SUPREME COURT OF QUEENSLAND

CITATION:	*Arawak Holdings Pty Ltd & Ors v Jackson* [2021] QCA 62
PARTIES:	**ARAWAK HOLDINGS PTY LTD AS TRUSTEE** ACN 157 865 195 (first respondent/not a party to the application) **VAULT 8 HOLDINGS PTY LTD AS TRUSTEE** ACN 105 339 759 (second respondent/not a party to the application **CRAIG ANDREW PERRY** (third respondent/not a party to the application **REGISTRAR OF TITLES** (fourth respondent/not a party to the application) **BIGWHALE GROUP PTY LTD AS TRUSTEE** ACN 635 682 352 (fifth respondent/applicant) **v** **LIANA RENAE JACKSON** (applicant/respondent)
FILE NO/S:	Appeal No 11857 of 2019 SC No 7304 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Dismissal for Want of Prosecution
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 57 (McMurdo JA)
DELIVERED ON:	6 April 2021
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2021
JUDGE:	Morrison JA
ORDERS:	**1. Application refused.** **2. No order as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – WANT OF PROSECUTION OR LACK OF PROGRESS – where there has been a three-and-a-half-year delay in bringing an application for an extension of time to appeal – where the extension is sought on the basis of a medical disability resulting in cognitive impairment – where the applicant to the appeal has undertaken to the Court to prosecute the appeal diligently – whether the applicant is prejudiced by the delay

Uniform Civil Procedure Rules 1999 (Qld), r 775

Muto v Faul [1980] VR 26; [1980] VicRp 3, applied
Spencer & Anor v Hutson & Ors [2007] QCA 178, applied
Tyler v Custom Credit Corporation Ltd [2000] QCA 178, applied

COUNSEL: M E Pope for the applicant
The respondent appeared on her own behalf

SOLICITORS: Derek Legal for the applicant
The respondent appeared on her own behalf

[1] **MORRISON JA:** The fifth respondent to the appeal, Bigwhale Group Pty Ltd, applies pursuant to r 775 of the *Uniform Civil Procedure Rules* 1999 (Qld) (***UCPR***) for orders that the application for leave to appeal be dismissed for want of prosecution.

[2] The appeal has been brought from orders made by McMurdo JA (after a trial) in March 2016. The synopsis below has been adopted from the reasons of McMurdo JA.[1]

Background

[3] The applicant, Ms Jackson, is the registered owner of a freehold residential property which she purchased in April 2010.

[4] The first respondent in the appeal, Arawak, held a registered mortgage over the property. Arawak was a company controlled by the third respondent, Mr Perry. He and Ms Jackson were once de facto partners.

[5] The mortgage was said to secure a loan to Ms Jackson of $730,000 to enable her to pay the purchase price ($710,000) and other expenses of her purchase of this property. The lender (not Arawak) was another company controlled by Mr Perry. According to the mortgage instrument, the lender acted as a trustee. Arawak took a transfer of the lender's title to the mortgage and so became the registered mortgagee.

[6] Arawak claimed that Ms Jackson had defaulted under the mortgage with the consequences that she owed Arawak more than $1 million and Arawak was entitled to possession and to exercise a mortgagee's power of sale.

[7] Ms Jackson was (and is) not in possession of the property. Instead, Mr Perry lives there, as he has done since April 2012, not long after the de facto relationship between Ms Jackson and Mr Perry ended.

[8] On 27 July 2015 Ms Jackson commenced proceedings claiming that the mortgage should be given no effect. She claimed that there was no loan at all to her for the acquisition of the property and, more particularly, no loan as apparently recorded by a loan agreement which was dated 8 April 2010, the date of the completion of her purchase. She claimed that she did not execute the mortgage instrument, the loan agreement or any other associated documents and that her apparent signature in each case was a forgery. Alternatively, she claimed that the mortgage was a sham and should be given no effect and be removed from the register.

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1 *Jackson v Arawak Holdings Pty Ltd & Ors* [2016] QSC 57.

[9] That challenge was unsuccessful. On 17 March 2016, McMurdo JA ordered that Ms Jackson's application be dismissed, and that the caveat lodged by her over the property be removed.

[10] On 30 August 2019 the present applicant (Bigwhale) purchased the real property from Arawak as mortgagee in possession. The purchase price was $1,150,000 and the contract settled on 30 October 2019. However, Bigwhale still does not have title to the property because Ms Jackson has applied for an extension of time within which to appeal from the orders of McMurdo JA.

Overall progress of the proceedings

[11] The material shows that the relevant steps in the application for extension of time to appeal, and other steps, have been as follows:

(a) on 17 March 2016 the orders were made by McMurdo JA;

(b) on 30 August 2019 Bigwhale entered into a contract to purchase the land from Arawak acting as mortgagee in possession;

(c) on 28 October 2019 the application for extension of time to appeal was filed, as well as an application for an interlocutory injunction preventing transfer of title to the land;

(d) on 30 October 2019 settlement of the land purchase occurred;

(e) on 31 October 2019 a notice of appeal was filed;

(f) on 9 December 2019 Fraser JA ordered that:

  (i) Ms Jackson have leave to amend the notice of appeal by adding grounds in accordance with the *UCPR*;

  (ii) no date be fixed for the hearing of the injunction application until Ms Jackson confirmed to the Registry that she had amended in the way described, and that she had filed all her affidavit evidence for the injunction application;

(g) on 24 June 2020 Bigwhale applied to be joined in the proceedings;

(h) on 23 July 2020 Mullins JA ordered that:

  (i) Bigwhale's application to be joined, the application by the Registrar of Titles to be removed from the proceedings, and the injunction application, all be listed for hearing on 18 August 2020;

  (ii) an amended notice of appeal be filed and served by 11 August 2020;

(i) on 18 August 2020, on the undertaking of Ms Jackson to prosecute the application for leave to appeal diligently, Mullins JA ordered that:

  (i) Bigwhale be joined as a party to the proceedings;

  (ii) pending the determination of the appeal the Registrar of Titles be restrained from registering the transfer;

  (iii) to the extent that Ms Jackson sought relief in relation to the exercise of the power of sale by Arawak in favour of Bigwhale based on

contentions not raised before McMurdo JA, she was directed to bring those matters by application in the Trial Division;[2]

(j) on 14 January 2021 the present application was filed.

[12] Bigwhale contends that no steps have been taken to prosecute the application for extension of time to appeal.

The application filed 28 October 2019 and notice of appeal

[13] The application sought several forms of relief, including an extension of time "due to Medical Reasons", admission of new evidence, injunctions, and declarations that the loan documents and mortgage were void. On 11 August 2020 an amended application was filed seeking relief on bases not raised before McMurdo JA. The extra relief was directed to be pursued in the Trial Division. No step has been taken to do so.

[14] The notice of appeal filed on 31 October 2019 simply repeated the relief sought in the application for extension of time. As with that application, on 11 August 2020 an amended notice of appeal was produced, but it again repeated the claimed relief in the amended application without articulating any grounds of appeal.

Legal principles

[15] The relief sought is that the proceedings be terminated for want of prosecution. The proceedings themselves consist of an application for extension of time within which to appeal the decision of McMurdo JA. The application and notice of appeal were filed about three and a-half years out of time.[3]

[16] In deciding whether to grant an extension of time the court examines whether any good reason has been shown to account for the delay and whether it considers it is in the interests of justice to grant the extension. Even where there is no satisfactory explanation for the delay the court may grant an extension if a refusal to do so would produce a miscarriage of justice.[4]

[17] As this Court observed in *Spencer & Anor v Hutson & Ors*:[5]

> "The prescribed time limits for appeals serve the important purpose of bringing finality to litigation. They are not lightly to be ignored. An applicant for an extension of the time for bringing an appeal must show that there is good reason for the court to relieve that party of the consequences of the expiration of the prescribed period for bringing an appeal. A demonstration that there is a good reason to extend time will usually involve an explanation for that party's delay."

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2 This was because the extra relief had been sought in an amended application filed 23 July 2020.

3 The time for an appeal expired on 14 April 2016; the application was filed on 28 October 2019.

4 See *R v Tait* [1999] 2 Qd R 667 at 668; *R v CAP (No 2)* [2014] QCA 323; and *Stevenson & Anor v Carter-Lannstrom & Anor* [2020] QCA 284 at [23]-[24].

5 [2007] QCA 178 at [28]; internal citations omitted.

[18] The court may grant an extension of time but only if positively satisfied it is proper to do so. In doing so, it is appropriate to consider the merits of the substantive application and to refuse an extension if the appeal is plainly hopeless.[6]

[19] The matters that are relevant to an application to dismiss proceedings for want of prosecution are identified in *Tyler v Custom Credit Corporation Ltd*,[7] and relevantly include:

(a) how long ago the proceedings were commenced;

(b) the prospects the appellant has of success in the application for leave to appeal;

(c) any delay before the proceedings were commenced;

(d) how far the proceedings have progressed;

(e) whether or not the proceedings have been characterised by periods of delay;

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

(g) whether or not there has been disobedience of Court orders or directions;

(h) whether the litigation between the parties would be concluded by the striking out the application for leave to appeal; and

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

[20] As can be seen from the principles recited above, the questions of delay, any explanation for it, and the interests of justice, are central to the issues on this application.

Impact of Ms Jackson's medical condition

[21] In her affidavit filed on 17 March 2021, in opposition to the present application, Ms Jackson has made a number of points. In paragraph 3 she said that she relied upon "all my previous affidavits and evidence in their entirety". During the hearing of the application she confirmed that she wished to rely upon all of her previous affidavits. Consequently, they have all been reviewed to see if they shed any relevant light on the issues concerning the present application.[8]

[22] Ms Jackson refers to various aspects of her medical condition which (relevantly) may be said to affect her personal capacity:

(a) in January 2013 she acquired a traumatic brain injury from a fractured skull, giving her permanent brain damage which leaves her with a disability causing cognitive dysfunction, confusion and memory problems;

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6 *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 176; (1984) 3 FCR 344 at 348-349; and *Chapman v State of Qld* [2003] QCA 172 at [3] per de Jersey CJ, White and Atkinson JJ. See also *Ford v La Forrest* [2002] 2 Qd R 44 at 45.

7 [2000] QCA 178 at [2]; *Mathieson v Lawson & Ors* [2019] QCA 35 at [38]-[40].

8 The affidavits to which I have had reference are: (i) 27 July 2015, Court Index Doc 2; (ii) 28 September 2015, Court Index Doc 17; (iii) 19 November 2015, Court Index Doc 30; (iv) 28 October 2019; (v) 31 October 2019; (vi) 9 December 2019; and (vii) 17 August 2020.

(b) she sees a psychiatrist on a monthly basis and while she lives independently, she requires "assistance or advocacy in some area's (sic) due to various impairments";

(c) her psychiatrist, Dr Fraser, said that Ms Jackson had been under his care since November 2017, she sustained an acquired brain injury in January 2013 and that injury has caused "ongoing cognitive impairment", resulting in a disability for which she requires "advocacy";

(d) Dr Smith, Ms Jackson's general practitioner, says that Ms Jackson has an acquired brain injury which causes her problems with cognition and that it takes her a long time to process information and make decisions; Dr Smith recommended the assistance of an advocate to help to provide direction with legal matters; and

(e) Ms Jackson describes the effect of the traumatic brain injury as affecting "cognitive function, memory, filter, sequencing of time and numbers and require some advocacy and assistance in comprehension, processing and meeting timelines".

[23] The applicant, Bigwhale, does not seek to challenge any of that evidence.

[24] Notwithstanding what Ms Jackson has said about her medical condition, the exhibits attached to her affidavits also include correspondence between herself and others from 2017 onwards, in which she has personally pursued various questions with accountants, the Australian Financial Complaints Authority (**AFCA**), Land Titles, members of Parliament and various others.

[25] Those communications have included quite detailed analysis of documents relating to the activities of her ex-partner, Mr Perry. Further, some of the correspondence, particularly with a handwriting expert (Mr Heath) reveals Ms Jackson's ability to argue her case, even after the end of the proceedings before McMurdo JA.

[26] Ms Jackson's affidavit, filed 17 August 2020 is relied upon in respect of the extension of time. Relevant parts of the affidavit are as follows:

(a) in June 2020, pursuing her case that fraud, forgery and perjury had been committed against her by her ex-partner, she had contact with Price Waterhouse and through them with a particular person appointed as the liquidator of Vault 8 Holdings Pty Ltd, a company involved in the loan and mortgage in 2010;[9]

(b) she had ongoing treatment with her specialist about the time orders were made by Mullins JA in July 2020;[10] and

(c) in September 2019 she engaged in correspondence with the Minister of Land Titles and others in the Land Title Registry concerning her case over the mortgage lodged over the land; she also lodged the complaint with the Department of Natural Resources, Mines and Energy.

[27] Ms Jackson's affidavit, filed 17 March 2021 contains a deal of material which relates to her attempts to obtain documents that are concerned with the matters the

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9 Paragraph 19.
10 Paragraph 23.

subject of the trial before McMurdo JA. Relevant to the present application the affidavit says very little apart from her medical condition and what is said in paragraph 15:

> "I am suffering extreme anxiety, and have been in communication with various departments of law enforcement, as my children and I have been stalked and those details are at the discretion of authorities.
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> As a self representing litigant without advocacy to prosecute diligently would be better applied by authorities and the judicial system to withhold their own mutual obligations to prosecute diligently in Common Law."

[28] Further, in paragraph 17 Ms Jackson says:

> "I seek orders for the registrar to provide a record index book as requested, as I require assistance/advocacy to fulfil those orders."

[29] Exhibit LRJ8(g) to the affidavit of Ms Jackson sworn on 28 October 2019 is part of the correspondence she had with AFCA in September 2019. In an email to Mr Crowhurst of AFCA on 10 September 2019, Ms Jackson noted that they had met at the Supreme Court where Mr Crowhurst had given her a way of contacting him. She mentioned the nature of her complaint, namely that the property was taken as a consequence of the fraud, and that she was "seeking an interlocutory injunction whilst investigations are carried out". Having mentioned that she had a disability and required advocacy, Ms Jackson attached a letter she had written to the Department of Land Titles concerning the fraudulent mortgage. Again she noted that she had "difficulty with navigating the system and require assistance and advocacy". She noted that she did not qualify for Legal Aid and had no legal representation, but had more evidence to produce and said she was "not out of time due to medical reasons". At the end of the email she added this:

> "Below is the email I sent to Land Titles and associated departments on Sunday as well as a link from the Supreme Court hearing … FYI The judge has extended me a timeframe for appeal, though I cannot afford to go back to court, I am wishful that the various departments could assist me in their area's (sic) and somehow through the grace of god I will have legal representation."

[30] The link to which she referred was apparently to the decision of McMurdo JA.

[31] On 10 December 2020 the registry contacted Ms Jackson as well as representatives of other parties. The initial part of that email was concerned with setting a date for the current application to be heard. However, it is also evident that by that time, notwithstanding the undertaking to prosecute the appeal diligently, no steps had been taken to do so. No index to the appeal record book had been prepared, nor any steps taken to prepare the record book itself. In that respect Ms Jackson and the others were advised that if an index was not supplied by 15 January 2021, then the registrar would settle the index, and the registry would produce the record book once an application for that had been lodged.

Consideration

[32] The present applicant, Bigwhale, was only joined as a party to the appeal on 18 August 2020, thus the period of delay about which it might legitimately complain is the seven months since the matter was dealt with by Mullins JA in August 2020. The application it has brought in response to that delay is to dismiss the proceedings for want of prosecution. It does not seek to strike out the appeal on the basis that no viable case can be articulated.

[33] The application by Bigwhale has been brought pursuant to r 775 of the *UCPR*. It provides:

> "**775 Effect of failure to prosecute appeal**
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> (1) If the appellant fails to comply with any step required under these rules or a practice direction, including a practice direction about filing or serving an outline of argument, the Court of Appeal may, at or before the hearing of the appeal and of its own initiative or on an application by a respondent, dismiss the appeal for want of prosecution."

[34] Accepting that a failure to comply with a step under the *UCPR* would include failure to comply with an order of the court, or a direction of the Registrar, r 775(1) is enlivened here because of:

(i) failure to comply with the orders of Mullins JA on 18 August 2020; and

(ii) failure to comply with the timetable set by the Registrar.

[35] More specifically, the only aspect of the orders on 18 August 2020 that compelled Ms Jackson to take a step is her undertaking to prosecute the appeal diligently. Order No. 2 was concerned with contentions that Ms Jackson sought to pursue, but which were not raised before McMurdo JA in the trial. Order No. 2 relevantly provided that "if Ms Jackson wishes to pursue those contentions it is directed that Ms Jackson bring an application in the Trial Division to pursue those contentions that are not properly the subject of the appeal". That Order merely directed that **if** she wished to pursue them then she should do so in the Trial Division. That order did not compel her to do so.

[36] Following 18 August 2020 nothing meaningful was done to advance the application to extend time, or the appeal. There were no amendments made to the notice of appeal beyond those filed on 11 August 2020.[11] No steps were taken to progress the appeal in terms of settling an index to the record book, preparing the record book itself, or preparing outlines.

[37] Thus it is the fact that when the application was heard by me it was nearly five years following the decision of McMurdo JA, sixteen months after the matter was heard by Fraser JA, and seven months after it had been dealt with by Mullins JA.

[38] The delay since August 2020 is long (seven months) and the explanation for it, though understandable, is not particularly satisfactory. The consequence of the delay is that the application and appeal have not been progressed at all. However,

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[11] Those amendments mirrored the amendments made to the application itself, and simply claimed relief rather than articulating proper grounds of appeal. Therefore, they did not advance the case at all.

in that seven-month period since August 2020 the Registrar has also advised that if necessary, the registry will settle the index to the record book and prepare the record books themselves, on appropriate application to do so.

[39] The decision of the Victorian Court of Appeal in *Muto v Faul*[12] gives some useful guidance. That court considered that there was inherent power to strike out an appeal for want of prosecution, saying that the conditions for doing so were the same as for dismissing an action on that basis. As to what must be shown, the court said:

> "It appears from the authorities to which we have referred, that the Court should not strike out or dismiss an appeal without deciding the matter of the appeal simply because there has been some failure to comply with the requirements of the rules. The present application has revealed that those rules both in this Court and in the County Court are inadequate. Hood, J.'s question which he asked in a number of cases, "How is a respondent hurt by a mere notice of appeal?", may be answered by saying that a litigant is entitled to know when he is no longer at risk in a particular matter.
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> So far as appears in the material before us the delay by the present respondent is entirely unjustified. It is well established that any court possesses an inherent jurisdiction to stay or dismiss cases brought before it which are frivolous or vexatious or an abuse of the process of the Court. This inherent power must extend, as this Court said in *Duncan v Lowenthal*, [1969] VR 180 at p. 182, to purging the Court list of cases which have not been reasonably prosecuted. This inherent power is of course very sparingly exercised but it is an essential power in the administration of justice. It is no answer to the exercise of the power in a proper case that to do so precludes a party from asserting or exercising a right given to him by statute. The books contain many cases in which the power to dismiss an action for want of prosecution is discussed and the conditions upon which the power will be exercised explained. We select a single passage from the judgment of Salmon, LJ (as he then was) in *Allen v Sir Alfred McAlpine and Sons Ltd.*, [1968] 2 QB 229 at p. 268; [1968] 1 All ER 543 at p. 561: "A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed the defendant must show:-
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> > "(1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff--so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case,

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12 [1980] VR 26.

but inordinate delay should not be too difficult to recognize when it occurs.

"(2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

"(3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

That case has since been approved in the House of Lords: see *Birkett v James*, [1978] AC 297."

[40] In the present case inordinate delay has been shown. Normally a party cannot let an appeal languish for seven months without proper steps being taken to advance it.

[41] But for Ms Jackson's medical conditions the delay is inexcusable. Her medical condition offers some excuse for the period since August 2020.

[42] That is unlike the previous periods of time, namely the three and a-half years between the judgment in the trial and when the application was filed in October 2019, and the time between then and August 2020.

[43] As to the first period, I have referred to the various parts of the affidavits of Ms Jackson which shed some light on what was occurring during that time. True it is that Ms Jackson suffers from a brain injury which leaves her with cognitive impairment and difficulties with memory and concentration. However, during 2017 through to 2019, the material shows that she pursued a line of investigation that involved the Australian Tax Office, the Australian Securities and Investments Commission, the Office of Fair Trading, AFCA, and certain accountants, liquidators and experts in respect of fraud issues. The material tends to show that Ms Jackson was deliberately pursuing extra curial relief not just because of her physical or mental disabilities, but because as a practical matter she could not afford to go to court.

[44] In the second period of delay once Ms Jackson had filed the documents in late October 2019 the matter came before this Court in a timely way. The orders made by Fraser JA in November 2019 reflected the fact that the notice of appeal did not articulate any proper grounds. Yet, nothing was done to amend the grounds until the matter was reviewed by Mullins JA and set for hearing in August 2020. There was no suggestion during that time of further pursuit of extra curial solutions.

[45] As to whether Bigwhale is likely to be seriously prejudiced by the delay, it only came into the appeal in August 2020, and its rights depend not upon any question dealt with at the trial before McMurdo JA, but upon its position as a bona fide purchaser for value, without notice of any prior adverse claim on the title. Of course, it wants its title perfected, but it did not point to any prejudice otherwise. It has not yet had to expend anything on steps in the appeal such as preparation of an outline of submissions.

[46] In my view, failure to comply with her undertaking and the Registrar's directions in the seven-month period since August 2020 does not, as against Bigwhale, bespeak a want of prosecution that should result in dismissal of the appeal. Given the explanation for the difficulties under which Ms Jackson operates as a consequence of her medical condition and the basis upon which this application has been brought, it seems to me that the interests of justice would not be served by dismissing the proceedings as against Bigwhale Group Pty Ltd for want of prosecution.

[47] For present purposes it is not necessary to express a view about the merits of the appeal itself, but it can be observed that the findings appear to be based, at least in part, upon a rejection of Ms Jackson's evidence. Therefore, it can be observed that success on the appeal can only be achieved after overcoming considerable hurdles.

[48] Given Ms Jackson's position it seems to me that this is a case that could usefully be referred to someone on the registry's pro bono list.

[49] In the circumstances I order:

1. Application refused.

2. No order as to costs.