

LAND COURT OF QUEENSLAND

CITATION: *Haseler v Department of Natural Resources and Water*
[2009] QLC 0082

PARTIES: Dianne M and Jon M Haseler
(appellants)

v.

Chief Executive, Department of Natural Resources and
Water
(respondent)

FILE NO: AV2008/0195

DIVISION: Land Court of Queensland, General Division

PROCEEDING: Application for costs

DELIVERED ON: 16 June 2009 (Ex tempore)

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RS Jones

ORDERS: **The appellants are to pay the respondent's costs of
and incidental to the adjournment of the hearing of
the appeal.**

APPEARANCES: Mr P Thomas, Acquisitions Manager for QM Properties,
as agent for the appellants
Mr W Isdale of Counsel instructed by Ms T Johnson for
the respondent

MR JONES: In respect of the question of costs, I will give some reasons. These reasons will probably be a bit more lengthy than they might be if the appellants were legally represented but seeing Mr Thomas is not a lawyer and may well have to report back to his clients, I thought I should give some more fulsome reasons than I might otherwise give. If you require, you will be able to get a copy of them from the transcript. I will just reserve the right to tidy up the transcript to perhaps neaten the reasons up a little.

This matter was listed for mention on 6 April 2009 and at that time the appellants were represented by Mr Thomas who is not a lawyer nor a registered valuer, but was, at one time, a registered valuer. The respondent was then represented by Mr Prasad, a lawyer employed by the respondent. On 6 April 2009 Mr Thomas advised the Court that he was likely to be the only witness for the appellants.

On that date, 6 April 2009, the Court relevantly ordered in order 1 that the parties must file and exchange valuers' reports 21 days prior to the hearing date. In order 3, the parties must file and exchange any witness statements (including lay witness statements) and any other documents upon which they intend to rely on at the hearing at least 21 days prior to the hearing date and then order 4, the parties must file and exchange any documents and materials to be relied on at the hearing date 21 days prior to the hearing date. By order 5 the parties had liberty to apply on the giving of two business days' writing.

Consistent with the orders of the Court, the respondent on 22 May 2009 filed the expert report he intended to rely on and that report was the valuation report of a Mr Buchanan, a registered valuer also employed by the respondent. A copy of this report was also provided to the appellants or at least to the appellants' agents at some time. I am not sure when that occurred, but there is no complaint about late service of that report by the appellants.

The orders of the Court were not complied with by the appellants. At about 4:30 p.m. on 12 June 2009 - that is the evening of the last working day before the hearing of this appeal - correspondence from Mr Thomas was received and that letter has become Exhibit 1. That correspondence relevantly identified a number of unfortunate incidents involving Mr Thomas. Just by way of summary, there seems to be four particular events. One was a flooding event which required him to attend northern New South Wales for the week commencing 24 May 2009. Soon thereafter or even during that week he became subject to a viral infection. In late May 2009 Mr Prasad contacted Mr Thomas to talk about the late delivery of the reports, but, unfortunately, Mr Thomas was, on 31 May 2009, struck down with a hip joint complaint which immobilised him and has required him to undergo surgery and, even as of today's date, he is not entirely recovered. Notwithstanding the lack of independent medical evidence, Mr Isdale was prepared to proceed on the basis of all of the matters referred to in that correspondence being true and correct. That letter, I should point out, also refers to the fact that the appellants now intended to rely on the valuation report prepared by a Mr Early, who in fact did give evidence here today.

A copy of Mr Early's valuation was filed in this Court on the morning of 15 June 2009, but was not delivered to Mr Isdale, counsel for the respondent, until at the Bar table at or about 10:00 a.m. on that morning. That morning, of course, was the date that the hearing of this appeal was to commence. It is not necessary to identify more than that the valuation of Mr Early is more than half a million dollars less than the amount contended for by the respondent. It relies on five sales, only three of which are common to the department's valuer and also raises issues of relativity. I should only have to refer to those matters to show that Mr Isdale was entitled to seek an adjournment to allow him to get instructions about that valuation and about how to proceed with the appeal. On that basis, the hearing of this appeal was adjourned to not before 10:00 a.m. today's date. It is of some credit to the respondent that he was ready to progress the appeal so quickly.

Mr Isdale now seeks his client's costs of and incidental to that adjournment and argument about the question of costs was left until today. I should mention here two further particular matters, namely that orders as to costs are not ordinarily meant to punish the losing or the infringing party but to indemnify the party required to incur costs which would otherwise have been avoidable if the other party had acted in a reasonable way. The second matter I should refer to is the source of the power for this Court to order costs. Section 34(1) provides a general power to order costs subject only to other acts to the contrary. Mr Isdale referred me to section 70 of the Valuation of Land Act, which, in many respects, would appear to be a section to the contrary for the purposes of section 34(1). Particularly in instances where a substantive appeal had been heard and determined. I have some reservations about whether section 70 is, in fact, a contrary act for the purposes of section 34(1) in respect of dealing with an issue such as this, namely an adjournment of a matter, but I am not going to decide that matter finally now. Mr Isdale refers me to and relies on section 70 sub-section (2) of the Valuation of Land Act. That section seems to me to be more favourable to the respondent and so I am prepared to proceed on the basis of that section being the governing legislation. That aside, though, it does appear to me that the respondent is entitled to its costs either under sub-section (2)(d) of section 70 or sub-section (2)(e).

The difficulties that Mr Thomas refers to - in effect to provide an excuse for the late delivery or production of a valuation report - do not appear to have begun until at or just after the time at which the orders were required to be complied with. While it is not uncommon for there to be some slippage in respect of compliance with orders of the Court - while that may be common, it is not common for there to be total non-compliance up to the eve of the trial without at least some form of explanation being given to the Court and or the other side. While I am prepared to accept that Mr Thomas's misfortunes would have prevented him from being ready for trial in the sense of being both advocate and/or witness, I am unable to accept that Mr Thomas was so incapacitated or the appellants were not otherwise able to inform the respondent that it was unlikely that the hearing would be able to proceed on the 15th. Indeed, there is no evidence before me to show that it was in any way impractical or unreasonable for the appellants to advise the respondent of the need for the delay of the hearing. Had reasonable notice been given to the respondent outlining the appellants' difficulties, I think it is reasonable to infer that it is more likely than not that the respondent would have been able to accommodate the appellants without the need to appear with counsel and his expert witness on the 15th of June. The respondent, through his agents, turned up on that date ready for trial and, through no fault of his own but entirely through the fault of the appellants, that appearance was largely wasted. In this context I note that Mr Thomas has quite candidly said on more than one occasion to the effect that the reason for the adjournment was his fault.

In the circumstances, then, I order that the appellants are to pay the respondent's costs of and incidental to the adjournment of the hearing of the appeal.

It is not necessary for me to make any more detailed orders than that, is it, Mr Isdale?

MR ISDALE: No, sir.

MR JONES: I appreciate everyone moving on quite quickly after lunch and allowing all of the matters associated with this appeal, save for my delivering a judgment, to be dealt with today. If there is nothing further, we will adjourn.

MR ISDALE: Thank you, sir.

THE LAND COURT ADJOURNED