

SUPREME COURT OF QUEENSLAND

CITATION: *Kelly & Anor v Slade & Anor* [2018] QCA 270

PARTIES: **GORDON JAMES KELLY**
(first appellant)
KATHLEEN MARY KELLY
(second appellant)
v
VICKI LEE SLADE
(first respondent)
DANNY ALEXANDER SLADE
(second respondent)

FILE NO/S: Appeal No 191 of 2018
DC No 1634 of 2015

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Brisbane – [2017] QDC 288 (Porter QC DCJ)

DELIVERED ON: 12 October 2018

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Sofronoff P and Morrison JA and Atkinson J

ORDER: **That an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973 (Qld)* be granted to the respondents.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT AN INDEMNITY CERTIFICATE – where the Court allowed the appeal against the decision of the primary judge and concluded there should be a retrial – where the unsuccessful respondent seeks an indemnity certificate – where the appeal turned on findings about the credibility and reliability of witnesses – whether an indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15

Aspasia Pty Ltd v Huntress [1985] 2 Qd R 241, cited *Mitchell v Pacific Dawn Pty Ltd* [\[2003\] QCA 526](#), followed

COUNSEL: A N Skoien with H J Knowlman for the appellants
A B Fraser for the respondents

SOLICITORS: Blue Ocean Law Group for the appellants
BR Solicitors for the respondents

- [1] **SOFRONOFF P:** I agree with Morrison JA.
- [2] **MORRISON JA:** On 28 August 2018 this Court delivered its reasons on the appeal, the issue being whether the learned primary judge erred in his examination of, and weight given to, contemporaneous documentation involving the transfer of an interest in a farm property between family members.¹
- [3] The proceedings below concerned an agreement between the appellants and the respondents that the respondents would pay Kathleen Kelly \$260,000 for her one third interest in the farm, and Gordon Kelly \$240,000 for his one third interest. Gordon Kelly’s money was to be paid with \$20,000 at settlement and the balance in two years, with no interest to accrue on the balance and he would be able to continue to reside on the farm. The relief sought at trial was payment of the balance to Gordon Kelly.
- [4] The evidence surrounding the disputed agreement consisted of three conversations between Gordon Kelly and his daughter, the first respondent, and two contemporaneous documents known as Exhibits 4 and 14.
- [5] The appellants succeeded on appeal because the learned primary judge fell into error in not giving any consideration to Exhibits 4 and 14 as being contemporaneous evidence of the price to be paid to Gordon Kelly. In his decision below, the learned primary judge made findings about the credibility and reliability of witnesses and concluded that a binding agreement between the parties could not be found to exist on the evidence of the appellants. However, the evidence given by the respondents was contrary to Exhibits 4 and 14 and yet the impact of the written documents on the respondents’ credit and reliability was not brought to bear.
- [6] On that basis, this Court set aside the judgment below and concluded that there should be a retrial. It was ordered that the respondents are to pay the costs of the appeal.
- [7] The respondents now seek an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act 1973 (Qld)*:
- “15 Grant of indemnity certificate
- (1) Where an appeal against the decision of a court—
- (a) to the Supreme Court;
- (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.”

¹ *Kelly & Anor v Slade & Anor* [2018] QCA 197.

- [8] Such a certificate entitles the respondent to be paid from the Appeal Costs Fund where the respondent has been ordered to pay the appellant's costs of the appeal in respect of which the certificate is granted.²
- [9] The application is made upon the basis of what was said in *Mitchell v Pacific Dawn Pty Ltd*:³

“As to costs, a great deal has been expended on the litigation, not all of which will be thrown away if a further hearing and determination proceeds to a conclusion. It was not, however, the fault of the parties that this has not already occurred, but a failing in the system for which they, their legal advisors or counsel are in no way responsible. Failure by the judge to give adequate reasons was held on appeal in *Pettitt v Dunkley* [1971] 1 NSWLR 376 to constitute an error in law. When, as happened in the present case, that failure was attributable not to the parties but the judge, and the appeal succeeds on that ground, it is an appropriate case under s 15(1) of the *Appeal Costs Fund Act 1973* (Qld) in which to grant an indemnity certificate having the effects and incidents set out in s 16 of that Act.”

- [10] The respondents' submit that it is arguable that the decision of this Court identified a mixed error of fact and law made on the part of the learned primary judge in his reasons.
- [11] *Aspasia Pty Ltd v Huntress*⁴ was an appeal from a decision of the District Court involving a disputed payment for the installation of an air-conditioning system. It was found that the trial judge had misdirected himself in regards to the question of credibility and an indemnity certificate was ordered:

“Whether this and other testimony was accepted depended on the view the learned trial judge took of the credibility of the witnesses and in particular of the witnesses Huntress on one hand and Johnston on the other.

...

My conclusion is that in reaching this decision on the matter of credibility, the learned trial judge was influenced by the circumstances to which I have referred. I am also satisfied that in relation to those matters, or at least some of them, he is shown to have been mistaken as to matters of fact. The result was, of course, that he was led to reject the evidence of Huntress and to prefer that of Johnston. So much is suggested by the reasoning and the form of reasons which His Honour has delivered.

...

A reading of his reasons for judgment confirms, in my respectful view, that those misdirections or errors of fact did influence the trial judge's findings on credibility. Credibility was fundamental, at least to the issue whether the unit had performed in accordance with the

² *Appeal Costs Fund Act 1973* (Qld), s 16(1).

³ [2003] QCA 526 at [17]. See also *Spencer v Burton* [2015] QCA 145 at [22] and [23].

⁴ [1985] 2 Qd R 241.

specifications contracted for, and was in my view relevant to all the issues in the case.”

[12] In my respectful view, this case is similar to *Aspasia Pty Ltd v Huntress*, and is one where the respondents’ conduct and submissions at trial did not contribute to the error established on appeal.⁵ As such, it falls within that category of case outlined in *Mitchell v Pacific Dawn Pty Ltd* in the paragraph reproduced above at [9].

[13] In my view, a certificate should be granted in respect of the costs of the appeal.

[14] I propose the following order:

1. That an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld) be granted to the respondents.

[15] **ATKINSON J:** I agree with Morrison JA.

⁵ *Lauchlan v Hartley* [1980] Qd R 149 at 151-2.