IN THE WARDEN'S COURT
HOLDEN AT SYDNEY
ON 2ND MAY, 1986
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

THE AUSTRALIAN GAS LIGHT COMPANY
v.
O'GRADY & OTHERS

BENCH:

On 4th February, 1986 there was delivered at this Court an assessment of compensation following upon the lengthy hearing over the preceding months of an application by The Australian Gas Light Company (the licensee) for an assessment of compensation over lands owned or occupied in the interests of Mr. P. O'Grady, Mrs. J. O'Grady and Ms. J. Burrell (the respondents). A copy of the assessment was supplied to the parties and on 25th March, 1986 at the request of the respondents the matter was listed for argument on the question of costs of the proceedings.

Mr. Talbot, on behalf of the respondents, argued the matter on their behalf. He indicated that over the several hearing days that the matter occupied, considerable time and effort had been spent not only in the actual hearing but also in preparation of the evidence to be presented and in research leading to cross examination of the licensee's witnesses. The respondent, Mr. O'Grady, had given evidence and had called an expert, Mr. O'Donnell, the cost of whom had been met by the respondents.

In the long term, compensation based on the formula as set out in the assessment could total between $4,000 and $5,000 but in addition the licensee would be responsible for the making good of any damage caused by its activities on the respondents' land. On the basis of that, Mr. Talbot submitted that the respondents' arguments had not been ignored and in fact had been acted upon. Even when the court disallowed Mr. O'Grady's claim for

payment of supervision fees as set out in the submissions supporting his case, Mr. Talbot argued that it was simply a matter of quantum because the court had recognised the need for supervision. Mr. Talbot further criticised the licensee for the submission of an initial offer of $100 and in the subsequent amendment of that to include a payment of $25 per day stating that it was not until proceedings were commenced that any attempt had been made by the licensee to indicate what sort of activity would be going on and therefore to give an inkling to the respondents as to the extent of possible damage to their property. He criticised the earlier correspondence from the licensee stating that there had been a misunderstanding by personnel of the licensee and it was only when Mr. Herbert, a witness for the licensee, was forced in cross examination to look at the situation in the light of his experience of another on-going drilling programme, that it could be taken that his evidence could be relied upon. He said that there was no way that that omission by the licensee could be laid at the door of the respondents. He said that correspondence prior to the application being lodged had been misleading and even particulars furnished after the application for assessment did not truly reflect the situation. Of the seven days in the proceedings, five of them were involved with evidence given on behalf of the licensee.

Mr. Talbot said that the respondents were entitled to refuse offers put to them by the licensee before and after proceedings had commenced. He said that a respondent in these proceedings would be seriously disadvantaged, bearing in mind their novelty and other practical circumstances if the normal rule in relation to costs was not applied. Mr. O'Grady was entitled to have representation through Counsel and attorney and was entitled to call his own experts as was the licensee. If this attitude was reasonable, he submitted, why then should the respondents be required to pay their own costs as they would not have the benefit of any compensation because the compensation

ordered to be paid by the Court would be dissipated in the costs. Mr. Talbot submitted that this was an injustice in the circumstances because nobody knew what a landowner might be entitled to expect in real compensation and the respondents were entitled to clarify this question. This Mr. Talbot said was a test case beyond the confines of other matters and the benefit of it would flow to the licensee. Mr. O'Grady had been constantly challenged to go to Court, both in conversation and in writing. The submissions on behalf of Mr. O'Grady had been included in the formula which the Court used in assessing compensation. Mr. Talbot submitted that that course basically had been adopted by the Warden and Mr. O'Grady had won the litigation and being in the nature of a successful defendant as he was seeking to establish what his compensation was, he was entitled to costs. Finally, Mr. Talbot submitted that the proceedings were conducted in such a way that there was a contest of issues and one or other of the parties was expected to win but even had the respondents lost it should be, notwithstanding what has been put to the court, that the respondents were entitled to their costs because of the way in which the proceedings arose. Mr. Talbot said that to allow the respondents' costs would not necessarily be creating a precedent, this being categorised as a special case.

In reply Mr. Margo said that Section 56(2)(d) of the Petroleum Act specified that in assessing compensation the Court had the power of a Warden's Court and that further pursuant to Section 57 of the Petroleum Act, Part IX of the Mining Act would apply to Warden's Courts. Included in Part IX was Section 146 of the Mining Act which provides that the Warden has power to award costs. Costs are at the discretion of the Warden and the exercise of the discretion to award costs had to be done judicially and in accordance with case law and rules of statute. It was, for instance, an error in law for a court to take into account extraneous matters not properly before the court in assessing costs.

Mr. Margo quoted the case of Laguillo v. Haden Engineering Pty. Ltd. (1978(1) N.S.W.L.R. 306 which was a decision laying down that it was a cardinal principal to be borne in mind when exercising a judicial discretion, as to costs, that, except in special circumstances, a successful defendant who has been brought to court at the suit of the plaintiff should have his costs. Indeed, powerful dicta exist that there is no jurisdiction in a judge to do otherwise than to award a successful defendant his costs, unless certain special factual situations are shown to exist. Reynolds J. preferred the view that it is not a question of jurisdiction in the strict sense but the proper exercise of an unfettered discretion, and that it is only a matter of lack of jurisdiction in the sense that any other order will not survive an appeal. The discretion must be exercised so to give effect to notions of fairness and justice and not according to statements made by courts which seem to confine a complete discretion accorded to the trial judge. This is not to say that justice and fairness will not require that, except in special circumstances, a wholly successful defendant should have his costs, because to deprive a successful defendant of his costs is to deny him justice. His Honour went on to draw a distinction between that principal and the situation in the matter then currently before the court in which the defendant was not wholly successful.

Mr. Margo outlined Section 51 of the Petrolem Act which required that the licensee apply to have compensation assessed in the absence of agreement between the parties.

It is a matter of history Mr. Margo said that the licensee held Petroleum Exploration Licence No. 260, granted by the Minister for Mineral Resources in 1981 and this gave the licensee an exclusive right to carry out such surveys and other operations to test for petroleum in the land the subject of the

licence, part of which covered, among other lands, those held by the respondents. The licensee intially approached Mr.O'Grady, Mr. Margo said, and some discussions took place without success. Mr. Margo stated that there was never any issue that the licensee was obliged to make good any damage caused, in order words to rehabilitate the area, nor was there ever any issue that some compensation would be paid. It was the amount itself which was in question. The copy of the draft agreement, exhibit 47, is proof that the licensee acknowledged its obligation under the legislation.

As it turned out, Mr. Margo submitted that the licensee had offered finally $1,225 by way of compensation against which the respondents had claimed either $84,000 or $94,000 so between the respondents' claim and the actual award was $79,000 or $89,000, a much larger difference than in between the figures between the award and the licensee's offer.

Mr. Margo submitted that the licensee had succeeded in the action. In anticipation of evidence given by experts for the respondents, expert evidence had been called by the licensee, and the evidence of the respondents' expert had been rejected. There had been a lengthy and unnecessary cross examination of the witness Herbert by the respondents' Counsel over three days. There had been no secrecy forthcoming from out of the licensee but from the respondents nothing was heard of what their claim for compensation was until 21st June, 1985, approximately the second last day of the hearing. Then and only then did the court hear about the claims for $18,000 supervision fee, $31,000 agistment and other extravagant figures. Mr. Margo, on behalf of the licensee, stated that the licensee has succeeded on all the issues and he requested that the respondents be ordered to pay the licensee's party and party costs. Solicitor and client costs were not sought.

So much for the submissions of learned counsel for both parties.

The question of costs is one clearly set out in Section 146 to be at the discretion of the Warden. I accept the principle that in ordinary litigation the successful party is entitled to his costs and in litigation under Sections 133 and 144, for instance, of the Mining Act, I always have awarded costs to the successful party. However, it has never been my practice over the eleven years that I have been Chief Warden under the Mining Act to award costs in compensation assessment hearings. I have adopted this practice for what I consider to be a good and valid reason which I propose now to state, as requested by Mr. Margo.

It is a principle well recognised by statute that in relation to prospecting, mineral exploration or mining practices over land belonging to or occupied by someone other than the prospector, explorer or miner, that the landowner or occupier is entitled to compensation. The Mining Act and Coal Mining Act make clear provision in parts VIII of both Acts, while the Petroleum Act in Sections 48, 51, 53, 55 and 56 makes similar but not identical reference to the rights of any landowner or occupier, as to compensation.

Contained in Section 122 of the Mining Act, Section 97 of the Coal Mining Act and Section 54 of the Petroleum Act is provision that the parties may agree as to what amount of compensation should be, their agreement shall be reduced to writing and the document shall be lodged with the Secretary of the Department of Mineral Resources. In the event of non-agreement within a prescribed time, any party may make an application (Mining Act and Coal Mining Act) or a complaint (Petroleum Act) to have the Warden assess compensation. The subject proceedings arose out of such a complaint

to me by the Australian Gaslight Company, the licensee, which was the holder of Petroleum Exploration Licence No. 260. So as regards compensation matters, one would normally conclude that on the one side there would be an applicant or complainant and on the other a respondent or defendant and so the stage would be set for adversary litigation in the usual and normally accepted sense. However, there the matter cannot end because there are factors which, in my opinion, set compensation hearings apart from other proceedings because matters coming under part VIII of the Mining Act, part VIII of the Coal Mining Act and Sections 48, 51, 55 and 56 of the Petroleum Act, are, it seems to me, not in the true nature of normal civil proceedings.

Until an assessment or application therefor is made, or compensation is the subject of an agreement, a party being the holder of a title under any of these three Acts is unable to exercise his right to pursue what he is otherwise entitled to do as regards prospecting, exploration or mining (Section 122(4) Mining Act, Section 97(4) Coal Mining Act, and to a lesser extent, Section 51(1) Petroleum Act). In civil proceedings, one normally finds issues of fact being decided in respect of which the losing party is usually bound to pay costs. In compensation proceedings under the Mining Act, Coal Mining or Petroleum Act while issues may be decided, there is still an overriding feature that irrespective of the decision on those issues, on the one hand the holder of the title cannot carry out activities under that title until agreement, assessment or application but on the other hand he is bound under the legislation to agree to pay compensation or to have compensation assessed. Furthermore, the owner or occupier is entitled, in the normal course of events, to some compensation, as little as it may be in some circumstances. So if, I were to award costs in compensation matters I would be placing a burden upon parties who are

respondents for they would know that while, in the case of the applicant/ title holder, if he fails to reach agreement with the owner or occupier he will, when some assessment is made, get his costs, while in the case of an applicant/owner or occupier, if also fails to reach agreement, he knows that the title holder cannot prospect, explore or mine until compensation is agreed to or assessed or applied for, and the applicant/owner or occupier will still get his costs. In other words, the first in would be best dressed with his costs.

This is my prime and general reason for not awarding costs in compensation matters and on careful examination of this matter, I see no reason to rule otherwise that the parties in these proceedings are to pay their own costs.

I would add this in respect of this particular matter. The respondents obtained more than they had been offered by way of compensation. On the other hand, the assessment was considerably less than that which they had claimed. In regard to the licensee, they had offered the sum of $100 initially to the respondents and while they intended to make good any disturbance or damage, bearing in mind the extent of an operation which necessitated the intrusion upon a valuable property less than 100 kilometres distance of Sydney over some 55 days by a drilling rig, several trucks and many personnel, the sum of $100 was still considerably deficient. So it seems to me that the respondents were entitled to pursue a claim in respect of which finally they had been offered $1,225 but they would have been in a stronger position in relation to their request for costs had they made known to the licensee the nature and extent of their anticipated compensation which will be likely to fall within Section 55. It was not until the second last day of the hearing, that both the Court and the licensee knew anything of the figures being sought by the

respondents. On the other hand there should have been a more realistic approach by the licensee on the question of compensation, from the outset.

So it seems to me that even had I not held the view as expressed above, bearing in mind the history of the proceedings and notwithstanding the long-held principle in relation to costs, I might well have directed for other reasons that the parties are to pay their own costs.