

SUPREME COURT OF QUEENSLAND

CITATION: *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS* [2012] QCA 60

PARTIES: **CURRUMBIN INVESTMENTS PTY LTD**
(ACN 010 304 677)
(appellant)
v
BODY CORP MITCHELL PARK PARKWOOD CTS
(respondent)

FILE NO/S: Appeal No 1879 of 2011
SC No 13890 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 March 2012

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Margaret McMurdo P and Fraser JA and Fryberg J
Judgment of the Court

FURTHER ORDER: **The respondent is granted an indemnity certificate under s 15 *Appeal Costs Fund Act 1973 (Qld)*.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – respondent applied for an indemnity certificate under s 15 *Appeal Costs Fund Act 1973 (Qld)* – whether indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15

Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS [\[2012\] QCA 9](#), related

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

SOLICITORS: Kinneally Miley Law for the appellant
Adamson Bernays Kyle & Jones Lawyers for the respondent

- [1] **THE COURT:** This Court made orders on 10 February 2012 allowing the appeal with costs; setting aside the orders made by the primary judge and substituting declarations as to the proper construction of the easement the subject of the appeal: *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS* [2012] QCA 9.
- [2] The respondent has applied for an indemnity certificate under s 15 *Appeal Costs Fund Act* 1973 (Qld). Where an appeal against a decision in the Supreme Court on a question of law succeeds, this Court has an unfettered discretion in determining whether to grant a respondent an indemnity certificate under s 15. This appeal succeeded on a question of law. The appellant was successful on an argument which was not advanced before the primary judge and substantially amended at the hearing of the appeal the relief it claimed, ultimately abandoning much of the declaratory relief sought at first instance and in the notice of appeal. There is substance in the respondent's contention that some of the expense it has been put in this matter to may have been avoided had the appellant framed its case differently at first instance and at the commencement of the appeal. It is also relevant that the respondent's contentions were fairly arguable. In those circumstances, this is an appropriate case in which to grant the respondent the indemnity certificate it seeks.

ORDER:

The respondent is granted an indemnity certificate under s 15 *Appeal Costs Fund Act* 1973 (Qld).