SUPREME COURT OF QUEENSLAND

CITATION:	*Hollyander Pty Ltd v Mike O'Regan & Associates Pty Ltd & Anor* [2011] QSC 164
PARTIES:	**HOLLYANDER PTY LTD (ACN 099 551 238)** (plaintiff) **v** **MIKE O'REGAN & ASSOCIATES PTY LTD (ACN 093 037 079)** (first defendant) and **MICHAEL JOHN O'REGAN** (second defendant)
FILE NO:	1106 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2011
JUDGE:	Daubney J
ORDER:	**There will be the following orders:** **1. The plaintiff's claim is dismissed.** **2. The defendants' counterclaim is dismissed.** **3. The security is discharged.** **4. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – INTERPRETATION AND GENERAL PROVISIONS – where the matter was deemed resolved – where the defendants brought an application seeking an order dismissing the claim for want of prosecution – where the plaintiff filed a cross application seeking the proceeding be reactivated and for leave to proceed under r 389 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the defendants seek judgement on its counterclaim. *Uniform Civil Procedure Rules* 1999 (Qld), rules 5, 280, 389, 676 *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
Cooper v Hopgood & Ganim (a firm) [1999] 2 Qd R 113
Cooper & Ors v Touche Ross & Co & Anor [2010] QSC 251
Multi-Service Group Pty Ltd (in liq) v Osborne [2010] QCA 72
Quinlan v Rothwell [2008] QSC 143
Tyler v Custom Credit Corp Ltd [2000] QCA 178

COUNSEL: S Armitage for the plaintiff
R S Ashton for the defendants

SOLICITORS: Lambert O'Donnell for the plaintiff
Thynne & Macartney for the defendants

[1] The defendants have applied for an order dismissing the claim for want of prosecution, for judgment on the first defendant's counter claim, and for an order dealing with the security for costs held by the registrar in the form of a bank guarantee. The plaintiff has cross applied for an order that the proceedings be reactivated, for leave to proceed pursuant to r 389 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") and for directions as to the future conduct of the proceedings.

[2] The plaintiff is a property developer. The first defendant is a company which provided specialist hydraulic and civil engineering services. The second defendant was the director and principal of the first defendant.

[3] In about April 2003 the plaintiff retained the first defendant to perform hydraulic and civil engineering services for a residential development at Biggera Waters.

[4] On 22 April 2003, the first defendant submitted a fee proposal for hydraulic engineering services for Stage 1 of the project. This proposal was accepted by the plaintiff. On 30 April 2003 the first defendant submitted a second fee proposal for hydraulic engineering services for Stage 2. The second proposal also covered civil engineering services for Stage 1 and part of Stage 2. The second proposal was accepted.

[5] On 15 January 2004, the first defendant submitted a third proposal for the balance of the hydraulic and civil engineering services for Stage 2 (the scope of the works included Stage 2 and Stage 3). It was accepted on 18 February 2004.

[6] Pursuant to these retainers, the first defendant provided services from June 2003. In July 2004, the retainers were terminated by the plaintiff.

[7] On 11 February 2005, the plaintiff issued this proceeding against the defendants claiming damages of $2,701,465.26 for negligence and/or breach of contract. The statement of claim alleged failures to obtain council approvals, to attend design and project control group meetings and meeting with contractors, to supply drawings, to design, document and certify hydraulic and civil engineering services for certain

buildings, and to issue certificates.[1] The plaintiff alleged that delays and non performance of the hydraulic and civil engineering services by the defendants caused delays in obtaining development approvals for Stages 2 and 3 of the development. These, in turn, delayed the completion of the development and the plaintiff claimed to have suffered losses in the general nature of "additional holding costs".

[8] The defendants filed a defence on 5 April 2005, denying the plaintiff's allegations and pleading that any delays in securing the development approval were for reasons other than the alleged failure to perform hydraulic and civil engineering services for Stages 2 and 3. The first defendant also filed a counterclaim seeking recovery of unpaid fees totalling $64,735.

[9] On 5 October 2005, a case flow intervention notice was issued.

[10] On 23 March 2006, Atkinson J ordered by consent, inter alia, that the parties agree on a joint expert on liability by 31 May 2006.

[11] On 26 October 2006, at a case flow review the parties reported to the court that they had been unable to find and agree upon an expert on liability. The parties proposed that they make further enquiries with an expert and if that expert could not confirm his availability to provide the report within an agreed period, then the matter should proceed to mediation without such a report. Atkinson J ordered that a request for trial date be filed by 31 January 2007, otherwise the matter would be deemed resolved and liberty to reactivate the matter on two clear days notice.

[12] On 7 December 2006, with no progress in the appointment of a joint expert, the parties filed a Consent Order for ADR.

[13] On 2 February 2007, the parties participated in mediation. The parties agreed on a number of matters including that the plaintiff would deliver a further amended statement of claim by 16 February 2007. There was then some further correspondence between the parties and in a facsimile of 19 September 2007, the plaintiff proposed that it file its further amended statement of claim by 26 October 2007. The further amended statement of claim has not yet been filed.

[14] On 28 October 2008, the parties received a case flow management intervention notice from the Court because of the failure to file a Request for Trial Date. At the case flow review on 28 November 2008, the parties provided a draft consent order setting out a case flow plan. Atkinson J declined to make any orders because the matter had been deemed resolved in accordance with her order of 26 October 2006.

[15] On 10 March 2009, the defendants' solicitors contacted the plaintiff's solicitors to inquire whether the plaintiff intended to apply to reactivate the matter. The defendants say that the plaintiff's solicitors said that they had no current instructions and did not expect to receive any in the near future.[2] The plaintiff's solicitor, however, denies saying that they did not expect to receive any instructions in the near future.[3]

[16] On 7 February 2011, the defendants filed the present application seeking orders:

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1 As set out in the Amended Statement of Claim at [6].

2 Affidavit of John Richard Moore, filed 3 March 2011at [38].

3 Affidavit of Geoffrey David Booth, filed 6 April 2011at [66].

(a) The stay of the proceedings operating pursuant to Rule 321 of the UCPR be lifted;

(b) As may be necessary or convenient the proceedings be reactivated in accordance with paragraph 5 of Practice Direction No 4 of 2002;

(c) The plaintiff's proceedings against the first and second defendants be dismissed for want of prosecution pursuant to Rule 280 of the UCPR or alternatively pursuant to the court's inherent jurisdiction;

(d) The first defendant have judgment on its counterclaim and costs;

(e) The plaintiff pay the defendant's costs of the proceedings including the costs of this application;

(f) Pursuant to Rule 881 of the UCPR the fund lodged in court by the plaintiff by way of security for costs be applied first in satisfaction of the defendants' costs in these proceedings and then to satisfaction of the judgment entered.

[17] On 6 April 2011, the plaintiff filed a cross application seeking orders:

(a) The proceedings be reactivated in accordance with paragraph 5 of Practice Direction No 4 of 2002;

(b) The parties be granted leave to proceed pursuant to Rule 389 of the UCPR;

(c) Directions as to the future conduct of the proceedings.

It was conceded in argument before me that the defendants' application was the catalyst for the plaintiff's application.

Deemed resolution

[18] The effect of a matter on the case flow list being "deemed resolved" was explained in *Multi-Service Group Pty Ltd (in liq) v Osborne*[4]:

> "…as long as a proceeding is "deemed resolved" no steps may be taken in it but the proceeding nevertheless continues in existence and is susceptible to reactivation. … This construction of the Practice Direction is consistent with what one would expect, given the wide range of circumstances in which a deemed resolution may take place. A deemed resolution of a proceeding thus results in something akin to the placing of the proceeding on an abeyance list."

[19] The defendants seek dismissal of the plaintiff's claim for want of prosecution under r 280 of the UCPR:

> "**280 Default by plaintiff or applicant**
>
> (1) If -

[4] *Multi-Service Group Pty Ltd (in liq) v Osborne* [2010] QCA 72 at [39].

(a) the plaintiff or applicant is required to take a step required by these rules or comply with an order of the court within a stated time; and

(b) the plaintiff or applicant does not do what is required within the time stated for doing the act;

a defendant or respondent in the proceeding may apply to the court for an order dismissing the proceeding for want of prosecution.

(2) The court may dismiss the proceeding or make another order it considers appropriate.

(3) An order dismissing the proceeding for want of prosecution may be set aside only on appeal or if the parties agree to it being set aside.

(4) Despite subrule (3), the court may vary or set aside an order dismissing the proceeding for want of prosecution made in the absence of the plaintiff or applicant, on terms the court considers appropriate, and without the need for an appeal."

Dismissal for want of prosecution

[20] A dismissal for want of prosecution "brings the proceeding to an end with the consequence that the parties' rights and obligations are permanently affected."[5] It brings finality to a proceeding.

[21] Rule 280 applies in the context provided by r 5 of the UCPR:

"**5 Philosophy—overriding obligations of parties and court**

(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court."

[22] Rules 280 and 5 of the UCPR co-exist with the Court's inherent jurisdiction to dismiss an action for want of prosecution.[6]

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5 *Multi-Service Group Pty Ltd (in liq) v Osborne* [2010] QCA 72 at [40].

6 *Quinlan v Rothwell* [2008] QSC 143.

[23] In *Tyler v Custom Credit Corp Ltd*,[7] Atkinson J listed the factors to be taken into account when determining whether the interests of justice require a proceeding to be dismissed or granted leave to proceed as including:

> "(1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
>
> (2) how long ago the litigation was commenced or causes of action were added;
>
> (3) what prospects the plaintiff has of success in the action;
>
> (4) whether or not there has been disobedience of Court orders or directions;
>
> (5) whether or not the litigation has been characterised by periods of delay;
>
> (6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
>
> (7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;
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> (8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;
>
> (9) how far the litigation has progressed;
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> (10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;
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> (11) whether there is a satisfactory explanation for the delay; and
>
> (12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial." (citations omitted)

[24] Her Honour then observed that "[t]he court's discretion is, however, not fettered by rigid rules but should take into account all of the relevant circumstances of the particular case."[8]

[25] The power to dismiss an action for want of prosecution is "confined to a judicial discretion, and for that if no other reason, is incapable of being exhaustively defined or delimited".[9] The onus is on the applicant to show that the proceeding should be struck out for want of prosecution.[10]

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7 [2000] QCA 178 at [2].

8 *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [2].

9 McPherson JA in *Cooper v Hopgood & Ganim (a firm)* [1999] 2 Qd R 113 at 124.

10 *Cooper v Hopgood Ganim (a firm)* [1990] 2 Qd. R 113 at 121.

[26] The defendants contended that the claim has been attended by periods of delay for which there is no satisfactory explanation.

[27] The defendants submitted:

> "(a) the orders of Justice Atkinson made 23 March 2006 were not complied with;
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> (b) the action became stayed by reason of a consent order for alternative dispute resolution made 7 December 2006;
>
> (c) the mediation was adjourned on 2 February 2007 and has never been resumed, with the action remaining stayed;
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> (d) there then followed a period of one year and eight months when nothing occurred by way of advancement of the proceedings;
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> (e) on 28 November 2008 Justice Atkinson declined to make further orders in the matter because it was deemed resolved by reason of her order made on 26 October 2006;
>
> (f) the plaintiff has done nothing in the two and a half years since."[11]

[28] Proceedings were initiated on 11 February 2005 and the relevant events occurred between April 2003 and July 2004. There was therefore no delay in bringing the action. The defendants, however, point to the plaintiff's conduct in failing to file an amended statement of claim, despite having agreed to do so at the mediation on 2 February 2007 and having confirmed that subsequently in correspondence on 19 September 2007, 26 October 2007 (to the Court) and 28 November 2008.[12]

[29] The plaintiff has not taken any steps in the proceeding since 28 November 2008 when Atkinson J declined to make further orders in the matter because it was deemed resolved by reason of her order of 26 October 2006. On 10 March 2009, the plaintiff's solicitors advised the defendants' solicitors that they had no instructions.[13] Nor did the defendants take any steps in the counterclaim during this two and a half year hiatus.

[30] Mr Booth, a director of the plaintiff, deposed as follows:[14]

> "99. Shortly after the case review hearing on 28 November 2008, the plaintiff gave consideration to the possibility and prospects of successfully pursuing an application for reactivation. However, at the time, I formed the conclusion that there was little the plaintiff could realistically do to reactivate the proceedings and I thought, that the deemed resolution of the whole of the proceeding meant that both the plaintiff's claim and the first defendants' counterclaim were at an end. In addition, Mr Spottiswood's focus was almost entirely on dealing with the dire financial difficulties that he and his group of companies (other than the plaintiff) was

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11 Defendants' written submissions at [14].
12 Affidavit of John Richard Moore, filed 3 March 2011.
13 Affidavit of John Richard Moore, filed 3 March 2011 at [38].
14 Affidavit of Geoffrey David Booth, filed 6 April 2011 at [99].

> experiencing. For these reasons, an application for reactivation was not pursued by the plaintiff at that time."

[31] The defendants submit that this demonstrates that the plaintiff had consciously and deliberately chosen to do nothing and had effectively abandoned the action. Counsel for the plaintiff submitted that what Mr Booth was intending to say was that Mr Spottiswood, as a director, was distracted from the proceeding, that it was thought by the directors that nothing could be done about the matter being deemed resolved, and they had to live with the fact that the claim and counterclaim had ended.

[32] Mr Booth also said:

> "101. I was very surprised that the defendants had filed an application against the plaintiff in this proceeding as I had thought that the effect of the proceeding having been deemed resolved meant both the claim and the counterclaim were at an end ..." [15]

This indicates that the plaintiff had considered that the matter was over.

[33] The defendants submit that the plaintiff has not offered any other excuse or explanation to the court for its delay.

[34] The plaintiff submits that it has given a satisfactory explanation for the delay - the periods of delay were due principally to the inability of the parties to locate and retain a suitable expert to provide expert evidence. The defendant does not disagree that there was difficulty in identifying and agreeing upon an expert but points to other causes of delay by the plaintiff such as those set out about above.

[35] Counsel for the plaintiff argued that as at November 2008 there was very little judicial guidance as to what "deemed resolved" meant or as to what factors were needed to reactivate a matter, but the Court of Appeal has since given its guidance in *Multi-Service*.[16] This, however, would not have precluded the plaintiff from seeking to reactivate the proceeding, and there is really no satisfactory explanation for why the plaintiff did not take any steps for almost two and a half years. It is relevant to note also that the plaintiff had the benefit of the guidance of *Multi-Service* for approximately one year before bringing this application. In fact, the plaintiff did not do anything until the defendants filed an application for an order dismissing the claim for want of prosecution. It is a short step to conclude that if the defendants had not made an application for dismissal for want of prosecution the plaintiff would not have made the cross application for reactivation of the proceeding and the proceeding would have remained in *"the twilight zone of "deemed resolution"."* [17]

[36] The plaintiff has done nothing to prosecute its claim in the proceeding over the last two and a half years. Despite counsel for the plaintiff urging me to the contrary, the delay has been caused by the plaintiff's delay for which there is no satisfactory explanation. Each party has obligations under rule 5 of the UCPR, including the obligation to proceed in an expeditious way, which the plaintiff has not done.

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15 Affidavit of Geoffrey David Booth, filed 6 April 2011 at [101].

16 [2010] QCA 72.

17 [2010] QCA 72 at [44].

[37] The plaintiff contends that the delay was due mainly to the inability of the parties to locate and retain a suitable expert to provide expert evidence and therefore the responsibility of the plaintiff and the defendants. In *Barton v Atlantic 3-Financial (Aus) Pty Ltd & Anor*,[18] Muir JA said as the second defendant "... was complicit in the delay in the prosecution of the proceedings, it would not be ideally placed to rely on prejudice to it as a result of the delay in any application to dismiss the proceedings for want of prosecution." I do not think that the substantial recent period of delay can be attributed to the inability of the parties to locate and retain an expert. The plaintiff's solicitor set out in affidavit material the steps taken to locate an expert, but there is no evidence that steps were taken and the difficulties in locating an expert continued once Atkinson J confirmed on 28 November 2008 that the matter had been deemed resolved by virtue of her earlier order.[19] Unlike the case in *Cooper & Ors v Touche Ross & Co & Anor*,[20] it cannot be said that the defendants contributed to the delay. True it is that the defendants were content to let the proceeding remain in the state of being deemed resolved, but I find that the delay in the proceeding was caused by the plaintiff's inaction and therefore do not find that the defendants have contributed to the prejudice.

Prejudice

[38] It is necessary to consider whether there is an irreparable element of unfair prejudice in unnecessarily delaying the proceedings.[21] Prejudice is a relevant but not prerequisite factor.[22]

[39] The defendants relied on the presumed prejudice referred to by McHugh J in *Brisbane South Regional Health Authority v Taylor*[23] and pointed to the difficulty of having a fair trial because of:

> "(a) the necessary complexity involved in reconstruction of a hypothetically earlier completion of the development;
>
> (b) the dependence upon oral evidence from Mr O'Regan, Mr Spottiswood, and others, including council officers;
>
> (c) the plaintiff's avowed but unfulfilled intention to produce an amended statement of claim and presumably some new kind of case."

[40] This litigation commenced a little over six years ago. Such a period of time is not unusual - common experience in the courts tells that there are actions arising from events occurring in 2003 and 2004 that are yet to be concluded. The passing of time means the witnesses will have a more diminished recollection of the relevant events than they would have had the plaintiff had prosecuted its claim expeditiously. The

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18 [2010] QCA 223.
19 Affidavit of Anthony Edward Lambert, filed 7 April 2011.
20 [2010] QSC 251.
21 *Aon Risk Services Australia Ltd v Australian National University* [2009] 239 CLR 175, per French CJ at 182.
22 *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113.
23 (1996) 186 CLR 541.

case appears well documented, and the plaintiff confirmed the availability of potential witnesses who are available and can give evidence at trial.[24]

[41] Nonetheless the plaintiff has had ample opportunity to apply to reactivate the proceeding and has not done so. It is prejudicial to the defendants that this matter has been lying dormant for the past two and half years only to have it reactivated now. Adopting the words of McPherson JA in *Cooper v Hopgood & Ganim*[25] "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." *A fortiori*, in a case in which the plaintiff has itself gone on with its life on the basis that the proceeding had been deemed resolved.

[42] The defendants also point to the second defendant's state of health and the serious and debilitating condition of which he suffers. The second defendant has suffered from Crohn's disease since 1999. A letter from his doctor reports:

> "This man has been under my care for an extended period of time for management of Crohn's disease. It is very likely that when he gets into any stressful situation his symptoms will exacerbate. For that reason it is advised that if there is a stressful situation operating then that situation should be resolved as quickly as possible."[26]

[43] It is submitted, and I accept, that it would be asking a great deal of him to devote another two years to the matter.

Plaintiff's prospects of success

[44] The defendants submit that the plaintiff's prospects are hopeless. The plaintiff submits that it is reasonably arguable that the plaintiff will succeed in the action. The plaintiff intends to file a further amended statement of claim and obtain expert engineering evidence and a revised forensic accounting report.[27]

[45] Whilst the matter is clearly not ready to proceed to trial, it cannot be said at this stage that the plaintiff does not have an arguable case. In the affidavit material and in the course of oral submissions, some attempts were made to demonstrate the merits of the case. It is sufficient to observe that the plaintiff's claim raises matter of fact that need to be investigated at trial.

Disobedience of court orders

[46] The defendants rely also on the plaintiff's disobedience of court orders, namely the order of Atkinson J made on 23 March 2006 that the parties agree on a joint expert by 31 May 2006.

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24 Affidavit of Anthony Edward Lambert, filed 7 April 2011.
25 [1999] 2 Qd R 113 at 124.
26 Exhibit MOR11 to Affidavit of Michael John O'Regan, filed 13 April 2011.
27 Affidavit of Geoffrey David Booth, filed 6 April 2011.

How far the litigation has progressed

[47] The defendants submit that the litigation has hardly progressed and points to the fact that there is "not even a statement of claim in proper order".[28] The plaintiff has not filed its further amended statement of claim despite indicating an intention to do so on several occasions prior to the matter being deemed resolved.

[48] The best that can be said is that the plaintiff's proceeding is still nascent.

No application for leave to proceed

[49] A failure to bring an application to proceed can be a factor warranting dismissal or reactivation of a proceeding. The plaintiff only applied for leave to proceed as a reaction to the defendants' application for dismissal of the proceeding.

[50] In *Quinlan v Rothwell*,[29] Chesterman J (as he then was) said:

> "[32] Should the action be allowed to proceed or should it be struck out? The answer may be found in a consideration of the plaintiff's own late application for leave to proceed. In *Dunseath v Febriway Pty Ltd* (2001) QDA 104 McPherson JA (with whom McMurdo P and Byrne J agreed) remarked that if an action cannot go on without leave, and no application for leave is made or foreshadowed, an action should be struck out for want of prosecution on the ground, apparently, that the absence of such an application showed that the plaintiff did not intend to proceed with his action at all or with any kind of expedition."

[51] Counsel for the plaintiff submitted that bringing the application to proceed was the only option to oppose the application for judgment on the counterclaim and access to the guarantee as security for costs. This submission and the concession that the defendants' application was the catalyst for the plaintiff's application demonstrates that an application for leave to proceed may never have been filed. The absence of an application indicates that the plaintiff had no intention to continue with the proceeding.

Reactivation of the proceeding

[52] The plaintiff has cross applied for a reactivation of the proceedings and leave to proceed under r 389 of the UCPR.

[53] Practice Direction 4 of 2002 ("the Practice Direction") relevantly provides:

> "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."

[54] UCPR r 389 provides:

> "**389 Continuation of proceeding after delay**

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28 Defendants' written submissions at [26].

29 [2008] QSC 143.

> (1) If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the proceeding, give a month's notice to every other party of the party's intention to proceed.
>
> (2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice.
>
> (3) For this rule, an application in which no order has been made is not taken to be a step."

[55] In *Multi-Service*, the Court said that the focus of an application for reactivation should be whether the applicant has:

> "(a) explained and justified the circumstances in which the proceeding was deemed resolved; and
>
> (b) prepared a plan to facilitate its timely determination." [30]

[56] It was also said in *Multi-Service*:[31]

> "[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 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".

[57] I do not think that either party has provided an adequate explanation or justification for the circumstances in which the deemed resolution occurred. The deemed resolution came about because of the parties' failure to file a request for trial date in compliance with the order of Atkinson J made on 26 October 2006 (or to make a timely application prior to 31 January 2007 for a variation or extension of the "deemed resolved" date). Before the matter was deemed resolved, there were substantial periods of delay, a failure to comply with a court order and the difficulty in locating and retaining an expert.

[58] It is relevant to consider whether the proceeding can be disposed of in a timely manner if it is reactivated. A further amended statement of claim is yet to be filed. The matter is far from ready for trial. Counsel for the plaintiff submitted that the previous impediments to prosecuting the proceedings have been overcome and an expert has been obtained. The plaintiff proffered a draft plan to facilitate the timely determination of the proceeding as is required under 5.4 of the Practice Direction, including "[t]he plaintiff has the ability to provide the necessary resources and funds to prosecute the action and without any further delays."[32]

[59] The claim and counterclaim are now statute barred and not reactivating the proceeding will deprive the parties of the opportunity to pursue their claims. The

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30 [2010] QCA 72 at [43].

31 [2010] QCA 72.

32 Affidavit of Geoffrey David Booth, filed 6 April 2011.

fact is, however, that the plaintiff and the defendants were content to leave the proceedings for approximately two and a half years and not pursue their claims on the basis of the deemed resolution. The evidence of Mr Booth as set out above demonstrates that the plaintiff thought that the claims were at an end. Not reactivating the proceeding and dismissing the claim for want of prosecution will formalise the state of affairs that has been in existence for the last two and a half years.

Conclusion

[60] In my assessment, the discretionary factors which I have just discussed weigh against the exercise of the discretion in favour of the plaintiff. There is in my opinion, no sufficient reason to reactivate the proceeding and permit it to continue. In the circumstances, the claim should be dismissed.

Counterclaim

[61] The defendants are also seeking a reactivation of their counterclaim for the purpose of obtaining judgment on the counterclaim. The counterclaim, on the face of it, is a claim for monies owing. The plaintiff submitted, however, that the claim would have to remain on foot in order for the counterclaim to be determined. The counterclaim concerns monies owing for professional fees under Stages 1 and 2 and while the claim does not seem to concern Stage 1, it does concern Stage 2.

[62] Counsel for the defendants explained that the failure to reactivate the proceedings in order for the counterclaim to be determined and take steps in the two and a half year period was because the integration of the claim and counterclaim meant it was impractical and inappropriate to do so. In that regard, the defendants' solicitor deposed:

> "[47] Because of the interdependence of the claim and the counterclaim, I had not thought it practical to progress the counterclaim independently of the plaintiff's claim."[33]

[63] Despite this, the defendants now seek that the counterclaim be reactivated, judgment given in its favour and the plaintiff's claim be dismissed for want of prosecution therefore seeking the separation of the claims from each other.

[64] Counsel for the parties conceded that the claim and counterclaim were interdependent. No satisfactory explanation has been given for the delay in the counterclaim. Frankly, it appears that both sides were content to proceed on the basis that the litigation between them had ceased. I am content to formalise that position for them. I would dismiss the counterclaim for want of prosecution.

Security for costs

[65] On 31 May 2006, the plaintiff was ordered to provide security for costs in this proceeding in the form of a bank guarantee in the amount of $110,000.00. That guarantee was provided.

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[33] Affidavit of John Richard Moore, filed 3 March 2011.

[66] In view of the dismissal of both the claim and the counterclaim, it is now appropriate that there be an order under r 676 of the UCPR discharging that security.

Conclusion

[67] There will be the following orders:

1. The plaintiff's claim is dismissed.

2. The defendants' counterclaim is dismissed.

3. The security is discharged.

4. I will hear the parties as to costs.