# LAND COURT OF QUEENSLAND

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| CITATION: | *ERO Georgetown Gold Operations Pty Ltd v Henry* [2015] QLC 22 |
| PARTIES: | ERO Georgetown Gold Operations Pty Ltd<br>(applicant)<br><br>v<br><br>Thomas Peter Henry<br>(respondent) |
| FILE NO: | MRA015-14 |
| DIVISION: | General Division |
| PROCEEDING: | Determination of compensation payable for renewal of mining lease |
| DELIVERED ON: | 28 July 2015 |
| DELIVERED AT: | Brisbane |
| HEARD ON: | 17 July 2014 |
| HEARD AT: | Georgetown |
| MEMBER: | PA Smith |
| ORDER: | **1. Compensation is determined for the renewal of ML 30122 in the total sum of One Thousand, Four Hundred and Ninety-six Dollars ($1,496).**<br>**2. ERO Georgetown Gold Operations Pty Ltd is ordered to pay the total compensation of $1,496 to Thomas Peter Henry by way of four equal instalments of $374 each, with the first instalment of $374 to be paid within one month of the renewal of ML 30122, and the remaining three instalments of $374 to be paid on the fifth, tenth and fifteenth anniversaries of the renewal of ML 30122 respectively.** |
| CATCHWORDS: | MINING LEASE – determination of compensation – factors to be considered<br>EVIDENCE – expert valuation evidence – rationale not given for expert opinion |

COMPENSATION – grazing property also used for tourism and fossicking – impact on tourism to be taken into account

*Land Court Act 2000*
*Mineral Resources Act 1989*
*State Development and Public Works Organisation and Other Legislation Amendment Act 2015*

*BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107
*Gregcarbil Pty Ltd v Backus & Ors (No. 4)* (2013) QLCR 458
*Horn v Sunderland Corporation* [1941] 2 KB 26
*Mitchell v Oakhill and Mitchell* (10 March 1998) unreported
*Richardson v Barrett* [2001] QLRT 89
*Shaw v Heritage Holdings Pty Ltd* (1992-93) 14 QLCR 139
*Smith v* Cameron (1986) 11 QLCR 64

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| APPEARANCES: | Mrs AJ Smith agent for the applicant<br>Mr EJ Morzone of Counsel for the respondent |
| SOLICITORS: | Emanate Legal for the respondent |

**Background**

[1] The applicant ERO Georgetown Gold Operations Pty Ltd (ERO) currently holds Mining Lease (ML) 30122. The miner applied for a renewal of ML 30122 on 13 November 2013 for a period of 20 years.

[2] ML 30122 is located on Flat Creek Station which is owned by Thomas Peter Henry (Henry). There is also access to the ML from the boundary of Flat Creek Station.

[3] The access through Henry's property is about 1 km long and 5 m wide. ML 30122 has an area of 3.252 ha.

**Principles of compensation**

[4] Section 279 of the *Mineral Resources Act 1989* (MRA) provides that a mining lease shall not be granted or renewed unless an agreement in relation to compensation has been filed at the office of the Mining Registrar, or in the absence of such an agreement, a determination of compensation has been made by the Court. In this matter, no agreement has been lodged with the Mining Registrar and the matter has been referred to the Court for determination.

[5] The issues which must be considered by the Court are set forth in s 281(3) and (4) of the MRA.

[6] Although s 281 sets out the matters to be considered, it does not define any method of assessment. In *Smith v Cameron*,[1] the Land Court held:

> "The section in my opinion merely identifies matters which shall be taken into consideration in making the assessment. It does not prescribe a method of valuation. No doubt each case will depend on its own facts and circumstances but it seems to me that either method is open to the valuer."

[7] In *Shaw v Heritage Holdings Pty Ltd*,[2] the Land Court said:

> "The method of assessment remains a matter which will be governed by the facts and circumstances of each case in which event emphasis may shift from one method to another."

[8] In considering *Mitchell v Oakhill and Mitchell*,[3] the then President of the Land Court, referring to s 281(3) of the MRA, found:

> "the latter section does not prescribe a method of assessment. In my view, as long as the amount of compensation finally determined sufficiently accounts for each of the matters referred to in the sub-section, it is not necessary to quantify an amount in respect of each of the matters referred to."

[9] In determining compensation under s 281 of the MRA, I have adopted the same approach I took in *Richardson v Barrett*.[4] This means that the matters set out in the section are concepts to be taken into account in determining compensation, not a notion of separate heads of compensation requiring separate and discreet treatment to arrive at an accumulated figure.

[10] The overriding principle is of equivalence, ensuring that, so far as money can do it, the landholders are placed in the same position as if the mining leases were not granted.[5] Of course, great care must also be taken to ensure that there is no "doubling up" of compensation.

**The Hearing**

[11] The hearing of this matter took place in Georgetown on 17 July 2014. Henry was represented by Mr Morzone of Counsel, instructed by Emanate Legal, solicitors. ERO was represented by Mrs Smith, an agent. Although Mrs Smith has no legal qualifications, she has a long history of experience in MRA related matters and has herself been an active miner.

[12] Expert valuation evidence was given at the hearing by two valuers, Mr Maxwell George Dickenson called by ERO, and Mr Ernest Mark Harrison called by Henry. Both valuers provided expert reports to the Court. Mr Dickenson's valuation report is by way of a letter and is exhibit 4, whilst Mr Harrison's report is exhibit 2. In addition to the exhibits

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1 (1986) 11 QLCR 64 at p 74 and 75.
2 (1992-93) 14 QLCR 139 at p 146.
3 (10 March 1998) unreported.
4 [2001] QLRT 89 at [9], [10] and [14].
5 *Horn v Sunderland Corporation* [1941] 2 KB 26 at 43 per Jacobs J.

provided at the hearing, I have also taken into account the material provided by the parties by way of compensation statements and hearing reports pursuant to orders of the Land Court, as well as the Mining Registrar's referral documents.

[13] This matter is somewhat unusual as it was heard in Georgetown during sittings of the Land Court which included another matter between the same parties, except in that matter Henry is the applicant.[6] What makes this situation unusual is that the claim by Henry in the other matter is a significant, complex one that was heard over a number of days and included a site inspection and evidence from a number of people, including both expert valuers who gave evidence in this matter. Whilst the other matter relates to a different mining lease, that other mining lease is also held by ERO and is located in relatively close proximity to ML 30122.

[14] The two matters were not heard together, although a site inspection of ML 30122 was undertaken on the same day as the more detailed site inspection in the other matter.

[15] The valuation evidence given in the current matter is quite scant compared to the detail of evidence provided (albeit under a different section of the MRA) in the other matter. There were no orders made that evidence in one matter would be taken as evidence in the other matter, so in determining the matter at hand I am limited to just that evidence before me relating to ML 30122.

[16] To avoid any concerns as to the nature in which evidence was received in this matter as compared to the other matter, I wish to put it on record that, having reached my conclusions in both matters, I can say unequivocally that my decision in the case at hand would be unchanged even if all of the evidence from the other matter had been received as evidence in this matter.

[17] It is appropriate to make one further observation regarding the hearing. As I indicated to the parties, it had been my intention, due to the relatively simple nature of this matter, to deliver an ex-tempore decision. However, the manner in which the case proceeded, and the extremely limited time in light of the Court time requirements for the other matter, made it impossible to do so. That meant that this matter was reserved, as was the more complex matter. The plan was for both matters to be delivered at the same time, to hopefully save confusion for the parties in both matters. This matter was ready for delivery on 13 May 2015. However, due to the implications of the case of *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors*,[7] the matter was not able to be delivered at the same time as the more complex matter.

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6 *Henry v ERO Georgetown Gold Operations Pty Ltd* [2015] QLC 13.

7 [2105] QSC 107.

[18] Following amendments to the *Land Court Act 2000* (the LCA) by *State Development and Public Works Organisation and Other Legislation Amendment Act 2015*, and in particular amendments to s 35 of the LCA, it is now appropriate that this decision be delivered.

**The valuation evidence**

[19] As I have already indicated, valuation evidence was given by two expert valuers in this matter. However, such valuation evidence was rather limited in its scope. Given the size of the ML in this matter, that is hardly surprising. As has been expressed by the Court in many cases involving the determination of compensation for small mining projects, it is understandable that the parties are loathe to expend large amounts of money on expert valuation evidence and other legal costs. That is reflective of the evidence of both valuers in this matter.

[20] Mr Dickenson's valuation letter is somewhat dated, having been made on 17 January 2011. It was clearly provided to ERO for the purpose of assisting ERO in negotiating compensation on a number of mining tenures. The report provides as follows:[8]

> "Our research indicates the market for cattle properties has dramatically slowed in the Etheridge Shire since 2008 with only two sales in 2009 and none in 2010.
>
> The two 2009 sales were in the Einasleigh district and analyse to $70 per hectare improved land with a carrying capacity of 1 head to 14 hectares adult equivalent (1:14 AE) and $90 per hectare improved land and a carrying capacity of 1:9 AE. We consider the sale properties are similar to the grazing land in the immediate Georgetown district and reflect a similar land value of $70 - $90 per hectare.
>
> The smaller, well managed properties at Georgetown are considered to be at the higher end of the value range analysed and indicate a value of $70 - $100 per hectare at a carrying capacity of 1:8 to 1:10 AE. For sale or resumption purposes we confirm a land value of $70/ha to $100/ha for grazing properties in the Georgetown district.
>
> There are few leases and agistment agreements to our knowledge in the Etheridge Shire but the overall northern district, in most normal seasons, enjoy agistment rates for breeders of $1 - $1.50 per head per week i.e. 10 hectares of better country carrying 1:25 head at $1/week to $1.50/week provides an income of $65 to $97.50 per annum or $6.50 to $9.75 per hectare.
>
> Based on land values of $70/ha to $100/ha and a return on investment of say 10%, equates to an expected return of $7/ha/pa to $10/ha/pa, and this confirms the returns from lease/agistment.
>
> Country types, productivity and land uses vary in the district but, in our opinion on average, the loss of income due to the loss of use of grazing land in the general Georgetown district is between $7 per hectare and $10 per hectare."

[8] Ex 4.

[21] During his oral evidence, Mr Dickenson increased his quantum of compensation to between $12.50 and $15 per ha per year.[9] In arriving at his higher figure, including taking into account the passage of time, I also accept his evidence as taking account of not only Henry's grazing operations on Flat Creek Station, but also, at least to some extent, Henry's tourist operations which include camping, bushwalking, bird watching and fossicking.

[22] During his evidence, Mr Dickenson was critical of Mr Harrison's report. He had this to say:[10]

> "Well, to me, it sounds excessive, just based on what we've been talking about, and looking quickly at it, there's no qualification of what – how that amount has been arrived at, or any breakdown of what the compensation is for, other than for mining activity, loss of quiet enjoyment, and block on the title, whatever that means. I'd be more inclined to suggest that a smaller piece of land is probably not going to affect the cattle property too severely. I'm not aware of where it is in relation to roads or any infrastructure, but I would suggest that range of 12.50 to 15 dollars per hectare per annum would be reasonable compensation."

[23] Mr Harrison's valuation report certainly looks more like a "normal" valuation report provided to the Land Court in a proceeding rather than the letter from Mr Dickenson. However, looks can be deceiving. It is true to say that Mr Harrison's valuation report contains valuable annexures.[11] However, Mr Harrison's report justifying his valuation of $10,000 is scant indeed. Relevantly, the report provides as follows:[12]

> "**Compensation Background**
>
> ML 30122 covers an area of 3.252 hectares in the north east section of the property adjacent to Lorne Vale and Glen Rowan boundaries as shown on the attached plans.
>
> The renewal of the Mining Lease will affect the property as follows:
>
> - Access through Flat Creek Station for a distance for about 1 kilometre
> - Mining activity adjacent to cattle producing lands
> - Loss of quiet enjoyment
> - Blot on title
>
> …
>
> I am of the opinion, subject to the assumptions and qualifications contained within this report, the compensation payable as at the date of Assessment is as follows:-
>
> NOMINAL COMPENSATION
>
> $10,000

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9 T1-38 lines 25-28 and T1-41 lines 8-16.
10 T1-38 lines 37-44.
11 Ex 2 pages 6-10.
12 Ex 2 pages 4 and 5.

(Ten Thousand Dollars)

Excludes Landholders Legal, Valuation and Professional Fees – to be advised"

[24] During examination-in-chief, Mr Morzone for Henry attempted to have Mr Harrison annunciate additional reasoning in support of his valuation of $10,000. I will let the transcript speak for itself:[13]

> "Okay. So for all those factors, you've just made assessment of a nominal amount of compensation. Was there any precise calculations that you've undertaken to come up with that figure, or it is a judgment on you- - -?---It's a judgment based on experience. I've acted for resuming authorities for private landholders for mining companies, and when there's a small impact on a property, I've offered landholders and either party – have acted for both sides – we've been able to strike a deal based on a nominal compensation amount, and that varies – this one is a smaller one, so I'm at the lower end of the range, and I think a figure of $10,000 is a reasonable amount to be assessed as nominal compensation."

[25] I must be critical of Mr Harrison's report where he refers to the definition of compensation payable[14] and then goes on to set out s 281 of the MRA. Although what Mr Harrison sets out is not in quotation marks, it gives the clear impression that he is providing a formal quotation of the compensation provisions under the MRA. When he was challenged on this point by Mrs Smith during cross-examination, Mr Harrison agreed that what he had set out was his interpretation of the compensation provisions of the MRA but he agreed that it was not part of the Act.[15] Although Mrs Smith's cross-examination related to the latter part of Mr Harrison's version of s 281 of the MRA, a close reading of the actual s 281 of the MRA shows other parts in Mr Harrison's interpretation which simply do not exist in the actual legislation.

[26] I find the manner in which Mr Harrison has referred to s 281 of the MRA in his report to be quite misleading.

**Analysis of the evidence**

[27] When an objective assessment is made of the valuation and other evidence in this matter, it is apparent that, apart from one point, there is not a great deal of difference between the valuers. When a valuation of the property as a whole is looked at, Mr Harrison arrives at a figure of $100 per ha, whilst Mr Dickenson places the per ha figure at between $70 and $90.

[28] The area of ML 30122 is only 3.252 ha. On my calculations, the area of the access amounts to about .5 ha, meaning that the total area of Henry's land impacted by ML 30122 is under 4 ha, but for the purposes of this determination I will round it to 4 ha.

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13 T1-15 lines 27-35.
14 Ex 2 page 3.
15 T1-19 lines 27-30.

In the scheme of things, there is little difference between 4 ha valued at $70 per ha and 4 ha valued at $100 per ha.

[29] I note that Mr Dickenson uses the figure of $100 per ha as an average across the property, and that he concedes that the property is made up of some good and some not so good country. From the evidence presented to me, I accept that ML 30122 is located in the not so good country from a grazing perspective, although it is located in proximity to an area frequented by Mr Henry's tourists. Balancing the valuation evidence, I am prepared to accept a value of $90 per ha for the area of land impacted by ML 30122.

[30] Four hectares of land impacted by ML 30122 at $90 per ha only amounts to the sum of $360. However, as the authorities show, determining compensation under s 281 of the MRA is not as simple as that. As I said in the case of *Gregcarbil Pty Ltd v Backus & Ors (No. 4)*[16] at paragraphs [87] to [90]:

> "[87] It must always be remembered that s 281 MRA is a "one size fits all" provision. That is, the provision applies as equally to a tiny ML on a huge outback property as it does to an enormous open cut operation over the totality of a rural property.
>
> [88] Indeed, determining compensation for matters which fall at each end of the spectrum is relatively easy. For instance, there have been, I expect, hundreds of determinations made of compensation for small MLs over very large properties where the classic determination has been an assessment of a rate per hectare for the total area of the ML per year. See for instance the recent Land Court decision *Fitzgerald v Struber* where Judicial Registrar O'Connor awarded what he referred to as the "minimal" sum of $10 per hectare per year, making in that case a total payment of compensation of $130 per year for the 10 year term of the ML.
>
> [89] Based on my experience, it may well be the case that, based purely on a per ha value of the land being used, a determination such as *Fitzgerald v Struber* (the like of which I have also determined a large number of times over my judicial career) essentially requires the payment by the miner of the total value of the mined land each year for the term of the lease. At first glance, this would appear to be against general compensation principles that compensation should not exceed the value of that taken (leaving aside of course any additional payments such as the minimum extra amount of 10% under s 281(4)(e)).
>
> [90] However, what must be remembered is that the assessment of compensation for mining is pursuant to the statutory scheme of the MRA and in particular s 281(3). Clearly, the existence of small MLs on a large property do have some impact on that property and, in my view, particularly given the small amount concerned and the absence (for practical, economic reasons) of valuation and other evidence, assessments such as those undertaken by Judicial Registrar O'Connor are entirely appropriate and consistent with the MRA. In these small cases, any reference to percentage diminution in the land would be futile."

[16] (2013) QLCR 458.

[31] I reject Mr Harrison's approach of stating the sum of $10,000 as a valuation for compensation under s 281 of the MRA but effectively giving no quantification to such sum. The approach taken by Mr Dickenson is, in my view, consistent with the numerous authorities from this Court in determinations of compensation for small mining leases on large properties. The question then remains: what is an appropriate amount per hectare per year to award in this matter?

[32] This question leads squarely to what is the clear point of difference between the valuers in this matter. That relates to the manner in which Henry's tourism operations on Flat Creek Station should be viewed.

[33] I have no doubt that applying a proper interpretation of s 281 of the MRA to this matter, that the compensation to be awarded to Henry must take into account any impact on tourist operations, just as it must take into account any impact on Henry's grazing operations.

[34] I have accepted Mr Dickenson's methodology in valuing the compensation under s 281 of the MRA. I also consider that Mr Dickenson is much closer to the mark in assessing the impact that the mining operation will have on Henry's tourism operations than the scant information provided by Mr Harrison. However, given that Mr Dickenson referred to compensation agreements in the vicinity of ML 30122 being in the $12.50 to $15 range, but on the evidence before me the tourism operations are only conducted on Henry's property, I do not believe that Mr Dickenson has totally taken full account of probable impacts of dust and noise etc on Henry's tourism operations. That said, however, I note that Henry's tourism operations also include fossicking for the very minerals that ERO is seeking to mine in this clearly mineralised area. I also accept that the highly scenic water pool area of the gorge, to which Henry takes his tourists, is located approximately 2.2 km from ML 30122. It was effectively conceded by Mr Morzone during his submissions that the various photographs depicting tourism activities do not show ML 30122 in them.

[35] Taking all factors into consideration, I am prepared to increase the compensation as assessed by Mr Dickenson by an additional $2 per ha per year to fully take into account what I consider to be limited impacts of ML 30122 on Henry's tourism operations not fully provided for by Mr Dickenson. I also consider it appropriate, given the evidence, to add that $2 per ha to the $15 per ha which is at the top of the range referred to by Mr Dickenson.

[36] Compensation at $17 per year for 4 ha equates to a total of $68 per year over a period of 20 years, being the term of the ML renewal. That amounts to a sum of $1,360. To this sum is to be added the additional amount of $136 in accordance with s 281(4)(e) of the

MRA, which I apply at the rate of 10%. This results in a total compensation of $1,496 payable by ERO to Henry.

[37] The final consideration is whether or not the compensation should be paid in a one up amount or a payment per year or for some other term. Although neither Mrs Smith nor Mr Morzone specifically addressed the point, I take their submissions to infer that Mrs Smith seeks payment of the compensation by yearly instalments, while Mr Morzone seeks an all up payment on renewal of ML 30122. As I have favoured Mr Dickenson's approach to compensation on a per ha basis per year, I am more inclined to order payment by way of instalments than an all up sum. However, taking into account the relatively small nature of the award in this matter, I consider it appropriate to order that the compensation by paid in four equal sums of $374 each, with the first instalment being paid by ERO to Henry within one month of the renewal of ML 30122, and the remaining instalments of $374 being paid by ERO to Henry on the fifth, tenth and fifteenth anniversaries of the renewal of ML 30122.

**Orders**

1. Compensation is determined for the renewal of ML 30122 in the total sum of One Thousand, Four Hundred and Ninety-six Dollars ($1,496).
2. ERO Georgetown Gold Operations Pty Ltd is ordered to pay the total compensation of $1,496 to Thomas Peter Henry by way of four equal instalments of $374 each, with the first instalment of $374 to be paid within one month of the renewal of ML 30122, and the remaining three instalments of $374 to be paid on the fifth, tenth and fifteenth anniversaries of the renewal of ML 30122 respectively.

**PA SMITH**
**MEMBER OF THE LAND COURT**