SUPREME COURT OF QUEENSLAND

CITATION:	*Citypoint (Hotels) Pty Ltd v AIB Pty Limited* [2012] QCA 126
PARTIES:	**CITYPOINT (HOTELS) PTY LTD** ACN 056 725 332 (appellant) **v** **AIB PTY LIMITED** ACN 009 635 527 (respondent)
FILE NO/S:	Appeal No 11514 of 2011 DC No 2710 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2012
JUDGES:	Holmes and Fraser JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – DISCONTINUANCE – where appellant filed claim against respondent and served it one day short of one year time limitation, unless renewed – where respondent requested, and was granted, extension of 30 days to file defence – where respondent's director died prior to claim being filed by appellant – where primary judge accepted that respondent had strong argument that most of claim was statute barred – where primary judge found appellant responsible for excessive and undue delay – where appellant argued that primary judge erred in not accepting explanation for delay – where appellant argued primary judge attributed insufficient weight to respondent's delay and failure to file defence – where appellant argued primary judge attributed insufficient weight to prejudice suffered by appellant by striking-out claim – where appellant argued primary judge attributed too much weight to death of respondent's director – whether primary judge erred in striking-out appellant's claim

Uniform Civil Procedure Rules 1999 (Qld), r 5(3), r 24, r 222

Citypoint (Hotels) Pty Ltd v AIB Pty Limited (Richards DCJ, District Court of Queensland, 15 November 2011, unreported), approved
Cooper v Hopgood & Ganim [1999] 2 Qd R 113; [1998] QCA 114, cited
Tyler v Custom Credit Corp Ltd & Ors [2000] QCA 178, cited

COUNSEL: A R Fitzsimons for the appellant
M O Jones for the respondent

SOLICITORS: Corums Lawyers for the appellant
Dowd and Company for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the order he proposes.

[2] **FRASER JA:** The appellant ("Citypoint") appeals against an order made in the District Court striking out its claim and statement of claim for want of prosecution.

[3] Citypoint claimed $214,392.35 for the outstanding balance of rental and charges payable by the respondent ("AIB") as tenant of office premises rented from Citypoint, and interest. The parties agreed upon the following brief chronology:

May 2001 - February 2003	AIB occupied the office space
2003 - 2006	Limited negotiation/discussions about rent owing to Citypoint
June 2006	AIB director Mr Skipworth dies
September 2008	Citypoint files proceeding
September 2009	AIB served
October - December 2009	AIB seeks documents and extension of time
December 2009	Citypoint forwards documents [this point was contentious] and grants extension for filing Defence
June 2011	AIB instructs solicitors to bring application to strike out proceedings
November 2011	Application heard and granted

[4] The statement of claim filed with the claim on 30 September 2008 alleged that:

(a) On or about May 2001 Citypoint and AIB agreed that AIB would occupy the premises upon agreed terms.
(b) The terms included that:
  (i) the tenancy commenced on 21 May 2001;
  (ii) the term was "Month-To-Month";
  (iii) the rental was $6,666.66 plus GST per month (and six car parks @ $100 plus GST each per month);

(iv) AIB was to pay for the electricity and for cleaning at $13.00 per square metre;

(v) AIB was to remove all fixtures and fittings and repair and reinstate the premises to their original condition upon termination of the tenancy;

(vi) and the landlord and tenant were to negotiate the terms, conditions, and covenants of a lease, and guarantees by Mr Skipworth and Ms Warne (the directors of AIB).

(c) AIB occupied the premises and six car parking spaces between 21 May 2001 and 28 February 2003.

(d) AIB failed to pay the rent and charges payable pursuant to the terms of the agreement.

(e) Citypoint and AIB failed to reach agreement on the terms, conditions, and covenants for the proposed lease.

(f) AIB notified Citypoint that AIB was vacating the premises on or about 31 January 2003.

(g) AIB vacated the premises on or before 28 February 2003.

(h) AIB failed to remove its fixtures and fittings and failed to repair and reinstate the premises in accordance with the agreement; as a result of that breach of the agreement, Citypoint removed AIB's fixtures and fittings and repaired and reinstated the demised premises at its own cost.

(i) AIB failed to pay the rent and charges payable by it pursuant to the agreement "as invoiced and claimed" by Citypoint between 21 May 2001 and 28 February 2003.

(j) AIB failed to pay interest on the arrears of rental and charges as required by the agreement and "associated agreements" (an undefined term).

(k) Citypoint called upon AIB to pay the outstanding rental and charges and other monies payable pursuant to the agreement and associated agreements.

[5] The solicitor having carriage of the matter for Citypoint was Mr Churven, who was a director of Citypoint. Citypoint did not serve the claim and statement of claim until 29 September 2009, one day short of the one year period after which the claim would otherwise have ceased to remain in force unless it were renewed: *UCPR*, r 24. AIB's solicitors wrote to Citypoint's solicitors requesting an extension of 30 days to file the defence. Pursuant to r 222 of *UCPR*, AIB's solicitors also required production for inspection of the agreement, invoices, and notification referred to in the statement of claim. In response to AIB's subsequent reminder letter, Citypoint's solicitors wrote on 28 October 2009, agreeing to extend the date for filing the defence to 30 November 2009 and indicating that they would respond to the request to produce documents for inspection. AIB's solicitors repeated the requirement for production of documents in letters of 16, 23 and 30 November 2009. On 15 December 2009 Citypoint's solicitors responded, agreeing to a request in AIB's solicitors' letter of 30 November 2009 for an extension for filing the defence to 14 days after Citypoint had provided the documents.

[6] There was a dispute before the primary judge about whether Citypoint provided the documents until after 28 September 2011, when Citypoint's solicitors received a copy of AIB's application to strike out Citypoint's claim for want of prosecution. Mr Churven swore that he had prepared a letter to AIB's solicitors dated

22 December 2009 and had marked the documents for attachment as copies to that letter. He could not recall issuing specific instructions about the method of delivery but he did not subsequently become aware of the letter and attachments being in his office. Mr Churven produced a copy 22 December 2009 letter and copies of the documents referred to in the statement of claim. AIB's former solicitor wrote to AIB's current solicitors noting that, so far as he was aware, his firm had not received the 22 December 2009 letter and a copy of it was not on the firm's file. In response to a suggestion by Mr Churven that the letter was probably hand delivered, AIB's former solicitor stated that the firm kept a register of hand delivered items and no item for the solicitor was received on 22 December 2009.

[7] The copy letter dated 22 December 2009 included a statement that Citypoint agreed to extend the date for filing the defence to 31 January 2010 and a request that AIB's solicitor advise if any further information or a reasonable extension of time was required. AIB did not file a defence. Citypoint did nothing to progress the claim. There was no further communication between the solicitors until AIB served its application to strike out the claim in late September 2011.

[8] The primary judge found that Citypoint had "delayed in prosecuting this matter significantly" in filing the original claim, serving the claim, and proceeding towards trial.[1] In relation to Citypoint's argument that the delay in the period after filing the claim resulted from AIB's failure to file a defence, the primary judge observed that:

> "Whilst that is to some extent true it is not for the defendant to try and push matters along. The plaintiff should be the one pursuing its claim. The plaintiff from the beginning of 2010 could have sought a default judgment but chose not to do so. It could have a [sic] least put the defendant on notice that it intended to do so."

[9] The primary judge referred to Mr Churven's explanation for Citypoint's delay in bringing and prosecuting the claim up until December 2009, that he thought that the dispute would be resolved because he got on well with Mr Skipworth, the director of AIB with whom he was dealing. There was uncontentious evidence that Mr Skipworth, AIB's managing director during the relevant period, died on 1 June 2006. The primary judge observed that Mr Churven's "hope of having the matter settled did not extend to actually speaking to Mr Skipworth at any stage from 2006 and on only three occasions from 2003 until his death", and that Mr Churven's explanation for not doing anything after December 2009 "comes down to a suggestion that he was involved in overseas interests and that this led him to lose track of time."

[10] The primary judge rejected Citypoint's argument that Mr Skipworth's death had not caused great prejudice to AIB because Mr Skipworth had died before the plaint was filed; the events alleged in the statement of claim were "now very old", AIB "…does not have in its possession or control documents relevant to the proceedings", the solicitors who acted at the time for AIB no longer operated, that Mr Skipworth died on 1 June 2006, the litigation was commenced on 30 September 2008, and "…very little has been done since then other than the papers being served on the defendant on 29 September 2009."[2]

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1 *Citypoint (Hotels) Pty Ltd v AIB Pty Ltd* (Richards DCJ, District Court of Queensland, 15 November 2011, unreported) at [6].

2 *Citypoint (Hotels) Pty Ltd v AIB Pty Ltd* (Richards DCJ, District Court of Queensland, 15 November 2011, unreported) at [8].

[11] The primary judge also accepted that AIB had a strong argument that most of Citypoint's claim was statute barred; although a negotiated agreement to pay the outstanding rent was mentioned in Mr Churven's affidavit, the claim was pleaded as a month to month tenancy, no additional agreement had been pleaded, and Citypoint's counsel conceded that the six year limitation period applied to each month of rent owing if rent was owed on a monthly basis. On that footing, the outstanding rent was no more than $37,360.60.

[12] The primary judge concluded:[3]

> "The matter has been characterized by delay from start to finish. The delay is attributable to the plaintiff and the litigation will be concluded by a striking out of the plaint. The death of Mr Skipworth has meant that the primary witness for the defendant is unable to give evidence and all documents that are relevant to the proceedings have been destroyed. Credibility of witnesses is likely to be very important in this case. The litigation is still in its infancy.
>
> In my view there is no satisfactory explanation for the lack of action by the plaintiff and the defendant is now suffering prejudice in obtaining ongoing work by the action being on the register of Advantage Limited records. This is negatively affecting their ability to tender for work and obtain finance.
>
> In my view the litigation in this case has been punctuated by excessive delay. The application should be allowed and the claim struck out for want of prosecution."

[13] Citypoint argued that the primary judge erred in not accepting Mr Churven's explanation for the delay up until it served the proceedings in September 2009. (The delay persisted for about six and a half years after AIB had ceased to occupy Citypoint's office premises). Mr Churven stated in paragraph 16 of his affidavit:

> "In regard to the time period between March 2003 and September 2008 I had an expectation based upon the agreement referred to in subparagraph 15 (k) herein and at least three conversations with Glen Skipworth during this period wherein we proposed to meet to resolve and settle the Plaintiffs outstanding claim. I did not believe that issuing legal proceedings during this period would be conducive to those proposed negotiations. I issued proceedings in September 2008 to protect the Plaintiff against the pending time limitation periods but withheld service with the intention of arranging a meeting and negotiating the matter prior to effecting service. In or about August - September 2009 I contacted AlB to speak with Glen Skipworth at which time I was advised of his earlier fate. I arranged for service of the proceedings shortly thereafter."

(In sub-paragraph 15(k), Mr Churven stated that the parties agreed to allow AIB to continue to occupy the premises until 28 February 2003 on certain terms and that they would negotiate a resolution of the matter following vacation of the premises, although they ultimately did not enter into any deed in that respect.)

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[3] *Citypoint (Hotels) Pty Ltd v AIB Pty Ltd* (Richards DCJ, District Court of Queensland, 15 November 2011, unreported) at [10].

The flimsiness of this explanation was exposed by the evidence that Mr Skipworth had died more than three years before Mr Churven contacted AIB in an attempt to speak with Mr Skipworth in 2009.

[14] Once Citypoint issued proceedings, it impliedly undertook to the court and to AIB to proceed in an expeditious way: *UCPR*, r 5(3). Citypoint quite deliberately failed to proceed in an expeditious way, thereby breaching its implied undertaking to the court and to AIB. Some delay might be explicable if Citypoint had embarked upon genuine negotiations to resolve the dispute, but it did not do so. It did nothing to resolve the dispute, either by prosecuting its litigation or by attempting to negotiate a compromise. The primary judge quite correctly regarded Mr Churven's explanation for the delay in commencing and prosecuting the action as being unacceptable.

[15] That unexplained delay is significant. The courts do not look favourably upon inexcusable delay in prosecuting a case in which the plaintiff earlier was guilty of unexplained delay in commencing an action and withheld service until the last moment.[4] Citypoint argued, however, that the delay after it served the claim in September 2009 was mostly attributable to AIB and that so much of the delay as was attributable to Citypoint was not unreasonable and was satisfactorily explained on the evidence. That is not so. I will assume in Citypoint's favour that it should be inferred from Mr Churven's evidence, summarised in [6] of these reasons, that Citypoint reasonably believed that it had supplied the required documents to AIB's solicitor in late December 2009 and had agreed to extend the date for filing the defence to 31 January 2010. Even so, there is no acceptable explanation for Citypoint's failure to progress the claim for the lengthy period between 1 February 2010 and 28 September 2011. From Citypoint's perspective, it was entitled to insist upon a defence by 31 January 2010, but when no defence was served Citypoint did nothing.

[16] Mr Churven stated in his affidavit that he "…always anticipated that the matter could be resolved by negotiation between the parties without undue acrimony…", he preferred "…to await the closing of the pleadings so that any issues between parties could be identified", he placed the file in a category "Awaiting for Response", he was busy in other business during 2010 and 2011, and those activities "…had the effect of one losing, to a considerable extent, the appreciation of the passage of time and the priority of other matters such as the within action." In short, Citypoint again failed to fulfil its implied undertaking to the court and to AIB to proceed with its claim in an expeditious way. I would affirm the primary judge's conclusions, quoted in [12] of these reasons, that the matter was characterised by delay "from start to finish", Citypoint was responsible for the delay, the delay was excessive, and there was no satisfactory explanation for the delay.

[17] Citypoint argued that the primary judge attributed insufficient weight to AIB's delay and failure to file a defence. Delay by a defendant is a relevant consideration,[5] but the primary judge took AIB's delay into account. From its perspective, it was awaiting the production of documents to which it was entitled and which Citypoint had foreshadowed. There was no error in the primary judge's

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4 *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113, at 121(2) per Pincus JA, and at 124 per Derrington J.

5 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [2](6).

observation that the argument that AIB was responsible for delay was "to some extent true", but that Citypoint was primarily responsible for the pursuit of its claim.

[18] Citypoint argued that the primary judge attributed insufficient weight to the prejudice suffered by Citypoint occasioned by the striking-out of its claim. The significance of this prejudice was substantially diminished by the primary judge's conclusion that only $37,360.60 of the total claim was not apparently statute barred. That conclusion was based upon the primary judge's view that, on the basis of the pleading, the six year limitation period commenced to run from the end of each month of the monthly lease. Citypoint was unable to advance any argument that might support a different view. On the evidence, it is possible that the whole of the potentially enforceable claim would be defeated by a set-off, although there was a dispute about that. Ms Warne referred to Mr Skipworth's information that AIB advanced $40,000 to Citypoint as a deposit and she noted that Citypoint had not accounted for that deposit in its claim. In reply, Mr Churven stated that the deposit "…was credited to the Defendant's rental account", but that was neither pleaded (although the claim was for the "outstanding balance") nor evidenced by the copy invoices attached to the copy 22 December 2009 letter.

[19] More generally, the argument that the trial judge should have attributed more weight to the loss of the claim is undermined by the absence of any persuasive evidence that the claim was sustainable in any amount, regardless of a limitation defence. According to Ms Warne, Mr Skipworth informed her that AIB spent approximately $140,000 on fit-out and refurbishment, but Citypoint did not contribute to the fit-out as it had agreed to, and AIB suffered loss when the premises were broken into on a number of occasions as a result of Citypoint's failure to conduct necessary maintenance, security and general upkeep of the premises. Mr Churven swore to a different version concerning the contribution to fit-out and the security at the demised premises, which attributed the responsibility to AIB, but he did not give evidence verifying the pleaded terms of the pleaded agreement and he did not explain how the amounts claimed for rental and car parking charges could be reconciled with the invoices.

[20] In this unsatisfactory state of the evidence, Citypoint has not demonstrated that the loss of its claim amounted to such substantial prejudice as to suggest error in the primary judge's decision.

[21] Citypoint argued that the primary judge attributed too much weight to the death of Mr Skipworth; that the primary judge was wrong in considering that he was AIB's primary witness because the evidence of Mr McKeering was that he had dealt primarily with Mr Day, rather than with Mr Skipworth; and that Mr Day was still available to give evidence for AIB. There is no doubt, however, that Mr Skipworth might have given critically important evidence. Ms Warne stated in her affidavit that Mr Skipworth had informed her, and she believed, that after AIB vacated the premises, AIB and Citypoint entered into a deed to resolve their dispute. She did not know the contents of the deed, she could find only an empty file which had once apparently contained relevant documents, and the file held by the firm of solicitors (since dissolved) who had formerly acted for AIB was incomplete. Mr Churven produced unexecuted drafts of leases and he swore that the parties did not enter into any deed, but the existence of this dispute does not detract from the potential importance of Mr Skipworth's evidence.

[22] Ms Warne also referred to Mr Skipworth's information that he had negotiated the terms of the lease with Citypoint. Mr Churven's affidavit itself suggests that

Mr Skipworth at least participated in the negotiations. Mr Churven stated that, apart from one telephone conversation, at no time before October 2002 did he communicate with Mr Skipworth "other than in the presence of Alan Day", and that the telephone call between himself and Mr Skipworth in about May 2001 "…discussed a number of terms in regard to the proposed lease agreement without any resolution …".[6] It is also notable that in a letter from Citypoint to Mr Skipworth dated 18 May 2001, which enclosed a draft lease agreement, the author (apparently Mr Churven) referred to "our recent communications", a proposal concerning the amount of rent and other terms made at "our last meeting", and "our further agreement this day". The letter asked Mr Skipworth to arrange for execution of the agreement. That draft agreement included a provision that the lease should contain terms, conditions and covenants "as contained in the document Annexure 'B' hereto", but the fundamental terms (as to rental, rental reviews, lease and rental commencement date, lease term, etc) were set out in the draft lease agreement itself. The reference in the 18 May 2001 letter to Mr Day suggested that his role may have concerned the negotiation and agreement upon Annexure B.

[23] Mr Churven swore that, "I spoke with Alan Day on many occasions in addition to various written communication exchanges with Alan Day in regard to the terms of the proposed lease agreement and all associated matters in respect of the tenancy both prior to the Defendant's occupancy and subsequent".[7] However, Mr Day swore an affidavit in which he stated that Mr Skipworth "negotiated the lease with Citypoint …", "I attended some, but not all meetings between Glenn [Skipworth] and the landlord, and witnessed Vicki Warne sign the lease, but was not otherwise involved in the events …". He could not recall writing any correspondence to Citypoint in relation to the lease but believed that if he wrote or signed correspondence it would have been reviewed and approved by Mr Skipworth, and that he had "…little or no knowledge of the matters raised in the Statement of Claim" and was not in a position to provide instructions to AIB's solicitors in relation to the proceedings.[8] In light of the lapse of a decade since the pleaded agreement was allegedly made, Mr Day's lack of knowledge is understandable even if he was heavily involved in the negotiations.

[24] Mr McKeering, whose affidavit was filed by Citypoint's solicitor, stated that he was a real estate agent who, in 2001, was a commercial leasing agent with PRD Realty Pty Ltd. In early April 2001 he met Mr Day "from AIB … in regard to AIB wishing to lease commercial office premises in Brisbane." Mr McKeering stated that in April and May 2001 he conducted negotiations between AIB and Citypoint in respect of the lease and that he recalled that Mr Day was the "principal person with whom I dealt on the part of AIB." The affidavit is remarkably vague. That is readily explicable by the lapse of time, but the fact is that it does not refer to the content or result of the negotiations, or whether the negotiations concerned the pleaded agreement (as to the terms upon which AIB went into occupation) or the terms of the proposed lease (which Citypoint pleaded were not agreed).

[25] On this evidence, Mr Skipworth, the managing director of AIB during the relevant period, participated in the critical negotiations and informed Ms Warne of a subsequent deed, now missing, which was designed to resolve the dispute.

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6 Affidavit of Mr Churven, para 15(b).

7 Affidavit of Mr Churven, para 15(c).

8 Affidavit of Mr Day, paras 5-8.

Mr Day might also have participated in the critical negotiations, but he swore that he had no recollection of the important matters. The primary judge's description of Mr Skipworth as the "primary witness" for AIB was therefore understandable. At the very least, he was potentially an important witness.

[26] Citypoint argued that it was significant that, although AIB's evidence was that all of the relevant documents held by it in relation to the negotiations had been lost or destroyed, Mr Churven gave evidence that he held copies of all of the correspondence and communications between the parties and with AIB's former lawyers. This evidence is of little weight because the documents were not attached to his affidavit and there was no evidence of their contents.

[27] Citypoint argued that the primary judge gave too much weight to Ms Warne's evidence that the existence of the court proceedings negatively affected AIB's ability to tender for work and obtain finance because the court proceedings were recorded on files maintained by credit reporting agencies. The record of one such agency, "Veda", included reference to "CA: court – writ", named Citypoint as the "creditor", and specified the amount claimed as "214392". It gave the plaint number and referred to the District Court. On the face of it, Ms Warne's evidence was credible. Citypoint argued that Veda's record revealed a separate dispute involving a different entity which suggested that there was another claim which, once it was defended, would be noted in a similar way. This was submitted to diminish the significance of the record of Citypoint's claimed debt. The argument is rather tenuous. The record merely refers to a file note that the account with the Main Group Limited was in dispute because the goods were delivered to the wrong address and that there was inadequate documentation on invoices. This does not justify disregard of Ms Warne's evidence.

[28] No error has been demonstrated which would justify the Court in concluding that the primary judge's discretion miscarried.

[29] I would dismiss the appeal with costs.

[30] **MARTIN J:** I agree with the reasons of Fraser JA and the order he proposes.