

# SUPREME COURT OF QUEENSLAND

CITATION: *Body Corporate for Cherwood Lodge CTS 20711 v Christophi* [2021] QSC 270

PARTIES: **BODY CORPORATE FOR CHERWOOD LODGE CTS 20711**  
(Plaintiff)  
v  
**TALAAAT CHRISTOPHI (ALSO KNOWN AS PETER CHRISTOPHI) BY HIS LITIGATION GUARDIAN MYLES GERARD MURPHY**  
(Defendant)

FILE NO/S: BS No 11181 of 2020

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 20 October 2021

DELIVERED AT: Brisbane

HEARING DATE: 19 October 2021

JUDGE: Bowskill SJA

ORDERS: **Orders to be made in the terms set out in the schedule to these reasons, upon the parties advising of the name of the costs assessor to be inserted in order 2, as required by r 501(3)(a) of the *Uniform Civil Procedure Rules 1999*.**

COUNSEL: M de Waard and B Strangman, for the plaintiff  
AJH Morris QC, for the defendant

SOLICITORS: OMB Solicitors, for the plaintiff  
Australian Law Partners, for the defendant

- [1] The plaintiff (the **body corporate**) commenced proceedings in the Magistrates Court at Southport (proceedings M362/2017) on 15 March 2017 seeking to recover from the defendant (**Mr Christophi**) outstanding body corporate contributions said to be owed by him.
- [2] In the amended statement of claim filed in that proceeding on 7 October 2020, the total amount of the claim was \$106,275.90, comprising:
- (a) \$28,228.23 in outstanding contributions (between June 2012 and February 2017);
  - (b) \$12,181.72 penalty interest; and
  - (c) recovery costs of \$65,865.95, particularised in paragraph 13 of the amended statement of claim as recovery costs having been incurred since 14 June 2012, by reference to specific invoices issued by Success Law and OMB Solicitors.

- [3] Also on 7 October 2020, a summary judgment application was filed by the body corporate in the Magistrates Court proceedings.
- [4] In September 2016, separate proceedings were commenced in the District Court by Mr Christophi seeking relief against the body corporate in the form of various declarations including as to the inability of the body corporate to recover “recovery costs” and interest, as well as unpaid contributions incurred before a particular date. This proceeding was transferred to the Supreme Court in October 2016, and given file number BS 11663/16.
- [5] It appears from file BS 11663/16 that nothing happened in respect of that matter between December 2016 and July 2020. It appears that may have been because Mr Christophi was “involuntarily hospitalised” in December 2016, following which he had the Public Trustee, and later others, appointed as his guardian or administrator.
- [6] On 20 July 2020, an order was made by Lyons SJA transferring the Magistrates Court proceedings to this Court, so that they could be heard together with the existing Supreme Court matter. The transferred Magistrates Court proceedings were given file number BS 11181/20.
- [7] By combination of an order made by Brown J on 20 October 2020, and the operation of r 95 of the *Uniform Civil Procedure Rules 1999* (Qld), an independent solicitor, Mr Murphy, was appointed the litigation guardian for Mr Christophi.
- [8] Both the originating application in the 2016 Supreme Court proceeding and the summary judgment application in the Magistrates Court proceeding came on for hearing before Jackson J on 10 November 2020.
- [9] On 12 November 2020, Jackson J made orders, by consent:
- (a) In proceeding 11181/20, that:
- “1. Judgment be ordered against the Defendant in the amount of \$28,228.23 for unpaid contribution instalments.
  2. Pursuant to r 501 of the *Uniform Civil Procedure Rules 1999* (Qld) (the “UCPR”):
    - (a) Mr Luke Andrew Short, costs assessor, be appointed as Referee to enquire into and report on the following question:

“What are the costs reasonably incurred by the Plaintiff, pursuant to s. 145 of the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld), in recovering the amount identified in Order 1?”
    - (b) Mr Short conduct his enquiry and make his report adopting the procedures set out in Chapter 17A, Division 3 of the UCPR, with such modifications as he considers necessary; and

(c) The remuneration of Mr Short be paid equally between the Plaintiff and the Defendant.”

(b) In proceeding 11663/16, that:

- “1. The Originating Application filed 22 September 2016 be dismissed.
2. Each party bear their own costs.”

[10] In submissions on behalf of the body corporate, in support of its summary judgment application, it was said that the body corporate did not on that day seek an order for the amount of the recovery costs claimed (then, \$65,865.95) but instead submitted it would be appropriate for the Court to order an assessment of the body corporate’s reasonable recovery costs to be assessed pursuant to s 145 of the *Body Corporate and Community Management (Standard Module) 2008* (Qld). I infer the claim for penalty interest was abandoned by the plaintiff.

[11] Following the order made by Jackson J on 12 November 2020:

- (a) on 16 February 2021, Mr Christophi’s solicitor provided submissions to Mr Short;
- (b) on 25 February 2021, the body corporate’s solicitor provided submissions to Mr Short;
- (c) by letter dated 30 March 2021, addressed to OMB Solicitors (the solicitors for the body corporate), Mr Short provided his report, setting out his opinion as to the reasonable recovery costs; and
- (d) on 19 April 2021, Mr Short’s report was provided to Mr Christophi’s solicitor (I infer, by the body corporate’s solicitors).

[12] The process adopted by Mr Short appears to have been undertaken without regard to the fact that he was appointed as a referee under r 501 of the UCPR to conduct an inquiry into the question the subject of order 1, and prepare a report to the court on the question. He did not provide a report to the court (cf r 501(1)(b) and r 505B(2), which requires the referee to file the report in the court). Rather, he provided a letter to the body corporate’s solicitors.

[13] In his letter dated 30 March 2021, Mr Short expressed the opinion that the costs reasonably incurred by the body corporate in recovering the amount of the unpaid contributions, under s 145 of the 2008 Regulation, was \$205,799.90.

[14] It may immediately be observed that the costs assessed by Mr Short far exceed the costs claimed, in the amended statement of claim filed in October 2020, by about \$140,000.

[15] On 6 October 2021, Mr Christophi, by his litigation guardian, filed an application seeking orders:

- (a) first, that pursuant to r 505D(1)(a) of the UCPR, the decisions, opinions and findings contained in the report of Mr Short, dated 30 March 2021, be rejected in its entirety; and
- (b) secondly, that pursuant to r 505C(c) and r 501 of the UCPR:

- (i) the Court remit the whole of the question contained in Jackson J's second order made on 12 November 2020 to the next available independent costs referee, from the Register of Approved Costs Assessors;
- (ii) the independent costs referee conduct their enquiry and make their report adopting the procedures set out in Chapter 17A, Division 3 of the UCPR; and
- (iii) the costs of the independent costs referee be paid equally between the parties.

[16] On 14 October 2021, the body corporate filed a competing application, seeking orders that:

- (a) all decisions, opinions and findings contained in the referee's report of Mr Short be accepted by the Court, pursuant to r 505D(1)(a) of the UCPR; and
- (b) judgment be entered against the defendant for the amount of \$205,799.90 for costs reasonably incurred by the body corporate, as assessed by Mr Short, pursuant to r 505D(1)(c) of the UCPR.

[17] Both applications came on before me for hearing on 19 October 2021.

[18] Having considered the written submissions of both parties, and commenced to hear oral submissions, it became quickly apparent to me that there were a number of reasons why the decision, opinion and findings in Mr Short's report should not be accepted. Those reasons include:

- (a) on its face, as an assessment of the costs reasonably incurred by the body corporate in recovering unpaid contributions of \$28,228.23, the amount of \$205,799.90 is somewhat staggering – even more so, when compared with the amount which was claimed in the amended statement of claim filed just one month before the summary judgment application was heard by Jackson J (\$65,865.95), which was particularised by reference to what appear to be actual invoices issued;
- (b) it is not clear from Mr Short's report what costs he included within the scope of his inquiry:
  - (i) the relevant costs to be assessed were the reasonable costs incurred by the body corporate in recovering the amount of the unpaid contributions the subject of the judgment given by Jackson J on 12 November 2020 – that is, the amount of \$28,228.23, the subject of Magistrates Court proceedings M 362/2017 (which was then transferred to this Court and given file number BS 11181/20);
  - (ii) however, it does not appear from his report that Mr Short confined himself to consideration of those costs (this is particularly relevant in the present case, because there appears to have been a somewhat tortured history of litigation between the body corporate and Mr Christophi, with various other proceedings dating back to 2005);
  - (iii) for example, the subject line of Mr Short's letter dated 30 March 2021 refers to both the Supreme Court proceedings 11663/16 and 11181/20 – but the

parties were ordered to bear their own costs of proceeding 11663/16, and so this should not have played any part in Mr Short's considerations;

- (iv) for another example, the Success Law invoices Mr Short refers to at p 3 of his letter includes invoices that were not referred to in paragraph 13 of the amended statement of claim, and there is no explanation as to whether or not, or how, the additional invoices relate to the costs of recovery of the unpaid contributions the subject of the relevant proceedings. In fact, Mr Short says in his report that there is no costs agreement, disclosure notice "or any other document that I can rely upon to ascertain how the costs of Success Law have been claimed", but he has proceeded to conduct the assessment in any event, on the assumption (I infer) that the costs claimed relate to the relevant proceedings;
- (v) the same point can be made in relation to the OMB invoices referred to at pp 4-5 of the letter, that is, that Mr Short has included a number which were not part of the body corporate's claim.
- (c) although Mr Christophi's solicitor wrote to Mr Short, on 19 April 2021, asking him to provide copies of the Success Law and OMB tax invoices referred to; to clarify whether he had included costs associated with proceeding BS 11663/16 in his assessment; and to explain his reasoning for adopting the Supreme Court scale of costs rather than the Magistrates Court scale, no response was received from Mr Short; and
- (d) the reasons given by Mr Short in the letter of 31 March 2021 do not adequately explain the approach he has taken to the assessment, in light of the competing submissions provided to him by each of the parties (including, for example, as to the inclusion of costs associated with the attendances on Mr Christophi's mortgagee – a matter challenged by Mr Christophi's legal representatives as not properly part of the reasonable costs of recovery of the unpaid contributions<sup>1</sup>).

[19] At the hearing on 19 October 2021, having formed the view that the decision and opinion contained in Mr Short's report should not be accepted, I questioned the parties as to the logic and reasonableness of continuing to spend considerable amounts of money fighting about this issue, in the context of a judgment having been obtained for unpaid contributions of just over \$28,000. I invited the parties to consider whether it was not possible for them to agree upon an amount as the reasonable costs of recovery, to avoid the need to embark on a further assessment process, with the attendant costs associated with that process (which of course are not limited to the assessor's fee, but include the respective solicitor's fees as well).

[20] Unfortunately, I was informed no agreement could be reached in that regard. However, counsel for the body corporate did inform me that he now had instructions to consent to orders in terms of paragraphs 1 and 2(a), (b) [with one change] and (c) of Mr Christophi's application, as well as that the body corporate pay Mr Christophi's costs of the application.

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<sup>1</sup> This, and a number of other issues are the subject of criticism in an affidavit of Mr Paul Cameron, a legal costs consultant, relied upon by Mr Christophi.

- [21] I am satisfied it is appropriate to make orders generally in terms of those sought by Mr Christophi in his application, with some variations. The first is that I propose to articulate the question very specifically, and expressly order that the scope of the inquiry is limited, so that there can be no doubt about the costs the subject of the proposed assessment. That ought to have been apparent from the wording of the question in order 2(a) made on 12 November 2020 – which referred to the costs incurred “in recovering the amount identified in order 1”. But given what has transpired, I consider it appropriate to be even more specific, by confining the scope of the inquiry to the recovery costs claimed in paragraph 13 of the plaintiff’s amended statement of claim, filed on 7 October 2020, and any further costs incurred in recovering the amount of \$28,228.23 in the period from 7 October to 12 November 2020 (the date the summary judgment application was heard). This limitation is appropriate because it is reasonable to assume that, in filing its amended statement of claim on 7 October 2020, what appeared in paragraph 13 of that document comprised the recovery costs incurred up to that date. The question for the costs referee is the reasonableness of those costs (and any further costs incurred from 7 October 2020 up to the hearing of the summary judgment application).
- [22] The change sought to paragraph 2(b) is to incorporate the words which appeared in Jackson J’s order 2(b), so that the order would read:
- “the independent costs referee conduct their enquiry and make their report adopting the procedures set out in Chapter 17A, Division 3 of the UCPR, with such modifications as he considers necessary.”
- [23] The addition of the underlined words was opposed by counsel for Mr Christophi, on the basis of a submission that the previous assessor had failed to afford procedural fairness to the parties by failing to give them an opportunity to be heard in respect of their competing contentions, and failing to give adequate reasons, and therefore it is not appropriate to contemplate modification of the procedures by the new assessor.
- [24] Relevantly, the procedure on a costs assessment is dealt with in r 720 of the UCPR (which falls within chapter 17A, division 3), with rules 716, 717, 719 and 720 also being relevant. Rule 720(1) and (2) give a costs assessor a broad power to decide the procedure they will follow, provided that the procedure is:
- (a) appropriate to the scope and nature of the dispute and the amount in dispute;
  - (b) consistent with the rules of natural justice; and
  - (c) fair and efficient.
- [25] Accordingly, in my view, the added words “with such modifications as he [or she] considers necessary” are not necessary, because the procedures to be adopted are in any event a matter for the assessor, subject to the express terms of r 720.
- [26] However, within chapter 17A, division 3, there are also other rules, which set out principles to be applied to an assessment, as opposed to procedure. In my view, it is appropriate that the order differentiate between these two, and record that the principles are to be applied to the extent they are relevant. In addition, I consider it appropriate to direct that the costs assessor has the powers otherwise conferred on an assessing registrar, under r 714(e) and (f), of directing or requiring a party to produce documents and giving directions about the conduct of the assessment.

- [27] In addition, I consider that one further addition should be made to the order, to clarify the procedure to be adopted, because there could be some room for confusion as between r 503 and r 720 of the UCPR. Rule 503 deals with the conduct of an inquiry before a referee appointed under r 501. But in my view the procedures contemplated by r 503(1) are not necessary or appropriate given the scope of the inquiry contemplated in this case. That was very likely the reason why the orders made on 12 November 2020 included order 2(b), to clarify the procedure which does apply. But I think it would be beneficial to expressly address this in the orders.
- [28] In relation to the costs of the applications, I will order that the body corporate pay Mr Christophi's costs of his application, but only from 13 October 2021 to the date of the hearing on 19 October 2021. I regard that as appropriate, as the application had to be made in any event, but could have been resolved by consent orders, following consideration of the material filed on 6 October 2021 (giving a week for that to occur). Although I endeavoured to see if these costs could be fixed by my order, to prevent even further costs of an assessment, that was not possible as the court was provided only with a verbal "estimate" in an amount I regard as frankly excessive (\$30,000). The body corporate ought to also pay Mr Christophi's costs of its cross-application. In both respects, the costs should be assessed on the standard basis. I am not persuaded indemnity costs are warranted.
- [29] There are a couple of remaining matters that should be mentioned. Mr Christophi has not paid the amount of the judgment debt the subject of order 1 made on 12 November 2020. Mr Christophi also did not pay his half share of Mr Short's fee, as required by order 2(c) made on that day. The body corporate paid that on his behalf, in order to obtain the report of Mr Short. Although I am satisfied that it is appropriate to order the body corporate to pay Mr Christophi's costs of his application, I also consider it appropriate to order:
- (a) that the amount of \$2,725 (representing Mr Christophi's half share of Mr Short's fees, which was paid on his behalf by the body corporate) be deducted from the costs ordered to be paid;
  - (b) that the costs order is not enforceable, and no steps are to be taken to assess the costs, unless and until Mr Christophi has paid to the body corporate the full amount of the judgment the subject of Jackson J's order 1 made on 12 November 2020; and
  - (c) that the body corporate have liberty to apply, on the papers, to vary order (a) above, to also exclude any further amount the body corporate is required to pay, on behalf of Mr Christophi, to obtain the new assessor's report, should he again fail or refuse to do so.
- [30] Lastly, I record that I am concerned that the parties can no longer be said to be conducting themselves consistently with r 5 of the UCPR. Although I will make orders, essentially in the terms of Mr Christophi's application, because:
- (a) I do not think Mr Short's report can be accepted;
  - (b) the parties cannot agree on the amount of the recovery costs; and
  - (c) I am not in a position to determine those costs, on the basis of the material which is before the court,

I strongly urge both parties to adopt a pragmatic approach, consistent with the obligation imposed on them, and on their legal representatives, by r 5 of the UCPR, to limit as much as possible the further incurring of expense in relation to this dispute.



## SCHEDULE

## SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE  
 NUMBER: BS 11181/20

Plaintiff: **BODY CORPORATE FOR CHERWOOD LODGE  
 CTS 20711**

AND

Defendant: **TALAAT CHRISTOPHI (also known as PETER  
 CHRISOPHI) BY HIS LITIGATION GUARDIAN  
 MYLES GERARD MURPHY**

## ORDER

Before: Justice Bowskill

Date:

Initiating documents: Application filed 6 October 2021 (CFI 37)  
 Application filed 14 October 2021 (CFI 41)

## THE COURT ORDERS THAT:

1. Pursuant to r 505D(1)(a) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), the decisions, opinions and findings contained in the report of Mr Luke Short, costs referee, dated 30 March 2021, are rejected.
2. Pursuant to r 505C(c) and r 501 of the UCPR, the following question is referred to [INSERT NAME - see r 501(3)(a) of the UCPR], to conduct an inquiry into, and prepare a report to the court expressing the referee's opinion on, the question:

“What are the recovery costs reasonably incurred by the plaintiff, for the purposes of s 145(1)(c) of the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld), in recovering the amount of \$28,228.23, the subject of the judgment given by order 1 made on 12 November 2020?”

3. Pursuant to r 505(1)(b), the scope of the inquiry the subject of order 2 above is limited to:
  - (a) consideration of the costs reasonably incurred by the plaintiff in recovering the amount of \$28,228.23, the subject of the Magistrates Court proceedings M 362/2017 (transferred to the Supreme Court and given file number BS 11181/20); and

- (b) more specifically, the recovery costs claimed in paragraph 13 of the plaintiff's amended statement of claim, filed on 7 October 2020, and any further costs incurred in recovering the amount of \$28,228.23 in the period from 7 October 2020 to 12 November 2020.
4. Rule 503(1) of the UCPR does not apply to the conduct of the inquiry the subject of order 2 above.
  5. Pursuant to r 505(1)(a) of the UCPR, the Court directs that:
    - (a) the independent costs referee is to conduct their inquiry and make their report adopting the procedures set out in Chapter 17A, Division 3 of the UCPR (in particular, rules 716, 717, 719, 720) and applying the principles, to the extent they are relevant, set out in rules 721-731 (inclusive); and
    - (b) pursuant to r 715 and r 716 of the UCPR, the independent costs assessor has the power to:
      - (i) direct or require a party to produce documents; and
      - (ii) give directions about the conduct of the assessment.
  6. The costs of the independent costs referee are to be paid equally by the plaintiff and the defendant.
  7. The plaintiff's application filed 14 October 2021 is dismissed.
  8. The plaintiff pay the defendant's costs of the defendant's application filed 6 October 2021, incurred in the period from 13 October 2021 to 19 October 2021, and the plaintiff's application filed 14 October 2021, to be assessed on the standard basis, if not agreed, less the amount of \$2,725 (being the defendant's half share of the fees required to be paid by the plaintiff to Mr Short).
  9. Order 8 above is not enforceable, and no steps are to be taken to assess the costs, unless and until the defendant has paid to the plaintiff the full amount of the judgment the subject of order 1 made on 12 November 2020.
  10. In the event that the defendant fails to pay his half share of the costs of the independent costs referee appointed under order 2 above, as required by order 6 above, and the plaintiff is required to pay his share in order to obtain the report, the plaintiff has liberty to apply, on the papers, to vary order 8 above, to also exclude that further amount from the costs recoverable.

Signed: