.

68 See transcript, page 49, lines 10-20. The conclusions on cattle carrying capacity in Mr Scott's decision appear to have been accepted by Mr Starr, in any event. See transcript, page 65, lines 25-35.

Conclusions

- [64] I have concluded that the parties were all taken by surprise when Mr Scott announced his intention to proceed to a hearing on the merits on the afternoon of 21 April 2008. However, Mr Scott, very fairly, gave the parties an opportunity to object to that course of action and gave the parties an opportunity to reserve their rights at the end of the hearing in the event that anyone felt that the hearing had not allowed his or her respective case to be fully and properly ventilated.
- [65] The transcript shows that Mr Starr consented to the course of action suggested by Mr Scott and, again, expressed his contentment with the way matters had proceeded at the end of the oral hearing.
- [66] I do not accept Mr Starr's evidence that his statements recorded on the transcript affirming the course taken by Mr Scott were the result of confusion or a state of intimidation on Mr Starr's part. I find that Mr Starr genuinely consented to the matter proceeding for determination and was genuinely happy with what had transpired at the end of the hearing. I find that the sense of grievance that Mr Starr now expresses has come into existence since that date.
- [67] I am not satisfied that Mr Starr had decided to engage solicitors for the original hearing of this matter. Although Mr Starr did have a telephone conversation on 9 April 2008 with Mr Haig about the hearing proposed for 21 April 2008, he had, up to that point in time, filed material that he had prepared, himself. Mr Starr's consent that the hearing proceed on 21 April 2008 was given, knowing he did not have the assistance of legal representation available to him, that day.
- [68] The two matters which Mr Starr stressed during the course of the hearing as a basis for a rehearing were the fact that the matter proceeded and the findings with regard to compensation for loss of value to the land. I am unable to find any error in Mr Scott's approach to the determination of compensation for loss of value of land. Some of Mr Starr's complaints seem to be based on a misapprehension of the quantum allowed by Mr Scott for that head of claim. Mr Starr also did not appear to understand fully the way in which Mr Scott approached the determination of that issue. In any event, Mr Scott's determination of the question of compensation for loss of land value, on my reading of his reasons, gives no basis for considering that that issue was decided otherwise than justly on the merits. Accordingly, that issue gives no basis for granting leave for a rehearing.
- [69] Although Mr Starr, on my findings, consented to the hearing, I have considered whether, nonetheless, he was disadvantaged by the hearing proceeding when it did. The one matter of significance raised before me in Mr Starr's written application for leave for a rehearing

was that he was prevented from calling relevant expert witnesses. Mr Starr has, however, not produced any evidence that he had (or would have been able to have) any relevant expert witness available to give evidence had Mr Scott not proceeded to hear the matter on 21 April 2008. I am unable to find any evidence of disadvantage of the kind that would militate in favour of a grant of leave for a rehearing.

[70] I am unable to find any evidence that the outcome of the hearing before Mr Scott was unjust or that Mr Scott's decision did not reflect the true merits of the case.

[71] In the circumstances, the application for a re-hearing is dismissed.

[72] The respondents' counsel made written submissions on the question of costs. However, that matter should be adjourned to allow the parties to make any further submissions they wish to make in the light of these reasons.

Orders

I make the following orders and directions:

1. That the application of Geoffrey Dennis Starr for leave for a rehearing of the determination of compensation made by Mr Scott dated 17 June 2008 is refused.
2. That the respondents, Victor John Edward Appleton and Janet Anne Appleton, have 14 days from the date of these orders to file and serve any submissions on the question of costs additional to the matters traversed in paragraph 7 of their submissions dated 21 February 2009 (exhibit 16 in the proceedings);
3. That the applicant, Geoffrey Dennis Starr, have 14 days from the date of receiving the submissions of the respondents to file and serve any submissions on the question of costs;
4. That the respondents, Victor John Edward Appleton and Janet Anne Appleton, have 7 days from the date of receiving the submissions of the applicant to file and serve any submissions in reply on the question of costs;
5. That the determination of the issue of costs is adjourned pending receipt of the parties' submissions.

**SJ KEIM SC
MEMBER OF THE LAND COURT**