

LAND COURT OF QUEENSLAND

CITATION: *Baxter Northside Properties Pty Ltd; Clare Cribb Pty Ltd v Valuer-General* [2024] QLC 4

PARTIES: **Baxter Northside Properties Pty Ltd**
(applicant)

v

Valuer-General
(respondent)

FILE NO: LVA179-23

PARTIES: **Clare Cribb Pty Ltd**
(applicant)

v

Valuer-General
(respondent)

FILE NO: LVA180-23

PROCEEDING: Jurisdiction – s 158(2) of the *Land Valuation Act 2010*

DELIVERED ON: 15 February 2024

DELIVERED AT: Brisbane

HEARD ON: Submissions closed 4 September 2023

HEARD AT: Heard on the Papers

JUDICIAL
REGISTRAR: GJ Smith

ORDERS:

- 1. The applications in respect of LVA179-23 and LVA180-23 are dismissed.**
- 2. The Court does not have jurisdiction to hear and determine either matter.**
- 3. Any submissions seeking costs in respect of either matter must be filed and served within 14 of the publication of these reasons.**

CATCHWORDS: PRACTICE AND PROCEDURE – Failure to file notice of appeal in time – where owner advised agent that it did not wish to proceed with appeal – where owner later instructs agent to proceed after appeal period has expired – where managing-director said to be unable to sign appeal authority – where agent is not cause of delay – nature of evidence – whether reasonable excuse is established

Land Valuation Act 2010 s 158

AG Russell v The Crown (1992-1993) 14 QLCR 202, applied.
Director-General, Department of Transport v Congress Community Development and Education (1998) 19 QLCR 168, distinguished.

Lamington Markets Pty Ltd as Tte v Valuer-General [2021] QLC 41, distinguished.

Loughnan v Valuer-General [2020] QLC 1, distinguished.

Trust Company of Australia Limited v Department of Natural Resources and Water [2007] QLC 45, distinguished.

APPEARANCES: Not applicable

Background

- [1] In each case the Court must determine pursuant to s 158 of the *Land Valuation Act* 2010 (the LVA) if reasonable excuse is established for not filing the appeal notice within the appeal period. The proposed appeals relate to disputed site values as at 1 October 2021 for land situated at Milton and Fortitude Valley within the Brisbane City Council local government area.
- [2] In each case the owners are related, are represented by Savills Valuations Pty Ltd and rely on the same evidence and submissions. Likewise, the respondent has the same legal representative and relies on the same evidence in each application. It is not in dispute in either case that the appeal period concluded at 4:30pm on 24 July 2023.

Evidence

- [3] Two affidavits have been filed in support of each application, one deposed by Ms Bianca Anne Krilich¹, an executive assistant at Power Hotels Group and the other deposed by Ms Nadine Fleur Harmsworth², an executive assistant at Savills. The

¹ Ex 1.

² Ex 2.

respondent relies on an affidavit of Ms Umm-I-Salma Zafar³, a legal officer employed by the Department of Resources. A summary of the relevant evidence is detailed in the following paragraphs.

- [4] On 24 May 2023 the respondent issued a decision on objection to Savills in respect of each site.
- [5] On 8 June 2023 objection decision notices for each site were emailed by Savills to the owners together with an attachment 1 to the Form 3 - Notice of Appeal against the Valuer-General's decision on objection for consideration.
- [6] On 5 July 2023 a follow up email was forwarded by Savills to the owners as no response to the earlier email had been received. A similar follow-up email was forwarded to the owners on 17 July 2023.
- [7] On 20 July 2023 Savills left a phone message with the owner's office requesting a phone response to discuss how the owners wished to proceed. A separate email was also forwarded minutes later.
- [8] On 21 July 2023, Ms Krilich, advised Savills by email that the owners did not wish to proceed with the appeals. Later that day, Mr Neil Murphy of Savills replied to this email in order to clarify the owner's instructions.
- [9] During the morning of 24 July 2023 Mr Murphy spoke with Ms Krilich regarding how the owners wished to proceed.
- [10] At 2:41pm on 24 July 2023 a further email was sent to the owners by Savills to enquire regarding their instructions. The email also advised that Savills needed to leave their office by 3:00pm in order to lodge the appeals.⁴
- [11] At 4:41pm on 24 July 2023 Savills received an email from Ms Krilich giving instructions to proceed. Although the email did not include a signed Attachment 1 document as required, a signed copy was received by Savills later at 5:35pm. The signed document was forwarded at that time as Ms Krilich had not been able to get the managing-directors signature prior to this time⁵. The proposed appeal notices were emailed to the Land Court registry at 5:48pm that day.

³ Ex 3.

⁴ Ex 2, NH-08.

⁵ Ex 1, para 9.

[12] On 3 August 2023 a Deputy Registrar wrote to the parties advising that, as the appeal period had expired at 4:30pm on 24 July 2023 the Court would need to decide if it had jurisdiction to hear and determine the proposed appeals.

[13] Later, on 4 August 2023, the Court made orders for the filing of materials and submissions, these orders also gave the parties the option for each application to be decided “*on the papers*” without an oral hearing.

Legislation

[14] Section 157 (2) of the LVA provides –

(2) Subject to section 158, an appeal cannot be started after 60 days after the day of issue stated in the objection decision notice (the appeal period).

[15] Section 158 (1)(2) of the LVA provides –

Late filing

- (1) This section applies if a valuation appeal notice is filed after the appeal period has ended.
- (2) The Land Court can hear the appeal only if—
 - (a) the valuation appeal notice was filed 1 year or less after the objection decision notice was issued; and
 - (b) the appellant satisfies the court there was a reasonable excuse for not filing the notice within the appeal period.

Example of reasonable excuse—

The notice of the valuer-general’s decision or the valuation appeal notice was lost or delayed in the ordinary course of post.

Issue

[16] Has the applicant in each case established a reasonable excuse for not filing a Notice of Appeal within the appeal period?

The applicants’ submissions⁶

[17] It is submitted on behalf of each applicant that the following points support a finding of reasonable excuse –

- i. The Notices of Appeal were filed 1 hour and 28 minutes outside the appeal period.

⁶ Filed 18 August 2023.

- ii. A director of the companies was unable to sign the appeal authority form until after 4.30pm on 24 July 2023.
- iii. Instructions were only provided by the applicants to Savills at 4:41pm on 24 July 2023.
- iv. Savills filed each Notice of Appeal via email to the Land Court Registry at 5:48pm on 24 July 2023.
- v. Savills on behalf of the applicants took all reasonable steps to file the Notices of Appeal within the appeal period.
- vi. Relevant authorities include *Loughnan v Valuer-General* [2020] QLC 1, *Trust Company of Australia Limited v Department of Natural Resources and Water* [2007] QLC 45 and *Lamington Markets v Valuer-General* [2021] QLC 41.
- vii. The delay in filing the Notice of Appeal was significantly longer in *Loughnan*. Despite the lengthy delay the Land Court was satisfied that it had jurisdiction to hear the appeal.
- viii. In *The Trust Company*, the Court took the view that a flexible approach should be adopted, finding that there was a reasonable excuse for the “slip” by the applicant’s solicitor in miscalculating the expiry of the appeal period. However, the Court further held that even if that were not sufficient to constitute a reasonable excuse, the fault lay with the applicant’s solicitors and “...the applicant had done everything that could be expected of a “reasonable man” entrusting the institution of the appeal to its solicitors”.
- ix. As in *Trust Company*, the applicants did everything that could be expected of a reasonable landholder by instructing Savills to file the Notices of Appeal.
- x. In *Lamington Markets* the Land Court was satisfied that:

“The Court has reached the conclusion that the circumstances which preceded the attempted filing of the notice (a matter of minutes outside the appeal period) may be viewed as a “slip” by the agent as envisaged by Muir J in *Congress Community*. It therefore follows that reasonable excuse is established and the Court has jurisdiction to hear the appeal.”
- xi. Further, even if the Land Court cannot be satisfied that the applicants have established “reasonable excuse”, the Land Court ought to follow its decision in the *Trust Company* and accept the late Notice of Appeal to avoid penalising the applicant for any slip its agent has caused.

The respondent's submissions⁷

[18] The respondent's primary submission is that the applicants cannot satisfy the Court of any cause which can be deemed to be a reasonable excuse. A summary of the observations and specific contentions are as follows:

- i. There is no evidence that Ms Krilich, Mr Murphy or Ms Harmsworth checked the opening hours of the registry.
- ii. Savills lodge a significant number of appeals against the Valuer-General's decisions and would have a superior knowledge of processes for the lodgement of appeals. These processes are not detailed or made known from Ms Harmsworth's affidavit.
- iii. The affidavit of Ms Harmsworth fails to clearly state the underlying facts or circumstances for the Court to conclude, firstly what is the actual cause of the delay and secondly, probative evidence to establish that the Court would be satisfied of reasonable excuse.
- iv. Ms Krilich's affidavit fails to state what the actual cause of delay was in providing instructions, why or what was the cause of the of company director being able to sign the authority form until after 4:30pm on 24 July 2023 or any reasons with supporting evidence that explains the delay in providing instructions to Savills before 4:30pm on 24 July 2023.
- v. The processes and procedures undertaken by Ms Krilich are not clear from her affidavit. The affidavit fails to clearly state the underlying facts and circumstances for the Court to conclude what was the actual cause of the delay and secondly direct and probative evidence from the landowner to establish that the Court would be satisfied of reasonable excuse.
- vi. The jurisdiction that is granted in the Act requires the Court to be satisfied that a reasonable excuse is established on the evidence. The excuse must be substantial. There must be some relevant circumstance or fact other than oversight or ignorance.

⁷ Filed 1 September 2023.

- vii. In the current matter there is no evidence to show that the applicant had done everything that should have been expected of him and has shown no cause that can be deemed by the Court to be a reasonable excuse.
- viii. Each case must be determined on its own facts and circumstances. It is critical that the submissions identify the excuse for the delay, supported by satisfactory evidence and explanation.
- ix. The applicant has failed to clearly state or reveal the cause of the delay in providing instructions from 21 July to 24 July 2023 and the actual cause in filing the appeal late and why Mr Power was unable to sign the appeal authority form until after 4:30pm on 24 July 2023.
- x. The evidence relied on by the applicant is unsatisfactory and insufficient to justify any conclusion that there was a reasonable excuse. There is no direct and probative evidence to establish that the Court would be satisfied of reasonable excuse.
- xi. The facts and circumstances in the present matter are dissimilar to the *Loughnan* decision. In the present matter there has been no failure in transmission and the email to the registry was received outside the registry hours and after the appeal period expired. The decision is of limited if any assistance to the applicant.
- xii. The applicant's reliance on the *Trust Company of Australia Limited* decision that the applicant did everything that could be expected of a reasonable landowner by instructing Savills to file the appeal thereby satisfying reasonable excuse is misconstrued and should not be accepted by the Court.
- xiii. There is no direct evidence from the applicant which deposes to the instructions provided to Savills nor that they had done everything that should have been expected of the Applicant to provide the instructions to Savills.
- xiv. The applicant's evidence in this matter clearly shows that the fault in the late filing of the appeal was not caused by the agents but rather the applicant in providing their changed instructions to proceed with the appeal after the last day to lodge the appeal at 4:30pm on 24 July 2023. As such the *Trust Company of Australia Limited* decision which relates to the slip or fault of the solicitor is of limited if any assistance.

- xv. The applicant's reliance on the *Lamington Markets Pty Ltd* decision is misconstrued and should not be accepted by the Court. The decision relates to the slip of fault by an agent in filing the appeal notice on time. The decision is of limited or any assistance to the applicant.
- xvi. The applicant has failed to identify with any particularity or precision the actual cause of the delay. The applicant provided instructions to the agent to file the appeal after the expiry period and failed to provide probative and direct evidence for the Court to be satisfied that reasonable excuse has been established.
- xvii. The applicant is represented by an agent, Mr Murphy from Savills, where legal professional privilege would not apply. It is unclear on the evidence and submissions filed by the applicant, the relevance of the heavily redacted parts of the affidavit, which are alleged to be confidential or not relevant.
- xviii. The underlying issue for the Court to properly understand are the facts and circumstances behind the change of instructions from the applicant within 3 days to proceed with the appeals when they had previously instructed their agents not to proceed. Furthermore, what the cause of the delay was in providing the instructions after the appeal period had expired, is the critical part of the evidence to establish whether the applicant has satisfied reasonable excuse under the Act.

Consideration and conclusion

- [19] The contentions in support of each application rely substantially on the *Trust Company*⁸, *Lamington Markets*⁹ and *Loughnan*¹⁰ decisions. The first two of these decisions were decided on the basis of the Land Appeal Court judgment in *Director-General, Department of Transport v Congress Community Development and Education*¹¹.
- [20] The Land Appeal Court in *Congress Community* considered the question of "reasonable excuse or explanation" as required by the *Land Act* 1964 for the late filing of a Notice of Appeal to the Land Appeal Court. Muir J considered that late

⁸ *Trust Company of Australia Limited v Department of Natural Resources and Water* [2007] QLC 45.

⁹ *Lamington Markets Pty Ltd as Tie v Valuer-General* [2021] QLC 41.

¹⁰ *Loughnan v Valuer-General* [2020] QLC 1.

¹¹ *Director-General, Department of Transport v Congress Community Development and Education* (1998) 19 QLCR 168.

filing was occasioned by “*a combination of pressure of work, physical tiredness, inexperience and, possibly bad luck on the part of the solicitor*” and observed:

“The expressions under consideration are broad in meaning and quite apt to cover a slip of the nature of that made by the employee of the Crown Solicitor.”¹²

- [21] The remaining members of the Land Appeal Court, Mr Wenck and Dr Divett allowed the application, but jointly stated:

"That does not imply however that, in our opinion, there was a reasonable excuse for the conduct of the solicitor to whom the applicant had entrusted the institution of the appeal. The reasonable cause and explanation of the lateness of the service and lodgement of the notice and payment of the prescribed fee, is, in our opinion, the fact that the solicitor failed in the duty entrusted to her. The applicant had done everything that should have been expected of him."¹³

- [22] *Trust Company* involved not dissimilar circumstances to *Congress Community*. President Trickett identified the issue as follows:

“There is no dispute that an error has occurred in calculating the final date to institute an appeal. The solicitors have conceded that the fault was theirs. The applicant had promptly given instructions to lodge an appeal. The issue is whether in these circumstances the applicant should suffer for the error of its solicitors.”¹⁴

- [23] In determining how that issue should be resolved the President 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.

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.”¹⁵

- [24] In *Lamington Markets* the owner’s agent had failed to lodge the appeal notice during the appeal period after having earlier attempted to file the notice at the registry during the Christmas closure period. On the final day of the appeal period, an executive assistant monitoring emails from home while on leave, had to return to the agents

¹² Ibid.

¹³ Ibid.

¹⁴ *Trust Company of Australia Limited v Department of Natural Resources and Water* [2007] QLC 45 at [10].

¹⁵ Ibid [45].

closed office to fax the appeal notice to the Land Court registry. The Court found that the agents closure arrangements were the cause of the notice not being filed within the appeal period and concluded that “*the circumstances which preceded the attempted filing of the notice (a matter of minutes outside of the appeal period) may be viewed as a “slip” by the agent as envisaged by Muir J in Congress Community*”.¹⁶

- [25] The submissions of the parties have been considered in some detail and no authority has been provided for the proposition that the principles in *Congress Community* are applicable in circumstances which do not involve some slip or oversight by an agent or a legal representative. The decisions relied upon require that there be evidence that an entrusted legal representative or agent has caused or contributed to the failure to lodge the Notice of Appeal in order to establish *reasonable excuse* as required by s 158 (2) of the LVA.
- [26] Accordingly, in the absence of some persuasive authority the contention on behalf of the owners is that “*it is clear that every possible step was taken by Savills to file the Notices of Appeal prior to the expiry of the appeal period*” does not attract the application of the so called second limb of *Congress Community* or afford any basis for the Court to find the existence of a “reasonable excuse”.
- [27] The *Loughnan* decision involved a failed lodgement via facsimile from a regional courthouse to the Land Court registry. The self-represented owner believed, albeit mistakenly that the appeal notice had been transmitted via the courthouse facsimile. The transmission failure became apparent only after the owner noticed that the matter was not listed for a preliminary conference later in the year. As noted previously, the Court did not find that a delay of 189 days was occasioned by Mr Loughnan.¹⁷ The decision is of very limited relevance to the present circumstances.
- [28] A separate contention on behalf of the applicants is that a managing director had not been able to sign the appeal authority forms until after 4:30pm on 24 July 2023 and that this would provide a basis for the Court to make a finding of reasonable excuse.
- [29] The evidence relied upon to support this contention is deposed at paragraph 9 of the affidavit of Ms Krilich¹⁸ which provides:

¹⁶ *Lamington Markets Pty Ltd as Tte v Valuer-General* [2021] QLC 41 [54].

¹⁷ *Loughnan v Valuer-General* [2020] QLC 1 at [39].

¹⁸ Ex 1, para 9.

9. At 5:35pm on 24 July 2023 I sent an email to Savills attaching a copy of the executed Attachment 1 to the Form 3 Notice of Appeal. The form was signed by Mark Power in his capacity as Managing Director and I could not get Mr Power's signature prior to this time.

[30] The general nature of the paragraph deposed by of Ms Krilich precludes any objective analysis being undertaken of the reasonableness or otherwise of the contended excuse.¹⁹ Accordingly, the Court is not able to find the on this basis that reasonable excuse has been established and the submission based on this evidence is not able to be adopted by the Court.

[31] The affidavit materials and related submissions have been considered as a whole and the Court is not able find any basis upon which to make a finding of reasonable excuse in respect of either application.

Orders

- 1. The applications in respect of LVA179-23 and LVA180-23 are dismissed.**
- 2. The Court does not have jurisdiction to hear and determine either matter.**
- 3. Any submissions seeking costs in respect of either matter must be filed and served within 14 of the publication of these reasons.**

¹⁹ *AG Russell v The Crown* (1992-1993) 14 QLCR 202.