LAND APPEAL COURT OF QUEENSLAND

CITATION:	*Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines (No 2)* [2009] QLAC 0007
PARTIES:	Kent Street Pty Ltd As Trustee (ACN 006 794 654) - and – Westfield Management Limited as Responsible Entity of Westart Trust (ACN 001 670 579) - and – AMP Pacific Fair Pty Ltd as Trustee - and – Westfield Management Limited as Responsible Entity (ACN 001 670 579) (appellants) v. Chief Executive, Department of Natural Resources and Mines (respondent)
FILE NO:	LAC 2007/0033
DIVISION:	Land Appeal Court of Queensland
PROCEEDING:	Appeal
ORIGINATING COURT:	Land Court of Queensland
DELIVERED ON:	12 June 2009
DELIVERED AT:	Brisbane
THE COURT:	White J Mrs CAC MacDonald, President of the Land Court Mr RS Jones, Member of the Land Court
ORDERS:	**1. The respondent pay the appellants' costs of and incidental to resisting the respondent's application to introduce new material prior to the hearing of the appeal on 4 August 2008, save for the costs associated with the indexed valuation, to be assessed on the standard basis.** **2. Otherwise the appellants' application for costs is dismissed.**
CATCHWORDS:	Real property – valuation of land – objections and appeal – hearing – costs – where the appellants appealed against a decision of the Land Court – where the appellants were

successful on appeal – where the appellants seek an order for part of the costs of the appeal and the whole, or alternatively, part of the costs at first instance – where 2008 amendments to the *Valuation of Land Act* 1944 (Qld) affect the costs of appeals – whether costs should be awarded

Integrated Planning Act 1997 (Qld), s.4.1.23
Land Court Act 2000 (Qld), s.34
Valuation of Land Act 1944 (Qld), ss 33, 45(1), 56, 64, 66, 70
AMP Life & Ors v Department of Natural Resources and Mines [2002] 23 QLCR 300, cited
Australian Capital Holdings Pty Ltd v Mackay City Council [2008] QCA 0170, applied
Collier v Brisbane City Council [2009] QPEC 40, applied
Department of Natural Resources and Mines v ISPT Pty Ltd [2003] QLC 0074, cited
Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines [2008] QLAC 0221, cited
Mudie v Gainriver Pty Ltd (No 2) [2003] 2 Qd R 271; [2002] QCA 546, applied
Perpetual Trustee Company Limited v Department of Natural Resources and Mines [2007] QLAC 0026, cited
PT Limited v Chief Executive, Department of Natural Resources and Mines [2007] QLAC 0121, cited
PT Limited & Anor v Chief Executive, Department of Natural Resources and Mines [2006] QLC 0068, cited

COUNSEL: Mr S Doyle SC, with Mr R Traves SC and Mr J Horton, for the appellants
Mr D B Fraser QC, with Mr T W Quinn, for the respondent

SOLICITORS: Minter Ellison for the appellants
Crown Solicitor for the respondent

[1] The appellants appealed pursuant to s.45(1) of the *Valuation of Land Act* 1944 (Qld) ("*VLA*") against the respondent's assessment of the unimproved value attributed to their land, known as the Pacific Fair Shopping Centre, as at 1 October 2002, in the amount of $90,000,000 contending for an unimproved value of $40,000,000. The learned Member determined the unimproved value in the amount of $128,200,000. The appellants appealed to this Court contending for a figure of $39,400,000 or, at worst, $46,700,000. On 17 June 2008, pursuant to amendments to the *VLA*, the respondent issued an indexed valuation in the amount of $47,800,000 in respect of which no evidence was led nor challenge made.

[2] This Court allowed the appeal and determined the unimproved value of the land at $47,490,000.[1]

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1 *Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines* [2008] QLAC 0221.

[3] The appellants now seek orders that the respondent pays part of their costs of the appeal before this Court and the whole, or alternatively, part of their costs at first instance.

[4] As is discussed in the principal reasons,[2] in 2008 extensive amendments were made to the *VLA* which directly affected how the Court should approach the appeal. The appeal fell to be decided on a different legislative basis from that which applied below. Included in the 2008 amendments was a completely different approach to the costs of appeals against valuations to that which had hitherto prevailed. Section 66, which was unchanged, concerns the orders that the Land Court or the Land Appeal Court may make upon an appeal under s.55 and concludes:

> "… and, subject to section 70, make such order as it deems fit with respect to the payment of costs."

[5] The new s.70 provides:

> "(1) Subject to subsection (2), each party to an appeal must bear the party's own costs for the appeal.
>
> (2) The court may only order costs for an appeal, including allowances for witnesses attending for giving evidence at the appeal, as it considers appropriate in the following circumstances –
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> (a) the court considers the appeal, or part of the appeal, to have been frivolous or vexatious;
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> (b) a party has not been given reasonable notice of intention to apply for an adjournment of the appeal;
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> (c) a party has incurred costs because the party is required to apply for an adjournment because of the conduct of the other party;
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> (d) a party has incurred costs because another party has defaulted in the court's procedural requirements;
>
> (e) without limiting paragraph (c), a party has incurred costs because another party has introduced, or sought to introduce, new material;
>
> (f) a party does not properly discharge the party's responsibilities in the appeal."

[6] The appellants contend that notwithstanding the significant curtailment of the circumstances in which the Court may now make an order for costs, it is entitled to an order on the appeal to this Court because the respondent sought unsuccessfully to introduce new material not previously before the learned Member to be considered on the appeal. The appellants also contend that they should have the whole of their costs before the learned Member because all or part of the respondent's conduct of that appeal fell within s.70(2)(a)[3] and s.70(2)(e).[4]

[7] The respondent resists an order being made in respect of costs in this Court and at first instance.

The Land Appeal Court Costs

[8] As found in the principal reasons,[5] on 30 July 2008, two clear business days before the hearing of the appeal in this Court was to commence, the respondent filed an application to adduce

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2 [2008] QLAC 0221 at [27] and following.
3 "Frivolous or vexatious".
4 "Introduced, or sought to introduce, new material".
5 [2008] QLAC 0221 at [198].

fresh evidence on the appeal pursuant to s.56 of the *Land Court Act* 2000 (Qld). That evidence fell into two categories:

- evidence of the "indexed valuation" which was not opposed by the appellants and arose as a consequence of the 2008 amendments, and
- documents concerned with head works charges associated with a rezoning application concerning the Telstra sale site in 1995–1996 together with a valuation reanalysis of the Telstra sale and its application to the Pacific Fair land by Mr Montgomery, both of which were opposed by the appellants.

[9] This Court refused the application for the reasons set out at [200]–[224] in the principal judgment. In brief they were that the documents sought to be introduced were neither admissible nor required to be disclosed on the ground of relevance. Furthermore, as was noted, had the new evidence been admissible the appeal would likely have had to be adjourned and therefore, in the exercise of the overall discretion, the Court would not admit it. This was because, at best for the respondent, there was a delay of more than three weeks in advising the appellants of the intention to introduce this further material.

[10] The respondent attempted to introduce material which was "new" in the sense that it was not before the learned Member.[6] Necessarily the appellants were distracted from their preparation for a complex and lengthy appeal by the need to address the application and the material.

[11] There is, accordingly, good reason to order that the respondent pay the appellants' costs of and incidental to resisting the respondent's application to introduce new material into the appeal except for the material relating to the indexed valuation.

The Costs at First Instance

[12] Previously s.70 of the *VLA* dealt with costs in a limited way. It provided:

> "(1) Where the value of land as finally determined upon an appeal against the valuation is the value stated by the owner in the owner's notice of appeal against the valuation, or is nearer to that value than to the valuation appealed against, costs shall not be awarded against the owner.
>
> (2) Otherwise costs shall not be awarded against the chief executive."

As a consequence of limiting the jurisdiction to award costs to the outcome of the appeal as to quantum, the Court could call in aid the general power to award costs in s.34 Of the *Land Court Act*.[7] That is no longer the case and s.70 is now "another Act to the contrary"[8] and is the legislative authority for awarding costs in respect of appeals under Part 6A of the *VLA*.

[6] By s 64 of the *VLA* an appeal to the Land Appeal Court is by way of a rehearing which is "on the record". It is in the same language as r 765 of the *Uniform Civil Procedure Rules* 1999 (Qld) concerning appeals to the Court of Appeal. For a discussion of "rehearing" and "de novo" see the discussion by McPherson JA in *Scrivner v Director of Public Prosecutions* [2001] QCA 454 at [10]; (2006) 125 A Crim R 279.

[7] *Perpetual Trustee Company Limited v Department of Natural Resources and Mines* [2007] QLAC 0026.

[8] *Land Court Act*, s.34.

[13] When the learned Member expressly made no order as to costs below, he was applying the previous costs regime in s.70. That was an advantageous decision for the appellants. The question then is what is this Court's power to entertain an application for the costs at first instance. This Court is not hearing an appeal about the costs awarded or not awarded below. This is an exercise of original jurisdiction. The appellants contend that s.70 does not differentiate between "appeals" and, in as much as both the Land Court and this Court hear and determine appeals, the language allows this Court to determine costs for the Land Court. Section 66 keeps appeals to the Land Court and this Court distinct, giving each court the power to make the same kind of orders and, "subject to s.70", to "make such orders as it deems fit with respect to the payment of costs". Section 70 must be read as if there were inserted after "each party to an appeal" the following words,

> "to the Land Court upon an appeal under section 55 or, upon the rehearing of any such appeal to the Land Appeal Court".

To read s.70 otherwise would be contrary to recognised practice and procedure.[9] This issue is unlikely to arise in the future as s.70 will apply at first instance and its application or not may be the subject of an appeal to this Court in the usual way.

[14] However, if it be assumed that there is jurisdiction of the kind contended for by the appellants to consider the costs at first instance, the appellants contend that they incurred costs in meeting the respondent's case which was "frivolous or vexatious" or "new". The complaint relates to what the appellants see as the elusive nature of the respondent's approach to his valuation of the subject land. There is little doubt that it was not easy to identify with certainty either the approach and methodology or the figure contended for by the respondent. The wide range of figureS was well encapsulated by the learned Member and quoted in the principal judgment:[10]

> "The valuation of the subject land issued in the amount of $180,000,000; a substantial increase over that of $40,000,000 which applied as at 1 October 2001. Following objection the valuation was reduced to $90,000,000 for reasons stated as, 'the valuation required calculation by a different methodology'. That methodology was purported to rely on s.3(2) of the Act and paying regard to amendments which took effect on 2 June 2003 but which had retrospective effect with regard to the 2002 valuation. Evidence was then led before me from the respondent to a valuation of $160,000,000 or $127,400,000, then to $155,100,000 and finally to $255,000,000…"

[15] It is perhaps useful to restate the process for challenging the respondent's assessment of value. The chief executive is not required to disclose his approach when issuing his notice of valuation. The land owner may lodge an objection and, if dissatisfied with the chief executive's decision on the objection, the land owner may appeal to the Land Court. The land owner must file grounds of appeal and the appeal is limited to those grounds. The valuation

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[9] See *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 170 per Holmes JA with whom Fraser JA and Chesterman J (as his Honour then was) agreed at [3].

[10] [2008] QLAC 0221 at [6].

made by the chief executive is, by virtue of s.33 of the *VLA* deemed to be correct “until proved otherwise upon objection or appeal or until altered or further altered”.

[16] It is accepted that the chief executive is not confined to the deemed correct valuation on the hearing of an appeal. In the *Chermside* appeal[11] the learned Member noted:[12]

> “The jurisdiction of the court in an appeal of this nature is to either affirm the valuation appealed against or reduce or increase the amount of the valuation to determine it correctly and in accordance with the Act. It follows that whilst a valuation which is statutorily deemed correct under section 33 subsists as such until proven to be incorrect, the real contest in circumstances where the Chief Executive elects to lead evidence to a different figure from that embraced by section 33, will be between the valuations to which evidence is addressed by the parties. It is the outcome of that contest which will displace the deemed correct valuation or theoretically lead to its affirmation. Nevertheless, the appellant remains confined to the grounds of appeal.”

[17] As to the methodology which was constantly adjusted and reappraised below, the respondent refers to quotations from the decision in *AMP Life & Ors v Department of Natural Resources and Mines*[13] made by Mrs MacDonald in *Department of Natural Resources and Mines v ISPT Pty Ltd*:[14]

> “[38] … Now apart from the fact that an appellant would not usually know at the time of lodgement of the Notice of Appeal (which includes the grounds of appeal) the valuation evidence relied on by the Chief Executive, there is no prohibition in the Act that I can find that limits either party to any particular valuation evidence or method. Such limitations, if they arise at all, would arise as a consequence, of the management of a particular case by the Court.
>
> [39] … I have come to the conclusion, therefore, that the Chief Executive is not confined to the same method of valuation as that adopted when the valuation originally issued.”

[18] That is accepted, but the appellants contend that the shift in ground and change in position by the respondent leading up to and during the hearing was well beyond what would reasonably be encompassed in the latitude afforded to the respondent exploring this complex valuation exercise. Both the appellants and the respondent have descended into minute detail about, *inter alia*, the reports, supplementary reports, fresh analyses and abandoned approaches by the valuers to sheet home responsibility for the prolongation and expense of the hearing below. Furthermore, their submissions are in many respects highly contentious, each alleging misstatement of the true state of the evidence or its nature or timing before the learned Member. To address those issues would require a review of, at least, a considerable amount of the more than 5,000 pages of transcript, the 279 exhibits, many constituting the reports of the 27 witnesses most of whom were experts. It is instructive to record that the learned Member said:

> “[432] Some criticism was made of various witnesses whose evidence before me differed in some respects from pre-trial material such as that included a section 35A application or in consideration of an objection against value. Such criticism was levelled at

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[11] *PT Limited & Anor v Chief Executive, Department of Natural Resources and Mines* [2006] QLC 68.
[12] [2006] QLC 68 at [6].
[13] [2002] 23 QLCR 300.
[14] [2003] QLC 74.

experts from both sides, particularly Messrs Highm and Denman. I have largely put aside those criticisms as being more in the manner of background noise than matters of substance. In truth the many exercises or components of exercises carried out under section 3(2) struck me as being better described as products of a voyage of discovery rather than references to a well worn chart. I therefore attempt to deal with the evidence directly on the merits."

[19] It is also apt to refer to the observations of the Land Appeal Court in the *Chermside* appeal,

> "…If litigation of the cost and complexity of the present case is to be avoided in the future, we are of the view that it would be desirable if the *VLA* was to provide for a mechanism by which the unimproved value of major commercial enterprises could be assessed without the need for the difficult, lengthy and complex evidence of the kind which was adduced before the Court below."[15]

As the Court observed this was complex and difficult litigation. In retrospect it could have been managed more efficiently by both sides. Both sides had employed experienced solicitors and counsel. The frustration of the appellants constrained by their grounds of appeal in seeking to come to grips with how the respondent would run "his" case is evident. The exercise of valuing land accommodating a very large shopping centre on the basis contended for by the respondent,[16] to continue with the learned Member's analogy, was in relatively unchartered waters.

[20] In considering the ambit and scope of the present s 70 a court will be assisted by decisions in the Planning and Environment Court where the provisions about costs in the *Integrated Planning Act* 1997 (Qld),[17] are substantially the same as s 70, cases such as in *Mudie v Gainriver Pty Ltd (No 2)*[18] and, recently, in *Collier v Brisbane City Council,*[19] discuss what is meant by "frivolous and vexatious" in planning litigation The matters complained of by the appellants, to the extent that they can be determined without revisiting at length the hearing below are not of the kind contemplated by the expressions "frivolous" or "vexatious", such as "characterised by lack of seriousness or sense", "not worthy of serious notice" or "serious and unjustified trouble and harassment".[20] In this context it needs to be kept in mind that the learned Member accepted the respondent's contentions on the unimproved value of the land.

[21] Accordingly, the court is of the view that the appellants have failed to bring themselves within the provisions of s.70(2)(a) or (e) such as to justify the exercise of the court's discretion to make an order for the costs below, even if there were jurisdiction to make orders about these costs.

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15 [2006] QLC 68 at [109].

16 As is well known both the Chermside Shopping Centre and the Pacific Fair Shopping Centre appeals were heard together but determined separately and subject to separate appeals to the Land Appeal Court separated by the 2008 amendments to the *VLA*. The appellants were successful in their application for the costs of the appeal and in respect of the costs at the first instance hearing in the *Chermside* appeal, *PT Limited v Chief Executive Department of Natural Resources and Mines* [2007] QLAC 121, that was, of course, determined under the replaced section 70 of the *VLA*.

17 Section 4.1.23.

18 [2003] 2 Qd R 271.

19 [2009] QPEC 40.

20 [2009] QPEC 40 at [4] per Rackerman DCJ.

Orders

1. The respondent pay the appellants' costs of and incidental to resisting the respondent's application to introduce new material prior to the hearing of the appeal on 4 August 2008, save for the costs associated with the indexed valuation, to be assessed on the standard basis.
2. Otherwise the appellants' application for costs is dismissed.

WHITE J

CAC MACDONALD
PRESIDENT OF THE LAND COURT

RS JONES
MEMBER OF THE LAND COURT