SUPREME COURT OF QUEENSLAND

CITATION:	*Gold v State of Queensland* [2011] QSC 112
PARTIES:	**ANDREW STEWART GOLD** (plaintiff) **v** **STATE OF QUEENSLAND** (defendant)
FILE NO/S:	S2 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	16 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 and 30 March 2011
JUDGE:	Dalton J
ORDER:	**1. Proceeding reactivated.** **2. Defendant's applications dismissed.**
CATCHWORDS:	Matter deemed resolved; Practice Direction 4 of 2002; Reactivation; Dismissal for Want of Prosecution; Failure to comply with Court Orders *Civil Liability Act* 2003 (Qld) s 37 *Personal Injuries Proceedings Act* 2002 (Qld) *Aon Risk Services Australia Ltd v Australian National University* [2009] 239 CLR 175 *Barton v Atlantic 3-Financial (Aus) Pty Ltd & Anor* [2010] QCA 223 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551 *GSM Operations Pty Ltd v Neilsen & Ors* [2011] QSC 76, [15]-[21] *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)* [2010] QCA 260 [16] *Multi-Service Group Pty Ltd (in liq) & Anor v Osborne & Anor* [2010] QCA 72 *Quinlan v Rothwell* [2002] 1 Qd R 64 [15], [29] *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 [2]

COUNSEL: Plaintiff appeared in person
Ms D Callaghan for the defendant

SOLICITORS: Crown Law for the defendant

[1] **DALTON J:** The plaintiff makes an application to reactivate this proceeding. It was deemed resolved on 7 June 2009. The defendant contests that application and makes its own applications for:

1. the proceeding to be set aside pursuant to r 371(2);
2. the proceeding to be dismissed for want of prosecution pursuant to r 280, or
3. judgment against the plaintiff pursuant to r 374 on the grounds that the plaintiff has failed to comply with two orders that he file a request for a trial date and has failed to respond to a r 444 letter.

History of Proceedings

[2] The plaintiff claims damages for personal injuries sustained when he was injured on 26 January 2004 in a single vehicle accident on Beachmere Road, Caboolture. There is no doubt that the plaintiff was so injured. He made a *Personal Injuries Proceedings Act* 2002 (Qld) (*PIPA*) claim and on 2 January 2007 filed a claim and statement of claim. A defence, reply and lists of documents were delivered. There was a settlement conference on 3 April 2008. The plaintiff changed solicitors twice between April and August 2008 and then once again at the end of 2008. By 6 February 2009 there was confusion, but he was at least partly acting in person. On 13 February 2009 an order was made that unless a request for trial date was filed by the plaintiff, the proceeding would be deemed resolved. By operation of this order the claim was deemed resolved on 7 June 2009. The application to reactivate was filed on 24 February 2011.

Merits of the Plaintiff's Claim

[3] Mr Gold exhibits police reports about his accident which say, *inter alia*, "Police observed a series of potholes on the left-hand side of the road which were full of water and marks approximately 40m North of these holes on the right side of the road where [Mr Gold's car] has left the road." This is consistent with the statement recorded in the police report from Mr Gold that he was travelling on the road when, "My left wheels have hit these potholes on the road, which were full of water. As I have hit these holes my vehicle has spun towards the right and the passenger side of the vehicle was facing the direction I was going. My vehicle has then crossed over to the right[hand] side of the road and ran into the ditch. I have hit everything in my path stopping against a big tree." One of the police reports contains a diagram showing the potholes. It depicts three, on the side of the carriageway on which Mr Gold was travelling, wholly contained within the road surface.

[4] A considerable difficulty for Mr Gold is that his claim is subject to the restriction found in s 37 of the *Civil Liability Act* 2003 (Qld) (*CLA*). That section provides:

> "37(1) A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority –
>
> (a) to repair a road or keep a road in repair; or

(b) to inspect a road for the purpose of deciding the need to repair the road or keep the road in repair.

(2) Subsection (1) does not apply if at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

(3) In this section –

…

road authority means the entity responsible for carrying out any road work."

[5] Mr Gold's statement of claim alleges that the State of Queensland is responsible for the maintenance and repair of the relevant road. Many of the allegations of breach made in the statement of claim do relate to the defendant's function as a road authority to do things within the ambit of s 37(1) of the *CLA*. In relation to only one of them does he allege the actual knowledge required by s 37(2):

"4

…(e) Failing to repair potholes and other defects in the road in an adequate or appropriate manner when it knew or ought to have known the danger they posed to road users, in particular, drivers of light, front-wheel-drive cars of Asian manufacture.

…"

[6] It is evident from the further and better particulars of the statement of claim and reply, that the plaintiff knows of no particular person who had the knowledge alleged. In respect of this part of the claim, the defendant relies upon a statutory declaration made by an officer of the Department of Main Roads, Principal Engineer (Maintenance). He swore:

"…

3. The defendant did not know that potholes would develop at the incident site, specifically at the adjacent shoulder of the road between Goong Creek Road and the bridge that traverses Goong Creek on Beachmere Road.

4. If any potholes did develop on Beachmere Road the defendant had a system of weekly pothole inspection runs to detect such potholes and repair them.

5. The defendant repaired potholes at the incident site but these potholes were located outside of, or were partially encroached on, the white edge line.

6. The defendant was not aware that any of the potholes at the incident site encroached beyond the white edge line onto the main carriageway."

[7] Mr Gold says that when looking at documents received from the Department of Main Roads he could not find documentary evidence to support the engineer's assertion that inspections had taken place prior to the accident and he could not find documentary evidence stating exactly where the potholes were located that caused his accident. His desire is, should the matter be reactivated, to cross-examine the engineer. The fact that there are no records of weekly pothole inspections does not mean that those inspections did not take place. It is true that paragraphs 5 and 6 of the statutory declaration are vague. To begin with both statements are unreferenced in time. Nonetheless, even when these faults are considered, together with the police reports discussed above, there is still no evidence available to the plaintiff

that the defendant had actual knowledge of the risk which the plaintiff says materialised and caused him harm.

[8] However, not all the allegations of breach in the statement of claim go to matters within the ambit of s 37 of the *CLA*. The statement of claim alleges breach in:

> "4 …
>
> (a) constructing the road in a manner that it was prone to deterioration;
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> …
>
> (f) failing to warn of the unsafe condition of the road;
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> (g) failing to review the speed limit when the defendant knew or ought to have known that the road was unsafe to drive on at 100 km/h;
>
> (h) failing to have any or any adequate regard to the accident history of the road in … setting speed limits and placement of warning signs;
>
> (i) failing to provide any or any adequate signage warning of the unsafe condition of the road and road edges;
>
> …"

[9] It is evident from the further and better particulars of the statement of claim and reply, that the plaintiff has no evidence to support his allegation that the road was constructed in a manner so that it was prone to deterioration. As to paragraphs 4(f)-(i) in the extract above, the plaintiff has an action for failing to warn or properly signpost the road which is independent of an allegation of the type caught by s 37(1) of the *CLA*. The particulars given of the statement of claim and reply do not inspire great confidence that the plaintiff does in fact have evidence to support this case. Further, given the plaintiff was driving to work at the time of the accident, I imagine that there will be a claim for contributory negligence based on the plaintiff's own knowledge of the road. However, it could not be said that the plaintiff's case is unarguable, or doomed to fail.

Delay in the Proceeding

[10] Mr Gold was somewhat late in beginning his *PIPA* proceedings, but not inordinately so, and made an excuse for delay. The claim and statement of claim were filed just within the limitation period and between that time – 2 January 2007 – and May 2007, the proceedings progressed promptly – pleadings closed and both sides made disclosure. Progress slowed between May 2007 and February 2009, but the proceedings did not come to a standstill. Amongst other things, the defendant obtained the statutory declaration of its Principal Engineer (Maintenance) in March 2008 and in April 2008 a settlement conference was held in the matter. In March/April 2008 solicitors representing the plaintiff changed due to a merger between two firms. In August 2008 a new firm of solicitors began acting for the plaintiff. In January 2009, that new firm of solicitors wrote to the defendant explaining that they were returning the file to the plaintiff's previous solicitors. Quite remarkably, the new solicitors told Crown Law they were not continuing with the matter because they believed the plaintiff's prospects of success were poor. The plaintiff swears that between April and August 2008 there was delay caused by these changes of solicitors and I accept that.

[11] The order of 13 February 2009 required that further and better particulars of the reply; an updated statement of loss and damage, and a request for trial date be filed. The first two matters were attended to, by solicitors acting on behalf of the plaintiff. The third was not. There is some confusion at this time as to whether the plaintiff was acting for himself or not. He appeared in person on 13 February 2009. He explains the failure to file a request for trial date by saying that after the order of 13 February 2009 was made, he was acting for himself and did not understand that he needed to sign a request for trial date. To the contrary, he swears that his erstwhile solicitors told him that they would take care of the matters needed to comply with the orders of 13 February 2009. He says they told him that he would receive a notification from the Court as to a hearing date for his matter.

[12] There is evidence that the plaintiff attempted to engage solicitors after 7 June 2009 and that he attended several times on QPILCH and the Supreme Court Registry's facilities for unrepresented litigants. He says he was unable to obtain useful legal advice and was suffering from health problems and financial difficulties. There is evidence that during this time the plaintiff made inquiries under the *Freedom of Information Act.*

[13] The defendant says that on 19 February 2010, Crown Law sent the plaintiff a copy of the order of 13 February 2009, advising that the matter was deemed resolved and suggesting that the plaintiff should seek legal advice. That letter is exhibited. The plaintiff's response to Crown Law was along the same lines as his sworn explanation on this application – that his erstwhile solicitors had advised him that the matter would be set down for trial and he would be advised of the trial dates. Oddly, the plaintiff says that he became aware on 9 June 2009 that the matter had been deemed resolved because Crown Law told him then. The lawyer from Crown Law deposes to speaking to Mr Gold on that day, but does not say he told him the matter had been deemed resolved. On the material before me, it seems that the plaintiff is mistaken in thinking he was told the matter had been deemed resolved on 9 June 2009. Such advice does not fit well with the content of the telephone conversation deposed to by the lawyer from Crown Law, nor with the content of the conversations he deposes to having had with the plaintiff over the remainder of June 2009. I assume he makes his affidavit from file notes. Further, the letter of 19 February 2010 has the appearance of being the first advice to the plaintiff of the matter being deemed resolved.

[14] On any account, there was a delay after February 2010. In September 2010 the plaintiff advised Crown Law that he had set down an application to reactivate the matter on 29 October 2010, although that seems not to have been the case. On 10 November 2010 the plaintiff was asked by Crown Law not to bring his application to reactivate the matter in either December 2010 or January 2011 because of holiday arrangements of lawyers representing the Crown.

[15] In summary, once the matter commenced, it progressed promptly until May 2007. It could not be said that there was any undue delay on the part of any party before August 2008. August 2008 marked a time when the plaintiff's file was transferred between lawyers. On 6 February 2009 the plaintiff filed a notice that he was acting in person. The next week the orders of 13 February 2009 were made. The orders of 13 February 2009 were complied with, but for the order that a request for trial date be signed. Consequently, until 7 June 2009 there was still no undue delay in the matter. There was between 7 June 2009 and February 2010 a period of eight

months where nothing occurred in the action because the plaintiff was under a misapprehension that the parties were waiting for the Court to allocate trial dates. The plaintiff having been disabused of that notion in February 2010, another period of delay ensued. The period until 10 November 2010 is attributable to the plaintiff.

Reactivation of the Proceedings

[16] In *GSM Operations Pty Ltd v Neilsen & Ors*[1] I set out my view as to the scope of paragraph 5.4 of Practice Direction No. 4 of 2002 and as to the matters which are relevant to be considered by a judge hearing an application pursuant to that paragraph, having regard to the Court of Appeal decisions in *Multi-Service Group Pty Ltd (in liq) & Anor v Osborne & Anor*[2] and *Barton v Atlantic 3-Financial (Aus) Pty Ltd & Anor*[3] and I will not repeat those matters here. Mr Gold's proceeding is not unarguable. He explains the proceedings having been deemed resolved by saying that this occurred, as it plainly did, at a time when he was partly acting for himself, and partly acting through solicitors and that there was confusion and misunderstanding on his part as to who was responsible for filing a request for trial date. He was not cross-examined on this version of events. Mr Gold puts no plan before the Court to have this proceeding determined in a timely way. The best he does in this respect is to say that he has found a solicitor who is prepared to take on his case if he is able to have the matter reactivated.

[17] The applicant for reactivation is thus in a position where he provides an explanation, but not a particularly satisfactory justification, for the proceedings having been deemed resolved and for the time which has passed since then, and does not provide a satisfactory plan for the proceeding's timely resolution. However, nor did the applicant in the *Atlantic 3* case and nor the applicant in *GSM Operations.* Nonetheless, having regard to 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,[4] and bearing in mind that the proceedings are relatively simple, and had progressed to a point where all interlocutory steps had been attended to, before they were deemed resolved, it seems to me that I ought reactivate the proceedings, bearing in mind the purpose of Practice Direction No. 4 of 2002 is to facilitate the timely and just disposition of proceedings. Until these proceedings are brought to a permanent end, either by a trial or summary disposition, they will subsist, unresolved, which is to the benefit of neither party.

Dismissal for Want of Prosecution

[18] The Court of Appeal in *Tyler v Custom Credit Corp Ltd & Ors*[5] listed matters which the Court may take into account in exercising its discretion to determine whether a proceeding should be dismissed for want of prosecution. As outlined above, the plaintiff does not have an unarguable case. This is important in exercising my discretion, because to dismiss the proceedings now will mean that there will never be a determination of the merits of Mr Gold's claim.

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1 [2011] QSC 76, [15]-[21].
2 [2010] QCA 72.
3 [2010] QCA 223.
4 *Multi-Service Group*, [44].
5 [2000] QCA 178 [2].

[19] Many of the factors outlined in *Tyler* (above) relate to delay and I have comprehensively discussed delay in this matter above. I bear in mind that the Courts generally are less tolerant of delay by a party than they were in the past – *Aon Risk Services Australia Ltd v Australian National University.*[6] In this regard, I take note of the fact that the solicitor representing the Crown deposes to at least two conversations he has had with the plaintiff where, essentially, the Crown lawyer called on the plaintiff to give up his proceeding. In responding to him, the plaintiff has both times made reference to the fact that he is impecunious, has no assets and nothing to lose by having his day in Court. I apprehend this is advanced by the Crown as the plaintiff's displaying an irresponsible attitude to the litigation. In circumstances where the Crown has taken a hard line in attempting to compromise this matter and has never offered any amount to the plaintiff by way of settlement, I am unable to regard the statements by the plaintiff as other than his assuming an equally hard line for the purpose of negotiation, and as having a desire to have the merits of his claim determined.

[20] During periods of delay there has been non-compliance with Court orders. I do not find this was contumelious – see below. Some of the delay has been caused by the plaintiff's lawyers, in particular in the period between April and August 2008. Some of the delay has been due to the impecuniosity of the plaintiff – in particular, the delay from June 2009. It is impossible on the material before me to say that his impecuniosity is the fault of the defendant. If the plaintiff succeeds on his claim at the end of the day, that will have been proven to be the case. The plaintiff provides explanations for delay occurring up until 19 February 2009, and to some extent for delay occurring after that, in that he was still unrepresented and struggling to deal with the proceeding while in ill-health. The defendant concedes very little prejudice arising to it because of the delay. There is certainly no submission made that it would be impossible to conduct a fair trial. The defendant says that extra costs will be incurred by it because of the delay, in that it will need to get the matter up and running again, which will inevitably involve some duplication of tasks and updating of information – for example, the plaintiff's statement of loss and damage. The defendant also relies upon the type of prejudice identified in *Brisbane South Regional Health Authority v Taylor.*[7]

[21] The matter had come to a point in June 2009 where apparently all interlocutory steps had been attended to and both parties anticipated that it would be set down for trial.

[22] For all the above reasons, I am not persuaded this matter ought to be dismissed for want of prosecution.

Rules 371 and 374

[23] In *Quinlan v Rothwell* (above), the Court of Appeal recognised a distinction between an application to dismiss for want of prosecution and an application to set aside a proceeding pursuant to r 371-[24]. In that case, authorities to the effect that repeated non-compliance with the rules can be indicative of a flouting of the rules or contumelious disregard, were discussed. I do not see evidence of Mr Gold's having flouted the rules in this case. To the contrary, progress in the action was

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6 [2009] 239 CLR 175; see also *Quinlan v Rothwell* [2002] 1 Qd R 64 [15], [29].

7 (1996) 186 CLR 541, 551.

satisfactory whilst he had solicitors acting for him but confusion, misunderstanding and inability to move promptly have characterised the period of time during which he has acted for himself. I see the non-compliance with the order of 13 February 2009 and the non-response to the letter sent pursuant to r 444 as being due to these factors, not contumelious disregard. It is true that a failure to comply with an order made 30 June 2008 to file a request for trial date has not been specifically addressed by the plaintiff. Nonetheless, this occurred during a time when there were changes of solicitors acting for the plaintiff, and in any event appears now to have been well and truly overtaken by events.

[24] In *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)*[8] the Court of Appeal discussed r 374. It was noted that in exercising the discretion conferred by r 374 the Court must take into account the purposes of the rules: "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense" – r 5. If this matter is summarily dismissed, those issues will never be tried.

[25] In relation to both the application pursuant to r 371 and the application pursuant to r 374, much of what I have set out above as to merits and delay is relevant. I do not find any flouting of the rules by Mr Gold. The merits of his case are not such that I could give a summary judgment in the defendant's favour. I take into account the delay in the matter and have regard to the principles in *Aon Risk Services* (above), which I note were discussed in *Johnson* at [17]. I also have regard to Mr Gold's explanation for the delay and the fact that no dramatic prejudice to the defendant flows from it. In the circumstances, I am not prepared to exercise my discretion to set aside the proceeding pursuant to r 371 or give judgment for the defendant pursuant to r 374.

[26] I will hear the parties as to costs and as to the directions which ought to be made in this matter.

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[8] [2010] QCA 260 [16] ff.