SUPREME COURT OF QUEENSLAND

CITATION:	*Westpac Banking Corporation v Hughes & Anor* [2011] QCA 42
PARTIES:	**WESTPAC BANKING CORPORATION** ACN 007 457 141 (appellant) **v** **RONALD HUGHES & MAVIS HUGHES** (respondents)
FILE NO/S:	Appeal No 9271 of 2010 SC No 271 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	11 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 February 2011
JUDGES:	Fraser and Chesterman JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed;** **2. Orders dismissing the application are set aside;** **3. The amended statement of claim is struck out;** **4. Judgment in the action for the appellant against the respondents;** **5. Respondents pay the appellant's costs of the action and of the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – PROCEDURE UNDER RULES OF COURT – AMENDMENT – where the appellant alleged that the respondents' amended statement of claim introduced a new cause of action after the expiry of the period of limitation – whether the amended statement of claim introduced a "new cause of action" within the meaning of r 376 *UCPR* 1999 (Qld) – whether the amendments to the further amended statement of claim should be disallowed TORTS – TROVER AND DETINUE – WHAT CONSTITUES CONVERSION – GENERALLY – where the

respondents alleged the appellant was liable in conversion for wrongful payment of a cheque – where the respondents' pleading did not address the requirement of possession or a right to possession – whether a plaintiff may claim damages against a drawee or paying bank in an action for conversion – whether summary judgment should be granted in favour of the appellant

Cheques Act 1986 (Cth), s 68, s 92, s 94(1)
Limitation of Actions Act 1974 (Qld), s 10(1)(a)
Uniform Civil Procedure Rules 1999 (Qld), r 376(1), r 376(4), r 376(4)(b), r 379

Associated Midland Corporation Ltd v Bank of New South Wales [1983] 1 NSWLR 533, cited
Bolton Properties Pty Ltd v J K Investments (Australia) Pty Ltd [2009] 2 Qd R 202; [2009] QCA 135, cited
Borsato v Campbell [2006] QSC 191, cited
Charles v Blackwell (1877) 2 CPD 151, considered
Citibank Limited v Papandony & Anor [2002] NSWCA 375, considered
Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport [2009] 1 Lloyd's Rep 201, cited
Draney v Barry & Ors [2002] 1 Qd R 145; [1999] QCA 491, cited
Great Western Railway Co v London & County Banking Co Ltd [1901] AC 414, considered
Hughes & Anor v Westpac Banking Corporation and Ors [2010] QSC 274, disapproved
Hunter BNZ Finance Ltd v Australia and New Zealand Banking Group Ltd [1990] VR 41, considered
Hunter BNZ Finance Ltd v C G Maloney Pty Ltd (1988) 18 NSWLR 420, considered
Lancashire and Yorkshire Railway v MacNicoll (1918) 88 LJKB 601, cited
Lloyds Bank Ltd v The Chartered Bank of India, Australia and China [1929] 1 KB 40, cited
Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119, considered
Penfolds Wines Proprietary Limited v Elliott (1946) 74 CLR 204; [1946] HCA 46, cited
Perpetual Trustees Australia Ltd v Heperu Pty Ltd (2009) 76 NSWLR 195; [2009] NSWCA 84, considered
Smith v Union Bank of London (1875) 10 QB 291, cited
Universal Guarantee Pty Ltd v National Bank of Australasia Ltd (1965) 39 ALJR 11, considered
Voss v Suncorp Metway Ltd (No 2) [2004] 1 Qd R 214; [2003] QCA 252, considered

COUNSEL: V G Brennan for the appellant
M A Jonsson for the respondents

SOLICITORS: McCullough Robertson Lawyers for the appellant
Williams Graham Carman for the respondents

[1] **FRASER JA:** This appeal should be allowed and summary judgment should be entered in favour of the appellant first defendant ("Westpac") dismissing the claim against it by the respondent plaintiffs.

Background

[2] In 2001 Cairns Penny Bank Limited drew a cheque for $250,000 in favour of the plaintiffs as payees. Westpac was the drawee. On or about 22 June 2001, Westpac made payment on the cheque to the National Australia Bank ("NAB") as the collecting bank for its customer, Drury Management Pty Ltd, and NAB deposited the proceeds of the cheque to Drury Management Pty Ltd's account. Nearly six years later, on 19 June 2007, the plaintiffs filed a claim and statement of claim in which they claimed $250,000 from Westpac. (The plaintiffs also made claims against NAB and another bank, but those claims have no relevance in this appeal.) The relief sought in the plaintiffs' claim against Westpac was "… the sum of $250,000.00 …" and interest. The claim and statement of claim did not nominate the cause of action upon which the plaintiffs relied.

[3] Westpac applied in the trial division for summary judgment dismissing the plaintiffs' claim. Westpac contended that the statement of claim did not plead any viable claim against Westpac. On 31 March 2010, before the hearing of Westpac's application, the plaintiffs filed a further amended statement of claim in which they claimed that Westpac had wrongfully converted the cheque. Westpac subsequently applied under r 379 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*") for an order disallowing the further amended statement of claim on the ground that it pleaded a new claim in conversion which was statute barred under the *Limitation of Actions Act* 1974. Any claim in conversion should have been brought within six years of when Westpac paid on the cheque,[1] that is, by 21 June 2007. Westpac argued that the initial statement of claim had not pleaded such a claim. The plaintiffs argued that they had pleaded such a claim and that the further amended statement of claim merely elaborated upon and provided more particulars of that claim.

[4] It was common ground in the trial division and on appeal that Westpac's application under r 379 should be dealt with on principles analogous to the principles applicable on an application for leave to amend under r 376. *UCPR* rr 376(1) and (4) provide:

> "**376 Amendment after limitation period**
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> (1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.
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> …
>
> (4) The court may give leave to make an amendment to include a new cause of action only if—
>
> (a) the court considers it appropriate; and

[1] *Limitation of Actions Act* 1974 (Qld), s 10(1)(a).

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

[5] The primary judge approached Westpac's application to disallow the claim for conversion made in the further amended statement of claim by enquiring whether, although the amendment changed the facts alleged in support of a cause of action, it was nevertheless "… reasonably apparent from a party's pleadings, prior to the amendment, that the party sought to raise that cause of action."[2] The primary judge concluded that the claim in the further amended statement of claim was not "new" and refused Westpac's applications.[3] Accordingly, the plaintiffs' claim could go to trial on their further amended statement of claim.

[6] In this appeal Westpac argued that the initial statement of claim did not plead a claim in conversion. It argued that the further amended statement of claim pleaded an entirely new cause of action which was based on very different allegations from those in the initial statement of claim. The plaintiffs argued that the primary judge's conclusion was correct for the reasons given by his Honour.

Analysis

[7] I respectfully disagree with the primary judge's conclusion. I have concluded that the initial statement of claim did not plead a cause of action in conversion, or any coherent claim. The further amended statement of claim pleaded an entirely new claim. There was no power to permit it to be added by amendment after the expiry of the limitation period. The plaintiffs' claim should have been dismissed.

[8] The plaintiffs' initial statement of claim pleaded against Westpac:

> "2. At all times material to this action, the plaintiffs were customers of the first and second defendants.
>
> 3. On or about 22 June 2001, the first defendant drew a cheque ("**Westpac cheque**") in favour of the plaintiffs, particulars of which follow:-

	Cheque No.	**Date of Cheque**	**Payee**	**Cheque sum**
3.1.	020186	22.06.01	RE & ME Hughes	$250,000.00

> 4. The Westpac cheque was crossed with two parallel traverse lines with the words "not negotiable" appearing between the lines.
>
> 5. The Westpac cheque contained a further direction to the collecting bank that the cheque be paid to the account of the payee only.
>
> 6. The Westpac cheque was not deposited to the account of the plaintiffs. The Westpac cheque was deposited to an account maintained by the third defendant ("**NAB account**"), particulars of which follow:-

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2 *Hughes & Anor v Westpac Banking Corporation and Ors* [2010] QSC 274 at [14], with reference to *Borsato v Campbell* [2006] QSC 191 at [8] per PD McMurdo J.

3 *Hughes & Anor v Westpac Banking Corporation and Ors* [2010] QSC 274 at [26], [36].

Branch	Malanda, Queensland
BSB	084 690
Account number	475 261 108

7. On or about 22 June 2001, the first defendant wrongly and without authority paid the cheque and debited the plaintiffs' Westpac account for the amount of $250,000.00.

8. In the premises, the first defendant had no authority to pay the Westpac cheque and is liable to pay the said sum of $250,000.00 to the plaintiffs.

9. In the alternative, it was an implied term of the contract between the first defendant, as banker, and the plaintiffs, as customer, that the first defendant would observe reasonable skill and care in and about executing the plaintiffs' orders, including cheques drawn on or to the plaintiffs' account. By reason of the matters pleaded the first defendant, in paying the Westpac cheque without inquiry, was negligent and in breach of contract and is liable to the plaintiffs for damages in the sum of $250,000.00.

10. On or about 22 June 2001, the Westpac cheque was presented to the third defendant for collection and the third defendant collected the proceeds of the cheque and placed them to the credit of the NAB account.

11. In the premises, the third defendant has converted the proceeds of the Westpac cheque to its own use and has wrongfully deprived the plaintiffs of them so that the plaintiffs have suffered loss and damage.

12. Alternatively, the proceeds of the Westpac cheque in the amount of $250,000.00 are payable to the plaintiffs by the third defendant as money had and received by the third defendant to the plaintiffs' use."

[9] That pleading made the curious claim that Westpac drew a "not negotiable", "account payee only" document on itself as drawee which named its own customers, the plaintiffs, as payees, but then paid on that document to someone other than the plaintiffs and debited the plaintiffs' account for the same amount. If that were the case, the plaintiffs' loss would have been $500,000, but they only claimed $250,000. In fact, as the plaintiffs subsequently acknowledged, whilst the cheque did name the plaintiffs as payees, the plaintiffs were not customers of Westpac and Westpac did not draw the cheque. The plaintiffs also abandoned the factually wrong allegation in paragraph 7 that Westpac debited the plaintiffs' account. The other allegation in paragraph 7, that Westpac paid the cheque without the plaintiffs' authority, was not supported by any pleaded fact which explained how Westpac lacked authority to pay its own money on its own document to whomever it chose. And if Westpac appreciated that the allegation in paragraph 3 that it drew the cheque was mistaken (because it conflicted with the details of the cheque there set out), the basis of Westpac's supposed lack of authority to pay on the cheque remained opaque.

[10] At the hearing of the appeal the plaintiffs' counsel acknowledged those factual errors and that the initial statement of claim did not plead any viable cause of action other than in conversion, but he argued that it sufficiently conveyed that the plaintiffs pursued a claim in conversion. The plaintiffs' counsel adopted the primary judge's reasoning that the claim based upon Westpac's wrongful payment of the cheque for the benefit of a third party, when the plaintiffs were the payees, sufficiently raised a claim in conversion, even though it might be necessary to plead some additional facts.[4]

[11] In my respectful opinion such a claim was not apparent on the face of the claim or the initial statement of claim. Only an owner or a person entitled to possession of a chattel[5] at the time of an alleged conversion has title to sue for conversion of the chattel.[6] The statement of claim included no allegation that the plaintiffs owned or were entitled to the cheque. The general allegation in paragraph 6 that the cheque "was deposited to" a specified account maintained by NAB might have encompassed a variety of different cases about who delivered the cheque to whom and in what circumstances, but it did not imply that the plaintiffs owned or were entitled to the cheque when Westpac paid on it.

[12] The plaintiffs' counsel argued that such an allegation was implicit in the allegations in paragraphs 3 and 7 that the plaintiffs were named as payees and that Westpac "wrongly and without authority" paid on the cheque. As to the first point, the mere presence of a payee's name on a completed cheque self-evidently does not confer upon the payee any entitlement to possession of it. It could not affect the drawer's liberty to keep, alter, or otherwise deal with the cheque, at least where there was no allegation that the drawer of the cheque or anyone else ever delivered or was obliged to deliver the cheque to the payee. Nor did the allegation that Westpac paid the cheque wrongly and without authority imply that the claim was in conversion. The basis of that allegation was unclear, but the pleading was consistent with the view that the alleged wrong and want of authority arose out of the banker/customer relationship: that was suggested by the allegation of such a relationship in paragraph 2, the absence of any allegation that the plaintiffs owned or were entitled to the cheque, and the allegation in paragraph 9 (albeit in the alternative) that it was an implied term of the contract between Westpac, as banker, and the plaintiffs, as customers, that Westpac would observe reasonable skill and care in and about executing the plaintiffs' orders, including cheques drawn to the plaintiffs' account. A claim in conversion was not hinted at, much less pleaded, in the initial statement of claim.

[13] The further amended statement of claim pleaded against Westpac:

> "2. ~~At all times material to this action, the plaintiffs were customers of the first and second defendants.~~
>
> 3. On or about 22 June 2001, Cairns Penny Bank Limited drew a cheque upon the first defendant as drawee ("**Westpac**

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4 *Hughes & Anor v Westpac Banking Corporation and Ors* [2010] QSC 274 at [26].

5 For the purposes of a claim in conversion, a cheque is regarded as a chattel which is worth the amount of money received under it: *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 55-56 per Scrutton LJ.

6 *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 per Dixon J at 226-227, 229, 230-234; Pollock F and Wright R, *Possession in the Common Law*, 1st ed (1888) Law Press, at pp 28, 121, 145. (I note that Chesterman JA has cited other authority which supports this proposition in the present context in paragraphs [41]–[45] of his Honour's reasons.)

cheque") in favour of the plaintiffs, particulars of which follow:

	Cheque No.	**Date of Cheque**	**Payee**	**Cheque sum**
3.1	020186	22.06.01	RE & ME Hughes	$250,000.00

4. The Westpac cheque was crossed with two parallel transverse lines with the words "not negotiable" appearing between the lines.

5. The Westpac cheque contained a further direction to the collecting bank that the cheque be paid to the account of the payee only.

6. The Westpac cheque was not deposited to the account of the plaintiffs. The Westpac cheque was deposited to an account maintained by Drury Management Pty Ltd with the third defendant ("**NAB account**"), particulars of which follow:

Branch	Malanda, Queensland
BSB	084 690
Account number	475 261 108

6A. The Westpac cheque was acquired from the Plaintiffs and deposited to the NAB account by Drury Management Pty Ltd fraudulently and in the conduct and for the purposes of an unregistered managed investment scheme then being undertaken by Drury Management Pty Ltd in contravention of s.601ED of the *Corporations Act 2001 (Cth).*

7. On or about 22 June 2001, the first defendant wrongly and without authority paid on the cheque ~~and debited the plaintiffs' Westpac account for~~ the amount of $250,000.00 to the third defendant as collecting bank acting for and on behalf of Drury Management Pty Ltd.

8. In the premises, the first defendant had no authority to pay the Westpac cheque and thereby converted the same and is liable to pay the said sum of $250,000.00 to the plaintiffs.

9. ~~In the alternative, it was an implied term of the contract between the first defendant, as banker, and the plaintiffs, as customer, that the first defendant would observe reasonable skill and care in and about executing the plaintiffs' orders, including cheques drawn on or to the plaintiffs' account. By reason of the matters pleaded the first defendant, in paying the Westpac cheque without inquiry, was negligent and in breach of contract and is liable to the plaintiffs for damages in the sum of $250,000.00.~~

10. On or about 22 June 2001, ~~the Westpac cheque was presented to the third defendant for collection and~~ the third defendant collected the proceeds of the cheque from the first defendant for and on behalf of the third defendant's account holder, Drury Management Pty Ltd and placed them to the credit of the NAB account.

> 11. In the premises, the third defendant has converted the proceeds of the Westpac cheque to its own use and has wrongfully deprived the plaintiffs of them so that the plaintiffs have suffered loss and damage.
>
> 12. Alternatively, the proceeds of the Westpac cheque in the amount of $250,000.00 are payable to the plaintiffs by the third defendant as money had and received by the third defendant to the plaintiffs' use."

[14] The further amended statement of claim pleaded the new allegations that:

(a) Cairns Penny Bank Limited drew the cheque;

(b) the plaintiffs came into possession of the cheque (that was not expressed but it was implied by paragraph 6A);

(c) the plaintiffs lost possession of the cheque through the fraud of a third party; and

(d) Westpac converted the cheque.

[15] The primary judge considered that the allegation of fraud in paragraph 6A was relevant merely to rebut a defence that Westpac paid on the cheque to Drury Management Pty Ltd as agent for the true owner or holder.[7] In my respectful opinion, the fundamental point of the allegation was to establish a basis for the plaintiffs to claim that they had title to sue in conversion. That was acknowledged in the submission for the plaintiffs that the allegation might support the conclusion that the plaintiffs remained entitled to the cheque throughout, or that the plaintiffs' rescission[8] of the transaction with the fraudulent party retrospectively re-vested their entitlement to possession, such as to confer a right to sue for conversion. That was an entirely new case.

[16] Westpac argued that the new claim was statute barred and did not arise out of the previous pleading. I accept that argument. The initial statement of claim did not plead, expressly or impliedly, that the plaintiffs owned or were entitled to the cheque, much less that the plaintiffs were entitled to the cheque because it was acquired from them by the fraud of a third party. It made no claim in conversion. It did not hint at such a claim. If any basis of claim was discernible in the initial statement of claim, it was an alleged breach by Westpac of an obligation it owed the plaintiffs as customers of Westpac. The plaintiffs abandoned that claim in the further amended statement of claim and substituted a new claim in conversion based upon alleged fraud by a third party.

[17] The unexpressed premise of the plaintiffs' argument was that the initial statement of claim was so generally expressed that this new claim, though substantially based upon new allegations, might be regarded as having arisen out of substantially the same facts as were alleged, expressly and impliedly, in the initial statement of claim. There can be no doubting that the initial statement of claim included broad allegations which might have comprehended a great variety of different facts, but as Pincus JA observed in *Draney v Barry*,[9] "… one cannot evade the plain intention of

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7 *Hughes & Anor v Westpac Banking Corporation and Ors* [2010] QSC 274 at [32].

8 Although the further amended statement of claim did not plead that the plaintiffs rescinded this transaction.

9 [2002] 1 Qd R 145 at 158, [32].

O 32 r 1(5) [of the repealed *Supreme Court Rules*], or its counterpart r 376(4), by inserting in a pleading a vague allegation raising no identifiable cause of action." His Honour continued:

> "Such an allegation would be liable to be struck out as not setting out the material facts: *Rubenstein v Truth and Sportsman Ltd* [1960] VR 473. But the fact that [it] was not struck out does not oblige the Court to ignore its vacuous character, when considering whether an amendment will if allowed add or substitute a "new cause of action". That view appears, in my opinion, the proper one to take under both the new and the old Rules, but especially under the former, which require that the rules be applied so as to avoid undue technicality and to facilitate their purpose: r 5(2). The spirit of the *UCP Rules* would not be respected if the question whether what are in substance new causes of action should be allowed to be added out of time is made to depend upon the presence or absence in the existing pleading of an allegation of misconduct which is so vague as to be devoid of any ascertainable meaning."

[18] The vacuity of the plaintiffs' initial statement of claim meant that the amendment to plead a claim in conversion necessarily involved the addition of a new cause of action which did not arise out of the same facts, or substantially the same facts, as any cause of action for which relief had already been claimed. The plaintiffs could not satisfy the condition in r 376(4)(b) upon which they relied as justifying the addition of the statute barred cause of action in conversion. The court was therefore not empowered to grant leave to amend under r 376(4). It follows that the further amended statement of claim should have been disallowed. The plaintiffs did not argue that they could plead any other viable cause of action which might not be statute barred. Accordingly they had no answer to Westpac's application for summary judgment.

[19] Since preparing these reasons I have had the advantage of reading the reasons of Chesterman JA. I acknowledge the force of his Honour's reasons for the tentative conclusion that the plaintiffs' intended claim in conversion would fail on the merits, but I would refrain from expressing an opinion on that point, particularly because Westpac's counsel disclaimed any contention that the further amended statement of claim should be disallowed on that ground. Subject to that, I agree generally with Chesterman JA's reasons. I also agree with the orders proposed by his Honour.

[20] **CHESTERMAN JA:** On 19 June 2007 the respondents commenced proceedings against the appellant and two other banks. The appellant was named as the first defendant. The cause of action against it arose out of the drawing and payment of a cheque on or about 22 June 2001. It is the only claim relevant to the appeal. The proceedings were commenced three days prior to the expiration of the period of limitation fixed by s 10(1)(a) of the *Limitation of Actions Act* 1974.

[21] The claim against the appellant was:

> "… $250,000, together with interest".

No cause of action was identified. The statement of claim pleaded:

> "2. At all times material to this action, the plaintiffs were customers of the first … defendan(t).

3. On or about 22 June 2001, the first defendant drew a cheque ("**Westpac cheque**") in favour of the plaintiffs, particulars of which follow:-

	Cheque No.	Date of Cheque	Payee	Cheque sum
3.1.	020186	22.06.01	RE & ME Hughes	$250,000.00

4. The Westpac cheque was crossed with two parallel traverse lines with the words "not negotiable" appearing between the lines.

5. The Westpac cheque contained a further direction to the collecting bank that the cheque be paid to the account of the payee only.

6. The Westpac cheque was not deposited to the account of the plaintiffs. The Westpac cheque was deposited to an account maintained by the third defendant ("**NAB account**") …

7. On or about 22 June 2001, the first defendant wrongly and without authority paid the cheque and debited the plaintiffs' Westpac account for the amount of $250,000.00.

8. In the premises, the first defendant had no authority to pay the Westpac cheque and is liable to pay the said sum of $250,000.00 to the plaintiffs.

9. In the alternative, it was an implied term of the contract between the first defendant, as banker, and the plaintiffs, as customer, that the first defendant would observe reasonable skill and care in and about executing the plaintiffs' orders, including cheques drawn on or to the plaintiffs' account. By reason of the matters pleaded the first defendant, in paying the Westpac cheque without inquiry, was negligent and in breach of contract and is liable to the plaintiffs for damages in the sum of $250,000.00.

…. ."

[22] In February 2010 the appellant applied to have the action dismissed summarily pursuant to *UCPR* r 293 or, alternatively, for an order that paragraphs 2, 7, 8 and 9 of the statement of claim be struck out as not disclosing any cause of action. By way of response the respondents made substantial amendments to the statement of claim on 31 March 2010, after the expiration of the limitation period.

[23] The amendments to the statement of claim deleted paragraphs 2 and 9, added a new paragraph 6A, and amended other paragraphs. As amended the statement of claim read:

"3. On or about 22 June 2001, Cairns Penny Bank Limited drew a cheque upon the first defendant as drawee ("Westpac cheque") in favour of the plaintiffs, particulars of which follow.

	Cheque No.	Date of Cheque	Payee	Cheque sum
3.1.	020186	22.06.01	RE & ME Hughes	$250,000.00

> 4. The Westpac cheque was crossed with two parallel transverse lines with the words 'not negotiable' appearing between the lines.
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> 5. The Westpac cheque contained a further direction to the collecting bank that the cheque be paid to the account of the payee only.
>
> 6. The Westpac cheque was not deposited to the account of the plaintiffs. The Westpac cheque was deposited to an account maintained by Drury Management Pty Ltd with the third defendant …
>
> 6A. The Westpac cheque was acquired from the Plaintiffs and deposited to the NAB account by Drury Management Pty Ltd fraudulently and in the that conduct and for the purposes of an unregistered managed investment scheme then being undertaken … in contravention of s.601ED of the *Corporations Act 2001 (Cth).*
>
> 7. On or about 22 June 2001 the first defendant wrongly and without authority paid on the cheque the amount of $250,000.00 to the third defendant as collecting bank acting for … Drury Management Pty Ltd.
>
> 8. In the premises the first defendant had no authority to pay the Westpac cheque and thereby converted the same and is liable to pay the said sum of $250,000.00 to the plaintiffs.
>
> …. ."

[24] When the application came on for hearing in April 2010 it was amended to include relief disallowing paragraphs 6A, 7 and 8 of the amended statement of claim. The application was then argued as one brought under *UCPR* r 379 to disallow the amendments because they had added or substituted a new cause of action after the expiration of the limitation period. The primary judge proceeded uncontroversially by considering whether, if leave to amend were necessary, it would have been granted pursuant to *UCPR* r 376(4). That rule provides:

> "(1) This rules applies … to an application … for leave to make an amendment … if a relevant period of limitation … has ended.
>
> …
>
> (4) The court may give leave to make an amendment to include a new cause of action only if -
>
> (a) the court considers it appropriate; and
>
> (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment."

[25] It is convenient to refer to the original statement of claim as the "statement of claim" and the further amended statement of claim as the "amended statement of claim". The primary judge referred to them respectively as "SC" and "FASC".

[26] The primary judge explained his approach to the application to strike out the amendments:

> "[12] As was pointed out on behalf of the first defendants, the SC did not expressly identify a cause of action. For that matter, neither did the Claim. Counsel for the plaintiffs referred to *Adamson v Williams*,[10] which dealt with a pleading which did not nominate a particular cause of action. Having noted that there was no requirement that a cause of action be expressly named in a pleading, the Court held that a pleading would permit a judgment under any cause of action that was established by the facts alleged in the pleading.[11] It seems to me that *Adamson* is authority for the proposition, therefore, that the plaintiffs would be entitled, at a trial conducted on the SC, to rely on any cause of action which would be established by the facts pleaded (if proven).
>
> [13] However, *Adamson* might not provide a completely suitable test for determining whether an amendment has the effect of including a new cause of action, under r 376. In *Borsato v Campbell*,[12] with reference to r 376, PD McMurdo J said:
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> > "The term 'cause of action' was defined in *Cooke v Gill*[13] 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 … 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*[14] 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 the plaintiff's case is described."
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> [14] Rule 376(4) identifies a test for the grant of leave to amend a pleading where the amendment will add a cause of action which may be described as "new". One of the purposes of this provision is to distinguish between cases where the

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10 [2001] QCA 38.
11 See [2]-[3].
12 [2006] QSC 191 at [8].
13 (1873) LR 8 CP 107, 116.
14 [2001] QCA 336, [19].

> amendment introduces a "new" cause of action, and those where this does not occur. It plainly contemplates that leave will be sought to make amendments which would not add a "new" cause of action to the proceeding. It seems to me unlikely that the test found in this provision was intended to apply to all cases where the amendment would change the facts alleged: pleadings are primarily concerned with the allegation of material facts. For the purposes of r 376(4), it seems to me that a cause of action is not "new", if it is reasonably apparent from a party's pleadings, prior to the amendment, that the party sought to raise that cause of action. As the passage from *Borsato* indicates, a cause of action is not new in this context simply because not all of the material facts which must be established for the plaintiff to succeed have already been pleaded.
>
> [15] Reference to r 376 makes it necessary to attempt to identify the causes of action apparently relied upon by the plaintiffs in the SC. It can be seen from paragraphs 9 and 12 of the SC that the pleader intended to establish three alternative causes of action. The second relied upon a contract between the plaintiffs and the first defendant. The third is the basis for a claim made only against the third defendant, and may be ignored for present purposes. The identification of the first cause of action is, however, not so straightforward."

[27] The approach adopted by the primary judge was supported by authority and was sound. It required an analysis of both the statement of claim and the amended statement of claim to see whether the facts pleaded in the latter, not included in the former, were "simply further particulars of the cause already claimed", or whether they described a cause of action which did not arise from the facts originally pleaded. Before coming to that analysis it is necessary to say something of the facts underlying the claim for conversion, and the cause of action itself.

[28] Beverley Fuller, a legal notices officer employed by the appellant, deposed that a search of its electronic data base of current account holders showed that the respondents were not customers of the appellant at any relevant time.

[29] Mr Hughes, one of the respondents, deposed that in June 2001 he and his wife decided to invest in a particular investment in a managed investment scheme operated by Drury Management Pty Ltd ("Drury"). Accordingly the respondents lent Drury $250,000. The terms of the loan were evidenced by a promissory note and deed both dated 22 June 2001. The respondents obtained the monies to lend to Drury from Cairns Penny Bank Ltd, ("Penny Bank") presumably a financial institution in which the respondents had funds in credit. Penny Bank drew a cheque for $250,000 on the appellant, payable to the respondents, and delivered it to them. It is the cheque described in the amended statement of claim.

[30] Mr Hughes attended the offices of Drury at Malanda, signed the promissory note and deed and handed over the cheque. An employee of Drury then deposited the cheque into its account with the National Australia Bank ("NAB") at Malanda. NAB collected the proceeds of the cheque from the appellant and credited them to Drury's account. Although there is no evidence on the point Penny Bank's account

with the appellant, and the respondents' account with Penny Bank, must have been debited with the amount of the payment.

[31] The promissory notice expressed itself to be given to the respondents by Drury on terms:

> "(a) Ronald Edward Hughes and Mavis Elsie Hughes hereby lends to Drury Management (Qld) (sic) Pty Ltd the sum of two hundred and fifty thousand dollars.
>
> (b) Drury Management Pty Ltd must repay to Ronald Edward Hughes and Mavis Elsie Hughes the said sum of two hundred and fifty thousand dollars on 22nd day of June 2002.
>
> (c) In addition to the said sum, Drury Management Pty Ltd must pay to Ronald Edward Hughes and Mavis Elsie Hughes interest calculated at the rate of 12 % per annum … and such amounts owing for the interest are to be paid to Ronald Edward Hughes and Mavis Elsie Hughes on 22nd day of June 2002."

[32] The terms of the deed are not relevant. They operated as an attempt on the part of Drury to avoid all liability to the respondents save for the obligation to repay the loan with agreed interest.

[33] The loan fell due for repayment on 22 June 2002. A receiver was appointed to Drury on 27 September 2002. The managed investment scheme was wound up by the Supreme Court on 29 March 2004 on the ground that Drury was not appropriately licensed. The respondent's moneys which they lent to Drury had been invested in the scheme but not in the promised investment. The respondents have not recovered any of their money.

[34] The cause of action which the respondents wish to pursue is one against a paying bank for the conversion of a cheque. The primary judge noted the unusual nature of such a claim:

> "[17] Mr Jonsson of Counsel, who appeared for the plaintiffs, submitted that in the circumstances pleaded, a plaintiff may claim damages against a drawee or paying bank, in an action for conversion. Neither he, nor Mr Brennan of Counsel, who appeared for the first defendant, was able to identify a case based on such a cause of action. However, Mr Jonsson referred to the judgment of Blackburn J in *Smith v Union Bank of London.*[15] That was a case where a cheque stolen from the plaintiff was validly negotiated and paid to a subsequent holder. The plaintiff sued the paying bank. In the course of his judgment, his Lordship said[16] with respect to the paying bank:
>
> > "I think (it) would have been liable for conversion of this cheque, if (it) had paid it to anyone but the lawful holder."

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15 (1875) LR 10 QB 291.

16 At p 295.

[18] *Paget's Law of Banking*[17] seems to give some recognition to such a cause of action.

[19] Further, s 92 of the *Cheques Act* 1986 (Cth) provides that, where a bank, in good faith and without negligence, pays a crossed cheque drawn upon it to a bank, the bank shall be deemed to have paid the cheque in due course. The protection may be limited, therefore, to the potential liability of the paying bank to the drawer of the cheque. However, its predecessor was s 86 of the *Bills of Exchange Act* 1909 (Cth). The effect of this section was to place a paying bank in the same position as if payment of the cheque had been made to the true owner. It seems to me that this recognises a potential action by the true owner against the paying bank, but for the protection provided by s 86.[18] It assumes the existence of an unidentified cause of action by the true owner of the cheque against the paying bank.

[20] In *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd*[19] a finance company had been induced to draw cheques in favour of an innocent payee by the fraud of a third party. The payee, again innocently, endorsed the cheques in some cases to the third party, and in some cases to a company under his control. The cheques were then deposited with a bank, which collected them. Giles J held that the property in the cheques had passed from the drawer, notwithstanding the fraud.[20] However, he made a number of other findings which are of present relevance. One was that the title created by the deliveries of the cheque was avoided when the transactions were rescinded by the finance company.[21] Another was that the commencement of proceedings rescinded the transactions.[22] Notwithstanding the position at the time when the collecting bank collected the cheques, the rescission operated retrospectively.[23] The collecting bank was liable in conversion to the finance company.[24]

[21] While in *Hunter's* case the defendant was the collecting bank, the tort of conversion may provide a remedy against the paying bank also. Thus it has been said:[25]

> "Voluntarily to receive goods in consummation of a transaction which is intended by the parties to give to the recipient some proprietary rights in the goods may be a conversion actionable by the owner. It has

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17 12th ed at 21.2.

18 This protection is recognised in Robson, *Riley's Annotated Bills of Exchange Act and Cheques and Payment Orders Act* (4th ed) p 222.

19 (1988) 18 NSWLR 420.

20 Page 431-432.

21 Page 437.

22 Page 437.

23 Page 440.

24 Page 440.

25 In Balkin and Davis, *Law of Torts* (3rd ed) p 82.

> been held a conversion … for a banker to receive a cheque from a person who has no title to it and to credit the proceeds to that person's account." (*references omitted*).
>
> [22] It is difficult to see why the principle stated in that passage would not apply to the paying bank, as much as the collecting bank. Payment to the collecting bank is intended to give the paying bank rights in the cheque in respect of which the payment is made."

[35] The primary judge then considered the allegations in the statement of claim that:

- The respondents were the payees of the Westpac cheque;
- The cheque was crossed and marked not negotiable;
- The cheque was not deposited to the account of the plaintiffs but to an account maintained by NAB; and
- The first defendant paid the cheque without authority.

and concluded that:

> "[25] … a cause of action, and the most likely cause of action, which can be identified by reference to the paragraphs preceding paragraph 9, is a cause of action in conversion. The plaintiffs alleged that they were the payees of the cheque; but that the defendant wrongfully paid the cheque for the benefit of someone else's account with the third defendant. The liability alleged in paragraph 8 is based on the payment made by the first defendant in respect of the cheque."
>
> [26] In my view, the SC sufficiently raised a claim in conversion for it to be said that the cause of action is not "new". The claim in the pleading is based upon the first defendant's wrongful payment of the cheque for the benefit of a third party, when the plaintiffs were the payees. It may well be that it is necessary to plead some additional facts for the plaintiffs to succeed, though that is not inevitably so. For example, it may be debated whether the allegation that they were the payees of the cheque is sufficient to found an action for conversion, which depends on possession or a right to immediate possession. It may also be necessary, either to avoid surprise, or, perhaps by way of reply to a defence alleging that possession had passed to Drury Management and then to the third defendant, to plead the fraud of Drury Management, and the rescission of the resulting transactions by the plaintiffs. These facts, however, seem to me to be additional facts which do not change the nature of the first claim made against the first defendant."

[36] The primary judge then considered the changes wrought by the amended statement of claim. The alteration in identity of the drawer of the cheque was not regarded as

significant because it did not introduce a material fact but only corrected a misdescription. Similarly his Honour concluded that the addition to paragraph 3 which identified the appellant as the drawee of the cheque was immaterial. His Honour concluded, correctly, that so much was implicit in paragraph 3 prior to amendment.

[37] The primary judge then considered the changes to paragraph 7. He thought all they did was "more clearly [articulate] facts which had been pleaded" in the statement of claim. That comment was based upon paragraph 6 of the statement of claim which had alleged the cheque was deposited to an account with NAB, and paragraph 7 of the same pleading which alleged that the appellant had paid the cheque.

[38] The primary judge did not mention the deletion from paragraph 7 of the allegation that the appellant had wrongly debited the respondents' Westpac account with the amount of the cheque, nor did he refer to the deletion of paragraph 2 in the statement of claim, that the respondents were customers of the appellant.

[39] His Honour then dealt with paragraph 6A of the amended statement of claim and observed, again correctly, that the allegation of fraud was not made against the appellant and that its function was:

> "… to defeat a defence which might be raised … that the first defendant made payment of a cheque to the third defendant as agent for the true owner or holder of it."

It did not therefore, his Honour thought, introduce a new cause of action. The same was said of the addition of words in paragraph 8 to allege conversion. The additional words "… simply identif(y) the cause of action" which the respondents said were the consequence of the facts initially pleaded.

[40] Whether the statement of claim did in truth plead conversion is best answered by considering (1) what facts must be proved to establish the cause of action and (2) what facts were alleged.

[41] According to the authors of *Atkins Court Forms 2nd Ed* (2010 Issue) Vol 39 p 301:

> "There is no precise definition of conversion, but it is a tort of strict liability involving three features:
>
> 1. the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession);
> 2. the conduct was deliberate, not accidental; and
> 3. the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods."

[42] The authority for the proposition that the tort has no precise definition is given as *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport; "The Van Gogh"* [2009] 1 Lloyd's Rep 201 at 209 in which Flaux J said that a "reasonable working definition" could be found in *Lancashire & Yorkshire Railway v MacNicoll* (1918) 88 LJ(KB) 601-605:

> "… dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that … there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right … inconsistent with the owner's right."

Flaux J noted that the definition had been adopted by Scrutton LJ in *Oakley v Lyster* [1931] 1 KB 148 at 153 and by Lord Porter in *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178 at 201.

[43] Salmond and Heuston on the *Law of Torts* 18th ed say this (92):

> "A conversion is an act, or complex series of acts, of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. Two elements are combined in such interference:
>
> (1) A dealing with the chattel in a manner inconsistent with the right of the person entitled to it, and
>
> (2) An intention in so doing to deny that person's right to assert a right which in fact is inconsistent with such right. But the word "intention" refers only to the intentional commission of the act."

[44] The essentiality of the plaintiff's ownership or right to possession of the cheque to an action for the conversion of it was accepted by Samuels JA in *Associated Midland Corporation Ltd v Bank of New South Wales* [1983] 1 NSWLR 533 at 542:

> "In order to make good its title to sue the plaintiff must show that at the relevant time it was the true owner of the cheque; and the true owner, in the sense of the person who can support conversion:
>
> > "… is the person who, taking into consideration the provisions of the Bills of Exchange Act, and recognising that the negotiable character of the instrument overrides the mere property in the chattel, is on that basis entitled to the property in and possession of the piece of paper.
> >
> > *Paget's Law of Banking 8th ed* (1972) at 348, 349: *Wilton v Commonwealth Trading Bank of Australia*; *Model Investments Pty Ltd (Third Party)* [1973] 2 NSWLR 644 at 651."

[45] Relevant passages in the 12th ed of *Paget* are:

> "A conversion is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession." (481) and
>
> "It is generally agreed, in stating the requisites for a plaintiff in conversion, that he must have been entitled to immediate possession of the chattel at the date of conversion." (483)

[46] The origin of the notion that a paying bank might incur liability in conversion appears to be *Smith v Union Bank of London* (1875) 10 QB 291 in which the payee of a cheque indorsed and crossed it generally and then lost it to a thief. It was presented for payment contrary to the crossing by a holder who took for value and in good faith. The payee sued the bank on which the cheque was drawn for paying it contrary to the crossing. His action failed because, notwithstanding the crossing, the cheque remained negotiable and the holder was the true owner of it. Nevertheless Blackburn J expressed the opinion, *obiter*, that the bankers:

> "… would have been liable for a conversion of this cheque, if they had paid it to anyone but the lawful holder." (295)

An appeal ((1875) 1 QBD 31) was unsuccessful because the plaintiff had passed property in the cheque to the holder. Lord Cairns (at 35) appeared to endorse Blackburn J's opinion.

[47] *Paget's Law of Banking* 12th ed states that, by reference to the case, payment of a cheque to someone who is not the true owner is probably an act of conversion (457) but cautioned (458) that the remarks of Blackburn J:

> "… and similar remarks are in wide terms, but they should probably be confined to cases where the payment is made in contravention of some statutory provision, or in such a manner as to preclude it from being a statutory discharge."

and

> "… in practice it will be very rare that a paying bank will be liable in conversion. …"

Charles v Blackwell (1877) 2 CPD 151 was relied on. The text continued (459).

> "It may thus be taken that whenever a bank pays a cheque without contravening any statutory enactment, in such a manner that, either at common law or by virtue of any statute, that payment, though made to an unlawful holder or possessor, operates as a discharge of the cheque, he is under no liability to the true owner for conversion."

[48] The facts in *Charles* were that the plaintiffs were the sellers of goods and the defendants the buyers. Goods having been bought payment was made by a cheque given to the plaintiff's agent who had authority to receive payment by cheque but probably no authority to indorse such cheques. Nevertheless having received the defendant's cheque he indorsed it to himself and misappropriated part of the proceeds. The plaintiff sued the defendants for the price of the goods and the defendant's bank in conversion.

[49] In the Divisional Court (1876) 1 CPD 548 Brett J said (553-4):

> "But (the plaintiffs) could not sue upon (the cheque) provided the bank was justified under statute in paying it; and, (the agent) being authorized (sic) to receive payment by cheque, as between the plaintiffs and defendants, the payment must be held good; and, if the cheque has been properly paid, the plaintiffs cannot maintain (conversion)."

The statute referred to was s 19 of the *Stamp Act* 1853 (UK) which is to the same effect as s 94(1) of the *Cheques Act* 1986 (Cth).

[50] Lindley J said:

> "If that be the true construction of the Act, the cheque in question has been paid by the bankers upon whom it was drawn; and, if so, it has been paid by the defendants. If, therefore, the action had been upon the cheque, payment would have been an answer: and it is equally an

> answer to a claim in (conversion) for the cheque; for, if paid, the plaintiffs cannot be entitled to recover the cheque."

[51] On appeal in *Charles* Cockburn CJ said 2 CPD (162-3):

> "A cheque taken in payment remains the property of the payee only so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account with his customer is settled. After that, the drawer is entitled to it as a voucher between him and the payee. If the cheque was duly paid, so as to deprive the payees of a right of action, either on it or in respect of the goods in payment for which it was given, they no longer have any property in it."

[52] There are, as I understand things, two points underlying the comments in *Paget*. They are that if the drawee of a cheque, the paying bank, pays in a manner authorised by the *Cheques Act* (Cth) it cannot be said it has paid someone other than the owner of the cheque. Having paid the cheque the paying bank is entitled to possession of it. See s 68 of the *Cheques Act* (Cth). Not being in possession of the cheque at any prior time it could not act with respect to the cheque in a manner inconsistent with the rights of the owner.

[53] It is worth digressing to point out that s 92 of the *Cheques Act* (Cth) made the payment by the appellant to Drury a payment in due course i.e. payment to the true owner if made in good faith, without negligence, and to a financial institution. All three conditions were satisfied. There is no allegation of bad faith. The cheque was paid to NAB. There was no negligence in paying to Drury because it was the holder in due course from the respondents.

[54] Against this background one turns to the statement of claim to see whether it alleges, expressly or by reasonable implication, that the respondents possessed the cheque or had a right to posses the cheque at the time it was presented for payment to the appellant by the collecting bank (NAB). I would accept that the pleading should not be analysed too critically, nor read pedantically, but broadly, resolving ambiguities or doubtful expressions in favour of the pleader, allowing inferences to be drawn from incomplete facts.

[55] There is no express allegation that the respondents ever possessed the cheque. The obvious way to have pleaded that fact would have been to allege its delivery by the drawer, Penny Bank, to the respondents who were the payees. That was not done. Nor, even by reading the statement of claim in the manner just described, can one find any basis for implying a right to possession. The inference might arise if the transaction described in the statement of claim was one which necessarily involved, or would ordinarily involve, the respondents having possession of the cheque. But when one looks to see what the pleaded transaction was one encounters unintelligibility. It is impossible to know what legal claim the statement of claim was meant to advance.

[56] The cheque described is one drawn by the appellant on itself in favour of the respondents, i.e. "a bank cheque". The respondents are said to have been customers of the appellant and that payment of the cheque was made wrongly and without authority from the respondents' account, not from the appellant's own monies. Such a case would be a clear case of breach of contract between banker and customer, but it would not involve the conversion of the cheque.

[57] Although pleaded in the alternative paragraph 9 of the statement of claim supports a cause of action in contract. The paragraph has its own difficulty because it seems to assume that the appellant acted negligently, in breach of contract, in paying the cheque contrary to the respondent's "orders" when they were not the drawers of the cheque and the cheque described did not contain any "order" from the respondents to the appellant.

[58] If breach of contract were the intended cause of action paragraphs 4, 5, and 6 were irrelevant so their presence raises a doubt about what case was meant. The essence of the claim in contract would be that the appellant took the proceeds of the cheque which it drew on itself from a customer's account. It would not matter to that claim how the cheque were crossed and/or noted or to whose account it was paid so the inclusion of paragraphs 4, 5 and 6, as well as paragraph 2, gives rise to real doubt that the respondents were in fact alleging that their account had been debited with the payment of the cheque.

[59] If their case is not that their account was wrongly debited but that the cheque should have been paid to them, but was not, then the inclusion of the allegations that they were customers of the bank, and that their account was debited with the payment of the cheque, as well as the contents of paragraph 9, were irrelevant and also give rise to doubt about the cause of action.

[60] The statement of claim may be an attempt to describe a case that the cheque was not paid to the credit of the plaintiff's account but was instead paid to the NAB as principal or agent for one of its customers. One can, perhaps, get that much out of the statement of claim. It does not follow necessarily from those assertions that the payment of the proceeds of the cheque to NAB was a conversion of the respondents' property. An obvious alternative explanation is that the respondents had indorsed the cheque and delivered it to the indorsee.

[61] The fact that the appellant was pleaded to be the drawer as well as the drawee of the cheque gives rise to the distinct possibility that the respondents were never in possession of the cheque. The drawer of a cheque is its true owner until the cheque is delivered to the payee. See e.g. *Hunter BNZ Finance Ltd v Australia and New Zealand Banking Group Ltd* [1990] VR 41 at 46. The loss described by the statement of claim could have occurred by the appellant delivering the cheque to NAB. There is no pleading of an underlying transaction by which the appellant was obliged to deliver the cheque to the respondents, from which an inference of possession might have arisen.

[62] One is, I think, forced to the conclusion that there is nothing in the statement of claim which suggests the inference that the respondents were ever in possession of the cheque and/or that its payment operated as a conversion of their rights to the cheque. The conclusion is reinforced by a consideration of the amended statement of claim. The amendments, and particularly the deletions they made to the statement of claim, show that the claim in conversion was new.

[63] For a start the amended statement of claim describes a different cheque. The parties to it are not the same. The amended statement of claim pleads a cheque drawn by Penny Bank not by the appellant. As well the cheque was said to have been paid to Drury not to NAB. There was no express allegation that the respondents had possession of the cheque but that is a necessary implication from paragraph 6A which pleads that Drury acquired the cheque from the respondents.

[64] The claim that the appellant had wrongly debited the plaintiff's account with the proceeds of the cheque was abandoned, as was the allegation that the respondents were customers of the appellant. As a consequence of those deletions the assertion that the appellant had acted in breach of contract between it and the respondents was also omitted.

[65] It is paragraph 6A which most clearly indicates that a new case was pleaded. It was necessary to establish a basis for asserting the respondents' right to possess the cheque at the time its proceeds were collected. Although it does not appear at all clearly from the amended statement of claim Mr Hughes' affidavit explains that the respondents negotiated the cheque to Drury as the mechanism by which the loan monies were advanced. To overcome the consequence that title to the cheque thereby passed to Drury making it the true owner the respondents pleaded that they were induced to deliver the cheque by Drury's fraud thereby making the transfer of title to the cheque voidable.

[66] I will say something later about the efficacy of such an argument but for the moment one notes that this basis for the claim is entirely absent from the statement of claim. There is no hint of it and nothing which might conceivably suggest it.

[67] It is not just that there is in paragraph 6A the first indication of a case in fraud. More fundamentally the paragraph raises for the first time a claim that the respondents had title to the cheque when it was collected by NAB.

[68] The case pleaded in the amended statement of claim is plain enough, though not felicitously expressed. It is a claim in conversion. The statement of claim is, as I have said, unintelligible. It is not possible to know what claim it intended to advance. As best one can tell it was intended to be for a breach of contract between banker and customer. It is, I think, plain enough that it was not an action in conversion for it lacks the central allegation *viz* that the payment of the cheque infringed the respondents' rights to possess it or, to the same effect, that they were the true owners of the cheque.

[69] I respectfully differ from the primary judge's contrary conclusion principally for two reasons. The first is that his Honour did not advert to the deletions made to the statement of claim which show, in my opinion, that the initial claim was intended to be one in contract. The second reason is the absence of any allegation or basis for inferring that the respondents were the owners of the cheque.

[70] It follows that the amended statement of claim raised a new cause of action outside the limitation period. Accordingly there should have been an order that the amendments be disallowed. It was common ground on the appeal that if the amendments were struck out there should be judgment for the appellant in the action. Counsel for the respondents frankly conceded that their only cause of action lies in conversion. If that cause of action cannot proceed the respondents have no other claim against the appellant. In those circumstances there should also have been an order for summary judgment on the appellant's application.

[71] The notice of appeal is confusing as to which orders are challenged. There is an identified appeal against the order dismissing the application for summary judgment though not against the dismissal of the application to have the amendments disallowed. However the only grounds of appeal seem to relate to that order, the attack on which was the only topic argued on the appeal. I understood counsel for

the appellant to say that the application for summary judgment was made with respect to the statement of claim, and was not pressed with respect to the amended statement of claim. The primary judge, though, recorded that summary judgment was sought separately with respect to the case pleaded in the statement of claim, and the amended statement of claim.

[72] His Honour disposed of that second part of the application, saying:

> "[41] Secondly, it is submitted that the evidence shows a voluntary delivery of the Westpac cheque to Drury Management, resulting in an immediate right on its part to deposit the cheque; and (perhaps by implication, a submission that as a result, Drury Management was entitled to demand, through its agent the third defendant, payment from the first defendant, which the first defendant was required to make). This submission may be considered with the third submission made on behalf of the first defendant, that Drury Management's possession may be said to be "tainted by some pleaded misrepresentation" which would make delivery of the cheque to Drury Management voidable. In support of these submissions, the first defendant relies upon the affidavit of Mr Hughes as to the circumstances in which he gave the cheque to a representative of Drury Management; and on a submission that Drury Management's possession remains lawful "until the plaintiffs exercised the right to avoid the underlying contract between the parties", which is said, on the evidence not to have yet occurred.
>
> [42] In *Hunter*[26] Giles J referred to authority for the proposition that where a person has obtained from another, by a fraudulently false pretence, a cheque crossed "not negotiable" with the intent to apply the proceeds to his own use, that person could not make any real title for such a cheque; and that a bank subsequently dealing with it could take no better title than the person who obtained the cheque fraudulently. In the present case, it would seem that the plaintiffs intend to assert that Drury Management, and accordingly the third defendant and first defendant, are in that position. In that respect, their position may be better than the finance company which was the plaintiff in *Hunter*. However, even if title passed, the plaintiffs may succeed in establishing that they can rescind their transaction with Drury Management ab initio; and that they have done so, at least by commencing this action, with the consequence that the first defendant's dealing with the Westpac cheque constitutes conversion. I do not have the high degree of certainty about the first defendant's prospects of success necessary to enable me to grant it summary judgment."

[73] It is not necessary to deal with this aspect of the judgment because the appeal succeeds on the objection to the amended statement of claim and because this point

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[26] At p 428.

was not the subject of argument. Nevertheless I briefly express a tentative opinion because it may be of some benefit to the parties to understand that the respondents' case fails on the merits, not only because of a failure to plead their case earlier.

[74] The trial judge by reference to *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114 at [80] to [81] held, correctly in my opinion, that summary judgment should be given only in the clearest of cases where there is a high degree of certainty about the ultimate outcome of the proceedings if they went to trial. I expressed the opinion in *Bolton Properties Pty Ltd v J K Investments (Australia) Pty Ltd* [2009] 2 Qd R 202 at 210 that:

> "…where the facts are settled and the respective rights of the parties turn upon questions of law *UCPR* r 292 would require the court to give judgment in advance of trial, even where the point is difficult."

The present is a case of that kind. The essential facts are established. The question is whether they give rise to the possibility that a claim in conversion on those facts might succeed.

[75] Mr Hughes deposed that Drury represented that the respondents' money would be placed with a named institution to obtain a return of 12 per cent without risk to the capital. Induced by that representation they decided to invest in the described investment and to that end "handed … the cheque (Mr Hughes) had been given by … Penny Bank" (the Westpac cheque) to Drury. The proceeds of the cheque were not invested in the described investment but "in an unregistered investment scheme". The money was applied in the acquisition of securities in Australian and overseas companies, and/or real estate here and overseas, and/or advanced to companies associated with Drury.

[76] The representation which induced the respondents to invest with Drury was described as fraudulent because Drury always intended to invest the monies otherwise than in the named institution.

[77] The transaction between the respondents and Drury, a loan at 12 per cent interest, was voidable by reason of the fraud, but it was not void. Though induced by fraud to invest the respondents intended to lend Drury $250,000 and delivered the Westpac cheque to Drury intending that it should take title to the cheque and be paid the proceeds.

[78] There are cases in which the drawer of a cheque who draws it because of the payee's fraud does not lose title to it though he delivered it to the payee. The category was described by Giles J in *Hunter* (at 428) as being those in which:

> "… a person who obtained from another, by a fraudulently false pretence, a cheque crossed "not negotiable" with the intent to apply the proceeds to his own use … ."

Lord Brampton thought that such a person would be no different to a thief who had stolen the cheque. See *Great Western Railway Company v London and County Banking Company Ltd* [1901] AC 414 at 418. Another case of that type is *Voss v Suncorp Metway Ltd (No 2)* [2004] 1 Qd R 214.

[79] Voss sold some property and asked for advice from his accountant about investing the proceeds. The accountant advised him to invest in a named fund which he then

set about creating and for which he opened a bank account. He then advised Voss to draw a cheque in favour of the fund and to deliver a cheque to him for deposit into its account. That was done and the accountant fled with the money. The bank which collected the proceeds of the cheque was liable in conversion. It was held that the accountant by reason of the fraud never became the owner of the cheque.

[80] In *Great Western Railway Co* a rate collector falsely represented to the railway that a rate had been made on it and obtained a cheque drawn in his favour crossed and marked "not negotiable". The collecting bank who obtained the proceeds and paid them to the rate collector was held liable to the railway company. The collector had no title to the cheque and could give none to the collecting bank.

[81] In *Citibank Limited v Papandony* [2002] NSWCA 375 Hodgson JA (with whom Meagher JA agreed) noted the distinction between cases of fraud in which "money was paid over pursuant to voidable transactions, so that the payees became the true owners and entitled to immediate possession of the cheques", and those where there was "a more all-embracing fraud, inducing the payments, in circumstances where there never were any genuine contracts justifying the making and retention of such payments." Describing the fraud in that case his Honour said:

> "[65] …The drawing of the cheques had been induced by fraud, and there was no basis for Mr Brachmanis or the payees or any bearer to assert any entitlement to retain them: there was no concluded contract that could justify retention, which needed to be avoided."

Brachmanis had induced the drawer of the cheques to make them out to companies he controlled by dishonest invitations to participate in their businesses. He was not the payee of the cheques but took possession of them from the drawer and banked them to his own account. In effect he stole them. *Voss* and *Great Western Railway Co* are of the same type.

[82] The distinction between circumstances in which a cheque is delivered pursuant to a voidable contract and those where there is no contract so that "the underlying events can be seen to be a nullity whereby no title can be seen as passing to the recipient of the cheque" was recognised in *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 195 at 212.

[83] The respondents do not describe a fraud of this type. Their case is of an intended transaction into which they actually entered though they were persuaded to do so by fraud.

[84] The facts in *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420 were closer to what the respondents here allege. Maloney dishonestly told Hunter, a finance company, that it had acquired goods from a supplier which it wished to lease from the finance company. It obtained cheques from the finance company to pay the supplier which did not in fact supply any goods. Maloney took the cheques from the finance company, delivered them to the supplier and persuaded it to indorse the cheques to him. He then deposited the cheques with his bank which collected the proceeds. It was sued in conversion by the finance company.

[85] Giles J held that the supplier obtained title to the cheques and by indorsing them passed title to Maloney. His Honour said (431-2):

> "Hunter intended that the cheque should go to (the supplier); Maloney intended that the cheques should go to (the supplier); and while (the supplier) did not … play any greater part than that of temporary holder of the cheques, (the supplier) intended to receive the cheques (and then indorse them to Maloney …). (The supplier) was an existing rather than fictional entity. Even though Hunter's intention was the result of the fraud practised upon it, there was a passing of property in the cheques.
>
> This view is consistent with the authorities earlier referred to. The members of the House in *Great Western Railway Co*. … who considered that (the collector) obtained no title of the cheque seemed to have done so on the ground that the railway intended the cheque to go to (the railway company) not to (the collector) … ."

[86] This aspect of *Hunter v Maloney* was approved by the Court of Appeal in *Perpetual* at 209-211.

[87] The difference between the two types of case is neatly illustrated by the facts in *Hunter BNZ Finance Ltd v Australia and New Zealand Banking Group Ltd* [1990] VR 41 which differed only slightly from those in the other case involving the same finance company, *Hunter v Maloney*, where the result was different. In both cases there was the misrepresentation that goods had been supplied to a company which approached Hunter Finance to finance the supply by way of lease. In *Hunter v ANZ* the finance company gave a cheque meant to pay the supplier of the goods to the director of the company which said it had acquired them and wished to lease them. Unlike the director in *Hunter v Maloney* he did not deliver the cheque to the supplier for indorsement but deposited it directly to the credit of an account one of his companies conducted with ANZ. It, the collecting bank, was liable in conversion because the cheque had never got into the hands of the payee and remained the property of the drawer.

[88] It may have been the distinction just discussed which caused the primary judge to remark that the respondents' position "may be better than the finance company … plaintiff in *Hunter*." I think it likely that the difference between the cases in which title did not pass because of fraud and those in which it did is that of intention. The drawers of the cheques delivered to the rate collector and the accountant did not intend the fraudsters to be the recipient of the proceeds of the cheques. The cheques were intended for the rate collector's employer and the fictitious investment company. The frauds intercepted the intention. By contrast the respondents intended to deliver title in the Westpac cheque to Drury for the purposes of the actual transaction evidenced by the promissory note. There was a transaction which the parties intended to perform. The fraud lay in the description of the investment which was to underpin the respondents' return from the transaction. The transaction was not illusory, an apparition of fraud. It was something which the parties intended to, and did, enter into.

[89] I would therefore conclude that title in the cheque passed to Drury.

[90] There remains the point that the title was voidable and, as the primary judge noted, the plaintiffs allege that they rescinded the transaction so that the title in the cheque

reverted to them retrospectively, to the date of the fraud. Support for that proposition can be found in *Hunter* at (440), where it was said that the effect of the finance company's avoidance of its purchase of the non-existent goods made the collecting bank "a converter of the cheques when at the time it dealt with the pieces of paper … ."

[91] This result would give rise to great uncertainty in commercial transactions. It has been rejected twice by the Court of Appeal in *Papandony* at [68] by Hodgson JA and secondly in *Perpetual* (213).

[92] In *Papandony* Hodgson JA said:

> "[68] … if what the appellant did at the time had been no conversion at all because authorised by the then true owner, I do not think subsequent rescission could change this into a conversion: in that respect … if *Hunter BNZ v Maloney* suggests the contrary, I would respectfully disagree. …"

In *Perpetual* Allsop P and Handley AJA said (213):

> "Like Hodgson JA, we have difficulty in understanding how a party with title when it acts can be guilty of a conversion by reason of a later avoidance of his title at general law."

[93] The respondents who had title to the Westpac cheque delivered it to Drury intending to lend it $250,000. Drury, by promising to repay the loan with interest, gave value for the cheque and acquired title to it. When the appellant paid the cheque to Drury's bank on Drury's behalf the respondents had no title to it. The appellant paid the holder of the cheque. The fact that it was marked "not negotiable" is immaterial. The respondents had a good title to the cheque and passed that title to Drury. Likewise the notation "account payee only" is of no consequence. The words operate as a warning to the collecting bank to inquire if it collects the cheque for someone other than the payee that that person has title to it. Drury had such a title. The words do not impose on the paying bank any obligation to satisfy itself that the collecting bank is collecting it on behalf of the named payee: *Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* (1965) 39 ALJR 11 (Privy Council).

[94] The subsequent avoidance of the transaction of loan did not retrospectively confer title in the cheque on the respondents. Because the cheque was paid to someone authorised by the *Cheques Act* to receive payment it was discharged. The drawee cannot be compelled to pay a second time which is the result the respondents seek by their action for conversion.

[95] I would allow the appeal and set aside the orders dismissing the application to disallow the amendments to the statement of claim, refusing summary judgment and giving the respondents leave to file an amended statement of claim. Instead I would order that the amended statement of claim be struck out and that there be judgment in the action for the appellant (first defendant) against the respondents (plaintiffs). The respondents should pay the appellant's costs of the action and of the appeal.

[96] **MARTIN J:** I agree with the reasons given by Chesterman JA, and with the orders he proposes.