SUPREME COURT OF QUEENSLAND

CITATION:	*Shaft Drillers International LLC & Anor v Australian Shaft Drilling P/L & Ors* [2013] QSC 79
PARTIES:	**SHAFT DRILLERS INTERNATIONAL LLC** (first plaintiff) AND **JOSEPH E SWIGER** (second plaintiff) v **AUSTRALIAN SHAFT DRILLING PTY LTD ACN 107 811 638** (first defendant) AND **PETER IRVINE RUNGE** (second defendant) and **ASD HOLDINGS PTY LTD ACN 108 079 983** (third defendant)
FILE NO/S:	BS 2 of 2012
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	27 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2013
JUDGE:	Jackson J
ORDER:	**The order of the court is that:**

1. **the plaintiffs have leave to file and serve an amended claim and statement of claim in the form attached as exhibit A to the application by 28 March 2013;**
2. **particulars of paragraph 8C(a) be included in the amended pleading, identifying the contracts to third parties for the performance of drilling services made by the first defendant to the extent that the plaintiffs are able to do so;**
3. **the costs of the application and today's appearance be reserved;**
4. **the plaintiffs shall pay the defendants' costs of and incidental to the application filed 9 January 2013**

on the standard basis;

5. **the defendants file and serve any amended defence and counterclaim by 4pm on 12 April 2013;**

6. **the plaintiffs file and serve any amended reply and answer by 4pm on 19 April 2013; and**

7. **the proceeding be listed for further review at 10am on 2 May 2013.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the plaintiffs apply to amend the statement of claim to delete the amounts claimed for damages – where the plaintiffs apply to add a claim in restitution for the payment of a reasonable amount for the use of a profit earning chattel – whether leave should be given to amend the statement of claim and claim

LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – SIMPLE CONTRACTS, QUASI-CONTRACTS AND TORTS – ACCRUAL OF CAUSE OF ACTION AND WHEN TIME BEGINS TO RUN – SIMPLE CONTRACTS – OTHER MATTERS – where the plaintiffs apply to add a new cause of action being a common law claim in restitution for the value for the use of a profit earning chattel – where the defendants oppose the amendment or propose to condition the amendment on the preservation of any limitation defence – whether the restitution claim is a cause of action founded on "quasi-contract" within the meaning of the statute – whether the limitation period for the new cause of action has expired

Civil Proceedings Act 2011 (Qld), s 16
Limitation of Actions Act 1974 (Qld), s 10(1)(a)
Uniform Civil Procedure Rules 1999 (Qld), r 149(d), r 150, r 155, r 375, r 376, r 376(4), r 377

Goff & Jones, *The Law of Unjust Enrichment*, 11th ed
Handford, *Limitation of Actions*, 2nd ed
Mason & Carter, *Restitution Law in Australia*, 2nd ed
McLean, *Limitation of Actions in Restitution*, (1989) 48 CLJ 472
Palmer, *Palmer on Bailment*, 3rd ed
Stoljar, *The Law of Quasi-Contract*, 2 ed

Austotel Pty Ltd v Franklins Selfserve Pty ltd (1989) 16 NSWLR 582, cited
BBB Constructions Pty ltd v Aldi Foods Pty Ltd [2010] NSWSC 1352, cited
BP Exploration Co (Libya) Ltd v Hunt (No 2) [1983] 2 AC 352, cited

British Steel Corporation v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504 at 511, cited
Bunnings Group Ltd v CHEP Australia Ltd [2011] NSWCA 342, cited
Butler v Egg and Pulp Marketing Board [1966] HCA 38; (1966) 114 CLR 185, cited
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, cited
Constructions Pty Ltd & Ors v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89, cited
Re Diplock [1948] Ch 465, cited
Roxborough & Ors v Rothmans of Pall Mall Australia Ltd [2001] HCA 68; (2001) 208 CLR 516, cited
Sabemo Pty Ltd v North Sydney Municipal Council [1977] 2 NSWLR 880, cited
Sempra Metals Ltd v IRC [2007] UKHL 34; [2008] 1 AC 561, considered
Walton's Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387, cited
Ward v Eltherington [1982] Qd R 561, cited
William Lacey (Hounslow) Ltd v Davis [1957] 1 WLR 932, cited

COUNSEL: D Clothier SC and C Johnstone for the plaintiffs
P Roney SC for the defendants

SOLICITORS: Bennett & Philp Lawyers for the plaintiffs
Bickfords for the defendants

[1] **JACKSON J:** The plaintiffs apply for leave to file and serve an amended claim and statement of claim pursuant to *UCPR* 375 and 377. Amendment of the claim requires leave under *UCPR* 377. The proposed amendments to the claim delete the statement of any amounts claimed for damages for conversion and damages for detinue and add claims for "an order for payment of a reasonable amount by the first and third defendants for those defendants' use of the E-Rig and Additional Equipment". The proposed amendments to the statement of claim correspond to the proposed amendments to the claim.

[2] The plaintiffs describe the added claims as a claim in restitution. It is unnecessary at this stage to analyse in detail or pronounce upon whether the material facts pleaded raise a cause of action or causes of action described by the plaintiffs as a claim in restitution, although it will be necessary to touch on one or two aspects of the nature of that claim to resolve the present application.[1] However, it may be observed that the claim in restitution as pleaded does not rely upon any estoppel,[2] or contract implied in fact.[3] Although the analogies are imprecise, the category of case seems to be one where no contract results from a negotiation while benefits are

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1 In *BBB Constructions Pty ltd v Aldi Foods Pty Ltd* [2010] NSWSC 1352 at [366], McDougall J attempted a statement of modern principle affecting the class of causes of action which would include the present case.

2 For example, of the kind alleged in *Walton's Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387; and see *Austotel Pty Ltd v Franklins Selfserve Pty ltd* (1989) 16 NSWLR 582 at 621.

3 For example, *Ward v Eltherington* [1982] Qd R 561.

conferred in contemplation of such a contract.[4] In the present case, the contextual factors of the alleged pre-existing relationship of the parties in bailment of the E-Rig and Additional equipment and the negotiation for the sale of the E-Rig and Additional Equipment may lead to arguments as to the scope and interrelationship of commercial risk taking on the one hand and acceptance (or free acceptance if the plaintiffs rely on that concept) of the benefit on the other hand.

[3] The defendants oppose the grant of leave to amend. There are three grounds of opposition. First, they submit that the lack of particularisation of the allegations of the first and third defendants' use of the E-Rig and the Additional Equipment will have the consequence that the matter will delayed.[5] Secondly, they submit that each of the plaintiffs' claims in restitution for an unstated "reasonable" amount for the first and third defendants' possession and use of the E-Rig and the Additional Equipment (which is defined to be a "reasonable hire amount") will have the same consequence. Thirdly, they submit that an order should be made to preserve any limitation defence they would otherwise have for the added cause of action or causes of action for the claim in restitution, which may have arisen more than six years ago.

Amount of the claim

[4] In failing to state the amounts claimed, the plaintiffs propose not to comply with either *UCPR* 149(d), 150 or 155. *UCPR* 149(d) and 150 require that the particulars of a liquidated demand must be stated in the statement of claim – it is axiomatic that a liquidated demand is for an amount. *UCPR* 155 requires that if damages are claimed, the pleading must state the nature and the amount of the damages claimed. This was a significant change introduced by the *Uniform Civil Procedure Rules* from the previous *Rules of the Supreme Court*. In my view, *UCPR* 149(d), 150 and 155 were intended to contain the universe of alternatives where a common law claim for a money judgment is made. A claim described as a claim in restitution for a reasonable amount for possession and use of a profit earning chattel is one which the *UCPR* require to be pleaded by a statement of the particulars of the liquidated demand or the amount of the damages claimed in the statement of claim.

[5] The plaintiffs' explanation for their proposal not to do so is that the amounts will depend on expert evidence and the defendants' disclosure. That expert evidence is required is not normally a reason to relieve a party from the obligation to state a relevant amount in compliance with the rules as to pleading.

[6] The suggestion that the defendants' disclosure is required was supported by reference to a passage from the speech of Lord Nicholls of Birkenhead in *Sempra Metals Ltd v IRC*[6]. In context, the relevant passage reasons that the court has power to depart from market value when assessing the value of a benefit gained by a defendant because "a benefit is not always worth its market value to a particular defendant. When it is not it may be unjust to treat the defendant as having received

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4 For examples, see *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 at 511, *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 at 939 and *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880. However, none of those cases was a common law claim "in restitution" for the value of the use of a profit earning chattel during the period of ineffective negotiations for sale.

5 Contrary to the implied undertaking to proceed in an expeditious way under *UCPR* 5(3).

6 [2007] UKHL 34; [2008] 1 AC 561 at 606.

a benefit as possessing the value it has to others". In other words, there may be a reason to reduce the amount of market value if the benefit to the defendant is less than the assessment of the relevant market value.

[7] There is no evidence to support an argument that the plaintiffs cannot state a reasonable hire amount whether or not that amount might be reduced by reference to the particular value to the defendant. They have done so in the prior articulation of their claims in this case. Paragraph 15 of the existing statement of claim ("ESOC"), which is proposed to be deleted, expressly alleges an amount, which is described as a reasonable hire amount, for the E-Rig and Additional Equipment utilising hourly rates, hours per week of use and relevant time periods.

[8] The absence of evidence is brought into focus by the coincidence that a couple of months ago the plaintiffs sought to raise what was in effect a claim for an account of the benefit obtained by the defendants from using the E-Rig and Additional Equipment. At the time, the causes of action pleaded were for a reasonable hire amount under an oral contract of hire and for damages for detinue and conversion. That proposed claim is now withdrawn. However, there is no reason to think that the plaintiffs seek to explore the possibility of reducing the amounts they might otherwise claim because the benefit to the defendants is less than the amount of the plaintiffs' loss or damage assessed on the principle of compensation. The inference which is more likely is that the plaintiffs seek to explore the possibility of articulating the amounts claimed for the defendants' possession and use of the E-Rig and Additional Equipment by reference to amounts which the defendants have made which may be more than market value, or the plaintiffs' loss or damage assessed on the principle of compensation.

[9] There is a live question whether a plaintiff who propounds its claim as a claim in restitution can claim a benefit obtained by the defendant which exceeds the amount of any loss suffered by the plaintiff.[7] The plaintiffs avoided any clear articulation of their position on this point in the hearing of the present application.

[10] There is an allied point about the deletion of the statement of any amount of the claims for damages for conversion and damages for detinue. Damages in tort, including the tort of conversion, are compensatory, which means that a plaintiff cannot recover a windfall which does not accord with the principle of restoring the plaintiff to a position as if the tort had not been committed.[8] Subject to that, where a profit earning chattel is converted or detained, the usual outcome is one of recompense under the "category or principle…either of price or hire"[9]. Prima facie, the question is not whether the defendant received a sum which the plaintiff would not have earned from using the profit earning chattel.[10]

[11] There is no explanation for the plaintiffs' proposal to delete the amount of its claims for damages for detinue and damages for conversion.

[12] Notwithstanding the plaintiffs proposed non-compliance with *UCPR* 149(d), 150 or 155, I do not propose to refuse the application on the ground that the particulars or

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7 Goff & Jones, *The Law of Unjust Enrichment*, 11th ed, at [4 – 11] and [6 – 63] – [6 – 74].

8 *Butler v Egg and Pulp Marketing Board* [1966] HCA 38; (1966) 114 CLR 185 at 191.

9 *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 at [171] – [175], referring, inter alia, to *Butler* and *The Mediana* [1900] AC 113 at 117.

10 Compare, however, Palmer, *Palmer on Bailment*, 3rd ed, at [33-01] – [33-019] and [37-029].

amounts are not stated as they should be, for both the claims for damages for conversion and detinue and the claims described as the claim in restitution. Instead, further directions may be sought to deal with that matter by either party after the amendments sought are made.

Use of the E-Rig and Additional Equipment

[13] The proposed amended statement of claim ("PASOC") alleges that the first defendant is a subsidiary of the third defendant and that the third defendant licenses the use of equipment that it owns to the first defendant. In that context, paragraph 8B alleges that the third defendant has used the E-Rig and the Additional Equipment in the course of its business by licensing them to the first defendant for use in the first defendant's drilling services business. In my view, there is no requirement to further particularise that allegation for it to be understood or for the defendants to be able to plead to it.

[14] Paragraph 8C(a) of the PASOC alleges that the first defendant has used and continues to use the E-Rig and Additional Equipment in the course of its drilling services business. A particular was provided by correspondence that the allegation of the first defendant's use means "deploying the equipment in the performance of its obligations pursuant to contracts with third parties for the performance of drilling services". The defendants complain that there are no particulars of the contracts given in circumstances where the defendants have already made disclosure to the plaintiffs of documents relevant to the contracts with third parties. The plaintiffs submit they are dissatisfied with the extent of that disclosure, but it appears to me that the plaintiffs' allegation in paragraph 8C, that they cannot particularise the use in relation to contracts with third parties until the completion of interlocutory steps in the proceeding, is over-stated. In my view, the plaintiffs should provide particulars of the contracts with third parties for the performance of drilling services which are referred to in para 8C(a), to the extent that they can, rather than providing no particulars at all.

Limitation period

[15] In order to preserve their position in relation to any question of limitation, the defendants submitted that any order for leave to file and serve an amended claim and statement of claim should be conditioned to be "without prejudice to or otherwise not limit the defendant's entitlement, if any, to plead that any part of those claims be recoverable because they made it outside any relevant period of limitation". The reason for such a condition is that otherwise time will have ceased to run for any cause of action added by amendment on the date when the proceeding was started, not the date when the claim or cause of action was added to the proceeding by amendment. It is unnecessary in this case to discuss whether that is an appropriate response to an application for amendment.

[16] The plaintiffs oppose that condition or argue that the application to amend should be refused because of any question of limitation, relying on a cascade of points.

[17] First, the plaintiffs submit that the amendment should be allowed unless the defendants demonstrate that their limitation argument has the consequence that part of the second plaintiff's claim has no reasonable prospects of success. This argument misconceives the scope of and the effect of the exercise of the court's

powers under *UCPR* 375 and 376 and the associated power in s 16 of the *Civil Proceedings Act* 2011 (Qld). The effect of allowing the amendment will be to apply the starting date of the proceeding, 3 January 2012, to the calculation of the time for any new cause of action added by amendment, including what the plaintiffs describe as the "arguable restitution claims". It is necessary, where a limitation period has ended, for the court to exercise the power under *UCPR* 375 subject to the limitations in *UCPR* 376. In this case, the relevant part of *UCPR* 376 is 376(4). So, the first question is whether the relevant period of limitation has ended. If it has, the exercise of the power to amend is conditioned on compliance with the requirements of *UCPR* 376(4). It is not appropriate to exercise the power to amend in advance of the answer to whether the limitation period has expired, putting aside the sort of proposal urged by the defendants as a condition intended to preserve any limitation defence for any new cause of action added by amendment.

Not arising out of substantially the same facts

[18] Assuming, contrary to the plaintiffs' submissions, that the limitation provided for under s 10(1)(a) of the *Limitations of Actions Act* 1974 (Qld) applies, and that a new cause of action arose on a date which is more than six years before when this application was filed, that is before 28 February 2007, *UCPR* 376 would be engaged. In that case, amendment under *UCPR* 375 may only be made to give leave to include the new cause of action if the court considers it "appropriate" and the new cause of action "arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed".

[19] I have previously mentioned paragraph 15 of the ESOC, which alleges a reasonable hire amount for the E-Rig and Additional Equipment over the relevant period. Paragraph 8 of the ESOC alleges that in conversations in 2005 and 2006 an agreement was made that the first and second defendants would be permitted to take possession of the E-Rig and Additional Equipment and utilise it in their drilling business in respect of an existing contract to perform work at the Moranbah Coal Site, in the context that the first and second defendants had made various offers to purchase the E-Rig.

[20] The essential differences between the facts alleged for the new causes of action for the proposed claim in restitution and those which are pleaded for the causes of action for which relief has already been claimed are that the proposed claim in restitution does not rely upon an oral agreement for the payment of a reasonable hire amount and it is made in part against the third defendant as the first defendant's holding company and licensor. Paragraph 10A(b) of the PASOC reduces the alleged effect of discussions about the defendants' use of the E-Rig to a statement by Mr Swiger that any sale of the E-Rig and Additional Equipment had to include compensation for the defendants' use of the equipment. The ESOC alleges that the first and second defendants have had the possession and use of the E-Rig for relevant periods. As well, it alleges that the possession and use were obtained by the first and second defendants in the context of discussions for the purchase of the E-Rig by them.

[21] There are other additional allegations in the PASOC. Some concern the status and involvement of the third defendant which was added as a party to the proceeding by a recent order. Others concern the involvement of SDI Ltd and the assignment of its assets, before dissolution, to the second plaintiff.

[22] With three possible exceptions, the conclusion to which I come is that the new cause of action or causes of action arose out of substantially the same facts as a cause of action for which relief was already claimed in the proceeding by the plaintiffs and that it would be appropriate to give leave to make the amendments to include the new cause of action or causes of action under *UCPR* 375 and 376, to the extent that the cause of action or causes of action may have arisen more than six years ago.

[23] The first possible exception is that by the proposed amendments the plaintiffs resile from confining the period of the claim for a reasonable hire amount to the period after March 2006, as paragraphs 4 and 15 of the ESOC presently do. No explanation has been offered for this. The plaintiffs propose to allege that the defendants had possession of the E-Rig and Additional Equipment from August 2005 and that the plaintiffs cannot particularise the date in about 2006 when the first defendant or third defendant commenced use of the E-Rig and Additional Equipment. The intention seems to be to make a claim for a reasonable hire amount from a date which may antedate March 2006 and, possibly, 2 January 2006, which is the earliest day within the 6 year limitation period prior to the start of the proceeding on 3 January 2012.

[24] Perhaps the plaintiffs want to keep their powder dry so as to rely on a date before then, in contrast to the ESOC which is confined to the period from 1 March 2006. If so, the question would be whether such a change is one which arises out of substantially the same facts as the facts alleged in the ESOC. In my view, it would not.

[25] The second possible exception is that paragraphs 8B(b) and 8C(b) of the PASOC allege that the third defendant and first defendant, respectively, have benefited from use of the E-Rig and the Additional Equipment by earning income and deriving profits from that use. Those facts do not, in my view, arise out of substantially the same facts as a cause of action for which relief has already been claimed.

[26] The third possible exception is that paragraph 8E alleges that the first and third defendants were unjustly enriched by their possession and use of the E-Rig and Additional Equipment. However, that allegation is made on the premise of the prior allegations in the pleading and does not, on its face, raise an additional factual allegation, as opposed to the legal conclusion that the prior facts disclose unjust enrichment as a "concept"[11] which "is not a definitive legal principle according to its own terms"[12]. Perhaps the allegation serves to identify the relevant "qualifying or vitiating factor" in the present case as the negotiation for, but ultimately the absence of, any legally binding agreement for sale. However that may be, no additional fact to those already identified is apparently raised.

Limitation period has not ended

[27] Accordingly, it is necessary to determine whether the limitation provided for under s 10(1)(a) of the *Limitations of Actions Act* applies, and whether any of the new

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11 *Roxborough & Ors v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516 at [70].

12 *Farah Constructions Pty Ltd & Ors v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at [150] and [151].

causes of action arose on a date which is more than six years before the application to amend was brought, that is before 28 February 2007.

[28] The plaintiffs submit that the new causes of action pleaded as the claim in restitution do not engage the requirements of *UCPR* 376 because no period of limitation applies to them.

[29] Section 10(1)(a) of the *Limitation of Actions Act* provides that an action shall not be brought after the expiration of six years from the date on which cause of action arose, in the case of "an action founded on simple contract or quasi-contract". The plaintiffs' contention is that the claim in restitution is not a proceeding founded on quasi-contract within the meaning of that paragraph. I reject that contention as a matter of the proper construction of the words "quasi-contract" in s 10(1)(a).[13]

[30] There is no reason, in context, to construe s 10(1)(a) as limited to claims of the kind which were once described as quantum meruit or quantum valebat, as the plaintiffs submitted. For one thing, a claim for money had and received by a defendant to the use of the plaintiff, as a species of common law claim, was well understood to be a claim in quasi-contract.[14] Secondly, claims for money for the value of benefits conferred under ineffective contracts, because negotiations did not end in contract, as previously noted, were also treated as quasi-contractual.[15] The piercing analysis of Deane J in *Pavey Matthews Pty ltd v Paul*[16] includes the following:

> "The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution."[17]

[31] The text of s 10(1)(a) largely follows the form of the corresponding provision in the 1960 Act which it replaced, but the words "or quasi-contract" were added in the 1974 Act. That legislative history shows that the intention was to make clear that the limitation period applying theretofore to a cause of action founded on a simple contract applied also to a cause of action of the kind described as "quasi-contract". A similar outcome had been reached where the words "quasi-contract" did not appear in the corresponding English provision dealing with simple contract, by construing it to extend to a cause of action for money had and received.[18] It is unnecessary to delve further into the history of prior limitation sections which applied to a claim brought in assumpsit before the passage of the Judicature Acts.

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13 Compare Goff & Jones at [33 – 07] – [33 – 08]; Mason & Carter, *Restitution Law in Australia*, 2nd ed, par [2717], [2719]; Handford, *Limitation of Actions*, 2nd ed, at [5.10.720]; McLean, *Limitation of Actions in Restitution*, (1989) 48 CLJ 472 at 473.

14 For example, see Stoljar, *The Law of Quasi-Contract*, 2 ed, at p 10.

15 For example, see *Sabemo* at 896; Stoljar, *The Law of Quasi-Contract*, at pp 239-245.

16 [1987] HCA 5; (1987) 162 CLR 221 at 246-258.

17 At 256.

18 *Re Diplock* [1948] Ch 465 at 514.

[32] In the end, the question is whether in construing s 10(1)(a) according to the modern principles of statutory interpretation[19] and guided by s 14A(1) of the *Acts Interpretation Act* 1954 (Qld), the words "quasi-contract" extend to a cause of action of the present kind. In my view, they do. Each of the causes of action described by the plaintiffs as a claim in restitution is one to which s 10(1)(a) applies.

[33] Next, the plaintiffs submit that the date on which any of the new causes of action arose is within six years of the present time because the failure of the negotiations for the sale of the equipment is a necessary element of the facts which gives rise to the alleged claim in restitution. In principle, there is some support for that contention, and it is probably correct in my view.[20]

[34] It is necessary to turn more closely to the date when any relevant new cause of action arose in order to determine whether the limitation period has ended. That date does not appear clearly on the face of the PASOC. However, paragraph 10A(c) alleges that the second plaintiff continued to permit the defendants to possess and use the E-Rig and the Additional Equipment "in a series of conversations and e-mails held or sent between 11 April 2007 and 27 November 2007".

[35] To some extent inconsistently with that, paragraph 17 of the PASOC alleges that on 2 October 2007 the second plaintiff made a demand for the return of the E-Rig and Additional Equipment.

[36] But even if 11 April 2007 were chosen as the last date on which the plaintiffs continued to permit the defendants to have possession and use in contemplation of entering into an agreement for sale, in my view no new cause of action for the payment of a reasonable hire amount on the failure of those negotiations will have arisen before that date passed, because until then the basis of the defendants' possession and use without an obligation to make any payment had not failed, even assuming that no demand before action was required. If it be necessary to adopt the modern language, the qualifying or vitiating factor which allegedly made the defendants' enrichment unjust had not occurred until then.

[37] It follows that I conclude that the limitation period for any of the new causes of action has not yet ended with the consequence that *UCPR* 376 does not apply.

[38] For those reasons, in my view, the plaintiffs should be granted leave to file and serve an amended claim and statement of claim in the form attached as exhibit A to the application, subject only to the requirement that particulars of paragraph 8C(a) be included in the amended pleading, identifying the contracts to third parties for the performance of drilling services made by the first defendant to the extent that the plaintiffs are able to do so.

Costs

[39] Because there was insufficient time to argue the matter fully, I indicated to the parties at the oral hearing that I would reserve any questions of costs for further argument if they wished to make those arguments. I have the provisional view that although the plaintiffs should pay the defendants' costs of the hearing before

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19 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

20 *BP Exploration Co (Libya) Ltd v Hunt (No 2*) [1983] 2 AC 352 at 373; Goff & Jones at [33 – 11].

Philippides J on 18 January 2013, the order should be that those costs be assessed on the standard basis, rather than on the indemnity basis.

[40] The parties appear to be agreed that the plaintiffs pay the defendants' costs of and incidental to this application to be assessed on the standard basis.

[41] At the conclusion of the hearing I directed the parties to bring in an order which reflected what I proposed to order, as I have indicated above.