## DILLON and Another v GOSFORD CITY COUNCIL

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

BASTEN and MACFARLAN JJA and HANDLEY AJA

21 July, 26 October 2011 — Sydney

[2011] NSWCA 328

**Real property — Compulsory acquisition — Assessment of market value — Approach for construction and value of easements.**

**Practice and procedure — Costs — Whether leave required for appeal from costs order under s 57(4) of the Land and Environment Court Act 1979 (NSW) — Applicable principles in awarding costs in class 3 proceedings under the Land and Environment Court Act — (NSW) Land and Environment Court Act 1979 s 57(4).**

The appellants were owners of a semi-rural property near Gosford. The respondent, being the local council (the council) for the area, decided to exercise its powers with respect to control of stormwater to build a levee on the appellants' property, with the intention of preventing the floodwaters flowing across the property.

The levee was constructed by the council, pursuant to an agreement with the appellants, in about 1996. On 27 October 2006, the council published a "Notice of Compulsory Acquisition of Land" which involved the acquisition of an interest in the appellants' property described as "an easement for a levee bank".

The council made an offer of compensation to the appellants. They deemed it unacceptable and filed an application in the class 3 jurisdiction of the Land and Environment Court seeking compensation of $375,108.

On 6 June 2008 the Land and Environment Court delivered its first judgment, upholding the council's assessment of market value of $45,000, as opposed to the $145,000 claimed by the appellants.

On 25 September 2009 the appellants filed a notice of motion seeking further declarations in respect of the interests they retained in their land and the interests lost by compulsory acquisition of the easement. They also sought to reopen the valuation generally pursuant to further amended points of claim which provided alternative calculations amounting to (at the higher end) $664,480 and (at the lower end) $441,720. The claim included an amount for scour protection works.

The motion was heard on 17 February 2010, a second judgment being delivered on 31 March 2010. The effect of that judgment was to dismiss the notice of motion, in so far as it sought to reopen the question of market value determined by the first judgment. Noting that the scour protection works had still not been undertaken, the court gave leave for that issue to be determined at a further hearing, together with the question of the costs of the substantive proceeding.

The third hearing took place in June 2010, judgment being delivered on 16 September 2010. So far as the scour protection works were concerned, the court allowed a further amount of $98,152 (which was the total amount after an apportionment of those costs as between the appellants and the respondent), the total compensation payable being $148,152. In respect of costs, the appellants were ordered to pay the respondent's costs of the unsuccessful reopening motion and of a withdrawn notice to produce documents. In respect of the substantive proceedings, the council was ordered to pay 75% of the

appellants' costs up to and including 22 July 2009, the date on which orders were made following the first judgment; thereafter, the appellants were ordered to pay 50% of the council's costs.

On the appeal, the issues for the court to determine were:

(1) whether the Land and Environment Court properly construed the notice of acquisition;

(2) whether the Land and Environment Court failed to provide reasons with respect to the operation of s 59A of the Local Government Act 1993 (NSW);

(3) whether the Land and Environment Court erred in dismissing the "reopening" application;

(4) whether the Land and Environment Court erred in apportioning the costs of the scour protection works; and

(5) whether the Land and Environment Court erred in awarding the costs of the proceedings.

**Held**, per Basten JA (Macfarlan JA and Handley AJA agreeing), dismissing the appeal:

(i) Established principles that, in the case of uncertainty, an easement should be construed "strongly against the grantor" can only apply analogously in circumstances of a compulsory acquisition. Here, the easement should be construed against the acquiring authority, which determined its terms: at [20].

(ii) In valuing an acquired interest, the preferable view is that there should be no presumption one way or another as to the scope of the easement and any ancillary rights which may attach to it. The court should not strain to give an expansive operation to the easement, especially in circumstances where no specific question as to its operation arises: on the other hand, neither should it construe the interest arising under the easement in a restrictive manner, so as to deny the owners full compensation for the diminution in their interests in the land: at [21].

(iii) The construction of the powers conferred by the easement is governed by two overriding considerations. First, the identification of the purpose of the easement was a levee. Second, the topographical area of the easement was defined by reference to an area depicted on a plan. The Land and Environment Court did not err in finding that the construction of the easement did not permit works on the appellants' land beyond the area of the easement: at [24]–[27].

(iv) The reference by the Land and Environment Court to s 59A of the Local Government Act was immaterial, and therefore the appellants' arguments did not arise for consideration: at [29], [32].

(v) In respect of the re-opening application, the Land and Environment Court correctly treated the issue as one requiring the exercise of the court's discretionary power to revisit a matter which had been determined, even though the whole proceedings had not been finally disposed of, not on the basis of any error attending the original judgment, but on the basis that the appellants sought to reformulate their claim. No error of law was identified in relation to his Honour's approach to the exercise of that discretionary power: at [36], [37].

(vi) The appellants' arguments in respect of the apportionment of the scouring costs failed to identify an issue of law, and was misconceived: at [45], [46].

(vii) In respect of whether leave was required in order to appeal from a costs order under s 57(4) of the Land and Environment Court Act 1979 (NSW), it was appropriate to follow existing authority in respect of s 101(2)(c) of the Supreme Court Act 1970 (NSW). The result is that no leave was required: at [58].

(viii) The discretion to award costs in respect of class 3 proceedings in the Land and Environment Court arises under s 98 of the Civil Procedure Act 2005 (NSW). That discretion is unfettered, in the sense that there is no presumption that costs should follow the event: at [60].

(ix) A claimant for compensation in respect of a compulsory acquisition should usually be entitled to recover the costs of the proceedings, having acted reasonably in pursuing the proceedings and not having conducted them in a manner which gives rise to

unnecessary delay or expense. Whether steps taken in maintaining proceedings are reasonable will depend upon the circumstances of the particular case. These may include a comparison between the positions adopted by the parties at the commencement of proceedings and the final outcome. To the extent that a claimant obtains less than the valuation provided by the Valuer-General, the claimant has been unsuccessful in the litigation. That will be a factor to be taken into account, but the weight given to that factor may depend upon the extent of the failure. The court may also take into account the time and expense incurred in relation to specific items. In short, the purpose of an award of costs must be taken into account, namely to compensate the party for expenditure incurred in the course of litigation; the nature of the litigation and the reasonableness of the conduct of the litigation are central considerations: at [70]–[72].

(x) There was no error on the part of the primary judge in respect of the costs of the first stage: at [74].

(xi) The challenge to the costs order in respect of the second stage of the proceedings should be upheld and that order should be set aside. Accepting the primary facts and evaluative judgments of the primary judge, the appropriate order is that each party bear its owns costs of the second stage of the proceedings: at [80].

## Appeal

This was an appeal from decisions of the Land and Environment Court: *Dillon v Gosford City Council* [2008] NSWLEC 186; *Dillon v Gosford City Council (No 2)* [2010] NSWLEC 44 and *Dillon v Gosford City Council (No 3)* [2010] NSWLEC 168.

The appellants (Kevin Walter Dillon and Kerry Ann Dillon) appeared in person.

*P C Tomasetti SC* and *N M Eastman* instructed by *Storey & Gough Lawyers* for the respondent (Gosford City Council).

**[1] Basten JA.** The appellants are the owners of a semi-rural property of approximately 1.5 hectares on the western side of Manns Road at Narara, near Gosford. The western boundary of the property is the mid-line of Old Narara Creek. In times of heavy rain, Old Narara Creek would flood, discharging water across the appellants' property on to Manns Road and thus onto the properties beyond. At the southern end of the appellants' property, the Old Narara Creek swings east and has been diverted through a culvert under Manns Road.

**[2]** The respondent, being the local council for the area, decided to exercise its powers with respect to control of stormwater to build a levee on the appellants' property, with the intention of preventing the floodwaters flowing across the property along the length of Manns Road and diverting them back into the creek where it flowed under the road. The levee was constructed by the council, pursuant to an agreement with the appellants, in about 1996. Some 10 years later, on 27 October 2006, the council published a "Notice of Compulsory Acquisition of Land" which involved the acquisition of an interest in the appellants' property described as "an easement for a levee bank". The present dispute concerns the compensation payable in respect of the acquisition of that interest, assessed pursuant to the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (the Land Acquisition Act).

**[3]** The appeal against the assessment of compensation by the Land and Environment Court should be dismissed; the court's orders as to costs are varied in part.

**(1) Background to appeal**

**[4]** An offer of compensation made by the council being deemed inadequate by the appellants, on 27 February 2007 they filed an application in the class 3 jurisdiction of the Land and Environment Court. Pursuant to amended points of claim dated 10 December 2007, the appellants sought compensation in an amount of $375,108, comprising the following elements:

| | | |
|---|---|---|
| Market value | | $145,000 |
| Loss attributable to disturbance: | | |
| (a) | removal and replacement of unsuitable fill | $90,310 |
| (b) | rectification and establishment of vegetation screen at the front of the block | $4,798 |
| (c) | installation of scouring control measures to the creek | $130,000 |
| (d) | legal, valuation and ancillary costs | $5,000 |
| | Total disturbance cost | $230,108 |
| Total claim | | $375,108 |

**[5]** By points of defence dated 6 July 2007, the council resisted the claim on the basis that the Valuer-General had determined the value of the interest acquired as follows:

(a) market value — $85,000
(b) disturbance — $15,000
Total — $100,000.

**[6]** On 9 December 2007 amended points of defence were filed which asserted market value of only $45,000 and allowed $5000 for legal and valuation fees, giving a total of $50,000. The claim for disturbance was wholly rejected.

**[7]** On 6 June 2008 the Land and Environment Court (Sheahan J, assisted by Acting Commissioner Miller) delivered its first judgment: *Dillon v Gosford City Council* [2008] NSWLEC 186. In respect of market value, the court upheld the council's assessment at $45,000. That finding turned on the construction of the notice of compulsory acquisition, an issue which the appellants have reagitated in this court. The first judgment also accepted the amount of $5000 for legal and valuation costs, conceded by the council, giving a total amount payable of $50,000.

**[8]** There remained a significant dispute in respect of the disturbance claim. The court rejected the claim in respect of the first two items noted above (namely unsuitable fill and vegetation screen) but accepted that some amount should be allowed in respect of measures to control scouring of the banks of the creek where flood waters re-entered (referred to as scour protection works). The orders of the court, which were not entered until 15 September 2009, left open the last item as a matter for further assessment, if not agreed by the council, when the scour protection works had been completed.

**[9]** On 25 September 2009 the appellants filed a notice of motion seeking further declarations in respect of the interests they retained in their land and the interests lost by compulsory acquisition of the easement. They also sought to reopen the valuation generally pursuant to further amended points of claim which

provided alternative calculations amounting to (at the higher end) $664,480 and (at the lower end) $441,720. The claim included an amount for scour protection works.

**[10]** The motion was heard on 17 February 2010, a second judgment being delivered on 31 March 2010: *Dillon v Gosford City Council (No 2)* [2010] NSWLEC 44. The effect of that judgment was to dismiss the notice of motion, in so far as it sought to reopen the question of market value determined by the first judgment. Noting that the scour protection works had still not been undertaken, the court gave leave for that issue to be determined at a further hearing, together with the question of the costs of the substantive proceeding.

**[11]** The third hearing took place in June 2010, judgment being delivered on 16 September 2010: *Dillon v Gosford City Council (No 3)* [2010] NSWLEC 168. So far as the scour protection works were concerned, the court allowed a further amount of $98,152, the total compensation payable thus being $148,152. In respect of costs, the appellants were ordered to pay the respondent's costs of the unsuccessful reopening motion and of a withdrawn notice to produce documents. In respect of the substantive proceedings, the council was ordered to pay 75% of the appellants' costs up to and including 22 July 2009, the date on which orders were made following the first judgment; thereafter, the appellants were ordered to pay 50% of the council's costs.

## (2) Issues on appeal

### *(a) Identifying issues*

**[12]** By a notice of appeal dated 25 June 2010, the appellants sought to challenge the first two judgments. The council filed a notice of motion on 26 July 2010 seeking to have that appeal dismissed as incompetent, presumably because the judgments were interlocutory and leave was required. However, following the third judgment, the appellants filed a further notice of appeal, repeating most of the grounds relied upon in the first notice, together with additional grounds relating to issues determined in the third judgment. The appeal was argued on the basis of the latter notice.

**[13]** The right of appeal to this court from a decision of the Land and Environment Court constituted by a judge, in the class 3 jurisdiction of that court, is limited to an appeal "against an order or decision … of the court on a question of law": s 57(1) of the Land and Environment Court Act 1979 (NSW).

**[14]** The case for the appellants was presented, with leave of the court, by Mr Dillon, who demonstrated a commendable grasp of the relevant legal principles. Rather than address the grounds of appeal identified in the second notice (which did not clearly identify appellable errors), he focused on legal issues which can be summarised as follows, namely whether the court below:

(a) properly construed the notice of acquisition;
(b) failed to provide reasons with respect to the operation of s 59A of the Local Government Act 1993 (NSW);
(c) erred in dismissing the "reopening" application;
(d) erred in apportioning the costs of the scour protection works, and
(e) erred in awarding the costs of the proceedings.

**[15]** For the reasons given below, the appellants failed to demonstrate error in respect of the substantive orders of the court. However, they succeeded in establishing error in respect of the costs order.

***(b) Construction of notice of acquisition***

**[16]** The appellants' underlying concern was that they had but one opportunity to claim compensation in respect of the easement acquired over their land. They were conscious of the exemption from liability for a council in respect of flood mitigation works, as identified in s 733 of the Local Government Act, and also the scope of the statutory powers conferred on the council by provisions such as s 59A of the Local Government Act. These powers, the appellants' contended, had to be taken into account in considering the nature and scope of the interest conferred on the council under the easement and thus the market value of the interest acquired. However, the central question addressed at the first hearing in the court below focused on the construction of the notice of compulsory acquisition, which read as follows:

> Notice of Compulsory Acquisition of Land
>
> GOSFORD City Council declares with the approval of Her Excellency the Governor, that the easement described in schedules 1 and 2 below … are [sic] acquired by compulsory process in accordance with the provisions of the Land Acquisition (Just Terms Compensation) Act 1991 for the purpose of a Levee Bank.
>
> …
>
> SCHEDULE 1
>
> Interest in the land being an Easement for a Levee Bank described on DP 1082242 as Proposed Easement and shown as Plan of Proposed Easement for Support and Right of Carriageway within Lot 3, DP 775599.
>
> SCHEDULE 2
>
> 1. The body having the benefit of this easement may:
>    (a) drain water from any natural source through each lot burdened, but only within the site of this easement, and
>    (b) construct and maintain levee banks to control flood waters.
>    (c) do anything reasonably necessary for that purpose, including:
>
>    entering the lot burdened, and taking anything on to the lot burdened, and using any existing line of pipes, and carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches, levee banks, removal of obstructions to the flow of water and equipment.
> 2. In exercising these powers, the body having the benefit of this easement must:
>    (a) ensure all work is done properly, and
>    (b) cause as little inconvenience as practicable to the owner and any occupier of the lot burdened, and
>    (c) cause as little damage as practicable to the lot burdened and any improvement on it, and
>    (d) restore the lot burdened as nearly as practicable (except for the placement of the levee banks) to its former condition, and
>    (e) make good any collateral damage.

**[17]** Schedule 1 was purely descriptive of the geographical extent of the easement by reference to a plan. (The description itself was inapt as the plan appeared to have been prepared for a different purpose.) The critical point of departure between the parties in respect of the notice was the power conferred by para 1(c) of Sch 2. The appellants contended that para 1 generally was a variation of the powers contained in Pt 7 "Easement for drainage of water" in Sch 4A of the Conveyancing Act 1919 (NSW). The variations were said to be significant, because they were designed to give effect to the purpose of the acquisition which was described as being "for the purpose of a levee bank". The appellants' primary contention was that the limitation in the proviso to subpara (a), permitting the body having the benefit of the easement to drain water "but only within the site

of this easement", did not expressly qualify the powers contained in subparas (b) and (c), the latter powers thus extending beyond the site of the easement, to the lot generally.

**[18]** Support for that conclusion was said to be gained from the conditions imposed by para 2 on the exercise of the powers set out in para 1, which included a requirement to restore the lot burdened as nearly as practicable to its former condition, subject to an exception in respect of the placement of the levee: para 2(d). There being no doubt that the council had power to enter the land generally in order to carry out work within the easement, the condition assumed, it was submitted, that the levee could be placed on the land anywhere where work could properly be done, including outside the area of the easement.

**[19]** The construction proposed by the appellants is expansive of the scope of the easement. Their argument requires consideration of whether that is an appropriate approach to the question of construction.

**[20]** The law has long recognised easements created in different ways, including by way of reservation, grant and prescription. How the easement is to be construed may depend upon the issues in question and the means of its creation. Established principles that, in the case of uncertainty, an easement should be construed "strongly against the grantor" can only apply analogously in circumstances of a compulsory acquisition: *Timpar Nominees Pty Ltd v Archer* [2001] WASCA 430 at [34] per Kennedy, Pidgeon and Wheeler JJ. If any principle or presumption of this kind is to apply, it is that the easement should be construed against the acquiring authority, which determined its terms. That is consistent with the established principle of statutory interpretation that a provision conferring a power not be construed as interfering with vested proprietary interests unless that intention is manifest: see *Clissold v Perry* (1904) 1 CLR 363 at 373; [1904] HCA 12 per Griffiths CJ, Barton and O'Connor JJ concurring; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64; 107 ALR 1 at 46–7; [1992] HCA 23 per Brennan J, Mason CJ and McHugh J agreeing, at CLR 95; ALR 71–2 per Deane and Gaudron JJ, at CLR 193; ALR 150–1 per Toohey J.

**[21]** In valuing an acquired interest, the preferable view is that there should be no presumption one way or another as to the scope of the easement and any ancillary rights which may attach to it. The court should not strain to give an expansive operation to the easement, especially in circumstances where no specific question as to its operation arises: on the other hand, neither should it construe the interest arising under the easement in a restrictive manner, so as to deny the owners full compensation for the diminution in their interests in the land. see s 3(1) of the Land Acquisition Act.

**[22]** It was not in contention that the interest in land constituted an easement, as understood under the general law: see, for example, *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* (2008) 37 WAR 498; [2008] WASCA 180. As explained by K Gray and S F Gray in *Elements of Land Law*, OUP, 5th ed, 2009, at 5.1.20:

> While easements must be construed so as to minimise the burden on the servient proprietor, they must not be construed so strictly as to defeat the right granted to the dominant proprietor. In effect the Court will, on ordinary contractual principles, imply into the grant such terms as would have been regarded as "reasonably necessary or obvious to the parties".

**[23]** The result will be that any user in excess of rights, or unreasonable interference with the exercise of rights, may be restrained by injunction: *Moncrieff v Jamieson* [2007] 1 WLR 2620; [2008] 4 All ER 752; Gray and Gray, 2009, at 5.1.21.

**[24]** The construction of the powers conferred by the easement is governed by two overriding considerations. First, the identification of the purpose of the easement was a levee. Second, the topographical area of the easement was defined by reference to an area depicted on a plan. The primary powers conferred by the easement, identified in Sch 2, were draining water, constructing "levee banks" and maintaining "levee banks". Those activities are to be read as providing greater particularity for the general purpose of the easement, namely a levee, and having regard to the site of the easement, as defined in Sch 1. So construed, the powers do not extend to construction or maintenance of a levee outside the defined area.

**[25]** Paragraph 1(c) of Sch 2 confers power to "do anything reasonably necessary for that purpose", being the purpose identified in the operative part of the notice and in subparas (a) and (b) of Sch 2. That power would permit activities on the appellants' land but outside the defined area, but there is nothing in subpara (c) which would expand the scope of the purpose so as to permit the construction of works, such as a permanent levee, on the appellants' land beyond the boundaries of the easement.

**[26]** Paragraph 2 of Sch 2 imposes conditions on the carrying out of such works generally. Thus subpara (d) requires the council to restore the lot burdened to its former condition in terms wide enough to include the areas within and without the easement. Given that understanding, the exception permitting the levee to remain in place is simply an express statement of what might in any event have been obvious, namely that restoration did not require removal of the levee itself. There is no implication to be drawn from that exception, to the effect that the levee was to extend beyond the area of the easement.

**[27]** This was the construction adopted by the primary judge in the first judgment at [31]–[42]. The appellants contend that there are passages in the second judgment, particularly at [78] and [79], which are inconsistent with the reasoning in the first judgment. That may be so, but, if it is so, the complaint is beside the point. The second judgment resulted in no relevant order, but only the dismissal of the appellant's notice of motion. The conclusion on the point of construction reached in the first judgment, which led, pursuant to the agreement of the parties, to the amount identified as market value of the acquired interest, was correct and not erroneous in respect of any question of law.

**[28]** The fact that the levee, constructed years earlier, extends beyond the easement does not affect the construction set out above. The lawfulness of the original construction is not in issue in this case; it appears to have been undertaken with the consent of the appellants. Whether the council has rights in respect of the maintenance of the levee, outside the easement, is a further question not in issue in the present case. The first ground of appeal must be rejected.

***(c) Section 59A of the Local Government Act***

**[29]** The second major issue agitated by the appellants does not arise for consideration. That conclusion derives from the manner in which the case was run at trial. At the outset, each party instructed a valuer; on 4 December 2007 they

produced a joint valuation report. The valuers agreed that the market value of the land depended upon the proper construction of the easement and that if the council's construction were upheld, the compensation should be that awarded by the primary judge, namely $45,000: first judgment at [13] and [43].

**[30]** The first judgment was delivered on 6 June 2008, orders being entered on 15 September 2009. The notice of motion filed by the appellants on 25 September 2009 sought additional relief, in two alternative forms. The first order sought, in effect, declarations that their land was not subject to an easement for a levee otherwise than within the area shown on the plan of the easement and that the purpose of the easement was limited to a "levee bank". In addition, they sought a declaration that they were entitled to continue to use the area on which the levee was constructed "unaffected by the provisions of ss 51, 59A and 191A of the Local Government Act 1993": order 1(a). In the alternative, they sought leave to file further amended points of claim seeking compensation in far greater amounts than the claims agitated in 2007–2008. The higher of the two sums was sought in the event declarations were not made; each assumed the application of, inter alia, s 59A, with the statutory powers and immunities either forming part of the "acquired interest" or being applicable, though not part of the acquired interest.

**[31]** In this court, although the argument referred in passing to other powers and immunities, the principal focus was on the operation of s 59A, which states:

> 59A *Ownership of water supply, sewerage and stormwater drainage works*
>
> (1) Subject to this Division, a council is the owner of all works of water supply, sewerage and stormwater drainage installed in or on land by the council (whether or not the land is owned by the council).
>
> (2) A council may operate, repair, replace, maintain, remove, extend, expand, connect, disconnect, improve or do any other things that are necessary or appropriate to any of its works to ensure that, in the opinion of the council, the works are used in an efficient manner for the purposes for which the works were installed.

**[32]** The appellants' primary argument in respect of s 59A was that the powers contained in subs (2) relating to any of the council's works were restricted to the works described in subs (1) of which the council was the owner, namely "works of water supply, sewerage and stormwater drainage". The appellants argued that the levee was not itself a work of stormwater drainage. Accordingly s 59A did not apply. Their concern, arising from the second judgment below, was the opinion expressed that s 59A of the Local Government Act "does apply": at [74]. However, the remark referred to the ownership of the works and thus was directed to subs (1), not subs (2). More importantly, the comment was immaterial: its only possible relevance was to a different assessment of market value. The primary judge refused to undertake such an exercise for reasons unrelated to the operation of s 59A. The fate of the present contention therefore turns on the challenge to the refusal by the primary judge to reopen the assessment of market value undertaken in the first judgment.

### *(d) Reopening application*

**[33]** At various stages, in the course of the proceedings below, the appellants appear to have contended that the first judgment could be reopened because:

(a) it was not a final judgment, the total amount of compensation not having been determined;

(b) being interlocutory, it could be reopened at any time to allow the applicant to claim the full amount of compensation due and payable, and

(c) the question sought to be raised in the notice of motion could be dealt with under the "slip rule".

**[34]** The third proposition was untenable. There was no "clerical mistake", nor any error "arising from an accidental slip or omission" in the first judgment or the orders consequent upon it: compare r 36.17 of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR). His Honour was correct to reject that possible basis for reconsidering the issue of market value: second judgment at [55]–[56].

**[35]** The primary judge further noted that there was no allegation that the judgment and orders were made "irregularly, illegally or against good faith", being the language of r 36.15(1): see, for example, *Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd* (2008) 71 NSWLR 262; 65 ACSR 545; [2008] NSWCA 38 at [84]–[87] per Spigelman CJ and *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* (2009) 170 LGERA 162; [2009] NSWCA 300 at [41].

**[36]** In respect of the first approach, his Honour described the orders made consequent upon the first judgment as "clearly 'final'" and noted that they had been "perfected", by being entered: second judgment, at [59] and [60]. However, he did not suggest that there was no power to vary or set aside such an order, no doubt because the notice of motion in effect seeking variation was filed within 14 days of the orders being entered: r 36.16(3A). Rather, his Honour treated the issue as one requiring the exercise of the court's discretionary power to revisit a matter which had been determined, even though the whole proceedings had not been finally disposed of, not on the basis of any error attending the original judgment, but on the basis that the appellants sought to reformulate their claim. This adopted the second approach noted above and was correct.

**[37]** No error of law was identified in relation to his Honour's approach to the exercise of that discretionary power. He referred, correctly, to the principles identified in *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 265; 108 ALR 55 at 60; [1992] HCA 36. Those principles were referred to with approval in *De L v Director-General, New South Wales Department of Community Services (No 2)* (1997) 190 CLR 207 at 215; 143 ALR 171 at 176–7; 21 Fam LR 432 at 437–8; [1997] HCA 14, albeit in relation to an application to reopen a judgment in that court: different principles may apply to a trial court, but no significant departure was identified in the present case. In the latter case, the joint judgment (of Toohey, Gaudron, McHugh, Gummow and Kirby JJ) dealt with the power of the High Court to reopen its own judgments or orders, noting that it was not in doubt. Their Honours continued:

> The Court may do so if it is convinced that, in its earlier consideration of the point, it has proceeded "on a misapprehension as to the facts or the law", where "there is some matter calling for review" or where "the interests of justice so require". It has been said repeatedly that a heavy burden is cast upon the applicant for reopening to show that such an exceptional course is required "without fault on his part", ie without the attribution of neglect or default to the party seeking reopening. By such expressions of the power to reopen final orders, courts seek to recognise competing objectives of the law. On the one hand, there is the principle of finality of litigation which reinforces the respect that should be shown to orders, final on their face, addressed to the world at large and upon which conduct may be ordered reliant upon their binding authority. On the other hand, courts recognise that accidents and oversights can sometimes occur which, unrepaired, will occasion an injustice.

**[38]** One of the factors influencing the primary judge was the delay in seeking to reopen the assessment of market value, some 15 months after the first judgment. During that time, significant steps had been taken to resolve the one outstanding issue, namely the cost and apportionment of the scour protection works: second judgment at [22]–[36]. His Honour noted that a similar situation had arisen in *Mir Bros Unit Constructions Pty Ltd v Roads and Traffic Authority (NSW)* [2005] NSWLEC 419 (*Mir*): second judgment at [61]. He noted at [62]:

> [62] In *Mir,* market value had been finally determined but disturbance claims stood over, and some 9 months elapsed before the applicant sought to reopen its case on three stated bases — (1) to reagitate the application of the "Before and After" valuation method, (2) to correct a possible arithmetical error, and (3) to introduce fresh valuation evidence on a matter which was debated and determined at trial, but had not been pleaded.

**[39]** The primary judge adopted the principles accepted by McClellan CJ in *Mir*, in similar circumstances: at [63]–[66]. He further considered the application of those principles in the present case: at [69]–[73]. His decision, neither to make the declarations sought, nor to allow the appellants to reopen to make additional claims in respect of market value, have not been shown to involve any question of law, erroneously decided. This conclusion requires the rejection of grounds 6–8 in the notice of appeal.

***(e) Disturbance claim — Scour protection works***

**[40]** The appellants were entitled to compensation for "any loss attributable to disturbance": s 55(f) of the Land Acquisition Act. That phrase is defined in s 59, relevantly for present purposes, to include "any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition": s 59(f). The need for protection against scouring by redirected flood waters was addressed in the first judgment in the following terms:

> 48 The effect of the levee has been to contain floodwaters from the Old Narara Creek and water in the ephemeral stream (which waters previously flowed across Manns Road and re-entered the Old Narara Creek below the culvert on this road) within the subject property so that these waters are discharged via the Old Narara Creek through the Manns Road culvert.
>
> …
>
> 50 One of the features of an unconfined alluvial stream is that, over time, as erosion takes place, the actual position of the stream moves. Where the velocity and volume of water in a stream remain unchanged, this movement must be regarded as a natural occurrence.
>
> …
>
> 53 Mr Boyden, the engineer relied upon by the [appellants], gave evidence that substantial works were required to maintain the integrity of the Old Narara Creek following construction of the levee, which will cause local scour of the Creek bank, and of the adjacent flood plain at the various points where water re-enters the Creek. … Mr Boyden prepared two proposals, the first was estimated to cost $350,000, and the second $130,000, both estimates being inclusive of GST.

**[41]** The primary judge accepted that a claim was available under s 59(f), for three reasons, explained (at [62]):

> [62] Firstly, the very reason for the construction of the levee was to prevent the escape of waters across Manns Road, thereby increasing the volume of water in the Old Narara Creek. Secondly, the increased volume of water carried by the Creek must increase the

potential for erosion beyond that which must be normally expected in a meandering stream. Thirdly, the diverted waters enter the Creek in such a way that they cascade down the near vertical banks, generally opposite the levee bank, causing, or certainly increasing, the risk of erosion of those banks.

**[42]** There remained a question as to the scope and cost of the works to be undertaken. At [73], the primary judge concluded:

> [73] I am satisfied that the works proposed by Mr Boyden and Mr Dillon extend beyond what is required or necessary to address the consequences of the increased flow of floodwaters in and into the Old Narara Creek following the construction of the levee. Accordingly, only a proportion of the cost of the works can properly be claimed as compensation arising from the acquisition …. That sum can be calculated only when the works have actually been completed and the appropriate proportion of the final cost determined.

**[43]** In his second judgment of 31 March 2010, the primary judge noted that the council had agreed not to insist upon the works being completed prior to contribution being paid and that the two experts had agreed that the cost of the works should be apportioned as to 53% to the appellants and 47% to the council: at [34]. The appellants had obtained a quotation in an amount of $175,156: at [36].

**[44]** On 5 May 2010, the council filed an expert report from a quantity surveyor costing the scour protection works at $171,600: third judgment at [13]. The primary judge accepted both that figure and the apportionment in the joint report of 25 September 2009 requiring the council to pay 47% of that cost: at [29]. The court further accepted the appellants' claim for an additional $17,500, giving a total figure of $98,152 for the scour protection disturbance claim: at [35].

**[45]** In an attempt to identify an issue of law in respect of what was almost entirely a factual assessment, the appellants took the court to various paragraphs in the joint expert report of 25 September 2009. These paragraphs involved, primarily, assessment of apportionment based on various models of possible flooding and the redirection of the flow of water. The appellants sought to challenge the bases of this assessment. Because they had been relied upon by the experts and were accepted by the primary judge, it was submitted that they thereby became "material considerations", whereas the appellants contended that they were "irrelevant matter" in relation to the question of the reasonableness of the disturbance claim: written submissions at para 82.

**[46]** This argument does not identify any question of law, let alone one erroneously determined. It appears to invoke the principle that an administrative decision, at least, may be set aside if the decision-maker has taken into account "irrelevant considerations". However, that principle provides no warrant for the court to inquire into findings of fact. Rather, it is limited to the identification, by reference to the statute or other legal principles under which the decision-maker acted, of some factor as a prohibited consideration, in the sense that, as a matter of law, it must be excluded from the decision-making process: M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, 4th ed, 2009, p 282. Whether the modelling was done well or badly and whether different outcomes might have been achieved, are beside the point. It is not possible to say that the statutory scheme precluded the court taking into account the results of such an exercise. The challenge is misconceived and must be rejected.

### (3) Costs

#### *(a) The costs orders made*

**[47]** It is necessary to deal separately with the challenge to the costs orders made below as the council submitted that there was no appeal as of right. It is convenient to start by explaining the orders made. In respect of the first part of the proceedings, the appellants obtained an order for payment of 75% of their costs. In respect of the balance of the substantive proceedings, namely the consideration of the disturbance claim, the appellants were ordered to pay 50% of the council's costs.

**[48]** Division of the proceedings into two parts reflected the manner in which the litigation was conducted, there being two hearings in respect of the substantive issues. However, consideration of the issues overlapped to the extent that the scour protection claim was agitated (and resolved in principle) in the first stage.

**[49]** The primary issue resolved in the first stage, namely market value, was resolved in favour of the council; the issue as to the availability of a claim for scour protection works was resolved in favour of the appellants. Other aspects of the appellants' claims were rejected. His Honour took these factors into account. He also took into account the fact that, on 20 December 2007, midway through the first hearing, the appellants offered to accept $150,000 plus costs, an offer rejected by the council. Subject to the question of costs, the ultimate award was only fractionally below the offer. That too was taken into account by his Honour: at [53]–[56].

**[50]** The adverse costs order in respect of the second half of the proceedings grew in significance, at least in the appellants' minds, in the course of preparation of the appeal. Although the orange book containing the submissions of both parties was filed on 23 June 2011, less than a month later, on 17 July 2011, a "supplementary" orange book was filed containing further written submissions on the issues of costs, a copy of the International Covenant on Civil and Political Rights, the second reading speech in respect of the bill which became the Land Acquisition Act and extracts from the Australian Law Reform Commission Report, No 14 on land acquisition and compensation. The issue said to be raised was identified as "one of significant public interest": supplementary written submissions, para 43.

**[51]** Although, in the course of argument, the appellant drew attention to their failure to obtain full recovery of costs in relation to the first stage of the proceeding, their primary argument was directed to their obligation to pay 50% of the costs of the council of the second stage, despite having obtained a judgment in their favour in a significant sum on account of disturbance.

**[52]** There are, however, two preliminary issues which need to be addressed before reaching the substance of their complaints, namely whether:

(a) they require leave under s 57(4)(f) of the Land and Environment Court Act, because they challenge an order or decision as to costs, and
(b) the principles to be applied in respect of costs orders in compulsory acquisition cases.

#### *(b) Whether leave required*

**[53]** It is commonplace to find a requirement for leave in respect of appeals against orders as to costs: see, for example, s 101(2)(c) of the Supreme Court Act 1970 (NSW); s 127(2)(b) of the District Court Act 1973 (NSW). In relation to

appeals within the Supreme Court and from the District Court, the court has followed English authority to the effect that leave is not required if the appeal contains bona fide grounds relating to issues other than costs; in such a case, the appeal is not, in the language of the Supreme Court Act, an appeal from "a judgment given or order made in proceedings in the court … as to costs only which are in the discretion of the court": *Wheeler v Somerfield* [1966] 2 QB 94 at 106; [1966] 2 All ER 305 at 310 per Lord Denning MR and at QB 107; All ER 311 per Harman LJ (Winn LJ agreeing with both).

**[54]** There are, however, three points of distinction between the provisions referred to above and s 57 of the Land and Environment Court Act. First, s 57(4) refers merely to an order or decision "as to costs", the word "only" being absent. Second, s 57(4)(f) departs from the Supreme Court Act (as does the District Court Act) by omitting the concluding clause, "which are in the discretion of the court". Apart from exposing the historical origins of the provision in the Supreme Court Act (in English statute law) nothing turns on that variance for present purposes: in each case the order as to costs will be made pursuant to s 98 of the Civil Procedure Act 2005 (NSW) which confers a broad discretion on the court. Third, appeals under ss 101 and 127 are by way of rehearing, whereas the appeal under s 57 of the Land and Environment Court Act is, in any case, limited to an order or decision of the court on a question of law: s 57(1).

**[55]** These considerations may pull in different directions: where the appeal is extensive (by way of rehearing) there may be a stronger case in principle for restricting appeals as to costs. On the other hand, that tendency is countered by the requirement for leave by the reference to an appeal from a judgment or order as to "costs only".

**[56]** There are practical considerations which militate in favour of a leave requirement limited to appeals raising a challenge only to a costs order. Were it otherwise, an appellant with an appeal as of right in respect of substantive issues, would be required to seek leave to appeal in respect of the costs order if the latter challenge were not merely contingent upon the outcome of the challenge to the substantive orders; there would be little point in a separate hearing of the leave application. Indeed, the appellant would usually not need to pursue an independent challenge to the costs order unless all other grounds failed.

**[57]** The practice of this court, not to require leave where there is a challenge to substantive orders as well as to a costs order, may not be in conformity with the approach adopted in other jurisdictions: *Arena Management Pty Ltd (recs and mgr apptd) v Campbell Street Theatre Pty Ltd* (2011) 281 ALR 304; 84 ACSR 33; [2011] NSWCA 128 at [129] per Campbell JA, McColl and Macfarlan JJA agreeing. Because to take a different view in respect of the Supreme Court Act would require departure from a line of authority (and practice generally) in this court, it would at least be preferable to have the matter considered by a bench of five judges. Further, it would be necessary to consider the wording of the statutory provisions in other jurisdictions said to take a different approach. That aspect was not addressed in submissions in the present case. Accordingly, this court should follow its prior interpretation of s 101(2)(c) (and the equivalent provision in the District Court Act).

**[58]** It does not necessarily follow that leave is not to be required under the Land and Environment Court Act. However, despite the three differences noted above, a critical semantic feature is the subject matter of the leave requirement: in the Supreme Court Act, it is "a judgment given or order made" and, in s 57,

"an order or decision". Each deals with the order under challenge and not with the scope or nature of the appeal. Accordingly, the preferable course is to follow the existing line of authority in this court in respect of s 101(2)(c) of the Supreme Court Act and apply it in relation to s 57(4) of the Land and Environment Court Act. The result is that no leave is required.

**[59]** If that conclusion were wrong, and leave were necessary, it would nevertheless be appropriate to grant leave to the appellants in the circumstances of this case, for two reasons. First, as will be noted shortly, there appears to be a real issue as to the correct principle in determining awards of costs in the Land and Environment Court in respect of compulsory acquisition valuation cases. Second, there is a real question as to the appropriateness of a costs order requiring a claimant for compensation, who recovers a significant amount of compensation, to pay half the costs of the respondent.

***(c) Principles in relation to costs***

**[60]** The power to award costs in class 3 proceedings in the Land and Environment Court arises under s 98 of the Civil Procedure Act. That section provides that "costs are in the discretion of the court": s 98(1)(a). The provision is said to be subject to rules of court and to any Act: the primary rule in that regard is r 42.1 of the UCPR, which provides that "the court is to order that costs follow the event unless it appears to the court that some other order should be made". However, as the council pointed out in a note following the hearing of the appeal, r 42.1 is an excluded provision in respect of proceedings in classes 1, 2 and 3 of the Land and Environment Court's jurisdiction: Sch 1 of the UCPR. Accordingly, the discretion remains unfettered, in the sense that there is no presumption that costs should follow the event. Although the primary judge referred to assessing costs on an "issues won and lost" basis, it does not appear that he placed explicit reliance upon a principle that costs should follow the event, which would, in the circumstances, have been erroneous.

**[61]** The written submissions in this court sought to reagitate factors said to favour a different conclusion with respect to the award of costs. They did not demonstrate the adoption by of any erroneous principle. However, the appellants asserted that, while acknowledging its significance, the primary judge failed to apply the principle stated by Talbot J in *Pastrello v Roads and Traffic Authority (NSW)* (2000) 110 LGERA 223; [2000] NSWLEC 209, that there must be "a strong justification for awarding costs against an applicant where the effect of making that order is to erode the benefit of the just compensation recovered as a consequence of the court's determination": at [17].

**[62]** Talbot J rejected the suggestion that it was appropriate to distinguish, in the circumstances before him, as to success or failure on particular issues, or heads of compensation. He did, however, acknowledge that there were cases in which that course had been taken and cases in which a claimant who was entirely unsuccessful on a clearly defined and separate issue might lose part of the costs which would otherwise be ordered.

**[63]** In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2010] NSWLEC 27 at [35] Biscoe J identified a general principle that "a person who has had their land taken by way of compulsory acquisition should not bear their own costs, but rather should be allowed to access the court to present an arguable and well organised case without being deterred by the prospect of being ordered to pay costs if the case proves unpersuasive". Jagot J stated in *Simpson v Bagnall* [2008] NSWLEC 79 at [10] that "in the ordinary course, a dispossessed

owner can expect to obtain the usual order for costs in their [sic] favour, particularly when the amount of compensation determined is greater than that offered by the resuming authority".

**[64]** The principle thus stated was expressed in similar, though less unequivocal, terms by Wilcox J in *Banno v Commonwealth* (1993) 45 FCR 32 at 51. However, the underlying principle has a longer history, a clear exposition being found in the judgment of Wells J in *Minister for the Environment v Florence* (1979) 21 SASR 108 at 134–5.

**[65]** All of these authorities, and many others, were cited in a comprehensive review of the relevant cases by Pepper J in *Halley v Minister Administering Environmental Planning and Assessment Act 1979 (No 3)* [2011] NSWLEC 94 at [43]–[46]. Her Honour then held at [47]:

> [47] As the case law currently exists there is, in my view, a tension between the statutory framework discussed above, namely, that generally costs follow the event, and the "different [principles]" that have evolved outside this legislative context for determining costs in cases concerned with compensation for the compulsory acquisition of land.

**[66]** The words "outside this legislative context" may be ambiguous, but the asserted tension appears to depend upon the assumption, set out at [37] in her Honour's reasons, that r 42.1 of the UCPR applies to such cases: as already noted, it does not. Accordingly, the tension is only material to the extent that weight may properly be given to a successful outcome.

**[67]** The appellants did not identify any clear statement within the reasons given by the primary judge, demonstrating an erroneous decision on a question of law. Rather, they argued that his Honour failed to adopt a strong presumption in favour of claimants for compensation receiving their costs of proceedings in the court. That presumption was sought to be derived from a number of provisions in the Act, including:

(a) the fact that a compulsory acquisition is, by definition, an exercise of the power of eminent domain over the rights of owners in land;
(b) the guarantee of just terms compensation defined as "not less than the market value of the land (unaffected by the proposal) at the date of acquisition" (see ss 3(1)(a) and 37);
(c) the requirement that the acquiring authority offer compensation in an amount determined by the Valuer-General (s 42(1));
(d) the requirement that the amount of compensation be such as will "justly compensate the person for the acquisition of the land" (s 54(1)), and
(e) the provision for recovery of "legal costs reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land" (s 59(a)).

**[68]** To the extent that the last factor might be said to override any general principles in relation to the discretionary award of costs in respect of litigation, the appellants called in aid the statement in s 8 that the Land Acquisition Act prevails, to the extent of any inconsistency, over the provisions of any other Act, which they submitted should include the Civil Procedure Act.

**[69]** The last contention cannot be accepted, nor can the reliance placed on s 59(a). Section 8 only confers priority on the provisions of the Land Acquisition Act over provisions of "any other Act relating to the acquisition of land": the Civil Procedure Act is not properly so characterised. Further, it is clear from its

position in the Land Acquisition Act, as a basis for the proper calculation of compensation under Pt 3, Div 4, s 59(a) is to be read as referring to legal costs incurred otherwise than in pursuit of valuation litigation, so that it operates, consistently with other paragraphs in s 59, to allow inclusion of a fixed sum in a claim and to permit, consequentially, inclusion of that amount in a judgment, regardless of the allocation of the costs of the litigation.

**[70]** In other respects, however, the appellants' propositions may be accepted. They support the proposition that a claimant for compensation in respect of a compulsory acquisition should usually be entitled to recover the costs of the proceedings, having acted reasonably in pursuing the proceedings and not having conducted them in a manner which gives rise to unnecessary delay or expense.

**[71]** That approach is also consistent with the absence of any general presumption that costs should follow the event: the owner who has been compulsorily dispossessed is entitled to take reasonable steps to seek the judgment of the court in respect of the adequacy of any compensation offered.

**[72]** Whether steps taken in maintaining proceedings are reasonable will depend upon the circumstances of the particular case. These may include a comparison between the positions adopted by the parties at the commencement of proceedings and the final outcome. To the extent that a claimant obtains less than the valuation provided by the Valuer-General, the claimant has been unsuccessful in the litigation. That will be a factor to be taken into account, but the weight given to that factor may depend upon the extent of the failure. The court may also take into account the time and expense incurred in relation to specific items. Beyond such general statements, it is unhelpful to go, lest the very generality of the discretion be thought to be fettered in some way. In short, the purpose of an award of costs must be taken into account, namely to compensate the party for expenditure incurred in the course of litigation; the nature of the litigation and the reasonableness of the conduct of the litigation are central considerations.

***(d) Application of principles***

**[73]** In the absence of any clear indication in his Honour's reasons that he adopted or sought to apply a wrong principle, the appellants' case was restricted to the contention that the circumstances to be taken into account, on the assumption that correct principles were applied, would have led to a result manifestly different from that reached by the primary judge, thus implying that, in some way which was not expressly identified, his Honour did not apply correct principle.

**[74]** In respect of the first stage of the proceedings, the appellants recovered 75% of their costs, in circumstances where they would have expected to do considerably worse on the basis of a costs follow the event rule. The primary issue resolved, namely the market value of the land, was resolved in favour of the council's offer and against the submissions made for the appellants. They were successful in establishing an entitlement to an amount (then unquantified) on account of scour protection works, but they were unsuccessful in respect of other items of compensation claimed. On the other hand, his Honour took into account the offer made midway through the first stage of the hearing, which was in effect the amount for which the appellants were ultimately successful. These circumstances do not demonstrate error on the part of the primary judge in respect of the costs of the first stage.

**[75]** The appellants' argument in respect of the second stage of the proceedings was stronger; although they received an amount on account of disturbance of $98,152, they were required to pay 50% of the council's costs.

**[76]** The justification for that assessment appears to have lain in a number of factors:

(a) The conduct of the case was unreasonable, in that there were seven interlocutory hearings between 22 July 2009 and 17 June 2010: at [67].

(b) The appellants vacillated as to the costs of the scour protection works and only accepted the council's figure of $171,600 "as the hearing approached", leaving in issue only small amounts on account of additional costs: at [68] and [32]–[34].

(c) As to apportionment, despite a common position adopted by the experts on 25 September 2009, at the beginning of the second stage, and accepted by the council, the appellants sought to attribute a higher proportion to the council throughout the second stage hearing, which took place over 2 days and which engaged most of the second hearing: at [26]–[28] and [69]–[71].

(d) The council's final offer of compromise on 2 June 2010, in an amount of $92,857 was met by the appellants' reaffirmation of their proposed figure of $190,000; the amount awarded by the court being only $5000 higher than the council's offer: at [73] and [77]–[78].

**[77]** Relevant considerations which might have led the primary judge to a different view in respect of the costs of the second part of the proceedings were as follows:

(a) the appellants had offered, but the council rejected, an offer to settle for almost precisely the amount eventually obtained, 2 years and 6 months before the final hearing, and

(b) the amount obtained by the appellants at the final hearing was in fact higher than the highest offer of the council, by approximately 6%.

**[78]** The latter factors, taken alone, supported an order that the appellants receive their costs, not pay costs. Against those factors must be weighed the apparent conclusion of the primary judge that the appellants had acted unreasonably and led to unnecessary costs being incurred by reference to the interlocutory proceedings taken in the second stage. Perhaps 75% of the costs of the final hearing were to be attributed to their unreasonable conduct in respect of the apportionment issue. Taking those factors into account, it would have been open to the primary judge to deprive the appellants of most of their costs or even make no order as to the costs of the second stage. However, given the nature of the proceedings and despite the "unfettered" discretion of the court with respect to costs, an order that the appellants pay half the respondent's costs appears not to be justified by the matters identified in the reasons, nor otherwise to be within a reasonable range in the circumstances of the case.

**[79]** Although it is hard to identify a decision of the primary judge on a question of law which has been erroneously answered, it is clear that the parties required the relevant principles to be addressed and applied. Thus this is not a case in which an error is said to arise in respect of a question of law which was not argued below: rather, it is a case where error appears to have arisen, although the precise point at which it arose cannot be identified with certainty. Apart from the undue expansion of interlocutory steps and of the final hearing, the primary judge appears to have placed significant weight on the failure of the appellants to

respond reasonably to the final pre-hearing offer of the council. The counter-offer may have been unreasonably high, but the appellants did better than the council's offer. If they were entitled to the judgment of the court on quantum, requiring them actually to pay costs was inconsistent with the application of correct principle. That involved an implicit erroneous decision as to correct principle, being a question of law.

**[80]** In those circumstances, the challenge to the costs order in respect of the second stage of the proceedings should be upheld and that order should be set aside. In accordance with the principles accepted by this court in *Thaina Town (On Goulburn) Pty Ltd v Sydney City Council* (2007) 71 NSWLR 230; 156 LGERA 150; [2007] NSWCA 300 the court may exercise the discretion as to the costs in the Land and Environment Court. Accepting the primary facts and evaluative judgments of the primary judge, the appropriate order is that each party bear its owns costs of the second stage of the proceedings. Otherwise, the appeal must be dismissed.

**(4) Costs of appeal and orders**

**[81]** That result leaves for determination the appropriate order for costs in this court. The relevant principles applicable to the proceedings below do not apply on an appeal; cost should follow the event, unless the court orders otherwise: r 42.1 of the UCPR.

**[82]** The appellants have been unsuccessful in their challenges to the substantive orders made below, but have succeeded in respect of part of the costs order made below. The last challenge was not raised in the notice of appeal, but only in the appellants' written submissions dated 31 January 2011. Apportioning the costs as between issues and using a broad brush, the appellants should pay two-thirds of the respondent's costs of the appeal.

**[83]** The court should make the following orders:

(1) Allow the appeal against the order for the costs of the second stage of the proceedings in the Land and Environment Court, but otherwise dismiss the appeal.

(2) Set aside order (9) made in the Land and Environment Court on 16 September 2010 and in lieu thereof direct that each party bear their and its own costs of the proceedings not covered by other orders.

(3) Order that the appellants pay two-thirds of the respondent's costs of the appeal.

**[84]** **Macfarlan JA.** I agree with Basten JA.

**[85]** **Handley AJA.** I agree with Basten JA.

**Orders**

(1) Allow the appeal against the order for the costs of the second stage of the proceedings in the Land and Environment Court, but otherwise dismiss the appeal.

(2) Set aside order (9) made in the Land and Environment Court on 16 September 2010 and in lieu thereof direct that each party bear their and its own costs of the proceedings not covered by other orders.

(3) Order that the appellants pay two-thirds of the respondent's costs of the appeal.

JONATHON DOOLEY
SOLICITOR