SUPREME COURT OF QUEENSLAND

CITATION:	*Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd* [2018] QCA 78
PARTIES:	**WIGGINS ISLAND COAL EXPORT TERMINAL PTY LIMITED** ACN 131 210 038 (appellant) **v** **CIVIL MINING & CONSTRUCTION PTY LTD** ACN 102 557 175 (respondent)
FILE NO/S:	Appeal No 10845 of 2017 SC No 6050 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 218 (Flanagan J)
DELIVERED ON:	27 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Fraser and Gotterson and McMurdo JJA
ORDER:	**The application for an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld) be refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT AN INDEMNITY CERTIFICATE – WHEN REFUSED – where the Court allowed the appeal against the decision of the primary judge and ordered the respondent to pay the costs – where the unsuccessful respondent seeks an indemnity certificate – where the appeal was from a decision of the trial judge to grant leave for the respondent to re-open its case – where the trial judge raised the necessity for the respondent to re-open its case, but where it was effectively a consequence of the respondent's attempt to rebuild its case and it was not forced to do so – whether an indemnity certificate should be granted *Appeal Costs Fund Act* 1973 (Qld), s 15 *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Limited* [2017] QSC 85, related *Lauchlan v Hartley* [1980] Qd R 149, applied *Vella v Larson* [1982] Qd R 298, distinguished *Wiggins Island Coal Export Terminal Pty Limited v Civil*

Mining & Construction Pty Ltd [2017] QCA 296, related

COUNSEL: D Kelly QC, with M G Lyons, for the appellant
D B O'Sullivan QC, with S J Webster, for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
Thomson Geer for the respondent

[1] **THE COURT:** Last December, this appeal was allowed and the respondent (CMC) was ordered to pay the costs.[1] CMC now applies for an indemnity certificate under s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld).

[2] The circumstances giving rise to this appeal were unusual. After a 36 day trial and extensive written submissions, the trial judge delivered reasons for judgment which ran to more than 300 pages.[2] No final orders were then pronounced, because the judge required further submissions on some issues, one of which was the quantification of what he described as CMC's Delay Claim. Over several days, the judge heard further argument on that issue in which CMC attempted to advance a substantially different case from that which it advanced at the trial.

[3] CMC tried to advance its new case by arguments based upon some of the evidence at the trial, but in doing so, CMC substantially departed from what had been the common ground between the parties about what constituted CMC's on-site overheads. As this Court held, it was CMC's belated adoption of a different concept of on-site overheads that required further evidence and thereby necessitated the re-opening of CMC's case. It is true that it was the judge who first raised the necessity for CMC to re-open its case. But in no way was CMC forced to do so.

[4] This Court held that the trial judge erred in the exercise of his discretionary power to allow CMC to re-open. It may be accepted that the appeal succeeded on a question of law.

[5] CMC concedes that its conduct contributed to the judge's error. But it points out that the grant of a certificate under s 15 is not confined to cases where an unsuccessful respondent to an appeal has played no part in the decision which is reversed.[3] CMC's argument cites *Vella v Larson*,[4] where Macrossan J said that:

> "[i]n a particular case, if a strong line is taken by the judge below, with the result that the respondent is virtually carried along by the court's attitude, this may be a strong circumstances in the exercise of the discretion."

But, as we have explained, this was not a case of that kind. CMC's decision to re-open was the consequence of an unmeritorious attempt to rebuild this part of its case, after the judge had published his Reasons, by departing from facts which had been common ground at the trial.

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1 *Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd* [2017] QCA 296.
2 *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Limited* [2017] QSC 85 ("Reasons").
3 *Lauchlan v Hartley* [1980] Qd R 149 at 150.
4 [1982] Qd R 298 at 301.

[6] CMC's conduct fell short of what is required of a party in the proper conduct of a case at trial, particularly by a well-resourced party in substantial commercial litigation. The judge's error came from granting the indulgence which CMC sought, and CMC's position in seeking leave to re-open could not be described as a reasonable one. In our conclusion, CMC should not have the benefit of a certificate under s 15(1). The application is refused.