SUPREME COURT OF QUEENSLAND

CITATION:	*Lohe v Gunter* [2003] QSC 150
PARTIES:	**CONRAD WILHELM LOHE** (applicant) **RICHARD STEPHEN GUNTER** (respondent)
FILE NO/S:	SC 11734 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	16 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 January 2003
JUDGE:	Holmes J
ORDER:	**DECLARATION THAT THE RESPONDENT IS A VEXATIOUS LITIGANT.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – s3 *Vexatious Litigants Act* 1981 – whether a person should be declared a vexatious litigant – whether vexatious legal proceedings have been instituted frequently and without reasonable ground

Australia Act 1986 (Cth)
Australia Act 1986 (UK)
Australia Acts (Request) Act 1985
Constitution Act 1867
Constitution (Office of Governor) Act 1987
Currency Act 1965
High Court Rules, O58 r 3
Imperial Acts Interpretation Act 1984
Judiciary Act 1903, s 49
Judicial Review Act 1991, s 12(b)
Justices Act 1886, s 157, s 222
Magistrates Courts Act 1921
Reserve Bank Act 1959
Supreme Court Act 1867, s 21, s 24, s 58
Supreme Court Act 1995, s 200, s 202, s 221
Supreme Court Rules, Form 57, r 81

Vexatious Litigants Act 1981, s3

Carnes v Essenberg & Ors [1999] QCA 339
Cusack v Commissioner of Taxation 2002 ATC 4676
Essenberg v R [2002] QCA 4
Jones v Skyring (1992) 109 ALR 303.
Owen v Deputy Commissioner of Taxation; Full Court of Federal Court unreported QB 132 [1995], 7 November 1995
R v His Honour Judge Noud; ex parte McNamara [1991] 2 Qd R 86
R v Minister for Justice & Attorney-General of Queensland ex parte Skyring Supreme Court of Queensland 17 February 1986 unreported
Re Cameron [1996] 2 Qd R 218
Re Skyring (1994) 68 ALJR 618
Sharples v Arnison [2002] 2 Qd R 444
Skyring v ANZ Banking Group Limited QCA 176 of 1993 (12 May 1994)
Skyring v Crown Solicitor [2001] QSC 350
Skyring v Electoral Commission of Qld & Anor [2001] QSC 080
Stubberfield v Webster [1996] 2 Qd R 211

COUNSEL: Mr. Flanagan for the Applicant
Respondent in Person

SOLICITORS: Crown Solicitor for the Applicant
Respondent self-represented

[1] The applicant Crown Solicitor has applied to have the respondent, Mr Gunter, declared a vexatious litigant pursuant to s 3 of the *Vexatious Litigants Act* 1981, which provides:

> "If the Supreme Court or a Judge thereof is satisfied that a person has frequently and without reasonable ground instituted vexatious legal proceedings or procured vexatious subpoena, summonses to a witness, warrants or process to be issued or that any other person acting in concert with such a person has without reasonable ground instituted vexatious legal proceedings or procured vexatious subpoena, summonses to a witness, warrants or process to be issued, the Supreme Court or such Judge may after hearing such person and, if the case require it, such other person, or giving him, her or them an opportunity of being heard, by its, his or her order, declare such person and such other person to be a vexatious litigant."

The applicant contends that the respondent has instituted vexatious legal proceedings frequently and without reasonable ground.

[2] The respondent seeks by cross-application to have the Crown Solicitor's application struck out for want of standing and to proceed with an adjourned application for the re-opening of earlier proceedings in this court before Wilson J. In addition, he seeks a direction that if the applicant fails to demonstrate that he has standing, the court direct that some other person have carriage of the proceedings, but that that aspect of

the application be adjourned pending hearing of the respondent's application for its removal to the High Court under s 40 of the *Judiciary Act* 1903 for the purpose of resolving constitutional issues. The respondent mounted a number of arguments in opposition to the application and in support of his cross-application, some of which are a recurring theme of his applications to this and other courts. What appears in the following paragraphs is a summary of the principal arguments regularly advanced by him, and, as the authorities show, by others.

Magna Carta

[3] The "fundamental law" to be applied in Queensland, the respondent contended, was that provided for by Sch 1 of the *Imperial Acts Application Act* 1984 which specifies 17 Acts. In particular, that Act preserved in force the Magna Carta. (To be precise, s 5 and Sch 1 of that Act continue ch 29 of the 1297 version of the Magna Carta with the same force and effect as the chapter had in Queensland immediately prior to the commencement of the Act). Chapter 29 includes this clause:

> "We will sell to no man, and we will not deny or defer to any man, either justice or right".

The respondent argued that this provision prevented the making of any costs order against him, as amounting to the selling of justice, and also that the *Vexatious Litigants Act* conflicted with Magna Carta, because the consequence of declaring an individual a vexatious litigant (the requirement to obtain leave before commencing proceedings) amounted to a denial of justice.

[4] The argument as to the effect of Magna Carta has been dealt with in a number of cases, the general thrust of which is that it is a fallacy to suppose that local legislation may not be made in conflict with it:[1]

> "an applicable enactment, whether Queensland, Commonwealth or Imperial is capable in law of repealing Magna Carta either completely or to the extent that it is inconsistent with that enactment."[2]

Invalidity of legislation because of failures to hold referenda

[5] The respondent's next argument turned upon Section 53 of the *Constitution Act* 1867, which requires any Bill providing for the abolition of, or alteration in, the office of governor, or expressly or impliedly affecting specified sections of the *Constitution Act* itself, including s 11A and s 11B, to be approved upon a referendum. The *Constitution (Office of Governor) Act* 1987 was invalid because the antecedent Bill had not been submitted to a referendum. Similarly, the *Australia Acts (Request) Act* 1985, which was a legislative request for the enactment by the Commonwealth and the parliament of the United Kingdom of the *Australia Act* 1986 (Cth) and the *Australia Act* 1986 (UK) respectively, was invalid because Section 13(1) of each of the proposed Acts formulated in its Schedules did entail amendment of s 11A and s 11B, and it, likewise, had not been the subject of a referendum. The consequence of all this was that letters patent constituting the office of governor made on 14 January 1986 and proclaimed on 6 March 1986 were without effect, and all legislation passed subsequently, including the *Judicial Review Act*, was invalid.

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1 *Carnes v Essenberg & Ors*. [1999] QCA 339; *Essenberg v R* [2002[QCA 4; *Re Skyring* (1994) 68 ALJR 618.

2 *Skyring v ANZ Banking Group Ltd* unreported QCA 176 of 1998 (12 May 1994).

[6] However, in *Sharples v Arnison*[3] the Court of Appeal considered and rejected these arguments. Mc Pherson JA analysed the relevant legislation and its consequences. Section 11B of the *Constitution Act* had, been "affected", but not by the *Australia Acts (Request) Act*. The legislation producing that result was the *Australia Act* 1986 (Cth) and the *Australia Act* 1986 (UK), passed by the parliaments of the Commonwealth and the United Kingdom, neither of which had any obligation to submit the relevant bill to a referendum. In its amended form, s 11B no longer concerned the duty of the governor to act in obedience to instructions, and it remained unaffected by the *Constitution (Office of Governor) Act*. And the last-mentioned Act did not alter the office of governor, so there was no requirement to submit the Bill to a referendum.

[7] Single judges in a number of cases have reached conclusions to more or less similar effect, both before and after the decision of the Court of Appeal in *Sharples v Arnison*[4]. The result is that there is no substance in the contention that State legislation enacted after March 1986 is invalid.

The currency argument

[8] The respondent argued that there was no means by which he might lawfully pay fines or costs because of the failure of the Crown to provide currency as prescribed by the *Currency Act* 1965, s 16 of that which provides for coinage as legal tender. There was, he said, no legal sanction for the issue of paper money; and there was a lack of correspondence between the face value of coins and the price at which they may be bought using paper money. (He referred to a particular example of a set of gold coins being bought for an amount far in excess of its face value.)

[9] As to the first part of the respondent's argument, Deane J in *Re Skyring's Application (No. 2)*[5] reached the conclusion that there was no constitutional bar against the issue of paper money as legal tender, a view which has been confirmed subsequently on a number of occasions.[6] As to the second aspect, in *Cusack v Commissioner of Taxation*[7] Cooper J considered an argument which turned around the difference between money as a unit of value and money as currency by which obligations are discharged. There was, he said, a presumption given statutory effect in provisions of the *Currency Act* and the *Reserve Bank Act* 1959 that parties contracted and parliament legislated with reference to the nominal value of money as expressed by legal tender; currency when used as legal tender was valued at its face value without regard to its intrinsic worth. The value of coins departed from their face value only when they were not being used as currency and were regarded simply as a commodity. The weight of authority is thus against the respondent's first point, and the reasoning of Cooper J is persuasive against the second.

The respondent's litigation

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3 [2002] 2 Qd R 444.

4 *R v Minister for Justice & Attorney-General of Queensland ex parte Skyring* Supreme Court of Queensland 17 February 1986 unreported; *Skyring v Electoral Commission of Qld & Anor* [2001] QSC 080; *Skyring v Crown Solicitor* [2001] QSC 350.

5 (1989) 59 ALJR 561.

6 *Re Skyring* (1994) 68 ALJR 618; *Skyring v ANZ Banking Group Ltd* (unreported Court of Appeal No. 176/1993, 12 May 1994; *Owen v Deputy Commissioner of Taxation*, Full Court of Federal Court unreported QB 132 [1995], 7 November 1995.

7 2002 ATC 4676.

[10] The story of the respondent's litigation relevant for present purposes begins in November 1995 when he was convicted by the Magistrates Court at Ipswich of one charge of driving an unregistered truck, one charge of driving the same truck without a number plate and one charge of failing to drive the truck into a checking site (or weighbridge). As far as I can discern from his submissions, the respondent brought an application for judicial review under the *Judicial Review Act* 1991, rather than proceeding by way of appeal, because he considered the magistrate to have committed an excess of jurisdiction. He seems to have formed the erroneous view that because Kirby J in *Re Stanbridge's*[8] application had indicated that where the real attack was on the merits of a decision (as opposed to the process by which it was reached), it was not proper to proceed on prerogative writs rather than by appeal, the converse must apply. Amongst the grounds stated in the application, No. 882/95, was the refusal of the magistrate to permit the calling of witnesses in support of a defence of lawful excuse, based on the currency argument. The application also sought an order setting aside the order made in the Magistrates Court for costs against the respondent as contravening the principle to be found in Magna Carta that justice could not be sold.

[11] The respondent also filed a notice of motion seeking leave for Mr Alan Skyring, who, the applicant deposes, has been declared a vexatious litigant, to appear on the application as amicus curiae. However, the substantive application and another by one of the respondents to it (the complainant in the summary proceedings) for its dismissal were, in January 1996, stayed on the respondent's application, pending proceedings in the High Court. Those proceedings involved an application by the respondent for prerogative writs to quash determinations made by the Family Court and also the decision of the Ipswich Magistrates Court, the latter on the basis that the statutory provisions under which he was convicted were *ultra vires* the Constitution.

[12] In July 1996 the respondent filed a further notice of motion seeking to have the notice of motion for striking out of the application dismissed, but also seeking the maintenance of the stay. The respondent's notice of motion bore the endorsement:

> "The Applicant's claim is as well for the Queen as for himself for remedy of long-standing defects in respect of the manner in which the State and nation's affairs generally, but the financial affairs in particular, are conducted".

This wording, or variations on it, recurs throughout the respondent's applications. He appears to have been under the impression that an endorsement to the effect that his claim was "as well for the Queen as for himself" in the form prescribed by Form 57 of the *Supreme Court Rules* would of itself constitute his action as a *qui tam* action, notwithstanding the complete absence of any statutory basis for such a manner of proceeding. After the filing of this notice of motion, nothing further appears to have happened in 882/95 for over a year.

[13] On 7 August 1997 the respondent was convicted in his absence of driving an unregistered vehicle, and was fined and ordered to pay court costs. He applied unsuccessfully for a re-hearing. On 16 September 1997 he filed a notice of motion by which he sought to amend his existing application for statutory review in 882/95 to include the refusal to re-hear the charge leading to this later conviction, giving as his ground that he had had not been served, so that to proceed in his absence was a denial

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8 (1996) 70 ALJR 640.

of justice. Muir J dismissed the application to file an amended application, firstly on the ground that the magistrate's order, falling within s 43 of the *Magistrates Courts Act* 1921, was a decision excluded from review by its inclusion in Sch 1 under the *Judicial Review Act* 1991, and secondly on the ground that in any event the proper course was an appeal under s 222 of the *Justices Act*.

[14] Also on 16 September 1997, the respondent filed a further application, given the number 7751 of 1997, for review of another decision by the Magistrates Court at Ipswich, convicting him of being the owner of a dog which was not under effective control in a public place. On that complaint he was fined and ordered to pay professional costs and costs of court, although no conviction was recorded. He sought review on the grounds, *inter alia*, that an application by him for a stay had been refused, constituting a denial of justice "according to the fundamental statute law of this state"; that the presiding magistrate's refusal to permit an *amicus curiae* to be heard was a denial of justice; and that the magistrate failed to have proper regard for material tendered by the respondent showing that Federal matters (not identified) were an issue in the proceedings. It was also contended in the course of the application that the order requiring payment of a fine and costs was not properly made, on the basis of the currency and Magna Carta arguments. As with his application in 882 of 1995, the respondent filed a notice of motion seeking leave for Mr Skyring to appear *amicus curiae.*

[15] In September 1997 de Jersey J (as he then was) dismissed the application in 7751 of 1997 on the application of the second respondent to it (the complainant below). Having established that the respondent was proceeding under s 20 of the *Judicial Review Act* 1991, de Jersey J rejected the respondent's argument that the decision was an administrative, rather than a judicial, decision and dismissed the application.

[16] Matters then seem to have gone rather quiet for almost two years until August 1999, when the respondent received a notice from the Magistrates Court at Ipswich which advised him that if he did not attempt to pay the amounts outstanding under the magistrate's orders or apply for a fine option order, a warrant would issue for his arrest. The respondent took the (erroneous) view that the staying of application 882 of 1995 by Fryberg J prevented any action on the magistrate's orders. He filed another application seeking confirmation of the existing stay in application 882 of 1995, and that the Crown Solicitor be instructed by the Supreme Court to take over prosecution of applications which the respondent had in train before the High Court.

[17] On the day on which that application was listed for hearing, the second respondent to it sought to have the stay lifted. With the respondent's consent, an order was made to that effect, and Fryberg J proceeded to hear the application to dismiss the substantive application for review. Exercising his discretion under s 12(b) of the *Judicial Review Act*, he did dismiss the application, concluding that s 222 of the *Justices Act* provided adequate provision for review and was the appropriate remedy. The Court of Appeal dismissed an appeal against that decision. The respondent, in his notice of appeal, alleged that his consent to the lifting of the stay had been obtained by fraud and that judicial review was the appropriate approach rather than appeal, because the magistrate had gone beyond his power in failing to acknowledge the existence of the currency argument raised by the respondent.

[18] In September 1999 the respondent applied to the District Court for an extension of time in which to serve a notice of appeal under s 222 of the *Justices Act* in respect of each of his convictions in the Magistrates Court at Ipswich. Robertson DCJ, in the absence of any evidence that the respondent was unable to serve the notice within time, dismissed the application. He adverted in his reasons to the fact that the respondent had been aware since the decision of Muir J in 1997 that the proper means of review was a s 222 appeal.

[19] The respondent appealed to the Court of Appeal, contending that his choice of judicial review in the first instance was correct, and that Robertson DCJ had failed to have proper regard to the currency argument. The appeal was dismissed, the court holding that there was no error shown on the part of the learned District Court judge. Pincus JA made the observation that the argument as to the absence of valid currency was "complete nonsense".

[20] The applicant applied for special leave from that judgment. As part of that process he made an application for expedition. An attempt to raise other demands by that application, including the setting aside of a fine option order as made under unconstitutional legislation, the disciplining of officers of the Crown and members of the judiciary for placing the respondent "in his present predicament", and the payment of compensation to him was unsuccessful, owing to a direction given pursuant to O 58 r 43 of the *High Court Rules* that the process not issue without leave of a justice. In the course of argument on his application for expedition the respondent sought to have Mr Skyring given leave to appear as *amicus curiae*, raised the currency argument once more, and argued that because his application had been brought as a "*qui tam*" it should be deemed important and given priority. That application was dismissed with costs by Callinan J, whose judgment was then appealed by the respondent.

[21] The grounds of appeal included an assertion that Callinan J had exceeded his jurisdiction by obstructing the course of justice and that he had acted oppressively in not giving sufficient attention to the issues raised by the respondent and by refusing to allow Mr Skyring to be heard as *amicus curiae*. The notice of appeal also raised the Magna Carta and currency arguments.

[22] The applications for leave to appeal and for special leave were heard together. In the course of his argument on the application the respondent referred again to the currency argument, made a somewhat obscure reference to "the Governor's Act*"* (presumably a reference to the failure to hold referenda argument) and asserted once more that the imposition of court costs upon him, leading to his incarceration for non-payment, was contrary to Magna Carta. In the course of that argument Kirby J made this comment:

> "Normally the Crown neither asks for, nor provides costs in proceedings which, putting it broadly, are criminal in nature."

but did not determine whether the costs order made by Callinan J was properly made. Both applications were dismissed.

[23] In September 2001 the respondent applied to Mullins J for re-openings of applications 882 of 1995 and 7751 of 1997. In his affidavit supporting that application, the respondent identified as the reasons for it the comments of Kirby J and a realisation that the constitutionality of the *Judicial Review Act* was at issue, a matter which ought to be decided in the Supreme Court. In argument before

her Honour, the respondent raised questions of the validity of the legislation under which the magistrates who made costs orders were acting, the standing of the court and the validity of the *Judicial Review Act*, all apparently on the basis of the argument as to the need for referenda. Mullins J, while not deciding that a power existed to re-open the applications, decided as a matter of discretion that the applications were without real prospect of success and ought not to be re-opened.

[24] On 14 September 2001 the applicant applied to re-open the decisions of Mullins J in 882 of 1995 and 7751 of 1997. Those applications were heard and refused by Wilson J who considered that she had no power to re-open either the decisions dismissing the judicial review applications or the applications before Mullins J. She noted that the respondent sought to raise submissions arising from the failure to hold a referendum before assent to the *Constitution (Office of Governor) Act* 1987. In that context she referred to the absence of any referendum as a matter of public knowledge. She observed that the proper way to challenge the decision of Mullins J was through the appellate process.

[25] On 1 October 2001, the respondent applied for a re-opening of the decision of Wilson J, explaining in his application that it was precipitated by what he regarded as an intimation by Wilson J that there was a proper cause of action more appropriately dealt with in a different forum. But that was not possible: he could not proceed by appeal to the Court of Appeal, because the Commonwealth aspects of his arguments could not be addressed; and, in any event, that court had been established by legislation which, on his argument, was invalid. In written submissions the respondent proposed that the court make declarations as to what constituted the fundamental law, and that once the High Court had determined the constitutional validity of the *Australia Act* 1986 the hearing of his matters be resumed. Atkinson J adjourned that application on 3 April 2002.

[26] Meanwhile, on 12 December 2001 the respondent filed a petition in the High Court challenging the validity of the 2001 Federal election claiming that the Governor of Queensland had no power to sign the writ issued to commence the electoral process for election to the Senate, on the basis of the failure to hold referenda argument, and that the Governor-General's issuing of the writ to commence the election for the House of Representatives was also without power on a similar argument as to a failure to hold a referendum before alleged changes to his powers said to have been made by the issue of revised Letters Patent in August 1984. The proceedings were referred for trial to the Federal Court, where on 29 July 2002 Cooper J dismissed the petition, for reasons including rejection of the failure to hold referenda argument.

[27] On 21 October 2002, the respondent applied for directions on how the Commonwealth aspects in issue in 882 of 1995 and 7751 of 1997 should proceed, and orders "in respect of action to be taken concerning the judgments and orders" given in other related matters which, he said, were now shown to be in error. That application, when heard before Fryberg J, was posited by the respondent on the basis it was brought in both proceedings. The respondent put to Justice Fryberg that there was a need to determine the fundamental law; and he raised the currency argument, the Magna Carta argument, and the observation by Justice Kirby as to the availability of costs. His Honour, observing that all of the arguments had been canvassed and rejected in other cases, said that nothing had been put which would justify any review.

[28] In December 2002, the respondent applied for an order directing that the proceedings adjourned by Atkinson J be resumed, and setting aside the decisions of Fryberg J, Wilson J and Mullins J. On 6 December 2002, Muir J dismissed the application, noting that other courts had found the arguments advanced by the respondent erroneous, and observing that a single judge could not go behind the order of another judge.

The cross-application here

[29] In his written and oral submissions before me the respondent argued that the invalidity of the letters patent issued on 14 February 1986 rendered the appointment of the applicant as Crown Solicitor invalid, so that his standing to bring the application was in question. This is the argument as to the failures to hold referenda, which has been resolved often and authoritatively against its proponents. Insofar as the respondent sought by his cross-application to have the proceedings before Wilson J re-opened, the short answer is that no such jurisdiction exists in me; and in any event a re-opening which merely sought to re-agitate the issues would be entirely impermissible.

[30] The proposal in the cross-application for adjournment of these proceedings while they are removed, pursuant to s 40 of the *Judiciary Act* 1903, for determination of constitutional questions to the High Court depends on the notion that there exist any pending proceedings in this court in which such questions are raised. The respondent argues that the proceedings before Wilson J are pending proceedings involving the constitutional validity of the *Australia Acts* 1986 and, as such, may be removed to the High Court under s 40 of the *Judiciary Act.* They are pending, he says, because Atkinson J, by adjourning them after the material to be relied on by both sides had been read, must have re-opened them. He seems to have regarded "adjourned" as necessarily meaning that the application was part heard, and somehow to have taken a further leap that it meant that the re-opening had commenced. That of course is a nonsense; the proceedings as they stood before Atkinson J did not involve any determination of any constitutional arguments, but merely whether an existing judgment should be re-opened. All that occurred was the adjournment of the application for a re-opening without any examination, let alone determination, of its merits.

[31] The respondent's cross-application must be dismissed.

The application here

The applicant's contentions

[32] Counsel for the applicant, Mr Flanagan, relied on the test for vexatiousness outlined by Fitzgerald P in *Re Cameron*:[9]

> "Although there are sometimes statutory indications, the broad test potentially concerns such factors as the legitimacy or otherwise of the motives of the person against whom the order is sought, the existence or lack of reasonable grounds for the claim sought to be made, repetition of similar allegations or arguments to those which have already been rejected, compliance with or disregard of the court's practices, procedures and rulings, persistent attempts to use the court's

9 [1996] 2 Qd R 218.

> processes to circumvent its decisions or other abuse of process, the wastage of public resources and funds, and the harassment of those who are the subject of the litigation which lacks reasonable basis: see, for example, *Attorney-General v Wentworth* (1988) 145 NSWLR 481; *Jones v Skyring* (1992) 66 ALJR 810; *Jones v Cusack* (1992) 66 ALJR 815, and *Attorney-General (NSW) v West* (NSW Common Law Division No 16208 of 1992, 19 November 1992, unreported)."[10]

[33] The respondent had, he submitted, attempted repeatedly and though different means of application to re-litigate the same matters. His proceedings were frequently brought; there were more than 20. A number constituted attempts to re-open matters already determined; and such attempts at "employing a variety of mechanisms to get the [already determined] questions before the court again" were, as Toohey J concluded in *Jones v Skyring*[11], without reasonable ground. That was particularly so in relation to the attempts at re-opening of the dismissed judicial review application before Justices Mullins, Wilson, Fryberg and Muir respectively, and, indeed, the respondent's cross-application here.

The respondent's contentions

[34] The respondent took issue with the applicant's references in his affidavit to his having sought the appointment of Mr Skyring as amicus curiae when the latter was a vexatious litigant, asserting that when the declaration to that effect was challenged on appeal it was not upheld 'robustly'. I note from the copy of the judgment of the Court of Appeal annexed by Mr Skyring that the court expressed their entire agreement with the reasons of the judge who made the order. A further contention that the standing of the Crown Solicitor to bring the application in respect of Mr Skyring, the standing of the judge at first instance to make the declaration and the standing of the Court of Appeal to give its judgment were all in question on the basis of the failure to hold referenda argument is without merit. The applicant's allusions to the respondent's attempts to have Mr Skyring appointed as *amicus curiae* although declared a vexatious litigant are properly made.

Judicial review or appeal

[35] As to the history of his litigation, the respondent said that in the first instance, he had sought by application for judicial review to resolve the dilemma of his being unable to pay charges, fines and costs because of the unavailability of legal tender. An appeal under s 222 was incapable of resolving the issues he had raised. Muir J's reliance on observations by Thomas J in *Stubberfield v Webster*[12] to the effect judicial review was not to be seen as a substitute for the appellate process was misconceived, because the latter was dealing with an application by a civil litigant. The respondent relied instead on this statement by Thomas J in *Stubberfield*:

> "Prerogative review remains available if there was no jurisdiction or if there has been a denial of natural justice"[13].

That, he says, makes it clear that the dismissals by Fryberg J and Muir J of his applications for judicial review were wrong.

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10 [1996] 2 Qd R 218 at p 220.
11 (1992) 109 ALR 303.
12 [1996] 2 Qd R 211.
13 [1996] 2 Qd R 211 at 212.

[36] The statement by Thomas J is nothing more than a summary of the effect of s 11AE of the *Magistrates Courts Act* dealing with review in relation to actions for small debts (in which no appeal was provided). It has nothing to do with the exercise of the court's discretion, invested in it by s 12 of the *Judicial Review Act* 1991, to dismiss an application where adequate provision is made elsewhere for review; or the obligation to dismiss, imposed by s 13, where such alternative means of review exists and the court is satisfied in the interest of justice that it should do so. Neither of those provisions makes any distinction between matters emanating from the civil jurisdiction and those from the criminal jurisdiction. It is not appropriate to consider any further the exercise by Muir and Fryberg JJ of the powers conferred by the Act in this regard.

Civil or criminal jurisdiction

[37] The *Judicial Review Act* had, the respondent contended, also caused Muir J and others wrongly to treat the application as being brought in the civil jurisdiction, when it belonged, in reality, in the criminal jurisdiction. The use of the statutory judicial review process in criminal matters led to a loss of civil liberties because the stay order granted in respect of the judicial review application had not had the effect of preventing any further action on the magistrates courts' orders, unlike an appeal under s 222 of the *Justices Act.* (This appears to be a reference to s 222(d) which permits entry into a recognisance upon which the appeal operates as a stay of execution except (pursuant to s 222D) where the conviction is one for an indictable offence.) And it was wrong, the respondent said, to make costs orders, which did not apply in the criminal jurisdiction.

[38] The complaint in relation to the supposed inefficacy of the stay order granted in application no. 882 of 1995 stems from a misapprehension as to its nature. It was a stay of the application itself, not a stay of the kind available under s 29(2) of the *Judicial Review Act* of the decision of which review was sought, or any proceeding under it. The availability of the recognisance procedure might indeed reinforce the view that appeal under the *Justices Act* was the more appropriate course for the respondent; but it is not necessary to explore this issue any further.

[39] As to whether the *Judicial Review Act* has produced some diversion of applications into the civil jurisdiction with an attendant risk of costs, I simply note that in *R v His Honour Judge Noud; ex parte McNamara*[14] McPherson J (as he then was) described an application for an order nisi for certiorari in a criminal proceedings as one:

> "which may be granted under O 81 of the *Rules of the Supreme Court* in the exercise of the general supervisory jurisdiction deriving from s 21 of the *Supreme Court Act* 1867".

Section 21[15] of the *Supreme Court Act* 1867, as it then stood, created the "common law and general jurisdiction of the court" as opposed to s 24[16] which gave the court criminal jurisdiction. Section 58[17] of the same Act conferred:

> "power to award costs in all cases lawfully brought before it and not provided for otherwise than by this section".

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14 [1991] 2 Qd R 86 at 98.

15 Reproduced as s 200 of the *Supreme Court Act* 1995.

16 Reproduced as s 202 of the *Supreme Court Act* 1995.

17 Reproduced as s 221 of the *Supreme Court Act* 1995.

The point is that had the respondent been able to bring his application by prerogative writ at common law, he could equally have expected to pay costs. And in so far as the respondent contended that the *Judicial Review Act* which had brought about the loss of recourse to the prerogative writs, was invalid on the basis of the failure to hold referenda argument, that is, as I have already indicated, a notion which has been comprehensively rejected.

[40] The respondent argued that he should not have been imprisoned for failure to comply with the Magistrates' costs orders. He relied in this respect on what Kirby J had said in the course of the special leave and leave to appeal applications. But this was not a prosecution brought on an indictment. Costs, as has often been said, are a creature of statute. Section 157 of the *Justices Act* 1886 applied to the summary prosecutions of the respondent. It provides for costs orders "in all cases of summary convictions and orders including such a conviction for an indictable offence". There is nothing in this argument.

The attempts at re-opening

[41] The respondent claimed that he had no option but the succession of re-openings. What he had intended by applying to re-open the decision of Justices Fryberg, Wilson and Mullins was to have the court make a statement as to what law constitutes the fundamental law of Queensland, which on his submissions is the law referred to in the Schedule to the *Imperial Acts Application Act*. The respondent has taken the view that the decisions in question constitute a fundamental miscarriage of process entitling him to have them set aside *ex debito justitiae*, relying for this contention on a passage in *Brennan v Brennan*[18]:

> "In a superior court the question is not whether the judgment or order is void or voidable but whether the flaw complained of is a mere irregularity which leaves the court with a discretion whether to set aside the judgment or order or not or is a fundamental miscarriage which prevents the trial being a real trial at all so that the person prejudiced is entitled *ex debito justitiae* to have the judgment or order set aside."

[42] As has been made clear in relation to the argument as to the effect of Magna Carta the statutes specified in the Schedule to that Act are capable of being, and have been amended, by other legislation of the Queensland Parliament. And the passage from *Brennan* does not, it need hardly be said, refer to the existence of any jurisdiction to set aside other than on appeal.

Conclusions

[43] I have endeavoured to outline and deal with the respondent's contentions here as succinctly as possible. Many of those contentions were a repetition of others previously mounted by the respondent and rejected. The history I have earlier set out shows his current application merely to be a continuation of a pattern of obdurate persistence with untenable arguments. The respondent has expressed in his submission his view that the courts failed to accept those arguments because they are in a "state of confusion". Indeed, he has gone so far as to say that he regards the process of this court and of the High Court as "utterly corrupted". If those views are genuinely held it is not clear why he has chosen to persist with litigation in both

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18 (1953) 89 CLR 129 at 134.

courts; but he maintains that his desire is to remedy systemic defects. In particular he has repeatedly and unsuccessfully aired the currency, Magna Carta and failure to hold referenda arguments which have been unequivocally rejected by this and other courts. He has made it clear that he will not accept any judgment as final. The history I have given speaks for itself.

[44] I am satisfied that the respondent has frequently and without reasonably ground instituted vexatious legal proceedings. The denial of the right to commence proceedings without first obtaining leave is an extreme step but it is in this case an appropriate one.

Order

[45] I declare that the respondent is a vexatious litigant.