IN THE SUPREME COURT OF QUEENSLAND No. 5205 of 1998

Brisbane

Before Justice Byrne

[Yalgan Investments P/L v Council of the Shire of Albert]

BETWEEN:

YALGAN INVESTMENTS PTY LTD Applicant

AND:

COUNCIL OF THE SHIRE OF ALBERT Respondent

REASONS FOR JUDGMENT - BYRNE J.

Judgment delivered 15 April 1999

CATCHWORDS:

COSTS - review of bill of costs - order to pay costs of and incidental to the hearing - s.27 *Acquisition of Land Act* 1967 - costs of expert reports - costs of junior counsel assisting senior counsel.

Counsel: Mr P J Lyons QC and Mr B G Cronin for the applicant
Mr G Robinson for the respondent

Solicitors: Primrose Couper Cronin Rudkin Solicitors for the applicant
King & Company Solicitors for the respondent

Hearing Date: 25 February 1999

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1 Review is sought pursuant to RSC O 91 r 119 of decisions of the Taxing Officer in respect of items in a bill of costs taxed by order of the Land Appeal Court. There are two main issues. One concerns the meaning of the order to taxation. The other is whether the Taxing Officer was wrong in disallowing entirely the costs of the junior of senior and junior counsel.

2 The dispute has its origins in a 1994 resumption of a 33.8 ha parcel of land near Mudgeeraba owned by the applicant. Eventually, the claim for compensation came before the Land Court, where the amount finally claimed was $5,192,671.30. This comprised $5,045,000 for loss of land, $139,671.30 for expenditure thrown away, and $8,000 for costs incurred in formulating and in lodging the claim. At the outset of the hearing, the respondent's valuation of the land was $2,500,000. This was amended during the hearing to $2,750,000. The Land Court eventually assessed the compensation at $4,223,671.30, of which $4,100,000 related to loss of the land. The balance was for disturbance.

3 The Land Court held that the parties should bear their own costs of the determination. From that decision, the applicant appealed with partial success, the Land Appeal Court ordering that the respondent “pay so much of the (applicant's) costs of and incidental to the hearing ... of the claim for compensation as are the costs of and incidental to a hearing for three days”. The hearing,

including the site inspection, had occupied six sitting days. The reason for the applicant's limited success on appeal is, as the Land Appeal Court explained it, that:

> "... although the award was nearer to the amount claimed by the claimant, the member found in favour of the respondent on most factual issues. It was a complex case and there has been no challenge to the member's composite approach in determining the amount of compensation. No useful purpose can be served by dissecting the judgment and the transcript of the six days of the hearing in an attempt to determine precisely what proportion of costs should be awarded. At this stage it is preferable to take a broad view, influenced by the substantial success achieved by the claimant. An award of costs of a hearing for three days is appropriate."

4 The Court's choice of the word "hearing" rather than, for example, "proceedings", in awarding "... so much of the costs of the hearing," has provoked a contest concerning the recoverable costs. In the Taxing Officer's opinion, it is not enough that the applicant has incurred expense in connection with the prosecution of the compensation claim through the Land Court; to be recoverable under the order, the expense must also be closely connected with a day of hearing. On this approach, the allowable costs extend to such items as instructions to counsel, copying documents for the brief, fees to counsel for appearing at the hearing, ordinary witness expenses (including costs of issue and service of subpoenas), and a few other expenses characterized as "incidental" to the hearing. However, the Taxing Officer disallowed items such as outlays to obtain experts' reports, even where the reports were put before the Land Court at the hearing as substantially the evidence in chief of the expert witness.

5 In taking this narrow view of the effect of the costs order, the Taxing Officer was influenced principally by two factors. First, he was impressed by the use of "hearing" twice in the operative part of the costs order. Where it secondly appears - "hearing for three days" - plainly the word refers to a period of time during which

the Court had convened to take evidence or argument. The Taxing Officer considered that the word should be accorded the same meaning in its earlier context: "costs ... of and incidental to the hearing". Therefore, or so the Taxing Officer thought, the recoverable expenses must be closely connected with the days on which the Court sat to adjudicate upon the claim. Secondly, he interpreted s.27 of the *Acquisition of Land Act* 1967 as limiting the power of the Land Court to award costs to those fees and outlays connected with the hearing itself, as distinct from preparatory expenses incurred after the proceedings were instituted but before the first day of the hearing. The latter, he thought, were recoverable only if allowed as a component of the assessed compensation.

6 Expense incurred in compiling a report tendered as the evidence in chief of an expert witness is, in my opinion, part of the costs "of" the hearing within the meaning of the Land Appeal's order; but if not a cost "of" the hearing, the outlay must at least be "incidental" to it.[1] Accordingly, whatever view be taken of the scope of the Land Appeal Court's order, the proper costs of obtaining such a report and putting it before the Land Court should be seen as "necessary or proper for the attainment of justice, or for maintaining or defending the rights of the party"[2] and therefore allowable on taxation. The appeal must

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1 It does not matter that the expert's testimony might not have been adduced until the fourth or a subsequent hearing day. For it is common ground that the Taxing Officer was entitled to conclude, as he did, that the taxation was to be conducted on the assumption that the events during the days of hearing - the evidence, the addresses, and the inspection - were all compressed into half the time actually taken.

2 RSC O 91 r 81; see also r 82A. The Land Appeal Court's order did not state the criteria to be applied in deciding whether the particular item, as distinct from the amount claimed for the fee or disbursement in question, should be allowed. The order required the Taxing Officer to fix the costs "according to the scale of costs prescribed ... in

therefore succeed. Still, as further consequences for this taxation probably attend the narrow construction which the Taxing Officer gave to the costs order, it is appropriate to consider more generally the correctness of his interpretation.

7 Section 27 of the *Acquisition of Land Act* provides:

> "(1) Subject to this section, the costs of and incidental to the hearing and determination by the Land Court of a claim for compensation under this Act shall be in the discretion of that court.
>
> (2) If the amount of compensation as determined is the amount finally claimed by the claimant in the proceedings or is nearer to that amount than to the amount of the valuation finally put in evidence by the constructing authority, costs (if any) shall be awarded to the claimant, otherwise costs (if any) shall be awarded to the constructing authority.
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> (3) Subsection (2) does not apply to any appeal in respect of the decision of the Land Court or to costs awarded pursuant to section 24(3) or section 25(3)."[3]

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respect of the (sic) proceedings in the Supreme Court and in accordance with ... s. 41(a) of the *Land Act* 1962". The parties, however, are content that rr. 81 and 82A apply. As it seems unlikely that the application of any other arguably available formula (see e.g. *Smith v Buller* (1875) 19 LR Eq 473, 475) could make a difference in this case, the criteria stated in those rules will be adopted.

3 Section 24(3) relates to amendments to claims; s.25(3) is concerned with the grant of leave to a claimant to be heard on a reference to the Court by a constructing authority for a determination of the amount of compensation where the claimant fails to enter an appearance on the reference.

8 The mention in s.27 of "hearing and determination" is reminiscent of s.26 of the statute, which provides that "... the Land Court shall have jurisdiction to hear and determine all matters relating to compensation under this Act". For centuries, the expression "hear and determine" has been a conventional choice of words to confer jurisdiction to adjudicate upon justiciable contests. The commission that Scrope CJ caused to be read when the Northamptonshire eyre opened on 6 November 1329, for example, authorized the justices to hear and determine pleas of franchises and trespasses:[4] that is, to try the cases and to decide their outcome.[5] This must also be the sense in which "hear and determine" is used in s.26. In a corresponding way, s.27 confers a power to grant costs in respect of the exercise by the Land Court of the jurisdiction invested by s.26. Section 27 therefore permits costs awards in respect of interlocutory,[6] as well as final, proceedings; and, putting the matter generally, the section authorizes costs orders in relation to fees and disbursements incurred from the time of institution of proceedings in the Court claiming compensation under the Act.

9 The Taxing Officer, as I have said, considered that s.27 constrained the power of the Land Court in recompensing a successful claimant for costs properly

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4 The Eyre of Northamptonshire 1329-1330 Vol 1, Selden Society translation (1983) p.2.

5 More recently, the Parliament of the Commonwealth invested the Federal Court of Australia with jurisdiction "to hear and determine appeals...": s. 19(2) *Federal Court of Australia Act* 1976.

6 The Act provides for interlocutory steps: see ss. 24(2), (2A), (4), (5) and (6); ss. 25(1) and (2). It would therefore be odd if the Act made no provision for costs in respect of them.

incurred in prosecuting a claim for compensation under the Act through the Land Court. In particular, he was persuaded that the legislature's use of "hearing", rather than "reference", "proceedings"[7] or some other more comprehensive word or expression, required this conclusion. This view of the effect of s.27 has, as the Taxing Officer recognized, real potential for mischief. For unless expenses incurred after the institution of proceedings in the Land Court and before the first day of hearing can be recovered as part of the assessment of the compensation payable in consequence of the acquisition, the interpretation favoured by the Taxing Officer would be so unreasonable that it is scarcely to be supposed that the Parliament could have intended it: it would mean that a claimant suffering loss through the acquisition of property by the State or one of its emanations would be driven to incur further, non-compensable loss in pursing the claim for compensation through the Court.

10 But the Taxing Officer thought that the "costs in respect of the preparation" of the case fell to be allowed "as part of the award of compensation", as he put it. Unfortunately, this view seems not to accord with the legislative scheme in relation to allowance of legal and valuation fees incurred in connection with compulsory acquisitions under the Act. In *Stanfield v. Brisbane City Council*,[8] the Land Appeal Court[9] said:

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7 cf s.41(9) of the *Land Act* 1962.

8 (1990) 70 LGRA 392, 417.

9 Thomas J, Mr Barry (President of the Land Court), and Mr White. See also *Merivale Motel Investments Pty Ltd v Brisbane Exposition & South Bank Redevelopment Authority* (1985) 10 QLCR 268, 288.

> "It has been the practice of the Land Court and this Court to allow a dispossessed owner as an item of disturbance the costs incurred for legal and valuation fees during the period from receipt of the notice of intention to resume up to the date of lodgment of the claim in court."

Consistently with this, and correctly in my opinion, the Land Court has more than once held that expenditure properly incurred in prosecuting in the Court a claim for compensation pursuant to the Act may be recovered through an award of costs.[10]

11 The concern that s.27 does not permit the award of costs for "preparatory" steps is unjustified. That leaves the question of the meaning of the order.

12 The Land Appeal Court granted the claimant its costs of[11] "the hearing", not those of the "hearing and determination" of the claim. But the omission of a reference to "and determination" in the form of order is not indicative of an intention to restrict its effect in the way suggested by the Taxing Officer. True it is that the absence of "and determination" renders the order susceptible of more than one possible meaning. In these circumstances, it is permissible to have regard to the reasons which accompanied the order[12] in interpreting the words used. Those reasons, which have already been set out, reveal that the limited relief is explained by the claimant's partial success. They also disclose that the

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10 *Merivale Motel Investments Pty Ltd v Brisbane Exposition & South Bank Redevelopment Authority* (1985) 10 QLCR 175, 203-204, 206.

11 "and incidental to".

12 *Australian Energy Limited v Lennard Oil NL (No 2)* [1988] 2 Qd R 230, 232, 243-244.

intention was to reflect that limited success by restricting the costs allowed for the days the Court sat to receive evidence and argument to those which would have been incurred had that hearing finished in three days, not by denying costs incurred in preparing the case. In effect, the Court was saying that the costs should be restricted as if the hearing were shorter than the six days actually occupied: nothing more.

13 That leaves the issue whether the Taxing Officer was wrong to refuse to allow any costs for junior counsel. The question is stated in that fashion for two reasons. First, the decision under review should be affirmed unless it is shown to be clearly wrong.[13] Next, the argument was directed not so much to the particular contributions made by junior counsel as to the broader question whether in view of the complexity of the issues, the volume and variety of material to be mastered and presented, the sizable amount of money at stake[14] and "the desirability of a division of labour"[15] between counsel, rather than senior counsel and solicitor, some allowance should have been made for junior counsel in the preparatory work or during the six day hearing.

14 There were substantial complexities in the Land Court case. Valuation problems arose from the nature of the property and from difficulties associated with identifying its development potential. Some of the land was flood prone. Some was suitable for one purpose; some for another:

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13 *Australian Coal and Shale Employees Federation v The Commonwealth* (1953) 94 CLR 621; *Cole v Gardner Bros (Old) Pty Ltd* [1972] QWN 32; cf *Re Fuller Holdings Pty Ltd (In Liq)* (1979) 21 SASR 212, 215.

14 *Beasley v Marshall* (No 3) (1986) 41 SASR 321, 332.

15 per Taylor & Owen JJ in *Stanley v Phillips* (1966) 115 CLR 470, 485.

in part for unit or townhouse development; in part for commercial development; in part for "rural home sites". The claimant also sought to establish that some was suitable for development as a resort hotel. Although that contention failed, the claimant did succeed in establishing that some of the land could be developed as an equestrian centre. Other portions were appropriate for parks and recreational facilities. An assessment of the highest and best use necessarily raised several issues concerning the range of possible uses and the intensity of potential developments.

15 A difficulty arose through zoning of the land as "Special Facilities - Resort Hotel (Maximum 300 rooms), Accommodation Units (Maximum 112 rooms), Residential Housing (Maximum 15 homesites), and Recreation Facilities" Zone. The respondent had approved the rezoning, which took effect in November, 1989. The rezoning application had included a plan, and a condition of approval required development in accordance with it. However, the description on the zoning map made no reference to the plan; and there was no rezoning deed. The absence of these controls created what the Land Court described as a "quite bizarre circumstance", and raised difficulties in identifying permitted developments. A related issue was whether the Council might impose similar conditions on any subdivision, or require rezoning of the subdivided lots - prospects suggesting a need to investigate Council practice, for that might provide guidance to a potential purchaser.

16 The planning situation was also complicated by the consideration that a new town planning scheme was on public exhibition at the resumption date. The case accordingly called for analysis of the new scheme's discretionary provisions relating to density of development and their likely application to the land on the assumption that it had not been resumed.

17 Identification of the land's highest and best use required much expert evidence: from a town planner, a civil engineer, an architect, an accountant, and valuers.

Considerable preparation was bound to be needed to master the case, in particular to appreciate the ways in which the expert evidence inter-related, and to decide how the claim might best be presented. The accountant's evidence relating to the feasibility of an equestrian centre, for example, dealt with a facility containing 228 stables, a large "grand prix" arena, grandstand seating, polo ground, 4 small practice arenas and a cross-country jumping course. Perhaps not surprisingly, some "refinement"[16] of the accountant's report occurred in the course of its preparation for presentation at the hearing.[17]

18 The valuation evidence was complex too. Because of the available range of uses for different parts of the site, various categories of sales had to be considered. Some of this material, or the conclusions to be drawn from it, was controversial. The evidence of sales of sites for townhouse developments, for example, had to confront a dispute about the way the prices should be analysed for site application (whether at a price per square metre or price per unit). There was also an issue about the trend of the market. The Land Court's reasons show that 10 sales were considered for this purpose. An investigation of the circumstances pertinent to each of them was appropriate. It was then necessary to compare those sales to the subject land, which was not an easy task in view of the range of location of the properties involved in the exercise. Then again, although not so difficult, the case concerning the value of the residential homesite component required sales analysis. Valuation evidence also involved investigation of sales of parcels referred to as "in globo sales" - large parcels; 13 such sales are referred to in the comprehensive, 58 page reasons of the Land Court. And the

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16 as the applicant's submissions characterized the process.

17 There were three versions of the accountant's report, with a reduction in length from an initial 76 to 49 pages.

adequate presentation of the claimant's case required an appreciation of the views of all valuation witnesses.

19 The outcome of the case gives one insight into the complexities. The Land Court found that the valuation methods presented for both sides were "deficient or flawed", holding that the assessment called for a "composite" method. That methodology was then applied to the findings of fact - a process which itself involved consideration of wide-ranging, sometimes complicated, often controversial evidence. The complexities were also acknowledged by the respondent's counsel in the Land Appeal Court, in arguing that the case before the Land Court was indeed "very complex" - a view with which the Land Appeal Court agreed.

20 The Taxing Officer considered that "the brief, though large, was manageable by senior counsel alone. But he did not have the advantage of the analysis of the issues and the evidence developed before me. As his reasons record, although it was asserted before him that the retention of both senior and junior counsel was justified "upon the basis of the complexity of the issues", "the claimant does not set out any of those issues and does not explain how those issues relevantly justified the engagement of two counsel". That is not now so. The detailed submissions before me amply indicate the size and difficulty of the litigation. On the other hand, the Taxing Officer, in forming the view that no costs should be allowed for junior counsel, apparently laboured under a mistaken impression concerning the variety of issues and the volume and complexity of the material involved.

The preparation and presentation of the case, including the cross-examination of the respondent's witnesses, called for much labour and skill from counsel. Of course, as the Taxing Officer has pointed out, the claimant's solicitor will have contributed substantially to the preparation. And the work to be expected of a solicitor matters when, as

here, the issue is whether the expense of the retention of junior, as well as senior, counsel should be allowed.

21 Even where a large volume of evidence is to be adduced, and a case bristles with legal or factual problems, frequently the conduct of the litigation will be reasonably within the capacity of senior counsel alone.[18] In this case, however, when due recognition is accorded to the complexity of the issues, the volume and variety of material to be dealt with in the preparation phase and at the final hearing, the advantages of a division of labour between two counsel,[19] and the very considerable sum at stake, the retention[20] of junior counsel was not a luxury or over-cautious. On the contrary, the engagement was, quite clearly, reasonably[21] "necessary" or, which in this context is to say much the same thing, "proper" within the meaning of RSCO 91 r 81.

22 I will hear submissions as to the form of order.

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18 cf *Resort Management Services Limited v Noosa Shire Council (No. 2)* [1995] 1 Qd R 56, 58.

19 who can be expected to bring to the case the specialist advocacy skills, judgment and experience of ordinarily competent barristers.

20 for the hearing and for at least some, if not all, of the preparatory work actually undertaken. As previously mentioned, consideration is not presently being given to whether particular claims for work done should be allowed and, if so, at what rate.

21 cf *Stanley v Phillips* (supra) at 478, 480.