SUPREME COURT OF QUEENSLAND

CITATION:	*Zonebar Pty Ltd v Global Management Corporation Pty Ltd & Anor* [2010] QSC 67
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:	S2904 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2009; 23 October 2009
JUDGE:	Daubney J
ORDER:	**On the plaintiff's application for leave to amend there will be the following orders:** **1. The plaintiff has leave to file and serve a Fourth Amended Claim in the form of the draft exhibited to the affidavit of Joel Hunter Pitman filed 23 July 2009, but excluding para 1 of the relief claimed.** **2. The plaintiff have leave to file and serve an Eighth Amended Statement of Claim in the form of the draft exhibited to the affidavit of Joel Hunter Pitman filed 23 July 2009, but excluding paras 3 – 7 of the draft pleading and para 1 of the prayer for relief.** **3. The plaintiff shall pay the defendant's costs of and incidental to the application.** **The plaintiff's application for leave to adduce further evidence is dismissed with costs.** **The defendant's application filed 27 May 2009 is**

dismissed with costs reserved.

The matter be listed for further review in the Supervised Case List at 4.30pm on 22 March 2010.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – AMENDMENT – where a sixth amended statement of claim and second amended claim had previously been struck out – where plaintiff had been granted leave to file a further amended claim with its next amended pleading – where a fourth amended claim and an eighth amended statement of claim were proposed – where parties had entered into a written agreement whereby the defendant was engaged by the plaintiff to act as project manager for a development project – where it was alleged this constituted a partnership agreement – where this partnership agreement was alleged for the first time in the proposed eighth amended statement of claim –where the parties also entered into a written partnership in respect of a specific development – where this agreement did not raise any new matters of fact or claim which had not been previously pleaded in previous versions of the statement of claim – whether leave to amend the pleadings should be granted

PARTNERSHIP – GENERALLY – WHAT CONSTITUTES PARTNERSHIP – FACTS AND AGREEMENTS EVIDENCING PARTNERSHIP – PARTNERSHIP IN FACT – AGREEMENT TO SHARE PROFITS – where the parties entered into a Project Management Agreement – where a term of this agreement was that the parties would share profits on a prescribed basis –whether the parties were in partnership pursuant to section 6 of the *Partnership Act*

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – EVIDENCE – where judgment had been reserved on the matter – where the plaintiff sought to rely on a further affidavit – where the plaintiff asserts that a failure to allow the evidence would lead to an injustice – where the plaintiff did not provide any explanation for its failure to lead that evidence at an earlier stage – whether leave to rely on the further affidavit first prepared and delivered only after the conclusion of argument should be granted

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – where the defendant made an application to have the plaintiff's claim dismissed for want of prosecution– where this was not a case where there had been long periods of total inactivity by the plaintiff – where it had taken six years for the plaintiff to develop a settled statement of claim – whether the plaintiff's claim should be dismissed

for want of prosecution

Limitation of Actions Act 1974 (Qld), s 10(2)
Partnership Act 1891 (Qld), s 6, s 27, s 47
Uniform Civil Procedure Rules, r 5

Aon Risk Services Aust Limited v Australian National University (2009) 239 CLR 175, applied
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Duke Group Ltd v Pilmer (1999) 72 SASR 64, applied
Smith v New South Wales Bar Association (1992) 176 CLR 256, applied
Zonebar Pty Ltd v. Global Management Corporation Pty Ltd & Anor [2008] QSC 263, cited
Zonebar Pty Ltd v. Global Management Corporation Pty Ltd & Anor [2009] QCA 121, cited

COUNSEL: P Hackett and J Pitman for the plaintiff
RA Perry SC with AL Wheatley for the first and second defendants

SOLICITORS: Morgan Conley Solicitors for the plaintiff
Minter Ellison for the first and second defendants

[1] Much of the procedural history to this matter is set out in the previous judgment I delivered by which I ordered, inter alia, that the plaintiff's sixth amended statement of claim ("6ASOC") be struck out, it being contemplated that the plaintiff would re-plead.[1] I also ordered that the second amended claim ("2AC") be struck out and the plaintiff have leave to file a further amended claim containing a prayer for relief in conformity with its next amended pleading.

[2] On 8 May 2009, the Court of Appeal refused an application by the plaintiff for an extension of time to appeal against my decision and struck out the notice of appeal which had been filed late.[2] For the reasons stated at length in the judgment of Keane JA, with whom White and Margaret Wilson JJ agreed, the appeal sought to be pursued by the plaintiff was devoid of merit, and accordingly there was no utility in granting the extension of time to appeal.

[3] It would appear that the documents which the parties agree were the third amended claim ("3AC") and the seventh amended statement of claim ("7ASOC") were filed on 26 November 2008, although for reasons which are not immediately apparent they were respectively entitled "second amended claim" and "sixth amended statement of claim". In order to avoid any confusion, however, I will refer to those documents filed on 26 November 2008 as 3AC and 7ASOC respectively.

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1 [2008] QSC 263.
2 [2009] QCA 121.

[4] In any event, after the Court of Appeal delivered its judgment, a number of interlocutory applications were filed, including an application by the plaintiff for summary judgment. These resulted in the parties requesting me, on 17 June 2009, to make the following orders by consent:

1. The plaintiff's application filed 4 June 2009 be dismissed with the plaintiff to pay the defendants' costs of and incidental to that application on an indemnity basis.

2. The plaintiff's claim against the second defendant be dismissed with the plaintiff to pay the second defendant's costs of and incidental to the proceedings, to be assessed on an indemnity basis.

3. The plaintiff's claim against the first defendant be dismissed in respect to paragraphs 2, 3, 5, 6 and 7 of the third amended claim (mis-described as the second amended claim) filed on 26 November 2008 with the plaintiff to pay the first defendant's costs of and incidental to paragraphs 2, 3, 5, 6 and 7 of the third amended claim, to be assessed on a standard basis.

4. The plaintiff's application for leave to amend the third amended claim and seventh amended statement of claim be adjourned until Monday, 10 August 2009 at 10am.

5. The plaintiff file and serve an affidavit which exhibits the proposed fourth amended claim and eighth amended statement of claim, in support of the application for leave to amend, by 4pm 22 July 2009.

6. The defendant's application filed 27 May 2009 be adjourned to Monday, 10 August 2009 with the plaintiff to pay the defendant's costs thrown away by the adjournment, on a standard basis.

7. The defendant identify in correspondence to the plaintiff by 4pm 31 July 2009, which parts, of the 27 May 2009 application will be continued with on 10 August 2009.

8. By 4.00pm on 6 August 2009, each party exchange and deliver to Justice Daubney's associate their written outlines of argument for the plaintiff's application for leave to amend and the defendants' application filed 27 May 2009.

9. The costs of and incidental to the review on 15 June 2009 be costs in the cause.

[5] The application for leave to amend the 3AC and 7ASOC referred to in Order 4 was made orally in the course of the appearance on 17 June 2009.

[6] On 23 July 2009, an affidavit was filed, to which was exhibited the plaintiff's proposed new pleadings, namely a fourth amended claim ("4AC") and an eighth amended statement of claim ("8ASOC").

[7] The hearing of that application ultimately came before me on 10 August 2009, and I reserved my judgment in the matter.

[8] On the day after that hearing, the plaintiff's solicitors wrote to the defendants' solicitors indicating that the plaintiff wished to put a further affidavit before me in relation to the applications heard on 10 August 2009. There was some correspondence between the parties, resulting in the plaintiff, on 4 September 2009, seeking a mention of the matter before me. That mention occurred on 14 September 2009, at which time leave was given for the further affidavit to be filed. Argument on whether the plaintiff should have leave to read and rely on that affidavit was heard on a subsequent date agreed by the parties, namely 23 October 2009.

The proposed new pleadings

[9] The proposed 8ASOC bears scant resemblance to previous versions of the pleading, even allowing for the fact that the claims against the second defendant were dismissed by consent on 17 June 2009. (As the claims against the second defendant have been dismissed, I will, for convenience, simply refer to the first defendant as "the defendant".) The 8ASOC is a six page document, as compared with the 7ASOC which ran to some 95 pages of pleading plus about the same number of pages of annexures. The 8ASOC seeks to set up two claims:

(a) A claim for $966,928 which the plaintiff claims is owed to it as a debt in consequence of a "partnership in respect of the development of the Springwood Central Project"; and

(b) A claim for $1,890,656 as a debt said to be owing to the plaintiff for "liabilities incurred, paid and payable by [the plaintiff] in respect of the Lot 7 Works to the extent that such liabilities exceed the agreed sum of $800,000".

The alleged Springwood Central Project partnership

[10] The proposed claim in respect of the alleged Springwood Central Project partnership appears for the first time in the proposed 8ASOC. It is pleaded as follows:

> "3. Between about 23 September 1999 and 26 November 2001, Global Management was engaged by Zonebar to act as the Project Manager of the Springwood Central Project under a written agreement ("the Project Management Agreement").
>
> Particulars
>
> The Project Management Agreement was documented in:
>
> (a) a letter dated 16 September 1999 from Global Management to Zonebar; and

(b) a letter dated 23 September 1999 from Zonebar to Global Management.

4. It was a term of the Project Management Agreement that Zonebar and Global Management would share profits and that Global Management would receive:

(a) 25% net profit share in the event aggregate net income or capital receipts or the value of retained portions of Springwood Central Project exceed funds expended on the Springwood Central Project by $6.5M;

(b) 10% net profit share in the event aggregate net income or capital receipts or the value of retained portions of Springwood Central Project exceed funds expended on the Springwood Central Project between $3.2M and $6.5M.

5. As a consequence of the terms of the Project Management Agreement including the agreement to profit share, Zonebar and Global Management were in partnership in respect of the development of the Springwood Central Project.

6. The Plaintiff has incurred losses in connection with the entire Springwood Central Project of $9,669,284 made up as follows:

Annexure hereto	Amount
"A"	$4,348,805
"B"	$2,110,205
"H" plus interest	$3,210,274
Total	$9,669,284

7. Global Management has failed, neglected or omitted to pay or reimburse Zonebar as to 10% of the sum of $9,669,284 and Zonebar claims $966,928 that Global Management is indebted to pay to Zonebar."

[11] True it is, as counsel for the plaintiff submitted, that the Project Management Agreement had previously featured in the plaintiff's pleadings as one of the foundations for the cases it had previously sought to maintain. But this alleged Springwood Central Project partnership has never previously been asserted by the plaintiff. As summarised in my previous judgment[3] at [20], the case in this respect was previously formulated as breaches of the contractual, tortuous and fiduciary duties which the plaintiff asserted were owed to it by the first defendant under or by reason of the Project Management Agreement.

[12] This proceeding has been on foot since 2003. The plaintiff now seeks not only to completely amend its case by delivering the 8ASOC, but it proposes now to advance a case which had never previously been advertised. When questioned about this in argument, the following exchange took place between me and counsel for the plaintiff:

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3 [2008] QSC 263.

"His Honour: It must have been a pretty well camouflaged partnership.

Mr Hackett: Well -----

His Honour: It's taken your side, what, six years to uncover it?

Mr Hackett: Does your Honour want me to answer that question?

His Honour: Not necessarily. It's the first time it's appeared anywhere in the pleadings, isn't it?

Mr Hackett: Your Honour, I can't be any blunter than – I was instructed to amend a statement of claim and to allege two partnerships in the terms that I've done."

[13] No explanation was given in the affidavit material filed in support of the application for leave to amend or in submissions either for this novel claim not having previously been made or for its first emergence in the draft 8ASOC.

[14] The plaintiff's written submissions in respect of the application for leave to amend can only be described as economical. I will quote them in full:

"**Plaintiff's Application**

1. The plaintiff's application seeks leave to amend the claim. Leave is required because the proposed amendment is of an originating process: rule 377(1)(c) UCPR. The effect of the proposed amendments are to:

   (a) formalise the discontinuance of proceedings against the second defendant, Mr Jakeman and to delete the relief previously claimed against him, and

   (b) articulate with more simplicity the continuing claims made against the first defendant, Global Corporation Management Pty Ltd pursuant to the Project Management Agreement and the Partnership Agreement.

2. Each of the Project Management Agreement and the Partnership Agreement has been the foundation for parts of the plaintiff's claims against the first defendant since the commencement of proceedings on 1 April 2003. Accordingly, no limitation issue arises for consideration under rule 376 UCPR.

3. Notwithstanding the plaintiff's application seeks leave to amend the statement of claim, leave is not required: rule 378 UCPR. In any event, even if leave were required it would be appropriate because the effect of the amendments is the same in paragraph 1 above."

[15] The defendant, on the other hand, put before me comprehensive, annotated and well-referenced written submissions in respect of the several applications before the Court. Specifically in relation to the plaintiff's application for leave to amend, the defendant submitted that there were two main factors to be considered:

(a) The discretionary considerations, i.e. the interests of justice, and

(b) The terms of the proposed 3AC and 8ASOC.

[16] As to the first of these matters, the defendant's submission was, in effect, that whilst these proposed amendments did not occur in the context of an imminent or pending trial, nevertheless in the circumstances of the present case, which was commenced in 2003, for the plaintiff still to be attempting to formulate its case represented unacceptable delay in the conduct of the proceeding which will occasion detriment to the defendant. The defendant highlighted the absence of any, let alone any satisfactory, explanation for the delay.

[17] In relation to the proposed 8ASOC, the defendant submitted that the pleading in respect of the alleged Springwood Central Project partnership was deficient because:

(a) It failed to plead a partnership;

(b) The claim for monies owing as a debt was misconceived and wrong at law; and

(c) Even if such a partnership existed, the plaintiff's proper remedy would be for an account, and such a claim is now statute barred.

[18] In reply, the plaintiff submitted:

(a) The plaintiff's proposed proceeding is based on the losses it incurred in the Springwood Central Project, and those losses were not determinable until the sale of the last unit in the project occurred in May 2008;

(b) The plaintiff's claim under the 8ASOC was not for an account in respect of the Springwood Central Project partnership, but a claim for monies owing pursuant to the defendant's liability to indemnify the plaintiff under ss 27 and 47 of the *Partnership Act*;

(c) Alternatively, and assuming the defendant disputes the quantum of the loss, an account would be sought by the plaintiff and ordered under the "further or other relief" claim (assuming also that the Court determines, as a preliminary, the existence and terms of the Springwood Central Project partnership);

(d) As the plaintiff's claim is for a specialty, the relevant limitation period is 12 years. In any event, the limitation period runs from the dissolution of the partnership, which occurred on the sale of the last lot in the project in May 2008.

[19] In respect of the discretionary matters, and to resist the first defendant's application for the claim to be struck out for want of prosecution, the plaintiff's submissions in reply were as follows:

"**Should the plaintiff's claim be struck out for want of prosecution?**

> 15. It is true that the history of this matter has been long and tortuous. However, the proceedings have been subjected supervision of the Court as would be evident to Your Honour and from the Court file. The plaintiff has not been dilatory in prosecuting its claim against the defendant.
>
> 16. The defendant submissions blur the lines between the claims brought against the defendant and those formerly brought against the second defendant.
>
> 17. The defendant does not point to any prejudice if the amendment to the claim is allowed."

[20] As is apparent from the terms of the draft 8ASOC set out above, the plaintiff alleges that it engaged the defendant to act as project manager of the Springwood Central Project, that the defendant had the entitlement under the Project Management Agreement to receive certain net profit shares in the eventualities asserted in para 4 of the pleading. With no further ado, the plaintiff would then baldly assert that "as a consequence of the terms of the Project Management Agreement including the agreement to share profit, [the plaintiff] and [the defendant] were in partnership in respect of the development of the Springwood Central Project".

[21] The statutory definition of partnership, namely that it is "the relation which subsists between persons carrying on business in common with a view of profit"[4] is "framed in deceptively simple language but it has given rise to many problems of interpretation".[5]

[22] A partnership does not exist just because one party says so. The draft 8ASOC does not plead any material facts on which to base its pleaded conclusion of the existence of a partnership. The fact that the plaintiff employed the defendant under a contract to provide project management services which allowed for part of the defendant's remuneration to consist of a share of the profits of the project is not, of itself, conclusive of the existence of a partnership. So much is clear from an application of s 6(1)(c)(ii) of the *Partnership Act*.

[23] Moreover, and in any event, there is nothing pleaded to make good the necessary element that the parties were "carrying on business in common". In *Duke Group Ltd v Pilmer*,[6] the Full Court of the Supreme Court of South Australia said:

> "952 In order to meet this criterion, it is not necessary that each of the alleged partners should take an active part in the direction and management of the firm. The business may well be carried on by or on behalf of the partners by someone else. The person carrying on the business must be doing so as agent for all the other persons who are said to be partners. Lord Wensleydale stressed the need for an

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4 *Partnership Act* 1891 (Qld), s 5.

5 Fletcher "*The Law of Partnership in Australia*" (9th ed) at p 23.

6 (1999) 73 SASR 64.

agency relationship in *Cox v Hickman* (1860) 8 HLC 268 at 312-313; 11 ER 431 at 449:

> 'A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability.'

953 Likewise, Griffith CJ said in *Lang v James Morrison & Co Ltd* (1911) 13 CLR 1 at 11:

> 'Now in order to establish that there was a partnership it is necessary to prove that J W McFarland carried on the business of Thomas McFarland & Co on behalf of himself, Lang and Keates, in this sense, that he was their agent in what he did under the contract with the plaintiffs – not that they would get the benefit, but that he was their agent.'

954 However, more than mere agency is required. There must be mutuality of rights and obligations, James LJ said in *Smith v Anderson* at 275:

> 'Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest or several interests in something which is to be divided between them.'

955 Those requirements of agency and mutuality are reflected in ss 5 and 6 of the *Partnership Act* as being the consequences of entering into a partnership. They read:

> '5. Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which the partner is a member bind the firm and the other partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner.
> 6(1) An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person authorised, whether a partner or not, is binding on the firm and all the partners.

(2) ...'

956 Unless there is that mutuality, however, there can be no partnership."

[24] I accept the defendant's submission in the present case, and indeed it is clear on the face of the proposed 8ASOC, that there is no pleading of material facts which would lead to a conclusion of the necessary mutuality between the plaintiff and the defendant as would be required to make good the assertion of partnership.

[25] Further, the two letters said by the plaintiff to comprise the written Springwood Central Project partnership agreement, viz the letter from the defendant to the plaintiff of 16 September 1999 and the letter from the plaintiff to the defendant of 23 September 1999, are in evidence before me. As the defendant's counsel pointed out, the necessary notion of mutuality was, in fact, expressly contrary to the terms of the plaintiff's letter of 23 September 1999, which stated that the defendant "shall have no authority to incur any liabilities or make any representations on our behalf without our express approval".

[26] When pressed in argument to identify the business which the plaintiff contended was that which the parties carried on in common, counsel for the plaintiff could do no more than say that it was "the development of the Springwood Central Project". Not only, however, is that not pleaded, it runs contrary to the express allegation that the defendant was engaged by the plaintiff to act as project manager of the project.

[27] For these reasons alone, the proposed amendment through the draft 8ASOC to introduce this claim in connection with the purported Springwood Central Project partnership is hopeless. I would not permit this claim to be advanced. This finding is sufficient to dispose of this aspect of the application for leave to amend. I should, however, address briefly the other arguments advanced.

[28] Paragraph 6 of the draft 8ASOC contends that the plaintiff has incurred losses in connection with the Springwood Central Project of $9,669,284. It is then baldly asserted that the defendant "has failed, neglected or omitted to pay or reimburse Zonebar as to 10% of the sum of $9,669,284 and Zonebar claims $966,928 that Global Management is indebted to pay to Zonebar."

[29] The source of the obligation for the defendant "to pay or reimburse" 10 per cent of the plaintiff's losses to the plaintiff is not identified anywhere in the pleading. What is proposed to be pleaded is that a term of the Project Management Agreement was that the defendant had a contractual entitlement to receive 10 per cent net profit share in the event the aggregate net income or capital receipts or the value of retained portions of Springwood Central Project exceeded funds expended on the project between $3.2 million and $6.5 million. Nowhere is it pleaded that there was a general agreement between the parties that losses on the project would be shared in the proportions 90/10. The pleading does not set up any obligation on the defendant "to pay or reimburse" the plaintiff, nor does it set up any basis upon which it could be said that the defendant "is indebted to pay" the plaintiff. The

plaintiff's invocation of ss 27 and 47 of the *Partnership Act* does not assist. Section 47 relates to the settling of accounts, and relevantly provides[7] that losses of the partnership are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits. Section 27(1)(b) enunciates general rules for the regulation of interests between partners (subject to any express or implied agreement which might exist between them), including that the partnership must indemnify every partner in relation to payments made and personal liabilities incurred by the partner in the ordinary and proper conduct of the business of the firm or in or about anything necessarily done for the preservation of the business or property of the firm.

[30] Counsel for the plaintiff referred to the following commentary from "*The Law of Partnership in Australia*":[8]

> "Each partner has a right of indemnity against co-partners for any expenses incurred by her or him in performing acts in the ordinary course of the partnership business or necessary for the preservation of partnership property. That indemnity, being an implied term of the partnership agreement, is a matter of contract, which can be enforced against the partnership by action."

[31] That right of indemnity, however, relates, as is clear from s 27(b), to payments made and liabilities incurred by the partner in the ordinary and proper conduct of the partnership business or in or about anything necessarily done for the preservation of the business or property of the firm. That is quite a different topic from the final apportionment of profits and losses as between partners.

[32] Even if there were a sustainable cause of action in respect of the alleged Springwood Central Project partnership, the appropriate relief for the plaintiff would have been to seek the taking and settling of accounts. On the settling of such accounts, as is clear from the terms of s 47(a), adjustment would, if appropriate, be made to reflect the proportion in which the partners were entitled to share profits. The other difficulty which the plaintiff faces in this regard is that, by s 10(2) of the *Limitation of Actions Act* 1974, an action for an account shall not be brought in respect of a matter that arose more than six years before the commencement of the action. On the terms of the proposed 8ASOC, the purported Springwood Central Plaza Partnership only enured between 23 September 1999 and 26 November 2001, i.e. the duration of the Project Management Agreement. Even if the plaintiff were to cast its claim as one for the taking of accounts, such claim would be statute barred.

[33] So far as the discretionary matters are concerned, it is sufficient for present purposes if I observe that, were it necessary for me to decide the application on this point, there would be much to be said for reaching a conclusion that the plaintiff in this case "has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial

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7 Section 47(a).

8 Fletcher, *Law of Partnership in Australia* (2007) at para [10.70].

dates".[9] That conclusion would, I think, have been reinforced by the fact that there is absolutely no explanation in the material for the delay in seeking to apply to amend to raise this new cause of action, in circumstances where such an explanation was undoubtedly called for:

> "Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by [UCPR r 5] to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the Rules."[10]

[34] For the reasons I have already given, however, it is unnecessary for me to determine this part of the application for leave to amend by recourse to these discretionary considerations. There is no utility in permitting the plaintiff to advance its proposed pleading in respect of the Springwood Central Project Partnership, and accordingly I would not grant leave to amend in respect of that part of the 8ASOC or the paragraphs of the 4AC which claim the relief based thereon.

The lot 7 partnership

[35] The balance of the 8ASOC, and the remaining claim sought to be pursued under the 4AC, is the latest articulation of a claim sought to be advanced by the plaintiff against the defendant arising out of a partnership agreement between the parties concerning the development of lot 7. The proposed pleading in this regard is as follows:

> "8. On 10 November 2000 Zonebar and Global Management entered into a written partnership in respect of the development of Lot 7 ("the Partnership Agreement").
>
> 9. The development of Lot 7 comprised the construction of a commercial warehouse upon Lot 7 in accordance with the designs, drawings and specifications submitted in September 2000 by Global management to Abigroup, Watpac and Hutchinsons as tenderers together with execution of the associated civil works ("the Lot 7 Works").
>
> 10. By the Partnership Agreement, Global Management was responsible for:
>
> (a) organising the necessary entities to perform the Lot 7 Works;
>
> (b) containing costs, claims, liabilities and obligations of Zonebar in relation to the Lot 7 Works to $800,000;

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[9] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, per Gummow, Hayne, Crennan, Kiefel and Bell JJ at [102].

[10] *Aon Risk Services Australia Ltd v Australian National University* at [103].

(c) indemnifying Zonebar against any overrun in costs, claims, liabilities and obligations in relation to the Lot 7 Works above the sum of $800,000.

11. On or about 26 February 2001, purportedly in accordance with the Partnership Agreement, Global Management arranged for Global Construction to enter into a subcontract with Abigroup for the execution of part of the Lot 7 Works ("the Lot 7 Building Agreement") with an adjusted contract sum of $1,362,314 inclusive of GST.

12. Abigroup claimed an amount of $128,942 (plus GST) as extras in respect of its execution of the Lot 7 Works pursuant to the Lot 7 Building Agreement and which were purportedly certified by Global Management between 6 and 20 September 2001.

13. Zonebar has incurred and paid $362,222.72 (plus GST) for the execution of the associated civil works so as to procure services and access to and from Lot 7 and the Lot 7 Works and so as to make title to Lot 7.

Particulars

These liabilities included:

(a) $200,000 of prepayment to Abigroup;

(b) $70,000 to Energex;

(c) $55,177 to the Council for headworks, sewer works and parkland charges.

14. Zonebar has incurred and paid $169,110.91 (plus GST) in other extra liabilities to procure execution of the Lot 7 Works.

15. As from early October 2001, Abigroup threatened to commence and thereafter maintained the proceedings against Zonebar until December 2005 and Zonebar incurred legal costs and outlays in the sum of $602,039.48 in respect of those proceedings.

16. Global Management has failed, neglected or omitted to pay or reimburse to or to exonerate Zonebar as to and Zonebar claims $1,890,656 that Global Management is indebted to pay to Zonebar for any liabilities incurred, paid and payable by Zonebar in respect of the Lot 7 Works to the extent that such liabilities in aggregate exceed the agreed sum of $800,000 calculated as follows:-

(a) The difference between the Contract Sum of $1,362,314 under the Lot 7 Building Agreement and the said sum of $800,000 of $562,314;

(b) The extras of $128,942 (plus GST) claimed by Abigroup for execution of the Lot 7 Works a total of $141,836;

(c) The associated civil works so as to procure services and access to and from Lot 7 of $362,222.72 (plus GST) a total of $398,445;

(d) The extra liabilities incurred by Zonebar with respect to the Lot 7 Works of $169,110.91 (plus GST) a total of $186,022;

(e) The legal expenses incurred by Zonebar in respect of the Abigroup proceedings of $602,039."

[36] It can be said immediately that this is a very much "cut down" version of the claim when compared with previous incarnations of the plaintiff's pleadings. It is unnecessary for me to rehearse the many and varied claims which were made in relation to the lot 7 works in previous versions of the pleading. It is, however, fair to say that these paragraphs in the draft 8ASOC do not raise any new matters of fact or claim which had not previously been pleaded as part of the previous versions of the statement of claim. To make good this finding, I set out below a table identifying the paragraphs in the draft 8ASOC and the paragraph numbers in the 7ASOC in which the same or substantially similar allegations appear:

8ASOC	**7ASOC**
8	38
9	Conceded in argument for the defendant as having been pleaded in a previous statement of claim.
10	41(a), (b) and (c)
11	49
12	63
13	64
14	65
15	66
16	60

[37] The defendant submitted not only that this further amendment ought not be allowed but that, if the amendment be not allowed, then the remnant 7ASOC ought be struck out either pursuant to the *Uniform Civil Procedure Rules* or the court's inherent jurisdiction. The defendant had, on 27 May 2009, filed an application seeking such relief.

[38] One of the consequences of the orders I made by consent on 17 June 2009 (see [5] above) was that order 3 operated such that the only claims by the plaintiff which thereafter remained extant were those sought in paras 1 and 6 of the 3AC, namely:

"1. $1,817,798 as debts pursuant to specific indemnities in the Indemnity Contract and the Partnership Agreement plus interest of $1,392,476 as claimed in paragraphs 60 - 66 and annexure H of the Sixth [sic] Amended Statement of Claim.

…

> 4. And further to paragraph 2 herein, damages of $144,922.18 plus interest of $106,343 arising from an overpayment to Abigroup for the Lot 7 Works as claimed in paragraphs 77 – 84 of the Sixth [sic] Amended Statement of Claim."

[39] All other claims against the defendant were dismissed.

[40] The claim now sought to be pleaded in the 8ASOC generally correlates with the relief which was sought in para 1 of the 3AC. The "Indemnity Contract" referred to in para 1 of the 3AC was pleaded in para 31 of the 7ASOC as being an oral agreement made on 28 September 2000 between representatives of the parties by which the defendant:

> "undertook to indemnity [the plaintiff] from and against, and to pay to [the plaintiff] any amount by which the construction and other liabilities incurred or payable by [the plaintiff] in respect of the Lot 7 Works exceeded the said costs to complete the Lot 7 Works."

This alleged indemnity contract does not form any part of the case which would now be pursued under the 8ASOC.

[41] Similarly, the claim made in para 4 of the 3AC does not seem to be any part of the case advertised in the draft 8ASOC. By reference to paras 77 and following of the 7ASOC, that was a claim for damages representing an amount which the plaintiff contended was overpaid to the builder Abicorp. Such damages were claimed to be reasonable by reason of breaches of common law, contractual and fiduciary obligations including, relevantly, duties (legal and fiduciary) said to arise under the partnership agreement.

[42] I do not propose elaborating at length on the case as pleaded in the 7ASOC. It is sufficient for present purposes to note that the lot 7 partnership claims in that document were confusingly pleaded as a smorgasbord of contractual, tortuous, equitable and statutory (i.e. *Trade Practices Act* 1974) claims.

[43] The plaintiff argues that leave ought not be given in respect of this part of the 8ASOC because the draft pleadings are insufficient. The defendant complains:

(a) that para 14 is vague and uncertain because it refers merely to "other extra liabilities";

(b) the assertion in para 15 sits ill with allegations made in previous versions of the statement of claim that the amounts claimed were incurred in proceedings concerning both lot 7 and lot 8, and not merely lot 7 as would now be asserted; and

(c) paragraphs 8, 12, 13, 14 and 15 lack particularity.

[44] I take a different view of these paragraphs of the proposed 8ASOC. In comparison with previous versions of the pleading, which were convoluted and dense documents, these paragraphs of the proposed 8ASOC succinctly state the material facts in respect of this claim on which the plaintiff will rely. True it is that at least several of the paragraphs pleaded could benefit from the provisions of further particulars – I think the defendant's complaint about the un-particularised reference to "other extra liabilities" in para 14 has some considerable force. But that can easily be addressed, in due course, by the defendant requesting, and the plaintiff providing, further and better particulars of that paragraph of the pleading. The complaint about para 15 by reference to matters pleaded in previous versions of the statement of claim may ultimately present a complete or partial defence to the matters pleaded, but they do not mean that the pleading is bad on its face. The defendant also submitted that "the threatened and then continued legal proceedings by Abigroup in October 2001 (at [15] of the 8ASOC) would seem quite removed from the Lot 7 Works", which are defined in para 9 of the 8ASOC. However, para 9 refers to "the construction of a commercial warehouse upon lot 7 in accordance with the designs, drawings and specifications submitted in September 2000 by Global Management to Abigroup…". No end date for those works is pleaded, and one therefore cannot say on the face of the pleading that the legal proceedings referred to in para 15 of the 8ASOC are necessarily temporally disconnected from the lot 7 works.

[45] I have already made the point that the facts and matters sought to be pleaded in this regard in the 8ASOC have been the subject of pleadings in previous versions of the statement of claim. No new claim is raised. If anything, the plaintiff's claim is cast in a much more direct and streamlined fashion in the proposed 8ASOC. The pleading of a case in this way, as compared with the diverse, almost "scattergun" approach adopted in previous versions of the pleading, will focus the parties' attention on the real matters at issue which require resolution.

[46] In all the circumstances, then, I would be inclined to grant the leave sought in respect of the 8ASOC, but excluding paras 3 – 10 thereof and para 1 of the prayer for relief. Similarly, I would grant leave in respect of the 4AC, but excluding para 1 thereof.

The defendants' application to strike out

[47] In view of my decision to grant leave, albeit limited, in respect of the 4AC and the 8ASOC, it is unnecessary for me to determine the defendants' application to strike out the plaintiff's claim. A number of matters do, however, need to be said.

[48] One of the grounds argued by the defendant as justifying the striking out and dismissal of the plaintiff's proceeding had determination of that issue been required, is the fact that the plaintiff continues to agitate a claim in respect of the lot 7 partnership which, so it is apprehended, is founded on a clause in the partnership agreement executed by the parties in about November 2000 which provided:

> "4.4 Subject always to clauses 4.1, 4.2 and 4.3 above, Global shall pay or indemnify Zonebar from and against any claims, liabilities and

> obligations paid, incurred or satisfied by Zonebar on any account, dealing, transaction or basis whatsoever in relation to the execution of the "Work" as defined in the Contract."

[49] On 6 September 2007, Mr Jakeman (formerly the second defendant and a director of the first defendant) swore an affidavit which was filed in the Court in response to one of the numerous summary judgment applications which had been made on behalf of the plaintiff in the course of the history of this proceeding. Specifically, Mr Jakeman deposed to receiving a draft of the partnership agreement containing that clause. He deposed to being concerned by that clause, and telephoning Mr Smits of the plaintiff to discuss. He says that as a result of that conversation, on 13 November 2000 he received a facsimile from the plaintiff advising, inter alia, that Zonebar did "not require indemnity from Global under clause 4.4 of the partnership agreement". Mr Jakeman further deposed that, relying on that facsimile, he executed the execution page of the partnership agreement and returned it.

[50] In argument before me, the defendant contended that this amounted to a complete answer to any and all claims which the plaintiff might seek to pursue against the defendant in reliance upon clause 4.4 of the partnership agreement.

[51] Curiously, and indeed almost inexplicably, despite that evidence having been before the court, and on notice to the plaintiff, since September 2007, no affidavit in response was sought to be adduced by the plaintiff until after the conclusion of the hearing before me. In argument before me, counsel for the defendant made extensive reference to this affidavit in the course of pursuing the argument for the alternative application for dismissal of the proceeding, and there was simply no response in that respect by or on behalf of the plaintiff. It was only after the conclusion of the hearing, when I had reserved judgment, that the plaintiff then sought to put before me a further affidavit sworn by Mr Smits in which he effectively joined issue with Mr Jakeman, and said that the reasons why Zonebar did not consider that it needed an indemnity were explained by Smits to Jakeman, and Jakeman accepted on 13 November 2000 that the defendant estimated the total construction cost to be less than $700,000, it had stated the building costs to be $800,000 because of the partnership proposal, the tenders of, inter alia, Abigroup were substantially less than $800,000, and it was intended that the plaintiff would cause the contract for the works to be assigned to the successful tenderer under a fixed price contract. Mr Smits also deposed to correspondence from Mr Jakeman to the plaintiff on 7 December 2000 "indicating an overall feasibility for the Lot 7 and Lot 8 projects in which $700,000 was provisioned for the Lot 7 building costs".

[52] This was the affidavit which was then the subject of the further application before me for the plaintiff to have leave to read and rely on that affidavit of Mr Smits. In view of my decision to allow leave to deliver part of the 8ASOC, it is also now not necessary for me to determine the question of whether leave ought be granted to rely on Mr Smits affidavit. I should indicate, however, that had it been necessary for me to determine this question, I would have refused leave for the plaintiff to rely on the affidavit first prepared and delivered only after the conclusion of argument on the principal applications. The plaintiff's submission was that the affidavit ought be received because not to receive it may result in a decision being made in error,

and this would cause an injustice to the plaintiff. It is remarkably notable, however, that nowhere in any of the affidavit material is there any explanation whatsoever for the plaintiff's failure to prepare or seek to rely on this further affidavit until after the conclusion of the hearing. Nor was there any application on the day of the hearing of the application for it to be adjourned to enable this further affidavit to be obtained.

[53] In *Smith v New South Wales Bar Association*,[11] Brennan, Dawson, Toohey and Gaudron JJ said:[12]

> "It is again necessary to distinguish between the considerations which may bear on a decision to re-open and the processes involved in reconsideration once a case has been re-opened. **If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application.** But assuming that that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete, or one in which reasons for judgment have been delivered. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side. In the latter situation the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised. But those questions bearing on re-opening are not decisive of the question whether, a matter having been re-opened by reason of error, further evidence can be called." [emphasis added]

[54] In the present case, the plaintiff's application was, in effect, for leave to reopen its case to lead the further evidence by Mr Smits. The plaintiff simply asserted that to fail to allow that evidence to be led would lead to an injustice. The plaintiff did not in any way, however, descend to providing any explanation for its failure to seek to lead that evidence at any earlier stage. On that basis alone, I would have refused the plaintiff's application for leave to rely on the further affidavit of Mr Smits. That will sound in costs against the plaintiff.

[55] That application by the plaintiff will therefore be dismissed with costs.

[56] In relation to the defendant's application to have the plaintiff's claim dismissed, the other principal argument was that, given the history of the matter, the claim should be dismissed for want of prosecution, in reliance on r 5 of the *UCPR* or the court's inherent jurisdiction. The defendant conceded that this was not a case in which there had been long periods of total inactivity on the part of the plaintiff. Rather, it founded its submissions in this regard on the tortuous history of this matter in which, as events have transpired, it has taken six years for the plaintiff to come up with a settled statement of claim which is amenable to proper prosecution through the processes of the court. In other words, the delay on which the defendant would have relied is that not primarily constituted by merely inactivity, but by the

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11 (1992) 176 CLR 256.

12 (1992) 176 CLR 256 at 266-267 (omitting references).

plaintiff's failure to prosecute the action in a way which would enable the other interlocutory steps to be concluded within a reasonable time.[13] The defendant pointed not only to the lamentable history of ineffectual pleading by the plaintiff, but also a history of lack of compliance with court orders and directions, and the prejudice caused to the defendant arising simply from the delay in prosecution of the proceedings, of the nature referred to by McHugh J in *Brisbane South Regional Health Authority v Taylor*.[14]

[57] The plaintiff's conduct of the proceeding to date can hardly be described as either efficient or expeditious. In considering the application of the equivalent of r 5 of the *UCPR*, the plurality of the High Court in *Aon Risk Services Australia Limited v ANU*[15] said at [98]:

> "Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a "just resolution" is to be understood in the light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs."

[58] As events have transpired in the present applications, I have found that the lot 7 partnership case now sought to be pleaded and advanced by the plaintiff is one which has been on foot and pursued by it for some time, although previously obscured by a thicket of other claims and factual and legal allegations in the previous versions of the pleading. The plaintiff should, however, not be under any misapprehension as to the diligence which will be required of it in respect of the further prosecution of this case. The defendants could justifiably expect that the plaintiff has now been given its very last chance. The plaintiff can expect that it will be required to scrupulously observe further directions to bring this matter to trial as soon as possible.

Conclusions

[59] On the plaintiff's application for leave to amend there will be the following orders:

1. The plaintiff has leave to file and serve a Fourth Amended Claim in the form of the draft exhibited to the affidavit of Joel Hunter Pitman filed 23 July 2009, but excluding para 1 of the relief claimed.

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13 *Bishopsgate Insurance Australia Limited v Deloitte Haskins & Sells* (unreported, Full Court, Supreme Court of Victoria, 9 September 1994), cited in *Latrobe Country Credit Co-operative Limited v Smith* [1999] 1 VR 440 at [16].

14 (1996) 186 CLR 541 at 551.

15 (2009) 239 CLR 175.

2. The plaintiff have leave to file and serve an Eighth Amended Statement of Claim in the form of the draft exhibited to the affidavit of Joel Hunter Pitman filed 23 July 2009, but excluding paras 3 – 7 of the draft pleading and para 1 of the prayer for relief.

3. The plaintiff shall pay the defendant's costs of and incidental to the application.

[60] The plaintiff's application for leave to adduce further evidence is dismissed with costs.

[61] The defendant's application filed 27 May 2009 is dismissed with costs reserved.

[62] The matter be listed for further review in the Supervised Case List at 4.30pm on 22 March 2010.