IN THE WARDEN'S COURT
AT GUNNEDAH IN THE STATE
OF NEW SOUTH WALES

JA BAILEY CHIEF MINING WARDEN

MINING ACT 1992
SECTION 155

APPLICATION FOR REVIEW OF ARBITRATORS DETERMINATION

Case 2008/01 Michael Clift & Karen Anne Clift v. Coal Mines Australia Limited

Case 2008/02 Robert Stuart Clift & Arna Clift v. Coal Mines Australia Limited

Case 2008/03 Robert Stuart Clift v. Coal Mines Australia Limited

Case 2008/04 C.J. & P.A. Duddy Pty Ltd. v. Coal Mines Australia Limited

Case 2008/05 Rossmar Park Pastoral Co. Pty. Ltd. v. Coal Mines Australia Limited

Case 2008/06 Clive James Duddy & Ian Clive Duddy v. Coal Mines Australia Limited

Appearances at hearing on 13th February 2008 at Gunnedah

Mr. D. Long, Solicitor of Long Howland, Gunnedah, appeared for each of the Applicants

Mr. P. Holland, Solicitor of Minter Ellison, Sydney, appeared for the Respondent in each case.

Decision as to preliminary points pursuant to the application for review

Handed down in the absence of the parties at Sydney on 28th February 2008.

This matter involves six applications for a review of an Arbitrator's Determination pursuant to Section 155 Mining Act 1992. Although there are six separate and distinct landholdings subject to this review, a legal challenge to the validity of the appointment of the Arbitrator has been raised which refer to each of the six matters and it was agreed to deal with that issue globally.

At the hearing of these issues at Gunnedah Court House on 13 February 2008, Mr. P. Long Solicitor appeared for each of the landholders and Mr. P Holland Solicitor appeared for the respondent mining company.

The essence of Mr Long's submission is that the notices under S142 and 143 Mining Act 1992 are invalid. He does not challenge the procedure of the Director General in the actual appointment of the Arbitrator, [in other words he does not challenge the appointment under S144(2) or (3)] but relies upon the fact that compliance with S.142 and 143 is a necessary pre-requisite before the Director General could appoint an Arbitrator.

The relevant sections of the Mining Act 1992 are set out hereunder:

142 Holder of prospecting title to seek access arrangement

(1) The holder of a prospecting title may, by written notice served on each landholder of the land concerned, give notice of the holder's intention to obtain an access arrangement in respect of the land.

(2) The notice of the holder's intention to obtain an access arrangement must, in addition to stating the holder's intention, contain:

(a) a plan and description of the area of land over which the access is sought sufficient to enable the ready identification of that area, and

(b) a description of the prospecting methods intended to be used in that area.

(3) The holder of a prospecting title and each landholder of the land concerned may agree (either orally or in writing and either before or after the prospecting title is granted) on an access arrangement.

143 Appointment of arbitrator by agreement

(1) If, by the end of 28 days after the holder of a prospecting title serves notice in writing on each landholder of the holder's intention to obtain an access arrangement, the holder and each landholder have been unable to agree on such an arrangement, the holder may, by further notice in writing served on each landholder, request them to agree to the appointment of an arbitrator.

(2) The holder of a prospecting title and each landholder of the land concerned may agree to the appointment of any person as an arbitrator.

144 Appointment of arbitrator in default of agreement

(1) If, by the end of 28 days after the holder of a prospecting title serves notice in accordance with section 143, the holder and each landholder of the land concerned have been unable to agree on the appointment of an arbitrator, then any one of them may apply to the Director-General for the appointment of a member of the Arbitration Panel as an arbitrator.

(2) An application must be accompanied by the appropriate lodgement fee.

(3) The Director-General, after consultation with the Heads of the Departments of Aboriginal Affairs and Agriculture, is to appoint a member of the Arbitration Panel as an arbitrator.

Mr Long made reference to many cases that have been recently decided upon the issue as to whether certain words within Acts of Parliament are to be treated as directory or mandatory and as to whether non compliance in the circumstances creates invalidity. Some of those cases also referred to particular legislation also containing sections which provide for defects to be overcome.

Nothing in Division 2 of Part 8 of the Mining Act 1992 provides for the exercise of a discretion if some defect exists, unlike S135 in Division 1, Part 8 [as cited by Mr Long] or S210A which is in Division 7 of Part 9 of the Act. So the issue in this matter is whether or not a non compliance creates invalidity.

It is trite to say that the interpretation of an Act depends, inter alia, upon the purpose and intent of that Act, as stated in paragraph 11 of the submission of Mr. Long: "...the Applicants submit ...but accept that the provision needs to be read in the context of the Act and its purpose."

This submission encapsulates the thrust of the points made by the various courts in the case law which has been submitted on behalf of both parties. Passages in those cases make reference to a particular Act in question (Bankruptcy Act 1966 [Cwlth], Juries Act 2000[Vic], Companies Act 1993[NZ], or to legislation in general. Although a number of cases have been cited by both parties in this matter, the current position of the law is cited in ***Project Blue Sky Inc v. Australia Broadcasting Authority (1998) 194 CLR 355,*** where the court said at para 93:

: "in our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "illusive" distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with the statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative

provision is invalid. The court goes on to say: "... a court, determining the validity done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or director, and, if directory, whether there has been a substantial compliance with the provision. A better test for determining the test for validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. .... in determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".

The issue before this court is essentially one of statutory interpretation.
S142(1) includes the word ".....may, by written notice served on each landholder of the land concerned.....". All this means is that it is not mandatory for the holder of a licence to give written notice of an intention to obtain an access arrangement. There is nothing wrong with verbal notice being given to a landholder and in a spirit of cordiality, one would expect that most requests are initially made in this manner. Sub-section 3 of that section even provides for an oral agreement on an access arrangement to exist between the parties.

If there is no agreement on that verbal request, then the legislation provides a procedure which is to be followed if the holder desires an arbitrator to be appointed. It is at that point of time that written notice is required. The wording of S142(2) clearly stipulates that a written notice is to contain the matters set out in sub-section 2 (a) and (b) of S.142.

It is clear that the purpose of S142(2)(a)(b) is to alert the landholder to the portion of the land which the title holder wishes to enter and to describe what methods of exploration will actually take place on the land. This is absolutely necessary if a landholder is to give an informed decision as to consent or refusal to an access arrangement.

In respect of S143(1), it states, inter alia, "...may, by further notice in writing served on each landholder....." so, once again it is not mandatory for a holder to serve a written notice upon a landholder seeking agreement as to appointment of an arbitrator. Such a request could be done verbally. It is only, however, when one wishes to activate the provisions of S144 that a written notice (pursuant to S143) is necessary.

It is not unreasonable to assume the purpose of written notice under S.143 is to establish clearly that the 28 days stipulated in s.144 has been met.

An important part of S144 is that the section may be activated by either the holder of the title or any one of the landholders. This is distinguished from the provisions of Sections 142 and 143, where the onus is upon the holder of the title to activate the sections.

S.142 is the most critical of these sections. It is the section designed to ensure that a landholder is fully aware of the intentions of the title holder in respect of the land. The other following sections are machinery for putting into place access arrangements if there is no consent under S.142.

Before a proper determination can be made in this instance, it is necessary to look at the appointment of an arbitrator under the Mining Act 1992.

Firstly, an arbitrator is appointed to an Arbitration Panel by the Minister after consultation with other Ministers under the provisions of S.139. Following an application under S 144, a specific Arbitrator is appointed, from that Panel, by the Director General only after consultation with "Heads of the Departments of Aboriginal Affairs and Agriculture": [S144(3)]. Clearly the appointment of an Arbitrator is not a haphazard affair, statutory procedures have to be adopted.

That being so, it would be fair to say that any pre-amble to the appointment of such Arbitrator must be in accordance with the statute. In other words, the spirit and intent of Sections 142 and 143 must be in place prior to the appointment. An arbitrator is not appointed on a *carte blanche* basis to, for example, "arbitrate in respect of EL 6506". The application for appointment of an arbitrator under S. 144 must be accompanied by letters forwarded to the landholder by the exploration licence holder under the provisions of S.142 and S.143. It is only in accordance with that application is the arbitrator appointed.

Common Challenge to all cases

Before looking at specific challenges in respect of each landholder, I shall look at the common challenge in respect of each one; that is, the submission by Mr. Long that in each case, S 142(2)(b) has been breached. There was no reference in the letters to the landholders [I use that term for practicality at present, there is in fact a dispute that letters were sent to those who were not landholders] as to a description of the prospecting methods intended to be used. There was, however, attached to the letter, a copy of a draft access agreement, in which such description was noted. The applicant submits that this is not sufficient for the purpose of S 142(2)(b).

In his written submissions Mr. Long annexed a letter from the mining company to landholders that are not a party to these proceedings. He cited that letter as being the correct way in which notice under S.142 (2) must be given. That particular letter (TAB 4) itemised the prospecting methods intended to be used. Although Mr Long did not attach a copy of the draft access arrangement which apparently was forwarded to the landholder with TAB 4, I have no doubt that draft also made reference to the prospecting methods outlined in the letter.

A copy of a draft access arrangement would not only outline the matters referred to in S.142(2)(a) and (b), but also refer to other matters as outlined in S.141.

True it is that TAB 4 in the submission of Mr. Long may be considered to be an "ideal" manner in which to comply with S.142, I do not see that the outlining of details of the prospecting methods intended to be used, in a draft access arrangement forwarded with a letter, is not complying with S142(2((b).

There is no failure to comply with S142(2)(b) in respect of the letters and attachments forwarded by the respondent mining company.

Mr Long further submitted that more details were required in the notice to the landholders under S.142(2)(b) and that the 2 to 3 lines depicted in the draft "Access Arrangement and Compensation Agreement" form forwarded to the landholders was not in accordance with the sub-section, for "without more details, how could a landholder enter into a useful negotiation?"

In this case, more details were obtained when the mining company gave evidence in court, after the submissions on this preliminary point. That witness (Stephen Davis) gave details of what the company wanted to do on the land. The evidence in chief of Mr Davis was about ten minutes, but after questions from Mr Long to clarify matters of concern for the landholders, his evidence occupied about 45 minutes of time. It is assumed now that the landholders are fully aware of what the needs of the mining company are when it comes to the exploration.

I doubt very much whether any mining company can give "a description of the prospecting methods intended to be used" in a notice under S142(2)(b) which would meet the satisfaction of a landholder without further questioning. The question then remains as to how far must the explanation go in the written notification? Should it be all the evidence that was given by Mr Davis on the 13th February, which would amount to many, many pages or should it be a shortened version of the evidence? If it is a shortened version, then clearly the landholders would not be fully informed and would require some questioning of the mining company.

I cannot see how the legislation intended any notice under S142(2)(b) to be more than a brief description of its intention, sufficient to enable the parties to sit down and negotiate. I come to this conclusion partly based upon the fact that the whole spirit of Division 2 of part 8 of the Mining Act 1992 is geared towards the parties coming to an agreement. This is blatantly clear throughout the sections, even when it reaches arbitration stage. S 147, places an obligation is upon an Arbitrator to use *"his or her best endeavours to bring the parties to a settlement"* before making a determination. For there to be an agreement there generally must be negotiations and discussions.

I do not see that the short description given in writing to the landholders in these instances would invalidate a notice under S142(2)(b).

Consequently, in respect of the general submissions as to the validity of the arbitration process concerning each applicant, I find that the description of the prospecting methods which were outlined in the "Draft Access Agreement" attached to a letter forwarded to the landholders was sufficient to comply with the provisions of

S.142(2)(b) Mining Act 1992. As that was the only submissions concerning cases 2008/01, 2008/02, 2008/03, I find that the Arbitration concerning each of those matters was valid and the substantive review under S.155 may proceed.

Case 2008/04

I now turn to what Mr Long refereed to as the "Individual Submissions as to Validity". In case 2008/04, the S.142 notice was correctly addressed to the proper landholder, i.e.: CJ & PA Duddy Pty Ltd. The first challenge is to the S.143 notice; it was addressed to "CJ & PA Duddy". The second challenge is that neither notice made any reference to Lot 1 DP 1110085, an area which the arbitrator gave access to the mining company.

Concerning the notice under S.143 to CJ & PA Duddy, this letter should have been forwarded to C J & P A Duddy Pty. Ltd. It is submitted that as it was addressed to the wrong Landholder, the notice was invalid. The notice under S142 was correctly addressed to the company as the landholder. A company, being an inanimate object, is not able to respond to any communication sent to it; it must be responded to by some person on behalf of the company. From documents filed by the mining company, it appears in document numbered 60 that the S.143 notice was forwarded to Scone Legal Solicitors. That letter makes reference to CJ & PA Duddy and also refers to the same lots of land that were referred to in the correct S.142 letter. It also appears that Scone legal Solicitors replied to that letter. I have no doubt that Scone Legal Solicitors were aware of whom they were responding on behalf of. Furthermore, I do not see that the Mining Act 1992 is constructed so that a notification under S.143, which, in this instance, leaves out the words "Pty Ltd", would be invalid.

Consequently, the S.143 letter sent to Scone Legal Solicitors and nominating the landholder as CJ & PA Duddy does not invalidate the arbitration process.

In respect of the second challenge to case 2008/04, concerning the fact that Lot 1 DP 1110085 was precluded from both notices under s.142 AND s.143. It would appear that this was rectified in final submissions by the mining company to the arbitrator. [see page 4 of Arbitrators Final Determination: "*CMAL's submission of 12 September*

corrected the errors of land ownership...and sought access to...Lot 1 DP 1110085...to drill 3 holes c133, c 134, c142..."] The only other insight as to this issue is in the Determination, wherein the arbitrator states: *"As the negotiated locations of drill holes C133, C134, C142 were acceptable to the landowner, I rule that CMAL should have access...."* Having regard to the current status of challenge to access, I cannot read the phrase "the negotiated location" as meaning "the consented location". I cannot infer that the landholder consented to a correction in the description of the land which the titleholder wanted access. [whether a consent would alter the situation is not a matter which I have to consider at this point of time] Furthermore, it appears that after that correction was done by the mining company, the arbitrator attempted for 3 months to bring the parties together to no avail. His final determination was made after all efforts to bring the parties to the table had been frustrated.

The principle thrust of the mining company's submission was that although errors were indeed made in relation to notification, the fact that a company, upon being aware of these errors, took immediate action to rectify the same, there ought to be some discretion in the court as to the way in which this matter should proceed. The company commenced its submission in outlining the length of time which it has taken for the arbitration. It submitted that the matter has gone on so long that all of the parties are well aware of whose land the mining company wishes to enter for exploration purposes and also what mark of such land is required.

The company submitted that it was the intention of Parliament that this regime was set up in the act to facilitate access to the properties not to set up a scheme to deny access to the land which is subject to the exploration licence. It was submitted that it was not the intention of Parliament that if some error was made, that the mining company should commence from the beginning again in relation to their efforts to obtain an access determination.

One issue raised by the mining company was that they were informed by the landholders not to communicate with them directly but with their then lawyers, Scone Legal. The mining company submitted that it did communicate from that point on with Scone Legal and have produced documentation where they sought from Scone

Legal, the names of the landholders that they were representing and received the same. Further letter requested, inter alia, the following: *"there are numerous landowners covered by the exploration licence area and, in order to enable BHP Billiton to verify the landowners against a specific parcel of land, please identify by Lot and DP number, the landowners, the subject of the exploration licence that you represent"*.

The mining company did not get a reply from Scone Legal in response to that specific request. Although in ideal circumstances and in an air of co-operation this would have been convenient for the mining company. The fact is that the onus is on the mining company to obtain that information for itself and may do so easily, one would have thought, with a title search

As I said earlier, S.142(1)(a) is a crucial clause, it was inserted to ensure the landholder was fully aware of what the mining company wanted to do on its land so that an informed decision could be made. It may very well be that a landholder may consent to a mining company going onto one portion of its land and refuse consent to the company entering another portion. The activation of arbitration under S.144 is clearly done after all other attempts to resolve the issue have been exhausted. S.144 should not be activated until a landholder has had an opportunity to consider its position. In this instance, the landholder was not informed about Lot 1 DP 1110085 in the letter pursuant to S.142, nor in any other correspondence. It was only in final submissions to the arbitrator that the mining company added that lot.

I re-iterate, an arbitrator is appointed to arbitrate in respect of a specific landholder and a specific lot of land. To traverse the parameters of appointment is to act ultra vires.

Accordingly, concerning case 2008/04, the access determination itself is valid other than the inclusion of Lot 1 DP 1110085.

Case 2008/05

I turn now to case 2008/05, concerning Rossmar Park Pastoral Company Pty Ltd.

There is no dispute that the S.142 was sent to the correct landholder; the challenge in this instance is to the S.143 notice which was addressed to "Rossmar Park Pastoral Company". I make the same observation as I did above concerning the S.143 notice to CJ & PA Duddy. The letter to "Rossmar Pastoral Company' was addressed to Scone Legal Solicitors. Although that letter did not have "Pty Ltd" inserted, it makes reference to all of the land referred to in the correct S.142 letter. It appears from document 75 tendered by the mining company that Scone Legal replied to the letter. I have no doubt Scone Legal was aware of the entity to which the S.143 letter referred.

The sole purpose of S.143 is to ascertain if there is going to be consent to a nominated arbitrator or whether it will be necessary for either party to apply to the Director General for one to be appointed from the Arbitration Panel. A time limit was placed in the section to allow adequate time for a party to consider its position and to ensure that the process is not prolonged.

I do not conclude that to address the S.143 letter to "Rossmar Pastoral Company" in this instance invalidates the arbitration process.

Accordingly, in respect of case 2008/05, the Arbitrators Final Determination is valid.

Case 2008/06

Finally now turning to case 2008/06. It would appear that the S.142 letter was sent to ER & CJ Duddy Pty. Ltd whereas the letter pursuant to S.143 was sent to ER & CJ Duddy. There appears to be a number of errors in relation to that particular matter. In the final submissions to the arbitrator, the mining company nominated the landholder as being Clive James Duddy and Ian Clive Duddy.

It would appear from submissions to the court that E R Duddy was in fact deceased prior to any letters being forwarded to the mining company.

The letter that Scone Legal forwarded to the mining company on the 26th October 2006, setting out the names of the people of whom they represent advised one of the landholders as being "CJ Dudley and Estate R. Duddy". The obvious question to ask is whether "Dudley" is a typographical error and should read "Duddy". The next

question is whether "C.J. Duddy" refers to "Clive James Duddy" and whether "Estate R Duddy" refers to the "estate of E.R. Duddy"?

I notice the correspondence after that date from BHP Billiton addressed to Scone Legal referred to both E.R & C J Duddy and also in other letters to E R & CJ Duddy Pty Ltd.

The mining company in its final submissions to the arbitrator nominated Clive James Duddy and Ian Clive Duddy as being then the landholders in respect of Lot 217 DP 755494. I assume that is now the correct landholder due to the fact that the applicant for review has indicated the same in its submissions. The question now arises as to whether or not following notification to the wrong landholder under S.142, the arbitration in respect of that particular matter is invalidated. In following the decision of the High Court in ***Project Blue Sky,*** what was the intention of Parliament in this instance when a wrong landholder is notified under S.142?

By way of an example, if William Brown is the registered proprietor of Lot 1 DP 123456 and a mining company notifies John Smith that it wants access to Lot 1 DP 123456 for exploration purposes. John Smith thinks that relates to his land and commences negotiation with the mining company. If an arbitrator's determination is ultimately made, one could not imagine the intent of the Mining Act would be to accept that as a valid determination and allow the mining company onto Lot 1 DP 123456.

I am not saying that in every instance, non compliance with S.142 would invalidate the arbitration process; it would depend upon the particular circumstance of the case each time. The mining company is urging this court not to invalidate the arbitration process this time. I referred to some general submissions by the mining company in page 8 above.

The process has been drawn out and it appears the mining company was not sure, in some instances, of who in fact it ought to be dealing with. The fact that the parties wanted the mining company to communicate with them through their legal advisors did not assist.

The process should have been simple. On would expect a mining company wanted to enter land would simply do a title search to ascertain the landholders and the correct area relating to each landholder and proceed from there with appropriate notification. This apparently was not done, or if it was done, was not done in all cases. As the result of that, what may have commenced as a simple and quick way to proceed ended up with a litany of errors in some of the cases, some of which were critical, some not.

I'm well aware that finding in favour of the landholder in this instance is going to do nothing more than prolong the process. As submitted on behalf of the mining company, any prolongation will mean further expenses on behalf of the mining company as well as the landholders; with the landholders legal expenses not being able to be recovered [section 152 Mining Act 1992]

Notwithstanding all of those matters, I am of the opinion that the arbitrator was appointed to make a determination in respect of landholder E R & C J Duddy Pty Ltd. That entity was not in existence at the time and that entity was never the holder of Lot 217 DP755494. Consequently, any determination allowing the company to enter and explore Lot 217 DP 755494 is invalid.

In summation, the review of the arbitrator's determination in respect of cases 2008/01, 2008/02, 2008/03, 2008/04, 2008/05 will continue, with an exception that in case 2008/04, any reference to Lot 1 DP 1110085 will be deleted.

There is no valid determination in respect of case 2008/06 for a review to continue.