WARDEN'S COURT
New South Wales
Goulburn

Jurisdiction:	Mining
Parties:	Big Island Mining Limited
	v.
	Caloola Holdings Pty. Limited
File number:	2006/36
Hearing dates:	6,7th April 2006 at Queanbeyan;
	19th June 2006 at Goulburn
Date of Decision:	20th June 2006
Mining Warden:	J. A. Bailey, Chief Mining Warden
Representation:	Mr. L. Moore Solicitor for Applicant
	Mr. W. Royds Solicitor for Respondent

Reasons for Decision

1 The application before the court is one for compensation assessment under the provisions of Division 1, Part 13 of the Mining Act 1992. The relevant sections of the Act are set out at the conclusion of this decision. Mining Lease 103 was granted on 15 December 1975 and has been renewed until 14 December 2027. The lease area comprises of 13.10 hectares and is part of land that is owned by Caloola Holdings Pty Limited. Documents have been tendered to the court which indicate that compensation agreements/access arrangements have been entered between the various persons/companies which have held ML 103 and relevant landholders in past years.

2 The Respondent Company denied the applicant mining company access to the property when the most recent agreement expired on 31 January 2006.

3 A view of the site was conducted when the court first sat on 6 April 2006. It was apparent from that view and evidence which followed, that the current occupiers of the land are very concerned about the state in which the site has been left over the years by various holders of ML 103. There is no dispute that many of the complaints about the condition of the site were occasioned by previous leaseholders. However, exhibits 12 and 13 list matters of complaint that have arisen since June 2004 and a lot of court time was taken up with these issues.

4 It was on 7 April 2006, during the cross examination of Mr. Stephen Royds, the property manager for the Respondent Company, that the court first became aware of some of the matters which are relevant to assist the court in assessing compensation. Many of the answers given by Mr. Royds was from his memory, without reference to any documentation. The cross examination of Mr. Royds did not conclude on 7 April 2006 and the case was adjourned for further evidence on 19 June 2006.

5 During the period of adjournment, Mr. Moore issued subpoenas upon the Respondent, requiring the production of documents, no doubt in an attempt to place concrete evidence before the court as to "compensable loss" by the Respondent. A dispute arose between the parties concerning the production of those documents. Documentation subject to a subpoena was never presented to the court by Mr. Moore. However, Mr. Stephen Royds did submit, on 19 June 2006, certain documents (exhibits 44) indicating the price

obtained for certain stock sold on dates between October 2005 and 1 June 2006. I will refer to this evidence later.

6 Upon returning to court on 19 June 2006, Mr. Moore sought and was granted leave to re-open the applicant's case and called "expert" evidence from Mr. Richard Ivey, an agricultural consultant and accountant. The report of Mr. Ivey was marked exhibit 45 in the proceedings. The report was prepared without the author having access to the property "Caloola"; he was assisted by oral and written advice, together with aerial photographs. The court was informed that there was no response to the four requests to allow Mr. Ivey upon the property for the purposes of preparing a report. The lack of some detail pertinent to "Caloola" became one of the focal points of the cross examination of Mr. Ivey.

7 The Respondent did not put a precise figure to the court as to what likely "compensable loss" will be occasioned to the landholder from the mining activities upon ML 103. It was submitted on the respondent's behalf that the court should rely upon the evidence of Mr. Stephen Royds, who is the only one with expertise in respect to the property "Caloola". The difficulty with that submission is that only figures of some sales have been presented to the court, no other figures as to expenditure were tendered. I assume the submission is calling upon the court to substitute some figures in Mr. Ivey's report for those of Mr. Royds and then the court make an assessment of compensation greater than that nominated in Mr. Ivey's report.

8 Mr Moore submitted that compensation should be assessed in accordance with Mr. Ivey's report. It is abundantly clear that the most thorough estimation of the likely "compensable loss" is the report of Mr. Ivey. The document concentrates on the economic loss of the respondent due to the unavailability of the land for grazing. The accuracy of that report was the subject of cross examination and a matter to which I must now refer.

9 The cross examination of Mr. Ivey honed in on Table 1 of the report. Following upon that and on the evidence in reply by Mr. Stephen Royds, I accept that the rainfall in the area around "Caloola" is greater than that at Braidwood as set out on Table 1 of the report. However, notwithstanding that Mr. Ivey conceded that yearly fertilisation will

assist growth for grazing, he did not concede that the extra rainfall would necessarily change aspects of his report.

10 A great deal of time was spent cross examining Mr. Ivey on Table 2 , the dry sheep equivalent (dse) and the "gross margins" for "Caloola". On a number of figures, relevant to "Caloola" in the 1970's, given to Mr. Ivey, he calculated the dse per hectare to vary between 22 to 31. On page 7 of his report, Mr. Ivey based his determination upon the average carrying capacity of ML 103 to be 3.32 dse per hectare. However, when pressed to calculate a gross margin in respect of cattle being sold for a specific price, Mr. Ivey indicated it was a complicated process that would take about a half hour, and he would need records from the property, it could not be calculated just on one sale price. He went on to explain that there may not necessarily be a greater gross margin simply because a higher price has been obtained; accompanying a higher price is generally higher commission and other expenses which must be considered. He did not concede that the gross margin, in respect of the high price received in one instance, would be greater than the gross margin quoted in Table 2.

11 Questions were also raised with Mr Ivey about his assumption as to density of timber and shelter belts on the property. That, as well as other aspects of cross examination, made it clear that his report would have been more precise if he had access to the property and records. However, as noted on page 4 of his report, it is stated: *"There may be some inaccuracies within this map as the features have not been 'ground truthed' by a property inspection."* Evidence from Stephen Royds was that the pasture on "Caloola" was of a superior quality than on other properties within the region, that his father, due to his illness, had understocked the property for at least the last 10 years.

12 The conclusion which one must arrive at following all of the evidence, is that although there may possibly be a variation of the "gross margins/dse" in respect of table 2 of the report of Mr. Ivey, had Mr. Ivey had access to the property and records, nothing has been put to the court to indicate the estimation of "compensable loss" in the report, exhibit 45, is not accurate. Consequently, I can only assess compensation on that basis. I emphasise here that Mr Ivey was of the opinion ML 103 occupied 12.4 hectares, whereas it in fact occupies 13.1 hectares. That, according to Mr. Ivey, would mean an increase of about 5% on his estimation of loss. I will take that into account.

13 Another ground of compensable loss referred to by the respondent was loss of an area of grazing land surrounding the perimeter of the mining lease. It was put to the court that stock would not go within 50 to 100 metres of the perimeter, consequently the grass, by not being eaten would then sour and would not be available to stock for the duration of the mining lease.

14 In responding to that, Mr Ivey indicated that in his experience cattle are not kept away from mining areas and they will graze up and even stretch under the fence to obtain feed. He cited examples in the Hunter Valley where he has seen this happen. He said that cows were domesticated animals and were not put off by the presence of humans or machines.

15 I am not convinced on the evidence produced to the court that the Respondent is entitled to compensation for loss of an area of up to 50 to 100 metres outside the perimeter of the mining lease area.

16 Mr. Stephen Royds put evidence before the court as to the estimated cost in erecting a fence around the mining site. He tendered a document he prepared, giving an estimate of about $15,000 for material for such a fence; he informed the court in evidence that the labour for erection would be about the same cost as the material. In other words, he was seeking a further $30,000 compensation for the erection of a fence around the mining lease area.

17 In response to that claim, Mr. Moore referred to Section 76 *Mining Act 1992* submitting that it is the leaseholders discretion as to whether or not a lease is to be fenced. However, subsection 2 provides that it is mandatory for a leaseholder to fence the area if requested by the landholder in writing. It was put to the court that it is the intention of the leaseholder to fence this area in due course.

18 No matter whether a fence is erected on the leaseholders volition or whether it is erected following a written request of the landholder, the cost of that fence is to be borne by the leaseholder. It is not a matter that comes within the ambit of "compensable loss". The applicant is aware however, that whilst having a view of the area, concerns were raised by the respondent as to the suitability of some of the fencing that has been erected around a shaft on the site. Claims being made that the fence was not "calf proof" when

initially constructed. One would expect that if the leaseholder does fence off the lease area in the near future, that care will be taken to ensure such fence adequately keeps out stock of all kind.

19 To conclude, figures have been put to Mr. Ivey concerning stocking of "Caloola" in the 1970's. Those figures saw Mr. Ivey increase the dse for those years. Unfortunately, the court has not the advantage of a dse based upon current stocking figures. In an attempt to increase the "gross margin" for "Caloola", figures of the sale of some stock was given to Mr. Ivey and he was unable, in the time and with the information he had, to calculate a "gross margin" for that sale price. I note that the price was from exhibit 44. That exhibit which has a high price per head of $944.53, also includes a figure as low as $459 per head and various prices in between. I have not calculated the average. One can understand however, that for Mr. Ivey to calculate a "gross margin" based upon a "one off" price per head, would give an artificial figure.

20 Although I cannot accept that an increased dse from the 1970's would be applicable today, I do accept that, on the evidence before me, that the dse used by Mr Ivey to calculate the expected loss for "Caloola" could have been in the higher range than the 5 that he used. I propose to utilise the dse range of 5 – 15 as mentioned on page 7 of his report. I do not however, move away from the maximum "gross average" of $30.44 which he used for his calculations. Although there is mention in the report of a possibility of sheep being grazed in future, I shall maintain the higher "gross average" which is applicable to "heavy feeder steers".

21 What I propose to do is to utilise the calculations of Mr. Ivey, both for the area covered by ML 103 and the southern area of the "rabbit paddock", but substituting 13.1 hectares for ML 103 in lieu of the 12.4 hectares [thus giving an accurate figure, rather than an increase of "about 5%]. I have calculated a figure for those areas based upon the maximum and minimum dse [5 and 15, as per footnote which appears on page 7 exhibit 45]. I have then averaged those figures to come up with a sum of money which I have assessed as the compensable loss to "Caloola" in respect of ML 103. Based upon those calculations, a compensable loss is arrived at for the area covered by ML 103 to be $2,476.32 and the area covered by the southern portion of the "rabbit paddock" to be $907.86. That amounts to a total of $3,384.18 per annum.

22 As with all compensation assessments under Part 13 of the Mining Act 1992, it is a calculation based upon expected loss. If it transpires that the compensation I have assessed is insufficient, the respondent has the right to apply for additional assessment pursuant to the provisions of S.276 Mining Act 1992.

23 Accordingly, compensation in respect of ML 103 is assessed at the rate of $3,384.18 per annum, payable by the applicant to the respondent. Such payment is to be paid within 28 days.

24 Set out hereunder, is the relevant sections of the Mining Act 1992:

262 Definition

In this Division:

"***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 landholder, 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 *Mine Subsidence Compensation Act 1961*.

265 Compensation arising under mining lease

(1) On the granting of a mining lease, a landholder of any land (whether or not subject to the lease) becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the lease.

(2) The holder of a mining lease may agree with a landholder as to the amount of compensation payable, but an agreement reached is not valid unless it is in writing, signed by or on behalf of the parties to the agreement.

(3) If a valid agreement is not entered into under this section within such period as may be prescribed by the regulations, the holder of a mining lease, or a landholder of land, may apply to a warden to assess the amount of compensation payable, and a warden is to assess the compensation payable.

(4) The holder of a mining lease is not authorised to exercise any rights under the lease on the surface of any part of the mining area unless the amount of any compensation payable to a landholder under subsection (1) in respect of that part of the mining area is the subject of a valid agreement or of an assessment made by a warden.

276 Additional assessment

(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.

(2) If it is proved to the satisfaction of a warden:

(a) that an access arrangement does not make provision for or with respect to compensation, and

(b) that compensable loss has been caused, or is likely to be caused, in respect of the land to which the arrangement relates,

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.

(3) If it is proved to the satisfaction of a warden:

(a) that the whole of the amount assessed by or in accordance with an access arrangement determined by an arbitrator as referred to in section 140 (b) has been paid in accordance with the arrangement, 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.

(4) A warden's decision on such an application has effect as an assessment of compensation under this Division.

(5) In making an assessment of compensation, a warden must have regard to any agreement between the parties concerned as to the compensation payable.

76 Fencing of land subject to mining lease

(1) The holder of a mining lease may fence the whole or any part of the mining area.

(2) The holder of the mining lease must erect and maintain a fence around any unfenced shaft, machinery or other works on the surface of the mining area if required to do so by notice in writing:

(a) given by the landholder of the land concerned, or

(b) in the case of Crown land (within the meaning of the *Crown Lands Act 1989*) for which there is no landholder other than the Crown—given by the Minister.