SUPREME COURT OF QUEENSLAND

CITATION:	*Pittaway v Noosa Cat Australia Pty Ltd & Ors* [2016] QCA 4
PARTIES:	**DONALD PITTAWAY** (applicant) **v** **NOOSA CAT AUSTRALIA PTY LTD** ACN 056 475 506 (first respondent) **NOOSA CAT COMPANY PTY LTD** ACN 010 818 256 (second respondent) **WAYNE LESLIE HENNIG** (third respondent)
FILE NO/S:	Appeal No 645 of 2015 DC No 3516 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2014] QDC 295
DELIVERED ON:	2 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2015
JUDGES:	Morrison JA and Douglas and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The orders made on 19 December 2014 are set aside.** **4. The respondents' application filed 17 September 2014 is refused.** **5. The respondents must pay the applicant's costs of and incidental to the application, and appeal, to be assessed on the standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING, AND RELATED CONTRACTS – REMUNERATION – RECOVERY ON QUANTUM MERUIT – IN GENERAL – where the applicant and the respondent entered into two linked agreements, the Shed Agreement, where the applicant would build a shed for the respondent, and the Boat Agreement, where the respondent would build a boat for the applicant – where the applicant

contended that he built the shed, but that the respondent did not pay the full amount for it, nor did they build the boat as required by the agreements – where the applicant started proceedings against the respondent in respect of damages for breach of contract – where orders were made in the District Court – where the applicant did not comply with those orders – where the respondent made an application to dismiss proceedings for want of prosecution under r 280 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where that application succeeded – where the applicant seeks leave to appeal from the order dismissing the proceedings – whether an appeal is necessary to correct a substantial injustice – whether there is a reasonable argument that there is an error to be corrected

District Court of Queensland Act 1967 (Qld), s 118(3)
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 214(2)(e), r 280, r 389, r 444

Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256, [2006] HCA 27, followed
Gold v State of Queensland [2011] QSC 112, considered
Green v Pearson [2014] QCA 110, considered
House v The King (1936) 55 CLR 499, [1936] HCA 40, cited
Johnson v Queensland Police Service [2014] QCA 195, cited
Mbuzi v Hornby [2010] QCA 186, cited
Pickering v McArthur [2005] QCA 294, cited
Schneider v Alusa Pty Ltd [2011] QSC 366, cited
Shellard v Orlanski [2001] VSCA 147, cited
Spitfire Nominees Pty Ltd v Ducco [1998] 1 VR 242, cited
Tyler v Custom Credit Corporation Ltd [2000] QCA 178, followed

COUNSEL: V G Brennan with B McGlade for the applicant
J W Lee for the respondents

SOLICITORS: Catton Roderick Lawyers for the applicant
Wellners Lawyers for the respondents

[1] **MORRISON JA:** Mr Pittaway was an industrial shed builder. By 2003 he had built some industrial sheds for Mr Hennig's companies, Noosa Cat Australia Pty Ltd and Noosa Cat Company Pty Ltd,[1] who were in the business of boat construction.

[2] In 2003 Mr Hennig wanted Mr Pittaway to build another shed, and Mr Pittaway wanted Noosa Cat to build him a boat. In October 2003 they entered into two linked agreements, the Shed Agreement and the Boat Agreement, to regulate the arrangements between them.

[3] Mr Pittaway contended that he built the shed, finishing it in September 2004, but that Noosa Cat did not pay the full amount for it, and did not build his boat as required by the agreements.

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[1] Mr Hennig and his companies are collectively referred to in these reasons as Noosa Cat.

[4] On 15 June 2010 Mr Pittaway started proceedings against Mr Hennig and Noosa Cat for damages for breach of contract, and other relief. The proceedings did not progress quickly, and were transferred to the District Court in August 2012.

[5] Orders were made on 30 May 2014 to bring the matter to trial, including in respect of pleadings, disclosure, delivery of expert evidence and affidavits. However, by October that year Mr Pittaway had not been able to comply with any of them. Noosa Cat brought an application to dismiss the proceedings for want of prosecution under r 280 of the *Uniform Civil Procedure Rules* 1999 (Qld). That application succeeded.

[6] Mr Pittaway seeks to appeal from the order dismissing the proceedings. He needs leave to so do under s 118(3) of the *District Court of Queensland Act* 1967 (Qld). The issues raised by the application are whether:

(a) an appeal is necessary to correct a substantial injustice; and

(b) there is a reasonable argument that there is an error to be corrected.[2]

Errors to be corrected

[7] It was contended that there were a number of specific errors on the part of the learned primary judge:

(a) when considering the question of prejudice caused by the delay, (i) assuming, without evidence, that the costs incurred would prevent a fair trial, and (ii) wrongly taking into account all the legal costs incurred since the commencement of the proceedings, rather than those caused by the delay;[3]

(b) failing to give proper weight to the fact that no prejudice had been suffered in terms of the ability to have a fair trial;[4]

(c) not giving due regard to the fact that long periods of delay were caused by Noosa Cat;[5]

(d) concluding that the amended statement of claim was defectively pleaded;[6]

(e) concluding that there was no evidence that Mr Pittaway held a registered builders licence, when there was such evidence, and in any event the onus of proving there was not lay on Noosa Cat;[7]

(f) wrongly holding that detailed affidavit evidence had to be adduced as to the strength of the case;[8]

(g) giving weight to the conclusion that while Mr Pittaway had arguable prospects of making out his case, it was not a strong one;[9] and failing to conclude that the *quantum meruit* case was a strong one;[10]

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2 *Pickering v McArthur* [2005] QCA 294 at [3]; *Mbuzi v Hornby* [2010] QCA 186 at [13]; *Johnson v Queensland Police Service* [2014] QCA 195 at [29].

3 Outline paragraphs 21-27.

4 Outline paragraphs 28-29.

5 Outline paragraphs 32-41.

6 Outline paragraphs 42-45.

7 Outline paragraphs 47-54.

8 Outline paragraphs 55-65. Reliance was placed upon *Green v Pearson* [2014] QCA 110. (***Green***)

9 Outline paragraphs 66-73. Reliance was placed upon *Gold v State of Queensland* [2011] QSC 112 and *Schneider v Alusa Pty Ltd* [2011] QSC 366.

10 Outline paragraphs 74-77.

(h) wrongly construing a letter from Noosa Cat's solicitors dated 7 December 2011;[11]

(i) giving insufficient weight to Mr Pittaway's difficulties since July 2014, during which time he was trying unsuccessfully to secure new legal representation.[12]

[8] In addition it was contended that there was error of the kind referred to in *House v The King*,[13] namely that the result was unreasonable or plainly unjust.

Chronology of the proceedings

[9] The learned primary judge's reasons annexed a schedule showing the steps in the proceedings. With some corrections it is reproduced as Annexure A to these reasons.

[10] Reference to that chronology, and the orders that are referred to in it, reveals that:

(a) the proceedings were commenced in the Supreme Court, and came under Case Flow Management;

(b) in the first year after the proceedings were commenced: the pleadings were completed, and a consent order was made[14] giving directions for the conduct of the matter, including as to disclosure, a joint expert report, mediation and a request for trial date;

(c) in the second year: a further consent order[15] was made for the provision of the joint expert report, mediation and a request for trial date; the joint expert report was obtained; the mediation occurred, and then further consent orders were made to reschedule the mediation, and taking steps to a request for trial date;[16]

(d) in the third year: consent orders[17] were made to get the mediation on by August 2012, and leading to a request for trial date; then another consent order[18] was made, directing amended pleadings and remitting the proceedings to the District Court; Mr Pittaway was three weeks late in filing his amended pleading, but Noosa Cat was nearly four months late in filing their amended pleading;[19]

(e) following the filing of Noosa Cat's amended pleading on 25 January 2013, neither side took any step for a year; that ended when Mr Pittaway filed an application for directions, on 21 May 2014, nearly four years after the proceedings commenced;[20] the directions sought included as to amended pleadings, disclosure, expert reports and a request for trial date;

(f) to that point it is difficult to ascribe blame for the delay to one side rather than the other; each had the capacity to make the matter progress more quickly but did not do so;

(g) the order made on 30 May 2014[21] was by consent;[22]

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11 Outline paragraphs 78-81.
12 Outline paragraphs 82-86.
13 (1936) 55 CLR 499 at 505.
14 Atkinson J, 27 May 2011; AB 817-819.
15 Atkinson J, 29 September 2011; AB 820.
16 Atkinson J, 16 December 2011, AB 823; 30 March 2012; AB 825.
17 Atkinson J, 12 July 2012; AB 827; this vacated the order dated 30 March 2012.
18 Atkinson J, 31 August 2012; AB 829.
19 Annexure A, items 13 and 14.
20 Annexure A, item 17; AB 831.
21 AB 833.
22 Even though the order does not say it was by consent, the parties agreed it was, and the learned primary judge records that it was at Reasons [6], albeit that the date is wrongly recorded.

(h) the first step required of Mr Pittaway under that order was to file an amended reply and answer by 28 July 2014; then there were steps as to disclosure, expert reports, the experts conferring, filing of affidavits of evidence and objections thereto, and finally a review on 15 October 2014;

(i) on 15 September 2014 Mr Pittaway's solicitor was given leave to withdraw from the record;[23]

(j) Noosa Cat filed an application on 17 September 2014, seeking to strike out parts of the pleading, and on 2 October 2014 they were given leave to amend that application to seek relief under r 280;

(k) thus the first time relief under r 280 was sought was on 2 October 2014.[24]

Approach of the learned primary judge

[11] The learned primary judge analysed the issues relevant to the application, by reference to the factors set out by this Court in *Tyler v Custom Credit Corporation Ltd*.[25] Atkinson J said:[26]

> "[2] When the Court is considering whether or not to dismiss an action for want of prosecution or whether to give leave to proceed under *Uniform Civil Procedure Rules* ("*UCPR*") r 389, there are a number of factors that the Court will take into account in determining whether the interests of justice require a case to be dismissed. These include:
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> (1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
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> (2) how long ago the litigation was commenced or causes of action were added;
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> (3) what prospects the plaintiff has of success in the action;
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> (4) whether or not there has been disobedience of Court orders or directions;
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> (5) whether or not the litigation has been characterised by periods of delay;
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> (6) whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
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> (7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;
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> (8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;
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> (9) how far the litigation has progressed;

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23 Annexure A item 22. Other evidence established that there was a dispute over unpaid fees, and Mr Pittaway had approached another firm to take over the file: affidavits of Mr Pittaway, dated 24 October 2014, paragraph 2 (AB 710-711), and 20 November 2014, paragraph 39 (AB 728).

24 The amended application was served on Mr Pittaway on 7 October 2014: affidavit of Mr Wellner, paragraph 3 (AB 700).

25 [2000] QCA 178 at [2], per Atkinson J. (***Tyler***)

26 McMurdo P and McPherson JA concurring. Internal footnotes omitted.

(10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;

(11) whether there is a satisfactory explanation for the delay; and

(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial."

Prospects of success in the claim

[12] The third factor in *Tyler* was an assessment of the prospects of success in the proceedings. The learned primary judge dealt with the issue in this way:

(a) Noosa Cat's arguments about the deficiency of Mr Pittaway's pleading were not determinative of the issue, as "[t]he state of the pleadings is not critical to [his] prospects";[27] it was not necessary to resolve the dispute about the alleged deemed admissions, as it was "clear enough that [Mr Pittaway] did not intend to admit those matters"; however, the style of the pleading created difficulties in assessing prospects; each side would want to amend if the application were refused;

(b) Mr Pittaway's prospects "rest on findings the court will have to make about arrangements reached, largely orally, over a lengthy period"; the competing versions about the arrangements made will be critical to the outcome;[28]

(c) Mr Hennig had "prepared a detailed affidavit in which he has sworn to matters relevant both to the claim pleaded against him and the companies and to his counterclaim against Mr Pittaway"; by contrast Mr Pittaway had "done nothing more than affirm that the matters set out in his amended statement of claim are true and correct", and he "has not sought to meet the assertions made by Mr Hennig about what they agreed at various times";[29]

(d) Mr Hennig had gone into detail about invoices, payments, materials purchased and quality of work, whereas Mr Pittaway had not;[30]

(e) however, an expert report, if accepted, showed that the value of Mr Pittaway's work was above that which he claimed;[31]

(f) Noosa Cat questioned whether Mr Pittaway was a licensed builder at the time of the work; Mr Pittaway would need to prove that he was licensed, and "that evidence is not before the court".[32]

[13] Having made those observations the learned primary judge then found that "Mr Pittaway has an arguable case" if he "gives evidence to support the recitations in the schedules to the pleadings; if he demonstrates he was a licensed builder at the relevant times and if he pleads his case with sufficient particularity".[33]

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27 Reasons [20].
28 Reasons [23].
29 Reasons [24].
30 Reasons [25].
31 Reasons [26]-[27]. That report was not accepted by Noosa Cat.
32 Reasons [28]-[29].
33 Reasons [30].

[14] The learned primary judge then said:[34]

> "Although the focus of this application is Mr Pittaway's failure to prosecute his claim, he ought to be prepared to meet the evidence and argument relevant to his prospects of success. I do not consider his change of solicitors prevented him from doing so. A detailed response to Mr Hennig's affidavit, at the very least, could be expected on such an application. As it largely went to their discussions, he was not hampered by his lack of access to his file. On the material presently before the court, Mr Pittaway's prospects of making out his claim could not be considered strong, a factor which favours dismissing his claim."

[15] There are a number of reasons why I am of the view that the learned primary judge's approach to this issue cannot be sustained.

[16] First, reference was made to the contention that Mr Pittaway was not a licensed builder, and how that fact might impact upon his ability to recover in the proceedings.[35] The learned primary judge found that Mr Pittaway had "exhibited a copy of his current builder's licence and says he held the licence at the relevant times".[36] However her Honour went on to say that:

> "Given his claims relate to works back to 1994 or 1995, his status at the relevant time would need to be proved, before Mr Pittaway could recover anything for his own labour. Again, that evidence is not before the court".[37]

[17] That conclusion cannot be sustained on the pleadings. Mr Pittaway pleaded that the Boat Agreement, made on 14 October 2003, involved (in part) setting off $190,000 of the cost of the boat against money owed to him by Noosa Cat for works defined as "second phase works".[38] The second phase works were done between 1994 and 1996.[39]

[18] Noosa Cat pleaded that Mr Pittaway did not hold a builder's licence in respect of the Shed Agreement and Boat Agreement,[40] both of which were made on 14 October 2003. However Noosa Cat did not plead the lack of a builder's licence as an answer to the money owing for "second phase works". In respect of those works, it was admitted that they were done under a contract between Noosa Cat and Mr Pittaway, but it was said that any residual claim for those costs was statute barred.[41]

[19] Thus, no part of the claim to "second phase works" done in 1994 to 1996 raised, on the pleading, any issue as to the holding of a builder's licence. The conclusion reached in paragraph [29] of the reasons below was in error.

[20] Beyond asserting that there was no builder's licence, and maintaining that stance in argument, Noosa Cat took no step to establish that there was no licence. In fact there was evidence that:

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34 Reasons [31].
35 Reasons [28].
36 Reasons [29].
37 Reasons [29].
38 Further Amended Statement of Claim, paragraph 4(b), Schedule 4, paragraph 25; AB 771 and 787.
39 Further Amended Statement of Claim, paragraph 4(b), Schedule 1, paragraphs 5-8; AB 771 and 778.
40 Further Amended Defence, paragraph 3(c)(ii), AB 793.
41 Further Amended Defence, paragraph 4(f)-(h), AB 794.

(a) Mr Pittaway held a builder's licence for many years prior to the construction of the shed;[42]

(b) search results from the Queensland Building and Construction Commission (**QBCC**) revealed that he held an Open Builder's Licence, No 11906, from 30 August 2003 onwards;[43] that covered the period when the shed was built;[44] the search results stated that the records for that licence class were "at least 10 years old and cannot be displayed";[45]

(c) the contract sheet which Mr Pittaway said was part of the shed contract recorded his building licence number as "BSA Licence No: 11906";[46]

(d) his current builder's licence, valid between 26 January 2009 and 21 October 2013, was exhibited;[47] and

(e) his solicitors had tried to get a replacement copy from the QBCC.[48]

[21] Secondly, the passage set out above in paragraph [14] reveals that the learned primary judge was influenced by the fact that Mr Hennig had sworn an affidavit going into considerable detail, whereas Mr Pittaway had not given a "detailed response to Mr Hennig's affidavit", when he "ought to be prepared to meet the evidence … relevant to his prospects of success". The learned primary judge proceeded on the basis that:[49]

> "Mr Pittaway has done nothing more than affirm that the matters set out in his amended statement of claim are true and correct. On this application, he has not sought to meet the assertions made by Mr Hennig about what they agreed at various times."

[22] Reference to Mr Pittaway's affidavit[50] shows that he swore that the "facts and particulars stated [in his pleading] are true and correct". However he went further:

(a) paragraphs 3-12 dealt with matters the subject of Noosa Cat's counterclaim;

(b) paragraphs 13-21 and 26-30 dealt with the issue of the builder's licence;

(c) paragraphs 22-25 dealt with an order sought for disclosure of the written contract pleaded in paragraph 6(a) of the pleading, formalising the Shed Agreement; and

(d) paragraphs 31-47 dealt with the issues concerning the conduct of the proceedings and the reasons for non-compliance with the orders.

[23] On an application to strike out for want of prosecution under r 280 UCPR, the question of assessing the prospects of success is but one factor of many that must be weighed in the balance. The assessment can only be provisional as such an application is not the trial and will not be attended by the level of evidence that a trial involves. Therefore, in my view, the Court must be careful not to let the application become a trial, nor to treat the differences in evidentiary detail as one might on a trial. The

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42 Affidavit of Mr Pittaway dated 20 November 2011, paragraph 18; AB 727.
43 AB 736.
44 Affidavit of Mr Pittaway dated 20 November 2011, paragraphs 15-17 and 19; AB 726-727.
45 AB 737.
46 AB 625.
47 Affidavit of Mr Pittaway dated 20 November 2011, paragraph 27; AB 727 and 747.
48 AB 765.
49 Reasons [24].
50 Sworn 20 November 2014; AB 725.

same caution should be adopted in preventing an application under r 280 from being treated as one for summary judgment under r 292.

[24] That there are differences that should be observed was acknowledged in *Schneider v Alusa Pty Ltd*:[51]

> "An application to dismiss for want of prosecution may readily be distinguished from an application for summary judgment in both form and substance. In an application to dismiss for want of prosecution, it is the want of prosecution not the absence of a demonstrated real prospect of success that is the foundation for the order sought. That will likely be reflected in the extent to which the evidentiary material filed in the former focuses on the issue of prospects compared to the evidentiary material filed in the latter. However, a party meeting an application to dismiss for want of prosecution must nonetheless be prepared to meet both evidence and argument going to the issue of prospects of success, it being a relevant consideration in such an application."

[25] In my view nothing said in that passage warrants the approach that the only way to "meet the evidence" is to engage, blow for blow, with an affidavit in great detail to answer another affidavit in great detail. In my view, to do so is to turn the r 280 application into something it is not.

[26] Further, that approach also has the tendency to overlook the differing circumstances applicable to each side. It is not uncommon for applications under r 280 to be filed only after the applicant has made good use of unconstrained time in which to compile a detailed affidavit, including detailed references to supporting material. In doing so the applicant dictates the first return date. Once served, however, the respondent does not often have the same luxury of unconstrained time.

[27] That was the case here as this chronology shows:

(a) on 15 September 2014, the solicitor for Mr Pittaway was granted leave to withdraw from the record; the solicitors for Noosa Cat were aware of his intention to do so before the application was made, and they "were kept informed of that happening";[52]

(b) Noosa Cat's application to strike out parts of the pleading was filed on 17 September 2014; it listed reliance only on an affidavit of Mr Wellner sworn 16 September 2014, and not the affidavit of Mr Hennig;[53] the evidence showed that the application and affidavit of Mr Wellner were served on Friday 19 September, at Mr Pittaway's home address, by registered post;[54]

(c) the first return date was 2 October; Mr Pittaway did not appear that day; the affidavit of Mr Hennig had been filed by then;[55] the evidence did establish that it had been served; service of the amended application, now claiming r 280 relief, was ordered to be served by post sent on Friday 3 October; the learned primary judge noted that a return day of 16 October was the minimum time that could be allowed for an application for final relief;[56]

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51 [2011] QSC 366 at [17]. (***Schneider***)
52 Transcript 2 October 2014, T1-4 lines 34-39; AB 4.
53 AB 814.
54 Affidavit of Mr Wellner, 24 September 2014, paragraphs 2-3 (AB 667-668).
55 Transcript 2 October 2014, T1-7 lines 10-11; AB 7.
56 Transcript 2 October 2014, T1-12 lines 1-4; AB 12.

(d) the evidence showed that the amended application and the Order of 2 October, but not the affidavit of Mr Hennig, were served, by registered post, on Wednesday 8 October;[57]

(e) the second return date was Thursday 16 October; Mr Pittaway appeared that day, but through a non-legal friend; there had been no contact between Noosa Cat's solicitor and Mr Pittaway in the interim;[58] the learned primary judge ordered Mr Pittaway to consult a general practitioner in relation to evident problems exhibited by Mr Pittaway with understanding and memory and whether they might prevent him from either instructing a solicitor or representing himself;[59]

(f) on Monday 20 October 2014, as ordered, Mr Pittaway consulted a GP, and the results of that consultation were referred to the court;

(g) on 23 October 2014 was the earliest time for a conference with a new firm of solicitors;[60] that firm was retained that day;[61]

(h) the next return day for determination of Mr Pittaway's request for an adjournment, was 31 October, a date set only on 27 October;[62] on that day Noosa Cat abandoned the application in so far as it sought relief other than under r 280;[63]

(i) affidavits from Mr Pittaway's new solicitor, Mr Murray,[64] deposed to:

(i) his retainer on 23 October 2014;

(ii) at the first conference with Mr Pittaway on 23 October, Mr Pittaway had been "unable to meaningfully articulate the background to this matter", and told him that all information about the procedural steps and history of the matter was with his previous solicitor, Mr Stapleton;

(iii) Mr Pittaway's inability to articulate or remember the procedural steps and history of the matter was due to the significant memory problems which he had, and which were ongoing and exacerbated by stress;

(iv) the limited extent of documents held by his firm, and the likely difficulties in obtaining documents from the previous firm due to a dispute over fees;

(v) that the District Court did not provide the court documents until 4 November 2014;

(vi) that the previous firm would not provide its file and asserted a lien over it; and

(vii) that the former solicitor, Mr Stapleton, had complete control of the proceeding and involved Mr Pittaway to a minimal extent.

[28] Whether an affidavit, which verifies a pleading, is sufficient will differ from case to case. One factor affecting that will be the level of detail in the verified pleading. In *Green v Pearson*[65] this Court considered a case where a party desired to establish that

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57 Affidavit of Mr Wellner, 9 October 2014, paragraphs 2-3 (AB 699-700).
58 Transcript 16 October 2014, T1-18 lines 1-7; AB 32.
59 Transcript 16 October 2014, T1-20 lines 1-7; AB 34.
60 Affidavit of Mr Pittaway sworn 24 October 2014, paragraph 2(f)(iii); AB 711.
61 Affidavit of Mr Murray, AB 713.
62 Outline for Mr Pittaway, 31 October 2014, paragraph 19; AB 139.
63 Transcript 31 October 2014, T1-13 lines 7-9 and 33-41; AB 52.
64 AB 713, 715, 719 and 761.
65 [2014] QCA 110. (***Green***)

evidence existed, supporting the denial of an admission which was sought to be withdrawn. The Court held there was no error in principle in the Court taking the view that an affidavit verifying the pleading was sufficient:[66]

> "[46] In exercising the discretion to give leave to withdraw an admission, there is no a priori rule as to what evidence is required in every case. Nor is there an a priori rule that an affidavit generally verifying a proposed defence will not be enough. Like the primary Judge, in my view it was relevant in the present case that the respondent who swore the affidavit was the principal witness who might be expected to know the relevant facts. It was therefore open to the primary Judge to act upon an affidavit generally verifying the contents of the draft defence dealing with facts within his knowledge. His Honour did so specifically because of the "level of detail with which the proposed amended pleading deals with the plaintiffs' allegations".
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> [47] That view was adopted in the context that after so much time "it would not be expected that the detail would still be retained in his mind" and that it would "be unlikely that he would have much in the way of documents from the time of the alleged events.""

[29] In this case there was a detailed pleading which was verified on oath. In addition there was evidence that Mr Pittaway's ability to remember was affected during the period that the application occupied, and it was adversely affected by the stress of the proceedings. Further, there was evidence that the previous solicitor was refusing to hand over his file, claiming a lien for unpaid fees. Given that fact, and the fact that he had ceased to act for Mr Pittaway, it was an easy inference to draw that he would not assist with the case, even to the point of assisting to draw an affidavit in greater detail than was done.

[30] In my view, the primary judge's approach to the affidavit material placed undue emphasis on the absence of a blow for blow response, and thereby her Honour fell into error.

[31] Thirdly, as set out in paragraphs [13] and [14] above, the learned primary judge found that Mr Pittaway had "an arguable case", however because of the failure to answer Mr Hennig's affidavit in like manner his "prospects of making out his claim could not be considered strong".[67]

[32] There is, in my view, tension between those two findings. Having reached the first her Honour should not have reached the second. The correct approach is aptly shown in *Gold v State of Queensland*.[68] That was an application under r 280, where the prospects of success were identified as limited but "it could not be said that [it] is unarguable, or doomed to fail".[69] Dalton J found that the fact that the case was not unarguable or doomed was a reason to refuse r 280 relief:[70]

> "The Court of Appeal in *Tyler v Custom Credit Corp Ltd* listed matters which the Court may take into account in exercising its discretion to

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66 *Green* at [46]-[47], per Jackson J, Fraser and Morrison JJA concurring.
67 Reasons [31].
68 [2011] QSC 112. (***Gold***)
69 *Gold* at [9].
70 *Gold* at [18]. Internal footnotes omitted. To similar effect see *Schneider* at [17].

> determine whether a proceeding should be dismissed for want of prosecution. As outlined above, the plaintiff does not have an unarguable case. This is important in exercising my discretion, because to dismiss the proceedings now will mean that there will never be a determination of the merits of Mr Gold's claim."

Prejudice to Noosa Cat

[33] This factor as set out in *Tyler* was "whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial".

[34] The relevant delay that Noosa Cat focussed upon was the delay since the orders were made on 30 May 2014. That was reflected in the learned primary judge's reasons:[71]

> "An overview of the key steps in the chronology of this litigation is set out in Appendix A to these reasons. It is clear that there have been periods of delay. Overall these proceedings have taken an inordinately long time to reach this stage. However, the focus of Noosa Cat's complaint is the delay since the consent orders were made in May 2014."

[35] However, the learned primary judge reviewed the entire history of the proceedings as reflected in Annexure A to her Honour's reasons. Whilst that presented a prism through which to view the specific delay, it had the potential to confuse the identification of the relevant prejudice alleged to have been suffered by Noosa Cat.

[36] Noosa Cat's submission to the learned primary judge in respect of the prejudice they had suffered was that it could be inferred that they had incurred a similar sum to that which was owing by Mr Pittaway to his former solicitors, namely $178,619.22.[72] Referring to that sum, counsel for Noosa Cat said:[73]

> "But I will draw your attention to paragraph 16, and you can see there, your Honour, that the assertion seems to be made that up until the time that the matter was in the hands of Mr Stapleton, there was an amount of legal fees due to his firm in the sum of nearly $179,000. I draw that to your Honour's attention because it can be reasonable (sic) inferred that if that amount has been expended on one side of the record, you would expect a not dissimilar size of amount to be expended on the other side of the record. This is an issue that goes to the prejudice that [Noosa Cat] is suffering by virtue of the failure of [Mr Pittaway] to adhere to the orders made."

[37] Then directly in response to the learned primary judge's request to address the question of the prejudice, counsel said:[74]

> "I will deal firstly with prejudice to [Noosa Cat]. If one needed to crystallise the picture that paints the prejudice [Noosa Cat] faces, it's that $179,000 referred to in Mr Murray's affidavit. … [Noosa Cat] is a commercial enterprise of fairly standard nature, you know, like a mum and dad show with family members as directors and all the rest of it. They've been spending the last few years with a side business of resisting litigation, and it - the cost and the toll of this is enormous.

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71 Reasons [33].
72 The amount owing appears at AB 762, affidavit of Mr Murray paragraph 16.
73 AB 66, T 1-9 lines 14-22.
74 AB 76, T 1-19 lines 19-25, 39-47.

> … 15th of June 2010 the claim was filed.
>
> … So, you know, four and a half - or four - over four years, and one would assume something of the order of 150 to 200 thousand dollars later, [Noosa Cat] is no closer to a resolution of these issues than it was two or three years ago. The prejudice is self-evident. I really don't think I need to say any more on that."

[38] By that submission Noosa Cat urged that their prejudice was the incurring of legal costs over the totality of the proceeding, in an inferred sum between $150,000 and $200,000. There was no attempt to identify the prejudice that was caused by the most significant delay about which complaint was made, namely that since 30 May 2014,[75] nor was there any attempt to produce evidence of the costs incurred.

[39] Her Honour found that Noosa Cat had suffered prejudice relevant to the application to strike out: "I do not accept … that Noosa Cat has suffered no prejudice."[76] That finding related to the following passage in the reasons:[77]

> "I accept, however, that the defendants have suffered prejudice given the history of the proceedings. Counsel for Noosa Cat invited me to infer that the defendants had incurred equivalent costs to those claimed from Mr Pittaway by his former solicitor. I decline to do so, but do not consider it necessary, in any event. Given the number of applications already heard in the Supreme and District Court, as well as the failed mediation, it is reasonable to assume the defendants have incurred significant legal costs in response to a claim still not properly pleaded against them."

[40] Thus the only prejudice identified was the incurring of legal costs, as otherwise Noosa Cat did not contend that it could not have a fair trial.[78] Therein, in my view, lay three difficulties.

[41] First, the costs that the learned primary judge referred to were those that had been incurred because of "the number of applications already heard in the Supreme and District Court, as well as the failed mediation". Plainly that refers to the costs incurred over the entirety of the proceedings, and not limited to those that were caused by the relevant delay. It is only the prejudice caused by the relevant delay that is to be taken into account. The error in that approach is demonstrated by the decision in *Spitfire Nominees Pty Ltd v Ducco*:[79]

> "Even if the primary judge held the opinion, not specifically articulated, that there was inordinate and inexcusable delay, it would appear that the detail of the steps taken was not addressed. Perhaps even more seriously, it appears likely that the judge was in error in the manner in which the question of delay was approached. As I have said, the judge did not analyse the steps and set out the length of the delay which was concluded had occurred, as a matter of law. The primary

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75 In the outline on appeal Noosa Cat submitted that the "delay of most significance is that of [Mr Pittaway] failing to comply with the orders … made on 30 May 2014": paragraph 21(b).

76 Reasons [48].

77 Reasons [45].

78 Reasons [44].

79 [1998] 1 VR 242 at 247-248. Emphasis added. See also *Spitfire Nominees Pty Ltd v Hall & Thompson (a firm)* [2001] VSCA 245 at [38].

judge did say, however, that it was proper to take into account on the prejudice issue the total time that had elapsed since the relevant event and noted that, "By the time this matter comes on for trial it will be ten years since the date of the contract sale".

This suggests that the primary judge simply grossed up the period of delay as elapsed time, instead of, as was the judicial obligation, considering what the net delay occasioned was and what prejudice, if any, was sustained as a consequence of that, rather than the general elapsing of time.

There appears to be some difference of opinion between counsel as to whether or not this matter of net delay was argued before the primary judge or not. But it was the judge's obligation to consider it and apply the law. This issue, and the obligation, was referred to by the Appeal Division of this court in *Bishopsgate* in which it stated at 25:

> There is a temptation in applications of this kind to look only to past and present prejudice. In each case, however, **one must look at each of the elements of prejudice asserted and examine the time at which it is likely to be suffered, always making due comparison between prejudice which the defendant has suffered or will be likely to suffer because of inordinate and inexcusable delay and any prejudice it might have suffered in any event.** So far as likely prejudice to the conduct of a fair trial is concerned the critical time is the time at which the action is likely to be heard. In the case of prejudice resulting from a defendant being kept at risk in respect of the subject matter of the action, the relevant period will extend from the time the action is brought to the time it is likely to be heard. In each case due allowance should be made for the time which any action will ordinarily take to reach final determination. In many applications of this kind the action has been through all interlocutory stages and is only awaiting setting down for trial and so it may be and has been argued that the relevant trial or determination would not be far in the future. There it would be appropriate to look at existing circumstances."

[42] Secondly, there was no attempt to analyse the period covered by the approach taken in order to see whether the delay, and therefore costs, for that period was solely the fault of Mr Pittaway or rather, shared by Noosa Cat. As shown in paragraph above, significant periods of time went by with both sides contributing to the delay. Particularly is that so towards the end of the third year after the proceedings were commenced when Noosa Cat was four months late in filing an amended pleading (paragraph [10](d)) and the following year when neither party progressed the proceeding at all (paragraph [10](e)).

[43] The failure to assess where the responsibility for the delay lay was an error of the kind identified in *Spitfire Nominees Pty Ltd v Ducco*:[80]

> "Yet, rather than taking the foregoing matters into account **- and in particular the fact that the lapse of time since notice was first given**

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[80] [1998] 1 VR 242 at 247-248. See also *Spitfire Nominees Pty Ltd v Hall & Thompson (a firm)* [2001] VSCA 245 at [38].

> **for discovery was not wholly the responsibility of the plaintiffs but was in part due to the defendant and his legal advisers -** it appears that his Honour committed the error of principle which was identified in *Spitfire Nominees Pty Ltd v Ducco*, of "gross[ing] up the period of delay as elapsed time, instead of, as was the judicial obligation, considering what the net delay occasioned was and what prejudice, if any, was sustained as a consequence of that, rather than the general elapsing of time". The need to find the source of prejudice in a plaintiff's inexcusable delay is also emphasised in *Bishopsgate Insurance Australia Ltd (In liq) v Deloitte Haskins & Sells*."

[44] Thirdly, even if the legal costs were properly identified as the prejudice suffered, the next step in the analysis was to ask whether the incurring of those costs meant that there was "an inability to ensure a fair trial". Noosa Cat did not contend that this was the case.[81]

[45] Thus, in my view, the learned primary judge did not correctly address the question whether or not the delay has resulted in prejudice such that there was an inability to ensure a fair trial.

Responsibility for the delay

[46] The learned trial judge held that the factors which enlivened the discretion under r 280 UCPR were not just the failure to comply with the orders 3, 4, 5 and 7 made on 30 May 2014,[82] but also the failure to provide timely disclosure, and to respond to a letter dated 9 September 2014 from Noosa Cat's solicitors.[83]

[47] In addition her Honour recorded a submission made by Noosa Cat:[84]

> "In addition to those matters set out above, Noosa Cat argues Mr Pittaway's history of failures to comply with pleading and other procedural requirements, even when repeatedly prompted by requests from Noosa Cat's solicitor, is an abuse of the court's process."

[48] Prior to the transfer to the District Court, there were periods where Noosa Cat was guilty of delay, or the delay cannot reasonably be attributed solely to Mr Pittaway.

[49] One example of that relates to disclosure. The reply and answer was filed on 10 August 2010,[85] which meant that under r 214(2)(e) UCPR, disclosure was due to be completed by 7 September 2010. The first order made under the Case Flow management regime, which is normally invoked because UCPR time limits have not been adhered to, was on 27 May 2011. Noosa Cat had evidently not completed disclosure at that time, more than eight months after it should have been done, as order 1 was that Noosa Cat serve a list of documents by 10 June 2011.[86]

[50] The second example relates to mediation. The orders of 27 May 2011 also included orders that the parties engage in mediation. There was agreement as to that course, signified by the fact that all the orders from then were consent orders, including the order of 12 July 2012 which set the last time period for the mediation to be finalised.

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81 Reasons [44].
82 AB 833-834.
83 Reasons [12].
84 Reasons [13].
85 Annexure A, item 3.
86 AB 817.

Six months after the first mediation order, the mediation was held on 28 November 2011. It was not finalised that day, as is evident from the letter from Noosa Cat dated 7 December 2011.[87]

[51] As things transpired it took another eight to nine months to complete the mediation process. It was only after that happened that the proceedings were transferred to the District Court.[88]

[52] Noosa Cat evidently took the view that the "onus to progress the matter" was something borne only by Mr Pittaway. In response to a submission that Noosa Cat had to accept some responsibility for the delay through to the end of the mediation in mid-2012, the submission made was that the mediation efforts ended on 28 November 2011 (the date referred to in the opening sentence of the letter of 7 December 2011) and therefore it was incorrect to suggest that mediation continued into 2012, and:

> "… what it does do is that it removes any ground that there might have been from the argument that the onus to progress the matter somehow shifted from the plaintiff to us because that history is not correct."[89]

[53] That submission was factually wrong as the order dated 12 July 2012 reveals. It also betrayed non-observance of the obligations cast on **both** parties under r 5, UCPR.

[54] Delays after transfer to the District Court are dealt with in paragraph [10] above.

[55] As to the progress before the orders of 30 May 2014, the learned primary judge made one important finding. Having noted that the proceedings started in 2010 and that mediation was unsuccessful, her Honour said that "Since it was transferred to this court it has made little progress, through no fault of Noosa Cat's".[90]

[56] That finding cannot be sustained.

[57] Notwithstanding that Noosa Cat later contended (before the primary judge) that one thing that prompted the application filed on 17 September 2014, was Mr Pittaway's failure to respond to complaints in a letter dated 7 December 2011,[91] nothing was done by Noosa Cat to compel responses to that letter until September 2014, three years after the complaints were made. So much was effectively conceded by Noosa Cat.[92]

[58] The learned primary judge referred to the 7 December 2011 letter, finding that as at the hearing in November 2014 "Most of the complaints raised by the defendant's solicitors have still not been attended to by Mr Pittaway".[93] Even if strictly true, the finding does not account for the three years in which Noosa Cat did nothing to press the alleged deficiencies raised in the letter.

[59] That Noosa Cat must share the responsibility for the delay from late 2011 is all the more evident from the letter. It said that the complaints about the pleading were being given in accordance with directions from the mediator,[94] and that the complaints were as to defects "that might stand in the way of the matter progressing on the next occasion it comes before the mediator early in 2012".[95] As it happened, the mediation

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87 AB 695.
88 Order dated 31 August 2012, AB 829.
89 Transcript 20 November 2014, T 1-58 lines 45-47; AB 115.
90 Reasons [6].
91 Transcript 16 October 2014, T1-14 line 45 to T 1-15 line 16; AB 28-29. The letter is at AB 695.
92 Noosa Cat's outline dated 2 October 2014, paragraphs 5-8; AB 121.
93 Reasons [17].
94 AB 695.
95 AB 697.

was finally scheduled to take place by 3 August 2012, as revealed in the consent orders made on 30 March 2012 and 12 July 2012.[96] The failure of the mediation led to the orders made on 31 August 2012.[97]

[60] The order transferring the matter to the District Court was made on 31 August 2012, two years after the proceedings were commenced, and after mediation was ultimately unsuccessful. Those orders required an amended statement of claim on 7 September 2012, and it was filed three weeks late, on 28 September 2012. However Noosa Cat's amended defence and counterclaim was over three months late.

[61] During the next 14 months there is nothing to show that Noosa Cat took any step to urge the matter on. Indeed the evidence before the learned primary judge showed that it was Mr Pittaway who sought to progress matters. On 27 May 2013 particulars were sought in respect of Noosa Cat's amended defence and counterclaim.[98] When the particulars were not provided a r 444 letter was sent on 17 March 2014.[99] The letter included a draft order to progress the matter.[100] Those particulars were provided on 28 March 2014, ten months after they were requested.[101] At the same time Noosa Cat announced an intention to amend their pleading.

[62] That period of relative inactivity was ended not by Noosa Cat, but by Mr Pittaway forcing the issue of the particulars, proposing a new order to take the matter forward, and then seeking directions on 21 May 2014, to bring the matter to trial. It was that application that resulted in the orders on 30 May 2014.

Delay because of, and following, the change of solicitors

[63] The learned primary judge referred to the breakdown in the relationship between Mr Pittaway and his former solicitor, Mr Stapleton, but found that it offered no explanation or excuse for the failure to comply with the consent orders of 30 May 2014.[102]

[64] The proper characterisation of the breakdown and its aftermath in the period following 30 May 2014 can only be properly done with the precise factual steps in mind:

(a) Mr Stapleton was the solicitor on the record from the start of the proceedings;

(b) he briefed senior and junior counsel to settle the pleadings;[103] he instructed the expert quantity surveyor to give a report on the work done by Mr Pittaway,[104] and he had the documents for that purpose;[105]

(c) he was involved directly in the steps leading to the orders made on 30 May 2014;[106]

(d) Mr Stapleton had complete control of the proceedings and ran them with minimal input from Mr Pittaway;[107]

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96 AB 827. See also the consent order of 30 March 2012, AB 825.
97 AB 829.
98 Annexure A item 15; affidavit of Mr Stapleton (AB 252), paragraph 5(c), part of Ex AS-3, AB 273-277.
99 AB 268.
100 AB 270.
101 Annexure A item 16; affidavit of Mr Stapleton, paragraph 5(d), Ex AS-2, AB 259.
102 Reasons [34]-[37].
103 AB 777, 809.
104 AB 205.
105 AB 205, Appendix E to the report of Mr Ford, AB 250-251.
106 See paragraph [61] above.
107 Affidavit of Mr Pittaway dated 20 November 2014, paragraphs 34 and 35 (AB 728); affidavit of Mr Murray dated 20 November 2014, paragraph 13 (AB 762).

(e) in mid-July 2014 Mr Pittaway and Mr Stapleton were in dispute in relation to their fees;[108] as a result Mr Stapleton ceased to do work in the matter;[109] that was the reason that the amended reply and answer was not filed on time under the orders of 30 May 2014;[110]

(f) on about 21 August 2014, Mr Pittaway approached a new firm of solicitors, Lember and Williams, to take over the matter;[111]

(g) on 25 August 2014, Lember and Williams wrote to Mr Stapleton, directing them to cease work "on all matters on our client's behalf", requesting the files, and withdrawing his authority to act;[112] that letter enclosed an authority signed by Mr Pittaway, directing that Mr Stapleton cease work;

(h) Mr Staplteton did not hand over the file;[113]

(i) on 26 August, expert reports were due under the order of 30 May 2014;

(j) on 27 and 28 August and 1 September, there was correspondence between Mr Stapleton and Lember and Williams, in which the absence of a Notice of Change of Solicitor was noted and Mr Stapleton foreshadowed an application to withdraw from the record;[114]

(k) Lember and Williams then did not accept the retainer in the Noosa Cat matter;[115] on 2 September Lember and Williams advised Mr Stapleton that they were not taking over the Noosa Cat matter, but had instructions to retrieve all files (including the Noosa Cat file) and obtain an itemised bill;[116]

(l) on 3 September 2014 Noosa Cat advised that the amended defence and counterclaim delivered under the orders of 30 May 2014 would be further amended;[117]

(m) by 8 September 2014 Mr Pittaway's affidavits were to be served under the orders of 30 May 2014;

(n) by 8 September 2014 the experts were to confer under the order of 30 May 2014;

(o) on 9 September 2014 Mr Stapleton filed an affidavit seeking to withdraw from the record;[118]

(p) on 11 September 2014 the application to withdraw was served on Mr Pittaway;[119]

(q) on 15 September 2014 Mr Stapleton was granted leave to withdraw from the record; the solicitors for Noosa Cat were aware of his intention to do so before the application was made, and they "were kept informed of that happening";[120]

(r) from then until 23 October 2014 Noosa Cat and its solicitors knew that Mr Pittaway did not have solicitors acting for him;

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108 Affidavit of Mr Pittaway dated 20 November 2014, paragraph 39 (AB 728).
109 Affidavit of Mr Pittaway dated 20 November 2014, paragraph 40 (AB 729).
110 Affidavit of Mr Pittaway dated 20 November 2014, paragraph 39 (AB 728).
111 Affidavit of Mr Pittaway dated 20 November 2014, paragraph 42 (AB 729).
112 Affidavit of Mr Pittaway dated 20 November 2014, paragraph 43 (AB 729), Ex DP-5, AB 749.
113 Affidavit of Mr Pittaway dated 20 November 2014, paragraphs 44 and 46 (AB 729).
114 AB 751, 754. Document 27, affidavit of Mr Stapleton dated 8 September 2014.
115 Affidavit of Mr Pittaway dated 29 October 2014, paragraph 2(d).
116 AB 754.
117 AB 287.
118 AB 840.
119 Affidavit of Mr Pittaway dated 20 November 2014, paragraph 47 (AB 729).
120 Transcript 2 October 2014, T1-4 lines 34-39; AB 4.

(s) by 22 September 2014 Noosa Cat's affidavits were to be served under the orders of 30 May 2014;

(t) Noosa Cat's application to strike out parts of the pleading was filed on 17 September 2014; the application and affidavit of Mr Wellner were served on Friday 19 September, at Mr Pittaway's home address, by registered post;[121]

(u) the first return date of the application was 2 October 2014;

(v) on 23 October 2014 new solicitors were formally retained;[122]

(w) from the time of their retainer the solicitors faced considerable difficulties in terms of: the requirement to respond to the orders made by the learned primary judge on 16 October 2014; the ability to decipher the background to the matter; the problems presented by Mr Pittaway's ability to recall, especially under stress; and the absence of documents;[123]

(x) Mr Stapleton refused to hand over the file, claiming a lien for unpaid fees.[124]

[65] To those facts must be added the learned primary judge's own observations of Mr Pittaway as a result of his appearance on 16 October 2014, when he gave evidence and was cross-examined, at the insistence of Noosa Cat. First, it was evident that he had trouble hearing and required a hearing device.[125] Secondly, he confessed to short term memory problems.[126] Thirdly, her Honour expressed concern as to Mr Pittaway's capacity to instruct lawyers or represent himself.[127]

[66] In dealing with the issue of delay following the consent orders of 30 May 2014 the learned primary judge said:

> "Other than to say that his solicitor attended to the litigation, Mr Pittaway has failed to explain his failure to comply with the consent orders.[128]
>
> Mr Pittaway seeks to place responsibility for delays since May of 2014 at the feet of his former lawyer and claims to have had no involvement in the management of the claim.[129]
>
> It is simply not adequate to come to Court and say the delay cannot be explained because everything was left to the solicitor and that it was all the solicitor's fault. The solicitor is the advisor and agent of Mr Pittaway. It is within his power to direct a solicitor who is not properly attending to his claim. It seems that Mr Pittaway was not only complicit in but content with an arrangement where everything was left to the solicitor. That was a choice he apparently made, but it cannot provide an explanation for his failure to comply with the requirements of the rules of court orders.[130]

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121 Affidavit of Mr Wellner, 24 September 2014, paragraphs 2-3 (AB 667-668).
122 Affidavit of Mr Murray dated 24 October 2014, paragraph 2; AB 713.
123 Affidavits of Mr Murray and Ms Jane, AB 713, 715, 723, 761
124 Affidavit of Mr Murray dated 20 November 2014, paragraph 16 (AB 762).
125 AB 17, line 39 – AB 18 line 5.
126 AB 18, 19, 20, 21, 22.
127 AB 32 - 34.
128 Reasons [34].
129 Reasons [36].
130 Reasons [37].

> Mr Pittaway's unexplained failure to comply with the consent orders from May 2014 cannot be attributed to either Noosa Cat or his solicitor and favour his claim being dismissed."[131]

[67] In my view, in light of the matters set out in paragraphs [64] and [65] above, there are a number of difficulties with those findings.

[68] First, the explanation for failing to comply with the 30 May orders was not limited to saying that his solicitor attended to the litigation. Nor was the failure to comply "unexplained". The first thing that had to be done by Mr Pittaway was to file an amended pleading by 28 July 2014. By that time he was in dispute with his solicitor over fees, and the solicitor had ceased to do any work. Within four weeks new solicitors had been retained to take over, and Mr Pittaway had directed Mr Stapleton to cease work. That period was when the next two steps were to be taken under the orders. By 9 September Mr Stapleton had filed an affidavit seeking to withdraw from the record. That was directly at the time when experts were to confer and affidavits were to be filed. Then the new firm declined to act on the Noosa Cat matter, which meant that another firm had to be found.

[69] Given that the file was withheld because of the fee dispute, the burden on the new firms was obvious. It was not something that Mr Pittaway could overcome himself, beyond, perhaps, paying the disputed fees so as to get the file. It was not suggested below or before this Court that he should have taken that step. Nor was he in a position to draw on memory to substitute for the documents.

[70] Secondly, for the same reasons Mr Pittaway's position was not that "the delay cannot be explained because everything was left to the solicitor and that it was all the solicitor's fault". True it is that Mr Stapleton had control of the proceeding and required limited input from Mr Pittaway, but there was no suggestion that the steps that were taken, were taken without instructions or input from Mr Pittaway.

[71] Thirdly, the dispute over Mr Stapleton's fees was not said to be other than a genuine dispute, nor was there a challenge to Mr Pittaway's evidence that Mr Stapleton ceased to perform work because of that dispute. In any event it was not said that Mr Pittaway's decision to direct that Mr Stapleton cease to act was for anything other than sincere reasons. Given that, it cannot be said that it was "within his power to direct a solicitor who is not properly attending to his claim". Mr Stapleton was attending to his claim until the dispute over fees arose. Nor, in the circumstances, can it be said that Mr Pittaway sought "to place responsibility for delays since May of 2014 at the feet of his former lawyer".

[72] Fourthly, there was no criticism of the efforts or time taken to secure new legal representation. The evidence established that the process to retain a new firm started at about the time the first step was required of Mr Pittaway under the 30 May orders, and was not finalised until after Noosa Cat had filed its application for r 280 relief. Until the new firm were retained Mr Pittaway did not have solicitors who could respond, and he could not do so himself. Once that application was filed and before the court (2 October 2014, then 16 October 2014) Noosa Cat were no longer pressing for compliance with the orders of 30 May 2014, but rather pressing for the claim to be dismissed.

[73] Fifthly, the characterisation of those matters is within the prism of two particular issues: one is the undoubted inability of Mr Pittaway to adequately represent himself; the second is the questionable ability of Mr Pittaway to supply what was necessary

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131 Reasons [40].

for the new solicitors to adequately assume control of the proceedings and respond to the orders.

[74] In my view, the circumstances that affected the ability to comply with the consent orders of 30 May 2014 did not exhibit that degree of inattention or disregard that they should have been taken to support dismissal of the claim.

Conclusion on the application

[75] For the reasons given above the learned primary judge fell into error in concluding that the circumstances warranted the dismissal of Mr Pittaway's claim. It cannot be doubted that dismissal of the claim amounts to a substantial injustice.

[76] I would propose the following orders:

1. The application for leave to appeal is granted.
2. The appeal is allowed.
3. The orders made on 19 December 2014 are set aside.
4. The respondents' application filed 17 September 2014 is refused.
5. The respondents must pay the applicant's costs of and incidental to the application, and appeal, to be assessed on the standard basis.

[77] **DOUGLAS J:** I agree with the reasons of Morrison JA and the orders proposed by his Honour.

[78] **NORTH J:** I have had the advantage of reading in draft the reasons for judgment of Morrison JA.

[79] I wish to make some brief comments arising from his Honour's discussion of the question of prejudice and whether on the evidence there was any risk that a fair trial could not be held.[132] The application before the learned primary judge was for an order dismissing the proceedings for want of prosecution pursuant to UCPR r 280. When considering such an application or the cognate UCPR r 389, whether to give leave to proceed following delay, it will be recalled that in *Tyler v Custom Credit Corp Ltd & Ors*[133] Atkinson J, with whom McMurdo P and McPherson JA agreed, identified 12 factors which might be taken into account in determining "whether the interests of justice" required either a case to be dismissed or leave to proceed to be refused.

[80] Her Honour was careful to note:[134]

> " …The court's discretion is, however, not fettered by rigid rules but should take into account all of the relevant circumstances of the particular case including the consideration 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.
>
> [3] Unnecessary delay in proceedings has a tendency to bring the legal system into disrepute and to decrease the chance of there being a fair and just result. …"
>
> (Footnotes omitted)

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132 His Honour's reasons at [40]-[45].

133 [2000] QCA 178.

134 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [2] and [3]. Noting also her Honour's use of "include" in [2] before mentioning the 12 factors.

[81] A perusal of the 12 factors that Atkinson J identified demonstrates that delay is mentioned on a number of occasions.[135] Significantly factors 1 and 12 in combination identify that the elapse of time between the occurrence of the events the subject of the claim and the consideration of the application by the Court may lead to the conclusion that prejudice would be occasioned to a party because of the inability to ensure a fair trial.[136]

[82] The powers expressly given to the Courts by UCPR r 280 and UCPR r 389 are not exhaustive of the Court's powers in the circumstances of delay, they are examples of an express recognition of the inherent power in a court to prevent an abuse of jurisdiction by permitting the termination or stay of a claim that would inflict unnecessary injustice upon an opposite party were it to be further prosecuted.[137] This inherent jurisdiction and power was extensively examined by the High Court in *Batistatos v Roads and Traffic Authority (NSW).*[138]

[83] Turning to *Spitfire Nominees Pty Ltd v Ducco* and to *Shellard v Orlanski*,[139] the Victorian judgments to which Morrison JA refers and to their application, the temptation to limit, in all cases of applications under UCPR r 280, the consideration only to aspects of delay in the course of litigation or the time elapsed since the last order or step in the proceedings and prejudice flowing only from that should be resisted. Depending upon the circumstances and the issues between the parties the enquiry may necessarily be much wider. Thus just as it may be wrong to "gross up" all of the elapsed time and the costs and effects of it in the context of a consideration of, properly limited to, the time elapsed since the last step or order or the period of noncompliance and the effect of that "delay", in a different case the elapsed time since the event the subject of the litigation and the ultimate consideration of a complaint by a party about delay or noncompliance may indicate that a fair trial cannot be held notwithstanding that the impugned time of noncompliance or delay may be comparatively short.[140]

[84] Nevertheless as Morrison JA is at pains to demonstrate[141] there was no suggestion before the learned primary judge that the parties could not have a fair trial, in this case the complaint was the alleged prejudice following from the costs of the litigation and the elapse of time since orders and the non-compliance with the orders or directions.

[85] Subject to the foregoing, for the reasons given by Morrison JA I agree with the orders proposed by his Honour.

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135 "Delay" is mentioned expressly in 6 of them ((1), (5), (6), (10), (11) and (12) and inferentially referred to in a further two (2) and (7)).

136 The significance of the delay and the effect upon the possibility of a fair trial may vary from circumstance to circumstance. Some types of claims or complaints may more readily give rise to the inference of prejudice than others. See for example *Hood & Anor v The State of Queensland & Ors* [2003] QCA 408 at [34].

137 *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720 per Dixon J. McHugh J had similar considerations in mind and attributed recognition of those to the Parliament in the context of the discretionary power to extend the limitation period, see *Brisbane South Regional Health Authority v Taylor* (1996-1997) 186 CLR 541 at 555-556.

138 (2006) 226 CLR 256.

139 *Spitfire Nominees Pty Ltd v Ducco* [1998] 1 VR 242 at 247-248 & *Shellard v Orlanski (t/a "Gordon and Orlanski")* [2001] VSCA 471 at [28].

140 Delay and its effects is not the only ground for the jurisdiction to be enlivened. It remains that "contumelious disregard" for orders or the requirements of the rules of court may still enliven jurisdiction though it is not a necessary nor decisive consideration. See *Batistatos v Roads and Traffic Authority (NSW)* (2006 CLR 256 at [67]-[70] and *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [2] at (4).

141 See for example at [40] & [44].

Annexure A

	Date	Event
1	15.06.2010	Mr Pittaway files Claim in the Supreme Court.
2	22.06.2010	Noosa Cat files Notice of Intention to Defend.
3	10.08.2010	Mr Pittaway files Reply.
4	07.12.2011	Noosa Cat writes to Mr Pittaway regarding pleadings and procedural matters.
5	27.05.2011	Directions (by consent) regarding the conduct of proceedings. Request for trial date is to be filed on or before 30.09.2011.
6	29.09.2011	Orders (by consent): - appointing a joint expert to prepare a report concerning value of construction; and - ordering mediation to take place on or before 25.11.2011, and appointing a mediator.
7	16.11.2011	Joint expert report filed.
8	28.11.2011	Mediation took place – adjourned, mediator made consent directions.
9	07.12.2011	Noosa Cat writes to Mr Pittaway regarding pleadings and procedural matters.
10	30.03.2012	Orders (by consent): mediation to take place before 22.06.2012.
11	13.07.2012	Orders (by consent): mediation to take place before 03.08.2012.
12	31.08.2012	Parties directed to file and serve amended pleadings: - amended claim and statement of claim by 7.09.2012 - amended defence and/or counterclaim by 28.09.2012 - reply and/or answer to counterclaim to be filed by 05.10.2012 - matter remitted to the District Court of Queensland.
13	28.09.2012	Amended statement of claim filed in the District Court.
14	25.01.2013	Amended defence and counterclaim filed.
15	27.05.2013	Particulars of the amended defence and counterclaim requested.

16	17.03.2014	Particulars of amended defence and counterclaim provided.
17	21.05.2014	Mr Pittaway's application for directions creating a timetable for filing of pleadings, appointment of joint expert, and request for trial date.
18	30.05.2014	Court directs the parties to file and serve, among other things, the following pleadings: - amended defence and counterclaim by 14.07.2014 - amended reply and answer by 28.07.2014 The matter is listed for review at a date to be fixed after 15.10.2014, and placed on the Commercial List.
19	16.07.2014	Further amended defence filed.
20	03.09.2014	Noosa Cat writes to Mr Pittaway regarding pleadings and procedural matters.
21	09.09.2014	Noosa Cat writes to Mr Pittaway regarding pleadings and procedural matters.
22	15.09.2014	Mr Pittaway's solicitor given leave to withdraw as solicitors on the record.
23	17.09.2014	Noosa Cat's application requesting strike outs and deemed admissions.
24	02.10.2014	No appearance by Mr Pittaway. Orders: - Noosa Cat have leave to amend application - serve amended application on Mr Pittaway by 03.10.2014 - hearing of amended application adjourned to 16.10.2014.
25	08.10.2014	Noosa Cat files amended application.
26	16.10.2014	Mr Pittaway appears with Mr Biggs as support person. Orders: - Noosa Cat's application is adjourned to date to be fixed - by close of business on 20.10.2014, Mr Pittaway must attend a general practitioner to obtain letter regarding his cognitive capacity and memory and what further investigation, if any, might be necessary. Mr Pittaway must provide a copy to Noosa Cat and the court. - by close of business 24.10.2014, Mr Pittaway must file and serve an affidavit stating: *steps he has taken to comply with orders of 04.07.2014

		* steps he has taken to obtain legal representation since Noosa Cat's application filed on 17.09.2014 (delivered to Mr Pittaway on 19.09.2014) * reasons why and for what period an adjournment of the application is required.
27	21.10.2014	Mr Pittaway appears with Mr Biggs as support person. Orders: Noosa Cat's application remains listed for a date to be fixed.
28	23.10.2014	Mr Pittaway retains new solicitors.
29	31.10.2014	Order: Noosa Cat's application adjourned to 20.11.2014.
30	20.11.2014	Noosa Cat's application heard.