

# SUPREME COURT OF QUEENSLAND

CITATION: *Eaton v Rare Nominees Pty Limited* [2019] QCA 242

PARTIES: **CHRISTOPHER JOHN EATON**  
(appellant)  
v  
**RARE NOMINEES PTY LTD ACN 094 976 833 as trustee for the MACKELLAR FAMILY SUPERANNUATION FUND**  
(respondent)

FILE NO/S: Appeal No 11105 of 2017  
DC No 4799 of 2015

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Brisbane – [2017] QDC 238 (Dorney QC DCJ)

DELIVERED ON: 5 November 2019

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Philippides and McMurdo JJA and Davis J

ORDER: **The application for an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act 1973 (Qld)* 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)* – where the respondent’s submissions advanced below were central to the primary judge’s decision – whether an indemnity certificate should be granted

*Appeal Costs Fund Act 1973 (Qld)*, s 15

*Barnes v Addy* (1874) LR 9 Ch App 244, considered  
*Eaton v Rare Nominees Pty Limited* [\[2019\] QCA 190](#), cited  
*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; [1984] HCA 64, considered

COUNSEL: S B Whitten for the appellant  
B A Hall for the respondent

SOLICITORS: Saal & Associates for the appellant  
Robinson Locke Litigation Lawyers for the respondent

- [1] **PHILIPPIDES JA:** On 13 September 2019, this Court made orders:
1. allowing an appeal brought by Christopher Eaton (the appellant) against Rare Nominees Pty Ltd (the respondent);
  2. setting aside the judgment of the District Court for the appellant against the respondent; and
  3. setting aside costs orders made by the trial judge and ordering that the respondent pay to the appellant his costs of the proceeding against him and of the appeal.
- [2] The respondent now applies for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973* (Qld) contending that the appeal was allowed on the basis of a question of law. In that regard, the respondent relies on paras [64] to [71] of my reasons and the reasons of McMurdo JA at [73] and [81] and the concurring reasons of Davis J at [89].<sup>1</sup>
- [3] The critical issue on the appeal concerned the trial judge’s finding that a fiduciary relationship arose in the context of a joint venture agreement between E-Coastal Developments Pty Ltd (E-Coastal) and the respondent and the consequential finding that the appellant was liable pursuant to the second limb in *Barnes v Addy*<sup>2</sup> for a breach by E-Coastal of its fiduciary duty owed to the respondent. The trial judge’s finding that a fiduciary relationship arose failed to give proper consideration to the critical feature that such a relationship arises where the fiduciary undertakes or agrees to act “for or on behalf of” and “in the interests of” another person in the exercise of a power or discretion which will affect the interests of the other person in a legal or practical sense as outlined in *Hospital Products Ltd v United States Surgical Corporation*.<sup>3</sup>
- [4] In particular, the trial judge erred in failing to consider how the imposition of the fiduciary relationship contended for at trial accorded with or was consistent with the contractual provisions of the Joint Venture Agreement to which the parties had agreed.
- [5] The error by the trial judge was one in respect of which the respondent made submissions arguing the position ultimately adopted by the trial judge. In those circumstances, it is not appropriate for an indemnity certificate to be issued.
- [6] **McMURDO JA:** I agree with the order proposed by Philippides JA, for the reason given by her in [5].
- [7] **DAVIS J:** I agree with the reasons and order proposed by Philippides JA.

---

<sup>1</sup> *Eaton v Rare Nominees Pty Limited* [2019] QCA 190.

<sup>2</sup> (1874) LR 9 Ch App 244.

<sup>3</sup> (1984) 156 CLR 41.