

SUPREME COURT OF QUEENSLAND

CITATION: *The Queensland Local Government Superannuation Board v Allen* [2017] QCA 201

PARTIES: **THE QUEENSLAND LOCAL GOVERNMENT SUPERANNUATION BOARD**
(applicant)
v
LYNDA ALLEN
(respondent)

FILE NO/S: Appeal No 10637 of 2015
DC No 4549 of 2014

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Brisbane - [2015] QDC 237; [2015] QDC 251

DELIVERED ON: 8 September 2017

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Philippides JA and Burns J

ORDERS: **The application for an indemnity certificate is refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the respondent submitted that it ought to be granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act 1973* (Qld)
Appeal Costs Fund Act 1973 (Qld), s 15
Eversden Pty Ltd v Miladi [2015] QCA 203, applied
The Queensland Local Government Superannuation Board v Allen [2016] QCA 325, related
Vella v Larson [1982] Qd R 298, applied

COUNSEL: S Fynes-Clinton for the applicant
J C Bell QC, with P Bingham, for the respondent

SOLICITORS: King & Company for the applicant
Maurice Blackburn for the respondent

- [1] **THE COURT:** The appeal in this matter was allowed on 30 March 2016.¹ The respondent was ordered to pay the applicant's costs of and incidental to the application for leave to appeal and the appeal calculated on the standard basis.
- [2] The respondent applies for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973 (Qld)* (the Act). In particular, it seeks an order that the respondent be granted an indemnity certificate in respect of leave to appeal and the appeal pursuant to s 15(1) of the Act.
- [3] The appellant was successful on appeal in respect of a question of implied waiver of legal professional privilege.²
- [4] The respondent submitted in support of its application that its side of the debate was "fairly arguable" and not either manifestly wrong or a matter that had been authoritatively determined to be wrong,³ and, therefore, the type of case in which an indemnity certificate ought to be given.⁴ It was contended that this is not a case whereby the respondent persuaded the Judge of the District Court to accept a principle that was wrong.⁵ Further, it was argued that discretionary factors do not require an indemnity certificate to be refused.⁶
- [5] While the appeal succeeded on the basis of the incorrect exercise of discretion by the primary judge, which may be characterised as an error of law, that does not automatically entitle the respondent to an indemnity certificate. The relevant principles were stated in *Eversden Pty Ltd v Miladi*:⁷
- "Section 15 of [the Act] is not intended to relieve against the ordinary risk of expense due to litigation loss, but rather is limited to relieving against a particular and limited type of misfortune in litigation.⁸ It is relevant to consider the conduct of the respondent at first instance and his responsibility, if any, for the erroneous decision of law for which the application for a certificate is made.⁹ In that regard, the obligation is upon the applicant to show some ground calling for the exercise of the discretion in his favour.¹⁰"
- [6] In the present case, it is evident that the respondent's submissions advanced below contributed to the primary judge's decision as to the exercise of his discretion in the respondent's favour. Even accepting that the respondent's submissions were "fairly arguable", it remains that, having elected to make those submissions, the respondent

¹ *The Queensland Local Government Superannuation Board v Allen* [2016] QCA 325.

² *The Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [6]-[7], [85]-[86] and [89]-[91].

³ *Lauchlan v Hartley* [1980] Qd R at 151-152.

⁴ *Haug v Jupiters Limited t/as Conrad Treasury Brisbane* [20047] QCA 6328 at [6] per Jerrard JA, with whom Williams JA and White J agreed; *Caltabiano v Electoral Commission of Queensland (No 2)* [2009] QCA 222 at [3] per Fraser JA; *John Urquhart (t/as Hart Renovations) v Partington* [2016] QCA 199 at [29] per McMurdo P; Morrison JA and Henry J.

⁵ *Zappulla v Perkins (No 2)* [1978] Qd R 401 at 401 per Wanstall CJ with whom Matthews and Kelly JJ agreed.

⁶ *Martin v Rowling* [2005] QCA 174 at [14].

⁷ [2015] QCA 203.

⁸ *Vella v Larson* [1982] Qd R 298 at 301.

⁹ *Vella v Larson* [1982] Qd R 298 at 301.

¹⁰ *Vella v Larson* [1982] Qd R 298 at 301.

accepted the risk of them being wrong.¹¹ There is no reason to conclude that the respondent paying the appellant's costs constitutes anything other than the materialisation of the ordinary risk of expense due to litigation loss. The application for an indemnity certificate should be refused.

¹¹ *Vella v Larson* [1982] Qd R 298 at 302.