

SUPREME COURT OF QUEENSLAND

CITATION: *Eversden Pty Ltd v Miladi* [2015] QCA 203

PARTIES: **EVERSDEN PTY LTD**
ACN 105 484 240
(appellant)
v
ARMIN MILADI
(respondent)

FILE NO/S: Appeal No 8398 of 2014
DC No 3991 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Brisbane – Unreported, 8 August 2014

DELIVERED ON: 23 October 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Holmes CJ and Philippides JA and Ann Lyons J
Judgment of the Court

ORDER: **The application for an indemnity certificate is refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the respondent submitted that it ought to be granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act 1973* (Qld) – where the respondent’s submissions advanced below were central to the primary judge’s decision – whether an indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15

Eversden Pty Ltd v Miladi [2015] QCA 126, related
Vella v Larson [1982] Qd R 298, applied

COUNSEL: No appearance for the appellant
No appearance for the respondent

SOLICITORS: No appearance for the appellant
Kerin Lawyers for the respondent

- [1] **THE COURT:** The appeal in this matter was allowed on 10 July 2015.¹ The respondent was ordered to pay the costs of the further amended application filed 29 July 2014 and the costs of the appeal. The respondent applies for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973* (Qld).
- [2] The respondent submits that the appeal succeeded on a question of law for the following reasons:
- (a) The primary judge erred in exercising his discretion pursuant to r 69(2)(f)(ii);
 - (b) The primary judge erred in exercising his discretion pursuant to r 376(4);
 - (c) It was not open to the primary judge to exercise the discretion to allow the appellant to be joined as a party under r 69 nor grant leave under r 367(4) to make the proposed amendments. In those circumstances there was no utility in setting aside the default judgment under r 290. The exercise of discretion under that rule also miscarried.

No other reason is put forward as to why the Court would exercise the discretion to grant an indemnity certificate.

- [3] While the appeal succeeded on the basis of the incorrect exercise of discretion by the primary judge, which may be characterised as an error of law, that does not automatically entitle the respondent to an indemnity certificate. Section 15 of the *Appeal Costs Fund Act* is not intended to relieve against the ordinary risk of expense due to litigation loss, but rather is limited to relieving against a particular and limited type of misfortune in litigation.² It is relevant to consider the conduct of the respondent at first instance and his responsibility, if any, for the erroneous decision of law for which the application for a certificate is made.³ In that regard, the obligation is upon the applicant to show some ground calling for the exercise of the discretion in his favour.⁴
- [4] The respondent's submissions advanced below were central to the primary judge's decision as to the exercise of his discretion in the respondent's favour. Having elected to make those submissions, the respondent accepted the risk of their being wrong.⁵ There is thus no reason to conclude that the respondent paying the appellant's costs constitutes anything other than the materialisation of the ordinary risk of expense due to litigation loss. The application for an indemnity certificate should be refused.

¹ *Eversden Pty Ltd v Miladi* [2015] QCA 126.

² *Vella v Larson* [1982] Qd R 298 at 301.

³ *Vella v Larson* [1982] Qd R 298 at 301.

⁴ *Vella v Larson* [1982] Qd R 298 at 301.

⁵ *Vella v Larson* [1982] Qd R 298 at 302.