

# SUPREME COURT OF QUEENSLAND

CITATION: *Quinn Villages P/L v Mulherin* [2006] QCA 500

PARTIES: **QUINN VILLAGES PTY LTD** ACN 000 776 189  
(plaintiff/respondent)  
v  
**HENRY DESMOND MULHERIN AS TRUSTEE FOR  
THE H D MULHERIN FAMILY TRUST NO 4**  
(defendant/appellant)

FILE NO/S: Appeal No 5973 of 2006  
SC No 11187 of 2003

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal - Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered 3 November 2006  
Further Order delivered 1 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 6 September 2006

JUDGES: McMurdo P, Holmes JA and Cullinane J  
Further Order of the Court

FURTHER ORDER: **Appellant to pay respondent's costs of the appeal to be assessed on the standard basis**

CATCHWORDS: PROCEDURE - COSTS - RECOVERY OF COSTS - where this Court in the substantive judgment dismissed the appeal with costs to be assessed - where the respondent now seeks costs on an indemnity basis - whether there are special or unusual circumstances justifying an order that the appellant pay the respondent's costs on an indemnity basis  
*Property Law Act 1974 (Qld), s 38*

COUNSEL: A J H Morris QC, with I A Erskine, for the appellant  
D J S Jackson QC, with J K Meredith, for the respondent

SOLICITORS: Gateway Lawyers for the appellant  
Plastiras Lawyers for the respondent

[1] **THE COURT:** The respondent seeks costs of the appeal on an indemnity basis.

[2] The basis upon which this order is sought is a claim by the appellant that it was entitled to an interest in the lands the subject of the agreement remaining after the development of Stage 1. The respondent alleges that this was an abuse of the

Court's process. It also relies upon the institution by the appellant of proceedings under s 38 of the *Property Law Act 1974* (Qld). These proceedings are predicated upon the claim that there was an interest in the balance lands.

- [3] The respondent had in fact sought to raise the latter matter as a further basis for the dismissal of the appeal. It sought to do so by letter of 2 November 2006. The receipt of this coincided with the delivery of judgment in the action. The appeal was dismissed. The Court did not need to consider the matters raised by the respondent.
- [4] An order that an unsuccessful party pay costs on an indemnity basis can be justified only where there are special or unusual circumstances.
- [5] The appellant's claim to an interest in the balance of the lands was advanced as an alternative to its primary claim that the contract had come to an end. In fact the primary judge ultimately dealt with the matter upon the basis that the issue had not been raised in the pleadings. At trial Senior Counsel for the respondent conceded that the appellant was entitled, in the event that the appeal failed, to an interest in the balance lands.
- [6] There is nothing about the appellant's conduct in raising or seeking to raise this matter as an alternative to its primary claim which could conceivably justify an order for costs on an indemnity basis. As we have said, the appellant's entitlement was ultimately conceded by Senior Counsel for the respondent.
- [7] There is no substance in the argument that such a claim constituted an abuse of the Court's process.
- [8] As to the subsequent proceedings, the respondent relied upon these as reinforcing its argument that there had been such an abuse of process. These proceedings were instituted some time after the appeal had been argued. They played no role in the way in which this matter was litigated either at first instance or on appeal.
- [9] Whether or not the institution of those proceedings prior to the dismissal of the appeal constituted an abuse of the process of the court in which they have been commenced and the appropriate costs order in those proceedings are matters the respondent can take up elsewhere.
- [10] The appellant should pay the respondent's costs of the appeal to be assessed on the standard basis.