SUPREME COURT OF QUEENSLAND

CITATION:	*Labaj v Collins* [2005] QCA 221
PARTIES:	**JOHN LABAJ** (plaintiff/applicant) **v** **LES COLLINS** (defendant/respondent)
FILE NO/S:	Appeal No 2255 of 2005 DC No 225 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2005
JUDGES:	de Jersey CJ, Williams JA and McMurdo J Judgment of the Court
ORDERS:	**1. Application to adduce additional evidence refused** **2. Application for leave to appeal dismissed** **3. Applicant is ordered to pay the respondent's costs to be assessed on an indemnity basis**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – STRONG REASONS FOR INTERFERENCE – where primary Judge dismissed application for summary judgment in proceeding claiming damages for negligent preparation of psychologist's report – where applicant had to secure leave to appeal under s 118 *District Court of Queensland Act* 1967 (Qld) – where application made out of time – where Disciplinary Committee of the Psychologists Board of Queensland had found the respondent guilty of unsatisfactory professional conduct – where respondent had failed to appear at two directions hearings – where unexplained delay in respondent filing a further amended defence – where applicant alleged bias against the primary Judge – whether issues arising on the pleadings could be determined summarily – whether there were sufficient special circumstances to grant leave to appeal APPEAL AND NEW TRIAL – APPEAL – GENERAL

PRINCIPLES – ADMISSION OF FRESH EVIDENCE – IN GENERAL – where applicant sought to admit affidavit confirming receipt of enforcement warrant notice – whether affidavit relevant to application

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where pleadings could not be determined summarily, a point made in earlier proceedings in the Court of Appeal and by the primary Judge – whether application had any arguable prospect of success – whether applicant must pay the respondent's costs on an indemnity basis

District Court of Queensland Act 1967 (Qld), s 118
Uniform Civil Procedure Rules 1999 (Qld), r 280, r 292(2), r 374

Carr v Finance Corporation of Australia Ltd (No 1) (1981) 147 CLR 246, cited
Labaj v Collins [2004] QCA 334; [2005] 1 Qd R 130, approved

COUNSEL: The applicant appeared on his own behalf
M H Hindman for the respondent

SOLICITORS: The applicant appeared on his own behalf
Wilson Ryan Grose for the respondent

[1] **THE COURT**: On 20 January 2004, the applicant commenced, in the District Court, a proceeding claiming damages in respect of the allegedly negligent preparation of a report by the respondent, a psychologist. The respondent prepared the report at the instance of WorkCover Queensland, in relation to the applicant's claim for compensation for injuries allegedly suffered in the course of his employment.

[2] In his amended statement of claim, filed 21 April 2004, the applicant alleges that the respondent owed him a duty of care, which she breached, causing injury to the applicant for which he claims damages. In her further amended defence, filed 14 February 2005, the respondent denies those contentions.

[3] By an application filed 25 January 2005, the applicant sought summary judgment. On 24 February 2005, the learned primary Judge dismissed that application. He was not satisfied, in terms of r 292(2) of the *Uniform Civil Procedure Rules* 1999 (Qld), that there was no need for a trial. A trial was necessary, he considered, for a proper determination, based on evidence, as to the existence of the alleged duty of care, its breach and any consequential loss. While it was the fact that the applicant had sworn an affidavit presenting his account of relevant matters, and the respondent had not, the issues to be explored at a trial had been crystallized by the pleadings, and they were not susceptible of summary determination. A Disciplinary Committee of the Psychologists Board of Queensland found in relation to the report that the respondent had been guilty of unsatisfactory professional conduct. His

Honour took the view that was essentially irrelevant to the resolution of the issues thrown up by the pleadings.

[4] Because the order dismissing the application for summary judgment was not a final judgment (*Carr v Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246, 248), it was necessary for the applicant to secure leave for any appeal (s 118 *District Court of Queensland Act* 1967 (Qld)). The applicant mistakenly appealed on 18 March 2005 without first securing a grant of leave. Having received the respondent's outline of argument and realizing his error, the applicant applied, on 27 May 2005, for leave. That application was out of time.

[5] At the commencement of the hearing of the application for leave to appeal, the applicant made a further application, to call additional evidence, comprising his own affidavit confirming receipt of notice of an enforcement warrant – redirection of debt. That concerns the redirection of a debt owed to the applicant by the respondent, to enforcement creditors to whom he owes a judgment debt of a larger amount. That is of no relevance to the disposition of the application for leave to appeal, and the application to call additional evidence should be refused.

[6] Ordinarily, the court would grant leave to appeal against the refusal of an application for summary judgment only in special circumstances. For example, it may be that the determination of the appeal would result in the resolution of an issue of abiding legal significance, or would expedite the determination of the substantial issues between the parties, or significantly promote the public interest. This case could not possibly fall into a category of that general character. The issues arising on these pleadings could not be determined summarily, a point made in earlier proceedings by Williams JA (*Labaj v Collins* [2004] QCA 334, para 9):

> "The next question is whether or not the general law recognises a cause of action against the respondent in the alleged circumstances. The contractual relationship was between the respondent and WorkCover, but the report, as was known to the respondent, was with respect to a claim made by the appellant. In those circumstances I would not be prepared to hold on a summary application that a duty relationship did not exist between the respondent and the appellant. Further, I would not be prepared to hold on a summary application that public policy would preclude the appellant recovering damages from the respondent if it was ultimately held that the report was prepared either not in good faith or negligently. Such questions should only be answered after a trial."

The learned primary Judge included that quotation in his reasons for judgment.

[7] The application for judgment was also expressed to be made in reliance upon r 280 of the *Uniform Civil Procedure Rules*. The learned primary Judge correctly observed that r 280 could not be relied upon because that rule expresses a power to dismiss proceedings by a plaintiff or applicant rather than a power to give a plaintiff summary judgment. The primary Judge treated that application purportedly made under r 280 as one made pursuant to r 374. Even then the basis for the application was not apparent. As best the primary Judge could distill it, the argument was that

the plaintiff should be given judgment because the defendant had twice failed to appear at two directions hearings.

[8] The learned primary Judge correctly observed that there was an unexplained delay in filing a further amended defence until 14 February 2005, together with a failure to appear at those directions hearings, but that there was no breach of an order so that r 374 could apply, and nor was the defendant's conduct such as to warrant the sanction of a judgment for the plaintiff.

[9] In his material put before the court at the hearing, the applicant alleges bias against the primary Judge. There is no basis for that allegation.

[10] The application for leave to appeal should be dismissed.

[11] The basis for such dismissal was clearly foreshadowed in the above passage by Williams JA, of which the applicant was reminded by the primary Judge; and it is incontrovertible. The application had no arguable prospect of success, as the applicant should have realized. That being so, in dismissing the application for leave to appeal, we order that the applicant pay the respondent's costs assessed on the indemnity basis.

[12] The orders of the court are as follows:

1. the application to adduce additional evidence is refused;
2. the application for leave to appeal is dismissed;
3. the applicant is ordered to pay the respondent's costs to be assessed on an indemnity basis.