

SUPREME COURT OF QUEENSLAND

CITATION: *Boylan v Gallagher* [2011] QCA 287

PARTIES: **KYM BOYLAN**
(appellant)
v
DONNA MARIE GALLAGHER
(respondent)

FILE NO/S: Appeal No 4482 of 2011
SC No 7518 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered 16 September 2011
Further Orders delivered 14 October 2011

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Fraser and Chesterman JJA and Philippides J
Judgment of the Court

FURTHER ORDERS: **1. The respondent is to pay the appellant’s costs of the proceedings in the trial division, excluding the costs of the trial, to be assessed on the standard basis.**
2. Pursuant to s 15(1) of the *Appeal Costs Fund Act 1973* (Qld), the respondent is granted an indemnity certificate in respect of the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant succeeded on appeal on a point conceded at trial – where the Court granted the parties leave to make submissions as to the costs of the proceedings in the trial division – where the respondent submitted that she should only be required to pay the appellant’s costs of the counterclaim excluding the costs of an incidental to trial – where the appellant submitted that costs should follow the event – whether the appellant should be awarded her costs of the proceedings in the trial division

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the respondent applied for an indemnity certificate – where the point upon which the appellant succeeded involved only a question of law arising from uncontentious facts –

where the point was conceded by the appellant at trial – whether an indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15(1)

Boylan v Gallagher [2011] QCA 240, cited

COUNSEL: No appearance by the appellant, the appellant’s submissions were heard on the papers
No appearance by the respondent, the respondent’s submissions were heard on the papers

SOLICITORS: Reichman Lawyers for the appellant
Morgan Conley Lawyers for the respondent

- [1] **THE COURT:** On 16 September 2011 the Court allowed the appeal in this matter with costs, set aside the order in the respondent/plaintiff’s favour for recovery of a deposit she had paid under a put and call option deed with the appellant, and gave judgment for the appellant/defendant on her counterclaim for \$2,100,000 as damages for the respondent’s breach of contract (formed upon the appellant’s exercise of the put option) in failing to complete the purchase of the appellant’s land.¹ Pursuant to the Court’s leave, the parties have now lodged written submissions as to the appropriate order about the costs of the proceedings in the trial division.
- [2] The respondent succeeded at trial on the ground that the appellant had not complied with the requirement in s 365(2)(c)(ii) of the *Property Agents and Motor Dealers Act 2000* (Qld) (“*PAMDA*”) that the seller or the seller’s agent direct the attention of the buyer or the buyer’s agent to the warning statement required by *PAMDA*. At the trial the appellant conceded that she had not complied with that requirement, but she argued that *PAMDA* did not apply or that the respondent had waived her entitlement under s 365(3) to “withdraw the offer to purchase made in the contract form”. The trial judge found against the appellant on both points.²
- [3] In the appeal, the appellant did not challenge the trial judge’s conclusion that *PAMDA* applied and the Court found it unnecessary to consider the appellant’s argument that the respondent had waived her entitlement under s 365(3). However, the appellant succeeded on appeal on the point she had conceded at trial. The respondent did not oppose leave being granted to amend the notice of appeal to agitate that point except on the ground that the point lacked merit. The Court found for the appellant on that point, holding that she had complied with s 365(2)(c)(ii).
- [4] The respondent submitted that because she was the successful party at trial and failed on appeal only on the point the appellant had conceded at trial, she should only be required to pay the appellant’s costs of the counterclaim excluding the costs of and incidental to the trial. The appellant submitted that: the concession was made at trial in accordance with *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*;³ the trial would have proceeded even if the appellant had not made the concession and had argued that she had complied with s 365(2)(c)(ii); the

¹ *Boylan v Gallagher* [2011] QCA 240.

² *Gallagher v Boylan* [2011] QSC 94 at [17], [30].

³ [2008] QSC 261 at [87].

trial judge would in any event have found for the respondent on the authority of *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*; and in those circumstances there was no sufficient warrant for departing from the general rule that costs should follow the event.

- [5] It is relevant that the appellant was ultimately the successful party on both claim and counterclaim. It may also be accepted that if the appellant had not made the concession at trial and had argued that she had complied with s 365(2)(c)(ii), it is quite likely that the respondent would still have pursued her claim and resisted the appellant's counterclaim. That is suggested by the respondent's argument on appeal that the appellant had not complied with that provision and the respondent's reliance upon *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* as support for that argument.
- [6] However, whilst that decision arguably supported the respondent's argument, it was distinguishable. It cannot be assumed that the trial judge would not have distinguished the decision and found in the appellant's favour at trial for the reasons given in this appeal.⁴ It would then be necessary to build hypothesis upon hypothesis in order to determine whether, if the appellant had argued and succeeded on the conceded point at trial, the respondent would have appealed and the appellant would in any event have incurred costs of both a trial and an appeal in vindicating her position. That there can be no reliable determination upon that issue is a result of the appellant having made the concession at trial which has been found to be unjustified. Those circumstances suggest that it would be unjust to require the respondent to indemnify the appellant against her costs of both the trial and the appeal. That the respondent succeeded at trial on the issues which were litigated and those issues were not determined adversely to her on appeal lends further support to that view.
- [7] In these very unusual circumstances, the appellant should have her costs of the appeal (as was ordered on 16 September 2011) and her costs in the trial division excluding the costs of the trial.
- [8] In relation to the order that the respondent pay the appellant's costs of the appeal, the respondent applied for an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act 1973* (Qld). In giving judgment, the Court observed of the point upon which the appellant succeeded that it "involved only a question of law arising from uncontentious facts".⁵ Accordingly the discretion to grant an indemnity certificate in respect of the appeal is enlivened. Having regard also to the fact that the point was conceded at the trial by the appellant, the discretion to grant the certificate should be exercised in the respondent's favour.
- [9] Accordingly the further orders are:
1. The respondent is to pay the appellant's costs of the proceedings in the trial division, excluding the costs of the trial, to be assessed on the standard basis.

⁴ *Boylan v Gallagher* [2011] QCA 240 at [35] - [36].

⁵ *Boylan v Gallagher* [2011] QCA 240 at [13].

2. Pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld), the respondent is granted an indemnity certificate in respect of the appeal.