

SUPREME COURT OF QUEENSLAND

CITATION: *Bluefin Seafoods Pty Ltd v Fraser Coast Regional Council*
[2018] QCA 300

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

FILE NO/S: Appeal No 2556 of 2018
SC No 5626 of 2016

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 14 (Bowskill J)

DELIVERED ON: 2 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 16 August 2018

JUDGES: Sofronoff P and McMurdo JA and Bond J

ORDERS: **The appeal be dismissed with costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the appellant, self-represented in the trial division, had difficulty in pleading its case – where the primary judge struck out the appellant’s fifth statement of claim on the basis that any discernible cause of action was statute barred, and gave judgment in the proceeding to the respondent – where the appellant submits that amongst the causes of action which were pleaded in the final statement of claim, there was one which had been pleaded originally and within the relevant limitation period, or, alternatively, that cause of action arose out of the same facts or substantially the same facts as a cause of action already claimed in the proceeding, pursuant to r 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld) – where the final statement of claim contained substantially new facts which did not plead a viable cause of action – whether the primary judge erred in striking out the appellant’s final statement of claim

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

Draney v Barry [2002] 1 Qd R 145; [\[1999\] QCA 491](#), considered

Paul v Westpac Banking Corporation [2017] 2 Qd R 96;
[\[2016\] QCA 252](#), considered

COUNSEL: A J Greinke for the appellant
 K Wilson QC for the respondent

SOLICITORS: Cranston McEachern for the appellant
 Barry Nilsson Lawyers for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and with the orders his Honour proposes.
- [2] **McMURDO JA:** The appellant, together with its two shareholders, commenced this proceeding in the Trial Division on 8 June 2016. The claims by the shareholders were discontinued and there were difficulties for the appellant, which was without legal representation, in pleading its case. Eventually the appellant's fifth statement of claim, which was filed on 1 December 2017, was struck out and the respondent was given judgment in the proceeding, for the reason that any discernible cause of action was statute barred.¹
- [3] Those orders are challenged by effectively two arguments. The first is that amongst the causes of action which were pleaded in the final statement of claim, there was one which had been pleaded originally and within the relevant limitation period. The second is that the same cause of action, if not originally pleaded, arose out of the same facts or substantially the same facts as a cause of action already claimed in the proceeding, so that the case is one within r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld).

The pleading in outline

- [4] The allegations in the appellant's final pleading were as follows. The appellant operated a commercial sea cucumber hatchery when, in or about April 2004, it contracted with the Queensland Department of State Development to purchase nearby land at Driftwood Court in Urangan, which it proposed to develop for an export processing facility and associated works. The appellant applied to the respondent for a development permit for that facility.
- [5] In or around October 2004, there was a conversation between representatives of the appellant and the respondent during which a number of representations, together described in the pleading as "the First Representations", were made by the respondent. Its officer said that the respondent was developing an "aquaculture precinct" and that the respondent would construct "utilities and roads for use there". The appellant was told that it should construct its processing facility there, instead of at Driftwood Court.
- [6] In reliance on the First Representations, in February 2005 the appellant terminated its contract for the Driftwood Court site and, in October 2006, it entered into a contract with the respondent, which the pleading described as the Development Agreement. The First Representations were misleading and deceptive, contrary to s 52 of the *Trade Practices Act* 1974 (Cth), because the respondent knew or ought to have known that it was not in a position to construct utilities for the precinct within a reasonable time.

¹ *Bluefin Seafoods Pty Ltd v Fraser Coast Regional Council* [2018] QSC 14 ("Reasons").

- [7] The Development Agreement provided for the appellant to be granted a two year lease over certain land in the precinct for a nominal rental, and for the appellant to develop that land by February 2007, so as to be employing certain number of people at the facility by certain dates in October 2007 and May 2008. It provided that the appellant would have an option to purchase the land at a certain price, together with a further option to purchase another lot within the precinct at market value. It was an implied term of the Development Agreement that the respondent would construct sewerage, water, electricity and other utilities for the precinct within a reasonable time, so as to allow the appellant to complete the required development, undertake the business proposed for the site and otherwise comply with its obligations under that contract.
- [8] The development works were commenced in about June 2006. A further representation, which the pleading called the Second Representation, was made by the respondent on 4 October 2006, namely that the respondent was in the process of developing the precinct by installing a new sewer line and other services. That representation was alleged to have been misleading or likely to mislead or deceive, in contravention of s 52, because the respondent knew or ought to have known that it was not in a position to “construct utilities to its agriculture precinct in compliance with its obligations under the Development Agreement”. In reliance upon the Second Representation, as well as the First Representations, the appellant spent \$560,000 developing its site in the precinct and it completed the required works under the Development Agreement, save for connecting the lot to utilities.
- [9] In about December 2006, the respondent ceased construction of infrastructure for the precinct, as a result of which the appellant was unable to use its site. The respondent’s failure to construct the necessary utilities within a reasonable time, or at all, was in breach of its obligation under the Development Agreement, and in particular the alleged implied term. That breach caused the appellant to suffer loss and damage, as particularised at paragraph 77 of the pleading to which I will return.
- [10] The respondent further breached the Development Agreement by not causing separate lots to be issued within the precinct, thereby depriving the appellant of the benefit of its option to purchase. That breach occurred in or by March 2007.
- [11] There were further representations, described in the ultimate pleading as the Third Representations, in February and March 2010. On 25 February 2010, an officer of the respondent said to the appellant that the respondent would proceed with stage one of the development of the precinct. That same officer sent an email to the appellant, on 1 March 2010, with a statement to the same effect.
- [12] By paragraph 50, it was pleaded that at the time of the Third Representations, the respondent was liable to compensate the appellant for the loss and damages alleged in paragraphs 77 and 79 of the pleading. Paragraph 55 alleged that in reliance upon the Third Representations, the appellant did not proceed against the respondent with a claim for damages as particularised in those paragraphs.
- [13] By paragraph 56, it was alleged that contrary to the Third Representations, the respondent did not proceed to develop the precinct by the construction of the necessary utilities within a reasonable time or at all. The respondent’s conduct in making the Third Representations was misleading or likely to mislead or deceive, in contravention of s 52.

- [14] On or around 1 March 2010, the parties agreed to vary the Development Agreement, so that the respondent would construct the necessary utilities within a reasonable time of that date. A reasonable time was no later than 31 August 2010. But in breach of the Development Agreement as varied, the utilities were not constructed by that date or at all. In consequence of that breach, and of the Third Representations, the appellant suffered loss and damage as alleged in paragraph 80.
- [15] The appellant's financial position was said to have deteriorated in consequence of the that breach of the Development Agreement as varied and the Third Representations, such that the appellant's mortgagee took possession of its hatchery thereby removing the appellant's ability to carry out the proposed processing business. The respondent treated the appellant's lease as having been abandoned by it and the appellant lost the benefit of the works which it had carried out on its proposed lot in the precinct. A further consequence of the decline in the appellant's financial position was the loss of leases which the appellant held from the Crown over areas of seabed for its hatchery business.
- [16] The loss and damage pleaded in paragraph 77, which was attributed to the breach of contract in 2007, consisted of the loss of profits from the appellant's proposed processing business and its wasted expenditure in developing the proposed lot in the precinct. Paragraph 78 alleged that this wasted expenditure resulted in the respondent being "unjustly enriched". By paragraph 79, it was alleged that the consequence of the breach of contract in or by March 2007, by which the appellant was deprived of the benefit of its option to purchase, was that it lost the opportunity to acquire the lot at a price which was less than its market value. It was for damages of those kinds that the respondent was liable to the appellant when the Third Representations were made in February/March 2010.
- [17] Consequently, it was the appellant's pleaded case that in reliance upon the Third Representations, it did not proceed with claims for damages of those kinds. They were each contractual claims, so that the limitation period for them would have commenced from the dates of the alleged breaches, which on the most generous view for the appellant, were no later than 2007. Therefore those causes of action became statute barred by the end of 2013 and well before the commencement of this proceeding.
- [18] The pleading, as described to this point, indicated a claim for damages from causes of action becoming statute barred, because the appellant relied on the Third Representations. However that was not the loss and damage which was alleged.
- [19] As I have said, the alleged loss and damage from the Third Representations (and the breach of contract in 2010) was said to have been that particularised in paragraph 80 as follows.
- (a) a loss of profit, or an opportunity to profit, from the processing business;
 - (b) a loss of the money expended in developing the lot in the precinct;
 - (c) a loss of the opportunity to acquire the lot at less than market value;
 - (d) the loss of the appellant's property where it had conducted its hatchery;
 - (e) the loss of the value of the seabed leases.

A new cause of action?

- [20] The appellant's argument accepts that there was no claim within the original pleading for a breach of contract in 2010. But the appellant's argument is that there was a case originally pleaded which was based upon the Third Representations. The primary judge held otherwise, and it is said that her Honour erred in that respect.
- [21] The original pleading alleged representations made in October 2004, in terms corresponding with those ultimately pleaded as the First Representations. Paragraph 10 of that pleading alleged that those representations induced the appellant to terminate the contract for Driftwood Court and to execute the agreement with the respondent (the Development Agreement), and paragraphs 11 and 12 alleged that the respondent knew or ought to have known that the appellant would suffer loss if the representations were not accurate. Paragraph 13 alleged that the respondent breached a duty of care in making those representations, and paragraph 15 alleged that as a result of the respondent's negligence, the appellant suffered loss and damage by its wasted expenditure in developing the lot at the precinct, a loss of income from using that land and a loss of income from an alternative use of land at Driftwood Court.
- [22] What followed in the original pleading was a series of allegations of events from 2006 through to the end of 2009, culminating in paragraph 45 which alleged that by December 2009, "contrary to the representations", the respondent had not built the infrastructure, causing financial strain to the appellant. Paragraph 46 pleaded that "as a result of the Council's negligence", the appellant suffered the same loss and damage which had been alleged earlier. After a few paragraphs which simply referred to complaints made by the appellant to the respondent about the lack of progress, there followed these paragraphs which are critical for the appellant's present argument:

- "51. [On] 25 February 2010, Council set up meeting with Meaclem to discuss the development proposal. Meaclem also discussed the financial strain / stress the Council has caused Bluefin.
52. [On] 1 March 2010, Council refer to our meeting and confirm that Council will proceed with Stage 1 of the development as discussed."

They were followed by paragraph 53 in these terms:

- "53. By October 2010, contrary to the representations the Council has not built the infrastructure, which had caused Bluefin to be financially strained."

A little further on there were these allegations:

- "62. The representations were incorrect and misleading.
63. As a result of Council's negligence Bluefin, has suffered loss and damage."

- [23] They were followed by paragraphs which related only to the claims by the shareholders, although it may be noted that the same alleged loss and damage suffered by the appellant was included within their claims also.

- [24] It is apparent that paragraphs 51 and 52 referred to the meeting of 25 February 2010 and the email of 1 March 2010 which the ultimate pleading described as the Third Representations. But the original pleading did not describe them as representations upon which the appellant had acted and by which it had suffered any loss. The original pleading is not open to the interpretation that what was pleaded in paragraph 52 was within the expression “the representations”, as that term was used throughout the document. That was an expression which described the representations said to have been made in or about October 2004.
- [25] I agree with the primary judge that the references to the events of 25 February and 1 March 2010 in the original pleading were “simply part of a broader narrative [and that] there was no pleading of anything being done in reliance on what was said ... and no cause of action pleaded arising from what was said”.² Her Honour made the same observation about what was pleaded in the third amended statement of claim. But in any event, that pleading was filed on 11 September 2017 which was after the expiry of any relevant limitation period. As her Honour said, it was not until the ultimate pleading that the appellant relied upon the Third Representations as an element of a cause of action, so that this was a new case and not a particularisation of a cause of action previously pleaded.³ Consequently the first of the appellant’s arguments must be rejected.
- [26] The appellant’s second argument is that if this was a new cause of action, it engaged the power conferred by r 376(4). Rule 376 relevantly provides:
- “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.”
- [27] As the primary judge noted, the appellant had not applied for leave to make the amendments which appeared in the ultimate pleading, but it was appropriate to consider whether leave ought to be given under r 376(4).⁴ Her Honour quoted this passage from the judgment of Thomas JA in *Draney v Barry*:⁵

“[Rule 376(4)] allows a fairly wide discretion in that the court will not allow such an amendment unless it considers it “appropriate” to

² Reasons at [33](a).

³ Reasons at [33](c).

⁴ Reasons at [36].

⁵ [2002] 1 Qd R 145 at [57]; [1999] QCA 491.

do so and also considers that the new cause of action arises at least substantially out of the same facts as the existing cause of action. I do not think that “substantially the same facts” should be read as tantamount to the same facts, and consider that the need to prove some additional facts is not necessarily fatal to a favourable exercise of discretion under r 376(4). If the necessary additional facts to support the new cause of action arise out of substantially the same story as that which would have to be told to support the original cause of action, the fact that there is a changed focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts. In short, this particular requirement should not be seen as a straitjacket.”

(Footnote omitted.)

Her Honour also quoted this passage from the judgment Fraser JA (with whom the other members of the Court agreed) in *Paul v Westpac Banking Corporation*:⁶

“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.”

(Footnote omitted.)

- [28] The primary judge said that so far as the claim was based on the Third Representations, the new facts which were pleaded were that the appellant did not proceed against the respondent with its claim for damages for the earlier breaches of contract and the First Representations and the Second Representation, because it relied upon the Third Representations that the Council would proceed with the development.⁷ She said that this new cause of action did not arise out of substantially the same facts as the causes of action previously pleaded, although those facts would have to be proved in order to establish the loss claimed under the new cause of action.⁸ As Fraser JA said in the above passage, these cases may involve questions of degree and fine judgment, but I agree with her Honour’s analysis. However, there were further reasons why these amendments were not to be allowed under r 376(4).
- [29] As already noted, the final pleading did not allege that because of the Third Representations, the appellant’s existing case became statute barred. It did allege that in reliance upon the Third Representations, the appellant did not proceed with

⁶ [2017] 2 Qd R 96 at [15]; [2016] QCA 252.

⁷ Reasons at [42].

⁸ Reasons at [43].

claims for damages. But to establish a loss from not doing so, the appellant had to plead (and prove) that it continued to act upon the faith of the Third Representations until the expiry of the limitation periods for those claims, which was close to the end of 2013. It should not be assumed that the absence of a pleading to that effect was due to an oversight. Although no lawyer signed the pleading, it seems that it was prepared with the assistance of counsel upon a pro-bono basis.⁹ The appellant alleged that a reasonable time for the completion of the works required of the respondent was October 2010, which makes it unlikely that it was not until after its claims became statute barred in 2013 that the appellant realised that the works were not being constructed.

- [30] Apart from not starting proceedings, the appellant did not plead any consequence from the Third Representations which the pleading had not attributed to earlier representations or breaches of contract.
- [31] Therefore the case based upon the Third Representations contained substantially new facts, but it also had the problem that those facts did not plead a viable cause of action. The appellant's second argument, based upon r 376(4) cannot be accepted.
- [32] In this Court, the appellant has been ably represented by Dr Greinke, who at times acknowledged the difficulties in his submissions and suggested that it might be appropriate for the appellant to have yet another chance to plead its case. But notably there was no formulation of another pleading which would overcome the defects in this one. This was the fifth version of the statement of claim and the appellant previously had been given leave to re-plead after another version, filed on 12 June 2017, was ordered to be struck out.

Conclusion and orders

- [33] The primary judge was correct to strike out the statement of claim and to give judgment for the respondent. I would order that the appeal be dismissed with costs.
- [34] **BOND J:** I agree with the reasons of McMurdo JA and with the orders which his Honour proposes.

⁹ Transcript of the hearing before the primary judge at 1-16.