SUPREME COURT OF QUEENSLAND

CITATION:	*Cook's Constructions P/L v Stork Food Systems Aust P/L* [2007] QSC 381
PARTIES:	**COOK'S CONSTRUCTIONS PTY LTD** ACN 004 782 558 (plaintiff/applicant) v **STORK FOOD SYSTEMS AUSTRALIA PTY LTD** ACN 004 448 042 (defendant/respondent)
FILE NO/S:	BS 10993 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 7 December 2007 Reasons delivered on 14 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2007
JUDGE:	Martin J
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – OTHER MATTER – where plaintiff made application to adjourn trial date – where parties had made a request for trial date – where matter set down for four week trial to commence in under two months – where plaintiff had notice of defendant's counterclaim and had sufficient time to seek to obtain its own expert opinion with respect to the matters raised – whether adjournment should be granted *Queensland Building Services Authority Act 1991* (Qld), s 42 *Di Carlo v Dubois & Ors* [2007] QCA 316, cited *State of Queensland v J L Holdings Pty Limited* (1997) 189 CLR 146, considered *United Motors Retail Limited v Australian Guarantee Corporation Limited* (1991) 58 SASR 156, cited
COUNSEL:	D J Digby QC, with S R Grahame, for the plaintiff/applicant K E Downes, with S B Hooper, for the defendant/respondent
SOLICITORS:	Clarke & Kann, as town agents for McPherson & Kelley, for the plaintiff/applicant

McCullough Robertson for the defendant/respondent

[1] **MARTIN J:** On 7 December I dismissed the plaintiff's application to adjourn the commencement of the trial in this matter to a date to be fixed. What follows are my reasons for dismissal.

[2] The events with which this action is concerned occurred in 1998 when the defendant contracted with Queensland Nitrates Pty Ltd to construct a plant to produce ammonium nitrate at Moura in Central Queensland. The defendant subcontracted aspects of the works to the plaintiff. The plaintiff alleges that it has been underpaid by the defendant and claims a sum of approximately $1.4 million. The defendant says that it has overpaid the plaintiff and on that basis, and on the basis of a failure by the plaintiff to comply with the *Queensland Building Services Authority Act* 1991, counterclaims for damages in the sum of approximately $10 million.

[3] The plaintiff commenced proceedings in the Supreme Court of Victoria in 2001. Those proceedings were transferred to Queensland in September of that year.

[4] The Statement of Claim in this matter has a sorry history. There have been nine separate versions of it – not all of which have been filed. The current version was filed on 5 July 2007. There have been a number of applications to the Court for summary judgment and for other interlocutory relief.

[5] In December 2004 the defendant delivered the preliminary report of the expert which it had retained for the trial – a Mr Gordon Leck. The final report from that expert was delivered to the plaintiff on 22 August this year. The essence of the report is unchanged and the criticism it makes of the plaintiff's formulation of its claim is, likewise, unchanged.

[6] In 2002 the defendant amended its pleadings to include a claim that the plaintiff, in doing the work for which it made its allegations of underpayment, carried out building work in contravention of s 42 of the *Queensland Building Services Authority Act 1991* (Qld). If that is correct, then the plaintiff is entitled to recover compensation for work done but, in effect, no profit on the work done.

[7] On 31 August this year a review of this matter was conducted before Daubney J at which both parties informed his Honour that the matter was ready for trial. On 15 October 2007 the plaintiff's solicitors signed the request for trial date. On 20 November 2007, pursuant to a consent order dated 28 September 2007, the parties' experts (and a representative of each party) met to identify the matters on which the experts agreed and disagreed, and to attempt to resolve any differences.

[8] In support of its application the plaintiff filed a number of affidavits. The major affidavit was that of Mr Robert Downing, the solicitor who has the conduct of the matter on behalf of the plaintiff. He said:

> "8. It was not until the meeting of experts that the Defendant's position and case on certain important issues, and the view of its expert Mr Gordon Lecke [sic] as espoused in his Expert Report of 22 August 2007 became clear to the Plaintiff and its experts."

[9] Mr Downing then goes on to say that it will be necessary for the plaintiff to engage another expert to respond to certain allegations and that the consequence of that is that the plaintiff will not be ready for trial on the appointed date and will need an adjournment of at least four months.

[10] The plaintiff also, through Mr Downing, says that, with respect to the *Queensland Building Services Authority Act* point:

> "At the time of signing the Certificate of Readiness for Trial, only some 7 days after the Defendant provided its Further and Better Particulars, the Plaintiff and its solicitors believed that the Plaintiff would be able to assess its entitlement under subsection 42(4) internally. However I am instructed by Jon Trende and believe that, in fact, because of the accounting system employed by the Plaintiff at the time of the relevant Subcontract it will need to engage an independent forensic accountant to undertake the calculation necessary to defend the Defendant's Counterclaim …".

[11] Notwithstanding that the plaintiff has known of the defendant's allegations with respect to the *Queensland Building Services Authority Act* for five years and has been aware of Mr Leck's expert opinion for nearly three years, it comes before the Court seeking an adjournment of the trial set down to commence on 29 January 2008.

[12] The plaintiff's expert, Mr Robinson, signed a joint report with Mr Leck on 4 December 2007 – only three days before the hearing of this application. The very short joint report exposes considerable problems for the plaintiff in proving its case. The joint report records the following:

> "Mr Trende [the plaintiff's Chief Executive Officer] advised the meeting that – 'Whether you get an expert report I think will be entirely determined by what position we end up with at the end of the three days.' In the absence of an expert's report by Mr Robinson, the meeting proceeded on the basis that that Mr Robinson would be providing expert evidence with respect to the measurement of quantities only for some of the plaintiff's claims (predominantly civil works) with respect to which he had provided the quantities to the plaintiff. There was no advice given by Mr Trende as to how expert evidence on rates of measurement of quantities not dealt with by Mr Robinson would be addressed by the plaintiff."

[13] An examination of the principles to be applied on an application such as this must commence with the decision of the High Court in *State of Queensland v J L Holdings Pty Limited* (1997) 189 CLR 146. That concerned a long running commercial dispute relating to a lease to develop certain land. It was estimated that the trial would take some four months. There had been a number of interlocutory hearings and the defence had been amended several times. The defendant applied again to amend its defence but the judge refused leave to add a defence which, though arguable, was likely to result in the vacation of the date which had been fixed for the trial some six months ahead.

[14] In the joint reasons of Dawson, Gaudron and McHugh JJ, their Honours, at 152-154, in referring to the decision under appeal said:

"The applicants applied to the Full Court of the Federal Court for leave to appeal against the refusal of the primary judge to grant the application for leave to amend. By a majority (Whitlam and Sundberg JJ, Carr J dissenting) the Full Court granted leave but dismissed the appeal. In granting leave to appeal, the majority conceded the potential injustice involved in denying the respondent the opportunity to ventilate the issue which the proposed amendment was intended to raise. Their Honours referred to the well-known passage in the judgment of Bowen LJ in *Cropper v Smith* … where his Lordship said:

> 'Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.'

The majority also referred to the decision of this Court in *Clough and Rogers v Frog* … where applications for leave to amend the defences in two actions by adding a new defence had been refused. The actions had been commenced more than five years previously and the applications were made two days before the actions were listed for hearing. The Court in allowing the appeals before it adopted the words above of Bowen LJ in *Cropper v Smith* … and said:

> 'As the defence, if established, would be a complete answer in either action, the amendments sought should have been allowed unless it appeared that injustice would thereby have been occasioned to the respondent, there being nothing to suggest fraud or improper concealment of the defence on the part of the appellants. With the exception of the suggestion of prejudice arising in respect of the loss of the possible claim against the nominal defendant, the matters relied upon by the respondent in opposition to the amendment sought go at the most to delay and irregularity only, matters which are relevant to costs but do not constitute injustice to the respondent in the sense in which that expression is used.'

The majority in the Full Court dismissed these remarks saying that 'times have changed since 1884, and even since 1974'. They referred to a passage from the judgment of Toohey and Gaudron JJ in *Sali v SPC Ltd* … where their Honours said:

> 'The contemporary approach to court administration has introduced another element into the equation or, more accurately, has put another consideration onto the scales…. The view that the conduct of litigation is not merely a matter

> for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard.'

The majority concluded:

> 'Unless we are to mouth the repeated cautions about discretionary judgments, case management, efficiency, practice and procedure, and the advantages of the managing judge, only to ignore them when it comes to the crunch, this appeal must be dismissed.'

It may be said at once that in the passage which we have cited from *Sali v SPC Ltd* Toohey and Gaudron JJ are not to be taken as sanctioning any departure from the principles established in *Cropper v Smith* and accepted in *Clough and Rogers v Frog*. *Sali v SPC Ltd* was a case concerning the refusal of an adjournment in relation to which the proper principles of case management may have a particular relevance. However, nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

[15] In order to consider what the justice of the situation requires it is necessary to take into account a number of factors in this case. I think that the matters of relevance include:

(a) the knowledge, held by the plaintiff for many years, of the issues in the case upon which it now seeks an adjournment;

(b) the agreement by the plaintiff that it was ready to proceed to trial.

(c) the fact that a trial of this length would, if adjourned, not be likely to be heard until 2009;

(d) the length of time which has elapsed since the events upon which this action is based. This supports a conclusion that further delay will occasion detriment to the defendant (as well as the plaintiff). See, in particular, *Di Carlo v Dubois & Ors* [2007] QCA 316 at [10];

(e) there has not been an adequate explanation for the indulgence now sought from the Court. The material discloses that the very issue (concerning expert evidence relating to calculation of the claim) which the plaintiff now seeks time to investigate, has been raised by the defendant on a number of occasions. In fact, the defendant warned the plaintiff of this very problem some years ago;

(f) the absence of any affidavit by Mr Robinson. This is troubling. One could be forgiven for thinking that his opinion as to the necessity for further expert evidence and the extent of such evidence would be valuable. In the circumstances, I think I am justified in drawing the inference that his evidence could not assist the plaintiff on this application;

(g) the material relied upon to support the claim that the plaintiff could not be ready for trial is hardly compelling. With respect to the response to Mr Leck's evidence, the affidavit of Mr Downing only discloses that one person has been approached to provide assistance. The area of expertise relied upon is not a narrow or confined area. It is difficult to accept that there is no one in Queensland, or elsewhere in Australia, who could provide the necessary assistance within the time available. Similarly, the material with respect to the *Queensland Building Services Authority Act* point provides no indication as to why the plaintiff cannot, in the time available, do the work necessary to meet the case.

[16] The issues I have listed above demonstrate that the plaintiff has, by its actions (or lack of action) ignored the requirements of the *Uniform Civil Procedure Rules 1999* (Qld) and the implied undertaking contained in those rules. The "attainment of justice", as referred to in *J L Holdings* does not require that, in situations such as this, an adjournment will always be granted at the cost of the applicant. The remarks of Bollen J in *United Motors Retail Limited v Australian Guarantee Corporation Limited* (1991) 58 SASR 156 at 163 are apposite in this case:

> "The days when a piece of litigation was treated rather as if it were the property of the parties for them to move at the pace they chose are well and truly past. The courts must strive to keep the lists moving at a pace which will do all practicable to reduce delay. Delay, that is, not only in the progress of any one case but in the movement of those waiting for trial. It is essential that parties be ready to start and that they do start on the day fixed for the commencement of a trial. Of course, sudden unexpected events will sometimes demand an adjournment or the taking of a case out of the list. But anything that justifies that action will be exceptional. Parties who are merely not ready at the right time must take the consequences. Of course, over all this and over everything said about case flow management is the umbrella of the interests of justice. Sometimes that will justify some adjournment or postponement. Nor must the general moving of the list cause undeserved prejudice to any party. Everything said by anyone on case flow management is said subject to the interests of justice. But again I refer to the cases waiting in the list. The interests of justice demand that they be delayed for as short a time as possible.
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> In the case at bar the appellant was merely not ready at the right time. It had not looked thoroughly into the matter, prepared and investigated it before the time fixed for the pre-trial conference, still less prior to trial."

[17] The plaintiff is, simply, not ready at this time. There is time for it to do the work necessary to be ready.