# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Pennefather & Anor v Young Engineering Service Pty Ltd & Ors* [2003] QSC 432 |
| PARTIES: | **GEORDIE PENNEFATHER**<br>(first plaintiff)<br>**KAREN PENNEFATHER**<br>(second plaintiff)<br>**v**<br>**YOUNG ENGINEERING SERVICE PTY LTD**<br>ACN 010 574 437<br>(first defendant)<br>**ALPHA CONSTRUCTIONS PTY LTD** ACN 010 612 941<br>(second defendant)<br>**COLIN AUBREY MAFLEN**<br>(third defendant)<br>**MICHAEL ROBERT CARTER**<br>(fourth defendant/respondent/cross-applicant)<br>**BARRY JAMES INSURANCE BROKERS PTY LTD**<br>ACN 010 630 127<br>(first third party/applicant/respondent)<br>**ZURICH AUSTRALIA INSURANCE LIMITED**<br>ACN 000 296 640<br>(second third party/applicant/respondent) |
| FILE NO/S: | S7501 of 1996 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 18 December 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8 December 2003 |
| JUDGE: | Mackenzie J |
| ORDERS: | **1. The applications to strike out the third party proceedings are refused**<br>**2. Leave is granted to the fourth defendant to take a further step in the proceedings**<br>**3. Costs of and incidental to each application be costs in the cause** |
| CATCHWORDS: | PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – DISMISSAL OF PROCEEDINGS FOR WANT OF PROSECUTION – where plaintiffs injured in industrial |

accident – where in late 1999 all defendants agreed to terms of settlement – where fourth defendant undertook to institute and expeditiously prosecute third party proceedings against second third party – where proceedings instituted mid 2001 – where informal disclosure occurred in the intervening period – where no formal disclosure – where no steps taken by fourth defendant in proceedings for over two years – where issues not pursued by third parties – whether third party proceedings should be struck out for want of prosecution – whether prejudice would occur as result of the delay

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – TIME – DELAY SINCE LAST PROCEEDING – whether leave should be granted to fourth defendant to take steps in proceedings

*Brisbane South Health Authority v Taylor* (1996) 186 CLR 541
*Quinlan v Rothwell* [2002] 1 Qd R 647
*Tyler v Custom Credit Corporation Limited (in liq)* [2000] QCA

COUNSEL: A R Forbes (sol) for the first third party
M J Liddy for the second third party
M T Brady for the fourth defendant

SOLICITORS: Phillips Fox for the first third party
Gadens Lawyers for the second third party
Rogers Matheson Clark for the fourth defendant

[1] **MACKENZIE J:** This is an application by the first and second third parties to strike out third party proceedings against them. The respondent to that application, the fourth defendant, seeks leave to take a step in the proceedings notwithstanding that more than two years have passed since the last step was taken.

[2] The first plaintiff in the action was injured in an industrial accident on 29 June 1995. The terms of settlement were agreed upon between all defendants. The elements of the settlement relevant for present purposes are that:

- the first defendant agreed to pay half the damages to the first plaintiff and the second and third defendants to pay the other half;
- contribution proceedings between the parties would proceed with any necessary adjustments made in accordance with judgment in the action;
- the fourth defendant was notwithstanding the settlement entitled to assert in the contribution proceedings that he was not liable to the first plaintiff;
- the fourth defendant undertook to the other defendants to institute and thereafter expeditiously prosecute the third party proceedings against the second third party claiming any amount the fourth defendant may be liable to pay in the action.

[3] The terms of settlement in relation to the second plaintiff were agreed at the same time, relevantly with the second and third defendants to pay the sum of $12,000 to

her and incorporating provisions corresponding to those in the settlement in favour of the first plaintiff with respect to prosecution of third party proceedings against the second third party. These settlements were reached on 12 November 1999.

[4] The third party proceedings were instituted against the first and second third parties on 9 July 2001 although there is evidence that, in the case of the first third party at least, the issue of third party proceedings had been raised in December 1999 and informal disclosure proceeded over an extended period. Formal disclosure never occurred. An order allowing the commencement of third party proceedings was made on 26 April 2001. From what has been said it may be inferred that while it took about 21 months to institute the third party proceedings, it is not a case where there was inaction throughout the whole period before doing so. It should also be noted that there appears to have been no direction given as to the way in which the contribution proceedings and the third party proceedings are to be heard. In particular there is no specific order that they be heard together.

[5] According to the fourth defendant, he had given all relevant documents to his solicitor in connection with the third party proceedings. He heard nothing further from his solicitor and did not try to contact him. He thought that the whole matter had probably just "gone away". He says that he also thought that it was pointless for him to litigate the issues with the first and second third parties until he knew that he might need to meet financial obligations to the other defendants.

[6] On 9 July 2002 he moved to New Zealand for family reasons. It is apparent from a letter of 26 September 2003 from his Queensland solicitors to a solicitor in New Zealand whom he had recently consulted that by September 2001 the fourth defendant had failed to keep appointments with the Queensland solicitor or to fund the prosecution of the proceedings as he had agreed to do. This was the reason given for inability of the fourth defendant's counsel in the present application to access the fourth defendant's file.

[7] What seems to have brought the matter to life is that the first defendant tendered a request for trial date to the fourth defendant and the third parties. There is a suggestion on behalf of the second third party that the first defendant required leave to do so. However, it is not necessary to pursue that issue for present purposes. The first third party's solicitors responded that disclosure had not yet been provided and that while they were anxious to progress the proceedings and were in contact with the New Zealand solicitors to pursue the issue, it was imperative that disclosure be completed before the request for trial date could be signed. The second third party responded that the matter was clearly not ready for trial because disclosure had not been completed and that the fourth defendant's whereabouts were unknown to it.

[8] One other matter that has limited the information available is that none of the fourth defendant, first third party or second third party seems to have considered whether it would have been desirable to let the first defendant know of the application. It may be accepted that the first defendant was not a necessary party because it was not a party to the third party proceedings. However, because of the linkage between the settlement, the contribution proceedings and the third party proceedings it may nevertheless have been, firstly, able to fill in some of the gaps in the sequence of the evidence especially as to what it was doing in the period when the action seems to have been dormant, and secondly, been able to make any pertinent submissions since its interests would probably be affected if the third party proceedings were

struck out. It may be that it could assert a contractual right of action arising from the settlement against the fourth defendant in that event. However, that appears to be of lesser utility since on the evidence it is unlikely that there will be any substantial prospect of recovery from the fourth defendant if he fails in the third party proceedings.

[9] There is evidence of a general kind that in 2001 and subsequently there were attempts by the defendants to have the issues of contribution between them resolved. These ended when the fourth defendant went to New Zealand. It was suggested that the second and third defendants were no longer interested in pursuing the fourth defendant. No steps were taken within the last 2 years by the fourth defendant to advance the third party proceedings. Nor did the third parties agitate the issues in the third party proceedings themselves.

[10] It may be thought that each may have had an interest in hastening slowly although that conclusion does involve a degree of speculation in the absence of evidence. The first defendant may have had an interest in not pursuing contribution against the fourth defendant without knowing whether it would prove to be the case that he would recover from one or other of the third parties and be a fruitful source of the benefits of any judgment against him in the contribution proceedings. The third parties presumably had little interest in bringing to a head proceedings against them that were apparently in abeyance. The fourth defendant, not having heard from either the first defendant or the third parties, probably had an interest in not causing either proceedings to revive by showing an interest in them. There was a possible conjunction of interests, all calculated to not stir up the proceedings.

[11] It is true that the fourth defendant had not pursued the third party proceedings expeditiously, as he undertook to do. That may not be irrelevant but seems more related to the relationship as between the defendants than to the question whether the third party claim should be struck out. It is against the background of all these circumstances that the application by the third parties must be decided.

[12] In *Tyler v Custom Credit Corporation Limited (in liq)* [2000] QCA 178 a review of factors relevant to determining whether the interests of justice required a case to be dismissed for want of prosecution was conducted. The reality of the present case is that probably for a combination of reasons including the fact that the fourth defendant went to live in New Zealand there has been delay. For reasons developed above there was probably not any particular incentive for the fourth defendant, the first third party or the second third party to bring matters to a head.

[13] On behalf of the first third party, it was submitted that the prosecution of the proceedings had been characterised by periods of delay. There had not been proper disclosure by the fourth defendant. There had been a delay in commencing the third party proceedings. Features of this were referred to earlier in these reasons. It was also submitted that the prospects of success against the first third party were not promising either in negligence or under the *Trade Practices Act* 1974 (Cth*)*. It was submitted that it was the kind of case where evidence of discussions between the fourth defendant and employees of the first third party in 1995 would need to be focused upon. There will also need to be evidence of the kind of insurance available as an alternative to the policy provided in 1995. It was submitted that there was prejudice in the sense discussed in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551-552 and 555 and *Quinlan v Rothwell*

[2002] 1 Qd R 647. It was submitted that either under the *Uniform Civil Procedure Rules* or the inherent jurisdiction the third party proceedings should be dismissed.

[14] On behalf of the second third party it was submitted that it would be necessary to analyse events involving the fourth defendant about nine years before the trial was likely to be held, to establish whether the fourth defendant's conduct amounted to failure to take reasonable precautions within the meaning of the policy of insurance. The prospects of success against the first third party, it was submitted, were not good. Further the fourth defendant was out of the jurisdiction and impecunious. (In my view the last matter is not of particular weight in this particular context although it may have implications for further conduct of the action if security for costs were sought). It was submitted that prejudice by reason of the delay was likely to occur in the case of the second third party.

[15] While accepting that the state of the matter is quite unsatisfactory, I am not persuaded that the case is one where the third party proceedings should be struck out at this point. However, it is a case where a strict management regime should be put in place to ensure that the matter is bought to a state where it is ready for trial as soon as possible. I therefore refuse the applications to strike out the third party proceedings. I give leave to the fourth defendant to take a further step in the proceedings. I order that costs of and incidental to each application be costs in the cause.