HIGH COURT OF AUSTRALIA

BRENNAN CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

BRONITA KARLA JACKAMARRA an infant
by her next friend STELLA JACKAMARRA APPELLANT

AND

WILLIAM DARREN KRAKOUER FIRST RESPONDENT

AND

STATE GOVERNMENT INSURANCE
COMMISSION SECOND RESPONDENT

Jackamarra v Krakouer [1998] HCA 27
22 April 1998
P28/1997

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Supreme Court of Western Australia and in lieu thereof order that:*

   (a) *the period for entering the appeal for hearing in the Full Court be extended to a date six weeks from the making of this order;*

   (b) *the second respondent's motion to strike out the appeal stand over generally;*

   (c) *the second respondent have liberty to restore the strike out application in the event of the appellant's failing to enter the appeal within the period specified in par (a);*

   (d) *the appellant pay the costs of the second respondent in the Full Court.*

3. *The second respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Western Australia

Representation:

L W Roberts-Smith QC with E J Vardon for the appellant (instructed by Acting Director of Legal Aid, Legal Aid Western Australia)

No appearance for the first respondent

P V Batros for the second respondent (instructed by Brian C Sierakowski)

CATCHWORDS

Jackamarra v Krakouer & Anor

Practice and Procedure – Extension of time to enter an appeal for hearing – Appeal lodged within time – Procedural default – Delay – Assessment of merits in exercise of discretion to extend time – Whether appeal is "arguable" or "fairly arguable" – Determination of "real prospect of success" – Availability of evidence.

1 BRENNAN CJ AND McHUGH J. The question in this appeal is whether the Full Court of the Supreme Court of Western Australia erred in refusing to extend the time for entering an appeal and, as a consequence of that refusal, in dismissing the appeal for want of prosecution. The decisive reason for the Full Court's decision was that the appeal lacked "any real prospect of success". On the way that the case was conducted, however, we think that the Full Court erred in relying on that ground.

2 The history of the case is set out in the judgments of Gummow and Hayne JJ and Kirby J. There is no need for us to repeat it. The transcript indicates that counsel for the appellant understood that he could show that the appellant had a case on the merits by referring to the reasons of Commissioner Dawes and by outlining the type of arguments that he intended to put before the Full Court on the hearing of the appeal. It does not seem to have occurred to him that the Full Court might reject the application for an extension of time by concluding that the appeal would fail because he had failed to refer to the passages in the evidence that supported his arguments. That is hardly surprising. The evidence was not before the Full Court. Counsel for the appellant was plainly under the impression that the success of his application for an extension of time did not depend upon proof of an evidentiary foundation for his arguments.

3 The understanding of counsel for the appellant as to how the Court would examine "the merits" was consistent with the practice of the courts in a number of common law jurisdictions[1] dealing with applications to extend the time for appealing. In *R v Secretary of State for the Home Department; Ex parte Mehta*[2], for example, Lord Denning MR said:

> "We often like to know the outline of the case. If it appears to be a case which is strong on the merits and which ought to be heard, in fairness to the parties, we may think it is proper that the case should be allowed to proceed, and we extend the time accordingly. If it appears to be a flimsy case and weak on the merits, we may not extend the time. We never go into much

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1 *R v Secretary of State for the Home Department; Ex parte Mehta* [1975] 1 WLR 1087 at 1091; [1975] 2 All ER 1084 at 1088 (England); *Jess v Scott* (1986) 12 FCR 187 at 191-192 (Federal Court of Australia); *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196 at 205 (Western Australia). *Esther Investments* was concerned with an application to extend the time for taking a step in respect of an appeal already lodged, but the Full Court applied the same principles as if it was an application to extend the time for lodging an appeal.

2 [1975] 1 WLR 1087 at 1091; [1975] 2 All ER 1084 at 1088.

> detail on the merits, but we do like to know something about the case before deciding whether or not to extend the time."

4 These remarks of Lord Denning were made in the context of an application for an extension of time to lodge an appeal. In that class of case, the respondent to the application has a vested right to retain the judgment[3], the subject of the appeal. To grant the application for an extension of time is to put at risk a vested right of the respondent. When the application for an extension of time merely concerns the doing of an act in respect of an appeal already lodged, as the present case does, an even more liberal approach is justified. The court is dealing with a pure procedural question – should time be extended? The merits of the appeal do not furnish the criterion for granting or refusing an extension. The appeal is already filed in the court. In most, if not all cases, concerned with the doing of an act in respect of a pending appeal, the only issues would seem to be the length of time that the breach of the procedural rule has continued, the reasons for the breach, and most importantly whether the respondent or the administration of the court's business would be prejudiced by granting the application.

5 In the Full Court, however, Malcolm CJ, with whose judgment Rowland and Franklyn JJ agreed, said[4]:

> "In such a case as the present, there are usually four main factors to be considered in exercising the Court's discretion to extend time, namely, the length of the delay, the reason for the delay, *whether there is an arguable case* and the extent of any prejudice suffered by the respondent: *Esther Investments Pty Ltd v Markalinga Pty Ltd*[5]." (our emphasis)

6 *Esther Investments Pty Ltd v Markalinga Pty Ltd*[6], like the present case, was concerned with the failure to enter an appeal for hearing in accordance with O 63 r 7(1) of the Rules of the Supreme Court 1971 (WA). That sub-rule provides that "[u]nless the Full Court or a Judge otherwise orders, an appeal must be entered[7]

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3 *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201; *Gallo v Dawson* (1990) 64 ALJR 458 at 459; 93 ALR 479 at 480.

4 Unreported, Supreme Court of Western Australia, 7 August 1996 at 17.

5 (1989) 2 WAR 196.

6 (1989) 2 WAR 196.

7 Sub-rule 7(3) provides that "[u]nless the Full Court or a Judge otherwise orders, an appeal shall not be entered for hearing unless the appellant has lodged at the Central Office 5 copies of the appeal book and such other copies (if any) as the Registrar

(Footnote continues on next page)

for hearing before the expiration of 12 weeks from the institution of the appeal". *Esther Investments*, like the present case, was therefore concerned with a purely procedural application to extend time for doing an act in respect of an appeal already lodged. Yet the Full Court in *Esther Investments* approached the exercise of discretion as if it were dealing with an application to extend the time for lodging an appeal. Indeed, the four factors to which Malcolm CJ referred in this case come from the judgment of Kennedy J in *Esther Investments* which, as Kennedy J acknowledged[8], derived from the judgment of the English Court of Appeal in *Palata Investments Ltd v Burt & Sinfield Ltd*[9]. But *Palata* was concerned with an application to extend the time for lodging an appeal against a judgment determining the substantive rights of the parties.

7 Cases such as *Palata* are therefore concerned with applications that seek to put at risk the substantive rights of the respondent. It is understandable that, where the applicant's right of appeal has gone, courts should insist, as they do[10], that the time for appealing will not be extended unless the proposed appeal has some prospects of success. But once an appeal has been lodged, different considerations apply. An appeal, honestly lodged by a suitor within time, "must be investigated and decided in the manner appointed"[11]. If the appeal is frivolous, it can be disposed of summarily. If there is gross delay in prosecuting the appeal, it may be dismissed for want of prosecution. If it fails to comply with a particular rule, the rules of court may entitle the respondent to strike it out[12]. But the merits of the appeal are not a relevant consideration where the application concerns an extension of time for taking a step in prosecuting the appeal unless, unusually, the Court can be satisfied that the appeal is so devoid of merit that it would be futile to extend time. The merits are examined at the end of the process, not during its course. It would lead to strange consequences if consideration of the merits was a prerequisite for extending the time for each and every step in the conduct of the

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may require". Order 63 r 13 contains detailed sub-rules concerning the preparation of appeal books.

8 (1989) 2 WAR 196 at 198.

9 [1985] 1 WLR 942 at 946; [1985] 2 All ER 517 at 520.

10 See, for example, *Gallo* (1990) 64 ALJR 458 at 459; 93 ALR 479 at 480; *Halliday v SACS Group Pty Ltd* (1993) 67 ALJR 678 at 679; 113 ALR 637 at 638.

11 *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720 per Dixon J.

12 Order 63 r 7(5), for example, allows a respondent to apply to the Full Court for an order dismissing the appeal for want of prosecution where the appellant has failed to enter the appeal for hearing as prescribed by r 7.

appeal, just as it would lead to strange consequences if consideration of the merits was a factor to be determined in considering extensions of time for every step in ordinary actions[13].

8 In this Court and in the Full Court, however, counsel for the appellant was content to conduct the appeal on the basis that the Full Court's exercise of discretion was controlled by the four factors referred to by Kennedy J in *Esther Investments*[14] and by Malcolm CJ in this case. Since we are of opinion that the appeal should be allowed even if the exercise of discretion was properly controlled by those factors, it is unnecessary for us to determine whether the appeal must succeed simply because the Full Court applied the wrong principles.

9 One reason that an appellate court does not go into "much detail on the merits"[15] in considering whether the time for an appeal should be extended is because ordinarily it only has "limited materials and argument"[16]. Unless motions to extend time for appeals are to turn into full rehearsals for those appeals, appellate courts can only assess "the merits" in a fairly rough and ready way. In most cases, that assessment will be made from the statement of the applicant's case rather than from the opposing arguments or any detailed examination of the proofs of the argument. The merits are merely one of the factors that must be considered in determining whether the discretion to extend time should be exercised. No doubt there will be cases – this was obviously one – where instinctively the court feels that, given the apparent strength of the judgment under appeal, the arguments supporting the appeal will fail. In that case, however, an appellate court needs to remind itself "that one story is good until another is told"[17] and that, if the court is inclined to act on the apparent strength of the judgment, the applicant for an extension of time should have a full opportunity to tell his or her story in rebuttal of the judgment. The court needs to remind itself also that the parties do not expect to argue the merits issue as elaborately as if they were arguing the appeal itself.

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13 Significantly, in *Birkett v James* [1978] AC 297 at 319 Lord Diplock made no reference to the merits of the case when stating the principles applicable for determining whether an action should be dismissed for want of prosecution.

14 (1989) 2 WAR 196 at 198.

15 *Mehta* [1975] 1 WLR 1087 at 1091; [1975] 2 All ER 1084 at 1088.

16 *Esther Investments* (1989) 2 WAR 196 at 205.

17 *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20 per Dixon CJ.

10 It is one thing to conclude that counsel's statement of the appeal argument contains the ground for its rejection. It is another matter altogether to hold that, although the logic of the argument is impeccable, the appeal has no merits because the applicant has not taken the Court to the detail of the evidence, the statutes or the case law. Given the practice in hearing applications for extension of time, the rules of procedural fairness require that an appellate court should not determine the application on the details of the evidence (if they have been provided) or the lack thereof unless counsel has been given fair notice that the court intends to take that course.

11 The transcript of the argument in the present case shows that counsel for the appellant made it plain to the Court that his argument depended on a careful examination of the whole of the evidence and that his submissions were only intended to demonstrate the nature of his arguments. At one stage, after saying that the case did not turn upon the recollection of witnesses, he informed the Court that the case turned "almost entirely upon a proper view of the medical evidence, and of course the medical practitioners are supported invariably in their evidence by their notes and by photographs and their reports". He also informed the Court that "[m]uch turned on the observations made by the medical practitioners at the time as to whether retinal haemorrhages were of a particular kind. It is perhaps not necessary for me to detail that now but there was a diversity of specialist opinion as to what the retinal haemorrhages were and what they indicated". Later, a significant passage appears in the transcript, counsel submitting:

> *"The findings made by the learned commissioner to the extent that they turn upon the medical evidence, or one view of the medical evidence, are challenged* in grounds 5 and 6. The finding to which your Honour the Chief Justice referred a moment ago is challenged in ground 6(a).
>
> MALCOLM CJ: 7 is also related to the medical evidence, is it not?
>
> ROBERTS-SMITH, MR: Yes, certainly, but *raises a somewhat different aspect of the medical evidence*." (our emphasis)

12 Immediately before the Court reserved judgment, the following exchange took place:

> "FRANKLYN J: Does it become clear, when they deal with the retinal haemorrhage and the bruising, that they are attributing in some way the alleged period of lucidity or absence of it to that?
>
> ROBERTS-SMITH, MR: I think it is. One, of course, needs to *look at all of the evidence, and their reports*, but my recollection is – and I trust I am not overstating it – that the period of lucidity, or the disbelief of that account, really went to their disbelief of the whole incident." (our emphasis)

13 With great respect, it seems to us that the Full Court could not come to the conclusion that the appeal had no prospects of success unless it examined all the evidence, particularly the medical evidence. This was an appeal which depended substantially, if not entirely, on determining whether various findings of the Commissioner were correct having regard to the proper evaluation of the evidence. If the Full Court had examined all the evidence, it may have come to a clear conclusion that the appeal could not succeed. In that case, applying the approach in *Esther Investments*, it would have been justified in refusing the application for extension of time. But without that evidence, it could not make the finding that it did.

14 In our view, it is not an answer to the appellant's case in this Court that the fault lay with her legal advisers because they did not put the evidence before the Full Court. No member of the Full Court indicated to counsel that the application would fail because the evidence was not before the Court. The application was conducted in accordance with what seems to be the practice in Western Australia, a practice which, as we have indicated, is dictated by the nature of the application.

Order

15 The appeal should be allowed. Counsel for both parties agreed that, if the appeal was allowed, the appropriate course would be for this Court to extend the time rather than remit the matter to the Full Court for further hearing. Counsel for the second respondent suggested that it would be appropriate to extend the time for entering the appeal to six weeks from today's date. We agree with the course proposed.

16 Accordingly, we would make the following orders:

(1) appeal allowed;

(2) set aside the orders of the Full Court;

(3) extend the time for entering the appeal to six weeks from today's date;

(4) stand over generally the second respondent's motion to strike out the appeal;

(5) the second respondent to have liberty to restore the strike out application in the event of the appellant's failing to enter the appeal within six weeks;

(6) the second respondent to pay the costs in this Court;

(7) the appellant, who had to seek the extension of time in the Full Court, to pay the costs in that Court although no doubt those costs will be borne

by the appellant's then solicitors whose default necessitated the application for an extension of time.

17 GUMMOW AND HAYNE JJ. Bronita Karla Jackamarra[18] was born on 28 November 1984. On 31 August 1987, when she was about 2 years 9 months old, she suffered serious head injuries which have resulted in severe and permanent brain damage.

18 On 10 October 1992, an action was commenced in the District Court of Western Australia in which Bronita, suing by her mother as next friend, sued her father, William Darren Krakouer, for damages for negligence. The action alleged that the appellant (as it is convenient to refer to Bronita) had been a front seat passenger in a motor car driven by her father when he braked suddenly, causing her to be thrown forward and strike her head on the dashboard of the car.

19 At some point State Government Insurance Commission ("SGIC"), Mr Krakouer's third party insurer, was joined as second defendant to the action[19] and it had effective control of the defence of the action.

20 The action came on for trial on the issue of liability in June 1995. On 7 August 1995, the primary judge dismissed the claim. He did not accept that the appellant had suffered injuries as a result of Mr Krakouer's negligent driving of a motor vehicle. He said that:

> "I do not accept that on a balance of probability the plaintiff suffered her severe head injury as a result of the first defendant's negligent driving. I think it just as likely, if not probable that the plaintiff suffered that injury as a result of some deliberate act of abuse. The fact that the plaintiff was found to have bruises on various parts of her body in unusual positions ranging from ages of less than twenty four hours to up to seven days called for investigation, as did the likelihood that the child was shaken."

21 On 14 August 1995, the appellant gave notice of appeal to the Full Court of the Supreme Court of Western Australia. SGIC contended that the appeal was not an appeal against a final order and was therefore incompetent for want of leave. Accordingly, application was made for leave to appeal and for an extension of time within which to apply for leave. On 10 November 1995, the Full Court held that the judgment of the District Court dismissing the action was a final judgment and that leave to appeal was not necessary.

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18 She is sometimes referred to in the papers as Ronita.

19 Why SGIC was joined as a defendant, rather than a third party, does not appear from the papers but nothing was said to turn on this.

22 The rules governing appeals to the Full Court of the Supreme Court of Western Australia require that an appeal be entered for hearing before the expiration of 12 weeks from the institution of the appeal[20].

23 On 10 November 1995, the day on which the Full Court gave judgment on the question of competency of the appeal, the solicitors for SGIC agreed to extend the time for entering the appeal for hearing until 6 February 1996. The steps to settle the contents of the appeal book were not taken before this extended time expired. The appellant's solicitor filed a draft appeal book index on 7 March 1996 and on 12 April 1996 served SGIC with a copy of that draft and notice of an appointment to settle it, fixed for 18 April 1996.

24 On 15 April 1996, SGIC filed and served a notice of motion to dismiss the appeal for want of prosecution[21]. Three months later, on 15 July 1996, the plaintiff filed and served a notice of motion seeking an extension of time[22] within which to enter the appeal for hearing.

25 The delay in the prosecution of the appeal was entirely the fault of the appellant's then solicitor who did not attend to the matter because of pressure to attend to other matters conducted by the service which employed her.

26 On 7 August 1996, the Full Court dismissed the application for extension of time and dismissed the appeal for want of prosecution, with costs. Malcolm CJ, with whom the other members of the Court agreed, said that:

> "In such a case as the present, there are usually four main factors to be considered in exercising the Court's discretion to extend time, namely, the length of the delay, the reason for the delay, whether there is an arguable case and the extent of any prejudice suffered by the respondent: *Esther Investments Pty Ltd v Markalinga Pty Ltd*[23]."

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20 Rules of the Supreme Court 1971 (WA), O 63 r 7(1).

21 Pursuant to O 63 r 7(5).

22 Pursuant to O 63 r 7(1).

23 (1989) 2 WAR 196.

Malcolm CJ went on to say that:

> "The critical issue, however, relates to the merits of the appeal. In my opinion the appeal lacks any real prospect of success. This is a case where the apparent lack of merit in the appeal is in the end decisive."

27 It is against the order refusing an extension of time and dismissing the appeal to the Full Court that the appellant now appeals to this Court. It was submitted that the conclusion that the appeal to the Full Court had no "real prospect of success" was wrong in both fact and law. It was submitted that because the Full Court had before it only the reasons for judgment of the primary judge, the notice of appeal to the Full Court and evidence only on the issue of delay in prosecuting the appeal (and did not have any of the evidence given at trial), it was not open to the Full Court to conclude that the appeal had no real prospect of success. Further it was submitted that the test applied was, in any event, too onerous.

28 Before dealing with these arguments, it is as well to set the arguments in their proper context.

29 Delays in the courts are a major cause of disquiet not only among those who resort to the courts but also among judges and all others associated with the courts. Delay will almost always impede the proper disposition of any case that does not come to trial promptly. Memories fade; records may be lost. The impediments are many, varied and obvious. Those impediments may be overcome but their presence is an added burden for both the litigants and the court that must try the case. Delay in a case will almost always add to the costs. The case takes longer to prepare and to try because the events are no longer fresh in the minds of those who will give evidence. Costs, therefore, increase. Delay in a case also adds to the overall burden on the judicial system. The case that has been delayed in coming to trial and therefore takes a day longer to try than otherwise would be needed, keeps another case out of the lists for that day. Or, as happened here, the case that has been delayed occupies the courts by applications to remedy some failure to comply with prescribed time limits. Each day's delay in bringing a case to trial and final judgment simply prolongs the uncertainty and worry felt by the litigants. No doubt there are other reasons for the disquiet felt by both litigants and lawyers about delay but the matters we have mentioned indicate why it is so important to avoid delays wherever possible.

30 It is with these considerations in mind that the rules of court prescribe times for the taking of certain steps in a proceeding. They are not prescribed for the purpose of implementing what Roscoe Pound referred to more than 90 years ago

as the "sporting theory of justice"[24]. They are prescribed as aids to the attainment of justice. Just as case management is not an end in itself, but an aid to the prompt and efficient disposal of litigation[25], so, too, the rules of court and the time limits which are prescribed there are not to be seen as ends in themselves. But they are aids to the attainment of justice and the times that they fix are prescribed as sufficient to take the step or steps identified while maintaining the general momentum of the litigation.

31 Here, cross-applications were made to the Full Court - by the respondent to the appeal to strike it out for want of prosecution, and by the appellant, for an extension of time within which to take steps prescribed by the rules governing the appeal. If the factors which are to be taken into account in considering each of these applications are not identical, they are, at least, broadly similar. Thus, it was not disputed that in considering whether to strike an appeal out for want of prosecution and in considering whether to grant an extension of time for the taking of the procedural steps necessary to make an appeal ready for hearing, the court dealing with those applications should have regard to the chances of the appeal succeeding. Nor was it disputed that, in some cases, the chances of the appeal succeeding may be so slight as to warrant summarily dismissing the appeal or refusing an extension of time. Both parties submitted that the test which the court should apply before taking either of those steps was whether the appeal is "arguable" or "fairly arguable". That apparent agreement may mask more than it reveals; much turns on what is meant by "arguable" or "fairly arguable".

32 Reference was made to the cases dealing with summary determination of actions before trial. In *General Steel Industries Inc v Commissioner for Railways*

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24 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice", reproduced in Glenn R Winters (ed), *Handbook for Judges*, (1975), 280 at 288:

> "It [the 'sporting theory of justice'] creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived ... . The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverse judgments, or sustains demurrers in the interest of regular play."

25 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154 per Dawson, Gaudron and McHugh JJ.

(NSW)[26] Barwick CJ set out, in an appendix to his reasons[27], a list of cases dealing with the test to be applied in determining whether to terminate an action summarily before trial. As Barwick CJ pointed out[28]:

> "The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
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> At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'."

Although various expressions have been employed in this context, all of them may be seen as different ways of saying that a court should not exercise its powers of summary determination of a proceeding except in clear cases[29]. The statements referred to in *General Steel Industries Inc* were all made about the summary determination of a proceeding without trial. The present matter arises in a different context. Here there has been a trial of the appellant's claim and the question is not whether she should be denied access to a determination of her claim in the ordinary way but whether she should now be denied access to a review of that decision.

33 Her appeal is as of right and was instituted within time but that right must be exercised subject to the limitations imposed by the rules. If exercising her right in accordance with those rules, she should not be denied the opportunity to present her appeal in the ordinary way except in a clear case. So, too, when an appellant has instituted an appeal within time, if all other things are equal, the bare fact that the appellant has failed to take some interlocutory step within the time fixed by the

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26 (1964) 112 CLR 125.

27 (1964) 112 CLR 125 at 138.

28 (1964) 112 CLR 125 at 129.

29 See also *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J:

> "A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury."

rules would not be reason enough to shut that appellant out from the pursuit of the appeal unless it were clear that the appeal would fail. Of course, the qualification "if all other things are equal" is very important and it should not be permitted to obscure the fact that very often the fact that an appeal is pending may itself affect the respondent adversely in some way. For the moment, however, we leave consideration of adverse effects of delay on the respondent to one side and look only to the degree of satisfaction that the court must have that the appeal will fail.

34 We do not think it useful to fasten upon one verbal formula in preference to all others as a description of the necessary degree of satisfaction. What must be shown is that it is clear that the appeal will fail and in that sense is not "arguable" or not "fairly arguable". Each of the formulae mentioned by Barwick CJ in the passage we have quoted from *General Steel Industries Inc* intends to convey that meaning. But, of course, if formulae of the kind set out in *General Steel Industries Inc* are applied in the case of an appeal, it is important to recall that the context is different. The boundaries of the field for debate between the parties on appeal have been set at trial. Before a proceeding has been tried there may well be considerable uncertainty about what evidence will be given and how that will affect the final identification of issues to be decided. Those uncertainties should have been largely resolved at trial and the material and the issues for consideration on appeal will ordinarily be readily identifiable. Is it clear, then, that those issues will be resolved against the appellant?

35 The parties submitted here that the Full Court should have decided whether the appeal was "arguable". It is important to understand what is meant in this context by "arguable". If it means no more than that counsel, acting responsibly, can formulate an argument which can properly be advanced in support of the appeal, the test is too loose; if it is clear that that argument will fail, the appeal should not proceed. To permit it to proceed is to subject the respondent to the many costs of litigation[30] needlessly and is to occupy the courts when they could be occupied more productively. No doubt, as Barwick CJ said in *General Steel Industries Inc*[31]:

> "... great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal."

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30 Attention is usually directed to the costs incurred for representation but they are only one kind of cost incurred in litigation. Litigants suffer other costs - not least their time and the general burden of the litigation.

31 (1964) 112 CLR 125 at 130.

But as he also said[32]:

> "On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

Inevitably, then, courts will sometimes have to balance competing considerations. If the futility of an appeal can be demonstrated only by hearing the whole argument there may be no advantage in bringing that argument forward to the time at which some application is made to cure a minor procedural default. But that is not the present case.

36 In the present case, the appellant accepted in the Full Court that she had to show that the appeal was arguable. Not only did the appellant's outline of argument to that Court address the merits of the appeal, any lingering doubt that there may have been about the importance of the question was resolved very early in the argument in that Court. At the outset of the argument counsel were told by the Court that the "appeal is likely to be struck out unless it is saved by its merits" and that counsel for the appellant

> "should take it that, having regard to the length of the delay, the reasons for the delay and the apparent absence of any prejudice other than the uncertainty of the situation, the key issue here is whether there is merit in the appeal sufficient to overcome those difficulties, because if the only question was the length of the delay, reasons for the delay and a matter of prejudice and the appeal had merit, it is likely that an extension of time would be granted."

And the appellant was right to proceed on the basis that a necessary part of the argument in support of the application to extend time and the opposition to the application to strike out was to show that the appeal was arguable. If she did not show that the appeal was arguable there would be no point in extending time and she would suffer no injustice if the rules were applied[33]; the application to strike out should succeed.

37 In fact, however, the appellant's argument in the Full Court did not go beyond stating the arguments which the appellant wished to advance on the appeal - arguments which were revealed by the notice of appeal. That notice of appeal gave seven grounds. Of these, only one (Ground 1) sought to raise any question of law;

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32 (1964) 112 CLR 125 at 130.

33 *Gallo v Dawson* (1990) 64 ALJR 458; 93 ALR 479.

the other six grounds were all challenges to findings of fact made by the primary judge. Attention was directed in the Full Court principally to the factual questions that it was sought to raise in the appeal. In this Court, attention was directed only to those factual questions. Nevertheless, it is as well to say something briefly about Ground 1 and the circumstances which gave rise to it before dealing with the other matters.

38 Mr Krakouer did not give evidence at the trial. The appellant tendered evidence of his account of the circumstances of the accident by tendering an answer which he had given to interrogatories and by leading evidence from the appellant's mother and the appellant's doctors of what Mr Krakouer had said about the accident. The accounts Mr Krakouer gave differed in important respects. SGIC led evidence from an insurance investigator of two conversations with Mr Krakouer in which, again, two different accounts were given. Ground 1 sought to challenge the reception of the evidence of the insurance investigator led by SGIC. Given the way in which the trial was conducted (in which evidence of out of court admissions by one defendant, Mr Krakouer, were treated as evidence against the other defendant) there is nothing in this point. Either SGIC was rightly treated by the parties as standing in the shoes of its insured, Mr Krakouer, or none of the evidence of out of court admissions by Mr Krakouer whether led from the appellant's mother, Ms Jackamarra, or the doctors, should have been admitted as evidence against SGIC. This ground of appeal may be put to one side, as it seems it was in the Full Court. The challenge which the appellant sought to mount by her appeal to the Full Court was, then, a challenge to the various findings of fact made by the primary judge. The challenge was put in various ways:

- that the primary judge should have assessed Ms Jackamarra's evidence otherwise than he did and reached different conclusions from those he did reach;

- that the primary judge should have reached other conclusions about the effect of Mr Krakouer's out of court statements than he did;

- that the primary judge should have reached other conclusions about the effect of the medical evidence than he did.

All of these challenges depended upon attacking the findings which the primary judge had made about the effect of oral evidence which he had heard. The difficulty of that task is notorious[34]. The difficulty of that task is none the less

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34 See, eg, *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

when, as counsel for the appellant submitted to the Full Court, this case was one which "turns almost entirely upon a proper view of the medical evidence".

39 As appears from the reasons for judgment of the primary judge (which were before the Full Court) he concluded that

- the appellant was uninjured when handed by her mother into the custody of Mr Krakouer about eight days before 31 August 1987, the day when she was taken to the doctor obviously severely injured;

- all four consultants who had examined the appellant for the purpose of giving evidence "were strongly of the opinion that the overall pattern of [her] injures was suggestive of deliberate child abuse".

Indeed the primary judge said in his reasons that the consultant who had been retained to give evidence on behalf of the appellant had expressly concurred with the opinion of a consultant retained on behalf of SGIC that "in view of the multiple bruises of varying ages and the apparent severity of the injury I believe that it is highly unlikely that this child's injuries were caused in the alleged motor vehicle accident as described".

40 In those circumstances, did the appellant show that the appeal was arguable by saying that she sought to challenge these findings? In our view it was not enough simply to state the argument - something more was needed to demonstrate that the argument was one that might succeed.

41 In some cases, reference to the reasons for judgment below and the notice of appeal will reveal an arguable case of error but in this case it did not. This was not said to be a case in which the reasons for judgment of the primary judge bespoke error. It was not suggested in the Full Court or before this Court that the reasons revealed inconsistency or error of logic. It was not suggested that the reasons showed that the primary judge had not used, or had misused, the opportunity which he had had to observe the witnesses. On their face, the reasons were cogent and comprehensive and were reasons that depended very largely upon the observations which the primary judge made of the witnesses who gave evidence before him.

42 This is not to say that every application to cure a procedural default in relation to an appeal will or may be turned into a hearing of the appeal. As we say, there will sometimes be nice questions of judgment to be exercised by the Court and by the parties' practitioners. But if there is a dispute about whether the appeal is arguable then it will be for the appellant who seeks to maintain the appeal to demonstrate that that is so. Sometimes, perhaps more often than not, very little material will be needed in aid of the contention that the appeal is arguable. This appeal was not of that kind. Indeed it was an appeal based on grounds of a kind

which present an appellant with particular difficulties. Those difficulties had to be addressed if the appellant was to show that her appeal was arguable.

43 In particular, if the appellant wished to contend that examination of the transcript of the evidence would reveal error by the primary judge, it was for the appellant to put that transcript before the Full Court. Merely stating that the appellant would argue on appeal that the findings of fact were flawed says nothing about whether that argument can be maintained. The transcript was available to the appellant's advisers at the time of the application to the Full Court. The appellant's argument to that Court expressly acknowledged that the appellant must demonstrate that the appeal was arguable and the Full Court pointed to the importance of this issue. The Full Court was entitled, and indeed was bound, to decide whether the appeal was arguable on the material that was placed before it. On that material no arguable case was demonstrated. We would therefore dismiss the present appeal.

44 KIRBY J. The Full Court of the Supreme Court of Western Australia declined an application, brought on behalf of an infant appellant, to cure a default by her then solicitors in complying with a procedural rule[35]. Instead, that Court acceded to an application by the respondent to dismiss the appeal for want of prosecution without a full hearing on the merits. It did this without having before it the transcript of evidence taken at the trial. The Full Court thus terminated an appeal which, but for the procedural default, would have been heard as of right. By special leave, its orders are now challenged in this Court.

An infant is injured in contested circumstances

45 Bronita Jackamarra (the appellant) was born in November 1984. Her mother, and next friend, Ms Stella Jackamarra, was only 15 years of age at the time. The child's natural father is Mr William Krakouer. He is the first respondent to this appeal. He owned a motor vehicle which was insured against third party risks by the State Government Insurance Commission ("the Commission"). Before this Court and in the Full Court, the Commission alone was represented to resist the appellant's application and to support the termination of her appeal.

46 Ms Stella Jackamarra came from Carnarvon to Perth in 1984 to attend school. She commenced a relationship with Mr Krakouer as a result of which she became pregnant with the appellant. It was not until the appellant was some three months old that Ms Stella Jackamarra had further contact with Mr Krakouer. After that, Mr Krakouer visited two or three times a week. In August 1987, she suggested to Mr Krakouer that he take the appellant, then aged two years and nine months, to Mt Barker, where his family lived, so that the child could get to know them. She later recalled that, two weeks before the trip, Mr Krakouer had complained that the brakes of his car were playing up and jamming. When the appellant was put in Mr Krakouer's car to commence the journey to Mt Barker the evidence was that she was uninjured. There was no proper child restraint in the car suitable for the child's safe carriage.

47 At about 5.00 p.m. on 31 August 1987, Dr M J Christensen, a general practitioner in Mt Barker, saw the appellant who was brought to his surgery by Mr Krakouer. As recorded by the doctor, Mr Krakouer described a car incident which had occurred half an hour earlier, just outside Mt Barker. Allegedly, Mr Krakouer's car had been involved in a violent episode of braking. As a result, the appellant had been flung against the dashboard of the car from the position she had been in, lying on the front seat. The child was found to have suffered a serious head injury. This necessitated radical intervention by Dr Christensen. The child was transfered to a District Hospital and later to the Princess Margaret Hospital in

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35 *Jackamarra v Krakouer*, unreported, Full Court of the Supreme Court of Western Australia, 7 August 1996 (Malcolm CJ (Franklyn and Rowland JJ concurring)).

Perth. There, she came under the care of a number of neurologists and paediatricians. What might otherwise have been an uncomplicated negligence action against Mr Krakouer, for which the Commission would have been liable to indemnify him, soon began to take on a different complexion.

48 A number of photographs were taken for the Princess Margaret Hospital file. These showed injuries to five areas of the appellant's body. The principal injury was to the top of the head. An area of hair was shaven revealing "red linear marks running parallel". There was also bruising to the appellant's jaw which was described, on 1 September 1987, as being "over 24 hours old but less than a week". There was bruising to the left ear. A fingertip of the appellant's right hand suggested injury caused possibly by crushing. On the appellant's stomach there were fairly large blue bruises considered to be between two and seven days old. In addition, the appellant had a retinal haemorrhage in two areas of the right eye. All medical consultants dealing with the case became suspicious that it was one of deliberate child abuse.

49 The predicament of the appellant could not have been more acute. She was undoubtedly seriously injured. By reason of her age and injuries, communication with her was so difficult that there could be no reliance on her evidence to describe what had occurred. Her mother was unable to help, beyond describing her condition when she was placed in Mr Krakouer's car. The latter gave a succession of histories disclosing significant differences. Initially, to Dr Christensen (and Dr Duncan at the Princess Margaret Hospital) he said that the braking incident had occurred at 4.30 p.m. on the day in question. It was claimed that the appellant did not lose consciousness immediately, but went shopping with Mr Krakouer to buy a dress, only later becoming unconscious at the time she was presented to Dr Christensen at 5.00 p.m. Subsequently, Mr Krakouer told the mother that there had not been a lucid interval. When questioned by an investigator for the Commission (Mr Ronald Sarre), Mr Krakouer denied that a braking incident had occurred. Later, he accepted that it had happened but claimed that the appellant had hit her head on the side pillar between the two doors of the car, her seat being inclined. In answer to interrogatories administered for the appellant, Mr Krakouer claimed that he had not actually seen the appellant come into collision with the car when it braked, as he was concentrating on controlling the car. After the incident, he saw her lying on the floor of the car in front of the passenger seat, apparently unconscious. The presence or absence of a lucid interval was considered to be medically significant. The experts expressed the opinion that, if the appellant had been injured in the motor vehicle as a result of being thrown violently against the dashboard so as to receive the serious injuries found, a lucid interval, even of half an hour, was unlikely, bordering on the impossible.

50 The appellant is an Aboriginal Australian. Her mother obtained legal advice, on her behalf, from the Aboriginal Legal Service ("ALS"). On 10 October 1992, a writ was issued out of the District Court of Western Australia claiming damages

against Mr Krakouer. Subsequently, the Commission was joined as a second defendant and Mr Krakouer was separately represented. In essence, the Commission's case was either that the appellant's injuries were caused by child abuse for which it was not liable or that the appellant could not establish, on a balance of probabilities, that her damage, or any of it, was occasioned by trauma arising out of the use of Mr Krakouer's motor vehicle, for which use alone it was obliged to indemnify him.

The infant's claim is dismissed at trial

51 The appellant's claim was heard in the District Court of Western Australia by Commissioner Dawes. The trial took place in June and July 1995. Judgment was delivered on 7 August 1995.

52 The Commissioner recounted the appellant's medical histories and the medical opinions set out above. He described the way in which he had permitted the appellant's case to be reopened to allow evidence to be given by Mr B A R Stokes, a neurosurgeon. This was at variance with the evidence given earlier by treating doctors and qualified experts. In Mr Stokes' opinion, it was quite possible that there had been a lucid interval between injury and loss of consciousness. Furthermore, bleeding at the back of the eye into the retina, which other medical experts had considered to be a typical outcome of violent shaking of the child, could, in Mr Stokes' opinion, equally have been caused by simple intracranial pressure typical of extreme brain swelling occurring in a child, even after a relatively mild head injury. There was therefore a clash of medical testimony to be analysed and resolved. In the result, the Commissioner preferred the evidence of the other experts to that of Mr Stokes.

53 It was then necessary to unravel the conflicting versions of events successively given by Mr Krakouer. The Commissioner recorded these. He noted a challenge to the admissibility of the evidence of Mr Sarre, given that Mr Krakouer had not given evidence in the trial. He ruled that the evidence was admissible[36]. Once admitted, that evidence added two further versions of events to complicate the process of fact-finding.

54 The Commissioner proceeded to his conclusion. Although, as he noted, the mother's recall of the conversation with Mr Krakouer about the way the injuries to her daughter had occurred had not been challenged at the trial, he concluded that she had "unconsciously transposed a much later account by [Mr Krakouer] back to 1 September 1984". He found that the report of Drs Christensen and Duncan, supported by contemporaneous written records, was more likely to be the accurate

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36 Relying, by analogy, on *Patmoy v Paltie* [1960] NSWR 334. See also Gillies, *Law of Evidence in Australia*, 2nd ed (1991) at 188.

one. He attributed the later versions given by Mr Krakouer, which deleted mention of the lucid interval, to a belated appreciation by him of the significance of such an interval as rendering trauma in the motor vehicle less likely, and hence other more sinister trauma a more likely explanation of the appellant's undoubted injuries.

55 In the light of the medical evidence which he preferred, the Commissioner concluded that he could not accept any of the conflicting accounts of injury given by Mr Krakouer[37]:

> "I do not accept that on a balance of probability the plaintiff suffered her severe head injury as a result of the first defendant's negligent driving. I think it just as likely, if not probable that the plaintiff suffered that injury as a result of some deliberate act of abuse. The fact that the plaintiff was found to have bruises on various parts of her body in unusual positions ranging from ages of less than twenty four hours to up to seven days called for investigation, as did the likelihood that the child was shaken."

56 It was from this decision of the Commissioner, and the order dismissing the appellant's claim which followed, that the appeal was taken to the Full Court of the Supreme Court of Western Australia.

An appeal is brought but becomes out of time

57 The appeal to the Full Court was filed promptly on 14 August 1995. Three days later, the Commission signified its intention to defend by filing a Notice of Intention to be Heard. Although Mr Krakouer had been represented before the Commissioner, his representative had taken no substantial part in the trial. There was no appearance for him in the appeal. On 31 August 1995, the Commission's solicitors suggested to the ALS that, because the Commissioner had severed and dealt separately with the issue of liability, the judgment entered by him was interlocutory and thus the appellant required leave to appeal. In consequence of this suggestion, on 7 September 1995, the ALS, on behalf of the appellant, filed an application for leave to appeal. That application was heard by the Full Court on 19 October 1995. On 10 November 1995, that Court ruled that the Commissioner's order was final and so did not require leave. Having occasioned this unnecessary interruption to the progress of the appeal, the Commission's solicitors, unsurprisingly, consented "to a reasonable extension of time" for the appellant to enter the appeal for trial. The solicitors suggested a period of two months "from the time when the relevant period last expired".

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37 *Jackamarra v Krakouer,* unreported, District Court of Western Australia, 7 August 1995 at 28 per Commissioner Dawes.

58 The procedure for the setting down of an appeal for hearing is established in Western Australia by the Supreme Court Rules[38]. Relevantly, the rule requires that, unless the Full Court or a judge otherwise orders, an appeal must be entered for hearing "before the expiration of 12 weeks from the institution of the appeal". It was agreed between the parties that the extension of time granted by the Commission would have expired on 6 February 1996. It was common ground that, by that time, no step had been taken by the appellant to have the appeal entered for hearing.

59 Nevertheless, on 7 March 1996, before any other step was taken, a draft appeal book index was filed. It was not served on the solicitors for the Commission until 12 April 1996. An appointment with the Registrar to settle the appeal book index was procured for 18 April 1996. However, at that appointment, the Commission's solicitor notified the ALS that two days earlier he had filed a motion in the Full Court for an order dismissing the appeal for want of prosecution. This notwithstanding, the appeal book index was settled by the Registrar on 28 May 1996. On 15 July 1996, the ALS filed a motion in the Full Court. This sought an extension of time within which to enter the appeal for hearing. That motion was accompanied by an affidavit by the solicitor employed by the ALS. By this affidavit, the solicitor deposed to the pressure of caseloads, the imposition of additional administrative responsibilities, necessary court attendances and the answering of telephone queries which had impeded the preparation of the appeal documents on time. As well, there had been delays in preparing the appeal book index in accordance with the Rules[39]. The solicitor's affidavit concluded by pointing out that the appellant was then 11 years of age and suffering from severe brain damage. The limitation period in respect of her cause of action "would not have expired until the year 2008". The appellant and her mother were described as living "at the remote Western Australia town of Fitzroy Crossing" where they did not have ready access to a solicitor. The affidavit concluded with a statement of the fact, obvious enough, that "the Appellant is in no way personally responsible for the delay in entering the Appeal for hearing". The delay in question (between the agreed date for the expiry of the extension and the application to the Full Court) was a little more than five months in all. Unless it was cured, by order of the Full Court (or if the Commission's motion succeeded), the claim of the appellant against Mr Krakouer would be extinguished for all time.

The Full Court refuses an extension and dismisses the appeal

60 When the matter was called on for hearing the Full Court turned first to the appellant's application for an extension of time. The presiding judge, Malcolm CJ,

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38 O 63 r 7.

39 O 63 r 13.

made it clear, early in the argument, that he regarded the delay of five months as "gross delay". He observed that the "appeal is likely to be struck out unless it is saved by its merits"[40].

61 However, the exploration of the merits by the Full Court was necessarily attenuated. That Court had before it the reasons of the Commissioner and the foregoing affidavit of the solicitor from the ALS. It did not have the transcript of evidence given at the trial or detailed written submissions on the grounds raised by the notice of appeal. Nor did the Court have the time, in a busy motion list, to conduct, in effect, a full appeal hearing. Even the reasons of the Commissioner were not available to all members of the Full Court when the case was first called. The hearing was therefore adjourned until later that day so that this difficulty, at least, could be overcome.

62 The argument before the Full Court was recorded. The transcript has been placed before this Court. Some of the argument was addressed to legal challenges, raised by the appellant, to the admissibility of the evidence of the investigator, Mr Sarre (ground 1), and to the adverse conclusion about the unchallenged evidence of the mother (ground 2). However, most of the argument was steered into a necessarily abbreviated attempt by counsel for the appellant to explain the conflict in the histories taken by, and opinions of, the several medical witnesses, as they affected the appellant's attack on the ultimate conclusions of Commissioner Dawes. I say that the argument was attenuated because, there being no transcript of the trial evidence before the Full Court, it was impossible to do more than to refer to the factual findings as contained in the Commissioner's reasons and to foreshadow the ways in which these would be challenged if the time default were cured and the appeal proceeded to a hearing in the ordinary way. In his last statement to the Full Court, counsel emphasised that it was necessary to look at all of the evidence in judging the appellant's attack on the Commissioner's findings[41]. The Full Court did not call for the evidence or adjourn the hearing to permit it to be obtained. At the end of argument, the Court reserved its decision.

63 In its published reasons, the Full Court[42] described the factual controversy much as I have done. So far as the challenge to the admissibility of the evidence of Mr Sarre was concerned, it was observed that, even if that challenge were to

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40 *Jackamarra v Krakouer,* Full Court of the Supreme Court of Western Australia, Trial transcript, 22 July 1996 at 4, 8.

41 *Jackamarra v Krakouer,* Full Court of the Supreme Court of Western Australia, Trial transcript, 22 July 1996 at 29.

42 *Jackamarra v Krakouer*, unreported, Full Court of the Supreme Court of Western Australia, 7 August 1996.

succeed, it would not affect the outcome of the appeal. A similar conclusion was expressed in respect of the challenge to the rejection of the mother's evidence. So far as the complaints about the inferences drawn by the Commissioner from the successive versions of Mr Krakouer (grounds 3 and 4), the opinion was expressed that these could only be disturbed by overturning the findings based upon the medical evidence. Such evidence was not, of course, before the Full Court. So far as the attacks on the findings said to be based on the medical evidence (grounds 5, 6 and 7), the view was expressed either that the findings were "clearly open on the evidence" or amounted to findings which were "not only open to [the Commissioner] but, on the face of it, were fully justified"[43]. It is not explained how these conclusions could be reached without access to the evidence referred to.

64 The Full Court then proceeded to apply its own decision in *Esther Investments Pty Ltd v Markalinga Pty Ltd*[44]. This addressed attention to "the length of the delay, the reason for the delay, whether there is an arguable case and the extent of any prejudice suffered by the respondent". All of the other factors being acknowledged as favouring the extension, the Full Court reached its conclusion. Giving the reasons of the Court, Malcolm CJ said[45]:

> "The critical issue ... relates to the merits of the appeal. In my opinion the appeal lacks any real prospect of success. This is a case where the apparent lack of merit in the appeal is in the end decisive."

65 As a result of this conclusion the application for extension of time was refused. The Commission's application for dismissal of the appeal for want of prosecution was granted. Having granted special leave, this Court must now review those orders. Because they are orders made in the course of decisions on matters of practice and procedure, involving the exercise of discretions, an approach of restraint is appropriate[46]. In this appeal, it is not enough that this Court would have reached a different conclusion on the merits. The appellant must show that an error of law or of principle occasioning an injustice has occurred which this Court should correct.

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43 *Jackamarra v Krakouer*, unreported, Full Court of the Supreme Court of Western Australia, 7 August 1996 at 15, 16 per Malcolm CJ.

44 (1989) 2 WAR 196.

45 *Jackamarra v Krakouer*, unreported, Full Court of the Supreme Court of Western Australia, 7 August 1996 at 19.

46 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177; *In re the Will of F B Gilbert (Dec'd)* (1946) 46 SR (NSW) 318 at 323.

Applicable principles for procedural time defaults

66 I take the following principles to apply:

1. The first rule is that there are no rigid rules. Procedural discretions, such as those in question here, are typically expressed in very wide language[47]. In the exercise of such discretions, courts should not be trammelled by a rigid set of rules, whether called guidelines or principles, which would impede the application of rules of court with the flexibility needed to do justice in the particular case[48]. This is why it is impossible to lay down fixed and binding rules for the exercise of discretions to enlarge time. Of necessity, each case must depend upon its own particular circumstances[49].

2. Nevertheless, it is useful to keep in mind a number of considerations which have commonly been taken into account. The starting point for the exercise of any power granted under legislation is the ascertainment of the terms of the grant and a consideration of the purposes for which the power has been afforded. Thus, if a rule requires that "special reasons" or "special circumstances" be shown as a pre-condition to a procedural indulgence, this will indicate a need to demonstrate circumstances out of the ordinary[50]. But where, as is usually the case (and is the case here), the discretion is conferred in unlimited terms, the question for the decision-maker is whether it would be just in all the circumstances to grant or refuse the application[51]. Necessarily, the indulgence is not granted as of course. It is for the party seeking to persuade the decision-maker to show that it should be granted. Such persuasion will usually depend upon the provision of an acceptable explanation of how the time default occurred. Neither a party nor its legal advisers may simply assume that a request for an extension of time will

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47 *Boomalli Ltd v Hake* [1985] WAR 7 at 9.

48 *In re Coles and Ravenshear* [1907] 1 KB 1 at 4; *Witten v Lombard Australia Ltd* (1968) 88 WN (Pt 1) (NSW) 405 at 412.

49 *Christie v Harvey and Hayward* (1900) 2 WAR 146 at 148; *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 1 WLR 942 at 947; [1985] 2 All ER 517 at 521; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 167.

50 *Jess v Scott* (1986) 12 FCR 187 at 195.

51 *Hall v Nominal Defendant* (1966) 117 CLR 423 at 429.

always be acceded to[52]. Inherent in the grant of a discretionary power is the assumption that it will sometimes be refused.

3. Courts have often drawn a distinction between the approach which they take to time limits of a substantive character and those appropriate to procedural rules. Thus in *In re Salmon (decd)*[53], Sir Robert Megarry V-C contrasted the requirement for the institution of proceedings within a certain time under the *Inheritance (Provision for Family and Dependants) Act* 1975 (UK) with procedural rules typically found in rules of court:

> "[T]he time limit is a substantive provision laid down in the Act itself, and is not a mere procedural time limit imposed by rules of court which will be treated with the indulgence appropriate to procedural rules."

For the purpose of this classification, which I accept, it cannot be doubted that the requirement under the Rules of the Supreme Court of Western Australia, that an appeal be entered for hearing within a specified time, is one of a procedural character and not one touching the substance of a party's appellate rights.

4. The party seeking indulgence bears the burden of persuading the decision-maker to grant its request. A consideration relevant to that exercise is whether the case is arguable. If it is hopeless, unarguable or bound to fail, the request for an extension of time will be refused[54]. However, this is basically because to grant it would be futile. The practice ordinarily adopted in judging the arguability of a point was described by Lord Denning MR for the English Court of Appeal in *R v Secretary of State for the Home Department; Ex parte Mehta*[55]. It ordinarily involves consideration of "the outline of the case":

> "We never go into much detail on the merits, but we do like to know something about the case before deciding whether or not to extend the time."

This description accords with my own experience of Australian practice. It appears to accord with that of the Federal Court of Australia where *Mehta*

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52 *Hall v Nominal Defendant* (1966) 117 CLR 423 at 435.

53 [1981] Ch 167 at 175.

54 *Foreman v Federal Commissioner of Taxation* (1983) 45 ALR 258 at 260.

55 [1975] 1 WLR 1087 at 1091; [1975] 2 All ER 1084 at 1088.

was cited and applied[56]. In *Esther Investments*[57], Seaman J, talking of the practice of the Supreme Court of Western Australia, said that the assessment of the merits was necessarily "broad" because the Court, on an application to extend time, will ordinarily have only "limited materials and argument". Reason and efficiency support this practice. On an application to cure a procedural time default, the parties are entitled to expect that the court will deal with procedural issues and not without warning or consent turn the motion into the substantive hearing of the appeal. Were that to be a common practice, the time of the courts in reviewing the factual and legal details of cases might be doubled - first in the practice list and then, if the matter were allowed to proceed, in the substantive hearing. That would not be an efficient use of the court's time or of the parties' attention to the case. Moreover, it could work an injustice on a party if a telescoped hearing, which should primarily be addressed to a procedural question, were converted into the determination of issues of complexity and substance, the proper treatment of which may require more time than is typically available in a busy practice court.

5. Judicial attitudes to the grant of an indulgence under procedural rules of court have changed somewhat since the rather rigid approach which formerly marked such decisions[58]. The change came about as it was realised that such rules were themselves only intended to contribute to the attainment of justice[59]. That object necessitates a flexibility which accepts "the fallible world in which legal disputes arise and in which they must be resolved"[60]. Judges have warned against permitting the rules of court, particularly those relating to time, to become "an instrument of tyranny"[61]. This judicial attitude produced a less "draconian"[62] practice which tended to focus attention on the need for a measure of flexibility, the avoidance of undue technicality and the consideration of whether there was any actual prejudice

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56 See *Jess v Scott* (1986) 12 FCR 187 at 191-192.

57 (1989) 2 WAR 196 at 205.

58 *In re Coles and Ravenshear* [1907] 1 KB 1 at 5-6.

59 *In re Coles and Ravenshear* [1907] 1 KB 1 at 4.

60 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 172.

61 *Outboard Marine Australia Pty Ltd v Byrnes: Bauknecht* [1974] 1 NSWLR 27 at 30; see also *Cohen v McWilliam* (1995) 38 NSWLR 476 at 478.

62 *C M Stillevoldt B V v E L Carriers Inc* [1983] 1 WLR 207 at 213; [1983] 1 All ER 699 at 704 per Griffiths LJ.

to a party if the indulgence were granted, beyond that inherent in the continued prosecution of the proceedings[63].

6. In the cyclical way of these tendencies, the close of the century has seen something of a revival of insistence upon a stricter adherence to rules and practices. The source of the strictness is a larger judicial concern to ensure the efficient despatch of court business. Such an objective was never completely overlooked by the courts[64]. Lord Denning MR, for example, in *Allen v Sir Alfred McAlpine & Sons Ltd*[65] countered the applicant's submission that to strike out an action without trial for time default would contravene *Magna Carta,* with this retort:

> "To this there is a short answer. The delay of justice is a denial of justice. Magna Carta will have none of it. 'To no one will we deny or delay right or justice' [Magna Carta, ch 40].
>
> All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time [Hamlet, Act III, sc 1]. Dickens tells how it exhausts finances, patience, courage, hope [Bleak House, ch 1]. To put right this wrong, we will in this court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure. But it is within the inherent justice of the court. And the Rules of Court expressly permit it."

More recently, this rhetoric has been converted into action in Australia as courts have come to appreciate that they have their own interest in ensuring compliance with time limits[66]. Court lists are typically more congested today. This fact and a growing awareness about the needs for efficiency in judicial administration help to explain a somewhat diminished inclination, recently, to extend procedural indulgences. Yet even today, rules and

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63 *Morris v Public Transport Commission of New South Wales,* unreported, Court of Appeal of New South Wales, 28 May 1984.

64 See eg *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12; [1964] 3 All ER 933 at 935; *Revici v Prentice Hall Inc* [1969] 1 WLR 157 at 159-160; [1969] 1 All ER 772 at 774.

65 [1968] 2 QB 229 at 245.

66 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 153-154.

efficient case management must not be seen as ends in themselves. The ultimate obligation of a court is the attainment of justice as the law requires[67].

7. In *Esther Investments*[68], the Full Court of the Supreme Court of Western Australia embraced, as relevant to applications for an extension of time, the four "major factors" which had been identified in *Palata Investments Ltd v Burt & Sinfield Ltd*[69], viz, the length of the delay, the reasons for the delay, whether there is an arguable case and the extent of any prejudice to the respondent. It was those principles which the Full Court applied in the present case. I would point out that *Palata Investments* was concerned with an application for an extension of time for appealing, not for extending the period within which an appeal, already lodged within time, might be entered for hearing. The distinction is important. In the latter case, the scope for review of the merits is necessarily more limited. The main object of the scrutiny is to obviate a hearing which would clearly be futile or to reinforce a preliminary view that a time default should be cured because of the apparent merits or arguability of the matter. I do not doubt that the four considerations mentioned in *Esther Investments* are relevant. But they are by no means exhaustive. Several others have from time to time been thought relevant. These include whether the delay was intentional or contumelious[70]; or merely the result of a bona fide mistake or blunder[71]; and whether the delay is that of the litigant or of its lawyers, with which the litigant should not be saddled[72]. It may also be relevant, where the default is that of a party's legal representatives, to take into account any considerations personal to the party which might have affected its ability to safeguard its own interests, for example, by applying pressure to its lawyers. Similarly, the extent to which any such prejudice may be remedied by an appropriate costs order is another consideration that has sometimes been treated as relevant.

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67 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154, 172.

68 (1989) 2 WAR 196 at 198.

69 [1985] 1 WLR 942 at 946; [1985] 2 All ER 517 at 520.

70 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; *Birkett v James* [1978] AC 297 at 318.

71 *Esther Investments* (1989) 2 WAR 196 at 204.

72 *Sophron v The Nominal Defendant* (1957) 96 CLR 469 at 474; *Hall v Nominal Defendant* (1966) 117 CLR 423 at 435; *Mehta* [1975] 1 WLR 1087 at 1091,1092; [1975] 2 All ER 1084 at 1088, 1089.

8. Where it is appropriate to conduct a preliminary assessment of the arguability or suggested futility of an appeal, it is necessary to bear in mind the principles of appellate review applicable to the case. Where, as in this case, the appellate court has, by statute, a right and duty to reconsider the decisions of fact and law made at the trial, the breadth of the court's functions has been stated many times[73]. Of course, if the decision of the primary judge turned on the credibility of the evidence of witnesses called at the trial, the difficulties of disturbing conclusions based upon such findings are well known[74]. Nevertheless, even in such cases, findings of credibility can sometimes be overcome[75]. Conflicts of medical and other expert testimony are not, in my view, ordinarily susceptible to resolution by simple credibility assessment[76]. A party, having an appeal as of right which it has exercised by filing a notice of appeal within time, is normally entitled to have the appeal heard and determined on its merits by the painstaking examination of evidence and argument. That is an entitlement which the appellant has been deprived of in this case.

Conclusion: the Full Court erred

67 When the decision of the Full Court is measured against the foregoing considerations, I am regretfully led to the conclusion that it erred in a matter of principle which authorises and requires the intervention of this Court.

68 The appellant had lodged her appeal within time. The time default which occurred was in no way one of her own making. As the solicitor for the ALS admitted, it was entirely her error for which it would be wrong to burden the appellant: an under-age Aboriginal child, living in a remote place without direct access to legal advice and suffering serious mental disabilities by reason of brain injury, however caused.

69 By filing her appeal promptly, the appellant secured the right to an appeal by way of appellate rehearing. That involved a full and thorough review of the Commissioner's decision including on matters of fact. It was a right which could be lost where there was non-compliance with the rule for the prompt setting down of the appeal for hearing. But that rule is clearly one of procedure only. Its object

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73 See eg *Warren v Coombes* (1979) 142 CLR 531 at 551-552.

74 *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

75 See eg *Chambers v Jobling* (1986) 7 NSWLR 1; *Halvorsen Boats Pty Ltd v Robinson* (1993) 31 NSWLR 1 at 5.

76 *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 at 291-292.

is to ensure the efficient despatch of business. As such, it does not concern the substantive rights of any party.

70 The discretion to extend time would therefore, in such a case, more readily be granted than in most others, particularly because the default was that of the party's legal representative alone. Whilst the appellant carried a burden of persuasion, it was not one which, in the circumstances, was particularly heavy. An explanation for the default was given. It was not challenged. There was no element of deliberateness in the delay; quite the contrary. The overall delay was itself relatively short and to some extent occupied by steps in furtherance of the appeal. At all times the Commission knew that the appellant wished to proceed with the appeal. To some extent, its suggestion that leave to appeal was required put the solicitors for the appellant to the unnecessary diversion of a hearing on that question which might have deflected attention from the routine preparation for the appeal as required by the Rules.

71 It is perfectly true that the appellant, on the face of the reasons of the Commissioner, appears to have substantial difficulties in the way of succeeding in the appeal. But no final conclusion could be reached on such a matter without the transcript and a more detailed review of the issues and argument than was possible in the Full Court's consideration of the two motions before it. In the absence of the transcript, I do not consider that it was open to the Full Court to make the purported evaluations which it did of the *evidence*, the judgments of the effect of the *evidence* on the outcome, the assessment of the possibility of overturning the medical *evidence* or the conclusion that findings recorded in the stated reasons of the Commissioner were "fully justified", that is, justified presumably by the *evidence*. The scrutiny of transcript in cases of this kind is often a tedious and sometimes a rather unrewarding judicial task. But it is the common task of appellate review. It was the task invoked by the appeal in this case. Only the procedural time default stood in the way. If the Full Court considered that the application for an extension of time should have been converted, in effect, into a hearing of the appeal on its merits, the proper course was to notify the parties, to require the provision of the full transcript and, if asked, to afford the parties time to prepare for argument of a significantly different proceeding than that which they had come to prosecute.

72 I do not see that the Commissioner's determination of the medical evidence which he preferred stands in the path of appellate review. As I read the Commissioner's reasons, he did not purport to decide that question on the basis of credibility but, as is usually preferable, by the application of logic and reason. The same is true of the Commissioner's assessment of the versions given by Mr Krakouer, who gave no oral evidence at the trial. An appellate court, provided with the same evidence, can perform the function of considering the evidence just as well.

73 There was no separate treatment by the Full Court of the application by the Commission for an order dismissing the appeal "for want of prosecution". That motion was apparently granted as a consequence of the dismissal of the appellant's application for an extension of time. For like reasons, I regard such an order as erroneous in the circumstances. The appellant never abandoned her wish to prosecute the appeal. The procedural mistake which provided an impediment ought to have been cured. The factors supporting a favourable exercise of the discretion were overwhelming. The one suggested obstacle (the ultimate merits of the appeal) was inappropriately elevated, without the necessary materials, from a broad evaluation of the likely prospects to a conclusive determination.

Orders

74 In the event that this Court concluded that the orders of the Full Court had miscarried, both parties asked that this Court exercise the discretion which the appellant had invoked. It is sensible to conform to that request.

75 I therefore agree in the orders proposed by Brennan CJ and McHugh J.