SUPREME COURT OF QUEENSLAND

CITATION:	*Burns v State of Queensland & Croton* [2007] QCA 240
PARTIES:	**CATHERINE ELIZABETH BURNS** (applicant/appellant) **v** **STATE OF QUEENSLAND & LUKE CROTON** (respondent/respondent)
FILE NO/S:	Appeal No 526 of 2006 SC No 515 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	27 July 2007
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Jerrard JA, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	COSTS – JURISDICTION – PERSONS NOT PARTIES TO PROCEEDINGS – APPLICATION FOR NON-PARTY COSTS – where respondent sought costs against the person who prepared the application and appeal – where the application and appeal were pointless – whether appropriate to make an order for costs *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner for Taxation* (2001) 179 ALR 406, applied *Kebaro Pty Ltd v Saunders* (2003) FCAFC 5, applied *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, applied *Murphy v Young & Co's Brewery* [1997] 1 WLR 1591, applied *Rushton (Qld) Pty Ltd v Rushton (NSW)* [2004] QSC 47, applied *Symphony Group PLC v Hodgson* [1994] QB 179, applied
SOLICITORS:	The applicant/appellant appeared on her own behalf with D J Walter assisting Crown Law for the respondent

[1] **JERRARD JA**: This Court gave judgment in the primary appeal in this matter[1] on 23 June 2006, dismissing thereby an application for an extension of time within which to appeal, and allowing 14 days within which to make written submissions as to costs. Written submissions were received, in which the successful respondents – who are in reality the first respondent, the State of Queensland – made an application for indemnity costs, or in the alternative costs assessed on the standard basis, but not against the unsuccessful applicant Catherine Elizabeth Burns. Instead, the State of Queensland sought only an order for costs against the person who had prepared her application and appeal, a retired police officer Mr David Walter.

Mr Walter's involvement

[2] The judgment in the principal appeal records that Mr Walter was not given leave on the hearing of the appeal to appear on behalf of Catherine Burns, which leave he had sought, but that he had submitted extensive written arguments on her behalf, prepared by him. The principal judgment describes the significant role Mr Walter took in the proceedings involving Catherine Burns and the State of Queensland. Those proceedings arose out of a refusal to grant her application for a permit to clear native vegetation on 25 acres of land owned by her, which land she intended to clear and sell. She unsuccessfully appealed the decision refusing her permission to the Planning and Environment Court, constituted by White DCJ, who dismissed the appeal on 2 August 2004. A notice of appeal to this Court against that decision was lodged on 26 August 2004, but ultimately dismissed by consent. Relevant to this matter, on 12 November 2004 an application signed by Mr Walter, as Mrs Burns' agent, was filed in the Cairns Registry of the Supreme Court, in which application various declarations and orders were sought. That proceeding was heard by de Jersey CJ on 15 November 2004, and his decision (*Burns v State of Queensland* [2004] QSC 434) was published on 19 November 2004. The application for an extension of time in which to appeal, heard in this Court in the principal appeal, and dismissed on 23 June 2006, was from that decision by de Jersey CJ.

[3] The judgment in that appeal describes the considerable role Mr Walter had played in each of those proceedings. He prepared the notice of appeal in the (subsequently abandoned) appeal to this Court from the decision of the Planning and Environment Court, and signed that notice of appeal, together with Mrs Burns. He conducted correspondence on her behalf prior to that appeal being withdrawn. He had also prepared the original notice of appeal to the Planning and Environment Court, and he appeared in that court on the appeal as her agent and represented her. He signed the application filed in the Cairns Registry of this Court, and heard by de Jersey CJ. The counsel who argued that application before the Chief Justice described Mr Walter as having done "an incredible amount of work on the matter". Mr Walter prepared the application for the extension of time to appeal the decision by de Jersey CJ, and a lengthy outline of argument. He had also prepared lengthy written arguments for the Planning and Environment Court, the hearing before the Chief Justice, and for the subsequently abandoned appeal to this Court from the decision of the Planning and Environment Court. Those written arguments (for those other Courts) were part of the material presented to this Court in the primary appeal, as

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1 *Burns v State of Queensland & Croton* [2006] QCA 235.

part of the appeal records of those parties. That material in toto establishes that Mr Walter played a major role in bringing and continuing the litigation in the Planning and Environment Court, in the Supreme Court before the Chief Justice, and in each of the abandoned, and the persisted in, appeals to this Court. The documents filed in support of the application for an extension of time within which to appeal, in the primary appeal in this Court, describe the principal role Mr Walter played in bringing on that application.

Mr Walter's argument

[4] The essential argument presented in the written outlines Mr Walter prepared for presentation in this and the other Courts, and when appearing before the Planning and Environment Court, was that the State of Queensland lacked legislative power to impose the requirement that, before clearing native vegetation from her freehold land, Mrs Burns had first to obtain a development permit to do that. He argued that the owner of freehold land had a right, with which the State of Queensland could not interfere, to clear such vegetation as the owner pleased. That issue had already been decided adversely to Mr Walter's arguments by this Court in *Bone v Mothershaw* [2003] 2 Qd R 600. The written submissions Mr Walter filed in this Court on the primary appeal recognised that the decision was against his argument.

[5] This matter was not the first time Mr Walter had unsuccessfully advanced that same argument, which was contradicted by *Bone v Mothershaw*. The State of Queensland, in its written submissions on costs in this matter, has drawn the court's attention to the proceedings in *Wilson v Raddatz* (District Court Maryborough 24 August 2005), in which Mr Walter appeared by leave on behalf of a Mr Wilson, in an appeal to the District Court seeking to overturn Mr Wilson's conviction in the Hervey Bay Magistrates Court on a count of starting an assessable development, namely the clearing of native vegetation on freehold land, without a development permit for that development. The judgment of Brabazon QC DCJ records that Mr Walter, who appeared as agent with leave of the court, forcibly argued against the legitimacy of the *Integrated Planning Act 1997* (Qld) and the *Vegetation Management Act 1999* (Qld). As quoted by Brabazon QC DCJ, the essence of Mr Walter's submission was that those statutes could not adversely affect the conduct of owners of freehold land.

[6] Brabazon QC DCJ applied the decision in *Bone v Mothershaw*, and likewise the decision of White DCJ in the appeal to that judge in the Planning and Environment Court in this matter, and also the decision of the Chief Justice at first instance in the primary appeal in this matter. Brabazon QC DCJ also referred to a matter of *Dore v State of Queensland & Anor* [2004] QDC 364, heard by Bradley DCJ in the Cairns District Court on 5 August 2004, in which similar arguments had been prepared in written submissions by Mr Walter for the appellants in that matter, and dismissed, with reasons, by Bradley DCJ. Brabazon QC DCJ noted that the fundamental point presented by Mr Walter in his argument was that ownership of freehold land meant that the provisions of the *Integrated Planning Act* and *Vegetation Management Act* were invalid to that extent. Brabazon QC DCJ dismissed the argument and the appeal.

[7] In *Glasgow v Hall* [2006] QDC 042 Mr Walter had also appeared as the agent for the appellant in that matter, who had been convicted in February 2005 of an offence of starting an assessable development without a development permit, constituted by clearing remnant vegetation on freehold land. Nase DCJ recorded in his judgment delivered on 2 March 2006, that Mr Walter argued that the term "freehold" or "freehold land" used in the *Integrated Planning Act* did not include land held in fee simple, and should be understood as a reference to freehold land owned by the State as distinct from privately owned freehold land; His Honour dismissed both arguments, applying *Bone v Mothershaw*, the judgment of de Jersey CJ at first instance in this matter, and referring to the judgments in the District Court in *Wilson v Raddatz*, *Dore v State of Queensland*, and in the Planning and Environment Court in this matter. That appeal was dismissed with the appellant ordered to pay the respondent's costs. Similarly costs orders had been made against the unsuccessful appellant in *Wilson v Raddatz;* and costs orders were made against Mrs Burns by the Chief Justice on 8 December 2005, following the dismissal of the applications filed in the Supreme Court on her behalf.

[8] Nase DCJ observed, correctly, that Mr Walter's arguments assumed that the law making power of the State with respect to land was derived from, and limited to, sections 30 and 40 of the *Constitution Act 1867* (Qld). As Nase DCJ wrote, the problem with that analysis is that the law making power of the State over alienated Crown lands is derived not from those sections but from the general law making power to make laws for the "peace, welfare and good government of the State"; it includes the power to regulate land clearing in the State. Nase DCJ also referred to the comment by White DCJ, giving the reasons for judgment in the unsuccessful appeal to the Planning and Environment Court, that although ownership of the land was alienated, the land itself was not alienated from the sovereign State of Queensland.

[9] The State of Queensland advised, in its written submissions on costs in this matter, that it has taken no steps to enforce its costs order against Mrs Burns, in deference to her age, to the fact that she is the widow of a long serving Queensland Police Officer, to her state of health and her impecunious personal circumstances, together with the fact the only way in which a costs order against her could be enforced would be a warrant of execution on the land the subject of the proceedings, which is her only remaining asset, and of little value. The submission by the State of Queensland in this matter also asserts that costs orders, likewise not enforced, were made against Mrs Burns as the unsuccessful appellant in the Planning and Environment Court proceedings heard by White DCJ.

[10] Mr Walter has thus exposed Mrs Burns, Mr Glasgow, and Mr Wilson to costs orders incurred when he appeared for them arguing against the essential proposition established by the decision of this Court in *Bone v Mothershaw*. He had heard judges follow that decision, and had the opportunity to read their reasons which gave independent judgments leading to the same conclusion as in *Bone v Mothershaw*. Nevertheless, he persisted with preparation of the written argument in the primary appeal in this matter, which was heard on 1 June 2006, although for that appeal to succeed, this Court would have to reverse its earlier decision in *Bone v Mothershaw*. The respondent's written submissions on costs in this matter included

material showing that Mr Walter had also appeared in person for a Mr Watts in a matter of *Watts v Ellis*, heard before Wall QC DCJ on 3 March 2006, with leave from that Court, presenting similar arguments. That learned judge had also advised that the judge was bound by the decision in *Bone v Mothershaw*, and that Mr Walter would have to persuade this Court to reconsider that decision, and if unsuccessful ask the High Court to reverse it.

[11] What Mr Walter certainly learnt from the written argument of the State of Queensland prepared for the primary appeal in this matter was that the High Court had already refused an application for special leave to appeal from the decision in *Bone v Mothershaw*, on 25 June 2003. He may not have known of that fact until he received the outline of argument prepared for that appeal. He may have known of the judgment by Jones J in *Dore & Ors v Penny* [2006] QSC 125, delivered on 5 May 2006, again dismissing, with reasons, arguments challenging the decision in *Bone v Mothershaw*. In the *Dore v Penny* appeal, Mr Walter did not appear, but he had prepared the written outline for the same parties before Bradley DCJ. Jones J heard a separate challenge in what was the same matter, and gave his own reasons for holding, like Nase DCJ, that the term "freehold land" in the *Integrated Planning Act* included privately owned land held in fee simple. He dismissed, with reasons, the central argument that land held in fee simple was alienated from State control, save for the reservations in the Deed of Grant.

[12] Mr Walter has been very persistent in presenting those arguments in Court in person, with leave, or in writing, on behalf of different applicants or appellants for some years. He may not have known until shortly before the hearing of the primary appeal in this matter of the unsuccessful special leave application in *Bone v Mothershaw*. He did know he had repeatedly failed to persuade Judges and Magistrates that the decision was wrong, and he had been given independent reasoning by a number of Judges and Magistrates dismissing his arguments and supporting the conclusion in that case.

Once Mr Walter learnt of the earlier refusal of special leave, persistence with the appeal in *Burns v State of Queensland* would have been self-evidently pointless, unless a further special leave application was intended.

Costs orders against non-parties

[13] In *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, Mason CJ and Deane J, with whom Gaudron J agreed, wrote as follows at 192-193:

> "For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation.

> Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

[14] That judgment dealt with the power given by Order 91 rule 1 of the *Supreme Court Rules 1900* (Qld), to make costs orders against non-parties. The provisions of the *Uniform Civil Procedure Rules 1999* (Qld) r 689(1) and r 766(1)(d), relevantly replacing Order 91 r 1, do not lead to any different result from the power described in *Knight v FP Special Assets*.

[15] Mr Walter has certainly played an active part in the conduct of Mrs Burns' litigation, particularly in the primary appeal, and Mrs Burns is of very small means. Mr Walter appears to be motivated by genuine sympathy for her position, which is that land she and her husband bought nearly 40 years ago cannot now be cleared of the vegetation growing on it, because the land is regarded as a known habitat for the endangered Mahogany Glider, and a known general habitat for the endangered Cassowary. That inability to clear vegetation substantially reduces the potential re-sale value of her land, as the State recognises in its decision not to execute its costs orders against her. The State proposes no compensation to her. But Mr Walter's interest in the outcome is not based simply on his sympathy for her, because he has advanced the same argument on behalf of other litigants.

[16] Dawson J in *Knight v FP Special Assets Ltd* described the power to award costs against a non-party a little differently, in these terms (at CLR 202):

> "The cases therefore establish a long asserted jurisdiction to award costs in appropriate cases against a person who is not a party to the proceedings where that person is the effective litigant standing behind an actual party or where there has been a contempt or abuse of the process of the court."

His Honour went on to explain that the principle was that the real litigant rather than the nominal party might be made liable for costs, recognising that that would happen in exceptional cases. In *Kebaro Pty Ltd v Saunders* (2003) FCAFC5, the Full Federal Court, in a passage cited with apparent approval by Muir J in *Rushton (Qld) Pty Ltd v Rushton (NSW)* [2004] QSC 47, wrote as follows:

> "[103] In our opinion, the authorities established, on the foregoing analysis, the following propositions:
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> - A non-party costs order is exceptional relief, although some categories of factual situations are now recognised as within the discretion, for example, the situation described by Mason CJ and Deane in *Knight* at 192-193. The width of the jurisdiction is illustrated by a recent English decision that there can be circumstances in which it would be appropriate to order costs **in favour** of a non-party against a party (see *Individual Homes v MacBreams Investments*, 23 October 2002, High Court of Justice Chancery Division at 8.
> - While such an order is extraordinary, the categories of case are not closed, although an order warrant its exercise, a sufficiently close connection, or as Gobbo J expressed it, a 'real and direct and ...material' connection with the principal litigation, must be

> demonstrated; in the words of Callinan J the non-party can fairly be liable if a judge by its conduct, to be a real party to the litigation, even if not **the** real party."

[17] I agree with that analysis, which stresses the nature of such an order. The decisions analysed in the judgment include *Symphony Group PLC v Hodgson* [1994] QB 179, in which Balcombe LJ in the UK Court of Appeal identified as relevant matters whether the non-party had some management of the action, had maintained or financed it, or had caused it. Likewise in *Murphy v Young & Co's Brewery* [1997] 1 WLR 1591, the UK Court of Appeal included as relevant factors whether the non-party had an interest in the outcome, whether the non-party initiated the litigation, had control over it, or had intermeddled in it. In *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner for Taxation* (2001) 179 ALR 406 Callinan J, when awarding costs against a non-party (in hopeless litigation it had backed) held the non-party was a real party to the litigation in very important and critical respects.

[18] This case shows an exceptional degree of involvement by Mr Walter in this and other litigation in which he repeats the same argument. Mr Walter has a real, direct, and material connection with the principal litigation; and can fairly be described as a real party to it. This litigation would not have happened without his extensive involvement in it, advancing an argument he has unsuccessfully advanced in other matters. Applying some of the tests found helpful in the UK, he helped initiate it, caused it, has controlled it, and has intermeddled in it.

[19] Sufficient grounds therefore exist for making an order against Mr Walter, in the exercise of the power recognised in *Knight v FP Special Assets* and further discussed in *Kebaro Pty Ltd v Saunders*. Because he may not have known of the unsuccessful earlier special leave application in *Bone v Mothershaw* until shortly before this appeal was to be heard, and because he had obtained no benefit himself from his efforts for Mrs Burns, I would not exercise a discretion against him in this matter.

[20] I would dismiss the application for costs against Mr Walter.

[21] **CULLINANE J**: I have read the reasons for judgment in this matter of Jerrard JA and agree with those reasons and the order proposed by him.

[22] **JONES J**: I agree with Jerrard JA.