LAND COURT,

BRISBANE

29 March 2000

Re: Appeal against Annual Valuation –
Valuation of Land Act 1944 –
Valuation Roll No: 623 –
Local Government: BCC-Hamilton.
(AV98-593).

Estate of LV Bressow (Deceased)
v.
Chief Executive, Department of Natural Resources

DECISION ON COSTS

Consequent upon the hearing of the judgment in the above matter on 23 December 1999, the appellant made application for the awarding of part of the appellant's costs in its favour. The respondent resisted that application, claiming that the provisions of section 70 of the Valuation of Land Act are a fetter to such an award, and asking that the application for costs be dismissed accordingly. The respondent then sought an order for the awarding of costs against the appellant in respect of the respondent having to appear before the Court in respect of the application for costs.

Mr C Hughes of Counsel appeared for the appellant. Mr J O'Rourke, Legal Officer, appeared for the respondent.

History of the Claim:

The Chief Executive determined the valuation of the subject land at $700,000 on 9 March 1998, confirming that figure on 25 August 1998. The appellant appealed to this Court seeking an unimproved value of $475,000, which was later amended to $500,000. Having heard the evidence this Court determined the valuation at $650,000. The basis of that determination was that the Court accepted the respondent's assessment of $700,000, but noted that that assessment had not adequately allowed for any impact of a Vegetation Protection Order (VPO), which the

Court assessed in the circumstances of this matter, as representing a diminution in the value of $50,000.

At the handing down of the decision on 23 December 1999, Counsel for the appellant signalled that an application for costs may be forthcoming, and requested that, either an application be lodged with the Court by 31 January 2000, or a formal advice be forwarded confirming that no application was contemplated. The respondent at that time had no objection to that process, and both parties agreed that any application for costs, if it occurred, should be considered on the submissions. The Court so determined.

On 28 January 2000, the appellant lodged by hand a written application for costs, requesting an order by the Court that the Chief Executive pay one-half of the appellant's costs of and incidental to the hearing. On its own initiative the Court issued a notice to both parties requesting their attendance at the Court on 11 February 2000, at which submissions would be sought on whether any further submissions should be taken, or whether the application could be resolved on the written statements. Both parties concurred that no further submissions would be necessary.

The Law:

The powers of the Land Court in respect of the ordering of costs are to be found in the provisions of section 41(9) of the *Land Act* 1962 which states:

> "The Court may make such order as it thinks fit as to the costs of or incidental to any matter that it has jurisdiction to hear and determine including, without limiting the generality of this subsection, the costs of an adjournment or application made in a pending matter, allowances to witnesses attending for the purpose of giving evidence at the hearing and the costs of any survey of boundaries."

Those provisions are also conditioned in respect of a matter of valuation under the *Valuation of Land Act* 1944 by section 70 of that Act which states:

> "**70(1)** Where the value of land as finally determined upon an appeal against the valuation is the value stated by the owner in the owner's notice of appeal against the valuation, or is nearer to that value than to the valuation appealed against, costs shall not be awarded against the owner.
>
> **(2)** Otherwise costs shall not be awarded against the chief executive. "

The appellant recognises the directions of section 70 of the Valuation of Land Act, and the fetter that section 70(2) places upon the exercise of discretion by the Court. However Mr Hughes for the appellant, argues that the "exceptional

circumstances of this case" may influence the Court to exercise its general discretion, notwithstanding the provisions of section 70. In support of its application for special consideration, the appellant argues that it is not the quantum of the amounts claimed and awarded which is important, but the fact that the proceedings demonstrated that, but for the appeal, the impact of the VPO would have continued to be ignored as an impost upon the use and value of the subject land, and that important principle would not have been explored effectively.

Decision:

I look first to the application for costs associated with the appearance on 11 February 2000 by the respondent. While I accept that both parties have been placed to additional expenses, the decision to direct the parties to attend was made by the Court in the interests of ensuring that either party had every opportunity to present relevant material. The Court was aware that both parties had already agreed for any application for costs associated with the hearing to be determined on written submissions. In those circumstances I see no justification for the awarding of any costs associated specifically with the application hearing on 11 February 2000.

In the matter of the application for costs associated with the hearing, in his application for special consideration of the exceptional conditions associated with the VPO, Mr Hughes sought comfort in the decision of *Yalgan Investments Pty Ltd v. Council of the Shire of Albert* [1997-98] 17 QLCR 401. In that matter the Land Appeal Court summarised the key judgment findings affecting the awarding of costs in this jurisdiction at pages 406 to 408. Mr Hughes sought particular support in the Land Appeal Court summaries at sections (f), (h) and (k) of the following general statements:

(a) the power to award costs is the creation of statute

(b) the power for the Land Court to make an order for costs is conferred by section 41(9) of the Land Act

(c) the discretionary power of the Land Court is full or complete

(f) the discretion to award costs must be exercised on principled grounds or judicially, and referred to relevant considerations

(h) a successful party can expect an order for costs in his favour, but costs are discretionary, and no hard and fast rules will ever be allowed to override that discretion

(k) it is wrong to only consider the amount of the value put in evidence; and it is usually more reliable to consider the conduct of the appellant, and the authority; and whether the parties have been forced unnecessarily into litigation; or whether vexatious or grossly exaggerated claims are presented which impose unnecessary burdens on the parties.

In support of his resistance to the awarding of costs, Mr O'Rourke sought guidance in the decision of *Toshach Nominees Pty Ltd v. Chief Executive, Department of Lands* (1994-95) 15 QLCR 9. In that matter the learned Member (later President) declined to award costs of an appeal, where the appellant had been successful in having the valuation reduced to $300,000 from the former figure of $360,000. The appellant had appealed for $286,000, and the final value determined was nearer to the appellant's estimate than that of the respondent.

In that matter the Court found that there was no evidence to support that the respondent had acted arbitrarily or capriciously, or with wanton disregard for valuation principles (page 13). The Court also noted the extended delay in lodging the application for costs after the handing down of the decision (26 September 1991 to 30 June 1993), which the Court found was fatal to the appellant's application for costs.

A similar finding was also found in *CR Gay v. Chief Executive, Department of Natural Resources* [1997-98] 17 QLCR 282, where the Member declined to award costs against the respondent, determining that each party should bear its own costs. An application for a re-hearing on costs in respect of whether the respondent had acted arbitrarily or capriciously in that matter was agreed to in *Gay* (supra) at page 296; and the results of that rehearing are reported at page 305. The references in the above decisions form the basis of my considerations in this matter.

However, in considering the special nature of the impact of the VPO, I am aware that there have been previous matters where considerations of the special merits of the matter have had an influence upon the awarding of costs. In the matter for instance of *The Valuer-General ats Queensland Club* (1990-91) 13 QLCR 207, the Land Appeal Court considered the matter of the impact of a heritage listing of the Queensland Club in Alice Street, Brisbane, upon the unimproved value of that land. The hearing in the Court below, and the hearing by the Land Appeal Court, was seen by both parties in the nature of a test case on a point of law as to whether the impact of the heritage listing ran with the land, or the old building. The Land Appeal Court

affirmed the decision of the Land Court that it ran with the land, and awarded that the respondent's costs be paid by the Valuer-General in that matter.

In summarising its decision the Land Appeal Court said at page 222:

> "There is no suggestion that the Valuer-General has acted arbitrarily or capriciously in interpreting the law forming the basis of his valuation. The argument before the Land Court and this Court demonstrates otherwise. It appears also that at all times it was agreed that the matter turned on a question of law. The valuation sums which should be applied to the land are dependant upon whichever interpretation of the law is correct. In these circumstances, Counsel for the respondent argues that the matter is in the nature of a test case and that it would be inequitable for the respondent to have to bear the costs of testing a piece of legislation which is used for the benefit of all. This, he submits, is the situation with taxation cases where the Commissioner wants something sorted out by a court. "

The Land Appeal Court also noted that such a point of law cannot be distinguished just because the principle may have only limited application. The Land Appeal Court noted the uniqueness of the *Queensland Club* matter , and distinguished that matter from its own findings in *Denning v. The Council of the City of Ipswich* (1988-89) 12 QLCR 171. In the *Denning* matter the Land Appeal Court considered the question of costs, which were not awarded to the dispossessed owner because the Land Appeal Court considered justice would not be seen to do so in the context of that matter, as the respondent Council had been successful in the matter. In the *Queensland Club* matter the Land Appeal Court found that the reverse reasoning was applicable, and awarded costs to the respondent.

The matter of whether a party won or lost was addressed in *Minister for the Environment v. Florence* (1980-81) 45 LGRA 127, where Wells J said at page 149:

> "Upon an ordinary claim in the general jurisdiction it is, generally speaking, obvious who has won and who has lost, and correspondingly clear why costs usually follow the event. Upon a claim for compensation for land compulsorily acquired, it is not, generally speaking, appropriate to speak of one party as having won; compensation is awarded to one who had already been given, by statute, the right to receive it. It is therefore as just to say of the latter sort of case that the claimant ought, in the absence of special circumstances, to receive his reasonable costs of obtaining the compensation that is, *ex hypothesi*, his due, as it is to say of the former sort of case that prima facie costs follow the event in favour of the party who has won. But costs are, as always, discretionary, and no hard and fast rule will ever be allowed to occupy part of an area controlled by a discretion, however predictable the result of its exercise may be in certain sorts of cases. "

Now while Wells J was there referring specifically to a matter of compensation, his words also provide guidance in matters of valuation. The relevance of the directions of Wells J in the current matter, in my opinion, lies in whether there were special circumstances which could be accepted to overturn the usual process in respect of costs. Mr Hughes argued that, because there had been no concession by the respondent in respect of the impact of the VPO, then the matter had of necessity had to come before the Court for direction. The acceptance of some impost by the VPO upon the valuation by the Court would tend to support Mr Hughes conclusion. However there is no evidence that the respondent had failed to recognise the impact of the VPO upon the valuation due to some lack of care or diligence in preparing the valuation. (See *Queensland Landmark Developments Limited v. Valuer-General* (1992-93) 14 QLCR 168, at 171.) In fact it was clear to both parties that there was a dearth of market evidence about the impact of a VPO upon values, and there was no direct evidence to that effect supplied by either party in this matter. I also note that the Court acknowledged the relatively-recent introduction of VPO legislation, and a consequential lack of clear guidance on their impacts. While there was no request by either party to treat the matter as a test case, in respect of the impact of a VPO upon the value of land, the evidence could be construed to convey such a conclusion. However as noted in the decision at page 21, the individual special circumstances of the current matter influenced the outcome.

The outcome of the decision of the Land Appeal Court in *Ballow Chambers Limited v. Valuer-General* (1992-93) 14 QLCR 422, can be distinguished in respect of the awarding of costs. In that matter the parties agreed on the relative valuations of that property, depending upon whether a classification under the Heritage Building Protection Act did, or did not, impose constraints which must be considered in the valuation. The Land Appeal Court agreed with the method adopted by the respondent, but awarded costs to the appellant, as the matter was agreed to be a test case to establish a principle. The specific nature of the VPO in the current matter, does not have that special character.

On the evidence before me I feel constrained in exercising my discretion in this matter; and do not treat the matter as special to the extent that it may be seen to establish a principle beyond the existing property. On that basis I make no award for costs to the appellant associated with the hearing of the appeal.

Conclusion:

The application for costs by the appellant in respect of partial costs associated with the hearing of the appeal is refused. The application by the respondent for the costs of the hearing on the application for costs is also refused. Both parties should bear their own costs on both matters.

(NG Divett)

Member of the Land Court