SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd* [2017] QSC 232
PARTIES:	**BRISBANE AIRPORT CORPORATION PTY LTD** (applicant/plaintiff) **v** **ARUP PTY LTD** (defendant/respondent)
FILE NO:	10025 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	20 October 2017
DELIVERED AT:	Bundaberg
HEARING DATE:	24 July 2017
JUDGE:	Applegarth J
ORDER:	**Leave is granted to amend substantially in the form of the amended statement of claim filed on 2 May 2017.**
CATCHWORDS:	PROCEDURE – SUPREME COURT – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the plaintiff amends its statement of claim – where the defendant submits the amendments introduce a new cause of action in negligence which is statute-barred – where the plaintiff disputes this but applies for leave (if required) to amend pursuant to r 376 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the amendments include a new cause of action – whether any new cause of action arises out of substantially the same facts as the existing cause of action – whether it is appropriate to allow the amendments *Uniform Civil Procedure Rules* 1999 (Qld) r 5, r 376 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, cited *Borsato v Campbell* [2006] QSC 191, cited *Jetcrete Oz Pty Ltd v Conway* [2015] QCA 272, cited *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94, cited *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd as Trustee of the QC Trust* [2014] QCA 267, cited

Paul v Westpac Banking Corporation Pty Ltd [2017] 2 Qd R 96; [2016] QCA 252, followed
Thomas v State of Queensland [2001] QCA 336, considered
Zonebar Pty Ltd v Global Management Corporation Pty Ltd [2009] QCA 121, cited

COUNSEL: G D Beacham QC with M H Martinez for the applicant/plaintiff
S L Doyle QC with N Andreatidis and S D McCarthy for the defendant/respondent

SOLICITORS: Holding Redlich for the applicant/plaintiff
Schweikert Harris for the defendant/respondent

[1] In 2002 Brisbane Airport Corporation (BAC) entered an agreement with Arup in relation to engineering consultancy services at the Brisbane airport. By 2004 BAC had developed a proposal to expand the apron and taxiway of the northern concourse of the Brisbane International Terminal. The project became known as the Northern Apron Expansion (NAE) project. In the following years Arup provided geotechnical, engineering and other services to BAC pursuant to certain retainers. Construction of the NAE commenced in 2006 and was completed in 2008.

[2] The structure of the NAE, working upwards, comprises:

(a) existing ground material, which consists of clay;

(b) a subgrade of 1.5m of clean sand, which is the foundation of the pavement;

(c) a sub-base layer of 200mm of fine crushed rock on top of the subgrade and directly beneath the concrete panels; and

(d) 400mm thick concrete panels, joined together to create an apron.

[3] In December 2010 BAC first identified significant cracks in the NAE. In the years that followed, BAC, Arup and others investigated their cause.

[4] On 29 September 2016 BAC sued Arup for negligence and, in the alternative, for contravention of the *Trade Practices Act* 1974 (Cth) arising out of alleged representations in relation to the design of the NAE. On 28 March 2017 BAC delivered an amended statement of claim (ASOC) and an expert report of Dr Raymond S Rowlings. On 8 June 2017 Arup asserted that the ASOC introduced a new cause of action in negligence which was statute-barred, and that BAC required leave pursuant to r 376 of the *Uniform Civil Procedure Rules* 1999 (Qld) to pursue such a new cause of action.

[5] Rule 376(4) applies to an application for leave to make an amendment if a relevant period of limitation, current at the date the proceeding was started, has ended.[1] Rule 376(4) provides:

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[1] Rule 376(1).

> "(4) The court may give leave to make an amendment to include a new cause of action only if –
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> (a) the court considers it appropriate; and
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> (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment."

[6] BAC disputes that the contentious amendments introduce a new cause of action and that any new cause of action is statute-barred. The limitation period cannot be easily determined at this stage of the proceeding. As a result, and on the contentious assumption that any new cause of action is statute-barred, BAC applies for leave, if it is required, to amend its statement of claim and submits that the amendments fall within the terms of r 376(4)(b).[2]

The issues

[7] The first issue is whether the contentious amendments include a new cause of action. The second issue is whether any new cause of action arises out of substantially the same facts as the existing cause of action. The third issue is whether it is appropriate to allow the amendments.

BAC's submissions

[8] BAC submits that the contentious amendments are essentially particulars of an existing cause of action about the negligent design work of Arup, which resulted in post-construction settlement, not a new cause of action. Alternatively, it submits that any new cause of action arises out of substantially the same facts as a cause of action for which relief already has been claimed. The amendments change the focus from a failure to consider the effect of "surcharging"[3] work upon clay underneath the subgrade to a failure to consider the prospect of post-construction compaction of the sand subgrade placed on top of the clay. In both cases, the harm that the duty addresses, and which BAC alleges Arup failed to address, is the prospect of undesirable settlement or compaction in the material beneath the NAE pavement.

[9] Finally, BAC submits that it is appropriate to grant leave to make the amendment because:

(a) Arup is not prejudiced by or taken by surprise by the subgrade issue, having first considered it in 2012 as a possible cause of the cracking;

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[2] This approach to the resolution of a dispute over whether an application under r 376(4) is required is taken where a party contends that any new cause of action is still within the limitation period, but the limitation period cannot be conveniently decided at that stage of the proceeding: see *Menegazzo v Pricewaterhousecoopers (A Firm)* [2016] QSC 94 at [44] – [46] and the cases cited therein.

[3] Surcharging is the process of loading a site with material to compact the ground beneath it.

(b) there has been an adequate explanation for the delay, namely the finalisation of Dr Rowlings' report which identified subgrade compaction as a primary cause of the NAE defects; and

(c) the amendments will not significantly delay the conduct of the case, will reflect BAC's expert opinion and will permit the real issues in dispute to be resolved.

Arup's submissions

[10] Arup submits that the amendments alter the scope of the duty or duties pleaded by BAC and the co-relative breaches of duty, and therefore raise a new cause of action.

[11] The new cause of action does not arise out of substantially the same facts merely because all of the allegations concern how defects in the design resulted in the settlement or compaction of material beneath the NAE pavement. According to Arup, BAC's submissions approach the issues under r 376(4) at too high a level of generality and ignore the materially different new facts that are the subject of the challenged amendments.

[12] Arup also submits that it is not appropriate to allow the amendments, principally because the relevant events occurred over a decade ago and BAC has not adequately explained its delay in pleading its new case.

The parties and their relationship

[13] In or about July 2002 BAC and Arup negotiated and executed a Relationship Deed which governed their relationship in connection with services to be provided at Brisbane Airport. In late 2004 Arup provided BAC with a Geotechnical Report in relation to the proposed area of the NAE project. The Geotechnical Report made certain recommendations and forecasts in relation to surcharging and the settlement of the NAE. In around February 2005 BAC retained Arup to provide consultancy services for the design of the surcharge works for the NAE project. BAC's pleading refers to this as the "Surcharge Consultancy Agreement". As noted, surcharging is a process of loading a site with material to compact the ground beneath it. Its purpose is to accelerate, and therefore control, the post-construction settlement of the underlying natural soil, being settlement that would occur as a result of long term consolidation of the soil. In the case of this project, sand was used as part of the surcharging work and where it was used it became part of the subgrade on which the sub-base and then the NAE pavement was constructed. In other areas, the NAE pavement was constructed on sand subgrade that had been placed there at an earlier time.

[14] In around March 2005, shortly after Arup accepted a retainer to provide consultancy services for the design of the surcharge, it was retained to provide engineering consultancy services for the design of the NAE project. This retainer is described in BAC's pleading as the "Engineering Design Services Agreement". Arup was subsequently engaged by BAC to provide superintendent services for the surcharge works and for the construction of the NAE.

[15] In general terms, BAC's case is that by reason of the various agreements and retainers entered into, starting with the Relationship Deed and including the Surcharge Consultancy Agreement and the Engineering Design Services Agreement, Arup owed it a common law duty to carry out the required work with reasonable skill and care. Its case is that an engineer undertaking the required work with reasonable skill and care would have had regard to certain standards and would have designed the NAE so that it would have a 40 year life span, assuming the level of aircraft traffic that was forecast. Instead, the NAE started to crack very early in its life, is defective and needs to be extensively rectified.

The cracks and investigations into their cause

[16] After BAC put Arup on notice in July 2012 of the cracking of the NAE, Arup performed a "desk study" and on 31 August 2012 provided its initial response. Its opinion at the time was that the cracks were fatigue cracks, occasioned by structural failure. It concluded that inadequate design was not responsible because the design met specified requirements and the works were executed in accordance with the design. Arup a considered two videos clips provided by BAC which revealed pumping of fines through joints at the crack slabs. Arup advised that the presence of surface fines at the cracks, combined with extremely high rainfall seasons preceding the onset of the cracking, suggested that the most likely cause of the cracking was a loss of subgrade strength, but it did not understand why this would have occurred.

[17] In March and April 2013 there were email exchanges between BAC and Arup. BAC inquired how Arup's design would have taken the risk of loss of subgrade strength into account. Arup responded that its design was adequate for the geotechnical conditions exhibited both historically and at the time.

[18] Between 2013 and 2015 various tests were commissioned by BAC in order to determine the cause of the NAE pavement failure. BAC engaged consultants to investigate the matter. After Arup received a without prejudice letter dated 2 December 2015, the parties engaged in without prejudice meetings which did not resolve the matter. In 2016 alternative dispute resolution workshops occurred but the parties were unable to resolve their dispute, and on 29 September 2016 BAC filed its claim and statement of claim.

[19] In around October 2016 BAC sought further independent engineering assistance from Dr Rowlings and he was retained in December 2016. He delivered his substantial report on or about 26 April 2017. It considered a number of causes of the cracking and concluded that the most likely main cause was densification of the sand subgrade.

The original pleading

[20] BAC's original pleading of negligence relies upon the various agreements and retainers to allege that Arup owed it a duty "to undertake the work required under the

Engineering Design Services Agreement with reasonable skill and care".[4] It pleads how an engineer, undertaking the required work, would have designed the NAE by reference to certain FAA standards and other international standards, so as to comply with the recommendations in the Geotechnical Report, and so as to take into account "the results of the Surcharge Work, having regard to the recommendations in the Geotechnical Report". Its pleading alleged breach of the duty of care in designing the NAE on many grounds, including:

(a) insufficiently thick panel;

(b) failing to take into account ground conditions and failing to take into account the difference between the results of the Surcharge Works and the recommendations of the Geotechnical Report;

(c) specification of the sub-base;

(d) drainage size;

(e) panel size;

(f) longitudinal panel joint joining systems; and

(g) traverse joining systems.

As a consequence of some or all of the design departures, cracking of the slabs is alleged to have occurred such that the design was not fit for the purpose for which it was required and the design did not achieve the design parameters that were pleaded. The pleading also alleged misleading and deceptive conduct in relation to certain alleged representations arising from a design certificate dated 17 February 2006.

The amendments

[21] Many of the amendments made in the ASOC are refinements and are not contentious. Those which are contentious for the purposes of this application relate to:

(a) an amendment of paragraph 45 to plead that Arup owed BAC a common law duty "to undertake the work required under the Surcharge Consultancy Agreement and the Engineering Design Services Agreement with reasonable skill and care";

(b) the scope of the duty, in particular new allegations which expressly rely on obligations to specify the standards to achieve certain compaction of the sand subgrade and rely upon a new definition of the surcharge works.

[22] Without setting out lengthy passages of the original pleading and the amended pleading, it is sufficient to summarise the new allegations which are in contention as alleging:

(a) a duty to take into account the results of the surcharge works and the ground conditions, and the fact that the NAE would be constructed on a sand subgrade comprised partly of the surcharge sand;

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[4] SOC, para 45.

(b) a consequential duty to design the sand subgrade so that it was sufficiently compacted and would not experience further compaction when saturated by water and loaded by aircraft running over the NAE;

(c) a breach of that duty by failing to design the surcharge works and the NAE so that the sand in the area the subject of the surcharging works designed by Arup would be sufficiently compacted; and

(d) a failure to properly consider or address in the design the compaction of the sand in other areas that were not subject to those surcharging works, so that the sand subgrade in those areas would be sufficiently compacted.

BAC's characterisation of the original and new factual matters

[23] BAC observes that the original statement of claim had already pleaded:

(a) a duty on the part of Arup to take into account the results of the surcharge works, having regard to the recommendations in the geotechnical report;

(b) a breach of duty, in that Arup failed to take into account the difference between the results of the surcharging works and the recommendations in the geotechnical report in circumstances where:

(i) the surcharging works had not achieved the level of settlement recommended in the geotechnical report, in various respects;

(ii) there was another area (which would also be part of the NAE) that was not surcharged at all;

(iii) there was therefore the prospect of greater than recommended post-construction settlement by the NAE, and differential settlement across part of the NAE;

(c) that the cause of the cracking included:

(i) differential settlement, which resulted in uneven and reduced sub-base support, resulting in the slab cracking;

(ii) a loss of "transfer efficiency" (the effectiveness of one slab in helping to support the load borne by another slab), which in turn was caused by overly large panel sizes, the lack of strength of the sub-base, and the type of transverse joint used in the panels.

[24] In short, the allegations relevantly focused upon:

(a) the outcome of the surcharging works in the surcharged area;

(b) the lack of surcharging in another area;

(c) the fact that this gave rise to the prospect of greater post-construction settlement than was recommended, and the possibility of differential post-construction settlement of the NAE;

(d) the settlement of the ground under the NAE, and a loss of load transfer efficiency at the transverse joints, as causes of the cracking.

[25] The ASOC now alleges as part of the allegations of breach of duty that Arup failed to take into account the outcome of the surcharge works and to design the works so that the sand subgrade would be sufficiently compacted. The alleged breach of duty in that regard is one of a number of alleged causes of the cracking. On BAC's case the immediate cause of the cracking is the loss of load transfer efficiency at the transverse joints. That, in turn, is caused by the compaction of the sand subgrade, as well as other features including large panel sizes and the use of a deformed tie bar in the longitudal joints.

[26] As for the new allegations, BAC submits that they still involve an allegation that Arup should have, but did not, take into account the outcome of the surcharging work designed by it and the extent of the surcharging work (i.e. the fact that it did not extend to all areas of the NAE). Whereas the previous pleading focused on the significance of these matters for the prospect of post-construction settlement in the natural ground beneath the subgrade, the amendments focus upon the significance of these failures for the prospect of post-construction compaction of the sand subgrade sitting on top of the clay. This change of focus is said to not alter the nature of the cause of action. The cause of the cracking is still linked to a loss of load transfer efficiency due, in part, to compaction of the subgrade. According to BAC, the amendments are essentially new particulars of an existing cause of action, being one based on a breach of duty by failing to take into account the outcome of the surcharging works, the extent of surcharging works (i.e. that they did not extend to all areas of the NAE), and the consequent possibility of post-construction settlement of the material below the NAE pavement.

Arup's characterisation of the amendments

[27] Arup contends that the challenged amendments now include an alleged breach of duty concerning the compaction of the sand in relation to the carrying out of work required under both the Surcharge Consultancy Agreement and the Engineering Design Services Agreement. The proposed amendments relate to a failure to specify standards for the achievement of certain compaction of the sand subgrade and also affect the scope of the content of the duty by redefining the "Surcharge Works". The new content of the duty of care and the co-relative breaches of that duty are said to give rise to a new cause of action. According to Arup, the new pleading alleges, for the first time, a failure in connection with the design and compaction of the sand layer, whereas the original pleading focused upon a failure to respond prospectively to the risk posed by a failure to achieve settlement of the clay after surcharging.

Do the contentious amendments plead a new cause of action?

[28] The frequently-cited judgment of McMurdo J (as his Honour then was) in *Borsato v Campbell*[5] considered the term "cause of action" in the context of r 376. The term has

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[5] [2006] QSC 191.

been defined to mean "every fact which is material to be proved to entitle the plaintiff to succeed".[6] However, not every newly-pleaded fact raises a new cause of action. McMurdo J stated:

> "The dividing line is between the addition of facts which involve a new cause of action and those which are simply further particulars of the cause already claimed, and its location involves a question of degree which can be argued, one way or the other, by the level of abstraction at which a plaintiff's case is described."[7]

[29] I turn first to consider Arup's point that the duty of care pleaded in paragraph 45 of the ASOC concerns work required under both the Surcharge Consultancy Agreement as well as work under the Engineering Design Services Agreement. In that regard, I take account of the fact that the original statement of claim pleaded a duty of care that arose out of all of the retainers, including the Surcharge Consultancy Agreement, and that BAC's case was and remains one in which there was an overarching duty to exercise reasonable skill and care in performing the required design work. BAC argues that the pleading of a duty in respect of work required of the Surcharge Consultancy Agreement is really a particular of the existing cause of action. It acknowledges that the duty in respect of the engineering design required Arup to look "backwards" at how the surcharge had been designed and how it had been constructed, and also to consider other areas which were not the subject of the surcharge design. By contrast, the duty in relation to the surcharge design required Arup to look "forward" to the fact that the sand would likely be used to form part of the sand subgrade upon which the NAE pavement would be constructed. Despite these different aspects, the cause of action is submitted to be the same, namely the negligent failure of the sole designer of the NAE to consider the surcharging work it had designed, the extent of that surcharging work (in terms of its area) and the possible post-construction consolidation of the material under the NAE pavement, whether it be from settlement of the clay or compaction of the sand subgrade.

[30] There is considerable force in these submissions. However, the amendments enlarge the scope of the common law duty pleaded in paragraph 45 to the work required under the Surcharge Consultancy Agreement, and necessarily involve the "forward" looking aspect. The new allegations are that the duty of care extended to undertaking additional work under a different agreement. Arup's point is not simply met by the fact that the common law duty is said to have arisen out of all of the retainers.

[31] Leaving aside the amendment made to paragraph 45 which extends the duty of care to work required under the Surcharge Consultancy Agreement, the more substantial difference relates to the content or scope of the duty of care with respect to the design of both the surcharge works and the NAE. Arup correctly points out that the scope of the duty in respect of the required work under both agreements expressly includes a duty to specify the standards for, and achievement of, a certain compaction of the sand subgrade. The original pleading did not allege a breach of duty in failing to design the surcharge works (however defined) and the NAE so that the sand subgrade would be sufficiently compacted. Arup's alleged duty of care in respect of the design of both the

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6 At [8].

7 Ibid.

surcharge works and the NAE needed to consider the possible post-construction settlement of material beneath the NAE pavement. However, there is an important distinction between the surcharging of clay and the compaction of the sand layer of the pavement structure. Surcharging of clay is intended to accelerate, and thereby control, the long-term post-construction settlement of the existing ground material. Compaction is the process of densifying and strengthening the sand layer to ensure that the sand is sufficiently compacted so that aircraft loadings on the pavement do not exceed the loadings exerted during compaction of the sand, and further compact the sand.

[32] The contested amendments in relation to the surcharge works and the need to design the sand subgrade so that it was sufficiently compacted may be part of the same story about the design of the surcharge works and the NAE, and Arup's alleged failure to take into account post-construction settlement of the material below the NAE pavement. However, the present issue is not whether the contested amendments arise out of substantially the same story. It concerns the prior question of whether they give rise to a new cause of action.

[33] The authorities demonstrate that the issue of whether new facts involve a new cause of action is a matter of characterisation about which reasonable minds may differ. It is always possible to characterise a new particular of a duty of care and its breach as giving rise to a new cause of action when it is simply a further particular of an existing cause of action.[8] In this case it is possible to characterise the contested amendments in that way. However, in my view, the newly-pleaded facts are not simply new particulars of an existing cause of action. The new facts concern the content of a duty of care in designing both the surcharge works and the NAE, and specifically concern a duty to design the sand subgrade so that it was sufficiently compacted.

[34] While not every newly-pleaded fact raises a new cause of action, in my view, the newly-pleaded facts which are in contention do so. Arup's submissions on the first issue are not answered by emphasising the overarching nature of Arup's obligations to undertake work with reasonable skill and care, and by submitting that the new pleading merely alleges another specific element of that overarching duty of care. The contested amendments relate to the content of the duty of care and plead new material facts about how it was breached. They involve a new cause of action.

Does the new cause of action arise out of substantially the same facts as the existing claim?

Relevant principles

[35] The words of r 376(4)(b) have been considered in a number of cases, and I will adopt the summary of them in *Menegazzo v Pricewaterhousecoopers (A Firm)*.[9] The words "substantially the same facts" should not be read as tantamount to the same facts. The

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[8] See, for example, *Jetcrete Oz Pty Ltd v Conway* [2015] QCA 272.

[9] [2016] QSC 94 at [48]-[49].

rule presupposes the addition of facts in an amended pleading in support of a new cause of action. As Thomas JA observed in *Draney v Barry*:

> "If the necessary additional facts to support the new cause of action arise out of substantially the same story as that which would have to be told to support the original cause of action, the fact that there is a changed focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts. In short, this particular requirement should not be seen as a straitjacket."[10]

The "story" is a shorthand reference to the matters that the plaintiff has to prove.[11] Some authorities may be thought to encourage "a fairly broad bush comparison between the nature of the original claim and that to which it is sought to be amended".[12] However, as *Thomas v State of Queensland* exemplifies, on occasions a judge can use "rather too broad a brush".[13]

[36] Depending upon the circumstances of the particular case, an amendment which sets out a different breach of duty may not be within the scope of r 376(4)(b). One possible inquiry in assessing whether the new cause of action arises out of substantially the same facts is to consider what would have happened if, at trial, the plaintiff sought to lead evidence of the facts without having made the amendment. If the evidence would clearly be objectionable on the ground of surprise or on the ground that it was simply irrelevant to the case raised by the plaintiff's pleading, then this may assist in determining whether the requirement of r 376(4)(b) is satisfied. In a case alleging breaches of duty, the inclusion of additional facts which raise quite different breaches of duty may lead to the conclusion that the new cause of action based on the new breach of duty does not arise out of substantially the same facts as a cause of action for which relief has already been claimed.

[37] The helpful test of asking whether the additional facts arise out of "substantially the same story", like the inquiry into what would have happened if the plaintiff had sought to lead evidence of the new facts without having made the amendment, are practical tests applied in reaching a conclusion about whether the requirement of r 376(4)(b) is satisfied. One returns to the words of the rule: "substantially the same facts". A question of degree is involved.

[38] The starting point is that the rule presupposes the addition of new facts in an amended pleading and that those new facts given rise to a new cause of action. Regard must be had to the acts and omissions which are alleged to establish liability under the new cause of action, and the adverse consequences for which damages are claimed.[14] However, the mere fact that the new pleading alleges a breach of a different specific

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10 [2002] 1 Qd R 145 at 164 [57].
11 *Thomas v State of Queensland* [2001] QCA 336 at [19].
12 Ibid.
13 At [20].
14 *Zonebar Pty Ltd v Global Management Corporation Pty Ltd* [2009] QCA 121 at [23].

duty does not mean that the new cause of action does not arise out of substantially the same facts as the facts upon which an existing allegation of breach arises.[15]

[39] The essential question is whether the new cause of action arises out of "substantially the same facts" as a cause of action for which relief already has been claimed. The answer to that question should be informed by an appreciation of the policies underlying the applicable statute of limitation.[16] Those policies may be inappropriately undermined if the required analysis is conducted at too high a level of generality. However, if those underlying policies are not threatened by a proposed amendment, the test in r 376(4)(b) may be found to be satisfied even though the new claim involves some variation in the facts.[17]

[40] If there was no variation of the facts so as to give rise to a new cause of action, then the rule would not be engaged. The rule is concerned with new facts of a kind which give rise to a new cause of action, as distinct from new facts which simply particularise an existing cause of action. The rule assumes a variation in the facts, for example because the new facts plead for the first time the specific content of a general duty or a different breach of duty.

Application of these principles

[41] Unsurprisingly, Arup's submissions on the present issue, like its submissions on the prior issue of a new cause of action, focus on what is different between the two pleadings. They emphasise that the new pleading includes a different obligation, namely Arup's failure to specify an adequate standard of compaction for the sand layer to guard against the risk of post-construction consolidation of material beneath the NAE pavement. The present issue, however, is not whether the pleadings are different because they plead new material facts. The issue is not even whether the amendments will make a difference because they plead important new facts. The issue is whether the new cause of action arises out of substantially the same facts as the existing cause of action or existing causes of action.

[42] Arup correctly submits that the new cause of action cannot be said to arise out of substantially the same facts merely because the allegations all concern the behaviour of the substances below the finished level of the pavement. To do so approaches the issue at too high a level of generality.

[43] The principles discussed above require close attention to the facts that are pleaded so that a judgment can be made on the question of degree which the word "substantially" in r 376(4)(b) poses. The existing pleading, like the amended one:

(a) pleads a claim in negligence based upon a duty of care which arises as a result of various retainers;

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[15] *Paul v Westpac Banking Corporation Pty Ltd* [2017] 2 Qd R 96 at 105 [23]; [2016] QCA 252 at [23].

[16] At 103 [15].

[17] Ibid.

(b) relies on a failure to design the NAE according to certain standards, including a failure to take account of surcharging work and the extent of surcharging.

(c) pleads the same consequence of Arup's alleged failure to specify a sufficient standard for the construction of levels below the pavement and the consequences of its other alleged breaches of duty: the loss of load transfer efficiency and cracking of the NAE pavement.

The main difference between the pleadings is that whereas the failure to consider the prospect of post-construction consolidation previously focused only on the natural ground, attention now shifts or extends to post-construction consolidation of the subgrade.

[44] The harm that the pleaded duty in both pleadings addresses is the same: the risk of excessive consolidation in the material beneath the NAE. The crucial difference is that the new pleading specifically pleads for the first time a particular content of that duty with respect to the compaction of sand.

[45] The focus in many cases involving r 376(4) is on different breaches, not their common consequences. The fact that substantially different breaches have common consequences is not sufficient to satisfy the test in r 376(4)(b), as some of the rulings in *Thomas v State of Queensland*[18] illustrate. However, the commonality of consequences is relevant to a consideration of whether one is concerned with "substantially the same story" to use an enduring metaphor in this area. The story may end the same way.

[46] Little is to be gained by attention to the facts of other cases. However, *Thomas v State of Queensland* illustrates that some important amendments which plead a different basis of liability will be allowed. For example, the original statement of claim in that case pleaded a failure to remove soil from a road,[19] whereas the amended pleading alleged, among other things, that the defendant should have removed the embankment, or sealed it, or otherwise dealt with the surface of the embankment so as to prevent soil being washed from it onto the surface of the roadway.[20] Despite this marked difference in the relevant breaches, the new allegations were found to be "sufficiently connected with allegations made in the original statement of claim to satisfy the necessary test and to permit the amendment".[21]

[47] This is not a case in which the new cause of action pleads a very different kind of breach,[22] or where the adverse consequences of the newly alleged breach of duty are different. The breach of the pleaded duty concerns a failure to exercise reasonable care in respect of the design of the NAE, namely a failure to consider the risk of consolidation of component parts beneath the NAE pavement.

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[18] [2001] QCA 336.

[19] At [13].

[20] At [14], [21](2).

[21] Ibid.

[22] For example the kind of breach alleged in *Thomas v State of Queensland* in relation to inappropriate paving of the road surface, being an amendment which did not fall within the rule.

[48] The duty of care to consider post-construction consolidation of materials beneath the pavement, and what should be done to prevent it, extended to all areas of the planned NAE. The area in which the sand was to be compacted extended beyond the area of the surcharging works, as originally defined in the SOC. However, the sand to be compacted was always within the area of the NAE expansion project, which Arup was engaged to design. The original claim concerned the negligent design and cracking of various areas of the NAE, including areas beyond the area of the surcharge works that were designed by Arup. What is new in the pleading is the addition of express reference to compaction of the sub-grade. Those new allegations apply to areas beyond the area of soil to be surcharged according to Arup's design of the surcharging works. However, the case remains one about the design of the whole of the NAE.

[49] The new specific content of the same generally pleaded duty of care relates to compaction of the sand subgrade, not the settlement of the ground material. However, these are aspects, along with many other aspects of the pleaded duty, which give it specific content. They are different aspects of how Arup allegedly failed to consider the risk of post-construction consolidation and what should be done about that risk in designing the NAE and the works which would be required to construct it.

[50] I am not persuaded that the challenged amendments, if allowed, would inappropriately undermine the policies underlying the applicable statute of limitations. I return to the question of prejudice in considering the issue of appropriateness under r 376(4)(a). However, there is no claim of a loss of evidence or that it would be oppressive to Arup to consider what caused the loss of subgrade strength. It considered that issue and other issues in 2012.

[51] The case, as amended, remains one about the negligent design of the NAE in a number of respects, including whether an engineer undertaking the required work with reasonable skill and care would have taken into account the ground conditions where the NAE would be constructed and the results of the previous surcharging. The ongoing investigations by BAC of the multiple causes of the cracking has shifted the focus of its case in this regard to a failure to adequately consider one particular alleged cause, namely insufficient compaction of the sand sub-base. However, the essential story remains the same in respect of the source of Arup's duty of care as the sole designer of the NAE, the standards to which it would have regard in designing the works and that the NAE, so designed, would have a certain life and not become defective through cracking. The additional facts that have been pleaded arise out of substantially the same story.

[52] The case always required BAC's witnesses to tell a story about the works which Arup was engaged to perform and how an engineer would go about designing a structure such as the NAE so as to ensure that it met BAC's requirements and did not crack. The new story has some additional details and a changed focus in respect of a failure to properly take into account ground conditions and to properly account for consolidation of materials beneath the surface of the NAE. I do not consider that the foregoing analysis of similarities and differences addresses the issue which arises under r 376(4)(b) at too high a level of generality so as to undermine the policies of the statute of limitations. As in *Thomas v State of Queensland* and other cases of this kind, one is necessarily

concerned with different specific breaches of a duty of care, or refinement of the content of a general duty of care to such an extent that a new cause of action arises. The rule exists to ameliorate the strict consequences of limitation statutes where the new cause of action arises out of substantially the same facts as an existing cause of action. On a consideration of the original pleading and the new pleading, and the extent of their common elements and their differences, I conclude that the new cause of action arises out of "substantially the same facts" as the existing cause of action in negligence.

Is it appropriate to give leave to make the contested amendments?

[53] The requirement in r 376(4)(a) is a potentially broad one, and is not confined simply to questions of prejudice.[23] In determining whether the proposed amendment is appropriate, regard should also be had to the principles discussed in *Aon Risk Services Australia Ltd v Australian National University*[24] and r 5 of the *UCPR*. The purpose of the rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. Principles have developed governing amendments for which leave is required.[25]

Possible prejudice

[54] Having regard to the fact that r 376(4) affects the operation of limitation statutes, it is appropriate to have regard to the underlying policies of limitation statutes which were stated by McHugh J in *Brisbane South Regional Health Authority v Taylor*[26] and adopted in *Paul v Westpac Banking Corporation*.[27] Having regard to those rationales, there is no submission that Arup will be prejudiced by the loss of evidence. The fact that the NAE experienced cracking was brought to Arup's attention in 2012. Arup considered at that stage the possibility that the cause of the cracking related to the subgrade. The fact that the relevant events occurred over a decade ago does not make it inappropriate to allow the contested amendments. The parties have investigated a number of possible causes over the years, and while it seems that Arup was unable to offer an explanation for the cause of the NAE cracking, communications continued after 2012 and then the parties attempted to resolve matters through ongoing without prejudice communications and meetings.

[55] Arup submits that there has not been an adequate explanation for the delay in pleading the amendments. I have had regard to the history of reports and investigations. Arup is particularly critical of the fact that BAC had certain data necessary for the formation of Dr Rowlings' opinion since early 2015 and has not explained why analysis of it was not undertaken until 2017. Whatever criticisms may be made of BAC in that regard, any delay has not been shown to prejudice Arup other than occasioning some delay in the progress of the proceeding and obtaining independent expert advice on the point. Since receiving the ASOC and Dr Rowlings' report in March 2017, Arup has had its expert,

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[23] *Menegazzo v Pricewaterhousecoopers (A Firm)* [2016] QSC 94 at [51]-[53].
[24] (2009) 239 CLR 175.
[25] *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd as Trustee of the QC Trust* [2014] QCA 267 at [74].
[26] (1996) 186 CLR 541 at 552-553.
[27] [2017] 2 Qd R 96 at 105 [21].

Mr Woodman, undertake certain investigations. Based on his work to date, Mr Woodman's preliminary opinion is that:

(a) the specified design for the compaction of the sand subgrade does not constitute a design defect; and

(b) the theory advanced by Dr Rowlings is not correct for three reasons which are stated in paragraph 52 of Ms Schweikert's affidavit.

If Mr Woodman was required to address the question of the adequacy of the compaction of the sand subgrade at a trial tomorrow, he would not be able to provide a proper response because he has to undertake further investigation and analysis of the kind outlined in paragraphs 45-50 of Ms Schweikert's affidavit. However, this evidence does not suggest that Arup is particularly prejudiced by whatever delay there has been in BAC having its expert come to a view about the causes of the failure following a considered investigation of the matter and analysis of data.

[56] The proceeding is far from a trial, with the progression of expert evidence delayed by this dispute over BAC's amendments. I do not consider that the amendments unduly prejudice Arup or are inappropriate. In fact, I consider that it is appropriate to allow the amendments so that the real issues as between experts and the real issues between the parties are resolved. Appropriate case management will enable the real issues between the experts to be identified. The purpose of civil proceedings is to enable the real issues in dispute to be resolved. The real issues would not be resolved, in my view, if BAC was prevented at this stage from advancing its claim on the basis of the views expressed by its expert in relation to an issue to which both parties were alive to in 2012. If the views of Dr Rowlings are wrong for the reasons suggested by Mr Woodman or for any other reason, then that should be demonstrated through an exchange of views between the experts or by the resolution of that issue at trial. The trial should be conducted on the basis of the real issues, which have been brought into focus by the parties' continuing investigations and the receipt of recent expert reports.

[57] Arup has yet to serve its expert report. Any additional costs it incurs by the timing of Dr Rowlings' expert report and the contested amendments can be addressed at an appropriate time.

[58] This is a case in which lengthy investigations into the cause of the cracking of the NAE have resulted in BAC shifting the focus of *part* of its case. It is appropriate that it should be permitted to amend its pleading to reflect its real case, so that the real issues between the parties are resolved.

[59] I am satisfied that it is appropriate to grant leave to make the contested amendments.

Conclusion

[60] A major issue in the proceeding is the cause of the cracking and it is appropriate that the contested amendments be made so that BAC advances a case which reflects the results of its investigations and tests and the expert evidence upon which it intends to rely at

trial. It is also appropriate that Arup respond to BAC's allegations, both in a pleading and in expert reports, so as to disclose what it contends are the causes of the cracks in the NAE which it designed.

[61] On one view, the contested amendments were a further particularisation of a broadly framed duty of care and an extension of that duty of care to the surcharge works. I have concluded, however, that the contentious amendments constitute a new cause of action. In addition, I conclude that the new cause of action arises out of substantially the same facts as the existing claim. It is appropriate that the amendments be allowed.

[62] Had I not reached the conclusion which I have on the "substantially the same facts" issue, I would nevertheless have allowed the amendments but made an order as to when they took effect. That date would have been the date upon which the proposed amendments were given to Arup. However, BAC has persuaded me that the amendments fall within the terms of r 376(4). Accordingly, the amendments will take effect as if they were pleaded at the time the claim was commenced.

[63] I will hear the parties, if required, as to the appropriate form of orders and make directions for the further conduct of the proceedings, including the progress of pleadings and the progress of expert evidence. The only order I presently propose to make is that leave is granted to amend substantially in the form of the amended statement of claim filed on 2 May 2017.