SUPREME COURT OF QUEENSLAND

CITATION:	*Artahs Pty Ltd v Gall Standfield & Smith (A Firm)* [2011] QSC 273
PARTIES:	**ARTAHS PTY LTD (ACN 102 757 399)** (plaintiff) **v** **GALL STANDFIELD & SMITH (A FIRM)** (defendant)
FILE NO:	5395 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 September 2011
JUDGE:	Applegarth J
ORDERS:	**1. Declare the service of the further supplementary list of documents exhibited at pages 12-14 of the affidavit of Brian David Bartley filed 19 August 2011 to have been ineffectual.** **2. The plaintiff's application is dismissed.** **3. The proceeding is struck out.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – TIME – DELAY SINCE LAST PROCEEDING – where proceeding did not settle at mediation in September 2008 – where Court intervened by way of case flow review in June 2009 – where case flow review resulted in order that parties complete disclosure and file request for trial date, in default of which the matter would be deemed resolved – where no further step was taken and the matter was deemed resolved in September 2009 – where plaintiff purported to serve an unsigned further supplementary list of documents in May 2011 – where plaintiff applied to reactivate proceeding in June 2011 – where plaintiff claimed that case flow hearing in June 2009 constituted a "step" in the proceeding – whether there had been a "step" in the proceeding within two years of the last step within the meaning of r 389(2) of the *Uniform Civil Procedure Rules* 1999 – whether plaintiff requires leave

to proceed and, if so, whether leave should be granted

Uniform Civil Procedure Rules 1999, r 389

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27 cited
Citicorp Australia Ltd v Metropolitan Public Abattoir Board [1992] 1 Qd R 592 cited
Concord Park Pty Ltd v Allied Organik Ltd [2003] QDC 420 followed
Dunseath v Kazanis [2001] QCA 104 cited
Elesenar Constructions Pty Ltd v Thiess Contractors Pty Ltd [2001] QDC 293 cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 cited
Hollyander Pty Ltd v Mike O'Regan & Associates Pty Ltd [2011] QSC 164 cited
Kaats v Caelers [1966] Qd R 482 applied
Multi-Service Group Pty Ltd (in liq) v Osborne [2010] QCA 72 cited
Pickering v McArthur (No 2) [2010] QDC 90 cited
Quinlan v Rothwell [2002] 1 Qd R 647; [2001] QCA 176 cited
Quinlan v Rothwell [2008] QSC 143 cited
Raabe v Brisbane North Regional Health Authority [2000] QSC 257 cited
Sheehan v Mercantile Mutual Life Insurance Co Ltd [2001] QDC 324 followed
Smiley v Watson [2002] 1 Qd R 560; [2001] QCA 269 cited
Tyler v Custom Credit Corp Ltd [2000] QCA 178 followed
Webster v Yates [2007] QSC 242 cited

COUNSEL: C D Coulsen for the plaintiff
R P S Jackson for the defendant

SOLICITORS: Lynch Morgan Lawyers for the plaintiff
Brian Bartley & Associates for the defendant

[1] This professional negligence action was commenced on 22 June 2007. It did not proceed to trial, and it did not settle at mediation. No step was taken after a mediation that occurred on 30 September 2008. The Court itself intervened by way of an intervention notice dated 12 June 2009. On 19 June 2009, Atkinson J made orders including, relevantly, that:

(a) the parties complete any further disclosure by 7 August 2009; and

(b) the parties file a request for trial date by 25 September 2009, in default of which, the matter will be resolved.

At the time those orders were made, it was anticipated that the plaintiff would make disclosure of copies of any contracts for the purchase of land that were executed by the directors of the plaintiff, or of which they had knowledge, and would do so by 7 August 2009. The existence of such contracts and the directors' knowledge of

them were relevant to the issues in the proceeding. But the plaintiff did not make any further disclosure within the time ordered by the Court. As a result, the matter was deemed resolved on 25 September 2009. An order to this effect was made on 6 October 2009.

[2] Thereafter the proceeding remained in what the plaintiff's counsel described as "the twilight zone of 'deemed resolution.'"[1] The process to take it out of the twilight zone is a reactivation application under Practice Direction 4 of 2002.

[3] During the time the matter remained in the "twilight zone", the plaintiff's directors, or one of them, took steps to obtain the documents that should have been disclosed by 7 August 2009 pursuant to the order of 19 June 2009. The plaintiff purported to serve an unsigned Further Supplementary List of Documents on 10 May 2011, but this was irregular because the proceeding had been deemed resolved and not reactivated.

[4] On 17 June 2011 the plaintiff filed an application to reactivate the proceeding. The application came before Douglas J on 22 July 2011, and his Honour made directions that were intended to resolve the issues that I am required to determine. Those issues are whether the application to reactivate came too late and whether the plaintiff also required leave to proceed pursuant to r 389 of the *Uniform Civil Procedure Rules* 1999 ("UCPR"). By consent, Douglas J ordered that the plaintiff make any application pursuant to r 389 by 4.00 pm on 12 August 2011 and that the defendant make any application in respect of the continuing conduct of the proceeding by 4.00 pm on 19 August 2011.

[5] The defendant complied with those orders. The plaintiff did not. The defendant applied for orders that:

(a) pursuant to r 371 of the UCPR the purported service by the plaintiff of a further supplementary list of documents on or about 2 August 2011 be set aside or, alternatively, be declared to have been invalid by reason of the plaintiff's failure to take a step in the proceeding for more than two years since the last step; and

(b) the proceeding be stayed.

The plaintiff did not make any application pursuant to r 389 (or any other application) until the eve of the hearing before me. On 6 September 2011 it filed an application seeking a declaration that it does not need leave pursuant to r 389(2) or, alternatively, seeking leave pursuant to r 389(2) to take a step in the proceeding.

[6] The issue of whether the plaintiff required leave to take a step depends on whether a step was taken in the proceeding within the two years preceding the purported step. The focus for consideration is on the period after the mediation that occurred on 30 September 2008. The defendant contends that no step was taken after the mediation. The plaintiff's position is that a step or steps were taken after October 2008 and that, accordingly, there has not been a period in which two years have elapsed without a step. It submits that the hearing before Atkinson J on

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1 *Multi-Service Group Pty Ltd (in liq) v Osborne* [2010] QCA 72 at [44] where this expression was coined.

19 June 2009 is properly characterised as a step in the proceeding, especially as orders were made for the further progress of the matter.

[7] The defendant responds that a "step" is something that has the characteristic of carrying the proceeding forward. It submits that, plainly, had the case flow directions been complied with by the plaintiff, the acts taken by the plaintiff in complying with each of those orders would have constituted a step within the meaning of the rule. But this is not what occurred. What occurred is that the Court intervened and, rather than comply with the directions made to carry the proceeding forward, the plaintiff did not comply with the Court's direction. In the circumstances, the defendant submits that the hearing on 19 June 2009 should not be characterised as a step in the proceeding. It submits that it would be a surprising result to find that an event constituted a "step" when it did not in fact carry forward the proceeding due to the plaintiff's non-compliance.

The meaning of "step"

[8] Rule 389 provides:

> "**389 Continuation of proceeding after delay**
>
> (1) If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the proceeding, give a month's notice to every other party of the party's intention to proceed.
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> (2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice.
>
> (3) For this rule, an application in which no order has been made is not taken to be a step."

[9] The meaning of "step" has been discussed in decisions of this Court in relation to r 389 and its predecessor. In general terms, a step in a proceeding is one which moves the matter towards judgment or the relief sought in the action.[2] However, this quality is not sufficient, since many informal steps that have that practical effect do not constitute a "step" within the meaning of the rule. It is doubtful whether intervention by the Court in issuing an intervention notice is itself a step. It may be the precursor to steps being taken in the proceeding. In that regard, giving notice of an intention to proceed after the expiry of a particular period was not itself a "proceeding" under the previous rule.[3] The same can be said in respect of the giving of a notice of intention to proceed under r 389(1).[4] The defendant points to this by way of analogy, and submits that a "step" cannot sensibly be characterised as including directions made on the Court's own initiative under Practice Direction

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2 *Webster v Yates* [2007] QSC 242 at page 4.

3 *Kaats v Caelers* [1966] Qd R 482 at 486-487 per Lucas J at first instance; upheld on that point by the Full Court: see [1966] Qd R 482 at 494 per Hanger J and at 499 per Stable J (with whom Mack CJ agreed).

4 *Sheehan v Mercantile Mutual Life Insurance Co Ltd* [2001] QDC 324 at [5].

4 of 2002. It submits that if that were a step, then the rule would require a party to give notice under subrule 389(1) or make application under subrule (2) before the Court could make such an order.

[10] The defendant submits that a "step" is *the act of a party* in taking a formal step required by the rules. It relies upon the following definition of "step" in *Kaats v Caelers*:[5]

> "...something in the nature of a formal step, at least a step *taken by the litigant* in the prosecution of the action, being a step required by the rules." (emphasis added)

[11] The plaintiff did not press a submission that *Hollyander Pty Ltd v Mike O'Regan & Associates Pty Ltd*[6] is authority for the proposition that a case review hearing is a step in the proceeding. It accepted the defendant's submission that the point being made by Daubney J was that the plaintiff in that case had not taken any steps in the proceeding after a case flow review, not that a case flow review hearing constituted a "step".

[12] The term "step" in r 389 should be interpreted in the same way as "proceeding" in O.90 r.9 of the previous rules. It is in the nature of a formal step required by the rules. The introduction of r 389 was not intended to suggest that something less formal than what was required under the previous rule may suffice. In that regard I respectfully adopt the analysis of McGill DCJ in *Concord Park Pty Ltd v Allied Organik Ltd*.[7]

[13] The term "step" in r 389 is not defined in the UCPR. However, its meaning is well-established by decisions of Queensland courts. The term has been taken to mean a step that is required by the rules to progress the action towards a conclusion.[8] Compliance by a party with a direction that is made to advance the proceeding to a conclusion likewise may have the required formality to constitute a step.

[14] Rule 389 does not specifically state that the step be one taken by a party. However this is implicit, and there is no suggestion that the rule was intended to change the accepted meaning of what constitutes a "step". As the quotation from *Kaats v Caelers* indicates, it is a step taken by a party. If the rule was intended to include some intervention by the Court itself, then such a significant change might have been reflected in the words of the rule. Absent such an indication, I accept the submission that a "step" for the purposes of r 389 requires a step taken by a party to the proceeding. This conclusion is not compelled by the terms of r 389(1). That provision might co-exist with a rule that provided for a step to be taken by a party or the Court itself, with the former being governed by r 389(1). But the rule does not provide that a step taken by the Court itself constitutes a "step" within the meaning of the rule, and I do not consider that such a definition is implicit in the provision.

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5 [1966] Qd R 482 at 499 per Stable J (with whom Mack CJ agreed).

6 [2011] QSC 164 at [29].

7 [2003] QDC 420 at [8]-[12]; cf *Raabe v Brisbane North Regional Health Authority* [2000] QSC 257 at [9].

8 *Pickering v McArthur (No. 2)* [2010] QDC 90 at [6]-[11]; *Citicorp Australia Ltd v Metropolitan Public Abattoir Board* [1992] 1 Qd R 592; *Smiley v Watson* [2002] 1 Qd R 560 at 563, [2001] QCA 269 at [12].

The rule should be interpreted in accordance with long-established authority, so that a step is something taken by a party, not the Court itself. In an era of greater case management, intervention by the Court itself in issuing an intervention notice and requiring the parties to attend a review hearing may be the precursor to the parties taking a "step". But the Court's intervention is not itself a "step". Authority indicates that a "step" for the purpose of r 389 is a step taken by a litigant.

[15] I do not accept that the Court's initiative in directing that a hearing be held on 19 June 2009 constituted a "step". The fact that the Court's purpose in directing that such a hearing be held, and in making directions at it, was to progress the proceeding to a resolution does not make the hearing or the orders made at it a "step" for the purpose of r 389.

[16] I proceed on the basis that compliance with the Court's direction to complete any further disclosure by 7 August 2009 would have constituted a "step". But this did not occur.

[17] In oral submissions, Counsel for the plaintiff also pointed to the swearing of an affidavit by the defendant's solicitor for the purpose of the caseflow review. The affidavit was not filed, and neither its preparation nor filing was required by the rules. Its preparation and service upon the plaintiff's solicitors was not a "step" for the purposes of r 389.

[18] Paragraph 1 of the plaintiff's application filed on 6 September 2011 seeks:

> "A declaration that the Plaintiff has taken a step in the proceedings in the last two years and does not require leave pursuant to Rule 389(2) of the *Uniform Civil Procedure Rules* 1999 to take a further step".

The application does not specify the relevant "step" that was taken in the last two years. The plaintiff's written submission that the hearing on 19 June 2009 "is properly characterised as a step in the proceeding especially as orders were made for the further progress of the matter" should be rejected. The hearing was not a step taken by a party. It was a hearing instituted by the Court itself. The fact that the hearing resulted in orders that:

(a) if complied with, would have progressed the proceeding and resulted in a request for trial; or

(b) otherwise resulted in the proceeding being deemed resolved

does not make the orders themselves a "step". The orders were the act of the Court, not the act of a party.

[19] No formal step required by the rules, or by the Court's order of 19 June 2009, was taken by a party. As a result the proceeding was deemed resolved. The plaintiff has not established the basis for the declaration sought by it. No "step" within the meaning of r 389 was taken during the two years after the mediation failed to resolve the proceeding.

[20] The delivery of an unsigned list of documents on 10 May 2011 was not a "step". The filing of the application to re-activate and the service of documents under cover of an affidavit on 17 June 2011, and the service of a signed Further Supplementary

List of Documents in early August 2011, were irregular because no step within the meaning of r 389 had been taken in the proceeding in the previous two years. No order under r 389(2) was made for the filing of documents on 17 June 2011 or the service of a Further Supplementary List of Documents. The solicitors for the defendant raised the need for the plaintiff to seek leave in correspondence on 25 May 2011 and again on 15 August 2011.

[21] In the circumstances, I dismiss the application for the declaration sought in paragraph 1 of the plaintiff's application. On the defendant's application, I declare the service of the further supplementary list of documents exhibited at pages 12-14 of the affidavit of Brian David Bartley filed 19 August 2011 to have been ineffectual. The defendant's application also sought an order that the proceeding be stayed. It did not seek an order at that stage for the proceeding to be struck out. It was not obliged to file an application to strike the proceeding out for want of prosecution. Its position was that the plaintiff required the Court's leave to proceed. Its position was correct in that regard. The plaintiff belatedly filed an application for leave to proceed. If it obtains leave, then no occasion will arise to strike out the proceeding for want of prosecution. If, however, leave is refused, then the defendant seeks a consequential order that the proceeding be struck out. This would appear to be the appropriate course in that event. Because of r 389(2), if a proceeding cannot go on without leave, and no application for leave is made or foreshadowed, the attitude is generally taken that the proceeding be struck out.[9] If leave is not granted on an application under r 389(2), then the proceeding in practical terms or effect becomes subject to a permanent stay "from which it could only be rescued, if at all, by striking it out."[10] At the hearing of the applications the defendant sought orders pursuant to r 280 or in the inherent jurisdiction of the Court that the proceeding be dismissed for want of prosecution.

The plaintiff's application for leave to proceed

[22] The discretion to grant leave to proceed under r 389(2) is not fettered by rigid rules. However, the criteria that should be considered on an application of this kind were stated by Atkinson J (with whom McMurdo P and McPherson JA agreed) in the oft-cited authority of *Tyler v Custom Credit Corp Ltd*.[11] The factors to be taken into account in determining whether the interests of justice require a case to be dismissed were said to 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 or causes of action were added;

(3) what prospects the plaintiff has of success in the action;

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

(5) whether or not the litigation has been characterised by periods of delay;

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9 *Dunseath v Kazanis* [2001] QCA 104 at page 9.

10 Ibid at page 6.

11 [2000] QCA 178.

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

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

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

(9) how far the litigation has progressed;

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

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

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

Atkinson J continued:

> "The court's discretion is, however, not fettered by rigid rules but should take into account all of 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."[13]

The date of the relevant events

[23] The proceeding was commenced on 22 June 2007, about four years after the events to which it relates. It concerns real property transactions in respect of which the plaintiff retained the defendant in March 2003. The plaintiff failed to complete two contracts in June 2004 and the sellers retained the deposits paid to them.

Prospects

[24] An application under r 389(2) is not one in which it is usually necessary or appropriate to give detailed consideration to the plaintiff's prospects. However, this consideration may assume greater significance where the outcome of the proceeding is fairly clear—for example, where the plaintiff's case appears doomed to fail.[14] In most cases, however, it is impossible on an application of this kind to assess prospects of success with any confidence because the nature of such an application and the subject of the proceeding do not permit it. The time of the Court does not allow a close examination of the matter, and often the resolution of issues depends

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12 Ibid at [2].

13 Ibid.

14 *Elesanar Constructions Pty Ltd v Thiess Contractors Pty Ltd* [2001] QDC 293 at [5].

on word-on-word contests and an appreciation of issues that can only be gained at trial.

[25] The advantage which a trial judge enjoys over other judges who are called upon to consider the evidence after the trial is well-established.[15] The advantage which a trial judge has over a judge considering a matter *before* it proceeds to trial and the evidence unfolds should be recognised upon an application like this. Apparently unlosable cases sometimes are lost, just as sometimes apparently unwinnable cases are won. And sometimes, in the end, a litigant wins the war after losing every interlocutory battle.

[26] The plaintiff in this case submits that the subject matter of the dispute is well-documented, and that it has "good prospects in the action in that the failure to advise on key terms and the failure to warn about the risks of the contract not being subject to finance is a breach of retainer and duty". The plaintiff's written submissions say no more about its prospects. However, I have regard to the pleadings and affidavits that were read by it at the hearing, and the plaintiff's oral submissions.

[27] The defendant submits that the plaintiff has no real prospects of succeeding in its claim. It relies on its defence and an affidavit of Mr Gall that contains a detailed response to the allegations of breach of duty. I set out below the defendant's written submissions on prospects.

[28] The parties' respective submissions on prospects require reference to the substantial issues in the proceedings.

[29] The proceedings arise out of a number of related transactions involving strata titled units in the "Broadbeach on the Park" development. That property was subject to a plan of subdivision to divide it into three lots. Two of the lots (Lots 1 and 2) had been purchased by Picone Services Pty Ltd ("Picone") and one of the lots (Lot 3) had been purchased by Delfran Holdings Pty Ltd ("Delfran"). Delfran and Picone were controlled by Mr Frank Picone.

[30] The plaintiff contracted to purchase Lots 1 and 2 from Picone for $5,830,000, and Lot 3 from Delfran for $660,000. It intended to on-sell the lots at a profit.

[31] In March 2003, Mr Flaherty, on behalf of the plaintiff, orally retained Mr Gall (of the defendant) for the defendant to act as the plaintiff's solicitor in respect of the plaintiff's purchase of these commercial lots and their proposed on-sale to third parties. At the time the plaintiff contracted to purchase Lots 1, 2 and 3, the development was still in the course of construction and no titles had issued. Settlement was due 14 days after notice was given that the relevant scheme had been established to create the lots. The contracts to purchase the lots were entered into on or about 14 April 2003. On 24 April 2003 the plaintiff entered into a contract to sell Lot 3 for $660,000. On 27 March 2003 the plaintiff entered into a contract to sell Lot 1 for $1,845,910. The plaintiff intended to subdivide Lot 2 and on-sell the proposed subdivided lots. It entered into contracts on various dates in 2003 to on-sell re-subdivided Lot 1, Lot 2 and Lot 4.

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15 *Fox v Percy* (2003) 214 CLR 118, [2003] HCA 22.

[32] The plaintiff's obligations to settle the Delfran contract and the Picone contract were not subject to the plaintiff obtaining any necessary finance. The plaintiff paid a deposit of $530,000 on the Picone contract and a $60,000 deposit on the Delfran contract, and these deposits were released to the sellers pursuant to a provision of the contracts, rather than being held by a deposit holder.

[33] Settlement of the re-sale contracts in respect of Lots 1 and 3 (but not the re-subdivided lots) was required to be effected contemporaneously with settlement of the purchase contracts from Picone and Delfran. Settlements of the re-sales of the re-subdivided lots were due to be effected at later dates. As the contract price the plaintiff was to receive on the on-sale contracts for Lots 1 and 3 was less than the total of the purchase prices the plaintiff was required to pay under the Picone and Delfran contracts, the plaintiff needed to obtain finance. The plaintiff made inquiries about finance in mid-2003 and November 2003. It also received an offer of finance in April 2004, but did not accept that offer. At a meeting between Mr Flaherty and Mr Gall on 20 April 2004, Mr Flaherty told Mr Gall that an offer of finance had been received at a rate of 1.25 per cent per month, but that he was trying to obtain a cheaper rate. Mr Flaherty also told Mr Gall that the arrangement he had with other persons interested in the plaintiff company was such that the lower the rate of interest paid, the greater Mr Flaherty's share of the profit.

[34] The plaintiff did not apply to Westpac for finance to settle the purchase contracts until 11 June 2004. Westpac advised of its conditional approval of finance by letter dated 23 June 2004. Settlement of the contracts was originally to be 18 June 2004, but was extended by agreement of the various parties to 25 June and then to 28 June 2004. Westpac did not provide the finance that was necessary for settlement to occur on 28 June 2004. Issues arose as to whether it was satisfied of the conditions contained in the terms of the conditional approval that it had given for finance. These matters are addressed in detail in the defence and in Mr Gall's affidavit. For the reasons given by him, Mr Gall says that he addressed the matters raised by Westpac's solicitors on 28 June 2004.

[35] As a result of Westpac's failure to provide the finance required for settlement the plaintiff was unable to complete the Picone contract and the Delfran contract, and on 28 June 2004 Picone and Delfran terminated their respective contracts and retained the deposits that had been paid to them. The plaintiff made a claim against Westpac in respect of Westpac's failure to provide the necessary finance. It recovered $350,000 pursuant to a settlement with Westpac.

[36] The defendant's submissions conveniently summarise the substance of the plaintiff's claim against it, namely that the defendant failed:

(a) to ensure that the contracts under which the plaintiff agreed to purchase certain real property ("the purchase contracts") were subject to finance;
(b) to warn the plaintiff of the risk of financial loss because the contracts were not subject to finance;

(c) to ensure that contracts for the on-sale of the real property ("the resale contracts") were enforceable;

(d) to take reasonable steps on or after 24 June 2004 to ensure that the plaintiff's financier (Westpac) was satisfied that its conditions of approval were met by 28 June 2004;

(e) to warn the plaintiff of the risk of financial loss if Westpac was not so satisfied by 28 June 2004;

(f) to explain that clauses of the purchase contracts were unusual in that they authorised release of the deposits;

(g) to advise that the vendors under the purchase contracts were required to give the plaintiff disclosure statements under section 213 of the *Body Corporate and Community Management Act* 1997 and section 21 of the *Land Sales Act* 1984 and that, because they had not done so, the plaintiff had a right to cancel the purchase contracts; and

(h) to advise the plaintiff that if the plaintiff failed to settle on the date for settlement of the purchase contracts, the deposits could be forfeited.

[37] The defendant's submissions identify the following difficulties with the plaintiff's claim:

> "(a) There can be no obligation on the defendant to ensure the purchase contracts were subject to finance, or no loss flows from the alleged failure, where:
>
> (i) It is admitted that no instructions were given to make the contracts subject to finance;
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> (ii) They were plainly not subject to finance and yet the plaintiff, by Mr White and Mr Flaherty, signed them;
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> (iii) The defendant could not require the vendors to contract on this basis;
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> (iv) It is not alleged that had the defendant proposed this to the vendors (despite not having instructions to do so) they would have agreed. There is no evidence from the plaintiff on this application to indicate that the vendors would have agreed to the contracts being subject to finance. That is a telling omission given this matter was raised in the defendant's outline of argument relied on the last occasion the matter was before the Court;
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> (v) The fact that the purchase contracts were not subject to finance did not in fact result in loss. It was plainly the plaintiff's failure to seek to obtain finance from Westpac earlier than 7 days prior to the original settlement date (and more than a year after entering the purchase contracts) that caused its loss. There can be no doubt that the plaintiff waited until 11 June 2004 to make

application to Westpac (as opposed to inquiries) because paragraph 27 of the FASOC [Further Amended Statement of Claim] alleges that it was on this date that the plaintiff made application to Westpac for finance. Mr Flaherty's affidavit does not say that the statement of claim is wrong in this respect;

(vi) It is not alleged (and could not be alleged) that the plaintiff did not know that it needed to obtain finance. If there were any doubt about this, it is dealt with in paragraph 3 of the reply. It is there alleged that Mr Flaherty informed the defendant that the purchase contracts required amendment so that the date for settlement was 14 days after receiving notice that the title had issued, because otherwise the plaintiff would not be able to obtain finance. That seemingly indicates that the plaintiff knew that it had to obtain finance and that it was necessary to have it in place at the time of settlement;

(vii) It is also clear that, in fact, finance was available to the plaintiff from April 2004 or at least there was an offer to the plaintiff of the necessary finance at that time;

(b) The risk of financial loss if the purchase contracts were not subject to finance and the plaintiff failed to obtain finance in time was obvious. It was also recognised by the plaintiff as is clear from a file note of a conversation between Mr Gall and Mr Leahy on 22 April 2004. Such a risk is so obvious it really beggars belief that this allegation is apparently seriously made. The plaintiff in fact had an offer of finance in April 2004 from another financier but declined to proceed with that offer because, as may be inferred, Mr Flaherty wished to maximise his share of the profit that plaintiff stood to make from the transactions. While Mr Flaherty deposes to his not knowing the significance and risks to the plaintiff of signing the purchase contracts without them being subject to finance, the relevant issue is whether the plaintiff company knew. The other director, Mr White, has chosen to remain silent on this topic. It may be inferred that had he been able to swear an affidavit which would have assisted the plaintiff on an application where the plaintiff's prospects of succeeding on such an allegation where squarely in issue, he would have done so. Further, it is plain that Mr Leahy (a shareholder who spoke with Mr Gall regarding the contracts) knew that a difficult position might be created if the time for settlement came around and the company did not have finance in place;

(c) As is clear from Mr Gall's affidavit the resale contracts were enforceable. In any case, none of the facts pleaded in subparagraph 24(c) of the defence as to the enforceability of these contracts are put in issue in the reply and they are thus

taken to be admitted pursuant to rule 166(1) of the UCPR. Further, the suggestion that Westpac was or would have remained unsatisfied as to this is at odds with the fact that Westpac has seen fit to pay the plaintiff the sum of $350,000.00 as a consequence of its failure or refusal to provide finance.

(d) As can be seen from Mr Gall's affidavit there is no substance in the allegation that the defendant did not take reasonable steps on or after 24 June 2004 to ensure that Westpac was satisfied that its conditions of approval were met by 28 June 2004. It was not required to do more than was reasonable having regard to the difficulties in contacting Westpac's solicitors (which Mr Gall refers to in paragraphs 21, 23, 24, 26, 27, 28, 31(b), (c), (d) and 32 of his affidavit) and the fact that the plaintiff had waited until 7 days prior to the date for completion to apply to its preferred financier;

(e) The contention that the defendant was negligent in failing to warn the plaintiff of the risk of financial loss if Westpac were not satisfied by 28 June 2004 is hopeless:

    (i) Because the risk was obvious and the directors of the plaintiff will not be believed if they, as commercially sophisticated men, give evidence that they did not understand what might flow if finance was not available to complete a contract on the date for settlement. Mr White does not even purport to depose to that. It is submitted that the reason why he does not is obvious.

    (ii) It is not said that had such advice been given some different result would have occurred. This is simply not causative of loss, even if there were a duty to give such advice;

(f) Whether or not the defendant should have explained that clauses of the purchase contracts were unusual in that they authorised release of the deposits is immaterial because:

    (i) No loss resulted from the deposits being released in circumstances where they would have been forfeited for failure to settle in any case;

    (ii) The plaintiff was, in any case, advised that it was inadvisable to agree to early release of the deposits by another solicitor prior to entering into the contracts but chose to ignore that advice. The allegation that had the defendant advised the plaintiff of that something different would have happened is hopeless;

(g) It is not in contest that the terms of the *Body Corporate and Community Management Act* 1997 and section 21 of the *Land*

> *Sales Act* 1984 were inapplicable to the lots being sold pursuant to the purchase contracts so that the alleged disclosure statements were not required;
>
> (h) The defendant was not negligent in not advising the plaintiff that if it failed to settle on the date of settlement of the purchase contracts, the deposits could be forfeited in circumstances where the plaintiff's directors were sophisticated businessmen. There is no evidence put before the Court that Mr White was not well aware of that."

On the basis of these matters, the defendant submits that the plaintiff has poor prospects of succeeding in its claim.

[38] The plaintiff's written and oral submissions did not engage specifically with the defendant's contentions in relation to each of these matters. Instead, the plaintiff's written submissions simply stated that the plaintiff had good prospects because the failure to advise on key terms and the failure to warn about the risks of the contract not being subject to finance were breaches of retainer and duty. The plaintiff's counsel pointed to the contents of Mr Flaherty's affidavit dated 6 September 2011 (a copy of which was filed by leave on 7 September 2011). In it, Mr Flaherty states:

> "I did not know at any time prior to the termination of the Delfran and Picone Contracts the significance and risks to the Plaintiff of signing these contracts without subject to finance clauses especially the risk of the deposit being forfeited having regard to the nature of the transactions."

[39] Mr Flaherty was an experienced businessman. So was his co-director Mr White. There is no suggestion that Mr Flaherty or any other director of the plaintiff instructed the defendant that the contracts should be subject to finance. The defendant accepts that it was an implied term of its retainer that it would explain to the plaintiff its principal rights and obligations under the purchase and on-sale contracts to the extent appropriate, having regard to the plaintiff's knowledge and experience in relation to such contracts and to the level of commercial experience and expertise of its directors and shareholders. It also admits that it was an implied term of its retainer that it would warn the plaintiff of any significant risks arising from the purchase and on-sale contracts to the extent appropriate, having regard to these same matters. It denies that it had a duty to warn the plaintiff of the risk of financial loss arising from the Delfran contract and the Picone contract not being subject to finance in circumstances in which the directors and shareholders of the plaintiff were commercially experienced and the risk was obvious. The evidence given on affidavit by Mr Gall on the topic of his discussions with Mr Flaherty about an offer for finance that had been received by the plaintiff, and about inquiries that the plaintiff made about finance in 2003, and the plaintiff's failure to accept an offer of finance in April 2004, are not disputed by the plaintiff.

[40] There is no evidence that it was sound practice for a solicitor acting for a company directed by experienced businessmen like Mr White and Mr Flaherty to advise that contracts were not subject to finance, or to advise of the obvious risk that if the plaintiff did not obtain finance it was at risk that the contract would not settle, that the contract would be terminated and the plaintiff would lose its deposit.

[41] It is possible that Mr Flaherty, despite his commercial experience, and the discussions which he had with Mr Gall in April 2004 about finance, will be believed in his assertion that he did not know at any time prior to the termination of the contracts of the significant risks arising from the fact that the contracts were not subject to finance. His evidence, which I have quoted earlier, may be accepted at trial after it is tested by cross-examination. However, this seems unlikely. I am not bound to accept uncritically Mr Flaherty's assertion that he did not know the significance and risks to the plaintiff of signing purchase contracts without them being subject to finance. However, as the defendant submits, the relevant issue is what the plaintiff company knew, and Mr White has chosen to remain silent on this topic.

[42] In circumstances in which the plaintiff's submissions, both oral and written, and the affidavit material relied upon by it have not engaged with the defendant's submissions in relation to the many difficulties identified by the defendant with the plaintiff's claim, I do not accept the plaintiff's submission that it has good prospects in the action. On the contrary, the matters raised by the defendant indicate that the plaintiff has poor prospects of success even if, which seems unlikely, Mr Flaherty is accepted in his assertion that he did not know the significance and risks to the plaintiff of signing purchase contracts that were not subject to finance.

Delay and disobedience of Court orders and directions

[43] On 4 December 2008, the defendant's solicitor, Mr Bartley, wrote to the plaintiff's solicitor noting that one of the central issues in the proceedings was the existence and extent of any obligation on the part of the defendant to provide advice as to the implications of the plaintiff entering into unconditional contracts. That was said to involve a consideration of the commercial experience of the directors of the plaintiff, and it was apparent from the pleadings that those directors had substantial involvement as directors of numerous companies. Mr Bartley anticipated that the plaintiff might contend that directorship of companies did not necessarily mean involvement in contracts to purchase property. The defendant did not have access to the business records of the various companies, and it did not wish to go to the expense of obtaining non-party disclosure from each of those companies. Mr Bartley noted that one available means of addressing the matter would be for the defendant to seek leave to interrogate the plaintiff. However, he proposed that the matter be resolved with less formality. He invited the plaintiff to obtain from the various companies copies of any contracts for the sale or purchase of land which were executed by the directors of the plaintiff or of which they had knowledge. Mr Bartley noted that the plaintiff had no obligation to accede to that request. However, he expressed the hope that the plaintiff would recognise the savings to both parties in addressing the matter in a less formal manner and in the way proposed.

[44] The plaintiff's solicitors made no response to that letter.

[45] On 12 June 2009 the Court wrote to the solicitors for the parties advising that the matter was to be listed for review before Atkinson J on 19 June 2009. In response, the plaintiff on 18 June 2009 proposed an order that it make further disclosure on or before 16 July 2009 and that the parties deliver any notice of non-party disclosure by 30 July 2009. In his letter dated 18 June 2009 the plaintiff's solicitor stated:

> "Our clients shall endeavour to obtain documents from those companies referred to in the Amended Defence in which its directors were involved that relate to issues in dispute. Our client needs 28 days to complete this task."

[46] On 19 June 2009 Mr Bartley wrote to the plaintiff's solicitors, referred to his letter dated 4 December 2008 (to which there still had been no response) and noted that the plaintiff's proposed draft order and correspondence did not give any indication that the plaintiff intended to accede to the defendant's request. As a result Mr Bartley proposed that the order include provision for the defendant to have leave to deliver interrogatories.

[47] This explains the background to the order made by Atkinson J on 19 June 2009 whereby the parties were directed to complete any further disclosure by 7 August 2009.

[48] The plaintiff did not provide the further disclosure by 7 August 2009, as required by the Court's order. I will later address its explanation for not having done so. Importantly, the plaintiff did not:

(a) seek an extension of time from the defendant, or from the Court to complete disclosure, as required by the Court's order; or

(b) propose some other way to address the issue. For example, the plaintiff did not propose that the relevant directors swear affidavits directed to their experience and knowledge as company directors of contracts for the sale of commercial property, or of difficulties that they had encountered or anticipated in obtaining documents from companies of which they had been directors at the relevant time in relation to such matters.

[49] Contrary to the plaintiff's submissions on this application, the defendant did not demand documents in respect of the more than 100 entities particularised in the defence of which either Mr Flaherty or Mr White had been a director. Allegations that Mr Flaherty or Mr White was or had previously been a director of the particularised companies were particulars in support of the allegation that they were commercially experienced, not that each of these companies engaged in real estate transactions. The defendant sought documents only in respect of companies of which these individuals had been directors, being contracts that these individuals had executed as directors or of which they had knowledge. The plaintiff's directors might have explained in 2009, as they have done in recent affidavits, that a large number of the companies were not involved in real estate transactions.

[50] Rather than seek an extension of time to comply with the Court's order, or seek some other order that would address the relevant issue concerning the directors' knowledge and experience in relation to such contracts, the plaintiff gave no indication that it was not able to comply with the Court's direction in relation to disclosure. In fact, by letter dated 29 July 2009 the plaintiff's solicitors wrote to the defendant's solicitors and advised:

> "Our client shall be completing any further disclosure by 7 August 2009 in accordance with Order 3 of the Orders of Her Honour Justice Atkinson made on 19 June 2009."

[51] The plaintiff did not do so. When a request for a trial date was not filed by 25 September 2009 in accordance with paragraph 6 of the directions made on 19 June 2009, the proceeding was deemed resolved. This was confirmed by Court order made on 6 October 2009.

[52] The plaintiff gave no indication that it intended to reactivate the proceeding until its solicitors wrote to the defendant's solicitors on 10 May 2011.

[53] By an affidavit filed on 17 June 2011, Mr Flaherty deposes as to companies of which he has been a director, and describes their trading activities. For the most part, these companies were not involved in real estate or property development. He was a director of "Angus Waters Development Pty Ltd", which was the purchaser and developer of land at Agnes Water pursuant to a contract entered into on 24 December 2002.[16] At that time, neither he nor Mr White were directors of the company. The development at Agnes Water consisted of the construction of three towers containing 12 holiday rental units in each tower. Mr Flaherty was not involved in the day-to-day running of the Agnes Water development. Sales of units occurred after the time he became a director, but he says that he did not review or sign them, and does not have copies of them. Mr Flaherty says that he was made aware by his solicitors, prior to and subsequent to the date for compliance with paragraph 3 of the orders made on 19 June 2009, that he should conduct searches for documents relating to the development and that he needed to search for documents in respect of property transactions in which he had been involved. Mr Flaherty does not depose to having undertaken any searches. I interpret his affidavit as indicating that the reason he did not do so in the case of Angus Water Development Pty Ltd is because he was not involved in the day to day running of that company and because the contract for the purchase of the relevant property occurred before the plaintiff acquired shares in the development company.

[54] The other director of the plaintiff, Mr Paul White, in an affidavit filed on 17 June 2011, details a large number of companies of which he has been a director including companies associated with Concrete Constructions Ltd (which later changed its name to Walter Construction Group Ltd). He explains the extent to which companies with which he was associated carried on real estate developments. He also addresses his role in relation to Angus Water Development Pty Ltd, in which the plaintiff became a shareholder in July 2003. He says that he was asked by his solicitors to conduct searches for documentation in relation to this company and "was still trying to find these documents up until 1 March 2011." He does not say when he began these searches, but he says that he made numerous telephone inquiries "between June 2010 and November 2011 [sic]" with a representative of the receiver. He also deposes to having spent time with employees of a law firm reviewing their archives of files. Again, he does not say when this occurred. He also made "several inquiries with the solicitors who acted on the on-sale, Praegor Batt Solicitors throughout January 2010 but have not yet been provided with copies of the on-sale contracts on their conveyance files." He refers to additional attempts to contact that firm, to sending an email to a solicitor at the firm on 5 November 2010, and to making follow-up phone calls.

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[16] Other documents indicate that the company is in fact called "Angus Water Development Pty Ltd". Mr Flaherty's affidavit refers to "Angus Street, Angus Water" but Mr White's affidavit indicates that while the development was located at Agnes Water, the relevant company was called Angus Water Development Pty Ltd.

[55] Mr White also deposes to his involvement in two companies that were set up in respect of a development at 120 Robertson Street, Fortitude Valley, and of having found some documents in respect of this development by spending many days searching through old boxes of archive files. He does not say when he began or finished these searches. He also gives evidence of trying to locate a solicitor who acted in relation to transactions in relation to this development. He gives evidence of having left a number of messages for this solicitor, including on 23 July and 20 August 2010, and of having received a return call from him on 24 September 2010. He was informed that the relevant documents on which the solicitor worked were left in Sydney with Sagacious Legal Services. The solicitor no longer knows where the documents may be located. Mr White also deposes to having signed some sale contracts in respect of a development at Coral Street, The Entrance in 2000. Mr White could recall signing some of the on-sale contracts, but could not recall receiving legal advice in respect of them and the purchase contracts. He says that he found some documents last year in respect of this development by spending many hours searching through old boxes of archive files. He also made inquiries of a Sydney based firm which acted in the matter, and of not being able to find the purchase contracts or the on-sale contracts. Mr White's affidavit was sworn on 31 March 2011.

[56] It appears that Mr White's searches resulted in the preparation of the unsigned Further Supplementary List of Documents that was sent to the defendant's solicitors under cover of a letter dated 10 May 2011.

[57] The affidavits relied upon by the plaintiffs on this application do not explain when the plaintiff, its directors and its solicitors commenced to search for the requested documents, and the basis upon which their solicitor:

(a) on 18 June 2009 advised that the plaintiff needed 28 days to complete the task of obtaining the documents; and

(b) on 29 July 2009 advised that the plaintiff would be completing any further disclosure by 7 August 2009 in accordance with Order 3 of the orders made on 19 June 2009.

[58] There is no suggestion that the search for documents commenced shortly after the defendant's solicitors requested them by letter dated 4 December 2008. Mr White gives an account of searches that he has undertaken, and provides some dates in relation to steps taken by him in the last year or two. Mr Flaherty does not appear to have undertaken any searches. No adequate explanation has been given by the plaintiff as to why the searches were not started sooner and completed much sooner. In the absence of an adequate explanation, one inference is that the plaintiff placed a low priority upon them. That said, Mr White's affidavit indicates that some of the searches were time-consuming. It is not clear whether the task of finding the documents or witnesses who could shed light on their location would have been any easier had it been undertaken sooner so as to comply with the Court's order.

[59] One consideration identified by *Tyler v Custom Credit Corp Ltd* is whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant. I do not consider that the delay in complying with the Court's orders is attributable to any substantial degree to the defendant. The defendant requested the documents and in doing so made clear that the plaintiff was not obliged to produce

them. The plaintiff made no response to that proposal until after the Court intervened in June 2009, following which the plaintiff agreed to a direction in relation to the completion of disclosure and obtained a date for disclosure that accommodated the time expected to complete that task. It did not seek an extension of that time close to the relevant date, or even after it had passed. The plaintiff's material does not indicate when it first became aware of the difficulty that would be encountered in complying with the Court's order, or why at that time it did not seek an extension of time or a different regime to address the relevant issue concerning the directors' knowledge and experience of land sale contracts. It was not incumbent upon the defendant to inquire in August and September 2009 as to why the plaintiff had not complied with the Court's order, and the plaintiff's solicitors did not communicate with the defendant's solicitors prior to the matter being deemed resolved on 25 September 2009, or, indeed, until 10 May 2011.

[60] The plaintiff does not suggest that the defendant was required to take a step in the proceeding. In the circumstances, the delay in the proceeding after December 2008 and, in particular, after the Court's order of 19 June 2009 is attributable substantially to the plaintiff.

[61] There is no suggestion that the plaintiff is impecunious or that any impecuniosity on its part is the reason for the delay in the litigation.

Is the matter ready for trial?

[62] The plaintiff submits that the matter is now ready for trial. However, this is not correct. The plaintiff's solicitor says that prior to trial the plaintiff wishes to:

(a) serve notices of non-party disclosure on the law firms that acted for the purchasers in the on-sale contracts referred to in paragraphs 16, 17 and 19 of the amended statement of claim; and

(b) file and serve an expert valuation report that gives a historical valuation of the proposed lot referred to in a table in the statement of claim described as "Proposed Subdivided Lot 3.

[63] In addition, it emerged during the hearing of the application that the plaintiff had not decided whether it would call an expert witness to address whether it was the practice of solicitors acting for such a buyer to advise that the relevant contract was not subject to finance and the risk that, if finance was not obtained prior to settlement and the transaction did not settle, the seller might terminate the contract and retain the deposit.

[64] The fact that a matter will soon be ready for trial is a relevant factor in deciding whether leave to proceed should be granted to proceed pursuant to r 389.[17] Sometimes expectations that a matter will come on for trial in the near future after the grant of leave are misplaced.[18] However, I will assume that if leave is granted the plaintiff will complete the steps which it wishes to undertake prior to trial, and that these steps will be concluded in a matter of months.

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17 *Quinlan v Rothwell* [2002] 1 Qd R 647, [2001] QCA 176.

18 ibid; cf *Quinlan v Rothwell* [2008] QSC 143.

Whether the delay has been caused by the plaintiff's lawyers being dilatory

[65] This is a factor identified in *Tyler v Custom Credit Corp Ltd*. There is no suggestion that the delay is attributable to the plaintiff's lawyers, or that any delay on the part of the plaintiff's lawyers in progressing the matter should not be attributed to the plaintiff itself. One of the plaintiff's directors appears to have carried out inquiries and searches for the requested classes of documents, rather than have solicitors undertake these tasks.

Has there been a satisfactory explanation for the delay?

[66] The failure to comply with the Court's direction in relation to disclosure, and the passage of a further period of almost two years between the making of the order on 19 June 2009 and the provision of an unsigned list of documents in May 2011 has not been satisfactorily explained. Some of the practical difficulties encountered by Mr White have been explained, but the duration of the delay has not been satisfactorily explained.

Has the delay resulted in prejudice to the defendant, leading to an inability to ensure a fair trial?

[67] It is possible that some documents which might have been located by compliance with the Court's direction in relation to disclosure, or more timely searches in late 2009, have been lost as a result of the plaintiff's delay. However, this can be put no higher than a possibility, and the loss of any such documents cannot be said to have resulted in irreparable prejudice to the defendant such that a fair trial is no longer possible. Relevant witnesses apparently remain available, and the relevant transactions were documented.

Other discretionary matters

[68] In *Tyler v Custom Credit Corp Ltd* the Court referred to 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."[19] Similar considerations arise in the context of late amendment.[20] This includes the strain and disappointment felt by a party when litigation which had been thought to be at an end is revived. I take into account that the proceeding was deemed resolved rather than struck out in late 2009. The defendant, and Mr Gall in particular, might have expected that an application to reactivate it eventually might be made. However, the plaintiff gave no indication after the proceeding was deemed resolved that it intended to revive the proceeding until it wrote to the defendant's solicitor on 10 May 2011.

[69] The question of whether leave should be granted pursuant to r 389(2) arises for consideration in the context of the implied undertaking to the Court and to the other parties to proceed in an expeditious way.

[70] The defendant was prepared to await the plaintiff's response to its December 2008 proposal, rather than undertake an expensive process of non-party disclosure or an application for leave to interrogate. Its delay in awaiting the plaintiff's response in

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19 [2000] QCA 178 at [2].

20 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214, [2009] HCA 27 at [101].

the first half of 2009 must be compared with the plaintiff's delay during this same period in doing anything to progress the proceeding, including responding to the defendant's sensible proposal. It was only the Court's intervention that induced the plaintiff to agree to give disclosure of the requested documents. It then failed to comply with the Court's order, or to proceed in an expeditious way to provide the disclosure it had indicated it would give.

The substantial issue on the application under r 389(2)

[71] As *Tyler v Custom Credit Corp Ltd* and other authorities make clear, an application for leave to proceed must "show that there is good reason for excepting the particular proceedings from the general prohibition".[21]

[72] Some of the factors that support the grant of leave in this matter are that, with case management, the proceeding could be made ready for trial in the not too distant future, and the delay has not seriously prejudiced the defendant's ability to obtain a fair trial.

[73] As against these and other factors that support the grant of leave is the absence of an adequate explanation for the plaintiff's delay, both before the intervention hearing on 19 June 2009 and in the two years that followed it. In particular, the plaintiff has not adequately explained why it took almost two years to complete a disclosure task that was predicted in June 2009 to take one month, nor has the plaintiff explained when it actually embarked on this task.

[74] This was not simply delay. It was a failure to comply with a Court order for any further disclosure to be completed by 7 August 2009. If the plaintiff had obtained no documents by 7 August 2009 (a matter not precisely addressed in the plaintiff's affidavits), then it has not explained why no documents were obtained by it in the month that followed that hearing, and why its solicitor wrote to the defendant's solicitor on 29 July 2009 stating that the plaintiff would complete any further disclosure by 7 August 2009 in accordance with Order 3. If the plaintiff had obtained certain documents by 7 August 2009, then it has not explained its failure to disclose them in accordance with the Court's order. Either way, the plaintiff's delay in progressing the proceeding in accordance with the Court's direction, and apparent disobedience of a Court order, are factors that tell against the grant of leave. This is so since the plaintiff's delay after June 2009 comes against a background of failure to progress the proceeding after the mediation that occurred on 30 September 2008, and a lack of response to the practical proposal made by the defendant's solicitor to avoid unnecessary costs associated with non-party disclosure against parties with whom the plaintiff's directors were, or had been, associated. The delay is attributable in one sense to the defendant's request for the plaintiff to obtain certain documents, but the plaintiff chose eventually to agree to that cost-saving course. Accordingly, the delay since late 2008 is substantially attributable to the plaintiff's delay in responding to the defendant's proposal, and then in complying with the Court order that was intended to implement it.

[75] In the absence of an adequate explanation as to when the plaintiff embarked on the task of obtaining the requested documents, and why it took the plaintiff almost two years to complete the task, it appears that the plaintiff gave the progress of the

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[21] [2000] QCA 178 at [5], quoting *William Crosby and Co Pty Ltd v The Commonwealth* (1963) 109 CLR 490 at 496, [1963] HCA 6 at [3] per McTiernan, Kitto, Taylor and Owen JJ.

proceeding a low priority. Any loss of interest in actively progressing it may be due to the apparently poor prospects of the plaintiff's claim. For the reasons given by the defendant on this application, the plaintiff's claim appears to have poor prospects of success. This is a relevant factor.

[76] It appears that the plaintiff, and in particular one of its directors, undertook the task of seeking out the requested documents, rather than have the plaintiff's solicitors pursue this task with his assistance in a more timely way. It is not suggested that the decision for the plaintiff, rather than its solicitors to undertake this task was due to any impecuniosity, and it is not suggested that the task could not have been embarked upon and completed much earlier.

[77] Any belief by the plaintiff that it could take up to two years after the hearing on 19 June 2009 to take another formal step in the proceeding without leave of the Court was misplaced.

[78] If the plaintiff had better prospects of success in the proceeding than it apparently does, and if a better explanation had been given for its delay and non-compliance with the Court's order, then the position would be different.

[79] On an application of this kind, the test is not whether a fair trial is still possible. Still, the rationale for the rule requiring leave to proceed is to prevent abuse of process, and to protect the parties from injustice or unfairness by reason of delay. In addition to the wide-ranging factors that have been identified in authorities such as *Tyler* as potentially relevant, there is r 5, which states that the purpose of the rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. Rule 5 requires the rules to be applied with the objective of avoiding, among other things, undue delay. By virtue of r 5 a party impliedly undertakes to the Court and to the other parties to proceed in an expeditious way. As Thomas JA (with whom the Chief Justice and Mackenzie J agreed) stated in *Quinlan v Rothwell*:

> "In addition, rule 5 gives express recognition to the importance of expeditious resolution of issues in proceedings. In my view the nature of the power of this court has not been altered, but the rules are a clear indication of the change in attitude that has independently taken place in courts throughout Australia. They suggest that courts will now be less tolerant of delay and that the expedition of proceedings should be encouraged to a greater extent than was formerly the case."[22]

[80] The applicant has the onus of showing not simply that a fair trial of the proceeding is possible. It must show that there is "good reason for excepting the particular proceedings from the general prohibition". Taking into account the matters that have been argued, I conclude that the plaintiff has not shown good reason for the grant of leave under r 389(2). I decline to exercise the discretion to grant leave, and I dismiss the plaintiff's application.

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22 [2002] 1 Qd R 647 at 658, [2001] QCA 176 at [30].

Consequential orders

[81] The proceeding was reactivated for the purpose of deciding if the plaintiff required leave to proceed and, if so, whether leave should be granted. Leave has been refused and, in those circumstances, there is no reason to leave the proceeding in a state of permanent abeyance. The appropriate order in the circumstances is that the proceeding be struck out.

Orders

[82] The orders will be:

1. Declare the service of the further supplementary list of documents exhibited at pages 12-14 of the affidavit of Brian David Bartley filed 19 August 2011 to have been ineffectual.

2. The plaintiff's application is dismissed.

3. The proceeding is struck out.

I will hear the parties in relation to the costs of the application and the costs of the proceeding.