

SUPREME COURT OF QUEENSLAND

CITATION: *Van Steensel Van Der A'A v Nominal Defendant* [2004] QCA 410

PARTIES: **ANTOINETTE VAN STEENSEL VAN DER A'A**
(applicant/applicant)
v
NOMINAL DEFENDANT
(respondent/respondent)

FILE NO/S: Appeal No 11518 of 2003
DC No 504 of 2003

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: Judgment delivered 2 March 2004
Further Order delivered 5 November 2004

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: McMurdo P, McPherson JA and White J
Separate reasons for judgment of each member of the Court, each concurring as to the further order made

FURTHER ORDER: **The plaintiff is given leave to apply for and to be granted an indemnity certificate under s 15 *Appeal Costs Fund Act 1973 (Qld)* in respect of the application for leave to appeal and the appeal**

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OUT OF A FUND – WHEN COSTS ALLOWED OUT OF A FUND – OTHER CASES – where applicant given judgment in District Court following decision of Supreme Court – later decision in Court of Appeal overturned that Supreme Court decision – respondent applied for leave to appeal against judgment in applicant's District Court application – applicant conceded that appeal must be allowed and did not appear so as not to incur any further costs – application for leave to appeal allowed on question of law and costs awarded against applicant – applicant did not apply for indemnity certificate until more than six months later contrary to Practice Direction – applicant's solicitor swore that delay was because of his oversight – whether indemnity certificate should be granted despite non-compliance with Practice Direction

Appeal Costs Fund Act 1973 (Qld), s 15
Supreme Court Practice Direction No 26 of 1999, par 36

COUNSEL: No appearance by the applicant, the applicant's submissions were heard on the papers

SOLICITORS: Baker Johnson Lawyers for the applicant

- [1] **McMURDO P:** The applicant respondent ("the plaintiff") originally brought an action in the District Court at Southport claiming damages for personal injuries she received in a motor vehicle accident which she claimed was caused by the negligence of the driver of an unidentified motor vehicle. In November 2003, the primary judge gave her leave to proceed under s 39(5)(c) *Motor Accident Insurance Act 1994 (Qld)*, consistent with the decision of Fryberg J in *Miller v Nominal Defendant*.¹ This Court overturned the decision in *Miller* on 15 December 2003.² The Nominal Defendant then applied for leave to appeal from the primary judge's decision. In the light of this Court's decision in *Miller*, the plaintiff conceded that the appeal must be allowed and on 2 March 2004 this Court ordered that the Nominal Defendant be granted leave to appeal and allowed the appeal with costs to be assessed, setting aside the order at first instance and instead ordering that the original application be dismissed with costs to be assessed.
- [2] The plaintiff did not bring this application for an indemnity certificate under s 15 *Appeal Costs Fund Act 1973 (Qld)* ("the Act") until September 2004.
- [3] She has not complied with this Court's Practice Direction No 26 of 1999, para 36 of which requires that any application for an indemnity certificate "be made either orally at the appeal hearing or parties may indicate that they intend to provide written submissions to the court within seven days of judgment of the court".
- [4] This Court's ex tempore reasons for judgment in the appeal record that "The [plaintiff's] solicitors have not appeared today so as not to incur any further costs." Because of that non-appearance, it was not possible for the plaintiff to comply strictly with the Practice Direction although there was no reason why she did not apply in writing at the appeal hearing or within seven days of the judgment for an indemnity certificate. The plaintiff's sensible cost-saving non-appearance before this Court on the appeal does not explain the unacceptable delay of over 6 months in bringing this application. Affidavit material now filed by the plaintiff's solicitor makes plain that the delay was because of her solicitor's oversight; he had always intended to apply for an indemnity certificate under the Act but does not practice regularly in this Court and was unaware of his obligations under the Practice Direction.
- [5] The appeal was successful on a question of law. This would be an appropriate case for the Court to exercise its discretion in favour of granting an indemnity certificate under s 15 of the Act but for the plaintiff's non-compliance with the Practice Direction. With some misgivings, I am finally persuaded that, for two reasons, the certificate should be granted despite that non-compliance. The first is because the plaintiff could not strictly comply with the Practice Direction because, having conceded the appeal should be allowed, neither she nor her lawyers appeared at the

¹ [2003] QSC 081; SC No 10485 of 2002, 22 April 2003.

² [2003] QCA 558; Appeal No 4398 of 2003, 15 December 2003.

hearing in an effort to save costs. The second is that the subsequent lengthy delay in applying for a certificate was not due to any fault on her part personally and I would not penalise her for her solicitor's shortcomings.

- [6] I would order that the plaintiff be given leave to apply for and to be granted an indemnity certificate under s 15 *Appeal Costs Fund Act* 1973 (Qld) in respect of the application for leave to appeal³ and the appeal.
- [7] **McPHERSON JA:** I agree with the reasons given by other members of the Court. This decision depends on its own particular facts.
- [8] **WHITE J:** The circumstances giving rise to this application for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 are set out in the reasons for judgment of the President.
- [9] Of concern is that the person who apparently had charge of the applicant's file is a solicitor of the court and a partner in the firm and yet admits to having no familiarity with "the practice of the Court of the [sic] Appeal and in particular Practice Direction 26 of 1999". Mr Alexander, the solicitor in question, deposes that it was always his intention to apply for an indemnity certificate pursuant to the *Appeal Costs Fund Act* after his client on legal advice recognised that she could not successfully defend the appeal. Even if this was the first civil appeal for this solicitor he ought to have familiarised himself with the court's procedures to be found in relevant Practice Directions.
- [10] The applicant's solicitors received the short form costs assessment from the Nominal Defendant's solicitors on 30 April 2004 and wrote

"We look forward to receiving your client's cheque in the amount of \$10,672.50 in payment of our client's costs and outlays."

If there was any time when an application for an indemnity certificate should have been sought (ignoring the Practice Direction) this was the time. Mr Alexander makes it clear that the applicant is a person of very limited means with a weekly income of approximately \$154. The firm expected to be paid only on a successful outcome of the proceedings. Yet it was not until 8 July 2004 that Mr Alexander wrote to the Deputy Registrar indicating that his client wished to apply for an indemnity certificate. By letter dated 12 July 2004 the Deputy Registrar drew to Mr Alexander's attention the effect of Practice Direction 26 of 1999. An application for leave to apply for an indemnity certificate was not filed until 15 September 2004.

- [11] Mr Alexander seeks that the applicant not be penalised by his oversight. If the court refused the application the client, no doubt, could seek her remedy against the firm. However, on balance, I agree with the President that in the circumstances of this matter the applicant should not be so penalised. I agree with the orders proposed by the President.

³ Under s 4 of the Act "appeal" includes "any other proceeding in the nature of an appeal".