

MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Pathak & Anor v Anna Wilshire as Trustee for the Jackson Family Trust & Ors* [2024] QMC 5

PARTIES: **SUMEET PATHAK**

(First Plaintiff)

AND

TRESSA JOSEPH

(Second Plaintiff)

AND

ANNA WILSHIRE AS TRUSTEE FOR THE JACKSON FAMILY TRUST

(First Defendant)

AND

DOGTRAILERS PTY LTD CAN 084 965 453 (BOTH IN ITS OWN CAPACITY AND AS TRUSTEE FOR THE GRAYDON FAMILY TRUST)

(Second Defendant)

AND

SAJI PTY LTD CAN 136 791 323

(Third Defendant)

FILE NO/S: 5129/17

DIVISION: CIVIL

PROCEEDING: APPLICATION

ORIGINATING COURT: Brisbane

DELIVERED ON: 27/02/2024

DELIVERED AT: Brisbane

HEARING DATE: 27/10/2023

MAGISTRATE: Pinder

ORDER: **1. The plaintiffs' application for leave to file and serve a**

further amended statement of claim is dismissed.

2. The proceeding is dismissed for the want of prosecution.

3. In the event that costs orders are not agreed by the parties, then I direct the parties file written outlines in respect of costs orders sought (to be no more than 5 A4 typed pages) with 21 days

CATCHWORDS: DEFAULT BY PLAINTIFF – DISMISSED FOR WANT OF PROSECUTION – LEAVE TO FILE FURTHER AMENDED STATEMENT OF CLAIM – RULE 280

Tyler v Custom Credit Corporation Limited [2000] QCA 178

Allianz Australia Insurance Limited v Corwa [2016] QCA 170

Cooper v Hopgood & Gamin [1999] 2 Qd R 113

COUNSEL: Mr English (Solicitor) for the Plaintiffs

Ms F Lubett for the Defendants

SOLICITORS: CIF lawyers for the Plaintiffs

Hamilton Locke for the Defendants

Introduction:

- [1] The plaintiffs bring suit claiming damages (of various basis) of \$46,579.34.
- [2] The plaintiffs claim allegedly arises from a contract entered into between the plaintiffs and the defendants in respect of the provision of boarding services for a dog in late December 2016. Unfortunately, the dog, an Alaskan malamute, became unwell and eventually had to be euthanized.
- [3] The plaintiffs commenced these proceedings by filing a claim and statement of claim on 9 September 2017.
- [4] Included in the defendant's outline of submissions conveniently is a chronology of the action, which reveals the plaintiffs' action has therefore been on foot for some 5 years and is still not, on the plaintiffs own case, ready for trial.

The Application:

- [5] There are two applications currently before the court for determination namely;
- *The defendant's application to dismiss the proceedings for want prosecution – filed 23 August 2023*
 - *The plaintiff's application for leave to file and serve a further amended claim and statement of claim – filed 8 September 2023.*
- [6] Whilst the two applications in fact had separate designated hearing dates, the parties agreed that both applications should be heard and determined together.

The Parties Material:

- [7] The plaintiffs rely on the following material:
1. Application filed 23 August 2023
 2. Affidavit of Trent Thorne affirmed 6 December 2022 and filed 7 December 2022
 3. Affidavit of Trent Thorne affirmed and filed 23 August 2023
 4. (Affidavit of Trent Thorne affirmed 20 September 2023 filed by leave
- [8] The defendants rely on the following material:
1. Application filed 8 September 2023
 2. Affidavit Benjamin James English filed 13 January 2023
 3. Affidavit Benjamin James English filed 8 September 2023.
- [9] The plaintiff's solicitor and the defendants counsel both conveniently provided comprehensive written outlines of arguments to assist the court.

The Relevant Rules:

1. Dismissal for Want of Prosecution:

- [10] The *Uniform Civil Procedure Rules* (UCPR) empowers the court to dismiss a proceeding for want of prosecution.
- [11] *Rule 280* provides:
- 280 Default by plaintiff or applicant*

(1) If—

(a) the plaintiff or applicant is required to take a step required by these rules or comply with an order of the court within a stated time; and

(b) the plaintiff or applicant does not do what is required within the time stated for doing the act; a defendant or respondent in the proceeding may apply to the court for an order dismissing the proceeding for want of prosecution.

(2) The court may dismiss the proceeding or make another order it considers appropriate.

(3) An order dismissing the proceeding for want of prosecution may be set aside only on appeal or if the parties agree to it being set aside.

(4) Despite subrule (3), the court may vary or set aside an order dismissing the proceeding for want of prosecution made in the absence of the plaintiff or applicant, on terms the court considers appropriate, and without the need for an appeal.

The Relevant Legal Principles:

[12] Conveniently the parties outline of submissions both agree that the leading authority in respect of the test to be applied under *rule 280* is the decision of the court of appeal in *Tyler v Custom Credit Corporation Limited* [2000] QCA 178.

[13] Atkinson J (with whom McMurdo P and McPherson agreed) said:

ATKINSON J: When the Court is considering whether or not to dismiss an action for want of prosecution or whether to give leave to proceed under Uniform Civil Procedure Rules (“UCPR”) r 389, there are a number of factors that the Court will take into account in determining whether the interests of justice require a case to be dismissed.¹ These include:

(1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;

(2) how long ago the litigation was commenced or causes of action were added;

(3) what prospects the plaintiff has of success in the action;

(4) whether or not there has been disobedience of Court orders or directions;

(5) whether or not the litigation has been characterised by periods of delay;

(6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;

- (7) *whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;*
- (8) *whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;*
- (9) *how far the litigation has progressed*
- (10) *whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;*
- (11) *whether there is a satisfactory explanation for the delay; and*
- and (12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.*

Relevant Factors – Consideration of Dismissal for Want Prosecution:

- [14] It is necessary to consider the parties material, the pleadings and chronology applying those factors identified in *Tyler v Customs Credit Court Limited*, to determine the defendant applications for dismissal for want prosecution.

1 - How Long ago the Events Alleged in the Statement of Claim Occurred and What Delay There Was Before the Litigation was Commenced:

- [15] Uncontroversially there was no delay between the event, allegedly caused the by defendants (namely the death of the dog) and commencement of those proceedings. The death occurred on 4 January 2017, an autopsy was completed on 5 January 2017 and the proceedings were commenced just short of 9 months later on the 19 September 2017.
- [16] There has however, been a lengthy delay between the event given rise to the cause of action and the application to dismiss want of prosecution currently under consideration.
- [17] In fact, nearly 7 years have elapsed between January 2017 and now. The elapse of a significant period, here 7 years, is clearly a relevant factor, but the defendants contend more relevantly, because of the question of prejudice through a lapse of time – addressed in point 12.

- [18] The plaintiffs rely on the decision of *Allianz Australia Insurance Limited v Corwa* [2016] QCA 170 seeking to address both this factor and point 12 in relation to prejudice.
- [19] *Allianz Australia v Corwa* considered delays, partially attributable to the pre-court procedure regime proscribed under the *Motor Accidents Insurance Act [1994] [QLD]*.
- [20] There the Court of Appeal refused to disturb the original decision where an application to dismiss for want of prosecution was unsuccessful.
- [21] The current claim does not feature significant delay imposed by the statutory pre-processing regime.

2- How Long ago the Litigation was Commenced:

- [22] The litigation was commenced by the plaintiffs 6 years ago with the original claim and statement of claim filed on 19 September 2017.
- [23] The agreed chronology and the parties' material uncontroversially demonstrate that despite now having retained three different firms of solicitors and having brought applications to add parties and respond to an earlier application to strike out portions of the statement of claim, that the plaintiffs' claim remains at a position where a properly pleaded claim has yet to be formulated.
- [24] As the defendants' outline correctly observes that the plaintiffs "*remain stuck at the first hurdle.*"
- [25] The plaintiffs' response is to assert that it was for the defendants, including through what appears to be a number "*without prejudice*" attempts to resolve the claim, to take issue earlier with the improperly pleaded and particularised claim.
- [26] The function of a properly pleaded case is not only to put the other party on notice but, to define the relevant issues and enable the court to identify them to facilitate adjudication.
- [27] These principles are embodied both in *rule 5* (philosophy - overriding obligation of parties and court).

- [28] The purpose of this rule is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a “*minimum expense.*”
- [29] The plaintiffs’ criticism of the defendants’ conduct is in those circumstances misplaced. The plaintiff must confront the significant hurdle of its failure to comply with an order of the court (made 3 February 2023) compelling the plaintiffs to replead the statement of claim on or before 17 February 2023.
- [30] The plaintiffs, and the three firms of solicitors retained by them, have been lax in pursuing the action and progressing the pleadings. In their material they do not advance and or contend any proper explanation for that delay.

3 - What Prospects the Plaintiff Has of Success in Action:

- [31] The parties’ outlines both acknowledge that the current statement of claim (noting that by order of 3 February 2023 a number of paragraphs were struck out) provides the plaintiff no prospect of succeeding in the action.
- [32] The plaintiff has provided a proposed further amended statement of claim which seeks to replead the action ultimately seeking damages on five separate basis:
- *For breach of contract;*
 - *For breach of statutory guarantees implied in the contract under the Australian Consumer Law;*
 - *For misleading with deceptive conduct pursuant to section 18 of the Australian Consumer Law;*
 - *In negligence;*
 - *Punitive damages for vexation.*
- [33] The defendants raise an exclusion clause contained in the contractual arrangement between the parties and contend that properly construed, it excludes the defendants’ liability in contract and tort.
- [34] The defendants concede that the exclusion clause cannot affect the plaintiffs’ rights under the *Australian Consumer Law* but assert the plaintiffs will face significant hurdles in proving their claim based on the defendants failing to provide service with “*due care and skill.*”
- [35] The plaintiff’s response is commendably concise.

[36] *“It is our submission that while hurdles may exist, these hurdles are not so significant as to render the prospects of success forceful.”*

[37] But do not septically address the defendants’ contentions.

[38] The pleadings identify that a valid exclusion clause, which is admitted by the plaintiffs, excludes the defendants’ liability in contract and tort.

[39] The plaintiffs pleaded case, taken at its highest in respect of the remaining causes of action, confronts the plaintiffs with significant difficulties and the plaintiffs’ prospects of success in the action certainly could not be assessed as strong.

4 - Whether or Not There Has Been Disobedience of Court Orders or Directions.

[40] The court made orders on 3 February 2023 which.

- Struck out paragraphs 4-11, 11.2, 22-24, 26-29, and 32 of the amended statement of claim filed on 6 April 2018.
- Required the plaintiff to file a further amended statement of claim by 4:00pm on 17 February 2023.
- Provided that upon receipt of the draft further amended statement of claim, the defendants were to inform the plaintiffs of any objections within 7 days;
- If the defendants objected to the draft further amended statement of claim, the plaintiffs were required to file an application for leave to make further amendments to the statement of claim by 3 March 2023.

[41] The defendants’ materials confirm that following the receipt of a draft further amended statement of claim, the defendants’ solicitors wrote to the plaintiffs’ solicitors on 22 February 2022 objecting to the sufficiency of the draft further amended statement of claim.

[42] On 3 March 2023 the plaintiffs’ solicitors wrote providing a further amended draft statement of claim.

- [43] On 15 March 2023 the defendants’ solicitors wrote particularising in great detail the defendants’ objections as to the sufficiency of the further draft amended statement of claim.
- [44] Uncontroversially, notwithstanding the orders made on 3 February 2023, which compelled the plaintiffs to file an application seeking leave to file and serve a further amended statement of claim by 3 March 2023, the plaintiffs did not do so. The plaintiffs in their outline do not provide any explanation for the disobedience with those orders.
- [45] The outline advances the following by way of explanation.
- [46] *“It is not denied there has been a non-compliance with the orders of February 2023 however, as outlined in the submissions the reason for this non-compliance was in the hopes of avoiding the need for a contested application and costs associated with this in circumstances where consent could have achieved by the parties.”*
- [47] The affidavit by Mr English both in support of the plaintiffs’ application for leave to further amend the statement of claim and in response to the defendants’ application for dismissal for want prosecution filed 8 September 2023 sets out a chronology in paragraphs 11-28 of correspondence passing between the respective lawyers from 17 February 2023 to 10 August 2023.
- [48] The explanation for failing to comply with the orders of 17 February 2023 is contained in paragraphs 29-34 of the affidavits.
- [49] Mr English disposes in these terms *“I have previously not filled an application to amend the statement of claim, as Hamilton Lock had objections and I believe the objections had been resolved with the recent amendment.”*
- [50] As the defendants outline properly identifies, there is no explanation by the plaintiffs for this disobedience with the court orders made 3 February 2023.

5 - Whether or Not the Litigation has been Characterized by Periods of Delay:

- [51] The parties’ respective outlines accept that there has been extraordinary delay in the progress of the litigation, in total more than 4 years.

6 - Whether the Delay is Attributable to the Plaintiff, the Defendant or both the Plaintiff and Defendant

- [52] The plaintiff has failed after nearly 7 years to yet articulate a properly pleaded claim in the claim and statement of claim against the defendants.
- [53] The plaintiffs' submission as to the conduct of the defendant is expressed in these terms *"It is once again submitted the defendants have held an ambivalent attitude to the pace of these proceedings content to take no action which would otherwise advance the matter. In adopting this attitude, the defendants have contributed to the delays."*
- [54] The agreed chronology clearly demonstrates extraordinary periods of delay on the part of the plaintiff and none of the material explains that delay.

7 - Whether or Not the Impecuniousness of the Plaintiff Has Been Responsible for the Pace of Litigation and Whether the Defendant is Responsible for the Plaintiffs Impecuniousness:

- [55] The plaintiffs do not contend that there are impecunious nor is that profited as an explanation for delay on their part.

8 - Whether the Litigation Between the Parties Would be Concluded by the Striking Out of the Plaintiffs Claim:

- [56] The plaintiffs' cause of action is now statute barred.
- [57] In the event that the defendants' application to dismiss for want prosecution is successful the plaintiff's litigation will be concluded.

9 - How far the Litigation has progressed

- [58] As correctly noted at the outset of the defendants' submissions, the plaintiffs are yet to have any properly pleaded and particularised claim and statement of claim filed and served in the litigation.
- [59] The litigation has not progressed to a point where it could be considered in any way ready for trial.

10 - Whether or not the delay has been caused by the plaintiffs' lawyers being dilatory

- [60] The plaintiffs' submissions in response accept that the plaintiffs' lawyers, noting that the current representation solicitors are the third firm of solicitors retained by the plaintiffs, has clearly been dilatory. They contend however, that the conduct of the defendants' solicitors is a relevant consideration in weighing that factor.
- [61] The agreed chronology and the affidavit of Mr English (filed 8 September 2023) reveals the extent of a dilatory conduct of the current lawyers, who over a matter of a period of in excess of 6 months failed (as required by the orders made 3 February 2023) to file a further application seeking leave to further amend statement of claim.
- [62] The chronology and both the parties' material confirms that each of the three successive firms of solicitors who acted for the plaintiffs have been dilatory.
- [63] The plaintiffs' material does not provide any explanation for that conduct, but quiet clearly the plaintiffs have been aware of the progress of the litigation, and nothing is advanced either in the plaintiffs' material nor the outline of submissions to suggest that the dilatoriness ought not be sheeted home to them.

11 – Whether there is a Satisfactory Explanation for the Delay

- [64] The plaintiff has provided no explanation for the delay whatsoever.
- [65] The affidavit of Mr English filed 8 September 2023 is silent as to any explanation.
- [66] The plaintiffs outline contends “*the conduct of the plaintiffs' solicitor can be described as naïve in hoping to achieve and sent to further amendment of the statement of claim.*” This explanation bares no scrutiny and certainly does not constitute any satisfactory explanation for the delay.

12 - Whether or Not the Delay has Resulted in Prejudice with the Defendant Leading to an Inability to Ensure a Fair Trial

- [67] The incident giving rise to the plaintiffs cause of action occurred more than 7 years ago. The defendants have identified several potential witnesses who have left the defendants employ.

[68] The defendants also contend that as more than 7 years have elapsed any potential witnesses' recollections may be impeded.

[69] The defendants have identified specific prejudice which may cause an inability to ensure a fair trial.

Consideration:

[70] The factors relevant to the defendants' application to dismiss for want prosecution, each identified and individually considered demonstrate that more than 6 years and multiple attempts, including applications to add parties and further amended statements of claim, are yet to see the plaintiffs formulate a properly pleaded and particularized case.

[71] The plaintiffs were on notice when the orders were made on 3 February 2023, striking out significant portions of the statement of claim and requiring the plaintiffs to replead their case, that they could not further delay progressing the litigation.

[72] In *Cooper v Hopgood & Gamin* [1999] 2 Qd R 113 the court of appeal set out principles in respect of the exercise of the courts discretion to dismiss an action for want prosecution.

[73] *McPherson JA* observed:

- *"The list is not, and not intended to be, exhaustive and takes not account of another factor that is often likely to be material, which is that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them. The physiological as well as the commercial effects of such a state of affairs ought not be underestimated."*

[74] The plaintiffs require leave to further amend the statement of claims.

[75] The plaintiffs in fact, now being out of time to apply pursuant to the orders made 3 February 2023, require leave *nun pro tunc* to even bring the application currently filed and before the court.

[76] The plaintiffs do not provide any satisfactory explanation for their failure to comply with the orders made 3 February 2023 and that leave ought not be granted.

Conclusion:

- [77] The onus is on the defendants to show that the matter should be struck out.
- [78] *Atkinson J in Tyler v Custom Credit (supra)* encapsulated the statement of principle in respect of applications of this type succinctly in these terms “*unnecessary delay in proceedings has a tendency to bring the legal system into disrepute and decrease the chance of their being a fair and just result. The futility and self-perpetuating nature of some litigation was viciously satirised by Charles Dickens in the bleak house.*”
- [79] In the circumstances of this particular case the courts discretion should be exercised in the defendants favour and the proceedings should be dismissed.

[80] **Orders:**

1. The plaintiffs’ application for leave to file and serve a further amended statement of claim is dismissed.
2. The proceeding is dismissed for the want of prosecution.

Costs:

In the event that costs orders are not agreed by the parties, then I direct the parties file written outlines in respect of costs orders sought (to be no more than 5 A4 typed pages) within 21 days.

Magistrate J N L Pinder

27/02/24