

SUPREME COURT OF QUEENSLAND

CITATION: *Jardine v Windsor Craig Solicitors* [2003] QCA 486

PARTIES: **TONY ALLEN JARDINE**
(plaintiff/respondent)
v
WINDSOR CRAIG, SOLICITORS (A FIRM)
(defendant/appellant)

FILE NO/S: Appeal No 1778 of 2003
DC No 452 of 2000

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Maroochydore

DELIVERED ON: Judgment delivered 17 October 2003
Further orders delivered 7 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 30 September 2003

JUDGES: Davies JA, Jones and Holmes JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

FURTHER ORDERS: **1. The respondent’s application for an indemnity certificate under s 15 of the *Appeal Costs Fund Act 1973* is refused**
2. The appellant pay the costs of the proceedings below, calculated on the standard basis and applying the appropriate Magistrates Court scale, up to and including 19 December 2002
3. The respondent pay the costs of the proceedings below incurred after 19 December 2002, calculated on the standard basis and applying the District Court scale
4. The respondent pay the appellant’s costs of the appeal

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – OTHER MATTERS – where appellant succeeded on appeal and had substituted judgment – where offer made prior to trial – where offer greater than substituted judgment – whether appellant should have their costs after the date of offer – where appellant succeeded on a point of law at appeal – whether an indemnity certificate should be issued

Uniform Civil Procedure Rules 1999 (Qld), r 361(1)
Appeal Costs Fund Act 1973 (Qld), s 15(1)

COUNSEL: A C Barlow for the appellant

S R D Blaxland for the respondent

SOLICITORS: Hyland Lawyers for the appellant
Swanston & Associates (Minyama) for the respondent

- [1] **DAVIES JA:** I agree with the further reasons for judgment of Holmes J and with the further orders she proposes.
- [2] **JONES J:** I agree with the further reasons for judgment of Holmes J and with the further orders she proposes.
- [3] **HOLMES J:** This appeal was decided in favour of the appellant, with judgment against it for \$3539.20 substituted for the judgment appealed, in the amount of \$41,691. The proposed costs orders were that the appellant pay the costs of the proceedings below on the appropriate Magistrates Court scale and that the respondent pay the appellant's costs of the appeal.
- [4] The appellant has filed material, however, demonstrating that an offer of \$14,000, with interest at 9% and costs on the Magistrates Court scale, was made to the respondent on 19 December 2002, prior to trial. It has also provided evidence to the effect that it was at all material times willing and able to carry out what was proposed in the offer. The requirements of r 361(1) of the *Uniform Civil Procedure Rules* 1999 are thus met: the respondent's judgment is not more favourable to it than the offer to settle, and there is no challenge to the defendant's willingness and ability to effect what was offered. There is no suggestion that another order for costs is appropriate. The result, therefore, is that this court must now order the appellant to pay the respondent's costs calculated on the standard basis up to and including the day of service of the offer to settle, and order the respondent to pay the appellant's costs calculated on the standard basis after that day. Because the judgment is one which could have been given in the Magistrates Court, he is entitled to his costs only on the appropriate Magistrates Court scale. However, the trial proceeded in the District Court, and the appellant should accordingly have its costs on that scale.
- [5] The respondent does not argue against any of those orders. But his counsel submits that he is entitled to the grant of an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act* 1973, because the appellant has succeeded in an appeal on question of law. That is so; but the error of law made by the learned trial judge was the direct product of the submissions made by the respondent's counsel. Those submissions were not supportable, and there was nothing novel about the legal principles involved. In those circumstances it would not be a proper exercise of the discretion under s 15 of the Act to grant an indemnity certificate. I would refuse that application.
- [6] The costs orders I would make are as follows:
 - 1. That the appellant pay the costs of the proceedings below, calculated on the standard basis and applying the appropriate Magistrates Court scale, up to and including 19 December 2002.
 - 2. That the respondent pay the costs of the proceedings below incurred after 19 December 2002, calculated on the standard basis and applying the District Court scale.

3. That the respondent pay the appellant's costs of the appeal.