SUPREME COURT OF QUEENSLAND

CITATION:	*Chavez v Moreton Bay Regional Council* [2009] QCA 348
PARTIES:	**CHESTER GORDON CHAVEZ** (plaintiff/appellant) **v** **MORETON BAY REGIONAL COUNCIL** (defendant/respondent)
FILE NO/S:	Appeal No 7753 of 2009 SC No 10727 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2009
JUDGES:	Keane and Holmes JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. The parties to exchange and deliver to the Court any written submissions on costs within seven days**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – VARIATION AND SETTING ASIDE OF CONSENT JUDGMENT – where parties entered into consent order with respect to taking step in action after two years – where order provided that proceedings be struck out for want of prosecution if appellant did not comply with time stipulated in consent order – where appellant did not comply with time stipulated in consent order – where appellant sought order that the Court extend time under consent order pursuant to r 7 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the Court could, and should, extend time for compliance *Uniform Civil Procedure Rules* 1999 (Qld), r 7, r 137, r 389 *Chavez v Moreton Bay Regional Council* [2009] QSC 179, affirmed *Cummings & Anor v Davis & Anor* [2001] QCA 293, cited *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268; [1988] HCA 13, cited

Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd & Ors [2009] QSC 98, cited
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593, cited
General Credits Limited v Ebsworth [1986] 2 Qd R 162, cited
Harvey v Phillips (1956) 95 CLR 235; [1956] HCA 27, cited
Mackay v Dick (1881) 6 App Cas 251, cited
Morgan v 45 Flers Avenue Pty Ltd (1987) 11 NSWLR 573, cited
Paino v Hofbauer (1988) 13 NSWLR 193, considered
Purcell v FC Trigell Ltd [1971] 1 QB 358, cited
R D Werner & Co Inc v Bailey Aluminium Products Pty Ltd (1988) 18 FCR 389, considered
Rayner v Rayner [1968] QWN 42, cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634; [1974] HCA 40, cited
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51, cited
Spann v Starwell Pty Ltd [1984] 1 Qd R 29, cited

COUNSEL: P J Dunning SC, with T F Pincus, for the appellant
T P Sullivan SC, with R G Fryberg, for the respondent

SOLICITORS: Everingham Lawyers for the appellant
McInnes Wilson Lawyers for the respondent

[1] **KEANE JA:** On 25 November 2003 Mr Chavez commenced proceedings for damages for negligence against the predecessor of the Moreton Bay Regional Council ("the Council"). Mr Chavez' claim arose out of the issue by the Council on 26 November 1997 of a building permit in respect of land at Beachmere then being developed by Mr Chavez. Construction commenced in December 1997 and was substantially complete by June 1998.

[2] The proceedings issued in November 2003 were not served on the Council until 24 November 2004. Mr Chavez served an amended statement of claim on 22 November 2005. In February 2006 Mr Chavez' then solicitor confirmed to the Council's solicitors that no further step would be taken in the proceedings until further and better particulars of the statement of claim were supplied. Thereafter, Mr Chavez did not provide further and better particulars. The details of the lack of progress in the action are described in the reasons of the learned primary judge.[1]

[3] On 16 April 2009 the Council applied to have Mr Chavez' action struck out for want of prosecution. Mr Chavez responded by seeking leave to proceed with his action, leave being necessary because of Mr Chavez' failure to take a step in the action for more than two years.[2] After negotiations the parties agreed to a consent order which was made on 11 May 2009. The consent order was relevantly in the following terms:

"**BY CONSENT IT IS ORDERED:**

1. The Application be adjourned to a date to be fixed.

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1 *Chavez v Moreton Bay Regional Council* [2009] QSC 179 at [10] – [16].
2 Rule 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld).

2. The plaintiff be given leave to take a step in this proceeding.

3. The plaintiff provide security for costs in favour of the defendant in the sum of $50,000.00 by way of a registered first mortgage upon real property on or before 4.00pm on 1 June 2009.

…

7. In the event the plaintiff does not comply with any of Orders 2-5 inclusive above, and upon the filing of an affidavit by the solicitor for the defendant to that effect, the proceedings be struck out for want of prosecution and the plaintiff shall pay the defendant's costs of and incidental to the proceedings on a standard basis.

…"

[4] Mr Chavez did not comply with order 3. On 2 June 2009, the Council obtained an order from the Registrar of the Supreme Court that Mr Chavez' action be struck out for want of prosecution.

[5] On 17 June 2009 Mr Chavez filed an application in the Supreme Court seeking an extension of time to comply with the consent order of 11 May 2009. He invoked r 7(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR") which provides that "[t]he court may, at any time, extend a time set under these rules or by order."

[6] On 7 July 2009 the Chief Justice heard Mr Chavez' application and declined to grant the extension of time sought.

[7] Mr Chavez now appeals to this Court contending that the learned primary judge erred in:

(a) regarding Mr Chavez as the "defaulting" party and the Council as the "innocent" party;
(b) relying upon the terms of the mortgage prepared on behalf of Mr Chavez as relevant to the exercise of the discretion under r 7 of the UCPR;
(c) failing to appreciate that the delay which had occurred in the prosecution of Mr Chavez' action had not prejudiced the fair trial of the action; and
(d) failing to relieve Mr Chavez against the injustice occasioned by the operation of the orders of 11 May and 2 June 2009.

[8] It will be necessary to refer to the material parts of the learned primary judge's reasons before turning to a discussion of Mr Chavez' arguments in support of his grounds of appeal.

The reasons of the learned primary judge

[9] The learned primary judge summarised the circumstances in which Mr Chavez failed to comply with the consent order:[3]

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[3] [2009] QSC 179 at [4].

> "… The plaintiff's present solicitors commenced to act for the plaintiff on 8 May 2009. Following the orders of 11 May, Mr Everingham of that firm arranged for a mortgage to be drafted to secure the sum of $50,000 as required. It was to be given over property owned by the plaintiff's wife. The plaintiff's wife executed the mortgage and it was returned to Mr Everingham on 22 May 2009. Mr Everingham intended to send the executed mortgage to the solicitors for the defendant, so that the defendant might execute it, with the document then to be registered by 4 pm on 1 June. Through Mr Everingham's oversight, that did not occur. Instead, the mortgage documents were apparently placed with his file, along with voluminous other documentation provided by the plaintiff to Mr Everingham on 22 May."

[10] The learned primary judge accepted that r 7 conferred on him a "broad power to relieve against injustice".[4] In particular, his Honour noted that it was common ground that an extension of time was available even though the order in question was made by consent.[5] His Honour said:[6]

> "I accept the submission made by Mr Sullivan, who appeared for the defendant, that matters relevant to the exercise of these discretions are the conduct of the defaulting party and the prosecution of the proceeding generally, the circumstances in which the self-executing order was made, any aspect of prejudice to the innocent party, and the circumstances of non-compliance."

[11] His Honour noted that the proceeding had advanced "only to a small extent".[7] He regarded Mr Chavez as being responsible for "substantial delay in the prosecution of the proceeding".[8] And his Honour rejected the contention advanced by Mr Dunning SC on behalf of Mr Chavez that the Council had not suffered prejudice by reason of the delay in this case. In this regard, his Honour said:[9]

> "… Mr Dunning suggested that this would not be a 'witness intensive' case, with emphasis more on the documentation. He took me to the further and better particulars, contained in the material exhibited to Mr Everingham's affidavit. But I would not confidently conclude from that that individual recollections may not feature importantly in any resolution of this proceeding. As but one example the other way, paragraph 2(a) of the particulars refers to face-to-face negotiations between the plaintiff and the defendant's chief town planner Peter Tabulo."

[12] I pause here to mention that the further and better particulars of Mr Chavez' statement of claim to which his Honour referred were provided only after Mr Chavez' action had been struck out. Until then, since February 2006, Mr Chavez' side had not pressed the Council to file a notice of intention to defend and defence.

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4 [2009] QSC 179 at [5]; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283.

5 [2009] QSC 179 at [6]; cf *Fairmont Suites and Hotels Pty Ltd v Duck Holes Creek Investments Pty Ltd & Ors* [2009] QSC 98 at [9] – [11].

6 [2009] QSC 179 at [7].

7 [2009] QSC 179 at [20].

8 [2009] QSC 179 at [19].

9 [2009] QSC 179 at [22].

[13] His Honour referred as well to a "subsidiary" point in relation to the mortgage:[10]

> "… The mortgage which was prepared would not appear to have satisfied the requirements of the order. That flows from clause 2.1 of the schedule to the mortgage, which is in these terms:
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> > 'The Mortgagor must pay the secured money or part thereof to the Mortgagee or as the Mortgagee directs within thirty (30) days of delivery by the Mortgagee of a costs assessment in Queensland Supreme Court matter number 10727 of 2003 following on a conclusion of the action in favour of the Mortgagee including an order for the payment of costs against the Mortgagor.'
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> There are three problems with that provision. First, the clause requires delivery of a 'costs assessment', which is not a creature known to the *Uniform Civil Procedure Rules* 1999 (Qld). The end point of the process of cost assessment under the Rules is a certificate of assessment. Second, the clause allows a period of up to 30 days after the delivery of a 'costs assessment' before the defendant may act on the security. The order of 11 May contained no such limitation. Third, payment is predicated upon the 'conclusion of the action in favour of the mortgagee including an order for the payment of costs against the mortgagor'. There is arguable ambiguity about that form of expression: would the clause be enlivened, for example, where the [matters] were concluded in favour of the plaintiff for a nominal amount, but with orders for costs against the plaintiff? Also, the provision would not secure interlocutory costs orders in favour of the defendant prior to a determination of the overall proceeding.
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> Mr Dunning pointed out in response that Mr Everingham's intention was to give the mortgage to the solicitors for the defendant in advance, so that these objections would have come to light and could have been rectified." (emphasis in original)

[14] It may be noted here, in relation to Mr Chavez' second ground of appeal, that his Honour's decision adverse to Mr Chavez did not turn on any deficiency in the terms of the mortgage ultimately proffered by Mr Chavez. His Honour said:[11]

> "Any deficiency in the draft mortgage is not a critical point for the present, because were time extended as sought, a mortgage in due form could be prepared. The deficiency of the mortgage is however of some significance, albeit not great, as a further reflection of the plaintiff's approach to the proceeding."

[15] The learned primary judge, having accepted that he had a discretion to extend the time for compliance with the consent order,[12] summarised his reasons for refusing to exercise that discretion in Mr Chavez' favour:[13]

> "Factors bearing critically on the ultimate exercise of discretion in this situation are the substantial delay in the plaintiff's prosecution of

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10 [2009] QSC 179 at [23] – [25].
11 [2009] QSC 179 at [26].
12 [2009] QSC 179 at [5] – [6].
13 [2009] QSC 179 at [27] – [28].

> the proceeding; the limited progress which had been made prior to the dismissal of the proceeding; namely, the prompt for the self-executing consent order, the amply warranted application for dismissal for want of prosecution; and the prejudice which would inevitably be occasioned were the proceeding now to be revived. One should also mention the public policy principle of finality (cf. *Brisbane South Regional Health Authority v Taylor* at p 552). All of this is in the context of a cause of action which allegedly arose approximately 11 years ago.
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> While one may sympathize where, as here, the explanation for the fate of the proceeding is inadvertence, the court is now called upon to exercise a discretion which must look more broadly to a wide range of relevant considerations. The aggregation of those considerations militates against granting an extension of time, or relieving the plaintiff of the consequences of his non-compliance with the order of 11 May."

[16] I turn now to discuss the arguments advanced by Mr Chavez in this Court in support of his grounds of appeal.

Was Mr Chavez the defaulting party?

[17] Mr Chavez seeks to argue that the delay leading up to the consent order was as much the responsibility of the Council as it was the responsibility of Mr Chavez. On this view, if blame for the earlier delay was relevant at all, the parties should be regarded as equally blameworthy for that delay. Accordingly, so it is said, responsibility for the previous delay was largely irrelevant to the exercise of the discretion to allow Mr Chavez a further extension of time.

[18] The first point to be made here is that Mr Chavez was in default under the consent order. The consent order of 11 May 2009 was a contract between the parties as well as an order of the court.[14] That contract provided, in terms, for the Council to seek to have the action struck out if the steps which it required of Mr Chavez were not taken by the due date. The consent order expressly contemplated that a failure to perform any step would result in an entitlement in the Council to seek and obtain the dismissal of his action. Mr Chavez defaulted in the performance of his obligations under the consent order. It was his default which gave rise to the need for him to seek an extension of time for performance. Accordingly, the learned primary judge made no error in approaching that application on the footing that Mr Chavez was the defaulting party.

[19] Even if one looks more broadly at the history of the proceedings, and accepts the point made on behalf of Mr Chavez that in early 2006 the Council could and should have filed a notice of intention to defend and a defence,[15] the inescapable fact remains that Mr Chavez told the Council that he was not pressing for a defence until he had supplied the particulars which he had agreed to give; even as at 11 May 2009 those particulars had not been supplied. Whether or not the Council was obliged by the UCPR to file a notice of intention to defend and defence at an earlier time, its failure to do so was in conformity with the position adopted by Mr Chavez. It was

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14 *General Credits Limited v Ebsworth* [1986] 2 Qd R 162 at 164 – 165; *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593 at 599.

15 Cf r 137(1) of the UCPR.

the failure of Mr Chavez to advance his position which held up the progress of the action. For that reason the attempt made on behalf of Mr Chavez to rely upon the decision of this Court in *Cummings & Anor v Davis & Anor*,[16] where the parties were at stalemate for which both were responsible, is misplaced.

[20] In my view the learned primary judge was correct to approach the case on the basis that Mr Chavez was the defaulting party. It cannot sensibly be disputed that it was for Mr Chavez to show good reason why time should be extended to relieve him of the consequences of his failure to comply with the consent order.

The terms of the mortgage

[21] On behalf of Mr Chavez it is argued that the deficiencies in the mortgage document prepared by Mr Chavez' solicitor were, at worst, minor and that, in any event, the Council could and should have pressed harder for the provision of the draft documentation.

[22] Given that the supposed deficiencies in the mortgage were, as his Honour said, "not critical", there is little for Mr Chavez in this point. Especially is this so when the considerations to which his Honour referred as of critical importance were so compelling against the exercise of the discretion in Mr Chavez' favour.

[23] The second ground of appeal affords no basis for setting aside the decision below.

Prejudice

[24] Mr Chavez argues that the fact of the agreement was an "admission against interest" by the Council which precludes it from relying upon the earlier delay as a source of prejudice warranting the refusal of the extension sought by Mr Chavez. This argument may be rejected immediately. It seeks to embrace the consent order while at the same time arguing that its breach should not have the consequences which the consent order itself prescribed. The learned primary judge did not err in declining to allow Mr Chavez to approbate and reprobate the consent order.

[25] The view taken by the learned primary judge on the issue of prejudice is amply justified by his Honour's finding that an important aspect of the case which Mr Chavez would seek to litigate involves evidence of discussions said to have taken place in meetings which occurred more than a decade ago. On the basis of that finding, it was open to the learned primary judge to proceed on the footing that the fair trial of the action would inevitably be prejudiced by the delay which has occurred in this case.

[26] That finding cannot be set aside. In the hearing before the learned primary judge, the Council relied on an affidavit which, albeit in general terms, asserted that the Council's ability to defend itself had been adversely affected by the passage of time and the difficulty in identifying and contacting potential witnesses. There was no objection to this evidence and the deponent was not cross-examined.

[27] On behalf of Mr Chavez it was urged that the Ombudsman had in 1999 investigated and reported on a complaint made by Mr Chavez. Accordingly, so it was said, it was unlikely that the Council had not been afforded every opportunity to investigate the claim fully and to marshal the evidence necessary to meet that claim. But the Ombudsman's report was not in evidence; and it was not sought to contradict the affidavit on which the Council relied or to cross-examine the deponent by reference to the terms of that report.

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16 [2001] QCA 293.

[28] I would reject the third ground of appeal.

Injustice

[29] Mr Chavez' argument that it was unjust of the learned primary judge to exercise his Honour's discretion so as to "deprive Mr Chavez of the opportunity to vindicate his claim against the Council" fails to appreciate that this opportunity was lost, not by virtue of the decision of the learned primary judge, but by reason of Mr Chavez' non-compliance with the terms of the consent order to which Mr Chavez had agreed. By the terms of the agreement contained in the consent order, Mr Chavez had agreed that his action could be struck out, at the Council's choice, in the events which happened. It might equally be said that the real question, so far as the justice of the case is concerned, is whether the discretion conferred by r 7 of the UCPR should be exercised to deprive the Council of the complete defence to Mr Chavez' claim (by virtue of the expiration of the limitation period) consequent upon the exercise by the Council of its rights under the consent order.

[30] The agreement which underlies the consent order was, at least arguably, inconsistent with Mr Chavez' seeking an extension of time for the performance of his contractual obligations in that it was necessarily implicit in the agreement underlying the consent order that Mr Chavez would not seek to deny to the Council the benefit of its bargain by seeking to have the time for performance extended so as to defeat the Council's right to seek the dismissal of the action in the consequence of a breach by Mr Chavez of the terms of his bargain.[17]

[31] It is well-settled that the contractual agreement underlying a consent order may be set aside on grounds on which contracts may usually be set aside.[18] What is not so clear is the extent to which the power to extend time conferred on the court by r 7 of the UCPR can override the contractual agreement of the parties simply by virtue of the circumstance that the agreement is contained in a consent order. In this regard, there are decisions of intermediate Courts of Appeal in Australia which support the proposition that a term of a consent order which contains a self-executing order for the dismissal of proceedings by reason of default in compliance by a due date may be extended by order of the court.[19] This view seems not to accord with that taken in England,[20] and it may not be consistent with previous decisions of Queensland courts.[21]

[32] In *Paino v Hofbauer*, McHugh JA, with whom Samuels JA agreed, said:[22]

> "English courts have gone so far as to say that a court will only interfere with a consent order based on a contract on the grounds that it interferes with any other contract: *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185; [1982] 1 All ER 377. In *Harvey v Phillips* (1956) 96 CLR 235 the High Court (at 244) approved the

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17 *Mackay v Dick* (1881) 6 App Cas 251 at 263; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 606 – 607.

18 *Harvey v Phillips* (1956) 95 CLR 235 at 243 – 244; *Purcell v FC Trigell Ltd* [1971] 1 QB 358 at 363 – 364; *General Credits Limited v Ebsworth* [1986] 2 Qd R 162 at 165.

19 *Morgan v 45 Flers Avenue Pty Ltd* (1987) 11 NSWLR 573; *R D Werner & Co Inc v Bailey Aluminium Products Pty Ltd* (1988) 18 FCR 389; *Paino v Hofbauer* (1988) 13 NSWLR 193.

20 *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185.

21 *Rayner v Rayner* [1968] QWN 42; *Spann v Starwell Pty Ltd* [1984] 1 Qd R 29; *General Credits Limited v Ebsworth* [1986] 2 Qd R 162 at 165; *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593 at 599.

22 (1988) 13 NSWLR 193 at 198.

statement of Lindley LJ in *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 at 280, where his Lordship said:

> '… To my mind, the only question is whether the agreement upon which the consent order was based can be invalidated or not. Of course, if that agreement cannot be invalidated the consent order is good.'

The issue in *Harvey v Phillips*, and in *General Credits Ltd v Ebsworth* [1986] 2 Qd R 162, which applied it, was whether a consent order based on a compromise agreement could be set aside. The issue in the present case is different. The Court does have a discretion. Moreover, I am not prepared to adopt the English approach to consent orders based on contracts. The discretion conferred by Pt 2, r 3, is not to be equated with the extent of the Court's powers to vary or set aside contracts."

[33] Having said that, McHugh JA went on to say:[23]

"Nevertheless, when a party asks that a consent order based on a contract should be set aside or varied and the underlying contract could not be set aside or varied, the case would need to be exceptional before the Court would exercise its discretion in favour of an applicant. Moreover, by itself the failure of the applicant to comply with the terms of a consent order based on a contract could rarely, if ever, be a sufficient ground to vary the order.

…

Sympathy for the plight of the respondents is not sufficient reason to deprive the appellants of their rights. The present plight of the respondents is the foreseeable and inevitable consequence of an agreement which required them to make payments on the due dates or forfeit their benefits. This Court ought not to exercise its discretionary power to confer a further benefit on the respondents when to do so would conflict with the parties' free and voluntary agreement."

[34] In *Paino v Hofbauer*, Clarke JA seemed to be in general agreement with McHugh JA on this point. Clarke JA said:[24]

"Since *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 62 ALJR 216; 77 ALR 411, the court's power to extend the time for compliance with its orders cannot be questioned as McHugh JA has pointed out. But the important question in this case does not concern power. It relates to the exercise of the judicial discretion which is called into question each time an appeal is made to the Court to grant indulgences.

In England there is a line of authority in support of the proposition that a consent order should not be set aside unless grounds which would entitle the court to set aside or vary a contract are shown: *Purcell v F C Trigell Ltd* [1971] 1 QB 358; *National Benzole Co Ltd*

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23 (1988) 13 NSWLR 193 at 198 – 199.

24 (1988) 13 NSWLR 193 at 200 – 201.

v Gooch [1961] 1 WLR 1489; [1961] 3 All ER 1097; *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185; [1982] 1 All ER 377.

Some of the judicial statements in these cases, and earlier ones referred to in them, are sometimes relied upon in support of an argument that the court is not empowered to set aside or vary any consent order. Or, at least, that if there is power then the court should not exercise its discretion in favour of a party who seeks an order that the order be varied or set aside.

But in *Siebe Gorman & Co Ltd v Pneupac Ltd*, Lord Denning MR observed there was a critical distinction between consent orders which recorded a contract between the parties and those orders which meant no more than that one party was not objecting. In respect of the former Lord Denning said (at 189; 380): 'the court will only interfere with such an order on the same grounds as it would with any other contract.'

There is also a line of authority in Australia to the effect that consent orders embodying a compromise agreement between the parties should only be set aside if the underlying agreement might be invalidated: *Harvey v Phillips* (1956) 95 CLR 235 at 243-244 and *General Credits Ltd v Ebsworth* [1986] 2 Qd R 162 at 165. These authorities are in point in the present case.

The respondents did not seek to establish that the underlying agreement should be set aside or that any grounds existed which entitled them to relief in respect of their non-compliance with its terms. On the contrary their counsel sought to argue that notwithstanding the grant of an extension of time for compliance with the Court orders the appellants could maintain an action for breach of contract.

According to that argument the occasion would arrive for the respondents to seek relief from, or to impeach, the agreement only when the appellants sued upon it. I do not agree. In my opinion an applicant for relief from the terms of a consent order embodying a compromise agreement is bound, as a general rule, to make out a case for the setting aside of the contract or the granting of relief from the consequences of non-compliance with its terms, in his application for the variation, or setting aside, of the consent order.

I should not be taken as saying that the Court has no power to make an appropriate order in the absence of proof of a circumstance which might entitle a party to relief in respect of his failure strictly to comply with the terms of a contract which was reflected in a court order. I simply suggest that it would be a rare case in which it would be a judicial exercise of the discretion to grant an indulgence the effect of which is to vary an agreement between the parties in *National Benzole Co Ltd v Gooch* (at 1494; 1101) per Diplock LJ.

The argument in this case has assumed the full binding effect of the agreement and, in these circumstances, the proper exercise of the

> judicial discretion required that the application by the respondents be dismissed."

[35] A more liberal view of the court's power to vary a contract contained in a consent order containing a self-executing order pursuant to r 7 of the UCPR or its analogues was taken by Woodward and Foster JJ in the Full Court of the Federal Court in *R D Werner & Co Inc v Bailey*:[25]

> "It is convenient to begin by considering whether there was in fact a binding contract between the parties expressed by the consent order, or whether this was one of the frequent cases in which an interlocutory order is made on the application of one party with the other party or parties consenting – in the sense of not objecting – but without there being any intention of entering into a formal and binding contract; see *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 at 189; [1982] 1 All ER 377 at 380. Courts are very familiar with the circumstance in which parties reach an agreement, either after a good deal of negotiation or perhaps quite readily, about the orders that should be made for the future conduct of an action. We would be most reluctant to reach any conclusion which tended to inhibit the ready consent of practitioners to the making of sensible arrangements in such cases. It would normally be understood by them that, if circumstances arose which made it necessary, they would be entitled to apply to the court for a variation of the orders to which they had consented. No doubt the fact of their consent would be a relevant consideration for the court in deciding whether to order a variation, but it would be understood by all that the ultimate decision was in the court's hands."

[36] One might be permitted to observe that in a case such as the present, one cannot be sanguine that the solicitors for the Council would have understood that under the agreed terms of the consent order Mr Chavez was entitled to apply for an extension of time in which to perform the obligations in return for which the Council had agreed to allow Mr Chavez to pursue his action. The Council's solicitors (as well as the reasonable person postulated by the law of contract as the test of the parties' intention) might have found surprising the suggestion that Mr Chavez had not been given his last chance to progress his action by the terms of the consent order. They may not have been at ease with the notion that Mr Chavez was free to seek further extensions of time to progress the action after the time for compliance with the consent order had expired and the Council had become entitled to seek the dismissal of the action. They may have been surprised by the suggestion that Mr Chavez might seek to justify an application for a further indulgence by reliance on a lack of competence or diligence on the part of his solicitor when the efforts, or lack thereof, of his various solicitors seem to have contributed to the occasion for the making of the agreement embodied in the consent order.

[37] In *R D Werner & Co Inc v Bailey*, Jenkinson J examined this issue more closely than the other members of that court:[26]

> "The making of an agreement between the parties that the order which Ryan J in fact made should be made was, in my opinion, a

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25 (1988) 18 FCR 389 at 390 – 391.

26 (1988) 18 FCR 389 at 399 – 401.

circumstance relevant to the determination of the application made to Northrop J for extension of the time limited for payment into Court. And I am of opinion that the agreement was what I take Lord Denning MR to have intended by the expression 'real contract' in *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 at 189–90; 1 All ER 377 at 380-381: a legally enforceable agreement, a contract. (And, therefore, an agreement for good consideration, as is pointed out in *National Benzole Co Ltd v Gooch* [1961] 1 WLR 1489; 3 All ER 1097.) But it was not, in my opinion, an agreement which included an implied term that the appellant would not invoke the Court's power to vary the order which was to be made. In that respect it was an agreement distinguishable from agreements for compromise of an action (as in *Harvey v Phillips* (1956) 95 CLR 235) or of an appeal (as in *National Benzole Co Ltd v Gooch*), in which a promise will, in my opinion, be implied not to invoke a curial power to set aside or vary orders giving effect to the compromise, except for a cause which would afford 'a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it' (*Harvey v Phillips* (1956) 95 CLR 235 at 243). The implication of a promise not to invoke that power derives from one of the promises made in such compromises, that one party will give up the claims it has been making for curial remedy. (That latter promise may itself be either express or implied.) The agreement between appellant and respondent in this case included no promise by the appellant to give up, if the appeal should be dismissed by force of the order to be made, the claims it has been making in this Court for curial remedy, in my opinion. The appellant is, in my opinion, free, subject to time limitations and to any plea of estoppel per rem iudicatam to seek to assert in a further appeal the claims to curial remedy it made in the appeal which now stands dismissed by the order of Ryan J. The agreement was a legally enforceable contract of compromise, of the respondent's claim for an order for security, but not a compromise, in my opinion, of anything but that claim. The words in the statement of the terms of the agreement, 'and failing which, the appeal be dismissed with costs', must be understood in the context which s 170 of the *Patents Act* 1952 (Cth), s 56(4) of the *Federal Court of Australia Act* 1976 (Cth) and the *Federal Court Rules* 1979 (Cth) provide. Those provisions all contemplate dismissal of a proceeding as the consequence of a failure to comply with the terms of an order for security. And the terms of the agreement for payment into Court and for the respondent's costs make it plain that the parties to the agreement intended that there should be an order of the kind which those provisions prescribe. In those circumstances there is no justification for understanding those words as expressing any agreement for the giving up of the appellant's claims for the remedies sought in the appeal, in my opinion. That conclusion leads, in my opinion, to the further conclusion that no implication is to be made of a term that the appellant would not invoke the Court's power to extend the agreed period of forty-five days. The parties were merely making an agreement as to the terms of the order by which the

> respondent's application for security should be resolved. Once that order had been made, the agreement had, in my opinion, been wholly performed. No further contractual obligation lay upon either party to the agreement, in my opinion.
>
> It will be apparent that the foregoing examination of the significance, in relation to the determination of the application made to Northrop J, of the consensual origin of the order of Ryan J is out of harmony with the reasoning upon similar questions in *Siebe Gorman & Co Ltd v Pneupac Ltd*, *supra*, and in *Purcell v F C Trigell Ltd* [1971] 1 QB 358. The reasoning in those and other cases seems to me to rest on an assumption that any attempt to vary or set aside a curial order made by consent in performance of a contractual term that that order should be made by consent of the parties to that contract (other than an attempt based on a ground which would suffice to render the contract void or voidable or to entitle the party making the attempt to equitable relief against the contract) constitutes a breach of that contract. That is not an assumption which is always justified, in my opinion. Whether the attempt is a breach will depend on the terms of the contract, including any implied terms, as it seems to me. The attempt this appellant made constituted no breach of its contract, in my opinion.
>
> Since an order extending the time limited by the order of Ryan J would not in my opinion have involved acceding to an application made in breach of contract, there is no occasion to consider whether the Court can, or whether it should, in any circumstances accede to an application the making of which does constitute a breach of a contract between the applicant and another party to the proceedings. (See *EI du Pont de Nemours & Co v Commissioner of Patents* (1987) 16 FCR 423."

[38] Applying the reasoning of Jenkinson J to the circumstances of the present case, it may be said that in this case Mr Chavez' breach of contract gave rise to a right in the Council to seek and obtain the striking out of the proceedings in the events which happened: for that right the Council gave up its claim to have the action struck out forthwith on the basis that Mr Chavez had not, after three years, provided the further and better particulars of his statement of claim. And Mr Chavez gave up his claim to seek unconditional leave to take a further step in the proceedings in return for leave to proceed qualified by the terms of the consent order. In these circumstances, the reasoning of Jenkinson J might be thought to suggest that Mr Chavez' application to defeat that right was made contrary to an implied promise to allow the Council the benefit of the bargain which the parties had freely made.

[39] In the end, however, it is not necessary to resolve this difference in the authorities. In accordance with the reasons of McHugh JA and Clarke JA in *Paino v Hofbauer*, the discretion conferred by r 7 should be exercised in favour of a party in the position of Mr Chavez only in cases where there is good reason for depriving the other party of the benefit of a free and voluntary agreement.

[40] In this case I am unable to see any good reason why the Council's rights under, and consequential upon, the consent order should be defeated by the exercise of the discretion conferred by r 7. To exercise the discretion in favour of Mr Chavez

would permit him to proceed with a claim which arose more than a decade ago and which would otherwise be statute-barred. No impropriety or unfairness contributing to the default by Mr Chavez is asserted against the Council. And the circumstance that Mr Chavez' default was due to his solicitor's dilatoriness, rather than personal fault on Mr Chavez' part, does not constitute good reason to deprive the Council of the benefit of its bargain. In this case, the role of Mr Chavez' solicitor was not merely to act as an officer of the court assisting a party to litigation to meet the exigencies of the litigation: Mr Chavez' solicitor was also engaged to assist Mr Chavez to complete his contractual obligations. Where a party to a contract chooses to delegate the task of performing the contract to that party's solicitor, the other party to the contract is entitled to treat the acts or omissions of the solicitor as the acts or omissions of the client. In *Sargent v ASL Developments Ltd*,[27] Mason J (as his Honour then was) said:

> "The solicitor is to be regarded as the alter ego of the client and the rights of the other party to the contract cannot be made to depend upon the diligence or lack of diligence exhibited by the solicitor in his dealings with his client."

[41] I would reject the fourth ground of appeal.

Conclusion and order

[42] In my respectful opinion, the decision of the learned primary judge was correct.

[43] The appeal should be dismissed.

[44] In accordance with the request of the parties, the Court will entertain submissions in relation to the question of costs. The parties should exchange and deliver to the Court any written submissions on costs within seven days.

[45] **HOLMES JA:** I agree with the reasons of Keane JA and the orders he proposes.

[46] **McMEEKIN J:** I have had the advantage of reading in draft the reasons prepared by Keane JA. I agree with those reasons and with the orders proposed.

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[27] (1974) 131 CLR 634 at 659.