QUEENSLAND

COMPENSATION*

Re Queensland Gas Company Ltd & CA Apel [2005] QLRT 25 (Koppenol P)

Petroleum lease – compensation – whether existing right to compensation under 1923 Act

Background

This was an application to determine a preliminary question of law. The lessee intended to drill a number of wells and carry out other activities but had not yet commenced operations.

In October 2004 the lessee applied to the Tribunal for a determination of compensation payable to the landholder under the *Petroleum Act 1923* (the 1923 Act). On 1 January 2005 significant amendments were made to the 1923 Act and the *Petroleum and Gas (Production and Safety) Act 2004* (the 2004 Act) came into operation.

The question

The 2004 Act included an enlargement of compensation payable to landowners as compared with the 1923 Act. As to which legislative scheme was applicable, the 2004 Act (s 922) relevantly provided that if "a right, under the former 1923 Act compensation provisions, to compensation existed immediately before the 2004 Act start day" compensation was to be determined under the 1923 Act. Thus, the question was whether the landholder had an existing right to compensation immediately before the commencement of the 2004 Act.

The landholder submitted that the right to compensation arose only upon the lessee's entry upon the land to conduct authorised activities. This was said to follow from various provisions of the 1923 Act which required compensation to be paid for the "occupation" of the land to be used.[1]

The lessee contended that the landholder's right to compensation was an inchoate or contingent right that arose either upon the grant of the lease or the filing of the application for determination of compensation. The effect of occupation of the land was said to be to make the compensation quantifiable.

On the landholder's approach no right to compensation existed immediately before the commencement of the 2004 Act and compensation would have to be determined under that Act. On the other hand the lessee's view that a right to compensation arose at least as early as the filing of an application with the Tribunal meant compensation should be decided under the 1923 Act.

Decision

The Tribunal referred to *Resort Management Services Ltd v Noosa Shire Council*[2] where the Queensland Court of Appeal distinguished between a mere prospect or hope of compensation and

---

* Matt Black BA, research officer to the presiding members, Queensland Land and Resources Tribunal.

1 *Petroleum Act 1923*, ss 88(3), (4), 99.

2 [1997] 2 QdR 291 (CA).

an inchoate or contingent right to compensation. Koppenol P observed that there was no statutory provision conditioning the acquisition of the right to compensation on the occupation of the land by the lessee. There was no indication in the 1923 Act that compensation could not be determined before occupation and the wording of s 99(1)(b) supported the view that compensation could be awarded prospectively.

Koppenol P held that at least as early as the application to the Tribunal for determination of compensation, the landholder no longer had only a prospect or hope of compensation but rather had an inchoate or contingent right to compensation (albeit subject to quantification). Thus, compensation was to be determined under the 1923 Act.

Re Anglo Coal (Moura) Limited and Broad [2005] QLRT 34 (Windridge MR)

Mining lease – determination of compensation – appeal against determination

Background

The miners had been granted an additional surface area of 83 hectares of land situated about 10km east of Moura. The area covered the landholder's entire lot. There was no residence on the property, but a small grazing operation was being conducted. Valuations were prepared on behalf of both the miners and the landholders.

Assessment of compensation

The landholder's valuer assumed that the land would be lost for the 15 year term of the lease and concluded that a valuation of $2,700 per hectare was appropriate. The miner's valuer suggested total loss might be avoided if rehabilitation takes place after 4 or 5 years and that a valuation of $2,500 per hectare should be adopted.

The *Mineral Resources Act 1989* s 281(4)(e) provided that an additional amount of at least 10% should be allowed to reflect the compulsory nature of mining leases. The miner's valuer assumed a figure of 10%, whereas the landholder's valuer argued for a 25% additional amount due to fast rising rural property values and a lack of similar properties being available.

The mining referee preferred the assumption that the land would be lost for the totality of the lease term because even if the land was rehabilitated in 5 years the landowners would be "long gone from the property". He preferred the valuation of $2,500 per hectare and found no special or unusual circumstances to justify an additional amount of more than 10%. Compensation was determined at $247,550.

Appeal

The landholders sought to appeal against the mining referee's determination. A preliminary point as to whether the appeal was properly instituted was heard by the President.[3] Koppenol P

[3] *Broad v Anglo Coal (Moura) Ltd* [2005] QLRT 45.

observed that although the mining referee's determination was made on 16 March 2005, the decision was subsequently amended pursuant to the 'slip rule'[4] on 4 April 2005.

An appeal against the mining referee's determination required that notice be served on the mining registrar within 20 business days of the compensation decision. The landholder lodged an appeal on 6 April but failed to serve notice on the mining registrar until 20 April. The landholder argued that the 20 day time ran from the date of the amendment of the original decision and so service on the mining registrar was in time. The miner contended that the time for appeal commenced with the original decision and so service was out of time.

Following *Denmeade v Stingray Boats*,[5] Koppenol P held that the time for appeal commenced on the date of the original decision, not the amendment of the decision. The appeal was therefore out of time and there being no facility for an extension of time it was struck out. The failure of the landholder's solicitors to properly institute the appeal caused the miner to incur expenses that would not otherwise have arisen. The President held that this amounted to special circumstances justifying an order that the landholder pay the miner's costs. [6]

Re Tipperary Oil & Gas (Australia) Pty Ltd & JM Guthrie [2005] QLRT 70 (Koppenol P)

Petroleum authority – determination of compensation – duty to mitigate damages

Background

The applicant miner sought a determination of compensation payable to a landholder under section 533(1) of the *Petroleum and Gas (Production and Safety) Act 2004* (the Act). The miner had conducted seismic survey work on the landholder's property at Injuner.

After receiving a written notice from the miner setting out the work that was intended to be undertaken, the landholder decided to move cattle to another property some distance away. In doing so, various expenses totalling $4,140 were incurred.

Compensation claims

The liability to compensate a landholder is set out in s 531 of the Act. In this case, the parties accepted that the compensation to be assessed fell only within the heading of "consequential damages the eligible claimant incurs because of … any cost or loss arising from the carrying out of activities under the petroleum authority on the land" (s 531(2)(b) & (5)(e)).

The landholder submitted that her compensatory damages were for the $4,140 cost of moving and agisting her cattle away from the area of the seismic survey work. The landholder made the decision to move the cattle based on her "personal knowledge of anticipated consequences of seismic works being carried out near these cattle".

---

4 *Uniform Civil Procedure Rules 1999*, r 388(1)(b); *Land and Resources Tribunal Act 1999*, s 65(1).
5 *Denmeade v Stingray Boats* [2004] FCA 1503, [22]–[24].
6 *Land and Resources Tribunal Act* s 50: costs only available in special circumstances.

The applicant submitted that it had not been necessary for the landholder to remove the cattle from the property and that the landholder failed to mitigate her losses in that she did not make any enquiries about the need to move the cattle. The miner proposed compensation of $357.50.

Decision

The Tribunal observed that a person claiming damages has a duty to take *reasonable* steps to mitigate the loss,[7] and that damages are recoverable only if they were *reasonably* incurred.[8] Thus, the question for the Tribunal was whether it was reasonable for the landholder, upon receipt of the notice and without contacting the miner, to have decided to move the cattle.

Koppenol P was unable to accept that the landholder's actions were reasonable. It was held that all the landholder "needed to have done when she received the notice was to pick up the telephone and ask the applicant's representative precisely where on her property was the work to be done and precisely what were they going to do". There was no evidence that the work undertaken would have had any negative effect on the cattle.

The Tribunal determined compensation in the sum of $357.50.

Armstrong v Brown [2005] QLRT 73 (Koppenol P, Windridge MR & Mr R Wright)

Mining lease – appeal against determination of compensation – costs

Background

This was an appeal under s 282 of the *Mineral Resources Act 1989* (Qld) (MRA) against a determination of compensation made by Kingham DP.[9] At first instance, the landowners sought $192,845 and the miner argued for that $38,775 should be awarded. The landholders were awarded $89,466 and appealed.

Compensation

For the landholders, it was submitted that the Deputy President's determination was in error in a number of areas. It was said that she should have accepted their valuer's opinions and approach to assessing compensation. However, counsel for the miner argued that although the landholders referred to "complaints" about Kingham DP's decision, they failed to demonstrate why that decision should not stand or why the valuer's evidence should have been accepted.

Koppenol P explained that when the basis of an appeal is that the original decision-maker has erred in various respects, it is necessary to point to the particular finding or conclusion which is in issue and explain why it is erroneous or mistaken. He rejected the landholder's contentions, finding that Kingham DP's reasons were "comprehensive and compelling" and that no error had been demonstrated.

---

7 *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 658.
8 *The Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 86, 127, 141.
9 *Brown v Armstrong* [2005] QLRT 18; see "Recent Developments" (2005) 24(1) *ARELJ* 13.

Valuation fees

The landholders also argued that Kingham DP should have allowed their valuation fees as part of the compensation. Koppenol P rejected that submission. Referring to High Court[10] and Queensland Court of Appeal[11] authority, he held that valuation fees are incurred in preparation of a claim not as a consequence of the grant of the mining lease.

Costs

Costs in the Tribunal are usually only available in special circumstances.[12] However, the miner sought costs under s 282(5) of the MRA, which in compensation appeals allows the Tribunal to order costs as it thinks fit. The President explained that, consistent with the approach of the Court of Appeal,[13] the specific costs provision of the MRA prevails over the general costs provision.

The appeal was dismissed with costs.

SOUTH AUSTRALIA

NATIVE VEGETATION REGULATIONS – SIGNIFICANT ENVIRONMENTAL BENEFIT*

Recent rounds of consultation by Primary Industry and Resources South Australia and the Department of Water, Land and Biodiversity Conservation with stakeholders on developing guidelines for defining what is a significant environmental benefit, have failed to settle guidelines which are acceptable to the mining and petroleum industries. Presently, mining and petroleum companies are left to contend with requirements which are not tailored to the resources industry.

Exemption for Mining

In the last few years the South Australian State Government has implemented a number of programs designed to effect a more stringent approach to the protection and conservation of native vegetation.

One of the programs involved amendments to the *Native Vegetation Act 1991*. Previously, operations subject to the *Mining Act 1971* and the *Petroleum Act 2000* were exempt from the provisions of the *Native Vegetation Act 1991* through the *Native Vegetation Regulations 1991*. The exemption was such that the clearance of native vegetation for operations under those Acts did not require the approval of the Native Vegetation Council (NVC).

---

10 *Minister of State for the Army v Pacific Hotel Pty Ltd* [1944] StRQd 112, 119, 120, 122, 129.
11 *Sullivan v Oil Company of Australia (No 2)* [2004] 2 QdR 105, 116.
12 *Land and Resources Tribunal Act 1999* (Qld) s 50.
13 *Land and Resources Tribunal v Schmidt & Ors* [2005] QCA 195.
* Andrew Corletto, Partner and Nick Karagiannis, Associate, Kelly & Co Lawyers