

LAND COURT OF QUEENSLAND

CITATION: *Devine Nominees Pty Ltd v Chief Executive, Department of Environment and Resource Management* [2009] QLC 0121

PARTIES: Devine Nominees Pty Ltd
(applicant)

v.

Chief Executive, Department of Environment and Resource Management
(respondent)

FILE NO: VLA215-09

PROCEEDING: Hearing of an application

DELIVERED ON: 18 August 2009

DELIVERED AT: Brisbane

MEMBER: Mr BR O'Connor, Judicial Registrar

ORDER: **The Court has jurisdiction to hear the appeal.**

CATCHWORDS: Jurisdiction – Late filing of appeal – Whether reasonable excuse

APPEARANCES: Mr A Crawford, Valuer, Chestertons, for the applicant
Mr S Fynes-Clinton, Counsel, instructed by Mrs T Johnson, Principal Lawyer, Department of Environment and Resource Management, for the respondent

[1] **O'CONNOR JR:** The issue for determination in this application is whether the Court has jurisdiction to hear an appeal in circumstances where the notice of appeal was filed some six weeks out of time. The key dates in question are as follows:

- the Chief Executive's decision on objection, made under s.43 of the *Valuation of Land Act 1944 (VLA)*, was notified to the applicant, Devine Nominees Pty Ltd (Devine) as required by that section by notice of decision issued and dated 17 February 2009

- the applicant had a right of appeal under s.45 of the *VLA* against the decision but, by virtue of s.45(2), only if the appeal was instituted within 42 days after the date of issue
- the appeal period expired on 31 March 2009
- the applicant's legal representatives, Deacons Lawyers (Deacons), claim the notice of decision on objection was never received by them but that they enquired of the Department on 3 April as to the position regarding the notice
- on 3 April, a further notice was sent to the applicant with the original date of issue of 17 February
- on 16 April, Deacons advised the Chief Executive that they intended to take 42 days from the time upon which they claim they received the notice on objection before deciding whether to lodge any appeal
- the purported appeal, AV2009/0010, was not filed in the Land Court Registry until 14 May 2009

[2] The respondent alleges that the purported appeal was therefore filed some six weeks out of time.

[3] Accordingly, the Registrar of the Court notified the applicant in accordance with s.57 of the *VLA* which states as follows:

57 Late filing

(1) If a notice of appeal is filed in the Land Court registry after the time stated in section 55(2), the registrar of the court must notify the owner that the appeal may not be heard unless the owner satisfies the court that the owner has a reasonable excuse for filing the notice after the time stated.

Example of reasonable excuse—

The notice of the chief executive's decision or the notice of appeal was lost or delayed in the ordinary course of post.

(2) If the owner satisfies the court under subsection (1), the court may hear and decide the appeal.

(2A) However, the court must not hear an appeal for which the notice of appeal was filed more than 12 months after notice of the chief executive's decision was given to the owner.

(3) The registrar shall furnish to the chief executive a copy of a notification by the registrar to the owner and of any notification to the registrar by the owner under this section.

Specific Issues

[4] I have perused in detail the oral and affidavit evidence of the parties and the submissions of the legal and agent representatives. In my view, the case essentially turns on three specific issues:

1. Was the decision on objection received by the applicant's solicitors shortly after the date of issue of 17 February 2009?
2. If it was, can the applicant claim the conduct of its agents (solicitors), (in not lodging an appeal in the required time) should not be sheeted home to it?
3. Once the applicant became aware that the appeal had not been filed in the 42 days from issue, was subsequent conduct in not lodging the appeal for some 42 days from its claimed awareness reasonable in all the circumstances?

Receipt of decision on objection by solicitors

- [5] Both parties provided affidavit evidence supported by oral testimony on this issue. The respondent's evidence was given by Mr Graham Jacobsen, a valuation officer in the Department, who outlined departmental procedures for mail despatch of the type of notice in question. He stated the notice was sent to the correct postal address of Deacons, that related material similarly sent both before and after the notice of 17 February 2009 had properly arrived at Deacons and that the notice in question had not been returned to the Department by Australia Post or any other means. He states that his division within the Department is a relatively small one and is not part of the wider related division where the responsible valuers are located.
- [6] Mr Tim Stork, solicitor from Deacons responsible for the carriage of the appeal, stated he had carried out a series of searches within the firm's office for the decision on objection in question but was not able to locate the missing notice. Counsel for the respondent stressed that Mr Stork's search was by no means a complete one, particularly as he had not arranged to search other possible files that the applicant may have had with Deacons to discern if the notice had been wrongly placed on them.
- [7] Counsel for the respondent pointed to s.39 of the *Acts Interpretation Act 1954* relating to the presumption of receipt of mail if sent to the proper address and to the fact that it is relatively rare for mail to be "lost", as opposed to return to sender, in the Australia Post system. He also noted the onus of proof was on the applicant to prove non-receipt on the balance of probabilities.
- [8] On consideration of the above evidence, I find (on the balance of probabilities) that the notice of objection decision was received by Deacons within a reasonable time of its being sent by the Department. What happened to it after that remains a mystery. The principal reasons for such finding relate to the evidence outlined above, particularly that previous mail had been sent to the Deacons' address both before and

after the notice in question and acknowledged as being received, other files in the Deacons' system which Devine may have had with that firm were not searched, the presumption of receipt of mail if correctly addressed and the onus of proof laying on the applicant (s.57(1) VLA).

Conduct of applicant's agent

- [9] For present purposes, I assume the conduct of Deacons in not lodging the appeal within the 42 day time period, is not covered by the "slip" rule referred to by Muir J in the *Congress Community*¹ case. The question then becomes whether the applicant, Devine, can claim that it acted reasonably in all the circumstances in placing the matter in hands of agents, namely a highly regarded firm of Brisbane solicitors who have had considerable experience in Land Court litigation.
- [10] Cases where the applicant has relied on an agent to lodge an appeal and such being subsequently lodged out of time were recently reviewed by the Land Court President in *Trust Company of Australia Limited v Department of Natural Resources and Water* (Trust Company).² The Court stated:

"... it is clear that essentially the issue in this case is whether this Court should apply the relatively strict approach adopted by the Land Appeal Court in the *Union Fidelity Trustee Company* case or the more flexible approach adopted by a later Land Appeal Court in the *Congress Community Development* case."

After considering these two cases in some detail, it further stated:

"Having regard to the circumstances of the present case and the authorities referred to above, I am of the view that the more flexible approach taken by the Land Appeal Court in the *Congress Community Development* case should be followed in the present case. Muir J found that there was reasonable excuse for the 'slip' of the solicitor in that case. In my view, the same could be said for the 'slip' of the solicitor in this case." (first limb)

"However, if that was not sufficient to constitute a reasonable excuse, I would adopt the reasoning of Mr Wenck and Dr Divett. As in that case, in the present case the fault lies with the solicitors, but the applicant has done everything that could be expected of a 'reasonable man' in entrusting the institution of the appeal to its solicitors." (second limb)

In a subsequent case, *Webb v Chief Executive, Department of Natural Resources and Water*³, the President noted limitation on this 'second limb':

"... this should not be taken as a precedent for the proposition that it would be reasonable for a landowner in all circumstances to entrust the lodgement of an appeal to their professional advisors. There may be other circumstances in which the action of the appellants or the actions of their professional advisors would not be regarded as

¹ *Director General, Department of Transport v Congress Community Development & Education Unit Ltd* (1998) 19 QLCR 168.

² (2007) QLC 0045.

³ [2007] QLC 0082.

a reasonable excuse for the late lodgement of an appeal. Each case must be dealt with on its own merits."

- [11] I am thus prepared to hold that the applicant's conduct falls with the second limb of the *Trust Company* decision and was reasonable until such time as it became aware that the appeal had not been lodged, that is 3 April 2009.
- [12] Counsel for the respondent made reference to the recent *Parklands*⁴ decision suggesting such was a more recent authority compared to the *Trust Company* decision. In *Parklands* the Court Member indicated he did not favour the majority in *Community Congress* (which held that the appellant to be immune from the conduct of its agent) but distinguished the latter case on its facts.
- [13] In the present case, the solicitors are agents, as was the case in the *Community Congress* case. The majority decision in the latter case (albeit not supported by the Presiding Justice) would seem to be binding authority on me in the instant case. As noted above, the *Trust Company* decision lends support for my conclusion.

Subsequent delay in lodging

- [14] Once the applicant received the notice of decision on 3 April 2006, it did not lodge an appeal until some 42 days after that time.
- [15] Counsel for the respondent argued that such is not reasonable as the applicant should have been aware of the time requirements and that the time the appeal was actually lodged was well outside the 42 days allowed from the date of issue time.
- [16] If it is assumed that the applicant only became aware of the notice of the decision on objection on 3 April 2009 (albeit with a date of issue of 17 February 2009), is it reasonable for it to take 42 days from 3 April to lodge the appeal? Mr Crawford, agent for the applicant at this hearing, submits that the *VLA* gives the period of 42 days to allow an owner to seek advice and make a decision on whether to embark on the costly exercise of lodging an appeal. He also points to the letter from Deacons of 16 April 2009 saying that they would be reserving their decision to appeal to the Land Court to within the 42 days of 3 April.
- [17] I am prepared to accept Mr Crawford's submission on this aspect. To require a lesser period of time from the date of the apparent receipt of notice by the owner would seem unreasonable, given the 42 days is the statutory permitted time where notice is received in normal circumstances.

⁴ *Body Corporate for Parklands CTS & Anor v Department of Natural Resources and Water* [2009] QLC 0065.

Conclusion

[18] In all the circumstances, I find that reasonable excuse has been established.

Decision

[19] The Court has jurisdiction to proceed with this appeal.

**BR O'CONNOR
JUDICIAL REGISTRAR**