DISTRICT COURT OF QUEENSLAND

CITATION:	*Williams v Griffiths* [2017] QDC 79
PARTIES:	**WARREN KENNETH WILLIAMS and ANNETTE JOY WILLIAMS** (applicants) **v** **JOHN MINTO GRIFFITHS** (respondent)
FILE NO/S:	D308 of 16
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	6 April 2017
DELIVERED AT:	Southport
HEARING DATE:	6 February 2017
JUDGE:	Muir DCJ
ORDER:	**The application for an extension of time to appeal is dismissed**
CATCHWORDS:	EXTENSION OF TIME FOR APPEAL – PRACTICE AND PROCEDURE – RELEVANT CONSIDERATIONS TO EXERCISE OF DISCRETION TO EXTEND TIME FOR APPEAL where applicants are the defendants in a claim by the plaintiff/ respondent for payment of monies due and owing / alternatively damages for trespass – where applicants wish to appeal order for Judgment made in Magistrates Court under UCPR r 374 -where applicants are applying almost one year out of time to extend the time within which to appeal – relevant considerations - whether discretion should be exercised to extend the time within which to appeal. *Uniform Civil Procedure Rules* 1999, r 5, r 150, 171, r 292 r 374, r 444, r 748, r 785(1), *ANZ Banking Group Ltd v Barry* [1992] 2 Qd R 12, cited *Attorney-General (Qld) v Barnes & Anor* [2014] QCA 152, cited *Beil v Mansell* [2006] 2 Qd R 199, followed *Chapman v State of Queensland* [2003] QCA 172, cited *Creswick v Creswick; Tabtill Pty Ltd v Creswick* [2011] QCA 381, cited *Gallo v Dawson* (1990) 93 ALR 479, cited

Harris v DJD Earthmoving Pty Ltd [2016] VSCA 188, cited
House v R (1936) 55 CLR 499, followed
Hunter Valley Developments Pty Ltd v Cohen, Minister for Home Affairs and Environment (1984) 7 ALD 315, followed
Johnson v Public Trustee of Queensland as Executor of the Will of Brady (deceased) [2010] QCA 260, followed
Klerck & Ors v Sierocki & Anor [2014] QCA 355, followed
Macquarie International Health Clinic Pty Ltd v Sydney Local Health District [2016] NSWSC 1587, cited
Meredith v Palmcam Pty Ltd [2001] 1 Qd R 645, followed
Morrison v Hudson [2006] 2 Qd R 465, followed
O'Callaghan v Hall [1993] QCA 297, distinguished
Pettitt v Dunkley [1971] 1 NSWLR 376, cited
Queensland Trustees Ltd v Fawckner [1964] Qd R 153, cited
Rodda v Transport Accident Commission [2008] VSCA 276, cited
Spencer v Hutson [2007] QCA 178, cited
Swordheath Properties Ltd v Tabet [1979] 1 WLR 285, cited
Tilley & Ors v Egan [2000] QCA 98, cited
Thomas v St George Bank [2013] QCA 136, cited
Transport Accident Commission v Campbell (2015) 69 MVR 410, cited

COUNSEL: D. D. Purcell for the applicants

L. D. Bowden for the respondent

SOLICITORS: Cruise Lawyers for the applicants

Provest Law for the respondent

Background

[1] The plaintiff (the respondent) is the owner of a building located at Ereton Drive, Labrador in South East Queensland. In January 2013, he leased part of the building to the defendants (the applicants) by a written lease, for a term of three years. Around the time of the commencement of the lease, the applicants erected a sign on the fascia of the building (which was not part of the leased area) without the consent of the respondent. Subsequently, there were negotiations as to what was to happen with the sign. The respondent then invoiced the applicants for the signage rights. The applicants did not pay these invoices.

[2] On 17 March 2015, the respondent filed a claim and statement of claim against the applicants seeking payment of fees for the signage for the period 5 February 2013 to 4 March 2015, at the rate of $1,034.22 per month (as per the invoices), or in the

alternative, damages for trespass (as per the invoices), at the rate of $1,034.22 per month.[1]

[3] Shortly after these proceedings were served, the applicants' solicitor received instructions to act and wrote to the respondent's solicitor requesting an extension of time to deliver the defence until 16 April 2015. An extension for the filing of the defence was given until midday on 15 April 2015.

[4] On 21 May 2015, a judgment by default which was obtained by the respondent on the afternoon of 15 April 2015, was set aside. At this time, the applicants were ordered to file and serve their defence within 14 days. On 26 May 2015, a notice of intention to defend and defence was filed.

[5] On 13 August 2015, after the applicants had failed to provide disclosure within 28 days after the close of pleadings, the respondent filed an application requesting the applicants comply with their disclosure obligations under the *Uniform Civil Procedure Rules* 1999 (UCPR). This application was returnable on 27 August 2015 but was later adjourned until 4 September 2015, at which time an order for disclosure and costs was made by consent (the Consent Order).

[6] On 11 October 2015, a letter pursuant to UCPR r 444 was sent by the solicitors for the respondent to the solicitors for the applicants, stating that the applicants had not complied with the Consent Order and requesting compliance by close of business on Thursday, 15 October 2015. This letter set out the repercussions for non-compliance as follows:

> "In the event that we do not receive your response by that date we are instructed to make application to the court for orders consequential upon the default, including orders that your clients' defence be struck out and judgment be entered in favour of the plaintiff".

[7] On 23 October 2015, the respondent's solicitors sent a further letter said to be written in accordance with UCPR r 444. This letter requested compliance with the Consent Order by Thursday 29 October 2015 and repeated the same consequences for non-compliance.

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1 As the claim included a claim for a liquidated debt or demand, the statement of claim was endorsed under r 150(3) of the *Uniform Civil Procedure Rules* 1999.

[8] On 4 November 2015, the respondent filed an application seeking orders pursuant to UCPR rr 171 and 374. Relevantly, the application stated:

> That pursuant to rule 374 of the *Uniform Civil Procedure Rules* the defendants show cause why judgment should not be entered for the plaintiff as a consequence of the defendants' failure to comply with the order of Magistrate McLennan made on 4 September 2015.

[9] On the return date of this application on 20 November 2015, despite there being evidence of service,[2] there was no appearance for the applicants.

[10] The hearing took approximately 15 minutes. The learned Magistrate had the benefit of written submissions from the plaintiff (the present respondent), and copies of two decisions referred to in those submissions which relevantly considered the exercise of the court's discretion under UCPR r 374.[3] It is clear from the transcript of the hearing that the Magistrate took the time to read the material. She asked the solicitor for the respondent to take a seat while she did so.

[11] The reasons of the Magistrate are as follows:

> HER HONOUR: Okay. First of all, I am satisfied the respondents have not complied with the order of the 4th of September 2015. The respondents have a history of non-compliance with the UCPR. I order, as per the draft judgement order.

[12] The order in terms of the draft was as follows:

> 1. *That pursuant to Rule 374 of the Uniform Civil Procedure Rules judgment be entered for the Plaintiff the sum of $35, 138.94 inclusive of interest in the sum of $1.009.68.*
> 2. *That the Defendants pay the costs of the Plaintiff in this [sic] proceeding inclusive of the costs of this application and the order of Magistrate Mclennan made on 4 September 2015 in the sum of $3,837.80.*
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> (Judgment)

Relevant appeal provisions

[13] Under UCPR r 748, a notice of appeal must, unless the Court of Appeal orders otherwise, be filed within 28 days after the date of the appealed decision. By virtue of UCPR r 785(1), this rule applies to appeals to the District Court.

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2 The affidavit of Geoffrey William Provest filed by leave on 20 November 2015.

3 The authorities of *Klerck & Ors v Sierocki* [2014] QCA 355 and *Johnson v Public Trustee of Queensland as Executor of the Will of Brady (deceased)* [2010] QCA 260 were given to the Magistrate.

[14] Pursuant to the reckoning of time under s 38 of the *Acts Interpretation Act* 1954 (Qld), an appeal in this case was required to be filed by 4.00 pm Friday 18 December 2015, unless the court orders otherwise.[4]

[15] On 14 December 2016, a notice of appeal was filed concurrently with the present application to extend the time to appeal the decision of Magistrate Callaghan on 20 November 2015 to order Judgment. As the appeal was filed out of time, it is not controversial before me that it has not been properly instituted as an appeal (in the absence of an order extending the time to file). Accordingly, the applicants also seek orders regularising the filing of that notice of appeal.

Considerations relevant to the exercise of the discretion to extend the time within which to appeal

[16] The court's discretion to extend time is broad and unfettered,[5] but like any discretion of this nature it must be exercised judicially.[6]

[17] The relevant considerations involved in the determination of whether there ought to be an extension of time, as elicited from the authorities, were uncontroversial before me. These considerations include:[7]

- The length of the delay;
- The explanation for the delay;
- The strength of the case for which an extension is required;
- The respective prejudice likely to be suffered by each party if an extension is granted; and
- The interest of a court in the administration of justice.

[18] I now turn to deal with each of these considerations.

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4 The respondent submitted that the appeal time ran out on or about 20 December 2015. Although nothing turns upon this issue, in my view, the applicants' calculation of 18 December 2015 is correct.

5 See discussion by Muir J in *Beil v Mansell* [2006] 2 Qd R 199 at [40]; with reference to *Chapman v State of Queensland* [2003] QCA 172 at [3] and *Queensland Trustees Ltd v Fawckner* [1964] Qd R 153.

6 *Attorney-General (Qld) v Barnes & Anor* [2014] QCA 152 at [15].

7 *Beil v Mansell* [2006] 2 Qd R 199 at 209; *Attorney-General (Qld) v Barnes & Anor* [2014] QCA 152; *Creswick v Creswick; Tabtill Pty Ltd v Creswick* [2011] QCA 381 at [15] per Fraser JA, citing *Gallo v Dawson* (1990) 93 ALR 479 per McHugh J (affirmed in *Gallo v Dawson (No 2)* (1992) 109 ALR 319).

Length of delay

[19] In the present case, the length of delay between the time expiring for appealing the Judgment and the application for an extension of time in which to appeal being made, is a few days short of a year.

[20] In opposing the application, the respondent contended that the delay in this case is so significant that "extraordinary circumstances" are required. In support of this submission the respondent relies on the joint judgment of the Queensland Court of Appeal in *O'Callaghan v Hall*, (where the delay was one of 18 months), as follows:[8]

> The process of litigation is not only expensive but time- consuming. It is desirable that, as far as practicable, the Courts discourage undue and unnecessary delay. The notion that the rules setting time limits should be treated as of no importance is one which if accepted would be destructive of the proper administration of justice. The present is a plain case of undue and unnecessary delay on the part of the defendant. **Only in the most extraordinary circumstances, and to avoid a plain injustice, could this Court consider granting an extension of time to appeal after such a long and unjustifiable delay** as has occurred here. [Emphasis added]

[21] There is some tension between the respondent's submission and the comments of Muir J in the Queensland Court of Appeal decision of *Beil v Mansell*, [9] a case involving a delay of some three and a half years. In *Beil*, Muir J qualified the reference to "extraordinary circumstances" referred to in *O'Callaghan,* considering that the court was stating no more than that in the circumstances of *that* case the applicant would need to show extraordinary circumstances.[10]

[22] I do not consider that the length of delay in the present case, of just under one year, requires there to be "exceptional circumstances". As identified by the Court of Appeal in *Attorney-General (Qld) v Barnes & Anor*,[11] the length of delay is but *one* of the matters to be considered in the circumstances of the particular case.

Explanation for the delay

[23] In *Queensland Trustees Ltd v Fawckner*,[12] Skerman J said:

> …in my view the absence of explanation of the delay is not in itself an insuperable obstacle to extending time for appeal, though failure to explain

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8 [1993] QCA 297 (Fitzgerald P, Pincus JA and Moynihan J).
9 [2006] 2 Qd R 199 at 207 at [39].
10 At [39].
11 [2014] QCA 152 at [14]-[15], with reference to Muir J's comments in *Beil*.
12 [1964] Qd R 153 at 163 (Skerman J).

> the delay as well as the length of time which has elapsed before an application is made are circumstances to be taken into account by a judge in deciding whether in the exercise of his discretion the time for appeal should be extended.

[24] The applicants rely on two affidavits from their solicitor, Leo Gerard Cruise, in support of the application for an extension of time in which to appeal.[13]

[25] Mr Cruise puts the blame for the events leading up to the Consent Order being made and the Judgment being entered, squarely on his own shoulders.

[26] Under the heading, '**Reasons for the Applicants' default between July and November 2015'**, Mr Cruise states:

> "24. In or about August 2015**,** I began to suffer with severe and debilitating depression consequent upon another complicated matter that I was dealing with which involved very difficult clients who refused to provide funds to enable us to brief Counsel in five litigation matters before the court. In addition to this they did not cooperate with providing the necessary information and if they did it was albeit conflicting and ambiguous. They still prolonged in providing concrete evidence of matters that they wanted to contest. Exhibit "LGC l" to this affidavit is a letter from my General Practitioner Dr Nick Sawyer.
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> 25. All this ambiguity and promises of payment that were not forthcoming lead to my distress and depressive state that I drowned in. In fact, I had stopped taking instructions in that sort of case several years earlier as I did not believe capable of managing them professionally. However, I had just taken on a new solicitor in the firm who was energetic and keen to take on such matters. When these clients failed to pay money into trust as promised I was unable to let the new solicitor to work on the files as she would be required to be paid for all work done. I therefore, started work myself because they assured me the money would be deposited into my trust account by the end of that particular week and it never was.
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> 26. As a result of my mental state at that time, this encumbered me so much that I lapsed in managing this Williams file competently.

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[13] Affidavit of Leo Gerard Cruise filed 14 December 2016 (Mr Cruise's first affidavit); Affidavit of Leo Gerard Cruise filed 1 February 2017 (Mr Cruise's second affidavit).

> 27. I was solely responsible for the conduct of these proceedings on behalf of the Applicants and, as a consequence of the mental illness with which I was suffering there was no person responsible for the daily conduct of these proceedings on behalf of the Applicants, such that no arrangements were made to:
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> (a) monitor any correspondence received from the Respondent's solicitors in relation to this matter; and
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> (b) have any person to appear at either the First Application[14] or the Second Application.[15]
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> 28. I do not believe that the Applicants were, at any stage, aware of my mental state or that I was not giving appropriate attention and consideration to their proceedings."

[27] In relation to the Consent Order being made, Mr Cruise's evidence was: "*I did not appear at the hearing of the First Application because I spoke to the Plaintiff's solicitor by telephone and agreed to the making of the Order to provide a LOD*" [list of documents].[16] It is unclear on the evidence whether he obtained his clients' instructions to consent.

[28] Exhibit LGC1 to Mr Cruise's first affidavit is a letter dated 1 December 2016 from his General Practitioner of three years, Dr Nick Sawyer (Dr Sawyer's letter). This letter states as follows:

> "***In February of this year**, Mr Cruise attended my surgery in a distressed state. He had become distressed with a legal case that effected his health and wellbeing. **In my assessment, I felt that he had developed an adjustment disorder with symptoms of depressed mood.** While not being a diagnosis of depression, adjustment disorder can, and frequently will, affect an individual's ability to carry out their work and duties as they would normally do them. This is what had happened to Mr Cruise, **while I did feel that he had started to recover at the time of seeing him**."* [Emphasis added]

[29] Mr Cruise also attempts to place the subsequent delay in bringing the present application for leave to extend the time to appeal, squarely on his own shoulders. His evidence is as follows:

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14 Defined at paragraph 14(b) of Mr Cruise's first affidavit as being the application heard on 27 August 2015 at which time the Consent Orders were made.

15 Defined at paragraph 19 (b) of Mr Cruise's first affidavit as being the application heard on 20 November 2015 at which time the Judgment was entered.

16 Paragraph 18 of Mr Cruise's first affidavit.

"Reasons for delay in filing Appeal

29. Following the Judgment being entered on 20 November 2015, I continued to suffer with severe depression which prevented me from attending to applying to set aside judgment without delay.

30. In February 2016, I consulted my doctor regarding my [sic] condition as I realised I was not performing up to standard and what I was capable of doing normally.

31. Having spoken to my doctor and getting some understanding of my condition, I returned to work and reviewed what had occurred with these proceedings.

32. Following my return to work**,** I discovered that Judgment had been entered against the Applicants due to depressive medical condition.

33. Upon learning that Judgment had been entered against the Applicants in these circumstances, I took the following steps:
    (a) Discussed with the Applicants what had occurred; and
    (b) briefed counsel to investigate how the Judgment could be set aside.
34. Prior to my conversation with the Applicants on or about in December 2015, I do not believe that they were aware that:
    (a) appropriate steps had not been taken to protect their interest m the proceedings; or
    (b) I was suffering with severe depression.

Steps which followed

35. In or about June 2015, I obtained instructions from the Applicants to:
    (a) make an application to the Court to extend the time to appeal against the Judgment;
    (b) prepare a draft Notice of Appeal which will, in the event that the application to extend the time was successful, form the basis of the Applicants' appeal against the Judgment;
    (c) prepare the LOD to address the non-compliance with the Orders of the Magistrates Court which led to Judgment being entered; and
    (d) prepare an Amended Defence to address the issues raised by the Respondents prior to the Judgment being entered."

[30] This explanation for delay given by Mr Cruise is vague, incomplete and devoid of crucial detail. It raises more questions than answers. For example:

- When exactly after Mr Cruise returned to work did he discover that the Judgment had been entered against the applicants?

- When after returning to work and discovering the Judgment did Mr Cruise discuss with the applicants what had occurred and, when did he brief Counsel to investigate how the Judgment could be set aside.

- Why did Mr Cruise not obtain instructions until June 2016[17] to apply to extend the time to appeal against the Judgment, prepare a notice of appeal, the list of documents and an amended defence?

- What conversation did Mr Cruise have with the applicants in December 2016?[18]

- How can it be that that the applicants only became aware that appropriate steps had not been taken to protect their interest in the proceedings in December 2016, given Mr Cruise's other evidence that he spoke to the applicants after the Judgment had been entered (whatever date that was) and had obtained instructions to appeal in June 2016?

- Why was the current application not filed until December 2016 given Mr Cruise had instruction to do so in June 2016?

[31] Counsel for the applicants quite properly accepted there were gaps in the evidence but did not seek an adjournment. He articulated the applicants case at its highest (in relation to the issue of delay), was that the delay can only be explained by the ongoing mental health issues of Mr Cruise.

[32] The difficulty with this submission is that apart from Dr Sawyer's letter pointing to some distress and an adjustment disorder with symptoms of depressed mood, which I accept go some way to explaining how the Consent Order and the Judgment occurred, there is no medical evidence of any ongoing mental health issues suffered by Mr Cruise. Mr Cruise's own evidence does not support such a submission. He does not address any continuing health issues after February 2016.

[33] During the course of the hearing, I raised with Counsel for the applicants the issue of there being an absence of evidence from the applicants as to what instructions they had given their solicitor in relation to the filing of the present application. Counsel submitted that I ought to proceed on the assumption that the applicants told Mr Cruise to act in their best interests and that the applicants were reliant upon the

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17 By Mr Cruise's second affidavit he corrected the reference to June 2015 in paragraph 35 of his first affidavit to June 2016.

18 By Mr Cruise's second affidavit he corrected the reference to December 2015 in paragraph 34 of his first affidavit to June 2016.

advice given by their solicitors. It was submitted that the affidavit material before me proves that Mr Cruise failed to live up to those expectations. I do not accept this submission. As I have said, the evidence does not go that far.

[34] The applicants are seeking the indulgence of the court to extend the time for filing an appeal after a delay of almost one year. The frailties in the evidence of Mr Cruise dealing with his medical condition and the explanation for delay are blaringly obvious. In such circumstances, it is surprising that the applicants adduced no evidence about when they were told about the Judgment, why it was not until June 2016 that they gave instructions to apply for an extension of the time in which to appeal and, why it was not until December 2016 that the application to extend time was eventually filed.

[35] Accordingly, whilst I accepted that there is some explanation of the applicants' failure to appear at the hearing on 20 November 2015, there is no real explanation for the subsequent delay in bringing the present application.

[36] I consider the applicants have failed to provide a satisfactory explanation for the lengthy delay in filing the present application.

Prejudice to the respondent

[37] The applicants quite properly accepted that any prejudice to the respondent was a material fact militating against the grant of an extension.[19] The applicants submitted that the fact that there was no current enforcement actions to enforce the Judgment against the applicants, notwithstanding the Judgment had been in place for over a year, was compelling.

[38] The evidence does not support the applicants' submission. There is ample uncontroverted evidence before me that the respondent has taken a number of steps to enforce the Judgment. These steps included that:

- On 29 November 2016, the respondent's solicitor applied to the court for an issue of an enforcement warrant.

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19 *Hunter Valley Developments Pty Ltd v Cohen, Minister for Home Affairs and Environment* (1984) 7 ALD 315 at 320 per Wilcox J.

- On 6 December 2016, a bankruptcy notice was served on the applicants. [20]
- On 14 December 2016, the applicants were sent a letter requiring them to complete a statement of financial position.
- On 10 January 2017, the respondent's solicitor applied for the issue of an enforcement warrant which was served on the male applicant on that same day.[21]

[39] The respondent has been proceeding for over a year on the basis that he has a good judgment. In doing so, he has incurred fees, including the issuing of a bankruptcy notice which, at the time of the hearing of the present application, there had not been an application to set aside. Clearly in these circumstances, the respondent would be prejudiced by an extension of the time in which to appeal.

Merits of the appeal

[40] The merits of the substantive appeal itself is a relevant factor to the exercise of the discretion to grant an extension of time to file the notice of appeal. Whist the court is not required to determine the merits in considering the application, there must be at least an arguable case.[22] The court will only consider the strength of such an appeal in a general way.[23]

[41] If the present application for leave to extend the time to appeal is successful, the applicants seek to agitate the following seven grounds of appeal:

1. The application filed by the respondent on 4 November 2015, seeking Judgment pursuant to UCPR r 374 did not allege the grounds on which it was based.
2. The letter which the respondent sent to the applicants prior to bringing the application filed on 4 November 2015 did not comply with UCPR r 444(1)(c) because it did not state with clarity the relief the respondent was seeking.
3. The relief sought by the respondent was for unliquidated damages and there was no or not sufficient evidence before the court to justify the quantum of

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20 Exhibit 1.
21 Affidavit of Jeffry William Provest, [11]-[14].
22 *Tilley & Ors v Egan* [2000] QCA 98 per McMurdo P.
23 *Morrison v Hudson* [2006] 2 Qd R 465 at [25].

damages claimed, and in such circumstance, the court ought to have ordered Judgment with damages to be assessed.

4. No consideration was given to the substantial prejudice which the applicants would suffer, consequent upon them losing the opportunity to defend the claim.
5. There was a misconstruing of the discretion under UCPR r 374(5) because the court considered the respondent had an automatic entitlement to judgment upon the court being satisfied that there had been non-compliance with an order of the court.
6. Having regard to the evidence before the court, it was unreasonable or plainly unjust to enter the Judgment against the applicants.
7. The court erred in law in failing to give reasons for its decision to enter Judgment pursuant to UCPR r 374(5).

Ground 1 - Application did not state grounds

[42] The application on its face stated the rule that it relied upon (UCPR r 374) and sought amongst other orders, an order that the applicant show cause why Judgment should not be entered for the respondent, as a consequence of their (the applicants), failure to comply with the Consent Orders. There was no ambiguity about the relief being sought. Further, the application was supported by an affidavit from the respondent's solicitors setting out the history of the matter and attaching the UCPR r 444 letters.[24] This ground of appeal is unmeritorious.

Ground 2 - No valid r 444 letter

[43] The relevant r 444 letter is dated 23 October 2015 and is exhibited to Mr Cruise's affidavit.[25] This letter complained that the applicants had failed to comply with the Consent Orders and stated that if the applicants did not comply with the orders, the respondent would file an application seeking orders, "…*consequential upon your clients' continuing default, including orders that your clients' defence be struck out and judgment be entered in favour of the plaintiff*".

[44] The purpose of a r 444 letter is to alert a respondent to an applicant's complaints, giving the respondent the opportunity to respond or remedy the problem, obviating

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24 Affidavit of Geoffrey William Provest filed 5 November 2017.
25 Paragraph 20.

the need for an application and serving the purpose of UCPR r 5.[26] In my view, the r 444 letter in this case was clear enough to identify the complaints and the relief being sought. This ground of appeal is unmeritorious.

Ground 3 - Insufficient material to allow court to assess damages

[45] The plaintiff's claim was for monies due and owing, or alternatively for damages in trespass, but assessed in the same amount.

[46] Counsel for the respondent conceded before me that the Magistrate was not asked to consider the claim as a liquidated debt but rather as a claim for damages for trespass. Before me, Counsel for the respondent also submitted there was such a basis for an assessment of damages because the claim for damages for trespass was based on the "user principle", being that a sum equivalent to a fair and proper fee for the infringed right ought to be paid.[27] The respondent also submitted, given the non-appearance of the applicants, it was open to the court to assess the damages for trespass at the figure claimed, on the basis of an implied admission. I do not accept this latter submission. There was no such implied admission on the pleadings. In my view, the position is somewhat analogous to that of a plaintiff applying for summary judgment under UCPR r 292. The burden of proof is on the plaintiff to show an entitlement to judgment with the evidentiary onus only shifting once that evidentiary onus has been satisfied.[28]

[47] The submissions provided to the learned Magistrate [29] specifically stated: "*in relation to the question of assessment of damages for trespass, the plaintiff relies upon paragraph 23 and Exhibit 11 of the affidavit of Jeffrey William Provest filed in this proceeding on 12 May 2015*". This affidavit exhibited a copy of the license agreement between the plaintiff and the previous tenants of the building (Nuplex) for the erection of a sign on the fascia of the building above their tenancy. Mr Provest's evidence was that the amount claimed against the defendants (applicants) is the same as that paid by Nuplex at the time Nuplex ended its lease in June 2014.

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26 *Meredith v Palmcam Pty Ltd* [2001] 1 Qd R 645 at [8].

27 *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285; *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2016] NSWSC 1587 at [166].

28 See *ANZ Banking Group Ltd v Barry* [1992] 2 Qd R 12 at [19] per Derrington J.

29 A copy of which were exhibited to Mr Provest's affidavit sworn 3 February 2017 at Exhibit GWP-1.

[48] In my view there was sufficient evidence before the Magistrate to make an assessment of the damages on the day of the hearing. This ground of appeal is unmeritorious.

Ground 4 - Court did not consider substantial prejudice the applicants would suffer

[49] I do not consider that there was any particular requirement on the Magistrate to consider the substantial prejudice to the applicants in the circumstances of this case. That the Magistrate took into account the relevant considerations may be deduced from the material before her.[30] This ground of appeal is unmeritorious.

Ground 5 - Court wrongly considered the respondent had an automatic entitlement to Judgment

[50] UCPR r 374 relevantly provides:

> "(1) This rule applies if a party does not comply with an order to take a step in a proceeding.
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> (2) This rule does not limit the powers of the court to punish for contempt of court.
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> (3) A party who is entitled to the benefit of the order may, by application, require the party who has not complied to show cause why an order should not be made against it.
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> (4) The application—
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> (a) must allege the grounds on which it is based; and
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> (b) is evidence of the allegations specified in the application; and
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> (c) must, together with all affidavits to be relied on in support of the application, be filed and served at least 2 business days before the day set for hearing the application.
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> *Note—*
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> See also rule 447 (Application to court).
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> (5) On the hearing of the application, the court may—
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> (a) give judgment against the party served with the application; or
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> (b) extend time for compliance with the order; or
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> (c) give directions; or
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> (d) make another order.

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30 *Thomas v St George Bank* [2013] QCA 136 at 23.

> (6) The party who makes the application may reply to any material filed by the party who was served with the application.
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> (7) The application may be withdrawn with the consent of all parties concerned in the application or with the court's leave.
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> (8) A judgment given under subrule (5)(a) may be set aside—
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> (a) if the application is made without notice—on an application to set the judgment aside; or
>
> (b) otherwise—only on appeal.
>
> (9) Despite subrule (8), if the court is satisfied an order dismissing the proceeding was made because of an accidental slip or omission, the court may rectify the order."

[51] The comments of Fraser JA in *Klerck & Ors v Sierocki & Anor*[31] (with whom Morrison JA and North agreed), provide a useful guide as to the application of UCPR r 374:

> The power to make an order must be exercised for the purposes for which that power is conferred. The purpose of the rules generally are "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense", the rules are to be applied "with the objective of avoiding undue delay, expense and technicality and facilitating" that purpose, and each party "impliedly undertakes to the court and to the other parties to proceed in an expeditious way": r 5. **That r 374 confers a power to give a judgment which will preclude a judicial determination of issues joined between the parties requires that power to be exercised with caution, but r 5 makes it clear that the relevant considerations must include those which bear upon the question whether an applicant under r 374 is being vexed by a respondent who is unwilling or unable to proceed with the expeditious disposition of the litigation.** In considering that question, it is relevant to take into account, as was held in *Johnson v Public Trustee of Queensland (as executor of the will of Brady) (dec'd)*, the "financial and personal strain imposed on litigants, witnesses and other parties who are affected by a party's failure to comply with a court order without adequate explanation or justification", the circumstance that the party applying for the order was put to substantial costs, the absence of any assurance that those costs would be recoverable from the party in default, and the absence of any indication by the party in default "as to how and when, if ever, she would comply with Court directions to file affidavits in a proper form in relation to her assets."[32] [**Emphasis added**]

[52] The Magistrate specifically referred to the respondents having a history of non-compliance with the rules. She was referred to evidence to support the quantum of the Judgment. As I have said above, the Magistrate had the benefit of written submissions, copies of relevant authorities and took the time to consider the matter.

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31 [2014] QCA 355 at [15].

32 With reference to [2010] QCA 260 at [17], [20].

There is no real basis to support the argument that the Magistrate thought there was an automatic entitlement to judgment. This ground of appeal is unmeritorious.

Ground 6 - Unreasonable or unjust to enter Judgment

[53] The principles in *House v R*[33] are relevant to the appeal should an extension be granted. The question is whether the result is so plainly unreasonable or plainly unjust such that a substantial wrong had in fact occurred.[34]

[54] The applicants argued that the same consequence could have readily achieved by way of a guillotine order under UCPR r 374(5)(d) which might have reasonably given the applicants' time to comply, under the threat of an adverse judgment upon failure to do so.

[55] I am not inclined to agree with this submission. Accepting the evidence of the applicants' solicitor at its highest, it was unlikely that such a guillotine order would have come to the applicants' attention. There is also no evidence from the applicants themselves as to what they would have done if they had known about the application.

[56] The applicants also argued that the statement of Keane JA (as he then was) in *Spencer v Hutson*[35] regarding public policy considerations underpinning the prescribed time limits for filing of appeals and the finality of litigation, whilst cogent in proceedings determined on their substantive merits, ought to carry limited weight in the exercise of the discretion to extend time against a Judgment entered on a technical non-compliance with directions of the court. The applicants do not point to any authority to support this submission. Whilst the authorities in my view make it clear that the power under UCPR r 374 must be exercised with caution, I do not accept that they extend as far as the general proposition contended for by the applicants.

[57] The decision of the Court of Appeal in *Johnson v Public Trustee of Queensland*[36] is particularly instructive on this point. There the court considered an appeal against the decision of a judge to give judgment under UCPR r 374 in circumstances where

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33 (1936) 55 CLR 499 at 505.
34 *Thomas v St George Bank* [2013] QCA 136 at 31.
35 [2007] QCA 178 at [28], citing the judgment of Muir J in *Beil v Mansell* [2006] 2 Qd R 199.
36 [2010] QCA 260.

there was a history of non-compliance with various orders. The decision of *Johnson* involved a family provision case, commenced in 2003. In 2009 it still had not been heard and the respondent set about getting directions that would have the matter listed for trial. In May 2009, directions were made but the applicant/appellant did not comply with them. The respondent then brought an application under UCPR r 374 which resulted in further directions on 1 September 2009 which the applicant did not comply with. Shortly after, another application was made under UCPR r 374 and on this occasion the proceedings were dismissed. Whilst the circumstances of *Johnson* were more extreme insofar as default and length of time are concerned, Applegarth J with whose reasons McMurdo P and Chesterman JA agreed, said relevantly:[37]

> By her amended grounds of appeal, the appellant contends that the primary judge overlooked material considerations. However, the discretion conferred by UCPR r 374(5) is broad, once the condition for its exercise arises. Its exercise is governed by the purpose of the rules stated in UCPR r 5 and the general consideration as to whether the interests of justice warrant the exercise of the discretion. The exercise of the discretion is also influenced by the arguments advanced at a hearing for and against its exercise. A court reviewing the exercise of such a discretion should not lightly conclude that the primary judge overlooked material considerations if these matters were not submitted to be material.

[58] In the circumstances that were before the Magistrate, I do not consider that it was unreasonable or unjust to order the Judgment such that the exercise of her discretion under miscarried r 374 UCPR.

Ground 7 - Court erred in law in failing to give reasons

[59] It is uncontroversial, that in certain circumstances such as where a court makes a final order or an order that actually or practically has the result of finally disposing of the rights of the parties, reasons must be given that disclose the path of reasoning that has led to the conclusion reached.[38] Failure to do so can constitute an error of law.[39] The applicants, although they did not appear, were legally represented in the proceeding and, the evidence established previous non-compliance with court orders. There were oral and written submissions made and clearly a consideration of

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37 Ibid at [18]. See also *Thomas v St George Bank* [2013] QCA 136; *Klerck v Sierocki* [2014] QCA 355.

38 *Harris v DJD Earthmoving Pty Ltd* [2016] VSCA 188 at [30].

39 *Rodda v Transport Accident Commission* [2008] VSCA 276 at [98]; *Pettitt v Dunkley* [1971] 1 NSWLR 376.

the matter by the Magistrate before ordering the Judgment; including a consideration of the assessment of damages. In the present circumstances, the reasons were limited but it cannot be said that there were no reasons.

[60] Whilst such a dearth of detailed reasons is not to be encouraged, the short reasons given in this case are not too surprising and must be seen in the context that the application was not a particularly complicated one. The reason for the decision are "obvious to any intelligent person".[40] The reasons, albeit brief, make it clear to the applicants why they lost. In the circumstances of this case, I do not consider this is a meritorious ground of appeal.

General public policy/interest of justice considerations

[61] Finally, whilst the applicants acknowledge the establishing of the merits of the substantive proceeding is not a prerequisite to the exercise of the court discretion to extend the period to appeal, they argue it is relevant to the extent it goes to the injustice the applicants might suffer should the court refuse the application. To that end, the applicants submit the defence of the claim has "some merit" and ought to be properly considered and determined by the court.

[62] Whilst it is true in the present case that there was not a determination on the merits of the claim, there was a determination made in the context of the UCPR rules setting time limits, which if not treated as important, would be destructive to the proper administration of justice.[41] The applicants have not given any explanation from their perspective for the delay in bringing this application, nor have they given any evidence to support their grounds of appeal or the merits of their defence of the claim. The inference open on the evidence as it stands is that the impetuous for the current application was the service of the bankruptcy notice upon the applicants.

Conclusion

[63] Upon the above analysis and balancing all the relevant considerations, I do not consider that the interests of justice warrant the grant of an extension of time for the filing of the appeal.

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40 *Transport Accident Commission v Campbell* (2015) 69 MVR 410 [87] per Santamaria JA.
41 *Beil v Mansell* [2006] 2 Qd R 199 at 42 (per Muir J).

[64] Accordingly, I order that the application for extension of time is dismissed. Given my findings, ordinarily costs would follow the event and the applicants would be ordered to pay the respondent's costs on the standard basis.

[65] I will allow the parties the opportunity to consider my judgment and provide (if necessary) short written submissions as to costs, by 4.00 pm 20 April 2017. If no submissions are received by this time, the cost order foreshadowed above will be made. In the meantime, if the parties are able to agree on the form of costs orders, they should be forwarded to my Associate.