# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Puppinato v D & D Machinery Pty Ltd* [2010] QSC 47 |
| PARTIES: | **Stephen Ilario Puppinato**<br>Applicant/Plaintiff<br>**And**<br>**D & D Machinery Pty Ltd ACN 000495287**<br>Defendant/Respondent/Cross Applicant |
| FILE NO/S: | S16/2001 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Rockhampton |
| DELIVERED ON: | 24 February 2010 |
| DELIVERED AT: | Supreme Court Rockhampton |
| HEARING DATE: | 5 February 2010 |
| JUDGE: | McMeekin J |
| ORDER: | 1. **The plaintiff's application is dismissed.**<br>**2. The proceedings S16 of 2001 are struck out.**<br>**3. The plaintiff is ordered to pay the defendant's costs, including reserved costs, of the applications and the proceedings.** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – TIME – DELAY SINCE LAST PROCEEDING – where the last step in proceedings was in November 2007 – where the service of a notice of non-party disclosure did not constitute a step in proceedings – where the defendant sought to dismiss the proceedings for want of prosecution – whether plaintiff's explanation reasonable – whether leave to proceed should be granted<br>PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS BEFORE TRIAL – where the plaintiff sought the determination of a preliminary issue concerning the existence of an agency relationship – where there had been no prior order of the court that there be any separate determination of any question in the matter – where |

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| | the determination is fundamental to the plaintiff's claim – whether the preliminary issue should be determined |
| COUNSEL: | J.W. Lee for the applicant/plaintiff |
| | V.G. Brennan for the defendant/respondent/cross applicant |
| SOLICITORS: | Stephens & Tozer Solicitors for the applicant/plaintiff |
| | McMahon Clarke Legal for the defendant/respondent/cross applicant |

[1] This is an application by the plaintiff in the action, Stephen Ilario Puppinato, for leave to take a step in the proceedings after a delay of two years: see r 389(2) *Uniform Civil Procedure Rules* 1999 ("UCPR").

[2] The respondent, the defendant in the action, D & D Machinery Pty Ltd, has brought a cross application to have the plaintiff's proceedings dismissed for want of prosecution pursuant to either r 280 of the UCPR or alternatively the inherent power of the court.[1]

[3] The plaintiff also sought in his application that a preliminary issue be determined, that issue concerning the existence of an agency relationship between the defendant and various distributors. There has been no prior order of the court that there be any separate determination of any question in the matter: see r 483(1) of the UCPR, nor was there any agreement between the parties that I take that course. The question is fundamental to a significant part of the plaintiff's claims and indeed that is why Mr Lee, counsel who appeared on behalf of the plaintiff, sought that it be determined. Indeed I understood him to submit that if the determination was against his client that would have a significant impact on whether there was any point to persisting with the proceedings.

[4] It seems to me that the agency issue will turn on an analysis of evidence, much of which is not before me, and that it would be entirely inappropriate that the question be determined separately. I indicated in the course of argument that I considered that part of the application premature and that I did not propose to determine that preliminary issue.

[5] The question to consider in determining whether to give leave to proceed under r 389 of the UCPR or whether to dismiss the action for want of prosecution turns on whether the interests of justice require that the case be dismissed.[2] In determining that question the factors identified by Atkinson J in *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [2] are usually referred to. All relevant circumstances of course must be bought into account, but those factors has proved instructive over the years.

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1 As to the availability of the inherent power see *Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176.

2 See *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 at 119.

**The Plaintiff's Case**

**[6]** The proceedings relate to the purchase by the plaintiff of four SAME tractors. It is common ground that the defendant was the importer of those tractors into Australia and the supplier of those tractors to the dealers from whom the plaintiff acquired the tractors. I use the term "purchase" loosely as in fact the plaintiff had finance companies purchase the tractors and leased the tractors from those finance companies. Nonetheless all relevant dealings were between the plaintiff and agents of the dealers.

**[7]** Three of the tractors were purchased in April 1997 from Bundaberg Tractors and Implements Pty Ltd. The fourth tractor was purchased in February 1998. In the present amended statement of claim it is alleged that the fourth tractor was purchased from the "John Dwyer Group" but in a proposed further amended statement of claim the plaintiff wishes to delete the reference to the John Dwyer Group and substitute Herbert River Machinery Pty Ltd.

**[8]** The plaintiff was a cane carter by occupation. He intended to and did use the tractors in the course of his work. He alleges that he had a number of contracts with cane growers associated with the South Johnston Sugar Co-operative Mill. The plaintiff alleges that he made the purpose for which he required the tractors known to those with whom he dealt. He alleges that the tractors were not suitable for that purpose and were not of merchantable quality.

**[9]** The plaintiff's pleading alleges three causes of action: breach of contract, misleading and deceptive conduct pursuant to s 52 of the *Trade Practices Act* 1974 (Cth) ("*TPA*"), and breaches of statutory warranties as to merchantability and fitness for purpose pursuant to s 74B and 74D of the *TPA*. The first two causes of action each require a finding that the persons with whom the plaintiff dealt were agents, or employed by agents, of the defendant.

**The History of the Litigation**

**[10]** The proceedings have advanced at a very leisurely pace. The problems with the tractors were said to be evident sometime in 2000. The claim and statement of claim were filed on 26 November 2001. The defence was filed on 18 February 2002. On 15 February 2002, and hence prior to filing the defence, the defendant served a request for further and better particulars of the statement of claim. There matters rested for four years and four months, until 29 June 2006, when the plaintiff filed an application for leave to proceed and for leave to amend his statement of claim. No step had been taken in the proceedings for four years and four months. Dutney J granted the plaintiff leave to proceed and dismissed the defendant's cross application that the proceedings be dismissed for want of prosecution and gave certain directions concerning the future conduct of the matter.

**[11]** Following the hearing before Dutney J, the plaintiff filed an amended claim and statement of claim on 12 September 2006 and provided a response to the 2002 request for further and better particulars on 22 September 2006.

**[12]** Further clarification was sought by the defendant of those further and better particulars on 13 October 2006 and a response to that request was made on 11 May 2007. In the meantime an amended defence was filed on 23 October 2006. On 19 November 2007 the plaintiff served his list of documents, about a year late.

**[13]** On 4 February 2008 the defendant served its list of documents. That list was not signed through an oversight but there was no suggestion that the plaintiff was under the impression that the list was not the intended list of documents nor does it seem that the failure to sign the list had any effect on the future progress of the proceedings. The defendant solicitors have confirmed by affidavit that the list served on 4 February 2008 is the list on which the defendant will rely for the purpose of the proceedings.

**[14]** That seems to have been the last step taken in the action. On 4 November 2008 the plaintiff's solicitors wrote to the defendant's solicitors querying whether there had been full disclosure and they followed that with a letter pursuant to r 444 of the UCPR. The defendant responded to that correspondence on 8 December 2008 confirming that all relevant documents had been disclosed.

**[15]** On 14 October 2009 the plaintiff's solicitors served a notice of non-party disclosure on ACP Magazines Ltd seeking disclosure of certain magazines published by that company. The relevance, apparently, is that the magazines contained advertisements that the defendant had placed with the publisher and which the plaintiff seeks to argue will assist in its proof that an agency relationship existed between the defendant and the dealers.

**[16]** I take it as established law that service of such a notice does not constitute a step in the proceedings: *Smiley v Watson & Anor* [2001] QCA 269 at [12]. As I have mentioned, the plaintiff now proposes to make further amendments to the statement of claim. In addition to the proposed substitution of Herbert River Machinery Pty Ltd for the John Dwyer Group, further particulars are provided in the amended pleading of various losses that the plaintiff claims that he incurred.

**[17]** It can be seen that since the matter was before Dutney J in August 2006 the plaintiff has amended his statement of claim, provided a response to the request for further and better particulars, and provided a list of documents. That last step occurred in November 2007. Over two years have since elapsed.

**The Explanation Offered for the Delay**

**[18]** The plaintiff has filed an affidavit in support of his application but that affidavit offers no explanation for the delays that have occurred in the prosecution of the proceedings. The defendant relied on an affidavit sworn by the plaintiff on 26 June 2006 in the proceedings before Dutney J in which he explained the delay to that time as being due firstly to his lack of funds, his impecuniosity being caused, he said, by reason of the matters complained of in the statement of claim, and secondly, by the advice that he had received to the effect that he had little prospect of establishing an agency relationship between the defendant and

the suppliers of the tractors. He descended to particularity in identifying the debts that he then had and they were in excess of one million dollars.

**[19]** The plaintiff's solicitors have sworn an affidavit in which they assert that "there are numerous judgements and other creditors seeking payment" from the plaintiff, that "there have been complications arising from our negotiations and correspondence" with those creditors and "this has meant that the matter has not always proceeded as a standard commercial litigation matter and that there have been occasions when the negotiations and correspondence with the creditors have taken precedence over prosecuting the plaintiff's claim against the defendant."

**[20]** The solicitor offers the further explanation that the plaintiff was a truck driver by occupation and that communication with him is thereby rendered difficult. The solicitor asserts that there have been occasions "when instructions have not been able to be taken due to an inability to contact the plaintiff."

**[21]** The material placed before me is not particularly enlightening as to what in fact was done between the receipt of the defendant's list of documents and the service of the notice of third party disclosure on ACP Magazines Ltd. In 2008 it is said that there were "various attendances on client to take instructions; unsuccessful negotiations with creditors; briefs to and receipt of advice from Mr John Lee of counsel." No particularity is offered. Thus it is unknown how many attendances there were on the plaintiff, what instructions were needed to further prosecute the action, what negotiations took place with what creditors, how many briefs there were to Mr Lee, what they related to, and why it was that these caused any delay in the prosecution of the proceedings.

**[22]** A faint submission was made that the defendant bore some of the blame for the delay. It was based on the delay of one month between the plaintiff's solicitors' letter of 4 November 2008, in which they wrote to the defendant's solicitors enquiring as to whether there had been full disclosure and as to whether they were persisting in the denial of the agency relationship alleged in the statement of claim, and the defendant's solicitor's response of a month later confirming that full disclosure had been made. Given that the agency relationship alleged is at the heart of much of the dispute it is puzzling why it took nine months for the plaintiff's side to write that letter, if indeed they were in doubt about matters. I am sceptical of the claim that writing a letter to the other side asking whether they persist in the denials plainly set out in their pleading provides any excuse for delay at all in prosecuting an action. But assuming that it does, here they received a response on 8 December 2008 and so that explains only one month of the delay since the matter was before Dutney J in August 2006.

**[23]** In 2009 the solicitor again swears to there being various attendances on the plaintiff to take instructions, unsuccessful negotiations with creditors and searches for editions of a magazine "Farms and Farm Machinery" from January, February and March of 1997. Again no particulars are supplied. Why it took nine years for the solicitors to decide that advertisements in the press might be helpful to their arguments remains unexplained.

**[24]** It is said that in September 2009 "agreement was finally reached with the judgement creditors of the plaintiff….as to the satisfaction of the plaintiff's numerous debts." Again no particulars are supplied nor is it explained how or why it is that this has caused any delay.

**[25]** It is said further that there were urgent negotiations with "a creditor of the plaintiff" in early November 2009. Again there are no particulars as to who the creditor might be, how much might be owing to the creditor and whether this debt has anything to do with the matters that are the subject of the pleadings.

**[26]** I turn now to the list of matters that were identified by Atkinson J in *Tyler* and which the parties accept need to be addressed here.

**Relevant Matters – Delay in Commencement**

**[27]** The events alleged in the statement of claim occurred in 1997 and 1998. This is not a documents case. The plaintiff alleges that material oral representations were made concerning the quality of the tractors and their fitness for purpose. It seemed inevitable that the detail of the conversations must be of importance.[3] How the plaintiff described his business, the description he gave of the weights the tractors would be hauling and, I suspect, many other matters, would be crucial to the determination of the issue of whether representations were made as the plaintiff alleges. There was a delay of some three to four years between the occurrence of those conversations and the commencement of the litigation.

**[28]** The litigation was commenced in late 2001. Amendments were made to the statement of claim adding the causes of action arising out of the *Trade Practices Act* provisions in September 2006. Relevantly, nine years after the purchase of the first three tractors a new cause of action was added.

**[29]** The plaintiff has now proposed to further amend the statement of claim to substitute a new and different supplier. The proposed pleading asserts that one Edi Carlo Solari made representations to the plaintiff concerning the merchantability and fitness for purpose of the fourth tractor for and on behalf of Herbert River Machinery Pty Ltd, the company it is said was then acting as agent of the defendant in respect to the supply of the tractor. Thus twelve years after the event the plaintiff seeks to introduce a fresh set of oral representations. It also appears that the plaintiff will assert that things were said by Mr Solari that go to the existence of an agency relationship between his company Herbert River Machinery and the defendant.

**Prospects of Success**

**[30]** The submissions of counsel largely focussed on the issue of the plaintiff's prospects of success**.** Mr Brennan who appeared on behalf of the defendant contended that the prospects were poor at best and Mr Lee contended, on behalf of the plaintiff, that his client's prospects were strong. In relation to the causes of action based on s 74B and s 74D of the *TPA*, Mr Brennan submitted that the

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[3] As to the significance on questions of prejudice, in an extension of limitation context, of critical conversations held long ago see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 546 – 548.

plaintiff could not bring himself within those provisions because the tractors were not for household use or "commercial road vehicles" within the meaning of that term as used in s 4B of *TPA* as they were not vehicles acquired principally for the purpose of transporting goods on public roads. That issue can only be resolved in the light of the evidence presented, and I have no knowledge of what the evidence might be as to whether the carting of cane pursuant to the contracts that the plaintiff had involved the transporting of goods on public roads. Mr Brennan also submitted that the proceedings were statute barred pursuant to s 74J of the *TPA*, the relevant limitation period being three years. That point, however, has not been taken in the amended defence.

**[31]** As for the balance of the plaintiff's case, it turns, amongst other things, on establishing agency. Again the issue will turn on disputed factual matters. The extent of the plaintiff's case seems to be that he can establish that the defendant imported the tractors into Australia and distributed those tractors to various identified dealers, that it placed advertisements in magazines identifying those dealers who were the "nearest D & D SAME dealer," and that repair work performed under the manufacturer's warranty was performed by dealers (and perhaps others) but only with the defendant's approval. Finally, it would appear from the material disclosed by the defendant that only those identified as authorised dealers had the right to sell these tractors within Australia. There is a reference to conversations that the plaintiff had with the dealers but that cannot be admissible on the subject issue.

**[32]** I think it fair to say, without in any sense deciding the issue, that the plaintiff will have significant difficulties in establishing the agency relationship. The general manager of the defendant, Mr Max Allan, swore an affidavit in the application in which he exhibited the various documents that evidenced the transactions that took place that involved the plaintiff's acquisition of the subject tractors. According to those documents tractors were ordered from the dealers from the defendant, paid for by financiers engaged by the dealers, and delivered by the defendant to the dealers, all before the plaintiff had any dealings with the suppliers. Those dealers then on sold the tractors to the plaintiff. No commission was paid by the defendant to the dealers and the defendant had no control over the prices charged to the plaintiff. The purchase price that the dealers were required to pay to the defendant was to be paid on delivery and was not contingent on the dealers affecting an on-sale of the tractors. Mr Allan expressly denies the existence of any agency relationship. These documents suggest that the dealings between the defendant and the suppliers to the plaintiff were simply ones of sale by the defendant, purchase by the dealers, and then resale to the plaintiff. Similar arrangements were held by the High Court to not constitute an agency relationship in *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644 at 653. Every case of course depends on its own peculiar facts.

**[33]** I would summarise the position as to the prospects of success issue as being that the plaintiff has not demonstrated that he has strong prospects of success.

**Failure to Comply with Any Order**

**[34]** The plaintiff failed to comply with the orders made by Dutney J but only in a relatively minor way – the amended statement of claim and the response to the request for particulars were each late, but by a period of less than two weeks.

**The Delays & Their Cause**

**[35]** It is plain that the litigation has been characterised by significant periods of delay. I have detailed that above. There was no step between the filing of the defence in February of 2002 and the plaintiff filing his application for leave to proceed in late June 2006. After the defendant filed its amended defence in October 2006, no list of documents was delivered by the plaintiff until thirteen months later on 19 November 2007. Mr Brennan pointed out that in eight and a half years since the proceedings commenced there had been eight formal steps taken.

**[36]** It cannot be said that the defendant has contributed to the delay in any material sense. As I have mentioned, the failure to sign the list of documents served on 4 February 2008 does not seem to have resulted in any practical delay. The only other complaint made about the defendant is that it took one month for it to respond to the plaintiff's letter inquiring as to whether there were any further documents to be disclosed. That exchange took place in November and early December of 2008.

**[37]** When the matter came before Dutney J in 2006 the plaintiff swore that his impecuniosity was responsible for the delays. He made no such claim in the proceedings before me. Certainly the plaintiff's solicitor has raised the question of difficulties in dealing with the plaintiff's creditors as a complicating factor in progressing the litigation. However, the plaintiff's solicitor does not necessarily have any knowledge of the plaintiff's true financial position. That is a matter that is within the plaintiff's knowledge and not necessarily within his solicitor's knowledge. Normally I would expect that if impecuniosity is to be raised as a relevant factor, a plaintiff would explain in detail his or her financial position and how it is that that impacts on their ability to progress the litigation. The matter is aggravated by the fact that the implicit undertaking of the plaintiff, when he sought the leave of the court in 2006, was that henceforth he could progress the litigation in a timely manner. If in fact his true position was that he could not, and that there would inevitably be further years of delay before there could be any expectation of proper preparation and trial, then that surely was something that he was obliged to put before the court.

**[38]** Mr Brennan submits that the failure of the plaintiff to provide any affidavit evidence as to the reasons for the delay or the prospects of success is of itself sufficient to justify denying him leave to proceed and in support points to the comments of Jerrard JA in *Hall v RH and CE McColl Pty Ltd* [2007] QCA 182 at [20] to that effect. Here there may not be a great deal that the plaintiff can say about the prospects of success and so I would not put the bar so high, but the failure of the plaintiff to explain the delay from his perspective is of significance.

**[39]** Ten years have passed since the plaintiff claims that he had significant difficulties with these tractors and that they caused interruption to his business.

The claim that those events have continued to cause the plaintiff an inability to maintain his action and properly prosecute it rings somewhat hollow in respect to the period between the granting of leave in 2006 and the present time, especially in the absence of any sworn material from the plaintiff.

**The Progress of the Litigation**

**[40]** The litigation has not progressed very far. It has reached the disclosure stage. Further amendments to the plaintiff's pleading are proposed. The defendant contends that much remains to be done. Ms Ibanez, the defendant's solicitor, has suggested that the defendant needs to gather a deal of evidence and identifies that evidence at paragraph 13 of her affidavit. It might be said that one would have thought the defendant would have commenced pursuing much of the evidence referred to long ago. It has certainly been aware of the thrust of the plaintiff's allegations for over eight years and in possession of reasonably detailed particulars of his claims since September 2006. What seems to have occurred is that the defendant assumed that the plaintiff was going to let the action go to sleep and so did not actively pursue the gathering of evidence to the extent that might be considered desirable in the period from 2002 to 2006. After the flurry of activity following Dutney J's order, the defendant again seems to have assumed that things were going to sleep. I do not accept that the defendant was entitled to take this attitude and I am not inclined to give this factor much weight in the scales against the plaintiff. The defendant complains that the plaintiff has not been diligent, and with some justification, but if the defendant had been diligent there should have been very little left to do to get the matter ready for trial. The only legitimate complaint that the defendant can make is in relation to the extent that the plaintiff proposes to introduce new issues in the proposed amended statement of claim. That should not delay the preparation of the matter to any great extent.

**Any Fault Attributable to the Advisors?**

**[41]** There is no suggestion that the plaintiff's legal advisors have been the cause of the delay. As Mr Brennan submits, it seems appropriate that the reasons for the delay be attributed to the plaintiff.

**Explanations for the Delay**

**[42]** There is no satisfactory explanation for the delay. As I have said, what explanation is offered is devoid of particulars. It seemed that there were periods of time in which the plaintiff was out of touch with his solicitors. It is not evident why negotiations with creditors should delay the proper prosecution of these proceedings. The explanation proffered from the bar table was that until matters were resolved with creditors the plaintiff was not to know if any successful prosecution of the proceedings would be for his benefit or for the benefit of his lawful creditors. Without knowing more I make no comment on the plaintiff's attitude to paying his creditors, but as an explanation justifying delay I consider it to be unsatisfactory.

**[43]** Given the earlier application before Dutney J the continued delays seem to me to be even more inexplicable and have added gravity.

**Prejudice to the Defendant**

**[44]** The defendant contends that the delays have resulted in substantial prejudice to the defendant and that there should be a conclusion that there cannot be a fair trial in the matter.

**[45]** It is clear that witnesses' recollections of conversations held twelve years or more ago have the potential to have a significant bearing on the outcome of the case. The capacity for persons to accurately recall conversations can only be adversely – and seriously adversely – affected by the passage of such a long period of time. The conversations lie at the heart of the plaintiff's case.

**[46]** Relevant issues include the cause of the machinery breakdowns of which the plaintiff complains. He alleges that the machinery was inadequate for the task that they were expected to perform. The defendant alleges that it was the plaintiff's method of operation that was the problem. The tractors it seems are no longer available for examination and no order has ever been sought either to preserve them for examination or to endeavour to have third parties make them available for examination.

**[47]** Further, Mr Solari has become a relevant witness only in recent times. The defendant's solicitors located him following receipt of the proposed amended statement of claim and, in a relatively short conversation, he has advised those solicitors that although he can recall the plaintiff and recall that he came to purchase a particular tractor he could not recall the specifics of any conversation. Thus there is evidence of erosion of memory from a significant witness on an important issue in the proceedings.

**Miscellaneous Matters**

**[48]** In addition to the matters identified by Atkinson J, another factor that might be material is "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."[4] Whilst those considerations may not be so important in relation to a corporation such as the defendant, it is nonetheless clear that they remain relevant: *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; 239 CLR 175 at [101] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

**[49]** Mr Brennan has drawn my attention to r 5 of the UCPR and the approach of the High Court in *Aon Risk Services,* particularly the comments in relation to the effect of delay on parties to the litigation, litigants more generally and on the administration of justice: see at [24] and [92] to [102].

**Conclusion**

**[50]** In summary there has been long delay, there is an inadequate explanation for it, the plaintiff's prospects of success are not shown to be strong and there is potentially significant prejudice to the defendant such that there must be a real

[4] *Cooper v Hopgood and Ganim* (1999) 2 Qd R 113 at 123-124.

concern as to whether a fair trial can be held. I am conscious of course that if I accede to the order sought by the defendant the plaintiff will be forever barred from pursuing his action.

**[51]** It seems to me that in balancing these various considerations it is in the interests of justice that the plaintiff be denied leave to proceed and that the defendant's application that the proceedings be struck out for want of prosecution be acceded to.

**[52]** The orders will be:

**(a)** The plaintiff's application is dismissed;

**(b)** The proceedings are struck out;

**(c)** The plaintiff is ordered to pay the defendant's costs, including reserved costs.