JURISDICTION	:	MINING WARDEN
TITLE OF COURT	:	OPEN COURT
LOCATION	:	PERTH
CITATION	:	STRIKER RESOURCES NL - v - BENRAMA PTY LTD & ELLISON (No 3) [2001] WAMW 38
CORAM	:	CALDER SM
HEARD	:	18 OCTOBER 2001
DELIVERED	:	3 JANUARY 2002
FILE NO/S	:	OBJECTION NO.S 3/001 & 4/001
TENEMENT NO/S	:	MISCELLANEOUS LICENCE 80/41
BETWEEN	:	STRIKER RESOURCES NL (Applicant) AND BENRAMA PTY LTD, JOHN BRUCE ELLISON, ROBYN MAY ELLISON (Objectors)

Catchwords:

APPLICATION FOR TENEMENT - private land - costs of objector
COSTS - application for tenement - private land - costs of objector
COSTS - objection to grant of tenement - private land - costs of objector
OBJECTION - to grant of tenement - private land - costs of objector
PRIVATE LAND - application for tenement - objection to - costs of objector

CALDER SM

Legislation:

MINING ACT 1978 (WA), s 33(1), s 33(2)

Result:

Representation:

Counsel:

Applicant:	Mr G H Lawton
Objectors:	Mr M P Workman

Solicitors:

Applicant:	Lawton Gillon
Objectors:	Michael Workman

Case(s) referred to in judgment(s):

NIL

Case(s) also cited:

NIL

RULING ON APPLICATION FOR COSTS: MINING ACT S33

THE PROCEEDINGS

1 Striker Resources NL ("Striker") lodged application L80/41 for the grant of a miscellaneous licence. The application was objected to by Benrama Pty Ltd ("Benrama") and John Bruce and Robyn May Ellison ("Ellison"). On 7 February 2001 Striker filed a motion to dismiss the objectors' second ground of objection, namely, "…*that the Application is not in the public interest in that the provisions of Section 111C of the Mining Act 1978 apply*". The motion also sought an order that the objectors file and serve full particulars of the remaining grounds of objection within seven days and that the hearing of the application for the grant of L80/41 be expedited and the matter listed for hearing. The motion was filed at the Kununurra registry. Application L80/41 was subsequently transferred to be heard before the Warden sitting in Perth. On 8 March 2001, by consent, an order was made that the parties file and serve particulars within specified periods and that the hearing of the motion of the applicant BE adjourned for hearing on 5 April 2001. Particulars of the application were subsequently filed by the applicant. On 3 April 2001 particulars of the objection were lodged. On 5 April 2001 the applicant's motion to strike out in part the objections was heard. Mr C L Zelestis QC, with Mr Lawton, appeared for Striker. The Ellisons were represented by Mr Workman. On 25 May 2001 I delivered my decision in respect of the applicant's motion to strike out part of the objections ([2001] WAMW 7). I dismissed the motion, ruling that it was open to the objectors to object on grounds of public interest and indicated that, insofar as the objections did raise issues going to the public interest for purposes of s 111A of the Mining Act 1978 (WA) ("the Act"), I would hear the objections in the course of determining the application for the grant of the miscellaneous licence.

2 On 1 June 2001 Mr Lawton filed the applicant's reply to the particulars of objections which had been lodged. In the reply the applicant expressly denied that the land the subject of lease of Crown land number H543202L was private land which was subject to the operation of the provisions of s 29 of the *Mining Act*. It was admitted, however, that the ground applied for in application L80/41 did intersect "… *a road accessway running between a camp site and an airstrip* …".

3 On 20 July and 16 August 2001 I heard evidence and submissions from both parties in respect of the ground of objection which did not

relate to the public interest issue. That ground of objection, as set out in each objection, is as follows:

> "*The application has not been marked out and applied for in accordance with Mining Act 1978 (as amended) and the Regulations thereunder.*"

4 Paragraphs 1 to 8 of the particulars of objection related to that ground of objection. The hearing before me on 20 July and 16 August was limited to a consideration of the first ground of objection as particularised in pars 1 to 8. Particular 1 stated that Benrama was the lessee from the State of Western Australia of an area of land subject to lease of Crown land number H543202L. Particular 2 stated that the Ellisons were shareholders and officers of Benrama and the operators/managers of a bush camp business operated from the land the subject of the lease. In par 8 of the particulars it is stated that the land the subject of the lease is private land as defined in the Act and that it includes a road accessway which is a substantial improvement and which is intersected at two points by the ground applied for by Striker. It is said that Benrama has not consented to the grant of L80/41. Paragraph 8 then goes on to make reference to several clauses of lease H543202L. The evidence and the submissions put before me at the hearing were primarily aimed at the question of whether or not there had been a proper marking out of the ground applied for but also raised the issue of whether or not the accessway was a "substantial improvement" for purposes of s 29(1)(d) of the Act. On 9 August 2001 Mr Workman made an application that the second day of the hearing, which was to take place on 16 August 2001, be vacated in order that an application could first be made seeking declarations in the Warden's Court by Benrama and be dealt with concerning the precise location of the land the subject of lease H543202L, evidence having been produced at the hearing on 20 July which raised some questions about that matter. In the course of argument upon that application by Mr Workman, Mr Lawton, on behalf of Striker, made a concession, which was reduced to writing. The concession is as follows:

> "*1. Applicant concedes/agrees for purpose of Appn L80/41 that the accessroad connecting the camp area and the airstrip being:*
>
> *(a) the accessroad as existing; and/or*
>
> *(b) the accessroad as set out in Special Lease 3116/11267(ExC2)and/or*

Lease H543202L(ExC4)is private land as defined in/for the purposes of the Mining Act.

2. *Paras 3 & 4 of Applicant's Reply of 30/5/01 be withdrawn.*"

5 The application to vacate the hearing date was not successful and the hearing resumed before me on 16 August 2001.

6 On 21 September 2001 I published my reasons for decision in respect of the issues heard on 20 July and 16 August ([2001] WAMW 20). I found that, in marking out the ground applied for, the applicant had not complied with the provisions of the Act and Regulations. I therefore refused the application for L80/41. The objectors now seek an order for costs pursuant to the provisions of s 29 of the Act.

RELEVANT PROVISIONS OF THE ACT AND REGULATIONS

7 Section 29(1) of the Act says:

> " *Subject to this Act, but notwithstanding any other Act or law, a mining tenement may be granted in respect of an area that consists of private land only or partly of private land and partly of any other land and the authority conferred thereby on the holder thereof may be exercised by that holder in respect of any such land."*

8 Section 29(2) of the Act says:

> *"Except with the consent in writing of the owner and the occupier of the private land concerned, a mining tenement shall not be granted in respect of private land —*
>
> *(a) which is in bona fide and regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation or is land under cultivation;*
>
> *(b) which is the site of a cemetery or burial ground;*
>
> *(c) which is the site of a dam, bore, well or spring;*

(d) on which there is erected a substantial improvement;

(e) which is situated within 100 metres of any private land referred to in paragraph (a), (b), (c) or (d); or

(f) which is a separate parcel of land and has an area of 2 000 square metres or less,

unless the mining tenement is granted only in respect of that part of that private land which is not less than 30 metres below the lowest part of the natural surface of that private "

9 Section 33(1) of the Act says:

"Subject to subsection (1a), where an application is made in accordance with this Act for a mining tenement that relates to private land notice of the application shall be given in the prescribed manner by the applicant to —

(a) the chief executive officer of the local government;

(b) the owner and occupier of the private land; and

(c) each mortgagee of the land under a mortgage endorsed or noted on the title or land register or record relating to that land,

but if there is no occupier of the land, or no such occupier can be found, the notice of the application shall be affixed in some conspicuous manner on the land."

10 Section 33(2) of the Act says:

"The owner and occupier of the private land or any portion of that land and any mortgagee referred to in

> *subsection (1)(c) are entitled to be heard in relation to any application in respect of any portion of that land and if the owner or occupier objects to the granting of the mining tenement, the warden may, if in the circumstances of the case he considers it proper so to do, and irrespective of the manner in which the application for the mining tenement is disposed of, order that the applicant pay to the objector or objectors, such sum by way of costs as the warden orders.*

11 In s 8(1) of the Act "***private land***" is defined as follows:

> "*… any land that … is … the subject of … any lease … (not being a pastoral lease within the meaning the Land Administration Act 1997 or a lease … otherwise granted by or on behalf of the Crown for grazing purposes only or for timber purposes or a lease of Crown land for the use and benefit of the Aboriginal inhabitants) but -*
>
> (a) (not relevant)
>
> (b) (not relevant)
>
> (c) (not relevant)

12 A miscellaneous licence is included within the definition of "***mining tenement***" in s 8(1). There is no definition in the Act of "substantial improvement".

13 There is no scale of costs contained within the Act or the Regulations for purposes of assessment by the Warden of the costs, which may be ordered pursuant to s 33(2) of the Act. The Act and Regulations contain no express provisions concerning the exercise by the Warden of the power to award costs beyond those contained within s 33. The proceedings before the Warden upon a hearing to determine an application for the grant of a miscellaneous licence are of an administrative nature and, therefore, do not come within the provisions of ss 132, 134, 136 and reg 128 does not have application.

PREVIOUS DECISION FINDINGS IN THE PROCEEDINGS

In Respect of the Dismissal Application – (concerning the public interest ground of objection)

14 The applicant's motion to dismiss the objectors' second ground of objection attacked the capacity of the objectors to make and the capacity of the Warden to hear an objection based upon the provisions of s 111A. The motion went to the heart of one of only two grounds of objection. It cannot be said that that ground was a ground which was merely ancillary or secondary in importance to the first ground of objection nor that, in the eyes of the objectors, the objection which the applicant sought to have removed was not a very significant ground. It cannot be said that, on its face, it is a ground which never had any real prospects of success even though I did leave it open to the applicant to argue in due course whether or not the factual basis of the objection which focused on s 111A, other than the environmental aspect, did in fact raise matters which could attract the operation of the provisions of s 111A insofar as the way may be open for the Minister to exercise his discretion thereunder. At the hearing of the application to dismiss the second ground of objection, Striker was represented by senior counsel and the issues were extensively argued. In my reasons for decision I concluded that it was open to the objectors to object to the grant of L80/41 on the ground of public interest. In reaching that conclusion I had no cause to make any findings of fact other than those related to the nature of the proceedings and the steps that had by then been taken in the proceedings before me.

In Respect of Ground 1 of the Objection - (Marking out)

15 After hearing submissions on 20 July and 16 August 2001 I delivered my reasons in respect of the objector's first ground of objection ([2001] WAMW 20). I delivered brief oral conclusions on 7 September 2001 and published written reasons on 21 September 2001. In the course of reaching my conclusions I made several findings of fact which are relevant to the issues raised by counsel before me in the course of arguing the question of costs. I made findings as to the physical marking out carried out by Mr Carpenter, Striker's employee. I made findings of fact as to the location of posts which he had placed in the ground in the course of that marking out. I made specific findings of fact as to how the access road used by the objectors in the course of their business came to exist in its form and condition as at the time of the hearing. During the course of the hearing I was made aware that it was the opinion of Mr Carpenter,

who is a mining engineer, that there was some doubt as to the true position of the three areas which, together, constitute the subject lease of land from the Crown. At par 10 I said:

> "… *For present purposes, however, it seems that the precise location of the ground the subject of Benrama's lease from the Crown need not be decided by me*."

16 I noted (par 14) that in the course of giving his evidence Mr Carpenter had said that both the "DOLA" track, by which he meant the location of the track as shown on the Department of Lands Administration titles document, and the "actual" track as it was on the ground at the time of marking out were intersected by the ground applied for by Striker in two places. That evidence of Mr Carpenter was uncontradicted. The hearing proceeded, I understood upon the basis that I accepted that, wherever the true location of the track the subject of the lease was, it was crossed in two places by the ground applied for by Striker. I believe that the hearing also proceeded upon the basis that that was the position adopted by both parties. It must also be borne in mind that Mr Lawton's concession made before me on 9 August 2001, which I have previously made reference to, occurred in the course of an application being made before me on that date at the instigation of Mr Workman who was seeking to have the hearing of application L80/41 adjourned beyond the part heard date of 16 August which had been previously set. The basis of his application was set out in his affidavit sworn 25 July in support of his application for adjournment. In that affidavit Mr Workman swore that, as was indeed the case, in the course of the proceedings thus far it had emerged that the location of the northernmost portion of the leasehold land held by Benrama was shown in a different location on a Department of Minerals and Energy Tengraph plan to the position shown in Crown Lease H543202L. The Tengraph plan to which he made reference related to exploration licence 80/1840 ("E80/1840"), said to be held by Jade Creek Resources NL, a corporate associate of Striker. It was said that the area of E80/1840 embraced the land contained with Benrama's Crown lease and also embraced the relevant ground applied for by Striker in application L80/41. Mr Workman said in his affidavit that he had been instructed by Benrama to commence proceedings seeking various declarations and orders concerning the land excised from the grant of E80/1840; that excised land purporting to be the area of Benrama's Crown lease. E80/1840 had been granted in July1994. Mr Workman said that Benrama had been the holder of special lease 3116/10410 commencing on 1 September 1990. That lease had been surrendered in August 1993 prior to the grant of E80/1840. Special lease 3116/11267 to Benrama

commenced the day following the surrender of the previous special lease. It was therefore in force as at the date of grant of E80/1840. Benrama subsequently acquired Crown lease H543202L which began on 1 September 2000 and was continuing as at the date of the application for L80/41. Mr Workman suggested that it appeared from the documentation available, in particular the plans to which he had made reference that the land which the grant of E80/1840 purported to excise from the exploration licence did not in fact excise the ground the subject of Benrama's lease. That, he said, would appear to have had the consequence that the whole of the land leased by Benrama was not or may not be on Crown land and may not be private land.

17 Mr Workman indicated that his client would be attempting to obtain declaratory relief to achieve the result that the land which was in fact the subject of the Crown lease to Benrama was the land excised from the grant of E80/1840. That, he said, would impact upon the argument of Striker that the road access was not and could not be private land.

18 In response Mr Lawton agreed that the excision which appeared to have been effected from the grant of E80/1840 was in a different location from the description of the land contained in Benrama's special lease. He said that, in reply, he had intended to argue that the roadway used by the objectors had not been excised and was therefore subject to the grant of the tenement and therefore outside the provisions of the Act related to private land. He said that he had been instructed to act for Jade Creek Resources NL, the registered tenement holder of E80/1840, but that he had not yet received instructions as to the attitude that his client would take in response to the proceedings by the objectors to the plaint which the objectors had filed in the Kununurra mining registry seeking the declarations in relation to the excision from E80/1840. In the course of submissions, Mr Lawton conceded that the area excised in the making of the grant of E80/1840 was incorrectly shown on the Tengraph plan. He said, however, that the effect of the concession made by Striker was to take away the private land argument based on the existence of E80/1840. That, he said, left three things to argue, namely, the marking out issue, the question of whether or not the accessway was a "substantial improvement" and, whether or not there was any effect on the private land argument arising from the wording of the special lease. He said that, therefore, the outcome of any new plaint lodged by Benrama would have no bearing upon the outcome of that aspect of the application of Striker and that part of the objection then being heard by me. It is important to keep in mind, as well, that at the commencement of argument on 20 July 2001 Mr Lawton expressly conceded that Benrama's access road was

intersected in two places by the ground applied for by Striker. It was in that context, therefore, that I made the comments at pars 10 and 14 of my reasons that it was not necessary, for purposes of these reasons, for me to make a finding as to the precise location on the ground of either the "DOLA" description of the track nor of the position of the track which had been described by the witnesses in evidence. In my conclusions, expressed at par 43 onwards, because of the limited issues then before me I did not, and I consider that I had no need to, make any precise findings as to the location of the track.

CONCLUSIONS

Section 33 of the Act

19 I agree with Mr Lawton that it is a proper interpretation of the words "*relates to*" in s 33(1) of the Act that they be given a narrow interpretation. In the Shorter Oxford English Dictionary "relate" is defined as meaning, inter alia, : "*…To connect, establish a relation between*". Also : *"To be related, have relation, stand in some relation, to another thing."*

20 It can be seen that, on their own, the words "relates to" are capable of being given either a wide or a restricted meaning, dependent upon the context in which they appear. The context in the Act is as follows. Subject to certain exceptions of limited application all gold and silver and other precious metals are the property of the Crown whether they are located on private land or land which is not private land. Private land is, again with some exceptions, "*notwithstanding any other Act or law …*" land in respect of which a mining tenement may be granted (s 29(1)). Pursuant to s 29(2) there are specified circumstances where, unless the owner or occupier of private land consents thereto, a mining tenement may not be granted *"in respect of private land"* unless the tenement is granted in respect of that part of the private land which is not less than 30 metres from the natural surface. The circumstances in which the private landholder has a right to withhold consent are limited to those which are connected with specified purposes of land use and where the private land is not subject to such specified purposes a mining tenement may be granted in respect of the private land. Private land may not be entered for the purpose of searching for minerals or marking out a tenement unless the Warden has granted to the person wishing to do so a permit to that effect. Upon the granting of the permit and prior to entering the private land in accordance with the permit for the first time, the holder

or his employee or agent must notify the owner or occupier of the intention to do so or place a copy of the permit in a prominent place and in any event, within 48 hours of first entering the land, send a copy of the permit by prepaid registered post to the occupier. The permit confers certain limited rights (s 32). The Warden may impose conditions upon the use of the permit and may require the holder to deposit a sum of money as security against any damage caused by the permit holder during the currency of the permit. Where a mining tenement is held over private land no mining is to commence on the natural surface or within a depth of 30 metres therefrom unless compensation has been agreed or determined prior thereto.

21 In my opinion, although a wider interpretation of the words "relates to" in s 33(1) may otherwise bring within the ambit of the provisions of that subsection private land over which the ground the subject of an application for a tenement does not extend but which is nevertheless affected or potentially affected thereby as a consequence of its proximity or because or some other connecting factor, that is not the way that the subsection should be interpreted. I believe that the provisions of ss 27 to 39 of the Act, under the divisional heading "**Private Land**", are intended to give some additional protection to and to give some additional powers to only those private land holders or occupiers over whose private land a mining tenement is sought or granted. It would therefore follow that, before costs could be ordered pursuant to s 33, the Warden would need to be satisfied that the objector was the owner or occupier of private land over which the subject application had been made. If the section were interpreted broadly so as to allow any person who held private land which would potentially be affected by the grant of a mining tenement to bring themselves within the provisions of s 33 merely because of that potential effect having the consequence that the application could therefore be said to "relate to" their land, it would make it impossible in practice for an applicant to ever know the full extent of the application of the provisions of s 33 and other relevant sections.

22 In my opinion, it necessarily follows that if the narrower interpretation of the words “relates to” is given in subsection (1), then that interpretation has application in subsection (2) where the right to ask to be awarded costs is created.

23 In the course of the hearings before me arising out of the marking out of the ground applied for, Mr Lawton conceded that the access road used by Benrama and the Ellisons was intersected in two places by the ground applied for. In his written concession, which I have set out above, he has,

in my opinion, made concessions which go further than the concession made at the hearing of 20 July. The concessions must be viewed in the light of the fact that pars 3 and 4 of Striker's reply of 30 May 2001 to the particulars of the objection previously provided by the objectors were withdrawn. Paragraphs 3 and 4 had denied that, as stated in the particulars of objection, all the land the subject of Benrama's Crown lease was private land as defined in the *Mining Act*. The applicant's reply, where relevant, had also stated that the road accessway running between the camp site and the airstrip was not private land as it was land the subject of the mining tenement. The withdrawal of those two statements in reply to the particulars of objection meant that those matters were no longer expressly contested by Striker. Taking those factors into account, it is my opinion that the effect of what took place is that Striker has, in par 1 of the written concession, expressly conceded that the access road connecting the camp and the airstrip is private land as defined in the *Mining Act* and, further, and expressly, that such land upon which the access road is constructed is set out in special lease H543202L.

24 In all of the circumstances I find that it has been admitted by Striker that the access road is in fact contained within Crown Lease H543202L and, therefore, admitted that it is private land for purposes of the hearing. That is an admission that I can properly accept and take into account. In the circumstances I am satisfied that the objectors, as owners and occupiers of the access road, are within the provisions of s 33 of the Act and entitled to recover costs.

THE ASSESSMENT OF COSTS

25 There is no provision contained within the Act or Regulations as to how costs, when awarded pursuant to s 33(2) of the Act, are to be assessed. The words "… *such sum by way of costs as the Warden orders*" should, I consider, be read as giving the Warden a fairly wide discretion to award reasonable costs. I do not consider that costs should be merely nominal. They should, however, not amount to indemnity costs. In my opinion, they should bear some relationship to the scales of costs and to the items within such scales of costs which are applied in other proceedings, including legal (as distinct from administrative) proceedings conducted within the State. The fact that the proceedings are conducted before a Magistrate and that there are prescribed scales of costs pursuant to other written laws in respect of legal proceedings conducted before Magistrates is another factor of which note should be taken. In particular, s 136 of the Act says that the practice and procedure in a Warden's Court

shall be governed (at present) by the Rules of the Local Court. Consistently with that, reg 128 says that where a Warden's Court orders costs to be paid by any party, those costs shall be in accordance with the costs allowed under the Local Court Rules. That is a clear indication that, in such proceedings, even though s 134(5) gives to a Warden exercising the jurisdiction of the Warden's Court in relation to matters relating to civil proceedings under the Act, like powers and authorities as are conferred upon the Supreme Court or a Judge thereof, costs are nevertheless to be in accordance with the Local Court costs scale. In my opinion, it was the intention of Parliament that, in assessing costs, whether pursuant to reg 128 in judicial proceedings or pursuant to s33 in administrative proceedings, the quantum of costs should be assessed by reference to a comparable scale in matters dealt with in jurisdictions conferred upon Magistrates. As Mr Workman commented in his submissions, it would create an unsatisfactory anomaly were a Warden to be able to award costs equivalent, for example, to the Supreme Court scale when sitting in the administrative jurisdiction, yet only able to award costs on the Local Court scale when exercising the judicial function. In my opinion, it can quite properly be said that, even though it has not been so expressed within the legislation, nevertheless, there is an indication to be derived from the legislation that when consideration is given to the question of costs arising out of administrative proceedings before a Warden, the level of costs allowable in the Local Court Scale in judicial proceedings is an appropriate benchmark for the assessment of costs. It can properly be taken into account, in my opinion, in reaching that conclusion, that whereas subsection 135(5) of the Act confers upon a Warden's Court in relation to all matters relating to any civil proceedings like powers and authorities as are conferred upon the Supreme Court, subsection 135(6) expressly provides that the practice and procedure of the Warden's Court is governed by the Local Court Rules.

Allowable Cost Items

26 Mr Workman has submitted that, pursuant to s 33(2) of the Act, the Warden must determine and fix a sum and make an order as to a lump sum of costs. He argues that there is no power for a taxing order to be made and that therefore costs cannot be taxed. I agree with those propositions. I consider, however, that in so doing the Warden must give consideration to component items and amounts said to make up the total costs sought and to attribute a value to those factors in arriving at the total amount of costs awarded. It would not be correct for the Warden to simply arrive at what the Warden thought was a reasonable amount

without explaining and setting out the basis of arriving at that final amount.

27 It is also submitted on behalf of the objectors that "costs" is not limited to legal costs and can include other items such as lost business costs, surveyor's costs, adviser's costs, travel costs. He has indicated that the objectors seek costs arising out of the engagement of their solicitor and travel costs for Mr Ellison to attend the hearings in Perth on 20 July and 16 August.

28 Mr Lawton said that the Warden's discretion to award costs pursuant to s 33(2) is one which is limited in its application to landowners or occupiers who are engaged in occupations such as farming or who simply live on the land as, for example, a householder, and does not extend to costs of owners or occupiers' private land who conduct other types of commercial operations on the land. He also drew my attention, for purposes of comparison with s 33(2), to the provisions of ss 96(5) (concerning forfeiture of prospecting licences) and 98(8) (concerning forfeiture of exploration licences and mining leases), in both of which subsections the Warden is empowered to award a tenement holder or lessee such "… *costs and expenses* …" as the Warden thinks fit. The distinction to be noted, he said, is that in s 33(2) there is no mention of "expenses" in addition to costs. He also submitted that an order or award of costs is not the same as an order or award for damages or compensation and that there is no intention that the provisions of the *Act* treat costs and compensation as being the same.

29 Mr Lawton argued that, in the present case, an order for costs could only be made in respect of costs incurred in connection with the private land and marking out issues and should not be related to the previously argued and determined preliminary issue in respect of the "public interest" objection.

30 In my opinion, if the Warden considers that the conditions precedent to the making of an order for costs under s 33(2) of the Act are fulfilled, then the Warden is empowered to make an order for costs in respect of "legal costs" together with all reasonable disbursements. Costs are not meant to be such as will fully indemnify the owner or occupier for all expenses nor to provide a vehicle by means of which other losses, such as lost business costs, may be recovered. To be an allowable cost or expense, the item and the quantum sought for any aspect of the total amount claimed must bear a reasonable relativity to the nature of the proceedings, to the factual circumstances of the case, to the matters in

issue, to the manner in which other parties have proceeded, to the standard of proof required and to all other aspects of the hearing. That is not meant to be an exhaustive list. It is well accepted that in judicial proceedings parties who are awarded costs will only in very rare cases not be left with a costs burden which is not covered by any order for costs in their favour. I do not consider that it is the intention of the Act in s33 to put the owner or occupier of private land in that regard in a better position than that of parties in proceedings in the Wardens Court, even though, in other respects, it does have that intention, namely, that costs do not necessarily, follow the outcome. I see no reason, however, why disbursements in respect of matters done to support the position adopted by a party, provided that, in the context of the whole of the proceedings, they are reasonable and were necessarily incurred, should not be recoverable.

31 I do not agree with the submission made by Mr Lawton to the effect that the objectors are not entitled to any costs beyond those incurred in respect of the private land/marking out issue, namely, the issue which was argued on 20 July and 16 August 2001 before me. Although that matter was dealt with as a discrete issue on those two days, nevertheless, up until the conclusion of that hearing which led to my refusing the application for L80/41, the objectors had been obliged to, firstly, lodge their objections, then to argue (successfully) that they were entitled to raise the "public interest" issue by way of objection to Striker's application and to instruct counsel to act on their behalf during the course of both of those hearings. Had the objectors not succeeded on their marking out argument before me, there was still the public interest ground to be argued, most likely in the form of an initial argument as to whether or not their particularised grounds of objection did in fact raise matters of public interest of a type capable of calling for the exercise by the Minister of the Minister's discretion under s 111A, followed, if they were successful on that preliminary issue, by a hearing requiring the calling of evidence and the making of submissions concerning that ground of objection for the purpose of the making of the final decision by the Warden as to whether or not the miscellaneous licence be granted.

32 A private land owner or occupier may object for any reason to the grant of a mining tenement over the private land owned or occupied by that person. Such an objector is not limited by the provisions of s 33 or any other section of the Act or any regulation as to the grounds upon which an objection to the grant of the tenement is made. Section 33(2) appears, on a literal reading, to give to a private landowner or occupier an absolute entitlement to be "heard" in relation to any application for a tenement over the subject private land without having to formally object

to the grant of the tenement. That, however, is not entirely clear because if there is no objection then it is difficult to know by whom or before whom the holder or occupier would be "heard". In respect of a miscellaneous licence, if there is no objection, the Registrar may grant or refuse the licence (s 42(1) applying pursuant to s 92) but there is no "hearing" and it is unlikely that the Registrar is empowered to do anything in the nature of conducting a hearing as there is nothing in the legislation which appears to contemplate that. It is perhaps arguable that if another person has objected to the grant of a miscellaneous licence which relates to private land not owned or occupied by that objector, the owner or occupier may be entitled to be heard in the course of the hearing and determination by the Warden in Open Court of that miscellaneous licence application without lodging a formal objection. Regardless of those matters, however, what emerges from a consideration of the provisions of s 33(2) is that where the owner or occupier does in fact object to the granting of a mining tenement, such an objector is given a unique right, regardless of the outcome of the application, to apply to have the Warden order payment of a sum of costs to the objector. The power of the Warden to order costs is expressed to be subject to the condition precedent that the Warden must, in the circumstances of the case, consider it proper to make an order for payment of the objector's costs. I do not consider that the "case" for purposes of s 33(2) should be said to be only that part of the objection which specifically and only relates to issues deriving solely or partly from the fact that the ground applied for is private land and should not include issues which arise in the broader plane such as, for example, marking out, s 111A, failure to comply with any other provisions of the Act or Regulations. I consider that s 33 was intended to give to private land owners and occupiers rights and privileges which no other objectors receive. The whole of division 3 of the Act is clearly intended to achieve a balance between the competing interests of private land owners and occupiers and holders of and applicants for the grant of mining tenements.

"The Circumstances of the Case"

33 In my opinion, the objectors all fall squarely within the provisions of s 33(2) of the Act. They have a legitimate and direct interest in the outcome of the application for L80/41. Although costs may be ordered "*irrespective of the manner in which the application … is disposed of*", the objectors have been successful in opposing the applicant's attempt to have their public interest ground of objection removed and they have been successful before the Warden in achieving their objective of having the

application refused because of the applicant's failure to mark out as required. The objectors have also succeeded in satisfying me that their accessway the subject of the proceedings is a "substantial improvement" for purposes of s 29 of the Act. It cannot be said that the manner in which the objectors have conducted themselves in these proceedings in any way caused or contributed to unnecessary or wasteful steps being taken by them or having to be taken by the applicant. It can not be said that the matter could or should have been settled without hearing. In my opinion, the circumstances of the case make it proper for me to make an order that the applicant pay a sum of costs in connection with the whole of the proceedings connected with application L80/41.

Assessment of Costs

34 I agree with the suggestion by both parties that before any quantum of costs could be considered it was necessary to await the outcome of the publication by me of these reasons. Following publication of my reasons either party is to have liberty to apply, upon giving 14 days' prior written notice to the other party, to have this matter relisted for further argument in connection with the issue of costs.