SUPREME COURT OF QUEENSLAND

CITATION:	*Maylodge Pty Ltd v Com. Of State Revenue* [2004] QSC 102
PARTIES:	**MAYLODGE PTY LTD ACN 010596273** **BRIAN LESLIE BOEHME** **MARY ANNE BOEHME** **MARIA JO-ANNE PURA** (applicants) **v** **THE COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO:	SC No 8568 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2004
JUDGE:	Mackenzie J
ORDER:	**Appeal dismissed with costs to be assessed.**
CATCHWORDS:	TAXES AND DUTIES – INCOME TAX AND RELATED LEGISLATION – OBJECTIONS AND APPEALS – APPEAL TO COURT – RIGHT OF APPEAL – OTHER MATTERS – duty on transfer of real property – valuation evidence – sufficiency *Duties Act* (Qld) 2001, ss 118, 213, 505 *Taxation Administration Act* (Qld) 2001, ss 70, 73
COUNSEL:	K Lee (solicitor) for the applicant F Redmond for the respondent
SOLICITORS:	Lee and Associates for the applicant Crown Law for the respondent

[1] **MACKENZIE J:** The originating application which forms the basis of these proceedings was filed on 26 September 2003. It sought, firstly, that the originating application be deemed to be a notice of appeal pursuant to s 70 of the *Taxation Administration Act* 2001 against the respondent Commissioner's decision of 25 July 2003 on the applicant's objection of 9 April 2003 to a reassessment of duty made on 13 February 2003. The ground of appeal was said to be that the applicants were

dissatisfied with that decision. Secondly, it sought that the reassessment be set aside.

[2] The essential facts of the matter are that real property at Burleigh Heads had been purchased in 1993 for $2.025m. At the time it was earning income from tenants. Over time it has ceased to be tenanted. It vested in the first applicant in its capacity of trustee of the Brian Boehme Second Family Trust. By a transfer executed on 27 June 2002, the real property was transferred to the second, third and fourth applicants as joint tenants. The consideration was expressed as $1.3m. Evidence in the form of an annual valuation notice from the Department of Natural Resources showing the date of valuation of 1 October 2000 and the effective date 30 June 2001 was sent to the respondent in support of that level of consideration.

[3] As part of the process of assessment of duty the respondent reminded the applicants of the 1993 purchase price of $2.025m and requested independent evidence of valuation of the property as at 27 June 2002. When this was not provided the respondent advised that if such evidence was not received, he might appoint a valuer to conduct a valuation at the applicants' cost pursuant to s 505 of the *Duties Act* 2001. When repeated requests were made unsuccessfully to the applicants, the respondent appointed the State Valuation Service to perform the valuation. A valuation of $1.7m was determined and, having been accepted by the respondent, formed the basis of the assessment objected to.

[4] The assessment issued on 9 January 2003. The letter of objection dated 9 April 2003 was about one month out of time but an extension was granted by the respondent so that it was treated as a valid objection. The response on behalf of the respondent identified four issues raised in that letter and an earlier one dated 23 October 2002. They were, in summary, as follows:

1. That imposition of duty on the transfer from the first applicant to the second, third and fourth applicants had resulted in duty being paid twice which was "unfair and immoral".
2. Advice had been given by a Government Office that beneficiaries of a trust were recognised as owners of the property. It was asserted that the beneficiaries had always been recognised as owners of the real property, as recognised in the relevant trust deed.
3. The unimproved capital value of the land was $1.3m.
4. The applicants did not accept liability for the cost of the "defective valuation" obtained by the respondent.

[5] It may be assumed with a degree of confidence that a proportion of objections will be prepared without legal assistance. Analysis of the document submitted to discern what the grounds of complaint are without insisting on precise formulation by the objector presumably results in a user-friendly system. However, where a right of appeal is provided for to this Court, and the appeal is to be limited to the grounds of objection, subject to s 73(1)(b) of the *Taxation Administration Act*, the need to ensure that the grounds are clearly understood is obvious. No complaint was made in this case about the distillation of the grounds within the Office of State Revenue.

[6] The provision in s 73(1)(a) which is concerned with cases where evidence material to the objection was not before the Commissioner when the original decision was made seems to provide no disincentive in a case like the present to the objector changing the nature of his attack on the decision by the Commissioner if the original

one is unsuccessful. The present case is a striking example. The objector did not take advantage of the opportunity to provide a valuation by a properly qualified person, despite that option being almost urged upon him. He was apparently content to rely on a misconceived argument based on a valuation made some time before the date of the relevant transfer on a different basis and for different purposes. It was only after his objection was dismissed that he sought to attack the basis of the valuation relied on by the respondent.

[7] The evidence was not "fresh" evidence, which is usually a minimum requirement for admission by a court in legal proceedings. Advice about potential developments had been sought at about the time of the transfer. However, a broad literal reading of s 73(1)(a) seems to envisage that where such evidence is produced after the original decision has been made, a further administrative review can be made upon an order being made by the court that a respondent reconsider the objection on the material not before him at the time of the original decision. In this case, an order was made by consent. Presumably, if such reconsideration results in additional grounds of appeal outside the original grounds of objection, the court must decide whether to allow such grounds (s 70(5)).

[8] It is easy enough to understand why there should be some mechanism for allowing a second chance before the respondent if, through no fault of an objector, relevant material was not taken into account. However, where the objector seeks to mount a different, or differently focused, attack on the original decision after the first has failed, the reason for allowing a second chance is less obvious. In this case, it is unnecessary to consider what limits, if any, there are, since the limited nature of the secondary attack results in its failure in any event. Nor is it necessary to define precisely the nature of the appeal, except to note that the respondent's submission that it is limited to administrative law grounds is at odds with the assertion in the explanatory notes to the Act which describes it as a "full merits review".

[9] With respect to grounds 1 and 2, the effects of ss 118 and 123 of the *Duties Act* were explained, together with the conclusion that neither section provided exemption from transfer duty. The legislation required the assessment to be issued. No concepts of fairness or morality were included in the legislation. When property was held in trust for beneficiaries by the trustee, the trustee had legal title. Endorsement of the fact that the trustee held land in that capacity for beneficiaries did not amount to recognition that the beneficiaries owned the land. There were no submissions that challenged this view of the law in the proceedings before me.

[10] With respect to ground 3, it was pointed out in the letter rejecting the objection that the valuation of $1.3m was the unimproved value of the land whereas $1.7m represented the unencumbered value of the land and improvements at the date of transfer. I will return to this issue later. With respect to ground 4, it was not accepted that the valuation was defective. It was pointed out that liability for the costs of the valuation arose from s 505(3) of the *Duties Act* which was utilised only after the applicants had refused requests to provide a valuation, notwithstanding having been advised of the possibility that the respondent might employ a valuer in that event.

[11] Rejection of the objection led to the filing of the originating application on 26 September 2003. After a couple of adjournments, the last of which involved a consent order that the respondent reconsider the objection having regard to

affidavits filed on behalf of the applicant and any other evidence obtained by the respondent, the State Valuation Service considered the additional material. There were affidavits from Mr Mitchell, a Fellow of the Australian Institute of Building Surveyors and a member of the Building Designer Association of Queensland Inc, and from Mr Boehme. Mr Mitchell's affidavit was concerned with the nature of the development that might be allowed on the site. It was common ground that the zoning was a category of resort residential with a height limit of 7 storeys as of right. The highest and best use was for redevelopment as a high rise tower. It was, however pointed out by Mr Mitchell that the design requirements imposed by the Gold Coast City Council would permit fewer units than had been referred to by the respondent's valuer.

[12] It is true that, when discussing the town planning regime applicable to the site, there was a mathematical calculation by the respondent's valuer of the number of units that would meet the density requirements without regard to other limitations which would reduce the number that could actually be built. The thrust of the appellants' argument seems to be that adopting $21,000 per bedroom as a basis for valuation led to the result that the value was less than $1.3m. It also seemed that an argument was being advanced, in oral submissions, that the land should have been valued as unimproved land because the improvements were not currently being used to generate income. The last-mentioned argument is plainly unsustainable in principle.

[13] In fact, the valuation treated the improvements as being "very close to economic obsolescence", so that the valuation proceeded on the basis that the value of the property as a commercial building was less than its value as a development site. However, the suggestion that this invalidates the valuation relied on by the respondent seems to me to miss the point that the direct comparison method of comparing the land with other land sold recently for residential unit development within a comparable size range was the primary method adopted by the valuer. This is a well recognised method of valuation.

[14] The valuer's methodology in this regard was simply to treat each sale used for comparison purposes as a redevelopment site. Where improvements existed, the cost of demolition was added to the purchase price and sum per square metre calculated. The relevant site was treated as excellent, consistently with the description in the Draft Planning Scheme of the area as "a highly desirable location". The value assigned to it by this method fell within the range established by the other comparable sales.

[15] While issue might be taken with the methodology of assuming that, of factors affecting the kind of development that might be built, only density provisions are relevant, the method appears to have been applied to each comparative sale. Whether, if other factors had been taken into account and a divisor representing the practical maximum number of bedrooms that might be built used in each case, precisely the same hierarchy of values per bedroom would have been reached is speculative; but, assuming in each case that fewer might be built than relied on by the valuer, the value per bedroom would in each case be higher. This demonstrates the fallacy in multiplying the practically achievable number of bedrooms by the value of each bedroom reached by what the appellants claim is a wrong method in order to reach a value of approximately what they rely on as the true value. In my view, assuming it was a wrong method, it was secondary to the rate per square metre basis. There was no specific challenge to the rate per square metre derived

upon analysis of the other sales relied on, nor to their comparability. There was no request by the appellants to cross-examine the respondent's valuer on relevant issues.

[16] The onus of proof lies on the appellant. Having regard to the limited scope of the challenge, the onus has not been discharged. The appeal is dismissed with costs to be assessed.