# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)* [2010] QCA 260 |
| PARTIES: | **LEIGH DIANE JOHNSON**<br>(appellant)<br>**v**<br>**PUBLIC TRUSTEE OF QUEENSLAND as executor of the will of CECIL JOHN BRADY (deceased)**<br>(respondent) |
| FILE NO: | Appeal No 516 of 2010<br>DC No 839 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | District Court of Queensland |
| DELIVERED ON: | 28 September 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 August 2010 |
| JUDGES: | McMurdo P and Chesterman JA and Applegarth J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal dismissed.**<br>**2. The appellant pay the respondent's costs of and incidental to the appeal.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – JUDICIAL DISCRETION – discretionary power to dismiss a proceeding – where appellant brought a family provision application for provision from the estate of her step-father – where the appellant failed to prosecute the proceeding – whether the appellant has a history of non-compliance with orders without proper justification – where the appellant gave no indication as to when she would comply with court directions – where appellant has suffered significant health problems, including psychological and psychiatric problems – whether the primary judge erred in exercising his discretion to dismiss the proceeding<br><br>*Uniform Civil Procedure Rules* 1999 (Qld), r 374, r 5<br><br>*Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175; [2009] HCA 27, cited<br>*Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388; [1990] FCA 520, cited |

*Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176, cited
*State of Queensland v JL Holdings* (1997) 189 CLR 146; [1997] HCA 1, cited

COUNSEL: M Stewart SC for the appellant
D North QC, with R Whiteford, for the respondent

SOLICITORS: Lillas & Loel for the appellant
Official Solicitor of the Public Trustee for the respondent

[1] **McMURDO P:** This appeal should be dismissed with costs for the reasons given by Applegarth J.

[2] **CHESTERMAN JA**: I agree that the appeal should be dismissed, and also agree with Applegarth J's comprehensive reasons for proposing that order.

[3] **APPLEGARTH J:** The issue in this appeal is whether the primary judge erred in exercising his discretion to dismiss the proceeding after lengthy delays in its prosecution and repeated failures by the appellant to comply with court orders.

[4] The appellant, a solicitor, filed a Family Provision application on 18 March 2003 for provision to be made out of the estate of her step-father (the deceased). The matter did not resolve at a mediation on 27 October 2003, and without prejudice correspondence between November 2003 and August 2004 failed to resolve it. The appellant then failed to prosecute the proceedings.

[5] It would have been open to the respondent executor to insist that the appellant seek leave to proceed, or for the respondent to bring an application to strike out the proceeding for want of prosecution when no step was taken by the appellant for years. Instead, on 17 June 2008 the respondent sent to the appellant's solicitors draft directions to progress the matter. These included directions in relation to the disclosure of documents relating to the appellant's income, expenses, assets and liabilities. The appellant did not agree to these draft directions, and did not provide the requested documents. Accordingly, on 23 April 2009 the respondent applied for orders dismissing the proceedings for want of prosecution and, alternatively, for directions. Two days before the hearing the appellant's solicitors consented to directions. Orders were made on 15 May 2009 for disclosure, the exchange of affidavits and delivery of a Request for Trial Date. The appellant did not comply with those directions.

[6] On 19 August 2009 the respondent applied for orders pursuant to rule 374 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") that the appellant show cause why her proceeding should not be dismissed. Rather than strike out the proceedings, Wilson DCJ (as his Honour then was) made directions on 1 September 2009 with a view to progressing the matter to trial. His Honour said to the appellant's counsel:

> "... your client has reached the point at which the patience of the Court is effectively exhausted; that is to say, her noncompliance with yet another order giving directions in this matter on what, in my view, is a generous timetable would be a matter this Court would regard as a very serious one and while I cannot and ought not, of course, bind any decision another Judge might make about the matter

> in the future, it seems to me your client's application balances on a knife edge."

[7] The appellant did not comply with the orders made on 1 September 2009. Instead, she belatedly filed an affidavit that purported to give the value of an interest in a self-managed superannuation fund ("the Invincible Superannuation Fund") and an interest in the Saraswati Unit Trust. These values were said to have been calculated by a friend of the appellant "without assistance from any expert valuer or real estate agent for the purpose to obtain finance from financial institution(s)." In response, the respondent notified the appellant's solicitors that at any trial the respondent would require the value of her assets and the amounts owing on them to be proved by admissible evidence. The orders of 1 September 2009 had required the appellant to deliver a signed request for trial date by 26 October 2009. She did not do so. Her solicitors said that a request for trial date would not be signed because the appellant was "obtaining documents relating to her assets and liabilities that are referred to in ... her affidavit". They did not know what time would be required to obtain them.

[8] As a result of the appellant's failure to comply with the orders made on 1 September 2009 the respondent applied on 12 November 2009 for orders that, amongst other things, the appellant show cause why her proceeding should not be dismissed pursuant to *UCPR* r 374. The application was returnable on 19 November 2009. Due to a misapprehension by the appellant's solicitor the appellant was not represented that day when an order was made striking out the proceedings. However, the appellant promptly applied to reopen the hearing, which was re-listed on 23 November 2009. On that day the appellant's then counsel informed the Court concerning the obtaining of evidence, including valuations of assets, and informed the Court that he believed "four weeks should be appropriate to obtain the documents". The primary judge noted that the appellant had been given the benefit of orders made by Shanahan DCJ and by Wilson DCJ and had failed to comply with those orders. He observed that the appellant was still not in a position to proceed to trial. He decided to adjourn the application to the week commencing 14 December 2009 so that "proper affidavit material" could be put before him which would demonstrate that the appellant's case was in a proper form, or setting out "with particularity when it will be and how that will be managed." His Honour concluded:

> "Unless I can have some confidence that the matter is really progressing so far as the applicant is concerned, towards bringing the matter on for trial in the proper way, my present view is that I would grant the application of the Public Trustee and have the matter struck out."

This statement made it clear to the appellant and her legal advisers that by the adjourned date the foreshadowed valuations of relevant assets needed to be obtained, or, at least the court needed to be informed with particularity how and when the outstanding evidence would be placed in a proper form before the Court. The appellant failed to attend to this matter. Instead, on the eve of the adjourned hearing the appellant's solicitors wrote to the respondent and advised:

> "We are awaiting valuations for the properties of Saraswati Unit Trust. We still do not know when the valuations will be available because our client relies on a third party to provide same."

The affidavit of her solicitor did not take the matter any further. He stated:

> "I have made enquiries to obtain valuations of the properties. At the date of this affidavit I am not in possession of valuations."

[9] In short, there was no indication as to when, if ever, the valuations would be obtained. The affidavit contained no information about the Invincible Superannuation Trust.

**The hearing on 18 December 2009**

[10] At the adjourned hearing on 18 December 2009 the appellant was represented by her solicitor's town agent. Counsel for the respondent outlined the history of the matter, including the previous occasions when the respondent had been required to bring the matter before the Court. These applications in which the appellant had obtained the Court's indulgence were said to be "costing the estate too much" and the appellant was still not ready for trial. Counsel noted that six and a half years had elapsed, the appellant had been warned and had been given time. Counsel submitted that the proceedings should be dismissed.

[11] In response, the solicitor appearing for the appellant acknowledged that there had been very significant delays which were "unfortunate and, indeed, reprehensible." He informed the Court that he had signed a Request for Trial and was prepared to file it. He indicated that the appellant was "prepared to go to trial with what she's got". He acknowledged that r 374 gave the Court "a very wide discretion" and, whilst acknowledging that the appellant had been guilty of delay, he informed the Court that "we're here ready to take a (trial) date".

**The reasons of the primary judge**

[12] The primary judge reviewed the history of the matter. There is no suggestion that his account of that history is in error. His Honour correctly observed that there was no indication as to when valuations would be available and that "the most recent material really does not advance the case in any meaningful way beyond where we were when it was last before me." The primary judge accepted that it was not the function of judges to punish those who have failed to comply with the rules by denying them access to the Court where their disputes may be properly resolved. However, his Honour noted the principle that a party that fails to prosecute an action with a degree of expedition risks being precluded from pursuing a cause of action and that the rules encourage parties to proceed in a way that will minimise expenditure on costs and lead to the expeditious determination of disputes. The primary judge noted what had been said by Wilson DCJ on 1 September 2009, which I have earlier quoted, and concluded that "it does not seem to me that in any meaningful way matters have advanced since then." An order was made that the proceeding commenced on 18 March 2003 be dismissed.

**The appeal**

[13] The notice of appeal filed on 15 January 2010 raised five grounds of appeal. The appellant's outline of argument filed 15 February 2010 addressed these grounds. The week before the hearing of the appeal the appellant's solicitors were placed in funds allowing them to brief Mr Stewart SC who, due to prior to commitments, was unable to consider the brief until the weekend before the appeal was heard on Monday, 16 August 2010. Mr Stewart SC advised that additional grounds of appeal should be raised and the appellant sought leave to file an amended notice of appeal. The respondent did not consent to leave being granted, but addressed the additional grounds of appeal. The Court reserved the question of leave.

[14] Mr Stewart SC provided new written submissions on behalf of the appellant and relied on only a few paragraphs of the appellant's submissions filed on 15 February 2010.

[15] The course of permitting an appellant to amend grounds of appeal on the eve of the hearing of an appeal without good cause should not be encouraged. It has the potential to prejudice the interests of justice by not permitting a respondent sufficient time to prepare to meet new grounds for appeal. Costs are wasted. However, in circumstances in which the respondent did not contend that it was prejudiced by the additional grounds of appeal being raised, I consider that leave should be granted to amend the notice of appeal in the form of the amended notice of appeal which is Exhibit JBL-1 to the affidavit of James Beresford Loel sworn 16 August 2010.

**Relevant principles**

[16] Rule 374 provides for a party who is entitled to the benefit of an order to, by application, require the party who has not complied to show cause why an order should not be made against it. On the hearing of such an application the Court may make a variety of orders and may "give judgment against the party served with the application."[1] Such a rule:

> "... must be administered sensibly and with an appreciation both of the fact that some delays are unavoidable, and unpredictable, by even the most conscientious parties and their lawyers, and of the likely serious consequences to an applicant of staying or dismissing a claim. ..."[2]

The exercise of the discretion conferred by *UCPR* r 374 must take account of the purpose of the rules, which is "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."[3] The rules are to be applied with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the rules.[4] In accordance with *UCPR* r 5(3), a party such as the appellant "impliedly undertakes to the court and to the other parties to proceed in an expeditious way", and the Court may impose appropriate sanctions if a party does not comply with the rules or an order of the Court.[5]

[17] Reference was made by the appellant to the observations of Dawson, Gaudron and McHugh JJ in *State of Queensland v JL Holdings*[6] about the extreme circumstances in which a party would be shut out from litigating an issue which is fairly arguable. Those observations were made in the context of the power to amend, and account must be taken of the more recent statements of principle concerning late amendment in *Aon Risk Services Australia Ltd v Australian National University*.[7] The High Court's consideration of the interests of justice in that case arose in the context of late amendment to pleadings, and a rule of court in similar terms to *UCPR* r 5 concerning the purpose of the rules of civil procedure. It is unnecessary to address the variety of matters that may affect the determination of the interests of justice

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1 *UCPR* r 374(5)(a).

2 *Lenijamar P/L v AGC (Advances) Ltd* (1990) 27 FCR 388 at 396 in relation to Order 10, r 7 of the Federal Court Rules.

3 *UCPR* r 5(1).

4 *UCPR* r 5(2).

5 *UCPR* r 5(4).

6 (1996-1997) 189 CLR 146 at 154-5.

7 (2009) 239 CLR 175.

upon an application to amend, and the extent to which they also apply to the exercise of discretion under *UCPR* r 374. In considering the exercise of the discretionary power conferred under *UCPR* r 374 to terminate a proceeding account must be taken of "the need for reasonable access to the courts".[8] The interests of justice also require account to be taken of the financial and personal strain imposed on litigants, witnesses and other parties who are affected by a party's failure to comply with a court order without adequate explanation or justification. The costs associated with bringing applications arising from non-compliance with court orders cannot always be recovered in full or at all by a costs order. In this matter the respondent was put to substantial costs associated with a number of hearings before judges of the District Court in 2009. For reasons to be addressed, there is no assurance that the respondent will recover those costs from the appellant, and recovery of them out of the estate diminishes the amount that is available for the benefit of its sole beneficiary.

[18] By her amended grounds of appeal, the appellant contends that the primary judge overlooked material considerations. However, the discretion conferred by *UCPR* r 374(5) is broad, once the condition for its exercise arises. Its exercise is governed by the purpose of the rules stated in *UCPR* r 5 and the general consideration as to whether the interests of justice warrant the exercise of the discretion. The exercise of the discretion is also influenced by the arguments advanced at a hearing for and against its exercise. A court reviewing the exercise of such a discretion should not lightly conclude that the primary judge overlooked material considerations if these matters were not submitted to be material.

[19] In considering a comparable rule in the *Federal Court Rules*, Wilcox and Gummow JJ stated that the discretion conferred by the rule was "unconfined, except for the condition of non-compliance with a direction ... [b]ut two situations are obvious candidates for the exercise of the power."[9] The first was "cases in which the history of non-compliance by an applicant is such as to indicate an inability or unwillingness to co-operate with the Court and the other party or parties in having the matter ready for trial within an acceptable period". The second were cases "whatever the applicant's state of mind or resources - in which the non-compliance is continuing and occasioning unnecessary delay, expense or other prejudice to the respondent." Their Honours observed that although the history of the matter will always be relevant, it is more likely to be decisive in the first of those two situations:

> "Even though the most recent non-compliance may be minor, the cumulative effect of an applicant's defaults may be such as to satisfy the judge that the applicant is either subjectively unwilling to co-operate, or for some reason, is unable to do so. Such a conclusion would not readily be reached; but where it was, fairness to the respondent would normally require the summary dismissal of the proceeding."

In the second of the two situations postulated by their Honours, namely a significant continuing default, it was observed:

> "it does not really matter whether there have been earlier omissions to comply with the Court's directions. Ex hypothesi the default is

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8 *Quinlan v Rothwell* [2002] 1 Qd R 647 at [29] in the context of an application to strike out proceedings for want of prosecution; cf *Quinlan v Rothwell* [2008] QSC 143.

9 *Lenijamar P/L v AGC (Advances) Ltd* (supra) at 396.

> continuing and is imposing an unacceptable burden on the respondent."

[20] In this matter both of the situations postulated by Wilcox and Gummow JJ existed. This proceeding became an obvious candidate for the exercise of the power to dismiss under *UCPR* r 374 because:

(a) the appellant's history of non-compliance indicated an inability or unwillingness to co-operate with the Court and the respondent in having the matter ready for trial within an acceptable period; and

(b) her default in compliance with the Court's orders was continuing and occasioning unnecessary delay and expense.

In addition, the appellant gave no indication as to how and when, if ever, she would comply with Court directions to file affidavits in a proper form in relation to her assets.

[21] I turn to consider the various grounds of appeal.

**Alleged errors in dismissing the proceeding when the appellant "was in the position to file a Request for Trial Date *instanter*" and had "indicated a willingness to take a hearing date of the proceedings *instanter*"**

[22] The appellant's preparedness on 18 December 2009 to file a Request for Trial Date and her willingness to "take a hearing date" counted for very little. In fact, it was a matter for concern. The matter was not ready for trial because the appellant, despite Court order, had failed to file an affidavit in proper form about the value of her assets, and gave no indication about when, if ever, such an affidavit would be filed. The primary judge would have acted contrary to the interests of justice in giving the proceeding a hearing date or acting on the Request for Trial Date in the circumstances. Allocating this matter hearing dates would have deprived other litigants who were ready for trial of the opportunity to have their matter heard on those dates. It risked allocating hearing dates to a matter which was not ready to proceed because there was no proper evidence concerning the financial circumstances of the appellant at the date of the order. The respondent should not have been prejudiced by being required to go to trial without knowing the case that it had to meet concerning the value of the appellant's assets, or to suffer the prejudice of the trial being adjourned if the appellant sought leave to introduce such evidence shortly before trial.

[23] There is no dispute that the court hearing the substantive application was required to take into account the circumstances existing at the date of the order.[10] Without affidavit material from the appellant addressing the value of her assets the matter simply was not ready for trial and the preparedness of the appellant's solicitors to sign a Request for Trial counted for little.

**Alleged error in relying upon the appellant's failure to file and serve expert valuation evidence when the appellant had filed affidavit material**

[24] The affidavit material relied upon by the appellant and her solicitors' submissions on 18 December 2009 did not inform the Court whether and when she intended to file and serve valuation evidence. Mixed messages were given to the Court. The appellant's solicitors' affidavit and an exhibited letter dated 17 December 2009 hinted that valuations might become available but said nothing about when, if ever,

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10 de Groot & Nickel, *Family Provision in Australia*, 3rd ed , 2007 para 2.26.

they would be. The oral submissions made on 18 December 2009 were to the effect that the appellant was prepared to go to a hearing without such evidence. The affidavit material that she had filed did not address in a proper form the value of her assets.

[25] The primary judge did not dismiss the appellant's proceeding simply because as at 18 December 2009 she had failed to file and serve valuation evidence. At the hearing on 23 November 2009 the primary judge indicated that at the adjourned hearing he required material that would present the appellant's valuation evidence in a proper form or set out with particularity when it would be in a proper form. The appellant failed to place material before the hearing on 18 December 2009 as to when any valuation evidence would be forthcoming. Against the background of non-compliance and the warning given to the appellant on 1 September 2009 the primary judge was entitled to take into account the appellant's continuing failure to file proper valuation evidence and the absence of any indication as to when, if ever, this evidence would be forthcoming.

**The alleged failure to consider the substantial injustice that would be suffered by the appellant if the proceeding was dismissed**

[26] There is no proper basis to conclude that the primary judge failed to consider the fact that the dismissal of the appellant's proceeding had the inevitable consequence that it would not be resolved on its merit at a trial. I do not consider that the dismissal of the proceeding amounted to a "substantial injustice". The dismissal order was made some six and a half years after the proceedings were commenced. For reasons later addressed the appellant had not satisfactorily explained her failure to prosecute the proceedings over several years or provided sufficient justification for her failure to comply with court orders. The consequence of having the proceeding dismissed was not an injustice to the appellant. The consequence was the result of the appellant's failure to comply with orders of the Court without adequate explanation or justification. There was no injustice to the appellant in dismissing the proceeding in circumstances in which she gave no sound reason to suppose that she would comply with further directions, the filing and service of necessary material or co-operate in having the matter ready for trial within an acceptable period.

**Alleged failure to consider whether the appellant's failure to comply with the previous directions of the Court were deliberate or contumelious**

[27] If the primary judge had found that the appellant's failure to comply with previous directions were deliberate or contumelious then there would have been even stronger grounds to dismiss her proceeding. He was not, however, required to find that her failures were either deliberate or contumelious.[11] It was sufficient to exercise the broad discretion conferred by r 374 that the appellant's history of non-compliance indicated an inability or unwillingness to co-operate with the Court and the respondent in having the matter ready for trial within an acceptable period, that the appellant's default was continuing and that the appellant failed to give any indication as to when, if ever, the outstanding material would be forthcoming.

**Alleged failure to consider that the appellant was destitute and unable at the time to pay for valuations by expert valuers**

[28] The primary judge's reasons indicate that he had regard to the appellant's affidavit which set out some details of her financial position. The submission that the

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11 *Lenijamar P/L v AGC Ltd* (supra) at 395-6.

appellant was "destitute" is hard to reconcile with the appellant's submission that the matter should proceed to trial and the respondent is adequately protected in respect of its costs by assets that include a property in the United States (estimated value of $68,235.29) and the appellant's interest in the Saraswati Unit Trust (estimated value of $103,004.80).

[29] On 12 October 2009 the appellant swore an affidavit about her health and the state of her legal practice which was conducted on a part time basis and was less active than it used to be. The affidavit exhibited taxation returns that reported professional fees of only $56,164 for the year ended 30 June 2008 and Business Activity Statements reflecting "total sales" of $34,201 for the quarter ended 30 September 2008 and only $3,800 for the quarter ended 31 December 2008. The appellant's affidavit shows that she has fallen upon hard times in recent years, does not have an office from which to work and is living with friends on a short term basis. A significant part of her financial difficulty apparently stems from her involvement with gambling. In 2004 she married a person who she describes as a "professional" sports gambler. She did not know of this at the time that they married. She involved herself in her former husband's gambling. Her tax records for the year ended 30 June 2005 record gross receipts from gambling of $7,667,746 and expenses of "tickets purchased" of $8,517,746. The appellant deposes that she separated in mid-2004 and divorced her former husband in August 2008. She says that she had trusted him to look after her affairs and believed that he was doing this properly, but in 2008 learned that he had gambled everything away.

[30] The primary judge was not informed that the outstanding valuations would not be available because of the appellant's financial circumstances, or that they would be available within a relatively short period. When the matter was before the primary judge on 23 November 2009 the appellant's then counsel predicted that the required evidence would be available within four weeks. At the hearing on 18 December 2009 the appellant's solicitor's affidavit simply said that he had made inquiries to obtain valuations of the properties and at the date of the affidavit he was not in possession of them. His exhibited letter of 17 December 2009 stated that the requirement for valuation of the appellant's various properties was difficult for her "due to her financial circumstances", and in relation to the valuation of the properties of the Saraswati Unit Trust he did not know when the valuations would be available "because our client relies on a third party to provide same". At the same time the letter indicated that the appellant wished to have the matter set down for hearing and the solicitor who appeared on 18 December 2009 informed the Court of his client's desire to obtain a final hearing date. There was no indication that the appellant lacked access to sources of funds to meet outlays associated with a trial. The appellant's affidavit material indicated that she was reliant upon the favours of friends for accommodation. She did not specifically address her inability to realise the value of her 20 per cent holding in the issued units of the Saraswati Unit Trust.

[31] The primary judge had regard to the appellant's affidavit concerning her financial position, but no submission was made that her financial position was so parlous that she could not pay for valuations of the relevant properties. There was no indication of the likely cost of those valuations. In the circumstances the primary judge did not err in exercising his discretion to dismiss the appellant's proceeding.

**Alleged failure to consider that the appellant suffered from a psychiatric disorder, one symptom of which was to avoid her past and dealing with this litigation, and that she had taken steps to prepare her case for trial as best she could**

[32] The primary judge did not fail to consider the appellant's health problems. He referred to the fact that she has suffered from "significant ill health including over psychological and psychiatric problems." The material included a medical report dated 28 August 2009 from a consultant psychiatrist, Dr Robert Hampshire, which described the difficulties that the appellant had in going back into memories of her early life, including the death of her mother and her relationship with her step-father. The appellant's solicitor expressed the opinion that as the result of the health issues from which the appellant suffers, and which had been the subject of several medical reports, she had difficulties in conducting the proceedings, including dealing with her recollections of the behaviour of her step-father.

[33] The appellant's mother died in 1969 when the appellant was aged fourteen and a half. She left home in about 1970 and her only contact with the deceased was a letter that she wrote to him in around 1996-1997 asserting that he had stolen her mother's estate from her, and asking for "half of everything". The complaint that the deceased stole the appellant's mother's estate stems from the fact that her mother married the deceased in the late 1950's after the appellant's parents were divorced. The marriage had the effect of revoking the appellant's mother's will.

[34] The deceased and the appellant's mother adopted a son, Bruce Brady, when the appellant was about seven years of age. Mr Brady was diagnosed with paranoid schizophrenia in around 1984 at the age of 22 years. After that he lived with the deceased. The deceased's last will is dated 2 May 2001. It left his estate to his adopted son, Mr Brady. The main asset of the estate is a house in which Mr Brady lives. It requires repairs. The estate as at October 2009 also consisted of cash funds totalling about $91,000. The medical evidence is that Mr Brady lives a very insulated, isolated life. The medical evidence is that:

> "It has been well shown that severe schizophrenics such as Bruce do better with constancy in their lives. Domiciliary constancy is an enormous factor.
>
> The fact that Bruce has not had a hospital admission for 12 years is in part due to the fact that he has a secure domicile and disruption of this could well be tragic.
>
> My feelings about Bruce's security of housing remain as they were in 2003, and the fact he has remained out of hospital with a fairly severe ongoing mental illness is testament to this."

Not surprisingly, Mr Brady deposed that he wishes to keep living at his current address as he is used to the environment and "if I had to leave it would be hard on me emotionally."

[35] The difficulty that the appellant has in dealing with recollections of her early life and more generally with these proceedings do not adequately explain her failure to prosecute them for many years and her recent failure to comply with court orders. The appellant addressed aspects of her early life, her mother's will and her relationship with the deceased (which effectively ended in 1970 save for the correspondence in about 1996-1997) in her affidavit sworn on 27 June 2003 in support of her application. The matters that required her attention, particularly in 2009, did not relate to unpleasant memories of her childhood. They related to her present assets and their value.

[36] The appellant swears that her psychological problems commenced in 1997 when she was charged with perverting the course of justice. She says that the prosecution was wrongly commenced and was dismissed in October 1997. It arose from a red light camera offence. The medical reports exhibited to her affidavit bear out her health problems. However, they do not fully explain her apparent lack of interest in progressing these proceedings after 2003. Despite her health problems, the appellant has continued to practice and to maintain her practicing certificate. A comparison between her 2003 affidavit (which the appellant acknowledged omitted to disclose her beneficial interest in a property described as the Palmer Street property and a property in Phoenix) and her October 2009 affidavit indicates that the appellant was able to attend to business matters involving property in Phoenix and Cairns and her interest in units in the Saraswati Unit Trust. She litigated a claim against a disability insurer and the proceedings were settled at mediation in late 2004.

[37] I am not persuaded that the appellant's psychiatric problems, including the symptom of wanting to avoid her past, adequately explain her failure to prosecute the proceedings for several years or her failure to comply with court orders made in 2009. Her failure to prosecute these proceedings, notwithstanding her significant health and financial problems, is consistent with a decision to give a higher priority to other matters, including her legal practice and the litigation against her disability insurer. Rather than invest her time and the proceeds of the settlement reached in late 2004 in progressing this matter to a trial, the appellant lost her money in what she describes as "an elaborate fraud" which was presented to her by her former husband and in permitting her former husband to gamble her assets and lose them.

[38] Even with her reduced financial and personal circumstances since 2005 the appellant might have progressed these proceedings if she thought, or was advised, that they had substantial prospects. She did not do so. It fell to the respondent to activate matters. After that the appellant did not do as best she could to prepare her case for trial. She failed to comply with court orders without proper justification and failed to obtain valuations of relevant properties despite substantial time within which to obtain them.

[39] I do not consider that the primary judge failed to take account of her psychiatric disorder. He did so. I do not consider that the primary judge was bound to conclude that the appellant had taken steps to prepare her case for trial as best she could. The appellant did not adequately explain her delay in obtaining necessary valuations.

**The alleged failure to consider that it was within the respondent's grasp to obtain valuations of the relevant properties, if it wished**

[40] The respondent might have attempted to obtain valuations of the relevant properties, if it wished. However, the properties were under the control of persons associated with the appellant and she was best-placed to facilitate inspections by valuers. The appellant had made no proposal, through her lawyers, that the respondent obtain the valuations and did not facilitate this course. Instead, the Court was given to understand on 23 November 2009 that four weeks was an appropriate time for her to obtain the necessary documents, including proper valuations of relevant assets. The primary judge was not required to consider that it was within the respondent's grasp to obtain valuations because no proposal for it to do so was advanced by the appellant's solicitors prior to or at the hearing on 18 December 2009.

**The allegation that the primary judge failed to consider that there was "no basis for a conclusion that the beneficiary of the will would suffer any prejudice as a consequence of the proceedings remaining on foot and proceeding to trial."**

[41] This amended ground of appeal may tend to suggest that the primary judge reached a conclusion that Mr Brady would suffer prejudice as a consequence of the proceedings remaining on foot and proceeding to trial. The primary judge did not make any specific finding in this regard. The appellant's submissions are to the effect that the evidence filed on behalf of the respondent did not point to any prejudice and that, in the absence of evidence that Mr Brady would be prejudiced, the discretion should have been exercised in the appellant's favour.

[42] If it be assumed that there was no satisfactory evidence of prejudice, then its absence did not require the application to be dismissed and orders to be made for the matter to proceed to trial. There is no requirement that an applicant for dismissal under a rule such as rule 374 must prove prejudice, although its existence is likely to be significant.[12] The appellant's failure to prosecute the proceeding for years, her failure to comply with court orders, her failure to attend to matters prior to the hearing on 18 December 2009 and the absence of any assurance that she would attend to those matters if given more time justified the exercise of the discretion to dismiss the proceeding. A finding of specific prejudice to Mr Brady was not a pre-condition to the exercise of the Court's discretion.

[43] His interests, however, had been prejudiced by the appellant's conduct and he was exposed to further prejudice if the matter proceeded to trial without a change in the appellant's attitude to the litigation and a preparedness to obtain evidence in a proper form that permitted any trial to be fairly conducted. The incurring of costs by the respondent in various hearings before the District Court in 2009 had the real potential to prejudice Mr Brady's position if, in due course, those costs could not be recovered from the appellant. They were apt to diminish the value of the estate. If trial costs were incurred which could not be recovered from the appellant then there was the risk that the estate's cash resources would be depleted and the home in which Mr Brady resided would have to be sold, with serious consequences for his welfare and mental health.

[44] The asserted value of the appellant's interest in the Saraswati Unit Trust of $103,004.80 was not proven by acceptable evidence and there was no assurance that any costs orders made against the appellant in 2009 or in the further conduct of the proceedings would be recoverable from the sale of those units. The appellant's property in Phoenix was said by a real estate agent to be worth between US$66,000 and US$80,000. It had a mortgage of US$42,000 and the appellant was informed that it would be necessary to spend about US$12,000 to bring it into a marketable state. The proceeds of any sale of that property might not be readily accessible to satisfy existing or future costs orders made in favour of the respondent. In circumstances in which the appellant had not sold assets in order to fund the litigation and in which her counsel on appeal acknowledged that she was insolvent, there was a significant risk that the respondent would be unable to enforce existing and future costs orders against the appellant's available assets.

[45] Although Mr Brady did not swear that the continuation of the proceedings and any uncertainty concerning their outcome was personally stressful to him, the course of giving the appellant more time to prepare for trial would be apt to make Mr Brady

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12 *Lenijamar P/L v AGC Ltd* (supra) at 396.

uncertain concerning his financial security and whether the home in which he resided would need to be sold to meet a judgment in favour of the appellant or costs associated with the litigation.

[46] I mention these aspects of potential prejudice to Mr Brady's financial and personal interests because I do not accept the contention that there was "no basis for any conclusion" that Mr Brady would suffer any prejudice as a consequence of giving the appellant more time to prepare to trial. However, the primary judge did not make a finding in relation to such prejudice. Even assuming that it was open to the primary judge to conclude that Mr Brady would not suffer any prejudice if the appellant was given more time to prepare for trial and that the primary judge would have reached this conclusion if the point had been argued, the absence of such prejudice would not have caused the discretion to be exercised by dismissing the application. The appellant's breach of her implied undertaking to the respondent and to the Court, her failure to comply with court orders and the absence of any assurance that her conduct would change and the matter would be properly prepared for trial by her called into question whether the matter should be permitted to proceed to trial and, if it did, whether any trial would be a fair one. It was unlikely to be fair if incomplete evidence concerning the appellant's assets was placed before the Court at the trial. The respondent would be disadvantaged in its cross-examination of the appellant.

[47] The appellant's conduct of the proceedings and the absence of any assurance that her conduct of them would alter so as to permit a fair trial of the matter within an acceptable period amply justified the dismissal of her proceeding, notwithstanding the absence of a finding concerning specific prejudice to Mr Brady.

**The contention that the appellant approached the hearing on 18 December as an occasion to "review the progress in obtaining financial information"**

[48] On 1 September 2009 the appellant's then counsel informed Wilson DCJ of his instructions "to seek six weeks in order to put [the appellant's] final affidavit evidence on and to produce remaining documents". When the matter came before the Court on 23 November 2009, the appellant's legal representatives were given a further chance to attend to outstanding matters after telling the primary judge that the trust assets were being valued by a third party. The primary judge made it clear that on the adjourned hearing date he expected the appellant's affidavits, including proper affidavit material in relation to valuations, to be either before him or for an affidavit to set out with particularity when this would be done. He made clear that unless he could have some confidence on the adjourned date concerning these matters his present view was to grant the application to have the proceeding dismissed. In the circumstances, the appellant had no reasonable basis to approach the hearing on 18 December 2009 as if it were simply an occasion to review her progress in obtaining financial information. She was clearly given to understand that if matters had not been attended to or if the Court could not be informed with particularity as to when and how outstanding matters would be attended to, then it was likely that the proceedings would be struck out.

**The appellant's limited legal representation on 18 December 2009 and the proffering of a request for trial**

[49] The solicitor who appeared for the appellant on 18 December 2009 was the town agent for the appellant's Sydney solicitors. Counsel who had earlier been briefed was unable to appear that day, but his inability to appear on the adjourned hearing

date had been known on 23 November 2009 and the appellant and her solicitors had ample time to prepare for the adjourned hearing.

[50] Rather than provide the Court with what the primary judge had indicated he required on the adjourned date, namely an affidavit that set out with particularity how and when outstanding affidavit material would be filed and the matter made ready for trial, the appellant's legal representatives chose to proffer a Request for Trial Date. The proffering of that request counted for very little in circumstances in which the material demonstrated that the matter was not in fact ready for trial due to the appellant's continuing default.

**Conclusion**

[51] The appellant failed to prosecute her proceeding for years. She failed to agree directions in 2008 for the matter to progress. She failed to comply with directions that were made in the first half of 2009. The District Court might have struck out her proceedings when the matter came before it on 1 September 2009. Instead the appellant was told that her non-compliance with directions placed her case on a knife edge. Despite being given a further opportunity to progress the matter under a revised timetable, the appellant failed to comply with that order. When the matter came before the primary judge on 23 November 2009 the appellant was given a further opportunity to attend to outstanding matters. She failed to do so. Her explanation for failing to obtain outstanding valuations was inadequate and, more importantly, neither she nor her legal advisers gave any indication that this material evidence would be provided.

[52] In the circumstances, the discretion to dismiss the proceeding was enlivened and it was open to the primary judge to conclude that the interests of justice were served by the discretion being exercised. The primary judge took into account the appellant's financial and personal circumstances. However, her history of delay, her unjustified non-compliance with generous and revised timetables for the matter to be prepared for trial and the absence of any indication that the matter would be ready for trial if the appellant was given more time amply justified the exercise of the discretionary power to dismiss the proceeding.

[53] The appellant had indicated over a lengthy period an inability or unwillingness to co-operate with the Court and the respondent in having the matter ready for trial within an acceptable period. She was in continuing default in complying with the Court's directions. There was no proposal as to how or when she would cure her default. The proceeding was an obvious candidate for the exercise of the discretionary power to dismiss. The primary judge's discretion did not miscarry. The appeal should be dismissed with costs.