NEW SOUTH WALES

ARBITRATION OF ACCESS TO LAND*

Halfpenny Investments Pty Ltd v Sydney Gas Operations Ltd (Case No 2003/44 in the Mining Warden's Court, Application for review of arbitrator's final determination pursuant to section 69R of the *Petroleum (Onshore) Act 1991* concerning PEL 2 (Chief Mining Warden of NSW, 20 January 2004))

Definition of land – Improvements to property – Compensation

Sydney Gas Operations Limited (SGO) is the holder of Petroleum Exploration Licence 2 (PEL 2). The area covered by this licence included the property belonging to Halfpenny Investments Pty Limited (Halfpenny). The *Petroleum (Onshore) Act 1991* (POA) prohibits SGO from conducting prospecting operations on the Halfpenny property without an agreed access arrangement or an access arrangement determined by an arbitrator. An access agreement was not agreed to by Halfpenny despite extensive negotiations and the matter was referred to an arbitrator in accordance with Part 4A of the POA.

The arbitrator determined an access arrangement and Halfpenny lodged an application for review of that determination pursuant to section 69R of the POA. The grounds of review by Halfpenny included an argument that the arbitrator had had no jurisdiction to make the determination because of the provisions of section 72 of the POA. The Department of Mineral Resources sought, and was granted, leave to appear as an interested party on this point.

Section 72 provides:

> "(1) The holder of a petroleum title must not carry on any prospecting or mining operations or erect any works on the surface of any land: …
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> > (c) on which is situated any improvement (being a substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work, or other valuable work or structure) other than an improvement constructed or used for mining or prospecting operations,
>
> except with the written consent of the owner of the dwelling-house, garden, vineyard, orchard or improvement …"

Halfpenny submitted that because there were improvements on its property the arbitrator had no jurisdiction to determine the matter without their written consent. These submissions were based upon an interpretation of the term "land" in section 72 of the POA such that if there was an improvement on a part of a "lot" the entire "lot" could not be subject to prospecting or mining operations (without landholder consent) and not just the "footprint" or area of the improvement. In support of this they relied on the Court of Appeal decision in *Kayuga Coal Pty Ltd v Ducey*[1] which considered the interpretation of section 62 of the *Mining Act 1992* (a section similar to section 72 of the POA) and in particular the meaning of the term "improvement".

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1 (2000) NSW CA 54.

The Department of Mineral Resources and SGO argued that the term "land" in section 72 was used in a physical or topographical sense. The argument was based upon the definition of land in the POA which states that it includes "land covered by water" and the fact that any other interpretation would make a number of sections of the POA redundant. *North Sydney Council v Ligon 302 Pty Ltd*[2] was also relied upon to support this interpretation, the High Court having held in this case that the term "land" under the *Environmental Planning and Assessment Act 1979* referred to "land" in a topographical sense and not as a bundle of rights.

On this preliminary point the Warden found in favour of the DMR and SGO and held that section 72 only prohibited exploration "*on the land on which that particular improvement is located* or within the distance specified in section 72, without the written consent of the landholder" (emphasis added).

Following this preliminary decision and as required by the POA, the Warden went on to hear the matter of access and compensation *de novo*.

Submissions to the Warden included reference to a number of cases decided in the Land and Environment Court regarding section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*. However, the Warden distinguished these cases and found that they were "compensating individuals in respect of entirely different circumstances" and would only be referred to by the court if there was no other relevant material available.

The Warden made particular reference to *Tregoyd Gardens Pty Ltd v Jervis and Anor*[3], a case concerning section 88K of the *Conveyancing Act 1919* and the granting of an easement, including compensation in consequence of this grant. In this case compensation was awarded for this "blot on title" and Halfpenny sought similar compensation. The Warden rejected this argument and stated that Halfpenny would only be disadvantaged if they sought to sell the land while the title was still current and to compensate them for this would be unjust enrichment.

The Warden conducted a view and heard various submissions and evidence, including valuation evidence from experts for both SGO and Halfpenny. Matters considered mainly focused on section 109(1)(f). The Warden stated that it "is usual in matters of this nature, having regard to what appears to be the use to which Halfpenny utilises this property, that information is placed before the court as to a sum of money which would be the expected loss caused to the landholder by the deprivation of the use of the surface of that part of the land which is subject to the roads and well sites which are to be utilised by the mining company." In this regard the Warden determined the compensation "in accordance with rental values put to the court." It is worth noting that in this case the amount of compensation determined by the Warden on this basis was significantly lower than the amount originally offered by SGO. The Warden was of the view that the original amount offered was not necessarily the correct one and may have been inflated compared to real value due to the fact that "the offeror, if there is an agreement, will not have the delay, inconvenience and legal expense of taking the matter to court."

This case may be interpreted as giving a message to landowners that there is merit in many cases in negotiating an out of Court agreement with the petroleum entity, rather than testing the matter in the Warden's Court.

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2 (1996) 137 ALR 644.

3 (1997) 8 BPR 15,845.