

SUPREME COURT OF QUEENSLAND

CITATION: *Chardon v Bradley* [2018] QCA 68

PARTIES: **JOHN WILLIAM CHARDON**
(applicant)
v
JILLIAN KATHLEEN BRADLEY
(respondent)

FILE NO/S: Appeal No 7385 of 2017
DC No 713 of 2015

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil) – Further Order

ORIGINATING COURT: District Court at Brisbane – Unreported, 20 June 2017
(Clare SC DCJ)

DELIVERED ON: 13 April 2018

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Fraser and Morrison and McMurdo JJA

ORDER: **That an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973 (Qld)* be granted to the respondent.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT AN INDEMNITY CERTIFICATE – where the Court allowed the appeal against the decision of the primary judge and set aside the orders made – where the unsuccessful respondent seeks an indemnity certificate – where the appeal turned on the exploration of factual aspects – whether an indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15

Chardon v Bradley [2017] QCA 314, related
Lauchlan v Hartley [1980] Qd R 149, applied

COUNSEL: A J Glynn QC, with O K Perkiss, for the applicant
D J Kelly for the respondent

SOLICITORS: Paddington Law for the applicant
Biggs Fitzgerald Pike for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

- [2] **MORRISON JA:** On 19 December 2017 this Court delivered its reasons on the appeal, the issue being whether the learned primary judge erred in refusing leave to amend the appellant's defence in a way in which he could preserve his right to privilege against self-incrimination.¹
- [3] The appellant succeeded because the learned primary judge fell into error when her Honour concluded that there was no real explanation as to why a positive case could not be pleaded, and confined the risk of self-incrimination to the response to six pleaded offences of which the appellant was convicted. This Court took the view that the risk to which the appellant might be exposed, if he pleaded beyond the fact that the acts constituting the six convicted offences never occurred, was not tenuous or remote. A number of possibilities were identified under which the operation of the *Uniform Civil Procedure Rules* 1999 (Qld) would require a pleading exposing the appellant to the risk of self-incrimination.²
- [4] The respondent now seeks an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld). It provides that where an appeal to this Court succeeds on a question of law, the Court may grant a respondent to the appeal an indemnity certificate. That certificate extends to the costs ordered to be paid to the successful appellant³, and an amount equal to the respondent's costs of the appeal.⁴
- [5] The application is made upon the basis of what was said in *Lauchlan v Hartley*⁵:

“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 on which the authorities are or appear to be in conflict 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 more 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.

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

¹ *Chardon v Bradley* [2017] QCA 314.

² [2017] QCA 314 at [29]-[33].

³ Section 16(1)(a) of the Act.

⁴ Section 16(1)(b) of the Act.

⁵ [1980] Qd R 149 at 151, per Connolly J, with whom Wanstall CJ and Lucas SPJ concurred.

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.”

- [6] In my respectful view, the issues on the appeal were ones which were fairly arguable within the meaning of what was said in *Lauchlan v Hartley*. In part, that was due to the way in which the appellant framed his case, refining it on appeal, and partly in the way the facts failed to be considered. The proceedings below were based upon the six offences for which the appellant had been convicted. In addition, there were two charges which were the subject of a *nolle prosequi*, as well as the non-pleaded assertions about the appellant’s relationship with the respondent prior to her turning sixteen.⁶ It was the exploration of those factual aspects on appeal which enabled the identification of the possible ways in which the appellant might want to raise a positive case in his defence, but nonetheless be subjected to the risk of self-incrimination.⁷
- [7] This was not a case where one could come to the view that there was no basis upon which the order below could have been made, nor is there any question of the learned primary judge being led into error by the respondent.
- [8] In my view, a certificate should be granted in respect of the costs of the appeal.
- [9] I propose the following order:
1. That an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld) be granted to the respondent.
- [10] **McMURDO JA:** I agree with Morrison JA.

⁶ [2017] QCA 314 at [27].

⁷ [2017] QCA 314 at [29].