IN THE WARDEN'S COURT, SYDNEY
ON 5TH AUGUST, 1981
BEFORE J. L. McMAHON,
CHIEF MINING WARDEN.

CLUTHA DEVELOPMENT PTY. LTD.

-v-

YEOMANS

This has been the hearing of an application to assess compensation pursuant to the provisions of Section 98 of the Coal Mining Act, 1973. The Minister for Mineral Resources for New South Wales granted to the applicant company, Clutha Development Pty. Ltd. (herein called Clutha) an authorisation under Section 21A of the Act to conduct borehole drilling, geological surveying and testing, geophysical surveying and testing in some land part of which is the land owned by a company of which the respondent, Mr. Yeomans, was the Managing Director, P.A. Yeomans Pty. Ltd., which is now in liquidation. The land is situated at Wedderburn, apparently within twenty kilometres of Campbelltown, New South Wales. The authorisation is for a period of two years from 9th February, 1981.

Evidence was given by the chief geologist of Clutha, Mr. Peter Goodwin, of the intentions of Clutha in relation to the lands of the respondent. Clutha proposes to drill possibly nine boreholes at various locations on the property. Of these nine, four will be of 150 mm internal diameter, the remaining five of 100 mm internal diameter. It is proposed that the holes be sunk to penetrate the upper part of the Bulli seam of coal which is to be found at an approximate depth of 500 metres. Mr. Goodwin deposed that the programme was estimated to take up to seven weeks for each drillhole with some possible reduction of this period to six weeks, given good drilling conditions. It was proposed to use three drilling rigs, the larger holes being sunk by a rig mounted on a truck called a Mayhew 15W, the smaller holes by a skid mounted rig. It was estimated that the operation for each large hole would require an area of about 1,000 square metres to be cleared, for the Mayhew, the skids approximately 500 square metres. It was proposed to up-grade tracks in the area to facilitate the movement of rigs and to give access to personnel vehicles and water trucks. At each drilling site a sump would be sunk to catch and retain water for use of the drilling operation. The total time involved, according to Mr. Goodwin, would be some 25 to 30 weeks on the respondent's land. Each hole would cost the company in overall expenses approximately $25,000 to sink.

In his evidence, Mr. Goodwin stated that apart from the benefit to the landowner by reason of the up-grading of the tracks, the sinking of the holes could well mean that ground water would be discovered permitting the owner of the land to have access to an underground supply. He felt that at the moment anyone drilling independently for water would incur a debt of about $5,000. Mr. Goodwin spoke of an approach by a Mr. Laan to Clutha, Mr. Laan being a purchaser of an area of approximately 5.402 hectares, from the respondent. In the Contract for Sale, portion of which is exhibit 4, the respondent agreed with Mr. Laan that, prior to completion, a borehole for water be sunk in the land. This was an obvious reference to a drillhole as envisaged by Clutha.

Clutha was offering as compensation the sum of $140 perdrillhole on the basis that the operations would take up to seven weeks, and beyond that time an additional payment of $20 per drillhole would be made for each additional week in excess of seven weeks. The evidence of Mr. Goodwin was confirmed somewhat

by that of Mr. Colin Paterson, the geologist with Clutha who had the general supervision in the field of the operations. He deposed of compensation of $120 per drillhole for up to seven weeks to certain other landowners with provision that beyond seven weeks they be paid $20 per drillhole for each additional week. In other words, the offer being made to the respondent was $20 per drillhole in excess to that paid to other landowners. It might be emphasised, however, that the other landowners are not at Wedderburn where the respondent's land is but at Burragorang. However, evidence given on behalf of Clutha indicated that the land at Burragorang was somewhat of better agricultural quality than that of the respondent.

Neither Mr. Goodwin nor Mr. Paterson could give any economical reasoning for the figure of $20 per week per borehole. It is a figure, they said, struck with landowners who are at arms length and which those owners are prepared to accept. Evidence of the agreements with those landowners was admitted on the basis that I was entitled to look at what was the prevailing rate for compensation as determined by private treaty although the probative value of those rates although pertinent may be limited when challenged. In other words, while they may be persuasive upon me they were certainly not authority for absolute adoption by a Warden, especially in view of the structure of Section 98 of the Coal Mining Act. That section provides for the assessment of compensation which shall be of the loss caused or likely to be caused by certain things set out in paragraph 98(1)(b) (i) to (vi) inclusive. Therefore without knowing the economical basis upon which the figure of $20 per week per borehole was struck, I could not determine that all the factors as envisaged in paragraphs (i) to (vi) had been taken into account.

In Reynolds v. Electricity Commission, an assessment delivered at the Warden's Court, Sydney on 14th December, 1978, this Court considered the question of compensation to be awarded to a landowner arising out of activities, or proposed activities, of the holder of an authorisation under the Coal Mining Act. In that particular matter, a formula had been arrived at which was intended to take into account all the matters as set out in paragraph 98(1)(b).

Surprisingly, the respondent did not seek to rely upon paragraphs (i) to (v) of paragraph 98(1)(b). For instance, Mr. Yeomans' evidence was that the damage to the surface of his land, to grasses or crops or to stock, was such that he could not envisage any real loss. However, he sought to rely upon paragraph (vi) "all consequential damage".

Mr. Yeomans' company purchased some of the land as early as 1953 by private treaty and subsequently acquired additional surrounding lands by public auction. He is an author of considerable note, being responsible for the introduction of the so-called key line irrigation system which has been adopted on many rural holdings throughout Australia. He had sought to apply that system to this land which had an area of in excess of 1,000 acres and additionally had put to use upon it an invention of his called a "tritter" which was designed to clear land of both vegetation and rock, leading to it becoming more arable. The respondent gave evidence of having himself been involved in the mining industry and indeed having been a partner to Clutha in a coal mining undertaking in the Hunter Valley. He had either been a contractor or owner of some nine coal mines at different stages throughout his versatile working career.

His evidence was that he had already sub-divided or he proposed to sub-divide the land for sale. When he had acquired the land, it had been the subject of a limitation of 25 acres per residential block, there had been a re-zoning and provision was made that an area of no less than 100 acres could be sub-divided for residential purposes. This re-zoning took place in 1974. Since then

Mr. Yeomans has tried to have the original zoning of 25 acres re-introduced and in this regard had had sub-divisions done on part of the property fronting Victoria Road, on the basis that he believed that shortly any purchaser of 25 acres would be able to obtain permission to build. In September, 1980 Mr. Yeomans said a Minister of the Crown had made a public statement that that re-zoning on the 25 acre basis would be re-introduced, the respondent had been waiting from week to week for this to be done and only on 26th June, 1981 did gazettal to that effect take place. Mr. Yeomans has sworn that circumstances now are that he has become somewhat financially embarrassed. He has been unable, through agents, to sell a great number of blocks which range in price from $48,000 to $75,000. He said that the problem in obtaining sales was the fact that rumours have abounded that there would be drilling on the blocks or adjacent to them and extreme difficulty was being experienced by agents in attracting buyers or in convincing prospective buyers that the environment will not be disturbed. The respondent stated that the cost to him of the activities of Clutha on the blocks is such that he is losing out on profits and he felt that he should be paid the sum of $400 per drillhole and $1,000 per week during the time that the drillers are in the area.

As previously stated, Mr. Yeomans' company is in liquidation. It is apparent from the evidence that proceedings have been taken by mortgagees in the Supreme Court and he is under considerable pressure to liquidate some of the assets to meet interest and principal owing on the lands. Mr. Yeomans felt that if initial sales of blocks which would return some $700,000 could be made, that that would relieve the pressure upon him, permitting the interest and principal to be paid and then permitting a more leisurely sale of the remaining blocks.

The thread going through Mr. Yeomans' evidence was that the presence of drilling rigs or the possibility of drilling activities on the land has adversely affected its value and he was seeking compensation for this. He called as a witness a real estate salesman for Richardson & Wrench Pty. Ltd., Mr. Richard Woodhouse. Richardson & Wrench, together with other real estate agents, are involved in selling activities and Mr. Woodhouse deposed that on prospective purchasers being informed that there is a possibility of exploratory drilling taking place, their reaction was that "they were not impressed". He attributed some of this to local rumour among residents who, he swore, have done much to deter prospective purchasers. However, he felt that if drilling could be delayed for some six months then more sales could take place thus alleviating Mr. Yeomans' financial problems, because the physical presence of the drills themselves would have a much more adverse effect upon people than their merely being told of the possibility of drilling taking place.

His evidence was in contradiction of that of a valuer, Mr. Trevor Russell, called by Clutha, who gave evidence that in his view the presence of drilling rigs on the area would not be likely to be unattractive to prospective purchasers. He based this opinion on the fact that because none of the blocks had natural water, if drilling could take place, ground water might well be discovered and brought to the surface for the purposes of domestic use.

In comparing the evidence of Mr. Russell with that of Mr. Woodhouse, I conclude that is more likely than not that prospective purchasers in normal circumstances would be deterred at the possibility of drilling taking place. As Mr. Woodhouse put it, the average purchaser of 25 acres in this area is looking for a retreat type situation. The presence of a drilling rig or possibility of its presence may be objectional to him. With all due respect to Mr. Russell, I do not see a great deal of merit in his contention that the presence of drilling rigs might not necessarily be unattractive or objectional although he did concede that that

might not be a selling point made to prospective purchasers by agents. On the other hand, while part of the evidence of Mr. Woodhouse was to the effect, as I have said, that prospective purchasers may be put off more by the sight of a drilling rig rather than merely being told about it, he did state that most of the proposed purchasers were local people and knew what a drilling rig looked like. Further, a great number of them would have cash and fewer of them than the normal run of buyers of real estate would be dependent upon obtaining bank or building society, etc. finance which is under considerable interest rate pressure at the moment. So in normal circumstances with land readily available for sale, one could reasonably conclude that the activities of Clutha may have adversely affected the respondent's selling programme. But there the matter cannot end because I am of the view that circumstances are not what one might call normal. It is apparent that sales are slow.

On the evidence, in my opinion, the following factors have been advanced as causing this:-

1. The presence of, and or possibility of, drilling rigs.

2. Shortage of funds for finance due to high interest rates.

3. The fact that up until 26th June, 1981 prospective purchasers could not be sure of the zoning, that is whether or not they would be given permission to build on any 25 acre lot that they purchased.

After consideration of all the evidence, I am of the view that while 1 and 2 above may be factors, the most cogent of the three is No. 3. The uncertainty of having permission to build would have to not only deter but would prohibit most buyers in my opinion. In addition, insufficient time has been allowed to elapse since 26th June last to disprove this contention.

I turn to the provisions of the Act and in particular Section 98(1)(b). Paragraphs (i) to (v) in Section 98(1)(b) relate to land user, i.e. paragraph (i) damage to the surface <u>of land</u>; (ii) deprivation of possession <u>of land</u>; (iii) severance <u>of land</u>; (iv) <u>surface</u> rights of way and easements; (v) destruction etc. of stock <u>on land</u>. Only (vi) "all consequential damage" omits to mention land or land user but I do not think that the legislators intended paragraph (vi) to be read ejusdem generis with paragraphs (i) to (v). There is no judicial precedent either from the Supreme Court in this State, from elsewhere, or from this Court that I can locate as to the meaning of "all consequential damage". Perhaps it is wise not to attempt definition, it being appropriate in each particular case for the Court to determine if there is any loss caused or likely to be caused by "all consequential damage", and what in each case, particular activity causing loss or likely loss could come within the meaning of "all consequential damage". In Reynolds v. Electricity Commission it was held that "all consequential damage" included inconvenience, and loss of time performing supervisory work, suffered or required to be performed by or on behalf of the land holder by reason of the activities of the holder of an authorisation which was drilling holes in a manner somewhat similar to Clutha in this matter. This it seems to me is a proper factor to be taken into account in determining compensation. On the other hand, one could envisage other activities which would be so remote that it would be unreasonable to require the holder of a concession or authorisation to pay compensation for. Again, the Court would have to determine if there were other factors not associated with the activities of the authorisation holder which would be causal or would be likely to be causal to the loss suffered or likely to be suffered. Of course, the facts of each particular case would have to be looked at to determine this point. As to these matters I would feel it proper to apply the civil standard of proof.

In this particular application to assess compensation I have found that there is another factor which is the major one causing the slackness in sales of the land. That is the uncertainty until recently about permission to build on these 25 acre lots. Further, while prospective purchasers may not have been impressed, as Mr. Woodhouse put it, with the possibility of drilling taking place on or adjacent to the land in which they were interested, I am not satisfied on the evidence at this stage that there is sufficient for me to say that loss has been suffered or is likely to be suffered in respect of this particular matter. In the circumstances, I propose to disallow the respondent's claim based on the possibility of compensation for loss of sales.

The parties have put little before the Court to come under paragraphs(i) to (v) but I am of the view that I am bound to look at all matters as set out in Section 98(1)(b) in assessing compensation. The absence of, or short-comings in, evidence makes it difficult but not impossible to make an assessment, and I emphasise the word assessment, and I find that there will be a loss caused or likely to be caused to the surface of land arising from the prospecting or drillingoperations. A major road and tracks will be used, areas will be cleared and sumps will be sunk so that the holes can be drilled. There will be some deprivation of the use of the land, as set out in paragraph (ii), although the actual area involved is only comparatively small. I do not find any evidence of severance, as set out in paragraph (iii) nor as to surface rights of way or easements as set out in paragraph (iv). Only a few head of stock are run on the land at the moment but I am of the opinion that some small ingredient must be added to the compensation in this regard. As to all consequential damage, as previously stated, on the evidence I am not satisfied that there is sufficient for me to say, in this particular matter, that any loss which the respondent has suffered, or is likely to suffer, arising directly or exclusively from the proposed drilling, can warrant consideration under this heading. The land is valuable and I note the evidence as to the prices being charged for the sub-divided lots, especially in view of Section 98(1)(d) - compensation assessed shall not exceed the non-mining market value of the land and improvements. Clutha has access to this land until February, 1983.

In the circumstances, taking into account the requirements of the Act, there will be an assessment made of $300 per drillhole if the activities go up to seven weeks. If sinking goes beyond seven weeks, the rate of $50 per week is to apply in respect of each drillhole. A sum calculated on this assessment is to be paid by Clutha to the Registrar of this Court within seven days of completion of each hole to be paid by him direct to the respondent.