

SUPREME COURT OF QUEENSLAND

CITATION: *Multiplex Bluewater Marina Village Pty Ltd & Anor v Harbour Tropics Pty Ltd* [2016] QSC 99

PARTIES: **MULTIPLEX BLUEWATER MARINA VILLAGE PTY LTD ACN 115 034 083**
(first applicant)
MULTIPLEX BLUEWATER MARINA LOT PTY LTD ACN 115 034 074
(second applicant)
v
HARBOUR TROPICS PTY LTD ACN 165 378 736 AS TRUSTEE FOR BLUEWATER TRUST
(respondent)

FILE NO: BS12894 of 2015

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 10 May 2016

DELIVERED AT: Brisbane

HEARING DATE: 8 February 2016

JUDGE: Mullins J

ORDER: **The application for relief in terms of paragraph 1 of the originating application and the issue of costs in respect of that application are adjourned to a date to be fixed.**

CATCHWORDS: REAL PROPERTY – EASEMENTS GENERALLY – DEFINITIONS AND CONSTRUCTION – where the respondent tavern owner granted an easement to the applicant marina owner and marina berth users for use of marina facilities including car parks on the respondent’s land – where the respondent sought to limit the time allowed for parking – where the applicant seeks a declaration that the applicant and marina berth users are entitled to unlimited use of the marina facilities – whether car parking for an extended period would change the nature of use from parking to storage – whether it is appropriate to make the declaration sought by the applicant which generally restates the terms of the easement instrument

Land Title Act 1994 (Qld), s 82, s 85B

Butler v Muddle (1995) 6 BPR 13,984, considered
Hare v Van Brugge (2013) 84 NSWLR 41; [2013] NSWCA 74, considered
Moncrieff v Jamieson [2008] 4 All ER 752; [2007] UKHL

42, considered
Thiess Services Pty Ltd v Mirvac Queensland Pty Ltd [2005]
 QSC 364, distinguished
Weigall v Toman [2008] 1 Qd R 192; [2006] QSC 349,
 considered
Westfield Management Ltd v Perpetual Trustee Co Ltd (2007)
 233 CLR 528; [2007] HCA 45, followed

COUNSEL: M D Martin QC and D de Jersey for the applicants
 M A Jonsson QC for the respondent

SOLICITORS: MacDonnells Law for the applicants
 Omega Lawyers for the respondent

- [1] By paragraph 1 of the originating application, the applicants seek a declaration that on the proper construction of registered easement 716452824 and the contract between the first applicant and the respondent dated 24 October 2013, the second applicant is entitled to the unlimited use of 64 car parks, a minimum of three showers, a minimum of three toilets and a laundry with provision for a minimum of two heavy duty washing machines and two clothes dryers on certain property owned by the respondent for use by the second applicant for the operation of the marina on the second applicant's property that adjoins the respondent's property.

The contract

- [2] The first applicant was the vendor and the respondent was the purchaser under the contract of the land described as proposed Lot 10 which was then part of Lot 185 on SP165903. Lot 10 was created by the registration of survey plan 264300 which cancelled Lots 185 and 186 and created Lots 10, 1850 and 1860 on SP264300. The contract settled on 6 June 2014 with ownership of Lot 10 transferred to the respondent. The first applicant remained registered as the owner of Lot 1850 and the second applicant remained registered as the owner of Lot 1860.
- [3] Under clause 12 of the special conditions of the contract the respondent had the obligation to commence construction of the "Purchaser's Development" within three months after the date of completion and continuously carry out that construction and complete construction within 12 months after construction commenced. The term "Purchaser's Development" is defined in the contract to mean:
- "the Purchaser's proposed development and use of the Land, which development and use must be as follows:
- (a) a tavern and in addition the following facilities at a minimum:
 - i) a convenience retail space;
 - ii) Marina Manager's office;
 - iii) Marina Facilities including toilets, showers and laundry; and

- iv) car parks for the Tavern and Marina sufficient to comply with the Local Authority's requirements, a minimum of 64 of which are for use by the Marina."
- [4] The term "Marina" is defined in the contract to mean the marina located adjacent to the land and forming part of Lot 186 on SP165903. The term "Marina Facilities" is defined in the contract to mean "the Marina Facilities set out in Special Condition 17.1(a)". The term "Marina Manager's Office" is defined in the contract to mean the area to be leased to the first applicant or the first applicant's nominee in accordance with special condition 18.
- [5] Clause 17 of the special conditions of the contract provides:
- "17.1 The Purchaser acknowledges and agrees that:
- (a) it must provide a minimum of 64 bitumen sealed car parks, a minimum of 3 showers, a minimum of 3 toilets and a laundry with provision for a minimum of heavy duty 2 washing machines and 2 clothes dryers which are required for use by the owners, lessees, occupiers and users of the Marina;
 - (b) the Marina Facilities are to be located on the Land at a location and in condition first approved and agreed to by the Vendor in accordance with Special Condition 14.2;
 - (c) the Purchaser is to construct the Marina Facilities at its cost;
 - (d) the Marina Facilities are in addition to facilities required by the Tavern; and
 - (e) the construction of the Marina Facilities is to be completed at the same time as the construction of the Tavern.
- 17.2 For the avoidance of doubt, no consideration is payable by the Vendor to the Purchaser on account of the construction or use of the Marina Facilities.
- 17.3 For the avoidance of doubt, although 64 car parks are required in accordance with Special Condition 17.1(a), under the Decision Notice a minimum of 91 car parks are required in total for the development on the Land."
- [6] Under special condition 18 of the contract, the respondent acknowledged that the first applicant was entitled to appoint a manager of the Marina and the parties agreed to enter into a lease for the Marina Manager's Office on the terms and conditions set out in the lease in annexure E to the contract.
- [7] Clause 19 of the special conditions of the contract provides for the easements the parties agreed they would enter into prior to completion and for the easements to be registered at the vendor's cost. The proposed easement to provide access to the Marina Facilities was incorporated as annexure G to the contract.

- [8] The easement which is the subject of this application conforms with the document in annexure G to the contract and was registered on 24 April 2015.
- [9] The parties to the contract also agreed under clause 19 of the special conditions to the respondent granting other easements including the easement in annexure F in favour of the first applicant for providing access to the Marina Manager's Office, the easement in annexure H in favour of the first applicant providing for services to the Marina Manager's Office, and the easement in annexure I in favour of the first applicant for providing for services to the Marina Facilities.
- [10] The respondent constructed the tavern, associated business premises and Marina Facilities on Lot 10 adjacent to the water (and Lot 1860). The car park is on the land side or western side of the tavern. The building which houses the Marina Manager's Office and the Marina Facilities is the building which is to the north of Lot 10 and is joined by a covered way to the main tavern building.

The easement

- [11] The respondent is the grantor under the easement in respect of the servient tenement which is described as Easement B on SP267830 in Lot 10 on SP264300. The dominant tenement is specified as Lot 1860 of SP264300. The second applicant is the grantee under the easement. Easement B covers the car park area of Lot 10, the building containing the other Marina Facilities and a pathway that provides access to and from Lot 1860 from and to the car park and the other Marina Facilities and thereby to and from the Marina Berths. The area of easement B is 2,414m² which comprises more than half the total area of Lot 10 (which has an area of 4,464m²).
- [12] The purpose of the easement is specified in item 7 as "Access". The formal grant of the easement is set out in item 8 as:
- "The Grantor for the above consideration grants to the Grantee the Easement over the servient tenement for the purpose stated in item 7 and the Grantor and Grantee covenant with each other in terms of the attached schedule."
- [13] Clauses 1, 2 and 5 in the schedule attached to the easement provide:
- "1. GRANT/EXECUTION
- The Grantor for the above consideration grants to the Grantee on an exclusive basis:
2. ACCESS
- An Easement for the Grantee and Marina Berth Users (in common with the Grantor and all other persons having the like right) including full and free right liberty and license from time to time and at all times hereafter to enter upon and to pass along the Servient Tenement, with or without vehicles, for all purposes connected with the use and enjoyment of the Marina Facilities to the extent that the Grantee and the Marina Berth Users will have free and uninterrupted and unimpeded right to access and use of the Marina Facilities at all times.

...

5. RIGHTS OF GRANTEE

The rights granted under this Easement require that the Grantor must not use the Marina Facilities and Servient Tenement in any manner that materially adversely affects the rights granted under this Easement. In addition, the Grantor must not obstruct the Servient Tenement in any manner that will prevent or unreasonably restrict the Grantee or Grantee's Users' use of the Marina Facilities and Servient Tenement or prevent the Grantee from any rights or use under this Easement.

6. OBSTRUCTION

6.1 For the avoidance of doubt, the Grantee must not or permit at any time:

- (a) the obstruction of access to the Servient Tenement or entrances to the Servient Tenement unless reasonable and permitted by this Easement;
- (b) the obstruction of access to or use of the Marina Facilities or entrances to the Marina Facilities; or
- (c) any act which may cause a nuisance to the Grantee or the Grantee's invitees."

[14] Relevant definitions set out in clause 11.1 in the schedule include:

"Marina Berths" means the marina berths located in the Dominant Tenement;

"Marina Facilities" means the marina facilities, including 64 car parks, a minimum of 3 showers, a minimum of 3 toilets and a laundry with provision for a minimum of heavy duty 2 washing machines and 2 clothes dryers located on the Servient Tenement;

"Marina Berth Users" means the Grantee's agents, employees, contractors, licensees, invitees, lessees, occupants and any person who uses or visits or may at any time be on the Dominant Tenement (with or without invitation)."

[15] Although clause 1 describes the grant in favour of the grantee as "exclusive", the parties acknowledge that, as a matter of construction of the easement, the grant is not exclusive, as the grant of access under clause 2 is in common with the grantor and all other persons having the like right and reservation of the respondent's rights in the servient tenement is clear from clause 5.

The dispute

[16] The respondent seeks to restrict the use of the car park by the Marina Berth Users who claim the right to park in the car park by virtue of the rights granted to them through the second applicant under the easement. The respondent wishes to impose a "Car Park Management Plan" on all users with restrictions including a time limit for car parking (of

four or five hours) to be enforced by arrangements for towing vehicles that are parked in excess of such time limit. The applicants contend that under the easement the second applicant and Marina Berth Users are entitled to uninterrupted and unimpeded use of the car park with no time limit for car parking.

- [17] It appears that some Marina Berth Users park vehicles in the car park and access their boats anchored in the Marina Berths before leaving the marina in the boats to go out on the water. Mr Sayers who is the director of the respondent deposed in his affidavit affirmed on 27 January 2016 that since 14 January 2016 a large number of vehicles had been parking in the tavern car park overnight and at times for consecutive days.
- [18] The respondent concedes that the access easement would be “virtually useless” if the second applicant or Marina Berth Users were not permitted to park vehicles in the car park to use and enjoy the Marina Facilities, but seeks to regulate the parking by restricting the time period that applies for parking and to make it clear that the parking of a car “permanently” or the parking of a vehicle with a trailer attached is not permitted. The respondent formulates the question to be decided as whether the limits the respondent proposes in its Car Park Management Plan materially fetter the right of access provided for under the easement. The respondent does not dispute the validity of the easement, but opposes the making of the declaration in the terms sought by the applicant on the grounds that the declaration does not reflect the true construction of the easement and seeks a declaration that is the direct negative of the declaration sought by the applicants.

Approach to the construction of the easement

- [19] Although the first applicant and the respondent agreed under the contract to the granting of the easement on the specified terms in annexure G, the easement was created upon registration of the instrument of easement under the *Land Title Act 1994 (Qld) (LTA)*: s 82(1) and s 85B *LTA*. Under s 82(3) of the *LTA*, the instrument must relevantly state the nature of the easement and its terms and the land to be benefited and the land to be burdened by the easement. The instrument of easement, as registered, is the document that is construed for the purpose of determining the parties’ rights under the easement.
- [20] The applicants rely on the recognition in a number of authorities, including *Weigall v Toman* [2008] 1 Qd R 192 at [25], that a right to park cars on the servient tenement can be the subject matter for the grant of an easement. The applicants submit that the easement grants a right to the second applicant and the Marina Berth Users to use up to the specified number of car parks, rather than a particular demarcated area and the servient tenement owner is not prevented or excluded from using the car park and is in no way precluded or restricted from using the servient tenement for its intended purpose of a tavern.
- [21] The applicants submit that the easement must be construed objectively by reference to what a reasonable person would understand it to mean and relies on the approach discussed by Muir J (as his Honour then was) in *Thiess Services Pty Ltd v Mirvac Queensland Pty Ltd* [2005] QSC 364 at [36]-[45]. The applicants submit it would have been anticipated that a Marina Berth User might well take the boat out of the Marina

Berth for a long period of time with a concomitant need to park in the car park for the same length of time.

- [22] The respondent submits that the clauses in the schedule to the easement are “facultative” of a grant of easement for the purpose stipulated in item 7 which is access and that clause 2 of the easement gives content to the right of access provided for under the easement. It is submitted that the opening words of clause 2 establish the character and quality of the right of access granted by the easement which is a right exercisable in common with the respondent and the respondent’s licensees to enter upon and to pass along the servient tenement with or without vehicles, for purposes connected with the use and enjoyment of the Marina Facilities. The respondent argues that the following words “to the extent that the Grantee and the Marina Berth Users will have free and uninterrupted and unimpeded right of access and use of the Marina Facilities at all times” do not create a separate and cumulative right to “free and uninterrupted and unimpeded . . . use of the Marina Facilities at all times”. It is argued that the purpose of the closing words of clause 2 is to give content and colour to the right of access created by the preceding part of the clause.
- [23] The respondent further submits that the easement does not confer on those who benefit under it any positive right of use of the Marina Facilities, but merely confers a right of access of such a character and quality as would facilitate the unfettered use contemplated by the closing words of clause 2, for which a licence to use those Marina Facilities would be implied. The respondent argues that the easement permits the grantee and all those who claim under the grantee the right to park temporarily upon the servient tenement for access purposes, but the use of the car park for any more permanent parking would amount to storage and be beyond the use permitted under the easement, relying on the Scottish case of *Moncrieff v Jamieson* [2004] SCLR 135 which was referred to in *Weigall* at [21]. The respondent also argues that the conditions of the easement do not derogate from the respondent’s right as owner to regulate the use of the Marina Facilities by the grantee and those who claim through the grantee.
- [24] The approach to construing the terms of an easement registered under the Torrens system was considered by the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at [37]-[45] and the principle of indefeasibility which underpins the Torrens system relied on to confine the evidence that is relevant to the construction of the easement. As the court stated at [39]:
- “The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.” (*footnote omitted*)
- [25] *Westfield* applied for a declaration that a registered right of way easement over a driveway on a property owned by Perpetual (on which was erected the multi-storey commercial premises known as Glasshouse) permitted *Westfield* as the registered owner of the dominant tenement (on which was erected the multi-storey commercial premises known as Skygarden) to allow persons or vehicles to use the driveway for the purpose of coming onto the dominant tenement and continuing over that land to access driveways, parking spaces and loading docks to be built on land beyond the dominant tenement also

owned by Westfield. The land beyond the dominant tenement contained two commercial developments that were proposed to be redeveloped by Westfield in conjunction with the Skygarden site. Westfield wished to use the right of way easement through Glasshouse to enable vehicular access from a street to all three sites.

- [26] The terms of the easement considered in *Westfield* were for “full and free right of carriage way for the grantee” of the dominant tenement “to go, pass and repass at all times and for all purposes with vehicles to and from” across the servient tenement. The court noted at [17] that the terms of the easement referred to activities permitted with respect to Glasshouse in terms of “across the lots burdened”, but the easement did not speak of activities “across” Skygarden rather than “to and from” Skygarden. It was noted by the court at [19] that Westfield had argued that the significance of the construction of the phrase “for all purposes” in the easement was that it encompassed “the purpose of accessing Skygarden ... and from there travelling to some further property”.
- [27] The court focused on the terms of the easement, noting at [30]:
- “The access is to go, pass and repass to and from Skygarden and across Glasshouse. The terms do not speak of going, passing and repassing to and from and across Skygarden, and across Glasshouse. The term ‘for all purposes’ encompasses all ends sought to be achieved by those utilising the Easement in accordance with its terms.”
- [28] The court also considered the conditions set out in the easement and found at [32]-[33] that they were consistent with the construction adopted by the court that confined use of the driveway on Glasshouse to enable access to and from Skygarden and not the land beyond Skygarden.
- [29] In relation to extrinsic evidence that had been relied on to discern the intention of the parties at the time of the grant of the easement, the court noted at [37] that the rules of evidence assisting the construction of contracts of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350-352 did not apply to the construction of the easement.
- [30] The approach to the construction of the easement in this matter which must be taken in light of the High Court’s decision in *Westfield* precludes applying the general approach to the construction of commercial contracts applied in *Thiess Services*. It also precludes making a declaration as to the construction of the easement by reference to the terms of the contract, as any successors in title to the parties to the easement will be bound only by the rights and burdens that accrue under the easement.
- [31] I have recited the prior dealings between the parties, including the provisions of the contract, as it explains how the dispute arose that has resulted in this proceeding. For the purpose, however, of construing the easement, I am limited by *Westfield* to the easement, the easement plan and the physical characteristics of the dominant and servient tenements: *Hare v Van Brugge* (2013) 84 NSWLR 41 at [18].

Does the easement grant unlimited use of the Marina Facilities?

- [32] There are curious aspects to the easement in this matter. The focus of the conditions in the schedule to the easement is on the access to the Marina Facilities which are all located on the servient tenement. The purpose of the easement identified in item 7, however, remains access and, by identifying both the servient and dominant tenements which are physically connected, the easement provides for access to and from the dominant tenement from and to that part of the servient tenement designated as Easement B. The need to benefit the dominant tenement in that way to conform with the statutory requirements for creating a valid easement was critical to the conferral of the other rights on the grantee and the Marina Berth Users to use the car park for parking up to 64 cars and the laundry and bathroom facilities set aside for use by Marina Berth Users on the servient tenement.
- [33] I therefore do not accept the respondent's argument that the only access rights granted under the easement are those contained in clause 2. Clause 2 of the schedule to the easement deals with the access to and from and the use of the Marina Facilities that is an additional benefit conferred on the grantee and Marina Berth Users above the right of access otherwise conferred by the easement over Easement B in favour of Lot 1860. It is also not a natural interpretation of clause 2 to limit the words following the words "to the extent" in the manner submitted on behalf of the respondent. Those words make it clear that the grantee and Marina Berth Users have rights of access to and from and use of the Marina Facilities in addition to the access between Easement B and Lot 1860. The second applicant does not need to rely on any implied licence for authority to use the Marina Facilities.
- [34] One problem with the declaration that the second applicant seeks is that it purports to link the entitlement to unlimited use of the Marina Facilities to "use by the second applicant for the operation of a marina forming part of Lot 1860". There is nothing in the instrument of easement itself which supports declaring the rights conferred on the grantee as being for the operation of a marina on the dominant tenement. In fact, it is directly contrary to the purposes specified in clause 2 of the conditions as "connected with the use and enjoyment of the Marina Facilities" which are all located on the servient tenement.
- [35] The applicants' submissions proceed on the assumption that the easement facilitated a Marina Berth User's use of a boat moored in the relevant Marina Berth away from the Marina Berth. The respondent's submissions concentrate on the use to be made of the Marina Facilities on the servient tenement and impliedly do not treat a Marina Berth User's use of the boat away from the Marina Berth as a purpose that was facilitated by the grant of the easement. That is also consistent with the respondent's submission that the right to park is temporary for facilitating access purposes and does not support permanent parking in the car park.
- [36] It is arguable on a narrow application of the decision in *Westfield* that the easement grants access to and from the dominant tenement and the Marina Facilities and no further, so that it would support use of the car park by a Marina Berth User to access the boat in the relevant Marina Berth, but not for using the boat away from the Marina Berth outside the dominant tenement. That narrow approach, however, overlooks the nature of the dominant tenement incorporating the Marina Berths at which boats are moored for the purpose of using them on the water. I do not consider therefore that this narrow approach to construing the easement is applicable.

- [37] It is relevant to the construction of the easement that the rights under clause 2 of the easement are conferred in the context of a grant of access to and from the dominant tenement. There must be a connection between the exercise of the additional rights conferred under clause 2 and the access to and from the dominant tenement. A point will be reached where the use of a boat away from the Marina Berth for an extended period means that parking in the car park by the relevant Marina Berth User loses its connection with the exercise of access to the dominant tenement. Another way of looking at it consistent with the respondent's approach is that the length of time the boat is away from the Marina Berth has the effect of changing the nature of the use of the car park from parking to storage. The distinction between parking and storage of vehicles was made by Lord Hope in *Moncrieff v Jamieson* [2008] 4 All ER 752 at [39] where the first instance Scottish decision that was referred to in *Weigall* was substantially upheld on appeal and the right to park was found to be ancillary to the servitude of the vehicular access in Scottish law.
- [38] This connection in time between car parking and access to the dominant tenement was a matter that was not canvassed expressly in argument as such and, without the benefit of argument, I am not prepared to nominate the period of time which would result in the use of the car park by a Marina Berth User no longer being authorised by the easement.
- [39] The conditions in the schedule to the easement such as clause 5 favour the grantee (and those claiming through the grantee), but do not oust completely the rights of the respondent as the registered owner of the servient tenement, as recognised in clause 2. Clauses 5 and 6 incorporate expressly the concept of reasonableness into some aspects of the obligations of the grantor and the grantee. From the nature of the improvements on Lot 10, the car park is intended for use as a car park by the patrons of the tavern at the same time as those persons who claim to use the car park, as a result of the rights given under the easement to the grantee. In such circumstances where there are competing rights over easement B, the concept of reasonableness applies to both the grantor and the grantee, even where it is not expressly incorporated in the conditions of the easement: *Hare* at [25] and *Butler v Muddle* (1995) 6 BPR 13,984 at 13,987.
- [40] The use in clause 2 of the description of the access and use of the Marina Facilities as "free and uninterrupted and unimpeded" has to be read to accommodate the rights of the respondent to use the servient tenement at the same time and the concept of reasonableness that applies to both the grantor and the grantee.
- [41] The answer to the question posed by the respondent is that the limits the respondent proposes in its Car Park Management Plan do materially fetter the right of access under the easement. Any sign the respondent places in the car park to regulate the car parking may need to differentiate in respect of cars parked by persons exercising the rights of the grantee under the easement and other users of the car park. As the grantee (and those claiming through the grantee) have the right to park vehicles in the car park up to the use of 64 car park spaces, that would not preclude a vehicle with a trailer from parking in the car park as that would still comprise a vehicle. As to the prohibition on "permanent" parking, that will apply to a Marina Berth User under the easement who is using a boat away from the Marina Berth when the length of time the boat is out of the berth is such that it breaks the connection between parking and access to the Marina Berth.

- [42] The parties did not address the question of whether there was any entitlement for the applicants to obtain relief based on the contract, separately from the easement, as the arguments focussed on the construction of the easement.

Order

- [43] It follows that the applicants cannot succeed in obtaining a declaration in the terms proposed in paragraph 1 of the originating application, as that will not resolve the dispute by restating generally the terms of the instrument of easement without allowing for the qualifications that must follow by the application of reasonableness of user and the limitations inherent in the nature of the rights conferred by the easement. The respondent seeks a declaration in the converse to that sought in paragraph 1 of the originating application, so that, in effect, it would be declared that the second applicant and Marina Berth Users are not entitled to unlimited use of 64 car parks and the other facilities that are defined in the easement as Marina Facilities. A declaration in those terms also does not assist in clarifying the rights that accrue to the second applicant and Marina Berth Users under the easement.
- [44] I am prepared to entertain making a declaration that reflects the rights of the second applicant and Marina Berth Users to access and use of, the Marina Facilities and for access between Easement B and Lot 1860 under the easement consistent with these reasons. I will therefore adjourn the application for relief in terms of paragraph 1 of the originating application to give the parties an opportunity to reach agreement on the terms of a declaration. I will also deal with the costs of the application at the next hearing date, if the parties are unable to agree on the terms of an order for costs. The interlocutory injunction that was granted on 8 February 2016 is in force until judgment or earlier order. That therefore continues until judgment on the application under paragraph 1 of the originating application is given. The parties may also consider whether they wish to revisit the terms of the interlocutory injunction.
- [45] The formal order which I make in the meantime is:
The application for relief in terms of paragraph 1 of the originating application and the issue of costs in respect of that application are adjourned to a date to be fixed.