SUPREME COURT OF QUEENSLAND

CITATION:	*Lanai Unit Holdings Pty Ltd* v *Mallesons Stephen Jaques* [2017] QSC 251
PARTIES:	**LANAI UNIT HOLDINGS PTY LIMITED ACN 602 697 745 as trustee for the LANAI UNIT TRUST** (plaintiff) v **MALLESONS STEPHEN JAQUES (A Firm)** (defendant)
FILE NO:	BS10583/14
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	6 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2017
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. the plaintiff have leave to amend the statement of claim substantially in accordance with the form exhibited to the affidavit of Brett Richard Imlay sworn 20 July 2017.** **2. the costs of the application are costs in the proceeding.**
CATCHWORDS:	PLEADINGS – FORM OF PLEADING – RAISING NEW MATTER – where the plaintiff engaged the defendant to act in relation to a residential building development – where the defendant drafted a form or forms of pre-sale contract for the units in the development – where the contracts did not comply with section 212(1) of the *Body Corporate and Community Management Act* 1997 (Qld) – where the plaintiff alleged the defendant was negligent and contravened the *Trade Practices Act* 1974 (Cth) – where the causes of action under the *Trade Practices Act* had been struck out – where the plaintiff applied to amend the statement of claim to add further causes of action for negligence corresponding to the struck out *Trade Practices Act* claim – where the causes of action to be added differed from the existing causes of action in negligence by the addition of an inconsistent counterfactual scenario and loss of a valuable commercial opportunity as damage - where there was a question as to whether the causes of action to be added were timed barred –

whether the amendments should be allowed

Civil Liability Act 2003 (Qld), s 11
Civil Proceedings Act 2011 (Qld), s 16
Trade Practices Act 1974 (Cth), s 52, s 82
Uniform Civil Procedure Rules 1999 (Qld), r 375, r 376

Adam v Shiavon [1985] 1 Qd R 1, discussed
Alcan Gove Pty Ltd v Zabic (2015) 257 CLR 1, cited
Althaus v Australia Meat Holdings Pty Ltd [2006] QSC 56, cited
Amaca Pty Ltd v Cremer (2006) 66 NSWLR 400, applied
Archie v Archie [1980] Qd R 546, cited
Astley v Austrust Ltd (1999) 197 CLR 1, cited
Baldry v Jackson [1976] 2 NSWLR 415, cited
Berezovsky v Abramovich [2011] EWCA Civ 153, discussed
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Commonwealth v Cornwell (2007) 229 CLR 519, discussed
Cooke v Gill (1873) LR 8 CP 107, cited
Draney v Barry [2002] 1 Qd R 145, applied
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241, cited
Hartnett v Hynes [2010] QCA 65, cited
Karasaridis v Kastoria Fur Products (1984) 37 SASR 345, cited
McQueen & Anor v Mount Isa Mines Ltd & Ors; *CMA Assets Pty Ltd & Anor v Mount Isa Mines Ltd & Ors* [2017] QCA 259, discussed
Menegazzo v PriceWaterhouseCoopers [2016] QSC 94, approved
Paul v Westpac Banking Corporation Ltd [2017] 2 Qd R 96, cited
Sneade v Wotherton Barytes and Lead Mining Co [1904] 1 KB 295, cited
Warner v Sampson [1959] 1 QB 297, cited
Weldon v Neal (1887) 19 QBD 394, cited

COUNSEL: N Kidd SC and P Tucker for the plaintiff
P O'Shea QC and S Hooper for the defendant

SOLICITORS: Levitt Robinson Solicitors for the plaintiff
Thynne + Macartney for the defendant

[1] **Jackson J**: This is an opposed application for leave to amend the statement of claim in conformity with a proposed Third Further Amended Statement of Claim ("3FASOC"). The claim is for damages for the tort of negligence for harm caused by a professional person, being a solicitor. Leave is required, at least in part, because the plaintiff applies to amend to include a new cause of action where a relevant period of limitation, current at the date when the proceeding was started, has ended.

Statutory framework

[2] Section 16 of the *Civil Proceedings Act* 2011 (Qld) ("CPA") provides:

> "**16 Amendment for new cause of action or party**
>
> (1) This section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document in a proceeding.
> (2) The court may order an amendment to be made, or grant leave to a party to make an amendment, even though—
> (a) the amendment will include or substitute a cause of action or add a new party; or
> (b) the cause of action included or substituted arose after the proceeding was started; or
> (c) a relevant period of limitation, current when the proceeding was started, has ended.
> (3) Despite subsection (2), the rules of court may limit the circumstances in which amendments may be made.
> (4) This section—
> (a) applies despite the *Limitation of Actions Act 1974*; and
> (b) does not limit section 103H."

[3] Rules 375 and s 376 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") provide:

> "**375 Power to amend**
>
> (1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in the way and on the conditions the court considers appropriate.
> (2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.
> (3) If there is misnomer of a party, the court must allow or direct the amendments necessary to correct the misnomer.
> (4) This rule is subject to rule 376.
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> **376 Amendment after limitation period**
>
> (1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.
> (2) The court may give leave to make an amendment correcting the name of a party, even if the effect of the amendment is to substitute a new party, only if—
> (a) the court considers it appropriate; and
> (b) the court is satisfied that the mistake sought to be corrected—
> (i) was a genuine mistake; and
> (ii) was not misleading or likely to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(3) The court may give leave to make an amendment changing the capacity in which a party sues, whether as plaintiff or counterclaiming defendant, only if—
   (a) the court considers it appropriate; and
   (b) the changed capacity in which the party would then sue is one in which, at the date the proceeding was started by the party, the party might have sued.

(4) The court may give leave to make an amendment to include a new cause of action only if—
   (a) the court considers it appropriate; and
   (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."

Rule 376 generally

[4] In my view, 376(4) of the UCPR is a rule that limits the circumstances in which amendments may be made within the meaning of s 16 of the CPA.

[5] Before the progenitor to r 376(4) was introduced, the amendment of a statement of claim in this court operated against well-established legal norms. Time ceased to run under any limitation statute from the issue of the writ of summons, because that is when the action was brought within the meaning of the limitation statute.[1] Second, when a statement of claim was amended, the amendment operated from the commencement of the action in which it was delivered.[2] Such an amendment would not be affected by a limitation defence that would have arisen to bar a new action. Third, accordingly, no amendment was allowed to add a new cause of action which would have the effect of defeating a limitation defence that arose after the date of issue of the writ of summons, except for an unclear category of cases involving "exceptional circumstances".[3]

[6] Against that background, the *Rules of the Supreme Court* 1900 (Qld) were amended from 14 December 1965 to introduce O 32 of r 1(2) and (5), as follows:

"(2) Where an application to the court or a judge for leave to make the amendment mentioned in paragraph…. (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the court or a judge may nevertheless grant such leave in the circumstances mentioned in that part if the court or a judge thinks it just to do so.

…

(5) An amendment may be allowed under par (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

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1 For example , see *Limitation of Actions Act* 1974 (Qld), s 10(1)(a).

2 *Baldry v Jackson* [1976] 2 NSWLR 415, 419; *Warner v Sampson* [1959] 1 QB 297; *Sneade v Wotherton Barytes and Lead Mining Co* [1904] 1 KB 295.

3 *Archie v Archie* [1980] Qd R 546, 551; *Weldon v Neal* (1887) 19 QBD 394, 395.

[7] When O 32 r 1(2) and (5) were introduced, the amendment that they effected to the operation of the limitation statute[4] was made by a rule of court. Elsewhere, a similar amendment brought a challenge to the validity of the rule as delegated legislation to effect a change to the operation of an Act. However, the statutory context is now different. The power under r 376(4) is supported by s 16 of the CPA.

[8] Although there were no reported judgments as to the operation of the rules in this State for almost 15 years, a wealth of cases at intermediate appellate court level have now been decided under O 32 r 1(2) and (5) and r 376(1) and (4) and under similar provisions in other jurisdictions.[5]

[9] Where r 376(1) and (4) apply, par (b) poses three questions. First, what are the facts for the causes of action for which relief has already been claimed? Second, what are the facts for the new cause of action sought to be included by the amendment? Third, in comparing the two sets of facts does the new cause of action arise out of the same facts or substantially the same facts as the cause of action for which relief has already been claimed?

[10] As the decided cases show, what is a cause of action for the purposes of the rule is critical to the scope of the enquiry whether the new cause of action arises out of the same facts or substantially the same facts.

[11] The expression "cause of action" is not defined in the CPA, the UCPR or the *Acts Interpretation Act* 1954 (Qld).

[12] Nevertheless, it is a central concept to the operation of the UCPR in a proceeding brought by claim. In particular, a proceeding which does not disclose a reasonable cause of action is liable to be struck out.[6] A plaintiff may include as many causes of action as the plaintiff has against a defendant[7] but it is not necessary for every defendant to be interested in all the relief sought or in every cause of action included in the proceeding.[8] And if including a cause of action may delay the trial of a proceeding, prejudice another party or is otherwise inconvenient the court may order separate trials or stay.[9] Whether a proceeding may be served on a person outside Australia is connected to whether the cause of action arose in Queensland.[10] It is unnecessary to multiply the examples further.

[13] There are cases in the context of r 376(4) and similar rules about what constitutes a "cause of action". Nearly all of them begin from a statement to the effect that a

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4 Then, the *Limitation Act* 1960 (Qld), s 9(1)(a).

5 In Queensland, for example, *Paul v Westpac Banking Corporation* [2017] 2 Qd R 96; *Zonebar Pty Ltd v Global Management Corporation Pty Ltd* [2009] QCA 121; *Thomas v State of Queensland* [2001] QCA 336; *Draney v Barry* [2002] 1 Qd R 145; *Adam v Shiavon* [1985] 1 Qd R 1. In England and Wales, for example, *Ballinger v Mercer Ltd* [2014] 1 WLR 3597*; Berezovsky v Abramovich* [2011] EWCA Civ 153; *Chantrey Vellacott v Convergence Group plc* [2005] EWCA Civ 290; *Senior & Pearson v Ward* [2001] EWCA Civ 229. In New South Wales, for example, *State of New South Wales v Radford* (2010) 79 NSWLR 327; *Proctor v Jetway Aviation Ltd* [1984] 1 NSWLR 166. In Victoria, for example, *Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63.

6 UCPR, r 171(1)(a).

7 UCPR, r 60(1).

8 UCPR, r 66.

9 UCPR, r 68.

10 UCPR, r 124(1)(a).

cause of action consists of the material facts necessary to found the relief that is claimed or sought in the proceeding. In some of them, courts have wrestled with the elusive distinction between an additional fact that is material in the sense just described, on the one hand, or is a particular or additional fact that does not raise a new cause of action, on the other. But it is not easy, or perhaps even possible, to reconcile all the cases.

[14] As Brett J said in *Cooke v Gill*:[11]

> "'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse."[12]

[15] In my respectful view, an accurate statement of the common law of Australia was made by the Court of Appeal of New South Wales in *Amaca Pty Ltd v Cremer*,[13] as follows:

> "A 'cause of action' is '… the fact or combination of facts which gives rise to a right to sue … [i]n an action for negligence, it consists of the wrongful act or omission and the consequent damage': *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 245, per Wilson J."[14]

[16] The usual taxonomy of the elements of the cause of action for negligence at common law breaks down what is a "wrongful act or omission" in that statement into the elements of the existence of a duty of care in law and breach of that duty. The three elements so derived are reflected in a 2015 statement of the High Court in *Alcan Gove Pty Ltd v Zabic*,[15] as follows:

> "The law is clear that actual damage or injury is an essential element of a cause of action in negligence for personal injury. (It is not disputed that the respondent established the other elements of his cause of action, namely, the existence and breach of a duty of care, and that the mesothelioma was caused by the appellant's breach of duty.)" (footnotes omitted)[16]

[17] But the elements of the tort for harm caused by the negligence of a professional person are no longer just a matter of common law. First, s 22 of the *Civil Liability Act* 2003 (Qld), may affect the standard of care for the element of breach of a duty of care. However, that section does not apply:

> "…to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service."[17]

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11 (1873) LR 8 CP 107.
12 (1873) LR 8 CP 107, 116.
13 (2006) 66 NSWLR 400.
14 (2006) 66 NSWLR 400, 413-414 [68].
15 (2015) 257 CLR 1.
16 (2015) 257 CLR 1, 7 [8].
17 *Civil Liability Act* 2003 (Qld), s 22(5).

[18] Second, causation is affected by s 11 of the CLA as follows:

> "**11 General principles**
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> (1) A decision that a breach of duty caused particular harm comprises the following elements—
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> (a) the breach of duty was a necessary condition of the occurrence of the harm (**"factual causation"**);
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (**"scope of liability"**).
>
> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
>
> (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—
>
> (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."

[19] These points are relevant to the analysis of the existing causes of action and any new causes of action in an application of the present kind. If a proposed amendment does not include a new cause of action but only a particular or additional fact as to an existing cause of action, r 376(4) does not apply. But if r 376 applies, and a new cause of action is to be included by the amendment, the inquiry then shifts, initially, to whether it arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed under r 376(4)(b).

[20] In a recent decision, *McQueen & Anor v Mount Isa Mines Ltd & Ors*; *CMA Assets Pty Ltd & Anor v Mount Isa Mines Ltd & Ors*,[18] the Court of Appeal considered what constitutes a new cause of action within the meaning of r 376(4).

[21] In *McQueen*, consideration focussed upon modern cases of authority or persuasion in relation to the connection between a cause of action and the material facts supporting the relief claimed.[19] In reaching the conclusion in that case, it was held

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18 [2017] QCA 259.

19 [2017] QCA 259, [45]-[62]

that, in this context, "cause of action" denotes a cause of action within the meaning of the *Limitation of Actions Act* 1974 (Qld).[20]

[22] That conclusion invites attention to what is the meaning of a cause of action within the *Limitation of Actions Act* 1974 (Qld). That statute repealed and replaced the *Limitation Act* 1960 (Qld). The Act of 1960 was based on the *Limitation Act* 1939 (Eng). The Act of 1939 followed a report in 1936 known as the Wright Committee Report.[21] It repealed and replaced the *Limitation Act* 1623 (Eng).

[23] The Act of 1623 is recognised as the first general limitations Act applicable to actions at common law for what we now call damages for breach of contract or tort, inter alia. It provided, in the section that dealt with the predecessor actions for damages for breach of contract or tort, that:

> "…actions, suits, or other proceedings as herein set out shall and may be commenced within the time herein expressed after **the cause of such actions**, suits, or other proceedings…" (emphasis added)

[24] The source of the phrase "cause of action" in modern limitations legislation may be apparent. But at once it is also apparent that when first used the expression did not denote the concept of "cause of action" in modern procedural law, because it pre-dated the abolition of the forms of action.

[25] It is not surprising that there has been, and still is, a degree of controversy that surrounds the meaning of "cause of action" when it is used in this and cognate contexts. That controversy was an inevitable consequence of the abolition of the forms of action. Some of the great legal minds, including Maitland[22] and Pomeroy,[23] have given it attention. In the American legal academy, learned articles have been written on the subject spanning almost a century.[24] That controversy includes whether there is one cause of action or more for different losses from the same negligent act or omission or breach of statutory duty.

[26] As the decided cases show, the courts have deployed a number of statements in explication of and even in lieu of the words "arises out of the same facts or substantially the same facts" in applying the rule. It is not to be overlooked that the statutory task is to apply the text of the rule, not a proxy test by way of judicial gloss upon that text. Nevertheless, a statement that has gained wide acceptance is that "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."[25]

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20 [2017] QCA 259, [41], [61].

21 (UK) Law Revision Committee Fifth Interim Report (Statutes of Limitation) 1936 Cmd 5334.

22 FW Maitland, *The Forms of Action at Common Law: A Course of Lectures*, 6.

23 Pomeroy, *Code Remedies*, 4 ed., § 347 (1904).

24 For example, AJ Bellia and BR Clark, "The Original Source of the Cause of Action in Federal Courts", 101 Va. L. Rev. 609 (2015); CE Clark, "The Cause of Action", 82 University of Pennsylvania Law Review 354 (1934); SA Harris, "What is a Cause of Action?", 16 Cal. L. Rev. 459 (1928).

25 *Draney v Barry* [2002] 1 Qd R 145, 164; *Paul v Westpac Banking Corporation Ltd* [2017] 2 Qd R 96, [11].

[27] It is in this well-trodden field of discourse that the particular problems raised in the present case must be considered.

The existing causes of action

[28] As currently constituted, the proceeding is a claim for damages for negligence. From June 2006, Lanai Apartments Pty Ltd was the trustee of the Lanai Unit Trust. In 2011, the trustee went into receivership and eventually it went into winding up in insolvency.

[29] On 7 November 2014, the plaintiff was appointed as the replacement trustee. It brings this proceeding in that capacity.

[30] From 9 May 2006, the trustee carried on business as the developer of a site at Mackay. The project comprised the construction of an 11 storey building containing approximately 80 residential apartments ("units").

[31] From April 2006, the defendant acted as solicitors in connection with the project. It drafted contracts for use (ultimately by the trustee) for the pre-sale of lots in the proposed community titles scheme for the land and building. The draft contract was utilised for 45 pre-sale contracts of sale of the units.

[32] From some time after May 2007, the building was developed using construction finance sourced from a bank.

[33] On 17 March 2009, the community titles scheme for the land and building was established.

[34] I will call the causes of action for damages for negligence alleged by the Further Amended Statement of Claim ("FASOC") the "Existing alleged negligence". They have been further articulated by the 3FASOC, but those amendments are not contentious.

[35] However, the defendant opposes the addition by the 3FASOC of alternative allegations of causation and loss for the Existing alleged negligence as a new cause of action. I will deal with later.

[36] Simplifying, the Existing alleged negligence is that:

(a) from April 2006, the defendant failed to include a provision in the draft contract that complied with the requirements of s 212(1) of the *Body Corporate and Community Management Act* 1997 (Qld) ("BCCMA") when drafting the pre-sale contract;
(b) the failure was a breach of the defendant's duty of care in tort[26] to exercise reasonable skill and care as solicitor;
(c) as a result of the alleged breach or breaches, each of the buyers under the pre-sale contracts was entitled to cancel the contract in accordance with s 212(3) of that BCCMA.

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26 It is the duty of care in tort that is relevant. No breach of contract is expressly alleged. That may be explained by the circumstance that the proceeding was started more than six years after any cause of action for breach of contract arose.

[37] As to causation and loss, the plaintiff alleged that:

(a) the buyers under 10 of the pre-sale contracts cancelled their contracts relying on the non-compliance with s 212(1);
(b) the trustee obtained lower prices on resale of the particular unit than under the original pre-sale contracts;
(c) as well, the buyers under 16 or 17 of the pre-sale contracts renegotiated their contracts relying on the error;
(d) the renegotiation was "on terms more favourable to the purchasers".

[38] An important point is that the alleged counterfactual or hypothetical past factual scenario for those losses was the lost chance of entering into and completing pre-sale contracts that did not contain the alleged failure and were not susceptible to cancellation by the buyers, "equal to the difference in the sales prices that would have been received … and the sales prices in fact received" for the affected units.

[39] The plaintiff alleged that it suffered loss and damage in that amount and other consequential losses being loss of interest on deposits, additional costs of management, loss of the use of the money from the sale proceeds, additional interest payable and losses associated with the receivership of the trustee. The amounts of those losses were not alleged in the FASOC, but are now alleged in the 3FASOC with particularity.

[40] I will call these allegations of loss, including the amendments to them in the 3FASOC that are not contentious, the "Existing alleged loss".

[41] The proceeding was started on 12 November 2014. The plaintiff submits that the first discernible damage for any cause of action occurred in late 2008 when the first of the susceptible pre-sale contracts was cancelled. The earliest date when one of those contracts was cancelled alleged in the 3FASOC is 21 November 2008. On that hypothesis, the existing causes of action for the Existing alleged negligence and the Existing alleged loss were brought within time.[27]

The TPA causes of action that were struck out

[42] The FASOC alleged another group of causes of action that, at least to some extent, were an alternative to the causes of action for damages for negligence already described. Those causes of action were for damages under s 82 of the *Trade Practices Act* 1974 (Cth) ("TPA") for contravention of s 52 of that Act. I will call them the "TPA causes of action". On 25 October 2016, I ordered that the paragraphs pleading those causes of action be struck out.[28]

[43] It is relevant to this application to summarise the TPA causes of action, because the proposed 3FASOC would add back factual allegations forming part of those causes of action.

[44] Simplifying again, the first group of the TPA causes of action alleged loss or damage suffered by the defendant's contraventions of s 52 of the TPA by engaging in conduct from April 2006 in drafting the pre-sale contracts and acting as solicitor

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27 *Limitation of Actions Act* 1974 (Qld), s 10(1)(a).
28 *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques (No 2)* [2016] QSC 242.

for the trustee in relation to the pre-sales contracts. The plaintiff alleged that the defendant impliedly represented that:

(a) the pre-sale contracts complied with the requirements of s 212(1) of the BCCMA; and
(b) the defendant had exercised the degree of skill and care of a reasonably competent solicitor with legal expertise practising in property development projects and transactions in Queensland; and
(c) those "Competence Representations" were misleading or deceptive.

[45] As to causation and loss, the plaintiff alleged that:

(a) by the Competence Representations, the trustee was induced to enter into the pre-sale contracts; and
(b) the Existing alleged loss (before the amendments made in the 3FASOC) was suffered by the defendant's contravention of s 52 of the TPA in making the Competence Representations.

[46] A second group of the TPA causes of action alleged loss or damage suffered by the defendant's contraventions of s 52 of the TPA by engaging in conduct from March 2007 in acting for the trustee in connection with obtaining approval of the construction finance facility from the bank for the building. The plaintiff alleged that:

(a) between March and May 2007 the defendant advised the trustee in connection with complying with the conditions for approval of the facility from the bank to finance the construction of the units;
(b) a condition of approval was that there were qualifying pre-sales contracts to a certain value.

[47] The plaintiff alleged that the defendant represented to the bank that provided the finance and the trustee that:

(a) the pre-sales contracts complied with the requirements of s 212 of the BCCMA; and
(b) the pre-sales contracts were binding and any deposits paid under them were non-refundable; and
(c) those "Finance Representations" were misleading or deceptive.

[48] As to causation and loss, the plaintiff alleged that:

(a) by the Finance Representations, the financing bank and the trustee were induced to enter into the construction finance facility for the project; and
(b) had the Finance Representations not been made, the trustee would have either:
    (i) solicited compliant pre-sales contracts; or
    (ii) sold the development site at a profit;[29]
(c) if the trustee had solicited compliant pre-sales contracts, the Existing alleged loss (before amendments in the 3FASOC) was suffered by

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29 FASOC, par 46(b).

the defendant's contravention of s 52 of the TPA in making the Finance Representations; and

(d) if the trustee had sold the development site at a profit, the loss or damage suffered by the defendant's contravention of s 52 of the TPA in making the Finance Representations was the "difference between [the] position in which the Unit Trust would have been had the site been sold and the current position of the Unit Trust."

[49] It will be observed that the allegations of causation and loss for the TPA causes of action for the Finance Representations were based on two alternative scenarios. The first was the Existing alleged loss. The second was sale of the development site for an alleged profit, apparently without carrying out the development. But no further facts were alleged in the FASOC as to what loss flowed from the second scenario. As will appear, the second scenario compares to what I describe below as the Alternative loss scenario.

New causes of action

[50] Paragraphs 23 to 39 of the 3FASOC would add new causes of action for negligence that I will call the Finance Representations negligence.

[51] Simplifying, those new causes of action are that:

(a) between March and May 2007 the defendant advised the trustee in connection with complying with the conditions for approval of a facility from the bank to finance the construction of the units;

(b) a condition of approval was that there were qualifying pre-sale contracts to a certain value were qualifying pre-sale contracts.

[52] The plaintiff alleges that:

(a) the defendant represented to the trustee and bank that the pre-sales contracts complied with the requirements of the BCCMA; and

(b) the defendant represented to the trustee and bank that the pre-sales contracts were binding and any deposits paid under them were non-refundable; and

(c) those "Finance Representations" were made negligently.

[53] The primary paragraph alleging negligence in making the Finance Representations negligence is paragraph 39 of the 3FASOC. It alleges that the breach of the duty of care comprised:

(a) drafting and having drafted pre-sale contracts that did not comply with s 212(1) of the BCCMA;

(b) failing to have any or any adequate regard to s 212(1) of the BCCMA;

(c) failing to have any or any adequate regard to the effect on the pre-sale contracts of a failure to comply with those requirements; and

(d) failing, accordingly, to exercise reasonable care to ensure that the Finance Representations were true and correct.

[54] Curiously, in par 39A(c), a paragraph which is not directed to the acts and omissions that comprised the alleged breach of duty, the plaintiff adds to the substance of the Finance Representations negligence by alleging that the defendant ought to have advised the trustee between March and May 2007 that the pre-sale contracts did not comply with s 212 of the BCCMA.

[55] As to causation, the plaintiff alleges that:

(a) the Finance Representations induced the trustee to enter into the construction finance facility for the project; and
(b) had the Finance Representations not been made the trustee would have solicited pre-sale contracts that were qualifying pre-sale contracts and sought to sell and sold the site.

[56] As to loss, the plaintiff alleges two different counterfactual or past hypothetical factual scenarios. First, the plaintiff alleges the Finance Representations negligence caused the Existing alleged loss.

[57] Up to this point, the amendments in the 3FASOC to add the Finance Representations negligence causes of action may be described as the addition of new causes of action that are fairly closely related to the struck out TPA causes of action based on the Finance Representations.

[58] However, second, the plaintiff also adds a different allegation of loss based on the counterfactual or past hypothetical factual scenario that had the Finance Representations not been made (from a time commencing between March and May 2007), the trustee would have solicited pre-sale contracts that were qualifying pre-sale contracts and would have sought to sell and sold the site. I will call this the "Alternative loss scenario".

[59] As part of the Alternative loss scenario, par 234B of the 3FASOC alleges that the trustee could and would have sold, or would have pursued but lost the opportunity to sell, the site by December 2007 for the sum of $10 million. That sale would have resulted in a profit on the project of $6.28 million, instead of the $8.2 million loss sustained on the project, being a total loss of $14.48 million, or $11.58 million as 80 percent of that sum as the loss of a valuable commercial opportunity.

[60] The defendant submits that the 3FASOC would add two new causes of action. In effect, it submits that the "First New Cause of Action" maintains the Existing alleged negligence, including the amendments thereto, but adds a new cause of action by the new allegation of causation of loss and the new allegation of loss comprised in the Alternative loss scenario.

[61] In effect, it submits that the "Second New Cause of Action" is that contained in the Finance Representations negligence and the Alternative loss scenario.

[62] As appears from my descriptions of the amendments proposed by the 3FASOC set out above, it may not be accurate to describe the additions in either of those categories as a single added cause of action, but nothing of substance flows from that point for the decision to be made.

Questions as to the application of rule 376(4)

[63] The present case raises three questions of law concerning the application of r 376(4)(b):

(a) first, can the rule apply if there is an unresolved dispute about whether a relevant period of limitation was current at the date the proceeding was started when it may have ended before then?
(b) second, how is the rule to be applied if some of the facts for which relief has already been claimed in the proceeding have been struck out because the cause of action for which relief was claimed from those facts has been held to be not maintainable?
(c) third, is there a new cause of action in negligence, within the meaning of the rule, when the plaintiff adds an inconsistent alternative counterfactual scenario as to what would have happened had the defendant not been negligent and a new loss of a valuable commercial opportunity as the loss for which damages are claimed?

Limitation period current when the proceeding was started

[64] There is a dispute about whether a relevant period of limitation for the First New Cause of Action was current at the date when the proceeding was started. If it was, r 376(1) applies r 376(4) to the application for leave to amend. Otherwise, the amendments fall to be considered under r 375.

[65] As previously stated, the plaintiff submits that the first discernible damage occurred in late 2008, upon the first of the cancellations of the pre-sales contracts. The plaintiff's written submissions did not analyse whether the Alternative loss scenario might raise a question whether loss was first suffered before then.

[66] The point arises from the allegation in par 234B of the 3FASOC that the trustee could and would have sold or would have pursued but lost the opportunity to sell the site by December 2007. If loss was suffered when that opportunity was missed, at any time before 12 November 2008, the period of limitation for First New Cause of Action would have expired before the proceeding was started and r 376(4) would not apply.

[67] In focussing on what it submitted was the First New Cause of Action, the defendant does not submit that the existing causes of action for the Existing negligence allegations and the Existing loss allegations, or any new causes of action based on the Finance Representation negligence allegations and the Existing loss allegations, are subject to a limitation defence because the Alternative loss scenario is a head of loss that was suffered for those causes of action. That possibility flows from two inter-related principles. First, in a claim for damages for negligence, a court assesses damages once and for all:

> "The sort of simple case in tort which comes repeatedly before the courts provides a ready and clear example. A plaintiff is negligently, personally and permanently injured. He may partially recover: his pain may or may not abate; he may never work again, or he may work in a less remunerative capacity; he may lose an opportunity of transfer or promotion, or of working to a greater age; he may, or may not lose the capacity to improve his qualifications by study; employment prospects in his calling might, in the ordinary course, have diminished, and he might have lost his position

> anyway. These are all contingencies bearing directly on the damages recoverable. They are contingencies which might take all of an ordinary adult lifetime to play out. But the courts do not await a lifetime. They assess damages, once and for all, on the basis of the probabilities…"[30]

[68] The second is that:

> "… to show the existence of a completely constituted cause of action in negligence, a plaintiff must be able to show duty, breach, and damage caused by the breach; accordingly, in the ordinary case, it is at the time when that damage is sustained that the cause of action 'first accrues' for the purposes of a provision such as s 11 of the Limitation Act."[31]

[69] Instead, the defendant's submissions are founded on the assumption that the Alternative loss scenario raises a new cause of action, rather than a new allegation of a head of loss or damage or a new allegation of when loss or damage was first suffered for the existing causes of action for the Existing alleged negligence.

[70] If that assumption is accepted, the defendant submits that the question of when the plaintiff first suffered loss or damage on the First New Cause of Action based on the Alternative loss scenario cannot be finally determined on this application.

[71] However, on that footing, the defendant submits that no order can be made under r 376(4) because the question whether the relevant period of limitation was current at the date the proceeding was started cannot be decided. Instead, the defendant submits that the question whether to allow the amendment should be decided under r 375.

[72] In my view, the question can be resolved in the present case, by proceeding as if r 376 applied. That is because the only reason why r 376(1) and (4) might not apply is that the relevant period for the new causes of action expired before the proceeding was started. But if it did, allowing the amendments can have no greater effect than deeming the new causes of action to have been added as if from the date when the proceeding was started. The defendant will be able to plead in the defence that the proceeding was brought after the expiration of six years from the date on which the relevant cause of action arose.[32]

[73] I do not say that this method of proceeding is appropriate in all cases where a relevant period of limitation may not have been current at the date when a proceeding is started because it may have expired. If it is clear that the period has expired before the proceeding was started, r 376 does not apply, and it would not be appropriate to allow an amendment to add a limitation barred cause of action, over a defendant's opposition, under r 375.

[74] However, in the present case, in my view, it is an appropriate to proceed as if r 376 applies, because it will prejudice neither party.

A struck out cause of action for which relief has already been claimed

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30 *Commonwealth v Cornwell* (2007) 229 CLR 519, 536-537 [57]. *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 530.

31 *Commonwealth v Cornwell* (2007) 229 CLR 519, 523 [5].

32 *Limitation of Actions Act* 1974 (Qld), s 10(1)(a).

[75] It is common for a statement of claim to allege a statutory cause of action claiming damages for loss or damage suffered as a result of contravening conduct that was misleading or deceptive or likely to mislead or deceive, and alternatively a common law cause of action for damages for the same loss or damage caused by a breach of a duty of care in negligence.

[76] The two causes of action do not have the same elements. First, a contravention of s 52 of the TPA is complete where a corporation, in trade or commerce, engages in conduct that is misleading or deceptive or likely to mislead or deceive.[33]

[77] Second, a cause of action for damages for economic loss caused by negligence arises where there is a duty of care, the defendant negligently breached the duty and the breach caused the plaintiff loss or damage.

[78] Accordingly, damage is not of the gist of an action based on a contravention of s 52, in the way that it is in an action for tort derived from the form of action on the case, including the tort of negligence.[34]

[79] However, a person who suffers loss or damage by conduct of another person that was done in contravention of s 52 may recover the amount of the loss or damage from the contravenor as damages, under s 82 of the TPA.

[80] The elements of the respective causes of action for damages overlap to such a degree that it is common for them to be alleged in the alternative. This is particularly so where the relationship of the plaintiff and defendant is that of commercial advisor and client, including that between a solicitor[35] and client in relation to the client's business affairs.

[81] At first blush, it may seem surprising, therefore, that the defendant submits that the second new cause of action constituted by the Financial Representations negligence does not arise out of substantially the same facts as the second group of TPA causes of action for the Financial Representations.

[82] However, the defendant submits that the new Financial Representations negligence causes of action should be compared only to the existing causes of action for the Existing alleged negligence without reference to the TPA causes of action, because the TPA causes of action have been struck out.

[83] This is an unappealing point. If the plaintiff had sought leave to amend to add the causes of action for the Financial Representations negligence and the Existing alleged loss, before the order striking out the TPA causes of action was made, it would not have arisen. As well, the defendant has been apprised of the content of the second group of TPA causes of action, as informing the proposed Financial Representations negligence causes of action, for some years before the current application to amend.

[84] The defendant relies on the text of r 376(4)(b) that the required comparison of the same facts or substantially the same facts must be made with the facts for "a cause

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33 *Trade Practices Act* 1974 (Cth), s 52.

34 *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1, 7 [8].

35 It is unnecessary to discuss the extensions of the operation of the TPA that pick up conduct by a solicitor who is not a corporation.

of action for which relief has already been claimed in the proceeding" and submits that a struck out cause of action does not satisfy that description.

[85] I reject that conclusion. The only decision on point also rejected it.[36] The past tense of the verb "has already been claimed" is capable of extending, on its ordinary meaning, to a cause of action for which relief was claimed at any prior time in the proceeding.

[86] That does not mean that the court might not decide that to permit a long deleted cause of action to be resurrected is not "appropriate" under r 376(4)(a). But that is a question of discretion, not a limit of the circumstances in which an amendment can be made, because the proposed new cause of action does not arise 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.

[87] I do not consider that this conclusion is gainsaid by cases that have decided, under different rules, that an election to abandon a claim made in a writ of summons by a subsequently delivered statement of claim cannot be reversed by amendment of the statement of claim.[37]

Substantially the same facts – Second New Cause of Action

[88] Even on this basis, the defendant submits that the Second New Cause of Action does not arise out of the same or substantially the same facts, because the following particular facts are alleged in the Financial Representations negligence allegations:

(a) the defendant ought to have known that the trustee would trust in the defendant's special competence to give the Finance Representations (par 37(a));
(b) it was reasonable for the trustee and the financier to rely on the Finance Representations (par 37(b)); and
(c) it was reasonably foreseeable that the trustee was likely to suffer loss if the Finance Representations were incorrect or false (par 37(c)).

[89] The defendant submits that these facts are critical to the Second New Cause of Action but were not part of the story told by the plaintiff to prove the TPA causes of action.

[90] Each of the particular facts challenged by the defendant is one that goes to the existence of a duty of care in tort. Of course, the existence of a duty of care is a conclusion of law. In principle, it could be said that in every case the material facts to give rise to the duty must be pleaded.

[91] However, in practice, many fact situations or relationships are so well recognised as giving rise to a duty of care that the facts of reasonable foreseeability and reasonable reliance are not specifically alleged. So, for example, no-one expects to

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36 *Althaus v Australia Meat Holdings Pty Ltd* [2006] QSC 56, [13]. I note that the order made in that case was reversed on appeal, but not on this ground; *Althaus v Australia Meat Holdings Pty Ltd* [2007] 1 Qd R 493. See also *Hartnett v Hynes* [2010] QCA 65, [27], although leave to re-plead was granted in that case.

37 In any event, see *Knox & Dyke Ltd v Holborn Borough Council* (unreported, but noted in LJ Newspaper, 23 May1931, p 455) where an abandoned cause of action was permitted to be restored.

see a statement of claim allege that it was reasonably foreseeable that if the defendant motor car driver failed to exercise reasonable care another person might be injured in a collision, or that such other person reasonably relied upon the defendant to exercise reasonable care. On the other hand, in many cases where a novel duty of care in negligence to avoid economic loss is alleged the relevant facts that give rise to the relevant duty of care, including in many cases those going to reasonable foreseeability and reasonable reliance, must be alleged with particularity.[38]

[92] However, since it has been fully accepted that a solicitor owes a concurrent duty of care in tort alongside the contractual obligations under a contract of retainer,[39] it has not been common practice, or decided by a court of authority, that the alternative duty of care in tort must be supported by allegations of reasonable foreseeability of loss or reasonableness of reliance, as well as the allegation of the solicitor's retainer. The explanation lies in the proposition that:

> "…the law has evolved to the conclusion that concurrent liabilities in both contract and tort may arise in cases of professional negligence. Prima facie, a plaintiff may sue a solicitor in either contract or tort or both."[40]

[93] In any event, the FASOC alleged:

(a) from in or about April 2006, the defendant agreed to provide legal services for reward to the trustee's predecessor in connection with the project (par 3);
(b) from 9 May 2006, the defendant provided those services to the trustee under the retainer (par 6A and 6B);
(c) from May 2006 to June 2009, the defendant owed to the trustee the duty to exercise reasonable skill and care in the course of providing legal services in connection with the project (par 12(a));
(d) from May 2006 to June 2009, the defendant owed a duty to exercise the degree of skill and care of a reasonably competent solicitor with legal expertise practising in property development projects and transactions in Queensland, in the course of drafting and advising on the pre-sale contracts (par 12(b)); and
(e) from May 2006 to June 2009, the defendant owed a duty to exercise reasonable skill and care to ensure that the pre-sale contracts complied with the statutory requirements applicable to them (par 12(c)); and
(f) in the course of acting for the trustee in securing the construction loan the defendant made the Financial Representations (paras 40 and 41).

[94] In my view, the defendant's remaining objection to the Second New Cause of Action must be rejected. The new causes of action for the Financial Representations negligence based on the Existing alleged loss arise out of substantially the same facts as the TPA causes of action for the Financial Representations.

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38 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 252, 260, 301 and 310; cf *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.
39 *Astley v Austrust Ltd* (1999) 197 CLR 1, [44].
40 *Astley v Austrust Ltd* (1999) 197 CLR 1, [44].

Substantially the same facts – First New Cause of Action

[95] The facts out of which a cause of action in negligence arise necessarily include the element and material fact that loss or damage was caused by the breach of the duty of care. That follows from acceptance of the proposition that damage is the gist of the action, so that absent damage no cause of action is complete.

[96] In the present case, both parties proceeded on the footing that the Alternative loss scenario may raise a new cause of action.

[97] In any event, should it be accepted that there is a new cause of action where the added allegations are of a different past counterfactual or hypothetical scenario, based on a different allegation of causation and a different loss of a valuable commercial opportunity? Or is there only one cause of action with different heads of damage, that are raised by the inconsistent alternative scenarios?

[98] *Adam v Shiavon* is an early example of the problem of different heads of loss or damage and a new cause of action. The plaintiff was injured and his car was damaged in a collision caused by the defendant's negligence. The proceeding that was started claimed damages for the property damage only. The plaintiff applied to amend the statement of claim to add a claim for loss or damage for personal injuries after the expiry of the relevant limitation period. It was apparently conceded that the cause of action for damages for personal injuries was a new cause of action for the purposes of O 32 r 1(2) and (5) and that it did not arise out of the same facts, but it was held that it arose out of substantially the same facts as the existing cause of action.[41] But there was no alternative scenario of causation and loss raised in *Adam*. It does not assist much in deciding the present case.

[99] However, in *Berezovsky v Abramovich*,[42] Longmore LJ said:

> "It may indeed be the case that if a claimant, suing in tort, substitutes by amendment a different kind of loss from that originally pleaded, he will be asserting a new cause of action, but that will not always be so. One needs to know more of the facts of the case before one can confidently assert that the claimant is proposing to substitute a new cause of action. If an act of violence constituting a single breach of duty causes the loss of both a cat and a dog, the claimant would not be substituting a new cause of action if he substituted the word 'dog' for the word 'cat' but would be relying on the original cause of action which had caused loss. He would be substituting a new loss for the old loss but would not be substituting a new cause of action for the original cause of action. If on the other hand the claimant was relying on a second and distinct act of violence causing a loss at some different time from the loss originally caused to the cat, he would no doubt be relying on a different cause of action.
>
> Thus the addition or substitution of a new loss is by no means necessarily the addition or substitution of a new cause of action. For a cause of action to arise in tort there must be a breach of duty which causes loss but it is permissible to add or substitute further losses if they all stem from an

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41 [1985] 1 Qd R 1, 8.

42 [2011] EWCA Civ 153.

> original breach of duty which has caused some loss. This happens everyday in personal injury claims in which a loss of earnings claim may be added to (or substituted for) a claim for loss and suffering, even after the original time-bar has expired; there is no question of a new cause of action being added or substituted because the loss all stems from the negligent act of the car driver or other tortfeasor …"[43]

[100] The parties did not debate this question. In my view, it is appropriate to proceed on the same assumption as did the parties, that the First New Cause of Action raises a new cause of action.

[101] The defendant submits that the Alternative loss scenario, in particular paras 39A, 234B and 235 of the 3FASOC, does not arise out of substantially the same facts as in the existing causes of action in the FASOC.

[102] In my view, the allegation of causation that emerges from paras 39A(c) and 234B(b)(ii) of the 3FASOC is substantially the same as par 46(b) of the FASOC. It is, in effect, the allegations of the loss of a valuable opportunity and the amount of the value of the alleged loss that appear for the first time in the 3FASOC. They should have been in the earlier iterations of the pleading,[44] but were not.

[103] In my view, the defendant's submission that the First New Cause of Action does not arise out of substantially the same facts as the TPA causes of action, because it is based on the Alternative loss scenario, should be rejected. Any new causes of action raised by the Alternative loss scenario for the First New Cause of Action arise out of the substantially the same facts as the causes of action for the Existing alleged negligence and the TPA causes of action in the FASOC.

Appropriate

[104] The defendant submitted that even if the new causes of action arise out of substantially the same facts, it is not appropriate to give leave to make the amendment under r 476(4)(a) because of the delay in making the application and the absence of any adequate explanation for the delay.

[105] There is no suggestion of actual prejudice to the defendant in the delay, apart from the inevitable degree of prejudice to factual inquiry caused by a long period between relevant events and the trial of a proceeding conducted upon viva voce evidence of recollection, described by McHugh J in *Brisbane South Regional Health Authority v Taylor*[45] as a "general presumption of prejudice".

[106] To the extent that the Alternative loss scenario raises questions of value, the retrospective value of the property development project is likely to turn on expert evidence that will not depend, or largely depend, on the quality of recollections. To the extent that the question of causation might involve evidence of what the decision makers for the trustee would have done, there is a restriction upon the scope of oral evidence on such a question in a negligence case.[46]

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43 [2011] EWCA Civ 153, [63]-[64]. Compare *Karasaridis v Kastoria Fur Products* (1984) 37 SASR 345, 351.

44 *Uniform Civil Procedure Rules* 1999 (Qld), rr 150(1)(b) and 155.

45 (1996) 186 CLR 541, 556.

46 *Civil Liability Act* 2003 (Qld), s 11(3)(b).

[107] I respectfully agree with the following statement by Applegarth J, in *Menegazzo v PriceWaterhouseCoopers*:[47]

> "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* 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. They include the principle that an application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. An application to amend will not be acceded to without adequate explanation or justification, including an explanation for any delay in applying for the amendment. The interests of justice require consideration of the prejudice caused to other parties if the amendment is allowed. This includes considering the strain litigation has on litigants and the distress caused by delay and proposed changes to a case. These may be greater where there is no adequate explanation for why the changes were not made sooner."[48]

[108] Even so, in my view, although no explanation for the delay has been given in this case, that omission should not lead to this application being dismissed and it should be held that this is a case where it is appropriate to give leave to make the amendments sought.

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47 [2016] QSC 94.
48 [2016] QSC 94, [52].