SUPREME COURT OF QUEENSLAND

CITATION:	*Lutheran Church of Australia Queensland District v Parups Waring Architects Pty Ltd* [2022] QSC 214
PARTIES:	**LUTHERAN CHURCH OF AUSTRALIA QUEENSLAND DISTRICT trading as ST JAMES LUTHERAN COLLEGE** (Applicant/Plaintiff) **v** **PARUPS WARING ARCHITECTS PTY LTD ACN 011 043 777** (Respondent/Defendant)
FILE NO/S:	3386/19
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 September 2022 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2022
JUDGE:	Crowley J
ORDER:	**The Order of the Court is that:**

1. **Pursuant to rule 371(2)(d) of the *Uniform Civil Procedure Rules 1999* (QLD) ("UCPR"):**

   (a) **the plaintiff's service of the report of Eric Hebron dated 9 May 2022 on 13 June 2022 be taken to be effectual; and**

   (b) **the plaintiff's service of its second list of documents on 19 August 2022 be taken to be effectual.**

   Pleadings

2. **The defendant file and serve an amended defence by 4 pm on 14 October 2022.**

3. **The plaintiff file and serve any amended reply by 4 pm on 28 October 2022.**

4. **The defendant file and serve any application for further disclosure by 4 pm on 14 October 2022.**

Disclosure

5. In the event the defendant files an application in accordance with order 4, above, then the orders in 6 to 14, below, do not apply.

Lay evidence

6. The plaintiff serve a summary of the evidence of any lay witness to be called by the plaintiff at the trial of the proceeding by 4 pm on 18 November 2022.

7. The defendant serve a summary of the evidence of any lay witness to be called by the defendant at the trial of the proceeding by 4 pm on 17 December 2022.

8. Without leave of the Court, no party shall be permitted to lead lay evidence from a lay witness not fairly disclosed by a summary delivered in accordance with Orders 7 and 8 above.

Expert evidence

9. The plaintiff file and serve any further expert evidence on which it intends to rely by 4 pm on 20 January 2023.

10. The defendant file and serve any further expert evidence on which it intends to rely by 4 pm on 10 February 2023.

11. The plaintiff deliver any expert evidence in reply on which it intends to rely by 24 February 2023.

Mediation

12. By 17 March 2023, the parties are to participate in a mediation.

13. The costs of the mediation will be shared equally between the parties.

Trial plan and request for trial date

14. If the proceeding is not resolved at mediation:

(a) The plaintiff deliver a draft trial plan to the defendant by 24 March 2023.

(b) The defendants respond to the draft trial plan by 31 March 2023.

(c) The parties confer on or before 6 April 2023 to finalise the trial plan.

(d) The parties sign and file a request for trial

date on or before 14 April 2023.

Liberty to apply

15. The parties be at liberty to apply on 3 days' notice.

Costs

16. The plaintiff pay the defendant's costs of the application filed on 12 September 2022 on a standard basis.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – DORMANT PROCEEDINGS – GENERALLY – where the plaintiff filed a claim in March 2019 – where the last formal step in the proceeding was taken in July 2020 – where the plaintiff sent a letter to the defendant in June 2022 giving notice under r 389(1) of the *Uniform Civil Procedure Rules 1999* (Qld) that the plaintiff intended to take a step in the proceeding – where the plaintiff sent another letter to the defendant in June 2022 enclosing a copy of an expert report – where the service of the expert report and the service of the list of documents were irregular steps in the proceeding – where r 389(2) provides that if no step was taken in a proceeding for two years, a new step could not be taken without an order of the Court – whether the Court ought to declare the irregular steps to be effectual under r 371(2)(d) – whether the plaintiff is first required to seek leave under r (2) to take a new step in the proceeding

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 371, r 372, r 389

AON Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, cited
Perez v Transfield Queensland Pty Ltd [1979] Qd R 444, cited.
Tyler v Custom Credit Corp Ltd [2000] QCA 178, cited
Ure v Robinson [2016] QSC 210, cited
Ure v Robinson [2017] 2 Qd R 566; [2017] QCA 20, cited
Way v Primo Rossi Pty Ltd [2018] QCA 203, cited

COUNSEL: M May for the applicant/plaintiff
J O'Regan for the respondent/defendant

SOLICITORS: Cooper Grace Ward for the applicant/plaintiff
Thynne + Macartney Lawyers for the respondent/defendant

Background to the application

[1] This is an application in which the Plaintiff seeks orders to rectify an irregular step taken in this proceeding. The application raises for consideration rr 371 and 389 of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*") and the interaction between those rules. The proper approach, and the result of the exercise of the relevant discretion, are in issue between the parties, as is the appropriate order to be made with respect to costs. Other directions as to the future progress of the matter are also sought but they are not contentious.

[2] The relevant background to this matter is set out in the Defendant's Outline of Submissions. The matter relates to services provided by the Defendant to the Plaintiff in 2014 and 2015. The Plaintiff college engaged the Defendant architects to provide design and project management services with respect to a new multipurpose classroom and sports structure, referred to as the covered outdoor learning area ("COLA"). The covered sports area included, amongst other things, a netball court. The COLA as finally designed and built did not permit the netball court to have the sideline clearances required to allow the court to host official netball club games.

[3] A key matter in issue in the proceeding is whether the Plaintiff instructed the Defendant that the netball court was to be able to host official games. The Plaintiff alleges, and the Defendant denies, that in early 2014 the Plaintiff gave oral instructions to the Defendant to that effect.

[4] The Plaintiff seeks damages for breach of contract, for negligence and for misleading or deceptive conduct in breach of the Australian Consumer Law, in relation to the inability of the netball court to host official games.

Background of the proceeding to date

[5] In terms of the background of the proceeding to date, as set out in the Plaintiff's Outline of Submissions, the Plaintiff college filed its claim and statement of claim on 29 March 2019. The Defendant filed its defence on 16 May 2019. The Plaintiff filed a reply on 29 May 2019. Since the close of the pleadings, in general terms, the parties have been engaged in performing disclosure, corresponding about issues regarding disclosure and, at least on the part of the Plaintiff, obtaining expert evidence and lay evidence.

[6] The last formal step taken prior to the more recent events in issue in this application was on 30 July 2020, when the Plaintiff provided the Defendant with copies of documents on its list of documents. It appears to be uncontroversial that this is a step in the proceeding for the purposes of r 389.

[7] From that time until the 13 June 2022, the Plaintiff contends that it did various things to progress its claim, which are set out in the affidavit of Mr Karunaratne, but the Plaintiff does not contend that any of those things amounted to actions that would constitute a formal step in the proceeding for the purposes of r 389.

[8] On 13 June 2022, the Plaintiff's solicitors sent two letters to the Defendant's solicitors. The first letter gave notice under r 389(1) that the Plaintiff intended to take a step in the proceeding. The second letter of that date enclosed a copy of an expert report. The Defendant did not respond to those letters at that time.

[9] Subsequently, on 19 August 2022, the Plaintiff's solicitors served a further list of documents on the Defendant's solicitors. That same day, the Defendant's solicitors wrote to the Plaintiff's solicitors stating that they considered the proceeding to be stayed pursuant to r 389(2) and that they considered the steps taken on 13 June 2022 and 19 August 2022 to be irregular.

Relevant rules of the *UCPR*

[10] Rule 389, which provides for the continuation of proceeding after delay, states:

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

[11] Rule 371, which provides for the effect of a failure to comply with the *UCPR,* states:

> **371 Effect of failure to comply with rules**
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> (1) A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken or order made in a proceeding, a nullity.
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> (2) Subject to rules 372 and 373, if there has been a failure to comply with these rules, the court may—
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> (a) set aside all or part of the proceeding; or
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> (b) set aside a step taken in the proceeding or order made in the proceeding; or
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> (c) declare a document or step taken to be ineffectual; or
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> (d) declare a document or step taken to be effectual; or
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> (e) make another order that could be made under these rules (including an order dealing with the proceeding generally as the court considers appropriate); or
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> (f) make such other order dealing with the proceeding generally as the court considers appropriate.

Irregular steps taken in this proceeding

[12] The service of an expert report would constitute a step taken in the proceeding. There does not seem to be any issue in dispute with respect to that matter in this case. But what gives rise to the issues to be considered in this particular case is that when the expert report was served by the Plaintiff on 13 June 2022, at the same time

notice was given under r 389(1), the step taken was irregular. That is because there was noncompliance with r 389(1), in that one month's notice was required to be given before the taking of a step after service of the relevant notice that day. Therefore, pursuant to r 371(1), there has been an irregularity, but the step of serving the expert report has not been rendered a nullity.

[13] Similarly, I am satisfied the service of a further list of documents would constitute a step taken in the proceeding, although again, here, that is an irregular step as it happened on 19 August 2022 and, by that stage, more than two years had passed since the last formal step in the proceeding on 30 July 2020. In those circumstances, no step could be taken by the Plaintiff without seeking an order of the Court granting leave for that to be done in accordance with r 389(2). Rule 389(2) effectively operates as a stay of the proceeding unless and until the defaulting party satisfies the Court it is appropriate to exercise its discretion to permit a step to be taken. It is in those circumstances that the Plaintiff brings this application.

The Defendant's submissions

[14] The Defendant opposes the application. In doing so, the Defendant raises a threshold issue with respect to r 389(2). The submission that is made is that this is the "gateway" through which the Plaintiff must seek leave to rectify the irregularities and it is not simply a matter of considering the exercise of discretion under r 371(2)(d), pursuant to which the Plaintiff seeks a declaration that a step taken has been effectual.

[15] The Defendant says that this is necessary because the Plaintiff's service of the expert report on 13 June 2022 was not a step taken in the proceeding and, at present, is not a step taken in the proceeding. Therefore, as two years have now passed since the last formal step was taken, the only discretionary avenue open to the Plaintiff is to seek the Court's leave under r 389(2).

[16] The same applies with respect to the service of the further list of documents. If the Defendant's argument is correct, then the exercise of discretion would be informed and guided by the considerations identified by Atkinson J in *Tyler v Custom Credit Corp Ltd* ("*Tyler*").[1] The Defendant concedes though, that if I am satisfied that it is appropriate to grant leave and make an order under r 389(2), there would be no residual argument to oppose an order for the declaration sought with respect to r 371(2)(d). That follows in the Defendant's argument because the discretionary considerations in respect of each of rr 389(2) and 371(2)(d) are the same, or at least substantially similar.

The Plaintiff's submissions

[17] The Plaintiff, on the other hand, says that it is not necessary to proceed through r 389(2) if the Court makes an order under r 371(2)(d), and whether such an order might be made involves a separate and different exercise of discretion, which involves consideration of matters that are not necessarily synonymous with the considerations identified in *Tyler*.

[18] The Plaintiff notes – and it appears to me as well – that there is no case that attempts to identify the matters that may be relevant to the exercise of discretion under r

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1 [2000] QCA 178 at [2].

371(2)(d). The Plaintiff submits it is an unfettered discretion that would be exercised, having regard to the following matters:

(a) the nature of the irregularity;

(b) the relevant circumstances in which the failure to comply occurred and the irregularity has arisen, for example, whether by mistake or by deliberate act;

(c) the terms of r 371(2)(d) of the *UCPR* and the nature of the order sought;

(d) the relevant circumstances in which the declaration that the step is effectual is sought, including the timing of the application and any delay in seeking the order, any events that have occurred since and the impact of such events;

(e) r 372 of the *UCPR*, which imposes the requirement for details of the failure to comply to be given in any application, and the relevant details that have been provided for such an application;

(f) r 5 of the *UCPR* and the overriding obligations of parties, and the ends to which the rules are directed, in terms of promoting and achieving the efficient conduct of litigation. In that respect, the Plaintiff also submits that a breach of the rules may engage various aspects of r 5 and that it is to be borne in mind that r 5 is concerned with matters of substance, not technicalities; and

(g) the consequences of the irregularity, both for the other party or parties in the instant litigation, particularly with respect to any prejudice that arises, and more generally to the administration of justice in the sense discussed in *AON Risk Services Australia Ltd v Australian National University*.[2]

[19] I agree that these considerations are relevant to the exercise of discretion under r 371(2)(d). I would add, though, that they are not necessarily an exhaustive or definitive list of considerations. The matters that will be relevant in any particular case will be determined by the facts and circumstances of that case. I would also add to that list – to the extent that it has not been covered in the matters set out – the purposes of rr 371(1) and 371(2)(d), in particular.

Ure v Robinson

[20] Both parties have referred me to the decision of the Court of Appeal in *Ure v Robinson* ("*Ure*"), in which Bond J (as his Honour then was) stated:[3]

> [37] The evident intention of r 389 is that a stay should be imposed on proceedings in certain circumstances and to require any person who seeks to lift the stay to approach the Court to seek an order. The policy is to ensure that proceedings which are significantly delayed come to the attention of the Court so that they can be dealt with appropriately: see *Thompson v Kirk* [1995] 1 Qd R 463 at 464 per Derrington J.

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2 (2009) 239 CLR 175.

3 [2017] 2 Qd R 566; [2017] QCA 20.

> [38] The construction of r 389 for which the appellant contends would defeat that intention. By the simple expedient of ignoring the requirements of r 389 and taking a step after the expiry of the two year period without approaching the court, a noncompliant litigant would avoid the need ever to comply with r 389(2). If the irregular step taken in breach of r 389(2) is a step for the purposes of r 389(2), once the irregular step was taken it could no longer be said of that proceeding that no step had been taken for two years since the last step. The two year time period would have started running again by virtue of the irregular step.
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> [39] I reject the proposed construction. The proper construction of r 389(2) is that the 'last step' contemplated must be the last effectual step, namely a step which was effectual because it was regular when taken, or a step which, although irregular when taken, has since been declared to be effectual under the rules. Taking that approach to the clause accords with the evident intention of r 389 and avoids the appellant's construction, which would deny utility to the rule.
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> [40] Indeed, taking this approach to the rules is entirely consonant with r 5 and with r 371, especially in light of the fact that there is a specific power in r 371 to declare a non-compliant step to be effectual. It will put the onus on the party seeking to re-enliven proceedings after the two year period has passed to approach the Court to seek the appropriate orders. If the Court is approached by such a person before the step is taken the appropriate order, assuming the Court is persuaded to exercise its discretion, would be an order pursuant to r 389(2) authorising the step to be taken. If the step has already been taken in breach of r 389(2) then the appropriate order would be an order under r 371(2)(d) declaring the step to be effectual, perhaps together with an order *nunc pro tunc* under r 389(2) permitting the step to be taken.
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> [41] This approach to what constitutes a step for the purposes of r 389(2) does not treat the irregular step as a nullity contrary to r 371. It treats the step as irregular but not effectual. That seems to be consistent with the existence in r 371 of an express power to declare a step to be effectual. Rule 371(1) does not make regular that which is irregular. 15 That depends upon the exercise of the discretions authorised by r 371(2). (footnotes omitted)

[21] The Plaintiff contends that paragraph [39] of Bond J's judgment supports its position that it is not necessary to obtain leave under r 389(2) noting, in particular, his Honour's view that the proper construction of r 389(2) is that the last step contemplated must be the last effectual step, namely a step which was effectual because it was regular when taken, or a step which, although irregular when taken, has since been declared to be effectual under the rules.

[22] The Defendant contends that paragraphs [39] and [40] support its position that the proceeding is stayed. No step had been taken and no declaration had been sought before the two-year limit within r 389(2) expired. Therefore, the position is that it is necessary for leave to be obtained under r 389(2) and not simply a matter of seeking the Court to exercise a discretion under r 371(2)(d).

[23] The Defendant also referred me to the first instance decision in *Ure v Robinson*, where Jackson J relevantly stated:[4]

> [17] … it follows that the effect of rule 389 subsection (2), is not avoided simply because the opposite party does not make a prompt application to set aside a step taken in contravention of the prohibition within a reasonable time.
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> [18] Accordingly, where there has been a delay in taking a step in a proceeding for two years or more, the question of whether the proceeding should be permitted to continue will arise - first on an application for an order that a new step may be taken under rule 389 (2) - although it may equally arise in an application to dismiss the proceeding for want of prosecution. It is unsurprising, therefore, that the factors to consider in deciding whether or not to dismiss a proceeding for want of prosecution, or whether to give leave to proceed under rule 389 (2) are much the same. That conclusion is supported by the reasons of Atkinson J. in *Tyler v Custom Credit Corp Limited*, where a well-known statement of the relevant factors is set out.

Way v Primo Rossi Pty Ltd

[24] The Defendant further referred me to the Court of Appeal's decision in *Way v Primo Rossi Pty Ltd* ("*Way*"), in which Brown J stated:[5]

> [11] The construction of r 389(1) contended for by the appellants would require additional words to be inserted into that provision, such as, "and such a step must be taken within a reasonable time after the issuing of the notice." There is no basis for the Court to read such words in rule 389(1) of the UCPR. The purpose of rule 389 is to ensure that parties do not unduly delay in the prosecution of proceedings and that, where no step has been taken for two years, the matter comes to the attention of the Court so that they can be dealt with appropriately. The construction of r 389 of the UCPR propounded by the appellants would be contrary to the intent of the rules, which are to ensure parties act expeditiously, and particularly contrary to r 5 of the UCPR.
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> [12] There is no conflict between r 389(1) and (2) of the UCPR which requires the Court to reconcile the two sub-rules. Issuing a notice of intention to proceed under r 389(1) does not obviate the parties' obligation to take steps in

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4 [2016] QSC 210.

5 [2018] QCA 203 at [11]-[12].

> proceedings in a two year period. If no step is taken in a proceeding for two years, leave must be sought under r 389(2), notwithstanding the issuing of a notice under r 389(1) of the UCPR. In the present case, the appellants had taken no step in the proceedings for more than two years and leave was required. (footnotes omitted)

[25] The Defendant submitted those paragraphs make plain that the purpose of r 389 is to ensure that the parties do not unduly delay the prosecution of a proceeding and that, where no step has been taken for two years, the matter comes to the attention of the Courts, so that it can be dealt with appropriately.

[26] It was also emphasised by the Defendant that whilst the issuing of the notice of intention to proceed in *Way* occurred within the two-year period since the last step was taken, that fact did not obviate the party's obligation to then take a step in the proceeding before the two-year time period expired. By analogy, the Defendant's argument in this case is that leave must be sought by the Plaintiff under r 389(2), notwithstanding the issuing of a notice by the Plaintiff under r 389(1) of the *UCPR* within the two-year time period.

The interaction between rr 371(2)(d) and 389(2)

[27] In my view, the Plaintiff's argument with respect to the interaction between the rules is correct. If a declaration is made under r 371(2)(d), then the irregularity may be rectified and will be declared to be an effectual step. It is therefore a step in the proceeding. That can be achieved by making an application to the Court after the two-year period prescribed by r 389(2) has elapsed since the taking of the last formal step in the proceeding.

[28] In my view, this is clear from the judgment of Bond J in *Ure* at paragraphs [39] and [40]. Those paragraphs of his Honour's judgment make plain that an order made under r 371(2)(d) declaring the step to be effectual will be taken to be a step in a proceeding.

[29] Further, in my view, the first instance judgment of Jackson J in *Ure* does not gainsay that interpretation. His Honour simply did not consider the issue of what constitutes a "step" in the way the matter was subsequently considered by Bond J in the Court of Appeal. In my opinion, that is how the term "step" must be understood for the purposes of the present application.

[30] The relevant facts in *Ure* are different to the present case. In *Ure*, the appellant served the respondent with a list of documents, more than four years after the last formal step had been taken in the proceeding, without first seeking leave under r 389(2). The respondent then applied for an order dismissing the claim for want of prosecution and declaring ineffectual the delivery of the list of documents.

[31] The argument that was put in *Ure* was premised on the earlier decision of *Perez v Transfield Queensland Pty Ltd* ("*Perez*")[6] which considered the former *Rules of the Supreme Court 1900* (Qld), which operated before the commencement of the *UCPR*. Jackson J observed in the first instance judgment in *Ure*,[7] r 389(1) of the *UCPR* is derived from former O 90 r 9 and r 371 of the *UCPR* was derived from

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6 [1979] Qd R 444.

7 [2016] QSC 210 at [10].

former O 93 r 17 and O 93 r 18.[8] His Honour went on to note,[9] there is a significant distinction between the former rules that were considered in *Perez* and those which apply under the current *UCPR*. The consequence of that difference was identified by his Honour where he set out the relevant reasons for the judgment in *Perez*,[10] and where he concluded that *Perez* was no longer representative of the law,[11] meaning that it was not necessary for a party to now bring an application as soon as possible, or within a reasonable time, seeking a declaration that a step was ineffectual, or to set aside a step taken in contravention of r 389(2), before r 389(2) applied to operate as a stay.

[32] It was in that context that the appellant in *Ure* argued in the Court of Appeal that the irregular step taken there was nonetheless a step taken in the proceeding and that Jackson J had erred in concluding that leave to proceed was required when no order had been made first declaring that service of a list of documents in that case was ineffectual. That is what led to the point considered on appeal as to whether an irregular step could nonetheless be considered as a step taken in the proceeding and, therefore, leave would not be required under r 389(2). Bond J concluded that the appellant's argument was not correct and Jackson J had not erred in concluding *Perez* no longer represented the law.[12]

[33] As to the reliance upon the Court of Appeal decision in *Way*, the factual circumstances there were quite different. Brown J summarised the relevant facts of that case as follows:[13]

> [3] The appellants in this case issued proceedings in November 2013. No step was taken in the proceedings after 17 September 2014. On or about 25 August 2016, after a change in solicitors, the appellants issued a notice of intention to proceed under rule 389(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (the *'UCPR'*). No step was sought to be taken in the proceedings until nine months after the provision of the notice pursuant to r 389(1) of the *UCPR*. While the appellants applied for leave to proceed, they contended that they did not, on the proper construction of r 389(2) of the *UCPR*, have to seek such leave. The primary judge rejected that contention. That is the first matter sought to be raised on appeal. It raises a point of construction for decision by this Court.

[34] As this brief factual summary shows, in *Way* the notice of intention to take a step had been given in accordance with r 389(1), but at a time less than one month before the expiry of two years since the taking of the last formal step. In those circumstances, a regular step could never have been achieved. The appellants in that case argued that each of rr 389(1) and (2) operated exclusively of each other, allowing the appellants to avoid the operation of r 389(2). That argument was rejected, and it was in that context that paragraphs [11] and [12] of her Honour's

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8 Ibid at [11].
9 Ibid at [12].
10 Ibid at [13].
11 Ibid at 6 [15].
12 *Ure* [2017] 2 Qd R 566 at [43].
13 [2018] QCA 203 at [3].

reasons were made, in that there was a requirement to seek leave if no step had been taken.

[35] However, the issue in *Way* was not whether a notice of intention to proceed is a step in the proceeding; as her Honour noted, the appellants in that case quite correctly conceded it was not.[14] Whether a step was taken or later declared to be effectual, as would be the case under rule 371(2)(d), was not considered in that case, nor was the interpretation of a "step" in accordance with Bond J's reasons in *Ure* relevant in that case. There, because the service of the notice of intention was not a step, nor could it be declared as being effectual as a step in the proceeding, the issue did not arise.

[36] For the reasons I have set out, I conclude that the Plaintiff is not required to seek leave under r 389(2) as a threshold gateway before I may consider the Plaintiff's application for a declaration under r 371(2)(d). In my view, the appropriate course is to consider that part of the application first. If I am satisfied that it is appropriate to exercise my discretion to declare the step to be effectual, there will be no need to consider the application for leave under r 389(2), as the service of the report would be a step taken within two years, and it follows that the subsequent service of the further list of documents would be a step that also ought to be declared as effectual, as it was taken a short time later.

Whether the Court ought to exercise its discretion under r 371(2)(d)

[37] The question now is whether I ought to exercise my discretion in favour of the Plaintiff, having regard to the various relevant discretionary considerations that I have already outlined. I note the following matters:

(a) the purpose of r 371(1) is that an irregularity is not a nullity, and r 371(2)(d) provides for one type of remedial discretionary relief that may be ordered if the facts and circumstances of the case warrant it;

(b) I have had regard to the overriding obligations in r 5;

(c) I have previously identified the nature of the irregularity and the circumstances in which it arose, which are further referred to in the affidavit of Malinda Karunaratne at paragraph 42 in particular. This was not a case of a deliberate act, but rather one of a mistake or of oversight;

(d) the irregularity arose close to the two-year period prescribed by r 389(2). However, unlike in *Way*, the service of the report was capable of constituting a step, albeit one that was irregular and would be required to be declared as effectual under r 371(2)(d). The irregularity in this matter occurred approximately one year and 10 months before the two-year period expired, which is a month before the circumstances that were present in *Way*. Therefore, the step in this matter could have been regularly taken by waiting for one month and then serving the report. The irregularity here has been described by the Plaintiff as serving the report too early, not too late. That is an apt description in some senses but, nevertheless, it was still an irregularity;

(e) with respect to the service of the further list of documents, the Plaintiff accepts this would otherwise engage r 389(2) unless I accept the Plaintiff's

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14 Ibid at 4 [9].

argument on r 371(2)(d) and exercise my discretion to declare the report service was an effectual step;

(f) the irregularity in serving the expert report was a matter which the Defendant was seemingly aware of, but did not raise any issue about, until after the two-year period from the last formal step had expired, when the list of further documents was served by the Plaintiff. The Plaintiff's argument is that this matter could have been raised earlier by the Defendant, and in those circumstances, the Plaintiff could have cured the irregularity by serving the report before the expiry of the two-year period. Whilst that may be so, it was nevertheless the Plaintiff's default in not serving the report in a regular way in accordance with r 389(1);

(g) the application for an order under r 371(2)(d) has been promptly sought by the Plaintiff. Details were provided in accordance with the requirement in r 372 and no issue has been taken with respect to the adequacy of the particulars of the application or of the circumstances of the default;

(h) there does not appear to be any intervening events that have affected the position of the parties or which would impact upon the future conduct of the litigation and a fair trial of issues in any insurmountable way or any way which would cause undue prejudice. No prejudice has been identified on the part of the Defendant beyond the delay in finalising the litigation;

(i) I do accept, though, that delay can be insidious in its effect, and its precise impact cannot be known. But at the present time, in my opinion, it would be speculative to suggest that that alone would be a basis to refuse to exercise my discretion. I accept that there has been delay since the proceeding commenced but I do not consider it to be unreasonable delay. The effect of the delay will also result in witnesses having to recount or recall conversations from nine years ago, rather than seven years ago, but I do not consider that to be such as to cause unfairness or injustice that otherwise would affect the availability of relevant evidence and the cogency of that evidence;

(j) I also note, however, that the inaction in the proceeding has been compounded by the disclosure issues that have arisen and the complaint that has been raised with respect to disclosure by the Defendant, which ultimately culminated in a further failure on the part of the Plaintiff to respond to the Defendant to inform them of the view that the Plaintiff had reached, namely that there was nothing further to disclose. That is in accordance with the letter of 20 August 2020 and the email of that same date serving that letter, Exhibit 1, which is before me. If that information had been communicated earlier in time when the Plaintiff had formed that view, then the Defendant could have, and I am told *would* have, made an application for disclosure two years ago.

[38] Having regard to the above matters and the relevant circumstances of this case, I do consider it is appropriate to exercise my discretion under r 371(2)(d) of the *UCPR* to declare the irregularities in the Plaintiff's service of the expert report and the further list of documents as effectual steps taken by the Plaintiff.

Orders

[39] In those circumstances, I will grant the application. I do not consider it is necessary, for the reasons I have given, for order 2 to be made, with respect to the relief sought under r 389(2), and that will be omitted and the further paragraphs of the order, in the draft form that has been provided to me, will be renumbered accordingly, and I will make those orders.

Costs

[40] The final issue is with respect to the question of costs. In my view, the appropriate order to make is that the Plaintiff pay the Defendant's costs of the application on a standard basis. I am of that view because the Plaintiff has sought an indulgence and been granted one.