

LAND COURT OF QUEENSLAND

CITATION: *Old Coach Developments Pty Ltd v State of Queensland*
[2008] QLC 0105

PARTIES: Old Coach Developments Pty Ltd (ACN 103 572 345)
(claimant/respondent)
v.
State of Queensland
(respondent/applicant)

FILE NO.: A2006/0800

DIVISION: Land Court of Queensland

PROCEEDING: Application for costs and refund of advance monies.

DELIVERED ON: 24 June 2008

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RS Jones

ORDERS:

- 1. The claimant, Old Coach Developments Pty Ltd, is to pay fifty percent (50%) of the State of Queensland's costs of and incidental to the hearing and determination of the compensation proceedings in the Land Court including reserved costs.**
- 2. The State of Queensland's application concerning the repayment of certain advance monies is dismissed.**
- 3. The State of Queensland's application for declaratory relief is dismissed.**

CATCHWORDS: **Costs** – s.27 – *Acquisition of Land Act 1967* – s.34 *Land Court Act 2000* – Where award of compensation is less than advance – Effect of advance on cost orders – Factors relevant to exercise of Land Courts discretionary powers.

Jurisdiction – s.26 *Acquisition of Land Act 1967* – s.5 *Land Court Act 2000* – Jurisdiction to order refund of balance of advance on compensation – Jurisdiction to make declarations concerning refund of balance of advance on compensation.

COUNSEL: Mr E Morzone, for the respondent/applicant.
Mr P Walker, for the claimant/respondent.

SOLICITORS Ms P Pavey, Crown Law, for the respondent/applicant.
James Conomos Lawyers, for the claimant/respondent.

The Applications

- [1] The State of Queensland seeks orders to the following effect:
- (i) That Old Coach Developments Pty Ltd pay its costs of and incidental to the proceedings and determination of the claim for compensation;
 - (ii) An order that Old Coach Developments repay to the State the sum of \$78,379 such sum being the balance of the advance on compensation paid by the State in excess of the compensation and interest thereon as determined by the Court;
 - (iii) As an alternative to order (ii) a declaration that Old Coach Developments is obliged to repay the sum of \$78,379 plus interest.

Background

- [2] Old Coach Developments was the former registered proprietor of land located in Griffin, a suburb of the Pine Rivers Shire Council. The land was resumed by the State of Queensland for school purposes on 8 September 2006.
- [3] On 15 November 2006, pursuant to s.19 of the *Acquisition of Land Act 1967 (ALA)* the company filed its claim in the registry of this Court in the amount of \$7,602,175 exclusive of interest. On the first day of the hearing of the compensation claim, 19 November 2007, with the leave of the Court the claim was amended to \$7,503,590 plus interest. This figure was made up of \$7,400,000 for the value of the land taken including improvements thereon and \$103,590 under the heading of disturbance.
- [4] On or about 27 September 2006, the State paid, by way of an advance against compensation, the sum of \$4,975,000. Notwithstanding the amount of the advance paid, the final position of the State was that the appropriate level of compensation was \$4,210,610 made up of \$4,200,000 for the value of the land taken and improvements thereon and \$10,610 under the heading of disturbance.
- [5] On 22 February 2008, compensation was determined by me in the amount of \$4,880,610. This figure was made up of \$4,870,000 for the value of the land taken and improvements thereon and \$10,610 under the heading of disturbance. A further order was made requiring the State to pay to Old Coach Developments interest on the sum of \$4,870,000 at the rate of 6% per annum from 8 September 2006 to the date of the payment of the advance on compensation.

Costs

The Power to Award Costs

[6] The jurisdiction of the Land Court to make costs orders is the creation of statute. In proceedings such as these the discretion to make orders is contained in s.27(1) of the *ALA* and s.34(1) of the *Land Court Act 2000 (LCA)*. Subject to s.27(2) of the *ALA* the discretion is a wide one but of course it must be exercised judicially. As was recognised by the Land Appeal Court in *Yalgan Investments Pty Ltd v Council of The Shire of Albert*:¹

"The discretion whether to award costs may not be exercised in an arbitrary manner but must be exercised on principled grounds ... or judicially, that is, for reasons that can be considered and justified ... by reference to relevant considerations"

[7] In this matter the discretion is constrained by the operation of s.27(2) of the *ALA* which effectively provides a formula for determining which of the parties involved in the litigation may be entitled to an order for costs. In this case there is no dispute that it is only the State that is so entitled.

[8] The common law principle which generally dominates the exercise of the discretion to award costs is that such orders should usually "follow the event". In this context costs are intended to be compensatory in that they are intended to indemnify the successful party against the expense to which he or she was put by reason of the legal proceedings.² Ordinarily, costs orders are not made by way of punishment of the unsuccessful party.

[9] Notwithstanding that common law principle, as the Land Appeal Court recently said,³ costs being discretionary, no presumptive rule or principle should control the proper exercising of the discretion. In this context it is recognised that cases involving the compulsory acquisition of land differ from more usual commercial claims in that the landowner, unlike the ordinary plaintiff in civil proceedings, through no choice or fault of his own, is often forced into the situation of having to make a claim for compensation.⁴

The State's Arguments

[10] The arguments for costs advanced on behalf of the State of Queensland can be summarised as:

- (i) This is a case where the State succeeded in almost all aspects;

¹ (1997) 17 QLCR 401 at 407 para (f).

² *Latoudis v Casey* (1990) 170 CLR 534, per Mason CJ at 543 and McHugh J at 567; *Oshlack v Richmond River Council* (1998) 193 CLR 72, per Brennan CJ at 75 and McHugh J at 97.

³ *PT Limited & Anor v Department of Natural Resources and Mines* [2007] QLAC 0121 at paras [20] to [23]; see also *Yalgan* at pp. 407 and 408, paras (h) and (i).

⁴ *Banno & Anor v Commonwealth of Australia* (1993) 81 LGERA 34 at 53; *Minister for the Environment v Florence* (1980 – 81) 45 LGRA 127 at 149; *Yalgan* at 407, para (e).

- (ii) The extent of the State's success is, in particular, demonstrated by the fact that the determination of the Court (including interest thereon) still failed to reach the amount of the advance on compensation;
- (iii) having regard to the amount of the advance and the determination of the Court it would be appropriate to categorise the compensation claim as exorbitant and the attitude of Old Coach Developments as so unreasonable as to force the State into unnecessary and otherwise avoidable litigation;
- (iv) In circumstances where orders as to costs are compensatory, having regard to the relevant circumstances in this case, there is no reason why the State is not entitled to a costs order in its favour.

The Arguments Advanced on behalf of Old Coach Developments

[11] In support of the submission that there ought be no orders as to costs it is argued that:

- (i) The case advanced could not be described as one arising out of a failure to address important issues nor one based on thoughtless or clearly unmeritorious assumptions or conclusions;
- (ii) The approach adopted by the claimant's valuer was a "legitimate" one and, accordingly, the claim advanced could not be regarded as being vexatious, dishonest or grossly exaggerated;
- (iii) Just over fifty percent of the hearing was spent on the timing of subdivision infrastructure, an issue about which the State was largely unsuccessful and/or was considered by the Court to have only a minor bearing on the outcome of the case;
- (iv) It was the State that made litigation unavoidable by prosecuting a case less than its advance and, in some respects, the company was a successful litigant in that by pursuing its claim, it avoided having to pay as a refund against the advance an amount in the order of \$670,000;
- (v) Or, in all the circumstances the position of both the claimant and the respondent at the commencement of the proceedings made litigation unavoidable.

Conclusion as to Costs

[12] I accept that the claim advanced was not dishonest or vexatious. I also accept that the claim was not one which arose out of a failure to address the important issues raised by the claim. However, as I identified in my judgment, I found a number of important elements of the valuation evidence of Mr Missingham flawed. In my opinion some elements of unmeritorious and/or unreasonable assumptions and conclusions were present in the valuation evidence advanced on behalf of Old Coach Developments.

- [13] It is true that the evidence concerning the timing of infrastructure occupied a significant amount of the hearing. A not insignificant amount of this time was concerned with the two officers of the Pine Rivers Shire Council, Messrs Vanderant and Lorenz. These gentlemen were called on behalf of Old Coach Developments, for the most part, to rebut the case mounted on behalf of the State to the effect that there were real risks associated with the development of the land because of the potential for delays in the availability of water and sewerage.⁵
- [14] It has been correctly pointed out that I found the risks of and associated with any delays were not as significant as contended for on behalf of the State and likely to have only a minor bearing on the outcome of the case.⁶ To a significant extent those findings were the result of the "optimistic view" adopted by Mr Slater in his primary valuation report.⁷
- [15] Notwithstanding my findings concerning the risks surrounding the availability of infrastructure it would not be a fair description in my view to say that, in raising the issue as it did, the State somehow acted in an unreasonable way. The issue was clearly one of concern to the civil engineer and valuer (Messrs McAnary and Slater) called on behalf of the State. The seriousness of the issue is also evidenced by the calling of the two council officers on behalf of Old Coach Developments. As was said by Mr Walker, counsel for the company, the issues of delay and risks were ones "... *the claimant had no choice but to ventilate.*"⁸
- [16] Further, the determination of the delay/risks issue played a part, albeit rather minor, in the application of some of the sales evidence.⁹ It also played a part in the rejection of the profit and risk allowance made by Mr Missingham in his hypothetical valuation exercise.¹⁰
- [17] When the facts and circumstances surrounding this issue are considered, I do not believe anything arises which would prevent the State from being entitled to favourable costs orders.
- [18] To my mind two critical issues in this application are; first, the extent of the differences between the claim, the amount contended for by the State and the determination of the Court. Second, the role or effect of the advance.

⁵ These risks are set out in the reasons for judgment (RJ) para [33].

⁶ Reasons for Judgment (RJ) para [44].

⁷ Repeated in part at RJ [32].

⁸ Oral submissions, T. 14.8.

⁹ RJ [44], [80], [83].

¹⁰ RJ [34], [35].

[19] In paragraphs 8(f) and 12 of the written submissions on behalf of Old Coach Developments the following statements of the Land Appeal Court and Land Court are emphasised.

"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 (Moyses 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)."¹¹

and

"... Rather the authorities suggest that other criteria must be considered in deciding whether costs should be awarded to the respondent:

- whether the conduct of the claimants (eg making an exorbitant claim) has been such as to force the authority, unreasonably and unnecessarily into litigation; or
- whether the claimants have pursued a vexatious, dishonest or grossly exaggerated claim; or
- whether the claimants have presented their case in such a way as to impose unnecessary burdens on the constructing authority or the Court."¹²

[20] The principles contained in these statements are, in my opinion, of particular relevance to this application. I have already said that it would not be appropriate to describe the claim and/or the company's case as vexatious or dishonest. However, that is not to say that the claim may not otherwise have been so excessive as to force the State unreasonably and unnecessarily into otherwise avoidable litigation. The State, by reducing its assessment of compensation to a figure below the advance, made settlement of this matter even more unlikely. However, in my opinion, that event had no material effect on the conduct of the proceedings. It did not make otherwise avoidable litigation unavoidable. It seems to me that the position of the company was, at all material times, that compensation should be determined at a figure at or about \$7,500,000.

[21] The determination of the Court (excluding interest) was about \$2,623,000 less than the amount contended for by Old Coach Developments, some \$94,300 less than the advance paid, \$976,490 less than the statutory midway position between the parties prescribed in s.27(2) of the ALA but \$670,000 more than the figure finally contended for on behalf of the State and, as a consequence of this, the company successfully avoided having to repay a significant amount of the advance monies.

[22] In my opinion, the State had substantial success in defending the claim pursued by the company. The circumstances here are materially different to those in the case of *Bowers*

¹¹ See *Yalgan* at 408, para (k).

¹² *Savina v Department of Main Roads (No 2)* (2001) 23 QLCR 29 at 32 – 33.

& *Anor v Council of the Shire of Pine Rivers*¹³ to which Mr Walker refers in his written submissions. In *Bowers*, while the determination of the Court was materially less than that claimed, it exceeded the amount contended for by the resuming authority by about 60% and materially exceeded the authorities initial advance against compensation. The facts and circumstances surrounding this case are also materially different from those facing the President of the Land Court in *Robertsons Furniture and Design Pty Ltd v Department of Main Roads*¹⁴ where the President was led to conclude that the payment of an advance in the sum of \$146,247.20 should be ignored in determining costs. In *Robertsons (Qld) Furniture* the claim finally contended for was \$790,443, amended from \$849,462. Compensation was determined by the court in the amount of \$239,605, a not insignificant increase over the amount of the advance. And, perhaps even more importantly, as was pointed out by the President, the resuming authority's primary case was that compensation should be nil. In my opinion no meaningful comparisons can be made between the relevant facts and circumstances in that case and those in this case.

[23] As I have already said, of significance in this case is that the determination of the Court (excluding interest) was about \$94,390 less than the advance paid by the State in late September 2006. The company could have accepted the advance. Instead, after its payment, the company filed a claim for \$7,602,175.

[24] In *Haber v Department of Main Roads*¹⁵, the Land Appeal Court was concerned with an appeal by the claimant against costs orders made by the President of the Land Court. The President had ordered the claimant to pay 50 per cent of the respondent's costs of the trial. In dismissing the appeal, the Land Appeal Court identified various matters the President was entitled to take into account in the exercise of his discretion.¹⁶ These included: the substantial success of the respondent, the excessiveness of the claim, the fact that costs would substantially erode the claimant's actual compensation, the claimant was entitled to seek expert evidence and, at the end of the day, achieved a level of compensation materially in excess of that previously offered and contended for by the respondent at trial.

[25] The appeal was dismissed. The Land Appeal Court concluded that the President had acted on principled grounds and no error in the exercising of the discretion to award costs had been revealed.

¹³ [2005] QLC 0053.

¹⁴ [2005] QLC 0025 at [32].

¹⁵ [2004] QLAC 0087.

¹⁶ See at paras [14], [16], and [17].

[26] A consistent theme in the judgments of *Savina*, *Bowers*, *Robertsons Furniture* and *Haber* is that the determination of the Court not only materially exceeded the sum finally contended for by the resuming authority but also exceeded any advance or offer made by the authority concerning compensation. Absent the advance, in circumstances where Old Coach has achieved some \$670,000 more than the Chief Executive's final assessment of compensation, consistent with the reasoning of a number of those authorities already referred to, there would be a reasonable argument in favour of their being no orders as to cost.

[27] However, in my opinion, the payment of the advance significantly alters things. In circumstances where the claimant rejects an advance which exceeds the determination of the Court and prosecutes a claim materially in excess of the advance, how could it be reasonably said otherwise than that it was the claimant who forced the resuming authority into otherwise avoidable litigation. When the advance is taken into account there is, in my opinion, prima facie a strong argument that the claimant should in fact be ordered to pay all of the resuming authority's costs.

[28] In cases such as this however, it is important not to lose sight of the fact that one of the Court's primary functions is to determine just compensation in circumstances where the land-owner has had its land taken by compulsory process. Cost orders against the company will materially erode the actual amount of compensation retained by it. In this context in *Pastrello v Roads and Traffic Authority* (NSW), Talbot J declined to have regard to an offer to settle made by the resuming authority in considering the question of costs.¹⁷ However, in that case the offer was apparently no longer open for acceptance after the land was in fact resumed. By the time the land was taken the claimant had no choice but to litigate or accept the respondent's lower revised assessment of compensation. That is not the case here. The advance was paid some nine days after the date of resumption and, on the material before me, it seems reasonably likely that it was available for some time after that.

[29] In *Hamzah Pty Ltd v Department of Main Roads*¹⁸ I concluded that on the facts in that case the existence of the advance was not in itself determinative and, in paragraphs 45 and 46 said:

"[45] However, in the circumstances of this case I have reached the conclusion that the advance itself is not determinative. On the material before me, by the time this hearing was to commence keeping the advance of \$3,000,000 was no longer an option open to Hamzah. The situation probably facing the company was to agree to return \$1,000,000 or some figure thereabouts or continue with its litigation. In that narrow context it could be said that *Hamzah* had a "win".

¹⁷ (2000) 110 LGERA 223 at 225 1.14-15.

¹⁸ [2008] QLC 0123 at paras 45 and 46.

[46] It is also relevant in my view that an advance pursuant to s.23 of the *ALA*, unlike an offer to settle in more usual commercial litigation, is the consequence of the exercising of compulsory acquisition powers. The dispossessed landowner, through no fault of his or her own, is forced into the situation of seeking advice from appropriate experts about matters including whether to prosecute a claim for compensation or accept the advance paid by the resuming authority. In this context the sentiments expressed by Wilcox J in *Banno v Commonwealth of Australia* are pertinent.

'... 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 situation 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. ...'

[30] The relevant facts in this case have similarities to those in *Hamzah*. On the material before me it seems more likely than not that by the time this hearing was to commence the advance was no longer available for acceptance. The situation probably facing Old Coach Developments was that it would be required to repay in excess of \$760,000. In that narrow context it could be said the company had a "win".

[31] Also, as I said in *Hamzah*, it is relevant in cases such as this that the payment of an advance pursuant to s.23 of the *ALA*, unlike an offer is to settle in more usual commercial litigation, is the consequence of the exercising of compulsory acquisition powers. Old Coach Developments, through no fault of its own, was forced into a situation of accepting the advance paid or accepting advice from appropriate experts in favour of prosecuting a claim for a higher level of compensation.

[32] In this case it could not be reasonably said that the company did not have regard to the advice of appropriate experts and, while it is clear that I did not accept significant elements of the evidence advanced on behalf of Old Coach Developments, the case for the State was not accepted in full.

[33] In my opinion, the claim was clearly an excessive one. However, I do not consider that it is one that was "grossly exorbitant" in the context contemplated by the Land Appeal Court in *Yalgan* or by Wilcox J in *Banno*.

[34] As was the situation in *Hamzah*, in attempting to balance the competing elements involved here and, in particular, the desirability of ensuring that Old Coach Developments receives just compensation with the need to recognise that the State is entitled to some compensation in the form of costs orders for having to defend the excessive claim made against it, I have decided that it is appropriate to order that the company pay fifty percent of the State's costs.

- [35] Before turning to the issues concerning the refund of the advance monies I should deal with some oral submissions made by Mr Morzone, counsel for the State of Queensland. At the centre of these submissions was the proposition that recent decisions of the Court of Appeal and Land Appeal Court¹⁹ have placed more emphasis on the compensatory nature of costs orders to the extent that there has been a movement away from, if not "an express rejection" of the propositions contained in sub paragraph (k) of the decision of the Land Appeal Court in *Yalgan*.
- [36] I disagree. In my opinion there is no material tension between what was said by the Court of Appeal in *Tamawood* and by the Land Appeal Court in *PT Limited* with what was said by the Land Appeal Court in subparagraph (k) of *Yalgan*.
- [37] Turning first to *Tamawood*, as I understand the facts in that case, the respondent was successful in establishing liability which was denied by the applicant companies. As a consequence the respondent was awarded damages. Nowhere in the decision of *Tamawood* is anything said which suggests that the relevant passage in *Yalgan* was no longer applicable or otherwise wrong in cases such as this. As was recognised by the Court of Appeal "countervailing considerations"²⁰ might exist which may, in the interests of justice, justify not making costs orders where *prima facie* such orders ought be made. An example of this could be where the "successful" party has unreasonably and materially prolonged the litigation process. A grossly exaggerated (exorbitant) claim could be such a cause.
- [38] The Land Appeal Court in *PT Limited* observed that in revenue cases a cautious approach to the awarding of costs would not necessarily offend the proper exercise of that discretion.²¹ A cautious approach being warranted in such cases to, as far as was reasonable, not unnecessarily impede ease of access to the Courts. However, a cautious approach does not mean that even in revenue cases costs orders should not be made where appropriate.
- [39] In my opinion the application of the principles enunciated in sub paragraph (k) of *Yalgan* is in accordance with the proper exercise of the discretion to award costs in cases such as this. It would be wrong to only have regard to the respective positions of the parties and the amount of compensation determined by the Court. It is not uncommon in proceedings in the Land Court for compensation to be determined, in the case of a claimant, at a figure below the notional halfway point prescribed in s.27(2) of the *ALA* but still materially

¹⁹ for example *Tamawood Ltd v Paans* (2005) 2 Qd R 101 at [30], [32] and [33], per Keane JA (CA) and *PT Limited & Anor* (LAC) at [20] to [25].

²⁰ *Tamawood*; paras [30] and [33].

²¹ at paras [23] and [34].

more than that finally contended for by the resuming authority. An approach which had regard only to, or gave too much weight to, which party notionally "won" for the purposes of s.27(2) could lead to a claimant's compensation being significantly and unjustly eroded by it having to pay, not only its costs of litigation but also those of the resuming authority. Such a result might be as unjust as that of the successful litigant in commercial litigation having the benefit of its success significantly eroded by being denied the benefit of appropriate costs orders.²²

[40] It would not be unreasonable, in my respectful opinion, to say that the Land Appeal Court in *Yalgan* advocates a cautious approach to the exercising of the discretion to award costs against claimants pursuing relief under the *ALA*. This approach of course does not mean that in appropriate cases such orders will not be made. As the Land Appeal Court in *Yalgan* repeatedly pointed out the discretion must be exercised judicially²³ and "*no hard and fast rules will ever be allowed to occupy part of an area controlled by a discretion.*"²⁴

[41] For these reasons I do not accept that the decision of the Court of Appeal in *Tamawood* or of the Land Appeal Court in *PT Limited* either expressly or by necessary implication reject or lessen the effect of what was said by the Land Appeal Court in *Yalgan*.

The Refund of Balance of Advance

[42] On behalf of the State it is submitted that the primary question that needs to be answered on this issue is "*does the (Land) Court, ancillary to its jurisdiction to (decide) the amount of compensation, have power to order the repayment of an excess of advance paid?*"²⁵ The Land Court has no express power to order the refund of the monies under s.23 of the *ALA* or any other legislation.

[43] However, Mr Morzone submits that this Court does have the necessary jurisdiction pursuant to s.5 of the *Land Court Act 2000 (LCA)* and s.26(1) of the *ALA*. Section 5 of the *LCA* relevantly provides:

"Jurisdiction of Land Court

(1) The Land Court has the jurisdiction given to it under an *Act*.

..."

Section 26(1) of the *ALA* relevantly provides:

"Jurisdiction relating to compensation

(1) The Land Court has jurisdiction to hear and determine all matters relating to compensation under this Act.

...

²² See *Tamawood* at [33].

²³ P. 407, para (f).

²⁴ P. 407, para (h); see also paras (c) and (i) at pp. 407-408.

²⁵ Correspondence of Ms Pavey to the Court dated 24 April 2008.

- (4) The decision—
- (a) shall be final as regards the amount of compensation awarded; and
 - (b) unless the amount shall have been paid into the Supreme Court pursuant to section 29, shall be final for all purposes and have the effect of a judgment of the Supreme Court and may be enforced accordingly.

..." (emphasis added)

[44] Mr Walker elected to make no substantive submissions about the jurisdiction of the Court to make the orders sought by the State. There was no dispute about the amount of the refund contended for by the State (\$78,379) and, during oral submissions, Mr Walker went so far as to say "... *If you do have jurisdiction I can see no way in which we could oppose such an order with one minor exception ...*".²⁶ The exception concerns the claim for interest on the amount of the refund. Mr Walker submitted to the effect that, even if the Land Court has jurisdiction to order the refund, it has no jurisdiction or power to order any interest payable thereon.

[45] On and from the publication of the resumption of the land in the Queensland Government Gazette, Old Coach Developments' estate and interest in the land was converted into a right to claim compensation under the *ALA*.²⁷ Pursuant to s.26(1) the Land Court has jurisdiction to hear and determine all matters relating to compensation under that *Act*. By virtue of the operation of s.5(2) of the *LCA* that jurisdiction is exclusive to the Land Court, subject of course to rights of appeal to the Land Appeal Court and, in more limited cases, to the Court of Appeal.

[46] In performing the duty prescribed under s.26(1), to determine all matters relating to compensation, the Land Court is required, in assessing the amount of compensation to be paid, to take account of the matters prescribed in s.20.

[47] At the risk of labouring the point, I have referred to the above sections to try and highlight that the primary jurisdiction of the Land Court in cases such as this is to determine the amount of compensation properly payable to the dispossessed landowner. The term compensation is not defined in the *ALA*, *LCA* or *Acts Interpretation Act 1954*. However, in *Nelungaloo Pty Ltd v Commonwealth*²⁸ Dixon J said:

"Now 'compensation' is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived. ..."

²⁶ Oral submissions T. 10.9 – T. 11.2.

²⁷ s.12(5).

²⁸ (1947) 75 CLR 495 at 571.

[48] I accept that the words "... *all matters relating to* ..." in s.26(1) of the *ALA* should be construed widely. I also accept that by retaining the advance as paid Old Coach Developments is in possession of more than the full money equivalent of what it lost, insofar as s.20 of the *ALA* permits, as determined by the Court. However, at the end of the day the matter to be determined must be one relating to compensation.

[49] In *Queensland Electricity Commission v Windsor*,²⁹ Master Weld relying at least in part of the decision of Williams J in *York Air Conditioning and Refrigeration Pty Ltd v The Commonwealth*,³⁰ determined that such monies were refundable. In *York* Williams J in part said:

"... But money paid in anticipation to discharge a liability for an uncertain amount which has not crystallized is in my opinion money paid under such a mistake if it eventually turns out that the creditor has been overpaid. Money paid under such circumstances is paid in the words of Lord Sumner in *Sinclair v Brougham* (5) ' upon a notional or imputed promise to repay. ..."

[50] The decision of Master Weld was appealed.³¹ The appeal was heard and determined by Moynihan J who categorised the nature of the claim in the following terms: "*The basis of the plaintiff's action is that the money was paid on a contingency – in effect the award of compensation at least in the amount of the advance – which has failed.*" His Honour does not appear to have thought it necessary to consider the plaintiff's alternative argument that the advance was repayable on the basis that it was paid on a mistake of fact.

[51] In *Maroochy Shire Council v Maroochy Central Holdings Pty Ltd*³² the Land Appeal Court considered that, in the circumstances of a revocation of a resumption of land under s.17(1) and s.17(1A) of the *ALA*, an advance against compensation paid by the resuming authority would be recoverable on the basis of it being a provisional payment. The Land Appeal Court referred to *Windsor* and to *York*. However, unlike Master Weld who in *Windsor* at first instance relied on the observations of Williams J in *York* at page 31, the Land Appeal Court relied on the reasoning of Dixon J in the same case. At pages 63-64 of *York* Dixon J said in respect of payments made on account of a liability yet to be finally ascertained and which in fact exceeded the extent of the liability:

"Such a payment is prima facie to be considered provisional.

When the liability has been ascertained the residue of the money lies in the payee's hands un-applied to the purpose for which it was received, namely the discharge of the ultimate debt.

Once it is found to have been paid provisionally and not finally, all difficulty disappears, in my opinion, and the balance can be recovered in an action of money had and received. ..."

²⁹ S.C. 87/209, No. 55 of 1987.

³⁰ (1949) 80 CLR 11 at 31.

³¹ SC 87/241; No. 55 of 1987.

³² (2003) QLAC 0024 at [39].

In *Maroochydore Central Holdings Pty Ltd v Maroochy Shire Council*³³, on appeal to the Court of Appeal, Jerrard JA agreed with the reasoning of the Land Appeal Court on this issue and also cited *York* at pages 63-64 as an instance of an advance being recoverable as a provisional payment.

[52] Whatever the cause of action underlying the right to recover the advance monies here is, be it based on a failed contingency (*Windsor*) or a provisional payment (*Maroochydore Holdings*) or an action simply for money had and received, it is not a proceeding or matter which, in my opinion, can be properly described as "relating to compensation". This may not be a particularly convenient outcome however, as the Land Appeal Court said in *Stanfield v Brisbane City Council*:³⁴

"The Land Court and the Land Appeal Court are Courts of statutory creation and their jurisdiction depends entirely upon the conferral of power by statute. These Courts cannot assume a jurisdiction which they do not possess, convenient though it may sometimes seem to be."

[53] Accordingly I find that I do not have the jurisdiction to order the return of the subject advance monies.

[54] While I have not relied on them in reaching my conclusions about jurisdiction I am comforted by the observations of the Land Appeal Court in *Maroochydore Central Holdings* where it said³⁵ that in respect of an advance paid where the resumption was subsequently revoked, the advance would be recoverable in "another Court". While it seems likely that the jurisdictional issue was not agitated to any material extent (if at all) before the Land Appeal Court, it is my view that such an experienced Court would be unlikely to ignore or overlook similar powers or jurisdiction of the Land Court if they existed.

[55] Given my finding about jurisdiction it is not necessary for me to determine whether or not the Land Court has the power to make any orders concerning interest on the outstanding balance of the advance.

The Declaratory Relief

[56] The power of this Court to make declarations is found in s.33 of the *LCA* which relevantly provides:

"Land Court may make declarations

(1) Any person may bring proceedings in the Land Court for a declaration about—

(a) a matter done, to be done, or that should have been done under this *Act* or another *Act* giving jurisdiction to the court; and

³³ (2007) QCA 326 at [18].

³⁴ (1990) 70 LGRA 392 at 396.

³⁵ at para [39].

(b) the construction of any legislation for the purpose of proceedings in which the court has exclusive jurisdiction.

...

(5) The court has jurisdiction to hear and decide a proceeding for a declaration about a matter mentioned in subsection (1)."

[57] The powers granted under s.33 should not construed as being subject to limitations which are not apparent from the words used to confer or grant the power.³⁶ However, in *Maroochydore Central Holdings* the Land Appeal Court said about the operation and effect of s.33:

"[32] Section 33 of the *LCA* provides the Land Court with a useful adjunct to its jurisdiction under the *Act*, enabling a decision about the construction or the application of the *Act* to be made in advance of the determination of the entire dispute between the parties. In some cases using this additional jurisdiction may facilitate the resolution of the larger dispute between the parties.

[33] There is nothing in the language of s 33 of the *LCA* to suggest that it is concerned with other than the application or construction of legislation in respect of which the Land Court has jurisdiction. It is not intended to confer on the Land Court a jurisdiction similar to that which involves the review of administrative decision making, as conferred by the *Judicial Review Act 1991*."

[58] It is submitted on behalf of the State to the effect that as the advance against compensation was a matter done under the *ALA*,³⁷ the Land Court, pursuant to s.33 of the *LCA* has the power to make a declaration declaring that the company is obliged to repay the excess of the advance.

[59] Pursuant to s.33 of the *LCA* and s.23 of the *ALA* there is no doubt that the Land Court has the power to make declarations concerning advances against compensation and that the powers, having regard to the matters raised in s.23 are likely to be wide ranging. I also accept that the payment of the advance was a "matter done" under the *ALA*. However, in my opinion, a declaration stating that a person is obliged to repay part of an advance against compensation, is not one which could reasonably be described as concerning a "matter done, to be done, or that should have been done under (the *ALA*)".³⁸

[60] Also, in circumstances where I have found that the Land Court does not have the jurisdiction to order the repayment of the balance of the advance, the declaratory relief sought would be largely ineffective. It seems to me inappropriate to make declarations about matters which the Court cannot in any effective way enforce or otherwise act upon.

[61] For these reasons the application for declaratory relief also fails.

[62] For the reasons set out above I order that:

³⁶ *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203: *The Owners of The Ship "Shin Kobe Maru" v Empire Shipping Co. Inc.* (1994) 181 CLR 404 at 421.

³⁷ See s.23 *ALA*.

³⁸ S.33(1) *LCA*.

1. The claimant, Old Coach Developments Pty Ltd, is to pay fifty percent (50%) of the State of Queensland's costs of and incidental to the hearing and determination of the compensation proceedings in the Land Court including reserved costs.
2. The State of Queensland's application concerning the repayment of certain advance monies is dismissed.
3. The State of Queensland's application for declaratory relief is dismissed.

RS JONES
MEMBER OF THE LAND COURT