SUPREME COURT OF QUEENSLAND

CITATION:	*Jenkins & Anor v Martin & Anor; Barwicks v Jenkins & Anor* [2005] QCA 64
PARTIES:	**ROBERT ALEXANDER JENKINS** **BERICE HOPE JENKINS** (plaintiffs/appellants) **v** **WILLIAM JOHN MARTIN** (first defendant/first respondent) **BARWICKS (A FIRM)** (second defendant/second respondent) **BARWICKS (A FIRM)** (plaintiff/respondent) **v** **ROBERT ALEXANDER JENKINS** **BERICE HOPE JENKINS** (defendants/appellants)
FILE NO/S:	Appeal No 7543 of 2004 SC 3941 of 1997 SC 2728 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2005; 2 March 2005
JUDGES:	Williams and Keane JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – DISMISSAL OF PROCEEDINGS FOR WANT OF PROSECUTION – where events giving rise to the appellants' claim occurred about 15 years ago – where the appellants began proceedings against the second respondent in 1997 and joined the first respondent in 2000 – where the learned judge dismissed the appellants' application to file the tenth version of the statement of claim – where the learned judge dismissed the appellants' claim against both

respondents for want of prosecution on the ground that the respondents were prejudiced by the appellants' delay in delivering a viable statement of claim – whether the learned judge was justified in dismissing the appellants' proceedings for want of prosecution

Queensland Law Society Rules 1987 (Qld)
Uniform Civil Procedure Rules 1999 (Qld)

Chapman v Rogers; ex parte Chapman [1984] 1 Qd R 542, considered
Cooper v Hopgood & Ganim [1998] QCA 114; [1999] 2 Qd R 113, applied
Quinlan v Rothwell [2001] QCA 176; [2002] 1 Qd R 647, cited

COUNSEL: J Stevens for the appellants
J B Sweeney for the first respondent
J C Bell QC, with J C Faulkner, for the second respondent

SOLICITORS: Cusack Galvin & James for the appellants
Carter Newell for the first respondent
Coyne & Associates for the second respondent

[1] **WILLIAMS JA:** Between 1975 and 1985 R A and B H Jenkins (the appellants) were involved with other persons and entities in a venture involving the development of a significant area of land at Airlie Beach. General Credits Ltd (General Credits) and other companies associated with it was the financier with respect to that proposed development. Disputes relating to the venture arose which were resolved by the various parties to the dispute entering into a Deed of Settlement in 1985 (the 1985 Deed). Subsequently disputes arose with respect to the implementation of the terms of that deed. In about May 1988 the appellants sought advice from a Victorian Queen's Counsel, W J Martin (the first respondent), with respect to those disputes. Between then and September 1991 the first respondent gave advice to the appellants on a number of occasions and attended a number of settlement conferences with General Credits and others. A solicitor, Ryan, was involved but the appellants had authorised the first respondent to deal directly with General Credits and to give instructions to solicitors acting on their behalf. In September 1991 Barwicks, the second respondent, were retained to act as solicitors for the appellants in their dispute with General Credits. A formal Client Agreement was entered into between the appellants and the second respondent in September 1993. The retainer of the second respondent was precipitated by the fact that in September 1991 General Credits issued proceedings (No 1596 of 1991) against the appellants and associated entities primarily seeking a declaration that General Credits was not bound by the 1985 Deed. If such a declaration was made the appellants would have been exposed to a much greater liability to General Credits. The appellants authorised the first respondent to give instructions to the second respondent on their behalf with respect to the conduct of the defence to the action commenced by General Credits. The appellants counter-claimed for damages for negligence and fraud and the first respondent advised them they had a chance of receiving $3 million. Settlement conferences failed to resolve the dispute and the

matter went to trial in the Supreme Court in about April 1994. After some days of hearing the proceedings were settled on 18 April 1994 on terms which largely left the position of the appellants under the 1985 Deed intact. But the appellants were dissatisfied with the settlement mainly because they allege that they had been led to believe by the first respondent that they would have achieved much more by defending and counterclaiming in the proceedings.

[2] In about December 1996 the second respondent submitted a Bill of Costs in Taxable Form which was taxed in default of any appearance by or on behalf of the appellants. In about June 1997 the second respondent commenced proceedings seeking recovery of their costs in the total sum of $316,154.55 (No 3941 of 1997). On an application for summary judgment the appellants were given unconditional leave to defend and a defence and counterclaim was filed. In that pleading delivered 23 June 1997 the essential allegation made by the appellants was that their good claim to recover over $3 million had been lost because of mismanagement by their legal representatives; in consequence it was said that the second respondent did not perform its retainer and in consequence was not entitled to payment of costs. It is not necessary to recount here the progress of that proceeding between June 1997 and early 2000 other than to record that amended counterclaims were delivered in June 1997, May 1999 and August 2000. In 2000 the appellants amended their counterclaim by adding the first respondent as a defendant to it, and significantly altered their complaint against their legal representatives with respect to the 1994 settlement. As P D McMurdo J said in his reasons for judgment under appeal: "However by 2000, the Jenkins complaint had changed dramatically, from saying that a good case had been badly conducted, to saying that their case against General Credits was always a weak one, and that until April 1994 they had been wrongly advised by Mr Martin and Barwicks that it was a good case." In March 2000 the appellants commenced separate proceedings (No 2728 of 2000) against the first respondent but those proceedings were not served until September 2000. Statements of claim were served on the first respondent bearing the dates March 2000 and February 2001. Then in March 2002 Moynihan SJA ordered that the two proceedings be consolidated and further ordered that the appellants file and serve a statement of claim in the consolidated proceeding by 28 March 2002. That statement of claim in the consolidated proceedings was the third statement of claim with respect to the first respondent, and the fourth pleading against the second respondent. It appears that two further statements of claim in the consolidated proceeding were delivered before that described as the sixth was delivered in May 2003, the seventh in July 2003, and the eighth in September 2003.

[3] Applications then came on for hearing before P D McMurdo J on 1 October 2003. For reasons delivered on 21 November 2003 it was ordered that the statements of claim filed 8 July and 30 September 2003 be struck out and it was further ordered that the appellants "are to file no further statement of claim except after at least 21 days from the provision of a draft of that pleading to the defendants and without the consent of both defendants or the leave of the court". In those reasons for judgment deficiencies in the various statements of claim to that point of time were detailed; the learned Judge considered that there were sufficient defects in the pleadings to warrant their being struck out. His Honour then considered the applications by the first and second respondents to have the proceedings against them dismissed. Those applications relied on the alternative bases of the proceedings being "hopelessly devoid of prospects" and a failure to duly prosecute the proceedings given that many relevant events occurred up to 15 years previously. His Honour said: "Each

of those submissions has considerable force, but at present I am not prepared to dismiss the proceedings." He also pointed out that dismissal of the appellants' proceedings would still leave the counterclaim for unpaid fees with a defence thereto based on quality of service and negligent advice. It was against that background that the order was made with respect to the delivery of a further statement of claim by the appellants. There was no appeal from that decision.

[4] Subsequent relevant events were summarised by P D McMurdo J in his reasons for judgment under appeal as follows:

> "No draft of a further amended statement of claim was delivered before the defendants filed applications for dismissal which were returnable on 12 February 2004. On that day, consent orders were made for the delivery of a draft by 8 March, in default of which the proceedings would be dismissed. On 8 March the plaintiffs delivered a draft statement of claim, which was the ninth version of their pleading. Each of the defendants objected to it and so it was necessary, pursuant to my order of last November, for the plaintiffs to obtain leave to file it. They filed an application for leave on 31 March but that application could not be heard by me in the Applications list in April because of a change to the Court calendar. The application came before me on 22 July. In the meantime, the plaintiffs had amended the ninth version and delivered a draft (tenth) statement of claim on 2 June."

[5] In consequence on 22 July 2004 P D McMurdo J was called upon to deal with the appellants' application for leave to file the tenth version of the statement of claim and the application by each respondent to have the appellants' claim dismissed for want of prosecution. No definitive reliance was placed on the failure to comply with the consent order of 12 February 2004. The respondents argued that the tenth statement of claim was embarrassing, and that it pleaded a case which had no real prospects of success. As the learned judge at first instance recorded, senior counsel then appearing for the appellants conceded during argument "that there were amendments which would have to be made to this tenth version of the statement of claim." Counsel for the respondents strongly urged the court in those circumstances to dismiss the claim of the appellants for want of prosecution. After referring to *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 and *Quinlan v Rothwell* [2002] 1 Qd R 647 the learned judge at first instance noted:

> "If this case was tried tomorrow, Mr Martin would have to turn his mind to a long series of meetings and other occasions upon which it is possible that he gave some advice or that he should have given advice. In that regard, the evidence is that he no longer has notes or relevant records."

The observation was then made that "further factual questions involving the likely attitude of General Credits to the settlement of the [1991] proceedings" would arise; such questions could hardly be answered appropriately in 2004-5 (or at some later time). In consequence of that his Honour found that the first respondent was prejudiced by the delay and in particular by the fact that a viable statement of claim had not yet been delivered. However the learned judge indicated he would not dismiss the claim on the ground that it was "obviously . . . hopeless." The claim against the first respondent was to be dismissed because he was "very seriously disadvantaged" by the delay which was not satisfactorily explained. The claim

against the second respondent was to be dismissed because the "same difficulties" were involved. There was no satisfactory explanation for the dramatic change in the nature of the claim against that respondent, and no satisfactory explanation for the failure to deliver a viable statement of claim after ten attempts. For those reasons published on 5 August 2004 his Honour made the following orders:

> "1. The plaintiffs' application for leave to file a statement of claim is dismissed.
> 2. The proceeding against the first defendant is dismissed for want of prosecution.
> 3. The proceeding against the second defendant is dismissed for want of prosecution, on condition that within fourteen days the second defendant undertakes that it will not pursue within the present proceeding or otherwise any claim for or in relation to fees and expenses as against the plaintiffs for which the second defendant sued in SC 3941 of 1997".

[6] From that decision a Notice of Appeal was filed on 31 August 2004. It should be noted that leave was granted (without opposition) on the second day of hearing in this court to file an amended Notice.

[7] The matter came on for hearing in this court on Friday 25 February 2005. Counsel for the appellants submitted that the appeal could not then proceed. It appeared that between the filing of the original Notice of Appeal and the matter coming on for hearing there had been correspondence between the solicitor for the appellants and the solicitor for the first respondent which prima facie evidenced a compromise of the whole of the proceedings between those parties. Counsel for the first respondent indicated that his instructions were that the matter had been compromised and the first respondent stood by that compromise. Counsel for the appellants intimated that on his instructions there was a dispute as to the authority of the solicitor for the appellants to have entered into the subject correspondence with the solicitor for the first respondent. He indicated that he had been informed by the male appellant that if it was held there was a compromise as alleged then he proposed to sue his current solicitor. It was on that basis that the adjournment was sought.

[8] This court then pointed out that it was not appropriate for it to determine whether or not there had been a compromise. It intimated that the appeal should proceed. If the appellants were successful then undoubtedly the first respondent would amend his defence and plead the compromise. If the appeal was unsuccessful then it would be a matter for the parties to determine whether or not the alleged compromise should be enforced or whether some other order should be made. After exchanges between bench and bar, and reference to the *Queensland Law Society Rules* 1987 (Qld) and observations thereon by Campbell CJ in *Chapman v Rogers; ex parte Chapman* [1984] 1 Qd R 542 at 543-545, it was accepted that the current solicitor for the appellants should not immediately withdraw because to do so would jeopardise the appellants' interests with respect to the appeal. The position was then reached that all parties were agreed that the appeal should proceed. But because there had been adjournments throughout the day to enable instructions to be taken it was obvious that the matter could not be completed on 25 February 2005. The court intimated that it was able to hear the matter on the following Wednesday, 2 March 2005, but Mr Bell QC for the second respondent was not then available. In consequence the somewhat unusual course was agreed to of hearing submissions from Mr Bell on the afternoon of 25 February 2005 and the remaining submissions

on 2 March 2005. That also gave counsel for the appellants, who had only recently been briefed, further opportunity of preparing submissions.

[9] On 2 March counsel for the appellants sought to rely on two affidavits recently sworn; a lengthy one from his instructing solicitor, and a shorter one from the male appellant. Objection was taken by the respondents to the court relying on that material; reference was made to r 766 of the *Uniform Civil Procedure Rules* 1999 (Qld). The court permitted the affidavits to be filed, but ruled that the contents thereof could not be referred to in support of the appeal.

[10] Between the filing of the original Notice of Appeal and the matter coming on for hearing there had been an application by the respondents to a judge of the trial division seeking an order for security for costs. In the course of that application a further draft statement of claim came to be placed on the court file. The affidavit of the solicitor which the appellants sought to file on 2 March 2005 also exhibited another statement of claim which counsel for the appellant submitted was that on which the appellants now relied. This court intimated that it would not give consideration to the statements of claim which came into existence after the orders of P D McMurdo J of 5 August 2004.

[11] But the court intimated to the parties that it proposed to deal with the appeal on the assumption that a viable statement of claim could have been delivered within a short period of time after the orders of 5 August 2004. That meant that the critical question for determination on the hearing of the appeal was whether the learned judge at first instance was justified in dismissing the appellants' proceedings for want of prosecution on 5 August 2004. If those orders were correct then it was beside the point that a viable statement of claim could have been delivered; the position was essentially no different from that where a viable statement of claim was before the court but nevertheless the action was dismissed for want of prosecution.

[12] The submissions by counsel for the appellants on the hearing of the appeal were more in keeping with submissions one would expect to hear at first instance rather than on the hearing of an appeal against the orders made at first instance in this case. It was incumbent upon the appellants to demonstrate some error on the part of the learned judge at first instance in reaching the conclusions which he did. Ultimately the court took counsel for the appellants through the findings contained in paragraphs [32] - [42] of the judgment appealed against and counsel was unable to point to any error of fact or otherwise with respect to the findings and observations contained therein.

[13] It is clear that at any trial based on the allegations contained in the tenth draft of the statement of claim it would be necessary to canvass the nature of the disputes resolved by the 1985 Deed, the nature of the disputes giving rise to the 1991 litigation and its resolution in April 1994, and more critically it would necessarily involve an evaluation of the chances of General Credits and its associates either being ordered to or agreeing in a compromise to pay to the appellants a significant sum of money if the disputes between 1988 and 1994 had been handled differently by their legal advisors. Given that the latest version of the pleading alleges that the appellants' case against General Credits was always hopeless but they were badly advised that it was a good one, it is difficult to see how substantial damages could be recovered over and above costs they actually incurred in paying their legal

advisers. Such difficulties are at the centre of the problems the appellants' current legal advisors have had in drafting a viable statement of claim.

[14] The learned judge at first instance understandably cited the passage from the judgment of Pincus JA in *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 at 122 where his Honour said:

> "It is desirable that litigants and their lawyers be given to understand that the Court will not necessarily countenance such a long delay in achieving a formulation of the allegations on which the action is based."

He also referred to the observation of McPherson JA at 124 in that case where it was stated 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."

[15] Here the appellants were put on notice by the order made on 21 November 2003 that the time had come for them to deliver a viable statement of claim otherwise they faced the real prospect of having their claim dismissed for want of prosecution. Thereafter senior counsel was engaged to draft a statement of claim, but even he conceded on 22 July 2004 that that draft was seriously deficient. The threat of dismissal was confirmed by the consent order of 12 February 2004; in default of delivery of a draft statement of claim by 8 March 2004 the proceedings would be dismissed. That order was not relied on as the ultimate basis for dismissal, but it clearly put the appellants on notice that time was running out for them.

[16] Counsel for the appellants advanced a submission that there was something unfair about the second respondent on 22 July 2004 undertaking not to pursue the claim for costs in the sum of $316,154.55 if the appellants' claim was dismissed for want of prosecution. There is, in my view, no validity in that submission. In giving his reasons for making the orders which he did on 21 November 2003 the learned judge referred to the fact that dismissal of the appellants' proceedings for want of prosecution would not put paid to the litigation between them and the second respondent because the claim for unpaid fees would remain with the defence that because the second respondent did not perform its retainer it was not entitled to recover costs. It was undoubtedly because of those observations that the second respondent proffered the undertaking at the subsequent hearing.

[17] The appellants have not demonstrated any error on the part of the learned judge at first instance and have not advanced any argument justifying the allowing of the appeal.

[18] The appeal should be dismissed with costs.

[19] **KEANE JA:** I have had the advantage of reading the reasons of Williams JA. I agree with those reasons and with the orders proposed by his Honour.

[20] **DOUGLAS J:** I also have had the advantages of reading the reasons of Williams JA and agree with his Honour’s reasons and the orders proposed by him.