SUPREME COURT OF QUEENSLAND

CITATION:	*Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 5)* [2014] QSC 81
PARTIES:	**MIO ART PTY LTD as trustee of the Spencer Family Trust** ACN 121 010 875 (Plaintiff) **v** **MANGO BOULEVARD PTY LTD** ACN 101 544 601 (First Defendant) **SILVANA PEROVICH** (Second Defendant) **ROBERT WILLIAM WHITTON as trustee of the bankrupt estate of Silvana Perovich** (Third Defendant) **BMD HOLDINGS PTY LTD** ACN 010 093 348 (Fourth Defendant)
FILE NO/S:	BS 1714 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	2 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2014
JUDGE:	Philip McMurdo J
ORDER:	**1. Leave for the plaintiff to amend the claim according to the annexure to the application filed 17 Feb 2014, save for paragraph 10 of that document.** **2. Paragraphs 49.5, 49.7, 49.8 and 9A of the second further amended statement of claim, filed on 22 January 2014, be struck out.** **3. Plaintiff to file and serve an amended statement of claim and an amended claim in accordance with these orders and the reasons for judgment within 28 days.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM

CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the plaintiff seeks leave to amend its claim and statement of claim – where the first and fourth defendants apply to disallow the amendments and to strike out the part of the pleading relating to the amendments – whether an amendment to plead a cause of action, which is time barred, could be made under r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld).

Civil Proceedings Act 2011 (Qld), s 16.
Limitation of Actions Act 1974 (Qld), s 35.
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 22, 149(1)(d), r 156, r 171, r 293, r 376(4), r 379.

Chethams v Remington & Co [1999] 3 VR 258
Draney v Barry [2002] 1 Qd R 145
Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 2) [2012] QSC 348
Mango Boulevard Pty Ltd & Anor v Mio Art Pty Ltd & Ors [2013] QCA 271
Ostabridge Pty Ltd (In Liquidation) (Receiver and Manager Appointed) v Stafford [2001] NSWCA 335
Sexton Developments Pty Ltd v Yarrawonga Pty Ltd [2003] QCA 173
Surrendra Overseas Ltd v Government of Sri Lanka [1977] 1 W.L.R 565

COUNSEL: F M Douglas QC for the plaintiff
M Hodge for the first and fourth defendants

SOLICITORS: Delta Law for the plaintiff
Carter Newell for the first and fourth defendants

[1] This judgment deals with a number of interlocutory applications relating to amendments or proposed amendments to the Claim and Statement of Claim. The Statement of Claim was amended by the filing of a Second Further Amended Statement of Claim on 22 January 2014 ("the 2014 pleading"). The first and fourth defendants, which I will call the defendants, apply for the disallowance of some of the amendments thereby made and for the striking out of those parts of the pleading. They also apply for summary judgment, under r 293 of the *Uniform Civil Procedure Rules* (Qld), in the case of some of those amendments.

[2] There are two applications by the plaintiff. One is for leave to amend the claim. That is resisted by the defendants, upon arguments which correspond with their challenges to amendments made by the 2014 pleading. In effect, the amendments to the claim which are challenged would claim relief for causes of action which are within the controversial amendments to the pleading.

[3] The other application by the plaintiff is to have certain questions tried in advance of the balance of the proceeding. They are questions which are the subject of the controversial amendments. Therefore, as I indicated at the hearing, this application for a preliminary trial of certain questions would have to await at least my decision upon the other applications. This judgment deals with the defendants' applications and the plaintiff's application to amend the claim.

Background

[4] Before going to the amendments in question, it is necessary to say something of the history of this complicated litigation. It arises from a joint venture for the development of land north of Brisbane. The land is owned by a company called Kinsella Heights Development Pty Ltd ("Kinsella"). The shares in that company were originally owned by a Mr Spencer and Ms Perovich (the second defendant). Mr Spencer says that he held his shares as a trustee and the plaintiff company (which he controls) is said to be the current trustee of that trust.

[5] In 2003, Mr Spencer and Ms Perovich agreed to sell 50 per cent of their shares to the first defendant, which was and is a subsidiary of the fourth defendant. The shares were transferred. But the parties are in dispute as to the price.

[6] The sale was made pursuant to a written contract entitled Share Sale Agreement ("the Contract"). It provided for the price to be quantified, at least potentially, according to the market value of the project land owned by Kinsella. Clause 4.1 of the Contract provided that the purchase price "of the Shares", comprising 50 per cent of each of the shareholdings of Spencer and Perovich, would be the higher of two amounts. One was $5 million. The other was then unknown but in broad terms, it was to be the difference between the improved market value of the project land at a certain future date when a relevant approval or approvals of its development issued, less $2 million. Clause 4.1 further provided that the purchase price (quantified either way) would be reduced by certain amounts.

[7] Thus far the present litigation has involved a dispute between the parties about whether the purchase price could be calculated by reference to the value of the land. The defendants maintained that in the events which occurred over some years from the end of 2006, the parties were governed by a valuation of the land which was so low that the purchase price became that alternative of $5 million (less the agreed deductions). The plaintiff maintained that the relevant value was yet to be ascertained. That controversy led to a lengthy trial which was resolved by my judgment in November 2012.[1] The plaintiff was successful with the consequence that the Contract's dispute resolution provisions were engaged for the determination of that value. An appeal by the defendants was dismissed by the Court of Appeal in September 2013.[2] Subsequently, pursuant to those provisions of the Contract, the valuation question has gone to arbitration.

[8] The Contract provided for the payment of the purchase price by two tranches. Clause 5.1(a) provided that on a certain future date, the first defendant would pay to Ms Perovich and Mr Spencer $5 million, together with interest thereon calculated according to cl 6.2 of the Contract, less those agreed deductions. As appears to be the presently common ground, consistently with what I noted to be common ground in the 2012 judgment,[3] this first tranche became payable on 7 February 2007.

[9] Clause 5.1 provided for a potential second tranche, by requiring the first defendant to pay the amount by which the price calculated pursuant to cl 4.1 exceeded $5 million (if any) within two days of the determination of the purchase price pursuant to cl 4 (or a later date which is not now relevant).

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1 *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 2)* [2012] QSC 348.

2 *Mango Boulevard Pty Ltd & Anor v Mio Art Pty Ltd & Ors* [2013] QCA 271.

3 *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 2)* [2012] QSC 348 at [62].

[10] For the most part the amendments which are the subject of the present applications concern the first tranche payment. The plaintiff claims that some of it has not been paid. It wishes to claim payment, with accrued interest, from the first defendant and also the fourth defendant which is said to have guaranteed the payment. The plaintiff also claims that it has suffered damages from the late payment or failure to pay the balance of this first tranche.

[11] It also wishes to claim damages for the delay in ascertaining the value of the land. It claims that it has become liable to another party for a substantial amount of interest on a debt which it could not pay because it has not received any payment as the second tranche.

The disputed amendments

[12] I go then to the amendments which are presently in question.

[13] Much of the present controversy is whether the claims for payment of what is said to be outstanding on the first tranche and for damages for the delay in making that payment are causes of action which are statute barred. It appears to be common ground that the cause of action for the balance of the first tranche as a debt owing by the defendants accrued on 7 February 2007. The defendants say that the cause of action for damages for non-payment or late payment of any of the first tranche also accrued on that date. The defendants then say that neither of these causes of action was claimed in the proceeding until the 2014 pleading, by which time more than six years had passed from their accrual. They argue that the introduction of these causes of action by the 2014 pleading should be disallowed because an amendment to plead a cause of action, which was current at the commencement of these proceedings, but which is now statute barred, could be made only in the circumstances specified in r 376(4), namely where the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief had already been claimed in the proceeding.

[14] For the plaintiff, it is argued that these causes of action had indeed been claimed in the proceeding, prior to the 2014 pleading and within the limitation period if it expired on 7 February 2013. Alternatively, the plaintiff argues, and has alleged in the 2014 pleading, the limitation period for the debt claim was restarted by an acknowledgement of the debt. The defendants dispute that the facts pleaded as an acknowledgement of the debt could have had that effect, because they say that in no case was the balance of the debt which is now to be claimed for the first tranche payment the subject of any acknowledgement that it was owing and recoverable by the plaintiff.

[15] I go first to the question of what, if anything, of these causes of action was claimed in the proceeding prior to the 2014 pleading. In July 2011, the plaintiff filed an amended statement of claim which relevantly contained this amendment, which (now devoid of its particulars) remains in the 2014 pleading and to which there is no present objection:

> "**XII. PLAINTIFF'S CLAIM IN DEBT**
>
> 49.4 Mango has failed to pay all moneys due and owing under the provisions of the SSA and in particular cl 4.1 thereof.
>
> Particulars

i. Funds retained by Mango from the first tranche due to the Plaintiff and the Second Defendant under cl 5.1(a) of the SSA and particularized in the Affidavit of Russel Thomson sworn on 5 February 2007 and filed in Supreme Court BS 987/07 upon payment of balance funds into Court.

ii. Total of $1,141,976 calculated on the basis of the BBSY rate applied monthly and capitalised annually up to 1 July 2011 with a daily interest rate of $178.48 accruing from that date."

[16] At least with an understanding of the particulars there pleaded, that paragraph was a clear complaint of a failure to pay the balance of the first tranche,. To explain that, the first defendant made a payment on account of the first tranche by making a payment into court on or about 6 February 2007. The calculation of the amount paid into court was explained in that affidavit of Mr Thomson. He explained that $2 million of the $5 million had already been paid (by an assignee from Mr Spencer and Ms Perovich calling up bank guarantees securing $2 million of the $5 million debt). He further explained that there were set-offs alleged by the defendants. Allowing for them and for the deductions which had been agreed within cl 4 of the Contract, the amount paid in was calculated as $1,042,325.18.

[17] The funds retained from the first tranche, referred to in those particulars of paragraph 49.4, appear to be an amount of slightly more than $1 million as set out in Mr Thomson's affidavit. In turn, the sum of $1,141,976 referred to in the particulars was made up of the funds retained by the first defendant together with accrued interest according to the provision for interest in the Contract.

[18] Therefore, the terms of paragraph 49.4, headed as it was "Plaintiffs claim in debt", would seem to demonstrate that the plaintiff had claimed in this proceeding a cause of action for the outstanding part of the first tranche payment. A complication, however, is that there was no claim for payment of this debt within that part of the pleading which was headed "Relief claimed" and nor was there such relief claimed within the Claim itself.

[19] Therefore, the defendants argue, the limitation period for the debt cause of action continued to run and ultimately expired in February 2013. And, they argue, r 376(4) does not permit an amendment to claim the payment of the balance of the first tranche, because although the facts constituting that cause of action may have been pleaded in paragraph 49.4, it was not a "cause of action for which relief ha[d] already been claimed in the proceeding".

[20] Rule 22 UCPR requires a plaintiff to "state briefly in the claim the nature of the claim made or relief sought in the proceeding". Rule 149(1)(d) requires, subject to r 156, a pleading to state specifically any relief the party claims. (Rule 156 provides that the court may grant general relief or relief other than that specified in the pleadings irrespective of whether general or other relief is expressly claimed in the proceeding.) The defendants say that neither of these rules was complied with insofar as a claim for payment of the first tranche debt is concerned.

[21] That last submission must be accepted in respect of the Claim. The deficiency is the explanation for the plaintiff's application for leave to amend the Claim by the insertion of a paragraph 9 which would be as follows:

> "9. An order that the first and fourth defendants pay to the plaintiff the sum of $1,205,456 together with interest thereon calculated on the basis of the 90 day BBSY rate plus 1% applied monthly and capitalised quarterly up to 2 January 2014 together with further interest accruing from that date."

This appears to be again related to the debt claim, as I will discuss below in relation to paragraph 49.6 of the 2014 pleading.

[22] However, the defendants' submission that the debt was not claimed within the Statement of Claim, prior to the 2014 pleading, is not so clearly correct. The plaintiff was required to state specifically any relief which it claimed. It did not do so within that part of its Statement of Claim which was headed "Relief claimed". But paragraph 49.4, together with its heading "Plaintiff's claim in debt" cannot be treated as surplusage. As the defendants now submit, that paragraph cannot be related to any other relief claimed in the Statement of Claim. Therefore the only rational explanation for its presence was that it was a pleading of a claim for an outstanding debt under the first tranche payment.

[23] Moreover, in that part of the Statement of Claim headed "BMD's guarantee", the plaintiff alleged that the fourth defendant was liable for the performance by the first defendant of its obligations as pleaded in certain paragraphs which included paragraph 49.4. Now again, there was no specific relief claimed against the fourth defendant, in respect of the matters alleged in paragraph 49.4, within that part of the pleading headed "Relief claimed". But it is difficult to accept that the defendants could have been under the impression that what was sought by this proceeding did not include the payment of what was alleged to be the outstanding balance (with interest) of the first tranche payment.

[24] Clearly enough in my view, the plaintiff did advance a claim for payment of that debt against the first defendant in paragraph 49.4 and against the fourth defendant in paragraphs 50 through 53. This is not to overlook the requirement of r 149(1)(d). Rather, that rule, like all rules within the UCPR, is to be applied with an objective of avoiding undue technicality and facilitating the purpose of those rules, which is the just and expeditious resolution of the real issues in civil proceedings: r 5.

[25] The first of the controversial amendments within the 2014 pleading is the insertion of a paragraph 49.5 to plead that "further or in the alternative, from time to time since 8 September 2006 [the first defendant] has acknowledged its indebtedness of the first tranche amount due and owing under the provisions of cl. 5.1(a) of the [Contract]". Particulars were provided which includes a letter from the defendants' then solicitors to Mr Spencer and Ms Perovich of 8 September 2006. That letter could not be relevant in the reckoning of any limitation period if, as the parties seem to agree, the cause of action did not accrue until 7 February 2007. The same would apply to another particularised item, which is Mr Thomson's affidavit which was sworn on 5 February 2007.

[26] There was argument in the present hearing as to whether at least some of the documents there particularised contained an acknowledgement of the alleged indebtedness, sufficient to cause the limitation period to recommence.[4] It is unnecessary and inappropriate to resolve that debt now, for several reasons. The first is that upon the view which I have expressed about the Statement of Claim, prior to the 2014 pleading, the plaintiff had included this cause of action in 2011, within the limitation period. Secondly, the resolution of that issue is affected by the question of whether a debtor which resists the payment of the debt by a claim of set-off can be said to be acknowledging the debt in the relevant sense. For a negative answer to that question, there is substantial authority which has been cited by counsel for the defendants.[5] But he also referred me to the doubts on that question expressed by Fryberg J in *Sexton Developments Pty Ltd v Yarrawonga Pty Ltd*.[6] Thirdly, the argument was pressed by the defendants in the course of seeking summary judgment under r 293 upon what was described as that part of the plaintiff's case which was contained in this paragraph 49.5. However, there is no cause of action pleaded by paragraph 49.5. Rather, it is in anticipation of a plea by the defendants that the cause of action for the outstanding debt upon the first tranche payment is statute barred. Indeed for that reason, paragraph 49.5 should not be in the Statement of Claim. Therefore, it will be ordered to be struck out, as the defendants alternatively sought.

[27] The next amendment was the insertion of paragraph 49.6 which, devoid of its particulars, is as follows:

> "By reason of the facts alleged in paragraph 49.4 and 49.5 above [the first defendant] is indebted to the plaintiff and the third defendant in the amount of $1,205,456 to 2 January 2014."

The particulars set out the calculation of that sum.

This paragraph is a more detailed and up to date plea of the cause of action first pleaded by paragraph 49.4. As I have held, that cause of action was included within the limitation period.

[28] However, the pleading is curious for the fact that it alleges that the first defendant is indebted to both the plaintiff (as the successor to Mr Spencer) and Ms Perovich. It is in a form which suggests that there was only one cause of action for the debt, to which Mr Spencer and Ms Perovich, and now the plaintiff and Ms Perovich, were and are jointly entitled. In the same way, the debt which was particularised in paragraph 49.4 has been quantified in an amount which was referrable to the whole of the payment allegedly required of the first defendant, rather than merely the plaintiff's one half share of it. (It should be noted that another amendment effected by the 2014 pleading was the deletion of the particulars to paragraph 49.4 within the paragraph itself.)

[29] For the plaintiff it was suggested that in an earlier judgment, I held that there was the one cause of action held by the plaintiff and Ms Perovich. That was not what I held. The context was an application by the plaintiff to amend the orders which I made in my 2012 judgment by which the question of the valuation was to go to

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4 Under s 35 of the *Limitation of Actions Act* 1974 (Qld).

5 *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 W.L.R 565 at 575; *Chethams v Remington & Co* [1999] 3 VR 258; *Ostabridge Pty Ltd (In Liquidation) (Receiver and Manager Appointed) v Stafford* [2001] NSWCA 335 at [36].

6 [2003] QCA 173 at [26].

mediation and arbitration. I held that the effect of those orders was that the dispute between the plaintiff, the defendants and Ms Perovich, as to the calculation of the price, was to go to arbitration and that although Ms Perovich had not been a plaintiff seeking that relief, she was entitled to participate in the arbitration and would be bound by the outcome. That was not to say that there was a single entitlement, jointly held by the sellers or their successors, to payment of the price. Clause 1.4 of the Contract provides that "the sale price for the Shares shall be apportioned equally between half of the Spencer Shares and half of the Perovich Shares". It is far from clear that there is a joint entitlement as the plaintiff seems to suggest. But this is an issue which should be left for fuller argument at the trial, particularly because it affects the estate in bankruptcy of Ms Perovich. If there were several causes of action, respectively enjoyed by the two sellers, then subject to the question of whether the debt was relevantly acknowledged by the defendants, her cause of action, now belonging to her trustee in bankruptcy, would be statute barred. I therefore decline to strike out paragraph 49.6 upon the basis that it contains an allegation of indebtedness to the plaintiff and to the third defendant.

[30] Otherwise, the complaint about paragraph 49.6 is one with which I have dealt, namely that it introduces a new cause of action out of time. The application to strike out paragraph 49.6 will be dismissed. For the same reasons the plaintiff should have leave to amend the Claim by the addition of the proposed paragraph 9.

[31] Paragraph 49.7 pleads a case for damages for breach of contract by the failure to pay all of the first tranche payment. That cause of action accrued upon the alleged breach, which was 7 February 2007. No question of an acknowledgment arises in relation to this cause of action. The cause of action had not been pleaded prior to the 2012 pleading. There was previously a claim, within the "Relief claimed" section of the pleading, for damages for breach of contract. But that was a complaint about another breach or breaches.

[32] It follows that the amendment by the introduction of this paragraph 49.7 cannot be permitted, consistently with r 376, unless it can be said to arise 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. The plaintiff suggested that the relevant power was contained wholly within s 16 of the *Civil Proceedings Act 2011* (Qld) which provides as follows:

> "**16 Amendment for new cause of action or party**
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> (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—
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> (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*."

[33] However, as s 16(3) provides, the rules of court may limit the circumstances in which amendments may be made and the rules have done that by r 376.

[34] Therefore, it is necessary for the plaintiff to bring this amendment within r 376(4). In *Draney v Barry*,[7] Thomas JA said that the need to prove some additional facts which are pleaded by the amendment is not necessarily fatal to a favourable exercise of the discretion under r 376(4). He said that:[8]

> "If the necessary additional facts to support the new cause of action arise out of substantially the same story as that which would have to be told to support the original cause of action, the fact that there is a change to focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts. In short, this particular requirement should not been seen as a straightjacket."

[35] In this case the matters which would be introduced by paragraph 49.7 are substantial and they would call for a factual inquiry which is well beyond that which would be required by the debt claim. They would involve a consideration of the position between the Spencer/Perovich interests and a third party, Traditional Values Management Ltd (in liquidation), which is said to have obtained a judgment on which interest continues to accrue. It is said that had the first tranche been duly paid, that interest burden would have been less and that the plaintiff is worse off by the extent of its liability to that party. The plaintiff claims damages on this basis of slightly in excess of $1.7 million.

[36] The question here is whether the additional factual inquiry which this claim would require has the consequence that this new cause of action does not arise out of substantially the same facts as that for which relief has already been claimed in the proceeding, namely the relief claimed by paragraph 49.4. The new claim is for damages for breach of contract, where the breach is the alleged non-payment of the debt which is therefore an issue already within the proceeding. What is new is the case that this has resulted in a particular loss for which the plaintiff would not be compensated by the accrual of interest upon the first tranche debt according to the express terms of the contract. My impression at the moment is that this is an amendment outside r 376(4). But it is unnecessary to express a concluded view upon that because the paragraph should be disallowed for the further reason advanced by the defendants which is as follows.

[37] The judgment which in fact was obtained by Traditional Values Management was against Mr Spencer. It was not against the plaintiff. The pleading does not

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7 [2002] 1 Qd R 145.

8 Ibid at 164.

demonstrate how the plaintiff has suffered damage of the kind which is alleged. The plaintiff is said to be the new trustee of the trust of which Mr Spencer was a former trustee. If it be assumed, for present purposes, that Mr Spencer became liable to Traditional Values Management as that trustee, he (or his estate in bankruptcy) would have a right to be reimbursed from trust assets for that liability. The plaintiff here might claim to be compensated by a loss of trust assets in providing that reimbursement. But those matters are not pleaded within this paragraph 49.7. Therefore, in its present terms, quite apart from whether it is an amendment which cannot be permitted according to r 376, it cannot stand. It will be ordered that paragraph 49.7 be struck out.

[38] Paragraph 49.8 is as follows:

> "Further, or in the further alternative, had [the defendants] made timely payment of the second tranche (the monies due under cl. 5.1(b) of [the contract]) then any debt claimable by TVM would be limited to an amount of zero and the Plaintiff claims $2,515,231.07."

[39] This is problematic at least because it assumes that there will be a second tranche payment. But that will depend upon the outcome of the arbitration.

[40] The case which is apparently intended by cl 49.8 is that the defendants have wrongly delayed the process of the valuation of the land and thereby the calculation of the price. But that case was pleaded already, prior to the 2014 pleading, particularly within paragraphs 48 and 49 of the Statement of Claim. In paragraph 49, it was and is alleged that if the second tranche had been paid earlier, the trustee of the relevant Spencer trust would have been able to invest its apportionable share of the price, so that the plaintiff has thereby suffered a loss. It is difficult then to see what is the intended purpose of paragraph 49.8. It should be struck out.

[41] The defendants also applied for summary judgment on the cases pleaded in paragraphs 49.7 and 49.8. As for 49.7, the defect in its pleading might be able to be remedied and the plaintiff should not be precluded from advancing that case by a final judgment. And as for the limitation period defence on 49.7, that should be assessed if and when the plaintiff is able to properly formulate that claim. As for 49.8, a judgment could have the effect of precluding the case which is already pleaded.

[42] There is also a question as to paragraph 9A of the 2014 pleading. Within the one paragraph, it contains a claim for the debt corresponding with the new paragraph 49.6 and damages claims corresponding with paragraphs 49.7 and 49.8. In view of my conclusions about the damages claims, this paragraph 9A cannot stand. It will be ordered to be struck out. But it should be clear that the plaintiff could amend to substitute a claim for relief based upon paragraph 49.6.

[43] That leaves for consideration the proposed paragraph 10 of the claim which is in the following terms:

> "10. An order that the first and fourth defendants pay to the plaintiff the sum of $1,709,697.85 as damages to 2 January 2014 together with accruing damages from that date or in the alternative the sum of $2,515,231.07 as damages to 2 January 2014 together with accruing damages from that date."

This appears to relate to the matter pleaded in paragraph 49.7 and therefore cannot be allowed.

Orders

[44] Upon the plaintiff's application filed 17 February 2014, the plaintiff will be given leave to amend the Claim as set out in the annexure to that application save for paragraph 10 of the proposed amended Claim.

[45] Upon the defendants' applications, it will be ordered that paragraphs 49.5, 49.7 and 49.8 together with paragraph 9A in the Second Further Amended Statement of Claim filed on 22 January 2014, be struck out. The plaintiff will be directed to file and serve an Amended Statement of Claim and an Amended Claim in accordance with these orders and these reasons for judgment within 28 days.