SUPREME COURT OF QUEENSLAND

CITATION:	*Hartnett v Hynes* [2010] QCA 65
PARTIES:	**BEAU TIMOTHY JOHN HARTNETT** (plaintiff/appellant) **v** **ROBERT MARK HYNES** (defendant/respondent)
FILE NO/S:	Appeal No 9861 of 2009 SC No 7747 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2010
JUDGE:	Muir JA and Daubney and P Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed;** **2. Paragraphs 1 and 9 of the orders and directions made on 10 September 2009 be set aside and that the following be substituted therefor:** ▪ **The appellant have leave to amend the third amended statement of claim filed on 11 September 2009 to include allegations which are in substance the same as those in paragraphs 7F, 7G and 7H of the appellant's proposed third amended statement of claim and any amendments consequential thereon;** ▪ **The appellant file and serve such amended statement of claim within 14 days of today's date;** ▪ **When filing and serving such amended statement of claim, the appellant file and serve an amended Schedule 1 which fully identifies (by reference to file number, date, amount and, where appropriate, credit note number or other such identifying feature) any unbilled work in progress, unbilled sundries and sums owing by debtors and aged debtors allegedly written off without the appellant's consent and any credit notes given to clients of the Partnership Business without the appellant's consent;**

3. The appellant's costs of the appeal be its costs in the cause.

CATCHWORDS: CIVIL PROCEDURE – PLEADINGS AND AMENDMENT – AMENDMENT – ORIGINATING PROCESS AND PLEADINGS – GENERAL – where appellant was refused leave to amend statement of claim to include additional paragraphs – where primary judge refused leave due to complexity and incompleteness of particulars within additional paragraphs – where primary judge refused leave because amendments raised new causes of action – whether amendments raised new causes of action – whether amendments should be refused on discretionary grounds

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 376(4)

Allonnor Pty Ltd v Doran [1998] QCA 372, cited
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, cited
Borsato v Campbell & Ors [2006] QSC 191, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Central Sawmilling No. 1 P/L & Ors v State of Queensland [2003] QCA 311, cited
Wolfe v State of Queensland [2009] Qd R 97; [2008] 1 QCA 113, cited

COUNSEL: K E Downes SC, with S R R Cooper, for the appellant
P Roney for the respondent

SOLICITORS: Hartnett Lawyers for the appellant
Hynes Lawyers for the respondent

[1] **MUIR JA: Introduction**
The appellant plaintiff appeals against an order of a judge of the trial division of this Court, refusing leave to the appellant to amend his statement of claim in certain respects.

[2] Before considering the grounds of appeal, it is desirable to identify the relevant pleadings and the history of the matter prior to the hearing at first instance. In his original statement of claim filed on 3 September 2007, the appellant alleged that:

(a) He and the respondent had carried on a partnership business of solicitors and migration agents which was dissolved on 3 September 2001;

(b) On about 14 September 2001, the appellant and respondent entered into a Dissolution Agreement which made provision for how moneys on account of unbilled work in progress and client debtors were to be collected and distributed;

(c) The Dissolution Agreement provided, inter alia, that the respondent would pay the appellant $100,000 by an instalment of $30,000 on 14 September 2001 and the balance by 12 equal monthly instalments of $5,833.33 commencing on 1 October 2001;

(d) The respondent failed to pay $40,782.51, being the balance outstanding of the sum of $100,000, in breach of clause 3 of the Dissolution Agreement.

(e) The respondent:

(i) failed to give the appellant evidence that the respondent had billed clients of the partnership business pursuant to clauses 2 and 4 of the Dissolution Agreement (paragraph 16);

(ii) failed to account to the appellant in respect of sums collected from clients of the partnership business pursuant to clauses 2, 3 and 4 of the Dissolution Agreement (paragraphs 17, 18 & 19); and

(iii) in breach of clauses 2 and 4 of the Dissolution Agreement and of the implied term of the Dissolution Agreement that the parties would do all things reasonably necessary on their part to ensure that each party received the benefit of the Agreement, failed to take steps reasonably necessary on his part to collect moneys from clients of the Partnership Agreement (paragraphs 20 & 21);

(f) By reason of the matters in paragraphs 20 and 21, the appellant suffered loss and damage equal to "one half of the unbilled work in progress for which the [respondent] did not bill the clients pursuant to clauses 2 and 4 of the Dissolution Agreement" (paragraph 22);

(g) The relief claimed included:

"(b) an order for all necessary accounts and inquiries as to the sum due and owing by the defendant to the plaintiff pursuant to clauses 2, 3 and 4 of the Dissolution Agreement;

(c) an order that the defendant pay what on taking the account shall be found to be due to the plaintiff;

…

(e) further or alternatively, damages for breach of the implied term of the Dissolution Agreement referred to at paragraph 6 hereof;

(f) damages for breach of clause 6 of the Dissolution Agreement;"

The interlocutory history as recorded in the primary judge's reasons

[3] Before the matter came before the primary judge, the appellant had delivered a number of redrafts of the statement of claim to the respondent and there had been at least four interlocutory hearings concerning, amongst other things, disclosure and the pleadings.

[4] The history of amendments to the statement of claim is described in the reasons of the primary judge as follows:

"[5] The first statement of claim was filed on 3 September 2007. An amended statement of claim was filed on 30 November 2007 and a defence was filed on 5 December 2007. The plaintiff's pleading at the time was the subject of complaint and letters were written pursuant to *UCPR* 444. A proposed third statement of claim was delivered and was the subject of a strike out application that was heard and determined by Mullins J on 28 July 2008. Her Honour struck out several

paragraphs of the plaintiff's then pleading … and made directions for the delivery by the plaintiff of a further pleading. The draft of a new statement of claim was delivered on 17 September 2008. At that stage the plaintiff's pleading that remained on the court's file, being the amended statement of claim filed 30 November 2007, save for parts of it struck out by Mullins J, essentially relied upon the written and implied terms of the Dissolution Agreement. The plaintiff claimed the unpaid balance of the $100,000 payable under that Agreement. He also sought an order for all necessary accounts and inquiries as to the sums due and owing by the defendant to the plaintiff pursuant to clauses 2, 3 and 4 of the Dissolution Agreement (which relate to work in progress and debtors), and an order for payment of what was found to be due to the plaintiff on taking of the account. He sought, in the alternative, damages for breach of the Dissolution Agreement. He also claimed damages for a separate breach of cl 6 of the Dissolution Agreement, which is the term that relates to the division of the business sign.

[6] On 13 November 2008 the plaintiff applied for orders in relation to disclosure. The matter came on for hearing before Wilson J on 25 November 2008 and, as appears from the defendant's outline of submissions, the focus of the hearing was in relation to disclosure. The application made returnable that date did not seek leave to amend the claim or statement of claim. However, a proposed 'second amended statement of claim' was annexed to the plaintiff's affidavit material. It was in the incomplete form of the pleading that had been delivered on 17 September 2008. The application for disclosure was unsuccessful. An order was made that it be adjourned, and that the plaintiff pay the defendant's costs of and incidental to the application. Wilson J also made orders:

1. That the plaintiff have leave to file and serve a further amended statement of claim on or before 9 December 2008;

2. That if the defendant proposed applying to strike out such further amended statement of claim in whole or in part, he provide the plaintiff with a letter in accordance with r 444 of the *UCPR* on or before 16 December 2008;

3. That the plaintiff respond to that letter on or before 14 January 2009;

4. That any application by the defendant to strike out the further amended statement of claim be filed and served on or before 19 January 2009.

[7] A new document styled 'second amended statement of claim' was filed on 9 December 2008. The defendant wrote a lengthy *UCPR* 444 letter in relation to it on 16 December 2008. His complaints included the introduction of new

> claims, including a new claim based upon a General Account Retainer Agreement, without the claim being amended. The plaintiff responded on 15 January 2009. At the same time he sent to the defendant a proposed amended claim and a proposed third amended statement of claim and sought the defendant's consent to an order that he have leave to file the amended claim. This was not forthcoming. On 20 January 2009 the defendant wrote to the plaintiff identifying complaints with the latest edition of the statement of claim.
>
> [8] On 27 March 2009 Atkinson J ordered the plaintiff to deliver a proposed statement of claim by 3 April 2009 and apply for leave and for any further disclosure by 9 April 2009. This did not occur and an extension of time to do so was obtained. On 21 May 2009 the plaintiff served a further revised pleading and a proposed amended claim. The proposed form of the third amended statement of claim delivered on 21 May 2009 has been further revised in two minor respects to delete two paragraphs. The version of the statement of claim in respect of which the plaintiff seeks leave was served on 16 June 2009." (citations omitted)

The primary judge's reasons for refusing leave to amend

[5] The primary judge refused leave to amend to include in the statement of claim paragraphs 7F, 7G and 7H of the draft third amended statement of claim before him ("the TASC") for a number of reasons. One reason was the complexity of the particulars of the allegations in those paragraphs and their lack of completeness. His Honour was of the view that, "The defendant should not be required to trawl through the schedules and to do his best, at considerable expense, to identify the particular transactions that are impeached and to guess the precise grounds upon which they are being impeached". In relation to the failure to provide "complete particulars", the primary judge pointed out that the matters being particularised related to events and things in late 2001 and that the appellant had had access to relevant documents for a long time. His Honour was concerned that the respondent would be put to great inconvenience and expense in meeting the issues raised by the amendments.

[6] Other reasons for refusal were that the breaches of the Dissolution Agreement sought to be introduced by the amendments were materially different to the breaches originally pleaded, replacements of allegations which had been struck out by Mullins J and raised new causes of action. The primary judge explained:

> "[63] … They involve new causes of action based on recently pleaded implied terms. Although the plaintiff had previously pleaded that there was an implied term that the defendant would bill partnership clients for unbilled work in progress and that the defendant would take 'all steps reasonably necessary' on his part to recover unpaid fees and that he failed to take 'all steps reasonably necessary on his part to collect sums from clients', the new allegations are different and contain differently-framed specific terms in relation to the invoicing, collection and writing off of debts.

[64] The new causes of action that the plaintiff wishes to advance concerning the failure to invoice clients, the writing off of debts and the issuing of credit notes appear to relate to transactions that occurred principally in late 2001 and the first half of 2002. By 30 June 2002 only $8,000 remained unpaid and there was little or no activity after that date. Although the last relevant entry in the partnership records appears to have occurred in June 2005 when the bank account was closed with a *50/50* split on the balance, the uncontested evidence is that, for all practical purposes, activities on the partnership account had ceased in June 2003. *The matters about which the plaintiff now complains appear to have occurred prior to 30 June 2002 when most of the remaining unpaid debts were written off. The plaintiff has not advanced an affidavit or argument which suggests that the conduct of which he complained concerning the writing off of unpaid debts and the like occurred at any later date. In the circumstances, the breaches complained of occurred more than six years ago and are now statute-barred. However, they were not statute-barred when the action was commenced on 3 September 2007.*

[65] *The uncontradicted affidavit material to which I have earlier referred indicates that many years ago and at about the time that the transactions in question occurred the plaintiff knew, or had means at his disposal to know, the substance of the matters about which he now complains in his proposed pleading such as the writing off of unpaid debts. He has not explained in an affidavit or otherwise why it has taken until now to formulate the new claim in relation to these transactions.*

…

[67] … However, the allegations concerning the alleged failure to invoice clients, the issuing of credit notes and the writing off of debts relate to numerous specific transactions and involve substantially different facts as to the obligation being breached and the relevant conduct. *There is a difference between the collection of debts and a failure to account for what was collected, and a failure to collect debts by writing them off, or not invoicing them in the first place.*

[68] The new claims for breach of contract relate to the fact of these acts or omissions occurring, as distinct from the defendant's alleged motivation in respect of these acts and omissions, being a matter which is raised in connection with the next group of amendments which relate to breach of fiduciary duty. *However, great expense will be incurred in locating and analysing numerous partnership transactions which are alleged to have occurred almost eight years ago.* The material relied upon by the defendant makes it highly likely that if the proposed amendments were allowed then

> the necessary contention by the plaintiff that he did not consent to the defendant's conduct in writing off unpaid accounts will be met by the contention that the requirement for consent was waived or that he is estopped from relying upon the absence of consent." (footnotes omitted) (emphasis added)

The parties' contentions in relation to the finding that paragraphs 7F, G and H of the TASC introduced new causes of action

[7] Counsel for the appellant's submissions in this regard may be summarised as follows.

[8] Paragraphs 20 and 22 of the original statement of claim encompass the matters pleaded in paragraph 7F of the second amended statement of claim and the TASC. The draft further amended statement of claim considered by Mullins J on 28 July 2008 ("the FAMSC") in paragraphs 6(f), 6(g) and the particulars to paragraph 20 encompassed the matters pleaded in paragraph 7G and 7H of the second amended statement of claim and the TASC.

[9] Although paragraph 20 of the TASC and its counterpart in the latest filed statement of claim were "struck out" on 28 July 2008, the appellant was granted liberty to re-plead its statement of claim. The allegations that the respondent did not invoice Partnership clients for unbilled work in progress, wrote off sums owing to the Partnership and issued credit notes to Partnership clients, were then re-pleaded in paragraph 7F, 7G and 7H of the draft statement of claim which was before Wilson J on 25 November 2008. The content of paragraphs 7F, 7G and 7H of the TASC was pleaded in the second amended statement of claim filed on 9 December 2008 pursuant to the orders of Wilson J.

[10] Although the term "cause of action" has been defined as being "every fact which is material to be proved to entitle the plaintiff to succeed",[1] that definition should not be applied literally so that any new fact to be added to a plaintiff's case would be treated as raising a new cause of action. "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."[2]

[11] The disallowed amendments merely expand upon matters already alleged in previous versions of the pleading. They can properly be described as a "refashioning or redesignation or further particularisation of a claim on the basis of facts already pleaded" as distinct from a "'new case' varying so substantially from what has previously been set up that it would involve investigation of matters of fact or questions or law, or both, different from what have already been raised and of which no fair warning has been given".[3]

[12] Counsel for the respondent submitted that the disallowed paragraphs and claims based on them had not formed part of any earlier claim and had never been the subject of any successful leave to amend. He contrasted the differences between the original statement of claim and the TASC and submitted that the primary judge's reasons were unimpeachable.

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1 *Allonnor Pty Ltd v Doran* [1998] QCA 372 at [3] per McPherson JA citing *Cooke v Gill* (1873) LR 8 CP 107 at 116.

2 *Borsato v Campbell & Ors* [2006] QSC 191 at [8].

3 *Central Sawmilling No. 1 P/L & Ors v State of Queensland* [2003] QCA 311 at [10] and [15].

Did paragraph 7F of the TASC raise a new cause of action?

[13] The relevant express terms of the Dissolution Agreement were alleged in the original statement of claim to be as follows:

> "5. (a) the partnership shall be dissolved as from 3 September 2001: [cl 1];
>
> (b) unbilled work in progress as at 3 September 2001 on files of clients of the Partnership Business (not including files on which work was done under a conditional fee agreement) shall be billed up to 3 September 2001: [cl 2];
>
> (c) unbilled work in progress as at 3 September 2001 on files of clients of the Partnership Business on which work was done under a conditional fee agreement shall be billed on the happening of the event identified in the fee agreement and shall be paid in priority to any work done by the plaintiff or the defendant on such files after the said 3 September 2001: [cl 4];
>
> (d) all sums collected by the plaintiff and the defendant from clients of the Partnership Business billed in accordance with clauses 2 and 4 of the Dissolution Agreement shall be deposited into a bank: account in the names of the plaintiff and the defendant: [cl 3];
>
> (e) the balance of the said bank account shall be paid out weekly to the plaintiff and the defendant equally: [cl 3];
>
> (f) the plaintiff and the defendant shall assist one another in collecting all sums payable to them by the said clients: [cl 3];
>
> …
>
> (i) the defendant, in addition to the sums referred to above, shall pay to the plaintiff the sum of $100,000, which such sum shall be payable:-
>
> (i) as to $30,000, on 14 September 2001;
>
> (ii) as to the balance, by 12 equal monthly instalments of $5,833.33 commencing on 1 October 2001: [cl 25].
>
> …"

[14] Paragraphs 6, 7, 16, 17, 18, 19, 20, 21 and 22 of the original statement of claim provided:

> "6. It was an implied term of the Dissolution Agreement that the plaintiff and the defendant shall each do all things reasonably necessary on his or their part to ensure that each party received the benefit of the said agreement.
>
> 7. The said term was implied:
>
> (a) by operation of law;

(b) alternatively to subparagraph (a), by operation of law as a matter of necessity so as to give the Dissolution Agreement business efficacy.

…

16. The defendant failed to give the plaintiff evidence that he (the defendant) had billed the clients of the Partnership Business pursuant to clauses 2 and 4 of the Dissolution Agreement.

17. Further, the defendant has collected sums from clients of the Partnership Business pursuant to clauses 2, 3 and 4 of the Dissolution Agreement.

PARTICULARS

Particulars of the clients and the sums collected by the defendant are unknown by the plaintiff until after disclosure herein.

18. Pursuant to clauses 2, 3 and 4 of the Dissolution Agreement, the defendant was required to pay to the plaintiff one half of the said sums.

19. The defendant has not accounted to the plaintiff in respect of any of the sums referred to in the preceding paragraph and the same remains due and owing by the defendant to the plaintiff pursuant to clauses 2, 3 and 4 of the Dissolution Agreement.

20. Further, the defendant has failed to take all steps reasonably necessary on his part to collect sums from clients of the Partnership Business as at the said 3 September 2001 pursuant to clauses 2 and 4 of the Dissolution Agreement.

PARTICULARS

Particulars of the clients, the sums and the omissions of the defendant are unknown by the plaintiff until after disclosure herein.

21. The conduct of the defendant at paragraph 20 hereof constitutes conduct in breach of:

(a) clauses 2 and 4 of the Dissolution Agreement; and

(b) the implied term of the Dissolution Agreement at paragraph 6 hereof.

22. By reason of the matters at paragraphs 20 and 21 hereof, the plaintiff has suffered loss and damage in the sum equivalent to one half of the unbilled work in progress for which the defendant did not **bill** the clients pursuant to clauses 2 and 4 of the Dissolution Agreement, particulars of which clients, unbilled work in progress and sum will be given after disclosure herein." (Emphasis added)

[15] Paragraph 7F of the TASC provides:

> "7F. The defendant did not invoice certain clients of the Partnership for unbilled work in progress and unbilled sundries as at 3 September 2001.
>
> PARTICULARS
>
> Particulars of the clients, unbilled work in progress and unbilled sundries are given in Schedule 1. Further particulars of the same are unknown by the plaintiff until after supplementary disclosure herein."

[16] Paragraph 6(a) of the TASC, like paragraph 6 of the original statement of claim, alleges that it was an implied term of the Dissolution Agreement that the appellant and the respondent would each do all things "reasonably necessary on his part" to ensure that the other party received the benefit of the Dissolution Agreement.

[17] Paragraph 7L of the TASC alleges that the conduct in each of paragraphs 7F, 7G and 7H constituted conduct in breach of the above implied term and of clause 2 of the Dissolution Agreement. It is also alleged, in paragraph 7L that the conduct referred to in paragraph 7F, 7G and 7H was in breach of: the implied terms pleaded in paragraphs (g) and (h); the express oral term pleaded in paragraph 7A and, in the alternative, the implied term pleaded in paragraph 7C. The breach of clause 2 of the Dissolution Agreement was alleged to arise (by paragraph 5(d)) of the TASC as a result of unbilled work in progress as at 3 September 2001 not being billed up to 3 September 2001.

[18] Paragraph 7F partially rewords the claim made in paragraphs 20, 21 and 22 of the original statement of claim. The former refers to a "failure to invoice for unbilled work in progress" in breach of the Dissolution Agreement and/or of an implied term that the respondent would invoice for and collect on account of the unbilled work in progress or cause that to be done. The latter complains of a failure "take all reasonable steps necessary … to collect" the same moneys (paragraph 20) in breach of clauses 2 and 4 of the Dissolution Agreement and of the implied term pleaded in paragraph 6 (paragraph 21). Failing to invoice for unbilled work in progress is perhaps the most obvious way in which the respondent may have "failed to take all steps reasonably necessary … to collect" money on account of work in progress. The paragraph 7F allegation is no more than a particular of the allegation in paragraph 20: it is well within its scope.

[19] The allegation in paragraph 7F is central to the appellant's case that he suffered loss as a result of the breach by the respondent of his obligation (express and implied) to collect moneys on account of work in progress, an allegation present from the outset. It is also necessary to consider the complete role of the paragraph 7F allegation in the TASC. That paragraph is referred to again in paragraphs 7A, 7L and in a number of the paragraphs commencing with 7LA and concluding with 7LG. Paragraphs 7LA to 7LG are not of concern for present purposes. Amendment was disallowed in respect of those paragraphs and there was no appeal in respect of that determination. Paragraphs 7A, 7C, 7K and 7L provide:

> "7A. It was an express oral term of the Dissolution Agreement that:
>
> (a) the defendant, by himself, or Mills, as agent for and on behalf of the Partnership would cause the

Partnership to invoice and collect from clients of the Partnership:

(i) unbilled work in progress in accordance with the terms of the Dissolution Agreement identified at paragraphs 5(b) and (d) above; and

(ii) unbilled sundries as at 3 September 2001 on files of clients of the Partnership Business;

(b) the defendant, by himself or Mills, as agent for and on behalf of the Partnership would cause the Partnership to collect sums owing by debtors and aged debtors in accordance with the terms of the Dissolution Agreement identified at subparagraph 5(d) above;

and account to the Partnership for such sums.

…

7C. Alternatively to paragraphs 7A and 7B above, it was an implied term of the Dissolution Agreement that:

(a) the defendant, by himself or Mills, as agent for and on behalf of the Partnership would cause the Partnership to invoice and collect from clients of the Partnership:

(i) unbilled work in progress in accordance with the terms of the Dissolution Agreement identified at paragraphs 5(b) and (d) above; and

(ii) unbilled sundries as at 3 September 2001 on files of clients of the Partnership Business;

(b) the defendant, by himself or Mills, as agent for and on behalf of the Partnership would cause the Partnership to collect sums owing by debtors and aged debtors of the Partnership in accordance with the terms of the Dissolution Agreement identified at subparagraph (d) above;

and account to the Partnership for such sums.

…

7K. The defendant did or omitted to do (as the case may be) the things identified at paragraphs 7F, 7G, 7H and 7J above without the knowledge or the assent of the plaintiff.

7L. By reason of the matter identified in the preceding paragraph, the conduct of the defendant identified at paragraphs 7F, 7G, 7H, and 7J ~~and~~ 7K above constituted conduct in breach of:

(a) the terms of the Partnership Agreement identified at paragraphs 2B(a), (c), (ca), (d), (da), (e), (f) and (g)(iii) above; and

(b) the terms of the Dissolution Agreement identified at paragraphs 5(b)~~, (d) and (e)~~, 6(a), (g), and (h), ~~(i)~~, and ~~(j),~~ 7A or in the alternative 7C, ~~7B and 9B above; or~~

~~(c) alternatively, the terms of the Dissolution Agreement identified at paragraphs 5(b), (d) and (e), 6(a), (g), (h), (i) and (j, 7C, 7D and 9B above.~~"

[20] As stated earlier, the breaches of clause 2 and of the implied term in paragraph 6(a) have been alleged from the time of the original pleading. Reliance on those breaches could not have caused paragraph 7F to raise a new cause of action. Consequently, the unqualified finding by the primary judge that paragraph 7F pleaded a new cause of action was erroneous.

[21] It may well be arguable that new causes of action were included by the reference in paragraph 7L(b) to the implied terms in paragraphs 6(g) and (h), the oral term in paragraph 7A, and the implied term in paragraph 7C. The failure to bill pleaded in 7F and the omission pleaded in 7K were treated in 7L as breaches of implied terms and of an oral term of the Dissolution Agreement not originally pleaded. However, the primary judge allowed paragraphs 7A to 7E inclusive, to remain in the pleading and there was no challenge by the respondent in this regard. Paragraphs 7A and 7C would have no scope for practical operation unless 7L was to be given effect. Also, proof of the implied terms alleged in paragraphs 6(g) and 6(h) depended on no new or additional evidence: the terms were said to arise from the written terms of the Dissolution Agreement.

[22] The primary judge held, and his findings in that regard are unchallenged, that the new oral term in the Dissolution Agreement alleged in paragraph 7A and the new implied term alleged in paragraph 7C, arose out of substantially the same facts as the original cause of action. In the case of the oral term, his Honour remarked that it "concerns the mechanics of invoicing and collecting sums due from clients". In the case of the 7C implied term, the primary judge concluded that although it arguably involved the inclusion of a new cause of action, it also arose out of substantially the same facts as the previously existing causes of action which "relate to the terms of the Dissolution Agreement concerning the invoicing of clients and collection of debts". I will return to this point, but in view of the allowing of the amendments, including the oral and implied terms of the Dissolution Agreement (7A and 7C), it is difficult to see why paragraph 7F and paragraphs 6(g) and (h), insofar as they related to 7F, were not treated as permissible consequential amendments.

Did paragraphs 7G and 7H of the TASC raise new causes of action?

[23] I now turn to a consideration of paragraphs 7G and 7H of the TASC. They provide:

"7G. On a date or dates after about 3 September 2001, the defendant issued credit notes to certain clients of the Partnership.

PARTICULARS

Particulars of the clients and the credit notes are given in schedule 1. Further particulars of the same are unknown by the plaintiff until after supplementary disclosure herein.

7H. On a date or dates after about 3 September 2001, the defendant wrote-off sums owing to the Partnership by certain clients of the Partnership.

PARTICULARS

Particulars of the clients and the write-offs are given in schedule 1. Further particulars of the same are unknown by the plaintiff until after supplementary disclosure herein."

[24] Those provisions have no counterpart in the original statement of claim but they appeared in earlier pleadings and draft pleadings.

[25] Paragraph 6(f) of the FAMSC before Mullins J on 28 July 2008 alleged that it was an implied term of the Dissolution Agreement that the respondent would not write-off any unbilled work in progress as at 3 September 2001 or give clients a credit note in respect thereof. Paragraph 6(g) of the FAMSC alleged that it was an implied term that the respondent would not write-off any sums owing by the debtors as at 3 September 2001 or give any such client a credit note without the appellant's consent.

[26] There was no direct allegation in that pleading that the facts alleged in paragraphs 6(f) and (g) constituted a breach of the Dissolution Agreement. Those allegations were included in paragraph 20 as particulars of the allegation that the respondent had failed to take all steps reasonably necessary to collect moneys pursuant to clauses 2, 3 and 4 of the Partnership Agreement and to account therefor. Paragraph 21 alleged that the conduct of the respondent referred to in paragraph 20 was in breach of clauses 2, 3 and 4 of the Dissolution Agreement and in breach of the implied terms of the Dissolution Agreement alleged in paragraphs 6(a), (b), (c), (d), (f), (g) and (h). Paragraphs 6(a) of each of the FAMSC and the TASC corresponded with paragraph 6 of the original statement of claim. Paragraphs 6(g) and (h) of the TASC provide:

"(g) the defendant would not write-off any unbilled work in progress and unbilled sundries on files of clients of the Partnership Business as at 3 September 2001 without the consent of the plaintiff;

PARTICULARS

The term is implied by the terms of the Partnership Agreement identified at paragraphs 2B(a) ~~and,~~ (c), (e) and (g) above, and in order to give the Dissolution Agreement business efficacy;

(h) the defendant would not write-off sums owing by debtors and aged debtors of the Partnership as at 3 September 2001 or give any such clients of the Partnership a credit note without the consent of the plaintiff;

PARTICULARS

The term is implied by terms of the Partnership Agreement identified at paragraphs 2B(a), (c), (e) and (g) above, and in order to give the Dissolution Agreement business efficacy;"

Those paragraphs corresponded with paragraphs 6(f) and (g) of the FAMSC.

[27] A perusal of the transcript of the argument before Mullins J reveals that paragraph 20 of the FAMSC was ordered to be struck out because its operation depended on implied terms alleged in paragraph 6 of the FAMSC which were ordered to be struck out. Counsel for the respondent before Mullins J accepted that the appellant should have leave to re-plead paragraph 20. Paragraph 6 of the Order required that the respondent review his disclosure of documents "taking into account … any credit notes in respect of unbilled work in progress of the partnership as at 3 September 2001 or billed work in progress up to 3 September 2001 or written off, unbilled or billed work of the partnership as at 3 September 2001 …".

[28] Paragraph 7 required the appellant to provide "full and detailed particulars of the allegations in paragraph 20 … which identifies the relevant client, credit note, unbilled work, write off or other material circumstances …".

[29] Consequently, it may be deduced from the terms of the Order that the parties and the judge had in contemplation that the amended statement of claim which was delivered pursuant to the Order would contain allegations along the lines of those in paragraphs 6(g) and (h) and 7G and 7H of the TASC. That the respondent thought there was always an issue about credit notes may be seen from the fact that a list of documents provided in April 2008 by the respondent to the appellant disclosed credit notes.

[30] The second amended statement of claim filed on 9 December 2008 pursuant to leave given by Wilson J alleged that there were terms of the Dissolution Agreement implied by common law that:

(a) the respondent would not write-off any unbilled work in progress and "sundries" as at 3 September 2001 without the appellant's consent (paragraph 6(g)); and

(b) the respondent would not write-off sums owing by debtors of the partnership as at 3 September 2001 or give any such clients a credit note without the appellant's consent (paragraph 6(h)).

[31] That pleading also contained paragraphs 7F, G and H in the form in which they appear in the TASC. Counsel for the respondent contends, and it was accepted by counsel for the appellant, that no leave was given for that pleading to be amended to insert any statute barred claims.

[32] Paragraphs 16 to 19 inclusive of the original statement of claim, in substance, allege that the respondent collected moneys from former clients of the partnership business pursuant to clauses 2, 3 and 4 of the Dissolution Agreement and failed to account to the appellant for his share of those moneys. Paragraphs 20, 21 and 22 of the original statement of claim allege, in substance, that the respondent failed to collect moneys from clients of the partnership business in breach of the terms of clauses 2 and 4 of the Dissolution Agreement and in breach of the implied term alleged in paragraph 6. The role of paragraph 7F in the TASC has already been discussed. Paragraphs 7G and 7H of the TASC are closely related to the allegation that the respondent failed to collect moneys. If the allegations are made out, they will show that the respondent took actions which ensured that relevant moneys could not be collected.

[33] At least part of the appellant's problems over his pleadings arise from attempts to graft onto the express terms of the Dissolution Agreement a multiplicity of implied terms, some of which struggle to co-exist with the express terms. In the process of seeking to add implied terms and an express oral term, the pleadings became confused and the obvious was overlooked. The allegations in paragraphs 7G and 7H could have been pleaded simply as breaches of the term that the parties were each obliged to do all things reasonably necessary to give the other the benefit of the Dissolution Agreement. Instead, the pleader has alleged: implied terms not to issue credit notes without the appellant's consent and not to write-off sums owing by partnership debtors without the appellant's consent; in 7G and 7H, the issuing of credit notes and the writing off of debts and in paragraph 7L, that the conduct in 7G and 7H constituted breaches of various express and implied terms of the Dissolution Agreement.

[34] There is a real question as to whether paragraphs 7G and 7H, used in the manner just discussed, and making, as they do, positive allegations give rise to fresh causes of action. The principles relevant to such a determination are usefully discussed in the following passage from the reasons of McMurdo J in *Borsato v Campbell & Ors*,[4] referred to with approval in the reasons of Keane JA in *Wolfe v State of Queensland*:[5]

> "The term 'cause of action' was defined in *Cooke v Gill* ((1873) LR 8 CP 107 at 116) 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 eg *Allonnor Pty Ltd v Doran* ([1998] QCA 372 at [3]) 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* ([2001] QCA 336 at [19]) 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* ([2003] QCA 311).
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> …
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> In *Thomas v State of Queensland*, the Court of Appeal disallowed an amendment of a case brought by an injured motorcyclist against the State as the authority responsible for the highway on which he was injured. His case was that there was a large amount of soil on the road surface which caused his motorcycle to lose traction and collide with another vehicle. His claim was pleaded originally on the basis

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4 [2006] QSC 191.

5 [2008] 1 QCA 113 at [17].

> that the defendant had been undertaking road works at the scene which had resulted in this soil on the road. He sought to amend to claim that the soil was there because it had been washed from a nearby embankment in a way which was attributable to poor construction of the highway in the first place. The Court held that this was a new cause of action, saying in its joint judgment: (At [16])
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> > 'The essential elements in a claim for damages for negligence are the duty of care, breach of that duty and injury caused by that breach. Here, although only for one injury an incident is alleged, different duties, different breaches and different causes of injury are now alleged. In our view the effect of the amendment is to include new causes of action.'"[6]

[35] Despite the fact that the allegations in 7G and H could have been provided as particulars of allegations in the original statement of claim of breaches of the express or implied terms of the Dissolution Agreement, they are used to establish breaches of other implied terms and of the alleged oral term of the Dissolution Agreement. In these circumstances, I consider that paragraphs 7G and 7H probably go beyond particularising or restating a pre-existing claim and thus contribute to the pleading of new causes of action. However, they are causes of action which arise out of the same facts or substantially the same facts, as the causes of action pleaded in the original statement of claim. That being the case, a court may give leave to amend the statement of claim to include the new causes of action if it "considers it appropriate".[7] Of considerable relevance to the exercise of that discretion is the fact that paragraphs 6(g) and (h) and 7G and 7H received, in effect, the imprimatur of Mullins J on 28 July 2008.

Should the amendments be refused on discretionary grounds?

[36] The primary judge summarised his reasons for refusing leave to amend to include paragraphs 7F, 7G and 7H in the statement of claim as follows:

> "[70] The plaintiffs unexplained delay in advancing the causes of action for breach which have only recently been formulated, their lack of particularity, the cost that will be occasioned to the defendant in having to investigate these matters and the policy which underlies periods of limitation[8] raise substantial reasons as to why it is not appropriate to give leave to make these amendments. The plaintiff has failed to persuade me that it is appropriate to grant leave."

[37] Counsel for the appellant argued that the primary judge erred in failing to take into account, sufficiently or at all, the history of the litigation and, in particular, the history of the amendments and draft amendments to the pleadings. Reference to that history, it was argued, revealed that the amendments in paragraphs 7F, 7G and 7H had been in previous editions of the pleadings for a considerable time, and, as was discussed earlier, the substance of the allegations in those paragraphs had been approved by Mullins J on 28 July 2008, less than a year after the commencement of the proceedings. The respondent had also given disclosure in April 2008 which

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6 *Borsato v Campbell & Ors* [2006] QSC 191 at [8] – [10] (citations footnoted in original).

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

8 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551.

acknowledged that credit notes were directly relevant to the matters in issue in the proceeding. These matters explain why the lengthy criticisms of the draft pleading, in very similar terms to the TASC delivered to the respondent's solicitors by the appellant's solicitors on 10 December 2008, in an email of 16 December from the respondent's solicitors to the appellant's solicitors, did not criticise paragraph 7F, and limited the criticism of paragraphs 7G and 7H to the particulars provided in Schedule 1 to the draft pleading.

[38] In my respectful opinion, it was wrong to describe the pleadings under consideration as "recently formulated" and I accept the submission that the primary judge erred in this regard. That error, and the error identified in paragraph [20] above, caused the exercise of discretion by the primary judge to miscarry and requires this Court to exercise the discretion afresh. It is thus necessary to address the other factors relevant to the exercise of the discretion.

[39] Counsel for the appellant's argument implied that the only relevant delay was that which occurred after the commencement of proceedings. The point was made by reference to *Aon Risk Services Australia Ltd v Australian National University*[9] and Rule 5(3) of the *Uniform Civil Procedure Rules* 1999 (Qld), that the statements of principle in the former and the operation of the latter relate to conduct after the commencement of proceedings, not to delay in commencement.

[40] Rule 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) is concerned with the conduct of proceedings and not, directly at least, with what has happened before proceedings are commenced. *Aon*, as the appellant's counsel submits, was concerned with rules in the *Court Procedures Rules* 2006 (ACT) relating to amendment of pleadings. But it is, or ought be, obvious that matters prior to the commencement of proceedings may bear on the exercise of a discretion to give leave to amend pleadings. The fact that there has been a lengthy unjustifiable delay in the commencement of proceedings will support an argument by the defendant that it is entitled in the interests of certainty to expect that the proceeding be prosecuted with all reasonable dispatch. Prejudice to the defendant flowing from the loss of or deterioration in the quality of evidence and heightened difficulties in verifying matters relating to the fresh claims, will often be of significance where there is a delay in commencing proceedings. For example, an allegation in respect of facts or utterances five or six years previously, which seems credible on the face of it, may, in the light of circumstances existing at the time, which have been forgotten or which, by the effluxion of time, cannot be established clearly, have appeared fanciful.

[41] That the primary judge had regard to considerations such as those just discussed in refusing leave appears from paragraphs [68], [69], [70], [78] and [106] of his reasons. One matter which weighed with the primary judge was that, as he found, a claim in respect of any breaches which may be established within the limitation period "would be a relatively trivial one". That finding, however, becomes of far less significance when it is understood that: paragraph 7F, in conjunction with other paragraphs, did not give rise to entirely fresh causes of action; the allegations in 7G and 7H arose out of substantially the same facts as causes of action which were pleaded within the limitation period and that the allegations in 7F, G and H had been raised within a year of the commencement of proceedings and concerned issues which the respondent had regarded as relevant on previously existing pleadings.

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9 (2009) 239 CLR 175.

[42] The appellant contended that the primary judge erred in finding, implicitly, that the particularisation of the allegations in paragraphs 7F, G and H were inadequate. The primary judge held that it was unsatisfactory for the appellant "to not give complete particulars". Counsel for the respondent submitted that the evidence supported the primary judge's findings concerning the inadequacy of particularisation and the unnecessarily onerous burden that would be placed on the respondent if the claims were allowed to proceed. Counsel for the respondent referred to unsuccessful discovery applications made before the primary judge and other judges and submitted that Schedule 1 did not identify what transactions were sought to be impeached, which clients were not invoiced, what unbilled work in progress or which credit notes were improperly issued, what amounts were written off, and the circumstances in which credit notes were improperly issued or write-offs improperly occurred.

[43] Counsel for the appellant pointed to the extensive particulars provided in a clear and logical manner in Schedule 1 to the TASC. The schedule is indeed extensive in relation to the allegations in 7F but even those particulars do not purport to be final. The 73 page schedule provides very few particulars of the allegations in 7G and 7H and those particulars do not purport to be complete. This lack of particularity was justified by counsel for the appellant on the basis of the continuing disputes over disclosure. She pointed out that one of the matters before the primary judge was an application for disclosure of a database and other materials to assist with particularisation. That, I think, deprives the criticisms of lack of particularisation of some of their force. It is relevant also that the proof of the allegations in paragraphs 7F, 7G and 7H would be of direct relevance to proof of the issues which have always been at the heart of the parties' dispute. Those issues are identified in paragraph [32] above.

[44] Counsel for the appellant submitted that the appellant is now in a position to provide the outstanding particulars. For the reasons advanced above, I would allow the amendments and make an order in relation to the provision of particulars. If the appellant does not comply with the Order and the particulars are inadequate, prompt application can be made by the respondent to strike out any allegations which are insufficiently particularised.

[45] The lack of particularity in Schedule 1 of the allegations in paragraphs 7G, H and L is troubling but because of the explanation given by the appellant's counsel, there is reason to suppose that the deficiency will be overcome promptly. If it isn't, application can be made to strike out insufficiency particularised allegations. Also, I am not convinced that the net bulk of the work to which the respondent will be put by virtue of the allegations in 7F, G and L was not required to meet other allegations. The case always revolved around establishing the money that should have been collected and distributed on account of unbilled work in progress and client debtors. Write-offs and credit notes, as has been observed at different times and in different ways, are integral to the evidence required to establish the alleged failure by the respondent to comply with his various express or implied contractual duties. I note in this regard that the original statement of claim sought "an order for all necessary accounts and inquiries as to the sum due and owing by the [respondent] to the [appellant] pursuant to *clauses 2, 3 and 4 of the* Dissolution Agreement". The words emphasised were deleted in the prayer for relief in the TASC.

[46] For the above reasons, I would order that:

1. The appeal be allowed.

2. Paragraphs 1 and 9 of the orders and directions made on 10 September 2009 be set aside and that the following be substituted therefor:

    - The appellant have leave to amend the third amended statement of claim filed on 11 September 2009 to include allegations which are in substance the same as those in paragraphs 7F, 7G and 7H of the appellant's proposed third amended statement of claim and any amendments consequential thereon.

    - The appellant file and serve such amended statement of claim within 14 days of today's date.

    - When filing and serving such amended statement of claim, the appellant file and serve an amended Schedule 1 which fully identifies (by reference to file number, date, amount and, where appropriate, credit note number or other such identifying feature) any unbilled work in progress, unbilled sundries and sums owing by debtors and aged debtors allegedly written off without the appellant's consent and any credit notes given to clients of the Partnership Business without the appellant's consent.

[47] I would order that the appellant's costs of the appeal be its costs in the cause. I would not change the costs order at first instance. The hearing before the primary judge was necessitated by the appellant's belated amendments. The appellant attempts to add an additional layer of complexity to his claims by alleging various fiduciary duties and breaches thereof were necessarily resisted. Insofar as the appellant succeeded in obtaining leave to amend to raise new causes of action, he obtained an indulgence from the Court.

[48] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Muir JA and with the orders proposed by his Honour.

[49] **P LYONS J:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with his Honour's reasons, and with the orders which he proposes.