DISTRICT COURT OF QUEENSLAND

CITATION:	*Casper v Singtel Optus P/L & Anor (No. 2)* [2012] QDC 18
PARTIES:	**PETER ARTHUR CASPER** (Plaintiff) **v** **SINGTEL OPTUS PTY LIMITED (ABN 90 052 833 208) FORMERLY CABLE AND WIRELESS OPTUS FORMERLY OPTUS COMMUNICATIONS PTY LIMITED TRADING AS OPTUS** (First Defendant) **and** **OPTUS MOBILE PTY LIMITED (ABN 65 054 365 696)** (Second Defendant)
FILE NO/S:	BD 3079/04
DIVISION:	
PROCEEDING:	Application
ORIGINATING COURT:	District Court
DELIVERED ON:	22 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2012
JUDGE:	Samios DCJ
ORDER:	**1. The plaintiff have leave to proceed with the proceedings.** **2. The defendants' application to dismiss the proceedings for want of prosecution is dismissed.**
CATCHWORDS:	Procedure – Courts and Judges generally – Courts – Leave to proceed – Dismissal of proceedings for want of prosecution – Principles applicable – Relevant considerations *Uniform Civil Procedure Rules* s 389(2) *Casper v Singtel Optus Pty Ltd* [2011] QDC considered *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 applied
COUNSEL:	Mr Favell for the plaintiff Mr McCafferty for the defendants
SOLICITORS:	McCarthy Durie Ryan and Neil for the plaintiff Minter Ellison for the defendants

[1] There are two applications before the court.

[2] The first is the plaintiff's application seeking leave to proceed pursuant to rule 389(2) of the UCPR. This application has been prompted by the decision of McGill DCJ in *Casper v Singtel Optus Pty Ltd* [2011] QDC, in which His Honour found the last step in the proceedings was on 7 July 2008, over three and a half years ago.

[3] The second application is the defendants' application to dismiss the proceedings for want of prosecution.

[4] The plaintiff claims that in or about May 1993 he reserved 10 consecutive digital mobile telephone numbers. Those numbers were 0411 111 110 to 0411 111 119. In these reasons each telephone number will be referred to by its last digit.

[5] By his Statement of Claim, the plaintiff seeks:-

(a) In respect of numbers 3, 4, 5 and 9: the "return of the right to use" each number, compensation for the loss of "the right to use" each number and "forfeiture of past [and] future income derived from" each number;
(b) In respect of numbers 2 and 6: compensation for the loss of "the right to use" each number and "forfeiture of past [and] future income derived from" each number; and
(c) Exemplary damages for various alleged acts "relating to the malice, ill will, duress, misrepresentation, breach of contract, breach of trust and negligence".

[6] There is no issue between the parties as to the mobile telephone numbers 0, 1, 7 and 8. It is not in dispute that the plaintiff subscribed to and was allocated numbers 0 to 9 (inclusive).

[7] Upon subscription the plaintiff suspended numbers 2 to 9. He subsequently reactivated numbers 7 and 8 and transferred them to members of his family.

[8] On 11 October 1996 the second defendant wrote to the plaintiff in respect of numbers 2, 3, 4, 5, 6 and 9. In this letter the plaintiff was advised that in respect of each suspended number, the second defendant would begin to charge a $5 monthly suspension fee and place a maximum time frame of six months on each suspended account.

[9] On 20 November 1996 the plaintiff wrote to the second defendant stating a desire to keep the numbers suspended for more than six months. In this letter he also wrote that he did not intend to activate numbers 2 and 3 for at least two years because they were intended for his sons who did not begin school until 1997. As for the other four numbers, 4, 5, 6 and 9, the plaintiff said each would be activated when mobile phone coverage in the area of their use improved. He requested, in respect of these four numbers, that he not be charged a suspension fee until the numbers were useable.

[10] On 11 December 1996 the second defendant responded to the plaintiff's letter. The author of the letter is Denice Maree Pitt. In the letter the second defendant advised the plaintiff, amongst other things:-

> "We feel it fair and reasonable to offer you an additional six months free suspension for the four mobile phones being used by your family. After this six month period you will need to call customer service to advise us of the action to be taken with the mobile numbers.
>
> We are able to be flexible and extend the suspension for another month or so dependant on the individual situation, however not for an unlimited period whilst waiting for coverage to improve.
>
> I understand that you would like the suspension fee waived until there is sufficient coverage in the areas indicated, however at this stage we have no time frame as to when coverage will improve in these areas so this is not a viable option.
>
> The Optus network has a maximum user capacity level and all mobile phone suspended and active, contribute to taking up this capacity. This is the reason Optus no longer suspends mobiles for longer than six months."

[11] In his Statement of Claim, the plaintiff says that on 17 December 1996 he made two telephone calls to the first defendant.

[12] At paragraph 9.4 of his Statement of Claim he alleges in relation to the first telephone call:-

(a) He informed the first defendant that he did not comprehend part of the 11 December letter;
(b) He advised that a six month suspension would be inadequate;
(c) The first defendant "offered two years suspension for the numbers"; and
(d) Offered "free suspension for four telephone numbers".

[13] At paragraph 9.5 of his Statement of Claim he alleges in relation to the second telephone conversation:-

(a) He again informed the first defendant that he did not comprehend parts of the 11 December letter;
(b) He did not comprehend part of the first telephone conversation;
(c) The first defendant advised that the numbers "were suspended for two years";
(d) The first defendant advised that "re-activation and suspension would not be required every six months"; and
(e) The first defendant advised that "a re-activation fee would be required every six months".

[14] Ms Pitt's affidavit exhibits the second defendant's account records for 17 December 1996. Those entries are:-

"**17-12-96 RALPHK ACCOUNT UPDATE NOTE 17-12-96**

> **RALPHK** CIS 0411111112 & 0411111113 – APPLIED OC&C CODE FOR SUSPENSION FEE FOR 2 YEARS (AS PER PREVIOUS NOTES) KNESIA SAS SOUTH Q3-5622
>
> **17-12-96 RALPHK CONT. WITH CUST NOTE 17-12-96**
> **RALPHK** CIS * 0411111112 & 0411111113 – CUSTOMER CALLED & SPOKE WITH DENICE PITT RE LETTER SENT WAS HAPPY WITH RESPONSE BUT WANTED TO KEEP HIS SONS MOBILE NUMBERS SUSPENDED FOR 2 YEARS, DENICE AGREED AS LONG AS HE PAYS FOR SUSPENSION HE IS HAPPY TO DO THIS. CUSTOMER SEEMS TO THINK THEIR (SIC) IS AN ADDITIONAL $65 CHARGE EVERYSIX MONTHS WHICH IS NOT THE CASE. KNEISA SAS SOUTH Q3-5622".

[15] In Ms Pitt's affidavit she states that she does not recall the plaintiff. She believes she must have written the correspondence of 11 December 1996 and had the telephone conversation of 17 December 1996 on the basis of her review of the exhibits. However she does not recall either.

[16] The defendants say in their defence that the plaintiff did not pay the suspension fees mentioned in the account records save for the month 5 July 1998 to 4 August 1998.

[17] It is accepted that in late September 1998 the second defendant cancelled numbers 2, 3, 4, 5, 6 and 9 and re-issued the numbers to members of the public.

[18] The present state of the numbers are:-

(a) Numbers 2 and 6 have since been re-issued to the plaintiff;
(b) Numbers 3 and 5 have been surrendered to the second defendant and are presently held in quarantine;
(c) Numbers 4 and 9 have been transferred by the users to another digital mobile service carrier or carriers.

[19] Mr Fletcher, the solicitor at Minter Ellison, the solicitors for the defendants, has sworn an affidavit setting out the history of the proceedings.

[20] The background to the plaintiff's claim against the defendants occurred from in or about May 1993 to in our about September 1998.

2004

[21] On 27 August 2004 the plaintiff commenced the proceedings against Singtel Optus Pty Limited by originating application.

[22] On 3 September 2004 there was a hearing before Brabazon DCJ when His Honour ordered the plaintiff to serve any amendments of his originating application and affidavits by 24 September 2004 and the matter was adjourned to a date to be fixed.

[23] On 17 September 2004 the plaintiff filed affidavits in the proceedings providing in some detail his version of events that occurred between 1993 and 1998.

[24] On 6 October 2004 the plaintiff filed an application in the proceedings seeking orders that four individuals be included as respondents to the proceedings. He

sought to join the four individuals on the basis that they were the current users for certain of the mobile phone numbers the subject of the proceedings.

[25] In October 2004 there was correspondence passing between the plaintiff and Minter Ellison.

[26] On 1 November 2004 Minter Ellison filed a number of affidavits. One from an employee of Singtel Optus. Two other affidavits were from the holders of number 3 and number 4 telephone numbers. A fourth affidavit was from a solicitor of Minter Ellison exhibiting an affidavit of another holder being the holder of number 9.

[27] On 1 November 2004 the matter came on before Brabazon DCJ. He ordered the plaintiff's application be dismissed. He directed the plaintiff to provide a written statement of any further facts to be relied on at the trial and final relief to be claimed, provide signed statements of any witnesses to be called and the UCPR as to particulars of any damages be observed and each party give disclosure. He declined to join the other parties.

[28] In November 2004 there was further correspondence between the plaintiff and Minter Ellison. The plaintiff also filed an application and supporting affidavit. By his affidavit he was seeking to identify the other parties holding the telephone numbers and answers to questions. Minter Ellison declined the plaintiff's request for personal details of the holders of the telephone numbers.

[29] On 6 December 2004 the parties appeared before Wylie DCJ on the plaintiff's application when His Honour extended the times in which the parties were to respond to Brabazon DCJ's directions. Wylie DCJ also declined to join any further parties and ordered costs against the plaintiff.

[30] On 23 December 2004 the plaintiff filed a Notice to Admit Facts. This was served on Minter Ellison on 30 December 2004.

2005

[31] On 13 January 2005 the first defendant responded to the Notice to Admit Facts.

[32] On 3 February 2005 the plaintiff filed a Claim and Statement of Claim. This was then served on Minter Ellison on 9 February 2005.

[33] Minter Ellison responded to the plaintiff stating that no direction had been made by the court for him to file and serve a Claim and Statement of Claim and that is was liable to be struck out. Amongst other things, Minter Ellison advised the plaintiff that they did not believe the plaintiff had complied with the order that UCPR as to particulars of any damages be observed. Minter Ellison advised the plaintiff that they believed it was appropriate for the parties to provide mutual disclosure shortly.

[34] On 11 March 2005 the plaintiff threatened to proceed to default judgment against the first defendant. Minter Ellison responded by email dated 21 March 2005 that it would be improper for the plaintiff to apply for default judgment as Singtel Optus were vigorously opposing the proceedings.

[35] In March and April 2005 there was the costs assessment in respect of the costs awarded by Wylie DCJ.

[36] On 4 April 2005 the plaintiff filed and served a list of documents.

[37] From in about April to June 2005 there without prejudice negotiations.

[38] On 24 August 2005 the plaintiff filed an affidavit in which he requested renewal of the application and claim.

[39] On 29 August 2005 the Registrar made an order renewing the Claim and Statement of Claim.

[40] In September 2005 the plaintiff complained to Minter Ellison of alleged unsolicited SMS messages being received by the plaintiff.

[41] On 6 October 2005 Singtel Optus served its list of documents.

2006

[42] On 13 February 2006 Singtel Optus served its amended list of documents.

[43] On 27 May 2006 the plaintiff emailed Minter Ellison asking whether Singtel Optus wished to disclose any further documents and whether it knew of any reason why the parties may not now advance to the matters in Chapter 13, Part 2 of the UCPR (Setting Trial Date).

[44] On 25 July 2006 Minter Ellison responded stating it believed it had disclosed all documents in its possession and control relevant to the plaintiff's claim and that the claim may proceed in accordance with UCPR Chapter 13, Part 2.

[45] On 29 September 2006 the plaintiff filed a further application for directions and that the first respondent pay his costs. The plaintiff said in an affidavit that he had been incorrectly billed by Singtel Optus for delivery of premium SMS messages or other premium content delivery services. He said he had received a significant number of unsolicited SMS messages.

[46] On 16 October 2006 Minter Ellison emailed the plaintiff outlining the terms in which the plaintiff had agreed to consent to his application being dismissed.

[47] On 23 October 2006 the Deputy Registrar ordered by consent that the plaintiff's application filed 29 September 2006 be dismissed with no order to costs.

[48] From in about November 2006 up to February 2007 there were without prejudice negotiations between the parties.

2007

[49] On 18 July 2007 Minter Ellison received a request for trial date from the plaintiff.

[50] Mr Fletcher's affidavit states that Minter Ellison did not sign the request as further consideration was being given to whether the matter was ready for trial, in particular whether Singtel Optus was the correct respondent to the application and whether it was desirable to file a document responsive to the plaintiff's Statement of Claim to define the issues for trial.

[51] On 14 December 2007 the plaintiff filed a further application in which he sought directions and that the first defendant pay his costs. He filed a supporting affidavit

on the same day. The affidavit was concerned with the request for trial date which had been served and not signed.

[52] On 21 December 2007 the parties appeared before Noud DCJ on the return of the plaintiff's application. His Honour ordered the second defendant be joined as a defendant and the costs be reserved. He directed the defendants file and serve a Points of Defence and all affidavit material on which they intended to rely by 28 March 2008.

2008

[53] On 28 March 2008 Minter Ellison and the plaintiff agree on an extension of time for the defendants to file and serve a Points of Defence and affidavit material.

[54] On 2 May 2008 correspondence from Minter Ellison to the plaintiff in part said the defendants had been unable to finalise the Points of Defence and further affidavit material due to the unavailability of counsel and particular witnesses.

[55] On 6 May 2008 the plaintiff replies by email.

[56] On 13 May 2008 the defendants state they are unable to finalise the material and send a further email to the plaintiff apologising for the delay and explaining that the age of the various events in the proceeding was complicating matters and foreshadowing that the material would be completed within the next week or so.

[57] On 2 June 2008 the plaintiff replies by email stating he did not accept the Minter Ellison's proposal for a further delay and that "you make seek continuance in the appropriate forum".

[58] On 7 July 2008 the defendants file a Points of Defence. This has been ruled by McGill DCJ to be the last step in the proceedings.

[59] On 10 November 2008 the plaintiff filed a notice of change of address for service.

2009

[60] On 18 December 2009 the plaintiff commenced new proceedings against Mr Billy Murelli and Ms Svetlana Kisselev (the 2009 proceedings). Mr Murelli and Ms Kisselev are the ROU holders of numbers 4 and 9 the subject of the proceedings. The plaintiff alleged he was the true owner of those numbers, had delivered a written demand to each of Mr Murelli and Ms Kisselev and claimed the return of the right to enjoy the beneficial use of numbers 4 and 9 and compensation for loss of the beneficial use of numbers 4 and 9 in the amount of $250,000 from each of Mr Murelli and Ms Kisselev and costs.

2010

[61] On 20 January 2010 the plaintiff filed an application for a stay of the proceedings pending completion of the 2009 proceedings. The plaintiff in his written submissions in support of the application for the stay submitted that for him to recover the right of use of certain of the mobile numbers in the proceedings it was first necessary for him to obtain relief in the 2009 proceedings.

[62] On 29 January 2010 the defendants filed their outline of written submissions.

[63] On 4 February 2010 the plaintiff's application was determined on the papers by Devereaux DCJ who ordered the application for a stay be dismissed.

[64] On 12 February 2010 Mr Murelli filed an application seeking summary judgment in the 2009 proceedings. He submitted among other things that any legally sustainable cause of action was met by an unarguable limitation defence pursuant to the *Limitations of Actions Act 1974*.

[65] On 1 March 2010 Mr Murelli's application was heard by Dorney DCJ.

[66] On 12 March 2010 Dorney DCJ gave summary judgment in favour of Mr Murelli.

[67] In April and in August 2010 there was without prejudice correspondence between the plaintiff and Minter Ellison.

2011

[68] On 16 February 2011 the plaintiff filed a notice appointing McCarthy Durie Ryan Neil (MDRN) solicitors to act on his behalf in the proceedings.

[69] On or about 28 February 2011 Minter Ellison received correspondence from MDRN confirming they acted for the plaintiff and enclosing a request for trial date and requested that the form be signed and returned.

[70] On 8 March 2011 Minter Ellison responded asserting that no step had been taken in the proceedings in over two years and therefore the plaintiff required the Court's leave to proceed.

[71] On 24 March 2011 MDRN wrote to Minter Ellison stating that the applicant had instructed them that steps had been taken in the previous two years and listed six items on which the applicant relied in support of that position.

[72] On 28 March 2011 Minter Ellison respond asserting that none of the six items amounted to a step taken in the proceeding.

[73] On 4 November 2011 the plaintiff files a further application in which he applied to the Court for directions and that the defendants pay his costs. He also filed a supporting affidavit including allegations that he had been receiving unsolicited SMS messages.

[74] On 21 November 2011 Minter Ellison request MDRN to detail what orders/directions the plaintiff would be seeking. The plaintiff's solicitor tells Minter Ellison that while their firm was still acting for the plaintiff he had filed the application himself and she was seeking his instructions.

[75] On 30 November 2011 Minter Ellison sends an email to MDRN asserting that as no step had been taken in the proceedings in over two years the plaintiff required the Court's leave to proceed.

[76] On 2 December 2011 Minter Ellison files an affidavit exhibiting the relevant correspondence.

[77] On 4 December 2011 the solicitor for the plaintiff advises she had forwarded that affidavit to the plaintiff. She confirmed MDRN were not acting for the plaintiff in respect of the current application.

[78] On 5 December 2011 the application was returned before McGill DCJ at which time the plaintiff appeared in person.

[79] On 14 December 2011 McGill DCJ ruled that the plaintiff required leave to take a new step in the proceedings.

2012

[80] On 25 January 2012 the plaintiff filed the application seeking leave to proceed. On 1 February 2012 the defendants filed the application to dismiss for want of prosecution.

[81] The plaintiff in his affidavit filed in support of his application states that by way of explanation for the delay in these proceedings until February 2011 he was a self represented litigant. He is a disability support pensioner who had been handling the matter personally as he could not afford legal representation. He suffers from post traumatic stress disorder and has been hospitalised on a number of occasions with various symptoms including chest pains caused by stress. He also states as a self represented litigant he did not appreciate what was meant by "steps" in a proceeding and did not realise that his continuous correspondence and applications over the preceding two years were not considered steps in a proceeding. He exhibits to his affidavit various correspondence and applications made over the preceding two years. Much of this correspondence relates to his failed proceedings against Mr Murelli. He goes on to state that he did not appreciate the consequences of not undertaking a step in a proceeding for more than two years. He believes the defendants have not suffered any prejudice due to any delay which could be attributed to him.

[82] The plaintiff's solicitor Ms Robson has also sworn an affidavit in support of the plaintiff's application. With respect to the delay she confirms that the applicant was self represented until February 2011 at which time MDRN were appointed as his legal representation. She also confirms that the applicant genuinely believed that steps had been taken in respect of the litigation in that emails and correspondence had been occurring throughout the two years which, in the plaintiff's view, was done with the sole purpose of continuing the litigation between the parties. She states since being appointed as a legal representative in February 2011 she has sent the solicitors for the defendants a request for trial date requesting their signature and return. Further has undertaken steps to get the matter ready for trial inclusive of engaging counsel and obtained instructions to bring this application for leave to proceed. She believes that the defendants being a large corporation with significant funds have not suffered any prejudice by reason of the delay.

[83] In *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 Atkinson J said:

> "When the court is considering whether or not to dismiss an action for want of prosecution or whether to give leave to proceed under *Uniform Civil Procedure Rules* ("UCPR") rule 389, there a number of factors that the court will take into account in determining whether the interests of justice require a case to be dismissed. These include:

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 and 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.

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 striking out 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 inability to ensure a fair trial.

The Court's discretion is, however, not fettered by rigid rules but should take into account all the relevant circumstances of the particular case including the consideration that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them."

[84] Dealing with the factors in Atkinson J's judgment the significant events in the proceedings occurred in about December 1996 over 15 years ago.

[85] There was also a delay before the litigation was commenced in that the plaintiff used all of the six years of the *Limitations of Actions Act* period to commence the proceedings.

[86] His prospects of success depend on the court accepting his evidence as truthful and reliable about the telephone conversations in December 1996. Apart from liability I have not seen any particulars of the damages claimed. However, Minter Ellison said in written submissions dated 29 January 2010 the proceedings appear substantially ready for trial.

[87] I was not referred to any specific court orders or directions that have been disobeyed by the plaintiff except the costs ordered by Wylie DCJ have not been paid.

[88] The litigation can be characterised by periods of delay. The Claim and Statement of Claim was filed on 3 February 2005 and the Points of Defence was filed on 7 July 2008. That is a period of about three and a half years. However during that time the plaintiff did on 27 May 2006 enquire of Minter Ellison whether the parties could advance to setting trial dates and the plaintiff did on 18 July 2007 deliver a request for trial date to Minter Ellison. The plaintiff brought an application on 14 December 2007 and in his affidavit referred to the request for trial date which had not been signed. Therefore the plaintiff was seeking to bring the matter on for trial. However, I accept he did not seem to know how to prompt the defendants to file a Points of Defence.

[89] What is not in the plaintiff's favour is that at the end of 2009 and the beginning of 2010 he pursued members of the public to whom the defendants had allocated these phone numbers Those proceedings did not advance the proceedings for which leave to proceed is now sought. In my opinion, the 2009 proceedings demonstrated how the plaintiff could be misguided about how to pursue his claim against the defendants.

[90] I accept the plaintiff has at times been ill and hospitalised on a number of occasions. The plaintiff appears to have some knowledge of the court processes but his knowledge is clearly inadequate to properly progress proceedings to trial.

[91] There has been delay attributable to the plaintiff. In my opinion there has also been delay attributable to the defendants. Interspersed between the significant steps such as filing the points of claim and filing the Points of Defence and disclosure there have been misguided applications on the part of the plaintiff and correspondence passing between the parties during the years since the proceedings were commenced.

[92] In my opinion despite the plaintiff's misguided actions he has been seeking to progress the proceedings. In my opinion his lack of knowledge of the court's procedures led him to allow the proceedings to stall after the last step. Although in his affidavit the plaintiff has not been specific about when he has been ill and hospitalised, I infer he has not been a well man and this has contributed to him allowing the proceedings to stall after the Points of Defence was filed on 7 July 2008

[93] I accept the plaintiff was not aware as he was representing himself that he should take a step to bring the matter on for trial.

[94] I am satisfied the plaintiff has a satisfactory explanation for the delay.

[95] In my opinion the defendants are aware of the plaintiff's complaint and what their case is in response to that complaint.

[96] I accept the plaintiff is without the means to conduct litigation. Clearly the defendants are not responsible for his position. If leave were not granted then that would conclude the plaintiff's claim. It does appear the issues have been defined and there has been disclosure. There might be an outstanding issue as to particulars of damages although that did not seem to concern the parties on the hearing of these applications.

[97] There is no suggestion of his lawyers being dilatory. He has not had lawyers until recently and they seem to have acted promptly to meet his instructions.

[98] The final consideration is whether or not the defendants have suffered prejudice leading to an inability to ensure a fair trial.

[99] The defendants submit they are prejudiced in this respect. They point to the affidavit of Ms Pitt. She states she does not remember the plaintiff nor the conversations. However, in my opinion that could have been her state of recollection at an early stage even before the proceedings commenced.

[100] The defendants in their Points of Defence are able to allege an oral agreement made on 17 December 1996 between the plaintiff and I assume Ms Pitt (para 19 - Points of Defence). It will be a matter for a trial judge to determine whether the trial judge accepts the evidence of the plaintiff in the context of the letters and the account records that are available and what inference is to be made from the correspondence and account records that are available. These are not proceedings solely based on recollection of oral conversations.

[101] I do not consider the defendants are prejudiced in their defence of the proceedings.

[102] As far as the proceedings are concerned, the next step is to set the matter down for trial.

[103] Therefore, balancing all relevant factors in the circumstances of this case, the plaintiff has satisfied me it is in the interests of justice to order the plaintiff have leave to proceed with the proceedings.

[104] With regard to the application to dismiss the proceedings for want of prosecution in my opinion the application involves the same considerations as the application for leave to proceed.

[105] In my view a trial judge will have to consider the oral evidence of the plaintiff in the context of the letters and account records that are available and make a determination of credibility and reliability. In my opinion a fair trial can still be had notwithstanding the events surrounding the conversations occurred over 15 years ago.

[106] In my opinion there is no good reason why the proceedings should not be allowed to proceed under the direction of the court. I dismiss the application to dismiss for want of prosecution.

[107] I will hear the parties on the question of costs.