

SUPREME COURT OF QUEENSLAND

CITATION: *K v B* [2012] QSC 351

PARTIES: **K**
(applicant)
v
B
(respondent)

FILE NO/S: 10095 of 2010

DIVISION: Trial Division

PROCEEDING: Application heard on the papers

DELIVERED ON: 14 November 2012

DELIVERED AT: Brisbane

HEARING DATE: Application heard on the papers

JUDGE: Peter Lyons J

ORDER:

- 1. I grant the applicant leave to proceed with this matter pursuant to r 389 of the UCPR**
- 2. I direct that within 14 days of today's date, the applicant file and serve personally on the respondent her statement of financial circumstances in compliance with paragraph 1 of Practice Direction 33 of 1999, the affidavits on which she relies in support of her application and a copy of this order ;**
- 3. I direct that by 4pm 19 December 2012, the respondent file and serve his statement of financial circumstances in compliance with paragraph 2 of Practice Direction 33 of 1999 together with any affidavit material on which he proposes to rely;**
- 4. I order the proceedings continue as if started by application;**
- 5. I order that the matter be placed on the supervised case list;**
- 6. I direct that the matter be reviewed at 9.15am on 15 February 2013.**

CATCHWORDS: *Uniform Civil Procedure Rules 1999 (Qld), r 389*
Property Law Act 1974 (Qld)
Tyler v Custom Credit Corp Pty Ltd & Ors [2000] QCA 178, considered

SOLICITORS: Barry.Nilsson. Lawyers for the applicant

Respondent in person

- [1] The applicant commenced proceedings on 20 September 2010. She now seeks leave to proceed with the claim, under r 389 of the *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)*; and leave to amend the originating process.
- [2] The applicant seeks relief in the principal proceedings under the provisions of Pt 19 of the *Property Law Act 1974 (Qld) (PLA)*. She alleges that she lived in a de facto relationship with the respondent for some 11 years; and that there are two children of the relationship (Nicholas, who is now 18 years of age; and Charlotte, who is now 14 years of age). She also alleges that the defendant has acquired substantial property, mostly during the course of their relationship; and that he has a substantial earning capacity. She also alleges that the respondent lives in a house registered in her name, but from which she has been excluded.
- [3] Somewhat unusually, the proceedings were commenced by claim and statement of claim¹. The respondent has not filed a defence. The applicant applied for default judgment on 13 December 2010. That application was refused, it being made to a registrar, and the registrar not having power to give her default judgment for some of the relief sought. Rule 288 of the *UCPR* would in those circumstances authorise an application for default judgment to a judge, no such application was made.
- [4] After the refusal of the application for a default judgment, the applicant brought proceedings in the Magistrates Court to recover possession of the property registered in her name. The respondent did not appear. The applicant's solicitor deposes that on 12 January 2011, the magistrate granted the applicant a warrant to eject the respondent from the property; and that an attempt was made to enforce the warrant on 14 March 2011, but the applicant, who attended the premises on that occasion, requested the police officers who were attempting to enforce the warrant, to cease doing so.
- [5] There was some, though limited, evidence, including letters of 24 January 2011 and 14 February 2011, of attempts by the applicant to endeavour to negotiate with the respondent on the matters the subject of these proceedings. These attempts were unsuccessful.
- [6] On 14 August 2012, a notice of intention to proceed was served on the respondent.
- [7] The applicant's submissions make reference to the matters identified by Atkinson J in *Tyler v Custom Credit Corp Pty Ltd & Ors*². It is apparent from her Honour's judgment that the list was not exhaustive. I do not, in this application, propose to deal with each of them.
- [8] A matter of some significance is the applicant's prospects of success in the principal proceedings. Assuming there are proper instructions on which the pleading is based, it would seem that she has real prospects of success.

¹ See r 10 of the *UCPR*; and PD 33 of 1999.

² [2000] QCA 178 at [2].

- [9] Another matter raised by her Honour is whether the litigation has been characterised by periods of delay, and whether the delays are attributable to the plaintiff, the defendant, or both.
- [10] There plainly seems to have been substantial delay in this matter, particularly between February 2011 and August 2012. However, it should be noted that the next action required by the *UCPR* was the delivery by the respondent of his defence. That was due in the latter part of 2010. He, therefore, is in breach of an obligation imposed by the *UCPR*. It seems to me likely that had the respondent carried out that obligation, the action would not have experienced the delay which has occurred. Having said that, there were steps available to the applicant which she could have taken, but did not take.
- [11] The explanation given on behalf of the applicant for the delay is, at best, limited. The material does not disclose whether any of the delay is attributable to delay on the part of the applicant's solicitors.
- [12] There has been no suggestion that the delay has resulted in prejudice to the defendant, leaving an inability to ensure a fair trial. It might be added that, in proceedings of this kind, courts regularly have to deal with events which occurred after a considerable time had passed.
- [13] In the circumstances, it seems to me appropriate to grant the applicant leave to proceed, and I propose to do so.
- [14] I also propose to seek some submissions as to whether the matter should continue as if commenced by application³; and about the management of the matter generally.

³ See r 11 of the *UCPR*