IN THE MINING WARDEN'S COURT
AT ST LEONARDS

J A BAILEY, CHIEF MINING WARDEN

FRIDAY 13 DECEMBER 2002

CASE NO. 2002/31

RANDOLPH JACK GOURLEY MARTIN (Applicant)

v.

SANDLOFT PTY LTD (Respondent)

SECTION 265 – ASSESSMENT OF COMPENSATION

APPEARANCES AT HEARING:

Applicant: Mr L Moore, Solicitor of Evans & Englert

Respondent: Mr W Alstergren of Counsel, instructed by Mr D Bartram, Solicitor of Weatherly & Bartram

Matter heard at Finley on 9th December 2002

DECISION

HANDED DOWN IN ABSENCE OF PARTIES

On the 20th August 2002 Randolph Jack Gourley Martin of Berrigan was granted Mining Lease 1519 (Act 1992). The mining lease occupies an area of 1.241 hectares which is situated on property owned by Sandloft Pty Ltd.

Following unsuccessful attempts to negotiate a compensation agreement, the leaseholder lodged an Application for Assessment of Compensation under the provisions of Section 265 of the *Mining Act 1992*.

The hearing of the application came before the Warden's Court at Finley on Monday 9th December 2002. Mr L Moore Solicitor represented the leaseholder and Mr W Alstergren of Counsel instructed by David Bartram Solicitor of Weatherly & Bartram appeared for the Respondent landholder.

The leaseholder, Mr Martin, gave evidence as to the procedure he adopts in extracting the dimension stone, granite, from the landholder's property. Mr Martin has mined the particular site over a period of approximately 15 years, when it was subject to a private mining agreement with a prior landholder. The granite consists principally of a rocky outcrop which had no overburden whatsoever on the majority of it, apart from a small portion to the north of the area which saw the granite being covered by about 3 foot of soil.

Mr Martin outlined that generally there are two people involved in extracting the granite from the ground and the equipment involves a compressor which operates a pneumatic drill and a thermal lamp is used for cutting the rock. On an average there are only 2 to 4 vehicle movements in and out of the property per month, at heavier times it might be 2 to 4 per week. Mr Martin conceded that the noise of the thermal lamp in starting up is equivalent to that of a jet engine. He gave evidence that he could make improvements to the equiment so that there would be less noise coming from both the thermal lamp and the compressor.

He uses water in the cutting process. This has the effect of both immediately cooling the rock so that it does not fracture and it also reduces dust from the cutting process.

Water has been previously obtained from the irrigation channel or was recycled from water captured in the quarry. He said that if he was not permitted any longer to obtain water from the irrigation channel it would be necessary for him to carry it in with the utilisation of a tanker.

He said he has never had any complaints from any neighbour concerning the noise which has been existing in the operation for the last 15 years. He has obtained permission from the Berrigan Shire Council to utilise the flame to cut the rock and has not had one incident in that 15 years where a fire has broken out in the area adjacent to the cutting of the rock.

He disputes the fact that shards of rock would appear outside the mining lease area. There is no blasting taking place and consequently there should be no reason why shards of rock would move out of the lease area. There has never been any incidents in the last fifteen years of anyone approaching him alleging that rocks have strayed from the lease area.

He indicated that a condition of his lease requires him to fence the area off. He intends to build a fence of concrete posts and have either barbed wire or a chain mesh fence, whatever is required by the Department of Mineral Resources.

Mr Martin has obtained a valuation from the Valuer General which indicates that the area subject to the lease would be valued at $5000. He said he made an offer to the landholder of compensation at the rate of $500 per annum and has also made an offer to purchase that portion of the land, subject to the lease, from the landholder.

The principal witness for the landholder was David McKenzie from the firm Hann McKenzie. They are property valuers and consultants. Exhibit 15 was a report by Mr McKenzie in respect of what he considered to be the loss which is occasioned to the landholder as a result of the mining activities taking place.

This property was purchased in June 1998 by the present owner for the price of $300,000. Mr McKenzie expressed the view that that was an inflated price. Mr McKenzie goes on to say: "Mr Lachlan Thorburn, one of the Directors of Sandloft

Pty Ltd is regarded as an astute local landowner and developer." He further says: "Mr Thorburn's history and reputation is as a farm developer. Typically, upon securing a new farm, he immediately commences redevelopment to raise productivity, presentation and value."

Mr MacKenzie said: "Mr Thorburn's vision involved extensive earth works to the irrigated areas of the property, construction of the homestead, construction of ancillary farm shedding, erection of a feed lot, style fattening operation, with feed systems via a series of silos, and a large silage/hay bunker to be situated within the existing quarry excavation and protected by construction of a large shed over the excavation."

His report goes on to say that there is a vast over-capitalisation of the site, having regard to the costs which have been expended to date, that is the purchase price plus a total of $46,200 which has been spent by Mr Thorburn in consulting fees, legal fees, surveying costs etc. He goes on to say: "Given the astute nature of the owner and his successful history of redeveloping farms in the area, it is obvious that the ongoing operation of the quarry was not contemplated by Mr Thorburn at the time of purchase."

Mr McKenzie indicated that the land immediately to the east of the mining site could in theory be developed by the landholder, but indicated: "but its fundamental characteristics make the proposal so compromised that any agricultural consultant would advise against such a scheme."

He concludes his opinion of the property by saying: "The reality is that Mr Thorburn will be the owner of a demonstrably less valuable property if quarrying continues on his farm."

Finally Mr McKenzie quantifies the loss he says is occasioned by the landholder. Firstly he puts the value of the property when purchased in 1998 as being $260,000 if one considers its limited development potential. He then claims $40,000 difference between that value and the price paid by Sandloft Pty Ltd. He further adds a loss of the cost expended by the landholder in relation to the proposed development, that

being the sum of $46,200. He adds to that the value of the area covered by the mining lease, as valued by the Valuer General, which is $5000. Finally he adds a figure of the loss of the value on "the current market value" which he assesses at $340,000 and reduces that by 5% due to: loss of security, loss of amenity, dust, noise, unsightliness, ongoing disturbance of granite shards in working agricultural paddocks, danger associated with open cut excavation. The total of those sums being $108,200. It is that sum which he says is the appropriate compensation that ought to be paid to the landholder.

Mr Moore cross examined Mr McKenzie extensively in relation to various aspects of his report. Mr McKenzie admitted that where the lease was, it was not a good area for say, rice production. He did say however that the mine could impact on the access to any rice production area and there would be a problem with security of this farm area due to people being on the mine site.

An issue was raised in relation to granite shards that were allegedly found in the crops. He indicated that farmers would be very wary of operating machinery with such stones like that in their crops. When asked whether granite shards could be naturally there, he indicated that it would be unlikely to be on the land which was north of the mining site. When asked about the area around the mining site he said that if it did not come from the mine site it would be unusual that it would be still there. He said "after years they would have all been removed."

He was asked:

Q: Doesn't naturally ploughing affect the sub strata of the land?

A: Yes.

The witness Mr McKenzie was asked about a paragraph which appears on page 4 of his report indicating that there would be a significant loss of residential amenities to the proposed homestead due to the impact of an operational quarry so close. After making appropriate measurements on the plan, which is exhibit 17, Mr McKenzie indicated that the proposed residence or homestead would be about 200 metres from the mining pit and it would be about 100 metres from the nearest proposed feed lot on the site. When questioned as to whether there would be a diminution in residential

amenity with a feed lot being closer than the mining site, the witness replied that having regard to the nature of rural workers, they would understand the nature of living there and would be more disturbed from the noise of the quarry than the noise of the cattle, notwithstanding the noise of the cattle would be for longer periods.

Mr Moore asked the witness his opinion in respect of various aspects of Section 262 of the Mining Act 1992. He was unable to indicate whether there was any damage to the surface of land etc. in accordance with sub section (a). Concerning sub-section (b) he said there was a small loss of deprivation of the use of the surface, in that about 10 metres along the edge of the mining area it could have been used for cropping. He was unable to put a value on that particular loss. He said there could be loss caused under sub-section (c), particularly in relation to the access track. He conceded that there was no loss as a result of surface rights of way and easements under sub section (d) and finally any loss under sub-section (e) would be "probably minimal".

The final witness for the landholder was Andrew Varley. Mr Varley is a graduate of agricultural science and worked for a period of time for the Department of Agriculture. He is now a full time farmer and has been involved with Mr Thorburn for the last 7 years in regard to other properties owned by Mr Thorburn. His report, marked exhibit 18, outlines the plans which the landholder is considering for this property and gives a conclusion that the mining site will significantly compromise the farm plan and operation. Mr Varley does not put a figure on any compensation which ought to be granted.

In giving his evidence he indicates that he has been present when small granite shards have been located in the crop area. These have been found off the track area, part of which is a rocky outcrop. He said he didn't believe that these shards were from that rocky outcrop. He said that such shards would damage equipment, there was a small risk of fire and the problems of puncture to tyres of farming equipment.

He gave evidence of the noise of the machinery used in the mining and indicated that it was a drone which was heard some five kilometres away, at the home of his parents. He said that when one is closer it is like the roar of a jet engine.

Mr Varley conceded under cross examination that there were other quarries near his parents' home and when questioned about the noise from them he indicated that they were all noisy but others have different noises. When he was questioned as to whether he was aware that there were no complaints to Mr Martin in 15 years he replied that that could be possible. He said: "when something has been going on in the area for that long it becomes part of the landscape...it is more of an issue in residential areas".

RELEVANT LEGISLATION

262 Definition

In this Division:
"compensable loss" means loss caused, or likely to be caused, by:

(a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or

(b) deprivation of the possession or of the use of the surface of land or any part of the surface, or

(c) severance of land from other land of the landholder, or

(d) surface rights of way and easements, or

(e) destruction or loss of, or injury to, disturbance of or interference with, stock, or

(f) damage consequential on any matter referred to in paragraph (a)–(e),

but does not include loss that is compensable under the Mine Subsidence Compensation Act 1961 .

265 Compensation arising under mining lease

(1) On the granting of a mining lease, a landholder of any land (whether or not subject to the lease) becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the lease.

(2) The holder of a mining lease may agree with a landholder as to the amount of compensation payable, but an agreement reached is not valid unless it is in writing, signed by or on behalf of the parties to the agreement.

(3) If a valid agreement is not entered into under this section within such period as may be prescribed by the regulations, the holder of a mining lease, or

a landholder of land, may apply to a warden to assess the amount of compensation payable, and a warden is to assess the compensation payable.

(4) The holder of a mining lease is not authorised to exercise any rights under the lease on the surface of any part of the mining area unless the amount of any compensation payable to a landholder under subsection (1) in respect of that part of the mining area is the subject of a valid agreement or of an assessment made by a warden.

276 Additional assessment

(1) If, after an assessment of compensation has been made, it is proved to the satisfaction of a warden:

(a) that the whole of the amount paid into court under this Part has been duly paid out, and

(b) that further compensable loss has been caused, or is likely to be caused, in respect of the land to which the assessment relates, or to other land,

the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.

(2) If it is proved to the satisfaction of a warden:

(a) that an access arrangement does not make provision for or with respect to compensation, and

(b) that compensable loss has been caused, or is likely to be caused, in respect of the land to which the arrangement relates,

the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.

(3) If it is proved to the satisfaction of a warden:

(a) that the whole of the amount assessed by or in accordance with an access arrangement determined by an arbitrator as referred to in section 140 (b) has been paid in accordance with the arrangement, and

(b) that further compensable loss has been caused, or is likely to be caused, in respect of the land to which the assessment relates or to other land,

the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the

authorisation to which the assessment relates, within the time and to the persons specified in the order.

(4) A warden's decision on such an application has effect as an assessment of compensation under this Division.

(5) In making an assessment of compensation, a warden must have regard to any agreement between the parties concerned as to the compensation payable.

In his submission Mr Moore indicated that compensation can only be paid in accordance with a compensable loss as outlined in Section 262 of the *Mining Act 1992*. He submitted that there cannot be a loss until something exists, there cannot be a loss to a non-existent thing. He submitted that Sandloft Pty Ltd is not prevented from developing because of this mine. Maybe some time in the future Sandloft Pty Ltd may have some rights for additional compensation under the provisions of Section 276 of the *Mining Act 1992*. It is mere speculation today to attempt to arrive at a figure in respect to something that may never come into existence.

Mr Moore submitted that any compensation has to come under the provisions of Section 265, the time for that is the time at the granting of the lease, not some years in the future. He said a court should not be called upon to speculate as to what the loss may be in the future.

Mr Moore made reference to the case of *Spencer v. The Commonwealth* (1907) 5C.L.R.418. That was a case involving an action for compensation under the *Property for Public Purposes Acquisition Act 1901*. It was held in that case that in assessing the value in land resumed under the Act, the basis of valuation should be the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling, but not anxious, to sell. A valuation was given of the property in evidence which was contingent upon a private railway siding being constructed across the street and into the buildings that were on the property. Higgins J said at page 420: "While desiring to give ample weight to the possibilities of this land, I refuse to treat these contingencies as if they were certainties."

Mr Moore also made reference to the High Court decision in *C A MacDonald Limited v. The South Australian Railways Commissioner* (1911) 12 C.L.R.221. That case involved a claim for compensation for land which was acquired under the *Lands Clauses Consolidation Act 1847 (SA).* It was held that in assessing the value of land taken, the intention of the owner to put it to a use which would bring in a large profit to him is, if relevant at all, only an element in determining whether the land has a special value by reason of its special adaptability for such use. It was claimed in that case that compensation for the land taken should be assessed on the basis that MacDonald, from whom they bought their business as an ongoing concern, had contemplated, or intended, using the land as a site for a slaughter house in connection with his freezing works. Although he had at one time entertained such an intention, the land taken was vacant land and had never actually been used in connection with those works.

It was said by Griffith CJ at p.231: "The doctrine that the compensation to be paid is the value to the owner has no application to a case where the alleged enhanced value merely depends upon disappointed hope."

Mr Moore submitted that the court should take into account that much of the surface is already land that has been quarried for the past 15 years. He said that the landholder is not significantly disturbed, if disturbed at all, by the use of the mining. There is no evidence that the landholder is deprived of 1 cent of any income by the presence of the mine being there.

Finally Mr Moore submitted that the offer made by his client remained, that is $500 per annum which is the equivalent of a 10% return on the value put on the land by the Valuer General, that is $5000.

In his submission Mr Alstergren put to the court that there is nothing before the court other than the experts that the landholder called as to the value of the land. He said unlike MacDonald's case, where it was possible that a slaughter house could have been put on the land, he submitted that this particular mine on this property would prevent the landholder from putting feedlots onto the site.

He submitted that this is not a case of a recent invention, but rather, a situation where the landholder specifically purchased this land for a particular purpose. He did so on expert advice. Consequently this must be distinguished from the cases that Mr Moore referred to. He submitted that there has been no income from the property by the landholder but rather it has suffered a loss as a result of the mine being on the site. He urged the court to award compensation as set out by the expert witness McKenzie.

There are concerns expressed by the landholder which may, if they eventuate, create a compensable loss for which the claimholder would be liable. However, those concerns will be attended to with the approval of the mining operations plan. Furthermore paragraph 11 of the mining lease specifically indicates an obligation upon the leaseholder to appropriately protect any excavations, to ensure access to them by persons and stock is restricted.

Having regard to the method of mining which has been outlined before the court, I have some difficulty in accepting that the shards of granite which have been found within the crops have in fact come from the mining site.

Notwithstanding the details with which Mr McKenzie has outlined the quantum of compensation, there is only one matter which he has referred to as compensable loss under Section 262. That is an area of some 10 metres on the edge of the mining site which he said would not be available for cropping purposes. When questioned as to that he was unable to place a monetary figure upon it.

From all the evidence that has been placed before the court it would appear that the only compensable loss caused to the landholder at the moment is possibly under Section 262 (b) (c). The landholder has indeed been deprived of the possession of some 1.241 hectares of his land. A value has been put upon that land of $5000, but I have no evidence of any monetary loss for not having a portion available for cropping.

It is understandable that the landholder would not want to sell that portion of his land to the leaseholder. If he did that he would forever lose the use of that land. Whereas in retaining that portion, at the expiration of the mining lease in 15 years, the

landholder will once again have full possession of that land which will then of course have been rehabilitated in accordance with the provisions of the mining lease.

The offer put forward by the leaseholder of $500 per annum equates with a 10% return on the value of $5000.

That is the only sum of money that has been put before the court which quantifies with any certainty the compensable loss occasioned to the landholder.

Although it may appear to have little comfort at this point of time, the landholder always has the right under the provisions of Section 276 of the *Mining Act 1992* to come back to the court for an assessment of additional compensation if indeed there is a further compensable loss in the future.

DETERMINATION

The leaseholder Randolph Jack Gourley Martin is to pay the landholder, Sandloft Pty Ltd, compensation assessed at $500 per annum. Payment is to be made prior to Mr Martin exercising any rights under Mining Lease 1519 and is thereafter due each 12 months from the date of the first payment and is to continue during the currency of Mining Lease 1519 or such other shorter period as agreed by the parties.