SUPREME COURT OF QUEENSLAND

CITATION:	*Medina v Electro Industry Group Queensland Ltd and Anor* [2016] QSC 143
PARTIES:	**STEVE JULIAN CLAUDE MEDINA** (plaintiff) **v** **ELECTRO INDUSTRY GROUP QUEENSLAND LTD** (defendant) **O'DONNELL GRIFFIN PTY LTD trading as DIVERSE DATA COMMUNICATIONS also trading as DDC COMMUNICATIONS** (third party)
FILE NO/S:	BS No 4825 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 July 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2016
JUDGE:	Martin J
ORDER:	**The third party proceedings are struck out.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CASE MANAGEMENT – OTHER MATTERS – where the applicant (ODG) is a third party and the respondent (EIG) is a defendant in personal injuries proceedings – where the plaintiff in those proceedings brought a claim against EIG in negligence – where EIG alleges that the plaintiff was working under the control of ODG and that ODG's negligence caused the plaintiff's injuries – where ODG seeks a declaration that EIG may not take a step in the proceedings or, alternatively, an order dismissing the third party notice for want of prosecution – where ODG submits there has been an inexcusable delay in the proceedings – where ODG submits that it has lost contact with a crucial witness – where EIG submits that the lack of contact with the witness is the fault of ODG – whether the orders sought by ODG should be made having regard to the factors set out in *Tyler v Custom Credit Corporation Ltd & Ors* [2000] QCA 178 *Civil Proceedings Act* 2011 (Qld), sch 1

Evidence Act 1977 (Qld), s 92
Uniform Civil Procedure Rules 1999 (Qld), r 4(2), r 191, r 371, r 389

Allianz Australia Insurance Ltd v Corowa [2016] QCA 170, considered
Bendeich v Clout [2003] QDC 305, cited
Tyler v Custom Credit Corporation Ltd & Ors [2000] QCA 178, applied

COUNSEL:	M T O'Sullivan for the applicant/third party D M Cormack for the respondent/defendant
SOLICITORS:	DLA Piper for the applicant/third party Kaden Boriss for the respondent/defendant

[1] O'Donnell Griffin Pty Ltd (ODG) is the third party in a personal injuries proceeding. It seeks a declaration that the defendant, Electro Industry Group Queensland Ltd (EIG), may not, pursuant to r 389 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR), take a step in the third party proceeding. In the alternative, ODG seeks an order dismissing the third party notice for want of prosecution.

The proceedings

[2] The plaintiff alleges that:

(a) he was employed by EIG as an electrical apprentice;

(b) he was injured on two occasions (July 2003 and in or about April 2004) while at work; and

(c) his injuries were due to, among other things, the negligence of EIG.

[3] EIG denies liability on the basis that:

(a) it was a labour hire company;

(b) the plaintiff was working at the direction of ODG; and

(c) the injuries were due to ODG's negligence or failure to take adequate precautions for the safety of the plaintiff.

Chronology

[4] EIG has made a number of concessions about the delays which have occurred.

[5] EIG concedes that, prior to 18 May 2015, there were periods of delay by the plaintiff in excess of two years and similar delays by EIG as against ODG.

[6] So far as proceedings between the defendant and the third party are concerned, a selective chronology gives a sufficient picture of what has occurred.

07.07.2003	"First accident"
??.04.2004	"Second accident"
07.12.2006	First notification of ODG of the first accident – WorkCover letter of contribution
08.05.2009	Claim and statement of claim filed
11.06.2009	Notice of intention to defend and defence filed
11.11.2009	Third party notice filed
04.01.2010	Third party defence filed
22.02.2010	Defendant sent list of documents (LOD), expert statements and request for LOD to third party
08.03.2010	Third party disclosed LOD to defendant
15.04.2010	Mediation took place
28.04.2010	Third party made an offer to the defendant
14.05.2010	Third party sent letter to defendant querying progress
01.07.2010	Defendant confirmed that the matter is proceeding
23.08.2011	Plaintiff discloses accountant's report
13.1.2012	Defendant disclosed reports of Dr English to the third party
23.10.2013	Defendant's current solicitors advised ODG's solicitors that they were acting.
29.10.2013	ODG's solicitors wrote to the defendant's solicitors advising them that they had closed the file.
26.04.2016	Defendant filed and served a further amended statement of claim against the third party.
27.04.2016	Caseflow directions were made

[7] EIG submits that the first step in the proceeding after 10 April 2013 was when the plaintiff filed an amended statement of claim on 19 May 2015.

[8] During 2014 there was correspondence between the parties in respect of a possible mediation of the matter. No such mediation took place. During that year EIG's solicitors disclosed some documents to the third party but on no occasion did they deliver a Notice of Intention to Proceed prior to making such disclosure. On 14 September 2015 ODG's solicitors sent a letter to EIG's solicitors in which it was noted that there had been a number of periods of time where more than 12 months had passed since the last step in

the proceedings and, on at least one occasion, more than two years had passed. The solicitors for EIG were asked whether there had been any additional steps in the proceedings taken as between it and the plaintiff which had not been communicated to the third party.

[9] From 18 May 2015 steps were taken by the plaintiff and the defendant including service of an amended statement of claim, an updated statement of loss and damage and an expert report.

[10] The claim by EIG against ODG only concerned the first accident until the Amended Statement of Claim against ODG of 26 April 2016 was filed. In that pleading EIG now seeks to ascribe fault to ODG for the second accident as well as the first.

[11] EIG accepts that the irregularity of not having sought leave before taking such steps with respect to the plaintiff and ODG is not cured by r 371 of the UCPR and seeks leave *nunc pro tunc*. But, for the reasons given below, those steps concerning the plaintiff are irrelevant so far as the third party is concerned.

The rules

[12] Rule 389 of the UCPR concerns delays in proceedings:

> "**389 Continuation of proceeding after delay**
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> (1) If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the proceeding, give a month's notice to every other party of the party's intention to proceed.
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> (2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice.
>
> (3) For this rule, an application in which no order has been made is not taken to be a step."

[13] The concession made by EIG is correct so far as the action by the plaintiff is concerned. As no step was taken for more than two years after 10 April 2013, leave was necessary to take a step in those proceedings after 10 April 2015.

[14] I have inferred from their arguments that the parties proceeded on the basis that the relevant "proceeding" for the purpose of r 389 was the entire dispute involving the plaintiff, the defendant and the third party. If my inference is correct, then I disagree with that construction of the ambit of the rule. The word "proceeding" is not defined in the UCPR (save as to r 352 which concerns offers to settle) but is defined in Sch 1 to the *Civil Proceedings Act* 2011:

> "*proceeding* means a proceeding in a court (whether or not between parties), and includes—
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> (a) an incidental proceeding in the course of, or in connection with, a proceeding; and
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> (b) an appeal or stated case."

[15] That definition applies because r 4(2) of the UCPR provides:

> "(2) Words and expressions used in the *Civil Proceedings Act 2011* have the same meaning in these rules as they have in that Act."

[16] Chapter 6, Part 6 of the UCPR provides for, among other things, "Third party and similar proceedings". Rule 191(1) explains that the Part provides for "a third party procedure in a proceeding started by claim". In other words, it is "an incidental proceeding in the course of, or in connection with, a proceeding" as set out in the definition in the *Civil Proceedings Act*. Rule 191(2) provides that a "third party proceeding starts when the third party notice is issued."

[17] For the purposes of r 389, a "proceeding" includes a third party proceeding and, for the purposes of determining whether a step has been taken in those proceedings, any steps taken in the main proceeding which solely affect the plaintiff and defendant are not steps for the purposes of the third party proceedings. One looks only at the activity of the defendant vis-à-vis the third party and vice versa.

[18] The conduct of the plaintiff and the defendant and the steps they have taken with respect to each other may well be relevant to the exercise of the discretion available under r 389 because that can have a "knock on" effect in the third party proceedings. But a step taken by the plaintiff, or one taken by the defendant which relates only to the plaintiff, is not a step to take into account when considering whether the time periods in r 389 have been engaged in the third party proceedings.

[19] It is unnecessary to pursue this further in the light of the defendant's concessions which have been accepted by the third party.

***Allianz Australia Insurance Ltd v Corowa* [2016] QCA 170**

[20] After this matter was heard the Court of Appeal delivered its judgment and reasons in *Allianz Australia Insurance Ltd v Corowa*.[1] EIG sought, and was granted leave, to file further submissions with respect to the decision in that case. Curiously, those submissions concentrated on the reasoning of the first instance judge rather than that of the Court of Appeal. ODG filed submissions in response.

[21] The decision in *Corowa* did not expose any new principle to be applied in a case of this sort. It was an appeal from a decision which was described by Henry J as involving "an unremarkable exercise of discretion".[2]

[22] For reasons which will become apparent, *Corowa* can be distinguished from this case. In *Corowa* the applicant had available to it what was described as a "helpful array of signed witness statements … significant because of section 92 *Evidence Act* 1977".[3] Some of these had been created following interviews conducted about a year after the accident. Henry J (with whom Morrison JA and North J agreed), in considering issues of disadvantage caused by the absence of witnesses, said:

> "[47] The applicant emphasised it is inevitable some disadvantage will flow against a party at trial in consequence of the pre-trial death of that party's

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1 [2016] QCA 170.
2 Op cit at [4].
3 Ibid at [43].

> main witness. However that is to say nothing of whether the disadvantage to that party is of such a degree, in the particular circumstances of the case, as to preclude a fair trial. The disadvantage will obviously be greater in a case where the main witness has not given an admissible account of events than in a case such as the present where the main witness provided two detailed witness statements, tenderable under the *Evidence Act*."

Dismiss for want of prosecution?

[23] ODG's submissions were concerned more with obtaining an order striking out the third party notice rather than the declaration. The main contention was that the continuation of the third party claim would inflict unnecessary injustice on ODG as there had been inexcusable delay in the prosecution of that claim.

[24] In an application of this nature, the factors to which a Court should have regard (at a minimum) were set out by Atkinson J in *Tyler v Custom Credit Corporation Ltd & Ors.*[4] They are listed later in these reasons.

[25] The major complaint made by ODG is that the lapse of time has put it in a position of great difficulty because of the absence of witnesses. The history of ODG's efforts concerning the collection of evidence commenced in September 2007. At that time, it became aware that a number of possible witnesses were unable to be found. They included John Smithers (an apprentice) and Martin Malkin (another employee). Another former employee (Paul Grannell) was able to be contacted but he had no recollection of the plaintiff and had no knowledge of any incident involving the plaintiff. The witness who appeared to be the most useful for the third party was the site foreman, Matthew Kirk. In October 2007 a solicitor for ODG spoke to the Kirk. Kirk told the solicitor that he kept a site diary (which he regarded as extremely accurate) and that he signed off on that diary every day. He recorded the number of hours worked by each of the workers and if an accident, injury or the use of first aid was reported to him then it would have been entered in the diary. He could not recall the plaintiff and was unaware of any incident involving the plaintiff on site. Of importance was his statement that the absence of an entry concerning any type of injury meant that there had been no report made to him.

[26] In April and May this year solicitors for ODG tried to contact Matthew Kirk. Those attempts were unsuccessful. The solicitors have no knowledge of his whereabouts nor do they have any contact details which would allow them to determine his whereabouts. The site diaries may well be admissible under s 92 of the *Evidence Act* 1977 but the inability to call the author would mean that its accuracy and the significance of the absence of an entry about an injury would not be in evidence. This is the problem confronting the third party.

[27] In the defendant's analysis of the considerations listed by Atkinson J in *Tyler* and their application to this case, it was submitted that the prejudice caused to the third party by not being able to call Matthew Kirk was not as a result of any delay in the court proceedings, but rather the failure of the third party's solicitors to properly investigate the claim and maintain contact with their witnesses.

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[4] [2000] QCA 178.

[28] The third party's solicitors did investigate the claim in 2007 and did obtain evidence at an appropriate level at that time. The submission that there is some obligation on solicitors to maintain contact with prospective witnesses is unsupported by authority. Solicitors owe many duties to their clients, but they are not required to engage in surveillance of the witnesses who might be needed in a trial.

[29] I am not satisfied, though, that ODG has established that it will not be able to locate Mr Kirk. There was, for example, no evidence about searching electoral rolls or the other means which are available to locate people.

[30] So far as the considerations listed in *Tyler* are concerned the following may be said:

(1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;

The relevant events occurred 12 to 13 years ago.

(2) how long ago the litigation was commenced or causes of action were added;

The third-party notice was filed in November 2009.

(3) what prospects the [defendant] has of success in the action;

The submissions from the defendant addressed this heading from the point of view of the plaintiff's action. While the failure of the plaintiff's action would end the third-party proceedings, success by the plaintiff does not guarantee success by the defendant in the third-party proceedings. EIG submitted that it has good prospects of success for contribution because ODG controlled the worksite where the plaintiff worked when the first injury is alleged to have occurred. That submission highlights the disadvantage occasioned to ODG by the inability to call Matthew Kirk as a witness.

(4) whether or not there has been disobedience of Court orders or directions;

Irrelevant.

(5) whether or not the litigation has been characterised by periods of delay;

The litigation has been drawn out and there have been periods (in excess of two years) in which the defendant has done nothing with respect to the third-party claim.

(6) whether the delay is attributable to the [defendant], the [third party] or both the [defendant] and the [third party];

The defendant concedes that it did not press the plaintiff when there were periods of delay. There is also no evidence that the third-party ever pressed the defendant.

(7) whether or not the impecuniosity of the [defendant] has been responsible for the pace of the litigation and whether the [third party] is responsible for the plaintiff's impecuniosity;

Irrelevant

(8) whether the litigation between the parties would be concluded by the striking out of the [third party's] claim;

If the defendant's third party proceedings were struck out then, it says, it would seek to take advantage of s 40(1)(a) of the *Limitation of Actions Act* 1974 which gives a defendant two years after judgment is given against it to commence third party proceedings. But whether that is decisive is doubtful. It may be that any attempt to commence new proceedings would be an abuse of process.[5]

(9) how far the litigation has progressed;

Apart from a proposed mediation, the matter appears ready for trial.

(10) whether or not the delay has been caused by the [defendant'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;

There is nothing to suggest that the defendant, itself, has been dilatory. There is an absence of satisfactory explanations by the defendant's solicitors.

(11) whether there is a satisfactory explanation for the delay;

EIG submits that some delay was caused by the third party's solicitors advising that they had closed their file. That could not prevent the defendant from taking a step.

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

This is dealt with above.

[31] In its supplementary submissions EIG argued that ODG has been remiss in its failure to "litigate expeditiously or to bring the application now before the court at a much earlier time". That, though, overlooks the fact that EIG must be taken to have realised, when it was told in October 2013 that ODG's solicitors had closed its file, that ODG regarded the action as being inactive. Notwithstanding that knowledge EIG did not take a step until April 2016 when it filed the amended third party statement of claim.

[32] The factors which weigh heavily in this case are:

(a) The unsatisfactory explanation for the delay.

(b) The current inability of the third party to locate witnesses, especially Kirk.

(c) The inevitable deterioration in the memories of any witnesses who might be found.

[33] In the absence of Mr Kirk, ODG has no witnesses upon which it can rely. Although the site diaries may be admissible under the provisions of the *Evidence Act*, the importance and meaning of the entries and, in particular, the absence of particular entries, cannot be conveyed to the court without Mr Kirk being available to give that evidence. Even if he

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5 See the discussion in *Bendeich v Clout* [2003] QDC 305.

were available, whatever recollection he might otherwise have had about general issues about the work system, the way scaffolding was used and the manner in which cables were laid in 2003 would have deteriorated substantially after the passage of 13 years.

[34] This is a case in which the defendant has sat on its hands. That might have been due to a forensic choice or to mere unexplained inactivity. The third party should not be compelled to face a case in which, through no fault of its own, it would not be able to call an essential witness. Further, it should not be required to face a case which EIG seeks to enlarge by its most recent pleading. The effluxion of time does lead to the deterioration of memory and, in this case, the unavailability of witnesses. That leads to a prejudice to the third party and will prevent it receiving a fair trial. In those circumstances it is appropriate to make the order sought.

[35] The third party proceedings are struck out.