

LAND APPEAL COURT OF QUEENSLAND

CITATION: *Boyle & Anor v Townsville City Council* [2003] QLAC 27

PARTIES: **Mercia E Boyle and the Estate of Ada Irene Power, deceased**
Appellant
v.
Townsville City Council
Respondent

FILE NO: LAC2003/0009

DIVISION: Land Appeal Court of Queensland

PROCEEDING: Application for a declaration that an appeal has been properly instituted

ORIGINATING COURT: Land Court of Queensland

DELIVERED ON: 7 May 2003

DELIVERED AT: Townsville

HEARD: By written submissions

JUDGE: Justice Cullinane

MEMBERS: Mr JJ Trickett
Mr RP Scott

ORDER: **The Court declares that as no notice of appeal was served within the time provided for in Section 65 of the *Land Court Act*, an appeal does not lie.**

CATCHWORDS: Jurisdiction – S.65 *Land Court Act 2000* – Meaning of "decision is given to the party" – Computation of time – Late lodgment of appeal

SOLICITORS: Wilson Ryan Grose for the appellant
Suthers Taylor for the respondent

[1] The Court has directed that there be determined as a preliminary issue whether an appeal has been properly instituted pursuant to the provisions of

s.65 of the Land Court Act 2000 as amended. The parties have made submissions in writing on this issue.

- [2] The proceedings before the Land Court took place between 9 July 2002 and 12 July 2002 inclusive at Townsville.
- [3] Judgment was pronounced in the Land Court at Brisbane on 19 December 2002.
- [4] On that date, the Respondent was represented but the Appellant was not represented.
- [5] It appears that the solicitor for the appellant had been contacted on either the day before or two days before judgment was pronounced by the Deputy Registrar of the Land Court and was told that judgment was to be handed down.
- [6] The solicitor inquired of the Deputy Registrar whether it was necessary for the Appellant to be present and was told that it was not and that the decision would be sent by post to the solicitors for the Appellant.
- [7] It seems that the judgment (the reasons and the decision) was posted on 19 December 2002 and received on the 23 December 2002.
- [8] A document in the form of a Notice of Appeal to the Land Appeal Court was lodged with the Land Court on 31 January 2003 and was on the same date provided to the solicitors for the Respondent.
- [9] Section 65 of the Land Court Act provides as follows:
- "(1) A party intending to appeal against a decision of the Land Court must, within 42 days after the court's decision is given to the party, serve notice of the appeal against the decision on –
- (a) all other parties to the proceeding on which the decision was made; and
- (b) the registrar of the Land Appeal Court."
- [10] The preliminary issue which arises involves the proper construction of s.65(1) and in particular what is meant by the words "within 42 days after the Court's decision is given to the party."
- [11] For the appellant it is contended that the words "after the Court's decision is given to the party" should be construed to mean after the time when the judgment which was posted to the solicitors for the Appellant arrived in the ordinary course of the post. For the Respondent it is submitted that the

words mean when the decision is delivered or handed down, in this case, 19 December 2002. If the latter view is correct the appeal is out of time.

[12] As a creature of statute the Land Appeal Court can only entertain an appeal where the jurisdiction of the court has been properly invoked, that is where the conditions precedent provided for in the statute conferring such a jurisdiction have been complied with. So much has been emphasised in cases such as *Union Fidelity Trustee Company of Australia Limited v The Co-ordinator General* (1988) 12 QLCR 153 and *Sargent v Powerlink & SEQEB* (1997-1998) 18 QLCR 73.

[13] There is undoubtedly a significant difference in the language used in s.44(11)(a) of the Land Act 1962 as amended (the predecessor to s.65) and that used in s.65.

[14] Section 44(11)(a) provided as follows:

"Appeals to Land Appeal Court. A party who desires to appeal to the Land Appeal Court from a decision of the Land Court shall serve notice of appeal on all other parties directly affected by the decision not later than 42 days after the pronouncement of the decision or, where an application for a rehearing is made pursuant to section 43 and refused, not later than 42 days after the pronouncement of the decision or not later than 14 days after the refusal of the Land Court to rehear the matter, whichever time is the later to expire."

[15] That subsection also conferred upon the Land Appeal Court a power to extend the time within which to appeal in certain circumstances. No such power, it is common ground, is conferred by the Land Court Act of 2000.

[16] Not surprisingly the Appellant placed some emphasis upon the difference in the language of s.44(11) and s.65. It was contended that because of this change in the language and because of the provisions of the Acts Interpretation Act the Court ought to conclude that the decision was given to the Appellant only when, in the ordinary course of the post, a copy of the judgment and the reasons was received by the Appellant.

[17] Section 39(1) of the Acts Interpretation Act provides as follows:

"If an Act requires or permits a document to be served on a person, the document may be served –

- (a) on an individual –
 - (i) by delivering it to the person personally; or

- (ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document;
or
- (b) on a body corporate – by leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate."

[18] Subsection 2 provides as follows:

"Subsection (1) applies whether the expression 'deliver', 'give', 'notify', 'send' or 'service' or another expression is used."

[19] Subsection 39A(1) provides:

"If an Act requires or permits a document to be served by post, service -

- (a) may be effected by properly addressing, prepaying and posting the document as a letter; and
- (b) is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved."

[20] Section 39 is of course predicated upon the basis that an Act requires or permits a document to be served on a person.

[21] Part 8 to the Land Court Rules contains provisions in relation to orders (the decision is an order – see the dictionary contained in the schedule to the rules) and reasons for an order. In this case the order and reasons were delivered at the same time.

[22] These rules provide respectively as follows:

"Order

41.(1) An order of the court is made by –

- (a) the order being pronounced in court by the member or judicial registrar making the order; or
- (b) the order being set out in a document, with or without reasons, and signed by the person making the order.

(2) An order takes effect on the day on which it is made.

(3) However, the court may order that an order takes effect from an earlier or later date.

Reasons for order

42.(1) The court's reasons for making an order may, if in written form, be published –

- (a) by the reasons being delivered in court to the registrar or a deputy registrar to give a copy to each party; or
- (b) by a copy of the reasons, signed by the member or judicial registrar making the order, being given to the registrar or a deputy registrar to –
 - (i) deliver in court; and
 - (ii) give or send a copy to each party; or
- (c) for a proceeding in which a decision is made without an oral hearing – by a copy of the reasons, signed by the member or judicial registrar making the order, being sent to each party.

(2) The court's reasons for a proposed order may be published before the order is made."

[23] As will be seen an order takes effect on the day on which it is made.

[24] The Appellant has not suggested that any other provision is relevant here.

[25] As will also be seen, Rule 42(1)(b) provides for circumstances in which a Registrar or Deputy Registrar who publishes the reasons of the Court may give or send a copy of such reasons to each party.

[26] However this is not the rule which is applicable here. The Court delivered its reasons under Rule 42(1)(a) to the Deputy Registrar to give a copy to each party. It would seem that as a matter of courtesy the Deputy Registrar posted a copy to the Appellant who was not present.

[27] Thus the statutory provision upon which s.39 of the Acts Interpretation Act is predicated does not exist here. Furthermore s.39 is in our view concerned with the service of documents. What is under consideration here is something different namely the making of an order by the Court and the publication of the Court's reasons for such an order.

[28] Whilst this is probably sufficient to dispose of the matter the Respondent as has been mentioned, primarily relied upon the language of the section itself. It is to be noted that similar language to that contained in s.65 is to be found in s.75 of the Land Court Act which provides for an appeal to the Court of

Appeal from the Land Appeal Court and also in s.4.1.5(7) of the Integrated Planning Act 1997.

- [29] Our attention has been drawn to a judgment of the Court of Appeal in *Browning & Anor v Cairns City Council & Anor* (2002) QCA 161 where in the judgment of Williams JA (with whom the other members of the Court agreed) it was said (paragraph 8);

"Section 4.1.57 of the Integrated Planning Act requires a party seeking leave of the Court of Appeal to appeal against a decision of the Planning and Environment Court to apply for leave within 30 business days after the court's decision; if leave is granted then the Notice of Appeal must be filed within 30 business days thereafter."

- [30] No issue of the kind however that arises here was raised in that case. We are inclined to think that this passage in William JA's judgment as well as the passage in the explanatory notes to the Land Court Bill 1999 on which reliance was placed can probably be regarded as neutral on the subject raised here.

- [31] In their ordinary and natural sense, the words "after the court's decision is given to the party" are not, in our view, apt to refer to the time at which a decision is received, where a party receives the decision and reasons somewhat after their delivery and publication in the circumstances and for the reasons already described.

- [32] We think that the language used is intended to convey in somewhat less formal words than were used in the earlier legislation the same thing. That is, we think the legislature has intended to refer to the delivery or handing down of the decision itself.

- [33] The order took effect on the day on which it was made and the reasons were published upon their delivery in Court to the Registrar.

- [34] For the above reasons then it seems to us that the Notice of Appeal is out of time and this being so the appropriate finding to make (see *Union Fidelity Trustee Company of Australia Limited v The Co-ordinator General* (1988) 12 QLCR 153 and *Sargent v Powerlink & SEQEB* (1997-1998) 18 QLCR 73 (*supra*) is that the appeal does not lie.

Order

[35] The Court declares that as no notice of appeal was served within the time provided for in Section 65 of the Land Court Act, an appeal does not lie.

**CULLINANE J
JUSTICE OF THE SUPREME COURT**

**JJ TRICKETT
PRESIDENT OF THE LAND COURT**

**RP SCOTT
MEMBER OF THE LAND COURT**