SUPREME COURT OF QUEENSLAND

CITATION:	*Lukac v Madsen (No 1)* [2012] QSC 289
PARTIES:	**Garry LUKAC** **(Plaintiff/Respondent)** **-v-** **Rod MADSEN** **(Defendant/Applicant)**
FILE NO/S:	Mount Isa S1 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Mount Isa
DELIVERED ON:	22 June 2012
DELIVERED AT:	Townsville
HEARING DATE:	12 April 2012
JUDGE:	North J
ORDER:	**1. The judgment entered against the defendant on 31 January 2012 be set aside.** **2. The Statement of Claim filed on 11 November 2011 be struck out.** **3. The plaintiff be given leave to deliver an Amended Statement of Claim.** **4. The Amended Statement of Claim be filed and served by Monday, 30 July 2012.** **5. The matter be reviewed in Mt Isa on a date to be fixed in the sittings to commence 17 September 2012.** **6. Costs of and incidental to the application be reserved.**
CATCHWORDS:	APPLICATION – APPLICATION TO SET ASIDE INTERLOCUTORY JUDGMENT – SELF REPRESENTED LITIGANT – where the matter originated in Mt Isa Magistrates Court and transferred to Mt Isa Supreme Court – whether default judgment was entered into irregularly and should be set aside – whether the Statement of Claim be

struck out - costs

COUNSEL: Mr Andrews (Solicitor) for the Applicant/Defendant

Mr Lukac (Respondent) in person

SOLICITORS: Thomsons Lawyers for the Applicant/Defendant

[1] The application before me, filed by the defendant,[1] is to have an interlocutory judgment for damages to be assessed set aside and for an order that the Claim and Statement of Claim "be dismissed for failing to disclose a tenable cause of action or as an abuse of process". Alternatively, an order was sought staying the proceedings "pursuant to the Court's inherent jurisdiction as an abuse of process"[2].

[2] The plaintiff is unrepresented and has conducted the litigation on his own behalf.

Introduction

[3] Before I turn to the application and the issues agitated before me something of the history of the litigation and how the matter came to this court should be recorded.

[4] The plaintiff is a resident of Mount Isa and the defendant is a magistrate who presides at Mount Isa. For many years prior to his appointment as a magistrate, the defendant was a practising solicitor in Mount Isa and for a time acted as the plaintiff's solicitor.

[5] On 11 November 2011 the plaintiff filed a Claim in the registry of the Magistrates Court in Mount Isa claiming $22,000 for loss and damage "suffered as a result of the defendant's negligence" and in addition claiming interest and costs.[3] The defendant was promptly served on 11 November 2011[4] and when the defendant did not file a Notice of Intention to Defend, the plaintiff applied on 23 January 2012 for a default judgment.[5] The application for default judgment was referred to by his Honour Judge Butler SC, Chief Magistrate and on 31 January 2012 where his Honour ordered:[6]

> "1. The defendant pay to the plaintiff damages to be assessed upon the plaintiff's statement of claim together with costs to be assessed and that the damages be assessed by the court.
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> 2. That the claim for costs of $676,000 in the request for default judgment be struck out.
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> 3. That a directions hearing be held in the Magistrates Court on a date to be fixed by the Registrar and notify to the plaintiff and the defendant by the Registrar."

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[1] Filed 1 March 2012

[2] Further relief was sought but not actively pressed, save for the issue of cost depending upon the orders made.

[3] The statement of claim claims a slightly different amount but for present purposes that can be passed over.

[4] Document 3 Magistrates Court file, affidavit filed 23 January 2012.

[5] Relevantly documents 4 and 5 of the Magistrates Court file being a request for default judgment and an affidavit in support of the application sworn by the plaintiff.

[6] See the order which is document 6 on the Magistrates Court file.

Contemporaneously his Honour delivered reasons for his orders.

[6] On 22 February 2012, acting under s 74 of the *Supreme Court of Queensland Act* 1991, I ordered that the proceedings pending in the Magistrates Court be transferred to the Supreme Court Registry in Mount Isa. This order followed the receipt by myself of a letter from His Honour the Chief Magistrate dated 8 February 2012, requesting that I assume the further supervision and conduct of the matter in light of the circumstance that the defendant was the resident magistrate in Mount Isa. His Honour's approach to me had been the suggestion of the Chief Justice whom he had consulted.[7]

[7] The application referred to[8] was heard by myself sitting in Mount Isa on 12 April 2012. At the application, Mr Lukac appeared in person and Mr Andrews (solicitor) appeared by phone for the defendant. On behalf of the defendant Mr Andrews relied upon the following:

1. Application filed 1 March 2012

2. Affidavit of John Damien Andrews filed 1 March 2012

3. Affidavit of Rodney John Madsen filed 14 March 2012

4. Affidavit of John Damien Andrews filed 4 April 2012

5. Outline of Submissions filed 5 April 2012

6. Affidavit of John Damien Andrews sworn 11 April 2012 (a copy of which was read and filed by leave).

[8] In addition, before me were the documents filed in the Magistrates Court which I have referred to.[9]

[9] At the hearing the plaintiff sought to rely upon other material:

1. Letter by the plaintiff to the Registrar, Magistrates Court of Queensland dated 2 January 2012.[10]

2. A document described as "Further documents" dated 26 March 2012 and filed in the Registry on 26 March 2012.

The defendant did not object to my receiving and considering those documents.

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[7] Copies of the letter from the Chief Magistrate to myself and my correspondence in reply and of the orders made are contained on the court file.

[8] See paragraph [1].

[9] (1) Claim filed 11 November 2011
(2) Statement of Claim filed 11 November 2011
(3) Affidavit of Service filed 23 January 2012
(4) Request for Default Judgment filed 23 January 2012
(5) Affidavit of G P Lukac in support filed 23 January 2012
(6) Judgment for the plaintiff filed 31 January 2012

[10] A copy of which is retained on the court file and was apparently received by the registry on 11 January 2012.

[10] In addition, at the hearing I informed the parties of the order I had made on 26 February 2012 and of the letter I had received from the Chief Magistrate which had been written at the suggestion of the Chief Justice.

The Claim and Statement of Claim

[11] While the relief claimed in the Claim appears straightforward the same cannot be said of the Statement of Claim. Rule 149(1) of the UCPR requires that a pleading:

> "(a) be as brief as the nature of the case permits; and
> (b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved;"

Both are breached in this Statement of Claim. The document is prolix and confusing. It is a narrative reciting events concerning the plaintiff's employment, the subsequent application for worker's compensation, some proceedings in the Commonwealth Administrative Appeals Tribunal, the steps taken by another firm of solicitors in that proceeding and the subsequent involvement of the defendant in connection with those proceedings, and also in connection with an issue concerning an alleged defamation.

[12] It is not possible to ascertain from the Statement of Claim the nature of the case the plaintiff seeks to advance against the defendant. There are contradictory indications. From the relief claimed in the Claim and some of the narrative in the Statement of Claim, one might intuit that a claim was advanced for a loss of damage occasioned by a breach of a duty of care by the defendant when acting as the solicitor for the plaintiff.[11] But the relief specified at the end of the Statement of Claim claims a payment of $19,357.93 "paid into the trust account" of the defendant.

[13] To add to the difficulties in comprehension, the plaintiff has attached "Supporting Documentation" which he describes as "F Documents", thus the description prolix. The Statement of Claim closely represents a witness statement or an affidavit, and one that is poorly drafted and difficult to follow.

[14] In its current form the Statement of Claim has a tendency to prejudice the delay of the fair trial of any proceedings because of its ambiguity and contradictory implications.[12] Further, it fails to disclose a reasonable cause of action on its face.[13] These deficiencies attributed may be a combination of the failure to plead material facts as required by UCPR 149(1)(b) and to the narration of evidence, the relevance of which it is not possible to ascertain.

The Defendant's application and supporting evidence

[15] The defendant applied for the following relief:

> "1. the judgment entered against the Defendant on 31 January 2012 be set aside pursuant to Rule 290 of the UCPR;

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11 See *Johnson & Ors v Perez* (1988-1989) 166 CLR 351 at 363.
12 See UCPR 171(b).
13 See UCPR 171(a).

2. pursuant to Court's inherent jurisdiction and Rule 658 of the UCPR, the Claim and Statement of Claim be dismissed for failing to disclose a tenable cause of action or as an abuse of process;

3. in the alternative, that the proceedings be permanently stayed, pursuant to the Court's inherent jurisdiction, as an abuse of process;

4. that pursuant to Rule 371 of the UCPR, the Respondents be permitted to apply for summary judgment under Rule 293 of the UCPR before filing a Notice of Intention to Defend and Defence;

5. further, and in the alternative, that pursuant to Rule 293 of Rule 658 of the UCPR, summary judgment be entered against the Plaintiff;

6. that the Plaintiff pay the Defendant's costs of and incidental to the proceedings, including this Application on an indemnity basis;

7. alternatively, that pursuant tot Rule 670 of the UCPR, the Plaintiff provides security for the Defendant's costs up to and including the end of the first day of trial in the proceedings in the sum of $60,000.00;

8. that the security be in a form acceptable to the Registrar of this Honourable Court;

9. that the proceedings be stayed until the Plaintiff has provided the security for the Defendant's costs;

10. that the plaintiff pay the Defendant's costs of and incidental to this Application."

At the hearing of the application the solicitor for the defendant pressed that the application that the default judgment be set aside and for orders either dismissing the plaintiff's claim or alternatively, striking out the Statement of Claim.

[16] The first contention raised on behalf of the defendant was that the default judgment could be set aside on the grounds that it was irregularly entered. The defendant, relying upon *Bratic v Toohey,*[14] submitted that an irregularly entered judgment could be set aside *ex debito justitiae*. It was submitted that the irregularity was that the default judgment had been entered when there had been an agreement in place between the defendant's solicitor and Mr Lukac that the defendant did not have to file a defence within the time specified under the Rules and that Mr Lukac would take no steps to enter judgment without giving the defendant's solicitor notice.

[17] The evidence in support of that contention was set out in the affidavit of Mr Andrews[15] in which he deposed:

> "[29] Shortly before 13 January 2012 I contacted Mr Lukac to seek to discuss matters with him. I sought to ascertain if he had obtained any legal advice although I did not seek to ascertain what if any legal advice he may or may not have obtained but simply wanted to make

[14] [1988] 2 Qd R 140 at 145.
[15] Filed 1 March 2012.

> arrangements with him to reach further agreement that a Notice of Intention to Defend and Defence was not required to be filed.
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> [30] Mr Lukac indicated to me that he had sent a letter to me and that because the email connection at the house where he was residing was not working he could not and had not sent that to me by email transmission. He indicated that it was being sent to me by some form of post.
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> [31] I indicated to him, based upon my knowledge from having practised in provincial Queensland and from the claims which were made by Australia Post, that in the circumstances it was almost certain that I would not be receiving the document until next week, that is, several days after the 31 January 2012.
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> [32] I indicated to Mr Lukac that in those circumstances I sought to agree with him that there would be an extension of the arrangements were in place. I sought to confirm that Mr Madsen did not need to file and serve any Notice of Intention to Defend or Defence at all until I was advised that there was a need to do so by Mr Lukac and that he would provide me with a time period within which I would be required to do that.
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> [33] As part of those discussions I mentioned to Mr Lukac that it was the intention of my client to seek to resolve matters on a basis which would be satisfactory to all parties including Mr Lukac and without the need for the court proceedings to proceed and, indeed, on a basis where those proceedings could be discontinued or withdrawn.
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> [34] Mr Lukac wanted to know why I felt it was necessary for these arrangements to be made and I said that because if the arrangements were not agreed to he could enter a default judgment in the matter. He indicated to me that he "*did not even know what a default judgment was".* I said the words to the effect of "*So we have an agreement"* of the kind and in relation to the issues that I required. I believe that Mr Lukac confirmed such an agreement."

[18] It is not clear in material before me whether Mr Lukac disputes the account sworn to by Mr Andrews. In the letter to the Registrar of the Magistrates Court dated 2 January 2012[16] there is an indication that Mr Lukac was disinclined to agree to grant either the defendant or his solicitor any indulgence.[17]

[19] In the state of the evidence I am disinclined to proceed on the basis that the evidence clearly establishes that there was an agreement between the plaintiff and the defendant's solicitor whereby both reached an understanding. While I do not doubt that Mr Andrews attempted to broach the issue with Mr Lukac, who may have said things that gave Mr Andrews some comfort, my impression from the submissions made by Mr Lukac and the way in which he expressed himself when

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16 See [9] above.

17 The date of the letter suggests that it refers to an earlier conversation but it does indicate the disposition of Mr Lukac.

before me was that he may well have not understood what was being asked of him by Mr Andrews in the conversation. Further, I have some reservations that a breach of an agreement not to take a step without notifying the other party entitles a default judgment to be set aside *ex debito justitiae*, that is without the party satisfying the court that there are grounds for concluding that the party has a defence on the merits.[18]

[20] In fairness to Mr Andrews' in submissions, while submitting that the judgment might be set aside as an irregularity, the greater focus of his submissions was upon the evidence placed before the Court demonstrating the defendant's contention that he had a defence and also evidence directed to other discretionary considerations.

[21] In *Deputy Commissioner of Taxation v Johnston*[19] Atkinson J said:

> "[3] The discretion to set aside a regularly entered judgment is unfettered but a number of matters are relevant to its exercise. As I held in *Yankee Doodles Pty Ltd v Blemvale Pty Ltd*, there are three matters which will usually be relevant to the exercise of the discretion:
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> (1) whether the defendant has given a satisfactory explanation of the failure to defend;
> (2) whether the defendant's delay in making the application to set aside precludes it from obtaining relief; and
> (3) whether the defendant has a prima facie defence on the merits."

[22] I have referred to the circumstances whereby the defendant failed to defend and the default judgment was entered. In my view, the defendant has satisfactorily explained the failure to defend. Promptly after being notified of the judgment steps were taken by the defendant and by his solicitor to prosecute the application before me. Consequently, the first two of the discretionary considerations identified by Atkinson J are met.

[23] It is a moot point, in the circumstances of such a deficient pleading how much should be required to demonstrate "a *prima facie* defence". Nevertheless, the defendant has sworn an affidavit[20] which was read before me. No application was made to cross-examine Mr Madsen or to challenge the affidavit. In the affidavit Mr Madsen deposed to the circumstances of his retainer to act in relation to an alleged defamation of the plaintiff, and secondly, to act in certain respects in relation to the proceedings before the Administrative Appeal Tribunal. In the circumstance of the defamation matter the defendant acted under a retainer agreement,[21] and the defendant says he performed that retainer. In respect of the Administrative Appeals Tribunal Matter (and the plaintiff's related or associated claims or complaints with respect to personal injuries suffered), the defendant agreed to investigate the matter to a limited extent but made it plain in correspondence that he would not be prepared to act on a speculative basis.[22] In respect of both matters, the defendant

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18 Consider in this context *Bratic v Toohey* [1988] 2 Qd R 140 at 146.
19 [2006] QSC 061 at [3].
20 Affidavit Rodney John Madsen filed 14 March 2012.
21 See Exhibit "RJM 1" to the affidavit of R J Madsen.
22 See Exhibit "RJM 7" the affidavit of R J Madsen.

has sworn that he performed the work in accordance with the retainer or the instructions he accepted from the plaintiff, that he charged the plaintiff and rendered fee notes and that he was paid without any complaint.

[24] If the plaintiff's claim, assuming it were properly pleaded, is one for damages for a breach of the duty of care owed by a professional (or for breach of contract), the defendant by his affidavit has satisfied me that he has a *prima facie* defence to such a claim. Alternatively, if the plaintiff's claim is for the refund of fees paid (and at this stage an intelligible claim has not been pleaded) then, in the circumstances of the defendant's affidavit, it is apparent that the defendant may have an answer to the present standing of the plaintiff to prosecute such a claim.[23]

Conclusion

[25] At the hearing there was no suggestion by the plaintiff that he acquiesced in the order sought by the defendant. In fact, in the course of the hearing it became plain that the plaintiff had an interest in further investigating matters. I gained the impression from his comments that he saw this proceeding as an avenue to conduct an open-ended investigation into the conduct of the defendant, and possibly also of others. The material placed before me by the plaintiff in addition to the material filed when the proceedings were pending in the Magistrates Court[24] was largely unintelligible. The letter from the plaintiff to the Magistrates Court dated 2 January 2012 is difficult to understand; it is even more difficult to understand the relevance of the documents described as "further documents" relied upon by the plaintiff.[25] In addition, subsequent to the hearing Mr Lukac lodged with the Court Registry a bundle of further documents comprising correspondence (and related material) passing between either the plaintiff and others or between the defendant and other organisations. It would seem that this correspondence arose out of the matters that the plaintiff seeks to agitate in the subject proceedings. I mentioned the lodgement of these documents in passing to record the receipt of them, I have not acted on those documents. In any event the documents do not remedy the deficiencies in the plaintiff's Statement of Claim.

[26] The defendant has demonstrated an entitlement to have the default judgment set aside, his affidavit and the other affidavits filed in support of his application satisfy the considerations identified by Atkinson J in *Deputy Commissioner of Taxation v Johnston.*[26] In the circumstances, it is premature to make orders sought by the defendant to the extent of having the Claim and Statement of Claim dismissed as failing to disclose a cause of action or as an abuse of process. The Statement of Claim does not properly plead a cause of action and certainly, if left in current form, would have a tendency to prejudice or delay a fair trial of the proceedings, but it may be that the plaintiff can, if properly advised, plead material facts indicating the possible existence of a cause of action.

[27] I will strike out the Statement of Claim under UCPR 171, but give the plaintiff leave to have re-plead. Having indicated that, I record that it is highly desirable that the plaintiff seek and retain legal advice. I doubt, without the assistance of competent

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23 See eg s 335(5) of the *Legal Profession Act* 2007.

24 See [8] above and the documents footnoted thereto.

25 See [9] above.

26 [2006] QSC 061.

legal advice, he is able to plead a Statement of Claim in accordance with the rules of Court. Nevertheless, he is entitled that opportunity.

Costs

[28] In the circumstances, I will order that the costs of the application be reserved. I acknowledge that the defendant has had a measure of success. He has successfully applied to have the default judgment set aside and orders are to be made to strike out the Statement of Claim. Nevertheless, I am conscious that judgment is entered in circumstances where it is not entirely clear to me that the plaintiff acted in breach of what he understood to be an agreement or undertaking given to the solicitors for the defendant. I propose to review the progress of the matter when I sit next in Mt Isa in September. By that time I will expect that the plaintiff will have filed and served a Statement of Claim which conforms with the rules. Failing that, I will entertain any applications that may be sought to be made on notice by either party to the other.

Orders

[29] The orders that I will make therefore are that:

1. The judgment entered against the defendant on 31 January 2012 be set aside.
2. The Statement of Claim filed on 11 November 2011 be struck out.
3. The plaintiff be given leave to deliver an Amended Statement of Claim.
4. The Amended Statement of Claim be filed and served by Monday, 30 July 2012.
5. The matter be reviewed in Mt Isa on a date to be fixed in a sittings to commence 17 September 2012.
6. Costs of and incidental to the application be reserved.