

SUPREME COURT OF QUEENSLAND

CITATION: *Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors (No 2)* [2011] QSC 42

PARTIES: **BODY CORPORATE FOR SUN CITY RESORT CTS 24674**
(plaintiff)
v
SUNLAND CONSTRUCTIONS PTY LTD
ACN 072 976 035
(second defendant)
and
G JAMES GLASS & ALUMINIUM (QLD) PTY LTD
ACN 010 828 056
(fourth defendant)
and
LEMONT PROPERTIES PTY LTD (ACN 010 317 138)
TRADING AS I & H CONTRACT FIXING
(first third party)
and
EMPLOYERS REINSURANCE CORPORATION
(ARBN 072715738)
(second third party)

FILE NO: BS 5992 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 March 2011

DELIVERED AT: Brisbane

HEARING DATE: 26 November 2010, 15 February 2011

JUDGE: Applegarth J

ORDERS: **1. Declare that the filing of the plaintiff's third amended statement of claim on 8 December 2008 shall be taken to be effectual.**

2. Declare that the filing of the plaintiff's fourth amended statement of claim on 18 December 2009 shall be taken to be effectual.

3. Leave be given pursuant to r 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld) to make the amendments contained in those pleadings in respect of

any new cause of action included in them.

4. Declare that pursuant to *UCPR* r 387(1) the amendments made in those pleadings take effect on and from 8 July 2004.
5. The plaintiff be given leave to amend the claim and amended statement of claim substantially in the form of exhibit ADP-1 to the affidavit of Alexander David Power filed on 29 October 2009 (Court Document Index 72), save that the amended statement of claim:
 - (a) not include allegations based on an alleged failure by the fourth defendant to make good all defects that appeared in the works prior to the expiration of the Defects Liability Period, or an alleged failure by the second defendant to cause such rectification work to be carried out, namely the allegations contained in paragraphs 7(d), 7(e), 17(p), 26, 33(i), 38(e) and 38(f) of the proposed statement of claim; and
 - (b) must plead and particularise the loss and damage claimed by the plaintiff, including the matters pleaded in paragraphs 36(d) and 38(d), in accordance with rr 150 and 155 of the *UCPR*, and must be supported by a Scott Schedule and such other documents as will adequately particularise the plaintiff's claim for damages.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – AMENDMENT – where high-rise building was constructed between 1996 and 1998 – where lengthy period between building completion and appearance of defects – where plaintiff body corporate commenced proceedings in tort and contract against construction companies in 2004 – where plaintiff filed four amended statements of claim between 2004 and 2009 – where amendments were partially in response to defendants' complaints about pleading and particularisation – where plaintiff experienced difficulty in gauging the extent of rectification work required and the quantum of its damages – where plaintiff claims to be subrogated to the rights of the original building owner under s 38 of the *Body Corporate and Community Management Act* 1997 (Qld) – where defendant alleges that the filing of two earlier statements of claim was ineffectual due to absence of leave required by r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether leave granted in the course of judicial case management in which consent orders were made for the filing of amended pleadings – where plaintiff seeks leave to file fifth amended statement of claim – where defendants oppose leave on various grounds – whether leave

should be granted

LEGISLATION: *Body Corporate and Community Management Act 1997* (Qld) s 38, s 180

Uniform Civil Procedure Rules 1999 (Qld) r 371, r 376, r 378, r 387

CASES: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 discussed

Bates v Queensland Newspapers Pty Ltd [2001] QSC 83 cited

The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2008] QCA 224 cited

Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors [2010] QSC 463 cited

Draney v Barry [2002] 1 Qd R 145; [1999] QCA 491 cited

Hartnett v Hynes [2009] QSC 225 discussed

Hartnett v Hynes [2010] QCA 65 cited

Jago v District Court of NSW (1989) 168 CLR 23; [1989] HCA 46 cited

Multi-Service Group Pty Ltd (in liq) v Osborne [2010] QCA 72 cited

New Asian Shipping Co Ltd v Sultan [2005] QSC 228 cited

Riverland Water Pty Ltd v Boulderstone Hornibrook Engineering Pty Ltd [2005] SASC 73 cited

State of Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146; [1997] HCA 1 cited

COUNSEL: B D O'Donnell QC and D S Piggott for the applicant/plaintiff
S J Lee for the respondent/second defendant
R A Holt SC and P W Telford for the respondent/fourth defendant

SOLICITORS: McCullough Robertson for the applicant/plaintiff
Gadens for the respondent/second defendant
Malleon Stephen Jacques for the respondent/fourth defendant

Introduction

- [1] The plaintiff (“the body corporate”) applies for leave to amend its claim and statement of claim. The proposed amendments to the claim delete parties who are no longer sued and causes of action that are not pressed by the body corporate. The body corporate says the proposed amendments also “articulate more clearly the causes of action that are pressed.” The proposed amended statement of claim is the fifth version of that pleading. The application is opposed by the second defendant (“Sunland Constructions”) and by the fourth defendant (“G James”). The first third

party and the second third party were not made respondents to the application. They formally appeared at the hearing, did not seek to participate actively in it and were granted leave to withdraw.

- [2] The proceedings relate to Sun City Resort, a 40-level residential unit building at the Gold Coast. It was constructed between 1996 and 1998. Sunland Constructions was engaged as construction manager by Sunland Southbank Pty Ltd (“Sunland Southbank”) pursuant to a construction management agreement dated 27 September 1996 (“the construction management agreement”). Sunland Constructions engaged G James pursuant to an agreement dated 6 February 1997 to design, manufacture and install aluminium windows, doors, glazing, curtain walling and associated works to form the exterior of the Sun City Resort building (“the trade contract”).
- [3] Sunland Constructions, Sunland Southbank, G James and Westpac Banking Corporation (as mortgagee) entered into a deed styled “Side Deed – Trade Contractor” (“the Side Deed”). I have described the terms and purpose of the Side Deed in an earlier judgment.¹
- [4] On 8 July 2004 the body corporate commenced these proceedings, alleging water ingress at the Sun City Resort and claiming damages against, amongst others, Sunland Constructions and G James. The body corporate relies on s 38(3) of the *Body Corporate and Community Management Act 1997* (Qld) (“the *BCCM Act*”) in its form as originally enacted. In essence, the body corporate claims that by operation of s 38(3) of the *BCCM Act* it is “subrogated” to the rights of the original owner of the land, Sunland Southbank, under the construction management agreement and the Side Deed.
- [5] The matter has had a complicated and protracted procedural history. G James and Sunland Constructions raise separate grounds of opposition to the grant of leave to amend and it will be necessary to address them in turn.

A summary of the history of the proceedings

- [6] The grounds of opposition raised by G James and Sunland Constructions, the objective of facilitating “the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense”² and the principles discussed by the High Court in *Aon Risk Services Australia Ltd v Australian National University* (“Aon”)³ necessitate reference to the history of the proceeding.
- [7] The claim has never been amended. It claims damages for negligence against the first defendant (Sunland Southbank), and damages for both breach of contract and negligence against each of the other defendants. The statement of claim that was filed on 8 July 2004 claimed general damages relating to the cost of rectifying defects. It pleaded claims in contract (based on s 36(3) of the *BCCM Act*) and tort against Sunland Constructions. It also pleaded claims in contract and tort against G James. Furthermore, it sought to claim on behalf of lot owners for breach of terms implied in contracts to purchase lots.

¹ *Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors* [2010] QSC 463.

² *Uniform Civil Procedure Rules 1999* (Qld) r 5(1).

³ (2009) 239 CLR 175; [2009] HCA 27.

- [8] On 13 July 2005 an amended statement of claim was filed with a particularised defect schedule. It no longer purported to claim on behalf of lot owners. The amended statement of claim deleted from the prayer for relief the claim for breach of contract against Sunland Constructions. It pleaded relevant terms of the construction management agreement entered into between Sunland Southbank and Sunland Constructions. It still claimed the costs of remedying damage done to common property and to units and their contents. Defences were filed by G James in November 2005 and by the Sunland defendants in December 2005. Lists of documents were filed in 2006. The action was not actively pursued. It was reviewed by Atkinson J as part of a case flow review in February 2008. The body corporate's solicitors changed in July 2008. There were case flow reviews by Atkinson J and Mackenzie J in July, September and October 2008.
- [9] On 8 December 2008 a wholly new statement of claim was filed (Statement of Claim #3). It abandoned claims in tort and introduced a new claim against Sunland Constructions for damages for breach of express terms of the construction management agreement. It also introduced a claim for indemnity under cl 7.3 of the construction management agreement. It added claims for damages for breach of express terms of contract against G James.
- [10] There was a further case flow review before Atkinson J on 19 December 2008. A consent order was made about requests for particulars of Statement of Claim #3, and Sunland Constructions and G James were ordered to file amended defences by 13 March 2009. They did not comply with those orders and the body corporate brought the matter before Daubney J on 9 April 2009. The defendants were given more time to file their defences and ordered to pay the body corporate's costs of the review in any event.
- [11] On 11 June 2009 Sunland Constructions filed an amended defence, which pleaded a statute of limitations defence for the first time. However, the pleading did not plead the date upon which Sunland Constructions contended any relevant cause of action accrued. At the same time, the solicitors for Sunland Constructions complained about the pleading and particularisation of certain allegations in the statement of claim concerning a roof membrane.
- [12] On 15 June 2009 G James filed its amended defence. On 17 June 2009 G James applied to join two third parties to the proceeding. On 24 June 2009 Sunland Constructions filed third party notices against G James seeking indemnity.
- [13] In July and August 2009 correspondence was exchanged about the pleading and particularisation of the roof membrane allegations. There was a mediation in late October 2009, which failed to resolve the proceedings.
- [14] On 18 December 2009 the body corporate filed an amended statement of claim (Statement of Claim #4) pursuant to a consent order made on 10 December 2009, which ordered that the body corporate "file and serve its Amended Statement of Claim No. 4 by 18 December 2009."
- [15] On 10 February 2010 the solicitors for Sunland Constructions sent a letter complaining about the statement of claim pursuant to rule 444 of the *Uniform Civil Procedure Rules 1999 (Qld)* ("UCPR"). The letter asserted that the damages claims were statute barred, that the amendments were not the subject of leave and that the

new pleading contained irrelevant allegations. On 11 February 2010 Sunland Constructions filed its amended defence to the new pleading.

- [16] On 22 February 2010 the solicitors for the body corporate responded to Sunland Constructions' *UCPR* r 444 letter.
- [17] On 31 March 2010 there was a hearing in the Supervised Case List before Daubney J. The hearing included reference to the fact that rectification work was ongoing. The undertaking of this rectification work and its likely cost were and remain material facts for the body corporate to plead properly and particularise. Daubney J in effect placed the proceeding into abeyance pending these further steps and investigations. Sunland Constructions also complained about alleged defects in the recently-filed statement of claim and raised the limitation issue. Directions were made for the body corporate to apply for leave to amend its claim and statement of claim.
- [18] For reasons that are explained in an affidavit filed by the body corporate's solicitor, rectification works were not able to be completed before the body corporate prepared the amended statement of claim that became the subject of its application for leave filed on 30 September 2010. The draft statement of claim (Statement of Claim #5 Version 1), which was exhibited to an affidavit in support of the application filed 30 September 2010, removed allegations relating to the roof membrane and certain matters that Sunland Constructions had contended were "irrelevant allegations".
- [19] Sunland Constructions and G James filed separate applications for the preliminary determination of separate questions. All three applications were directed by P Lyons J to be heard on the same date. On 25 October 2010 the body corporate indicated to P Lyons J that it consented to the separate determination of a limitation question identified by Sunland Constructions. However, prior to the hearing of that application it indicated that it no longer consented to that separate determination. Sunland Constructions' application was part-heard by me on Friday, 26 November 2010. It came before me for review on 3 December 2010, when further evidence came to light bearing upon the date when construction was completed. That evidence contradicted Sunland Constructions' earlier contention that construction must have been completed by 30 June 1998. A letter dated 5 August 1998, from the architects for the project—a letter which was not before me at the hearing on 26 November 2010—indicated that construction was not completed until 5 August 1998. For reasons given by me in an *ex tempore* judgment on 3 December 2010, I declined to order that the issues raised by Sunland Constructions be the subject of preliminary determination pursuant to *UCPR* r 483.
- [20] G James' application for the separate determination of certain issues was heard and reserved by me on 26 November 2010. My judgment on that application was delivered on 10 December 2010.⁴
- [21] A month prior to the hearing of 26 November 2010, the body corporate circulated a new version of its proposed Statement of Claim #5, which added new claims based upon a defects liability warranty and added a claim for indemnity under cl 7.3 of the construction management agreement (based upon an alleged liability of Sunland

⁴ *Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors* [2010] QSC 463.

Southbank to lot owners under contracts for the sale of lots). Statement of Claim #5 also asserted that the body corporate itself suffered loss which entitled it to indemnity arising from a breach of the construction management agreement.

- [22] The hearing of the application for leave to amend concluded before me on 15 February 2011, by which time the body corporate had delivered and disclosed to the other parties expert reports that had been received by it since the hearing in November 2010. These included: (a) a report from Dr Jacobs dated 29 November 2010 concerning proposed structural repairs; (b) a further report by Dr Jacobs dated 14 December 2010 about rectification methods; (c) a report dated 15 December 2010 attaching a Scott Schedule titled “Repair Specification for each unit”; and (d) the report of a quantity surveyor, Mr Lowry, dated 14 February 2011 and titled “Sun City – the estimated cost to rectify building defects.”

Explanation for the proposed amendments

- [23] The body corporate’s reasons for the amendments proposed in Statement of Claim #5 are explained in an affidavit sworn by its solicitor.⁵ The body corporate says that its proposed amendments fall into three categories:
- (a) Some are because the process of identifying and rectifying defects in the building is continuing. These amendments concern rectification works done since Statement of Claim #4⁶ and the ongoing investigations into other rectification works.⁷
 - (b) Other amendments address complaints made in correspondence by Sunland Constructions and G James about the form of Statement of Claim #4.⁸
 - (c) The remaining amendments reflect a more complete legal analysis of the body corporate’s case. They plead more completely the material terms of the express written contracts,⁹ the operation of the defects liability period under the trade contract,¹⁰ and the legal concepts underlying the body corporate’s claim.¹¹

Principles governing leave to amend

- [24] The principles discussed by the High Court in *Aon* inform the exercise of the discretion to grant leave to amend a claim pursuant to *UCPR* r 377 and the discretion to allow or direct a party to amend a claim or a pleading pursuant to *UCPR* r 375 (which is subject to *UCPR* r 376 in respect of amendment after a

⁵ Affidavit of Alexander Donald Power filed 12 November 2010.

⁶ The amendments to paragraphs 36(b), 36(c), 39(b) and 39(c).

⁷ The amendments to paragraphs 36(d) and 39(d).

⁸ The amendments to paragraphs 15(a), 17(a), 17(h), 17(j), 17(o), 28, 29, 31, 32, 33(a), 35, 36(a), 38(e), 38(f), 39(a).

⁹ The amendments to paragraphs 7(d), 7(e), 17(d), 17(l), 17(m), 17(p), 33(h), 33(i).

¹⁰ The amendments to paragraphs 9 and 26.

¹¹ The amendments to paragraphs 7(f), 14, 36(e), 36(f), 37, 39(e), 39(f) and 40.

limitation period has ended). This case, unlike *Aon*, does not concern a matter that is close to trial and the amendments sought will not lead to the adjournment of a trial or the vacation of fixed trial dates. However, the High Court's discussion of relevant principles informs the exercise of my discretion in this case.

[25] *Hartnett v Hynes*,¹² like this case, involved an application to amend in which the proceeding had a complicated interlocutory history with various amendments and proposed amendments to pleadings. In that matter I stated that the following principles assume importance:

1. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation.¹³
2. The discretion is guided by the purpose of the rules of civil procedure, namely the just and expeditious resolution of the real issues in dispute at a minimum of expense.
3. There is a distinction between amendments which are necessary for the just and expeditious resolution of "the real issues in civil proceedings" and amendments which raise new claims and new issues.
4. The Court should not be seen to accede to applications made without adequate explanation or justification.
5. The existence of an explanation for the amendment is relevant to the Court's discretion, and "[i]nvariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment".¹⁴
6. The objective of the Court is to do justice according to law and, subject to the need to sanction a party for breach of its undertaking to the Court and to the other parties to proceed in an expeditious way, a party is not to be punished for delay in applying for amendment.
7. Parties should have a proper opportunity to plead their case, but justice does not permit them to raise any arguable case at any point in the proceedings upon payment of costs.
8. The fact that the amendment will involve the waste of some costs and some degree of delay is not a sufficient reason to refuse leave to amend.
9. Justice requires consideration of the prejudice caused to other parties, other litigants and the Court if the amendment is allowed. This includes the strain that the litigation imposes on litigants and witnesses.

¹² [2009] QSC 225.

¹³ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 182, 217; [2009] HCA 27 at [5], [111].

¹⁴ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 215; [2009] HCA 27 at [102].

10. The point the litigation has reached relative to a trial when the application to amend is made is relevant, particularly where, if allowed, the amendment will lead to a trial being adjourned, with adverse consequences on other litigants awaiting trial and the waste of public resources.
11. Even when an amendment does not lead to the adjournment of a trial or the vacation of fixed trial dates, a party that has had sufficient opportunity to plead its case may be denied leave to amend for the sake of doing justice to the other parties, and to achieve the objective of the just and expeditious resolution of the real issues in dispute at a minimum of expense.
12. The applicant must satisfy the specific requirements of rules, such as *UCPR* r 376(4), when it seeks to introduce a new cause of action after the expiry of a relevant limitation period.

[26] The appeal in that case did not review these principles, and the Court of Appeal also addressed the principles that apply when there has been a lengthy delay in the commencement of proceedings.¹⁵ More recently, the Court of Appeal has also stated that:

“The importance of parties’ progressing litigation expeditiously, as a matter of fairness to the parties and other litigants, and the recognition that the courts exist as a finite public resource, were emphasised in *Aon*. In that case, the Court laid to rest the notion that a party’s dilatory conduct could be excused simply by that party’s meeting a costs order.”¹⁶

Consideration of G James’ opposition to a grant of leave

[27] G James opposes the body corporate being given leave to further amend its statement of claim on the following grounds:

- “(a) The Plaintiff has amended its Statement of Claim 5 times since proceedings were commenced in July 2004. Each amendment was significant and has required G James to incur legal and other costs in meeting the amended claim.
- (b) Notwithstanding that the body corporate’s claim is essentially for damages calculated by reference to the alleged rectification of building defects, in no version of the Statement of Claim—including the Statement of Claim the subject of leave in this application—has the Plaintiff:
 - (i) Prepared a Scott Schedule;

¹⁵ *Hartnett v Hynes* [2010] QCA 65 at [39]-[40].

¹⁶ *Multi-Service Group Pty Ltd (in liq) v Osborne* [2010] QCA 72 at [31].

- (ii) Pleaded its damages in a way that complies with UCPR 150 and 155.
- (c) The Plaintiff's own evidence confirms that it will not be in a position to fully articulate its claim for some time. The affidavit sworn by [the plaintiff's solicitor] on 30 September 2010 deposes to the following facts concerning the rectification works, the subject of the Plaintiff's claim:
 - (i) In the period between November 2009 and September 2010 only 37 units were subjected to rectification works, even though the Sun City Resort comprises 268 units and 2 multi-level penthouses;
 - (ii) The work completed to date is only the first of approximately 7 or 8 stages.
- (d) It is expected that rectification works will not recommence until at least early 2011 so as not to disrupt the Christmas period. Accordingly, it is unlikely that rectification works will be complete in the foreseeable future.
- (e) The body corporate has refused to provided [sic] Further and Better particulars of its proposed Statement of Claim."

[28] The fact that the body corporate has amended its statement of claim on a number of previous occasions does not disentitle it from being granted leave to further amend. The Court has power to disallow amendments which are made without leave pursuant to *UCPR* r 378, to make directions concerning further amendment and to refuse leave to make amendments that will be unjust to the parties affected by them or that will impede the just and expeditious resolution of the real issues in the proceedings. However, a further amendment may be necessary to enable a party such as the body corporate to plead its case properly and to facilitate the just and expeditious resolution of the real issues in dispute.

[29] It is unfortunate that the progress of rectification works and the completion of expert reports did not permit the body corporate to quantify the cost of the rectification works, and to plead and particularise those matters before the application was filed. Given the lengthy history of the matter, the body corporate found itself in a difficult position. It wishes to progress the proceeding in a timely and resource-effective manner. It engaged an expert to prepare a report and specifications identifying the additional rectification work that is to be done. Dr Jacobs expected to complete his work by 30 November 2010. Now that his and other reports are available, the body corporate will be able to provide the particulars foreshadowed in paragraph 36(d) of its proposed pleading. Although it would have been preferable to have the body corporate's proposed statement of claim in a form which pleads its damages in a way that complies with *UCPR* rr 150 and 155, supported by appropriate particulars and Scott Schedules relating to the matters pleaded in relevant paragraphs of its pleading, the body corporate remains under an obligation to the Court and to the other parties to proceed in an expeditious way. Given past delays in the matter, I consider that it was appropriate for it to attempt to

progress the proceedings by seeking leave to amend its claim and its statement of claim. Any grant of leave could be made subject to the timely provision of pleadings and particulars in relation to rectification costs, so as to avoid G James having to file a number of further defences. It would be wasteful to require G James to file a defence pending the provision of a pleading which advances the existing pleading of loss and damage in proposed paragraph 36(d). These matters relate to the terms upon which leave to amend might be granted, and to consequential directions concerning the filing of an amended defence by G James. They are not compelling reasons to refuse leave to amend.

- [30] It is not submitted by G James that the proposed amended pleading against it presents a weak or hopeless case on the pleaded facts. G James raised substantial issues concerning the proper interpretation of s 38(3) of the *BCCM Act* and its application to the Side Deed, which I have addressed in a separate judgment. I have concluded that the body corporate is entitled to rely upon s 38(3) in its claim against G James. The body corporate's case against G James alleges breaches of contract that resulted in substantial defects. The body corporate's case is that these defects affect the building and some of them permit the ingress of water. If the body corporate succeeds in establishing its claims concerning the design, manufacture, construction and installation of windows and glazing, then it has a potentially large damages claim.
- [31] The just and expeditious resolution of that claim, and the matters raised in defence of it by G James, justify amendments that address complaints made in correspondence by G James and Sunland Constructions about the form of Statement of Claim #4. Those amendments more completely plead the material terms of relevant contracts and identify the issues to be tried in resolving the body corporate's claim, including quantum.
- [32] I will hear from the parties concerning appropriate directions, including conditions upon the grant of leave and directions concerning the filing and service of an amended statement of claim and the filing and service of an amended defence by G James.

Consideration of Sunland Constructions' opposition to a grant of leave

- [33] Sunland Constructions' opposition to the body corporate's application for leave to amend raises more complex issues than G James' opposition. Sunland Constructions raises a contention that the application in effect involves applications to amend in the forms of Statement of Claim #3 and Statement of Claim #4, as well as Statement of Claim #5, because the prior amendments were not the subject of a grant of leave. Alternatively, it submits that if the application only involves Statement of Claim #5 then that should be dismissed on the grounds of:
- (a) futility;
 - (b) the body corporate's poor prospects of success on its most recent allegations;
 - (c) unexplained delay;

- (d) oppression; and
- (e) prejudice.

- [34] To address Sunland Constructions' first contention about the status of Statement of Claim #3 and Statement of Claim #4, it is necessary to address in greater detail some further aspects of the procedural history of the matter. As noted above, the claim has never been amended: it has always included a claim in contract against Sunland Constructions under the construction management agreement. Statement of Claim #2 did not include a prayer for relief claiming damages for breach of contract against Sunland Constructions. However, the claim remained unamended and supported the claims made in contract against Sunland Constructions under the construction management agreement, as pleaded in Statement of Claim #3 (filed 8 December 2008) and Statement of Claim #4 (filed 18 December 2009). No application was made pursuant to r 376 in relation to those amended pleadings, presumably because no party thought it was necessary for it to make an application under that rule. In that regard, the body corporate sued Sunland Constructions for breach of contract in its unamended claim, its pleadings had always pleaded the contract and, if it was necessary to seek leave under r 376, then leave would probably be granted.
- [35] No point was raised by Sunland Constructions at the time those amended pleadings were before the Court, or at the time they were filed in 2008 and 2009, about the need to obtain leave pursuant to r 376. Sunland Constructions did not apply pursuant to r 389 to disallow the amendments made in those amended pleadings. If r 387(1) applied to the amendments, its effect would be that the amendments took effect from the date of the document being amended, namely the statement of claim originally filed on 8 July 2004.
- [36] Importantly, Sunland Constructions consented to orders on 17 October 2008 and 10 December 2009 that the body corporate file Statement of Claim #3 and Statement of Claim #4 respectively. The formal order of 10 December 2009 does not include the words "by consent", but it was accepted that this was an oversight and that the orders were in fact by consent.
- [37] There is a strong argument that at least the second of these consent orders for the filing and service of amended pleadings in effect granted whatever leave was required to file them. The observations of Keane JA (with whom McMurdo P and Lyons J agreed) in *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*¹⁷ lend some support to the argument that the conduct of the Supervised Case List in relation to the amendment of pleadings permits directions to be made about the conduct of proceedings inconsistent with other provisions of the rules governing the amendment of pleadings. Those observations relate to an inhibition upon the entitlement to amend under *UCPR* r 378. I do not take them to suggest that the power to make directions in the conduct of the Supervised Case List confers a general discretion to make directions inconsistent with the requirements of r 376. However, they support the view that in a case such as this, where Daubney J made an order by consent for the delivery of an amended pleading in a particular form, the order may be taken to carry with it the grant of any necessary leave required under the rules to make the amendment. Whether a particular order has that effect will

¹⁷ [2008] QCA 224 at [38].

depend upon the circumstances. In this case, I am inclined to the view that the consent orders made in 2008 for the filing and service of Statement of Claim #3, and the orders made by Daubney J on 10 December 2009 for the filing and service of Statement of Claim #4, carried with them the grant of any leave required by r 376.

- [38] In the period of two years following the filing of Statement of Claim #3 (on 8 December 2008) the parties have progressed the proceeding. Defences have been filed, disclosure has been made, the parties have participated in a mediation and taken other steps to prepare the matter. Sunland Constructions complains that leave was not obtained to amend the body corporate's pleading. It has not applied to set aside the orders made on 10 December 2009 for the filing and service of Statement of Claim #4. Its prospects of obtaining an order setting aside those orders would appear to be poor in circumstances in which it consented to the orders being made and did not raise any issue concerning the requirement for leave at the time.
- [39] If the asserted need for the body corporate to obtain leave in order to permit Statement of Claim #3 and Statement of Claim #4 to be filed had been raised at the time they were filed, then the Court would have been required to consider whether to grant such leave. Sunland Constructions may have argued successfully that the body corporate was required to seek leave. However, it cannot be said that the body corporate had no prospect of obtaining such leave. Sunland Constructions does not make a submission to this effect.
- [40] Even if I had been persuaded that leave would not have been granted upon application by the body corporate at the time, I must take account of the fact that matters have proceeded in the meantime and that the body corporate has incurred additional expenses in the conduct of the litigation. It has reasonably assumed that the statements of claim filed by it pursuant to consent orders were amended in accordance with the Court's rules and supervision. Having not raised the issue of leave in 2008 and 2009 when the occasion arose to do so, and having consented to orders for the filing and service of amended pleadings, it would be unfair to permit Sunland Constructions to rely on the argument that those amended pleadings did not obtain a necessary grant of leave. It did not raise the issue of leave until February 2010 and, after that, did not seek to set aside previous orders or have the pleadings set aside.
- [41] Sunland Constructions should be taken to have waived any irregularity arising from the omission of a formal grant of leave to amend so as to permit the filing of Statement of Claim #3 and Statement of Claim #4. If those pleadings were irregular because of the absence of a formal grant of leave under r 376(4), then the conduct of the proceeding and the circumstances outlined above make it appropriate for an order to be made pursuant to r 371 declaring the filing and service of the pleadings to have been effectual and to make any other necessary orders to address any irregularity that arose by reason of the absence of a formal grant of leave. However, the view I take of matters is that the consent order for the filing and service of Statement of Claim #4 involved the grant of leave to amend the statement of claim to include any new cause of action.
- [42] I should, however, make orders that address any irregularity that arose from the circumstances in which Statement of Claim #3 and Statement of Claim #4 were filed. To the extent that either statement of claim was amended without a necessary

grant of leave, it was an irregularity rather than a nullity.¹⁸ The filing and service of the amended pleadings remain valid unless the Court orders otherwise.¹⁹ Neither Sunland Constructions nor any other party has applied to have the amended pleadings set aside. Had an application been made to set aside those pleadings I would have declined to exercise my discretion to make such an order. The delay in applying to set aside would have been highly relevant.²⁰ So would the fact that the parties and the Court proceeded on the basis of the pleadings for a substantial period. The body corporate was entitled to proceed on the basis that those pleadings defined the issues. The prejudice involved in setting aside those pleadings cannot adequately be addressed by an order for costs.

[43] To the extent that there was a failure to comply with the rules by the body corporate in not applying for a grant of leave under r 376(4), and a formal grant of leave not being made, I consider that it is appropriate to declare pursuant to r 371(2)(d) that the filing and service of Statement of Claim #3 and Statement of Claim #4 shall be taken to be effectual, and to order that leave be granted to make the amendments contained in those pleadings. In the circumstances which applied when the parties consented to the filing of new pleadings, and also in the circumstances that now prevail—namely the conduct of the litigation for substantial periods on the basis that the amended pleadings were valid and defined the issues for resolution—it is appropriate to grant leave so as to include any new cause of action. The body corporate’s claim always has included a claim for breach of contract against Sunland Constructions. If Statement of Claim #2 should be treated as, in effect, abandoning that claim, then it still pleaded contractual provisions in support of the claim in tort. To the extent that the amendments made in Statement of Claim #3 and Statement of Claim #4 were subject to a relevant period of limitation that had ended at the time the amendments were made, any new cause of action arose substantially out of the same facts as the cause of action for which relief had already been claimed.²¹ If the need for leave had been raised, the body corporate had at least reasonable prospects of obtaining a grant of leave pursuant to r 376(4) at the time the amended pleadings were filed. An appropriate course under r 371(2), in all the circumstances, is not to prejudice the body corporate or the just resolution of the issues raised in those pleadings by depriving the body corporate of any necessary grant of leave that may have been required, and that probably would have been given, if the requirement for leave had been raised in late 2008 or late 2009.

[44] Appropriate orders are:

1. Declare that the filing of Statement of Claim #3 on 8 December 2008 shall be taken to be effectual.
2. Declare that the filing of Statement of Claim #4 on 18 December 2009 shall be taken to be effectual.
3. Leave be given pursuant to r 376(4) to make the amendments contained in those pleadings in respect of any new cause of action included in them.

¹⁸ *UCPR* r 371(1).

¹⁹ *Bates v Queensland Newspapers Pty Ltd* [2001] QSC 83 at [10]; *New Asian Shipping Co Ltd v Sultan* [2005] QSC 228 at [16].

²⁰ *Bates v Queensland Newspapers Pty Ltd* [2001] QSC 83 at [9].

²¹ cf *UCPR* r 376(4); *Draney v Barry* [2002] 1 Qd R 145 at 164; [1999] QCA 491 at [57].

4. Declare that pursuant to r 387(1) the amendments made in those pleadings take effect on and from 8 July 2004.

- [45] I should mention in this context Sunland Constructions' submission that no grant of leave could operate by force of r 387(1) to deem the changes made in those amended pleadings to operate from 8 July 2004 because the changes made by them do not constitute an "amendment". It submits that the term "amendment" does not apply to changes that introduce an entirely different cause of action. I do not accept the submission. The amendments permitted by rr 376 and 378 include amendments that introduce a new cause of action and that make substantial changes. Statement of Claim #3 transformed the way in which the body corporate pleaded its case, but the pleading still amounted to an "amendment" that was permitted by the rules.
- [46] Having rejected Sunland Constructions' submissions to the effect that the filing of Statement of Claim #3 and Statement of Claim #4 were unauthorised, and that the body corporate is required to seek leave to amend in respect of those amended pleadings, I turn to its opposition to leave being granted in respect of Statement of Claim #5.

The futility objection

- [47] Sunland Constructions submits that no useful purpose would be served by allowing the claim for damages for breach of contract to proceed against it because the last day of the limitation period for that claim was 30 June 2004. The action was not commenced until 8 July 2004. Sunland Constructions submits that the claim for breach of contract was already statute barred by that time and, thus, cannot succeed.
- [48] Sunland Constructions' contention that any cause of action for breach of contract accrued on 30 June 1998 is disputed. It is a contention based on the fact that the date for practical completion under the construction management agreement was 30 June 2004 and the claim that construction was in fact completed by this date. Although the body corporate pleads in Statement of Claim #4 that G James and Sunland Constructions each achieved practical completion under the trade contract and under the contract management agreement respectively on or about 30 June 1998, Sunland Constructions' amended defence filed 11 February 2010 pleads in response that practical completion of the construction management agreement occurred between 30 June 1998 and 27 July 1998. If this is so, and practical completion did not occur until after 7 July 1998, then the action for breach of contract may have been commenced within time. As previously noted, evidence was placed before the Court on 3 December 2010 that work under the contract was not completed until 5 August 1998. If the breach of Sunland Constructions' contractual obligation to complete the work to the required standard occurred on the latter completion date, then the cause of action arguably accrued on 5 August 1998 and the proceedings were commenced within time.
- [49] The body corporate advanced substantial arguments in relation to the nature of subrogation under s 38(3) of the *BCCM Act* and about the operation of the indemnity in cl 7.3 of the construction management agreement. Sunland Constructions also advanced substantial arguments on these questions of law. One

aspect of the body corporate's argument is that s 38(3) transfers contractual rights to the body corporate and that the effect of s 38(3) is that the limitation period starts to run against the body corporate when s 38(3) takes effect, namely on the establishment of the scheme and the creation of the body corporate on 27 July 1998. Sunland Constructions advances substantial arguments to the effect that the rights to which the body corporate is subrogated are subject to all defences, including limitation of actions defences, and that the body corporate cannot be placed in a better position than the party to whose rights it is subrogated. These competing arguments involve important questions of law. If the body corporate's argument concerning the proper construction of s 38(3) is upheld then Sunland Constructions' limitation defence will fail.

- [50] I am not persuaded that the body corporate's claim for breach of contract is clearly met by a limitation defence such that it would be futile to allow its claim for damages for breach of contract to proceed.
- [51] The body corporate also claims to be subrogated under s 38(3) to the contractual indemnity contained in cl 7.3 of the construction management agreement. Again, substantial arguments were addressed, principally during the hearing of Sunland Constructions' application for the separate and prior determination of these issues, concerning the meaning of cl 7.3 and the nature of the liability or loss in respect of which it indemnifies the Proprietor (Sunland Southbank). The body corporate submits that the nature of subrogation under s 38(3) entitles it to indemnity, pursuant to cl 7.3 of the construction management agreement, in respect of losses that it has suffered and is continuing to suffer in rectifying defects in the building. Alternatively, it submits that the indemnity in cl 7.3 operates because Sunland Southbank has incurred loss or liability. In essence, the body corporate argues that Sunland Southbank suffered loss because the building that was constructed for it was not constructed in conformity with the standard required under the construction management agreement. The body corporate further contends that the measure of Sunland Southbank's loss is *prima facie* the cost of rectifying the building so as to conform with the standard of contractual performance promised by Sunland Constructions under the construction management agreement. It also contends that Sunland Southbank has a liability to the original purchasers of lots or proposed lots for breach of the warranty implied into each sale contract by s 180 of the *BCCM Act*.
- [52] Sunland Constructions advances substantial arguments concerning the operation of cl 7.3 and submits that neither the body corporate nor Sunland Southbank has incurred a liability or loss which entitles it to indemnity pursuant to cl 7.3. Again, the competing arguments are not of a kind that permits me to conclude that the body corporate's arguments are without merit and that it is futile to permit the proposed amendments.
- [53] The body corporate should, in the interests of justice, be permitted to obtain a determination at trial as to the nature of the subrogation provided for in s 38(3) of the *BCCM Act* and to sue for what are contended to be its losses or, alternatively, losses or liabilities incurred by Sunland Southbank as a result of Sunland Constructions' breaches.

Prospects of the recently added allegations

- [54] One change made by the recent version of the proposed amended statement of claim is the allegation of a “liability” of Sunland Southbank for the purposes of cl 7.3 of the construction management agreement. I do not accept that this new allegation is untenable or has such poor prospects of success that I should not grant leave. Rather, the body corporate should be permitted to have a determination of these issues on their merits at trial. Sunland Constructions submits that the duty to indemnify under cl 7.3 only arises in respect of a relevant liability of, or loss by, Sunland Southbank. It submits that Sunland Southbank has no “liability” to any third party since there is no existing legal liability enforceable in a court. Apart from anything else, it submits that a claim by a third party against Sunland Southbank would be statute barred. These are substantial arguments, and in response the body corporate points to Sunland Southbank’s alleged liability to the original purchasers of lots or proposed lots for breach of the warranty implied into each sale contract by s 180 of the *BCCM Act*. It argues that the warranty was breached when the contracts were completed some time after 27 July 1998. The body corporate further argues that the limitation period affects only the remedy and does not extinguish Sunland Southbank’s liability. I consider that the body corporate’s argument has sufficient merit to warrant leave being granted to have this and other issues decided at trial. It is strongly arguable that the term “liability” in cl 7.3 is not confined to a liability that is either admitted or is established by judgment.²² It is also strongly arguable that Sunland Southbank may have a liability towards purchasers of lots in the building in respect of defects that only became apparent after the limitation period expired. Such a liability might exist in circumstances in which it might be thought unconscionable to plead a limitations defence, leaving Sunland Southbank (or the body corporate in its place) to seek indemnity from the building contractor which breached its contract and which was responsible for the defects that emerged. In short, it is strongly arguable that the indemnity clause applies to a liability in respect of defects that did not become apparent until after the limitation period expired, and that such a liability exists notwithstanding the entitlement of a party to plead, if so advised, a limitations defence.
- [55] Whether, and to what extent, the parties who contracted to purchase units suffered a loss is, in any event, likely to be an issue at trial in the context of arguments previewed by Sunland Constructions that the units were sold at full market value so that Sunland Southbank suffered no loss. If Sunland Southbank suffered no loss, then the body corporate’s entitlement to sue by virtue of s 38(3) is in respect of a non-existent loss.
- [56] I consider that the body corporate should be permitted to amend, and to seek to recover at trial, what it contends is its entitlement to an indemnity, under cl 7.3 of the construction management agreement, for loss it has suffered and is continuing to suffer in rectifying defects in the building. Alternatively, if s 38(3) permits the body corporate to recover Sunland Southbank’s losses rather than its own, it is strongly arguable that such losses are *prima facie* measured by the cost of rectifying the building.

²² *Riverland Water Pty Ltd v Boulderstone Hornibrook Engineering Pty Ltd* [2005] SASC 73 at [18].

- [57] The fact that Sunland Southbank is not the subject of a separate claim in the proposed pleading and has ceased to be represented in the proceedings does not, in my view, disentitle the body corporate from pursuing the enforcement of the rights of Sunland Southbank to which it was subrogated by virtue of s 38(3) of the *BCCM Act*.
- [58] The body corporate should be permitted to obtain a judicial determination of its entitlement to recover its own losses, or to be subrogated to the rights of Sunland Southbank for losses which it allegedly suffered when Sunland Constructions failed to perform its contractual promise to carry out construction works to the standards required by the contract. The body corporate has raised substantial, viable legal arguments in support of that part of its proposed pleading which relies on the operation of s 38(3) of the *BCCM Act* and the indemnity under cl 7.3. The trial of the proceedings will require investigation of the performance by Sunland Constructions of its contractual obligations and the cost to rectify defects in the building.
- [59] The determination at trial of most of the legal issues argued between the body corporate and Sunland Constructions is in the interests of justice. This is because the arguments are viable and do not add additional facts of any complexity. The new issues essentially involve the deployment of additional legal contentions.
- [60] The same assessment of prospects cannot be made for another proposed part of the body corporate's case. The body corporate seeks to rely upon cl 5.13 of the construction management agreement, which relevantly states:

“The Construction Manager shall cause all relevant Trade Contractors to carry out the obligations imposed upon them under the relevant Trade Contract regarding rectification of defects, during the Defects Liability Period.”

The body corporate argues that cl 5.13, properly construed, required Sunland Constructions to cause G James to rectify the defects in the building during the Defects Liability Period. Sunland Constructions argues that the remedies provided under such a defects liability clause differ from remedies for breach of contract and that such a clause is not apt to cover fundamental work which should have been carried out prior to practical completion.

- [61] Sunland Constructions further argues that its obligations during the Defects Liability Period, pursuant to cl 5.13, required it to cause relevant trade contractors to carry out their defects liability obligations, and this turns on the content of the obligation of each trade contractor under the relevant trade contract. The trade contract entered into by G James provided:

“DEFECTS. The Contractor shall maintain the Works until Completion and thereafter make good all defects that may appear in the Works prior to the expiration of the Defects Liability Period as set fourth [sic] in the Third Schedule.”

The Third Schedule of the contract provided for a Defects Liability Period of 52 weeks from practical completion. The proposed statement of claim does not plead that the defects alleged in it were defects that “appeared” or were patent at any time

during the Defects Liability Period, or that notice was given to Sunland Constructions or G James of those alleged defects during that period.

- [62] The body corporate submits in response that, when regard is had to other clauses of the construction management agreement, cl 5.13 obliged Sunland Constructions to require defects to be remedied, even if the body corporate had not complained about them. I am prepared to accept on an application of the present kind that it is arguable that the obligation imposed by cl 5.13 did not depend upon a complaint by the body corporate. However, this does not address the more fundamental matter to which cl 5.13 directs attention, namely the content of the obligation of the relevant trade contractor regarding rectification of defects. The body corporate says that Sunland Constructions' argument requires the terms of the construction management agreement to be read down by reference to the obligations as to defects imposed on G James in the trade contract. The construction management agreement was executed in September 1996 and the trade contract in February 1998. Consequently, the body corporate submits that the Court "cannot construe a contract by reference to another contract, between different parties, that post-dates it."
- [63] I do not consider that Sunland Constructions' argument has such a flaw. Clause 5.13 must be construed according to its terms. Its terms require reference to the obligations imposed under a relevant trade contract, being a contract that may have been entered into on a date much later than the date upon which the construction management agreement was entered. Reference to the trade contract entered into by G James shows that its obligation was to make good any defects that appeared in the works prior to the expiration of the Defects Liability Period. The body corporate does not allege that the defects appeared in the works prior to the expiration of the Defects Liability Period.
- [64] The body corporate has failed to place before me a pleading or material that shows that it has reasonable prospects of success on the newly-developed allegation concerning breach of cl 5.13. This new part of its proposed pleading relates to breach of a different express provision. The facts upon which it depends are not properly pleaded so as to engage cl 5.13 of the construction management agreement in respect of G James' obligation to make good any defects that appeared in the works prior to the expiration of the Defects Liability Period. This new aspect of the body corporate's claim appears to have poor prospects of success. Applying the principles that I have earlier identified, I decline to exercise my discretion to permit the body corporate to now advance a pleading that relies upon cl 5.13 of the construction management agreement.
- [65] The new allegations in the proposed pleading that Sunland Constructions promised:
- (a) to cause all trade contractors to carry out the obligations imposed on them under the relevant trade contract regarding rectification of defects, during the Defects Liability Period; and
 - (b) to supervise and administer the carrying out of such rectification work during the Defects Liability Period

are expressly based on cl 5.13.²³ The body corporate does not plead that, independent of cl 5.13, Sunland Constructions was required to cause G James to rectify defects in the building during the Defects Liability Period. In the absence of a plea that defects appeared in G James' work prior to the expiration of the Defects Liability Period, the new pleas that Sunland Constructions breached its obligations:

- (a) to cause G James to carry out its obligations regarding rectification of defects during the defects liability period; and
- (b) to supervise and administer G James in the carrying out of such rectification work during the defects liability period

should not be permitted. The matter is not an oversight in failing to allege the fact that defects appeared in the relevant works prior to the expiration of the Defects Liability Period. There is no evidence that they did.

- [66] In the circumstances, the body corporate should not be permitted to plead claims that are based on an alleged failure by G James to rectify defects that appeared prior to the expiration of the Defects Liability Period, or an alleged failure by Sunland Constructions to cause such rectification work to be carried out. Accordingly, any new pleading should not include paragraphs 7(d), 7(e), 17(p), 26, 33(i), 38(e) and 38(f) of the proposed statement of claim.

Unexplained delay

- [67] Sunland Constructions correctly submits that delay in applying to amend is a relevant factor and that this is all the more so where the delay is unexplained.
- [68] I have had regard to the affidavits of past and present chairpersons of the body corporate about the body corporate's endeavours to progress the proceedings, the appointment of new lawyers in 2008 and the body corporate's limited funds to carry out the major works that are required to repair the defects. I am satisfied that the body corporate has made reasonable steps to progress the pleadings and wishes to resolve the proceedings.
- [69] I have previously addressed the history of the proceedings. In its early stages the litigation proceeded without intervention or management from the Court. The defendants did not seek the Court's assistance to expedite the proceedings. Case flow reviews commenced in early 2008 and since then various versions of the statement of claim have been filed pursuant to orders, including consent orders. Some amendments have been in response to complaints by Sunland Constructions and G James concerning the form and content of the pleading. Delays in respect of Statement of Claim #5 have arisen, in part, because the matter was placed in abeyance pending completion of rectification work, and the pleading and particularisation of matters in relation to that rectification and its cost. The body corporate has brought its application for leave to amend in accordance with a direction made on 31 March 2010. That direction required it to seek leave to amend its claim and statement of claim. The reasons for those proposed amendments have been explained by the body corporate's solicitor. I do not consider that the body

²³ Statement of Claim #5, paragraphs 7(d) and (e).

corporate's delay should disentitle it from making amendments that are intended to plead more completely the material terms of the contracts upon which it relies, the nature of its claims and, following receipt of expert reports about the nature and extent of further rectification work required, the quantum of its claims.

Oppression

- [70] Associated with the previous submission is the submission that it is oppressive, even for a corporate defendant,²⁴ to have to continually meet new allegations regarding distant events. I take account of Sunland Constructions' complaints concerning the history of the body corporate's pleadings, including the introduction of matters that were later abandoned. However, certain matters were recently abandoned following complaints by one or other of the defendants concerning their viability. The body corporate should not unnecessarily be criticised for abandoning or amending parts of its claim in response to complaints. A number of the amendments relate to matters that do not require factual investigation. They relate to the terms of contracts and the operation of statutory provisions upon which the body corporate relies. Sunland Constructions is able to meet legal arguments that the body corporate has deployed in reliance upon ss 38(3) and 180 of the *BCCM Act* and relevant provisions of the contract, including the indemnity clause. I am not persuaded that the body corporate is so oppressed by the proposed amendments that I should not grant leave to make them.
- [71] I consider that the body corporate should be permitted to plead, as it does in paragraph 39(e), that Sunland Southbank was not given what it was entitled to under the construction contract, and that the measure of its loss is the cost of rectifying the building so that it conforms to the standards required under the agreement. There is substantial authority that this is the *prima facie* measure of its loss. The facts for which Sunland Constructions wishes to contend, namely that the units were sold at market value and that their sale price was not affected by hidden defects in the building, may not, if proven, displace this *prima facie* measure. The trial judge may conclude that the *prima facie* measure is the appropriate measure against a building contractor whose defective work did not become apparent until after the units were sold. There is much to commend the view that the appropriate measure is one that protects what may loosely be described as the performance interest, and that Sunland Southbank was entitled to protection of that interest, even if it sold the units. The consumers who purchased units may have assumed that the building had been constructed in accordance with the standards of contractual performance that Sunland Southbank had promised. In circumstances in which the legislature has seen fit, in the interests of consumer protection, to subrogate the body corporate to the rights of the original owner under the building contract, the body corporate has substantial prospects of persuading the trial judge that the measure of Sunland Southbank's loss is the measure pleaded in paragraph 39(e) of the proposed pleading. Its prospects are sufficiently strong to grant leave to plead paragraphs 39(e) and 40.
- [72] The proposed pleading is appropriate where there is a certain ambiguity in s 38(3) as to whether the rights to which the body corporate are subrogated are the rights to

²⁴ As to which see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214; [2009] HCA 27 at [101].

a contractual remedy in respect of its loss or the loss of the original owner, Sunland Southbank. In either case, the loss pleaded is the same, namely the cost of rectification. The late inclusion of paragraph 39(e) is to guard against a legal argument that may be advanced at trial. The proposed amendment does not necessitate the joinder of Sunland Southbank, assuming that it was formally removed as a party to the proceedings at some stage or will be removed once the claim is amended. Neither the body corporate, nor Sunland Constructions, nor Sunland Southbank seeks the latter's joinder in the event that the amendment is allowed. The body corporate's position is that if s 38(3) entitles it to sue for loss suffered by Sunland Southbank, rather than the body corporate's loss, then it sues in its own name by virtue of its statutory entitlement, and that it is not necessary for Sunland Southbank to be joined.

- [73] The proposed paragraph 39(f) pleads that Sunland Southbank "is liable under each contract for the sale of a lot in the scheme, as being in breach of the term implied by s.180 of the *Body Corporate and Community Management Act 1997* that at completion of the contract there would be no latent or patent defects in the common property, other than defects arising through fair wear and tear or defects disclosed in the contract". The inclusion of this new plea anticipates a legal argument by Sunland Constructions that the indemnity clause in the construction management agreement relates only to a liability to third parties, and not a loss that Sunland Southbank suffered.
- [74] I consider that the just resolution of the real issues justifies the inclusion of this precautionary pleading. It will be for the trial judge to determine the proper construction of cl 7.3 of the agreement. Although the late inclusion of a plea that relates to the terms of the contract between Sunland Southbank and purchasers of lots may be said to revisit the matter of implied terms raised in the original pleading, the implied term contended for in paragraph 39(f) is different to the implied terms that were originally pleaded. It is a term implied by statute and there is no contest about it. The proposed pleading does not raise any significant new factual issues: the current pleading and those that precede it squarely raise the issue of defects in the common property.
- [75] The implied term being contended for differs from that previously pleaded. It does not involve the kind of oppression that arises when a matter previously abandoned is raised again in the same form. The late inclusion of this paragraph has been explained. I do not consider that its inclusion should be disallowed. It does not raise additional facts that prejudice either Sunland Constructions or the fair trial of the proceedings. There is no suggestion that Sunland Constructions or its legal representatives (who also represented Sunland Southbank when it was an active party in the proceedings) are prejudiced in ascertaining when the relevant contracts were entered into or settled. Sunland Constructions may wish to raise the issue that no loss was suffered by Sunland Southbank because, when it sold the units, none of the defects were apparent and the market value of the units had not been reduced as a result. For the purpose of these recent applications, Sunland Constructions has assembled evidence that defects did not appear until some years after the construction work was completed in August 1998. It has affidavit evidence that no defects were reported during the defects liability period. No reports of defects during that period have been disclosed, and Sunland Constructions points to an expert report, obtained by the body corporate, which states that windows did not leak until February/March 2003.

- [76] Sunland Constructions has already assembled a schedule of owners of lots and the dates of transfers. I am not satisfied that it is oppressed by the body corporate's proposed reliance on an argument that Sunland Southbank was liable under each original contract for a breach of the term implied by s 180 of the *BCCM Act*. Whether or not the breach occurred is likely to be addressed by the evidence already assembled in the case concerning defects in the common property. Whether or not Sunland Southbank has a liability under each contract essentially turns on legal arguments of the kind rehearsed during Sunland Southbank's application for the prior, separate determination of those issues. The inclusion of those pleas is not likely to prejudice the fair trial of the real issues, or to be oppressive.
- [77] As unedifying as it may be to permit the body corporate to add additional legal planks to its case more than twelve years after the construction of the building, and more than six years after commencing these proceedings, I consider that it should be permitted to bolster its case in the form proposed. I am not persuaded that this is oppressive to Sunland Constructions. I do not consider that the more complete pleading of relevant contractual terms, and the late pleading of alternative bases upon which to allege that Sunland Constructions is bound to indemnify the body corporate for loss or liability, is an abuse of process.²⁵ The body corporate's claim against Sunland Constructions has remained one founded on a contract, the terms of which are not in dispute. Sunland Constructions has been able, during the course of the proceedings, to prepare its defence to allegations that it is responsible for completing the construction in a defective condition, in breach of its contractual obligations. The late inclusion of additional pleas by the body corporate is intended to anticipate arguments, which Sunland Constructions has previewed, about the interpretation of cl 7.3 and the nature of the subrogation provided for by s 38(3) of the *BCCM Act*.
- [78] Although it is unfortunate that the body corporate seeks to bolster its case at this stage, the matter is not ready for trial and, on balance, it would be contrary to the interests of justice to prevent the body corporate from going to trial on pleadings that more completely develop the legal basis of its claim, and that meet points raised by Sunland Constructions about the nature of the indemnity provided in cl 7.3 and the liabilities and losses against which Sunland Constructions indemnified the owner of the building.
- [79] Any inconvenience to Sunland Constructions by the late inclusion of these additional pleas can be met by orders as to costs and by directions that ensure that their inclusion does not delay the trial of the proceedings.
- [80] I decline to uphold Sunland Constructions' objection on the grounds of oppression.

Prejudice

- [81] Sunland Constructions argues that if leave is granted it may be shut out from pursuing claims against G James that are statute barred. It argues in the alternative that, at the very least, it will have to seek leave under r 376 to plead one such claim. I am not persuaded that it will be shut out from pursuing those claims. It already

²⁵ *Jago v District Court of NSW* (1989) 168 CLR 23 at 58; [1989] HCA 46 at [7] of Deane J's judgment, upon which Sunland Constructions relied in the context of alleged oppression.

has proceedings against G James in which it seeks indemnity and relies upon the trade contract.

- [82] If Sunland Constructions considers that it needs leave to amend its proceedings against G James then it should seek leave.

Conclusion

- [83] The real issues in the proceedings are whether the body corporate is entitled to recover damages for breach of contract or pursuant to contractual indemnities that Sunland Constructions and G James gave to the original owner of Sun City. The proceedings were not actively prosecuted for substantial periods, and the costs of rectifying the defects in the building have only recently been quantified. The body corporate engaged new lawyers in 2008, and they progressed the revised pleading of their client's case, subject to court supervision. This supervision included directions for the delivery of Statement of Claim #3 and Statement of Claim #4, and an effective hold on the matter until the body corporate could plead and particularise the extent of rectification required and its cost. It now can do so.
- [84] The body corporate has adequately explained the delay in applying for leave to amend. The interests of justice require consideration of the prejudice caused to other parties, and to the administration of justice, by that delay and the various amendments to the body corporate's pleading. A party is not entitled to an unlimited number of amendments to revise and refine its case, even where it pays the costs occasioned by those amendments. On balance, I consider that the body corporate should have leave to amend. Some amendments constructively respond to complaints made by the other parties. Others more completely plead the express terms of the contracts upon which the body corporate has always relied. Some spell out the nature of the rights to which it is subrogated and the losses and liabilities in respect of which it claims indemnity. The respondents to the present application are prepared to meet the body corporate's legal arguments concerning the nature of its rights and the proper interpretation of indemnity clauses.
- [85] The recently-added pleas largely seem to be the product of "the application to the case of fresh legal minds".²⁶ The Court's discretion should not be exercised to punish for delay in pleading these points. The case could not progress much further until the body corporate's losses were properly pleaded and particularised. Now that they can be, the just resolution of the real issues in dispute is served by granting leave to amend, on terms. The just resolution of the real issues would not be served by permitting the matter to proceed to trial on the basis of the incomplete pleading of relevant contractual terms or in a form that precluded the body corporate from meeting arguments about the nature of its subrogated rights or the nature of the loss or liabilities in respect of which it may claim indemnity.
- [86] I uphold Sunland Constructions' objection to those proposed amendments that seek to introduce a new claim in contract based upon breaches of cl 5.13 of the construction management agreement that are alleged to have occurred during the Defects Liability Period. The body corporate has not pleaded or proved sufficient facts to show that it has prospects of success in respect of this cause of action when

²⁶ *State of Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 170; [1997] HCA 1 per Kirby J.

regard is had to the obligations that were imposed upon G James, under its trade contract, to rectify defects that appeared during the Defects Liability Period. I decline in my discretion to grant leave to the body corporate to raise a new case based upon such a breach of cl 5.13.

[87] I otherwise consider that the body corporate should be granted leave to amend its claim and its statement of claim, upon terms. Those terms will include conditions and directions relating to the pleading and particularisation of the cost of further rectification, the time within which it is required to file and serve its further amended statement of claim and particulars thereof, the time for filing and service of defences, and costs.

[88] I will hear the parties in relation to these matters and consider the form of order proposed by the body corporate and the form of statement of claim that it proposes to file and serve in accordance with the grant of leave that I will give.

[89] The grant of leave does not affect a defendant's entitlement to plead that a relevant limitation period had expired by the time the proceedings were commenced on 8 July 2004.

[90] I propose to order that:-

1. The plaintiff be given leave to amend the claim and amended statement of claim substantially in the form of exhibit ADP-1 to the affidavit of Alexander David Power filed on 29 October 2009 (Court Document Index 72), save that the amended statement of claim:
 - (a) not include allegations based on an alleged failure by the fourth defendant to make good all defects that appeared in the works prior to the expiration of the Defects Liability Period, or an alleged failure by the second defendant to cause such rectification work to be carried out, namely the allegations contained in paragraphs 7(d), 7(e), 17(p), 26, 33(i), 38(e) and 38(f) of the proposed statement of claim; and
 - (b) must plead and particularise the loss and damage claimed by the plaintiff, including the matters pleaded in paragraphs 36(d) and 38(d), in accordance with rr 150 and 155 of the *UCPR*, and must be supported by a Scott Schedule and such other documents as will adequately particularise the plaintiff's claim for damages.

[91] I will make further directions for the delivery of amended pleadings on dates to be fixed generally in accordance with paragraphs 1-9 of the draft orders that are at pages 124-125 of the exhibits to the affidavit of Dana Prue Taege (filed by leave on 15 February 2011), and for the referral of the matter to mediation if the parties agree to the terms of a referral order.

[92] I will hear the parties as to the costs of the applications that I have determined.