SUPREME COURT OF QUEENSLAND

CITATION:	*Klerck & Ors v Sierocki & Anor* [2014] QCA 355
PARTIES:	**PAUL GRANT KLERCK** (first appellant) **INTERACTIVE ENTERTAINMENT AUSTRALIA PTY LTD** ACN 068 003 805 (second appellant) **SK & ASSOCIATES PTY LTD** ACN 155 041 491 (third appellant) **INFOLINK IT PTY LTD** ACN 128 081 489 (fourth appellant) **v** **JARROD SIEROCKI** (first respondent) **INSOLVENCY GUARDIAN PTY LTD** ACN 149 298 313 (second respondent)
FILE NO/S:	Appeal No 2257 of 2014 SC No 638 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2014
JUDGES:	Fraser and Morrison JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – JUDGMENTS AND ORDERS – OTHER MATTERS – where the respondents commenced a proceeding claiming damages for defamation, and the appellants filed a defence – where multiple orders were made against the appellants with which they did not comply – where the primary judge ordered pursuant to r 374 of the *Uniform Civil Procedure Rules* that

the respondents have judgment against the appellants – whether the primary judge was permitted to consider matters other than non-compliance with an order of the kind mentioned in r 374(1) – whether the primary judge's discretion miscarried because the judge proceeded on an incorrect factual basis, or because the order was unreasonable or plainly unjust

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 374

Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased) [2010] QCA 260, considered
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, cited
Lenijamar Pty Ltd v AGC (Advances) Ltd (1990) 27 FCR 388; [1990] FCA 520, considered
Mansfield v Director of Public Prosecutions (WA) (2006) 226 CLR 486; [2006] HCA 38, cited

COUNSEL: M Lawrence for the appellants
A Nelson for the respondents

SOLICITORS: Irish Bentley Lawyers for the appellants
Whitehead and Associates Solicitors for the respondents

[1] **FRASER JA:** If a party does not comply with an order to take a step in a proceeding, rule 374 of the *Uniform Civil Procedure Rules* 1999 ("UCPR") empowers a party entitled to the benefit of that order to make an application requiring the defaulting party to show cause why an order should not be made against it, and it confers a discretionary power upon the judge hearing the application to make orders, including an order for judgment against the defaulting party.

[2] A judge in the Trial Division ordered pursuant to r 374 that the respondents (the plaintiffs) have judgment against the appellants (the first, second, third and fifth defendants), conditional upon the assessment of damages by the Court under Ch 13 Pt 8 of the UCPR. (The primary judge also ordered judgment against the fourth defendant, who has not appealed against the judgement. The application for judgment against the sixth defendant was refused.)

[3] The appellants' notice of appeal against the order for judgment against them includes seven grounds of appeal. Counsel for the appellants reformulated those grounds in three contentions, to the effect that the primary judge:

(a) misconstrued r 374(4)(b) of UCPR;

(b) erred in basing the exercise of the discretion to give judgment on a conclusion that the third and fourth appellants did not attend and participate in a mediation; and

(c) ordered a judgment which was "unreasonable or plainly unjust" such that it may be inferred "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."[1]

[4] I will discuss those contentions after I have summarised the procedural background and the primary judge's reasons for ordering judgment against the appellants.

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[1] *House v The King* (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTiernan JJ).

Procedural background

[5] On 24 January 2013 the respondents commenced a proceeding in the Trial Division in which each respondent claimed damages and injunctions in relation to alleged publications of defamatory words on 10 separate occasions. The appellants filed a defence on 20 February 2013. In correspondence with the appellants' solicitor the respondents' solicitor criticised aspects of that pleading as not being in compliance with provisions of the UCPR. The respondents sought various orders to vindicate their criticisms. The respondents did not have complete success in all of their interlocutory applications, but they were not themselves in default or dilatory in any way which bears upon the issues in this appeal. It is necessary here to mention only those orders which were made against the appellants and with which they did not comply:

(a) First, on 17 April 2013, Martin J ordered that the defendants had leave by no later than 8 May 2013 to amend their defences, subject to the proviso that the defendants were required to obtain leave before amending any paragraph of the defence dealing with specified paragraphs of the statement of claim. The appellants failed to comply with this order in two respects: they served an amended defence on 10 May 2013 (two days after the time limited by the order) and they made amendments which withdrew, without leave, deemed admissions made in the original defence.

(b) Secondly, on 23 May 2013 Daubney J directed that by no later than 4.00 pm on 10 June 2013 the appellants file a further amended defence. The appellants also failed to comply with this order in two respects: they filed a further amended defence on 11 June 2013 (one day after the time limited by the order), and they again did so without leave to withdraw the admissions in the original defence.

(c) Thirdly, on 9 July 2013, Mullins J ordered that any further re-pleading of the defence must address the defects identified in the hearing before her Honour on that day and exemplified by specified paragraphs of the fourth defendant's amended defence. The appellants' second further amended defence filed on 1 October 2013 did not comply with this order.

(d) Fourthly, on 5 August 2013 Byrne SJA, having given the appellants leave to the extent necessary to withdraw admissions in relation to specified paragraphs of their further defence, ordered that the appellants were to file and serve a further amended defence by not later than 19 August 2013. The appellants did not comply with that order in that they did not file their second further amended defence until 1 October 2013 (the day after the date appointed for the court ordered mediation under directions mentioned in the following subparagraph).

(e) Fifthly, also on 5 August 2013, Byrne SJA made directions for the appellants and the respondents to participate in the mediation to be conducted by not later than 30 September 2013, including a direction for the provision of the pleadings to the mediator, and ordered that, by not later than seven days prior to the date of the appointed mediation, the parties were to pay their respective percentages of the fee negotiated by the parties with the mediator, namely, 25 per cent ($1,925) for the plaintiffs and 12.5 percent ($962.50) for each of the appellants and the fourth and sixth defendants. The appellants did not comply with that order in that:

(i) None of the appellants paid their percentage shares of the mediator's fees by 23 September 2013.

(ii) It was not until 2 October 2013 that the percentage shares payable by the first and second appellants were paid (in one payment of $1,925 by the first appellant).

(iii) It was not until 14 November 2013 that any further payment on behalf of any of the defendants was paid.

(iv) On that date the first appellant paid only a further $1,000 towards the mediator's fees. The defendant to whom the $1,000 payment was referable was not identified. (Although money remained outstanding by one or more of the defendants under the order made by Byrne SJA, the mediator did not seek any further payment and the mediation proceeded on 30 September despite the short payment.)

[6] An annexure to the respondent's application under r 374 recited assertions that the first appellant (and the fourth and sixth defendants) had defamed the respondents in emails and websites and set out a history of the proceedings. That history included the non-compliances with the orders and also other criticisms of the appellants' conduct, both in the litigation and in other respects.

The primary judge's reasons

[7] The primary judge quoted those parts of the application in the reasons for judgment, summarised the submissions made for both parties, referred to authorities upon r 374, and then set out the reasons for the decision under the heading "Discussion". Omitting the primary judge's references to the fourth and sixth defendants, the main considerations taken into account by the primary judge's reasons for holding that the appellants had not shown cause why judgment should not be ordered against them may be summarised as follows:

(a) The appellants failed to plead properly in their original defence.

(b) They continued to fail to plead appropriately despite the opportunities afforded to them to do so by the orders made by Martin J, Daubney J, Mullins J and Byrne SJA.

(c) The third and fourth appellants failed to comply with Byrne SJA's orders for payment of the mediator's fees.

(d) The appellants' pleaded defences were not "particularly cogent or persuasive".

(e) "In particular," the appellants' non-compliances with the orders and their failure to propose any course for advancing the litigation expeditiously, other than their willingness to reconvene the mediation.

[8] The primary judge referred to the considerations in (a) – (c) as "significant reasons" for ordering judgment.

The first contention: the primary judge misconstrued r 374(4)(b) of the UCPR

[9] Rule 374 provides:

"(1) This rule applies if a party does not comply with an order to take a step in a proceeding.

(2) This rule does not limit the powers of the court to punish for contempt of court.

(3) A party who is entitled to the benefit of the order may, by application, require the party who has not complied to show cause why an order should not be made against it.

(4) The application—

(a) must allege the grounds on which it is based; and

(b) is evidence of the allegations specified in the application; and

(c) must, together with all affidavits to be relied on in support of the application, be filed and served at least 2 business days before the day set for hearing the application.

Note—

See also rule 447 (Application to court).

(5) On the hearing of the application, the court may—

(a) give judgment against the party served with the application; or

(b) extend time for compliance with the order; or

(c) give directions; or

(d) make another order.

(6) The party who makes the application may reply to any material filed by the party who was served with the application.

(7) The application may be withdrawn with the consent of all parties concerned in the application or with the court's leave.

(8) A judgment given under subrule (5)(a) may be set aside—

(a) if the application is made without notice—on an application to set the judgment aside; or

(b) otherwise—only on appeal.

(9) Despite subrule (8), if the court is satisfied an order dismissing the proceeding was made because of an accidental slip or omission, the court may rectify the order."

[10] The appellants argued that r 374(4)(b) gave evidentiary effect only to allegations of grounds of the application in conformity with r 374(4)(a), which were limited to non-compliances with orders referred to in r 374(1). It is not necessary to consider that issue because none of the other allegations in the application with reference to which the primary judge exercised the discretion to order judgment under r 374(5)(a) were contentious. The appellants' counsel argued that the primary judge's quotation in the reasons of allegations in the application which extended beyond the alleged non-compliances with orders and other non-contentious matters, and the primary judge's summary of the respondents' arguments referring to those additional matters, suggested that he took into account all of the allegations in the application. The reasons make it plain, however, that the primary judge exercised the discretion with reference to the considerations mentioned under the heading "Discussion". The primary judge described those matters succinctly and in such terms as permits reference to the more detailed submissions about them, but none of those considerations were contentious.

[11] The appellants' counsel also argued that r 374 limits the considerations which may be taken into account in the exercise of the discretion to non-compliances with those orders referred to in r 374(1) which are alleged in the application in conformity with r 374(4)(b). No such limitation is expressed in r 374(5), which confers the relevant power to order judgment. That the jurisdiction to make an order under r 374(5) is enlivened only where there has been non-compliance with an order of the kind described in r 374(1) does not justify an implication that no other matters may be taken into account in exercising the discretion. The provision in r 374(4)(c) for affidavits in addition to allegations in the application is consistent with the view that other matters may be relevant.

[12] In *Mansfield v Director of Public Prosecutions (WA)*,[2] the High Court cited authority, including the following remarks by Gaudron J in *Knight v FP Special Assets Ltd*,[3] as support for the rejection of a statutory implication which would exclude what were otherwise relevant considerations which the Supreme Court of Western Australia might take into account in making a freezing order under s 43 of the *Criminal Property Confiscation Act* 2000 (WA):

> "It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant… Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

[13] Those remarks are applicable here.

[14] That the discretion is not confined in the way for which the appellants contended was also made clear in *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)*[4] by Applegarth J, with whose reasons McMurdo P and Chesterman JA agreed:

> "…Such a rule:
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>> "…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 … [*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]."
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> …
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> Reference was made by the appellant to the observations of Dawson, Gaudron and McHugh JJ in *State of Queensland v JL Holdings*

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2 (2006) 226 CLR 486 at 496 [24] – [25].
3 (1992) 174 CLR 178 at 205.
4 [2010] QCA 260 at [16] – [19].

[(1996-1997) 189 CLR 146 at 154–5] 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* [(2009) 239 CLR 175]. 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 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". [*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]. 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. …

… 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.

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" [*Lenijamar P/L v AGC (Advances) Ltd*, supra at 396]. 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 continuing and is imposing an unacceptable burden on the respondent.""

[15] The power to make an order must be exercised for the purposes for which that power is conferred. The purpose of the rules generally are "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense", the rules are to be applied "with the objective of avoiding undue delay, expense and technicality and facilitating" that purpose, and each party "impliedly undertakes to the court and to the other parties to proceed in an expeditious way": r 5. That r 374 confers a power to give a judgment which will **preclude** a judicial determination of issues joined between the parties requires that power to be exercised with caution, but r 5 makes it clear that the relevant considerations must include those which bear upon the question whether an applicant under r 374 is being vexed by a respondent who is unwilling or unable to proceed with the expeditious disposition of the litigation. In considering that question, it is relevant to take into account, as was held in *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)*, 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 circumstance that the party applying for the order was put to substantial costs, the absence of any assurance that those costs would be recoverable from the party in default, and the absence of any indication by the party in default "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."[5]

[16] The circumstances taken into account by the primary judge which are set out in [7](a) – (c) and (e) of these reasons arguably suggested the existence of both of the situations described as "obvious candidates for the exercise of the power" by Wilcox and Gummow JJ in *Lenijamar Pty Ltd v AGC (Advances) Ltd*, but particularly the first situation, that the case was one "in which the history of non-compliance by an applicant [in this case, defendants] 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 consideration summarised in [7](d) of these reasons – that the pleaded defences were not "particularly cogent or persuasive" – did not directly bear upon those matters, but it was a relevant consideration for a different reason. Injustice in an order for judgment without a trial of the issues will more readily be apparent where the party suffering judgment has an apparently strong case. The way in which the primary judge expressed this consideration amounted merely to a conclusion that the appellants' defence of the claims against them was not in that category. There was no error in that conclusion.

[17] The primary judge did not misconstrue r 374. All of the considerations taken into account by the primary judge were relevant considerations upon the proper construction of r 374. The appellant's first contention should not be accepted.

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5 [2010] QCA 260 at [17], [20].

The second contention: the primary judge erred in basing the exercise of the discretion to give judgment on a conclusion that the third and fourth appellants did not attend and participate in a mediation

[18] In support of the appellants' second contention, their counsel referred to a paragraph in the annexure to the respondents' application which stated:

> "23 The Third, Fourth and Fifth defendants have impeded the Mediation by failing to pay their percentage of the Costs as Ordered to do so by Byrne SJA on 5 August 2013 and by failing to attend and participate in the Mediation…".

[19] The fourth defendant is not a party to this appeal. The appellants pointed out that the third and fifth defendants (who are the third and fourth appellants) were controlled by the first appellant, who was their sole shareholder, and he did attend the mediation. The appellants argued that the statement that the third and fifth defendants failed to attend and participate in the mediation was wrong. They also argued that the circumstance that the mediator's fees were not paid in accordance with the order of Byrne SJA did not impede the mediation because the mediator proceeded in any event and did not insist on the further payment by the order and the mediation proceeded.

[20] Assuming all of those things in the appellants' favour, the second contention fails because the primary judge did not find or take into account that the third or the fourth appellant impeded the mediation by failing to pay its percentage of the costs in accordance with the order of Byrne SJA or failed to attend or participate in the mediation. As mentioned in [10] of these reasons, the primary judge exercised the discretion only with reference to the considerations identified in [7] of these reasons. Those matters did not include any finding that the mediation was impeded by any failure of the third or fifth appellant to pay the costs of the mediation or to fail to attend or participate in the mediation.

The third contention: the order of the primary judge was "unreasonable or plainly unjust" such that it may be inferred "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance"

[21] The appellants did not argue that the primary judge erred in finding the facts which are summarised in [7](a) – (e) of these reasons, but they argued that those matters did not justify the extreme step of ordering judgment in favour of the respondents. The appellants accepted that the primary judge exercised a wide discretion, but submitted that the Court should adopt a more circumspect approach when considering an application under r 374 against a defaulting defendant because of the drastic consequence of non-compliance that a judgment might be entered for a substantial amount of money in a case in which a plaintiff's claim might lack merit.[6] It must be said, however, that consequences of similar seriousness might be visited by entry of judgment against a plaintiff under this rule where the plaintiff's claim has intrinsic merit. There is no doubting that the discretion under r 374 must take into account the seriousness of the consequences of shutting out a claim or the defence of a claim. The

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6 The appellants' counsel cited Robin QC DCJ's decisions in *Sun Louvre Pty Ltd v Huenerberj* [2003] QDC 439 at [12], *Truran & Storey v Peekhurst Pty Ltd* [2008] QDC 180 at p 3, *Hendon Homes Pty Ltd v Centennial Group Holdings Pty Ltd* [2008] QDC 284 at pp 1 – 4, *DJ Ryan Nominees Pty Ltd v Ellett & Anor* [2010] QDC 429 at pp 1 – 3, and *Body Corporate for St Tropez South v Q Tech Waterproofing Pty Ltd* [2013] QDC 65 at p 5.

point was clearly expressed in the passage already quoted from *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)*. As I mentioned in [15] of these reasons, the circumstance that r 374 confers a power to give a judgment which will preclude a judicial determination of issues joined between the parties requires the power to be exercised with caution. There is no basis for finding that the primary judge did not adopt that approach.

[22] The appellants argued that the present case did not involve ongoing contumelious default of the kind described in *Lenijamar Pty Ltd v AGC (Advances) Ltd* or inordinate delay of the kind in *Johnson v Public Trustee of Queensland as executor of the will of Brady (deceased)*. They argued that the impecuniosity of the appellants was a consequence of the respondents' actions, that the appellants had expressed the genuine wish for the matter to proceed to trial within a reasonable period, that at the time of the hearing before the primary judge the mediation had been adjourned and the mediator's certificate had not been filed, and that this state of affairs explained why the appellants responded to the application under r 374 by indicating their willingness to re-convene the mediation but otherwise not proposing any course by which the litigation might usefully and expeditiously be advanced.

[23] The evidence did not justify a finding that any impecuniosity of the appellants was caused by the respondents. The other submissions for the appellants fall short of justifying the Court in finding that the primary judge's exercise of the discretion miscarried. In relation to the first two considerations taken into account by the primary judge (that the appellants had failed to plead properly in their original defence and that they had continued to fail to plead appropriately despite opportunities afforded to them by the orders made by Martin J, Daubney J, Mullins J and Byrne SJA), before the primary judge the solicitor for the appellants acknowledged that there was an issue to the extent that the defences did not comply with the rules[7] which needed to be addressed.[8] The circumstance that the appellants had continued to fail to plead appropriately notwithstanding the various opportunities afforded them to do so was significant. In relation to the third consideration taken into account by the primary judge (that the third and fourth appellants failed to comply with Byrne SJA's orders for payment of the mediator's fees), the fortuitous circumstance that the mediator was nonetheless prepared to proceed with the mediation was relevant but it did not preclude the primary judge from taking this consideration into account.

[24] The fourth consideration taken into account by the primary judge (that the pleaded defences were not "particularly cogent or persuasive") was a relevant consideration as explained in [16] of these reasons. It is not necessary to examine the very lengthy pleadings in detail to explain each of the ways in which the defences lacked cogency or persuasiveness. It is sufficient to give two examples:

(a) One of the many complaints of defamation by the respondents concerned the "Seventh Defamatory Words" which were alleged to have been posted on a website by the first appellant or the fourth defendant. Under a heading which referred to the first respondent as a "toxic conman", the Seventh Defamatory Words included statements that "countless numbers of people… have fallen victim to his conman ways and have all suffered at the hand of [the first respondent's] heartless conduct"; that the fourth defendant had not previously understood "much about sociopaths and their toxic behaviour and the destruction that their

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7 Transcript, at 1-18, line 26.

8 Transcript, at 1-22, lines 38 – 45.

selfishness lack of morals could cause". Paragraph 39 of the amended statement of claim did little other than reproduce the words of the publication in alleging that the Seventh Defamatory Words defamed the first respondent by conveying imputations such as that he was a conman, a sociopath, lacked morals, was destructive towards other people, and was selfish. Yet paragraphs 39(a)(i) and (ii) of the second further amended defence alleged not only that the words did not convey, but that they were not capable of conveying that the first respondent was destructive towards other people and was selfish.

(b) Paragraph 39(d) of the second further amended defence also alleged that the same imputations were not defamatory of the first or second respondents because the circumstances of the publication pleaded in other paragraphs of the same pleading "were trivial and were such that neither the First nor the Second Plaintiff was likely to sustain any harm…". The first pleaded circumstance, in paragraph 38(a), was an admission that the words appeared on the website as alleged by the respondents – hardly a circumstance suggesting triviality. The next three pleaded circumstances, in paragraphs 38(b) – (d), constituted various ways of alleging that the fourth defendant alone published the alleged words. That allegation also has no apparent bearing upon the allegation that the publication was trivial. Next the appellants relied upon paragraph 39(a) of the second further amended defence, which alleged that the words did not convey and were not capable of conveying some of the imputations. I have already referred to the improbability of some of those allegations, but it is also noteworthy that there was no allegation to that effect concerning the pleaded imputations that the Seventh Defamatory Words conveyed that the first respondent was a conman, had ruined the fourth defendant's life, was toxic, had defrauded the fourth defendant, had defrauded a countless number of people other than the fourth defendant, and was a sociopath. It is not easy to comprehend the appellant's allegation that such a publication was trivial.

[25] The primary judge emphasised the final consideration taken into account: the appellant's non-compliance with the orders and their failure to propose any course for advancing the litigation expeditiously other than their willingness to reconvene the mediation. The non-compliance with the orders attracted significance because of the appellants' repeated failure to comply with basic requirements designed to afford procedural fairness in the litigation and because of the absence of any assurance that the situation might improve. The orders made by Byrne SJA on 5 August 2013 were designed to provide for mediation after the appellant's defence was finally put into an appropriate form. Thus the effect of the appellants' stance before the primary judge was to seek a revival of a mediation, which should already have been concluded with reference to appropriate pleadings, upon the basis of a defence which still continued to require attention despite all of the previous orders. That circumstance substantially diminishes the weight of the appellants' only assurance, that they were willing to participate in a further mediation.

[26] The respondents made the point in the outline of submissions filed on their behalf in the Trial Division that the appellants had not attempted to give any explanation for their repeated delays and had not given the Court an undertaking or set out any plan about how they might proceed expeditiously in the future.[9] The outline of submissions

9 Respondents' outline of submissions, 3 February 2014, at para 8; AB 247 – 248.

for the appellants accused the respondents of attempting to delay and cause expense to the appellants, argued that there was no justification for dismissing the proceedings, criticised aspects of the evidence relied upon by the respondents and referred to evidence of the respondents' willingness to attend a reconvened mediation, but there was no response to the submissions that the appellants had not attempted to give any explanation for their repeated delay and non compliance and had not given the Court any undertaking or set out any plan as to how they would proceed expeditiously in the future.[10] At the hearing before the primary judge counsel for the respondents again made the point that there had been no explanation for the appellants' failure to amend their defences in accordance with Court orders[11] or their failure to comply with the orders of Mullins J and Byrne SJA.[12] The appellants' solicitor sought to defend his clients' conduct, but, as I have indicated, acknowledged that the defence still required attention. Otherwise the appellants' solicitor submitted that the appellants were willing to participate in further mediation and that this was a desirable course. Notwithstanding a further submission by the respondents' counsel in reply that the appellants had provided no explanation for their defaults and had provided no assurance of any improvement of their conduct in the future,[13] in the further submissions by the appellants' solicitor no reference was made to any such explanation or assurance.

[27] In those circumstances it is understandable that the primary judge placed significant weight upon the appellants' failure to "put forward any realistic proposal for advancing the litigation expeditiously" apart from their proposal to participate in a reconvened mediation.[14] In light of the appellants' repeated non-compliance with court orders, the frustration of the mediation, and their failure to explain their defaults or hold out any prospect of an improvement in their future conduct, it was open to the primary judge to treat the case as being one in which the appellants' history of non-compliance indicated an inability or unwillingness to cooperate with the Court and the respondents in bringing the matter on for trial within an acceptable period.[15] Given the nature of the proceedings, involving as they did publications made on the internet of what appear on their face to be very serious defamatory imputations attacking the character and conduct of the respondents, the primary judge was also entitled to proceed on the footing that the appellants' delays and defaults were likely to produce a heavy burden upon the respondents.

[28] The caution which must attend the exercise of the extreme power to give judgment nevertheless left it open to the primary judge to exercise the discretion not to make such an order, but I am not persuaded that the primary judge's decision was so unreasonable or unjust as to justify an inference that the discretion must have miscarried.

Proposed order

[29] I would dismiss the appeal with costs.

[30] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

[31] **NORTH J:** I have read the reasons for judgment of Fraser JA. For the reasons given by his Honour I agree with the order proposed.

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10 Outline of argument of the first, second, third, fifth and sixth defendants, 3 February 2014; AB 249 – 252.
11 Transcript, 3 February 2014, at 1-9, line 25.
12 Transcript, 3 February 2014, at 1-12, line 7.
13 Transcript, 3 February 2014, at 1-25, lines 30 – 40.
14 [2014] QSC 9 at [16], [18].
15 Cf *Lenijamar Pty Ltd v AGC Advances (Ltd)* (1990) 27 FCR 388 at 396.