SUPREME COURT OF QUEENSLAND

CITATION:	*Mineral Resources Engineering Services Pty Ltd as Trustee for the Meakin Investment Trust v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia* [2015] QSC 62
PARTIES:	**MINERAL RESOURCES ENGINEERING SERVICES PTY LTD as trustee for the MEAKIN INVESTMENT TRUST** (plaintiff/respondent) **v** **COMMONWEALTH BANK OF AUSTRALIA** ACN 123 123 124 (defendant/applicant)
PARTIES:	**PETER ALEXANDER HAY** (plaintiff/respondent) **v** **COMMONWEALTH BANK OF AUSTRALIA** ACN 123 123 124 (defendant/applicant)
FILE NO/S:	SC No 6906 of 2010 SC No 6907 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	11 December 2014
JUDGE:	Philip McMurdo J
ORDER:	**In 6906 of 2010:** **1. paragraphs 48 through 68 and 73 through 76 of the amended statement of claim filed on 3 October 2014 take effect from that date;** **2. paragraphs 77 through 79 and 87 of that pleading be struck out with leave to re-plead consistently with these reasons for judgment;** **3. paragraph 31 of that pleading be struck out with leave to re-plead consistently with these reasons for judgment.**

In 6907 of 2010:

1. **paragraphs 51 through 72 and 77 through 80 of the amended statement of claim filed on 3 October 2014 take effect from that date;**
2. **paragraphs 81 through 84 of that pleading be struck out with leave to re-plead consistently with these reasons for judgment;**
3. **paragraph 33 of that pleading be struck out with leave to re-plead consistently with these reasons for judgment.**

CATCHWORDS: LIMITATION OF ACTIONS – GENERAL MATTERS – AMENDMENT OF ORIGINATING PROCESSES AND PLEADINGS OUTSIDE LIMITATION PERIOD – AMENDMENTS INTRODUCING NEW CAUSE OF ACTION OR PARTICULARISING CAUSE OF ACTION – where the defendant applied for the disallowance of certain amendments to each plaintiff's statement of claim – where the plaintiffs pleaded, inter alia, that the bank engaged in unconscionable conduct, in contravention of the *Australian Securities and Investments Commission Act* 2001 or the *Trade Practices Act* 1974, and also in also in equity – whether certain amendments contained in each amended statement of claim raised new causes of action which were by then time barred – whether amendments to the pleadings fell within r 376(4) of the *UCPR* – whether parts of the amended pleadings were obscure and failed to inform the defendant of the plaintiff's case

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the defendant applied for the disallowance of certain amendments to each plaintiff's statement of claim – where the plaintiffs pleaded, inter alia, that the bank engaged in unconscionable conduct, in contravention of the *ASIC Act* or the *TPA*, and also in also in equity – whether certain amendments contained in each amended statement of claim raised new causes of action which were by then time barred – whether amendments to the pleadings fell within r 376(4) of the *UCPR* – whether parts of the amended pleadings were obscure and failed to inform the defendant of the plaintiff's case

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – whether certain amendments contained in each amended statement of claim raised new causes of action which were time barred – whether amendments to the pleadings fell within r 376(4) of

the *UCPR* – whether parts of the amended pleadings were obscure and failed to inform the defendant of the plaintiff's case

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – LIMITATION PERIOD – WHEN CAUSE OF ACTION ACCRUES – where the plaintiffs pleaded, inter alia, that the bank engaged in unconscionable conduct, in contravention of the *Australian Securities and Investments Commission Act* 2001 or the *Trade Practices Act* 1974, and also in also in equity – whether certain amendments contained in each amended statement of claim raised new causes of action which were by then time barred

Australian Securities and Investments Commission Act 2001 (Cth), s 12DA
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), s 375, s 376(4), s 378, s 379, s 387

Draney v Barry [2002] 1 Qd R 145, considered
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, applied
Mokrzecki v Popham & Ors [2013] QSC 123, considered
Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330, applied
Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431, applied
Vairy v Wyong Shire Council (2005) 223 CLR 422, applied
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, cited
Westpac Banking Corporation v Hughes [2012] 1 Qd R 581, cited

COUNSEL: D O'Brien QC, with P L Somers for the plaintiffs/respondents
R S Hollo SC, with J M Ahmed for the defendant/applicant

SOLICITORS: Russells for the plaintiffs/respondents
Clayton Utz for the defendant/applicant

[1] In each of these two cases, which are being managed together on the Commercial List, the defendant applies for the striking out or disallowance of certain amendments to the statement of claim which were made by the plaintiff on 3 October 2014. The pleadings in the two cases are substantially the same, as are the present arguments about the relevant amendments.

[2] It is convenient to discuss the arguments by reference to the claim made by Mr Hay and to add such reasons as are necessary to deal with the differences, such as they are, which arise in the other proceeding.

[3] Mr Hay was a borrower from the bank under a margin loan which was the subject of an agreement made between him and the bank's predecessor.[1] Critical to the operation of this agreement was the comparison at any time between what was described as the current loan to security ratio and the margin call loan to security ratio. The former was the ratio of the amount borrowed to the total market value of the assets held as security for the loan, expressed as a percentage. The latter was an agreed threshold loan to security ratio. If at any time the former came to exceed the latter, then the borrower could be required by the bank to eliminate that excess either by altering the amount of the loan or the security (or both).

[4] Mr Hay pleads that it was an express or alternatively an implied term of his agreement with the bank that if the margin call loan to security ratio was exceeded, the bank would notify him of that fact, or in other words that he was in margin call.

[5] He alleges that the agreement contained other implied terms, which required the bank, with reasonable care and diligence, to compile and supply him with information as to the state of his loan to enable him to know the amount owing, the market value of the securities for the loan, whether the current loan to security ratio exceeded the margin call loan to security ratio and what steps he had to take to remedy any excess. And he pleads that in the event that the information provided to him was not accurate or up to date, the bank was obliged to inform him of that fact and to provide sufficient information so that he could determine the true state of his loan and the market value of his securities.

[6] He complains that he was provided with information which was not accurate and up to date. In consequence, he says, he did not know the extent of the deterioration in the state of his account as the value of the security for his loan fell in the second half of 2008. He pleads that on 30 September 2008 he was in margin call and again eight days later without being informed by the bank on either occasion. In consequence, he delayed selling some of the security which caused him substantial losses in a market where the value of that security continued to decline. He further complains that ultimately the bank sold all of the security for the loan without first giving him notice of its intention to do so.

[7] The complaints which I have described thus far are pleaded as alternative claims for damages for breach of contract, damages for negligence, damages for misleading and deceptive conduct in contravention of s 12DA of the *Australian Securities and Investments Commission Act* 2001 (Cth) or alternatively s 52 of the *Trade Practices Act* 1974 (Cth) and for damages for unconscionable conduct pursuant to the ASIC Act or the TPA.

[8] In each case the pleading which is the subject of the bank's application is that filed on 3 October 2014. However, on the eve of the hearing, the plaintiffs provided in draft further amended statements of claim which addressed some of the complaints which the

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[1] State Bank of New South Wales Limited whose rights and obligations were acquired by the bank in 2001.

bank had made about the October pleadings. Therefore some of the bank's original complaints need not be discussed.

[9] Most of the bank's remaining arguments concern aspects of the allegations of unconscionable conduct. I will mention first an argument which was conceded by counsel for the plaintiffs at the hearing. Each plaintiff pleads that the bank engaged in unconscionable conduct, not only in contravention of the ASIC Act or the TPA, but also as "unconscionable conduct in equity".[2] However, the October pleadings do not claim any equitable relief. Counsel for the plaintiffs said that this was an oversight which would be corrected.

[10] The bank's remaining complaints about the unconscionable conduct case fall into two categories. One is that several amendments made by the October pleadings (and repeated in the more recent drafts) raised new causes of action which were by then time barred. The second is that one part of the unconscionable conduct case which was added in the October pleadings and reworded in the more recent drafts, is obscure and thereby fails to inform the bank of the plaintiff's case.[3]

[11] As to the amendments in the first category, the bank's counsel agreed that in these cases, the question of whether a cause or causes of action was time barred is not one which could be fairly determined at this interlocutory stage. In *Wardley Australia Ltd v Western Australia*,[4] Mason CJ, Dawson, Gaudron and McHugh JJ said that limitation questions should not be decided in interlocutory proceedings "except in the clearest of cases" because:

> "Generally speaking, in such proceedings insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question."

Nor did the plaintiffs argue that any limitation question relating to these amendments should be determined now. The bank's arguments were premised upon the possibility that one or more causes of action were added out of time by the October pleadings and the plaintiff's argument accepted that possibility.

[12] Before going to the particular amendments which are the subject of these arguments, it is necessary to identify the relevant procedural rules and the authorities. Rule 375(1) of the *Uniform Civil Procedure Rules* provides that the court may allow or direct a party to amend a claim or a pleading in the way and on the conditions the court considers appropriate. Rule 375(4) provides that this is subject to r 376.

[13] Rule 376(1) provides that r 376 applies to an application for leave to make an amendment if a relevant period of limitation, current at the date the proceeding was started, has ended. Rule 376(2) provides for an amendment which corrects the name of a party and is not presently relevant. Nor is r 376(3) which provides for an amendment changing the capacity in which a party sues. What is relevant is r 376(4), which provides as follows:

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2 Hay Statement of Claim, para 84(e); Meakin Statement of Claim, para 87(e).
3 The so-called "seventh element" as discussed below at [41], [47] – [51].
4 (1992) 175 CLR 514, 533.

> "(4) The court may give leave to make an amendment to include a new cause of action only if -
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> (a) the court considers it appropriate; and
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> (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."

[14] Rule 377 requires the leave of the court for an amendment to an originating process, unless the amendment is a technical matter or the originating process has not been served. But that does not apply to a pleading, which may be amended without leave as often as necessary before the filing of the request for trial date: r 377(2) and r 378. If a party makes an amendment without leave under r 378, another party may apply to the court to disallow all or part of the amendment and on that application, the court may make an order it considers appropriate: r 379. Such an application for disallowance is to be made within eight days after service of the amendment. The present applications by the bank were made outside that time but no point is taken by the plaintiffs in that respect, in circumstances where the plaintiffs were notified of the bank's objections within that period. At directions hearings on 9 October 2014, the orders which were made contained an express reservation as to the bank's right to contend that the amendments made by the October pleadings should be disallowed or should take effect only from the date of the amendments.

[15] Rule 387(1) provides that if a document is being amended under these rules, the amendment takes effect on and from the date of the document being amended. The bank's concern is that it could lose a limitation defence if the October amendments remained without any further order. By r 387(1) those amendments would relate back to the date of the commencement of these proceedings, a date comfortably within any relevant limitation period. The bank argued that the subject amendments to the unconscionable conduct case in each pleading should be the subject of an order, made under r 379(2), that those amendments take effect only on the date of the filing of the amended statements of claim (3 October 2014).

[16] The plaintiffs resist that order because of the potential for the benefit of r 376 to be lost to them. The evident intent of r 376(4) is to permit an amendment, where appropriate, which would add a cause of action, current at the date the proceeding started but now out of time, with the effect of depriving the defendant of a limitation defence (which it would enjoy if that new cause of action were prosecuted in a new proceeding).

[17] Rule 376 is expressed to operate in the context of the court being asked to give leave to make an amendment. But as the present arguments accept, an application under r 379 should be determined by reference to the rules and principles which govern the court's discretion to give leave to amend.[5]

[18] A practical difficulty in cases such as the present is that because it cannot be fairly determined whether a relevant period of limitation has expired, it cannot be concluded that r 376 applies. The bank asked me to proceed as I did in *Mokrzecki v Popham &*

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[5] *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581, 584.

Ors,[6] by determining whether the amendments raised new causes of action and if so, whether those causes arose out of the same or substantially the same facts as a cause of action for which relief had been claimed in the proceedings. In other words, I should determine whether the element in r 376(4)(b) could be satisfied, if r 376 was applicable. If, as the bank argued, there were new causes of action which did not arise out of the same facts, then the plaintiffs could not lose the beneficial operation of r 376 by orders that the amendments should take effect only from the date on which they were made.

[19] In response, one submission of the plaintiffs was that I should not consider whether r 376(4)(b) could be satisfied, but instead I should leave that to the trial judge, just as the question of limitation defences should be determined then. In my view however, the r 376(4)(b) question or questions could and should be determined now. It is preferable for the effective date of the amendments to be determined now because of the effect of that issue upon the pleading of the bank's case. The reasons for the desirability of leaving limitation questions to the trial do not apply to this different question of whether a new cause of action arises out of the same facts, a question which is to be answered by the facts which are pleaded, rather than by those which are ultimately found at the trial.

[20] I have mentioned already the nature of the original complaints made by each of the plaintiffs within their cases of unconscionable conduct. They were that the information provided by the bank was not accurate and up to date, the bank failed to notify the plaintiff that the loan was in margin call and that the bank ultimately sold all of the plaintiff's securities without giving notice to the plaintiff. The unconscionable conduct claim in each proceeding was much expanded, at least by the length of the pleading, in the October 2014 amendments.

[21] In Mr Hay's pleading, the unconscionable conduct claim was divided into seven elements, of which the seventh is pleaded under the heading "Defendant's Actions affected by Commercial Relationship with Storm [Financial Limited]". Then in para 84 of that pleading, there are six combinations of elements which were alleged "both collectively and as individual contraventions" to have constituted unconscionable conduct in a relevant statutory sense or in equity. Each combination involves the seventh element and one of the other elements.

[22] In the Meakin pleading of October 2014, there are nine elements of unconscionable conduct which are pleaded. The seventh element is the same as that in the Hay pleading. By para 87 of the Meakin pleading, there are some eight combinations, each involving the seventh element and one other element, which are said to have constituted, both collectively and as individual contraventions, unconscionable conduct in the statutory and equitable senses.

[23] Therefore, each of the October pleadings, on its face, raised new causes of action, in that there were said to be six or eight distinct contraventions of, for example, s 12CB of the ASIC Act.

[24] In the more recent draft pleadings, the plaintiffs propose to plead the same elements of their unconscionable conduct cases, although with a rewording of the pleading of the seventh element and by removing that element as an essential part of each alleged contravention. I will return to those proposed amendments. But first it must be

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[6] [2013] QSC 123.

considered whether some of the October 2014 amendments arose out of substantially the same facts as a cause of action which had been pleaded previously.

[25] In the Hay pleading, the bank concedes that the first and fifth elements were not new, in the sense that they were facts which were the same or substantially the same as those which had been previously pleaded. The bank makes the same concession in relation to the first, fifth, eighth and ninth elements of the Meakin pleading.

[26] Therefore the first element to be considered is element 2, which the pleadings describe as the bank's "Allowing Prepayment of Interest and Extension of Credit Limit". This element is pleaded in paras 51 through 58 of the Hay pleading. It is there alleged that he was allowed by the bank to exceed his approved credit limit before, on the bank's suggestion, he successfully applied for that limit to be increased. The increase in his loan was in consequence of the bank's agreeing to his drawing, as an additional borrowing, a sum by which he prepaid interest on the loan for the year to 30 June 2009. He alleges that the bank's conduct in allowing his current loan to security ratio to exceed his base loan to security ratio[7] was inconsistent with the bank's general policy on margin lending, or what para 58 of his pleading described as the bank's "buffer policy". He there pleads that by breaching this policy in permitting him to borrow to prepay interest, the bank exposed him to the risk of further losses by increasing his debt. In the Meakin case, the second element is materially the same within paras 48 through 54 of that pleading.

[27] The conduct of the bank of which the plaintiffs complain within this second element was not pleaded in their earlier statements of claim. But the plaintiffs contend that there are no substantial new facts because the previous pleadings did set out the terms of the buffer policy. It is true that the terms of the policy were pleaded in the Hay pleading at para 34 and the Meakin pleading at para 37. But it is there that the similarity ends.

[28] In *Draney v Barry*,[8] Thomas JA said at [57] that the need to prove some additional facts is not necessarily fatal in the context of r 376(4) and that:

> "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 changed 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 be seen as a straightjacket."

But in the case of this second element, the alleged conduct of the bank is quite distinct from that which had previously been alleged. It could not be said to involve simply the addition of details to a complaint which, in substance, had been made already.

[29] The third element of each pleading was described as the "Continued Approval of High Gearing Against Funds". Identical allegations appear in paras 59 through 68 of the Hay pleading and 55 through 64 of the Meakin pleading. It is alleged that from May 2007, the bank conditionally increased the plaintiff's borrowing limit against the security of investments in "Funds" to 80 per cent of the value of the security. The conditions of that increase included things which were to happen between the bank and Storm. It is

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[7] Effectively the margin call loan to security ratio less 10 per cent.
[8] [2002] 1 Qd R 145.

alleged that those conditions were not fulfilled because the bank "failed to" cause those things to occur, such as the receipt of monthly reports from Storm. It is alleged that by no later than 30 June 2008, the bank knew that in the 2007/08 financial year, a number of things had occurred which, in effect, were indicators of likely declines or further declines in the value of the relevant securities for the plaintiffs' loans. It is then alleged that the bank, "acting reasonably", ought to have decreased the borrowing limits on the relevant Funds to at least the pre-May 2007 limits, on or about (in the alternative) any of the months from December 2007 through August 2008. It is alleged that by failing to decrease the plaintiff's limit on any of those dates, the bank exposed the plaintiff to further risk of loss.

[30] Again this is quite a distinct series of complaints from those which had been previously been pleaded. The plaintiffs' response goes no further than to say that "such matters are consistent with and connected to" certain allegations in the previous pleadings. They refer first to paras 22(c)(ii) and (v) of the Meakin pleading. Those allegations appeared under the heading "The Unauthorised Sale", where the essence of the complaint was that the bank sold the plaintiff's remaining securities on hand, over four days in December 2008, without giving notice of any margin call and otherwise wrongfully. In para 22(c), it was pleaded that certain things would have occurred but for those unauthorised sales. In particular, para 22(c)(ii) pleaded that on or about 8 December 2008, the bank would have reduced the base loan to the security ratio on a certain 12 Funds and para 22(c)(v), that the bank would have reduced that limit on two further Funds on or about 9 January 2009. It can be seen at once that the facts of those original complaints, involving conduct in December 2008, are quite distinct from those the subject of the third element which involved different and earlier conduct.

[31] Next the plaintiffs refer to paras 35 of the (original) Hay pleading and para 38 of the (original) Meakin pleading, where it was alleged that at all material times from about May 2007, the bank offered its margin lending customers who were clients of Storm (including the plaintiff) a base loan to security ratio of 100 per cent on cash. But this is not a part or at least a significant part of the so-called third element.

[32] The plaintiffs also refer to paras 33 and 36 of the (original) Hay pleading and paras 36 and 39 of the (original) Meakin pleading, where it was alleged that by the agreement between the parties, the bank was entitled unilaterally to vary the base loan to security ratio. It can be said, as the plaintiffs say, that this has a connection with the case now pleaded as element 3. But the argument goes no further.

[33] In my view, this element of each of the October pleadings was not based upon the same or substantially the same facts as earlier pleaded.

[34] Element 4 is headed "Failure to Address Buffer Status Adequately or at All". The respective cases are substantially the same although there are some differences in relation to the precise dates on which the plaintiff's current loans to security ratio exceeded the base loan to security ratio, i.e. the period in which the loan was "in buffer". In each case it is said that the bank knew that the plaintiff was not taking steps to reduce its current loan to security ratio to take it out of buffer, when a reasonable person in the bank's position would have issued one or more letters to the plaintiff, advising that the loan was in buffer, which the bank did not do. It is alleged that the bank thereby exposed the plaintiff to further risk of financial loss.

[35] There was no previous complaint in either case of the failure to notify the plaintiff that the loan was in buffer. But the plaintiffs say that this is just an extension of the previous allegation that the bank failed to notify the plaintiff that the loan had reached the wrong side of a certain threshold. But that was a different threshold, namely that the loan was in margin call. Element 4 goes further than adding some detail to that complaint. It is a distinct complaint of the bank's failure to notify the plaintiff about a different circumstance. In my view, it does not arise from the same or substantially the same facts as the previously pleaded causes of action.

[36] The sixth element is headed "Enforcement of Margin Calls". In the Hay pleading, the complaint is that the bank "failed to sell down any of the Plaintiff's Portfolio in order to reduce the Plaintiff's current loan to security ratio to below the base loan to security ratio" at certain times in October 2008 and (more generally) until on or around 20 November 2008. A similar pleading is made in the other proceeding, although the relevant period of inaction by the bank is somewhat longer.

[37] The plaintiffs' response is to say that this is simply part of their original complaints that the bank failed to provide notices of margin call. But this is quite a different complaint. Rather than complaining that securities were sold by the bank without notice to the plaintiffs, the complaint here is that (with such a notice) the securities should have been sold by the bank earlier. Again this element does not arise from the same or substantially the same facts of a cause of action originally pleaded.

[38] The seventh element, as pleaded by Mr Hay last October, was as follows:

> "81. At all material times from around December, 2007, the total sum of money the Defendant had lent to clients of Storm, caused the Defendant to make the maintaining of a business relationship with Storm a priority.
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> 82. At all material times from around December 2007, the Defendant's actions in addressing the margin loans of its customers, who were also customers of Storm, were affected by the Defendant's priority pleaded in the paragraph 81 thereof, and considerations that were:
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> (a) unrelated to the contractual relationships between the Defendant and its margin loan customers;
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> (b) unrelated to the best interests of margin loan borrowers, who were customers of Storm, including the Plaintiff; and
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> (c) related to maintaining the defendant's commercial relationship with Storm.
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> 83. As a result of the matters pleaded in paragraphs 81 and 82 hereof, the Plaintiff was exposed to further risk of financial loss."

Relevantly identical paragraphs appear in the Meakin statement of claim of October 2014.[9] This is the first time that the plaintiffs complained that the bank had acted unconscionably by giving priority to the maintenance of a business relationship with Storm, rather than to the interests of its customers such as the plaintiffs.

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[9] Paras 77-79.

[39] But the plaintiffs submit that Storm's "involvement" and its "connection with the defendant" were matters which had been originally pleaded.[10] They refer to the Meakin pleading at paras 1(a), 1(d), 1(e)(iii) and 8. But prior to the October amendments, there was no case to the effect that the bank had a relationship with Storm which so compromised its dealings with its own customers that it acted unconscionably towards them. The seventh element as pleaded last October was entirely new.

[40] It follows that in each of the October pleadings, elements 2, 3, 4, 6 and 7 of the unconscionable conduct claims could not be within r 376(4). As I have noted, each of elements 2, 3, 4 and 6 in combination with element 7, is pleaded as constituting a distinct contravention of relevant legislation which proscribed unconscionable conduct. In each case therefore, a new cause of action has been added. The defendants should not lose the benefit of a possible limitation defence. It should therefore be ordered that those elements as pleaded last October should be amendments which are effective only from 3 October 2014.

[41] The case then pleaded for element 7 had other difficulties, as recognised to an extent by the plaintiffs in their December drafts. The further amendment proposed by those drafts, for example, would have para 82 of the Hay pleading read as follows:

> "82. At all material times from around December 2007, the Defendant's conduct pleaded in paragraphs 50 to 80 hereof:
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> (a) was a consequence of the Defendant's priority pleaded in paragraph 81 hereof;
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> (b) related to maintaining the Defendant's commercial relationship with Storm;
>
> and did not involve consideration of:
>
> (c) the contractual relationship between the Defendant and the Plaintiff;
>
> (d) the interests of the Plaintiff."

[42] The (present) October pleading complains of "the Defendant's actions in addressing the margin loans of its customers, who were also customers of Storm", rather than being confined to the bank's conduct pleaded in relation to the plaintiff. At least for that reason, the October pleading of element 7 was vague and too wide. It did not identify what were "the Defendant's actions" which were pleaded in, for example, para 82 of Mr Hay's pleading. In the same way it did not identify the "considerations" which were there pleaded. Paragraph 82 of Mr Hay's pleading and the equivalent para 77 of the Meakin pleading did not identify what was within the plaintiff's case so that the defendant could be in a fair position to meet it. Quite apart from the newness of element 7, the vagaries of its pleading mean that the paragraphs which pleaded element 7 or which relied upon it should be disallowed and thereby struck out.

[43] From my conclusions thus far, it should be ordered that paras 51 through 72 and 77 through 80 of Mr Hay's amended statement of claim and 48 through 68 and 73 through 76 of the Meakin amended statement of claim should take effect on and from 3 October

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[10] Plaintiffs' Outline of Submissions, para 57.

2014. It also follows that paras 81 through 83 of the Hay amended statement of claim and paras 77 through 79 of the Meakin amended statement of claim should be struck out.

[44] Once those paragraphs are struck out, it would follow that para 84 of the Hay pleading and para 87 of the Meakin pleading could not remain, because each is entirely reliant upon those paragraphs which are to be struck out. That is because each combination of facts which is pleaded as a distinct contravention of a relevant statutory proscription of unconscionable conduct has, as a necessary element, the so-called element 7.

[45] But for the draft pleadings provided by the plaintiffs immediately prior to the hearing, there would then be a need for further orders which struck out the remainder of the October pleadings which alleged unconscionable conduct and claimed relief on that basis. However, the proposed pleadings must be considered, because if the same defects as to element 7 would not appear in those pleadings, then the unconscionable conduct case should not be struck out in its entirety.

[46] Most importantly, the proposed pleadings would not make the seventh element an essential element of any alleged contravention. Instead, the proposed case of each plaintiff is that each of the elements would itself be said to constitute a contravention, with an alternative case that all elements should be considered together as constituting a contravention. In that way, the absence of element 7 would not be fatal.

[47] What must also be considered is the proposed re-pleaded terms of element 7. It must be said that para 82 of the draft narrows the case of its predecessor, in that it eliminates the reference to the bank's actions in addressing the margin loans of other customers. Nevertheless the proposed pleading of element 7 is far from clear. In para 81, it is still to be pleaded that the bank had reached a position which made "the maintaining of a business relationship with Storm a priority". Just what business relationship had to be maintained is not revealed. Presumably, this is the same relationship as the bank's "commercial relationship with Storm" which is to be pleaded in, for example, para 82(b) of Mr Hay's proposed pleading. It is necessary for the plaintiffs to identify the relevant facts and circumstances of this alleged relationship with Storm.

[48] Further, it is necessary for them to plead the facts by which the maintenance of that relationship became "a priority". They propose to allege that the maintenance of the relationship became a priority because of the total sum of money which the bank had lent to clients of Storm. That indicates that the proposed case is that the bank had an interest in maintaining, if possible, the financial future of Storm and its Funds. But without an identification of the alleged "relationship", this element of causation is not apparent.

[49] A further difficulty of this proposed pleading is the expression "related to" in para 82(b) of the Hay draft. That is such a wide expression that it does not inform the bank of the nature and extent of the alleged connection between the bank's conduct and the maintenance of its relationship with Storm. It is to be presumed that subparagraph (b) of the proposed para 82 involves something beyond what is pleaded in subparagraph (a).

[50] A further difficulty is in the proposed para 82(d), where it is to be alleged that the bank did not consider the "interests of the Plaintiff". The source of an obligation of the bank

to act in the interests of the plaintiff, beyond the alleged contractual terms and the alleged duty of care, is not apparent.

[51] For these reasons, a pleading of element 7 in terms of the drafts would be defective and be liable to be struck out.

[52] But because of the proposed amendment to remove the seventh element as an essential element of any alleged unconscionable conduct, no further references to unconscionable conduct within the October 2014 pleadings should be struck out. It is to be expected that the plaintiffs will re-plead in terms of para 84 of the Hay draft and para 87 of the Meakin draft, excluding references to the seventh element, unless that element can be re-pleaded in a way which is consistent with these Reasons.

[53] The remaining issue involves the pleading of the bank's duty of care. Paragraph 32 of the Hay pleading alleges that the bank owed the plaintiff a duty to exercise reasonable care and diligence:

> "(a) in providing the Data so that, at the time it was published, it was accurate, up to date and reliable;
>
> (b) alternatively, to provide the Data Qualification."

The "Data" is earlier identified as certain information provided by the bank to Mr Hay as to the state of his loan, including his current loan security ratio. In the Meakin pleading, the data involves substantially the same type of information, although provided to that borrower by quarterly margin loan statements. The "Data Qualification" is identified as the means by which the plaintiff could determine the true realisable market value of the securities and the true state of the margin loan.[11]

[54] There is no complaint as to the terms in which the alleged duty of care is pleaded. Nor is there a complaint about the pleading of the facts and circumstances from which the alleged duty arose. The bank's complaint is that the scope of that duty is not pleaded. There is a purported plea of that matter in, for example, para 33 of Mr Hay's amended statement of claim as follows:

> "33. The scope of the Defendant's duty pleaded in paragraph 32 hereof included exercising all due care, skill and diligence of a lender providing information as to a state of a margin loan used for the purpose of investing in unlisted indexed funds."

An identical plea appears in the Meakin amended statement of claim (para 31).

[55] In each case the plaintiff then makes a number of allegations as to what was done or not done in breach of the duty of care. But the scope of the duty is not further revealed.

[56] In several cases in the High Court, the importance of the identification of the scope of a common law duty of care has been emphasised: see *Romeo v Conservation Commission of the Northern Territory*;[12] *Graham Barclay Oysters Pty Ltd v Ryan*;[13]

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[11] Meakin Statement of Claim, para 9(e).
[12] (1998) 192 CLR 431, [122].
[13] (2002) 211 CLR 540, [192].

Vairy v Wyong Shire Council[14] and *Roads and Traffic Authority of New South Wales v Dederer*.[15]

[57] The need to identify the scope of the duty comes from the risk that a court will reach a conclusion of negligence by effectively formulating a duty of care by reference to a particular act or omission which has caused a loss, rather than by comparing the defendant's conduct with what the court has identified as that which should or should not have been done.

[58] A plaintiff's pleading must identify the facts which the court should find in properly reasoning to a conclusion of negligence. Therefore, it is necessary for a plaintiff, at least in cases of relative complexity such as these, to identify what the exercise of reasonable care required of the defendant. It is not sufficient for a plaintiff to allege simply that what was done or not done by the defendant was negligent.

[59] In these pleadings, there is an apparent recognition of the need to plead the scope of the alleged duty of care. But the plaintiff in each case has failed to identify relevantly what should or should not have been done. Instead, there is effectively a repetition of the existence of a duty of care. The defect is not one which could be cured simply by the provision of particulars. Paragraph 33 of the Hay pleading and para 31 of the Meakin pleading will be struck out, in each case with leave to re-plead.

[60] As already mentioned, some complaints about the October 2014 pleadings have been acknowledged by the plaintiffs and the proposed remedy of those matters, as indicated by the drafts, satisfies the bank's present concerns. The plaintiffs will have to re-plead accordingly and also consistently with these reasons. I will hear the parties as to the time by which those pleadings should be filed.

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[14] (2005) 223 CLR 422, [59], [119]-[128].
[15] (2007) 234 CLR 330, [65]-[67].