SUPREME COURT OF QUEENSLAND

CITATION:	*Nalos Pty Ltd & Anor v Robert Bird Group Pty Ltd & Ors* [2015] QSC 174
PARTIES:	**NALOS PTY LTD ABN 65 002 946 821** (first plaintiff) **WOOLWORTHS LIMITED ABN 88 000 014 675** (second plaintiff) **v** **ROBERT BIRD GROUP PTY LTD ABN 67 010 580 248** (first defendant) **WATPAC CONSTRUCTION PTY LTD ABN 71 010 462 816** (second defendant) **WATPAC LIMITED ABN 98 010 562 562** (third defendant) **HOLCIM (AUSTRALIA) PTY LTD ACN 099 732 297 (FORMERLY KNOWN AS READYMIX HOLDINGS PTY LTD ACN 099 732 297)** (first third party) **SHEPHERD CONTRACTING PTY LTD ABN 49 227 647 893 AS TRUSTEE FOR THE FAW TRUST** (second third party)
FILE NO/S:	11451 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2015
JUDGE:	Burns J
ORDER:	**Application dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where proceedings for breach of contract and negligence are on foot – where the plaintiffs seek to amend the further amended claim and further amended statement of claim to add new causes of action for misleading or deceptive conduct – where leave is required to amend – whether it is appropriate to grant leave to

amend the further amended claim and further amended statement of claim – whether the plaintiffs have advanced an adequate explanation for their delay in seeking to add the new causes of action – whether a fair trial of the proceeding can be secured with the addition of the new causes of action and notwithstanding such delay

Trade Practices Act 1974 (Cth), s 51A, s 52, s 82, s 87
Uniform Civil Procedure Rules 1999 (Qld), r 376

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 313 ALR 408; [2014] HCA 36
Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17
Hartnett v Hynes [2010] QCA 65
Hartnett v Hynes [2009] QSC 225
Page v The Central Queensland University [2006] QCA 478
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515; [2004] HCA 16

COUNSEL:	D A Skennar for the plaintiffs G A Thompson QC, with D M Turner, for the first defendant M K Stunden for the second defendant
SOLICITORS:	Clayton Utz for the plaintiffs Barry Nilsson for the first defendant HWL Ebsworth for the second defendant

[1] The plaintiffs in this proceeding – Woolworths Limited[1] and its wholly owned subsidiary, Nalos Pty Ltd[2] – commenced proceedings in the Supreme Court of New South Wales on 5 October 2012 and, on 2 November 2012, those proceedings were transferred to this court.[3] As presently framed, the plaintiffs claim damages for breach of contract and negligence in connection with the design and construction of a commercial building situated in the Brisbane suburb of Larapinta. They now seek the leave of the court to add new causes of action against the first and second defendants who are, respectively, Robert Bird Group Pty Ltd[4] and Watpac Construction Pty Ltd.[5] In particular, leave is sought to amend the Further Amended Claim and Further Amended Statement of Claim[6] to

1 Herein, "Woolworths".
2 Herein, "Nalos".
3 Affidavit of Ian Bloemendal filed on 15 April 2015; paragraph 3.
4 Herein, "the Robert Bird Group".
5 Herein, "Watpac". As to the parties not directly concerned with this application, the third defendant, Watpac Limited, is a guarantor of the second defendant and was added in 2013. The third parties, Holcim (Australia) Pty Ltd and Shepherd Contracting Pty Ltd, were added in 2014 after separate proceedings commenced against them by Watpac were consolidated with this proceeding.
6 Herein, "the FASOC".

incorporate claims alleged to arise from conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth).[7]

[2] The plaintiffs submit that the limitation period for these new claims had not expired when the proceeding was commenced and that, accordingly, the court has a discretion pursuant to r 376(4) of the *Uniform Civil Procedure Rules* 1999[8] to allow an amendment to incorporate those claims. The court may only do so where such a course is considered appropriate[9] and 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 has already been claimed in the proceeding by the party applying for leave to make the amendment.[10]

[3] It is not in contest that the proposed amendments seek to agitate new causes of action against the Robert Bird Group and Watpac. Nor is it contended by either defendant that the causes of action do not arise out of substantially the same facts as those which are already the subject of the contract and negligence claims in the proceeding.[11]

[4] As such, and assuming the limitation period for the new causes of action had not expired by 5 October 2012, the question for determination on this application is whether it is *appropriate* to give leave to make the proposed amendments. In the context of this case, the answer to that question very much depends on whether the plaintiffs have advanced an adequate explanation for their delay and, further, whether a fair trial of the proceeding can be secured with the addition of the new causes of action notwithstanding such delay.

Background to the application

[5] The origin of the dispute reflected on the face of the current version of the plaintiffs' pleading – the FASOC – may be traced back to early 2004[12] when the Robert Bird Group was engaged by Woolworths to provide structural engineering consulting services in respect of the design and construction of what was to become a regional distribution centre to service Woolworths' supermarkets in northern New South Wales and Queensland.[13] It is alleged that, from that time until approximately August 2004, the Robert Bird Group was engaged in the preparation of a Preliminary Building Brief that was comprised by what are referred to in the FASOC as a "Bird Brief" dated 30 April 2004 prepared by the Robert Bird Group and a "Design Brief" dated 13 August 2004 prepared by a firm of architects.[14] Thereafter, the Robert Bird Group was engaged to, inter alia, supervise the structural engineering aspects of the construction pursuant to what is described in the FASOC as a Consultant Deed entered into on 19 May 2006.[15]

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7 Herein, "TPA".
8 Herein, "UCPR".
9 UCPR 376(4)(a).
10 UCPR 376(4)(b).
11 That is because the new causes of action are conceded to "arise out of the substantially the same story as that which would have been told to support the original cause of action": per Thomas JA in *Draney v Barry* [2002] 1 Qd R 145, 164.
12 Although it appears that the Robert Bird Group undertook design work with respect to the project from an even earlier point in time, that is, from late 2003. See Affidavit of Elsbeth Reynolds filed on 13 April 2015; paragraph 3.
13 Herein, "the RDC". See paragraph 5 of the FASOC.
14 Paragraph 6 of the FASOC.
15 Paragraph 10 of the FASOC.

[6] On 1 March 2005, Watpac was engaged by Woolworths to construct the RDC.[16] Subsequently, a written contract for the construction of the RDC was entered into between Nalos and Watpac on 20 March 2006.[17] The portion of the RDC with which this proceeding is concerned is concrete slab flooring over three levels in the RDC's "ambient facility".[18] It is alleged that the flooring was designed by the Robert Bird Group and subsequently constructed by Watpac under the supervision of the Robert Bird Group between September and December 2005.[19]

[7] By the FASOC, the plaintiffs allege that the first and second defendants are liable to them for breach of contract and negligence in relation to the design and construction of the flooring. In support of that pleading, specific design and construction requirements on the part of the plaintiffs are alleged. So, for example, it is pleaded that the flooring was required to be designed and constructed in accordance with applicable Australian Standards, that it be capable of withstanding "unlimited frequency of movements of mobile materials handling equipment … which utilise small diameter hard wheels" and that it be of the "finest quality with a burnished finish".[20] It is also alleged that the RDC was required to have a "design life" of 50 years.[21] As a general proposition, the FASOC advances a case to the effect that the flooring and RDC failed to live up to these requirements, but the plaintiffs' essential complaint is that the flooring has sustained, and will continue to sustain, "excessive cracking" requiring "extensive maintenance and repair including at least the application of a permanent topping solution".[22] By reason thereof, it is alleged that the plaintiffs have suffered loss and damage in a sum totalling approximately $20 million.[23]

[8] In the case of the Robert Bird Group, it is alleged that various pleaded design and supervision failures put it in breach of express provisions of the Design Brief, the Bird Brief and the Consultant Deed.[24] Further, it is alleged that the Robert Bird Group owed a duty of care to the plaintiffs to exercise reasonable care, skill and diligence in the provision of its design and supervision services, but failed to do so.[25] The damages claimed in contract and tort are alleged to be the same.[26]

[9] In the case of Watpac, it is alleged that the flooring was not constructed in accordance with several express terms of the construction agreement as well as a term that is alleged to arise by implication,[27] and that such alleged shortcomings put Watpac in breach of that agreement.[28] Then, it is alleged that Watpac owed a duty of care to the plaintiffs to exercise reasonable care, skill and diligence in the construction of the flooring and, in that regard, it is pleaded that the duty owed was "coextensive with Watpac's contractual

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16 Paragraph 7 of the FASOC.
17 Paragraphs 7A and 27 of the FASOC.
18 Paragraph 8 of the FASOC.
19 Ibid.
20 Paragraph 14 of the FASOC.
21 Ibid.
22 Paragraphs 19 and 32 of the FASOC.
23 Particularised in paragraph 19 of the FASOC.
24 Paragraphs 16 and 17 of the FASOC.
25 Paragraphs 20 to 25 of the FASOC.
26 Paragraphs 19 and 26 of the FASOC.
27 Paragraphs 27 to 30 of the FASOC.
28 Paragraph 31 of the FASOC.

obligations".[29] Again, the damages claimed in contract and tort are alleged to be the same,[30] and are identical to the damages claimed against the Robert Bird Group.

The proposed new causes of action

[10] On 5 February 2015, the solicitors for the plaintiffs informed the defendants' solicitors that the plaintiffs were "considering amending the FASOC to include a claim for breach of section 52 of the *Trade Practices Act*".[31] On 30 March 2015, a draft Second Further Amended Claim and Second Further Amended Statement of Claim[32] was forwarded by email to, relevantly, the solicitors for the Robert Bird Group and the solicitors for Watpac.[33]

[11] By the SFASOC, the plaintiffs seek to advance claims for relief in the form of damages pursuant to ss 82 and 87 TPA against the Robert Bird Group and Watpac for alleged contraventions of s 52 TPA. These claims are based on what were submitted by the counsel for the plaintiffs to be representations made by the Robert Bird Group and Watpac "in design documents, tender documents and contractual documents that are already the subject of the existing statement of claim".[34] A review of the SFASOC confirms that the express representations which the plaintiffs hope to allege are, indeed, based on express contractual promises and, where implied representations are alleged, they are said to arise by implication from various contractual provisions.

[12] Specifically, it is proposed to be alleged under the SFASOC that the Robert Bird Group made the following representations:

- that the design and construction of the flooring would be in accordance with applicable Australian Standards;[35]
- where there was no applicable Australian Standard, that it would act in accordance with best professional practice and industry standards, and that it was capable of so acting;[36]
- that the flooring would be capable of withstanding unlimited frequency of movements of the mobile materials handling equipment;[37]
- that the finish of the flooring would be of the finest quality;[38]

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29 Paragraphs 33 to 37 of the FASOC.
30 Paragraphs 19 and 26 of the FASOC.
31 Affidavit of Ian Bloemendal filed on 15 April 2015; paragraph 5 and exhibit IRB-9.
32 Herein, "the SFASOC".
33 Affidavit of Ian Bloemendal filed on 31 March 2015; paragraph 6 and exhibit IRB-8.
34 Submissions on behalf of the applicants/plaintiffs dated 14 April 2015; paragraph 16.
35 Paragraph 26C of the SFASOC.
36 Paragraphs 26C and 26G(g) of the SFASOC.
37 Paragraph 26D of the SFASOC.
38 Paragraph 26E of the SFASOC.

- that the design life of the RDC would be 50 years;[39]

- that it had the skill and expertise required for the performance of the supervision and other services under the Consultant Deed;[40]

- that it would use its best endeavours and exercise proper skill and judgment in the fulfilment of its obligations under the Consultant Deed, and that it was capable of so doing;[41]

- that it would use its best endeavours to fully inform itself of the plaintiffs' requirements for its services under the Consultant Deed as well as the project, and that it was capable of so doing;[42]

- that Nalos, in entering the Consultant Deed, could rely on its particular skills, experience and ability to provide the services under the Consultant Deed;[43]

- that it would perform the services under the Consultant Deed with the degree of professional skill, care and diligence expected of a professional consultant experienced in the type of project for which it was engaged, and that it had that degree of professional skill, care and diligence;[44]

- that the services under the Consultant Deed were suitable and complete in all respects for the plaintiffs' requirements;[45]

- that the services under the Consultant Deed would be provided by personnel appropriately trained, experienced and competent, and that it was capable of providing such personnel;[46] and

- that the design of the RDC would comply with all requirements as set out in the Design Brief and the Bird Brief.[47]

[13] The SFASOC then goes on to allege that the several representations made by the Robert Bird Group were relied on by the plaintiffs,[48] and that they were misleading and deceptive or likely to mislead or deceive in contravention of s 52 TPA.[49] Further, the plaintiffs seek to invoke s 51A TPA in the case of any representation made regarding a future matter.[50] It is then alleged that, but for the conduct alleged to have been in contravention of s 52

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39 Paragraph 26F of the SFASOC.
40 Paragraph 26G(a) of the SFASOC.
41 Paragraph 26G(b) of the SFASOC.
42 Paragraph 26G(c) of the SFASOC.
43 Paragraph 26G(d) of the SFASOC.
44 Paragraph 26G(e) of the SFASOC.
45 Paragraph 26G(f) of the SFASOC.
46 Paragraph 26G(h) of the SFASOC.
47 Paragraph 26G(i) of the SFASOC.
48 Paragraph 26H of the SFASOC.
49 Paragraphs 26I and 26J of the SFASOC
50 Paragraph 26K of the SFASOC.

TPA, the plaintiffs would not have entered into the Consultant Deed but would have engaged an alternative consultant,[51] and damages under ss 82 and 87 TPA are sought in the same measure as is presently claimed in contract and tort.[52]

[14] In the case of Watpac, it is proposed by the SFASOC to attribute the following representations to it:

- that it was a professional contractor specialising in construction services and experienced in construction projects such as the RDC;[53]

- that it had the experience, skill and expertise required to construct concrete floors that would meet Woolworths' objectives and requirements, that it was capable of doing so and that it would do so;[54]

- that it was capable of successfully performing the necessary construction services for the RDC project including management of subcontractors;[55]

- that it had strong technical expertise, a proven track record in delivering projects of the nature of the RDC project and a clear understanding of Woolworths' objectives;[56]

- that it was committed to effectively planning the work and coordinating the delivery process to provide "maximum opportunity" for the performance of its subcontractors, and that it would do so;[57]

- that it had selected a team of personnel who had the expertise and specific experience to manage the construction, handover and subsequent commissioning and delivery of the "challenging" RDC project, or that it would do so;[58]

- that it would apply its "proven expertise" for the benefit of the RDC project, and to ensure its timely and successful completion;[59]

- that it was experienced in producing "flat floors" and could therefore consistently achieve the desired tolerance for the flooring;[60]

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51 Paragraph 26L of the SFASOC.
52 Paragraphs 26L and 26M of the SFASOC.
53 Paragraph 38C(a) of the SFASOC.
54 Paragraph 38C(b)(i) to (iii) of the SFASOC.
55 Paragraph 38C(b)(iv) of the SFASOC.
56 Paragraph 38C(c) of the SFASOC.
57 Paragraph 38C(d) of the SFASOC.
58 Paragraph 38C(e) of the SFASOC.
59 Paragraph 38C(f) of the SFASOC.
60 Paragraph 38C(g) of the SFASOC.

- that it would carry out and complete the works under the construction agreement in accordance with its terms and direction authorised under it, and that it was capable of doing so;[61]

- that it would set out the works in accordance with the construction agreement, and that it was capable of doing so;[62]

- that it would ensure the quality of the work by using materials, plant and equipment and standards of workmanship required by the construction agreement, and that it was capable of doing so;[63]

- that it would construct the flooring in accordance with the final structural drawings and structural specifications prepared by the Robert Bird Group, and that it was capable of doing so;[64] and

- that the concrete mix would be suitable for, and flooring would be constructed to be capable of, withstanding unlimited movements by the materials handling equipment, and that it was capable of delivering such a concrete mix.[65]

[15] The SFASOC then alleges reliance by the plaintiffs on the alleged representations[66] and pleads that they were misleading and deceptive or likely to mislead or deceive in contravention of s 52 TPA.[67] Like the proposed pleading against the Robert Bird Group, the plaintiffs seek to invoke s 51A TPA in the case of any representation alleged on the part of Watpac regarding a future matter[68] and alleges that, but for the conduct said to have been in contravention of s 52 TPA, the plaintiffs would have appointed a different contractor.[69] The same damages as are presently claimed in contract and tort are then sought pursuant to ss 82 and 87 TPA.[70]

Consideration

[16] At the outset, it is to be observed that the majority of the representations that are proposed to be pleaded against the Robert Bird Group as well as Watpac are with respect to future matters. Further, in the case of representations regarding existing matters, they are limited to representations which are alleged to have been made about an existing capacity or ability to deliver on what is alleged to have been represented for the future. None of that is surprising in circumstances where all such representations are derived from contractual promises, but this feature of the proposed pleading assumes special significance in the exercise of my discretion whether to allow these new claims to proceed to trial.

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61 Paragraph 38D of the SFASOC.
62 Paragraph 38E of the SFASOC.
63 Paragraph 38F of the SFASOC.
64 Paragraph 38G of the SFASOC.
65 Paragraph 38H of the SFASOC.
66 Paragraph 38I of the SFASOC.
67 Paragraphs 38J and 38K of the SFASOC.
68 Paragraph 38L of the SFASOC.
69 Paragraph 38M of the SFASOC.
70 Paragraph 38N of the SFASOC.

[17] That is because of the deeming effect of s 51A TPA as it would apply to the proposed amendments. By that provision, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading. Importantly, by s 51A(2) TPA, in a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

[18] As such, if the amendments are allowed, a burden will be cast on the Robert Bird Group and Watpac to adduce evidence on the question whether there were reasonable grounds for the making of the alleged representations as to future matters. If no or insufficient such evidence is adduced, they will be deemed not to have had reasonable grounds for the making of the representations.[71]

[19] That observed, the principles governing the exercise of my discretion in an application such as this were considered by Applegarth J in *Hartnett v Hynes*.[72] There, his Honour emphasised that "justice is the paramount consideration in determining an application to amend pleadings".[73] In the context of a discussion regarding the discretion conferred by r 378 UCPR, his Honour stressed that such a rule is subject to the "overriding purpose" of the UCPR to be found in r 5 UCPR, that is, "to facilitate the 'just and expeditious resolution of the real issues in civil proceedings at a minimum of expense' and the requirement that the rules be applied with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the rules".[74] The same may be said of the discretion conferred by r 376 UCPR.

[20] After referring to statements of principle to be derived from *Aon Risk Services Australia Ltd v Australian National University*,[75] his Honour said this:

> "If the amendments include a new cause of action and the relevant period of limitation was current at the date the proceeding was started, but has since ended, the Court may give leave only in the circumstances referred to in *UCPR* 376(4). It will not be 'appropriate' to allow the amendment if the plaintiff has not established an absence of prejudice from the cause of action being claimed so late. Issues of prejudice analogous to those which arise in respect of applications for extensions of time under the *Limitation of Actions Act* 1974 arise. In determining whether it is 'appropriate' to give leave to make an amendment, the objectives stated in *UCPR* 5 and the principles discussed by the High Court in *Aon* also arise for consideration.
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> The principles discussed by the High Court in *Aon* inform the exercise of the discretion to grant leave to amend a claim pursuant to *UCPR* 377 and the

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71 As to the type of evidence required to reverse the deeming effect of s 51A TPA, see *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 513 per Heerey J. And see *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262 at 267-270 [25]-[36] per Sundberg, Siopis and Greenwood JJ.

72 [2009] QSC 225.

73 At [12].

74 At [11].

75 (2009) 239 CLR 175.

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

1. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation.

2. The discretion is guided by the purpose of the rules of civil procedure, namely the just and expeditious resolution of the real issues in dispute at a minimum of expense.

3. There is a distinction between amendments which are necessary for the just and expeditious resolution of 'the real issues in civil proceedings' and amendments which raise new claims and new issues.

4. The Court should not be seen to accede to applications made without adequate explanation or justification.

5. The existence of an explanation for the amendment is relevant to the Court's discretion, and '[i]nvariably the exercise of that discretion will require an explanation to be given where there is a delay in applying for amendment'.

6. The objective of the Court is to do justice according to law, and, subject to the need to sanction a party for breach of its undertaking to the Court and to the other parties to proceed in an expeditious way, a party is not to be punished for delay in applying for amendment.

7. Parties should have a proper opportunity to plead their case, but justice does not permit them to raise any arguable case at any point in the proceedings upon payment of costs.

8. The fact that the amendment will involve the waste of some costs and some degree of delay is not a sufficient reason to refuse leave to amend.

9. Justice requires consideration of the prejudice caused to other parties, other litigants and the Court if the amendment is allowed. This includes the strain the litigation imposes on litigants and witnesses.

10. The point the litigation has reached relative to a trial when the application to amend is made is relevant, particularly where, if allowed, the amendment will lead to a trial being adjourned, with adverse consequences on other litigants awaiting trial and the waste of public resources.

11. Even when an amendment does not lead to the adjournment of a trial or the vacation of fixed trial dates, a party that has had sufficient opportunity to plead their case may be denied leave to amend for the sake of doing

justice to the other parties and to achieve the objective of the just and expeditious resolution of the real issues in dispute at a minimum of expense.

12. The applicant must satisfy the specific requirements of rules, such as *UCPR* 376(4) where it seeks to introduce a new cause of action after the expiry of a relevant limitation period."[76] (footnotes omitted).

[21] I respectfully adopt his Honour's summary of the discretionary consideration applicable to an application such as this. In particular, I agree that the court should not be seen to accede to applications made without adequate explanation for the delay although I recognise that the absence of an explanation will not necessarily, without more, be a decisive factor telling against the exercise of the discretion conferred by r 376 UCPR.

[22] The relevance of delay, and the prejudice caused to a defendant if a delayed cause of action is added to a proceeding, will of course vary from case to case. Sometimes, such prejudice can be satisfactorily addressed by an order for costs. In other cases it cannot. Further, where as here a relevant limitation period has expired, the considerations will obviously be different. It is also important to appreciate that, in a case where a proceeding is brought within time but there was an unexplained delay in the institution of those proceedings, it is especially incumbent on a plaintiff to proceed as expeditiously as possible. This very point was made by Muir JA (with whom Daubney and P Lyons JJ agreed) on appeal in *Hartnett v Hynes*.[77] His Honour said:

> "Rule 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) is concerned with the conduct of proceedings and not, directly at least, with what has happened before proceedings are commenced. *Aon*, as the appellant's counsel submits, was concerned with rules in the *Court Procedures Rules* 2006 (ACT) relating to amendment of pleadings. But it is, or ought be, obvious that matters prior to the commencement of proceedings may bear on the exercise of a discretion to give leave to amend pleadings. The fact that there has been a lengthy unjustifiable delay in the commencement of proceedings will support an argument by the defendant that it is entitled in the interests of certainty to expect that the proceeding be prosecuted with all reasonable dispatch. Prejudice to the defendant flowing from the loss of or deterioration in the quality of evidence and heightened difficulties in verifying matters relating to the fresh claims, will often be of significance where there is a delay in commencing proceedings. For example, an allegation in respect of facts or utterances five or six years previously, which seems credible on the face of it, may, in the light of circumstances existing at the time, which have been forgotten or which, by the effluxion of time, cannot be established clearly, have appeared fanciful."[78]

[23] The deterioration in the quality of evidence and the impairment of a defendant's capacity to investigate, and then attempt to meet, new claims after a prolonged period of delay is

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76 At [25]-[27].
77 [2010] QCA 65.
78 At [40].

well-recognised. In the oft-cited passage from the judgment of McHugh J in *Brisbane South Regional Health Authority v Taylor*,[79] his Honour said:

> "The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates'. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive evidence has disappeared without anybody now 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matters, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."[80]

[24] To similar effect is the following statement of Keane JA (with whom Williams JA and White J agreed) from *Page v The Central Queensland University*:[81]

> "While it is true to say that the court will be reluctant to deny a litigant with an arguable case the opportunity for a fair trial of his or her claim, it must be emphasised that the opportunity in question is the opportunity for a *fair* trial. The court is not in the business of preserving the opportunity to conduct solemn farces in which parties and witnesses are invited to attempt to reconstruct recollections which have long since disappeared. Such a trial would not be fair for either party."[82]

[25] It follows that, in the proper consideration of an application to add a new cause of action after a long period of delay, the central question will be whether a fair trial of the cause of action can be secured notwithstanding such delay. As to this, the applicant for relief bears the onus of persuading the court that a fair trial can indeed be secured in such circumstances.

[26] Here, the design and construction defects about which the plaintiffs complain are alleged to have been latent, and did not manifest themselves until some time after construction of

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79 (1996) 186 CLR 541.

80 At 551.

81 [2006] QCA 478.

82 At [24]. This statement was also referred to by Applegarth J in *Hartnett v Hynes* at first instance: [2009] QSC 225, at [17].

the flooring was completed. On the plaintiffs' case, these alleged defects were not patent until March 2007.[83] Although such a proposition is disputed by Watpac,[84] even on the plaintiffs' case as to when the causes of action accrued, this proceeding was not commenced until 5 October 2012. The delay in doing so has not been explained by the plaintiffs.

[27] Given that the plaintiffs took their time to institute proceedings, the defendants were entitled "to expect that the proceeding be prosecuted with all reasonable dispatch", to borrow Muir JA's expression in *Hartnett v Hynes*.[85] The plaintiffs have not done so. In fact, it was not until 5 February of this year that the proposal to add the new cause of action was signaled to the plaintiffs' opponents and, then, a draft pleading was not provided until almost two months later (30 March).

[28] The only explanation offered for this delay on the part of the plaintiffs is the handing down of the judgment of the High Court in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[86] and its feared effect on their prospects of success in the negligence claims which are presently advanced against the Robert Bird Group and Watpac. But the decision in *Brookfield* did not lay down any new principle. At best for the plaintiffs, it clarified the effect of the earlier decisions of the court in *Bryan v Maloney*[87] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[88] and otherwise turned on considerations of vulnerability.[89] To the extent that it was suggested that the application of such principles was unclear, that might explain why the plaintiffs now regard their claim in negligence as unpromising, but it hardly explains why entirely separate causes of action under the TPA were not pleaded.

[29] It follows that I am not persuaded that the plaintiffs have advanced a satisfactory explanation for the delay, either in the commencement of this proceeding or in its prosecution to date.

[30] I am also not persuaded, if I were to exercise my discretion to allow the addition of the new causes of action, that a fair trial can be secured. It is now over 11 years since the Robert Bird Group was engaged and only a slightly shorter period since Watpac was retained. It is quite unrealistic to expect those defendants to answer a representations case when the plaintiffs' proposed reliance on s 51A effectively reverses the evidentiary onus. To the point, although arising substantially out of the same facts as the existing claims for breach of contract and negligence, the addition of the new causes of action will require the Robert Bird Group and Watpac to attempt to establish the states of mind of those persons who were involved in the making of what the plaintiffs say were representations as to future matters. That would require an investigation of the individual design and construction considerations taken into account by the particular teams of engineers and builders who were employed or engaged by, respectively, the Robert Bird Group and

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83 See Submissions on behalf of the applicants/plaintiffs dated 14 April 2015; paragraph 35.

84 See second defendant's Outline of Argument dated 17 April 2015; paragraphs 3 and 14 to 17. Watpac there contends that the cause of action against it accrued in October 2005.

85 [2010] QCA 65 at [40].

86 (2014) 313 ALR 408.

87 (1995) 182 CLR 609.

88 (2004) 216 CLR 515.

89 At [22] and [34] per French CJ; at [51], [56]-[59] per Hayne and Kiefel JJ; at [130]-[132], [140], [144] per Crennan, Bell and Keane JJ; and at [182]-[185] per Gageler J.

Watpac with respect to the RDC project over a decade ago. It would involve enquiries as to the calculations performed, the published material and other data considered and the processes of reasoning adopted as well as the beliefs that were formed at the time based on that information. I have no confidence that such an exercise can be at all satisfactorily carried out.

[31] Acceding to this application would carry with it an expectation bordering on fiction; that is, that the witnesses will be able to properly recall what was considered and then acted on approximately 10 years ago. It is similarly unrealistic to expect that the memories of such witnesses can be sufficiently revived by reference to the contemporaneous documents to allow for a fair trial of these new claims. It will be difficult enough responding to the claims already made for breach of contract and duty, let alone being put in the position of having to advance a positive case to establish reasonable grounds for the making of representations as to future matters. Indeed, the affidavit material assembled on the part of the Robert Bird Group in response to this application only serves to confirm these concerns. That material establishes that a significant proportion of the type of evidence to which such witnesses would ordinarily be expected to have recourse will either not be available or, if available, be unreliable or incomplete.[90]

[32] I am mindful that the proceeding has not been set down for trial and that further evidence with respect to the contractual and tortious claims is still being assembled. However, if the new causes of action are allowed to proceed, there would be a significant risk of injustice to the Robert Bird Group and Watpac. For this reason, and in circumstances where no explanation for the delay in seeking to prosecute such claims has been advanced, I refuse to exercise my discretion under r 376 UCPR so as to permit the causes of action under the TPA to be added to this proceeding.

Conclusion

[33] The application is dismissed.

[34] I shall hear the parties on the question of costs.

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90 Affidavit of Elsbeth Reynolds filed on 2 April 2015; Affidavit of Stephanie Cook filed on 10 April 2015.