IN THE MINING WARDEN'S COURT
AT ST LEONARDS

J A BAILEY, CHIEF MINING WARDEN

FRIDAY 11TH SEPTEMBER 1998

CASE NUMBER	PARTIES	CAUSE OF ACTION
1997/47	David John Andrewartha Laurel Andrewartha v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/48	David John Andrewartha Laurel Andrewartha v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/49	Betty May Chapman Tom Chapman v. BHP Steel (AIS Pty Ltd	Application to Assess Compensation
1997/50	Betty May Chapman Tom Chapman v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/51	Caroline Graham v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/52	Caroline Graham v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/53	Shirley Kelly George Kelly v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/54	Shirley Kelly George Kelly v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/55	Errol Jackson Williams v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/56	Errol Jackson Williams v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/57	Leonard Michael Williams Denise Ann Williams v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/58	Leonard Michael Williams Denise Ann Williams v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction
1997/63	Dareon Brotherhood of Australia Limited v. BHP Steel (AIS) Pty Ltd	Application to Assess Compensation
1997/64	Dareon Brotherhood of Australia Limited v. BHP Steel (AIS) Pty Ltd	Complaint for Damages and Injunction

HEARING DATES: 9th to 13th March 1998
16th to 19th March 1998
26th May 1998

JUDGMENT DELIVERED: 27th August 1998

DECISION AS TO COSTS

Following my judgment delivered on 27th August, 1998, submissions were made the next day on the question of costs. Before considering those submissions, it is necessary to look at the statutory provisions for the awarding of costs.

Section 317 of the Mining Act 1992 provides:

317 Costs may be allowed

(1) The costs of all proceedings under this Act before a warden (whether in a Warden's Court or otherwise) are in the discretion of the warden and the amount of such costs may be determined by the warden or taxed, as the warden may direct.

(2) The reference in subsection (1) to costs includes a reference to an arbitrator's costs in relation to a hearing under division 2 of Part 8.

Rule 15 of the Mining Act 1992 provides:

Costs

15. Costs recoverable in proceedings before a Warden's Court are, unless the court otherwise orders, to be determined by reference to the scales of costs applicable in the District Court

Relevant portions of Section 308 of the Mining Act 1992 are:

308. Defendant may pay money into court

(1) A defendant in proceedings before a Warden's Court in which money is claimed may, at any time not later than 2 days before the hearing, pay into the court:

(a) the amount claimed, together with the complainant's costs up to the time of the payment, or

(b) such lesser amount as the defendant considers a full satisfaction in respect of the matter complained of.

(4) In the event that:

(a) a lesser amount is paid into court, and

(b) the complainant elects to proceed and not to accept the lesser amount, and

(c) the complainant fails to recover any amount in respect of the complainants claim additional to the lesser amount,

the warden may order the complainant to pay such of the defendant's costs as are incurred after the date of the payment into court.

Section 208I of the Legal Profession Act, 1987, as amended in 1994 provides:

> This division does not limit any power of a court or a tribunal to determine in any particular case the amount of costs payable or that the amount of the costs is to be determined on an indemnity basis

Part 7, clause 45 of that Act provides:

> On and from the commencement of Part 11, as substituted by Schedule 3 to the Legal Profession Reform Act 1993, a reference in any Act or other instrument (however expressed) to the taxation of costs is taken to be a reference to the assessment of costs under Division 6 of Part 11.

It is clear that legislation has provided a warden with a number of discretionary options concerning costs.

Submissions from the complainants are that, with the exception of the compensation assessment concerning L. M. and D. A. Williams (case No. 1997/57), the defendant company should pay the complainants costs as assessed under the Legal Profession Act. The complainant did not suggest the exercise of any discretion in respect of case No. 1997/57 other than what is provided for in Section 308(4) of the Mining Act 1992, that is, that the complainant pay the defendant's costs on and from the date of payment into court, that is, 4th March, 1998 and that such costs be assessed under the provisions of the Legal Profession Act. The complainants specifically indicated that indemnity costs under Section 208I of the Legal Profession Act were not sought.

The complainants outlined that, leaving aside Case 1997/57, in all instances, the amount awarded by the court exceeded the amount paid into court on 4th March, 1998 and the amount offered in open court on 16th March, 1998. Furthermore, the two

issues involved were causation and quantification and the complainants have been successful in both.

Lukies v. Ripley [no.2] 35NSWLR 238 was cited by the complainants, particularly the passage commencing at point E of pg.292:

> *There is either no power, or alternatively, if there is power, it would rarely be exercised to deprive successful plaintiffs of their costs: see Deen v. Different Drummer Pty Ltd (Court of Appeal, 30 March 1978, unreported).*

His Honor went on to say, however:

> *Accordingly, so far as the plaintiffs' costs are concerned, the only question is whether the plaintiffs should be deprived of their costs or their costs should be discounted because of some conduct.*

The defendant submits that the court should make an order that each party pay its own costs. That submission is supported partly by the assertion that the complainants were never willing to attempt to settle the matter. Mr. Rares submitted that even when the open offer was made in court, with a proviso that the defendant was willing to have discussions about costs, no approach was made by the complainants to negotiate a settlement. There was no attempt by the complainants to move from the total figure of $2,000,000 which was claimed.

The offer in open court was 5% of that which was claimed. The decision of the court was 8% of that which was claimed.

Mr. Rares referred to p 8 of the judgment, cited the cross examination of one of the complainants Mr. Kelly and submitted that when Mr. Kelly was cross examined, his claim "evaporated". Mr. Rares said it was unreasonable for the complainants to pursue their claims in the manner in which they did - if the claims had been presented in a reasonable way, the defence would be able to focus on the real issues and shorten the proceedings.

The defendants submission, that the manner in which the claims were pursued was unreasonable, is supported by a part of the evidence of one of the complainants, Ms Graham. It may be pertinent to repeat here a portion of page 29 of my judgment, which is an exchange under cross examination between Mr. Rares and Ms. Graham:

> *Is not one of the fundamental things you are seeking in this matter an amount, a payment from BHP?---It's not only that. We do want to bring the whole issue of the river to the attention of everybody and it seems a legal case like this is one of the ways we can go on doing this and that's---*
>
> *That is why you are not the slightest bit interested in settling this case, are you?*
>
> *--I don't think that's---*
>
> *Because you want to bring it to the attention of the media through the court case, that is right, is it not?---I mean that might be---*
>
> *That is right, is it not?---No. that's not entirely right. That's part of it.*

In the matter of *Rosser v. Maritime Services Board of N.S.W. (No 3) (Supreme Court of New South Wales 25 November 1997, Young J.)* reference was made to the decision of Holland J in *Walker v. Crane Enfield Metals Pty. Ltd (1.12.89 unreported)* and a submission to Young J that "if there are negotiations for a settlement and one party makes offers near the mark and the other makes totally unrealistic offers, then the court may make the appropriate orders to reflect the need to encourage bona fide attempts to settle litigation." Young J, on that said: *I consider that the most a court can derive from* ***Walker's Case*** *is that in an exceptional case it may be unreasonable for a party to refuse an offer that is close to, but less than ,the verdict and that such unreasonableness may be tested by the party's counter-offers."*

In this matter, the refusal to make a counter-offer meant that there was an adherence to the original claim of $2 million. For the purposes of considering the principle of *Walkers* case as enunciated by Young J., was the refusal to accept the offer of the defendant unreasonable? Having regard to the offer of the defendant of $96,000, the verdict of $160,000 and the claim of $2 million, clearly it was unreasonable.

In addition to an unwillingness to settle, the aspect of causes should be also be considered, it was submitted, as a reason to alter the usual order as to costs.

The claims made by the complainants were:

1. Compensable loss
2. Damages
    - •Nuisance
    - •Negligence
    - •Trespass
    - •Exemplary
3. Injunctive relief

The complainants were successful in respect of compensable loss and damages in nuisance only. The complainants failed in obtaining damages for negligence, trespass or exemplary damages and failed to gain injunctive relief.

The defendant made admissions at the outset about matters which entitled the complainants to compensable loss. There is a huge gap between the total amount awarded to all of the complainants ($160,000) and the total amounts claimed ($2 million). There was not shown to be any basis upon which the amount of damages claimed could be justified. Even if the complainants were successful on all of the causes claimed, the quantum claimed was clearly out of all proportion. In the absence of such evidence, I can only assume that conveniently rounded figures were simply "plucked from the air".

It is clear that the defendant was attempting to shorten the proceedings; by making payments into court, by making admissions at the opening of the case and by making further offers of settlement in open court. Notwithstanding those efforts, it appeared the complainants case was being run on the basis that the defendant was resisting ever causal claim and every cent of quantum. On the evidence, the complainants were more interested in the publicity attendant upon the proceedings and the embarrassment to the defendants corporate public profile.

The defendant is seeking to rely, in one part, upon the fact the court accepted the evidence of the valuer it produced in court as a reason for altering the general practice in awarding costs to the successful party. I cannot accept that as being a valid reason - it is really a normal procedure in court, when consideration disputes as to quantum, for each party to produce witnesses of varying opinions. It cannot be said that the complainants were unreasonable in the approach taken to that aspect of the case.

A great deal of the first week of evidence was taken up by the complainants, who each presented evidence to court by way of typed statement. Having regard to many common generalisations existing in those statements, it was necessary for the defence to cross examine each complainant at length - such cross examination often revealing many inaccuracies and/or exaggerations. In the written submissions of the defendant, the following comment is made: "the statements have the hallmark of being produced by rote off a word processor running issues which were irrelevant and paid little regard to accuracy." It is my opinion that if a properly prepared statement of each complainant was presented to the court, there would have been a reduction in hearing time.

It is my opinion that there are strong reasons as to why the complainants costs should be discounted because of the conduct of the complainants. Furthermore, there are good reasons why there should be a differentiation between costs awarded before the offer of settlement was made in open court on 16th March, 1998 and costs awarded after that time. By refusing to consider settling the case and continuing on with litigation, for a relatively insignificant gain, the defendant should be required to pay only a fraction of the costs of the complainants from that point.

BENCH: I MAKE THE FOLLOWING ORDER IN RESPECT OF COSTS:

1. IN ACCORDANCE WITH SECTION 308(4) MINING ACT 1992, AND IN THE EXERCISE OF MY DISCRETION, THE APPLICANTS LM AND DA WILLIAMS ARE TO PAY THE DEFENDANT'S COSTS IN RESPECT OF THE APPLICATION FOR ASSESSMENT OF COMPENSATION (CASE 1997/57) WHICH WERE INCURRED AFTER THE DATE OF PAYMENT INTO COURT, THAT IS, 4TH MARCH 1998. THE QUANTUM OF THE COSTS MAY BE AGREED BETWEEN THE PARTIES AND IF NO AGREEMENT IS REACHED WITHIN 28 DAYS, THE COSTS ARE TO BE ASSESSED IN ACCORDANCE WITH THE LEGAL PROFESSION ACT.

2. IN RESPECT OF ALL OTHER CASES BEFORE THE COURT, THE DEFENDANT IS TO PAY THE COSTS OF THE COMPLAINANTS IN THE FOLLOWING MANNER:

- 75% OF COSTS UP UNTIL THE OFFER WAS MADE OF SETTLEMENT AT THE COMMENCEMENT OF COURT AT 10AM ON 16 MARCH 1998.

- 25% OF COSTS FROM THAT POINT OF TIME.

THE QUANTUM OF SUCH COSTS MAY BE AGREED BETWEEN THE PARTIES AND IF NO AGREEMENT IS REACHED WITHIN 28 DAYS THE COSTS ARE TO BE ASSESSED IN ACCORDANCE WITH THE LEGAL PROFESSION ACT.