PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Jimbelung Pty Ltd v Beaudesert Shire Council & Ors* [2005] QPEC 032
PARTIES:	**JIMBELUNG PTY LTD ACN 061 358 987** Appellant v **BEAUDESERT SHIRE COUNCIL** Respondent And **TAMBORINE MOUNTAIN NATURAL HISTORY ASSOCIATION INC** First Co-Respondent And **TAMBORINE MOUNTAIN PROGRESS ASSOCIATION INCORPORATED** Second Co-Respondent And **BARRY J KOGEL AND MARY BERNADETTE COMISKEY** Third Co-Respondents And **IAN CHRISTIAN THOMAS AND SHEILAH MAREE THOMAS & ORS** Fourth Co-Respondents And **FRIENDS OF MOUNT TAMBORINE ASSOCIATION INC** Fifth Co-Respondent
FILE NO/S:	1628 of 1998
DIVISION:	Planning & Environment Court
PROCEEDING:	Application
ORIGINATING COURT:	Planning & Environment Court of Queensland, Brisbane
DELIVERED ON:	10 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2005
JUDGE:	**Alan Wilson SC,DCJ**
ORDER:	**1 That the appellant have leave to take a further step in**

this appeal

2 That the appellant pay the fifth respondent's costs of and incidental to the application for leave, assessed on the standard basis

CATCHWORDS: PROCEDURE – DELAY – DELAY OF MORE THAN 2 YEARS – *Uniform Civil Procedure Rules*, r 389 – LEAVE TO PROCEED – appeal in Planning and Environment Court – no step for many years – relevant considerations

Uniform Civil Procedure Rules, r 389

Cases considered:
Tyler v Customs Credit Corp Ltd (2000) QCA 178

COUNSEL: Mr S Ure for the Appellant
Mr W Cochrane for the Respondent Beaudesert Shire Council
Ms J Bragg for the Fifth Co-Respondent
Ms S Peat, in person, for the Tamborine Mountain Progress Association Incorporated

SOLICITORS: Varro Clarke & Co for the Appellant
Corrs Chambers Westgarth for the Respondent Council
Environmental Defenders Office for the Fifth Co-Respondent

[1] No step has been taken in this appeal for some years and in an earlier judgment delivered 15 April 2005 I held that the Appellant was required to seek leave under the *Uniform Civil Procedure Rules*, r 389(2) before any further step could be taken. An application to that effect, then brought, was opposed by two of the Respondents. Beaudesert Shire Council did not oppose the Appellant's application and, through its Counsel, signified that it saw no basis upon which leave ought to be refused.

[2] On 23 May 1996 the Appellant's consultants applied to the Council to rezone part of a parcel of 102.9 ha in an area categorised as the "Rural zone" in a way which would permit its use for the construction of detached dwellings and group title dwelling units on four lots at Mt Tamborine.

[3] By letter 12 March 1998 the Respondent advised the Appellant it had refused the application for rezoning, a decision which was appealed in this court by Notice of Appeal filed 17 April 1998. In formal terms that was the last step in the action, although various Respondents filed Notices of Election and Notices of Address for Service in May and June 1998. The next step taken by the Appellant was to apply to this court on 25 February 2005 for directions about the future conduct of the appeal. Some of the Co-Respondents raised r 389 at that point, and it was subsequently held to apply. Further affidavits were filed on behalf of the Appellant, and the Fifth Co-Respondent concerning this subsequent application.

[4] Rule 389 relevant provides:

> **389 Continuation of proceeding after delay**
> (1) If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the

> proceeding, give a month's notice to every other party of the party's intention to proceed.
> (2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice.
> (3) For this rule, an application in which no order has been made is not taken to be a step.

[5] The rule, like all of the *UCPR*, is to be considered in the light of the general principles stated in r 5:

> **5 Philosophy—overriding obligations of parties and court**
> (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.

[6] The factors relevant to the discretion arising under r 389(2) were considered by Atkinson J in *Tyler v Customs Credit Corp Ltd* (2000) QCA 178, in which her Honour said they would include:

> (1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
> (2) how long ago the litigation was commenced or causes of action were added;
> (3) what prospects the plaintiff has of success in the action;
> (4) whether or not there has been disobedience of Court orders or directions;
> (5) whether or not the litigation has been characterised by periods of delay;
> (6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
> (7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;
> (8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;
> (9) how far the litigation has progressed;
> (10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;
> (11) whether there is a satisfactory explanation for the delay; and
> (12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.

[7] The Appellant's evidence establishes this is not a case in which the appeal has simply gone to sleep for many years. Following Council's refusal there were ongoing negotiations between it and the Appellant; the Appellant obtained further reports; further negotiations, some of them involving some of the Respondents ensued; and, certainly since mid 2003, there has been regular activity and ongoing discussions which, relevantly, have resulted in a reduction in the intensity of the original proposal.

[8] Although not all of the Respondents were actively involved in those negotiations it is plain that much has continued to pass between the Appellant and Council, to the point where it could not reasonably be said that the latter might, in the face of the

Appellant's silence, have concluded the matter was moribund – a conclusion supported by the Council's position in the face of this application.

[9] Assertions of prejudice were advanced by the Fifth Co-Respondent: experts retained in 1999 are no longer available; a number of respondents have apparently ceased to live on Tamborine Mountain; five have died; and, the Association has been devoting its efforts to other matters. None of these cause prejudice to the Respondents in a way which militates against a fair trial: other experts may be retained, and the departure or demise of named Co-Respondents still leaves many with an active interest. It is also clear from this Co-Respondent's material that it has had involvement with some of the negotiations until the time they stalled in, it appears, the latter part of 2004.

[10] It was also pointed out that there have been some legislative changes to the *Vegetation Management Act* 1999, and the draft SEQ Regional Plan has been presented, but the latter does not apply to development applications properly made before 27 October 2004 and neither would preclude developments such as that proposed. Even if their provisions are relevant, these are matters which go to the merits of the application and may be taken into account at the hearing.

[11] The Appellant also points, in my judgment appropriately, to differences between appeal proceedings of this kind and civil proceedings to which the *UCPR* are primarily directed. In many of the latter recollection of factual events and such things as the preservation of documents and questions of credit are often important. In proceedings in this court the usual case involves the evaluation of a development proposal against relevant town planning law and provisions and it is extremely rare to find that questions touching historical matters, and memory and recollection, are in issue. Certainly, nothing of that kind is suggested here.

[12] Although the appeal process has been prolonged it is plain the case involves quite complicated issues and the parties have been actively involved in negotiations over a number of years. This is not, it seems to me, delay in the sense of a want of action or progress towards a resolution of the matter, a view supported by the significant changes in the present form of the application which is very different from that originally proposed, and refused by Council.

[13] In the absence of evidence of actual prejudice and in the face of an explanation for the delay, and in light of the nature of this proceeding, there is no basis upon which leave ought to be refused. The principles expounded in *UCPR* r 5 must be read in a way which accommodates cases of this kind. Certainly, nothing in the history of the matter suggests it ought to attract sanction. The negotiations between the Appellant and the Respondent led ultimately to agreement about a set of conditions whereby the appeal was resolved between them in April last year, a factor which also supports the conclusion that the previous, albeit prolonged negotiations were not without some point. In my judgment, this is a case in which the relevant factors warrant the granting of the leave the Appellant seeks.

[14] Objection was taken to the inclusion, in the Appellant's affidavit material, of "without prejudice" correspondence. The objection is a reasonable one: the letters were produced to establish the occurrence of ongoing negotiations and their existence can reasonably be taken into consideration where delay is raised, but that contingency does not require nor permit the letters themselves to be placed before the court. The letter from the First Respondent by election 7 October 2003, and letters from the Fifth Co-

Respondent by election dated 8 October 2003, and 30 April, 25 May and 2 June 2004 exhibited to the affidavit of Mr Laws should be expunged from the court file, as should those attached to Mr Clarke's affidavit, dated 3 September 2003 and 26 April 2005. That may be effected by giving the Appellant leave to either remove them from the court file, or expunge them by marking.

[15] Finally, the Fifth Respondent by election seeks costs associated with the previous hearing on 11 March 2005, when the Appellant asserted leave was not necessary because r 389 did not apply. The *Integrated Planning Act* 1997, s 4.1.23, provides that each party will bear its own costs, but gives the court a discretion to award costs where:

> (e) a party has incurred costs because another party has defaulted in the court's procedural requirements.

None of the experienced Counsel involved in the case was able to refer me to any instance where the rule had been applied in circumstances like those arising here.

[16] Where an Appellant chose to proceed with an application for directions, after long delay, but without applying for leave under r 389 the discretion is, I think, attracted. As the Reasons for Judgment delivered 15 April 2005 show, and the rules of this court plainly provide, there are many instances where the *UCPR* will apply and this is one of them; and, that view has been taken in a large number of previous cases in this court. Those factors point to the conclusion that this is an appropriate case in which the discretion should be enlivened.