LAND COURT OF QUEENSLAND

CITATION:	*Friese v Lonergan & Anor* [2019] QLC 27
PARTIES:	**Murray John Friese** (applicant) v **Patrick Joseph Lonergan** (respondent) **Prue Madeline Lonergan** (respondent)
FILE NOs:	MRA219-18
DIVISION:	General Division
PROCEEDING:	Determination of compensation payable for renewal of mining lease
DELIVERED ON:	4 June 2019
DELIVERED AT:	In chambers
HEARD ON:	1, 2, & 3 April 2019 Submissions closed 10 May 2019
HEARD AT:	Clermont
MEMBER:	PG Stilgoe OAM
ORDERS:	**1. In respect of the application for renewal of ML 70152, compensation is determined in the amount of Three Thousand Seven Hundred and Twenty-Six Dollars and Thirty-Eight Cents ($3,726.38).** **2. The applicant must pay the respondents the amount set out in Order 1 within thirty (30) days from the notification of the renewal of the mining lease by the Department of Natural Resources, Mines and Energy.** **3. The applicant must contribute to the expense of**

track maintenance by paying 10% of any invoice for track grading that is reasonably necessary during the term of the renewal of the mining lease, with such invoices not exceeding one invoice per annum.

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – COMPENSATION – where both parties were automatically referred to the Court after lapsing of period in relevant mining legislation – where a compensation determination was required for the renewal of a mining lease – where the relevant mine was a small-scale gold mine – where the subject land of the mining lease was marginal land – whether previous compensation determinations decided on little to no evidence could be relied upon – whether there was an entitlement to compensation for deprivation of possession of the surface of land – whether there was an entitlement to compensation for diminution for the renewal of a mining lease in the absence of specific evidence about the impact of dust, noise and other mining activities on productivity – whether there was an entitlement to compensation for time spent negotiating the mining lease compensation and for managing the property – whether the applicant miner should contribute to the grading of the access track to the mining lease when the respondent landholders were the predominant users of the track

Mineral Resources Act 1989 s 279, s 281

Carabella Resources Limited v Goodwin [2016] QLC 32, cited
Deimel v Phelps & Anor [2019] QLC 4, cited
Gosper & Ors v Struber & Anor [2019] QLC 11, cited
Horn v Sunderland Corporation [1941] 2 KB 26, distinguished
Mitchell v Oak Hill & Mitchell (1998) 19 QLCR 66, applied
Palmer v Appleton & Anor [2014] QLC 5, distinguished
Re Fitzgerald & Anor and SR Struber & Anor [2009] QLC 76, distinguished
Smith v Cameron (1986) 11 QLCR 64, applied
Sullivan v Oil Co of Australia Ltd and Santos Petroleum Operations Pty Ltd [2003] QLRT 2, considered
Tasmania v Effingham Pty Ltd (No 2) [2005] TASSC 55, cited
Valantine v Henry [2018] QLC 21, applied
Wills v Minerva Coal Pty Ltd [No 2] (1998) 19 QLCR 297, applied

APPEARANCES: CM Luck (solicitor), Taylors Solicitors, for the applicant

DT Marland (solicitor), Marland Law, for the respondents

[1] Murray Friese and his wife have a passion for small-scale mining, and they want to share this passion with their six grandchildren.[1] To indulge his passion, in 2017 Mr Friese bought two mining leases on Rolfe Creek, a property north west of Clermont. Patrick and Prue Lonergan have owned Rolfe Creek since 2012. Mr Friese paid the Lonergans compensation of $100 per year per lease under compensation agreements that the previous owners of both the property and the leases had negotiated.

[2] Mining Lease (ML) 70152 was due to expire in February 2019, so Mr Friese applied to renew it for a further ten years. The renewal has been granted, but the parties cannot agree what compensation Mr Friese should pay.

[3] Ms Luck, lawyer for Mr Friese, submits that I should take a global approach to compensation for both the mining lease and the access road by applying an annual payment of $150. She submits that such an approach is consistent with that taken in the case of *Palmer v Appleton & Anor*.[2]

[4] Ms Luck's suggested figure of $150 per annum is premised on a long line of decisions in the Land Court, most of which involve the Strubers as the respondent landowners.[3] The Strubers are absentee landowners, who have rarely engaged with the Land Court in the determination of compensation. The assessment of compensation in those cases is based on a 2009 case of *Re Fitzgerald & Anor and SR Struber & Anor*.[4] This assessment has never been revisited or updated to take inflation into account. These precedents are not a sound basis for assessing compensation if other evidence is available.

[5] The Lonergans want $64,696.80, relying on the heads of compensation identified in section 281 of the *Mineral Resources Act 1989* (MRA) and made up as follows:

Deprivation of possession of the surface of the land (3.1 ha x $245/ha)	$776.77
Loss of land in access road (one third share of 5 km x 5 m = 2.5 ha x $245/ha)	$200.00
Diminution in the value of the remaining land	$11,483.50
Weed monitoring and control (2 hours x 4 times per year for 10 years @ $150/hour)	$12,000.00

1 T2–3, lines 17 to 26.
2 [2014] QLC 5.
3 See, for example, *Gosper & Ors v Struber & Anor* [2019] QLC 11.
4 [2009] QLC 76.

Fire break management (2 hours per year @$150 per year x 10 years)	$3,000.00
Diminution of the balance land	
Loss of production	$9,855.00
Cost of track maintenance	$20,000.00
Management time in negotiations with Mr Friese	$1,500.00
Sub-total	$58,815.27
Plus 10% for compulsory nature of compensation	$5,881.53
Total	**$64,696.80**

[6] I will examine each claim for compensation in turn, but it is important to remember that the MRA merely identifies matters which I should consider in determining compensation.[5] I do not need to quantify the amount under each head if my final determination sufficiently compensates the Lonergans.[6]

[7] Mr Marland, lawyer for the Lonergans has referred me to the principle of equivalence: that, so far as money can do it, the landholders are placed in the same position as if the mining claim was not granted.[7] I accept the proposition, however it is important to recognise that this mining lease is not over previously undisturbed land, as there has been mining activity in this area for many years.[8] Therefore, any compensation I determine will not be calculated on restoring the land to its pre-mining condition.

Deprivation of possession of the surface of the land

[8] The Lonergans provided a valuation prepared by Taylor Byrne for bank purposes which assessed the value of Rolfe Creek at $245 per hectare.[9] The evidential value of this document is not ideal, given that it was not prepared for litigation and its author could not be cross-examined. Ms Luck also pointed out that I have no knowledge of what information was provided to the author of the report and, therefore, on what the valuation may have been based.[10]

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5 *Smith v Cameron* (1986) 11 QLCR 64, 74-75.
6 *Mitchell v Oak Hill & Mitchell* (1998) 19 QLCR 66, 71.
7 *Horn v Sunderland Corporation* [1941] 2 KB 26, 43, as cited in *Deimel v Phelps & Anor* [2019] QLC 4.
8 T2-15, lines 13 to 25.
9 Ex 8.
10 T2-32, lines 26 to 38.

[9] Ms Luck also questions the accuracy of the valuation, given that Mr Lonergan told me they bought the land in 2012 for $500,000 and the valuation is now approximately $1.15 million.[11]

[10] Despite the shortcomings identified by Ms Luck, the valuation does provide me with some guidance in determining compensation.

[11] If there is to be compensation for deprivation of the land, the appropriate rate to be applied is not, however, $245 per hectare. That is the rate for land that contains structures – Lot 11. The lease is on Lot 10. The value of that land is $147/ha ($690,000/4690 ha).[12] That is the rate appropriate rate to apply, if I find that the Lonergans have been deprived the surface of the land.

[12] As Ms Luck pointed out, the Lonergans will not be physically deprived of the surface of the land. The lease is unfenced and cattle are free to access it. The term of the lease is only 10 years, and there is no suggestion that the Lonergans will be permanently deprived of the use of the land.

[13] However, there was considerable evidence before me about the effectiveness of rehabilitation. While the question of rehabilitation normally is a matter for whether or not a mining lease should be granted, it is a factor that I am minded to take into take into consideration when assessing compensation.

[14] Mr Friese, together with the former holder of the mining lease Mr Gerald Skilton, recently seeded an area of land adjacent to the mining lease as a rehabilitation measure.[13] They had some success, assisted by recent rain, as I observed patches of fresh grass growing on the former mining site. The fact is, though, that successful rehabilitation will take a long time, will be expensive, and not necessarily be successful.[14] Mr Peter Spies, an agronomist called on behalf of the Lonergans, estimates that the rehabilitation costs will be in excess of $40,000 per hectare, and may be often upwards of $100,000 per hectare.[15]

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11 Applicant's Closing Submissions filed 3 May 2019, para 26.
12 Exhibit 8, pages 2 and 5.
13 T2-5, lines 4 to 24.
14 Ex 11, page 6.
15 Ibid.

[15] Therefore, in many respects, the productive capacity of the subject land may be lost for a long time. Even though the degradation of the land predated Mr Friese, the renewal of the mining lease means that the land will be compromised for at least a further 10 years. I have therefore decided to treat the issue of compensation as equivalent to the Lonergans being deprived of the use of that land.

[16] The Lonergans also claim one third of the value of the area of the access road. The access road has many uses, the least of which is to enable Mr Friese to access his mining lease. There is no suggestion that the Lonergans will be deprived of the use of this land. No allowance should be made for the loss of land due to access.

Diminution in the value of the remaining land

[17] Mr Marland submits that a nominal 1% of the value of the land is a reasonable assessment of the adverse impact of the mining lease on the balance of the land.

[18] He submits there is an increased knowledge in the rural property market about the impacts and issues associated with resource activities and infrastructure in pastoral lands including dust, noise and light disturbance, substance and erosion issues, noxious weed outbreaks, livestock disturbance, livestock straying and ongoing time management projects. Mr Marland submits that these impacts reduce the value of a property which is subject to a mining lease and that the lease represents a "blot on the title" because of the additional issues, concerns and costs that a hypothetical purchaser would apply to discount the purchase price.[16]

[19] None of these submissions was supported by evidence. In particular there was no evidence of the "increased knowledge".

[20] There are further problems with Mr Marland's submission. The first is that the mining lease existed when the Lonergans bought the property so, if Mr Marland is correct that a mining lease depresses the property value, the purchase price was already affected. Further, as Ms Luck pointed out, the evidence[17] suggests that the value of the property has increased over the last six years despite the increased awareness of these issues. The final difficulty with this submission is that I did not

16 Respondents' Closing Submissions, para 37 to 39.
17 Ex 8.

receive any positive evidence to support the assertion that the value of farming properties impacted by resource activity is diminished.

[21] Mr Marland referred to a list of criteria or "principles" articulated in the decision of *Tasmania v Effingham Pty Ltd (No 2)*[18] to be used in assessing injurious affection or diminution in value of the balance land. It is not necessary to venture so far from this jurisdiction to find a case in which the court has applied these criteria or principles; the court regularly considers the impact of dust, noise and carrying capacity when determining compensation.[19] Whether or not these criteria will result in compensation for diminution in value of the land is always a question of fact and degree.

[22] The area of the mining lease is less than 1% of the total area of Rolfe Creek. It is not located on the most productive area of the property. I am asked to determine compensation for a renewal of lease, not a new lease, so, to some extent, diminution in the value of the land has already occurred. In the absence of specific evidence about the impact of dust, noise and other mining activities on productivity, there is no basis for compensating the Lonergans for the diminution in value of their remaining land.

Weed management, biosecurity, interference with property operations and livestock management, and firebreak management

[23] Initially, the Lonergans' claim for increased management costs was limited to weed management and firebreak management. In their written submissions, the Lonergans have extended the claim for increased management time to include the general operation of the property.

[24] Many of the Lonergans' concerns, and therefore their perceived need for management, arise from a perception that Mr Friese will not comply with the conditions of his mining lease, and that this non-compliance will not be monitored or regulated by the Department of Environment and Science.

[25] Ms Luck referred me to *Valantine v Henry*[20] in support of the proposition that I must act on the assumption that mining activities will be properly and lawfully

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18 [2005] TASSC 55.
19 See, for example, *Carabella Resources Limited v Goodwin* [2016] QLC 32.
20 [2018] QLC 21, [69].

conducted and questions of non-compliance should not be built into an assessment of compensation. I agree with that proposition, but *Valantine* is also authority for the proposition that the very existence of a mining lease and mining activities warrant observation and checking by the landholder from time to time.[21] To the extent that the Lonergans' claim foreshadows non-compliance, it must be rejected. However, they are entitled to compensation for the increased costs of observation and surveillance arising from the existence of the mine.

[26] Mr Friese must, to some extent, take the Lonergans' weed management regime as he finds it. Mr Lonergan has a series of CCTV cameras throughout the property and he checks the footage when notified that a person is accessing the land. He told me of the process:[22] he has to retrieve the cameras, download them, check the footage against the weed certificate, and then file the certificate. Mr Lonergan was unable to estimate how long that activity takes, but I accept that there is some time involved.

[27] The Lonergans submit that, because Mr Friese's site is effectively unmanaged for five months of the year, and that period is during the wet season, they must frequently inspect the mining lease area to see whether weeds are being managed or spread from the mining lease onto the land. I do not accept that this is an additional burden imposed by the presence of the mining lease. Instead, I consider regular inspection for weed infestation as part of prudent land management, and that the inspection regime would ordinarily include the area of Mr Friese's lease.

[28] The Lonergans submit that they are required to install and maintain firebreaks in areas adjoining the mine site to assist in the management of fire risks. I did not see any fire breaks in the vicinity of the lease, but Mr Lonergan told me that there is one to the north.[23]

[29] Given this is an existing lease, those firebreaks should already be in place. The creation and management of firebreaks is an essential part of land management, whether or not there is a mining lease on the property. The existing access track is a significant firebreak. There have been mining leases in the vicinity of Mr Friese's lease for many years. If there is only one other firebreak in existence, and that has

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21 Ibid [70].
22 T2-66, lines 43 to 45; T2-67, lines 1 to 42.
23 Ex 10; T2-72, lines 4 to 7.

been adequate to date, the Lonergans have not persuaded me that additional firebreaks are required.

[30] There should be no compensation for the creation of firebreaks, and the cost of maintaining the existing firebreaks would appear to be minimal.

[31] Mr Marland submits that the Lonergans should be compensated for the additional work at the rate of $150 per hour. He supports this figure by reference to the decision of *Sullivan v Oil Co of Australia Ltd and Santos Petroleum Operations Pty Ltd*[24] in which, it is said, the tribunal awarded a reasonable management time allowance of $100 per hour. Mr Marland submits that I should apply a CPI of 2% to that figure of $100, giving a current rate of $150 per hour.

[32] A close reading of the decision in *Sullivan* shows that the tribunal did not award management time allowance of $100 per hour. Instead, it accepted the calculation by Mr Brown, a valuer, where he applied $5 per hectare difference in the before and after value of the subject property as an appropriate calculation of the additional costs in management.[25]

[33] Mr Marland's proposed rate of $150 per hour equates to a weekly wage of over $5,500. That is an excessive rate for work that is not "managerial" in the true sense of the word. The additional supervision contemplated by the Lonergans is more akin to the work of a Station Manager or overseer. A much lower hourly rate would, therefore, seem appropriate. Unfortunately, I have no evidence about what might be appropriate.

[34] The tribunal in *Sullivan*, earlier referred to by Mr Marland, found that an hourly rate of $70 was appropriate for a senior manager of a substantial enterprise.[26] 14 years have passed since that decision, so $70 per hour, in present terms, may be too low. Doing the best I can, I determine that an annual amount of $320 is adequate compensation for the additional time required by the presence of Mr Friese's mining lease. This represents four hours per annum at an hourly rate of $80.

[35] The net present value of an annual payment of $320 per annum over 10 years, assuming a 2% discount rate, is $2931.92.

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24 [2003] QLRT 2, [88].
25 Ibid [88], [92].
26 Ibid at [90].

Cost of maintaining the track

[36] Mr Lonergan gave evidence[27] that he has graded the access track three times since he bought the property in 2012. Except for the latest grading, around March 2019,[28] Mr Lonergan was unable to say precisely when the previous grading had taken place.[29] Rather than it being an annual event, Mr Lonergan's evidence shows he grades the track on an "as needs" basis.

[37] Mr Lonergan told me that he uses the access track for his own purposes in running Rolfe Creek, and that he would use the track at least once a week.[30] In contrast, Mr Friese told me that he would use the track about eight times per year[31]. As I have already mentioned, the access track also acts as a fire break. Accordingly, the track is far more important to the Lonergans than it is to Mr Friese. Further, any deterioration in the track is more likely through the Lonergans' use than Mr Friese's use. If Mr Friese uses the track eight times per year and the Lonergans use the track once a week, Mr Friese' use is 8/60 of the total use (about 13%). Given that the track is also used as a firebreak, I consider that Mr Friese's contribution to the maintenance of the track should be fixed at 10%.

[38] Because of the ad hoc nature of the track maintenance to date, I am not prepared to give the Lonergans compensation for annual track maintenance. Instead, Mr Friese should contribute to the expense of track maintenance[32] by paying the Lonergans 10% of any invoice for reasonably necessary track grading during the term of the renewal of the mining lease within 30 days of presentation of an invoice. However, Mr Friese should not be liable to contribute to more than one invoice per annum.

Loss of production

[39] Mr Marland submitted that, as a result of the mining activity, livestock depastured on the property have moved away from the mining activity. He submits that the livestock will continue to stay away from the mining activity area, reducing the

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27 T2-56, lines 1 to 4.
28 Exhibit 4.
29 T2-55, lines 29 to 35.
30 T2-56, lines 19 to 20.
31 Ex 1, page 1.
32 As contemplated by MRA s 281(3)(vi).

stocking capacity of the land surrounding the mining lease area. The Lonergans called no expert evidence to support that proposition.

[40] As Mr Friese pointed out, he rarely sees livestock around the mining lease due to the poor quality of the land, which only provides feed to cattle at limited times during the year.[33] Mr Lonergan gave evidence that, most of the time, cattle are nowhere near the mining lease[34]. I observed that the area around the mining lease is naturally hilly, has sparse vegetation, and has been subjected to mining in the past. It is already marginal country for cattle production.[35] Accordingly, I am not prepared to attribute any loss of productivity to the mining lease.

Time spent negotiating with Mr Friese

[41] Mr Lonergan was vague in identifying the time spent with Mr Friese trying to negotiate compensation. At best, it seems that there was only one meeting.[36] I do not accept that this meeting justifies a claim for 10 hours spent in negotiations. The bulk of the time claimed appears to be time the Lonergans spent preparing for the hearing. Time spent preparing for the hearing cannot be the subject of compensation.[37]

Conclusion

[42] In view of my findings about the effect of the mining lease on the term future of the land, Mr Friese should compensate the Lonergans by a one-off payment of $455.70 calculated by reference to the value of the land in question (3.1 ha x $147/ha). Further, as I have found that the presence of the mining lease will increase the time required to manage the property, Mr Friese should pay the Lonergans $2,931.92. Therefore, the Lonergans are entitled to compensation of $3,387.62.

[43] MRA section 281(4) requires an additional amount to account for the compulsory nature of the action taken in granting a lease ("uplift"). The minimum uplift is 10% on the aggregate of amounts determined for compensation. That requires a further payment of $338.76.

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33 T2 – 20, lines 38 – 45.
34 T2-53, lines 1 to 3.
35 Ex 11, page 8.
36 T2-65, lines 25-40.
37 *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297, 363.

[44] Mr Friese should pay a total of $3,726.38.

[45] If the Lonergans incur costs in maintaining the access track then, as I have indicated, Mr Friese should pay his fair share of that cost. That can be achieved by applying the formula I have identified in paragraph 38 above.

Orders:

1. **In respect of the application for renewal of ML 70152, compensation is determined in the amount of Three Thousand Seven Hundred and Twenty-Six Dollars and Thirty-Eight Cents ($3,726.38).**
2. **The applicant must pay the respondents the amount set out in Order 1 within thirty (30) days from the notification of the renewal of the mining lease by the Department of Natural Resources, Mines and Energy.**
3. **The applicant must contribute to the expense of track maintenance by paying 10% of any invoice for track grading that is reasonably necessary during the term of the renewal of the mining lease, with such invoices not exceeding one invoice per annum.**

PG STILGOE OAM
MEMBER OF THE LAND COURT