SUPREME COURT OF QUEENSLAND

CITATION:	*Basha v Basha* [2010] QCA 123
PARTIES:	**MOHAMMED ASLAM BASHA** (plaintiff/appellant) **v** **MOHAMMED ASHRAF BASHA** (defendant/respondent)
FILE NO/S:	Appeal No 11193 of 2009 DC No 474 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2010
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal dismissed with costs to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the appellant applied for leave to appeal against the order of a District Court judge dismissing the appellant's claim for want of prosecution – where the primary judge found that the appellant's case should be dismissed as it had no reasonable prospect of success, was marked by lengthy delays, shifting allegations and lost records – whether the primary judge erred in dismissing the appellant's claim – whether rule 5(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) authorises the dismissal of a proceeding in the absence of an identified breach of the rules or order of the Court APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the appellant applied to adduce new evidence – where the evidence was available to the appellant at the time of hearing and the evidence was not compelling – whether leave should be granted

District Court of Queensland Act 1967 (Qld), s 69(1)
Supreme Court of Queensland Act 1991 (Qld), s 85
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 5(3), r 5(4), r 280, r 371(2), r 389, r 389(2), r 766(1)(c), r 766(2)

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175; [2009] HCA 27, cited
Basha v Basha unreported, Clare SC DCJ, District Court of Queensland, No 474 of 2000, 11 September 2009, cited
Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27, cited
Hall v RH & CE McColl P/L [2007] QCA 182, cited
Newcastle City Council v Batistatos [2005] NSWCA 20, cited
Page v The Central Queensland University [2006] QCA 478, cited
Quinlan v Rothwell [2002] 1 Qd R 647; [2001] QCA 176, cited
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455; [2000] QCA 292, cited
Tyler v Custom Credit Corp Ltd & Ors [2000] QCA 178, cited

COUNSEL: R Clark for the appellant
A Lyons for the respondent

SOLICITORS: Roberts and Kane for the appellant
J C Lawyers for the respondent

[1] **HOLMES JA:** I have had the advantage of reading the reasons of Fraser JA. I agree with his Honour's conclusion that the proceeding was properly dismissed because it would be an abuse of process to permit the claim to proceed to trial, and with his reasons for reaching that conclusion. In light of the arguments advanced by the appellant, however, I would add these comments: I do not think r 5(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) authorises dismissal of a proceeding in the absence of some identified breach of the rules or an order of the Court. In the present case no such breach was relied on; rather, the respondent sought to have the proceedings struck out for want of prosecution. I agree, however, with Fraser JA that s 69(1) of the *District Court of Queensland Act* 1967 (Qld) empowered the learned District Court judge to dismiss the proceedings in order to prevent an abuse of process. Accordingly, I agree with the orders his Honour proposes.

[2] **FRASER JA:** On 11 September 2009 Clare DCJ ordered that the appellant's proceedings in the District Court be dismissed for want of prosecution. The appellant has applied for leave to appeal against that order, if leave is necessary. The respondent did not oppose the grant of leave. In order to appreciate the arguments in the appeal it is necessary first to summarise the issues in the proceedings, the procedural history in the District Court, and the primary judge's reasons for dismissing the proceeding.

Summary of the issues in the District Court proceeding

[3] Some background facts are uncontentious. In 1988 the appellant was running a snack bar business in Brisbane. The respondent, the appellant's elder brother,

visited Australia for the first time in 1988 and worked in the snack bar before returning to Pakistan in 1990. The respondent wished to migrate to Australia but difficulties with a visa apparently kept him in Pakistan until 1993. The respondent then returned to Australia and again worked in the snack bar from 1993 to 1996. In February 1990 properties at 36 and 38 Cascade Street, Kippa Ring were registered in the appellant's name. Those properties were sold in August and December 1993 and towards the end of 1993 properties at 173 and 181 Toohey Street, Caboolture were registered in the respondent's name. The essence of the subsequent dispute was whether the appellant or the respondent was the beneficial owner of the Toohey Street properties.

[4] The appellant's claim was for a declaration that the respondent held the Toohey Street properties registered in his name in trust for the appellant, and for consequential orders. The appellant's original statement of claim filed in February 2000 alleged that the appellant lent the purchase price for the Toohey Street properties to the respondent. Despite correspondence from the respondent's solicitors which asserted that the alleged loan agreement could not justify the appellant's claim to the properties, the appellant adhered to that allegation and filed further particulars of it. Seven years after starting the proceeding, in October 2007, the appellant amended his statement of claim. The essence of the appellant's amended statement of claim was that to establish a credit rating for the respondent the appellant provided $150,000 from the proceeds of the sale of the Cascade Street properties which the respondent used to buy the Toohey Street properties, with alleged results of a relationship of mutual dependence and trust; a promise by the respondent to apply for a housing loan to acquire another property and to transfer the Toohey Street properties to the appellant; an agreement that the appellant would receive the rental income from the Toohey Street properties and be responsible for insurance, maintenance and council rates; and a presumption that those properties were held in trust for the appellant. Essentially the same claim was maintained in the appellant's further amended statement of claim filed in June 2009.

[5] The appellant alleged that he received the rentals from the Toohey Street properties until 1999. The appellant alleged that the respondent was then unable to establish his credit worthiness in Australia, asserted that he was entitled to the rental income from the Toohey Street properties, refused to transfer them to the appellant, and asserted that he owned them. The appellant treated the respondent's alleged conduct as a breach of the arrangements under which the properties were purchased and commenced proceedings in the District Court on 7 February 2000.

[6] The respondent defended the claim. He admitted that the proceeds from the sale of the Cascade Street properties were used in the purchase of the Toohey Street properties in his name. He pleaded that this occurred as part of a wider transaction. He alleged that the appellant and respondent made an agreement in 1989 under which profit accumulated from the snack bar business would be directed such that each would end up owning real estate of equal value; by a further oral agreement in 1990 the accumulated business earnings were to be used to buy the Cascade Street properties; the appellant used accumulated earnings and other money provided by the respondent in the purchase of those properties; similar transactions were undertaken in relation to other properties bought in the name of the appellant between March 1991 and February 1993; and accumulated earnings from the business and rental receipts were also used in the purchase of the Toohey Street properties in 1993. The respondent maintained this defence after the appellant amended his statement of claim.

[7] It therefore appears that upon the appellant's further amended statement of claim the critical issues were:

(a) whether the Toohey Street properties were purchased pursuant to the 1993 oral agreement alleged by the appellant or pursuant to the different oral agreements which the respondent alleged were made between 1989 and 1993;

(b) whether, as the appellant alleged, the proceeds of sale of the Cascade Street properties constituted all of the purchase money for the Toohey Street properties or whether, as the respondent alleged, accumulated earnings from the snack bar business and other receipts were also used in that purchase.

Summary of the procedural history in the District Court

[8] The following procedural chronology was uncontentious:

DATE	EVENT
7 February 2000	The statement of claim was filed
14 April 2000	Letter from the defence putting the plaintiff on notice that the statement of claim was "fundamentally misconceived"
9 May 2000	Defence requested particulars
27 June 2000	Further and better particulars of statement of claim filed
1 August 2000	Copy of intention to defend and defence served on the plaintiff
16 October 2000	Plaintiff's list of documents served
27 October 2000	Defendant's list of documents served
18 January 2001	The defence and counter claim was filed
23 April 2001	The plaintiff forwarded his request for trial date
27 April 2001	Letter from the defendant asserting that the request for trial date was premature because the pleadings were not finalised and discovery was not complete
11 May 2001	The reply and answer was filed
24 September 2001	Defendant's supplementary list of documents served

14 February 2002	Amended statement of claim was filed
3 May 2002	Plaintiff's further list of documents served
5 May 2002	Notice of change of plaintiff solicitors
22 August 2002	Notice that the plaintiff was acting for himself
18 October 2002	Notice of change of plaintiff's solicitors
18 February 2003	Plaintiff's further list of documents served
11 April 2003	Application to dispense with the signature of the defendant on the request for trial date
21 July 2003	Plaintiff's further list of documents served
16 October 2003	Application and Supporting affidavit filed alleging the plaintiff was ready for trial
4 November 2003	Order by consent dispensing with the defendant's signature on the request for trial date and referral to mediation
12 December 2003	Mediation failed
7 June 2004	Plaintiff requested further discovery from the defendant's list of documents
11 October 2005	Plaintiff gave notice of intention to proceed
13 October 2005	Notice of change of defence solicitors
31 October 2005	Plaintiff's further list of documents served
30 March 2007	Plaintiff gave notice of intention to proceed
16 July 2007	Plaintiff gave notice of intention to proceed
27 July 2007	Letter from the defence complaining of delay

4 October 2007	Further amended statement of claim filed
6 December 2007	Letter from defence complaining of delay, asserting the amended statement of claim was out of time and foreshadowing a potential application to strike out the plaintiff's claim for want of prosecution
19 December 2007	Letter from plaintiff's solicitors disputing a delay of 2 years
20 March 2008	Plaintiff's solicitors' requested the defence pleading in response to the amended statement of claim
1 April 2008	Defence advised plaintiff's solicitors of intention to obtain counsel's advice
2 December 2008	Plaintiff gave notice of intention to proceed
16 February 2009	Plaintiff's further list of documents was served
25 February 2009	The plaintiff filed the request for trial date
12 March 2009	The defence continued to assert that the plaintiff had not complied with r 389 *UCPR* and gave notice of intended application to strike out proceedings for want of prosecution
24 April 2009	Set down for trial
25 June 2009	Further amended statement of claim filed by leave

[9] On 22 June 2009, after the matter had been set down for trial, the respondent brought the application which resulted in the dismissal of the appellant's claim.

Summary of the primary judge's reasons

[10] The respondent's application to strike out the proceeding invoked the "inherent jurisdiction" and rules 5 and 389 of *UCPR*. The primary judge found that r 389(2), which requires a plaintiff to seek leave to proceed if no step has been taken for two years, did not apply because none of the lengthy periods of inactivity endured for two years. The primary judge's reasons focussed upon the "inherent jurisdiction" and *UCPR* r 5. *UCPR* r 5 provides:

> "(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.
>
> *Example—*
>
> The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

[11] The primary judge referred to the implied undertaking in *UCPR* r 5(3) that the parties will proceed in an expeditious way and to the power of the court in r 5(4) to impose sanctions, including dismissal of the proceedings if a party does not comply with the rules[1] and held that the proceedings should be dismissed for want of prosecution only if the respondent established that the objective effect of continuation of the action would be an abuse of process or would clearly inflict unnecessary injustice upon the respondent.[2]

[12] With reference to the considerations which are generally relevant in an application to dismiss proceedings for want of prosecution identified in *Tyler v Custom Credit Corporation Ltd*,[3] the primary judge found that: on the appellant's case the respondent's breach had occurred in 1999 so that there was no delay in commencing litigation, but that the events alleged in the statement of claim dated back to 1993;[4] the original statement of claim filed in February 2000 alleged that the 1993 arrangements were in the form of a loan by the appellant to the respondent of $150,000 which the respondent failed to repay after demand,[5] but that the current, main cause of action for breach of a resulting trust was added in 2007;[6] the appellant's prospects of success appeared to be very poor;[7] the pace of the action had been painfully slow, the worst of the delay being clearly attributable to the appellant;[8] the appellant had not explained his delay;[9] the drawn out process of the appellant's disclosure both indicated that the appellant had breached his disclosure

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1 *Basha v Basha* unreported, Clare SC DCJ, District Court of Queensland, No 474 of 2000, 11 September 2009 at [18].

2 *Basha v Basha* at [19], referring to *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; [2006] HCA 27 at [53], [70], [71].

3 [2000] QCA 178.

4 *Basha v Basha* at [20].

5 *Basha v Basha* at [11]-[12].

6 *Basha v Basha* at [14], [21].

7 *Basha v Basha* at [22]-[23].

8 *Basha v Basha* at [24]-[25].

9 *Basha v Basha* at [33].

obligations and raised a suspicion that staggered disclosure was used by him as a device to avoid the consequences of delay;[10] because the respondent undertook to discontinue his counterclaim if the appellant's claim was struck out the litigation would be concluded by dismissing the appellant's claim;[11] and the loss of contemporaneous records and the passage of time impaired the capacity of both parties to testify with precision and accuracy about the detail of their agreement and impaired the respondent's ability to test the reliability of the appellant's account.[12]

[13] The primary judge considered that the appellant's case had no reasonable prospect of success and that it had been marked by lengthy delays, shifting allegations, and lost records. Her Honour accepted that a claim should be dismissed for want of prosecution only in the most obvious case but was satisfied that this was such a case.[13]

Application to adduce new evidence

[14] At the hearing of the appeal the appellant sought leave to rely upon an affidavit of the appellant and an affidavit of his solicitor. Those affidavits were sworn in October 2009, after the action had been dismissed. The evidence in them was not before the primary judge. The appellant's counsel acknowledged that the Court's leave was required to permit the appellant to adduce this new evidence.[14] The respondent opposed leave.

[15] The affidavit of the appellant set out his version of events but only in very general terms. For example, as to the critical agreement concerning the purchase of the Toohey Street properties, the appellant deposed that it "was agreed" that those properties be purchased in his brother's name and that it "was agreed" that he would transfer the properties back to the appellant when he was able to secure a home loan in his own right. The appellant also set out a summary of what he argued was the source of the money for the purchase, which he swore was his money, but he did not descend to detailed particulars or identify material which corroborated those statements.

[16] The appellant's affidavit also gave an explanation for delay. Primarily, he swore that it was inappropriate in his Muslim culture to challenge the authority of the eldest son, his brother, and that he "idealistically hoped that my elder brother would see reason and honour the agreement reached in 1993 when he finally migrated to Australia". Once the appellant issued proceedings r 5(3) bound him to an implied undertaking to the Court and to the respondent to proceed in an expeditious way. His understandable reluctance to challenge his elder brother could not explain the dilatory conduct of his proceedings after he had commenced them. The appellant also deposed that he experienced "some difficulties" in understanding his lawyer's requirements (though he did not make out a case for shifting blame for the delays to his lawyers), had to spend "many hours" reconstructing materials, and in attempting to establish the sources from which he said he paid for the properties, took "a considerable amount of time" in seeking to find material left in boxes. These statements were again in the most general form. Whilst one can understand that the

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10 *Basha v Basha* at [29].
11 *Basha v Basha* at [32].
12 *Basha v Basha* at [38].
13 *Basha v Basha* at [46].
14 See *UCPR* r 766(1)(c), r 766(2).

tasks would have been time consuming and might have caused some delays, they are hardly capable of explaining any significant part of the nine years which elapsed after the appellant commenced the proceeding.

[17] The affidavit of the appellant's solicitor, Mr Sellars, explained that for the first six years or so in which his firm conducted the proceedings they were conducted by his former partner. From perusal of the file he set out various steps that had been taken between the failure of the mediation held at the end of 2003 until June 2008, when he took over the file. Mr Sellars deposed that after he assumed the conduct of the file on 30 June 2008 he was "unable to commence work on this action until November 2008", and he then took the steps which appear in the chronology set out earlier in these reasons.

[18] The appellant's counsel argued that leave should be given to read those affidavits because the necessity for them arose from a possible error in a decision which he made in the District Court not to adduce such evidence. As that submission acknowledged, the evidence was available to the appellant at the time of the hearing in the District Court. For the reasons I have given the affidavits do not provide compelling evidence in the appellant's favour. The appellant, by his counsel, made a deliberate decision not to adduce such evidence. Those considerations are opposed to the grant of leave to adduce the new evidence and nothing that was argued favours the grant of leave. I would refuse leave.

[19] I turn now to consider the grounds of the appellant's appeal. It is appropriate to begin with the second and third grounds of appeal, which contend that the primary judge did not apply the correct principles.

Ground 2(b): The Primary Judge erred in the application of applying (sic) the principles of UCPR 5 without consideration to other rules relevant to striking out a claim for want of prosecution.

Ground 2(c): In the event that the Primary Judge struck out the proceedings for want of prosecution based on inherent jurisdiction, then the Primary Judge erred in applying the principles of striking out for want of prosecution relying on the inherent jurisdiction.

[20] Under ground 2(b), the appellant's counsel referred to provisions empowering the Court to strike out proceedings: s 85 of the *Supreme Court of Queensland Act* 1991 (Qld) (power to dismiss if 2 years have passed since the last step) and r 280 (power to dismiss for failure to take a step required by the rules or to comply with an order of the court within a stated time). The appellant's counsel also referred to r 389 (*UCPR* r 389(2) requires a party who has taken no step for two years to obtain leave to take a new step). Reference might also be made to r 371(2) (which confers power to set aside a proceeding where there has been a failure to comply with the rules). The appellant's argument did not explain why the primary judge was obliged to consider rules which empowered the District Court to dismiss proceedings other than *UCPR* r 5, which was the particular rule invoked by the respondent.

[21] One question agitated in the course of argument was whether or not r 5(4) empowers the courts to impose sanctions where a party has complied with all applicable procedural rules in the progress of the proceeding. In *Ridolfi v Rigato Farms Pty Ltd*[15] de Jersey CJ with whose reasons McPherson JA and Williams J

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15 [2001] 2 Qd R 455 at 459, para [22].

agreed, observed that r 5(3), "confirms each party's obligation to proceed expeditiously, or risk sanctions (r 5(4)) which may include dismissal". Similarly, in *Quinlan v Rothwell*[16] de Jersey CJ observed that r 5 had gone to the length of "expressly confirming that breach of a party's 'implied undertaking' 'to proceed in an expeditious way' may attract sanctions including, as per the proffered example, dismissal of the proceeding." However, whether or not the power of dismissal in r 5(4) exists in the absence of any breach of the rules or a court order is academic. The evidence established that the appellant contravened many procedural rules in the course of the dilatory prosecution of his claim. For example:

(a) Under r 164(2) the appellant's reply to the respondent's defence served on 1 August 2000 was due by 15 August 2000 but the reply was not filed until 11 May 2001.

(b) As late as the time of the hearing of the application to dismiss in June 2009, the appellant sought leave to amend that reply and answer because it did not comply with the rule concerning non-admissions. Notably he had not produced the proposed amendments even by then.

(c) In the absence of any reply to the defence served on 1 August 2000, pleadings closed on 15 August 2000 but the appellant's first list of documents was not served until 16 October 2000.

(d) That list of documents was deficient in that many documents which pre-dated it were disclosed in the following five lists of documents. For example, the fifth list of documents served by the appellant, on 31 October 2005, disclosed 140 documents of which all but two (items 25 dated 23 July 2001 and 36 dated 12 July and 23 July 2001) pre-dated the appellant's statement of claim filed on 7 February 2000; and those two exceptions pre-dated the dates of service of the second, third and fourth list of documents. There are many similar examples which demonstrate that the appellant's various lists of documents failed to disclose documents which pre-dated them. It is sufficient to refer only to the appellant's sixth list of documents, served on 16 February 2009, in which every dated document in the three page list was dated in the 1990s.

[22] Furthermore, the filing of the appellant's fifth list of documents on 31 October 2005 (disclosing documents which should have been disclosed in his first list of documents) was the only positive step taken by the appellant between December 2003 and 4 October 2007; the appellant's amended statement of claim filed in 2007 changed the cause of action seven and a half years after the proceedings were commenced; and the appellant then took another 16 months to file the request for trial date on 25 February 2009, filing it on a date which was more than four years after the appellant had obtained an order dispensing with the respondent's signature on the request in November 2003.

[23] As to ground 2(c), counsel for the appellant conceded in his written outline that the primary judge possessed jurisdiction to strike out the proceeding in the "inherent jurisdiction". The reference to the "inherent jurisdiction" should be understood as a reference to the implied power of an inferior court to strike out a proceeding to

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16 [2002] 1 Qd R 647 at [4].

prevent abuse of that court's process[17] or to s 69(1) of the *District Court of Queensland Act* 1967 (Qld), which confers on the District Court the powers and authorities of the Supreme Court for the purposes of exercising its civil jurisdiction, enabling it "in like manner and to like extent" to make any order a Supreme Court judge might in a similar proceeding. Thomas JA held in *Quinlan v Rothwell*[18] that the combination of *UCPR* rr 5(4), 280 and 371 reaffirms the Supreme Court's longstanding powers of dismissal and that those rules co-exist with the Supreme Court's inherent jurisdiction.[19] Similarly, in the District Court those rules co-exist with the District Court's power to prevent an abuse of its process.

[24] It is settled that the failure to take as well as the taking of procedural steps and other delay in the conduct of proceedings are capable of constituting an abuse of process.[20] There is such an abuse of process where, taking into account the burdensome effect upon the defendant arising from the lapse of time, the objective effect of continuation of the proceeding is that a fair trial is not possible.[21] Under *UCPR* the courts are less tolerant of delay than was the case under former procedural regimes.[22] Whilst the High Court's decision in *Aon Risk Services Australia Ltd v Australian National University*[23] directly concerned the principles to be applied in applications for amendments, passages in the judgments emphasise the general significance of provisions in the form of r 5 in the application of procedural rules which require consideration of the effect of delay upon the quality of justice.[24] The express recognition in r 5(3) of the importance of expeditious resolution of proceedings must be borne in mind when deciding whether or not the objective effect of continuation of the proceeding is that a fair trial is not possible.

[25] The appellant's counsel argued that the primary judge erred by referring to the considerations relating to applications to dismiss proceedings for want of prosecution discussed in *Tyler v Custom Credit Corp Ltd*.[25] I would reject the submission. Those considerations are not decisive of the question whether a proceeding should be dismissed under r 5 or the exercise of the power to prevent an abuse of process, but the primary judge was right to treat them as shedding light upon the proper exercise of those powers. Nor do I accept the appellant's argument that the primary judge did not give adequate reasons of the appellant's breaches of the implied undertaking found by the primary judge. The reasons demonstrate that the appellant breached numerous procedural rules. That is hardly surprising where the action had not been tried nine and a half years after it was commenced.

Ground 2(d): The Primary Judge erred in concluding that the Plaintiff was in breach of his disclosure obligations

[26] I have already set out examples of the many and substantial breaches by the appellant of his obligations of disclosure. They were proved by the appellant's own

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17 *Batistatos v Road Traffic Authority (NSW)* at [5], [6], [10], [11].

18 [2002] 1 Qd R 647 at [30], de Jersey CJ and Mackenzie J agreeing. See also *Page v The Central Queensland University* [2006] QCA 478 at [15], per Keane JA, Williams JA and White J agreeing.

19 See also *Batistatos v RTA (NSW)* at [21] - [26], concerning the analogous dual existence of the inherent jurisdiction and the New South Wales Supreme Court rules authorising dismissal of proceedings.

20 *Batistatos v Road Traffic Authority (NSW)* at [15].

21 *Batistatos v Road Traffic Authority (NSW)* at [49], [53], [69], [70].

22 *Quinlan v Rothwell* [2002] 1 Qd R 647 per Thomas JA at [30].

23 (2009) 239 CLR 175.

24 See per French CJ at [25] - [30]; per Gummow, Hayne, Crennan, Kiefel and Bell JJ at [93], [97], [102], [113] - [114]; and per Heydon J at [119].

25 [2000] QCA 178 at [2] per Atkinson J, McMurdo P and McPherson JA agreeing.

delivery of lists of documents over the years containing numerous documents which were in existence and should have been disclosed in his first list. The appellant challenged the primary judge's finding that the breaches of the appellant's disclosure obligations "raises suspicion that staggered disclosure has been used by the plaintiff as a device to avoid the consequences of delay."[26] That finding was justified by the appellant's piecemeal disclosure of documents which were in existence and should have been disclosed before the first list, the fact that the only positive step taken by the appellant between December 2003 and 4 October 2007 was the filing of one such list of documents, and the absence of any explanation by the appellant for that form of drip feeding disclosure.

Ground (e): The Primary Judge erred in determining that the Defendant/Counter-Claimant was not responsible for progress

[27] The appellant did not challenge the trial judge's conclusions that the pace of the action had been painfully slow and that the worst of the delay was clearly attributable to the appellant. This ground of appeal was directed to the primary judge's conclusion[27] that whilst the respondent had made a limited effort to push the matter along he was not the party responsible for the progress of the appellant's claim and that the respondent was entitled to wait to see whether the slow moving claim would be abandoned. The appellant's counsel argued that the respondent, as a counterclaimant, was bound to agitate the prosecution of his counterclaim but had taken little or no steps to do so and that the primary judge "erred in not considering the appellant's and the respondent's obligations equally".

[28] The appellant was responsible for the worst of the delay as the primary judge found. It must also be recalled that during the seven years after commencement of the proceeding the appellant's claim to beneficial ownership of the Toohey Street properties was afflicted by the potentially serious defect that the appellant alleged that he had lent the respondent the purchase price for those properties. The respondent's generally passive approach until the pleading was put into a somewhat more conventional form in 2007 was not irrelevant[28] but the respondent's failure diligently to pursue his counterclaim or to apply for early dismissal of the appellant's claim could not relieve the appellant of his implied undertaking to the respondent and the court under r 5(3) to proceed with his own claim in an expeditious way. The primary judge did not err by attributing to the appellant the primary responsibility for the consequences upon his own claim of his own delay.

Ground (f): The Primary Judge erred in attributing undue weight to the absence of contemporaneous records and the passage of time

[29] It is not in dispute, as the primary judge recorded, that an oral agreement made at least 16 years ago is at the heart of the parties' dispute and that no direct witnesses to the agreement had been identified other than the appellant and respondent.[29] The primary judge found that whilst records of a company established by the parties which operated the snack bar business and records concerning the rental properties were kept by the appellant, little of those records had been disclosed;[30] that the tax

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26 *Basha v Basha* at [29].

27 *Basha v Basha* at [31].

28 cf. *Quinlan v Rothwell* [2001] QCA 176 at [29] per Thomas JA, referring to the opportunity of a defendant to bring an action to an end where the plaintiff did not abide by the rules.

29 *Basha v Basha* at [37].

30 *Basha v Basha* at [41].

returns for the relevant periods had been disclosed by the appellant but they were of dubious value because they persistently recorded profits at unsustainably low levels which were inconsistent with loan applications within the same period;[31] that almost all relevant records held by banks, solicitors and real estate agents appear to have been destroyed after they had been kept for seven years; that most if not all of those records were likely to have been destroyed before or very soon after the appellant commenced his action; and that whilst some of the documents might have been lost because the respondent did not pursue an application for third party disclosure in 2001, the loss of the relevant documents was otherwise beyond the respondent's control.

[30] Those findings reflected the unchallenged and detailed evidence in affidavits filed by the respondent. The appellant did not contend for any error in any of them. Rather, his counsel argued that the appellant was entitled to rely upon "the presumption of ownership" and that the respondent was unable to rebut that presumption either because his allegations were false or because he had failed to secure the material necessary for his own defence and counterclaim. As to the latter point, it is again necessary to bear in mind the significant change in the appellant's pleaded case made as late as seven years after he started his proceeding and 14 years after the alleged oral agreement was made. Furthermore, the appellant's argument that he was entitled to rely upon a presumption of ownership illustrates a serious aspect of the potential injustice created by the appellant's delay: if the circumstances proved by the appellant at trial are sufficient to give rise to the claimed presumption of ownership then he might succeed only because the passage of a very lengthy period of time has led to the loss of the records and diminution in the quality of the respondent's oral evidence which otherwise might have rebutted the presumption of ownership.

[31] The primary judge was right to place substantial weight upon the loss of the records and the extent of the delay. The primary judge referred to "at least 16 years" but bearing in mind the importance of identifying the ultimate source of the funds for the purchase of the Toohey Street properties, a trial must traverse events extending back some 20 years to about 1989. It cannot be disputed that the ultimate source of those funds was a critical issue. It is true, as the appellant's counsel pointed out, that the respondent was required to turn his mind to that issue when the appellant issued his proceeding, but that was not until some 7 to 11 years after the relevant events and in the context that the appellant alleged a loan, an allegation that he persisted in until some 14 to 18 years after the relevant events. Very importantly, contemporaneous documents that would likely have shed light upon the critical issues have been lost through the passage of time.

[32] The appellant's counsel argued that evidence of the property transactions is readily obtainable from the public record, but whilst those documents would likely be of some assistance they could not themselves supply a reliable answer to the critical question concerning the source of the funds for the purchase of the Toohey Street properties. The appellant's counsel argued that those lost documents which threw light upon the source of the purchase money were "capable of being reconstructed" by an expert. In support of that submission the appellant's counsel referred the Court to the taxation returns disclosed by the appellant, but they demonstrate only that the snack bar business recorded losses at the relevant time. There is no reason

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31 *Basha v Basha* at [42].

to question the primary judge's scepticism about the reliability of those records. The source of the necessary information for the expert to undertake the suggested "reconstruction" exercise was not explained. There was no evidence that an expert could "reconstruct" the information in the lost documents. The trial judge did not err in concluding that the absence of contemporaneous records and the passage of time would inevitably impair the capacity of the parties to testify with precision and accuracy about the detail of their agreement and would impair the ability of the respondent to test the reliability of the appellant's account.

Ground (a): The Primary Judge erred in determining that the Plaintiff's prospects of success are weak

Ground (g): The Primary Judged erred in relying upon facts in issue in determining the prospects of the Plaintiff's case were weak without receiving evidence

[33] In finding that the appellant's prospects of success appeared to be very poor and that his case had no reasonable prospect of success, the primary judge referred to the likelihood that the appellant's credibility would be undermined by his original statement of claim filed in 2000. The evidence shows that the appellant persisted in and gave further particulars of that allegation for seven years after obtaining advice from counsel. The primary judge also noted that the appellant had not provided any explanation for the subsequent change in his pleadings in 2007 nor adduced any evidence of his prospects. Further, it was central to the appellant's case that he had provided the full purchase price of $147,000 for the two houses in Toohey Street and his pleadings identified the proceeds of sale of the two allotments in Cascade Street as the source of that capital. The primary judge considered that the documentary evidence tended to corroborate the respondent's claim that funding for the purchase of the Toohey Street properties was sourced beyond the proceeds of sale of the Cascade Street properties. Her Honour reasoned that the first Cascade Street property was sold for $56,500; whilst the sale price of the second block was unknown it adjoined the first block and was sold only three months later, making it improbable that it was sold for the $90,000 to make up the cost of acquisition of the Toohey Street properties; furthermore, the evidence suggested that the purchase of 173 Toohey Street was settled before completion of the sale of the second block of land in Cascade Street.[32]

[34] Those are substantial points, but I nevertheless accept the argument advanced for the appellant under these grounds of appeal to this extent, that the evidence did not support the positive finding that the appellant's case had no reasonable prospect of success. The issues hinged substantially upon the parties' oral agreements and the source of funds, as to which the appellant and respondent are probably the only witnesses. Their evidence could affect the complexion to be given to the very limited available documentary evidence and it might or might not rebut the inferences drawn by the primary judge.

[35] In light of the material that cast doubt upon the appellant's claim, the absence of any affidavit evidence from the appellant in the proceeding before the primary judge concerning his prospects of success was relevant.[33] The appellant did not explain the apparent weaknesses in his claim suggested by that material and he did not show that he had an apparently meritorious claim, but in my view the evidence did not

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32 *Basha v Basha* at [43].

33 See *Hall v RH & CE McColl Pty Ltd* [2007] QCA 182 per Jerrard JA (McMurdo P and Holmes JA agreeing) at [20].

sufficiently support the positive finding that the appellant had no reasonable prospect of success.

Conclusion

[36] Because the primary judge's decision turned in part upon her Honour's conclusion that the appellant had no reasonable prospects of success, a conclusion which overstated the effect of the evidence in my respectful opinion, I have reconsidered the application afresh.

[37] The issue concerns the effect of the delay in prosecuting the claim. The appellant's counsel emphasised that the appellant's claim was not the subject of any limitation period. That is so, but as Bryson JA pointed out[34] in a passage approved in the plurality judgment in *Batistatos v RTA (NSW)*,[35] periods of statutory limitation operate indifferently to the existence of what might be classified as delay on the part of a plaintiff. A plaintiff has a "right" to institute a proceeding, but that "right" is subject to the defendant's "right" to seek the exercise of the power of the court to stay proceedings where they amount to an abuse of the court's process.[36]

[38] The events out of which the dispute arose occurred between about 16 and 20 years ago. The respondent was required to turn his mind to those events as a result of the commencement of the proceedings in 2000, between about 7 and 11 years after the events occurred, and then in the context of a statement of claim that was changed in an important respect seven years later in 2007. The appellant's unexplained delay in prosecuting his proceedings, including his late and progressive disclosure of relevant documents and his unexplained late change in his statement of claim, amounted to a serious breach of his implied undertaking to prosecute his claim with diligence. The lapse of so much time must necessarily have led to the fading of the parties' memories of critical events. They are the only witnesses who can give evidence of critical oral agreements. The lapse of time has also led to the loss of documentary evidence which had an important bearing upon another critical issue. No other evidence has been identified as having a substantial bearing upon the critical issues. In these circumstances, there can be no confidence that a decision at a trial could be based upon an appreciation of the true facts rather than upon the mere remnants of evidence which remain despite the ravages of time. Furthermore, the foreshadowed prospect that the appellant might succeed by reliance upon a presumption of ownership which is unable to be rebutted because of the loss of documentary evidence and the deterioration in the quality of the oral evidence over the last decade is redolent of potentially serious injustice.

[39] The proper conclusion is that a fair trial is not possible. The respondent has established that the objective effect of continuation of the action would clearly inflict unnecessary injustice upon the respondent. It would be an abuse of process to permit the claim to proceed to trial. The primary judge was right to dismiss the proceeding.

Proposed Orders

[40] I would dismiss the appeal with costs to be assessed on the standard basis.

[41] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Fraser JA and with the orders he proposes.

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34 *Newcastle City Council v Batistatos* (2005) 43 MVR 381 at 405-406.

35 226 CLR 256 at [62].

36 226 CLR 256 at [63]-[65].