IN THE MINING WARDEN'S COURT
AT RYLESTONE

J A BAILEY, CHIEF MINING WARDEN

TUESDAY 11TH MAY 2004

CASE NO. 2004/2

AUSTRALIAN CEMENT LIMITED	**(Applicant)**
v.	
RICHARD BARRY TROUNSON	**(First Respondent)**
RACHAEL CHARLOTTE TROUNSON	**(Second Respondent)**

APPEARANCES AT HEARING ON 28TH APRIL 2004

Applicant:	Mr L Moore, Solicitor of G P Evans & Englert
First Respondent:	No appearance
Second Respondent:	Appears in person unrepresented

DECISION DELIVERED 11TH MAY 2004

Application for Assessment of Compensation was lodged on behalf of the Australian Cement Limited in respect of the mining company's use of land which is currently held by Richard Barry Trounson and Rachael Charlotte Trounson. The Application for Assessment of Compensation concerns a part of Consolidated Mining Lease No. 12.

The Applicant is relying on Part 13 of the *Mining Act 1992* and in particular Section 262 and Section 265 of that Act.

MINING ACT 1992 - SECT 262

Definition

262 Definition

In this Division:
"compensable loss" means loss caused, or likely to be caused, by:

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

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

(c) severance of land from other land of the landholder, or

(d) surface rights of way and easements, or

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

(f) damage consequential on any matter referred to in paragraph (a)–(e),

but does not include loss that is compensable under the Mine Subsidence Compensation Act 1961 .

MINING ACT 1992 - SECT 265

Compensation arising under mining lease

265 Compensation arising under mining lease

(1) On the granting of a mining lease, a landholder of any land (whether or not subject to the lease) becomes entitled to compensation for any compensable

loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the lease.

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

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

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

BACKGROUND

Full production of the mining company commenced in this area in 1916. The transportation of the raw material by way of ropeway commenced in that year and has continued ever since. The ropeway has been upgraded over the years and this is now the third version which is operating.

The company has held many mining leases and mining purpose leases for its operations over the years. These leases were consolidated into CML 12 in early 2003. The ropeway now forms part of the new CML 12.

It is unknown what compensation arrangement, if any, was in existence in 1916 between the mining company and the then landholder. Company records were destroyed by fire in the 1960's and there has been no payment of compensation since that day. Employees of the company at present are unaware of any details of compensation which may have been paid to the original landholders prior to 1960.

On the 15th July 2002 Richard Barry Trounson and Rachael Charlotte Trounson became joint tenants of a portion of land which is currently traversed by the ropeway. A dispute has arisen in respect of the mining company utilising an access road over the Trounson's property into CML 12. Attempts to negotiate an agreement as to

compensation for that use has been unsuccessful and consequently the matter is before the court.

THE HEARING

The application was heard at Rylestone Court on the 28th April 2004. Evidence was received on behalf of the mining company, as to the need for the mining company to cross a portion of the Trounson's land to gain access to the ropeway which transports the raw material to the processing plant. The ropeway operates for 24 hours a day, 7 days per week and transports the material over a distance of 5 kilometres. The corridor of land over which the ropeway operates forms part of what is now Consolidated Mining Lease No. 12.

Evidence was received that it is necessary to periodically enter the Trounson's property from Bylong Valley Way, cross the property by vehicle for a distance which is less than 100 metres, until CML 12 is reached. The company requires access at this point for the purpose of maintenance and emergency repairs.

The company requires access through this area in a four wheel drive vehicle to carry out routine maintenance "roughly on a monthly basis". Also once per month or once every two months an employee enters the site to inspect the area, with a cable inspection being carried out every quarter.

The steel cables of the ropeway are generally replaced each ten years. There are two separate cables and the replacement is done on each one, five years apart. In other words if cable No. 1 was replaced today, cable No. 2 would be replaced in five years time and five years after that, cable No. 1 would be replaced again.

The replacement of cables requires two, fifty tonne vehicles (cranes), a cherry picker, and vehicles transporting personnel, to occupy this area over a period of seven (7) days. There is generally seven to ten people involved in relation to replacing the ropeway cables and it is generally done in daylight hours. The heavy equipment would stay on the site for the duration of the work program. During the replacement period all vehicles need to cross the "right-of-way" and return. Otherwise vehicles,

except those transporting work personnel, remain in the area which is part of CML 12 for the duration of the replacement period.

Other than the use of the right-of-way for the purposes of replacing cables once every five years, it was estimated by the company that they would use this right-of-way in a four wheel drive vehicle no more than about thirty times per year. Evidence was given that it would be rare for a need to use that particular section to rectify a breakdown. The court was told that there are special sensors in various areas of the ropeway and generally any problems are located and dealt with at either end of the ropeway. Evidence was given that there had been no breakdowns in that particular section for the last twelve months.

So far as the mining company is concerned the area that is traversed as a right-of-way is utilised for grazing cattle and there has been no complaints to the mining company of problems concerning the operations of the company and the cattle grazing.

Exhibit 3 is a Title Search concerning the property owned by Mr and Mrs Trounson and it signifies that the land which they own excludes that part which is now formed a portion of Consolidated Mining Lease 12, that is, the area of land upon which is constructed the ropeway for the mining company. Furthermore, it is clear that the roadway which the mining company is using to drive into the area occupied by the ropeway is part of an easement granted by way of a right of carriageway to the Rylestone Shire Council.

Rachael Charlotte Trounson gave evidence on behalf of herself and her husband. She was concerned that the mining company was using their land "without formal approval". She indicated that she notified the company that she was happy to enter into an agreement for them to use this land at the rate of $1,000 per month. She indicated the company replied with an offer of $1,000 per year. She indicated to the court that as owners of the land she should have unfettered exclusive use of that land. Under cross examination she confirmed that the area which is the subject of the right-of-way is used by them for grazing cattle and confirmed that the cattle can still graze over that particular piece of property.

Mrs Trounson confirmed that the property was purchased in July 2002 for the price of $250,000. At the moment they are running eighty head of cattle upon the property, a number which Mrs Trounson indicated was under-grazing of the subject property.

Mrs Trounson was unable to indicate on what basis she and her husband arrived at a compensation rate of $1000 per month. However she did say in court that if she leased an area of the property that would be the type of figure that they would receive. Nothing was put to the court by the landowners as to the loss, if any, in relation to the inability of the cattle to graze over that area of track which is compressed as a result of vehicles crossing it up to 30 times per year. No evidence was placed before the court as to agistment rates for that area.

Under cross examination it was put to Mrs Trounson by Mr Moore that payment at the rate of $1000 per month would mean that the company would in fact be buying that portion of land each and every two months. To that question Mrs Trounson replied: "If that's what you say".

At one point of time Mrs Trounson indicted that it would be preferable if the mining company entered onto the property at the eastern most end and consequently there would be no need to utilise this right of way. In respect of that point the company had given evidence earlier that from a point of view of safety it was undesirable for vehicles, in particular heavy vehicles, to be entering onto the property at that eastern point, due to it being a "blind spot" on the public road.

SUBMISSIONS

In his final submissions to the court Mr Moore indicated that the subject property was purchased in July 2002 by Mr and Mrs Trounson at a price which was calculated at $752 per acre. The right-of-way which is being utilised by the company consists of an area of 2.17 acres. Mr Moore submitted that the right of way has been utilised by the company since its operations commenced in 1915. It is a right-of-way which was formally granted to the Council of the Shire of Rylestone in 1991 for the purposes of the Shire gaining access to a gravel pit. The Shire apparently no longer utilises the right-of-way. It is solely utilised by the mining company.

Mr Moore submitted that it was difficult to find a compensable loss which would be applicable in this instance under the provisions of Section 262 of the *Mining Act 1992*. He submitted that only sub paragraph (a) would be applicable in this instance and paragraphs (b) through to paragraph (f) are not applicable.

Mr Moore went on to submit that there has been nothing put forward by the landowner as to any loss occurring whatsoever or is likely to occur as a result of the mining company travelling across a small portion of the property for about 30 times per year. Mr Moore submitted that if there is likely to be a compensable loss it can only be a very small amount. Mr Moore conceded that the area affected is slightly in excess of two acres and that one head of cattle could be run on that two acres of land. He went on to say however that that one head of cattle is not at the moment denied of using any grass which is on that area of land that is utilised as a right-of-way. Consequently any loss would be extremely minimal.

Mr Moore went on to submit that "in the spirit of goodwill" the mining company would be willing to make an offer of compensation of $100.00 per annum for the life of the lease of CML 12.

In her final submissions to the court Mrs Trounson made reference to the evidence that she had given before the court and reiterated the amount which she thought was applicable.

DETERMINATION

It is unknown how Mrs Trounson came up with the figure of $1000.00 per month for the small use that the mining company has of their land. She made reference to that as being a figure which would be applicable if that area of property was leased. It appears in the circumstances to be an excessive rental figure. I took the liberty of making observations in the local real estate windows after the Inquiry and observed in one instance that a large house with many facilities on 36 acres of land could be rented in the area for $120.00 per week. Any leasing of this area subject to the right-of-way would not be for residential purposes. One wonders as to what purpose such an elongated relatively small strip of land could be leased.

If one looks at the various heads of compensable loss under the provisions of Section 262 of the *Mining Act 1992*, it appears that the submission of Mr Moore is correct in this instance. There may very well be damage to grasses in respect of the motor vehicles driving across a track. No doubt there is some compaction of the soil and grass would not grow as readily on the area where the motor vehicle tyres traverse the land some thirty times per year. No evidence was given as to this occurring, however common sense would dictate that it would be minimal damage to those grasses.

By stretching one's imagination in interpreting sub paragraph (b), one may say that by the mining company driving over the land 30 times per year, the landowner suffers "a deprivation...of the use of...part of the surface..." of the land. But in saying that, the deprivation is for such a relatively short period of time that any compensable loss would be so minimal that it is not quantifiable.

No matter which way one looks at the compensable loss which may be likely to occur under the provisions of Section 262 it is, in all the circumstances, extremely minimal. A figure of $1000.00 per month which was requested by Mr and Mrs Trounson is clearly extremely excessive and is not in fact a figure of compensable loss. Furthermore the amount of $1000.00 per annum which has been cited as an offer by the mining company to resolve this issue before coming to court is also a figure, to my mind, which appears to be excessive in all the circumstances.

As no figure has been put to the court which accurately quantifies the compensable loss which has been caused or is likely to be caused to the landowners, a figure must be struck which appears to be just and reasonable in all the circumstances.

In arriving at a figure I am aware of the provisions of S276, wherein an application may be made in future, if further compensable loss is or is likely to be caused.

The mining company offered $100 per annum as a gesture of goodwill. This figure appears to be adequate insofar as the usual travelling across the right of way. However, I am of the opinion that an additional sum should be added to take into account the cable changes each five years.

Accordingly, I propose to make an assessment of $200 per annum. That sum is payable from the date of purchase of the land by Mr and Mrs Trounson (15th July 2002) until the expiration of CML 12. The payment is to be made on an annual basis in advance with the first payment on or before 15 July 2004. That is, by 15 July 2004 the sum of $600 is to be paid, bringing payment up until 14 July 2005. If the mining company wishes to make a lump sum payment after that for the duration of the life of CML 12 it is free to do so.