By Stephen Warne

The consequences of serious allegations without an adequate foundation

Fraud 'undoes all'.[1] It undoes the authenticated judgments of courts,[2] indefeasibility of title,[3] statutes of limitation,[4] legal professional privilege,[5] proportionate liability,[6] the evidentiary burdens in establishing causation,[7] the rule that costs follow the event,[8] and innumerable other aspects of the substantive and procedural law.

There are many advantages to pleading fraud, not least being the nice price that can be extracted in negotiation for substituting for the fraud allegations something more anodyne, especially in claims against professionals. Where money held on trust is concerned, compensation is available from the government through fidelity funds associated with various professions.[9]

Of course, often enough[10] alleging fraud also undoes the defendant's insurance cover. And it must be proved in accordance with the principles in *Briginshaw v Briginshaw,*[11] providing reasons for caution in alleging fraud, independent of those enumerated below.

There are, I speculate, two opposing currents in the law relating to unfounded allegations in civil litigation:

- First, there is a hysteria about alleging fraud and an ignorance amongst civil lawyers of how to establish circumstantial cases, such that it is alleged too infrequently. The consequences are important.[12] Dishonest conduct is hardly ever denounced: fraud is all around us, but fraud cases are not. A 2012 study concluded that only 1.5 per cent of fraud is even reported to the UK police and 0.4 per cent of cases are prosecuted – at a cost to the UK economy of £73 billion (almost $150 billion) a year. In the UK, the trend has shifted towards private prosecutions, business having given up on the police.[13]

  It should not be forgotten that in the unanimous decision which spooks lawyers from alleging fraud, the High Court said that:

  > 'Cases will constantly arise in which it is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person and to use such strong terms as seem to him in his discretion to be appropriate to the occasion.'[14]

- But on the other hand, there is probably too little policing of the rule against being party to the making of unjustified allegations. In the main, only egregious cases have been prosecuted, infrequently, usually as an adjunct to an allegation of abuse of process, and too often about allegations against other lawyers.[15] There have, however, been two noteworthy disciplinary prosecutions of more nuanced conduct in recent times; one in Victoria, and the other in the Northern Territory.[16] In the latter case, the practitioner was ordered to apologise and fined $19,500.

Clients of timid practitioners are probably suffering, in other words, because the failure to tackle any but the most obvious instances of abuses by their over-zealous and downright shifty colleagues has resulted in uncertainty. Where the law is simply unclear, commentators fear to tread. As a result, no truly useful Australian commentaries set out the acequate factual foundation obligations needed to assert fraud, while the leading cases are not easily absorbed.

The proper factual foundation obligations are found in a non-uniform mishmash of common law, statute, and rules of professional conduct. What impliedly repeals what seems still to be worked through. The Victorian parliament has passed legislation about the administration of justice in civil proceedings, the *Civil Procedure Act* 2010. It stipulates that the overarching purpose of civil procedure is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.[17] By s18(d), litigants and their lawyers are to make and defend 'claims' in civil proceedings only if they have a 'proper basis' 'on the factual and legal material available to [them] at the time of' doing so.[18] The provisions are rooted in the common law, but the Act's s29 provides a new grant of jurisdiction to courts to do as they like with costs, including personal costs orders against solicitors and other non-parties associated with litigation, sloughing off the restraints on the common law jurisdiction and encouraging courts to become proactive. How all this plays out in Victoria largely remains to be seen, but the Court of Appeal recently pointedly lamented the failure of lower courts to implement the revolution called for by the parliament.[19]

New South Wales lawyers have had similar obligations for some years, but only in relation to certain damages claims.[20] Since at least 2002, Federal Court pleadings must be endorsed with a solicitor's certificate that the factual and legal material then available to the solicitor provides a proper basis for each allegation.[21] Counsel's signature on a pleading has long been seen as a voucher that the pleaded case is 'not a mere fiction'.[22]

CONDUCT RULES

Solicitors' conduct rules are in a state of flux. The new truly uniform Australian Solicitors' Conduct Rules already apply in South Australia, NSW and Queensland. They are likely to apply in Victoria this year. Under these rules, allegations in litigation must be 'reasonably justified by the material then available' (r21.2), and allegations in court documents (an undefined term) and submissions during hearings may be made only where the solicitor believes on reasonable grounds that the factual material already available to the solicitor provides a proper basis to do so (r21.3). There is a further rule (r32) relating to allegations of conduct warranting professional discipline against fellow solicitors.

These broadly stated new rules contrast with the traditional rules for solicitors which have concentrated on serious allegations and allegations 'in court against any person'. The rules in Victoria especially will change dramatically. Victoria's *Professional Conduct and Practice Rules 2005* presently seem positively to suggest that solicitors may make allegations of fraud without a proper factual foundation so long as the client specifically instructs that course having been warned of the serious possible consequences. This is a truly bizarre bit of drafting, which one suspects must have arisen out of a misunderstanding on the part of the drafter but which has apparently attracted no controversy ever since, illustrating what a forgotten backwater of legal ethics these rules are.

The conduct rules for barristers are more uniform.[23] This article takes Victoria's somewhat idiosyncratic rules, the most detailed of them all, as the starting point for analysis.

The conduct rules governing Victorian barristers require them to act only in a way that is not prejudicial to the administration of justice, a concept no doubt now informed by the overarching obligations enumerated in the *Civil* >>

Procedure Act 2010 (Vic) of which the proper basis obligation referred to above is one: r4.

There are obligations to make 'allegations or suggestions' under privilege against any person (apparently including non-parties) only if reasonably justified by the material then available to the barrister: r31(a).

The sole privilege in question is probably the absolute privilege against defamation proceedings accorded to statements made by parties and their legal representatives, witnesses, juries and judges in and for the purposes of court and tribunal proceedings.[24] Complaints made to legal regulators, too, are absolutely privileged because they are a necessary precursor to disciplinary proceedings,[25] and allegations in such a complaint might be caught by the rule.

The same 'reasonably justified by the material then available' requirement also applies to each invocation of the coercive powers of a court: r31(a). What constitutes the invocation of the coercive powers of a court is unclear, but presumably it includes issuing subpoenas. 'Court' is defined by the rules to include disciplinary and other tribunals, arbitrations and mediations.

Additional obligations apply to the making of *any* allegation when it is:

(a) Made during the course of the opening of a trial: r35. Then the barrister must believe on reasonable grounds that the allegation will be capable of 'support by the evidence which will be available to be presented to support the client's case'.
(b) In a pleading or affidavit drawn or settled by the barrister. Then the barrister must include the allegation only if 'supported by facts contained in instructions, or by facts which the barrister otherwise reasonably believes to exist': r32.

Additional obligations again apply if the allegation is of criminality, fraud or other serious misconduct and it is made in a court document: r34; in the course of cross-examination: r38; or in the address on the evidence: r42.

Barristers must not draw or settle any document for use in a court containing such an allegation without having reasonable grounds to believe that:

(a) factual material already available to the barrister provides a proper basis for the allegation; and
(b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client if it is not made out. See r34.

Additionally, allegations of criminality, fraud or other serious misconduct may be included in witness statements or affidavits only where a barrister has reasonable grounds to believe that the evidence will be admissible in the case when filed: r34.

In *McLaren v Legal Practitioners Disciplinary Tribunal*,[26] a Full Court of the Northern Territory Supreme Court found that a disciplinary complaint about a lawyer lodged with the body which receives such a complaint was a 'court document' within the NT's solicitors' conduct rule equivalent of the rule just described, r34.

Allegations of criminality, fraud or other serious misconduct on the part of any person in the course of cross-examination may be made only if:

(a) the barrister believes on reasonable grounds, having made reasonable enquiries to the extent practicable, that the material already available to the barrister provides a proper basis for the suggestion; or
(b) he receives and accepts an opinion from an instructing solicitor that material which appears to support a suggestion of criminality, fraud or otherwise serious misconduct is credible: rr38(a), 39 40.

Allegations of this kind against any person in the course of the barrister's address on the evidence (including final written submissions before a judge alone)[27] must not be made unless the barrister believes on reasonable grounds that the evidence in the case provides a proper basis for the suggestion: r42.

Victoria's conduct rules seem unduly complicated, and how they are intended to relate to each other, the common law and statutory obligations of barristers and solicitors alike is puzzling. The lack of a widely available useful commentary means that what differentiates 'reasonable grounds', 'support by facts', 'capable of support by the evidence', 'proper basis' and 'well-founded', remains shrouded in mystery. Why such a proliferation of expressions is necessary is equally unclear.

Given the obligation on lawyers to warn clients of the consequences of a serious allegation, the nature of those consequences is insufficiently clear in the present law. I bet that compliance by lawyers with whatever such rules' proper construction requires is far from uniform.

An allegation of criminality made in cross-examination would appear to be covered by both rules 31(a) and 38 (see, for example, r9(c)). Consider the case where a Victorian barrister does not believe on reasonable grounds that material available to her appears to suggest the credibility of an allegation of criminality. She has not made reasonable enquiries in that regard and instead relies on her instructing solicitor's opinion. She goes ahead and makes the allegation. She does not breach r38, but how does she satisfy rule 31(a)'s obligation only to make suggestions under privilege which are reasonably justified by the material then available to the barrister (or indeed the obligation in s18(d) of the *Civil Procedure Act* 2010 (Vic) not to make allegations for which she does not, on the factual material available to her, have a proper basis?)

A lack of clarity in the proscription of unfounded allegations is not peculiar to Australia. In America, rule 11 of the *Federal Rules of Civil Procedure* has required that court documents be signed by lawyers certifying that to the best of their knowledge, formed after reasonable inquiry, the allegations are well-grounded in fact and are warranted by existing law (or a good faith argument to extend, modify or reverse existing law), and not filed for an improper purpose. A leading American text reports that an empirical study by the Federal Judicial Centre which gave federal district court judges 10 real-case fact scenarios revealed that there was unanimous agreement among the surveyed judges in none of the scenarios, and in only three of the cases did 75 per cent or more of the judges agree that there was a r11 breach.[28]

COMMON LAW OBLIGATIONS

To add further complication, there are common law obligations, which are not displaced by conduct rules (see, for example, r9(a) of the Victorian Bar's rules), but which might well be affected by statutory schemes. Breach of these judge-made rules may result in professional discipline even if no breach of one of the specifically relevant conduct rules is involved. Lawyers are effectively prohibited from engaging in conduct that would reasonably be regarded by competent and reputable peers as disgraceful and dishonourable; such conduct gives rise to disciplinary consequences. There are also some very broadly stated conduct rules available to creative prosecutors.

In *White Industries (Qld) Pty Ltd v Flower & Hart*, which was a claim for a personal costs order against the respondent firm, Goldberg J said it was the law that:

- professional discipline may follow if practitioners do not take care to have specific instructions and an appropriate evidentiary foundation, direct or inferred, for alleging fraud; that is, in the 'too ready assertion of fraud against a party in circumstances where it could not be proved to the high standard required of such allegations';[29] and
- lawyers must not 'trespass, in matters involving reputation, a hair's breadth beyond what the facts as laid before him and duly vouched and tested will justify.'[30]

In his seminal article, 'Lawyers' Duties to the Court', Justice Ipp said, having reviewed the cases, that:

> 'before allegations are made inferring unjust conduct on the part of the court, or unprofessional conduct on the part of other lawyers, counsel must first satisfy himself by personal investigations or inquiries that a foundation exists, apart from his client's instructions, for making such allegations'.[31]

COSTS CONSEQUENCES

Apart from disciplinary prosecution, there are other consequences of unfounded allegations of serious misconduct. First, the making of knowingly false allegations of fraud self-evidently gives rise to the possibility of a special costs order, such as costs on an indemnity basis.[32] So, too, does an inadequate factual foundation.[33]

Secondly, at least some such conduct enlivens courts' inherent jurisdiction to order lawyers to pay costs personally (though the effect of advocates' immunity, if relied on, perhaps remains to be fully worked out.[34]). In *White Industries (Qld) Pty Ltd v Flower & Hart*, Goldberg J ordered the defendants, a Brisbane firm, to personally pay a builder $1.65 million in costs when it made allegations of knowing fraud against the builder without an adequate factual foundation and without considering whether there was an adequate factual foundation. His Honour made that order despite the fact that the solicitors had Ian Callinan QC's advice to do so.[35]

More interesting are the costs consequences of responsibly, but unsuccessfully, alleging fraud. In a leading case, Woodward J said:

> 'It is sometimes said that [special] costs can be awarded where charges of fraud have been made and not sustained; but in all the cases I have considered, there has been some further factor which has influenced the exercise of the court's discretion: for example, the allegations of fraud have been made knowing them to be false, or they have been irrelevant to the issues between the parties'.[36]

That statement has been followed subsequently and, in my view, very likely represents the law in Australia.[37] Nevertheless, it is possible to find statements in cases[38] and commentaries which appear to say that the mere failure of an allegation of fraud justifies departure from the usual rules of thumb in relation to costs. Dal Pont's *Law of Costs* speaks of 'the "rule" that a party alleging but failing to prove fraud is deprived of costs even if successful in the action generally' without citing Australian authority, before suggesting that it is too broadly formulated.[39]

Given the obligations on lawyers not to make allegations of fraud without obtaining specific instructions from their client after a warning as to the consequences of making it, it would be desirable for the true costs consequences of failing to prove fraud claims and allegations to be more widely and accessibly stated.

SO WHAT IS AN ADEQUATE FACTUAL FOUNDATION?

The test for the adequacy of factual foundation for an allegation becomes more onerous as a matter progresses: the >>

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Given the obligation on lawyers to warn clients of the consequences of a serious allegation, the nature of those consequences is insufficiently clear in the present law.

Victorian Bar's conduct rules summarised above recognise as much, with more onerous tests applying, for example, to closing addresses. Applying the test is most difficult at the beginning of a matter. The jurisprudence is probably most developed in this regard in NSW. In *Keddies v Stacks*,[40] the NSW Court of Appeal was considering s345 of the *Legal Profession Act* 2004 (NSW) which requires practitioners to have a reasonable belief on the basis of provable facts that a damages claim has reasonable prospects of success. It says that facts are 'provable' where the practitioner 'reasonably believes that the material then available to him or her provides a proper basis for alleging that fact'. The Court said at [59]:

> 'That material did not have to comprise only admissible evidence. Credible material that was not strictly admissible could also be considered. The next requirement was that such material constitute a proper basis for alleging each relevant fact: … insofar as material was relevant, but not admissible in evidence, the material would be sufficient to satisfy the legal practitioner that the facts to which such material related could be proved in due course.'

In a case about a conduct rule stated in the same terms as the Victorian Bar's conduct r34 discussed above, the Supreme Court of Victoria approved a passage from an English decision which suggests that an allegation of fraud could be improper only 'if no reasonable lawyer, properly considering matters, could have reached' it, since what constitutes a proper foundation for an allegation of fraud 'will sometimes be a matter of judgement on which reasonable lawyers could differ'.[41]

Adequacy must be measured in terms of the burden of proof. The greater the opprobrium that would follow the establishment of an allegation, the more actively persuaded the court must be of its truth, and the less acceptable may be 'inexact proofs, indefinite testimony, or indirect inferences', despite the fact that all allegations in civil proceedings are judged according to the civil standard.[42] This is in part because of a doubtful 'conventional perception that members of our society do not ordinarily engage in' dishonest conduct.[43]

What amounts to an adequate factual foundation can only be ascertained by a factually intensive analysis of the reported cases which is unachievable in an article of this length but which I have attempted at the Australian Professional Liability Blog.[44] Nevertheless, it is worth commenting on two themes which give rise to controversy.

CIRCUMSTANTIAL EVIDENCE

Commercial lawyers' love affair with documentary evidence can generate timidity in relation to circumstantial evidence.[45] Yet, as the NSW Court of Appeal observed, 'Of its nature, fraud is often perpetrated covertly. The perpetrators of fraud will often take pains to cover their tracks.'[46] Their Honours said that the necessary evidentiary foundation may be 'direct or inferred', and went on to say 'We say inferred, because it will sometimes be impossible to prove fraud by direct evidence. The tribunal of fact may be invited to draw an irresistible inference of fraud from the facts proved.'[47] In a later case, Justice Habersberger provided a much-needed clarification of that passage when he said 'This does not say that there has to be an irresistible inference of fraud before it can be pleaded.'[48]

RELIANCE ON MATERIAL FROM OTHER SIDE

To what extent must a plaintiff be able to prove every allegation before the defence and before discovery? Is the practice of pleading 'further particulars will be provided after discovery and interrogation' sustainable?

Some American cases recognise the propriety of making serious allegations that rely on a reasonable expectation that the discovery process will yield part of the necessary factual matrix for making an allegation; for example, where the respondent's hostile pre-litigation attitude required the gathering of information by compulsion.[49] To what extent Australian courts might come to a similar conclusion is unclear. The High Court has said unanimously that:

> 'It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side.'[50]

The Court in that case was considering a series of allegations made in the opening of the trial of private criminal prosecution, however. In relation to allegations made earlier on in matters, the modern law is not stated so emphatically. Indeed, the Supreme Court of Victoria has (without considering the passage just referred to) approved English cases which make clear that where it is reasonable to believe that further material may become available to the plaintiffs before trial, including by cross-examining defendant's witnesses, there may be no finding of impropriety,[51] a proposition consistent with the passage from *Keddies v Stacks* set out above. ■

Notes: **1** *Van Der Stok v Van Voorhees*, 151 NH 679, 683 (2005); *Jones v. Emery*, 40 NH 348, 350 (1860); *Hazel-Atlas Glass Co v Hartford-Empire Co*, 322 US 238 (1944). **2** *Wentworth v Rogers (No. 5)* (1986) 6 NSWLR 534. **3** See, for example, *Transfer of Land Act* 1958 (Vic), s44. **4** See, for example, *Limitation of Actions Act* 1958

(Vic), ss21 and 27. **5** See, for example, *Evidence Act* 2005 (Cth), s125. **6** See, for example, *Wrongs Act* 1958 (Vic), s24AM. **7** *Gould v Vaggelas* (1984) 157 CLR 215. **8** *Ritter v Godfrey* [1920] 2 KB 47 at 60 (Lord Atkin); *Instant Colour Pty Ltd v Canon Australia Pty Ltd* [1996] FCA 1097 (Nicholson J) under the heading 'Public Wrong'; *Rawley Pty Ltd v Bell (No. 3)* [2007] FCA 1429. See also Gino Dal Pont, *Law of Costs* (3rd ed, LexisNexis Butterworths, 2013) at [8.55] – [8.57] and [8.27]. **9** See, for example, *Legal Profession Act* 2004 (Vic) part 3.6. **10** Not always though: the Legal Practitioners Liability Committee's professional indemnity policy which insures almost all Victorian (and some national) law firms and all Victorian barristers, insures against civil liability for fraudulent conduct of insureds. **11** (1938) 60 CLR 336. **12** Gino Dal Pont, *Law of Costs* (3rd ed, LexisNexis Butterworths, 2013) notes the recent undoing of a federal legislative experiment in mandating costs consequences when knowingly false allegations were made in matrimonial proceedings because of the chilling effect on vulnerable litigants' assertion of legitimate safety fears for themselves and their children: see [8.59]. **13** Dr Mark Button, Chris Lewis, David Shepherd, Graham Brooks and Alison Wakefield, 'Fraud and Punishment; Enhancing Deterrence Through More Effective Sanctions', 2012, accessible at http://bit.ly/1b6MuB6. **14** *Clyne v NSW Bar Association* (1960) 104 CLR 186, 200. **15** *Clyne*, *Molyneux*, and *McLaren* were about lawyers' allegations against other lawyers. **16** *Victorian Bar Inc v Molyneux* [2006] VCAT 1417 and *Law Society of the NT v McLaren*, unreported, Legal Practitioners Disciplinary Tribunal, 27 April 2009 (liability) and 11 June 2009 (penalty) confirmed on appeal: *McLaren v Legal Practitioners Disciplinary Tribunal* [2010] NTSC 02. (Other recent prosecutions include *Legal Profession Complaints Committee v in de Braekt* [2011] WASAT 1 and *Council of the NSW Bar Association v Asuzu* [2011] NSWADT 209.) **17** *Civil Procedure Act* 2010 (Vic), ss7(1), 8. The Act applies to state courts but not to the principal statutory Victorian tribunal, VCAT. **18** *Ibid*, s18(d). A post summarising uses of s18(d) to date may be found on my Australian Professional Liability Blog at http://bit.ly/1kOk199. **19** *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337. **20** *Legal Profession Act* 2004 (NSW), s347. **21** *Federal Court Rules* r16.01. **22** *Great Australian Gold Mining Co v Martin* (1877) LR 5 Ch D 1, 10 (James LJ) approved in *Texxcon Pty Ltd v Austexx Corporation Pty Ltd* [2013] VSC 327 (Davies J) at [65]. **23** Apart from Tasmania, which is said to be about to bring itself into uniformity with the other non-Victorian jurisdictions, the other states have relatively uniform simpler rules of broader application which are similar to, but significantly different from, Victoria's. The other states' barristers' conduct rules are set out in this post at my Australian Professional Liability Blog: http://bit.ly/MF6ph0. **24** See s27 of the *Defamation Act* 2005 and Patrick George, *Defamation Law in Australia* (2006, LexisNexis Butterworths), ch 21. **25** *Hercules v Phease* [1994] 2 VR 411; *Mann v O'Neill* (1996) 191 CLR 204 at 215. See my post at my Australian Professional Liability Blog: http://bit.ly/1dJHnDx and Patrick George, *Defamation Law in Australia* (2006, LexisNexis Butterworths), p262. **26** *McLaren v Legal Practitioners Disciplinary Tribunal* [2010] NTSC 02. **27** *Victorian Bar Inc v Molyneux* [2006] VCAT 1417. **28** Ronald D Rotunda and John S Dzienkowski, *Legal Ethics; The Lawyer's Deskbook on Professional Responsibility* (2012-2013, published by the American Bar Association's Center for Professional Responsibility), p762, citing Saul M Kassin, 'An Empirical Study of Rule 11 Sanctions' (1987). **29** (1998) 156 ALR 169 at 241, citing the NSW Court of Appeal in *Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201 at 203-4. **30** *Ibid*, citing *Oldfield v Keough* (1941) 41 SR(NSW) 206, which in turn cited Lord Macmillan in 'The Ethics of Advocacy' in *Law and Other Things* (1937). **31** D A Ipp, *Lawyers' Duties to the Court* (1998) LQR 63 at 85, citing *R v Elliott* (1975) 28 CCC (2d) 546; *Myers v Elman* [1940] AC 282. **32** *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202; (1988) 81 ALR 397 (Woodward J); *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 536 at [24]; (1993) 46 FCR 225 at 233-34 (Sheppard J). **33** *NIML Ltd v MAN Financial Australia Ltd (No. 2)* [2004] VSC 510 (Harper J) at [6], approved in *Ezekial-Hart v Law Society of the ACT* [2012] ACTSC 103 at [131] (Refshauge J). **34** *Karam v Aloe & Co Pty Ltd* [2012] VSC 609 at [12]; Kieran Hickie 'The Quiet Erosion of the Advocates' Immunity Under the Civil Procedure Act 2010 (Vic)?' (2013) 37 *Australian Bar Review* 259. See *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [2004] VSC 105, [58] (Habersberger J); cf *Attard v James Legal Pty Ltd* [2010] 80 ASCR 585; *Day v Rogers* [2011] NSWCA 124; *Maurice Blackburn v Burmingham* [2009] VSC 20; *Foster James Pty Ltd v Dalton* [2010] VSC 327; and *Goddard Elliott v Fritsch* [2012] VSC 87 at [835]. **35** *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, approved on appeal at (1999) 87 FCR 134. See my extensive blog post about the case at http://bit.ly/MhRf1p. Absence of factual foundation for the fraud case and the failure to consider properly whether there was one were themselves a sufficient basis for the costs orders, as was made clear by his Honour at 251-2. **36** *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202; (1988) 81 ALR 397 (Woodward J) at [21] citing *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* [1986] FCA 85; (1986) 71 ALR 287 at 288. **37** *Thors v Weekes* (1989) 92 ALR 131 at 152 (Gummow J); *Vink v Tuckwell (No. 3)* [2008] VSC 316 at [93] and [101] (Robson J); *Rosemin Pty Ltd v Gasp Jeans Chadstone Pty Ltd (No. 2)* [2010] FCA 406 (Middleton J); *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* (Federal Court of Australia, 3 May 1991, unreported, French J: see *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 536 at [24]; (1993) 46 FCR 225 at 233-4 (Sheppard J) at [17]). To similar effect is *Jarrold v Isajul (No. 2)* [2013] VSC 657 (McMillan J). **38** *Chen v Chan* [2009] VSCA 233 at [10] (Maxwell P, Redlich JA and Forrest AJA) ('Special circumstances may also include the making of an allegation of fraud which is not proved'), but what the Court must have meant is revealed by a consideration of the cases cited for that proposition: *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177 (the very source of the 'something more' proviso); *Re Talk Finance and Insurance Services Ltd* [1994] 1 Qd R 558 (a case about a knowingly false allegation of fraud) and *NIML Ltd v Man Financial Australia Ltd (No. 2)* [2004] VSC 510 (an inadequate factual foundation case). **39** Gino Dal Pont, *Law of Costs* (2013) at [8.58]; citing *Ex parte Cooper* (1878) 10 Ch D 313 at 322; *Chambers and Campbell v Merchants Bank of Canada* (1922) 68 DLR 381 at 385, 392. For a full analysis of whether these and subsequent Canadian authorities justify the 'rule', see my blog post 'The costs consequences of failing to prove a responsibly advanced allegation of fraud' at http://lawyerslawyer.net/?p=3078. **40** [2012] NSWCA 254. **41** *Brown v Bennett (No. 2)* [2002] 1 WLR 713 at [113] (Neuberger LJ) approved in *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [2004] VSC 105 at [80] (Habersberger J). **42** *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-2 per Dixon J. **43** *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 450. **44** See www.lawyerslawyer.net. The posts tagged 'Alleging fraud & misconduct' are collected together at http://bit.ly/NvzcWe. **45** As a cure, I would recommend Associate Professor Andrew Palmer's excellent '*Proof; How to Analyse Evidence in Preparation for Trial*' (2nd ed, Thomson Reuters, 2010). If judgments in inadequate factual foundation cases adopted his rigorous methodology for charting inferences diagramatically, much clarification of this area of law would quickly be achieved. **46** *Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201 at 203-4. **47** *Ibid*. **48** *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [2004] VSC 105 at [78]. **49** Rotunda et al, above note 28, p751, fn 7. **50** *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 201. **51** *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [2004] VSC 105 at [79] to [80] apparently approving in considered dicta *Three Rivers DC v Bank of England* [2001] UKHL 16; [2001] 2 All ER 513 at [144]- [145] (Lord Hutton); *Brown v Bennett (No. 2)* [2002] 1 WLR 713 at [112] (Neuberger LJ).

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