SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Management Ltd (in liq) v EY & Ors (No 2)* [2018] QSC 226
PARTIES:	**LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288** (plaintiff) **v** **EY (ALSO KNOWN AS ERNST & YOUNG) (A FIRM)** (first defendant) **PAULA McLUSKIE** (second defendant) **MICHAEL JAMES REID** (third defendant)
FILE NO:	SC 2166 of 2015
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	8 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2018
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The plaintiff has leave to amend the claim in accordance with the application filed on 10 August 2018.** **2. Paragraph 121 of the fifth further amended statement of claim is struck out with leave to replead paragraphs 118 to 121A as the plaintiff may be advised.** **3. On or before 9 November 2018, the plaintiff file a**

sixth further amended statement of claim.

4. **On or before 14 December 2018, the defendants file and serve a defence to the sixth further amended statement of claim.**

5. **On or before 21 January 2019, the plaintiff file and serve any reply.**

6. **The costs of the application are the defendants' costs in the proceeding.**

7. **The proceeding be reviewed on 4 February 2019.**

8. **The following references in the order of Justice Jackson dated 8 May 2017 ("Order") to paragraphs in the second further amended statement of claim be corrected as follows:**

   (a) **the reference in paragraph (1)(b) of the Order to paragraph "85(a)(xx)" of the second further amended statement of claim be corrected to read "85(a)(xxi)"; and**

   (b) **the reference in paragraph (1)(b) of the Order to paragraph "95(m)" of the second further amended statement of claim be corrected to read "98(m)".**

CATCHWORDS: LIMITATION OF ACTIONS – GENERAL MATTERS – AMENDMENT OF ORIGINATING PROCESSES AND PLEADINGS OUTSIDE LIMITATION PERIOD – AMENDMENTS INTRODUCING NEW CAUSE OF ACTION OR PARTICULARISING CAUSE OF ACTION – where a claim for damages against the auditors of a managed investment scheme alleges breach of contract, or negligence, or contraventions of the *Trade Practices Act* 1974 (Cth), *Competition and Consumer Act* 2010 (Cth), *Corporations Act* 2001 (Cth) and *Australian Securities and Investments Commission Act* 2001 (Cth) – where a fifth further amended statement of claim filed – where application for leave to amend claim – where defendants oppose amendment on ground that amendments add time barred cause of action and pleading does not plead sufficient facts in support of inference of necessary awareness or knowledge – whether pleading sufficient for inference of awareness or knowledge – whether leave to amend appropriate

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – MATTERS TO BE PLEADED SPECIFICALLY – where plaintiff alleges contraventions of

Corporations Act 2001 (Cth) s 601HG(4) and s 601HG(4B) – where awareness required to be pleaded under *Uniform Civil Procedure Rules* 1999 (Qld) r 150(1)(k) – where all facts from which inference of state of mind drawn required to be specifically pleaded under *Uniform Civil Procedure Rules* 1999 (Qld) r 150(2) – whether pleading sufficient for inference of awareness or knowledge

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CASE MANAGEMENT – LISTS – COMMERCIAL LIST – where *Uniform Civil Procedure Rules* 1999 (Qld) r 378 provides for amendment before request for trial date – where matters on commercial list are not listed for trial by request for trial date – where amendment made outside scope of an order for amendment – when amendments may be made for matters listed on commercial list

Corporations Act 2001 (Cth), s 601HG, s 1325
Limitation of Actions Act 1974 (Qld), s 10, s 38
Uniform Civil Procedure Rules 1999 (Qld), r150(1)(k), r 150(2), r 375, r 376, r 377, r 379

Ag-Exports (Australia) Pty Ltd & Anor v Export Finance and Insurance Group [2006] NSWSC 467, cited
Agtrack (NT) Pty Ltd v Hatfield (2003) 7 VR 63, cited
Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251, cited
Air Link Pty Ltd v Paterson (No 2) (2003) 58 NSWLR 388, cited
Armstrong v Milburn (1885) 54 LT 247, cited
Banque Commerciale SA v Akhil Holdings Ltd (1990) 169 CLR 279, cited
Cavenham Pty Ltd v Robert Bax & Associates [2010] QSC 307, cited
Continental Conveyor & Equipment Pty Ltd v Williams [2000] NSWSC 481, cited
Enviroinvest Ltd (recs and mgrs apptd) & Anor v Pescott & Ors [2011] VSC 325, cited
Equititrust Ltd (in liq) v Equititrust Ltd (in liq) & Ors (2018) 124 ACSR 115, cited
Fuller v Toms [2012] FCAFC 155, cited
Hawkins v Clayton (1988) 164 CLR 539, cited
Idoport Pty Ltd & Anor v National Australia Bank Ltd & Ors [2000] NSWSC 599, cited
Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques [2017] QSC 251, cited
Lyons v Kern Konstructions (Townsville) Pty Ltd (1983) ATPR 40-343, cited
Mercedes Holdings Pty Ltd v Waters (No 5) [2011] FCA

1428, cited
Murdoch v Lake [2013] QSC 268, cited
Osgood v Sunderland (1914) 111 LT 529, cited
Paul v Westpac Banking Corporation [2017] 2 Qd R 96, cited
PSL Industries Ltd v Simplot Australia Pty Ltd (2003) 7 VR 106, cited
QNI Resources Pty Ltd v Sino Iron Pty Ltd [2017] 1 Qd R 167, cited
Ramsay v McElroy [2004] 1 Qd R 667, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, cited

COUNSEL: D Ananian-Cooper for the plaintiff
B Roberts SC for the defendants

SOLICITORS: Gadens Lawyers for the plaintiff
King and Wood Mallesons for the defendants

Jackson J:

[1] The applicant plaintiff seeks an order for leave to amend the claim pursuant to r 375(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR").

[2] The existing subject matter of the proceeding is a claim for damages against auditors for breach of contract, or negligence, or contraventions of the *Trade Practices Act* 1974 (Cth) ("TPA"), *Competition and Consumer Act* 2010 (Cth) ("CCA"), *Fair Trading Act* 1989 (Qld) ("FTA"), *Corporations Act* 2001 (Cth) ("CA") and *Australian Securities and Investments Commission Act* 2001 (Cth) ("ASIC Act").

[3] The plaintiff seeks to add a claim for damages under s 1325(2) of the CA. That sub-section provides that the Court may make compensation orders in some circumstances where a person engages in conduct in contravention of a provision of Ch 5C of the CA.

[4] The defendants oppose the application. They submit that the claim to be added is for a new cause of action that is now time barred by s 1325(4) of the CA, although time had not run at the date when the proceeding was started. Accordingly, under rule 376 of the UCPR leave may only be granted if the new cause of action arises out of substantially the same facts as a cause of action for which relief has already been claimed and leave is appropriate.

[5] The defendants accept that the new cause of action arises out of substantially the same facts. Their opposition is on the basis that it is not appropriate to grant leave. The ground of that opposition is that the pleading of one of the elements of the new cause of action is insufficient.

[6] Broadly speaking the claims in the proceeding are made by the plaintiff as responsible entity of a registered managed investment scheme known as the "LM First Mortgage Income Fund" ("the Fund") against both the auditors of the financial statements and financial reports and the auditors for the compliance plan for the Fund. I set out the background facts to the proceeding in paragraphs 5 to 13 of my judgment in *LM Investment Management Pty Ltd (in liq) v Ernst & Young* [2017] QSC 73 ("my earlier judgment").

[7] On 8 May 2017, I made orders directing the plaintiff to amend the second further amended statement of claim ("2FASOC") in certain respects. I did not, however, grant general leave to amend and the plaintiff did not apply for general leave.

[8] However, apparently relying on r 378 of the UCPR, the plaintiff saw fit to file an amended statement of claim dealing not only with the matters the subject of my direction on 8 May 2017, but many other matters as well. As a matter of substance, bearing in mind a number of criticisms I made of the pleading in my earlier judgment, it made sense to amend more widely than was directed. However, as a matter of management of a case on the Commercial List, a party seeking to amend outside the scope of an order for amendment already made should apply for a direction that it be permitted to do so before doing so. That has always been the practice.

[9] The UCPR are not drawn with a view to cases that are managed on the Commercial List. The facility of amendment before the request for trial date under r 378 is not apt to a case on the Commercial List. A case on that list is not listed for trial by a request for trial date. The listing is made directly by the Judge managing the case when the Judge is satisfied it is appropriate to do so. The pleading process and all interlocutory directions are in the management of the Judge: see paragraphs 16 and 18 of Practice Direction 3 of 2002.

[10] On 21 November 2017, the plaintiff filed a third further amended statement of claim ("3FASOC").

[11] Shortly afterwards, the plaintiff delivered a form of pleading of its case for damages.

[12] On 29 May 2018, following correspondence between the parties, I made an order for directions for the filing of a fourth further amended statement of claim and steps towards the hearing of this application.

[13] That pleading was filed late, but in any event was followed by a fifth further amended statement of claim ("5FASOC") filed on 7 August 2018, again purportedly done under r 378.

[14] On 23 July 2018, the plaintiff filed particulars of loss and damage, without any direction relating thereto, extending to over 400 pages.

[15] On 24 July 2018, I made further directions, extending the times to comply with the earlier directions and setting a final date for hearing this application.

[16] The current position is that although this proceeding was started in 2015, the claim and statement of claim are not yet finalised and, as yet, no defence has been filed. On no view is this satisfactory.

[17] I summarised the causes of action pleaded in the original statement of claim ("SOC") in my earlier judgment. That pleading addressed two of the audit engagements of the defendants for the 2008 financial year, namely:

(a) the audit of the Fund's annual financial report; and

(b) the audit of the plaintiff's compliance with the compliance plan.

[18] Paragraph 52 alleged that the relationships between the plaintiff on the one hand and the first and third defendants were such that the first and third defendants owed duties to exercise reasonable care and skill and diligence when:

(a) carrying out the audit of the plaintiff's compliance with the compliance plan and reporting thereon in accordance with section 601HG(3) of the Act; and

(b) identifying circumstances that ought to be reported to ASIC, and reporting thereon, in accordance with s 601HG(4) or s 601HG(4B) of the CA.

[19] Paragraph 56 alleged that for the purpose of meeting its statutory obligations to prepare a financial report for the financial year ended 30 June 2008, the plaintiff prepared financial statements for the year.

[20] Paragraph 63 alleged that contrary to the financial statements the value of the mortgage investments of the Fund was materially overstated, the Fund held assets whose value ought to have been impaired and the Fund had impairment losses in respect of mortgage investments that were greater than the amounts reported.

[21] Paragraph 65 alleged that the first and third defendants carried out an audit of the plaintiff's compliance with the compliance plan for the financial year ended 30 June 2008.

[22] Paragraph 66 alleged that on or about 10 March 2009 the first and third defendants issued an audit report for compliance with the compliance plan for the year ended 30 June 2008 (this was subsequently amended by paragraph 102(a) of the further amended statement of claim to allege that this report was issued on 11 May 2009).

[23] Paragraph 69 alleged that in the conduct of the compliance plan audit the first and third defendants should have been aware of the matters alleged in paragraph 63, that those matters were a breach of the lending policy in the compliance plan, that the loan to value ratios of loans were incorrectly calculated, that loans had been varied or extended without an updated valuation, that security properties or loans had not been revalued and that loan extensions had been granted on the basis of capitalised interest arrangements where there had been defaults by borrowers who were poor credit risks.

[24] In paragraph 70, these matters were alleged to be breaches that amounted to contraventions of the CA that the first and third defendants had reasonable grounds

to suspect and in paragraph 71 it was alleged that the first and third defendants contravened subsections of s 601HG of the CA in failing to notify ASIC of the matters alleged in paragraph 69 and in failing to provide the plaintiff or its directors with a report as required under s 601HG(3)(c) of the CA.

[25] The allegations of breach of contract, negligence or misleading or deceptive conduct in relation to the audit of compliance with the compliance plan appeared in paragraphs 75, 76, 79 and 86 of the SOC.

[26] It would add unnecessarily to the length of these reasons to set out the allegations of breach in relation to the compliance plan audit in further detail. They may be summarised, in the same way as I did in my earlier judgment. It was alleged that the first and third defendants wrongly failed to identify and to report to ASIC matters required to be reported under ss 601HG(4) and (4B) of the CA and to provide a non-compliance report. There were also allegations of breach in the performance of the audit work and failure to report to the plaintiff that the plaintiff had failed to comply with the compliance plan.

[27] A number of paragraphs of the SOC alleged that the defendants' breaches of contract, negligence or contraventions of the TPA, CA or ASIC Act caused the plaintiff loss or damage. They were organised separately around the categories of breaches relating to the financial report audit and the compliance plan audit respectively.

[28] Paragraph 95 (in relation to the breaches relating to the compliance plan audit) alleged that the plaintiff would have put in place a system to ensure that the Fund maintained sufficient liquidity in the event of a downturn in the property and credit markets, including by retaining investor Funds as cash to meet its liquidity requirements, and would have remedied the systemic failings to ensure that non-compliance with the compliance plan did not occur again.

[29] Paragraph 96 alleged that if the steps described in paragraph 95 had begun no later than 28 days after the end of three months after the end of the financial year ending on 30 June 2008, the plaintiff would not have made further advances on loans which were not compliant with the compliance plan and which were not recoverable; would not have made any further payments which did not comply with the compliance plan; would have recovered loans which did not comply with the compliance plan; the Fund would not have been exposed to a lack of liquidity; the residual value of the assets held by the plaintiff upon the winding up of the Fund would have been greater than is in fact the case; and the plaintiff would have ceased paying itself management fees and repaid the excessive management fees it had previously paid itself.

[30] Paragraph 104(e) (in relation to the breaches or contraventions relating to the financial report audit and compliance plan audit) alleged that the Fund would have been made illiquid earlier than it in fact was and would have been wound up which would have reduced the ongoing costs and increased the realisable value of the Fund assets.

Amendments in the 2FASOC

[31] I also summarised the causes of action pleaded in the 2FASOC in my earlier judgment. It will be recalled that the SOC was confined to causes of action based on the audit of the financial report for the year ended 30 June 2008 (now defined in the 2FASOC as the "2008 Financial Statements Audit") and the audit of compliance with the compliance plan for the same year (now defined as the "2008 Compliance Plan Audit"). The first major change introduced by the amendments that appeared in the 2FASOC is that new causes of action were introduced for audits for later years.

[32] New causes of action were introduced for later audits of the compliance plans as follows:

(a) 2009 Compliance Plan Audit;

(b) 2010 Compliance Plan Audit;

(c) 2011 Compliance Plan Audit; and

(d) 2012 Compliance Plan Audit.

[33] Other major changes introduced by the amendments were that the obligations of the defendants as auditors were pleaded out extensively and the subject matter of the alleged breaches by the defendants of the respective obligations was expanded.

When the causes of action arose

[34] The starting point for analysis is when the challenged cause of action for damages under s 1325(2) of the CA arose or accrued.

[35] In my earlier judgment I held that each of the alleged causes of action for damages for negligence[1] or contravention of s 82 of the TPA[2] arose or accrued on the date when damage was suffered first and the same reasoning applied to each of the causes of action for damages.

[36] For a particular cause of action, loss must have been suffered first when the hypothetical scenario of what would have happened but for the breach alleged would have resulted in a receipt that did not occur or would have avoided an expense that was made or would have avoided a trading loss over a relevant period.

[37] Those dates are still not alleged. But as a practical matter, since the plaintiff alleges that the breaches in respect of the 2008 financial year delayed the winding up of the Fund that otherwise would have occurred promptly and would have avoided losses of the kinds alleged, *ex hypothesi*, loss or damage must have been suffered soon after the alleged breaches. And it now appears in paragraphs 74, 75 and 76 of the 5FASOC that loss or damage was first suffered from 1 July 2009.

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1 *Hawkins v Clayton* (1988) 164 CLR 539, 587-588.

2 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.

The limitation periods, their extension and amendments

[38] Under s 1325(4) of the CA, the limitation period for a cause of action for damages under s 1325(2) for contravention of ss 601HG(3), 601HG(4) or 601HG(4B) of the CA is six years from the date when the cause of action arose or accrued.

[39] The plaintiff alleges that the times when the causes of actions for breach of contract or negligence arose are extended under s 38 of the *Limitation of Actions Act* 1974 (Qld) ("LAA"). The equitable doctrine of fraudulent concealment operated to preclude reliance on a limitation provision for equitable claims. However, it did not operate on causes of action at common law, including damages for breach of contract and negligence.[3] Section 38 of the LAA operates to defer the beginning of the period of limitation in relation to those causes of action where a plaintiff's right of action has been concealed by fraud.[4]

[40] The power of this court to permit amendment of a claim to add a cause of action that is time barred is now contained in s 16 of the *Civil Proceedings Act* 2011 (Qld):

> "(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."

[41] Rules 375 and 376 of the 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.

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[3] *Osgood v Sunderland* (1914) 111 LT 529; *Armstrong v Milburn* (1885) 54 LT 247.

[4] Section 38 does not apply to the time limit under s 99(3) of the *Fair Trading Act* 1989 (Qld) because it was not one "prescribed by" the LAA.

(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.

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.

…

(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."

[42] Neither side questions the power of the court under these provisions to allow an amendment to add a cause of action based on a law of the Commonwealth that expressly provides that loss or damage suffered by a contravention may be recovered by action against the contravener, subject to a provision that the action may be commenced or begun (only) within a limited period.

[43] If the limit on the period to commence or begin the action under a law of the Commonwealth went to the right rather than the remedy, State procedural laws to extend the time would not apply. However, for a claim for damages under ss 52 and 82 of the TPA, there is intermediate appellate court authority[5] and a decision of this court under the current rules[6] that amendment under r 376 of the UCPR is permitted to add a cause of action after the period to commence an action under s 82(2) of the TPA has expired.

[44] As I did in my earlier judgment, I will proceed on the assumption that the same conclusion would be reached for the causes of action for damages under s 1325(2) of the CA. The contrary was not argued.

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[5] *Air Link Pty Ltd v Paterson (No 2)* (2003) 58 NSWLR 388; *Ramsay v McElroy* [2004] 1 Qd R 667; and *PSL Industries Ltd v Simplot Australia Pty Ltd* (2003) 7 VR 106.

[6] *Murdoch v Lake* [2013] QSC 268.

Causes of action that were time barred when the proceeding was started

[45] The defendants previously submitted that causes of action in the 2FASOC based on allegations of contraventions of ss 601HG(4) and (4B) of the CA during the 2008 Compliance Plan Audit should be struck out from the 2FASOC because they were time barred when the proceeding was started. This point applied to both originally pleaded and added causes of action.

[46] The plaintiff previously responded that it did not directly claim damages for any alleged contraventions of ss 601HG(4) and (4B) of the CA. It relied on those contraventions as going to the allegations of breach of contract, negligence or misleading or deceptive conduct. The plaintiff alleged that the 2008 Compliance Plan Audit was carried out,[7] and that the report on the audit was issued to the plaintiff on 11 May 2009.[8]

[47] In the 2FASOC the allegations of breach by the first and third defendants during the course of the 2008 Compliance Plan Audit were as follows:

(a) paragraph 105 of the 2FASOC alleged that there were circumstances amounting to contraventions by the plaintiff of the compliance plans, the constitutions and/or the CA;

(b) paragraph 106 of the 2FASOC alleged that in conducting the 2008 Compliance Plan Audit and preparing and completing the 2008 Compliance Plan Audit Report the first and third defendants knew or had reasonable grounds to suspect that those circumstances amounted to contraventions of the compliance plans, the constitutions and/or the CA;

(c) paragraph 107 of the 2FASOC alleged that the first defendant and the third defendant contravened s 601HG of the CA by failing respectively:

(i) to provide a report which included statements to the effect that in its opinion (1) the plaintiff had not complied with the compliance plans in respect of the matters pleaded which amounted to contraventions of the CA and/or the constitutions; and (2) the compliance plans did not meet the requirements of Part 5C.4 of the CA; and

(ii) to report to ASIC the circumstances of which they became aware in the course of carrying out the 2008 Compliance Plan Audit, which they had reasonable grounds to suspect amounted to significant contraventions of the CA, within 28 days of becoming so aware, as required by s 601HG (4B) of the CA;

(d) paragraphs 111 and 112 of the 2FASOC alleged that the first and third defendants acted negligently, as pleaded, in carrying out the 2008 Compliance Plan Audit, in preparing and completing the 2008 Compliance Plan Audit Report and in expressing the 2008 Compliance Plan Audit Opinion.

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7 2FASOC, paragraph 101.

8 2FASOC, paragraph 102(a).

[48] As to when loss was first suffered, paragraph 134 of the 2FASOC alleged that the defendants' breaches caused the plaintiff loss being:

(a) the amount of the advances which the plaintiff made on impaired loans which amounts are not now recoverable;

(b) the amount of payments made by the plaintiff which did not comply with the CA and/or the constitutions and/or the Fund's product disclosure statements and/or the compliance plans including, but not limited to, the distributions and/or redemptions paid to Class B unit holders as particularised;

(c) the amount of the loans which are not now recoverable because the plaintiff failed to take action to recover those loans in a timely manner;

(d) the diminution in the value of the Fund which arose because the Fund was not liquidated in a timely manner;

(e) the amount of management fees, including further loan management fees, which were paid to the plaintiff and/or LM Administration Pty Ltd when such fees ought not to have been paid;

(f) insofar as the plaintiff is prevented from agitating any claim advanced in this statement of claim through effluxion of time, the value of the loss of the opportunity to advance that claim by proceedings commenced inside the limitation period applicable to it, as pleaded in the 2FASOC.

[49] After the 3FASOC was filed the defendant contended that the added causes of action for damages under s 1325(2) for contravention of s 601HG(3), (4) or (4B) of the CA were not time barred when the proceeding was started but would be time barred if a fresh proceeding were started now. As appears from the foregoing, if that contention is correct, no leave was granted to the plaintiff under r 376 to add that cause of action by the orders I have made to date. The 5FASOC is subject to the same complaint.

Fraudulent concealment

[50] The plaintiff alleged in the 2FASOC that all the causes of action for breach of contract or negligence were concealed by the fraud of the defendants and that the plaintiff did not discover the fraud until "around June 2015", so that the period of limitation did not run from when the breach of contract occurred or loss or damage was first suffered until the date when the fraud was discovered.[9]

[51] It will be remembered that the plaintiff was placed into administration on 19 March 2013 and that it went into liquidation, the Fund was ordered to be wound up and the receiver was appointed by 21 August 2013.

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[9] There is no question at this stage that the plaintiff could with reasonable diligence have discovered the fraud at an earlier date.

[52] The plea was broken into separate sections for the audits and reports for the financial statements and reviews, on the one hand, and the compliance plan audits and reports on the other.

[53] As to the compliance plan audits and reports, paragraph 158 alleged that the first and third defendants, being aware of the matters set out in paragraph 105 in relation to each of the compliance plan audit engagements, did not, in the course of the compliance plan audit engagement in question, adequately communicate the matters set out in paragraph 105 to the plaintiff and did not provide a qualified opinion that the plaintiff as the responsible entity of the Fund had not complied with the compliance plan during the financial year in question and/or that the compliance plan did not continue to meet the requirements of Part 5C.4 of the Act, despite knowing that the opinion should have been a qualified opinion or being wilfully blind or recklessly indifferent to that fact. Paragraph 160 alleged that the plaintiff's rights of action with respect to those audits and reports for breach of contract and for negligence were concealed by fraud of the first and third defendants within the meaning of s 38 of the LAA.

[54] These were unconventional pleas in a statement of claim. Because a defendant is required to raise a limitation plea in the defence, reliance on s 38 of the LAA is conventionally raised in the plaintiff's reply. The plaintiff had sought to do it pre-emptively in the 2FASOC. The defendants challenged this pleading, but not on the ground of prematurity.

[55] In my earlier judgment one of the defendants' attacks was that the allegations that the plaintiff's rights of action were concealed by fraud were insufficient because of the absence of pleaded facts from which the inference of fraud is to be drawn.

[56] As to the compliance plan audits and reports, the defendants submitted for my earlier judgment that the allegations in paragraphs 158 and 160 of the 2FASOC that the first and third defendants were aware of the matters set out in paragraph 105 but did not communicate the matters set out in that paragraph or provide a qualified audit opinion despite knowing that the opinion should have been qualified and thereby concealed the plaintiff's rights of action by fraud were insufficient, because paragraph 106 alleged that those defendants knew or had reasonable grounds to suspect the matters alleged in paragraph 105, and reasonable grounds to suspect are not enough.

[57] I held that the defendants had failed to take account of the careful collection of facts from which the plaintiff alleges that the defendants' fraudulent concealment may be found. A plaintiff who alleges fraudulent concealment may not be able to point to direct evidence or some other smoking gun to base an inference of fact of fraudulent concealment. But it may still be able to construct a sufficient set of circumstances from which the inference should or could be drawn. I held that is what the plaintiff had sought to do by the cross-referenced allegations in paragraphs 156 and 160 of the 2FASOC.

[58] In my earlier judgment I held that, at the pleading stage, on consideration under r 171 of the UCPR, it could not be concluded that the inferences of fraudulent

concealment that the plaintiff alleged will not be drawn. It may be that the complex of the cross-referenced facts, when viewed in the light of the proofs offered at trial, will not justify the inferences of fraudulent concealment alleged. But that was not the question. The plaintiff alleged facts from which it is possible that the inferences may be drawn. That was enough to justify the plea.

[59] It followed that paragraphs 137 to 156 and 157 to 160 of the 2FASOC were not ordered to be struck out. Those paragraphs are substantially reproduced in the 5FASOC, although under different paragraph numbers.

Added causes of action

[60] The possible added cause or causes of action for damages or compensation under s 1325(2) for contravention of s 601HG(3), (4) or (4B) are alleged in paragraphs 40, 41A, 41, 44, 113, 115, 116, 118-121, 121A, 122, 123, 134 and 135 of the 5FASOC.

[61] A recent decision considering the operation of the requirement under r 376 of the UCPR that an added cause of action arises out of substantially the same facts as the pre-existing cause or causes of action is *Paul v Westpac Banking Corporation*.[10] Fraser JA 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. If those underlying policies are not threatened by a proposed amendment, the test in UCPR r 376(4)(b) may be found to be satisfied even though the new claim involves some variation in the facts. This approach is consistent with the careful way in which the rule has generally been applied since it was enacted."[11] (footnotes omitted)

[62] In my view, any new cause of action under consideration does arise substantially out of the same facts as the pre-existing causes of action. The subject of the alleged failure or failures to notify ASIC or to warn the plaintiff of the same matters are the same subjects that inform the pre-existing causes of action.

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[10] [2017] 2 Qd R 96.

[11] [2017] 2 Qd R 96, 103 [15].

[63] As indicated at the outset, the defendants do not contest that point. The point of departure between the parties is that the defendants submit that the inclusion of a claim for relief under s 1325(2) adds a new cause of action or causes of action. The plaintiff submits that it does not.

[64] Second, the plaintiff submits that, in any event, the claim for relief was added by the 3FASOC, so that it does not really need to amend the claim, even though it presses for an order that it should be given leave to do so.

[65] If a new cause of action is to be added, the second point is unattractive. That is because the plaintiff added the claim for relief under s 1325(2) by an amendment to the statement of claim for which it was not given leave, either under r 376 or under the practice that generally applies to amendments of pleadings on the Commercial List. An amendment is not authorised under r 378 where leave is required under the UCPR, and if r 376 applied, the plaintiff was not entitled to add a cause of action under r 378 or under my order of 8 May 2017 so as to steal a march and avoid the operation of r 376. The fact that the plaintiff purported to add a claim under s 1325(2) of the CA by the 3FASOC adds nothing to its position on the hearing of this application.

[66] The plaintiff submits that the addition of a claim for relief under s 1325(2) of the CA does not add a cause of action for the purposes of r 376, in effect because the cause of action is ascertained from the material facts alleged not from the claim for relief, and the material facts were in the 2FASOC.

[67] There are specific rules in the UCPR that require that if a claim under an Act is relied upon, the pleading or originating application must identify the specific provision under the Act: rr 149(e) and 26(6). It might seem curious that the same requirement is not directly and expressly applied to a claim (r 22(2)), but of course the claim must attach the statement of claim that is the pleading as defined in r 149.[12]

[68] In any event, the plaintiff submits that the requirement to identify s 1325(2) under r 149(e) does not make that allegation a part of the cause of action for the purposes of r 376, relying upon *Agtrack (NT) Pty Ltd v Hatfield*.[13] I note also the discussion of the cognate pleading rule to r 149(e) in *Agtrack (NT) Pty Ltd v Hatfield* in the Victorian Court of Appeal.[14] The decision of the High Court on appeal from that decision was not directed to what is required to plead a cause of action under a rule like r 376. I considered the meaning of the expression "cause of action" in r 376 in *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques*.[15] There is no occasion to repeat that discussion here.

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[12] *Uniform Civil Procedure Rules* 1999 (Qld) Sch 3, definition of "pleading".

[13] (2005) 223 CLR 251, 264-265 [38]-[40].

[14] (2003) 7 VR 63, 75 [17]-[18].

[15] [2017] QSC 251, [11]-[25].

[69] In my view, it is unnecessary to decide the question whether there is an added cause of action by the proposed amendment to the claim to identify s 1325(2) of the CA. That is because in the end the defendants' opposition is based on the adequacy of the facts pleaded of the awareness of the first and third defendants as alleged in paragraphs 118, 119 and 121 of the 5FASOC. The point taken is that what is alleged to give rise to the inference of awareness is not enough to support that inference, at the pleading stage, so that the plaintiff should not be permitted to make those allegations of awareness.

[70] As the plaintiff pointed out, the relevant allegations are not only made as allegations of material facts in support of a cause of action for damages or compensation under s 1325(2) for contravention of s 601HG(4) or (4B) of the CA. They are also alleged in support of the cause of action for misleading or deceptive conduct in paragraph 130 of the 5FASOC and the (premature) plea of fraudulent concealment in paragraphs 159-161 of the 5FASOC.

[71] In these circumstances, it is preferable to directly consider whether the pleaded allegations are insufficient as allegations of awareness for the purposes of r 171 of the UCPR, rather than consider whether the answer to the same question means it would be inappropriate to give any necessary leave to add a cause of action under r 376.

Inferences of awareness

[72] Section 601HG(3), (4) and (4B) provide:

> "(3) Within 3 months after the end of a financial year of the scheme, the auditor of the compliance plan must:
>
> (a) examine the scheme's compliance plan; and
>
> (b) carry out:
>
> (i) if the scheme has only had one responsible entity during the financial year—an audit of the responsible entity's compliance with the compliance plan during the financial year; or
>
> (ii) if the scheme has had more than one responsible entity during the financial year—an audit of each responsible entity's compliance with the compliance plan during that part of the financial year when it was the scheme's responsible entity; and
>
> (c) give to the scheme's current responsible entity a report that states whether, in the auditor's opinion:
>
> (i) the responsible entity, or each responsible entity, complied with the scheme's compliance plan during the financial year or that part of the financial year when it was the scheme's responsible entity; and

(ii) the plan continues to meet the requirements of this Part.

Contravention by individual auditor

(4) An individual auditor conducting an audit of a compliance plan contravenes this subsection if:

(a) the auditor is aware of circumstances that:

(i) the auditor has reasonable grounds to suspect amount to a contravention of this Act; or

(ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or

(iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and

(b) if subparagraph (a)(i) applies:

(i) the contravention is a significant one; or

(ii) the contravention is not a significant one and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and

(c) the auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of those circumstances.

…

Contravention by lead auditor

(4B) A person contravenes this subsection if:

(a) the person is the lead auditor for an audit of a compliance plan; and

(b) the person is aware of circumstances that:

(i) the person has reasonable grounds to suspect amount to a contravention of this Act; or

(ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (12)); or

(iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and

(c) if subparagraph (b)(i) applies:

(i) the contravention is a significant one; or

(ii) the contravention is not a significant one and the person believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and

(d) the person does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the person becomes aware of those circumstances."

[73] At this point it is appropriate to confine attention to s 601HG(4) of the CA. Simplifying, it provides in effect that it is a contravention of that subsection if a compliance plan auditor in conducting an audit is aware of circumstances the auditor has reasonable grounds to suspect amount to a contravention of the Act and the contravention is a significant one if the auditor does not notify ASIC in writing of the circumstances within a limited time.

[74] The defendants submit that:

(a) awareness of the relevant circumstances is an element of the cause of action for damages under s 1325(2) for contravention of s 601HG(4);

(b) accordingly, it is a material fact that must be pleaded under r 149(1)(b) and a condition of mind that must be specifically pleaded under r 150(1)(k) of the UCPR;

(c) further, under r 150(2), any fact from which the awareness is claimed to be an inference must be pleaded; but

(d) the facts of the last kind that are pleaded are not enough to support an inference of the alleged awareness of the alleged circumstances that give rise to the contravention.

[75] The relevant circumstances are alleged in paragraphs 118 and 119 of the 5FASOC. Paragraph 118 alleges eight sets of circumstances. Paragraph 119 alleges the further circumstance that the compliance plan for the Fund from time to time did not satisfy s 601HA of the CA in four different ways. Paragraph 120 alleges "further" contraventions by the plaintiff company of the CA and/or constitution of the Fund. Paragraph 121 alleges the facts from which the first and third defendants' awareness of the circumstances are to be inferred. Paragraph 121A alleges that the first and third defendants had reasonable grounds to suspect the circumstances amounted to the contraventions alleged in paragraph 120.

[76] First, paragraph 118 alleges:

"118. At the time of the conduct by the first defendant and/or third defendant of each of the Compliance Plan Audits, the following circumstances amounted to contraventions by the plaintiff of the measures specified by the Compliance Plans:

(a) the plaintiff did not apply generally accepted accounting principles in the preparation of the accounts in accordance with the Constitution, and particularly in the valuation of the real property assets securing the loans and receivable of the Fund, in breach of the Scheme Valuation measures of the Compliance Plans;

Particulars

(i) The deficiencies in the preparation of the accounts is to be inferred from the deficiencies in the Financial Statements as pleaded in paragraph 63 above.

(b) a number of the valuations of the real property securities relied on by the plaintiff from time to time were not compliant with the Valuation Policy measures of the Compliance Plans;

Particulars

(i) Many of the valuations used by the plaintiff to calculate the value of underlying real property securities were not carried out by valuers on the valuation panel or properly qualified valuers;

(ii) Instead of obtaining valuations prepared by independent, qualified and registered valuers from 2008, the plaintiff in many cases relied upon valuations prepared by its own in-house management personnel;

(iii) In many instances the valuations relied upon from 2008 did not assess the current market value of relevant security properties, and/or were not based on reasonable assumptions and appropriate valuation methodologies.

(c) a number of loans were varied or extended without an updated valuation when an updated valuation was required in accordance with the Lending Criteria and the Valuation Policy measures of the Compliance Plans and when there were indicators that the discretion not to obtain an updated

valuation, if it had been exercised, should not have been exercised by the plaintiff.

Particulars

(i) The loans in relation to which the variations or extensions occurred otherwise than in accordance with the requirements of the Compliance Plans included but were not limited to the Northshore Bayview St Pty Ltd loan, the Eden Apartments Pty Ltd loan, the Bezzina Developers Pty Ltd loan, the St Crispin's Property Pty Ltd loan, the OVST Pty Ltd loan, the Bellpac Pty Ltd loan and the Young Land Corporation Pty Ltd (Yeppoon) loan;

(ii) The general fall in the property market in Australia from late 2007 and the occurrence of the global financial crisis was sufficient reason to conclude that:

(A) there was a reason to believe that an updated valuation should be obtained; and

(B) it was not appropriate to determine that the obtaining of an updated valuation would serve no useful purpose;

(iii) The RE did not properly consider whether or not the obtaining of an updated valuation would serve no useful purpose.

(d) in relation to a number of loans that comprised commercial loans or construction loans for which no valuation had been obtained within 24 months or 12 months respectively, the real property securities had not been valued in accordance with the Valuation Policy measures of the Compliance Plans when there were indicators that the discretion not to obtain an updated valuation, if it had been exercised, should not have been exercised by the plaintiff;

Particulars

(i) The plaintiff refers to and repeats particulars (c)(ii) and (c)(iii) above.

(e) in relation to a number of loans that were in default, the plaintiff adopted a "hold strategy" for the real property securities securing those loans without obtaining current as is market valuations from a properly qualified and registered valuer in the preparation or the regular updating of the

detailed recoverability analysis required by the Collections and Arrears Management measures of the Compliance Plans;

Particulars

(i) The plaintiff refers to and repeats particulars (c)(ii) and (c)(iii) above.

(ii) Further in relation to some loans, the sale of some of the properties securing that loan for materially less than the estimates of value contained in the existing valuations held by the plaintiff was a further reason to conclude that an updated valuation should be obtained.

(f) the plaintiff's internal audit function and/or procedures were significantly reduced from around 2009 onwards despite the financial position of the Fund and the pressures of the global financial crisis increasing the risks of potential non-compliance with the Act, the Compliance Plan and the Constitution, in breach of the Audit measures of the Compliance Plans;

(g) the plaintiff did not adequately consider the propriety of the fees (including their amount) paid to itself and/or LM Administration in breach of the Fees and Expenses, the Conflict of Interest, the Related Party Issues, and the External Service Providers measures of the Compliance Plans; and

(h) the plaintiff did not adequately consider the propriety of paying redemptions to Class B unitholders after 11 May 2009, or of paying income distributions to Class B unitholders after 1 January 2011, in breach of the Conflict of Interest measures."

[77] Next, the relevant awareness is alleged in paragraph 121 of the 5FASOC as follows:

"121. The first defendant (by the third defendant or other persons the plaintiff cannot at present particularise) and/or third defendant, in conducting the Compliance Plan Audits and preparing and completing the Compliance Plan Audit Reports, became aware of the circumstances set out in paragraphs 118 and 119 hereof by reason of and to be inferred from the following matters:

(a) As to the circumstances set out in paragraph 118 as a whole, the third defendant gave evidence in the examinations conducted under section 597 of the Act (the Public Examinations) agreeing that, as the auditor conducting the

Compliance Plans, he had been required to "give a report about whether or not the responsible entity's complied with the compliance plan".

(b) As to the circumstances set out in paragraphs 118(a), 118(b), 118(c), 118(d) and 118(e) above, and the particulars thereto:

(i) the third defendant acknowledged in the Public Examinations that he was aware of the pressures of the global financial crisis, including credit tightening, and that he "could be" aware that that usually leads to uncertainty for the property market;

(ii) it is to be inferred from the third defendant's qualification as a registered company auditor and his decision to take on the responsibilities of a compliance plan auditor that he the third defendant was aware of the content of AASB Guidance Statement G014 issued on 12 August 2009, which relevantly stated that:

(A) (at [14]) "Similarly, the compliance plan auditor who conducts the audit of a scheme's compliance plan under section 601HG, is required under ASAE 3100 Compliance Audits to obtain an understanding of the scheme's compliance plan (the subject matter) and other engagement circumstances sufficient to identify and assess the risks of non-compliance, either of the responsible entity with the compliance plan or of the compliance plan with the Act, and be mindful of the compliance related expectations set out in RG 144, RG 45 and the other relevant ASIC regulatory guides, including those regulatory guides applicable to managed investment schemes generally."

(B) (at [17]) "In addition to the issues normally considered when undertaking financial report audits and compliance plan audits, auditors of mortgage schemes will need to consider several matters that are particularly important to the operation of such schemes. These matters include whether: ... (b) appropriate documentation is available in respect of all loans made by the scheme, including detailed loan agreements, securities held, guarantees, terms of repayments and external independent valuations; ..."

(iii) it is to be inferred from the third defendant's qualification as registered company auditor and his decision to take on the responsibilities of a compliance plan auditor that he the third defendant was aware of the content of ASIC Regulatory Guide 119 (Commentary on compliance plans: Pooled mortgage schemes), issued in April 2004, relevantly including:

(A) ASIC's stated belief that "prudential loan management, i.e. poor valuation procedures, inadequate security, and poor procedures and responses to defaults on mortgage payments" was an area that was systemically weak in the market;

(B) The examples provided of appropriate compliance measures, including that valuations be updated every three years, and every 12 months for development loans where the draw down period continues over 12 months;

(iv) it is to be inferred from the third defendant's qualification as a registered company auditor and his decision to take on the responsibilities of a compliance plan auditor that the defendant was aware of the terms of ASIC Regulatory Guide 45(Mortgage schemes — improving disclosure for retail investors), issued in September 2008, which emphasised the significance of independent and up to date valuations, by stating in relevant part:

(A) (at RG45.1) "Since mid-2007, Australia has experienced debt market turbulence flowing from the US sub-prime crisis, together with successive interest rate increases and a cyclical softening in property markets. Some mortgage schemes have experienced financial stress under these economic conditions..."

(B) (at RG45.166) "We expect compliance plan auditors to be aware of the disclosure and advertising obligations in this guide. In determining whether a plan continues to meet the requirements of the Corporations Act, compliance plan auditors should consider whether the compliance plan is adequate to ensure compliance with these disclosure and advertising guidelines"

(C) (at RG45.64(b)) "The responsible entity should have a clear policy on how often they obtain valuations ..."

(D) (at RG45.67) "Robust and objective valuations are needed to ensure that the scheme's financial position is correctly stated in the PDS and ongoing disclosures."

(E) (at RG45.69) "We expect that, where possible, responsible entities will only use professional valuers who are registered or licensed in the relevant state or territory or overseas jurisdiction and who subscribe to overseas jurisdictions. We also expect that responsible entities will be careful to ensure that their instructions to valuers are comprehensive and contain reasonable assumptions"

(v) The third defendant gave evidence in the Public Examination that he would have reviewed the accounts, specifically the Financial Statements, as part of his conduct of the Compliance Plan Audits.

(vi) The first defendant and/or the third defendant had access to and had reference to the audit papers of the first defendant and/or the second defendant from the Audits and Reviews in conducting the Compliance Plan Audits.

(vii) The first defendant and/or the third defendant had access to the books and records of the Fund for the purpose of conducting the Compliance Plan Audits.

(viii) The third defendant was also at various times the engagement quality review partner of the first defendant in relation to some of the Audits and Reviews, and he gave evidence in the Public Examinations that in that role "he went through with the engagement partner the impairment testing work".

(ix) In the premises of the matters set out above in this subparagraph, it is to be inferred that the third defendant would have reviewed and consulted the Financial Statements, the valuations of the real property securities of the Fund, its record of all variations and extensions of its loans, and the impairment testing work referred to in sub-paragraph (viii) above, which evidenced on their face and/or by omission the matters set out in paragraphs 118(a),

118(b), 118(c), 118(d) and 118(e) above and the particulars thereto.

(c) As to the circumstances set out in paragraph 118(f) above:

(i) the third defendant acknowledged in the Public Examinations that he was aware of the pressures of the global financial crisis, including credit tightening, and that he "could be" aware that that usually leads to uncertainty for the property market, and he would thereby have been aware of the increased risk of potential non-compliance with the Act, the Compliance Plans and the Constitutions;

(ii) the third defendant would have been aware of the pleaded reduction in internal controls by reason of his awareness of the controls previously in place pursuant to his engagements as the compliance plan auditor in earlier financial years;

(d) As to the circumstances set out in paragraphs 118(g) and 118(h) above:

(i) The third defendant gave evidence in the Public Examinations agreeing that he was aware "at some point" that the Fund had pre-paid the RE for the services that it was to perform.

(ii) The third defendant gave evidence in the Public Examinations that he recalled that in 2012 there were redemptions and reinvestments by the B Class unit holders, despite the Fund being closed.

(iii) Further, the nature and quantum of fees paid to LMIM and/or LM Administration, and their pre-payments, as well as the payment of redemptions and the declaration of further income distributions, were referred to in the Financial Statements.

(iv) In the premises of the matters set out above in this subparagraph, and in sub-paragraphs (b)(v) and (b)(vii) above, it is to be inferred that the third defendant would have reviewed and consulted the Financial Statements, the Compliance Committee Minutes, the Related Party Investment Register, the Register of Conflicts and the Breaches Register, which evidenced by omission the matters set out in paragraphs 118(g) and 118(h) above.

(e) As to the circumstances set out in paragraph 119 above:

(i) the third defendant gave evidence in the Public Examinations agreeing that he knew that it was his obligation as the auditor conducting the Compliance Plan Audits to make sure that the making sure that the Compliance Plans had adequate measures in place to ensure compliance with the Act and the Constitution, including the arrangements for ensuring that the scheme property was valued at regular intervals appropriate to the nature of the property.

(ii) the third defendant was aware of the matters set out in subparagraphs (b)(i) and (b)(iv) above.

(iii) the third defendant was aware of the matters set out in paragraph 118, as set out in sub-paragraphs (b) to (d) above.

(iv) in the premises, the inadequacy of the measures and procedures included in the Compliance Plans to ensure compliance by the plaintiff with the Constitutions and the Act were manifest.

(f) Further particulars will be provided upon completion of interlocutory steps and by way of an expert's report."

[78] The defendants submit this is not enough.

[79] Across the range of Australian jurisdictions from time to time, there have been different pleading requirements as to the basis of alleged conditions of mind. The starting point is that at common law there was always a heightened requirement for particularity when fraud was alleged.[16] Similar requirements apply when other analogous conditions of mind are alleged. However, the requirement to give particulars of knowledge as a condition of mind was not treated in the same way, absent a rule requiring it.

[80] One such rule was Order 12 rr 1-3 of the *Federal Court Rules* as at the early 1980s, under which particulars of a condition of mind of knowledge could be ordered, that was considered in *Lyons v Kern Konstructions (Townsville) Pty Ltd*.[17] In that case Fitzgerald J refused to order premature discovery to enable particulars of the alleged knowledge that there was no reasonable basis for alleged representations as a mere fishing expedition.

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[16] *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 285.

[17] (1983) ATPR 40-343.

[81] There are other cases under cognate rules.[18] And some particular points are worth mentioning. For example, where the effect of an allegation of knowledge comes very close to an allegation of fraudulent intention, particulars may often be necessary.[19] Having regard to the serious conduct that failure to comply with the statutory obligations to report the circumstances of which the auditor is aware, a similar approach should be taken to the pleading of awareness under s 601HG(4). Where the facts do not support an alleged inference of fraudulent knowledge, the court may refuse to permit the pleading.[20]

[82] These observations are made by way of background or context against the text of r 150(2) of the UCPR, by which a party alleging a condition of mind such as awareness who seeks an inference of that fact must plead all the facts from which the inference is to be drawn.

[83] It would add unhelpfully to these already over-long reasons to deal with each of the allegations in paragraph 118 as supported by paragraph 121 seriatim. For present purposes, I consider that two or three instances are enough.

[84] In paragraph 118(a) the plaintiff alleges that a relevant circumstance, of which paragraph 121 alleges the first and third defendants were aware, was that the plaintiff did not apply generally accepted accounting principles in the preparation of its accounts, particularly in the valuation of the real property assets, and cross refers to paragraph 63 in the particulars of that allegation. Paragraph 63(a) alleges that the plaintiff did not identify the mortgage investments it had made as impaired. The particulars identify twelve such investments. Paragraph 63(b) alleges that the plaintiff did not use up to date and relevant valuations when calculating impairment. Paragraph 63(c) alleges other accounting errors, including not properly estimating or discounting future cash flows or allowing for holding or realisation costs.

[85] In paragraph 121(a) and (b), the plaintiff alleges facts from which awareness of the paragraph 118(a) circumstance is to be inferred by reference to three kinds of facts. First, that the third defendant was aware of the global financial crisis, including credit tightening, and aware that the latter usually leads to uncertainty for the property market. Second, that qualification as a relevant auditor meant that the third defendant was aware of a number of statements made by ASIC, including some by way of general market warnings. Third, that the third defendant had reviewed the plaintiff's financial statements, had some awareness of impairment testing, and had

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[18] For example, *Continental Conveyor & Equipment Pty Ltd v Williams* [2000] NSWSC 481; *Idoport Pty Ltd & Anor v National Australia Bank Ltd & Ors* [2000] NSWSC 599 ("*Idoport*"); *Ag-Exports (Australia) Pty Ltd & Anor v Export Finance and Insurance Group* [2006] NSWSC 467 ("*Ag-Exports*"); *Enviroinvest Ltd (recs and mgrs apptd) & Anor v Pescott & Ors* [2011] VSC 325; *Fuller v Toms* [2012] FCAFC 155; *QNI Resources Pty Ltd v Sino Iron Pty Ltd* [2017] 1 Qd R 167; and *Equititrust Ltd (in liq) v Equititrust Ltd (in liq) & Ors* (2018) 124 ACSR 115.

[19] *Idoport* at [54].

[20] *Ag-Exports* at [31].

access to the first and second defendants' financial audit working papers and the plaintiff's books and records.

[86] To the extent that the facts alleged in paragraph 121(a) and (b) are pleaded under r 150(2) to be all the facts, as required,[21] from which the inference of an actual awareness of the circumstance alleged in paragraph 118(a) as specified with more particularity in paragraph 63, in my view, they do not go far enough.

[87] The second instance is paragraph 118(c), where the plaintiff alleges that the relevant circumstance, of which paragraph 121 alleges the first and third defendants were aware, is that a number of the loans were varied or extended without an updated valuation when one was required by the compliance plan and there were indicators that the discretion not to obtain an updated valuation should not have been exercised by the plaintiff. The particulars identify seven loans and allege that the general fall in the property market in Australia from late 2007 and the occurrence of the global financial crisis were sufficient reason to conclude that an updated valuation should be obtained.

[88] The facts alleged in paragraph 121(a) and (b) (as previously summarised) are also all the facts from which the inference of awareness of the lack of required updated valuations are to be inferred in relation to paragraph 118(c). In order to make sure I understood the plaintiff's case, I questioned counsel as to whether the awareness alleged proceeded on an assumption that the first and third defendants were required to review every one of the loans to determine whether an updated valuation was required or whether it was alleged that the working papers showed that the identified seven loans had been reviewed and that awareness of the circumstance as it related to them was to be inferred from the review. Counsel's answer made it clear that it was the first alternative.

[89] In my view, this too is an instance where to the extent that the facts alleged in paragraph 121(a) and (b) are pleaded under r 150(2) to be all the facts from which the inference of an actual awareness of the circumstance alleged in paragraph 118(c), in my view, they do not go far enough.

[90] The same reasoning applies to the cause of action for compensation for contravention of s 601HG(4B) of the CA, as against the third defendant.

[91] As to s 601HG(3), the cause of action based on contravention of that sub-section stems from paragraph 41A of the 5FASOC as follows:

> "The obligation imposed by section 601HG(3)(c) of the Act on the auditor of the Compliance Plans, properly construed, is to provide a report expressing an opinion that was reasonable based on the circumstances of which the auditor has become aware in the course of their examination and audit carried out in accordance with sections 601HG(3)(a) and (b) of the Act"

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[21] *Cavenham Pty Ltd v Robert Bax & Associates* [2010] QSC 307, [12].

[92] Section 601HG(3) does not expressly so provide. However, the plaintiff relies on the possibility of that construction of the section.[22] Accordingly, a breach of the alleged obligation requires awareness of the relevant circumstances and the same reasoning applies to the cause of action for compensation under s 1325(2) for contravention of s 601HG(3).

Conclusions

[93] In my view the conclusion that follows is that paragraph 121 of the 5FASOC should be struck out, with leave to replead in respect of paragraphs 118 to 121A of the 5FASOC.

[94] However, in my view, leave to amend the claim should be given. That amendment may prove unnecessary, given that paragraphs 118 to 121A may all need to be reviewed by the plaintiff. However, from both parties' submissions it seems likely that the plaintiff will want to maintain a cause of action for damages or compensation for contravention of s 601HG(3), (4) or (4B), if it can, as it submits that proportionate liability is not a defence to such a claim. Accordingly, it is expedient to give leave to make the amendment to the claim, although at least one of the relevant paragraphs supporting the claim will have to be repleaded.

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[22] *Mercedes Holdings Pty Ltd v Waters (No 5)* [2011] FCA 1428, [41].