IN THE MINING WARDEN'S COURT
AT LIGHTNING RIDGE

J A BAILEY, CHIEF MINING WARDEN

THURSDAY 3 JUNE 2004

CASE NO. 2004/7

PAUL GILLBEE (First Applicant)
TERRY GILLBEE (Second Applicant)

v.

MACAPIKA PTY LTD (Respondent)

APPLICATION FOR REVIEW OF ARBITRATOR'S FINAL DETERMINATION UNDER THE PROVISIONS OF SECTION 155 OF THE MINING ACT 1992 CONCERNING EXPLORATION LICENCE 6031

APPEARANCES AT HEARING:

Mr L Moore, Solicitor of Evans & Englert for the mining company.

The Landholders in person, unrepresented.

HEARING DATES: 18th and 19th May 2004 at Balranald

DECISION

HANDED DOWN IN ABSENCE OF PARTIES

Exploration Licence 6031 was issued on 10th December 2002. The area subject to the licence is within a property known as "Hillview". The holder of the licence Macapika Pty Ltd was unable to enter into an agreement with the landholder concerning access arrangements and consequently the matter was referred to arbitration.

Following the arbitrator's final determination an application was made to the Warden's Court for a review of that determination.

The Review of the Arbitrator's Final Determination under the provisions of Section 155 of the *Mining Act 1992* was conducted at Balranald on the 18th and 19th May 2004.

Mr L Moore, Solicitor, appeared on behalf of the mining company and the landholders represented themselves, with Paul Geoffrey Gillbee being the sole witness and spokesperson for the landholders.

THE HEARING

Peter James Morton gave evidence on behalf of the mining company, explaining to the court the work, which was intended to be performed under the exploration licence. Exhibit 2 is an aerial photograph of the portion of land, which is owned by the landholders and outlined thereon is the area, which is covered by EL 6031. Evidence was given that only a portion of that exploration area will in fact be explored. The reason for this is that it is that smaller portion which was hatched in red on the aerial photograph where it is expected the greater deposits of gypsum will be located.

It is intended to explore by means of drilling a number of 3-inch rotary auger holes to a depth of 2 metres only. This would involve using a rig on a trailer, which weighs about three-quarters of a tonne, which is attached to a four wheel drive vehicle. The initial testing will require a few hundred test holes to be drilled. The second stage of drilling those holes would be to dig a trench, depending on the results from the drillhole. The trench would be dug using an excavator with a small bucket. The trench would be about 1 metre wide, three metres long and 2 metres deep.

Insofar as the time to be spent in drilling the holes and trenches, it was indicated by Mr Morton that the mining company would drill approximately 100 holes per day. Each test hole is filled before moving to drill another. Insofar as digging the trenches, Mr Morton informed the court it would only take about 15 minutes to excavate the trench and fill it back up again. He indicated to the court that in each instance that is in relation to drilling and trenching topsoil is put aside and replaced immediately in its proper position when each hole and trench is rehabilitated.

The drilling stage would comprise two to three days of drilling and involve four persons in total at any one time being on the site, together with two vehicles and a trailer (which has thereon the drilling rig).

For the trenching phase the excavator will be brought onto the property on a low loader and unloaded. The trenching phase would be completed within three days after which point of time the equipment would be removed from the property and returned at a later stage if necessary. Four persons plus an operator of the excavator would be required to be on the property during this three day period.

The initial drilling and trenching would take approximately one week. There would then be a period of approximately one month whilst laboratory testing was being performed upon the drill samples. The company would then go back onto the property and repeat the process once again for another week. After further laboratory testing of the samples, it may be necessary for the mining company to repeat the process for a third week.

In relation to the time spent on the property in total it was not possible to specify dates at this point of time. The time required to be on the property is contingent upon the availability of the equipment, which is required to be hired, the prevailing weather conditions and the time spent for the laboratory to analyse the samples.

Mr Morton pointed out that the Arbitrator in his determination allowed a period of six months for the work to be carried out. Mr Morton indicated that that was adequate so far as the company was concerned.

Insofar as compensation is concerned the mining company was happy to offer the sum of $5.00 for each drill hole and $25.00 for each trench excavated upon the land. When there was a challenge to those initial figures which were granted in the interim determination of the arbitrator, Mr Morton told the court that he offered a larger sum, that is, $8.00 per drill hole and $30.00 for each trench, on the basis that it was his understanding that that would be accepted and the company could go onto the land and explore immediately. He said the company is no longer prepared to pay that sum because the terms of the determination were clearly rejected. His company was not able to explore immediately and consequently is going to be further hampered due to the delays because of the oncoming lambing season, which approaches within a few weeks.

Arrangements have been made with an adjoining neighbour who has given the company consent to drive over that property into the exploration area so that the company will not be utilising a path that passes by the homestead of the landholders.

Anthony John Mason, a mining consultant, gave evidence on behalf of the mining company and he indicated to the court his role in assisting with the exploration procedure. He informed the court that the south-eastern corner of the ancient lake upon which the exploration area exists is a slightly deeper area of lake and consequently it would have been more consistently wet, therefore giving a higher level of purity to any gypsum that may be there.

Mr Mason indicated that he was confident that gypsum does exist in the area but does not know at this point of time as to whether or not the extraction of the mineral would be economically viable. He said there is a likelihood that they may not have to do as much work as indicated by the evidence of Mr Morton. He indicated to the court that he, with the company, has looked at fifteen to twenty separate areas concerning gypsum and so far has only located two or three areas that are economically viable.

He gave evidence that in the 35 years in which he has been involved in this type of area he has never been informed by a farmer that any livestock had been injured. He has never had a situation where there has been a compensation claim lodged due to

livestock which may have been affected by the exploration process. He reiterated that naturally under the *Mining Act 1992* the mining company is liable for any damage that may occur as a result of the exploration being performed.

Insofar as compensation is concerned, Mr Mason indicated that there was a protocol in New South Wales where an agreement exists between the Farmers Federation and the New South Wales Mineral Council as to the sum of money for certain holes which are drilled upon a property. Insofar as a figure of compensation for the daily presence of the mining company on the landholders' property, Mr Mason indicated that although he is aware on a number of occasions that such a request has been made for a sum of money by the landholder, he has not in his experience seen it agreed to by the mining company.

As I indicated earlier the only witness on behalf of the landholders was Paul Geoffrey Gillbee. Mr Gillbee indicated to the court that his family simply did not want the mining company on their land. He was not concerned with compensation and gave no thought to it in the first instance. Now that he is aware that the mining company has a right to be on the property he is concerned to ensure that the compensation is adequate to cover the damage which will occur to his stock as a result of being disturbed by the exploration process.

Mr Gillbee does not want the mining company entering his property in the direction, which they indicated on the aerial map, exhibit 2. Mr Gillbee would prefer the company drive some 500 metres north on the neighbour's property and enter from the northern end of his property. The reason for that is that he is concerned that vehicles crossing the property close to the corner section of "Hillview" will startle the sheep and lambs.

Mr Gillbee indicated that he preferred not to have the company on his property during the lambing and shearing season. He indicated that that could be for a period of three to four months. He is concerned for small lambs running around the property; they would be vulnerable if disturbed in normal circumstances, but in the drought they would be weaker than normal. If spooked by vehicles they could fall over in the stampede of the flock and could in fact die. If that occurs there could be a loss of

$100.00 on each occasion. Mr Gillbee was seeking $200.00 per day for the 16 or so days that the company will be physically on the property as compensation to cover matters such as this and the need for the landholder to travel to the property every day to check on the stock. That is a trip of 80 kilometres each way each day for the landholder.

Mr Gillbee also indicated that he did not want the mining company's vehicle to travel near the watering holes as this also disturbs the sheep.

Under cross-examination Mr Gillbee indicated that he runs about 1 sheep per 5 acres on the property [although at another point of time, a figure of one per 7 acres was quoted] and conceded that it was a sparse occupancy of the land. When questioned about his comment concerning the loss of his right to stock the property he indicated that he has not lost his legal right to have his stock there but that the stock will not go in the area where the exploration is taking place. In answering a question concerning the loss of his sheep due to stress, Mr Gillbee indicated that the sheep would not necessarily die, although some might, but there will be a loss in wool production because of stress.

When challenged as to accurately quantifying that loss Mr Gillbee indicated that he required $8.00 per drill hole, $30.00 per trench and $200.00 for each day on which the mining company is on his land. He estimated that that total figure would go somewhere towards compensating him for the loss which he expects to suffer as a result of the mining company exploring upon the property "Hillview".

Following the evidence of Mr Gillbee, the court and the parties proceeded to the property at "Hillview" to conduct a view. The parties crossed the property in two four-wheel drive vehicles. We initially approached a watering hole where sheep had congregated. It was observed that as the vehicles approached a watering hole, sheep ran away from the watering hole and congregated some distance away.

Whilst on site Mr Gillbee indicated where he preferred the mining company to drive its vehicles over the property of the neighbour, the property known as "Allanvale" and then entering "Hillview" from the northern end. The mining company indicated that

there would be no need for it to go within 500 metres of any watering hole or tank on the property.

As we returned from the view it was noticed that the sheep that were originally disturbed when drinking at the watering hole had all returned once again and were drinking.

SUBMISSIONS

Mr Moore submitted to the court at the conclusion of all the evidence and the viewing, that the damage which will be occasioned to the property of the landholders will be minimum. He submitted that the Gillbees cannot quantify the amount of loss at this particular point of time simply because it is not possible. It is unknown at this point of time whether or not there will be a loss that is "likely to be caused". He submitted that the Gillbees want to be compensated "up front" and are calculating that on the basis of the number of days that the mining company will be on the land. To adopt such a procedure would be dependent upon injury occurring and there has been no evidence given in this court of any loss "likely to be caused".

He further went on to submit that Mr Mason, a geologist, gave evidence to the court that was contrary to that which was given by the landholders. In Mr Mason's experience he has not received any complaint for loss of livestock in the 35 years in which he has been involved in the industry.

Mr Moore submitted that Mr Mason is not suggesting that damage cannot occur but if it did occur the landholder would not be without its remedy, having regard to the provisions of Section 276 of the *Mining Act 1992*.

It was Mr. Moore's submission that the loss is not likely to occur and it is merely speculative on the part of the landholder.

Mr. Moore submitted that the court can take into account what in fact happened during the view. He said that when sheep were approached at the waterhole, they were disturbed, but they only moved away a short distance and had returned to the

waterhole when we all returned to that area later. This is in contrast to the description given by Mr. Gillbee that the sheep would stampede and not return to the waterhole. Consequently, he submitted, the evidence of Mr. Gilllbee should be taken with some caution.

When considering a sum for compensation, the Arbitrator based the figure he awarded upon a figure that has been arrived at by representatives of the farming and mining industries many years ago, and has been updated. Mr. Moore submitted that in awarding compensation quantum, this court should not move away from the interim award of the Arbitrator. The latter figure of the Arbitrator was one that was awarded on the basis that the landholder would allow the mining company onto the property immediately and that all the issues of access would be put at rest. However, it is now seen that the landholder is not allowing the access in accordance with the Arbitration and consequently it would be unreasonable and inappropriate for the landholder to accept the increased offer when the basic condition was rejected.

To depart from the interim figure of the Arbitrator would be to depart from the industry's standard and contrary to the provisions of S.262 Mining Act 1992.

In relation to the entry of the mining company vehicles onto the property, Mr. Moore submitted that it is unreasonable for the Gillbees to want their neighbour to accommodate the mining company in a way that is not acceptable to the Gillbees. Mr. Moore pointed out that the court has no power to impose obligations upon a neighbour who is not a part of these proceedings.

Mr. Moore submitted that allowing the mining company the time of 6 months to complete exploration is not excessive. The four month period requested by the Gillbees could impose an unreasonable constraint upon the company. The company is willing to refrain from exploring during the lambing season but cannot see any necessity to cease drilling during the shearing season.

In his submission, Mr. Gillbee stated that disturbed stock will move away from grassed areas and not return. This means that grass which they have paid for will not be eaten by the sheep. If it is necessary for them to have to drive to the property

each day to check their stock, this costs money, money that he says must be compensable.

The property "Hillview" is landlocked so the company must go through some other property, to gain access to the subject area.

LEGISLATION

There has been no challenge to the legislation concerning this matter. One of the main issues has been the question of compensation. Section 141(2) of the *Mining Act 1992* provides:

> An access arrangement that is determined by an arbitrator must specify the compensation, as assessed by the arbitrator, to which each landholder of the land concerned is entitled under Division 1 of Part 13.

Section 263 of the Act, which is within Division 1 of Part 13, provides that upon the granting of an exploration licence, the landholder becomes entitled to compensation for any compensable loss suffered.

Section 262 of the Act provides:

> **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 paragraphs (a) – (e),

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

For reasons that will become apparent in my determination, I set out the provisions of Section 147 and 155(6) of the Act:

147 Conciliation

(1) An arbitrator is not to make a determination until the arbitrator has used his or her best endeavours to bring the parties to a settlement acceptable to all of them.

(2) If the parties come to such a settlement, the arbitrator must make a determination that gives effect to the terms of the settlement.

155 Review of determination

(6) In reviewing a determination under this section, a Warden's Court has the functions of an arbitrator under this Division in addition to its other functions.

DETERMINATION

In considering those matters raised, I take into account an undertaking by the mining company when the court was attending the site, that they would not need to be within 500m of any watering hole. To that extent, there would be no disturbance at all to any sheep that were around the watering holes at the time the company vehicles were entering onto the exploration area. As to disturbance of sheep that will be grazing when vehicles are entering/leaving the area and during drilling times, that all depends upon sheep being within the immediate vicinity at the time. The sheep, according to evidence, are grazed at the rate of approximately one per 5 to 7 acres. It appears on the evidence before me that the potentiality of disturbance to the sheep is not great, furthermore, it would be impossible to quantify that disturbance, in accordance with S.262, at this point of time. For that reason, one can understand why the arbitrator adopted the industry standard, which has been struck to cover such matter; particularly when the provisions of S.276 *Mining Act 1992* allows for further compensation at the end of the exploration period, if need be.

I accept what Mr. Mason put to the court about his experience in never having any claims for injury to stock as the result of exploration. However, in accepting that, it cannot be said categorically that injury to stock will never be occasioned during exploration.

The concerns of the landholders as to disturbance to stock may eventually be validated, one does not know. However, the time upon which the mining company will upon the land is really unknown at present. If, as Mr. Morton indicated, it is established that the gypsum is insufficient to be economically viable for extraction, it may be that the mining company will be on "Hillview" for a matter of a few days only. Naturally, the shorter time the company is exploring, the less likelihood of disturbance to stock.

In the application for review, the landholders, in a letter accompanying the application, stated, inter alia: *We thought that an arbitrator was a third person involved to bring the two parties to a "compromise". Mr Meehan's final determination has no compromises....* True it is, having regard to the provisions of Section 147 set out above that an arbitrator must attempt to bring the parties to what the landholder refers a "compromise". However, clearly that was not done, and that being so, the arbitrator must only then make a determination based upon the evidence which has been placed before him, in accordance with the provisions of the *Mining Act 1992.* Similarly, as provided by S.155 (6) of the Act, any determination by this court can only be made in accordance with the evidence, which was submitted, and the provisions of the *Mining Act 1992.*

As nothing has been put to this court which firstly establishes that the landholders will in fact suffer a compensable loss and secondly, nothing which accurately quantifies a sum of compensation if in fact a loss occurs, this court is left, insofar as compensation is concerned, with adopting the industry standard, with the understanding that the landholder may make further application under the provisions of S.276, if need be, at a later point of time.

Mr. Moore has submitted that the compensation awarded in the interim arbitrators determination should be awarded in this instance. In reviewing records retained in my office, I note that the industry standard has been increased over the years to the current level. Consequently, the industry standard that was adopted in the interim determination of the arbitrator, of $5 per auger drill hole and $25 per trench, quite adequately updates the appropriate compensation of some years ago. In all the circumstances, I do not see why that compensation figure should not be applied in this instance. I agree with the submissions of Mr. Moore that the larger figure which was adopted in the final determination, was only suggested on the basis that the mining company would be able to move immediately onto the property and commence exploration.

In looking at the rate of $5 per drill hole and having regard to the number of holes the company indicated it would be drilling each day, means that compensation of at least $500 per day would be payable to the landholder. On the evidence before the court, this should be adequate to cover matters that are of concern to the landholders.

In giving his evidence, Mr. Gillbee indicated that other than the matters raised before the warden's court, he was happy with the access arrangements of the arbitrator. Consequently, with appropriate amendments, I propose to make a determination along the lines as delivered by the arbitrator. I enclose a copy of the determination.