

SUPREME COURT OF QUEENSLAND

CITATION: *Pittaway v Tutt & Quinlan & Anor* [2003] QCA 365

PARTIES: **JASON PITTAWAY**
(plaintiff/respondent)
v
W H TUTT & QUINLAN
(first defendant/appellant)
STEPHEN E KERIN
(second defendant/appellant)

FILE NO/S: Appeal No 10016 of 2001
SC No 6683 of 2001

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered on 6 September 2002
Further order delivered on 29 August 2003

DELIVERED AT: Brisbane

HEARING DATE: 17 May 2002

JUDGES: McMurdo P, McPherson JA and Wilson J
Judgment of the Court

ORDER: **Order that the respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973 (Qld)* in relation to the appellants' costs of appeal.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – WHEN GRANTED – where court allowed an appeal against primary judge's dismissal of an application for summary judgment in September 2002 – where application for an indemnity certificate filed in August 2003 – where no application made at hearing or when judgment was handed down through oversight – whether indemnity certificate should be granted
Appeal Costs Fund Act 1973 (Qld), s 15

COUNSEL: P A Keane QC, with K N Wilson, for the appellants
J A Griffin QC, with D R Kent, for the respondent

SOLICITORS: McInnes Wilson for the appellants
Richardson McGhie for the respondent

- [1] **THE COURT:** On 6 September 2002, this court allowed an appeal against the primary judge's dismissal of an application by the appellant/defendants for summary judgment. The court ordered the respondent/plaintiff to pay the appellant/defendants' costs of the claim and the appeal.
- [2] On 18 August 2003 the respondent filed this application for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973* (Qld). Under that provision a certificate may be granted where the appeal succeeds on a question of law, which it did in this case.
- [3] Practice Direction 26 of 1999, paragraph 36 is in the following terms –
“An application for an indemnity certificate under s. 15(1) of the *Appeal Costs Fund Act 1973-1981* and accompanying submissions will be made either orally at the appeal hearing or parties may indicate that they intend to provide written submissions to the court within seven days of judgment of the court.”

According to the respondent's solicitor, no application was made either at the hearing or when judgment was handed down through oversight.

- [4] The preferred course of making an application at the hearing or when judgment is handed down is obviously intended to save the costs of an application such as this, as well as to ensure that the best use is made of the court's time. It is regrettable that that course was not followed in this case. However, since this was an oversight apparently by the respondent's solicitors, we are prepared to accept the explanation as adequate and would grant a certificate.
- [5] Order that the respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973* in relation to the appellants' costs of the appeal.