SUPREME COURT OF QUEENSLAND

CITATION:	*Barmettler & Anor v State of Queensland* [2010] QCA 198
PARTIES:	**RUDY BARMETTLER** (first plaintiff/first appellant) **ANGELA BARMETTLER** (second plaintiff/second appellant) **v** **STATE OF QUEENSLAND** (defendant/respondent)
FILE NO/S:	Appeal No 13753 of 2009 SC No 191 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	30 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2010
JUDGES:	McMurdo P and Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs**
CATCHWORDS:	PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – primary judge gave summary judgment against the appellants and ordered they pay the respondent's costs – whether the Court had jurisdiction to proceed summarily ADMINISTRATIVE LAW – JUDICIAL REVIEW – GENERALLY – jury found against the appellants in the District Court – appellate court also found against the appellants – whether the appellants had a right to judicial review by jury *Uniform Civil Procedure Rules* 1999 (Qld), r 293, r 474 *Fingleton v The Queen* (2005) 227 CLR 166; [2005] HCA 34, cited *Matthews v General Accident, Fire and Life Insurance Corporation Limited* [1970] QWN 37, cited *Rajski v Powell* (1987) 11 NSWLR 522, cited

COUNSEL:	The appellants appeared on their own behalf J M Horton for the respondent
SOLICITORS:	The appellants appeared on their own behalf Crown Law for the respondent

[1] **McMURDO P:** The appeal should be dismissed with costs for the reasons given by Muir JA.

[2] **MUIR JA:** The appellants appeal against an order of a judge of the trial division of this Court giving judgment in the proceeding in favour of the respondent State of Queensland and ordering that the appellants pay the respondent's costs. The judgment was given on an application by the respondent for summary judgment pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld). The proceeding was commenced by a claim filed in the Supreme Court on 20 April 2009. In it, and in the accompanying statement of claim, the appellants claimed against the respondent $1,000,000 damages and, arguably, judicial review by a jury of the District Court decision in the proceeding. The claim contained assertions, statements of fact and arguments and it is impossible to determine from it the existence of any sustainable cause of action.

[3] The 13 page statement of claim maintained the claim for $1,000,000. The prayer for relief provides:

> "The plaintiff's (sic) claim **ONE MILLION DOLLARS ($1,000,000,00** (sic) for –
>
> 1. THAT a Jury adjudge the Judge, a public officer, in the trial of matter of District Court Claim 149 of 1998, Rudy & Angela Barmettler – v – Solicitors Greer & Timms, on … … … to … …, was guilty of an Abuse of process as to the Conducting of a Fair Trial.
> 2. THAT THE State of Queensland is vicariously liable for the misconduct of that public Officer and is to be held responsible for damages to the plaintiff's to the sum of $AUD 1,000,000,00 (sic) (**one million Australia (sic) dollars**)."

[4] It is apparent that the claim sought to be advanced against the respondent, at least in part, was one for damages allegedly sustained by the appellants as a result of the conduct of the judge in the course of a previous District Court proceeding to which the respondent was not a party.

[5] It is unnecessary to subject the balance of the statement of claim to any detailed analysis. As well as the claim for damages, it was alleged that the "trial in the matter of District Court Claim Number 149 of 1998 … requires a Judicial Review by a Jury …". Allegations were made that the trial was attended by bias, lack of procedural fairness, errors of law by the judge and a lack of evidence. There then followed a series of assertions concerning alleged misconduct by the judge in the course of the trial and observations on things said and done during the trial.

[6] Although it is difficult to glean from the statement of claim the precise nature of the District Court proceeding, it may be seen from the reasons in *Barmettler & Anor*

v Greer & Timms,[1] delivered on the appeal from the District Court decision, that the appellants' claim in the proceeding was against the appellants' solicitors for breach of a duty allegedly owed the appellants when acting as their solicitors in the purchase of a house and takeaway food centre pursuant to a contract of sale and purchase. The Supreme Court statement of claim also contains allegations relating to the contract and the appellants' solicitors' conduct under their retainer in the conveyancing transaction.

[7] Further relevant facts are set out as follows in paragraphs 1 to 5 inclusive of the respondent's defence filed on 21 May 2009:

> "1. The matter which gave rise to this proceeding was heard by a judge (her Honour O'Sullivan DCJ) and a jury of four on 23 October 2006 and 31 October 2006.
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> 2. The jury dismissed the Plaintiffs' claim.
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> 3. The claim was for damages arising from the alleged negligence of solicitors acting for the Plaintiffs in a land transaction in 1992.
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> 4. The Plaintiffs appealed those orders to the Court of Appeal.
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> 5. On 25 May 2007, the Court of Appeal dismissed that appeal in proceeding No 10043 of 2006."

[8] Paragraph 6 of the defence provided:

> "6. The Defendant denies the Plantiff is entitled to the relief sought in this proceeding on the following grounds:
>
> (a) persons against whom liability is alleged, namely a firm of solicitors "Greer and Timms", is not a party to this proceeding;
>
> (b) even if those persons were included as parties to this proceeding, this State is not vicariously liable for the acts or omissions (of any) of them as is alleged, whether because the principals of that firm were officers of the Court or otherwise;
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> (c) the trial judge has, at law, complete protection from civil liability in the execution of her functions;
>
> (e) the Plaintiffs' avenue for seeking redress in connection with the irregularities (if any) at trial was by an appeal to the Court of Appeal, which is an avenue of which they have availed themselves."

[9] On appeal it was found that the appellants had been unfairly treated by the District Court judge, subjected to ill-tempered behaviour by her and that the female appellant had been unjustifiably imprisoned for contempt of court. Nevertheless, it was held that "despite the unfortunate conduct of the trial" the appellants had failed to establish that the judge's conduct had resulted in a miscarriage of justice: their case was "underprepared and hopeless".

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1 [2007] QCA 170.

[10] The respondent's application for summary judgment under r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) was made on the basis that the appellants had no real prospect of succeeding on their claim and that there was no need for a trial. The learned primary judge regarded the appellants' claim as one for judicial review by a jury and for damages. I am content to adopt that analysis, even though the prayer for relief did not advert to a claim for judicial review. However the claim and statement of claim are construed, they do not disclose a sustainable cause of action. Judicial review by a jury is not a procedure known to law in this jurisdiction. Even if such a procedure were legally open, the defendant in the District Court proceeding would have been a necessary party.

[11] The appellants' claim for damages is unsustainable. Judicial officers, acting within their jurisdiction, enjoy complete immunity from civil liability.[2] Moreover, the State is not vicariously liable for the wrongs of judicial officers acting as such. The Judiciary, under Queensland's and Australia's constitutional arrangements, is independent of the Executive. Discussion of the relationship between the Crown and the Judiciary may be found in *Rajski v Powell*.[3] In addition to these insuperable obstacles to success, the appellants could not demonstrate that they suffered loss as a result of the judge's conduct. The jury's verdict was against them. The Court of Appeal in dismissing the appellants' appeal made the findings referred to above and there was no appeal from its decision. It is thus abundantly clear that no course was open to the primary judge other than to give the summary judgment sought by the respondent.

[12] The appellants filed an 11 page outline of argument. It is not necessary to discuss it in any detail. It does not address the fundamental difficulties just identified, but repeats complaints about the conduct of the trial and the defendant solicitors' alleged acts and omissions under their retainer. In short, it contains nothing capable of shedding the faintest doubt on the correctness of the orders at first instance.

[13] On the hearing of the appeal, the Court, at the request of the female appellant, permitted a person described by her as a "McKenzie friend" to address the Court on her behalf. This gentleman orally regurgitated some of the assertions contained in a document entitled "Challenge to the Jurisdiction of the Court" relied on by the appellants before the primary judge. Its principal thrust was that trial by jury was the inalienable right of a citizen in a democratic society and could not be denied by Parliament. Another assertion in the document, which was embraced by the "McKenzie friend", seemingly without his noting any incongruity in his position, was that no judicial officers in Australia had been validly appointed since 1919.

[14] Finally, I will deal briefly with the grounds of appeal.

(i) The right to trial by a jury is inalienable.

The proposition is inaccurate. As the primary judge explained in his reasons, any right to a civil jury trial is the creation of Statute.[4] The history of civil jury trials in New South Wales and Queensland was explained as follows by Kneipp J in *Matthews v General Accident, Fire and Life Insurance Corporation Ltd*:[5]

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2 *Fingleton v The Queen* (2005) 227 CLR 166 at [36] - [39] and *Rajski v Powell* (1987) 11 NSWLR 522 at [534] - [536].

3 (1987) 11 NSWLR 522 at [530] - [531].

4 *Matthews v General Accident, Fire and Life Insurance Corporation Limited* [1970] QWN 37.

5 [1970] QWN 37 at 95.

> "There has not been at any time, in New South Wales or Queensland, any common law rights to trial by jury, such rights not having been among those introduced into New South Wales by the Australian Courts Act of 1828. That Act provided (s. 24) for the application in New South Wales of all laws and statutes in force within the realm of England, provided that they were not inconsistent with any of its provisions. It also provided (s. 5) for trial in a criminal case by a judge and seven officers of the armed forces, and (s. 8) for trial of issues of fact in civil cases by a judge and two assessors. These modes of trial being inconsistent with trial by jury, it followed that trial by jury was not introduced into Australia in 1828: *The Queen v. Valentine* (1871) 10 S.C.R. (N.S.W.) 113, at p. 122, per Stephen C.J.; and that in New South Wales, and hence in Queensland, any right to trial by jury is necessarily a creation of statute law: *R.W. Miller & Co. v. Wilson* (1932) 32 S.R. (N.S.W.) 466, at p. 475, per Harvey J.
>
> In New South Wales trial by jury in civil cases was the subject of a number of temporary Acts, and was then established permanently by the Act 8 Victoria, No. 4, which provided for the trial of 'all issues of fact' by a jury of four persons. This was later repealed and replaced by the Act 11 Victoria, No. 20, s. 20 of which provided for trial by a jury of four persons of 'all actions at law and all civil issues of fact in the Supreme Court'. This latter provision was in force when the Colony of Queensland was created by the Letters Patent of June 6, 1859, and it was continued in force by clause 20 of that document, and by s. 33 of *The Constitution Act of* 1967. It remained in force, it appears, until the passing of *The Judicature Act of* 1867, since when the right to trial by juries in civil actions has been dealt with by Rules of Court. It was provided in 1867 by *The Common Law Practice Act* (s. 78), that an action might be tried by a judge alone, but only with the consent of the parties. There has been a series of Jury Acts passed, commencing in 1867, but they all appear to have been regulatory or procedural in character, and not to affect the present question."

This proceeding was commenced by claim and the appellants elected for a trial by jury in their statement of claim. Under r 474, the Court could have ordered a trial without a jury if the requirements of the rule were satisfied. No such order was made but no trial took place. The respondent, as it was entitled to do, applied pursuant to r 293, for the summary determination of the matter. Judgment can be given under that rule on a claim or part of a claim only if the Court is satisfied that "there is no need for a trial of the claim or the part of the claim" as the case may be. The primary judge was so satisfied and gave judgment. As a result, there could be no trial, whether by jury or otherwise. If the matter had proceeded to trial, the same result would inevitably have followed. Also, the statement of claim could have been struck out at any time as disclosing no sustainable cause of action.

(ii) The appellants did not consent to any part of the proceedings not being determined by a jury.

Whether the appellants consented or not is irrelevant. They had no right to judicial review by jury, as explained above.

(iii) The Court had no jurisdiction to proceed summarily.

The jurisdiction was conferred by r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld).

(iv) The appellants challenged the jurisdiction of the Court in a document entitled, "Challenge to the Jurisdiction of the Court" filed on 11 September 2009. When there is such a challenge, "there is a peremptory (sic) Stay of Proceedings until the Jurisdiction is determined by … a Special Jury".

As is explained earlier, there was no right to a trial by jury of a proceeding commenced by an application or something akin to it. Nor does a party to a proceeding obtain a stay of it merely by commencing another proceeding in relation to the same matter or by the making of an application in the existing proceeding.

(vi) & (vii)

The primary judge denied due process and the rules of natural justice by judging in his own cause to award himself jurisdiction and the appellants were denied natural justice.

There was no denial of due process or procedural fairness. The appellants were given ample opportunity to present their unarguable case. The primary judge did not act in his own cause or award himself jurisdiction. He had jurisdiction under the *Uniform Civil Procedure Rules* 1999 (Qld) and the *Supreme Court of Queensland Acts* 1991 and 1995. He exercised that jurisdiction as he was obliged to do.

[15] I will not set out ground (viii) which is no more than the statement of an erroneous opinion.

[16] None of the grounds of appeal had substance. Consequently, I would order that the appeal be dismissed with costs.

[17] **CHESTERMAN JA:** I agree with Muir JA, that the appeal should be dismissed with costs, for the reasons given by his Honour.