DISTRICT COURT OF QUEENSLAND

CITATION:	*Munro v Dhanush Infotech Pty Ltd* [2019] QDC 67
PARTIES:	**DAVID MUNRO** (applicant) v **DHANUSH INFOTECH PTY LTD** (respondent)
FILE NO/S:	990/19
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	4 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2019 (*Ex tempore*)
JUDGE:	Kefford DCJ
ORDER:	**The application is dismissed.**
CATCHWORDS:	JUDGMENTS AND ORDERS – SETTING ASIDE JUDGMENT – FRAUD – where summary judgment was given – where the applicant says it was obtained by fraud – whether summary judgment was obtained by fraud
LEGISLATION:	*Uniform Civil Procedure Rules 1999* (Qld), r 215, r 293, r 667, r 668
CASES:	*Benseman v Noosa Cat Australia Pty Ltd* [2001] QDC 77, approved *COFP Pty Ltd v Dhanush Infotech Pty Ltd* [2015] QCA 1, considered *COFP Pty Ltd v Dhanush Infotech Pty Ltd* [2016] QDC 105, considered *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1, applied *Moore & Anor v Devanjul Pty Ltd* [2010] QDC 353, approved
SOLICITORS:	Mr Munro was self-represented Ms J Hatch, employee of Dhanush Infotech Pty Ltd with authority for the respondent

[1] HER HONOUR: This is an application by Mr Munro under rule 667 and rule 668 of the *Uniform Civil Procedure Rules* 1999 to set aside the decision of his Honour Judge Griffin made on 5 February 2014. Mr Munro says that the order was obtained by fraud. This is disputed by the respondent, Dhanush Infotech Pty Ltd.

[2] Before dealing with each of Mr Munro's allegations of fraud, it is helpful to set out some of the relevant background to the proceedings. COFP Pty Ltd brought proceedings against Dhanush Infotech Pty Ltd for moneys owed for services rendered and damages for breach of contract. Dhanush Infotech Pty Ltd defended the proceedings on the basis that any agreement made was not with it, but with another company, Dhanush Academy of Technology and Management Pty Ltd. Dhanush Infotech Pty Ltd succeeded in obtaining summary judgment from his Honour Judge Griffin on 5 February 2014. His Honour Judge Griffin ordered:

> "1. The claim be dismissed.
>
> 2. The plaintiff pay the defendant's costs the application as agreed or assessed.
>
> 3. The plaintiff pay the defendant's costs the proceedings as agreed or assessed.
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> 4. The registrar forthwith pay all the security for costs held by the Court and any accretions thereon to the defendant's solicitors' trust account."

[3] That decision was the subject of an appeal to the Court of Appeal. The Court of Appeal's reasons are published in *COFP Pty Ltd v Dhanush Infotech Pty Ltd* [2015] QCA 1. The Court of Appeal decision records that the appellant's sole director, Mr David Munro, appeared on its behalf at first instance and in the Court of Appeal. The decision details the allegations in the statement of claim, the allegations in the defence, Dhanush Infotech Pty Ltd's evidence on the summary judgment application, the evidence put forward by Mr Munro on the summary judgment application, and the submissions made at that time. It also outlines the submissions made on appeal including allegations that signed agreements relied on in the summary judgment application were "*obviously false*".

[4] The Court of Appeal dismissed the appeal. It found that COFP Pty Ltd had no prospect of succeeding in the action it had brought against Dhanush Infotech Pty Ltd and that the primary Judge made no error in giving summary judgment under r 293 of the *Uniform Civil Procedure Rules 1999* (Qld). The Court of Appeal said:

> "[26] Mr Munro's (and consequently the appellant's) primary difficulty is that, whatever one makes of the Formal Agreements, he cannot point to any evidence of an agreement with the respondent. His only sworn evidence consisted of the affidavit put before the primary judge. In it, he did not in fact depose to any agreement; what he said was that there was a discussion of "them" buying the business and whether a suggested price and rate of payment was fair. Although Mr Munro deposed in that affidavit that as far as he was concerned, "the deal was substantially completed", he identified no statement by either of the other men present which would amount to an agreement, let alone the specification of parties to it. Indeed, he acknowledged that Mr Gupta indicated that he would send a letter of intent. Even on Mr Munro's submissions, he plainly considered that negotiations were not at an end with that conversation: he executed a letter of intent and, on his account, a version of a services agreement."

[5] Following its unsuccessful appeal, COFP Pty Ltd filed a further proceeding in the District Court. On 6 May 2016, his Honour Judge Jones dealt with those proceedings. He dismissed an application by COFP Pty Ltd for review of the order of Judge Griffin and ordered that the statement of claim be struck out. His reasons are published in *COFP Pty Ltd v Dhanush Infotech Pty Ltd* [2016] QDC 105.

[6] As I have said, the application before me is one by Mr Munro who now seeks to set aside the order of his Honour Judge Griffin on the basis that it was obtained by fraud. In *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1, Chief Justice Gleeson and Justices Gummow, Hayne and Heydon reaffirmed the underlying principles applicable to setting aside a judgment at paragraphs 34 and 35 where they said:

> "34 A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.
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> 35 The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called "fresh evidence rule") are all rules based on the need for finality. As was said in the joint reasons in Coulton v Holcombe, "[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial"."
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> (footnotes omitted)

[7] Having said that, there is no doubt that a judgment obtained by fraud may be set aside. The relevant principles for setting aside a judgment obtained by fraud were considered by his Honour Judge Dodds in *Benseman v Noosa Cat Australia Pty Ltd* [2001] QDC 77. His Honour Judge Dodds said this:

> "[31] There is no doubt a judgment obtained by fraud may be set aside: *Cabassi v. Vila* (1940) 64 CLR 130 at 147; *Boughen v Abel* (1987) 1 QdR 138. As Connolly J put it in *Boughen*, what must be reconciled are the principles that fraud vitiates a judgment and the public interest in the finality of litigation. They "are reconciled by the requirement that the party seeking to set aside a judgment on the ground of fraud produce evidence of facts discovered since the judgment complained of": at 140, 141.
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> [32] In *Wentworth v Rogers (No.5)* (1986) 6 NSWLR 534 Kirby P in his reasons for judgment in which Hope and Samuels JJA agreed discussed the principles involved in a proceeding to set aside a judgment obtained by fraud. He noted that such proceedings are

> equitable. The principles included that the party asserting the judgment should be set aside must show that there has been a new discovery of material evidence which had it been available at the trial would probably have effected the outcome of the trial. There must be clear evidence of fraud and the successful party must be shown by admissible evidence to have been responsible for the fraud which taints the judgment so that it would be inequitable they should take the benefit of it . Ordinarily proof of perjury without more will not be sufficient to attract the exceptional relief involved in the setting aside of a judgment. There is a public interest in finality of litigation.
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> [33] In *Monro Schneider Associates (Inc) & Anor v Number 1 Raberem Pty Ltd & Ors (No.2)* (1992) 37 FCR 234 the Federal Court then consisting of Spender, Gummow and Lee JJ examined the law in Australia on setting aside a judgment for fraud. The Court considered the law was to the same effect as set out in the judgment of Lord Bridge delivering the judgment of the House of Lords in *Owens Bank Ltd v Bracco* (1992) 2 AC 443 at 483. It summarised the position at 241 of the judgment as:
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> (a) the evidence involving fraud (must be) newly discovered since the trial;
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> (b) the evidence...could not have been found by the time of the trial by exercising reasonable diligence;
>
> (c) the evidence (was) so material that its production at the trial would probably have effected the outcome and when the fraud charged consists of perjury then;
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> (d) the evidence must be so strong that it would reasonably be expected to be decisive at a rehearing and if unanswered must have that result.
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> [34] There are any number of cases which discuss the proof required for a finding of fact in a civil action. Proof is on the balance of probabilities even when the allegation is one of fraud. *Neat Holdings Pty Ltd v Karajan Holding Pty Ltd* (1992) 110 ALR 449. The type and seriousness of the allegations involved may affect the strength of the evidence required for proof but the standard of proof is not altered. *Briginshaw v Briginshaw* (1938) 60 CLR 336. Neat Holdings Pty Ltd."

[8] There are 11 allegations of fraud that were explained by Mr Munro during the hearing. Before I deal with each of them, it should be noted that the only evidence relied on by Mr Munro was that contained in affidavits filed by him on 22 March 2019 and 29 March 2019. It was apparent from the documents themselves, and from multiple exchanges with Mr Munro, that the documents attached to the affidavits were not true copies of the original documents. Mr Munro had altered them by, for example, adding his own comments and notations or by bolding parts of the documents or by extracting only parts of the documents rather than the full document.

[9] The first alleged fraud relates to the signature on the copy of the letter of intent to purchase a business that was attached as exhibit JF1 to the affidavit of John Forde, sworn the 3rd of October 2014. Mr Forde's affidavit, in exhibiting the document, said at paragraph 2:

> "I am informed by Ms Joanne Hatch, the respondent's business relationship manager, and I verily believe it to be true, that on or about 23 June, 2014, the

> respondent was moving office premises and Ms Hatch found the original of the Letter of Intent to Purchase a Business between DATAM as buyer and David Munro as seller. Now shown to me and marked exhibit "JF-1" is the document."

[10] Mr Munro says the signature on that document is different to the signature on what was represented to be copies of that document. The copies to which he drew my attention are those contained at exhibit JF-2 to the affidavit of John Forde sworn on 3 October 2014, and the copy of the document contained in Mr Munro's affidavit, REV19 at pages 10 to 12. Document REV19, attached to the affidavit of Mr Munro, filed on the 22nd of March 2019 starts with a letter from Mahoney Lawyers dated 21 October 2013 that says:

> "We enclose, by way of service, our client's list of documents dated 21 October, 2013 and a copy of the documents listed at items 1 to 9 in the Schedule 1 part 1."

[11] The document to which Mr Munro directed my attention is the third document behind the list of documents which appears behind that letter. It corresponds, by way of description, to the document described as item 3 in schedule 1 part 1 of the list of documents, being a letter of intent between DATAM and David Munro.

[12] The second allegation of fraud is explained by Mr Munro at page 2 and the top half of page 3 of his 11-page outline. It relates to a statement made in the affidavit of Mr Forde, sworn on 16 June 2014, where, at paragraph 5, Mr Forde says:

> "On or about 6 January 2014 Mr Kidston settled the further amended defence of the (then) defendant filed 7 January 2014. That pleading included the allegation at subparagraph 4B(f)(ii) that Dhanush Academy of Technology and Management Pty Ltd ("DATAM") made payments to Mr Munro under the CEO agreement (the "CEO Payment Allegation")."

[13] At paragraph 15 of that same affidavit, Mr Forde said as follows:

> "Mr Kidston does not now believe the Submission to be true, and wishes to correct the Submission by stating that the National Australia Bank bank statements of DATAM that were in evidence evidenced several payments by DATAM to Mr Munro."

[14] Mr Munro says those statements are false. He says evidence that they are false can be seen in the emails from D Chandrema, the director of finance and ops for Dhanush Infotech, dated 18 December 2010. He sets out the contents of the emails, to the extent that he relies on them, in his outline at pages 2 and 3.

[15] The second of the emails contains the following:

> "Dear David, I was doing a financial review of DATAM when I observed that your salary debits are not happening for the last 2 months. I checked up with Mark when he mentioned that you have refused to take the payment of $3000 as per the contract."

[16] Mr Munro says the email demonstrates that these two statements by Mr Forde in his affidavit and the position of Mr Kidston are untrue, because both the emails were in the possession of Mahoney Lawyers since September 2013.

[17] With respect to the first allegation of evidence of fraud, I am not persuaded that the signatures are different signatures. I have compared each document. The copies

appear to me to be poor photocopies of what is said to be the original document. Due to the poor reproduction, the date on the document and parts of the signature appear, to me, to fade in the replicas.

[18] With respect to the second allegation of evidence involving fraud, I am not satisfied that there is clear evidence of fraud. That Mahoney Lawyers had the emails referred to since September 2013 does not demonstrate that the statements made by Mr Forde at paragraphs 5 and 15 of his affidavit, sworn on 16 June 2014 are false, nor do they provide clear evidence of fraud by Mr Kidston.

[19] Mr Munro's third allegation of evidence of fraud relates to statements made in an affidavit of Dendukuri Suryanarayana Murthy sworn 4 December 2013, in particular, paragraphs 12, 13 and 14 of that affidavit. Mr Murthy, at paragraph 1, deposes to being the director of the defendant, Dhanush Infotech Pty Ltd. At paragraphs 12, 13 and 14, he says – he indicates that he attaches true copies of three documents. Mr Munro says this is false. He says there are no originals of those documents and as such, Mr Murthy was not attaching true copies of the documents.

[20] The basis of Mr Munro's allegations are set out at pages 4, 5 and 6 of his outline, where he identifies a request that he made to Mahoney Lawyers. That request was made under r 215 of the *Uniform Civil Procedure Rules*, whereby Mr Munro required Mahoney to produce the original documents, being documents described as "letter of intent", "agreement" dated 25/4/10 and "terms of agreement" dated 25/5/2010.

[21] In response to that request, Mahoneys wrote to Mr Munro on 18 November 2014. Those three documents referred to by Mr Munro were – had been described as "DLD3", "DLD4" and "DLD5", respectively. In Mahoneys letter of 18 November 2014, Mahoneys said:

> "In regard to item DLD 3, which is the document listed in our client's list of documents dated 21 October 2013 at item 3, we are instructed that it is exhibited to the affidavit of John A Kavanagh Forde filed 3 October 2014.
>
> In regard to items DLD 4 and DLD 5, we are instructed that our client does have in its possession or control the original of these documents."

[22] After sending that letter, Mr Forde, of Mahoneys, sent an email to Mr Munro, referring to that letter and noting an error in the last sentence. The email said that the last sentence should read:

> "In regard to items DLD 4 and DLD 5, we are instructed that our client does not have in its possession or control the original of these documents."

[23] Evidence that Dhanush Infotech Pty Ltd did not have in its possession or control the original of the documents on 18 November 2014 is not sufficient to establish a fraud. It does not demonstrate that at the time that Mr Murthy swore his affidavits on 4 December 2013, the documents exhibited to his were not true copies of the documents.

[24] The fourth allegation of fraud relates to a statement contained in part 2 of a list of documents produced by Mahoney Lawyers. It is extracted at page 8 of Mr Munro's outline. The statement relates to documents for which privilege is claimed. The description of the document for which privilege is claimed is:

> "The defendant's and the defendant's solicitor's proofs of evidence, statements, drafts of documents, and other papers and memoranda prepared

> in connection with and relating solely to the prosecution or defence of this action"

[25] Mr Mahoney submits that if they claim privilege for "*proof of evidence*", and there is no proof, that is a fraud. The proof of evidence to which Mr Munro refers and which he says does not exist was not detailed. There is no proper foundation to this allegation.

[26] The fifth allegation of fraud is that the signature purporting or said to be that of Neville Smith on the original letter of intent to purchase a business is not the signature of Neville Smith. Mr Munro asserts that it is the signature of Mr Gupta. Mr Munro attempts to substantiate his allegation by extracting many copies of documents with signatures. Examples are contained in his affidavit of 22nd March 2019, exhibit A, REV1, pages 7 through to 12. There are also other examples to which he took me during the hearing, such as those in that same affidavit at REV29, pages 1 to 6. What Mr Munro relied on as fresh evidence is not admissible evidence. Even if it were, I do not find it to be convincing.

[27] The sixth, seventh, eighth, ninth and tenth allegations of fraud relate to the Further Amended Defence of the defendant, settled by Mr Kidston of counsel. Each of the allegations are premised on the basis that statements made in the Further Amended Defence of the defendant are untrue. The sixth allegation relates to paragraph 4B.(b) where the Further Amended Defence says that:

> "the Discussions always contemplated the later execution of formal documents and did result in a binding agreement between the parties."

[28] Mr Munro says this is false. The seventh allegation of fraud relates to paragraph 5A. of the Further Amended Defence of the defendant. It says:

> "As to paragraph 4 of the statement of claim, admits that the sum of $40,000 was paid but denies it was in accordance with paragraph 3(c) of the statement of claim because the payment was made pursuant to the Formal Agreements."

[29] Mr Munro says this admission was a wrongful admission and amounts to a fraud. The eighth allegation of fraud relates to paragraph 9 of the Further Amended Defence. Paragraph 9 says:

> "As to paragraph 8 of the statement of claim, the Defendant:
>
> (a) admits that it has refused to pay the sum of $61,564.64 to the Plaintiff; and
>
> (b) denies that it has failed or neglected to do so on the basis that it has no obligation in law to make such a payment to the Plaintiff."

[30] Mr Munro says the admission that the defendant refused to pay the sum of $61,564.64 is evidence to be a fraud given what is pleaded in paragraph 9B., namely, that it denies that it has failed or neglected to do so on the basis that it has no obligation in law to make such a payment to the plaintiff. The ninth allegation of fraud relates to paragraph 4B.(f)(ii) of the Further Amended Defence. The pleading in that paragraph is to the effect that:

> "to the extent any of the Formal Agreements were entered into prior to the registration of DATAM, they were subsequently ratified by DATAM performing the obligations thereunder by at least:

> …
>
> (ii) making payments to Mr. Munro pursuant to the CEO agreement."

[31] Mr Munro submits this is evidence of a fraud as the allegation is false. The 10th allegation of fraud relates to paragraph 4B.(g) of the Further Amended Defence where the defendant says:

> "the amounts sought to be recovered in this proceeding are amounts payable under the CEO Agreement. Consequently, the plaintiff has no standing to sue and is suing the wrong defendant."

[32] Mr Munro says that statement in the pleading is evidence of a fraud because it is causing so much confusion.

[33] Pleadings are not evidence. The purpose of a pleading is to crystallise the real issues in dispute so that a party can be fully informed of the other's case. The function of the pleading is to state with sufficient clarity the case that must be met. Whether that case is established, depends on the evidence. Mr Munro did not direct my attention to any evidence that the material facts referred to were false, or at least none that I found compelling.

[34] The eleventh allegation of fraud was explained by Mr Munro by reference to his affidavit filed on 22 March 2019, REV 30, page 1 of 11. It purports to extract an email that Mr Munro says shows that he never met Neville Smith on the 15th of April 2010, and that Mr Smith did not sign the letter of intent to purchase a business on that date. The words extracted at that part of Mr Munro's affidavit appear to be an email from someone described as Neville, to David Munro at 2.49 pm. The extract in the affidavit is not admissible evidence of the email. Even if it were, it is insufficient to persuade me that Mr Smith did not sign a letter of intent to purchase a business on the 15th of April 2010, the original of which is said to be at exhibit JF1 to the affidavit of John Forde, sworn 3 October 2014. Mr Munro has not discharged his onus of showing that there is clear evidence of fraud or that Dhanush InfoTech Pty Ltd was responsible for fraud.

[35] Even if I accepted the information put before me by Mr Munro as admissible evidence, and even if I accepted that it demonstrated that Dhanush Infotech Pty Ltd was responsible for fraud, in order to succeed, Mr Munro would still need to demonstrate that the frauds he alleges taint the judgment so that it would be inequitable for Dhanush Infotech Pty Ltd to take the benefit of it. As was observed by His Honour Judge McGill in *Moore & Another v Devanjul Pty Ltd* [2010] QDC 353 at 64:

> "[64] To set aside an order made on the ground of fraud, it is necessary to show not only that there was some fraudulent conduct by the party who obtained the order, but that the fraud was in relation to a material matter, that is, that the fraud was in relation to a matter where, if the true facts had been known at the time, it is reasonably probable that the outcome would have been different."
>
> (footnotes omitted)

[36] The allegations made by Mr Munro focus on an attempt to demonstrate that a signature on an agreement with DATAM was not, in fact, a signature by Mr Smith. That allegation, and the other allegations, to the extent that they differ, were not material to the claim the subject of the proceedings. As I observed earlier, the Court

of Appeal noted at paragraph 26 of its judgment that Mr Munro's primary difficulty is that whatever one makes of the formal agreements, he cannot point to any evidence of an agreement with Dhanush Infotech Pty Ltd.

[37] Some attempt was made by Mr Munro to address that difficulty in the hearing today. He directed my attention to a document from Dhanush Infotech Pty Ltd to David Munro dated 24 February 2010 and headed "Letter of intent to purchase a business." It appears in his affidavit filed on the 22nd March 2019, REV17 pages 2 to 4. I have concerns about the veracity of the document, given the extent to which the other documents contained in the affidavit of Mr Munro have been altered by him. In any event, I am not satisfied that it is evidence of an agreement with Dhanush Infotech Pty Ltd. The letter states that it confirms mutual intentions with respect to a potential transaction. That potential transaction was an agreement that will occur between DATAM and Mr Munro once DATAM began operating.

[38] In all of the circumstances, I am not satisfied that Mr Munro has demonstrated that the order of His Honour Judge Griffin, made on the 5th of February 2014 was obtained by fraud. I dismiss the application.