

# SUPREME COURT OF QUEENSLAND

CITATION: *Ferrari Estate Holdings Pty Ltd v Sovereign Resort Developments Pty Ltd & Ors (No 2)* [2015] QSC 220

PARTIES: **FERRARI ESTATE HOLDING PTY LTD**  
**(ACN 099 918 760) AS TRUSTEE**  
(Respondent Plaintiff)  
v  
**SOVEREIGN RESORT DEVELOPMENTS PTY LTD**  
**(ACN 010 434 018)**  
(Applicant First Defendant)  
and  
**COOKTOWN EARTHMOVING & QUARRYING PTY LTD**  
**LTD (ACN 010 827 540)**  
(Applicant Second Defendant)  
and  
**MATTHEW TROY CAREY TRADING AS MTC**  
**BUILDER (BN 17 682 757)**  
(Applicant Third Defendant)

FILE NO/S: SC 139 of 2010

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 31 July 2015

DELIVERED AT: Cairns

HEARING DATE: 19 June 2015

JUDGE: Henry J

ORDERS: 1. The claim as against the second and third defendants is dismissed.  
2. I will hear the parties as to the costs of this application and the first defendant's application at 10.00 am on 7 August 2015.

CATCHWORDS: PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – DISMISSAL OF PROCEEDINGS FOR WANT OF PROSECUTION – where the second and third defendants in the original claim seek dismissal – where the claim against the first defendant has already been dismissed for want of prosecution – where no step has been taken for more than 2 years – where the proceedings were characterised by periods of delay – whether the claims should be dismissed

*Ferrari Estate Holdings Pty Ltd v Sovereign Resort Developments Pty Ltd & Ors* [2015] QSC 126, cited  
*Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178, applied

*Uniform Civil Procedure Rules 1999 (Qld)* r 5, r 280

COUNSEL: Nil

SOLICITORS: The plaintiff's director, Ms EPD Ferrari, appeared without legal representation for the respondent plaintiff.  
 Williams Graham Carman Lawyers for the first defendant appeared but played no role in the application.  
 Gagens Lawyers for the applicant second defendant  
 Moray & Agnew Lawyers for the applicant third defendant

- [2] On 13 May 2015 I dismissed the plaintiff's claim as against the first defendant for want of prosecution.<sup>1</sup>
- [3] In the wake of that decision the second and third defendants made application for the dismissal of the claim as against them for want of prosecution.
- [4] The materials relied upon in support of their application are not identical to the materials relied upon in the first application. However there is in substance little difference in the issues arising from the materials relied on in the present application as compared to the issues that arose in the first application.

### **Background**

- [5] The plaintiff alleges its land and building, the Ferrari Estate's building in Cooktown, was flooded and damaged on or about 19 March 2004 as a result of development works undertaken by the second and third defendants at the Sovereign Resort Hotel for the first defendant owner of the hotel.
- [6] The plaintiff alleges its cause of action accrued then. Indeed the plaintiff's director, Ms Ferrari, deposes she was sure within several months of 19 June 2004 that the works were the root cause of the problems.<sup>2</sup> Nonetheless the plaintiff delayed in filing its claim until 19 March 2010, about six years after the event. Limitation defences are pleaded.
- [7] The third defendant filed its notice of intention to defend and defence on 28 April 2010 and the second defendant did likewise on 6 May 2010. The second defendant made a request for further and better particulars of the statement of claim on about 17 May 2010 and the plaintiff filed a reply to the second defendant's request for further and better particulars on 22 June 2010.
- [8] The next and apparently last "step" the plaintiff took in the proceeding as against the second defendant was the service of a list of documents on 5 March 2012. The next and apparently last step the plaintiff took as against the third defendant was similarly

<sup>1</sup> *Ferrari Estate Holdings Pty Ltd v Sovereign Resort Developments Pty Ltd & Ors* [2015] QSC 126.

<sup>2</sup> Affidavit of Ethel

a service of the plaintiff's list of documents on the third defendant on 2 March 2012, followed by a provision of copies of documents from the plaintiff's list on 30 May 2012.

- [9] It follows the plaintiff has taken no step in the proceeding for over three years. The applicants submit that such activity as did occur regarding the plaintiff's documents in 2012 was perfunctory and that the plaintiff has not meaningfully progressed the proceeding for over five years.
- [10] The applicants seek an order pursuant to r 280 of the Uniform Civil Procedure Rules 1999 (Qld) ("UCPR") dismissing the prosecution for want of prosecution.

### **Delay**

- [11] The considerations relevant to an application of this kind were canvassed in *Tyler v Custom Credit Corp Ltd & Ors.*<sup>3</sup> They include reference to how long ago the relevant events occurred, the extent of the delay in commencing the litigation, how long ago it was commenced, whether the litigation has been characterised by periods of delay, to whom the delay is attributable and how far the litigation has progressed. All of those considerations are adverse to the plaintiff's position.
- [12] The events occurred over 11 years ago. It took the plaintiff at least six years to even commence the action notwithstanding longstanding knowledge of the fact of damage and the defendants' alleged liability for causing it. In the five years since filing the claim it has done little to advance the action. It has not progressed it past disclosure and has not taken a step in over three years. None of that failure to comply with the litigant's implied undertaking to proceed expeditiously<sup>4</sup> is the fault of the defendants.

### **Explanations for delay**

- [13] Such explanations as are proffered for the delay fall far short of explaining delay and inaction of such magnitude as has occurred here.

#### *Complaint re former lawyer*

- [14] The applicant asserts that the delay was compounded by the conduct of its former lawyer Mr Towne. It relies largely upon the material previously filed on this topic<sup>5</sup> and previously canvassed in my decision of 13 May 2015.
- [15] Ms Ferrari additionally exhibited a letter by her to the Legal Services Commission dated 16 August 2013. Much of that letter is difficult to comprehend. It includes similar themes to the previously filed materials, complaining of a failure to follow instructions about consolidating proceedings and the allegedly unauthorised use of money the applicant paid into Mr Towne's trust account. It also contains some reference to the seeking of expert evidence about explosives. However that does not seem to relate to the present defendants' alleged activities and might be connected with blasting associated with work relating to the Seagren's building,<sup>6</sup> another premises neighbouring the applicant.

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<sup>3</sup> [2000] QCA 178.

<sup>4</sup> Per r 5 UCPR.

<sup>5</sup> Affidavit of Ethel Ferrari filed 18 June 2015, footnote 1 to paragraph [13].

<sup>6</sup> Affidavit of Ethel Ferrari filed 18 June 2015, ex EPDF 5.

- [16] The letter of 16 August 2013 is the last evidence in time of Ms Ferrari's contact with the Legal Services Commission. The plaintiff has still chosen not to enlighten the court about the outcome of its complaint. Further the applicant has not explained how the pursuit of its complaint prevented it in the meantime from advancing the present proceeding. The best evidence of when the plaintiff last dealt with Mr Towne still appears to be 25 September 2012. The plaintiff's continued failure to advance this litigation since then is consistent with a tendency to delay which was evident long before its dissatisfaction with Mr Towne.

*Ill-health*

- [17] The plaintiff's Ms Ferrari deposes that her health problems are to a large extent to blame for the delay in the plaintiff instituting and progressing proceedings.
- [18] Her affidavit filed 18 June 2015 exhibited the same medical certificate of 9 February 2015 by Dr Amarjit Singh as was relied upon in the former application. It states:  
 "THIS IS TO CERTIFY THAT

Ms Ethel Ferrari  
 22/06/1935 , PO Box 7297

IS RECEIVING MEDICAL TREATMENT AND HAS BEEN  
 COMPLYING WITH MEDICAL ADVICE.

Mrs Ethel Ferrari advised me that her home was flooded with water several years ago and she has been suffering from depression. She has been a patient of mine since 25/08/2011.

She has had three skin cancers on her right leg adjacent to the shin bone. She had emergency surgery to remove a malignant cancer. Her recovery has been slow but her health is improving.

She has sever (sic) arthritis that is very painful this will increase with ageing that adds to her slow recovery.

I can verify that since I have known her she has had multiple ongoing medical issues."<sup>7</sup>

- [19] That evidence of Ms Ferrari's unfortunate physical ailments does not explain how they would cause any material delay in advancing the plaintiff company's legal proceeding. The certificate's reference to Ms Ferrari's advice that she has been suffering depression is no evidence of such a diagnosis by that doctor.
- [20] Ms Ferrari also exhibited a letter of 5 June 2015 by Dr Des Hill. It states:  
 "Ms Ethel "Patrina" Ferrari was treated at the Cooktown Medical Centre for depression in 2007. She felt that her depression was due to ongoing problems with her neighbour which started some years earlier. She felt they had performed earthworks which caused water damaged to her building. She was counselled & prescribed Zoloft at

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<sup>7</sup> Affidavit of Ethel Ferrari filed 18 June 2015, ex EPDF-1.

that time. Since that time I have seen her only occasionally as she has been residing in the Kuranda/Cairns region most of the time.

Past Medical History:

<b>Date</b>	<b>Condition</b>
28 May 2007	DEPRESSION <sup>8</sup>

- [21] While that evidence implicitly provides a medical opinion that Ms Ferrari was suffering from depression it only relates to Ms Ferrari's condition in 2007.
- [22] Ms Ferrari deposes that her depression has been ongoing and that the melanoma diagnosis added to her "already poor mental state", thus being a "large contributing factor" to the delay.<sup>9</sup> Her self-assessment of her mental state does not carry the same weight as the clinical assessment of a medical practitioner.
- [23] Even accepting that she has suffered depression to varying degrees since the alleged damage and that it was aggravated by her melanoma diagnosis it does not follow that she was for prolonged periods debilitated to the extent of being unable to actively assist the plaintiff company to advance its case. Moreover there is no evidentiary basis to conclude that the plaintiff company did not have the resources to advance its case without the active assistance of Ms Ferrari.

### **Impecuniosity?**

- [24] The impecuniosity of a plaintiff as a reason for delay and whether the defendants caused that impecuniosity are relevant considerations in an application of this kind. There is no evidence of either here.

### **Prospects**

- [25] The plaintiff's prospects of success are also a relevant consideration of this kind. In December 2010 the defendants jointly obtained and served on the plaintiff an expert engineer's report prepared by Mr Eric Fox pursuant to Chapter 11 Part 5 of the UCPR. That report supports the defence that the building works carried out by the defendants did not cause or contribute to any damage suffered by the plaintiff. Significantly the plaintiff has not served any expert evidence pursuant to Chapter 11 Part 5 of the UCPR in respect of the claim against either of the remaining defendants.
- [26] Ms Ferrari's recent affidavit exhibited some evidence that was not before the court at the time of the previous application and which Ms Ferrari seemingly perceives is relevant to prospects. Some of that evidence goes to the heritage status of the plaintiff's building,<sup>10</sup> which, despite Ms Ferrari's penchant for reiterating that status, does not assist an assessment of prospects. Some of that evidence goes to proof of the building having suffered water damage,<sup>11</sup> however it is the cause of that damage which is the real issue in the case.
- [27] As to the cause of the damage there is a statement by handyman Thomas Mears exhibited to Ms Ferrari's affidavit.<sup>12</sup> It dwells predominantly upon the causative

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<sup>8</sup> Ibid.

<sup>9</sup> Affidavit of Ethel Ferrari filed 18 June 2015, [10].

<sup>10</sup> Affidavit of Ethel Ferrari filed 18 June 2015, ex EPDF-3, 10.

<sup>11</sup> Affidavit of Ethel Ferrari filed 18 June 2015, ex EPDF-6, 7, 8, 9.

<sup>12</sup> Affidavit of Ethel Ferrari filed 18 June 2015, ex EPDF-5.

responsibility of persons who performed work associated with the Seagrens property. It refers passingly and imprecisely to “water from the Sovereign Hotel excavations”. If it is a proof of evidence that Thomas Mears would give, his evidence would provide no more than equivocal support for the plaintiff’s case against the present defendants.

- [28] The only additional evidence which has the apparent potential to positively support the plaintiff’s case is a letter to the applicant by consulting engineer Alan McPherson of 23 October 2009. It states, inter alia:

“We initially responded to your request to examine and inspect stormwater runoff problems that have been affecting the above building in a report dated 19<sup>th</sup> November 2008. We have now expanded the report to include recommendations and comments relating to some ground water issues and the condition of the building.

...

Our inspection and assessment reveals that, during rain events, surface water is being directed onto your property from the property at the side containing the Seagren Inn and parts of the rear of your site adjacent to the Sovereign Hotel Resort.

...

We understand that, at one stage, during the construction of the Sovereign Hotel Resort section at the rear (eastern boundary) of your property that an earth bank was cut away or removed. Photographic evidence provided by yourself clearly showed the earthworks that were undertaken. This allowed surface water from the road and hillside at the rear to enter your property. If a significant rain event occurred at that time then, in our opinion, the resulting flows would have flooded the rear of the building seeping into the Foyer, Banking Chamber and front portico.

At the time of our inspection it appeared that the bank had been restored. However, we noted that surface flows could still enter your property and that there were damp spots in the rear lawn. These spots, in the garden behind your property, appear to be caused by the irrigation system owned by the Sovereign Hotel Resort and Seagren Inn.

...

It is noted that since the restoration of the earth bank on the Sovereign Hotel Resort property that the amount of surface water emanating from that area has been reduced.”

- [29] That letter’s content raises the possibility that expert evidence in admissible form might be raised in support to some extent of the plaintiff’s case but the plaintiff has not obtained and served expert evidence under the UCPR. On the materials as they stand the defendants’ prospects of success appear better than the plaintiff’s. Given the imprecision in the known state of the plaintiff’s case I do not regard that consideration of prospects as a determinative consideration against it but plainly it is not a consideration that positively assists its position either.
- [30] This prompts discussion of another aspect of the plaintiff’s delay not mentioned above.

### **Delay re expert evidence**

[31] Each of the applicants complain of a repeated omission by the plaintiff to obtain and serve expert evidence. For the second defendant, solicitor Peter Coggins deposed:

- “11. The Plaintiff has, on numerous occasions, evinced an intention to obtain and serve expert evidence in support of her claims in the proceeding, but no evidence has ever been forthcoming. For example:
- (a) on 29 December 2010, Ms Ferrari, director of the Plaintiff, advised me in an email communication that “I am getting a report prepared by a Registered builder...[and] A report from a Professor/Associate at the University of Melbourne is currently being prepared on the cement...”;
  - (b) on 16 March 2011 I received an email from Ms Ferrari in which she stated “*I was due to have the report from the Builder this week. Cardwell was flooded again last week. I have been advised that I will get the report next week 25 March then it has to go to the Engineer...*”; and
  - (c) I note that in the Plaintiff’s director’s letter to the First Defendant dated 19 December 2014, almost 4 years after the Plaintiff’s email dated 29 December 2010, the Plaintiff’s director stated “*Now we are proceeding to Court we need updated reports from the experts...I repeat we have to get updated reports to proceed.*”
12. I have not received any of the reports referred to in the Plaintiff’s director’s emails of 29 December 2010 and 16 March 2011, and nor have I received the reports referred to in the Plaintiff’s letter of 29 December 2014. I note that nearly 6 months has passed since the Plaintiff’s letter of 19 December 2014 and the references made therein to “updated reports”.”

[32] In a similar vein the third defendant’s Nicola Ellis deposed:

- “9. “[S]ubsequent to the last step taken by the plaintiff as outlined ... above:
- (a) I sent letters on behalf of the third defendant to the plaintiff’s (then) solicitor dated 17 July 2012, 27 August 2012 and 15 October 2012 (attached and marked **NMLE-1**) requesting:
    - (i) Further disclosure; and
    - (ii) Any engineering report obtained (as earlier foreshadowed).
  - (b) I was contacted by Ms Petrina Ferrari by telephone on 19 November 2012 to advise that she was now acting for the plaintiff in place of Daniel Towne & Associates. Ms Ferrari also indicated she was in the process of obtaining further expert reports from explosive and hydraulic experts and was trying to get everything together before Christmas.
  - (c) On my client’s instructions, on 18 February 2013, I contacted Ms Ferrari by telephone to ascertain her intentions regarding the matter at which time she advised that:
    - (i) The plaintiff now had three court proceedings on foot in relation to her land and building;
    - (ii) She had spoken to a new solicitor and a barrister was to review her matter and provide advice; and

(iii) She envisaged obtaining three further reports from a hydrologist, an explosive expert and a heritage conservation expert.

10. Despite what was represented by Ms Ferrari regarding the plaintiff's intentions I received no further communication from or on behalf of the plaintiff until 29 October 2014 when served with the plaintiff's notice that party acting in person. ...

12. Even after the first defendant's application was heard and determined, no further step has been taken by the plaintiff to pursue the claim and/or obtain leave of the court."

[33] On any view the plaintiff has repeatedly failed to advance its case through obtaining and serving expert evidence pursuant to the UCPR.

[34] Its pattern of intimating something would be done about that but still not doing it was persisted in even after the filing of the present applications. Ms Ferrari's affidavit exhibits a letter dated 3 June 2015 from Storm Water Consulting Pty Ltd, referring to Mr McPherson's letter of 23 October 2009 and quoting for the carrying out of a hydraulic analysis of the catchment flows to the plaintiff's property.<sup>13</sup> This was presumably intended to show the plaintiff was intending to procure potentially relevant expert evidence. Instead it merely highlights a failure to gather potentially relevant evidence in the more than five years since Mr McPherson's report.

#### **Other considerations**

[35] An obvious consequence of granting the present applications is that the plaintiff will thereafter be so far out of time as to be precluded from further pursuit of its case as against the defendants. That relevant consideration obviously ought be weighed against the considerations already discussed, in addition to the prejudice which will flow to the defendants if this litigation is permitted to continue.

[36] Mr Coggins' affidavit deposes to the director of the second defendant having informed him that the plant operators who performed the relevant works left the second defendant's employ in 2004 and insofar as the director is aware they no longer live in Cooktown. That falls short of evidence that on detailed enquiry those potential witnesses cannot be found. However it does highlight the difficulty confronting the defendants in ensuring relevant witnesses will be available in support of the defendants' case so long after the event. The affidavit of Ms Ellis complains more generally of the inevitable diminution in witness recollection and the adverse effect of having the "threat, uncertainty and stress of ongoing litigation" hanging over the third defendant.

[37] I infer from the nature of this case and the delay involved that the defendants will inevitably have been prejudiced by the delay. The recollections of such witnesses as they can find will obviously be less reliable than would be the case had the litigation been instituted promptly and thereafter pursued in a timely way.

[38] Further whilst each of the defendants are companies I reiterate the view I expressed in my decision of 13 May 2015 that, just as ordinary members of the community are entitled to get on with their lives and plan their affairs without the continuing threat

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<sup>13</sup> Affidavit of Ethel Ferrari filed 18 June 2015, ex EPDF-11.

of litigation hanging over them, so too are companies. Litigation pending against companies, particularly for such a lengthy period as here, will inevitably give rise to corporate uncertainty and an impaired ability to plan future activity and expenditure. These corporate defendants are as entitled as human litigants are to protection from prejudice caused by a litigant failing to honour its undertaking to proceed expeditiously.

### **Conclusion**

- [39] In summary the plaintiff has engaged in prolonged delays both before and after the institution of this litigation. It has failed to comply with its implied undertaking to proceed in an expeditious way. Such explanations as are proffered for its delays are wholly inadequate to explain delays of the magnitude that have occurred here. On the face of what little evidence it has actually gathered to date its case cannot be said to have developed good prospects of success and is far short of being ready to be listed for trial.
- [40] The conclusion is irresistible that the plaintiff has long considered the defendants should wait for the case to be progressed as and when it suits its director Ms Ferrari to progress it.
- [41] The plaintiff's claim against the second and third defendants should be dismissed for want of prosecution.
- [42] It will be necessary to hear the parties as to the costs of this application. It also remains necessary to hear the parties as to the costs of the former successful application of the first defendant.

### **Orders**

- [43] My orders are:
1. The claim as against the second and third defendants is dismissed.
  2. I will hear the parties as to the costs of this application and the first defendant's application at 10.00 am on 7 August 2015.