DISTRICT COURT OF QUEENSLAND

CITATION:	*Sunshine Coast Regional Council v Thomas (No 2)* [2019] QDC 70
PARTIES:	**SUNSHINE COAST REGIONAL COUNCIL** **(appellant)** **v** **NATHAN EDWARD THOMAS** **(respondent)**
FILE NO/S:	Maroochydore Registry 150/18
DIVISION:	Civil
PROCEEDING:	Appellate
ORIGINATING COURT:	Caloundra Magistrates Court
DELIVERED ON:	7 May 2019
DELIVERED AT:	District Court at Brisbane
HEARING DATE:	12 April 2019 and 18 April 2019
JUDGE:	Reid DCJ
ORDER:	**1. In the circumstances, I refuse the application for an appeal costs fund certificate.**
CATCHWORDS:	APPEAL – COMPLAINT – SUMMONS – COSTS FUND CERTIFICATE – where a learned acting Magistrate struck out a complaint and summons in which the appellant sought to prosecute the respondent for breach of s 194 of the *Animal Management (Cats and Dogs) Act 2008* (Qld) – where the appeal was allowed – where Counsel for the respondent made an application for an appeal costs fund certificate pursuant to ss 15(2) and 21(1) of the *Appeal Costs Fund Act 1973* (Qld) – where the learned acting Magistrate was heavily influenced by the respondent's submissions in making his decision to strike out the complaint and summons. *Animal Management (Cats and Dogs) Act 2008* (Qld) s 194 *Appeal Costs Fund Act 1973* (Qld) ss 15(2); 21(1) *Acquilina v. Dairy Farmers' Co-operative Milk Company Ltd. (No. 2)* [1965] N.S.W.R. 772 *Brisbane City Council v Ferro Enterprises Pty Ltd* [1976] Qd R 332 *Electronic Rentals Pty Ltd v Anderson & Ors* (1970) 92 WN (NSW) 672

Electronic Rentals Pty Ltd v Anderson & Ors (1971) 45 ALJR 302
Lauchlan v Hartley (1980) Qd R 149
Madsen v Appo; *ex parte Appo* (unreported, Full Court of the Supreme Court of Queensland, 20th December 1973) No 46-50 of 1973
Sultana Investments P/L v Cellcom P/L (No 2) [2008] QCA 398
Zappulla v Perkins (No 2) [1978] Qd R 401

COUNSEL: IA Munsie for the respondent

SOLICITORS: Aitken Whyte for the respondent

[1] When I delivered judgment on 18 April 2019, Counsel for the respondent made an application for an appeal costs fund certificate. It is clear to me that the learned acting Magistrate was heavily influenced by the respondent's submissions in making his decision to strike out the complaint and summons because. He accepted the respondent's counsel's submissions that the JP did not perform his duties properly in issuing the summons in the way he did. Counsel for the respondent, as I've previously outlined in my reasons, submitted that it was a failure on behalf of the JP to not consider evidence in issuing the complaint and summons.

[2] In my reasons, I have set out why these submissions lead to the erroneous conclusion that a JP must consider evidence in issuing a complaint and summons. I directed the parties to a lengthy excerpt of *Madsen v Appo; ex parte Appo* (supra) which relied on Asprey J's observations in the *Electronic Rentals* case. That passage, simply put, elucidated why it was not necessary for a JP to consider evidence in the way that the learned acting Magistrate thought was necessary, and the way in which counsel for the respondent had submitted to the Magistrate.

[3] Section 15(2) of the *Appeal Costs Fund Act* provides that "where an appeal against the decision of a court to the District Court on a question of law succeeds, the District Court may, upon application made in that behalf, grant to any respondent to the appeal an indemnity certificate in respect of the appeal".

[4] Section 21(1) of the *Appeal Costs Fund Act* provides that "the grant or refusal of an indemnity certificate lies in the discretion of the Court of Appeal, the Supreme Court or the District Court, as the case may be, and no appeal lies against such grant or refusal".

[5] In *Lauchlan v Hartley* (1980) Qd R 149 the Full Court refused an application for an Appeal Costs Fund Act certificate. In that case, Connolly J, with whom Wanstall CJ and Lucas SPJ agreed, His Honour pointed out that there were

> "no statutory criterion by which the Court has to act in the exercise of its discretion. His Honour went on to cite a passage from the judgment of Moffitt J. (as he then was) in Acquilina v. Dairy Farmers' Co-operative Milk Company Ltd. (No. 2) [1965] N.S.W.R. 772 in discussing an application for the grant of a certificate under comparable legislation. At p. 774 the learned judge said:
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> > "I think that section … has as its purpose, the relief of a party who incurs or becomes liable for costs not through

> his own decision or conduct but because of some error of law of the tribunal … it is relevant to consider to what extent costs provided by a certificate, if granted, were due merely to an error of the tribunal, and to what extent, if any, they were due to the conduct of or decision taken by the applicant.""

[6] Connolly J noted that in a number of cases the Court has refused certificates and attention has tended to concentrate on the part played by the respondent in persuading the tribunal below to come to what is found to be a decision based on an erroneous principle.

[7] The Court accepted that it was not appropriate to refuse a certificate merely because counsel's submissions had led the Court below into error. The critical question is whether the argument advanced was reasonable or fairly arguable.

[8] Connolly J said at p 151:

> "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."

[9] That decision in *Lauchlan v Hartley* (supra) was approved by the Court of Appeal in *Sultana Investments P/L v Cellcom P/L (No 2)* [2008] QCA 398 also referred to *Zappulla v Perkins* (No 2) [1978] Qd R 401, where a certificate was refused "because 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"". In also considering *Zappulla*, the court in *Lauchlan* observed that "attention has tended to concentrate on the part played by the respondent in persuading the tribunal below to come to a decision which this Court later held to be erroneous in principle". The court in *Lauchlan* also outlined that:

> "There are many situations in which the state of the law is such that the proposition advanced by the successful party at first instance is fairly arguable even though an appellate court may later disagree with it. The same may be said of many situations in which it is not so much the state of the law but its application to the particular facts or the particular instrument which occasions the difficulty. If an unsuccessful respondent is only entitled to a certificate where his argument played no part in the decision which is reversed, the application of s. 15 will be confined to cases in which the tribunal at first instance has fallen into unaided error. This would confine its operation within very narrow limits. There would seem to be no

> warrant for confining the discretion of the Court in this way. Nor does any decided case so confine it."

[10] In *Brisbane City Council v Ferro Enterprises Pty Ltd* [1976] Qd R 332, Hoare J (with Stable J agreeing and Matthews J agreeing as to the application for costs and orders proposed), said "in my opinion it is clearly relevant to consider the extent if any that the costs incurred were "due to the conduct of or decisions taken by the applicant"". Hoare J here also considered Moffit J's observations in *Acquilina v Dairy Farmers Co-operative Milk Company Ltd No 2* (supra).

[11] The court in these circumstances is thus bound to consider whether it was the case that there was no proper basis on which the submission could have been made, or whether the propositions in the matter were reasonable or fairly arguable.

[12] In this case the state of the law when it comes to the necessity of evidence before a JP who is tasked with issuing a complaint and summons was not fairly arguable, as set out in *Maden v Appo; ex parte Appo* (supra). I think the present matter is more akin to *Zappulla*, that is, the respondent's submissions at first instance were wrong and counsel persuaded the learned acting Magistrate to accept the necessity of evidence in these circumstances, and to act upon those submissions in making his decision, contrary to established law.

[13] I am of the view that counsel for the respondent made submissions at first instance that were inconsistent with the settled legal principle outlined in *Madsen,* and had no proper legal basis. In submitting to the acting learned Magistrate that there was a requirement for evidence to be put before a JP in issuing a complaint and summons and persuading the Magistrate to accept and act upon that submission, which the Magistrate did and pointed to counsel's submissions in coming to that decision, counsel significantly contributed to an erroneous decision being made contrary to established law.

[14] In the circumstances, I refuse the application for an appeal costs fund certificate.