SUPREME COURT OF QUEENSLAND

CITATION:	*Wine Connection Pty Ltd as Trustee v Pitcliff Pty Ltd* [2013] QSC 56
PARTIES:	**WINE CONNECTION PTY LTD (ACN 072 924 568) AS TRUSTEE FOR EASTMAN FAMILY TRUST** (Applicant) v **PITCLIFF PTY LTD (ACN 087 643 338)** (Respondent)
FILE NO/S:	10/2009
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Cairns
DELIVERED ON:	11 March 2013
DELIVERED AT:	Supreme Court, Cairns
HEARING DATE:	16 January 2013
JUDGE:	Henry J
ORDER:	**1. The applicant's application is dismissed;** **2. Pursuant to rule 280 of the *Uniform Civil Procedure Rules* 1999 (Qld), the proceeding is dismissed for want of prosecution; and** **3. I will hear the parties as to costs.**
CATCHWORDS:	PRACTICE – ACCOUNTS – DELAY – LEAVE TO PROCEED – DISMISSAL OF PROCEEDINGS FOR WANT OF PROSECUTION – where applicant obtained a consent order for an account of its former partnership with respondent – where respondent filed a statement and account – where applicant did not file a statement challenging the respondent's statement and account – where applicant failed to take a step in the proceeding for over two years – meaning of "proceeding" in r 389 - where applicant seeks leave to proceed – where respondent applies to dismiss the proceeding for want of prosecution

Uniform Civil Procedure Rules 1999 (Qld) rr 5, 280, 389, 528, 532, 533, 535, 536, 539

Artahs Pty Ltd v Gall Standfield & Smith (a firm) [2012] QCA 272

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541

Cooper v Hopgood & Ganim [1999] 2 QdR 113

Cousins v Mount Isa Mines limited [2006] 2 QdR 343

Groeneveld Australia Pty Ltd & Ors v Wouter Nolten & Ors [2011] VSC 512

Merritt v Hughes [2010] QSC 100

Puppinato v D & D Machinery Pty Ltd [2010] QSC 47

Tyler v Custom Credit Corp Ltd & Ors [2000] QCA 178

COUNSEL:	Jonsson MA for the applicant Moody S for the respondent and cross-applicant
SOLICITORS:	Devenish Law for the applicant Slater & Gordon Lawyers for the respondent and cross-applicant

[1] The applicant obtained a consent order for the taking of an account in respect of its former partnership with the respondent. The respondent filed a statement and account indicating no money was payable to the applicant.

[2] The applicant failed to comply with the 28 day deadline for filing a statement challenging the accuracy of the respondent's filed material. Moreover, the applicant thereafter failed to take a step for over two years.

[3] Notwithstanding that inordinate period of inaction in the face of materials indicating it is owed nothing, the applicant now seeks leave to proceed. The respondent cross-applies to dismiss the proceeding for want of prosecution.

Background

[4] The applicant and respondent were partners in a partnership at will, trading as EJP Beverages.

[5] The partnership ended by agreement on 31 March 2007.

[6] On 13 January 2009, over four years ago, the applicant filed an originating application seeking an order:

> "That all necessary accounts be taken and enquiries held of the partnership dealings and transactions between the applicant and the respondent for the determination of such amount as may be due by either partner to the other, including, an account and/or enquiry as to the value of the profits made since the dissolution of the partnership, known as EJP Beverages."

[7] On 23 February 2009, the Registrar ordered by consent that "an account be taken in common form of all dealings and transactions of the partnership...for the purpose of determining such amount, if any, as may be payable by either partner to the other". Order two required the respondent to file an "account verified by affidavit of all dealings and transactions of the partnership" within 28 days. In turn, order 3 required:

> "Any statement by the applicant challenging the accuracy of the account and statement so filed and served be filed and served within 28 days of service of the said account and statement upon the applicant and otherwise in compliance with r. 532 of the *Uniform Civil Procedure Rules*."

[8] It was further ordered that the application be adjourned to a date to be fixed with liberty to apply on three days' notice.

[9] On 30 March 2009, the respondent filed an affidavit by Anthony Di Vincenzo in purported compliance with order two. That was about a week after the lapse of the 28 day period contemplated by the order, but no issue has been taken about that. That affidavit's accounting of the business identified a gross distribution owing to the applicant in the amount of $41,801.35. However, it also identified other moneys owing for which the applicant was responsible in a total amount exceeding the gross distribution by $2,004.81. Its effect was that the total distribution owing to the applicant was negative $2,004.81, so that no amount would be payable by the respondent to the applicant.

[10] By letter dated 20 April 2009, the applicant complained to the respondent that the affidavit of Mr Di Vincenzo failed to verify all of the dealings and transactions referred to in the account and called upon the respondent to remedy its breach of the order by delivering a further affidavit, verifying the relevant entries contained within the account. The applicant's letter foreshadowed that upon receipt of that affidavit the applicant would file and serve its statement challenging the accuracy of the accounts.

[11] On 21 May 2009, a second affidavit by Mr Di Vincenzo was filed. That affidavit provided more comprehensive information than the first affidavit, predominantly by exhibiting documents. However, the applicant still did not file and serve its statement challenging the accuracy of the accounts

[12] Nearly two years later, on 12 April 2011, the applicant filed a notice of intention to proceed. The notice was thought to be required under r 389(1) of the *Uniform Civil Procedure Rules* ("*Rules*") because no step had been taken for over one year. The parties are at common ground that the notice correctly identified the last step taken in the proceedings occurred on 21 May 2009, when the second affidavit of Mr Di Vincenzo was filed.

[13] On 20 July 2011, over three months after the filing of notice of intention to proceed, the respondent filed a notice of objection to items in the account set out in the first

affidavit of Mr Di Vincenzo. Curiously, no notice of objection was filed in respect of the second affidavit of Mr Di Vincenzo. The respondent contends the notice of objection should not have been filed without an order of the court pursuant to r 389(2) in that, prior to the notice's filing, over two years had expired since the last step in the proceeding had been taken.[1] The applicant acknowledged in a letter dated 17 May 2012 that for that reason the notice was irregular. On 18 December 2012, another six months later and almost 17 months after the irregular filing of the notice of objections, the applicant filed the application now before the court.

[14] The applicant seeks orders including:

> "1. Insofar as it be necessary, an order that the applicant have leave to proceed with this proceeding.
>
> 2. An order that an account be taken before and under the direction of the Registrar on a date to be fixed by the Registrar for the purpose of determining such amount, if any, as may be payable by either party to the other. ..."

[15] The respondent by way of cross application seeks orders pursuant to r 280 dismissing the proceeding for want of prosecution. Failing the dismissal of the proceeding, it seeks orders setting aside the purported notice of objection and transferring the proceeding from the Cairns Registry to the Brisbane Registry.

Preliminary issue: is leave to proceed required?

[16] Rule 389(2) relevantly provides:

> "If no step has been taken in that proceeding for two years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice."

[17] On the face of it, the last step in the proceeding prior to the purported filing of the notice of objection on 20 July 2011 occurred over two years earlier on 21 May 2009, when the second affidavit of Mr Di Vincenzo was filed.

[18] The term "step", which is not defined by the *Rules*, includes, but it is not limited to, a step that is required by the *Rules* to progress the action towards a conclusion.[2] For example, the filing and service of a reply or a subsequent pleading, while not required by the *Rules*, would amount to a step in a proceeding.[3] Whether the filing of the notice of objection constituted a purported step in the proceeding was not the subject of argument before me. The parties were at common ground that it was and I proceed on that basis. It is the meaning of "proceeding" rather than "step" on which the parties joined issue.

[19] While the applicant does not abandon its application for an order that it should have leave to proceed with the proceeding, it contends that such an order is unnecessary. It submits r 389 has no application where the action or proceeding has already progressed to the point of perfection of final orders which acknowledge and give effect to the underlying right asserted in the action or proceeding. In effect, the applicant contends that the "proceeding", in the sense contemplated by r 389, concluded with the consent

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1 The filing of the r 389(1) notice of intention to proceed prior to the expiration of two years did not avoid the operation of r 389(2) once two years had expired without a step.

2 *Artahs Pty Ltd v Gall Standfield & Smith (a firm)* [2012] QCA 272 [3], [48].

3 Ibid.

order of the Registrar on 23 February 2009. The applicant submits any subsequent activity in the matter ought not be characterised as a purported step in the "proceeding" within the meaning of r 389.

[20] In support of that interpretation, the applicant points to r 535, which provides:

> "If there is delay in prosecuting an account, the court may make orders for staying or expediting the proceeding, or for the conduct of the proceeding."

[21] The applicant submits that r 535 is necessary because once there is an order for the taking of an account, the "proceeding", in the sense contemplated by r 389, is completed. It submits that after such an order it is r 535 that allows the court to deal with delay.

[22] The words of r 535 do not suggest it ought operate to the exclusion of r 389. Even if after an order for the taking of an account there was not a delay of the magnitude of two years, there may nonetheless be delays warranting the intervention of the court via r 535. However, it does not follow that the failure of a party aggrieved by delay to actively seek an order of the court under r 535 should remove its entitlement to the protection of r 389(2) and its requirement, in effect, that the inactive party must seek an order of the court where the delay exceeds two years.

[23] The applicant also argued that the "proceeding" is complete on the making of the order that an account be taken because such an order determines the substantive right sought by the application. It relied upon a long established principle, discussed in *Groeneveld Australia Pty Ltd & Ors v Wouter Nolten & Ors*,[4] to the effect that the doctrine of *res judicata* precludes issues being raised about the rights of the parties in the course of the account because the rights of parties in proceedings for an account of profits must be established at trial. That principle was relevant in that case because the defendant sought, after consenting to a judgment ordering the taking of an account of profits, to dispute that it should be liable for any of the profits so determined. In the present context, if the account had determined there was money payable by the respondent to the applicant the principle would in effect have precluded the respondent from denying that liability. That is, the principle would here preclude a party from asserting rights inconsistent with the consent order having been made.

[24] However, the principle does not mean the "proceeding", in the sense that word is used in the *Rules,* is complete on the ordering of the account. Such a contention is literally at odds with r 535, which expressly uses the word "proceeding" to refer to the process of prosecuting an account. In this case, it is also at odds with what was sought in the originating application, with the limited extent of the orders made by the Registrar on 23 February 2009 and with the contents of the *Rules* in respect of the taking of an account.

[25] The originating application was for an order that all necessary accounts be taken "for the determination of such amount as may be due by either partner to the other". The consent orders included an order for the taking of an account "for the purpose of determining such amount, if any, as may be payable by either partner to the other". That is, the order did not itself constitute a determination of what, or indeed if any, amount was payable.

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4 [2011] VSC 512, [21]-[24].

[26] Further, the application was also for an order that the applicant be entitled to interest on such amount as may be found to be due and owing to it. The consent orders did not deal with this aspect of the application, but did adjourn the application to a date to be fixed with liberty to apply on three days' written notice. The adjournment of the application is also at odds with the applicant's characterisation of the proceeding as finalised.

[27] While r 536 provides that an account must be taken before the Registrar unless the court directs it to be taken before a special referee or the court itself, no directions were given as to the timing or venue of the taking of the account before the Registrar. It remained to be seen whether or not there would be directions sought or given that the account be taken before a special referee or the court itself. It also remained to be seen in the event the account would be taken by the Registrar or a special referee, whether it would become necessary pursuant to r 539 to refer to the court a question arising on the taking of the account. It also remained to be seen whether there would be a challenge to the accuracy of the account pursuant to r 532 and the taking of evidence by examination or cross-examination on oath pursuant to r 533.

[28] For all of these reasons, I conclude the proceeding commenced by the originating application had not been finalised by the consent order of 23 February 2009.

[29] It follows, given the applicant's delay in taking a step in the proceeding for over two years, that it requires the court's leave to take a further step.

[30] If I am wrong in reaching that conclusion, and if instead the orders sought by the applicant fall to be made under r 535, I would in any event decline to make such orders because of the same considerations as are discussed hereunder in respect of the merits of the matter.

Relevant considerations

[31] The considerations bearing upon whether leave should be given per r 389 are, in essence, the same as those considerations that arise on the cross application to dismiss the proceeding for want of prosecution per r 280.

[32] In *Tyler v Custom Credit Corp Ltd & Ors*[5] Atkinson J, with whom McMurdo P and McPherson JA agreed, identified a number of factors a court will take into account in considering whether or not to dismiss an action for want of prosecution or whether to give leave to proceed under r 389:

> "These include:
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> (1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
>
> (2) how long ago the litigation was commenced or causes of action were added;
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> (3) what prospects the plaintiff has of success in the action;
>
> (4) whether or not there has been disobedience of Court orders or directions;
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> (5) whether or not the litigation has been characterised by periods of delay;

[5] [2000] QCA 178, [2].

(6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
(7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;
(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 to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;
(11) whether there is a satisfactory explanation for the delay;
(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.

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 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." (Citations omitted.)

Merits

[33] The respondent acknowledges that if the taking of the account proceeded it would be principally based on documentary records. Thus, it cannot point to some specific forensic prejudice it would suffer in the conduct of the account by virtue of the lengthy delay. However, that is not a determinative consideration. Moreover, it does not mean that more generalised prejudice is absent. Lengthy delay is inherently prejudicial to the quality of justice, which will inevitably deteriorate as a result of delay, potentially in ways that are not recognisable.[6] The generalised prejudice to a defendant of a very long delay, including the psychological and commercial effects, should not be underestimated.[7]

[34] As to the relevant period of delay, there were mixed reasons for the delay between the end of the partnership and the bringing of the originating application and no particular issue is taken about that. Rather the respondent's submissions focussed on the inordinate delay that occurred after the application was made.

[35] The applicant filed its originating application on 13 January 2009. The Registrar's consent order soon followed on 23 February 2009, as did the filing of Mr Di Vincenzo's two affidavits, on 30 March 2009 and 21 May 2009 respectively. It then took over two years for the applicant to file its notice of objection on 20 July 2011 and even then its objections went only to Mr Di Vincenzo's first affidavit, not his second.

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6 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551; *Tyler v Custom Credit Corp Limited & Ors* [2000] QCA 178, [45].

7 *Cooper v Hopgood & Ganim* [1999] 2 QdR 113, 124 [18] & [35].

[36] The consent order required the applicant to file any statement challenging the accuracy of the account and statements filed by the respondent within 28 days of service of that material. The notice of objection was not a statement by the applicant, as was required by the order. On any view of it there has been disobedience of the order. That order was obviously calculated at advancing the account in a timely fashion, consistent with the spirit of r 5 and the parties' implied obligation to proceed expeditiously.

[37] The explanation for that disobedience is that the respondent's material failed to disclose sufficiently detailed and verified information. The applicant's position by implication is that it should not therefore have been expected to comply with the order requiring it to file its statement challenging the accuracy of the account and statement filed by the respondent. It is certainly arguable that the respondent's initially filed material could have contained greater detail. However, it did provide more detail in the second affidavit of Mr Di Vincenzo and the applicant did not take a like objection to the adequacy of that supplementary material. Also the *Rules* clearly contemplate that during the process of the taking of the account additional detail may have to be provided.[8]

[38] Further it was possible for the applicant to file its statement in compliance with order 3, referring, in compliance with r 532, to omissions of the kind which it complained of in its notice of objection. Alternatively or additionally, it could have used the liberty to apply provision of the order so as to return to court and seek directions under r 528 about verifying the account. It did none of these things.

[39] In any event, even if the notice of objection could be regarded as having the effect of postponing the need for the applicant to file a statement in compliance with order 3, or even if the notice of objection could be regarded as having the character of a statement of the kind contemplated by order 3, the fact remains it was filed nearly two years and three months after the expiration of the time for compliance with order 3. It was an inordinate delay.

[40] Against that background, the explanation for the delay assumes obvious importance. While a satisfactory explanation for delay is not a condition precedent to the granting of leave to proceed, it is nonetheless a significant consideration warranting particular attention in cases of this kind.[9] In such cases, the affidavit evidence will ordinary warrant close scrutiny to properly consider not only whether an explanation is proffered for the delay, but what, if any, evidentiary detail is proffered in support of that explanation.[10]

[41] The explanation for the delay is purportedly contained within the affidavit of Michael Eastman sworn 14 December 2012.

[42] In that affidavit Mr Eastman describes himself as "the applicant" in the proceedings, but he is not the applicant, he is a director of the applicant company. His affidavit purports to explain the delay after the filing of the originating application by reference to his financial problems. He does not depose to the applicant company's financial position or provide any explanation for the applicant's delay after the filing of the originating application in January 2009.

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8 See for example r 530.

9 *Cousins v Mount Isa Mines Limited* [2006] 2 QdR 343, 349.

10 *Puppinato v D & D Machinery Pty Ltd* [2010] QSC 47, [18], [42]; *Merritt v Hughes* [2010] QSC 100, [39].

[43] Mr Eastman deposes to having obtained finance through a facility with the National Australia Bank for $700,000 in order to "personally finance" the establishment of a wholesale liquor distribution business in Cairns by him. He deposes to closing down that wholesale distribution business in early 2009 because of two events. The first was the entry into the marketplace of the First Choice liquor outlet, soon followed by the Dan Murphy's liquor outlet. The second was explained somewhat obscurely by him as follows:

> "17. As I was unable to have the partnership business finalised and to be paid out, the money which I believe I'm owed by the partnership, some $300,000, I was unable to reduce my funding with the National Australia Bank."

[44] His affidavit does not clearly identify what he means by "the partnership business", but assuming it to be an implied reference to the partnership between the applicant and the respondent, there are other more significant difficulties with his lack of detail.

[45] His affidavit earlier made reference to "discrepancies in the financial figures" received from the respondent in 2007 and 2008, but provided no detail about those discrepancies. No foundation whatsoever was identified in Mr Eastman's affidavit in support of his bland assertion of belief that he is owed $300,000 by the partnership.

[46] His affidavit refers to a number of his other personal financial difficulties, including the tenant of his warehouse falling behind in rent and the eventual sale of that warehouse for $170,000 less than the price he paid for it. He also deposed to the sale of the warehouse leaving him with a debt of $170,000 to the National Australia Bank and a debt of $170,000 to the Australian Tax Office. He deposed to selling a house he owned at Lake Tinaroo, inferentially for the purpose of reducing that debt, and to refinancing his wife's house in Atherton so he could pay out the Australian Tax Office debt. According to his affidavit, those events were in or around mid-2008, that is, they preceded the era of delay that warrants particular explanation.

[47] Mr Eastman's affidavit continued:

> "24. This was in or around mid-2008. I subsequently commenced working as the manager of the International Club in Atherton for around $80,000 per annum. I held that position for approximately two years.
>
> 25. Because [sic] my financial difficulties and my inability to achieve a resolution with the partnership business with the respondent, I found it extremely difficult to fund my solicitors to continue work on my matter.
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> 26. In or around August/September 2009, I had outstanding accounts with my solicitors at the time, Preston Law. I was unable to fund my solicitors to progress the matter and did not provide them any instructions to do so at that time.
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> 27. In February 2010 I terminated my retainer with Preston Law and instructed Devenish Law to act for me in respect of this matter.
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> 28. There was considerable delay in obtaining my file from my former solicitors Preston Law. My current solicitors, Devenish Law,

> did not receive the file from Preston Law until around 3 August 2010.
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> 29. At this time although I had instructed Devenish Law to have carriage and conduct of the matter I did not have sufficient funds to instruct them to take any substantive steps in the proceeding. ...
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> 34. In or around late March 2011 I instructed my new solicitors Devenish to file a notice of intention to proceed on my behalf, which they subsequently filed on 12 April 2011 and served on the respondent on the same day."

[48] Mr Eastman's affidavit goes on to exhibit a series of letters up to 30 August 2011 and then deposes:

> "45. By this stage it had become clear that to have the Account verified would require a hearing before the court. As I did not have sufficient funds to prosecute a hearing at that time I was unable to instruct my solicitors to make the necessary application to this court.
>
> 46. I am now in a financial position to proceed with this matter expeditiously."

[49] Notwithstanding Mr Eastman's references to his own financial difficulties, his affidavit contains no explanation of the applicant's financial position, whether in the past or presently. Given the absence of evidence about that, there is no basis to infer with confidence that the applicant is without assets or access to funding and that it relies solely upon Mr Eastman's financial contribution.

[50] However, even assuming the applicant has no access to funds except for those provided by Mr Eastman, Mr Eastman's explanation of his financial position is unsatisfactory. He provides no evidence at all of his net financial position from the time of or subsequent to his filing of the application in early 2009. In a similar vein, he provides no detail as to his present financial position so as to lend any credence, against the vague background of his past financial problems, to his assertion that he is "now in a financial position to proceed with this matter expeditiously".

[51] Mr Eastman explains that he caused the applicant company to be deregistered on or about 1 August 2012 and that it was reinstated, apparently as a result of steps taken by his solicitors, on or about 7 November 2012. Mr Eastman deposed of his actions in 2012:

> "51. … I did not realise that by deregistering the company the trust would not be able to proceed with having the account taken before the court. Due to the length of these court proceedings, the considerable length of time since the company had traded and the fact that I had always conceptualised that the proceedings were being taken by the trust, I did not realise that the continuing registration of the company was necessary."[11]

[52] On the whole of the evidence it is unlikely that this event was the cause of delay that would not have happened in any event. But at worst, the de-registration could only

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[11] Affidavit of Michael Eastman sworn 14 December 2012 [51].

have delayed matters by several months. Moreover, the deregistration document signed by Mr Eastman asserted that the company was not a party to any legal proceedings. Mr Eastman's affidavit provides no direct explanation for such an endorsement. His explanation that he had always conceptualised the proceedings as being taken by the trust is unconvincing in the light of his inevitable knowledge of the identity of the named applicant in the proceeding. Another unsatisfactory aspect of his evidence relating to this topic is that Mr Eastman also made an application to deregister the company in 2011,[12] yet his affidavit makes no reference to that action by him, let alone advances an explanation for it.

[53] The applicant's history of delay since instituting its application in early 2009 does not fall to be considered in a vacuum. It is relevant that, within a short time of the filing of the application, the respondent had filed and served its account, the effect of which was to indicate that no amount was payable by the respondent to the applicant. If that account were correct, then there would have been no point in the applicant further pursuing the taking of the account. The applicant requested further information in respect of the content of Mr Di Vincenzo's first affidavit and was provided with it in Mr Di Vincenzo's second affidavit, an affidavit that was not the subject of the notice of objection. In the face of this body of evidence, to the effect the applicant is owed nothing, the applicant has provided no evidence that it is owed anything. At the highest, Mr Eastman's affidavit asserts, without providing the foundation for the assertion, that he is owed about $300,000 by the partnership.

[54] The applicant contends, in effect, that it is not in a position to demonstrate its prospects of success in respect of the account because the respondent's statement of account provides insufficient detail to test the veracity of the conclusion that no money is owing. However, it must surely have been within the ability of the applicant to provide at least some evidentiary foundation in support of a conclusion that money is owed. At best it has laid on an assertion, without identifying the foundation for it, that Mr Eastman, as distinct from the applicant, is owed some $300,000 by the partnership. If Mr Eastman's affidavit is to be taken as impliedly asserting that it is the applicant, rather than he, which is owed $300,000, then, if there be any veracity to such an assertion, the evidentiary foundation for it could have been readily identified. It was not. Against this background, the applicant's prospects of the account determining that it is owed money appear to be poor.

Conclusion and orders

[55] Notwithstanding the finality involved in depriving the applicant of an opportunity to continue to pursue the taking of an account, the above discussed considerations compel the conclusion that it is not in the interests of justice that the proceeding continues any longer.

[56] Leave should not be given under r 389(2) and the applicant's application should be dismissed. The proceeding should be dismissed for want of prosecution pursuant to r 280. I am conscious that the refusal of leave under r 389(2) would have the effect of precluding the continuation of the proceeding. However, the respondent has discharged its onus in respect of its application under r 280 and is entitled to an order expressly dismissing the proceeding.

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12 Affidavit of Andrew Young [42.1].

[57] Given the orders to be made it is unnecessary to deal with the respondent's request for the transfer of the proceeding had the proceeding been allowed to continue.

[58] My orders are:

1. The applicant's application is dismissed;

2. Pursuant to rule 280 of the *Uniform Civil Procedure Rules* 1999 (Qld), the proceeding be dismissed for want of prosecution; and

3. I will hear the parties as to costs.