DISTRICT COURT OF QUEENSLAND

CITATION:	*Beljan v Ristic* [2016] QDC 133
PARTIES:	**BRANISLAV BELJAN** (applicant) **v** **PETER RISTIC** (respondent)
FILE NO/S:	126 of 2010
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court
DELIVERED ON:	23 May 2016, ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	23 May 2016
JUDGE:	Everson DCJ
ORDER:	**1. The application for leave to proceed is dismissed.** **2. The originating application is struck out.** **3. The applicant is to pay the respondent's costs of and incidental to the proceeding on the standard basis.**
CATCHWORDS:	PRACTICE – Family provision application – dismissal of proceedings for want of prosecution – relevant considerations – whether justification for delay – whether breach of implied undertaking to proceed expeditiously – prospect of success. *Uniform and Civil Procedure Rules 1999, r 430, 389(2), 371, 5* *Succession Act 1981, 41(8)* *Energo Form ACT Pty Ltd v Beljan [2015] ACTSC 257* *Re Brown, Deceased [1952] St. R. Qd. 47* *Tyler v Custom Credit Corp Ltd & Ors [2000] QCA 178* *White v Barron (1980) 144 CLR 431*
COUNSEL:	P J Goodwin for the applicant

H L Blattman for the respondent

SOLICITORS: Carswell and Company for the applicant

Diamond Lawyers for the respondent

[1] Before me are two competing applications in relation to a family provision application, which was filed on 9 March 2010. The applicant, in respect of the originating application, is Mr Beljan. The respondent is his brother, Mr Ristic. I will refer to Mr Beljan as the applicant, and Mr Ristic as the respondent. The applicant brings an application seeking leave to proceed pursuant to rule 389(2) of the Uniform and Civil Procedure Rules 1999 ("UCPR").The respondent brings an application seeking to strike out the proceeding for want of prosecution pursuant to rule 371.

[2] The estate is that of Zagorka Ristic, who was the mother of both the applicant and the respondent. She died on 18 June 2009, leaving the applicant and the respondent as the executors of her will. In her will, she left her entire estate to the respondent. It is common ground between the parties that the only notable asset of the estate was her house, which has now been sold for non-payment of rates by the Gold Coast City Council. Neither the applicant nor the respondent have taken the necessary steps to obtain a grant of probate, despite the fact that Ms Ristic, died nearly seven years ago. The only step taken in the proceeding before me was the filing of the originating application. A non-complying supporting affidavit sworn on information and belief by the applicant's then solicitor is the only documentation which was filed in support of the originating application. The affidavit is not what was contemplated by Practice Direction number 8 of 2001, and is not compliant with rule 430 of the UCPR. Despite the parties having engaged in negotiations at various times, nothing has really been done to progress this matter at all.

[3] The leading decision in respect of applications of the type before me, is *Tyler v Custom Credit Corp Ltd & Ors*[1]. In delivering the judgment of the Court of Appeal, Atkinson J noted that there are a number of factors that the court will take into account in determining whether the interests of justice require a case to be dismissed. Her Honour stated that these include:

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[1] [2000] QCA 178.

"(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…;

(3) what prospects the plaintiff has of success in the action;

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

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

(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 will 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;

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

(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial." [2]

[4] I also note that rule 5 of the UCPR contains an obligation that a party "impliedly undertakes to the court and the other parties to proceed in an expeditious way". It is important to bear in mind that it is the applicant which brought this proceeding and the applicant is subject to this obligation.

[5] Turning to the matters called up by Atkinson J and listed above, the first matter can be addressed by stating that the applicant's claim crystallised on the death of the deceased on 18 June 2009, and that the originating application was filed just within the nine month limitation period contemplated by section 41(8) of the Succession Act 1981. Turning to the second of the considerations, the litigation was obviously

[2] *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178, p 2.

commenced over six years ago. As for the applicant's prospects of success with regard to the originating application, it is important to note that a claim of this type needs to be determined upon the circumstances existing at the date of the testator's death, including the circumstances which could reasonably be foreseen at this time.[3] The court must also look to what is necessary or appropriate prospectively from the date of the death, including events which are contingent as well as those which are "certain or likely".[4] Although the applicant deposes to the fact that his business has failed and he has a current liability of $57,000 for the Australian Taxation Office, such that his current financial position is now dire, he also deposes to the fact that he had a successful contracting business in the building industry until he suffered an injury in 2009. Perusal of the judgment of the ACT Supreme Court, *Energo Form ACT Pty Ltd v Beljan*[5], reveals that this was a knee injury suffered on 17 November 2009, which occurred several months after the death of the testator. Accordingly, although the applicant has a moral claim (and in this regard, I note that the applicant paid $8481 in funeral expenses, which he has not been reimbursed for out of the estate) it is unclear what, if any, need he had at the relevant date, namely, the date of her death. His prospects of success are therefore somewhat unclear.

[6] The next matter for consideration is whether or not there has been disobedience of court orders or directions. I find that there has not been. The next matter for consideration is whether or not the litigation has been characterised by periods of delay and, quite simply, it has. The next matter for consideration is whether the delay is attributable to the applicant, the respondent or both of them. While at various times the parties have attempted to negotiate with each other, neither of them has successfully progressed the administration of the estate, let alone the originating application. For many years, nothing at all occurred until the applicant sought and ultimately obtained the services of his current solicitors who were prepared to take on this proceeding on a speculative basis. The current solicitors did not receive instructions from the applicant until September 2015 and it is fair to say that since this time they have attempted on numerous occasions to progress the matter by correspondence and attempts at a without prejudice resolution. I do not know why the respondent has not taken any steps to conclude the administration of

[3] *Re Brown, Deceased* [1952] St. R. Qd. 47 at 51.
[4] *White v Barron* (1980) 144 CLR 431 at 441 per Stephen J.
[5] [2015] ACTSC 257.

the estate or finalise this proceeding, however he is under no express obligation to take any steps in this proceeding. The next matter for consideration is whether or not the impecuniosity of the applicant has been responsible for the lack of progress in the proceeding. The applicant deposes to the fact that it has been, however the extent of his deleterious conduct suggests more than impecuniosity as the reason.

[7] The next matter for consideration is whether the litigation between the parties will be concluded by the striking out of the originating application. I find that it will be. The next matter for consideration is how far the litigation has progressed, and it has not progressed far at all. There has not even been filed a complying affidavit which addresses the requirements of practice direction 8 of 2001. The next matter for consideration is whether or not the delay has been caused by the applicant's lawyers being dilatory. It appears from the material before me that the applicant did not place his former solicitors in funds such that the matter could be progressed. I am not of the view that his current solicitors were dilatory.

[8] The next matter for consideration is, significantly, whether there is a satisfactory explanation for the delay and, quite simply, there is not. The applicant talks about being preoccupied with proceedings in the ACT in respect of his compensation claim and various health issues relating to his knee, but these do not offer anything close to a satisfactory explanation for the delay. The final matter for consideration is whether or not the delay has resulted in prejudice to the respondent, leading to an inability to ensure a fair trial. Surprisingly, the estate remains completely un-administered. The conduct of the respondent and the applicant has been so appalling, in terms of their obligations as executors, that the only significant asset of the estate has been sold compulsorily by the local government for non-payment of rates. On behalf of the respondent, Ms Blattman submits that the prejudice will consist of the time which has elapsed between events relevant to this dispute at the present time and in evidence of such matters being less reliable as a consequence of the passage of time. The nature of this evidence is such that I am not of the view that this will result in any particular prejudice.

[9] Balancing all of the matters set out above, whilst I am of the view that although the conduct of both parties, in so far as the finalisation of the estate is concerned, has been nothing short of appalling, the fact remains that the originating application is

one which has been brought by the applicant. The only step which has been taken in the course of this proceeding which complies with the rules and the relevant practice direction is the filing of the originating application itself over six years ago. It is important that proceedings of this type are progressed and disposed of expeditiously, and that is why there is a nine month limitation period pursuant to section 41 of the Succession Act, and that is why the practice direction contemplates the addressing of all the relevant considerations in a timely way. The only thing that can be really said in favour of the applicant is that what Mr Goodwin referred to as the 'Mexican stand-off' between the parties, which has resulted in a situation where there is going to be no real prejudice if the applicant is given leave to proceed. Considering the obligations both implied by the nature of the application and by virtue of rule 5 of the UCPR, this is not sufficient to justify the granting of leave to proceed.

[10] Whilst I concede that notwithstanding the deterioration of not only the applicant's financial position but also his health occurred in the period since the death of the testator, he may have some prospects of success, should the proceeding continue. Whilst I concede that there has been no disobedience to court orders or any evidence of a desire to deliberately delay the progress of this proceeding, the fact remains that the explanations proffered by the applicant for the delay are particularly insufficient and unsatisfactory. It is not for the respondent to seek to advance a claim against an estate of which he is an executor and of which he is the sole beneficiary. The blame for the tardiness in progressing this matter falls at the feet of the applicant. In all of the circumstances, I dismiss the application for leave to proceed and I strike out the originating application.

[11] The orders are the application for leave to proceed is dismissed. The originating application is struck out and the applicant is to pay the respondent's costs of and incidental to the proceeding on the standard basis.