SUPREME COURT OF QUEENSLAND

CITATION:	*Arc Holdings Pty Ltd v Riana Pty Ltd and Another* [2008] QSC 191
PARTIES:	**ARC HOLDINGS (AUST) PTY LTD (ACN 111 648 643)** **(plaintiff)** **AND** **RIANA PTY LTD (ACN 010 976 815)** **(first defendant)** **AND** **REPPALS (1) PTY LTD (ACN 085 994 136) trading as MAIN COMMERCIAL FIRST NATIONAL** **(second defendant)**
FILE NO/S:	BS 9189 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application to reactivate a matter
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2008
JUDGE:	Atkinson J
ORDER:	**1. The matter be reactivated** **2. The plaintiff should pay the defendants' costs of and incidental to the application to reactivate.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – where case flow management of proceedings in the civil jurisdiction in Brisbane gives practical effect to r 5 of the UCPR, rules imposing times for taking steps in litigation and the direction making power of the court – where Practice Direction No 4 of 2002 paragraph 5.5 provides procedure for reactivating a matter that has been deemed resolved – whether a matter that has been deemed resolved should be reactivated

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – where plaintiff complied with some but not all case flow directions – where adequate explanation for failure to comply with directions favours an exercise of the discretion to reactivate the matter – where matter should have been relisted before the court for variation to orders made before the matter was deemed resolved – where failure to make application to vary directions before matter was deemed resolved should sound in costs

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – where matter is now ready for trial – where claim and defences must be regarded as having sufficient prospects of success for the claim to need to be resolved by litigation – where no material put before the court suggests the defendants will suffer prejudice from a decision to reactivate

Supreme Court Act 1991 (Qld), s 118D

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 280, r 366, r 389

Bazley v State of Queensland [2001] QSC 476, cited

Birkett v James [1978] AC 297, cited

Bishopgate Insurance Australia Ltd (in liquidation) v Deloitte Haskins and Sells, Supreme Court of Victoria, Appeal Div, No 4901 of 1989, 9 September 1994, cited

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited

Buderim Ginger Ltd v Booth [2003] 1 QdR 147, cited

Campbell v United Pacific Transport Pty Ltd [1966] QdR 465, cited

Collingwood v Calvert CA No 3028 of 1996, 6 December 1996, cited

Cooper v Hopgood & Ganim [1999] 2 QdR 113, cited

Cousins v Mt Isa Mines Ltd [2006] 2 QdR 343, cited

Department of Transport v Chris Smaller (Transport) Ltd [1989] 1 AC 1197, cited

Evans v Speakman [2008] QCA 034 147, cited

Gleeson v Brock [1969] QdR 361, cited

Hall v RH & CE McColl Pty Ltd [2007] QCA 182, cited

Hood v State of Queensland [2003] QCA 408, cited

Holmes v Civil & Civic Pty Ltd CA No 15 of 1992, 14 September 1992, cited

Hoy v Honan CA No 4058 of 1996, 19 August 1997, cited

Kaats v Caelers [1966] QdR 482, cited

Keioskie v Workers' Compensation Board of Queensland CA No 46 of 1992, 15 September 1992, cited

Lewandowski v Lovell (1994) 11 WAR 124, cited

Norbis v Norbis (1986) 161 CLR 513, cited

Quinlan v Rothwell [2001] QCA 176, cited

Randell v Charter [2003] QCA 180, cited

Raso v Bayliss [2005] ACTSC 94, cited

Stollznow v Calvert [1980] 2 NSWLR 749, cited

Tate v McLeod [1969] QdR 217, cited

Tyler v Custom Credit Corp Ltd & Ors [2000] QCA 178, applied

Witten v Lombard Australia Ltd (1968) 88 WN (pt 1) NSW 405, cited

COUNSEL: P Woods for the first defendant

SOLICITORS: Delaneys Lawyers for the plaintiff

J Hall Lawyers for the first defendant

Carter Newell Lawyers for the second defendant

[1] The plaintiff has applied for these proceedings to be reactivated pursuant to paragraph 5.5 of Practice Direction No. 4 of 2002 (PD 4/2002). The application is necessary because the matter was deemed resolved on 12 July 2008.

[2] The proceedings were given directions on 24 April 2008 as a result of a case flow management intervention. Case flow management of proceedings in the civil jurisdiction in Brisbane has been implemented to give practical effect to r 5 of the Uniform Civil Procedure Rules (UCPR) and the rules imposing times for taking steps in litigation and the direction making power of the court (UCPR r 366; *Supreme Court Act 1991* s 118D(2)(a)). It is regulated by PD 4/2002. The aim is to ensure that proceedings progress to a timely and cost-effective resolution.

[3] At the heart of the Queensland case flow management system is the concept that ordinarily a matter should be ready for trial within 180 days of the defendant's notice of intention to defend being filed. If no request for trial date has been filed by that time, the Registry will send the parties a notice known as a CFM2. In response the parties must propose an acceptable case management plan or the matter will be referred to the case flow management judge who will give directions for the timely disposition of the proceedings. The directions are designed to ensure that any case management plan proposed at the directions hearing is comprehensive, including a date by which the request for trial date must be filed or the matter will be deemed resolved, to ensure cases are properly prepared for trial, to excise those which are not going to trial and to deem resolved those cases which should in fact be finalised or in which the parties cannot comply with directions.

[4] The court expects the legal profession and parties to progress matters to resolution by early formulation of final pleadings to define the issues, communication with all other parties involved to propose a case management plan and to prepare the matter for an early resolution through negotiation or mediation or trial, if it cannot be otherwise resolved. The case flow management system is designed to ensure that those expectations are met and to facilitate the just and expeditious resolution of the real issues in dispute at a minimum of expense. This is clearly in the public interest. The days of litigating at leisure are over.

[5] The directions in this case were made on 24 April 2008 by Atkinson J, the designated case flow management judge. The directions provided specific dates for delivery of particular documents by the plaintiff to the second defendant; delivery of the plaintiff's expert town planning report; and the time by which mediation was to be completed. The directions finally provided that if the matter did not resolve at mediation, the request for trial date be filed by 11 July 2008 or the matter would be deemed resolved. No request for trial date had been filed by that date so on 12 July 2008 the matter was deemed resolved.

[6] On 1 August 2008 the plaintiff filed an application to have the matter reactivated proposing a plan for the timely determination of the matter. The application is governed by paragraphs 5.4 and 5.5 of PD 4/2002. Paragraph 5.4 provides:

> "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."

[7] Pursuant to paragraph 5.5, the registrar may refer the matter to a judge for decision. In accordance with the registrar's usual practice where an order that the matter be deemed resolved was made by a judge, the application was appropriately referred to me for decision. Once a matter has been deemed resolved by court order, the parties cannot have it reactivated by a consent order.

[8] On an application for reactivation, the party seeking that relief must, by affidavit, satisfactorily explain and justify the circumstances in which the matter was deemed resolved. Matters which will inform the discretion of the court as to whether or not

to reactivate the proceedings are similar to those factors which are relevant to considering whether or not to dismiss an action for want of prosecution under UCPR r 280 or whether to give leave to proceed under UCPR r 389 which were set out in *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [2].[1] These factors relate to the conduct of the litigation and the reasons for the failure to comply with directions leading to the matter being deemed resolved, as well as a consideration of the utility of the litigation. 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.[2]

[9] The relevant factors include:

(1) The conduct of the litigation prior to the directions being given. This may include: how long ago the events alleged in the statement of claim occurred;[3] what delay there was before the litigation was commenced; how long ago the litigation was commenced or causes of action were added;[4] and whether or not the litigation has been characterised by periods of delay;[5]

(2) What explanation is provided for the failure to comply with the directions which has led to the matter being deemed resolved; [6] and whether the failure to comply with court directions is attributable to the plaintiff, the defendant or both the plaintiff and the defendant or their legal representatives;[7]

(3) Whether or not the failure to comply with directions has resulted in prejudice to the defendant leading to an inability to ensure a fair trial;[8]

(4) How far the litigation has progressed[9] and how close it is to trial;[10]

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1 See also *Bazley v State of Queensland* [2001] QSC 476 at [22]–[23]; *Buderim Ginger Ltd v Booth* [2003] 1 QdR 147 at [22]; *Randell v Charter* [2003] QCA 180 at [20]; *Hood v State of Queensland* [2003] QCA 408 at [4] ; *Raso v Bayliss* [2005] ACTSC 94 at [18]; *Cousins v Mt Isa Mines Ltd* [2006] 2 QdR 343 at [29]; *Hall v RH & CE McColl Pty Ltd* [2007] QCA 182 at [13]; *Evans v Speakman* [2008] QCA 034 147 at [49].

2 *Witten v Lombard Australia Ltd* (1968) 88 WN (Pt1) NSW 405 at 412; *Stollznow v Calvert* [1980] 2 NSWLR 749; *Norbis v Norbis* (1986) 161 CLR 513 at 538; *Cooper v Hopgood & Ganim* [1999] 2 QdR 113 at 118-119, 124.

3 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197 at 1207-1208 per Lord Griffiths; *Bishopgate Insurance Australia Ltd (In liquidation) v Deloitte Haskins and Sells*, Supreme Court of Victoria, Appeal Div, No 4901 of 1989, 9 September 1994 at 22, 23; *Hoy v Honan* CA No 4058 of 1996, 19 August 1997 at 4; *Cooper v Hopgood & Ganim* at 120, 121.

4 *Cooper v Hopgood & Ganim* at 120 per Pincus JA.

5 *Birkett v James* [1978] AC 297 at 322-323; *Bishopgate Insurance Australia Ltd (In liquidation) v Deloitte Haskins and Sells* at 27; *Cooper v Hopgood & Ganim* at 119, 120, 124.

6 *Campbell v United Pacific Transport Pty Ltd* [1966] QdR 465 at 473-474; *Witten v Lombard Australia Ltd* at 412; *Dempsey v Dorber* [1990] 1 QdR 418 at 420; *Keioskie v Workers' Compensation Board of Queensland* CA No 46 of 1992, 15 September 1992 per Thomas J at 4; *Cooper v Hopgood & Ganim* at 124.

7 *Campbell v United Pacific Transport Pty Ltd* at 473, 475; *Kaats v Caelers* [1966] QdR 482 at 497; *Tate v McLeod* [1969] QdR 217 at 224-225; *Gleeson v Brock* [1969] QdR 361 at 369*; Holmes v Civil & Civic Pty Ltd* CA No 15 of 1992, 14 September 1992; *Keioskie v Workers' Compensation Board of Queensland* per Thomas J at 7; *Lewandowski v Lovell* (1994) 11 WAR 124; *Hoy v Honan* at 5; *Collingwood v Calvert* CA No 3028 of 1996, 6 December 1996 at 5, 7, per Fitzgerald P; *Cooper v Hopgood & Ganim* at 124.

8 *Witten v Lombard Australia Ltd* at 412; *Dempsey v Dorber* at 420; *Keioskie v Workers' Compensation Board of Queensland*; *Bishopgate Insurance Australia Ltd (In liquidation) v Deloitte Haskins and Sells* at 24-25; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 554-555 per McHugh J; *Cooper v Hopgood & Ganim* at 118, 124.

9 *Keioskie v Workers' Compensation Board of Queensland* at 10 per Thomas J.

(5) What prospects the parties have of success in the action;[11] a plaintiff must be prepared to show that it has sufficient prospects of success and, where relevant, a defendant that it has sufficient prospects of defending the matter, that the litigation should be allowed to continue. If the case is not one needing judicial determination then there is no point in reactivating it.

The prior conduct of the litigation

[10] This matter commenced when the plaintiff filed a claim against the two defendants on 1 November 2005 with regard to a contract of sale entered into on 17 December 2004 to purchase vacant land known as Lot 24 Gold Coast-Springbrook Road (Gooding Drive) Merrimac (the land contract) and described as Lot 24 on RP 158466 County of Ward Parish of Gilston in the State of Queensland (the land) for the sum of $5,000,000 (the purchase price). The land contract was subject to two variations in July 2005. It appears therefore that the litigation was commenced not long after the dispute between the parties arose.

[11] The claim followed an originating application filed in BS 9104/05 on 28 October 2005 by the first defendant in this action seeking a declaration that the plaintiff's purported termination of the land contract was invalid and seeking removal of a caveat over the land. On 15 November 2005, the originating application was dismissed by consent and upon certain undertakings the caveat was removed.

[12] A notice of intention to defend was filed in this action by the first defendant on 22 November 2005 and the second defendant 10 May 2006. The defence of the second defendant was filed well outside the time provided by r 137 of the UCPR that a notice of intention to defend should filed within 28 days after the date the claim is served. Particulars were sought and given and disclosure took place.

[13] On 12 September 2006 the first defendant made an application that the court enter judgment against the plaintiff pursuant to r 293(1) of the UCPR. That application was adjourned by consent on 26 September 2006. On 9 October 2006, the application for judgment was dismissed. On 5 October 2006, the plaintiff filed an amended statement of claim pursuant to r 378 of the UCPR. On 18 October 2006, the second defendant filed an amended defence. On 22 November 2006, the plaintiff filed an amended claim pursuant to leave granted on 9 October 2006 and r 377 and a reply to the defences of the first defendant and the second defendant. On 1 December 2006, the first defendant filed a notice of change of solicitor. Nothing more happened on the court file until the matter was heard as a case flow review on 24 April 2008 where orders were made to progress the matter to mediation and, if necessary, to trial.

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10 *Bazley v State of Queensland* at [58]; *Quinlan v Rothwell* [2001] QCA 176 at [9], [35].

11 *Keioskie v Workers' Compensation Board of Queensland* at 2-3 per McPherson J; *Cooper v Hopgood & Ganim* at 124.

[14] It appears, however, that the case was still an active one requiring resolution. The parties were continuing to canvas issues such as whether and in what way security for costs should be provided and providing further discovery. The litigation had become bogged down rather than proceeding to resolution. Such circumstances amply demonstrate why the case needed case flow management but are not sufficient reason not to reactivate it.

Explanation for failure to comply with directions

[15] The plaintiff complied with the directions to provide copies of certain specified documents. However, it failed to provide the expert report by 6 June 2008 as required by the directions. The plaintiff's solicitor explained this failure in two affidavits setting out the reasons for non-compliance. He explained that the plaintiff was unable to procure the expert town planning report from the expert it had retained, Craven Ovenden, until 17 June 2008. On that date an electronic copy was provided by the plaintiff to the first and second defendants.

[16] Mr Delaney, the plaintiff's solicitor, explained that, on the day following the orders made on 24 April 2008 he contacted the plaintiff's expert witness to tell him of the court orders and the date on which the expert report was required to be served, namely 6 June 2008. On 23 May 2008 the town planners contacted Mr Delaney and asked for a copy of the original material change of use (MCU) application lodged by the first defendant with the Gold Coast City Council (GCCC) in 2001 and a copy of any relevant court documentation with respect to the appeal filed by the first defendant in relation to the GCCC's refusal of the first defendant's application for an MCU.

[17] Mr Delaney was of the view that these documents ought to be in the possession of the first defendant and had not been disclosed. He endeavoured to obtain the MCU application from publicly available sources but was unable to do so. The same day he contacted the GCCC to obtain a copy but was told that he would have to make a Freedom of Information (FOI) Request. He was told that if the documentation was required urgently and for the purposes of litigation there should be no delay in obtaining the documents. On the same day Mr Delaney forwarded a letter to the FOI decision maker at the GCCC requesting the relevant documentation and explaining why his request was urgent.

[18] On 27 May 2006 the relevant officer from the GCCC wrote to Mr Delaney requiring payment of the relevant fee and informing him that the statute permitted 45 days to process the application. In view of the litigation, she suggested that he consider applying for the documentation by way of a notice of non-party disclosure. On receipt of the letter Mr Delaney immediately rang the FOI officer. She agreed to attend to the request urgently and said that it should take only one or two days after receipt of payment. Mr Delaney sent her a letter confirming the urgency and a trust account cheque in payment of the fee.

[19] On 2 June 2008, the plaintiff's solicitor searched the court registry in Southport and inspected documents in relation to the appeal proceedings referred to earlier. On 3

June 2008 the plaintiff's solicitor again contacted the FOI officer from the GCCC who had not yet received the plaintiff's solicitor's trust account cheque which had been sent on 28 May 2008. She agreed to proceed with the application in any event despite not having yet received payment of the fee. On 4 June 2008 the plaintiff's solicitor provided his expert town planner with a copy of the relevant court documentation relating to the appeal.

[20] On 6 June 2008 the plaintiff's solicitor contacted his expert town planner asking when he anticipated the production of his report. The expert advised him he had been unable to complete the report due to other pressing matters but would be attending to it as soon as possible. He said that he had to travel to the Gold Coast to visit the site and other relevant sites and intended to do so on 10 June 2008. Mr Delaney stressed to him the urgency of the matter and that the failure to produce the report within the time prescribed by the court order of 24 April 2008 would put the plaintiff in breach of the order. Mr Delaney then met with his expert on 10 June 2008 to discuss the progress of the report and again stressed the urgency with which it was required and requested that it be produced as soon as possible.

[21] On 10 June 2008 the first defendant's solicitor sent a memo by facsimile to the plaintiff's solicitors pointing out that the time for delivery of the expert report had expired and that the report had not been delivered and there had been no explanation for that nor request for an extension. The first defendant's solicitor referred to the order requiring mediation to take place by 27 June 2008 and that the plaintiff had not put any arrangements in place in respect of that order. The first defendant's solicitor said that she held instructions to apply to the court to vary the orders made on 24 April 2008 to include an order that the proceedings be dismissed in the event of further non-compliance.

[22] The plaintiff's solicitor says he made many attempts to contact the FOI officer from the GCCC by telephone but was unable to contact her until 11 June 2008 whereupon she said she had forgotten about the plaintiff's FOI application but that it was almost completed and the documentation would be available for collection at 3.00pm that day. The plaintiff's solicitor collected the documentation and immediately sent it by email to his expert.

[23] On 11 June 2008, in response to the first defendant's facsimile of 10 June 2008, the plaintiff explained to the defendants that there had been delays in procuring the report due to a delay in obtaining relevant documentation from the GCCC by way of FOI Request. The plaintiff's solicitor asserted that in the process of obtaining the expert report it had become apparent to him that the first defendant had failed to disclose all relevant documentation and required an amended list of documents. The plaintiff's solicitor also offered to apply to the court to vary the orders previously made which had required delivery of the expert report by 6 June 2008. This is of course precisely what he should have done; but he did not.

[24] On 16 June 2008 the plaintiff's solicitor contacted his town planning expert to see how the report was progressing and telling his expert that the plaintiff was in breach

of the court order. The town planning expert then promised to have it ready on the following day.

[25] The town planning expert produced an unsigned electronic copy of his report on 17 June 2008. This was eleven days after the required date for service of the report. The plaintiff's solicitor immediately sent a copy of the report by email to the defendants and invited them to submit a panel of approved mediators and advise as to suitable dates. On 23 June 2008 the first defendant's solicitors replied nominating two possible mediators and asking the plaintiff's solicitor to confirm that he had taken steps to have the matter relisted before the court to amend the orders previously given.

[26] On 25 June 2008 the first defendant's solicitors sent a memorandum by facsimile to the plaintiff's solicitors reminding them that they had still not delivered the final signed expert report with annexures. In spite of their expressed view that the plaintiff's request for further disclosure was unnecessary they attached a supplementary list of documents and noted that the plaintiff had still not sought to have the matter relisted before the court for variation to the orders made on 24 April 2008.

[27] On 26 June 2008 the plaintiff's solicitors provided an original signed copy of the expert town planning report to the defendants.

[28] Finally on 11 July 2008, the first defendant's solicitors wrote to the case flow manager seeking a relisting for a variation of the orders made on 24 April 2008. They then wrote to the plaintiff's solicitors enclosing draft orders for their consideration so that the matter would not need to be relisted.

[29] No application to vary the orders that were made on 24 April 2008 had been made by 12 July when the matter was deemed resolved in spite of the first defendant sending to the plaintiff a copy of a proposed draft order. The plaintiff did not agree to the draft order varying the times for compliance with the directions made on 24 April 2008 until 15 July 2008 by which time the matter had been deemed resolved.

[30] The plaintiff's solicitor has provided an adequate explanation for his failure to comply with the directions. He can however be rightly criticised for failing to make an application to vary the directions whereupon adjustments could have been made to the timetable before the matter was deemed resolved. It appears that the defendants would have consented to such a course. The failure to do so should sound in costs. Where, however, an adequate explanation for the failure to comply with directions is set out in the affidavit material, this does not favour an exercise of the discretion not to reactivate the matter.

Prejudice

[31] No material has been put before the court to suggest that the defendants will suffer any prejudice from a decision to reactivate other than that the proceedings against them will continue until resolved.

How close the matter is to trial

[32] It appears that the matter is now almost ready for trial, although the parties have, sensibly, agreed to attempt to resolve their dispute through mediation prior to the matter being set down for trial. It may well be that the production of an expert report by the plaintiff will cause the defendants to want to answer it with a report of their own in which case further directions to accommodate that will be given. This is a case in which the parties should have given consideration to the appointment of a joint expert pursuant to Practice Direction 2 of 2005.

Prospects of success

[33] It is undisputed that the plaintiff entered into the land contract with the first defendant on 17 December 2004. It is also undisputed that on that date the plaintiff paid Senlie Tong Real Estate, an agent acting in conjunction with the second defendant, the real estate agent, $250,000 by way as a deposit and part payment of the purchase price, a term and condition of the land contract, on 17 December 2004. There were two variations to the land contract. By the first variation the first defendant agreed to extend the settlement date to 29 July 2005, conditional upon the plaintiff authorising the second defendant to release the deposit to the first defendant. On July 1 2005 Senlie Tong Real Estate released the deposit to the first defendant. By the second variation, on 29 July 2005, the plaintiff and the first defendant agreed to vary the land contract to extend the settlement date to 26 August 2005.

[34] The plaintiff claims that the land at all material times was "residential property" as defined in *Property Agents and Motor Dealers Act 2000* (the Act) s 17 and therefore that the land contract required compliance with s 366 of the Act by having as a first or top sheet a warning statement in the approved form (the warning statement). The land contract did not have a warning statement so attached. On 26 August 2005 the plaintiff terminated the land contract purportedly in accordance with s 367 of the Act and demanded a return of the deposit from the first defendant.[12] On 12 September 2005 the first defendant refused to refund the deposit.

[35] The plaintiff claims that he has incurred legal expenses in relation to the land contract totalling $6,152.84,[13] and other expenses related to applying for building approval for the land of $326,199. The plaintiff claims a declaration that by notice dated 26 August 2005 it validly terminated the land contract and the plaintiff claims

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12 Pursuant to s 367 of the Act.

13 Assuming that first defendant and second defendant are liable under s 367(5) of the Act.

as against the first defendant repayment of the deposit of $250,000 paid by plaintiff to first defendant on 1 July 2005, or alternatively, as against the first defendant pursuant to s 367(4) of the Act a refund of the above deposit. The plaintiff also claims as against the first and second defendants payment in the sum of $332,352.71 pursuant to s 367(5) of the Act.

[36] Essentially the defendants claim that the land contract was not for the sale of residential property as defined by s 17 of the Act and its sale is, therefore, not governed by the Act. They allege that the purported termination was not valid but was a breach of the land contract so that the plaintiffs have forfeited the deposit.

[37] It appears that this is a claim which will have to be decided after a trial if it is not able to be resolved at mediation. The defendant was not successful in having the claim dismissed under r 293 and it could not be said that the claim as framed is clearly without merit. Both the claim and the defences must be regarded as having sufficient prospects of success for the claim to need to be resolved by litigation.

Conclusion

[38] I am prepared to order that the matter be reactivated. The parties have made written submissions as to costs. In view of the circumstance in which it came to be deemed resolved the plaintiff should pay the defendants' costs of and incidental to the application to reactivate.