SUPREME COURT OF QUEENSLAND

CITATION:	*Barton v Atlantic 3-Financial (Aus) Pty Ltd & Anor* [2010] QCA 223
PARTIES:	**NATHANIAL KELBURN DUNBAR BARTON** (plaintiff/appellant) **v** **ATLANTIC 3-FINANCIAL (AUST) PTY LTD** ACN 056 262 723 (DEREGISTERED) (first defendant/first respondent) **ATLANTIC 3 FUNDS MANAGEMENT LIMITED** ACN 092 110 097 (second defendant/second respondent)
FILE NO/S:	Appeal No 1295 of 2010 SC No 6621 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2010
JUDGES:	Muir and White JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed;** **2. The order of 4 February 2010, except insofar as it relates to costs, be set aside;** **3. The proceedings be reactivated;** **4. The second respondent pay the appellant's costs of the appeal;** **5. The second respondent be granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld).**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – primary judge refused appellant's application for reactivation of proceedings – Supreme Court Practice Direction No. 4 of 2002 paragraph 5.4 outlines the procedure for reactivating a matter that has been deemed resolved – whether primary judge erred in failing to correctly identify

the principles or factors relevant to the exercise of the discretion under the Practice Direction – whether exercise of primary judge's discretion miscarried – whether Court should exercise discretion afresh

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – second respondent sought to apply for an indemnity certificate under s 15(1) *Appeal Costs Fund Act* 1973 (Qld) – whether indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 389

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175; [2009] HCA 27, cited
Holdway v Arcuri Lawyers (A Firm) [2008] QCA 302, cited
Mitchell v Pacific Dawn P/L [2003] QCA 526, cited
Multi-Service Group Pty Ltd (in liq) & Anor v Osborne & Anor [2010] QCA 72, applied
Sali v SPC Ltd (1993) 67 ALJR 841; [1993] HCA 47, cited

COUNSEL: D A Savage, with P D Tucker, for the appellant
T Matthews for the respondents

SOLICITORS: Malcolm Johns & Company for the appellant
Cusack Galvin & James for the respondents

[1] **MUIR JA:** The appellant plaintiff appeals against an order of the primary judge made on 4 February 2010 dismissing with costs the appellant's application, pursuant to *Practice Direction 4 of 2002*, to reactivate the proceedings.

[2] In her ex tempore reasons the primary judge stated that the principles relevant to the determination of an application to reactivate a proceeding which had been deemed resolved by operation of the practice direction were those propounded by her in *Multi-Service Group Pty Ltd (In Liquidation) & Ors v Osborne & Ors*[1] and *Arc Holdings Pty Ltd v Riana Pty Ltd*.[2]

[3] The primary judge summarised the matters which were required to be addressed on the hearing of such an application as including:

> "1. The conduct of the litigation prior to directions being given: which may include how long ago the events in the alleged statement of claim occurred, what delay there was before the litigation was commenced, how long ago the litigation was commenced or causes of actions were added, and whether or not the litigation has been characterised by periods of delay;
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> 2. What explanation is provided for the failure to comply with the directions which has led to the matter being deemed

[1] [2009] QSC 286 at [3] - [5].
[2] [2008] QSC 191.

resolved, and whether the failure to comply with Court directions is attributable to the plaintiff, the defendant or both the plaintiff and the defendant or their legal representatives;

3. Whether or not the failure to comply with directions has resulted in prejudice to the defendant leading to an inability to ensure a fair trial;

4. How far the litigation has progressed and how close it is to trial;

5. What prospects the parties have of success in the action. A plaintiff must be prepared to show that it has sufficient prospects of success and, where relevant, a defendant that it has sufficient prospects of defending the action, that the litigation should be allowed to continue. If the case is not one needing judicial determination, then there is, as I have said previously no point in reactivating it."

[4] Her Honour concluded that: the appellant's delay in prosecuting the proceedings had been "egregious, and … insufficiently explained"; (inferentially) the delay would cause prejudice to the second respondent; the proceedings had not progressed substantially; the second respondent would have difficulty obtaining summary judgment and the appellant had "comprehensively failed to comply with its (sic) implied undertaking to prosecute his claim expeditiously".

[5] The construction of the practice direction and the correct approach to the exercise of the court's discretion on applications for reactivation were explained as follows by the Court in *Multi-Service Group Pty Ltd (in liq) & Anor v Osborne & Anor*:[3]

"[43] … There was no application by the respondents under rr 280, 371 or 374 and the primary judge (assuming she had power to do so) did not call on the appellants to show cause why the proceedings should not be set aside under r 371. Consequently, there being no serious question that the appellants lacked an arguable case, the focus of the primary judge on the application for reactivation should have been on the matters identified in paragraph 5.4 of the Practice Direction, namely, whether the appellants had:

(a) explained and justified the circumstances in which the proceeding was deemed resolved; and
(b) prepared a plan to facilitate its timely determination.

[44] The nature and extent of the explanation and justification of the circumstances which led to the deemed resolution are, of course, relevant to, but not determinative of the exercise of the discretion to reactivate. That discretion needs to be exercised consistently with the objectives of the Practice Direction. The focus of the Practice Direction is on the timely disposition of proceedings, not on their retention by means of a de facto stay: its objectives could not be served by allowing the proceedings to linger indefinitely in the twilight zone of 'deemed resolution'."

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3 [2010] QCA 72.

[6] The Court had said earlier:

> "[40] The deemed resolution of a proceeding may be contrasted with a process under the Rules which brings the proceeding to an end with the consequence that parties' rights and obligations are permanently affected. Such processes include:
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> - the dismissal of proceedings for want of prosecution (r 280)
> - judgment by default (rr 283 – 288)
> - summary judgment (rr 292, 293)
> - an application to set aside all or part of a proceeding for failure to comply with the Rules (r 371).
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> [41] The Practice Direction does not purport to establish another mechanism extraneous to the Rules for concluding proceedings. Rather, it is apparent from its terms and, in particular, paragraphs 1.3, 5.1 and 6.2, that its provisions are intended to be utilised in conjunction with the Rules. The Practice Direction's character as a case management tool is further recognised by its inapplicability to proceedings on the Supervised Case List and the Commercial List and by the provision in paragraph 6.2 that non-compliance with the Practice Direction or directions under it may 'on the application of a party, or at the court's own initiative' result in an order pursuant to r 371(2)."

[7] In my respectful opinion the exercise of the primary judge's discretion miscarried as a result of undue focus on past delay and the giving of insufficient consideration to the appellant's prospects of advancing the proceedings in a timely way. Consequently, this Court is required to exercise the discretion afresh. Counsel for the appellant argued in their outline of argument that the primary judge had erred by giving undue weight to case management principles at the expense of "determining where justice lies". The justice of the case was said to be found by "examining the relevant, and quite unique, factual matrix to the application". In oral submissions a different approach was adopted. Senior counsel for the appellant focussed his attention on: the absence of any incentive for the appellant to activate these proceedings as long as the first respondent (A3F) and the second respondent (A3FM) were not actively pursuing him in proceedings in the Supreme Court of New South Wales; the respondents' own inertia in the proceedings which suited their convenience and the appellant's present resolve to have these proceedings transferred to New South Wales and concluded.

[8] Before considering the merits of the appellant's submissions it is desirable to summarise the facts. A3F lent the appellant $278,900 on the security of a mortgage over his farm in Wellington, New South Wales, in August 1999. In about November 1999, the appellant guaranteed the obligations of Loawave Pty Ltd under a Deed of Loan between it and A3F and gave A3F a second mortgage over his farm to secure his obligations to A3F in that regard. The two mortgages became assets of an unregistered management investment scheme known as the Barton Scheme.

[9] The appellant alleges that A3F breached its obligations under the Loawave Deed of Loan causing Loawave to default and that A3F sold Loawave's property at under value. Loawave also alleged that its default was caused by a breach of the Deed of Loan by A3F and that it suffered loss in consequence of the breach.

[10] The appellant defaulted under the first mortgage and commenced proceedings in New South Wales (the NSW proceedings) against A3F, Loawave and another to set aside the Deed of Loan. A3F counter-claimed in respect of the two mortgages. The NSW proceedings were compromised on terms that the appellant pay A3F $420,000 and that the appellant consent to the dismissal of the NSW proceedings against A3F.

[11] In May 2003 Loawave assigned its rights against A3F to the appellant who commenced these proceedings claiming in his own right and as Loawaves' assignee.

[12] The appellant contended that the terms of the offer "to compromise this action as against [A3F]" which was accepted by A3F in June 2003 left it unclear whether or not the compromise encompassed A3F's counter-claim. He also alleged that he was not bound by the compromise agreement, as A3F and subsequent assignees of A3F's rights could not procure the release of the mortgages which was a requirement of an express or implied term of the compromise.

[13] On 9 January 2004 A3F assigned its rights in respect of its causes of action against the appellant to A3FM.

[14] On 3 November 2004 the appellant obtained a declaration in these proceedings that the rights acquired by A3FM in respect of the loan to the appellant were subject to a set-off of any amounts due from A3F to the appellant in his own right or as assignee. A3FM was joined as a party and reactivation of the proceedings was ordered.

[15] An amended claim in the proceedings filed on 18 November 2004 showed A3FM as the second defendant, but claimed relief against A3F, which was then in liquidation. No statement of claim against A3FM was delivered. On 28 July 2005 a notice to admit facts was served by the appellant and A3FM served a notice to dispute facts on 5 August 2005.

[16] A summary judgment application by the appellant in the NSW proceedings was dismissed on 2 December 2004 and an appeal against that decision was dismissed on 18 October 2005.

[17] According to the appellant, when his former solicitor, Mr Loel, ceased acting for him after July 2005 he did not retain another legal advisor until 2009.

[18] A case flow management hearing was held on 10 May 2007 before the primary judge. A solicitor from Mr Loel's firm purported to represent the appellant but the appellant had no notice of the application and was not aware of Mr Loel's place of work. The primary judge was told by the solicitor that they were having difficulty in contacting the appellant. The primary judge ordered that if an application for leave to proceed was not filed by the appellant by 10 August 2007 the matter would be deemed resolved. No such application was filed.

[19] A3F was deregistered on 21 August 2007.

[20] On 18 May 2009 A3FM assigned its rights in the Barton Scheme and in relation to the compromise agreement to investors in the Barton Scheme. The investors brought an application in the NSW proceedings on 4 September 2009 to be joined in the proceedings and for judgment against the appellant in the sum of $420,000 plus interest.

[21] On 28 October 2009 Macready AJ refused the investors' application on the basis that the extent to which the applicants were entitled to recover all or any part of the compromise sum of $420,000 depended on determination of the appellant's entitlement, in his own right and as Loawaves' assignee, to have losses claimed in the Queensland proceedings set off against the sum of $420,000. His Honour referred to other possible impediments to the investors' claim. He expressed the view that Queensland may be the more appropriate forum to settle the net balance of the investors' claim and remarked that "for that to occur it will be necessary for the Queensland proceedings to be reinstated and prosecuted to finality".

[22] In an affidavit sworn on 15 December 2009 the appellant deposed to having retained solicitors, as well as senior and junior counsel, "in order to facilitate a timely determination of the matter". He swore to an intention to "actively prosecute" the proceedings. In an affidavit sworn on 16 November 2009, the appellant asserted that "it is anticipated that a cross-vesting application will be made to have either the NSW Proceeding or the present proceeding transferred to the other jurisdiction in order that they be determined together".

[23] On the hearing at first instance on 4 February 2010, counsel for the appellant informed the primary judge that his instructions were that an application would be made to transfer the proceedings to New South Wales. The primary judge stated that the matter had to be reactivated first. Counsel for the appellant did not dispute the correctness of the proposition and there was no contention to the contrary on appeal. However, why an application for reactivation and one involving the taking of a step in the proceedings or their cross-vesting could not be disposed of in the one hearing is not immediately clear to me.

[24] What emerges from the foregoing account is that the appellant has done very little to prosecute his claims in these proceedings and has been in comprehensive breach of his obligations under r 5(3) of the *Uniform Civil Procedure Rules* 1999 (Qld) to proceed in an expeditious way. From the appellant's perspective, it was sensible enough for him not to pursue these proceedings while no steps were being taken to enforce the compromise of the NSW proceedings against him. The only benefit he could gain from success in the proceedings was the ascertainment of a sum able to be set off against any amount ordered to be paid by him the NSW proceedings. It is also true and it was conceded by counsel for the respondent, that A3FM had no interest in advancing the proceedings. But a party's convenience and motivations, whilst they may have relevance to the exercise of a discretion on an application to reactivate proceedings, cannot excuse that party from the performance of his or her obligations under the rules. The rights of the other party or parties as well as the principles stated in r 5 of the *Uniform Civil Procedure Rules* need to be considered. As was remarked in the joint reasons in *Aon Risk Services Australia Limited v Australian National University*:[4]

> "Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings."

Their Honours had earlier[5] implicitly approved the observation of Toohey and Gaudron JJ in *Sali v SPC Ltd*[6] that case management reflected:

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4 (2009) 239 CLR 175 at 213.

5 At para [93].

6 (1993) 67 ALJR 841 at 849.

> "[t]he 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 …"

[25] The inactivity of A3F and A3FM and the fact that it served the purposes of A3F and A3FM that the Queensland proceedings lay dormant would be relevant to an application to strike out the proceedings for want of prosecution. As A3FM was complicit in the delay in the prosecution of the proceedings, it would not be ideally placed to rely on prejudice to it as a result of the delay in any application to dismiss the proceedings for want of prosecution. To the extent that an applicant's past delay is relevant on an application for reactivation, similar considerations would apply.

[26] Counsel for A3FM accepted that the primary judge had taken an approach to the determination of the reactivation application which was inconsistent with the decision in *Multi-Service Group*. He argued forcefully, however, that the conclusion reached by the primary judge was correct as:

(a) Reactivation of the proceedings would not enable the appellant to take a step in the proceedings unless the appellant obtained leave of the Court under r 389;
(b) The explanation given by the appellant for delay was unsatisfactory;
(c) A3FM was prejudiced by the extensive delay in the proceedings;
(d) The proceedings had not been advanced to the point at which a statement of claim against A3FM had been delivered;
(e) The appellant had not proposed a plan to facilitate the timely determination of the proceedings.

[27] Some of these matters, and in particular the prejudice allegation which has already been discussed, go more to the merits of an application for dismissal for want of prosecution, which application could have been brought but was not. It is correct that the proposal put forward by the appellant for the timely determination of the matter leaves much to be desired, but there was a proposal. The appellant, as I have said, swore to having retained senior and junior counsel "in order to facilitate a timely determination of the matter". He also swore to an intention to "actively prosecute" the proceedings and there was no reason to doubt counsel's assertion at first instance that he held instructions that an application for cross-vesting of the matter was to be made.

[28] Counsel for the respondent candidly informed the Court that his client had no interest in having the proceedings progressed. The Court, however, does have an interest in the timely disposition of proceedings and that is the focus of the practice direction. The fact that an application under r 389 may be needed to enable the appellant to take a step in the proceedings would not appear to have much bearing on the exercise of the court's discretion unless, perhaps, it was apparent that such an application would be futile. That can hardly be said to be the case here. The evidence does not suggest that the appellant does not have an arguable case. The appellant explained his delay. The fact that the explanation did not amount to a justification is not a bar to reactivation. The fact that a statement of claim against A3FM had not been filed and served by the time of the hearing at first instance is not of much significance. The appellant was prevented from taking a step in the proceedings and his counsel explained to the primary judge that the pleading against

A3FM would not differ substantially from the statement of claim against A3F. He explained the way in which it would differ.

[29] While it would be within the sound exercise of the discretion of a judge exercising a hearing an application for reactivation to require a party in the position of the appellant to put forward a more precise timetable for the finalisation of the litigation and to produce a draft properly particularised statement of claim and any affidavits he proposed to rely on in support of any cross-vesting application, I am of the view that the better, and most cost effective, course is to order that the proceedings be reactivated and that the appellant make application within 21 days of the date hereof for an order under r 389. That will enable the appellant to further his objective of having the NSW proceedings and these proceedings heard together and disposed of.

[30] A3FM filed a notice of contention in which, in substance, it was contended that even if the primary judge erred in her approach, an order that the proceedings be dismissed for want of prosecution was warranted and that the primary judge erred only in not inviting an oral application for dismissal or in not utilising r 371(2) in order to determine the proceedings. Fortunately for it, A3FM does not need to rely on these contentions. The application before the primary judge was by the appellant for reactivation of the proceedings, not by the respondent for their dismissal for want of prosecution. Plainly, having regard to the interlocutory nature of the former and the finality of a dismissal order, it cannot be assumed that the appellant's case would have been presented in the same way and on the same material had the appellant been facing the risk of dismissal of his proceedings.

[31] Although it was open to the primary judge to exercise powers under r 371(2) she was not obliged to take that course and could not have done so without giving appropriate notice of her intention in that regard to the appellant. Nor was the primary judge obliged to invite the respondent to make an application for dismissal of the proceedings. Although courts are nowadays more active than in the past in case management, we have yet to reach the stage where courts are obliged to assist one party to litigation in the furtherance of that party's case against the other: litigation remains an adversarial process.

Conclusion

[32] For the above reasons I would order that:

(a) The appeal be allowed;
(b) The order of 4 February 2010, except insofar as it relates to costs, be set aside;
(c) The proceedings be reactivated;
(d) The second respondent pay the appellant's costs of the appeal;
(e) The second respondent be granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld).

[33] It is appropriate not to disturb the costs orders below. The appellant placed himself in a position in which the proceedings were deemed resolved. An application for reactivation had to be brought and the second respondent's conduct was not unreasonable.

[34] It is appropriate that the certificate under the *Appeal Costs Fund Act* requested by the second respondent be granted. The outcome of the appeal depended essentially on the finding that the primary judge erred in law in applying *Practice*

Direction 4 of 2002. That error did not result from any conduct on the part of the second respondent.[7]

[35] **WHITE JA:** I have read the reasons of Muir JA and I agree with those reasons and the orders that he proposes.

[36] **MULLINS J:** I agree with Muir JA.

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[7] See *Mitchell v Pacific Dawn Pty Ltd* [2003] QCA 526 at para [17] and *Holdway v Arcuri Lawyers (A Firm)* [2008] QCA 302 at para [9].