IN THE WARDEN'S COURT
HELD AT ST LEONARDS
ON THE 13TH JUNE 1997
J A BAILEY, CHIEF MINING WARDEN

CASE NO. 1997/13

M R & M D O'BRIEN

-v-

JESASU PTY LIMITED

This is an application for additional assessment of compensation under the provisions of Section 276 of the Mining Act 1992.

The application arises out of Exploration Licence No. 4278. By way of background, after the failure initially of the mining company and the landowner to come to an agreement concerning compensation to the landowner, an Arbitrator was appointed who duly gave a decision concerning such compensation.

The Arbitrator's decision was appealed to the Warden's Court. An order was subsequently made on 10th January 1995 by the then Chief Mining Warden, such order substantially increased the compensation originally ordered by the Arbitrator.

The exploration now being complete, the landowner is now seeking additional assessment of compensation.

Maxwell Raymond O'Brien gave evidence for the applicants. By way of undisputed facts Mr O'Brien tendered a document, Exhibit 1, which is a diagram of his property, and such property is broken up into some 16 separate paddocks. Paddocks 1 to 6 are cut off from paddocks 8 to 16 by a public road. The exploratory drilling took part in paddocks 3, 4 and 5.

Mr O'Brien gave evidence that he requires his paddocks for the purposes of fattening his lambs. He indicated to the Court that paddock No. 5, where the majority of drilling was to take place, was the paddock that he intended to sow oats for the purposes of finishing off the fattening of his lambs. He said there was no feed whatsoever in paddock 5 and there was improved pastures on other paddocks. It was necessary to retain other paddocks for the improved pastures and then to sow oats in paddock No. 5 so he could obtain the maximum benefit insofar as fattening his lambs.

He indicated that it was necessary to sow the oats in February as March and April were always the drier months. He gave evidence that if he dug up one of the other paddocks to sow the oats, then he would be deprived of that improved pasture and he would have insufficient feed for his sheep.

As a result of the mining company advising him that they wished to commence drilling he was, according to his evidence, unable to sow the oats in paddock No. 5. He then indicated that by the time the drilling had ceased it was too late and too dry to sow oats. He indicated that by the time the drilling had finished and he had then prepared the land he was unable to sow until the 21st May 1995, on a semi wet ground. He said the pasture was slow and there was no benefit of fodder received until the following summer.

The mining company came onto paddock No. 5 on the 27th February 1995 and had concluded drilling by the 1st April 1995. At the request of the landowner they put off drilling in paddock No. 3 until June of 1995.

Before commencing drilling, there was another agreement entered between the landowner and the mining company and that was dated 24th February 1995, that document is exhibit 7 in the proceedings before me. This agreement was in addition to the determination of the Chief Mining Warden as mentioned earlier. The agreement provided inter alia that an additional lump sum of $20,000 would be paid by the mining company to the landowner. Evidence before me indicated that that money was indeed paid.

Mr O'Brien produced figures to the Court which indicated the amount of his loss as a result of the drilling on his land. In the application which was originally submitted there was a claim of $87,523 in total. At the court hearing those figures were adjusted and a total of $119,708 was put forward by Mr O'Brien as the loss over the two years following the exploration which took place on his property. Mr Colin William Ritchie, a Chartered Accountant who has been performing the accountancy work for Mr and Mrs O'Brien for 7 to 8 years, gave evidence that his calculation of the loss to the O'Brien's during 1995 and 1996 amounted to a total of $133,096.

As with Mr O'Brien, Mr Ritchie indicated that the major enterprise of the O'Brien's is the fattening of lambs from which the major income is derived. To achieve optimum lamb prices depends on being able to fatten lambs to prime condition which in turn depends on having improved pasture available.

Mr Ritchie produced figures of profits for the O'Brien's for the years 1990 through to 1996. It is noted that in 1994 the grazing enterprise net profit was $56,487. The same for 1995 was a loss of $802, and in 1996 there was a profit of $9,672. Mr Ritchie goes on to indicate that the average grazing enterprise net profit for the years 1990 to 1996 was a profit of $43,508. However the grazing enterprise net profit for the years 1995 to 1996 show that the profit is reduced to a figure of $4,435, a reduction of almost $40,000.

I note that a perusal by me of the profit and loss account of M R & M D O'Brien for the years ending 30th June, 1995 and 30th June, 1996 makes no mention of the sum received as compensation, that is, $32,500, nor of the $460 received for the loss of the sheep that fell into the exploratory holes. One would expect that ought to have been included so that Mr O'Brien could arrive at a more honest and accurate figure as to his losses.

Under cross examination, Mr Ritchie conceded that his figures were derived, as is the practice of all accountants, from material which is supplied to him by his client, the O'Brien's.

One of the losses to Mr O'Brien's income was the loss of young merino ewes due to pregnancy toxaemia. This, according to Mr O'Brien was caused by the lack of green feed.

Another concern of Mr O'Brien was the lack of water in the bores. He gave evidence that prior to the commencing of mining he was able to pump water from the bores sunk on his property in paddocks 4 and 6 at the rate of 1000 gallons per hour, 24 hours per day. However once the mining company started pumping water he gave evidence that he was only able to use the bores for 20 to 30 minutes at a time and would then have to leave pumping for 5 hours to allow the water to build up again. Mr O'Brien gave evidence that the water in the bores have been lowered to such a degree that it would now require him to obtain a new pump to pump the water up a greater depth.

Under cross examination Mr O'Brien conceded that the mining activities were on adjoining properties. He further conceded that the mining company did not pump out of his dam, however he replied that they pumped elsewhere "and this feeds into our dam". He further conceded that he did not have any experts look at his bore holes.

When questioned about the drought, Mr O'Brien told the court that 1994 was the worst drought year so far as he was concerned.

Concerning exhibit 7, the additional agreement that was entered into between the parties, Mr O'Brien was adamant that of the $20,000 that was paid to him under that agreement, $15,000 was meant to be his legal expenses in relation to the hearing before the Warden's Court, in which the Chief Mining Warden made a direction that each party pays his own costs. Mr O'Brien was adamant that the additional $5000 was the only amount which was for compensable loss. He adhered to this under cross

examination notwithstanding Clause 3 of that Agreement which states "each party will pay their own legal costs for the Warden's hearing and will not appeal against that decision".

Michael George Digby, a Field Agronomist, gives evidence of being aware of the property owned by the O'Brien's. He indicated that paddocks numbers 1 to 7 were the most fertile with paddocks 8 to 16 not being as arable as paddocks 1 to 7. He gave evidence that oats is the most useful crop for the time of year required by Mr O'Brien. He was questioned as to whether oats could be sowed in other paddocks. His reply that the cost of the establishment of improved pasture was such that it would be uneconomical and unwise to sow oats on an improved pasture paddock. He further indicated that the hilly country, paddocks 8 to 16, would not be suitable at that point of time to sow oats.

Under cross-examination he was aware that the condition of the land during the periods 1994 to 1995 and 1995 to 1996 was affected badly by drought. He gave evidence that an improved pasture paddock would be good for use over a period of 5 to 8 years depending on certain circumstances.

Mr Digby was recalled on the second day of the hearing and gave further opinions as to certain figures that had been outlined by Mr O'Brien in his evidence. In summary he conceded that the figures quoted by Mr O'Brien could be reasonable in some instances. In respect of $205 per head being the average net profit over 7 years he said that figure, if correct, was "real good profit". He indicated that the figure of $70 for the young merino ewes would have been top of the range and in respect to the $200 per tonne as being the market price for seed and feed oats, Mr Digby replied that that figure would be excessive and indicated that during drought periods there is always someone who is ready to exploit the situation. I took that reply to mean that there was someone exploiting the sale of seed and feed to Mr O'Brien, not Mr O'Brien exploiting the situation and putting that figure there. Mr O'Brien was questioned as to a cut-off time for the sowing of oats in paddock No. 5. His reply was that the whole purpose was to have seed for cold times and the earlier sowing the

better. He indicated that the end of February would be a close off date to obtain a good bulk up. He indicated that oats must be sowed when there was moisture in the ground, any later sowing one would be taking a gamble. When questioned as to the gamble to be taken he said "everything in agriculture is a gamble on the weather".

Mr Digby was asked as to whether one could expect a loss of income due to the drought conditions as at the 30th June 1995. He indicated that one would certainly expect a reduction in income. When asked about the year before that, his reply was that it depends upon the standard of management of the individual.

Mr Anthony Ackhurst, a Mining Engineer, was the first witness on behalf of the mining company. Mr Ackhurst gave evidence of arranging a meeting with Mr O'Brien before drilling commenced. He said that Mr O'Brien was not satisfied with the Warden's determination and he was considering lodging an appeal. After discussions it was decided to make a payment to Mr Ackhurst to facilitate the mining company's entry on to the land and to obviate the need for an appeal. Apparently Mr O'Brien seemed amenable to that and as a result an agreement was signed (that is exhibit 7).

Mr Ackhurst thinks that the first drill hole commenced on the 28th February and that the drilling equipment was removed at the end of March. The company came back on the 5th June as they had been asked to wait until that time before they drilled on paddock No. 3. That phase was completed on the 21st June. A total of 114 holes were drilled. Payments to Mr O'Brien were finalised at that point of time.

When questioned under cross-examination as to whether Mr O'Brien told him that paddock No. 5 was primed for the sowing of oats, Mr Ackhurst replied that he may have been told that but he does not recall.

When questioned as to whether or not in early February 1995 it was possible that the whole of paddock No. 5 would ultimately have holes drilled on it, Mr Ackhurst

indicated that it would not have been the whole of the paddock, "but certainly the areas close to the creek would be drilled".

The Operations Manager of the mine, William Eric Leadbitter gave evidence that he worked on the site at Mr O'Brien's land and was responsible for backfilling the holes. When backfilling the holes he said he followed the instructions given to him by Mr O'Brien. He was asked to use his truck to compact the dirt over the holes. The normal procedure is to heap the dirt over the hole to allow it to subside slowly. This takes about 12 months but in drier periods it could take longer. With this normal arrangement the mining operators can see the heap subsiding and take appropriate action to put further dirt there.

However when the holes were compacted according to Mr O'Brien's instructions, it created what Mr Leadbitter said was a bridge over the hole, which in fact collapsed as that under it compacted. It was for that reason that stock had fallen into the holes.

Under cross-examination he was asked whether he did anything to arrest the problem which was created, which saw animals fall into the hole. Mr Leadbitter said that when it was brought to his attention the holes were topped up as their normal procedure and they did not compact thereafter.

Mr Ian Donald Hare, a Hydrogeologist, gave evidence concerning the subterranean water on the land of Mr O'Brien. He disagreed with Mr O'Brien's scenario as to the activities of the mining company lowering the water in the bores.

He gave evidence that the water level was dependent upon the rainfall at the time. He produced some tables and documentation, exhibits 21 and 22, concerning rainfall between October 1994 and May 1997 and concerning a work summary from the Department of Land and Water Conservation concerning the two bores on Mr O'Brien's land. Mr Hare said that the water level on each bore is similar today as it was when the bores were created in 1980. In fact in one bore there is more water in it today than when it was constructed.

The witness indicated that the mining in the surrounding land would have a minimal effect upon the ground water on Mr O'Brien's property. Furthermore he said that the exploration activity that took place would have no effect whatsoever on the water table.

Mr Hare indicated that the creek is a source of a water supply to the bore, indicating that the creek re-charges the ground but the bores get water from other sources as well.

Mr Richard Victor Ivey, an Agricultural Consultant and Chartered Accountant, gave evidence on behalf of the mining company. He is familiar with Mr O'Brien's property and has considered the matters raised by Mr O'Brien in the document of his evidence which is exhibit 2. Mr Ivey was of the opinion that the alleged loss by Mr O'Brien as a result of the mining activities was clearly incorrect.

In reference to the pregnancy toxaemia which existed in the ewes on Mr O'Brien's property, Mr Ivey indicated that this was a problem which may be very common in some ewes. It may be brought about by many reasons, one common reason is where there are lush oats available, which have a high amount of water, consequently the ewes need to consume plenty to obtain the energy they require. The way to overcome that problem was to supply high energy food.

In relation to the statement of the ewes deserting their lambs to chase grain, Mr Ivey indicated that good management could prevent this from occurring. He proffered the opinion that it would be very surprising if there was a major problem of the desertion of lambs on the paddocks the size of that which existed on Mr O'Brien's property.

The witness compiled from information received from official sources, various documents relevant to the subject property. Exhibit 24 was a table of rainfall statistics for the years 1990 through to 1996. Exhibit 25 is a table of drought declaration periods for Mr O'Brien's property for the years 1990 through to 1996. Exhibit 26 is a

compilation of cattle prices for the years 1990 to 1996. Exhibit 27 is a table of wool price movements for the years 1990 to 1996. Mr Ivey gave evidence that in his opinion the reason for the downturn in profits was the result of the drought which consequently affected cattle prices and a drop in the wool prices over the last few years. He expected an opinion that one would expect to obtain far less profit in 1995 than in 1994 for fatted cattle. He gave evidence that an effect of the drought is that profits are often higher than otherwise on the onset of the drought, as a result of stock numbers being sold off and reduced and consequently extra profits for that year. Once the drought is broken there is a very pronounced reduction in profit because the landowner is spending money on re-stocking.

He produces the tables which indicate that cattle prices in 1994 were at their peak and they have fallen down as the years progress through to 1996, indeed there is a substantial drop in cattle prices over that period of two years.

In relation to wool sales he expressed an opinion that the wool in 1995 had nothing to do with the exploration that took place on his land because the sheep of Mr O'Brien were shorn in January or February of that year. He expressed an opinion that he would expect that there would also be less wool coming from the property because the number of sheep on the property would be reduced due to a drought factor.

The witness expressed an hypothesis that if Mr O'Brien had planted the oats in February then it would have been a very poor quality crop, having regard to Mr O'Brien's evidence that the land was that dry in April and even weeds would not grow on it. It was Mr Ivey's opinion that because drought was declared on Mr O'Brien's property in May, that the oats if they were sown in February would have been insufficient quantity or quality to yield 1.5 tonnes of seed. It was this quantity of seed according to Mr O'Brien that was lost as a result of the exploration on his land. Mr O'Brien places his compensable loss for that alone as being $12,000.

Mr Ivey placed before the court three possible strategies which could have been undertaken by Mr O'Brien to mitigate any possible loss as a result of the exploration

that was about to take place on his land. The first strategy would be to sow paddock 5 with oats. Drilling would have disturbed and reduced the production of the crop, but the area affected on the whole of the property would have been very small. He calculated the size of the holes, the number of holes and the area over which vehicular traffic might proceed and came to a figure of about 6 acres of oats in the 70 acre paddock being destroyed. In what he says is an over-estimation, he estimated 150 lambs would not be able to be fattened because of that destruction created by the exploration. It would be necessary to sell them off at a lesser price and allowing $20.00 per head makes a total deduction he says of Mr O'Brien's income of $3000.

The second strategy is to look for another paddock in which to grow the oats. He indicated that any good manager looks for alternatives which are necessary because of harsh weather, drought and other conditions which exist within this particular industry. He says in any one year it may be necessary to plough up pastured areas so that oats could be sown. He indicated the fact that paddock 5 is not under oats this year and in fact paddock 6 is under oats. He said from his knowledge paddock 6 could have been put under oats during 1995. Even though the landowner would lose the pasture area, that loss is less than if he lost a whole oats area. In placing paddock 6 under oats Mr O'Brien would have lost the grazing of that particular paddock and consequently would have suffered a loss of not being able to fatten 210 lambs that, with the reduction of $20.00 per head, would amount to a loss of $4,200. He indicated that that would have been a maximum loss because there may have been some savings in husbandry costs that could reduce that particular amount.

The final strategy that he put forward to the court would have been to feed the sheep that could not have been pastured in strategy two, by the purchase of fodder. If 210 lambs were fed for 52 weeks, at the most, at the rate of 3 kilograms per week at $250.00 per tonne, the feed cost would be $8,190. In addition there would be the cost of rationing the feed, say a half a day per week at $100 per day, that would amount to $2,500. So in adopting strategy three there would be a total cost to Mr O'Brien of $10,690.

Having regard to the fact that the mining company had paid at this stage the sum of $32,500 to Mr O'Brien as compensatory loss, Mr Ivey expressed the opinion that if Mr O'Brien had adopted any of the three strategies put forward before the court, Mr O'Brien would have indeed made a handsome profit from the compensation that was paid to him by the mining company.

At the conclusion of Mr Ivey's evidence in chief there was a request by Mr Dwyer, Counsel appearing for Mr O'Brien, for an adjournment of the case so that he could confer with his expert witness, Mr Colin Ritchie, who had by then returned back to Inverell. He indicated that he wished to confer with Mr Ritchie to obtain instructions, having regard to the evidence given by Mr Ivey so that he could cross-examine Mr Ivey. This application was objected to by Mr Moore, Solicitor, who appeared for the mining company. I granted a short adjournment so that Mr Dwyer could converse and receive instructions from Mr Ritchie via telephone. Upon resumption, Mr Dwyer indicated that he had conferred with Mr Ritchie, there was no need for a further adjournment and that he had no questions in cross-examination of Mr Ivey.

In evidence in reply Mr O'Brien disputed the expert's evidence before the court and expressed his opinion that the pregnancy toxaemia was created only as a result of the loss of good feed.

He said that it was his intention to sow oats but when he found out that they were going to drill there he was concerned at what the drill truck would do to his land, and was very concerned about ploughing it up, making it a lot easier for the truck to compact the soil and possibly cause further damage in the long run. He was adamant that he was a good manager of his property and indicated that a prudent farmer would not lose all of paddock 6 as suggested in Mr Ivey's strategy No. 2. His concern in relation to obtaining grain to feed the sheep was that some grain might have to be obtained from overseas which could introduce a weed problem to his paddocks, he didn't want to take that chance.

Mr O'Brien concluded by indicating that if the mining company had not come in he would have continued to make a profit from the earlier years.

In his submission Mr Moore put to the court that this was not a proper application under Section 276 of the Mining Act 1992. This case was not one where there were unexpected occurrences during the period of the exploration. This was simply a claim by Mr O'Brien which went over all the prior matters which had been put before the former Chief Warden. Mr Moore submitted that not only was Mr and Mrs O'Brien aggrieved by the amount awarded by Mr McMahon but further they were aggrieved by the amount that was paid to them by the mining company as a result of the agreement which forms exhibit 7 in the proceedings before me. In entering that agreement Mr Moore submitted that the company extracted a consideration, a quid pro quo. The company agreed to pay the $20,000 to the O'Brien's in exchange for peace. The agreement expressly indicates that there would be no appeal against the Chief Warden's decision.

Mr Moore submitted that this matter currently before me was merely an appeal against Mr McMahon's decision and furthermore an appeal against the agreement entered between the parties for a payment of a further $20,000. Mr Moore submitted that to blame the drought at the door of the mining company is clearly wrong. Mr O'Brien has already been compensated for the exploration done by the mining company and is not entitled to any further compensation. Mr O'Brien had received a total of $32,500 already from the mining company in addition to the $460 they paid for the sheep that died. If any of the three strategies were adopted as suggested by Mr O'Brien he would have achieved more than adequate compensation as a result of the exploration on his land.

In his final submission Mr Moore indicated that not only should there be no further compensation payable, but that Mr O'Brien should be obliged to pay the costs of the mining company on this application.

In his submissions Mr Dwyer put to the court that at the time of the last hearing for compensation, matters could not possibly have been contemplated at that particular time and consequently the full picture was not able to be put before Mr McMahon. He submitted that cattle and sheep were not sold because of the drought, but merely because of the situation in which Mr O'Brien found himself because of the activities of the mining company. In relation to the $20,000 that was paid pursuant to the agreement which is exhibit 7, it was submitted that clearly $15,000 of that was for legal costs of Mr O'Brien. He makes reference to the fact that Mr Ackhurst makes mention of that figure being quoted. He further submitted that Mr O'Brien is a prudent farmer and that I ought to accept his opinion that it would not be reasonable to plough up paddock at that particular time for the purposes of sowing oats. He further submitted that feeding by hand was really not an option to his client at that particular time, it is only the fact that Mr O'Brien was unable to plant on paddock 5 at that particular time in February that Mr O'Brien has suffered the loss which he alleges.

Section 276 of the Mining Act, 1992, provides:

> *(1) If, after an assessment of compensation has been made, it is proved to the satisfaction of a warden:*
>
> *(a) that the whole of the amount paid into court under this part has been duly paid out; and*
>
> *(b) that further compensable loss has been caused, or is likely to be caused, in respect of the land to which the assessment relates, or to other land,*

the warden must, on the application of any of the parties concerned assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.

Section 262 of the Act provides:

"compensable loss" *means loss caused, or likely to be caused, by:*

(a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations; or

(b) deprivation of the possession or of the use of the surface of land or any part of the surface; or

(c) severance of land from other land of the owner or occupier of that land; or

(d) surface rights of way and easements; or

(e) destruction or loss of, or injury to, disturbance of or interference with, stock; or

(f) *damage consequential on any matter referred to in paragraph (a) - (e), but does not include loss that is compensable under the Mines Subsidence Compensation Act 1961.*

On 10th January, 1995, the former Chief Warden, in granting the Final Access Arrangement, included the following in regard to compensation:

> (f) The holder shall pay or cause to be paid to the owner or occupier compensation in the following terms:-
>
> (i) for each Caldweld drill hole, $100.00.

(ii) for all other matters coming with the definition of "compensable loss" as in Section 262, $500 for every week or part thereof.

(iii) for the need by the landowner to inspect and supervise the activities of the holder, $1000 as a single and once only payment.

Compensation for these activities to be paid at the end of each week, the first payment to also include the payment as in (iii) above.

From the evidence before me, I accept that the only reason the mining company entered into the agreement of 24th February, 1995, was to circumvent further unnecessary delays in their exploration program with the threat of Mr. O'Brien appealing the Warden's decision as to compensation. Part of that agreement is:

"Clause f (ii) of the Wardens determination is to be varied to read as follows:-

(ii) For all other matters coming with the definition of "compensable loss" as in Section 262:

A The holder agrees to pay the owner a lump sum amount of $20,000 payable $10,000 on the first day the owner grants access and $10,000 on the completion of testing within the 50 day period set out in paragraph B".

Notwithstanding Mr. O'Brien's opinion as to what sums amounted to compensation and what sums were for other items, such as his legal costs, I accept that all monies (excluding the money paid for the sheep that were killed when they fell in the holes drilled by the mining company) that were paid to Mr. O'Brien were paid pursuant to either the determination of the Warden or the agreement between the parties and that such money was for "compensable loss". The amount was in total $32,500.00.

As seen above, S.276 is applicable when "further compensable loss has been caused". Mr. Moore submitted that this application was merely a "re-hash" of the matters placed before the Warden on the previous occasion and Mr. O'Brien is merely attempting to obtain a greater amount of compensation than that granted, or simply, this is an attempt by Mr. O'Brien to appeal the decision of 10th January, 1995. Mr. Moore submitted that S.276 was only to be used in those instances where unforeseen or unusual circumstances arose in the exploration program that may not have been foreseen in the original application.

If I am to understand the applicants view, it is that on the prior occasion, matters put forward under S.262 necessitated a degree of speculation as to the loss "likely to be caused". What is being put to me now is a figure which allegedly is the actual loss caused.

It is my view that the provisions of S.276 is in the Act for the very purpose of giving the landowner compensation which is a more accurate figure, determined after the event has occurred (in this instance).

Consequently, the entitlement to Mr. O'Brien under S.276 by way of compensable loss is the loss actually occasioned over and above the $32,500 already paid to him.

The question to be considered then is whether or not the figures put forward by Mr. O'Brien were in fact a loss which was the result of the exploration activities of the mining company in paddock number 5 from 27th February, 1995 to 1st April, 1995. The other matter is the aspect put forward by the applicant concerning the lowering of the water in the bores. To put this latter matter to rest, I accept the evidence put to me by the mining company's witness, Mr. Hare, in that the exploration activities of the mining company has no effect upon the two bores on Mr. O'Brien's land.

Mr O'Brien's figures are to be compared only to the evidence of Mr. Ivey, who gave evidence that the losses to Mr. O'Brien were the result of drought, the downturn in the cost of stock, etc., and not the result of mining activities. Further, he is not saying that

there is no loss due to mining, but the losses are far less than Mr. O'Brien put to the court.

Mr. Ivey puts forward three possible strategies, of which a prudent farmer ought to have adopted one in the circumstances, to mitigate his losses due to the drilling activities of the mining company. Mr. Ivey was not challenged by way of cross examination, on any aspect of his evidence. I must place considerable weight upon his evidence.

Furthermore, the applicant brings to court no corroborative evidence to support his claims that the downturn on his income was due solely to the activities of the mining company on paddock five for a little over 4 weeks. Indeed, one of his witnesses, Mr Digby, indicated that there is an expectation of a reduction in income in that period due to the drought conditions. To support the applicant's case one would expect it to be a simple task to have a neighbouring farmer, not affected by mining activities, produce evidence of an increase in profits for 1995 and 1996, to the extent that Mr. O'Brien says his profits ought to have increased. If there was such evidence, the court may have been able to place more weight upon the evidence of Mr. O'Brien.

On the evidence before me, I cannot accept that the losses outlined by Mr. O'Brien were as a result of the mining activities undertaken on his land. I accept unreservedly, the evidence of Mr. Ivey as to the strategies that ought to have been adopted by Mr. O'Brien to mitigate his loss. I cannot accept that a landowner is entitled to sit back and do nothing to maintain his income whilst some 4 weeks of exploration is being undertaken upon his land, and then simply claim all losses upon the mining company.

If the most expensive strategy outlined by Mr. Ivey was adopted by Mr. O'Brien, then his maximum loss would have been $10,690.00. Mr. O'Brien has already been compensated to the amount of $32,500, clearly there has been no further compensable loss caused, and no further compensable loss likely to occur.

Mr. O'Brien cannot succeed in his application.