

SUPREME COURT OF QUEENSLAND

CITATION: *Multiplex Bluewater Marina Village Pty Ltd & Anor v Harbour Tropics Pty Ltd* [2017] QCA 247

PARTIES: **MULTIPLEX BLUEWATER MARINA VILLAGE PTY LTD**
ACN 115 034 083
(first appellant)
MULTIPLEX BLUEWATER MARINA LOT PTY LTD
ACN 115 034 074
(second appellant)
v
HARBOUR TROPICS PTY LTD
ACN 165 378 736
(respondent)

FILE NO/S: Appeal No 9653 of 2016
SC No 12894 of 2015

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – [2016] QSC 99 (Mullins J)

DELIVERED ON: 24 October 2017

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Morrison and Philippides JJA and Flanagan J

ORDERS: **1. The respondent pay the appellants’ costs of and incidental to the proceedings (including reserved costs) and the appeal.**
2. The respondent be granted a certificate under s 15 of the *Appeal Costs Fund Act 1973* in relation to the costs payable by the respondent to the appellants in relation to the costs of the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – WHEN GRANTED – where the Court allowed appeal against the decision of the primary judge and set aside the orders made – where the appellants’ complaint turned on a question of law – where the respondent did not contribute to the error of law – whether an indemnity certificate should be granted

Appeals Costs Fund Act 1973 (Qld), s 15

Multiplex Bluewater Marina Village Pty Ltd & Anor v Harbour Tropics Pty Ltd [2017] QCA 202, related *Spencer v Burton* [2015] QCA 145, applied

COUNSEL: L F Kelly QC, with D de Jersey, for the appellants
M A Jonsson QC for the respondent

SOLICITORS: Clayton Utz for the appellants
Cairns Beaches Law and Conveyancing for the respondent

[1] **THE COURT:**

Background

The appeal concerned the proper construction of easement No. 716452824. The only issue for determination was the proper construction of the Easement and in particular cl 2 thereof.¹

- [2] On 12 September 2017, this Court allowed the appeal against the decision of the primary judge and removed from the declaration made by the primary judge the 10 hour time limitation on the use of the car parks as was contended for by the appellants.

The appellants' submissions as to costs

- [3] The appellants submitted that the effect of the decision is that the appellants' position in the originating application that no time restriction applied to the use of the car parks on the easement land was vindicated.
- [4] The appellants submitted that, having wholly succeeded on the appeal, the appellants ought be entitled to their costs of the application, including the reserved costs, as well as the costs of the appeal.
- [5] The appellants refer to the order of the Court in this appeal, delivered on 12 September 2017 and paragraph 3 of the orders thereto and submitted that the foreshadowed order that the respondent is to pay the appellants costs ought be made, that is, the costs of the proceedings (including the appeal) ought follow the event. Accordingly, the respondent should be ordered to pay the appellants' costs of and incidental to the entire proceeding (including reserved costs).
- [6] The costs orders sought by the appellants ought to be made.

The respondent's application for an Appeal Costs Fund certificate

- [7] The respondent seeks a certificate pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld) (the Act) which provides:

“15 Grant of indemnity certificate

- (1) Where an appeal against the decision of a court—
(a) to the Supreme Court;

¹ *Multiplex Bluewater Marina Village Pty Ltd v Harbour Tropics Pty Ltd* [2017] QCA 202 at [3] and [117].

(b) to the High Court of Australia from a decision of the Supreme Court;

on a question of law succeeds, the Supreme Court may, upon application made in that behalf, grant to any respondent to the appeal an indemnity certificate in respect of the appeal.”

- [8] The respondent submitted, relying on *Spencer v Burton*,² that such a certificate stands ready where a first instance judge “made errors of law in his [or her] Honour’s reasons and that the respondent’s conduct and submissions at trial did not contribute to these errors”.³
- [9] The respondent argued that in the present case, the appellants’ complaint turned on a question of law – essentially that the primary judge misconstrued the terms of the Easement and erred in construing the Easement as restricting the time period for use of the car parks.⁴
- [10] The Court allowed the appeal and set aside the orders at first instance based on error by the primary judge. The respondent submitted that that error was not contributed to by it and no contrary argument is made by the appellants. A further aspect of the first instance decision successfully challenged was her Honour’s adoption of a 10 hour time limit for car parking over Lot 10. The selection of a time limit of 10 hours was the subject of challenge on the appeal, separately from the construction issue. It was said that there was no basis for adopting that figure, which had not been proposed by either side. The respondent submitted that, given that neither side proposed the 10 hour time limit, no case could be made that anything said or done by the respondent induced the Court to make that error.
- [11] The appellants joined in submitting that, given the appeal was successful on a point of law, in accordance with s 15 of the Act, a certificate ought to be granted to the respondent in relation to the costs of the appeal.
- [12] In the present case, it is appropriate to grant a certificate as sought but it is to be confined to the costs payable by the respondent to the appellants in relation to the costs of the appeal.

Orders

- [13] The orders of the Court are:
1. The respondent pay the appellants’ costs of and incidental to the proceedings (including reserved costs) and the appeal.
 2. The respondent be granted a certificate under s 15 of the *Appeal Costs Fund Act 1973* in relation to the costs payable by the respondent to the appellants in relation to the costs of the appeal.

² [2015] QCA 145.

³ [2015] QCA 145 at [23].

⁴ [2017] QCA 202 at [119].