IN THE MINING WARDEN'S
COURT HOLDEN AT
SYDNEY BEFORE
J.L. McMAHON,
CHIEF WARDEN.
9TH AND 10TH AUGUST
AND 21ST OCTOBER,
1977.

BENCH: This is an assessment of compensation under the Mining Act, 1973, as amended.

Blue Circle Southern Cement Limited is the nominee of Standard Portland Cement Limited the lessee of certain mining purposes leases in the Kandos district in central New South Wales. Some of the land over which those leases from the Crown are held is owned by Kurrawen Pty. Ltd. within a property called "Mount View" Clandulla.

The mining purposes leases have the numbers 889, 963, 965 and 1196. Traversing the land contained in these leases is an aerial ropeway constructed of steel stanchions and cables which convey large steel buckets for several kilometres across the property. Buckets normally contain the raw cement product from the lessee's mines to the lessee's processing plant. Constructed and existing on the leases are also the attendant facilities for the operation of the ropeway.

By application dated 4th July, 1977, Kurrawen made application for assessment of compensation and it was set down for hearing commencing on the 9th August, 1977. On that day Mr. G.M. Grant appeared as Authorised Agent for Kurrawen while Mr. M.D. Newell appeared in the same capacity for the lessee. At the hearing Mr. Grant gave evidence himself, called a Mr. Percy Yeomans, an expert in irrigation, Mr. R.P. Tippett the Manager of "Mount View" and a Divisional Manager for Kurrawen Mr. C.K. Cockerill. For the lessee Mr. Newell gave evidence himself and called the Assistant Mine Manager of the Portland Cement Works Mr. T. McCarthy as a witness.

The main lease is MPL 889 which is over an area of some 21.18 hectares of which some 16.37 are in "Mount View". This lease was initially granted on the 6th September,1937, and is current until the 6th September, 1998; whether by coincidence or otherwise the present renewal to 1998 took affect from the 7th September, 1977. The purpose of MPL 889 was to erect standards, posts, wires and appliances in connection with the transmission of electricity and for the aerial ropeway associated with the cement works. MPL 963 has an area of 1.82 hectares of which 0.68 hectares are within "Mount View". This lease was granted on the 20th November, 1939, and is current until 20th November, 1979. The purpose of this lease was the construction of a water supply pipe to the cement works. MPL 965 has an area of some 4.2 hectares of which some 3.23 hectares are located within "Mount View". As in the case of MPL 963, MPL 965 was granted on the 20th November, 1939, and is due to expire on the 20th November, 1979. The purpose of this lease is the construction, maintenance and service to an aerial transmission pipeline and to an aerial ropeway. MPL 1196 has an area of some 5.86 hectares of which 2.31 hectares are within "Mount View". It was granted on the 15th February, 1955, and is current until 15th February, 1996. The renewal of this lease took place as recently as the 24th September, 1976. The purpose of this lease is the erection of standards, posts, wires and appliances for the conveyance of electricity and the construction and maintenance of a road.

As can be seen three of the four leases have been current since before 1940 and two of them, including the main one, MPL 889, are current

until almost the year 2000. When the three long standing leases were first granted the lessee negotiated with the then landowners and signed a compensation agreement. Suffice is to say that the agreement vested in the lessee an option to renew for a further period of 20 years from 1957 and as that option was exercised and up until 6th September, 1977, the area was covered as to compensation At the present time however, as the leases are still current and as the compensation agreement has expired, in the absence of further agreement between the parties the Warden has to assess any compensation payable.

In 1972 Kurrawen Pty. Ltd. obtained the title to "Mount View" and since then has undertaken a programme of water preservation and conservation together with soil and pasture improvement. It was assisted by the expertise of Mr. Yeomans who is an internationally recognised expert on a form of water conservation, which he introduce called "keyline" irrigation. This particular type of irrigation relates to a point in a primary valley called a "keypoint" which is the point on land where the steep slope on one side of the valley is met by the flatter, longer slope of the other. The keyline then extends on the same level on either side of the keypoint. It is said that keypoints and keylines only apply to primary valleys which are the highest series of valleys in every natural water catchment region Mr. Yeomans presented a plan to Kurrawen to the effect that if dams were constructed in strategic points along keylines that the greatest possible use could be made of all water that fell in the catchment area.

As a result of the advice received from Mr. Yeomans and applying the principles of keyline irrigation Kurrawen has introduced a series of dams which are shown in Exhibit 3 which is a plan of the property, and which are spotted green. One proposed dam which is spotted red marked 'A' was according to Kurrawen, impossible economically to construct because of the existence of the ropeway and its attendant facilities, and, as a result of dam 'A' having not been constructed, it was then technically inappropriate to build dam 'B', also spotted red in Exhibit 3. Kurrawen submitted that dams 'A' and 'B' were in the best possible keyline positions but that because they could not be constructed the whole of the area hatched red on Exhibit 3 could not be irrigated even though it had been possible, using the other dams marked 1 to 10 to irrigate the remainder of the property as outlined in Exhibit 3 in the area hatched green. It was put to me by Kurrawen that it was not practical to contemplate another type of irrigation other than keyline bearing in mind the economics of construction.

Putting aside the question of irrigation for the time being Mr. Grant on behalf of Kurrawen had made some comments and called Messrs Tippet and Cockerill in respect of suggestions that the lessee's employees had been leaving gates open and had been otherwise contributing to causing difficulties in running the property. Mr. Tippett complained of stock being "boxed" which means that they were mixed, when the requirements of the owners were that they be kept separate; this necessitated considerable expenditure in money and time to draft cattle and sheep into correct herds. Mr. Cockerill confirmed this evidence and supported Mr. Tippett's other evidence on the question of shooters and trespassers entering the property without authority. From the evidence it seems that Kurrawen has finally resorted to a sophisticated gate-locking system to prevent trespassers, etc. and to minimise boxing of stock, and while there had been less incidents of these troubles in recent times it seems that this diminution had been caused, it is suggested by Mr. Grant and his witnesses,by the lessee having to suspend its operation. I find, however, as a fact that there is no evidence at this stage before me to prove to the civil standard of proof that the agents or the employees of the company generally caused the boxing of stock, and the existence of trespassers and shooters. There may have been isolated incidents but I cannot be satisfied on the evidence and on the question of general compensation I delete from consideration the complaints in regard to these matters.

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Reverting then to the question of compensation generally, since early July, 1977, the operations of the lessee in the subject mining purpose leases have been under indefinite suspension. The reason for this has not been explained in evidence although it is a notorious fact that the general conditions in the building industry have reduced demand for cement products. The results, however have been that there has been a greatly diminished need to use and service the ropeway and other fittings. Perhaps it is significant that the suspension of operations should happen to coincide with the application for assessment of compensation.

When determining compensation I believe it essential not to overlook the fact that the mining purposes leases and their attendant ropeway and other structures were in existence at the time of the purchase by Kurrawen of the property. These unsightly structures would have been there for any prospective purchaser to see and be deterred by and therefore, in my opinion, it is more likely than not reasonable to say that the purchase price would have been appropriately reduced by virtue of the existence of the mining purposes leases and the structures. I note that Mr. Grant has said that his solicitors had difficulty in obtaining copies of compensation agreements, but I note also that he has conceded that at the time of purchase he was obviously aware of the ropeway and of the existence of the four leases.

Bearing in mind the successful attempts at irrigation brought about by the constructions of dams 1 to 10 as in Exhibit 3 and applying formulae set out in his evidence Mr. Grant submitted several bases upon which determination of compensation could be approached. On the other hand Mr. Newell made the point that dam 'A' which was the most important missing dam could be constructed under the ropeline with the supports for the line either contained in the centre of the dam or at the sides, or both. He added that Kurrawen had applied to Rylstone Shire Council, the local Government body to the area for approval to subdivide some of the lots of "Mount View" into smaller areas, perhaps with a view to sale, and therefore doubt was cast on real intentions of Kurrawen when they refer to inability to irrigate.

During the hearing a question was raised about the power of the Warden under the Mining Act relative to assessment of compensation. Mr. Newell submitted that compensation should be restricted only to relate to deprivation of or use of surface of the land to the extent of those areas contained in the leases, but not outside the leases. On the other hand Mr. Grant submitted that lands outside the area of the lease should be subject of compensation assessment. Having considered both of these submissions I note the provisions of Section 122 (1)(b) which reads as follows:-

> "Where an authority is granted ..... the owner and occupier of any private lands, and the occupier of any Crown lands, not being lands subject to the authority, are entitled to compensation for any loss referred in Section 124 (1)(b) suffered, ...".

Therefore it is apparent that the owner of private lands which are not lands the subject of an authority is entitled to compensation in addition to that compensation payable to the owner of any private lands the subject of the authority, in other words, lands that are affected by reason of the grant of authority, although they are not contained in the area of that authority, may be considered if any loss is suffered, or likely to be suffered as a result of the grant of the authority, for the purposes of compensation. Having so found, ground (i) to (vi) in paragraph (b) to subsection 1 of Section 124 must be considered.

On the 17th August, 1977, with the consent of and in the presence of both parties I attended the scene of the leases and made an inspection of the ropeway and attendant facilities. At the same time I required the parties to submit to me further evidence as to value of the land, both irrigated and dry. On inspection I observed the various aspects of the property and the ropeway. Speaking from a layman's point of

view, I was most impressed by the general appearance of the farm and of the obvious thorough planning which had gone in its development including the apparent utilisation to the greatest advantage of the available natural water supply.

Dealing with the evidence of valuation there has been forwarded to me with the acquiescence of both parties, and on my request, written advice from Mr. J.D. Powdrell, a Chartered Surveyor and Valuer of the Graziers Association of N.S.W. He inspected the lands on the 30th August, 1977, and assessed a fair market value of the irrigated land at $520 per hectare, or $210 per acre. He further advised that a fair market value of the adjacent non-irrigated land was $210 per hectare or $85 per acre.

The evidence given by Mr. Grant as to the difficulties caused by the ropeway in that dam 'A' could not be constructed was confirmed by Mr. Yeomans who in his evidence proposed that in his opinion "Mount View" was properly managed and was profitable. Although he deposed of the difficulties involved dams 'A' and 'B' because could not be constructed, he did concede that it was possible to irrigate the red hatched area in Exhibit 3 by means other than the keyline system, although, he said, the cost would render the project uneconomical. He felt therefore that there was no practical way of irrigating the red hatched area at the present time other than by the keyline system.

Mr. Grant stated in evidence that if dams 'A' and 'B' could be constructed 160 of a total of 180 acres as presently shown as dry land and hatched in red on Exhibit 3 could be irrigated, with a further 20 acres at the northern end of the ropeway in the same category. Thus some 180 acres or 73 hectares of land are, on Mr. Grant's evidence and that of Mr. Yeomans, being left dry when they could be irrigated were it not for the existence of the ropeway.

The proposition put to me by Mr. Newell that only those lands which were the subject of the leases on "Mount View" should be considered and which I have already rejected meant that he was talking about only an area of some 6.1 hectares, the total value of which would on the written valuation be in the vicinity of $1945.00. As I have already found the Act requires that I must look outside land the subject of an authority, and beyond the land which may be affected by that authority outside its area. This means that rather than talking about land value around $2000.00 a closer value of the subject land, on the value being lands both within and outside the area of the leases would be $15,300.00 on the basis that 180 acres are affected as being dry and their value is $85 per acre.

Section 124 (1)(d) provides -

> "Where compensation is by this Act directed to be assessed by the Warden the assessment shall not exceed in amount the market value for other than mining purposes of the land and the improvements thereon."

I note that Mr. Powdrell's valuation did not purport to include improvements such as fences, stock water points, yards or buildings, and I assume that at least some of these assets would exist on the lands said to be unirrigated by reason of the existence of the ropeway. In interpreting the provisions of Section 124 (1)(d), however, I have referred to a number of cases as to the meaning of "value" and in particular Spencer's case reported in (1907) 5 C.L.R. 418 and the Commonwealth v. Arklay (87 C.L.R. 159 at 169). I take "value" therefore to mean "an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook any ordinary business considerations". Their Honours' commented in Arklay's case that the best evidence of value is with comparable sales of other land but this evidence is often not available. I note that Mr. Powdrell has stated that no similar properties have been sold in the district.

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However, on his valuation the difference in value between an irrigated acre and a dry acre on "Mount View" is $125 and it follows that with 180 acres involved a total value difference at the moment exists at $22,500.00.

During Mr. McCarthy's evidence mention was made of erecting structures so that dam 'A' could be built under the ropeline. This proposal which has now been placed in writing before Kurrawen has been rejected by that company.

As I understand Kurrawen's claim, Mr. Grant has worked on a number of bases the first one of which is the estimated grazing capacity of dry land in the effected areas as against irrigated land in adjacent area. He considered that carrying capacity of dry land was at best one steer to two acres or up to three acres as against one and a half steers per acre on irrigated land. It followed from this argument that the loss of production of current stock values was $27.38 per acre foot of water and at the present loss being, in his opinion, 200 to 250 acre foot. On today's cost that loss would be around $20,000 bearing in mind loss of weight gain.

A second basis upon which Mr. Grant relied was the loss of agistment return. Working on the difference in production between an irrigated as against a dry acre and possible costs of $1 per week for fattening a steer and $1.50 fattening a cow and calf unit, he felt that each extra acre foot of water was worth an extra $26.00 per annum. A further method of approach was, he considered, a loss of production of hay on dry land. Basing his calculation on $50 per ton sale price delivered and production costs at $20 per ton and that a yield of one half a pound of hay per square yard that is one ton per cut, and if there were three cuts of hay each year of 8 inches of irrigation water required for production, then the conclusion reached was that the loss of production would be $45 per acre foot of water. I would comment that this assessment does not appear to take into account the risk of loss during the process of hay making.

Mr. Grant then proposed a calculation on the basis of the ratio of water needed to the ultimate item of production namely, in this case, pastures. He arrived at a value of $28.44 per acre foot of water. Finally Mr. Grant submitted that research carried out into the yields of energy per acre foot of water, figures by the University of California, had arrived at a total loss applying the numbers to "Mount View" of $4425 per annum. As the main lease had 20 years to run and discounting this figure at 10% his total gross compensation figure was $37,000 approximately from which certain deductions could take place being interest on capital for the constructions of dams 'A' and 'B' reducing the compensation claim to $35,000. No mention was made by Mr. Grant as to the account of the costs of maintenance of proposed dams 'A' and 'B', but he did refer to the extra labour costs which he felt could be relatively insignificant.

In approaching the exercise of assessing compensation a Warden is bound by the provisions of the Mining Act, the most important one of which as far as criteria are concerned is Section 124 (1)(b) which provides -

> "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;
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> (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 damages."

Looking beyond the legislation to the facts of this matter but still considering an approach for the purposes of assessing compensation I feel bound firstly to look at the question whether in fact the reluctance of the management of Kurrawen to construct dams 'A' and 'B' have resulted, or will result, in the loss of production justifying an award of compensation as envisaged in Section 124 (1)(b and secondly if there is a loss of production whether that is the most appropriate method of assessing compensation, bearing in mind the great number of other factors which could influence production and return, for example, marketing, prices, seasons and other occurrences of nature.

Apparent from the evidence are a number of points some of which I have already mentioned but which ought to be repeated. Firstly, Kurrawen has not lost the use of the land nor has it been deprived of it's surface as an owner sometimes is when mining operations take place on mining leases, scarring the surface and resulting in dumping of overburden. These are mining purposes leases and it is only the existence of the stanchions, cables and other facilities which in the main occupy a very minor part of the surface of the land. Secondly, some subdivision has or will take place in the future at the instance of Kurrawen on "Mount View", and I am of the opinion that sight must not be lost of this action of the company. Thirdly, the lessee has offered to construct the ropeway in such a fashion that dam 'A' can be built under it. Fourthly, there is no doubt that there has been some inconvenience to Kurrawen as a result of the existence of the mining purposes leases on "Mount View", but even Mr. Yeomans' evidence was indicative of the fact that irrigation by other means other than keyline was possible although the feasibility was doubtful. Mr. Yeomans added that the existence of irrigated land on a property will itself increase the capacity for development of adjacent dry land, because such dry land has a greater chance to grow a full crop of grass and therefore an increased opportunity for recovery for grazing purposes. Fifthly, the ropeway and the leases were on the property when Kurrawen purchased it. Comment has already been made about this fact.

Turning then to the criteria as outlined in Section 124 (1)(b) and dealing firstly with paragraph (i) which covers the subject of damage, on the evidence before me I cannot find that there has been damage suffered by the owner because of the existence of the leases. As to paragraph (ii) deprivation, here again Kurrawen has been deprived of some possession and use of it's surface but this is minor indeed. As to (iii) severance, I cannot see where the existence of the leases has resulted in any severance of land. Dealing with paragraph (iv), surface rights-of-way and easements, I am of opinion that no compensation would flow to Kurrawen as a result of the existence of this paragraph. In relation to paragraph (v) destruction etc. to stock, I have already dealt with this subject and have commented that I cannot find, on the evidence, any proof that the lessee's agents or employees were responsible for stock loss and so on. In regard to the final paragraph, paragraph (vi) "all consequential damages" in Kurrawen's case because of the existence of the ropeway dam 'A' could not be constructed, therefore dam 'B' was inadvisable, and as a result a large area of land could not be irrigated by the keyline system. Does this fall within the category of "all consequential damages"?

I feel that the principle of "all consequential damages" means that the damages must be reasonably proximate to the mining operations, that is the existence of the authority, and not so remote geographically, in time or otherwise to the need for the lessee to pay compensation.

In this matter there is evidence that as a direct result of the ropeway dams 'A' and 'B' could not be constructed, and I am of opinic that this falls within the meaning of "all consequential damages". On the other hand if there were other factors, as exist in this case as outlined in the points above by which such consequential damages could be reduced, minimised or eradicated entirely, then these would also have to be considered in arriving at a figure for compensation: so theoretically and in practice there has been some loss of production through the existence of the ropeway; but is it the most appropriate.

In the whole of the circumstances therefore I am of opinion that the loss of value of production from dry land as compared to irrigated land for the purposes of assessing compensation in this matter ought to be disregarded.

Looking at another formula upon which to work and bearing in mind that there are two categories of land in this matter, that is, land which is the subject of the leases and land which is outside those areas but still affected as outlined by the evidence given on behalf of Kurrawen, which latter category I have already found has to be considered for the purposes of assessing compensation, I feel that in this matter there is no difference in the two respective areas. I am of the view that a fair and reasonable compensation in this matter is the sum of $10 per hectare per annum, bearing in mind that the evidence suggests that there is some 73 hectares in all affected by the existence of the mining purposes leases and applying the figure of $10 for each hectare I arrive at a compensation figure of $730 payable per annum. The Consumer Price Index available only yesterday from the Commonweal Government indicates an inflation rate of 9% annually; but this figure has been higher since 1972. What the future holds as to inflation is an unknown quantity but I am of opinion that a proposed inflation rate at 10% is the most appropriate, to apply to the subject sum.

Therefore when that figure is indexed at an interest rate of 10%, being $730 x 7.400 over 21 years on acturial tables a total interest payable is $5,402.00 payable over 21 years, plus the annual principal sum of $730. This leads to the total of $730 plus $257.24, being $5,402.00 divided by 21, which is a figure of $987.24 per annum. In arriving at this figure I have merged into consideration the totality of the area of the four leases and other lands affected, as if they were all current until the expiry date of the main lease, Mining Purposes Lease No. 889, that is, 6th September, 1998, so that in the event of renewal of the other leases before that date, the situation has been already covered.

I direct that the sum of $987.24 be paid within one month of today by the lessee to the Warden's Court at Sydney for payment out to the landowner, for the time being. The subsequent annual payments to take place on or before 1st December of each year, the second payment to be on or before 1st December, 1978.

I make no order as to costs.