SUPREME COURT OF QUEENSLAND

CITATION:	*King v Allianz Australia Insurance Limited* [2015] QCA 146
PARTIES:	**DANIEL RAYMOND KING** (appellant) **v** **ALLIANZ AUSTRALIA INSURANCE LIMITED** ACN 000 122 850 (respondent)
FILE NO:	Appeal No 9666 of 2014 SC No 406 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Townsville – Unreported, 20 August 2014
DELIVERED ON:	14 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Philippides JA, Mullins and Burns JJ Judgment of the Court
ORDERS:	**1. The order for costs made in order 1 on 12 June 2015 is confirmed.** **2. No order as to the costs of the further submissions on costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where appellant's appeal against the primary judge's decision on the respondent's application for review of a costs assessment was successful – where appeal allowed with costs and respondent to pay appellant's costs of the application for review assessed on the District Court scale – where parties sought and were given leave to file and exchange further submissions regarding basis on which costs to be assessed – whether costs of the appeal should be awarded on the standard or indemnity basis *King v Allianz Australia Insurance Limited* [2015] QCA 101, related
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: Roati Legal for the appellant
Moray & Agnew for the respondent

[1] **THE COURT:** The appellant's appeal against the primary judge's decision on the respondent's application for review of a costs assessment was successful: *King v Allianz Australia Insurance Limited* [2015] QCA 101 (the reasons). When the reasons were published the following orders were made:

1. Appeal allowed with costs.
2. Set aside the orders at first instance.
3. Instead, the application for review is dismissed.
4. The respondent must refund to the appellant the amount paid by the appellant to the respondent consequential upon the orders at first instance.
5. The respondent must pay the appellant's costs of the application for review assessed on the District Court scale.

[2] The parties sought and were given leave to file and exchange further submissions on the basis on which costs are to be assessed in orders 1 and 5, and in respect of any application for a certificate under the *Appeal Costs Fund Act* 1973 (Qld).

[3] The appellant's written submission made pursuant to this leave was confined to the basis for assessment of the costs pursuant to order 1, submitting those costs should be on the indemnity basis. The respondent then filed a submission opposing the appellant's application for the costs of the appeal to be assessed on the indemnity basis, but sought confirmation of order 1 made on 12 June 2015 which had the effect that costs would be assessed on the standard basis.

[4] Neither party made an application under the *Appeal Costs Fund Act* 1973.

The parties' submissions

[5] The appellant submits that the conduct of the respondent in connection with all aspects of the proceeding is relevant to the exercise of discretion as to whether costs should be ordered to be assessed on the indemnity basis. The appellant refers specifically to the respondent's requiring legal proceedings to be instituted, as well as then requiring a detailed costs statement and then delivering extensive objections, and then, after the costs assessment was made, pursuing the review application which led to the appeal over the amount of $5,750 disallowed on the review. The appellant describes the respondent's conduct in resisting the appeal as an "unreasonable attempt … to maintain on appeal the clearly flawed outcome of the review application, including the costs of that application."

[6] Apart from the respondent's conduct at all stages of the proceeding, the appellant submits that unless indemnity costs are awarded on the appeal, the appellant's success on the appeal will be much diminished in the practical financial outcome: *Tamawood Limited v Paans* [2005] 2 Qd R 101, 112 and *Theden v Nominal Defendant & Anor* [2008] QCA 92 at [2] and [4].

[7] The respondent submits that the appellant has not shown the conduct of the respondent was "plainly unreasonable", as referred to in *Hadgelias Holdings Pty Ltd & Anor v Seirlis & Ors* [2014] QCA 325 at [11].

[8] The respondent relies on the approach of the Court of Appeal in *Di Carlo v Dubois & Ors* [2002] QCA 225 at [36]-[40] to the effect that an award of costs on the indemnity basis should not be made too readily. The respondent notes that the observations made in *Tamawood* were in the context of a jurisdiction where parties were to pay their own costs, unless the interests of justice required otherwise, and indemnity costs were awarded against the unsuccessful appellants in *Theden* because of the "paltry" sum of $1,423.08 in issue in addition to it having been an integral part of the appellants' case to allege criminal misconduct against another party that was contrary to longstanding authority.

[9] The respondent relies on the context in which it sought to maintain the primary judge's decision which was that the appellant had an uncomplicated quantum only claim in respect of which the respondent had made an early admission of liability and was settled for $275,000 clear of the refund of rehabilitation expenses, but inclusive of statutory refunds, plus costs and outlays to be assessed on the District Court scale where the assessment by the costs assessor was $146,577.22.

[10] The respondent relies on no *Calderbank* offer being made by the appellant in relation to the outcome of the appeal. The respondent notes the appellant had disputed the inclusion in the supplementary record for the appeal of the written submissions that were before the primary judge until the commencement of the hearing of the appeal. The respondent submits that the prolix outline of argument was also a relevant factor.

[11] The respondent submits that it was resisting recovery of a more substantial sum on the review application, when the primary judge took the course that he did in relation to the two items that were disallowed by the primary judge that became the subject matter of the appeal, and that the reasons for the primary judge disallowing the amount the subject of the Giles' objection were capable of being read, so as not to offend r 742(5)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld).

Should costs of the appeal be assessed on the indemnity basis?

[12] The appellant in the notice of appeal had sought the order that is reflected in order 1 made on 12 June 2015 that "the appeal be allowed with costs". The appellant's written submissions filed in support of the appeal confirmed that as the order sought by the appellant. In the normal course, that would not be treated as seeking costs to be assessed on an indemnity basis. The fact that the appellant did not prior to the publication of the reasons seek any different order in relation to the costs of the appeal is not irrelevant.

[13] Each party seeks to rely on conduct of the other party that relates to the conduct of the proceeding generally, rather than the issues that resulted in the appeal. The general assertion made by the appellant about the manner in which the respondent dealt with the appellant's claim for damages and the general assertion made by the respondent about the quantum of the appellant's costs in relation to the quantum of the appellant's damages are not of direct relevance to the costs of the appeal. The appeal was concerned with narrow issues on two complaints that were determined by the primary judge in the respondent's favour on the review application. The respondent sought to uphold the primary judge's decision. Although after the appeal it may be said that the respondent's prospects of doing so were not great, the appellant had not sought to bolster its position on the appeal in relation to costs by making a relevant offer to settle the appeal. As the respondent has submitted, the authorities relied on by the appellant where indemnity costs have been awarded to ensure that an appellant's success has not been diminished in

the practical financial outcome of the proceeding can be distinguished on the facts. The appellant's substantial costs assessment in respect of the appellant's proceeding that was settled has been preserved. As far as the appeal was concerned, it was ordinary litigation where costs should follow the event and the circumstances overall do not favour exercising the discretion to award the costs of the appeal on the indemnity basis.

[14] The further submissions filed by both parties tended to traverse matters that were unnecessary for the purpose. The respondent's reliance on *Hadgelias* was unhelpful, as that case concerned when indemnity costs should be ordered against a party whose conduct in not accepting an offer to settle was "plainly unreasonable". The respondent's characterisation of the appellant's outline on the appeal as prolix was also not accurate. Even though the appellant is unsuccessful in obtaining costs on the indemnity basis, the preferable order in the circumstances in relation to the costs of the further submissions is that no order be made as to those costs.

Orders

[15] The orders which should be made, as a result of the further submissions filed by the parties pursuant to the leave given on 12 June 2015 are:

1. The order for costs made in order 1 on 12 June 2015 is confirmed.
2. No order as to the costs of the further submissions on costs.