

# LAND COURT OF QUEENSLAND

CITATION: *Southedge Daintree Pastoral Company Pty Ltd and Anor v Kenneth Michael Wilson* [2009] QLC 0122

PARTIES: Southedge Daintree Pastoral Company Pty Ltd and Weymouth Pastoral Company Pty Ltd (applicants)  
v.  
Kenneth Michael Wilson (respondent)

FILE NOS: MRA 1356-08 and MRA 1357-08

DIVISION: General Division

PROCEEDING: Application for compensation for mining lease

DELIVERED ON: 19 August 2009

DELIVERED AT: Brisbane

HEARD AT: Written submissions

PRESIDENT: Mrs CAC MacDonald

ORDER: **1. Compensation is determined in the sum of One Thousand, Four hundred and thirty Dollars (\$1,430).**  
**2. The respondent is ordered to pay the applicants' costs of and incidental to this matter, fixed in the sum of Two Hundred and Seventy-five Dollars (\$275).**  
**3. The respondent is ordered to pay the compensation of \$1,430 and costs of \$275 to the applicants within one month of the grant of the mining lease.**

CATCHWORDS: Mining Lease – compensation – claim for partial loss of grazing rights by landowner – claim allowed in part – claim for fencing to exclude stock from lease and access to lease – not allowed – costs for preparation of claim allowed in part.

- [1] On 24 December 2008 I handed down my decision in respect of an application by Kenneth Michael Wilson for Mining Lease 20529. Objections to the grant of the lease had been filed by Southedge Daintree Co Pty Ltd and Weymouth Pastoral Co Pty Ltd, the owners of the land over which the Mining Lease was sought. That decision recommended to the Honourable the Minister for Mines and Energy that Mining Lease 20529 be granted over the application area for a term of five years and that the lease should be subject to certain special conditions as set out in the recommendation.
- [2] Southedge Daintree Pastoral Company Pty Ltd and Weymouth Pastoral Company Pty Ltd (the applicants) have now sought compensation from Kenneth Michael Wilson in respect of the proposed grant of the mining lease. The applicants' claim for compensation was supported by valuation evidence supplied by Ian James Anders, a property consultant of Cairns. Mr Anders is a registered valuer.
- [3] The applicants claim a total amount of \$13,365 made up of compensation of \$12,150 for grant of ML 20529 together with an additional 10% (\$1,215) to be awarded under s.281(4)(e) of the *Mineral Resources Act 1989* (the Act). In addition, pursuant to s.281(7) of the Act, the applicants have claimed \$550 as the costs of formulating the claim for compensation, being the professional fees of Mr Anders.

### **Compensation**

- [4] The claim for compensation is made up as follows -
- Carrying capacity of mining lease area plus 5 metre wide access track, 7 head (adult equivalent) at an agistment rate of \$2.50 per head per week -
- |                                                                                                                                                                     |                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| 7 head for the 5 year term of lease (7 x 2.50 x 52 x 5)                                                                                                             | \$4,550        |
| Cost of fencing to exclude stock -                                                                                                                                  |                |
| Approximate length of lease boundary 1.9 kms. Estimated cost of fencing to full barbed cattle proof standard, including any line clearing, rocks etc \$4,000 per km |                |
| Cost of fencing lease boundary to exclude cattle                                                                                                                    | <u>\$7,600</u> |
|                                                                                                                                                                     | \$12,150       |
| Add 10% (s.281(4)(e))                                                                                                                                               | <u>\$1,215</u> |
| Total compensation claimed                                                                                                                                          | \$13,365       |
- [5] The application for determination of compensation was made pursuant to s.281 of the Act. Relevantly, s.281 provides that the Land Court shall settle the amount of compensation that an owner is entitled to as compensation for -

"(3)(a)

(i) deprivation of possession of the surface of land of the owner;

(ii) diminution of the value of the land of the owner or any improvements thereon;

- (iii) diminution of the use made or which may be made of the land of the owner or any improvements thereon;
- (iv) severance of any part of the land from other parts thereof or from other land of the owner;
- (v) any surface rights of access;
- (vi) all loss or expense that arises;

as a consequence of the grant or renewal of the mining lease.

(4) In assessing the amount of compensation payable under subsection (3) –

...

(e) an additional amount shall be determined to reflect the compulsory nature of action taken under this part which amount, together with any amount determined pursuant to paragraph (c), shall be not less than 10% of the aggregate amount determined under subsection (3).

(5) In any case the Land Court may determine the amounts and the terms, conditions and times when payment aggregating the total compensation payable shall be payable.

...

(7) The Court shall give written notice to all parties and may make such order as to costs between the parties to the determination as it thinks fit."

[6] The principles to be applied in assessing compensation under s.281 have been considered by this Court on a number of occasions.<sup>1</sup> In *Wills v Minerva Coal Pty Ltd [No 2]*<sup>2</sup> it was held by Mr Scott that, in determining compensation under s.281, regard must be had primarily to the words of the section. However, assistance may be sought from other relevant areas of law including the law relating to the assessment of compensation for the compulsory acquisition of land provided that there is no inconsistency with s.281. In the compulsory acquisition of land context, it has been said that the purpose of the compensation provisions is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This has sometimes been described as the principle of equivalence. In such cases a claimant is entitled to be compensated fairly and fully for his loss.<sup>3</sup> Mr Scott also said that s.281 neither prescribed nor suggested a method of assessment or valuation. The selection of an appropriate method is a matter for the relevant expert who should be careful not to duplicate items by simply accumulating figures assessed independently under each of the items listed in s.281(3)(a)(i) to (vi). The assessment of compensation may be made by the before and after method or by the summation or piecemeal approach.<sup>4</sup>

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<sup>1</sup> See for example *Smith v Cameron* (1986) 11 QLCR 64; *Wills v Minerva Coal Pty Ltd [No. 2]* 19 QLCR 297; *Zimmerebner v Hawkins* (1999) 20 QLCR 71.

<sup>2</sup> (1998) 19 QLCR 297 at 313

<sup>3</sup> *Director of Buildings v Shun Fung Ironworks Ltd* [1995] 1 ER 846 at 852.

<sup>4</sup> *Smith v Cameron* (1986) 11 QLCR 64 at 74.

[7] In this matter, the only evidence lead by the applicant adopted the piecemeal approach. In the absence of any other evidence, I consider it to be an appropriate method of valuation in the circumstances and, accordingly, that methodology will be adopted.

***Loss of grazing capacity***

[8] The claim of \$4,500 for loss of grazing capacity is for compensation for the deprivation of possession of the applicants' land under s.281(3)(a)(i). The applicants have quantified the claim on the basis that neither the area of the mining lease nor the access track (identified as 5 metres wide) will be available to the applicant during the 5 year term of the lease, because the legal effect of the grant of the mining lease is that, for the term of the lease, the applicant will have no right to enter or use the area of the lease and the access track will be lost to grazing because it will be graded and kept bare.

[9] Mr Wilson has challenged that formulation of the claim because, he says, the maximum area that would be disturbed by his mining operations at any one time would be half a hectare. In addition, Mr Wilson says that he has applied for an access road 2.5 metres in width, (subsequently corrected to 3 metres) not 5 metres, such a width being consistent generally with existing access roads or tracks in the area. Further, the access track which he proposes to use is ungraded and not maintained by the land owner and the tracks, gulleys and river crossings are washed out. In his opinion the access track will not be lost to grazing because the track will simply constitute two tyre tracks of worn grass which should not be graded as that would contribute to surface erosion in the area.

[10] The relevant provisions of the *Mineral Resources Act* dealing with the rights of a mining lessee are ss.235, 276(1) and 403.

[11] Section 235 provides that -

"(1) ... during the currency of a mining lease, the holder of the mining lease and any person who acts as agent or employee of the holder (or who delivers goods or substances or provides services to the holder) for a purpose or right for which the mining lease is granted -

(a) may enter and be -

- (i) within the land comprised in the mining lease; and
- (ii) upon the surface area comprised in the mining lease;

for any purpose for which the mining lease is granted or for any purpose permitted or required under the lease or by this Act;

(b) may do all such things as are permitted or required under the lease or by this Act.

(2) During the currency of the mining lease, the rights of the holder relate, and are taken to have always related, to the whole of the land and surface area mentioned in subsection (1)."

Section 276(1)(a) provides that -

"(1) Each mining lease shall be subject to -

- (a) a condition that the holder shall use the land comprised in the mining lease bona fide for the purpose for which the mining lease was granted and in accordance with this Act and the conditions of the mining lease and for no other purpose; ..."

Section 403(1) provides that -

**"Offences regarding land subject to mining claim or mining lease**

(1) A person shall not -

- (a) enter or be upon land; or  
(b) use or occupy land; or  
(c) erect any building or structure on or make any other improvement to land;

that is the subject of a mining claim or the surface area of a mining lease unless –

- (d) the person is authorised by or under this Act, any other Act relating to mining, the GHG storage Act or the *Geothermal Exploration Act 2004* in that regard; or  
(e) the person is the owner of the land or is authorised in that behalf by the owner and, in either case, the person has the consent of the holder of the mining claim or, as the case may be, mining lease."

[12] I do not consider that these provisions result in the grant to the mining lessee of a right to exclusive possession of the lease area. Section 235 has the effect that the lessee is entitled to go onto and remain on the area for purposes connected with mining only. Section 403 creates certain statutory offences in relation to unauthorised entry onto the lease area. Neither section in its terms grants exclusive possession rights nor enables the lessee to prevent unauthorised entry on to the lease area.

[13] Further, s.403(e) of the Act envisages that the lessee may consent to the owner or the owner's authorised representative entering onto or using the lease area, and that where that consent is given, no offence would be committed by an owner or his or her authorised representative entering on or using the land. In this case it is clear from Mr Wilson's submissions that he does not object to the applicants' cattle continuing to graze on those parts of the mining lease area that are not from time to time disturbed by the mining operations. Mr Wilson will be fencing the operational areas as required. The result is that although the owners may regard themselves as deprived of possession of the land, their cattle may from time to time graze on the area.<sup>5</sup>

[14] Similarly, there is no provision in the Act granting Mr Wilson exclusive rights to possession of the access track and he does not intend to grade the access track to the extent that it is fully cleared. There is therefore no reason to conclude that, subject to

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<sup>5</sup> *Zimmerebner v Hawkins* (1999) 20 QLCR 71 at 90; *Salmon v Lindsay & Armstrong* [2002] QLRT 54 at [25], [26].

safety issues, the area of the track cannot be used for grazing although it is acknowledged that the carrying capacity may be adversely affected.

[15] As indicated above, the calculation of loss of grazing capacity is made on the basis of Mr Anders' assessment that the mining lease area and access track are capable of supporting 7 head of adult equivalent cattle. Mr Anders is a registered valuer and I have accepted that the assessment of carrying capacity is within his area of expertise.

[16] Mr Wilson has challenged Mr Anders' opinion in this regard. Mr Wilson said that he believed that the area of the mining lease application was in an unimproved state and currently in an advanced state of land degradation. There is no infrastructure in the area and the roads are not maintained. The fences are in a dilapidated state with poorly maintained gates, and the existing dam is at least 5 kms. away. In his opinion the only current use for the application area was low intensity cattle fattening and grazing. There is only one wet season per year and there are no provisions for irrigation of the area to produce further pasture during the dry season. Mr Wilson is aware of a property on the southern end of the Atherton Tableland with higher than average rainfall and rich fertile soils where the carrying capacity is 1.5 beast per hectare. By contrast, he said, approximately half of the surface area of the lease is rock or covered in rock, and is not suitable for grazing cattle. Of the remaining land, Mr Wilson said that one quarter is marginal surface area while the remainder could be said to be better grazing land. In his opinion the carrying capacity of the lease area was 1 beast per 10 to 12 hectares.

[17] Although Mr Wilson has challenged Mr Anders' opinion that the land in question has a carrying capacity of 7 head, Mr Wilson did not produce any persuasive evidence establishing that that was incorrect. Mr Wilson relied firstly on a comparison of a property with which he was familiar near Millaa Millaa near the southern end of the Atherton Tableland where the property supports cattle grazing of 1.5 beasts per hectare. That evidence in itself is not sufficient in my view to counteract the expert opinion of Mr Anders. Mr Wilson subsequently referred to the fact that the "going rate of compensation all across the Palmer River which covers from Mareeba to the top of the Cape" is \$5 per beast. On that basis he calculated that the amount of compensation for the term of the proposed mining lease would be \$250. The evidence as to an alleged "going rate" is not adequate or sufficiently specific to establish the carrying capacity of the subject land. I therefore have accepted Mr Anders' opinion that the carrying capacity of the total area of the lease and the access track is 7 head.

[18] However, for the reasons set out above, I do not consider that the applicants are entitled to compensation for the loss of the grazing capacity of the whole lease area and the

access track. Mr Wilson said that he would only mine one half of a hectare at any given time. But Mr Wilson's application indicated that he would need adequate ground to construct a tailings dam, to connect to a viable water supply at the southern end of the lease area and to locate a communications tower on the highest point of the land. There is no evidence as to the area of land required for those activities.

[19] A draft environmental authority (mining lease) code compliant Level 2 mining project has been issued to Mr Wilson under the *Environmental Protection Act 1994*.<sup>6</sup> Chapter 2 Part 3, Division 2 of the *Environmental Protection Regulation 2008* prescribes criteria for mining activities under such an environmental authority.<sup>7</sup> Section 31(1)(a) provides that –

"In addition to the criteria mentioned in section 30, the following criteria are prescribed for mining activities allowed, or to be allowed, under an environmental authority (mining lease - ...

(a) the mining activities do not, or will not, at any one time, cause more than 5ha of a riverine area or mine workings to be significantly disturbed."<sup>8</sup>

[20] In the absence of any evidence as to the precise extent of Mr Wilson's mining operations, I will adopt 5 hectares as the area to be used for those activities. In addition, there will be some loss of grazing capacity on the access track which Mr Wilson identified as 3 metres wide in his mining lease application.

[21] I have accepted the applicants' claim that the area of the lease (approximately 23 ha) plus the access track have a carrying capacity of 7 beasts, or approximately 1 beast to 3.5 hectares. On that basis, the loss of 5 hectares to mining activities and the partial loss of the access track area (identified by Mr Wilson as 1.76 ha) would result in a rounded loss in carrying capacity of 2 head. There has been no challenge to Mr Anders' assessment of the agistment rate at \$2.50 per head per week and, accordingly, I have accepted that assessment. The consequent monetary loss is

$$2 \times \$2.50 \times 52 \times 5 = \$1,300$$

I therefore determine compensation for loss of grazing capacity in the sum of \$1,300.

[22] In addition, pursuant to s.281(4)(e) of the Act, I award the sum of \$130 which is 10% of the compensation determined above, to reflect the compulsory nature of the grant of the mining lease. The total compensation payable under this head is \$1,430.

### ***Cost of fencing to exclude stock***

[23] The applicants' valuer, Mr Anders, also said that for the applicants to comply with their food safety and animal welfare obligations, the applicants must ensure that their cattle are

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<sup>6</sup> See s.151(2)(b), *Environmental Protection Act 1994*.

<sup>7</sup> Section 29.

<sup>8</sup> The same criterion applied under s.6(1)(b), Schedule 1A, *Environmental Protection Regulation 1998*.

completely kept out of the lease area. Two reasons were identified, livestock production assurance and duty of care.

[24] Mr Anders said that for the owners to maintain accreditation under the Livestock Production Assurance Scheme, the owners must be able to demonstrate that their stock do not have access to any unacceptable substances. He said that cattle will lick, chew or consume many things found on or around machinery and vehicles. Further, exposure of the animals to any chemicals used in processing minerals on a lease area would endanger the applicants' certification under the Assurance Scheme.

[25] Mr Anders also said that under the *Animal Care and Protection Act 2001*, the owner of cattle has a duty of care to the animal which includes providing for the animal's needs and safety. In his opinion, once a mining activity begins, some cattle will be attracted to the site and shafts and other excavations will constitute a definite threat. In his opinion it would be necessary for the respondents' cattle to be excluded from the entire lease.

[26] While Mr Anders is a registered valuer and as such is able to give expert evidence in respect of the valuation of land, there was nothing in the material submitted to me to demonstrate any expertise in relation to livestock production assurance or the duty of care owed to livestock. While I have no doubt that Mr Anders' opinions are honestly held, I do not think those opinions should be given any higher weight in relation to these issues than those of a lay person. Mr Wilson has said that he will not be leaving any machinery or chemicals lying around in areas to which the cattle may have access. Mr Wilson also said, and I am required to assume, that he will carry out his mining operations in accordance with the appropriate legislative and other requirements as to safety.<sup>9</sup> On that basis I do not consider that there is any real likelihood that the welfare and safety of the cattle will be compromised by this mining operation given that the area of the proposed mining disturbance will be fenced by Mr Wilson. It follows that I do not accept that there is a need to fence the entire perimeter of the access track and the mining lease area and, therefore, this aspect of the compensation claim is rejected.

[27] The total compensation payable under all heads is \$1,430. I consider that it is appropriate that the compensation be paid as a lump sum within one month of the grant of the mining lease. Although there are two applicants for compensation, Mr Houen has filed a single claim on their behalf, and has sought a single determination because the applicant companies have common beneficial ownership and the Weymouth Pastoral Company's share of the total is nominal. In the circumstances I consider that it is appropriate to make one determination.

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<sup>9</sup> *Smith v Cameron* (1986) QLCR 64 at 76.

## Costs

[28] The applicants have sought \$550 as their costs of formulating the compensation claim. That sum represents Mr Anders' fee for preparing the valuation report and affidavit relied on by the applicants in support of their claim.

[29] Section 281(7) of the *Mineral Resources Act* provides that the Land Court may make such order as to costs between the parties to the determination as it thinks fit. I consider that the effect of that provision is that the Court has a complete and unfettered discretion as to the order to be made. It has been held, in relation to similar statutory provisions, that the discretion is not to be exercised arbitrarily but judicially, that is for reasons that can be considered or justified.<sup>10</sup>

[30] Mr Wilson has submitted that, if there is to be any award of compensation for fees, I should also address the fact that he received an account from his solicitor for \$2,339.70 in respect of legal advice in connection with the preparation of Mr Wilson's responses to the mining lease objections.

[31] Mr Wilson's legal fees were incurred in respect of his response to the objections to his mining lease application, not the application for determination of compensation. Section 281(7) does not give me power to award costs in respect of the mining lease applications.

[32] The applicants' claim for costs remains to be considered. The costs have been incurred because of the mining lease application and the consequent need for a determination of compensation. Mr Anders' evidence was partially relevant and useful in my determination of compensation but I have not accepted his evidence concerning fencing. In those circumstances, I am prepared to exercise my discretion in favour of the applicants and order the respondent to pay half of the costs sought in respect of the application for determination of compensation that is \$275.

## ORDERS

1. Compensation is determined in the sum of One Thousand, Four hundred and thirty Dollars (\$1,430).
2. The respondent is ordered to pay the applicants' costs of and incidental to this matter, fixed in the sum of Two Hundred and Seventy-five Dollars (\$275).
3. The respondent is ordered to pay the compensation of \$1,430 and costs of \$275 to the applicants within one month of the grant of the mining lease.

**CAC MacDONALD**  
**PRESIDENT OF THE LAND COURT**

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<sup>10</sup> *Wyatt v Albert Shire Council* [1986] 1 Qd R 486; *BHP Queensland Coal Investments Pty Ltd v Cherwell Creek Coal Pty Ltd (No 2)* [2009] QLAC 008.