SUPREME COURT OF QUEENSLAND

CITATION:	*Allianz Australia Insurance Limited v Mashaghati* [2018] QCA 292
PARTIES:	**ALLIANZ AUSTRALIA INSURANCE LIMITED** **ABN 15 000 122 850** **(appellant/cross respondent)** **v** **MEHRANG MASHAGHATI** (respondent/cross applicant)
FILE NO/S:	Appeal No 11149 of 2016 DC No 1540 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QDC 245
DELIVERED ON:	26 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Sofronoff P and McMurdo JA and Applegarth J
ORDER:	**The application for an indemnity certificate is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – where the unsuccessful respondent applied for an indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld) – where the appeal turned upon the trial judge's decision to admit certain medical reports into evidence – where the admission of those reports was held by this Court to have rendered the trial unfair – where the admission of those reports was urged by the applicant – where the learned trial judge was led into error by the arguments advanced by the applicant's legal representatives – whether an indemnity certificate ought to be granted *Appeal Costs Fund Act* 1973 (Qld), s 15 *Brisbane City Council v Ferro Enterprises Pty Ltd* [1976] Qd R 332, cited *Lauchlan v Hartley* [1980] Qd R 149, cited *Richards v Faulls Pty Ltd* [1971] WAR 129, cited *Vella v Larson* [1982] Qd R 298, cited *Zappulla v Perkins (No 2)* [1978] Qd R 401, cited

COUNSEL:	G F Crow QC, with N Jarro, for the appellant/cross respondent K C Fleming QC for the respondent/cross applicant
SOLICITORS:	McInnes Wilson for the appellant/cross respondent Bennett & Philip for the respondent/cross applicant

[1] **SOFRONOFF P:** On 9 June 2017 the Court allowed the appellant's appeal and, among other orders, ordered the applicant to pay the appellant's costs of the appeal and cross-appeal. The applicant now seeks an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act* 1973.

[2] The facts of this case, and the reasons for the Court's decision, are set out fully in the Court's Reasons for Judgment.[1] It is unnecessary to repeat them.

[3] The appeal turned upon the learned trial judge's decision to admit certain medical reports into evidence. As the Court held, this resulted in the trial being unfair. The applicant made submissions urging the admission of that evidence. They were submissions directed towards gaining a tactical forensic advantage over the appellant by the admission of evidence favourable to the applicant while denying the appellant the opportunity to lead evidence in response. As I explained in my reasons, the applicant's representatives took steps with the deliberate aim of ensuring that the appellant's lawyers remained unaware of the proposed new evidence until it was too late to do anything about it.

[4] Section 15(1) of the Act provides, relevantly:

> "(1) Where an appeal against the decision of a court –
>
> (a) to the Supreme Court;
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> …
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> 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."

[5] In support of his application for a Certificate, the applicant correctly says that the appeal succeeded on a question of law. That means that the Court's discretion to grant or to withhold the grant of a Certificate has been enlivened.

[6] It has been held that the grant of a Certificate is not routine.[2] It is insufficient, to justify an exercise of discretion in favour of an applicant, merely to show that the appeal has succeeded on a question of law.[3] It has long been established in Queensland that the conduct of the applicant at the trial and the applicant's responsibility, if any, for the erroneous decision of law in question is of relevance to the exercise of discretion.[4] Conversely, the fact that the applicant's submissions to the trial judge led to the order which has been reversed does not of itself compel an exercise of discretion adverse to the applicant.[5]

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1 *Allianz Australia Insurance Ltd v Mashaghati* [2018] 1 Qd R 429.
2 *Richards v Faulls Pty Ltd* [1971] WAR 129.
3 *Richards v Faulls Pty Ltd*, *supra*, at 138; *Reeve v Fowler* [1965] NSWR 110 at 111 per Walsh J.
4 *Brisbane City Council v Ferro Enterprises Pty Ltd* [1976] Qd R 332; *Zappulla v Perkins (No 2)* [1978] Qd R 401; *Vella v Larson* [1982] Qd R 298.
5 *Lauchlan v Hartley* [1980] Qd R 149.

[7] In this case the learned trial judge was led into error by the arguments of the applicant's legal representatives which sought to take advantage of their deliberate non-disclosure of their intention to obtain and to adduce further evidence. That tactical manoeuvre was, as was found on the appeal, a manoeuvre that was in conflict with the reasonable expectation in modern litigation that parties will not engage in such surprise tactics. On appeal the applicant's counsel, who did not appear at the trial, was not able to explain why that course was followed.

[8] In these circumstances, the appellant's success in the appeal, albeit on a point of law, was a direct result of the way in which the applicant chose to conduct the trial.

[9] The Appeal Costs Fund should not indemnify parties whose own unjustified trial tactics lead to the misfortune of an adverse costs order.

[10] For these reasons I would refuse to grant a Certificate.

[11] **McMURDO JA:** I agree with Sofronoff P.

[12] **APPLEGARTH J:** I agree with Sofronoff P.