IN THE WARDEN'S COURT
HOLDEN AT SYDNEY
ON 2ND MAY, 1985,
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

The Shell Company of Australia Ltd.

v.

Roberts

BENCH: This has been the hearing of an application under Section 122(3) of the Mining Act, 1973, as amended, for the assessment of compensation payable by the licence holder, or on behalf of the licence holder, to Mr. Henry Ivan Roberts, in respect of the following titles under the Act:-

Exploration Licence No. 1990

Prospecting Licence No. 792

Prospecting Licence No. 793

Prospecting Licence No. 880.

The Shell Company of Australia Ltd, (herein called the applicant) trading under the name of Billiton Australia for the purposes of metals exploration, Buka Minerals N.L., Triako Mines N.L. and Broken Hill Metals N.L. are all involved in a joint venture effecting exploration of the areas the subject of the abovementioned titles while Mr. Roberts (herein called the respondent) is the holder of certain Western Lands Leases for grazing purposes on the subject land, his property being called "Whiteleeds" a few kilometres out of Broken Hill.

Evidence has been forthcoming from Mr. Brian William Fowler, the Titles Officer for the applicant, and the applicant's senior geologist in the Broken Hill area, Mr. Syed Dashlooty, in the case for the applicant, while in the respondent's case, the respondent gave evidence and later by leave called a fellow grazier Mr. Norman John Clark. Certain documents have been tendered as exhibits during the proceedings and these will be referred to later. Among them is the transcript of earlier proceedings before me, as will be referred to shortly.

Mr. Fowler gave evidence about negotiations had with the respondent by means of face to face discussions, telephone calls and two letters, which are now exhibits 2 and 3. Certain offers were made to the respondent, but according to Mr. Fowler they were not accepted.

A complication to the negotiations was a decision handed down by myself in Sydney on 14th June, 1984 in the matter of C.R.A. Exploration Pty. Limited v. Roberts. Transcript of the evidence at that hearing is exhibit 8. In it, I had laid down certain figures following lengthy evidence at Broken Hill during which I heard that the exploration company in that matter was seeking to conduct exploration activities upon the land of the present respondent in a manner very similar to those to be employed in this case. Against that decision, both C.R.A. and the respondent had appealed to the District Court and to date no decision to vary my assessment has been handed down from that jurisdiction. However several months ago C.R.A. had issued a notice of discontinuance of its appeal, but strictly speaking, each appeal still remains on foot. Submissions suggest that a hearing was listed for late April but in evidence from the respondent, he has confirmed that his appeal would be withdrawn and I assume C.R.A.'s appeal will be also withdrawn. It was some reluctance to apply the principles of the decision of the Wardens' Court, some confusion in interpretation and a delay in determination of the matter by the District Court, which it would seem, has contributed to the parties in this matter being unable to come to some sort of amicable agreement.

The applicant through Mr. Fowler has stated that the decision being appealed against was acceptable to the applicant with the exception of perhaps two matters. Firstly the figure of 70c per metre of track leading to each of two percussion drill holes was considered by the applicant and other exploration companies to be excessive and secondly the applicant preferred to have a flat and fixed rate per drill hole including the land adjacent to a drill hole. In my assessment I had set the rate of $10 per percussion or diamond drill hole, and then 5c per square metre of land surrounding that hole which I considered to be areas of moderate disturbance. The slight disturbance occasioned in the setting of gridlines in order to, inter alia, sink rab (rotary air blast) holes was included in the flat rate of 85c per rab hole.

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The evidence from Mr. Dashlooty suggests that the decision was found wanting as no mention was made of gridlines per se and that in the unusual circumstance where line clearing takes place and no rab holes are sunk, some rate should be fixed.

Mr. Fowler has suggested that the respondent should accept some figure less than that which was included in the C.R.A. v Roberts decision as to at least two aspects of exploration activity, while the respondent, according to Mr. Fowler, was seeking more than the figures included and specified in that decision. The respondent agrees that this was his initial approach, but lately he has changed his mind, and as recent as a week before the hearing he had instructed his solicitor to accept compensation figures from the applicant along the guidelines as laid down in the previous matter and indeed, as it is now put, he is prepared to embrace the C.R.A. v. Roberts decision. One of the difficulties, Mr Fowler has said, in accepting the previous assessment of 70c per metre of access road to the percussion drill sites was how to define a road. There had been discussions between himself and the respondent about this matter and Mr. Fowler agreed that one of the propositions put to the respondent was that a compensation agreement should be signed, leaving the question of what constituted a road to be the subject of later action.

Mr. Buckworth for the respondent has cross examined Mr. Fowler at some length in relation to an offer which C.R.A. Exploration Pty. Limited had made to the holder of property adjacent to the respondent a Mr. Blore, such offer, it was said incorporating payment of $500.00 per percussion, diamond, reverse circulation and rotary drill hole, the very thing which the respondent says he sought from the applicant in these, and earlier proceedings, and which the applicant herein was unwilling to pay. I would comment that the documents tendered as exhibits 6 and 7, do not precisely state that the sum of $500.00 is finally payable per hole, and I would reject this argument as being relevant to my assessment in this matter.

Mr. Dashlooty has given in evidence his outline of the means by which the exploration exercise on "Whiteleeds" would be carried out. The operation is not unlike that which is usually conducted to search for group 1 minerals, that is the laying of grid lines, the taking of electromagnetic readings by means of wire loops, the collecting of samples, and then if anomolies in the geological strata are found to exist, the taking of more precise readings by conducting a ground magnetic survey. If an area of encouraging rock were exposed, samples would be taken, but if he were not exposed, it would be necessary to conduct rab drilling, which meant the sinking of several holes which could be as shallow as from one to two metres, or as deep as twenty metres. The drilling rig for this activity is mounted on a truck. If further exploration was considered necessary, it would be a requirement to sink diamond or percussion drill holes. This later activity could mean that the one site of the hole would be occupied for up to two to three weeks.

Mr. Dashlooty also considered that some aspects of the figures as laid down in the C.R.A. Exploration Pty. Limited v. Roberts matter were unacceptable because they went beyond the value of the land for purposes other than mining. He said that any sort of track at 70c per linear metre was unacceptable, when it applied to access roads.

In coming to their considered conclusions that some of the figures in the C.R.A. Exploration Pty. Limited v. Roberts matter were too high, I believe that both Mr Fowler and Mr Dashlooty have not paid appropriate heed to the provisions of the Mining Act. Section 122(1) provides for an entitlement to compensation for any loss suffered, or likely to be suffered, as a result of the grant of an authority or the exercise of the rights conferred by the Act or the authority on the registered holder of the authority. Section 124(1)(b) lays down the criteria to be applied by a Warden in assessing compensation and section 124(1)(d) provides that the assessment shall not exceed in amount the market value for other than mining purposes of the land and the improvements thereon. The gentlemen have gone through exercises by mathematical calculation and have said in effect that if square metres on

"Whiteleeds" are worth 5c and linear metres are worth 70c in compensation, then the whole property is worth many millions of dollars. This is a valuation which is absurd. They have fallen into error because they have taken into account just the area of land that has been disturbed and used it as a base calculation factor and unfortunately they appear to have overlooked the wording of the Act of "loss suffered or likely to be suffered" as a result of the grant of the authority or exercise of the rights under it. Results may be caused directly or indirectly and it is a matter of common sense, I would suggest, that the mere fact of exercise of the rights under the authority by the registered holder or his agent causes or is likely to cause damage, deprivation, severance, adverse effect upon stock and some consequential damage to the land without the surface of land itself being actually disturbed. Instance the example given by Mr. Roberts in evidence. He has said that exploration activities at one end of a four by four paddock, meaning a paddock four miles by four miles in dimension, puts stress on the other end, for the stock move away to that other end, thereby in effect overstocking that other end. Mr Clark confirmed that this could be so. It is impossible to measure this sort of thing in square or linear metres or to say that it should be worth so much per borehole. Stock could, for further instance, be driven away from a watering place, and while it might be suggested that they would find their way back when they got thirsty enough, there is still a disturbance to them which cannot be measured in metres, square or linear, or borehole numbers and again, as Mr Clark explained, their condition suffers.

Mr. Roberts has now indicated, as I have said, that now he is quite happy to embrace the decision previously given in the C.R.A. Exploration Pty. Limited v. Roberts matter. Apparently he was not always of that mind for he had appealed against it in the first place.

Mr. Moore for the applicant in cross examining Mr Roberts on the extent of his herd and likely return from his grazing activities went some distance along the way in presenting evidence which I prefer to see presented in compensation matters. For example, the number of cattle areas lost upon

which a value may be placed as a starting point, is always helpful. Notwithstanding the absence of evidence though, an assessment has to be made under the Act - perhaps the Legislature was being very particular when the exercise was called an assessment, rather than a determination.

One further matter needs to be mentioned and that is that Buka Minerals N.L. had signed with the respondent a previous compensation agreement dated 28th April, 1979, in respect of two previous titles namely Exploration Licence Nos. 1161 and 1127, which have been succeeded by the applications which have now led to the grant of the four titles currently under consideration for the purposes of compensation assessment. It may be that the earlier compensation agreement could be still current as to a small area of land. In any case, Mr. Buckworth for the respondent indicated that currently he had no instructions to raise objections to proceedings to assess compensation. It is in his client's interests not to object, because the 1979 rates are now being exceeded by higher payments generally and because of this factor and the absence of any objection at the hearing, I assume that Mr Roberts is waiving any rights of objection he might have to this assessment.

Exhibits 4 and 5 are maps which show the extent of the area of Western Lands Leases 108 and 1317. There is a considerable area of the respondent's land the subject of the four mining titles. In any area of this size, tyre marks across country where one or two trips are made are inconsequential, but were line clearing occurs, I believe I have a responsibility to specify some amount. I note that in Exhibits 2 and 3 the applicant offered the respondent $5 per kilometre while in Exhibit 6, another company offered another landholder $20 per kilometre. I have already found in C.R.A. v. Roberts the sum of 85c per rab hole was meant to include compensation arising from line clearing and I am minded to increase this figure to $1.00 per rab hole, which I do. In the rare circumstances where line clearing takes place but no rab holes are sunk, I direct that there shall be paid the sum of $10.00 per kilometre of line cleared.

Little mention was made during these proceedings in relation to costeaning, but should the Minister approve such activity, then I would consider my previous assessment in the case lastmentioned, i.e. at 5c per square metre, fair and reasonable and in accordance with the dictates of the Act.

I am left with the impression that the respondent felt that there was no need for a payment for supervision, but on the other hand he placed greater emphasis upon the dust problem and even called Mr. Clark to confirm his concern. I had previously allowed a separate figure for dust and another for supervision. Mr Roberts felt that as a grazier he had enough to do apart from supervising drilling crews on a property as vast as the one he holds, and I accept his evidence. On the other hand I was equally impressed with what he had to say about the dust problem. I realise that this problem would vary from season to season and perhaps from area to area, and of course would not apply after rain which was sufficient to wash the dust off the vegetation. Until that happened however, stock would find vegetation less palatable to eat. I am of the view that the sum of $250, is appropriate for dust and I would exclude any payment for supervision in this particular matter.

I turn now to the vexed and difficult question of percussion or diamond drill holes. In the previous assessment I attacked the problem from 3 angles. Firstly such a drill hole was excessive disturbance and $10 per hole was ordered to be paid, secondly the area around the holes was moderate disturbance and the sum of 5c per square metre was ordered to be paid, and thirdly the roads to and from drill sites were generally seen as slight disturbance, but because they would be in such regular use over many days during which a diamond or percussion drill hole was being put down, and because in that particular case they were only over a relative short distance, making their use more intense, I directed a payment of 70c per linear metre for roads to such sites. There are some interpretation difficulties. It has been put by Mr. Fowler that often it is difficult to define what areas around a hole have been disturbed. Obviously in C.R.A. v Roberts the two areas were defined in metres, and no one would have any

problem working out mathematically the amount payable; but there is always a lot of movement around a drill site out of the immediate surrounds of it, and I can see that there would be the basis for further disputes as to what area, should dimensions not be specified, would be disturbed land. For this reason and for the sake of conclusiveness and allowing the parties to know their respective positions, I would revert back to specifying a particular figure per drill hole, incorporating the $10 basic figure and including assessment for what I believe to be a mean average area disturbed, knowing of course, that sometimes the figure may be too little, and at other times it would be too much; but at least parties would have some tangible figure. I arrive at a figure of $120 per diamond and $75.00 per percussion drill hole site but where more than one hole is drilled at the one site compensation is to be $150 and $100 respectively.

The other problem is that of tracks. They may be constructed in practice in two ways. Firstly, by the use of a machine such as a bulldozer grader or tractor mounted grader blade, and secondly, and more commonly, by usage, that is by vehicles running back and forth, disturbing or denuding the land along the course taken by the wheels of vehicles, of vegetation and creating an access-way. As I have already said, I am bound to take into account not just the area of road itself, but the recognised and likely effect upon the land and stock on the land, through which the track runs. I am of the view that for <u>new</u> machine made tracks there shall be payable a rate of 15c per linear metre and for <u>new</u> usage made tracks there should be a figure of 10c payable per linear metre. For the <u>use</u> of each linear metre of track, not being new track, there should be a figure of 2c payable. These figures work out at $150.00, $100.00 and $20.00 per kilometre respectively and I would hope applies in a practical way the spirit and intent of the Act bearing in mine that I have, in effect, also increased the rate per diamond, percussion drill and rab holes.

I am conscious of the fact that the base figures deviate somewhat from previous assessments made by this court. In fact only on the 12th of April this year in a matter heard at the Wardens Court, Cobar, I assessed compensation in the matter of Seltrust Mining Corporation v Goldfinch on a series of figures somewhat less than those which have been applied in this

matter. I would point out however, that in this case Seltrust had negotiated with a large number of other land owners and had agreed with them on the figures which I subsequently assessed to be applicable to the Goldfinch matter but I also applied a figure of $100.00 for supervision in addition to a figure of $80.00 for dust damage.

The question arose during evidence as to what was or was not a track and it seems the parties could not agree. I feel that I should attempt to define what a track is for the purposes of this assessment. A track is one readily identifiable by a casual observer but does not include areas where mere depressions have been made in vegetation by occasional trips across it. There should be some reduction in the incidence of vegetation.

On the question of costs there is a discretion vested in the Warden under Section 146. As a matter of practise over the years that I have been the Chief Warden I have declined to award costs in compensation matters unless the circumstances were unusual. In this particular matter the parties were unable to reach agreement and each has said that the stand taken by the other was unacceptable. It has been put with some force by Mr Buckworth that his client has been put to considerable expense to, in effect, test the measure of compensation payable by exploration companies but on the other hand it could be said that I have assessed compensation, so therefore if costs were to go to the successful party, the applicant should be awarded those costs. After earnest consideration of this matter I have formed the conclusion that the parties are to pay their own costs and that will be the order.

I direct that a sum of compensation calculated in accordance with the above be payable by the applicant to the respondent to the extent that it can be calculated at the expiry of each quarterly period, the payments being due in the first fourteen (14) days of January, April, July and October. The first of the payments therefore are due between the 1st and the 14th July, 1985. Payment may be made direct to the respondent by the applicant rather than through the Registrar. Finally, it has been put that the figures should apply for two years only. I decline to make any order as to time.