SUPREME COURT OF QUEENSLAND

CITATION:	*Otto v Redhead & ors* [2011] QSC 252
PARTIES:	**GLENN LAWRENCE OTTO** (applicant) **v** **GRAHAM REGINALD REDHEAD AND PETER CHRISTIAN THOMPSON (AS EXECUTORS AND TRUSTEES OF THE WILL OF BERYL MAY OTTO, DECEASED)** (first respondent) **BRETT ADRIAN OTTO** (second respondent)
FILE NO/S:	SC No 3010 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	Delivered ex tempore 13 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13 July 2011
JUDGE:	Atkinson J
ORDERS:	**1. The applicant's applications for interlocutory injunctions are dismissed.** **2. I declare that the notice of objection of Glenn Otto served in relation to the costs statements by Brett Otto in relation to the orders dated 4 October 2007, 21 November 2008, and 29 May 2009 do not comply with rule 706 of the *Uniform Civil Procedure Rules 1999* (Qld).** **3. Pursuant to rule 710 of the *Uniform Civil Procedure Rules 1999* (Qld), I appoint Stanley Moffat as the costs assessor to assess the costs claimed by the second respondent, Brett Otto, pursuant to the orders dated 4 October 2007, 21 November 2008, and 29 May 2009.** **4. I order that the assessment of the second respondent's costs claimed pursuant to the orders dated 4 October 2007, 21 November 2008, and 29 May 2009 proceed in accordance with rule 708 of the *Uniform Civil Procedure Rules 1999* (Qld).** **5. I approve a charge by Mr Moffat in the sum of $300**

per hour, including GST, for the work performed in undertaking the assessment of the second respondent's costs claimed pursuant to the orders dated 4 October 2007, 21 November 2008, and 29 May 2009.

6. **I order that the costs of the executors and Brett Otto of and incidental to the applications before me be paid by Glenn Otto on an indemnity basis to be deducted by the executors from his share of the estate on the distribution of the estate of the late Beryl Otto.**

CATCHWORDS: PROCEDURE – COSTS – RECOVERY OF COSTS – where the second respondent sought various declarations and orders to enforce costs orders that were previously made – where the applicant sought interlocutory injunctions to stay the costs orders until a trial hearing to re-examine the conduct of the first and second respondents in the course of the administration of his late mother's estate – whether there was a serious question to be tried such that the injunctions should be granted – whether the second respondent should get the orders sought

Uniform Civil Procedure Rules 1999 (Qld), r 705, r 706, r 708, r 710

Otto v Redhead and Thompson & anor [2007] QSC 278, cited
Otto v Redhead & anor [2008] QSC 280, cited
Otto v Redhead & ors [2009] QCA 147, cited

COUNSEL: The applicant appeared on his own behalf
Morgan D J for the first respondent
Ivanisevic J for the second respondent

SOLICITORS: The applicant appeared on his own behalf
O'Reilly Lillicrap Solicitors for the first respondent
Hopgood Ganim Lawyers for the second respondent

HER HONOUR: I will give my decision now ex tempore in this matter because unfortunately this matter, since its inception, has been characterised by many applications, reserved judgments, resulting inevitably in delay and this is a matter where the whole of the matter needs to be resolved and as quickly as possible so that two brothers, Glenn Lawrence Otto and Brett Adrian Otto, can move on with their lives and away from this matter which has detained them in this poisonous dispute for so long.

Their mother, Beryl Otto, died on 20 September 2005 as is recorded in the many judgments written in the applications in this matter. She was a widow, her husband having died some ten years earlier. Brett Otto and Glenn Otto are her only surviving children.

The first respondents, Graham Redhead and Peter Thompson were the executors that she appointed in her last will made on 8 September 2005. That will has been admitted to probate. As Chesterman J (as his Honour then was) recorded in his reasons for judgment handed down on 4 October 2007, the brothers regard each other with rancour, and according to the executors' counsel, "the estate has been administered in a climate of suspicion and antipathy, remarkable even for this jurisdiction." My observation of the matter today and unfortunately particularly of Mr Glenn Otto who appears for himself shows that the situation has not changed; if anything it has worsened.

The matter is set down for trial. It was set down for trial last year, but an attempted settlement of the matter failed and it has been set down for trial before Mullins J commencing on 18 August 2011 and her Honour will be conducting a directions hearing in this matter this Friday at 4.15 p.m. at a time to suit the parties.

It did, at first, appear to me that it might be convenient to adjourn these applications to her Honour, but insofar as they deal with discrete matters they ought be determined now so that the trial is not bogged down in further extraneous issues.

There was originally before the Court an application by the second respondent, Brett Otto, for a declaration that the notices of objection served by the applicant, Glenn Otto in respect to Brett Otto's costs statements do not comply with rule 706 of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR"); an order appointing Stanley Moffat, a costs assessor who is on the Supreme Court's register of approved costs assessors to assess the costs claimed by Brett Otto pursuant to orders dated 4 October 2007, 21 November 2008 and 29 May 2009; an order that the assessment of Brett Otto's costs by Mr Moffat proceed in accordance with rule 708 of the UCPR; and an order awarding the costs of and incidental to this application to Brett Otto on an indemnity basis.

Subsequent to that application being filed three applications were filed by Glenn Otto seeking interlocutory injunctions to

stay the costs orders and costs statements until, "a trial hearing to re-examine the conduct of the First Respondent (the two trustee/executors of my mother's estate) and the conduct of the Second Respondent (trustee agent and beneficiary Brett Otto), leading up to the hearing and additionally re-examine the properness of the executors accounts which were provided."

Those applications are supported by lengthy affidavits which contain a mixture of fact, assertion and opinion. The four applications are related to each other and so it is convenient to hear and determine them together.

It is first necessary to set out the circumstances in which the costs orders which are the subject of the proposed cost assessment were made. This matter came before Chesterman J on an application by Glenn Otto on 14 September 2007. His Honour delivered reasons for judgment on 4 October 2007: see *Otto v Redhead and Thompson & anor* [2007] QSC 278. It is asserted in Glenn Otto's affidavit that he had no representation when the order was handed down and he says, "Such a travesty should not stand." He asserts in paragraph 8.1 of his affidavit:

> "The assistant [sic] of Justice Chesterman failed proper protocol to:
>
> 1. Failed to adequately provide enough time to the applicant's counsel;
>
> 2. Failed to notify the applicant's solicitor;

3. Failed to follow-up with a phone call to verify receipt of the notification to the applicant's counsel;

4. Failed to follow-up with a phone call to verify a receipt of the notification to the applicant's solicitor.

This was a shocking travesty of justice for Glenn that should not have occurred if decent practice by the Associate had been followed."

He then refers to the way in which the judge's associate, quite properly in my opinion, sent his counsel notice by email the day before the judgment was to be handed down, that the judgment would be handed down at 9.30 am the next morning. That is entirely in accordance with proper process. The fact that Glen Otto's counsel, if it be the case, did not read the email or make arrangements for anyone else to access his emails does not mean that proper notification of the handing down of the judgment was not given, and further it appears that copies of the judgment were provided by email after they were handed down in public to all parties.

If a party has been given notice of the judgment being handed down it is not a matter for the court if the party does not appear in response to that notice in spite of the court's attempt to properly give notice, and if there is any problem caused by that then, of course, the party can ask for the matter to be relisted to be dealt with. That did not happen.

If the party is unhappy with the order made it can seek leave to appeal the costs order from the judge who made it, or it can appeal the judgment as a whole. That did not happen.

His Honour gave extensive reasons for judgment in determining at what date the assets to be appropriated between the residuary beneficiaries were to be valued in accordance with the will and how the net income should be taken into account. Given the manner in which the matter was argued and his Honour's views of the facts and the law before him it is unsurprising that he ordered that the costs of the first respondent, that is Glenn Otto, of and incidental to the applications be assessed on the indemnity basis and paid from the estate of Beryl Otto, deceased, and that the second respondent, Brett Otto's, costs of and incidental to the applications be assessed on the standard basis and that two thirds of those costs be paid by the applicant, Glenn Otto.

I have had careful regard to all the material that has been put before me by Glenn Otto and there is nothing in that material that suggests to me that any different costs order would have been made by his Honour had he known all of the matters that are referred to in that material, all of which are irrelevant to the costs order made by Chesterman J.

The matter came on again before Martin J from an application filed by Glenn Otto on 14 July 2008. That application was for the removal of the executors and an interim cash distribution of $500,000 to each beneficiary.

That application was wholly unsuccessful. The lengthy reasons for judgment handed down on 21 November 2008 after a hearing on 25 July 2008 and further submissions being received on 9 October 2008 and 20 October 2008 sets out in great detail his Honour's reasons for making that decision: see *Otto v Redhead & anor* [2008] QSC 280.

The reasons for judgment conclude by saying the application was dismissed and his Honour would hear the parties on costs. Having heard the parties on costs his Honour ordered that the applicant, Glenn Otto, pay the costs of the first respondents, the executors, and the second respondent, Brett Otto, of and incidental to the application on the standard basis, and that the first respondents and the second respondent recoup the difference between their costs assessed on the standard basis and their indemnity costs from the estate of Beryl May Otto, deceased.

Unlike the previous judgment referred to that judgment was the subject of an appeal. That appeal was heard by the Court of Appeal on 21 May 2009 by Keane and Fraser JJA and Applegarth J, and a unanimous judgment of the court was handed down on 29 May 2009 dismissing the appeal and ordering that the appellant, Glenn Otto, pay the costs of each of the respondents of and incidental to the appeal to be assessed on the indemnity basis: see *Otto v Redhead & ors* [2009] QCA 147.

The fact that that costs order was made demonstrates the court's view of the hopelessness of the appeal. Their Honours

said at paragraph [22], "This is certainly not a case where the estate should bear the costs of the appeal to this Court. The pursuit of the appeal was quite unreasonable. It had no real prospect of success", hence the costs order that was made.

Again having regard to the material placed before me by Glenn Otto in his applications for an injunction, I see absolutely nothing that would have had any impact on the costs orders made by Martin J or by the Court of Appeal which was fully apprised of the matters before it and the various allegations of fraud, deceit, and other criminal activity which the applicant has alleged against the executors and his brother, Brett Otto.

Unsurprisingly Mr Brett Otto has sought to enforce those costs orders and has prepared a costs statement to claim costs in respect of the costs orders to which he is entitled. The assessment of costs procedure is set out in the UCPR, chapter 17A part 3. Rule 705 provides that a party entitled to be paid costs must serve a costs statement in the approved form on the party liable to pay the costs. The costs statement served accords with that requirement.

Rule 706 deals with the procedure to be availed of by a party who receives the costs statement and objects to any item in the statement. Rule 706(1) provides:

> "A party on whom a costs statement is served may, within 21 days after being served, object to any item in the statement by serving a notice of objection on the party serving the statement."

A notice of objection was served on the party entitled to be paid the costs; however, subsection 2 of rule 706 sets out what the notice of objection must contain. It provides:

> "The notice of objection must - (a) number each objection; and (b) give the number of each item in the costs statement to which the party objects; and (c) before each objection - concisely state the reasons for the objection identifying any issue of law or fact the objector contends a costs assessor should consider in order to make a decision in favour of the objector."

The notice of objection does not comply with those mandatory requirements. The notice of objection is not in a form which can be considered by a costs assessor, and since it is not in accordance with rule 706 is not, in fact, a valid notice of objection. Accordingly, it cannot and should not be considered by the costs assessor who will have before him a costs statement which he should consider.

In order to meet that particular problem the applications for interlocutory injunction were brought by Glenn Otto. As I mentioned earlier, there are three applications for an interlocutory injunction in respect of each of the costs

statements in respect of the three orders for costs made against him.

The applications are lengthy and are on the file, so there is no need for me to recite their precise terms. Essentially in order to succeed in his interlocutory application the applicant would have to show that there is a serious question to be tried that the costs orders made by the courts and judges to which I have referred, none of which have been successfully appealed, should be set aside. Unless the applicant can show there is a serious question to be tried, then he must, of course, be unsuccessful in his application for interlocutory relief.

The first ground that is canvassed by the applicant in the applications and the lengthy affidavits filed in support is that the order made by Chesterman J was made in the absence of a party. I have already referred to that matter and there is no serious question to be tried that the costs order made by Chesterman J should be set aside for that reason.

The second matter adumbrated at length is that the orders were obtained by fraud.

As I have already stated, notwithstanding the length and depth of the allegations made, there is nothing, in my view, which would have led the judges involved to have made any different orders as to costs. There is nothing that suggests that those orders or costs should be set aside.

There is in my view, therefore, no serious question to be tried, that those costs orders, made so long ago and quite properly, would now be set aside notwithstanding no appeal on one and an unsuccessful appeal on the other leading to the costs order made by the Court of Appeal.

Accordingly, I dismiss the applications for interlocutory injunction.

In regard to Brett Otto's application, I declare that the notice of objection of Glenn Otto served in relation to the costs statements by Brett Otto in relation to the orders dated 4 October 2007, 21 November 2008, and 29 May 2009 do not comply with rule 706 of the UCPR.

Pursuant to rule 710 of the UCPR, I appoint Stanley Moffat as the costs assessor to assess the costs claimed by the second respondent, Brett Otto, pursuant to the orders dated 4 October 2007, 21 November 2008, and 29 May 2009.

I order that the assessment of the second respondent's costs claimed pursuant to the orders dated 4 October 2007,

21 November 2008, and 29 May 2009 proceed in accordance with rule 708 of the UCPR.

I approve a charge by Mr Moffat in the sum of $300 per hour, including GST, for the work performed in undertaking the assessment of the second respondent's costs claimed pursuant to the orders dated 4 October 2007, 21 November 2008, and 29 May 2009.

I note that the executors are here not because they were respondents to the application by Brett Otto but because they had been made active respondents to the three applications brought by Glen Otto.

So it remains to decide the question of costs.

...

HER HONOUR: I order that the costs of the executors and Brett Otto of and incidental to the applications before me be paid by Glenn Otto on an indemnity basis to be deducted by the executors from his share of the estate on the distribution of the estate of the late Beryl Otto.
