

LAND COURT OF QUEENSLAND

CITATION: *LGM Enterprises Pty Ltd v Brisbane City Council*
[2009] QLC 0083

PARTIES: LGM Enterprises Pty Ltd
(applicant)

v.

Brisbane City Council
(respondent)

FILE NO: A2007/0820

DIVISION: Land Court of Queensland, General Division

PROCEEDING: Hearing of an application

DELIVERED ON: 17 June 2009 (Ex tempore)

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RS Jones

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

APPEARANCES: Mr L McGinn, Company Director, for the Applicant
Mr G Evans, Solicitor, Brisbane City Council Legal Practice, for the Respondent.

IN THE LAND COURT OF QUEENSLAND

BEFORE MR RS JONES (Member)

BRISBANE, 17 JUNE 2009

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A2007/0820

In the matter of the determination of compensation payable consequent upon the resumption by the Brisbane City Council under the provisions of the *Acquisition of Land Act 1967* for road purposes as lessor of Tenancy 1 on Lot 1 on RP 117943, County of Stanley, Parish of Kedron.

LGM Enterprises Pty Ltd

v.

Brisbane City Council

Mr L McGinn appeared on behalf of the Claimant.

Mr G Evans of Brisbane City Legal Practice appeared on behalf of the Respondent.

MR JONES: I am going to give my reasons now, but I will reserve the right to tidy them up for the purposes of any publication. But having said that, the substance of what I am about to say won't be changed in any way.

The applicant, LGM Enterprises Pty Ltd, is a claimant for compensation under the Acquisition of Land Act 1967. The respondent is a constructing authority under that Act. On 16 December 2004 the respondent resumed certain land. Neither the land resumed nor the parent parcel was owned by the claimant, but the claimant asserts that its business interests have been seriously affected by the resumption and on 10 October 2007 filed a claim for compensation in this Court. On 23 February 2009 this Court ordered, among other things, that the claimant had leave to amend its claim for compensation. Other orders concerning the conduct of the case were also made.

By an application filed in this Court on 12 June 2009, the claimant sought the following relief: an order that "(1) Determination of the amount of an advance be set at the amount requested by LGM Enterprises Pty Ltd at the previous appearance before the Land Court of Queensland on 23 February 2009."; and "(2) In the absence of an estimate from Brisbane City Council in relation to the claim, the claimant's estimate as determined according to the standard accounting practices by Sims Crawford Elliott & Co. be accepted as the advance amount to be paid by the constructing authority."

In support of the relief sought, the claimant made certain allegations of fact in the application and by an affidavit filed today by Mr Evans, solicitor for the respondent, certain other factual matters were set out.

By way of an oral application made today, the claimant amended the relief sought to declaratory relief rather than for specific orders, but the terms of the declarations were to be essentially in the same terms as the orders sought.

On 23 February 2009, the date that the orders that I have already referred to were made, I also dealt with an application filed by the claimant which sought, by way of relief, (1) an order that leave be granted for the claimant to amend its claim and (2) an order concerning the payment of an advance. The relief sought in respect of the amendment was given. The relief sought in respect of the payment of advance moneys was refused. There were two grounds for that refusal, the primary ground being that the Court did not have the jurisdiction to grant the relief sought and, secondly, in the circumstances that then existed as a matter of discretion, the relief ought not be granted. Apart from dealing with the quantification of the amount sought, the relief sought in today's application is materially, if not essentially, the same as that sought in February 2009.

The claimant has referred me to various sections of the Acquisition of Land Act, in particular sections 23 and 26 and also to sections of the Land Court Act, namely sections 5, 7 and 33. While I do not intend to refer to all of these sections in terms now, I have given them due consideration. I should, however, say something specific about some of the sections of the Land Court Act and particularly sections 7 and 33 and also section 23 of the Acquisition of Land Act.

Section 7 of the Land Court Act effectively provides that as a court of equity and good conscience, the Land Court is not bound by rules of evidence and must act according to equity and good conscience and the substantial merits of the case. While section 7 clearly gives a degree of flexibility to the way this Court handles its affairs, it must still act in accordance with the normal rules of natural justice and in accordance with the laws of the State. Section 7 does not allow the Land Court to act arbitrarily and certainly does not allow the Court to assume jurisdiction where jurisdiction does not in fact exist. In this context, I refer to the decision of the Land Appeal Court in *Stanfield v. Brisbane City Council* [1990] 70 LGRA 392 at 396 where the Land Appeal Court relevantly said: "The Land Court and the Land Appeal Court are courts of statutory creation and their jurisdiction depends entirely upon the conferral of power by statute. These Courts cannot assume a jurisdiction which they do not possess, convenient though it may sometimes seem to be."

Section 33 of the Land Court Act relevantly provides in section 33(1)(a): "Any person may bring proceedings in the Land Court for a declaration about - (a) a matter done, to be done, or that should have been done under this Act or another Act giving jurisdiction to the court". The key words here are the reference to an Act giving jurisdiction to the court. Section 5 of the Land Court Act also provides that the Court has jurisdiction given to it under "an Act". The jurisdiction given to the Land Court under the Acquisition of Land Act, pursuant to section 26(1) of that Act, is the jurisdiction to hear and determine all matters relating to compensation under the Act. The power to deal with all matters relating to compensation includes not only the power to determine the amount of compensation under section 20, but also includes the power to make orders in respect of interest (section 28) and costs (section 27) and, also, the Court has the jurisdiction to determine whether or not a claimant has a compensable estate or interest in the land taken.

Until very recently, the Land Court had no specific or express powers to deal with advances under section 23 of the Acquisition of Land Act. However, pursuant to section 26A of the Act, this Court now has powers dealing with the recovery of advance moneys where the advance exceeds the total amount of compensation including interest ordered by the Court.

But section 26A is of no assistance here as it only comes into operation in circumstances where an advance against compensation has in fact been paid by the constructing authority.

Returning then to section 23 of the Acquisition of Land Act, I am prepared to proceed on the basis that the necessary factual requirements - for example, under section 23(1), 23(2) and 23(4); in particular under sub-section (4), the passing of 90 days since the lodgment of the claim - have been met. I should mention here that it is not necessary to deal with sub-sections (5) and (6) of section 23 to deal with this application. Sub-section (3) of section 23 relevantly provides “the amount of an advance under this section shall not exceed - (a) where the constructing authority has made to the claimant an offer in writing of an amount of compensation in settlement of the claimant’s claim - that amount; or (b) where the constructing authority has not made the offer mentioned in paragraph (a) - an amount equal to its estimate of the amount of compensation payable to the claimant.”

I should also mention here sub-section (2) because of the reliance placed on it by Mr McGinn for the claimant. Sub-section (2) provides, ‘Subject to being satisfied that the applicant is entitled to claim compensation and to sub-section (3) the constructing authority shall make to the applicant the advance applied for by the applicant in respect of the compensation claimed by the applicant.’

Essentially Mr McGinn relies on this sub-section to say that in circumstances where the constructing authority has not made an advance following an offer or an estimate of compensation under sub-section (3), then sub-section (2) gives power to the Court to require the constructing authority to pay an advance in the amount specified by the claimant. I cannot accept that submission because it fails to have regard to the specific words used in sub-section (2), namely that it is subject to the operation of sub-section (3) of section 23, which, in turn, limits the amount of the advance to the amount of the offer or estimate of the constructing authority.

Sub-section (4) provides that an advance may be recoverable as a debt due and unpaid to the claimant by a constructing authority. In the decision of *Kameruka Ridge Pty Ltd & Anor. v. Director-General of Transport*, an unreported decision of His Honour Justice Ambrose of the Supreme Court dated 19 June 1998, His Honour there pointed out or at least identified some of the difficulties in being able to bring an action by way of debt in circumstances where the amount sought to be recovered comprises a sum of money which may not have been estimated, much less specified or otherwise quantified so as to become a liquidated sum.

Leaving those difficulties aside for a moment, an action for the payment of outstanding advance moneys under sub-section (4) of section 23 would be an action in debt. This Court does not have express powers to deal with such actions and the question therefore is, “Does it have that power under some other section of the Act?” In this respect, section 33 does not justify the making of the express orders initially sought by the claimant because section 33 gives to the Court the power to make declarations, not the types of orders initially sought. However, having regard to the amendments made by the claimant, the question that then needs to be asked is whether this Court has the jurisdiction to grant the declaratory relief sought on the basis that the failure of the respondent to pay in advance is a matter to be done or that should have been done under either the Land Court Act or another Act giving jurisdiction to this Court. That Act, of course, relevantly here would be the Acquisition of Land Act. In my opinion, the answer is “No.” As I’ve already said, under section 23 sub-section (4), any action requiring the respondent to repay the advance would essentially be an action for the recovery of a debt. This Court has no express powers to deal with such actions and it would be, in my opinion, an unreasonable stretch of language to equate the words used in section 26 sub-section (1) of the Acquisition of Land Act “relating to compensation” to extend to capture under section 23 sub-section (4) the recovery of moneys as a debt.

When this matter came before me on 23 February 2009, I said, in part, the wording of sub-section (4) of section 23 is such as to not give this Court the jurisdiction to make the orders then sought: “The amount of the advance may fall within the jurisdiction of other Courts, depending on the amount involved - that is, depending on the amount involved, it may fall within the jurisdiction of the Magistrates Court, District Court or the Supreme Court. It does not strike me as obvious, as Mr Evans submitted, that this Court has the power, in effect, to deal with and decide actions which would, in effect, be for debt, money or moneys due and unpaid. It is for that reason that I would find that this Court does not have the jurisdiction to make the order sought.” I am still of that view.

Also, the operation and effect of section 33 has to be construed having regard to the actual jurisdiction granted to the Court under the legislation in issue in the proceedings. Here I am turning my mind perhaps more particularly to the declaratory relief that the claimant now seeks. The declaratory relief given under section 33 should not be read down - that is, when a court is given the power to grant declaratory relief, that power should not be construed as being subject to limitations which do not appear in the actual words used to confer the grant of the power.

However, in *Maroochy Shire Council v. Maroochy Central Holdings Pty Ltd.*, an unreported decision of the Land Appeal Court [2003] QLAC 24 at paragraphs 32 and 33, the Land Appeal Court relevantly said about section 33: “Section 33 of the Land Court Act provides to the Land Court a useful adjunct to its jurisdiction under the Act enabling a decision about the construction or the application of the Act to be made in advance of the determination of the entire dispute between the parties. In some cases, using this additional jurisdiction may facilitate the resolution of the larger dispute between the parties. There is nothing in the language of section 33 of the Land Court Act to suggest that it is concerned with other than the application or construction of legislation in respect of which the Land Court has jurisdiction. It is not intended to confer on the Land Court a jurisdiction similar to that which involves the review of administrative decision-making as conferred by the Judicial Review Act 1991.”

In the case of *Heavey Lex No. 64 Pty Ltd v. Director-General, Department of Transport* [1994] 2 QR 592, a case to which I was referred by Mr Evans, the Court was concerned with the situation where no advance on compensation had been paid within the 90 days prescribed in section 23 sub-section (4) of the Acquisition of Land Act in circumstances where there was only some very preliminary advice about the amount of compensation that ought to be paid in the hands of the constructing authority. At page 594, His Honour Justice Mackenzie said: “The Director-General’s decision is based on an error of law” - I pause there to observe that that decision would appear to be a decision based on the preliminary advice on compensation to which I have already referred - and then going back to the quote, “and therefore must be reviewed. I order that the matter be remitted to the Director-General, Department of Transport with a direction that on or before 3 November 1993 he proceed, according to law, to make an estimate of the compensation payable to the claimant, Heavey Lex No. 64 Pty Ltd. I further order that within two working days after making that estimate, he forward to Heavey Lex No. 64 Pty Ltd relevant documents relating to the advance for execution and, upon receipt of satisfactory evidence of execution of those documents, forward to Heavey Lex No. 64 Pty Ltd within two working days thereafter an amount equal to the estimate of compensation payable to the claimant.”

In my view, I do not have the power to grant or make orders or declarations of the type made by His Honour there or as the claimant seeks here, effectively imposing an obligation upon the respondent to pay in advance in excess of that provided for under section 23(a) or (b) of

the Acquisition of Land Act. It is my view that any action, other than in debt - which I have already dealt with and determined - would be to seek relief of the type granted in Heavey Lex. In my view, the power to grant that relief is dependent upon the existence of a power similar to that provided under the Judicial Review Act being open to this Court. In my view, this Court does not have that express power as it is not at all clear that the calculation and payment of an advance under section 23 is a matter relating to compensation under section 26. The Land Appeal Court in the Maroochydore case to which I have already referred said section 33 is not meant to confer upon the Land Court a jurisdiction similar to that which involves the review of administrative decision-making as conferred by the Judicial Review Act. For these reasons, the application must be dismissed.

(Submissions on costs ensued.)

MR JONES: In respect of the question of costs, costs in circumstances such as these are not meant to punish the unsuccessful party but to indemnify the party that is required to come before the Court to defend himself and, having come before the Court, has been successful.

In the circumstances of today's application, in accordance with the general rule that costs should follow the event, it strikes me that the respondent would be entitled to its costs on that basis alone.

In the circumstances of this particular case, though, there is the additional fact that the jurisdiction of this Court to grant relief of the type sought had already been dealt with on the 23rd of February 2009 and essentially the same conclusions reached.

In all the circumstances, then, as unfortunate as it may be, I really don't think I have any alternative but to order that the claimant pay the respondent's costs of and incidental to today's application.

Now bearing all that in mind, in respect of today's application, the orders of the Court are (1) that the application is dismissed; (2) the claimant is to pay the respondent's costs of and incidental to the application.

I will then make separate orders in respect of the orders of 23 February 2009 and those orders will be as follows: that orders 5 through to 10 of the orders made on 23 February 2009 be set aside and, in lieu thereof, the following orders made: (1) respondent is to file and serve a response to the applicant's amended statement of facts, issues and contentions upon which it intends to rely upon by 22 June 2009; (2) the applicant requests any further and better particulars which it may require in relation to the respondent's response to the applicant's amended statement of facts, issues and contentions on or before 1 July 2009; (3) the respondent to provide a response to any request for further and better particulars made pursuant to paragraph 2 of this order by 14 July 2009; (4) the parties are to participate in a mediation in order to resolve or seek to limit the matters to be addressed, such a mediation to be conducted on 10 August 2009; (5) both parties are to exchange copies of all documents upon which they intend to rely at the mediation by no later than 3 August 2009; (6) the parties have liberty to apply upon the giving of two clear business days' notice in writing each to other.

Is there anything further?

MR EVANS: No, sir.

MR MCGINN: No, sir.

MR JONES: We will adjourn.

THE LAND COURT ADJOURNED