SUPREME COURT OF QUEENSLAND

CITATION:	*Bettson Properties Pty Ltd & Anor v Tyler* [2019] QCA 230
PARTIES:	**BETTSON PROPERTIES PTY LTD** ACN 009 873 152 **TOBSTA PTY LTD** ACN 078 818 014 (appellants) **v** **PAULINE AUDREY TYLER** (respondent)
FILE NO/S:	Appeal No 8215 of 2018 SC No 1996 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 153 (Burns J)
DELIVERED ON:	25 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Sofronoff P and Fraser JA and Mullins J
ORDER:	**Grant the respondent an indemnity certificate in respect of the appeal pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld).**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – OTHER PARTICULAR CASES AND MATTERS – where the Court allowed an appeal and ordered the respondent to pay the appellants' costs of the proceedings in the Trial Division and in the appeal, but gave leave to make submissions concerning the appropriateness of that order – where the appellants submit that the appropriate order was that which the Court made – where the respondent submits that the appropriate order is that there be no costs of the proceeding in the Trial Division or the appeal, or alternatively, that the respondent be granted an indemnity certificate pursuant to the *Appeal Costs Fund Act* 1973 (Qld) and any costs awarded to the appellants be limited to the amount recoverable under that certificate – whether costs should follow the event APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – WHEN

GRANTED – where the Court allowed the appeal and ordered the respondent to pay the appellants' costs of the proceedings in the Trial Division and in the appeal, but gave leave to make submissions concerning the appropriateness of that order – where the appellants submit that the appropriate order was that which the Court made – where the respondent submits that the appropriate order is that there be no costs of the proceeding in the Trial Division or the appeal, or alternatively, that the respondent be granted an indemnity certificate pursuant to the *Appeal Costs Fund Act* 1973 (Qld) and any costs awarded to the appellants be limited to the amount recoverable under that certificate – whether an indemnity certificate ought to be granted – whether any costs awarded to the appellants ought to be limited to the amount recoverable under that certificate

Appeal Costs Fund Act 1973 (Qld), s 15

Lauchlan v Hartley [1980] Qd R 149; [1979] QSCFC 106, cited
Northern Territory of Australia v Sangare (2019) 93 ALJR 959; [2019] HCA 25, cited

COUNSEL: D A Kelly QC, with R A Quirk, for the appellants
M T De Waard for the respondent

SOLICITORS: Clinton Mohr Lawyers for the appellants
Kelly Legal for the respondent

[1] **SOFRONOFF P:** I agree with Fraser JA.

[2] **FRASER JA:** When the Court allowed the appeal in this matter it ordered the respondent to pay the appellants' costs of the proceedings in the Trial Division and in this appeal but gave the parties leave to make submissions concerning the appropriateness of that order.[1] The appellants submit that the appropriate order is that which the Court made. The respondent submits that the appropriate order is that there be no costs of the proceeding in the Trial Division or the appeal or, alternatively, that the respondent be granted an indemnity certificate pursuant to the *Appeal Costs Fund Act* 1973 (Qld) and any costs awarded to the appellants be limited to the amount recoverable under that certificate.

[3] As the appellants submit the usual position is that the successful party should have its costs. In order to understand the respondent's argument to the contrary it is necessary to read these reasons together with the Courts reasons for dismissing the appeal. The respondent's argument proceeds by these steps:

(a) In the Trial Division the appellants argued that "prevent" in ss 246Q and 246S of the *Building Act* 1973 (Qld) means to prohibit someone from installing solar panels anywhere on their roof.

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1 [2019] QCA 176.

(b) The appellants' outline of argument in the appeal contended for the similar meaning of "to make impossible" or "stop from happening".

(c) After I inquired during argument in the appeal whether "prevent" also comprehended "to make impracticable" the appellants advanced that proposition.

(d) The Court held that "prevents" in the two sections bears its common primary meaning of "stops from happening", which comprehends cases where the result of the relevant restriction or withholding of consent is that it is impossible, impracticable or impractical to install a solar hot water system or photovoltaic cells."[2]

(e) Because the proposition that "prevents" contemplates "to make impracticable" was not argued in the Trial Division or before the hearing of the appeal, the respondent did not lead evidence about the impracticability of moving the solar panels on her roof in compliance with the appellants' demand, thereby causing significant prejudice to the respondent.

(f) That should be taken into account by an order that the appellants not recover their costs of the appeal: *Malick v Lloyd*;[3] *National Australia Bank v KDS Construction Services Pty Ltd*.[4]

[4] The appellants contend in reply that the record reveals that there was no material change between their argument in the Trial Division and their argument on appeal, the respondent was at all times alive to the relevant issue, and if the respondent was surprised she could have sought (but did not seek) an adjournment or an opportunity to adduce evidence in response to the appellants' evidence.

[5] The respondent's argument cannot be accepted, for two reasons. First, in the Trial Division the appellants filed two affidavits by a witness experienced in fitting and installing solar systems. The effect of his evidence was that the solar panels would remain viable if relocated to the position on the roof required by the appellants, although in that position they would be about 15 to 20 per cent less efficient than in the position in which the respondent has caused them to be installed. In reliance upon that evidence, the appellants argued in the Trial Division that because the solar panels would remain viable in the position required by the appellants, the respondent was not prevented from installing the solar panels which should stay on the roof.[5] The appellants had notified the respondent of the effect of the solar panel expert's advice nearly six weeks before the hearing, as the respondent acknowledged in her submissions in the Trial Division.[6] The respondent did not seek to challenge that evidence.

[6] Secondly, the appellants argued in the appeal that the word "prevents" in ss 246Q and 246S meant "to make impossible" or "to stop from happening" and that those

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2 [2019] QCA 176 at [28].

3 (1913) 16 CLR 483 at 492.

4 (1987) 163 CLR 668.

5 Applicants' Outline of Submissions 15 March 2018, paras 33, 37, 46; Transcript 15 March 2018, T 1-9 l 34 – 45, T 1-10 ll 30 – 39, T 1-12 ll 1 – 5 ("he's a solar panel expert … the evidence is unchallenged") ll 27 – 30 ("it might depend on how well the solar panels work … if they don't work at all, essentially you're prohibiting someone from putting the solar panels on their roof").

6 Respondent's Outline of Argument 15 March 2018, paras 14 – 15.

meanings did not comprehend a case where the solar panels would remain viable at the prescribed location, albeit that it was not the optimum location for the solar panels.[7] That argument is wholly consistent both with the arguments they advanced in the Trial Division and with the Court's construction of the statutory provisions.

[7] In the context of argument about the indemnity certificate application, the respondent also submits that if a costs order in favour of the appellants is enforced, it will result in her impecuniosity, potentially the sale of her house, and likely bankruptcy. If those regrettable consequences eventuate, they will be consequences of the respondent's conduct in installing the solar panels despite the covenants in the contract she signed and her decision to defend the appellants' claim, thereby putting the appellants to the cost of contested litigation. Impecuniosity is not a ground upon which the appellants should be deprived of costs upon the basis that they have succeeded in the litigation: *Northern Territory of Australia v Sangare*.[8]

[8] The appellants' arguments relating to the indemnity certificate are directed to the proposition that it is not just and reasonable to limit the appellants' costs to the costs recoverable by the respondent under any indemnity certificate. For reasons already given that should be accepted. The respondents have not established any principled basis upon which the appellants should be deprived of costs either in the Trial Division or in the appeal.

[9] Because the appeal succeeded on a question of law the court has a discretion under s 15 of the *Appeal Costs Funds Act* 1973 (Qld) to grant the respondent an indemnity certificate. This was apparently the first case in which the relevant statutory provisions have fallen for consideration in the Supreme Court. As the reasons of the primary judge demonstrate, the construction of those provisions advocated by the respondent was fairly arguable. In my judgment this is an appropriate case for the exercise of the discretion to grant a certificate: see *Lauchlan v Hartley*.[9]

[10] I would grant the respondent an indemnity certificate in respect of the appeal pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld).

[11] **MULLINS J:** I agree with Fraser JA that the costs orders made when the Court's reasons on the appeal were published on 6 September 2019 should remain, but with the addition of an order granting the respondent an indemnity certificate in respect of the appeal pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld).

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7 Outline of Argument of the appellants 19 November 2018, paras 18, 21, 31(b) and (c).
8 [2019] HCA 25.
9 [1980] Qd R 149 at 151.