DISTRICT COURT OF QUEENSLAND

CITATION:	*Noosa Cat (Australia) Pty Ltd v Davies* [2020] QDC 80
PARTIES:	**NOOSA CAT (AUSTRALIA) PTY LTD** **(ACN 056 475 506)** (plaintiff / applicant) **v** **GREGORY ERIC DAVIES AND JANELLE VERONICA DAVIES** (defendants / respondents)
FILE NO/S:	D28/2015
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Maroochydore District Court
DELIVERED ON:	13 May 2020
DELIVERED AT:	Maroochydore District Court
HEARING DATE:	1 May 2020
JUDGE:	Long SC, DCJ

ORDER:

1. **The plaintiff and the defendant have leave to proceed with this proceeding pursuant to rule 389(2) of the *Uniform Civil Procedure Rules*.**

2. **The plaintiff file and serve any further amended statement of claim on or before 27 May 2020.**

3. **The defendant file and serve any amended defence and counterclaim on or before 10 June 2020.**

4. **The plaintiff file and serve any amended reply and answer on or before 24 June 2020.**

5. **The parties complete disclosure by 10 July 2020.**

6. **The costs of this application be reserved for the trial judge.**

CATCHWORDS: PROCEDURE – DELAY – APPLICATION TO CONTINUE PROCEEDING UNDER UCPR r 389 – Whether the proceeding be permitted to continue notwithstanding that no step had been taken for two years or more

LEGISLATION: *Uniform Civil Procedure Rules* 1999 (Qld), rr 389(2), 385(3)

CASES: *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178
Way & Anor v Primo Rossi Pty Ltd & Anor [2018] QCA 203
Wall's Sand and Gravel Pty Ltd v Mattiazzi [2019] QDC 87
Hood v State of Queensland [2002] QSC 169

COUNSEL: JW.Lee for the plaintiff / applicant
SM.Gerber for the defendant / respondent

SOLICITORS: Wellners Lawyers for the plaintiff / applicant
McCormick Lawyers for the defendant / respondent

[1] By application filed on 9 April 2020, the applicant and plaintiff in a claim filed on 3 March 2015, seeks leave, pursuant to rule 389(2) of the *Uniform Civil Procedure Rules* ("UCPR"), to take a step in the substantive proceeding.

[2] The background chronology to this application is as follows:

(a) On 3 March 2015, the applicant's claim and statement of claim was filed;

(b) On 9 April 2015, the respondents filed a notice of intention to defend and defence and counterclaim;

(c) On 4 May 2015, the applicant filed a reply and answer;

(d) On 6 November, 2015, the applicant filed a list of documents; and

(e) On 28 September 2017, the applicant filed an amended statement of claim.

Since the filing of that amended statement of claim, there has been no further step taken in this proceeding and the only other notation from the file is that on 18 December 2017 the respondents filed a notice of change of solicitors.

[3] The plaintiff's claim is for damages for:

1. breach of the terms of a deed made between the parties; and
2. misleading and deceptive conduct in breach of s 18 of the *Australian Consumer Law* and pursuant to ss 236 and 237 of that law.

The deed to which reference is made, is to a deed of compromise dated 1 August 2013, made in the course of the trial, in the Supreme Court of Queensland, of the claim of the respondents that an expensive fishing vessel, manufactured for them by the plaintiff, was unseaworthy and not fit for purpose. That claim had been filed on 11 January 2012. Effectively, the terms of settlement required the applicant to repurchase the vessel from the respondents, for the sum of $650,000 and to pay the respondents' costs of that proceeding, save for costs to be recovered from other parties with whom the respondents had previously settled.

[4] In the substantive proceeding now before this Court, the applicant claims, in the amended statement of claim, $59,954.37 as damages in respect of items alleged to have been missing or removed from the vessel or which were in a damaged condition (beyond fair wear and tear), when it was repurchased and returned in accordance with the deed. In this regard, reliance is placed upon clause 8 of the deed, which provided:

> "For the purposes of clause 6(b) above, the expression "Vessel" shall include all plant and equipment, including electronic equipment on the Vessel (other than the plaintiffs' fishing and crabbing gear (being crab pots, flags and rope, sorting tray, rods, reels and tackle)."

And also upon clause 9, which provided:

> "The plaintiffs confirm that the vessel has not been operated since September 2011 and since that time has not been physically damaged (other than wear, tear, corrosion and deterioration from lack of use)."

[5] The second aspect of the applicant's claim, is premised on a clause in the deed which provides that the applicant was to pay the costs of the respondents, as follows:

> "The plaintiff's costs of and incidental to the proceeding on the standard basis to be assessed or agreed (less any costs recovered by the plaintiffs from the third, fourth and fifth defendants under the terms of settlement between the plaintiff and the third, fourth and fifth defendants)".

It is contended that this clause is to be considered in the context of an alleged representation of the solicitor for the respondents to the applicant's solicitor in words to the effect:

> "I cannot give fixed amount for costs payable by Noosa Cat since the other defendants will be paying one third each up to the point of settlement with them, and Noosa Cat will pay one third up to that point, after which Noosa Cat will pay all the costs."

[6] Accordingly and although it may not be entirely clear as to how it follows that, due to alleged "discounts" allowed to the other parties, the amount owing pursuant to the terms of the deed, by the applicant, should have been reduced to zero and such as to allow the applicant to recover the sum of $94,295.17, already paid in respect of the costs, and to not be liable for the balance of $91,543, as claimed by the respondents by way of counterclaim, it would appear that the gravamen of the applicant's claim is that it is not liable to pay the amount by which the respondents agreed to reduce the costs recoverable from the other parties to less than one third of the relevantly identified figure.

[7] Apart from some criticism directed at the deletion, by the applicant's amended statement of claim, of specific claims relating to misrepresentation as to damage to the engines of the vessel, the respondents otherwise point out that in accordance with UCPR 385(3), no amendment of their defence is required as they continue to rely on their pleading:

> "… that there were no items of plant and equipment 'missing from the Vessel' when the plaintiff took possession of the Vessel on 16 September 2013."[1]

[8] Accordingly and as otherwise joined on the pleadings, there are issues as to whether:

(a) any of the specified items were "missing" or "removed" or relevantly damaged, when the vessel was returned; and

(b) there was:

  (i) any breach of the terms of the deed, including by implication, as to the condition of the vessel; or

  (ii) any misrepresentation, as a construction of the settlement deed, or by the conduct and/or silence of

---

1 Statement of Claim filed 3/3/15, at paragraph 7(b).

> the respondents in the negotiations in respect of the agreement, such as to be a basis for relief pursuant to the Australian Consumer Law;

Otherwise, the respondents' defence denies the pleaded bases of the applicant's claim in respect of the payment of costs, including as to there being any implied term in the deed, such as contended by the applicant. And by their counterclaim, the respondents seek recovery of the unpaid balance of the costs payable pursuant to the deed, less an amount reflective of the effect of other costs orders made in the earlier proceedings, being an amount of $91,543.[2]

[9] The submissions for each party were, unsurprisingly, made in reference to the decision in *Tyler v Custom Credit Corp Ltd & Ors*.[3] Particularly for the respondents, attention was directed to each of the typical factors identified as relevant considerations. It may be noted that some but not all of the identified factors will necessarily be present in given cases but the point that is made is that where any such factor is present it will be taken into account. For example, in this instance there is no consideration arising in respect of any impecuniosity being responsible for the pace of the litigation. The factors or criteria are noted in an inclusive sense, in the context of noting that there are a number of factors that will be taken into account in determining the interests of justice as an exercise of discretion in a particular case. It was expressly noted that:

> "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."[4] (citations omitted)

And also that:

---

2 It is also to be noted that in its answer to counterclaim, at paragraph 14, the applicant also seeks to effectively set off an amount of $30,000, as an agreed sum of costs to be paid by the respondents in respect of a failed application of the respondents to have a costs assessor removed.

3 [2000] QCA 178. For the applicant, reference is also made to *Way & Anor v Primo Rossi Pty Ltd & Anor* [2018] QCA 203 and for the respondents, also to *Wall's Sand and Gravel Pty Ltd v Mattiazzi* [2019] QDC 87.

4 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178, at [2].

> "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."[5]

More particularly, in respect of an application of the kind involved here, it was observed:

> "On an application for leave to proceed, the applicant for leave must 'show that there is good reason for accepting the particular proceedings from the general prohibition' …. The rationale of the rule requiring leave to proceed after a long delay is to prevent abuse of process. The court must be satisfied that the continuation of the proceedings would not involve injustice or unfairness to one of the parties by reason of delay."[6] (citations omitted)

[10] Factors which will necessarily require consideration will relate to the extent and causes of delay, in the context of the extent of progress of the litigation and ultimately, whether the effect of the delay is to lead to an inability to afford a fair trial.

[11] Here the critical delay is that no step has been taken since the filing of the amended statement of claim, on 28 September 2017, with the consequence that as and from 28 September 2019, UCPR 389(2) was engaged so as to prevent a new step being taken in the proceedings without the leave of the court.

[12] Whilst the respondents are correct to point out that the broader context is that the relevant events relating to the execution of the deed occurred on 1 August 2013 and that the claim was not filed until 3 March 2015 and that the amended statement of claim was filed some two years and four months after the reply and answer was filed, there is otherwise some difficulty in the approach of the respondents in attempting to sheet home the entire responsibility for delay in progress of the proceedings, to the applicant. In this respect it is necessary to understand that whilst the cause of action which is the subject of the respondents' counterclaim could be separately pursued by them, it is a claim which they have chosen, for obvious reason, to make part of the proceeding before the court.[7]

[13] It is therefore to be noted that the party moving the court for leave to proceed is the applicant, who whilst accepting some dilatoriness on the part of its solicitor,

---

5 Ibid at [3].
6 Ibid at [5].
7 Pursuant to UCPR 177.

otherwise seeks to explain its necessity to do so on some computer system failure in the office of its solicitor, which may have led to the absence of a "bring up" notification, such as may have avoided the necessity to bring this application.

[14] Difficulty may therefore be seen in a contention made for the respondents that they:

> "… have been prejudiced by the delay in the plaintiff's prosecution of its claim."

Notably there is no contention that the prejudice is in terms of any ability to ensure a fair trial. Rather it is contended that they:

> "… wish to get on with their lives and avoid the ongoing legal costs and being further vexed by the plaintiff concerning the vessel they purchased from the plaintiff in 2008."

That is understandable when, as has been noted, the issues are concerned with the construction of the deed, in the context of alleged representations made and exchanges between the parties' lawyers and leading to the execution of that deed.[8]

Moreover, an obvious difficulty with the submission is that the interest of the respondents in the proceedings is most clearly identified in their seeking to recover what they contend remains owing to them pursuant to the deed and the distinct absence of any step taken by them to bring the matter to trial.[9] That is also in the context that despite the lack of identification by the applicant of any particular next step for which the court should give leave, it was identified, for both parties, that apart from the prospect of allowing for updated lists of documents in the consequence of the amended statement of claim,[10] the matter was effectively ready to be set down for trial.

[15] On the hearing of the application, it was effectively common ground that refusal of this application would not necessarily result in conclusion of the litigation between the parties. However and for the applicant, that contention did not appear to be made in cognisance of the applicability of UCPR 389(2) also to the respondents'

---

8 Although, it may also be noted that in its reply, at paragraph 7, the response to the pleading at paragraph 11(a) of the defence (in response to the representations pleaded as made by the solicitor for the respondents in respect of costs to be recovered from the other parties), is to indicate uncertainty as to some exact words that were used.

9 For instance, by serving a request for trial dates pursuant to UCPR 467 and, if necessary, applying to dispense with the applicant's signature pursuant to UCPR 469.

10 Although, it may not be clear what further disclosure may be contemplated, when no new allegation appears to have been added by the applicant.

counterclaim. And more generally and in respect of the respondents' postulation of ability to institute fresh proceedings in respect of their counterclaim, there was no engagement in respect of any effect of the *Limitation of Actions Act* 1974.

[16] There is criticism that the applicant has not proffered evidence as to its prospects of success and also as having made and now abandoned an aspect of its claim in respect of the damaged condition of the engines of the Vessel, when the damaged state of those engines was an issue in the proceeding in the Supreme Court. However, the issue is with what remains and as observed by Ambrose J in *Hood v State of Queensland*,[11] this consideration is only one of multiple considerations that may be taken into account and it is neither necessary for an applicant to demonstrate that it will succeed, nor for a respondent to demonstrate certain failure. Demonstration by an applicant of a fairly arguable case may suffice.[12] Here there is only what appears on the face of the pleadings and it suffices, in the context of the connected and unresolved disputes between the parties, to note an understanding that:

(a) the applicant's claim in respect of the returned condition of the Vessel, may in the end depend upon determination as to whether or not equipment which was contemplated to be returned with the Vessel under the deed, was or was not or returned relevantly damaged, which may eventually require a consideration of the credit of relevant witnesses; and

(b) in respect of any assessment of the prospects of the applicant's claim in relation to the costs payable pursuant to the deed, in the context of what has been noted above,[13] the outcome may well depend upon ultimate consideration of the response in the Defence, as pleaded at paragraph 28(b):

> "(b) deny the allegations as they believe they are untrue because:
> (i) the defendants did not make the Vessel Representation or the Representation by Silence as pleaded in paragraphs 15 and 16 above;
> (ii) there is legal basis for the alleged obligation of the defendants to 'identify a reasonable figure to recover

---

11 [2002] QSC 169 at [135]-[138].
12 *Artahs Pty Ltd v Gall Standfield & Smith (A Firm)* [2012] QCA 272.
13 See paragraph [6], above.

from each of the Volvo and Aqua Marine parties and offset the total of such amounts…';

(iii) the amounts for which the defendants settled the claims for costs against the Volvo and Aqua Marine parties was reasonable and was recommended by the defendants' costs assessor QICS; and

(iv) the plaintiff is liable to pay the defendant's costs of the Supreme Court proceeding pursuant to clauses 4(b) and 11 of the Deed."[14]

[17] On balance and having regard to the circumstances of this litigation and those which now warrant this application, the better view is that this litigation should be allowed to proceed, so that the disputes between the parties may be efficaciously brought to conclusion. No injustice or unfairness is to be discerned in allowing this to occur and particularly if, as was foreshadowed on the hearing in this eventuality, there are accompanying orders to achieve efficacious progress to trial. The parties will be permitted to make further submissions as to such appropriate orders.

---

[14] See Defence and Counterclaim filed 9/4/20, at [28] and [29].