SUPREME COURT OF QUEENSLAND

CITATION:	*The President's Club Limited & Anor v Palmer Coolum Resort Pty Ltd & Anor* [2019] QSC 209
PARTIES:	**THE PRESIDENT'S CLUB LIMITED** ACN 010 593 263 (first plaintiff) and **THE AMBASSADOR'S CLUB LIMITED** ACN 010 593 647 (second plaintiff) **v** **PALMER COOLUM RESORT PTY LTD** ACN 010 593 638 (first defendant) and **COEUR de LION INVESTMENTS PTY LIMITED** ACN 006 334 872 (second defendant)
FILE NO:	SC No 5746 of 2012
DIVISION:	Trial
PROCEEDING:	Claim
DELIVERED ON:	26 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2019; supplementary material received from the first plaintiff and defendants on 6 August 2019; objections to the first plaintiff's supplementary material received from the defendants on 23 August 2019
JUDGE:	Wilson J
ORDERS:	**The orders of the Court are:** **1. The first plaintiff is granted leave to take a step in this proceeding.** **2. The defendants' amended application, to dismiss or permanently stay the proceeding for want of prosecution, filed 25 July 2019, is dismissed.** **3. The first plaintiff's amended application, to transfer the proceeding to the Federal Court, filed by leave 11 July 2019, is dismissed.** **4. The question of costs is adjourned to a date to be fixed.**

CATCHWORDS: PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – OTHER MATTERS – where the first plaintiff makes an application that the proceeding be transferred to the Federal Court of Australia ("the Federal Court") – where r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that if no step has been taken in a proceeding for two years from the time the last step was taken, a new step may not be taken without an order of the court – where the last step taken by the first plaintiff was nearly six years ago – whether the first plaintiff's application that the proceeding be transferred to the Federal Court is a step for which the first plaintiff requires leave to proceed – whether leave to proceed should be granted

COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – CONCURRENT JURISDICTION OF DIFFERENT COURTS – TRANSFER OF PROCEEDINGS UNDER CROSS-VESTING LEGISLATION – where the first plaintiff makes an application that the proceeding be transferred to the Federal Court – whether the proceeding should be transferred to the Federal Court

Corporations Act 2001 (Cth) s 1337H
Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 5
Uniform Civil Procedure Rules 1999 (Qld) r 389(2)

Allianz Australia Insurance Limited v Corowa [2016] QCA 170, cited
Amalia Investments Ltd v Virgtel Global Networks NV (No 2) (2011) 198 FCR 248; 284 ALR 549, cited
AMCI (IO) Pty Ltd v Aquilla Steel Pty Ltd [2009] QSC 66, cited
Anderson v McPherson [2009] WASC 35, cited
BHP Billiton Ltd v Schultz (2004) 221 CLR 400; [2004] HCA 61, applied
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Central Bore Nickel NL v Richfile Pty Ltd (1995) 16 WAR 230, cited
Commissioner of Taxation v Residence Riverside Pty Ltd (2013) 95 ATR 86; [2013] FCA 720, cited
Cooper v Hopgood & Ganim [1999] 2 Qd R 113; [1998] QCA 114, cited
Emanuel Management Pty Ltd (In Liq) v Fosters Brewing Group Ltd (1999) 73 SASR 303, cited
Ghosh & Anor v NBN Limited and Ors [2014] QCA 53, followed
Grahame Cavanough v Commonwealth of Australia [2000] QSC 068, cited
IH Dempster Nominees Pty Ltd v Chemgoods Pty Ltd [1993]

2 Qd R 37, cited
James Hardie & Coy Pty Ltd v Barry (2000) 50 NSWLR 357, cited
Pittaway v Noosa Cat Australia Pty Ltd [2016] QCA 004, cited
Quinlan v Rothwell [2002] 1 Qd R 647; [2001] QCA 176, cited
Re Westgate Wool Co Pty Ltd (in liq) [2006] SASC 372, cited
Smiley v Watson & Anor [2001] QCA 269, considered
Spitfire Nominees Pty Ltd v Ducco [1998] 1 VR 242, cited
Tyler v Custom Credit Corp Ltd [2000] QCA 178, applied
Ure v Robertson & Ors [2016] QSC 210, cited
Valceski v Valceski (2007) 70 NSWLR 36, cited
World Firefighters Games Brisbane v World Firefighters Games Western Australia Incorporated & Ors [2001] QSC 164, cited

COUNSEL: G Handran and T Jackson for the first plaintiff
No appearance for the second plaintiff
P Dunning QC and M Karam for the first and second defendants

SOLICITORS: McBride Legal for the first plaintiff
No appearance for the second plaintiff
Alexander Law for the first defendant
Sophocles Lawyers for the second defendant

[1] There are three applications before the Court:

1. First, The President's Club Limited (ACN 010 593 263) (the first plaintiff or "the Club") has applied for an order that this proceeding be transferred to the Brisbane Registry of the Federal Court ("transfer application"). It is noted that:

   (a) this application has been filed almost six years after any party has taken a step in this proceeding;

   (b) in those circumstances, the defendants submit that leave to file the application was required pursuant to r 389(2) of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*"); and

   (c) the first plaintiff disputes that such leave is necessary.

2. Second, if leave is required, the first plaintiff has applied for leave pursuant to r 389(2) to proceed with its transfer application.

3. Third, the defendants have applied for this proceeding to be dismissed or permanently stayed for want of prosecution.

[2] The claim between the second plaintiff, The Ambassador's Club Limited (ACN 010 593 647), and the defendants, has been settled and the second plaintiff was not involved in this application.

[3] Despite initial correspondence from the second plaintiff's solicitors stating that the second plaintiff's position was that they did not oppose the orders sought by the first plaintiff in respect of the transfer application,[1] later correspondence set out a contrary position:[2]

> "We are instructed that the second plaintiff:
>
> (1) withdraws the attached letter to you from King & Wood Mallesons, the former solicitors on the record for the second plaintiff, dated 10 July 2019 in its entirety;
>
> (2) opposes the orders sought by the first plaintiff in the Transfer Application on the grounds that the second plaintiff:
>
> > (a) objects to being joined as a party to Federal Court proceedings to which it is currently not a party;
> >
> > (b) has settled the Proceeding with the defendants; and
> >
> > (c) does not have the necessary funds or resources to actively participate in any legal proceedings;
>
> (3) consents to the orders sought by the defendants in the Strike-Out Application.
>
> 4. Notwithstanding the matters set out in subparagraphs 3(2) and 3(3) above, if the Court is minded to dismiss the Strike-Out Application and make the orders sought by the first plaintiff in the Transfer Application, the second plaintiff respectfully requests that the parties indicate that the second plaintiff's position is that the Court ought to make an order pursuant to rule 69 of the UCPR to remove the second plaintiff as a party to the transferred proceeding, given the settlement with the defendants and to allow the second plaintiff to be deregistered.
>
> 5. Given the matters set out in subparagraph 3(2)(c) above, the second plaintiff does not intend to appear at the hearing of the Transfer Application and Strike-Out Application on 30 July 2019, and is content to abide the orders of the Court.
>
> 6. Please kindly produce a copy of this letter to the Court as evidence of the second plaintiff's position".

[4] This trial was heard on 30 July 2019 with cross-examination of the first plaintiff's solicitor, Mr Robson.

[5] At the trial I requested that the parties provide further submissions in the form of:

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1 Affidavit of Joshua Galvin Robson sworn 29 July 2019, JGR-04, p 3.

2 Affidavit of Joshua Galvin Robson sworn 29 July 2019, JGR-04, p 1-2, [3]-[6].

1. A document setting out a list of matters that are different in this proceeding and the Federal Court proceedings.[3]

2. A document setting out a background and chronology of the matters.[4]

[6] These documents were provided to me on 6 August 2019 by email separately from both the first plaintiff and the defendants. The first plaintiff also delivered a "Court Book" encompassing three Parts; documents submitted by consent, documents submitted by the first plaintiff only and documents submitted by the defendants only.

[7] The parties agreed upon:

1. A table of allegations made by the Club unique to this proceeding.[5]

2. A table of allegations made by the Club which overlap between this proceeding and the Federal Court proceedings.[6]

[8] Unfortunately, the parties were unable to agree upon a chronology of events and a table of related proceedings. Both parties provided their respective versions of these documents,[7] and I note the first plaintiff's versions encompass the material which is agreed upon marked in black text.

[9] I have made the Court Book an exhibit to the Court file in this proceeding,[8] noting the defendants object to the first plaintiff's material in Part B of the Court Book being tendered into evidence.[9] I have only relied upon the content of the parties' respective chronology of events and table of related proceedings which is agreed upon by the parties (as marked in black text in the first plaintiff's versions).[10]

Background

[10] The plaintiffs commenced this proceeding on 28 June 2012 by way of originating application.[11]

[11] Members of the Club own parcels of 13 shares which are stapled to a quarter share (as tenant in common) of a freehold villa within the Palmer Coolum Resort. Members of the Club are entitled to participate in a time-share scheme which pooled letting income from use of the villas as Resort accommodation.[12]

[12] The first defendant (or "Palmer Coolum Resort") administered the Resort. The second defendant (or "CDLI") was (and remains) a member of the Club and related entity of

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3 Transcript of the hearing on 30 July 2019, p 46.
4 Transcript of the hearing on 30 July 2019, p 125, line 45 to p 126, line 47.
5 Exhibit 5, Part A, tab 1, table 1.
6 Exhibit 5, Part A, tab 1, table 2.
7 First plaintiff's chronology of events: exhibit 5, Part B, tab 2; First plaintiff's summary table of proceedings: exhibit 5, Part B, tab 3. Defendants' chronology of events: exhibit 5, Part C, tab 5; defendants' summary table of proceedings: exhibit 5, Part C, tab 6.
8 Exhibit 5.
9 Email from Alexander Law to Associate Wilson J dated 23 August 2019.
10 I note also I have not relied upon exhibit 5, Part B, tab 4, first plaintiff's bundle of cases referred to in summary table of proceedings, which the defendants object to being tendered into evidence at this stage.
11 Originating application filed 28 June 2012, court document ("CD") 1.
12 First plaintiff's outline of argument filed 10 July 2019, p 1, [4].

Palmer Coolum Resort, having earlier developed the Resort and retained certain interests in the Club.[13]

[13] Central to the Club was a Resort Administration Agreement, by which Palmer Coolum Resort was obliged to conduct the Resort and operate the letting pool for the benefit of the Club's members, and afford members various rights of access to Resort facilities and lifestyle benefits.[14]

[14] The Club submits that entities controlled by Clive Palmer effectively took over CDLI in, or before, March 2012, before it withdrew a deed poll which supported an exemption from the Managed Investment Scheme provisions.[15] That step, the Club submits, was used as a device by, and precipitated, Palmer Coolum Resort *inter alia* to cease operating the letting pool and refuse to comply with the Resort Administration Agreement.[16] The Club alleges that this conduct was unlawful.[17]

[15] On 1 August 2012 Atkinson J ordered that the matter proceed by way of claim and statement of claim and also made orders which programmed the matter towards a hearing on 9 October 2012.[18]

[16] The plaintiffs filed a statement of claim on 9 August 2012.[19] The defendants filed a defence and counterclaim on 22 August 2012[20] and the plaintiffs filed a reply and answer on 6 September 2012.[21]

[17] On 28 September 2012, the first plaintiff applied for some of Atkinson J's orders to be vacated and for an order that the proceeding be adjourned to the Civil List for hearing on a date to be fixed.[22]

[18] The defendants opposed that application.[23] However, the application was successful.[24]

[19] On 3 October 2012 the plaintiffs filed an amended statement of claim[25] which may be summarised as follows:

1. First, the plaintiffs sought specific performance of the Resort Administration Agreement entered into by the plaintiffs and the defendants on or about 17 January 2001 in respect of the administration of the Palmer Coolum Resort and related matters.[26] They also sought declarations that that agreement was not unenforceable or frustrated as contended by the defendants.[27]

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13 First plaintiff's outline of argument filed 10 July 2019, p 1, [5].
14 First plaintiff's outline of argument filed 10 July 2019, p 1, [6].
15 First plaintiff's outline of argument filed 10 July 2019, p 1, [7].
16 First plaintiff's outline of argument filed 10 July 2019, p 1, [7].
17 First plaintiff's outline of argument filed 10 July 2019, p 1, [7].
18 Order of Atkinson J dated 1 August 2012, CD 15.
19 Statement of Claim filed 9 August 2012, CD 16.
20 Defence of the First and Second Defendants filed 6 September 2012, CD 18.
21 Reply and Answer filed 6 September 2012, CD 21.
22 Application filed 28 September 2012, CD 25.
23 First and Second Defendants' Submissions, CD 29.
24 A copy of the final Order made on 3 October 2012 does not appear on the Court file. A copy of the draft Order is annexed to Affidavit of Michael John Sophocles sworn 15 July 2019, MJS-2, p 5-6.
25 Amended Statement of Claim filed 3 October 2012, CD 26.
26 Amended Statement of Claim filed 3 October 2012, p 12, [28(a)].
27 Amended Statement of Claim filed 3 October 2012, p 12-23, [28(b)].

2. Second, they sought damages for alleged breaches of the Resort Administration Agreement and alleged misleading or deceptive or unconscionable conduct.[28]

3. Third, they sought orders requiring the defendants to take steps to ensure the first plaintiff's compliance with the managed investment scheme provisions of the Corporations Act.[29]

4. Fourth, they sought relief for the alleged trespass by the defendants onto villas at the Resort.[30]

5. Fifth, they claimed for levies alleged to have been owing by the second defendant.[31]

[20] The next step contemplated was an amended defence being filed by 24 January 2013.[32]

[21] The defendants did not meet this deadline and filed their amended defence and counterclaim on 1 November 2013.[33] That, then, became the last step taken in this proceeding.

[22] On 8 July 2019, almost six years after a step was taken by any party, the Club filed this application to have this proceeding transferred to the Federal Court of Australia[34] so that this proceeding is consolidated with proceeding no. QUD801 of 2018 ("the Federal Court proceedings") which is presently before that court.[35]

[23] In the Federal Court proceedings, CDLI seeks orders that the Club be wound up for oppressive conduct or on just and equitable grounds.[36]

[24] The Club cross-claims against CDLI and various other entities for alleged unconscionable conduct and breaches of fiduciary duty.[37]

[25] The Club submits that both CDLI[38] and the Club[39] rely in the Federal Court on matters arising from this proceeding. Furthermore, the Club avers that this proceeding and the CDLI's counterclaim provides an answer, or part of an answer, to the Federal Court

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28 Amended Statement of Claim filed 3 October 2012, p 13, [28(e)].
29 Amended Statement of Claim filed 3 October 2012, p 13, [28(c)].
30 Amended Statement of Claim filed 3 October 2012, p 13, [26F].
31 Amended Statement of Claim filed 3 October 2012, p 11, [26A]-[26B]. It is now common ground that those levies have been paid such that this aspect of the plaintiffs' claim has fallen away.
32 Order 1 of Order filed 20 December 2012, CD 36 varying order 1 of Order dated 5 December 2012, CD 34 which varied order 1 of the Order filed 5 November 2012, CD 32, which varied order 3 of the initial Order made on 3 October 2012 ("that the Defendants are to file their amended defence and counterclaim by 4.00pm on 17 October 2012"). A copy of the final Order made on 3 October 2012 does not appear on the Court file. A copy of the draft Order is annexed to Affidavit of Michael John Sophocles sworn 15 July 2019, MJS-2, p 5-6.
33 Amended Defence of the First and Second Defendants filed 1 November 2013, CD 37.
34 Application filed 8 July 2019, CD 38.
35 Affidavit of Joshua Galvin Robson affirmed 8 July 2019, [9].
36 Defendants' outline of argument filed 26 July 2019, p 3, [12].
37 Defendants' outline of argument filed 26 July 2019, p 3, [12].
38 First plaintiff's outline of argument filed 10 July 2019, p 4, [8], citing Concise Statement, [4A(d)], [18(f)], [22A(c)(i)] and [23], Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, p 7-10.
39 First plaintiff's outline of argument filed 10 July 2019, p 4, [8], citing Concise Response, [17(i)] (and [3] of the Schedule), Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, commencing at p 20-26.

proceedings by CDLI either failing to establish a factual foundation for the relief which it relies upon, or by conduct which tends against the discretion which CDLI invokes before the Federal Court.[40]

[26] The Club submits that this proceeding and the matters underlying it form an integral and symbiotic element of the Federal Court proceedings.[41]

[27] The Federal Court proceedings are ongoing and are set down for a trial at the end of this year, with the following to be noted:

1. On 24 June 2019, Greenwood J dismissed an application by CDLI to have its originating process determined separately from the matters raised in the concise response and cross-claim filed by the Club.[42]

2. On 27 June 2019 Greenwood J made detailed programming orders and set the proceeding down for a two-week trial commencing on 2 December 2019.[43]

[28] This transfer application was filed by the Club on 8 July 2019; some eleven days after the Federal Court trial was set down by Greenwood J.

Rule 389(2) of the *UCPR*

[29] The defendants submit that the Club requires the leave of the court pursuant to r 389(2) of the *UCPR* to proceed with its transfer application and further that such leave should not be granted.[44]

[30] It is not disputed by the parties that the last step in this proceeding was nearly six years ago when the defendants filed their amended defence and counterclaim on 1 November 2013.[45]

[31] Rule 389 of the *UCPR* ("Continuation of proceeding after delay") provides relevantly:

> "(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."

[32] The effect of the rule is that a proceeding is stayed, in effect,[46] unless, and until, the Court gives "leave to proceed".[47]

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40 First plaintiff's outline of argument filed 10 July 2019, p 4, [8], citing *Coeur de Lion Investments Pty Ltd v The President's Club Ltd* [2019] FCA 994, [18], [32], [39]-[43], [49]-[51], [60].

41 First plaintiff's outline of argument filed 10 July 2019, p 4, [8].

42 *Coeur De Lion Investments Pty Limited v The President's Club Limited, in the matter of The President's Club Limited* [2019] FCA 994, Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-1, p

43 Order of Greenwood J dated 27 June 2019, Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-1, p 54-56.

44 Defendants' outline of argument filed 26 July 2019, p 3, [13].

45 Amended Defence of the First and Second Defendants filed 1 November 2013, CD 37.

46 *Ure v Robertson & Ors* [2016] QSC 210 at [7] per Jackson J.

47 *Ure v Robertson & Ors* [2016] QSC 210 at [18] and [87] per Jackson J. As Jackson J observed at footnote 12, the expression "leave to proceed" is not used in r 389(2) but commonly appears in the case law.

[33] The Club relies upon *Smiley v Watson* [2001] QCA 269 ("*Smiley*") and submits[48] that the transfer of this proceeding to the Federal Court does not move it "toward the judgment or relief sought in the action"[49] and, accordingly, this application does not constitute a "step" in the proceeding for which any grant of leave is required under r 389.[50]

[34] In *Smiley,* the Court of Appeal considered whether the transfer of proceedings from the Magistrates Court to the District Court was a step in the proceedings thus invoking r 389 (2).

[35] Williams JA[51] in *Smiley*[52] considered Ryan J's decision in *IH Dempster Nominees Pty Ltd v Chemgoods Pty Ltd*[53] ("*Dempster Nominees*").

[36] *Dempster Nominees* held that a remitter from the Supreme Court to the District Court was not a step in a proceeding for the purposes of the rule. Ryan J in *Dempster Nominees* stated that it was "not a step which advances the course of the action in any way, it simply has the effect that the action proceeds thereafter in a District Court rather than in the Supreme Court".[54]

[37] Williams JA in *Smiley* stated that there was force in the reasoning of Ryan J in *Dempster Nominees* and that the transfer of proceedings from one court to another does not move the matter "toward the judgment or relief sought in the action", a test commonly applied in such situations.[55] Williams JA further stated:[56]

> "[18] ... If the transfer of a matter from one court to another does not constitute taking a step for purposes of the rule in question, neither party is prejudiced by the making of such an order. If leave to proceed in the action pursuant to r 389(2) of the UCPR is required, all that the transfer means is that the application would be to the court to which the matter was transferred, rather than to the court from which it was transferred."
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> [19] Ultimately I have come to the conclusion that the transfer was not the taking of a step in the proceeding. It follows that the District Court judge was entitled to make the order transferring the matter up notwithstanding that leave had not been previously obtained. It also means that once that order was made it was for the District Court to determine whether or not leave should be granted to take a step in the proceeding."

[38] It is noted that *Smiley* was determined in 2001.

[39] However, in 2014 the Court of Appeal determined *Ghosh & Anor v NBN Limited and Ors* [2014] QCA 53 ("*Ghosh*"). In *Ghosh* the only step in the proceedings taken after

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48 First plaintiff's outline of argument filed 10 July 2019, p 4, [19].
49 *Smiley v Watson & Anor* [2001] QCA 269 at [18].
50 *Smiley v Watson & Anor* [2001] QCA 269.
51 Davies JA and McPherson JA both agreed with the reasons of Williams JA.
52 *Smiley v Watson & Anor* [2001] QCA 269 at [17] per Williams JA.
53 [1993] 2 Qd R 377.
54 *IH Dempster Nominees Pty Ltd v Chemgoods Pty Ltd* [1993] 2 Qd R 37 at 378 per Ryan J, cited in *Smiley v Watson & Anor* [2001] QCA 269 at [17] per Williams JA.
55 *Smiley v Watson & Anor* [2001] QCA 269 at [18] per Williams JA.
56 *Smiley v Watson & Anor* [2001] QCA 269 at [18]-[19] per Williams JA.

the filing and service of the claim and statement of claim was the filing by the appellants of an application over two years later seeking that the proceedings:[57]

> "…be transferred to the Sydney Registry Defamation List and heard by Her Honour Gibson DCJ as Case 2013/88183 Dr Ghosh vs Ninemsn and Ors at 86 Goulburn Street, Sydney NSW 2000.
>
> District Court of NSW …"

[40] Muir JA in *Ghosh*[58] cited r 389(2) and stated:

> "No application was made for an order under r 389(2). Accordingly, the rules prohibited the appellants' application".[59]

[41] Muir JA also then set out a number of other insuperable problems facing the appellants' appeal which were unrelated to the r 389(2) issue.

[42] *Ghosh* did not consider, or refer to, *Smiley.*

[43] The first plaintiff submits that *Ghosh* conflicts with *Smiley* and should not be followed for the following reasons:

1. Muir JA's remarks in *Ghosh* were not the subject of considered argument, nor is any reasoning exposed.[60]

2. The appellants in *Ghosh* were self-represented.[61]

3. *Smiley* (and the other cases it approved) was neither raised nor considered in *Ghosh*.[62]

4. *Ghosh* does not deal with, or overrule, what the earlier Court of Appeal said in *Smiley*.[63]

5. *Smiley* is a considered judgment, which not only considers the applicable rule, but also the existing authorities.[64]

6. The reasoning of Muir JA, is non-binding *obiter dicta*.[65]

[44] The defendants submit that I am bound by the decision in *Ghosh.*[66]

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57 *Ghosh & Anor v NBN Limited and Ors* [2014] QCA 53 at [3] per Muir JA.
58 Holmes JA (as she then was) and Douglas J agreed with the reasons of Muir JA.
59 *Ghosh & Anor v NBN Limited and Ors* [2014] QCA 53 at [9] per Muir JA.
60 First plaintiff's outline of argument filed 10 July 2019, p 4, [20].
61 First plaintiff's outline of argument filed 10 July 2019, p 4, [20].
62 First plaintiff's outline of argument filed 10 July 2019, p 4, [20].
63 Transcript of the hearing on 30 July 2019, p 35, line 1-5.
64 Transcript of the hearing on 30 July 2019, p 35, line 7-10.
65 Transcript of the hearing on 30 July 2019, p 35, line 15; p 35, line 22.
66 Defendants' outline of argument filed 26 July 2019, p 3, [17].

[45] The defendants acknowledge that earlier authorities (citing *Smiley*) suggest that the position may be different where the application is to transfer the proceeding to another court within the Queensland court hierarchy:[67]

> "So what one sees, is that *Smiley* deals with a more limited operation than our learned friend ask of it. *Smiley* is concerned with a case where there's proceedings in one court, there's on foot an application in relation to – the question of 389 is engaged, there is talk of transferring that within the same court hierarchy, so that one court rather than another in that hierarchy exercises its power under 389, and that's what was strictly decided in that case, and that's what it's authority for. Now
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> HER HONOUR: Why is it different than if we get out of the building so to speak?
>
> MR DUNNING: If we get out of the building, there is no 389 in the Federal Court. It'll have its own regime.
>
> HER HONOUR: Yes. It has its own regime.
>
> MR DUNNING: It'll have its own regime but there is no 389. The – see in Smiley, there was no talk that the delinquent party would avoid the consequence of the rule. The delinquent party still has to obtain leave. It was a question of which of the courts within the Queensland hierarchy would that leave be obtained. So that's all the case".[68]

[46] The defendants submit that Muir JA disposed of the issue in *Ghosh* on the basis of the appellants' failure to seek an order under r 389(2), therefore, his reasons are not *obiter* and are binding upon me.[69] I agree.

[47] I accept the defendants' submission that the Court of Appeal's decision in *Ghosh* is directly applicable and binding upon me in this case.[70]

Leave to proceed – relevant principles

[48] In my view, on the basis of *Ghosh*, the Club requires the leave of the Court pursuant to r 389(2) of the *UCPR* to proceed with its transfer application.

[49] The rationale of the rule requiring leave to proceed after a long delay is to prevent abuse of process.[71] The Court must be satisfied that the continuation of the proceedings would not involve injustice or unfairness to one of the parties by reason of delay.[72]

[50] In *Tyler v Custom Credit Corp Ltd* [2000] QCA 178, Atkinson J (with whom McMurdo P and McPherson JA agreed) stated that when the Court is considering whether or not to dismiss an action for want of prosecution, or whether to give leave to proceed under r 389 of the *UCPR*, there are a number of factors that the Court will take into account in

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67 Defendants' outline of argument filed 26 July 2019, p 3, [17].
68 Transcript of the hearing on 30 July 2019, p 82, line 15-25.
69 Transcript of the hearing on 30 July 2019, p 84, line 30 to p 85, line 12.
70 Defendants' outline of argument filed 26 July 2019, p 3, [17].
71 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [5] per Atkinson J.
72 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [5] per Atkinson J.

determining whether the interests of justice require a case to be dismissed. These include:[73]

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.

6. Whether the delay is attributable to the plaintiff, the defendant or both.

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 was caused by the plaintiff's lawyers being dilatory.

11. Whether there is a satisfactory explanation for the delay.

12. Whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.

[51] The court has a discretion which is not fettered by rigid rules but rather should take into account all relevant circumstances.[74] It is noted that the relevant circumstances of some cases may require consideration of factors additional to the above twelve factors and/or render some of the twelve factors of such neutral significance as to not require discussion of them.[75]

[52] It is recognised that reasonable excuse for the delay is not a condition precedent to a grant of leave to proceed and a greater focus is placed upon the existence of material prejudice to the other party by permitting the action to proceed.[76]

[53] The first plaintiff, in this application for leave to proceed, must "show that there is good reason for excepting the particular proceedings from the general prohibition" in a case in which nearly six years have elapsed from the time when the last step was taken.[77]

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73 *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [2] per Atkinson J.
74 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [2] per Atkinson J.
75 *Allianz Australia Insurance Limited v Corowa* [2016] QCA 170 at [17] per Henry J.
76 *Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176 at 656, [26] per Thomas JA citing *Wilson v Bynon* [1984] 2 Qd R 83.
77 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [5] per Atkinson J.

[54] The Court must be satisfied that the continuation of the proceedings would not involve injustice or unfairness to one of the parties by reason of delay.[78]

The Club's submissions as to why leave should be granted

[55] The Club submits that justice favours the proceeding continuing[79] for the following reasons:

1. The proceedings were commenced promptly.

2. The Club has, on a preliminary examination, reasonable prospects of success.

3. The trial is largely documentary.

4. There are overlapping issues with the proceedings set to be tried in the Federal Court in December. Those matters are indispensable to the relief which CDLI there seeks and, for that reason, were not severed by Justice Greenwood. The conduct to be tried in the Federal Court is however broader, such that the overlapping issues form but an important subset of the broader controversy, which has expanded since these proceedings commenced. The broader controversy involves all of the conduct which had occurred since Mr Palmer took over the Resort. CDLI must, accordingly, defend the common claims. The Club thus applies to transfer these proceedings to the Federal Court to enable them to be heard together in December.

5. Dismissing the Club's claim will not quell the controversy and bring finality to the litigation because:

   (a) of the Federal Court Proceedings;

   (b) the Court will still need to resolve the defendants' counterclaim.

6. The Club has, on balance, provided a satisfactory explanation for the delay and inaction.

7. The defendants have, or one of them has, contributed to the delay and inaction.

8. There was never an occasion, particularly given the skirmish of litigation between the parties and parties related to them, where the defendants could reasonably have anticipated that the controversy had resolved. Rather, the continuing litigation has been fierce and widespread.

9. The defendants do not point to any relevant prejudice which clearly inflicts unnecessary or unavoidable injustice.

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78 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [5] per Atkinson J citing *Walton v Gardiner* (1993) 177 CLR 378; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

79 First plaintiff's outline of argument filed 26 July 2019, p 4, [17]. These submissions were made in relation to the defendants' dismissal application however such submissions are also applicable to the leave application.

10. The evidence does not demonstrate a substantial risk that a fair trial cannot be had.

11. The Club suffers real prejudice if the proceeding is dismissed because the cause of action it prosecutes is time barred.[80]

The defendants' submissions as to why leave should not be granted

[56] The defendants submit that leave should not be granted for the following reasons:[81]

1. There has been an extraordinary and largely unexplained delay.[82]

2. The "general presumption of prejudice" is apt in this case given the extremely long delay and the number and variety of issues raised in the proceedings.[83]

3. CDLI's solicitor deposes to specific prejudice which the defendants may suffer if this proceeding is re-enlivened at this late stage.[84]

4. In any event, specific prejudice is not necessary. This case involves a wholesale disregard by the plaintiffs of the court rules (especially r 5 of the *UCPR*) of a type which should not be countenanced.[85]

Delay

[57] In *Cooper v Hopgood & Ganim*[86] (which dealt with the closely related question of dismissal for want of prosecution), Pincus JA (with whom Derrington J generally agreed) said at 119:[87]

> "Where it cannot be established that the plaintiff's delay in pursuing the action (as opposed to the total period which has elapsed since the events in issue occurred) has led to a substantial risk of the kind mentioned in *Birkett v. James* [i.e. a substantial risk that it is not possible to have a fair trial of the issues in the action or ... such as is likely to cause or have caused serious prejudice to the defendant], it must surely sometimes be the case that the delay is of such a character as, with other circumstances, to provide a good ground for bringing the action to an end."

[58] Courts appear more ready than before to infer that substantial delays will substantially reduce the chance of a fair trial.[88]

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80 The first plaintiff cites *Limitation of Actions Act* 1974 (Qld) s 10.
81 Defendants' outline of argument filed 26 July 2019, p 4-5, [25]-[26].
82 Defendants' outline of argument filed 26 July 2019, p 4, [25(a)].
83 Defendants' outline of argument filed 26 July 2019, p 4, [25(f)].
84 Defendants' outline of argument filed 26 July 2019, p 4, [25(f)].
85 Defendants' outline of argument filed 26 July 2019, p 4, [25(g)].
86 [1999] 2 Qd R 113; [1998] QCA 114.
87 [1999] 2 Qd R 113 at 119; [1998] QCA 114 per Pincus JA.
88 *Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176 at 657, [28] per Thomas JA.

[59] In this case, there has been a substantial delay. The last step in the proceedings was nearly six years ago when the defendants filed their amended defence and counterclaim on 1 November 2013.[89]

[60] For the next six years no step was taken in relation to this matter.

[61] The Club provides the following explanation:

1. The parties being embroiled in lengthy litigation, ancillary to this proceeding, which had a real potential to nullify the claims in this proceeding.[90]

2. The revenue of the Club being hampered by CDLI's conduct and difficult (but necessary) decisions having to be made to appropriate funds to different legal actions being run simultaneously, and often on appeal, by CDLI.[91] Despite showing unbridled alacrity for litigation, CDLI preferred to initiate and prosecute new actions in preference to its counterclaim in this proceeding. Different decisions would have been taken by the Club, but for the conduct of CDLI.[92]

3. CDLI has unsuccessfully sought to wind up the Club[93] and prosecute the Club's directors for conduct which is in issue in this proceeding and the Federal Court proceedings.[94]

4. The parties have been in negotiations which the Club genuinely believed would resolve these proceedings.[95]

Other ongoing litigation

[62] There has been other ongoing litigation involving the parties.

[63] The first plaintiff and defendants were unable to reach agreement on a table summarising the related litigation between the parties. Following a dissection of the different versions of this table, the following points appear to be agreed upon:[96]

1. *Coeur De Lion Investments Pty Ltd v Kelly and Ors* [2012] QSC 364; Queensland Supreme Court Proceeding 3296 of 2012: CDLI applied for leave to bring a proceeding in the name of the Club against directors of the Club. The proceeding was dismissed.

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89 Amended Defence of the First and Second Defendants filed 1 November 2013, CD 37.

90 First plaintiff's outline of submissions filed 26 July 2019, p 6, [20(a)] citing Affidavit of Joshua Galvin Robson sworn 22 July 2019, [19(d) – (i)], [19(k) – (l)], [19(o)], [19(r)], [19(u) – (x)], [19(aa) – (hh)].

91 First plaintiff's outline of submissions filed 26 July 2019, p 6, [20(b)] citing Affidavit of Joshua Galvin Robson sworn 22 July 2019, p 27-29, [20].

92 First plaintiff's outline of submissions filed 26 July 2019, p 6, [20(b)].

93 First plaintiff's outline of submissions filed 26 July 2019, p 6, [20(c)] citing Affidavit of Joshua Galvin Robson sworn 22 July 2019, p 23-24, [19(yy)], [19(zz)], [19(aaa)].

94 First plaintiff's outline of submissions filed 26 July 2019, p 6, [20(c)] citing Affidavit of Joshua Galvin Robson sworn 22 July 2019, p 22-23, [19(uu)—(vv)] and JRG-01 at p 5; Amended Defence and Counterclaim filed 1 November 2013, [55] – [58];

95 First plaintiff's outline of submissions filed 26 July 2019, p 6, [20(d)] citing Affidavit of Joshua Galvin Robson sworn 22 July 2019, p 20-25, [19(ii)], [19(kk)], [19(xx)], [19(ddd)].

96 First plaintiff's summary table of proceedings: exhibit 5, Part B, tab 3 (black text only). Defendants' summary table of proceedings: exhibit 5, Part C, tab 6. This list only contains text which was agreed upon by the parties (marked in black text).

2. Takeovers Panel, *The President's Club Limited* [2012] ATP 10: The Club sought *inter alia* declarations that the acquisition of shares by the respondents constituted unacceptable circumstances and orders that [...].[97] The Panel made declarations of unacceptable circumstances and other orders [...].[98]

3. *The President's Club Limited & Another v Palmer Coolum Resort Pty Ltd*; Queensland Supreme Court Proceeding 5746 of 2012: The Club seeks *inter alia*, an order requiring specific performance of the Resort Administration Agreement (RAA) and damages. On 22 August 2012, CDLI filed a counter claim seeking *inter alia* declarations that the RAA is unenforceable and funds paid as a quantum meruit. [...][99]

4. *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591; Federal Court Proceeding QUD526 of 2012: CDLI brought a judicial review application in respect of the decision of the Takeover's Panel in *The President's Club Limited* [2012] ATP 10. The application was dismissed.

5. *Coeur de Lion Investments Pty Ltd v Kelly & Ors* [2013] QCA 160; Queensland Supreme Court of Appeal Proceeding Number 12260 of 2012: CDLI appealed the decision in *Coeur De Lion Investments Pty Ltd v Kelly and Ors* [2012] QSC 364. The appeal was dismissed.

6. *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68 (22 May); and *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 128 (4 September); Federal Court Proceeding QUD300 of 2014: PLC appealed against the decision in *Queensland North Australia Pty Ltd v Takeovers Panel* [2014] FCA 591 to the Full Court of the Federal Court. The appeal was allowed. The matter was remitted to the Takeover Panel to be re-determined.

7. *Takeovers Panel, Re Presidents Club Ltd 02* [2016] ATP l: This was a remittal of the Club's original 2012 application. The Takeovers Panel again made a declaration of unacceptable circumstances and [...].[100]

8. *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498 (24 December 2015); and *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2016] FCA 1445 (30 November 2016); Federal Court Proceeding QUD1075 of 2015; and Federal Court Proceeding QUD1077 of 2015 (heard together): Prior to the determination of the abovementioned remittal, PLC applied for a stay of orders; and for judicial review of an order made by Takeover's Panel extending time. PLC's applications were unsuccessful.

9. *Coeur de Lion Investments Pty Ltd v The Presidents Club Ltd* [2017] QSC 6; Queensland Supreme Court Proceeding Number 6286 of 2016: CDLI challenged a ruling made to disallow it from casting a vote at the Club's AGM on 23 November 2015 because it had outstanding levies causing its voting rights to be suspended under the Club's constitution. CDLI's application was dismissed.

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97 Disputed text.
98 Disputed text.
99 Disputed text.
100 Disputed text.

10. *Coeur de Lion Investments Pty Limited v The President's Club Limited* [2017] QCA 309; Queensland Court of Appeal Proceeding Number 2165 of 2017: CDLI appealed against the order of Mullins J in *Coeur de Lion Investments Pty Ltd v The Presidents Club Ltd* [2017] QSC 6. The appeal was dismissed.

11. *The President's Club Limited -v- Coeur de Lion Investments Pty Limited & Another*; Queensland Supreme Court Proceeding Number 10686 of 2017: The Club brought a claim for unpaid levies against CDLI and PLC. A counterclaim was made by CDLI and PLC, then withdrawn. The claimed levies were paid the day before a summary judgement application was listed to be heard.

12. *Patrick Kelly -ats- Coeur De Lion Investments Pty Ltd* Magistrates Court Proceeding Number 00116328/18(6); *Bruce Wallis -ats- Coeur De Lion Investments Pty Ltd* Magistrates Court Proceeding Number 00116344/18(1); *Ian Lewis -ats- Coeur De Lion Investments Pty Ltd* Magistrates Court Proceeding Number 00116346/18(4): CDLI laid complaints under the *Justices Act* 1886 (Qld), against Mr Kelly, Mr Wallis and Mr Lewis (directors of the Club) for alleged contraventions of the *Corporations Act* 2001 (Cth). The complaints were dismissed.

13. *Coeur de Lion Investments Pty Limited v The President's Club Limited*; Queensland Supreme Court Proceeding Number 11447 of 2018: CDLI brought an application requiring the Club to amend its share registry to reflect a sale of shares from CDLI to Clive Palmer. The matter was settled by a consent order.

14. *Coeur De Lion Investments Pty Limited v The President's Club Limited, in the matter of The President's Club Limited* [2019] FCA 994; Federal Court Proceeding Number QUD801 of 2018: Application by CDLI seeking that the Club be wound up on just and equitable grounds and for alleged oppression. Cross-claim by the Club seeking *inter alia* damages for alleged unconscionable conduct. This matter is yet to be determined.

15. *The President's Club Limited v Coeur de Lion Investments Pty Limited*; Queensland Supreme Court Proceeding Number 12360 of 2018: The Club commenced proceedings against CDLI [...][101] for an extraordinary general meeting of the Club wherein it was proposed a special resolution be passed *inter alia* to wind up the Club.

16. *Coeur de Lion Investments Pty Limited v The President's Club Limited*; Queensland Supreme Court Proceeding Number 12863 of 2018: CDLI applied to the Supreme Court, in its capacity as a member of the Club, to obtain access to certain books and records of the Club. The application was dismissed.

17. *Ian Lewis & Ors -ats- Coeur De Lion Investments Pty Ltd*; Magistrates Court Proceeding served on or about 27 November 2018: [...][102] Complaints laid by CDLI under the *Justices Act* 1886 (Qld), against directors for alleged contraventions of the *Corporations Act* 2001 (Cth). [...][103]

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101 Disputed text.
102 Disputed text.
103 Disputed text.

18. *Coeur De Lion Investments Pty Ltd v Lewis & Ors* [2019] QDC 90; Queensland District Court of Appeal Proceeding Numbers 4641 of 2018, 4642 of 2018 and 4643 of 2018: Appeal against decisions in Magistrates Court Proceeding Number 00203385/17(0), 00116346/18(4) and 00116344/18(1) dated 14 December 2018 [...].[104] The appeals were dismissed.

19. *Coeur De Lion Investments Pty Ltd v Lewis & Ors*; Queensland Court of Appeal Proceeding Numbers 178 of 2019, 179 of 2019 and 180 of 2019: CDLI has lodged applications to appeal against the decision of *Coeur De Lion Investments Pty Ltd v Lewis & Ors* [2019] QDC 90.

Difficult decisions having to be made to appropriate funds to different legal actions being run simultaneously

[64] The Club's solicitor, Mr Robson, deposes to being told certain things by a Mr Lewis,[105] a director of the Club, and accordingly stated the following in his affidavit:[106]

> "(i) Difficult decisions have had to be made by the Directors to allocate the funds available to the Club from time to time including in the way the Club has been able to prosecute or defend and fund proceedings concerning CDLI and the other Palmer companies;
>
> (ii) The Directors have not been able to allocate funds to prosecute or defend, as the case may be, all legal proceedings concerning CDLI and the other Palmer companies other than when it was deemed necessary to protect the interests of the Club and its members, and then the Directors have been careful in the way in which they have allocated funds to proceedings concerning CDLI and other Palmer companies because the nature, scope, intensity and number of proceedings has been difficult to predict;
>
> (iii) That is particularly so having regard to the extensive history of proceedings and appeals commenced by CDLI and the other Palmer companies, and the uncertainty that creates for the Directors in determining the best and most appropriate use of funds available or anticipated to be available to the Club;
>
> (iv) Whilst commencement of this proceeding was considered vital to protecting the interests of the Club and its members when it was initiated, subsequent events and proceedings (relevantly including the closure of the resort, revenue constraints and the potential takeover) have impacted these proceedings and decisions have had to be made in relation to the best and most efficient use of member funds, which decisions have meant that these proceeding [sic] were not able to be prosecuted actively without reference to other matters. That inaction was however influenced by Mr Palmer and his related entities being equally content to pursue other proceedings, often to appeal courts, in preference to prosecuting his counterclaim in this proceeding. Had the Palmer companies shown any desire or raised any

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104 Disputed text.
105 Affidavit of Joshua Galvin Robson sworn 22 July 2019, p 13-29, [19]-[20].
106 Affidavit of Joshua Galvin Robson sworn 22 July 2019, p 28-29, [20(g)].

> complaint rendering this proceeding more urgent, different decisions would have been made and the long period of inactivity avoided;
>
> (v) The conduct of this proceeding has been influenced by each of the matters set out above in this paragraph."

[65] The only evidence about any difficult decisions having to be made by the Club to fund different legal actions being run simultaneously comes from the Club's solicitor.

[66] No director from the Club gave any evidence about this important issue.

[67] Accordingly, the weight and persuasiveness of any submission based on such second-hand evidence from the solicitor is reduced.

[68] Further, it is clear that the Club had funds at the relevant time:

> "It's important to explain to your Honour that it's not that we say that we were impecunious and therefore unable because we certainly had some funds. Our submission is we just had difficult decisions to make in respect of the careful allocation of resources in circumstances which were uncertain, unforeseeable and unpredictable.[107]
>
> So to tie that off, it was – the operating funds that were available to the directors were not only considerations that had to be made in respect of what were those material uncertainties but also, as Mr Robson identified in evidence, funds that had to be allocated for the maintenance of the villas and expenses which The first plaintiff paid on behalf of members such as rates and land tax and those sorts of things related to the villas. And those decisions had to be made in circumstances where, as I took you to earlier, the letting pool had ceased operating on the 11th of April 2011. And a matter which is borne out in paragraph 19 of Mr Robson's affidavit: the entire resort was mothballed in about March 2015. So the letting pool wasn't operating. The resort was only being operated on a limited basis and not for the benefit of members, and it was entirely mothballed in 2015."[108]

Settlement negotiations

[69] There has been three settlement negotiations during the nearly six year period.[109]

The defendants have also not taken a step in the proceedings

[70] The Club highlights that both parties have an obligation under r 5 of the *UCPR* to proceed expeditiously.

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107 Transcript of the hearing on 30 July 2019, p 66, line 35-40.
108 Transcript of the hearing on 30 July 2019, p 68, line 25-35.
109 Chronology of Events provided by the first plaintiff on 6 August 2019: by late December 2012 and early January 2013, post-March 2015, prior to 2 July 2016.

[71] The Club submits that save for the late filing of the amended defence and counterclaim, the same complaints can be said of the defendants in failing to prosecute their counterclaim (which is akin to a separate proceeding).[110]

[72] Prior to the defendants' application, neither party had raised the progress of this proceeding in any forum (including in the Federal Court when CDLI sought to sever the common issues from the trial of its counterclaim).[111] The first plaintiff submits that the defendants' election to let the litigation lapse detracts from their complaint as to the Club's delay[112] and illustrates the weak causal connection between the Club's delay and the prejudice hypothesised by them.

[73] The Club highlight's Henry J's apt observation in *Allianz Australia Insurance Limited v Corowa*[113] as applicable in the current case:[114]

> "The applicant's inaction in not having taken such a course earlier in the intervening year and eight months again suggests it suited the applicant's purposes to not advance the matter."

[74] The defendants submit that the conduct of both parties in not prosecuting the matter for nearly six years should mean that both claims be dismissed:[115]

> "HER HONOUR: So, Mr Dunning, are you saying if this application was – if you were bringing an application – well, you need to – you needed leave to take another step, you would say you, on your – your party would fail to meet that – meet the standard?
>
> MR DUNNING: That's right. And it'd be different if different considerations arise where one party is said to be given leave and the other refused. But no, if we're right about what we say regarding the plaintiff, it would follow that we also wouldn't get leave.
>
> HER HONOUR: So the plaintiff uses this to support their case, but you say actually it really should – it doesn't support your case. It brings both of you down.
>
> MR DUNNING: Correct. Because we're not in a position presently to take a step in the proceeding, because we're also caught by 389(2) and if your Honour accedes to our application to dismiss the claim, we weren't be able to be heard in opposition to or dismiss it along the health [sic] proceedings."

Discussion - delay

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110 First plaintiff's outline of submissions filed 26 July 2019, p 7, [22] citing *Uniform Civil Procedure Rules* 1999 (Qld) rr 177 and 181-185.

111 Affidavit of Joshua Galvin Robson filed 22 July 2019, JGR-03, p 662-663.

112 *Allianz Australia Insurance Limited v Corowa* [2016] QCA 170 at [34] per Henry J (Morrison JA and North J agreeing).

113 [2016] QCA 170.

114 Transcript of the hearing on 30 July 2019, p 57, line 1 to 20; *Allianz Australia Insurance Limited v Corowa* [2016] QCA 170 at [26] per Henry J (Morrison JA and North J agreeing).

115 Transcript of the hearing on 30 July 2019, p 106, line 4-20.

[75] I have some concerns about the Club's explanation for the delay.

[76] I have no evidence from any director of the Club as to the detail of the difficult decisions that needed to be made as to the prioritising of funding for the various litigation on foot throughout the nearly six year period. In these circumstances I do not place much weight on the second-hand evidence of the Club's solicitor as to this issue.

[77] There were only three settlement negotiations throughout this nearly six year period which does not, by itself or combined with the other factors, offer a cogent explanation for the extended delay.

[78] It is clear that there has been a number of other pieces of litigation which occurred throughout this nearly six year period. However, it is noted that this ongoing litigation were, sometimes, one day skirmishes in court and not protracted litigation.

[79] Further, Federal Court proceedings commenced in November 2018.[116] No transfer application was made for eight months.

Prejudice to the defendants

[80] The Club has the onus of showing that any prejudice the defendants may suffer is not such as to cause injustice to the defendants should the action be permitted to continue.[117]

[81] It is necessary to examine each of the elements of prejudice asserted and examine the time at which it is likely to be suffered, always making due comparison between prejudice which the defendant has suffered, or will be likely to suffer, because of inordinate and inexcusable delay and any prejudice it might have suffered in any event.[118]

[82] So far as likely prejudice to the conduct of a fair trial is concerned, the critical time is the time at which the action is likely to be heard. In the case of prejudice resulting from a defendant being kept at risk in respect of the subject matter of the action, the relevant period will extend from the time the action is brought to the time it is likely to be heard. In each case due allowance should be made for the time which any action will ordinarily take to reach final determination.[119]

[83] So far as prejudice is concerned, in cases where there has been a long delay in prosecuting the proceedings, there is a "general presumption of prejudice" [120] which recognises that there is "likely prejudice simply because of that delay".[121]

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116 Chronology of Events provided by the first plaintiff on 6 August 2019: on 7 November 2018 Federal Court Proceeding QUD801 of 2018 ("the Federal Court Proceeding") commenced by the second defendant, seeking to windup the first plaintiff.

117 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [46] per Atkinson J.

118 *Spitfire Nominees Pty Ltd v Ducco* [1998] 1 VR 242 at 247-248 as cited in *Pittaway v Noosa Cat Australia Pty Ltd & Ors* [2016] QCA 4 at [41] per Morrison JA.

119 *Spitfire Nominees Pty Ltd v Ducco* [1998] 1 VR 242 at 247-248 as cited in *Pittaway v Noosa Cat Australia Pty Ltd & Ors* [2016] QCA 4 at [41] per Morrison JA.

120 *Grahame Cavanough v Commonwealth of Australia* [2000] QSC 068 at [48(a)] and [49] per Mullins J.

121 *Grahame Cavanough v Commonwealth of Australia* [2000] QSC 068 at [60] per Mullins J.

[84] It is well known in litigation that the passage of time makes it more difficult to prove facts if and when a trial may eventually occurs. Memories fade and witnesses may be unavailable or incapable of testifying.[122]

[85] The prejudice caused by the passing of time may be as insidious, as it is subtle, in that the parties cannot demonstrate what they have forgotten.[123]

[86] It is recognised that sometimes, the deterioration in the quality of evidence is not recognisable even by the parties:[124]

> "Prejudice may exist without the parties or anybody else realising that it exists. As the United Sates Supreme Court pointed out in *Barker v Wingo*, "what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstances because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose."

[87] It is necessary to remember however that the inevitable disadvantage to all parties of delay does not necessarily mean that the relevant issues cannot be fairly tried,[125] particularly in cases which can be for the most part be determined by documents.[126]

[88] The second defendant's solicitor states that:

> "... in the limited time available to me since 9 July 2019, I had not had an opportunity to investigate in any detail the question of whether there would be any specific prejudice to the defendants in this proceeding if this proceeding were now to be reactivated, after no step having previously been taken in this proceeding between 1 November 2013 and 8 July 2019. That remains the position."

[89] However, the second defendant's solicitor has had an opportunity (albeit limited) to review the current pleadings and has identified some matters that involve factual disputes which might depend upon the recollection of relevant events by witness of facts.

[90] As to possible prejudice which the defendants might suffer if the Club is given leave to proceed, the second defendant's solicitor deposes to this in paragraphs 11 to 20 of his affidavit sworn on 15 July 2019 and includes:

1. Change of solicitors.[127]

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122 *Allianz Australia Insurance Limited v Corowa* [2016] QCA 170 at [34] per Henry J.

123 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [46] per Atkinson J, referring to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551 per McHugh J.

124 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 551 (in the context of an extension of a limitation period).

125 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [45] per Atkinson J.

126 *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [46] per Atkinson J.

127 Affidavit of Michael John Sophocles sworn 15 July 2019, p 3, [11].

2. Factual disputes which might depend upon the recollection of events by witnesses of fact.[128]

3. The unknown whereabouts of a relevant witness, Mr William Schoch.[129]

4. From his experience he believes that the greater the delay between the dates of events which are relevant to the litigation and the date when the evidence gathering process is able to be undertaken in earnest, the greater the risk that sources of evidence which were once available will cease to be available and the greater the risk that lines of inquiry which could have once been pursued profitably have since "gone cold".[130]

Change of solicitors

[91] Recently, on or about 9 July 2019, the defendants changed solicitors in relation to this matter.[131]

[92] The second defendant's solicitor deposes to the following:[132]

> "... If the change of solicitor from HopgoodGanim Lawyers to another firm of solicitors had occurred before, or within a reasonable time after, the last formal step was taken in this proceeding on or about 1 November 2013, I anticipate that arrangements would have been made for an orderly handover of files from HopgoodGanim Lawyers to the new solicitor firm and that the new firm would then have had a reasonable time to consider how the proceedings might be advanced towards trial and a reasonable time to prepare the proceedings for trial in this Court. If this proceeding is permitted to continue, despite the delay which occurred between 1 November 2013 and 8 July 2019, and if this proceeding is now transferred to the Federal Court of Australia to be heard together with the proceedings already set down for trial in that Court for two weeks commencing on 2 December 2019, I believe that the time for me to take these steps would be significantly reduced, as compared to what the position would have been prior to 1 November 2013 or within a reasonable period after that date."

[93] The Club's response to any alleged issues arising from the defendants' change of solicitors is that this prejudice as fanciful and the prospect contained to be lost is hypothetical, illusory and misconceived.[133] Counsel for the Club further submitted:

> "That, of course, assumes that HopgoodGanim didn't give the defendants any advice, and there's no deposition to that effect. No one from the defendants, including Mr Palmer, has come forward and said HopgoodGanim didn't give them any advice. We know that they haven't made any strenuous efforts or any reasonable efforts to obtain the file, so

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128 Affidavit of Michael John Sophocles sworn 15 July 2019, p 4, [13].
129 Affidavit of Michael John Sophocles sworn 15 July 2019, p 6-7, [18].
130 Affidavit of Michael John Sophocles sworn 15 July 2019, p 7, [20].
131 Notice of change of solicitor for the first defendant filed 9 July 2019; Notice of change of solicitor for the second defendant filed 9 July 2019.
132 Affidavit of Michael John Sophocles sworn 15 July 2019, p 3, [11].
133 First plaintiff's outline of argument filed 26 July 2019, p 4, [24(a)].

> we don't know what's on the file, and, of course, they were given the file in 2015, and who knows what they've done or did with whatever they obtained at the time.
>
> So the proposition that appears in that paragraph is nothing other than speculation and irrelevant because HopgoodGanim remained as the solicitors on the record until very recently. There's also no deposition, of course, that any other solicitor would have acted any differently at the time."[134]

Factual dispute - Para 14(b)(ii) of the defendants' amended defence and counter-claim

[94] The second defendant's solicitor states the following:[135]

> "First, the defendants allege in paragraph 14(b)(ii) of their Amended Defence and Counterclaim filed 1 November 2013 that the 'implementation of the Proposed Development (as defined in the '2007 addendum' to the Resort Administration Agreement) was complete by December 2010 and the particulars provided in support of that allegation are that 'the relocation of 5 golf holes was practically complete in December 2009 and finalised by March 2010' and that 'the construction of works relating to the Beach Club was finalised in December 2010'. The allegations in paragraph 14(b)(ii) of the Defence are denied by the plaintiffs in paragraph 8 of their Reply and Answer dated 5 September 2012. These matters appear to me to involve factual disputes of a kind which might depend, at least on part, upon the recollection of relevant events by witnesses of fact."

[95] In response, the Club states this issue will not be relevant at trial and that this matter will be removed from the proceedings.

[96] Amended pleadings have been drafted to that effect, to ameliorate any perception of possible prejudice on those issues.[136]

Factual dispute - Para 20(b) of the Club's amended statement of claim

[97] The second defendant's solicitor states the following:[137]

> "Secondly, paragraph 20(b) of the plaintiffs' Amended Statement of Claim dated 3 October 2012 (ASOC) alleges that the defendants engaged in certain conduct 'whilst knowing' that the plaintiffs disputed the alleged fact pleaded in paragraph 20(a) of the ASOC. That allegation is denied in paragraph 20(b) of the Defence. It appears to me to involve a factual dispute of a kind which might depend, at least in part, upon the recollection of relevant events by witnesses of fact".

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134 Transcript of the hearing on 30 July 2019, p 71, line 15-20.
135 Affidavit of Michael John Sophocles sworn 15 July 2019, p 4, [13(a)].
136 First plaintiff's outline of argument filed 26 July 2019, p 7-8, [25].
137 Affidavit of Michael John Sophocles sworn 15 July 2019, p 4, [13(b)].

[98] In response, the Club states this issue will not be relevant at trial and that this matter will be removed from the proceedings.

[99] Amended pleadings have been drafted to that effect, to ameliorate any perception of possible prejudice on those issues.[138]

Factual dispute - Para 22(c) of the Club's amended statement of claim

[100] The second defendant's solicitor states the following:[139]

> "Thirdly, it is alleged in paragraph 22(c) of the ASOC that the defendants issued a statutory demand to the first plaintiff in respect of money that 'to the knowledge of the defendants, was the subject of a genuine dispute'. In paragraph 22 of the Defence, the defendants admit that they 'issued a statutory demand to the first plaintiff' but otherwise deny the allegation. In other words, the statutory demand was issued by the defendants was issued in respect of money that 'to the knowledge of the defendants, was the subject of a genuine dispute' is denied. It appears to me to involve a factual dispute of a kind which might depend, at least in part, upon the recollection of relevant events by witnesses of fact".

[101] In response, the Club states this issue will not be relevant at trial and that this matter will be removed from the proceedings.

[102] Amended pleadings have been drafted to that effect, to ameliorate any perception of possible prejudice on those issues.[140]

Factual dispute - Para 26F of the Club's amended statement of claim

[103] The second defendant's solicitor states the following:[141]

> "Fourthly, paragraph 26F of the ASOC alleges that certain use, letting or occupation of villas was 'without the licence or permission of the plaintiffs as lessees of the villas', 'contrary to the lessees' rights to quiet enjoyment under the terms of the leases' and constituted 'trespass'. Those allegations are denied in paragraph 26F of the Defence because the defendants allege that the plaintiffs 'were not in physical possession of the villas at the relevant time', 'made the villas available to the defendants' and 'held no intention to take possession of the villas'. These matters appear to me to involve a factual dispute of a kind which might depend, at least in part, upon the recollection of relevant events by witnesses of fact".

[104] The Club states this issue is to be determined wholly or substantially on documents, including contractual documents which govern the rights of the Club's members and

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138 Affidavit of Joshua Galvin Robson sworn 22 July 2019, paragraph 16(b); first plaintiff's outline of argument filed 26 July 2019, p 7-8, [25].

139 Affidavit of Michael John Sophocles sworn 15 July 2019, p 4, [13(c)].

140 Affidavit of Joshua Galvin Robson sworn 22 July 2019, [16(b)]; first plaintiff's outline of argument filed 26 July 2019, p 7-8, [25].

141 Affidavit of Michael John Sophocles sworn 15 July 2019, p 4, [13(d)].

the defendants' to use the villas, and booking records for the villas during that period.[142]

The evidence of Mr Schoch

[105] In the limited time available to him, Mr Sophocles, the second defendant's solicitor, has given some preliminary consideration to who might be the witness or witnesses to give evidence of the events in question.[143]

[106] One such witness would appear to have been Mr Schoch who was a director of Palmer Coolum Resort and CDLI and was the General Manager of Palmer Coolum Resort during the period between about June 2011 and December 2013.[144] Mr Sophocles deposes to not knowing the whereabouts of Mr Schoch.[145]

[107] Further, the defendants submit, that Mr Schoch's employment ceased in December 2013 and he did not leave his employment on good terms.[146] Mr Schoch subsequently commenced multiple proceedings against persons and entities related to the defendants.[147]

[108] The defendants submit that had it been known to them, within a reasonable time after the filing of the amended defence on 1 November 2013, that no further step would be taken in this proceeding until 8 July 2019, the defendants would have made inquiries in 2014 about possible sources of evidence alternative to Mr Schoch, given that Mr Schoch would by then have been regarded as a person most unlikely to co-operate in any way with the defendants.[148]

[109] The defendants submit that there would now be difficulties in making inquiries in the second half of 2019 concerning possible sources of evidence alternative to Mr Schoch because, after this interval of time, the defendants are not be able to identify who might be able to give such evidence as a witness alternative to Mr Schoch.[149]

[110] In response, the Club states that Mr Sophocles doesn't identify any steps that he's taken to locate Mr Schoch, such as looking on LinkedIn or any of those usual forms of social media. Further, in the event that Mr Schoch can't be found, the Club notes that it's not said that there's anything deficient in Mr Schoch's affidavit, i.e. it wasn't the fullest and best account of the evidence that Mr Schoch could possibly give:[150]

> "Remarkably, no issue is taken with the scope or extent of Mr [Schoch]'s affidavit to say that it in any way is deficient so as to otherwise capture a reliable version of what occurred. The proposition that he's been dismissed so, therefore, he's likely to be unhelpful isn't made good without contacting him. And, in any event, he can be subpoenaed and his affidavit can be

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142 First plaintiff's outline of argument filed 26 July 2019, p 7-8, [26].
143 Affidavit of Michael John Sophocles sworn 15 July 2019, p 6, [17].
144 Affidavit of Michael John Sophocles sworn 15 July 2019, p 6, [18(a)].
145 Affidavit of Michael John Sophocles sworn 11 July 2019, p 5, [19].
146 Affidavit of Michael John Sophocles sworn 15 July 2019, p 6, [18(c), (d)].
147 Affidavit of Michael John Sophocles sworn 15 July 2019, p 6, [18(d)].
148 Affidavit of Michael John Sophocles sworn 15 July 2019, p 6, [18(e)].
149 Affidavit of Michael John Sophocles sworn 15 July 2019, p 7, [18(f)].
150 Transcript of the hearing on 30 July 2019, p 70, line 19-23.

> tendered. The trial in the Federal Court is a trial by affidavit. The directions have already been made and they're in evidence."[151]

[111] The Club further submits that the defendants were controlled by Mr Palmer and it's not said that Mr Palmer doesn't have a recollection or isn't available to give relevant evidence in relation to any of these matters. Further, there were other directors of the defendants at the time and there is no evidence that any attempt has been made to contact them.[152]

[112] Further, the Club notes that the defendants' amended defence was due to be filed by 24 January 2013,[153] but the defendants failed to meet this deadline for another 11 months. It was not until 1 November 2013 that the defendants filed their amended defence.[154] Mr Schoch left his employment a short time later in December 2013[155] and the Club submits:[156]

> "And there's allegations in this case that Mr [Schoch], who was a director – not the only director, but one of the directors of CDLI fell out with Mr Palmer and that his employment came to a sudden end in – it says in or about December 2013. And there's then, by the defendants, said to be some possible, not actual, prejudice that flows from that. So it's important that your Honour takes into account who caused the delay up to that period of time because that incident, to the extent that it matters, is said to be attributable to the first plaintiff. That's why it's important that I take you through this. So, as I submitted, the delay that occurred up until November 2013 lies at the door of the defendant's."

These examples of prejudice are not exhaustive

[113] The defendants stress that these examples of prejudice deposed to by Mr Sophocles are not exhaustive.[157]

[114] Mr Sophocles deposes that it remains the case that he has not had an opportunity to investigate in any detail the question of what specific prejudice the defendants to this proceeding would suffer if the proceeding were reactivated.[158] The defendants submit that:[159]

1. The events in question in the above examples occurred between approximately seven and nine years ago.[160]

2. In the normal course of events, it is likely that any witnesses who might be required to give evidence of these events would find that their recollection of

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151 Transcript of the hearing on 30 July 2019, p 72, line 16-22.
152 Transcript of the hearing on 30 July 2019, p 72, line 25-30.
153 Order made on 20 December 2012.
154 Amended Defence and Counterclaim filed 1 November 2013.
155 Affidavit of Michael John Sophocles sworn 11 July 2019, p 5, [18(b)].
156 Transcript of the hearing on 30 July 2019, p 53, line 14-22.
157 Defendants' outline of argument filed 26 July 2019, p 5, [26(b)].
158 Affidavit of Michael John Sophocles sworn 15 July 2019, p 3-4, [12].
159 Defendants' outline of argument filed 26 July 2019, p 5-6, [26].
160 Affidavit of Michael John Sophocles sworn 15 July 2019, p 5, [14]-[15]; defendants' outline of argument filed 26 July 2019, p 6, [26(c)].

events had faded, at least to some degree, and possibly to a significant degree, in the period since November 2013.[161]

3. In response to the examples given by Mr Sophocles, the Club has belatedly indicated that it will admit some further facts.[162] Yet this serves to highlight the difficulties which will arise as this matter progresses if leave to proceed is granted. The Club has already had to amend its case to respond to identified instances of factual disputes which are likely to require evidence from witnesses of fact.[163]

4. Mr Sophocles also notes, that it is usually only once clients and their lawyers begin preparing for trial in earnest (once pleadings, disclosure and other interlocutory steps are complete), that the clients and their lawyers will have a full appreciation of the evidence which is necessary or desirable to seek to obtain and adduce at trial.[164] That is especially so because, in the subsequent evidence gathering process, additional sources of relevant evidence and lines of inquiry frequently come to light which were not previously apparent.[165]

[115] The defendants' counsel elaborated on the inherent prejudices that they say remain despite the Club's withdrawal of certain matters in their case:

> "Well, it's diluted or it's diluted and is minimised to the extent of those concessions that the plaintiff offers up. But what the cases are [indistinct] in saying is that delay is pernicious. It's what you don't realise you once might have had access to, had the litigation been prosecuted diligently. And the allegation that it's documentary is a good case in point and I'll take your Honour to the defamation case in due course to show that. Six years later, you can't actually confidently say this is an all-documentary case because all of the leads are now cold as to whether there might have been people who could have given good eyewitness accounts of various things and staying and, you know, the trespass claim or why particular things were said or done, why documents came into existence, why they weren't responded to, why they were responded to in the way they were.[166]
>
> Saying, look, we'll excise a couple of allegations that it's clear, again, would turn on contentious oral evidence, doesn't really help you for knowing what you can't now properly prove that you would have if at the time when the litigation would have come on in an orderly way, you'd have been making inquiries, the people would have still been around or if they weren't around, other – fresh enough in other people's memories to find them. And that's lost. And it's pernicious because you can't put your finger on it in the – in the sort of straightforward way you can offer up as has been done here a few instances – say, "We won't press

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161 Affidavit of Michael John Sophocles sworn 15 July 2019, p 6-7, [16]; Defendants' outline of argument filed 26 July 2019, p 6, [26(d)].
162 Affidavit of Joshua Galvin Robson sworn 22 July 2019, [16(b)(ii)].
163 Defendants' outline of argument filed 26 July 2019, p 6, [26(e)].
164 Affidavit of Michael John Sophocles sworn 15 July 2019, p 7, [19].
165 Affidavit of Michael John Sophocles sworn 15 July 2019, p 7, [20].
166 Transcript of the hearing on 30 July 2019, p 107, line 28-38, see also p 111, line 22-31.

> that issue", but that's ultimately not an answer to the predicament that our client finds itself in. Your Honour, can I then."[167]

[116] The Club submits that the defendants' complaint is nothing more than general prejudice with some speculation as to the possibility of specific prejudice.[168]

[117] The Club notes that effectively the defendants' submission as to prejudice is all encompassing as no attempt has been made to distinguish between prejudice that only attends to isolated issues in this proceeding and those that are being litigated presently in the Federal Court. Accordingly, the Club submits that the defendants' submissions amounts to a position where they couldn't even possibly get a fair trial in the Federal Court;[169] a position that has never been raised by the defendants in the Federal Court.

[118] It was noted by the first plaintiff that the defendants brought an application in the Federal Court with the express intention of ensuring that they didn't have to grapple with the factual controversies that overlap. However, no reference was made by the defendants to prejudice was made in the Federal Court action.[170] This submission has some resonance.

[119] I accept the Club's further submission that this is not a case where no one has considered the issues in this proceeding for the last six years as there are some overlapping issues raised in the Federal Court which have been subject to short form pleadings.[171] This is an important factor in this case.

Prospects of success

[120] The Club submitted that there is, on a preliminary examination, reasonable prospects of success.[172] However, no further submissions were made to substantiate such a position.

[121] The Club submitted that:[173]

> "HER HONOUR: You make a statement without any further detail, but just on a preliminary examination, there was reasonable prospects of success.
>
> MR HANDRAN: Yes.
>
> HER HONOUR: How do I determine that?
>
> MR HANDRAN: It's not quibbled with.
>
> HER HONOUR: It's not quibbled?
>
> MR HANDRAN: No, it's a case for breach of contract. The clauses are pleaded, the conduct which is otherwise the subject of the unconscionability

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167 Transcript of the hearing on 30 July 2019, p 113, line 22 to 31.
168 Transcript of the hearing on 30 July 2019, p 72, line 25-26.
169 Transcript of the hearing on 30 July 2019, p 124, line 24-27.
170 Transcript of the hearing on 30 July 2019, p 124, line 21-29.
171 Transcript of the hearing on 30 July 2019, p 125, line 8-11.
172 First plaintiff's outline of submissions filed 26 July 2019, p 4, [17(b)].
173 Transcript of the hearing on 30 July 2019, p 79, line 22-23.

> has been pleaded in the Federal Court, albeit in a more expensive term. I suppose a better way to put it or a way which might be less controversial is your Honour wouldn't conclude that the case had poor prospects of success.
>
> HER HONOUR: Because?
>
> MR HANDRAN: Because no attempt has been made to obtain summary judgement or to strike it out or to take any other step that would ordinarily follow a case of that category. And, in fact, Justice Greenwood finds that the matters may well provide an answer in the Federal Court."

[122] The defendants do in fact quibble with the Club's view as to their prospects of success and submit that it fell to the Club to demonstrate such a position and they haven't done so.[174]

[123] The Federal Court trial, which canvasses a number of the issues raised in this matter, is set down for December 2019.[175]

[124] It cannot be said, at this stage, that the Club does not have an arguable case.

The litigation between the parties would not be concluded if leave was not granted

[125] The litigation between the parties would not be concluded if leave was not granted due to the Federal Court trial listed in December of this year. Many of the issues to be canvassed in that trial have a commonality with these proceedings.

[126] The parties agreed upon a table of allegations made by the Club which overlap between this proceeding and the Federal Court proceeding:[176]

1. CDLI developed the Resort.
2. The Resort Accommodation included the villas.
3. Villas are held in quarter interests.
4. Villas are leased to the Club.
5. CDLI retains interests in the Club.
6. The Resort Administrator retains ownership of the Resort facilities.
7. The Club once operated a time share scheme.
8. The Resort Administrator, the Club and CDLI entered into the Resort Administration Agreement.
9. In July 2011, Mr Palmer acquired control of CDLI and the Resort Administrator.

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174 Transcript of the hearing on 30 July 2019, p 105, line 5-20.

175 Affidavit of Michael John Sophocles sworn 15 July 2019, p 3, [11]; Order made by Greenwood J on 27 July 2019, Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, p 54.

176 Exhibit 5, Part A, tab 1, table 2: Allegations made by the Club which overlap between the Supreme Court Proceeding and Federal Court Proceeding, p 3-4.

10. The time share scheme is required to be registered under the *Corporations Act* 2001 in order to operate (unless an exemption is granted).

11. ASIC granted the Club an exemption to the obligation to register the time share schemes under the *Corporations Act* 2001.

12. CDLI executed the Deed Poll, which was a condition of the ASIC exemption.

13. CDLI revoked the Deed Poll.

14. CDLI thereafter ceased to operate the letting pool.

15. CDLI refused owners access to Resort facilities.

16. What is now Palmer Leisure Coolum Pty Ltd, issued a bidder's statement.

17. The Resort Administrator ceased to pay the developer's subsidy.

18. The Club has ceased receiving letting pool income.

19. The takeover panel made a declaration of unacceptable circumstances in respect of the takeover bid (July 2012).

20. CDLI and the Resort Administrator's conduct is unconscionable within the meaning of the unwritten law or under the ACL.

[127] The parties also agreed upon a table of allegations made by the Club which are unique to this proceeding:[177]

1. 2007 Addendum was entered into requiring the Club to be put into a "break even" position by CDLI until 3 August 2012. CDLI refused to put the Club into a break even position from about 24 May 2012 until 3 August 2012.[178]

2. From on or about 11 April 2012, PCR continued to charge the Club operating expenses pursuant to the RAA.[179]

3. Since ceasing to comply with the RAA from about March 2012, PCR has used and derived income from the villas inconsistently with the Club's rights.[180]

[128] Whilst 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

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177 Exhibit 5, Part A, tab 1, table 2: Allegations made by the Club which unique to the Supreme Court Proceeding, p 1.

178 The defendants admit the fact of the 2007 Addendum and the fact the Club was not put into a break-even position from about 24 May 2012. The defendants deny liability based on the proper construction of the terms of the 2007 Addendum (see paragraphs 13, 14 and 21 of the amended defence [Document 37]). As such, the only issue is the proper construction of the 2007 Addendum.

179 The defendants positively plead they have issued invoices for operating expenses, (see paragraphs 18(c) and 18(d) of the amended defence [Document 37]). As such, the only issue which remains is whether those invoices were pursuant to the RAA.

180 The defendants positively plead they let the villas (paragraph 26E(b) of the amended defence [Document 37]) and derived income (but not profit) from letting the villas. As such, the only issue which remains is whether that use was inconsistent with the Club's rights, and if so, what relief should be granted.

hanging over them,[181] such a consideration has less relevance in this matter as there is a trial listed in the Federal Court which involve many of the same issues and evidence on some common questions.

Leave is granted

[129] Taking into account, and balancing, all of the factors I must, in my view weighs in favour of exercising my discretion in favour of the Club.

[130] As stated above, I was not particularly impressed with the evidence for the explanation of the delay as provided by the first plaintiff's solicitor in circumstances where effectively it was second-hand evidence that could have been provided by a director of the Club.

[131] However, a unique feature in this case is that there is a Federal Court proceeding that is presently on foot that has some overlap of issues raised in this proceeding.

[132] The correct test to the question of prejudice is "whether the plaintiff has satisfied the onus of showing that any prejudice the defendant may suffer is not such as to cause injustice to the defendant should the action be permitted to continue".[182] I am satisfied the first plaintiff has discharged this onus.

[133] Many of the issues raised by the defendants have been dealt with by the Club by the withdrawal of allegations.

[134] There is of course always the insidious prejudice that remains in any litigation delayed by the passing of time where the parties cannot demonstrate what it is that they have forgotten or lost. The defendants highlight this inherent prejudice that they face and rely on McHugh J's powerful passage in *Brisbane South Regional Health Authority v Taylor*[183] ("*Taylor*").

[135] I acknowledge the issues raised by McHugh J in *Taylor* that the passing of time necessarily incurs prejudice that may not be apparent or be clearly articulated to a party. However, *Taylor* is not to be applied such that a passing of a particularly lengthy period means that a proceeding must ipso facto be dismissed.[184]

[136] Despite the persuasiveness of the passage commonly relied on in *Taylor*, the force of the statement is not elevated into an arbitrary rule that no fair trial can be had whenever there has been a very substantial delay. A closer examination of the specific circumstances of the particular action is necessary.[185]

[137] Matters of prejudice and delay are not as cogent in this case due to the Federal Court proceedings where matters of some commonality are being litigated and both parties have had to engage with those issues for some time.

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181 *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [2] per Atkinson J; *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113; [1998] QCA 114 at 124 per McPherson JA.

182 *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [46] per Atkinson J.

183 (1996) 186 CLR 541 at 551.

184 *Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176 at 652, [8] per de Jersey CJ.

185 *Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176 at 659, [33] per Thomas JA.

[138] This is not a case where all of the issues have been dormant for nearly six years. To the contrary, both parties are preparing for a Federal Court trial which involve many of the same witnesses and evidence on the common questions.

[139] I am satisfied that the circumstances of this case show that there is good reason for excepting these proceedings from the general prohibition in a case in which nearly six years have elapsed since the last step was taken.

[140] I am satisfied that, in all of the circumstances, the continuation of these proceedings would not involve injustice or unfairness to the defendants for the reason of delay.

[141] Leave is granted for the Club to proceed with its transfer application.

Dismissal for want of prosecution

[142] Counsel for the defendants acknowledge that if I am satisfied that leave should be granted, the defendants' application for the dismissal for want of prosecution will follow that event.[186]

[143] Accordingly, the defendants' amended application filed 24 July 2019 is dismissed.

The transfer application

[144] Section 5 ("Transfer of proceedings") of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) provides relevantly:

> "(1) Where:
>
> (a) a proceeding (in this subsection referred to as the relevant proceeding) is pending in the Supreme Court of a State or Territory (in this subsection referred to as the first court); and
>
> (b) it appears to the first court that:
>
> (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Federal Court or the Family Court and it is more appropriate that the relevant proceeding be determined by the Federal Court or the Family Court;
>
> (ii) having regard to:
>
> (A) whether, in the opinion of the first court, apart from this Act and any law of a State relating to cross-vesting of jurisdiction and apart from any accrued jurisdiction of the Federal Court or the Family Court, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Federal Court or the Family Court;

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186 Transcript of the hearing on 30 July 2019, p 7, line 15-35.

> (B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the first court apart from this Act and any law of a State relating to cross-vesting of jurisdiction; and
>
> (C) the interests of justice;
>
> it is more appropriate that the relevant proceeding be determined by the Federal Court or the Family Court, as the case may be; or
>
> (iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Federal Court or the Family Court;
>
> the first court shall transfer the relevant proceeding to the Federal Court or the Family Court, as the case may be."

[145] Section 5 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Qld) is to a similar effect.[187]

[146] That power is satisfied, here, if "it appears" to this Court that either:

1. this proceeding is "related to" the proceeding in the Federal Court and it is "more appropriate" that the Federal Court determine this proceeding;[188] or

2. "it is otherwise in the interests of justice" that this proceeding be determined by the Federal Court.[189]

[147] On a transfer application it is necessary to take into account:[190]

1. The importance of making the best use of scarce judicial resources.

2. The specialist nature of one court or another in relation to the subject matter of the litigation to prevent unnecessary costs being incurred by the parties to litigation.

3. The desirability of avoiding the risk of inconsistent findings.

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187 Noting however that ss 5(1)(b)(i) of the Cth Act: "the relevant proceeding arises out of, or is related to, another proceeding pending in the Federal Court or the Family Court and it is more appropriate that the relevant proceeding be determined by the Federal Court or the Family Court" and 5(1)(b)(iii) of the Cth Act: "it is otherwise in the interests of justice that the relevant proceeding be determined by the Federal Court or the Family Court" are not present in s 5(1) of the Qld Act.

188 *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) s 5(1)(b)(i)/(ii).

189 *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) s 5(1)(b)(iii).

190 *Commissioner of Taxation v Residence Riverside Pty Ltd* (2013) 95 ATR 86; [2013] FCA 720 at [10] per McKerracher J.

[148] In addition:[191]

1. If it appears to the Court that the legislative criteria are established such that it is in the interest of justice that the proceedings be determined by another court then the first court is required by legislation to exercise the power of transfer. No exercise of discretion arises.[192]

2. The elements of evaluation or discretion that lead to the conclusion that it is in the interest of justice to transfer (thus making it obligatory to transfer) include the likelihood that there will be more efficient use of judicial resources, the likelihood that contrary findings of fact arise or conflicting orders being made on the same material can be achieved and the likelihood that costs can be minimised.[193]

3. The interests of justice referred to in section 5 of the *Cross-Vesting Acts* is not divorced from practical reality.[194]

4. The decision calls for a 'nuts and bolts' management decision as to which Court is the more appropriate to hear and determine the substantive dispute.[195]

[149] The words "related to" are of wide import and do not require the applicant to point to specific issues common to both proceedings – it is the "proceeding" in this Court which must "appear" to be "related to" the proceeding in the Federal Court.[196]

[150] Those words are evidently directed at avoiding a multiplicity of proceedings. The commencement of like actions in different jurisdiction are part of what the cross-vesting laws seek to avoid.[197]

[151] In *Amalia Investments Ltd v Virgtel Global Networks NV (No 2)*[198] Greenwood J stated:[199]

> "A relevant proceeding arises out of another proceeding if there is some causal element between the two even if the causal element is not "… direct or proximate": *Re Hamilton Irvine* (1990) 94 ALR 428 at 432. A pending proceeding relates to another proceeding if the two are associated or connected: *Re Hamilton Irvine* at p 433; *Leithead v Leithead* (1991) 109

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191 *Commissioner of Taxation v Residence Riverside Pty Ltd* (2013) 95 ATR 86; [2013] FCA 720 at [11] per McKerracher J, cases referenced in text have been placed in footnotes.

192 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 per Gleeson CJ, McHugh and Heydon JJ (at [14]), per Gummow J (at [62]) and per Callinan J (at [222]).

193 *McCormack v Newburg Enterprises Pty Ltd* [2002] FCA 457 per Lee J (at [12]).

194 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 (at [15]).

195 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 (at [13]) and *Zhu v Tech Universal (HK-Macau) Development Pty Ltd, in the matter of Tech Universal (HK-Macau) Development Pty Ltd* (2005) 53 ACSR 704 per Gyles J (at [8]).

196 *Anderson v McPherson* [2009] WASC 35 at [17] per Johnston J, citing *Carey v Carey* (Unreported, WASC, Library No 8307, 14 June 1990), *Seymour v Devine* [2003] WASC 260, *Osmond v Osmond* (1988) FLC 91-953.

197 *Central Bore Nickel NL v Richfile Pty Ltd* (1995) 16 WAR 230 per Ipp J.

198 (2011) 198 FCR 248.

199 *Amalia Investments Ltd v Virgtel Global Networks NV (No 2)* (2011) 198 FCR 248 at [41]; 284 ALR 549 at 557 [41] per Greenwood J as quoted in *Commissioner of Taxation v Residence Riverside Pty Ltd* (2013) 95 ATR 86; [2013] FCA 720 at [13] per McKerracher J.

> FLR 177; *Hoddell v Hoddell Pty Ltd* [1999] WASC 156; *Armstrong v Armstrong* [2004] WASC 121, [49] to [56]; *Bell Group Ltd v Westpac Banking Corporation* (2000) 173 ALR 427 at [186] to [203]. A proceeding is related to another proceeding where "… a substantial and common question" arises in both proceeding (*Mattock v Mattock* (1989) 13 Fam LR 288 per McLelland J at 290) or where the "… facts and circumstances in the two proceedings … appear to be intertwined" (*Foley v Green* [2011] VSC 155 per Almond J at [21]. In *Buckley v Gibbett*, the two proceedings were found to be related on the footing of the "… essential commonality of facts and of parties" thus satisfying the "… requirements of relationship" per RD Nicholson J at p 560F."

[152] Where common questions arise in proceedings in separate jurisdictions, considerations of comity between courts require considering the transfer of proceedings.[200]

[153] Even assuming that the first threshold is established, namely that this proceeding is "related to" the Federal Court proceeding, the same considerations as to what is involved in resolution of each of the proceedings are also relevant to the question of whether it is in the interests of justice for there to be a transfer. This is generally viewed as being a value judgment.[201]

[154] The "interests of justice" are the same under section 5(2)(b)(ii)(C) as under section 5(2)(b)(iii) and "the inquiry directed by consideration of the term 'interests of justice" encompass all the matters that determine which is the more appropriate forum…" which involves determining with which court the action has the most real and substantial connection.[202]

[155] Philippides J in *World Firefighters Games Brisbane v World Firefighters Games Western Australia Incorporated & Ors*[203] set out the range of factors considered relevant in assessing the "more appropriate forum":[204]

1. The application of the substantive law, if it is peculiar to a particular jurisdiction.

2. Forensic advantages or disadvantages conferred by the competing procedural laws.

3. The plaintiff's choice of forum and the reasons for that choice.

4. Substantive connections with the forum (e.g. residence, domicile, place of occurrence and choice of law).

5. Balance of convenience to parties and witnesses.

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200 *Emanuel Management Pty Ltd (In Liq) v Fosters Brewing Group Ltd* (1999) 73 SASR 303 at [22] per Debelle J.

201 *Commissioner of Taxation v Residence Riverside Pty Ltd* (2013) 95 ATR 86; [2013] FCA 720 at [16] per McKerracher J citing *Dawson v Baker* (1994) 120 ACTR 11 at p 14.

202 *AMCI (IO) Pty Ltd v Aquilla Steel Pty Ltd* [2009] QSC 66 at [22] per A Lyons J citing *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 730.

203 [2001] QSC 164.

204 *World Firefighters Games Brisbane v World Firefighters Games Western Australia Incorporated & Ors* [2001] QSC 164 at [32] per Philippides J.

6. Comparative cost and delay.

7. Convenience of the court system.

[156] The "justice" is not however disembodied, or divorced from practical reality.[205] The interests of the respective parties, although not the same as the interests of justice, are relevant considerations.[206]

[157] Relevantly, the interests of justice are merely a factor in the "appropriateness" test under the first limb, but remain the sole consideration under the alternative limb.

[158] In *Commissioner of Taxation v Residence Riverside Pty Ltd*,[207] McKerracher J stated that ordinarily where cross-vesting transfer occurs, the factors in support of it would be obvious and a conclusion that the value judgment or decision about whether it is in the interests of justice for the proceeding to be dealt with in another court will be readily instinctive taking into account a variety of matters including:[208]

1. The stage of the proceeding in the respective courts.

2. The commonality or diversity of the parties.

3. The nature of the proceedings.

4. The commonality or diversity of issues.

5. The risk of conflicting findings of fact or conflicting orders.

6. A cost benefit analysis.

7. The potential unnecessary drain on judicial and other public and private resources.

8. Whether there is any particular judicial expertise residing in one court or the other.

[159] As Mason P stated in *James Hardie & Coy Pty Ltd v Barry,*[209] the applicant carries a persuasive onus.[210]

[160] The Club also relies upon section 1337H of the *Corporations Act* 2001 (Cth) ("*Corporations Act*"). So far as civil matters arising under the *Corporations Act* are concerned, this section operates to the exclusion of the *Cross-Vesting Acts*.[211] The issues arising for consideration under that provision are broadly similar to those relying upon section 5 of the *Cross-Vesting Acts*, although under section 1337H, unlike under

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205 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [15] per Gleeson CJ, McHugh and Heydon JJ.

206 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [15] per Gleeson CJ, McHugh and Heydon JJ.

207 (2013) 95 ATR 86; [2013] FCA 720 at [17] per McKerracher J.

208 *Commissioner of Taxation v Residence Riverside Pty Ltd* (2013) 95 ATR 86; [2013] FCA 720 at [17] per McKerracher J.

209 (2000) 50 NSWLR 357.

210 *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at [100] per Mason P. The Club accepts that it carries a mere persuasive onus, see first plaintiff's outline of submissions filed 10 July 2019, p 3, [13].

211 *Re Westgate Wool Co Pty Ltd (in liq)* [2006] SASC 372 at [18] per Debelle J.

section 5 of the *Cross-Vesting Acts*, the Court has a residual discretion not to transfer the proceeding.[212]

Transfer application –first plaintiff's submissions

[161] The first plaintiff states that the proceeding in this Court is "related to" the proceedings in the Federal Court in several ways[213] and there are common facts in issue and common questions of law.[214]

[162] The first plaintiff submits that the case (and real controversy) may be tried more suitably for the interests of all the parties and the ends of justice in the Federal Court, given those proceedings:

1. Are listed for a two-week trial commencing on 2 December 2019.[215]

2. Involve the same witnesses and evidence on the common questions.

3. Are determined by a mixture of common law and Commonwealth statutes which is within the jurisdiction of the Federal Court.[216]

4. Concern what is, in effect, one justiciable controversy between the parties.[217]

5. Should be resolved by one court determining the whole controversy, to avoid duplication and inconsistency.[218]

Transfer application - defendants' submissions

[163] The defendants submit that it is not in the interests of justice to transfer this proceeding to the Federal Court and the application should be dismissed for the following reasons:[219]

> "(a) As to the status of the Federal Court proceeding:
>
> (i) On 27 June 2019 Greenwood J made detailed programming orders and set the proceeding down for a two-week trial commencing on 2 December 2019.
>
> (ii) At the case management hearing on 27 June 2019 counsel for TPC[220] did not oppose the proceeding being set down for trial. To the

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212 *Re Westgate Wool Co Pty Ltd (in liq)* [2006] SASC 372 at [31]. Section 1337L of the Corporations Act sets out certain additional factors to which the court must have regard but these factors are not of significance in this case.

213 See first plaintiff's outline of submissions filed 10 July 2019, p 2, [7]-[8].

214 Affidavit of Joshua Galvin Robson affirmed 8 July 2019, p 8, [17].

215 Order made by Greenwood J on 27 June 2019, Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, p 54.

216 *Federal Court of Australia Act* 1976 (Cth) s 32.

217 *Valceski v Valceski* (2007) 70 NSWLR 36 at [85] per Brereton J; Affidavit of Joshua Galvin Robson affirmed 8 July 2019, p 8, [17].

218 *Valceski v Valceski* (2007) 70 NSWLR 36 at [78], [85] per Brereton J.

219 Defendants' outline of submissions filed 26 July 2019, p 8-9, [36(a), (b), (c), (d), (e), (f), (g)] (footnotes omitted).

220 TPC refers to the Club/the first plaintiff.

contrary, TPC's own draft orders would have set the proceeding down for trial in November 2019.

(iii) Nor did TPC raise before Greenwood J that it proposed to apply to this Court for an order transferring this proceeding to the Federal Court so that it could be heard with the Federal Court proceeding. Quite to the contrary, although on the morning of 27 June 2019 TPC sent CDLI (and the other parties to the Federal Court proceeding) draft order which would involve an application to consolidate that proceeding with the Federal Court proceeding, TPC never put to Greenwood J that it intended to bring such an application.

(b) It was not until after Greenwood J had set the Federal Court proceeding down for trial (with the acquiescence of TPC) that TPC filed this application to transfer this proceeding to the Federal Court so as that it may be heard with that proceeding.

(c) That is especially surprising given the extraordinary period of inactivity in this proceeding.

(d) If this proceeding were transferred from this court to the Federal Court to be heard with the proceeding in that court, there is a real risk that a trial of the Federal Court proceeding in December 2019 will no longer be possible. That is especially so because it will be necessary for the parties to give detailed consideration to these proceedings, bearing in mind that they have lain dormant for a considerable period. The solicitors for the defendants were not engaged in the matter when it was last active in 2012 and 2013. Further, the court documents in the Federal Court proceeding will likely need to be amended, and it is likely that a series of additional interlocutory steps (eg. discovery relating to the issues presently raised in this proceeding) would be required.

(e) TPC has not adequately explained why it is in the interests of justice to transfer this proceeding to the Federal Court. It is submitted that the court should take into account the following matters:

(i) Some of the issues raised in this proceeding have already been resolved by subsequent events. For example, TPC's claim for unpaid levies has been resolved by payment of those levies.

(ii) TPC's affidavit material points to some matters of overlap between the proceedings. However, so far as issues raised in this proceeding are already raised (or could simply be raised by a party without a transfer order) in the Federal Court proceeding, there is no need for any part of this proceeding to be transferred to the Federal Court.

(iii) Further, and in any event, to the extent that there are any issues which are raised in this proceeding but have not already been raised in the Federal Court proceeding (and may now be at risk of being statute-barred), it is submitted that is the obvious result of TPC not

> progressing its claim since November 2013 and, as such, any prejudicial effects associated with it failing to prosecute its claim should properly remain with TPC rather than in effect be shifted to the defendants.
>
> (iv) Further, the Federal Court's decision will give rise to issue estoppels which would bind the parties in this proceeding in any event, which ameliorates any risk of inconsistent findings.
>
> (f) The parties to the two proceedings are not the same. In particular, the second plaintiff to this proceeding (Ambassador's Club) is not a party to the Federal Court proceeding. Accordingly, if the proceeding is to be transferred, it may be that Ambassador's Club's claim is transferred into a sizeable Federal Court proceeding in which it is not otherwise a party. Ambassador's Club's position is that it consents to its proceeding being dismissed or permanently stayed for want of prosecution and opposes TPC's transfer application.
>
> (g) There is no particular judicial expertise in the Federal Court which makes that court a more appropriate court to decide the issues in this proceeding."

Transfer application - determination

[164] I have considered the circumstances of this case and the relevant factors to be considered as set out above.

[165] There are clearly issues of commonality between this proceeding and the Federal Court proceeding. I accept that that the proceeding in this Court is "related to" the proceedings in the Federal Court in several ways and there are a number of common facts in issue and common questions of law.

[166] However, I do not consider that the Federal Court is the more appropriate court, or it is in the interests of justice to transfer the proceedings to the Federal Court, in circumstances where a two week trial is due to commence less than five months after this application was filed.

[167] On 12 December 2018, the first plaintiff's solicitor raised with the second defendant's solicitor the possibility of a consolidation of proceedings in other jurisdictions. The first plaintiff's solicitor summarises the correspondence between the parties as to this issue:[221]

> "a) Your letter dated 12 December 2018 referred to 'proceedings pending in other jurisdictions' without identifying any such proceedings. Indeed, our response to that letter (dated 23 January 2019) said that:
>
> > "With respect to the reference to 'consolidation of proceedings pending in other jurisdictions', we have no idea what proceedings are being referred to or why your clients contend that there should be 'consolidation' of such proceedings."

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221 Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, p 83.

b) Your letter dated 13 February 2019 was no more illuminating. Indeed, that letter made the following concessions:

> "We have no specifically identified the overlapping allegations with other criminal and civil proceeding, nor have we identified what proceedings may need to be consolidated and what cross claims may need to be brought. This is largely a function of CDL not having identified the material facts on which it relies. Until it does so, our client is unable to address these matters in a precise fashion."

[168] On 15 February 2019 at a case management hearing in the Federal Court, the defendants' counsel made some vague reference to a possibility that there may be a consolidation of other proceedings[222] and submitted:[223]

> "There has been reference, as I've referred to at 11.3, to overlapping allegations and other civil and criminal cases, and the addition of – a need for the addition of unnamed other parties as cross-claimants and cross-defendants, and the consolidation of other proceedings without saying precisely which proceeding that is. And, in my submission, it's just unhelpful: your Honour can't make any meaningful directions about any of that until there's an application that's on. There's no reason, if those matters are relevant, that the defendants couldn't have put on an application before now so that this time could have usefully been used to either timetable or determine those applications, but here we are here with no application; just vague references to the possibility of bringing such an application in an attempt to seemingly stall the progression of the matter. Then there's reference to the need for a pleading and, in my submission, your Honour will have formed your own view about that, but it's not – a pleading shouldn't be required in this case. Certainly on the basis of the matters that have been alleged by the plaintiff, which are of a narrow compass as I've indicated. Finally, we've only received two days ago, late on Wednesday afternoon, a more fulsome response to the matters that were put forward on behalf of the plaintiff in December and that was three months after the commencement of proceedings and some two months after that communication was sent".

[169] On 15 February 2019, Greenwood J's order contained a liberty to apply order[224] which he explained was designed to preserve an opportunity to "see what might come as a consequence of a proposed cross claim or a proposed other form of proceeding being filed which may or may not need to be consolidated."[225]

[170] On 27 June 2019, Greenwood J made detailed programming orders and set down the Federal Court proceeding for a two week trial commencing on 2 December 2019.[226]

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222 Affidavit of Joshua Galvin Robson sworn 29 July 2019, JGR-04, p 11-12.

223 Transcript of the case management hearing on 15 February 2019, p 6, line 21-39 annexed to Affidavit of Joshua Galvin Robson sworn 29 July 2019, JGR-04, p 12.

224 Affidavit of Joshua Galvin Robson sworn 22 July 2019, JGR-03, p 660.

225 Transcript of the case management hearing on 15 February 2019, p 17, line 40-42 annexed to Affidavit of Joshua Galvin Robson sworn 29 July 2019, JGR-04, p 23.

226 Order made by Greenwood J on 27 June 2019, Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, p 54.

[171] At the case management hearing on 27 June 2019 counsel for the first plaintiff did not oppose the proceeding being set down for trial in November 2019.[227] At this time the first plaintiff did not give Greenwood J any notice that an application would be made to transfer this proceeding to the Federal Court.

[172] Just prior to the case management hearing, where the Federal Court trial was set down, the first plaintiff's solicitor raised with the second defendant's solicitor that this proceeding should be consolidated with the Federal Court proceedings.[228]

[173] The second defendant's solicitor responded:[229]

> "Now you say for the first time that there should be consolidation with Supreme Court of Queensland Proceeding Number 5746 of 2012 (the Supreme Court Proceeding) and that your client proposes to bring applications for transfer and consolidation. With respect, this overlooks the fact that the Supreme Court proceeding has lain dormant for a number of years and that leave would now be required pursuant to UCPR 389(2) for any new step to be taken in the Supreme Court proceeding, including any application to transfer those proceedings to the Federal Court. Any such applications for leave and for transfer would be vigorously opposed by our client.
>
> In any event, the fact that, more than seven and a half months after this proceeding was commenced, your client now wishes to make applications of the kind referred to in the foregoing paragraph should not stand in the way of directions being made at today's Case Management Hearing for what his Honour described as 'the future conduct of the case with a degree of expedition'.
>
> We therefore intend to press for the orders proposed by our client to be made today."

[174] The first plaintiff's counsel thus explains why the proposed transfer application was not brought to the attention of Greenwood J when he set the Federal Court proceeding down for trial:[230]

> "MR HANDRAN: What appears is that the defendants opposed that course of action and indicated not that they would seek to dismiss the proceeding because they were suffering some prejudice or other injustice, but that they would vigorously oppose the transfer. And it – and the response went on to conclude that the application which had been foreshadowed for a transfer should not stand in the way of the directions being made for what the judge had described as the future conduct of the case with a degree of expedition. So there was often – so we raised it, there was opposition, the trial judge had previously indicated that he'd only deal with things that were in front of him. There was no case in front of him on the following day, so this application was filed promptly to make sure that

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227 Affidavit of Michael John Sophocles sworn 11 July 2019, p 3, [11]-[12]; MJS-1, p 14-15.
228 Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, p 84-85.
229 Affidavit of Joshua Galvin Robson affirmed 8 July 2019, JGR-01, p 84.
230 Transcript of the hearing on 30 July 2019, p 78, line 45 to p 79, line 11.

> the proceedings could be transferred to the Federal Court so that they could be dealt with. That's the simple and the complex explanation for why it wasn't agitated before his Honour at the case management hearing at five. Your Honour, that's our submissions unless we can assist you further?"

[175] The defendants submit that Greenwood J was entitled to know[231] that a transfer application would be made by the first plaintiff:[232]

> "MR DUNNING: Well, it would certainly impact upon the making of those orders. And in terms of that court organising its affairs, it would want to know that there was such an application in prospect. Now, we don't want to do anything to jeopardise the hearing in the Federal Court, which is, in part, the reason for the strength of our opposition here. We have plenty of other good reasons that – the reason we're doing it as well, but we see this as a – as, ultimately, a ploy to stop the trial going ahead at the end of the year, because once it gets over there, they then say, "Well, here are the issues we want to raise, when it's [indistinct] they're going to take the limitation defence. We won't need to go and investigate that.
>
> HER HONOUR: But the – to be fair, they're – that's just matters of speculation, though, isn't it? You never know, it might get over there and it just – the trial goes as set down by Justice Greenwood.
>
> MR DUNNING: Well, there's evidence due in those proceedings in a matter of weeks for, as I say, a two-week trial in the first two weeks of December, so that it would be disruptive I think's an inevitability rather than, in our respectful submission, speculation. Your Honour, can I then move to our learned friends' outline and deal with some matters specifically there."

[176] The Federal Court trial was thus set down on the afternoon of 27 June 2019 with no indication that there would be a transfer application made by the first plaintiff to consolidate proceedings. The Court ordered by consent that:[233]

> "1. The proceeding is set down for a two-week trial commencing on 2 December 2019.
>
> 2. By 12 July 2019:
>
> > (a) the plaintiff file and serve its concise statement in reply to the defendant's concise statement in response; and
> >
> > (c) the cross-respondents file and serve their concise statements in response to the concise statement of cross-claim.
>
> 3. By 26 July 2019, the cross-applicant file and serve any concise statements in reply to the cross-respondents' concise statements in response to the concise statement of cross-claim.

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231 Transcript of the hearing on 30 July 2019, p 99, line 43.
232 Transcript of the hearing on 30 July 2019, p 100, line 1-19.
233 Affidavit of Joshua Galvin Robson sworn 8 July 2019, JGR-01, p 54-55.

4. By 9 August 2019, the parties agree or attempt to agree:

(a) a statement of facts and issues; and

(b) an index to a bundle of documents to be tendered at trial, to be broken into three parts if necessary, namely:

(i) documents admitted by consent;

(ii) documents upon which the plaintiff/cross-respondents rely, to which the defendant/cross-applicant object; and

(iii) documents upon which the defendant/cross-applicant rely, to which the plaintiff/cross-respondents object.

5. By 23 August 2019, the plaintiff file and serve any affidavit evidence upon which it intends to rely.

6. By 20 September 2019, the defendant/cross-applicant file and serve any affidavit evidence and expert evidence upon which it intends to rely.

7. By 11 October 2019:

(a) the plaintiff file and serve any affidavit evidence in reply;

(b) the cross-respondents file and serve any affidavit evidence and expert evidence upon which they intend to rely.

8. By 25 October 2019, the defendant/cross-applicant file and serve any affidavit evidence and expert evidence in reply.

9. By 8 November 2019, the parties' experts conduct a joint conclave and produce a report identifying any issues that remain in dispute, and the reasons why.

10. By 15 November 2019, the parties' file a court book comprising the concise statements, statement of agreed facts and issues, affidavits, expert reports and tender bundle of documents.

11. By 29 November 2019, the parties exchange objections to evidence.

12. Liberty to all parties to apply on two days' notice.

13. Costs in the proceeding."

[177] It is noted that two extra days were reserved on 16 and 17 December 2019 in case the trial exceeded the allocated two weeks.[234]

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234 Transcript of the case management hearing on 27 June 2019, p 3, line 30-33 annexed to Affidavit of Michael John Sophocles sworn 11 July 2019, MJS-1, p 18.

[178] The Club then made this application to transfer this proceeding eleven days later after the order of Greenwood J set out a program for the Federal Court trial to commence on 2 December 2019.

[179] I agree with the defendants that if this proceeding was transferred then there is a real risk that the Federal Court trial would be delayed.

[180] A relevant factor in deciding whether it is in the interests of justice to transfer the proceeding is the stage of the proceeding in the respective courts.[235] In my view this factor weighs heavily against the transfer of this proceeding to the Federal Court.

[181] Accordingly, weighing up all of the factors, I do not consider it is in the interests of justice to transfer this proceeding to the Federal Court which carries with it a risk of delaying the Federal Court trial due to commence on 2 December 2019.

[182] The first plaintiff's transfer application is dismissed.

Costs

[183] The first plaintiff seeks an order that the defendants pay the first plaintiff's costs of the first plaintiff's application filed 8 July 2019 (the transfer application) and of the defendants' amended application filed 24 July 2019.[236] The defendants did not provide submissions on costs.

[184] I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions on the question of costs. I encourage the parties to agree on a timetable for the exchange of written submissions and, if it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing. In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

Orders

[185] The first plaintiff is granted leave to take a step in this proceeding.

[186] The defendants' amended application, to dismiss or permanently stay the proceeding for want of prosecution, filed 25 July 2019, is dismissed.

[187] The first plaintiff's amended application, to transfer the proceeding to the Federal Court, filed by leave 11 July 2019, is dismissed.

[188] The question of costs is adjourned to a date to be fixed.

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235 *Commissioner of Taxation v Residence Riverside Pty Ltd* (2013) 95 ATR 86; [2013] FCA 720 at [17] per McKerracher J.

236 First plaintiff's outline of submissions filed 26 July 2019, p 8, [27].