SUPREME COURT OF QUEENSLAND

CITATION:	*Zonebar Pty Ltd v Global Management Corporation Pty Ltd & Anor* [2008] QSC 263
PARTIES:	**ZONEBAR PTY LTD (ACN 079 510 795)** (plaintiff) **v** **GLOBAL MANAGEMENT CORPORATION PTY LTD (ACN 082 208 062)** (first defendant) and **BARRY LEE JAKEMAN** (second defendant)
FILE NO:	2904 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2008
JUDGE:	Daubney J
ORDER:	**1. The Sixth Amended Statement of Claim filed on 29 January 2008 be struck out** **2. The Second Amended Claim filed 5 February 2008 be struck out and the plaintiff have leave to file a further amended claim which contains a prayer for relief in conformity with its next amended pleading** **3. The parties be heard as to the necessary orders and directions including as to costs** **4. The plaintiff's application under rule 667 be dismissed with costs**
CATCHWORDS:	LIMITATION OF ACTIONS – GENERAL – APPLICATION OF STATUTES OF LIMITATION – AMENDENDMENT OF WRIT OF PLEADING – Generally – where plaintiff has filed a sixth amended statement of claim ("6ASOC") – where 6ASOC raises new claims under s 52 of the *Trade Practices Act* 1974 (Cth) ("TPA"), for negligence and for contractual breaches in relation to a parcel of land dedicated to the Crown as parkland reserve – where plaintiff also seeks to make further amendments setting out additional complaints about the defendant's conduct in relation to this

land – where claims pleaded in previous statements of claim do not relate to this land – whether amendments constitute a new cause of action – whether the relevant limitation periods have expired

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – Pleading – Generally – where plaintiff has filed a 6ASOC – where request for trial date not filed – where defendant seeks striking out of the 6ASOC – where 6ASOC raises new claims under s 52 of the *Trade Practices Act* 1974 (Cth), for negligence and for contractual breaches in relation to a parcel of land dedicated to the Crown as parkland reserve – where plaintiff also seeks to make further amendments setting out additional complaints about the defendant's conduct in relation to this land – where claims constitute new causes of action – where limitation period expired – where plaintiff applies for leave to amend the 6ASOC – whether the new causes of action arise out of substantially the same facts as the causes of action previously pleaded by the plaintiff – whether it is otherwise appropriate for the amendments to be allowed

Uniform Civil Procedure Rules 1999 (Qld)

Balsato v Campbell [2006] QSC 191
Crump v Equine Nutrition Systems Pty Ltd (2006) NSWSC 206
Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234
Draney v Barry [2002] 1 Qd R 145
Thomas v State of Queensland [2001] QCA 336
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514

COUNSEL: C D Coulsen for the plaintiff
R Perry SC with A L Wheatley for the defendants

SOLICITORS: Morgan Conley for the plaintiff
Minter Ellison for the defendants

[1] This proceeding was commenced by a claim and statement of claim filed on 1 April 2003. The matter has had a chequered history, characterised by periods of inactivity interspersed with challenges to the plaintiff's pleading.

[2] On 13 July 2007, the plaintiff filed its fourth amended statement of claim. On 26 July 2007 the solicitors for the defendants advised the plaintiff's solicitors that they had completed a review of the latest pleading and that an application to strike out that pleading would be brought. Later that day, the plaintiff's solicitors asked for details of the alleged inadequacies.

[3] On 27 July 2007, the matter came on before me for review in the Supervised Case List, at which time I made the following orders and directions:

> '1. The defendants file and serve any application they may wish to bring in relation to the plaintiff's fourth amended statement of claim and any supporting affidavits on or before 4pm on 3 August 2007 and such application shall be listed for hearing by Daubney J on 20 September 2007.
>
> 2. The plaintiff file and serve any affidavits in response to such application on or before 4pm on 21 August 2007.
>
> 3. The defendants file and serve any affidavits in response by 4pm on 28 August 2007.
>
> 4. By 28 August 2007 the defendant's solicitors identify in correspondence to the plaintiff's solicitors the proposed amended defence to paragraph 25 of the fourth amended statement of claim (and the paragraphs in the fourth amended statement of claim which are consequent upon the allegations in paragraph 25).
>
> 5. The plaintiff's application for summary judgment filed on 25 July 2007 be adjourned to 20 September 2007 before Daubney J.
>
> 6. By 4pm on 18 September 2007, each party shall exchange and deliver to the Judge's associate their written outlines of argument for the applications listed for 20 September 2007.
>
> 7. The time for delivery of the defence to the fourth amended statement of claim be extended to a date to be fixed by Daubney J on 20 September 2007.
>
> 8. The parties have liberty to apply on the giving of not less than three business day's notice to the other.
>
> 9. Costs of today be costs in the proceedings.'

[4] On 3 August 2007, the defendants filed and served their application to strike out the plaintiff's pleadings. As contemplated by my order, that was listed for hearing on 20 September 2007. Also listed before me on that day was an application by the plaintiff for summary judgment. That application was dismissed with costs. In respect of the defendants' application to strike out, the parties, on the giving of particular undertakings by each of them, agreed to a regime for the delivery of a further amended statement of claim. The undertakings and orders made on that day were as follows:

- 'By the Plaintiff:

  That the consent order has been agreed to by the parties without admissions: one, upon the recognition by the plaintiff that the fifth amended statement of claim will be redrafted as an entirely fresh pleading which recasts the matters the subject of the fourth amended statement of claim as a whole.

- By the Defendants:

That the Defendants agree to the consent order on the basis that the defendants reserve all of their rights with respect to any cause of action not included in the current claim and reserve all of their rights in respect of any parties not currently joined in the action.

THE COURT ORDERS:

1. The Plaintiff have leave to file and serve a Fifth Amended Statement of Claim on or before 7 November 2007;

2. The Defendants file and serve any Defence to the Fifth Amended Statement of Claim on or before 21 December 2007;

3. The parties jointly report to the Supervised Case Manager by 28 January 2008 setting out:

   3.1 the status of the proceeding;

   3.2 a proposal, or if agreement has not been reached, each party's proposal for the further advancement of the proceedings;

4. The proceedings be further reviewed on a date to be fixed;

5. There be liberty to apply on the giving of not less than 3 business days notice;

6. A transcript be prepared to today's hearing and made available to the parties;

7. The costs of and incidental to this application be reserved.'

[5] On 7 November 2007, the plaintiff filed and served its fifth amended statement of claim ('5ASOC'). On 27 November 2007, the defendants' solicitors wrote to the plaintiff's solicitors complaining of numerous deficiencies in the pleading, requesting further and better particulars, and also making a request for documents under *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") rule 222.

[6] On 18 December 2007, the following further orders were made by consent, at the request of the parties:

'1. The Plaintiff file and serve a Sixth Amended Statement of Claim on or before 4pm, 28 January 2008, which incorporates the particulars requested by the Defendants' in the Defendants' letter written pursuant to rule 444 of the Uniform Civil Procedure Rules 1999 and dated 27 November 2007 ("the 27 November letter");

2. The Plaintiff provide to the Defendants', copies of the documents requested pursuant to rule 222 of the uniform Civil Procedure Rules 1999, in the 27 November 2007 letter , on or before 28 January 2008;

3. The Defendants' file and serve any Defence to the Sixth Amended Statement of Claim on or before 24 March 2008;

4. The proceedings be further reviewed on a date to be fixed;

5. The parties have liberty to apply on the giving of not less than 3 business days' notice.

6. The parties jointly report to the Supervised Case Manager by 31 March 2008 setting out:

   (a) The status of the proceeding;

   (b) A proposal, or if agreement has been reached, each party's proposal for the further advancement of the proceedings;

7. The costs of and incidental to the application be reserved.'

[7] A sixth amended statement of claim ('6ASOC') was filed and served on 29 January 2008. The documents requested under r 222 were not, however, supplied.

[8] On 5 February 2008, the plaintiff sought to file a second amended claim ('2AC'). Rule 377(1)(a) provides to the effect that an originating process may not be amended except if the amendment is a technical matter, and then with the leave of the Registrar or the Court. The plaintiff's solicitor filed an affidavit deposing to the general effect of the orders I had made on 20 September 2007 and 18 December 2007 and asserted that 'the amendments [to the claim] is technical in nature in aligning the second amended claim in terms of the relief of the new redrawn statement of claim'. On the basis of that averral, the Registrar permitted the 2AC to be filed, and it was served on the defendants on 6 February 2008.

[9] On 12 February 2008, the defendants' solicitors wrote to the plaintiff's solicitors complaining of a number of matters, including the plaintiff's continuing failure to deliver the documents requested under r 222, the fact that new causes of action had been included in the 6ASOC outside the relevant limitation periods, and that the claim had been amended without properly obtaining the leave of the Court.

[10] When the matter was reviewed on 22 February 2008, I made a self-executing order against the plaintiff requiring production of the documents previously ordered to be disclosed. That production was required by 25 February 2008, failing which the plaintiff's claim would be struck out. I also ordered that the time for delivery of a defence to the 6ASOC be extended to a date to be fixed by me.

[11] On 25 February 2008, on the basis of material then put before me by the plaintiff as to efforts which had been made to identify and produce documents, I vacated the self-executing order previously made, and made further orders and directions for the delivery of documents and for the filing of an affidavit to explain why any particular documents could not be produced.

[12] At the next review of the matter on 19 March 2008, I made the following orders and directions:

'1. Any Application by the Plaintiff in relation to the Second Amended Claim and/or the Sixth Amended Statement of Claim together with any supporting affidavits be filed and served by 4pm 27 March 2008 and such application shall be listed for hearing by Daubney J on 11 April 2008;

2. The Defendants filed and serve any affidavits in response by 4pm 3 April 2008;

3. Any Applications by the Defendants in relation to the Second Amended Claim and/or the Sixth Amended Statement of Claim together with any supporting affidavits be filed and served by 4pm 3 April 2008 and such application shall be listed for hearing by Daubney J on 11 April 2008;

4. The Plaintiff file and serve any affidavits in response by 4pm 7 April 2008.

5. By 4pm on 9 April 2008, each party exchange and deliver to Daubney J's associate their written outlines of argument for the Applications listed for 11 April 2008;

6. Costs in the proceedings.'

[13] No application by the plaintiff under order 1 was filed by 27 March 2008, and on 3 April the defendants filed and served an application, as contemplated by order 3, seeking the striking out of the 6ASOC (or, at least, those parts of it said to raise new causes of action), the striking out of the 2AC, and directions for the further conduct of the matter.

[14] When this application came on before me on 11 April 2008, there had been non-compliance by the plaintiff with the direction to exchange submissions. It also became clear that, notwithstanding the plaintiff's failure to file any application concerning its pleadings, it nevertheless wished to make such an application. Accordingly, on 11 April 2008 I ordered:

1. The Defendant's Application be adjourned sine die.

2. Any Application by the Plaintiff in relation to the Second Amended Claim and/or the Sixth Amended Statement of Claim together with any supporting affidavits be filed and served by 4pm 18 April 2008 and such application shall be listed for hearing together with the Defendants' Application on 16 May 2008.

3. The Defendants file and serve any affidavits in response by 4pm 28 April 2008.

4. The parties will exchange, and deliver by e-mail to Daubney J's associate their written outlines of argument, 2 business days prior to the date set for hearing the Defendants' Application and any Application by the Plaintiff.

5. The Plaintiff pay the Defendants' costs thrown away by reason of the adjournment to be assessed on the indemnity basis.

[15] On 18 April 2008, the plaintiff filed and served an application seeking the following relief:

> '1. Insofar as leave is required pursuant to UCPR 376 to make an amendment after the expiration of a limitation period to the Amended claim filed 1 April 2003 in terms of the Second Amended Claim dated 5 February 2008 that the Plaintiff be granted leave *nunc pro tunc*.
>
> 2. Insofar that the leave of the Court is required pursuant to UCPR 375 and 377 respectively, for the Plaintiff to:
>
> (a) amend the Amended Claim filed 1 April 2005, in terms of the Second Amended Claim dated 5 February 2008; and further
>
> (b) amend the Fifth Amended Statement of Claim filed 7 November 2007, in terms of the Sixth Amended Statement of Claim dated 29 January 2008.
>
> then the Plaintiff be granted leave *nunc pro tunc*.
>
> 3. Alternatively that pursuant to UCPR 375, the Plaintiff have leave to amend the Fifth Amended Statement of claim in terms of the Sixth Amended Statement of Claim dated 29 January 2008.
>
> 4. Further and in the alternative, that pursuant to UCPR 375 the Plaintiff have leave to amend the Fifth Statement of Claim in terms of Attachment "A" hereto.
>
> 5. The Defendants be directed to file and serve a defence within 14 days after the hearing of this Application.
>
> 6. The Defendants pay the Applicant's costs of and incidental to the application to be assessed.
>
> 7. Such further or other order.'

[16] The defendants' application to strike out and the plaintiff's application for leave, if required, came on for hearing on 16 May 2008. Also listed for hearing was an application which had been filed directly by the director of the plaintiff seeking the setting aside of the indemnity costs order made on 11 April 2008. I will deal with that application separately.

[17] This litigation arises out of the development of a real estate project known as the 'Springwood Central Project' on land owned by the plaintiff. The first defendant was retained in September 1999 to act as the project manager for the plaintiff. The second defendant was the director and principal of the first defendant.

[18] In order to give context to the issues which I must now decide, it is convenient to set out a summary of the plaintiff's case as it was articulated in the 5ASCOC (filed 7 November 2007).

[19] The 5ASOC referred to the plaintiff being the owner and developer of the Springwood Central Project since about 15 July 1998, and particularised the holdings within that project as follows:

> '8. Since about 15 April 1998 Zonebar has been the owner and developer of the Springwood Central Project.
>
> Particulars
>
> The Springwood Central Project included:-
>
> a. The creation of Lots 7 & 8 on RP 131633, Lots 1, 5, 6, 9 and 10 on RP150819 and Lots 11 & 12 on RP 175232 ("the Zonebar land");
>
> b. The construction of Retail Warehouses on Lots 7, 8 and 11 as follows:-
>
> i. Lot 7 by Abigroup between 5 April, 2001 and 9 September 2001,
>
> ii. Lot 8 by Multi span Australia Pty Limited ("Multi Span") between 3 January, 2003 and 3 September, 2003; and
>
> iii. Lot 11 by Multi Span between 23 April, 2004 and 15 September, 2004;
>
> 9. The Zonebar Land was re-subdivided:-
>
> a. on 29 August 2001 to produce the following lots on RP131633;
>
> i. Lot 101;
>
> ii. Lot 7;
>
> iii. Lot 8; and
>
> iv. Lot 100, which was dedicated to the Crown as Parkland Reserve.
>
> b. as to Lot 101 on RP 131633 on or about 21 March 2003 to produce the following Lots on SP 150819:
>
> i. Lot 5, which, subject to certain boundary adjustments for easements was also known as Lot 5A before that subdivision (herein referred to as "Lot 5" or "Lot 5A") and
>
> ii. Lots 1, 4, 6, 9 and 10.'

[20] The terms of the project management agreement with the first defendant were then pleaded, it being asserted, in brief, that the first defendant owed the plaintiff an implied contractual duty of skill, care and diligence (referred to as 'the Skill Term') and an obligation at law to take reasonable care to act with reasonable skill, care and diligence (referred to as 'the Skill Duty'). It was also asserted that, by reason of the

relationship created by the project management agreement, the first defendant owed the plaintiff fiduciary duties (referred to as 'the PMA Fiduciary Duty') to act in good faith, to avoid conflicts of interest, and to refrain from using confidential information.

[21] The 5ASOC then set out a series of allegations arising from the plaintiff's utilisation of the services of the first defendant under the project management agreement 'with a view to constructing retail warehouses on proposed Lots 7 and 8 so as to earn or derive development profits and to selling those Lots for current open market values' (para 15). The circumstances surrounding the establishment of a limited partnership to construct a commercial warehouse on Lot 7 with a view to on-selling it to a named third party was pleaded, as were the terms of the fiduciary duties said to be owed to the plaintiff under that partnership. The terms of an agreement for construction of warehouses on Lot 8 by a third party builder under an 'External Works Agreement' were pleaded. The 5ASOC then set out matters which occurred between the first defendant and the external builder in connection with the Lot 7 works which were said to constitute breaches of the partnership fiduciary duty, the PMA Fiduciary Duty, the Skill Term and the Skill Duty. Claim was made for the loss the plaintiff claimed to have suffered as a result of the first defendant's 'failure to ensure the timeliness of completion of the Lot 7 works in its roles as superintendent and project manager'.

[22] The pleading then moved to set out various allegations of default and delay on the part of the external builder in connection with the works on Lot 8, it being asserted that the external builder's failings had been caused by breaches by the first defendant of the PMA Fiduciary Duty, the Skill Term and the Skill Duty, and that the plaintiff had suffered loss and damage as a result of those breaches.

[23] The 5ASOC then set out a series of allegations concerning representations and advice said to have been made to the plaintiff:

- Representations made by the second defendant on behalf of the first defendant 'in respect of the capital investment which would need to be made in respect of the Springwood Central Project and the development profits (including capitalised rent) which it would receive as a result and the timing of the development' ('the investment representations');
- Recommendations which the second defendant had made on behalf of the first defendant that the plaintiff should accept the external builder as the contractor for the Lot 7 works and the Lot 8 works.

[24] It was then alleged that the first defendant failed to advise the plaintiff in respect of numerous matters, including (by para 71A) 'that a number of new approvals, including a rezoning approval, subdivisional approvals, building, operational works and development permits were required to be obtained from the [Logan City Council] before the development scheme recommended by [the first defendant] in respect of the Springwood Central Project could proceed', and other matters particularly concerning the works on Lot 7 and Lot 8. It was alleged that each of these failures to advise constituted breaches of the Skill Term, the Skill Duty, a

particular clause of the construction management agreement and the PMA Fiduciary Duty, which resulted in delays in completion of the Lot 7 works, the Lot 8 works, and certain other external civil works related to Lot 7.

[25] The 5ASOC then pleaded at some length claims that the investment representations were made in breach of the Skill Term, the Skill Duty, a particular clause of the construction management agreement and the PMA Fiduciary Duty, and further that the investment representations were misleading and deceptive, or likely to mislead or deceive. The plaintiff then pleaded the profit it could have made from a sale of the project in mid-2001 'had [the plaintiff] not been misled by the investment representations and [the first defendant's] failure to advise in respect of statutory approvals', and the losses the plaintiff claimed to have suffered as a consequence of the breaches.

[26] Similarly, the first defendant's recommendation concerning the building contractor was pleaded as a foundation for cases cast as breaches by the first defendant of the Skill Term, the Skill Duty and the PMA Fiduciary Duty and as conduct which was misleading and deceptive or likely to mislead or deceive. The losses claimed in the 5ASOC to have been suffered by reason of these breaches all related to the Lot 7 works, the Lot 8 works, and the external works related to Lot 7, and in connection with the limited partnership agreement concerning Lot 7.

[27] A further case was then pleaded concerning representations alleged to have been made by the first defendant in connection with the price at which the particular building contractor could perform the Lot 7 works and the Lot 8 works, and these representations were pleaded to have been made in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ('*TPA*'). The loss said to have been suffered by the plaintiff in consequence was the additional cost involved in having this building contractor perform the Lot 7 works and the Lot 8 works.

[28] The 5ASOC concluded with a brief pleading asserting the second defendant's accessorial liability pursuant to s 75B of the *TPA*.

[29] The prayer for relief in the 5ASOC accordingly made the following claims:

> 'The First Defendant:
>
> 1. damages of $778,947 for negligence and/or breach of fiduciary duty and/or breach of contract concerning the External Works;
>
> 2. damages of $2,451,731 for negligence and/or breach of fiduciary duty and/or breach of contract concerning the Lot 7 Works;
>
> 3. alternatively to (b), indemnity of $2,451,731 pursuant to the Partnership Agreement;
>
> 4. damages of $914,000 for negligence and/or breach of fiduciary duty and/or breach of contract concerning the Lot 8 Works;

5. further or alternatively, damages of $4,144,678.17 for breaches of Section 52, pursuant to Sections 82 and 87, of the Trade Practices Act concerning the Investment Representations; and

6. further or alternatively, damages of $6,334,760 for breaches of Section 52 of the Trade Practices Act, for negligence and/or breach of fiduciary duty and/or breach of contract concerning the CMA Representations and the Abigroup Tender Representations.

The Second Defendant:

7. damages of $4,144,678.17 as claimed in paragraph 1(e) above pursuant to Sections 75B(1)(c) and 82 and 87 of the Trade Practices Act; and

8. further or alternatively, damages of $6,334,760 as claimed in paragraph 6 above pursuant to Sections 75B(1)(c), 82 and 87 of the Trade Practices Act.

As against both Defendants:

(a) Interest under Section 47 of the Supreme Court Act 1995 at a rate of 11.5% on all amounts awarded herein.

(b) Costs.'

[30] The 6ASOC is a significantly different pleading from the 5ASOC in a number of respects. In respect of the facts and matters which have been pleaded in the 5ASOC, there are numerous changes, amendments, insertions, and additions to the previous pleading. A direct comparison of the two pleadings is tiresomely difficult, because the amendments made in the 6ASOC have not been made in such a way as to distinguish them so as to be identifiable from the remainder of the document. This failure to comply with the express requirement of r 382(1) by the plaintiff is not explained. For present purposes, it is unnecessary for me to dwell on this aspect of amendments made to the case previously pleaded, because the challenge is to a new case sought to be raised in the 6ASOC concerning that part of the Springwood Central Project known as 'Lot 100'. I observe immediately that the only mention of Lot 100 in the 5ASOC was in paragraph 9(a)(iv) which simply pleaded that the Zonebar land was re-subdivided on 29 August 2001 to produce Lot 100 from RP 131633 and Lot 100 was dedicated to the Crown as parkland reserve. As appears from my summary of the allegations made in the 5ASOC, Lot 100 did not figure in any of the allegations made in the 5ASOC concerning the causes of action pleaded or the losses claimed in that pleading.

[31] The following new paragraphs appear in the 6ASOC:

'14. On 1 October 1996, Logan City Council ("the Council" or "LCC") approved the re-zoning of the Zonebar Land to service industry uses upon certain conditions ("the Original Re-zoning Approval") pursuant to which and subsequent Development Permits, Global Management advised and represented to Zonebar that it was required to dedicate and transfer for no consideration to Council or the State of Queensland future Lot 100 ("the Lot 100 Representation"). [lengthy particulars not reproduced]

...

67. The Tender Representations, the CMA Representations, the 90 Day Representation, the Lot 100 Representation, the Costing Representations and the Investment Representations:

(a) were made by or imputable to Global Management, as a corporation;

(b) were conduct in trade or commerce;

(c) were misleading or deceptive to Zonebar or likely to mislead or deceive Zonebar;

(d) included representations as to future matters within the meaning of Section 51A of the Trade Practices Act, 1974 (Cth.) ("the TPA"); and

(e) to that extent must be taken by the application of that Section to be misleading or deceptive to Zonebar or likely to be misleading or deceptive to Zonebar in the premises. [lengthy particulars not reproduced]

...

73. Between respectively its appointment as Project Manager on 23 September 1999 (paragraph 17) and as Superintendent of the Lot 7 works on 23 November 2000 (paragraph 44) and 26 November 2001, Global Management failed, neglected or omitted to advise, inform or warn Zonebar and/or to take the necessary steps or actions to procure or effect:

(a) further to paragraphs 14-16:

(i) as to when applications for development permits should be made to Council, including applications for development permits for re-zoning (MCU), subdivisional approval, operational works permit and building approval to enable the development scheme recommended by Global management in respect of the Springwood Central Project to proceed expeditiously;

(ii) until the last possible moment, for each individual application for approval or permit that was so required; and

(iii) as to supply of necessary information, drawings and documents to complete or finalize the applications and to obtain the development permits

(b) as to:

(i) accurately as to the likely or reasonably foreseeable infrastructure, consultancy, finance, rates and headworks contributions, land tax, and holding costs (as well as the amounts of the requisite LCC and Energex bonds) and delays which

would be incurred by Zonebar in or whilst procuring such approvals and permits;

(ii) as to any critical co-ordination issues and funding constraints which would apply to the execution of the Lot 7 Works, the Lot 8 works and the External Works;

(iii) as to Abigroup's on-going compliance or non compliance with any critical path programming constraints and any contractual time limits applicable to the execution of all or any of such Works in the light of the Norstorm Contracts as to Lot 7 and the Lot 7 works, the Lot 8 Building Agreement as to the Lot 8 works and the First Autofin Contact as to Lot 5; and

(iv) to procure and implement approved tenders and only recommend and effect acceptance of fixed price and time tenders from other reputable and reliable builders (on the basis of suitable performance security guarantees and provision for suitable liquidated damages) for the execution of any Works comprised in the Springwood Central Project, based upon fully detailed designs, specification and drawings, approved and priced independently by approved quantity surveyor/s or construction costs consultant/s and in the light of the relevant commercial and temporal conditions imposed under the Norstorm Contracts as to Lot 7 and the Lot 7 works and the Autofin Proposal and the First Autofin contract as to Lot 5; and

(c) the excision of that part of Lot 100 which was not required to be dedicated or transferred as public reserve, nor to obtain compensation of true market value therefor [sic] for Zonebar, as stated in paragraph 105. [lengthy particulars not reproduced]

...

74. Further to paragraph 73, as a result of the breaches of Global Management referred to in paragraph 75 in relation to the Lot 7 works, such that it did not effect or procure and that it delayed the timeliness of Practical Completion by 30 April 2001 (achieved on 24 August 2001) and Final Completion by 18 May 2001 (achieved on 11 September 2001) in its respective roles as Superintendent under the Norstorm/Global Construction Building Agreement, the Lot 7 Building Agreement and the External Works Agreement and as Project Manager, Zonebar suffered loss and damage.

...

75. The breaches referred to in paragraphs 73-74 were breaches of and/or did not conform with:

(a) Representations:-

(b) the Skill term (paragraph 18);

(c) the Skill Duty (paragraph 20);

(d) the PMA fiduciary Duty (paragraph 21).

(e) its Partnership Duties as to the Lot 7 Works (paragraphs 38-41);

(f) the Investment Representations (paragraph 46);

(g) the costing Representations (paragraph 47);

(h) the CMA Representations (paragraph 48);

(i) the External Works Duty (paragraph 52);

(j) the Duties of Superintendence (paragraph 53);

(k) the 90 Day Representation (paragraph 56);

(l) the Lot 100 Representation (paragraph 14);

(m) the Facilitation Duties (paragraph 58); and/or

(n) Section 52 of the TPA as to such Representations

...

105. Further to paragraphs 14, 73 and 74, as a result of breaches by Global Management of the Skill Term and the Skill Duty owed to Zonebar and of Section 52 of the TPA in relation to the dedication and transfer of Lot 100 to the State of Queensland, Zonebar suffered loss and damage.

Particulars

(A) The development permits or approvals of LCC in File D002743 in relation to the Reconfiguration for future SP 131663 and the Material Change of Use-Retail Showrooms and Warehouses for future Lots 7 & 8 on SP 131663 required that Zonebar as applicant transfer an area of land equivalent to 10% of the site then owned by the applicant as public reserve;

(B) LCC required Zonebar to transfer, free of cost to the State of Queensland, as public reserve all of the land in Lot 100 in SP131633 as a condition of its Development Permit for Reconfiguration for future SP 131663 and Preliminary Operational Works Approval in lieu of 10% of the area of the site then owned by Zonebar;

(C) Prior to the dedication and transfer of Lot 100 as aforesaid, Zonebar was advised by Global Management, negligently and in breach of Section 52, that it had no alternative in the circumstances other than to dedicate and transfer all of the land comprised in Lot 100 as required by Council, despite Zonebar's protestations that it was only obliged by Condition 9 of the Orignal Re-zoning Approval, as repeated in subsequent Development Permits issued by LCC to Zonebar, to dedicate or transfer a land area equivalent to 10% of the Zonebar land.

(D) As a result of that advice, the State of Queensland was unjustly enriched at the expense of Zonebar by the transfer of future Lot 100 on SP 131663 to the State of Queensland on about 7 August 2001, free of cost to LCC or the State of Queensland, in lieu of the transfer of only 10% of the site then owned by Zonebar.

(E) An area of 1.74 ha. or approximately 17,400 m/2 in excess of that required, was so transferred to State of Queensland.

(F) Global Management did nothing to obtain compensation for Zonebar for this unjust enrichment of the State of Queensland at Zonebar's expense.

(G) The excess area was capable of being used in various developments, including but not limited to an extension of the adjacent higher density cluster residential development, subject to landfill, batters and retention walls or use as a golf range or otherwise.

(H) As at 5 August 2004, adjacent Lot 1 to Lot 100, was assessed by SB Group Property Valuers & Consultants Ltd as having the Market Value of $2,200,000 or $215/m2 "As Is" with Development Approval in place for Mortgage Security Purposes. It was sold and transferred by Zonebar for $1.5M or $146.63/m2 on 16 September 2004.

(I) The current open market or development value of the parcel of land so lost by Zonebar was about $150/m2 and probably in excess of that estimate if a residential or higher use density development (after landfill) was capable of being effected in that area. Accordingly, in August 2001, that parcel had a potential market value of the order of:

17,400 m2 x $150 = $2,610,000.

(J) Adopting a rounded off value of $2.5M, that parcel of land, if realised then, the proceeds of sale would have had a Garry forward interest benefit for Zonebar:

$2.5M x 2341 days (from 31/08/01 until 29/01/08) x 12% p.a. = $1,924,110

(K) Together, the claim plus interest amount to:

$2,500,000 + $1,924,110 = $4,424,110'

[32] The prayer for relief pleaded in the 6ASOC is in the following terms:

'As against the First Defendant:

Payment of debts under indemnities and damages for negligence, breach of fiduciary duties, breach of contract and for breaches of the Trade Practices Act 1974 (Cth), including interests (as particularised above or generally) and GST on all amounts:

1. $1,817,798 as debts pursuant to specific indemnities in the Indemnity Contract and the Partnership Agreement plus interest of 41,392,476 as claimed n paragraphs 60-66 and Annexure H; and damages and interest;

2. $9,669,284 (including 1) concerning the turnkey Directions and all Representations re Lots 5, 7 & 8 as claimed in paragraphs 67-72 and Revised Annexures A, B, D and H;

3. further or alternatively to 1 and 2, $11,129,625 concerning those Directions, Representations and delays to Lot 7 Works, Lot 8 Works and External Works and Sales of Lots 5, 7 & 8 and loss re Lot 100 as claimed n paragraphs 67, 73-76 and 105;

4. included in 2, damages of $144,922.18 plus interest of $106,343 concerning an overpayment to Abigroup for the Lot 7 Works as claimed in paragraphs 77-84;

5. included in 2 and 3, $4,348,805 concerning the Lot 8 Works as claimed in paragraphs 67 and 85-95 – Revised Annexure A;

6. included in 2, $2,110,205 concerning the External Works and Lot 5 as claimed in paragraphs 67, and 96-104 and Revised Annexure B;

7. included in 3, $4,424,110 concerning Lot 100 and the Lot 100 Representation as claimed in paragraphs 14, 67 & 105; and

8. further or alternatively to 2 and including parts of 5 & 6, $13,593,394 concerning the Investment Representations as claimed n paragraphs 67-76, and 85-112;

And, as against the Second Defendant:

Pursuant to Sections 52, 75B(1)(c), 82 and 87 of the Trade Practices Act 1974 (Cth) as damages, compensation, interest and gst [sic] on:

9. $9,669,284, as claimed in paragraph 2;

10. further or alternatively, $11,129,625, as claimed in paragraph 3 above (re Lots 5, 7, 8 and 100); and

11. further or alternatively, 44,348,805, as claimed in paragraph 5 (re Lot 8);

12. further or alternatively, $2,110,205, as claimed in paragraph 6 (re Lot 5);

13. further, $4,424,110, as claimed in paragraph 7 above (re Lot 100); and

14. further or alternatively, $13,593,394 as claimed in paragraph 8 (re Lots 5, 7, 8 and 100).

As against both Defendants:

(a) Alternatively to interest claimed above, interest under Section 47 of the *Supreme Court Act* 1995 at a rate of 11.5% on all amounts awarded herein.

(b) Costs.

(c) GST on all such amounts.'

[33] The defendants contend, in brief, that these claims by the plaintiff for an additional $4,424,110 concerning Lot 100 and the Lot 100 representations involve the addition of new causes of action, for which the relevant period of limitation which was current at the date the proceedings commenced has ended, and as such, leave of the Court was required to make that amendment to the 6ASOC. The defendants' application to strike out is founded on the absence of such leave having been granted. The plaintiff contends that such leave is, and was, not required, but as a fail-safe has made a cross-application for such leave should it be required.

[34] I should also note that these are not the only amendments which the plaintiff would seek to make to the pleading. In addition to these paragraphs in the 6ASOC, the plaintiff has sought, by its application, to make further amendments, as set out in a schedule appended to the application:

'**ATTACHMENT A**

Insert after paragraph 74 in 5ASOC or after paragraph 105 in 6ASOC

74A/105A In breach of the duties referred to in paragraph 11 herein, Global Management failed to advice [sic] Zonebar that:

(a) Zonebar should not accept the change to Condition 5.1 of the Negotiated Decision Notice issued on 7 February 2001;

(b) Zonebar should appeal against the change to Condition 5.1 of the Negotiated Decision Notice on 7 February 2001;

(c) Zonebar had rights and remedies including a right of appeal in respect to Condition 9 of the original Rezoning Approval;

(d) Zonebar had rights and remedies in respect to the variation of Condition 5.12 referred to herein;

(e) Zonebar that it had rights to consideration, compensation or accreditations under the *Integrated Planning Act* 1997.

74B/105B As a result of the failure of Global Management to advise Zonebar in terms of Paragraph 74A/105A herein, Global acted in breach of its duties owed to Zonebar.

74C/105C At all material times Zonebar relied on the advice given by Global Management.

74D/105D As a result of the aforementioned breach of duty, Zonebar suffered loss and damage.

74E/105E The loss and damages suffered by Zonebar was:

(a) that lot 100 be transferred to the local authority for no consideration and free of costs;

(b) Zonebar having to provide 10% of all the property be dedicated to green space;

(c) Zonebar obtaining on the sale of the lots and amount less than that which would have been obtained had not:

(i) lot 100 be required to be transferred to the local authority free of cost;

(ii) the remaining lots not be subject to the 10% free green space requirement.

(d) Zonebar was denied the opportunity to obtain consideration and compensation or accreditation under the *Integrated Planning Act* 1997 due to the variation of Condition 5.1 and the imposition of Condition 9;

(e) Zonebar lost opportunity to develop the property to a different configuration with a resultant increased yield and profit had conditions 5.1 and 9, referred to herein, been successfully challenged.

Insert after paragraph 98 in 5ASOC or after paragraph 105E in 6ASOC

98A/105F Between 13 April 2000 and 28 December 2000, Zonebar, in writing, made inquiries of Global Management in respect to the progress of local authority approvals.

98B/105G In answer to the abovementioned enquiries, Global Management advised and represented to Zonebar that:

(i) Zonebar should transfer lot 100 to the local authority free of costs;

(ii) Zonebar should accept and not appeal against the change to Condition 5.1;

(iii) Zonebar had no rights or remedies to ground any appeal or application or take other action in respect to Condition 9;

(iv) Zonebar did not have rights to seek or obtain consideration, compensation or accreditation under the *Integrated Planning Act* 1997.

98C/105H The abovementioned representations were made in trade and commerce.

98D/105I In reliance on the representations by Global Management, Zonebar did not seek to:

(a) challenge the imposition of the change to Condition 5.1;

(b) challenge the imposition of Condition 9 as interpreted by the local authority;

(c) apply for compensation under the Integrated Planning Act.

but nevertheless, completed the development in compliance with condition 5.1 and condition 9.

98E/105J Each of the abovementioned representations was misleading or deceptive to Zonebar or likely to mislead or deceive Zonebar.

98F/105K The representations were representations as to future matters in the meaning of Section 51A of the *Trade Practices Act*.

98G/105L As a result of reliance on the representations and the contravention, Zonebar has suffered loss and damage, but such amount is only ascertainable and quantifiable on the sale all of the lots other than lot 100.

98H/105M In the premises Global Management has by the representation's [sic] contravened section 52 of the *Trade Practices Act*.

98I/105N As a result of the contravention, Zonebar has suffered loss and damage in the amount [to be ascertained] being the amount the lots would have been sold for in a condition not subject to the local authority requirements as imposed.

98J/105O On 6 September 2005, Zonebar was advised by Eaton Lawyers that it had a right to compensation under section 5.4.5 of the *Integrated Planning Act* 1997 but such compensation was subject to time limits in addition to other rights in respect to the local authority approvals.'

[35] The application filed by the plaintiff is less than a model of clarity. For example, one of the alternative orders sought is 'that pursuant to *UCPR* 375 the plaintiff have leave to amend the fifth statement of claim in terms of Attachment 'A' hereto, yet attachment A seems to seek to have amendments made to either the 5ASOC or the 6ASOC. In argument, however, counsel for the plaintiff, on instructions, told me that the version of the pleading which the plaintiff really sought to propound was the 6ASOC with the inclusion of the further paragraphs set out in Attachment A to the plaintiff's application.

[36] The central issues for resolution, therefore, are whether the amendments in the 6ASOC and Attachment A relating what can compendiously be described as the Lot 100 claims require leave, and if so, whether that leave ought be granted. In respect of the first question, rule 378 provides that before the filing of a request for trial date, a party may, as often as necessary, make an amendment for which leave was not required under the *UCPR*. The request for trial date has not been filed, but the defendants contend that leave for these amendments was and is required because they plead new causes of action for which the limitation periods have expired.

[37] Rule 376 relevantly provides:

'(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 changing the capacity in which a party sues, whether as plaintiff or counterclaiming defendant, only if –

(a) the court considers it appropriate; and

(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.'

[38] Accordingly, the following questions arise in connection with each of the Lot 100 claims:

(a) Is it a new cause of action?
(b) If so, has the limitation period for the cause of action expired?
(c) If so, does the new cause of action arise out of the same facts or substantially the same facts as the causes of action previously pleaded by the plaintiff?
(d) If so, is it otherwise appropriate for the amendment to be allowed?

[39] Central to the Lot 100 claims made in the 6ASOC is the allegation in paragraph 14 that the first defendant advised and represented to the plaintiff 'that it was required to dedicate and transfer for no consideration to Council or the State of Queensland future Lot 100 ('the Lot 100 representation').' This was a completely new allegation, made for the first time in the 6ASOC. It did not arise out of, nor was it a further particularisation of, facts or matters which had been pleaded in previous versions of the statement of claim.

[40] Paragraph 73(c) of the 6ASOC pleads, relevantly, that the first defendant 'failed, neglected or omitted to advise, inform or warn [the plaintiff] and/or to take the necessary steps or actions to procure or effect ... the excision of that part of Lot 100 which was not required to be dedicated or transferred as public reserve, nor to obtain compensation of true market value therefore for [the plaintiff], as stated in paragraph 105.' This is then alleged, in paragraph 75 (set out above) to constitute a breach of the various duties pleaded elsewhere in the 6ASOC. Once again, this is a completely new factual allegation, which in no way arises out of, or further particularises, the cases which had been posited in the early iterations of the statement of claim.

[41] It follows, and indeed it is apparent on the face of the 6ASOC, that the matters alleged in paragraph 105 of the 6ASOC, which are expressly pleaded to arise 'further to paragraphs 14, 73 and 74' are completely new claims and allegations.

[42] Similarly, it is abundantly clear that the facts and matters referred to in the proposed new paragraphs set out in Attachment A are completely new allegations which are not even made in the 6ASOC.

[43] In enquiring whether the effect of the paragraphs in the 6ASOC and Attachment A to which I have just referred is to include new causes of action, it is no answer to say, as the plaintiff now does, that previous versions of the statement of claim all alleged a breach of duty by the defendants in respect to Local Government approvals or that claim had previously been made pursuant to the *TPA* in respect to other representations made by the defendants.

[44] In *Balsato v Campbell*[1], Philip McMurdo J said[2]:

> 'The term "cause of action" was defined in *Cooke v Gill* as being "every fact which is material to be proved to entitle the plaintiff to succeed", a definition which many judgments have employed in the context of this rule or its equivalent: see e.g. *Allonnor Pty Ltd v Doran* per McPherson JA. But it has not been applied literally, for otherwise any new fact to be added to a plaintiff's case would be treated as raising a new cause of action which required leave in the context of a rule such as r 376(4). So in *Allonnor Pty Ltd v Doran* for example, there is an indication of what the Court of Appeal in *Thomas v State of Queensland* subsequently endorsed as a "fairly broad brush comparison between the nature of the original claim and that to which it is sought to be amended". The dividing line is between the addition of facts which involve a new cause of action and those which are simply further particulars of the cause already claimed, and its location involves a question of degree which can be argued, one way or the other, by the level of abstraction at which a plaintiff's case is described. Some illustrative guidance is provided by *Allonnor Pty Ltd v Doran*, *Thomas v State of Queensland* and another judgment of the Court of Appeal, *Central Sawmilling No. 1 Pty Ltd & Ors v State of Queensland*.'

[45] It is clear in the present case that the Lot 100 claims now sought to be advanced by the plaintiff involve different factual allegations, different breaches of contractual, statutory and common law duties and different claims for damage that had previously been pleaded. (See, for comparison, *Thomas v State of Queensland*[3]). In my view, these paragraphs would seek to raise new causes of action.

[46] The next question then is whether the limitation periods in respect of these new causes of action have expired.

[47] When one reads paragraph 73, 74 and 105 of the 6ASOC, it appears that the causes of action sought to be advanced in respect of the Lot 100 representations are founded in:

(a) Contract, as an alleged breach of the Skill Term;
(b) Tort, as an alleged breach of the Skill Duty;
(c) An alleged contravention of s 52 of the *TPA*.

[48] In respect of the claim in contract, it has long been the law that the cause of action accrues on the breach. This determines the commencement of the six year limitation period under s 10(1)(a) of the *Limitation of Actions Act* 1974 ('*LAA*').

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1 [2006] QSC 191
2 at [8]
3 [2001] QCA 336 at [16]

The breaches alleged in paragraph 73 of the 6ASOC are expressly said to have occurred between 23 September 1999 and 23 November 2000. The breaches alleged in paragraph 74 are all said to have occurred during 2001. On any view, the limitation period for the Lot 100 claims in contract had expired when the 6ASOC was filed in January 2008.

[49] The cause of action in negligence for breach of the Skill Duty is alleged to arise from failing or neglecting to advise the plaintiff that it was not required to dedicate all of Lot 100 or failing to obtain compensation of the true market value therefore. Again, according to the express plea in paragraph 73, this allegedly occurred between 23 September 1999 and 26 November 2001.

[50] The essential elements necessary to the cause of action in negligence to accrue in the present context are the duty of care, the breach of that duty and injury caused by that breach. The cause of action in negligence in claims such as each of those pleaded here does not accrue until the damage caused by the breach is suffered.

[51] On the case sought to be pleaded in the 6ASOC, the plaintiff claims to have suffered damage when Lot 100 was transferred for no consideration or compensation. This transfer occurred, according to the 5ASOC and on other evidence before me, in August 2001. Accordingly, the six year limitation period imposed by s 10 of the *LAA* for the Lot 100 claims in negligence had expired when the 6ASOC was filed.

[52] Similarly, to the extent that the 6ASOC would seek to raise a case that the Lot 100 representation (as defined in para 14 of the 6ASOC) contravened s 52 of the *TPA*, it is clear from para 105(d) that the loss-suffering event was the voluntary transfer of the Lot 100 land on 7 August 2001. An extensive affidavit by the plaintiff's director, Mr Smits, has been filed which goes into some detail to specify the alleged failures of the first defendant to disabuse the plaintiff of the substance of the Lot 100 representations, and also to quantify the losses suffered by reference to the sale values of surrounding parcels of land in the years following 2001. But the method of quantification of the loss is to be distinguished from the loss being incurred. As Brennan J (as he then was) said in *Wardley Australia Ltd v Western Australia*[4]:

> 'A plaintiff may suffer economic loss as damage in a number of ways: by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability. Whether loss or damage is actually suffered when any of those events occurs depends on the value of the benefit, if any, acquired by the plaintiff paying the money, transferring the property, having the value of the asset diminished or incurring the liability. If the plaintiff acquires no benefit, the loss or damage is suffered when the event occurs. At that time the plaintiff's net worth is reduced. And that is so even if the quantification of that loss or damage is not then ascertainable.'

[53] Accordingly, the s 52 claim in respect of the Lot 100 representation was pleaded in the 6ASOC for the first time only after the six year limitation period prescribed by s 82(2) of the *TPA* had expired.

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4 (1992) 175 CLR 514 at 536

[54] By the draft pleadings set out in Attachment A, however, it would appear that the plaintiff would seek to mount even further arguments of breach of duty and breach of the *TPA*. The terms of these proposed pleadings is set out above. They are patently an attempt to raise new causes of action. In its written submissions, the effect of the case sought to be propounded was stated by the plaintiff as follows:

> 'When Lot 100 became the subject of the revised development approval of 22 December 2000, the Defendants failed to tell the Plaintiffs that:
>
> (i) the change should not have been consented to but rather be opposed;
>
> (ii) the Plaintiff had a right to compensation under the *Integrated Planning Act*;
>
> (iii) the Defendant failed to tell the Plaintiff that the local authority requirement that each other lot have a 10 per cent free space be opposed.'

[55] The plaintiff further submitted in this respect:

> '20. The Plaintiff complains that the Defendant's [sic] did not advise it of the other rights or alternatively other causes of action open to it in response to the local authority requirement that Lot 100 an 10 per cent of all other land become parkland.
>
> 21. The Plaintiffs [sic] complaint is not that reliance on representations caused the transfer of Lot 100 for no consideration but rather Zonebar was not advised to exercise its rights in respect to either compensation or its right to oppose the restriction that a further 10 per cent of all remaining lots be sent over to free space.
>
> 22. The Plaintiff by Mr Smits deposes that he did not become aware of these rights and accordingly the failure of the Defendant's [sic] to properly advise the Plaintiff of the rights until receiving advice on the 6 September 2005.
>
> 23. Accordingly, the relevant time limit of six years did not commence until Mr Smits became aware of the loss and damage.'

[56] Reference is made in the last paragraph quoted to *Crump v Equine Nutrition Systems Pty Ltd*[5].

[57] The first set of proposed pleadings in Attachment A (paras 74A/105A-74E/105E) would seek to plead failures on the part of the first defendant to give certain advice. These failures are said to be 'in breach of its duties owed to [the plaintiff]'. This can only be a reference to the duty described elsewhere in the Statement of Claim as the 'Skill Duty'. The loss said to be suffered by reason of those breaches of duty is set out in para 74E/105E. I should observe in passing that these paragraphs are in direct contradiction of the submission made in paragraph 21 of the plaintiff's submissions quoted above. That notwithstanding, however, it is clear that, so far as

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5 (2006) NSWSC 206 at [135]

the losses claimed in paragraphs 74E/105E(a), (b), (c) and (e) are concerned, those losses were incurred when the Lot 100 was transferred in August 2001.

[58] The proposed claim at paragraph 74E/105E(d) is problematic at a number of levels. First, the notion that the plaintiff was 'denied' the opportunity to obtain consideration and compensation under the *Integrated Planning Act* 1997 ('*IPA*') does not sit with the fact, as deposed to in the material before me, that on 4 August 2007 the plaintiff filed what it described as a 'protective' originating application against the Logan City Council.

[59] Secondly, a person's right to compensation in the event of suffering loss 'because of an error or omission in a planning and development certificate' arises pursuant to s 5.4.5 of the *IPA*. By s 5.4.6(c), such a claim may be brought 'at any time after the day the certificate is given'. There is nothing in the proposed pleading to support the notion that the plaintiff has, in fact, lost any right it may have had under s 5.4.5, or, even less, that it has been 'denied' such a right. Even if, as Mr Smits says, he did not know of the right to claim such compensation until he received advice from his then solicitors in September 2005 about legal action he was contemplating against the Logan City Council and its officers, there is nothing in the material to support the notion that such a right has been lost.

[60] In an affidavit sworn on 18 April 2008, Mr Smits swore that on 6 September 2005 the plaintiff 'was advised by Eaton Lawyers that it had a right to compensation under s 5.4.5 of the *Integrated Planning Act* 1997 and that such compensation was subject to time limits'. Yet, Mr Smits had exhibited that advice from Eaton Lawyers to an affidavit he sworn only a week earlier, on 11 April 2008. The advice makes it expressly clear that it was directed to potential proceedings against the local authority. After stating a brief summary of the background, the advice said:

> 'It is our understanding that you wish to contest aspects of this transfer under the premise that it was erroneous and you were coerced and that you are contemplating legal action against the LCC and the officers in question.'

[61] Under the heading 'Statutory Compensation', the advice said:

> 'Part 4 of the *Integrated Planning Act* 1997 provides for compensation in instances where expiry of certain time limits, this legislation can only be useful should it be decided that the LCC's definition of 10 per cent is correct. In such an instance, it would be possible to argue that the development approval was wrongly worded (the document refers clearly to the then Lots 1 and 42 as the "site" and thus 10 per cent of those lots are able to be appropriated). If this is found to be the case, you would be entitled to recover compensation under s 5.4.5 of the Act.'

[62] In short, on this aspect, the proposed pleading articulated in paragraph 74E/105E(d) of Attachment A does not, in its current form, give rise to any cause of action, let alone new cause of action, on the part of the plaintiff.

[63] The second tranche of proposed pleadings in Attachment A would plead certain representations said to have been made by the first defendant to the plaintiff (paragraphs 98D/105G). Once again, this is in direct conflict with the contention set out in paragraph 21 of the plaintiff's submissions, which expressly disclaimed a complaint of reliance on representations but contended that the plaintiff's case is that the plaintiff was not advised to exercise its rights in respect to either compensation or its right to oppose the restriction that a further 10 per cent of all remaining lots be sent over to free space. Once again, however, when one looks at paragraphs 98G/105L and 98I/105N of Attachment A, it is clear that the loss-suffering event from which the losses therein claimed are said to flow is the voluntary transfer of the Lot 100 land. Those paragraphs merely articulate the manner of quantification of the loss said to have been suffered by reason of that event.

[64] Paragraph 98J/105O is an attempt by the plaintiff to postpone the accrual of the limitation period to the time when Mr Smits received the advice from Eaton Lawyers in September 2005. Even putting aside the difficulties to which I have referred above in this regard, however, it seems to me that this attempt is to no avail. It was in connection with this paragraph, as I apprehend it, that the plaintiff sought comfort in the following statement by Hoeben J in *Crump*[6]:

> '*Wardley Australia Ltd v Western Australia* ... makes it clear that in a case such as this time will not commence to run against a plaintiff until the cause of action under s 82 TPA accrues. That does not occur until a plaintiff becomes aware or ought reasonably to have become aware of the alleged loss or damage.'

[65] As I understand it, the plaintiff would seek to say that, as it did not become aware that it had a right to compensation under s 5.4.5 of the *IPA* until September 2005, any limitation period in respect of a claimed loss of that right of compensation did not accrue until that date. Such a proposition, however, blithely ignores not only the fact of the voluntary transfer of the Lot 100 land in August 2001, but Mr Smit's own assertions as to his knowledge and understanding of the matters which would underpin a claim which might conceivably be brought under s 5.4.5 of the *IPA*. For example, in paragraph 19 of his affidavit sworn on 18 April 2008, Mr Smits says that at about 20 December 2000 he 'expressed the view to the defendant in telephone conversations between Messrs myself and Mr Jakeman to the effect that condition 9 (and condition 4.1) meant that Zonebar was only obliged to dedicate 10 per cent of the entire Zonebar land to park reserve and not 10 per cent of the developable lots'. Further in that affidavit, he deposes to attending a meeting with Council officers on an occasion between 14 March 2001 and 11 April 2001 in the course of which he was advised that 'Council's interpretation of condition 9 was that it could require Zonebar to dedicate to parkland reserve an area equivalent to 10 per cent of the site area of each developable lot in the project' and that 'we expressed our disagreement with that proposition'. This indicates knowledge of the necessary facts which would underlie a claim pursuant to s 5.4.5 of the *IPA*. As Wilson J said in *Do Carmo v Ford Excavations Pty Ltd*[7]:

> 'Knowledge of the legal implications of the known facts is not an additional fact which forms part of a cause of action. Indeed, a person may

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6 *supra* at [135]

7 (1984) 154 CLR 234 at 245

> be well appraised of all of the facts which need to be proved to establish a cause of action but for want of taking legal advice may not know that those facts give to a right to relief.'

[66] Accordingly, the proposed paragraph 98J/105O would not, in my view, have the practical effect of deferring the accrual of a cause of action (if it exists) founded in a right to claim compensation under s 5.4.5 of the *IPA* until the time of receiving the advice from Eaton Lawyers in September 2005.

[67] I have spent some time on the proposed amendments set out in Attachment A, also having noted that these proposed amendments do not in fact reflect what is said in the plaintiff's submissions to be the case that the plaintiff would really desire to advance.

[68] It will be apparent from what I have said so far that it is my view that, to the extent that new causes of action are raised by the plaintiff in the 6ASOC and proposed by the plaintiff in Attachment A, the limitation periods in respect of those new causes of action had expired at the time the 6ASOC was filed.

[69] The next question, then, is whether each of those new causes of action arises out of the same facts or substantially the same facts as the causes of action previously pleaded by the plaintiff.

[70] True it is, as Thomas JA said in *Draney v Barry*[8] that 'substantially the same facts' should not be read as tantamount to the same facts, and the need to prove some additional facts is not necessarily fatal to a favourable exercise of the discretion under rule 376(4). As his Honour said:

> 'If the necessary additional facts to support a new cause of action arise out of substantially the same story as that which would have been told to support the original cause of action, the fact that there is a changed focus with elucidation of additional details should not of itself prevent a finding that a new cause of action arises out of substantially the same facts.'

[71] Even the most generous view for the plaintiffs, however, could not make good such a contention in the present case. I have referred above to the fact that the Lot 100 claims now sought to be advanced in the 6ASOC involve different factual allegations, different breaches of contractual, statutory and common law duties, and different claims for damage than had previously been pleaded. The novelty of the case sought to be advanced in Attachment A is even more apparent. It is clear, in my view, that these causes of action do not arise out of substantially the same facts as the causes of action which have previously been pleaded.

[72] It follows that the amendments contained in the 6ASOC to raise the Lot 100 claims were impermissible as amendments for which leave was required but had not been obtained. For the reasons I have just set out at length, I would not now grant such leave, to the extent that the amendments seek to introduce new causes of action in

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8 [2002] 1 Qd R 145

respect of which these limitation periods have expired. Nor would I grant leave to make further amendments to the statement of claim to incorporate the proposed paragraph set out in Attachment A to the plaintiff's application.

[73] There was a further objection to the 6ASOC, namely paragraph 38 which pleaded:

> '38. In reliance upon the Tender Representations (paragraph 36), the current Turnkey Directions (paragraph 45) and Costing Representations (paragraph 47), between 10 and 23 November 2000, with a view to enabling and effecting:
>
> (a) Norstorm to purchase proposed Lot 7 from Zonebar for $700,000;
>
> (b) the supply of the Lot Works to Norstorm for $1,150,000 exclusive of GST;
>
> (c) recovery or derivation by Zonebar of an anticipated development profit of $350,000 in respect of the supply of the Lot 7 Works to Norstorm;
>
> (d) recovery or derivation by Global Management of any saving in total costs for the Lot 7 Works being below $800,000;
>
> (e) funding of the execution of the Lot 7 works by Zonebar;
>
> (f) limitation of Zonebar's ultimate liability for such total costs to $800,000 through indemnification from Global Management;
>
> (g) the execution of the Lot 7 Works by a duly licensed builder; and
>
> (h) achieving Practical Completion of the Lot 7 Works by 30 April 2001;
>
> Zonebar accepted and the offer from Global Management to cause or procure Global construction to be the licensed builder nominated for the execution of the Lot 7 Works under the proposed Norstorm/Global Construction Building Agreement and to procure the physical execution of those works by Abigroup (or another construction company) under an assignment or subcontract pursuant to that Building Agreement and entered in to a Partnership Agreement with Global Management as admitted by the defendants in paragraph 25 of the first amended defence.'

The defendant objected to the incorporation in that pleading of the admission contained in paragraph 25 of the first amended defence. The defendants' consternation in this regard is well-founded. The paragraph of the first amended defence sought to be incorporated by the plaintiff in paragraph 38 of the 6ASOC was a pleading in response to the original statement of claim filed on 1 April 2003. Since then, the plaintiff has amended (or purported to amend) its pleading no less than six times, including the 5ASOC which was a fresh pleading and the 6ASOC which was again a significantly different pleading. The time for the delivery of the defence to the more recent amended statements of claim has been suspended since my order of 15 June 2007. It is clear that the defendant intended to completely

re-plead its defence once it had received the final form of the amended statement of claim.

[74] Paragraph 25 of the defendant's amended defence admitted allegations contained in paragraphs 28 and 29 of the original statement of claim. Paragraphs 28 and 29 of the amended statement of claim were in completely different terms from paragraph 38 of the 6ASOC.

[75] In all the circumstances, the plaintiff's purported adoption of an admission of superseded paragraphs in a previous version of the statement of claim is completely inappropriate.

[76] Given my findings in relation to the Lot 100 claims contained in the 6ASOC and also the fact, as I have noted, that the 6ASOC was completely formally defective for non-compliance with rule 382(1), I consider the appropriate approach is to strike out the 6ASOC in its entirety and require the plaintiff to re-plead the statement of claim.

[77] It follows also that the 2AC should be struck out, and the plaintiff have leave to file an amended claim which contains a prayer for relief in conformity with its next amended pleading. In adopting this approach, however, I would not wish it to be thought that I endorse the conduct of the plaintiff's solicitor in seeking to justify the filing of the 2AC on the basis that the amendments were technical in nature when even a moment's deliberation reveals that not to be the case.

[78] I will hear the parties as to the necessary orders and directions which are now required in that respect, and as to costs.

The plaintiff's application concerning the previous costs order

[79] On 11 April 2008, I made orders, including an order that the plaintiff pay the defendant's indemnity costs.

[80] The plaintiff directly (i.e. not through its solicitors) filed an application by which it was sought that:

(a) Mr Smits have leave to appear on behalf of the plaintiff;

(b) An order under Rule 667 setting aside the indemnity costs order made on 11 April 2008, and substituting an order that those costs be reserved or made costs in the cause.

[81] This application was called on for hearing immediately after the hearing of the pleadings applications which I have determined above. Notwithstanding the presence in Court of counsel who had appeared for the plaintiff on the pleading applications, that counsel was not instructed to appear on the application under rule 667. Rather, Mr Smits, the director of the plaintiff, sought leave to appear on behalf of the plaintiff. That leave was required because s 209 of the *Supreme Court Act* 1995 provides:

> '(1) In all matters and proceedings in the Supreme Court a party may appear in person or by a lawyer or by any person allowed by special leave of the judge in any case.'

[82] The application was sought to be made under rule 667(1) which provides:

> '(1) The court may vary or set aside an order before the earlier of the following –
>
> (a) the filing of the order; or
>
> (b) the end of 7 days after the making of the order.'

[83] It became apparent in the course of argument, however, that the order in question was filed on 14 April 2008, but the application was not filed until 9 May 2008. In short, and as was accepted by Mr Smits, even if I had granted Mr Smits leave to appear, the application under rule 667 was bound to fail because the order in question had been filed well before the application had been made.

[84] The plaintiff's application under rule 667 should therefore be dismissed with costs.

[85] As already noted, I will hear the parties with respect to the necessary orders and directions.