

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : GUTTA -v- IERINO [2010] WASC 402 (S2)

CORAM : MAZZA J

HEARD : 10-12 MARCH, 31 MAY & 2 NOVEMBER 2010,
8 FEBRUARY & 21 DECEMBER 2011

DELIVERED : 22 DECEMBER 2010

**SUPPLEMENTARY
DECISION** : 1 MARCH 2012

FILE NO/S : CIV 1168 of 2007

BETWEEN : MARIA TERESA GUTTA
Plaintiff

AND

ANTONIO GUISEPPE IERINO
Defendant

Catchwords:

Civil law - Costs orders - Offers to settle not before trial judge - Whether there was an abuse of process in perfecting costs order during conferral - Whether original costs order should be reopened - Whether indemnity costs should be ordered

Legislation:

Rules of the Supreme Court 1971 (WA), O 21 r 10, O 24A, O 43 r 3, O 59 r 9

Result:

Application dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	Ms M L Coulson
Defendant	:	Dr P R MacMillan

Solicitors:

Plaintiff	:	Carlo Primerano & Associates
Defendant	:	Gibson Lyons Lawyers

Case(s) referred to in judgment(s):

Bailey v Marinoff [1971] HCA 49; (1971) 125 CLR 529
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27;
(2006) 226 CLR 256
Burrell v The Queen [2008] HCA 34; (2008) 238 CLR 218
Calderbank v Calderbank [1975] 3 WLR 586
Ford Motor Company of Australia Ltd v Lo Presti [2009] WASCA 115
Gutta v Ierino [2010] WASC 402
Gutta v Ierino [2010] WASC 402(S)
Minister for Education v Klein [2005] WASCA 185(S)
Rogers v The Queen (1994) 181 CLR 251
Smith v New South Wales Bar Association [2002] HCA 36; (1992) 176 CLR
256
St Barnabas Nominees Pty Ltd v Stallard Corp Pty Ltd [No 2] [2011] WASC
289(S)
Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378
Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd [2006] WASC
161; (2006) 33 WAR 1

1 **MAZZA J:** Before me is an application by the plaintiff filed 28 September 2011. As will become apparent, it is of an unusual nature. The principal orders sought by the plaintiff are:

1. The Court uplift and remove from the record of the proceedings the extracted order of the Honourable Justice Mazza made on 6 May 2011, which provides that:

'The Defendant pay the Plaintiff's costs of the action (including any reserved costs), to be taxed if not agreed, on a party/party basis according to the relevant determination or determinations applicable to the Supreme Court' ('the Costs Order').

2. The Costs Order as defined at paragraph 1 above be amended to provide as follows:

'The Defendant pay the Plaintiff's costs of the action, including any reserved costs, to be taxed if not agreed, on an indemnity basis such that the Defendant pay all costs incurred by the Plaintiff except in so far as they are of an unreasonable amount or have been unreasonably incurred.'

2 The application is opposed by the defendant. I have read, in support of the application, the affidavit of her solicitor Carmelo Giuseppe Primerano, sworn 27 September 2011. For the defendant, I have read the affidavits of Timothy Brendan Lyons and Andrea Nicole Lyons, each sworn on 21 October 2011 and a further affidavit from Mr Lyons sworn 30 November 2011. Neither party sought to cross-examine the other on the affidavit evidence.

Background

3 On 22 December 2010 I gave judgment for the plaintiff in her action against the defendant: ***Gutta v Ierino*** [2010] WASC 402. The present proceedings relate to the costs orders that I made on 6 May 2011. I made an order that the defendant pay the plaintiff's costs on a party/party basis. The plaintiff had sought that I make a costs order against the defendant on an indemnity basis. My reasons for making a costs order on a party/party basis are set out in ***Gutta v Ierino*** [2010] WASC 402 (S). These reasons should be read with the reasons I have previously given.

4 In my reasons delivered on 6 May 2011, I made the following observation at [14]:

... The only attempt to settle the matter that I was made aware of was that the plaintiff offered to settle her claim by receipt of a payment of \$45,000 from the defendant. That offer which was made in a letter dated 27 June 2006 was rejected by the defendant.

5 I was only told about the offer of 27 June 2006 and no others by counsel then appearing for the plaintiff. This offer was of no significance to the exercise of my discretion whether or not to order indemnity costs because it was for a sum greater than the plaintiff was awarded in the action, being \$36,487.66.

6 I was not correctly informed about the offers that the plaintiff had made to settle the action. Mr Primerano deposed that other offers to settle were made by the plaintiff well before trial for amounts less than the judgment sum. No mention of these offers was made in the course of any of the oral or written submissions made to me on costs. Clearly then, I was not aware of them.

7 The offers to settle made on behalf of the plaintiff prior to trial, of which I was unaware, are:

1. an offer pursuant to O 24A of the *Rules of the Supreme Court 1971* (WA) (RSC), dated 19 September 2007, in which the plaintiff offered to compromise her claim on the basis that the defendant paid her the sum of \$28,000 (the O 24A offer);
2. a letter by the plaintiff's solicitors to the defendant's solicitors, dated 20 November 2008, which expressly referred to the principles in *Calderbank v Calderbank* [1975] 3 WLR 586 (the Calderbank letter). In that letter, the plaintiff offered to settle the action on the basis that the defendant pay her \$30,000, with no order as to costs. The letter stated that the plaintiff reserved her right to produce the letter at trial in respect of costs and particularly in respect of a claim for indemnity costs. On its terms, the offer lapsed at 12 noon on 28 November 2008.

8 Neither offer was accepted by the defendant.

9 In his affidavit Mr Primerano explained that the offers were not brought to my attention because, by his oversight, he had not told the plaintiff's then counsel, Mr Aristei, about them. This explanation has not been challenged, and accordingly, I accept it. Certainly, there is no evidence which would allow me to find otherwise.

10 By the time I made the costs order, the defendant had filed an appeal against my judgment in the substantive proceedings. On 27 May 2011, the plaintiff filed a cross-appeal in relation to the costs order. On 25 July 2011, the plaintiff filed a notice of discontinuance with respect to that cross-appeal.

11 On 16 August 2011, the parties attended before a registrar to settle the appeal book index in respect of the defendant's appeal. It was noted that the costs order I had made and not been extracted: affidavit Andrea Nicole Lyons, par 3.

12 It is not disputed that on or about 17 August 2011 the parties' solicitors agreed that the plaintiff would extract the costs order. Despite this agreement, the plaintiff did not extract the order. Ms Coulson told me from the bar table, without objection, that at the time this agreement was reached, the oversight was not known. She further said that when she was retained in August 2011 (I infer after the agreement was reached on 17 August 2011) and she became aware of the oversight, she recommended that no steps be taken to extract the order.

13 A letter dated 12 September 2011 was sent to the defendant's solicitors by Ms Coulson's firm, Coulson Legal. This letter makes the following points:

1. as at the date of the letter the costs order had not been extracted;
2. Ms Coulson had been 'instructed to prepare an application to re-visit the costs order ... on the grounds that critical facts were not brought to the attention of his Honour at the time that the costs order was made'; and
3. the 'critical facts' referred to were the O 24A offer and the Calderbank letter.

14 Ms Coulson invited the defendant's solicitor to sign, by close of business on 15 September 2011, a minute of consent orders to provide that the defendant pay the plaintiff's costs of the action on an indemnity basis.

15 Towards the end of the letter, Ms Coulson wrote:

I will telephone you later this week to discuss the application, and to confer for the purposes of O 59 r 9 of the Rules [*Rules of the Supreme Court*].

16 Mr Lyons replied on the same day in these terms:

Prior to taking instructions, I would be grateful if you could advise the following:

1. under which Rule it is proposed that the application to which you refer is to be made; and
2. any authorities supporting the course of action which you propose.

We look forward to hearing from you for the purpose of O 59 r 9.

17 Coulson Legal responded by letter dated 14 September 2011 as follows:

I respond as follows, adopting the same definitions as in my letter to you dated 12 September 2011.

- 1 The costs order has not yet been perfected pursuant to O 43 r 3 of the *Rules of the Supreme Court 1971* (WA), and accordingly it is provisional only.
2. The court has the power to review, correct, alter, modify or withdraw the costs order at any time until it has been perfected. See *Smith v New South Wales Bar Association* (1992) 108 ALR 55; *Norman v Norman* (1992) 6 WAR 372; *Naresh v Millard & Anor* [2004] WASCA 241; and *Hoad v Nationwide News Pty Ltd* (1997) 37 IPR 407.

18 On 15 September 2011, without notice to the plaintiff, the defendant's solicitor filed an engrossed costs order for entry. A perusal of the file shows that the court apparently was not informed by the defendant of the plaintiff's proposed application.

19 On 16 September 2011, the court's order was entered and then authenticated in accordance with O 43 r 3 RSC.

20 Mr Primerano states in his affidavit that on 15 and 19 September 2011, Ms Coulson attempted to telephone Mr Lyons for the purpose of conferring in relation to the proposed application. On each occasion, Mr Lyons was unavailable and a message was left for him to return Ms Coulson's call. Mr Lyons did not return those calls. Mr Lyons' affidavit of 21 October 2011 confirms this.

21 It is accepted by the parties that, on 20 September 2011, Ms Coulson telephoned Mr Lyons and spoke to him for the purpose of conferral. The content of that conversation is not challenged. Mr Lyons told Ms Coulson that he had extracted the costs order.

The parties' submissions

- 22 The plaintiff observed that when the proposed application was brought to the defendant's solicitors' attention, the costs order had not been entered. As such, it was unperfected. It was submitted that at that time an application could have been made by the plaintiff to reopen the costs proceedings to inform me of the O 24A offer and the Calderbank offer. It was argued that this information would have had the likely effect of persuading me to recall my costs order and make an indemnity costs order against the defendant.
- 23 The plaintiff submitted that Mr Lyons' action in extracting the costs order after receiving Coulson Legal's letters dated 12 and 14 September 2011, and during the conferral process pursuant to O 59 r 9 of the RSC, was an abuse of process because, although not inconsistent with the literal application of the procedural rules of court, it was manifestly unfair to the plaintiff and brought the administration of justice into disrepute. I was urged to uplift the extracted order from the file to, in effect, put the plaintiff in the position she would have been prior to the costs order being extracted.
- 24 The plaintiff further submitted that if I find that there was no abuse of process and the costs order was perfected, I may nevertheless vary the costs order pursuant to either O 21 r 10 of the RSC (the slip rule) or the court's inherent jurisdiction. However it occurs, the plaintiff submits that I should, because of the offers order indemnity costs
- 25 On behalf of the defendant, it was submitted that he had the right under the RSC to extract the costs order, and this was particularly so as the plaintiff's solicitor had not complied with his agreement to do so. There was, in these circumstances, no abuse of process.
- 26 The defendant submitted that neither the slip rule nor the inherent jurisdiction of the court should come to the aid of the plaintiff when she failed to put before the court all relevant material in relation to the question of costs. Finally, it was submitted that even if I was persuaded to reconsider the costs orders I made, I should not make an indemnity costs order. The defendant submitted that among a number of factors which should lead me to this decision, was that the rejection of the Calderbank offer was not at the time unreasonable.

Analysis of the submissions

- 27 Order 43 RSC is concerned with the drawing up and the entry of judgments and orders. Order 43 r 1(2) provides that a party having the carriage of the order shall have the first option to enter or extract it, but if that party fails to do so within three days from the making of the order, any other party affected by the order may enter or extract it.
- 28 The plaintiff had the first option to enter the costs order but did not do so within three days of its making. Accordingly, the defendant had the right to extract it at any time after that.
- 29 The defendant was able to have the costs order settled and passed by a registrar, without the knowledge of the plaintiff, by using the procedure set out in O 43 r 10 RSC. This rule allows a registrar, in any case in which he or she thinks it expedient to do so, to settle and pass an order without requiring the parties to attend an appointment and without giving notice to any party. Later in these reasons I will deal with the issue of whether, in the circumstances of this case, this procedure should have been adopted by the defendant. After an order has been settled and passed, it must be filed and once filed, it is duly entered: O 43 r 14 RSC. This process is known as 'perfecting' the order.
- 30 It is common ground between the parties that my costs order was entered and perfected on 16 September 2011.
- 31 The entry of an order is an important procedural step. Prior to an order being perfected, a court may review, correct or alter its judgment at any time: *Smith v New South Wales Bar Association* [2002] HCA 36; (1992) 176 CLR 256, 265. But once an order has been perfected, subject to certain exceptions, which include the slip rule and the inherent jurisdiction of the court, the court that made the order has no power to reconsider or alter it. A party dissatisfied by such an order must resort to any right of appeal that may exist: *Burrell v The Queen* [2008] HCA 34; (2008) 238 CLR 218 [15] and *Bailey v Marinoff* [1971] HCA 49; (1971) 125 CLR 529, 539.
- 32 In light of these rules and the fact that the plaintiff had abandoned her cross-appeal with respect to the costs orders, the entry of the costs orders was very much to her disadvantage. If the argument that the entry of the costs orders was an abuse of process fails, she may, at least, have been deprived of the opportunity of having her application reopened and reconsidered. It may be that the plaintiff will be left with an order for

party/party costs in circumstances where, having regard to the offers to settle, there should have been an order for indemnity costs.

33 The first issue for me to resolve is whether the entry of the costs orders was an abuse of the process of the court.

34 The processes and procedures of a court exist to administer justice. They are not to be converted into instruments of injustice or unfairness: *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378, 393. Thus, inherent in every court is the power to prevent its processes and procedures being abused: *Rogers v The Queen* (1994) 181 CLR 251, 286. The categories of abuse of process are not closed, but two well recognised categories are the use of the court's procedures to unjustifiably cause oppression to a party; or to bring the administration of justice into disrepute. Any procedural step taken in proceedings is capable of being an abuse of the court's process: *Rogers v The Queen* (286), *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256 [15].

35 At the time the defendant's solicitors entered the costs order, the defendant had been put on notice by the plaintiff of her intention to apply to 'revisit' the making of the costs order because that order had not been perfected. Up until then, the defendant had not taken any interest in entering the costs order. From this and the close coincidence between the receipt of Coulson Legal's letters of 12 and 14 September 2011 and the step taken to enter the order on 15 September 2011, I infer that the defendant's solicitor took that step more with the intention of undermining the plaintiff's foreshadowed application than to assist in the preparation of the appeal book.

36 In her submissions, the plaintiff's counsel placed particular emphasis on the costs order being entered during conferral under O 59 r 9 RSC. That rule states:

- (1) No order shall be made on an application in chambers unless the application was filed with a memorandum stating -
 - (a) that the parties have conferred to try to resolve the matters giving rise to the application; and
 - (b) the matters that remain in issue between the parties.
- (2) The Court may waive the operation of subrule (1) in a case of urgency or for other good reason.

37 In her letter of 12 September 2011, the plaintiff's solicitor expressed her intention to confer pursuant to O 59 r 9 before filing any application. The defendant's solicitor in his letter of 12 September 2011 indicated his apparent willingness to confer by ending that letter with this sentence:

We look forward to hearing from you for the purpose of Order 59 rule 9.

38 At the time the costs order was entered, conferral had not taken place in any real sense and it had not been completed.

39 In these circumstances, although the defendant had the right to enter the order, it was unfair for the defendant's solicitor to have done so without first conferring with the plaintiff.

40 The defendant's solicitor having given the impression of wishing to confer, took advantage of the information given by the plaintiff to unexpectedly and without notice, take a procedural step which, as I have already found, was intended to undermine the plaintiff's application. These actions were contrary to the duty to confer which is a duty that must be carried out in good faith. The duty, as Martin CJ made clear in *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd* [2006] WASC 161; (2006) 33 WAR 1 is a serious one that practitioners, as officers of the court, are expected to comply with to the letter and to the spirit.

41 Had the defendant's solicitor warned the plaintiff, the plaintiff could have requested the court not to settle and pass the order pursuant to O 43 r 10 RSC. The plaintiff would then have had an opportunity to seek an appointment before a registrar to argue whether the costs order should be settled and passed prior to the making of the plaintiff's proposed application.

42 There is another matter of relevance. It appears that the court was not informed by the defendant's solicitor of the plaintiff's proposed application when he sought to enter the costs order. In my opinion, the procedure in O 43 r 10 should be used when there is no controversy about the order or judgment sought to be settled and passed. This was not the case here. No doubt the defendant's solicitor believed that he was acting in the best interests of his client, but a practitioner's paramount duty is to this court: r 5 *Legal Profession Conduct Rules 2010* (WA). The obligation of complete candour that a practitioner has to the court should have led to the proposed application being brought to the court's attention.

43 The defendant's solicitor felt justified to act as he did because the plaintiff had not complied with her agreement given on 17 August 2011 to extract the costs order. The answer to this is that at the time the agreement was made, the plaintiff was not apparently aware of the oversight. Further, when the plaintiff became aware of the oversight, the plaintiff informed the defendant and sought to bring the matter before the court for determination. In these circumstances, the plaintiff's noncompliance with the agreement could not justify the defendant's actions.

44 A finding that an abuse of process has occurred should not be made lightly and all of the circumstances must be carefully considered. I have come to the conclusion that the entering of the costs order was unjustifiably oppressive to the plaintiff and if allowed to stand, would bring the administration of justice into disrepute. I find that the entering of the costs order was an abuse of process.

45 I will now proceed on the basis that the costs order was unperfected. If I find that a different costs order should be made to the one dated 6 May 2011, I will recall and replace that order. If I decide that no other order should be made, it will be unnecessary to take that course.

46 The power to reopen an unperfected order is discretionary. In exercising that discretion, an important consideration is the public interest in the finality of litigation. This principle 'serves not only to protect parties to litigation from attempts to re-agitate what has been decided, but also has wider purposes': *Burrell v The Queen* [16]. One wider purpose is that the principle 'serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike to get it right the first time': *Burrell v The Queen* [16].

47 The principle of finality, depending upon all of the circumstances of the particular case, may not preclude the exceptional step of reviewing an earlier order.

48 The relevant principles which inform the exercise of the discretion to reopen an unperfected order were, in the context of the position of the High Court and an intermediate court of appeal, set out by Steytler P in *Minister for Education v Klein* [2005] WASCA 185(S) as follows:

As the High Court has reaffirmed in *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at 215, there is no doubt that that Court may reopen unperfected judgments or orders if it is convinced that it has proceeded 'on a misapprehension as to

the facts or the law' (*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302) or where 'there is some matter calling for review' (*Smith v New South Wales Bar Association (No 2)* (1992) 176 CLR 256 at 265) or where 'the interests of justice so require' (*Autodesk* at 322, per Gaudron J). The power is one which, the High Court has said, must be exercised with great caution (*State Rail Authority of NSW v Codelfa Construction Pty Ltd (No 2)* (1982) 150 CLR 29 at 38; *Wentworth v Woollahra Municipal Council (No 2)* (1982) 149 CLR 672 at 684 and *Autodesk* at 302) and the circumstances that will justify a rehearing, must be 'quite exceptional': *State Rail* at 38 per Mason and Wilson JJ. That is so because of the obvious public interest in the finality of litigation: *De L* at 215; *Autodesk* at 302; *State Rail* at 38; and *Wentworth* at 684. However, the judgments of the High Court reveal a preparedness by that Court to reopen an unperfected judgment or order where an applicant can show that 'by accident without fault on his part he has not been heard': *Wentworth* at 684, per Mason ACJ, Wilson and Brennan JJ; and *Autodesk* at 302, per Mason CJ, 308, per Brennan J, and 312, per Deane J. That is because a court should not pronounce a judgment against a person on a ground which that person has not had an opportunity to argue: *Pantorno v The Queen* (1989) 166 CLR 466 and *Autodesk*, at 308, per Brennan J [7].

49 Acknowledging the obvious differences between a court sitting at first instance and an appellate court, those principles by analogy apply here.

50 The oversight by the plaintiff's solicitor was a serious one. While accidental it occurred because of the solicitor's fault. Judgment was given in the plaintiff's favour on 22 December 2010. The matter was then adjourned to, amongst other things, deal with the question of costs. On 8 February 2011, oral submissions were made in respect of costs. Further opportunity after that date was given to the parties to make written submissions.

51 It is clear that the plaintiff had ample opportunity over an extended period of time to put to the court all the information which was relevant to the question of costs. Moreover, the plaintiff was seeking indemnity costs, a departure from the usual costs order. The onus was on the plaintiff to demonstrate some special or unusual feature of the case which justified the making of such an order. Accordingly, careful attention needed to be given to the material that was placed before the court. That did not happen.

52 The costs order was made on 6 May 2011. It was not until some time in August 2011 that the oversight was noticed. By then the appellant's cross-appeal against the costs order had been filed and discontinued.

53 The plaintiff's solicitor's oversight is difficult to comprehend. It is
hard to see how the offers could have been forgotten, let alone forgotten
for so long.

54 In all these circumstances, the public interest in the finality of
litigation causes me to decline to review the costs order.

55 Had it been necessary to consider the offers of settlement, I would
not have made an award of indemnity costs. My reasons for arriving at
this conclusion may be briefly stated.

56 I will refer first to the O 24A offer. Order 24A provides that where
an offer is made by a plaintiff and not accepted by the defendant and the
defendant obtains a judgment no less favourable than the terms of the
offer, the plaintiff will be entitled to an order against the defendant for
costs from the date on which the offer was made on a party/party basis. In
other words, the making of an offer under O 24A does not contemplate
the award of indemnity costs: *St Barnabas Nominees Pty Ltd v Stallard
Corp Pty Ltd [No 2]* [2011] WASC 289(S) [25].

57 However, the position with the Calderbank offer is potentially
different. The principles governing Calderbank offers and an award of
indemnity costs as a result of a refusal to accept such an offer were set out
by Buss JA (with whom Wheeler JA agreed) in *Ford Motor Company of
Australia Ltd v Lo Presti* [2009] WASC 115 [16] - [32]. The critical
question is whether the offer, when all of the relevant facts and
circumstances are considered, was unreasonably refused. In deciding
whether the rejection of a Calderbank offer was unreasonable, ordinarily
regard should at least be had to the following:

- (a) the state of the proceeding at which the offer was received;
- (b) the time allowed to the offeree to consider the offer;
- (c) the extent of the compromise offered;
- (d) the offeree's prospects of success assessed as at the date of the
offer;
- (e) the clarity with which the terms of the offer were expressed; and
- (f) whether the offer foreshadowed an application for indemnity costs
in the event of the offeree's rejecting it.

58 These factors are not exhaustive.

59 I accept that the Calderbank offer was made at a relatively early stage of the proceedings, that it was clearly expressed and that it, in substance, foreshadowed an application for an indemnity costs in the event it was rejected.

60 However, in my opinion, indemnity costs should not be given because, at the time the offer was made it was not unreasonable for the defendant to refuse it. At November 2008 there were two main issues in dispute. First, had the transfer of land form been forged? Second, if it had been forged, what damages, if any was the plaintiff entitled to? As to the last mentioned issue, it seems to me that at the time the Calderbank offer was made, it was not at all clear what damages, if any, the plaintiff was reasonably entitled to. As to the issue of forgery, the parties had not at that time exchanged witness statements. Of importance, is that the defendant was not aware of the evidence of Mr D'Silva's actions in respect of the mortgage document he altered in September and October 2005 in the name of Shaun Wellbourne-Wood: *Gutta v Ierino* [57] - [58], [121] - [126].

61 Moreover, lest there be any doubt about it, I still hold to the reasons which I gave between [28] - [31] in *Gutta v Ierino* [2010] WASC 402(S).

62 In light of the conclusions that I have reached, it is unnecessary for me to consider the submissions made by the plaintiff in respect of the slip rule and the inherent jurisdiction of the court.

Conclusion

63 The defendant's solicitor's conduct in extracting the costs order was an abuse of process. I have determined the plaintiff's application on the basis that my orders were unperfected. I have concluded that notwithstanding that I was unaware of the plaintiff's offers to settle, indemnity costs should not be awarded. There is no need to uplift the cost order I made and change it. The plaintiff's application will be dismissed.

64 The order that I make is:

- (1) the plaintiff's application filed 28 September 2011 is dismissed.