SUPREME COURT OF QUEENSLAND

CITATION:	*Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust* [2010] QCA 351
PARTIES:	**VALE 1 PTY LTD AS TRUSTEE FOR THE VALE 1 TRUST** (plaintiff/appellant) **v** **DELORAIN PTY LTD AS TRUSTEE FOR THE DELORAIN TRUST** ACN 125 370 461 (defendant/respondent)
FILE NO/S:	Appeal No 594 of 2010 SC No 3884 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	Judgment delivered on 28 September 2010 Further Orders delivered on 10 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	McMurdo P and White JA and Applegarth J Judgment of the Court
ORDERS:	**1. The respondent pay the appellant's costs of and incidental to the originating application filed 14 April 2009 to be assessed on a standard basis.** **2. The respondent pay the appellant's costs of and incidental to the appeal.** **3. The respondent be granted a certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld) in respect of the appeal costs.**
CATCHWORDS:	PROCEDURE – COSTS – APPEALS AS TO COSTS – DISCRETION NOT EXERCISED – where the respondent submits there should be no order as to costs at first instance on the basis that the decision of the primary judge was essentially overturned on a point that was not raised below – whether costs should follow the event PROCEDURE – COSTS – CERTIFICATE FOR COSTS: COSTS ON OTHER THAN INFERIOR COURT SCALE – CASES TO WHICH STATUTE OR RULE APPLIES – where respondent seeks an indemnity certificate for the

appeal – where appellant succeeded on a question of law that involved an important point of statutory construction – whether an indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15

Cheree–Ann Property Developers Pty Ltd v East West International Development Pty Ltd [2007] 1 Qd R 132; [2006] QSC 182, cited
Haug v Jupiters Limited t/a Conrad Treasury Brisbane [2007] QCA 328, cited
Lauchlan v Hartley [1980] Qd R 149, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, followed
Sultana Investments P/L v Cellcom P/L (No 2) [2009] 2 Qd R 287; [2008] QCA 398, cited
Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust [2010] QCA 259, cited

COUNSEL: P J Roney for the appellant
G Handran for the respondent

SOLICITORS: Macrossan and Amiet for the appellant
Hickey Lawyers for the respondent

[1] **THE COURT:** The appeal in this matter was allowed, the orders made by the primary judge were set aside and in lieu thereof the appellant obtained a declaration that the relevant agreement was validly terminated by it.[1] The Court had proposed to make orders that:

(a) The respondent pay the appellant's costs and incidental to the originating application filed 14 April 2009.

(b) The respondent pay the appellant's costs of and incidental to the appeal.

However, the respondent was given leave to make submissions on costs. It submits that there should be no order as to the costs at first instance. It does not oppose an order that it pay the appellant's costs of and incidental to the appeal, but seeks an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld).

[2] The appellant submits that the respondent should pay its costs of the proceeding at first instance to be assessed on the standard basis, since there is nothing that would warrant departure from the rule that costs ought follow the event.[2]

The costs of the proceedings at first instance

[3] The appeal raised two essential issues. The first was whether the decision in *Cheree-Ann Property Developers P/L v East West International Development P/L*[3] should be followed. The second was whether the primary judge erred in concluding that this case was "on all fours" with *Cheree-Ann*. The appellant succeeded on both

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1 *Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust* [2010] QCA 259.

2 *Uniform Civil Procedure Rules* 1999 r 681*; Oshlack v Richmond River Council* (1998) 193 CLR 72 at [66] – [67].

3 [2007] 1 Qd R 132; [2006] QSC 182 ("*Cheree-Ann*").

issues. The respondent submits that the decision of the primary judge was "essentially overturned by this Court on a basis which was not raised by (the appellant) below." It is true that the appellant argued before the primary judge that *Cheree-Ann* was distinguishable, and the contention that it should not be followed was only developed during the course of the appeal. However, it is not accurate to submit that the appellant only succeeded because this Court decided that *Cheree-Ann* should not be followed. The appellant also succeeded in demonstrating that this case was not "on all fours" with *Cheree-Ann*. The facts of this case were materially different to the facts of *Cheree-Ann*. The agreement between the appellant and the respondent could not be characterised as something other than a contract for the sale of residential property, and could not be fairly characterised as a contract that provided stock for a party that undertook a business as a property marketer.

[4] If this Court had simply confined *Cheree-Ann* to its facts, rather than concluded that it should not be followed, the appellant still would have been successful in its appeal on the basis the primary judge erred in concluding that this case was "on all fours" with *Cheree-Ann*. The appeal still would have been allowed, the orders at first instance set aside and the declaration which the appellant obtained on appeal would have been made.

[5] The fact that the appellant succeeded in the appeal on the ground that *Cheree-Ann* should not be followed, being an argument that was not advanced by it at first instance, does not provide a sufficient reason to deprive it of an order for costs at first instance. The appellant should have succeeded at first instance, but did not do so because the respondent persuaded the primary judge that this case was on all fours with *Cheree-Ann*.

[6] The respondent has not shown why there should be no order as to the costs of the proceedings at first instance. Those costs should follow the event. The appropriate order is that the respondent pay the appellant's costs of and incidental to the originating application filed 14 April 2009 to be assessed on a standard basis.

Indemnity certificate

[7] Section 15 of the *Appeal Costs Fund Act* 1973 relevantly provides:

> "(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 power to grant an indemnity certificate is discretionary. The Act does not specify criteria for the exercise of the discretion. However, this Court has given guidance about the circumstances in which the discretion should be exercised.[4] An example of the granting of an indemnity certificate in a case in which a decision was reversed on a point of law is *Haug v Jupiters Ltd t/a Conrad Treasury Brisbane*[5] which involved competing constructions of certain sections of the *Personal Injuries*

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4 *Lauchlan v Hartley* [1980] Qd R 149; *Sultana Investments P/L v Cellcom P/L (No 2)* [2008] QCA 398.

5 [2007] QCA 328.

Proceedings Act 2002. Another example is *Sultana Investments P/L v Cellcom P/L (No 2)*[6] in which the appellant was successful on an important point of law and in which "both sides of the debate were fairly arguable."[7]

[8] In this case the appellant succeeded on an important question of statutory interpretation. The point of statutory construction and the issue of whether *Cheree-Ann* should be followed involved issues of importance to parties other than the parties to the appeal. The respondent's contention that *Cheree-Ann* should be followed was fairly arguable.

[9] If the Court had decided to follow *Cheree-Ann*, then the appellant nevertheless would have failed in the appeal since this Court found that this case is materially different to the facts of *Cheree-Ann*. This is a discretionary consideration which does not favour the granting of an indemnity certificate. However, the appellant succeeded on a question of law that involved an important point of statutory construction. In the circumstances, we consider that this is an appropriate case in which to grant an indemnity certificate.

[10] The orders as to costs will be:

1. The respondent pay the appellant's costs of and incidental to the originating application filed 14 April 2009 to be assessed on a standard basis.

2. The respondent pay the appellant's costs of and incidental to the appeal.

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

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6 Supra.

7 *Lauchlan v Hartley* (supra) at 151.