SUPREME COURT OF QUEENSLAND

CITATION:	*Platinum United II Pty Ltd v Secured Mortgage Management Limited (in liq)* [2012] QSC 30
PARTIES:	**PLATINUM UNITED II PTY LTD ACN 108 421 334** (First Applicant) and **PLATINUM UNITED PTY LTD ACN 103 365 215** (Second Applicant) v **SECURED MORTGAGE MANAGEMENT LIMITED (IN LIQUIDATION) ACN 089 571 184** (Respondent)
FILE NO/S:	BS 10072 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	February 28, 2012
DELIVERED AT:	Brisbane
HEARING DATE:	February 7, 2012
JUDGE:	Boddice J
ORDER:	**1. The parties are to prepare minutes of orders in accordance with these reasons.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the first applicant entered into a commercial facility agreement, as borrower, with the respondent, as lender – where the first applicant's obligations were secured by the second applicant – where the first applicant claims the respondent breached its obligations under the agreement, causing the applicants to suffer loss and damage – where the applicants seek leave to file and serve a fourth amended statement of claim – where the fresh statement of claim seeks to plead new causes of action as well as replead existing causes of action – where the respondent opposes leave on various grounds – whether leave should be granted

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where applicants seek leave to file and serve a fourth amended statement of claim – whether leave should be granted

Australian Securities and Investments Commission Act 2001 (Cth)

Trade Practices Act 1974 (Cth)

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175

Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1987] 2 WLR 1300

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Cement Australia Pty Ltd v Australian Competition and Consumer Commission (2010) 187 FCR 261

Edensor Nominees Pty Ltd v Anaconda Nickel Ltd [2001] VSC 502

Hartnett v Hynes [2009] QSC 225

Mobileworld Operating Pty Ltd v Telstra Corporation Ltd [2005] FCA 292

Mooloolaba Slipways Pty Ltd v Cashlaw Pty Ltd [2011] QSC 236

Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd (No 2) [2011] QSC 42

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80

Zoneff v Elcom Credit Union Ltd (1990) 94 ALR 445

COUNSEL: A Morris QC, with C Jennings, for the first and second applicant

R Derrington SC, with S Cooper, for the respondent

SOLICITORS: Baker & McKenzie for the first and second applicant

McInnes Wilson Lawyers for the respondent

[1] The applicants seek leave to file and serve a fourth amended statement of claim, in proceedings listed for trial for three weeks commencing 28 May 2012. The respondent opposes leave being granted to the applicants.

[2] The proceedings relate to claims that the respondent breached its obligations under a Commercial Facility Agreement entered into by the respondent, as lender, with the first applicant, as borrower, on 21 May 2007 ("the CFA") by failing to pay progress payment claims presented by the first applicant in relation to the development of a unit complex at Caloundra. The applicants contend the development did not proceed as a consequence of a refusal by the respondent to provide funding in order to progress its construction, and that this refusal caused the applicants to suffer loss and damage. The first applicant's obligations were secured by the second applicant.

[3] The proposed fourth amended statement of claim does not simply seek to make minor amendments. By its terms, it "entirely supersedes and replaces the third amended statement of claim". It seeks to plead new causes of action as well as replead existing causes of action. The respondent contends the new causes of action are pleaded too late in the proceedings, in circumstances where no adequate explanation has been given for the late pleading.

Background

[4] The applicants commenced the proceeding on 17 October 2008. The applicants have filed, or delivered, amended versions of the statement of claim on 27 February 2009, 2 March 2009, 24 December 2009, 19 April 2010 and 20 October 2010.

[5] The final version of those statements of claim ("the third further amended statement of claim") was the subject of an application to strike out substantial parts of it. The Chief Justice granted that application, but gave the applicants leave to replead.[1] An appeal was dismissed, with the Court of Appeal again giving leave to replead. No action was taken in accordance with the leave to replead prior to the determination of the appeal.

[6] Subsequent to the dismissal of the appeal, the applicants indicated an intention to amend the statement of claim. There were delays in producing that amended statement of claim. On 4 August 2011, orders were made to the effect that the applicants were not to file any further amended statement of claim without the consent of the respondent, or the leave of the Court.

[7] Notwithstanding several orders requiring delivery of any proposed amended statement of claim, the applicants first delivered a draft form of the amendments on 12 September 2011. A revised form of the proposed amended pleading was delivered on 14 September 2011, with a further revised version delivered on 16 September 2011. Another revised version was delivered subsequent thereto addressing deficiencies said to exist in that draft.

[8] The trial of the proceeding was listed for three weeks commencing on 28 May 2012 after orders were made on 4 August 2011 placing the matter on the list of matters to be allocated trial dates for the first half of 2012.

Pleadings

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1 *Platinum United II Pty Ltd & Anor v Secured Mortgage Management Limited (in liq)* [2010] QSC 455 [2011] QCA 229.

[9] The third further amended statement of claim claimed damages for breach of contract, together with damages pursuant to s 12GF of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("ASIC Act") or pursuant to s 87 of the *Trade Practices Act* 1974 (Cth) ("TP Act"), together with associated declaratory relief pursuant to each of those Acts.

[10] Relevantly, the third amended statement of claim alleged:

(a) misleading or deceptive conduct in contravention of those Acts by the making of specified representations which the first applicant had relied upon in entering into the CFA;

(b) the inclusion of implied terms within the CFA that the respondent would give notice to the first applicant of any concerns regarding delay in the progress of construction of the apartment complex;

(c) the existence of implied warranties pursuant to s 12ED of the ASIC Act;

(d) unconscionable conduct;

(e) a breach of s 12DI(1) or (3) of the ASIC Act;

(f) breach of contract by failing to provide construction finance, and failing to give notice of delay concerns in breach of the implied term.

[11] Prior to the successful strike-out application, the central thrust of the applicants' case was that the terms of the CFA included specified implied terms which were necessary to give business efficacy to the agreement. Further, the CFA was entered into in reliance upon representations made by the respondent to the effect that the respondent, as lender, would not rely upon the "absolute discretion" reserved to the respondent in the CFA as to whether to make periodic payments in response to the presentation of progress payments claims.

[12] The strike-out application was successful on the basis that the CFA, properly construed, gave the respondent a discretion to provide progressive funding. On that construction, there was no basis for implying the further alleged terms into the CFA, and allegations the respondent had breached the CFA could not succeed.

[13] The proposed fourth amended statement of claim advances fresh allegations on the basis of the construction of the CFA as found by the Chief Justice, which was upheld on appeal. The applicants now seek to assert:

(a) the existence of collateral warranties arising out of specified representations, together with implied terms and written terms of the CFA. The alleged representations are materially different to those previously relied upon as the basis upon which the CFA had been entered into by the first applicant;

(b) the existence of, and breach of, a duty of care;

(c) breaches of the ASIC Act and the TP Act;

(d) had the representations not been made, the first applicant would have sought, and obtained, alternate funding on terms no less advantageous to it, and would have proceeded to construct the entire apartment complex within its original estimated time. Alternatively, the first applicant would not have entered into the CFA and the second applicant would not have provided the relevant guarantees and securities, as the construction of the apartment complex would not have proceeded in such circumstances.

Leave to amend

[14] The principles relevant to an application to amend a pleading at an advanced stage in the litigation are not in dispute. Those principles were usefully summarised, in the context of the UCPR, by Applegarth J in *Hartnett v Hynes*:[2]

> "[12] Justice is the paramount consideration in determining an application to amend pleadings.[3] Lord Griffiths stated in *Ketteman v Hansel Properties Ltd*:[4]
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> > "...justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties that are occasioned by facing new issues, the raising of false hopes…"
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> This statement commands acceptance in this country.[5] In this case there are personal litigants, and there is evidence of the consequences to the defendant of allowing amendments in the form proposed by the plaintiff. Consideration is required as to whether the prejudice caused by an amendment made pursuant to *UCPR 378* can be remedied by an order for costs. The rules provide that the costs of and resulting from an amendment made under *UCPR 378* are to be paid by the party making the amendment unless the Court orders otherwise.[6] However, the Court's consideration of an amendment made pursuant to *UCPR 378* is not undertaken solely by reference to whether any prejudice to the other party can be compensated by costs. The right to amend pursuant to *UCPR 378* is qualified by a party's obligations under *UCPR 5* and the Court's own obligation to facilitate the just and expeditious resolution of the real issues in proceedings at a minimum of expense. Amendments made pursuant to *UCPR 378* may not comply with the rules of pleading or have a tendency to prejudice or delay the fair trial of the proceeding, in which event the Court may disallow the amendments on application, or direct a party to further amend the pleading so as to comply with the rules of pleading or to avoid such prejudice.
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> [19] *Aon Risk Services Australia Ltd v Australia National University* ("Aon") concerned amendments to a pleading for

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2 [2009] QSC 225.

3 *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155 ("*JL Holdings*"); *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [30], [98] ("*Aon*").

4 [1987] AC 189 at 220.

5 *Aon* (supra) at [100]-[101].

6 *UCPR* 386.

which leave was required and which were sought during a trial. However, the High Court's statements of principle and its consideration of a rule in similar terms to *UCPR 5* provide guidance in determining an application to disallow amendments made without leave, particularly in cases involving unexplained delay in making amendments. There is "an irreparable element of unfair prejudice in unnecessarily delaying proceedings".[7] Undue delay can undermine confidence in the rule of law, and the modern common law adversarial system is not a system which permits disregard of undue delay.[8] Case management principles do not supplant the objective of doing justice between the parties according to law. However, the interests of justice are not served by courts acceding to late amendments without explanation or justification. Rules such as *UCPR 5* that have been enacted since *JL Holdings* indicate that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the Court and upon other litigants.[9]

[20] The amendments in Aon were dependent on the exercise of the Court's discretionary power. However, as I have observed, the right to amend pursuant to *UCPR 378* is qualified by *UCPR 5*, and *UCPR 5* resembles r 21 of the *Court Procedure Rules* 2006 (ACT) that was considered in *Aon*.[10] *UCPR 5* seeks to facilitate the just and expeditious resolution of "the real issues in civil proceedings" at a minimum of expense. The just resolution of proceedings remains paramount, but speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings.[11] Parties should have a proper opportunity to plead their case, but limits may be placed upon re-pleading when delay and costs are taken into account.[12] The need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.[13]

[21] The objectives of the rules of civil procedure do not require that every application for amendment should be refused, or

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7 *Aon* (supra) at [5].
8 Ibid at [24].
9 Ibid at [93].
10 Rule 21 of the ACT Rules was based upon *UCPR* 5 and similar rules: *Aon* at [7].
11 *Aon* at [98].
12 Ibid.
13 Ibid.

amendments for which leave is not required should be disallowed, because the amendment involves the waste of some costs and some degree of delay.[14] The nature and importance of the amendment is relevant.[15] The extent of the delay and the costs associated with it, together with the prejudice which might reasonably be assumed to follow and that which is shown, are to be weighed against the grant of permission to a party to alter its case.[16] Much depends upon the point the litigation has reached relative to a trial when the amendment is made or application to amend is made.[17]

[22] These and other considerations apply where, in an application of the present kind, the plaintiff seeks leave to amend a pleading in which some of the amendments would be authorised by *UCPR 378* and others require leave. Amendments made prior to a request for trial and which, if allowed to stand, will not result in a trial being adjourned to the prejudice of the other party and other litigants awaiting trial dates do not raise all of the considerations that arose in *Aon*. However, *UCPR 5* and the principles stated in *Aon* do not support the proposition that a party has a right to amend as many times as it likes before a request for trial date, without explanation or justification. Such a course may involve a breach of the party's undertaking to the Court and to the other party, cause prejudice to the other party that cannot be remedied by an order for costs and be inconsistent with the just resolution of the real issues in civil proceedings at a minimum of expense.

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[27] 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 377* and the discretion to allow or direct a party to amend a claim or a pleading pursuant to *UCPR 375*. I have already referred to some of these principles in discussing the operation of *UCPR 5* in the case of amendments made without leave pursuant to *UCPR 378* and the Court's power to disallow such amendments or make directions concerning further amendment of a claim or a pleading in order to avoid prejudice to the other party and to comply with the rules of civil procedure and their purpose. In the context of the present application and in respect of amendments to the claim or the statement of claim for which leave is required, 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

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14 Ibid at [102].
15 Ibid.
16 Ibid.
17 Ibid.

entitled to raise an arguable claim, subject to payment of costs by way of compensation.[18]

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 a delay in applying for amendment".[19]

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 the litigation imposes on litigants and witnesses.

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.

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18 *Aon* at [5]; [111].

19 Ibid at [102].

> 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 their 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.
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> 12. The applicant must satisfy the specific requirements of rules, such as *UCPR 376(4)* where it seeks to introduce a new cause of action after the expiry of a relevant limitation period."

[15] In *Aon Risk Services Australia Ltd v Australian National University*[20] the High Court said at [111-113]:

> "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. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in J L Holdings which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.
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> A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.
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> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings. [footnotes omitted]"

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20 (2009) 239 CLR 175.

Submissions

[16] The applicants accept the amended pleading contains new causes of action, and recasts previously pleaded causes of action. However, they submit the Court ought to grant, in the exercise of its discretion, leave to file the fourth amended statement of claim as any new factual or legal issues raised in the pleading relate to, or naturally arise from, the previously pleaded case, in light of the new construction of written terms as found by the Chief Justice and the Court of Appeal. Further, the applicants submit the amended pleading raises clearly arguable propositions of importance to the applicants' claim.

[17] The applicants submit such a pleading can only enhance the prospects of a just resolution of the proceedings in accordance with UCPR r 5. The applicants contend there has been no material delay in formulating the amendments following publication of the judgment of the Court of Appeal. Finally, the applicants submit there is no real prejudice identified by the respondent, and the proposed amended pleading will not impact on the trial being able to commence on 28 May 2012.

[18] Whilst accepting the applicable principles for the determination of any grant of leave, the applicants submit the exercise of that discretion necessarily involves a balancing exercise having regard to the circumstances of the case. They rely on the observations of the Full Court of the Federal Court of Australia in *Cement Australia Pty Ltd v Australian Competition and Consumer Commission*:[21]

> "*Aon Risk* is not a one size fits all case. Whilst various factors are identified in the judgment as relevant to the exercise of discretion, the weight to be given to these factors, individually and in combination, and the outcome of that balancing process, may vary depending on the facts in the individual case. As the plurality in *Aon*

[21] (2010) 187 FCR 261 at [51].

> *Risk* observed at [75], statements made in cases concerning amendment of pleadings are best understood by reference to the circumstances of those cases, even if they are stated in terms of general application."

[19] The respondent submits leave to amend ought to be refused in the exercise of the Court's discretion, as the proper application of case management principles necessitates the refusal of leave. The applicants filed five previous versions of the statement of claim prior to a successful strike-out application and unsuccessful appeal from that application, and thereafter delivered multiple versions of a proposed fourth amended statement of claim. The respondent submits the final version thereof seeks to replace the previous pleading entirely with a proposed new pleading which seeks to advance new causes of action, which raise factual issues not previously part of the applicants' case. The respondent contends one of the new claims sought to be made was expressly disavowed by the applicants on a prior occasion.

[20] The respondent further submits there is no explanation or justification for the prolonged delay in seeking leave, and the application comes very late in the action after dates for trial have been set. Finally, the respondent submits leave ought to be refused as the proposed pleading continues to contain deficiencies which would prejudice the proper conduct of the trial.

Discussion

[21] Whether the applicants should be granted leave to file and serve the fourth amended statement of claim involves a consideration of all of the circumstances of the case. Those circumstances include the history of amendments to date (both made and foreshadowed), the circumstance that both the Chief Justice and the Court of Appeal

gave the applicants liberty to replead, the pending hearing date, and any unfairness to the respondent in granting leave so long after the commencement of the proceeding, and shortly before its listed trial date.

[22] In considering these issues, it is relevant to have regard to the differences in the proposed pleading, any explanation (or lack thereof) for the lateness of the foreshadowed amendments, the consequences for any trial preparation to date and in the future, and any prejudice to the respondent.

The proposed amendments

Collateral warranties

[23] A central difference between the third further amended statement of claim and the proposed fourth amended statement of claim is an allegation that the CFA comprised collateral warranties arising out of representations, implied terms and written terms. The collateral warranties are said to arise from statements allegedly made by the respondent prior to entry into the CFA. It is pleaded, for the first time, that these statements were relied upon by the first applicant when entering into the building contract.[22]

[24] It was submitted by the respondent that the collateral warranty plea was hopeless as the case as pleaded did not constitute any statement which was clearly promissory in nature, and involved statements which were plainly inconsistent with the written terms of the principal contract. Whilst there may ultimately be merit in that submission, whether a principal contract would not have been entered into without a

representation said to constitute the collateral contract is ultimately a question to be determined having regard to the evidence. As such, the plea cannot be said to involve a claim that is frivolous or untenable as a matter of law.[23]

[25] The respondent also submitted that the plea in respect of the collateral warranties is embarrassing, as there is reference to conduct after the date of execution of the original building contract. However, the applicants accept only conduct before signing of the contract could be relied upon. This concession addresses this concern of the respondent. In any event, it was accepted by the respondent that if there was established a cause of action which was not untenable, it was not appropriate to refuse leave on the basis of an alleged deficiency in respect of the particular plea which did not go to the establishment of the cause of action.

Implied terms

[26] Although the third further amended statement of claim pleaded implied terms, the fourth amended statement of claim pleads new implied terms, namely that the credit facility to be provided by the respondent would be reasonably fit for the first applicant's purpose, and would be reasonably capable of fulfilling the result which the first applicant intended and expected to achieve by entering into the facility.[24]

[27] The respondent submits the implied terms sought to be relied upon do not meet the conditions required for the implication of a term into a formal contract.[25] Whilst

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22 Paragraphs 10B, 10C, 13C and 13D of the proposed Fourth Amended Statement of Claim.

23 *Mobileworld Operating Pty Ltd v Telstra Corporation Ltd* [2005] FCA 292 at [13]-[17]; see also *Edensor Nominees Pty Ltd v Anaconda Nickel Ltd* [2001] VSC 502 at [192]-[193].

24 Paragraph 13C of the proposed Fourth Amended Statement of Claim.

25 See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-3.

there may ultimately be merit in that submission, resolution of that issue is not so clear as to render the claim hopeless or untenable.

Negligence

[28] The applicants plead that a duty of care arises as the respondent was aware of the first applicant's financial circumstances, made the representations, and intended or was aware the applicants would rely on the representations.[26] They contend the existence of a duty of care, and any breach of it, is appropriately to be determined after analysis of the evidence. The respondent contends such a plea is hopeless having regard to the observations in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*.[27]

[29] Whilst the respondent's submission may ultimately have merit, there may be scope for such a duty in a pre-contractual setting.[28] I am not satisfied such a claim is hopeless or untenable.

Alleged breaches of the CFA

[30] Whilst the respondent contends these pleas are defective, once leave is granted to rely upon the alleged collateral warranties and implied terms, alleged breaches of the CFA based upon those collateral warranties and implied terms[29] cannot be said to be hopeless or untenable.

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26 Paragraphs 25A, 25B and 30B of the proposed Fourth Amended Statement of Claim.
27 [1986] AC 80.
28 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1987] 2 WLR 1300.
29 Paragraphs 13E(c), 13E(d), 13E(e) and 13E(f) of the proposed Fourth Amended Statement of Claim.

Alleged breaches of sections of the ASIC Act[30]

[31] The respondent submits the pleaded breaches do not disclose reasonable causes of action. However, these alleged breaches must be viewed in the context of the pleaded collateral warranties and implied terms. I am not satisfied the pleas are hopeless or untenable.

Alleged breach of s 12CA of the ASIC Act or s 51AA of the TP Act

[32] These pleas allege unconscionable conduct on the part of the respondent.[31] The applicants contend they are reasonably arguable pleas on the basis the word "unconscionable", in its statutory context, is not limited to traditional equitable notions of unconscionability.[32]

[33] The respondent submits the proposed pleading does not plead any material facts which would disclose a reasonable cause of action based on a breach of either of these sections. The respondent submits more is required than simply taking advantage of a superior bargaining position.[33]

[34] Whilst there may ultimately be merit in the respondent's submission, the term unconscionability, as used in the statutory provision, is very wide. I am not satisfied the pleas are hopeless or untenable.

Claimed damages for breach of contract[34]

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30 Paragraphs 33(a), 33(b) and 36 of the proposed Fourth Amended Statement of Claim.
31 Paragraph 35C of the proposed Fourth Amended Statement of Claim.
32 See, generally, *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445.
33 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64.
34 Paragraphs 37, 38, 39, 40 and 41 of the proposed Fourth Amended Statement of Claim.

[35] The applicants seek to amend the pleading to reformulate their claim for damages for breach of contract. They contend this reformulation is consistent with reliance upon the alleged collateral warranties and implied terms.

[36] The respondent contends the reformulated plea amounts to a "back door attempt" to replead some of the contractual causes of action previously struck out by the Chief Justice. However, that submission is made on the basis an assessment of damages for breach of contract must take into account the respondent's absolute discretion whether to fund the construction of the development. If the applicants are given leave to rely upon the pleaded collateral warranties and implied terms, the amended pleading of the claim for damages is not hopeless or untenable.

Unjust enrichment

[37] Whilst the applicants sought to rely upon a prayer for relief for unjust enrichment, the applicants abandoned any reliance upon this plea at the application.

Should leave be granted?

[38] Having considered all of the circumstances, in the context of the applicable principles, I am satisfied the interests of justice favour the granting of leave to plead the alleged collateral warranties and implied terms.

[39] Whilst the pleading of collateral warranties is an entirely new allegation, relying upon new statements allegedly made by the respondent prior to entry into the CFA, and allegations that the respondent was contractually obliged to undertake certain matters, these matters fall within the factual matrix which would have to be

considered at any trial. As such, they are matters the respondent can reasonably be required to address in the three months before the trial of this proceeding. Similarly, the implied terms plea is one the respondent can fairly and reasonably be required to address in the time available before trial.

[40] Whilst the respondent submits there is no explanation for why such pleas have not been made earlier, the successful strike-out, and subsequent appeal provides an explanation. Further, granting leave will allow a just determination of the issues in dispute between the parties although the respondent will be required to deliver amended pleadings, and revisit the issue of particulars, any prejudice to the respondent due to this requirement can be addressed by further directions.

[41] In reaching this conclusion, I have had particular regard to the fact that both at first instance, and on appeal, the applicants were granted liberty to replead. The pleading of collateral warranties and implied terms seeks to address the deficiency in the previous pleading. That is properly a matter within leave to replead.

[42] I am also satisfied it is appropriate to grant the applicants leave to rely upon alleged breaches of the CFA (except to the extent of any reliance upon paragraph 30 of the fourth amended statement of claim), the alleged breaches of the ASIC Act and the TP Act, and the plea of estoppel. Granting leave for those pleas would allow a just resolution of the issues in dispute between the parties. They are matters the respondent can reasonably be required to address in the time prior to trial. There is no unfairness to the respondent in all the circumstances.

[43] However, the breaches sought to be relied upon in paragraph 30 of the proposed fourth amended statement of claim are in a different category. They seek to rely

upon allegations specifically struck out by the Chief Justice. Whilst the applicants contend they are properly repleaded, having regard to the applicants' reliance upon collateral warranties and new implied terms, the matters sought to be relied upon in paragraph 30 do not fall within the now pleaded collateral warranties and/or implied terms. The respondent should not be put to the time and expense of addressing issues previously the subject of a successful statutory application.

[44] The plea of negligence is also in a different category. Whilst amended pleas on the basis of collateral warranties and implied terms may be explicable at this late stage, having regard to the previous reliance on implied terms, there is no explanation as to why an entirely new cause of action, never previously sought to be relied upon in any shape or form, is now sought to be relied upon by the applicants. A contention that such a plea naturally arises out of the circumstances now sought to be pleaded in the fourth amended statement of claim is insufficient to justify requiring the respondent to expend precious time reserved for preparation for trial addressing an entirely new cause of action. It would not be just to grant leave to plead this cause of action. To do so would unfairly prejudice the respondents.

[45] Similarly, the claimed loss and damage based on the alternate finance claim and on a "no transaction" case are in different categories. There is no explanation why these totally different claims (the latter having been expressly disavowed) are now made so late in the proceeding. The claims do not naturally arise from the circumstances now pleaded. It would not be just to grant leave to plead these claims at this late stage. To do so would unfairly prejudice the respondent.

[46] In determining, in the exercise of my discretion, to grant leave as aforesaid, I have had regard to the risk of prejudice to the respondent, particularly that, if the amendments delayed the trial of the proceedings, it would result in considerable stress to witnesses, would delay the winding up of the managed investment scheme, and would restrict the liquidators of the respondent from realising essential assets as part of the liquidation. Those concerns are significant. However, there is no reason identified by the respondent as to why it would not be in a position to proceed with the trial commencing 28 May 2012. Whilst the respondent submitted a grant of leave would necessitate a return to the beginning of the pleading stage, the amended pleadings will not involve consideration of a totally new factual matrix, and the new allegations should be readily able to be addressed well prior to any trial.

[47] The respondent did not contend the trial dates must be vacated if leave was granted to deliver the further amended pleading. At best, the respondent identified the possibility that amended pleadings may jeopardise the trial from proceeding on the due date. That concern can be readily addressed by the imposition of strict directions so as to ensure fairness to the respondent in respect of the completion of further steps, whilst guaranteeing that the trial proceeds on the designated dates.

Conclusions

[48] I am satisfied, in the exercise of my discretion, that the applicants should be granted leave to deliver the fourth amended statement of claim, subject to deletion of any plea based on negligence, deletion of paragraph 30 of the proposed pleading, deletion of the claims based on alternate finance and “no transaction”, and deletion of the prayer for relief for unjust enrichment.

[49] The parties are to prepare minutes of orders in accordance with these reasons.

[50] I shall hear the parties as to costs.