

# SUPREME COURT OF QUEENSLAND

CITATION: *Hymix Australia Pty Ltd v Auctus Management Services Pty Ltd & Anor* [2013] QSC 116

PARTIES: **HYMIX AUSTRALIA PTY LTD**  
ACN 000 582 221  
(plaintiff)  
**v**  
**AUCTUS MANAGEMENT SERVICES PTY LTD**  
ACN 123 945 791  
(first defendant)  
**PETER ROY WAKELING**  
(second defendant)

FILE NO/S: 11149 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 May 2013

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2013

JUDGE: Atkinson J

ORDER: **Application refused.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – where the matter was deemed resolved as a result of a self-executing 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

*Practice Direction 17 of 2012*

*NDC Investments (Aust) Pty Ltd v Sign Vision (Aust) Pty Ltd & Anor* [2013] QSC 35, followed

COUNSEL: M T Smith (*sol*) for the plaintiff  
No appearance for the first defendant

No appearance for the second defendant

SOLICITORS: Patane Lawyers for the plaintiff  
 No appearance for the first defendant  
 No appearance for the second defendant

- [1] On 31 August 2012 this matter was deemed resolved as the result of a self-executing order made on a case flow review on 30 March 2012. On 24 January 2013 the plaintiff, Hymix Australia Pty Ltd ("Hymix"), made an application for the proceeding to be reactivated. That application was adjourned and heard by me on 22 February 2013.

### **History of the matter**

- [2] This proceeding commenced by claim filed on 13 October 2010. The claim sought the following relief:

1. A declaration that by a written guarantee made between the Plaintiff and the Second Defendant on or about 1 March 2009 ("**the Guarantee**") the Second Defendant granted a charge and/or equitable mortgage to the Plaintiff in respect of his interest in the estate in fee simple in the land described as Lot 57 on Registered Plan 814488, County of Churchill, Parish of Rosewood, being the whole of the land contained in Title Reference 18181222 ("**the Land**").
2. A declaration that the charge and/or equitable mortgage charges the Second Defendant's interest in the Land with the payment of all moneys due and owing by the First and Second Defendants to the Plaintiff on any account whatsoever (including claims for interest and legal costs on a Solicitor and own client basis) associated with the credit facility held in the name of the First Defendant, all of which sums are due and owing by the Second Defendant to the Plaintiff under the Guarantee.
3. An order that the charge and/or equitable mortgage be enforced by sale.
4. Relief pursuant to Section 99(2) and/or alternatively Section 38 of the Property Law Act 1974.
5. An order that the Second Defendant deliver up possession of the Land to the Plaintiff or alternatively that the Plaintiff recover against the Second Defendant possession of the Land.
6. That pursuant to the Guarantee between the Plaintiff and Second Defendant, the Second Defendant pay the following sums to the Plaintiff:-
  - (a) \$7,641.68 being the balance of the total outstanding purchase price of goods sold and delivered by the Plaintiff to the First Defendant and the Plaintiff's legal costs of and incidental to lodgement of a caveat over the Land together with outlays;
  - (b) Continuing interest calculated from the due date for payment of each outstanding invoice until all such amounts owing on the invoices, including interest,

- have been paid, or in the alternative interest pursuant to the Supreme Court Act 1995; and
- (c) All costs and expenses incurred by the Plaintiff, its legal advisers, and others in respect of anything instituted or being considered against the First and/or Second Defendants, which may be incurred by the Plaintiff.
7. Further or in the alternative, that pursuant to a credit agreement made between the Plaintiff and the First Defendant on or about 26 February 2009, the First Defendant pay the following sums to the Plaintiff:-
- (a) \$5,368.88 being the balance of the total outstanding purchase price of goods sold and delivered by the Plaintiff to the First Defendant;
- (b) Continuing interest calculated from the due date for payment of each outstanding invoice until all such amounts owing on the invoices, including interest, have been paid, or in the alternative interest pursuant to the Supreme Court Act 1995; and
- (c) All costs and expenses incurred by the Plaintiff, its legal advisers, and others in respect of anything instituted or being considered against the First and/or Second Defendants, which may be incurred by the Plaintiff.
8. Insofar as any Goods and Services Tax is payable on the relief claimed herein the Plaintiff seeks an order that the Defendant indemnify the Plaintiff for any such Goods and Services Tax payable pursuant to A New Tax System (Goods and Services Tax) Act 1999 (Cth), as amended."

[3] The statement of claim accompanying the claim pleaded that on 26 February 2009 the first defendant, Auctus Management Services Pty Ltd ("Auctus"), entered into a credit trading agreement contained in an application entitled "Application for Commercial Credit". The alleged agreement was referred to in the pleading as the Credit Agreement. The plaintiff alleged that the material terms of the Credit Agreement were that the plaintiff would supply materials and products on credit and on a running account to Auctus; that all moneys payable by Auctus to Hymix would be paid within 30 days from the date of invoice; if Auctus did not pay Hymix by the due date for payment it would be liable to pay continuing interest at a rate equivalent to the reference rate charged by the plaintiff's principal bank from invoice date until payment of the debt; and that Auctus was to pay all costs and expenses incurred by Hymix, its legal advisers, and others in respect of anything instituted against Auctus and/or any guarantor.

[4] Hymix alleged that from time to time it supplied materials and products to Auctus on credit and on a running account but that in breach of its obligations to Hymix under the Credit Agreement, Auctus had not paid all outstanding sums due as at 12 June 2010 at which time the indebtedness of Auctus to Hymix stood at \$5,368.88. It was alleged therefore that Auctus owed Hymix the balance of its debt in the sum of \$5,368.88; continuing interest until the payment of the debt plus all costs, charges and expenses; and all costs and expenses incurred by the plaintiff in respect of

anything instituted or being considered against the first defendant and/or any guarantor.

- [5] Hymix then alleged that on 1 March 2009 the second defendant, Peter Wakeling, entered into a written guarantee with the plaintiff, the material terms of which were that Mr Wakeling guaranteed to Hymix the payment by Auctus for all materials and products supplied by Hymix to Auctus; that the guarantee would be a continuing guarantee for the whole of Auctus' indebtedness on any account however or whatsoever arising; that Mr Wakeling indemnified Hymix against all loss and damage arising out of any dealings with Auctus, the intent being that Mr Wakeling was primarily liable for Auctus' indebtedness to Hymix; and that Mr Wakeling charged to Hymix "all his estate and interest in any land with payment of all moneys owed by the first defendant."
- [6] It was pleaded that because of the first defendant's default and the terms of the guarantee, Mr Wakeling was now liable to pay to Hymix the balance of the debt in the sum of \$5,368.88, continuing interest and all costs and expenses incurred by Hymix, its legal advisers and others in respect of anything instituted or being considered against the first and/or the second defendants.
- [7] The statement of claim then alleged that the plaintiff caused its solicitors to lodge caveats against Mr Wakeling's interest in land over which he was the registered proprietor, being Lot 57 on RP 814488, County of Churchill, Parish of Rosewood being the whole of the land contained in Title Reference 18181222 ("the land"). The plaintiff claimed that Mr Wakeling was liable to it for the amount of legal costs for the plaintiff to lodge what is referred to in one paragraph as "caveats" and in another as "the caveat".
- [8] The plaintiff's claim was filed by Patane Lawyers. On 2 December 2010 the defendants filed a notice of intention to defend the proceedings. The notice of intention to defend was filed by their solicitors, ClarkeKann. Apart from some criticism of the way in which the statement of claim was pleaded, the defendants specifically denied owing any monies to the plaintiff. The plaintiff filed a reply on 15 December 2010.
- [9] There was no further activity on the court file until an intervention notice in the form CFM2 under Practice Direction 4 of 2002 was sent by the Case Flow Manager of the Supreme Court to the solicitors for both parties. That notice required the filing of an acceptable case flow plan or the matter would be referred to a judge.
- [10] No such plan was filed and accordingly the matter was heard on the case flow management list by me on 10 February 2012. On that date I made the following order:
- "That pursuant to Rule 389 of the *Uniform Civil Procedure Rules 1999* the Plaintiff serve its notice of intention to proceed on the Second Defendant by 24 February 2012 or the matter be deemed resolved. Otherwise the matter is adjourned to 30 March 2012."
- [11] On the adjourned hearing on 30 March 2012 I made the following orders:
- "1. That the Second Defendant provide a list of documents by 13 April 2012;

2. That the Second Defendant provide a copy of any documents requested by the Plaintiff from the list of documents by 27 April 2012;
3. That the Plaintiff file and serve any amended Statement of Claim if required by 11 May 2012;
4. The Second Defendant file and serve an amended Defence if required by 25 May 2012;
5. The Plaintiff and/or Second Defendant make any request for further particulars by 8 June 2012;
6. The Plaintiff and/or the Second Defendant serve any further and better particulars which have been requested by any party by 22 June 2012;
7. The parties file a consent order for mediation by 29 June 2012;
8. Such mediation to be completed or waived by consent of the parties by 27 July 2012;
9. If the mediation proposed in paragraph 4 is unsuccessful or waived by the parties then the parties will sign and file a Request for Trial Date by 31 August 2012 or the matter be deemed resolved;
10. That each party be at liberty to apply for further directions by giving each other party notice of any application of at least seven (7) days."

[12] No amendments to the pleadings were filed and no consent order for mediation was filed. In accordance with paragraph 9 the matter was deemed resolved on 31 August 2012. An order to that effect was perfected by the Registrar on 19 September 2012.

### **Application for re-activation**

[13] The application for reactivation was made pursuant to paragraph 8.1 of Practice Direction No 17 of 2012 (PD 17/2012) which provides:

"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."

- [14] The objectives of case flow management were fully set out in *NDC Investments (Aust) Pty Ltd v Sign Vision (Aust) Pty Ltd*.<sup>1</sup> PD 17/2012 establishes a system to facilitate the just and timely disposition of proceedings in accordance with philosophy set out in r 5 of the *Uniform Civil Procedure Rules 1999* ("UCPR"). 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.

**The circumstances in which the proceeding was deemed resolved**

- [15] No court documents were filed by either party after the order giving directions was made on 30 March 2012 before the matter was deemed resolved pursuant to that order on 31 August 2013.
- [16] The second defendant delivered his list of documents, as ordered, albeit five days late, on 18 April 2012. On the same date the plaintiff sought further disclosure.
- [17] The solicitors for the second defendant informed the plaintiff that the second defendant was the guarantor of the liability of Auctus and did not himself have any day to day involvement with Hymix. Auctus was now in liquidation and all the books and records were in the possession of the liquidator. Accordingly the second defendant had no documents of any description other than those contained in his list of documents. The second defendant's solicitors suggested that if the plaintiff disagreed, it should identify which documents it said their client in fact had in his possession that he had not disclosed. They suggested that the appropriate course was to issue a notice of non-party disclosure to the liquidator.
- [18] Notwithstanding that letter, on 14 May 2012 the solicitors for the plaintiff wrote to the solicitors for the second defendant again seeking further disclosure by the second defendant. The plaintiff did not nominate any specific documents which it said should be disclosed. On 18 May 2012, the second defendant's solicitors wrote to the plaintiff's solicitors enclosing a letter sent by them to the first defendant's liquidators on that date saying, *inter alia*:
- "Pursuant to Division 3 of the *Corporations Act 2001*, the first defendant was required to provide you with its books and records upon its winding up. Our client seeks access to those books and records so it may take copies of any material relevant to the allegations in issue in the above proceeding."
- [19] On 21 May 2012, the liquidators advised the second defendant's solicitors that they had no objection to the documents being inspected.
- [20] On 8 June 2012, the second defendant's solicitors wrote to the plaintiff's solicitors rehearsing the history to which I have referred, and saying that given that the documents were no longer their client's documents they were unable to draft and serve a further list of documents and pointing out that if the plaintiff wished to have copies of those documents it had been able to inspect and obtain copies of those documents for itself but had failed to do so. The second defendant had no legal entitlement to the documents held by the liquidator and as such they were not within the second defendant's power or control. The solicitors for the second defendant

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<sup>1</sup> [2013] QSC 35 at [10] - [21].

therefore informed the plaintiff that the second defendant had complied with his disclosure obligations and could not disclose, by way of list of documents, documents which were not in his possession or control.

- [21] The solicitor for the plaintiff deposes that on or about 30 July 2012 he served a request for trial date upon the solicitors for the second defendant. The request for trial date was not signed and returned. No application for a variation of the orders made by me on 30 March 2012 was made by the plaintiff and accordingly as set forth herein the matter was deemed resolved.

### **Delay**

- [22] This litigation has been characterised by unacceptable delays. The liability for the principal debt of \$5,368.88 was said to have arisen on 12 June 2010. Although the proceeding was started promptly no explanation has been offered for the plaintiff's long delay after the reply was filed on 15 December 2010. The proceeding was inactive until subject to the case flow intervention notice on 27 January 2012.
- [23] The plaintiff's solicitor proposed that if the proceeding were reactivated, he would send a letter in terms of a letter dated 20 December 2012 to the second defendant's solicitor seeking further and better particulars of the second defendant's defence. The plaintiff would also serve a supplementary list of documents. No explanation was given for the plaintiff's not having made full disclosure before that time. No explanation was given for the plaintiff's delay after the matter was deemed resolved.

### **Any failure to comply with court directions**

- [24] Both parties failed to comply with court directions.

### **Prejudice**

- [25] The plaintiff's solicitor deposed on 20 December 2012 that he was not aware of any prejudice that would be suffered by the second defendant if the matter were reactivated. However on 15 January 2012, ClarkeKann applied for leave to withdraw as solicitors on the record for the first and second defendants. That order was made on 24 January 2013 with the second defendant being ordered to pay the costs of the application to withdraw fixed in the amount of \$2,095.50. Accordingly the second defendant now faces the distinct disadvantage of having to represent himself.

### **The parties' capacity to prepare for trial in a timely way**

- [26] The plaintiff has shown at best a staccato approach to preparing this matter for trial. The plaintiff has not sought leave to proceed against the first defendant and it is not known if the second defendant, who retained lawyers to defend the claim, has any capacity to prepare for trial.

### **The need for a trial**

- [27] This litigation is complex in nature and yet is based on an alleged debt of \$5,368.83. The plaintiff has belatedly suggested that it could be remitted to the District Court. The resources expended on all sides in this litigation clearly already far outweigh the debt which is the subject of this proceeding.

**Conclusion**

- [28] Given the failure by the plaintiff to seek any variation to the orders made on 30 March 2012 so that the matter was deemed resolved, the excessive and unexplained delays by the plaintiff and the prejudice suffered by the second defendant by the withdrawal of his legal representatives, this is not in my view an appropriate case in which to reactivate the proceeding. I refuse the application.