IN THE MINING WARDEN'S COURT
AT MOSS VALE

J A BAILEY, CHIEF MINING WARDEN

THURSDAY 27 AUGUST 1998

CASE NUMBER	PARTIES	CAUSE OF ACTION
1997/47	David John Andrewartha Laurel Andrewartha v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/48	David John Andrewartha Laurel Andrewartha v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/49	Betty May Chapman Tom Chapman v. BHP Steel (AIS Pty Ltd	Application to Assess Compensation
1997/50	Betty May Chapman Tom Chapman v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/51	Caroline Graham v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/52	Caroline Graham v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/53	Shirley Kelly George Kelly v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/54	Shirley Kelly George Kelly v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/55	Errol Jackson Williams v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/56	Errol Jackson Williams v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/57	Leonard Michael Williams Denise Ann Williams v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/58	Leonard Michael Williams Denise Ann Williams v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/63	Dareon Brotherhood of Australia Limited v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/64	Dareon Brotherhood of Australia Limited v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction

HEARING DATES: 9th to 13th March 1998
16th to 19th March 1998
26th May 1998

JUDGMENT

There are two sets of separate actions before the Court. Firstly, there is a request by 7 Applicants for assessment of compensation under the provisions of Section 265 of the Mining Act 1992. Secondly, there are 7 complaints claiming damages and injunctions against the defendant company.

In respect of the first action, appropriate legislation is Section 265 of the Mining Act 1992 which states:

265 Compensation arising under mining lease

(1) On the granting of a mining lease:

(a) the occupier of any Crown land, and the owner and any occupier of any private land, subject to the lease, and

(b) the owner and occupier of any private land, and any occupier of any Crown land, not subject to the lease,

become entitled to compensation for any compensable loss suffered, or likely to be suffered, by them as a result of the exercise of the rights conferred by the lease.

(2) The holder of a mining lease may agree with an owner or occupier 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 an owner or occupier 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 an owner or occupier under subsection (1) (a) in respect of that part of the mining area is the subject of a valid agreement or of an assessment made by a warden.

As to what constitutes compensable loss, the following definition appears in Section 262:

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 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 *Mine Subsidence Compensation Act 1961*.

Under the Mine Subsidence Compensation Act, the Mine Subsidence Board has the responsibility of compensating any landowner whose improvements on land or household effects are damaged by mines subsidence. Contributions are made each year by leaseholders to enable the Mine Subsidence Board to pay such compensation. Consequently, if a leaseholder has paid its contributions and complies with the terms of the lease it cannot be liable for any damage, as outlined in the Act, occasioned by subsidence. However, it would appear that if damage is caused as a result of negligence of the leaseholder, the leaseholder becomes liable for such negligence. If illegal mining operations are undertaken by a person and it is necessary for payments to be made by the Board for subsidence, the person or company performing the illegal

mining operations becomes liable to the Board for the amount of compensation it has paid.

None of the damage alleged in the claim before me come within the scope of the Mine Subsidence Compensation Act 1961. Consequently the proviso in S.262 need not be further considered.

Section 272 of the Act states:

272 Assessment of compensation

(1) The assessment of compensation payable under this Part:

(a) must be made in the manner prescribed by the regulations, and

(b) must not be made until notice in the approved form:

(i) has been published in a newspaper circulating generally in the State and in one or more newspapers circulating in the locality in which the land concerned is situated, or

(ii) has been served on each person who appears to a warden to be interested in the assessment, and

(c) must not exceed in amount the market value (for other than mining purposes) of the land and the buildings, structures and works situated on the land.

(2) Any compensation agreed on or determined under Subdivision B of Division 3 or Division 5 of Part 2 of the *Commonwealth Native Title Act* for essentially the same act as an act in respect of which compensation is to be assessed under this Part must be taken into account in the assessment of compensation for the act under this Part.

Regulation 38 states:

38 Assessment of compensation: section 272

For the purposes of section 272 (a) of the Act, the prescribed manner of assessing compensation is by making an assessment that has regard to the following factors:

(a) the nature, quality, area and particular characteristics of the land concerned.

(b) the proximity of the land to any building, structure, road, track or other facility.

(c) the purpose for which the land is normally used.

Concerning the second action, the Complainants seek remedies at common law and rely upon Section 296 of the Mining Act, 1992, for jurisdiction: in particular Section 296 (e) and (k).

296 Jurisdiction of Wardens' Courts

A Warden's Court has jurisdiction to hear and determine proceedings relating to any matter outlined in sub-sections (a) to (u). Sub-sections (e) and (k), which are relevant for these proceedings, provide that:

(e) any demand for debt or damages arising out of prospecting or mining, or...

(k) trespass or encroachment on, or injury to, land as a result of prospecting or mining.

They claim the damages under the following headings:

- Private nuisance
- Public nuisance
- Negligence
- Trespass to land
- Exemplary damages

Furthermore, there is a claim that an injunction should be granted to prevent any mining in the area by the Defendant company. (The power of a Warden's Court to grant an injunction is outlined in Section 312 of the Mining Act 1992).

The claims have been itemised in a document marked exhibit 3 - it is convenient to set that exhibit out below for simplicity.

Address Claimed pursuant to Mining Act/ Complaint & Summons	Compensation for loss in market value of property only[1] s 265	Damage to land s 265	Damage to river bed s 265	Damage consequential to damage to river bed (decrease in water quality, gas emissions) ($10,000.00 each) s 265	Inability to swim, canoe, fish, drink from river, camp ($10,000 each) Complaint	Danger from rockfalls Complaint	Death of vegetation s 265	Fumes, foul odours s 265	Danger from gas igniting Complaint	General loss of amenity including loss of conservation values Complaint	Exemplary damages Complaint	Total[2] ($)
140 Douglas Park Dr S & G Kelly	$70,000	20,000	20,000	20,000	40,000	20,000	15,000	15,000	20,000	20,000	30,000	290,000
270 Douglas Park Dr T & B Chapman	$75,000	20,000	-	20,000	40,000	20,000	-	15,000	20,000	20,000	30,000	260,000
314 Douglas Park Dr EJ Williams	$60,000	20,000	20,000	20,000	50,000	20,000	15,000	15,000	20,000	20,000	30,000	290,000
330 Douglas Park Dr LM Williams	$10,000	-	-	50,000	50,000	20,000	-	15,000	20,000	20,000	30,000	215,000
340 Douglas Park Dr D & L Andrewartha	$60,000	20,000	20,000	20,000	40,000	20,000	15,000	15,000	20,000	20,000	30,000	280,000
360 Douglas Park Dr The Dareon Brotherhood Ltd	$110,000	20,000	20,000	20,000	50,000	20,000	15,000	15,000	20,000	20,000	30,000	340,000
10 Carra Avenue Caroline Graham	$95,000	20,000	20,000	20,000	50,000	20,000	15,000	15,000	20,000	20,000	30,000	325,000

1 This amount does not include loss of personal amenity for the Complainants or Economic Loss which may have been suffered. The Valuation is based on the professional assessment of AT Cocks Property Valuers.

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- The Complainants are the owners of land which is alleged to be affected by mining activities of the defendant company.
- All of the Complainants, except L M & D A Williams are the registered proprietors of land having riparian rights over the Cataract River.
- All of the Complainants allege the effects of the mining have interfered with their enjoyment of their land.
- The Complainants have no commercial use for the water in the Cataract River. It is used by them for recreational purposes only.
- There is no dispute that the Defendant company is the holder of a lease entitling it to extract coal from an area which includes certain portions beneath the Complainant's land.

The Defendant company has made the following admissions:

> "BHP admits for the purposes of these proceedings only that there has been subsidence caused damage to parts of the land in the gorge which entitles the complainants owning such land in the gorge to fair compensation under part 13 of the Mining Act 1992 (NSW).
>
> In particular (and this varies between complainants whose land is in the gorge):
>
> 1. Subsidence has caused cracks to appear on parts of that land and in a number of rock pools which has caused increased drainage from some of those pools;
> 2. Subsidence has caused gas to be released in a number of places on that land, the likely source of which is strata between approximately 200 - 350 metres below the surface (but above the mining operations) which gas releases each last for about 6 - 12 months;
> 3. Subsidence has caused there to be an increased risk of rock falls on some land in the gorge which was already subject to such a risk before mining operations began."

The Defendant maintains that not all of the problems in the Cataract River are the result of mining, - rather that the creation of a pumping station at Broughtons Weir by Sydney Water and dry weather conditions are contributing, to a significant degree, to the lack of water in the river.

In order to succeed on the claims before the court and on the assessment of compensation, it is necessary for the Complainants to establish, in the first instance, the condition of each of the subject properties prior to any mining. That condition is to be compared with the present, post mining condition and to establish on the balance of probabilities whether there is, in each case, a compensable loss as well as an entitlement to the common law damages as claimed.

The position of pre-mining has been put to the court by each of the complainants, perhaps a brief summary of the evidence of the Complainants will appropriately outline their case in that respect.

Summary of Evidence of Complainants

George Stanley Kelly - 140 Douglas Park Drive, Douglas Park.

The Kelly residence is 25 metres from the gorge, with a land title to the centre of the Cataract river. It was purchased in 1977, due to the idyllic surrounds. No mining was taking place when it was purchased; the river at that time was flowing and clean. The Kelly's regularly took their children and friends to the river to swim and fish.

Bushwalks can no longer take place, due to danger from falling rocks. It is doubtful whether any fish are left, if any, there is a fear that they would not be fit for consumption. Mr. Kelly first noticed die back of vegetation in early 1996. The river has now dried up, rockfalls are imminent and to go near the gorge is risky. There has been a rockfall for a width of 100 yards on the property. There is a presence of foul odours and algae and the Kelly's have been deprived of the use of the Cataract River.

Under cross examination it was ascertained that:

- there has never been gas emissions on this land
- odours only occur rarely and only when the wind is in a certain direction and then it is very faint.
- the odour could have been something other than from the gas emission.
- the river did not run in the drought time of the 1970' and 1980's.
- if there is no overflow of the Weir, the river didn't run.
- the only affect the gas has upon his land is the danger of it being ignited and creating a bushfire.
- he was not claiming the possibility of spontaneous ignition.

In giving evidence of recalling a pumping station being built on the Weir in 1993/4; and that no water came down the river at all during that time, Mr. Kelly was asked:.

Q. That had nothing to do with the BHP? A. Not at that time.

Q. Without extensive large regular flows from the weir, the river has not had the depth that it had in the 1980's? A. Right, but it always had water in the pools.

Under cross examination Mr. Kelly stated: *"We never had trouble until they built the pumping station."* He was then asked:

Q. And BHP did not build the pumping station? A. No

Q. Do you agree it is not BHP 'S problem? A. Not in my section of the river.

Concerning the aspect of odours, the following exchange took place:

Q. You claim $15,000 for the rare occasion you have a foul smell? A. No

Q. That would be ridiculous claim? A. Yes.

Shirley Joan Kelly - 140 Douglas Park Drive, Douglas Park

Mrs Kelly gave evidence that when she purchased the property with her husband they knew the mine was planned for the area. The property was purchased due to the idyllic surrounds. Upon purchasing, the river was used for swimming and fishing and bushwalking in the surrounds with children and friends. These activities can no longer be undertaken. The water quality makes it dangerous to swim in the river, there is very little aquatic life left in the river and if there are any fish, they would not be fit for consumption.

Rockfalls commenced 2 to 3 years ago. "Die back" of vegetation was first noticed in 1996.

The condition of the river has worsened in the past 12 months. Due to the rockfalls it is risky to go into the gorge at any time.

Thomas George Chapman - 270 Douglas Park Drive, Douglas Park

Although owning the property with his wife since 1971, they have only lived there permanently since 1995. Between 1971 and 1995, the property was used as a weekender. On weekends and school holidays, the activities enjoyed would be swimming, picnicking, walking, visiting the caves, barbequing and rock climbing. *"The title we had on the property meant we owned our own rocks pools and swimming holes."*

No longer can swimming in the river take place because it is too polluted. There can be no walking in the area due to the danger of falling rocks. The admiring of the scenery is dependent upon the waterflow, which in recent times is non-existent.

Loss of water was noticed in October, 1995, together with loss of aquatic life in the river. The growth of algae deposits in the river was noticed, with the prevalence of foul odour. There is a concern the gas emissions may ignite and cause bushfires. As a result of the changes in the river the children or grandchildren are not allowed to use the river.

Under cross examination, it was ascertained that:

- the residence is 350m from the gorge.
- there were no fumes in the house, only down at the river bed.
- the odour was for a period of 4 to 5 months.

> *Q. So you are claiming $15,000 for smells that lasted 5months and you could only smell it down at the river bed? A. Yes*

He admitted he was not making a claim for $15,000 for gas emissions, notwithstanding it was clearly outlined in exhibit 3, but states that some of the claims for other matters should be more.

Q. You agree that a fair compensation from the BHP is the difference between what it is worth today and what it would have been if there was no mining? A. Yes, that is part of it ... it does not compensate me for the loss of the river.

He admitted that he has never used a canoe in the river and that it has been many years since he has camped down in the gorge; although he sees no reason why his grandchildren should not be able to enjoy the benefits of the gorge if they so desire.

Betty May Chapman - 270 Douglas Park Drive, Douglas Park

The wife of Thomas George Chapman, her evidence in chief was basically the same as her husbands. Under cross examination she states that she stopped using the river about March 1997. In addition to the loss of value of the land, she is seeking damages for the destruction of the environment and damage to *"our fun and recreation"*.

Errol Jackson Williams - 314 Douglas Park Drive, Douglas Park

This witness has long ties with the Cataract river. He has lived at his current address for 50 years, with his maternal grandmother acquiring properties on the river at the turn of the century. He has personally owned the land for 29 years. He was raised on the river with his siblings and the Cataract River was his recreational playground. He gave evidence of his fondest memories with his father on the river.

He gave evidence of his son going fishing in 1994 and coming home to tell him that all the fish were dead.

He smelt gas in the area. The gas flows in the upper reaches of the river has stopped, but is still flowing on the lower reaches.

Under cross examination Mr. Williams indicated that he was not able to specify dates, *"I'm hopeless with dates"* and consequently could not accurately place dates upon various events he detailed in chief. The odour he gave evidence about, he admitted, could have been caused by something other than gas. Mr. Williams admitted that

while there has never been any gas smells on his land, there is some cracking of the river bed and the cliff face directly under what he called "lookout rock"

Leonard Michael Williams - 330 Douglas Park Drive, Douglas Park

Mr Williams has personally owned the property for 31 years. He is the only complainant whose property does not abut the Cataract River; although it is part of a subdivision of a block which does abut the Cataract River. Leonard Michael Williams, a brother of Errol Williams, has lived in the area since a child and has raised his own children in the area. He gives evidence of the fond memories he has as a child growing up in the area of the Cataract River. *"In those days we used to swim in the river, canoe, fish, camp, picnic, cave, walk, admire the scenery and drink from the river."*

When the land was subdivided for sale, he purchased his lot from his mother, because he knew and loved the property so well. *"I knew that it was the greatest place in the world to bring up children."* He expected his grandchildren to also enjoy the benefits of living on the river.

He first noticed damage in the river approximately 4 years ago, when the river ran completely dry. He noticed large cracks in the river bed 2 years ago, with gas emissions, foul smelling odours, the growth of algae and the death of aquatic life.

He no longer allows his family to use the river due to the dangers involved since the changes have occurred. Furthermore, he anticipates the problems within the river will continue, or increase, following the commencement of longwalls 14 and 15. He has been deprived of the opportunity of seeing his grandchildren enjoy the environs of the Cataract River.

Under cross examination, it is evident that this witness, due to the location of his property, does not have the same problems as other complainants, in that his land does not abut the gorge at all, he has no view of the gorge, he cannot smell any gases from his land, there is no danger of rock falls on his land, there is no die back or any dead vegetation visible from his land.

Denise Ann Williams - 330 Douglas Park Drive, Douglas Park

This witness is the wife of Leonard Michael Williams. She describes the use of the river prior to damage being occasioned and how to be in the gorge was like being a thousand miles from anywhere. She expresses her sadness that the river will never ever be as it was.

Evan Bekiaris

This witness, a chartered accountant, is the company secretary for the complainant Dareon Brotherhood of Australia Ltd. The properties, 360 Douglas Park Drive, Douglas Park, consists of three lots, were purchased by the complainant in 1979 for recreational purposes by members and friends of their club. It was utilised by the members who engaged in recreational activities in the river and enjoyed the sounds of running water, wildlife and the extensive water views.

The witness says these activities are no longer possible, due to the deterioration in the river. Members of the club no longer use the river for recreational purposes and some members have been frightened from attending functions because of the gas emissions and the associated risk.

It is the opinion of this witness that the Cataract River has become worse in the past 12 months. Noticeable is the cracking of the riverbed, gas omissions, rockfalls, the growth of algae and the death of aquatic life.

Members are inquiring as to the sale of part or all of the property.

David John Andrewartha - 340 Douglas Park Drive, Douglas Park

Mr. Andrewartha has been for over ten years the owner, with his wife, of the subject property. Evidence is given of activities he would frequently engage in down at the river - swimming, picnics, walks, visits to the caves, barbeques and rock climbing. The motivation behind purchasing the property was the natural beauty of the area and the fact that they would own their own rock pools and swimming holes. Children were taught to swim in the river and one spot has been named after a daughter.

Since the damage, it is impossible to pursue any activity in the river - the river is too polluted to swim, it is too dangerous to walk because of the rockfalls.

Under cross examination he admits there has been no gas emissions on his property.

Laurel Eva Andrewartha - 340 Douglas Park Drive, Douglas Park

Mrs Andrewartha is the owner of the subject property with her husband. Her evidence supports her husband as to activities in the river and the problems noticed in recent years.

Caroline Vernon Graham - 10 Carra Avenue, Douglas Park

This witness has been the owner and occupier of the property since 1970. The property consists of two lots, lot 1 has buildings etc. constructed thereon, lot 2 being entirely native bushland. The Cataract River forms the rear boundary of both lots. There are extensive views of the gorge from the timber decking located outside her lounge room.

She used the river, with her children, for camping, barbeques, swimming and canoeing in the river. She recalls it was well stocked with aquatic life, the water was fit to drink, it was like her own private river and wilderness - a beautiful and peaceful environment.

Towards the end of 1996, she noticed that the river had dried up. There was algae and orange deposits on the river bed. In early 1997 she noticed gas bubbling in the river and foul odours apparent in the vicinity of the river. Later vegetation on the side of the river was noticed, dying and dead fish were seen in the river.

The river can no longer be used as before, there is the danger of pollution and injury from rocks that may fall in the area.

She is further concerned about what will occur when the defendant company commence further longwall mining in the area.

The defendant company had made an offer for her to sell her property, she declined the offer.

When cross examined about the number of times she would use the river, the witness replied that it depended upon the seasons - once per week or every couple of months. When asked whether the offer by BHP to purchase the property ($370,000) was the value that had been placed upon her property by two independent valuers, she replied that the sum was the "rock bottom".

THE CONDITION OF THE CATARACT GORGE PRE MINING

In addition to oral evidence of the Complainants, some family photographs were tendered to the court which assisted to paint a general picture of the condition of the river, prior to mining.

The Cataract River has never been, in the time relevant to these proceedings, a river which consisted of water wall to wall in the gorge, other than in times of flooding. The usual condition of the river was a series of water holes in the rock bed of the river. These water holes (rock pools) were connected by slow flowing, narrow bodies of water. Water was clean and potable and the river provided aquatic life. Users of the gorge were not confronted with the fear of falling rocks.

THE CURRENT, POST MINING CONDITION OF THE CATARACT GORGE

Expert evidence was given to the court by witnesses called by both parties. The evidence was received from William Meynick, Dr Phillip Pels, Mr M B Wald and Mr D R Warry. Evidence consisted of outlining the effect of long wall mining upon the gorge: the cracking of the river bed, the emission of gases, the collapse of cliff faces, the dying of vegetation. Opinions were expressed about the path water now takes in the river: the reasons for lack of aquatic life, the length of time gases will continue to be emitted, the effect of future mining upon the gorge.

Concerning that evidence, on the balance of probabilities, I find the following facts, which are in addition to the admissions made by the Defendant company:

- **Gas emissions.** The emissions are the result of mining subsidence. Such emissions are estimated to last 6 to 12 months, in some areas the emissions have ceased.
- **Oily Scum on water.** The evidence was insufficient to satisfy this court that mining is the cause of the scum.
- **Algae in water.** Algae in water forms naturally. In the Cataract River mining has contributed indirectly to the algae, in that the mining has caused cracking which in turn has increased the ground water flow. The ground water flow has lowered oxygen levels. Such low oxygen levels contribute to the creation of algae.
- **Water quality.** The quality depends heavily upon the water discharged from the weir. The extent to which mining contributes to the low oxygen levels in the river could not be ascertained. The low oxygen levels contributed to the fact that the Lower Cataract River does not meet the ANZECC freshwater Ecosystem, Recreational or Drinking Water Criteria.
- **Cliff stability.** Sandstone cliffs in some areas of the gorge are naturally unstable, however, mining has caused rock falls and has increased the likelihood of rock falls. Rock falls have occurred on Kelly's property, the Dareon property and in an area between the Andrewartha and Dareon properties.
- **Vegetation die back.** This has clearly been the direct result of mining. However, none of the Complainants have vegetation die back upon their land. It can be viewed from some of the properties.
- **River levels.** There is a correlation between the mining and the river level. Cracks in the river bed caused by mining have resulted in water seeping below the river bed; consequently there is a lack of water, on occasions, in areas which form part of the land of some Complainants. Up to 5 megalitres per day is lost to ground water, volumes in excess of that figure remain as surface water. There is no loss of water from the river itself, as the water which seeps through cracks will resurface downstream.
- **Aquatic life.** Evidence was insufficient to determine whether contamination from mining caused a loss of aquatic life in the Cataract River. The lack of surface

water is a contributing cause of the lack of aquatic life; to that extent mining has contributed to a lack of aquatic life in the river.

CLAIMS FOR ASSESSMENT OF COMPENSATION UNDER SECTION 265

The thrust of the submissions by the Defendant company is that Section 265 is to cover all aspects of compensation which arise out of the circumstances created in the Cataract River Gorge. In particular reliance is placed upon the definition of "compensable loss" in Section 262 which includes in paragraph (f) "damage consequential on any matter referred to in paragraphs (a) to (e)." It is argued, inter alia, by the Defendant company that Section 296 (e), (k) may be an avenue for a claim for damages in those instances where mining takes place without an authority; as Section 265 is contingent upon "the granting of a mining lease". Consequently, all compensation must be granted under Section 265 and no other damages may be awarded.

It is argued on behalf of the Defendant company that in granting a mining lease to BHP, the Minister was aware of the creation of subsidence as the coal was extracted by the longwall process. Furthermore it is a condition of the lease that the coal is to be extracted in that manner. The authority for the BHP to extract coal was granted no doubt on the basis that if any subsidence created damage to any private land or structure, that the individual would be able to be compensated under the provisions of Section 265 of the Mining Act 1992 or alternatively under the provisions of the Mine Subsidence Compensation Act 1961. As I said earlier, the Mine Subsidence Compensation Act 1961 need not be considered in this case.

The claims under Section 265 are based upon, inter alia, the loss in value of land since damage has occurred due to mining. Three witnesses were called to give evidence on the land valuations.

The Complainant brought an expert, a Mr Blackwell, to the Court to give evidence as to evaluation of the properties in question prior to mining and post mining. A similar exercise was undertaken by two expert valuers produced by the Defendant company, they being Mr Graveur and Mr Nicholson. Paragraph 5.5.2 of the Defendant

company's submissions incorporates a table of the summary of evaluation evidence. It is a convenient table which I reproduce here.

Summary of Valuation Evidence

	Graveux - Ex 52			Nicholson - Ex 53			Blackwell - Ex 42		
Complainant	Before	After	Loss	Before	After	Loss	Before	After	Loss
Kelly	300	275	25	290	260	30	350	280	70
Chapman	320	310	10	300	295	5	370	295	75
Williams (EJ)	230	220	10	260	255	5	300	240	60
Williams (L)	230	230	0	200	200	0	210	200	10
Andrewartha	250	240	10	260	250	10	310	250	60
Dareon	615	575	40	700	675	25	580	470	110
Graham	420	385	35	420	400	20	480	385	95

These three experts whose evidence is critical concerning the claim were subjected to cross examination for a considerable time. All three give three separate varying valuations concerning the subject properties. However, Mr Blackwell who gives evidence for the Complainant gives figures which are drastically greater than those figures produced by the two experts who gave evidence for the defence. The written submissions by the Complainants highlight what they perceive to be salient points from the evidence of their expert witness, but do not analyse that evidence with the evidence of the two experts produced by the defence. This analysis was attended to by Mr A Shand QC when he was speaking to the submissions on 26th May 1998. The written submissions by the defence analyse in some detail the evidence of the three experts on valuation, highlighting salient points from the experts produced by the defence and highlighting what the defence perceive to be flaws in the valuation of the properties produced by Mr Blackwell.

In all matters other than the property which does not have a river frontage, Mr Blackwell reduced the values of each property by 20%. This was a criteria which was not supported by the other expert witnesses.

The following submission was put forward by the Defence:

> " Mr Blackwell's adoption, (with the exception of the property of Mr Mike Williams) of a 20% diminution across the board method of comparing the before and after value of the Complainants' properties, cannot be reconciled with proper valuation methodology, the facts or the evidence of the market. Mr Blackwell's use of this 20% diminution factor was most clearly shown as inappropriate when he was confronted with his valuation of the Chapman's property. There is no discernible physical damage to, or impact on it particularly in comparison with Ms Graham's property to which he applied the same factor".

The defence further submit: "As Mr Graveur said, the damage to each property is different. An assessment of the diminution in value due to that damage should vary accordingly."

Of the three Valuers who gave evidence, Mr Graveur is the only Valuer who has extensive local knowledge. The aspect of such extensive local knowledge in itself supports submissions that some weight is to be given to his evidence.

The property of L M and D A Williams has been distinguished from the other properties by all three experts. The reason being that the property does not have direct access to the gorge. The gorge cannot be seen from that property.

Mr. Graveur when giving a valuation, included in the after figure, the loss of amenity to the land. Also considered was diminution as the result of environmental alterations to the general area.

Mr. Graveur and Mr. Nicholson, who was also called on behalf of the defendant, both placed less value upon the river than did Mr. Blackwell, the expert called on behalf of

the complainants. Mr. Graveur was questioned about this when he was giving evidence:

> *"There are a number of people who would find the availability of the river attractive. There would be a sector of the real estate market that would enjoy that environmental advantage there. But I find there is also a very large sector of real estate market that would be happy to buy property in Douglas Park Drive that back onto the river for completely different reasons. They would have other usage's of the property."*

He cites the Kelly's, who breed dogs and have an ideal property for any potential sale to a dog or animal breeder. The attraction is that the size and isolation from other residences generally comply with council regulations concerning the breeding of animals. Consequently, this property would have a greater attraction to animal breeders than a property which may be used for recreational purposes, due to its location.

Mr. Graveur compared sales in the general area, of properties that do not back onto the gorge, to ascertain that the problem caused by mining in the gorge has had no general affectation on prices of properties in the area. *"And the ability to fish on their land must be relevant to some of those purchasers that you are putting yourself in the shoes of? A very small percentage, in my experience, would attribute value to a property because of the ability to fish on it."*

David Blackwell outlines in his statement, exhibit 42, *"Our assessment does not include an allowance for loss of personal amenity and is limited to loss in the current market value of the subject properties."*

Concerning the property of L. M. Williams, he states: *"Whereas properties which have direct access to the gorge had a 20% diminution in value...as there is no direct access but due to its proximity to the recreational and scenic features of the Cataract River, therefore a reduction in value of $10,000 or 5%".*

When Mr. Nicholson gave his evidence about the existence of a 50m to 80m gorge at the back of the properties, he said: *'The access difficulty if it is at all possible, with initial descent and subsequent assent to the freehold ownership area of individual properties in the gorge, is not seen as a particular or significant item of purchaser attraction."* And *"The existence of what many persons would see as an unacceptable danger along the cliff/escarpment edge would deter many prospective buyers".*

Specifically in respect of the land of L M & D A Williams, he states: *"The claimant's reference to value diminution arising out of mining activities and their alleged effect on the gorge and river does not transfer to this property because the benefit of the gorge does not attach to it."*

The defendant submits that all the experts overstate the diminution in value of the complainants properties caused by BHP'S mining. They have assumed that all the damage has occurred as the results of mining by BHP. It is submitted that the absence of flow in the river is, as a matter of practical reality, due to the non release of water from Broughton Weir and the drought. There is an admission as to some damage due to mining.

The Complainants submit the Court should accept the valuation placed upon the properties by Mr Blackwell.

Of the three experts on valuation, I accept the evidence given by Mr Graveur as being the diminution in value to the properties.

By what manner is quantum determined in respect of matters outlined in S.262 of the Mining Act, 1992?

The only way the loss under S.262 may be determined in respect of these matters, is the loss in market value of each claimant's land. Support for that proposition comes from *Minter v. Eacott (1952) 69WN93*, where Owen J said:

> *"In dealing with this count the learned District Court Judge appears to have considered that the value of the plaintiffs land before and after the subsidence*

was quite irrelevant. In that respect I think he was wrong...the diminution in value caused by the subsidence which in fact took place is an appropriate measure of damages, although a diminution of value caused by fear of future subsidence is not recoverable."

All three valuers took into account the provisions of S.262 when considering the loss in market value. That being so, the court in accepting the loss in value of the land is then confronted with additional claims by the complainants under S.265, which are outlined in exhibit 3 as being:

- Damage to land
- Damage to river bed
- Damage consequential to damage to river bed
- Death of vegetation
- Fumes, foul odours.

The defendant submits that there is double counting in exhibit 3. "The land is worth less because of all of the various aspects of damage proved to have been suffered due to mining. One can not recover that loss and then seek to recover extra money (under Part 13 or at common law) for the component item which that loss reflects." The submission then cites a passage from *Livingstone v. Rawyards Coal Company (1880) S App Cas 25 at p41.3-4*: *"....when you took away the coals that were below the land, that the surface of the land would come down, you must not take the sum which would be given as compensation for the injury to the surface twice over."*

Accordingly, the complainants are not entitled, after being given a sum for diminution in the value of the property, to a further sum for those matters claimed under S.265 as outlined above.

In assessing quantum, the defendant company submits that not all of the difficulties occasioned in the Cataract gorge have been created by mining. This is correct. A deduction must be given for the extent to which drought and non release of water from Broughton Pass Weir have contributed to the problems within the gorge.

There was no discharge of water at all from Broughton Pass Weir between May and December, 1997. (There have been occasions in recent times, when water has been released on request and appropriate payment from BHP. This contributes to the lack of water in the river. However, also contributing is the weather; lack of rain, leading to drought conditions, will naturally contribute to the lack of water in the river.

So there are three factors which contribute to the shortage of river water:

1. *mining activities*
2. *failure to release water from Broughton Pass Weir*
3. *lack of natural water in the river catchment area downstream from Broughton Pass Weir, due to weather conditions.*

What would be the position in the river if factors 2 and 3 were present and not 1? The evidence is insufficient to come to an exact conclusion. The evidence is that upon a flood release from the weir, the water disappeared within 2 days. Notwithstanding, there is no total loss of water in the river, as Mr Shand Q C strongly submitted to the Court, it is the loss of water from the water holes which would not occur but for the mining. Mining clearly must have a significant role in relation to the existing condition of the river. Weather conditions and the failure to release water from the Weir must have an impact upon the river conditions; however, that impact is subordinate to the impact made by mining.

In considering what post mining value to place upon each property, one of the factors Mr. Graveur considered was the damage to the land. In each of the properties, excluding L. M. & D. A. Williams, he cited the loss of water from the river. He also cited other aspects of damage which were peculiar to each property, in most instances, those other aspects generally were a direct result of mining. Part of the reason for the loss of water in the river is a combination of weather conditions (lack of rain) and the non release of water from Broughton Pass Weir. Although mining activities play a major role in the lack of water, some proportion of harm must be attributed to the other two factors.

In apportioning the role that mining has affected the river, the court is obliged to arrive at a figure which is just and equitable in the circumstances; all of the causes must be considered before apportionment is made. Apportionment is always a question of fact - each case must be considered on its own merits. Accordingly, I have assessed mining activities contributing to the problems to the extent of 80%, with the weather and lack of water release 20%.

Therefore, compensation is assessed under Section 265 of the Mining Act, 1992 as follows:

Case 1997/47	**D. J. & L. Andrewartha**	**$ 8,000.00**
Case 1997/49	**B. M. & T. Chapman**	**$ 8,000.00**
Case 1997/51	**C. Graham**	**$28,000.00**
Case 1997/53	**S. & G. Kelly**	**$20,000.00**
Case 1997/55	**E. J. Williams**	**$ 8,000.00**
Case 199757	**L. M & D. A. Williams**	**$ nil**
Case 1997/63	**Dareon Brotherhood of Aust. Limited.**	**$32,000.00**

CLAIMS FOR DAMAGES UNDER S.296

NUISANCE

Concerning the claim for damages for nuisance, both public and private, cases were cited by both the Complainants and the Defendant, notwithstanding the Defendant submits there is no right to claim common law damages. I will refer to some pertinent cases.

In *Halsey v. Esso Petroleum Co Ltd (1961) 2 All ER 145*, there was consideration of liability in nuisance for noise of tankers on a highway as to whether or not that constituted public or private nuisance. I note some of the comments made by Veale J in his decision:

> *"If a person makes an unreasonable use of the public highway, for instance, by parking stationery vehicles on it, a member of the public who suffers special damage has a cause of action against him for public nuisance."* And further: *"In the particular circumstances of this case I do not think that it*

matters very much whether one regards the alleged nuisance by vehicular noise as a private or a public nuisance."

His Honour quotes from Devlin J in *Southport Corporation v. Esso Petroleum Co Ltd (1954) 2 All ER 571*:

"It is clear that to give a cause of action for private nuisance the matter complained of must affect the property of the Plaintiffs. But I know of no principle that it must emanate from land belonging to the Defendant."

From the authorities, it would appear in the circumstances of the damage occasioned to the Cataract River, if such damage constitutes a nuisance, there is a blurred line separating the nuisance into the category of private or public.

It is submitted by the Complainant that in *Kent v. Cavanagh (1973) 1 ACTR 43 at 54*, it was decided that in some circumstances, interference with the use and enjoyment of a public park or reserve, or the ecology thereof, may constitute a public nuisance. To correctly quote Fox J in respect to that comment the report states: *"I do not doubt that in some circumstances interference with the use and enjoyment of a public park or reserve. ....."*. That case did in fact decide that in the circumstances of the facts surrounding the matter *"the evidence fell far short of what would be necessary to establish that the proposed tower would be a public nuisance as being offensive to the sight"*. There are two other portions in the judgment given by Fox J which may be pertinent in this case: *"For the Defendants it is submitted that the alleged consequences cannot constitute a nuisance, but that in any event, the Defendants cannot be made liable in respect thereof because the work will be done under statutory authority."* And further: *"On the assumption that the work will be justified by statutory authority it becomes impossible to be satisfied to the required degree that an actionable nuisance will occur."*

In respect of the claim for private nuisance, the submissions on behalf of BHP make reference to extracts of decisions of cases such as: *Gartner v. Kedman (1962) 108 CLR12 at p 47.2; Elston v. Dore Gibbs (1982) 149 CLR480 at pp 487.7 - 488; Backhouse v. Bonomi (1861) 9HLC 503; Van Son v. Forestry Commission of NSW*

(1995) 86 LGERA 108 at pp 120.4. The Defendant company, after making reference to various extracts of those cases, submitted that there is no cause of action in private nuisance existing in this particular case. There are no additional damages or causes of action available other than that which is available under Part 13 of the Mining Act 1992.

In respect of the claim for public nuisance it is submitted by the Defendant company that such claim is without any factual basis; no authorities have been cited by the Complainants to show that a cause of action for public nuisance exists, based on damage from subsidence. Furthermore, it is submitted that a defence of statutory authority would be applicable if there were a claim for public nuisance.

On the evidence before the court, I am satisfied on the balance of probabilities that the mining has created nuisance. It is of little moment whether it is private or public nuisance. As to whether the defendant company is liable to the complainants for damages will be considered later in this judgment.

TRESPASS

In respect of the claim for damages for trespass to land the submissions by the Complainants make no reference to what facts are relied upon to establish this particular trespass. It is assumed that they are relying upon the fact that the Defendant company extracted coal from beneath the surface of the Complainants' land.

Reference is made in the submissions to the matter of *Bulli Coal Mining Co. v. Osborne (1899) AC351.* The facts in that case concerned the fraudulent extraction of coal from beneath another person's land. Damages in trespass were awarded against the party which extracted the coal. The successful party was entitled to recover the market value of all the coal worked and gotten from the land.

The Defendant company in its submission on that point cited an extract from the text by John G Fleming "The Law of Torts", Ninth Edition. At page 50 of that text under the heading "Trespass Beneath and Above the Surface" the following appears:

> "Ordinarily, entry underneath the surface at any depth is trespass, unless possession of the surface has been severed from that of the subsoil, as by a grant of mining rights."

That text goes on to cite the decision of *Bulli Coal Mining Co. v. Osborne* as an authority that it is actionable to tunnel into adjoining land for the purpose of exploiting a coal seam.

The circumstances of BHP mining under the Cataract River is quite distinct from the circumstances in Osborne's case. In the present matter before the Court, the Defendant company has the right, pursuant to its lease, to extract that coal from under the surface of the Complainants' land. It is quite clear in the circumstances of this particular case that there is no action available to the Complainants in respect of trespass to their land by the Defendant company.

EXEMPLARY DAMAGES

Under the heading of exemplary damages the following submission is made on behalf of the Complainants:

> "(a) The respondent's conduct in continuing mining activities, the subject of the Complainants' complaint, and in making longwall mining applications in the furtherance of those activities without sufficiently addressing the causes of loss and damage raised in the complaints before the Warden; and
>
> (b) The manner in which the Respondent approached the settlement process provided for by the Act, prior to the hearing of these proceedings;"

was such as to attract exemplary damages to punish the Respondent for outrageous conduct, especially when reckless of the Complainant's rights and motivated by profit making, and for having acted arrogantly and mindful only of its own interest and in contumelious disregard of the rights of the Complainants. Reference is then made to *XL Petroleum v. Caltex (1985) 155 CLR 448* and *Uren v. John Fairfax & Sons P/L (1966) 117 CLR 118.*

Concerning the claim for exemplary damages, the Defendant company outlined in submissions its role in respect of mining this particular area and its role after learning of the difficulties being occasioned in the Cataract Gorge. The company conducted tests and liaised through public forums and attempted to settle this matter before the commencement of the hearing and submits: "There is no basis to punish it (BHP) for its conduct prior to or during these proceedings."

The origins of exemplary damages come from the English law and perhaps initially are somewhat obscure. The House of Lords in *Rookes v. Barnard (1964) AC 1129* restricted the categories in which exemplary damages could be awarded. One category was in circumstances "in which the Defendant's conduct was calculated by him to make a profit for himself which may well exceed the compensation payable to the Plaintiff". The House of Lords noted that the object of exemplary damages was to punish and deter, and as deterrence is logically the function of the criminal law, the Court's discretion to award exemplary damages should be restricted to those categories nominated in *Rookes v. Barnard.*

The Australian courts did not follow a restrictive course that was followed by the English courts. In *Uren v. John Fairfax & Sons Pty Ltd (1966) 117 CLR 118*, the High Court of Australia observed that *Rookes v. Barnard* did not express the law in Australia and should not be followed.

In *Lamb v. Cotogno (1987) 164 CLR 1*, the High Court extended exemplary damages to appropriate cases based upon unintentional wrongs. The High Court made some statements in respect of exemplary damages, one being:

> *"The intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word..... ".*

In *Cullinan v. Urban Transit Authority of NSW*, an unreported decision of Carruthers J of the Supreme Court of NSW 20th December 1991, a Plaintiff was injured when disembarking from a ferry in dangerous conditions. His Honour found that the injury

the Plaintiff suffered was as a result of the negligence of the master in allowing the passengers to disembark when clearly it was not safe to do so, and if exemplary damages were available, the negligence in this instance could not be said to be a conscious wrong doing in contumelious disregard of the Plaintiff's rights. In *Coloca v. BP Australia (1992) 2 VR 441*, O'Bryan J of the Victorian Supreme Court made some reservations in respect to a claim for exemplary damages in actions for personal injury by negligence. His Honour indicated that awards for exemplary damages in negligence actions will be unusual and rare. Furthermore he said:

> *"They can apply only where the conduct of the Defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or as is sometimes put, where he acts in contumelious disregard of the Plaintiff's rights."*

The submissions on behalf of the Defendant company in respect of the claim for exemplary damages is, inter alia, that there is no basis whatsoever to the claims by the Complainants that can justify the punishment of BHP for outrageous conduct, recklessness and arrogance. It is submitted that there is no evidence that BHP has not sufficiently addressed the causes of the present complaints. Evidence indicates that BHP mined at all times only with the considered approval of the Minister and the Chief Inspector of Mines as required by law. BHP has been demonstrated to have:

- investigated the relevant conditions in and around the gorge;
- published reports of findings;
- disclosed its findings and those of its consultants to the Complainants and the public through public forums; and
- offered to settle on fair and reasonable terms in open court, and, earlier, at least with Ms Graham who refused for irrational or political reasons.

In respect to the second basis put forward by the Complainants in relation to the Defendant's approach to settlement, the defence submit that it has been faced by insuperable obstacles to settlement. The submission cites evidence of the cross examination of Ms Graham:

"Do you put yourself forward as a meek little lamb who is prepared to leave everything entirely in the hands of her solicitors, Miss Graham? --- I don't think anyone would say I was a meek little lamb but where it comes to areas of expertise that I'm not acquainted with I have to trust the solicitors we've engaged.

Is not one of the fundamental things you are seeking in this matter an amount, a payment from BHP? --- It's not only that. We do want to bring the whole issue of the river to the attention of everybody and it seems a legal case like this is one of the ways we can go on doing this and that's ---.

That is why you are not the slightest bit interested in settling this case, are you? --- I don't think that's ---

Because you want to bring it to the attention of the media through the court case, that is right, is it not? --- I mean that might be ---.

That is right, is it not?---No. that's not right entirely. That's part of it.

You will not settle this case because you want to run BHP through the court, do you not?-- Well, BHP could have settled it before.

By paying you ridiculous sums of money you would agree?---By paying us something more than generous or slightly generous.

Something more than fair, is that what you say you would be prepared to settle for?--- Well, I'm not qualified to estimate fairness or degrees of fairness. That's why we engaged solicitors. So I really can't answer that kind of question."

The submissions by the defence go on to say that there is no evidence to suggest that BHP has not acted appropriately. It is submitted that the Complainants and their Solicitors have conducted the matter in such a way as to frustrate the possibility of settlement. The submissions go on to cite various instances where the Defendant company indicate there has been a frustration caused as to any possibility of settlement. The defence outline that the Complainants may very well be more interested in collateral issues rather than settling the Complaints before the court. Reference is made to the publicity that was generated over these matters, such publicity at the instigation of the Complainants; even media reports indicate the quantum being claimed well before the court was aware of such amount.

The final submission on this issue by the defence is: "in the circumstances, even if BHP committed any tort, there is no basis to punish it for its conduct prior to or during these proceedings."

In the matter placed before me, I cannot see any basis, on the balance of probabilities, for making any awards for exemplary damages.

NEGLIGENCE

The Complainants submit that the BHP owed a duty of care not to cause damage to their properties - that duty of care was breached when mining continued with the Defendant company well knowing the likely effects of the longwall mining. *Sutherland Shire Council v. Heyman (1985) 157CLR 424* is authority, the Complainants submit, for the proposition that statutory authority is no defence to a claim of negligence. However, that case considered a situation which is quite different from this matter.

After referring to various aspects of evidence before the Court, the Defendant company submitted that there has been no breach of duty of care by the BHP in their mining operations. The submission goes on to cite *Water Administration Ministerial Corporation v. Puntoriero (1997) 42 NSWLR676*, as being the authority for there is no actionable negligence (or other tort) if the statute gives authority for the doing of the very thing which it authorised to be done.

In its submission, the Defendant outlines the awareness that it had as to the possibility of damage and the escape of gas through mining activities. Reference was made to *Wyong Shire Council v. Shirt (1980) 146CLR 40*, wherein Mason J referred to the matters that had to be considered by a tribunal of fact to determine whether there had been a breach of a duty of care - if a reasonable man could have foreseen that his conduct involved a risk of injury, the tribunal of fact must determine what a reasonable man would do. *"The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating*

action and any other conflicting responsibilities which the Defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of responses to be ascribed to the reasonable man placed in the Defendant's position."

The Defendant submits that due to economies of longwall mining, the inability to avoid the risk of gas emissions, the impact on surface flows having regard to the lack of flow in the river due to the pre-existing state of the river and level of flows from the river, that it was reasonable for BHP to do what it did.

A mining company is well aware that mining can cause damage to the properties of others. Acts of Parliament exist which provide avenues for payment of compensation for damages which occur as the result of mining. A lease to mine in this manner was issued to the Defendant company, the issuing authority approved mining under the river and is aware of the problems.

On the facts presented at the hearing, I cannot find that the Defendant company is liable to the Complainants in damages due to negligence.

DAMAGES UNDER S.296 OF THE MINING ACT

Having regard to the facts of the cases before me, the only basis for a claim for damages at common law is a claim for nuisance. Whether or not a party may claim damages under S.296 of the Mining Act 1992, depends upon the interpretation placed upon that section, in particular, sub-section (e).

The defendant company submit common law damages are not able to be awarded under S.296. Reference was made to *Benggong v. Bougainville Copper Pty. Ltd (1971)124CLR47.* In that matter, which was an appeal from the full bench of the Supreme court of Papua New Guinea, Barwick CJ. said at p52:

> *"It is quite clear from a perusal of the Ordinance that if damage done in pursuance of a lease for mining purposes may not be compensated under S.56 there is no provision*

of the Ordinance which gives the person suffering the damage any right to compensation."

After referring to extracts from other judges in that case and to *Project Blue Sky Inc. v. Australian Broadcasting Authority[1998]HCA28* where consideration was given to statutory construction, the defence submit that the complainants are not able to sue in common law; as the Papua New Guinea legislation is similar to the New South Wales Mining Act, 1992. I agree it is similar, but it is not identical. It is the difference, although subtle, which is important in this instance.

Section 56 of the Mining Ordinance of New Guinea at that time stated:

56. *(1) Compensation in respect of prospecting or mining on private land shall be assessed in relation to the following matters:*

(a) *damage to the surface and to improvements on the surface, including crops and economic trees;*

(b) *severance (sic) of the land from other land of the owner;*

(c) *loss of surface rights of way; and*

(d) *all consequential damage.*

This section is allied to the existing S.262 of the Mining Act, 1992 (NSW). It should be considered with the New Guinea Section 68 (which may be compared to the NSW S.296).

68. *Every Warden's Court shall be a court of record and shall have jurisdiction to hear and determine all actions, suits, claims, demands, disputes and questions which may arise in relation to mining or in any way relating to any mining tenement where the land in respect of which any dispute arises is held under this Ordinance....etc.*

Section 56 of the New Guinea legislation provides that compensation shall be assessed in relation to matters specified and for *"all consequential damage"*. The word *"damage"* does not appear in Section 68 of the New Guinea legislation. Section 262 of the N.S.W. Mining Act, 1992, provides for compensation to be assessed for

matters specified and *"damage consequential to any matter"* specified in the section. Section 296 of the N.S.W. Act includes the word *"damage"*.

For these reasons, it seems to me that the New guinea legislation is not similar to the current N.S.W. legislation - consequently, the decision in *Benggong v. Bougainville Copper Pty. Ltd.* cannot support the submission that damages cannot be awarded in the matter before this court.

The defendant company, in support of its submission, put forward the proposition that it is clear from the wording of S.265 of the Mining Act 1992, that the section provides for the granting of compensation when a mining lease is in existence; on the other hand, S.296(e) and (k), which makes no mention of an authority, applies only to those instances when mining has taken place without a lease.

The history of various sections of various Acts should be considered to determine whether the submission that common law damages may not be awarded under Section 296, is correct.

The lease in this instance was issued under the Coal Mining Act 1973. If the Mining Act 1992 had not been enacted, any claim for compensation would be under Section 98 of the Coal Mining Act 1973. The provisions of Section 98(1)(b) of that Act states:

> *Where compensation is by this Act directed to be assessed by the warden the assessment shall... ... ...be of the loss caused or likely to be caused by -*
>
> (i) *damage to the surface of land, and damage to the crops, trees, grasses or other vegetation on land, or damage to buildings and improvements thereon, being damage which has been caused by or which may arise from prospecting or mining operations;*
>
> (ii) *deprivation of the possession or of the use of the surface of land or any part of the surface;*
>
> (iii) *severance of land from other land of the owner or occupier of that land;*

(iv) *surface rights-of-way and easements;*

(v) *destruction or loss of, or injury to, or disturbance of, or interference with, stock on land; and*

(vi) *all consequential damage;*

That section is to be compared with S.262 of the Mining Act 1992, the section under which some of the claims are brought. S.262(f) states: *Damage consequential on any matters referred to in paragraph (a) to (e).* whereas S 98(vi) of the Coal Mining Act 1973 refers to *all consequential damage* thus giving a wider scope, in relation to assessment of damages, than S.262(f) of the Mining Act 1992.

Section 109 of the Coal Mining Act 1973 outlines the jurisdiction of a Warden's Court. Sub-section (e) states: *Any demand for debt or damages arising out of, or specific performance of any contract relating to, prospecting or mining, or to an authorisation or a concession.* The Warden's Court jurisdiction under the Mining Act 1992, is outlined at S.296. Sub-section (e) states: *any demand for debt or damages arising out of prospecting or mining,*

The wording of the sections of the Acts clearly indicate it was Parliament's intention under the Mining Act 1992 to restrict compensation which may be awarded under the provisions of Part 13 of that Act to a narrower field than that which existed under the Coal Mining Act 1973. Matters which previously could be brought under the provisions of Section 98(b)(vi) of the Coal Mining Act 1973 and can no longer be brought under Section 262(f) of the Mining Act 1992, must necessarily be now brought under the provisions of Section 296 of the Mining Act 1992.

I cannot accept the submission from the defence that S.296(e) is restricted to illegal mining. Some subsections of S.296 are restricted to those instances where the land is subject to an authority of claim (see for example, S.296(a), (b), (d)) other subsections are not so restricted. Section 296 of the Mining Act 1992 can refer to damages which are occasioned in those instances where mining is pursuant to a mining lease and also to those instances where mining has taken place illegally.

It appears to be very clear that parliament intended that if damage or loss is occasioned to landowners as a result of mining activities and if compensation is not able to be assessed under the provisions of Section 262 then it is to come under the provisions of Section 296.

THE COMMON LAW CLAIMS

The complainants claim the following under S.296 Mining Act 1992:

- Inability to swim, canoe, fish, drink from river, camp ($10,000 each, i.e. $50,000 for each of four properties and $40,000 for each of three properties)
- Danger from rock falls ($20,000 each property)
- Danger from gas igniting ($20,000 each property)
- General loss of amenity including loss of conservation values ($20,000 each property)
- Exemplary damages ($30,000 each property)

So far as exemplary damages are concerned, I have stated earlier that in the circumstances of the facts before me, the complainants are not entitled to exemplary damages.

Concerning the claim for the danger from gas igniting - I know of no authority where the common law grants damages on the basis of what may occur in the future. Indeed, *Minter v. Eacott* expressly indicates damages are not recoverable on the basis of a fear of future occurrences. And *Darley Main Colliery Co. v. Mitchell (1886)11App Cas 127* is authority for the fact that if future damage (in that case it was subsidence) occurs, that would require a fresh claim for damages. Consequently, there will be no award for damages for "Danger from gas igniting".

The claim for danger from rock falls, although claimed under S.296, has been taken into account by Mr Graveur when he considered the post mining valuation of the properties: *"Risk from an increase in rock falls was also considered."* As this has

been incorporated in the assessment of compensation under S.265, I am unable to make an award for damages under S.296 for the same matter.

I find it hard to distinguish between "General loss of amenity etc" and "Inability to swim, canoe, fish etc". It would be more convenient to place these matters under the one category. It may be that Mr Blackwell, when he referred to the phrase *"loss of personal amenity"*, was referring to the categories "general loss of amenity etc." and "inability to swim, canoe etc." However, that phrase generally is used, in a legal sense, when one loses a limb etc. So as not to confuse these claims with claims for personal injury, it might be better to categorise them with the phrase "loss of enjoyment of the use of land". It is my opinion that damages are available under Section 296 (e) for "loss of enjoyment of the use of land" in the circumstances of the matters before me.

As seen earlier, L. M & D. A. Williams were not entitled to compensation under S.265, principally on the grounds that their land did not abut onto the Cataract gorge and river. If damages are allowed under S.296 to those whose land abuts the gorge and river, what, if anything, allows L. M and D. A. Williams to be awarded damages under S.296, as distinct from any other members of the community?

The complainants submissions refer to *Walsh v. Ervin (1952)VLR361.* It would appear that L. M. & D. A. Williams may be able to claim for nuisance for "particular damage", provided it is appreciably greater in degree than any suffered by the general public. The text *Fleming on Torts* paraphrases that decision in the following way:

> *In order to complain of public nuisance, a private complainant must be prepared to show that he has incurred some "particular" or "special" loss over and above the ordinary inconvenience or annoyance suffered by the public at large.*

Although L.M. & D.A. Williams are occupiers of land which is not physically damaged by the mining operations so far as these claims are concerned, Mr. Williams may be distinguished from the general public in that his relationship with the Cataract

River commenced when he a child and has continued ever since, a period of about 60 years. His family has been connected to the river for 5 generations.

It is clear that L M Williams has developed a recreational affiliation with the Cataract River; from his unique position of the 60 years of his residency and his continual access to the river through his family's ownership of the river facing, adjoining lot. It is for that reason and for that special reason alone that he may be distinguished from other members of the general public.

It is my opinion that this complainant, as well as the other complainants, is entitled to claim under S.296(e) damages for what I have categorised as "loss of enjoyment of the use of land".

QUANTUM

The claims made for what I call "loss of enjoyment of the use of land", is the sum of either $60,000 or $70,000 in respect of each property. That total amount is made up of various sums as outlined above. No evidence was presented as to how the complainants reached those specific sums. The complainants submit: "In addition to physical damage to land and interference with property rights in that land, recovery of non pecuniary losses of a Complainant's subjective experience of past discomfort and inconvenience is allowable and may be regarded as part of the normal measure of damages, with damages for loss of amenity in personal injury cases providing the analogy for the process of quantification".

In a comparatively recent decision of *Von Son v. Forestry Commission of NSW (1995)86LGERA108,* the Plaintiff established that a private nuisance had existed and obtained (a modest amount of general damages - $3,000.00) for past, but not future, loss of enjoyment of the use of her land, but nothing for alleged aggravated damages. In that case the Plaintiff, as the result of pollution to a creek, was unable to pump water from the creek into tanks for domestic use and unable to use the creek for recreation.

In the matter of *Bone & Anor. v. Seale (1975) 1 All ER 787* an appeal was lodged against that decision in granting an amount of money for damages as a result of smell which was occasioned intermittently over a period of twelve and a half years. It was held in the appeal that although there was no direct comparison to be drawn with damages awarded in personal injury cases, the sort of damages awarded in such cases for loss of the sense of smell showed that an amount calculated in the lower court at the rate of five hundred pound a year for nuisance by smell, was out of all proportion to the damage suffered. An appeal was allowed against the quantum, an award of one thousand pounds was substituted.

Stephenson L J said at 793: *"Is it possible to equate loss of sense of smell as a result of the negligence of a Defendant motor driver with having to put up with positive smells as a result of a nuisance created by a negligent neighbour? There is, as it seems to me, some parallel between the loss of amenity which is caused by personal injury and the loss of amenity which is caused by a nuisance of this kind. If a parallel is drawn between those two losses, it is at once confirmed that this figure is much too high. It is the kind of figure that would only be given for a serious and permanent loss of amenity as a result of a very serious injury, perhaps in the case of a young person. Here we have to remember that the loss of amenity which has to be quantified in pounds and pence extends over a long period - a period of twelve and a half years - but it must not take account of any future loss."*

Scarman L J said at 794: *"Six thousand pounds for 12 years discomfort in a matter of smell is out of all proportion to awards for comparable loss of amenity in that class of case...It is not, I think, possible to say we must adopt, or seek to adopt, any rigid standard of comparison between a nuisance case and a personal injury litigation. Nevertheless, overall the law ought to remain consistent when it is dealing with analogous situations."*

In making reference to the facts of the case Scarman L J said at 795: *"There was an intolerable nuisance but it was only a nuisance; it was endured admittedly for twelve years but it was intermittent. Clearly it varied in intensity and sometimes it was*

wholly absent; these variations depended upon the direction of the wind and the change of the seasons."

Ormrod L J said in relation to the question of quantum: *"All one can do in a particular set of circumstances is to look at what sort of figures are awarded in other cases, and in that way get some sense of the order of magnitude which the sum of damages ought to follow, bearing also in mind the question of reasonableness and fairness, which I think in this type of case are extremely important."*

The Complainants submit, under the sub heading of private nuisance: "The principal that a Complainant is entitled to the amount of compensation which will put him in the same position as if he had not suffered the wrong may be given effect in different ways, and a proper assessment is determined by the circumstances of the case and the overriding requirement of what is reasonable."

Part of that statement is an extract of the words used by Samuels J A in the matter of *Evans v. Balog (1976) 1NSWLR 36.* However, that case was considering damages which had been occasioned to a building, not to land per se. Notwithstanding those circumstances, the principle enunciated by Samuels J A is still relevant.

In *Oldham v. Lawson (No.1) (1976) VR 654* it was held:

> *"To establish a nuisance it must be shown that there has been a substantial degree of interference with the enjoyment of the use of the premises." And further "damages for nuisance which does not occasion actual damage to the premises are to be assessed in accordance with the general principle that the sum awarded is to be one which must be regarded as giving reasonable compensation. An element in reasonableness is the fairness of the compensation to be awarded."*

This case involved nuisance by noise. It cited with approval the matter of *Bone & Anor. v. Seale*: From Scarmon L J in that case at 795:

> *"One must bear in mind also a further general principle, that, when one is removed from the world of pecuniary loss and is attempting to measure*

damages for non pecuniary loss, an element in reasonableness is the fairness of the compensation to be awarded. There must be moderation; some attention must be paid to the rights of the offending defendant as well as the rights of the injured plaintiff."

The Complainants have claimed the sum of $10,000 under the heading of "Inability to Swim".

In attempting to gain a comparison with damages awarded in personal injury cases, I referred to the April 1998 edition of Benefits Guide published by Workcover NSW. Under the provisions of Section 66 of the Workers Compensation Act 1987 a maximum amount of $10,000 is provided for in respect of each of the following injuries: Loss of first joint of forefinger of the right hand; loss of 2 joints of middle finger of either hand; loss of a joint of the great toes of either foot; loss of one testicle. Under the headings of, "inability to swim, canoe, fish, drink from river, camp" and "general loss of amenity including loss of conservation values", a sum of $60,000 is claimed in respect of three properties and $70,000 for each of the remaining four properties. Referring to the same guide, those same figures are the maximum payable in respect of the "loss of power of speech", "permanent impairment of the back" and "loss of either leg below the knee". There is provision for the payment of the maximum amount of $100,000 for injuries such as, "permanent brain damage", "loss of sight of both eyes", "HIV infection or AIDS". The lowest maximum payable under that Section is the sum of $2,000 for the "loss of any joint of any toe other than the great toe".

Although these figures are in respect of matters concerning injury under the Workers Compensation Act, it is a statutory figure in which one ought to be able to seek some guidance in relation to quantum concerning damages claims.

Not all of the complainants utilise the river for drinking water, to swim and canoe and fish and camp. Some complainants utilise the river for barbeques, walking, picnics, rock climbing etc. Clearly, some complainants have used the river to a greater degree than others and each has utilised it in a different manner. What is clear is that each

one has suffered a loss of enjoyment of the use of land. The evidence is such that it is really impossible to distinguish one complainants loss as being greater than the other. I propose to award damages in the same sum in respect of each property. I assess those damages in the sum of $10,000.

The defendant company submits that the loss to the complainants is not all the result of the mining activities. I find this is correct. On the same basis as indicated earlier I find 80% is to be apportioned as a result of the mining activities.

Consequently I make the following orders:-

CASE 1997/48	**VERDICT FOR THE COMPLAINANTS IN THE SUM OF $8000**
CASE 1997/50	**VERDICT FOR THE COMPLAINANTS IN THE SUM OF $8000**
CASE 1997/52	**VERDICT FOR THE COMPLAINANTS IN THE SUM OF $8000**
CASE 1997/54	**VERDICT FOR THE COMPLAINANTS IN THE SUM OF $8000**
CASE 1997/56	**VERDICT FOR THE COMPLAINANTS IN THE SUM OF $8000**
CASE 1997/58	**VERDICT FOR THE COMPLAINANTS IN THE SUM OF $8000**
CASE 1997/64	**VERDICT FOR THE COMPLAINANTS IN THE SUM OF $8000**

INJUNCTION

Submissions by the Complainants concerning the imposition of any injunction are scant. Indeed, they rely upon one sentence: "Damages may not be sufficient relief if there is a clear interference with a legal right and such conduct is likely to continue". Reference is then made to *Munro v. Southern Dairies [1955]VLR332 AT 339.* There was no clearly identifiable evidence before the court directed towards the granting of

an injunction. I assume evidence of the possibility of damage occurring further to the properties with the continuation of mining is being relied upon by the Complainants.

This court has on a considerable number of occasions granted injunctions, particularly those sought under the provisions of S.313 of the Mining Act 1992. Without going into the merits of criteria upon which an injunction ought to be granted, perhaps the issue can be disposed of with the same brevity given to it by the Complainants and put succinctly by Mr Rares, S.C. and his junior counsel Mr Parsons, in the written submissions of the defendant company: "There is no evidentiary basis to warrant an injunction".

THE APPLICATION FOR THE GRANTING OF AN INJUNCTION IS REFUSED.