

SUPREME COURT OF QUEENSLAND

CITATION: *Mathiesen v Lawson & Ors* [2019] QCA 35

PARTIES: **RODERICK GORDON MATHIESEN**
(appellant)
v
ALAN JOSEPH LAWSON
(first respondent)
GRAHAM FARREN
(second respondent)
TONNIJ JOHANNES BOBELDYK
(third respondent)
COMPACTOR HIRE (TOWNSVILLE) PTY LTD
ACN 077 355 447
(fourth respondent)
ROD MATHIESON PLANT HIRE PTY LTD
ACN 011 006 447 (IN LIQUIDATION)
(fifth respondent)

FILE NO/S: Appeal No 8213 of 2018
SC No 410 of 2007

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Townsville – [2018] QSC 154 (North J)

DELIVERED ON: 1 March 2019

DELIVERED AT: Brisbane

HEARING DATE: 14 November 2018

JUDGES: Sofronoff P and Philippides JA and Boddice J

ORDERS: **The appeal be dismissed, with costs.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where the primary judge refused an application, made instant, for leave to proceed – where the proceeding was commenced almost a decade earlier – where the primary judge ordered that the proceeding be dismissed for want of prosecution – where there was potential prejudice that witnesses, recollection or documents could have been lost – whether the primary judge erred in the exercise of his discretion to dismiss the proceeding by acting upon a wrong principle and mistaken facts – whether the primary judge erred by giving inadequate reasons

Uniform Civil Procedure Rules 1999 (Qld)

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Pittaway v Noosa Cat Australia Pty Ltd [2016] 2 Qd R 556;
[\[2016\] QCA 4](#), cited
Tyler v Custom Credit Corporation Ltd & Ors [\[2000\] QCA 178](#), cited
Ure v Robertson [2017] 2 Qd R 566; [\[2017\] QCA 20](#), cited

COUNSEL: N Andreatidis, with S Kelly, for the appellant
 D B Fraser QC, with P W Telford, for the respondent

SOLICITORS: Cohen Legal for the appellant
 Connolly Suthers for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of Boddice J and the orders his Honour proposes.
- [2] **PHILIPPIDES JA:** For the reasons given by Boddice J, I agree with the orders proposed by his Honour.
- [3] **BODDICE J:** On 4 July 2018, the primary judge delivered reasons for refusing an application by the appellant, made *instanter*, for leave to proceed in respect of a proceeding commenced against the respondents almost a decade earlier. The primary judge further ordered that the proceeding be dismissed for want of prosecution and that judgment be entered for the respondents against the appellant with costs.
- [4] The appellant appeals those orders. At issue is whether the primary judge erred in the exercise of his discretion to dismiss the proceeding by acting upon a wrong principle and mistaken facts, or by giving inadequate reasons.

Background

- [5] The appellant and the first, second and third respondents are businessmen. Between 1989 and 2008, they operated a business together through the seventh named respondent. The other respondents were associated entities.
- [6] In 2007, a dispute arose between the appellant and the first, second and third respondent in relation to the operation of that business. Central to that dispute, was an allegation that the respondents had surreptitiously operated a similar business in competition with the seventh named respondent. That business was conducted by the sixth named respondent.
- [7] On 22 June 2007, the appellant purported to commence the proceeding on behalf of the originally named seventh respondent,¹ which had been placed in liquidation. Leave to commence those proceedings was subsequently given *nunc pro tunc* in 2008.
- [8] The proceedings, in essence, sought damages and other relief by way of derivative proceedings. The central basis for the claimed relief was that the operation of the sixth named respondent's business was undertaken by the other respondents (other than the seventh named respondent) in breach of fiduciary and other duties and involved conduct in contravention of the *Trade Practices Act 1974* (Cth).

¹ Now the fifth named respondent.

- [9] The appellant's claim and statement of claim filed on 22 June 2007 was alleged to be significantly deficient. However, a "holding defence" was filed by the first, second, fourth, fifth and sixth respondents on 4 November 2009.
- [10] The appellant filed an amended statement of claim on 19 May 2015 and a further amended statement of claim on 22 July 2015. That pleading was the subject of an application to strike out, filed 17 August 2015. That application also sought dismissal of the proceeding for want of prosecution. The appellant also filed an application for leave to proceed in the proceeding, pursuant to rule 389 of the *Uniform Civil Procedure Rules 1999* ("UCPR").
- [11] Those applications were heard on 26 August 2015. Judgment was not given until 6 October 2016. On that date the primary judge ordered a number of paragraphs be struck out of the amended statement of claim. The appellant was given leave to re-plead and the balance of the application filed 17 August 2015 was adjourned for further hearing.
- [12] On 18 November 2016, the appellant filed a second further amended statement of claim pursuant to the grant of leave to re-plead. Amended defences were filed thereafter.
- [13] The further hearing of the adjourned application took place on 10 and 11 April 2017. That application pressed for the dismissal of the appellant's proceedings for want of prosecution, or for noncompliance with the UCPR and, alternatively, a striking out of parts of the appellant's second further amended statement of claim. Judgment in respect of that application was not given until 4 July 2018. It was that judgment that led to the orders, the subject of this appeal.

Primary Judge's Reasons

- [14] In the reasons delivered on 4 July 2018, the primary judge specifically stated those reasons should be read with the primary judge's earlier reasons and orders on 6 October 2016. The 6 October 2016 reasons dealt with the first, second, fourth and sixth respondent's application to strike out the appellant's further amended statement of claim, either in whole or in part. That application was successful in striking out parts of the further amended statement of claim.
- [15] In the 6 October 2016 reasons, the primary judge found the further amended statement of claim was inadequate in its pleading of fraud and the claimed relief for passing off and misleading and deceptive conduct. These inadequacies also justified striking out the appellant's pleading in respect of loss and damage and other ancillary paragraphs. Notwithstanding those findings, the primary judge found the appellant ought to be granted leave to re-plead, over the objections of those respondents.
- [16] In reaching that conclusion, the primary judge expressed concern that the proceedings had been bedevilled by delay. There was also a suggestion documents may have been lost. The primary judge noted that much would depend upon the allegations in the amended pleading, in the context of the available disclosure. For that reason, the primary judge declined to finally determine the applications for dismissal for want of prosecution or referral to alternate dispute resolution. Orders were made permitting the appellant to replead with the balance of the application being adjourned to a date to be fixed.

- [17] In his reasons for dismissing the proceeding on the resumed hearing of that application, the primary judge expressly noted that the appellant had on several occasions after the filing of the second further amended statement of claim, expressly disavowed any intent to make any further amendment to the statement of claim. Accordingly, the nature and extent of the allegations and matters raised in that amended pleading, informed the consideration of the dismissal application.
- [18] Against that background, the primary judge found the pleadings of fraud and exemplary damages in the second further amended statement of claim did not meet the requirements of the UCPR. That pleading also contained no allegation giving rise to a cause of action or a right to any relief against the fourth respondent. Further, that pleading, both in form and content, bore no similarity with the original statement of claim, filed in 2007. Numerous paragraphs in the new pleading made allegations of fact different from the earlier pleading. The new pleading contained allegations which arguably constituted new causes of actions brought after expiry of the limitation period. However, the primary judge declined to rule upon those issues, finding the determination of any limitation of actions point should occur at trial.
- [19] Having made those observations, the primary judge found the history of the dealings in the pleadings, the complexity of the factual allegations and the circumstances relevant to that conduct dating from many years ago, were relevant to the application for dismissal of the proceeding for want of prosecution. In that respect the primary judge noted there had been a delay in the taking of a step in the proceeding, between 2007 and 2009, with the consequence that the taking of further steps thereafter were ineffectual, without the leave of the court. The failure to obtain that leave enlivened the power to dismiss the proceedings for want of prosecution.
- [20] In exercising his discretion to dismiss the proceeding, the primary judge concluded that by reason of delay, loss of evidence and difficulty in preparing to meet a case formulated as late as November 2016, there could not be had a fair trial.² In reaching that conclusion, the primary judge found the pleadings concerning damage and compensation, raised a complex reconstruction of the business and financial dealings from 1997 to 2007, in circumstances where the case now to be met was only pleaded, and thereby notified to the respondents, upon the filing of the second further amended statement of claim.
- [21] In respect of delay, the primary judge observed the litigation had been characterised by periods of delay with the obligations imposed by UCPR r 5 not being met, with much of the delay being attributable to the appellant, as opposed to the respondents. Further, there was no satisfactory explanation for that delay.
- [22] In respect of prospects, the primary judge found it was not possible to reach a reliable conclusion. However, as credit would be at the heart of the resolution of any trial, there was an importance in the integrity of documentation and the recollection of available witnesses. There was a live dispute whether the loss of documents would occasion prejudice to the respondents. The litigation had only now reached the stage where it might be said pleadings had closed. Disclosure, although in an advanced state of completion, was still the subject of contention between the parties. The obligation of disclosure was controlled by the ambit and

² AB25.

content of the pleadings, in circumstances where the original statement of claim was particularly uninformative and the second further amended statement of claim contained different allegations.

- [23] The primary judge noted evidence from the respondents to the effect documents had been lost as a result of a cyclone in 2011 and perhaps in the aftermath of a sale in 2008. However, the primary judge was not prepared to conclude the respondents had deliberately withheld documents or consciously delayed in looking for documents or disclosing available documents. The primary judge was also cautious about drawing conclusions to the effect that a forensic accountant would be unable to provide a report because of those missing records.
- [24] Notwithstanding those conclusions, the primary judge found that because of the effluxion of time by 18 November 2016, there was a compelling inference the respondents would be considerably prejudiced in preparing for and meeting the now pleaded claim. That pleading was factually complex, particularly in respect of loss and damage. There was a likelihood that potential witnesses may be unlocatable or have died, or that the available witnesses will have lost memory or have poor recollection due to the passage of time. Whilst the loss of documents, the death of a particular witness and other matters, individually may not appear to be circumstances of overwhelming prejudice, whether they be viewed individually or collectively, they were instances of prejudice.
- [25] Those instances, considered in the light of the criticisms of the current pleading, and in particular its want of particularity and specificity, and in the context of the passage of time, founded a conclusion that a fair trial upon the issues raised by that pleading, was not possible, and that to move the proceeding forward to trial would be unjust and an abuse of the process of the Court. That conclusion entitled the relevant respondents to an order dismissing the proceedings, either under UCPR r 280 or pursuant to the Court's inherent power.
- [26] Finally, the primary judge observed that the respondents were entitled to the finality of a dismissal of the proceeding. Accordingly, for the reasons previously given, the appellant's application made *instanter* for leave to proceed was refused.

Appellant's submissions

- [27] The appellant submits the primary judge erred in finding there was relevant missing documentary evidence. A significant number of the allegedly missing documents still existed and in a number of respects, documents asserted to have been missing could not have existed, as they related to a period prior to incorporation of the relevant corporation. The primary judge's reasons failed to refer to those matters. That error was relevant to the ultimate exercise of the discretion, as missing documents were one of the instances of prejudice relied upon to support a conclusion that there could not be had a fair trial and that to permit the proceeding to go forward would be unjust and an abuse of process.
- [28] The appellant submits the primary judge erred in finding there was a prejudice in the loss of witnesses or recollections. None of the individual respondents were dead. Detailed defences had been filed in response to the second further amended statement of claim, indicative of an ability to give instructions. For the first time, the respondents had pleaded an alleged agreement at a meeting in 1996. The ability to give such instructions properly called into question any assertion that there was

prejudice as a consequence of a loss of recollections. The fact that one potential witness had died did not support a conclusion of prejudice. The witness was not a respondent to the proceeding and was not named in the pleadings. There was no evidence that no one else could give the relevant evidence.

- [29] Further, whilst the primary judge found that evidence may be desirable from past employees, customers and others familiar with the business and the industry in general, there was no evidence led at all about prejudice due to the unavailability of past employees, customers or other relevant witnesses. The well accepted concept that delay has had an effect on the quality of evidence from the deterioration of witnesses' recollections, did not support a conclusion that there was a likelihood of potential witnesses being dead or unlocatable.
- [30] The appellant submits the primary judge erred in the findings as to the availability of expert forensic evidence. There was no evidence a forensic report could not be obtained, and there was no evidence any difficulties would arise as a consequence of the delay. The appellant had been able to obtain an extensive report based on the available documents and cost. A contest as to methodology was irrelevant to the question whether there would be a fair trial.
- [31] The appellant submits the primary judge erred in the findings as to the relevance of delay. The primary judge improperly grossed up the delay to 18 November 2016 and attributed much of that delay to the appellant, rather than considering what part of the delay was properly attributable to the appellant and what prejudice was sustained as a consequence of that delay. The grossed up delay included periods of delay that could not be attributable to the appellant and included prejudice the respondents would have suffered in any event.
- [32] Finally, the appellant submits the primary judge's finding that to permit the proceeding to go forward would be unjust and an abuse of process underpinned the exercise of the discretion to refuse leave to proceed in circumstances where the exercise of that discretion was unreasonable or plainly unjust. The exercise of that discretion was inextricably linked to the material errors made by the primary judge, and the passage of time was not so great as to sustain that finding.
- [33] The appellant submits that in re-exercising the discretion, the Court of Appeal ought, notwithstanding the existence of significant delay, dismiss the respondents' application and grant the appellant leave to proceed. The proceeding is now well advanced. Steps had been taken to progress it to trial. There had been no disobedience of court orders or directions.

Respondent's submissions

- [34] The respondents submit the primary judge's exercise of the discretion was neither unreasonable nor plainly unjust. The second further amended statement of claim was delivered some twenty years after the relevant events and seven years after the proceeding had become stayed, by reason of the effect of UCPR r 389(2). That pleading advanced a deficient claim unrecognisable from the claim first commenced against the respondent in 2007. That pleaded claim was itself in need of reformulation.
- [35] The respondents submit there was no error in the findings of the primary judge or in the exercise of the discretion to dismiss the proceedings. No effectual step in the proceeding had occurred between 27 September 2007 and 28 October 2009. As a consequence, UCPR r 389(2) was enlivened. The subsequent additional periods

of delay were only relevant in a secondary sense. Further, the findings of prejudice arising from the loss of documentary evidence and the death of a witness, were only factors relevant to the ultimate finding of unfairness. The primary judge's conclusions as to the difficulties associated with the cost and availability of a forensic examination, were not a feature in the ultimate exercise of the discretion.

- [36] The obligations of disclosure were governed by the pleadings, which were initially deficient and poorly articulated. For more than nine years after the proceedings had commenced, it would have been very difficult for a party to be confident of the ambit and extent of the disclosure obligations. The fact other witnesses may have been available to give similar evidence did not address the prejudice from the death of a witness. It was impossible to know what evidence that witness would have given in response to the allegations in the second further amended statement of claim.
- [37] Finally, the respondents submit that even if there was an error in the exercise of the discretion, this court would come to the same conclusion that the interests of justice warrant the exercise of a discretion to dismiss the proceeding for want of prosecution.

Discussion

- [38] In *Tyler v Custom Credit Corporation Ltd & Ors*,³ twelve matters were identified as factors to be taken into account in determining whether the interests of justice required a proceeding to be dismissed for want of prosecution or leave to proceed to be refused. The first of those factors included the time period since the events, the subject of the proceeding. The last factor included whether or not delay had resulted in prejudice leading to an inability to ensure a fair trial.
- [39] Those factors are not, however, the only relevant factors. Further, as Atkinson J (with whose reasons McMurdo P and McPherson JA agreed) observed:

“The court’s discretion is, however, not fettered by rigid rules, but should take into account all of the relevant circumstances of the particular case, including the consideration 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.

Unnecessary delay in proceedings has a tendency to bring the legal system into disrepute and to decrease the chance of there being a fair and just result [footnote omitted].”⁴

- [40] Depending on the particular circumstances, delay can give rise to prejudice to the fair trial of a proceeding, even if the delay is short. Further, the likelihood of prejudice being occasioned by delay between a trial and the occurrence of the events, the subject of the proceeding, is manifest in a circumstance where, as in this case, the plaintiff seeks to plead a fundamentally different and new case many years after the commencement of the proceeding and many, many years after the occurrence of the events which are the subject of the claim.

³ [2000] QCA 178.

⁴ *Tyler v Custom Credit Corporation Ltd & Ors* [2000] QCA 178 at [2]-[3].

- [41] In the present case, the primary judge's conclusion that a fair trial could not be had and that it would be unjust for the proceeding to continue, must be viewed in the context of the finding of the primary judge that the likely occasion for prejudice occurred in the circumstance that the case now to be met was only pleaded and thereby notified to the respondents on 18 November 2016. That circumstance frames the findings of likely prejudice by reason of delay and the loss of documentary and other evidence.
- [42] Further, as the primary judge properly observed, any activity by the appellant in pursuing the proceeding must be viewed in the context of the fact that the period of inactivity between 2007 and 2009 had engaged UCPR r 389(2) with the consequence that no effectual step could be taken thereafter without leave to proceed. The enlivening of UCPR r 389(2) is significant. It placed the appellant in the situation where the proceeding was stayed and had been for many years.⁵
- [43] The need for leave to proceed is a particularly relevant circumstance, in a case substantially reformulated some eight years after the proceeding commenced. The fact that a new case had to be met by the respondents for the first time so many years after the commencement of the proceeding gave rise to likely prejudice. That particular circumstance meant the attribution of responsibility for the delay in the proceeding did not assume the prominence that it does in cases of the type under consideration in *Pittaway v Noosa Cat Australia Pty Ltd*.
- [44] In such a particular circumstance, the death of a witness and the loss of documentation, albeit as a consequence of a natural disaster and/or a voluntary destruction, also occasions likely prejudice. A likely prejudice arises in the loss of the opportunity to have preserved evidence, had the case as now pleaded been originally pleaded from the outset. The likely prejudice identified by the primary judge in those particular circumstances supported the primary judge's conclusion that a fair trial could not be had and that it would be unjust and an abuse of process for the proceeding to be allowed to continue to trial. There was no error in that conclusion.
- [45] In any event, an assessment of delay, in the context of prejudice, requires more than a simple grossing up of the period of time that has elapsed. It requires a consideration of the prejudice that flows from that delay, rather than the general elapsing of time.⁶ However, a consideration of the primary judge's reasoning reveals that the observation that "much of the delay...identified appears to be attributable to the plaintiff as opposed to the defendants", related to the primary judge's earlier reference to specific instances of significant delay by the plaintiff in taking steps involving the respondents.⁷ The periods of delay referred to in paragraph 42 of the reasons for judgment were correctly identified as appearing to be attributable to the appellant as opposed to the respondents. There was also no satisfactory explanation for that delay.
- [46] Similarly, the primary judge's findings in relation to missing documentary evidence were open in the context of the significance of the new case, first pleaded in the pleading filed on 18 November 2016. As the primary judge observed, at the forefront of that new case and the respondents' pleaded defence, were credit issues.

⁵ *Ure v Robertson* [2017] 2 Qd R 566 at 577 [37].

⁶ *Pittaway v Noosa Cat Australia Pty Ltd & Ors* [2016] 2 Qd R 556 at [41] and [44].

⁷ *Mathieson v Lawson & Ors* [2018] QSC 154 at [49]; AB23.

Documentation corroborative of a particular witness' account would be important, as would evidence from available non-party witnesses. There was an importance in the integrity of the documentation and the recollection of available witnesses.

- [47] The pleading of that new case, in circumstances where the original statement of claim was deficient and “particularly uninformative”,⁸ also supported the primary judge’s observation as to the potential significance of the loss of the evidence from the witness, now dead. It is no answer that there may be others who could give evidence. The relevant issue was not merely the industry generally. Relevant evidence to be given by that witness was evidence about the sale of the business itself in April 2008, including the negotiations and the state of the equipment. That evidence assumed a significance on the pleading of the new case in November 2016.
- [48] There was also no error in the reference to lost documentation in the context of the expert forensic report. The appellant complained that the forensic accountant engaged by the respondents may not have been provided with all of the available documents. It is in that context that the primary judge made the observation that the cost of forensically examining the claim for loss and damage will be significant, with contestable issues concerning methodology and calculation of the claim. Those observations were open on the material, as was the observation that it may be desirable for there to be evidence from past employees, customers and others familiar with the business and industry, particularly in the context of the newly pleaded case.
- [49] A consideration of the particular circumstances of the pleading of a new case, in a proceeding subject to UCPR r 389(2), supported the conclusion of the primary judge that lost documents, the death of a witness and the other matters, “whether viewed individually or collectively”, were instances of prejudice.⁹ That prejudice flowed even though the respondents had filed detailed defences and had not sworn to a loss of recollection. It is the likely loss of other evidence that is significant to the findings of prejudice.
- [50] Those conclusions, in the context of the newly pleaded case itself having a want of particularity, supported the finding that a fair trial upon the issues raised in that new pleading was not possible, and that it would be unjust and an abuse of the process of the court to allow the matter to proceed to trial.
- [51] Those conclusions being open, there is no basis to conclude the primary judge erred in exercising the discretion to dismiss the proceeding for want of prosecution. There was no error of fact or law. The exercise of that discretion was neither unreasonable nor plainly unjust.¹⁰ That being so, the exercise of the discretion to refuse leave to proceed was itself neither unreasonable nor unjust.

Orders

- [52] I would order the appeal be dismissed, with costs.

⁸ AB26 at [54].

⁹ AB28 at [59].

¹⁰ *House v The King* (1936) 55 CLR 499.