SUPREME COURT OF QUEENSLAND

CITATION:	*NDC Investments (Aust) Pty Ltd v Sign Vision (Aust) Pty Ltd & Anor* [2013] QSC 35
PARTIES:	**NDC INVESTMENTS (AUST) PTY LTD** ACN 131 068 918 (plaintiff) **v** **SIGN VISION (AUST) PTY LTD** ACN 080 580 678 (first defendant) **GREGORY JOHN BROWN** (second defendant)
FILE NO:	8936 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	29 January, 5 February 2013
JUDGE:	Atkinson J
ORDERS:	**1. The proceeding is reactivated.** **2. The application that the proceeding be dismissed for want of prosecution is dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – where the matter was set down for case flow review because no request for trial date had been filed within 180 days of the filing of the defence –where the matter was deemed resolved as a result of an order made on a case flow review – where *Practice Direction 17 of 2012* para 8 outlines the procedure for reactivating a matter that has been deemed resolved – where the plaintiff made an application for the proceeding to be reactivated – where the criteria to be considered are the past history of the proceeding, the effect of that history on the future conduct of the proceeding and the proposed plan for the timely determination of the proceeding – whether the proceeding should be reactivated PROCEDURE – COURTS AND JUDGES GENERALLY –

COURTS – DISMISSAL OF PROCEEDINGS FOR WANT OF PROSECUTION – where the defendants applied for orders that the proceeding be dismissed for want of prosecution under r 280 of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the proceeding should be dismissed for want of prosecution

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – where the plaintiff pleads that, induced by and relying on representations made by the first and second defendants, the plaintiff purchased a sign manufacturing business from the first defendant – where the plaintiff sought damages pursuant to s 82(1) of the *Trade Practices Act* 1974 (Cth) (TPA) (now s 236 of the *Australian Consumer Law* 2010 (Cth) (ACL)) for contravention by the first and second defendants of s 52 (now s 18 of the ACL) – where the plaintiff sought compensation or other remedial orders pursuant to s 87 of the TPA (now s 237(1)(a) of the ACL) – where the plaintiff also sought damages for breach of contract

TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – where the plaintiff alleged that it was a term of the business contract that the first defendant would not be involved with, or have an interest in, a business, either directly or indirectly, similar to the business sold to the plaintiff for a term of three years within a radius of 150 kilometres and that it would obtain a covenant from the second defendant on the same terms and conditions – where the plaintiff alleged that the second defendant's wife as agent for the defendants commenced a business similar to and less than 10 kilometres from the business sold to the plaintiff – where the plaintiff alleged that the first defendant and second defendant breached their respective restrictive covenants

Australian Consumer Law 2010 (Cth), s 18, s 236, s 236(1), s 237, s 237(1), s 243
Competition and Consumer Act 2010 (Cth), s 4
Trade Practices Act 1974 (Cth), s 52, s 82, s 82(1), s 87
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 137, r 149, r 149(1), r 154(1), r 155 , r 164(2), r 171, r 171(1), r 214(1)(a), r 214(2)(e), r 214(3), r 280, r 308A, r 309, r 371(2), r 374(3), r 374(5), r 467

Practice Direction 17 of 2012

Banque Commerciale SA v Akhil Holdings Ltd [1990] HCA 11; 169 CLR 279, cited

Barcar Pty Ltd v Carpatsea Pty Ltd [2008] NSWSC 344, cited
Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd [2011] QCA 252, followed
Brown v Jam Factory Pty Ltd [1981] FCA 35; (1981) 53 FLR 340, cited
Cook's Construction Pty Ltd v SFS 007 298 633 Pty Ltd (formerly t/as Stork Food Systems Australasia Pty Ltd) [2009] QCA 75, cited
Domino Pty Ltd v Daydream Island Resort Investments Pty Ltd [2003] QSC 44, cited
Esso Petroleum Co Ltd v Mardon [1976] 1 QB 801, cited
Jaddcal Pty Ltd v Minson (No 3) [2011] WASC 362, cited
Kizbeau Pty Ltd v WG & B Pty Ltd [1995] HCA 4; (1995) 184 CLR 281, considered
Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd [1981] FCA 15; (1981) 36 ALR 23, cited
Tyler v Custom Credit Corp Ltd [2000] QCA 178, applied
Yorke v Ross Lucas Pty Ltd [1982] FCA 180; (1982) 69 FLR 116, considered

COUNSEL: M J McDonald for the plaintiff
L M Copley for the defendants

SOLICITORS: Parker Simmonds Lawyers for the plaintiff
Lee Lawyers for the defendants

[1] On 14 September 2012 this matter was deemed resolved as a result of an order made on a case flow review on 21 June 2012. On 8 October 2012 the plaintiff NDC Investments (Aust) Pty Ltd ("NDC") made an application for the proceeding to be reactivated. On 19 October 2012 the defendants Sign Vision (Aust) Pty Ltd ("Sign Vision") and Gregory John Brown applied for orders that the proceeding be dismissed for want of prosecution under r 280 of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR"). The applications were heard together.

History of the matter

[2] This proceeding was commenced by a claim filed on 20 August 2010. NDC sought damages pursuant to s 82(1) of the *Trade Practices Act* 1974 (Cth) ("TPA") for contravention by the first and second defendants of s 52 of the TPA, compensation or other remedial orders pursuant to s 87 of the TPA, damages for breach of contract, interest and costs. The claim was supported by a statement of claim setting out the facts on which the plaintiff relied. That claim and statement of claim was not served on the defendants.

[3] The plaintiff's pleaded case is that, induced by and relying on representations made by the first and second defendants, NDC purchased a sign manufacturing business from the first defendant, Sign Vision, pursuant to a business contract dated 5 June 2008 for the sum of $380,000 plus stock in trade and work in progress estimated at $10,000. The plaintiff paid a deposit of $35,000. The plaintiff alleges that at all material times Mr Brown was the sole director and shareholder of and the sole controlling mind and will of Sign Vision. The plaintiff further alleges that it was a

term of the business contract that Sign Vision would not be involved with, or have an interest in, a business, either directly or indirectly, similar to the business sold to the plaintiff for a term of three years within a radius of 150 kilometres and that it would obtain a covenant from Mr Brown on the same terms and conditions ("the restrictive covenants"). Settlement of the business contract took place on 1 July 2008 when the plaintiff paid the balance of the purchase price of $381,339.06.

[4] The plaintiff alleges that four months later, in November 2008, the second defendant's wife commenced a business similar to and less than 10 kilometres from the business sold to the plaintiff. The plaintiff therefore alleges that the first defendant, through its sole controlling mind and will, Mr Brown, and Mr Brown personally, breached their respective restrictive covenants by assisting the second defendant's wife to commence, and then to operate, the competing business, as a consequence of which the plaintiff suffered damage. The plaintiff alleges that as a result of that conduct it lost nearly 90 per cent of the clientele of its business, a substantial portion of whom resumed business with the first defendant, through the auspices of the business conducted by the second defendant's wife.

[5] After issuing a number of notices of non-party disclosure, the plaintiff filed an amended statement of claim on 25 March 2011. It was served on the same date. On 10 April 2011 and 3 May 2011, the defendants sent letters to plaintiff detailing many complaints about the amended statement of claim. The plaintiff's detailed reply suggested, *inter alia*, that the defendants should deliver a request for further and better particulars. On 3 May 2011 the defendants filed a notice of intention to defend and a defence. A reply was filed on 25 May 2011. The plaintiff's list of documents was served on 17 August 2011 and the defendants' amended list of documents was served on 31 October 2011. The plaintiff contended that the defendants' disclosure was deficient.

[6] Because no request for trial date had been filed within 180 days of the filing of the defence, the matter was set down for case flow review. On 9 February 2012 I made the following orders by consent:

> "1. (a) A consent order for mediation is to be filed by 24 February 2012;
>
> (b) The parties participate in a mediation to take place by 9 March 2012 before a mediator to be agreed and the costs of the mediation be borne equally by the plaintiff and the first/second defendant;
>
> 2. The defendants make any request for further and better particulars of the amended statement of claim by 23 March 2012;
>
> 3. The plaintiff file and serve any further and better particulars of the amended statement of claim or, in the alternative, a further amended statement of claim by 5 April 2012;
>
> 4. The defendant file and serve an amended defence (if required) to any further amended statement of claim (if required) by 27 April 2012;
>
> 5. If the mediation proposed in paragraph 1 is unsuccessful, the parties sign and file a request for trial date by 22 June 2012 or the matter will be deemed resolved.
>
> 6. The parties have liberty to apply within three business days' notice in writing to the other parties."

[7] No order regarding the evidence to be given by experts was necessary as none of the parties intended to rely on expert evidence. A request for a consent order for mediation to take place on 9 March 2012 was provided to the court on 24 February 2012. The mediation was not successful.

[8] No request for further and better particulars was delivered by the defendant. On 8 May 2012, the plaintiff wrote to the defendants requiring the provision of a supplementary list of documents. The matter was set down for case flow review on 22 June 2012 at the request of the plaintiff. A consent order varying the timetable was made on 21 June 2012 to the following effect:

> "1. The plaintiff file and serve further amended statement of claim by 27 July 2012;
> 2. The first defendant and second defendant (defendants) file and serve amended defence by 10 August 2012;
> 3. The plaintiff and the defendants provide supporting list of documents by 24 August 2012;
> 4. The plaintiff and the defendants to sign and file request for trial date by 14 September 2012 or the matter be deemed resolved."

[9] The plaintiff served a draft further amended statement of claim on the defendants on 30 July 2012. The draft proposed adding two further defendants. The plaintiff apparently decided not to seek to add the further defendants as that would require the leave of the court. No amended pleadings as required by the order were filed and the matter was deemed resolved in accordance with the order on 14 September 2012.

Case flow management

[10] The system of case flow management in the civil jurisdiction of the Supreme Court of Queensland was introduced by Practice Direction No. 4 of 2002. This practice direction was replaced by Practice Direction No. 17 of 2012 (PD 17/2012). For the assistance of legal practitioners and self-represented litigants the court published a plain English guide to case flow management at the same time as PD 17/2012. Both are available on the court website: www.courts.qld.gov.au/courts/supreme-court/practice-directions/supreme-court. This application for reactivation falls to be determined under PD 17/2012, para 3 of which provides that the practice direction applies to civil proceedings instituted by claim in the Brisbane Registry of the Supreme Court.

[11] The objectives of case flow management are set out in para 2 of PD 17/2012. The principal objective is to give effect to r 5 of the UCPR which provides:

> "**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."

[12] Paragraph 2.2 of PD 17/2012 provides that the practice direction establishes a system to facilitate the just and timely disposition of proceedings, with the minimum necessary commitment of resources by the courts and litigants, by monitoring the progress of individual proceedings against predetermined timelines, and intervening when a proceeding is not progressing satisfactorily. As is provided in para 2.4 of the practice direction, case flow management is based on an expectation that most proceedings will be ready for trial or otherwise resolved with 180 days of the filing of the defence. As para 2.5 provides, if the proceeding is not ready for trial or otherwise resolved within that time frame, the court will impose directions to ensure the proceeding is prepared for trial with appropriate sanctions for non-compliance.

[13] If any proceeding is not ready for trial or otherwise resolved within 180 days, the court will send the plaintiff an intervention notice in a form known as CFM1. If no email address has already been provided the party receiving an intervention notice from the case flow manager must, within 14 days of the issue of the notice, file an address for service (Form 8) setting out an email address.

[14] Within 28 days of the issue of a CFM1 notice the plaintiff must respond by undertaking one of the steps set out in para 5.3 of PD 17/2012. If the matter has settled then the plaintiff should give written notice that the proceeding has been settled under r 308A of the UCPR (para 5.3(b)). If the matter has or should be discontinued the plaintiff should file a notice of discontinuance under r 309 (para 5.3(a)). If the matter is ready for trial the parties should file a request for trial date under r 467 (para 5.3(c)). If none of the above applies the plaintiff must justify the failure to file a request for trial date and propose a plan to facilitate the timely determination of the proceeding (para 5.3(d)).

[15] Paragraph 5.4 of PD 17/2012 provides that if one of those steps is not followed or not followed satisfactorily the proceeding will be placed on the case flow review list for directions to be given by the case flow judge. The parties or their legal representatives must attend the directions hearing when the proceeding is listed or it may be deemed resolved.

[16] Paragraph 6 of PD 17/2012 sets out what must occur when the plaintiff proposes a plan to facilitate the timely determination of the proceeding. The plan must be comprehensive and pay close attention to the rules and relevant practice directions. Paragraph 6.1 provides as follows:

"**6 Proposing plans and giving of directions**

6.1 Where the plaintiff elects to propose a plan under subparagraph 5.3(d), the parties must confer as to the appropriate directions which will ensure that the proceeding will be prepared for trial. The plan must be comprehensive and include specific dates for—

(a) if no step has been taken in the proceeding for:

(i) 1 year—the giving of one month's notice to every other party of the party's intention to proceed in accordance with rule 389(1) of the UCPR;

(ii) 2 years—the bringing of an application to the court for an order that a step may be taken in accordance with rule 389(2)of the UCPR;

(b) If the proceeding is within the jurisdiction of the District Court or the Magistrates Court—the transfer of the proceeding to that court (noting the date at which changes to the jurisdiction of the District Court and Magistrates Court came into effect);

(c) amended pleadings, if necessary;

(d) any disclosure or further disclosure, as well as how that disclosure should be made;

(e) the filing of any interlocutory applications;

(f) an alternate dispute resolution plan, including, for example, the date for filing of a consent order for mediation and the date by which it is to occur;

(g) the giving of expert evidence in compliance with Practice Direction 2 of 2005 and Chapter 11, Part 5 of the UCPR, and in particular, for—

(i) the appointment of a joint expert in accordance with paragraphs 4 and 5 of the Practice Direction 2 of 2005; or

(ii) if that Practice Direction does not apply or the parties have satisfied the court that a joint expert should not be appointed—a conclave of experts as set out in rule 429B(1);

(h) any other directions necessary to bring the matter to resolution; and

(i) the filing of a request for trial date or notice of discontinuance and provision that, if neither is filed, the proceeding be deemed resolved on that date. That date should be a case flow review date."

[17] Paragraph 6.3 of PD 17/2012 sets out the circumstances in which directions may be made without the need for a court appearance. Except as provided in para 6.3 the parties must appear at a case flow review and present to the judge a draft order which complies with the para 6.1. Paragraph 6.5 of the practice direction provides for what parties must do if they are unable to comply with the directions that have been made as follows:

"If a party is unable to comply with the directions made, that party may apply to amend the order giving directions for the proceeding by emailing the following to the associate of the case flow judge (associate.atkinsonj@courts.qld.gov.au), copying that email to the case flow manager (caseflowmanager@justice.qld.gov.au) and all other relevant parties to the proceeding, by 12 noon on the day before the date when the direction must be followed or the date on which the proceeding will otherwise be deemed resolved:

(a) a draft consent order in the terms of the amended plan in Microsoft Word format, which vacates any previous orders with which the party is unable to comply, and proposes new orders;

(b) if the amended plan does not comply with paragraph 6.1 - an explanation for that non-compliance;
(c) evidence of the consent of all relevant parties, and, where applicable, an explanation as to why consent of one or more of the parties to the proceeding is not required, for example because judgment has been entered against them;
(d) an explanation for the proposed amendment; and
(e) a copy of the previous order(s) which the new draft consent order proposes to amend."

[18] Paragraph 7 of the practice direction sets out the consequences of non-compliance with directions made by the judge under case flow management. They are as follows:

"**7. Consequences of Non-Compliance**

7.1 If a request for trial date is not filed by the date set out in directions made under this practice direction, the proceeding will be deemed resolved without the need for further order.

7.2 Non-compliance with this practice direction or directions made under it may, on the application of a party, or at the judge's own initiative, also result in:

(a) an order pursuant to rule 371(2);
(b) an order pursuant to rule 374(5);
(c) a non-complying party being deprived of the costs of late compliance;
(d) a non-complying party being ordered to pay the other party's costs thrown away by reason of the non-compliance, which may be fixed and payable forthwith;
(e) the proceeding being listed for trial notwithstanding non-compliance."

[19] Rule 371(2) therein referred to provides that where there has been a failure to comply with the UCPR the court may, *inter alia*, set aside all or part of the proceeding. Rule 374(5) provides that the court may, upon the hearing of an application under r 374(3), give judgment against a party who has failed to comply with an order.

[20] Paragraph 3.3 of the practice direction provides that if a matter is deemed resolved it means that the proceeding is in abeyance and no step can be taken unless and until the matter is reactivated by order of the court.

[21] The reactivation of proceedings is governed by para 8 of PD 17/2012. It provides as follows:

"**8. Restoring proceedings deemed resolved**

8.1 A proceeding deemed resolved may be reactivated by an application by any party before the case flow judge supported by affidavit material, which must:

(a) explain and justify—
(i) the circumstances in which the proceeding was deemed resolved;
(ii) any delay; and

(iii) any failure to comply with court directions; and

(b) address—

(i) any potential prejudice caused by the delay;

(ii) the parties' capacity to prepare the case for trial in a timely way; and

(iii) whether a trial is required for resolution of the proceeding; and

(c) propose a plan to facilitate its timely determination in accordance with paragraph 6.1.

8.2 An application for reactivation may also be heard and determined at the same time as an application made by a party under rule 374.

8.3 The judge may then:

(a) make an order pursuant to rule 371(2);

(b) make an order pursuant to rule 374(5); or

(c) reactivate the proceeding and give directions appropriate to effect its timely determination."

Dismissal for want of prosecution

[22] In addition to the plaintiff's application for reactivation, as earlier mentioned, the defendants applied for the plaintiff's claim to be dismissed for want of prosecution under r 280 of the UCPR. Both applications were heard together on 29 January and 5 February 2012. Rule 280 provides:

"**280 Default by plaintiff or applicant**

(1) If -

(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."

[23] In deciding whether or not to dismiss an action for want of prosecution the court has regard to the criteria set out in *Tyler v Custom Credit Corp Ltd*:[1]

> "When the Court is considering whether or not to dismiss an action for want of prosecution … there are a number of factors that the Court will take into account in determining whether the interests of justice require a case to be dismissed.[2] These include:
>
> (1) how long ago the events alleged in the statement of claim occurred[3] and what delay there was before the litigation was commenced;
>
> (2) how long ago the litigation was commenced or causes of action were added;[4]
>
> (3) what prospects the plaintiff has of success in the action;[5]
>
> (4) whether or not there has been disobedience of Court orders or directions;[6]
>
> (5) whether or not the litigation has been characterised by periods of delay;[7]
>
> (6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;[8]
>
> (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;[9]
>
> (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]
>
> (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.[11] 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;[12]

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1 [2000] QCA 178 at [2].

2 *Cooper v Hopgood & Ganim* [1999] 2 QdR 113 at 119.

3 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197 at 1207-1208 per Lord Griffiths; *Bishopgate Insurance Australia Ltd (In liquidation) v Deloitte Haskins and Sells*, Supreme Court of Victoria, Appeal Div, No 4901 of 1989, 9 September 1994 at 22, 23; *Hoy v Honan* CA No 4058 of 1996, 19 August 1997 at 4; *Cooper v Hopgood & Ganim* at 120, 121.

4 *Cooper v Hopgood & Ganim* at 120 per Pincus JA.

5 *Keioskie v Workers' Compensation Board of Queensland* CA No 46 of 1992, 15 September 1992 at 2-3 per McPherson J; *Cooper v Hopgood & Ganim* at 124.

6 *Cooper v Hopgood & Ganim* at 121;

7 *Birkett v James* [1978] AC 297 at 322-323; *Bishopgate Insurance Australia Ltd (In liquidation) v Deloitte Haskins and Sells* at 27; *Cooper v Hopgood & Ganim* at 119, 120, 124.

8 *Holmes v Civil & Civic Pty Ltd* CA No 15 of 1992, 14 September 1992; *Lewandowski v Lovell* (1994) 11 WAR 124; *Hoy v Honan* at 5.

9 *Hoy v Honan* at 3 per Derrington J; at 7 per Fitzgerald P.

10 *Keioskie v Workers' Compensation Board of Queensland* at 10 per Thomas J.

11 *Campbell v United Pacific Transport Pty Ltd* [1966] QdR 465 at 473, 475; *Kaats v Caelers* [1966] QdR 482 at 497; *Tate v McLeod* [1969] QdR 217 at 224-225; *Collingwood v Calvert* CA No 3028 of 1996, 6 December 1996 at 5, 7, per Fitzgerald P; *Cooper v Hopgood & Ganim* at 124.

12 *Gleeson v Brick* [1969] QdR 361 at 369*; Keioskie v Workers' Compensation Board of Queensland* per Thomas J at 7.

(11) whether there is a satisfactory explanation for the delay;[13] and

(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.[14]

The court's discretion is, however, not fettered by rigid rules but should take into account all of the relevant circumstances of the particular case[15] including the consideration that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them.[16]"

[24] I shall first consider the plaintiff's application that the proceeding be reactivated under para 8 of PD 17/2012. If the plaintiff satisfies the court that a matter should be reactivated then it is unlikely that the defendant would in those circumstances be able to satisfy the court that the matter should be dismissed for want of prosecution. There is utility in hearing the applications together as a party who successfully opposes an application to reactivate may also succeed in persuading a court to finally dispose of the matter by dismissing it for want of prosecution. The practice direction further points to the utility of the simultaneous hearing of an application for reactivation with an application to enter judgment for failure of a party to comply with the UCPR or a court order. Such an order has the advantage of finally disposing of a proceeding.

[25] In considering an application for reactivation pursuant to PD 17/2012, the court will have regard to the past history of the proceeding, the effect of that history on the future conduct of the proceeding and the proposed plan for the timely determination of the proceeding. This is done by having regard to the criteria set out in subparagraphs 8.1(a), (b) and (c) of PD 17/2012.

The circumstances in which the proceeding was deemed resolved

[26] On 11 September 2012, three days before the proceeding was to be deemed resolved if a request for trial date was not filed, the plaintiff's solicitors wrote to the defendant's solicitors proposing a further case flow directions order which extended the times for filing a further amended statement of claim and amended defence, provided for further disclosure and sought an order extending the time by which the parties were to file a request for trial date or the matter be deemed resolved. On the following day, the defendants' solicitors replied referring to the draft further amended statement of claim served on 30 July 2012, asking whether that was the statement of claim referred to in the proposed directions and informing the plaintiff that any application to add further defendants or additional causes of action would be opposed. The plaintiff's solicitors responded on 13 September 2012 that the

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13 *Campbell v United Pacific Transport Pty Ltd* at 473-474; *Witten v Lombard Australia Ltd* (1968) 88 WN (Pt1) NSW 405 at 412; *Dempsey v Dorber* [1990] 1 QdR 418 at 420; *Keioskie v Workers' Compensation Board of Queensland* per Thomas J at 4; *Cooper v Hopgood & Ganim* at 124.

14 *Witten v Lombard Australia Ltd* at 412; *Dempsey v Dorber* at 420; *Keioskie v Workers' Compensation Board of Queensland*; *Bishopgate Insurance Australia Ltd (In liquidation) v Deloitte Haskins and Sells* at 24-25; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 554-555 per McHugh J; *Cooper v Hopgood & Ganim* at 118, 124.

15 *Witten v Lombard Australia Ltd* at 412; *Stollznow v Calvert* [1980] 2 NSWLR 749; *Norbis v Norbis* (1986) 161 CLR 513 at 538; *Cooper v Hopgood & Ganim* at 118-119, 124.

16 *Cooper v Hopgood & Ganim* at 124 per McPherson JA.

plaintiff would be amending its statement of claim but not adding any further defendants. They again asked that the defendant agree to the proposed case flow directions. At 4.30pm on 13 September the solicitors for the defendants advised that the defendants would not consent to the proposed order.

[27] In such a situation, where the proceeding would be deemed resolved absent an order of the court, the party who does not want the matter to be deemed resolved should contact the case flow manager and the associate to the judge managing the case flow list to ensure that the matter is listed in the next case flow review list. In accordance with the usual directions, the date that the matter was to be deemed resolved, 14 September 2012, was a date scheduled for case flow review list. If the proceeding had been listed, further directions would most likely have been given and the date for which the matter was to be deemed resolved extended.

Delay

[28] The events, the subject of the claim, occurred after the second defendant's wife allegedly commenced a competing business in November 2008. The claim was filed in August 2010, after some delay but still well within the limitation period. The delay that next occurred was due to the plaintiff issuing notices of third party disclosure to obtain evidence to support and refine its claim. This led to an amended statement of claim being filed and served seven months later on 25 March 2011. Rule 137 of the UCPR provides that a notice of intention to defend must be filed within 28 days after the day the claim is served. The notice of intention to defend was, in this case, filed a little later, on 3 May 2011. Rule 164(2) provides that a reply must be filed within 14 days after the day of service of the defence. In this case the reply was filed a little later, on 25 May 2011.

[29] The duty of disclosure arises as soon as the pleadings close. Ordinarily this will be satisfied by delivering a list in accordance with r 214(1)(a) of the UCPR within 28 days after the close of pleadings (r 214(2)(e)). A copy requested of any document which is not the subject of a claim of privilege should be delivered within 14 days (r 214(3)). In this case the plaintiff's list of documents was not delivered until 17 August 2011 and the defendants' amended list on 31 October 2011, a list claimed by the plaintiff to be deficient. It can be seen that neither party made disclosure in accordance with the times provided in the rules, but that the defendants' delay was more substantial than the plaintiff's.

[30] The 180 days after the filing of the defence, which is the time in which the parties are expected to have the matter ready for trial, was reached on 31 October 2011. Hence the proceeding was set down for case flow management and directions given by the court for its future conduct. The delay that occurred prior to that date was occasioned both by the plaintiff and the defendants.

Failure to comply with court directions

[31] The first directions made on 9 February 2012 required the parties to file a consent order for mediation by a certain date and for the parties to participate in a mediation by 9 March 2012. Those directions were complied with. Paragraph 2 of the order required the defendants to make any request for further and better particulars of the amended statement of claim by 23 March 2012. No request was ever delivered and the parties failed to comply with the directions that followed, and were consequential upon, that direction.

[32] The next directions were made by the court on 21 June 2012. The first direction was that the plaintiff file and serve a further amended statement of claim by 27 July 2012. This direction was not followed. Neither party provided any further list of documents as directed.

[33] It can be seen that both the plaintiff and the defendants failed to comply with directions made by the court.

Prejudice

[34] The plaintiff contends that none of parties has suffered prejudice in consequence of any of the delay. The defendants did not contend to the contrary.

Parties' capacity to prepare for trial in a timely way

[35] This was a matter of most concern in this case. By the time the application was heard the plaintiff had not yet served on the defendants a draft of the statement of claim on which it would wish to rely on the trial of the action. It should go without saying that a basic requirement of a litigant who commences proceedings in this court is that the claim can be properly articulated in a statement of claim.

[36] When the applications came on for hearing on 29 January 2013 and it became apparent that the plaintiff was not able to yet provide the court with a further amended statement of claim, the hearing was adjourned with a direction that the plaintiff deliver to the defendants its draft further amended statement of claim by close of business on 31 January 2013.

[37] The plaintiff delivered its proposed further amended statement of claim in accordance with that direction. It is appropriate to examine that proposed pleading to determine whether the plaintiff is able to articulate its case. It would be pointless to reactivate the case on the basis that the defendants could then successfully apply to have the statement of claim struck out as that would be a waste of time and resources of the parties and the court. If the plaintiff is not able to plead its case then that would be a strong argument in favour of the proposition that it is not able to prepare its case in a timely way.

[38] The relevant provisions of the UCPR are r 149 which contains the basic rules of pleadings, r 155 which relates to the specificity required of a damages claim, and r 171 which provides for the circumstances in which all or part of a pleading may be struck out. This is not the hearing of an application to strike out the statement of claim. It is nevertheless relevant to the application to re-activate for the reasons stated.

[39] The basic requirement for pleading a claim and statement of claim are found in r 149(1) of the UCPR which provides:

> "Each pleading must -
>
> (a) be as brief as the nature of the case permits; and
>
> (b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and
>
> (c) state specifically any matter that if not stated specifically may take another party by surprise; and

(d) subject to rule 156, state specifically any relief the party claims; and

(e) if a claim or defence under an Act is relied on - identify the specific provision under the Act."

[40] As Mason CJ and Gaudron J held in *Banque Commerciale SA v Akhil Holdings Ltd*:[17]

> "The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In Liquidation)* [1916] HCA 81; (1916) 22 CLR 490, per Isaacs and Rich JJ at p 517. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision."

[41] Rule 155 of the UCPR introduced a rule requiring much more specificity in pleading damages than had previously been the case. This serves the purpose of defining the relief sought by the plaintiff with greater clarity so that the defendant knows what case it has to meet and the court what issues it has to decide with regard to that relief.

[42] Rule 171 defines when pleadings which fail to comply with the rules or are otherwise objectionable may be struck out. Rule 171(1) provides:

"(1) This rule applies if a pleading or part of a pleading -

(a) discloses no reasonable cause of action or defence; or

(b) has a tendency to prejudice or delay the fair trial of the proceeding; or

(c) is unnecessary or scandalous; or

(d) is frivolous or vexatious; or

(e) is otherwise an abuse of the process of the court."

[43] A number of the apparent deficiencies in the statement of claim were remedied by the latest draft further amended statement of claim. The defendants however made specific complaints as to the draft further amended statement of claim which I shall deal with *seriatim*:

[44] **Paragraph 2:** The plaintiff pleaded that to induce the plaintiff to enter into the business contract for the sale of the first defendant's business to the plaintiff, the first defendant, through its agent, provided the plaintiff with a business profile document which set out the sign manufacturing services carried out by the first defendant and the identity of its clients.

[45] The defendants submitted that there is no allegation that these representations were misleading, wrong in fact or otherwise inconsistent with the true state of affairs existing at the time the statements were made leaving the defendants to speculate how the plaintiff is going to eventually make use of the allegations, if they are relevant and how they are said to be relevant.

[46] The plaintiff contended that para 2 is not intended to be read in isolation from the balance of the proceeding. It contended that the defendants' objection is met by the

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17 [1990] HCA 11 at [18]; 169 CLR 279 at 286.

pleading in para 27(b) where the plaintiff alleges that the conduct engaged in by the defendants referred to, *inter alia*, in para 2 was in trade and commerce and misleading and deceptive or likely to mislead or deceive in contravention of s 52 of the TPA, which is now s 18 of the *Australian Consumer Law 2010* ("ACL").

[47] The defendants' response was that there was no allegation that the second defendant was involved in the making of the representation. However, it appears that that fault is remedied by para 28 of the draft further amended statement of claim which pleaded further, or in the alternative, to the breach of the TPA and the ACL by the first defendant, that the second defendant aided, abetted, counselled, or procured or was, directly or indirectly, knowingly concerned in, or party to, that contravention of the TPA and the ACL. This may well be the subject of a request for further and better particulars.

[48] A second criticism made by the defendants in their response is that the plaintiff failed to plead what is alleged to be misleading and deceptive about the representations. In *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd*,[18] Philippides J, with whom Chesterman JA and North J agreed, observed:

> "Clearly, in order for a pleading to disclose a cause of action for misleading and deceptive conduct, it is necessary to plead what is alleged to be misleading and deceptive about the representations (see, for example, *Pioneer Electronics Australia Pty Ltd v Edge Technology Pty Ltd* [1999] FCA 142 at [4] applied in *Mohareb v Lambert & Rehbein (SEQ) Pty Ltd* [2010] QSC 126 at [22] to [24])."

It is necessary for the plaintiff to plead the material facts said to give the representations their misleading and deceptive character. In this respect, the draft further amended statement of claim is still deficient. It would appear from a fair reading of the pleadings that the gravamen of the misleading and deceptive conduct is to be found in the representation made by the second defendant (whether on his own behalf or on behalf of the first defendant, or both) pleaded in para 3A of the draft further amended statement of claim. If so, there should not be any difficulty in further amending the statement of claim.

[49] **Paragraph 13A** of the draft further amended statement of claim alleges that as well as paying the purchase price for the business, the plaintiff also paid out the balance of the first defendant's loan for a computer system in the sum of $12,972.92.

[50] The defendants contend that there are no material facts pleaded as to why the amount was paid or why the plaintiff would be entitled to claim this amount from the defendants.

[51] The plaintiff's response was to submit that the draft further amended statement of claim annexed a copy of the Business Contract marked "A": see para 8 of the draft further amended statement of claim. In para "N" of the Items Schedule of that contract the Plant and Equipment is said, at (b), to refer to leased equipment. It then refers to clause 15 of the contract and Schedule B. An item included in Schedule B is the "computer loan". Clause 15 assigns the benefits and burdens of such loans to the plaintiff as purchaser. There is nothing in this pleading point. Notwithstanding the fact that it might be desirable for the plaintiff to further amend to make the

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[18] [2011] QCA 252 at [35].

allegation that this was part of the purchase price more explicit, the defendants know what case they have to meet.

[52] **Paragraph 20** of the draft further amended statement of claim alleges that in about November 2008, the second defendant's wife, Debbie-Ann Brown, as agent for the first and/or the second defendant, commenced a sign manufacturing business (Signwayz) with Callan Gunn from an address at Hope Island and then from about 21 April 2009, relocated the "Signwayz" business to an address at Arundel. Both addresses are alleged to be within the restricted area prescribed by the business contract. Paragraphs 22 and 23 of the draft further amended statement of claim then set out allegations as to how the first and second defendants assisted Ms Brown and Mr Gunn to set up and operate the "Signwayz" business.

[53] The defendants submit that the allegation of "agency" is a conclusion of law and there are no material facts pleaded to support the allegation. They refer to paras 22 and 23 of the draft further amended statement of claim to highlight the inconsistency with the pleading of agency, which, contrary to r 154(1) is not pleaded in the alternative. The defendants refer to the decision of this court in *Domino Pty Ltd v Daydream Island Resort Investments Pty Ltd*[19] where Ambrose J held:

> "It is quite insufficient in my view in a case of this sort for the plaintiff to plead merely that Williams was the actual or apparent or ostensible agent of Daydream Investments and/or Daydream Island. That bare allegation of fact merely pleads a legal conclusion. It does not plead the facts upon which such a conclusion might properly or arguably be reached."

[54] The plaintiff's response was to point to para 23 of the defence filed on 3 May 2011 where the defendants denied the allegations in para 20 of the amended statement of claim (which had pleaded that Ms Brown, as agent for the first defendant, commenced the sign manufacturing business, Signwayz, with Mr Gunn, at an address at Hope Island in November 2008). The denial in para 23 of the defence was on the grounds that:

(a) Mr Gunn commenced operating Signwayz on or about 28 October 1999 or, in the alternative, 9 September 2005;

(b) Ms Brown joined Signwayz in or about November 2008 with the principal role of providing administrative support to Mr Gunn and Signwayz; and

(c) Signwayz was operated by Mr Gunn from an address in Oxenford.

[55] The plaintiff says that the defendants cannot complain that they do not know the case they have to answer if they have already pleaded to the allegation. This does not deal with the problem that the plaintiff has not pleaded any material facts from which the conclusion of agency can be drawn. The draft is deficient in this respect.

[56] **Paragraph 27(b)** of the draft further amended statement of claim alleges that the conduct engaged in by the first and second defendants referred to in paras 2, 3A, 7, 10 and 13 of the draft further amended statement of claim was in trade or commerce and misleading and deceptive or likely to mislead or deceive in contravention of s 52 of the TPA (now s 18 of the ACL). The defendants submitted that neither para 2

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19 [2003] QSC 44 at [59].

or 13 made any reference to the second defendant. As the plaintiff submitted in its response, that submission overlooks para 28 of the draft further amended statement of claim which alleges that the second defendant aided, abetted, counselled or procured, or was, directly or indirectly, knowingly concerned in, or party to the contravention of s 52 of the TPA and s 18 of the ACL by the first defendant as alleged in para 27(b). In answer the defendants submitted that in order to have aided, abetted, counselled or procured a representation, there must be an allegation against the second defendant "in the first place". That is not a correct statement of the law. However, the plaintiff should set out the material facts upon which it relies to make the allegations set out in para 28.

[57] **Paragraph 30** of the draft further amended statement of claim and the prayer for relief are pleaded as follows:

> "30) By reason of:
>
> (a) the first defendant's breach of the Business Contract;
>
> Further, or in the alternative
>
> (b) the first and second defendants' contravention of s 52 of the TPA (now s 18 of the Australian Consumer Law 2010), ~~and its breach of the Business Contract~~, the plaintiff has suffered loss or damage; including but not limited to:
>
> | | |
> |---|---|
> | Purchase Price of 'Sign Vision' business | $380,378.87 |
> | Payout of Loan for 1st defendant's computer system: | $12,972.92 |
> | Rent paid to first defendant under the Lease: | $66,154.21 |
> | Outgoings paid to first defendant under the Lease: | $6,917.63 |
> | Legal & other fees incurred on purchase of 'Sign Vision' business: | $5,723.68 |
> | Legal & ~~other fees~~ incurred in enforcing Cl 12.2(b): | $8,748.75 |
>
> AND THE PLAINTIFF CLAIMS against the first and second defendants:
>
> 1. Damages, in the sum of $480,896.06, for breach of the Business Contract.
> 2. in the alternative,
>
> Damages, in the sum of $480,896.06, pursuant to ~~s 82(1) of the Trade Practices Act 1974 (Cth)~~ section 236 of the Australian Consumer Law 2010 for contravention, by the first and second defendants, of s 52 of the Trade Practices Act (now s 18 of the Australian Consumer Law 2010).
> 3. Further or in the alternative,
>
> Compensation ~~or other remedial~~ orders, in the sum of $480,896.06, pursuant to section 237(1)(a) of the Australian Consumer Law 2010 ~~s 87 of the Trade Practices Act~~. for contravention, by the first and second defendants, of s 52 of the Trade Practices Act (now s 18 of the Australian Consumer Law 2010).
> 4. ~~Further or alternatively, damages for breach of the Business Contract~~.
> 5. Interest thereon pursuant to s 47 of the Supreme Court Act 1995.
> 6. Costs."

[58] The defendants submitted that the damages pleaded have little or no regard to the principles regarding damages for a breach of a restraint of trade and/or misleading and deceptive conduct. They submitted first that the appropriate measure for

damages for a breach of restraint of trade is calculated on the assumption that the first and second defendants would have opened a competing business on the expiration of a reasonable restraint period. Secondly, they submitted that the plaintiff must prove that, but for the breaches of the restraint clause by the defendants, the plaintiff would have obtained customers' revenue that was obtained by the business Signwayz commenced in breach of the restraint. Thirdly, they submitted that the claim is to be calculated on the loss of profits by the plaintiff.

[59] The defendants relied for the third proposition on the decision in *Jaddcal Pty Ltd v Minson (No 3)*[20] where Le Miere J held:

> "[222] The damages must be assessed having regard to a number of points. First, Mr Daws assumed that Jaddcal lost profits as a result of Xtreme Ice Arena operating between 1 December 2010 and 27 May 2011. The defendants submitted that they are not liable for any loss of revenue to Jaddcal as a result of the operation of Xtreme Ice Arena beyond 28 February 2011, that is, 18 months after the date of the deed. I have found that the reasonable period for the restraint is a period of no more than 18 months. … The losses to which Jaddcal is entitled are losses resulting from the operation of Xtreme Ice Arena before 28 February 2011. …
>
> [223] Damages should be calculated on the assumption that Xtreme Ice Arena would have opened on the expiration of the reasonable restraint period of 18 months, that is approximately 1 March 2011. On this basis the gross revenue lost to Jaddcal would be the revenue lost to Xtreme Ice Arena between 30 November 2010 and 28 February 2011.
>
> [224] Secondly, Jaddcal must prove that, but for the breaches of the Restraint Clause by the first to fourth defendants, Jaddcal would have obtained customers and revenue that was obtained by Roselink. This requires consideration of what would have happened had the first to fourth defendants not infringed the Restraint Clause. The process involves a degree of estimation, but that is no bar to recovery.
>
> [225] I find that the breach of the Restraint Clause by the first to fourth defendants caused, or contributed to, Roselink establishing and opening the ice rink business at the Xtreme Ice Arena. …
>
> [226] I find that Jaddcal lost customers to Roselink. …
>
> [227] Thirdly, the claim is not properly for loss of revenue but for loss of profits. The profits to be calculated are the lost profits, that is lost revenue less costs that would have been incurred in earning the lost revenue. Costs savings are to be brought to account."

[60] In relation to the damages for the breach of the TPA or the ACL the defendants submitted that the proper measure of damages was the difference between the real value of the business acquired as at the date of acquisition and the price paid for it.

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20 [2011] WASC 362 at [222] - [228].

They relied upon a decision of Bergin J in *Barcar Pty Ltd v Carpatsea Pty Ltd*[21] where her Honour referred to a submission by the plaintiff and the defendant in that case regarding the decision of the High Court in *Kizbeau Pty Ltd v WG & B Pty Ltd*:[22]

> "In an action for damages for deceit for inducing a person to enter a contract of purchase, which is an action that is closely analogous to an action for damages for breach of s 52, **the courts have consistently held that the proper measure of damages is the difference between the real value of the thing acquired as at the date of acquisition and the price paid for it**. Nevertheless, although the value is assessed as at the date of the acquisition, subsequent events may be looked at in so far as they illuminate the value of the thing as at that date. A distinction is drawn, however, between subsequent events that arise from the nature or use of the thing itself and subsequent events that affect the value of the thing but arise from sources supervening upon or extraneous to the fraudulent inducement. Events falling into the former category are admissible to prove the value of the thing, those falling into the latter category are inadmissible for that purpose. Thus, the takings of a business subsequent to purchase are generally admissible, not only to prove that a representation concerning the takings was false but also to prove the true value of the business as at the date of purchase. Even when some difference exists between the conditions under which the business was conducted before and after purchase, evidence of subsequent takings may be admissible, 'subject to due allowance being made for any differences in relevant conditions'. But if it is established that the decline in takings has been caused by business ineptitude or unexpected competition, evidence of subsequent takings is not admissible to prove the value of the business as at that date, events such as ineptitude and unexpected competition being regarded as supervening events. **In some cases of deceit, it may also be proper to compensate the defrauded party not only for the difference between the value of the thing acquired and the price paid for it but also for losses induced by the fraud and directly incurred in conducting the business**. All of these principles are appropriate to the assessment of damages under s 82 where a breach of s 52 of the Act had induced a person to purchase a business." (references omitted, emphasis added)

[61] It can be seen that *Kizbeau* is not authority for the proposition that the proper measure of damages is limited to the difference between the real value of the business acquired as at the date of acquisition and the price paid for it.

[62] The defendants submitted that although not pleaded, the claim for damages appeared to be based on *restitutio in integrum*, although no rescission of the contract is pleaded. They referred to *Cook's Construction Pty Ltd v SFS 007 298 633 Pty Ltd (formerly t/as Stork Food Systems Australasia Pty Ltd)*,[23] where Keane JA observed "the only decisions which support the necessity for *restitutio in integrum* are

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21 [2008] NSWSC 344 at [103].

22 [1995] HCA 4 at [16]; (1995) 184 CLR 281 at 291.

23 [2009] QCA 75 at [73].

concerned with cases of rescission of contract, and the respondent's counterclaim does not depend upon the exercise of a right to rescind the subcontract. Accordingly, no question of a mutual restoration of the parties to their pre-contractual position arises."

[63] The defendants submitted that the plaintiff's pleading appeared to allege that the business has no value whatsoever and notwithstanding that the business had traded for the last 5 years and will continue to do so, the plaintiff is entitled to:

(a) a refund of the purchase price (which included $88,700 of plant and equipment);

(b) a refund for the payout of a loan for a computer system which the plaintiff presumably now owns;

(c) a refund of the 2 years rent and outgoings (even though the term of the lease was for a period of 3 years); and

(d) a refund of legal fees incurred in the purchase of the business that the plaintiff continues to trade and will continue to trade regardless of the outcome of this proceeding.

[64] In response the plaintiff referred to the decision of *Barcar* which concerned a claim for damages for deceit and submitted that the provisions of the TPA and now the ACL give the court power to make far reaching orders, including refund of monies paid and interest. The plaintiff submitted that is well established that the court has power not only to refund all monies paid, as a consequence of misleading and deceptive conduct, but interest as well.

[65] *Australian Consumer Law* is defined in s 4 of the *Competition and Consumer Act* 2010 (Cth) to mean Schedule 2 as applied under Subdivision A of Division 2 of Part XI. Division 4 Subdivision A of Part 5-2 of the ACL covers compensation and other orders for injured persons. Section 237(1) provides that:

> "(1) A Court may:
>
> (a) on application of a person (the ***injured person***) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:
>
> (i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or
>
> (ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 250 to be an unfair term; or
>
> …
>
> make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.
>
> Note 1: For applications for an order or orders under this subsection see section 242.
>
> Note 2: The orders that the court may make include all or any of the orders set out in section 243."

[66] Alternatively the plaintiff makes its claim under s 236(1) of the ACL which provides:

> "(1) If:
>
> (a) a person (the ***claimant***) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened a provision of Chapter 2 or 3;
>
> the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention."

[67] The kinds of orders that can be made under s 243 of the ACL are numerous. Section 243 provides as follows:

> "**243 Kinds of orders that may be made**
>
> Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the ***respondent***) include all or any of the following:
>
> (a) an order declaring the whole or any part of a contract made between the respondent and a person (the ***injured person***) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract;
>
> (i) to be void; and
>
> (ii) if the court thinks fit - to have been void *ab initio* or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
>
> (b) an order:
>
> (i) varying such a contract or arrangement in such manner as is specified in the order; and
>
> (ii) if the court thinks fit - declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
>
> (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
>
> (d) an order directing the respondent to refund money or return property to the injured person;
>
> (e) except if the order is to be made under section 239(1) - an order directing the respondent to pay the injured person the amount of the loss or damage;

(f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;

(g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;

(h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:

(i) varies, or has the effect of varying, the first mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument."

[68] The plaintiff submitted that cases decided under s 82 and s 87 of the TPA are relevant to the relief claimed under s 236 and s 237 of the ACL. The plaintiff referred to *Yorke v Ross Lucas Pty Ltd*[24] as an example of a case which concerned the assessment of damages where the plaintiff alleged breaches of s 52 of the TPA in the course of selling a business. In that case, Fisher J adopted the approach used by Fox J in *Brown v Jam Factory Pty Ltd*:[25]

> "The correct way to approach the assessment of damages in this case, in my view, is to compare the position in which the applicants might have been expected to be if the misleading conduct had not occurred with the situation they were in as a result of relying on that conduct."

[69] The assessment of damages was seen as analogous to the assessment of damages for the tort of deceit but that is a "guide rather than a positive requirement."[26] Fisher J referred with approval to the decision in *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd*[27] where Northrop J observed that "there may be cases where the measure of damages to be recovered exceeds the difference in value between the amount by which the price paid exceeds the true value". *Esso Petroleum Co Ltd v Mardon*[28] is such a case. Fisher J held in *Yorke v Ross Lucas Pty Ltd*[29] that the plaintiff was in the circumstances of that case entitled to:

- interest on the amount paid by it to purchase the business to the date of judgment;
- compensation for actual losses incurred in carrying on the business;
- the amount payable by the plaintiff to the landlord in respect of loss and expenses incurred by the landlord on re-entry and prior to re-letting;
- the costs of going into and out of the business; and

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24 [1982] FCA 180; (1982) 69 FLR 116.
25 [1981] FCA 35; (1981) 53 FLR 340 at 351.
26 *Yorke v Ross Lucas Pty Ltd* at 131.
27 [1981] FCA 15; (1981) 36 ALR 23 at 59.
28 [1976] 1 QB 801.
29 At 137 - 138.

- a proportion of the additional capital put into the business.

[70] It is apparent that the pleading in para 30 and the prayer for relief fail in particular to make sufficient distinction between the relief claimed for breach of contract and the relief claimed for breach of the TPA and ACL.

[71] The defendants have made legitimate criticisms of the plaintiff's draft further amended statement of claim. If they were to apply to strike it out, some but not all of the pleading would be struck out. This is not a case, however, where the plaintiff is quite unable to articulate a genuine claim but one where there are deficiencies in the pleading which should be capable of amendment.

[72] The plaintiff must satisfy the court that it has the capacity to prepare for trial in a timely way. The difficulties it has faced in pleading its case have caused concern but not sufficient to reach the conclusion that the plaintiff will not be able to remedy those deficiencies. However, it must be subject to a strict timetable and a failure to comply will inevitably lead to an application by the defendants under the UCPR to strike out the plaintiff's statement of claim and/or for judgment.

Whether a trial is required for resolution of the proceeding

[73] A mediation of this matter was not successful. Accordingly it appears that a trial is the only way to resolve it. If the plaintiff's claim is arguable and properly articulated then it should be allowed to go to trial unless its behaviour means that the proceeding should be dismissed. The corollary of this is that if the merits of the plaintiff's case are not arguable, reactivation would be futile. That is not the case here. The plaintiff has an arguable case. The draft further amended statement of claim articulates, to a large extent, the plaintiff's claim. However it is still in need of further amendment to comply with the rules as to pleading.

Proposed plan

[74] The proposed plan must comply with para 6.1 of PD 17/2012. The first plan proposed in the affidavit material filed on the application did not do so. It did not specify dates for compliance but rather the less satisfactory practice of providing for the parties to take steps such as filing pleadings, making disclosure and filing a request for trial date a number of days after the preceding step. The court's experience is that the parties must know the precise date by which a step must be taken in order to be able to comply with the court's directions. This is particularly so where the parties have already demonstrated an unwillingness or incapacity to comply with court directions.

[75] This was remedied in a plan subsequently proposed by the plaintiff before the date of hearing of the application for reactivation. However that plan needs further adjustment to allow for the filing of a further amended statement of claim.

Conclusion

[76] This is a proceeding which should, on balance, be reactivated. In view of the matters canvassed on the application for reactivation, it should not be struck out for want of prosecution.

[77] I shall hear the parties on the precise form of the order to be made and as to costs, noting that the usual order in a case such as this is that the applicant for reactivation should pay the other parties' costs.