SUPREME COURT OF QUEENSLAND

CITATION:	*Till v Nominal Defendant* [2011] QSC 351
PARTIES:	**PETER TILL** (Plaintiff) **v** **NOMINAL DEFENDANT** (Defendant)
FILE NO/S:	S73 of 1997
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	28 November 2011
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	16 November 2011
JUDGE:	McMeekin J
ORDER:	**1. Proceedings are struck out.** **2. Plaintiff to pay Defendant's costs of the proceedings including reserved costs and costs of this application.**
CATCHWORDS:	PROCEDURE - SUPREME COURT PROCEDURE - Application to Dismiss Proceeding for Want of Prosecution - - Where proceedings over 14 years old – Where plaintiff's conduct and attitude has contributed considerably to delay – Where plaintiff impecunious and acting alone - Whether balance of factors favour proceedings be struck out *Uniform Civil Procedure Rules* 1999 (Qld) *Basha v Basha* [2010] QCA 123 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 *Lilyville Pty Ltd v Colonial Mutual Life Assurance Society Limited* [1999] QSC 372 *Page v Central Queensland University* [2006] QCA 478

Quinlan v Rothwell [2002] 1 Qd R 647

Ridolfi v Rigato Farms Pty Ltd [2000] QCA 292

Till v Nominal Defendant [1999] QCA 490

Till v Nominal Defendant [2010] QSC 121

Tyler v Custom Credit Corporation Pty Ltd [2000] QCA 178

COUNSEL: Plaintiff in person

R Dickson for the defendant

SOLICITORS: Plaintiff in person

Walsh Halligan Douglas for the defendant

[1] **McMeekin J:** This is an application by the Nominal Defendant to strike out these proceedings for want of prosecution. The application is brought in the inherent jurisdiction of the Court to protect its own processes from abuse.[1]

[2] Peter Till claims damages for negligence. He says that he was injured on 10 May 1996 when a motor cycle he was riding was struck by a utility motor vehicle. The vehicle remains unidentified.

[3] An action was commenced on 28 May 1997. The Nominal Defendant initially admitted liability but subsequently sought to withdraw its admission. It was held entitled to do so by the Court of Appeal on 26 November 1999.[2] An unsuccessful mediation occurred in December 2002. A Request for Trial Date was signed by the defendant's solicitors in May 2003. The plaintiff's side did not respond. In June 2009 the defendant applied to have the matter set down for trial. The proceedings came on for hearing before me on 31 August 2009. The plaintiff's case was opened, certain documents were tendered (on an undertaking to call necessary medical witnesses) and the plaintiff called to give evidence. His cross examination is not yet concluded.

[4] On 2nd September 2009 I adjourned the trial, then into its third day, on the application of Mr Till's counsel, Mr Mullins. Mr Mullins had become concerned through the trial that his client lacked the necessary capacity to provide him with instructions. He was concerned that the plaintiff appeared not to accept that he was in fact Peter Till, unless it suited him to be that person. Documents that Mr Till had prepared and which were to that effect were tendered. Mr Mullins pointed out that he had no confidence that Mr Till took responsibility for his evidence or his obligations to disclose relevant documents. A psychiatrist who had examined Mr Till years before was provided with a copy of the transcript and opined that if Mr Till in fact believed his statements then he was seriously, psychiatrically ill. I stayed the proceedings pending an enquiry into Mr Till's capacity pursuant to r72 *UCPR.*

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1 *Quinlan v Rothwell* [2002] 1 Qd R 647 at [30], de Jersey CJ and Mackenzie J agreeing. See also *Page v Central Queensland University [2006] QCA 478 at [15*], per Keane JA, Williams JA and White J agreeing

2 [1999] QCA 490

[5] I was then of the view that if Mr Till's capacity was impaired then a litigation guardian needed to be appointed to enable rational decisions to be made in the conduct of the litigation. Subsequently Mr Till refused to cooperate with any psychiatric examination. Eventually Mr Till's solicitors applied, orally, to have Mr Till transferred to the Queensland Consumer and Administration Tribunal (QCAT) for the purpose of that body investigating whether Mr Till had capacity to provide instructions to enable the proceedings before me to proceed. I acceded to that application in April 2010 and referred the matter to QCAT.[3]

[6] On 22 November 2010 QCAT determined that Mr Till did have capacity. The Member who determined the matter found that Mr Till's strategy was "to ridicule authority figures … to take the mickey out of them when playing the game in Court".[4]

[7] On 14 March 2011, and following receipt of the decision of QCAT, I set the further hearing of the adjourned trial down for the June sittings of the circuit Court at Mackay. That was not a step initiated by the parties but by me.

[8] To that point in time Mr Till had taken no step to advance his case since its adjournment on 2 September 2009.

[9] On 3 May 2001 the defendant applied for a stay of the proceedings. The plaintiff's solicitors had applied for leave to withdraw as a result of their difficulties with Mr Till,[5] which was granted on 3 May 2011. Mr Till was heard personally on the applications before the Court that day. Despite a number of enquiries from me he was not prepared to say that he intended to proceed with the trial. Effectively he would not respond meaningfully to the questions put to him. I adjourned the further hearing of the trial and made an order that it not be brought on without the leave of the Court.

[10] Since that application Mr Till has taken no step to advance his case.

[11] On the hearing of the present application Mr Till did not appear when called. Service was proved. He responded to the notices sent to him by faxing a letter to the Court addressed to "the Dishonourable Supreme Court Judge". He invited the Court to contact him by telephone "to talk about the harm being done to this living individual." The letter was signed "Rock, the individual who acts for the artificial person Peter Till". Mr Till continues to treat the Court proceedings as a joke.

[12] Despite Mr Till's attitude and gross discourtesy I determined to hear him over the telephone on the application. I wished to give him every opportunity to be heard in respect to an application which, if successful, would deprive him of a potentially valuable cause of action. Mr Till indicated in the course of the ensuing telephone call that he was not prepared to return to Queensland – the trial he said could proceed only over a video link. He faces further arrest in Queensland on outstanding warrants for a failure to pay fines imposed on him. Eventually Mr Till descended to abuse and I ended the connection.

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3 [2010] QSC 121

4 [2010] QCAT – app GAA3305-10 – 22 November 2010 – Senior Member Endicott - at para 8

5 See affidavit of McSwan filed 4 March 2011 at para 3

[13] The defendant has indicated that at the time of the trial in September 2009 it had arranged for 20 witnesses to attend. Those witnesses include an eye witness to the accident who maintains that Mr Till was riding on the wrong side of the road and at speed as he rounded a corner and ran into an oncoming car. That witness is still available and maintains a continuing recollection but it is inevitable that there must be a deterioration in his recall of the minutiae of the days' events so long ago and that happened in an instant.[6]

[14] In summary the subject accident occurred over 15 years ago. From December 2002 to June 2009 the plaintiff let the matter drift. He was forced on to trial at the defendant's insistence. During the trial he treated the proceedings as a joke pretending not to be Peter Till as it suited him. He refused to accept any psychiatric assessment to facilitate the expeditious determination of his capacity, the concern about which had been raised by his own antics. He has done nothing to advance his case since its adjournment over two years ago. He now has no solicitors acting for him. He has not filed a notice indicating that he will represent himself and has no address for service within the jurisdiction.[7] To advance his case he will need to arrange and call medical and other witnesses. He appears to have no capacity or interest in doing so. He will not return to the jurisdiction. I have no interest in assisting Mr Till in his efforts to avoid justice. But significantly a trial cannot be conducted by a litigant in person by video link in any practical sense – I would be reluctant to allow that to occur with experienced counsel well versed in the rules of procedure and of evidence. Mr Till has no knowledge of either, and is quite capable of seemingly irrational behaviour even when present in person when most litigants are more amenable to the direction of the Court. It is an entirely impractical suggestion.

[15] In my view there has been inexcusable delay, the plaintiff's conduct amounts to a deliberate abuse of the processes of the Court, and the prospects of a fair trial on the issue of liability appear remote. The plaintiff exhibits no present intention to progress the matter.

[16] The discretion that any Court has to control its own processes can, in this instance, be guided by the Rules. Rule 389(2) of the *Uniform Civil Procedure Rules* 1999 provides that no step may be taken in a matter without the leave of the Court where there has been a delay of two years since the last step. The rule indicates a general proposition that where there has been such delay there is a prohibition on the matter proceeding unless good reason be shown: *Lilyville Pty Ltd v Colonial Mutual Life Assurance Society Limited* [1999] QSC 372. It is more than two years since the plaintiff last took any step.

[17] Rule 389 is not available here as the defendant took a step on 18 October 2011 by amending its defence. That amendment was to meet an argument, first mentioned in the opening of the plaintiff's case, to effectively challenge the effect of the order of the Court of Appeal in allowing the Nominal Defendant to withdraw its admission of liability. But the step reflects no credit on the plaintiff.

[18] While it might be said that the more recent delay has come about as a result of an order of the Court staying the proceedings that was entirely due to the plaintiff's

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6 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 ; [1996] HCA 25

7 See rr 17 and 986(2) *Uniform Civil Procedure Rules* 1999

own bizarre conduct. As well, he has done nothing since to facilitate a prompt disposal of the concerns about his capacity that he had deliberately raised presumably for mischievous purposes. Nor has he taken any step to advance matters since the finding of the QCAT member in November of last year.

[19] The factors mentioned by Atkinson J in *Tyler v Custom Credit Corporation Pty Ltd* [2000] QCA 178 at [2] are relevant in shedding light on the proper approach to an application such as this.[8] The only one of the twelve factors that her Honour listed that might be called in aid of the plaintiff's position is that he is presumably impecunious and presumably has been carried by the solicitors who have acted for him. While there is no evidence to that effect he swore that he lived in a car at Nimbin and has done so for many years. That is however but one factor.

[20] Against that are many others. Not least of those is that it is far from clear that he has a valuable cause of action. A dispassionate eye witness with a good recollection might well have a significant influence on the resolution of the liability issue.

[21] In my view the balance of the factors mentioned by Atkinson J overwhelmingly favour the striking out of the proceedings.

[22] UCPR r 5 provides:

> "(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.
>
> Example—
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> The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

[23] The example suggests that a failure to proceed in an expeditious way, perhaps necessarily combined with other features, may be sufficient to result in dismissal of the proceedings. There is some debate as to whether there needs to be a breach of the rules or an order of the Court before proceedings can be struck out for a failure to comply with r 5(3). In *Ridolfi v Rigato Farms Pty Ltd* [2000] QCA 292 de Jersey CJ with whose reasons McPherson JA and Williams J agreed, observed that r 5(3), "confirms each party's obligation to proceed expeditiously, or risk sanctions (r 5(4)) which may include dismissal". Similarly, in *Quinlan v Rothwell* de Jersey CJ observed that r 5 had gone to the length of "expressly confirming that breach of a party's 'implied undertaking' 'to proceed in an expeditious way' may attract sanctions including, as per the proffered example, dismissal of the proceeding."

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8 *Basha v Basha* [2010] QCA 123 at [25] per Fraser JA

Here I note that there is a relevant breach of the rules – the plaintiff has not filed an address for service as required - but that is not the worst of the plaintiff's failures.

[24] In *Basha v Basha*[9] Fraser JA observed:

> "It is settled that the failure to take as well as the taking of procedural steps and other delay in the conduct of proceedings are capable of constituting an abuse of process. There is such an abuse of process where, taking into account the burdensome effect upon the defendant arising from the lapse of time, the objective effect of continuation of the proceeding is that a fair trial is not possible. Under UCPR the courts are less tolerant of delay than was the case under former procedural regimes."

[25] Here the defendant has already incurred the costs of securing the attendance of 20 witnesses. Those costs have been wasted and there seems little prospect of them being recovered from the plaintiff. If I set the matter down again it would necessarily have to be ready to proceed again. As well there must be significant concerns about recollections that are now 15 years old, albeit that a statement was obtained long ago from the eye witness. Finally, the plaintiff makes a mockery of the processes that he has sought to engage to his advantage and shows no sign of wanting to prosecute his case.

[26] Whilst I am conscious that the power to strike out should be reserved for obvious cases I am satisfied that this is such a case.

[27] The proceedings are struck out with costs.

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9 Ibid at [24] – citation of authority omitted