SUPREME COURT OF QUEENSLAND

CITATION:	*Way & Anor v Primo Rossi Pty Ltd & Anor* [2018] QCA 203
PARTIES:	**LINDA JOY WAY** (first applicant) **WAY & SMYTH FORTUNE PTY LTD** ACN 073 062 209 (second applicant) **v** **PRIMO ROSSI PTY LTD** ACN 010 001 055 (first respondent) **TIMOTHY FREDERICK TRITTON** (second respondent)
FILE NO/S:	Appeal No 9155 of 2017 DC No 376 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport – Unreported, 11 August 2017 (Muir DCJ)
DELIVERED ON:	31 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2018
JUDGES:	Morrison and Philippides JJA and Brown J
ORDERS:	**1. Grant leave to appeal.** **2. Allow the appeal.** **3. Set aside the orders of the primary judge dated 11 August 2017, save for paragraph 3 of her Honour's orders.** **4. Order that the appellants be granted leave under r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) to take a further step in the proceeding.** **5. Order that the respondents pay the appellants' costs of and incidental to the appeal to be assessed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – where the appellants issued proceedings in November 2013 for various causes of action arising from a purported agreement for the sale of an interest in a business – where the appellants in August 2016 issued

a notice of intention to proceed under rule 389(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*) – where the appellants subsequently applied for leave to proceed, but contended that they did not, on the proper construction of r 389(2) of the *UCPR*, have to seek such leave – where the primary judge found that the appellants were required to seek leave to proceed – where the primary judge determined not to allow the appellants to proceed and dismissed the proceedings pursuant to r 280 of the *UCPR* – where the appellants argue that the primary judge gave too much weight in the question of prospects of success to the causes of action which required a valuation of the business – where the respondents submit that the primary judge was correct to refuse leave, given the appellants' poor prospects of success, delay and the prejudice to the respondents – whether there is an error by the primary judge – whether an appeal is necessary to correct a substantial injustice to the applicant

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – where discretion is to be re-exercised by the Court of Appeal – where considerations in *Tyler v Custom Credit Corp* are applicable – whether leave to proceed should be granted under r 389

District Court of Queensland Act 1967 (Qld), s 118
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 280, r 389(1), r 389(2)

Allianz Australia Insurance Limited v Corowa (2016) 76 MVR 260; [2016] QCA 170, cited
Artahs Pty Ltd v Gall Standfield & Smith (A Firm) [2013] 2 Qd R 202; [2012] QCA 272, cited
Cooper v Hopgood & Ganim [1999] 2 Qd R 113; [1998] QCA 114, cited
Quinlan v Rothwell [2002] 1 Qd R 647; [2001] QCA 176, cited
Tyler v Custom Credit Corporation Ltd & Ors [2000] QCA 178, applied
Ure v Robertson [2017] 2 Qd R 566; [2017] QCA 20, cited

COUNSEL: G J Radcliff for the applicants
S Miller (*sol*) for the respondents

SOLICITORS: Legend Legal Group for the applicants
Cronin Litigation Lawyers for the respondents

[1] **MORRISON JA:** I agree with the reasons of Brown J and the orders her Honour proposes.

[2] **PHILIPPIDES JA:** I have had the advantage of reading the reasons for judgment of Brown J. I agree with her Honour's reasons and the orders proposed.

[3] **BROWN J:** 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.

[4] The primary judge, after rejecting the appellants' contention that they were not obliged to seek leave to proceed, determined not to allow the appellants to proceed and dismissed the proceedings pursuant to r 280 of the *UCPR*. That exercise of discretion is the subject of the second matter that has to be determined on this appeal.

[5] The appellants contend that leave is not required pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld), because the primary judge's orders brought the proceedings to an end. The respondents made no submission in this regard. The proceedings were commenced after s 118(2) of the Act was amended in 2010. The judgment does not fall within either of the circumstances in s 118(2)(a) or (b) of the Act, therefore the appellants do not have a right of appeal. Under s 118(3) of the *District Court of Queensland Act* 1967 (Qld), the appellants require leave to appeal from this Court.[1] Leave to appeal is generally granted where there is both a reasonable argument that there is an error to be corrected and an appeal is necessary to correct a substantial injustice to the applicant.[2] This will be considered by reference to the grounds of appeal sought to be raised.

Did the appellants need leave to proceed?

[6] The appellants contend that subsection (1) and (2) of r 389 of the *UCPR* operate exclusively of each other. Rule 389 of the *UCPR* relevantly provides:

> "(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.
>
> (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."

[7] The learned primary judge determined that the rules plainly envisage the circumstance where, even having issued a notice of intention to proceed, no step is then taken. Rule 389(2) is unqualified: if no step has been taken in a proceeding for two years from the time the last step was taken, a new step must not be taken without the order of the Court. No exception is provided for compliance if a notice has been

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1 As the parties submissions have been framed by reference to "appellants" and "respondents" and the Court documents similarly refer to the parties in those terms, I will continue to refer to the parties by reference to "appellants" and "respondents" even though the appellants are in fact applicants.

2 *Johnson v Queensland Police Service* (2014) 67 MVR 543 at [29].

delivered under r 389(1) prior to the expiry of the two years period since the last step was taken. Her Honour therefore determined that r 389(2) of the *UCPR* applied.[3] The appellants submit that her Honour was incorrect and that if a party complies with the notice requirement of r 389(1), that negates, for a reasonable period of time but no longer than one year after delivery of the notice, the requirement to comply with r 389(2). The appellants contend that if that was not the intention of the rules, and the two rules are to be read independently, the legislature should have determined that the delay period for r 389(1) be 1 year and 11 months. In particular, the appellants rely on the fact that r 389(1) has not been given primacy over r 389(2) of the *UCPR* by the use of words such as "subject to r 389(2)" in r 389(1) of the *UCPR*.

[8] The respondents contend that there is no ambiguity in r 389 of the *UCPR* and that, as no step had been taken for a period of more than two years, the appellants were required to seek leave to proceed with litigation.

[9] As was quite correctly conceded by the appellants, a notice of intention to proceed is not a step in a proceedings.[4] At the time that the application for leave to proceed was heard by her Honour, no step had been taken in the proceedings since September 2014, which was by the respondents. No step had been taken, notwithstanding that a notice of intention to proceed had been delivered in August 2016. The application seeking leave to proceed and also the application that the respondents provide copies of certain documents from the respondents' list of documents within 21 days were filed on 31 May 2017.

[10] While it is true that if a party issued a notice of intention to proceed after one year and 11 months of not taking a step, they would be precluded from taking a step in the proceeding without seeking leave of the Court under r 389(2), given that the party must under r 389(1), before taking a step in the proceeding, give a month's notice of the party's intention to proceed, that does not support the construction contended for by the appellants. On the appellants' argument, a party could perpetually issue a notice of intention to proceed a month prior to the two year period and then not take a step in the proceedings, unless r 389(1) is qualified.

[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.[5] 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*.[6]

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3 AB 345.

4 *Kaats v Caelers* [1966] Qd R 482 at 499 per Stable J (with whom Mack CJ and Hanger J agreed). The decision concerned O 90 r 9 of the Rules of the Supreme Court. It is not materially different from r 389 of the *UCPR* and the decision continues to apply: *Sparkman's Electrical Pty Ltd v Habershon* [2017] QSC 156 at [6] per McMeekin J.

5 *Ure v Robertson* [2017] 2 Qd R 566 at [39].

6 *Artahs Pty Ltd v Gall Standfield & Smith (A Firm)* [2013] 2 Qd R 202 at [4] per McMurdo P.

[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 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.

[13] Her Honour was plainly correct. Rule 389(1) does not operate as an alternative to rule 389(2) once notice of intention to proceed is given.

[14] The appellants' grounds of appeal in paragraphs 1 and 2 are not reasonably arguable. There was no error in law by the learned primary judge.

Should leave to proceed have been refused?

[15] The appellants contend that her Honour's discretion erred in refusing leave to proceed on the basis that:

(a) the delay was not inordinately long, had not been the result of disobedience of court orders and was in part due to the appellants' impecuniosity caused by the respondents' failure to pay;

(b) the primary judge gave too much weight in the question of prospects of success to the causes of action which required a valuation of business and did not in that assessment take into account the cause of action for breach of contract which did not require such a valuation; and

(c) the primary judge applied inordinate weight to the suggestion that the respondents would suffer prejudice if they were required, some ten years after the events, to have the business valued.

[16] The respondents contend that there was delay on the part of the appellants and that there was no evidence that any impecuniosity delayed the appellants in progressing the claim, and the evidence was only that it restricted Ms Way, the first appellant, from engaging senior counsel in a matter which her Honour accepted was not significantly complex. They further contend that the primary judge gave appropriate weight to the appellants' prospects of success and to the prejudice that would be suffered by the respondents if leave to proceed was granted.

[17] There is no dispute that the cause of action arose in June or July 2012 and that the proceedings were commenced some 17 months later on 19 November 2013. The evidence analysed by her Honour showed that the proceedings seemed to progress with some delay although it could not be described as inordinate delay up until September 2014. There was then a delay of over two and a half years until the appellants' application for leave to proceed.

[18] Her Honour addressed the various factors relevant to an application for leave to proceed[7] as identified in *Allianz Australia Insurance Limited v Corowa*,[8] *Cooper v Hopgood & Ganim*,[9] *Quinlan v Rothwell*,[10] *Keioskie v Workers' Compensation*

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7 AB 352, 353, 356 and 357.
8 (2016) 76 MVR 260.
9 [1999] 2 Qd R 113 at AB 353.
10 [2002] 1 Qd R 647 at AB 353.

Board of Queensland,[11] *Sparkman's Electrical & Ors v Habershon & Anor*,[12] and *Tyler v Custom Credit Corporation Ltd*.[13]

[19] Her Honour concluded that:[14]

> "Having regard to the criteria outlined in *Tyler v Custom Credit Corporation* and the general considerations in relation to the case, it is my view, firstly, that the plaintiffs do not have a satisfactory explanation for the delay in this proceeding; secondly, there is evidence of prejudice for the defendants if leave was granted; and, thirdly, the defendants will be put to the ongoing expense of expending a claim with poor prospects of success. It follows, therefore, that I consider the plaintiffs' application for leave to proceed ought to be dismissed."

Delay

[20] Her Honour carried out a careful and considered analysis of the steps taken by the parties, the correspondence exchanged between them and the evidence of the first appellant as to impecuniosity.[15] No error was identified by the appellants in respect of her Honour's analysis. While the appellants contended that there was delay by both sides of the record, her Honour's conclusion was open on the evidence. While it is true that the respondents did seek to correspond in time, as was noted by her Honour, the respondents had not sought to expedite the proceedings after September 2014, notwithstanding their counterclaim. However, her Honour had evidence before her that the respondent would abandon its counterclaim if leave was not granted to the appellants.[16] While all parties have a responsibility for expediting a proceeding pursuant to rule 5 of the *UCPR* and cannot sit on their hands, given the evidence before her Honour that the counterclaim would be discontinued, her Honour was not in error in attributing this consideration less significance than it otherwise would have been.

[21] Similarly, her Honour's finding that the delay could not be attributed to the impecuniosity of the appellants was borne out, given the lack of evidence before her Honour. The evidence was accurately set out by her Honour. At the hearing, while not abandoning this ground, Counsel for the appellants rightly did not pursue it.

Prospects of Success

[22] In the amended statement of claim the first appellant claims monies for breach of a loan contract and guarantee in an amount of $383,348.38.[17] The second appellant seeks to raise in the alternative a claim for damages or restitution in the sum of $232,800.00.[18]

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11 Unreported, CA No 46 of 1992, 15 September 1992.
12 [2017] QSC 156.
13 [2000] QCA 178.
14 AB 357, lines 35-42.
15 AB 349-352.
16 AB 352, lines 25-29.
17 Amended statement of claim, paragraphs 20-21, AB 278.
18 Amended statement of claim, paragraphs 22-23, AB 278-279.

[23] The amended statement of claim alleges that the first and second respondents have failed to pay money to the first appellant under a loan agreement between the first appellant and first respondent in relation to a sum agreed to be paid for the sale of the business of the second appellant to the first respondent which was guaranteed by the second respondent. The amount claimed is the difference between the amount the subject of the loan and the amount repaid. Alternatively, the second appellant seeks damages from the first respondent based on an implied term in the business sale contract, that the first respondent would pay a fair and reasonable price for the business of the second appellant, claiming the difference between what is alleged to be a fair and reasonable price for the business in August 2007 and what was paid. There is an alternative claim in restitution based on the fair and reasonable market value.

[24] The respondents deny that a contract as alleged by the appellants existed, but claim that there was an agreement that the second respondent would pay a fair and reasonable price for the interest in the business of The World of Maths Pty Ltd, the second appellant. They contend that the fair and reasonable price for the business of the second appellant in 2007 was $300,000.00.[19] The fair and reasonable price for the interest purchased from The World of Maths Pty Ltd was $150,000.00.[20] The respondents have made a counterclaim seeking, *inter alia*, the amount of $115,300.00 as an overpayment made by them to the appellants.[21] That claim relies on the value of the business in 2007. Thus, the question of a valuation is necessary for the appellants' alternative case and the respondents' defence and counterclaim.

[25] The appellants contend that her Honour erred in assessing their prospects of success in only having regard to the lack of valuation evidence and the fact that the financial records did not support the value of the business as alleged in the amended statement of claim. The appellants claim that in doing so, her Honour failed to have proper regard to the contract claim which did not rely on any valuation evidence. The respondents, however, submit that her Honour gave appropriate weight to the lack of evidence as to the value of the business, particularly since the contract relied upon for the claim for money owing was not signed and the respondents deny there was such an agreement.

[26] Her Honour correctly identified that one of the claims of the appellants was based on a breach of the alleged loan agreement for monies due and owing.[22] Her Honour then went on to discuss the defence of the respondents and their contention that there was no written agreement in the terms alleged by the appellants, in which case the proceeding would turn on the value of the business in 2007.[23] Her Honour stated:

> "It was relatively uncontroversial before me that in the absence of a written agreement as to the purchase price, the value of the business in 2007 will be a relevant and crucial aspect of the proceeding and will no doubt or most likely be a matter of expert evidence."[24]

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19 Defence of the first and second defendants, paragraphs 24-25, AB 297-298.
20 Defence of the first and second defendants, paragraphs 24-25, AB 297-298.
21 Counterclaim, paragraphs 3 and 9-10, AB 301-302.
22 AB 347, lines 43-50.
23 AB 348, lines 20-23.
24 AB 348, lines 20-24.

[27] Her Honour accepted a submission of the respondents that the case was a relatively simple one where the appellants sought relief by way of damages, breach of contract and that ultimately the issue will turn on the value of the business.[25]

[28] The appellants had not at the time of hearing obtained any expert evidence but conceded that it would be necessary.[26] Her Honour analysed the late disclosed financial records and a rudimentary analysis by the respondents. That did not support that the business had a turnover of $450,000.00, which had been the basis of the appellants' accountant's valuation of the business at $500,000.00.[27] Nor were the appellants able to identify any documents which supported the valuation.[28]

[29] The value of the business assumed some prominence in the application before her Honour, given that her Honour had acceded to a previous application by the appellants to adjourn the matter to put further material before the Court in respect of the valuation of the business,[29] particularly financial records relevant to the valuation of the business. The records produced did not on their face support the appellants' valuation. The appellants conceded that expert evidence may well be required, which as noted by her Honour, did not support the appellants' suggestion that the matter could be ready for trial in a couple of months.

[30] Her Honour said in relation to the submissions of the appellants:[30]

> "…even if I was to accept everything that was contained in paragraph 11 [of the appellants outline], the submissions do not deal at all with what will be the issue at trial, which is proof of the value of the business in 2007."

[31] Her Honour did not accept the respondents' submission that the appellants' case was weak insofar as the evidence of the agreements relied on oral testimony.[31] However, her Honour stated that: [32]

> "The more pressing issue in this case does seem to me whether or not the plaintiffs have real prospects in the present case of proving their case insofar as there is a need for evidence in relation to the value of the business in 2007."

[32] The question of the valuation was clearly the focus of the second hearing.

[33] Her Honour concluded that:[33]

> "As I have said, the crux of the case does seem to be the valuation of the business in 2007. Despite having had the opportunity to put on further evidence which at least may go some way to explaining the valuation, the plaintiffs have not done so. Indeed, the evidence does not support the valuation as contended by the plaintiffs."

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25 AB 350, lines 5-10.
26 AB355, lines 14-16.
27 AB 356, lines 8-10 and 20-22.
28 AB 356, lines 23-25.
29 AB 347.
30 AB 354, lines 40-43.
31 AB 354, lines 43-46; AB 355, lines 4-6 and AB 350, lines 15-19.
32 AB 355, lines 6-10.
33 AB 356, lines 34-38.

[34] Her Honour was, given the history of the matter, inclined to the view that the delay in the matter was linked to the difficulties the appellants were having in relation to the valuation.[34]

[35] In assessing the prospects of the appellants' argument, her Honour did not take account of the plaintiffs' claim for damages for breach of contract, focussing upon the causes of action which relied upon the valuation of business. Her Honour had noted earlier in her reasons that the evidence of whether there was an agreement will largely turn upon oral testimony but found that that did not cause any significant prejudice to the respondents given the detailed pleadings.[35] The appellants' claim in contract does not turn on the valuation of the business. In circumstances where her Honour had largely rejected a submission by the respondents that the appellants' case was weak because of the lack of any signed documents and the reliance on oral testimony,[36] her Honour should have brought that matter to bear in assessing the prospects of the appellants' case. In failing to give weight to the contract claim of the appellants in her overall assessment of prospects, her Honour erred in the exercise of her discretion.

Prejudice

[36] In considering the prejudice to the respondents, her Honour found that prejudice would be suffered by the respondents because of the impact on their ability to brief an expert accountant for the purpose of valuing the business. However, the appellants submit that her Honour erred insofar as she particularly focused on the damages claim based on the value of the business rather than the contract claim which was for a liquidated sum. As the oral testimony was particularly relevant to the question of whether agreements were reached, I do not consider that her Honour placed undue weight on the briefing of an expert as opposed to the need for oral testimony. The alternative causes of action of the appellants to the claim in contract in all likelihood require valuation evidence in order to establish the appellants' claim. I do not consider that her Honour erred in finding that there was evidence of prejudice if leave was granted.

Grant of Leave

[37] Given that I have found that her Honour erred in her assessment of the prospects of the appellants' claim and that was one of the factors to which her Honour gave weight in reaching her decision, the application for leave should be granted and the decision should be set aside. Substantial injustice would otherwise be caused to the appellants, given the question of leave being granted affects their ability to continue the action.

Re-exercise of discretion

[38] It is necessary to consider afresh whether leave should be granted under r 389. A number of relevant considerations are identified in *Tyler v Custom Credit Corporation Ltd*,[37] and were considered by the learned primary judge. Given the error of her Honour was in relation to the assessment of the poor prospects of the claim, it is

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34 AB 356, lines 39-40.
35 AB 355/4-6.
36 AB 355/4-6.
37 [2000] QCA 178.

appropriate to consider now that factor in particular together with the impact of any prejudice that will be suffered by the respondents if leave is granted. The claim based on contract turns on oral testimony. To the extent that there are competing views, that will depend on an assessment of the credit of the witnesses. The appellants do however have some support for their claim in contract insofar as there are written, albeit unsigned, documents which they contend represent the contract in part. The defence and counterclaim also lends some support to the fact that there was a contract. While the respondents deny that the contract as pleaded in the amended statement of claim was made, they do contend that an agreement was made between the parties for the purchase of the business The World of Maths Pty Ltd, but that it was in different terms.

[39] The first appellant provided a sworn affidavit deposing that all of the facts insofar as they are relevant to the merits of her claim and the second appellant's claim are true and correct and annexed "Unsigned Contract – Business Sale dated 16 July 2007 and unsigned and undated Loan Agreement" referred to in paragraphs 6 to 10 of the amended statement of claim.

[40] Her Honour rejected the submission that the delay had affected the first respondent's recollection of events, noting that it was not a major issue given that the case seemed to be clearly articulated on the pleadings.[38] That finding is unchallenged.[39] The contractual claim does turn significantly on oral evidence. Although a proper assessment cannot be made, given the question of whether a contract was made and if so on what terms will turn largely on the credit of the parties to the alleged oral agreement, there is some evidence as discussed above supporting its existence. It cannot be said that the claim is without any prospects of success, nor that any prejudice will be suffered by the respondents in respect of the contract claim if leave is granted.

[41] I agree with her Honour that it appears that the view of the appellants that the matter is ready for trial is an overly optimistic one, particularly having regard to the respondents' submission that final disclosure, possibly third party disclosure and the retainer of an expert accountant to provide a report as to the value of the business are yet to occur, as well as possible amendments to the amended statement of claim. However, I do not consider that the respondents are unduly prejudiced by the delay such that a fair trial cannot occur and leave should not be granted. This is particularly so, given the respondents' counterclaim itself relies on a valuation of the business in 2007, and the appellants did locate the financial records of the second appellant in 2017 after the first adjournment of the applications.[40] The contract claim does not rely on any valuation evidence.

[42] A further factor weighing in the appellants' favour is that the appellants' claim was not statute-barred at the time of the application. That reduces the significance of the fact that the first appellant and second respondent ceased a long term relationship and should be able to carry on their lives without the prospect of litigation, to the extent that is properly a matter for the Court's consideration. While there will be some delay before this matter is ready for trial, there is no reason why the parties cannot act expeditiously and the matter cannot be heard in the next half of the year.

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38 AB 357, lines 9-11.
39 T1-18/15-29.
40 AB 355/34-44.

[43] The valuation of the business as at 2007 is not merely a matter relied upon by the appellants for the purpose of their claim for damages but also by the respondents for the purposes of their counterclaim. While the respondents stated that they would not continue with their counterclaim if successful in the strike-out application, the counterclaim remains on foot. Given the continuation of that claim, the valuation of the business as at 2007 does not only affect the appellants' contractual claim but also the respondents' counterclaim.

[44] While the question of leave is a finely balanced one I consider that leave to proceed should be granted, given the relatively straight forward claim by the appellants in contract.

[45] While her Honour's criticisms of the appellants as to their delay were well founded, as were the deficiencies in the evidence presented said to support the valuation of the business, given that the matter will not be resolved by ordering that the proceedings be dismissed as the action of the appellants would not appear to be time-barred, I consider that leave to proceed should be given in relation to the whole of the appellants' claim, not only the contractual claim.

Conclusion

[46] I would grant leave to appeal, allow the appeal and set aside the orders of the primary judge dated 11 August 2017, save for paragraph 3 of her Honour's orders. I would order that the appellants be granted leave under r 389(2) of the *UCPR* to take a further step in the proceeding.

[47] There is no reason that costs should not follow the event and I would order that the respondents pay the appellants' costs of and incidental to the appeal to be assessed.