SUPREME COURT OF QUEENSLAND

CITATION:	*Hyacinth Developments Pty Ltd v Scenic Rim Regional Council & Ors* [2018] QSC 230
PARTIES:	**HYACINTH DEVELOPMENTS PTY LTD** (ACN 100 627 709) (plaintiff) **v** **SCENIC RIM REGIONAL COUNCIL** (first defendant) **ONESOURCE PTY LTD** (ACN 010 859 408) (second defendant) **MUS PTY LTD** (ACN 116 375 065) (third defendant) **WARREN KEITH MORTON** (fourth defendant)
FILE NO/S:	BS No 10423 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2017
JUDGE:	Douglas J
ORDER:	**1. The plaintiff be granted leave to file a pleading in the form of the proposed second further amended statement of claim.** **2. The application for summary judgment is dismissed.** **3. The application to strike out the proposed second further amended statement of claim is dismissed.** **4. The parties shall be heard as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – OTHER CASES AND MATTERS – where the plaintiff obtained

approvals from the first defendant to develop land – where the plaintiff purchased the land and commenced the development – where the approvals were declared invalid by the Planning and Environment Court – where the invalidity of the approvals caused the plaintiff to cease development and enter into liquidation – where the plaintiff commenced proceedings almost ten years after the land was originally purchased and almost six years after the approvals were declared invalid – where the defendants brought a summary judgment application on the basis that the proceedings were commenced out of time – whether the limitation issue ought to be decided at an interlocutory stage

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – OTHER CASES AND MATTERS – where the defendants brought a strike out application on the basis that the proceedings were commenced out of time – whether the limitation issue ought to be decided at an interlocutory stage

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 it was unclear whether the proceedings were commenced outside the limitation period – where the plaintiff sought to amend the pleadings three years after the proceedings were commenced – where the purported amendments were outside the limitation period – whether the amendments introduced a new cause of action – whether the amendments caused prejudice to the defendants – whether the plaintiff ought to be granted leave to amend

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – PARTICULAR PLEADINGS – ORIGINATING PROCESS – where the plaintiff sought to amend the pleadings three years after the proceedings were commenced – where the defendants argued that there had been delay – whether the plaintiff ought to be granted leave to amend

Civil Proceedings Act 2011 (Qld), s 16
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 376(1), r 376(4)

Bennett v Australian Capital Territory [2016] ACTSC 258, cited

D'Agostino v Anderson [2012] NSWCA 443, cited
Edwards v State of Queensland [2012] QSC 248, cited
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54, cited
JNJ Resources Pty Ltd v Crouch & Lyndon (a firm) [2015] 2 Qd R 115; [2014] QSC 13, cited
Jobbins v Capel Court Corporation Ltd (1989) 25 FCR 226, cited

McQueen v Mount Isa Mines Ltd; CMA Assets Pty Ltd v Mount Isa Mines Ltd [2017] QCA 259, cited
Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd [2015] 1 Qd R 476; [2014] QCA 233, cited
Mokrzecki v Popham [2013] QSC 123, cited
Mount Isa Mines Ltd v CMA Assets Pty Ltd [2016] QSC 260, cited
Murdoch v Lake [2014] QCA 216, followed
Ozipko v Massey-Ferguson Ltd (1965) 53 DLR (2D) 284, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Stevenson Group Investments Pty Ltd v Nunn [2013] QPELR 1; [2012] QCA 351, applied
Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council [2010] QPELR 195; [2009] QPEC 98, cited
The Starsin [2001] 1 Lloyd's Rep 437; [2001] EWCA Civ 56, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55, cited
Western Canadian Place Ltd v Con-Force Products Ltd [1997] 9 WWR 527, cited
Winnote Pty Ltd v Page (2006) 68 NSWLR 531; [2006] NSWCA 287, cited

COUNSEL: D O'Sullivan QC with J Hastie for the plaintiff
N Andreatidis for the first defendant
A Nicholas for the second, third and fourth defendants

SOLICITORS: O'Connor Ruddy & Garrett for the plaintiff
Barry Nilsson Lawyers for the first defendant
Bartley Cohen Law for the second, third and fourth defendants

[1] There are two applications before me. The first is brought by the plaintiff and seeks leave to amend the statement of claim. The second application seeks summary judgment for the defendants or, alternatively, to strike out the plaintiff's second further amended statement of claim ("2FASOC").

[2] It is convenient to address the summary judgment application first and to recognise that the defendants' application, based as it is on an argument that the plaintiff's action is brought out of time, faces the significant hurdle of the decision in *Wardley Australia Ltd v Western Australia*[1] that it is undesirable that limitation questions of this kind should be decided in interlocutory proceedings except in the clearest of cases as, generally speaking, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question.

Background

[3] In this case the cause of action pleaded is principally one in negligence against the first defendant, the Scenic Rim Regional Council, and in negligence and breach of the *Trade Practices Act* 1974 (Cth) against the second, third and fourth defendants who, at relevant times, operated as a town planner giving advice to the plaintiff.

[4] The plaintiff wished to develop land at North Tamborine and, on the pleading, entered into a contract to purchase the land on the strength of representations by the Council that its development proposal was acceptable to it and could be progressed as a minor change without the necessity for advertising it or publicly notifying it. That was in a context, which the plaintiff then says it did not know, where there had been active public opposition to earlier proposals to develop the land on behalf of a community group styled the "Tamborine Mountain Progress Association Incorporated".

[5] The Council approved a number of so-called minor change applications after an initial meeting on 12 April 2005 between it and the plaintiff. The second minor change application was approved on 7 July 2005 and on 26 August 2005 the plaintiff exercised a call option to purchase the land, having previously entered into a contract for its purchase which was rescinded by mutual agreement on 18 May 2005 and replaced by a put and call option deed. The plaintiff settled its purchase of the land on 1 November 2005.

[6] Then, on 12 December 2006, the Council approved a further so-called minor change application, the third such application made by the plaintiff with the assistance of the second, third and fourth defendants.

[7] As things transpired the Tamborine Mountain Progress Association Inc became aware of the proposal to develop the land and objected successfully in the Planning and Environment Court. In those proceedings the Council conceded that the minor change

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[1] (1992) 175 CLR 514, 533; see also *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* [2015] 1 Qd R 476, 494 at [26], 509 at [69].

applications approved by it were beyond its power as they should have been subject to impact assessable procedures which required public notification.[2]

[8] The consequence was that Judge Wilson SC, as his Honour then was, declared that the approvals were beyond power and had no lawful effect and that a further plan of development which the Council purported to approve was not generally in accordance with the plan of development approved as part of the original rezoning of the site. His Honour described the Council's decision as "inexplicable and incomprehensible".[3] Notably, however, his Honour recognised that he had a discretion whether to grant or refuse relief based on arguments for the plaintiff in this matter that it had no reason to believe that the approvals were anything but lawful, that it had always acted in accordance with them, had undertaken substantial works and very large borrowings and was incurring interest at the rate of over $100,000 per month while the proceedings delayed its development. The argument also was that the Tamborine Mountain Progress Association had been guilty of undue delay in bringing its application before that Court.

[9] His Honour clearly proceeded on the basis that he had a discretion whether or not to make the declarations sought but concluded, at [35]:

> "The obvious consequences attract a degree of sympathy for [the plaintiff] but, in the weighing of the various discretionary elements, major errors in the approval process must be the principal factor, and delay in discovering them and pursuing the appropriate remedies does not overcome the compelling need to ensure the unlawful consequences are rectified."

[10] As things transpired a consequence of the making of the declarations was that the plaintiff lost its financial support for the development, went into liquidation, sold the land and did not have access to funds to pursue development approvals of the type that should have been sought earlier. It has now come out of external administration and its original director now has control of the company again.

Summary judgment

[11] It was against that background that the plaintiff commenced these proceedings on 19 October 2015, just before the sixth anniversary of Judge Wilson SC's decision in the Planning and Environment Court made on 20 October 2009. The plaintiff's argument to resist the summary judgment is, essentially, that its loss did not crystallise until the making of that decision, particularly because of the existence of the discretion in his Honour whether or not to grant declaratory relief, but also because of an argument that the approvals provided a lawful basis for the plaintiff to act which continued until the approvals were declared to be beyond power or were set aside by a court of competent jurisdiction.

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[2] *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council* [2010] QPELR 195.

[3] *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council* [2010] QPELR 195, 198 at [18].

[12] In that context, the plaintiff relied upon the decision of the Court of Appeal in *Stevenson Group Investments Pty Ltd v Nunn*.[4] There, McMurdo P, with whom Fraser JA and Mullins J agreed, expressed the view that, even if any of the alleged non-compliances in that case amounted to jurisdictional error, her Honour remained unpersuaded that the intention of the *Integrated Planning Act* was that the permit was necessarily void and of no legal effect in those circumstances where such a declaration was not sought until long after the relevant building was completed and sold. Such an approach seems to me to be also consistent with the decision in *Project Blue Sky Inc v Australian Broadcasting Authority*.[5] Accordingly, the plaintiff argued that it did not suffer actual damage until those declarations were made.

[13] The defendants' argument is that the plaintiff suffered the loss as soon as it became bound to purchase the land as the "package of rights" acquired by the plaintiff when it purchased the land was less valuable than the price which it paid. As a consequence, its cause of action occurred on that date and the loss occurred then. The 2FASOC sets up three categories of loss claimed by the plaintiff at paras 127A to 127J dealing with causation and loss. They were characterised by Mr Andreatidis for the Council as the "different transaction case", the "no transaction case" and the "lost opportunity case". In my view it is arguable that each of those formulations of the possible losses suffered by the plaintiff is affected by the issue whether the development approvals continued to be valid until his Honour Judge Wilson's decision. It was not until then that the package of rights lost its value.

[14] The argument that the plaintiff suffered the loss as soon as it became bound to purchase the land depends on my being satisfied that the development approval was a nullity at that stage. There is a reasonable argument that the development approvals did continue to be valid until his Honour Judge Wilson's declarations with the consequence that the value of the land acquired by the plaintiff was only diminished when those declarations were made.

[15] The plaintiff sought to distinguish a number of authorities relied on by the defendants on the basis that the undiscovered defects in those cases existed before the land was purchased.[6] For example, in *D'Agostino v Anderson*,[7] the development approval that was relevant there had lapsed and did not exist before the plaintiff became bound to purchase the land. Again, in *Winnote Pty Ltd v Page*, that company from the outset received rights of a dramatically inferior kind compared to those it should have

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4 [2013] QPELR 1, 11 at [39].

5 (1998) 194 CLR 355, 388-391 at [91]-[93].

6 See *Winnote Pty Ltd v Page* (2006) 68 NSWLR 531; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 and *D'Agostino v Anderson* [2012] NSWCA 443 and cf *JNJ Resources Pty Ltd v Crouch & Lyndon (a firm)* [2015] 2 Qd R 115, 122-123.

7 *D'Agostino v Anderson* [2012] NSWCA 443 at [20].

received.[8] The submission in this case was that the plaintiff did not, from the outset, get significantly less than it should have. This was because the rights were in place when it acquired the land and continued until they were set aside on 20 October 2009.

[16] Those submissions seem to me to be correct with the consequence that I should not decide at this stage that the limitation of actions defence is so strong as to justify summary judgment for the defendants. The plaintiff has, in my view, a real, not fanciful, prospect of success in the action.

[17] Mr O'Sullivan QC for the plaintiff also submitted that, on 20 October 2009, the plaintiff suffered a distinct and different species of loss and damage from any that it might have suffered before because, on and from that moment, it ceased to have the benefit of a lawful right to carry out its development project and, from that moment, its financier ceased to provide further drawdowns and deprived it of the funds necessary to apply for the appropriate approvals or to otherwise carry out the development project. Because of my conclusion about the impropriety of now giving summary judgment, however, I do not need to determine whether or not there was such a new cause of action arising on 20 October 2009 in any event.

[18] The plaintiff also relied on arguments that it had prima facie a strong case. That does not seem to me to be particularly relevant in an application of this kind once the conclusion is reached that the matter should go to trial rather than be dismissed summarily. Consequently the defendants' application for summary judgment is dismissed.

The form of the proposed amended statement of claim

First and second complaints

[19] There were 11 original complaints by the Council, the first defendant, about the form of the proposed amended statement of claim. Not all of them were pressed. The first was that part of the proposed 2FASOC should be struck out to the extent it pleaded a claim for breach of s 52 of the *Trade Practices Act* 1974 (Cth) against the Council. No such cause of action was advanced by the plaintiff against the Council.

[20] Nor, for the reasons already advanced, would I entertain the second complaint by striking out the pleading on the bases that the causes of action pleaded were statute barred.

Third complaint

[21] There were several further complaints by the Council about the form of 2FASOC. There was a complaint that the statement of claim was defective because of deficiencies in the pleading of a duty of care owed by the Council to the plaintiff. Paragraphs 78 to 78AG allege a breach of duty of care by reference, respectively, to paragraphs 68AA to

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[8] *Winnote Pty Ltd v Page* (2006) 68 NSWLR 531, 542 at [60]-[61].

68AF of the 2FASOC. Paragraphs 68AA to 68AF of 2FASOC allege why the plaintiff says the Council owed a duty of care to the plaintiff but do not allege that the Council did owe the plaintiff a duty of care.

[22] The plaintiff submitted with some justification that this complaint involved an overly pedantic approach to the construction of the 2FASOC because it was necessary to read each of the paragraphs together. Its counsel submitted this may not be the most elegant form of pleading, but that it did not make the pleading defective. It seems to me that the combinations of the relevant paragraphs do amount to a sufficient pleading both of the owing of a duty of care and of its breach. The plaintiff also proposed to further amend the pleading to make the connection between the relevant paragraphs clearer.

Fourth complaint

[23] There was also resistance by the Council to a proposed amendment to para 21B of the 2FASOC which makes allegations about the failure to disclose public opposition to the development proposals. That was then relied on in para 78(a) to allege that, in failing to disclose that public opposition, the Council breached its duty of care to the plaintiff where the duty of care pleaded in para 68 does not allege that the Council owed the plaintiff such a duty of care. Paragraph 67(b) already pleads that the Council owed the plaintiff a duty to warn the plaintiff to avoid a foreseeable and not insignificant risk of harm. It was submitted, it seems to me to be correctly, by the plaintiff that that was sufficient to support the breach alleged of the failure to disclose public opposition in para 78(a). In any event, the plaintiff proposes to amend para 67 to include a new sub-para (c) making clear the allegation of failure to disclose public opposition to the development of the land.

Fifth to eleventh complaints

[24] The other complaints by the first defendant related to issues which seem to me to be readily curable by the means proposed by the plaintiff in its written submissions.[9]

Leave to amend

[25] The plaintiff also seeks leave to further amend its statement of claim in paras 21(g) and 118A and in paras 21B and 78(a), 127A(b)(iv) and 127B to 127D to include two new causes of action in respect of which the limitation period has now expired but where the two new causes of action are said to arise out of the same or substantially the same facts as have already been pleaded.

First new cause of action

[26] The first new cause of action alleged in paras 21(g) and 118A of the 2FASOC, alleges that the second to fourth defendants, described collectively as the Town Planner, failed

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[9] See paras 73-89 of those written submissions.

to correct or qualify statements made at a 12 April 2005 meeting with the Council. The existing statement of claim already pleaded that:

- on 12 April 2005, a meeting took place which was attended by representatives of each of the defendants;
- the plaintiff stated at that meeting that he wished to make various changes to a development approval over land he was considering purchasing;
- in response to a question from the Town Planner, the Council made representations to the effect that the changes to the development approval could be effected by way of an approval to make a "minor change" to the development approval (the "minor change representation");
- the minor change representation was incorrect because the Council had no power to approve the proposed changes to the development approval by way of a minor change and could only approve those changes by way of another type of application (the "proper approval process");
- the Town Planner subsequently proceeded on the basis that the minor change representation was correct by, inter alia, submitting applications to effect minor changes to the development approval rather than following the proper approval process;
- the Town Planner failed to advise the plaintiff about the proper approval process and, as a consequence the Town Planner;
    - breached the duty of care owed to the plaintiff; and
    - engaged in conduct which was misleading or deceptive within the meaning of s 52 of the *Trade Practices Act.*

[27] In the 2FASOC, the plaintiff now pleads:

- in para 21(g) of the 2FASOC that the Town Planner failed to correct or qualify the minor change representation; and
- in para 118A of the 2FASOC that, by failing to correct or qualify the minor change representation, the Town Planner engaged in conduct which was misleading or deceptive contrary to s 52 of the *Trade Practices Act.*

Second new cause of action

[28] The second new cause of action pleaded in paras 21B, 78(a), 127A(b)(4) and 127B to 127D of the 2FASOC, alleges that the Council failed to disclose active public opposition to the plaintiff's proposal. In para 21B of the 2FASOC, it is alleged that the Council and the Town Planner were aware of active public opposition to earlier proposals to develop the land the subject of the development approval. The 2FASOC goes on to allege, in para 78(a), that the Council breached the duty of care it owed to the plaintiff because the information it provided to the plaintiff at the April 2005 Meeting

was incomplete and inaccurate because it failed to disclose the public opposition to earlier development proposals, of which it was aware.

[29] The plaintiff accepts that this allegation involves the introduction of a new cause of action but argues it should be given leave to introduce it because it is closely connected with the plaintiff's existing case about alleged misrepresentations made at the April 2005 meeting. The connection is sufficiently close, it submits, because the new facts alleged can properly be said to arise out of the same, or substantially the same facts already alleged. It submitted that no prejudice should be occasioned to the defendants by reason of the amendments, and that it is otherwise appropriate to give leave to introduce them.

Consideration

[30] Mr O'Sullivan QC's submissions also raised an issue of some potential general interest. This can be characterised as an application to amend the pleading by introducing a cause of action that arose before the proceeding itself had commenced, that would arguably have been statute barred at the date of the amendment but not statute barred when the proceedings began. He pointed out that, on one construction of rr 375 to 380 and r 387 of the *Uniform Civil Procedure Rules* 1999, if no request for trial date has been filed, leave is not required and the appropriate course is for the defendants to apply within eight days to disallow the amendments pursuant to r 379 of the UCPR. Such an application would then be governed by the principles set out in r 376(4) permitting the court to give leave to amend to include a new cause of action if the court considers it appropriate and that 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.[10]

[31] He submitted that, on another construction of the rules, while r 376(4) is expressed in permissive terms, it also implicitly prohibits an amendment of the kind identified in r 376(1). That rule only applies "if a relevant period of limitation, current at the date the proceeding was started, has ended".

[32] The plaintiff brought the application out of an abundance of caution in the event that leave were required but submits that, if it cannot currently be determined whether the period of limitation was current at the date the proceeding was started, so that it was unclear whether r 376(4) could apply, one could find a solution to the practical difficulty that arises where there is a question of whether a limitation period has expired and that cannot be fairly determined ahead of trial.[11]

[33] He submitted that I could solve the problem by applying s 16(1) of the *Civil Proceedings Act* 2011 (Qld), which provides a separate source of jurisdiction to the court to grant leave to amend a pleading introducing a new cause of action statute

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[10] Compare *Edwards v State of Queensland* [2012] QSC 248 at [30] and *Mokrzecki v Popham* [2013] QSC 123 at [25]-[26].

[11] *Mokrzecki v Popham* [2013] QSC 123 at [12] and see [16]-[21] also.

barred when the amendment is made. That power is not confined to cases falling within the language of r 376(1). That seems to me to be a sensible approach to the potential problem. I should also point out that Mr O'Sullivan's submissions included the argument that the court's inherent jurisdiction would extend to permit such an amendment.[12]

[34] The limitation question should not be determined at this stage. For the reasons I have expressed earlier, it is not something that should be determined on a summary judgment application nor, I would add, on this application to amend the pleading. There may be good arguments to the effect that the limitation period had not expired when this proceeding was instituted but that question should not be determined now.

[35] In that context, Mr O'Sullivan QC's submission that s 16(1) of the *Civil Proceedings Act* 2011 provided the appropriate power to amend a pleading introducing a new cause of action statute-barred when the amendment is made was coupled with a submission that it would be appropriate to exercise that power in accordance with the considerations identified in r 376(4). He argued that a new cause of action was introduced by the paragraphs I have recited earlier but that those causes of action arose out of the same or substantially the same facts as those already pleaded and that it was otherwise appropriate to grant leave.

[36] The submission was that the new cause of action arose out of the same or substantially the same facts as those already pleaded because it had always been alleged that the Town Planner attended the April 2005 meeting at which a minor change representation was made. It was also previously alleged that the Town Planner himself made a representation in substantially the same terms as the minor change representation and it had always been alleged that the Town Planner breached the duty of care owed to the plaintiff and engaged in misleading and deceptive conduct by failing to advise the plaintiff about the proper approval process. Thus, it was submitted that the new cause of action, that the Town Planner failed to correct or qualify the minor change representation and thus engaged in conduct which was misleading or deceptive contrary to s 52 of the *Trade Practices Act* by failing to advise the plaintiff about the proper approval process, arose out of substantially the same facts.

[37] That does seem to me to be the case and I do not see how the proposed amendments can cause the second, third and fourth defendants unfair prejudice as those issues factually have always been relevant.

[38] Similar considerations apply to the second new cause of action relating to the Council, the first defendant, arising out of the allegation that it and the Town Planner were aware of active public opposition to earlier proposals to develop the land. The new allegation is that the Council breached the duty of care it owed to the plaintiff because the information it provided to the plaintiff at the April 2005 meeting was incomplete and

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[12] *Edwards v State of Queensland* [2012] QSC 248 at [31]-[32].

inaccurate because it failed to disclose the public opposition to earlier development proposals of which it was aware.

[39] The Town Planner submitted that the amendments referring to historical public opposition to the development proposal introduced a whole new factual inquiry into the extent of the Town Planner's knowledge which went beyond the statements made at the 12 April 2005 pre-purchase meeting. Accordingly, it submitted, that those amendments did not arise out of the same or substantially the same facts as the earlier pleaded case.

[40] The plaintiff's submissions against that were, essentially, that the existence of public opposition was intimately connected with the representations which the Town Planner is alleged already to have made at that meeting about the process and time frame for obtaining development approval. It was submitted that, given the extent to which third party objectors play a part in development assessment processes, the existence of opposition directly impacted on information which a competent town planner would provide when giving advice on the prospects and time involved in obtaining a development approval. Accordingly, it was submitted that the amendments did arise out of the same or substantially the same facts as the earlier pleaded case.

[41] The plaintiff accepts that this involves the introduction of a new cause of action but submits that it arises out of conduct closely connected with the plaintiff's existing case about alleged misrepresentations made at the April 2005 meeting and that no prejudice should be occasioned to the defendants by reason of the amendment. I agree with those submissions and have reached the view that the amendments sought should be made.

Amendments made in relation to causation and loss

[42] There were other amendments made to the 2FASOC with respect to causation and loss. There the plaintiff's argument was that the new allegations merely refined the way that causation and loss were pleaded and did not introduce a new cause of action. If that were wrong they submitted that they should also be given leave because the amendments also arose out of substantially the same facts as those already pleaded.

[43] The existing pleading alleges a loss of opportunity to apply for the correct development approvals which caused the land to have a value less than it otherwise would have. Alternatively, the plaintiff argues that it lost the opportunity to develop the land in accordance with the proposed plan of development and incurred, in the further alternative, wasted costs in developing the land including the cost of constructing improvements on it, legal costs and fees paid to the defendants.

[44] The proposed amendments in respect of causation and loss now plead that, but for the defendants' wrongdoing, the plaintiff would not have purchased the land and consequently suffered loss in the form of wasted expenditure in purchasing and developing it. The pleading proposed then goes on to allege that it lost the opportunity to apply to the Council to obtain the correct development approval and in doing so suffered loss being the difference in the value of the land with and without the correct

development approval and the loss of profit associated with the development of the land.

[45] The argument is that where damage is an element of the cause of action, a new cause of action generally does not arise in respect of different and separate items of loss and damage, there being, instead, only a single cause of action.[13] In *Murdoch v Lake*,[14] Peter Lyons J, with whom Morrison JA agreed, held that the amendments in that case which introduced new allegations about causation and loss did not give rise to a new cause of action.[15]

[46] I agree with that approach and with the submission that the amendments in respect of the plaintiff's case on causation and loss do not introduce a new cause of action. If I am wrong in that, it is also my view that those allegations arise out of the same or substantially the same facts as those already pleaded as the plaintiff has merely refined the way in which it has pleaded the wasted expenditure and loss of opportunity.

Delay

[47] The Town Planner also submitted that it was not appropriate to give the plaintiff leave to make the amendments because of the delay in making the amendments to its pleadings since the proceedings were commenced. Those delays were explained by the plaintiff's financier stopping its access to funds once the Planning and Environment Court's decision was handed down on 20 October 2009 with the result that the plaintiff went into liquidation in July 2010 and remained in liquidation until 31 August 2015 when a deed of company arrangement was entered into which gave control of the plaintiff back to its director, Mr Markham. Thereafter, the plaintiff submits that it acted promptly on 19 October 2015 to commence the proceedings.

[48] The earlier pleading had been filed in February 2017 pursuant to a Court order. There was useful correspondence between February 2017 and July 2017 between the Council's solicitors and the plaintiff's solicitors about the pleadings and inconclusive correspondence between the Town Planner's solicitors and the plaintiff's solicitors about security for costs. That explained the delay during that period. There was also a change of solicitors and counsel shortly before the summary judgment application was brought.

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[13] *Jobbins v Capel Court Corporation Ltd* (1989) 25 FCR 226, 228, criticised in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 528-529 on the different question of when damage was first suffered. See also *The Starsin* [2001] 1 Lloyd's Rep 437, 459 at [105] cited with approval in the House of Lords: [2004] 1 AC 715, 746, 751.

[14] [2014] QCA 216.

[15] See at [53]-[57]. See also *Mount Isa Mines Ltd v CMA Assets Pty Ltd* [2016] QSC 260 at [30]. See also *McQueen v Mount Isa Mines Ltd; CMA Assets Pty Ltd v Mount Isa Mines Ltd* [2017] QCA 259 at [72]; *Bennett v Australian Capital Territory* [2016] ACTSC 258 at [86], [89]-[90]; *Ozipko v Massey-Ferguson Ltd* (1965) 53 DLR (2D) 284 at [9]-[10] and *Western Canadian Place Ltd v Con-Force Products Ltd* [1997] 9 WWR 527 at [22], [30]-[31].

[49] In those circumstances, I would not use the fact of delay as a reason to prevent the plaintiff from being given leave to file the pleading in the form of the proposed 2FASOC.

Orders

[50] I give leave to the plaintiff to file the pleading in the form of the proposed 2FASOC. I also dismiss the application for summary judgment and the application to strike out the proposed 2FASOC. I shall hear the parties as to costs.