

# LAND APPEAL COURT OF QUEENSLAND

CITATION: *Hamzah Pty Ltd v Department of Main Roads Queensland* [2009] QLAC 0004

PARTIES: Hamzah Pty Ltd  
(appellant)

v

Chief Executive, Department of Main Roads  
(respondent)

FILE NOS: LAC2008/0312

DIVISION: Land Appeal Court of Queensland

ORIGINATING COURT: Land Court

DELIVERED ON: 12 June 2009

DELIVERED AT: Brisbane

THE COURT: White J  
Mrs CAC MacDonald, President of the Land Court  
Mr RP Scott, Member of the Land Court

ORDERS:

- 1. The appeal is allowed.**
- 2. Instead order that the parties are to bear their own costs of the substantive hearing at first instance.**
- 3. The respondent to pay the appellant's costs of and incidental to the appeal unless the respondent contends that some other order ought be made in which case:**
  - (i) the respondent file and serve its submissions within 21 days;**
  - (ii) the appellant file and serve their submissions within 14 days of receipt of the respondent's submissions;**
  - (iii) the respondent file and serve its reply, if any, within 7 days of receipt of the appellant's submissions;**
  - (iv) the Court will decide the question of costs on the written submissions of the parties without the need for oral argument.**

**CATCHWORDS:** Costs – acquisition of land – appeal against partial award of costs to constructing authority – “halfway rule” – proper criteria for award – whether conduct of claimant (in light of the advance paid) unreasonably forced constructing authority into litigation

Costs – acquisition of land – criteria for costs award where advance or offer to settle – different for offer to settle under Uniform Civil Procedure Rules – basis on which offer made, not amount, key factor in acquisition

Appeal – discretion – circumstances where discretion of lower court can be altered on appeal – central issue not properly considered by lower court – discretionary decision to award costs varied

**APPEARANCES:** Mr SP Fynes-Clinton for the appellant  
Mr M Hinson SC and Mr W Cochrane for the respondent

**SOLICITORS:** Condon Charles for the appellant  
Crown Solicitor for the respondent

- [1] This is an appeal by the appellant (Hamzah) against the decision of the Land Court made on 17 June 2008<sup>1</sup> by which it was ordered that Hamzah pay 50% of the costs of the respondent (DMR) of and incidental to the hearing and determination of certain compensation proceedings in that Court. The proceedings arose out of the resumption by DMR under the *Acquisition of Land Act 1967* (AOL Act) of part of a parcel of land owned by Hamzah, for the purpose of a proposed new Toowoomba bypass road.
- [2] Hamzah was the registered proprietor of four adjoining parcels of land comprising an area of 71.616 ha described as Lots 206 on Survey Plan 135001 and Lots 2, 3 and 4 on Registered Plan 22818, Parish of Gowrie. Lot 4 having an area of 18.952 ha was resumed on 22 July 2005.
- [3] On 16 October 2006 Hamzah filed a claim for compensation pursuant to s.19 of the AOL Act claiming \$4,600,000 (“plus applicable GST”) together with disturbance and interest on compensation. Then on 6 November 2006 an amended claim for compensation was filed seeking an amount of \$5,015,000 which was said to include “applicable GST” and \$31,390 under the hearing of disturbance, plus interest. On

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<sup>1</sup> [2008] QLC 0123.

the first day of hearing (10 December 2007) the claim was amended with leave to \$6,088,000 for the value of land taken including injurious affection and \$34,897.32 under the heading of disturbance. Hamzah also put forward an alternative figure in the amount of \$5,797,000 for reasons we discuss below.<sup>2</sup> Although the claim for compensation was not further amended it was submitted on behalf of Hamzah at the conclusion of evidence that compensation for the value of land including injurious affection ought to be determined in the amount of \$4,750,000 or in any event not less than \$3,850,000.

- [4] For DMR the compensation figure for land including injurious affection and severance was \$2,000,000 and in the alternative a figure of \$2,460,000 was proposed. Whilst proceedings were underway the parties settled the disturbance head in the amount of \$23,000 all up inclusive of interest. The parties also settled on a figure of \$110,000 for severance damage in the form of additional link road costs.
- [5] On 27 March 2008 the Land Court determined compensation in the amount of \$2,946,000 (plus interest)<sup>3</sup> which amount included the \$23,000 disturbance amount agreed to by the parties. Section 27(2) of the AOL Act provides:

“(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.”

- [6] As the compensation figure determined by the Court was closer to that finally put in evidence by the constructing authority than to the amount finally claimed by the claimant, it was only DMR which was entitled to seek an order for costs. DMR sought that order asking that Hamzah pay the whole of the constructing authority’s costs of the proceedings. That application was successful in part in that the Land Court ordered that Hamzah pay 50% of those costs.<sup>4</sup>

- [7] It will be useful at this point to list some relevant points of chronology:

- July 2006 DMR offered compensation of \$3,000,000 covering the value of land taken and injurious affection to Lot 3 (being the lot immediately adjacent to the resumed Lot 4) on the basis that there was no injurious affection to the two remaining lots to the south.<sup>5</sup> That offer was not accepted.

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<sup>2</sup> At [11].

<sup>3</sup> [2008] QLC 0062 (RJ).

<sup>4</sup> [2008] QLC 0123 (RJ costs).

<sup>5</sup> Our understanding is that the offer was made verbally at a “without prejudice” meeting between the parties.

- 3 October 2006 DMR paid an advance<sup>6</sup> against compensation of \$3,000,000 following which the parties moved the matter towards trial with the trial ultimately set to commence on Monday 10 December 2007. The \$3,000,000 figure was based on a valuation by a Mr Horrigan who gave valuation evidence in the Land Court. In that earlier valuation Mr Horrigan expressed the view that injurious affection flowing from the proposed roadworks would reduce the value of the retained Lot 3 only, there being no effect on Lots 206 and 2.
- 6 December 2007 (Thursday) DMR delivered its trial valuation report by which Hamzah was notified for the first time that DMR's trial contention was for compensation of \$2,000,000 for the value of land taken, severance and injurious affection to Lot 3; it remaining DMR's contention that there was no injurious affection to the two remaining lots to the south. There was no communication from DMR to Hamzah indicating that the offer of \$3,000,000 remained open to acceptance.
- 10 December 2007 (Monday) trial commenced.
- 27 March 2008 judgement given in which the Court below found that the whole of the balance land, not merely Lot 3, would be injuriously affected by the project which gave rise to the resumption of Hamzah's land.

[8] The learned Member<sup>7</sup> said in his reasons that the major issues requiring resolution were:

1. The most appropriate valuation methodology.
2. The number of lots lost as a consequence of the resumption.
3. The nature and extent of the injurious affection affecting the balance lots in subdivision.
4. The effect on the value of the balance lots caused by the injurious affection.

[9] There was little issue concerning the before resumption value of Hamzah's land. Mr Horrigan placing a figure of \$9,200,000 on it whilst a Mr Thiel for Hamzah valued the land at \$9,702,324. The parties were able to reach agreement on a before value in the amount of \$9,450,000.

[10] As we understand the record, the issue relating to valuation method referred to by the learned Member occupied little independent trial time, that issue being largely dealt with integrally with the valuation evidence.

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<sup>6</sup> Pursuant to s.23 AOL Act.

<sup>7</sup> RJ [10].

- [11] There was no disagreement between the valuers as to the number of lots available for sale in the before resumption case (343 lots).<sup>8</sup> It was the potential lot yield after resumption which separated the two valuation experts, Mr Thiel basing his after valuation on a 284 lot yield whilst Mr Horrigan assumed 302 lots. It was this difference in after resumption yield that formed the basis of the alternative valuation figures mentioned above.<sup>9</sup>
- [12] The learned Member adopted 292 lots in a Solomonian exercise intended to reflect the view that a hypothetical prudent purchaser might take of the evidence. That conclusion appears to have been reached having regard to evidence that did not occupy a large amount of trial time.
- [13] The issue which generated the greatest debate between the parties and which involved the bulk of the evidence at the trial, was injurious affection. That injurious affection resulted from both the visual intrusion of the completed road project and the generated traffic noise into what would otherwise have been a more rural and tranquil environment.<sup>10</sup> Of these two disabilities, it appears from the learned Member's reasons that it was the noise issue which was of greater significance and which gave rise to substantial evidence including that from acoustic experts.
- [14] The learned Member concluded (against the contention for DMR) that the whole of the balance land was injuriously affected, albeit with that effect reducing the greater the distance from the proposed roadworks. Notwithstanding that conclusion, the learned Member concluded that Mr Thiel's assessment of the effect of injurious affection on the value of the balance land was too high. Putting aside disturbance, the compensation figure determined by the Court included \$2,812,840 for the loss of land and injurious affection and \$110,000 for additional link road costs in the form of severance damage.
- [15] Whilst part of the increase in the compensation figure above the \$2,000,000 figure contended for by DMR is attributed to the agreement regarding the before valuation of Hamzah's land and part to the determination of the number of lots lost as a result of the resumption, the bulk of the increase resulted from the conclusion by the Land Court that injurious affection extended to encompass the whole of the balance land.

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<sup>8</sup> RJ [17].

<sup>9</sup> In [3].

<sup>10</sup> RJ [38].

In the result, Hamzah was successful to the extent that it gained the benefit of an award of compensation with respect to land, injurious affection and severance in an amount of \$923,000 greater than the \$2,000,000 finally contended for by DMR but \$1,827,000 below the figure of \$4,750,000 finally contended for by the claimant and \$3,165,000 below the amount of \$6,088,000 finally claimed.

[16] The power of the Land Court to order costs is relevantly referable to s.34 of the *Land Court Act 2000* and to s.27(2) of the AOL Act. Section 34 provides:

**34 Costs**

- (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.
- (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.

Section 27(2) is set out at [3] above.

[17] In *Yalgan Investments Pty Ltd v Council of the Shire of Albert*<sup>11</sup> the Land Appeal Court set out in summary form a number of propositions distilled from authorities cited by the Court. We need to refer to one only of those propositions:

“(k) 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 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.” (citations deleted – our added emphasis)

[18] There was no suggestion before us or before the learned Member below that Hamzah has pursued a “vexatious, dishonest or grossly exaggerated claim”.<sup>12</sup>

[19] Appeal courts are generally reluctant to interfere with the decision of a Court below based on the exercise of a discretion bestowed by statute unless that decision is shown to have been clearly wrong. In *Yalgan* this Court referred to that proposition at 412 then quoted from the judgment of Kitto J in the *Australian Coal and Shale Employees' Federation v. The Commonwealth*:<sup>13</sup>

“the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgement is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give

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<sup>11</sup> [1997] 17 QLCR 401 at 406 to 408.

<sup>12</sup> See RJ costs at [47].

<sup>13</sup> (1953) 94 C.L.R. 621 at 627.

weight or sufficient weight to relevant consideration, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance: *House v. The King*.<sup>14</sup>” (our added emphasis)

[20] We now consider the reasons of the learned Member which led to his conclusion on the question of costs. At [25] in his costs decision the learned Member observed that, excluding disturbance, Hamzah had been awarded compensation in the order of \$3,000,000 less than the amount of the claim faced by the Chief Executive at the commencement of the hearing; \$452,000<sup>15</sup> less than the mid point prescribed by s.27(2) of the AOL Act and \$77,000 less than the advance paid. The learned Member also observed, however, that Hamzah had achieved \$923,000 more than DMR had finally contended for at the trial and as a consequence avoided having to repay nearly \$950,000 of the monies advanced.

[21] The learned Member referred to the difference between the parties as to whether injurious affection extended beyond Lot 3 of the balance land then said:

“[30] The respective positions of the parties, supported by the advice of relevant experts, about the extent and effect of injurious affection made litigation virtually inevitable. As Mr Fynes-Clinton said in his oral submissions it was this issue that effectively ‘shut the gate’ on the possibility of settlement.

[31] It is also my opinion that the reduced valuation of the Chief Executive from \$3,000,000 to \$2,000,000 would have had little (if any) effect on Hamzah’s decision to proceed to trial. To an extent this is confirmed by the company increasing its claim from about \$5,000,000 to just over \$6,000,000. In this context I should record that there was no suggestion by Mr Fynes-Clinton that the Chief Executive in some way acted in any inappropriate way in contending for a figure at trial less than the advance.”

[22] At [33] of his costs reasons the learned Member said that the issue between the parties concerning the number of lots lost resulted in a “draw” between them, whilst on the injurious affection issue, he had found that Mr Horrigan had underestimated the extent and effect of injurious affection whilst Mr Thiel had “materially overstated those matters in his valuation”.

[23] The Court also mentioned the evidence of a Mr Smale: evidence adduced by Hamzah with respect to injurious affection, but of no assistance to the Court. Mr Smale’s evidence occupied little Court time.

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<sup>14</sup> (1936) 55 C.L.R. 499, at pp. 504, 505].

<sup>15</sup> This figure appears to be based on the final amount contended for by the claimant (\$4,750,000) rather than the amount finally claimed (\$6,088,000). However no issue was taken by the parties as to this.

[24] The learned Member then turned his mind to the payment of the advance and said that when the advance was paid to Hamzah it was open to the claimant to accept that figure. Had it done so, the learned Member went on, the claimant would have received more than the compensation (excluding interest) determined by the Court. The time and costs associated with the subject litigation would also have been largely avoided, he said. In such circumstances the learned Member said it might be said “that the claimant had forced the resuming authority into avoidable litigation. In such circumstances there is, in my opinion, quite a strong argument that the claimant should have to pay all of the resuming authority’s costs.”<sup>16</sup>

[25] The learned Member went on at [39] to say “However, it still needs to be borne in mind that the Court’s primary function is to determine just compensation in circumstances where the landowner has had its land taken by compulsory process.”

[26] The learned Member returned to the issue of the advance:

“[44] Absent the advance, in circumstances where Hamzah achieved in excess of \$900,000 more than the Chief Executive’s primary case there would be an arguable case for making no order as to costs or making only strictly limited orders to bring into account the time spent dealing with the issues raised by Mr Smale. However, for the reasons outlined above, when the advance is brought into account there is also a strong argument for making full costs orders.

“[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 to ‘win’.

[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, though 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*<sup>17</sup> are pertinent<sup>18</sup>:

‘... 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

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<sup>16</sup> RJ costs [37] to [38].

<sup>17</sup> (1993) 81 LGERA 35 at 53.

<sup>18</sup> See also *Pastrello v Roads and Traffic Authority (NSW)* (2000) 110 LGERA 223 at 225 L17-19.

resumes 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. ...’ ”

[27] At [47] the learned Member expressed the view that apart from one witness (presumably Mr Smale) there could be no suggestion that Hamzah did not seek and act upon appropriate advice. He also said that the claim could not be characterised as being “grossly exaggerated”. Then finally the learned Member said:

“[48] In attempting to balance the competing elements in this case and, in particular, the need for the Chief Executive to be fairly compensated for the costs he incurred in having to defend against the excessive claim made against him with the desirability of ensuring that Hamzah receives fair compensation, I have decided that it would not be appropriate to order that the company pay all of the costs of the Chief Executive but that it should have to pay a significant proportion of his costs.

[49] In the circumstances of this case, I have reached the conclusion that Hamzah should pay 50% of the Chief Executive’s costs.” (our added emphasis)

[28] It was submitted for Hamzah before us that a correct appreciation of the facts indicates that there was no period of time or point in time at which Hamzah had any practical alternative other than to maintain and pursue the compensation proceedings in the court below unless it was prepared to abandon its claim for injurious affection to the balance of the Hamzah land beyond Lot 3.

[29] It was further submitted for Hamzah that the success of Hamzah in ultimately convincing the court at first instance that the factual issue of injurious affection to the whole of the balance land ought to be determined in its favour was a critical matter in the consideration of the application for an order for costs. Against that the respondent submitted that the factual extent of injurious affection was not the critical issue. It was, it was submitted, the quantum of compensation for such injurious affection as the court found. It appears to be common ground that Hamzah fell well short on the issue of quantum.

[30] The evidence shows that up to the time when valuations were exchanged just before the commencement of the trial, Hamzah would have reasonably understood that DMR’s position was that compensation for land, injurious affection and severance was \$3,000,000 on the assumption that injurious affection did not extend beyond Lot 3. The contest between the parties on the question of the extent of injurious affection therefore remained a live issue both before and after the exchange of valuations. However, the revelation to Hamzah on that day that DMR would be contending to a figure of \$2,000,000 not \$3,000,000 added a further dimension to what separated the parties. That is, there was now a potential requirement for Hamzah to refund \$1,000,000 to DMR out of the \$3,000,000 advance unless it could convince the Land

Court that compensation was substantially greater than \$2,000,000. In order to do so Hamzah would be required to join issue on those four matters mentioned at [8] above, particularly the issue of injurious affection and its effect on value.

- [31] The learned Member did not accept a submission for Hamzah that it had effectively “won” the injurious affection point saying that whilst Mr Horrigan had underestimated the extent and effect of injurious affection that Mr Thiel had materially overstated those matters in his valuation.<sup>19</sup>
- [32] The significant issue which separated the parties related to the fact of injurious affection to the balance land beyond Lot 3.<sup>20</sup> Hamzah’s maintenance of its position on that issue was clearly justified given the determination of the court in its favour. No adjustment of Hamzah’s position as to the quantum of compensation for injurious affection could be expected to have led to a change in DMR’s position on the issue of fact. The claimant was justified in proceeding on the basis of the opinion of its expert valuer on the quantum issue.<sup>21</sup>
- [33] Criticism can be made against Hamzah with respect to Mr Smale’s evidence, however that evidence occupied little time and, even rejecting reliance on that evidence, did not lead the learned Member to reject Hamzah’s contention as to the factual extent of injurious affection. There was nothing about the conduct of the trial which the learned Member considered was relevant to the exercise of discretion regarding costs.<sup>22</sup>
- [34] It is apparent that the amendments of the claim prior to and after the commencement of the trial had no effect on DMR’s willingness to contest the matter. Similarly, the adjustment downwards of the figure contended for following the leading of evidence had no effect on DMR’s position. As the learned Member said, the respective positions of the parties on the issue of injurious affection made litigation virtually inevitable.<sup>23</sup>
- [35] It was submitted for Hamzah that in cases of compulsory acquisition where a claimant has done substantially better at trial than would have been the case if it had accepted the constructing authority’s trial position, there is a need for “strong justification” for any costs ordered to go against the claimant. It is clear that s.27(2)

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<sup>19</sup> RJ costs [33].

<sup>20</sup> See RJ costs [27] to [30].

<sup>21</sup> See for example *Robertson’s Furniture and Design (Qld) Pty Ltd v Department of Main Roads* [2005] QLC 0025 at [42].

<sup>22</sup> RJ costs [25] to [29].

<sup>23</sup> RJ costs [28] to [30].

of the AOL Act ought not be construed as expressing a general rule that costs should be awarded to the constructing authority merely because the claim is substantially more than the amount awarded.<sup>24</sup>

[36] In support of the requirement for “strong justification” Mr Fynes-Clinton referred to the passage in *Banno v Commonwealth of Australia* quoted in [26] above. Counsel for Hamzah also referred to *Overton Investments Pty Ltd v Minister administering the Environmental Planning and Assessment Act 1979*<sup>25</sup> where Stein J said:

“This Court heard argument as to the relevance to the issue of costs of the amount of the Valuer-General’s determination and its relationship to the ultimate award by the Court. I do not understand either party to suggest that it is an irrelevant factor to be taken into account on costs. In my view, it can be a relevant factor but one which rarely will be a determining one. Nevertheless, I do not see that his Honour placed any under weight on the factor.

Nor do I see that is a simple matter of ascertaining who won or lost the litigation. Compensation determinations are not like awards of damages for personal injury. Obtaining an award of compensation of \$100 does not necessarily mean that a landowner “wins” the litigation. A judge is entitled to look realistically at the litigation, the issues, the way it was conducted and the result, in order to assess who really succeeded and to what extent.”

[37] In our view the authorities cited, including in particular *Yalgan*, do not need to be embellished by the adoption of a phrase such as “strong justification” to describe the standard needed to justify a costs order against a claimant. Our consideration of the authorities, the submissions and the reasons both in the substantive matter and that concerning costs leads us to the view that the issue in this case reduces to a simple question: was the conduct of Hamzah in deciding to prosecute its claim for compensation at trial in light of the advance of \$3,000,000 such that it unreasonably or unnecessarily forced DMR into litigation? We conclude that it was not.

[38] As recognised by the learned Member<sup>26</sup> the payment of an advance (and, we would add, an offer to settle compensation under the AOL Act) is quite different from an offer of the type contemplated in the *Uniform Civil Procedure Rules* rule 360:

**360 Costs if offer to settle by plaintiff**

- (1) If—
  - (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
  - (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer; the court must order the defendant to pay the plaintiff’s costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.

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<sup>24</sup> See *Yalgan* p.5 [j].

<sup>25</sup> [2001] NSW CA 137, 439 at 448 to 449.

<sup>26</sup> RJ costs [46].

- (2) If the plaintiff makes more than 1 offer satisfying sub rule (1), the first of those offers is taken to be the only offer for this rule.

- [39] The claimant is a dispossessed owner. Pursuant to s.12(5) of the AOL Act, the interest of a dispossessed owner is converted into a right to claim compensation. The elements of compensation in turn are provided for in s.20. In a case such as this, a claimant under the Act should not be expected to sacrifice any head of compensation in pursuing a claim and may be justified in ensuring that each item of compensation appropriately considered a source of claim has been treated as such by the constructing authority. This is of particular relevance in a jurisdiction where there are no pleadings. In an offer under UCPR rule 360 it is the figure of offer that is the relevant consideration not the basis upon which it is made.
- [40] We have drawn the conclusion that the learned Member should not have awarded costs against the claimant in this matter. That conclusion is not enough for the appeal to succeed as we need to be satisfied the learned Member fell into error for any of the bases referred to by Kitto J in *Australian Coal and Shale Employees' Federation v. The Commonwealth*.<sup>27</sup>
- [41] In our view, the learned Member in attempting to “balance the competing elements” failed to “give ... sufficient weight” to the central issues of influence on Hamzah’s conduct; that is, the factual question of the extent of injurious affection and the late change in valuation by DMR.
- [42] In attempting to balance the competing elements set out by the learned Member in his reasons, the Member has, we think, disregarded the pivotal effect of the differences between the parties concerning injurious affection and the impact of the late change in valuation by DMR on the claimant. It is the pivotal effect of these considerations that, in our view, should be taken into account in considering Hamzah’s conduct in prosecuting its case. We are of the view that its conduct in the circumstances was justified and that there is an error in the exercise of the discretion by the Member in attempting to include those pivotal considerations along with a range of other matters in forming a view as to the outcome of the costs application.
- [43] We are also of the view that the learned Member fell into error in treating the quantum of the advance compared with the level of compensation determined by him as a relevant factor in dealing with the issue of costs in circumstances where the

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<sup>27</sup> See [19] above.

learned Member concluded that the claim was not “grossly exaggerated”.<sup>28</sup> Reference to the advance in that way requires the employment of hindsight and disregards the reduction of the DMR figure from \$3,000,000 to \$2,000,000 and the effect of that on Hamzah’s appreciation at that time of its options.

### **Order**

1. The appeal is allowed.
2. Instead order that the parties are to bear their own costs of the substantive hearing at first instance.
3. The respondent to pay the appellant’s costs of and incidental to the appeal unless the respondent contends that some other order ought be made in which case:
  - (i) the respondent file and serve its submissions within 21 days;
  - (ii) the appellant file and serve their submissions within 14 days of receipt of the respondent’s submissions;
  - (iii) the respondent file and serve its reply, if any, within 7 days of receipt of the appellant’s submissions;
  - (iv) the Court will decide the question of costs on the written submissions of the parties without the need for oral argument.

**WHITE J**

**PRESIDENT OF THE LAND COURT**

**MEMBER OF THE LAND COURT**

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<sup>28</sup> RJ costs [47].