DISTRICT COURT OF QUEENSLAND

CITATION:	*Amos v Monsour Pty Ltd & Ors* [2008] QDC
PARTIES:	**EDWARD AMOS** Plaintiff / Respondent **v** **MONSOUR PTY LTD** First Defendant / Applicant and **FRED MONSOUR** Second Defendant / Applicant and **DESLEY FAYE MONSOUR** Third Defendant / Applicant
FILE NO:	2 of 2008
PROCEEDING:	Judgment
DELIVERED ON:	20 June 2008
DELIVERED AT:	Brisbane
HEARING DATES:	18 and 20 June 2008
JUDGE:	Judge Brabazon QC
ORDER:	(1) Pursuant to Rule 293 of the *Uniform Civil Procedure Rules 1999* (Qld) (the UCPR), the Defendants be granted judgment against the Plaintiff for all the Plaintiff's claim; (2) The Plaintiff pay the Defendants' costs of and incidental to the proceedings and the application on the indemnity basis, such costs to be fixed by the Court; (3) Within 14 days, the Defendants file and serve a short-form cost assessment by an approved cost assessor, together with any submissions on which it intends to rely; (4) Within a further 21 days, that the Plaintiff file and serve any submissions in reply containing his objections; (5) The costs be fixed by the Court, on a date to be fixed, in the week of 28 July 2008l; and (6) Within 14 days of the costs being fixed by the court, the Plaintiff pay the Defendants' costs.

CATCHWORDS: **PRACTICE AND PROCEDURE** – SUMMARY JUDGMENT – where defendant/applicants seek an order against plaintiff/respondent under Rule 293 of the *Uniform Civil Procedure Rules* – whether summary judgment can be entered – where allegations of fraud by defendants' counsel form the basis of plaintiff's claim.

Legislation
Uniform Civil Procedure Rules 1999 (Qld) r 293.

Cases
Boughen v Able (1987) 1 Qd R 138
Colgate-Palmolive Co & Anor v Cussons Pty Ltd (1993) 118 ALR 248.
Di Carlo v Dubois [2007] QCA 316
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534

COUNSEL: Mr D Tait SC and Ms C Heyworth-Smith for the Plaintiff

Mr P O'Shea SC and Ms S Moody for the First, Second & Third Defendants

SOLICITORS: Keller Nall & Brown for the Plaintiff

McInnes Wilson Lawyers for the First, Second & Third Defendants

What follows is the transcript of a ruling given on 20 June 2008. It has been revised.

This is an application by Mr Monsour, his family company and his wife for summary judgment against claims made by Mr Amos. It is necessary to say something about the history to understand the issue.

In the 1990s Mr Amos sued the National Australia Bank. He settled his claim on the basis that he pay the bank's costs to be assessed by Mr Monsour. Each side agreed not to challenge that assessment. Mr Amos was unhappy with the assessment. He sued Mr Monsour in the Magistrates Court, alleging negligence and breach of contract. On 21 July 2004 the claim was heard over a long day. He lost and had to pay indemnity costs.

On 27 June 2007 those costs were assessed by the magistrate. The hearing took about an hour. The costs were assessed at $49,996. Mr Amos appealed against the decision and the assessment of costs. His appeal against the decision was dismissed by a judge of this Court. Later Judge Nase heard the appeal against the costs assessment. The appeal took two days, 6 and 7 April 2006. In his judgment the judge reduced the assessment to $45,506 but otherwise dismissed the appeal. He ordered Mr Amos to pay the standard costs of the appeal.

In April 2007 Mr Amos appealed against that judgment to the Court of Appeal. In July 2007 his appeal was dismissed. He had to pay the standard costs of the appeal. The $45,506 so far has not been paid by him.

In January 2008 Mr Amos started proceedings in this Court against Mr Monsour. He alleged that Judge Nase's decision was procured by fraud on behalf of Mr Monsour. The issue here is this – should his claim be dismissed summarily or allowed to proceed to trial? Mr Monsour's side relies upon Rule 293:

> (2) If the court is satisfied —
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim;
> the court may give judgment for the defendant against the plaintiff....

In effect, the rule means that fanciful claims are dismissed summarily whereas merely improbable ones go to trial.

Mr Amos's statement of claim says that Mr Monsour was responsible for the fraud at the hearing because of the written submissions of his counsel. In fact, the magistrate assessed the costs after a hearing of about one hour. However, in written submissions Mr Monsour's counsel said they were assessed over a long day of some seven and a half hours. The pleading goes on to say that that statement was deceitful and fraudulent. It induced the judge to give an erroneous judgment. The complaint is also that the error was carried through into the Court of Appeal causing costs to be paid by Mr Amos. He wants Judge Nase's judgment set aside because of the fraud.

The requirements of such a claim have been definitively explained recently by the Court of Appeal in *Di Carlo v Dubois* [2007] QCA 316 at paragraphs 30 to 33. It is sufficient

for this morning's purposes to mention a summary of similar principles in *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534:

> A party who seeks to establish that a judgment ought to be set aside due to fraud must establish that the claim is based on newly discovered facts; that the facts are material and such as to make it reasonably probable that the claim will succeed; that they go beyond mere allegations of perjury on the part of witnesses at the trial, and that the opposing party who took advantage of the judgment is shown, by admissible evidence, to have been responsible for the fraud in such a way as to render it inequitable that such a party should take the benefit of the judgment.

See also the Queensland decision in *Boughen v Able* (1987) 1 Qd R 138 at 140-141.

Particulars of fraud have to be given (as they have been here) and must be proved strictly. The allegations cannot be kept in reserve but have to be brought forward in a prompt way.

It is necessary to turn to the facts of this case. Judge Nase was considering an appeal. He was not a trial judge. Not all of the costs assessment was challenged. Mr Amos was present at the trial before the magistrate and at the later costs assessment. Counsel for Mr Amos submitted that the correct amount of costs should be about $20,000 rather than around the $50,000 at which they had been assessed by the magistrate.

Before Judge Nase, counsel for Mr Monsour prepared several long outlines of argument which were apparently given to the judge or the other side. Some of them correctly said that the trial in the Magistrates Court lasted one long day. Other versions of the outline incorrectly said that the costs hearing lasted for a day. It should be accepted here that the judge and Mr Amos's side got the incorrect version of 40 pages. For that reason, Therefore Judge Nase (at paragraph 5) and the Court of Appeal (at paragraph 4) both wrongly said that the assessment took up a whole day.

The early pages of the transcript of the hearing before Judge Nase shows that there was confusion about the time taken for the assessment. See pages 11 to 12. The Judge by then had read the incorrect submission. He said that he was dealing with an assessment that took one day. That error was not corrected by either counsel. However, on the same page of the submissions for Mr Monsour it was said that the costs hearing of 27 July 2004 had lasted a single day. That date, 27 July 2004, was the date the parties assumed that there had been the long hearing. (It may be observed that in truth it was on 21 July 2004.) The assessment and the orders were on 27 June 2005. That appears at the top of the same page of the submissions.

It is apparent that there was an error and confusion at that early stage of the hearing, in the written submissions and in the mind of the judge and both counsel. If read carefully, the error in the submissions would have been apparent.

The other feature of the hearing before Judge Nase, if one looks at the transcript of the two days, is that both he and counsel had before them the transcript of the costs assessment made by the magistrate. See, for example, transcript page 62 line 45 to page 63 line 10,

page 110 line 12 and pages 150 to 151. At page 103 counsel for Mr Monsour observed to the judge, who had said he might have to read the transcript, that, "It wasn't that long." Therefore, counsel and the judge must have read exactly what happened at the costs hearing before the magistrate.

While Judge Nase's judgment incorrectly records that a whole day was taken in the assessment there is nothing in his reasons to show that he was influenced by that mistake. He did examine the merits of the contentious issues at some length but did not mention in any way the length of the hearing. Likewise there seems to be nothing of substance in the whole of the transcript before him to show that the mistake had or was likely to have any impact on him. The judgment rather than the transcript is to be taken to reveal the judge's reasons for his decision.

As I have mentioned, Mr Amos was present at his trial in the Magistrates Court and the costs assessment. The same counsel for Mr Amos was present at the costs assessment and before Judge Nase. Mr Wilson, counsel for the Mr Monsour, appeared only at the hearing before Judge Nase. The point of that is to say that Mr Amos and his counsel had an opportunity to correct errors which had been made in front of them at the hearing but did not do so before Judge Nase delivered his judgment.

It is true that there was a misstatement by Mr Monsour's counsel in the written submissions, apparently shared at least at the early stage of the hearing by Mr Amos's counsel and not corrected by either.

It is very likely to have been no more than a mistake. There is just no evidence of dishonesty on the part of counsel, and there is no basis to say that he was dishonest. See, by analogy, *Di Carlo v Dubois* at paragraph 38.

The allegation of fraud on the materials here is unsustainable. There should be a judgment summarily entered dismissing Mr Amos's claims, that leaves only this morning the question of costs.

I have heard submissions about the level of costs that should be ordered. Mr Tait has handed up a very useful written submission about a variety of cases which illustrate the dividing line between an award of ordinary costs and an award of indemnity costs, and the caution that should be exercised in doing that.

I have looked at Mr Justice Shepherd's judgment in *Colgate-Palmolive Co & Anor v Cussons Pty Ltd* (1993) 118 ALR 248. I have listened to what Mr O'Shea has said about that.

With regard to Mr Justice Shepherd's judgment at the middle of page 257 – he discusses the categories in which indemnity costs might or should be ordered. One of his categories is described as "the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions." In my view that is this case. Therefore there should be an award of indemnity costs.

There is a need to adjust the draft order slightly. This is the order of the court:

(1) Pursuant to Rule 293 of the *Uniform Civil Procedure Rules 1999* (Qld) (the UCPR), the Defendants be granted judgment against the Plaintiff for all the Plaintiff's claim;
(2) The Plaintiff pay the Defendants' costs of and incidental to the proceedings and the application on the indemnity basis, such costs to be fixed by the Court;
(3) Within 14 days, the Defendants file and serve a short-form cost assessment by an approved cost assessor, together with any submissions on which it intends to rely;
(4) Within a further 21 days, that the Plaintiff file and serve any submissions in reply containing his objections;
(5) The costs be fixed by the Court, on a date to be fixed, in the week of 28 July 2008; and
(6) Within 14 days of the costs being fixed by the court, the Plaintiff pay the Defendants' costs.