LAND COURT OF QUEENSLAND

CITATION:	*Lim v Moreton Bay Regional Council (No 2)* [2019] QLC 22
PARTIES:	**Edwin Villa Abrille Lim** (applicant) v **Moreton Bay Regional Council** (respondent)
FILE NO:	AQL177-17
DIVISION:	General Division
PROCEEDING:	Application for costs
DELIVERED ON:	13 May 2019
DELIVERED AT:	Brisbane
HEARD ON:	Submissions closed 18 April 2019
HEARD AT:	Heard on the papers
MEMBER:	PA Smith
ORDER:	**The respondent's application for costs is refused.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – whether s 34 of the Land Court Act 2000 or s 27 of the Acquisition of Land Act 1967 applies – where the Court found in favour of the applicant in the originating proceedings – whether the applicant's conduct has unreasonably and unnecessarily forced the respondent into litigation – whether the applicant presented its case in a way that imposed unnecessary burdens on the respondent or the Court – whether the applicant has pursued a vexatious, dishonest, or grossly exaggerated claim *Acquisition of Land Act 1967*, s 27 *Land Court Act 2000*, s 34 *Banno & Anor v Commonwealth of Australia & Anor* (1993) 81 LGERA 34, applied *Lim v Moreton Bay Regional Council* [2019] QLC 2, cited

McDonald v Department of Transport & Main Roads (No. 2) [2016] QLC 8, applied
Moyses & Ors v Townsville City Council (1979) 6 QLCR 271, applied

APPEARANCES: E Lim, the applicant (self-represented)
D Whitehouse (instructed by Moreton Bay Regional Council) for the respondent

Background

[1] On 25 January 2019, I delivered my decision regarding a claim for compensation by Edwin Villa Abrille Lim (the applicant) consequent upon the compulsory acquisition of land owned by him by the Moreton Bay Regional Council (the respondent) pursuant to the *Acquisition of Land Act 1967* (the ALA).

[2] The respondent now makes an application for costs, which is opposed by the applicant. The application was heard on the papers. The respondent relies on s 34 of the *Land Court Act 2000* (the LCA) and s 27 of the ALA for its application for costs.

The legislation

[3] The first question to address is whether s 34 of the LCA is the source of this Court's power to make orders as to costs in this matter. This is an important consideration, given that s 34(1) states that the section is subject to the provisions of that Act or another Act to the contrary. Put simply, if other legislation makes specific reference to orders that may be made as to costs, that legislation prevails over s 34.

[4] Section 27 of the ALA does make specific reference to costs for matters such as the one at hand. Accordingly, s 27 of the ALA, and not s 34 of the LCA, applies in this matter.

[5] Section 27 of the ALA provides as follows:

> (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.
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> (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.

(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).

[6] In terms of s 27(2) of the ALA, the applicant's final claim was $873,018.88. The "amount of the valuation finally put in evidence" by the respondent was $152,500. The determination made by the Court was $255,670. Accordingly, because the compensation awarded is closer to the respondent's final valuation than the applicant's final claim, s 27(2) of the ALA means that costs, if any, can only be awarded to the respondent.

General principles

[7] I can do no better than to quote from the 2016 decision of former President MacDonald in *McDonald v Department of Transport & Main Roads (No. 2)*[1] where her Honour set out the legal principles to be considered in ALA costs matters. Her Honour had this to say at paragraph 12:

> "In exercising the discretion to award costs in compulsory acquisition cases, the following principles should be considered:
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> (a) The discretion is to be exercised judicially, that is for reasons that are not arbitrary, and must be justified by reference to relevant considerations. (*Wyatt v Albert Shire Council* [1987] 1 Qd R 486 at 489; *Yalgan Investments Pty Ltd v Albert Shire Council* (1997) 17 QLCR 401 at 407).
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> (b) The fact that the claim is for compensation for the compulsory acquisition of land must be taken into account. Compulsory acquisition cases are different from ordinary claims in the significant respect that the claimant, unlike the ordinary plaintiff, has no choice whether to make a claim or not. The mere acquisition by a compulsory process gives the claimant a claim to compensation which he or she could hardly be expected to renounce (*Yalgan Investments Pty Ltd v Albert Shire Council* (1997) 17 QLCR 401 at 407).
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> In *Barns v Director-General, Department of Transport* (1997-98) 18 QLCR 133 at 135,136, the Land Appeal Court said:
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> > 'This Court has an unfettered discretion as to the costs of and incidental to an appeal before it. An unfettered discretion is not an unprincipled one, and on ordinary principles, costs in circumstances such as these would follow the event. The general rule that costs will usually follow the event is one which is deeply embedded in our law. Although it has attracted some criticism in recent years, there was no attempt by the legislature to modify it when the practice of this Court was given attention in the *Land Act 1994*. It is a general rule which *prima facie* should be applied in this case.
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> > The respondent submitted that the rule is not always applied by Courts exercising jurisdiction in land compensations matters. He cited *Moyes v*

[1] [2016] QLC 8.

Townsville City Council, Theo v Brisbane City Council, Minister for the Environment v Florence and *Banno V Commonwealth of Australia*. These cases show that in compensation cases, the Land Court must take into account the fact that an appeal to that court is the only way in which a dispossessed owner can obtain an independent determination of the value of the land taken. As Wilcox J said in *Banno*:

> "The acquisition left the applicants in the position of either accepting the Commonwealth's assessment of the proper compensation or of having the Court rule on its adequacy. Perhaps people in that position should be allowed access to the Court, to present an arguable and well organised case, without being deterred by the prospect of being ordered to pay the Commonwealth's costs if their case proves unpersuasive. I distinguish the case of resumees who pursue a vexatious, dishonest or grossly exaggerated claim or present their case in such a way as to impose unnecessary burdens on the Commonwealth or the Court".'

Similarly, in *Pastrello v Roads and Traffic Authority (NSW)* (2000) 110 LGERA 223 at 225, Talbot J said:

> 'There needs to be a strong justification for awarding costs against an applicant where the effect of making that order is to erode the benefit of the just compensation recovered as a consequence of the Court's determination. It is only in special cases that the Court will deprive the owner of the full benefit of the compensation which is determined as fair and just in the circumstances of the case.'

(c) The conduct of the parties is relevant, particularly the conduct of the applicant.

When considering whether to award costs against a claimant, the Land Appeal Court said in *Yalgan* (1997) 17 QLCR 401 at 408:

> 'Section 27(2) of the *Acquisition of Land Act 1967* should not be regarded as a legislative suggestion that, where the claim is substantially more than the amount awarded, and the amount put in evidence by the constructing authority is not substantially less than the amount awarded, the Court should not merely refrain from awarding any costs to the claimant but should award costs to the authority.
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> Where the Land Court is considering whether it should award costs to a constructing authority, it could be wrong to have regard merely to the amounts of the claim and of the award and of the value put in evidence by the authority. Usually it would be more relevant to enquire whether the conduct of the claimant (such as, for example, making an exorbitant claim) has been such as to force the authority, unreasonably and unnecessarily, into litigation (*Moyes* at p. 274) or whether the claimant has pursued a vexatious, dishonest or grossly exaggerated claim or presented his case in such a way as to impose unnecessary burdens on the constructing authority or the Court (*Banno* at p. 53).'" (citations in original)

[8] I note that s 27 of the ALA has not been amended since her Honour's decision in *McDonald*. I adopt then President MacDonald's analysis of the section and case law.

[9] What is now required is to consider how the facts in the current matter apply to the legal principles. I turn to the parties submissions. As the application for costs is made by the respondent, I will start with the respondent's submissions.

Respondent's submissions

[10] The respondent has appropriately referred to the authorities set out in paragraph 7 of this decision. Relying on those decisions, the respondent submits that the applicant's claim for compensation was exorbitant. Further, the respondent notes that the applicant chose not to engage legal representation; he also did not call independent expert town planning or valuation evidence.

[11] The respondent also correctly points out that in my substantive decision in this matter, I was critical of Mr Lim for continuing to conduct his case as if the material that he was relying on had been prepared by an independent expert, in circumstances where such material was prepared by himself.[2]

[12] The respondent has also quoted from my decision where I was critical of the applicant's evidence and the conduct of the applicant with respect to such evidence. Relevantly, I had this to say:

> "[87] Much of the applicant's evidence, in both documentary and oral form, is not relevant to the overall determination of this case. This has infected the claim that the applicant has sought to make out for compensation. For instance, from a planning sense, the applicant spent some time criticising the respondent for not carrying out other flood rectification work which, the applicant says, would have made the resumption of his property unnecessary. This of course is completely irrelevant to my determination in this matter. This Court is not charged with reviewing the decision to resume the applicant's land; the Court **is** charged with determining the proper amount of compensation payable consequent upon the resumption.
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> [89] Furthermore, the applicant has relied upon a great deal of 'evidence' in his documentary material to which either no weight or extremely limited weight (bearing in mind the obligations of the Land Court pursuant to s 7 of the *Land Court Act 2000*) can be given. Again, as regards for planning evidence, examples include newspaper articles and the like, both local and interstate, relating to planning approvals made/proposed for other properties."

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2 *Lim v Moreton Bay Regional Council* [2019] QLC 2, [49]

[13] The respondent submits that it is relevant in considering whether to award costs that a significant amount of time was spent by the respondent and the Court listening to, and considering, evidence that was ultimately irrelevant to the overall determination of the case. The respondent points out that this ambiguity extended to the applicant's claim for compensation which varied from an initial amount of almost $3 million to the amount finally sought of $873,018.88.

[14] The respondent acknowledges the deficiencies in the respondent's valuation method as set out in my earlier decision. In this regard, the respondent submits that, had the constructing authority contended for the award ultimately assessed by the Court, it remained unlikely that litigation would have been avoided due to the substantial distance between the amount awarded and the amount claimed.

[15] The respondent submits that the applicant's claimed amount for compensation had no arguable basis.

Applicant's submissions

[16] The applicant contends that no order should be made as to costs.

[17] The applicant has provided written submissions in support of his contention that he conducted his case appropriately. He contends that there were significant deficiencies in the respondent's case as to town planning and valuation evidence and that those deficiencies were specifically referred to in my substantive decision and relied upon by myself in awarding compensation of $103,170 (plus interest) above that which the respondent contended for.

[18] The applicant remains convinced that his claim of $873,018.88 was not exorbitant because that was the figure that he believed he needed to receive in order to be able to buy a property equivalent to that which he lost in the compulsory acquisition.

[19] The applicant refers to discussions between the parties and disputes that comments he referred to occurred during a mediation process. Rather, the applicant submits that the comments and exchanges between the parties occurred prior to the mediations commencing and therefore he considers that same are not subject to the confidentiality of the mediation process. The applicant specifically submits that he

was intimidated by the respondent's counsel in one non-mediation meeting to drop the case "as it is doomed to fail".

[20] Although the applicant's submissions are lengthy (19 pages, 62 paragraphs long), a great deal of what the applicant has to say is a repeat of what he said in the substantive hearing by way of evidence and submissions and those points have already been dealt with in my earlier decision. There is no utility in referring to these issues further, save to note that I was in agreement with him on a number of points, and against him on many others. In this regard, I note what the applicant has to say at paragraph 40 of his submissions; that is, the applicant's "deficiency in oratorical skills, knowledge of legal technicalities and court procedures hindered his presentation of comparison charts, aerial photographs, newspaper articles, extensive well researched articles and citations".

Respondent's reply submissions

[21] It is somewhat surprising that the respondent's reply submissions make reference to an offer made by the respondent to the applicant on a confidential basis except as to costs. Details of that offer are set out in an affidavit of Angus James Conaghan which was filed at the same time as the reply submissions. I find the filing of the affidavit and the submissions somewhat surprising as I would normally expect those details and evidence to be included in the substantive submissions of the respondent seeking costs, rather than a reply. No doubt, the respondent contends that it has included such material in reply submissions in light of, and in response to, what the applicant had to say in his submissions. At any rate, the applicant has not corresponded with the Court in any way making any objection to the reply material not properly arising under reply and, given the circumstances, I am prepared to accept that the reply material of the respondent is generally in response to the submissions of the applicant.

[22] The details of the offer made by the respondent are clear. On 15 December 2017, the respondent wrote to the applicant offering to settle the matter by payment of the sum of $200,000, inclusive of disturbance items and interest. The offer was repeated in a further letter by the respondent on 29 January 2018 which noted that the offer would be withdrawn after close of business on 23 February 2018. In both letters, the respondent advised the applicant of its intention to rely upon the letters on the issue of costs if the offer was not accepted. The offer was not accepted by the applicant and

of course, the applicant went on to be awarded a sum greater than that set out in the offer (being the sum of $255,670 plus interest).

[23] I also note that the respondent's letter of 15 December 2017 refers to without prejudice correspondence from the applicant on 5 December 2017, noting an offer from the applicant to resolve the matter on the basis of the respondent paying the applicant the sum of $877,592.32. That offer was specifically rejected by the respondent.

[24] The respondent contends that the Court should regard the applicant's high offers and unwillingness to consider an offer in the vicinity of the Court's ultimate finding to be relevant to the exercise of its discretion in this matter. The respondent also submits that regard should be had to the genuine attempts made by the respondent to resolve the dispute, including by providing copies of textbook extracts and cases to the applicant when it was not obliged to do so.

Determination

[25] The respondent has accurately quoted from my substantive decision where I was critical of certain aspects of the applicant's conduct during the hearing. However, the paragraphs extracted by the respondent do not tell the full story. In my decision, I also had the following to say regarding the applicant:

> "[86] …The applicant is clearly a highly educated, articulate person who has knowledge far exceeding the average Queenslander in both valuation matters and acquisition law…
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> [106] In the same vein, the applicant at page 20 of Exhibit 3 stressed the need to 'take into full consideration the resumed property's unique characteristics' in establishing compensation…
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> [107] Nowhere in any of its evidence does the respondent refute any of such factual evidence put forward by the applicant. Further, despite the above characteristics of the resumed land being front and centre in the applicant's case, nowhere does Mr Gillespie appear to have considered sales of properties with the same features in his comparison sales. Nothing in the material that I have before me shows even the possibility of mature, koala bearing eucalyptus trees being located in natural bushland on any of the sale properties, let alone any of the other natural features that the applicant has provided evidence of as critical features of the resumed land. There are no photographs of the sale properties."

[26] The above is far from the only instance in my decision where I was favourably impressed by the evidence of the applicant and critical of the respondent and/or the experts it called. For instance, as regards Mr Gillespie's expert valuation evidence, I had this to say:

> "[85] …Mr Gillespie did not include details of his discussions with Mr Smith as revealed during re-examination as to the possibility of the northern part of the pre-resumption area being subdivided to allow construction of a dwelling. That was clearly important evidence relating to the resumed area which both Mr Gillespie and Mr Smith had an obligation to bring directly to the attention of the Court in their respective written reports in order to properly discharge their responsibilities to properly assist the Court with their expert opinions."

[27] My criticisms of Mr Gillespie's evidence did not stop there. As I said:

> "[133] Even taking into account the different zoning, there seems to be a misfit between Mr Gillespie's valuations. On its face, this is troubling given that the Dale Street sales and the resumed land were all acquired by the respondent under the same scheme.
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> …
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> [144] …I have independent expert evidence from Mr Gillespie which I have accepted in part, but which has glaring omissions relating in particular to his failure to properly, if at all, take account of the resumed land containing koala habitat, established rainforests, flora, fauna, and a creek, as well as his failure to take any account of the Dale Street sales based on his incorrect knowledge as to what the law provides, and his failure to give any real regard to the highest and best use possibility of the pre-resumption property, absent the scheme of resumption, being subdivided and with the construction of an additional residence on a separate block in the northern part of the pre-resumption property."

[28] I was also critical of parts of the expert town planning evidence of Mr Smith. My criticisms chiefly related to Mr Smith's failure to disclose details of discussions he had with Mr Gillespie relating to the prospects of subdivision of the applicant's property, as well as the circumstances surrounding Mr Smith's supposedly minor amendments to his report for the sake of clarification. In this regard, I noted:

> "[68] Mr Gillespie's evidence casts further doubt on the amendments to Exhibit 7 proposed during evidence-in-chief by Mr Smith. Mr Gillespie's evidence of what Mr Smith told him is certainly consistent with the unamended Exhibit 7, but not so much with the amended Exhibit 7.
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> …
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> [84] In the circumstances, I agree with the applicant that the amendments proposed by Mr Smith were more than just

> clarification/typographical, making a substantive change to the way in which Exhibit 7 is read. Not only should leave to make the amendments have been sought; the applicant should have been provided with advance notice of the respondent's intention, through Mr Smith, to have the contents of Exhibit 7, which the applicant had had for many months, amended. This would have allowed the applicant a fair opportunity to consider the proposed amendments, an opportunity which he did not properly have when the amendments were proposed."

[29] As is apparent from the above, in my decision I was critical of the way the case was run by both the applicant and the respondent. I can do no better than to repeat my summary conclusions regarding the applicant and the respondent in this regard:

> "[152] The respondent only has itself to blame for not answering the factual evidence provided by the applicant as to the koala habitat, established rainforest, flora, fauna and creek existing on the resumed land; the relative scarcity of many of those items; and the value that those items bring to the resumed land. Likewise, the applicant has himself to blame for not providing the Court with independent expert opinion which could have assisted the Court in determining a value for the resumed land taking into account those components."

[30] Had the circumstances of this matter been entirely consistent with those set out in the costs submissions of the respondent then, on the basis of the general principles relating to costs in ALA matters as set out earlier in these reasons, I would have had no hesitation in awarding the respondent the costs that it seeks. However, as is clear, the respondent is not at all blameless in the manner in which it has conducted certain aspects of its case.

[31] The critical questions arising from the authorities set out earlier in these reasons are clear; that is, has the conduct of the applicant (such as, for example, making an exorbitant claim) been such as to force the respondent, unreasonably and unnecessarily, into litigation (*Moyses*),[3] or has the applicant pursued a vexatious, dishonest or grossly exaggerated claim or presented his case in such a way as to impose unnecessary burdens on the respondent or the Court (*Banno*).[4]

[32] In my view, the respondent in this matter was not forced unreasonably and unnecessarily into litigation. It must of course be remembered, as is the case in all acquisition matters, that it is entities such as the respondent who compulsorily take

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3 *Moyses & Ors v Townsville City Council* (1979) 6 QLCR 271.

4 *Banno & Anor v Commonwealth of Australia & Anor* (1993) 81 LGERA 34.

land belonging to an applicant, often against the will or wishes of the applicant (but of course for a proper public purpose as allowed by acquisition legislation).

[33] The respondent cannot rely upon its offer to settle the matter. Had the applicant accepted such offer, his proper compensation would have fallen short by over $55,000 plus interest. In other words, the respondent's offer was more than 25% less than the applicant was entitled to. In any way of looking at it, that is a considerable amount. While it may be true, as the respondent asserts, that the applicant would not have accepted an offer from the respondent even if it had been identical to the ultimate award made by the Court, that is no more than speculation on the respondent's behalf. The respondent must live with the consequences of the offer that it actually made and not with the hypothetical consequences of an offer that it did not make.

[34] There is no evidence at all that the applicant pursued a vexatious claim. Likewise, there is nothing in my view that supports any finding that the applicant presented a dishonest claim. There is however strong support for the contention that the applicant presented a grossly exaggerated claim, at least at the outset.

[35] The applicant initially sought almost $3 million in compensation. Of course, by the time that the hearing commenced, the quantum of the applicant's claim was substantially reduced. As the ALA makes clear in s 27(2), it is the claim finally put forward by the applicant which I have to consider. Such a figure was of course over $620,000 more than the award I ultimately made (excluding interest). Even though the applicant's final claim was substantially reduced from his original claim, it is true to say that the final claim was at least an exaggerated claim, or perhaps even a grossly exaggerated claim. In any event, the final determination was well below the midway point between the amount proposed by the respondent and the amount claimed by the applicant.

[36] The question must therefore be asked; did the applicant present his case in such a way as to impose unnecessary burdens on the respondent. My reasons for decision in the substantive matter clearly show that the applicant did present parts of his case in a way which placed unnecessary burdens on the respondent. This included presenting much material in evidence which was of very little, if any, weight or use in determining the matter, and continuing to intertwine opinion evidence and factual

evidence even after the Court brought to the applicant's attention the requirement of the applicant to limit himself to factual evidence only.

[37] Were there no other factors to take into account, the distance of the amount finally claimed by the applicant when compared to the award made by the Court and the midpoint between the position of the applicant and the respondent would incline me to make an award for costs in favour of the respondent. This is particularly so given the extra burden that was placed on the respondent because of the irrelevant material put into evidence by the applicant and the mixture of opinion and factual evidence supplied. However, to make such an award for costs in this case would ignore troubling aspects of the conduct of the respondent.

[38] The respondent's case, including the evidence of the experts that it called, ignored the fundamental cornerstone of the applicant's case; that is, that he had taken from him by compulsory acquisition key attributes of his property, such as koalas, rainforest, flora, and fauna, which were extremely difficult, if not impossible, to replace in an urban environment, which were in the applicant's view, supported by the ultimate findings of this Court, of compensable value.

[39] Also, the respondent failed to properly seek leave, as it should have done, for the amendments to Mr Smith's town planning report as proposed by him, which were significant and fundamental to aspects of my final determination. This failure by the respondent meant that the respondent presented its case, at least in part, in such a way as to place unnecessary burdens on the applicant and the Court.

[40] Further, the expert witnesses called by the respondent failed to disclose in their reports details of discussions that they had had which clearly indicated the possibility for the applicant's pre-resumption land to be subdivided. The possibility of subdivision is an essential element for consideration in any acquisition case, and those experts had a clear duty to the Court to make those comments known in their reports. Had details of their conversation not emerged during oral evidence, the Court would have been unaware of that critical fact and the amount ultimately awarded in compensation to the applicant would have inevitably been a lesser amount than that to which he was actually entitled. I cannot stress enough the seriousness of that oversight or failure by the experts and the injustice that the applicant would have suffered had their discussions not belatedly come to light.

[41] When I balance all of the relevant considerations to take into account in this matter, it is my view that this is an appropriate case in which to make no order as to costs.

[42] The respondent's application for costs is refused.

Orders

The respondent's application for costs is refused.

PA SMITH
MEMBER OF THE LAND COURT