

# SUPREME COURT OF QUEENSLAND

CITATION: *Lukac v Madsen (No 2)* [2012] QSC 295

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: 26 September 2012

DELIVERED AT: Mount Isa

HEARING DATE: 17 September 2012

JUDGE: North J

ORDERS:

1. The plaintiff's Claim be struck out.
2. Judgment be entered for the defendant.
3. That the plaintiff pay the defendant's costs of and incidental to the proceedings to be assessed on the standard basis and on the scale of costs and charges applicable as if the proceedings had been heard and determined in the Magistrates Court of Queensland.

CATCHWORDS: APPLICATION – PRACTICE AND PROCEDURE – SELF REPRESENTED LITIGANT – where the matter come on for review in Mt Isa – where the plaintiff was self represented – where there was non-compliance with court orders by the plaintiff – where the defendant brought an application for the matter to be dismissed under the inherent jurisdiction of the court or alternatively that proceedings be stayed

COSTS – JUDICIAL DISCRETION – where the matter originated in Mt Isa Magistrates Court and transferred to Mt Isa Supreme Court – where the matter was transferred by court order because of public interest – whether costs be assessed on the scale of costs and charges applicable as if the

matter was heard in the Magistrates Court

CASES: *Lukac v Madsen (No 1)* [2012] QSC 289  
*Johnson v Public Trustee of Queensland* as executor of the Will of Brady (deceased) [2010] QCA 260  
*von Risefer & Ors v Permanent Trustee Co Pty Ltd & Ors* [2005] QCA 109

COUNSEL: Mr Andrews (Solicitor) for the Applicant/Defendant  
 Mr Lukac (Respondent) in person

SOLICITORS: Thomsons Lawyers for the Applicant/Defendant

- [1] On 22 June 2012 I ordered that the plaintiff's Statement of Claim filed on 11 November 2011 be struck out. The plaintiff was given leave to deliver an Amended Statement of Claim and I ordered that the Amended Statement of Claim be filed by Monday, 30 July 2012. As a consequence of orders made by myself on 22 June 2012, the matter came on for review at Mount Isa before me on 17 September 2012.<sup>1</sup>
- [2] Mr Lukac appeared representing himself and Mr Andrews appeared by phone for the defendant. Mr Lukac did not file an Amended Statement of Claim as ordered and in the course of the hearing it became clear that there was no reasonable prospect of one forthcoming. On a number of occasions I asked Mr Lukac about this but it was clear there was no document, and that none was being prepared.<sup>2</sup>
- [3] It was difficult to ascertain what Mr Lukac wanted to achieve from the proceedings. At one point he told me:
- "I'm here for justice and I want to get well and I'd like to love my children again and anything else that I have held near and dear to me in the past. And that's about all I've got to say on the matter. I've got some other things I'd like to discuss for sure. There's stuff that's there. Stuff in the barrister's brief."<sup>3</sup>
- [4] In response to his situation, Mr Andrews applied for the summary determination of the action. He relied upon the following material on the Court file:
1. Application filed 13/9/12 (Court file doc 16)
  2. Application 1/3/12 (Court file doc 5)
  3. Affidavit D J Andrews 1/3/12 (Court file doc 6)
  4. Affidavit R J Madsen 13/3/12 (Court file doc 7)
  5. Affidavit D J Andrews 4/4/12 (Court file doc 9)

<sup>1</sup> See *Lukac v Madsen (No 1)* [2012] QSC 289.

<sup>2</sup> See for example T1-4 18 – 125. T1-5 145 – T1-6 15. T1-10 125-1 35.

<sup>3</sup> T 1-9 17-1 12.

6. Affidavit D J Andrews 20/4/12 (Court file doc 11)
7. Affidavit D J Andrews 10/9/12 (Court file doc 15)
8. Affidavit D J Andrews 17/9/12 (Court file doc 17)
- [5] The relief sought by the application filed 13 September bore a close resemblance (but not identical) to that sought under that filed 1 March.<sup>4</sup> The application sought dismissal either under the inherent jurisdiction of the Court or under rule 658 *UCPR* alternatively that the proceedings be stayed. Alternatively the application sought an order pursuant to rule 371 *UCPR* that he be permitted to apply for summary judgment under rule 293. It also sought an order for security for costs.
- [6] An application might have been made following the procedure under rule 374 *UCPR*<sup>5</sup> however the application was not endorsed with the relief as expressly contemplated by *UCPR* 374.
- [7] The plaintiff's (Mr Lukac) Statement of Claim has been struck out. He has no present intention of delivering a new Statement of Claim let alone one that complies with the rules of Court. He has not complied with the orders I made earlier this year. This state of affairs should not be permitted to continue. The requirements of the prompt and orderly progression of litigation established by the objects of the *UCPR* should not be overlooked.<sup>6</sup> The public interest in litigation pending against a member of one of the State's courts being resolved expeditiously and not being permitted to linger is obvious.
- [8] There is power in the inherent jurisdiction of the Court, in order to prevent the abuse of the process of the Court, for orders to be made to terminate the proceedings.<sup>7</sup> It is, in my judgment, an abuse of the process in the Court to leave pending a claim without any intention of filing a Statement of Claim in support, thereby preventing a defendant to join issue, knowing what are the issues to be litigated and to prepare in an orderly and cost effective way to meet the claim at trial.
- [9] In the circumstances there will be an order that the plaintiff's claim be struck out and order that there be judgment entered for the defendant.

### Costs

- [10] In the affidavit of Mr Andrews filed on 17 September 2012<sup>8</sup> Mr Andrews went to some length to particularise the costs that he submitted had been incurred on behalf of Mr Madsen in response to the proceedings commenced by Mr Lukac<sup>9</sup>. In submissions before me Mr Andrews urged that I fix the cost to avoid further delay and a cost associated with any assessment.<sup>10</sup>

<sup>4</sup> See *Lukac v Madsen (No 1)* [2012] QSC 289 at [15].

<sup>5</sup> See *Johnson v Public Trustee of Queensland* as executor of the Will of Brady (deceased) [2010] QCA 260 at [16]-[20].

<sup>6</sup> Rule 5 *UCPR*

<sup>7</sup> *von Risefer & Ors v Permanent Trustee Co Pty Ltd & Ors* [2005] QCA 109 at [14]-[21].

<sup>8</sup> Sworn 14 September 2012.

<sup>9</sup> In paragraph 17 of the affidavit, Mr Andrews submitted that the costs since the outset if calculated at the charge out rates charged by his firm might be as high as \$32,072 plus GST.

<sup>10</sup> T1-15 115 – 140.

- [11] While noting that there is power under the rules for me to fix costs<sup>11</sup> the difficulty I have is that the costs claimed in the affidavit have not been assessed or estimated, so far as I could determine, by reference to any scale of fees or charges. This is relevant because, as outlined in my Reasons delivered on 22 June 2012, these proceedings were removed into this Court from the Magistrates Court by an order made by myself.<sup>12</sup> Prima facie rule 688 *UCPR* would operate so that the costs incurred before the proceedings were removed into this Court would be assessed in accordance with the scale of costs and charges applicable in the Magistrates Court.<sup>13</sup>
- [12] It should not be overlooked that Mr Lukac chose to litigate in the Magistrates Court, not in this Court. The proceedings were removed into this Court by my order because of the public interest that attached to them as explained in my Reasons delivered on 22 June 2012.<sup>14</sup> For this reason I do not consider it would be fair to Mr Lukac to order that all costs he might be ordered to pay be assessed as if he had chosen to litigate in this Court.
- [13] In the written submissions on behalf of the defendant Mr Andrews sought indemnity costs. He pointed to two proposals made by the defendant to Mr Lukac to settle proceedings on terms as to costs he submitted were more favourable to Mr Lukac than an order than he pay costs assessed on a standard basis.
- [14] The first is found in a letter dated 3 April 2012.<sup>15</sup> That proposed no order as to costs. The second was part of a letter dated 4 September 2012<sup>16</sup> which proposed that Mr Lukac pay the defendant's costs (including reserved costs) fixed at \$11,000.
- [15] There are a number of matters that might be said about the offers. Neither was expressly made pursuant to Ch 9 Pt 5 of the *UCPR* as required by Rule 353(3) *UCPR*. Thus the relevant provisions of the *UCPR* are not engaged. Even if they were it is not clear to me, in relation to the second offer, that the order I have in mind is "not more favourable" to Mr Lukac than the offer to fix costs.<sup>17</sup> Further in relation to the second offer it was made late, shortly before the hearing fixed for 17 September 2012 by which time most of the costs associated with the matter would have been incurred. Finally it might be observed that the applications that were filed sought relief on multiple grounds, they also sought security for costs. The affidavits were lengthy and sometimes repetitive. While the difficulties associated with litigation when opposed by a litigant in person and confronted with the inconvenience of the matter being conducted in a remote court are notorious, it is not clear to me that all the time and effort that the defendant's legal advisers have been put to was necessary in order to achieve the outcome I have ordered.
- [16] But even if these matters might be overcome, there are unusual circumstances that apply here that indicate that "another order is appropriate".<sup>18</sup> Mr Lukac is acting in person. In my judgment he had some difficulty in clearly focussing on what he

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<sup>11</sup> Rule 687(2)(c) *UCPR*.

<sup>12</sup> See *Lukac v Madsen (No 1)* [2012] QSC 289 at [6]

<sup>13</sup> Refer generally Schedule 3 to the *UCPR* 1999

<sup>14</sup> See *Lukac v Madsen (No 1)* [2012] QSC 289 at [6]

<sup>15</sup> Exhibit "JDA1" to the affidavit of JD Andrews filed 20/4/2012 (Court file doc 11)

<sup>16</sup> Exhibit "JDA4" to the affidavit of JD Andrews filed 10/09/2012 (Court file doc 15)

<sup>17</sup> Rule 361(1)(a) *UCPR*

<sup>18</sup> Rule 361 (2) *UCPR*

seeks to achieve by the litigation.<sup>19</sup> Notwithstanding that his recent conduct in not taking steps, in breach of an order of the court, to file and serve the statement of claim is an aspect of an abuse of the court's process, it is my assessment that this is beyond him and he is unable to interest qualified lawyers to take his case on. For these reasons, any assessment of costs should be on the standard basis.

[17] The defendant ought to recover his costs in that they should follow the event. However in the circumstances I have discussed that the proceedings were removed into this Court on the Court's initiative I'm of the view that the costs should be assessed on the scale of costs and charges applicable as if the proceedings had been heard and determined in the Magistrates Court.

[18] Accordingly there will be orders:

1. The plaintiff's Claim be struck out.
2. Judgment be entered for the defendant.
3. That the plaintiff pay the defendant's costs of and incidental to the proceedings to be assessed on the standard basis and on the scale of costs and charges applicable as if the proceedings had been heard and determined in the Magistrates Court of Queensland.

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<sup>19</sup> See para [3] above.