SUPREME COURT OF QUEENSLAND

CITATION:	*Bisnovaty v Matchland Pty Ltd* [2019] QCA 241
PARTIES:	**VYACHESLAV BISNOVATY** (appellant) **v** **MATCHLAND PTY LTD** ACN 052 101 176 (respondent)
FILE NO/S:	Appeal No 168 of 2019 DC No 422 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 3 December 2018 (Reid DCJ)
DELIVERED ON:	5 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2019
JUDGES:	Fraser and Philippides JJA and Lyons SJA
ORDER:	**The appeal is 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 for damages for negligence or breach of contract in February 2013 – where liability was admitted but all or the most substantial part of the quantum of the claim was in issue – where the appellant failed to comply with court orders made in March 2017 or to progress the litigation by November 2018 – where the appellant failed to comply with orders requiring his appearance before the District Court in December 2018 – where the appellant's claim was struck out for want of prosecution – whether the order striking out the appellant's claim was unreasonable or plainly unjust *Uniform Civil Procedure Rules* 1999 (Qld), r 5, r 280, r 374 *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *Tyler v Custom Credit Corporation Ltd & Ors* [2000] QCA 178, applied *Ward v Wiltshire Australia Pty Ltd & Anor* [2008] QCA 93, cited
COUNSEL:	The appellant appeared on his own behalf J O McClymont for the respondent
SOLICITORS:	The appellant appeared on his own behalf

Jensen McConaghy Lawyers for the respondent

[1] **FRASER JA:** The appellant filed a notice of appeal challenging an order made by Reid DCJ on 3 December 2018 that the appellant's claim in the District Court against the respondent be struck out for want of prosecution.

[2] On 23 May 2011 the appellant was injured whilst undertaking a task of his employment by the respondent. On 7 February 2013 he commenced a claim against the respondent in the District Court for damages for negligence or breach of contract for his injuries, described as L5/S1 central and left paracentral disc prolapse and consequential major depressive disorder and adjustment disorder with depressed and irritable mood. The major component of the claimed damages was future economic loss exceeding $490,000.

[3] On 10 April 2013 the respondent filed a defence in which it: admitted liability for the appellant's personal injuries; denied the appellant's description of the injury; contended that the injury was an aggravation of the pre-existing L5/S1 disc protrusion/degeneration; denied that this injury caused any psychiatric injury; admitted that as a consequence of the back injury, combined with long term unemployment and family conflict, the appellant sustained an adjustment disorder and has depressed and irritable mood; and denied that the appellant had a major depressive disorder as a result of his back injury or otherwise. The respondent also denied various allegations concerning the quantum of the claim, including the allegation that the appellant would suffer future economic loss as alleged or at all. The respondent contended that: the appellant's unemployment after he was injured resulted from a redundancy foreshadowed before the injury, rather than from the injury; the appellant was capable of undertaking employment; he was undertaking studies to obtain more remunerative employment; and his injuries did not preclude him from working until normal working age at a salary exceeding his pre-injury net salary.

[4] The following chronology of subsequent events is largely drawn from the appellant's outline of argument, with amendments and additions reflecting evidence in the appeal record book:

18.08.2015 or 19.08.2015	A request for trial date was filed and the matter was listed for a two day trial commencing on 22 October 2015[1] or on 20 and 21 October 2015.[2]
14.10.2015	The appellant's solicitors emailed the respondent's solicitors and referred to information and documents received by the appellant's solicitors' firm on or about 12 October 2015, which required further investigations to be undertaken by the respondent.[3]
20.10.2015	Upon the application of the respondent Koppenol DCJ ordered by consent that the trial be adjourned.
Between 04.12.2015 and	The matter was relisted for trial, initially for two days and by subsequent order for three days, on 20 – 22 April 2016.

1 Affidavit of Ms Weber sworn 16 October 2015, para 2.
2 Affidavit of Ms Weber sworn 12 September 2017, para 8.
3 Affidavit of Ms Weber sworn 16 October 2015, para 4.

18.03.2016	
13.04.2016	Upon the respondent's application the trial was adjourned by order of Rackemann DCJ, who made directions that the appellant provide the respondent with a statutory declaration concerning his "business transactions", and an updated statement of loss and damage within seven days (with which direction the appellant complied), and that the appellant make disclosure of any other relevant documents.[4]
03.03.2017	Rafter SC DCJ made orders by consent that: the appellant submit to examinations by three specialist doctors before 31 March 2017 in Brisbane; within 14 days the appellant supply a list of his actual eBay sales of consumer goods for the period of three years before the date of the incident to the date of the order; and within seven days the appellant make available to the respondent's solicitor the appellant's Facebook account in a way described in the order.
12.09.2017	The respondent filed an application for orders requiring the appellant to comply with the orders made on 3 March 2017.[5]
18.09.2017	The respondent's application of 12 September 2017 was adjourned by consent to allow a solicitor for the applicant to pursue an application in the Queensland Civil and Administrative Tribunal ("QCAT") about the capacity of the appellant to provide instructions with respect to his common law personal injury damages claim in the District Court. The applicant stated that the appellant had travelled to Israel in or about early September 2016 following the death of his mother. Before and since that time the appellant's instructions with respect to his personal injuries claim, had become increasingly more confusing and irrational; he had failed to provide logical, rational instructions to resolve and progress his claim; and, despite his assurances, he failed to comply with orders of the Court to progress it. The applicant noted that the appellant's ongoing actions had placed him at significant risk of having his claim struck out and a significant order for costs being made against him.
22.08.2018	QCAT declared that the appellant has capacity to conduct a claim for damages for personal injuries and to instruct his lawyers in that claim.
04.09.2018	The appellant's solicitors informed the respondent that they had received correspondence on behalf of the appellant indicating that he was seeking alternative legal representation for his personal injuries claim.
18.09.2018	The respondent filed an application for orders that the appellant's proceedings be dismissed for want of prosecution pursuant to r 280 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), or that pursuant to r 374 of those rules judgment be given against the appellant for his failure to comply with orders made by Rafter SC DCJ on 3 March 2017, and that the appellant pay the respondent's costs of the proceedings.

4 Affidavit of Ms Weber sworn 12 September 2017, paras 11 – 13.

5 The application may instead have been for an order dismissing the claim (see exhibit "KBW–14" to the affidavit of Ms Weber sworn 12 September 2017), but nothing turns on this.

04.10.2018	Upon the hearing of the respondent's application, Koppenol DCJ acceded to a submission for the appellant that the application be adjourned for one month to allow the appellant to engage new legal representatives and so ordered. The application was adjourned to 5 November 2018.
30.10.2018	The respondent's strike-out application was adjourned from 5 November 2018 to 13 November 2018 to enable the appellant's solicitors to pursue an application for leave to withdraw as the solicitors for the appellant.
13.11.2018	Upon application by the appellant's solicitors, Reid DCJ gave those solicitors leave to withdraw as solicitor on the record for the appellant and ordered that the appellant appoint a new solicitor to act on his behalf or file a notice that he was acting in person. Upon the respondent's strike-out application, Reid DCJ ordered that by 4.00 pm on Wednesday 28 November 2018 the appellant, personally or through his solicitors, notify the associate to Reid DCJ of the appellant's intention to appear before the Court on 3 December 2018, that the appellant, personally or through solicitors appear before the court at 10.00 am on Monday 3 December 2018 and have leave to appear by telephone, and that if the appellant failed to comply with those orders the appellant's claim be struck out for want of prosecution and in that event the appellant pay the respondent's costs of and incidental to the action on the standard basis, including any reserved costs.
28.11.2018	A solicitor sent an email to the associate to Reid DCJ advising that the solicitor acted for the appellant for the purpose of finding him a law firm to assume the conduct of his personal injuries claim. The email stated that the solicitor was instructed that the appellant currently resided in Israel, poor health prevented him from flying to Australia, and the appellant intended to appear by telephone on 3 December 2018.
30.11.2018	Reid DCJ's associate sent an email to the appellant, his then current solicitor, and the respondent, stating that his Honour was minded to give the appellant a specific time to call in on 3 December 2018. His Honour suggested 12.00 pm and the parties were invited to indicate any objection to that time.
02.12.2018	The appellant sent an email to Reid DCJ's associate enquiring whether the Court could provide a Russian interpreter for his call to Australia.
03.12.2018	At 7.52 am Reid DCJ's associate sent an email to the appellant, his solicitors, and the respondent, stating that a Russian interpreter could not be provided. At 9.35 am, the respondent's solicitors sent an email to the appellant which attached draft orders concerning the further conduct of the case, which would be proposed upon the resumed hearing of the application. At 12.00 pm the appellant did not appear by telephone. Reid DCJ stood the matter down until 12.22 pm to allow the appellant further

	time to appear. The appellant did not appear or communicate with the Court on 3 December 2018.
09.12.2018	The appellant sent an email to Reid DCJ's associate stating that he had received a letter to call the Court by 12.00 am (sic) Australian time but in Israel it was 4.00 am, he could not make that call because of pain, he took his medicine and could not wake up at 4 o'clock. The appellant enquired whether he had an opportunity to reschedule a call.

[5] The first sentence of the primary judge's reasons is not reproduced in its entirety in the transcript, but it conveys that the self-executing order made on 13 November 2018 operated upon the non-appearance of the appellant on 3 December 2018 to strike-out the appellant's proceeding. The primary judge went on to observe that in any case he would have exercised his discretion to order that the proceedings be struck out.

[6] The primary judge took into account the following matters:

(a) The proceeding related to an accident which took place more than seven and a half years ago.

(b) The proceeding was commenced more than five and a half years ago.

(c) The original request for a trial date was in excess of three years ago.

(d) The trial had been listed to commence twice, in October 2015 and April 2016.

(e) The appellant had not complied with any of the orders made by Rafter SC DCJ in March 2017 which required the appellant's attendance for specialist medical examinations on or before 31 March 2017, further disclosure in relation to a list of eBay sales of customers' goods, and further disclosure in relation to the appellant's Facebook account.

(f) The latter two orders could have been complied with by the appellant despite the fact that he was living in Israel; and in relation to the first order, at no stage had the appellant suggested any alternative process to enable medical examinations consistent with Rafter SC DCJ's orders and nor had he proposed any date upon which he might return to Australia to attend the examinations.

(g) Nothing in the appellant's conduct of the matter indicated that at any stage he was prepared to allow the matter to proceed to trial in the usual way.

(h) The appellant's conduct was in gross dereliction of the implied obligation pursuant to r 5 of the UCPR. (Rule 5(3) of UCPR provides that a party in a proceeding in a court impliedly undertakes to the court and to the other parties to proceed in an expeditious way.)

(i) An important factor was that the appellant had failed to comply with court orders: the primary judge referred to *Tyler v Custom Credit Corporation Ltd & Ors*.[6]

(j) The appellant's decision to move to Israel and to reside there and not comply with the court orders created the possibility of prejudice to the respondent if the appellant made a larger claim upon the footing that his incapacity had increased beyond that reported in the earlier medical reports and the respondent found it difficult to obtain evidence to contradict any such claim: the primary judge referred to *Ward v Wiltshire Australia Pty Ltd*.[7]

[7] The primary judge concluded that in circumstances in which the appellant appeared to have deliberately flaunted orders of the court, and where one might gain a jaundiced view about the appellant's desire to progress the litigation, and having regard to the dismissal of the solicitors previously engaged by the appellant, it was appropriate that the claim be struck out consistently with the order of 13 November 2018.

[8] The grounds of appeal in the appellant's notice of appeal comprise various assertions of fact by the appellant followed by the statement that it is "in the interests of procedural fairness and natural justice" that the primary judge's order be set aside, so that the appellant may continue to prosecute his claim in the District Court. I will discuss the grounds of appeal under the headings set out in the appellant's outline of argument.

Ground 1: denied procedure fairness – interpreter for self-represented litigant

[9] The appellant states that he was born in the Ukraine, he speaks Russian and Hebrew, and he speaks English as his third language. He submits that the denial of his request on short notice for a Russian/English interpreter denied him procedural fairness, bearing in mind that he is self-represented.

[10] Upon that point counsel for the respondent referred the primary judge to an affidavit sworn on 18 September 2017 by a solicitor, Mr Shannon, who had the day to day conduct of the appellant's claim for damages between mid-March 2016 and mid-August 2017. Mr Shannon deposed that when he met the appellant in March 2016 the appellant predominantly spoke Russian and his son acted as his interpreter, but because the appellant responded to questions almost immediately Mr Shannon gained the distinct impression that the appellant fully understood all of the questions asked of him. In the following months Mr Shannon exchanged numerous emails with the appellant and his son about the conduct of the court proceedings. All of those communications were in English. The responses received from the appellant and from his son were also in English. Mr Shannon was satisfied that the appellant fully understood the issues being put to him for the purposes of instructions to conduct the litigation. There is no evidence to the contrary before the Court.

[11] The appellant has not adduced evidence that he was insufficiently fluent in English to make whatever submissions he might have wished to make at the hearing. Nor is there any explanation of his omission to adduce any evidence for use at that hearing. He has not adduced any evidence to explain why he did not enquire about the

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6 [2000] QCA 178 at 2 – 4.

7 [2008] QCA 93, particularly at [86] and [87].

possibility of the Court providing an interpreter until 2 December 2018, the day before the hearing of the strike-out application, when on 13 November 2018 the primary judge had ordered the appellant to appear on 3 December 2018 and on 28 November 2018 the appellant, by his solicitors, had conveyed his intention to appear. As the respondent points out, the fact that the District Court does not provide interpreters for civil proceedings is notified on the "Queensland Courts" website. If the appellant had raised that topic with his solicitor, the appellant presumably would have been given information to that effect.

[12] There is also no evidence that the appellant would have encountered any difficulty in himself arranging for an interpreter (for example his son) to be present during the telephone appearance if he thought that was desirable. Furthermore, the appellant's email to the primary judge's associate on 9 December 2018 does not contend that the absence of an interpreter explained the appellant's omission to appear by telephone at the hearing before the primary judge on 3 December 2018.

[13] The appellant's argument that he was denied procedural fairness as contended for in this ground lacks any support in the evidence.

Ground 2: denied procedural fairness – timing of proposed draft orders

[14] The appellant argues that he was denied procedural fairness because about two and a half hours before the hearing in Brisbane the respondent provided the appellant with proposed draft orders providing, on certain conditions, that the appellant's proceeding be listed for trial. The appellant states that he did not understand the meaning and effect of the proposed consent orders and did not respond to the respondent because of the time when they were emailed to him.

[15] Those draft orders were evidently supplied against the possibility that the appellant's claim might not be struck out. Because the appellant did not appear at the hearing on 3 December 2018 the draft orders were irrelevant to the disposition of the respondent's strike-out application. Ground 2 fails accordingly.

Ground 3: the appellant did not dismiss his solicitors

[16] The appellant contends that the primary judge's reference to "the dismissal" of his solicitors reveals that the primary judge may have proceeded upon a mistaken understanding.

[17] The appellant did not dismiss his solicitors. The primary judge made an order granting leave to the appellant's solicitors to withdraw as solicitors on the record. His Honour's reference to the dismissal of the solicitors is an inconsequential slip. The substantial point was that the appellant was no longer represented by a solicitor because of his failure to give instructions to his solicitors to progress his litigation for a very lengthy period. The appellant's failure to supply necessary instructions to his solicitors was so serious that the solicitors sought a declaration about the appellant's capacity upon the footing that his conduct appeared to them to be irrational. There is no basis in the evidence before this Court to disregard QCAT's decision that the appellant did not lack capacity to instruct those solicitors. His continuing failure during a lengthy period to give them the instructions required to progress the litigation was a serious breach of his implied undertaking to proceed in an expeditious way.

[18] Notwithstanding that the appellant's solicitors communicated to the respondent the appellant's instructions in September 2018 that he was seeking alternative legal representation, the appellant did not secure any such representation by 3 December 2018, he did not adduce evidence that there was any realistic prospect that he would secure legal representation in the foreseeable future, and he did not supply any form of assurance to rebut the inference from his past conduct that his claim would continue to consume legal and judicial resources without progressing to a trial.

[19] The primary judge's reference to the appellant having dismissed his solicitors, when they instead were given leave to withdraw because of the appellant's failure to give them instructions to progress his claim, does not justify appellate interference in the primary judge's exercise of discretion.

Is the order unreasonable or plainly unjust?

[20] The appellant nevertheless contends that it is in the interests in justice, procedural fairness and natural justice, that the appellant's claim should not have been struck out. In support of that contention the appellant relies upon the contentions I have rejected that the primary judge may have erred in considering that the appellant had dismissed his solicitor and that he was denied procedural fairness.

[21] In addition, the appellant refers to the circumstance that the respondent admitted liability for the injuries sustained by the appellant. Ordinarily that is likely to be a significant consideration. Its significance is reduced here, where either all or the most substantial part of the quantum of the appellant's claim was in issue, the continuing non-compliances with orders relating to quantum made about one year and nine months before the claim was struck out were found to have been apparently deliberate, there was no assurance in the evidence that the appellant might comply with those orders within a reasonable time or at all, and the appellant had been personally responsible for the serious delays in the prosecution of his claim.

[22] In *Tyler v Custom Credit Corporation Ltd & Ors*[8] Atkinson J (with whom McMurdo P and McPherson JA agreed) identified an inclusive list of factors which a court takes into account in determining whether the interests of justice require a case to be dismissed:[9]

> "(1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
>
> (2) how long ago the litigation was commenced or causes of action were added;
>
> (3) what prospects the plaintiff has of success in the action;
>
> (4) whether or not there has been disobedience of Court orders or directions;
>
> (5) whether or not the litigation has been characterised by periods of delay;

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8 [2000] QCA 178.

9 [2000] QCA 178 at [2]. (Footnotes omitted).

(6) whether the delay is attributable to the plaintiff, the defendant, or both the plaintiff and the defendant;

(7) whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;

(8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;

(9) how far the litigation has progressed;

(10) whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers;

(11) whether there is a satisfactory explanation for the delay; and

(12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial."

[23] The factors supporting the striking out in this case are (1), (2), (4), (5), (6), (8), (9), (10) (the appellant, rather than his legal advisers, are responsible for most of the delay) and (11) (there is no satisfactory explanation for the delay). As to the remaining factors: (3) it is not possible to assess the prospects of success; (7) there is no suggestion that the respondent's impecuniosity is responsible for the pace of the litigation; and (12) the delay has not been shown to have produced an inability to ensure a fair trial, subject to the contingency mentioned in [6](j) of these reasons.

[24] That a fair trial may be conducted is ordinarily an important factor favouring refusal of a strike-out application. As against that, however, the primary judge concluded that the appellant appeared to have deliberately flaunted orders of the court and his Honour held a jaundiced view about the appellant's desire to progress the matter. The grounds of the appellant's appeal do not challenge those conclusions. They are supported by the evidence.

[25] In the particular circumstances of this case, the primary judge's exercise of discretion is not open to challenge upon the ground that the order striking out the claim is unreasonable or plainly unjust such as to allow for an inference that, although no specific error in the primary judge's reasons can be identified, the exercise of the discretion has miscarried.[10]

Proposed order

[26] I would dismiss the appeal with costs.

[27] **PHILIPPIDES JA:** For the reasons given by Fraser JA, I agree that the appeal should be dismissed with costs.

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10 See *House v The King* (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTiernan JJ).

[28] **LYONS SJA:** I agree with the reasons for judgment of Fraser JA and the orders proposed by his Honour.