SUPREME COURT OF QUEENSLAND

CITATION:	*Body Corporate for "Medici" CTS No 34361 and the Unit Owners Listed in Schedule A v Whybird & Partners Pty Ltd and Anor* [2016] QSC 296
PARTIES:	**BODY CORPORATE FOR "MEDICI" CTS NO. 34361 AND THE UNIT OWNERS LISTED IN SCHEDULE A** (plaintiffs) **v** **WHYBIRD & PARTNERS PTY LTD** **ABN 80 092 733 849** (first defendant) **EVANS HARCH PTY LTD** **ABN 42 010 370 724** (second defendant)
FILE NO:	SC No 369 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2016
JUDGE:	Douglas J
ORDER:	**1. Refuse the application by the plaintiffs.** **2. Grant the relief sought by the second defendant that the proceedings be struck out for want of prosecution.** **3. I order that the plaintiffs pay the second defendant's costs of and incidental to the applications and the proceeding.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – where the plaintiffs filed a claim and statement of claim in respect of alleged defects in the construction of a block of home units called "Medici" on 12 January 2012 – where the block of home units was completed in about August 2005 – where the plaintiffs first notified the second defendant of the defects in or about early 2006 – where the plaintiffs have taken no step in the proceedings since 20 December 2012 when the claim and statement of claim were served on the second defendant – where the plaintiffs did not require the second defendant to file and serve a notice of

intention to defend and defence at that time – where the second defendant requested further particulars of the pleading – where further particulars were not provided by the plaintiffs – where the plaintiffs seek leave to file an amended statement of claim – where the amended statement of claim sought to be filed by the plaintiffs contains an amendment that arguably does not arise out of "substantially the same facts" as the cause of action originally claimed – where a limitation question would arise if leave were given to amend the statement of claim – whether the claim should be dismissed for want of prosecution

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 376(4)(b), r 389, r 389(2)

Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited [2015] 1 Qd R 476; [2014] QCA 233, cited
Menegazzo v Pricewaterhousecoopers (A Firm) & Ors [2016] QSC 94, cited
Paul v Westpac Banking Corporation [2016] QCA 252, cited
Tyler v Custom Credit Corp Ltd [2000] QCA 178, cited

COUNSEL:	M J May for the plaintiffs D W Marks QC for the second defendant
SOLICITORS:	Schweikert Harris Lawyers for the plaintiffs Axia Litigation Lawyers for the second defendant

[1] This is an application for leave to file an amended statement of claim. Leave is needed under r 389(2) of the *Uniform Civil Procedure Rules* 1999 because the plaintiffs have taken no step in the proceedings since 20 December 2012 when their solicitors served the claim and statement of claim originally filed on 12 January 2012. The second defendant has a cross-application seeking an order dismissing the claim for want of prosecution in the inherent jurisdiction of the court. The action against the first defendant was discontinued on 31 July 2014, those parties, the plaintiffs and the first defendant, having settled their differences.

Background

[2] The action arose out of alleged defects in the construction of a block of home units called "Medici" in 2004-2005. The block was completed in about August 2005. The first defendant was sued as the design engineer and the second defendant as the builder and project manager. The existing pleading, in para 15, alleges a failure by the second defendant to ensure the construction works were undertaken with appropriate care and skill for, among other reasons, failing to build so as to avoid problems related to the aggressive or corrosive environment at a Queensland coastal resort town. Some of those issues had been raised in an email of 5 October 2009 sent on behalf of the plaintiffs saying it was then over three years and nine months since the plaintiffs first notified the second defendant of defects in the building, presumably in early 2006, about six years before the statement of claim was filed.

[3] Arguably, the existing pleading covers those issues identified in the email, including the way in which the relevant allegations have been re-pleaded in para 15(f) of the proposed amended statement of claim where the allegation is that defective materials, not appropriate for the corrosive environment were used. Those allegations may well be capable of being found to have arisen out of "substantially the same facts" for the purposes of r 376(4)(b) of the *UCPR*.[1]

[4] A further amendment proposed is to allege that the second defendant installed glass panels in the building's balustrades not in compliance with an Australian standard because they did not have a minimum edge cover of at least 8 mm. Arguably, that proposed amendment does not fall within the existing pleading and does not arise out of substantially the same facts thus giving rise to a limitation question if leave were given to amend the statement of claim. That question could be postponed to trial by giving leave to make the amendment only as from the delivery of the proposed amended pleading on 30 May 2016; see, eg, *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors*.[2]

[5] That issue of the limitation period is raised here, particularly, because there was correspondence by email on 16 November 2009[3] from the plaintiffs relating to unsecured balcony glass saying that, in the previous two years (from, presumably, late 2007), at least three glass panels had slipped out of their frames which the second defendant had caused to be rectified. The second defendant's case is that the correspondence, therefore, makes it clear that the cause of action for any damage caused by the defective glass panels is statute barred, the plaintiffs having been aware of the issue since late 2007.

[6] The plaintiffs argue that it is inappropriate to decide that issue in this application because the plaintiffs did not discover that the glass panels were defective in the way pleaded in the proposed amended statement of claim, relating to the breach of the Australian standard, until about 24 July 2012 when it received a report of that date.[4] In that context, reference was made to the decision of the Court of Appeal in *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited*.[5]

[7] It is also significant, however, that that letter informed the plaintiffs that the balustrade was originally installed in 2005 "by a now defunct company". The evidence did not otherwise clearly identify the company, said to have been a subcontractor of the defendant, or show, whether, if it had been deregistered, it might be revived because, for example, it was insured against the relevant risk.

Leave to proceed?

[8] That is one consideration that has led me to conclude that I do not need to decide whether leave should be given to amend the statement of claim. Rather, in my view, the plaintiffs should not have leave to amend because they have not shown that they should be

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1 See, eg, *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [48]-[50] and *Paul v Westpac Banking Corporation* [2016] QCA 252 at [11]-[13].

2 [2016] QSC 94 at [45].

3 See the affidavit of S P Evans filed by leave 31 May 2016 (ex SPE-2).

4 See the affidavit of H N Schweikert filed 26 May 2016 at p.76.

5 [2015] 1 Qd R 476, 506-507 at [53]-[54].

permitted to take a new step in the proceeding under r 389. Therefore, the defendant should succeed in its application to dismiss the plaintiffs' claim for want of prosecution.

[9] As I have set out earlier, the plaintiffs' steps in the action were to file the claim and statement of claim on 12 January 2012 and to serve it on 20 December 2012. The letter accompanying the court documents suggests that the parties had been in negotiations that had not resolved the matter and went on to say that the plaintiffs did not require the second defendant to file and serve a notice of intention to defend and defence in accordance with r 137 at that time.

[10] The second defendant, nonetheless, requested further particulars of the pleading by letter of 16 January 2014. The further particulars were not provided. The plaintiffs' solicitors did write on 17 April 2015 and 19 May 2015 affirming their commitment to progressing the matter in an expeditious way and, if necessary, amending the claim, but no proposed amended statement of claim was delivered until about 4.30 pm on 30 May 2016. This application had been filed on 27 April 2016.

[11] The explanation for the slow progress of the proceedings advanced for the plaintiffs commences by pointing out the oddity of the second defendant complaining about the progress of proceedings where it had not taken the next formal step available to it of filing a notice of intention to defend. It had, however, sought particulars without a response.

[12] The plaintiffs also point to the fact that there had been a good deal of negotiation between the parties over a long period of time during which the plaintiffs had spent time and money obtaining evidence to substantiate their claims and that proceedings were initiated because of possible limitation period issues.

[13] The plaintiffs also assert they possessed limited means, being the body corporate and its members who owned units in the building, and were faced with a number of different categories of defects. The body corporate had levied the unit owners $88,400 each. Some of the defects posed a threat to the structural integrity of the building and the occupants' personal safety while the others were matters of quality and workmanship. The plaintiffs took the approach of prioritising the question of safety issues against the first defendant over the ones going to quality and workmanship relating to the second defendant.

[14] It was submitted for the plaintiffs that up until around 2014 the matter still had the character of ongoing negotiation between the parties with the plaintiffs seeking to substantiate their claim to the second defendant with a view to resolving the matters outside the court process. They say they relied on the conduct of the second defendant as indicating that it was prepared to negotiate.

[15] The plaintiffs also submitted that the steps that had been taken by them since proceedings were commenced were steps that would have been required in any event in the course of the litigation even though they were initially done for the purpose of seeking to resolve the matter out of court.

[16] They argue that they will be prejudiced to the extent that the amount of the claim is approximately $710,000 and argue that the prejudice to the second defendant is minimal.

The prejudice to the second defendant in having lost the potential ability to claim contribution or indemnity from third parties was sought to be excused on the basis that it should have known since 2006 that the matters the subject of the claim were contentious and that it has known that the claim was to be pursued during the whole period.

[17] The second defendant's submissions in this context were that the plaintiffs' approach to litigation had been dilatory to the extent of torpor. Their deliberate conduct in proceeding against the first defendant rather than the second defendant could not properly be explained simply by the diversion of resources so that the delay of four years and three months since the filing of the pleading and this application for leave to proceed was not properly explained. It relied upon its inability to join its subcontractors who have now gone out of business.

[18] The second defendant also points out that, with respect to the initial complaints relating to the finishes of the building, that it is inherently more difficult to obtain expert evidence since the building was completed in about August 2005. One would have thought that the defendant should have been gathering evidence about those issues in any event but the effect of delay on the memory of witnesses is well recognised.

[19] When one identifies the relevant considerations listed by Atkinson J in *Tyler v Custom Credit Corp Ltd*,[6] I have taken into account:

1. the length of time since the building was erected in 2005;

2. the very significant delay until proceedings were instituted in January 2012 when it appears evident that the plaintiffs were on notice of defects about six years before then;

3. the failure to progress the matter in accordance with r 5 of the UCPR to facilitate the just and expeditious resolution of the real issues and in breach of the implied undertaking to proceed in an expeditious way; and

4. the long delays during litigation which are essentially attributable to the plaintiffs, particularly since they failed to respond to the defendant's request for further and better particulars.

[20] The evidence of the limited means of the plaintiffs, described as "mum and dad" individuals in the submissions, to conduct the litigation is not terribly persuasive having regard to the investments they have made in their units in the block. There are 32 units listed in schedule A to the statement of claim, most having two owners. The evidence is that the units sold for prices up to $1.65 million.[7]

[21] Other relevant issues include that the litigation is likely to conclude if the plaintiffs' claim is struck out. The litigation has not progressed very far at all and the delay appears likely

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6 [2000] QCA 178 at [2].

7 See the affidavit of H N Schweikert filed 26 May 2016 at para 11.

to have been caused less by the plaintiffs' lawyers than by the instructions from the plaintiffs to proceed more expeditiously against the first defendant.

[22] In those circumstances, I am not satisfied that there is a satisfactory explanation for the delay and there is evidence of prejudice both from the passage of time in respect of the likely effect on the memories of witnesses about the quality of the work done on the building and in respect of the ability of the defendant to proceed against its subcontractors.

Conclusion and orders

[23] Accordingly, I shall refuse the application by the plaintiffs and grant the relief sought by the second defendant that the proceedings be struck out for want of prosecution. I also order that the plaintiffs pay the second defendant's costs of and incidental to the applications and the proceeding.