# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Sparkman's Electrical Pty Ltd & Ors v Habershon & Anor* [2017] QSC 156 |
| PARTIES: | **SPARKMAN'S ELECTRICAL PTY LTD ACN 060 161 828**<br>(Plaintiff/Respondent)<br><br>And<br><br>**JOHN ANTHONY JEREMY**<br>(Plaintiff/Respondent)<br><br>And<br><br>**KYLIE GAYE JEREMY**<br>(Plaintiff/Respondent)<br><br>**v**<br><br>**JOHN BARRIE HABERSHON**<br>(Defendant/Applicant)<br><br>And<br><br>**COMPLETE TECHNICAL SERVICES GROUP PTY LTD ACN 125 403 965**<br>(Defendant/Applicant) |
| FILE NO/S: | S50 of 2014 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Rockhampton |
| DELIVERED ON: | 26 July 2017 |
| DELIVERED AT: | Rockhampton |
| HEARING DATE: | 17 July 20117 |
| JUDGE: | McMeekin J |
| ORDER: | **1. The application to strike out is refused.**<br><br>**2. The plaintiffs are given leave to proceed.**<br><br>**3. The plaintiffs are ordered to pay the defendants' costs.**<br><br>**4. The parties are directed to confer within seven days with a view to agreeing on appropriate further directions as to the conduct of the** |

**proceedings in light of these reasons.**

5. **If such agreement is reached the plaintiffs are directed to provide to my associate a draft order agreed by the parties on or before 4pm on 2 August 2017.**

6. **If agreement cannot be reached:**

   (a) **the parties are directed to file such submissions as they may be advised as to the directions that ought to be made on or before 4pm on 2 August 2017.**

   (b) **Unless submissions are made to the contrary the appropriate orders will be determined on the papers.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISIONS – WANT OF PROSECUTION OR LACK OF PROGRESS – where the defendants apply to strike out the proceedings for want of prosecution – where the proceedings concern a claim for loss of profits occasioned to the plaintiffs by reason of an alleged breach of an employment contract – where the plaintiff gave notice of an intention to take a further step in the proceedings one week short of two years since the last disclosure – whether notice of intention to proceed amounts to taking a further step in the proceedings – whether the last step was the mediation undertaken in December 2014 – whether the last step was the provision of disclosure carried out in June 2015 – whether the proceedings be struck out for want of prosecution.

*Uniform Civil Procedure Rules* r 5, r 389

*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, cited

*Artahs Pty Ltd v Gall Standfield & Smith (A Firm)* [2012] QCA 272, considered

*Barker v Wingo* (1972) 407 US 514 at 532, cited

*GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710, cited

*Kaats v Caelers* [1966] Qd R 482, applied

*Kanyilmaz v Nominal Defendant (Queensland)* [2000] QSC 180, cited

*Maxwell v Keun* [1928] 1 KB 645, considered *Paradise*

*Grove Pty Ltd v Stubberfield* [2000] QSC 214, cited

*South Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, considered

*Tyler v Custom Credit Corp Ltd* [2000] QCA 178, considered

*Wright v Ansett Transport Industries Limited* [1990] 1 Qd R 297, cited

COUNSEL: K C Kelso for the applicant

S J Deaves for the respondent

SOLICITORS: Brandon & Gullo Lawyers for the applicant

Chris Trevor & Associates for the respondent

[1] **McMeekin J:** There are two applications before me. The defendants apply to strike out the proceedings for want of prosecution. In the course of the hearing the plaintiffs applied, orally, for leave to proceed, but arguing that it was not necessary that they take that course.

[2] The proceedings concern, inter alia, a claim for loss of profits occasioned to the plaintiffs by reason of an alleged breach of an employment contract by the first defendant, it being pleaded that the breach occurred in June 2011. It is evident that the relevant conversations that took place in that month, and the timing of events then, are at the heart of the complaints.

[3] The litigation has proceeded at a languid pace. The plaintiffs now indicate that they propose to seek leave to amend their pleadings.

[4] The first defendant's employment with the first plaintiff ended in June 2011. The first notice that the first defendant had of any claim was in June 2012, over a year later. Proceedings commenced on 28 January 2014 – 18 months later again. By June 2014, pleadings had closed and lists of documents had been exchanged. A mediation was held in early December 2014. Over the next seven months there were requests for documents and further disclosure. The last such disclosure was on 15 June 2015.

[5] On 8 June 2017 – one week short of two years since the last disclosure – the plaintiff gave notice of an intention to take a further step in the proceedings. They were required to do so by r 389(1) UCPR. The defendants responded with this application.

[6] There are two preliminary arguments. The plaintiffs contend that they do not need leave to proceed because the giving of the notice of intention is itself a step in the proceeding for the purposes of r 389. I disagree. The point was decided in respect of the former rules in *Kaats v Caelers* [1966] Qd R 482 at 486-7 per Lucas J;

confirmed on appeal: [1966] Qd R 482 at 494 per Hanger J and at 499 per Stable J (with whom Mack CJ agreed). I see no reason why the same approach is not applicable under the UCPR. I note that while the precise point was not before the Court in *Artahs Pty Ltd v Gall Standfield & Smith (A Firm)* [2012] QCA 272, the reasoning in *Kaats* was discussed and no dissent made from the decision.

[7] Further, by its own terms the Notice does not purport to be such a step. It is headed "Notice of Intention to Proceed" and reads "Take Notice that the plaintiffs intend to proceed to take further steps in this proceeding…". This follows the plain meaning of r 389(1). It provides:

> "If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the proceeding, give a month's notice to every other party of the party's intention to proceed."

[8] In my view the giving of the Notice does not advance the proceeding at all. It is a necessary action prepatory to taking the next step in the proceeding.[1]

[9] The second preliminary argument concerns when the last step was taken for the purposes of the rule. The defendants contend that the last such step was the mediation undertaken in December 2014. The plaintiffs contend that the provision of disclosure, albeit in correspondence and by the defendants, in June 2015 was the last such step. In my view the plaintiffs are correct. The authorities relevant to the debate were examined by Peter Lyons J in *Artahs* at [38] to [48]. The provision of both a supplementary affidavit of documents and copies of documents so disclosed have each been held to constitute a step in a proceeding: *Kanyilmaz v Nominal Defendant (Queensland)* [2000] QSC 180; *Paradise Grove Pty Ltd v Stubberfield* [2000] QSC 214; *Wright v Ansett Transport Industries Limited* [1990] 1 Qd R 297. That is precisely what occurred here.

[10] I turn then to the principal debate – should the proceedings be struck out for want of prosecution? The point is of considerable importance as the limitation period expired in June 2017.

[11] The relief sought involves an exercise of a discretion. Many of the factors relevant to the exercise of that discretion were listed by Atkinson J (McMurdo P and McPherson JA agreeing) in *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [2].

[12] My analysis of the factors relevant here is:

(a) As explained above, the litigation has been characterised by significant delays attributable to the plaintiff's side of the case - about six years have passed since the relevant events occurred; there was a long and unexplained delay of two and half years before commencement of proceedings; three and a half years have passed

[1] See to like effect the reasoning of Stable J in *Kaats* at 500.

since the litigation commenced; the plaintiffs now need leave to proceed;

(b) The plaintiff's prospects are by no means certain. There is a significant gap in the proofs so far as they have been disclosed. I will come back to that point;

(c) Striking out, or refusing leave, will deprive the plaintiffs of their cause of action;

(d) Despite the indication of a need for amendment the litigation is well advanced. The amendment, I am told, will go to damages;

(e) The explanation for the delay proffered is that the plaintiff's solicitors have been dilatory. Different solicitors have had conduct of the file as solicitors have left or taken leave, and there seems to have been little in the way of proper oversight of the file. Taken at face value this conduct is hardly much of an excuse but the explanation is unsatisfactory in that nothing is said as to what the plaintiffs were doing. So far as the evidence shows no enquiries were made of the solicitors for very long periods. No explanation is offered for the lack of action for years after June 2011;

(f) There is a concern about the availability of a fair trial. Recollecting events of six years ago and their timing is never likely to be accurate. And there is always the difficulty that McHugh J spoke of in *South Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551 that "what has been forgotten can rarely be shown".[2] Against that, the defendants led no evidence that the witnesses that they have identified as relevant have expressed any concerns about their ability to accurately recall relevant conversations and there are some documents in existence – letters and emails – which provide a guide as to what occurred.

[13] The considerations are finely balanced. Despite the long delays, and the plaintiffs being seemingly personally complicit in those delays, the proceedings are well advanced; the plaintiff would have had an entitlement to proceed had their solicitors provided notice of an intention to proceed only a month earlier; and there is no evidence of actual prejudice when I would expect there to be such evidence if it existed. But the limitation period having expired it seems to me that there would be more injustice than justice in allowing the proceedings to continue if the plaintiffs in fact had only limited prospects of obtaining substantial damages.

[14] It is necessary to say a little more about the cause of action. In October 2010 the first plaintiff, Sparkman's Electrical Pty Ltd (Sparkman's) employed the first defendant, John Habershon, as its site supervisor on a project that a company Dyno Noble Moranbah Ltd had underway, known as Project Aurora. At about the same time that the employment contract was entered into Sparkman's entered into a contract with Dyno Noble Moranbah Ltd to manage the project.

[15] Mr Habershon has explained to an extent what occurred in June 2011. On 14 June 2011 Mr Habershon gave a week's notice terminating his employment as he was

[2] Citing *Barker v Wingo* (1972) 407 US 514 at 532.

entitled to do. In that notice he said: "the project with IPL [a reference to Incitec Pivot, the company controlling Dyno Nobel] at Moranbah has changed and Dyno Nobel have taken over the village and Site maintenance. I have been asked to run the remainder of the project directly."

[16] On 15 June 2011 Dyno Nobel issued a purchase order to the second defendant, a company under Mr Habershon's control, requesting the supply of certain services. The purchase order is in similar, but slightly different, terms to that issued to Sparkman's the year before.

[17] On 17 June 2011 the manager of Dyno Nobel wrote to the Sparkman's in these terms: "As discussed by phone, following a review of our site support services on the project we have decided to terminate our agreement…" Reference was then made to the relevant clause of the agreement which permitted such termination on two days' notice. The materials before me do not show when the phone call referred to in the letter was made.

[18] The plaintiffs' right to any significant damages will depend on whether they can show that but for Mr Habershon's failure to alert them to the Dyno Nobel's intentions earlier than he did (if he in fact had any knowledge prior to 15 June and there is no evidence of that) and but for his indication of his willingness to resign from Sparkman's employment and enter the employment of Dyno Nobel, their contract with that company would have continued. The evidence probably can only come from Dyno Nobel. At this stage there is no indication of what that evidence might be.

[19] Counsel for the plaintiffs argued that the obvious inference was that Mr Habershon's willingness was fundamental to the timing of events. That may be so, but it tends to ignore the problem that if the defendants can demonstrate that Dyno Nobel would have persisted with their intention to terminate whatever his attitude the damages will be negligible.

[20] The time for final proof has not yet come. Mr Habershon could have lead more detailed evidence about what went on and chose not to. Each side chose not to lead evidence from Dyno Nobel. The inference that the plaintiffs rely on that I have referred to is certainly open.

[21] With some hesitation I have determined that the application to strike out should not succeed and that leave to proceed should be given. There has been undue delay with the concomitant strain and uncertainty imposed on the defendants and those factors are relevant[3] and important. And I am conscious of r 5 UCPR and the relevance of

[3] Cf. *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 192 paragraph [30] per French CJ.

the older cases decided in a "more leisured age".[4] But it surely remains right to say, as Atkin LJ did in *Maxwell v Keun* [1928] 1 KB 645 at 657:

> "In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion."

[22] In my judgment the plaintiffs have not been guilty of such conduct and justice can be done by allowing the action to proceed. The defendants should have their costs.

[23] The parties indicated that they would want directions put in place to expedite the hearing if I reached this conclusion. I direct that the parties confer within seven days with a view to agreeing on appropriate orders in light of these reasons. If such agreement is reached the plaintiffs are directed to provide to my associate a draft order agreed by the parties on or before 4pm on 2 August 2017. If agreement cannot be reached the parties are directed to file such submissions as they may be advised on or before 4pm on 2 August 2017. Unless I receive submissions to the contrary I will determine the appropriate orders on the papers.

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[4] See *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716 per Samuels JA; *Aon Risk Services* (2009) 239 CLR 175 at 190 paragraph [25] per French CJ.