IN THE WARDEN'S COURT NO: 2007/05
AT SYDNEY IN THE STATE
OF NEW SOUTH WALES
13th AUGUST 2007
J. A. BAILEY CHIEF MINING WARDEN

GUJARAT NRE AUSTRALIA PTY. LIMITED Applicant

v.

BELLPAC PTY. LIMITED Respondent

Application for Assessment of Compensation CCL 745
S.265 Mining Act 1992

Appearances on 7th June, 2007:

Mr. Webster SC, instructed by Brendan Tobin of Sparke Helmore for Applicant
Mr. P. McEwen SC, with R. Scruby of Counsel, instructed by Mr. L Gallate, Solicitor of Kemp Strang for Respondent.

Decision handed down in the absence of parties

BACKGROUND

On 13th February, 2007, Gujarat NRE Australia Pty. Ltd [hereinafter referred to as Gujarat] made application for assessment of compensation in respect of Consolidated Coal Lease No.745. The respondent to that application was Bellpac Pty. Ltd. [hereinafter referred to as Bellpac] The matter first came before the Warden's Court on the 26th March, 2007 and, at that point of time, the solicitor for the applicant appeared and mentioned it on behalf of the respondent company. Following certain directions being made, the matter was then adjourned until the 27th April 2007.

Prior to the 27th April, there was a Notice of Motion filed by Bellpac Pty. Ltd to strike out the proceedings due to lack of jurisdiction. On the 27th April 2007, Mr Tobin, solicitor, appeared on behalf of the Applicant company and there was no appearance by the respondent company, which had been excused.

Following that appearance, the Notice of Motion that had been filed by the respondent was set down hearing over a two day period on the 7th and 8th June, 2007.

When the matter came before the Warden's Court on the 7th June, both parties appeared and were represented by Senior Counsel. There was an application on behalf of the respondent to the Notice of Motion, that is the applicant for the compensation – Gujarat Pty. Ltd – that the matter be adjourned. Following objection by Bellpac to that application, the court refused the adjournment. Subsequently, Mr Webster, SC sought leave of the court for Gujarat to discontinue the proceedings, that is the application before the court for compensation. Mr McEwen, SC, did not object to the application to discontinue and consequently that was granted.

What is in issue following the discontinuance of the proceedings is an application by Bellpac Pty. Ltd for its professional costs. Those costs are opposed.

On behalf of Bellpac, it was submitted that the application under Section 265 of the Mining Act 1992 only came before the court as a "tactical step" by Gujarat to combat demands that it had made upon Bellpac pursuant to some correspondence between the parties in late 2006. It was further submitted that following the Notice of Motion that

the Warden's Court did not have jurisdiction, Gujarat failed to respond to such claim other than giving their denials.

It was further submitted that Bellpac was entitled to its professional costs because Gujarat has failed to indicate the mining area in relation to which its present claim is related and particulars of that and other particulars are vague to the point of meaningless.

Basically, the submission put to the court centres on Gujarat doing very little in relation to communicating to the other side concerning this application and, furthermore, notification of discontinuance was received only a few days before the hearing. Consequently, Bellpac ought to be entitled to the full indemnity costs.

On behalf of Gujarat, Mr Webster submitted that indemnity costs would certainly not be appropriate in this particular case and that an order ought to be made that each party pay its own costs. Mr Webster challenged the fact as to whether or not the Notice of Motion put on by Bellpac was a valid one at all. He said that there was no valid basis for putting that motion before the court.

LEGISLATION/CASE LAW

Section 317 of the Mining Act 1992 provides:

> **317 Costs may be allowed**
>
> (1) The costs of all proceedings under this Act before a warden (whether in a Warden's Court or otherwise) are in the discretion of the warden and the amount of such costs may be determined by the warden or taxed, as the warden may direct.
>
> (2) The reference in subsection (1) to costs includes a reference to an arbitrator's costs in relation to a hearing under Division 2 of Part 8.

It is clear from the wording of that section that a Warden's Court has a broad discretion in relation to the awarding of costs. Notwithstanding the submission of Mr Webster, that there is no express power under the section to award indemnity costs.

I am of the opinion that Section 317 provides such wide discretion, that a Warden's Court may award indemnity costs.

In considering indemnity costs, as a rule, they may be awarded in those circumstances where:

1. There is no prospect of success, in other words, "without substance", "groundless", "fanciful or hopeless"
2. Where there is an abuse of process
3. Where a party is participating in conduct which is considered unreasonable, such as unnecessarily prolonging proceedings, unfounded allegations of fraud or improper conduct, behaviour which causes unnecessary anxiety, trouble or expense, and matters of that nature.
4. Where a party is involved in fraud or misconduct

Although that list is not exhaustive, for a court to award indemnity costs, it's discretion must be exercised with some caution. The circumstances must be such that it requires a "sufficient and unusual feature" ***[Colgate Palmolive Co v. Cussons Pty. Ltd Ltd (1993)46FCR225]***

As Campbell J said in ***Joseph Lahoud & Anor v Victor Lahoud & Ors [2006] NSWSC 126 10/03/2006,*** at paragraph 40: "I have no doubt that the Court can order indemnity costs concerning an issue which was hopeless".

An abandonment of a claim is not, in itself, a reason to order indemnity costs. [see ***Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd (1995)36NSWLR 24]***

I accept that this application for compensation assessment was put before the court by the applicant was bona fide and not "groundless" or for any other reason which would trigger an awarding of indemnity costs.

During submissions reference was made to ***Kiama Council v Grant (2006), 143 LGRA 441***. Reference is made in this case to extracts of the following cases:

Australian Securitites Commission v Aust-Home Investments Ltd (1993) 44 FCR 194; ***Australian Securities Commission v Boronia Investments Pty. Ltd (1995) 18ACSR 772***: ***Re Minister for Immigration and Ethnic Affairs; ex parte LAI QUI; One.Tel Limited v Commissioner of Taxation (2000) 101 FCR 548***. Those cases were cited by Preston CJ in ***Grants*** case under the sub-heading "The Approach to Costs where no Hearing on the Merits". I will now cite some of the passages that were referred to in the submission on behalf of Bellpac: "A successful party is prima facie entitled to a costs order .... when there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a cost order." "In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other parties should obtain the costs of the action."

"If it appears that both parties have acted reasonably, in commencing and defending the proceedings, and the conduct of the parties continued to be reasonable until the litigation was settled, or its further prosecution became futile, the proper exercise of the cost discretion would usually mean that the court will make no order as to the cost of proceedings."

After citing a large number of cases, Preston C.J., under the sub-heading of "Summary of Principles" makes the following comments:

"The Principles that emerge from these cases ... where there has been no hearing on the merits:

(a) Where one party effectively surrenders to the other party by:

(i) discontinuing without the consent of the other party or:

(ii) giving undertakings to the court or submitting to the court making orders against the parties substantially in the terms or to the effect claimed by the other party; the proper exercise of the costs discretion will ordinarily be to make the usual order as to costs, unless there is disentitling conduct on the part of the other party; and

(iii) where some supervening event or settlement so removed or modifies the subject of the dispute that no issue remains except

that of costs, the proper exercise of the costs discretion will ordinarily be to make no order as to costs unless;

(iv) one of the parties has acted so unreasonably that the other party should obtain costs of the action;

(v) even if both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried so that the party should have obtained the costs of the action".

Although not referred to by the parties, the issue of costs, where one party discontinued the substantive matter, was recently considered also in the decision of ***Fordyce v Fordham]2006]NSWCA274.*** In that matter, McColl JA referred to a number of cases including ***Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia & Anor; Ex parte Lai Quin.*** In ***Fordyce*** the issue there was the question of costs after an action had been discontinued. The Court of Appeal held that each party should pay its own costs. In giving her decision, Her Honour made comments such as: "I take into consideration the fact that the opponents sought leave to discontinue their proceedings but having regard to my view that they were reasonable in commencing the proceedings and their discontinuance was sought only in circumstances where their further prosecution was unnecessary", and "This is a case in which neither party won or lost. Rather, as Mr Simpkins submitted, they became "spent" or "futile", and "I agree with the primary judge that the opponents' conduct in commencing the proceedings was reasonable:, and "The claimant's conduct was indubitably provocative".

Her Honour proceeded to refer to ***Austcorp Finance and Leasing Pty. Ltd v Thomas*** (unreported, Supreme Court of Queensland, 23 August 1991) ... "provided that on discontinuance the court or Judge should make costs orders 'as may be just'." And likewise Her Honour referred to ***J T Stratford & Sun Ltd v Lindley (No 2) [1969] 1 WLR 1547*** saying "...which dealt with the consequences of an order giving the plaintiffs leave to discontinue, ***RSC* 0 21, r 3(1)** left it to the Court to make such order as to costs 'as it thinks just'."

In considering cases I have referred to in this matter, they talk about "hopeless", "groundless" applications being withdrawn. This case is different, it is an application

for assessment of compensation that is being withdrawn. The Applicant put in an application so that it could gain access to land. A holder of a Mining Licence is by law, entitled to access, but is subject to compensation being in place. The application, in itself, is not one that is "hopeless" or "without substance".

The respondent says there is a deed with provision for compensation and it is to that end that the Notice of Motion was filed – citing the deed as applying to the compensation arrangement under Part 13 of the Mining Act 1992 and accordingly, if that is so, the court has no jurisdiction.

However, the applicant's reply is that the subject deed is not designed to cover "compensatory loss" under Section 262 of The Mining Act 1992, and even if it does, it appears the deed grants access for a period of three years. It is the end of three years which concerns the Applicant, because with no compensation arrangement in place, it may be denied access.

In making the following comments, I rely upon submissions put to me by the parties in court. I have not considered the deed itself. If the Supreme Court declares that the Warden's Court does not have jurisdiction because the deed covers compensatory loss, then that compensation deed, on what I have been told, expires in three years. That being so, the applicant at the expiration of that time will need, if there is no agreement, to seek a compensation determination from this court.

Needless to say, if the Supreme Court declares the deed does not apply to compensatory loss under Section 262 then the applicant will need to commence proceedings again.

Whatever happens in the Supreme Court, it appears (having regard to the fact that the parties are disputing over this issue now) that this court at some point in time, unless the applicant has no further need for access to the respondent's land, will need to make a compensation determination.

The purpose of the discontinuance of the present action was so that the parties could argue this court's jurisdiction, along with other issues that they are in dispute, before

the Supreme Court. True it is that if the question of jurisdiction was argued before me and one party did not accept my decision, then there would be a right of appeal to the Supreme Court. Commonsense dictates that the greater practicality is achieved by putting the jurisdiction of this court as an issue before the Supreme Court in the first instance, if the issue can be considered in the current proceedings before that court.

It would appear that the respondent, from what was said in Court, suggested to the applicant that this issue be pursued in the Supreme Court rather than the Warden's Court. It was conceded that that comment was made by the respondent "without prejudice". It would appear on the face of it that the applicant has gone along with that suggestion, although leaving it until the final day to notify the respondent of an intention to discontinue.

It is the respondent's contention that it expended professional fees in preparing for this Notice of Motion and has receive notification of the applicant's intention only at the eleventh hour. The respondent, whose Notice of Motion to discontinue the application was before this court, filed a large number of documents to assist its case. True it is that there were many communications between the parties seeking better particulars of the compensation claim. However, also on the file is a great deal of material concerning the current dispute between the parties in the Supreme Court. That dispute has nothing to do with this court or anything arising from this court. However, in its Notice of Motion, the respondent makes reference to two deeds which are in dispute in the Supreme Court and relies upon those deeds to support its contention that this court has no jurisdiction to make a compensation determination.

I accept that the deed referred to as "Access Licence" may deal with compensation arrangements. However, I find it very hard to accept how a document referred to as "Remediation Licence Deed" could possibly have any connection with compensatory loss under Section 262 of The Mining Act 1992. (I reiterate, that I make those comments without reading any of the documents).

All mining leases have a requirement for rehabilitation of the site. If the holder does not comply with that clause, Mineral Resources may take action for enforcement of

that part of the holder's obligation, such situation could involve the imposition of fines. [See S240 Mining Act 1992]

"Remediation" and "Compensatory Loss" under the Mining Act 1992 is like "chalk and cheese".

That being said, it would appear that any time in preparing submissions that the Remediation Licence Deed deprives this court of jurisdiction would be unnecessary. Certainly any work on that aspect appears to be crucial to the current Supreme Court action between the parties and not this court.

What I am saying is that if this court were to order costs, it would need to exclude the costs spent on preparing submissions as to the Remediation Licence Deed, on the information that has been put to me.

However, costs is in my discretion. True it is that if discontinuance is due to the fact that the applicant had no case, then cost naturally follows. The difficulty here is that the applicant will have a "case" if:

1. The Supreme Court says the Access Licence does not take into account compensatory loss.
2. The Supreme Court says that the Access Licence is or does refer to compensatory loss and the respondent denies the applicant access after the period in the Access Licence expires.

That "case" is one to be presented to the Warden's Court if the parties are not in agreement as to any compensatory loss. Unless the parties change their present attitude, it would not be an unreasonable assumption to conclude that there will be no agreement as to "compensatory loss".

I indicated at the outset that I would not deliver my decision on costs until after the filing of the documents in the Supreme Court and any further submissions by the parties. I also indicated that I was unsure as to whether or not the filing of the documents would make any difference to the situation as it stood on the 7th June 2007.

Following the filing of documents by Gujarat in the Supreme Court, a submission was received by Kemp Strang, Solicitors for Bellpac, stating, inter alia, "We do not consider that the Cross Claim filed by Gujarat is relevant to the issue of an order for costs in these proceedings". I can only agree with that submission. The filing of that document makes no difference, other than it shows that Gujarat was genuine in indicating to the court that the discontinuance was for the purpose of pursuing the issue of jurisdiction in the Supreme Court.

Consequently, it appears no matter what occurs in the Supreme Court, the parties will be back before the Warden's Court in relation to Section 265 of the Mining Act 1992. When they come back before this court, this court must make an assessment as to the quantum of the "entitlement" of the landholder (see Section 265 Mining Act 1992) as to the compensable loss. [This may change if the parties decided to agree to compensation]

To summarise, without agreement, the applicant will be successful in this court. It would have been on this occasion but for the Notice of Motion (which could only have postponed the issue at best) and the decision of the applicant (at the suggestion of the respondent) that the issue raised in the Notice of Motion be argued in the Supreme Court.

This Notice of Motion may have put the respondent to legal fees but it has also put the applicant to unnecessary legal expenses.

I accept that the application for assessment of compensation was bone fide and for a proper purpose.

IN EXERCISING MY DISCRETION, I ORDER THAT EACH PARTY PAY ITS OWN COSTS IN THIS JURIDICTION