SUPREME COURT OF QUEENSLAND

CITATION:	*Ure v Robertson & Ors* [2016] QSC 210
PARTIES:	**LYNNE KATHLEEN URE** (plaintiff) **v** **PATRICIA JUNE ROBERTSON** (defendant) AND **LYNNE KATHLEEN URE** (first defendant by counterclaim) AND **RONALD URE** (second defendant by counterclaim) AND **SUMMERHILL PROPERTY DEVELOPMENTS PTY LTD (ACN 010 558 460)** (third defendant by counterclaim)
FILE NO:	No 2634 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	16 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The parties will be heard on the appropriate form of order to give effect to paragraphs [1] to [95] of these reasons.** **2. The defendant's application for an order releasing the undertaking given to the Federal Court is refused.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – WANT OF PROSECUTION OR LACK OF PROGRESS – where the plaintiff filed a claim in March 2007 and the defendant filed a counterclaim in September 2010 – where the case concerned

an alleged oral agreement made almost 10 years ago, and the parties proposed to expand the dispute to encompass prior business dealings – where there were long periods of delay caused by different sides of the record at different times – where the more recent delay was the responsibility of the plaintiff and defendants by counterclaim, but the defendant had also done nothing to progress the counterclaim – where the defendant applied to dismiss the claim for want of prosecution and the plaintiff applied for leave to proceed – where UCPR r 389 provided that if no step was taken in a proceeding for 2 years, a new step could not be taken without an order of the court – whether the claim and the counterclaim should be dismissed for want of prosecution

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – UNDERTAKING IN COURSE OF LEGAL PROCEEDING – whether a state court could make an order relieving a party from an undertaking given to the Federal Court

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), s 4, s 5
Limitation of Actions Act 1974 (Qld), s 10
Rules of the Supreme Court 1900 (Qld), O 90 r 9, O 93 r 17, O 93 r 18
Uniform Civil Procedure Rules 1999 (Qld), r 280, r 371, r 389

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
Australian Securities and Investments Commission v McIntyre [2008] 1 Qd R 26; [2007] QSC 139, cited
Batistatos v Roads and Transport Authority of New South Wales (2006) 226 CLR 256; [2006] HCA 27, cited
Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 WLR 485, cited
Cooper v Hopgood & Ganim [1999] 2 Qd R 113; [1998] QCA 114, applied
Fitzpatrick v Batger & Co Ltd [1967] 1 WLR 706, cited
Kanyilmaz v Nominal Defendant (Qld) [2000] QSC 180, distinguished
Menegazzo v Pricewaterhousecoopers (A Firm) [2016] QSC 94, cited
NgAti Te Ata v *New Zealand Steel Mining Limited* [2015] NZCA 547, cited
Perez v Transfield (Qld) Pty Ltd [1979] Qd R 444, distinguished
Quinlan v Rothwell [2002] 1 Qd R 647; [2001] QCA 176, cited
Tate v McLeod [1969] Qd R 217, cited
Tyler v Custom Credit Corp Ltd [2000] QCA 178, applied

William Crosby & Co Pty Ltd v The Commonwealth (1963) 109 CLR 490; [1963] HCA 6, cited

COUNSEL: N Ferrett for the plaintiff
B Porter for the defendant

SOLICITORS: HopgoodGanim Lawyers for the plaintiff
Tucker & Cowen for the defendant

[1] **Jackson J:** On 15 July 2016 the defendant applied to dismiss the claim in the proceeding for want of prosecution. On 11 August 2016 the plaintiff cross-applied for leave to proceed.

[2] This court has inherent power to dismiss a proceeding for want of prosecution.[1] Surprisingly, perhaps, the first reported cases where such an order was made under the inherent power appear to be from the late 1960s: *Tate v McLeod*[2] in this court and *Fitzpatrick v Batger & Co Ltd*[3] in England and Wales.

[3] However, r 280 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") relevantly provides:

> "(1) If—
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> (a) the plaintiff or applicant is required to take a step required by these rules or comply with an order of the court within a stated time; and
>
> (b) the plaintiff or applicant does not do what is required within the time stated for doing the act;
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> a defendant or respondent in the proceeding may apply to the court for an order dismissing the proceeding for want of prosecution.
>
> (2) The court may dismiss the proceeding or make another order it considers appropriate.
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> (3) An order dismissing the proceeding for want of prosecution may be set aside only on appeal or if the parties agree to it being set aside."

[4] Recognising that the inherent power of this court to strike out a proceeding for want of prosecution remains, r 280 exists in the context of other relevant rules in the UCPR. The statutory structure was described with precision by Thomas JA in *Quinlan v Rothwell*[4] as follows:

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1 See the note to the *Civil Proceedings Act* 2011 (Qld), s 22 in LexisNexis, *Civil Procedure Queensland*, vol 2, [54,103.10].
2 [1969] Qd R 217.
3 [1967] 1 WLR 706.
4 [2002] 1 Qd R 647.

"Under the current law, and in particular since the introduction of the [UCPR], there are several sources of jurisdiction to dismiss for non-compliance with rules or for want of prosecution of proceedings:

(a) There is a general statutory discretion to dismiss a proceeding when two years have passed since the last step was taken;

(b) Rule 5(3) of the UCPR recognises that a party impliedly undertakes to the court and to the other parties to proceed expeditiously, and r 5(4) permits the court to 'impose appropriate sanctions' if a party does not comply with the rules or an order of the court;

(c) Rule 280 permits the making of an order dismissing the proceeding if a plaintiff or applicant fails to take a step required by the rules or fails to comply with an order of the court within a stated time;

(d) Rule 371(2) restates the longstanding power of the court to set aside all or part of a proceeding if there has been a failure to comply with the rules, at the same time recognising that a failure to comply with the rules is an irregularity only."[5] (footnotes omitted)

[5] The express statutory discretion to dismiss a proceeding when two years have passed since the last step was taken applies to the District Court and Magistrates Courts, but not to the Supreme Court as such.[6]

[6] In this court, apart from the inherent power or the powers under the rules to dismiss or strike out, when two years has passed since the last step was taken, UCPR r 389 also provides:

"(2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice."

[7] Accordingly, when no party has taken a step in the proceeding for two years, the proceeding is stayed, in effect ("a new step may not be taken").

[8] That prohibition is subject to r 371 of the UCPR which provides as follows:

"(1) A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken or order made in a proceeding, a nullity.

(2) Subject to rules 372 and 373, if there has been a failure to comply with these rules, the court may—

(a) set aside all or part of the proceeding; or

(b) set aside a step taken in the proceeding or order made in the proceeding; or

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5 [2002] 1 Qd R 647, 653-654 [14].

6 *Civil Proceedings Act* 2011 (Qld), s 22 which notes that the Supreme Court "has inherent power to dismiss proceedings for want of prosecution".

(c) declare a document or step taken to be ineffectual; or

(d) declare a document or step taken to be effectual; or

(e) make another order that could be made under these rules (including an order dealing with the proceeding generally as the court considers appropriate); or

(f) make such other order dealing with the proceeding generally as the court considers appropriate."

[9] Although prior cases have dealt with some of these points, it is appropriate to make two observations as to the current statutory structure under the rules mentioned above.

[10] First, r 389(1) of the UCPR is derived from former O 90 r 9 of the *Rules of the Supreme Court* 1900 (Qld). That rule differed from equivalent rules in other jurisdictions because it provided that when three years had elapsed from the time when the last proceeding was taken, no fresh proceeding should be taken without the order of the court or a judge. Other jurisdictions did not have the provision for an automatic stay of the kind created under UCPR r 389(1). The exception was the High Court of Australia, perhaps because the former rules of that court were derived from the Queensland rules of 1900. The origins and purposes of the former High Court rule were discussed in *William Crosby & Co Pty Ltd v The Commonwealth*.[7]

[11] Second, r 371 is derived from the former O 93 r 17 and O 93 r 18 of the *Rules of the Supreme Court* 1900 (Qld). As was explained by Hoare J in *Perez v Transfield (Qld) Pty Ltd*,[8] O 93 r 17 was introduced in 1965 so as to remove the distinction that formerly existed between a nullity and an irregularity in relation to non-compliance with the rules of court.

[12] However, there is a significant difference between the form of the rules of court at the time when *Perez* was decided and the current UCPR. When *Perez* was decided, there was an express limit that applied to an application under O 93 r 17 to set aside any step for irregularity. Order 93 r 18 was follows:

> "An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

[13] The consequence of O 93 r 18 can be seen in the reasons for judgment in *Perez.* Once it was concluded that the failure of a party to observe the requirements of O 90 r 9 was an irregularity within the meaning of O 93 r 17, it followed that:

> "Such an application must be made within a reasonable time (O 93 r 18) otherwise that party will lose his rights under O 93 r 17(2). So understood the effect of O 90 r 9 will generally remain unimpaired. A prudent litigant will continue to make applications to the court as required by the rule. Should

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7 (1963) 109 CLR 490, 493-495.
8 [1979] Qd R 444, 450-452.

> he fail to do so the onus is on the other side to make the application. It is only if he fails to make the application within a reasonable time that the party loses his rights to rely on the provisions of O 90 r 9."[9]

[14] This was described by Lucas J in *Perez* as follows:

> "… This result is not in accordance with the intention disclosed in O 90 r 9. As a member of the committee which was responsible for the revision of the rules in 1965, I must take a share of the blame."[10]

[15] In my view, the removal of any equivalent to O 93 r 18 from the UCPR in 1999 means that *Perez* no longer represents the law.

[16] There is no conflict between that conclusion and the decision of Muir J in *Kanyilmaz v Nominal Defendant (Qld)*[11] because in that case, although the application was heard after the introduction of the UCPR, the relevant step was taken out of time and no application was made to set it aside when the prior rules, being O 93 rr 17 and 18, applied.

[17] If that reasoning be right, it follows that the effect of r 389(2) is not avoided simply because the opposite party does not make a prompt application to set aside a step taken in contravention of the prohibition within a reasonable time.

[18] Accordingly, where there has been delay in taking a step in a proceeding for two years or more, the question of whether the proceeding should be permitted to continue will arise first on an application for an order that a new step may be taken under r 389(2), although it may equally arise on an application to dismiss the proceeding for want of prosecution. It is unsurprising, therefore, that the factors to consider in deciding whether or not to dismiss a proceeding for want of prosecution or whether to give "leave to proceed" under r 389(2)[12] are much the same. That conclusion is supported by the reasons of Atkinson J in *Tyler v Custom Credit Corp Ltd*, where a well-known statement of the relevant factors is set out.[13]

[19] Another relevant statement was made by McPherson JA in *Cooper v Hopgood & Ganim*,[14] which was repeated by Thomas JA in relation to the current rules of court in *Quinlan v Rothwell*[15] and other cases[16] as follows:

> "*Birkett v James* suggests only some of the factors relevant in exercising the discretion, which include matters such as the duration of the time lapse involved; the cogency of any explanation for delay; the probable impact of procrastination on fading recollection; the death or disappearance of critical witnesses or records; costs already or likely in future to be expended or thrown away; the apparent prospects of success or otherwise at a trial of the

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9 *Perez v Transfield (Qld) Pty Ltd* [1979] Qd R 444, 452.
10 *Perez v Transfield (Qld) Pty Ltd* [1979] Qd R 444, 447.
11 [2000] QSC 180.
12 The rule does not use that expression but it commonly appears in the case law.
13 [2000] QCA 178, [2].
14 [1999] 2 Qd R 113.
15 [2002] 1 Qd R 647, 657 [27].
16 For example, *Australian Securities and Investments Commission v McIntyre* [2008] 1 Qd R 26, 30 [12].

> action; and the progressively growing problem of effectively hearing and determining questions of fact arising out of events that have taken place many years before. The list is not, and is not intended to be, exhaustive; and it takes no account of another factor that is often likely to be material, which is that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them. The psychological as well as the commercial effects of such a state of affairs ought not to be underestimated."[17]

A family business dispute

[20] The plaintiff and the defendant to the claim are sisters-in-law. The defendant is 81 years old. Her brother ("Mr Ure") is the plaintiff's wife and the second defendant by counterclaim. Until about 2007 they were engaged in business together in one form or another. As will appear later, the parties appear to wish to expand the scope of their dispute from that presently encompassed by the claim. It is necessary, therefore, to briefly summarise their relationship as indicated or described by that evidence.

[21] Commencing from about 1979, the defendant and Mr Ure were involved in business dealings which included:

(a) operating the Aloha Surf Motel on the Gold Coast;

(b) property development conducted by Hardgrave Property Developments Pty Ltd; and

(c) property development conducted by Summerhilll Property Developments Pty Ltd.

[22] In about 1986, the defendant and Mr Ure each bought adjoining undeveloped residential lots of land at 12 and 10 Park Road Noosa Heads, respectively. Both had the intention to build houses. There was a long process involved in obtaining development approval. Mr Ure's application was decided in 2002.[18] Ultimately, an approval was obtained to build a house on each of the lots by 2006.

[23] The plaintiff's claim is that she and the defendant agreed that the plaintiff "for reward, would take all steps necessary to obtain [approvals] in respect of the [defendant's lot] for the benefit of [the defendant]".

[24] The plaintiff alleges that on 27 November 2006 the plaintiff and defendant orally agreed that:

(a) the plaintiff would attend to obtaining building and operational works approval for the property; and

(b) the defendant would pay for services provided by the plaintiff from 2002 and for further services as to the approvals, in the sum of $800,000

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[17] *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113, 124.
[18] *Ure v Noosa Shire Council* [2003] 1 Qd R 586.

net of architects and engineers' fees from the settlement of the sale of the defendant's property.

[25] The defendant denies the alleged contract.

[26] On affidavit, the defendant says that she visited the plaintiff's and Mr Ure's home on or about 27 November 2006. Her brother was ill at the time. She says the plaintiff asked her for more than $1 million and then $800,000 because the plaintiff and her brother were in financial difficulty. The defendant says she made no promise to give any money.

[27] In affidavits sworn for the purpose of this application, Mr Ure and the plaintiff say that the agreement to pay $800,000 was made. However, they say that it was not for (or only for) the plaintiff's work in organising approvals but was a settlement of the outstanding entitlements of Mr Ure against the defendant for unequal contributions to their joint business endeavours over the years.

[28] In January 2007, the defendant entered into a contract to sell her property for $3.015 million. Settlement was due to occur on 22 February 2007.

[29] On 25 January 2007, the plaintiff and Mr Ure demanded $800,000 for services rendered in obtaining approvals for the property. They threatened to register a caveat absent agreement by the defendant to pay that sum.

[30] In those circumstances, the parties agreed that the defendant would pay $800,000 into her solicitor's trust account from the sale proceeds pending resolution of the plaintiff's claim.

[31] On 26 March 2007, the current proceeding was started by claim.

[32] On 28 July 2008, the trial of the proceeding was adjourned to 28 October 2008.

[33] On 28 October 2008, the trial of the proceeding came on for hearing. It was adjourned to a date to be fixed. An order was made that the defendant pay the plaintiff's costs of the adjournment.

[34] On 3 September 2010, the defendant filed a counterclaim against the plaintiff and the other defendants by counterclaim, being Mr Ure and Summerhill Property Developments Pty Ltd.

[35] On 17 November 2010, the defendants by counterclaim applied to strike out parts of the counterclaim and for an order for inspection of documents.

[36] On 22 December 2010, A Lyons J ordered that parts of the counterclaim be struck out. These parts were critical to the counterclaims made against Mr Ure for fraudulently misappropriating the defendant's share of the profits of her alleged partnership or joint venture with Mr Ure, and any liability of the plaintiff and Summerhill Developments Pty for being knowingly concerned in that conduct.

[37] The order also provided for:

(a) Mr Ure and Summerhill Developments Pty Ltd to make disclosure by 30 April 2011;

(b) the defendant to replead her counterclaim by 31 May 2011;

(c) the defendants by counterclaim to file and serve a reply and answer by 30 June 2011.

[38] On 4 February 2011, it was ordered that the defendant pay the amount of $51,771.74 as costs of the October 2008 adjournment of the trial.

[39] On 19 April 2011, the plaintiff served a bankruptcy notice on the defendant to pay the amount of $51,771.74.

[40] On 30 September 2011, the defendant was made bankrupt based on non-compliance with the final order for payment of the plaintiff's costs.

[41] On 28 June 2013, the bankruptcy order was annulled.

[42] On 10 February 2014, the plaintiff's appeal from the order of annulment was settled and consent orders were made dismissing the appeal.

[43] On 11 March 2015, the defendant by her solicitors complained of non-compliance with the order for disclosure made on 22 December 2010 and threatened to apply to dismiss the proceeding for want of prosecution.

[44] On 20 March 2015, the plaintiff and defendants by counterclaim's solicitors responded, providing lists of documents.

[45] On 2 November 2015, the defendant by new solicitors again threatened to apply to dismiss the proceeding for want of prosecution.

[46] On 17 November 2015, the plaintiff and defendants by counterclaim's solicitors wrote to the defendant seeking time to respond.

[47] On 22 December 2015, the plaintiff and defendants by counterclaim's solicitors responded as a matter of substance, stating an intention to amend the claim and statement of claim and requesting that the defendant await further developments.

[48] On 15 July 2016, the defendant applied to dismiss the proceeding for want of prosecution.

Progress and scope of the proceeding

[49] Although the proceeding as constituted by the plaintiff's claim was set down for trial in 2008, on any view it is nowhere ready for trial. The plaintiff has not yet reached a finalised statement of claim, let alone subsequent pleadings or interlocutory steps.

[50] As foreshadowed by the summary set out previously, there are two respects in which the plaintiff intends to add to the claim made by the claim and statement of claim.

[51] First, on the claim for $800,000 made in the current statement of claim the plaintiff seeks to change her position so that the consideration moving from the plaintiff for the alleged contractual payment was not simply the services including obtaining building and operational works approvals. The plaintiff now states that this was also a settlement of the outstanding entitlement of Mr Ure against the defendant for unequal contributions to the joint business endeavours, and to settle up the affairs of the parties over their long history of business arrangements. An additional factor appears to be that Mr Ure says that he personally provided the purchase price for the defendant's lot.

[52] Second, by their solicitor's letter to the defendant's solicitors dated 22 December 2015, the plaintiff and Mr Ure gave notice that "a further cause of action will need to be pleaded on behalf of Mr Ure and related entities – based in equity on the transactions carried out in furtherance of the Joint Undertakings." They notified the defendant that Mr Ure was in the process of quantifying the claim in equity with a forensic accountant but that (then) current indications were that it would exceed $1.5 million.

[53] As yet, it does not appear that the proposed further claim has been formulated, although Mr Ure's affidavit seems to have been intended to raise aspects relevant to it.

[54] However, the unresolved scope of the proceeding if it were to continue is not confined to the plaintiff and Mr Ure's claims. The defendant's counterclaim has not been pleaded in accordance with the rules of court. That led to the order of A Lyons J striking out paragraphs of the counterclaim. Nevertheless, it appears that the defendant wishes to claim against Mr Ure an account of all monies received by Mr Ure from proceeds of the development by Summerhill Developments Pty Ltd of land at Buderim.[19]

[55] In short, although the extent of their alleged joint business or accounting relationships said to give rise to the relief sought on the counterclaim and the proposed further claim by the plaintiff and Mr Ure may differ, they appear to stem from the same circumstances.

[56] Even so, all the major interlocutory steps in a proceeding of this kind are incomplete. The plaintiff and Mr Ure appear to propose that there would be evidence from a forensic accountant. But there is no real indication of the extent, cost or timing of the proposed expert evidence. So far the defendant has no basis to know what evidence of that kind she too might have to gather in response to the plaintiff and Mr Ure's amended claim, if any.

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[19] Similar claims are sought to be made against Summerhill Pty Ltd and the plaintiff.

[57] It seems clear that the defendant has not attempted any expert or other analysis of the documents disclosed by Mr Ure and Summerhill Developments Pty Ltd.

[58] The extent of the likely necessary interlocutory steps is great and unresolved.

Causes of delay

[59] The first stage of delay was between the start of the proceeding in March 2007 and April 2011.

[60] There was no appreciable delay revealed by the evidence up to the time when the plaintiff's claim was first set down for hearing in August 2008 and then set down for hearing on 28 October 2008.

[61] On 28 October 2008, the trial was adjourned at the defendant's application on the basis that the defendant pay the costs of the adjournment. From that date until 3 September 2010, the delay lies at the defendant's door. It might be said that there should be joint responsibility for some of that delay. However, it was not until 3 September 2010 that the defendant filed a counterclaim.

[62] On 17 November 2010, the plaintiff, Mr Ure and Summerhill Pty Ltd then brought a reasonably prompt and successful application to strike out critical paragraphs of the counterclaim. The application was decided by the order of A Lyons J made on 22 December 2010 providing directions for disclosure and further pleading in April and May 2011.

[63] The second stage of delay is between in April 2011 and 10 February 2014.

[64] On 19 April 2011, the plaintiff served the bankruptcy notice on the defendant. On 20 July 2011, the bankruptcy petition was heard. On 30 September 2011, a sequestration order was made. On 1 February 2012, the defendant applied to annul the sequestration order. On 18 May 2012, the application for annulment was heard. On 28 June 2013, the bankruptcy was annulled. In July 2013, the plaintiff appealed the order to annul the bankruptcy. On 10 February 2014, the appeal was compromised and orders were made disposing of it.

[65] The period of this delay cannot be laid squarely at the door of either of the parties, although the first non-compliance with an order of the court was the failure of Mr Ure and Summerhill Developments Pty Ltd to make further disclosure by 30 April 2011. However, from 30 September 2011 until 28 June 2013 the plaintiff's claim against the defendant was stayed by virtue of the sequestration order.[20]

[66] The third period of delay begins in substance on 10 February 2014, when the bankruptcy appeal was compromised, and runs to the present time.

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[20] *Bankruptcy Act* 1966 (Cth), s 58.

[67] On 11 March 2015, the defendant sent a r 444 notice to the plaintiff and defendants by counterclaim, complaining of the failure of Mr Ure to comply with the order for disclosure made on 22 December 2010. The letter stated that it sought the relief that the claim be dismissed or set aside, and separation of the counterclaim with summary judgment. On 20 March 2015, the solicitors for the plaintiff and defendants by counterclaim responded by enclosing lists of documents on behalf of Mr Ure and Summerhill Pty Ltd to remedy non-compliance with the outstanding order for disclosure. The parties to the proceeding then promptly went back to sleep.

[68] On 2 November 2015, new solicitors acting for the defendant wrote to the solicitors for the plaintiff and defendants by counterclaim, asserting that no step in the proceeding had been taken since the filing of the application dated 17 November 2010 (or arguably the making of the orders of A Lyons J on 22 December 2010). They contended that the parties required the leave of the court to take any further step under r 389 of the UCPR. They gave notice of the defendant's intention to apply to have the claim dismissed for want of prosecution and that, if such an order were made, the defendant did not intend to seek leave to proceed on the counterclaim.

[69] On 17 November 2015, new solicitors acting for the plaintiff and defendants by counterclaim responded, seeking 21 days to give a further response. On 22 December 2015, the solicitors for the plaintiff and defendants by counterclaim responded further, giving notice of intention to amend the claim as previously discussed and requesting that any application to strike out for want of prosecution be deferred until the defendant had the opportunity to consider a draft of the proposed amended statement of claim.

[70] Thereafter, no party progressed the proceeding until 15 July 2016 when the defendant's application to strike out the proceeding for want of prosecution was filed, spurring the plaintiff's cross-application for leave to proceed.

[71] The responsibility for this period of delay lies principally at the door of the plaintiff and defendants by counterclaim. From February 2014, when the bankruptcy appeal was compromised, there could be no doubt that Mr Ure and Summerhill Developments Pty Ltd were obliged to comply with their outstanding obligations as to disclosure. Nothing was done until complaint was made by the defendant over a year later in March 2015, following which there was peremptory compliance or attempted compliance with those obligations. The defendant could have, but did not then, contend that the time for compliance or taking a step without an order of the court authorising a further step under r 389(2) had expired.

[72] The defendant took no further step until November 2015 when, by her new solicitors, she made that contention and gave notice that she intended to apply to dismiss the proceeding for want of prosecution. Having been put squarely on that notice, the plaintiff and defendants by counterclaim sought more time and then responded by expressing an intention to significantly change the constitution of the proceedings and by seeking yet more time. However, even then, they did not take any step or seek an order authorising any further step. Hence, the delay throughout this period must be mostly their responsibility.

[73] Looking at the proceeding overall, the impression is of one long period of delay (over 2 years) caused by one side of the record, followed by another long period of delay (over 2.75 years) caused by both, followed by a third long period of delay (2.5 years) caused mostly by the other side of the record. The more recent delay has been the responsibility of the plaintiff and defendants by counterclaim. But the defendant has done nothing to progress the counterclaim either.

Prospects

[74] It is not possible to form a view that either party has prospects of success that are significantly better than the other. The defendant submits that the plaintiff's prospects of success on the claim as presently framed are poor because of the uncommercial amount claimed for the services. But that is not necessarily an obvious strength in the defendant's case and, in any event, the plaintiff and Mr Ure's recent affidavits and solicitors' correspondence since December 2015 meet the argument, at least in part, on the footing that the consideration for the sum of $800,000 included an agreement to settle the outstanding balances on the accounts as between the defendant and the plaintiff and Mr Ure. The defendant rightly enough submits that this is a significant departure from the case as it has been pleaded for almost 10 years. On the other hand, it is not greatly inconsistent with the defendant's counterclaim that there is accounting to be done for at least the Summerhill Developments Pty Ltd part of their prior business dealings.

Effect of delay on evidence

[75] The plaintiff and Mr Ure submit that this is not a case where the delay to date has caused a loss of the critical evidence as the plaintiff, Mr Ure and the defendant have given versions of the conversations relied upon in the statement of claim as the basis of the alleged contract for payment of $800,000.

[76] Whatever else is true, it can be confidently said that the affidavits on either side about the prior business dealings and the conversations as to any agreement and the accounting relationships and positions as between the parties are far from fulsome. Second, these affidavits were prepared in July and August of 2016, almost 10 years after the last of the relevant sequence of events which then extend further backward in time – back to the 1970s on Mr Ure's affidavit.

[77] Accordingly, in my view, there is every reason to think that the prospect of a fair hearing of the evidence of what actually passed between the parties in their oral communications relevant to their rights and liabilities inter se will have degraded from what may have been the position in 2008 when the proceeding on the plaintiff's claim first came on for trial.

[78] On the evidence, this is not a case that the court can say will be substantially proved on either side by documentary evidence. The plaintiff and defendants by counterclaim did not purport to prove that they still have possession of all relevant documents so as to be able to prove the extent of their dealings inter se. There is no document that evidences the contract alleged in the statement of claim. There is no document that evidences the

varied terms of that contract and the consideration for it as stated in the affidavits of the plaintiff and Mr Ure.

Impecuniosity

[79] Both parties rely on impecuniosity in support of their positions.

[80] The defendant submits that she is unable to pay or to borrow the funds to defend the proceeding. She is an 81 year old retiree with limited income other than a pension. Her home at Byron Bay is her major asset, but she is unable to borrow against it to pay her costs because she has undertaken to pay more than $380,000 to top up the agreed reductions to date to the amount paid into her solicitor's account in 2008 to abide the plaintiff's claim. She is unable to borrow more.

[81] The plaintiff and Mr Ure say that they have been unable to pay to fund the proceeding because of financial problems they have suffered in the wake of the global financial crisis. They have indicated from where the funds to progress the proceeding will come, but there are is an outstanding question whether they will be able to gather these funds.

[82] Neither party adduced evidence of the likely costs to reach the end of the proceedings. Nonetheless, given that the plaintiff and Mr Ure intend to apply to amend the claim to open up the whole of the accounting relationships between the parties since the 1970s and the defendant intends to do so by the counterclaim for the land transactions conducted through Summerhill Developments Pty Ltd, there must be a real question about the ability of either side of the record to fund the costs.

Health

[83] The plaintiff and Mr Ure say in their affidavits that they have had and have ongoing significant health problems.

[84] The defendant is 81 years old and says that she also has health problems.

Effect of dismissing the proceeding

[85] By her application, the defendant seeks an order declaring that service in March 2015 by Mr Ure and Summerhill Developments Pty Ltd of lists of documents be declared to be ineffectual as a step in the proceeding.

[86] In my view, it is not necessary to make such an order. The proceeding on the claim is in effect stayed under r 389(2). The defendants by counterclaim took an irregular step in serving the lists. But that step did not uplift the effect of r 389(2) upon the claim. Any contrary view is based on a misapprehension as to the continuing application of *Perez* under the present rules of court as previously discussed. Further, the irregular step was not one made in the part of the proceeding constituted by the plaintiff's claim. It was made in the part of the proceeding constituted by the counterclaim. The irregular step did not have the effect of releasing the plaintiff from the effect of r 389(2), under which the

plaintiff cannot take a further step in the proceeding on the claim without an order of the court.

[87] The submissions made on both sides did not recognise that the proceeding on the counterclaim is also stayed in effect under r 389(2). Neither party had taken any step in that part of the proceeding for more than two years before the irregular step. No step can be taken without an order of the court under r 389(2).

[88] If the proceeding on the claim is in effect stayed under r 389(2), is it necessary to order that it be dismissed for want of prosecution? In *William Crosby*, the High Court held that an equivalent rule stayed the proceeding and the defendant effectively withdrew an application to dismiss for want of prosecution. However, such an order is appropriate if leave to proceed is not ordered because the proceeding should be forever stayed.

[89] The parties disputed what would be the effect of such an order.

[90] Any further claim by the plaintiff or Mr Ure upon a contract not under seal would be subject to a defence under s 10(1)(a) of the *Limitation of Actions Act* 1974 (Qld) as a cause of action "founded on simple contract" that arose more than six years ago. As to a claim at common law for money had and received, as a restitutionary amount, any further claim by Mr Ure would be subject to a defence under s 10(1)(a) of the *Limitation of Actions Act* 1974 (Qld) as a cause of action "founded on … quasi-contract" that arose more than six years ago. As to a possible equitable claim for an account arising out of any accounting relationship between Mr Ure and the defendant stemming from an joint venture, and Mr Ure's allegation that his contribution to it was unequal, prima facie it would be subject to a defence under s 10(2) of the *Limitation of Actions Act* 1974 (Qld) as "an action for an account" in respect of a matter that arose more than six years ago.[21]

[91] As to the counterclaim, an order made on the claim for an account under para 26(a) of the counterclaim would also be subject to a defence under s 10(2) of the *Limitation of Actions Act* 1974 (Qld).[22] While the presently struck out causes of action for fraudulent misappropriation and knowing involvement might be free of a limitation defence under ss 27 or 38 of the *Limitation of Actions Act* 1974 (Qld), the defendant offers to seek leave to discontinue her counterclaim if the proceeding on the claim is dismissed.

[92] In any event, in the light of modern developments of the principles affecting abuse of process,[23] it could not be assumed that any part of the claim or counterclaim would be successfully re-started if an order to strike out the proceeding on both the claim and counterclaim were made in the inherent power of the court. Striking out or dismissing the proceeding for want of prosecution would be likely to quell the controversy between the parties, subject to dealing with the defendant's undertakings mentioned later on.

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[21] *Menegazzo v Pricewaterhousecoopers (A Firm)* [2016] QSC 94, [107]-[109].
[22] *Menegazzo v Pricewaterhousecoopers (A Firm)* [2016] QSC 94, [107]-[109].
[23] *Batistatos v Roads and Transport Authority of New South Wales* (2006) 226 CLR 256, 267-270 [16]-[26].

Conclusion as to dismissal or leave to proceed

[93] Having regard to the normative factors articulated in *Tyler* and *Cooper*, and the particular relevant factors discussed above, in my view both the claim and the counterclaim in the present proceeding should be dismissed for want of prosecution. Correspondingly, none of the parties should remain free to take a further step in the proceeding, beyond the resolution of the present applications.

[94] Although neither party applied for an order that the counterclaim should be dismissed, the defendant offered an undertaking to apply for dismissal of the counterclaim if the claim were dismissed. In my view, that is not enough. There is no proper basis on which to order that the claim be dismissed for want of prosecution but leaving alive the possible prosecution of the counterclaim.

[95] I will hear the parties on the appropriate form of order, having regard to these reasons.

Defendant's undertakings

[96] The remaining aspect of the application is that the defendant seeks orders releasing her from undertakings.

[97] One undertaking was given to the Federal Court as part of the terms of the settlement of the plaintiff's appeal from the order of the Federal Circuit Court annulling the defendant's bankruptcy. The undertaking was as follows:

> 1. Patricia June Robertson hereby undertakes that she will not encumber, dispose of, transfer or otherwise deal with the property situated at 4/2 Alcorn street, Suffolk Park in the State of New South Wales more particularly described as lot 5 DP 270196, Parish Byron County of Rous (**the Property**), whether in law or in equity without first providing 14 days written notice of any such intention to encumber, dispose of, transfer or otherwise deal with the Property to Lynn Kathleen Ure via her solicitors Affleck Lawton lawyers at 4/105 George Street, Beenleigh QLD 4207 (attention Bruce Affleck) and by e-mail to baffleck@afflecklawton.com.au, or to such other person and address of which Patricia June Robertson might be notified in writing by the said Lynn Kathleen Ure.
>
> 2. Notwithstanding the terms of the undertaking in paragraph 1 Patricia June Robertson shall not encumber, dispose of, transfer or otherwise deal with the Property, whether at law or in equity (**dealing**) unless the dealing be on the basis that any funds to be received by Patricia June Robertson as a result of such dealing be first applied to the balance held in the Trust Account of McCormick Lawyers (**Trust account amount**) pursuant to the Authority, Direction and Undertaking given by Patricia June Robertson dated 8 February 2007 (**the Undertaking**) such that no sum be permitted to be available for the benefit of Patricia June Robertson, her successors or assigns or any other person or entity at her (or their) direction until such time as the Trust account amount reaches

> a total of $800,000 (**the Security amount**) and any moneys over and above the Security amount be available to be distributed to Patricia June Robertson, her successors or assigns.

[98] The defendant submits that this court can make an order releasing her undertaking to the Federal Court. Where an undertaking is given to a court, expressed to operate until further order, it is not simply a matter of contract whether the court may release the party from the undertaking. Therefore, it is not a pre-requisite of an order for release that the other contracting party consents.

[99] As the High Court said in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc:*[24]

> "… a court undoubtedly has such a power. Just as an interlocutory injunction continues 'until further order', so must an interlocutory order based on an undertaking. A court must remain in control of its interlocutory orders. A further order will be appropriate whenever, inter alia, new facts come into existence or are discovered which render its enforcement unjust…"[25]

[100] In the recent decision of *NgAti Te Ata* v *New Zealand Steel Mining Limited*,[26] the Court of Appeal of New Zealand said:

> "This jurisdiction is a necessary incident of the court's power to control its own processes. The test is simply whether circumstances have so changed as to afford good grounds for withdrawal."[27] (footnote omitted)

[101] Accordingly, had the undertaking been one given to this court, there is no doubt as to the court's power to release the defendant from her undertaking upon dismissal of the proceeding. However, the undertaking was given to the Federal Court. The defendant submits that, nevertheless, this court may release the defendant from her undertaking exercising power under the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) ("Commonwealth Act").

[102] The basis of that submission was not developed. However, it is necessarily complex. In what follows, I pass by any possible constitutional question.

[103] The starting point is that apart from the cross-vesting legislation it is not suggested that this court has power to make an order directly affecting the operation of an order of the Federal Court, including an undertaking given to that court.

[104] The defendant relies on s 4(1) of the Commonwealth Act as conferring "jurisdiction with respect to" the matter before the Federal Court in the bankruptcy proceeding. However, the cross-vesting scheme is structured as a two part scheme. While s 4(1) may confer "jurisdiction" on this court, the cross-vesting scheme operates by a system of transfers of

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[24] (1981) 148 CLR 170.
[25] (1981) 148 CLR 170, 178.
[26] [2015] NZCA 547.
[27] [2015] NZCA 547, [30]; And see *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 WLR 485, 492-493.

extant proceedings. It is s 5(4) of the Commonwealth Act and s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Qld) that provide for the Federal Court to transfer a proceeding pending in that court to this court. There is no provision for this court to transfer to itself a proceeding pending in the Federal Court.

[105] Accordingly, I refuse the defendant's application for an order releasing the undertaking given to the Federal Court in the bankruptcy appeal.