LAND COURT OF QUEENSLAND

CITATION:	*Skilton v 2PL Superannuation Pty Ltd (No 2)* [2020] QLC 8
PARTIES:	**Gerald David George Skilton** (applicant) v **2PL Superannuation Pty Ltd** (respondent)
FILE NO:	MRA201-19
DIVISION:	General Division
PROCEEDING:	Determination of compensation payable for grant of mining lease
DELIVERED ON:	14 February 2020
DELIVERED AT:	Brisbane
HEARD ON:	Submissions closed 20 December 2019
HEARD AT:	Heard on the papers
MEMBER:	PG Stilgoe OAM

ORDERS:

1. **Gerald Skilton must pay 2PL Superannuation Pty Ltd compensation as follows:**
   a. **$5,732.10 for the cost of the Access Negotiations report ($5,211 plus 10%);**
   b. **$1,320 per annum in administration and inspection costs ($1,200 plus 10%);**
   c. **If Mr Skilton's work on the mining lease impedes access to Bath Tub Dam so that the construction of an alternative watering point is required—$3,414.40 ($3,104 plus 10%), to be paid within 30 days of presentation of an invoice;**

d. If 2PL is required to muster and walk cattle down an alternative to the access track when it is blocked because Mr Skilton has not provided appropriate access—$1,760 ($1,600 plus 10%);

e. If Mr Skilton's mining operation requires 2PL to take the longer route to check watering points—$14.66 ($13.33 plus 10%); and

f. Thirty-three per cent (30% plus 10% of 30%) of any invoice for reasonably necessary track grading during the term of the mining lease, to be paid within 30 days of presentation of an invoice, with a maximum of one invoice per year.

2. The gross amounts payable in orders 1(b)-(e) are to be indexed annually according to the CPI in Brisbane.

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – COMPENSATION – where the land was used for commercial cattle operations – 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 of the value of the land – whether there was entitlement to compensation for diminution of the use made of the land or any improvements thereon – whether there was entitlement to compensation for loss or expense arising from the mining operations – whether there was entitlement to compensation for the cost of preparing a valuation report

Mineral Resources Act 1989 s 281

Byerwen Coal Pty Ltd v Colinta Holdings Pty Ltd (No 2) [2018] QLC 49
Deimel v Phelps [2020] QLC 2
Deimel v Phelps [2019] QLC 4
Friese v Lonergan & Anor [2019] QLC 27
Mitchell v Oakhill & Anor [1998] QLC 25
Valantine v Henry [2018] QLC 21
Wills v Minerva Coal Pty Ltd (No. 2) (1998) 19 QLCR 297

APPEARANCES: Not applicable

[1] This case highlights some perennial problems with mining compensation matters. The first problem is something I have mentioned before; compensation is not to be determined, as miners would prefer, by applying a standard rate per hectare without

considering whether or not a landowner incurred actual loss or expense. The first problem highlights the second problem; a landowner must show actual loss or expense. The fear of loss or a potential expense that is only marginally linked to the mining lease, or which may be aspirational, is not a matter for compensation. The third problem is that a compensation claim is not the appropriate mechanism for a landowner to attempt to place restrictions on a miner's use of the land, either by seeking to impose conditions or by claiming "compensation" which, if granted, would mean that the mining operation is no longer viable.

[2] Gerald Skilton has a 15-year mining lease on Rolfe Creek, a property west of Clermont. Rolfe Creek is an aggregation of Lots 10 and 11 on CLM109. 2PL Superannuation Pty Ltd owns Lot 10 and Patrick and Prue Lonergan, the directors of 2PL, own Lot 11. The parties cannot agree what compensation Mr Skilton should pay 2PL so the task has fallen to me under s 281 of the *Mineral Resources Act* (MRA).

[3] Mr Skilton submits that he should pay $440 per year, based on $15 per hectare for the lease area, $5 per kilometre for the access track, and a 10% uplift. As I have already noted, Mr Skilton's calculation of compensation misconceives the application of the MRA. The Act does not contemplate a licence fee calculated by reference to the area of the lease.

[4] 2PL submits that the compensation should be $135,299, calculated as follows:

Head of compensation	**Amount**
Deprivation of possession of surface of the land of the owner	$8,289
Diminution in the value of the land	$14,000
Diminution of the use made or which may be made of the land of the owner or any improvements thereon:	
• New watering point	$14,404
• New fence line	$4,095
Severance of any part of the land from other parts thereof or from other land of the owner:	
• Road, cattle mustering	$17,300
• Road, water run	$6,500
Surface rights of access – road maintenance costs	$26,000
Loss or expense:	
• Valuation report	$5,211
• Our time	$2,200
• Inspection and administration	$25,000
	$122,999
Plus 10%: s 281(4)(e) MRA	$12,300

Total	**$135,299**

[5] To determine compensation, I am required to look at the factors in s 281(3) MRA, as claimed by 2PL.

Deprivation of possession of the surface of the land

[6] 2PL states that, because of the noise generated by the mining activity, livestock depastured on the property will move away from the lease area. It says that mining leases in the area have already impacted existing livestock activities and the impact will increase with the additional area of Mr Skilton's lease. It says that mining operations on the lease will result in the direct loss of 25.13 ha of land for the full 15 year term. It says that, without mining operations, approximately two head could graze within the mining lease area. It claims a loss of $300 per hectare per annum.

[7] 2PL provided a valuation from Access Negotiations Pty Ltd in support of its claim for deprivation of possession of the surface of the land. Access Negotiations assessed the value of Rolfe Creek at $300 per hectare. It assessed Rolfe Creek against three recent sales. Billaboo, at $150 per hectare, was considered inferior. Native Bee North, at $175 per hectare, was considered superior as was Colorado at $350 per hectare. It is interesting that the sales evidence relied upon did not include the transfer of Lot 10 from Mr and Mrs Lonergan to 2PL in November 2018. Although it may not have been an arm's length transaction in the classic sense, stamp duty had to be paid on the market value objectively ascertained and the absence of that transfer is not explained.

[8] In a recent decision concerning a mining lease adjacent to Mr Skilton's lease, *Friese v Lonergan & Anor*,[1] Mr and Mrs Lonergan provided a valuation stating that the land was valued at $245 per hectare. I questioned the value of that evidence, given that the valuation was not prepared for litigation and its author could not be cross-examined. Although the Access Negotiations valuation was prepared for the purposes of litigation, I have the same difficulty in that its author is not available for cross-examination.

1 [2019] QLC 27.

[9] In *Friese*, I observed that the value of Lot 10 was not $245 per hectare but closer to $147 per hectare.[2] The difference between $147 per hectare and $300 per hectare is inexplicable and I am not prepared to accept the latter figure. Given that the author of the Access Negotiations report considered Native Bee North to be a superior property, my initial assessment of $147 per hectare appears to be more accurate.

[10] Access Negotiations assumed that the whole of the lease area would be unavailable to stock for the whole of the lease term. The author made that assumption even though eligibility criteria provide[3] that Mr Skilton can work only 10 ha of the lease at any one time.

[11] Access Negotiations also relied on a report from Peter Spies dated 28 September 2018 in which Mr Spies noted that the area had poor soil quality and that he didn't "… think anything would grow in this medium". Mr Spies was commenting on the current condition of the land, i.e. the condition prior to any mining by Mr Skilton under this lease. This evidence is quite different from that available in *Friese*[4] where the evidence suggested at least some capacity for rehabilitation and I assessed compensation on the basis that rehabilitation would be delayed for about 10 years. If the country cannot support growth in its current condition then it is unlikely that Mr Skilton's mining activity would have any significant adverse impact so that it amounted to a deprivation of possession of the land.

[12] I reject any claim for compensation based on deprivation of possession of the surface of the land.

Diminution of the value of the land or any improvements

[13] 2PL submits that Mr Skilton's mining operation will impact the ongoing use of the land for grazing. It submits that none of the mined land can be used, as it will be unproductive and dangerous to cattle.

[14] Access Negotiations noted the comments of Trickett P in *Mitchell v Oakhill*[5] that a hypothetical purchaser will consider that a property affected by a mining lease will

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2 Ibid [11].
3 Eligibility Criteria and Standard Conditions for Mining Lease Activities – Version 2, filed by the applicant on 30 July 2019, 3.
4 *Friese v Lonergan & Anor* [2019] QLC 27.
5 *Mitchell v Oakhill & Anor* [1998] QLC 25.

suffer a diminution in value.[6] Access Negotiations acknowledged that it is difficult to place a specific value on the diminution of the land but considered a nominal 1% discount across the entire aggregation would be appropriate. That equates to $14,000 calculated over the whole aggregation as (4690 ha - 25.7 ha x $300). I have already commented that I consider $300 per hectare excessive. I am prepared to accept that, if there is to be a calculation of the diminution of the property, it should be calculated against the whole of the aggregation of Lots 10 and 11.[7]

[15] Access Negotiations gives no basis for applying a nominal 1% discount, save that the grant of a mining lease creates issues with biosecurity, weeds, fire, livestock disturbance, general security concerns and additional management time. All of these matters can be the subject of compensation under s 281(3)(vi) MRA and are the subject of a separate claim by 2PL. The Court does not look at each head of compensation under s 281, assign a value to each head of compensation, and then calculate the total compensation by adding each of those values if that exercise results in "double dipping".[8] In my view, assigning a nominal value of 1% to account for these matters, and then claiming compensation for the same matters, offends that principle. The better way to address this aspect of the claim for compensation is by considering a claim for loss and expense.

Diminution of the use made or which may be made of the land of the owner or any improvements thereon

[16] 2PL submits, and I accept, that rehabilitated land will not support grazing. I note, however, my previous observation that Mr Spies already considers the land within the lease area is marginal.

[17] Access Negotiations states that Lot 10 has a carrying capacity of 1 adult equivalent ("AE") per 12 ha. Given the mining lease is 25.13 ha, I might assume that the carrying capacity of Rolfe Creek overall will be diminished by 2 AE. If I had the annual profit to be expected from one AE, and I accepted the submission of Access Negotiations over the evidence of Mr Spies, I could calculate the diminution in the use to which the land might be put. Based on the current information, I am unable to assign any amount for compensation.

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6 Ibid 10.
7 As I did in *Byerwen Coal Pty Ltd v Colinta Holdings Pty Ltd (No 2)* [2018] QLC 49 [38].
8 *Wills v Minerva Coal Pty Ltd (No. 2*) (1998) 19 QLCR 297, 320.

[18] 2PL submits that, due to the proximity of the mining lease to its Bath Tub Dam, the dam will silt up from mine run off.

[19] Condition A6 of the Standard Conditions, with which Mr Skilton must comply, provides that he must design, install and maintain adequate erosion and sediment control structures to prevent or minimise the sedimentation of any watercourse, waterway, wetland or lake.

[20] Condition B8 provides that Mr Skilton cannot release waste water into the dam unless, as an alluvial miner, he releases into flowing water. If Mr Skilton is releasing into flowing water, he must first discharge the waste water into a settling pond.

[21] In assessing compensation, the Court must assume that a miner will comply with its obligations.[9] The conditions provide protection against 2PL's fears that Bath Tub Dam will silt up. I am not prepared to award compensation on the strength of a mere possibility.

[22] 2PL also submits that, because the mining lease is adjacent to Bath Tub Dam, cattle will be reluctant to water there. 2PL therefore claims the cost of installing a new watering point. This is not compensation for diminution of the land or improvements on the land; it is a claim for expenses arising from the fact of the mining lease. I have addressed this below.

Severance of any part of the land from other parts of the land

[23] 2PL submits that the lease cuts off the access road to the central water point and that an agreement[10] between Mr Skilton and a neighbouring miner Murray John Friese means that the road will be inaccessible. 2PL says that it cannot construct an alternative access and the obstruction of the road will create longer routes for watering and mustering.

[24] The agreement between Mr Skilton and Mr Friese does not deal with the access road; it deals with a spur from the access road through Mr Skilton's lease to Mr Friese's lease.

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9 *Valantine v Henry* [2018] QLC 21 [68].

10 "Lease Access Agreement for Lease ML70052 & ML70152 through or over ML100108", attachment 2 to the Statement of Compensation filed by the respondent on 13 December 2019, 1.

[25] Severance of property under s 281(3)(a)(iv) MRA means that a parcel of land will be cut off from the balance of the land by the presence of the mining lease. The road might be severed but there is no suggestion that the land is severed. Cattle will be able to walk freely across that road or around that part of the land that Mr Skilton has fenced. Once again, 2PL's claim is more properly a claim for an expense.

Loss or expense arising from the conduct of the mining operations

Cost of valuation and professional fees

[26] 2PL claims $5,211 for the cost of providing the Access Negotiations report.

[27] The Access Negotiations report is not simply a valuation; it purports to be a report on the heads of compensation available under s 281 MRA. To the extent that the report provides legal advice, Access Negotiations should not charge for it. The fact that many of its assumptions and conclusions are wrong is also unhelpful.

[28] However, 2PL has provided a tax invoice from Access Negotiations Pty Ltd dated 2 December 2019 for a total of $5,733, made up of $5,500 for the valuation report (GST inclusive) and $233 for accommodation expenses. I accept that it was a legitimate expense and 2PL is entitled to reimbursement for the cost as claimed.

[29] 2PL also claims the cost of "our time" to prepare the compensation statement. I assume "our time" is a reference to Mr and Mrs Lonergan's time. *Deimel v Phelps* is authority for the proposition that this Court will not compensate self-represented parties for the time spent in preparing for court.[11]

Cost of inspection and administration

[30] The Court accepts that the presence of a mining lease will increase the administration time for a landowner. 2PL claims an additional 24 hours per annum (two hours per month) at $100 per hour.

[31] 2PL filed two compensation statements; first on 13 December 2019 then on 20 December 2019. In the first compensation statement 2PL claimed 12 hours per annum at $150 per hour. In the second compensation statement, 2PL claimed 24 hours per annum at $100 per hour.

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11 [2020] QLC 2.

[32] Access Negotiations thought that the rate of $100 per hour applied in an earlier decision of *Deimel v Phelps*[12] was a reasonable assessment, even allowing for the fact that the "landowner" (presumably the Lonergans and not the superannuation fund) run a contract spraying business.

[33] In *Friese*,[13] I applied an hourly rate of $80. I am prepared to increase that to $100 based on *Deimel v Phelps*[14] but I cannot see any justification for an increase to $150. Therefore, I accept 2PL's more modest rate of $100 per hour as set out in the second compensation statement.

[34] However, the difference between 12 hours per annum in the first compensation statement and 24 hours per annum in the second compensation statement is not adequately explained. 2PL states that it will require additional administration time in undertaking weed, pest and biosecurity monitoring of the mining lease areas and access areas. As the directors of 2PL are not employed full-time in the Rolfe Creek operation it is difficult to see how a relatively small area of land in a large aggregation creates such an administration burden. I consider an annual amount of $1,200 (12 one-hour inspections per annum at $100 per hour) is sufficient to account for the additional administration costs that Mr Skilton's lease will impose on 2PL.

Additional watering point

[35] It is true that the edge of the Mr Skilton's mining lease is adjacent to, although not contiguous with, part of Bath Tub Dam.[15] However, there are significant parts of the dam that are not affected by the mining lease and Mr Skilton will not be accessing the whole of the lease area at all times during the term of the lease. While I am prepared to accept that a new watering point may be required at some time during the lease, I am not persuaded that it is necessary infrastructure unless and until Mr Skilton's operations block access to the dam. Further, I am not persuaded that 2PL requires a permanent watering point to address this issue.

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12 [2019] QLC 4 [37].
13 *Friese v Lonergan & Anor* [2019] QLC 27 [34].
14 [2019] QLC 4 [37].
15 "ML Overlay on Rolfe Creek Infrastructure", attachment 7 to the Statement of Compensation filed by the respondent on 13 December 2019.

[36] I also cannot understand why that watering point must be 3 km from the dam. 2PL has marked watering points on a map labelled "long way to central water" but the map has no scale. If that map is designed to show the distance between Central Water Tank and Bath Tub Dam, I accept that proposition but the map does not explain where 2PL will place the watering point, particularly in relation to the way in which its paddocks are configured.

[37] I will allow the cost of the trough and tank in the event that they are required due to Mr Skilton's mining operation, even though this is permanent infrastructure to meet a temporary problem. I will not allow the cost of the poly pipe because the length required is presently unknown. I will not allow the cost of installation based on the quote from Bennett Contracting and Plant Hire Pty Ltd as this is a quote for road construction and the detail for installing the pipe is not sufficiently defined.

[38] Mr Skilton must pay $3,104, the cost of the trough and tank:

1. In the event that his work on the mining lease impedes access to Bath Tub Dam so that an alternative watering point is required;

2. After the new watering point is installed; and

3. Within 30 days of presentation of an invoice.

Relocation of the fence

[39] 2PL submits that the mining lease cuts a paddock fence line which becomes inaccessible for mustering and fence line checking. It claims $4,095, the cost of relocating 500 m of the fence.

[40] 2PL's claim assumes that Mr Skilton will fence the whole of the lease for the whole period of the lease. There is no such suggestion in the material. Mr Skilton intends to fence only the camp.[16] If he adheres to that practice, then the fence will not be inaccessible and it will not need to be relocated.

The road

[41] 2PL has two claims concerning the access track.

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16 Response to Compensation Claim Made by 2PL Superannuation Pty Ltd, filed by the applicant on 20 December 2019, 4.

[42] 2PL's first claim is for the cost of extra travel time in the event that Mr Skilton blocks access via the track to the Central Water Point. 2PL claims that the cattle will have to walk an extra 3.48 km after a muster, that cattle walk at 1.5 kilometres per hour and, therefore, that the additional labour required is eight hours per annum for two people at $100 per hour per person. The total claim for additional mustering costs is $1,600 per annum.

[43] 2PL also claims additional driving time to check watering points. The additional driving distance is 3.76 km, an approximately eight minute drive. 2PL submits that the checks are required weekly, which results in an additional six hours per annum. It claims $600 per annum.

[44] I accept that if the main access is blocked by Mr Skilton's mining activity, the alternative access will be 3.48 km longer. I also accept that there may be times when 2PL staff are required to take the longer route due to Mr Skilton's mining activities. However, because Mr Skilton is restricted to mining 10 ha at any one time, and he has offered to provide alternative access at those times, I cannot accept that the access track will be permanently unavailable to 2PL. In the event that 2PL does muster and walk cattle down an alternative to the access track when it is blocked and Mr Skilton has not provided appropriate access, I agree that Mr Skilton should pay compensation of $1,600. In the event that Mr Skilton's mining operation requires 2PL to take the longer route to check watering points, Mr Skilton must pay 2PL $13.33 (i.e. one eight-minute trip at $100 per hour) for each week that the access track is unavailable and Mr Skilton does not provide alternative access.

[45] 2PL's second claim is for a contribution to the cost of maintaining the access track. 2PL submits that the cost is $6,000 per annum. An invoice from Bennett Contracting and Plant Hire Pty Ltd dated 27 March 2019 supports that sum.[17] 2PL submits that, based on Mr Skilton's historical use of the track, he should pay 40% of that amount. It submits that Mr Skilton accessed the track 312 times per annum, three times as many as 2PL, which makes him the primary user.

[46] Mr Skilton disagrees with 2PL's assessment of his use of the track. He says he will go to town (i.e. use the track) about once per fortnight. He cannot guess how many

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17 "Road Maintenance Invoice 2019", attachment 14 to the Statement of Compensation filed by the respondent on 20 December 2019.

times he will receive visitors or contractors but he estimates it would not be every week.

[47] In *Friese*, I accepted that 2PL personnel used the access track about once per week.[18] Mr Friese estimated that he would use the track about eight times per year. I ordered that Mr Friese should pay 10% of the track maintenance as and when it occurred.

[48] Mr Skilton's use of the track, at once per fortnight, is 26/86 of the estimated use, or about 30%. Similarly to the position with Mr Friese, Mr Skilton should be required to contribute only to the cost of maintaining the track as and when maintenance occurs, by paying 2PL 30% of any invoice for reasonably necessary track grading during the term of the mining lease within 30 days of presentation of an invoice. However, Mr Skilton should not be liable to contribute to more than one invoice per annum.

Additional claims

[49] Section 281(4)(e) MRA provides that there should be an additional amount determined to reflect the compulsory nature of the mining lease regime, which shall not be less than 10%. 2PL claims an additional amount of 15% but offers no justification, whether by precedent or reference to economic conditions, to justify 15%. In the absence of such justification, I consider 10% sufficient.

[50] 2PL also claims an annual increase of 3% due to the 15 year term of the lease. The Consumer Price Index (CPI) in Brisbane is currently running at 2%.[19] Rather than assign a particular rate, a better reflection of economic conditions would be to link the annual increase to CPI.

Mr Skilton's request for clarity

[51] Mr Skilton has asked me to settle what he considers a long-standing problem; that 2PL has locked gates, has issued only one key for the gate and will not permit that key to be copied. Mr Skilton says that this is an unacceptable safety issue.

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18 *Friese v Lonergan & Anor* [2019] QLC 27 [37].

19 Australian Bureau of Statistics, "Capital cities comparison", *6401.0 - Consumer Price Index, Australia, Dec 2019* (Web Page, 28 January 2020) <https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6401.0Main%20Features3Dec%202019?opendocument&tabname=Summary&prodno=6401.0&issue=Dec%202019&num=&view=>

[52] If Mr Skilton thinks I am going to order 2PL to unlock the gates he is sadly mistaken. This is a proceeding to determine compensation, not to determine the conditions of access.

[53] Note 42 of Condition B12 of the standard conditions for mining lease activities refers to the *Mining and Quarrying Safety and Health Act 1999*. That Act requires the operator to have a safety and health management system.[20] The *Mining and Quarrying Safety and Health Regulation 2017* states that a safety and health management system must include an emergency response plan.[21] An emergency response plan must have regard to plans for liaising with and using local or state emergency services.[22] Perhaps the answer to Mr Skilton's problem lies in his own hands, and not in 2PL's, by implementing an appropriate emergency response plan in consultation with the local emergency services.

Orders

1. **Gerald Skilton must pay 2PL Superannuation Pty Ltd compensation as follows:**
   a. **$5,732.10 for the cost of the Access Negotiations report ($5,211 plus 10%);**
   b. **$1,320 per annum in administration and inspection costs ($1,200 plus 10%);**
   c. **If Mr Skilton's work on the mining lease impedes access to Bath Tub Dam so that the construction of an alternative watering point is required—$3,414.40 ($3,104 plus 10%), to be paid within 30 days of presentation of an invoice;**
   d. **If 2PL is required to muster and walk cattle down an alternative to the access track when it is blocked because Mr Skilton has not provided appropriate access—$1,760 ($1,600 plus 10%);**
   e. **If Mr Skilton's mining operation requires 2PL to take the longer route to check watering points—$14.66 ($13.33 plus 10%); and**
   f. **Thirty-three per cent (30% plus 10% of 30%) of any invoice for reasonably necessary track grading during the term of the mining**

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20 *Mining and Quarrying Safety and Health Act 1999* s 55.
21 *Mining and Quarrying Safety and Health Regulation 2017* s 35.
22 Ibid ss 32, 39.

lease, to be paid within 30 days of presentation of an invoice, with a maximum of one invoice per year.

2. **The gross amounts payable in orders 1(b)-(e) are to be indexed annually according to the CPI in Brisbane.**