SUPREME COURT OF QUEENSLAND

CITATION:	*Multi-Service Group Pty Ltd (in liq) & Anor v Osborne & Anor* [2010] QCA 72
PARTIES:	**MULTI-SERVICE GROUP PTY LTD (IN LIQUIDATION)** ACN 071 610 127 (first plaintiff/first appellant) **ROBERT EUGENE MURPHY (AS LIQUIDATOR)** (second plaintiff/second appellant) **v** **GRAEME JOHN OSBORNE** (first defendant/first respondent) **GRO SERVICES PTY LTD** ACN 083 003 445 (second defendant/second respondent)
FILE NOS:	Appeal No 11380 of 2009 Appeal No 11381 of 2009 SC No 4620 of 2006 SC No 5388 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2010
JUDGES:	McMurdo P, Muir JA and Daubney J Judgment of the Court
ORDERS:	**1. The appeals be allowed;** **2. The orders of the primary judge made on 11 September 2009 be set aside;** **3. The proceedings be reactivated;** **4. The costs of the applications at first instance be the parties' costs in the cause;** **5. The respondents pay the appellants' costs of the appeals to be assessed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – where primary judge refused appellants' application for reactivation of proceedings – where *Practice Direction No. 4 of 2002* paragraph 5.4 provides the procedure

for reactivating a matter that has been deemed resolved – where matters were deemed resolved because appellants failed to comply with case-flow management orders – where appellants submitted non-compliance was due to complex nature of winding up – where respondents also failed to comply with some aspects of the orders – where both sides had taken steps to prosecute the proceedings – whether primary judge erred in failing to correctly identify the principles or factors relevant to the exercise of the discretion under the Practice Direction – whether primary judge erred in finding it would not be in the public interest to reactivate proceedings – whether primary judge erred in failing to give any or any sufficient consideration to the interests of justice – whether Court can exercise discretion to reactivate proceedings

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – STRONG REASONS FOR INTERFERENCE – GENERALLY – where appellants' late in providing a solvency report – where appellants' submitted delay was due to complex nature of winding up – where primary judge referred to incorrect volume of material involved in winding up – whether primary judge's decision not to reactivate proceedings was based on facts not supported by and contrary to the evidence – whether primary judge gave sufficient regard to the reasons for the appellants' delay – whether primary judge considered appellants' prospects of success – whether primary judge erred in exercise of discretion

Uniform Civil Procedure Rules 1999 (Qld), r 5(3), r 280, r 371, r 374, r 389, r 452(2)(b)

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Hall v Poolman (2009) 228 FLR 164; [2009] NSWCA 64, cited
Multi Service Group Pty Ltd (In Liquidation) and Ors v Osborne and Ors [2009] QSC 286, discussed

COUNSEL: D Savage SC, with I A Erskine, for the appellants
P Morrison QC, with P Tucker, for the respondents

SOLICITORS: Tucker & Cowen for the appellants
Ernst & Young for the respondents

[1] **THE COURT: Introduction**
The appellant company in liquidation and the appellant liquidator ("the Liquidator") appeal against an order by the primary judge in each of proceedings BS 4620/06 and BS 5388/04 that the appellants' "application for reactivation" of the proceeding

be refused. The Orders were made on the hearing of an application in each proceeding for orders including: "Orders pursuant to Rule 452(2)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld) and paragraph 5 of Practice Direction No. 4 of 2002 that … the proceeding be reactivated …".

[2] It is desirable, at the outset, to identify the content of the hearings before the primary judge and what led up to the appellants' applications.

[3] In BS 5388/04, commenced by the appellants against Graeme Osborne, the former managing director of Multi Service Group Pty Ltd ("MSG"), and Roslyn Osborne, Mr Osborne's wife, the appellants claimed:

> "• $100,000 against both defendants in relation to a cheque made payable to MSG but deposited into the defendants' joint home loan account; and
>
> • $11,436.90 against Mr Osborne for him taking for himself a rebate which MSG was entitled to receive; and
>
> • that the 'heads of agreement' was unenforceable against the first plaintiff."

[4] In BS 4620/06, commenced by the appellants on 2 June 2006 against Mr Osborne and GRO Services Pty Ltd ("GRO"), the corporate trustee of the Osborne Family Trust, the appellants claimed, inter alia:

(a) against Mr Osborne, for recovery of $200,000 paid by MSG to Mr Osborne in breach of his fiduciary and statutory duties by way of a purported "termination payment" on or about 26 October 2001;

(b) against Mr Osborne, for payment of the above sum of $200,000, on the alternative basis that the subject transaction was "an uncommercial transaction within the meaning of Section 588FB of the *Corporations Act*" 2001 (Cth), or constituted a voidable transaction within the meaning of s 588FE(3)(iv) of the Act;

(c) against Mr Osborne, for payment of $106,681.60 originally paid by MSG to Mr Osborne on or about 26 October 2001 for no consideration by way of loan repayable on demand;

(d) against Mr Osborne, for payment of the said sum of $106,681.60 on the alternative bases that moneys were paid in breach to Mr Osborne in breach of his fiduciary and of statutory duties; and

(e) against GRO and Mr Osborne for payment of $17,500 being moneys expended by MSG for improvement of property registered in GRO's name.

[5] Other claims were for $11,596.95 paid to solicitors by MSG on account of Mr Osborne's legal costs and for $51,500 paid by MSG to Mr Osborne out of moneys paid to MSG by its insurers.

[6] The statement of claim includes allegations that MSG failed to keep financial records correctly recording and explaining its transactions and financial position which would enable true and fair statements to be prepared and audited in the period 1 July 1999 to 4 June 2003 and that when the subject transactions were undertaken, MSG was insolvent or of doubtful solvency.

[7] On 14 May 2008, a Deputy Registrar sent a Case-Flow Management Intervention Notice in respect of each proceeding to the solicitors on both sides of the record. The notice stated, inter alia:

> "Because of the failure to file a request for trial date the matter will be listed for review before Justice Atkinson at 11.00am on 30 May 2008.
>
> At the review hearing Justice Atkinson WILL require a plan (in the form of a draft order), which should include the following elements to ensure the timely disposition of the matter:-
>
> - Directions that include an actual date for compliance with each step;
> - If directions include provision for expert reports then a provision for experts to meet under rule 429B. You should also give consideration of the appointment of a single expert;
> - An actual date for filing a request for trial.
>
> Justice Atkinson has directed that the registry is not permitted to accept a consent order to amend a case flow plan approved by her. Any amendment to such a plan must be submitted to Justice Atkinson at a further review.
> …"

[8] There was a hearing before the primary judge who made an order dated 30 May 2008 containing comprehensive directions for the future progress of the action. The initiating document was described in the Order as "Case-Flow Management Intervention Notice dated 14 May 2008". The Order concluded:

> "15. By 15 May 2009, the Plaintiffs sign and serve on the Defendants a request for trial date.
>
> 16. By 22 May 2009, the Defendants sign and file with the registry the request for trial date, or the matter be deemed resolved."

[9] There was extensive non-compliance with the requirements of the Order and the appellants were not in a position to serve a request for trial date by 15 May 2009.

[10] On 19 May 2009, the solicitors for the appellants wrote to the solicitors for the respondents, enclosing draft orders in respect of the conduct of the proceedings, which they requested be made by consent. The letter stated: "Given that the 'deemed resolved' date is 22 May 2009, we ask that you provide your response as a matter of urgency". There appears to have been no response to the letter.

[11] On 22 May 2009, a Deputy Registrar made an order in each proceeding that "The matter is deemed resolved". The initiating document was identified as a "Case-Flow Intervention Notice". The point of this order is unclear as the proceedings would have been "deemed resolved" by operation of the Order of 30 May 2008 when the respondents failed to sign and file the request for trial date on or before 22 May 2009. Moreover, the Deputy Registrar's order was made before the expiration of the time stipulated by the Order.

[12] On 10 June 2009, the appellants' solicitors wrote to the respondents' solicitors, giving notice of a proposed application to the Court for reactivation of the proceedings. The respondents' solicitors replied to that letter on 16 June 2009,

advising that their clients would not consent to any orders reactivating either matter. The letter asserted that the relief sought by the appellants was inappropriate because of the appellants' lengthy delays and the other matters recited at length in the letter.

The primary judge's reasons

[13] After setting out the content of the directions made by her on 30 May 2008, the primary judge observed that:[1]

> "No request for trial date in either matter [was] filed by 22 May 2009, and so an order of the deputy registrar was made on 25 May 2009 in respect of both matters, deeming them resolved."

[14] The Deputy Registrar's order was in fact made on 22 May. The primary judge noted that the matters were initially listed for mention on 31 July 2009 and adjourned for hearing to 6 August 2009 due to time constraints. On that day, the matter was adjourned to enable counsel to file further submissions, taking into account the decision in *Aon Risk Services Australia Ltd v Australian National University*.[2] The reasons then discuss the nature of applications to reactivate and the principles relevant to their determination.

[15] The reasons state that, "The conduct of the matters by the parties prior to their being deemed resolved demonstrated a complete disregard for the directions made by the court. Almost none of the orders made on 30 May 2008 were complied with by the dates specified in the orders and many were not complied with at all". There is then discussion of the nature and extent of compliance or non-compliance, as the case may be. That discussion concludes with the observation that, "In summary, by the time the applications for reactivation were heard, it could be said that the pleadings had not even closed".

[16] Referring to explanations for delay advanced by counsel for the appellants, the primary judge noted that "the 'crux' of the delay was identified as the fact that the solvency report [had] not been completed". That, she observed, was given as the explanation for the failure to comply with the remaining orders of 30 May 2008, such as the orders in relation to mediation, disclosure and further expert reports.

[17] Questions of prejudice were addressed and it was noted that the onus was on the appellants to demonstrate that the respondents would not suffer significant prejudice by reason of the delay. It was observed that the respondents raised two particular matters in relation to prejudice; "caveats lodged in relation to both claims and the poor health of Mr Osborne".

[18] Under the heading *"How close the matter is to trial"*, it was stated that: the Liquidator had provided instructions to the respondents' solicitors to finalise a reply, whether or not further particulars of the further amended defences were provided; the appellants' counsel had made submissions to the effect that little stood in the way of the filing of a request for trial date within a matter of weeks and that counsel for the respondents had submitted to the effect that after the provision of the solvency report, it would be necessary for the appellants to obtain experts' reports on the question of solvency and concerning "possible appropriate executive remuneration" for Mr Osborne.

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1 *Multi Service Group Pty Ltd (In Liquidation) and Ors v Osborne and Ors* [2009] QSC 286 at [7].

2 (2009) 239 CLR 175.

[19] The last section of the reasons headed *"Prospects of success"*, refers to affidavit evidence adduced on behalf of the appellants to the effect that the issues in dispute were in narrow compass, that the trials would be brief, and that the appellants' prospects of success were good. The primary judge, referring to assertions in the affidavit evidence that MSG's impecuniosity was substantially attributable to the conduct of Mr Osborne during his time as a director and after he resigned, and to the opinion that the trial would be "short and sharp", said:[3]

> "The first and fourth matters are not strictly relevant to the plaintiff's prospects of success. If, as the plaintiffs suggest, the matter can be resolved in relatively short compass, it begs the question as to why the pleadings have not closed and the plaintiffs have not been able yet to deliver a solvency report. An insolvency involving 500 documents could hardly be considered a large insolvency matter.
>
> Mr Hambleton further deposed that the defence relied upon by the defendants in each matter based on the "resignation agreement" was likely to fail. His belief was based on the information elicited at the public examination and from the inability of the defendants to provide proper particulars.
>
> The defendants, as might be expected, asserted that the plaintiffs do not have a good cause of action considering the level of indifference displayed in pursuing the proceedings. It is further submitted that any suggestion that the proceedings could be resolved quickly was untenable considering:
>
> - The length and detail of the pleadings
> - The volume of documents
> - The requirement that both parties adduce expert evidence as to solvency, record keeping and executive remuneration
> - The factual issues in dispute."

[20] The reasons conclude as follows:[4]

> "These proceedings have not been prosecuted at any time with the expedition required of parties under the UCPR. Whatever the justification for that, it could not be sustained once orders had been made for the timely resolution of the matter which were not complied with and yet no variation of those orders was sought. This was compounded when the matter was deemed resolved. Even then, an application for the matters to be reactivated was not filed for many months. It would not be in the public interest to allow these proceedings to be reactivated when prejudice will be suffered by the defendants and the plaintiffs themselves have been substantially responsible for the delays.
>
> The applications are refused. I will hear submissions as to costs."

[21] It is now convenient to address the arguments advanced in support of the grounds of appeal.

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3 *Multi Service Group Pty Ltd (In Liquidation) and Ors v Osborne and Ors* [2009] QSC 286 at [64]-[66].

4 *Multi Service Group Pty Ltd (In Liquidation) and Ors v Osborne and Ors* [2009] QSC 286 at [67]-[68].

Grounds 2, 3, 4 and 5 - the primary judge erred in law: in failing to correctly identify the principles or factors relevant to the exercise of the discretion arising under paragraph 5.4 of *Practice Direction No. 4 of 2002*; in finding that it would not be in the public interest to allow the proceedings to be reactivated; and in failing to give any or any sufficient consideration to the interests of justice

The appellants' contentions

[22] The substance of the argument advanced by counsel for the appellants on these grounds was as follows. The Practice Direction is designed to facilitate the timely determination of a dispute by trial or other process (including ADR) set out in the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*" or "the Rules") for ending proceedings early.[5]

[23] The mechanism of "deemed" resolution of a dispute, whilst apt to aid in the process of facilitation of the timely resolutions of a particular dispute, ought not be permitted to be an end in itself. Where the requirements stipulated in paragraph 5.4 of the Practice Direction can be fairly said to have been met (and here the affidavit material disclosed a plausible and reasonable explanation and justification for the circumstances leading to the proceeding being deemed resolved and proposed a plan to facilitate the timely determination of the dispute), the Court ought adopt a course that would result in judicial adjudication or mediation rather than an administrative process which effectively locks the parties out of any assistance from the Court.

[24] From paragraphs 1.2, 1.3, 3, 6.1, and 6.2 of the Practice Direction it may be deduced that the intervention contemplated by the Practice Direction is facultative. The primary judge failed to properly consider that the application was one for reactivation under the Practice Direction.

[25] While the public interest is an important consideration and case management principles are relevant, the underlying philosophy of the common law and the *UCPR* is that the interests of justice are paramount.

The respondents' contentions

[26] Counsel for the respondents submitted to the following effect. The obligation placed on parties to proceed expeditiously by r 5(3) of the *UCPR* and the consequences of breach of it are not to be governed solely by reference to the principles which govern the dismissal of proceedings for want of prosecution, for non-compliance with court orders, or pursuant to the inherent jurisdiction of the Court. The orders made on 30 May 2008 were pursuant to the case-flow management regime established by the Practice Direction and there is no basis to constrain the discretion of the Court by reference to the principles on which the appellants rely.

[27] There was no "comprehensive explanation of the delay", rather an inadequate explanation for the failure to deliver the solvency report and no explanation whatsoever of the appellants' failure to otherwise comply with the orders made on 30 May 2008.

[28] The claim that "the real cause of the delay" for the failure to provide the solvency report was "the poor state of record-keeping and the intermingling of accounts"

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5 Paragraph 1.3 of *Practice Direction No. 4 of 2002*.

cannot be sustained. There was no evidence that the state of MSG's records and accounts in November 2008, five years after the commencement of liquidation and two years after completion of the public examinations, operated as an impediment to the completion of the solvency report.

[29] The appellants' submissions on delay failed to acknowledge the prejudice identified by McHugh J in *Brisbane South Regional Health Authority v Taylor*.[6] There is nothing to suggest that the primary judge placed undue weight on matters concerning Mr Osborne's health, or on the caveat issue.

[30] As for the submission that the only prospect of a return to creditors in MSG's liquidation lay in these proceedings, the primary judge plainly considered it, but was right to reject it. There was evidence that the Liquidator had consumed over $1,000,000 of MSG's assets in the course of the liquidation and was claiming a further $175,000 as a liquidator's priority. The prospect of any return to unsecured creditors was therefore very poor.

[31] The importance of parties' progressing litigation expeditiously, as a matter of fairness to the parties and other litigants, and the recognition that the Courts exist as a finite public resource, were emphasised in *Aon*. In that case, the Court laid to rest the notion that a party's dilatory conduct could be excused simply by that party's meeting a costs order.

[32] Merely because one purpose to be served by the Practice Direction is the timely determination of proceedings by trial or otherwise, that does not mean that the Court is unable to deal with a failure to comply with case-flow management orders. To the contrary, the Practice Direction makes it plain that parties will be expected to adhere to court-imposed timelines, failing which, the Court may impose an order under r 371(2) of the *UCPR*. Such an order includes termination of the proceedings for want of compliance by one of the parties.

Consideration of grounds 2, 3, 4 and 5

[33] The Practice Direction explains that it "establishes a system to facilitate the just and timely disposition of proceedings, with the minimum necessary commitment of resources by the court and litigants, by monitoring the progress of individual proceedings … and intervening when a proceeding is not progressing satisfactorily".[7] In paragraph 1.3, a related objective is identified as being:

> "… to focus attention on the early disposition of proceedings utilizing the procedures of chapter 9 of the Uniform Civil Procedure Rules … which provides for:
>
> - judgment by default
> - summary judgment
> - discontinuance and withdrawal
> - alternative dispute resolution processes
> - offers to settle."

[34] Paragraph 4 of the Practice Direction explains the role of case management notices which may be issued to a plaintiff to "show cause why the proceeding should not be deemed resolved". Under paragraph 4.3 such a notice may be given where a request

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6 (1996) 186 CLR 541 at 551.

7 *Practice Direction No. 4 of 2002*, para 1.2.

for trial date has not been filed 180 days after the date of filing of notices of intention to defend. The plaintiff must show cause within 21 days of the date of the notice. Paragraph 5 of the Practice Direction provides:

> "**5. Responding to notices and restoring proceedings deemed resolved**
>
> 5.1 A party must respond to a notice to show cause by:
>
> - entering judgment, filing an application for trial date or bringing some other application to facilitate the timely determination of the proceeding; or
> - justifying the failure to enter judgment or file a request for trial date, and proposing a plan to facilitate the timely determination of the proceeding.
>
> 5.2 The Registrar may then:
>
> - give directions in terms of the plan, or otherwise as appropriate to effect the timely determination of the proceeding; or
> - refer the proceeding to a Judge.
>
> 5.3 If cause is not shown the proceeding will be deemed resolved, and the Registrar will notify the parties to that effect by form CFM3.
>
> 5.4 A proceeding deemed resolved may be reactivated by an application by any party, supported by affidavit material explaining and justifying the circumstances in which the proceeding was deemed resolved, and proposing a plan to facilitate its timely determination.
>
> 5.5 The Registrar may then:
>
> - reactivate the proceeding;
> - give directions appropriate to effect its timely determination; or
> - refer the proceeding to a judge.
>
> The Registrar is hereby accorded that jurisdiction, pursuant to rule 452(2).
>
> Unless otherwise ordered, there will be no order as to the costs of such application before the Registrar."

[35] Paragraph 6.1 is concerned with powers of the Court over the conduct of proceedings and paragraph 6.2 deals with the consequences of non-compliance with the Practice Direction or directions made under it. Those paragraphs provide:

> "6.1 The court may give directions for the further conduct of the proceedings. For example, it may, at any time, at its own initiative, on notice to the parties, review its progress, and give directions to facilitate the efficient and timely determination of the proceeding.

> 6.2 Non-compliance with this practice direction or directions made under it may, on the application of a party, or at the court's own initiative, result in:
>
> - an order pursuant to rule 371(2);
> - a non-complying party being deprived of the costs of late compliance;
> - a non-complying party being ordered to pay the other party's costs thrown away by reason of the non-compliance, which may be fixed and payable forthwith;
> - the non-complying party being ordered to pay, as an administration charge, the sum of $75.00;
> - the Registrar writing directly to the non-complying party drawing attention to the non-compliance and any consequential orders;
> - the proceeding being listed for trial notwithstanding non-compliance."

[36] There was some debate in the course of oral submissions as to what was meant by the deemed resolution of a proceeding. Senior counsel for the respondents submitted that it meant that the parties were deemed to have resolved the dispute the subject of the litigation. This conclusion, he submitted, flowed from the definition of "resolved" in paragraph 2.4, namely, "as used in this practice direction means that the parties are deemed to have resolved their dispute". That construction does not sit very well with the invariable use of the words "deemed resolved" in conjunction with the words "the proceeding": for example, "… why the proceeding should not be deemed resolved", "a proceeding deemed resolved" and "the circumstances in which the proceeding was deemed resolved".

[37] As the concern of the Court in applying the Practice Direction is with the proceeding instituted by the parties and, short of determination of that proceeding, not with any question relating to the existence or otherwise of the underlying dispute, we would not readily conclude, despite the definition of "resolve" that the words "the proceeding should not be deemed resolved" should be read as meaning "why the parties should not be deemed to have resolved their dispute". But, in view of our conclusions as to the proper construction of the Practice Direction, the precise meaning of the fiction created by its deeming provisions is probably not important.

[38] One possible meaning of a deemed resolution of a proceeding is that the proceeding must be taken to have been concluded finally. Such a construction, however, is inconsistent with the structure and language of the Practice Direction. It is also one which would give rise to an obvious doubt about whether the Practice Direction was within the power conferred by s 118D of the *Supreme Court of Queensland Act* 1991 (Qld) and should thus be rejected if an alternative construction is available which would ensure validity.[8] Under paragraph 5.3, if a plaintiff fails to show cause to the Registrar, or to a judge, the proceeding will be deemed resolved. A deemed

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[8] *Chu Kheung Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 7 and the *Acts Interpretation Act* 1954 (Qld), s 9, which have some application by analogy.

resolution may take effect without a hearing and may result from a party's inadvertence in circumstances in which the party's conduct has been generally exemplary. Also, a defendant's conduct may be instrumental in the deemed resolution of a matter. An example of this is where a defendant fails to sign and return a request for trial date sent to him by the plaintiff and a self-executing order of the nature of that made by the primary judge on 30 May 2008 operates to effect a deemed resolution. A deemed resolution may thus take effect in circumstances in which a plaintiff's non-compliance with orders or obligations under the Rules has been great or minimal, deliberate or accidental, or even where a plaintiff has not failed to comply with the Rules.

[39] Under paragraph 5.4, a proceeding deemed resolved may be reactivated by the Registrar, or the Registrar may refer an application to reactivate to a judge (paragraph 5.5). It is implicit in paragraph 5.4 that as long as a proceeding is "deemed resolved" no steps may be taken in it but that the proceeding nevertheless continues in existence and is susceptible to reactivation. It is inherent in the concept of reactivation that that which may be reactivated, although inactive at the time of making an application for reactivation, continues to exist. This construction of the Practice Direction is consistent with what one would expect, given the wide range of circumstances in which a deemed resolution may take place. A deemed resolution of a proceeding thus results in something akin to the placing of the proceeding on an abeyance list.

[40] The deemed resolution of a proceeding may be contrasted with a process under the Rules which brings the proceeding to an end with the consequence that parties' rights and obligations are permanently affected. Such processes include:

- the dismissal of proceedings for want of prosecution (r 280)
- judgment by default (rr 283 – 288)
- summary judgment (rr 292, 293)
- an application to set aside all or part of a proceeding for failure to comply with the Rules (r 371).

[41] The Practice Direction does not purport to establish another mechanism extraneous to the Rules for concluding proceedings. Rather, it is apparent from its terms and, in particular, paragraphs 1.3, 5.1 and 6.2, that its provisions are intended to be utilised in conjunction with the Rules. The Practice Direction's character as a case management tool is further recognised by its inapplicability to proceedings on the Supervised Case List and the Commercial List and by the provision in paragraph 6.2 that non-compliance with the Practice Direction or directions under it may "on the application of a party, or at the court's own initiative" result in an order pursuant to r 371(2).

[42] The primary judge, however, treated the application for reactivation as akin to an application for dismissal for want of prosecution or to an application for leave to proceed under r 389. She explained her approach in this way:[9]

> "On an application for reactivation, the party seeking that relief must, by affidavit, satisfactorily explain and justify the circumstances in which the matter was deemed resolved. Matters which will inform the discretion of the court as to whether or not to reactivate the

[9] *Multi Service Group Pty Ltd (In Liquidation) and Ors v Osborne and Ors* [2009] QSC 286 at [15].

> proceedings are similar to those factors which are relevant to considering whether or not to dismiss an action for want of prosecution under UCPR r 280 or whether to give leave to proceed under UCPR r 389 which were set out in *Tyler v Custom Credit Corp Ltd & Ors* [2000] QCA 178 at [2]. The matters that the court will consider were set out in full in *Arc Holdings Pty Ltd v Riana Pty Ltd* at [9]. These factors relate to the conduct of the litigation and the reasons for the failure to comply with directions leading to the matter being deemed resolved, as well as a consideration of the utility of the litigation. The court's discretion is, however, not fettered by rigid rules but should take into account all of the relevant circumstances of the particular case." (citations omitted)

[43] In our respectful opinion, the primary judge's approach was erroneous. There was no application by the respondents under rr 280, 371 or 374 and the primary judge (assuming she had power to do so) did not call on the appellants to show cause why the proceedings should not be set aside under r 371. Consequently, there being no serious question that the appellants lacked an arguable case, the focus of the primary judge on the application for reactivation should have been on the matters identified in paragraph 5.4 of the Practice Direction, namely, whether the appellants had:

(a) explained and justified the circumstances in which the proceeding was deemed resolved; and
(b) prepared a plan to facilitate its timely determination.

[44] The nature and extent of the explanation and justification of the circumstances which led to the deemed resolution are, of course, relevant to, but not determinative of the exercise of the discretion to reactivate. That discretion needs to be exercised consistently with the objectives of the Practice Direction. The focus of the Practice Direction is on the timely disposition of proceedings, not on their retention by means of a de facto stay: its objectives could not be served by allowing the proceedings to linger indefinitely in the twilight zone of "deemed resolution".

[45] As the exercise of the primary judge's discretion miscarried, it falls to this Court to exercise the discretion afresh. It is convenient to consider the matters relevant to the exercise of the discretion when discussing the remaining ground of appeal.

Ground 1 – the primary judge erred in the exercise of her discretion by basing it on facts not supported by and contrary to the evidence

[46] Counsel for the appellants referred to paragraphs 34 and 64 of the primary judge's reasons, in which reference is made to "500 documents". The sworn evidence was that there were over 500 boxes of documents, not 500 documents, as her Honour found.

[47] Counsel for the appellants submitted that the error was material to the primary judge's reasons as the magnitude of the task facing the Liquidator was relevant to an assessment of his delay. For their part, counsel for the respondents submitted that the reference to 500 documents showed that the primary judge did have regard to the difficulty of the winding up but that there were many other reasons for her refusal of the application. In particular, it was submitted that the explanations for non-compliance with the 30 May 2008 Order were inadequate and did not rise above the generalisation that the winding up had been "difficult and involved". It

was pointed out also that the transcript records the counsel who appeared for the appellants at first instance mentioning 500 documents in his oral address. Even if the transcript is accurate in that regard, counsel's slip had no material consequences. The evidence of 500 boxes was before the Court and was stated correctly in counsel's written submissions. It is also unlikely that at the time of addresses, counsel would have been understood to be relying on the need to consider 500 documents to demonstrate the complexity of the muddled financial affairs of a group of companies and to justify many months of delay on the part of the appellants.

[48] The submissions of the respondents' counsel understates the evidence. Mr Hambleton, an accountant who assumed responsibility for MSG's winding up in the absence of the Liquidator, swore to the following effect: "The winding up of MSG has been difficult and involved"; MSG formed part of the "Multi Service Group" of companies and the records, finances and accounts of companies within the Group were in more than 500 boxes; consideration and analysis of the books and records was time consuming; public examinations were conducted in mid 2006 of a number of persons in relation to the affairs of MSG; the Liquidator has pursued five separate actions for unfair preference recoveries in respect of MSG and two others in respect of another company in the Group and MSG's financial records were incomplete, poorly kept and deficient.

[49] Dealing with the delay in providing the solvency report, Mr Hambleton swore that he completed a solvency report for MSG for the period from 5 December 2002 for use in District Court proceedings. That report concluded that MSG was "hopelessly insolvent" during the period relevant for that proceeding. Mr Hambleton said that when preparing this report, "considerable work" was done towards preparing the solvency report for these proceedings; some 150 hours had been spent in preparing the report which was 80 per cent complete; and it was expected that the report would be ready by August 2009. He also swore that the investigation and analyses done thus far "clearly indicate" that MSG was insolvent at relevant times.

[50] As Mr Hambleton was not required for cross-examination, there is no reason why his evidence should not be taken at face value. Certainly he could have spent more time and money on producing a more detailed account of his and the Liquidator's conduct, but what he did swear to was sufficient to show that disentangling the affairs of MSG was a huge, expensive and time consuming task. This financial debacle, on the face of the evidence before the primary judge, resulted from Mr Osborne's stewardship.

[51] We consider, with respect, that the primary judge erred in her implicit conclusion that the Liquidator did not face a complex and time consuming task in disentangling the financial affairs of MSG. We do not accept the submission that the primary judge's reference to 500 documents was not material to her reasons. The complexity and cost of establishing MSG's true financial position so that the solvency report could be prepared was the principal justification advanced on behalf of the Liquidator for his delay. The delay in the delivery of the solvency report was the main stumbling block to the progress of the proceedings.

[52] It also seems to us that the primary judge, although discussing matters under the heading "Prospects of success", failed to consider those prospects. Her Honour limited herself to reciting the competing contentions on prospects of success. It is

relevant to note that, at least as recorded by her Honour, the respondents' submissions on prospects did not address the merits of the appellants' claims. On the other hand, there was nothing about the pleaded claims which suggested that they were lacking in substance or credibility, and some attempt was made in affidavit material filed on behalf of the appellants to address the merits.

[53] The material before the primary judge showed that the proceedings had not simply "gone to sleep". The parties, albeit in a leisurely way, continued to take steps to prosecute the proceedings, and in September 2008 and from March to May 2009, engaged in "without prejudice" communications with a view to settlement. In the second half of 2008, in proceeding BS 5388/04, an amended statement of claim and an amended defence were filed and served, further and better particulars of the allegations in the amended statement of claim were requested and provided, and an application for security for costs was made and dismissed. In the same period, in proceeding BS 4620/06, there were communications between the parties' solicitors concerning "security for costs, removal of caveats and particulars". A security for costs application was made and dismissed and further and better particulars of the allegations in the amended statement of claim were requested and provided.

[54] The primary judge was concerned that no reply had been filed in either matter, despite the length of time both had been on foot. It did not appear, however, that the replies, which the Liquidator had instructed the appellants' solicitors to prepare, would be likely to materially alter the issues for determination or be productive of further significant delay in the proceedings.

[55] The above discussion makes it apparent that the evidence adduced by the appellants at first instance may well have been sufficient to enable them to successfully resist a strike-out application had one been brought. And that conclusion can be reached even without recourse to the "public interest in liquidators bringing recovery proceedings, such as proceedings against directors for breach of duty or insolvent trading and proceedings for the recovery of unfair preferences".[10]

[56] But, as we explained earlier, the bar the appellants were required to surmount in order to succeed on their reactivation application was set rather lower. The appellants' evidence established that: their claims were, at the very least, fairly arguable; a trial could take place in the reasonably near future; they had a plan to facilitate the timely determination of the proceedings and that they were in a position to, and would thenceforth, prosecute their claim diligently and in accordance with the Rules. The material explained and justified the circumstances in which the "deemed resolution" had occurred. There was no good reason for leaving the proceedings to languish in their "deemed resolved" state in which the appellants could have applied again for a reactivation order. There was, however, good reason to make orders calculated to ensure that the proceedings would be determined on their merits as soon as was reasonably practicable.

[57] For the above reasons, in each proceeding, we would: allow the appeal; set aside the orders of the primary judge made on 11 September 2009; order that the proceeding be reactivated; order that the costs of the application at first instance be the parties' costs in the cause and order that the respondents pay the appellants' costs of the appeal to be assessed. It is not ordered that the respondents pay the appellants' costs at first instance, as the genesis of the applications before the primary judge was the extensive default and cavalier conduct of the appellants.

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[10] See *Hall v Poolman* (2009) 228 FLR 164 at 198.