

LAND COURT

BRISBANE.

17th July, 1992.

**Re: In the matter of appeals under Section 9.48
of the Water Resources Act 1989 against
assessments by the Foresthome Drainage Board.
(A91-88 and A91-90)**

Cesare Reno Lancini

v.

Foresthome Drainage Board

Brooklands Cordelia Pty Ltd

v.

Foresthome Drainage Board

(Hearing at Ingham)

DECISION

These are appeals under Section 9.48 of the Water Resources Act 1989 by Cesare Reno Lancini and Brooklands Cordelia Pty Ltd (Brooklands) against the assessments of the Foresthome Drainage Board for rates payable to it for the year ending 30th June, 1992. These assessments issued on 7th October, 1991.

In the case of Mr C.R. Lancini, the rate assessment is in respect of 77.71 hectares, being the land described as Portion 42, Sub 2 Portion 46, Resub 1 Sub 1 Portion 129, Resub 2 Sub 1 Portion 46, Part Sub 2 Portion 46, Part Resub 1 Sub 1 Portion 129, Parish of Cordelia (Catherina Creek Section). This land has been categorised by the Board and rated as follows:-

56.83 hectares Category A, rated at \$10.68 per hectare

2.69 hectares Category B, rated at \$2.67 per hectare

18.19 hectares not categorised or rated.

Gross rates total \$614.13, from which is deducted discount of \$92.12, making total net rates \$522.01.

In the case of Brooklands, the rate assessment is in respect of 39.981 hectares,

being the land described as Sub 2 Resub 2 Sub 2 Portion 57, Resub 2 Sub 1 Portion 129, Parish of Cordelia (now known as Lot 2 on Plan CWL82, Lot 1 on RP 703740 and Lot 2 on RP 703758, Parish of Cordelia) and Lot 144 on Plan CWL3075, Parish of Marathon. This land has been categorised by the Board and rated as follows:-
28.781 hectares Category A, rated at \$10.68 per hectare
11.20 hectares Category B, rated at \$2.67 per hectare

Gross rates total \$337.29, from which is deducted discount of \$50.59, making total net rates \$286.70.

The assessment notices show that neither property has had any land included in Category C, the rate per hectare of which is shown as \$2.67 per hectare, the same as Category B.

These appeals relate to two properties which are adjacent to each other and which have common grounds of appeal. With the agreement of the parties the matters were heard together.

The Issues Involved

The grounds of appeal contained in the appeal lodged by Mr Lancini state:-
"My property does not derive any benefit from the relevant drain. The relevant drain is detrimental to my property. It accelerates the flow of local rain water from the upstream catchment onto my property from which there is insufficient outlet. It has converted my farm into a "Sump" area for the drain, causing severe crop losses. Accordingly, I object to the payment of any levies whatsoever."

The appeal lodged by Brooklands contains similar grounds of appeal.

The appellants gave evidence to the effect that the Foresthome Drainage Board, in undertaking its operations of discharging water through its drainage system, has caused areas of both farms to suffer from ponding after heavy rainfall, which resulted in the loss of areas of sugar cane. They claimed that the farms receive no benefit from the activities of the Board, but suffer detriment, therefore the Board should not levy rates on either of the farms.

The case for the Foresthome Drainage Board is that the Board has properly

made and levied the rates according to the basis of rating which has been authorised by By-law No. 1. The grounds of appeal of both appellants refer to "benefit", but the Board submits that "benefit" is not relevant in these appeals. The Board further submits that the Land Court has no jurisdiction to determine the areas affected by the ponding of run-off water, as that is not a matter contained in the grounds of appeal and the appellants are bound by their grounds of appeal.

The Foresthome Drainage Board and the Foresthome Drainage Area

The Foresthome Drainage Board and the Foresthome Drainage Area were constituted by an Order in Council of 11th December, 1980, published in the Government Gazette 13th December, 1980, under the provisions of the Water Act 1926. This Order in Council states that the Area is constituted" ... to provide improved drainage within the area and to ensure continued maintenance of the drainage works and to provide for the proper administration of the area".

Under the Order in Council the Board was to take over some 21 kilometres of primary drains and some 12 kilometres of secondary drains indicated on the plan in the Second Schedule to the Order in Council showing the general layout of the Foresthome Drainage Area. The Board was also to assume responsibility for the maintenance of Catherina Creek, between a specified point at or near where the drain enters the creek and its outfall into the Herbert River. It was also provided that the Board may enter into an agreement with the Herbert River Improvement Trust in respect of responsibility for the maintenance and stream improvement works to Catherina Creek.

The Order in Council goes on to say that some of the drains in the proposed area are presently under the control of the Hinchinbrook Shire Council and are to be maintained by the Council.

The proposed method of rating contained in the Order in Council was to be: "... based on the Board raising revenue to cover annual costs by levying rates per tonne of cane delivered to a sugar mill, the rate varying with location, and on a rate per

hectare for unassigned lands."

The plan in the Second Schedule to the Order in Council shows that the area of the Town of Ingham is amongst the areas not to be rated, and also shows that the Council was to continue to maintain the drains between Ingham and Sach's Lane.

Certain lands in the Foresthome Drainage Board Area were declared to be exempted from rating for the purposes of the Water Act 1926, by a Order in Council dated 12th November, 1981, including - "(1) All dwelling houses and their curtilages, all sheds, headlands, drains, drainage furrows and farm access roads; (2) All swamp land (other than swamp land suitable for future assignment which can be drained by the Board's works); and (3) The area of the Town of Ingham and Mountainous Areas depicted on the aforementioned second schedule plan to the Order in Council published on 13th December, 1980."

The method of rating previously mentioned was substituted by another Order in Council dated 20th June, 1985. This authorised the Board to make and levy rates on the basis of -

- (a) a rate per hectare for assigned land; and
- (b) a rate per hectare for unassigned land.

On 4th February, 1988, the Governor in Council approved a new By-law No.1 made by the Foresthome Drainage Board in respect of rates and charges. This by-law was published in the Government Gazette of 6th February, 1988, and contained the following clauses:

"3. In each year the Board may make and levy rates on land drained by the Board's works on the following several bases:-

- (a) on assigned or horticultural land (which is called Category A) a rate per hectare;
- (b) on cleared unassigned land (which land is called Category B) a rate per hectare; and
- (c) on uncleared unassigned land (which land is called Category C) a rate per hectare.

Provided always that the Board may vary any of the rates per hectare in proportion to the benefit received by the land from the Board's work.

The separate categories are more particularly shown in the rate book of the Board.

4. Notwithstanding any other provisions of this By-law in respect of any land within the Area, the Board may fix the maximum amount or the minimum amount as the case may be for each category which is to be paid as rates by the person liable in respect of the land. "

The Water Act 1926 was repealed by the provisions of the Water Resources Act 1989, but the Drainage Areas and Boards constituted under the Water Act 1926 which were in existence immediately prior to the commencement of the Water Resources Act are, by Section 1.3(2)(g) and (h) of that Act, deemed to be constituted under that Act and continue in existence under the names then assigned to them until they are abolished or dissolved or otherwise dealt with under the Water Resources Act.

The Witnesses for the Appellants

Evidence was given by three witnesses on behalf of the appellants. Mr D.R. Pearson, a Director of Brooklands and Mr C.R. Lancini, gave evidence of the loss of cane on lands affected by ponding from rainwater run-off in 1990 and 1991. They submitted details of the areas affected and of their financial losses through lost production. Mr Pearson calculated that 44 acres (about 17.8 hectares) of the Brooklands land were affected, while Mr Lancini estimates that an area of about 130 acres (about 52.6 hectares) of his land was affected. Of these areas cane was totally lost in 1991 on 18 acres (7.3 hectares) and 100 acres (40 hectares) respectively.

Evidence was also given by Mr N.T. McKee, a Civil Engineer in practice as a Consulting Engineer in Townsville, who has expertise in drainage. Mr McKee is familiar with the Foresthome Drainage Area and had studied reports by a firm of consulting engineers regarding the drainage in the Ingham area. He said that the drainage system in the area between Ingham and Catherina Creek had been changed over the years by the filling in and diverting of certain water courses, which resulted in the water which normally would have flowed through them being directed into Catherina Creek and discharged via that watercourse into the Herbert River. In addition a connector drain had been constructed between Catherina Creek and the

adjoining Alligator Ponds Drainage System to carry the overflow from Catherina Creek.

Mr McKee's evidence indicated that the Catherina Creek and connector drain system was unable to cope with the volume of water which is discharged through the Foresthome Drainage Area after heavy rain, with the result that ponding occurs in the vicinity of the subject lands. The appellants see this as a failure by the Board to provide adequate drainage and it clearly emerged as being their underlying concern. Far from conferring a benefit on their lands, the appellants allege that the activities of the Foresthome Drainage Board cause detriment to their properties. As they receive no benefit they claim they should not be liable for rates.

The Witness for the Respondent

Mr E.R. Wilson, Secretary of the Foresthome Drainage Board gave evidence on behalf of the Board. He explained the constitution of the Board, its rating system and the extent of its responsibility. He gave details of works that had been carried out by the Board in the vicinity of the subject lands.

Mr Wilson said that following the flooding in 1991, the Board arranged for a survey to be made to calculate the area where cane was destroyed by ponding on Lancini's property. This survey was undertaken by staff of the Water Resources Commission and resulted in an area of 18.1914 hectares as the affected area. This was in direct conflict with the evidence of Mr Lancini who estimated that the area of lost cane was more like 40 hectares.

I might say here that I am prepared to accept the area calculated by survey by an independent third party on behalf of the Board, rather than the estimate of Mr Lancini. The Board has tendered a plan of the survey while Mr Lancini relies on his opinion of the affected area, unsupported by additional evidence.

Mr Wilson said that following that survey, the Board varied the rate per hectare on that 18.19 hectares so that it be rated at nil instead of attracting the Category A rate of \$10.68 per hectare. Mr Wilson added that the Board decided that a further tolerance area of 10 per cent be down graded and varied from Category A to Category

B.

It emerged in evidence that the Board was unaware that Brooklands had lost cane as a result of the ponding. However, evidence was given by Mr Wilson that an area of that company's land was considered by the Board to be a problem area and allowed to remain in Category B even though as assigned land it qualified for Category A. Mr Wilson said that those variations in the rate per hectare were made by the Board under the discretionary power in the proviso to Clause 3 of By-law No.1.

Submissions on behalf of the Drainage Board

Mr Dillon, Solicitor for the Foresthome Drainage Board, submitted that the Court should dismiss these appeals. Firstly, he submitted that the Court had a very narrow jurisdiction to deal only with the amount of an assessment of rates, not with the method of assessment. Secondly, he submitted that the appellants were bound by their grounds of appeal and therefore many of the matters relating to the areas and amount of cane lost are outside those grounds. The grounds refer to benefit and that, he said, is not relevant.

In relation to his first argument, he submitted that the Foresthome Drainage Board is constituted by the Order in Council of 11th December, 1980, and subsequent amendments and had rated the subject lands lawfully in accordance with the law as contained in the Water Act, (now the Water Resources Act) and the By-law No.1. It was therefore not for the Court to direct that a different basis of rating be used.

Mr Dillon relied heavily upon the authority of the decision of the learned Member (now President) of the Land Court, Mr D.J. Barry, in Tisiano Benedetto De Agostini and Joan Mary Louise De Agostini v. Babinda Swamp Drainage Board, a decision delivered on 2nd February, 1990. In that case the Babinda Swamp Drainage Board had levied the appellants with an assessment of rates for the six months ending 31st January, 1990, together with a claim for arrears. They appealed under Section 28 (7) of the Water Act 1926, on the basis that neither the assigned land nor the unassigned land received any benefit from the works of the Babinda Swamp Drainage Board and

that the works actually caused damage to their land.

In that case Mr Barry said that the appeal was a repeat of an appeal which came before him in Innisfail in 1982, the decision of which is reported in (1981/82) 8 QLCR 171, and he repeated what he had said in the previous decision. In that case the Board had relied for its method of rating on Section 29C of the Water Act, which provided that in lieu of making and levying rates in accordance with other provisions of the Act, a Board may make a levy for rates in respect of any land in its area on such basis or bases as the Board may by by-law determine.

In that case the relevant By-law enabled the Board to fix rates and charges on several bases -

- (a) on land assigned for sugar cane growing, Category A;
- (b) on cleared unassigned land, Category B; and
- (c) on uncleared unassigned land, Category C.

It was submitted that the Court had no power to consider the question of benefit in that case, because the Board by means of its By-law had excluded the question of benefit as a rating factor.

Mr Barry pointed out that the matter had been previously considered by the former President of the Land Court, Mr W.F. Smith, in Appeal against Water Rate Assessment N.A.M. Graving v. Grevillea Rural Water Supply Board (1970) 37 CLLR 153. In that decision Mr Smith discussed at length the provisions of Section 29 of the Water Act 1926 and various amendments which, he said, widened substantially the basis of rating, and he expressed the view that the original concept of "benefit" may be departed from if a Board adopts any of the more mechanical bases specified in Section 29A to 29C. He pointed out that the question of which basis of rating should be adopted for any particular period is one for the Board to decide.

The President also quotes from the decision of Mr Smith in the abovementioned case where he says -

" *When Section 29 was the sole basis of rating, appeals were generally instituted and contested on the grounds that the area assessed by the Board as benefited was excessive and the rate should be reduced to conform to the actual area of the property receiving benefit from the scheme. Issue was joined on this point and determination, following the evidence submitted, confirmed, increased or reduced the assessment.*

In short, the Court reviewed the whole process of the assessment of rating of a particular property and ensured that the basis of rating had been properly and correctly applied.

The Court's duty, as I appreciate the matter, is the same at the present time and it must satisfy itself that the particular assessment had been properly made and levied according to whichever of the enlarged bases of rating the Board has adopted.

The Land Court is a creature of statute. It has no inherent powers of correction in the public interest or on the grounds of equity. The wide powers given it by Section 40(5) of the Land Act apply in the exercise of its jurisdiction, duty, powers or functions and do not enable it to assume a jurisdiction or power which is not specifically given by statute. It is the function of a Board to determine the basis of rating and so long as that basis is one authorised by the Water Act I have no power to direct that a different basis apply in the case of the assessment appealed against. The possession of such a power by this Court - and the consequent uncertainty as to which bases the Court might adopt - would lead to chaos in the annual budgeting of a Board. "

The President expressed complete agreement with the conclusions reached by Mr Smith and held that his inquiry is limited to ensuring that the subject assessments have been properly levied in accordance with the provisions of the Act.

Is Benefit Relevant in these Cases?

In the present cases, By-law No.1 - Rates and Charges, was presumably also made under the authority of Section 29C of the Water Act, as that was the only provision which allowed the Board to make and levy rates on the basis or such several bases as the Board may by by-law determine. Although, as in the cases quoted above, the concept of benefit is not mentioned in Section 29C, the proviso to Clause 3 of By-law No.1 provides that the Board may vary any of the rates per hectare in proportion to the benefit received by the land from the Board's works. Therefore the concept of "benefit" may be reintroduced if the Board chooses to exercise the discretion given to it in this proviso, to vary any of the rates per hectare.

The relevant parts of the Water Resources Act 1989 took effect from 1st February, 1990. However, By-law No. 1 is saved by Section 1.3(2)(n) of that Act,

which provides as follows:

" All by-laws made under the repealed Acts and in existence immediately prior to the commencement of this Act continue in existence as by-laws under this Act until repealed in accordance with this Act "

Ironically, if the By-law had not been saved and the Board had made a by-law under the provisions of the Water Resources Act 1989, it would have had to take benefit into account by the mandatory requirement in Section 9.41, which provides -

" A board, instead of making and levying rates in accordance with section 9.40 may make and levy rates in respect of land within its area that is subject to rating under this Act on a basis or bases as the board by by-law determines.

In determining by by-law the basis or bases on which rates may be made or levied in accordance with this section, the board must have regard to the benefit received or likely to be received by a ratepayer. " (My underlining)

The rate assessments in respect of these appeals were both made by the Board on 27th September, 1991, and issued on 7th October, 1991, following the 1990 and 1991 floods. In the case of Mr Lancini's land there has been a variation of the rate per hectare for 18.19 hectares from \$10.68 per hectare as Category A land to nil, while in the case of Brooklands there has been no corresponding variation. There is, however, Mr Wilson's evidence of the Board exercising its discretion and downgrading an area from Category A to Category B at an earlier time. This would seem to indicate that the Board has made an effort to have regard to the benefit received, or likely to be received, by the land in each case.

However, the Board had a discretion whether or not to vary any of the rates per hectare, but was under no obligation to do so, under the proviso to By-law No.1. The Board could have decided against varying the rates per hectare. However, once the Board decided to vary the rate per hectare it was required to do so in proportion to the benefit received by the land from the Board's works.

In these cases the Board has varied the rate per hectare on 18.19 hectares of Mr Lancini's land because that is its assessment of the area where cane was

destroyed through ponding. However, although the fact that cane was destroyed on Brooklands land was not challenged, no such variation has been made. The reason, Mr Wilson said, is that the Board did not know that the Brooklands land had suffered loss of cane through ponding.

Submissions by the Appellants.

Mr Spina, solicitor for the appellants, argued that the Court does have the power under Section 9.48(3) of the Water Resources Act 1989, to vary the amounts of the assessment. When read with Section 41(5) of the Land Act 1962, the Court has the power of correction in such cases. The appellants receive no benefit, but suffer detriment, he submits, through the activities of the Board. Therefore, the Court should review the decision of the Board to rate these lands and vary the rates in each case by reducing them to nil, or to a nominal amount.

Is the Court Competent to Review that Decision?

Mr Dillon relies on Mr Barry's decision in the De Agostini case for his submission that the provisions of Section 9.48 of the Water Resources Act must be read narrowly and that this Court has no jurisdiction to review decisions of the Board, but must confine itself to considering the amount of the assessment and whether that has been properly arrived at. On this argument the Court cannot have regard to the method of assessment and the concept of benefit towards which the appellants' grounds of appeal are directed, is irrelevant.

I cannot agree with Mr Dillon. Certainly, as indicated in De Agostini and in Graving, the Court cannot direct the Board as to which basis of rating it should apply, but once having adopted a basis of rating, it is competent for the Court to ensure that the assessments have been levied properly in accordance with that basis. But in the absence of express statutory authority, can this Court review an administrative decision in such circumstances?

It is well settled that the Land Court and Land Appeal Court are competent to review the exercise of a discretion vested in the Valuer-General under the Valuation of

Land Act. (For a recent example see R.M. and A.J. Beanland v. The Valuer-General (1990-91) 13 QLCR 113). In a series of cases from Baker Bros. Ltd. v. Mooro Water Supply Board (1929) 12 C.L.L.R. 283 to Beach v. Commissioner of Irrigation and Water Supply (1934) 15 C.L.L.R. 30, the Land Court assumed that it had the power to consider whether or not lands were benefited by the works of various authorities. In Denman v. Back Creek Water Board (1962) 29 C.L.L.R. 205, the learned Member, Mr Dodds, assumed that the Court had power to review a number of decisions of the Board in that case.

Therefore, it would seem that this Court has the power to review the decisions made in the exercise of its discretion by the Foresthome Drainage Board under By-law No. 1, to vary the rates per hectare in proportion to the benefit received.

Mr Pearson has given evidence that cane was totally lost though ponding on 18 acres (7.3 hectares) of Brooklands' land in 1991 and this was not challenged by the Board. Having decided to vary the rate per hectare from \$10.68 to nil in respect of 18.19 hectares of Mr Lancini's land where cane was lost, the Board must, in my opinion, apply the same reasoning to the area where similar losses occurred on the land owned by Brooklands. In this case the only evidence I have as to the area affected is from Mr Pearson, who estimates that cane was totally lost on 7.3 hectares and I accept that.

The question then arises as to whether that 7.3 hectares is in respect of the area of 28.781 hectares in Category A, or the area of 11.2 hectares in Category B. There was no evidence presented which assists me in this regard, so I will follow the usual practice in such cases and resolve any doubts in favour of the appellant. I find that an area of 7.3 hectares should be varied from \$10.68 per hectare to nil from the area of 28.781 hectares in Category A. If by measurement of the affected area this proves to be incorrect, the Board can vary subsequent assessments.

Do the Lands Receive any Benefit?

With regard to the appellants' submission that the lands receive no benefit

whatsoever from the activities of the Drainage Board, I am not prepared to go along with this. The evidence has indicated that the Foresthome Drainage Board is in a difficult position because, since the development of East Ingham, the water runs off this area much faster than previously. The water enters the Foresthome Drainage Board Area at a greater rate, causing difficulties at the other end of the scheme where the drain enters Catherina Creek. The combined capacity of Catherina Creek and the connector drain are not sufficient to dispose of the water which accumulates after heavy downpours and as a result ponding occurs on the subject lands for some time resulting in the loss of cane.

However, the Drainage Board has undertaken works to keep both Catherina Creek and the connector drain open and free of obstructions and evidence has been given of this by both the appellants and Mr Wilson. The engineer, Mr McKee, has given evidence that to correct the drainage problem would cost something in the order of \$300,000. This places the Board in an impossible position as its annual income is less than \$20,000.

Both appellants have given evidence that the problems of ponding occurred only after the heavy rainfall in 1990 and 1991. Previously there appears to have been no ponding problem. Mr Lancini gave evidence that the drainage was excellent after the construction of the connector drain up to 1990. Mr Pearson's evidence also indicates no drainage problem until 1990. It was about that time that the increased flow of water from the East Ingham area entered the Foresthome Drainage System. This is beyond the control of the Drainage Board which is forced to accept the water.

I am not prepared to find that the activities of the Foresthome Drainage Board did not provide some benefit to these lands prior to the heavy downpour in 1991, or that the lands presently derive no benefit from the Board's activities. If the Board had not kept Catherina Creek and the connector drain clear of obstructions and operative through other maintenance, there may well be more ponding than at present.

Therefore, on the ground that no benefit is derived by the appellants from the activities of the Foresthome Drainage Board, these appeals must fail.

The Board had the power to make and levy rates in accordance with any of the methods provided for in the Water Resources Act. It has chosen to continue to make and levy rates as authorised in the said By-Law No.1, made under the Water Act. Benefit is not relevant until the Board determines to vary the rates per hectare and then it must do so in proportion to the benefit received by the land from the Board's works. Apart from the variation made in respect of Brooklands, there is no evidence that the Board has not properly exercised its powers and discretions. It has been established that cane has been lost on part of the lands of both appellants through ponding. The Board has varied the rate per hectare in respect of one appeal, and it is competent for the Court to vary the rate per hectare on the affected part of the other for the reasons stated above. However, while I am of the opinion that this Court is competent to ensure that the assessments have been levied in accordance with the basis properly adopted by the Board, I cannot hold that these properties be exempted from contributing to the Foresthome Drainage Board. To do so would be to direct that the Board adopt a different basis of rating, which this Court does not have the power to do - see Graving and De Agostini (supra).

Conclusion

In the event, the appeal by Mr C.R. Lancini is dismissed and the assessment of the Foresthome Drainage Board affirmed.

The appeal by Brooklands is upheld and the assessment of the Foresthome Drainage Board is varied as follows:-

21.481 hectares Category A at \$10.68 per hectare	\$229.42
11.2 hectares Category B at \$2.67 per hectare	\$ 29.90
7.3 hectares not categorised or rated	
Gross rates	<u>\$259.32</u>

I leave aside the matter of discount as that is entirely a matter for the Foresthome Drainage Board.

I have set out my reasons for decision in some detail in the hope that it may be of some assistance to the parties in the future.

(J.J. Trickett)

Member of the Land Court