

COURT OF APPEAL

FRASER JA

**Appeal No 7072 of 2016
DC No 19 of 2016**

**LOOK DESIGN AND DEVELOPMENT PTY LTD
ACN 130 652 701**

Respondent/Applicant

v

HITESH LAL

Appellant/Respondent

BRISBANE

FRIDAY, 9 JUNE 2017

JUDGMENT

FRASER JA: The respondent to this appeal has filed an application for orders that the appeal be dismissed for want of prosecution and that the appellant pay the respondent's costs of the application and the appeal. The appellant has filed an affidavit by Ms Ferrell, solicitor acting for the respondent, which sets out the history and demonstrates that the appellant has not prosecuted the appeal, including that he has not complied with the order of Justice Gotterson made on 19 October 2016, which permitted him to file an application for leave to appeal, a notice of appeal having been struck out.

It appears, unfortunately, that there is no direct evidence that this application and supporting affidavit have been served on the appellant. However, the appellant has been in communication with the Registry and in particular he has sent by email or facsimile, a document dated 27 March 2017 addressed to the Deputy Registrar and to Butler McDermott Lawyers.

I'm informed by counsel for the respondent to the appeal that his solicitors received this document. In it the appellant states that on three occasions he signed a memorandum of agreement for dismissal of the appeal. For present purposes, it is necessary only to refer to the attached memorandum of agreement for dismissal of appeal dated on 19 March 2017 by the appellant. It appears also to be signed by the solicitors for the respondent and dated 14 March 2017.

Counsel for the respondent informs me that he does not have instructions directly that this document was in fact signed by his instructing solicitors or signed on that date but the memorandum of agreement is consistent with that which the respondent was seeking to have completed with the appellant. The memorandum of agreement for dismissal of appeal from the solicitors for the respondent has been made an exhibit in this application. It recites that the appellant and respondent agree that this appeal should be dismissed by consent and that the appellant pay the respondent's costs set by consent of \$22,908.58. Had that memorandum of agreement in an original form been filed and stamped by the Registrar, the effect of the *Uniform Civil Procedure Rules*, r 762 would be that it took effect as orders of the Court.

Unfortunately, notwithstanding a statement by the appellant in his document of 27 March that the original was sent to the Registrar, that document is not in the file. In these circumstances, it seems to me to be perfectly appropriate to accept that both parties have agreed to dismissal of the appeal on the terms stated in the memorandum of agreement to dismissal of appeal, notwithstanding the absence of the original memorandum of agreement and notwithstanding that the appellant has not appeared today. I should mention in that respect that there have been

communications between the Registry and the appellant which notified the appellant of the hearing today. Counsel for the respondent informs me that similar communications took place between his instructing solicitors and the appellant.

Accordingly, I will make the orders set out in the memorandum of agreement to dismissal of appeal. I order that the appeal is dismissed and that the appellant pay the respondent's costs set by consent at \$22,908.58.

...

The memorandum was, on its face, signed first by the solicitors for the respondent and subsequently signed by the appellant some five days later. It therefore appears that the appellant must have had in his possession an original of the memorandum signed by both parties. There may possibly be an unresolved question about that because of statements by the appellant in his communications with the Registry, but as the material appears to me, I should draw the inference that it was the appellant who had the original signed by both parties and the appellant who failed to lodge it with the Registry. In these circumstances, it seems to me appropriate to make an order for costs of the hearing today in favour of the respondent, but reserving it to the appellant to revisit that question should he wish to do so.

I order that in addition to the order for costs by consent at \$22,908.58, the appellant pay the respondent's costs of the hearing today. I give liberty to the appellant to apply in relation to these orders should he wish to do so.