SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Carpet Mills Pty Ltd v Dupont (Australia) Ltd* [2002] QSC 196
PARTIES:	**QUEENSLAND CARPET MILLS PTY LTD (ACN 011 013 522)** (first plaintiff) **ROBYN EDMONDSON** (second plaintiff) **v** **DUPONT (AUSTRALIA) LIMITED (ACN 000 716 469)** (first defendant) **PHILIP PATRICK CARTER and RICHARD ANTHONY BARBER** (second defendants)
FILE NO:	S10944 of 1996
DIVISION:	Trial Division
PROCEEDING:	Applications filed 14 December 2001, 14 February 2002, 12 April 2002
DELIVERED ON:	25 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2002
JUDGE:	Wilson J
ORDER:	**(1) That the amended statement of claim delivered on 29 October 1998 be struck out;** **(2) That the plaintiffs have leave to proceed subject to the following conditions:** **(i) payment of the costs ordered by Dowsett J on 4 April 1997 ($3,548.30) on or before 2 July 2002;** **(ii) if the costs ordered by Muir J on 12 October 1998 have been taxed, payment of those costs on or before 2 July 2002;** **(iii) amendment of the writ in accordance with the leave given by Muir J on or before 2 July 2002 (the time for amendment being hereby extended accordingly);** **(iv) filing and serving an amended statement of claim on or before 9 July 2002;** **and that in default of compliance with any of those**

conditions, the plaintiffs' claims be dismissed and there be judgment for the defendants on the claim, with costs (including reserved costs if any) to be assessed;

(3) That the plaintiffs' applications for particulars of the defence and counterclaim and disclosure be adjourned to a date to be fixed;

(4) That the defendants' application for security for costs be adjourned to a date to be fixed;

(5) That the plaintiffs pay the defendants' costs thrown away by the amendment of the statement of claim on 29 October 1998 and the two draft further amended statements of claim delivered in April 2002, such costs to be assessed on the standard basis;

(6) That the plaintiffs pay the defendants' costs of and incidental to the applications filed by the plaintiffs on 14 December 2001 and 12 April 2002, such costs to be assessed on the standard basis.

(7) That the plaintiffs pay the defendants' costs of and incidental to the application filed by the defendants on 14 February 2002 insofar as it seeks relief in relation to the statement of claim, such costs to be assessed on the standard basis;

(8) That there be no order as to the costs of the application filed by the defendants on 14 February 2002 insofar as it seeks security for costs.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – where plaintiffs had not taken a further step in the proceeding for 2 years – whether plaintiffs should be given leave to proceed - whether statement of claim should be struck out -whether plaintiffs should be given leave to amend statement of claim – whether delay caused by conduct of plaintiffs or defendants – whether defendants' conduct was oppressive – whether defendants would be prejudiced by amendment – whether first plaintiff should provide security for costs – whether grant of leave should be conditional on plaintiffs satisfying costs orders made in previous hearings

Supreme Court of Queensland Act 1991 (Qld), s 85
Supreme Court Rules (Qld) (repealed), O 32 r 8
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 381, r 389(2)

Bazley v State of Queensland [2001] QSC 476 at para [21], SC No 1291 of 1993, 18 December 2001, referred to.
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 555, referred to.
MacDonnell v Rolley [2001] QCA 32, Appeal No 3478 of 2000, 6 May 2001 at para [14], referred to.

Tyler v Custom Credit Corporation Limited [2000] QCA 178, Appeal No 9766 of 1999, 19 May 2000, at para [2], para [5], considered.
William Crosby & Co Pty Ltd v The Commonwealth of Australia (1963) 109 CLR 490, referred to.

COUNSEL: C D Coulsen for the plaintiffs
J D McKenna for the defendants

SOLICITORS: Cholm B Darvall for the plaintiffs
Allens Arthur Robinson for the defendants

[1] This proceeding was commenced on 23 December 1996. Two applications by the plaintiffs and one application by the defendants are presently before the Court, seeking respectively –

application by plaintiffs filed 14 December 2001:

(i) leave to proceed;
(ii) disclosure;

application by plaintiffs filed 12 April 2002:

(i) leave to deliver a further amended statement of claim;
(ii) an extension of time in which to amend the writ;
(iii) particulars of para 22(a) of the defence and counterclaim;

application by defendants filed 14 February 2002:

(i) that the claims by the first plaintiff in the amended statement of claim delivered on 29 October 1998 be struck out;
(ii) alternatively, that certain specified paragraphs of that pleading be struck out;
(iii) further or alternatively, that the plaintiffs file and serve a further statement of claim;
(iv) further or alternatively, security for costs.

Background

[2] The first plaintiff (Queensland Carpet Mills Pty Ltd), as trustee for the Edmondson Family Trust, conducted a carpet manufacturing business. Its directors were Alan and Robyn Edmondson. The first defendant (Dupont (Australia) Limited) sold yarns for the manufacture of carpet. In 1994 and 1995 the first plaintiff purchased particular shipments of yarn from the first defendant. By September 1995 the first plaintiff owed the first defendant $1.28 million, and it gave the first defendant a mortgage debenture over its assets and undertaking. The debt was not paid. On 5 June 1996 the first defendant appointed the second defendants receivers and managers of the assets and undertaking of the first plaintiff. They remained in office

until March 2000. In the meantime Mr Alan Edmondson became a bankrupt on 4 November 1996 and his marriage to Mrs Robyn Edmondson failed.

Commencement of Proceeding

[3] On 23 December 1996 the first plaintiff and Mr and Mrs Edmondson as second plaintiffs issued a writ against the first defendant claiming damages for breach of s 52 of the *Trade Practices Act* 1974, damages for fraudulent misrepresentation and/or negligent misrepresentation and damages for breach of contract.

[4] The plaintiffs proceeded to serve a writ of non-party discovery on the receivers and managers, who applied to have it set aside. On 4 April 1997 Dowsett J ordered that it be set aside and that the plaintiffs pay the receivers' costs. Those costs, which were subsequently taxed in the amount of $3,548.30, have never been paid.

[5] A statement of claim was delivered on 3 April 1997. The first defendant requested further and better particulars on 21 April 1997. In May 1997 the plaintiffs' present solicitor, Mr Darvall, began to act for the second plaintiffs, and shortly thereafter Mr Edmondson (one of the second plaintiffs) filed a notice of discontinuance. In October that year the solicitors who had initiated the proceeding ceased to act for the first plaintiff as the result of an order by Dowsett J. Since then Mr Darvall has acted for the first plaintiff also, although he does not seem ever to have filed a formal notice to that effect.

[6] In about June 1997 Rothmont Holdings Pty Ltd was appointed trustee of the Edmondson Family Trust in lieu of the first plaintiff.

Applications heard by Muir J - October 1998

[7] On 17 June 1998 the remaining plaintiffs gave notice of their intention to proceed. On 25 August 1998 they filed a summons (inter alia) for leave to join Rothmont Holdings Pty Ltd as a plaintiff, leave to join the receivers as second defendants, and leave to file an amended statement of claim. The first defendant filed a summons for security for costs on 9 September 1998. The two applications came before Muir J on 12 October 1998. His Honour –

(i) gave the plaintiffs leave to amend the writ to join the receivers as second defendants;

(ii) gave the plaintiffs leave to amend the writ by adding claims against the second defendants for negligence, breach of fiduciary duty, trespass and conversion;

(iii) directed that the plaintiffs deliver an amended statement of claim on or before 26 October 1998;

(iv) directed that any request for particulars of the statement of claim be delivered within 14 days of 26 October 1998;

(v) directed that particulars be supplied within 14 days of delivery of a request;

(vi) directed that defences be delivered within 28 days of receipt of particulars;

(vii) ordered the plaintiffs to pay the defendants' costs of the plaintiffs' application;

(viii) declined to order security for costs, but adjourned the defendants' summons to a date to be fixed;

(ix) ordered that the costs of the defendants' summons be costs in the cause.

It is not apparent whether the costs referred to in (vii) have been taxed.

Subsequent conduct of the litigation

[8] The plaintiffs ought to have attended to amendment of the writ within 14 days: *Supreme Court Rules* O 32 r 8. They have never done so, and hence their present application for an extension of time in which to do so: *UCPR* r 381.

[9] An amended statement of claim was delivered on 29 October 1998. Since then there has been seemingly endless correspondence about the proper parties to the proceeding and about particulars. I shall return to this below.

[10] A defence and counterclaim was delivered on 27 April 1999.

[11] A reply and answer was delivered on 16 June 1999.

[12] The *Uniform Civil Procedure Rules* commenced to operate on 1 July 1999. In June 2001 there was an unsuccessful attempt to resolve the disputes by mediation. (It was not a Court ordered ADR process.) The proceeding was placed on the supervised case list in November 2001.

[13] Despite much correspondence, neither side has given disclosure.

Leave to Proceed

[14] Rule 389(2) of the *UCPR* provides –

> "**(2)** If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice."

The last step in this proceeding was the delivery of the reply and answer on 16 June 1999. Thus, the issue is whether this is a proper case in which to grant leave to proceed.

[15] It is for the applicants (in this case the plaintiffs) to show that there is good reason for excepting the proceedings from the general prohibition contained in r 389(2): *William Crosby & Co Pty Ltd v The Commonwealth of Australia* (1963) 109 CLR 490, 496; *Tyler v Custom Credit Corporation Limited* [2000] QCA 178 at para [5]; *Bazley v State of Queensland* [2001] QSC 476 at para [21]. The Court's wide discretion is to be exercised in the context of a general statutory discretion to dismiss a proceeding when two years have elapsed since the last step was taken (*Supreme Court of Queensland Act 1991* s 85) and r 5 of the *UCPR* which provides –

"**Philosophy – overriding obligations of parties and court**

5 (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court."

In *Tyler* at paragraph [2] Atkinson J set out a non-exhaustive list of factors relevant to the exercise of the discretion:

"(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 application 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

> (12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.
>
> 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."

[16] Mindful as I am of the financial constraints under which the plaintiffs have laboured, nevertheless I cannot be confident that their claims, or any of them, have particularly good prospects of success given their apparent inability properly and adequately to plead them. In addressing the considerable delays, their counsel impressed on me that they had not sat idly by allowing time to pass. On the contrary, he stressed, they had had to deal with numerous and detailed requests for particulars, arguments about the proper parties to the proceedings, and threatened applications.

[17] The parties to this litigation are clearly very unevenly balanced in terms of the financial resources available to them. If the plaintiffs are correct in their assertions, the defendants' conduct has driven them into penury. As I observed during the hearing, litigation is an adversarial process, and parties may engage in legitimate tactical manoeuvring. The defendants are entitled to defend the proceedings vigorously, but not oppressively.

[18] While attendance to the defendants' correspondence would have absorbed a very large part of the plaintiffs' time and resources, I do not think that the defendants' conduct could be described as oppressive in all the circumstances. The claims made against them are serious and the quantum sought is large indeed. It is often possible to resolve disputes about pleadings and particulars by correspondence (even if prolonged) less expensively than by resort to the Court, and parties should be encouraged to try to do so. The major fault clearly lies with the plaintiffs, whose approach to the litigation has been fitful and uncoordinated.

[19] The first plaintiff is suing as trustee of the Edmondson Family Trust. It ceased to be the trustee in June 1997 and was replaced by Rothmont Holdings Pty Ltd, but it resumed that position in March 2000 (when the receivership over the first plaintiff came to an end). The defendants properly raised the issue of whether the first plaintiff was a proper party to the proceeding. I have already referred to Mr Edmondson's ceasing to be a plaintiff, but after his discharge from bankruptcy, his rejoinder as a plaintiff was contemplated.

[20] The plaintiffs have obviously found it difficult to formulate their claims against the defendants. Very broadly, they allege that certain representations were made on behalf of the first defendant about yarns it was seeking to promote, that those representations were false, misleading and deceptive, that they acted in reliance on those representations and suffered loss thereby. A statement of claim was delivered on 3 April 1997 in which the plaintiffs sought damages for breach of s 52 of the *Trade Practices Act*, damages for fraudulent misrepresentation and equitable damages. Since then there have been six further attempts to produce a satisfactory

pleading - 2 June 1998, August 1998, 7 October 1998, 29 October 1998, April 2002 and again in April 2002. (That delivered on 29 October 1998 was purportedly pursuant to the direction of Muir J, and neither of the subsequent ones has been filed.) The claims have now expanded, and as counsel for the defendants submitted can be divided into four classes:

(i) claims arising out of the first defendant's conduct in 1994 (breach of contract, fraudulent misrepresentation, misleading and deceptive conduct);

(ii) claims that the mortgage debenture was wrongfully obtained (unconscionable conduct, duress, undue influence, unfair preference);

(iii) claims that the receivers were wrongfully appointed (estoppel, breach of contract, collusion); and

(iv) claims arising from the receivers' conduct in the receivership (trespass, conversion, bad faith, conduct contrary to the *Corporations Law*, negligence).

Some of these claims are entirely new, and despite the different causes of action relied on, there is what counsel for the defendants described disparagingly as a "one size fits all" claim for damages. The first plaintiff claims to have suffered the following losses –

(a) loss of all its assets estimated at $6.5 million;

(b) loss of profits June 1994 - June 1997 estimated at $38 million;

(c) loss of profits June 1996 - June 2007 approximately $26 million;

(d) replacement cost of the business approximately $6.5 million.

It also claims interest and exemplary damages. The second plaintiff claims to have lost money advanced to the first plaintiff, personal property and earnings of approximately $1 million.

[21] I do not think it is necessary for me to undertake a paragraph by paragraph analysis of the latest draft pleading. As I understood the purport of his submissions, counsel for the plaintiffs conceded that there are major problems with the pleading in its present form, but argued that the plaintiffs do have viable causes of action which they should be given another opportunity to plead. The primary position of counsel for the defendants was to oppose the grant of leave to proceed, but he submitted that one option open to me is to give leave to proceed conditional upon payment of outstanding costs orders, payment of costs thrown away by the failed amendments and the filing of a proper pleading, the leave being suspended until the pleading has been provided.

[22] The proceeding was commenced shortly before the expiration of the time for bringing the claims under the *Trade Practices Act*. It has been on foot for five and a half years, and still has not progressed beyond arguments about the statement of claim. The plaintiffs would now be out of time to commence fresh proceedings for breach of contract in 1995, although their claims for equitable relief would not be directly affected by any limitation statute.

[23] The defendants did not point to any actual prejudice such as the death or disappearance of witnesses or the loss of particular documents. However, they relied on the legislative presumption of prejudice inherent in limitation statutes, which was discussed by McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 555. It is legitimate for the Court to take account of the possibility of prejudice, so long as it is not baseless speculation, the extent of the possibility being a factor to be weighed in the balancing exercise: *MacDonnell v Rolley* [2001] QCA 32 at para [14]. The defendants' counsel submitted that insofar as the claims are based on oral representations, after all this time the first defendant's witnesses, who are "corporate people" who would have handled many transactions since, would not necessarily have clear recollections of the relevant conversations. In contrast, he submitted, Mr Edmondson had made the litigation "his life's work" over the intervening years and could be expected to relate much more contextual detail. As I observed during the hearing, there is always the risk that someone who has made a case his life's work will have unconsciously and innocently convinced himself of the veracity of what is in fact an inaccurate version of events. In other words, the passage of time may work against both sides, and I am unable to assess against which side it is likely to be more destructive.

[24] The defendants first applied for security for costs against the first plaintiff in 1998. Muir J declined to order security at that stage, but left the summons alive "until such time as the further amended statement of claim is delivered in a fully particularised form": *ex tempore* reasons 12 October 1998 page 6. Their counsel submitted before me that they had been proceeding "without any safety net, as it were, in terms of costs" and that that was relevant to prejudice. There is some substance in their point, but, of course, it was open to them to renew their application for security at an earlier time. When the application was renewed before me, the defendants relied on a costs estimate relied on in 1998, and did not have an updated estimate. Their counsel drew attention to the plaintiffs' conduct since October 1998 as making the case for security stronger, and to the fact that Mr Edmondson's father is now apparently standing behind him financially. (The application is against the corporate plaintiff only, and it would be necessary to show that Mr Edmondson Snr is standing behind it also.)

[25] The statement of claim delivered on 29 October 1998 should be struck out. The plaintiffs should be given leave to proceed, but subject to the following strict conditions:

(i) payment of the costs ordered by Dowsett J on 4 April 1997 ($3,548-30) on or before 2 July 2002;

(ii) if the costs ordered by Muir J on 12 October 1998 have been taxed, payment of those costs on or before 2 July 2002;

(iii) amendment of the writ in accordance with the leave given by Muir J on or before 2 July 2002 (the time for amendment being hereby extended accordingly);

(iv) filing and serving an amended statement of claim on or before 9 July 2002;

and that in default of compliance with any of those conditions, the plaintiffs' claims should be dismissed and there should be judgment for the defendants on the claim, with costs (including reserved costs if any) to be assessed.

[26] The plaintiffs have sought certain particulars of the defence and counterclaim and disclosure by the defendants. I am not prepared to consider making such orders until the plaintiffs have filed an acceptable statement of claim. I expect that, if and when they do so, the defendants will want to amend their pleading. The issues should be defined by the pleadings before there is disclosure.

[27] Further, the defendants' application for security for costs should be adjourned to a date to be fixed, to be brought on after the plaintiffs have complied with the conditions to which the leave to proceed is subject.

[28] The plaintiffs should pay the defendants' costs thrown away by the amendment of the statement of claim on 29 October 1998 and the two draft further amended statements of claim delivered in April 2002, such costs to be assessed on the standard basis.

[29] The plaintiffs should pay the defendants' costs of and incidental to the applications filed by the plaintiffs on 14 December 2001 and 12 April 2002 and the application filed by the defendants on 14 February 2002 insofar as it seeks relief in relation to the statement of claim, all such costs to be assessed on the standard basis.

Orders:

(1) That the amended statement of claim delivered on 29 October 1998 be struck out;

(2) That the plaintiffs have leave to proceed subject to the following conditions:

(i) payment of the costs ordered by Dowsett J on 4 April 1997 ($3,548-30) on or before 2 July 2002;

(ii) if the costs ordered by Muir J on 12 October 1998 have been taxed, payment of those costs on or before 2 July 2002;

(iii) amendment of the writ in accordance with the leave given by Muir J on or before 2 July 2002 (the time for amendment being hereby extended accordingly);

(iv) filing and serving an amended statement of claim on or before 9 July 2002;

and that in default of compliance with any of those conditions, the plaintiffs' claims be dismissed and there be judgment for the defendants on the claim, with costs (including reserved costs if any) to be assessed;

(3) That the plaintiffs' applications for particulars of the defence and counter claim and disclosure be adjourned to a date to be fixed;

(4) That the defendants' application for security for costs be adjourned to a date to be fixed;

(5) That the plaintiffs pay the defendants' costs thrown away by the amendment of the statement of claim on 29 October 1998 and the two draft further amended statements of claim delivered in April 2002, such costs to be assessed on the standard basis;

(6) That the plaintiffs pay the defendants' costs of and incidental to the applications filed by the plaintiffs on 14 December 2001 and 12 April 2002, such costs to be assessed on the standard basis.

(7) That the plaintiffs pay the defendants' costs of and incidental to the application filed by the defendants on 14 February 2002 insofar as it seeks relief in relation to the statement of claim, such costs to be assessed on the standard basis;

(8) That there be no order as to the costs of the application filed by the defendants on 14 February 2002 insofar as it seeks security for costs.