LAND COURT OF QUEENSLAND

CITATION:	*Mepham & Ors v Department of Natural Resources and Water* [2009] QLC 0080
PARTIES:	Norman F A Mepham, Marie A Mepham and Derek J A Mepham (applellants/respondents) v. Chief Executive, Department of Natural Resources and Water (respondent/applicant)
FILE NO:	A2000/0003
DIVISION:	Land Court of Queensland, General Division
PROCEEDING:	Hearing of applications
DELIVERED ON:	4 June 2009 (Ex tempore)
DELIVERED AT:	Brisbane
HEARD AT:	Brisbane
MEMBER:	Mr RS Jones
ORDER:	**1. The appellants' appeal is struck out for want of jurisdiction.** **2. The respondent's application is dismissed.** **3. The appellants' application is dismissed.** **4. The respondent is to pay the appellants' costs of and incidental to both applications.**
CATCHWORDS:	Jurisdiction of Land Court under the *Soil Conservation Act 1986* – application for declaratory relief – ss 5 and 33(1) *Land Court Act 2000*
APPEARANCES:	Mr G Allan of Counsel instructed by Anderssen Lawyers for the appellants Mr W Isdale of Crown Law instructed by Mrs T Johnson, Principal Lawyers, Department of Environment and Resource Management, for the respondent

MR JONES: These applications come before me in the following circumstances. The appellants are property owners whose farm management is said to be affected by a property plan under the *Soil Conservation Act* over an adjoining property. A public notice dated 19 November 1999 gave notice of the Chief Executive's intention to revoke an existing property plan said to be pursuant to s.13(4) of the *Soil Conservation Act* and approve a new property plan said to be pursuant to s.10(6) of the Act.

On 9 December 1999 Messrs Grant & Simpson, the solicitors then acting for the appellants, objected on behalf of the appellants to the proposed soil conservation plan. The grounds of the objection are set out in that letter, part of Exhibit NP1 of the affidavit of Mr Purcell, and I don't intend to go into those grounds in any detail. At the conclusion of the letter of the appellants' then solicitors there is a summary of the grounds of the objection and it identifies what the concerns of the appellants were. Although it doesn't say so in that letter the objection would have been made pursuant to s.21 of the *Soil Conservation Act.*

On 4 January 2000 the department wrote to Grant & Simpson advising that their objection had been "overruled". That correspondence relevantly commenced with the following words, "After considering your objection dated 9 December 1999 to the proposed approved property plan prepared under provisions of s.10 of the *Soil Conservation Act 1986* I have made the following determinations on your objection." That letter is signed by a Mr Pat Lyons who was identified as the respondent's district manager for Emerald. On 25 January 2000 the appellants filed in the registry of the Land Court a notice of appeal appealing against the decision made in respect of their objection. Subsequent to that there was a challenge to the validity of the notice of appeal brought by the respondent and on 11 May 2001 the Judicial Registrar determined that the appeal was invalid essentially on the ground that s.22(5)of the Act had not been complied with and that strict compliance was necessary. On 4 September 2001 the Land Appeal Court overturned that decision and held that the notice of appeal was valid and that the Land Court had the jurisdiction to deal with the appeal.

Then some time later, on 24 March 2009, the respondent filed in the registry of this court a general application which relevantly sought to have the appeal struck out for want of prosecution pursuant to Rule 14(2) of the *Land Court Rules 2000.* But before the respondent's application could be dealt with, on 26 May 2009 the appellants filed an application seeking declaratory relief and relevantly a declaration in the following terms, "A declaration that the purported determination of the appellants' objection purportedly made to s.21(4) of the *Soil Conservation Act 1986* be declared invalid and of no effect." Three other declarations were sought but it is not necessary to go into any detail about their form and effect.

I should point out here that the issue of delegation was not raised in the notice of appeal filed by the appellants, nor was it raised in the proceedings before the Judicial Registrar or the Land Appeal Court. Central to the appellants' application being dealt with today is that the decisions made concerning the appellants' objections were not decisions made by the Chief Executive. It is asserted that the objections were considered and decided by the aforesaid Mr Lyons who was not the Chief Executive and no delegation was authorised under the legislation.

As things unfolded it became clear that Mr Lyons did not have the authority to consider and decide the objections of the appellants and in this respect an affidavit filed in this court on 3 June 2009, the affidavit of Mrs Johnson a senior lawyer acting for the respondent, concedes that the decision of Mr Lyons was ultra vires and says further that the respondent was prepared to consider the appellants' objection afresh. This information was conveyed to the solicitors acting for the appellants on 28 May 2009. Despite this concession or admission made by the respondent the appellants still seek, among other things, a declaration essentially in the same terms as the declaration which I have already read into the record.

In the submissions made on behalf of the appellants I've been referred to numerous authorities and propositions concerning the legal principles governing delegation of authority that was said to be applicable in the circumstances of these applications. While it is now unnecessary to deal with the question of delegation and/or authority, it is still necessary however to determine whether or not this court has in fact the jurisdiction or power to grant the declaratory relief sought by the appellants. As Mr Allan, counsel for the appellants, points out the Land Court derives its jurisdiction from legislation. In that respect it is an inferior court.

In *Stanfield v. Brisbane City Council* [1990] 70 LGRA 392 at 396 the Land Appeal Court relevantly said, "The Land Court and the Land Appeal Court are courts of statutory creation and their jurisdiction depends entirely upon the conferral of power by statute. These courts cannot assume a jurisdiction which they do not possess, convenient though it may sometimes seem to be." In this context Mr Allan also refers to the decision of the Land Appeal Court in *Sargeant v. Powerlink* 18 QLCR 73 at pp.77-78 as authority for the proposition that the Land Court, on its motion in the absence of submissions by either party must still resolve any doubts it may have concerning jurisdiction. That would also be the case where the parties were prepared to agree that the court should hear and determine the issue. The reason being that any orders made without jurisdiction amount to nothing and would be of no force and effect.

The *Land Court Act 2000* relevantly provides pursuant to s.5(1) that the Land Court has the jurisdiction given to it under an Act and if the jurisdiction for a proceeding is expressly conferred on the Land Court under an Act then the jurisdiction is exclusive. Also pursuant to s.33 of the *Land Court Act* the Land Court has the power to make declarations in the following circumstances, "Any person may bring proceedings in the Land Court for a declaration about – (a) a matter done, to be done, or that should have been done under this Act or another Act giving jurisdiction to the court; and (b) the construction of any legislation for the purpose of proceedings in which the court has exclusive jurisdiction." In the circumstances of this application if the court does have power to grant the relief sought by the appellants it would be pursuant to s.33(1)(a) of the *Land Court Act.*

When the court is given power to grant declaratory relief that power should not be construed as being subject to limitations which do not appear in the actual words used to confer or grant the power. However, the operation and effect of s.33 has to be construed having regard to the actual jurisdiction granted to the court under the legislation in issue in the proceedings. In *Maroochy Shire Council v. Maroochydore*

Central Holdings Pty Ltd, an unreported decision of the Land Appeal Court 2003 QLAC 24, at paras. 32-33 the Land Appeal Court said, "Section 33 of the *Land Court Act* provides to the Land Court a useful adjunct to its jurisdiction under the Act enabling a decision about the construction or the application of the Act to be made in advance of the determination of the entire dispute between the parties. In some cases using this additional jurisdiction may facilitate the resolution of the larger dispute between the parties. There is nothing in the language of s.33 of the *Land Court Act* to suggest that it is concerned with other than the application or construction of legislation in respect of which the Land Court has jurisdiction. It is not intended to confer on the Land Court a jurisdiction similar to that which involves the review of administrative decision-making as conferred by the *Judicial Review Act 1991*."

I accept Mr Allan's submissions that this part of the decision of the Land Appeal Court is strictly obiter and therefore not binding on me but I also accept Mr Isdale's submission to the effect that I would nonetheless find the observations of the court persuasive. It is my view that by reference to cases such as the *Maroochy Shire Council* case and *Stanfield* it is necessary to inquire as to just what is the jurisdiction conferred on the Land Court and, in the circumstances of this case, pursuant to the *Soil Conservation Act.* Pursuant to ss.21 and 22 of the Act dealing with objections and appeals the scheme of the legislation appears to be (1) a person has the right to object against a decision of the Chief Executive, s.21(1); (2) upon receipt of all objections lodged in compliance with sub-s.(1) the Chief Executive is obliged to consider and make a determination on each objection and to notify in writing the objector of his determination, s.21(4) and (5); (3) the objector may appeal the decision of the Chief Executive concerning the objection to the Land Court, s.22(1) and in any appeal the appellant is to state in his grounds of appeal all the grounds upon which he intends to rely and the appellant is bound by those grounds and bears the burden of proving them, s.22(3) and (4).

After considering all the submissions made and the legislation in question, I have reached the conclusion that the jurisdiction of the Land Court conferred under the *Soil Conservation Act 1986* is, pursuant to s.22(1) of that Act, confined to determining on its merits, that is in accordance with the relevant facts and applicable law raised in the grounds of appeal, the merits of the appeal lodged in accordance with s.22 of the Act. I have not been referred to any other relevant sections of the Act which confers a wider jurisdiction to the court. The relief sought by the appellants really has nothing to do with the merits of the appeal but is concerned more with a more fundamental issue, namely whether or not the decision concerning the objection was valid at law. Consistent with my reasoning in *Spars Pty Ltd v. Brisbane City Council*, an unreported decision of the Land Court [2007] QLC 23, at para. 20, it is my view that the phrase within s.33(1)(a) of the *Land Court Act,* "an Act giving jurisdiction to the court", when read with s.5 of the Act should be construed to mean that the jurisdiction conferred on the Land Court to grant declaratory relief does not extend beyond those matters about which the Land Court has had actual jurisdiction conferred pursuant to the relevant legislation. It is not enough that the Act is one which confers jurisdiction, even exclusive jurisdiction, but only in respect of some of the matters about which the Act is concerned. As I have already said, to use the language of s.5 of the *Land Court Act* the jurisdiction conferred on the Land Court under the *Soil Conservation Act* is not an overarching jurisdiction but is a limited jurisdiction to hear and determine appeals against determinations on objections made by the Chief Executive.

The appellants' application, as I have said, is in reality concerned about the validity of an administrative decision. It seems to me that the appropriate vehicle for the relief sought would be pursuant to the *Judicial Review Act 1991* and s.128 of the *Supreme Court Act 1995* and in this regard I refer specifically to ss.4, 7, 19 and 20 of the *Judicial Review Act.* I have been unable to find any express power or any power granted by necessary implication to the Land Court to grant declaratory relief in respect of what is essentially an administrative matter. Accordingly, I find that the court does not have the jurisdiction to grant the declaratory relief sought.

Given my findings concerning jurisdiction, it is not necessary for me to decide Mr Allan's argument to the effect that, despite the concession made by the respondent, it is still necessary for the declaration sought to be made. But I must say that in light of the concessions made by the respondent, I find it difficult to conceive how it could be said that the purported decision could somehow still continue to bind and affect appellants or third parties and that a declaration is necessary to finally dispose of that decision. That said, I make no final determination about that part of the appellants' application.

The question then is what to do with the applications and the appeal before me. On behalf of the respondent it is submitted that, given the concessions made by the respondent, the appellants ought withdraw their appeal. On behalf of the appellants it is contended that it should be struck out for want of jurisdiction. I prefer the latter course of action. The jurisdiction of the Land Court pursuant to ss.21 and 22 of the *Soil Conservation Act* requires as conditions precedent the existence of a lawful objection and decision thereon. Here there is the former but not the latter. That is there is no lawful determination of the Chief Executive for the court to consider and decide. Accordingly, for the reasons I have expressed I will order that the application by the applicants for declaratory relief be dismissed and that the appeal be struck out for want of jurisdiction. In respect of the respondent's application to have the appeal struck out for want of prosecution Mr Isdale, counsel for the respondent, decided to leave that matter to the court. Having regard to all the circumstances surrounding these proceedings I have decided that the appropriate order is to dismiss that application also.

This then brings me to the question of costs. The appellants seek orders that the respondent pay their costs of and incidental to the applications and also their costs of and incidental to the appeal itself. The respondent does not ask for costs but resists the appellants' application for costs. As a starting point, I think it needs to be said that ordinarily costs are not meant to punish the party that has lost proceedings but to indemnify the party who has had to expend moneys having to successfully prosecute its claim or defend an action brought against it. In this case I think it is inevitable that the respondent must bear some of the appellants' costs. After all, it was his improperly made determination of the objection which has started this whole unfortunate state of affairs, but this is not a case where the appellants are entirely blameless. As I have already said, nowhere in the notice of appeal was it pleaded that the determination appealed against was bad at law and it was not raised in proceedings before the Judicial Registrar or the Land Appeal Court. In my opinion there was no reasonable explanation as to why it took until this year to bring the question concerning the validity of the purported determination of the Chief

Executive before the court. I should pause here to note that in reaching that conclusion I've had regard to the matters raised in Mr Mepham's affidavit. It seems to me that the question of validity should have been brought on much earlier and at least in part, and I stress in part, part of the reason for the delay and the costs incurred during that delay is the inaction of the appellants themselves and/or their agent. Here I should expressly exclude from any indication of fault the appellants' present legal representatives. It appears to me that once they were seized with these proceedings they acted very quickly, particularly in respect of the validity question and I suspect that, but for them being involved, this question might not have ever been raised and dealt with.

It is not disputed that pursuant s.34(1) of the *Land Court Act* that I have the power to order costs in respect of the two applications which I have dealt with. However, Mr Isdale has submitted that I do not, pursuant to s.34(1) of the *Land Court Act*, have the power to make orders concerning the cost of the substantive appeal itself. I disagree. The appeal on its face is, in my view, a proceeding for the purpose of s.34(1). The only limitation on the power to make costs orders in respect of the substantive appeal could only arise because the court, lacking jurisdiction to deal with the appeal itself, it also lacks jurisdiction to make costs orders in respect of it. I've been referred to a number of cases by Mr Allan on this point, but I'll simply refer to two of them, namely *Gazebo Hotels Pty Ltd v. Sydney City Council* [1980] 41 LGRA at 91 and the observations of Justice Cripps at p.95 of that decision and more recently the decision of *Markisic v.Vizza*, an unreported decision of the Court of Appeal of New South Wales [2002], NSWCCA 53 and the observations of Justice of Appeal Stein with whom the other members of the court agreed. His observations are at paragraphs 29 and 30 of that decision. I won't read into the record what their Honours said but I will simply say that I respectfully agree with the observations made in that case and find that I do have the jurisdiction to make orders in respect of the substantive appeal.

In these proceedings there are a variety of competing elements including first, the decision underlying the whole of these proceedings was bad at law and no fault in respect of that could be laid at the feet of the appellants. Second, both parties have been guilty of delay in respect of the prosecution of the appeal. Third, until very recently the validity point had escaped the attention of both sides. Four, while the appellants' application for declaratory relief failed it, at the end of the day, was the vehicle which brought the question of the validity of Mr Lyons' decision squarely into focus and drew the concessions made by the respondent. In that sense it really achieved its central goal. Last, the respondent's application failed having regard to some of the matters that I've referred to, particularly the concession made by the respondent concerning the validity of Mr Lyons' decision that application arguably ought never have been made and, at the very least, should never have been allowed to succeed.

In all the circumstances surrounding these proceedings and doing what I can to balance the competing elements I propose to order that the respondent pay some of the appellants' costs but limit the scope of the order to the costs associated with the two applications presently before me. Accordingly I order as follows: (1) the appeal is struck out for want of jurisdiction; (2) the respondent's application is dismissed; (3) the appellants' application is dismissed; (4) the respondent is to pay the appellants' costs of and incidental to both applications. If there's nothing further?

MR ALLAN: No sir.

MR ISDALE: No sir.

THE LAND COURT ADJOURNED