LAND COURT OF QUEENSLAND

CITATION:	*RG Property Three Pty Ltd as Tte v Valuer-General* [2020] QLC 19
PARTIES:	**RG Property Three Pty Ltd as Tte** ABN 99 154 666 529 (appellant) v **Valuer-General** (respondent)
FILE NO:	LVA013-18
DIVISION:	General Division
PROCEEDING:	Application for costs
DELIVERED ON:	10 June 2020
DELIVERED AT:	Brisbane
HEARD ON:	29 May 2020
HEARD AT:	Brisbane
MEMBER:	PG Stilgoe OAM
ORDERS:	**1. The application for an extension of time in which to file an application for costs is granted.** **2. The application for costs is refused.** **3. Each party must bear its own costs.**
CATCHWORDS:	REAL PROPERTY – VALUATION OF LAND – OBJECTIONS AND APPEALS – QUEENSLAND – COSTS – where the appellant landowner successfully appealed the Valuer-General's valuation of a shopping centre – where the appellant sought an order for costs under s 171(2) of the *Land Valuation Act 2010* – whether costs can be awarded against the Valuer-General under s 171(2)(a) of the *Land Valuation Act 2010* and, if so, whether such an order was appropriate in the circumstances – whether the Valuer-General's introduction of new material during the hearing justified a costs order – whether the Valuer-General complied with his responsibilities as a model litigant – where the application for costs was refused

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TIME, EXTENSION AND ABRIDGMENT – where the appellant had 14 days from the publication of the primary judgment to file and serve any submissions as to costs – where the appellant filed its costs submissions along with an application for an extension of time outside the 14-day period – whether the extension should be granted – where the requested extension was short and the respondent suffered no prejudice – where the application for an extension of time was not opposed – where the extension was granted

Land Valuation Act 2010 s 171

BWP Management Limited v Valuer-General [2019] QLAC 4, cited
Chavez v Moreton Bay Regional Council [2009] QSC 179, cited
GPT RE Limited v Valuer-General (No 3) [2019] QLC 8, distinguished
Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines (No 2) [2009] QLAC 7, cited
Mudie v Gainriver Pty Ltd & Anor (No 2) [2003] 2 Qd R 271, applied
Scott v Handley (1999) 58 ALD 373, applied
Suncorp Metway Insurance Pty Ltd v Valuer-General (No 3) [2017] QLC 53, not followed
YFG Shopping Centres Pty Ltd as Tte & Anor v Valuer-General; Shayher Alliance Pty Ltd as Tte v Valuer-General; Leda Commercial Properties Pty Ltd as Tte v Valuer-General; Lipoma Pty Ltd as Tte v Valuer-General; RG Property Three Pty Ltd as Tte v Valuer-General [2020] QLC 10, cited

APPEARANCES: A Lonergan (solicitor), Colin Biggers & Paisley Lawyers, for the applicant
D O'Brien QC, with J Hastie (instructed by Corrs Chambers Westgarth) for the respondent

[1] The appeal by RG Property Three Pty Ltd against the Valuer-General's valuation of its Park Ridge property as at 1 October 2015 was successful.[1] RG now applies for an order that the Valuer-General pay its costs of the appeal.

[2] Section 171(1) of the *Land Valuation Act 2010* ("LVA") sets out the default position – that each party to a valuation appeal must bear the party's own costs of

[1] *YFG Shopping Centres Pty Ltd as Tte & Anor v Valuer-General; Shayher Alliance Pty Ltd as Tte v Valuer-General; Leda Commercial Properties Pty Ltd as Tte v Valuer-General; Lipoma Pty Ltd as Tte v Valuer-General; RG Property Three Pty Ltd as Tte v Valuer-General* [2020] QLC 10.

the appeal. However, s 171(2) gives the Court power to make a costs order if any of six circumstances apply. RG contends that three of those circumstances apply:

1. All or part of the appeal was frivolous or vexatious.[2]
2. It incurred costs because the Valuer-General introduced, or sought to introduce, new material.[3]
3. The Valuer-General did not properly discharge its responsibilities for the appeal.[4]

[3] RG's application for costs was filed late, so it needs an extension of time. The Valuer-General does not oppose the extension of time being granted.

Should I grant the extension of time?

[4] The relevant matters to consider in an application for an extension of time include the conduct of the defaulting party, the circumstances of non-compliance and any prejudice that the complying party may suffer as a result.[5]

[5] RG's reasons for not filing within time are not compelling. That the order requiring costs submissions within 14 days was made in my judgment and was not a consent order ("for which the Appellant could be said to be responsible")[6] does not detract from the fact that it was an order of the Court. Compliance with an order should not depend on whether a party was "responsible" for it.

[6] Similarly, the workload of an instructing solicitor is not a compelling argument for non-compliance.

[7] The extension of time required is short and the Valuer-General has not suffered any prejudice because of the delay. For that reason, I will grant the extension of time requested.

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2 Section 171(2)(a) LVA.
3 Ibid s 171(2)(e).
4 Ibid s 171(2)(f).
5 *Chavez v Moreton Bay Regional Council* [2009] QSC 179 [7].
6 "Submissions of the Appellant on Extending Time and Costs", filed by the appellant on 24 April 2020 [10].

All or part of the appeal was frivolous or vexatious

[8] Subsections 171(2)(b) to (f) clearly identify "a party" whose conduct should be scrutinised when the Court is considering whether to exercise the discretion to make a costs order. By contrast, s 171(2)(a) refers to an **appeal** or part of an **appeal** (my emphasis). There must be some reason for the difference in the drafting of s 171(2)(a) because, if the legislature intended that either party to an appeal could be frivolous or vexatious in a way that called up the discretion to order costs, the subsection could have followed the same drafting pattern as sub-ss 171(2)(b) to (f).

[9] RG referred me to the decision in *GPT RE Limited v Valuer-General (No 3)*[7] as an example of the Court exercising its discretion to order costs against the Valuer-General. Whether or not s 171(2)(a) could apply to the conduct of the Valuer-General was not argued before the Member. The case involved a particular set of circumstances which are not replicated here and which the Member found also satisfied the elements of s 171(2)(f). It is not authority for the proposition that s 171(2)(a) is enlivened when, or if, the conduct of the Valuer-General falls short.

[10] The Land Appeal Court in *Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines (No 2)*[8] rejected a submission that the Valuer-General's conduct had been frivolous or vexatious. Although that case was decided under the *Valuation of Land Act 1944*, not the present LVA, the provisions are similar and the comments apposite. Again, it appears as if the parties accepted that s 171(2)(a) applied to the Valuer-General without any serious examination of the wording of the subsection.

[11] The Court also had occasion to consider whether the Valuer-General's conduct was vexatious in *Suncorp Metway Insurance Pty Ltd (No 3) v Valuer-General*.[9] The appellant submitted, and the Member accepted,[10] that s 171 will apply equally to both parties. With the greatest respect to the Member, I am not persuaded that this is a correct interpretation of the section.

[12] The difference in the way s 171(2)(a) is drafted has a logical basis. It is easily conceivable that a landowner might start an appeal against valuation that is

7 [2019] QLC 8.
8 [2009] QLAC 7 ("*Kent Street*").
9 [2017] QLC 53.
10 Ibid [14].

frivolous or vexatious, or that an appellant might conduct the appeal in a way that puts the Valuer-General to unnecessary expense in responding to part of the appeal. The Valuer-General, however, is in a different position. He has no option but to engage in the appeal process as the respondent. I cannot conceive how the Valuer-General's actions can make an appeal, or part of it, frivolous or vexatious.

[13] Section 171(2)(a) does not give me a discretion to make a costs order if the Valuer-General's conduct was frivolous or vexatious. That power exists only if the appellant's conduct was frivolous or vexatious.

[14] If I am wrong about the interpretation of s 171(2)(a), I should also make some comments about whether, in fact, I consider the Valuer-General's conduct was frivolous or vexatious.

[15] The parties both referred me to the decision of the Court of Appeal in *Mudie v Gainriver Pty Ltd (No 2)*[11] for guidance as to the meaning of "frivolous and vexatious". McMurdo P and Atkinson J made the following remarks:[12]

> "Unquestionably, something much more than lack of success needs to be shown before a party's proceedings are frivolous or vexatious. Although in a different context, some assistance can be gained from the discussion of the meaning of these words in *Oceanic Sun Line Special Shipping Company Inc v Fay* where Deane J states that "oppressive" means seriously and unfairly burdensome, prejudicial or damaging and "vexatious" means productive of serious and unjustified trouble and harassment, meanings apparently approved by Mason CJ, Deane, Dawson and Gaudron JJ in *Voth v Manildra Flour Mills Pty Ltd*. Those meanings are apposite here."

[16] I accept that this passage gives guidance as to the test I should apply.

[17] RG points to three specific reasons why I should find that the Valuer-General was frivolous and vexatious:

1. The Valuer-General's valuer, Mr Weir, applied the *Spencer* test in assessing comparable sales when there was, or ought to have been, no doubt that a comparable sale should not be assessed in this way.
2. Mr Weir impermissibly used the trading performance of the existing improved structures to assess valuation.
3. The Valuer-General failed to concede that the valuation of the subject property was incorrect given that a deduction for site works ought to have been made in circumstances where both valuers agreed on the value of the site works.

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11 [2003] 2 Qd R 271.
12 Ibid [36].

[18] None of these matters, in my view, is so serious as to warrant the label "frivolous or vexatious".

[19] Although *BWP Management Ltd v Valuer-General*[13] had clarified the interaction between the *Spencer* test and the assessment of comparable sales, the transcript of this hearing demonstrates that the question of whether that task should be approached subjectively (i.e. by reference to the purchaser's actual knowledge) or objectively (i.e. by reference to industry standards) was still open.[14] Therefore, Mr Weir's decision to adopt the objective approach was open and could not be viewed as unreasonable.

[20] RG submitted that the Valuer-General had adopted Mr Weir's approach in his submissions[15] and that this, somehow, made the Valuer-General complicit in Mr Weir's reasoning. That submission is simply unsustainable. Mr Weir was an independent expert. The Valuer-General had no ability to influence his thoughts or to direct him in a particular way. To the extent that the Valuer-General adopted Mr Weir's reasoning, it was a small part in an extensive case. I do not accept that the Valuer-General acted in any way that can be considered frivolous or vexatious in adopting Mr Weir's analysis.

[21] I have a similar view in relation to Mr Weir's use of the trading figures. The fact that I disagreed with Mr Weir's approach should not be elevated to something that was "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustifiable trouble and harassment".

[22] In his costs submissions, the Valuer-General has taken issue with my finding that there was an error in the valuation through the failure to deduct site costs. I don't need to deal with that submission because it was not a reason for my decision to favour Mr Ladewig's evidence in this limited case. The sole reason that RG prevailed was, as acknowledged, Mr Weir's approach to population growth. As I pointed out in the decision, I also had difficulty with Mr Ladewig's approach.

[23] Further, as I pointed out in the decision, the failure to deduct site costs was RG's failure. I agree with the Valuer-General that RG should not be able to rely on its

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13 [2019] QLAC 4.
14 T 4-4, lines 39 to 41; T 4-30, lines 34 to 43.
15 "Submissions of the Appellant on Extending Time and Costs", filed by the appellant on 24 April 2020 [27], [37].

own failure to elevate a "win" to an assertion that the Valuer-General conducted his case in a way that was frivolous or vexatious.

[24] I also draw guidance from the comments of the Land Appeal Court in *Kent Street*,[16] a shopping centre case in which the Valuer-General contended for six different valuations at various times throughout the case.[17] Although the Court said that "it was not easy to identify with certainty either the approach and methodology or the figure contended for by the respondent",[18] the Court acknowledged that shopping centre valuations are difficult cases, and it was not persuaded that the Valuer-General's conduct had been frivolous or vexatious simply because its position on valuation changed throughout the case. In comparison to *Kent Street*, the Valuer-General's conduct of this case was exemplary.

[25] It is a very high bar to establish that any party's conduct has been frivolous or vexatious. RG has not satisfied me that the Valuer-General reached that bar here.

The introduction of new material

[26] The Valuer-General concedes that it introduced new material at the start of the hearing. Senior counsel for RG took that new material in his stride, as was appropriate given its limited nature.

[27] That material constituted a very small part of one appeal in a hearing of five appeals. Even if those costs could be identified and isolated from the bulk of the costs incurred over the course of the hearing, it is a matter of little consequence and I am not inclined to exercise my discretion in favour of RG.

The Valuer-General did not properly discharge his responsibilities for the appeal

[28] RG submits that the Valuer-General did not comply with his responsibilities as a model litigant. In summary, the model litigant principles are:[19]

> "As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for example, spoken positively of a public body's obligation of "conscientious compliance with the procedures designed to minimise cost and delay": *Kenny's* case, above, at 273; and of assisting

16 [2009] QLAC 7
17 Ibid [14].
18 Ibid.
19 *Scott v Handley* (1999) 58 ALD 373 [45].

> "the court to arrive at the proper and just result": *P & C Cantarella Pty Ltd v Egg Marketing Board*, above, at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure: *Yong's* case, above, at FCR 166; of not unfairly impairing the other party's capacity to defend itself: *Saxon's* case, above, at 268; and of not taking advantage of its own default: *SCI Operations Pty Ltd*, above, at FCR 368."

[29] It does RG no credit to frame its submissions as a breach of the Valuer-General's duty to act as the model litigant. To suggest that the Valuer-General breached his obligations simply because I found against him on three points stretches credibility. Further, as I thought I made clear in the appeal decision, two of those points – the *Spencer* test and the use of trading data – had no impact on my decision.

[30] The Valuer-General was entitled to rely on the opinion of his independent valuer in responding to the appeal. There is nothing in the Valuer-General's conduct of this case to suggest that he did anything but follow a procedure designed to minimise cost and delay. There is no suggestion that he took purely technical points of practice and procedure. There is no suggestion that he unfairly impaired RG's capacity to conduct its case. There is no suggestion that the Valuer-General took advantage of his own default. Apart from the late provision of some limited material, the Valuer-General was not in default.

[31] This is not an exceptional case. RG should not seek to elevate its success in the appeal into some form of vindication of its actions for which the Valuer-General should pay.

[32] Each party should bear its own costs of the appeal.

Orders:

1. **The application for an extension of time in which to file an application for costs is granted.**

2. **The application for costs is refused.**

3. **Each party must bear its own costs.**

PG STILGOE OAM
MEMBER OF THE LAND COURT