# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Field v Luxor Products Pty Ltd & Anor* [2009] QSC 218 |
| PARTIES: | **MARK ANTHONY FIELD trading as M & N WATERPROOFING & RESTORATION SERVICES (BN 6535811)**<br>**(plaintiff/applicant)**<br>**v**<br>**LUXOR PRODUCTS PTY LTD ACN 002 301 886**<br>**(first defendant/first respondent)**<br>**AND**<br>**GABR SAYED ELGAFI**<br>**(second defendant/second respondent)** |
| FILE NO: | BS 10122 of 2005 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 10 August 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 July 2009 |
| JUDGE: | P Lyons J |
| ORDER: | **1. The claim is dismissed for want of prosecution** |
| CATCHWORDS: | PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – DISMISSAL OF PROCEEDINGS FOR WANT OF PROSECUTION – where the plaintiff is in default due to a failure to comply with previous court orders on a number of occasions – where the defendant seeks an order that the action be dismissed for want of prosecution – where there was a lack of credible explanation for the delay – Consideration of r 5 *Uniform Civil Procedure Rules 1999* (Qld) – whether the plaintiff is entitled to commence fresh proceedings after the action has been dismissed while the plaintiff's claim is still within limitation periods.<br><br>*Trade Practices Act 1974* (Cth), ss 74G; 74J<br>*Uniform Civil Procedure Rules 1999* (Qld), rr 5; 444<br><br>*Aon Risk Services Australia Ltd v Australian National* |

*University* [2009] HCA 27, considered.
*Arc Holdings Pty Ltd v Riana Pty Ltd & Another* [2008] QSC 191, mentioned
*Birkett v James* [1978] AC 297, considered
*Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FCA 1623, considered
*Cooper v Hopgood & Ganim* [1999] Qd R 113, applied
*Ketteman v Hansel Properties* [1987] 1 AC 189, considered
*Lenijamar Pty Ltd; Domenico Picone and Margaret Anne Picone v AGC (Advances) Limited* (1990) 98 ALR 100, followed
*Logicrose Ltd v Southend United Football Club*, unreported, Chancery Division, 5 February 1988, mentioned
*Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146, considered
*Mango Boulevard Pty Ltd v Spencer& Ors* [2008] QCA 274, considered
*Quinlan v Rothwell & Anor* [2001] QCA 176, considered
*Re Jokai Tea Holdings Ltd* (1992) 1 WLR 1196, followed
*The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2008] QCA 224, considered
*Tolley v Morris* [1979] 1 WLR 592, cited
*Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178, considered

COUNSEL: D North SC with P J Hay for the plaintiff/applicant

A Crowe SC for the defendants/respondents

SOLICITORS: Mason Black Lawyers for the plaintiff/applicant

Piper Alderman for the defendants/respondents

[1] **P Lyons J:** The plaintiff has, again, failed to comply with an order of the Court requiring it to take an action by a specified date. It seeks a variation of that order, and further directions. The defendants seek an order that the action be dismissed for want of prosecution.

**The litigation**

[2] The claim arises out of cleaning work performed by the plaintiff on tiles in a residence at Port Douglas. The plaintiff used a product supplied by the first defendant. In the course of the cleaning work, damage was done to the tiles and surrounding fittings and fixtures, joinery and paint work.

[3] The owners of the residence sued the plaintiff. The plaintiff compromised that claim in March 2005.

[4] The plaintiff then commenced the present action. In it, the plaintiff claims damages for breach of contract, negligence in relation to the supply of the product, negligent misrepresentation, misleading conduct under the *Trade Practices Act 1974* (Cth), false and misleading representations under that Act, and compensation pursuant to s 74G of that Act for failure to comply with an express warranty. The claims against the second defendant are limited to claims for negligence, misleading conduct, and false and misleading representations.

[5] The claim and statement of claim for the present action were filed on 28 November 2005. The notice of intention to defend and defence were filed on 30 January 2006.

[6] By April 2008, the matter had become subject to case flow review. On 24 April 2008, Atkinson J made directions about the further conduct of the matter. Those directions included a direction that the parties obtain and serve any further expert evidence upon which they proposed to rely by 22 May 2008, and that they exchange preliminary witness lists by the same date. Her Honour also directed that the parties exchange witness statements by 11 July 2008 and file a request for trial date by 25 July 2008.

[7] Directions were again made about the conduct of the matter on 17 July 2008. Amendments to the pleadings were contemplated. The parties were directed to obtain and serve any further expert evidence upon which they proposed to rely by 28 August 2008; to exchange witness statements by 9 October 2008; and to file a request for trial date by 23 October 2008.

[8] On 22 October 2008, the plaintiff's solicitors wrote to the defendant's solicitors seeking a one week extension for the taking of the next step in the matter, because the plaintiff's barrister had become ill and was admitted to hospital. On 27 November 2008, a solicitor employed by the solicitors for the plaintiff (not the solicitor currently having the day-to-day conduct of the matter) provided an affidavit stating that the plaintiff did not require further expert evidence prior to trial, and that the proceedings were in their final stages of preparation before trial and should be ready to be listed for trial as a consequence of a request for trial date to be filed by 23 February 2009.

[9] Accordingly, on 28 November 2008, Atkinson J made directions about the further conduct of the matter, including an order that the parties exchange witness statements by 16 February 2009 and that the parties sign and file a request for trial date by 23 February 2009.

[10] In the latter part of 2008 and in early 2009, the parties amended their pleadings. They exchanged statements of issues and outlines of contentions in late January and early February 2009. The defendant's witness statements were filed and served on 27 February 2009.

[11] The plaintiff failed to file and serve its witness statements by 16 February 2009. On 23 February 2009, it sought an extension of time for the exchange of witness

statements and the filing of a request for trial date. At that time, it requested an extension to 24 March 2009 for the exchange of witness statements, and until 26 March 2009 for the filing of the request for trial date.

[12] The plaintiff failed to meet these deadlines. On 25 March 2009, the defendants' solicitors filed an application for an order for the delivery of the plaintiff's witness statements and the filing of a request for trial date. On 2 April 2009, de Jersey CJ made an order by consent that the plaintiff file and serve its witness statements by 28 April 2009, and that a request for trial date be filed by 5 May 2009. Again, the plaintiff failed to meet these deadlines.

[13] On 4 May 2009, the plaintiff's solicitors sought a further extension of a month for the filing and serving of the plaintiff's witness statements, and on 5 May 2009, filed an application to obtain the extension. On 11 May 2009, the defendants filed an application seeking an order that the action be dismissed, or alternatively, that the plaintiff file and serve all witness statements within seven days.

[14] These applications came on for hearing on 15 May 2009. The plaintiff was then ordered to file and serve its witness statements by 5 June 2009, and a further order was made that, without the leave of the Court, the plaintiff is unable to rely at trial upon any witness statement not filed by 19 June 2009. It must have been obvious that substantial compliance was expected by 5 June, and good reason would be needed for any extension beyond 19 June. Needless to say, the plaintiff again failed entirely to comply with the order fixing the date by which it was to file and serve its witness statements. Indeed, no witness statements had been filed or served by 19 June 2009.

[15] On 30 June 2009, the solicitors for the defendants sent by e-mail to the solicitors for the plaintiff a request for allocation of trial date form, and suggested some potential dates for a trial in September, October and November 2009. A response was ultimately sent on 7 July 2009. It gave reasons why the proposed dates in September, October and November were unsuitable to the plaintiff and stated that they were "unable to commit to any date in November or any other date after that".

[16] The plaintiff has given notice of an intention to rely on some 20 witnesses. By the time of the hearing of this application on 20 July 2009, only five witness statements had been filed. Four other statements were served, of which two had not been signed.

[17] The solicitor with the day-to-day carriage of the matter for the plaintiff has deposed in an affidavit of 17 July 2009 to efforts in May and June of 2009 to complete witness statements and to have them filed and served. Exhibited to her affidavit are statements from the plaintiff, in one case said to be dated 15 May 2009. In fact, the statements bear dates in 2004 and 2005. There is no evidence of any attempt to prepare more recent statements, but the solicitor for the plaintiff deposes that she expects to be able to provide a statement from the plaintiff and his son by 7 August 2009.

[18] It is relevant to note something of the conduct of the defendants' case. As mentioned, they filed the statements of their witnesses on 27 February 2009. On 18 March 2009, the solicitors for the defendants wrote a letter to the solicitors for the plaintiff under r 444 of the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*) complaining of the failure by the plaintiff to deliver witness statements in accordance with the directions made on 28 November 2008, and giving notice of an application to the Court if the statements were not filed and served by 24 March 2009 (a date nominated by the solicitors for the plaintiff in their letter of 23 February 2009). That was followed by a letter from the solicitors for the defendants to the solicitors for the plaintiff on 24 March, noting that there had been no response to the letter of 18 March, and requesting a response that day. There being none, the solicitors for the defendants filed the application which produced the orders made on 2 April 2009. It should be noted that these orders were made by consent, the time by which the plaintiff's evidence was to be delivered being the result of a proposal by the solicitors for the plaintiff. At the time when the parties reached agreement, the solicitors for the defendants warned the solicitors for the plaintiff that if there were any breach of the order, a further application would be made and a guillotine order would be sought.

[19] On 29 April 2009, the plaintiff having failed to comply with the consent orders, the solicitors for the defendants again wrote a letter under r 444. The solicitors for the plaintiff responded saying that although their client was keen on advancing the proceedings, he was not in a position to serve his evidence at that stage. They gave notice of an intention to seek a one month extension. In early May, the parties then filed applications, the defendants seeking an order that the plaintiff's action be dismissed, or alternatively that the plaintiff file and serve all witness statements within seven days.

[20] On 12 May 2009, the solicitors for the plaintiff wrote to the solicitors for the defendants asserting that the defendants had unreasonably withheld their consent to the extension, and were unreasonable in pressing for a guillotine order. The solicitors for the defendants responded on 13 May 2009. They referred to the length of time since the action commenced, and to the plaintiff's history of non-compliance with self-imposed deadlines. They also stated that they had never received "any real explanation for the delay", except for a reference to the number of "uninterested third party witnesses". They pointed out that no explanation had been given of what actions had been taken on the part of the plaintiff to progress the statements. They suggested that the letter under reply indicated that the plaintiff did not consider himself bound by directions and orders of the Court, unless the solicitors for the plaintiff were satisfied that the defendants had suffered prejudice. They referred to the very heavy cost which the action imposed on the defendants, and the emotional strain associated with it.

[21] Needless to say, on 15 May 2009, the defendants opposed the plaintiff's application for an extension of time within which to file and serve witness statements, and pressed for the imposition of a guillotine order.

[22] None of the witness statements having been filed and served by 19 June 2009, on 22 June 2009, the solicitors for the defendants again wrote to the solicitors for the

plaintiff. They noted that the order of 15 May 2009 had not been complied with and that no explanation had been received for the plaintiff's failure. They then attempted to have the matter set down for trial, by sending on 22 June 2009 a request for trial date document for the plaintiff's solicitors to sign and return. On 23 June 2009, the solicitors for the defendants confirmed they wanted the document signed and filed by 26 June, and they did that again by letter of 25 June 2009. The document was returned under cover of a letter dated 26 June 2009 (which may have been sent during the evening of 25 June 2009). The document included a statement that all necessary steps in the proceeding were complete, and that all necessary witnesses would be available. I have already mentioned the outcome of the subsequent request by the solicitors for the defendants for agreement about trial dates and a request for the allocation.

**The explanations for non-compliance with the orders**

[23] By letter dated 23 February 2009 to the Court, the solicitor for the plaintiff requested a one month extension of the requirement to exchange witness statements by 16 February 2009. Her explanation was very brief. It was simply the complexity of the matter and the sheer volume of coordinating conferences with interstate witnesses. A letter of 28 February 2009 sought a similar extension for the filing in the request in the trial date, with an almost identical explanation.

[24] The solicitor for the plaintiff provided a very short affidavit for the hearing of 15 May 2009 for the purpose of explaining the failure by the plaintiff to comply with the order of the Chief Justice that its witness statements be filed and served by 28 April 2009. She attributed the non-compliance to the fact that there were public holidays in April and that she had taken a week's leave unexpectedly. There was no suggestion of difficulty in contacting witnesses, or a lack of cooperation by them in this affidavit.

[25] However, the solicitor for the plaintiff provided a further affidavit on 14 May 2009. The affidavit itself did not provide further explanation for non-compliance, but in a letter dated 12 May 2009 to the defendant's solicitors, which was exhibited to her affidavit, the plaintiff's solicitor stated that the plaintiff was relying on a number of uninterested third party witnesses from whom statements were to be obtained. No further explanation for the delay was given in that letter. Also exhibited to that affidavit was a letter from the plaintiff's solicitors dated 14 May 2009 (signed by another solicitor) which stated that "all previous timeframes provided by our office for an extension of time was (*sic*) provided with the genuine and sincere belief that our client would be in a position to serve all the evidence it wished to rely upon at the hearing of this matter." No basis for that belief was identified. The letter then suggested that the estimates of time required to prepare the plaintiff's witness statements may have been "…a little optimistic".

[26] The solicitor for the plaintiff swore a further affidavit on 17 July 2009. In it, she stated that she had experienced difficulties in attending to the matters required to be done to comply with court orders in a timely way. She attributed those delays to the following:

(a) trying to persuade witnesses who have no interest in the outcome of this matter to assist with the provision of instructions and signed statements;
(b) the volume of work that has been required to finalise witness statements;
(c) her "other file load";
(d) issues that have arisen within the firm by reason of the fact that her supervising partner had departed from the firm.

[27] With respect to the last matter, it should be noted that she also swore that on 29 June 2009, her supervising partner left the firm suddenly. No details were given of her "other file load".

[28] The solicitor for the plaintiff also deposes that she has been unable to attend to the preparation of a current statement from the plaintiff or his son "(d)ue to the other matters I was working on for this file and on other unrelated litigation files".

[29] It is useful to give some context to these explanations. One of the plaintiff's witnesses is a quantity surveyor, Stephen Gregg. He has provided a statement dated 19 June 2009. In substance, it reflects work he had carried out by February 2005. There appears to have been no contact between him and the plaintiff's solicitors from that time until May 2009.[1] He appears to have some considerable difficulty in recollecting the details of the work he carried out.[2]

[30] Mr. Patrick Stephens is a chemist who carried out an analysis on the first defendant's product. He has provided a statement dated 23 June 2009. However, it is evident that his work was completed by June 2006, when he prepared a report which is exhibited to his statement.

[31] Dr. Loc Duong is a scientist specialising in geology and materials. An unsigned and undated statement from Dr. Duong has been provided by the solicitors for the plaintiff to the solicitors for the defendants. As will be apparent, the work done by Dr. Duong and the report of his results must have been available by June 2006.

[32] Professor Graham George was the Dean of the Science Faculty at Queensland University of Technology in 2006. He co-ordinated the work of Mr. Stephens and Dr. Duong, as a result of which he provided a report dated 21 June 2006. There is no suggestion that he has carried out any further work since then. He has provided a statement dated 19 June 2009.

[33] Mr. Michael Marsh claims expertise in health and safety issues. He has provided a statement which is unsigned and undated. The substance of his evidence is contained in a report dated 21 November 2006 prepared for the solicitors then acting for the plaintiff. The only additional information to which he refers is a copy of the Material and Safety Data Sheet for one of the products of the first defendant, which he may have been provided with for the purpose of his first report; and some other

---

1 See pages 141, 199, 202 and 205 to the exhibits to the affidavit of Danielle Peita Adams sworn 9 July 2009 ("Adams").

2 See page 140 of the exhibits to Adams, paragraph 23.

information relating to the product, which appears to be consistent with the information previously available to him. As a result of this additional information, he confirmed the material in his 2006 report.

[34] Mr. Jega Jegatheesan is an Associate Professor in Environmental Engineering. He has provided a statement dated 15 June 2009. His statement records that on 25 November 2004, he was asked to carry out some tests on a sample or samples of concrete as a result of which he produced a report which is undated. However, Professor Jegatheesan is now unable to recall whether the report, which has two sets of results, records the testing of two samples, or has two sets of results for one sample. There is no evidence of any further work by Professor Jegatheesan after November 2004.

[35] The statements from expert witnesses which have been provided to date by the solicitors for the plaintiff support the affidavit of one of those solicitors on 27 November 2008, to the effect that the plaintiff did not require further expert evidence prior to trial, and that the proceedings were in their final stages of preparation. However, they do not provide any support for the subsequent explanations for delay.

[36] The solicitor for the plaintiff deposes that "(a)s at 15 May 2009 our firm had taken statements from the following witnesses…". The first to be mentioned is the plaintiff. The affidavit is not accurate; the statements from the plaintiff pre-date the involvement of the solicitors for the plaintiff. The list includes the plaintiff's son, of whom the plaintiff's solicitor later says she has not been able to take a current statement. If work had been done by the plaintiff's solicitors to take statements of the experts discussed above, some of whom are included in the list, it appears to have been rather formal in nature. Nor does this evidence of the plaintiff's solicitor sit comfortably with other evidence about later work on the preparation of statements (of Messrs Gorman, Charters, Moser, Nystrom, Murray, Stevens, and Smith, and Professor Jegatheesan).

[37] The statements of non-experts which have been provided to the defendants are generally based on records from the time when the claims arose, that is, 2004 (with the costs of alternative accommodation for the owners of the property extending into 2005). Where the plaintiff's solicitor's affidavit indicates work she has done to prepare statements, most of that work was done in June 2009, with little real evidence of work done by her firm (which took over the conduct of the action in November 2007) before the middle of May 2009. Indeed, the preparation of some of the statements only commenced then. There is no evidence of any significant work done by her before this time, and one is left with the impression that no real work was done by her firm to prepare witness statements until after the hearing on 15 May 2009. Even then, not a great deal of work appears to have been done. The evidence does not demonstrate a great deal of difficulty in obtaining the cooperation of witnesses (with one exception). The explanations proffered by the plaintiff's solicitor in February, May and July of 2009 are without substance. Indeed, on the material available to me, they appear in some substantial respects to be less than frank.

**Relevant principles**

[38] It has long been a "well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases."[3] To similar effect, in *Queensland v J L Holdings Pty Ltd*,[4] in respect of an application to amend a defence, Dawson, Gaurdron and McHugh JJ said:[5]

> "Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties."

[39] Rule 5 of the *UCPR* states that the purpose of those rules is to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense." It also provides that a party to a proceeding in a court impliedly undertakes to the court and to the other parties to proceed in an expeditious way; and that if a party does not comply with the rules or an order of the court, the court may impose appropriate sanctions including dismissing proceedings where a plaintiff fails to proceed as required by an order of the court.

[40] In *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*,[6] Keane JA, with whom the other members of the court agreed, regarded r 5 as a potential qualification to the principle in *J L Holdings*, which he identified as being that considerations of convenience and efficiency of the administration of justice advanced by a system of case management must give way to the fundamental obligation of the courts to do substantive justice between the parties.[7] However, his Honour did not consider it necessary to reach a concluded view as to whether r 5 called for some departure from that principle. However, in *Aon Risk Services Australia Ltd v Australian National University*,[8] (*Aon*), the High Court has recognised that a rule similar to r 5 has affected the application of *J L Holdings*.[9]

[41] The cases to which I have referred are concerned with amendments to pleadings. However, the considerations which underpin them have no doubt permeated other areas of the law.

---

3 *Cropper v Smith* (1884) 26 Ch D 700, 710, cited recently by Daubney J in *Dick v Alan Powell Holdings* [2008] QSC 219 at [20].
4 (1997) 189 CLR 146.
5 At page 155.
6 [2008] QCA 224.
7 Paragraphs 44-46.
8 [2009] HCA 27.
9 Paragraphs [93]-[98], [111].

[42] *Birkett v James*[10] was concerned with an application to dismiss an action for want of prosecution. Lord Diplock (with the support of Lord Simon of Glaisdale, Lord Edmund-Davies and Lord Russell of Killowen[11]) referred to the practice of not applying to dismiss an action for want of prosecution, except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time a step on which he had defaulted.[12] His Lordship then referred to the principles relevant to an application to dismiss an action for want of prosecution, saying:[13]

> "Those principles are set out, in my view accurately, in the note to R.S.C., Ord. 25 r.1 in the current *Supreme Court Practice* (1976). The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and (b) that such delay will give rise to a substantial risk that it is not possible to have fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

[43] His Lordship specifically considered the situation where the limitation period had not expired. He noted[14] that in such a case, if a second action could be instituted, then to dismiss the first action would not mitigate the prejudice to the other party from delay but would aggravate it. He then expressed the view that the fact that the limitation period had not expired must always be a matter of great weight in an application to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff was involved.[15]

[44] In part, his Lordship's approach was influenced by the view that, except in the case of an abuse of process, an action commenced within the limitation period could not be stayed.[16] The High Court has recently held that an action might be stayed, notwithstanding the fact that a statute of limitations did not prevent its commencement, if it is no longer possible to have a fair trial.[17] This was a case where there was no suggestion that there was fault on the part of the plaintiff associated with the lapse of time between the events out of which the claim arose and the commencement of the proceedings.

[45] In *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd*,[18] Finkelstein J suggested that the High Court in *J L Holdings* confined its decision to a case where costs would provide full compensation to the party not in default, and noted that these

---

10 [1978] AC 297.
11 See pages 325, 331 and 336; see also Lord Salmon at pages 330-331.
12 Page 318.
13 Page 318.
14 At page 320.
15 See page 322.
16 At page 320.
17 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.
18 [2007] FCA 1623.

days, there was an increasing gap between the benefit of a costs order and the amount which a party was required to pay its lawyers.

[46] In *Cooper v Hopgood & Ganim*, [19] the Court of Appeal determined an appeal from an order striking out an action where there had been substantial delays, and on a number of occasions, failure to comply with directions as to the time by which amended pleadings were to be delivered. The appellant contended that the matter was to be determined by reference to the two rules stated in *Birkett v James*, which have been set out above; and that neither was satisfied, so that the claim should not have been struck out. Pincus JA did not consider that case to be determinative, but adopted the view that a decision to strike out an action is to be made upon a balance of the relevant circumstances.[20] His Honour thought that even if default had not been "intentional and contumelious" it may be so substantial and persistent that it becomes a potent consideration in favour of striking out an action.[21] McPherson JA also considered *Birkett v James* did not lay down rules controlling the determination of an application to dismiss an action for want of prosecution; rather, the power to do so is discretionary, and is incapable of being exhaustively defined.[22] His Honour listed a number of considerations relevant to the exercise of the power to dismiss an action, and of that list he said:

> "… it takes no account of another factor that is often likely to be material, which is that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them. The psychological as well as the commercial effects of such a state of affairs ought not be underestimated."

[47] Derrington J spoke to similar effect, and characterised the plaintiff's conduct as "highly reckless disregard of the Court's orders."[23]

[48] One of the orders which was the subject of the appeal in *Mango Boulevard Pty Ltd v Spencer & Ors*[24] was an order striking out a defence and counter-claim, with no leave to re-plead. The order had been made as a result of persistent failure by the defendants to disclose documents critical to a key issue in the case. Muir JA (with whom the other members of the Court agreed) cited the following passage from *Logicrose Ltd v Southend United Football Club*:[25]

> "(B)ut where a litigant's conduct puts the fairness of the trial in jeopardy, …, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow the litigant to take a further part in the proceedings and (where appropriate) to determine the proceedings against him… A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair

---

19 [1999] Qd R 113.
20 Page 118.
21 Page 119.
22 Pages 123-124.
23 Page 124.
24 [2008] QCA 274.
25 Unreported, Chancery Division, 5 February 1988; see *Mango Boulevard* at [26].

> trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> Further, in this context, a fair trial is a trial which is conducted without undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself."

[49] His Honour then noted that there was no allegation of fraudulent conduct in *Mango Boulevard* and continued:[26]

> "…the discussion in the final paragraph of the passage just quoted is pertinent to the matters under consideration. And an inordinate amount of time, energy and, no doubt money, has been consumed in the course of Mango's attempts to obtain a fair trial. If the evidence before the primary judge had demonstrated that all reasonable steps had been taken and would continue to be taken by the appellant to meet its disclosure obligations, the outcome of the application may have been different. But even then, it would have been necessary to consider whether Spencer's and the appellant's past conduct had removed or greatly reduced the possibility that due disclosure could be made."

[50] *Quinlan v Rothwell & Anor*[27] was a case where an application to dismiss an action for want of prosecution was unsuccessful on appeal. However, in that context, Thomas JA made the following comments about the rules:[28]

> "At the same time the rules of the court are not an end in themselves. They do not exist for the discipline of practitioners or clients, or for the protection of courts from inefficient litigants, but rather as a means of ensuring that issues will be defined in an orderly way and that parties have the opportunity of full preparation of their case before the trial commences. <u>The rules also afford defendants the means of bringing to an end actions in which the other parties will not abide by the rules.</u> The present respondents, like the appellant, appear to have been content over very length periods to allow the action to go to sleep" (*emphasis added*).

[51] His Honour also noted that r 5 gives express recognition to the importance of expeditious resolution of issues in proceedings, and he said that the rules were a clear indication of a change of attitude that has taken place in courts throughout Australia.[29]

---

26 At [27].
27 [2001] QCA 176.
28 At [29].
29 See [30].

**Disposition**

[52] It is not without significance that the action became the subject of the Court's case-flow management regime in the early part of 2008. The regime is intended to provide a system to facilitate the just and timely disposition of proceedings, with the minimum necessary commitment of resources by the Court and litigants, by monitoring the progress of individual proceedings against predetermined timelines, and intervening when the proceeding is not progressing satisfactorily.[30] The plain purpose of the regime is to identify matters which have not proceeded with proper expedition, and to take steps to ensure that further delay is avoided. In particular, the Court is empowered to give directions for the conduct of proceedings which are subject to this regime and to facilitate the efficient and timely determination of those proceedings.

[53] The directions given on 24 April 2008 were given while the action was subject to this regime. Directions given on this occasion were not complied with by either party. The directions were varied on 17 July 2008, with a new timetable for the taking of steps by the parties. The initial steps were to be taken by the plaintiff, the first such step being the provision of particulars on 24 July 2008 and the filing and serving of an amended statement of claim on 31 July 2008. The particulars were not provided until 2 September 2008 and the amended statement of claim was not provided until 27 November 2008.

[54] The directions were further varied on 28 November 2008. It will be recalled that the varied directions included directions for the exchange of witness statements, and for the signing and filing of a request for trial date in the latter part of February 2009.

[55] The only explanation put forward by the plaintiff for its failure to comply with directions in this period relates to the ill health of junior counsel, in the latter part of October 2008. While that might have accounted for a failure to attend to some things, it is difficult to see that it had any impact on obtaining witness statements. Indeed, one of the solicitors for the plaintiff deposed in November 2008 that the proceedings were then in their final stages of preparation.

[56] Against that background, and in light of the repeated orders of the Court, the failure of the solicitors for the plaintiff to take any steps to prepare a statement by the plaintiff throughout 2008 and in the first half of 2009 can only be described as inexcusable. The absence of evidence of any real activity to obtain witness statements from other witnesses until May of this year should be similarly characterised. That absence of activity is made apparent by the absence of any direct evidence from the solicitor for the plaintiff, or anyone else, of any real activity to complete the preparation of witness statements from the time of the order of Atkinson J in April 2008 until May 2009, and from the consideration of the statements which have been provided, albeit very late, which is set out earlier in these reasons.

---

[30] See paragraph 1.2 of Practice Direction No. 4 of 2002.

[57] Even under the approach in *Birkett v James*, which seems now to be regarded as generous to a party who is dilatory in the conduct of its case, an action will be struck out if the default has been intentional and contumelious. An example given in that case is disobedience to a peremptory order of the Court.[31] In *Re Jokai Tea Holdings Ltd*,[32] after referring to *Tolley v Morris*,[33] Browne-Wilkinson V-C said:

> "Where there has been such contumelious disobedience not only the plaintiff's original action but any subsequent action brought by him based on the same cause of action will be struck out: *Janov v Morris* [1981] 1 WLR 1389. The basis of the principle is that orders of the court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed. The rationale of such penalty being that it is contumelious to flout the order of the court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court's order, his conduct is not contumelious and therefore the consequences of contumely do not flow."

[58] In my view, against the background of the case-flow management regime which I have mentioned, the repeated and persistent failures by the plaintiff to comply with orders of the Court, supported by explanations which lack credibility, and where the plaintiff is not prepared to commit to a trial until an indefinite time after November this year, the plaintiff's conduct is in a category which to me seems comparable to intentional and contumelious default. If the test from *Birkett v James* were to be applied, it would result in the dismissal of the plaintiff's claim. However, its authority in some contexts has been doubted.

[59] In *Lenijamar Pty Ltd; Domenico Picone and Margaret Anne Picone v AGC (Advances) Limited*,[34] the Full Court of the Federal Court heard an appeal against an order dismissing an action for want of prosecution and failure to comply with procedural directions concerning discovery. Wilcox and Gummow JJ made reference to *Birkett v James* and other English authority which followed it. Their Honours noted that in the Federal Court, which had a system of case management and different rules to those in England, the English decisions were of little assistance. They then referred to O 10 r 7, which made provision for an application to dismiss a proceeding where a party fails to comply with an order of the court. Of the power to dismiss, their Honours said:[35]

> "But two situations are obvious candidates for the exercise of the power: cases in which the history of non-compliance by an applicant is such as to indicate an inability or unwillingness to co-operate with the court and the other party or parties in having the matter ready for trial within an acceptable period and cases – whatever the applicant's state of mind or resources – in which the non-compliance is continuing and occasioning unnecessary delay, expense or other prejudice to the respondent. Although the history of the matter will

---

31 See also *Tolley v Morris* [1979] 1 WLR 592, 603.
32 (1992) 1 WLR 1196.
33 [1979] 1 WLR 592.
34 (1990) 98 ALR 100.
35 At page 208.

> always be relevant, it is more likely to be decisive in the first of these two situations...even though the most recent non-compliance may be minor, the cumulative effect of an applicant's default may be such as to satisfy the judge that the applicant is either subjectively unwillingly to cooperate or, for some reason, is unable to do so. Such a conclusion would not readily be reached; but, where it was, fairness to the respondent would normally require the summary dismissal of the proceeding."

[60] In my view, the present case is one where the plaintiff is either unwilling to cooperate in having the matter ready for trial in an acceptable period, or, for some reason, is unable to do so. That is demonstrated by persistent failure to comply with directions, the absence of any genuine explanation for default, and the unwillingness to take control of the action to enable it to be heard within a reasonable time. The propositions stated in *Lenijamar* provide strong support for a conclusion that the plaintiff's action should be dismissed.[36]

[61] As mentioned, in *Cooper*, the Court of Appeal took the view that the discretion was a broad one, and that a number of factors are potentially relevant to its exercise. Atkinson J, when a member of the Court of Appeal in *Tyler v Custom Credit Corp Ltd & Ors*[37] and again in *Arc Holdings Pty Ltd v Riana Pty Ltd and Another*[38] identified a number of such factors. Some of these will be mentioned briefly.

[62] The events referred to in the statement of claim by and large occurred in 2004. The present action was commenced in November 2005. I am not in a position to assess the plaintiff's prospects of success, though there has been no suggestion that the claim is doomed to fail. There has plainly been disobedience, particularly on the part of the plaintiff, of court orders. The litigation has been characterised by periods of delay, both before and after it became subject to the case flow regime. The cause of early delay in the action has not been investigated, though it seems clear that the plaintiff was in part responsible for it. More recent delay is plainly attributable to the plaintiff. There is no suggestion that the impecuniosity of the plaintiff has had any role in the pace of litigation; indeed, the action has been conducted by the plaintiff's insurer. The litigation has progressed to a stage where the defendant appears to be ready for trial. The plaintiff has done some work by way of preparation for trial, but this has not been completed, and the plaintiff is unable to commit to a trial date. There is no satisfactory explanation for recent delay.

[63] Other factors referred to in *Tyler* require fuller consideration. One of those factors is whether the litigation between the parties would be concluded by striking out the plaintiff's claim. There is some uncertainty about this. To the extent that the plaintiff's claim is based on s 74G of the *Trade Practices Act 1974* (Cth), the limitation period may have expired: see s 74J. However, it is by no means obvious to me that this case is one to which s 74G would apply. The limitation period for

---

[36] *Lenijamar* was applied at appellate level in *Fairey v Fairey (No 2)* [2000] NSWCA 173 and *Hiskey v Westpac Banking Corporation Limited* [2001] FCA 169. Its approach to the English authorities was referred to by Pincus JA in *Cooper* at pages 118-119.

[37] [2000] QCA 178.

[38] [2008] QSC 191.

the balance of the claim has not yet expired. There is authority for the proposition that if an action is struck out for want of prosecution, a subsequent proceeding based on the same claim may be struck out as an abuse of process.[39] It seems to me, therefore, that I should proceed on the basis that the plaintiff may be able to institute fresh proceedings, but that is by no means certain.

[64] Another factor referred to in *Tyler* is whether the delay has been caused by the plaintiff's lawyers being dilatory, or whether it is in part the responsibility of the plaintiff. There has been no affidavit from the plaintiff in this case. Nor is there evidence that the plaintiff has relied entirely on the solicitors. The litigation is in truth being conducted by, and for the benefit of, an insurer. There was a change of the plaintiff's solicitors in November 2007. The reason for the change is unclear. It is also by no means clear whether delay of the plaintiff to date, and failure to comply with orders of the Court, is entirely attributable to the fault of the solicitors, or whether the insurer has been slow to authorise the taking of steps for the action. There is simply no evidence about these matters. In any event, an insurer is likely to have experience in litigation, and to be aware that the courts expect plaintiffs to act with promptness. It is less able than an inexperienced litigant to say it was justified in leaving the conduct of proceedings entirely in its solicitors' hands, without taking any action to ensure that the solicitors were acting promptly to advance the action.

[65] Counsel for the plaintiff have submitted that there is no suggestion that the delay has led to an inability to ensure a fair trial. It appears that the defendant has fully prepared its case. However, one of the occupants of the house where the work was carried out now appears to be unwilling to give evidence, and that evidence might be helpful to the defendants. I have noted that some of the experts appear to have some difficulty in identifying the basis on which they wrote their reports. Part of the case seems to relate to discussions between the plaintiff and the second defendant. With the passage of time, it is by no means certain that there has been no prejudice to the defendants in relation to the conduct of the trial.

[66] Relevant prejudice is not limited to these considerations. In *Cooper*, McPherson JA regarded as relevant the psychological and commercial effect of the continuing threat of litigation on ordinary members of the community. In *Mango Boulevard*, Muir JA referred to a passage which described a fair trial as one which is conducted without undue expenditure of time and money. In *Ketteman v Hansel Properties,*[40] the strain of litigation was held to be a basis for refusing to allow leave to amend a defence to raise the expiry of a limitations period at the end of the hearing. The joint judgment in *J L Holdings* appears to recognise the relevance of this consideration, but it was not significant in that case because of the nature of the case and the identity of the litigants.[41] The significance of the strain which litigation imposes on the parties was also recognised in *Aon*.[42]

---

39 *Janov v Morris* [1981] 1 WLR 1389; see also *Re Jokai Tea Holdings Ltd* at 1202.

40 [1987] 1 AC 189.

41 See pages 154-155.

42 Paragraphs [30], [100]-[101].

[67] The second defendant provided an affidavit. He is a director of the first defendant. The other director is his wife. He deposes that the defendants' legal costs and disbursements to date total almost $400,000, and that neither defendant is insured. He is 68 years of age. He had intended to retire at 65, but could not do so because of the need to fund his legal costs. He says that he and his wife are constantly under stress. They are unable to make plans for their future because of the uncertainty arising from the outcome of the litigation. Both have had to continue to work in order to pay legal fees. They separated for a period of time, a matter which he attributes to the stress of litigation. He and his wife have also had to rely on personal savings to fund their defence. He also deposes to being unwell. He takes a number of medications for stress and blood pressure.

[68] Objection was taken to the second affidavit, without notice, on the ground that it was conclusory and based on assertions which could have been demonstrated by documents. It was also submitted that the material in the affidavit was inadmissible because it was not supported by medical evidence. The objections were overruled, and the second respondent, who resides in Sydney, was required to attend in person for cross-examination. The cross-examination had no effect on his evidence.

[69] In my view, this is a case where the litigation has caused, and continues to cause, significant personal strain to the second defendant, and no doubt, to his wife. It seems to me to be a relevant consideration in determining the outcome of this application.

[70] There is one additional matter which I have taken into account. If an order is made dismissing the plaintiff's action for want of prosecution, it is likely that the plaintiff would be ordered to pay the costs of the defendants. If the plaintiff were subsequently able to commence an action arising out of the same events, and were ultimately to succeed, it might be thought that the costs order in the present case represents something in the nature of a windfall for the defendant. While that factor troubles me, there is considerable uncertainty related to it.

[71] When I consider the range of factors previously referred to, it seems to me that, on balance the correct outcome is to order that the plaintiff's action be dismissed. 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*.

[72] I should add that I have given consideration to making orders the effect of which would be that the action would be stayed, until the plaintiff demonstrated that his case was fully prepared and he was in a position to proceed, and limiting the time for doing so. However, the history of the matter leads me to conclude that even that course is likely to result in further failure to meet deadlines, and further applications for extensions of time.

**Conclusion**

[73] The claim will be dismissed for want of prosecution. I shall hear submissions about costs.