SUPREME COURT OF QUEENSLAND

CITATION:	*Littleford v Gold Coast City Council & Anor; Moon v Gold Coast City Council & Anor* [2013] QCA 4
PARTIES:	**In Appeal No 2511 of 2012:** **BRIAN LITTLEFORD** (applicant) **v** **GOLD COAST CITY COUNCIL** (first respondent) **NATIONAL TRUST, QUEENSLAND trading as CURRUMBIN WILDLIFE SANCTUARY** (second respondent) **In Appeal No 2512 of 2012:** **BRUCE MOON** (applicant) **v** **GOLD COAST CITY COUNCIL** (first respondent) **NATIONAL TRUST, QUEENSLAND trading as CURRUMBIN WILDLIFE SANCTUARY** (second respondent)
FILE NO/S:	Appeal No 2511 of 2012 Appeal No 2512 of 2012 P & E Appeal No 186 of 2008 P & E Appeal No 71 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Applications for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Southport
DELIVERED ON:	1 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2012
JUDGES:	Fraser and White JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In each appeal:** **1. Application for an extension of time for filing the application for leave to appeal refused.**

2. Application for leave to appeal refused.

3. The applicant pay the respondents' costs of the applications on the standard basis.

CATCHWORDS: PROCEDURE – COSTS – PRACTICE MATTERS – TIME TO MAKE ORDERS – where costs ordered against applicants in the Planning & Environment Court to be assessed by a court appointed costs assessor – where applicants contended primary judge erred in law by denying each applicant natural justice – where applicants argued primary judge departed from "expressed procedural commitment" and order for assessment inconsistent with their reasonable expectation that such an order would not be made without further notice and summary making of order denied applicants adequate opportunity to respond – where applicants contended primary judge made orders contrary to *Competition Policy Reform (Queensland) Act* 1996 – where applicants argued orders for costs assessment and appointment of costs assessor endorsed price fixing and cartel arrangement – whether applicants denied natural justice – whether orders contrary to *Competition Policy Reform (Queensland) Act* 1996

Competition Code (Qld)
Competition Policy Reform (Queensland) Act 1996 (Qld), s 5
Uniform Civil Procedure Rules 1999 (Qld), r 706, Sch 2

COUNSEL: In Appeal No 2511 of 2012:

No appearance for the applicant
N J Kefford for the first respondent
S Sheaffe for the second respondent

In Appeal No 2512 of 2012:

The applicant appeared on his own behalf
NJ Kefford for the first respondent
S Sheaffe for the second respondent

SOLICITORS: In Appeal No 2511 of 2012:

No appearance for the applicant
Minter Ellison (Gold Coast) for the first respondent
MSL Lawyers for the second respondent

In Appeal No 2512 of 2012:

The applicant appeared on his own behalf
Minter Ellison (Gold Coast) for the first respondent
MSL Lawyers for the second respondent

[1] **FRASER JA:** The applicants, Mr Littleford and Dr Moon, have applied for leave to appeal against orders made in the Planning & Environment Court directing that costs ordered against each of them be assessed by a court appointed costs assessor.

Each has also applied for an extension of time for filing the application for leave to appeal.

[2] Section 498 of the *Sustainable Planning Act* 2009 provides that an appeal against a decision of the Planning & Environment Court may be instituted only for error or mistake in law or absence or excess of jurisdiction. No question of jurisdiction was agitated in the applications. The applicants contended that the primary judge erred in law by denying each applicant natural justice and by making orders that were contrary to the *Competition Policy Reform (Queensland) Act* 1996.

Denial of natural justice

[3] The applicants' argument that the order for assessment denied the applicants natural justice was premised upon their contention that the order departed from an earlier "expressed procedural commitment".[1] On that premise, the applicants argued that the order for assessment was inconsistent with their reasonable expectation that such an order would not be made without further notice and that the summary making of the order denied the applicants an adequate opportunity to respond. The respondents submitted that the arguments were unsustainable on the evidence.

[4] The costs order in favour of the respondents was made on 19 March 2010. On 6 September 2010, the first respondent served a costs statement on each applicant. Rule 706(1) of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*") entitles a party upon whom a costs statement is served to object to any item in the statement by serving a notice of objection on the parties serving the statement within 21 days after service of the costs statement. Rule 706(2) requires the notice of objection to concisely state the reasons for objection to any item in the statement, identifying issues of law or fact the objector contends should be considered by the costs assessor in order to make a decision in favour of the objector. On 24 September 2010, the applicants filed a notice of objection to the first respondent's costs statement, but the objections were incomplete.

[5] On 20 December 2010, the first respondent filed an application for orders appointing a nominated costs assessor and for the costs assessor to carry out the costs assessment. That application was made in accordance with r 710, which empowers a party who has served (or upon whom has been served) a costs statement to apply for a costs assessment not less than 21 days after service of the costs statement, and r 713, which empowers a party to apply to the court for directions if (as was the case here) the parties have not agreed that a costs assessment be carried out by a particular costs assessor.

[6] The first respondent's application came on for hearing before the primary judge on 28 January 2011. Dr Moon, who made submissions for both applicants on that and other occasions, described the extensive and detailed nature of the costs statements and submitted that the applicants required more time to complete the task of objecting to the items. After hearing argument, the primary judge extended the time for the applicants to file and serve any notice of objection to 30 April 2011 and adjourned the matter for further hearing to a date to be fixed. Dr Moon argued that by that order the primary judge accepted that the applicants needed more time to complete the task of objecting to the costs statements. It is noteworthy, however,

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1 Applicants' outline of argument filed 3 August 2012, p 4.

that the primary judge explained to Dr Moon that if he and Mr Littleford had not completed their objections before 30 April 2011 "you will have to indicate the extent to which you have complied, and the reasons why you haven't been able to fully comply".[2]

[7] The second respondent had served costs statements on the applicants on 20 January 2011. On 2 February 2011, the applicants served a notice of objection in respect of two of the four costs statements. On 17 May 2011, the second respondent wrote to the applicants seeking their agreement to the appointment of a costs assessor. The applicants' response on 1 June 2011 was that it was premature to appoint a costs assessor because they were "progressing our response to your costs statement in a bid to pursue an agreed outcome without the need for a costs assessor". On 22 June 2011, the second respondent duly applied for orders that the second respondent's costs pursuant to the 19 March 2010 order be assessed and that a nominated person be appointed as costs assessor.

[8] The first and second respondents' applications for assessment were heard on 29 July 2011. Dr Moon again sought further time for the applicants to complete their objections. He swore an affidavit referring to computer problems which had delayed the work. He told the primary judge that he had not kept any backup copy of the data. The primary judge allowed the applicants a further three months to formulate their objections to the costs assessment. The applicants argued that the primary judge accepted their submissions about the computer breakdown, but the primary judge said that he was "…not prepared to accept that…it's going to go on and on forever".[3] Furthermore, the primary judge also said that, whilst it would "…better…and perhaps cheaper in the long term if an agreement could be reached about costs rather than involving a costs assessor…" and that he was "…not inclined to appoint one yet until Dr Moon and Mr Littleford have had a reasonable time to formulate their objections…",[4] the judge added that "I would expect that by then [the adjourned date of 7 November 2011]…you would have formulated…any objections you have to the costs assessments submitted to you by each of the other parties".[5]

[9] The applicants had not completed the objections by 7 November 2011, when the applications were again before the primary judge. Dr Moon swore an affidavit in which he stated that he had been unable to complete the task he had set out to achieve but still wished to pursue the task in order to obtain a consent order to save the costs of assessment. Dr Moon deposed that he had assumed that he would have obtained electronic copies of the "costs applications" (presumably meaning the costs statements) and that had not occurred.

[10] The applicants' argument that they were denied natural justice was based upon a statement by the primary judge towards the end of that hearing that he was "…minded to grant [a further extension] until the 14th of December, and I would expect either Dr Moon to have finished his work by then, or to be in a position to give me a definitive answer as to when you will be finished." The applicants argued that, in light of the primary judge's acceptance on earlier occasions that the applicants should be given a reasonable time to articulate their objections, the

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2 Transcript 28 January 2011 at 1-11.
3 Transcript 29 July 2011 at 1-4.
4 Transcript 29 July 2011 at 1-7.
5 Transcript 29 July 2011 at 1-11.

primary judge's statement generated an expectation that, if the applicants had not completed the objections by the adjourned date of 14 December 2011, they would be given more time. That is not what the primary judge said. Furthermore, shortly before making the observation upon which the applicants relied, the primary judge said that "…I can't have this go on and on now…because the – the clients of – of the respondents' firms are entitled to be reimbursed for the costs you've put them to…".[6] And immediately after making the observation upon which the applicants relied, in response to a comment by Dr Moon that he did not know whether or not by the adjourned date he would be in a position to give a definitive answer as to when he would be finished, the primary judge said that "…I think you should be able to then because you've … gained some particulars this morning".[7]

[11] The effect of the further adjournment of the applications to 14 December 2011 was that the applicants were to be heard on that date. The applicants had ample time to ready themselves for the hearings. Nothing said by the primary judge conveyed any fetter upon his discretion on 14 December 2011 to make the orders which the applications sought.

[12] By 14 December 2011, as many as 635 days had elapsed from when the applicants were ordered on 19 March 2010 to pay the first and second respondents' costs. The first respondent had served a costs statement 15 months before the hearing and the second respondent had served costs statements nearly 11 months before the hearing. Yet Dr Moon swore an affidavit in which he stated that he believed it would not be before August 2012 that he would be in a position to complete the assessment in full and make an offer to each party. After hearing argument about the reasons for the delay, the primary judge observed that he was "going to put a stop to it" that "we've been having this argument back and forwards for a year now" and "we're no further advanced", and that "I have no confidence that it'd be resolved… were I to give you another couple of months".[8] The primary judge explained that he proposed to accede to the respondents' applications because "little would be achieved by giving the appellants further time to specify their objections".[9] The primary judge ordered that the respondents' costs pursuant to the order dated 19 March 2010 be assessed, and that the person previously nominated be appointed as the costs assessor to carry out the costs assessment.

[13] The primary judge also made orders requiring the first respondent to provide identified copies of various documents to the costs assessor, that by a specified time on 13 January 2012 the applicants provide to the costs assessor any further written objections to the costs statements of the respondents, and that the costs assessor afford the applicants the opportunity of making any further objections in person upon notice to the respondents.

[14] The primary judge's orders allowing successive adjournments and the order extending the time yet further at the last hearing were generous to the applicants. The applicants were given ample opportunity to argue against the orders sought by the respondents. The primary judge did not deny the applicants natural justice by making the orders on 14 December 2011. This proposed ground of appeal could not succeed.

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6 Transcript 29 July 2011 at 1-14.
7 Transcript 7 November 2011 at 1-15.
8 Transcript 14 December 2011 at 1-4.
9 Transcript 14 December 2011 (order) at 1-14.

Competition Policy Reform (Queensland) Act 1996 *("the Competition Act")*

[15] The applicants contended that the orders for the costs assessment and the appointment of a costs assessor "erred by endorsing price fixing and a cartel arrangement in contradiction of" the *Competition Act*.[10] The argument started from the premise that the costs would be fixed in accordance with *UCPR* Sch 2. In relation to litigation in the District Court, Sch 2 fixes costs for specific items of work, empowers the making of an additional reasonable allowance for a solicitor's care and conduct of a proceeding, and allows for reasonable amounts to be fixed for matters for which a cost is not provided for in the schedule.

[16] The applicants argued that *UCPR* Sch 2 is a "cartel provision" within the meaning of s 44ZZRD of the *Competition Code* (the text of which is applied as Queensland law by s 5(1) of the *Competition Act*). Section 44ZZRD is a definition provision. It is given effect by provisions of the *Competition Code* in Subdivs B and C, which create offences and provide for civil penalties in relation to the making of contracts, arrangements and understandings containing a cartel provision. The applicants argued that Sch 2 was a cartel provision because it was an arrangement or understanding made between the Court and solicitors whose clients' entitlement to recover costs were affected by Sch 2 of *UCPR* which had the purpose or effect of fixing, controlling or maintaining prices (see s 44ZZRD(2)). The applicants also argued that Sch 2 of *UCPR* was prohibited by s 45 of the *Competition Code*, which "forbids price fixing", and by s 45A, which was submitted to state that "any provision that has the effect of fixing prices between parties in competition is forbidden".[11]

[17] There is no s 45A in the *Competition Code*. So far as appears to be relevant to the applicants' arguments, s 45 provides, in subsection 2, that "a person shall not" make or give effect to a contract, arrangement or understanding which contains a provision that has the purpose, or would have or be likely to have the effect, of substantially lessening competition. I accept the respondents' submissions that there was no substance in the applicants' argument that Sch 2 amounted to an anti-competitive arrangement or understanding between the Court and solicitors. Sch 2 does not purport to fix prices or set minimum prices which lawyers may charge. It contains no provision which suggests a purpose or effect of limiting competition amongst legal practitioners for litigious work. Rather, in the context of orders for the assessment of costs ordered to be paid to one party by the other party to litigation, Sch 2 operates to limit how much money the beneficiary of the order can recover from the other party by way of a partial indemnity against the beneficiary's liability to pay costs to its own lawyers. There was also no basis for the contention that the Court is a party to the supposed arrangement or understanding. Contrary to the applicants' submission that Sch 2 is "a contrivance of the Supreme Court facilitated by a power delegated to the Court" and "an "arrangement" of and by the Supreme Court", Sch 2 is part of the rules of court made by the Governor-in-Council pursuant to s 118(1)(a) of the *Supreme Court of Queensland Act* 1991. The Governor-in-Council's unilateral act in making rules of court is not an arrangement or understanding between two or more persons who are competitive with each other. I also note that, unsurprisingly, the applicants did not cite any authority for the proposition that a court that makes an order under *UCPR*, or the Governor-in-

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10 Applicants' outline of argument p 5.

11 Applicants' outline filed 3 August 2012 at 4.1.

Council who makes rules of court, is a "person" whose conduct is regulated by the *Competition Code*.

[18] The applicants' arguments would also necessarily involve factual investigations about the purpose and effect of alleged arrangements. There was no evidence on those topics and no factual investigation was undertaken in the District Court because, as was pointed out for the first respondent, the applicants made no submissions to the primary judge on this topic. Contrary to another of the applicants' submissions, that is significant. Parties are generally bound by the conduct of their proceedings at first instance. It would not be appropriate to grant leave to appeal to permit the applicants to raise for the first time on appeal their unpromising arguments about the *Competition Code*.

Proposed orders

[19] It is unnecessary to decide the question, which was disputed, whether or not an extension of time was required for the applications for leave to appeal. The applications for extension of time and the applications for leave to appeal should be refused because the proposed appeals are hopeless.

[20] In each of Appeal Nos 2511 of 2012 and 2512 of 2012, I consider that the appropriate orders are:

(a) Refuse the application for an extension of time for filing the application for leave to appeal.
(b) Refuse the application for leave to appeal.
(c) Order that the applicant pay the respondents' costs of the applications on the standard basis.

[21] **WHITE JA:** I have read the reasons for judgment of Fraser JA. I agree with his Honour's reasons and the orders which he proposes.

[22] **DOUGLAS J:** I also agree with the reasons of Fraser JA and the orders proposed by his Honour.