

SUPREME COURT OF QUEENSLAND

CITATION: *Bluefin Seafoods Pty Ltd v Fraser Coast Regional Council*
[2018] QSC 14

PARTIES: **BLUEFIN SEAFOODS PTY LTD ABN 90 063 023 807**
(plaintiff)
v
FRASER COAST REGIONAL COUNCIL
(defendant)

FILE NO: SC No 5626 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 9 February 2018

DELIVERED AT: Brisbane

HEARING DATE: 6 February 2018

JUDGE: Bowskill J

ORDERS: **1. The further amended statement of claim filed on 1 December 2017 is struck out.**
2. Judgment is entered for the defendant.

CATCHWORDS: LIMITATION OF ACTIONS – GENERAL MATTERS – AMENDMENT OF ORIGINATING PROCESS AND PLEADINGS OUTSIDE LIMITATION PERIOD – AMENDMENTS INTRODUCING NEW CAUSE OF ACTION OR PARTICULARISING CAUSE OF ACTION – Where the defendant applies to strike out the statement of claim in its entirety, on the basis that the plaintiff’s claims are statute barred – where the plaintiff concedes that the causes of action for which it commenced the proceedings on 8 June 2016 are statute barred – whether new allegations in the plaintiff’s amended statement of claim filed in December 2017 constitute new causes of action, in respect of which the limitation periods have expired – whether the new causes of action arise out of the same or substantially the same facts as the earlier causes of action for which relief was claimed

Uniform Civil Procedure Rules 1999 (Qld), r 376(4)

Borsato v Campbell [2006] QSC 191

Draney v Barry [2002] 1 Qd R 145

Paul v Westpac Banking Corporation [2017] 2 Qd R 96

Thomas v Queensland [2001] QCA 336

COUNSEL: K N Wilson QC for the defendant (applicant)

SOLICITORS: Barry Nilsson Lawyers for the defendant (applicant)
Ms T M Rimmer, a director of the plaintiff, appeared for the plaintiff by leave

- [1] On 8 June 2016 Bluefin Seafoods Pty Ltd commenced proceedings against the Fraser Coast Regional Council seeking “damages including equitable damages”. Ms Rimmer and Mr Meaclem, in their capacity as shareholders of Bluefin, were the second and third plaintiffs, but their action has been discontinued. The cause(s) of action relied upon by Bluefin are difficult to elucidate from the original statement of claim, but appear to comprise claims for damages for misleading and deceptive conduct, on the basis of representations by representatives of the Council, which Bluefin relied upon in making certain decisions in relation to a sea cucumber aquaculture hatchery operated by it at Urangan, to its financial detriment; as well as related claims for damages for negligence and breach of contract (in relation to what is described as a Development Agreement entered into in October 2006).
- [2] At no stage since this proceeding was commenced has Bluefin been legally represented. Ms Rimmer, as a director of Bluefin, was given leave to appear for Bluefin at the hearing of this application, there being no objection to that course from the Council.¹
- [3] The original statement of claim is poorly drafted and difficult to comprehend, but relevantly for present purposes Bluefin alleged that:
- (a) On or about 13 October 2006 Bluefin and the Council entered into an agreement under which in consideration of the Council providing the necessary infrastructure, Bluefin would develop an aquaculture facility on certain land (paragraph [19]).
 - (b) Under the terms of this contract Bluefin spent \$560,000 developing the land (paragraph [21]).
 - (c) “But wrongfully and in breach of the express and implied terms. Council has not provided or co-operated in the provision of the necessary infrastructure in consequence whereof Bluefin has suffered loss and damage” (paragraph [22]).
 - (d) (After referring to various other things that happened, or were represented by the Council, in the period from about March 2007 to about April 2009) “By December 2009, contrary to representations the Council has not built the infrastructure, which had caused Bluefin to be financially strained” (paragraph [45]).

¹ As to the need for leave, see s 90 of the *Supreme Court of Queensland Act* 1991 (formerly s 209 of the *Supreme Court Act* 1995); see also *Hubbard Association of Scientologists International v Anderson* [1972] VR 340 at 341-344 and *Simto Resource Ltd v Normandy Capital Ltd* (1993) 10 ACSR 776 at 781-783, referred to by Keane JA in *ASIC v Neolido Holdings Pty Ltd* [2006] QCA 266 at [59].

- (e) There was a meeting with the Council on 25 February 2010 to discuss the development proposal (at paragraph [51]) and a further meeting on 1 March 2010 at which the Council confirmed it “will proceed with Stage 1 of the development as discussed” (at paragraph [52]).
 - (f) “By October 2010, contrary to the representations the Council has not built the infrastructure, which had caused Bluefin to be financially strained” (paragraph [53]).
- [4] The conclusions, in terms of a legal consequence, sought to be drawn from these, and the other allegations in the pleading, are very broad, and purport to relate to all the “representations” apparently pleaded. So, for example, in so far as Bluefin is concerned, the pleading concludes with the following:
- “61. The Council knew or ought reasonably to have known that Bluefin would risk the incurring of economic loss if the representations or any of them were not accurate.
 - 62. The representations were incorrect and misleading.
 - 63. As a result of Council’s negligence Bluefin, has suffered loss and damage.”
- [5] In its defence filed on 4 August 2016, among other matters, including objections to the form of the pleading as improper and embarrassing, the Council pleaded that, in so far as Bluefin’s action accrued prior to 8 June 2010 it is statute barred, and s 10 of the *Limitation of Actions Act 1974* was relied upon to defeat Bluefin’s claim.
- [6] An amended statement of claim was filed on 26 August 2016. It did not fix the many problems with the original statement of claim.
- [7] An amended defence was filed on 2 September 2016, in which the limitations defence remained unchanged.
- [8] The proceeding was placed on the supervised case list in April 2017, and has been the subject of review by Applegarth J on various occasions since then.
- [9] A (second) amended statement of claim was filed on 12 June 2017. This version was not an improvement on the original.
- [10] On 7 July 2017 the defendant filed an application seeking that the claim filed 8 June 2016 and the amended statement of claim filed 12 June 2017 be struck out, or alternatively that summary judgment be entered for the defendant. In addition to challenging the form and substance of the pleading, it was also contended that Bluefin’s claims were statute barred (see Council’s written submissions filed on 18 July 2017).

- [11] By orders made on 18 July 2017 by Martin J the amended statement of claim filed on 12 June 2017 was struck out, but the plaintiffs (at that time, still including Ms Rimmer and Mr Meaclem) were given leave to re-plead. I infer from this that the limitation issue was not a basis for striking out the pleading.
- [12] A (third) amended statement of claim was then filed on 11 September 2017. Although Bluefin was still unrepresented, from this version of its statement of claim it is apparent that it had by this time received some legal assistance, from a barrister volunteering with LawRight, whose name appears at the end of the document.
- [13] In this version of the statement of claim, an effort has been made to categorise the representations alleged to have been made at various times, and the steps taken in reliance upon them. So, for example, representations alleged to have been made in October 2004, which are said to have induced Bluefin to enter into the Development Agreement, are referred to as the “First Representations” (see paragraphs [6]-[9]). Representations alleged to have been made in October 2006, about works the Council was then undertaking, and which it is said were for the purpose of encouraging Bluefin to continue spending money in complying with its obligations under the Development Agreement, which it did, are referred to as the “Second Representations” (see paragraphs [25]-[29]).
- [14] In addition, the alleged failure of the Council to complete construction of the “utilities” on the relevant land, by about December 2006, is alleged to be in breach of the Council’s obligations under the Development Agreement, and is described as the “First Breach”, as a result of which Bluefin suffered loss and damage (see paragraphs [30]-[38]). A “Second Breach” of the Development Agreement is alleged, arising from the Council’s refusal, in about March 2007, of Bluefin’s request to exercise an option under that agreement to purchase the relevant land (see paragraphs [40]-[45]).
- [15] This version of the statement of claim also alleges that on 1 March 2010 a “Third Representation” was made, to the effect that the Council would proceed with stage 1 of the development, which seems to relate to the construction by the Council of utilities on the relevant land, which it is alleged was made for the purpose of encouraging Bluefin to continue to comply with its obligations under the Development Agreement. It is not expressly alleged that Bluefin relied on the Third Representation in that way. It is alleged that, contrary to this representation, the Council did not carry out the construction of the utilities within a reasonable time or at all (see paragraphs [50]-[54]).
- [16] On 3 November 2017 Bluefin was ordered to file and serve a reply specifically addressing the limitations defence pleaded by the Council.
- [17] The reply filed by Bluefin on 1 December 2017 contains one paragraph, as follows:
- “[Bluefin] Admits that if cause of action accrued prior to 8 June 2010 it would be statute barred but denies the cause of action is statute barred for

the reasons set out in paragraphs 50 to 80 of the Further Amended Statement of claim filed and served with this Reply.”

[18] Also on 1 December 2017, Bluefin filed a (fourth) further amended statement of claim. In contrast to the previous version, this document does not bear the name of any counsel, voluntary or otherwise.

[19] The main changes in this version of the statement of claim are:

- (a) The deletion of the concluding paragraphs pleading loss or damage suffered as a result of the First Representation (paragraph [12]) and the Second Representation (paragraph [28]). The equivalent concluding paragraphs in respect of the First Breach (paragraph [38]) and the Second Breach (paragraph [45]) remain, but for reasons explained below, this may have been an oversight.
- (b) In relation to the Third Representation:
 - (i) Whilst in substance this remains an allegation that “the Council will proceed with stage 1 of the development”, the pleading is amended to allege that this was said in a meeting on 25 February 2010 and in an email dated 1 March 2010 (see paragraphs [52]-[54]).
 - (ii) It is alleged that by 25 February and/or 1 March 2010 the Council was liable to Bluefin for damages for the First Breach and the Second Breach, and/or the First Representation and the Second Representation (see paragraphs [50] and [51]).
 - (iii) It is further alleged that in reliance upon the Third Representation, Bluefin did not proceed against the Council with a claim for damages for the First Breach, the Second Breach and/or the First Representation and the Second Representation (see paragraph [55]).
- (c) The addition of a new allegation that on or around 1 March 2010 the Council and Bluefin agreed to vary the Development Agreement, to allow the Council to carry out the construction of the utilities within a reasonable time of that date; that a reasonable time was no later than 31 August 2010; that in breach of the Development Agreement as varied, the Council failed to do that, as a result of which Bluefin suffered loss and damage, comprising a combination of the losses previously alleged to have flowed from the First Breach, Second Breach, First Representation and Second Representation (see paragraphs [59]-[61] and [77]-[80]).

[20] On 22 December 2017 the Council filed the present application, seeking orders:

- (a) firstly, that the amended statement of claim filed on 1 December 2017 be struck out in its entirety;

- (b) alternatively, that almost all of it be struck out, apart from the new claim in relation to variation of the Development Agreement;
- (c) alternatively, for summary judgment in favour of the Council.

- [21] The sole basis of the Council's application on this occasion is that Bluefin's claims are statute barred.
- [22] Bluefin has been able to receive some assistance from LawRight, including in the preparation of a written outline for the purposes of this application.
- [23] It is recorded in Bluefin's written outline, filed in court on 6 February 2018, that Bluefin "does not maintain a claim for damages for the first and second breaches of contract or the first or second representations (**the initial breaches**). The causes of action based upon the initial breaches are now statute barred" (see paragraph [8]).
- [24] This is a fair and appropriate concession to have made given that, in order to have been within the 6 year limitation period (assuming, favourably to Bluefin, that was the period which applied to its misleading and deceptive conduct claims), the causes of action for those "initial breaches" would have to have arisen no later than 8 June 2010. Having regard to the facts alleged by Bluefin (see paragraphs [13] and [14] above) I accept the Council's submission that the claims based on the First and Second Breaches, and the First and Second Representations, were unarguably brought outside the 6 year limitation period.² Accordingly, it is appropriate that they be struck out. As noted at paragraph [19](a) above, it appears Bluefin may have attempted to do this, but perhaps not in a complete or entirely satisfactory manner.
- [25] The real issue is whether the same conclusion follows in respect of the causes of action based on the Third Representation and the alleged variation of the Development Agreement.
- [26] In both cases, taking the facts alleged in the amended statement of claim on their face, and putting the case at the highest for Bluefin, each of these causes of action had accrued by 31 August 2010, being the time by which, Bluefin alleges, it was reasonable for the utilities to have been constructed by the Council, in accordance with the Third Representation, and the terms of the varied Development Agreement. That is the position of Bluefin, in its written submissions, where it is said:

“13. The loss suffered by the plaintiff arising out of the varied contract did not accrue until the defendant was in breach of the contract as varied on 1 March 2010.

14. That breach of contract / loss occurred when the defendant did not carry out the construction works by 31 August 2010.

² See paragraphs [19] to [32] of the Council's written submissions, filed in court on 6 February 2018.

...

22. The loss suffered by the plaintiff as a consequence of the Third Representations by the defendant occurred when the defendant failed to complete the works within a reasonable time of that representation i.e. 31 August 2010.”

- [27] Assuming the claims for damages by reference to the Third Representation and the variation to the Development Agreement are new causes of action, proceedings in respect of them would need to be commenced by 31 August 2016, in order to be within the requisite 6 year time limitation. They were not pleaded until the further amended statement of claim was filed on 1 December 2017.
- [28] Bluefin contends that its causes of action based upon the Third Representation, and breach of the varied Development Agreement, are not statute barred. Bluefin’s argument in this regard seems to be on the basis that the proceedings otherwise were commenced on 8 June 2016 (that is, before 31 August 2016).
- [29] The issues to be determined therefore are:
1. Whether the pleading based on the Third Representation, as it appears in paragraphs [50]-[58] and [62] of the further amended statement of claim filed 1 December 2017, and the pleading based on the breach of the varied Development Agreement, as it appears in paragraphs [59]-[62] of that document, are new causes of action.
 2. If so, whether they are statute barred.
 3. If so, whether they can be permitted to be added to the proceedings, outside the limitation period, under r 376(4) of the *Uniform Civil Procedure Rules 1999*.

New causes of action?

- [30] In *Borsato v Campbell* [2006] QSC 191 McMurdo J (as his Honour then was) said this in relation to the meaning of “cause of action” in r 376(4):

“[8] The term ‘cause of action’ was defined in *Cooke v Gill* as being ‘every fact which is material to be proved to entitle the plaintiff to succeed’, a definition which many judgments have employed in the context of this rule or its equivalent: see eg *Allonnor Pty Ltd v Doran* per McPherson JA. But it has not been applied literally, for otherwise any new fact to be added to a plaintiff’s case would be treated as raising a new cause of action which required leave in the context of a rule such as r 376(4). So in *Allonnor Pty Ltd v Doran* for example, there is an indication of what the Court of Appeal in *Thomas v Queensland* subsequently endorsed as a ‘fairly broad brush comparison between

the nature of the original claim and that to which it is sought to be amended'. **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. Some illustrative guidance is provided by *Allonnor Pty Ltd v Doran*; *Thomas v Queensland* and another judgment of the Court of Appeal, *Central Sawmilling No 1 Pty Ltd v Queensland*.

- [9] In *Allonnor*, the plaintiff was employed by the defendant as a delivery driver, and sued for an injury to his back and neck said to have been suffered on a certain date making a certain delivery of furniture. He sought to amend to add a claim for an injury to his shoulder, allegedly caused by another delivery made to a different address but on the same day. McPherson JA 'doubted whether what was sought to be added by way of amendment really amounts to a new cause of action' but in any case held that the new cause of action (if any) arose out of substantially the same facts and the amendment should be allowed. His Honour said:

On any view of what is pleaded, the plaintiff was, at the end of the day in question, left with physical injury to his body, which resulted from the same cause, which was lifting (whether on one or more than one occasion) in the course of the same employment with the same employer. It is not unreasonable to state it in this way, although admittedly it is to some extent a matter of the level of generality at which the proposition is expressed.

- [10] In *Thomas v Queensland*, the Court of Appeal disallowed an amendment of a case brought by an injured motorcyclist against the State as the authority responsible for the highway on which he was injured. His case was that there was a large amount of soil on the road surface which caused his motorcycle to lose traction and collide with another vehicle. His claim was pleaded originally on the basis that the defendant had been undertaking road works at the scene which had resulted in this soil on the road. He sought to amend to claim that the soil was there because it had been washed from a nearby embankment in a way which was attributable to poor construction of the highway in the first place. The court held that this was a new cause of action, saying in its joint judgment:

The essential elements in a claim for damages for negligence are the duty of care, breach of that duty and injury caused by that

breach. Here, although only for one injury an incident is alleged, different duties, different breaches and different causes of injury are now alleged. In our view the effect of the amendment is to include new causes of action.

[11] In *Central Sawmilling*, the plaintiffs claimed damages for breach of contract, saying that the defendant, the State of Queensland, by three identified written agreements had promised to provide them with certain quantities of timber. They then sought to amend to plead another agreement made between various timber millers, including the plaintiffs, and the defendant by which they were to receive those amounts of timber. That was held to involve a new cause of action.”³

[31] *Borsato* was a medical negligence claim. As originally pleaded, the plaintiff alleged a breach of duty on the part of two surgeons in the manner in which they performed surgery on him. The amendments sought to plead a breach of the duty to warn about risks of the surgery. McMurdo J found that:

“[14] Indisputably, the breach of duty now alleged is quite distinct from that already alleged. In substance it is such a different case from an allegation of negligent performance of the surgery that it cannot be described as some further particularisation of the original claim of breach of duty. It requires the plaintiff to prove a distinct fault, necessarily prior in time to the alleged breach in the course of the surgery, and then to prove the likelihood of some sequence of events in response to a proper warning. I do not accept that it is appropriate for present purposes to characterise the duty in this new case as the same as in the existing case, but on any view the new case involves quite a different breach.”

[32] McMurdo J’s approach has been adopted in a number of subsequent cases: see, for example, *Wolfe v State of Queensland* [2009] 1 Qd R 97, *Jetcrete Oz Pty Ltd v Conway* [2015] QCA 272 and the discussion in *McQueen v Mount Isa Mines Ltd* [2017] QCA 259 at [44]-[55].

[33] In this case, both the cause of action arising from the Third Representation, as it is pleaded in the amended statement of claim filed on 1 December 2017, and the cause of action for breach of the allegedly varied Development Agreement, are new causes of action. Those were not causes of action sought to be raised by Bluefin prior to the amendment. That is plainly the case in relation to the cause of action for breach of the allegedly varied Development Agreement, because no such variation had previously been pleaded. It is also the case in relation to the Third Representation because,

³ Emphasis added; references omitted.

although there had been earlier references to a representation being made on 25 February and/or 1 March 2010 in the pleadings:

- (a) prior to the (third) amended statement of claim filed on 11 September 2017, this was simply part of a broader narrative – there was no pleading of anything being done in reliance on what was said; and no cause of action pleaded arising from what was said (cf paragraphs [3] and [4] above);
- (b) in the (third) amended statement of claim filed on 11 September 2017, a statement made on 1 March 2010 (that Council will proceed with stage 1 of the development as previously discussed) is pleaded and defined as the Third Representation, but there is still no pleading of anything done in reliance on it, and it is seemingly incorporated into the First Representation and the Second Representation – collectively the “misleading and deceptive conduct” – for the purposes of the damages claimed (see [73] of this document);
- (c) the first time it was alleged Bluefin relied upon the Third Representation in deciding not to bring proceedings in relation to the “initial breaches” was in the (fourth) amended statement of claim filed on 1 December 2017. This is a new case. It is not a particularisation of the cause of action (arguably) previously pleaded; it is a new cause of action.

[34] The mere presence in the earlier versions of the statement of claim of a reference to a person on behalf of the Council saying, on 25 February or 1 March 2010, that Council will proceed with stage 1 of the development as previously discussed, does not enable the conclusion to be reached that the cause of action arising from the Third Representation, as eventually pleaded on 1 December 2017, is not a new cause of action. In this regard, the following observations of Pincus JA in *Draney v Barry* [2002] 1 Qd R 145 at [32] are apposite:

“... one cannot evade the plain intention of ... r 376(4), by inserting in a pleading a vague allegation raising no identifiable cause of action. Such an allegation would be liable to be struck out as not setting out the material facts... But the fact that [a paragraph containing such an allegation] was not struck out does not oblige the Court to ignore its vacuous character, when considering whether an amendment will if allowed add or substitute a ‘new cause of action’... The spirit of the UCP Rules would not be respected if the question whether what are in substance new causes of action should be allowed to be added out of time is made to depend upon the presence or absence in the existing pleading of an allegation of misconduct which is so vague as to be devoid of any ascertainable meaning.”

Has the limitation period expired?

[35] As already discussed, the limitation period in respect of these two new causes of action would have commenced to run from 30 October 2010, and therefore expired on 30 October 2016. They were not pleaded until 1 December 2017, after the limitation period had expired.

Can they be relied upon now?

[36] Bluefin has not made an application for leave to make the amendments which appear in the pleading filed on 1 December 2017. Nevertheless, it is appropriate to consider whether leave ought to be given under r 376(4), in determining this application.

[37] Relevantly, r 376(4) provides that the court may give leave to make an amendment to include a new cause of action in respect of which the relevant period of limitation has ended 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.

[38] In determining whether a new cause of action arises out of the same or substantially the same facts, the relevant principles to be applied are as follows.

[39] In *Draney v Barry* [2002] 1 Qd R 145 at [57] Thomas JA said:

“[Rule 376(4)] allows a fairly wide discretion in that the court will not allow such an amendment unless it considers it ‘appropriate’ to do so and also considers that the new cause of action arises at least substantially out of the same facts as the existing cause of action. I do not think that ‘substantially the same facts’ should be read as tantamount to the same facts, and consider that the need to prove some additional facts is not necessarily fatal to a favourable exercise of discretion under r 376(4). 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.”

[40] In *Thomas v Queensland* [2001] QCA 336 at [19] the Court of Appeal clarified, by reference to this passage from *Draney v Barry*, that:

“Of course ‘the story’ is a shorthand reference to the matters that the plaintiff has to prove.”⁴

- [41] In *Paul v Westpac Banking Corporation* [2017] 2 Qd R 96 at [15] Fraser JA (with whom Gotterson JA and Douglas J agreed) said:

“In an appropriate case leave to amend to add a new cause of action which is statute barred may be granted even though it involves reliance upon facts in addition to those out of which a pleaded cause of action arises, provided that those additional facts are substantially the same as facts already pleaded. The question in each case is whether the facts out of which a new cause of action arises are substantially the same as facts relied upon in a cause of action for which relief has already been claimed in the proceeding. As has been mentioned in other cases, this may involve questions of degree and fine judgment, but the answer to that question should be informed by an appreciation that the policies underlying the applicable statute of limitation may be inappropriately undermined if the required analysis is conducted at too high a level of generality...”⁵

- [42] In so far as the claim based on the Third Representation is concerned, the new facts, out of which this new cause of action arises, are that Bluefin did not proceed against the Council with its claim for damages for the First Breach and the Second Breach, and the First Representation and the Second Representation, because it relied upon the Third Representation, made in February and March 2010 that the “Council will proceed with Stage 1 of the development”, which it was apparent by 31 August 2010 would not occur.
- [43] That new cause of action does not “arise out of” substantially the same facts as the causes of action previously pleaded. It arises out of new facts that are not substantially the same as the facts relied upon as giving rise to the previous causes of action; although those facts would have to also be proved, in order to establish the loss which is claimed.
- [44] The mere reference, in the pleading, at an early stage, to a representation of the kind now said to comprise the Third Representation, is not sufficient to avoid this conclusion. At no stage prior to the 11 September 2017 amendment (which in any event was outside the limitation period) was the Third Representation clearly pleaded as such. At that stage, no reliance on the Third Representation was pleaded. Prior to the 11 September 2017 amendment, the reference to a statement by a representative of the Council, on 25 February or 1 March 2010, to the effect of the later defined Third Representation, was simply part of the narrative – it was not a fact that Bluefin had to prove, in order to establish its previous claims for damages for the First Breach, Second Breach, First Representation or Second Representation.

⁴ See also *Althaus v Australia Meat Holdings Pty Ltd* [2007] 1 Qd R 493 at [33]-[36] per Keane JA.

⁵ References omitted.

- [45] In so far as the claim based on breach of the varied Development Agreement is concerned, the new facts are that on or around 1 March 2010 the Council and Bluefin agreed to vary the Development Agreement to allow the Council to carry out the construction of the utilities within a reasonable time; a reasonable time was no later than 31 August 2010; that did not occur; that was a breach of the Development Agreement as varied; Bluefin suffered loss and damage as a consequence of that breach.
- [46] It is even clearer, in the case of this new cause of action, that it does not arise out of substantially the same facts as the causes of action previously pleaded. It arises out of entirely new facts pleaded, which are not substantially the same as those previously pleaded. In addition, although no distinction is presently drawn in the 1 December 2017 version of the pleading, the measure of damages will be different, from that said to flow from the First Breach, the Second Breach, the First Representation and the Second Representation. In so far as the alleged breach of the varied Development Agreement is concerned, the measure of damages is that which would put Bluefin into the position it would have been had the varied Development Agreement been performed. That would necessarily be quite different to the damages which may have flowed, had Bluefin been able to successfully maintain and prove its claims for damages as a result of the First Breach, the Second Breach, the First Representation and the Second Representation. This is a case where, as Keane JA said in *Zonebar Pty Ltd v Global Management Corporation Pty Ltd* [2009] QCA 121 at [23]: “[t]he substance of the new cause of action is different in terms of the acts or omissions which give rise to it, and the adverse consequences for which damages are claimed”.⁶
- [47] The new causes of action sought to be added by the amendment made on 1 December 2017 do not arise out of the same or substantially the same facts as the causes of action previously pleaded. I would not, therefore, grant leave to make the amendments.
- [48] It follows that it is appropriate to strike out the whole of the amended statement of claim filed on 1 December 2017. Since this is on the basis that the causes of action pleaded in it are all statute barred, it is appropriate, further, to give judgment for the Council, under r 293 of the UCPR.
- [49] I will hear the parties as to costs.

⁶ See also *Borsato v Campbell* [2006] QSC 191 at [15]-[16] per McMurdo J.