# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Atlantic 3-Financial (Aust) Pty Ltd v Deskhurst Pty Ltd & Anor* [2003] QSC 182 |
| PARTIES: | **ATLANTIC 3-FINANCIAL (AUST) PTY LTD ACN 056 262 723**<br>(plaintiff)<br>**v**<br>**DESKHURST PTY LTD ACN 101 303 705**<br>(first defendant)<br>**ROBERT GEORGE HALLAS**<br>(second defendant) |
| FILE NO/S: | SC No 5736 of 2002 |
| DIVISION: | Trial Division |
| PROCEEDING: | Reference from the Registrar |
| ORIGINATING COURT: | Brisbane |
| DELIVERED ON: | 17 June 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 June 2003 |
| JUDGE: | White J |
| ORDER: | **1. Reactivate the proceeding.**<br>**2. Direct that the plaintiff bring any application challenging the second defendant's claim of privilege within 14 days and otherwise be prevented from doing so without special leave of the court.**<br>**3. The second defendant bring any application for security for costs within 14 days and otherwise be prevented from doing so without special leave of the court.**<br>**4. There be no order as to costs.** |
| CATCHWORDS: | *Uniform Civil Procedure Rules*, r 5, r 982 |
| COUNSEL: | Mr Ian Mitchell Deputy Registrar for the Registrar<br>Mr Paul Lynch Solicitor for the plaintiff<br>Mr Mark Martin for the second defendant |
| SOLICITORS: | Lynch & Company for the plaintiff<br>North Coast Law for the second defendant |

[1] This is a reference by the Registrar pursuant to r 982 of the *Uniform Civil Procedure Rules* and Practice Direction 4/2002 Case – Flow Management – Civil Jurisdiction. This Practice Direction concerns the implementation of a system to facilitate the

philosophy of the *Uniform Civil Procedure Rules* as set out in r 5, that is, to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. The court may impose appropriate sanctions if a party does not comply with the rules to achieve these ends.

[2] The system sets timelines by which proceedings should progress to specific stages. By para 4.3 of the Practice Direction, where a request for trial date has not been filed 180 days after the final date of filing notices of intention to defend Registrar may call on the plaintiff by notice to show cause why the proceeding should not be deemed resolved.

[3] By para 4.4 the plaintiff must show cause within 21 days. A party must respond to a show cause notice by entering judgment, seeking a trial date or bringing some other application to facilitate the timely determination of the proceeding or justify the failure to do so and propose a plan to facilitate the timely determination of the proceeding. The Registrar may then give a direction or refer the proceeding to a judge.

[4] If cause is not shown the proceeding will be deemed resolved and the Registrar will notify the parties to that effect. By para 5.4 a proceeding deemed resolved may be reactivated by an application by any party supported by affidavit material explaining and justifying the circumstances in which the proceeding was deemed resolved and proposing a plan to facilitate its timely determination. The Registrar may then reactivate the proceeding, give directions or refer the proceeding to a judge.

[5] This proceeding commenced by claim filed 25 June 2002. The second defendant filed an intention to defend and counter-claim on 15 August 2002. There is, apparently, no notice from the first defendant. The plaintiff filed a reply and answer on 3 September 2002.

[6] On 12 February 2003 the Registrar gave a notice under para 4 of Practice Direction 4 of 2002 directing the plaintiff to show cause within 21 days why the proceeding should not be deemed resolved because the second defendant's notice of intention to defend was filed on 15 August 2002 and a request for trial date had not been filed within 180 days. That notice was sent to the second defendant's solicitors.

[7] There was no response from the plaintiff's solicitors within the time limited by the Practice Direction and on 7 March 2003 the Registrar gave notice under para 5 that the proceeding was deemed resolved.

[8] The plaintiff filed an application on 9 May 2003 that the proceeding be reactivated and proposed that the application be decided on the papers without oral hearing pursuant to Ch 13 Pt 6 of the *Uniform Civil Procedure Rules*. The plaintiff complied with the requirements of r 490 in as much as a notice, submissions and a draft order as well as an affidavit from Mr Paul Lynch, the plaintiff's solicitor, explaining the failure to respond to the notices from the Registrar and proposing a plan to advance the proceeding were filed.

[9] The second defendant wrote to the Registrar by letter dated 19 May 2003 stating:

> "It is intended that this correspondence be regarded as the second defendant's submissions in the application."

The second defendant opposed the application to reactivate the matter on the basis that:

1. the plaintiff had not adequately explained the delay to enliven the Registrar's discretion to reactivate;

2. the second defendant will incur costs in defending a matter deemed determined;

3. the plaintiff has recourse against its solicitors.

[10] If the proceeding is reactivated the second defendant seeks its costs to be paid on an indemnity basis and the provision of security for costs by the plaintiff as a condition of reactivation.

[11] The Registrar concluded that it was inappropriate that the application be decided without oral hearing and referred the matter to the court for appropriate directions and posed three questions for the court's consideration:

> "1. On the hearing of an application on the papers should the Registrar accept submissions in a letter instead of a document filed in the Registry? (rule 492 UCPR).
>
> 2. In the circumstances of this case has the Plaintiff satisfied the requirement in paragraph 5.4 of the practice direction to reactivate the proceedings?
>
> 3. Does the circumstances of this case justify the making of a costs order under paragraph 5.5?"

Neither Mr Lynch nor Mr Martin for the second defendant made submissions on the first question. The Practice Direction does not direct the method of response by a party responding to an application to reactivate under para 5.4. The procedure for an application without oral hearing was followed by the plaintiff. It is not suggested that it was inappropriate to utilise this procedure.

[12] The proper response by the second defendant would have been dictated by r 492. It provides:

> "If the respondent wishes to present a written submission or evidence, other than oral evidence, the respondent must file and serve on the applicant a response with all relevant accompanying material at least three business days before the date set for deciding the application."

There is nothing in the rule that the submission must be in a separate document but the obligation on a respondent is to "file and serve" on the applicant a response. This suggests that it is a document which is in conformity with the practices of the registry and letters are not, in the usual case, documents capable of being filed. It is desirable that a submission clearly be so identified. Here the letter is plainly a submission. Undue technicality is not encouraged by r 5. However the rules clearly set out what is to be done and the court or a party should not be obliged to search for submissions in a document, such as a letter, which consists of other matters. That is not the case here and it would be unduly pedantic to require a further document to be filed and served.

[13] If a respondent wishes to put evidence before the court as provided for in r 492 the proper way to do so is by affidavit. Evidence may not be secreted in assertion in the

submissions. Here the matters raised in opposition to the reactivation are not matters of evidence and are appropriately contained in the submissions. For the purposes of this application the letter of 19 May from the second defendant sufficiently complies with r 492 but the Registrar will wish to encourage a uniform response to applications to reactivate and it may be appropriate to add to para 5.4 of Practice Direction 4 that in the usual case the procedure envisaged by Ch 13 Pt 6 for a decision on the papers without oral hearing will be appropriate.

[14] The second question goes to the heart of the application to reactivate. Mr Lynch deposes that the intervention notice received from the Registrar by facsimile transmission was not drawn to his attention for two weeks. What is more, he neglected to reply within 21 days. He accepts that the fault is entirely that of his firm. He does not explain why a request for trial date was not made within 180 days. The second defendant demands a fuller explanation. There is not much that can relevantly be added – it is not helpful to be given an account of who does or did not do what in the solicitor's office. The systems in place failed – or perhaps there were inadequate systems.

[15] This is not a stale matter. It commenced last year. It concerns proceedings brought by a mortgagee against a borrower and a guarantor of loans made by the plaintiff to the first defendant. The Practice Direction has not been in operation for long. The profession will need to be more alert to its consequences. The proceeding ought to be reactivated. If the plaintiff wishes to challenge the claim of privilege asserted by the second defendant it should bring its application within 14 days and otherwise be prevented from doing so without special leave of the court. If the second defendant wishes to bring an application for security for costs it must do so similarly within 14 days with the same consequences for not complying with the time limitation.

[16] Paragraph 5.5 provides that in the usual case there will be no order as to the costs of an application to reactivate a proceeding before the Registrar. Mr Lynch has conceded that his firm ought to pay the costs of the re-application. The opposition by the second defendant was not particularly meritorious. The Registrar was prompted to refer the matter to the court by the second defendant's opposition and method of making submissions. Notwithstanding Mr Lynch's concession which may have been made without regard to para 5.5 of the Practice Direction there are no circumstances that suggest that a costs order ought to be made against the plaintiff. Accordingly there should be no order as to costs.

[17] The orders and directions are:

1. The proceeding be reactivated.

2. The plaintiff must bring its application to challenge the claim of privilege asserted by the second defendant in its list of documents within 14 days and otherwise be prevented from doing so without special leave of the court.

3. The second defendant to bring an application for security for costs within 14 days and otherwise be prevented from doing so without special leave of the court.

4. There be no order as to costs.