SUPREME COURT OF QUEENSLAND

CITATION:	*Sierocki and Anor v Klerck and Ors* [2014] QSC 9
PARTIES:	**JARROD SIEROCKI** (First Plaintiff) and **INSOLVENCY GUARDIAN PTY LTD ACN 149 298 313** (Second Plaintiff) v **PAUL GRANT KLERCK** (First Defendant) and **INTERACTIVE ENTERTAINMENT AUSTRALIA PTY LTD ACN 068 003 805** (Second Defendant) and **SK & ASSOCIATES PTY LTD ACN 155 041 491** (Third Defendant) and **BRENT THOMPSON** (Fourth Defendant) and **INFOLINK IT PTY LTD ACN 128 081 489** (Fifth Defendant) and **CHRISTINE WAKE** (Sixth Defendant)
FILE NO/S:	BS 638 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	11 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2014

JUDGE: Douglas J

ORDER:

1. **Pursuant to r 374 of the *Uniform Civil Procedure Rules*, the plaintiffs have judgment against the first, second, third, fourth and fifth defendants conditional upon the assessment of damages by the Court under Chapter 13 Part 8 of the *Uniform Civil Procedure Rules*.**
2. **The application against the sixth defendant is dismissed.**

CATCHWORDS: PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – RULES OF COURT - where the defendants are in default due to a failure to comply with previous court orders – where the defendants must show cause why judgment should not issue against them – where there was a lack of credible explanation for the failure to comply on the part of five of the defendants – where the defences pleaded for five of the defendants were not cogent or persuasive - where no realistic plan for the future conduct of the proceedings was advanced on the part of five of the defendants

Uniform Civil Procedure Rules 1999 (Qld), s 374

Field v Luxor Products Pty Ltd [2009] QSC 218
Johnson v Public Trustee of Queensland as Executor of the will of Brady (deceased) [2010] QCA 260

COUNSEL: A Nelson for the plaintiffs / applicants

D Stevenson (solicitor) for the first, second, third, fifth and sixth respondents

Brent Thompson (fourth defendant / respondent) in person

SOLICITORS: Adams Ross Lawyers for the plaintiffs/ applicants

Irish Bentley Lawyers for the first, second, third, fifth and sixth defendants / respondents

Brent Thompson (fourth defendant / respondent) in person

[1] The plaintiffs have brought an application pursuant to r 374 of the *Uniform Civil Procedure Rules* 1999 (Qld) requiring the defendants to show cause why judgment should not issue against them. That rule applies if a party does not comply with an order to take a step in a proceeding. The application alleges as the breaches of the orders all defendants' failure to file and serve amended defences pursuant to an order of Byrne SJA made 5 August 2013, the impeding of an alternative dispute resolution process, contrary to r 322, by the third, fourth and fifth defendants failing to pay their percentage of the mediator's fees in accordance with Byrne SJA's orders and the failure of those three defendants to attend and participate in the mediation. Breaches of the implied undertaking in r 5(3) to proceed expeditiously

are also alleged as further grounds for the orders sought in the application, which, by r 374(4)(b) is evidence of the allegations specified in it.

[2] The allegations of breach of the implied undertaking are particularised in an annexure to the application. The annexure recites assertions that the first, fourth and sixth defendants had defamed the plaintiffs by emails or on a range of websites. It then proceeds to set out a history of the proceedings as follows:

> "8. The Claim and Statement of Claim were served upon each of the Defendants on 24 January 2013;
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> 9. The First Defendant continued to publish a further 24 defamatory 'articles' of and concerning the Plaintiffs, only stopping on 20 February 2013, the same day that he filed his Defence;
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> 10. The First, Second, Third, Fourth and Fifth Defendants each filed their Defence on 20 February 2013;
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> 11. The First, Second, Third, Fourth and Fifth Defendants each failed to serve their Defences, despite the requirements of UCPR 142 so as to delay the proceeding;
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> 12. The First, Second, Third, Fourth and Fifth Defendants each falsely nominated Qld Law Group as their lawyer in their Notices of Intention to Defend so as to delay the proceeding;
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> 13. The First Defendant pleaded ridiculous arguments in his Defence including that the First Defendant did not know and could not admit if he was an individual, or if he was a director of certain of the corporate defendants;
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> 14. On 17 April 2013 Martin J afforded the First, Second, Third, Fourth and Fifth Defendants a limited opportunity to replead their Defences specifically requiring that if deemed admissions were to be withdrawn, an application for leave to do that had to be made first.
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> 15. On or about 10 May 2013 the First, Second, Third and Fifth Defendants served an Amended Defence out of time and ignoring the requirement to seek leave to withdraw admissions;
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> 16. On 23 May 2013, Daubney J again gave the Defendants scope to re-plead. He ordered the Plaintiffs to write to the Defendants comprehensively setting out their complaints with the Defendants' proposed Further Amended Defence, and that was done. The First, Second, Third and Fifth Defendants then filed their Further Amended Defence [Doc

44], ignoring some of the Plaintiffs' complaints and ignoring the need to seek leave to withdraw deemed admissions.

17. The Fourth Defendant did not serve an Amended Defence until 11 June 2013 and ignored the requirement to seek leave to withdraw admissions;

18. On 12 June 2013 a subpoena was issued to Xcentric Ventures LLC in the United States of America for the production of documents that would identify the person/s responsible for publication of defamatory material of and concerning the Plaintiffs on the website http://www.ripoffreport.com.

19. On or about 15 June 2013 several of the Defendants communicated with, and requested that, Xcentric Ventures LLC not comply with the subpoena.

20. Xcentric Ventures LLC failed to comply with the subpoena.

21. On 8 July 2013 the First, Second, Third, Fourth and Fifth Defendants applied for leave to withdraw admissions. On 5 August 2013 the First, Second, Third, Fourth and Fifth Defendants were given leave to amend their defences and were Ordered to do so by not later than 19 August 2013 but they have not done so.

22. On 5 August 2013 the parties were Ordered to participate in a Mediation. The Plaintiffs were ordered to pay 25% of the Mediator's Fee and they did so ore than seven days prior to the Mediation date. The Defendants were ordered to each pay 12.5% of the Mediator's Fee.

23. The Third, Fourth and Fifth Defendants have impeded the Mediation by failing to pay their percentage of the Costs as Ordered to do so by Byrne SJA on 5 August 2013 and by failing to attend and participate in the Mediation;

24. The First Plaintiff continues to suffer emotional hurt, humiliation and embarrassment as well as reduction of his professional reputation or standing as a result of the publication by the Defendants of the material complained of in the Statement of Claim;

25. The Second Plaintiff continues to (sic) reduction of its professional reputation or standing as a result of the publication by the Defendants of the material complained of in the Statement of Claim;"

Submissions

[3] In oral argument Mr Nelson for the plaintiffs focused on the failure of the defendants to file amended defences by 19 August 2013. The fourth defendant, appeared in person. The solicitors for the other defendants continued to be the solicitors on the record for him but have asked him to withdraw his instructions to them. He continues to be in breach of the order, apparently because of a lack of funds to pay lawyers to act for him, an inability to obtain legal aid and concerns about how the pressure of acting for himself will affect his mental health.

[4] The first, second, third and fifth defendants filed a second further amended defence on 2 October 2013, two days after the mediation was convened and on the same day as this application was filed. The sixth defendant filed an amended defence on that date also. It appears that the applicants' solicitor received notice of those documents but did not have the chance to peruse them before the application was filed.

[5] That second further amended defence of the first, second, third and fifth defendants is itself criticised as still not conforming with the rules. In particular, for example, it is said not to comply with r 149(2) in failing to plead material facts in support of a point of law raised in paragraph 39(a)(ii) of the pleading, contrary to an example given by Mullins J on 9 July 2013 in the order her Honour made determining an earlier application made by the plaintiffs for summary judgment.

[6] No particular criticism was made of the amended defence of the sixth defendant. The allegations against her relate only to the ninth of ten criticised publications and her defence on its face appears to be focussed on relevant issues including a clear denial that she published the relevant document, which was accompanied by an appropriate explanation for that denial. Paragraph 13(a)(ii) of her amended defence deleted the original allegations that were similar to the criticised para 39(a)(ii) of the second further amended defence of the first, second, third and fifth defendants. The plaintiffs said that the document had not been filed, only served on them, but the Court file shows that it was filed on 2 October 2013.

[7] The failure to comply with the court's order requiring the amended defences to be filed by 19 August 2013 has not been addressed satisfactorily beyond the assertion by the defendants' solicitor that he focussed on preparing for the mediation Byrne SJA also ordered in an attempt to expedite the proceedings. It would have been useful for the mediation to have pleadings delivered in accordance with the order to help provide some focus for the settlement negotiations. No plan has yet been advanced by the defendants of an appropriate way to further amend the pleadings in order to advance this case in accordance with the earlier directions by Mullins J and Byrne SJA.

[8] The failure of the third and fifth defendants to pay their share of the mediator's fees was said to be explained by their impecuniosity, they being companies with no assets, and the mediator's apparent willingness to accept a reduced fee. No explanation was offered, however, why the natural persons behind those corporate

defendants did not advance them funds to ensure compliance with the court's order. It was submitted that those defendants effectively attended the mediation through the first defendant who had some association with those companies.

[9] The fourth defendant's failure to attend the mediation was explained in his written submission by reference to his poverty and mental state at the time but no evidence was offered of his then condition apart from the assertions in his outline of submissions. No medical evidence, for example, was offered on his behalf.

[10] Mr Nelson also relied on the actions of several unspecified defendants who requested Xcentric Ventures LLC, a company based in the United States, not to comply with this court's subpoena for documents directed to it as evidence that those defendants had breached the implied undertaking to proceed expeditiously.

[11] Mr Stevenson, a solicitor at the firm which acts for the first, second, third, fifth and sixth defendants and which, as I have said, is still the firm on the record for the fourth defendant, argued that the defendants' participation in the mediation and their continued willingness to do so was a powerful reason to refuse to give judgment against them at this stage. He conceded that the amended defences filed on behalf of the first, second, third and fifth defendants could be criticised as in need of further amendment but offered no timetable by which that process could occur. Nor was any proposal made to regularise the third and fifth defendants' failure to obey the court order to pay their share of the mediator's fee.

[12] Mr Nelson pointed out that the allegations of defamation made by the plaintiffs include allegations made to the first plaintiff's wife that the first plaintiff was an adulterer and many allegations aimed at his business reputation and general character that were very offensive. Those submissions are borne out by the allegations pleaded of documents said to have been emailed or posted on websites, some at least of which continue to be accessible on the internet. He argued that the ongoing distress to the first plaintiff and his family alleged in the application is entirely understandable and that their distress is a relevant factor in determining whether or not the defendants have shown cause why judgment should not issue against them on the grounds in the application. He also drew attention to an offensive text message sent by the fourth defendant shortly before the mediation was due to resume which encouraged the mediator to conclude that there was no point in pursuing the attempted mediation at that stage.

The authorities

[13] Rule 374 has been discussed by the Court of Appeal recently in these terms:[1]

> "The exercise of the discretion conferred by UCPR r 374 must take account of the purpose of the rules, which is 'to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'; UCPR r 5(1)

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1 *Johnson v Public Trustee of Queensland as Executor of the will of Brady (deceased)* [2010] QCA 260 at [16].

> The rules are to be applied with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the rules; UCPR r 5(2)
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> In accordance with UCPR r 5(3), a party such as the appellant 'impliedly undertakes to the court and to the other parties to proceed in an expeditious way', and the Court may impose appropriate sanctions if a party does not comply with the rules or an order of the Court; UCPR r 5(4)
>
> In considering the exercise of the discretionary power conferred under UCPR r 374 to terminate a proceeding the interests of justice require account to be taken of the financial and personal strain imposed on litigants, witnesses and other parties who are affected by a party's failure to comply with a court order without adequate explanation or justification. The costs associated with bringing applications arising from non-compliance with court orders cannot always be recovered in full or at all by a costs order."

[14] A passage in an earlier decision of Peter Lyons J was relied upon in particular by the applicants:[2]

> "The persistent failure to comply with court orders, the absence of any credible explanation for default and the advancing of explanations which are difficult to accept, the unwillingness to commit to a hearing date within a reasonable time, and the strain imposed on the second defendant and his wife are all factors which seem to me, taken together, to warrant this result. It is consistent with my consideration of the approaches identified in *Birkett v James* and in *Lenijamar*."

Discussion

[15] The original failure of the defendants to plead properly and the continued failure of the first to fifth defendants to plead appropriately in spite of opportunities given to them to do so by Martin J, Daubney J, Mullins J and Byrne SJA and the failure of the third, fourth and fifth defendants to comply with the order of Byrne SJA in respect of payment of the mediator's fees are significant reasons why the orders sought in the application for judgment should be given against those defendants. Nor are the pleadings that have been delivered particularly cogent or persuasive in describing the defences that are said to be available.

[16] The fourth defendant's failure to attend the mediation and to pay the mediator's fees may well be explained by his poverty and health at the time but his behaviour in sending the text message shortly before the adjourned hearing of the mediation was highly inflammatory and clearly had the effect of sending that process off the rails. He does not put forward any realistic proposal for advancing the litigation expeditiously.

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2 *Field v Luxor Products Pty Ltd* [2009] QSC 218 at [71].

[17] The situation of the sixth defendant is different. No criticism has been levelled at the amended defence filed on her behalf on 2 October 2013 beyond the fact that it was filed late. She attended the mediation also and paid her share of the mediator's fee. The case against her is narrow and, unlike the case with the other defendants, has a clear and, if established, a cogent defence pleaded that she did not publish the alleged defamation. I have formed the view that the late filing of that pleading should not preclude her from having the opportunity to defend the case against her so that she has shown cause why judgment should not issue against her.

[18] In particular, however, the other defendants' lack of compliance with the orders, and their failure to propose a course by which the litigation could be advanced usefully and expeditiously, apart from the proposal that they were willing to reconvene the mediation, leads me to conclude that they have not shown cause why judgment should not issue against them on the grounds stated in the application. That will leave the issue of damages to be determined against those defendants. It may be useful to reconvene the mediation with a view to ascertaining whether damages can be agreed.

Conclusion and order

[19] Accordingly, I order that, pursuant to r 374 of the *Uniform Civil Procedure Rules*, the plaintiffs have judgment against the first, second, third, fourth and fifth defendants conditional upon the assessment of damages by the Court under Chapter 13 Part 8 of the *Uniform Civil Procedure Rules*.

[20] I further order that the application against the sixth defendant is dismissed.

[21] I shall hear the parties as to costs.