SUPREME COURT OF QUEENSLAND

CITATION:	*Schneider v Alusa Pty Ltd & Ors* [2011] QSC 366
PARTIES:	**JOHANN JOSEF SCHNEIDER** (Plaintiff) v **ALUSA PTY LTD (ACN 084 846 533)** (First Defendant) **ALAN ROSS GAYNOR** (Second Defendant) **URSULA JANE GAYNOR** (Third Defendant)
FILE NO/S:	324 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	7 October 2011
DELIVERED AT:	Cairns
HEARING DATE:	30 September 2011
JUDGE:	Henry J
ORDER:	**1. The application to dismiss the plaintiff's claim for want of prosecution is dismissed.** **2. The application to strike out paragraphs 2-7 of the Statement of Claim is dismissed.** **3. The respondent is to provide answer to the applicant's request for further and better particulars of 5 July 2010 by way of an Amended Statement of Claim to be filed and served by 4 pm 21 October 2011.** **4. In the absence of agreement between the parties, acceptable to the Registrar, as to the manner and date of argument as to costs, I will hear the parties as to costs at 9.30 am 21 October 2011.**
CATCHWORDS:	PROCEDURE – UNIFORM CIVIL PROCEDURES RULES – APPLICATION TO DISMISS FOR WANT OF PROSECUTION – APPLICATION TO STRIKE OUT PLEADING – where the respondent failed to provide further and better particulars – where the applicant sought to dismiss for want of prosecution prior to filing a defence – where the applicant sought to strike out particulars as disclosing no

reasonable cause of action.

COUNSEL: T W Quinn for the applicant/defendants
J Trevino for the respondent/plaintiff

SOLICITORS: Lyne & Co for the applicant/defendants
Preston Law for the respondent/plaintiff

[1] The applicant seeks an order dismissing the plaintiff's claim for want of prosecution in the exercise of the Court's inherent jurisdiction or alternatively striking out paragraphs 2 – 7 inclusive of the Statement of Claim pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 ("UCPR") and the inherent jurisdiction of the Court.

Background

[2] The plaintiff's claim seeks the taking of an account of monies received in respect of cattle allegedly removed by the defendants from a property known as St Ronans and in respect of the progeny of such cattle. In the alternative the plaintiff seeks $805,212.56 damages for conversion of the cattle and their progeny.

[3] The evidence filed on the application explains that St Ronans was one of three adjoining cattle properties, the other two being Springfield and Sundown, owned by a group of companies controlled by Donald Logan ("the Logan Group"). The Logan Group ran cattle on all three properties, treating the properties as one.

[4] The Logan Group sold St Ronans to R & E Henry Pty Ltd by a contract dated 23 June 1997. R & E Henry Pty Ltd then on-sold St Ronans by contract dated 3 December 1998 to Johann Schneider and Klaus Schneider as trustees of Schneider Property Trust ("the plaintiff" [1]).

[5] The contract between the plaintiff and R & E Henry Pty Ltd identified the property acquired as the leasehold land on which St Ronans was located. It did not specifically describe cattle as being part of the property acquired and it did not list cattle in the contract's third schedule, which apportioned components of the overall purchase price to specific items. On the other hand, clause 2 of the contract purported to expressly reserve property and assets set out in schedule 2 from the sale and the attached schedule 2 read "nil".

[6] The first defendant, whose directors are the second and third defendant, purchased Springfield by a contract dated 30 October 1998. On the same date the first defendant also entered into a contract for purchase of the livestock from D & G Logans Cattle Pty Ltd as trustee for the Georgina Donfam Grazing Trust. The livestock was described in the contract as including branded and unbranded cattle then depastured on Springfield as well as cattle bearing five specified brands wherever depastured within two local shires, a geographical area including St Ronans.

[7] In its Statement of Claim filed 21 June 2010, the plaintiff pleads that on settling its purchase of St Ronans on or about 7 January 1999, it thereupon assumed possession

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[1] Klaus Schneider is not named as a plaintiff in the proceeding because he retired as a trustee in 2009, whereupon Johann Schneider, the named plaintiff, became the sole remaining trustee.

of all cattle depastured on St Ronans as trustee for the benefit of those interested in the Schneider Property Trust.

[8] Paragraph 5 of the Statement Claim pleads that the defendants unjustifiably and without authority of the plaintiff removed the following cattle from St Ronans:

> *"(a) 694 head in June, 1999 having a value of not less than $301,737.32;*
> *(b) 899 head in September 2001 having a value of not less than $390,867.22;*
> *(c) 167 head in October 2005 having a value of not less than $72,608.26;*
> *(d) 92 head in September, 2008 having a value of not less than $39,999.76."*

Those cattle and their progeny are the subject of the plaintiff's claim for the taking of an account or alternatively damages for conversion.

Progress of the claim to date

[9] The Claim and Statement of Claim was filed on 21 June 2010.

[10] On 1 July 2010, the defendants' solicitor requested the production for inspection and copying of certain documents. Those documents were provided by facsimile on 5 July 2010.

[11] Also on 5 July 2010, the defendants' solicitor by facsimile correspondence enclosed by way of service a request for particulars of the Statement of Claim. This was accompanied on the same date by a letter from the defendants' solicitors outlining its complaints about deficiencies in the existing Statement of Claim. The most significant of its complaints went to the lack of clarity in the Statement of Claim as to the basis upon which the plaintiff alleged it was entitled as against the defendants to either ownership or a right to possession of the cattle referred to in the Statement of Claim. The letter said inter alia:

> *"The defendants respectfully request that the plaintiff furnishes some proper explanation as to the facts supporting either ownership of the cattle in question or a right to possession thereof."*

[12] The correspondence written by the defendants' solicitor seeking the Further and Better Particulars did not nominate a time within which a response was required or indicate that the letter was written under Part 8 of the UCPR, i.e. it did not specify matters required by r 444 as a prerequisite to an application for orders by the Court requiring the provision of Further and Better Particulars.

[13] The plaintiff's solicitor advised the defendants' solicitor by email on 15 July 2010 that they expected to be in a position to respond to the request for Further and Better Particulars at some stage in the following week and indicated they did not require the defendant to file a Defence until 14 days after receiving that response.

[14] The plaintiff did not forward the foreshadowed response to the request for Further and Better Particulars and there is no evidence of any further correspondence

between the parties prior to the defendant/applicant's filing of the present application on 19 September 2011[2].

Application to dismiss Claim for want of prosecution

[15] In *Tyler v Custom Credit Corp Ltd & Ors*[3] Atkinson J (with whom the President and McPherson JA agreed) observed the factors that the Court will take into account in determining whether the interests of justice require a case to be dismissed for want of prosecution include:

> *"(1) how long ago the events alleged in the statement of claim occurred and what delay there was before 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 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;*
> *(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;*
> *(10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home with 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 advisors;*
> *(11) whether there is 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)*

Her Honour went on to acknowledge that, as was emphasized in *Cooper v Hopgood and Ganim*[4], the court's discretion should not be fettered by rigid rules and should take account of all relevant circumstances, including the desirability of people getting on with their lives without the stress of litigation hanging over them.

[16] In this application the applicant placed particular weight on consideration of the plaintiff's prospects. The emphasis it placed on this consideration appeared to prompt a complaint in the course of the respondent's submissions that the application to dismiss for want of prosecution was really an application for summary judgment by stealth.

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2 The question of whether in the circumstances of this case the failure to file a notice of intention to defend meant the court's leave was required under UCPR135 to file or pursue the present application was not raised in argument.

3 [2000] QCA 178

4 (1999) 2 QdR 113

[17] An application to dismiss for want of prosecution may readily be distinguished from an application for summary judgment in both form and substance. In an application to dismiss for want of prosecution, it is the want of prosecution not the absence of a demonstrated real prospect of success that is the foundation for the order sought. That will likely be reflected in the extent to which the evidentiary material filed in the former focuses on the issue of prospects compared to the evidentiary material filed in the latter. However, a party meeting an application to dismiss for want of prosecution must nonetheless be prepared to meet both evidence and argument going to the issue of prospects of success, it being a relevant consideration in such an application.

[18] The applicant identified two considerations said to indicate the plaintiff has very little prospect of success, namely, a "limitation defence" and the absence of title to support the claims.

[19] As to the "limitation defence", the first two of a series of four alleged removals of cattle occurred in 1999 and 2001 and the applicant submits that the claim, insofar as it relates to those cattle, is out of time.[5] Had the applicant filed a defence it would have been required to specifically plead such a limitation defence[6] and there would likely have been a reply pleading a response to that defence. Instead the applicant has opted to equip the court to consider the issue only to the extent raised in the affidavits filed.

[20] It appears from the affidavit of the plaintiff, that he permitted or acquiesced to the removal of cattle from his property by the applicant in the mistaken understanding that the applicant had title to the cattle and was entitled to remove them. He contends that mistake flowed from representations made by the applicant, stating:

> *"In or around June 1999 Alan Gaynor said words to me to the effect of "I bought these cattle off Logan and you bought this property without cattle", "if you don't let me come and get my cattle, I will involve the stock squad and the same thing that happened on Sundown and Sugarbag Stations two or three months ago will happen again here.""*

Of the above reference to the stock squad and Sundown and Sugarbag Stations the plaintiff states the defendants had a dispute with R & E Henry Pty Ltd over the ownership of cattle on those stations and the stock squad had effectively closed down those stations to perform a muster over two to three weeks to remove the cattle for the defendants.

[21] Whether the mistake allegedly made by the plaintiff is, in the context of the claim, a proper basis for the extension of the period of limitation[7] and if so, whether the mistake could with reasonable diligence have been discovered earlier, cannot with confidence be determined on the state of the materials presently filed. This uncertainty in turn makes it difficult to assess to what extent if any the striking out of the plaintiff's claim would conclude the litigation between the parties. However, even taking the applicant's argument at the highest, the relief sought in the claim relates in part to removal of cattle in respect of which there is no limitation issue.

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5 Per s 10 *Limitation of Actions Act* 1974

6 Per UCPR 150(1)(c)

7 Per s 38 of *Limitation of Actions Act* 1974

[22] The other limb of the applicant's argument as to prospects is its assertion the plaintiff has no title to support its claims. The applicant makes the point that a title to sue in conversion involves either ownership or the claimant's proprietary or possessory interest in the chattel[8]. The applicant complains the pleadings do not properly address either ownership of or any proper legal basis for a right to immediate possession of the cattle, the subject of the claim. However this was the primary focus of its request for further and better particulars and it has chosen to pursue this application without the advantage of first using the regime provided under the UCPR so as to compel the provision of the particulars requested. In the circumstances I am not prepared to infer the statement of claim's lack of clarity on this point means the plaintiff must have no title to the cattle.

[23] In any event, as the respondent correctly submits, it may reasonably be implied from the pleading's references to assuming possession that the plaintiff is claiming it had possessory title to the cattle. On the evidentiary material filed it came into possession of the cattle on St Ronans when it acquired the property. In argument counsel for the respondent submitted the cattle had in effect been abandoned, thus becoming the respondent's property. It is probably sufficient for present purposes that it is open to conclude the respondent in taking ownership of the property took possession of the cattle on it. Possession confers a title of its own, a "possessory title", which is as good as an absolute title as against every person except the absolute or true owner[9]. On the face of it then there likely exists a proper foundation for the respondent's claim.

[24] That may not be enough to ensure the success of the claim, particularly if the applicant was the absolute or true owner of the cattle. On the materials filed the applicant appears to have an argument of some substance that it is the absolute or true owner, although some evidence clouded the force of that argument. The applicant's counsel commendably sought to identify in oral submissions the irrelevance to its ownership point of evidence about disputes over ownership of the cattle preceding the respondent's acquisition of St Ronans and anomalies in the ownership of the cattle brand certificates for the brands of cattle in issue. However the applicant's assertion of ownership is yet to be articulated in the pleading of a defence, making it difficult to confidently assess the relevance of evidence in this application.

[25] The plaintiff presently appears to have an arguable case. To the limited extent the claim's prospects of success can at this stage be meaningfully assessed, its prospects are not so poor as to be a consideration adverse to the respondent in the application to dismiss for want of prosecution.

[26] As to the other considerations identified in *Tyler v Custom Credit Corp Ltd & Ors*[10], the applicant emphasised the delay before commencement of the litigation. There was a lengthy delay and while it is a consideration adverse to the respondent its significance is tempered by the evidence of the respondent that he did not become aware of the mistake mentioned above until September 2009 and that the mistake flowed from the earlier conduct of the applicant.

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8 *Horsley v Phillips Fine Art Auctioneers Pty Ltd* NSWSC 3211 of 1992, BC 9505362

9 *Russell v Wilson* (1923) 33 CLR 538 at 546, discussed in *Flack v Chairperson, NCA & Anor* (1997) 150 ALR 153 at 156,157.

10 supra

[27] The applicant properly emphasised the prejudice, some of which may be insidious and difficult to identify[11], flowing from the delay in initiation of the litigation. It highlighted that a potentially relevant witness, Donald Logan, died last year. That underscores the force of the applicant's submission, notwithstanding that it is not clear whether his death was before or after the commencement of the action[12] and that it is difficult to infer with any precision the potential relevance of his evidence, particularly in the absence of a filed defence.

[28] The delay since the commencement of the claim and consideration of potential prejudice and the stress of ongoing litigation that may flow from that is a consideration diminished in part by the mutual acquiescence of the parties in respect of that delay. The respondent should have responded in a timely way to the request for particulars. However his inaction is not without explanation. His affidavit cites the distraction of his divorce proceedings from September 2010 and the devastating financial impact of Cyclone Yasi, which struck earlier this year, upon his property and finances. This explanation does not satisfactorily explain the delay in advancing the matter, at least by the provision of the particulars the respondent said he would provide. Even allowing for his personal crises he has placed inadequate weight on his implied undertaking as a litigant[13] to proceed expeditiously.

[29] As for the applicant its last and only complaint to the plaintiff was its request for further and better particulars of July last year. It could have, but did not make that request under cover of an r 444 letter. This precluded it from seeking an order of the court for further and better particulars. It could have, but did not, send any follow up correspondence enquiring after the apparent failure to provide the promised further and better particulars. It could have, but did not, repeat its request for further and better particulars under cover of an r 444 letter. It could have, but did not, file a notice of intention to defend or a conditional notice to defend. It could have, but did not, file a defence in which it would have been obliged per r 150(4)(a) to specifically plead a matter it alleged made the claim not maintainable. It could have, but did not, file a notice of intention to defend followed by an application for summary judgment, the filing of such a notice being a prerequisite to such an application per r 293.

[30] While it was not obliged to do any of these things[14], the absence of such activity diminishes the force of its complaint as to considerations of delay, consequent potential prejudice and stress of litigation since the claim was filed. It could have but chose not to take action to advance the progress of the litigation.

[31] Considerations not already mentioned which appear to be relevant are the absence of disobedience of court orders and the absence of repetitive periods of delay during the litigation.

[32] It is noteworthy that there has not been inactivity sufficient to ground an application to dismiss the proceeding for want of prosecution under the regime for doing so

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11 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551

12 The initiation of a proceeding may prompt preparation to meet the proceeding by the taking of a statement of a witness. Should that witness die, the statement may be admissible pursuant to s 92 *Evidence Act*.

13 Per UCPR 5(3)

14 The letter of the plaintiff's solicitors dated 15 July 2010 effectively waived the requirement for the filing of a defence until after receipt of a response from them.

provided by the UCPR, r 280. That does not preclude an application seeking dismissal for want of prosecution in the exercise of the court's inherent jurisdiction but it further illustrates the strikingly early stage at which the applicant has brought this application. The timing of the application, brought even before the filing of a defence, may be contrasted with the stage at which other such applications have been successfully brought, for example: *Bird v Ace Insurance Limited*[15] where no step had been taken in the proceeding for three and a half years, *Hollyander Pty Ltd v Mike O'Regan & Associates Pty Ltd & Anor*[16] where there had been a failure to comply with orders of the court and no step had been taken for two and a half years, *Pickering & Anor v McArthur*[17] where over eight years had elapsed since the filing of the pleadings and there had been repeated delays in the interim, *Collier v State of Queensland*[18] where the court had repeatedly struck out the Statement of Claim and repeatedly afforded the plaintiff the opportunity to again file and serve a Statement of Claim, *Basha v Basha*[19] where there had been lengthy delays during the eight year period since the filing of the defence, *Puppinato v D & D Machinery Pty Ltd*[20] where eight years had elapsed since the filing of the pleadings and almost four years had elapsed since an unsuccessful attempt to have the claim dismissed for want of prosecution. Unlike those cases this is not a matter in which it can be concluded there has been a want of prosecution.

[33] On a consideration of the competing considerations relevant here, the application to dismiss for want of prosecution must fail.

Application to strike out pleadings

[34] The applicant submits that paragraphs 2–7 inclusive in the Statement of Claim disclose no reasonable cause of action and should therefore be struck out pursuant to UCPR 171 and the inherent jurisdiction of the Court. In the absence of repleading, the striking out of paragraph 2-7 would be fatal to the plaintiff's action.

[35] Regardless of whether the exercise of a power of that kind is founded in the inherent jurisdiction or on statutory rules of court, the need for caution in exercising the summary intervention of the court to prevent a plaintiff submitting his case for determination is the same.[21]

[36] The respondent's counsel candidly conceded in the course of the argument that the further and better particulars which had been sought by the applicant should be provided. This was, in effect, a concession that the case has not been adequately pleaded. It was not a concession that the pleadings disclosed no reasonable cause of action. The respondent contends in effect that the foundation for the causes of action which are pleaded can be identified by inference from the pleadings as possessory title.

[37] The pleadings should have more clearly identified the foundation for the plaintiff's title to the cattle, the existence of title to the cattle being a necessary foundation for

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15 [2011] QSC 262
16 [2011] QSC 164
17 [2010] QCA 341
18 [2010] QSC 254
19 [2010] QCA 123
20 [2010] QSC 47
21 *General Steel Industries Inc v The Commissioner for Railways (New South Wales)* (1964) 112 CLR 125 at 129-130

the causes of action being pursued. However, I am not prepared to conclude that the pleadings disclosed no reasonable cause of action. Even if I were, I would not regard the circumstances of this case as being so clear as to warrant summary intervention which would have the effect of depriving the plaintiff of further pursuing its claim. That is, even if I had been persuaded that I should strike out any of paragraphs 2-7 inclusive, I would have given liberty to replead them.

[38] In my view the pleadings are not in such disarray as to require the repleading in full of paragraphs 2-7. The preferable course is for the respondent to amend its pleadings in such a way as to answer the applicant's request for further and better particulars and to do so within 14 days.

[39] I have imposed a short deadline on the provision of the amended pleadings notwithstanding the contents of the respondent's affidavit as to his personal and financial problems. It is apparent those problems did not prevent him being legally represented in this application. Given the proper concession that the further and better particulars requested ought be provided, it is disappointing that they were not provided by the time of the hearing of the application, particularly given that the respondent's preparation for the hearing of the application must necessarily have involved a consideration of the same issues identified by the request for further and better particulars.

[40] The applicant may have failed in its primary application but the respondent's ongoing failure to provide the particulars it promised and which I now order it to provide will likely be relevant in my consideration of costs, an exercise the parties asked me to postpone until after the delivery of this decision.

Orders

1. The application to dismiss the plaintiff's claim for want of prosecution is dismissed.
2. The application to strike out paragraphs 2-7 of the Statement of Claim is dismissed.
3. The respondent is to provide answer to the applicant's request for further and better particulars of 5 July 2010 by way of an Amended Statement of Claim to be filed and served by 4 pm 21 October 2011.

In the absence of agreement between the parties, acceptable to the Registrar, as to the manner and date of argument as to costs I will hear the parties as to costs at 9.30 am 21 October 2011.