DISTRICT COURT OF QUEENSLAND

CITATION:	*Meyer & Meyer v Grace Worldwide (Australia) Pty Ltd* [2022] QDC 84
PARTIES:	**ROLF MEYER & HEIDI MEYER** (Plaintiff) **v** **GRACE WORLDWIDE (AUSTRALIA) PTY LTD ACN 070 345 845** (Defendant)
FILE NO:	4300/15
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	13 April 2022
DELIVERED AT:	Brisbane
HEARING DATE:	16 December 2021
JUDGE:	Porter QC DCJ
ORDER:	**1. Leave to proceed is refused.** **2. The proceedings are dismissed.**
CATCHWORDS:	CIVIL PRACTICE AND PROCEDURE – CONTINUATION OF PROCEEDING AFTER DELAY - Where the plaintiff applies to the Court for leave to proceed – Where the proceedings were commenced over 8 years before in the Supreme Court – Whether the plaintiffs have a reasonable explanation for the delay – Whether the plaintiffs are responsible for the delays – Whether the plaintiffs have strong prospects of success at trial – Whether the defendant would be prejudiced by the Court granting the plaintiffs leave to proceed – leave to proceed refused. CIVIL PRACTICE AND PROCEDURE – DISMISSAL OF PROCEEDING FOR WANT OF PROSECUTION – Where the plaintiff has taken a step in the proceeding for more than 2 years - Whether there has been a lengthy delay – proceedings dismissed.
COUNSEL:	C. Harding for the applicant/ plaintiff

M. Steele for the respondent/ defendant

SOLICITORS: Cantwell Lawyers for the applicant/ plaintiff

Norton White for the respondent/ defendant

Summary

[1] The plaintiffs allege that when goods stored in 1986 and 1991 were delivered up by the defendant (**Grace**) in January 2011, certain paintings were missing, and another was damaged. The plaintiffs commenced proceedings in the Supreme Court over three years later, in May 2014. The proceedings were transferred to this Court in October 2015. As of December 2021, the plaintiffs had not taken a step in the proceedings for over 4 years. They applied for leave to proceed under Rule 389(2) of the *Uniform Civil Procedure Rules* 1999 (**UCPR**). Grace cross applied for the dismissal of the proceedings for want of prosecution. For the reason which follow, leave is refused, and the proceedings are dismissed for want of prosecution.

The issues

[2] The plaintiffs allege that in about April 1986, they entered into a storage contract with Brambles Holdings Ltd or Grace Bros Pty Ltd and then caused, inter alia, four wooden crates of goods to be sent by air from Port Moresby to a storage facility operated by the relevant entity. They allege that in July 1991, they entered into another such contract with Brambles Holdings or Brambles Australia Ltd and then caused three crates and a suitcase to be shipped from Port Moresby to the same storage facility. Together, the stored items are designated "the Goods" in the Amended Statement of Claim (**ASOC**) and are listed in annexures to the pleading.

[3] They allege they were invoiced monthly by one or more of the contracting entities until August 1995. In August 1995, Grace acquired the storage business of the various entities which operated or had operated the storage facility. They next allege that from August 1995 to January 2012, Grace had the Goods in its care and Grace issued invoices and the plaintiffs paid them. On this basis, the plaintiffs allege a contract for storage of the Goods between them and Grace from August 1995. As will be seen, Grace admits that a contract for storage arose between the parties in August 1995 (but not necessarily for the Goods).

[4] The plaintiffs allege that in January 2011, they inspected their goods at Grace's storage facility (a different facility from the one to which the Goods had been dispatched) and discovered that numerous paintings were missing, and some goods were water damaged. They allege that they told Grace's employee Mr Bartram of the issues. In January 2012, Grace delivered all the goods it held on behalf of the plaintiffs to the plaintiffs. Those goods which did not include the allegedly missing paintings.

[5] The plaintiffs allege that it was a term of each of the three contracts that at the end of the storage term, Grace would "*deliver the Goods to the Plaintiffs in the condition in which they had been left*" with the original contracting parties.

[6] The plaintiffs also allege on various grounds that Grace had a contractual and tortious duty, and a duty as bailee, to exercise reasonable care in performing the storage contract and in caring for the Goods. They allege that Grace breached those duties in various (rather general) ways and that as a result, the paintings were lost or, in one case, damaged by water. Those allegations are not particularised and the causal link between these allegations and the loss alleged is unclear. However, it is unnecessary to consider these alleged breaches further because the plaintiffs' case is more easily made out by reference to the redelivery obligation, not least because that legal obligation is admitted by Grace.

[7] The ASOC claims $173,249 in damages for the loss of the paintings and damage to one painting.

[8] The plaintiffs also claim the refund of the storage fees paid. I do not understand how the facts pleaded give rise to claim for the storage fees to be refunded. The contract has not been avoided nor is it alleged that no consideration passed for the storage fees. Indeed, the ASOC recognises that the storage contract with Grace was performed from August 1995 and some goods were redelivered in accordance with that contract. (Further, while considerable sums of interest could arise given the delay, it is doubtful that the plaintiffs would recover interest for the whole of the period up to judgment given the delay by the plaintiffs in the conduct of these proceedings.)

[9] The Amended Defence was drawn by a legal practitioner unfamiliar with the UCPR. It contains a number of bare denials which the plaintiffs submit give rise to important deemed admissions under Rule 166(4). It also raises of number of issues which are not necessary to analyse in this judgment. They include: a limitations defence, a defence based on a contractual notice provision, and an apportionable claim argument. Relevantly to this judgment, Grace defends as follows:

(a) It does not admit that the items alleged to have been consigned and stored in 1986 and 1991 were in fact consigned and stored.

(b) It denies that the first or second contracts were with Grace but concedes that in August 1995, Grace 'assumed the responsibilities' of the other contracting parties under those contracts[1];

(c) It admits that in August 1995 it "*took into its care and keeping for storage purposes any of the said Goods…that were in fact at the premises*" as at August 1995[2];

(d) It admits that the plaintiffs alleged some of the Goods were missing and told Mr Bartram that, but otherwise does not admit the allegations about dealings in January 2011;

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[1] It was not argued by the plaintiffs that accrued liabilities under the existing contracts somehow passed to Grace.

[2] ASOC [10]; Amended Defence [10]

(e) Grace admits that it was obliged to deliver up the goods to the plaintiffs, whether under the contract or as bailee. The terms in which it did so are important. It pleads[3]:

> In response to paragraph 16B of the Amended Statement of Claim, the Defendant
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> a. admits sub-paragraph (a);
>
> b. denies sub-paragraph (b); and
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> c. says that it was a term of the 1995 Contract that, upon the request of the Plaintiffs, the Defendant would deliver the Plaintiffs' property to them in the same condition in which it had been delivered to the Defendant in or about August 1995.

(f) Read with the allegation in paragraph (c) above, this is an allegation that Grace only had to deliver up goods which were in storage as at August 1995 and in their condition as at that date; and

(g) Grace pleads bare denials to the allegations of breach and loss and damage.[4]

Procedural history

[10] The genesis of the dispute was the complaint made by the Meyers when they inspected their stored goods in January 2011. At that stage, their goods had been stored with Grace or its predecessors for between 20 and 25 years. However, proceedings were not commenced until May 2014. One might have thought that in those circumstances, a certain urgency in bringing and pursuing the proceedings might have been prudent. However, progress since then has been marked by long periods of delay punctuated by short periods of inconclusive activity.

[11] There was activity was from filing of the proceedings in May 2014 to September 2014. In that period, Grace filed its defence reasonably promptly and provided disclosure by delivery of documents. No reply was filed. The plaintiffs gave disclosure on 9 January 2015.

[12] No steps were then taken until 26 October 2015, a delay of some 9 months.

[13] On 7 August 2015, the parties received a case flow intervention notice from the Supreme Court requiring the parties to deliver "a plan to facilitate the timely determination of the proceeding". There is no evidence of any plan of the kind called for by the intervention notice being proposed, much less pursued. However, the notice seems to have prompted the plaintiffs to serve an expert report on 26 October 2015. The matter was then transferred by consent to the District Court on 29 October 2015.

[14] No steps were then taken until 22 November 2016, a delay of some 13 months.

[15] On 22 November 2016, the plaintiffs filed the ASOC. It was served on 30 November along with a proposal for mediation. Grace again responded in a timely

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[3] Amended Defence [16B] and see [17A]
[4] Amended Defence [22] and [23]

way given the time of year, filing the Amended Defence on 24 January 2017. It then took over four months for the mediation to occur. It occurred on 5 June 2017 and failed. On 29 June 2017, the plaintiffs filed a reply.

[16] No formal step was thereafter attempted until 8 October 2021, a delay some 4 years and 3 months.

[17] However, there was some activity in this period, albeit activity which was ineffective to move the proceedings forward.

[18] On 9 September 2019, the plaintiffs' solicitors delivered an unsigned Request for Trial. That Request for Trial was materially incomplete.[5] Notably, it neither confirmed that proceeding was ready for trial as required by Item E, nor indicated what remained to be done to get the matter ready for trial. It also appears to have wrongly stated that the parties had not engaged in a dispute resolution process: see Item F. It seems Grace's solicitors did not respond, and the plaintiffs took the matter no further. The covering letter also asked for Grace's list of documents. Disclosure had been given by Grace on 10 September 2014,[6] though one can imagine it might have been overlooked given that Grace's disclosure had been given 5 years before.

[19] On 8 February 2021, 17 months after sending the incomplete draft Request for Trial, the plaintiffs' solicitors followed up the 9 September 2019 letter with a further email. It relevantly provided[7]:

> Dear Colleagues
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> We act for the Plaintiffs in the above matter.
>
> Our email sent to Mr Robert Wilson has bounced back to us. It appears Mr Wilson may have left the firm. Would you kindly advise us who the contact is for his file and direct our email to the person handling the matter.
>
> Pursuant to section 389(1) of the *Uniform Civil Procedure Rules* 1999 we hereby give one month's notice of our client's intention to proceed.
>
> You have also yet to serve s with your client's List of Documents pursuant to section 214 of the *Uniform Civil Procedure Rules* 1999 (Qld), which is now overdue. Please have this served on us as soon as possible.
>
> We also refer to our email of 9 September 2019 in which we served on you a Request for Trial Date. To date we do not appear to have received any response from you, nor the signed Request for Trial Date.
>
> Please return the signed Request for Trial Date by post and by email within seven (7) days, failing which we hold instructions to file an Application for leave to proceed to trial without your client's signature on the Request.
>
> We look forward to receiving our prompt response.

[20] This email had three defects:

(a) Leave to proceed was required under Rule 389(2);

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[5] Cahalan CD 17 exhs pp. 64 to 67
[6] Cahalan CD 17 exhs p. 40
[7] Cahalan CD 17 exhs p. 62

(b) Disclosure was provided in 2014 (albeit perhaps not strictly in accordance with the Rules); and

(c) The Request for Trial which was provided nearly 18 months before was unsigned and incomplete.

[21] The request for a prompt response was presumably ironic.

[22] However, Grace's solicitors did respond promptly on 16 February 2021 pointing out the first two matters set out above. The plaintiffs' solicitor swears in these applications that he cannot locate a list of documents, though he accepts he received Grace's disclosure from 2014.[8] The plaintiff's position seems to be that despite the mode of substantive disclosure in 2014, Grace had not delivered an 'official' list of documents. That criticism of Grace's conduct of the disclosure process is a little difficult to accept. Grace's disclosure in 2014 was expressly provided under Rule 217 and no complaint had been articulated about that approach for the preceding 7 years. Further, the disclosure had an index and separate schedule identifying privileged documents. Respectfully, it is difficult to accept that the plaintiffs have any proper ground for complaint about disclosure from Grace. *A fortiori* when one notes that the plaintiffs' solicitors had incorporated the defendant's disclosure into its own list of documents.[9]

[23] The plaintiff's solicitors responded to Grace's reliance on Rule 389(2) by contending that serving a Request for Trial (unsigned and incomplete) was a step in the proceedings and foreshadowing serving another such request. Grace's solicitors pointed out the error in that view with authority the same day.[10] Despite the foreshadowed further Request for Trial, no step, formal or informal, involving Grace was taken between 16 February 2021 and October 2021, a delay of another 8 months.

[24] The last period of activity is that which culminated in these applications.

[25] It appears that from about February 2021, the plaintiff's solicitor sought further expert reports from the previous valuer and from the artist who painted four of the lost works, Ms Flores.[11] In any event, on 8 October 2021, the plaintiffs' solicitor purported to serve, by email, an expert report of Mr Flores.

[26] Grace's solicitor ignored that report because in her view, leave to proceed was required and because leave was required to deliver the report. She was correct on both counts. There is no evidence of any further communication from the plaintiffs' solicitors until the filing of the plaintiffs' application for leave to proceed on 3 December 2021.

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[8] Cantwell CD 14 [26]
[9] Cahalan CD 22
[10] Cantwell CD 14 exhs pp 89 to 92
[11] One wonders as to how the artist is qualified to give expert opinion on the value her own work, but I suppose it might be possible. The valuations are very modest in any event.

Analysis

[27] The considerations recognised as informing the discretion to grant leave under Rule 389(2) and to dismiss for want of prosecution mirror each other and are conveniently listed in *Tyler v Custom Credit Corporation Limited* [2000] QCA 178 at [2] as follows (footnotes omitted):

> (1) how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
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> (2) how long ago the litigation was commenced or causes of action were added;
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> (3) what prospects the plaintiff has of success in the action;
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> (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;
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> (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;
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> (8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;
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> (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;
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> (11) whether there is a satisfactory explanation for the delay; and
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> (12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.

[28] For convenience, I intend to deal with some of these factors together.

Delay in commencing litigation and explanation thereof

[29] As set out in paragraph [10] above, there was over 3 years delay in commencing the proceedings. The explanation for the delay in commencing the proceedings is as follows[12]:

> Between June 2012 and 14 January 2014 investigations were undertaken by the plaintiffs and their loss adjuster to identify the goods which had been lost. I was told by plaintiffs that this was a time consuming task given the time periods involved, and that they had to locate and review voluminous documents dating back almost 30 years which had to be recovered from Papua New Guinea.

[30] This explanation is vague and does not really account for the relatively long time taken to commence proceedings. If there were voluminous documents to be

[12] Cantwell CD 14 at [5]. Mr Myers swears in almost identical terms.

obtained from Papua New Guinea, it is not evident from the documents as to what they are.

[31] But even if there were significant difficulties in determining what was shipped and stored, the matter only goes to highlight that this proceeding involves events which happened over a period stretching back to 1986 and 1991. That was a very long time ago on any view even in 2012 and is a factor telling against leave. Further, the ancient nature of the events called for prompt conduct of the proceedings. That did not occur.

Delay in the proceedings

[32] These proceedings were commenced in 2014. Any case commenced in a court in 2014, no matter how complex, should have been finalised by trial or settlement long, long before now. That observation applies with particular force when one notes the relatively small sum involved in these proceedings. As I have noted in paragraphs [7] and [8] above, the likely claim is less than $180,000, putting the matter close to the monetary jurisdiction of the Magistrates Court. (The initial claim for $322,000 included (inexplicably) recovery for all the storage fees from 1986. It also claimed over $900,000 in interest. That claim was self-evidently unsustainable.)

[33] There is a particular obligation on parties to pursue small claims promptly to avoid the incurring of more cost and inconvenience than could be justified by the claim. That obligation was not met in this case. Rather, this case has been marked by short periods of activity and long periods of inaction. It is convenient to summarise the chronology:

(a) There was activity for 8 months ending in January 2015, then delay for 9 months to October 2015;

(b) There was activity in October 2015, then delay for 13 months until November 2016;

(c) There was then activity for 7 months, then delay for 4 years and 3 months until October 2021, with the application for leave being filed in December 2021.

[34] So, in broad terms, there was activity in progressing the proceedings forward for a total of about 16 months out of a total of 7 years. Not only that:

(a) Even during the 16 months of "activity" there appear to have been periods of inactivity; and

(b) The October 2015 events were prompted by the Supreme Court notice and, despite the nature of that notice, were singularly ineffective to move the case towards a trial.

Explanation for delay

[35] The plaintiffs put forward various explanations for this delay, but none are persuasive as an excuse for the delays identified. The explanations are of the most general kind. They fail to address some of the specific periods of delay, and where they do address a period of delay, they fail to explain the delay for the whole of that period.

[36] Mr Meyer provides the only direct evidence as follows[13]:

> 7. My wife and I sold our business in Guam in December 2017 and moved from Guan to Cairns in January 2018. The economic situation in Guan at that time had been difficult, largely because of tensions between the USA and North Korea. To enable us to sell our business it was necessary for us to allow the purchaser to initially pay only part of the price for the business and to defer payment of the balance until December 2018.This fact, together with the costs involved in moving from Guam to Cairns, placed my wife and I under some financial pressure over that time.
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> 8. In about 2015 I was also diagnosed with cancer which required treatment and continues to involve monitoring on a monthly basis.
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> 9. Despite the difficulties discussed above my wife and I have always remained committed to pursuing this matter as expeditiously as possible. We have always responded to any requests for information and documents made of us and have regularly followed up our solicitors regarding the progress of this matter and to seek assurance that matters were moving along.
>
> 10. Due to our age and medical advice that we received, my wife and I spent periods in isolation after the commencement of the Covid 19 pandemic, however we are presently both willing and able to personally attend a trial of this matter in Brisbane and remain keen and committed to see this matter to a conclusion as soon as possible.

[37] This evidence does not even colourably explain the delay between January 2015 and December 2017 (the date of the move from Guam) during which period there was only activity in October 2015 which was prompted by intervention by the Supreme Court. This was 3 years of delay with minimal progress. There is no evidence to support the view that Mr Myer's cancer diagnosis prevented the on-going conduct of the case at all, much less for the whole of the next 3 years.

[38] Further, the problems with Guam were seemingly resolved in December 2018. They do not explain the lack of activity for the ensuing 3 years. Nor does the reference to periods in isolation during COVID. Nothing is sworn to which explains when those periods were, nor why they prevented the plaintiffs from progressing the matter. The Queensland Courts never closed during COVID and the conduct of civil litigation continued over the whole period.

[39] Given the inadequacy of the explanation proffered, I am not persuaded of the assertions in paragraphs 9 and 10 of Mr Meyer's affidavit. Nor am I persuaded by the endorsement of those statements by the solicitor for the plaintiffs, which was too vague and general to explain many years of delay.

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[13] Meyer CD 13 at [7] – [10]

[40] While the plaintiffs' solicitor seems willing to take some of the blame for the delay, at the very least, the plaintiffs have acquiesced in the conduct of the matter in such a dilatory manner as to lead to the inference they were content to litigate at snail's pace.

Responsibility for the delay

[41] Responsibility for the delay lies entirely at the plaintiffs' door. Grace has responded with reasonable promptness in all the phases of the plaintiffs' activity.

Prospects of success

[42] Mr Harding for the plaintiffs contended that his clients had strong prospects of success. He made that submission on the basis that Grace is bound by two key deemed admissions which greatly assist the plaintiffs' case.

[43] The first is a deemed admission that the "Goods" as defined in the ASOC, were received into Grace's possession when Grace took over the business of the other parties in 1995. The second is a deemed admission of the loss claimed. These admissions would greatly simplify the plaintiffs' case. Indeed, given the position of Grace that it was obliged to deliver up the goods in its possession in the condition received, such admissions might leave very little in dispute at the trial. All that would be required might be for the plaintiffs to give evidence as to what was not delivered of the "Goods" in January 2012 and the condition of the one damaged item.

[44] Mr Harding's submission is arguable on the pleadings. Grace pleads bare denials to paragraphs 11A(a), 22 and 23 of the ASOC, which are the key paragraphs relied on by Mr Harding.

[45] Paragraph 11A(a) is the key allegation because it alleges that the "Goods" were taken into the care of the Defendant from August 1995. Elsewhere in the pleading, the "Goods" are defined as the goods claimed by the plaintiffs to have been delivered in 1986 and 1991: see paragraph 1 of the ASOC. This is deemed admitted on one view because of the bare denial of paragraph 11A(2) in the Amended Defence.

[46] Mr Steele, who appeared for Grace, submitted that although it was only arguable that a deemed admission arose from the bare denial of paragraph 11A(a) if that allegation was considered in isolation. He submitted it would be obtuse to read the Amended Defence as a whole as admitting that all the Goods were received by Grace in 1995. That submission is correct. The Amended Defence read as a whole shows that Grace does not admit the "Goods" were delivered for storage or received by Grace in August 1995. Grace repeatedly alleges it was responsible only for such of the plaintiffs' property as was received by Grace in August 1995: see Amended Defence paragraphs 1, 9, 10, 16B(c), 17(a) and 17A(b).

[47] It is unfortunate that interstate solicitors sometimes fail to ensure that they are familiar with the requirements of the UCPR. The deemed admission arising from bare denials is a well known and fundamental pleading principle in Queensland and

Grace was entitled to expect its solicitors to be aware of that matter if they chose to act in Queensland litigation. However, that is no reason to permit the plaintiffs to take advantage of a clear mistake in the presentation of the pleading. Even if it were formally required to seek leave to withdraw the admission, it is difficult to see why leave would be refused given the tenor of the Amended Defence is to put the receipt of the Goods by Grace in August 1995 into issue.

[48] Grace's position is weaker on the bare denial of the claimed loss and damage. However, it seems likely to me that the explanation for that admission was the same misunderstanding of the effect of the UCPR as for paragraph 11A.

[49] The plaintiffs argued that I should not take into account the prospect of leave to withdraw an admission because their solicitor pointed out the effect of the deemed admissions in 2017. I am unpersuaded by that submission. After June 2017, the plaintiffs took no step in these proceedings for over four years. And after two years, Grace could not have sought leave to withdraw admissions without itself seeking leave to proceed. Even recognising the obligation of a defendant to conduct proceedings in an expeditious way under Rule 5(c) UCPR, it is not credible for the plaintiff to seek to exclude Grace from seeking leave to withdraw admissions in the context of this matter, given its own delays.[14]

[50] Also relevant for the deemed admission of loss and damage specifically is the evidence that through October 2021, the plaintiffs' solicitor was seeking further expert evidence to make out the pleaded loss. It can hardly be said that the plaintiffs have assumed they did not need to prove loss.

[51] In my view, it is correct to approach the merits in any future trial on the basis that the key deemed admissions relied upon by the plaintiffs will not be in place at trial. Once that conclusion is reached, the plaintiffs' case cannot be classified as a strong one. They will have to prove at trial that the Goods they allege were delivered to Grace's predecessors decades ago were in fact delivered and prove that those Goods passed into the possession of Grace in 1995. Mr Harding's argument that the Court would infer that any loss happened in the longer period the goods were in Grace's possession rather than the shorter period before 1995 was creative but not particularly persuasive. It assumes that all the Goods went into Grace's possession in the first place. And it assumes that the circumstances of storage over the period were otherwise consistent. Neither assumption can be confidently adopted in the absence of evidence to support it.

[52] For the purposes of these applications, I find that the plaintiffs' case is arguable and no more than that. It is a neutral factor in these applications.

How far the litigation has progressed

[53] The proceedings are not ready for trial. If leave is granted, there will likely be an application for leave to withdraw deemed admissions. That application has good prospects on the material before me. It will then be necessary for the plaintiffs to

[14] That does not excuse the failure of Grace's solicitors to deal with the basic non-compliance in form of the Amended Defence when it was pointed out to them.

prepare to prove loss and damage and otherwise to prepare witness statements. Similarly, Grace will have to begin trial preparation after having had little reason to do so since mid-2017. In my view, it is likely considerable work will be required before the matter is ready for trial.

Prejudice to Grace

[54] Grace pointed to difficulties in locating and taking statements from people involved in these events. There is little doubt that at this stage that will be difficult, if not impossible. It is highly unlikely any such witness will recall much about these events in any case unless there are contemporaneous business records which can be used to prompt recollection.

[55] However, that was always likely to be the case because of the long standing nature of these events, reaching back to 1986. Indeed, one would wonder just how much independent recollection the plaintiffs now have of events occurring in 2012, much less 26 years before.

[56] Although it is difficult to pinpoint the impact of the delay, it is inevitable that such a long delay in relation to such ancient events will have some impact on the fairness of the trial.

Remaining considerations

[57] The plaintiffs have not disobeyed any Court orders. However, it should be noted that the conduct of this matter involved a very sustained breach of the fundamental duty to proceed expeditiously under Rule 5 UCPR.

[58] There is no suggestion Grace is responsible for any financial difficulties the plaintiffs might have had (not that any are credibly asserted as relevant to these applications).

[59] These proceedings will be concluded by refusal of leave and dismissal for want of prosecution.

[60] Finally, I reject the suggestion that just because Grace is a large corporation, it does not suffer from the uncertainty of on-going litigation. Certainly, it does not suffer the anxiety of a natural person defendant or the impact which might be felt by a small business. However, there are significant internal costs and diversion of resources which result from the conduct of litigation. Those impacts distract those involved from paying attention to the core business of the company. Those costs are inchoate and irrecoverable. *A fortiori* where a matter is so old that all employees involved are gone, previous solicitors have moved on and files have been archived (as occurred here).

[61] The prompt and efficient resolution of commercial disputes is designed to avoid just these kinds of impacts on commercial life.

CONCLUSION

[62] There is very little which stands in favour of granting leave and several significant considerations which support refusing it. Leave to proceed is refused and the proceedings are dismissed for want of prosecution. I will hear the parties as to costs.