

LAND COURT OF QUEENSLAND

CITATION: *The Board of Trustees of the Brisbane Grammar School v Brisbane City Council* [2009] QLC 0061

PARTIES: The Board of Trustees of the Brisbane Grammar School
(applicant/respondent)
v.
Brisbane City Council
(respondent/applicant)

FILE NO: A2006/0056

DIVISION: Land Court of Queensland, General Division

PROCEEDING: An application under the *Land Court Act 2000*

DELIVERED ON: Ex tempore – 30 April 2009

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RS Jones

ORDERS: **1. The application is dismissed.**
2. The respondent/applicant is to pay the applicant/respondent's costs of and incidental to this application on the standard basis.

CATCHWORDS: Application pursuant to the *Uniform Civil Procedure Rules 1999* and *Land Court Act 2000* for a separate and preliminary hearing of questions – consideration of factors tending to support and tell against the making of orders for a preliminary determination of a question – not shown that the hearing of separate questions would be likely to contribute to the saving of time and/or costs by substantially narrowing the issues for trial

APPEARANCES: Mr W Sofronoff QC with Mr D O'Brien of Counsel, instructed by Corrs Chambers Westgarth for the applicant/respondent
Mr M Hinson SC and Mr D Quayle of Counsel, instructed by Brisbane City Legal Practice for the respondent/applicant

EXTRACT OF TRANSCRIPT

THE LAND COURT RESUMED

MR JONES: I propose to dispose of this application today. I reserve the right to tidy up these reasons in the event that it goes somewhere else after here.

By way of some background, on 3 March 2000 the Brisbane City Council resumed approximately 4,665 square metres of land owned or controlled by the Board of Trustees of the Brisbane Grammar School. The school alleges in its statement of facts and contentions that “the loss of the land was particularly acute because the land remaining could no longer be configured as two reduced-sized ovals used for the purpose described” and that comprehensive investigations into the availability of alternate sites were conducted, but yielded no viable alternatives and the only viable alternative to deal with the issues raised by the resumption was to construct a replacement oval over air space over existing railway lines and that the cost of carrying out these works would be approximately 25 million dollars. I am referring here specifically to paragraphs 20, 22, 24, 25, 26 and 30 of the school’s statement of facts and contentions.

This is, to some extent, elaborated on in paragraph 12 of the school’s written submissions where many of the matters to which I have referred are repeated in paragraphs 5 through to 11 and in paragraph 12 it is said that “it is apparent from the matters pleaded that the school’s claim for compensation is based on the reinstatement principle”.

This matter has a long history of reviews and directions. Unfortunately, not all of those have been particularly productive. On 20 February 2009 the Brisbane City Council filed an application seeking relief, namely that certain paragraphs of the school’s statement of facts and contentions be struck out and that there be a preliminary determination of specific questions. The relief concerning the specific questions to which I have just referred is dealt with in paragraph 2 and is articulated in this way: “That pursuant to the Uniform Civil Procedure Rule 483, the following questions be determined separately and in advance of the hearing of the applicant’s claim for compensation: (a) whether having regard to the effects of the resumption as alleged by the applicant in its statement of facts and contentions and the particulars thereof compensation is assessable on the basis pleaded in paragraphs 25-29 and 39 of the applicant’s statement of facts and contentions; (b) if so, what credit should be given for enhancement as pleaded in paragraph 39 of the applicant’s statement of facts and contentions or otherwise”.

For reasons it is not necessary to go into, that part of the application concerning the striking-out of parts of the school’s statement of facts and contentions no longer needs to be decided or otherwise dealt with today.

The school opposes the application essentially on three grounds. First, that the questions proposed to be addressed and dealt with at the preliminary hearing have not been properly articulated and it is unlikely that they ever would be able to be articulated to the satisfaction of the school and/or the Court. The second point is that the questions to be dealt with cannot be conveniently separated from the rest of the case and, as a consequence of that, it could not be said that any savings in time or money would be achieved by splitting the case in the way proposed by the council.

As I understand the council's case, at the heart of the preliminary issue is whether or not the claim as articulated by the school is a reasonable response to the resumption - that is, is it reasonable for the school to spend 25 million dollars or thereabouts to replace what was lost by the taking of less than 5,000 square metres of land. From what has been said today, it is clear that the bare value of the land taken would be many times less than the 25 million dollars claimed.

As to the formulation of an appropriate question to deal with the first of the preliminary questions to be dealt with, I am more optimistic than Mr Sofronoff, Senior Counsel for the school, that an appropriate question could be formulated, but I acknowledge that there might be some difficulties in doing so.

As to the second question dealing with the issue of enhancement, I must concede that I am still struggling to see how that issue would be approached and indeed I am struggling to see how a question could be properly articulated to deal with that matter or issue.

In support of the council's position in its written submissions, a number of matters were raised. I do not intend to refer to them all here, but some of the more important matters raised were, by example, that in paragraph 15 it is said the effect of the resumption was to take about 20 per cent of the land available for playing fields. Then there was some description of the dimensions of the ovals that were affected. In paragraph 16 it is said that the extent of use of the ovals of the school was on a daily basis during term time and then there were some particulars given of that use. In paragraphs 21 and 22 by reference to, in particular, the *Director of Buildings and Lands v. Shun Fung Ironworks [1995] 2AC 111 at 125*, the respondent quite properly points out that there are three conditions to be satisfied in applying the principle of fair and adequate compensation, namely, (a) there has to be a causal connection between the resumption and the claimed loss; (b) the loss must not be too remote a consequence of the resumption; and (c) the law expects those who claim compensation to behave reasonably. Then in paragraph 24 it is noted that the question is whether the school, acting prudently, would pay 25 million dollars plus in response to the taking of the land. In subsequent paragraphs it is pointed out that - at least up until this time - there does not appear to have been any substantive interruption with the school's activities. In paragraph 26, for example, it says that "the school has been operating for some time now under the circumstances described above and the school does not plead that such operations are more expensive or have had any effect, which should sound in an award for compensation".

Mr Hinson, Senior Counsel for the Brisbane City Council, in response to various matters raised in opposition by the school in paragraph 31 of the school's written submissions, also submitted that, with the exception of those matters raised in sub-paragraphs (f) and (g), they provided no strong grounds for refusing the application as most involved matters which were either known or otherwise adequately dealt with in the various pleadings, including the further and better particulars given by the school.

As to sub-paragraph (g), which says "whether the compensation sought (being the proven cost of constructing the replacement ovals less the credit for enhancement) is, in all the circumstances, reasonable", as I understand the council's position, that ought not be a major hindrance in deciding whether or not to have a preliminary hearing as it could proceed on the basis that costs in the order of 25 million dollars could be accepted as being reasonably indicative of the cost of carrying out the works proposed by the school and, therefore, there would be no need to call experts to deal with the question of costs and/or the details of those works.

As to sub-paragraph (f) of paragraph 31 dealing with the question of enhancement. I am still unsure as to how the issue of enhancement would be able to be effectively dealt with without evidence.

In opposition to the position of the council, the school raises a number of matters. I do not intend to read them out here in any detail other than to indicate that in paragraph 21 it is asserted that, on a literal reading of the first question posed by the council, it is likely to involve a hearing of all questions of fact and law in relation to whether the compensation claimed - that is, the cost of the replacement of the ovals based on the reinstatement principle - is appropriate compensation. According to the school, such a hearing would, in effect, involve a trial of what would substantially be the full case between the parties. The school also alleges that the council has not properly articulated the question. I have already dealt with that matter by saying that I think it would be possible for an appropriate question to be articulated dealing with the first question, but have real doubts about how an appropriate question could be articulated dealing with the question of enhancement.

Another matter raised by the school is that at the trial - by that I mean the preliminary hearing - there would be a real contest about the cost of 25 million dollars. As I have said earlier, that matter might be able to be dealt with by proceeding on the basis that the figure of 25 million dollars is a reasonable estimate of the works proposed and, after all, it is that amount that is pleaded by the school in its claim for compensation.

As to paragraph 31, which I have already referred to, Mr Sofronoff did not dispute Mr Hinson's description or characterisation of the matters raised in sub-paragraphs (a) through to (e). However, as I understand Mr Sofronoff's submissions, they were to the effect that - for example, in respect of sub-paragraph (g) - in any preliminary hearing it would be necessary to deal in a detailed way with the costs of the proposed works and any enhancement because, if that was not done, the Court would not be able to decide whether or not the action taken by the school was reasonable in all the circumstances. In his oral submissions, Mr Sofronoff indicated the nature of the evidence the school would be likely to call in a preliminary hearing and this included, in addition to evidence, no doubt expert evidence in justification of the 25 million dollars pleaded, there would also be evidence of lay witnesses and perhaps some expert witnesses dealing with questions including the availability of alternate land, the need for there to be sporting fields proximate to a school of the type involved here, evidence about investigations into alternative options, evidence about the bona fides of the school in pursuing this scheme and there would also, as I understand it, be evidence about negotiations with Queensland Rail concerning the occupation of air space and perhaps even evidence from headmasters from other GPS schools.

In paragraph 29 of the school's submissions, it is submitted on behalf of the school that a prerequisite of a separate determination of a preliminary issue is that it must be able to be reasonably shown that there would be considerable savings in time and expense. On behalf of the school it is submitted that there is no evidence in support of various critical assertions made by the council and, in particular, there is no sworn evidence before the Court of what the separate determination would be expected to involve and which lay and expert witnesses would be called. Having regard to what I have today heard from two very experienced senior counsel, I am confident of being able to reach a conclusion about the type of witnesses that would be likely to be called.

In respect of sub-paragraph (b) of paragraph 29, it is said that there is no evidence as to how long an orthodox trial would take. Now that is true, but, again, I have the advantage of, if you like, the educated guess of two very experienced senior counsel, both of whom say that

the substantive hearing would take about three weeks. In respect of sub-paragraphs (c) and (d) of paragraph 29, the issues are not so straightforward.

In respect of paragraph 29 sub-paragraph (c), attention is drawn to the lack of any evidence to show that the time expected to be saved by having a separate determination. There is no evidence to show that there would be a saving of time. In this context, while counsel were able to agree that three weeks would be a reasonable estimate, for the full hearing of the matter they were unable to agree about how long the preliminary hearing might take. Mr Sofronoff said two weeks and Mr Hinson acknowledged that up to one week would be involved. Allowing for submissions and the possibility of a view and the extent of the witnesses Mr Sofronoff outlined that he would be likely to call at the hearing of the preliminary matter, it could easily be that a preliminary hearing might take closer to two weeks than one week. In any event, the best that I can say on the material before me is that there is a real prospect that the preliminary question could take as long, if not longer, than the balance of the case left to be determined. That is the opposite of the situation in the Allianz case to which I was referred where the time taken to decide the liability question was materially shorter than the time which would have been taken up in the hearing and determination of the issue of quantum. In that case, the hearing, as I recollect it, of the issue of liability would have taken some time longer than or in the order of five days, whereas the quantum case would have run for considerably longer than that. That is not the case here. Also in considering the question of time, the splitting of the case raises the prospect of appeals against the determination of the preliminary question, which would further delay the hearing and final determination of the matter for months, if not considerably longer.

Also of relevance in my opinion is that in this case, unlike the situation in the Allianz case, the hearing of the preliminary question will not dispose of the question of valuation principle, methodology or practice, leaving only quantum to be decided.

The school, if the council were successful in this application, would have to re-formulate its claim. The new case might well involve the same number, if not necessarily the same type of expert and lay witnesses, for both sides. On the material that is before me, there is simply no way of saying whether or not the new case, which would have to be articulated by the school, would occupy any less time than the three weeks estimated to deal with the case presently before the Court. There is simply no way of knowing at this stage what the new case, if the council is required to re-plead, might be.

On balance, I do not consider that it could be said with any degree of confidence that the hearing and determination of the preliminary question would result in any meaningful savings in costs and/or time. In saying this, I am also aware that, in the present proceedings, there have been a number of interlocutory applications dealing with matters such as further and better particulars and I am not at all confident that a new case, as re-pleaded by the school, may not result in a similar set of occurrences.

In the school's written submissions, in paragraph 20 I was referred to the judgment of Justice Branson in the case of *Reading v. AMP [1999] 217 ALR 495, paragraph 8*. In sub-paragraph (f) His Honour referred to matters which tend to support the making of an order for the determination of a preliminary question. The matters in support of making such an order included contributions to the saving of time and costs by substantially narrowing the issues for trial or even leading to disposal of the action. There is no clear evidence of this in this case. For the reasons that I have already given, I have considerable reservations about whether or not the determination of the preliminary question would lead to any material savings in time and/or costs. There is certainly nothing which would indicate that settlement might be more likely following the determination of the preliminary question.

Turning to the matters that tell against the making of orders for the determination of a preliminary question, they include the situation where, to do so, would give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of the trial. Second, would result in a significant overlap between the evidence adduced on the hearing of the separate question and at trial and, third, prolonging rather than shortening the litigation. For the reasons I have expressed above, I think there is a real risk of the first and last of those matters occurring here and, at the very least, not a remote prospect of there being a significant overlap between the evidence adduced at the hearing of the separate question and at the trial of what is left.

For the reasons I have given, I dismiss the application.

(Submissions ensued concerning costs.)

I order the respondent/applicant to pay the applicant/respondent's costs of and incidental to this application.