LAND COURT OF QUEENSLAND

CITATION:	*93 Fairfield Pty Ltd ACN 621 146 058 as Trustee for 93 Fairfield Unit Trust v Chief Executive, Department of Transport and Main Roads (No 2)* [2023] QLC 16
PARTIES:	**93 Fairfield Pty Ltd ACN 621 146 058 as Trustee for 93 Fairfield Unit Trust** (applicant) v **Chief Executive, Department of Transport and Main Roads** (respondent)
FILE NO:	AQL069-21
DIVISION:	General
PROCEEDING:	Application for costs
DELIVERED ON:	Judgment delivered 27 July 2023 Further order delivered 18 October 2023
DELIVERED AT:	Brisbane
HEARD ON:	Submissions closed 10 August 2023 Submissions in reply closed 24 August 2023
HEARD AT:	Heard on the papers
MEMBER:	WA Isdale
ORDER:	**There will be no order as to costs.**
CATCHWORDS:	REAL PROPERTY – COMPULSORY ACQUISTION OF LAND – PROCEEDINGS FOR COMPENSATION – QUEENSLAND – COSTS – where the respondent resumed land for future railway land – where the applicant applied to the Court to determine the compensation based on the date of constructive resumption – where the respondent was successful in the original proceeding – where the respondent seeks to recover costs and incidentals to the litigation – where the applicant opposes the application due to being an involuntary litigant

Acquisition of Land Act 1967 (Qld) ss 20(5)(g), 27A
Land Court Act 2000 (Qld) s 27

93 Fairfield Pty Ltd ACN 621 146 058 as Trustee for 93 Fairfield Unit Trust v Chief Executive, Department of Transport and Main Roads [2023] QLC 10
Anson Holdings Pty Ltd v Wallace and Anor (2010) 31 QLCR 74; [2010] QLAC 2
Banno v The Commonwealth (1993) 81 LGERA 34
Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads (No 3) (2018) 39 QLCR 318; [2018] QLAC 9
Dunn v Burtenshaw & Anor (2010) 31 QLCR 156; [2010] QLAC 5
Dunn v Burtenshaw & Ors (2011) 32 QLCR 270; [2011] QLAC 5
Harber v Chief Executive, Department of Main Roads [2005] QCA 123
Pastrello v Roads and Traffic Authority (NSW) (2000) 110 LGERA 223
Yalgan Investments Pty Ltd v Council of the Shire of Albert (1997) 17 QLCR 401; [1997] QLAC 191

APPEARANCES: Written submissions:
Mr DR Gore KC and Mr DA Quayle (instructed by Anderssen Lawyers), for the applicant

Mr DG Clothier KC and Ms JS Brien (instructed by Clayton Utz), for the respondent

Background

[1] In December 2018, land owned by the applicant was publicly notified in the Queensland Government Gazette as future railway land. This action was taken by the respondent. The applicant had intended to develop this land for commercial use as a service station. It was an experienced property developer, and this was an activity within its expertise.

[2] In 2020, the land was formally taken under the *Acquisition of Land Act 1967* ("the Act") and the applicant claimed compensation under that Act for its loss. It is significant that the applicant has suffered the loss of its land. It is, effectively, required to then stand up for its rights to proper compensation, being drawn into the compensation process involuntarily due to the exercise of a statutory power by a government authority. It did not so much choose to litigate as need to.

[3] There is no suggestion that the respondent acted other than properly in taking the land in pursuance of a legitimate purpose undertaken for the public benefit.

[4] The applicant brought its claim to this Court and, at mediation, the dispute in relation to the land value was resolved at an agreed value of $5,500,000.

[5] The respondent paid three advances in compensation to the applicant which together resolved this part of the claim.

[6] What remained in dispute were claims for interest, insurance, rates and utilities charges and land tax. These, in total, amounted to $2,097,081. The applicant sought to be compensated for these things on the basis that they were "costs attributable to disturbance" within the meaning of section 20(5)(g) of the Act.[1]

[7] This Court decided[2] that the claims in respect of these items were not within the scope of what was recoverable under the Act and dismissed the application made in pursuance of the clams.[3]

[8] The successful respondent, the Chief Executive, is now seeking to recover its costs of and incidental to the litigation. The applicant opposes this and submits that no order should be made in relation to costs. The result of that would be that each party would bear its own costs.

Some general observances about costs

[9] The purpose of costs is not to be in any way punitive. It is to indemnify a successful party for the costs reasonably incurred in a proceeding. A direction to order costs must be exercised judicially, for reasons that are stated. In the present circumstances, there are relevant legislative provisions concerning the Courts discretion in relation to costs.

The legislative framework

[10] The *Land Court Act 2000*, section 27A states the following on the matter of costs:

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1 *93 Fairfield Pty Ltd ACN 621 146 058 as Trustee for 93 Fairfield Unit Trust v Chief Executive, Department of Transport and Main Roads* [2023] QLC 10.
2 Ibid [56].
3 Ibid [59].

> **27A Costs**
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> (1) Subject to the provisions of this or another Act to the contrary, the Land Court may order costs for a proceeding in the court as it considers appropriate.
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> (2) If the court does not make an order under subsection (1), each party to the proceeding must bear the party's own costs for the proceeding.

[11] In this case, there is a provision in the *Acquisition of Land Act 1967.* Section 27 states:

> **27 Costs**
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> (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.
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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).[4]

[12] Subsection (1) is unsurprising, saying nothing substantially different to what is in the *Land Court Act.* The discretion will be exercised judicially, considering what is relevant and not what is not.

[13] Subsection (2) provides a restriction on the exercise of the discretion; subsection (3) does not apply to the present case.

The submission of the parties

The respondent's submissions

[14] The respondent seeks its costs of and incidental to the claim which the applicant unsuccessfully made for interest and holding costs, which was what the hearing was limited to. It also seeks to recover costs thrown away by the adjournment of the hearing from when it was originally set down in June 2022. It was ultimately heard on 8, 9 and 12 May 2023. The costs are sought to be as agreed or, failing that, on the standard basis. This would allow the costs to be independently assessed by an expert on a standard scale.

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4 *Acquisition of Land Act 1967* s 27.

[15] The submission is that the operative amount finally claimed was $2,097,081. The respondent maintained, successfully, that none of this amount could be claimed, thus valuing the claim at nil. The respondent submits that section 27(2) applies with the result that costs, if any are to be awarded, could only be awarded to the respondent. It is not submitted that the discretion in subsection (1), as controlled by subsection (2), has been curtailed in such a way as would prevent a decision not to order costs. The use of the words "if any" twice in section 27(2) supports this conclusion.

[16] The respondent submits that the conclusion which should be drawn from its contention that section 27(2) applies is simply that the applicant is not eligible for a costs order in its favour. This is not significant as the applicant is not seeking such an order. It seeks only that there be no order as to costs.

[17] The result of section 27(2), it is submitted, is that the respondent is eligible for an award of costs. This is not a conclusion which would be necessary for such an order to be made as, even in its absence, as the successful party, its claim could equally be made under section 27A of the *Land Court Act.* The words "if any" used in section 27(2) do not mandate an order in favour of the respondent if the subsection applies to its circumstances; they only would operate to permit such an order and prohibit one in favour of the applicant which, as has been noted already, is not being sought.

[18] The position remains the same as when the Land Appeal Court was considering costs in *Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads (No 3).*[5] This is particularly relevant as the respondent has made some submissions about possibly reducing the percentage of a costs order in its favour to allow for an aspect that will be addressed later in these reasons. Member Stilgoe, with whose reasons Kingham P and Dalton J agreed, said:

> "[4] The starting position for the costs of the appeal is that they should follow the event; that is, that Cidneo should pay the Chief Executive's costs. However, Cidneo contends that the circumstances of this case are unusual and an order that it pays a proportion of the Chief Executive's costs is more appropriate.
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> [5] Cidneo contends that, although it was unsuccessful in the appeal, two grounds of appeal were made out and that the decision below was infected by appellable error. It contends that a "fair outcome" would be an order that it pay 70% of the Chief Executive's costs.

5 (2018) 39 QLCR 318; [2018] QLAC 9.

> [6] A court should be slow to depart from the usual rule and recent decisions did not endorse the view that a partial success on issues should justify an adjustment to the usual order. In *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* the High Court stated:
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> > ... The preferable approach... is the one usually taken, that costs should follow the outcome of the appeal. This is not a case where it may be said that the event of success is contestable, I (sic) reference to how separate issues have been determined. There are no special circumstances to warrant a departure from the general rule, and good reasons not to encourage applications regarding costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like.
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> [7] Similarly, *in John Urquhart v Partington* the Court of Appeal said:
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> > …where a party has been successful in the outcome of the appeal the fact that it did not succeed on every issue or ground advanced will not usually warrant a departure from the general principle that costs should follow the outcome of the appeal."[6] (Citations omitted).

[19] The respondent points to the fact that it was successful in the matter as being the most significant factor in its submissions.[7]

[20] It is pointed out by the respondent that the hearing of the application in question was set for four days commencing on 6 June 2022. At a pre-hearing mention on 2 June 2022, the applicant sought an adjournment as it would not be ready to proceed due to the need to respond to questions raised by Mr Green, the respondent's finance expert, and to obtain further information to assist the experts.[8] Further preparation of the case led to the eventual three days of hearing.

[21] The respondent makes clear that its claim for costs is confined to the costs of and incidental to the claim for the items considered at the hearing in May 2023 and determined by the Court of 27 July 2023 when the decision and reasons were delivered.

[22] It is noted that the respondent was wholly successful in this dispute, the applicant wholly unsuccessful. The compensation for the value of the land taken was paid

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6 *Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads (No 3)* (2018) 39 QLCR 318, 319; [2018] QLAC 9, 2-3.

7 Submissions on Costs of the Respondent, 10 August 2023, [8].

8 Transcript of Proceedings, *93 Fairfield Pty Ltd ACN 621 146 058 as Trustee for 93 Fairfield Unit Trust v Chief Executive, Department of Transport and Main Roads* (Land Court of Queensland, WA Isdale (Member), 2 June 2022) T 1-2, lines 21 to 40 (DR Gore KC).

well before the hearing and the remaining claim, always disputed, was novel in nature, with no precedent able to be called in aid to support it.

[23] From the date of the mediation on 26 October 2021, when the land value was agreed, the costs expended were primarily directed towards the claim found to be unsupported by the Act. The applicant had no need to approach the Court in order to receive compensation for the loss of its land, only for the claim subsequently found not to be allowable.

[24] All of the evidence relied on at the hearing was prepared subsequent to the resolution of the land value at the mediation on 26 October 2021.

[25] The result of the originating application heard in May 2023 is, in the respondent's submission, not surprising and the adjournment of the hearing from the June 2022 original timeline was due to the applicant's choice in attempting to improve its case, rather than any external cause.

[26] The respondent's choice not to call the finance expert it engaged, Mr Green, should be seen, it submits, as a forensic decision properly made at the hearing. It does not render his involvement up to then unnecessary. It is submitted that not calling him might be, at most, a basis for, for instance, a five percent reduction in the costs payable. After the cross-examination of Mr Pullar, the principal witness for the applicant, it was decided there was no need to call Mr Green. This removed an issue from the case. The reasonableness of loan arrangements was no longer needed to be considered by the Court.

[27] It is worth observing that professional decisions such as this are often made in the course of a hearing and may serve to shorten and simplify proceedings, saving time and costs for all concerned. Such a decision is an example of the exercise of the skill of a professional advocate and is to be encouraged by Courts in the interest of justice being able to be delivered more speedily and with less expense.

[28] Considering all of the circumstances, the respondent submits, the order it seeks should be made.

The applicant's submissions

[29] The applicant submits that no order for costs should be made due to the abandonment during the hearing of the respondent's position that the loan arrangements were not reasonable commercial ones. This aspect, it submits, was the material driver in the time and expense taken to get to the hearing. The applicant also submits that the claim it advanced was fairly arguable and presented efficiently. The claim made was regarding a novel aspect not previously considered by the Court and had the character of a test case with public benefit in the resolution of the dispute. It was also stressed that the dispossessed owner is an involuntary litigant who should not be discouraged from presenting an arguable case by the prospects of an adverse order for costs.

[30] It is submitted that section 27(2) of the *Acquisition of Land Act* does not apply because "the amount finally claimed by the claimant" was never amended to reflect the settlement of the land value aspect and there was never a "valuation finally put in evidence" by the respondent.

[31] Accordingly, it is submitted, section 27(2) cannot be engaged in this case.

[32] As has been already noted, the applicant is not seeking an order for costs so that part of section 27(2) making costs subject to a restriction favouring the applicant does not apply. The other part of section 27(2) which, if it applies, would restrict a costs order, if made, to the respondent also has no useful effect in this case as only the respondent is seeking a costs order. The repeated use of the words "if any" in section 27(2) point to the discretion referred to in section 27(1). As has been discussed already, for present purposes this is no different to consideration of a costs application under section 27A of the *Land Court Act.*

[33] The applicant submits that the Court does not have any evidence that would enable it to make findings about the preconditions to the application of section 27(2). As has been discussed, this is not of moment for present purposes as, in the facts of this case, section 27(2) does not provide any operative pre-condition to the making of the order sought. Section 27(1) of the *Acquisition of Land Act* and section 27A of the *Land Court Act* provide the necessary authority for the Court to make the order sought.

[34] The applicant accepts that the Court has complete discretion as to the award of costs, subject only to section 27(2) of the *Acquisition of Land Act*.[9] The discretion is to be exercised judicially, for reasons that can be considered and justified.[10]

[35] Factors relevant to that exercise of discretion are the compulsory nature of the process,[11] the need for claimants not to be deterred from presenting an arguable case by the prospect of a costs order[12] and the need to have a strong justification where the cost order would erode the compensation.[13] Only in special cases will the Court deprive the owner of the full benefit of the compensation which is its due.[14]

[36] It would be relevant to consider whether the claim actually made has effectively forced the respondent into litigation.[15]

[37] The applicant refers to the decision of the Land Appeal Court in *Anson Holdings Pty Ltd v Wallace and Anor,*[16] where the Court said, in an appeal from a decision of the Land Court to order costs against a landowner in a case involving hearing an objection by it to the grant of a mining lease:

> "[22] Previous decisions of this Court in relation to s 34(1) of the *Land Court Act* indicate that the discretion given to the Land Court under s 34 is complete and that that discretion is not to be fettered by any preconceived rules or principles other than that the discretion is to be exercised judicially. Thus in *BHP Queensland Coal Investments Pty Ltd v Cherwell Creek Coal Pty Ltd (No. 2)* the Land Appeal Court said –
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> > "[6] In *Wyatt v Albert Shire Council*, the Full Court considered s 31(1) of the *City of Brisbane Town Planning Act 1964* which relevantly provided that the Local Government Court may make such order as it thinks fit as to the costs of any proceeding before it. The similarity between s 31(1) and s 34(1) has been recognized by this Court in the past. The Full Court held in *Wyatt* that the effect of s 31 was that the discretion conferred with respect to costs is complete or full. The discretion is not to be exercised arbitrarily, but judicially, that is, for reasons that can be considered or justified. Resort may be had to any settled practice of a court but a purported

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9 Applicant's Submissions, 10 August 2023, [11].
10 Ibid.
11 *Yalgan Investments Pty Ltd v Council of the Shire of Albert* (1997) 17 QLCR 401, 407; [1997] QLAC 191, 4.
12 *Banno v The Commonwealth* (1993) 81 LGERA 34, 53.
13 *Pastrello v Roads and Traffic Authority (NSW)* (2000) 110 LGERA 223, 225.
14 Ibid. But note that too high a claim may result in a price being paid. *Harber v Chief Executive, Department of Main Roads* [2005] QCA 123 at [35] per Keane JA; Submissions on Costs in Reply of the Respondent, 24 August 2023, [6].
15 *Yalgan Investments Pty Ltd v Council of the Shire of Albert* (1997) 17 QLCR 401, 408; [1997] QLAC 191, 5.
16 (2010) 31 QLCR 74; [2010] QLAC 2.

> exercise of discretion which fails because the mind is closed to relevant considerations through a rigid adherence to preconceptions is an error of law. Thus an approach that required exceptional circumstances to be established before such a wide discretion is exercised is likely to be incorrect. Similarly it would not be right to start with the preconception that costs follow the event. The Court also said that it would be wrong to attempt to lay down rules governing the exercise of the discretion and each case should be governed by its circumstances. (Footnotes omitted)."
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> [23] Since s 34(1) of the *Land Court Act* gives the Court a complete and unqualified discretion in respect of an order for costs, an appeal against the exercise of that discretion is to be determined in accordance with the principles set out in *House v R* –
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> > "… It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."
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> Accordingly, this appeal will succeed only if it appears that there was some error by the learned Member in exercising his discretion or that in some other way there has been a failure to properly exercise the discretion." (Citations omitted).

[38] What was then section 34(1) is now section 27A(1).

[39] The Court is guided by this decision of the Land Appeal Court.

[40] The applicant also directs attention to the decision of the Land Appeal Court in *Dunn v Burtenshaw & Ors*[17] where the Land Appeal Court considered that the proceedings could clarify the law and reduce the need for further litigation and there was an element of public interest. As Mr Dunn was advised of the arguments which prevailed against his appeal at least a month and a half before it was heard, the

17 (2011) 32 QLCR 270; [2011] QLAC 5.

respondent received a costs order limited to the preparation of submissions on the point of law upon which it was ultimately successful.[18]

[41] The applicant submits that the basis on which the Court dismissed the application was not an element of the case the respondent advanced, which likely reflects the novelty of the case and the absence of jurisprudence to provide guidance.

[42] It is also submitted that the abandonment of a suggested lack of commercial reality and reasonableness of the borrowing arrangements the subject of interest charges is relevant. This area of dispute, only abandoned during the hearing, had necessitated considerable costs being expended in preparation. Those financial arrangements were made before any forewarning of the resumption.[19]

[43] The time and expense taken to address those issues was significant, and it was wasted.[20] It would be inappropriate that the applicant pay the costs of the case abandoned by the respondent so late in the day.[21]

[44] The case was, it is submitted by the applicant, fairly arguable and was efficiently presented. It was not vexatious or grossly exaggerated and did not unfairly burden the respondent or the Court.

[45] The claim was novel and there was no authority on the point. The Court's decision clarified that area of the law, and the need for further litigation may be reduced. There is a character of public-interest litigation or a test case in the applicant's claim, it is submitted. Accordingly, there should be no order as to costs.

Conclusion

[46] The Court has considered all the matters which have been set out above. It has an unfettered discretion in this matter. The discretion must be exercised judicially, with reasons given.

[47] It is significant that the respondent has been fully successful and that it has a claim for the costs it necessarily incurred. It is also the case that the abandonment of a

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18 Ibid [31]-[34]. The substantive decision is reported at *Dunn v Burtenshaw & Anor* (2010) 31 QLCR 156; [2010] QLAC 5.
19 Applicant's Submissions, 10 August 2023, [23].
20 Ibid [29].
21 Ibid [30].

significant part of the case occurred at a late stage, when the expenses relating to that aspect were already incurred. It is however clear that the progression of the evidence was what informed that decision. It was made when experienced counsel rightly evaluated that such a course should then be taken. No criticism or disadvantage should flow from that decision made in the prudent exercise of professional judgment during the hearing.

[48] The applicant was, in the sense described, an involuntary litigant and was entitled to attempt to maximise the compensation payable to it. Just as validly, the respondent, as a custodian of the public purse in these matters, had to act properly to ensure that money was correctly spent and not wasted.

[49] In all the circumstances of this case, the Court is persuaded that both parties acted properly throughout and that a high level of professional skill attended the decisions made in the preparation of this case and its conduct in Court. The respondent was a "model litigant", as it should be.

[50] The claim was one which was reasonably arguable[22] and was efficiently presented. It was also professionally and efficiently resisted, and Court time was saved by the decision to abandon an aspect of it in view of how the case developed in Court. Abandoning the hearing dates in June 2022 was a step taken in proper response by the applicant to the circumstances which then existed, and which led to the positive outcomes of reducing the hearing from four days to three and precipitating the decision of the respondent to properly abandon at the hearing that aspect of its case which could then be seen to be otiose. It would not be appropriate to make a costs order in favour of the respondent in respect of costs thrown away by the adjournment of the hearing in June 2022 as that adjournment was instrumental in ultimately shortening the case.

[51] The absence of any authority in respect of the claim which proceeded to hearing and the desirability of a Court decision in respect of it is ultimately the decisive factor in the Courts decision that justice is best served in this case by the Court making no order as to costs. The result is that, as stated in section 27A of the *Land Court Act,* each party must bear their own costs.

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22 Applicant's Submissions on Costs in Reply, 24 August 2023, uses the expression "well arguable" at [3].

Order

There will be no order as to costs.