SUPREME COURT OF QUEENSLAND

CITATION:	*Creevey v Baker & Ors* [2016] QCA 209
PARTIES:	**JANET LOUISE CREEVEY** (appellant) **v** **NOEL RAYMOND BAKER** (first respondent) **AIDA BAKER** (second respondent) **WILLIAM JOHN DILLON** (third respondent) **GLENDA JOY BANAGHAN** (fourth respondent)
FILE NO:	Appeal No 3444 of 2016 SC No 227 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 8 March 2016
DELIVERED ON:	23 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2016
JUDGES:	Fraser and Gotterson and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondents' costs of the appeal on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – EMBARRASSING, TENDENCY TO CAUSE PREJUDICE, SCANDALOUS, UNNECESSARY ETC OR CAUSING DELAY IN PROCEEDINGS – where the appellant filed a statement of claim which was stuck out with leave to re-plead – where the appellant filed a fresh statement of claim and applied for an order permitting the filing – where the learned primary judge refused to make such an order, striking out the application because the case was doomed to fail – where the appellant alleges the learned primary judge erred in the exercise of the direction under r 389(2) *Uniform Civil Procedure Rules* 1999 – where the appellant alleges bias on the part of the learned primary judge, and a denial of natural justice – whether

	the learned primary judge erred in the way described in *House v The King*
	Uniform Civil Procedure Rules 1999 (Qld), r 389(2)
	Artahs Pty Ltd v Gall Stanfield & Smith (A Firm) [2011] QSC 273, cited *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *Tyler v Custom Credit Corp* [2000] QCA 178, cited
COUNSEL:	The appellant appeared on her own behalf The first respondent appeared on his own behalf No appearance for the second respondent T Pincus for the third and fourth respondents
SOLICITORS:	The appellant appeared on her own behalf The first respondent appeared on his own behalf No appearance for the second respondent Bartley Cohen for the third and fourth respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** The appellant, Janet Louise Creevey, commenced a proceeding in the Supreme Court of Queensland by way of an originating application filed on 7 January 2010. The named respondents were Noel Raymond Baker and Aida Baker. On Ms Creevey's application, William John Dillon and Glenda Joy Banaghan were ordered to be joined as third and fourth respondents respectively to the proceeding in 2012. An order that Ms Creevey file and serve a statement of claim was made at the same time.

[3] Ms Creevey filed a statement of claim on 19 April 2013 ("the 2013 Statement of Claim").[1] On an application made by Mr Dillon and Ms Banaghan, a judge of the trial division ordered that this statement of claim be struck out with leave to re-plead on 10 May 2013.[2] His Honour observed that it was apparent that the statement of claim did not comply with the rules of pleading. In its then form, "it has a tendency to prejudice or delay the fair trial of the proceeding".[3] At the same time, an application filed by Ms Creevey for freezing orders over certain real property owned by the respondents was dismissed.

[4] On 23 February 2016, Ms Creevey filed an application seeking an order under r 389(2) of the *Uniform Civil Procedure Rules* 1999. The immediate objective of the application was to obtain an order which would permit her to file a re-pleaded statement of claim. This order was necessary because no step had been taken in the proceeding for more than two years. Other relief sought in the application was joinder of Claire Patricia Highland as fifth respondent to the proceeding and freezing orders over real property owned by Mr and Mrs Baker, by Mr Dillon, by Ms Banaghan and by Ms Highland.

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1 AB177-196.
2 AB198.
3 AB25 ll3-4.

[5] Ms Creevey filed a fresh statement of claim on 2 March 2016 ("the 2016 Statement of Claim").[4] This pleading, as had been its predecessor, was prepared by Ms Creevey without legal assistance. It was the statement of claim which the application filed on 23 February 2016 had in contemplation.

[6] The application was heard on 8 March 2016 by a judge of the trial division. The learned primary judge refused to make an order under r 389(2). In his reasons, his Honour acknowledged that Ms Creevey had offered some explanation for the delay of almost three years between the order made on 10 May 2013 and the filing of the application. He was, however, of the view that the case, as pleaded in the 2016 Statement of Claim, was doomed to fail. He considered that, accordingly, the discretion to make an order under r 389(2) ought not be exercised.[5] His Honour also accepted a submission made on behalf of Mr Dillon and Ms Banaghan that if such an order was refused, then the proceeding itself should be struck out either under r 280(1) or in the Court's inherent jurisdiction.[6] Ms Creevey's application was dismissed in its entirety. She was order to pay the defendants' costs of both the application and the proceeding on the indemnity basis.[7]

[7] On 5 April 2016, Ms Creevey filed a Notice of Appeal to this Court against the orders made on 8 March 2016.[8] In that document, she seeks orders setting aside the orders under appeal and granting her application filed on 23 February 2016. However, during the hearing of the appeal at which she appeared for herself, Ms Creevey focused her submissions upon contentions that the proceeding should not have been struck out and that an order ought to have been made permitting her to file a further statement of claim. She asked that this Court permit her to file such a statement of claim within 30 days.

The appellant's proceeding

[8] Ms Creevey is a former wife of Leonard Daniel Catchpole who died on 24 December 2006. He was the father of her two daughters. The Bakers are husband and wife. Mr Baker was a business associate of Mr Catchpole. Both were involved with two building related companies, Viclen Homes Pty Ltd ("Viclen") and Herriott Services Pty Ltd ("Herriott"). Ms Creevey alleges that ASIC records show that Mr Baker and Mr Catchpole were registered as owners of 98 per cent and two per cent respectively of the issued shares in Viclen from 15 July 1993 to 5 January 1998. Mr Baker was also registered as the owner of all of the issued shares in Herriott from 23 February 2004 to 14 November 2008.

[9] Mr Dillon is now a retired solicitor. In practice, his firm, Dillons Solicitors, acted for Mr Catchpole in a number of litigation matters. One was a proceeding in February 2003 in the Federal Magistrates Court in which Ms Creevey sought orders for child support payments against him. Another was a District Court proceeding tried in March 2004. A third was a Federal Magistrates Court proceeding heard in December 2006 which apparently concerned custody issues. The 2016 Statement of Claim also refers to proceedings in which Dillons Solicitors acted for Mr Catchpole's widow, the earliest of which was heard in the Supreme Court of Queensland in October 2008. Ms Banaghan is a solicitor who was employed by Dillons Solicitors.

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4 AB138-161. In this pleading, she was named as Plaintiff and the four respondents as the First to Fourth Defendants. Ms Highland was named as the Fifth Defendant.

5 AB21; Judgment p4 ll28-30.

6 Outline of Submissions filed 8 March 2016 paragraph 2: AB167.

7 AB176.

8 AB199-203.

[10] Ms Highland is a person who, it is alleged by Ms Creevey, was Mr Catchpole's de facto partner from October 1993 for an unspecified period of time. The 2016 Statement of Claim implies that, at some point, Ms Highland became registered as a shareholder in Viclen. It pleads that she was "still listed as the 98% shareholder" in 2003.

[11] In principal, the relief claimed by Ms Creevey in the 2016 Statement of Claim against all respondents, including the proposed fifth respondent, are related to child support payments that she alleges were not ordered to be paid to her in the 2003 proceeding, a circumstance which she complains came about as a result of conduct on the part of the respondents which she impugns as having been fraudulent. This is evident from paragraph 38 thereof which pleads:

> "Negligible child support payments caused the Plaintiff to remain in unsafe employment, causing debilitating ongoing health problems, resulting in the loss of her employment, the family home and inheritances, inter alia, and leading to severe traumas and ongoing hardships and continue to do so, today."[9]

[12] By way of relief, Ms Creevey claims "arrears" of child support of $631,106.55 together with interest thereon of $708,416.90, and damages consisting of the following components:

(i)	Aggravated damages for "extraordinary and severe traumas endured over two decades":	$200,000
(ii)	General damages for "prevention of the right to provide for necessities for children":	$240,000
(iii)	Loss on a forced sale of a residential property at Earlville in Cairns:	$350,000
(iv)	Lost income and superannuation:	$657,000

[13] There is also a sum of $130,000 claimed as damages for a loss of interim payments from 2001 to 2004 by way of inheritance which Ms Creevey relates to the manner in which litigation over Mr Catchpole's estate was conducted by Dillons Solicitors in 2008.

[14] In very broad terms, the alleged frauds of which Ms Creevey complains are that, in the child support proceeding, the Bakers facilitated the appearance that Mr Catchpole did not have a beneficial interest in either Viclen or Herriott and that Mr Dillon and Ms Banaghan conducted that litigation on the basis that Mr Catchpole was indigent, when they knew that that was not the case. In relation to the estate proceeding, the complaint is that the solicitor respondents, in acting for the widow, knowingly under-represented Mr Catchpole's income and assets and over-represented legal fees owed to them, to Ms Creevey's disadvantage.

The grounds of appeal

[15] This appeal is against the exercise of a discretion. In order to vitiate the exercise of the discretion here, Ms Creevey need demonstrate an error on the part of the learned primary judge of a kind described in *House v The King*.[10] In her submissions, Ms Creevey maintained that the learned primary judge had misapprehended the 2016

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9 AB159.

10 (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 505.

Statement of Claim and had thereby erred in concluding that it, like the 2013 Statement of Claim, suffered from "incurable pleading defects".[11]

[16] I would mention at this point that in beginning her oral submissions, Ms Creevey contended that the principal reason given by the learned primary judge for his refusal to make an order under r 389(2) was delay on her part. It was further contended that his Honour failed to have regard to evidence adduced by her as to her health problems, impecuniosity, lack of legal assistance and difficulty in accessing records in order to explain the delay. In the face of that evidence, it was wrong for his Honour to have refused the order.

[17] These contentions cannot be accepted. It is clear from his Honour's reasons that he was conscious of those evidential factors.[12] It is equally clear that he did not refuse the order sought because of the delay itself or a failure to explain the delay. The refusal was on account of deficiencies in pleading a viable case.

[18] Apart from challenging the exercise of the discretion, Ms Creevey has sought to impeach the integrity of the proceeding at first instance at two levels. One is bias on the part of the learned primary judge. The second is a denial of natural justice. It is convenient to consider these issues first.

Bias

[19] At the hearing at first instance, the solicitor for Mr Dillon and Ms Banaghan was asked by the learned primary judge when the proceeding had been started. When told that it was in 2010, his Honour commented, "[w]ell, delay is going to be fatal." The solicitor agreed with that comment and continued, saying, "[b]efore your Honour deals with the application against my clients, Mr Baker and his wife …" At that point, his Honour spoke, saying, "[s]orry. Delay can be fatal."[13]

[20] The submission made by Ms Creevey is that his Honour's initial comment that delay would be fatal demonstrated apparent bias akin to prejudgment on his part. I am unable to accept that submission for two reasons.

[21] First, his Honour disavowed the comment almost immediately. In an apparent self-correction, he re-cast it by substituting "can" for "is". As re-cast, the comment accurately states the law. In view of the correction, it is implausible that his Honour acted upon the uncorrected comment.

[22] Secondly, his Honour's process of reasoning, to which I have referred, reveals that he did not act upon the footing that because there had been delay, the order sought must be refused. The order was refused for another, and unrelated, reason.

Natural justice

[23] Ms Creevey has not identified any aspect of the hearing before the learned primary judge which she contends resulted in a denial of natural justice to her as that expression is understood in ordinary legal concepts. The concept that she apparently intends to invoke by the use of the expression "denial of natural justice" is of the nature of a deduction, namely, because, as she would say, the orders sought by her

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11 AB20: Judgment p3 ll43-44.
12 AB19: Judgment p2 ll32-43.
13 AB4; Tr1-4 l40 – AB5; Tr1-5 l1.

were wrongly refused and the order striking out the proceeding was wrongly made, it follows that she must have been denied justice.

[24] That line of reasoning does not, of course, disclose a basis for impeaching the integrity of the hearing at the first instance. At its highest, it draws attention to the question of whether the learned primary judge erred in exercising the discretion. I now turn to that question.

The exercise of the discretion – refusal of order under r 389(2)

[25] No issue was taken by Ms Creevey with respect to the adoption by the learned primary judge of the principles guiding the exercise of the discretion under r 389(2) enunciated in the decision of this Court in *Tyler v Custom Credit Corp Ltd*.[14] Nor did she question his Honour's acceptance of the proposition affirmed by Applegarth J in *Artahs Pty Ltd v Gall Stanfield & Smith (A Firm)*[15] that, whereas for an application under r 389(2) a detailed consideration of the plaintiff's prospects will not usually be necessary or appropriate, the prospects may assume a greater significance where the plaintiff's case appears doomed to fail.

[26] At the heart of Ms Creevey's submissions on this issue is her challenge to the characterisation by the learned primary judge of the 2016 Statement of Claim as one that retains the fundamental defects that had been identified in the 2013 Statement of Claim. In particular, Ms Creevey criticised a table in the written submissions for Mr Dillon and Ms Banaghan at first instance[16] in which certain key paragraphs in the 2016 Statement of Claim were categorised as being comparable with key paragraphs in the 2013 Statement of Claim.

[27] Ms Creevey contended that the table was inaccurate because improvements had been made by way of more detailed particularisation which addressed defects in the antecedent pleading. In written submissions, she allowed for one exception, namely, a failure to plead specifically s 408C of the *Criminal Code* (Qld), which enacts the crime of fraud. That omission, Ms Creevey submitted, could be addressed by simple amendment. This concession, I must say, reveals a significant misapprehension on Ms Creevey's part. That statutory provision does not, of itself, lay a basis for recovery of damages under the civil law.

[28] To illustrate her criticism of the table, Ms Creevey took the Court to paragraphs 15(a) and 17 of the 2016 Statement of Claim which, according to the table, are comparable with paragraphs 25, 31 and 33 of the 2013 Statement of Claim. Paragraph 15(a) is the first of five sub-paragraphs in paragraph 15 which impugn alleged conduct on Mr Dillon's part. It is pleaded as follows:

> "15. OPPOSITE AND CONTRADICTORY ARGUMENTS IN TWO DIFFERENT COURTS:
>
> (a). The Third Defendant, knowingly and fraudulently, acted for Len Catchpole, in two separate Court matters, in two different Courts, overlapping the same period of time, by facilitating the submission/presentation of two opposite

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14 [2000] QCA 178, per Atkinson J at [2] (McMurdo P and McPherson JA agreeing).

15 (2011) QSC 273 at [24]. This proposition was neither challenged nor discredited on appeal at [2012] QCA 272; [2013] 2 Qd R 202.

16 At paragraph 13: AB171.

> and contradictory submissions/arguments AND the Third Defendant knowingly and fraudulently facilitated the submission/presentation of false evidence, in at least one of these two Court matters."[17]

[29] Paragraph 17 is intended to supplement paragraph 15(a) with more detail. It is pleaded in these terms:

> "OPPOSITE AND CONTRADICTORY ARGUMENTS IN TWO DIFFERENT COURTS:
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> 17. (a) In February, 2003, the Third Defendant, whilst providing legal representation for Len Catchpole in Federal Magistrates Family Court File No. 3284/02 trial, instructed or enabled instructions to Counsel Fleetwood, to submit evidence, claiming that Len Catchpole was in poor financial straits, surviving on partial welfare payments and financial support from his then wife, Ms Clark AND that Len Catchpole could not afford to pay more child support. Len Catchpole had averaged paying $24.89 per week for child support, for the previous 10 years, since 1993, for his two children.
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> (b) However, in March, 2004, the Third Defendant, whilst providing legal representation for Len Catchpole in the District Civil Court File No. 4465/00 trial, instructed or enabled instructions for Counsel Elliadis, to submit evidence and testimony, that Len Catchpole had earned much more than $130,000.00 each year, from 1993 to 1999 AND that Len Catchpole had transferred his shareholdings in Viclen Homes Pty. Ltd. to the First Defendant and latterly to the Fifth Defendant, because the Plaintiff was hounding him for child support payments.
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> (c) The Third Defendant, instructed or enabled instructions for Counsel Elliadis and Len Catchpole's testimony in District Civil Court File No. 4465/00 trial in March, 2004, where Len Catchpole testified that the company, Viclen Homes Pty. Ltd., paid for tens of thousands of dollars of his personal expenses and that he purchased a $300,000.00 business, generating yet more income over and above the $130,000.00 plus, he earned from his industrial consultancy business AND YET the Third Defendant enabled the submission of evidence in the Federal Magistrates Family Court File 3284/02 trial in February, 2003, that Len Catchpole 'would suffer hardship' if he had to pay any more monies to the Plaintiff.
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> (d) Further, the Third Defendant enabled the filing of Len Catchpole's Affidavit of 20/02/03, wherein he deposed that he did not receive income from an alleged dormant or frozen bank account in Zambia, YET the Third Defendant enabled Len Catchpole's testimony in the District Civil

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17 AB144.

> Court File No. 4465/00 trial in March, 2004, wherein Len Catchpole testified that he had received large sums of monies from this alleged dormant or frozen Zambian bank account AND the Plaintiff produced documentary records in the Federal Magistrates Family Court File No. 3284/02 in 2003, of Len Catchpole having accessed and having access to such funds."[18]

[30] It may be accepted that paragraphs 15(a) and 17 do not exactly replicate paragraphs 25, 31 and 33 of the 2013 Statement of Claim. There is, perhaps, scope for debate as to the degree to which they are analogous with each other. However, there is little to be gained by examining that question. The critical question is whether paragraphs 15(a) and 17 competently plead fraudulent conduct on the part of Mr Dillon. Addressing that question exemplifies the approach taken by the learned primary judge.

[31] There are, in my view, fundamental problems with those two paragraphs. Yet they are central to Ms Creevey's complaints which, it will be recalled, stem principally from the way in which the 2003 child support proceeding in the Federal Magistrates Court was defended for Mr Catchpole. They are directly related, too, to the heads of damage she claims in that they are, to a very large extent, based on a claimed insufficiency in the child support payments.

[32] The problems are these. Firstly, neither paragraph 15(a) nor paragraph 17 allege a factual basis for the allegation that Mr Dillon knew that evidence tendered or testimony given in that proceeding was false. Secondly, so far as evidence tendered and testimony given in the District Court proceeding in 2004, pleaded in paragraph 17(b), (c) and (d), are concerned, there is embarrassment at two levels. One is that such evidence and testimony, tendered and given as they were about a year after the Federal Magistrates Court proceeding, could not have informed Mr Dillon's knowledge in February 2003. The other is that the evidence and testimony, referred to in paragraph 17(b), concerned Mr Catchpole's earnings between 1993 and 1999, and not his income or assets in February 2003.

[33] When the problems with these paragraphs were pointed out to Ms Creevey at the hearing of the appeal, she moved from a stance of defending the 2016 Statement of Claim to one of requesting one more chance to prepare a coherent statement of claim.

[34] Similar problems attend other sub-paragraphs in paragraph 15. Paragraph 15(b), for example, which is headed "Submission of False Documents and Testimony", is developed in paragraph 18. That paragraph, however, is replete with references to evidence tendered and testimony given in the 2008 Supreme Court estate proceeding as well as in the 2004 District Court proceeding. How that evidence informed Mr Dillon's knowledge at the time of the 2003 Federal Magistrates Court proceeding is unpleaded.

[35] These problems also attend the case pleaded against Ms Banaghan which, in paragraph 23 of the 2016 Statement of Claim adopts the case pleaded against Mr Dillon in paragraph 15. The additional pleading of fraud on Ms Banaghan's part in respect of the estate proceeding as developed in paragraph 31 of the 2016 Statement of Claim, also fails to plead a factual basis for asserting knowledge on Ms Banaghan's part that evidence tendered and testimony given in it were false.

[36] No less serious problems attend the problem of fraud against Mr Baker and the derivative pleading of it against Mrs Baker.

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18 AB145-146.

[37] Paragraph 7(a) of the 2016 Statement of Claim alleges that Mr Baker knowingly and fraudulently represented himself "as a registered beneficial shareholder of [Viclen and Herriott] with the Australian Securities and Investments Commission ("ASIC"), when in fact, [Mr Baker] was only ever an employee… and [Mr Catchpole] was the true beneficial shareholder."[19]

[38] In the first place, a record of ownership of a share in a company on a register maintained by ASIC is, of course, a record of legal ownership. It does not evidence, or represent, beneficial ownership of the share. More fundamentally, the pleading does not elucidate how a record of registration of Mr Baker as a shareholder in Viclen from 1993 to 1998 or of Herriott from 2004 to 2008[20] could have constituted a representation by him that he owned a share or shares in either company in February 2003 when the child support payments proceeding was heard and determined, nor of the nature of share ownership.

[39] The 2016 Statement of Claim is also seriously deficient with respect to the element of causation. Paragraph 38, set out above, is the only occasion in which specific reference is made to it. However, no causative link is pleaded between the conduct alleged against the respondents and the heads of loss for which damages are claimed.

[40] For these reasons, I would reject Ms Creevey's contention that the learned primary judge misapprehended the 2016 Statement of Claim. I accept the submissions made on behalf of Mr Dillon and Ms Banaghan that that statement of claim fails to disclose a reasonable cause of action against any respondent and, for that matter, against Ms Highland. In its current form, it would have a tendency to prejudice or delay a fair trial of the proceeding.[21] It is, in this sense, embarrassing.[22] His Honour did not err in reaching a conclusion to that effect.

[41] That being so, it follows, in my view, that his Honour correctly refused to make an order under r 389(2). Had such an order been made in order to legitimise the filing of the 2016 Statement of Claim, that pleading would have been liable to have been stuck out under r 171(2).

[42] I would mention, in this context, that Ms Creevey's request of this Court to give her one more chance to plead suggests that some consideration might be given to whether the learned primary judge erred in failing to make an order under r 389(2) and at the same time granting leave to plead yet again. The issue is, I note, hypothetical in that no such order for leave was sought. Thus, there cannot have been any error on his Honour's part in not making combined orders of that kind.

[43] That aside, there are very considerable discretionary reasons why an order granting leave ought not have been made had it been sought. They include the circumstance that two seriously deficient statements of claim have already been prepared, one almost three years after the other and in non-compliance with the terms of an earlier grant of leave. Further, whereas, before this Court, Ms Creevey hinted at possibilities of her obtaining qualified legal assistance to plead, she produced no evidence of the availability of such assistance either on appeal or before the learned primary judge.

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19 AB139.

20 As noted earlier in these reasons, these are the shareholder pleadings against Mr Baker in paragraphs 9(i) and 10(a) of the 2016 Statement of Claim.

21 See UCPR rr 171(1)(a) and (b).

22 Cf the broadly similar deficiencies in the pleading for which leave to file was refused in *Fuller v Toms and Ors* [2010] QCA 283, especially per Fraser JA at [18].

The exercise of the discretion – strike out of proceeding

[44] Once it is accepted that the refusal of an order under r 389(2) was made without error, the question arises whether the subsequent order dismissing the proceeding was also made without error. No separate error was alleged by Ms Creevey at this level. That is not unsurprising. Where she has failed to obtain an order under r 389(2), her proceeding has no future. She does not have the benefit of an order permitting her to take any further step in the proceeding, particularly the step of filing a further statement of claim.

[45] As the decision in *Tyler* reminds, the interests of the respondents need also to be considered. This proceeding has been on foot for six years now. It has not advanced to a point of a competent statement of claim. There is no reasonable prospect that such a pleading might foreseeably emerge as could perhaps warrant a fresh application under r 389(2). To trouble the respondents and Ms Highland further with the proceeding is not in anyone's interests.

Disposition

[46] Ms Creevey has not established a viable ground of appeal. Her appeal must be dismissed. An order that she pay the respondents' costs ought be made.

Order

[47] I would propose the following orders:

1. Appeal dismissed.

2. Appellant to pay the respondents' costs of the appeal on the standard basis.

[48] **PHILIPPIDES JA:** I agree for the reasons stated by Gotterson JA that the appeal should be dismissed with costs.