SUPREME COURT OF QUEENSLAND

CITATION:	*Ure v Robertson* [2017] QCA 20
PARTIES:	**LYNNE KATHLEEN URE** **(appellant)** **v** **PATRICIA JUNE ROBERTSON** **(respondent)** **RONALD URE** **(not a party to the appeal)** **SUMMERHILL PROPERTY DEVELOPMENTS PTY LTD** **ACN 010 558 460** **(not a party to the appeal)**
FILE NO/S:	Appeal No 10555 of 2016 SC No 2634 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 210
DELIVERED ON:	28 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2017
JUDGES:	Gotterson and Morrison JJA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – WANT OF PROSECUTION OR LACK OF PROGRESS – where the appellant filed a claim in March 2007 and the respondent filed a counterclaim in September 2010 – where the appellant provided a list of documents in March 2015 without obtaining an order of the Court – where *UCPR* r 389 provided that if no step was taken in a proceeding for two years, a new step could not be taken without an order of the Court – where *UCPR* r 371(2)(d) empowered the Court to declare a step taken in breach of the *UCPR* to be effectual – where the respondent applied for an order dismissing the claim for want of prosecution and declaring ineffectual the delivery of the list of documents – where the primary judge dismissed the claim and counterclaim for want of prosecution

– whether the delivery of the list of documents constituted a step having been taken within the meaning of r 389(2) – whether the discretion of the primary judge miscarried

Bankruptcy Act 1966 (Cth), s 58(3), s 60(2)
Rules of the Supreme Court, O 90 r 9, O 93 r 17, O 93 r 18
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 280, r 371, r 389

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Luka Brewery v Grundmann [1985] 2 Qd R 204, cited
Perez v Transfield (Qld) Pty Ltd [1979] Qd R 444, considered
Tyler v Custom Credit Corp Ltd [2000] QCA 178, cited
Ure v Robertson [2016] QSC 210, cited

COUNSEL: M D Evans for the appellant
B T Porter QC, with G Dietz, for the respondent

SOLICITORS: HopgoodGanim Lawyers for the appellant
Tucker & Cowen Solicitors for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Bond J and with the reasons given by his Honour.

[2] **MORRISON JA:** I have read the reasons of Bond J and agree with those reasons and the orders his Honour proposes.

[3] **BOND J:**

Introduction

[4] By order made on 16 September 2016 the learned primary judge dismissed for want of prosecution –

(a) the claim brought by Mrs Ure (as plaintiff) against Ms Robertson (as defendant); and also

(b) the counterclaim brought by Ms Robertson (as plaintiff by counterclaim) against Mrs Ure, Mr Ure and their company (as, respectively, the first, second and third defendants by counterclaim).

[5] Mrs Ure now appeals from the dismissal of her claim. She contends that the primary judge's discretion miscarried for two reasons.

[6] First, and primarily, because the primary judge misconstrued rr 371 and 389 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) and their interrelationship. The primary judge is said to have erred when he found that the appellant required leave to proceed under r 389(2) and when he failed to follow the approach which had been taken by the Full Court in *Perez v Transfield (Qld) Pty Ltd* [1979] Qd R 444 in relation to the statutory predecessors of rr 371 and 389, namely O 90 r 9 and O 93 rr 17 and 18 of the *Rules of the Supreme Court*.

[7] Second, because, in his analysis of the relevant periods of delay in the proceeding, the primary judge:

> "… erred in not finding, and attributing significance to, the fact that the delay in the prosecution of the Claim was stalled and frustrated by the respondent advancing the Counterclaim after the Claim had been set down for trial twice, resulting in an adjournment of the trial in October 2008, and costs order against her, and then failing to pay the costs order resulting in her bankruptcy, and then failing to advance her counterclaim afterwards."

[8] The appellant asks this Court to set aside his Honour's decision for either or both of those errors and, this Court's own discretion then having been enlivened, to exercise it so as to refuse to dismiss the claim for want of prosecution.

[9] Ms Robertson, the respondent to this appeal, does not challenge the dismissal of her counterclaim.

The first ground of appeal: alleged errors of law

The relevant rules of Court

[10] The following table identifies the relevant rules of the UCPR and contrasts them with the relevant parts of the previous *Rules of the Supreme Court*, in each case with emphasis added:

UCPR	***Rules of the Supreme Court***
UCPR r 371 Effect of failure to comply with rules (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** **(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.	O 93 r 17 (1) **Where**, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, **there has**, by reason of anything done or left undone, **been a failure to comply with the requirements of these rules**, whether in respect of time, place, manner, form or content or in any other respect, **the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein**. (2) **Subject to subrule (3), the Court or a Judge may, on the ground that there has been such failure as is mentioned in subrule (1)**, and on such terms as to costs or otherwise as the Court or a Judge thinks just, **set aside either wholly or in part the proceedings in which the failure occurred, any step** taken in those proceedings or any document, judgment or order therein **or** exercise the powers under these rules to allow such amendments (if any) to be made and to **make such order (if any) dealing with the proceedings generally as the Court or a Judge thinks fit**. (3) …

UCPR	***Rules of the Supreme Court***
	O 93 r 18 **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**.
UCPR r 389 Continuation of proceeding after delay (1) If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the proceeding, give a month's notice to every other party of the party's intention to proceed. (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. (3) For this rule, an application in which no order has been made is not taken to be a step.	O 90 r 9 (1) When no proceeding has been taken in a cause for one whole year from the time when the last proceeding was taken, any party who desires to proceed shall, before taking any step in the cause, give a month's notice to every other party of his intention to proceed. (2) **When three years have elapsed from the time when the last proceeding was taken, no fresh proceeding shall be taken without the order of the Court or a Judge, which may be made either ex parte or upon notice**. (3) A summons on which no order has been made shall not be deemed a proceeding within this rule; but notice of trial, although avoided by non-entry or countermanded, shall be deemed such a proceeding.

[11] Two changes of substance between the *Rules of the Supreme Court* and the UCPR will immediately be observed.

[12] First, UCPR r 371 does not reproduce any equivalent to O 93 r 18.

[13] Second, UCPR r 371(2)(c) and (d) introduce a new express power to declare a step "ineffectual" or "effectual", for which there was no equivalent in O 93 r 17.

The decision of the primary judge

[14] In order to understand how the question of dismissal for want of prosecution came before the primary judge, it is necessary to record some of the chronology of events in the litigation.

[15] On 27 March 2007, the proceeding was started by claim. On 28 July 2008, the trial of the proceeding was adjourned to 28 October 2008. When it came on for hearing on that date, it was adjourned to a date to be fixed and Ms Robertson was ordered to pay Mrs Ure's costs of the adjournment.

[16] On 3 September 2010, Ms Robertson filed the counterclaim to which I have earlier referred. On 17 November 2010, the defendants by counterclaim applied to strike out parts of the counterclaim and for an order for inspection of documents.

[17] On 4 April 2011, A Lyons J ordered that:

(a) parts of the counterclaim be struck out and that Ms Robertson should replead her counterclaim by 31 May 2011;

(b) the defendants by counterclaim file and serve a reply and answer by 30 June 2011;

(c) the second and third defendants by counterclaim make disclosure by 30 April 2011; and

(d) the costs of the application be costs in the cause.

[18] On 4 February 2011, the costs order which had been made against Ms Robertson in October 2008 was quantified and Ms Robertson was ordered to pay the amount of $51,771.74.

[19] There followed an excursion into the Federal judiciary in relation to steps taken under the *Bankruptcy Act* 1966 (Cth). I make the following observations:

(a) On 19 April 2011, Mrs Ure served a bankruptcy notice on Ms Robertson claiming payment of the amount of $51,771.74.

(b) On 30 September 2011, Ms Robertson was made bankrupt by sequestration order in the Federal Magistrates Court based on non-payment of the amount claimed by the bankruptcy notice.

(c) As a matter of bankruptcy law, upon Ms Robertson becoming a bankrupt:

(i) it was no longer competent for Mrs Ure to take any fresh step in the proceeding against Ms Robertson: s 58(3) of the *Bankruptcy Act*; and

(ii) Ms Robertson's counterclaim was stayed until her trustee made an election, in writing, to prosecute or to discontinue the counterclaim: s 60(2) of the *Bankruptcy Act*.

(d) On 28 June 2013, by order of the Federal Circuit Court of Australia the bankruptcy order was annulled. The Court determined that although the order was originally made because of the inadequacy of Ms Robertson's response to the application and her failure to place admissible evidence of her solvency before the court, the true position was that she had clearly been solvent and the sequestration order should be annulled.

(e) On 10 February 2014, Mrs Ure's appeal to the Federal Court of Australia from the order of annulment was settled in terms of a Deed of Variation and Agreement and consent orders were made in the Federal Court of Australia dismissing the appeal with no order as to the costs of the proceeding in the Federal Circuit Court.

[20] On 11 March 2015, Ms Robertson by her solicitors complained of non-compliance by the second and third defendants by counterclaim with the order for disclosure made on 22 December 2010 and threatened to apply to dismiss the proceeding for want of prosecution.

[21] It is common ground that by 20 March 2015 no step had been taken in relation to either the claim or the counterclaim for more than two years. By that date UCPR r 389(2) therefore operated in relation to all parties to the proceeding and prevented them from taking a new step without obtaining an order of the Court.

[22] On 20 March 2015, the solicitors for Mrs Ure and the other defendants by counterclaim provided a list of documents on behalf of the second and third defendants by counterclaim. They took that step without obtaining an order of the Court as they were required to do by UCPR r 389(2).

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

[24] On 17 November 2015, the solicitors for Mrs Ure and the other defendants by counterclaim wrote seeking time to respond. On 22 December 2015, they 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.

[25] On 15 July 2016, Ms Robertson filed an application seeking an order dismissing Mrs Ure's claim for want of prosecution and other orders including that the service of the list of documents by the second and third defendants by counterclaim on 20 March 2015 be declared ineffectual under UCPR r 371(2)(c). On 11 August 2016 Mrs Ure filed an application seeking an order pursuant to UCPR r 389(2) that leave be granted to take a step in the proceeding.

[26] Both applications were argued before the learned primary judge on 12 August 2016.

[27] The learned primary judge recognised[1] that the Supreme Court had an inherent discretion to strike out a proceeding for want of prosecution. He also noted[2] that –

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

(b) UCPR r 280 permitted 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;

(c) UCPR r 371(2) restated 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 was an irregularity only; and

(d) When two years had passed since the last step was taken UCPR r 389(2) had the effect of staying the proceeding by prohibiting a party from taking a new step without the order of the court. That prohibition was also the subject of UCPR r 371.

[28] The learned primary judge noted that UCPR r 371 had been derived from the former O 93 rr 17 and 18 and r 389(2) had been derived from O 90 r 9. Under those rules the Court had, in *Perez v Transfield (Qld) Pty Ltd*, determined that O 93 r 18 operated to impose an express time limit within which an application under O 93 r 17 should be made. The learned primary judge stated:[3]

> "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:

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1 *Ure v Robertson* [2016] QSC 210 at [4].
2 *Ure v Robertson* [2016] QSC 210 at [4], citing *Quinlan v Rothwell* [2002] 1 Qd R 647, 653-654 [14].
3 *Ure v Robertson* [2016] QSC 210 at [13].

> '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 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.'

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.'"

[29] The learned primary judge concluded that the removal from the UCPR of any equivalent to O 93 r 18 meant that *Perez v Transfield (Qld) Pty Ltd* no longer represented the law. It would follow, his Honour thought, that the effect of UCPR r 389(2) was not avoided simply because the opposite party did not make a prompt application to set aside a step taken in contravention of the prohibition within a reasonable time. He concluded that:[4]

> "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) 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."

[30] His Honour then proceeded in this way –

(a) he concluded the proceeding was to be regarded as having been stayed by operation of r 389(2) once no step had been taken at all for more than two years by 20 March 2015;

(b) he found that the step taken by serving the list of documents on 20 March 2015 was to be regarded as an irregular step which did not effect that outcome; and

(c) he analysed the delay which had occurred in the proceeding by reference to the considerations adverted to in *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 and other cases and concluded that he should not make an order under r 389(2) permitting a step to occur, but rather that he should dismiss for want of prosecution both the claim and the counterclaim.

<u>The appellant's argument</u>

[31] The appellant accepted that by 20 March 2015 no step had been taken in relation to either the claim or the counterclaim for more than two years. UCPR r 389(2) therefore operated in relation to all parties and obliged them not to take a new step without obtaining the order of the court.

[32] The appellant accepted that when, on 20 March 2015, the second and third defendants by counterclaim took the step of delivering the list of documents, they

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4 *Ure v Robertson* [2016] QSC 210 at [18].

did so without complying with the r 389(2) requirement of obtaining an order of the court.

[33] The appellant contended, correctly, that, pursuant to r 371(1), the failure to comply with r 389(2) was an irregularity and did not render the step a nullity.

[34] The appellant then contended that, because the irregular step was not a nullity, once it had been taken, it became the "last step" for the purpose of the operation of r 389(2) going forward. Accordingly, once it had been taken, it was not necessary to obtain the order of the Court under r 389(2) until a further two years had expired from that last step.

[35] The appellant acknowledged that that outcome was subject to an opponent bringing an application under r 371 to declare ineffectual the hypothesised last step. If such an application was made and succeeded, r 389(2) would apply again. However, the rule in *Perez v Transfield (Qld) Pty Ltd* would apply such that if an opponent failed to bring an application under r 371 to declare ineffectual the hypothesised last step within a reasonable time, the opponent would lose its rights to rely on r 389(2). The appellant contended that the respondent's eventual application under r 371 was brought too late, at a time when she had already lost her rights.

[36] The result, said the appellant, was that a step having been taken on 20 March 2015 "in the proceeding" within the meaning of r 389(2), which had not been set aside, either as soon as possible, or within a reasonable time, or at all, leave to proceed was not required. Because the primary judge had concluded that an order under r 389(2) was required, and took that into account, his discretion miscarried.

Analysis

[37] It is worth repeating the terms of r 389(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."

[38] The evident intention of r 389 is that a stay should be imposed on proceedings in certain circumstances and to require any person who seeks to lift the stay to approach the Court to seek an order. The policy is to ensure that proceedings which are significantly delayed come to the attention of the Court so that they can be dealt with appropriately: see *Thompson v Kirk* [1995] 1 Qd R 463 at 464 per Derrington J.

[39] The construction of r 389 for which the appellant contends would defeat that intention. By the simple expedient of ignoring the requirements of r 389 and taking a step after the expiry of the two year period without approaching the court, a non-compliant litigant would avoid the need ever to comply with r 389(2). If the irregular step taken in breach of r 389(2) is a step for the purposes of r 389(2), once the irregular step was taken it could no longer be said of that proceeding that no step had been taken for two years since the last step. The two year time period would have started running again by virtue of the irregular step.

[40] I reject the proposed construction. The proper construction of r 389(2) is that the "last step" contemplated must be the last effectual step, namely a step which was effectual because it was regular when taken, or a step which, although irregular

when taken, has since been declared to be effectual under the rules. Taking that approach to the clause accords with the evident intention of r 389 and avoids the appellant's construction, which would deny utility to the rule.

[41] Indeed, taking this approach to the rules is entirely consonant with r 5 and with r 371, especially in light of the fact that there is a specific power in r 371 to declare a non-compliant step to be effectual. It will put the onus on the party seeking to re-enliven proceedings after the two year period has passed to approach the Court to seek the appropriate orders. If the Court is approached by such a person before the step is taken the appropriate order, assuming the Court is persuaded to exercise its discretion, would be an order pursuant to r 389(2) authorising the step to be taken. If the step has already been taken in breach of r 389(2) then the appropriate order would be an order under r 371(2)(d) declaring the step to be effectual, perhaps together with an order *nunc pro tunc* under r 389(2) permitting the step to be taken.

[42] This approach to what constitutes a step for the purposes of r 389(2) does not treat the irregular step as a nullity contrary to r 371. It treats the step as irregular but not effectual. That seems to be consistent with the existence in r 371 of an express power to declare a step to be effectual. Rule 371(1) does not make regular that which is irregular. That depends upon the exercise of the discretions authorised by r 371(2).[5]

[43] It follows that the learned primary judge made no error when he concluded that the proceeding was to be regarded as having been stayed by operation of r 389(2), notwithstanding the fact that the list of documents was served on 20 March 2015.

[44] Nor did the learned primary judge make any error when he concluded that *Perez v Transfield (Qld) Pty Ltd* no longer represented the law and that the effect of UCPR r 389(2) was not avoided simply because the opposite party did not make a prompt application to set aside a step taken in contravention of the prohibition within a reasonable time. The result in *Perez v Transfield (Qld) Pty Ltd* was driven by the existence of O 93 r 18 and, as Lucas J recognized in the passage quoted by the learned primary judge, gave rise to an outcome which was not consonant with the intention of O 90 r 9. The learned primary judge correctly concluded that the fact that the UCPR did not reproduce any equivalent of O 93 r 18 rendered *Perez v Transfield (Qld) Pty Ltd* inapplicable. His Honour's view is reinforced by the express power to declare a step "effectual", for which there was no equivalent in O 93 r 17.

[45] For completeness, I should mention another argument which was advanced by the appellant in conjunction with the first ground of appeal but with which I do not find it necessary to deal.

[46] In his reasoning the learned primary judge differentiated between the proceeding *qua* claim and the proceeding *qua* counterclaim, treating a step which might be regarded as a step on the counterclaim as irrelevant to the operation of r 389(2) in relation to the proceeding *qua* claim.[6] The appellant submitted that "proceeding" in r 389(2) focuses on the whole of the matter before the court (the "proceeding" as a

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5 The last two sentences of this paragraph paraphrase observations made by Master Lee (as Lee J then was) in relation to O 93 r 17 in *Luka Brewery v Grundmann* [1985] 2 Qd R 204 at 212.

6 *Ure v Robertson* [2016] QSC 210 at [86] to [87].

whole) and does not distinguish between defendants, nor between claim and counterclaim. One cannot split the "proceeding" into different parts.

[47] I agree with the submissions advanced by the respondent that the determination of the correctness or otherwise of this approach is moot because no step had been taken for two years by 30 March 2015, whichever view is taken of "proceeding".

Conclusion

[48] In my view the first ground of appeal fails.

The second ground of appeal: alleged errors in fact finding

[49] It was common ground that before a court will overturn an exercise of discretionary judgment of the nature of that made by the primary judge, the appellant must demonstrate the kind of error identified in *House v The King* (1936) 55 CLR 499 at 504-505, namely:

(a) acting upon a wrong principle;

(b) allowing extraneous or irrelevant matters to guide or affect him;

(c) mistaking the facts;

(d) failing to take account some material consideration; or

(e) reaching a result which, upon the facts is so unreasonable or plainly unjust that the appellate court may infer error, even if the court cannot identify it precisely.

[50] It is not contended that the result of the exercise of discretion by the primary judge was so unreasonable or plainly unjust that this court should infer error. Rather the appellant by its second ground of appeal seeks to persuade this court of specific error.

[51] The appellant suggests the learned primary judge erred in not finding, and attributing significance to, the fact that the delay in the prosecution of the claim was stalled and frustrated by the respondent. The respondent was said to have done so by advancing the counterclaim after the claim had been set down for trial twice, resulting in an adjournment of the trial in October 2008 and a costs order against her, then failing to pay the costs order resulting in her bankruptcy, and then afterwards failing to advance her counterclaim.

[52] There is no merit in this complaint.

[53] The primary judge did not mistake the facts. He specifically noted that the claim had been set down for trial twice;[7] that there had been adjournment of the trial in October 2008 for which the defendant had been required to pay the costs;[8] and that she had failed to pay the costs order resulting in her bankruptcy.[9] He certainly found that the respondent had failed to advance her counterclaim afterwards, because he concluded that it too should be dismissed for want of prosecution.[10]

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7 *Ure v Robertson* [2016] QSC 210 at [60].
8 *Ure v Robertson* [2016] QSC 210 at [61].
9 *Ure v Robertson* [2016] QSC 210 at [64].
10 *Ure v Robertson* [2016] QSC 210 at [93].

[54] Nor did the primary judge fail to take these considerations into account. He addressed them by analysing the delay over the period of the litigation within three stages of delay, and had regard to the matters adverted to by the appellant within that structure.

[55] The first stage of delay was the period from the start of the proceeding up until the order which was made by A Lyons J in April 2011 to which I have referred at [17] above. The primary judge attributed responsibility for almost two years of that period to the respondent and not the appellant. In doing so, he was giving weight to the considerations to which the appellant points.

[56] The second stage of delay was the period between the time of the order in April 2011 and the compromise of the appeal from the order annulling the bankruptcy, which occurred in February 2014. His Honour thought that the period of this delay could not be laid squarely at the door of either the appellant or the respondent. He correctly noted that the second and third defendants by counterclaim had initially been at fault for not complying with the order of A Lyons J. He noted correctly that during this period the appellant's claim had been stayed by virtue of the sequestration order. Although His Honour did not specifically refer to it, so was the respondent's counterclaim. It was open to his Honour to evaluate the delay during this period in the way he did.

[57] The third stage of delay was from February 2014 when the bankruptcy appeal was compromised until the hearing of the application before his Honour in August 2016. His views about this period and the conclusion he reached in relation to responsibility for delay over all three stages of delay appear as follows:[11]

> "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 [the second and third defendants by counterclaim] 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.
>
> 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.
>
> 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."

[58] The approach which the learned primary judge took to the matters raised by the second ground of appeal was open to him. The second ground of appeal also fails.

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11 *Ure v Robertson* [2016] QSC 210 at [71] to [73].

Conclusion

[59] For the foregoing reasons, the learned primary judge did not err as contended by the appellant and, accordingly, the occasion does not arise for this Court to exercise its own discretion in relation to the application to dismiss the claim for want of prosecution.

[60] The appeal should be dismissed with costs.