**LAND COURT**

**BRISBANE**

**28 JULY 1998**

**Re: Appeal against Annual Valuation -**
**Valuation of Land Act 1944 -**
**Valuation Roll No: 1200 (AV96-517)**
**Local Government: Townsville**

**Blanche E and Duncan A Kennedy**
**v.**
**Chief Executive, Department of Natural Resources**

**AND**

**Valuation Roll Nos: 1767/10000 (AV96-518)**
**1201 (AV96-519)**
**1768 (AV96-520)**
**Local Government: Townsville**

**Blanche E Kennedy**
**v.**
**Chief Executive, Department of Natural Resources**

**(Hearing at Townsville)**

**DECISION ON APPLICATION FOR COSTS**

This matter deals with an application for costs by the respondent following a decision by the Land Court to strike out the four appeals for want of prosecution against the determination of the unimproved values of the above four properties. It was agreed to hear the four matters concurrently.

The four properties are contiguous and are located at 40 Rose Street, North Ward, Townsville. The subject lands are described as Lot 54 on Plan T118160 (AV96-517); Lot 1 on RP 735078 (AV96-518); Lot 5 on Plan T118261 (AV96-519); and Lot 2 on RP 73508 (AV96-520). Mr D Kennedy seeks to represent his deceased mother's Estate of Blanche E Kennedy, and feels he has an obligation to the estate to continue these appeals.

At a hearing before the learned President on 16 July 1997 the Court was advised that the appellants did not intend to appear or give evidence in respect of the appeals. The matters were adjourned until 18 July 1997, at which the four matters were then struck out for want of prosecution. Following those actions the respondent sought leave to make application for an award of costs in his favour. By agreement with the parties, and in an attempt to ensure that the appellants were fully appraised of their

responsibilities in the matter, the application for costs was adjourned to a date to be fixed. The application for costs was heard on 16 July 1998.

Mr D Turnbull appeared for the appellants, calling evidence from Mr GW Eales, a registered valuer. Mr J O'Rourke appeared for the respondent, calling evidence from Mr RA Noakes, the departmental registered valuer responsible for the valuation.

**Background:**

Mr Turnbull argues that the appellants sought advice from Mr Eales on the preparation of their appeals, as has been his practice over a number of years. The appellants made eight previous appeals on each of four properties against the then current valuations between 1982 and 1996, prior to the current four matters before the Court. Subsequent to the current matters, there an additional four appeals pending before the Court for hearing. Of the previous matters one was withdrawn (1982); two were struck out for want of prosecution (1989, 1996); and five were dismissed by the Court (1987, 1988, 1990, 1992 and 1993).

In all appeals the general grounds of appeal have been practically similar in that it was argued that the subject lands were liable to damage from cyclonic tidal surges, a matter allegedly not adequately addressed by the respondent. On only one occasion during those former appeals did Mrs Kennedy give evidence, while Mr Kennedy has never provided evidence to this Court.

In the current matter Mr Eales gave evidence, after analysing the unimproved values of the four properties, that he advised the appellants that there was little valuation evidence to support his case for a reduction in the unimproved values. The appellants noted that advice, and advised Mr Eales that it was his intention to have Mr Eales request the Court to note the statement of appeal by the appellants, and to record that statement on the Court's files for historical purposes.

**Grounds of Application:**

The respondent argues that the appellants' history of appeals to this Court has occurred over an extended period of years, without any appearance to give evidence to support their claims or to be cross-examined. This has placed a heavy burden upon the resources of the respondent. In all of the 32 matters previously before this Court, there has been no acceptance of the arguments and claims made by the appellants. The respondent argues that the nature of the current appeals may be considered to be of such a character as they may be seen to constitute an unreasonable burden upon the Court and the respondent.

As a consequence of the current matters, the respondent now submits the following details of costs incurred:

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| Valuer's Costs | $1,000 |
| Counsel's Costs | $ 822 |
| Total | $1,822 |

**The Evidence:**

There is some divergence of understanding of the communications between Mr Eales and Mr Noakes in respect of the processing of the appeals. Neither valuer was able to substantiate their personal recollection of the actual telephone discussion between them, by reference to their diary records.

Mr Eales had recollections of his advising Mr Noakes that the appellants would not be submitting evidence of a valuation nature, but would be submitting some other statements to the Court. From memory, he believed this communication occurred at least one week prior to the hearing. However, there was no suggestion that the matter would not proceed to hearing.

Mr Noakes' recollection of events did not negate that there had been a telephone discussion but, at the time, he had concluded that the matter would continue to hearing, and it would be remiss of him if he had not prepared his statement for presentation to the Court. Accordingly, he fully documented six copies of his report as required and sought to brief counsel. The times detailed in the respondent's claim for costs were seen to be very conservative.

Both experienced valuers agree that it is their normal practice to confirm communications in writing, particularly in respect of matters which have been withdrawn or settled by the parties. However on this occasion, for whatever reason, the valuers relied upon telephone communications, a process often undertaken by the valuers on many matters under negotiation as part of an objection or appeal. In the current circumstances, their telephone conversations appear to have left some divergence in the understanding of the two parties. Mr Eales apparently believed that the matter before the Court would constitute no more than a request for the appellant's statement (Mr D Kennedy) to be noted and retained on the Court's files. Mr Noakes was uncertain of what proceedings might occur, and prepared for a normal hearing before the Court. His reports, he claims, were prepared about two weeks prior to the hearing.

In seeking to understand how this breakdown in communication may have occurred, it is relevant to note that Mr Eales has acted for the appellant and his mother

over a long period of time, and was very conversant with the concerns and strategies of the appellants. He confirmed that the appellants had pursued the former appeals and the current matters in the belief and hope that, in the event of subsequent major damage to the property by tidal surge action, their claims would be justified. Indeed, such a scenario was envisaged by the learned Member in his decision of 14 September 1995 in AV95-44 to 47, unreported, where he said at p.7:

> "Mr Kennedy's writings indicate that he sees the need to have all current and past arguments continually placed before this Court apparently as support for arguments which will be raised in some other place, when property damage inevitably, in his mind, next occurs."

It was argued that the appellant (Mr D Kennedy) continued to argue that strategy as trustee of his mother's estate.

Mr Noakes, by contrast, had not been involved in the former appeals by the appellants, but had been aware of the history of the properties. In considering the grounds of the current appeals Mr Noakes had determined that the possible impact of any tidal surge would have also affected the comparable sales evidence that he had analysed, and accordingly had been allowed for in the valuation of the subjects.

Mr Turnbull argues that, in view of the telephone advice from Mr Eales that there would be no valuation evidence submitted, it would have been a prudent course of action by the respondent to restrict the level of activity involved by the valuer in preparing his statement for the Court. However, Mr Noakes argues that to not have the statement prepared for the hearing would have been both a lack of courtesy to the Court and an imprudent action on behalf of the respondent. As there had been no written confirmation of the proposal to not lead valuation evidence, any request by the respondent for an adjournment, should further evidence have been forthcoming at the hearing, could have resulted in costs being awarded to the appellants.

In respect of the actual hearing of the appeals on 16 and 18 July 1997, Mr Turnbull further argues that much of the duration of the hearing before the learned President was influenced by counsel for the respondent in resisting the application to have the written statements of the appellants retained in the files of the Court Registry. While those statements formed no part of the Court's decision, the President agreed that they would be retained on the Court's registry files. It was also agreed that the respondent's counsel at the hearing on 16 and 18 July 1997 had been in Townsville on other business, and had been briefed very late in the process prior to the hearing.

**Decision:**

In considering this matter it is accepted that there was communication between the valuers, but unfortunately that telephone communication was not documented. Each party had a different understanding of the consequences of that message. I feel it would have been reasonable for Mr Eales to conclude that the hearing of the matter on 16 July 1997 would have been of short duration, with the matter dismissed for want of prosecution, and for the grounds of appeals to have been retained upon the files of the Court registry. Indeed, it was on this basis that Mr Eales, on 18 July 1997, accepted the decision to dismiss the appeals, but resisted the quantum of the foreshadowed costs. Based upon Mr Eales' acceptance that some costs may be relevant, the President adjourned the application for costs so that Mr Eales could further consult with his client.

However, it is also reasonable, in view of the history of the properties, that Mr Noakes could have interpreted the advice that no valuation evidence would be forthcoming, but that other matters would be placed before the Court, to infer that the hearing may still be argued on other merits in July 1997. For these reasons, a prudent experienced professional would, in Mr Noakes' opinion, continue to be prepared to defend the unimproved value.

On the basis that Mr Noakes did, in fact, document his statement, I accept that his costs now claimed represent a conservative estimate of the expenses incurred by the respondent for the valuation service. In the matter of the costs of legal services by the respondent, I accept that those costs were likely to have been incurred by the respondent, however, I feel the extent of time involved in the hearing of the matter may have been impacted by the resistance from counsel to the filing of the written statements of the appellants. However, there would be no argument that the costs occurred for the legal advice were reasonable.

The matter that I need to apply myself to, in view of the advice from Mr Eales to Mr Noakes, is whether that legal representation in fact had been necessary at all. It is common practice in this Court that matters of a less complex nature are often defended by a senior valuer for the respondent. Perhaps in view of the protracted and persistent nature of the history of appeals on these properties, the respondent saw "shadows among the trees". In the end it would appear that some of the respondent's costs may have been greater than were really necessary.

However, it would also be fair to note that the appellants contributed to this scenario by their persistent claims and failure to substantiate those claims by the giving

of evidence, and cross-examination of evidence. In the end the course of justice is best pursued where all the facts are brought before the Courts under the full glare of examination. It does appellants' cases no good to continually argue that their views of the world are correct, in spite of decisions and evidence to the contrary. It also serves no purpose for the appellants to seek to document claims on the files of the Court registry, in case they may later be seen to substantiate some future matters, which may, or may not, occur in another place. To persist in such a matter may lead to the actions of that person being construed to be seen as having acted in a frivolous or vexatious manner.

In the current matter, I believe the deeply held opinions of the appellants, in respect of tidal surges and their possible impact upon the land, are sincerely and fervently held. On this occasion I do not find that they have been the subject of a frivolous or vexatious nature, but to continue the current strategy adopted by the appellants may well lead to a different conclusion in the future.

Under the *Valuation of Land Act*, and in the context of annual valuations, it is always the right of a land owner to appeal a decision of the Chief Executive to this Court. That such appeals can occur regularly does not in itself constitute grounds for claims of frivolousness or vexatiousness. However, to continue to appeal on the same grounds, in the face of repeated rejection of those grounds by this Court, moves any appellant towards the point where his actions must be interpreted within the context of the history of the appeals.

**Summary:**

In summary, I believe that at least some of the costs claimed are reasonable in these circumstances. I am aware that it is the normal practice of this Court, in matters of this general nature, to direct that each party bear their own costs. In this regard I note that guidance was given in *WH Bowden v. The Valuer-General* (1980-81) 7 QLCR 138, where the Land Appeal Court said at p.147:

> " Easy access to the Land Court to air grievances and have valuations reviewed is, as we have already stressed, most desirable in revenue cases, and such action should be available without fear of costs being awarded to either party except in special circumstances."

That was also followed in *Seganfreddo Nominees Pty Ltd, JA Brazier & Ors v. The Valuer-General* (1980-81) 7 QLCR 10, and also in *Scott Properties Pty Ltd v. The Valuer-General* (1977) 4 QLCR 18.

I also note that *Bowden* supra said at p.145:

> " The power of the Land Court and the Land Appeal Court to grant costs originates respectively in sections 41(9) and 44(16) of the Land Act. The power so granted is discretionary and is in no way circumscribed."

However, in applying any such discretion, this Court must only do so in accordance with the principles outlined in *Moyses and Morris and Ors v. The Council of the City of Townsville* (1979) 6 QLCR 271, which said at p.273:

> "The general rule, then, is that costs are in the discretion of the Court, but of course the discretion must be exercised judicially, that is, by reference to relevant considerations."

This matter was also discussed in *The Proprietors "The Lodge Beenleigh" v. Chief Executive, Department of Natural Resources* (AV97-107), 5 September 1997, unreported.

While the appellants have sought some comfort from the findings of *Chief Executive, Department of Lands v. Juris Towers Pty Ltd* (1994-95) 15 QLCR 273, where costs were not awarded, and where departmental officers failed to carry out reasonable inquiries in relation to the subject, the current matter can be distinguished in view of the breakdown in communication on behalf of both parties. Likewise, the decision in *Toshach Nominees Pty Ltd v. Chief Executive, Department of Lands* (1994-95) 15 QLCR 9, where the chronology of repeated claims over succeeding years for the subject lands was considered by the Court, was also noted. In that matter the learned Member (later President) found at p.13:

> "However, nowhere in the record can I find evidence to support a conclusion that he had acted arbitrarily or capriciously or with wanton disregard for valuation principles. On my consideration of the evidence I would not exercise the discretion in favour of the applicant."

That matter can also be distinguished as I have found that in the current matters there is no evidence of arbitrariness or capriciousness on the part of the appellants. For the same reason I find no support for the appellants from *Hymix Industries Pty Ltd v. The Valuer-General* (1990-91) 13 QLCR 173, as the approach of the parties in that matter were seen as appropriate, but the complexity of the valuation was such as to precipitate the appeal.

In the matter of *E.F.S (Holdings) Pty Ltd Pty Ltd v. The Valuer-General* (1980-81) 7 QLCR 14 the appeal was struck out as the appellant failed to appear, and costs were subsequently awarded against the appellant. However, that also can be distinguished as in that matter there was no appearance for the appellant, while in the current matter Mr Eales did effectively represent the appellants.

To summarise the current matter I find that there is some liability by both parties in contributing to the total amount of the costs now claimed. While the valuers' costs were reasonable, there was a discretion exercised by the respondent in continuing with the valuation statements, in spite of verbal advice from Mr Eales that such matters would not be contested. On those costs I will allow 50%, or $500 as liability of the appellants. In arriving at this figure I note that there is some confusion as to how long before the hearing that Mr Eales advised Mr Noakes.

In the matter of the legal costs incurred, I believe that those may have been unnecessary, but for the previous history of appeals. While it is always the respondent's right to seek legal counsel, his often practice is to the contrary, except on complex matters. However, I would advise the appellants that any future legal appeals may involve some expenses in this area. In the current circumstances I make no allowance for the costs of legal counsel.

**Conclusion**

In the end I find that the Chief Executive has been put to incurring unnecessary costs associated with his defending his valuation. It is ordered that the appellants pay to the respondent the sum of $500 costs in this matter.

**NG DIVETT**

**MEMBER OF THE LAND COURT**