IN THE WARDEN'S COURT, SYDNEY
ON 14TH AUGUST, 1981,
BEFORE J. L. McMAHON,
CHIEF MINING WARDEN.

A. LYELL

-v-

BATHURST MINING AND CRUSHING CO. PTY. LIMITED
AND WHITEMAN.

BENCH:-

This has been the hearing of an application to assess compensation pursuant to the Mining Act, 1973. The landowner, Mr. A. Lyell, has sought that the Warden assess compensation and I have conducted an Inquiry in accordance with the Act, pursuant to its provisions, especially Sections 122 to 127 inclusive. The respondent, Bathurst Mining and Crushing Co. Pty. Limited, herein called Bathurst Mining, has been joined by Mr. R. W. Whiteman as together they are holders of Mining Lease No. 243 over land owned by Mr. Lyell.

Mr. Lyell owns a property of some 17 hectares or 42 acres, which is some 14 kilometres from Bathurst, in central New South Wales. The main purpose to which the land is put, apart from mining, is grazing activities and he purchased it with his family for the purpose of having a small holding in the country to get away from the strains of city life. Generally, he spends only weekends on the property, occupying a house constructed of cement blocks thereon.

The lessees were granted a lease to mine for limestone by means of open cut or quarry methods for a period of 21 years from 21st July, 1976. At the time that Mr. Lyell purchased the property in 1969, while there had been evidence of quarrying operations, none was currently functioning, but he was subsequently approached by Mr. Lewis, who is the Managing Director of Bathurst Mining,and Mr. Whiteman and executed an agreement dated 17th November, 1971, which is exhibit 3. That agreement purported to run for a period of five years and made provision for the payment of an initial sum of $10, together with royalty of 20¢ per tonne of the material removed with a minimum amount of $200 per annum.

Quarrying operations were conducted by Bathurst Mining from 1971 until 1976 when there was a cessation. During the period June, 1972 until July, 1976 Mr. Lyell was overseas. When Mining Lease No. 243 was granted, Mr. Lyell received a letter from Mr. Lewis, exhibit 6, referable to compensation but had not been in touch with him since to finalise any agreement. While there had been no quarrying operations conducted between 1976 and 1979, in late 1979 quarrying operations re-commenced under the direction of a Mr. Walter Evans, a sub-lessee from the respondents, and were being conducted from then up to the date of the hearing before me.

In his evidence, Mr. Lewis did not dispute the above matters. However, he took issue on the claim by Mr. Lyell that blasting operations at the quarry had damaged the house, by way of cracking the walls of it on two occasions. He stated that having written the letter, exhibit 6, to the agent for Mr. Lyell, on 2nd September, 1976, which drew attention to the compensation question, and having heard nothing, he had assumed that he could go ahead, or permit Mr. Evans to go ahead, and quarry on the site. Exhibit 6 indicates that Mr. Lewis specified to Mr. Lyell that compensation could be agreed to by the parties, could be assessed by a Warden, or could be dispensed with. Mr. Lyell conceded that he had received, but had not replied to,Mr. Lewis' letter.

In relation to the cracking of the house, Mr. Lyell said that the initial cracking had occurred while he had been overseas and that when he returned, the house had to be re-plastered and re-painted at a cost of between $1,000 $1,500. That work having been done, the house remained stable until recently when one weekend it was intact and the following weekend he found the cracks re-appearing and his sister-in-law had told him there had been a major blast at the quarry in the intervening week. In respect of the cracks, he was seeking the sum of $1,250 to $1,500 for repair and re-painting and would accept the lesser of these amounts. Apart from hearsay evidence of the blasting, there was no other evidence to connect the cracks and their re-occurrence with the quarrying operations. Mr. Lyell also complained that a horse had been injured when it had fallen into the quarry and that a pet cat had been caught in a rabbit trap set by one of the quarry operators. Both animals required veterinary treatment.

Mr. Lewis expressed regret at the injury to the animals. He contended that the subsequent cracks to the house had not been caused by the blasting operations and sought to tender a letter in evidence which was rejected as the author of it was not available for cross-examination. The letter purported, according to Mr. Lewis, to indicate the correct origin of the cracks.

So much for the facts in the case. Mr. Bateman, on behalf of Mr. Lyell submitted, notwithstanding the provisions of Section 124(1)(b) that his client sought a percentage or proportion of the amount of saleable limestone won from the quarry and sought to up-date a figure set out in the original agreement of twenty cents per tonne by applying the Consumer Price Index, bringing it currently to 52.7 cents per tonne. I put to Mr. Bateman as to how one could get over the directive provisions of Section 124(1)(b) and I understood from his reply that his client would be happy with an assessment of compensation, notwithstanding those provisions, provided it was on the basis of the amount of saleable limestone won, was in accordance with a reasonable sum based on the return being enjoyed by Mr. Lewis, Mr. Whiteman and Mr. Evans, and was indexed as above in accordance with the Consumer Price Index.

I understood Mr. Lewis to say that he did not agree with the basis of an assessment being the amount of saleable limestone won but would have been happy for an assessment to be based on the extent of ground disturbed. Neither Bathurst Mining nor Mr. Whiteman was legally represented before me.

Mr. Lyell put a value of his property at $50,000 which of course included the residence. Mr. Lewis was not in a position to dispute this figure. On the evidence, approximately 3 hectares of ground is being taken up by the quarrying operations and associated activities conducted by the lease holders. There is a shed, with explosives magazine, associated vehicular usage area and the quarry, but the applicant still has the use of well over 2 hectares of land for grazing purposes. It has been agreed that there is another lease operated by another party not associated with these proceedings who is also mining limestone on the other side of this small farm and this lease covers about 3 hectares.

Section 124(1)(b) lays down the criteria upon which a Warden ought act in assessing compensation. Section 124(1)(b) provides that where compensation is by this Act directed to be assessed by the Warden, the assessment shall, except where the assessment is to be made for the purposes of Section 123, 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.

There was very little evidence presented to me by either party as to what was considered to be a fair and proper figure under any of these headings. As I have said, Mr. Lyell sought to rely upon the amount of saleable limestone won and Mr. Lewis relied upon the basis of area of ground disturbed. This court has frequently made the practice of assessing compensation especially in relation to activities on the basis of the number of holes sunk, that is in exploration activities, or of land disturbed as in consteaning activities, or the area or depth of ground taken in open cut activities but generally there is some evidence as to what value of compensation is appropriate, based on the requirements of the Act.

However, where no, or little, evidence is presented to a Warden as to that value, considerable difficulties are experienced because the legislation having specified criteria, it is not open to a Warden to go outside them in order to make an assessment. Therefore, I specifically and deliberately decline to make any assessment on the basis of the weight of material won or sold.

Because of the absence or dearth of evidence, with the consents of the parties, I carried out an inspection of the land and quarry on 27th July, 1981. The acreage was as described by Mr. Lyell in evidence and that covered by the quarry is grazing land. There was a small area of cultivation well away from the quarrying operations and the lease is over land in which there is a rocky outcrop, but with some natural grassing. As far as value of the land is concerned, I note the undispute figure which Mr. Lyell put on it of $50,000 and while this would include the residence on the property, I must not lose sight of that fact because of the provisions of Section 124(1)(d) - the compensation assessed shall not exceed in amount the market value of the land and improvements for other than mining purposes. It seems to me that there would be some loss caused or likely to be caused by the activities of the lease holders which would come under the heading of 124(1)(b) (i), i.e. damage to the surface of land; (ii) deprivation of possession of the land; nothing under (iii) severance of land; nor (iv) but some assessment under (v) and perhaps some assessment under (vi) all consequential damage, bearing in mind that trucks and service vehicles have

to pass the front of the house on the way to and from the quarry. It might here be noted that apart from the other quarry on Mr. Lyell's property, which appears to be dormant at the moment, other quarrying operations are taking place on the other side of the subject lands which have necessitated the construction of a sealed road past the front of the house, through the property and to the other quarry. From that sealed road there is a gravel topped road to the subject lease and to the quarry area. This would become boggy in wet times and dusty during dry periods and such might well have some adverse effect upon Mr. Lyell's property.

During evidence Mr. Lyell referred to the effect that blasting has had on his property from fly-rock and damage to the residence, and putting aside the question of the residence for the moment, I think also that some consideration has to be given to Mr. Lyell if blasting is to take place on the subject land. This would come also under the heading of "all consequential damage".

While the area of the subject lease covers some 2.83 hectares within a property of only 17 hectares, which also has another quarry of similar size upon it, I think it would be safe to say that the operations of the subject quarry would have adverse effects upon the owner and occupier. Again, it is clear that Mr. Lyell and his family use the property only on a weekend basis although up to the recent drought he ran stock upon it. There would be likely to be some diminution in the value of the property, because of the existence of this lease and the quarry.

In the circumstances, I make the following assessment, under Section 124(1)(b): (i) for damage to the surface of land etc. $300 per annum; (ii) deprivation of possession or use of the land $100 per annum; (v) destruction or loss or injury to livestock or possibility thereof $50 per annum; (vi) all consequential damage $200 per annum, this amount to be payable within one month from today and if no compensation has been previously paid during the currency of Mining Lease No. 243 it is to be paid in respect of past years during which the lease was worked, unless suspension applications had been granted of labour conditions. As far as the future is concerned, it is desirable that it be kept up-to-date with current values and for the want of a more accurate guide, the Consumer Price Index will be employed, and so long as the lease holders or someone of their behalf work the lease and unless suspension of operations is granted by the Minister, I direct that the total figure arrived at, which is $650 per annum, be adjusted in accordance with the Consumer Price Index and varied accordingly, the first variation of which is to take place on 1st July, 1982. Payment in accordance with this

assessment may be made in respect of the period up to 30th June, 1981 to the Registrar of this Court, to be paid out by him to the applicant.

I turn then to the alleged damage to the house. The evidence in relation to the damage is unsatisfactory. Mr. Lyell swore that it was not damaged on one weekend and that he had been merely told by his sister-in-law that there had been a large blast at the quarry and he had found it damaged the following weekend. The sister-in-law was not called to give evidence nor was any date specified as to the blast. On the other hand, Mr. Lewis contested that blasting had caused the damage but here again he could not prove that this was the case. The residence was inspected by myself. While there is some structural cracking in the walls it certainly did not seem to me to be of such magnitude that I could conclude definitely that blasting was the cause, especially bearing in mind the propensity of concrete and brick buildings to develop expansion and movement cracks. Accordingly, I deliberately make no assessment of compensation in respect of the alleged damage to the residence.

On the question of costs, it is open to a Warden, under Section 146, to award costs. Exhibit 6 - the letter - indicates that Mr. Lewis, on behalf of the lessees, approached the landowner, Mr. Lyell, in 1976 and Mr. Lyell has left it until 1981 before approaching the Court to have compensation assessed. The question of awarding costs is discretionary and in exercise of that discretion, I think it both proper and reasonable to direct that the parties pay their own costs.