SUPREME COURT OF QUEENSLAND

CITATION:	*Elsafty Enterprises Pty Ltd & Anor v Gold Coast City Council* [2011] QCA 84
PARTIES:	**ELSAFTY ENTERPRISES PTY LTD** ACN 096 009 371 (first applicant) **SUSTAINABLE INTERNATIONAL PROPERTY PTY LTD** ACN 142 066 108 (second applicant) **v** **GOLD COAST CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 13692 of 2010 DC No 3300 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2011
JUDGES:	Chesterman and White JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused.** **2. The applicants pay the respondent's costs of the appeal to be assessed on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where applicants sought to appeal decision of the Planning and Environment Court to cease development of a rooftop "public viewing platform" – where applicants complained that trial judge interrupted submissions and examination of witnesses, did not inform applicants that they could present evidence at close of respondent's case and refused to allow two witnesses to give evidence – whether the alleged conduct of the trial judge constituted a defect in the administration of justice in the form of pre-judgment APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF

COURT BELOW – IN GENERAL – FAILURE TO EXERCISE DISCRETION – where applicants claimed that trial judge reversed the onus of proof – where applicants claimed that respondent acquiesced in allowing development to progress – where applicants claimed they would suffer hardship as a result of preventing the project to progress – whether the trial judge erred in exercising his discretion

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where applicants challenged the primary judge's approach to the construction of the legislation and planning scheme – where applicants argued that the use of the rooftop of the premises was permitted under the *Sustainable Planning Act* 2009 (Qld) and the *Local Government (Planning and Environment) Act* 1990 (Qld) – whether the project constituted a 'material change of use' of the premises – whether the primary judge erred in his interpretation of the legislation and planning scheme

Local Government (Planning and Environment) Act 1990 (Qld), s 1.4, s 8.10(8B)
Sustainable Planning Act 2009 (Qld), s 10, s 498, s 578(1)

Bhagat v Global Custodians Ltd [2002] FCAFC 51; [2002] FCA 223, cited
Boral Resources (Qld) Pty Ltd v Cairns City Council [1997] 2 Qd R 31; [1996] QCA 249, cited
British American Tobacco Australia Services Limited v Laurie (2011) 85 ALJR 348; [2011] HCA 2, cited
du Boulay v Worrell & Ors [2009] QCA 63
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Forge v Australian Securities and Investments Commission (2006) 228 CLR 45; [2006] HCA 44, cited
Hills v Chalk [2009] 1 Qd R 409; [2008] QCA 159, cited
Johnson v Johnson (2000) 201 CLR 488; [2000] HCA 48, cited
Matijesevic v Logan City Council [1984] 1 Qd R 599, cited
Minister for Immigration and Ethnic Affairs v Kurtovic (1990) 21 FCR 193; [1990] FCA 22, cited
Mudie v Gainriver Pty Ltd [2002] 2 Qd R 53; [2001] QCA 382, cited
S*eymour CBD Pty Ltd v Noosa Shire Council* [2002] QCA 446, cited
Tynan v Meharg (1998) 101 LGERA 255, cited
Vakauta v Kelly (1988) 13 NSWLR 502, cited
Vakauta v Kelly (1989) 167 CLR 568; [1989] HCA 44, cited
Warringah Shire Council v Sedevcic (1987) NSWLR 335, cited
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, cited

COUNSEL: N M Cooke QC for the applicants
C L Hughes SC, with N Kefford, for the respondent

SOLICITORS: Cranston McEachern for the applicants
McCullough Robertson for the respondent

[1] **CHESTERMAN JA**: I agree with the orders proposed by White JA for the reasons given by her Honour.

[2] **WHITE JA:** On 15 December 2010 Robin DCJ sitting in the Planning and Environment Court in Brisbane ordered that the applicants:

> "… by their directors, servants, agents or contractors immediately cease, and until further Order desist from undertaking, or causing or permitting to be undertaken, any activity involving use by the public for the consumption of food and beverages, including such uses as comprise a material change of use as a Café, Tavern, Restaurant, Reception Room or any other undefined use which is assessable under the Gold Coast City Plan 2003, on the roof top of the building known as the 'Burleigh Beach House' located at 43 Goodwin Terrace, Burleigh Heads and described as Lot 129 on Crown Plan WD6680."[1]

He gave liberty to apply and costs were reserved.

[3] The applicants, whom it is convenient to refer to by name rather than status in the proceedings, are Elsafty Enterprises Pty Ltd, the lessee of the land, represented by its director Mr El Safty, and Sustainable International Property Pty Ltd, represented by its director Mr Youssef, the proposed operator of the roof top facility. They seek leave to appeal those orders pursuant to s 498 of the *Sustainable Planning Act* 2009 (Qld). The reasons which the applicants contend justify granting leave are those which constitute the grounds of appeal appearing in the amended application and amended notice of appeal.[2] They are, in brief, that:

1. The conduct of the primary judge in dealing with the legally unrepresented applicants was such as to give rise to a reasonable apprehension of bias in favour of the respondent Gold Coast City Council ("GCCC").
2. The primary judge's exercise of his discretion whether to issue an enforcement order in the terms sought by the GCCC miscarried because he gave no proper consideration to issues of acquiescence by the GCCC and the hardship that the enforcement order would cause the applicants.
3. The primary judge erred in law in his construction of the relevant planning legislation and ought to have concluded that the increase in "Total Use Area" was "nil" and the area of the roof was not included in the "Gross Floor Area" and thus constituted an exempt development.

[4] The applicants had contended below, in response to an application by the GCCC for an enforcement order to restrain the proposed use of the roof top for the consumption of food and drink in premises which Elsafty Enterprises operates a restaurant, that a permit to do so was not required because such a use was encompassed in the existing permit to operate a restaurant. The proposed operator of the roof facility is Sustainable International Property Pty Ltd using the business

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1 AR 1295.

2 Not filed and no leave to file sought.

name "Clique". It had already undertaken considerable work on the roof in readiness for the enterprise and the festive season. The roof overlooks the beach at Burleigh Heads with dramatic views north to Surfers Paradise and to the point break at Big Burleigh in the other direction.

[5] Since the applicants claim that their entitlement to use the roof in the way proposed is encompassed in the original permit granted in 1986 and that the GCCC has acquiesced in that understanding over the ensuing years it is necessary to consider, albeit it selectively, that history.

History

[6] The building known as the Burleigh Beach House is located on Crown leasehold land at 43 Goodwin Terrace, Burleigh Heads described as Lot 129 on Crown Plan WD6680 having an area of 1,520m^2 ("the land"). The lease is due to expire on 30 June 2030 and was granted for the purpose of "commercial/business purposes namely for Swimming Pool, Kiosk, Restaurant and associated Health Facility purpose and for no other purpose whatsoever".[3]

[7] Kinami Pty Ltd appealed to the Local Government Court sitting at Southport in 1985 against a refusal by the GCCC to approve an application for permission to construct a single storey building for the purpose of a restaurant on the land. Row DCJ, who constituted the court, in his reasons for decision noted that:

> "The subject land is the site of the Burleigh Heads swimming pool and is located on the ocean to the immediate south-east of the patrolled area at Burleigh Heads surfing beach. The subject land is presently occupied by a swimming pool complex that was for the most part constructed a number of years ago. The pool area was renovated in 1982-83 and the pergola area and bar-b-que constructed. The Appellant acquired the lease of the property late in 1980. At present and for some time past, the swimming pool has been closed. The buildings have severely deteriorated, being the subject of considerable vandalism. The subject land is zoned Public Open Space (General) within the relevant Town Planning Scheme. In that zone the proposed use for the purpose of a restaurant is a purpose for which buildings or other structures may be erected or used or for which land may be used only with the consent of the Respondent under and pursuant to Column IV of the Table of Zones."[4]

[8] Objections from 561 persons were received relating, *inter alia*, to traffic and noise, particularly to the residents in the apartment blocks behind the proposed building, as well as objections to the further development of the foreshore. Row DCJ noted that the proposal included demolishing the dilapidated buildings on the site and erecting a single storey, sloped roof building. His Honour granted the appeal and adjourned the further hearing until the parties could settle the detailed conditions to which the approval would be subject.

[9] On 7 March 1986 Row DCJ made formal orders[5] subject to certain conditions.[6] Relevant, for this application, are the following as issued by the GCCC:

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3 AR 543, 544.
4 AR 902-903.
5 AR 1189.
6 AR 911-14.

"TOWN PLANNING PERMIT NO. 9/225

In pursuance of a Local Government Court Order dated 7th March, 1986, the Council of the City of Gold Coast hereby approves an application to erect a Restaurant on land described as … subject to the following conditions:

(1) Payment to Council of $126,000.00 in lieu of twenty-eight (28) off-street carparking spaces …

(3) The roof line of the proposed restaurant is to be amended to reduce its height so as to minimise the visual impact of the development to the reasonable satisfaction of the Chief Inspector.

(4) The swimming pool facility is to be maintained for public use.

…

(6) Submission to and approval by Council of satisfactory building plans and specifications in accordance with the Building Act, Council's By-laws where applicable and the City of Gold Coast Town Planning Scheme and generally in accordance with the plan approved in this Town Planning Permit and the conditions of this Permit. The building is to be constructed in accordance with the approved building plans prior to the commencement of the use approved in this Town Planning Permit.

…

(12) Any lighting device is to be so positioned and shielded as not to cause any glare nuisance to any nearby residential occupation or passing motorist.

(13) The premises are to be fully air-conditioned and sound-proofed to the reasonable satisfaction of the Chief Inspector.

(14) There is to be no interference with the amenity of the neighbourhood by reason of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit, oil, or otherwise.

…

(28) Restaurant to accommodate no more than 200 people.

...

(36) The approval is only for a restaurant and any discotheque type activity would be subject to consent for indoor recreation and would require a Town Planning Application."

[10] The then developer negotiated amended building plans with the GCCC amongst other things to change the roof from sloping to flat made of cement. The roof, comprising some 400m^2 was referred to as an outdoor "viewing platform" from time to time in the correspondence about the building plans particularly referring to

a glazed balustrade around the roof edge. The concern was principally safety because the roof area extended out over the swimming pool and the GCCC were concerned that glasses should not be able to be balanced on the top of the balustrade. A totally enclosed 1500mm high glazed balustrade with no ledge on top was required and is in place. Approval was also given in 1987 for an increase in the restaurant area to 436.3m^2 from 400m^2 as stipulated originally (noted to be an increase of 3.9%)[7] for which one further car park space contribution was required.[8] A request had been made to extend an outdoor terrace area for restaurant dining. The GCCC responded:

> "… the outdoor terrace area has not been approved for restaurant seating and as this area is in excess of the 5% allowable a [sic] minor modification to the Town Planning approval already granted, the use of the terrace area for restaurant seating will require Town Planning Consent and a further additional carparking contribution."[9]

[11] In 1988 a request to increase the height of the building by one metre to accommodate high seas was considered to be within the existing permit.[10]

[12] In 1990 the then Town Clerk wrote to Linkon Design:

> "… it is confirmed that the outdoor roof terrace area can be used for restaurant purposes without Town Planning Approval or car parking contribution as it does not form part of Total Use Area as defined in the current Town Planning Scheme."[11]

A file note of the same date confirms this (probably first in time):

> "P & D Committee and Ald Ganim agreed that outdoor area could be used for restaurant eating without T.P. approval or additional carparking."[12]

The applicants regard this as a clear intimation that what is proposed for the roof is within the existing approval.

[13] A separate town planning application was approved in 1993 for an additional restaurant on the lower ground floor formerly designated for a gymnasium. The restaurant was to be entirely enclosed by the existing building and similar conditions concerning noise and amenity control to those imposed originally for the restaurant were imposed.[13] The total use area was 390m^2 and required the provision of 26 car spaces.

[14] In 2003 and 2004 respectively approval was given for a material change of use for alterations and additions to the kitchen and for outdoor dining around the pool[14] and covered areas near the pool.[15]

[15] Over the ensuing years the lease changed hands and negotiations were ongoing between the developer for the time being and the GCCC. On 9 July 2009 new stairs providing improved access to the roof area were approved.

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7 AR 915.
8 AR 917.
9 AR 595.
10 AR 918.
11 AR 1315.
12 AR 1316.
13 AR 920-924.
14 AR 931.
15 AR 942.

[16] On or about 20 August 2009 Elsafty Enterprises received a Show Cause Notice dated 14 August 2009 from the GCCC. The GCCC was concerned that the building height with the balustrade exceeded the height permitted under Town Planning Permit No. 9/225. This action was likely in response to complaints about the activity on the roof. At the conclusion of its Show Cause Notice the GCCC requested Elsafty Enterprises to "advise of the proposed/intended useage [sic] of the roof top area".

[17] On 4 September 2009 Mr Martin Roberts, a senior development compliance officer with the GCCC, attended a meeting at the land with the project manager engaged by Mr El Safty in relation to an application to work outside the permitted construction hours of 6.30 am to 6.30 pm Monday through Saturday. The work involved the demolition of part of the existing roof structure by concrete cutting, jack hammering, form work and the pouring of concrete to construct the new stairway located at the main entrance and leading to the roof top. The justification for doing so was to improve access to the roof top to maintain plant and equipment, the existing staircase being too narrow and winding for workplace health and safety purposes. Mr Roberts ordered the work to cease because the intended use of the additional floor space being created was assessable development and it would trigger a material change of use of the premises.

[18] By letter dated 4 November 2009 the GCCC notified Mr El Safty that the Show Cause Notice had been lifted. Mr El Safty replied to the request about "use" by letter dated 28 January 2010[16] drawing attention to the letter of 29 August 1990 and internal memo of the same date, and to the correspondence about the nature of the balustrade to prevent "beer glasses or similar" falling into the swimming pool as demonstrating that there was no contravention of the legislation and no planning permission was required.

[19] After the withdrawal of the Show Cause Notice, the GCCC, through their solicitors, wrote to Mr El Safty on 22 March 2010:

> "Burleigh Beach House – Unlawful use of roof top terrace…
>
> We reiterate to you again that the use of the roof top terrace of the Premises for any use whatsoever will amount to a development offence for the carrying out of assessable development without a development permit [referring to s 578(1) of the *Sustainable Planning Act 2009* (Qld)]. No development approval currently attaches to the land which permits the use of the roof top terrace as you allege. Our reasons in support of this view are set out in further detail below.
>
> Should you proceed to carry out any of the following uses on the roof top terrace as defined by Council's Gold Coast Planning Scheme 2003 (**Planning Scheme**) for:
>
> (a) either a material increase in the intensity or scale of the existing first floor *Restaurant(s)* or a new Restaurant use;
>
> (b) a *Reception Room* (i.e. for the conduct of receptions or functions at which food or drink is served); or
>
> (c) a *Tavern* (which includes bars and non-residential hotels),

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16 AR 774.

> without an effective development permit enabling the use to occur, then we hold instructions to commence proceedings against you and your company, El Safty Enterprises Pty Ltd. Such proceedings will likely be two-fold; seeking urgent injunctive relief in the Planning and Environment Court to immediately cease the use and subsequently in the Magistrates Court for prosecution of the alleged offence."[17]

The writer advised that proceedings would seek declarations as to the lawfulness of the use and consequential orders restraining the use in the absence of an effective development permit and continued:

> "Subject to you considering our representations and taking your own professional advice on the matter, Council encourages you to direct your resources towards engaging in a pre-lodgement meeting to consider your preferred use of the Premise's roof top terrace. If you choose to lodge a development application it will then be assessed against Council's Planning Scheme in accordance with the usual IDAS process under the *Sustainable Planning Act 2009* (Qld)."[18]

Mr El Safty was reminded that the terms of the Crown lease required the land to be used in conformity with the Town Planning Schemes, by-laws and requirements of the GCCC.

[20] Mr Sharpe, a senior planning officer with the GCCC agreed in cross-examination that couples using the roof for "a kiss and an embrace"[19] would not be a material change of use, nor would accessing the roof for maintenance. During the hearing, in exchanges with his Honour, it was suggested by counsel and Mr El Safty that diners venturing up to the roof between courses from the restaurant would not constitute an unlawful use. At the hearing below and on this application the position of the GCCC was that there was no absolute opposition to the use proposed, merely that the applicants were required to go through the usual planning processes as had occurred in the past, for example, for extended restaurant facilities around the swimming pool.

[21] Work continued and it became apparent that the roof was to be used for a bar. Mr El Safty conducted a public inspection of what he proposed with a number of adjacent residents whose accommodation overlooked the building. On 16 September 2010 Mr El Safty introduced the GCCC officers during a visit to the site to Mr Youssef as being involved in the project. Details of the proposals were given about the project: the roof top would be fitted with a bar, lounges, day beds, high tables and bar stools, planter boxes and sails; an entry fee would be charged to ensure that only desirable clientele were attracted. Mr El Safty and Mr Youssef proposed that car parking issues would be resolved by offering valet parking for patrons by the use of the GCCC's library car park after hours. In these conversations Mr El Safty pronounced his belief that approval had been granted to carry out this work under earlier development approvals relating to the premises. A public sign was displayed at the front of the premises which suggested that the public viewing platform had been approved by the GCCC. The photographs in the appeal record show the extensive nature of the proposal for the roof as well as an artist's impression of the completed development.[20]

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17 AR 554.
18 AR 555.
19 AR 119, Trial transcript 1-119.
20 AR 713-14.

[22] On 30 September 2010 the GCCC issued a plumbing compliance notice related to work on the "Sky Bar Terrace". The applicants make much of this notice as indicative of acquiescence but it was conditioned on any other required development permits.[21]

The application for injunctive relief

[23] The GCCC filed its application on 11 November 2010 seeking orders against Elsafty Enterprises, with a return date on 1 December 2010. The GCCC sought a declaration that the proposed use of the roof top was assessable development for which there was no effective permit and unless restrained, Elsafty Enterprises intended to use the roof top for a "Restaurant", "Café", "Reception Room" or "Tavern" within the meaning of those terms in the Planning Scheme. On 29 November 2010 the GCCC filed an application to join Sustainable International Property and to amend the original application on the basis that it proposed to operate the "licensed viewing platform" under the business name "Clique".

[24] On 1 December 2010 Searles DCJ ordered that by 6 December 2010 Elsafty Enterprises file and serve any affidavit material or other statements of evidence on which it intended to rely and set down the two applications for hearing on 9 December 2010, a Thursday. On 9 December, the GCCC was represented by senior and junior counsel. Mr El Safty appeared for his company and Mr Youssef appeared for Sustainable International Property, of which he was the sole director. Mr Youssef had been served with the GCCC's material and did not oppose his company's joinder.

[25] Because of the complaint of apprehended bias manifested by pre-judgment it is necessary to consider in some detail the progress of the application. Counsel for the GCCC read the material on which he proposed to rely after giving an opening. Mr El Safty had advised that he wished all of the GCCC deponents to be present for cross-examination but was able to reduce that number to six. Mr El Safty relied on two affidavits by himself and one by Mr David Ransom, a town planning consultant who had formerly been employed by the GCCC. Mr El Safty indicated that he proposed calling his wife and Mr Youssef to give evidence. The primary judge then asked Mr Youssef:

> "HIS HONOUR: Are you going to present a case, Mr Youssef, or just rely on what Mr El Safty does?
>
> MR YOUSSEF: Depends on the outcome of today, your Honour.
>
> HIS HONOUR: Well, you've got to make a decision.
>
> MR YOUSSEF: Well - - - - -
>
> HIS HONOUR: I mean, if you want to go out and get your own town planner or something - - - - -
>
> MR YOUSSEF: I've got a degree in property and I finished with Majors and Honours and on the Dean's list and I've got [indistinct] To the Future Property Leaders Award from the Property

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21 AR 500.

> Council of Australia national award this year, your Honour. So I think I'm pretty - - - - -
>
> HIS HONOUR: Well, if you're presenting yourself as something like a planning expert Mr Hughes might possibly object to that, but I don't know. We'll face it when we come to it.
>
> MR YOUSSEF: I think it's pretty straightforward, your Honour, if I just pointed it out to Mr Hughes what…"[22]

[26] Mr El Safty then made a preliminary submission to the primary judge seeking to have the application dismissed because, he argued, the GCCC had withdrawn its Show Cause Notice in November 2009. The primary judge explained that although Mr El Safty could cross-examine on the letter withdrawing the Show Cause Notice, the GCCC was not precluded for that reason from bringing the present application.

[27] Each of the GCCC witnesses was cross-examined by Mr El Safty at length. In the course of cross-examination Mr Roberts, a senior compliance officer, was asked whether what was being done on the roof constituted a material change of use. His Honour intervened observing that that was a matter for the court. He then said:

> "I mean, I don't want to stop you if this is leading to some useful outcome... from your point of view, or might."[23]

To this observation Mr El Safty responded that he had made his point. After a further exchange in which Mr El Safty protested that the GCCC was pursuing his enterprise using public resources on a frivolous and vexatious application, his Honour asked why, if it got additional information, it could not pursue the matter. He then added, "I don't want to throw you off your stride"[24], to which Mr Elsafty replied that he was "Okay", that he had asked all the questions he needed and that the witness had been most helpful. After re-examination of Mr Roberts, Mr Youssef indicated that he wished to ask some questions which his Honour permitted. Mr El Safty then sought to ask further questions. His Honour conceded that since he, himself, had asked the witness a question, Mr El Safty could further cross-examine. That further cross-examination extended for some half dozen pages of transcript. Whilst that was occurring his Honour sought to summarise the applicant's position. In that exchange Mr El Safty explained his purpose to which his Honour responded, "So there's some point in this."[25]

[28] The court adjourned at 2.00 pm until 3.00 pm. His Honour had expressed some mild concern that the matter would not finish that day. After lunch Mr El Safty continued his lengthy cross-examination of a witness. At the end of re-examination Mr El Safty had one more question which was permitted. During the cross-examination of Mr Sharp, executive co-ordinator with the GCCC, much discussion ensued about parking requirements at Burleigh Heads. His Honour suggested to Mr El Safty that the applicants were seeking to avoid any further contribution to parking. Mr Youssef then intervened, making reference to certain GCCC internal memoranda. His Honour suggested that Mr El Safty should return to cross-examining Mr Sharp.

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22 AR 34, Trial transcript 1-34.
23 AR 51, Trial transcript 1-51.
24 AR 52, Trial transcript 1-52.
25 AR 84, Trial transcript 1-84.

[29] It can be discerned from the transcript that a cordial tone had prevailed in the court throughout the day and may be exemplified by this exchange after Mr El Safty had been able to produce to the court the hitherto unavailable order made by Row DCJ on 7 March 1986, which the GCCC itself had been unable to locate:

> "HIS HONOUR: Well, I'm sure they've got a dress code that would keep all the surfers out, haven't they? [speaking of the casual dining area]
>
> MR EL SAFTY: Your Honour, I actually surf that point regularly and I can tell you - - - - -
>
> HIS HONOUR: But you don't come in in your boardies, do you? You do?
>
> MR EL SAFTY: Yep. And - - - - -
>
> HIS HONOUR: Even at night?
>
> MR EL SAFTY: Yes. I moved from Brisbane to the Gold Coast for that reason."[26]

After some further light banter his Honour asked Mr El Safty to continue. A little later Mr Youssef asked if he could be excused to go to the bathroom and his Honour asked,

> "Do you trust Mr El Safty to mind the shop while you're gone? I think we'll break the rules and go ahead without him if you feel comfortable about that."[27]

Mr El Safty explained that Mr Youssef had helped him with research and his Honour suggested that he could fill him in, to which Mr El Safty responded, "Promise" and got on with questioning the witness.

[30] In the course of the afternoon it became apparent that the evidence would not finish that day. Senior counsel for the GCCC indicated that he had a commitment in Mackay on the following Monday and Mr Youssef said that he would be in Sydney because he had another development that he wished to attend to. His Honour warned that if he did not continue to participate in the hearing he might have to decide whether the GCCC would continue against Mr El Safty's company and defer the application against Mr Youssef's company. The applicants had been clear to the court that they proposed to continue with their preparations to open the roof for business and had only been prevented from doing so by the weather the Saturday before. His Honour indicated that he wished to conclude the GCCC's evidence that day and asked Mr Youssef, "[W]ell, can you change your plans?", to which Mr Youssef responded, "I'm gonna have to, your Honour". [28]

[31] It then became likely that further evidence could be accommodated that day. His Honour asked counsel for the GCCC, "can you deal with Mr El Safty?" and counsel agreed. His Honour said that he was happy to go on "and even Mr Youssef if it's going to possibly help with next week but it's not going to take you long to put your questions to Mr El Safty."[29] At the end of cross-examination the primary

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26 AR 134, Trial transcript 1-134.
27 AR 135, Trial transcript 1-135.
28 AR 143, Trial transcript 1-143.
29 AR 151, Trial transcript 1-151.

judge invited Mr El Safty to leave the witness box and indicated that the court would hear from Mr Youssef, adding, "at least, get what he wants to give in evidence?", to which Mr El Safty responded, "Unless Mr Youssef has got any questions for me".[30] Mr Youssef responded that he did not.

[32] Not surprisingly, counsel for the GCCC suggested that Mr Youssef would need to return because he had given no statement and he had no idea what he would say. His Honour then suggested that the evidence-in-chief could be adduced and cross-examination take place on the following Tuesday. Mr Youssef intervened and said that he would "rather speak to my lawyers" before he gave evidence but made it clear that he wished to give evidence. His Honour told him that he had tomorrow and suggested that he should have his evidence in affidavit form like Mr El Safty by the end of the weekend. Mr Youssef responded that he would do his best. Mr El Safty explained that Mr Youssef was his second mortgagee and agreed that Mr Youssef should obtain separate legal advice. His Honour observed "I'm not sure whether you're giving evidence for yourself or for Mr El Safty or for both".[31] Mr Youssef indicated that he was unsure and that was the reason he wished to speak to his lawyers. His Honour then directed:[32]

> "…if there's going to be evidence by you that it be provided as a written statement or affidavit by lunch time Monday. I mean, you'll be able to deal with it then. So that gives you tomorrow and the whole weekend and Monday morning …"

[33] Mr Youssef responded that he was busy and would do his best to get it done by Monday. His Honour extended time to 5.00 pm Monday and adjourned until 10.00 am on 14 December 2010. He directed that any evidence from Mr Youssef be made available in writing by 5.00 pm on 13 December 2010. The court adjourned at 6.00 pm.

[34] The matter continued on Tuesday, 14 December 2010 at 11.00 am. Mr NM Cooke QC announced his appearance for the two applicants and sought an adjournment. He told the court that he and his instructing solicitors had received instructions about midday the previous day and they were not prepared to embark on a hearing without proper preparation. Mr Cooke told his Honour that there was a deal of work to be done: obtaining the transcript, documents, approval permits, witness statements, and conferences with witnesses to prepare themselves and their clients for the rest of the trial. Mr Cooke said his client was somewhat "intimidated by the team that he had opposed to him"[33], and thought he should get some legal assistance. His Honour observed that Mr El Safty did not do "too badly". Mr Cooke urged that the status quo be maintained but, on questioning from his Honour, what that entailed was not particularised. After some discussion about the issues his Honour said:

> "I have no idea what the answer is yet. I think it's half a question, Mr Cooke, what use rights come out of the approval in the 1980s."[34]

Mr Cooke responded that the photographs showed that the roof was to be used as "a public viewing area".[35] He said it would not be possible to be prepared for the

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30 AR 167, Trial transcript 1-167.
31 AR 168, Trial transcript 1-168.
32 AR 168, Trial transcript 1-168.
33 AR 172, Trial transcript 2-3.
34 AR 173, Trial transcript 2-4.
35 AR 173.

balance of the hearing within a week with the pressures of Christmas but offered undertakings in terms of the restraint sought in the application. The application sought to restrain the use of the roof for a restaurant, café, reception room or tavern as defined in the planning scheme.

[35] It had become apparent that the applicants proposed to permit the consumption of food and beverages on the roof in a way which did not appear to contradict the planning definitions in any direct way – a cover charge would be imposed for those who wished to go to the roof and that charge would include food and beverages catered for by an external caterer and the licence would be that of the restaurant below. Numbers of up to 250 were mentioned. The applicants were not prepared to give an expanded undertaking not to engage in that kind of activity in return for an adjournment. His Honour was not persuaded that the undertaking offered would provide any assurance to the GCCC that there would not be a large scale use of the roof area associated with the consumption of alcohol and food which would generate substantial noise and demand on parking. His Honour declined to grant the adjournment, noting that the applicants had had adequate notice of the GCCC's attitude since March 2010.

[36] On the refusal of the adjournment Mr Cooke and his solicitor withdrew. His Honour indicated that the matter would proceed. Mr Youssef had not provided any statement as directed. His Honour then said:

> "Well, I think it's reasonable to assume that the evidence is completed, isn't it?"[36]

His Honour invited Mr Youssef to "say something". He said:

> "I would like to, your Honour. I would just like to say that I don't think I was given enough time to sort out my legal representation, and I told you I was in Sydney. The first I heard of this was only a few days before we came to Court last week. We were here until late, 6 – after 6 on Thursday evening. I wasn't able to source my legal representation until – getting all my paperwork and that ready for him, I couldn't get it done before the weekend so the earliest I could see Mr Cooke was Monday. So I don't – I would like to say, your Honour, I'm going to appeal it, whatever the outcome is, because I don't feel that I've had a fair go at this. And I have known of this case for – I've known of it for less than a week. So I don't think it's fair. I don't think I'm getting a fair go at it."[37]

[37] His Honour asked Mr Youssef whether he intended to give evidence as Mr El Safty had done earlier. Mr Youssef said that he did not know because he had no opportunity to take legal advice about whether he should give evidence. He contended that it was "overwhelming" for him and that the courts were overwhelming - "I usually have legal representation to sort this out for me".[38] Mr Youssef again said that he would appeal the decision not to adjourn the application. Again, when his Honour asked him whether he wished to give evidence, Mr Youssef responded that he did not know what he wanted to do. His Honour said he took that as meaning "no" but Mr El Safty indicated that he was relying on evidence that Mr Youssef might give.

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36 AR 197, Trial transcript 2-28.

37 AR 197, Trial transcript 2-28.

38 AR 198, Trial transcript 2-29.

[38] Counsel for the GCCC mentioned that it had been made plain on the previous Thursday, at the conclusion of the proceedings, that if Mr Youssef wished to give evidence a statement was to be provided. Mr Youssef responded that he did not know what evidence the court required of him. His Honour remarked that while he appreciated the time was short, he understood that arrangements had been made which Mr Youssef had accepted as sufficient. The following exchange took place:[39]

> "MR YOUSSEF: I told your Honour that – well, if that's what you're saying, I'm going to have to accept it. I didn't say I believed it was fair. I made it clear to the Courts that I did not believe it was fair. And if that's what you think, I can't overrule your judgment, can I?
>
> HIS HONOUR: Well, I haven't made a judgment yet - - - - -
>
> MR HUGHES: Well, your judgment was - - - - -
>
> HIS HONOUR: - - - - - except – except that it's going to be decided today.
>
> MR YOUSSEF: Yeah, well, your judgment was that I had to have an affidavit in to the other party by Monday, five o'clock. That was your judgment, and I didn't think that was fair."

[39] Mr El Safty complained that Mr Ransom had to leave and he wished to clarify further matters with him. His Honour responded:

> "HIS HONOUR: All right. Well, I know nothing about these legal planning aspects. Mr Hughes will be having to address the Court on that to persuade me that he's got a compelling enough case to take the serious step which he would like the Court to take of stopping a significant commercial activity. I do appreciate the seriousness of what the council's seeking and I'm going to take a properly cautious approach. The mere fact that I refused the adjournment doesn't indicate what final outcomes would be today."[40]

After some further discussion about the terms of the undertaking his Honour said:

> "So there's no point in talking about whether it's going to be adjourned or not, because it isn't. Mr Hughes wants the matter dealt with finally, so if it is and if it goes against you, then as Mr Youssef clearly knows, and I'm sure you do, your remedy is to appeal or seek leave to appeal from the Court of Appeal. And you can apply to the Court of Appeal if things go against you this afternoon to have any injunction that this Court might impose stayed or set aside until the Court of Appeal decide what ought to happen."[41]

[40] His Honour suggested that counsel should make his submissions as it was legal argument and that Mr El Safty and Mr Youssef should listen carefully to see if they could "pick some holes in things he says".[42] Mr Youssef said:

> "Your Honour, I would just like to make a record for the Courts. I don't think this is fair. I disagree with it, and I will be appealing if I don't like what – the outcome of it all."[43]

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39 AR 199, Trial transcript 2-30.
40 AR 200, Trial transcript 2-31.
41 AR 201, Trial transcript 2-32.
42 AR 202, Trial transcript 2-33.
43 AR 202, Trial transcript 2-33.

After counsel was invited to commence his submissions Mr El Safty interrupted to understand "where we are in proceedings now".[44] His Honour answered:

> "We're where we were last Thursday at six o'clock with Mr Hughes about to make the legal argument in support of a proposition that he ought to get the order that he seeks."[45]

[41] The court adjourned at 12.48 pm until 2.30 pm. After counsel had completed his submissions his Honour said, "Yes, Mr El Safty? The floor is yours now."[46] Mr El Safty indicated that he wished to call Mr David Ransom. His Honour demurred because it seemed as though Mr Ransom was to be called to give his interpretation of the provisions in the legislation. His Honour permitted Mr Ransom to give evidence over objection. Before he was called Mr El Safty indicated that his evidence would occupy between 20 minutes and half an hour. Mr El Safty raised his concern that on issues of law the applicants were disadvantaged but his Honour was concerned that Mr Ransom's evidence should be confined to facts. His Honour invited Mr El Safty to call Mr Ransom to give evidence for 20 minutes. Mr El Safty responded that he would appreciate the opportunity to be able to finish his sentences.[47]

[42] When Mr Ransom was employed by the GCCC he had some involvement in the subject building plans. He was involved in the Show Cause Notice proceedings and was asked a number of questions. After some 11 pages of transcript his Honour observed that Mr El Safty had had twice "your 20 minutes" and asked him how much longer he proposed to be. He said that he would be another 10 minutes. His Honour observed, "And you won't go a second after that. All right? Go on".[48] His Honour indicated that many of the observations made by Mr El Safty could appropriately be left to submissions. Mr El Safty indicated that he just needed to ask Mr Ransom three more questions regarding critical matters. The first question was long and his Honour said of that, "Was that one question?"[49] His Honour thought Mr El Safty was wasting time and that he did not want a speech. The applicants complain about this exchange where his Honour appears to be irritated at the meandering style of Mr El Safty against the pressures on time and, against the long examination-in-chief that had already occurred. After an exchange between his Honour and Mr Ransom about matters going to use, Mr El Safty said, "Strictly speaking, I can't ask any more questions, your Honour"[50] to which his Honour responded, "Yes, all right, good". His Honour then indicated that he was going to stop Mr El Safty at that point.

[43] Mr Hughes was then invited to cross-examine. After a relatively brief cross-examination his Honour told Mr Ransom he was excused but Mr Youssef intervened and said that he had "a couple of questions for Mr Ransom", to which his Honour responded, "Well, two questions".[51] Mr Youssef said that he was not going to take long but felt that he had the right to ask those questions and his Honour repeated, "Two questions". With complaints from the GCCC counsel his Honour

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44 AR 203, Trial transcript 2-34.
45 AR 203, Trial transcript 2-34.
46 AR 232, Trial transcript 2-63.
47 AR 234, Trial transcript 2-65.
48 AR 246, Trial transcript 2-77.
49 AR 250, Trial transcript 2-81.
50 AR 252, Trial transcript 2-83.
51 AR 255, Trial transcript 2-86.

observed that it was not helpful to ask questions of Mr Ransom who had not been employed by the Council for 10 years about their processes. Mr Youssef seemed to suggest that he would not waste the court's time by asking any further questions about the balustrade[52] and his Honour excused Mr Ransom.

[44] His Honour invited Mr El Safty to make a closing address "as counsel for the GCCC had done" but Mr El Safty responded that he still wanted to call his wife. His Honour said that he would not permit any more evidence, that it was "absolutely ridiculous". His Honour then said:

> "You know the system. The evidence is called first then we have the legal addresses. You were here last Thursday when it couldn't have been more clear that if Mr Youssef was going to give evidence the Council was entitled to know in advance roughly what he was going to say. You can't just bring surprise witnesses on people like this. I'm not going to allow it. So if you want to make submissions to the Court now is your chance to do that. I'm not going to allow anymore evidence."[53]

[45] Mr El Safty sought a five minute recess which was granted. The court adjourned at 4.51 pm and resumed at 4.59 pm. Mr El Safty commenced his submissions, and as often occurs with final submissions, his Honour probed the propositions being advanced by Mr El Safty. There can be no doubt from reading the transcript that Mr El Safty was confident in his mastery of the material and in the vigour of his belief in his entitlement to use the roof in the way in which he and Mr Youssef wished it to be used based upon the original approval as modified by the GCCC. He demonstrated familiarity with the planning scheme. Mr El Safty's submissions were a long complaint about the perfidy of the GCCC in allowing the lessee of the land, incrementally, to think the objective of a "viewing platform" with the supply of food and drink for up to 250 people could be achieved. His Honour said:

> "HIS HONOUR: Well, you know what they perceived. They perceived you ought to make a development application and - - - - -
>
> MR EL SAFTY: Your Honour, at a cost of a million dollars.
>
> HIS HONOUR: You disagree and now we're working out who's right."[54]

In the course of submissions, his Honour said:

> "No-one – no-one's saying it's not a good and unusual idea – that there wouldn't – wouldn't produce a useful attractive new attraction. No-one is saying that."[55]

[46] Mr El Safty managed to give, without objection, extra evidence about what was proposed for the site in the course of his submissions. After a long exchange his Honour said that Mr El Safty was departing from the issue before the court - whether to grant an injunction. His Honour suggested that Mr El Safty could not take the matter much further:

> "It's essentially what Mr Ransom says. There are two questions, really. Has the Council got a case that there's going to be

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52 AR 257, Trial transcript – 2-88.
53 AR 258, Trial transcript 2-89.
54 AR 273, Trial transcript 2-104.
55 AR 275, Trial transcript 2-106.

> a development offence? Well, that depends on what the existing permits authorise. I've got to make a decision about that. If the Council wins, then the next question is, 'Do I stop you from doing what you want to do because rightly or wrongly, I think it's a development offence?' And there are all sorts of other considerations there about the staff you've engaged and how much money you've spent and whether you appear to be doing the right thing over the years, all that sort of thing. And one – you are spending most of your time, really, saying 'The Court needn't have any concern that if it operates, it would operate in an undesirable way. It would sort of be quiet, peaceful, orderly, and only upset the most unreasonable people'."[56]

Mr El Safty commenced to respond but was interrupted by his Honour:

> "Yes, I know. Well, there's no point in going around and round in circles, saying that again and again. I know that's your case and I have to think about who is right about that, you or the Council."[57]

Mr El Safty concluded his submissions shortly after. His Honour invited Mr Youssef to make submissions. He commenced by saying that he felt that he was not represented properly and had not had enough time to deal with the case: "So I have nothing else to say".[58] His Honour explained to Mr Youssef that if there were an order against Mr El Safty's company only it would be unwise of Mr Youssef to assist in any way in breaching the injunction. When counsel had completed reply his Honour said that he would give judgment at 10 o'clock the following morning and the court adjourned at 6.30 pm.

The decision below

[47] The primary judge gave ex tempore reasons the following morning mindful that both sides were concerned for an early decision. There is no complaint that his Honour overlooked any relevant fact in his careful recital of the history and of the issues. He noted the efforts of Mr El Safty in assembling the necessary documents and added:

> "As it happens they [the applicants] have had greater success in this area than the council; 'freedom of information' possibilities have been resorted to.
>
> This consideration is not solely the reason for an accolade to those gentlemen, it also has an obverse side of giving the court some satisfaction that the respondents – or Mr El Safty's company, at least – are very much on top of the issues, legal and factual, which concern the court."[59]

His Honour dealt with the Show Cause Notice fully and noted:[60]

> "It's true there was some mention in the 2009 events and documents of what might be permissible uses. One can understand the

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56 AR 292, Trial transcript 2-123.
57 AR 293.
58 AR 298, Trial transcript 2-129.
59 AR 1256.
60 AR 1273.

> respondents' – Mr El Safty's company in particular – taking from the 2009 outcome that the council had no issues respecting uses."

But, he added:[61]

> "Any understanding along those lines ought to have dissipated in March 2010 when the council's solicitors sent a detailed letter clearly asserting that the use that appeared to be proposed of the rooftop area was unapproved and unlawful."

His Honour set out passages from that letter. He noted that as a matter of common sense, law and practise in planning it was accepted that there was usually no objection to occasional uses of premises incidental to some authorised use. Thus,

> "… the occasional resort of restaurant patrons to the roof for some satisfying activity while they waited for their next course, for example,"[62]

would be acceptable. His Honour continued:

> "What's proposed for the roof now is, in my view, a totally different case. Mr Sharpe's [sic] evidence was useful in establishing the legitimacy of council concerns as to the impacts of what appears to be proposed for the roof. The specific categories mentioned by him are noise, traffic, demand on parking in Burleigh Heads and light nuisance. I accept that his expertise as a planner and experience in the council qualify him to depose to there for being such legitimate concerns."[63]

[48] Mr El Safty had provided a noise expert's report which acknowledged that what was proposed for the roof, even absent any discotheque, would generate noise at levels of concern to sensitive receptors located across Goodwin Terrace. That expert had proposed that noise attenuation barriers 2.4 metres high could be erected. Mr El Safty claimed some expertise in the area, which his Honour noted, and his assertion that there were alternative means of noise attenuation which would not require such a high barrier. His Honour made reference to the balustrades on which a great deal of reliance was placed by the applicants to indicate permission by the GCCC from the earliest times for roof top activity. He said:[64]

> "Apropos the balustrades, it might be noted that when, over the years, the council has given thought to them, it was determined that for safety reasons the balustrades ought to be narrow at the top so that any patrons there could not place glasses on them which might fall to the injury of persons below.
>
> I agree with Mr El Safty that that is an indication that some use of the roof area which might give rise to those proper concerns was envisaged by council officers, and indeed the council officially. Again, in my opinion, that's a very different thing from saying that the council has in some way become committed to a proposition that it has approved the large-scale use of the roof now envisaged, effectively – doubling of the restaurant … immediately below and of its capacity."[65]

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61 AR 1273.
62 AR 1275.
63 AR 1275.
64 AR 1276.
65 AR 1276-7.

[49] His Honour noted that even if a permit had in some fashion been granted in the past for outdoor activities including what was proposed, provisions in the *Local Government (Planning and Environment) Act* 1990 (Qld) caused any such permit to lapse not later than four years after the commencement of the Act if no use had commenced. His Honour was persuaded that the GCCC was entitled to the relief sought to prevent threatened development offences being committed on the roof.

[50] The primary judge considered the discretionary matters noting the appropriate principles referring to *Mudie v Gainriver Pty Ltd*:[66]

> "The Court's function in determining what is to be done in such cases [where work has been commenced or performed without planning approval] is to perform a balancing exercise with a view to matters of both private and public interest. It is a discretionary power … Certain "guidelines for the exercise of discretion" were formulated by Kirby P. in *Sedevcic's case*, and it is enough to refer to pp. 339-341 of that case and to pp. 259-260 of *Tynan's case* as useful checklists of points that will often need consideration in such matters. Among potentially relevant matters is the aspect of discouraging potential developers from thinking that planning requirements may lightly be disobeyed.
>
> > "Also relevant to the discretion is the 'orderly enforcement' of a 'public duty' to comply with the requirements of planning laws … Another way of putting this is that there is a public interest in upholding the law and seeing that it is obeyed. As Kirby P said in *Sedevcic* (at 340; 365), 'Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy'."[67]

[51] His Honour referred to the applicant's argument that the GCCC, over many years had done much to generate the belief that the roof (which it allowed to be built as a flat roof) could be used for the purposes of the kind now proposed. He outlined the argument that the GCCC had given every appearance of abandoning concerns about use when it withdrew the Show Cause Notice. His Honour referred to the argument that the letter of 30 September 2010 in the form of a compliance permit approving plumbing and drainage work on the roof area and the sinks for the bars, had led to the "inescapable implication" that the GCCC was approving the activities proposed for the roof, or, accepting that appropriate planning permission existed. But his Honour noted that the approval was subject to any other necessary development permits and concluded:

> "I do not accept, at all, the contention that the council has been blowing hot and cold, at least since March 2010 when the solicitor's letter went. It's absurd, in my opinion, to suggest that the compliance permit of 30 September 2009 [sic] can be taken as overriding the council's persistent approach since the letter of 22 March 2010 or before. The letter records the reason for it is Mr El Safty's withdrawal of an undertaking that had been given.
>
> The latest demonstration of the council's determination to prevent the threatened use is its representations by the solicitors to the Office

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66 [2002] 2 Qd R 53 at [13].

67 Per Stein J in *Tynan* at 259-260.

> of Liquor and Gaming Regulation – a detailed letter was sent on 15 October 2010 [sic] urging the Office to withhold any co-operation by way of facilitating what's proposed by Clique on the rooftop."[68]

[52] The primary judge concluded, correctly with respect, that any statements by GCCC officers that what was contemplated by the applicants fell within the original planning permit or was otherwise not opposed, could not prevent the GCCC from performing its statutory duties.[69] His Honour recognised that any representations beyond power could not operate as an estoppel against the GCCC, although he added:

> "I do not doubt that a clear statement by council officer with relevant responsibilities and apparent authority to the effect that, say, no development approval was necessary to implement a use frankly and fully described could well stand in the way of the Council's obtaining from a court with a discretion in the matter orders of the kind sought here."[70]

[53] His Honour noted that the GCCC was late in joining Mr Youssef's company and said:

> "The points made by the respondent which may be seen as relevant to the discretion issue include delay, in particular lateness in respect of the second respondent's joinder. I attempted to explain to Mr Youssef that even if no order were made against his company but one was made against Mr El Safty's, there would be considerable risk in his proceeding to do anything on the roof through Clique which undercut the Court's order against the other respondent."[71]

[54] His Honour paid due regard to what he describes as the "huge amount of money" that had been spent in furthering the roof plans noting that there was no evidence as to what expenditure might have been made before the letter in March was received. He mentioned that Mr Youssef had said that large numbers of staff had been engaged and were ready to start on the day of judgment. His Honour recognised that the injunction, if it went, would lead to a loss of an excellent activity and venue. He observed that some polling had indicated strong community support for the venture; that the applicants had assured the court there was no need to fear that nuisance or disturbance might occur - it would be an orderly operation; and that any complaints ought to be left to the general law about noise abatement and sale of liquor. His Honour acknowledged that Mr El Safty contended that the proposal "ticked every box". The question was not whether the use ought to be successful but whether, without a permit, there should be no use.

[55] His Honour concluded:

> "… there's no ambiguity[72] in the approval which is for a restaurant inside the principal building and not for any large-scale similar activity on the roof of it, approval for any such activity, if there ever had been one, having lapsed in any event.

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68 AR 1280.

69 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 per Gummow J at 208; S*eymour CBD Pty Ltd v Noosa Shire Council* [2002] QCA 446 at [22] per Cullinane J.

70 AR 1281.

71 AR 1281.

72 *Matijesevic v Logan City Council* [1984] 1 Qd R 599 at 605.

> I would be among the first to be extremely reluctant to prevent a worthwhile activity or development, to which considerable resources had been devoted, prevented. Like the community, the court abhors waste. I would be amenable to interim arrangements being made that might permit the activity to go ahead within appropriate parameters if steps were in train to regularise it which, in my view, would certainly be necessary here."[73]

But, his Honour concluded, the applicants were determined to do what they planned and there was no prospect of the parties reaching accommodation. His Honour referred to the sign which was outside the premises on Goodwin Terrace describing what was to take place on the roof as "The GCCC approved Burleigh Beach House public viewing platform …" to enjoy the views "over a relaxing drink and/or light meal between the hours of 10.00 am and 10.00 pm weekdays and to midnight on Fridays and Saturdays"[74], as "blatant" in their confrontation with the GCCC. Mr Cooke complains that this is an example of bias. It is no more than a correct statement given that the applicants were well aware of the GCCC's views that a permit was required.

[56] The primary judge considered the relevant provisions in the legislation and concluded that the proposed use was not a minor change in the scale or intensity of an existing use and the restraint order should be made.

Apprehension of bias complaint

[57] The applicants contend that the primary judge's conduct of the hearing was such as to give rise to a reasonable apprehension of bias in that:

(a) he constantly interrupted the applicants' submissions and examination of witnesses;

(b) he did not inform them at the close of the GCCC's case that they were entitled to present evidence to advance their case;

(c) he refused to allow Mrs El Safty and Mr Youssef to give evidence,

and those defects were such as to constitute a defect in the administration of justice. The complaint is not the refusal to grant an adjournment or a denial of procedural fairness in not giving the applicants an opportunity fairly to put their case (although both Mr El Safty and Mr Youssef made complaint to the court about those matters), but that the conduct of the hearing gave rise to a reasonable apprehension of bias in the form of pre-judgment.

[58] There was no application to the primary judge that he should disqualify himself from continuing to hear and, in due course, to determine the application or, even, at the close of the second day, to disqualify himself from proceeding to determine the matters in dispute between the parties. Mr Youssef possibly came close to doing so when he expressed his discontent at how the hearing had proceeded and determined to appeal any decision. In the grounds of appeal and submissions in support, the applicants make an allegation of pre-judgment. That is because, in refusing the application for an adjournment, interjecting, limiting cross-examination and refusing to allow further witnesses to give evidence in the applicant's case, the applicants contend the primary judge demonstrated a determination not to be persuaded to the applicants' cause.

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73 AR 1284-5.

74 AR 1287.

[59] There was no disagreement about the principles to be applied when one party alleges that a judicial decision is vitiated by the appearance of bias on the part of the pronouncing judicial officer. The test to be applied in Australia:

> "… is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide."[75]

[60] The plurality[76] in *British American Tobacco Australia Services Limited v Laurie* observed, citing *Ebner v Official Trustee in Bankruptcy*[77] and *Forge v Australian Securities and Investments Commission*,[78]

> "It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification."[79]

[61] In *Johnson*, which concerned remarks made in the course of the trial by a Family Court judge about credit, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated:

> "The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial.'"[80]

They then said:

> "Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge[81], the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx."[82]

Their Honours further explained:

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75 *Johnson v Johnson* (2000) 201 CLR 488 at [11], 492; [2000] HCA 48.

76 (2011) 85 ALJR 348; [2011] HCA 2, per Heydon, Kiefel and Bell JJ.

77 (2000) 205 CLR 337 at 344-345, [6]-[7].

78 (2006) 228 CLR 45 at 77, [66]; [2006] HCA 44.

79 At [139].

80 At [12] citing *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, per McHugh JA, adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585 per Toohey J.

81 *Webb v The Queen* (1994) 181 CLR 41 at 73, per Deane J.

82 At [13].

> "Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."[83]

[62] Would, then, a fair-minded lay observer in possession of all the relevant facts have thought that the primary judge was demonstrating that he had pre-judged the issue which he had to decide? It was abundantly clear that the judge had not reached any conclusion on the construction point when he adjourned proceedings on the evening of 14 December 2010. He said so several times and recognised the analysis to be difficult. But did his management of the proceedings tend to gainsay his statements to that effect? Much of the evidence which Mr El Safty (and, in a more limited sense, Mr Youssef) wanted to place before the court went to the discretionary issue as to whether the relief sought ought to be granted. From the applicants' perspective it bordered on arguing that the GCCC were estopped from seeking the relief because of past dealings over the use to which the roof area might be put.

[63] His Honour was appreciative of the industry of Mr El Safty in obtaining the historical documents relative to the application to develop the land. He permitted a lengthy exploration by Mr El Safty of these matters with the GCCC witnesses. The interruptions complained of, when they occurred, were towards the end of cross-examination and, if Mr El Safty explained his purpose in seeking to continue and which appeared to his Honour relevant to the matters in issue, he was permitted to continue. The limitation on Mr Ransom's evidence was an attempt to have Mr El Safty focus his questions on what was relevant. In any event, it was Mr El Safty who said he would be 20 minutes to half and hour not the judge who set that time initially. Mr Ransom had sworn an affidavit as his evidence-in-chief. He was permitted to respond to a great many leading questions which went to the construction of the planning scheme and to give answers about the GCCC practice long before his employment there, an indulgence which would unlikely have been extended had the applicants been legally represented.

[64] The refusal to permit Mrs El Safty to be called when she had sworn no affidavit nor given a statement of her evidence did not speak of pre-judgment. Her evidence would likely only have supported and, perhaps, added to, the evidence already before the court going to the discretionary issues.

[65] The complaint that Mr Youssef was not permitted to be called is, in reality, a complaint about the refusal to grant an adjournment. Mr Youssef did not want to give evidence until he obtained legal advice. Notwithstanding two full working days and a weekend he apparently had not done so until half a day before the resumed hearing. His Honour respected that intimation.

[66] With one or two exceptions, towards the end of the hearing where some mild exasperation at lengthy and unfocussed cross-examination is discernible from the primary judge, the interventions were directed to exposing the issues which had to be decided. His Honour was plainly drawing out the facts and circumstances of

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83 At [13].

relevance with Mr El Safty and seeking to probe the construction point. There can be no doubt, after reading the whole transcript of the proceedings, that Mr El Safty had detailed knowledge of the relevant planning scheme and supporting legislation as well as of the long history of this site. Mr Youssef's self-proclaimed expertise in property matters at the commencement would have conveyed to a fair minded observer that he did not think that he required legal assistance. These men were tertiary educated, commercially astute and experienced developers who, no doubt, from a past course of dealings with local authorities, thought that a satisfactory outcome could be negotiated rather than retaining lawyers when the application was served on them.

[67] Mr El Safty had been on notice for almost nine months that the GCCC had a particular view about the need for a further permit to use the roof in the manner contemplated. At what point Mr Youssef became aware is not clear, but since he (or his company) was, apparently, the source of funds for the fit out on the roof and the proposed operator of the facility it is highly unlikely that he was surprised by the application or, at least, was aware of the issues. That Mr El Safty sincerely held the opinion that the original permit granted in 1986 allowed the use which he and Mr Youssef contemplated does not appear a sound reason for not being adequately prepared to meet the GCCC's case; that Mr Youssef had other developments to consider which distracted him from focussing upon this one was a choice that he made.

[68] Generally, the courts afford self-represented litigants a degree of indulgence and assistance[84] but, as Muir JA observed in *du Boulay v Worrell & Ors*[85], they are as much bound by the rules of court as the represented litigant and those rules seek to facilitate efficient, fair and cost effective litigation. The directions made on 1 December 2010 directed that evidence was to be in affidavit or statement form so far as concerned Mr El Safty. When the proceedings adjourned on the evening of 9 December, if there was any doubt about the issues, and that seems highly unlikely in view of the letter of March 2010 and Mr Youssef's presence at the GCCC officers' meeting at the premises in September 2010, it was made clear that any further evidence was to be in some written form. There was no sense that Mr Youssef did not understand that requirement nor that he did not give these matters any high priority. No lay observer could have doubted that both counsel for the GCCC and the judge afforded an appropriately regulated opportunity to be prepared for the resumed hearing four days later.

[69] Finally, the earnest attention to the issues by the primary judge set out very fully in a lengthy ex tempore judgment given the following morning after a late sitting demonstrates appropriate even handedness. A fair minded lay observer would not, at any point in the proceedings, have thought that the primary judge did not bring an impartial and unprejudiced mind to the resolution of the question which he was required to decide.

[70] There is no prospect of success on this ground.

Discretion

[71] The appellants assert that the primary judge did not perform the balancing exercise required.[86] The applicants contend that his Honour reversed the onus of proof,

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84 *Bhagat v Global Custodians Ltd* [2002] FCA 223.

85 [2009] QCA 63.

86 *Mudie v Gainriver Pty Ltd* [2002] 2 Qd R 53 at [13].

requiring the applicants to satisfy the court that the relief sought by the GCCC ought to be refused and gave "overwhelming influence" to the respondent's submissions. It is the case that at the very end of his Honour's reasons he said:

> "The respondents haven't satisfied the court that relief ought to be refused to the council on a discretionary basis."

That was said in the context of his Honour's conclusion that the GCCC had adduced sufficient evidence to demonstrate that approval was required and, therefore, issues of acquiescence and hardship were evidentiary matters for the applicants to raise sufficiently.

[72] A diligent consideration of the primary judge's reasons demonstrates plainly that his Honour did engage in weighing the relative arguments advanced by the parties and, indeed, gave particular prominence to those of the applicants. And it was not want of balance which caused his Honour to describe the applicant's sign outside the premises as "blatant" in their confrontation with the GCCC. The sign was a very strong assertion that they had GCCC approval in the face of the very firm view that a further approval was necessary.

[73] His Honour dealt carefully with the issue of acquiescence, a matter of primary importance to the applicants. His Honour acknowledged that the withdrawal of the Show Cause Notice might have led Mr El Safty to think that the GCCC would no longer pursue his company about the proposed use of the roof. But, as his Honour noted, by March 2010 the applicants, or at least Mr El Safty, could have been under no illusions about the GCCC's attitude. And that was nine months before the application was brought.

[74] The applicants' allegation of disregard for the hardship they would suffer if they were compelled to give up their project was acknowledged. The applicants criticise him for refusing to allow Mrs El Safty or Mr Youssef to be called at the end of the hearing, who, it is speculated, might have provided some figures about expenditure prior to March 2010. That evidence was not opened and no schedule was offered to the other side which would justify that submission.

[75] The primary judge approached the balancing exercise carefully and appropriately. Throughout he was open to the parties negotiating about terms which did not include the serving of food and drink to a large number of patrons on the roof.

Construction

[76] The applicants criticise the primary judge's approach to the construction of the relevant legislation and planning scheme. They contend that "the premises, namely the building, was approved pursuant to an Order of Judge Row for restaurant use under the 1982 Planning Scheme"[87], and that

- the building approvals envisaged the ancillary use to the restaurant of the roof for serving drinks and cocktail food because building includes the roof;

- on 29 August 1990 the Planning and Development Committee of the GCCC resolved that the roof top could be used for restaurant eating without town planning approval or additional car parking and this was a correct view; and

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87 Written outline para 5.1.

- the "Total Use Area" definition was the same in the superseded scheme as at present and excludes an open roof.

[77] By Town Planning Permit No. 9/225 the GCCC approved the application "to erect a Restaurant" on the land subject to conditions including satisfactory building plans. The primary permit was not a building approval in which a restaurant would be housed. As submitted by Mr Hughes, the building plans, eventually approved, provided a place for a restaurant in a completely enclosed area of approximately 400m^2 immediately below the roof, air conditioned and sound proofed.

(i) Ancillary use

[78] "Use" is defined in the *Sustainable Planning Act* 2009 (Qld) as:

> "in relation to premises, includes any use incidental to and necessarily associated with the use of the premises."

"Premises" is defined as "(a) a building or other structure; or (b) land, whether or not a building or other structure is situated on the land". In *Boral Resources (Qld) Pty Ltd v Cairns City Council*[88] it was contended that gravel crushing was a use incidental to and necessarily associated with the lawful use of gravel extraction. The definition of "Use" in s 1.4 of the *Local Government (Planning and Environment) Act* 1990 (Qld) was relevantly the same as in the *Sustainable Planning Act* 2003 (Qld) (and in the *Local Government Act* 1936-1985). The court said:[89]

> "The present case should be distinguished from one where a challenged process could be regarded as inevitably involved in a permitted use. Also, there could be a case of a different kind where there exists only one significant use and a further use only arguably and insignificantly present so that it might be regarded as no more than merely technically in existence. The process of screening and crushing which the appellant voluntarily proposes to conduct as an additional process here, has a character quite different from those just described. It would be a process difficult to place within the ambit of use embraced within the definition in s. 1.4 as one "*necessarily* associated" with another use of extraction even if it can properly be described as "incidental" to it."

[79] The applicants contend that the proposed roof top use is "necessarily associated with" the Break Point Restaurant to provide the drinks and pre-prepared snack food in an extended liquor licensing area. In the 1982 Town Planning Scheme for City of Gold Coast a "Restaurant" was defined as:

> "Any premises used or intended for use as a restaurant for the regular supply to the public of substantial meals at which the persons partaking thereof are seated at a table."

It is not materially different in the 2003 Planning Scheme except the meals served are no longer to be "substantial"[90] and the patrons need not be seated. There is nothing about the proposal for upwards of 250 people on the roof engaging in the consumption of food and liquor purposes with music[91] which is *incidental to* the

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88 [1997] 2 Qd R 31.

89 At 35.

90 AR 815.

91 Mr El Safty's evidence was that those who booked the roof top for, for example, a wedding reception would provide their own DJs.

operation of the restaurant. Nor is it *necessarily* associated with the restaurant. What is proposed is a separate facility, not the stroll up to the roof with a glass of wine (with or without the plates of tapas) to look at the view between courses from the restaurant below mentioned by Mr Cooke.

[80] There had been some suggestion that what was envisaged as a viewing platform was, in truth, within the concept of "Outdoor Recreation". Under the Planning Scheme in 1982 such a use was assessable and had not been included in the application before the Local Government Court. A "Reception Room" was defined in 1982 as:

> "Any premises used or intended for use for the holding of receptions or functions at which food and/or drink is served;
>
> The term does not include a restaurant, indoor recreation or hotel as herein defined."[92]

Such a use also required the consent of Council. It was not sought or granted in the 1985 application.

(ii) Material change of use

[81] "Material change of use" is defined in s 10 of the *Sustainable Planning Act* 2009 (Qld) in relation to premises:

> "(a) generally –
>
> (i) the start of a new use of the premises; or
>
> (ii) the re-establishment on the premises of a use that has been abandoned; or
>
> (iii) a material increase in the intensity or scale of the use of the premises."

Mr Hughes contends that what is proposed falls within s 10(a)(i) or (iii).

[82] The Burleigh Local Area Plan Table of Development for Precinct 6 – Public Open Space[93] under "A: Material Change of Use" provides as exempt "**Minor Change** in the scale or intensity of an existing lawful use" and as "Impact Assessable":

> "Cafe
> Car Park
> Caravan Park
> Child Care Centre
> Community Purposes n.e.i
> Ecotourism Facility
> Indoor Recreation Facility
> Outdoor Sport and Recreation
> Restaurant"

[83] In Part 6 Division 1 Chapter 2 s 7.6.1 under "Material Change of Use" is:

> "…Any use, not listed in Section A of the Table of Development, should be considered undesirable or inappropriate in the LAP or LAP precinct to which the Table of Development applies.
>
> Any Material Change of Use not individually listed in the relevant Table of Development will be treated as an impact assessable development …"[94]

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92 AR 889.
93 AR 858.
94 AR 847.

The intent for Public Open Space in Precinct 6 contains the following:

> "The intent for these areas in public ownership is to maintain and enhance the existing recreational, environmental and community service uses accommodated in these reserves. It is intended to better integrate the public reserves with surrounding areas in terms of landscaping and built form. However, no further intrusion of commercial uses into this precinct will be supported."

[84] In Part 4 "Minor Change in the Scale or Intensity of an Existing Use" means:

> "**Minor Change in the Scale or Intensity of an Existing Use**
>
> A change in the intensity or scale of an existing use that does not exceed any of the following:
>
> - the limits expressed in the approved Plan of Development (or approved Management Plan) for the premises, where applicable;
> - an increase of 25m^2 of total use area;
> - an increase in the number of separate tenancies occupying the premises; and
> - any extension of commercial operating hours on the premises, into and within the period between 7pm and 7am on any day."

"Total Use Area" is defined as:[95]

> "The sum of all the areas (exclusive of all walls and columns) of all storeys of a building which are used or intended for use for a particular purpose, plus any other area of a site which is used, or intended to be used, for the same purpose. The term does not include:
>
> - areas (inclusive of all walls and columns) of any lift wells, lift motor rooms, air conditioning and associated mechanical or electrical plant and equipment rooms;
> - areas of any staircases;
> - areas of any common foyer where these are not being used for commercial or retail purposes;
> - areas of any public toilets;
> - areas of any staff toilets, washrooms, recreation areas and lunchrooms, provided that such areas are not open to persons other than staff; and
> - areas used for the access, parking and associated manoeuvring of motor vehicles."

[85] "Storey" is defined:[96]

> "That space within a building which is situated between the floor of one level and the floor of the next level above, or if there is no level above, the highest point of any impermeable ceiling above. The term includes any useable space on the roof area covered by impermeable material. For the purposes of calculating the number of storeys to determine compliance with the Planning Scheme, or sections which

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95 Chapter 3 Explanatory Definitions, AR 836.

96 Chapter 3 Explanatory Definitions, AR 834.

> control the height of any building, the number of storeys (excluding the ground floor storey) shall be determined either as:
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> - the actual number of spaces between levels;
> - the number of storeys calculated by dividing the distance in metres or part thereof between the top of the floor of the first storey and the top of the ceiling of the topmost storey by:
>
> (a) three metres in the case of a residential use;
> (b) four metres in the case of a non-residential use;
>
> whichever is the greater plus the ground floor storey. Any fraction, which results from the above calculation, shall constitute a storey …"

[86] For the purpose of the application, the area of the roof is understood to be 400m^2. The allowable extra area to fall within the description "minor" is 25m^2. The applicants contend that on a proper construction of the Planning Scheme and its definitions the flat roof of the building would not be included in the calculation of the Total Use Area. It is not a "storey" because it is not covered. If it is relevant, "Gross Floor Area", excludes "roof" from its calculation. Accordingly, they argue, the proposed use of the roof would fall within the definition of "Minor Change" and is exempt from development approval. Mr Hughes directs attention to the balance of the definition of "Total Use Area" – "plus any other area of a site which is used, or intended to be used, for the same purpose". "Site" is[97] "Any land on which development is carried out, or is proposed …" It is not immediately attractive to include the roof of a building as "any other area of a site". I would conclude that the applicants are correct in arguing that the roof area does not exceed the allowable margin of total use area. But that is not the true issue.

[87] What is proposed is the start of a new use of the premises.[98] It may be characterised as a "reception room"[99] or as a "restaurant". If the latter, it is a new restaurant. It would be an absurd result from a planning perspective if there were an existing lawful use of an area in a building as a restaurant, that that approval extended to any other restaurant which may be commenced subsequently in another part of the building. In the past, in this building, approval has been obtained to start a new restaurant.

[88] If the proposed use is as a "Public Viewing Platform" that would not be a change in the intensity or scale of an existing permitted use of the premises but "the start of a new use of the premises". The plan to have the restaurant provide the food and, in the interim, liquor for reward would involve a change in the scale of the existing restaurant use that exceeded "the limits expressed in the approved Plan of Development".[100] Because Mr Youssef's company is to operate the roof facility this would increase the number of separate tenancies occupying the premises. As to the latter, the applicants submit that they would make other arrangements if that were an impediment. There was no evidence as to whether the proposed hours of operation aligned with the restaurant.

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97 Chapter 3 Explanatory Definitions, AR 834.

98 *Sustainable Planning Act*, s 10(a)(i) – *material change of use*.

99 "Any premises used, or intended to be used, for the conduct of receptions or functions at which food or drink is served. This term does not include a Restaurant, Indoor Recreation, Tavern, Resort Hotel or Cafe" – 2003 Planning Scheme.

100 AR 813.

(iii) The 1990 "approval"

[89] The applicants contend that the permit granted to them in 1986 sufficiently encompassed the activity and the use contemplated on the roof. If the letter of 29 August 1990[101] constituted approval it has lapsed because there was no use of the roof in the four years after the commencement of the *Local Government (Planning and Environment) Act* 1990, and by virtue of s 8.10(8B) of that Act since no relevant use had commenced it had lapsed.

[90] On the construction issue, there are no prospects of success.

Conclusion

[91] There are no prospects of the applicants succeeding on any of the grounds which they have raised in their amended notices. An appeal would be fruitless and thus the application for leave to appeal should be refused.

[92] Had the applicants established a reasonable apprehension of bias in the primary judge, even if their other grounds were likely to be successful, the proceedings would likely have been restored to the Planning and Environment Court for consideration anew before another judge.[102] This is because the appearance of neutrality in the judge is fundamental to any system of justice and any departure from it will undermine any reliance on any part of that hearing and especially where, as here, there is complaint that the applicants were not permitted to put their case fully.

Orders

[93] The orders I would make are:

1. Application for leave to appeal refused.
2. The applicants pay the respondent's costs of the appeal to be assessed on the standard basis.

[94] **MARTIN J**: I agree, for the reasons given by White JA, with the orders proposed by her Honour.

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101 AR 1315.

102 *Hills v Chalk* [2008] QCA 159.