IN THE MINING WARDEN'S COURT
AT ST LEONARDS

J A BAILEY, CHIEF MINING WARDEN

MONDAY 15 MAY 2000

CASE NO.	PARTIES
2000/11	Sydney Gas Operations Pty Ltd v. Brownlow Hill Pty Ltd.
2000/12	Brownlow Hill Pty Ltd v. Sydney Gas Operations Pty Ltd

APPEARANCES:

Mr A Phelps, Solicitor of Piper Alderman appears for Sydney Gas Operations Pty Ltd

Mr J Connors, Solicitor of Fitzgerald White Talbot appears for Brownlow Hill Pty Ltd

HEARING DATES: 13 March, 1 May 2000

DECISION ON PRELIMINARY POINT

PROCEDURE ON "REVIEW"

Both parties have lodged an Application for Review of an Arbitrator's Decision under the provisions of Section 69R of the Petroleum (Onshore) Act 1991. A preliminary point has arisen as to the manner in which a Warden ought to conduct a review under that particular Section.

By way of background the Arbitrator who determined this particular matter heard evidence, the parties were represented legally, witnesses were cross examined under oath, evidence was recorded and a transcript is available, and the Arbitrator was legally qualified.

Nothing in the Petroleum (Onshore) Act 1991 defines or gives any guidance to the meaning of the word "review".

Mr Phelps, Solicitor, who appeared on behalf of the Sydney Gas Operations Pty Ltd submitted that a review should be conducted by way of reading the transcript of evidence which was placed before the Arbitrator and the parties then making further submissions to the Warden. Mr Phelps pointed out that both parties had ample opportunity to present a full case before the Arbitrator and unless the landowner can establish grounds as to why witnesses were not able to be called before the Arbitrator the Warden's court should not allow any further evidence to be called at the review.

Mr Connors, Solicitor, representing Brownlow Hill Pty Ltd submitted that it was a matter for the Warden to determine the manner in which a review is to take place and that fresh evidence ought to be able to be called at the review.

Both parties in their submissions made reference to a number of decided cases in other jurisdictions to support their claim. It is necessary to look at those cases before a determination can be made as to how a review should be conducted.

Reference was made to the *Builders Licencing Board v. Spurway Constructions (Syd.) Pty Ltd & Anor.* which was a decision of the High Court in 1976. That case involved a matter where a complaint was made against the holder of a Builder's Licence under

the New South Wales Builder's Licencing Act 1971. An Inquiry was held before the Chairman of the Builder's Licencing Board. A determination was made by the Board adverse to the Licensee, that Licensee then appealed to the District Court. The District Court determined that such an appeal was in the nature of a hearing of de novo and accordingly the Board had to present its case anew to that court. This decision was ultimately confirmed by the High Court. Both parties made reference to this case. Mr Phelps pointed out the decision of *Mason J* who indicated that, in considering the nature of the review process contemplated by legislation, reference must be had to the following:

- whether or not provision was made for a hearing at the first instance - that is, prior to review;
- whether a record existed at the hearing at first instance;
- whether the authority at first instance was bound by the rules of evidence;
- whether the matters for determination were justiciable;
- whether there existed a requirement that reasons for the decision at first instance be furnished.

If those matters were answered in the negative, such would be grounds for determining that the review was to proceed by way of a hearing de novo. *Mason J* favoured a review on the record if the following were applicable:

- whether the authority at first instance determined justiciable issues formulated in advance;
- whether a formal hearing was conducted with the parties legally represented;
- the giving of oral evidence;
- the keeping of a transcript;
- the application of the rules of evidence; and
- whether the authority at first instance gave reasons for determination.

It is these later points which Mr Phelps relies upon to support his claim as to how the review should take place.

On the other hand Mr Connors made reference to page 61 of *Spurways* case where *Mason J* said: "Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of re-hearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect. Further on His Honour said: "There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing do novo".

Mr Connors pointed out that there is nothing in the Petroleum (Onshore) Act 1991 which requires an Arbitrator to be bound by the rules of evidence or to record any evidence of any hearing which is conducted. Consequently, notwithstanding the fact that evidence was given, witnesses were cross examined by legal practitioners and a transcript was recorded, as there is no provision in the Act for this to be mandatory, any review must be a hearing de novo.

Mr Phelps made reference to the matter of *Wigg v. The Architect's Board (1984) 36 SASR111* wherein he indicated that His Honour Justice Cox concluded that a wide power to enable a body to fashion its own procedures to meet the circumstances of the case is indicative of a re-hearing, but qualifies this by stating that where there is an initial full hearing, the review body should conduct its review on the documents and the record of evidence and arguments before the initial decision-maker, admitting only such additional evidence as it considers necessary to decide upon the substantial merits of the case.

Mr Phelps submitted that evidence at the arbitration hearing should be adopted on a review which would obviate the necessity to call witnesses who had already given evidence unless there were good reasons to do so. As authority for this he cited, *Association of Professional Engineers, Scientists and Managers of Australia (on behalf of Cross) v. Deniliquin Council (1995) 129ALR418.* Mr Phelps said in his written submission: "His Honour stated that even in a review which proceeded by way

of a hearing de novo, the efficient administration of justice was relevant and that Parliament would not have intended that a review be conducted as if a hearing (at first instance) had never occurred". Mr Phelps then quoted Keifel J of the Federal Court in *Powder Family on behalf of the Jetimarala people v. Registrar, National Native Title Tribunal (unreported 5/7/99):* "I consider that one might assume more readily these days that the legislature is concerned not to duplicate processes and there is a move away from de novo hearings".

In *Cockatoo Dockyard Pty Ltd. v. Atamian (unreported CA40073/94)* Clarke J A indicated that a reviewing court's powers are, naturally, discretionary. He indicated there may be good reasons to re-hear all or any of the facts, or he may for appropriate reasons decline to stir up ancient embers.

In the matter of *Brandy v. Human Rights and Equal Opportunity Commission (1995) 183CLR245* at page 261 the Court said: "In considering the nature of the "reviews" by Sections 25ZAC, it is relevant to note that the expression "review" is commonly used in the context of judicial control of administrative action and in the context of comprehensive administrative review by the Administrative Tribunal of Administrative Decisions. But what emerges from the judicial decisions and, for that matter, from statutes is that "review" has no settled predetermined meaning; it takes its meaning from the context in which it appears".

Mr Connors cited the matter of *Wigg v. Architect's Board of South Australia* to support his case and refers to page 113 of that decision where it was said: "Which type of appeal is given by a particular Act will depend upon its construction. .... it will be a matter of discerning Parliament's intention from an examination of the legislation as a whole". Mr Connors submitted that one then gets back to the legislative intention of Parliament in inserting Part IVA of the Petroleum (Onshore) Act 1991. It provides for an informal conciliation then arbitration all on an informal basis; this is to be compared with the regime under the balance of the Act where there is a structured way of appeal.

Mr Connors cited *Watson v. Hanimex Cover Services Pty Ltd. (unreported CA40277 of 1990)* where Kirby P as he then was said "..... uncertain by the terms of Section 36 itself, resort must then be had to dictionary definitions of the word "review", any clues in the scheme of the Act which would suggest the meaning of the word in Section 36 and court decisions in other cases where statutes have provided for "review" within courts in the relationship of judges and secondary officers of such courts". His Honour then cited various dictionary definitions and then indicated "such definitions do not throw much light on what the compensation court should actually do when conducting the review envisaged by Section 36".

His Honour then outlined the scheme which is applicable under the Compensation Court Act 1984 wherein Parliament envisaged that Commissioners would be non-lawyers and although they must act judicially the proceedings are to be conducted informally, parties may be legally represented and proceedings are not required to be recorded. There is a power of "review" of any decision made.

His Honour later said "all of these indicia suggest that, in a proper case, it will be open to a judge of the Compensation Court, conducting a review, to permit evidence to be adduced before him or her, such evidence may be a repetition of the whole or part of the evidence taken before the Commissioner. Or it may be entirely fresh evidence which was not received before the Commissioner or even offered there".

Mr Phelps relied also, to support his case, upon the fact that the other party ought not to be allowed to call fresh evidence at any review. He relied upon the fact that the Arbitrator gave the parties ample opportunity to call any fresh evidence which they so desired before the matter concluded. He submitted that any leave by the Warden to call fresh evidence should be withheld unless the Court is satisfied that there was a good reason why the evidence was not adduced before the Arbitrator. He cited for his authority *Commonwealth Bank of Australia v. Quade (1991) 178 CRR@134.*

Section 69K of the Petroleum (Onshore) Act 1991 provides:

(1) Except as otherwise provided by this Act or the regulations, the procedure at a hearing is to be as determined by the Arbitrator.

(2) An arbitrator must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

Section 69I of the Petroleum (Onshore) Act 1991 permits a party to be represented by a barrister or a solicitor only with the leave of the arbitrator. The arbitrator may not grant leave without the consent of all parties.

Section 69J of the Petroleum (Onshore) Act 1991 requires the arbitrator to use his or her best endeavour to bring the parties to a settlement prior to embarking upon any arbitration.

Section 69O of the Petroleum (Onshore) Act 1991 sets out the criteria for the payment of costs. It is clear from that, that an arbitrator does not have to make any decisions concerning the payment of costs by parties.

There is nothing in the Petroleum (Onshore) Regulation 1997 in respect of the role of an arbitrator.

It is clear from the Act that the arbitration concerning access is a procedure of an informal nature, where the rules of evidence are not applicable and there is no obligation to record the evidence which is heard before the arbitrator.

In this particular instance the parties were legally represented, witnesses were sworn before giving evidence and were subjected to cross examination by a legal practitioner, and a transcript of the proceedings has been prepared.

Other than the arbitrator not being bound by the rules of evidence, it would appear that other factors were applicable, wherein the matters outlined by Mason J in *Spurway* Constructions case, favour a review on the record.

However, the grounds for the review being sought by Sydney Gas Operations are that the arbitrator indicated that there was no evidence in respect of a certain aspect of the compensation yet awarded a specific figure for compensation. Common sense dictates that if a more accurate compensation figure is to be determined, additional evidence must be produced at a review. This would sit comfortably with the decision in *Weekes* case where it was indicated that only additional evidence considered necessary to decide upon the substantial merits of the case would be required when a review is undertaken.

Section 69R(6) of the Petroleum (Onshore) Act 1991 provides: "In reviewing a determination under this section, a Warden's Court has the functions of an arbitrator under this Part in addition to its other functions". Section 114 provides that the Warden's Courts under the Mining Act 1992 constituted Warden's Courts for the purposes of the Petroleum (Onshore) Act 1991. Under the Mining Act 1992 notwithstanding a Warden's Court being a court of record, a Warden has a wide power in relation to procedural matters.

Each review must be treated on its own merits. It is clear from reading the transcript of the arbitration that the witnesses were extensively cross examined, on their evidence, by legal practitioners and it would be futile to recall those witnesses to repeat the evidence and cross examination which took place previously. It is my opinion that as far as those witnesses are concerned a study of the transcript would be sufficient to inform me of the evidence produced before the arbitrator.

With regard to the grounds for review laid down by both parties it would appear that one or both parties may desire to call further evidence at this review. A study of the cases which have been submitted to me compels me to allow each party to call further evidence if they so desire. Such evidence must be relevant to the matter at issue. Accordingly I propose to adopt the following procedure in respect of this particular review:

- The transcript of the proceedings before the arbitrator will be used as evidence in this review.

- Witnesses who gave evidence before the arbitrator will not be called to give the same evidence at the review; they may be called, with the leave of the court, if it is necessary to rebut or clarify any matters that are raised by other witnesses who give evidence at the review.
- Any of the parties may produce further witnesses at the review if those witnesses are supporting the grounds of review as stipulated by each party.
- Submissions will not be confined to the witnesses who are called to give evidence at the review but will include submissions on the evidence which appears in the transcript of the arbitration.