

LAND COURT

BRISBANE.

9th August, 1991.

Re: Appeal under Section 4.26 of the Water Resources Act 1989 -
A90-85

D.R.V. Cox

v.

The Commissioner of Water Resources

APPLICATION FOR ORDER FOR DISCOVERY

DECISION

This appeal is by David Vivian Richard Cox against the decision of the Commissioner of Water Resources to refuse an application for bore licenses on land described as Lot 6 on RP 33082 in the Parish of Northcote, which property is in the Ayr district of North Queensland. The matter was set down for hearing in Ayr on 22nd July, 1991 and there is an application by the appellant Cox on 17th July, 1991 for an Order for Discovery of certain documents relevant to the matter and claimed to be in the possession of the respondent Commissioner. This application came before the Court in Brisbane on 22nd July, 1991. It is convenient to say here that the respondent Commissioner was not prepared to give discovery in the proceedings.

Counsel for the appellant argued at some length that the Court should grant the application, notwithstanding the decision of the learned President of this Court in re: Appeal under Section 12 of the Water Act 1926-1987 (A89-42) - HHD Stevenson v. The Commissioner of Water Resources (decision dated 16.2.90 and not yet reported) wherein a similar application

was refused.

It is submitted by the appellant, based on the text of the learned President's decision, that he may not have had the benefit of a comprehensively developed argument since the only authority cited by him was the decision of the Land Appeal Court in re: Mount Abundance (Freehold) Claim for Compensation (1926/27) 11 C.L.L.R. 11 where that Court said, inter alia, "We do not think that the Act, or the rules of the Court or the Land Appeal Court, provide any machinery for ordering discovery of documents. We think, however, that under Section 32 of the Land Act we can order the attendance of any witness having the custody of documents we think should be produced."

Now it is suggested that there is other authority to which it appeared the learned President was not referred, and also statutory change of which the Court might not have been informed. Now as to legislation change, it is submitted that the decision of the Land Appeal Court in re: Mount Abundance (freehold) Claim for Compensation (supra) was made at a time when the relevant section of the Land Act of 1910 was Section 32. In 1937 and under the provisions of Section 9 of the Lands Acts and Other Acts Amendment Act (1 Geo VI No. 18) subsection (2)(a) was inserted in the principal Act and that subsection reads in part, that the Court, in the exercise of any jurisdiction, duty, power, or function conferred or imposed upon it shall be governed in its procedure and in its decisions by equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms or the practice of other Courts. This provision is contained within the Land Act of today. It is contended in argument that this amendment was inserted in the Land Act for a particular plain purpose and that the language of procedure was used in importing a jurisdiction of equity and good conscience, and that it is a statutory prescription which was not available when the Land Appeal Court dealt with the Mount Abundance matter. It is further argued by Counsel for the appellant that the decision of the Land Appeal Court does not stand for the proposition that there was no jurisdiction to order discovery. Counsel further referred the Court to what he said is the time honoured work of Bray - Law of Discovery & Digest, and cited passages from that text which I can see little benefit in repeating here, save to say that it

is suggested that there can be no doubt that the Court was given the traditional powers of equity, indicative of the need for it to be somewhat inquisitorial and somewhat flexible even beyond the ordinary equitable jurisdiction.

Reference was made of the Judgment of the Full Court of New South Wales in re: Browne v. Commissioner for Railways (1935) 36 SRNSW 21 where the following passage from the Judgment of the then Chief Justice was quoted. "So far as Courts are concerned it has been held that if jurisdiction is conferred upon a court it may and should exercise that jurisdiction and if no procedural machinery has been provided it is for the Court to provide such machinery as best it can".

It is contended on behalf of the respondent Commissioner of Water Resources that the Court has no jurisdiction to entertain the application and any resultant order would be a nullity. It is his Counsel's submission that this Court is bound by the authority of the Land Appeal Court in the Mount Abundance case and that I should have regard to the decision of the learned President in the Stevenson case and also to the decision of my learned colleague Mr White as a result of the subsequent hearing of the Stevenson case which was handed down on 6th April, 1990. Mr White indicated that he accepted that the learned President was correct in refusing discovery and agreed with his reasons. The Commission contends that the learned President was correct in taking the view that the question of whether the Court had the power to order discovery was a question that went to the Court's jurisdiction rather than a mere procedure along the way in the exercise of what otherwise was its jurisdiction to hear an appeal.

Notwithstanding the well presented and reasoned argument by Counsel for the appellant, which directed me to many authorities as well as Bray and Browne v. Commissioner for Railways (supra) I too cannot see that this Court is seized of jurisdiction to grant an order on application for discovery. That the Court is a creature of statute is not disputed and the Court can only make directions for procedure in respect of things that it has the power to do. Nowhere in the rules of the Court is found the power to order discovery nor is such power provided in the relevant provisions of the Land Act 1962 - 1990. It seems that the Court can

regulate its procedures - vide Rule 28 of the Land Court - but it has to have the power to make directions in relation to matters before such procedural directions are made.

I can see no course open to the appellant other than to make application for subpoenas for the required documents in accordance with Rule 9 of the Rules of the Land Court.

Accordingly, I find that I have no power to order discovery and refuse the application.

(C.H. Carter)

Member of the Land Court.