SUPREME COURT OF QUEENSLAND

CITATION:	*Murdoch v Lake* [2013] QSC 268
PARTIES:	**MALCOLM ALEXANDER STEPHEN MURDOCH (plaintiff)** **v** **STEPHEN MAURICE LINTON LAKE (defendant)**
FILE NO:	BS9994 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application and cross-application
DELIVERED ON:	2 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	7 May 2013
JUDGE:	Margaret Wilson J
ORDER:	**1. The plaintiff's application for leave to file and serve an amended claim and a fourth amended statement of claim in accordance with the drafts exhibited to the affidavit of Joel Hunter Pitman sworn and filed on 22 April 2013 is refused;** **2. Leave to replead is refused;** **3. The plaintiff's claim is dismissed.** **4. The parties to have leave to make written submissions on costs – the defendant's submissions to be provided by 4pm on 8 October 2013 and the plaintiff's submissions by 4pm on 11 October 2013.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the plaintiff sought leave to file and serve an amended claim and fourth amended statement of claim under r 375 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the plaintiff's pleading was completely redrawn in the draft fourth amended statement of claim – where the fourth amended statement of claim contained allegations that were not made in earlier pleadings, for which the limitation period had expired – where the plaintiff submitted that these arose out of substantially the same facts as that for which relief had already been claimed – whether the plaintiff should be given leave to replead

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – DISMISSAL FOR WANT OF PROSECUTION – where the defendant sought dismissal of the proceeding for want of prosecution – where the plaintiff had been ordered to file and serve further and better particulars of the second amended statement of claim, or to further amend the statement of claim to the same effect by 20 February 2013 – where the plaintiff filed a third amended statement of claim on 6 March 2013 – where the plaintiff abandoned reliance on the third amended statement of claim – where the refusal of leave to file and serve the fourth amended statement of claim left the plaintiff in a position similar to not having filed a statement of claim in support of the claim – where there were no periods of undue inactivity on the part of the plaintiff after the commencement of the proceeding – where the fourth amended statement of claim should be taken to represent the best case that the plaintiff could propound – where the fourth amended statement of claim failed to plead a cause of action which was not statute barred – whether having regard to all the circumstances of the case, the claim should be dismissed for want of prosecution

Civil Proceedings Act 2011 (Qld) s 16, s 58
Rules of the Supreme Court 1991 (Qld) O 31 r 1, O 24 r 5
Trade Practices Act 1974 (Cth) s 82, s 87(1A)
Uniform Civil Procedure Rules 1999 (Qld) r 22(2)(b), r 155, r 280, r 366, r 367, r 372, r 375, r 376, r 377, r 378, r 382, r 387

Cooper v Hopgood & Ganim [1999] 2 Qd R 113, considered
Knorr v CSIRO [2012] VSC 529, cited
Murdoch v Lake [2012] QSC 307, related
Ramsay v McElroy [2004] 1 Qd R 667, considered
Stollznow v Calvert [1980] 2 NSWLR 749, cited
Traderight (NSW) Pty Ltd v Bank of Queensland Ltd [2011] NSWSC 972, applied
Udowenko v CEO and Board of Directors of St George Bank (No 2) [2011] NSWSC 1122, considered
Witten v Lombard Australia Ltd (1968) 88 WN (Pt 1) NSW 405, cited

COUNSEL: AJ Greinke for the plaintiff
D Kelly SC, M Hodge for the defendant

SOLICITORS: Morgan Conley Solicitors for the plaintiff
Hopgood Ganim for the defendant

[1] **MARGARET WILSON J:** By application filed on 22 April 2013, the plaintiff sought leave to file and serve an amended claim and fourth amended statement of claim. By cross-application filed on 24 April 2013 the defendant sought orders striking out certain paragraphs of the third amended statement of claim, summary

judgment or alternatively dismissal of the proceeding for want of prosecution. Each party asked for costs against the other.

Background

[2] In an application for particulars of the second amended statement of claim, Douglas J summarised the background to the litigation and the cause of action alleged:

> "[2] The defendant was the chief executive officer of GBST Holdings Pty Ltd ('GBST'). The plaintiff was a director and shareholder of GBST. The plaintiff brought proceedings against GBST and others in 2003 in the Supreme Court of Queensland (BS5402/03) alleging, amongst other things, oppression and unfair dismissal. The 2003 proceeding was settled by deed of settlement on 20 September 2004. In 2005, GBST listed as a public company.
>
> [3] In this proceeding, the plaintiff alleges that there was a secret understanding, arrived at before 20 September 2004, between the defendant and the board members of GBST, other than the plaintiff, that GBST would pursue an Initial Public Offering. The defendant has denied that there was such an understanding.
>
> [4] The plaintiff alleges that the failure to disclose the understanding was misleading or deceptive conduct on the part of GBST and a corporate shareholder of GBST, Crown Financial Pty Ltd ('Crown'). The plaintiff also alleges that the defendant was knowingly concerned in this misleading or deceptive conduct.
>
> [5] The plaintiff claims damages on the basis that, if told of this understanding, he would have refused to enter into the deed of settlement, remained a shareholder of GBST and benefited from the IPO." [1]

[3] His Honour ordered the plaintiff to file and serve further and better particulars of paragraphs 19 and 20 of the second amended statement of claim or to further amend the statement of claim to the same effect. He ordered the plaintiff to do so by 20 February 2013.

[4] On 6 March 2013 the plaintiff filed a third amended statement of claim.

[5] On 18 April 2013 Martin J gave directions (by consent) for the filing and serving of the present applications.

[6] The plaintiff has abandoned reliance on the third amended statement of claim. A draft amended claim and draft fourth amended statement of claim were exhibited to an affidavit sworn by the plaintiff's solicitor Mr Pitman filed on 22 April 2013.[2]

[7] On the hearing of the present applications, the defendant contended that the plaintiff should not be given leave to file and serve his draft amended claim and fourth

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1 *Murdoch v Lake* [2012] QSC 307.

2 Affidavit of Joel Hunter Pitman filed 22 April 2013 (court doc # 46).

amended statement of claim and that the proceeding should be dismissed for want of prosecution. Counsel agreed that the defendant's application for summary judgment should await the outcome of the argument about leave to file an amended claim and a fourth amended statement of claim.

The claim

[8] The proceeding was initiated by the filing of the claim and statement of claim on 17 September 2010. In the claim the following relief was sought:

(a) Damages and or compensation in the sum of $3,243,334.00 under sections 82 and 87 of the *Trade Practices Act* 1974 (Cth);
(b) Interest pursuant to s 47 of the *Supreme Court Act* 1995 (Qld);
(c) Costs.

The prayer for relief in the statement of claim mirrored that in the claim, with the addition of a claim for such further or other relief as the court considered appropriate.

The draft amendments to the claim

[9] The plaintiff wishes to make the following amendments to the claim:

(a) to delete the claim for damages pursuant to s 82 of the *Trade Practices Act*;
(b) to delete "in the sum of $3,243,334.00" – that is, to claim compensation in an unquantified amount;
(c) to delete the reference to s 47 of the *Supreme Court Act* 1995 and substitute a reference to s 58 of the *Civil Proceedings Act* 2011 (Qld).

[10] I assume that the plaintiff relies on s 87(1A) of the *Trade Practices Act*.[3] His counsel informed the court that he wishes to the delete the claim for damages to avoid the risk of quantum being reduced on account of contributory negligence. He said he is not seeking to recover for any future loss by relying only on s 87.

The draft fourth amended statement of claim

[11] The plaintiff's pleading has been completely redrawn in the draft fourth amended statement of claim. There has been no attempt to follow the procedure for amending prescribed by *Uniform Civil Procedure Rules* 1999 (Qld) ('*UCPR*') r 382. The Court may treat the draft new pleading as an amendment and it may impose an appropriate costs sanction. The issue is whether it ought to do so in the circumstances of this case.[4]

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3 The corresponding provisions of the *Competition and Consumer Act* 2010 (Cth) ('the CCA') came into effect on 1 January 2011. Under the *Trade Practices Amendment (Australian Consumer Law) Act (No 2)* 2010 (Cth) schedule 7 item 6(1), the *Trade Practices Act* as in force immediately before the commencement of the CCA continues to apply in relation to acts or omissions that occurred before the CCA commenced. Item 7(1) of schedule 7 provides that the *Trade Practices Act* also continues to apply to or in relation to any proceedings commenced, but not concluded, before 1 January 2011. As the parties agree that the acts or omissions are alleged to have occurred more than 6 years ago, and the proceedings commenced on 17 September 2010 prior to the commencement of the CCA, the provisions of the *Trade Practices Act* are applicable.

4 *Uniform Civil Procedure Rules* 1999 (Qld) r 371.

[12] In the second amended statement of claim the plaintiff alleged that GBST and Crown's failure to disclose –

> • an understanding made between the defendant, Mr Sundell and Mr Puttick (on behalf of various entities) to cause GBST to pay a dividend to shareholders and thereafter pursue an initial public offering; and
>
> • that the defendant was the beneficial owner of Convertible Preference Shares Class B ('CPSB') in GBST, that the defendant had made a loan to Sundell Holdings Pty Ltd and used such loan, whilst CEO of GBST, to purchase or hold undisclosed shareholdings in GBST, and that Crown was the trustee of CPSB in GBST for and on behalf of the defendant

was misleading and deceptive or likely to mislead and deceive the plaintiff into entering into the deed of settlement.[5]

[13] Counsel for the defendant submitted that there are three secret understandings alleged in the fourth amended statement of claim, only one of which is akin to that alleged in the earlier pleadings. He submitted that the limitation period for the new causes of action has ended. Counsel for the plaintiff conceded that this is so with respect to one cause of action, but submitted that the new cause of action arose out of substantially the same facts as that for which relief has already been claimed.

Limitation period

[14] In this proceeding the Supreme Court of Queensland is exercising federal jurisdiction.

[15] The applicable limitation period for a proceeding under s 87(1A) of the *Trade Practices Act* may be "made at any time within 6 years after the day on which the cause of action that relates to the conduct accrued".[6]

[16] In *Ramsay v McElroy*[7] the Court of Appeal considered the relationship between s 82 of the *Trade Practices Act* and Queensland provisions as to amendment to add a cause of action after the expiry of a limitation period. What the court said is, in my view, just as applicable to the amendment of a claim for compensation under s 87(1A) as it is to the amendment of a claim for damages under s 82. The limitation period applicable in that case was three years pursuant to s 82(2), as the cause of action crystallised before an amendment to that subsection changing the period to six years.

[17] White J (with whom the other members of the court agreed) said –

> "[23] When it entertains claims for damages under s 82(1) of the *Trade Practices Act* the court is exercising federal jurisdiction so that s 79 of the *Judiciary Act* 1903 (Cth) applies. It provides, relevantly, that:
>
> > 'The laws of each State … including the laws relating to procedure … shall, except as otherwise provided by … the laws of the Commonwealth, be binding on all Courts

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5 Further amended statement of claim filed 30 April 2012 (court doc # 17) para 19.

6 *Trade Practices Act* 1974 (Cth) s 87(1CA).

7 [2004] 1 Qd R 667, 674-675.

> exercising federal jurisdiction in that State … in all cases to which they are applicable.'
>
> [24] So far as is relevant, s 80 of the *Judiciary Act* provides that so far as the provisions of the laws of the Commonwealth are insufficient to carry them into effect, the common law in Australia as modified by the statute law in force in the State in which the court in which the jurisdiction is exercised is held, so far as it is applicable and not inconsistent with the laws of the Commonwealth, governs all courts exercising federal jurisdiction in the exercise of their jurisdiction in civil matters.
>
> [25] In Queensland the *Uniform Civil Procedure Rules* and s 81 of the *Supreme Court of Queensland Act* 1991 enable parties to be joined and amendments to be made after limitation periods have expired against that party. Section 82(2) of the *Trade Practices Act* prescribes a period of limitation for claims brought for damages pursuant to s 52 – in this proceeding, three years. The question is whether the Commonwealth legislation 'otherwise provided' so as to exclude the application of the Queensland provisions. The test is whether the Commonwealth legislation is irreconcilable with the state provisions, see *Northern Territory v GPAO* per Gleeson CJ and Gummow J,[8] per Gaudron J,[9] and *Austral Pacific Group Ltd (In liq) v Airservices Australia* per Gleeson CJ, Gummow and Hayne JJ.[10]"

Section 81 of the *Supreme Court of Queensland Act* 1991 considered in *Ramsay v McElroy* was in precisely the same terms as s 16 of the *Civil Proceedings Act* 2011 (Qld). The provisions of the *UCPR* considered in that case were in their present terms.

[18] White J considered whether the effect of s 82(2) was to extinguish the cause of action or to bar the remedy, citing with apparent approval the conclusion of Chernov JA in *PSL Industries Ltd v Simplot Australia Pty Ltd*[11] that it merely barred the remedy. Her Honour continued –[12]

> " [33] As the Australian Law Reform Commission noted in its report on *The Judicial Power of the Commonwealth*,[13] since there is no general federal limitation statute applicable to all actions in federal jurisdiction and there is no complete code governing the limitation of actions in federal matters, the law of the state or territory is necessarily picked up and applied as 'surrogate' Commonwealth law. This is even more so where matters of practice and procedure are concerned particularly joinder of parties and amendment of pleadings.

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8 (1999) 196 CLR 553 at 588.

9 at 606.

10 (2000) 203 CLR 136 at 144.

11 (2003) 7 VR 106 at 114-115.

12 *Ramsay v McElroy* [2004] 1 Qd R 667, 677.

13 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) at 570.

> [34] Section 82(2) of the *Trade Practices Act* is located in a section of the Act separate from those which allow the rights of action. It has not 'otherwise provided' for matters relating to amendment either within or beyond the limitation period described. The Queensland rules of court and s 81 of the *Supreme Court of Queensland Act* 1991 are not irreconcilable with the Commonwealth law and accordingly become surrogate Commonwealth law for the cause of action based on the *Trade Practices Act*."

[19] Thus, Queensland law as to amendment to add a cause of action after the expiry of a limitation period imposed by the *Trade Practices Act* is picked up by s 79 of the *Judiciary Act*.[14]

Relevant Queensland law as to amendment

Section 16 of the *Civil Proceedings Act* provides –

> "**16 Amendment for new cause of action or party**
>
> (1) This section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document in a proceeding.
>
> (2) The court may order an amendment to be made, or grant leave to a party to make an amendment, even though—
>
> (a) the amendment will include or substitute a cause of action or add a new party; or
>
> (b) the cause of action included or substituted arose after the proceeding was started; or
>
> (c) a relevant period of limitation, current when the proceeding was started, has ended.
>
> (3) Despite subsection (2), the rules of court may limit the circumstances in which amendments may be made.
>
> (4) This section applies despite the *Limitation of Actions Act* 1974."

[20] Rules 375, 376, 377, 378 and 387 of the *UCPR* provide (relevantly) –

> "**375 Power to amend**
>
> (1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in the way and on the conditions the court considers appropriate.
>
> (2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.
>
> …
>
> (4) This rule is subject to rule 376.
>
> **376 Amendment after limitation period**
>
> (1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a

[14] See also *In the matter of Norman Nominees Pty Ltd (in liq); Griffin & Khatri v Zervos Pty Ltd* [2011] QSC 320 at [11]-[23].

relevant period of limitation, current at the date the proceeding was started, has ended.

…

(4) The court may give leave to make an amendment to include a new cause of action only if—

(a) the court considers it appropriate; and

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

377 Amendment of originating process

(1) An originating process may not be amended except—

(a) if the amendment is a technical matter—with the leave of the registrar or the court; or

(b) if the originating process has not been served and all sealed copies of the originating process, and other documents filed with the originating process, are returned to the court that issued the originating process—with the leave of the registrar or the court; or

(c) otherwise—with the leave of the court.

(2) Subrule (1) does not apply to a pleading or particular included in an originating process.

378 Amendment before request for trial date

Before the filing of the request for trial date, a party may, as often as necessary, make an amendment for which leave from the court is not required under these rules.

387 When amendment takes effect

(1) If a document is being amended under this part, the amendment takes effect on and from the date of the document being amended.

(2) However, an amendment including or substituting a cause of action arising after the proceeding started takes effect on and from the date of the order giving leave.

(3) Despite subrule (2), if an amendment mentioned in subrule (2) is made, then, for a limitation period, the proceeding as amended is taken to have started when the original proceeding started, unless the court orders otherwise."

Amendment of the claim

[21] Counsel for the plaintiff submitted that there is no requirement to quantify the amount of compensation sought in the claim.

[22] Rule 22 of the *UCPR* deals with what must be stated in a claim. It provides (relevantly) –

"(2) A plaintiff must—

(a) state briefly in the claim the nature of the claim made or relief sought in the proceeding; and

(b) attach a statement of claim to the claim".

[23] Rule 155 is concerned with what must be stated in pleading if damages are claimed. It provides –

> "**155 Damages**
>
> (1) If damages are claimed in a pleading, the pleading must state the nature and amount of the damages claimed.
>
> (2) Without limiting rule 150(1)(b), a party claiming general damages must include the following particulars in the party's pleading—
>
> (a) the nature of the loss or damage suffered;
>
> (b) the exact circumstances in which the loss or damage was suffered;
>
> (c) the basis on which the amount claimed has been worked out or estimated.
>
> (3) If practicable, the party must also plead each type of general damages and state the nature of the damages claimed for each type.
>
> (4) In addition, a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise."

[24] I accept that there is no express requirement to quantify an amount claimed (whether as damages or compensation) in the claim, and no express requirement to quantify compensation as opposed to damages claimed in the statement of claim. Nevertheless, the court has both inherent power and power under rr 366 and 367 to order that the compensation claimed be quantified in either or both the claim and the statement of claim.

[25] It is convenient to consider the application to amend the pleading before reaching a conclusion on the application to amend the claim.

The original statement of claim

[26] As originally pleaded, the plaintiff's claim was relatively straightforward.

[27] He alleged that prior to 20 September 2004 the CEO and board members of GBST (not including himself) had an understanding to cause GBST to pay a dividend to shareholders to extinguish in whole or in part shareholder loans and thereafter to pursue an Initial Public Offering. The defendant was the CEO. The understanding was oral, and made between Mr Sundell (on behalf of Crown Financial Pty Ltd), the defendant and Mr Puttick. It was secret and not disclosed to the plaintiff.[15]

[28] He alleged that GBST and Crown's failure to disclose the understanding was misleading and deceptive or likely to mislead and deceive him into entering into the deed of settlement on the term that GBST had a valuation of $29.7m in contravention of s 52 of the *Trade Practices Act*.[16] The defendant was knowingly concerned in the contravention of s 52 by reason of his failure to disclose the understanding.[17]

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15 Statement of claim filed 17 September 2010 (part of court doc # 1) paras 9-11.

16 Statement of claim filed 17 September 2010 (part of court doc # 1) para 19.

17 Statement of claim filed 17 September 2010 (part of court doc # 1) para 20.

[29] He alleged that he suffered loss and damage, being the difference between what he received for his shares under the deed of settlement and what he would have received on the public listing. He claimed $3,243,334.00 calculated as follows:

> Under the Deed of Settlement he received the value of his shares less his shareholder's loan. $5.1m minus $1.3m = $3.8m.
>
> The true value of his shares was $8,001,334.00.
>
> The difference in value of his shares was $2,901,334.00.
>
> He would also have received a dividend on 14 January 2005 in the amount of $342,000.00.
>
> Accordingly, he claimed
> $2,901,334.00 + $342,000.00 = $3,243,334.00.

First amended statement of claim

[30] The first amended statement of claim was filed on 26 April 2012.[18] It was essentially in the same terms and sought the same relief as the second amended statement of claim, which was filed on 30 April 2012.[19] In the latter, some further amendments were made to paragraphs 6, 19A, 21 and 22.

The second amended statement of claim

[31] In the second amended statement of claim, the plaintiff alleged that the defendant was knowingly concerned in, or was a party to, a contravention of s 52 of the *Trade Practices Act*.[20]

[32] Paragraphs 19 and 19A of the second amended statement of claim were as follows -

> "19. The failure to disclose the understanding by GBST and Crown, and the matters pleaded in 2(g), 2(h) and 3(e) of the statement of claim, was misleading and deceptive or likely to mislead and deceive the plaintiff into entering in the deed of settlement on the basis ~~term~~ that GBST had a valuation of $29.7M and that the plaintiff's shareholding was 17.2% rather than 21.2%, in contravention of section 52 of the TPA.
>
> 19A But for the aforesaid misleading and deceptive conduct the plaintiff would not have entered into the deed of settlement and would have retained his shares in GBST, and sought the cancellation of the CPSB in proceedings BS5402/03, entitling him to participate in the dividend declared and IPO and he would have sold his restricted shares after the restricted period in the IPO came to an end."

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18 Amended Statement of Claim filed 26 April 2012 (court doc # 13).

19 Further amended statement of claim filed 30 April 2012 (court doc # 17).

20 Further amended statement of claim filed 30 April 2012 (court doc # 17) para 20.

[33] The understanding and its non-disclosure were pleaded in paragraphs 9, 10 and 11 –

> "9. Prior to 20 September 2004 the defendant as CEO and board members of GBST (not including the plaintiff) had an understanding to cause GBST to pay a dividend to shareholders and thereafter pursue an Initial Public Offering (the 'understanding').
>
> Particulars
>
> The understanding was oral and made between Sundell (on behalf of himself as a director of GBST and Crown as a shareholder of GBST), the defendant (on behalf of himself as an officer of GBST and as a shareholder of GBST) and Puttick (on behalf of himself as a director of GBST and as a shareholder and representative of the Puttick Family Trust also a shareholder of GBST) in face to face meetings, by telephone and written communications none of which were disclosed to the plaintiff.
>
> 10. The material terms of the understanding were, that:
>
> (a) GBST would pay a dividend to extinguish in whole or part shareholder loans.
>
> (b) GBST would pursue an Initial Public Offering.
>
> 11. The understanding was secret and not disclosed to the plaintiff or made the subject of Board meetings attended by the defendant or referred to in any documentation provided to the plaintiff."

[34] The matters pleaded in paragraphs 2(g), 2(h) and 3(e) were –

> "2. The defendant was at all material times:
>
> …
>
> (g) the beneficial owner of Convertible Preference Shares Class B in GBST ('CPSB');
>
> (h) [sic] had made a loan to Sundell Holdings Pty Ltd and used such loan, whilst Chief Executive Officer of GBST, to purchase or hold undisclosed shareholdings in GBST".
>
> "3. Crown at all material times:
>
> …
>
> (e) was the trustee of CPSB in GBST for and on behalf of the defendant".

[35] Douglas J ordered the plaintiff to provide particulars of paragraph 19 –

> "… as to paragraph 19 of the statement of claim, provide particulars of all facts, matters and circumstances relied upon by the plaintiff as:
>
> (1) rendering the alleged failure to disclose misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the *Trade Practices Act 1974* (Cth);
>
> (2) further, or in the alternative, forming part of the conduct, or forming part of the relevant context of the conduct, alleged to have been misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the said Act."

[36] Paragraph 20 of the second amended statement of claim was as follows –

> "20. By reason of the defendant's failure to disclose the understanding and the matters pleaded in 2(g) and 2(h) and 3(e) of the statement of claim, he was knowingly concerned in, or was party to, the contravention of section 52 of the TPA within the meaning of those expressions used in section 75B of the TPA."

[37] Douglas J ordered the plaintiff to provide particulars of paragraph 20 –

> "… as to paragraph 20 of the statement of claim, provide particulars:
>
> (1) identifying the facts, matters and circumstances relied upon in respect of paragraph 19 of the statement of claim that the defendant is alleged to have known for the purposes of paragraph 20 of the statement of claim;
>
> (2) in respect of each of the identified facts, matters and circumstances, the date on which it is alleged that the defendant came to know of the matter;
>
> (3) in respect of each of the identified facts, matters and circumstances, how it is alleged that the defendant came to know of the matter;
>
> (4) of any conduct by the defendant engaged in in respect of those facts, matters and circumstances relied upon for the purposes of paragraph 19 and 20 of the statement of claim."

[38] The plaintiff alleged that he had suffered loss or damage in the sum of $6,595,054.00 or alternatively in the sum of $12,603,338.00. Paragraphs 21 and 22 were as follows –

> "21. By reason of the matters pleaded herein, the plaintiff has suffered loss and damage in the sum of $6,595,054.00 ~~$3,243,334.00~~ being the difference between the payment made under the deed of settlement to the plaintiff and receipt of the 14 January 2005 dividend and participating in the float of GBST on the same terms as the other shareholders. ~~for his shares and the price realisable on a float and the payment by GBST of the plaintiff's proportion of the 14 January 2005 dividend~~.
>
> Particulars
>
> (a)…(f).
>
> 22. In the alternative, the plaintiff has suffered loss and damage in the sum of $12,603,338.00 being the recalculation of paragraphs 21(c), (d), (da), (e) and (f) on the basis that the CPSB had not been issued.
>
> Particulars
>
> (a)…(c)."

Analysis of draft fourth amended statement of claim

[39] In deciding whether leave to amend should be given, it is necessary to analyse the new pleading and to compare the allegations in it with those in the second amended statement of claim.

[40] It is convenient to adopt counsel for the plaintiff's summary of the structure of the fourth amended statement of claim –

(i) paras 12 – 13: the conduct of the earlier proceeding
(ii) paras 14 – 16: the entry into the deed of settlement
(iii) paras 17 – 20: the plaintiff's lack of knowledge of matters concealed from him by GBST, Crown and the defendant
(iv) paras 21, 23: such conduct was misleading or deceptive
(v) para 24: the defendant was knowingly involved in the contravention
(vi) paras 22, 25: the plaintiff suffered loss and damage.

The alleged contravention of s 52

[41] In the fourth amended statement of claim, the plaintiff alleges in paragraph 20 that he did not know of certain matters when he executed the deed of settlement –

> "20 In executing the Deed of Settlement, the plaintiff did not know:
>
> 20.1 the defendant had arranged with Crown to acquire and by 20 September 2004 had acquired, a beneficial interest in the CPSB share issue, as pleaded in paragraph 17;
>
> 20.2 the defendant had arranged for the cash deficiency in GBST in order to promote the CPSB share issue, as pleaded in paragraph 18;
>
> 20.3 the defendant had entered into the agreement or arrangement pleaded at paragraph 19."

[42] In paragraph 21 he alleges misleading and deceptive conduct in these terms –

> "21. The conduct of GBST and Crown pleaded at paragraphs 10 and 14 was misleading or deceptive within the meaning of s 52 TPA by reason of the matters pleaded at paragraphs 17, 18 and 19 and the following:
>
> 21.1 the matters pleaded in paragraphs 17, 18 and 19 were not disclosed to the plaintiff at any time prior to executing the deed of settlement;
>
> 21.2 the failure to disclose these matters was intentional on the part of GBST (by the defendant) and Crown (by Sundell), such intention to be inferred from the matters in 17, 18 and 19 and the following:
>
> 21.3 the defendant had a duty as CEO to disclose to the directors of GBST knowledge of an initial public offering and his interest in an initial public offering for GBST shares, but failed to disclose;
>
> 21.4 during a meeting of the directors of GBST on 6 December 2002, the defendant said words to the effect that he could only contribute less than $200,000 as a shareholder for working capital;
>
> 21.5 during a meeting of the directors of GBST on 13 December 2002
>
> (a) the defendant asked Sundell whether Crown would agree to sell him at a later date some

of the CPSB shares (which was untrue given the arrangement in paragraph 17);

(b) Sundell on behalf of Crown said words to the effect that Crown did not want to enter into any arrangement to sell any shares to other parties (which was untrue given the arrangement in paragraph 17);

(c) when the plaintiff intended to exercise his rights to take up shares, Sundell withdrew the Crown offer;

(d) the Crown offer in respect of the CPSB share issue was reinstated on the basis that no other shareholders (including the plaintiff and the defendant) were to take up any shares;

21.6 while Crown took up the CPSB share issue, it only paid 20% of the value of the shares;

21.7 Crown did not at the time of the CPSB share issue have the financial capacity to pay for the balance of 80% of those shares;

21.8 Crown by Sundell had arranged with the defendant not to call upon the balance of 80% of the CPSB shares;

21.9 part of the value paid by Crown was in respect of the interest held by Crown on trust for the defendant, towards which the defendant contributed by means of the advances pleaded in paragraph 17;

21.10 the defendant had a duty as CEO to disclose to the directors of GBST his $300,000 payment on 5 October 2002 referred to in paragraph 17.3 in anticipation of being used to subscribe for the CPSB share issue, but failed to disclose;

21.11 the defendant had a duty as CEO to disclose to the directors of GBST his interest in the CPSB share issue, but failed to disclose;

21.12 the conduct of GBST by the defendant and Crown by Sundell was in these circumstances intended to conceal the fact that the defendant had an interest in the CPSB share issue."

[43] Paragraphs 10 and 14 are as follows –

"10. In December 2002 GBST issued Convertible Preference Shares Class B ('CPSB') to Crown, pursuant to an offer made by Sundell on behalf of Crown and accepted at a meeting of the directors of GBST on 13 December 2002.

14. On 20 September 2004 the plaintiff executed a deed bearing that date titled 'Deed of Separation, Settlement and Release' ('the Deed of Settlement') including the other parties to that deed including GBST, Crown, Sundell and the defendant."

[44] Reading paragraph 21 literally, what was allegedly misleading and deceptive was GBST's issue of the CPSB in December 2002[21] and the plaintiff's execution of the deed of settlement in September 2004.[22] That was allegedly so by reason of certain "agreements or arrangements"[23] which were not disclosed to the plaintiff and what transpired at meetings of the directors of GBST on 6 and 13 December 2002.[24] This clumsily drafted paragraph cannot be allowed.

[45] I shall assume paragraph 21 could be recast as an allegation that the non-disclosure of the agreements or arrangements and of the defendant's shareholding and loan and his beneficial interest in CPSB held by Crown was misleading and deceptive. But should the plaintiff be given leave to replead?

Paragraph 17

[46] Paragraph 17 of the fourth amended statement of claim is as follows –

> "17 The defendant had in 2001 and 2002 provided advances or otherwise had contributed monies to an arrangement with Crown, by which the defendant, was to acquire and did acquire a beneficial interest in the CPSB share issue, whether directly or through CapX.
>
> **Particulars**
>
> 17.1 On or about 10 July 2001 the defendant paid $1,000,000 to Sundell Holdings Pty Ltd.
>
> 17.2 The payment was recognised in the financial statements of Sundell Holdings Pty Ltd under 'Current liabilities – interest bearing liabilities – S Lake' in the sum of $616,192.
>
> 17.3 On or about 5 October 2002 the defendant paid $300,000 to Crown or alternatively to CapX.
>
> 17.4 The defendant had orally agreed with Crown, by Sundell, for Crown to hold 20% of the CPSB shares on trust for the defendant.
>
> 17.5 CapX had recorded in its financial statements for the year ended 30 June 2002 under the account name 'Listed Equities – Long position' the sum of $3,171,689 [sic],[25] which figure:
>
> (a) represented the value of the combined investments of Crown and the defendant in GBST shares; and
>
> (b) included the $300,000 paid by the defendant on or about 5 October 2002.
>
> 17.6 CapX had recorded in its financial statements for the year ended 30 June 2003 under the account name 'Listed Equities – Long position' the sum of $2,236,052, which included a reduction in the previous balance by the transfer of the loan account for the defendant in the accounts of Sundell Holdings Pty Ltd.
>
> 17.7 On 3 May 2005 GBST issued a prospectus.

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21 Draft fourth amended statement of claim contained in Affidavit of Joel Hunter Pitman filed 22 April 2013 (court doc # 46), exhibit JHP-1 at para 10.

22 Draft fourth amended statement of claim (part of court doc # 46) para 14.

23 Draft fourth amended statement of claim (part of court doc # 46) paras 17, 18, and 19.

24 Draft fourth amended statement of claim (part of court doc # 46) sub-paras 21.1-21.5.

25 There was a typographical error in para 17.5. The figure should have been "$3,173,689". See T 1-68.

17.8 Such prospectus declared the ordinary shareholding of the defendant to be 4,248,000 ordinary shares.

17.9 The defendant's shareholding as disclosed in the prospectus included 848,000 ordinary shares arising from the conversion of CPSB shares held by him.

17.10 At the time of the issue of the prospectus the defendant held a further 940,000 ordinary shares in GBST, arising from the conversion of CPSB shares into ordinary shares, such shareholding not being disclosed in the prospectus.

17.11 The 940,000 ordinary shares were reflected in the CapX accounts.

17.12 The CapX account balance for 'Listed Equities – Long position' from time to reflected [sic] the balance:

(a) increased by monies contributed by Sundell (by Sundell Holdings Pty Ltd and Crown) and Lake to towards their combined equity investments in GBST, including the defendant's advances pleaded above;

(b) decreased by profits and costs of financing arrangements in respect of such investments, including establishment fees, interest, penalty rates and break costs;

(c) decreased by transfer of shares into the defendant's name, including a transfer of 20% of the CPSA shares.

17.13 Accordingly, the inference ought to be drawn that Crown held 20% of its CPSB shares on trust for the defendant, or alternatively for CapX, and this had been agreed as between Sundell and the defendant."

[47] Paragraph 17 of the fourth amended statement of claim refers to an "arrangement" between Crown and the defendant, and paragraph 19 refers to an "agreement or arrangement" reached by the defendant, Mr Sundell and Mr Puttick (on behalf of various entities). The expression "understanding" was used in the second amended statement of claim. Speaking about paragraph 19 of the fourth amended statement of claim (which has some affinity with what was alleged in paragraphs 9-11 of the previous pleading), counsel for the plaintiff told the Court that no significance should be attached to the change of language – that what was meant was something short of a binding agreement.[26]

[48] Counsel for the plaintiff submitted that there were "two strings" to paragraph 19 of the second amended statement of claim – the listing understanding and the arrangement to obtain CPSB shares.[27] In oral submissions he said that the latter was pleaded in paragraphs 2(g), 2(h) and 3(e) of the second amended statement of claim: the defendant made a loan to Sundell Holdings Pty Ltd (Mr Sundell's entity); the defendant became the beneficial owner of the CPSB shares, by means of Crown acquiring the shares but holding them on trust for him.[28] In his written submissions he said that the substance of the allegations in paragraphs 2(g), 2(h) and 3(e) was that the defendant had made undisclosed advances in order to acquire shareholdings in GBST.

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26 T 1-53.

27 T 1-49 – 1-50.

28 T 1-50.

[49] Counsel for the plaintiff submitted that the "arrangement' referred to in paragraph 17 of the fourth amended statement of claim had already been raised by paragraph 3(e) of the second amended statement of claim.[29] He said –

> "So as to 376(4), I submit that paragraph 17 is no more than a redrafting and particularisation of what had previously been at 2(g), 2(h) and 3(e), in relation to what was on the [second] amended statement of claim, therefore not a new cause of action, but merely particulars of an existing cause of action that was already in play in the previous pleading. Or even if there's no precise agreement between the two, then it certainly arises out of the facts that were pleaded in the previous statement of claim."[30]

[50] The reference to paragraphs 2(g), 2(h) and 3(e) in the earlier pleading was certainly opaque. I do not accept that it could fairly be read as an arrangement for the defendant to obtain CPSB. The allegation that the defendant acquired the beneficial interest in the CPSB share issue "directly or through CapX" did not appear in the previous pleading in any shape or form.

[51] Further, as counsel for the defendant submitted, the arrangement referred to in paragraph 17 of the fourth amended statement of claim could not be the trust relationship referred to in paragraph 3(e) of the previous pleading, having regard to sub-paragraphs 21.5(a), 21.5(b), 21.6, 21.7, 21.8, 21.10 and 21.12 of the new pleading.

[52] In short, I consider that the arrangement pleaded in paragraph 17 of the fourth amended statement of claim was not previously pleaded. It is the foundation for a new misleading or deceptive conduct case, which does not out of substantially the same facts as the cause of action for which relief was claimed in the second amended statement of claim.

[53] For reasons which I shall develop below, I am not persuaded that the CapX allegations are based on any more than speculation.

[54] Paragraph 17 should be disallowed.

Paragraph 18

[55] Paragraph 18 of the fourth amended statement of claim is as follows –

> "18. During 2002 the defendant, as CEO of GBST, arranged the affairs of GBST intending to create, and did create, a cash deficiency in December 2002.
>
> **Particulars**
>
> 18.1 The cash deficiency was approximately $1,000,000.
>
> 18.2 The defendant ceased providing cash flow forecasts to the board meetings of directors of GBST from August 2002.
>
> 18.3 The defendant first provided a cash flow forecast for the month of December 2002 to a management team meeting of GBST on 12 November 2002.

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29 T 1-50.

30 T 1-51.

18.4 In December 2002 the defendant first proposed payments of $750,000 purportedly for redundancies for restructuring, notwithstanding that the defendant had been instructed by the directors at their meeting on 29 October 2001 to action restructuring in order to improve cash flow position.

18.5 The defendant did not take any real steps to obtain loan finance, factoring of debt, or the timing of payments to address the deficit, and such steps as were taken were merely a verisimilitude.

18.6 Further particulars of the manner in which the defendant as CEO arranged the affairs of GBST to create the cash deficiency will be provided following disclosure and obtaining expert reports.

18.7 During November and December 2002 the defendant relied on the deficit as a justification for the CPSB share issue, in which, by reason of the matters pleaded above, he had a personal interest."

[56] Counsel for the plaintiff conceded that this is a new foundation for a misleading or deceptive conduct case – that is, a new cause of action – but submitted it arose out of substantially the same facts as previously pleaded.[31] He developed his argument in this way. The defendant's acquisition of a secret interest in the CPSB is at the heart of what is alleged in paragraph 17. Paragraph 18 sets out the means by which that was brought about – by the defendant's creating a deficiency and thus a basis for saying it was necessary to raise funds through the CPSB share issue.

[57] There are several reasons why I do not accept that submission.

[58] The arrangement alleged in paragraph 17 was not alleged in the previous pleading. In other words, what is alleged in paragraph 17 is not a cause of action for which the plaintiff sought relief in the previous pleading. The court's power to give leave to include a new cause of action after the expiration of the limitation period does not arise unless (inter alia) the new cause of action arises substantially out of the same facts "as a cause of action for which relief has already been claimed."[32] In my view "has already been claimed" means claimed in the proceeding prior to the application for leave to amend, and not a cause of action sought to be introduced at the same time as that for which the limitation period has expired. Thus, whether the cause of action alleged in paragraph 18 of the fourth amended statement of claim arises out of substantially the same facts as a cause of action for which relief has already been claimed is to be determined by comparing it with the second amended statement of claim.

[59] Further, as counsel for the defendant submitted, the particulars in sub-paragraphs 18.1 – 18.7 introduce seven discrete tiers of factual inquiry not pleaded in the second amended statement of claim.[33]

[60] The plaintiff's claim is for compensation for misleading or deceptive conduct. The critical allegation that the defendant engaged in such conduct is in paragraph 21.

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31 T 1-51 – 1-52.

32 *UCPR* r 376(4)(b).

33 T 1-77.

However, the particulars of paragraph 21 are insufficient to support an allegation that the non-disclosure of the arrangement to create a cash deficiency in GBST was misleading or deceptive. As Ball J said in *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd* –

> "Silence can, of course, amount to misleading and deceptive conduct… but if that is what is alleged, it is necessary to plead the facts which, taken together with the silence, amount to the misleading conduct and to plead that that conduct is misleading or deceptive or likely to mislead or deceive." [34]

Apart from alleging the non-disclosure and that it was intentional, the plaintiff has not pleaded any facts in support of his allegation that the non-disclosure was misleading or deceptive. Intention is irrelevant to whether conduct is misleading or deceptive. He has not pleaded that the defendant was under a duty to disclose his creation of the cash deficiency.[35] The matters alleged in paragraph 18 do not give rise to a misleading or deceptive conduct case, whether or not they amount to breach of fiduciary duty.

[61] Counsel for the defendant pointed to the allegation in sub-paragraph 20.2 of the fourth amended statement of claim that the plaintiff did not know about the alleged deficiency when he executed the deed of settlement, and observed that this was inconsistent with his denial of the existence of a deficiency in the previous proceeding.[36] Be that as it may, I do not think it weighs against the application for leave to add paragraph 18, as the very point the plaintiff wants to make is that he was not told about the deficiency.

[62] Paragraph 18 should be disallowed.

Paragraph 19

[63] Paragraph 19 of the fourth amended statement of claim is as follows –

> "19 Prior to 20 September 2004 the defendant (on behalf of himself, GBST and CapX) and Sundell (on behalf of GBST, Crown and CapX) together with John Puttick (another director and shareholder of GBST) reached an agreement or arrangement to the effect that:
>
> 19.1 GBST would pay dividends, such dividends being used:
>
> (a) to extinguish Puttick's shareholder loan; and
>
> (b) to facilitate Crown to purchase the balance of the CPSB share issue and to convert the same into ordinary shares;
>
> 19.2 GBST would pursue an Initial Public Offering and become listed on the Australian Stock Exchange.
>
> **Particulars**
>
> 19.3 Particulars of the communications forming the arrangement cannot be provided since the plaintiff was not party to such arrangement, and disclosure of relevant documents has not yet occurred.

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34 [2011] NSWSC 972 at [33]; applied by Douglas J in *Murdoch v Lake* [2012] QSC 307 at [14].

35 In sub-paras 21.3 and 21.10 of the draft fourth amended statement of claim the plaintiff pleaded that the defendant had a duty to disclose certain other matters.

36 T 1-20 – 1-21.

19.4 Further or alternatively the agreement or arrangement is to be inferred from the following matters:

(a) The investment by Crown and the defendant in GBST was recorded in the financial statements of CapX.

(b) Such investment was recorded as 'Listed equities – long position', which indicates that GBST was intended by the defendant and Sundell to be a listed entity.

(c) On 10 December 2003 CapX granted Leveraged Equities Ltd an equitable mortgage of over [sic] securities including the investment in GBST, with a maximum prospective liability of $10,000,000.

(d) In or about March 2004 GBST paid Puttick $250,000, purportedly as an ex gratia payment for services to GBST.

(e) On 20 September 2004 the parties executed the deed of settlement.

(f) On 18 October 2004 the plaintiff resigned as a director of GBST.

(g) On 19 October 2004 Sundell on behalf of GBST met with Glen Mumford of ABN Amro to give instructions for the initial public offering and listing of GBST.

(h) Sundell's meeting with Mr Mumford was with the knowledge and agreement of the defendant and Puttick and purportedly pursuant to a resolution of the directors of GBST.

(i) Pursuant to the Deed of Settlement, Crown paid $2,276,573 to the plaintiff purportedly to buy back ordinary shares held by the plaintiff as pleaded above.

(j) On 17 January 2005, however, Crown transferred the same ordinary shares to the trust established by GBST for a GBST Employee Share Option Plan.

(k) Such trust purchased those shares from Crown by means of a loan of $2,203,000 and a contribution of $133,000 made by GBST to such trust.

(l) Between December 2004 and March 2005 GBST restructured its share capital, including on 17 March 2005 converting CPSA and CPSB shares into ordinary shares.

(m) On 14 January 2005 GBST declared and paid a dividend of $2,000,000, $480,337 of which was used to extinguish Puttick's shareholder loan.

(n) On 17 March 2005 none of the remaining CPSB tranche payments had been called, representing 80% of their value.

(o) On 17 March 2005 Crown and Lake used all or part of the 14 January 2005 dividend to pay for the balance of the CPSB share issue and conversion into ordinary shares.
(p) On 3 May 2005 GBST issued a prospectus for the initial public offering."

[64] In paragraph 8 the plaintiff alleges that CapX was at all material times a registered company, that Mr Sundell and the defendant were its directors from 1 August 2000, and that from or about November 2000 it had two class A ordinary shareholders, namely Mr Sundell and the defendant.

[65] In his written submissions, counsel for the plaintiff argued that the pleading of the undisclosed public listing arrangement in paragraph 9 of the previous statement of claim was "set out more expansively" in paragraph 19 of the fourth amended statement of claim. He submitted –

> "50. A core element of the plaintiff's 'story' is the undisclosed acquisition of shares by [the defendant] in GBST. The inclusion of the matters regarding CapX are particulars of the manner in which [the defendant] both acquired and disguised his undisclosed investment in GBST [sic]. It is 'substantially the same story with additional facts'.
> 51. It is also appropriate to give leave under Rule 376(4)(a) because the plaintiff first discovered the involvement of [the defendant] and Mr Sundell in CapX on 10 February 2013, so these matters could not have been pleaded in the [second amended statement of claim]." (*References omitted*)

[66] Counsel for the defendant conceded that what is alleged in paragraph 19 of the fourth amended statement of claim bears more resemblance to the secret understanding previously pleaded than does what is alleged in either the new paragraph 17 or the new paragraph 18. The plaintiff relies on both direct communications (which he says he cannot particularise since he was not a party to the arrangement and because disclosure had not yet occurred) and inference, in contrast to his earlier disavowal of reliance on inference.[37] But the alleged involvement of CapX is a new element, distinguishing it from the very simple case previously pleaded.[38]

[67] The court may refuse leave to amend where there is no evidence to support an allegation sought to be added.

[68] Counsel for the defendant submitted that there was merely a "contention" of a connection between GBST and CapX, but "absolutely no credible evidence before [the court] of any connection whatsoever – of a real connection".[39] The defendant denied any connection.[40]

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37 T 1-20, 1-55 – 1-56.
38 T 1-20.
39 T 1-37.
40 Affidavit of Julia Maree O'Connor filed 6 May 2013 (court doc # 56) para 10.

[69] Counsel for the plaintiff responded that the allegation was not that CapX was a direct investor in GBST. Rather, the allegation was of investment through Crown, which was a direct investor in GBST and held the CPSB shares.[41]

[70] There were allegations about CapX in the third amended statement of claim filed in March 2013 (the pleading that was abandoned).

[71] The plaintiff obtained copies of financial statements for CapX lodged with ASIC for the years ended 30 June 2002 and 30 June 2003. In an affidavit sworn on 3 May 2013 he said –[42]

> **"**70.CapX had recorded in its financial statements for the year ended 30 June 2002 … under the account name 'Listed Equities – Long position' the sum of $3,171,689. I contend that this balance arose from the value of the combined investments of Crown and the defendant in GBST shares." (*Emphasis added*)

[72] The plaintiff swore an affidavit on 6 May 2013 (the day before the hearing). He exhibited to that affidavit a spreadsheet he had prepared

> "…showing [his] calculations of the manner in which the movements in the CapX account reflect the combined investment of Crown and [the defendant] in GBST."[43]

[73] The plaintiff swore another affidavit on the morning of the hearing (7 May 2013), which was filed and read by leave. He exhibited to that affidavit a further spreadsheet, which he described as an "updated reconciliation of [the] CapX account". Counsel for the plaintiff told the court that his client had compared what appeared in financial statements for CapX he had obtained from ASIC with matters alleged in the third amended statement of claim and found that the value of CapX's listed equities as at 30 June 2002 almost exactly matched the value of transactions between Mr Sundell and the defendant in relation to GBST.[44] He said –

> "The inference that my client draws, and the case he wishes to make, is that what appears in the books of CapX is, effectively, a scorecard of how Mr Sundell and [the defendant] have recorded their, in effect, financing of the acquisition of shares by Crown and the acquisition of shares by [the defendant], particularly through CPSB share issue. It'll be a staggering coincidence – is what – how it's advanced at the moment – again, my client doesn't have access to the internal books to verify any of this.
>
> But it would be a staggering coincidence for those figures to line up in the way that [the plaintiff] has done, without one drawing the inference that this was, effectively, a scorecard-keeping exercise by Mr Sundell and [the defendant] who controlled this entity, in relation to tracking the value or their financing or [sic] their acquisition of shares in GBST."[45]

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41 T 1-65.

42 Affidavit of Malcolm Alexander Stephen Murdoch filed 6 May 2013 (court doc # 55).

43 Affidavit of Malcolm Alexander Stephen Murdoch filed 6 May 2013 (court doc # 53), exhibit MASM-2 para 5.

44 T 1-70.

45 T 1-70.

[74] The plaintiff has not sworn to the process he undertook in preparing the spreadsheets. He has not sworn to the truth of the facts he alleged in the (abandoned) third amended statement of claim. In his spreadsheet he has endeavoured to link transactions alleged in the third amended statement of claim, some of them at least being transactions involving GBST and not Crown but a related entity Three Crowns Investments Pty Ltd, to arrive at the "listed equities – long position" of $3,171,689 included in CapX's current assets as at 30 June 2002. To achieve the linkage he has added in interest at 5.2% pa. His rationale for the addition of the interest and the rate at which he has calculated it are purely speculative. He has included items such as building loan break costs, stamp duty and legal costs. His counsel could not explain how such a "scorecard" could equate to "the value of the combined investments of Crown and the defendant in GBST shares"[46]

[75] Paragraph 19 should be disallowed. It is more than a particularisation of the understanding pleaded in the second amended statement of claim. It raises a different understanding – one involving CapX. In other words, it raises a new cause of action after the expiration of the limitation period, one not arising out of substantially the same facts as the understanding pleaded in the seconded amended statement of claim. Further, there is no direct evidence to support the allegations about CapX's involvement. Nor is there evidence from which CapX's involvement could be inferred.

Loss and damage

[76] Paragraph 25 of the fourth amended statement of claim is as follows –

> "25 By reasons [sic] of the matters pleaded herein, the plaintiff has suffered loss and damage being the difference between benefits under the deed of settlement and value of the lost opportunity for the plaintiff to proceed to trial.
>
> **Particulars of relief at trial**
>
> 25.1 The extinguishment of the plaintiff's then shareholder loan balance, of $1,300,000, as part of any buyout of shares.
>
> 25.2 The repayment to the plaintiff of the cost incurred by the plaintiff in borrowing to service the shareholder loan on 30 June 2003.
>
> 25.3 Damages of $354,795 for wrongful termination of employment.
>
> 25.4 A declaration that the 13 December 2002 issue of CPSB shares was void *ab intio*.
>
> 25.5 Orders for the purchase of the plaintiff's shares in GBST by GBST or one or more of the then shareholders for the sum $9,321,216 based on the initial public offering value of GBST being $43,968,000 and the plaintiff's shareholding being 21.2%, or other value as would have been determined by the Court in the Earlier Proceeding.
>
> 25.6 Payment to the plaintiff of costs for his legal costs, on a standard or alternatively an indemnity basis."

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[46] Draft fourth amended statement of claim (part of court doc # 46) sub-para 15.5.

[77] There are no facts pleaded in the fourth amended statement of claim in support of a causative link between the defendant's non-disclosure of the matters alleged in paragraph 17 and relief the plaintiff could have sought in the earlier proceeding had he been aware of those matters.

[78] Counsel for the defendant conceded that, had they been proved in the earlier proceeding, the matters alleged in paragraph 18 could have given rise to relief for breach of fiduciary duty or oppression. But of course that is not sufficient for them to amount to misleading or deceptive conduct.

[79] The agreement or arrangement alleged in paragraph 19 was an agreement or arrangement to publically list GBST. In paragraph 19A of the previous pleading the plaintiff alleged that he would have participated in the public listing. There is no plea to that effect in the fourth amended statement of claim. As counsel for the defendant submitted, it is inexplicable how the existence of an agreement between the defendant, Mr Sundell and Mr Puttick could have affected the plaintiff's decision to compromise the earlier proceeding by executing the deed of settlement.

Conclusion on application for leave to deliver fourth amended statement of claim

[80] The allegation of misleading or deceptive conduct in the fourth amended statement of claim is based on three arrangements, all of which are different from the understanding previously pleaded. The plaintiff is really seeking to introduce three new causes of action all of which are statute barred. I am unpersuaded that any of them is based substantially on the same facts as the cause of action previously pleaded. Accordingly, the application for leave to file and serve the fourth amended statement of claim should be refused.

[81] The plaintiff commenced this proceeding in September 2010. In seeking leave to file and serve the fourth amended statement of claim he effectively abandoned the cause of action on which the proceeding was based, and sought to introduce new causes of action which are statute barred. As counsel for the defendant submitted, it should be taken that the fourth amended statement of claim represents the best case he is able to propound. There is no suggestion he could reformulate his case in some other way that it would not be out of time.

[82] Leave to replead should be refused.

Conclusion on application for leave to amend the claim

[83] In the circumstances there would be no utility in granting leave to amend the claim. Leave to amend the claim should be refused.

Dismissal for want of prosecution

[84] The refusal of leave to file and serve the fourth amended statement of claim will leave the plaintiff in a position similar to not having filed a statement of claim in support of the claim. The defendant seeks an order dismissing the proceeding for want of prosecution.

[85] Under the former *Rules of the Supreme Court* O 31 r 1, where a plaintiff defaulted in the delivery of a statement of claim within the time allowed, the defendant might

apply for the dismissal of the action for want of prosecution, and the court might order the action to be dismissed accordingly or make some other order. There is no cognate provision in the *UCPR*, probably because the statement of claim must now be attached to the claim[47] whereas under the former rules it was to be delivered separately from the writ in various instances.[48]

[86] Rule 280 of the *UCPR* provides (relevantly) –

> "**280 Default by plaintiff or applicant**
>
> (1) If—
>
> (a) the plaintiff or applicant is required to take a step required by these rules or comply with an order of the court within a stated time; and
>
> (b) the plaintiff or applicant does not do what is required within the time stated for doing the act;
>
> a defendant or respondent in the proceeding may apply to the court for an order dismissing the proceeding for want of prosecution.
>
> (2) The court may dismiss the proceeding or make another order it considers appropriate."

The power in sub-rule (2) is enlivened by the plaintiff's non-compliance with the order of Douglas J.

[87] The court also has an inherent power to dismiss for want of prosecution.

[88] The discretion to dismiss for want of prosecution is unfettered. In *Cooper v Hopgood & Ganim*[49] Pincus JA (with whom Derrington J agreed) adopted and applied what was said in the New South Wales cases *Stollznow v Calvert*[50] and *Witten v Lombard Australia Ltd*[51] to the effect that the discretion must be exercised having regard to all the circumstances of the particular case, rather than in accordance with rigid rules. In an appropriate case the power may be exercised despite the court's not being persuaded of likely prejudice to the defendant or that a fair trial would no longer be possible.

[89] The plaintiff executed the deed of settlement on 20 September 2004. As early as 11 May 2005 his solicitors wrote to the defendant's solicitors alleging misleading conduct and foreshadowing a claim for damages of $3 million approximately. Challenged to substantiate the claim, the plaintiff's solicitors failed to do so.

[90] This proceeding was commenced on 17 September 2010, but not served until 22 February 2012.

[91] Since then, it has been dogged by arguments about the statement of claim. It cannot be said that there have been periods of undue inactivity on the part of the plaintiff, except perhaps in his response to Douglas J's order. His Honour's decision was handed down on 9 October 2012, but it was not until February 2013 that the parties agreed on the terms of a draft order to place before his Honour. I am satisfied that

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47 *UCPR* r 22(2)(b).

48 *Rules of the Supreme Court* O 24 r 5.

49 [1999] 2 Qd R 113.

50 [1980] 2 NSWLR 749.

51 (1968) 88 WN (Pt 1) NSW 405.

the plaintiff was primarily responsible for that delay. During the intervening period, from November 2012 to February 2013, the plaintiff personally did considerable research into his case and reviewed documents with a view to placing them before his solicitors and counsel. His Honour gave him until 20 February 2013 to provide particulars or a further pleading. The plaintiff himself drew the third amended statement of claim, which was filed on 6 March 2013. He abandoned it soon after. The draft fourth amended statement of claim was prepared by different counsel.

[92] In *Udowenko v CEO and Board of Directors of St George Bank (No 2)*[52] Johnson J said –

> "117 Should the Court take the exceptional step of dismissing the proceedings for want of prosecution? I said in the judgment of 29 July 2011[53] that this question was not dependent on how long has passed while the proceedings have been on foot. Nor is it dependent upon there being a lengthy period of inaction on the part of a party. One can have a case such as this where, although the proceedings have been on foot for some 13 months (on one view not a long period), that when one looks at what has happened in that time and what has not happened, it can be seen that the proceedings have not moved to first base, let alone beyond it.
>
> 118 The Plaintiffs have still not filed a properly pleaded initiating process. There is no reasonable prospect, in my view, that if given time they will do so. In one sense, this is an unusual and exceptional state of affairs. Having been called upon twice to consider the state of this litigation, I am satisfied that this describes accurately the current state, and the future prospects of this litigation."

See also *Knorr v CSIRO.*[54]

[93] The gravamen of the application to dismiss the proceeding is the plaintiff's failure to plead a cause of action which is not statute barred. As counsel for the defendant submitted, the plaintiff has now had several attempts at pleading his claim. He has abandoned the chain of causation that led to loss in the original pleading. It should be taken that the draft fourth amended statement of claim represents the best case that he is able to propound. It pleads causes of action for which the relevant limitation period has expired, and which do not arise out of substantially the same facts as the cause of action originally pleaded. Resolution of the factual controversies inherent in determining his claim as so pleaded would, it seems, depend to a significant extent of credibility – a task which usually becomes more difficult as more time passes.

[94] In all the circumstances, the claim should be dismissed for want of prosecution.

Orders

[95] I make the following orders –

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52 [2011] NSWSC 1122 at [117]-[118].
53 [2011] NSWSC 867 at [56].
54 [2012] VSC 529 at [25]-[29].

(i) The plaintiff's application for leave to file and serve an amended claim and a fourth amended statement of claim in accordance with the drafts exhibited to the affidavit of Joel Hunter Pitman sworn and filed on 22 April 2013 is refused;
(ii) Leave to replead is refused;
(iii) The plaintiff's claim is dismissed.

[96] I will hear the parties on costs.