SUPREME COURT OF QUEENSLAND

CITATION:	*Pickering & Anor v McArthur* [2010] QCA 341
PARTIES:	**CARLYLE PICKERING &** **MAILY PICKERING** (plaintiffs/appellants) **v** **JOHN McARTHUR,** (defendant/respondent)
FILE NO/S:	Appeal No 3943 of 2010 DC No 1533 of 2001 DC No 1938 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2010
JUDGES:	Margaret McMurdo P, Chesterman JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce further evidence is refused.** **2. The appeal is dismissed with costs, including the costs of the application to adduce further evidence.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FRESH EVIDENCE – IN GENERAL – where the appellants seek leave to adduce further evidence in the form of affidavits – where the respondents oppose the adducing of this evidence under r 766(1)(c) of the UCPR – where appellants argue that the further evidence is necessary to redress the omission of evidence of their efforts to progress the proceedings – whether the further affidavits are relevant – whether the affidavits contained further evidence not discoverable before the hearing – whether the further affidavits are admissible APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – JUDGE MISTAKEN OR MISLED – GENERALLY – where the originating claim was filed in 2001 – where the claim by the appellants alleged that the respondent, in his capacity as a masseuse and

'spiritual healer' had caused psychological injury, and in the case of one appellant, had performed unwanted sexual touching – where there is a significant delay between the events and the applications – where there is a delay as a result of the appellants conduct – whether the learned primary judge erred in finding that the appellants delay was not the result of a medical condition – whether solicitors were responsible for delay

District Court of Queensland Act 1967 (Qld), s 118(3)
Uniform Civil Procedure Rules 1999 (Qld), r 389(2), r 766

Brisbane City Council v Mainsell Investments Pty Ltd [1989] 2 Qd R 204, cited
Mulholland v Mitchell [1971] AC 666, cited
Thomson v Smith [2005] QCA 446, cited

COUNSEL: M J Byrne for the appellants
A P J Collins for the respondent

SOLICITORS: Hatzis Lawyers for the appellants
HWL Ebsworth for the respondent

[1] **MARGARET McMURDO P**: Each appellant filed an application for leave to appeal from an order of the same District Court judge dismissing each appellant's application for leave to proceed and, on the respondent's applications, dismissing each appellant's action for want of prosecution with costs, including costs of the application. The appellants filed an application for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) from those orders. It was agreed at the hearing that this Court should treat those applications as appeals against the orders dismissing each appellant's action. Each appellant also sought leave to adduce further evidence under *Uniform Civil Procedure Rules* r 766.

[2] I agree with the orders proposed by Jones J.

[3] **CHESTERMAN JA**: I agree with Jones J that the appeals should be dismissed with costs, and with his Honour's reasons for proposing those orders.

[4] In particular I agree that the appellant's applications to adduce further evidence on the hearing of the appeals should be refused. I would reach that conclusion whether or not special grounds had to be shown for the reception of the recent affidavits. The subject matter of the affidavits amounted to no more than a re-agitation of arguments advanced at first instance, and to the extent that the affidavits deposed to facts those facts could have been proved before the primary judge.

[5] His Honour having exhaustively examined the material identified[1] all the factors, *pro* and *con* relevant to the exercise of the discretion to allow the actions to proceed, or to be struck out. As Jones J points out the factors were identical in both applications save for an additional factor in Maily Pickering's proceedings. Counsel for the appellants did not criticise his Honour's identification of the relevant factors. He did not submit that any relevant factor had been omitted or that

1 [2010] QDC 90 at [117].

an irrelevant one had been included. Nor was it said that the learned primary judge mistook the relevant law. The appeals can succeed, therefore, only if the results are so unreasonable as to indicate egregious error.

[6] That conclusion is not open. The factors identified by the primary judge indicate, strongly in my opinion, that the correct orders were made.

[7] Of particular importance is the fact that the determination of negligence alleged against the respondent depends (ignoring all other difficulties) upon what was said between the appellants and respondent on many occasions, some as long as 15 years ago. It is not possible to have a fair trial in such circumstances.[2] It is beyond the reasonable capacity of human memory to recall with accuracy, unaffected by self interest, the terms of such old conversations.

[8] The appeals should be dismissed with costs.

[9] **JONES J**: The appellants seek to set aside orders made in the District Court dismissing for want of prosecution their respective claims for negligence and the complementary orders refusing their respective applications for leave to proceed pursuant to R 389(2) of the *Uniform Civil Procedure Rules* (UCPR). Their Notice of Appeal (lodged by the appellants personally) is framed as an application for leave to appeal the decision pursuant to s 118(3) of the *District Court of Queensland Act.* The "decision" in fact determined six applications in three separate proceedings. Two of the proceedings were instituted by the respective appellants. The third proceeding instituted by another plaintiff raised identical issues but is not the subject of an appeal. The orders dismissing the proceedings for want of prosecution are final orders in respect of which leave is not required. The respondent raises no objection to the matter continuing as separate appeals against each of the decisions below. I shall for convenience refer to the claimants as "the appellants".

[10] The grounds of appeal as stated in the Notice are:-

> "Provision of fresh evidence:
> Refuting the Defendant's Affidavit
> Steps taken refuting the two-year time delay."

On the appeal, the principal ground argued was that the learned primary judge failed to give appropriate weight to the appellants' explanations for delay. The learned primary judge, quite properly, dealt separately with each application. The appeal ground is the same for both proceedings and the considerations are identical. In the circumstances the appeals were heard together making separate reference to the facts as necessary.

[11] The appellants also seek leave to adduce further evidence in the form of separate affidavits sworn by each of them and filed on 16 June 2010. This application is opposed by the respondent on the basis that "special grounds", as required by R 766(1)(c) of UCPR, have not been shown such as to allow the admission of such evidence. I should deal firstly with the application to admit further evidence.

Further evidence

[12] Rule 766 relevantly provides:-

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[2] See *HWC v The Corporation of the Synod of the Diocese for Brisbane* [2009] QCA 168 at [70] per Fraser JA and [88] to [91] in my reasons for judgment.

> "**766 General powers**
> (1) The Court of Appeal –
> …
> (c) may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit or in another way; and
> …
> (2) For subrule (1)(c), further evidence may be given without special leave, unless the appeal is from a **final judgment,** and in any case as to matters that have happened after the date of the decision appealed against." (my emphasis)

[13] The respondent points to the curiosity that the rule gives rise to in this case. If further evidence is sought to be led on the appeal against the dismissal of the proceedings for want of prosecution, then "special grounds" will need to be shown. If, on the other hand, the evidence is sought to be led only on the refusal of leave to proceed, special grounds need not be established. The resolution of the appeal will turn on the Court's attitude to the orders dismissing the proceedings. Consequently, special grounds will need to be shown.

[14] The appellants argue that the further evidence is necessary to redress the omission of evidence of their efforts to progress the proceedings, to show that delay was caused by their then solicitors,[3] to assert that they did not know of the two year rule and that they were advised that they would not be prejudiced by delay.[4] Put on those bases, the appellants' request faces the initial hurdle that the material was well known and available at the time of the hearing.

[15] The Court received the appellants' separate affidavits on the hearing of the appeal but reserved for further consideration the question of whether their contents were admissible under the rule. A perusal of the affidavits show that their contents do not refer to matters occurring after the date of the decision.

[16] In his affidavit, the appellant Carlyle Pickering asserts that on 9 November 2009, that is, one day before the hearing, he instructed his solicitor to file an affidavit in response to the respondent's affidavit filed some five days earlier. The issues he sought to raise were identified in an email sent on his behalf by a Mr Doug Pope and intended to be conveyed to counsel[5]. Those issues included a reference to the organisation known as the Inner Energy Centre (IEC) of which the parties were members and to a corporation Justice Through Integrity Pty Ltd which was formed to redress perceived wrongs inflicted on members of the IEC by the respondent. The affidavit dealt with the respondent's subsequent employment, his conduct with respect to former members of the IEC, the cancellation of his membership in other organisations and his allegations of harassment by the appellants and others. The issues of this kind were canvassed in the materials considered by the learned primary judge and were found by him to be irrelevant to the question which he had to decide. He said:-

> "[62] The significance of much of this material was not apparent. If these proceedings were being pursued for a collateral purpose, namely as an act of revenge on the part of the supporters of the

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3 Para 13 Affidavit of Carlyle Pickering – supplementary Appeal book at p 13.
4 Ibid at p 20 paras [45] and [47].
5 Ex "CP3" to the affidavit of Carlyle Pickering filed 15 June 2010.

> defendant's former wife for his treatment of her, then it was not necessary to be concerned about dismissing the actions for want of prosecution, as that would mean that the proceedings were an abuse of process of the court, having been brought for a collateral purpose, and should be struck out or stayed no matter how expeditiously they were being pursued. Ultimately counsel for the defendant did not put the matter in those terms.
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> [63] That this particular plaintiff may have been involved in other proceedings against the defendant may in theory be of some relevance in relation to the progress of this matter, since sometimes when there are multiple legal proceedings on foot one is advanced at the expense of others. But no argument was advanced on either side that that was a relevant consideration here. That the defendant feels that the proceedings are motivated by a desire to persecute and harass him is not I think a relevant consideration. Insofar as the defendant complains of stress, concern and hardship associated with the continuation of these proceedings, that is understandable and a relevant consideration in relation to applications of this nature, but otherwise what has happened in relation to other proceedings brought by these plaintiffs and other people against him, or other matters which he seeks to characterise as harassment, are really irrelevant to anything I have to decide."[6]

[17] From my review of the material before the learned primary judge, I respectfully agree with his ruling as to irrelevance. The same conclusion applies to the proposed further evidence on this topic. It is simply not relevant. The suggestion that the decision making process may have been tainted by having one set, rather than two sets, of irrelevant evidence does not deserve further comment.[7]

[18] The other aspects of the further affidavit to which the court's attention was drawn was a fact that the appellant Carlyle Pickering attended on his then solicitor on six occasions between February – December 2008,[8] that he was unaware of the two year requirement of Rule 389(2) and that his then solicitor removed from her supporting affidavit this detail of his state of knowledge.

[19] Since both appellants were represented by solicitors throughout the course of this proceeding, their personal knowledge of the rule was not of any significance in making an explanation for the delay. Until June 2007, the delay was largely explained. The learned primary judge properly focussed on the period of delay thereafter. The supporting affidavit by the solicitor did make reference to the appellants' attendances on her[9] but the only tangible result of those attendances was the taking of another statement and the decision in January 2009 to obtain a fresh report from Dr Quadrio who referred to that statement. The further evidence attempts to show that the appellants' former solicitors bore some responsibility for the delay. Such a suggestion is contrary to the manner in which the case below was conducted. The learned primary judge in respect of each of the applications before him noted that "It was not submitted that the delay was caused by the plaintiffs'

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6 Appeal book p 574.
7 Transcript p 1-12/40.
8 Affidavit Carlyle Pickering sworn 15 June 2010 para [15].
9 Para [61] Affidavit of Laura Neil sworn 13 October 2009.

lawyers being dilatory".[10] If there had been any basis for attributing blame to former solicitors one would have expected such a prospect would have been explored by experienced counsel representing the appellants and if appropriate to have been raised in submissions.

[20] The further affidavit of the appellant, Maily Pickering, did not detail any new significant fact that was not available at the time of the hearing. Much of its terms descended into argument attempting to re-litigate the issues determined below. In short, there was nothing in the further affidavits which provided any illuminating explanation for delay during the relevant period. In similar vein, the appellants' separate affidavits sworn on 15 April 2010 couched, mainly in argumentative terms, do not advance any special grounds for its admission.

[21] The principles upon which further evidence will be received was discussed by the Court of Appeal in *Thomson v Smith*[11] where Muir JA cited the reasons of Lord Wilberforce in *Mulholland v Mitchell*[12]:-

> "I do not think that, in the end, much more can usefully be said than, in the words of my noble and learned friend, Lord Pearson, that the matter is one of discretion and degree. Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

[22] Guidance on the exercise of discretion to admit further evidence can also be found by consideration of decisions on preceding rules of court which require firstly that the further evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that if given it would probably have an important influence on the result of the case although it need not be decisive: third, the evidence must be such as to be apparently credible.[13] The evidence proffered as further evidence by the appellants does not satisfy the first two of those requirements and no comment is necessary about the third. Such of the evidence that had any relevance, could only bear upon the primary judge's assessment of the explanation. In the main, the evidence touched upon matters that he had properly considered. I would not, therefore, exercise my discretion to receive the further evidence.

Background facts

[23] The appellant Carlyle Pickering is the father of the appellant Maily Pickering. The appellants filed their respective initial Statements of Claim on 30 March 2001 and 26 April 2001. Notices of Defence to the respective claims were filed on 28 May 2001.

[24] The pleadings show that the respondent carried on the business of a massage therapist and that he provided "spiritual healing" services on occasions. He had no

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10 Reasons at [111]. See also at paras [81] and [96].
11 [2005] QCA 446.
12 [1971] AC 666.
13 *Brisbane City Council v Mainsell Investments Pty Ltd* [1989] 2 Qd R 204.

formal qualifications or expertise as a counsellor. Such services as he provided were sought by the appellants between the years 1996 and 1999. In 1999 there was a falling out between the respondent and the appellants and other members of the Inner Energy Centre following allegations against him of improper conduct.

[25] The appellant, Carlyle Pickering, alleges that the respondent's counselling of him included persistent advice that he should leave his de facto partner. The appellant accepted the advice and acted upon it by terminating the relationship. As a result the appellant claims he suffered a psychological injury.[14]

[26] Maily Pickering alleges that the respondent's counselling of her included persistent and sometimes contrary advice that she should move out of a residence she shared with a flatmate and that her relationship with her father was inadequate. This counselling caused her to become alienated from her father. She further alleges that the respondent engaged in inappropriate behaviour including unwelcome sexual touching. As a consequence she suffered a chronic adjustment disorder and chronic low grade depression.[15]

[27] The respondent denies each of the allegations. He denies also that he owed a duty of care or that his counselling was such as to exercise any influence over the appellants or that any psychological injury resulted from his counselling or conduct.

[28] The appellants describe the "spiritual healing" in Particulars dated 8 April 2006 as being constituted by:-

> (a) attempting to heal damage in or improve the emotions, personality or psyche of the person;
> (b) attempting to assist a person;
> (c) assisting a person to obtain a fuller understanding of themselves, their attitudes, and approaches to life;
> …
> (f) to aid or enable a person to sustain relationships of substance and longevity.[16]

The appellants are unable to particularise the dates on which such counselling/spiritual healing occurred.[17] The respondent claims that he did keep clinical records but these were damaged by flood and were subsequently destroyed.

[29] The resolution of issues of this kind, obviously give rise to questions of credit based upon what was said at various counselling sessions. There are no clinical records now available to permit even the accurate fixing of the dates of any consultation. Resolution of the factual issues are always difficult in a case of this kind, even when there is no delay. His Honour drew attention to this difficulty in his reasons at paragraph [66].[18]

[30] The learned primary judge makes findings as to the history of the progress of both proceedings. The detail can be observed in the following chronology as it relates to the appellant Carlyle Pickering. The history for the proceeding by Maily Pickering is not materially different.

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14 Further Amended State of Claim – Appeal book pp 477-483.
15 Further Amended Statement of Claim – Appeal book pp 485-490.
16 Appeal book p 516.
17 Appeal book p 115.
18 Appeal book p 575.

2001	30 Mar/26 Apr	Statements of Claim filed
	8 May 2001	Defences filed
	28 May	Replies
	2 Nov	Particulars sought
2002	17 Dec	Particulars delivered (after delay of 13 months)
2003	26 Jun	List of documents served
	14 Nov	Statement of Loss and Damage served
	17 Dec	Amended Statement of Claim filed
2004	16 Jan	Stay of proceedings until psychiatric examination undertaken
	11 May	Amended Statement of Claim struck out
	11 Jun	Application to strike out further amended Statement of Claim
2005	20 Apr	Decision on application – 1 paragraph struck out
	18 May	Further amended Statement of Claim
	16 Aug	Appeal against refusal to strike out whole claim dismissed by Court of Appeal
	23 Nov	Defence to further amended Statement of Claim
	7 Dec	Reply filed
2006	Jan-Feb	Particulars sought and delivered
	May-Jul	Discussions on mediation
	3 Aug	Draft statement of loss and damage to appellant
2007	9 Jan	Revised statement of loss and damage sent to appellant
	5 Apr	Signed statement of loss and damage returned (delivered to Respondent's solicitors on 16 Apr)
	9 May	Request for trial date sent to respondent's solicitors
	25/26 Jun	Trial on charges against respondent ends with nolle prosequi
	Jul-Aug	Unsuccessful settlement negotiations
	22 Oct	Solicitors confer with psychiatrist (Dr Schoener)
2008	21 Feb	Applicant confers with solicitors
	1 May	Applicant confers with solicitors (Mrs Neil) who advised
		Commenced preparations to brief counsel
	22 May	Applicant confers with solicitors
	2 Jun	Applicant confers with solicitors
	30 Aug	Applicant confers with solicitors

	16 Dec	Applicant confers with solicitors for an unsuccessful attempt to Reopen negotiations
2009	Jan	Applicant request examination by psychiatrist (Dr Quadrio)
	12 Mar	Examination by Dr Quadrio
	22 Jun	Dr Quadrio's report received
	18 Aug	Application for leave to proceed
	23 Oct	Application to strike out for want of prosecution

[31] This history has to be considered as being a response to events occurring between 1996 and 1999, some 10-13 years prior to the applications. Having commenced the proceeding only shortly before the expiration of the limitation period, the Statement of Claim did not reach its final form until May 2005 and the Statement of Loss and Damage is still not compliant.[19] The delay in providing particulars in 2002 and the lack of progress between 2006 and mid 2007, are significant. Much of the delays resulted from the appellants' failure to attend to particulars or to his statement of loss and damage. The fact that criminal proceedings were on foot, justified the respondent in not signing a Request for Trial but this was no barrier to the appellants preparing for trial.

The hearing below

[32] The applications for leave to proceed were filed on 18 August 2009. The appellants argued that the applications were strictly speaking unnecessary because two separate steps in the proceeding had been taken within the preceding two years. The conduct relied upon as constituting such steps were the disclosure of tax returns on 18 May 2009 and the provision by way of further disclosure of copies of notices of non-party disclosure on 28 October 2008. The learned primary judge found that neither was a step in the action for the purpose of R 389(2) of the UCPR and that the last step taken as required by the Rules was the appellants' delivery of a request for a trial date. The respondent refused to sign this request whilst criminal proceedings against him were still on foot. The criminal proceedings ceased on or about 25 June 2007 but the appellants did not thereafter pursue the respondent for a response to the request for a trial date.

[33] Accepting this as the starting point for the respondent to comply with the request, the learned primary judge found that no step had been taken after that day and consequently the applications for leave to proceed were necessary.

[34] The conclusion reached by the learned primary judge is stated in the following terms:-

> "[117] Broadly speaking the factors favouring allowing the matter to proceed are as follows:
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> 1. If leave is refused, the plaintiff will lose any prospect of recovering damages in respect of the matters claimed. I acknowledge that this is a factor of some importance.
> 2. There have been no breaches of court orders or directions.
> 3. Some, though not very much, of the delay has been attributable to factors beyond the plaintiff's control.

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[19] Reasons paras [37]-[38] Appeal book p 567.

On the other hand, there are a number of factors weighing against allowing the matter to proceed:

4. The delay overall has been quite substantial, that is to say, there has been a long time elapsed since the events giving rise to the litigation.
5. The proceeding depends on the resolution of conflicts of oral testimony, about a number of matters extending over a significant period of time. In such circumstances, a delay of this length has made it difficult to conduct a fair trial.
6. There are a number of significant difficulties facing the plaintiff in relation to liability, and if he were successful it appears unlikely that more than a moderate award of damages would be made.
7. There have been lengthy periods when nothing has been done by or on behalf of the plaintiff to carry the proceeding forward, most of this delay being unexplained.
8. For most of the period since the action was commenced the things the plaintiff did were in response to steps taken, requests from or prompting by the defendant.
9. There is no indication that there has ever been any serious attempt properly to prepare the matter for trial or to bring it on for trial. The plaintiff appears willing to wound but reluctant to strike.
10. There has been a clear and prolonged breach of the implied undertaking in r 5(3).
11. It is unreasonable that the defendant has had the continuing threat of this litigation hanging over his head for so long, and he should be entitled to get on with his life and plan his affairs without it."[20]

[35] In his separate consideration of Maily Pickering's application, the learned primary judge reached the same conclusions but relied on a further matter, namely, that the plaintiff's "rehabilitation has been impeded by the delay in the action and would probably be further affected by allowing it to continue".[21]

[36] The learned primary judge was guided in the exercise of his discretion by a number of well known authorities.[22] What underpins these conclusions is his Honour's detailed analysis of relevant considerations which, apart from delay, included:-

- The appellants' prospects of success;[23]
- The lack of readiness for trial having regard to the inadequate statement of loss and damage;[24] and
- The prejudice to the defendant.[25]

No challenge has been made to his Honour's conclusions in relation to the prospects of success and the prejudice. In my view, they are not open to challenge on the

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20 Appeal book pp 589-590.

21 Appeal book p 592.

22 Reasons paras [113]–[116] - *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178; *Quinlan v Rothwell* [2002] 1 Qd R 647; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; *Hall v RH & CE McColl P/L* [2007] QCA 182.

23 Reasons paras [68]-[72] Appeal book p 577.

24 Reasons paras [37]-[38] Appeal book p 567.

25 Reasons para [82] Appeal book p 579.

material relied upon. The question of readiness for trial is challenged on the basis that it would not take much to complete the work necessary to prepare the case. His Honour was entitled to conclude to the contrary having found "the most remarkable deficiency is that there has been a complete failure to satisfy the requirements of r 547(3)(g)".[26]

Explanation for delay

[37] On the question of delay, his Honour considered the impact of the psychiatric condition of the appellant Carlyle Pickering on the delay. Carlyle Pickering in his affidavit supporting the application, deposed that –

> "6. Since the commencement of my claim, my diminished ability to think and concentrate has made it very difficult for me to gather and produce the information required by my solicitors in order to progress my claim.
>
> 7. In particular, my personal involvement in gathering information required by my solicitors has caused me a substantial amount of distress due to the fact that doing so results in my having to relive my experience with the Defendant, which ultimately exacerbates the abovementioned symptoms of my injury.
>
> 8. Any involvement I am required to have with respect to my legal proceedings also brings about intense feelings of guilt over having introduced my daughter, Maily Pickering, to the Defendant, and the repercussions of their subsequent relationship."[27]

[38] The appellants' then solicitor in her affidavit confirmed that he gave instructions to her to this effect[28] but she does not depose that she personally observed any such reduced capacity to concentrate or to gather information.

[39] In his reasons, the learned primary judge said:-

> "[30] … the report noted that the plaintiff does not have much energy (p 4) and that he presents as humourless and intense with a grim and brooding quality, withdrawn interpersonally and with a pervasive sense of pessimism: p 7. Reference was also made to his despairing attitude, and his ongoing depression, despair and bitterness: p 9. Both the plaintiff in his affidavit and Ms Neil in her affidavit speak of his symptoms as including a reduced capacity to concentrate and ongoing indecisiveness, **but I cannot find reference to either of these matters in the psychiatrist's report**.
>
> [31] The plaintiff in his affidavit said that his diminished ability to think and concentrate have made it very difficult to gather and produce the information required in order to progress the claim. He also complained about suffering distress from having to relive his experiences with the defendant for the purpose of gathering information required by the solicitors, and that this provoked intense feelings of guilt over having introduced his daughter to the defendant. He said that as a result he has often been unable to

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26 Reasons [37] Appeal book p 567.

27 Appeal book p 62.

28 Para [7] to affidavit sworn 13 October 2009.

> respond to requests for information from the solicitors as promptly as he could have but for this condition. **It is difficult to reconcile what was said in this affidavit with the psychiatrist's statement that he is intensely preoccupied with his dispute with the defendant.** However, the plaintiff was not cross-examined on his affidavit.
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> …
>
> [118] With regard to the plaintiff's psychiatric problems, accepting at face value what is said in his affidavit, those problems do not explain the great bulk of the delay that has occurred, unless it is because those problems also led him to be reluctant actually to bring the matter on for trial. I suppose that if he finds it distressing to think about the matter for the purpose of gathering information for, or even just putting his signature on, a statement of loss and damage, it is going to be very difficult for him actually to go into the witness box and expose himself to cross-examination. Perhaps his hope was that if the matter dragged on long enough, the defendant would in effect pay him some money to go away. **In any event, I do not accept that this is a case where the plaintiff's psychiatric state has meant that the very slow pace of the litigation so far has been the best he could reasonably achieve.** On the contrary, I regard the conclusion as irresistible that over an extended period of time there has been no serious attempt to bring the matter to trial or to prepare it properly for trial.[29] (my emphasis)

Issues on appeal

[40] The appellants identified two points in contending that the learned primary judge erred in drawing his conclusions about the lack of explanation for the appellants' delay -

> 1. That his Honour erred in holding that there was no reference in the report of Dr Quadrio to the plaintiff's claim of symptoms of reduced capacity to concentrate and ongoing indecisiveness; and
>
> 2. That the failure to get the matter ready for trial was due to the dilatoriness of the appellant's then solicitors rather than the appellant himself.

[41] As to the first of these, reliance is placed on the contents of Dr Quadrio's report[30]. His Honour noted the opinion of Dr Quadrio as set out in the body of her report and contrasted that with the claims of the appellant referred to in para [29] above. What his Honour overlooked was Dr Quadrio's reference, in the Appendix to her report, to the DSM IV criteria for Major Depressive Episode. What, on its face, appears to be a simple list of standard criteria was, by the use of asterisks, identified as symptoms complained of by the appellant. Included in the list is:-

> "(8) Diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others)."

For the diagnosis of major depressive episode to be made, that symptom, together with four others, are required to be present every day over a two week period.

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29 Appeal book p 565 and p 590

30 Ex "LAN1" to affidavit of Laura Neil sworn 13 October 2009 (not included in the Appeal book).

[42] There is no evidence of when, or for what period, the episode existed nor how that symptom impacted on the appellant's daily life nor whether he sought treatment for it having regard to the obvious inconvenience it is said to have caused. Dr Quadrio did not record any complaint by the appellant of any difficulty in gathering or producing information.

[43] It is easy to understand how the learned primary judge would overlook evidence presented in such an oblique manner. But the question is, whether such an oversight has resulted in any error. It is difficult to know what weight is to be given to symptoms which are identified only in the precise terms of a specific criterion without any detail as to how the symptom impacted on the appellant's daily life. Moreover, though the symptom may have existed for a short period, or periods, it is difficult to conceive that such a symptom would be present over the whole of the extended periods of inaction which characterise the delay in this matter.

[44] In the part of the report dealing with the appellant's actual complaints, there is no reference to diminished capacity to think or to indecisiveness. The only equivalent reference is by the words "Mr Pickering is less focussed on work and is not as effective as he used to be". It is difficult to get any clear picture as to the extent to which the appellant's mental state impaired his capacity to provide his solicitor with information. The report, in the list of the documents referred to by Dr Quadrio, mentions a statement by Mr Pickering in December 2008 which indicates that the appellant did have the capacity to give detailed information up to that time. It seems clear from the terms of Dr Quadrio's report that the appellant was still able to engage in work despite significant physical limitations and the fact that he suffered a stroke in 2006. One is left with the impression that whatever impairment the appellant had in his ability to concentrate, it was not so disabling as to prevent his giving appropriate instructions to his solicitors for such a lengthy period of time as is manifested by the delay in this case. His Honour found, correctly in my view, that "There is nothing to suggest that any part of the subsequent delay (after 2007) was attributable to any difficulty in obtaining instructions from the plaintiff".[31] His other findings highlighted above are quite consistent with the evidence and not at odds with the appellant suffering the symptom of diminished ability to think or concentrate for short periods.

[45] The oversight by the learned primary judge did not, in my view, constitute an error such as has caused his discretion to miscarry. The discretion is based on a number of considerations of which the explanation for delay is but one part. Those considerations have been clearly articulated in his Honour's Reasons and do not require repetition here. Of most significance, is the conclusion that the delay "has made it difficult to conduct a fair trial".[32]

[46] The second issue is the contention that the delay was in the main, or in part, due to the dilatoriness of the appellant's then solicitor. This contention is difficult to maintain. It is, to a large extent, based upon the acceptance of the further evidence which I have determined should not be received but the evidence led below did at least invite a consideration of the solicitors' role in the history of the delay. His Honour found that "the material before me strongly suggests that the plaintiff's solicitors have not ever made any serious attempt to get this matter ready for trial and were not doing so at the time when the issue about delay was pointed out by the

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31 Reasons [32] Appeal book 565.

32 Reasons paras [117] and [122] Appeal book p 589 and 592.

defendant's solicitors".[33] It is clear from this statement that his Honour was critical of the conduct of the solicitors, despite the fact that no submissions were made of "the plaintiffs' lawyers being dilatory".

[47] Delay on the part of solicitors is often a relevant consideration in applications of this kind. The weight of such a consideration, amongst other competing considerations, varies considerably depending upon the client's level of sophistication or education, the complexity of the issues and the professional relationship. What is clear in this case is the frequency of contact between the appellants and their then solicitor. Despite that contact the matter did not progress, thus justifying his Honour's finding referred to in the preceding paragraph. I am not persuaded that his Honour's discretion has miscarried by reason of any failure to appreciate the role of the appellant's former solicitors in the progress of their claims.

[48] I would, therefore, make the following orders in respect of each appeal:

1. The application to adduce further evidence is refused.

2. The appeal is dismissed with costs, including the costs of the application to adduce further evidence.

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33 Reasons [79] Appeal book p 579.