

LAND COURT OF QUEENSLAND

CITATION: *Re Fitzgerald & Anor and SR Struber & Anor* [2009] QLC 0076

PARTIES:

1. Ralph De Lacey and Cheryl May Fitzgerald
(Applicants)

- and -
2. Cheryl May Fitzgerald
(Applicant)

- and -
3. Ralph De Lacey and Cheryl May Fitzgerald
(Applicants)

- and -
4. Raymond Michael Fitzgerald
(Applicant)

v.

Stephen Roy Struber and Dianne Wilson-Struber
(Respondents)

FILE NO/S:

1. VOA127/2008 (Mining Lease 20419)
2. VOA128/2008 (Mining Leases 3054, 3134 and 20248)
3. VOA129/2008 (Mining Lease 20272)
4. VOA130/2008 (Mining Lease 20408, 20420, 20421 and 20422)

PROCEEDING: Applications relating to variation of access

DELIVERED ON: 21 May 2009 (Ex tempore)

DELIVERED AT: Cooktown

MEMBER: MR PA Smith, Member

ORDERS:

1. **I award compensation in the all up term of \$5 per hectare per year, to the variation of access area of 35 ha, for the variation of access for**

each of the 6 Mining Cases and 3 Mining Lease Applications.

- 2. I grant liberty to the parties to apply for an amendment of the compensation order should evidence held by the Mining Registrar show that the width of access with respect to any of the Mining Leases or Mining Lease applications is in other than 10 metres in width.**
- 3. I make no order as to costs.**
- 4. I direct the Registrar of the Land Court to provide a copy of these reasons to the Honourable the Minister for Natural Resources, Mines and Energy and Minister for Trade, bringing to the Honourable the Minister's attention the comments I make at paragraph 26.**

CATCHWORDS:

MINING LEASES – DETERMINATION OF COMPENSATION – principles – misleading public information asto state of road – public benefit – historic mining – tourist access – doubling up - costs

Mineral Resources Act 1989, s.317(5)

Wills v. Minerva Coal, (1998) 19 QLCR 297

Horn v. Sunderland Corporation [1941] 2 K.B. 26 at 43.

Zimmerebner v. Hawkins & Ors (1999) 20 QLCR 71

Unimin Australia Limited v. Maurice and Tricia Freeman [2007] QLCR 76

Edwards v. Calmsden & Ors [2007] QLRT 118

White v. Warner & Anor [2007] QLRT 53

Titan Sandstone Pty Ltd v. ChongHerr Investments Pty Ltd [2009] QLRT 96

APPEARANCES:

Mr R De Lacey appeared on his own behalf

Mrs C Fitzgerald appeared on behalf of CM and RM Fitzgerald

Ms A English of Bottoms English Lawyers on behalf of the respondents.

Background

[1] Today in Cooktown I have been hearing seven matters which were all listed together. In referring to seven matters as listed together that itself is in some ways a misnomer as will become obvious when I deal with the specific matters that relate to this decision, but for the purposes of this brief introduction the matters have one common stream and that is that the respondents in each matter are the landholders of "Palmerville Station", Mr and Mrs Struber.

- [2] The matters before me today have been for the most part settled leaving four files requiring a decision. Those four files are VOA128/2008 which relates to mining leases 3054/3134/20248, the applicant being CM Fitzgerald; VOA130/2008 which relates to mining leases 20408/20420/20421/20422 and those mining leases are held by RM Fitzgerald, VOA129/2008 held by R De Lacey and CM Fitzgerald relating to mining lease 20272 and VOA127/2008 which relates to mining lease 20419 and relates to holders R De Lacey and CM Fitzgerald. With respect to each of those variation of access files the matters were brought before the Land Court after a referral by the Mining Registrar pursuant to s.317(3) of the *Mineral Resources Act* "the MRA". It is appropriate to quote s.317(3) as follows:

"317(3) Variation of access to mining lease land

Where, in respect of an application for a variation of the land used or proposed to be used as access under this section, the mining registrar is not satisfied that the owner of the land proposed to be used as access consents to the use, the mining registrar must refer the issue of consent to the Land Court for its consideration."

- [3] Pursuant to s.317(5) of the MRA the Land Court is to hear and determine the matter by determining whether or not there should be consent to the proposed variation and if consent should be given the amount (if any) of compensation payable by the holder in respect of the proposed use of that land as access.
- [4] With respect to each of the variation of access files that I have just referred to the applicants and the landholders have today reached an agreement as to access. The only issue therefore remaining is a determination of compensation with respect to the variation of access as agreed between the parties. The matter of the compensation for the variation of access with respect to the nine variation of access matters contained within the four variation of access files was heard in Cooktown on 21st May. Evidence was provided in a number of ways. The parties have produced evidence before the court by way of statements and written submissions. Additionally oral evidence was given by Mr De Lacey and Mrs Fitzgerald for the applicants and by Mr Struber on behalf of the landholders. The witnesses were all subject to cross-examination. Various documents were placed into evidence by way of exhibits.

The Evidence

- [5] This is a matter which on its face is relatively simple when it comes to determining the evidence and I find little conflict between the evidence of the applicants and the landholder in this regard. Dealing firstly with the evidence which is in conflict that

conflict mainly relates to the impact, if any, that vehicles have on cattle on a road which is perhaps frequently or perhaps infrequently used. For I think as long as mining and pastoral interests have interacted there has been a disagreement between landholders and miners as to the respective impacts that each activity has on the other and the evidence in this case was no different. I do accept that the presence of vehicles on an access route, particularly through rather remote country as appears to be the case here, would have an impact on beasts, particularly young beasts that aren't used to traffic, but that as the amount of traffic increases and the beasts become more used to the traffic, then the impact on those beasts will decrease over time. Of course this is an ongoing process following a muster and new beasts coming to the area. With new young beasts, the process will start again. It can also start again of course if there is a period of time with little access or no access use of the road. In many respects, although the evidence is in conflict regarding this aspect, I accept that both sides in giving their evidence truthfully believe the impacts that their respective activities cause. It just then remains to be a balancing exercise for the court, but in the circumstances of this matter, little turns on that one conflict of evidence.

- [6] Having set that conflict aside, I turn to the principal evidence which is in substance not in dispute. I will attempt to word it this way although a full understanding of this matter can only be gained by reference to the various maps that have been put into evidence, in particular the maps in Exhibit 2, Exhibit 9 and Exhibit 10. What the matter boils down to relates to what is shown on Exhibit 10 as Whites Creek Road. I will not bother to go into the metes and bounds definition of what that road is but for the purposes of the evidence it is consistent between the parties what I am referring to when I refer to Whites Creek Road. This road is a misnomer as on the evidence placed before me it is not actually a road at all in the sense in which one understands the gazettal of a road. I accept the evidence of Mr De Lacey that the road came into existence in the mid 1980s when it was created out of an agreement between a previous miner and a previous landowner as a means of access to a since expired mining lease. I also accept the evidence of all parties that the road, Whites Creek Road, has continued to be used as if it were an open road for access to various mining leases within the Palmer River district on the landholders' property. The area is of course historic in mining terms including the area known as R16; the historic Maytown township; and a history for the entire district which dates back to the gold rush days of the 1870s and 1880s.

- [7] Gold mining has continued in this area and it is fair to say on the totality of the evidence before me that there remain a number of active mining leases or proposed mining leases on the Struber properties and that the bulk of miners will be seeking, or already do use, Whites Creek Road as the access to their mining interests. It is also clear from the evidence that tourists frequent the historic workings and the evidence also is suggestive of the fact, which I'm prepared to accept in these circumstances given the concurrence of all parties, that the area is in fact promoted as a tourism holiday destination and a four-wheel drive adventure trip. This of course causes difficulties not only for the Strubers but also for the miners for as long as the Whites Creek Road remains not in actual fact a road.
- [8] One can only imagine the difficulties that all parties have experienced over time and these are demonstrated by photographs tendered by Mr Struber in Exhibit 11 showing damages that have occurred to fencing, gates etc. Whilst not on the access area they are indicative of the difficulty in retaining control over assets and property in remote areas of large properties where there are multiple number of users and of course in those circumstances it is difficult to ever determine who has been responsible for what activities. That becomes particularly relevant when I turn to Exhibit 13 which shows one clear pit of rubbish which Mr Struber states is located on or about Whites Creek Road and another pit which shows rubbish strewn around the general area. I accept Mr Struber's evidence that these are on Whites Creek Road and I also accept the evidence of Mr De Lacey that they are not the result of any of his activities. Mrs Fitzgerald has joined in that evidence and I also accept her evidence in that regard. It does though continue to show the difficulty that a landholder and a miner is faced with when these instances occur and of course it simply highlights the inevitable incompatibility in some areas of pastoral and mining operations exacerbated when you add tourism operations on top of that, particularly uncontrolled tourist operations promoted as adventure expeditions for four-wheel driving.
- [9] Before concluding my overview of the evidence, I should stress that negotiations have been occurring between the Strubers and the Cook Shire Council to regularise Whites Creek Road and the evidence is that agreement was finally reached between the Strubers and the Cook Shire Council as to the metes and bounds of that road for gazettal purposes only yesterday. It is of course an unknown element to the court as to how long it will be before that road is gazetted and what formal resumption or

other processes will be gone through. Those are not matters before me. All I can say is that it is accepted I think by all parties that there remains a period of time for which a determination of compensation is required by the court and that that period of time is unknown at this time until such time as a formal gazettal of Whites Creek Road along the metes and bounds as shown in Exhibit 9 occurs.

[10] Having detailed the factual matrix behind these matters and stressing that I have read all of the relevant evidence, including the evidence filed as part of written submissions and factual evidence early in these proceedings and those specifically brought before me today, I now turn to examine the law relating to determination of compensation in matters such as this.

Principles of Compensation

[11] It has often been stated that the principles of compensation under the MRA are littered with inherent difficulties relating to doubling-up; issues as to whether or not separate heads should be awarded as separate monetary sums under each provision in s.281 of the MRA; or whether an all-up sum should be determined taking into account all of the heads. I tend to agree with the observations of Member Scott of the Land Court in *Wills v. Minerva Coal*¹ when dealing with a compensation matter under the MRA. He stated that the matters set out in the MRA were compensation concepts to be taken into account in determining compensation, not a figure accumulated by amounts arrived at following a separate and discrete treatment of them as if they were separate heads of compensation. In determining compensation, the overriding principle is of equivalence ensuring that, so far as money can do it, the landholders are placed in the same position as if the mining lease was not granted.²

[12] I concur with Member Scott's observations in that regard. I also note with approval the lengthy determination of compensation principles set out by then President Trickett of the Land Court in the case of *Zimmerebner v. Hawkins & Ors.*³ One problem that immediately springs to mind is that most of the case authorities deal with compensation for mining leases. The authorities regarding the amount of compensation to be determined for access are limited indeed. It is not surprising in circumstances where the authorities are limited and the terminology of the MRA is complex and the factual matrix of the matters under consideration here are so unique that I have not had any valuation evidence placed before me and I have also had little

¹ (1998) 19 QLCR 297.

² *Horn v. Sunderland Corporation* [1941] 2 K.B. 26 at 43 per Jacobs J.

³ (1999) 20 QLCR 71.

evidence as to the actual value that should be applied to the particular land in question in this particular matter.

- [13] As Member Jones said in the case of *Unimin Australia Limited v. Maurice and Tricia Freeman*⁴:-

"I realise that my determination of compensation in this case is a result of little more than calculated guesswork or speculation. However, in circumstances where the parties have elected to provide little or no material to the Court concerning their position about compensation there is not much more than the Court can do."

- [14] I accept of course that the parties in this case have certainly not provided no information to the court. However, in a pure valuation sense the actual evidence that would be appropriate in applying all valuation principles in order to arrive at the proper amount of compensation in this matter remains scant. Living in a time of uncertain economic conditions, rising costs and the expense of obtaining professional valuation reports, one can completely understand from both parties a reluctance to spend many thousands of dollars engaging expert valuation opinions which may indeed only tend to create differing opinions lengthening the time of hearing and lengthening costs for all parties in circumstances where the actual quantum that is being dealt with is in relative terms small.

- [15] It would be remiss of me to not refer to the case of *Edwards v. Calmsden & Ors.*⁵ That was a determination of compensation by myself in a mining lease access matter. Where the matter is of particular interest is found in paragraph [3] of the decision as follows.

"The miner has submitted that there should be no or minimal compensation as the access is an ungazetted mining road which has been in existence for at least 40 years; the landholders conduct low intensity grazing; no grazing land will be impacted on by the road usage; and that the existing access is poor, with any upgrading work undertaken by the miner improving not diminishing the value of the land."

- [16] Unfortunately in that case the miner's submissions did not include any details of the length of access over the landholders' property which is indicative of many cases which I have had to determine compensation, particularly in my days in the Land and Resources Tribunal where the emphasis was almost always on compensation for the mining lease disturbed actual area and not for access. Having no idea of the size of

⁴ (2007) QLC 76.

the actual access in the case I have just quoted from, in that case I came to the conclusion that I could only award a nominal amount given that I had no idea if the access was 180 metres or 100 kilometres. The amount awarded in that case was \$5 per annum for the term of the lease which equated to \$100.

[17] In other cases there have been similar difficulties in determining the quantum of compensation. For instance, in the matter of *White v. Warner & Anor*,⁶ there was also scant evidence as to what the actual access to be dealt with was and in that matter the award that was made for access which was across a property was again a nominal amount of \$10 which led to a total compensation of only \$310. I hasten to add that did not concern a mining lease application in this area of Queensland, but it does show the difficulties with determining the quantum of compensation for access and in this matter for variation of access. The competing issues that I have to take into account are these. On the one hand there are numerous miners using a road not unlike the circumstances in the matter I referred to where there had been an ungazetted road with mining access for 40 years and therefore leading to a nominal amount of compensation. The important point though is that compensation was awarded in that case, not no compensation as the miner had sought. The difficulty arose that I had no idea as to the length or width of that access.

[18] Applying all of those authorities to the case in hand and looking at the provisions of s.281 of the *Mineral Resources Act* the basic presumption flows that compensation should be awarded to the Scrubbers by the miners in these matters. However, account must also be taken of s.317(5) of the *Mineral Resources Act* where I note the inclusion of two important words dealing with a variation of access and that is that the court has to determine the amount (if any) of compensation payable by the holder in respect of the proposed use of that land as access. There is a clear reason in my view for the use of the words "if any". When one is varying an access clearly there is a presumption that there has been an access already in existence to vary. Particularly for granted mining leases, there has either been an agreement as to compensation as between the parties or a determination of the court as to compensation and that compensation would of course include compensation for access. Unfortunately, due to the limited state of the information provided by the Mining Registrar with respect to all of the matters currently before me, I have no way of knowing what determinations or agreements are currently in effect relating to the compensation

⁵ [2007] QLRT 118.

terms for each of the granted mining leases held by the miners of which I understand there are six, with three of the matters being at this stage merely mining lease applications.

- [19] Having set out those difficulties, there is one other difficulty that I must raise and that is the fact that it would seem that the miners have been encouraged, in accordance with their evidence which I accept, to take access through Whites Creek Road by the mining regulators. There have clearly been presumptions on the part of the miners that this was an open road and the presumption would seem to exist, although I can put it no higher than that on the state of the evidence, that at least some in the mining field of Government have also accepted Whites Creek Road as being an actual gazetted road. In that regard I refer particularly to Exhibit 10 which names Whites Creek Road as a road on a map relating to ML6719 produced by what was then the Department of Mines and Energy. One can completely understand the frustration of all of the parties when what appear to be official documents produced by Government contain information which can be relied upon by tourists and by miners, to the detriment of the landholder, in those circumstances.

Determination of Compensation

- [20] Having thrown all of the above into the melting pot and realising the extraordinarily late hour that is now upon all of us in this hearing room, it turns to me to attempt to devise a form of compensation in these matters which is fair and just for all concerned. Ms English contends for an amount of \$10 per hectare per year over the access per mining lease for the purposes of this determination I am prepared to accept as being an area of 35 hectares being an access of a length of 35 kilometres with a width of 10 metres. I will formally order that if the evidence is able to establish that the actual variation of access documentation filed with the Mining Registrar shows access widths of 20 metres and not 10 metres then I grant liberty to the parties to come back before me to have any determination amended.
- [21] As I have indicated, Ms English for the Strubers contends for a rounded up figure of \$10 per hectare per year taking into account the nature of the inconvenience that Mr and Mrs Struber have been put to by the wrongful use of their property in the area of Whites Creek Road as an access when in fact it was not a legally gazetted access and no formal mining lease access is over that area of land. She makes compelling submissions as to why a figure such as what she mentions should be awarded. On

⁶ [2007] QLRT 53.

the other hand, Mr De Lacey contends that no amount should be awarded by way of compensation because the road is in existence, was brought about as a result of agreement between the previous landholder and a previous miner and that the existence of a road, whilst it remains a mining access, will be a benefit to the Strubers in that the miners will be responsible for the care, maintenance and upkeep of that road and that the road could be of assistance when it comes to fire fighting which was acknowledged by Mr Struber. Further, the road is the only logical access to R16 and that the particular miners involved in this case should not be compelled to pay compensation for the sins of others and the sins of history in the manner in which this matter has developed, to colloquialise the submissions that Mr De Lacey has made. I also see merit in what Mr De Lacey says. Mr De Lacey's calling for a low or nominal amount of compensation is supported by a weight of authorities including those which I have referred to. However, this case also is rather unique and unusual and I fear one which without a clear determination of the court now will simply lead to continued angst between all the parties and a continued loss of money for all concerned.

[22] I have some conceptual difficulties with awards of an amount of dollars per hectare per year over land, particularly when it is poorer country of little value. However, I also understand the reality of the situation and have in the past made awards precisely in that nature so that the landholders can receive some form of real compensation. In looking at a determination I note that the going rate, to use the terms accepted by Ms English, Mr De Lacey and Mrs Fitzgerald, for compensation for mining lease areas on the Struber land is \$10 per hectare per year. I am prepared to accept that figure as an appropriate figure for mining lease operation land taking into account the impact that continued mining leases will have on the various operations. I consider it appropriate to reduce that figure because I am only dealing with an issue of access in this particular case. For this matter I wish the legislation allowed me to make a determination which covered the variation of access back to the time in which the mining leases, being the six granted leases, were granted so there could be some finality between the parties in that regard. However, I do not see that the provisions of s.317 allow me to do that and, in the absence of agreement between the parties, I can only make a determination of compensation as and from such time as the variation of access takes effect. This stance will put Mr and Mrs Struber to additional expense unless there can be some agreement between the

parties as relates to earlier access, but that is a matter which could only be taken into account cost-wise if there is any new matter initiated in the future.

[23] Having referred to all those authorities and doing the best that I can on the evidence and with some reluctance to what is fair for both parties in this matter I have determined an amount of \$5 per hectare per year for each mining lease. I need to explain in part the reason for arriving at that figure. I note in a previous decision that I have already quoted reference is made to access for mining programs and I have the suspicion that the matters set out in VOA130/2008 are essentially the one program but I simply have no evidence before me to show that. Were I awarding compensation for that as a program and in effect coming back to four lots of compensation for four variation of access files, I would have been inclined to have awarded a higher sum of perhaps \$7.50 per hectare per year,⁷ but I don't have those details from the Mining Registrar. I am stuck with the fact I have nine separate mining lease applications so I have little choice I believe in following the legislation other than to determine compensation with respect to each of those mining lease applications. I have reduced the amount accordingly to \$5 per hectare per year, but that still is a sum which for the mining lease holders and applicants is somewhat high if the matters are taken as overall mining programs and not completely separate operations. I have that inference but I can't take that inference any further on the state of the evidence and the paucity of information before me. However, bearing in mind that inference and the fact that I have come to a determination of a figure which applies to each of the mining leases, I consider that figure to be appropriate given all of the circumstances in this matter.

Costs

[24] That leaves then the question of costs and that is also a very live issue between the parties. Mr Struber rightly feels aggrieved that the instance of the circumstances that he has found himself in in this matter have caused him to expend a sum of about \$30,000 in legal costs in trying to come to some finality with the shire council for the gazettal of the road. I completely understand his frustrations in the process regarding that amount. I also have heard from Mr De Lacey the frustrations that the miners have experienced over delays in having the issues of access to their mining leases determined and the losses that they have suffered as a consequence of the unfortunate circumstances that surround the non-gazettal of Whites Creek Road. Just as the bulk

⁷ As one sum covering all leases in the mining program.

of the question of costs with respect to Mr and Mrs Struber specifically do not fall further under the terms of compensation other than those as I have incorporated into the \$5 per hectare per year, so too do the losses of which the miners complain.

[25] Under the *Land Court Act 2000* the Land Court has a discretion to award costs to parties in the prosecution of cases. The Land Court, as a general rule, does not often award costs, particularly at first instance, in matters such as this. It is normally only in circumstances where the behaviour of one party or another, or the unreasonable stance of one party or another warrants such an award for costs in matters like these under the MRA. In the circumstances of this matter I am in no doubt whatsoever that both parties feel sufficiently aggrieved with the other to believe that an award of costs is necessary. In this regard I refer to a decision of mine in the matter of *Titan Sandstone Pty Ltd v. ChongHerr Investments Pty Ltd*⁸ where parties were so aggrieved with each other that each party sought a determination of indemnity costs against the other. The result in that case was that I felt it appropriate to make no award for costs and I am so minded in this case, but that does not completely conclude the statements I wish to make in this matter.

[26] The landholders have been put to considerable expense because of what would appear to be on the evidence before me the presumption by Government authorities that Whites Creek Road was gazetted. I do not know what is occurring as regards the issue of the resumption of Whites Creek Road and the payment of compensation and costs to the Strubers with respect to that resumption process. Perhaps that is a matter that will come before the Land Court for determination at some stage under the *Acquisition of Land Act* but that is a matter for another time and another place. However, insofar as this process interrelated with the MRA matters has resulted in significant out-of-pocket expenses for the Strubers I direct that this determination of compensation be passed to the Minister responsible for the MRA with a recommendation that an ex gratia payment be considered for Mr and Mrs Struber to take account of costs that they have incurred through no fault of their own in their endeavours to rectify a situation that has been less than satisfactory in circumstances where I am prepared to put on record my acknowledgment that Mr and Mrs Struber have undertaken the honourable course in having the road formally made through a gazettal process by the council in circumstances where that gazettal will in some instances actually cause more difficulties to their property; their property

⁸ [2009] QLRT 96.

management; and dealings; but in circumstances where the gazettal of that road will open up mining areas with greatly enhanced accessibility for the miners of Queensland and in particular the miners in the Palmer River district, and also for tourist access to historic Maytown. If any ex gratia payment were to be considered by Government, as I hope it is, of course that ex gratia payment will be one that would take into account whatever compensation and legal costs were awarded for the gazettal of the road not a doubling up of any costs in that regard.

ORDERS

1. I award compensation in the all up term of \$5 per hectare per year, to the variation of access area of 35 ha, for the variation of access for each of the 6 Mining Cases and 3 Mining Lease Applications.
2. I grant liberty to the parties to apply for an amendment of the compensation order should evidence held by the Mining Registrar show that the width of access with respect to any of the Mining Leases or Mining Lease applications is in other than 10 metres in width.
3. I make no order as to costs.
4. I direct the Registrar of the Land Court to provide a copy of these reasons to the Honourable the Minister for Natural Resources, Mines and Energy and Minister for Trade, bringing to the Honourable the Minister's attention the comments I make at paragraph 26.

**PA SMITH
MEMBER OF THE LAND COURT**