SUPREME COURT OF QUEENSLAND

CITATION:	*GSM Operations Pty Ltd v Neilsen & Ors* [2011] QSC 76
PARTIES:	**GSM (OPERATIONS) PTY LTD ACN 085 950 803** (plaintiff) v **PAUL GREGORY NEILSEN** (first defendant) and **AHMED EL-SAFTY** (second defendant) and **JOHN HASSAN** (third defendant)
FILE NO/S:	BS11925/08
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	22 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2011
JUDGE:	Dalton J
ORDER:	**The proceedings are reactivated.**
CATCHWORDS:	Practice direction 4/2002 – reactivation of matter deemed resolved – affidavit explaining and justifying – relevant matters for consideration – merits – prejudice – interlocutory nature of deemed resolved order and application to reactivate. *Uniform Civil Procedure Rules* 1999 *Corporations Act* 2001 *Multi-Service Group Pty Ltd (in liquidation) & Anor v Osborne & Anor* [2010] QCA 72 *Barton v Atlantic 3 - Financial (Aust) Pty Ltd & Anor* [2010] QCA 223 *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* [1996] FCA 822 *David Grant & Co Pty Ltd v Westpac Banking Corporation*

(1995) 184 CLR 265

COUNSEL: Mr M Bland for the applicant plaintiff.

Mr C D Coulsen for the respondent second defendant.

SOLICITORS: Minter Ellison Gold Coast for the plaintiff.

QBM Lawyers for the second defendant.

[1] **DALTON J:** This is an application brought by the plaintiff against the second defendant for reactivation of the proceeding after it was deemed resolved.

The Proceeding

[2] The plaintiff alleges that the second defendant guaranteed debts of a company incurred on a trading account established between the plaintiff and that company. It alleges that between November 2007 and May 2008 the plaintiff sold goods to the company for a price of $674,000 which was not paid. It is alleged that demand was made on the guarantee and that demand was not met.

[3] The second defendant admits he did give a guarantee, but says it was subject to the first and third defendants also guaranteeing the amounts owing on the trading account. He says that as the first and third defendants never provided guarantees, he is not liable on his. The second defendant denies he has received a demand and says that a demand is necessary pursuant to the terms of the guarantee.

Progress of the Proceeding

[4] For a simple matter this proceeding has a complicated history. A claim and statement of claim were filed in November 2008. Before they were served on the second defendant, an amended statement of claim was filed. Then, surprisingly, the claim and original statement of claim were served on the second defendant in October, 2009. Before the amended statement of claim was served on the second defendant, solicitors acting for him sent the plaintiff's solicitors a letter requesting copies of the documents referred to in the amended pleading pursuant to r 222 of the *Uniform Civil Procedure Rules* 1999. On 3 December 2009 the plaintiff's solicitors served the amended statement of claim on the second defendant and provided documents in response to the r 222 request. The plaintiff filed a reply to the second defendant's amended defence on 10 March 2010. It has never been served.

Case Flow Directions and Subsequent Progress

[5] On 18 December 2009 directions were made which provided for further and better particulars, a reply, disclosure and mediation. These steps were to occur before the end of April, 2010. The final substantive direction was that, "By Friday 14 May 2010 the parties are to file a request for trial date, in default of which the matter be deemed resolved."

[6] Particulars were sought and received by the plaintiff by 12 February 2010. On 15 March 2010 the plaintiff's solicitors tendered an executed request for trial to the second defendant. The second defendant's solicitors refused to sign it. They referred to the order of 18 December 2009 and pointed out that disclosure had not taken place, nor had mediation. On 22 March 2010 the plaintiff's solicitors

delivered: a list of documents, a supplementary list of documents and a further list of documents. On 24 March 2010 the second defendant's solicitors made a complaint pursuant to r 444 that certain documents had not been disclosed by the plaintiff. On 13 May 2010 the plaintiff's solicitors served yet another supplementary list of documents. It did not disclose the documents in respect of which complaint had been made. No response has ever been made to the r 444 complaint of 24 March 2010.

[7] The second defendant made disclosure by list on 24 March 2010. His solicitors requested copies of documents from the plaintiff's solicitors by way of inspection.

[8] The second defendant's solicitor swears that neither on disclosure, nor in response to the request pursuant to r 222, was any demand upon the second defendant under the guarantee disclosed. This seems to be correct on the material filed. However, at the hearing of the matter, Counsel for the plaintiff tendered a copy of a letter from the plaintiff's solicitors to the second defendant dated 30 September 2008 demanding the sum of $674,000. The letter does not refer to the guarantee. There is no evidence before me that the letter was sent.

The Proceeding is Deemed Resolved

[9] Friday 14 May 2010 came and went. It was the date fixed for the parties to file a request for trial date in default of which the matter was deemed to be resolved. There was no attempt made by either party to apply to have the directions varied before 14 May 2010.

[10] On 9 June 2010, the solicitors for the second defendant sent a letter to the solicitors for the plaintiff referring to the fact that no request for trial date had been filed and concluding, "Accordingly this matter is deemed to be resolved." The next day the solicitors for the plaintiff sent the second defendant's solicitors a letter which read:

> "We refer to the above matter and to our telephone conversation today with Jackie of your office. Please find enclosed the sealed Order as per your request."

Enclosed was an order which is stamped "Final Order" and bears the seal of the Supreme Court. There is one order of the Court: "The matter be deemed resolved." The order shows at its foot that it was prepared in the Office of the Registrar but also at its foot bears the name and address of the plaintiff's solicitors. There is no explanation in the material as to how this order came to be made or what was the telephone conversation which led to the letter of 10 June 2010 being sent. There was a dispute as to whether the plaintiff took the order out. I cannot resolve that on the material before me.

[11] On 24 September 2010 the plaintiff's solicitors wrote to, "The Associate, Supreme Court" referencing this matter and saying:

> "We refer to the above matter and to the Final Order made by Atkinson J on 17 May 2010.
>
> Please confirm whether the Order that 'the matter is deemed resolved' pertain (sic) to all Defendants."

[12] Nothing occurred between the parties between 10 June 2010 and 1 October 2010, when the plaintiff's solicitors sent a letter to the second defendant's solicitors saying:

> "We refer to the above matter and note that Capital Finance appears to have settled with [the first defendant] from sales (sic) of his house. Please provide your client's position for having the matter set down for trial."

[13] Two weeks later the plaintiff's solicitors wrote again. After a further two weeks, the plaintiff's solicitors wrote again, noting that no response had been received and enclosing a request for trial. The second defendant's lawyers responded on 1 November 2010 referring to the deemed resolved order of 17 May 2010 and saying that in the premises, the tender of a request for trial was incompetent. There was one more exchange along similar lines before the present application was made.

[14] This application was made on 9 February 2011 by way of an application sent by the plaintiff's solicitors by letter addressed to the Registrar of the Magistrates Court. This letter enclosed an application for an order, "That the plaintiff be given leave to recommence the file against Mr El-Safty only" and an affidavit from a Mr Russell Norton. An amended application was filed at the hearing of the application.

Matters Relevant to an Application to Reactivate

[15] The deemed resolved concept comes from Practice Direction No. 4 of 2002. The purpose of the Practice Direction is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. It establishes a system to facilitate the just and timely disposition of proceedings by monitoring individual proceedings and intervening when a proceeding is not progressing satisfactorily. The initial trigger for intervention is a show cause notice sent by the Registry pursuant to paragraph 4.3 of the Practice Direction. Paragraph 5 of the Practice Direction is as follows:

> "**5. Responding to notices and restoring proceedings deemed resolved**
>
> 5.1 A party must respond to a notice to show cause by:
> - entering judgment, filing an application for trial date or bringing some other application to facilitate the timely determination of the proceeding; or
> - justifying the failure to enter judgment or file a request for trial date, and proposing a plan to facilitate the timely determination of the proceeding.
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> 5.2 The Registrar may then:
> - give directions in terms of the plan, or otherwise as appropriate to effect the timely determination of the proceeding; or
> - refer the proceeding to a Judge.
>
> 5.3 If cause is not shown the proceeding will be deemed resolved, and the Registrar will notify the parties to that effect by form CFM3.

> 5.4 A proceeding deemed resolved may be reactivated by an application by any party, supported by affidavit material explaining and justifying the circumstances in which the proceeding was deemed resolved, and proposing a plan to facilitate its timely determination.
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> 5.5 The Registrar may then:
> - reactivate the proceeding;
> - give directions appropriate to effect its timely determination; or
> - refer the proceeding to a judge.
>
> ..."

[16] From the heading, and from the context in which paragraph 5.4 of the Practice Direction appears, it is clear that paragraph 5.4 deals with an application to the Registrar who has notified parties pursuant to paragraph 5.3 of the Practice Direction. Paragraph 5.5 gives the Registrar power to either grant the application made under paragraph 5.4 or to refer the proceeding to a Judge. As well, there is a general power at paragraph 6.1 of the Practice Direction for a Judge to review the progress of a proceeding and give directions to facilitate its efficient and timely determination. It is not clear how this matter came before a Judge on 18 December 2009. However, it is clear that the matter was not deemed resolved because cause was not shown in response to a notice sent pursuant to paragraph 4.3 of the Practice Direction. The matter was either deemed resolved by automatic operation of the order of 18 December 2009, or because of the order of 17 May 2010.

[17] There was a dispute between the parties as to the matters I could have regard to in exercising my discretion whether or not to reactivate this proceeding. In *Multi-Service Group Pty Ltd (in liquidation) & Anor v Osborne & Anor*[1] the Court of Appeal made it clear that a deemed resolution of a proceeding is to be contrasted with a process where parties' rights are permanently and finally determined, such as a judgement in default, a summary judgement or a dismissal for want of prosecution – [40]. A proceeding deemed resolved is not brought to a permanent end, but continues in existence, susceptible to reactivation – [39]. The approach on an application to reactivate a proceeding deemed resolved is to be contrasted with the approach of a Court in dealing with summary mechanisms which bring a proceeding permanently to an end. In *Multi-Service Group* the Court of Appeal said:

> "[43] …there being no serious question that the appellants lacked an arguable case, the focus of the primary judge on the application for reactivation should have been on the matters identified in para 5.4 of the Practice Direction, namely, whether the appellants had:
>
> (a) explained and justified the circumstances in which the proceedings was deemed resolved; and
> (b) prepared a plan to facilitate its timely determination.
>
> [44] The nature and extent of the explanation and justification of the circumstances which led to the deemed resolution are, of course, relevant to, but not determinative of the exercise of the discretion to

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1 [2010] QCA 72.

> reactivate. That discretion needs to be exercised consistently with the objectives of the Practice Direction. The focus of the Practice Direction is on the timely disposition of proceedings, not on their retention by means of a de facto stay: its objectives could not be served by allowing the proceedings to linger indefinitely in the twilight zone of 'deemed resolution'."

[18] The applicant contended that I could look to nothing but the two matters at subparagraphs (a) and (b) of paragraph [43] of the *Multi-Service Group* case in exercising my discretion. In particular, the applicant contended I could not look at the merits of the proceeding or the prejudice alleged by the respondent.

[19] The provisions of paragraph 5.4 of the Practice Direction are directed to a Registrar's consideration of an application for reactivation. If a Registrar decides not to reactivate pursuant to paragraph 5.4, it is the proceeding, not the application to the Registrar, which is referred to a Judge pursuant to paragraph 5.5 of the Practice Direction. Thus, while the matters specified by paragraph 5.4 of the Practice Direction are to be in the forefront of the mind of a Judge deciding whether or not to reactivate proceedings, I cannot see that the terms of paragraph 5.4 mandate that these are the only matters a Judge may consider, or that the discretion to reactivate cannot be exercised in an appropriate case if an applicant does not show one or more of those matters. I do not understand the Court of Appeal in *Multi-Service Group* or in *Barton v Atlantic 3 - Financial (Aust) Pty Ltd & Anor*[2] to suggest otherwise. Consistently with what is said at paragraph [44] of the *Multi-Service Group* case (above), in the *Atlantic 3* case, the Court of Appeal was prepared to make orders to reactivate where the explanation of the circumstances in which the matter was deemed resolved did not amount to a justification,[3] and the plan to facilitate the timely determination of the action left much to be desired.[4]

[20] The Court of Appeal considered the merits of the proceeding proposed to be reactivated at paragraphs [43], [52] and [56] of the *Multi-Service Group* case, but only to the limited extent necessary to ascertain that the claims made by the applicant in that matter were arguable. The same approach was taken in the matter of *Atlantic 3* at [28]. If the merits of the proceeding proposed to be reactivated were not arguable, reactivation would be futile. Likewise, if there were some other matter which meant that an application for reactivation would be futile, that could no doubt be considered on such an application.[5]

[21] As to prejudice claimed by a respondent to an application to reactivate, in the *Atlantic 3* case, the Court of Appeal commented that allegations of prejudice to the respondent as a result of delay in the proceedings went more to the merits of an application for dismissal for want of prosecution than an application to reactivate proceedings,[6] and that may be accepted. The type of prejudice alleged in that case is not discussed in any detail, but appears to be the type of prejudice which results from long delay in having a trial in a matter – [26]. The Court of Appeal did not say that prejudice could never be relevant to the exercise of a discretion to reactivate,

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2 [2010] QCA 223 at [27].

3 [28].

4 [27].

5 cf., *Atlantic 3* at [28], there would be no point in reactivating a matter if upon reactivation leave under r 389 would be required, but could not be granted.

6 [27].

and no doubt each case must be determined on its facts. In this case prejudice is not alleged to be due to delay in prosecuting the action so that, say a fair trial cannot be had, but is said to be caused by the respondent changing his position after the deemed resolution of the matter, because it had been deemed resolved. As the discussion below reveals, when that point is examined, it is apparent that it does not go against the reactivation of the matter, although it may go to support an application to bring the matter to a summary end.

The Applicant's Material

[22] The affidavit of Mr Norton, served with this application, was not read by counsel for the applicant. Nonetheless I have it before me because it is part of the exhibit bundle to an affidavit which he did read. It contains little relevant information. It shows that the first defendant was made bankrupt on 7 June 2010. It says that "The defendant's property was sold under mortgagee in possession on 9 April 2010." It is impossible to know from this sentence which defendant is referred to; who sold the property, or whether there was any commercial advantage obtained by the plaintiff from the sale. Mr Norton deposes, "I verily believe that the second defendant, Mr Ahmed El-Safty, has not placed himself into bankruptcy and that the matter can and should proceed". He swears that the money claimed in the action is still owing by Mr El-Safty. He does not attempt to explain or justify how the matter was deemed to be resolved.

[23] The applicant read two affidavits both sworn by a solicitor from a firm which was said to have begun acting for the plaintiff a matter of days before the application was heard. One affidavit exhibits a bundle of correspondence between the applicant's previous solicitors and the second defendant's solicitors without any explanation of that correspondence whatsoever. The second affidavit exhibits a draft order setting out the plan proposed by the applicant to facilitate the timely determination of this proceeding.

[24] It was submitted that the applicant's affidavit material did not fit the description of the material required by paragraph 5.4 of the Practice Direction because it contained no explanation or justification of the circumstances in which the proceeding was deemed resolved. Comparison was sought to be made with the rule in *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund.*[7] The necessity to look carefully at whether an affidavit supporting an application has been filed in accordance with s 459G of the *Corporations Act 2001* arises from the tightly defined jurisdiction of the Court to set aside a statutory demand.[8] There is no comparable language at paragraph 5.4 of the Practice Direction. Nor is there any warrant for closely confining the right to apply to reactivate a proceeding given the purpose of the Practice Direction as stated at paragraph 1 of it, and the injunction there to avoid technicality. In any event, as explained above, a Judge exercising a discretion to reactivate is not strictly bound by the terms of paragraph 5.4 of the Practice Direction.

[25] Having said that, the applicant's material is very sparse. There is nothing showing that the plaintiff at relevant times had instructed its solicitors to proceed with diligence and efficiency. This is important because there is a suggestion from the stop/start chronology of this matter; from the letter of 1 October 2010 and from Mr

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7 [1996] FCA 822.

8 *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 267 – 277.

Norton's affidavit, that other means of recovery were being pursued by the plaintiff. The plaintiff may have made a commercial choice either not to prosecute these proceedings diligently, or to treat the deemed resolved order as the end of the matter. The letter of 10 June is consistent with such a choice. There is no material from the applicant's previous solicitors to explain the reasons for the deemed resolved date passing without an attempt to vary the 18 December 2009 directions, or the lack of any prompt action after the deemed resolved date to reactivate the proceedings. There is no material from those solicitors explaining the circumstances in which the order of 17 May 2010 came to be made and how they came to send a copy of it to the second defendant's solicitors on 10 June 2009 without any indication that they demurred from the deemed resolved result, or the apparent final nature of the order. These matters call for explanation. There is nothing showing that the applicant's previous solicitors would not co-operate in making an affidavit for use on this application.

[26] I was told that the dearth of material on behalf of the applicant results from a deliberate choice not to traverse these matters so as not to waive legal professional privilege. No doubt that choice was open to the applicant, but in making it there was a very real risk that it would not be in a position to persuade the court to grant the relief it seeks. It is not at all uncommon for these types of matters to be explained in similar applications.

[27] Counsel for the applicant relied upon the correspondence exhibited to his affidavit material to show that the applicant's previous solicitors were incompetent in their conduct of the matter and in particular had no understanding of the nature of a deemed resolved order. He relies upon this to explain and justify how the proceeding came to be deemed resolved. I have related in the narrative above the factual material he extracted from the correspondence. It shows that the previous solicitor's conduct of the matter was far from satisfactory. There are some things which could only be accounted for by error or incompetence. However, in the absence of any material of substance, either from those solicitors, or from the plaintiff, I am not prepared to assume that incompetence was the explanation for the failure diligently to prosecute the action after the order of 18 December 2009; for the failure to seek to have that order varied, or for the failure to have the order of the 17 May 2010 promptly set aside. Incompetence may account for all those things, but it not the only explanation open on the face of it. It follows that the applicant has put before me no satisfactory explanation and no justification of the circumstances in which this matter was deemed resolved.

[28] Another fault with the applicant's material is that the plan proposed to facilitate the timely determination of this matter is inadequate. The plan is as follows:

> "2. By 11 March 2011, the Second Defendant request any documents contained in the List of Documents filed by the Plaintiff that the Second Defendant requires copies of.
>
> 3. By 18 March 2011, the Plaintiff provide copies of any documents requested by the Second Defendant.
>
> 4. By 25 March 2011, the parties file a Request for Trial Date."

[29] This makes no provision for the outstanding disclosure issues to be resolved. It makes allowance for inspection and the provision of copy documents to the second

defendant, which has already occurred. It makes no allowance for inspection of the second defendant's documents, which appears not to have occurred. It makes no allowance for mediation. However, the deficiencies in the proposed plan could be dealt with by directions and I do not see them as determinative of this application against the applicant.

[30] The best that might be said for the applicant is that the action is a simple one, and there seems little to be done before a trial could be had. The trial could be anticipated to be short. There has been delay in prosecuting the proceedings, but they are by no means stale.

The respondent's position

[31] The respondent relied upon what it identified as the inadequacy of the applicant's material as to explanation and justification. Counsel for the respondent also pointed to the delay at various stages of the proceeding, as far back as service of the originating proceeding. Past delay on the facts of this matter has little relevance as a consideration separate from the enquiry to see whether the applicant has explained and justified the circumstances leading to the matter being deemed resolved.[9] Delay after the deemed resolved order was made, and came to the attention of the applicant's then solicitors, is not adequately explained.

[32] The respondent asserted that the applicant's proceeding had no merits and I should therefore not reactivate it. The strength of this submission was rather lost when the applicant tendered something which may amount to a letter of demand on the guarantee – ex 3. With that before me I cannot conclude that the applicant's case is not fairly arguable.

[33] The respondent is a director of a company known as El Safty Enterprises Pty Ltd. He put detailed evidence before the Court that he has told existing financiers to this company, prospective financiers to this company, and a credit ratings agency that he no longer has any potential liability to the plaintiff in these proceedings because of the order of 17 May 2010 that it is deemed resolved. He shows that he sent or caused to be sent to his financiers, and prospective financiers, a copy of the order of 17 May 2010 under cover of a letter from his solicitors. It read:

> "We act on behalf of Mr Ahmed El-Safty, the second defendant in these proceedings.
>
> Enclosed, for your records, is a copy of a sealed order made by Her Honour Justice Atkinson on 17 May 2010, by which the proceedings were deemed resolved.
>
> Accordingly, that is the end of the matter."

[34] He sent a copy of the order of 17 May 2010 and a similar letter under his own hand to the credit ratings agency.

[35] The respondent says, again in a detailed way, that he expects significant prejudice to the business interests of El Safty Enterprises Pty Ltd if he must now renege on his previous position because of an order reactivating the proceedings.

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9 cf., *Atlantic 3* [25].

[36] The applicant says that any such prejudice will occur because of the respondent's solicitors' wrong advice that the deemed resolved order was the end of the proceedings, combined with the subsistence of the potential liability of the respondent in the proceedings, not because of anything it has done. It can be accepted that the potential liability to the applicant subsists and that a deemed resolved order is not the end of proceedings. On the other hand, the order was stamped "Final Order", and the applicant's solicitors did send it to the respondent's solicitors with no demur to its having been made and no indication that that they intended to seek to reactivate the proceedings. Unfortunately neither the applicant nor the respondent explained the circumstances surrounding the making and taking out of the order of 17 May 2010, or the conversation referred to in the letter of 10 June 2010. These matters to the prejudice of a third party might support an application for dismissal for want of prosecution or some other summary application to bring the matter finally to an end. Before a party in the position of the current respondent could bring, say an application for dismissal for want of prosecution, the proceeding would have to be reactivated. The Court of Appeal's statement in *Atlantic 3* that assertions of prejudice will normally go more to that substantive type of application, than to the discretion to reactivate, can be seen to hold true in this case.

Disposition

[37] The applicant has given no satisfactory explanation, and no justification, for the proceedings having been deemed resolved. The plan it proposes for timely resolution of the proceeding is inadequate. Nonetheless, I am mindful of the Court of Appeal's warning that the objects of the Practice Direction are not served by allowing proceedings to linger indefinitely in the twilight zone of deemed resolution.[10] My impression is that the strenuous opposition to this application proceeded on the basis that if no order to reactivate was made by me, the proceedings would finally be at an end. If so, that is a misapprehension of both the nature of a deemed resolved order (see above) and the interlocutory nature of an application to reactivate.[11] Until the proceedings are brought to a permanent end, either by trial or by a method of summary disposition short of trial (see paragraph 1.3 of the Practice Direction), they will subsist, unresolved, which is to the benefit of neither party. The proceedings are simple; could be tried shortly in a relatively short trial, and are by no means stale. In those circumstances, bearing in mind the purpose of the Practice Direction is to facilitate the timely and just disposition of proceedings, I will reactivate the proceedings.

[38] I will hear the parties as to costs and as to the directions which should be made for the future conduct of the matter.

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10 *Multi-Service Group* [44].

11 *Atlantic 3* [30].