

IN THE WARDEN'S COURT
HOLDEN AT SYDNEY ON
2ND DECEMBER, 1981
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

Omya Minerals Pty. Ltd. and another

v.

R. Burge and others

BENCH:

This has been the hearing of an application made on behalf of Omya Minerals Pty. Ltd. and L.H. McGill Pty. Ltd. who are conducting a joint undertaking in respect of Mineral Lease No. 4360 (Act 1906), for conditions to be imposed or stipulated in regard to a right-of-way from a public road to the area of the subject lease. The respondents in the matter are Mr. Wesley Burge and his wife who own or occupy areas of land called portions 48, 78 and 46, Mr. Burge's brother, Mr. Ross Burge, who owns portions 75, 73 and 57, and Mr. and Mrs. A. and J.E. Lyell who own portion 49. All portions are in the parish of Ponsonby, county of Bathurst, and are situated at Georges Plains, near Bathurst, New South Wales.

Some objection arose from Mr. Wesley Burge as to whether a road called a reserve road should be used by the applicants in lieu of a road called a formed road. Mr. Burge felt that there would be some interference to his property if the formed road were used. It seemed clear to me on the evidence, however, that the applicants had already up-graded the formed road to such an extent that it now has a sealed surface and the respondents had, in October, 1980, each been made aware of the applicants' intentions in relation to the road of access and had then acquiesced in those intentions. For these reasons, I over-ruled Mr. Wesley Burge's objection and at the conclusion of the sittings at Bathurst on 27th November, 1981 it was indicated to the parties that the road of access to the lease should be along the so-called formed road. I reserved for further consideration the question of conditions to attach to any document evidencing right-of-way.

Evidence was given by a Mr. A.H. Paul, an experienced valuer, who deposed of having inspected the areas of land through which the road of access runs. In his

opinion the land value was some \$125 per acre at the present time and on that basis and allowing for a road width of 12 metres and assessing the distance of that road in each particular landowner's areas came to a total area of land to be occupied by the access road. In respect of Mr. and Mrs. Wesley Burge, the distance of 1145 metres which multiplied by 12 metres came to 3.4 acres and allowing for a 7½% return of value on an annual basis the sum of \$31.85 per annum was considered to be an appropriate rental for this land. Similarly, in respect of the part portion 78 which was under Crown Lease No. 1914/35, there was some 384 metres which came to a total area of 1.13 acres with an estimated return of \$10.60 per annum payable also to Mr. and Mrs. Wesley Burge. As to the lands of Mr. Ross Burge there was some 2,112 metres which multiplied by 12 metres came to 6.23 acres which calculated on a 7½% return produced an annual rental of \$58.50. As to the land of Mr. and Mrs. Lyell there was some 494 metres which multiplied by 12 metres produced 1.48 acres with an estimated annual return on a 7½% value basis produced a rental value of \$13.85 per annum.

The landowners did not dispute these calculations but indicated that they were concerned about noxious weeds and in particular saffron thistles and Patersons curse and were also worried about rocks falling from trucks. They made no particular mention as to what the figure should be in dollars as recompense for any inconvenience or loss arising from the activities of the lease holders but I consider they are entitled to some figure, bearing in mind that one truck every 16 minutes will be travelling along this roadway when production reaches its height.

There is also the possibility of stock being disturbed although Mr. Paul tended to think that they would become accustomed to the traffic. Again, the roadway goes close to the residences in the area and while this might be of some measure of convenience to the occupants of those houses, certain traffic, noise, vibration and dust hazards would result. I note from the evidence of the two Mr. Burges that this area has been where their homes have been for many years and still are, and I think it proper to look at all these factors in order to make some determination by way of compensation.

The applicants and the respondents, the two Mr. Burges, in October, 1980 executed agreements as to the roadway and I think it proper to annexe this deed to any document evidencing a right-of-way. I have received a telegram from Mr. and Mrs. Lyell, which is exhibit 2, which incorporates some of the conditions already agreed to by the two Mr. Burges in the copies of their agreements, exhibits 4 and 5, and mentions the noxious weeds problem which has already been mentioned also by the Burges in their sworn evidence.

A plan as presented to me by the applicants, setting out in red the so-called formed road, will also be annexed to the document evidencing the right-of-way.

I think that the matter can most equitably be resolved by me in assessing rental at the figures calculated by Mr. Paul. However, I am of the opinion that the landowners or occupiers are entitled to something in addition to that in view of the hazards that I have mentioned and the disturbance which may result and I am of the view that the distance within each particular portion is relevant in order to form a basis of compensation assessed. I emphasise that no land owner put figures in dollars and cents as to what was considered to be an appropriate rental or compensation and the applicants were also silent as to compensation, with the exception of the evidence of Mr. Paul. Mr. R.C. Ferguson, the quarry manager, indicated that the agreements would be honoured by his employer and I think the spirit of those agreements and the undertaking to honour the terms could also be applied to the land of Mr. and Mrs. Lyell, especially in view of the terms of their telegram.

In the circumstances I am of the opinion that the distance within each portion is relevant for the purposes of compensation assessment and taking all factors into account as much as I am able, I think it proper to assess compensation at 10¢ per metre per annum for freehold land. So in respect of the land of Mr. and Mrs. Wesley Burge there will be compensation at \$114.80 per annum. As to the lands within portion 78 this is a Crown Lease and therefore a lesser figure of compensation is considered to be applicable and I believe that 5¢ per metre per annum to be appropriate. As to this portion therefore a figure of \$19.70

per annum is appropriate to be paid to Mr. and Mrs. Wesley Burge in addition to \$114.80 and the total annual rental of \$42.45. As to the lands of Mr. Ross Burge there will be a figure by way of compensation of \$211.20 per annum in addition to the annual rental of \$58.50 and as to the lands of Mr. and Mrs. Lyell there will be the sum of \$49.40 per annum as compensation in addition to the annual rental of \$13.85.

During the course of the proceedings, Mr. Ross Burge indicated that the local council might have been responsible for some of the length of his roadway as considered by Mr. Paul to calculate the rental. I was not informed as to the distances involved, so the figures in respect of Mr. Ross Burge are maximum only; lesser figures may be paid depending on the length of roadway in respect of which he is responsible, but using the same formulae that I have applied.

As to payment, I direct that a figure representing the totality of rental and compensation be paid in advance on or before 15th January each year direct to the respective owners or occupiers, as the case may be. It will be noted that I have left in the document evidencing right-of-way a right of any party to apply for a variation of any of the conditions therein.