# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Sultana Investments P/L v Cellcom P/L (No. 2)* [2008] QCA 398 |
| PARTIES: | **SULTANA INVESTMENTS PTY LTD**<br>ACN 094 174 240<br>(plaintiff/respondent)<br>**v**<br>**CELLCOM PTY LTD**<br>ACN 060 776 098<br>(defendant/appellant) |
| FILE NO/S: | Appeal No 10648 of 2007<br>DC No 1897 of 2005 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal – Further Order |
| ORIGINATING COURT: | District Court |
| DELIVERED ON: | 9 December 2008 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | Heard on the papers |
| JUDGES: | McMurdo P, Holmes JA and White AJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. The respondent pay the appellant's costs of the hearing in the District Court proceedings on the standard basis to 12 April 2006 and thereafter on the indemnity basis of assessment.**<br>**2. The respondent pay the appellant's costs of the appeal to be assessed on the standard basis.**<br>**3. The respondent be granted a certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 in respect of the appeal costs.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – the appellant succeeded in its substantive appeal – the appellant had previously offered to settle the proceedings on terms more favourable to the respondent than the result achieved – whether the court should exercise its discretion to award the appellant indemnity costs<br><br>APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – APPEAL COSTS |

FUND – POWER TO GRANT INDEMNITY CERTIFICATE – GENERAL PRINCIPLES AS TO WHEN GRANTED OR REFUSED – the respondent seeks an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld) – the appellant succeeded on a point of law – whether both sides of the point were fairly arguable – whether an indemnity certificate should be granted

*Appeal Costs Fund Act* 1973 (Qld), s 15, s 16
*Uniform Civil Procedure Rules* 1999 (Qld), r 361

*Astway P/L v Council of the City of the Gold Coast* [2007] QSC 224, discussed
*Calderbank v Calderbank* [1975] 3 WLR 586, discussed
*Colgate Palmolive Co Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225; [1993] FCA 536, cited
*Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299, affirmed
*Fountain Selected Meats (Sales) Pty Limited v International Produce Merchants Pty Limited* (1988) 81 ALR 397, cited
*Haug v Jupiters Limited t/a Conrad Treasury Brisbane* [2007] QCA 328, cited
*Jackson Nominees P/L v Hanson Building Products P/L* [2006] QCA 159, cited
*J-Corp Pty Limited v Australian Builders Labourers Federated Union of Workers (No. 2)* (1993) 46 IR 301; [1993] FCA 42, cited
*Kozak v Matthews & Anor* [2007] QSC 204, discussed
*Lauchlan v Hartley* [1980] Qd R 149, applied
*Sultana Investments P/L v Cellcom P/L* [2008] QCA 357, related
*Tector v FAI General Insurance Co Ltd* [2001] 2 Qd R 463; [2000] QCA 426, cited
*Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd*, unreported, French J, Federal Court of Australia, WAG No 55 of 1988, 3 May 1991, cited
*Zappulla v Perkins (No. 2)* [1978] Qd R 401, cited

COUNSEL: J K Meredith for the appellant
D R Kent for the respondent

SOLICITORS: Greg Chapman for the appellant
O'Reilly Lillicrap for the respondent

[1] **McMURDO P:** I agree with White AJA.

[2] **HOLMES JA:** I agree with the reasons of White AJA and the orders she proposes.

[3] **WHITE AJA**: The appellant succeeded in its appeal against a decision of a District Court Judge and now seeks an order that:

> "(a) The appellant pay the respondent's (plaintiff) costs, calculated on a standard basis, to up and including 24 June 2005; and
>
> (b) The respondent pay the appellant's costs of and incidental to the proceedings below from 25 June 2005 and of the appeal to be assessed on an indemnity basis."[1]

[4] The orders on the appeal were:

> 1. Appeal allowed.
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> 2. The judgment in favour of the respondent in the District Court on 26 October 2007 be set aside and in lieu thereof the respondent's claim be dismissed.
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> 3. Judgment for the appellant on its counter-claim in the sum of $121,000 together with interest from 19 April 2006 to judgment."[2]

The court concluded: [3]

> "Unless there are circumstances to suggest a different order, the respondent should pay the appellant's costs of the hearing in the District Court and of the appeal to be assessed on the standard basis."

[5] The circumstance which the appellant submits calls for a different order is that by letter dated 24 June 2005 the appellant offered to settle the proceedings in the following terms:

> "I refer to my letter of 1 March 2005 and in particular, my client's offer to pay your client the sum of $30,000 plus GST. I confirm that this offer remains on foot."

The offer was said to be without prejudice save as to costs. That letter was sent by facsimile transmission and might be presumed to have been received on 24 June 2005. On that day the appellant filed its notice of intention to defend and defence. The defence did not, however, plead the prohibition arising under s 140 of the *Property Agents and Motor Dealers Act* 2000, preventing recovery or retention of a reward, until 12 April 2006, the principal issue on which it succeeded on appeal. Until then its defence was concerned with the construction of the Agreement about commission. On that issue it was unsuccessful on appeal.

[6] The offer was not accepted.

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1 Amended appellant's costs submissions.

2 *Sultana Investments Pty Ltd v Cellcom Pty Ltd* [2008] QCA 357 at [56].

3 At [57].

[7] The respondent resists an order for costs on the indemnity basis on a number of grounds which will be considered in due course, but first an oddity in the appellant's proposed order (a) must be addressed. At first reading the submission that the **appellant** pay the **respondent's** costs to 25 June 2005 seems to be an error, but on inquiry was confirmed. The written submissions of the appellant make reference to r 361 of the UCPR. It provides relevantly:

> "(1) This rule applies if-
>
> (a) the defendant makes an offer to settle that is not accepted by the plaintiff and the plaintiff obtains a judgment that is not more favourable to the plaintiff than the offer to settle…
>
> (2) Unless a party shows another order for costs is appropriate in the circumstances, the court must-
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> (a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the date of service of the offer to settle; and
>
> (b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer to settle."

[8] This rule would appear to explain the appellant's proposed order (a). What has been overlooked is that the respondent (plaintiff) obtained **no** judgment in its favour as a consequence of the appeal orders and, accordingly, r 361, even had there been an offer to settle within the provisions of Chapter 9 of the UCPR, would not apply. Presumably, the proposed order is an attempt to reflect as nearly as possible the Chapter 9 costs' regime.

[9] In *Emanuel Management Pty Ltd (in liquidation) v Foster's Brewing Group Pty Ltd*[4] Chesterman J discussed the anomalous situation created by r 361 that there appears to be no provision for the situation when a plaintiff has not obtained any judgment. His Honour said:

> "Nevertheless it is clear that r 361 does not by implication prevent an order for indemnity costs being made in favour of a defendant save in the particular circumstances covered by the rule. A defendant who has been completely successful and has made an offer to settle better than the result for the plaintiff should not be in worse position than a partly unsuccessful defendant who made such an offer."[5]

[10] His Honour considered the appropriate discretionary response where a successful defendant has offered to compromise on terms which gave a plaintiff something and the offer was rejected and summarised the authorities:[6]

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4 [2003] QSC 299 at [36]-[39].
5 At [37].
6 At [38].

> "There are slightly conflicting views: on the one hand there is said to be a 'presumption' that the defendant should have its costs on the indemnity basis and the plaintiff must show some good reason why another order should be made. The second view is that the defendant must show that the offer was rejected unreasonably, judged in the circumstances known at the time it was made."

[11] His Honour rejected the adoption of any hard and fast rule, noting, correctly, with respect, that since the award of costs is discretionary there will be many circumstances to be weighed but the making of an offer "is a very relevant circumstance" and, if no countervailing circumstances are raised, "the order for indemnity costs is likely to be made".[7]

[12] In *Kozak v Matthews & Anor*[8] Helman J accepted a submission that where an applicant had been wholly unsuccessful (assuming that r 361 applied to a *Succession Act* application) and an offer to settle had been made by the respondent/executor pursuant to Chapter 9 of the UCPR, such an offer may be treated as a *Calderbank* offer.[9]

[13] In *Astway Pty Ltd v Council of the City of the Gold Coast*[10] Wilson J concluded that where a successful defendant has made an offer to which r 361 does not apply then r 689 – the general rule that costs follow the event unless another order is more appropriate - applies. Whether to depart in that circumstance from the usual order that costs are to be assessed on the standard basis will then fall to be considered consistently with factors identified as enlivening the discretion to award costs on the indemnity basis.[11]

[14] This court noted in *Tector v FAI General Insurance Co Ltd*[12] that the regime governing offers to settle in Chapter 9 of the UCPR does not apply to appeals, nonetheless, this court may order costs to be assessed on an indemnity basis and the circumstances in which costs on that basis might be awarded are at large.[13] Although Shepperd J in *Colgate Palmolive* conveniently collected together a number of circumstances in which indemnity costs might be awarded, his Honour accepted that the discretion is "absolute and unfettered".[14] In *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd*[15] French J (as his Honour then was) noted that the categories in which the discretion may be exercised to award indemnity costs are not closed. Subsequently in *J-Corp Pty Limited v Australian Builders Labourers Federated Union of Workers (No. 2)*[16] his Honour said that in order to sustain an order for indemnity costs:

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7 At [39].
8 [2007] QSC 204.
9 *Calderbank v Calderbank* [1975] 3 WLR 586 at 595.
10 [2007] QSC 224.
11 As, for example, in *Colgate Palmolive Co Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225.
12 [2000] QCA 426.
13 At [4].
14 Quoting Woodward J *in Fountain Selected Meats (Sales) Pty Limited v International Produce Merchants Pty Limited* (1988) 81 ALR 397 at 400.
15 Unreported decision 3 May 1991.
16 (1993) 46 IR 301 (19 February 1993).

> "It is sufficient, in my opinion, to enliven the discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case."

[15] Where a *Calderbank* type offer has been made courts are inclined to the award of indemnity costs as an incentive to parties to consider seriously offers to settle which are reasonably made. The respondent contends that an order for costs on that basis ought not be made because the appellant has obtained "a windfall'" by the judgment, that is, the benefit of the respondent achieving 14 successful sales, reselling the apartments which did not settle at a higher price and not paying any commission to the respondent. The respondent notes its success on the construction point on appeal.

[16] The offer made by the appellant reflected its contention contained in its letter of 24 January 2005[17] to the respondent prior to the commencement of proceedings, that the balance said to be due to the respondent on the appellant's construction of the agreement between the parties was $30,000. It was not until the amended defence and counter-claim was filed on 19 April 2006 that the appellant alleged that s 140 of PAMDA applied so that the respondent was not entitled to any reward for its participation in the sale of the apartments in The Mews and counter-claimed, as noted, for the sum already paid of $121,000.

[17] Whilst the construction of the Agreement between the parties was not of undue complexity and has been held to favour the respondent, nonetheless, the s 140 allegation was serious and with consequences which would, if successful, have been disastrous for the respondent. Whatever views the respondent might have held about the morality of the appellant's conduct in seeking to claw back the monies already paid after the successful introduction of purchasers, it required the respondent to consider the real likelihood that the argument would be successful. The offer of $30,000 whilst somewhat less than half the amount sought by the respondent, was plainly a real compromise by the appellant in light of the legal advice about the operation of s 140 of PAMDA. The failure to accept the offer is an important factor and, as Chesterman J observed in *Emmanuel*, in the absence of other countervailing factors will be likely to lead to an order for indemnity costs.

[18] That the letter did not stipulate any time before the offer expired does not seem determinative. It might be presumed to be still "on the table" even after the amended defence and counter-claim was served. There is nothing to suggest it was not. That it was an "all up" offer, that is, inclusive of costs, is not a weighty countervailing factor. The respondent has not given any indication of its costs to March 2005 or to April 2006. The former date was before the defence was served and the latter well before trial preparation would have commenced. Until the appellant raised the s 140 issue in its amended pleading there was no particular compulsion on the respondent to accept the offer but thereafter not to do so was a very risky course. The estoppel response was always a fragile shield given the state of the authorities. Accordingly, it seems appropriate that the respondent should pay

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17 *Sultana Investments Pty Ltd v Cellcom Pty Ltd* at para [14].

the appellant's costs of the District Court proceedings to 12 April 2006 on the standard basis but thereafter on the indemnity basis of assessment.

[19] No factor has been identified which dictates that the appellant's costs of the appeal should be on any other than the standard basis.

**Indemnity certificate**

[20] The respondent seeks an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 for the hearing in the District Court and the costs on appeal. The reason advanced is baldly stated - because the appellant succeeded on a point of law. Section 15 provides, relevantly:

> "(1) Where an appeal against the decision of a court –
>
> (a) to the Supreme Court…
>
> on a question of law succeeds, the Supreme Court may, upon application made in that behalf, grant to any respondent to the appeal an indemnity certificate in respect of the appeal."

The granting of an indemnity certificate entitles the respondent to be paid from the Fund referred to in the *Appeal Costs Fund Act* 1973[18] of an amount equal to the appellant's and respondent's costs of the appeal.[19]

[21] The power to grant an indemnity certificate is discretionary and there is no appeal from the exercise of the discretion.[20] There are no criteria in the Act for the exercise of the discretion, however, the Full Court in *Lauchlan v Hartley*[21] considered how the discretion should be exercised and invited submissions from the Minister charged with oversight of the Fund.[22] Counsel for the Minister conceded that notwithstanding that the submissions of counsel had led to the order or judgment which was later reversed, that should not, of itself, lead to a refusal of a certificate, provided that the submissions were reasonably advanced or were fairly arguable. Accordingly, the court gave some guidance about circumstances in which it may be said that the argument advanced was reasonable or that the proposition was fairly arguable. Emphasising that he intended to be neither definitive nor exhaustive Connolly J, with whom Wanstall CJ and Lucas SPJ agreed, said:[23]

> "Where a decision is reversed on a point of law it will frequently be the case that both sides of the debate are fairly arguable. Thus a situation in which the authorities are or appear to be in conflict

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18 *Appeal Costs Fund Act* 1973, ss 10-14.
19 Section 16(1)(a), (b) and (c). The amount is capped by Regulation.
20 Section 21.
21 [1980] Qd R 149.
22 At p 151.
23 At p 151-2.

> provides an obvious instance in which a resort to the appellate process is justifiable although of course the limits to which it can properly be taken at the expense of the fund must depend on the particular circumstances. Again the proper construction of a particular instrument will often call for a nice balancing of competing considerations so that the opposing views may properly be regarded as fairly arguable. Again, appeals from the exercise of a judicial discretion will frequently turn upon the weight to be given to one or more of the relevant considerations. Yet another instance is provided by the appeal from a value judgment such as those aspects of the assessment of damages which are at large.
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> A different category of case altogether however is that where the Full Court is of the view that there was no basis on which the judgment or order under appeal could properly have been made. In such a case it is material to consider the part played by the unsuccessful respondent in leading the tribunal to the decision. Where the advocate, barrister or solicitor, invites a decision for which there is no legal warrant, or which is inconsistent in some respect with settled legal principle, the question arises whether his contentions were in truth fairly arguable. If, in the opinion of the Full Court, the legal warrant was arguably available or the settled principle was arguably distinguishable, the respondent may still succeed in obtaining a certificate. If not he will ordinarily fail to obtain the certificate."

[22] An example where a certificate was not obtained is *Zappulla v Perkins (No. 2)*[24] where the plaintiff at first instance based his claim for damages on a principle

> "…which was wrong, for elementary reasons, and he persuaded the judge of the District Court to accept that principle and act upon it in measuring his damages".[25]

*Lauchlan v Hartley* was an example of the refusal of a certificate where counsel below sought a departure from settled practice in relation to orders for costs after payment into court.[26]

[23] An example of success was *Haug v Jupiters Limited Trading as Conrad Treasury Brisbane*[27] which involved competing constructions of certain sections of the *Personal Injuries Proceedings Act* 2002. So, too, an application was successful in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd*[28] which concerned the implication of a term into a contract, said to be a question of law.

[24] On this appeal there was no dissent from the primary Judge's fact finding. The appellant succeeded on the application of the provisions of the *Property Agents and*

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24 [1978] Qd R 401.
25 At 401, per Wanstall CJ with whom Matthews and Kelly JJ agreed.
26 At p 152.
27 [2007] QCA 328.
28 [2006] QCA 159.

*Motor Dealers Act* 2000 to those facts contrary to the approach below. The primary Judge found that the respondent did not come within the provisions of the Act because he was relevantly not an agent for others. His Honour also reached the tentative conclusion that the conduct of the respondent in Queensland was insufficient to bring it within the operation of the Queensland legislation. The nexus issue was not pleaded by the respondent in its reply and answer and, when his Honour raised it during final submissions with counsel, his Honour appeared satisfied by assurances that it was not a live issue in the proceedings. Nonetheless, as discussed in the principal reasons,[29] his Honour took it up in his reasons and concluded that the respondent was "not caught by the prohibition" in s 140 of PAMDA. That was an error, but not one to which the respondent was in any way a party.

[25] The respondent filed a notice of contention seeking to uphold the judgment on a ground not dealt with below. The respondent had pleaded an estoppel against the appellant should the PAMDA prohibition argument succeed. The primary Judge did not deal with that claim because of his conclusions on other matters.

[26] The appellant was successful on an important point of law. It was a difficult issue, and, although the outcome has favoured the appellant, "both sides of the debate were fairly arguable".[30] It is difficult to distinguish this case from many cases where a certificate has been granted, particularly where a statutory construction point is involved. I would, therefore, grant an indemnity certificate in so far as it relates to the appeal.

[27] The respondent seeks a certificate for the hearing below but has provided no basis for doing so. Section 16 of the *Appeal Costs Fund Act* entitles a respondent to the costs of the appeal (and of a new trial, if ordered) only. Practice Direction No. 1 of 2005 provides in para 37 for an application for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act*.

> "An application for an indemnity certificate…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".

It is not clear if on receiving judgment the respondent indicated that an application for an indemnity certificate would be made. There was not, however, any untoward delay in making the application as it has been included in the submissions about costs invited by the court.

[28] I would make the following orders:

1. The respondent pay the appellant's costs of the hearing in the District Court proceedings on the standard basis to 12 April 2006 and thereafter on the indemnity basis of assessment.
2. The respondent pay the appellant's costs of the appeal to be assessed on the standard basis.

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29 *Sultana Investments Pty Ltd v Cellcom Pty Ltd* [2008] QCA 357 at [40]-[43].

30 *Lauchlan v Hartley* at p 151.

3. The respondent be granted a certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 in respect of the appeal costs.