SUPREME COURT OF QUEENSLAND

CITATION:	*Dupois v Queensland Television Ltd & Ors* [2015] QCA 160
PARTIES:	**CHARLES DUPOIS** (appellant) **v** **QUEENSLAND TELEVISION LTD** ACN 009 674 373 (first respondent) **TCN CHANNEL NINE PTY LTD** ACN 001 549 560 (second respondent) **GENERAL TELEVISION CORPORATION PTY LTD** ACN 004 330 036 (third respondent) **NINE NETWORK AUSTRALIA PTY LTD** ACN 008 685 407 (fourth respondent) **KATE DONNISON** (fifth respondent) **GRANT WILLIAMS** (sixth respondent) **THERESE ZUANETTI** (seventh respondent)
FILE NO:	Appeal No 4059 of 2015 SC No 2754 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application - Civil
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 30 March 2015
DELIVERED ON:	28 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2015
JUDGE:	Holmes and Fraser JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to adduce fresh evidence refused.** **3. Until the conclusion of the trial of this action and any appeal therefrom, these reasons for judgment not be published on the court website or in any other forum**

without the prior leave of this Court or a judge of the Supreme Court.

4. **The appellant pay the respondents' costs of and incidental to the appeal to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the appellant sued the respondents for defamation – where the appellant sought damages for economic loss to the value of $50,000,000.00 – where the primary judge concluded that the expert report filed by the appellant was not admissible on the grounds of relevance and for non-compliance with the rules of court – where the primary judge found that there was no evidence to support the proposition that the appellant had any realistic prospect of success of establishing the economic loss – where the primary judge dismissed part of the appellant's claim pursuant to r 293 *Uniform Civil Procedure Rules* 1999 (Qld) – whether the primary judge erred

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – where the appellant sought to adduce fresh evidence in the form of three affidavits – where the evidence was available at the time of the hearing – whether the evidence would have had an important influence on the result of the case – whether the evidence was credible – whether the application to adduce evidence should be allowed

Uniform Civil Procedure Rules 1999 (Qld), r 292, r 293, r 766

Clark v Ryan (1960) 103 CLR 486; [1960] HCA 42, cited
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, applied
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, considered
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, applied
Spencer v The Commonwealth (2010) 241 CLR 118; [2010] HCA 28, cited

COUNSEL: The appellant appeared on his own behalf
R J Anderson for the respondent

SOLICITORS: The appellant appeared on his own behalf
Johnson Winter Slattery for the respondent

[1] **HOLMES JA:** I agree with the reasons of North J and the orders he proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of North J and the orders proposed by his Honour.

[3] **NORTH J:** UCPR r 293 permits a court to give judgment for a defendant against a plaintiff for all or part of the plaintiff's claim if the court is satisfied that the plaintiff has "no real prospects of succeeding" on all or that part of the plaintiff's claim and that "there is no need for a trial" of the claim or the part of the claim. An application for, what is styled "Summary Judgment" may be made on application at any time after filing a notice of intention to defend[1].

[4] This appeal concerns the exercise of that power to dismiss part of a plaintiff's claim for damage claimed in respect of an alleged defamation. The appellant, who represented himself on the appeal (as he has done in the proceedings below), is the only plaintiff. He alleges that on 24 January 2012 in the television programme, "A Current Affair" broadcast by the first, second, third and fourth defendants he was defamed as a consequence of which he suffered loss and damage[2]. In the prayers for relief at the end of the Statement of claim the appellant claims:

> "(A) $250,000.00 – General Damages for Defamation, Such Damages being calculated as a global sum.
>
> (B) ~~$500,000.00~~ - $1,000,000.00 – As Aggravated Damages.
>
> (C) $50,000.000.00 – By way of Economic Loss.
>
> (D) Interest.
>
> (E) Costs."

[5] On 30 March 2015 Jackson J, sitting in application jurisdiction ordered[3]:

> "Pursuant to UCPR rule 293 that part of plaintiff's claim in paragraph 11 of the Further Amended Statement of Claim and paragraph C of the claim for relief is dismissed;"

[6] In order to better understand the issue before his Honour and in this appeal it is convenient to set out the appellant's pleaded case for damages[4]:

> "**LOSS AND DAMAGE**
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> 10. In the premises each of the defendant's is liable to the plaintiff for damages for defamation including aggravated damage by reason of the publication the plaintiff has been brought into hatred, ridicule and contempt and has been gravely injured in his character, his reputation and has suffered hurt and embarrassment and has and will continue to suffer loss and damage.
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> 11. Further by reason of the broadcast:
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> (a) The agreement entered into with an existing Australian / American registered public company namely Save the World Technologies' INC and the plaintiff to incorporate his World Peace project, including his World Peace and

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1 UCPR r 293(1).
2 Further Amended Statement of Claim, 29 August 2014, AR 295.
3 AR 319.
4 Further Amended Statement of Claim Harris paras 10-12.

Humanitarian Anthem titled 'If We Can Dream' recorded by the plaintiff as the recording artist for a personal fee of AUD $ 50,000,000.00 payable to him was cancelled by the director namely Lyn Muller and its shareholders. The payment was due to come from the public company platform obtaining two billion dollars in share sales and revenue throughout 200 hundred different countries who were to be involved in this global World Peace Project.

(b) The agreement referred to in 11(a) herein was entered into on Friday the 20th of January 2012 by way of a verbal agreement, confirmed by a hand shake between the plaintiff and the managing director of the aforesaid public company which took place in the managing directors home on the gold coast Queensland, with the intention of formalising the agreement into a written contract the following week.

(c) The plaintiff who is an established International Recording Artist, TV Host and an officially endorsed World Peace Ambassador, also entered into an agreement with the aforesaid public company to co-star in a motion picture with actor Steven Segal that they intended to produce, that agreement has now also been cancelled. The monetary payment to co-star opposite actor Steven Segal which was still in negotiation with the plaintiff has now been withdrawn.

(d) The principle terms of the agreement required the plaintiff to hand over his entire World Peace project to the public company to be promoted as a major part of its platform to float a large public share issue both in Australia and America that would produce revenue from share sales in excess of two billion dollars.

(e) As the plaintiff is the owner and creator of the World Peace project involving 200 countries is was a term of the said agreement that the plaintiff will be paid a fee of AUD $ 50,000,000.00 (fifty million dollars) and the balance of the revenue raised from share sales would be used to finance the said World Peace project and any unsold shares would be distributed equally between the parties.

(f) It was a further term of the said agreement that the plaintiff would receive his fee of AUD $ 50,000,000.00 as soon as that amount was raised from the sale of the International share float to the public.

(g) The said agreement was cancelled by the managing director on the morning of the day after the publication of the said broadcast of the A Current Affair segment, by a conversation between the managing director and the executive producer of the World Peace project over the telephone as a direct result of the said broadcast and in particular the constant defamatory accusations on the

plaintiffs character and reputation with respect to his family and his past business dealings highlighted in the broadcast.

(h) Full particulars of ~~the identity of the public company and its managing director,~~ the distribution and viewership of the said broadcast will be supplied after the completion of discovery and after interrogatories ~~has~~ have been administered.

12. As a consequence of the matters pleaded in paragraph ~~13~~ 11 hereof the plaintiff has lost income of $ 50,000.000 ~~and has also lost his opportunity of being recognised in front of Hollywood Producers in other potential Hollywood acting roles~~."

[7] It is apparent from the statement of claim that the appellant's claim for economic loss of $50,000,000.00 is premised upon an agreement between himself and a public company Save the World Technologies Inc made in a conversation between the appellant and the managing director of that public company on Friday 20 January 2012[5]. Under the agreement the appellant was to "handover" his World Peace project, including his World Peace and Humanitarian Anthem titled "If We Can Dream", to the public company "to be promoted as a major part of its platform to float a large public share issue" in Australia and the USA[6]. Further, in consideration of this, it was a term of the agreement that the appellant would be paid a "personal fee" of $50,000,000.00 "as soon as that amount was raised from the sale of the International share float to the public."[7]

[8] In argument we were informed that on 21 October 2014 Flanagan J had made orders and directions that the appellant file and serve:

- A statement of his evidence-in-chief and a list of documents he intended to tender at trial;
- A list of lay witnesses he intended to call at trial and (save as their evidence may be summarised in affidavits already filed) a precis of their evidence;
- Any expert report,

by dates specified in that order.[8] The appellant complied with these orders and directions so that when the application was heard by his Honour the evidence upon which the appellant relied was known.

[9] In making the orders and directions Flanagan J was facilitating the early identification of the issues between the parties and the evidence relied upon to prove the appellant's case as pleaded. In particular, for the purposes of this appeal, the evidence, including expert evidence, relied upon as proof of the probable success of the float and public share issue to be carried out by Save the World Technologies Inc sufficient to generate revenue to enable payment to the plaintiff of the $50,000,000.00 fee[9] was before his Honour at the hearing of the application for summary judgment. One of the

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5 Further Amended Statement of Claim paras 11(a) and (b).
6 Further Amended Statement of Claim paras 10(a) and (d).
7 Further Amended Statement of Claim paras 11(a), (e) and (f).
8 See exhibit 1 on the Appeal.
9 The statement of the appellant's evidence, the affidavits or precis of the lay evidence, the list of documents filed pursuant to the order of Flanagan J was reproduced at AR 144-175.

documents filed was styled a "Valuation & Analysis" comprising some 21 pages authored by a Patrick Brodnik. It is the only document styled expert report filed in response to the order of Flanagan J.[10] In addition a CV of Mr Brodnik was filed[11].

[10] The consideration of the claim pleaded for $50,000,000.00 in damages leads inevitably to the conclusion that an award of that amount could only follow from a conclusion that the prospects of success of the float and public share issue were so high that it was certain that revenues in excess of $50,000,000.00 would follow thus enabling the payment as alleged in paragraph 10(f) of the statement of claim. Such an assessment involved a consideration of a hypothetical of the nature considered by the High Court in *Sellars v Adelaide Petroleum NL*[12]. Further that for such a finding to be made a court would have to be persuaded by a body of expert evidence from those experienced in floats and public share issues involving projects, including the anthem, of the nature described in the statement of claim. Thus it is not surprising that the examination of the expert evidence available in support of the plaintiff's claim was at the forefront of his Honour's reasons.

[11] It is apparent from the transcript of the hearing before his Honour that he had an opportunity to carefully read the affidavits and exhibited evidence[13] so that when both parties had made oral submissions he was in a position to give judgment and state his reasons. When his Honour turned to a consideration of the appellant's claim for special damages of $50,000,000.00 and the report of Mr Brodnik he said:[14]

> "The only expert report in support of the claim for special damages of AUD$50 million is one prepared by Patrick Brodnik, which is dated 12 December 2014. In 22 pages, Mr Brodnik prepared what is headed an International Property Valuation Assessment and Analysis, Including the Initial Public Offering for the International Stock Market for "One World Music, Film and TV Pty Ltd". On page 3 of the report, Mr Brodnik refers to a business forecast for OWMFTV, which is the acronym for that company, which he says has a market value in excess of $200 million based on a list of projects which are 11 in number. Only two of those items appear to relate to the subject matter of paragraph 11 in the statement of claim, or perhaps three.
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> There are problems with this report. It is unnecessary to deal with them all. But, for present purposes, a couple of observations are pertinent. First, the conclusion at page 21 of a net worth appraisal in Australian dollars includes projections as to the value of various items that appear to relate, and, on the face of the document, do relate, to all the relevant projects. Second, the opinions expressed by Mr Brodnik are apparently based on details which are not set out and assumptions which are not set out in the report. …
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> …
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> Mr Dupois submits that the complaints made about Mr Brodnik's report, to some extent, miss the point. He submits, specifically, that

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10 The report is found at AR 178-199; see further AR 179 confirming its designation as an expert report.
11 See AR 136-139.
12 (1994) 179 CLR 332 at 349 ff.
13 See T1-10 l 1-5, AR 10.
14 AR 38, reasons at line 7 ff.

> OWMTV has nothing to do with the public company platform referred to in paragraph 11, subparagraph (a) of the further amended statement of claim. That public company platform was never brought into existence and was to be solely for the World Peace Project or the International World Peace Project, as it is described.
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> The immediate difficulty which that submission raises is that if Mr Brodnik's report as to the value of OWMTV is, as Mr Dupois submits, not relevant to the question of the claim for special damages alleged in paragraph 11 of the further amended statement of claim, then notwithstanding that the time for the production or service of the plaintiff's evidence in support of that claim has passed, there is nothing at present which supports it.
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> The plaintiff relies on the fact that there is evidence of making the agreement, and it was submitted that there might be other evidence about that. For present purposes, I am prepared to act on that footing. He further submits that the professional production of what is described as the 2009 World Peace Theme Song, 'If We Can Dream', is evidence of the quality of the project. I am prepared, also, to act on that assumption.
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> Nevertheless, the problem remains that there is no evidence that supports the proposition that the plaintiff has any realistic prospect of success of showing that $50 million would have been paid to him if the agreement which he alleges in paragraph 11 had not been brought to an end following the alleged defamatory broadcast. The fee-earning basis which he alleges is of a complex and large scale financial project. It is pleaded that it would have involved a public company platform obtaining revenue throughout 200 different countries and a float of a large public share issue both in Australia and America.
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> There is no evidence which has been produced by the plaintiff in accordance with the directions of the court to date in support of a finding of fact that such a financial undertaking had any realistic prospect of happening if the alleged defamatory broadcast had not been made."

[12] After considering other matters relating to the appellant's claim for $50,000,000.00[15] his Honour proceeded[16]:-

> "On the evidentiary material presently available, in my view, the plaintiff has not reached the hurdle of showing there is a real prospect of success, and the defendant has established the contrary. The plaintiff submitted that the defendant has adduced no evidence on this question, but the simple fact is that it is not for the defendant, and will not be for the defendant at trial, to do so unless there is some admissible evidence which can support the claim on the footing that I have mentioned.
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> The plaintiff's claim is one for defamation. He seeks trial by jury. The evidence which will go before the jury, on the face of it, in answer or in support of the plaintiff's claim must be admissible. Mr Brodnik's

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15 Including considering whether in point of law the appellant's claim for economic loss should be categorised as a claim for a loss of opportunity consistent with the reasoning of the High Court in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

16 AR 40, line 11-25.

> report appears, clearly, to be not admissible on the grounds both of relevance and because it does not comply with the rules of court. The plaintiff, in his summary of evidence, does not foreshadow any admissible evidence or proof which will potentially mount the threshold required. There is no other indication in the material or in any evidence that the parties referred to me that the plaintiff will be able, or might be able, to do so."

His Honour concluded that the plaintiff had no real prospects of success in his claim for $50,000,000.00 and proceeded to give judgment for the defendants on that part of the plaintiff's claim under r 293.

[13] In argument the appellant reminded us of some of the authorities in Australia and elsewhere concerning the power of the court to summarily determine a claim or defence or part thereof. In *Deputy Commissioner for Taxation v Salcedo* [2005] 2 Qd R 323 this court had occasion to consider the power to summarily determine proceedings against a defendant under UCPR r 292 but the reasoning of the court and the principles discussed were directed to both UCPR r 292 and r 293[17]. In his reasons Williams JA[18] said[19]:-

> "[11] … Rule 292 and r 293 brought about significant changes in the law and procedure relating to summary judgment. The wording of r 292 and r 293 is clearly based on the drafting used in Part 24 of the *Civil Procedure Rules* (UK) which came into force in the United Kingdom in 1999. In *Swain v Hillman* [2001] 1 All ER 91 of the Court of Appeal had to consider rule 24.2, the equivalent of r 292. Lord Woolf MR said at 92:
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> > 'The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or … they direct the court to the need to see whether there is a "realistic" as opposed to "fanciful" prospect of success.'
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> Later, again speaking of the rule, he said at 94:
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> > 'It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.'
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> In his reasons at 95, Pill LJ accepted that the term 'real' was used in contradistinction to 'fanciful'. The third member of the court, Judge LJ, whilst recognising that summary judgment was a "serious step", went on to say at 96:
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> > 'This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect

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17 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 233 per McMurdo P at [2] & [3].

18 With whom McMurdo P and Atkinson J agreed.

19 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 235, 234-237, [11]-[17].

> of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable.'

[12] Wilson J followed and applied that approach in *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 Qd R 249. At 254 her Honour emphasised that the 'test is that of "no real prospect" of success and not that of improbability of success'.

[13] The approach adopted by the Court of Appeal in *Swain v Hillman* was approved by the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1; particular reference should be made to Lord Hope of Craighead at 259-260, Lord Hutton at 272-273, and Lord Hobhouse of Woodborough at 282-283. Lord Hope at 260 approved of a statement that:

> 'particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.'

But in saying that, and this is a theme running through all the judgments, the overriding consideration must be the just disposition of the case – there must be a fair hearing. As Lord Hope put it again at 260:

> 'I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly.'

It is clear from his Lordship's reasoning that the test to be applied was whether there was a 'real prospect of succeeding'; the test should not be formulated by using other verbiage. As Lord Hobhouse expressed at 282: 'The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality.'

[14] This Court approved that approach in *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq*) [2003] 1 Qd R 259. There Holmes J, with the concurrence of Davies JA and Mullins J, speaking of r 293(2) and the expression 'no real prospect of succeeding' said at 264-265:

> 'That level of satisfaction may not require the meeting of as high a test as that posited by Barwick CJ in *General Steel*: "that the case for the plaintiff is so clearly untenable that it cannot possibly succeed". The more appropriate inquiry is in terms of the Rule itself: that is, whether there exists a real, as opposed to a fanciful, prospect of success. However, it remains, without doubt, the case that: "great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case."'

In making that statement her Honour made a footnote reference to *Swain v Hillman* and *Three Rivers District Council v Bank of England (No 3).*

[15] The question was also considered by this Court in *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469. Jones J, with the concurrence of Cullinane J, said of r 293(2) at 475:

> 'This new rule results, not only in a change in terms, but also reflects a change in the philosophy from that embodied in the former rules and in the propositions identified in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99. Wilson J considered this new rule in *Foodco Management Pty Ltd v Go My Travel Pty Ltd* and found guidance in the approach taken by the Court of Appeal in the United Kingdom in *Swain v Hillman.'*

After quoting passages from the judgment of Lord Woolf in *Swain v Hillman,* Jones J went on to say at 475-476:

> 'This statement by Lord Woolf is clearly consonant with the philosophy of the *UCPR* as set out in r 5. It is this philosophy which underpins the change in approach reflected in the new rules. These remarks apply with equal force to both rr 292 and 293 of the *UCPR*. .... In my view, the reasoning of the Court of Appeal (UK) in *Swain* should be adopted as setting the proper test for applications pursuant to rr 292 and 293 of the *UCPR*.'

[16] Finally it should be noted that PD McMurdo J, with whom McPherson JA agreed, (and who constituted the majority in *Gray v Morris*) said at 133:

> 'With respect to those who may have expressed a different view, it seems to me that rr 292 and 293 should be applied by reference to their clear and unambiguous language, without a need for any paraphrase or comparison with a previous rule. But in the application of the plain words of rr 292 and 293, and in particular the consideration of whether there is a need for a trial, a court must keep in mind why the interests of justice usually require the issues to be investigated at a trial.'

[17] That review of the authorities clearly establishes to my mind that there has been a significant change brought about by the implementation of r 292 and r 293 of the UCPR. The test for summary judgment is different, and the court must apply the words found in the rule. To use other language to define the test (as was contended for in this case by counsel for the appellant relying on the reasoning of Chesterman J in *Gray v Morris*) only diverts the decision-maker from the relevant considerations. But, and this underlies all that is contained in the UCPR, ultimately the rules are there to facilitate the fair and just resolution of the matters in dispute. Summary judgment will

> not be obtained as a manner of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial. In my view, the observations on summary judgment made by the judges of the High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99 are not incompatible with that application of r 292 and r 293; what is important is that in following the broad principle laid down by their Honours the test as defined by the rules is applied."

[14] In *Spencer v The Commonwealth of Australia*[20] the High Court considered the power found within s 31A(2) of the *Federal Court of Australia Act* 1976 (Cth) to summarily determine a claim when the court is satisfied that a party has "no reasonable prospect of successfully prosecuting" the proceeding or part thereof. The section considered, as a whole, is very different from the rules of this court[21] but while noting the careful injunction made by their Honours[22] that it would be dangerous to apply in the context of s 31A what had been said about the test of "no real prospect" in the United Kingdom, there is, I consider, nothing in their Honours' judgment concerning the test provided for under the *Federal Court Act* and how the Federal Court should apply its power to suggest that the guidance offered by the judgment of this court in *Deputy Commissioner of Taxation v Salcedo* upon the provisions of the UCPR was inconsistent with the High Court's judgment in *Spencer v The Commonwealth*[23].

[15] His Honour's criticisms of the "Valuation & Analysis" authored by Mr Brodnik[24] are well made[25]. The report does not consider the prospects of success of the float and public share offering referred to in the pleadings nor does it offer any analysis or opinion evidence of the income that might be generated from such an enterprise. Rather it appears to be a discussion of the "intrinsic market value"[26] of an entity known as One World Music Film and TV Pty Ltd which is not referred to in the plaintiff's statement of claim. Further in so far as Mr Brodnik purports to value "the intrinsic market value" of the company the report contains no information or evidence detailing the assets of the corporation how those assets might be valued nor how they relate to the float and public share issue the subject of the Statement of Claim. His Honour was correct when he said that the opinions expressed by Mr Brodnik were not based upon details of information or assumptions from which an assessment can be made of the worth of the opinion expressed[27].

[16] Further the curriculum vitae of Mr Brodnik[28] offers no basis from which it could be concluded Mr Brodnik had either from training or qualifications or from experience

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20 (2010) 241 CLR 118.

21 Consider for example s 31A(3).

22 Consider *Spencer v The Commonwealth* (2010) 241 CLR 118 per Hayne, Crennan, Kiefel and Bell JJ at p 140, [57].

23 Consider *Spencer v The Commonwealth* (2010) 241 CLR 118 at 131-132, [24] per French CJ and Gummow J and the careful reminders of McMurdo P and Williams JA in *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 at 233, [3] and at [17] quoted above.

24 AR 178-199.

25 Including the failure of the author to comply with UCPR r 428(c).

26 AR 199.

27 Indeed from a reading of the report Mr Brodnik's introduction to the report (at AR 179) and from the curriculum vitae (AR 136-139) it is difficult to ascertain how Mr Brodnik might be qualified to offer expert opinion evidence of a valuation and analysis of such a corporation.

28 AR 136-139.

(or from any combination) necessary qualifications to offer an expert opinion of the prospects of success of the float and public share issue pleaded in the statement of claim[29] sufficient to guarantee returns to enable the fee of $50,000,000.00 to be paid. So even if he had offered an opinion relevant to the matters pleaded in the statement of claim, which he did not, there is no basis suggested in either the document styled "Valuation & Analysis" or the curriculum vitae for the reception of opinion evidence upon these matters[30]. At the hearing of the appeal a further difficulty concerning the status of Mr Brodnik to offer opinion evidence as an expert independent of the parties emerged. In his affidavit filed as part of the application made by the appellant to adduce fresh evidence[31] it emerged that Mr Brodnik was a shareholder in the public company that had allegedly entered into the contract with the appellant. Mr Brodnik swore[32] that he was actively working with the public company and was consulted by its directors and management concerning the matters the subject of the contract. The association that Mr Brodnik had with Save the World Technologies Inc casts serious doubt on his standing to offer independent expert evidence of the matters the subject of his report consistent with the obligations of an expert witness and such witness's duty to the court[33].

[17] The evidence of the other witnesses the plaintiff proposed to call in his case was before his Honour in the form of précis or affidavits[34]. While that evidence in general supports the plaintiff's own evidence of the fact of making the agreement with Save the World Technologies Inc there was no evidence from those witnesses from which it might be concluded that the public float and share issue in Australia and the United States might be successful. So while there is evidence from some that the song or anthem was a quality product and might be popular there is no evidence from persons with demonstrated experience in merchant banking, underwriting floats and public share issues, stockbrokers or from those with considerable experience in ventures of a like kind to that proposed in the statement of claim.

[18] In short, at the hearing of the application for summary judgment the appellant offered no evidence in an admissible form upon the matters discussed by his Honour. Nor did the appellant place any evidence before his Honour from which it might be concluded that the appellant had any prospect of obtaining evidence upon this issue.

[19] In the absence of any evidence or the suggestion of the possibility that any evidence was available the appellant's prospect of success upon this aspect of his claim could at its highest be described as fanciful. In argument before us neither side was able to direct our attention to an instance where the judgment had been entered summarily in favour of one party against another in like circumstances on part of a claim for damages for defamation. This, of itself, is not surprising for the occasions in which summary judgment might be indicated would, because of the great care that should be taken before exercising discretion to give judgment, be so rare as to be an extraordinary occurrence. In my view this is such an extraordinary occurrence. His Honour was correct to give judgement for the defendants. There was no real prospect of the appellant succeeding on the part of this claim for which judgment was given.

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29 See para 11(d).
30 Consider *Clark v Ryan* (1960) 103 CLR 486, per Dixon CJ at 491-492.
31 See application filed 30 June 2015 and affidavit Patrick Brodnik filed 30 June 2015.
32 Paragraph 5 of the affidavit filed 30 June 2015.
33 See for example UCPR r 428(3)(e).
34 AR 144-173.

[20] At the hearing of the appeal probably in belated acknowledgment of the deficiencies identified by Jackson J, the appellant sought to tender fresh evidence[35] pursuant to UCPR r 766(1)(c). The evidence was in affidavit form being an affidavit of the appellant[36], an affidavit of Mr Patrick Brodnik[37] and an affidavit of Mr Peter John Blyton[38]. In respect of all three gentlemen it is to be noted that each of them had either by way of précis or by way of affidavit, provided evidence that was placed before his Honour at the hearing of the application below. By way of explanation why the evidence that these deponents were seeking to give was not included in the material before his Honour, the appellant said that he did not foresee at the time of the hearing the need for any further clarification of the existing evidence and he pointed to the circumstance that he was a self-represented litigant with no legal training.

[21] UCPR r 766(1)(c) permits the reception of further evidence upon questions of fact providing "special grounds" are demonstrated. It is well established that three conditions are relevant to the demonstration of "special grounds"[39]:

> "First it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

[22] It will be readily apparent that the appellant does not assert that the evidence was unavailable at the time of the hearing even with the exercise of "reasonable diligence", all three deponents were available and provided affidavit or statement evidence that was before his Honour. But putting that matter to one side for the moment in the circumstance that the application determined by his Honour was one for summary judgment and that the appellant was representing himself it is with respect to the other two of the circumstances that the appellant has greatest difficulty[40]. The affidavit of the appellant goes no further than to repeat some of what he had said in the précis of his evidence and affidavits that were before his Honour, to explain why the further affidavits of Mr Brodnik and Mr Blyton were not available and to attempt to put their evidence or potential evidence in context. The evidence of Mr Brodnik essentially went no further than his "Valuation & Analysis". In his affidavit he confirmed, consistently with the finding by his Honour below, that the "Valuation & Analysis" was primarily to evaluate the company One World Music, Film and TV Pty Ltd and its projects[41]. Although he went on to offer an opinion as to the probable success of the project as he understood it there was to be floated on the "international stock exchange" he offered no further information justifying any contention that he may be qualified to offer an expert opinion. In his affidavit Mr Blyton deposed that he was an established international recording producer and engineer with 30 years experience in the industry having worked extensively with a number of famous artists. He swore that he had

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35 Application filed 30 June 2015.

36 Sworn 29 June 2015, filed 30 June 2015.

37 Sworn 29 June 2015, filed 30 June 2015.

38 Sworn 28 June 2015, filed 30 June 2015.

39 *Clarke v Japan Machines (Aust) Pty Ltd* [1984] 1 Qd R 404 per Thomas J at 408.

40 The credibility of the evidence and the consideration as to whether, if it had been available, it would have had an important influence on the result of the case and potentially be decisive often might assume more significance than the former, consider *Orr v Holmes* (1948) 76 CLR 632 at 641 to 642 per Dixon J.

41 Affidavit filed 30 June 2015 at para 3.

been in charge of staging large successful concerts with well-known international recording artists as well as producing hit songs. In his affidavit he went on to offer the opinion that the potential income generating possibilities of the song that the plaintiff had written was great and he suggested that sales alone might be estimated to exceed $200,000,000.00. Unfortunately, as is the case with Mr Brodnik's evidence, Mr Blyton offered no basis for any conclusion that he might be qualified as an expert to offer an opinion as to the prospects of success of the float and public share issue. So while Mr Blyton's evidence does support the conclusion that the peace theme song, "If We Can Dream" is a quality project, and I am prepared to act upon that assumption, as was his Honour below, it is not evidence of the critical matter raised by the pleadings identified by his Honour below.

[23] In the circumstances I am not persuaded that the evidence could not have been obtained with reasonable diligence at the hearing below. And, perhaps more importantly, the evidence is not credible expert opinion evidence and because of that, even if it had been available at the hearing before his Honour, it would not have altered the result.

[24] During the course of argument at the hearing of the appeal it became apparent that there is another obstacle to success by the appellant for his claim for $50,000,000.00. On more than one occasion in argument the appellant made it plain that the "World Peace Project" which included his Anthem was in fact owned by the company One World Music, Film and TV Pty Ltd, the company purportedly valued by Mr Brodnik.[42] In argument the appellant informed us that he was the sole shareholder of that company, nevertheless it became apparent that the rights to the successful promotion of the project and song were held by the company not the plaintiff and it is the company rather than the plaintiff who would be entitled to payment of the fee apparently negotiated between the plaintiff and Save the World Technologies Inc.[43] For this additional reason it is apparent that the plaintiff's claim for $50,000,000.00 has no real prospects of succeeding.

[25] The appellant has not persuaded me that there was any error on the part of Jackson J. It is plain from his Honour's reasons that he well understood the test to be applied when considering an application for summary judgment. In the state of the evidence his Honour was right to enter judgment for the defendants.

[26] The fresh evidence sought to be tendered at the hearing of the appeal does not meet the grounds required for the reception of fresh evidence and the application to adduce fresh evidence should, for the reasons I have given, be refused. For a number of reasons relating to the circumstance that the trial of this action is to be before a judge and jury it is desirable that any publicity of pre-trial rulings or applications be, so far as is possible, limited so as not to prejudice the integrity of any trial. For that reason, it is desirable that a non-publication order be made.

[27] For the reasons I have given the orders I propose are:

1. Appeal dismissed.
2. Application for leave to adduce fresh evidence refused.
3. Order until the conclusion of the trial of this action and any appeal therefrom, that these reasons for judgment not be published on the court website or in any other forum without the prior leave of this court or a judge of the Supreme Court.

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42 T1-14 l 15; T1-23 l 45; T1-24 l 10.

43 T1-24 l 31-38; T1-26 l 5.

[28] The respondents have been successful on the appeal from a judgment in which they were successful in obtaining summary judgment on one aspect of the plaintiff's claim. No circumstances have been identified why the costs of this appeal should not follow the event. I would order that the appellant pay the respondents' costs of and incidental to the appeal to be assessed on the standard basis.