# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 |
| PARTIES: | **MARK JOHN MENEGAZZO**<br>(plaintiff)<br>**v**<br>**PRICEWATERHOUSECOOPERS (A FIRM)**<br>**ABN 52 780 433 757**<br>(first defendant)<br>and<br>**BRENDAN PETER MENEGAZZO**<br>(second defendant)<br>and<br>**DEBRA LOUISE MENEGAZZO**<br>(third defendant)<br>and<br>**DAVID ANGELO MENEGAZZO**<br>(fourth defendant)<br>and<br>**JUTLAND PTY LTD**<br>**ACN 010 813 322**<br>(fifth defendant)<br>and<br>~~**THYNNE & MACARTNEY (A FIRM)**~~<br>~~**ABN 79 763 953 991**~~<br>~~(sixth defendant)~~<br>and<br>**MCCULLOUGH ROBERTSON LAWYERS (A FIRM)**<br>**ABN 42 721 345 951**<br>(seventh defendant) |
| FILE NO: | SC No 10502 of 2013 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court of Queensland at Brisbane |
| DELIVERED ON: | 29 April 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 March 2016 |
| JUDGE: | Applegarth J |
| ORDERS: | **1. Adjourn the applications to a date to be fixed for the purpose of allowing the parties to confer and bring in forms of order reflecting the reasons for judgment** |

**and directions for the future conduct of the proceeding.**

2. **Direct the parties to confer for the purpose of agreeing steps for the just and expeditious resolution of the real issues in the proceeding at a minimum of expense.**

3. **Liberty to apply.**

CATCHWORDS: PROCEDURE – CIVIL PROCEDURE IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – RAISING NEW MATTER – where the plaintiff sues various defendants arising out of his relinquishing interests in companies and trusts that owned pastoral properties and carried on businesses in the cattle industry – where the plaintiff had agreed to relinquish certain interests in favour of his three siblings (the second, third and fourth defendants) in exchange for acquiring certain properties and not having to repay a loan of $18,500,000 – where the plaintiff seeks leave to amend a claim and further amend a statement of claim which has gone through a number of editions – where the pleadings allege breaches of the 'fair dealing rule' by his siblings, and breaches of duties of care by the first, fifth and seventh defendants in relation to various advices and valuations – where the plaintiff submits that new causes of action in the proposed pleading arise out of substantially the same facts as that for which relief had already been claimed – where defendants oppose the grant of leave on the basis that the amendments raise new causes of action which are time-barred and do not fall within r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) – where action not started until six years after relevant events – where inadequate explanation for delay in raising new causes of action – whether proposed pleading raises causes of action which arise out of substantially the same facts as those for which relief has already been claimed – whether any new causes of action raised are time-barred – whether it is otherwise appropriate for leave to amend to be granted

EQUITY – EQUITABLE PRINCIPLES – RESCISSION – MISTAKE – where the plaintiff alleges that he and his siblings were all under a misapprehension as to the value of the companies and trusts when entering into the agreement whereby he relinquished his interests in them in return for substantial property and a loan release – where the proposed new claim is said to be supported by the principle of "equitable common mistake" – where the defendant siblings submit that this claim is misconceived, bad in law and is liable to be struck out – whether leave should be granted to

amend the proposed pleading to incorporate the new cause of action – whether the principle of "equitable common mistake" extends to a common mistake of the kind alleged in the proposed pleading about the value of property

LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – TRUSTS AND DECEASED ESTATES – ACTIONS IN RESPECT OF TRUST PROPERTY AND BREACH OF TRUST – where the defendant siblings submit that the new claims for breach of trust are time-barred because the six year limitation period in s 27(2) of the *Limitation of Actions Act* 1974 (Qld) applies – where the plaintiff submits that the new claims are not in relation to a "breach of trust" for the purposes of s 27(2) – whether the new claim is an action to recover "trust property" so as to bring it within the exception in s 27(1)(b) – whether the new claim is in relation to a "future interest" of a beneficiary so as to bring it within an exception to s 27(2) contained in s 27(2A)

*Limitation of Actions Act* 1974 (Qld), s 10(2), s 10(6), s 27(1), s 27(2), s 27(2A), s 38(1)(b), s 38(1)(c)
*Limitation Act* 1935 (WA)
*Trade Practices Act* 1974 (Cth), s 52
*Uniform Civil Procedure Rules* 1999 (Qld), r 5, r 171, r 222, r 371, r 375, r 376, r 376(4)(a), r 376(4)(b), r 377(1)(c)

*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 cited
*Armitage v Nurse* [1998] Ch 241 at 261 cited
*Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328 followed
*Baldwin v Icon Energy Ltd (No 2)* [2015] QSC 286 cited
*Bartlett v Barclay's Bank Trust Co Ltd* [1980] Ch 515 at 537 cited
*Borsato v Campbell* [2006] QSC 191 cited
*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551-553 cited
*Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712-713 cited
*Clay v Clay* (2001) 202 CLR 410 cited
*Doneley v Doneley* [1998] 1 Qd R 602 at 608 cited
*Draney v Barry* [2002] 1 Qd R 145 at 164 applied
*Errichetti Nominees Pty Ltd v Paterson Group Architects Pty Ltd* [2007] WASC 77 followed
*Feigan v Ainsworth* [2011] VSC 454 at [32] – [34] cited
*Great Peace Shipping Ltd v Tsaviliris Salvage (International) Ltd* [2003] QB 679 followed
*Grist v Bayley* [1967] Ch 532 cited
*Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA 1048 at [103] – [109] followed

*Hartnett v Hynes* [2009] QSC 225 cited
*HWG Holdings Pty Ltd v Fairlie Court Pty Ltd* [2015] VSC 519 cited
*James v The State of Queensland* [2015] QSC 65 cited
*Jane v Bob Jane Corporation Pty Ltd* [2013] VSC 406 cited
*Jetcrete Oz Pty Ltd v Conway* [2015] QCA 272 cited
*J J Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 cited
*Johns v Johns* [2004] 3 NZLR 202 at [43] – [63] cited
*McCullough Robertson Lawyers (A Firm) v Menegazzo* [2015] QSC 109 cited
*McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 cited
*Mineral Resources Engineering Services Pty Ltd as Trustee for the Meakin Investment Trust v Commonwealth Bank of Australia* [2015] QSC 62 cited
*Mokrzecki v Popham* [2013] QSC 123 followed
*Monto Coal 2 Pty Ltd v Sanrus Pty Ltd as Trustee of the QC Trust* [2014] QCA 267 cited
*Murdoch v Lake* [2014] QCA 216 cited
*Newgate Stud Co v Penfolds* [2004] EWHC 2993 Ch cited
*Page v The Central Queensland University* [2006] QCA 478 at [24] cited
*Paulus v Jones* Unreported, Queen's Bench Division 16 April 1984 cited
*Pianta v BHP Australia Coal Ltd* [1996] 1 Qd R 65 cited
*Project Company No 2 Pty Ltd v Cushway Blackford & Associates Pty Ltd* [2011] QCA 102 cited
*Robert Bax v Cavenham* [2011] QCA 53 cited
*Solle v Butcher* [1950] 1 KB 671 discussed
*Stacey v Perkins* [2015] QDC 100 cited
*Svanosio v McNamara* (1956) 96 CLR 186 cited
*Taylor v Johnson* (1982) 151 CLR 422 cited
*Thomas v State of Queensland* [2001] QCA 336 cited
*Tito v Waddell (No 2)* [1977] 1 Ch 106 considered
*Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 584 cited
*Westpac Banking Corporation v Knight Property Investments No 3 Pty Ltd* [2014] QSC 270 cited
*Wheatley v Bower* [2001] WASCA 293 at [123] cited
*Wolfe v State of Queensland* [2009] 1 Qd R 97 applied

COUNSEL: G A Thompson QC and E Morzone for the plaintiff
L F Kelly QC and M F Johnston for the second and third defendants
S R Eggins for the fourth defendant
T Pincus for the fifth defendant
R P S Jackson QC for the seventh defendant

SOLICITORS: Emanate Legal for the plaintiff
Allens Linklaters for the second and third defendants
Minter Ellison for the fourth defendant
Hopgood Ganim for the fifth defendant
Bartley Cohen for the seventh defendant

[1] This litigation started late, in November 2013, six years after the events to which it relates. Since then it has made slow progress. The plaintiff seeks leave to amend his claim and to further amend his pleading, which has gone through a number of editions. Various defendants oppose leave being granted on the ground that the amendments raise new causes of action which are time-barred and do not fall within r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*"). The second, third and fourth defendants also oppose leave to amend on other grounds, and apply to strike out all or part of the plaintiff's proposed amended claim and proposed further amended statement of claim in the event leave is granted to amend. They argue that some of the plaintiff's proposed causes of action are bad in law or are defective in point of pleading.

[2] In general terms, the plaintiff's proposed pleading relates to the circumstances under which he came to relinquish his interests in companies and trusts that owned pastoral properties and carried on businesses in the cattle industry, together with his interest in the estate of his late father, Peter Menegazzo. In exchange for agreeing to relinquish those interests in favour of his three siblings (the second, third and fourth defendants), the plaintiff acquired certain properties and was released from the obligation to repay a loan of $18,500,000.

[3] The plaintiff agreed in principle to that deal on 7 November 2007, and alleges that in doing so he relied on:

(a) short form appraisals of nine rural properties and a meatworks, in which the fifth defendant gave an "Opinion of Value" for each pastoral property, which totalled $329,595,000, and an "Opinion of Value" for the meatworks of $10,000,000 to $12,000,000;

(b) a memorandum and attached spreadsheets prepared by the first defendant ("PwC") which estimated the potential net asset value of the relevant pastoral properties, taking account of tax liabilities that may arise on the realisation of assets.

[4] The plaintiff alleges that:

(a) the fifth defendant breached a duty of care which was owed to him in preparing the Opinions of Value dated 5 November 2007; and

(b) PwC breached a duty of care which was owed to him in preparing its memorandum and net assets calculation dated 7 November 2007.

As a result of his alleged reliance on those documents, the plaintiff says that he agreed to receive less than the true value of his interests.

[5] In his proposed amended claim and proposed pleading against his siblings, the plaintiff alleges that:

(a) they breached the "fair dealing rule' which governs the purchase by a trustee of a beneficiary's interest under a trust;

(b) alternatively, that the plaintiff and his siblings were under a common fundamental misapprehension about the value of the Menegazzo Group and therefore about their respective rights: this claim is based on the contentious doctrine of "equitable common mistake" articulated in *Solle v Butcher*[1] which has since been disapproved by the English Court of Appeal and the Queensland Court of Appeal.

[6] The plaintiff also sues the seventh defendant, a firm of solicitors he engaged on 7 November 2007 about the advice it gave him.

[7] In seeking leave to amend, the plaintiff's basic position is that, with the exception of the claim for equitable common mistake made against the second, third and fourth defendants and the claim for breach of contract against the seventh defendant, all claims are the same as previously raised. In any event, he submits that all the causes of action contained in his proposed pleading arise out of the same facts or substantially the same facts as a cause of action for which relief had already been claimed in the original claim and statement of claim filed on 6 November 2013.

[8] As for his claims against the second, third and fourth defendants, the plaintiff submits that the essential difference is that the original statement of claim related to a trust under the will of his late father ("the Will"), whereas the proposed pleading includes properties which were held by the Stanbroke Investment Trust and the Peter Menegazzo Family Trust, as well as the trust created by the Will. The plaintiff submits that there are no statutory limitation periods applicable to his causes of action against the second, third and fourth defendants or, if there are, the amendments do not give rise to new causes of action, save for the claim for equitable common mistake.

[9] In general terms, the second, third and fourth defendants submit that the proposed statement of claim pleads a much broader, and therefore new, cause of action for breach of trust which extends to trusts which were never part of the plaintiff's original claim and that the new causes of action are time-barred. His breach of trust claim, which has been extended to his alleged interest in 15 companies, is submitted to not arise out of substantially the same facts as the cause of action for which relief has already been claimed. In addition, the new cause of action for "equitable common mistake", for which leave is required, is said to be misconceived. According to the second, third and fourth defendants, it is not appropriate to allow the amendments because they are an exercise in futility and a waste of resources. They are time-barred and defective in point of pleading.

[10] The fifth defendant submits that leave to make the proposed amendments should be refused because they would add new causes of action which do not arise out of the same or substantially the same facts as any cause of action previously pleaded against it and because it would be inappropriate to allow the amendments. The fifth defendant also applies to strike out the existing statement of claim against it.

[11] The seventh defendant similarly points to new causes of action against it in the proposed pleading which are submitted to not arise out of the same or substantially the same facts, and points to various grounds upon which it is not appropriate to permit the amendments.

[12] The defendants rely on the initial delay in commencing the proceeding, the manner in which the litigation has been conducted by the plaintiff to date and the absence of any

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1 [1950] 1 KB 671.

adequate explanation from the plaintiff as to why it has taken until now to bring forward his proposed amendments.

**Background**

[13] The plaintiff and the second, third and fourth defendants are siblings. Their parents died in a plane crash on 2 December 2005. The four siblings were appointed executors of their father's Will. The Will also appointed them trustees of a trust created by the Will which provided for each to receive a one quarter share of the residue of the deceased's estate.

[14] Leaving aside property that belonged to the estate of the late Peter Menegazzo, trusts and companies associated with the Menegazzo family held other property. They owned numerous large cattle properties, a feedlot and a meatworks. They carried on businesses of raising cattle, slaughtering cattle and processing, marketing and selling beef products. The siblings became trustees for those trusts and directors of trustee companies in the group. The trusts included the Stanbroke Investment Trust and the Peter Menegazzo Family Trust. The Stanbroke Investment Trust holds all of the shares issued in Vanwarren Pty Ltd, which is the ultimate holding company of Stanbroke Pastoral Company Pty Ltd and Valley Beef Pty Ltd. Stanbroke Pastoral Company Pty Ltd is and was the owner of several cattle stations and a feedlot. Valley Beef Pty Ltd is and was the owner of a meatworks.

[15] Following the death of Peter Menegazzo, the siblings became trustees of the Stanbroke Investment Trust. They also became directors of Mowburn Nominees Pty Ltd, which is trustee of the Peter Menegazzo Family Trust. Mowburn Nominees Pty Ltd, as trustee of the Peter Menegazzo Family Trust, was the owner of cattle stations named Warrenvale, Glenore and Vanrook.

[16] Other companies in the Menegazzo/Stanbroke Group, to which the siblings were appointed as directors, were trustees of trusts which operated feedlot, abattoir and beef marketing and sale businesses. Ringtank Pty Ltd, as trustee of the Ringtank Trust, owned properties described as the Ballina properties. The Menegazzo/Stanbroke Group consisted of 15 companies and eight trusts.

[17] After the death of their parents, the siblings, to different degrees, were involved in the day-to-day management of the family's businesses and properties. Mr James Bell QC was asked by the siblings to attend family meetings and to act as a facilitator for communications between them. Differences arose between the siblings over decisions to be made in operating the family's businesses. PwC had acted as an adviser to the family. At some stage, the plaintiff and the fourth defendant indicated that they wanted to consider options to "exit" from the family business arrangements. The siblings agreed that consultants would need to be instructed to provide figures for arrangements to be put in place. On 31 October 2007 Mr Bell, acting on behalf of the Menegazzo Group, sent an email to Mr Rod Douglas (of the fifth defendant), who had undertaken work for Mr Peter Menegazzo and the family in previous years in connection with real estate. Mr Bell, as instructed by the siblings, sought an opinion about the value of the rural property interests of the Menegazzo Group for the purpose of considering the value of the group assets.

[18] On 5 November 2007 Mr Douglas, as director of the fifth defendant, responded to the email and enclosed his "Opinion of Value" for each property. His covering letter said

that the "Opinion of Value" was based on comparable sales, his knowledge of the subject properties and the cattle herd and his experience in rural property. The "Opinion of Value" was expressly stated by Mr Douglas to be "my opinion only" and should not be taken as a "sworn valuation". It consisted of opinions of value of nine rural properties on a "walk in walk out" basis, which totalled $329,595,000, together with an opinion of value as to the meatworks which as at 1 November 2007 was said to have a value of between $10,000,000 and $12,000,000.

[19] As appears from the plaintiff's original statement of claim, it was clear on the face of the documents which Mr Douglas prepared that they were not formal valuations, but rather "short appraisals".

[20] PwC is alleged to have provided a calculation of the potential net asset value of the properties of the Stanbroke Group in the form of a Pastoral net assets calculation dated 7 November 2007.

[21] The plaintiff alleged in his original statement of claim that at the meeting on 7 November 2007 an agreement was reached with his siblings to the effect that he would accept "in lieu of his entitlement under the Will" certain properties, and that an $18.5 million debt would be forgiven. The properties he agreed to accept include Vanrook Station (which the fifth defendant thought was worth, together with its cattle, $55,750,000) and a quarter share in other properties.

[22] Immediately after the 7 November 2007 meeting, Mr Bell told the plaintiff that he would require independent legal advice before reaching any binding agreement with his siblings. Mr Bell arranged for the plaintiff to be introduced to a partner of McCullough Robertson, the seventh defendant. Thereafter formal documents were entered into and a deed was executed on 31 December 2007.

**The claims in the original statement of claim**

[23] The essence of the plaintiff's claim against PwC in his original statement of claim is that PwC owed him a duty of care in tort in respect of its preparation of the so-called "Asset Valuations" and breached that duty.

[24] The essence of the plaintiff's claim against the second, third and fourth defendants, as originally pleaded, related to the agreement which is alleged to have been reached at the 7 November 2007 meeting about what he would accept "in lieu of his entitlement under the Will". The plaintiff alleged that by receiving the assets which he did pursuant to that agreement, he received less than his one quarter entitlement. In particular, it is alleged that in acquiring his interest in the trust created by the Will, his siblings did not give full value because the value of the assets he received was less than one quarter of the value of the property of that trust.

[25] The original statement of claim also made claims against the second, third and fourth defendants about an alleged "side agreement", but that allegation is not pressed. Critically for present purposes, the pleaded causes of action for breach of trust and breach of fiduciary duty related to the second, third and fourth defendants' obligations as executors and trustees *under the Will*, not their obligations as trustees of other trusts or as directors of companies which acted as trustees.

[26] As for the fifth defendant, the essence of the original statement of claim was that the fifth defendant owed a duty of care to the plaintiff in its preparation of "the Property Valuations" (elsewhere described in the pleading as "short appraisals"), and that these documents failed to meet the appropriate standard of valuation expected from a reasonably competent valuer because each "failed to properly identify the components of the assets being valued, the basis or methodology on which the valuation was conducted, and any underlying assumptions on which the valuations were based". The fifth defendant was alleged, in the alternative, to have negligently misrepresented the value of the properties.

[27] The claim against the sixth defendant, a firm of solicitors which had acted for the deceased and his family, was discontinued following an application to strike it out.

[28] As for the original claim against the seventh defendant, it alleged that the firm breached its duty of care to the plaintiff in five pleaded respects. It is unnecessary to detail them because a number of them are not pursued in the proposed pleading. It seeks to include new alleged breaches of duty, to which I will return.

[29] I should add that PwC objected to a grant of leave to the plaintiff to file a proposed pleading which was exhibited to the plaintiff's solicitor's affidavit dated 27 November 2015. PwC brought an application in respect of proposed paragraphs 36, 38 and 39. However, the matter was resolved as between the plaintiff and PwC and consent orders were made by me in respect of PwC's application. This led to the formulation of a new proposed pleading which was tendered at the hearing before me on 15 March 2016. I will refer to it as "the proposed pleading".

**History of the proceeding**

[30] This proceeding was not started until 6 November 2013, one day prior to the sixth anniversary of the "Exit Meeting" which was held on 7 November 2007. Delay prior to the commencement of a proceeding is an obvious matter which bears on the exercise of the Court's discretion to grant leave.[2]

[31] The plaintiff's present solicitor has outlined, based upon her review of documents obtained from the plaintiff's previous solicitors, certain events which occurred between 2007 and the commencement of proceedings. The plaintiff first instructed legal representatives in about October 2008, when he conferred with solicitors in Sydney and a Queen's Counsel. In 2009 he retained another firm, based in Melbourne. His then solicitor sought access to documents and records in relation to relevant entities. The plaintiff was in regular communications with his QC and his solicitors in Melbourne. Another firm in Melbourne provided active assistance to him. In 2011 he communicated regularly with and directly with his barristers. He received a number of joint advices from them during 2011 and 2012. In fact, between October 2008 and June 2012 he received seven joint advices from counsel.

[32] Steps were taken to engage an expert forensic accountant. In May 2012, a new firm of chartered accountants was engaged to provide accounting advice. About the same time, the plaintiff retained two Sydney firms, Equius Legal and Sagacious Legal, while still having a firm in Victoria involved. During 2012 and after further conferences, counsel

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[2] *Hartnett v Hynes* [2009] QSC 225 at [18]; [2010] QCA 65 at [40].

revised a draft statement of claim, based on the plaintiff's instructions. In 2013, a new barrister was briefed and there were meetings with the accountants. In September 2013 a new firm of accountants was engaged to provide advice. Because of the plaintiff's concern about the limitation period's pending expiry, a claim and statement of claim was filed on 6 November 2013, by which time his solicitors had become Agility Legal.

[33] On 14 March 2014 the plaintiff's present solicitors, Emanate Legal, began to act for him, and after obtaining access to the large volume of files which the plaintiff's previous legal advisers held, reorganised them. A new senior counsel and a new junior counsel (not the counsel who presently appear for him) were retained. On 20 March 2015 a proposed amended claim and a proposed amended statement of claim were delivered to the other parties and these documents were filed on 30 March 2015. They effectively abandoned the entirety of the original statement of claim and sought, without leave, to introduce new claims for breach of contract, negligent misrepresentation and breach of s 52 of the *Trade Practices Act* 1974 (Cth) ("*TPA*"). The filing of those documents without leave was objected to, with various defendants foreshadowing applications to disallow them.

[34] On 7 April 2015, the seventh defendant filed an application seeking to have the amended statement of claim against it struck out. The plaintiff proposed a timetable to the second, third and fourth defendants about obtaining leave and confirmed that he would not require those defendants to file and serve a defence.

[35] On 21 April 2015, McMurdo J heard the seventh defendant's application to strike out the amended statement of claim against it. For reasons delivered on 8 May 2015, the pleading was struck out.[3]

[36] The second, third and fourth defendants inquired of the plaintiff's solicitors as to whether they should be directing their foreshadowed strike-out application to the existing pleading or should await a further pleading. Some months later the plaintiff's solicitors advised that counsel were settling amendments together with an application seeking leave. Delays continued and it was not until 3 September 2015 that the plaintiff filed an application seeking leave to amend in terms of an amended claim and a further amended statement of claim. The revised pleading persisted with a number of apparently time-barred causes of action including causes of action for negligent misrepresentation and breach of s 52 of the *TPA*. The defendants opposed leave being granted and also brought an application to strike out that pleading in its entirety. Those applications proceeded to a hearing before Flanagan J on 29 and 30 October 2015. On the second day of the hearing the applications were adjourned, following which the plaintiff's application for leave to amend was dismissed. Orders were also made on 4 December 2015 that the amended statement of claim filed on 30 March 2015 was ineffectual as against the second, third and fourth defendants. The plaintiff was ordered to pay the costs of the second, third and fourth defendants in respect of the plaintiff's application filed on 3 September 2015 and in respect of those defendants' separate applications. He also was ordered to pay the costs of the first, fifth and seventh defendants.

[37] On 27 November 2015, the plaintiff filed an application seeking orders:

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[3] *McCullough Robertson Lawyers (A Firm) v Menegazzo* [2015] QSC 109.

(a) pursuant to r 377(1)(c) of the *UCPR* for leave to amend the claim filed on 6 November 2013 in terms of an amended claim exhibited to his solicitor's affidavit filed that day; and

(b) pursuant to r 375, and if necessary r 376 of the *UCPR*, for leave to amend his statement of claim generally in terms of the further amended statement of claim exhibited to that affidavit.

[38] In summary, the proceeding was commenced about six years after the events to which it related. In the period of more than two years since the proceeding was commenced it has not progressed to the stage where any defendant has been required to file a defence, due to the plaintiff's various proposed changes to his claim and pleadings, and deficiencies in those documents. The statement of claim has now gone through five editions. The original statement of claim was filed on 6 November 2013. The version filed on 30 March 2015 was declared ineffectual as against the second, third and fourth defendants. The version filed on 3 September 2015 was abandoned. The version proposed in the application filed 27 November 2015 has been the subject of minor revisions to accommodate the concerns raised by PwC. In substance, there have been four main attempts at articulating the plaintiff's case. Because the second and third editions of the plaintiff's pleading have effectively been abandoned, the plaintiff accepts that the required comparison is between his original statement of claim and the proposed pleading.

**Rule 376(4)**

[39] The plaintiff's application for leave to amend requires consideration of his separate claims against his siblings (the second, third and fourth defendants), the fifth defendant and the seventh defendant. However, common issues arise concerning the application of r 376(4) to the proposed statement of claim in respect of all the defendants who contested the application for leave to amend.

[40] Rule 376(4) 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.[4] Rule 376(4) provides:

> "(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
>
> (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."

[41] Commonly there will be three separate questions to consider in an application for leave to amend:

(a) Is there a new cause of action?

(b) Does it arise out of substantially the same facts?

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[4] Rule 376(1).

(c) Is it appropriate to give leave to make the amendment?

In some applications or in respect of some amendments, an applicant may acknowledge that an amendment raises "a new cause of action".

**A new cause of action**

[42] The frequently-cited judgment of McMurdo J in *Borsato v Campbell*[5] considered the term "cause of action" in the context of r 376. The term has been defined to mean "every fact which is material to be proved to entitle the plaintiff to succeed".[6] However, not every newly-pleaded fact raises a new cause of action. McMurdo J stated:

> "The dividing line is between the addition of facts which involve a new cause of action and those which are simply further particulars of the cause already claimed, and its location involves a question of degree which can be argued, one way or the other, by the level of abstraction at which a plaintiff's case is described."[7]

[43] In *Murdoch v Lake*,[8] Peter Lyons J (with whom Morrison JA agreed), cited authority that a "cause of action is the combination of facts which gives rise to a right to sue". His Honour noted that in *Bruce v Odhams Press Ltd*,[9] Scott LJ had observed that it is often difficult to distinguish between a material fact, and a particular piece of information which it is reasonable to give to the defendant, in order for the defendant to know the case to be met. Pleadings sometimes include facts which are not material facts. Lyons J went on to observe:

> "… if an amendment introduces a new material fact, then a new cause of action is introduced, even if the cause of action is of the same type or category as one pleaded before the amendment. However, if the material facts remain the same, then no new cause of action is introduced."[10]

**A relevant limitation period has ended**

[44] In some cases an applicant for leave to amend may not acknowledge that leave is required pursuant to r 376(4) and contend that any new cause of action is still within the relevant period of limitation. There may be scope for argument about that, for example, where it is not clear when the plaintiff first suffered loss and damage in cases in which the cause of action is not complete until loss and damage is suffered. In such cases the approach is often taken to proceed to the issues that arise under r 376(4), namely whether any new cause of action arises out of the same or substantially the same facts as the cause of action for which relief has already been claimed, and whether it is appropriate to make the amendment. This is because if the requirements in r 376(4) are satisfied, the plaintiff should be granted leave to make amendments, notwithstanding the expiry of the limitation period.[11] If an applicant satisfies the requirements of r 376(4) then it should have the benefit of that rule, which permits the inclusion, by amendment, of a cause of action

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5 [2006] QSC 191.
6 At [8].
7 [2006] QSC 191 at [8].
8 [2014] QCA 216 at [17].
9 [1936] 1 KB 697 at 712-713.
10 [2014] QCA 216 at [17].
11 *Mokrzecki v Popham* [2013] QSC 123 at [21].

which otherwise would be out of time. If the court hearing the application is not in a position to fairly determine whether a relevant period of limitation, current at the date the proceeding was started, has ended, but the applicant satisfies the requirements of r 376(4), then there is no relevant detriment to the defendant in being deprived of a limitation defence.[12] If, however, the requirements of r 376(4) are not satisfied, and it is not clear whether the new cause of action is out of time "the amendment may be permitted but on terms that it take effect from the order giving leave or from some other time, so as not to prejudice a possible limitation defence".[13]

[45] In some cases it will be inappropriate to decide a contested issue of whether a relevant period of limitation has ended, and therefore whether r 376 applies, because that issue cannot be fairly determined. However, this does not mean that issues under r 376(4) cannot be determined. They should be so as to allow the effective date of the amendments to be determined.[14] If the circumstances demonstrate that the requirements of r 376(4) are satisfied, then leave may be granted. If, on the other hand, they are not, then an order may be made that the amendments take effect, not from the date of the document which is being amended, but from some other date, such as the date when the amendments were foreshadowed or the date when the application to amend was made or the date that leave is granted to make them.[15]

[46] Such a course is appropriate where the issue of whether the limitation period for a new cause of action has expired cannot fairly be determined and therefore the Court cannot determine if r 376 applies. In some cases, however, it may be possible to fairly decide whether a limitation period has expired. The facts and the law may be clear. If it is possible to determine (or it is conceded) that the relevant period of limitation for the new cause of action has ended, and if the requirements of r 376(4) are not satisfied, then the power to give leave to amend to include the new cause of action under r 376(4) is not engaged. The power to give leave to amend pursuant to r 375 is subject to r 376. There is no power under r 375 to allow an amendment to add a new cause of action after the expiry of the limitation period.[16]

[47] An application for leave to amend pursuant to r 375 and/or r 376 may also be refused on grounds which would justify the striking out of the proposed pleading. These would include a plea which is bad in law or defective due to its non-compliance with rules of pleading.

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[12] Ibid.

[13] Ibid at [22]; *Mineral Resources Engineering Services Pty Ltd as Trustee for the Meakin Investment Trust v Commonwealth Bank of Australia* [2015] QSC 62 at [18] – [19] ("*Mineral Resources*"); *Baldwin v Icon Energy Ltd (No 2)* [2015] QSC 286.

[14] *Mineral Resources* at [19].

[15] *Mokrzecki v Popham* at [22]; *Westpac Banking Corporation v Knight Property Investments No 3 Pty Ltd* [2014] QSC 270 at [11]; *Stacey v Perkins* [2015] QDC 100 at [10] – [13].

[16] *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 584 [7] and 589 [18]; *Mokrzecki v Popham* at [15], [23]. Even if it were assumed that a power to amend existed, there would be no utility in granting leave to amend under r 375 or under some other power because the new cause of action would be met by a clear limitation defence. The amendment would be futile.

**Substantially the same facts**

[48] The words "substantially the same facts" should not be read as tantamount to the same facts.[17] The rule presupposes the addition of facts in an amended pleading in support of a new cause of action. As Thomas JA observed in *Draney v Barry*:

> "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 straitjacket."[18]

The story metaphor in this passage has proven a useful and enduring one. However, as the Court of Appeal constituted by McMurdo P, Thomas JA and Holmes J (as her Honour then was) observed in *Thomas v State of Queensland*,[19] the "story" is a shorthand reference to the matters that the plaintiff has to prove. Some authorities may be thought to encourage "a fairly broad bush comparison between the nature of the original claim and that to which it is sought to be amended".[20] However, as *Thomas v State of Queensland* exemplifies, on occasions a judge can use "rather too broad a brush".[21]

[49] Depending upon the circumstances of the particular case, an amendment which sets out a different breach of duty may not be within the scope of r 376(4)(b).[22] One possible inquiry in assessing whether the new cause of action arises out of substantially the same facts is to consider what would have happened if, at trial, the plaintiff sought to lead evidence of the facts without having made the amendment. If the evidence would clearly be objectionable on the ground of surprise or on the ground that it was simply irrelevant to the case raised by the plaintiff's pleading, then this may assist in determining whether the requirement of r 376(4)(b) is satisfied.[23] In a case alleging breaches of duty, the inclusion of additional facts which raise quite different breaches of duty may lead to the conclusion that the new cause of action based on the new breach of duty does not arise out of substantially the same facts as a cause of action for which relief has already been claimed.

[50] The helpful test of asking whether the additional facts arise out of "substantially the same story", like the inquiry into what would have happened if the plaintiff had sought to lead evidence of the new facts without having made the amendment, are practical tests applied in reaching a conclusion about whether the requirement of r 376(4)(b) is satisfied. One returns to the words of the rule: "substantially the same facts". A question of degree is involved.

**Appropriateness**

[51] The requirement in r 376(4)(a) is a potentially broad one, and is not confined simply to questions of prejudice. A proposed amendment will be inappropriate when it is bad in

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17 *Draney v Barry* [2002] 1 Qd R 145 at 164 [57].
18 Ibid (footnote omitted).
19 [2001] QCA 336 at [19].
20 Ibid.
21 At [20].
22 *Wolfe v State of Queensland* [2009] 1 Qd R 97 at 101 [15].
23 *Wolfe v State of Queensland* [2009] 1 Qd R 97 at 100 [12].

law. Caution is required not to reject a claim as bad in law where the law may be in a state of uncertainty or development.[24] A proposed pleading also will be inappropriate where it does not comply with the rules of pleading and is liable to be struck out. A pleading which is "difficult to follow or objectively ambiguous or creates difficulty for the opposite party insofar as the pleading contains inconsistencies, is liable to strike out because it can be said to have a tendency to prejudice or delay the fair trial of the proceeding".[25]

[52] In determining whether the proposed amendment is appropriate, regard should also be had to the principles discussed in *Aon Risk Services Australia Ltd v Australian National University*[26] and r 5 of the *UCPR*. The purpose of the rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. Principles have developed governing amendments for which leave is required.[27] They include the principle that 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. An application to amend will not be acceded to without adequate explanation or justification, including an explanation for any delay in applying for the amendment. The interests of justice require consideration of the prejudice caused to other parties if the amendment is allowed. This includes considering the strain litigation has on litigants and the distress caused by delay and proposed changes to a case. These may be greater where there is no adequate explanation for why the changes were not made sooner.

[53] If it is appropriate to make an amendment to include a new cause of action pursuant to r 376(4), there may be other proposed amendments which do not warrant the grant of leave or there may be existing parts of the pleading which are defective and liable to be struck out.

**Proposed amendments affecting the second, third and fourth defendants**

[54] Although there is an overlap in respect of some issues raised by the plaintiff's application for leave to amend and the second, third and fourth defendants' application to strike out all or parts of the proposed pleading, it is convenient to address first the issues under r 376(4). These include:

(a) whether the proposed pleading includes a new cause of action;

(b) if so, whether it arises out of the same or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding; and

(c) whether it is appropriate to allow the amendments.

[55] The second, third and fourth defendants contend that leave is required pursuant to r 376(4) in respect of:

(a) a new cause of action for breach of trust;

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[24] *Project Company No 2 Pty Ltd v Cushway Blackford & Associates Pty Ltd* [2011] QCA 102 at [27] – [29].
[25] *Robert Bax v Cavenham* [2011] QCA 53 at [16].
[26] (2009) 239 CLR 175.
[27] *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd as Trustee of the QC Trust* [2014] QCA 267 at [74].

(b) a new cause of action for an equitable account; and

(c) a new cause of action for "equitable common mistake".

The claim for "equitable common mistake" is said to be misconceived, and, for that reason alone, the defendants submit that it should not be allowed or that it should be struck out of any amended pleading for which leave is given. In any event, according to the second, third and fourth defendants, none of the new causes of action satisfy the requirements of r 376(4).

**Breach of trust claim**

[56] The original claim filed 6 November 2013 sought against the second, third and fourth defendants:

> "A declaration that the purchase of Mark's beneficial interest in the assets of the estate of the late Peter Menegazzo by each of Brendan, David and Debra was in breach of trust."

It also sought equitable compensation or equitable damages and an order that the "Exit Deed be set aside to the extent it contains releases by Mark".

[57] The original claim for breach of trust, like the proposed amended claim, is based on the "fair dealing rule". The High Court in *Clay v Clay*[28] stated:

> "The 'fair dealing rule' provides that a transaction whereby the beneficial interest of a beneficiary is purchased by the trustee is not voidable ex debito justitiae, but may be set aside, unless the trustee can show that no advantage has been taken of the position of trustee, that full disclosure has been made to the beneficiary, and that the transaction is fair and honest."

The rule places the onus upon the trustee to show, among other things, that full value was given for the beneficial interest that was purchased by the trustee and that the trustee disclosed all information which could affect the judgment of the beneficiary.[29]

[58] The significant difference between the claim, as originally brought and pleaded, and the claim in the proposed pleading is that the latter is no longer confined to the plaintiff's beneficial interest in the trust created by his father's Will. He has broadened his claim so that it extends to other trusts that were not part of his original claim, and the claimed relief extends to his alleged interest in 15 companies identified in Schedule 1 to the proposed pleadings, of which the second, third and fourth defendants, or some of them, were directors. The new claim extends to the defendants' roles as trustees of the Stanbroke Investment Trust, and their roles as directors of seven trustee companies. The relief claimed is expanded to include the reconveyance of shares alleged to have been held by the plaintiff in 15 companies. The second, third and fourth defendants separately submit in their strike out application that there is no basis for this claim, and certainly no articulation of facts to support such a claim.

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[28] (2001) 202 CLR 410 at 434 [50].

[29] D Heydon and M J Leeming *Jacobs' Law of Trusts in Australia*, 7th ed (2006) [1747]; *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 225, 241.

**A new cause of action?**

[59] The plaintiff's original submissions asserted that the material facts constituting the breaches of trust in each case remained the same and that the amendments were "simply further and better particulars of the causes of action already pleaded". However, this submission was not pressed in later written or oral submissions. There appears no real scope to seriously dispute that the proposed amendments seek to raise new causes of action in respect of different trusts. It is not to the point that the claim remains one for breach of trust with a declaration being re-cast to cover the plaintiff's beneficial interest in other assets and a declaration that the purchase of his interests in those assets and in the estate was each "an unfair dealing in breach of fiduciary duty". It is not sufficient that the new cause of action is of the same type or category as the one pleaded before the amendment.[30] If an amendment introduces a new material fact, then a new cause of action is introduced. The proposed amendments clearly introduce new material facts in relation to alleged breaches of the "fair dealing rule" in respect of additional trusts. Although the trusts were identified in Schedule 3 to the original statement of claim, the breach of trust and breaches of fiduciary duty pleading in paragraphs 35 – 42 related to the trust created by the Will. The matters pleaded against the second, third and fourth defendants in respect of the additional trusts and breaches of fiduciary duty in respect of those trusts are new causes of action.

**Substantially the same facts?**

[60] The plaintiff submits that his "essential complaint" based upon the fair dealing rule is the same. The difference is the addition of assets held in the Stanbroke Investment Trust and the Peter Menegazzo Family Trust, and the expansion of the case to plead breaches of the fair dealing rule in respect of those trusts.

[61] The plaintiff notes that one sub-paragraph of the original statement of claim referred to his "entitlement to the assets and undertakings of the Stanbroke Group under the Will" and that the pleading defined the Stanbroke Group to mean the 15 companies and eight trusts in Schedule 3 to the original statement of claim. The same 15 companies and eight trusts appear in Schedules 2 and 3 of the proposed pleading. The original pleading erred in adding the words "under the Will".

[62] If the original pleading had not erroneously included the words "under the Will", and referred simply to the plaintiff's interest or entitlement in the Stanbroke Group, the present issue would not arise. It was, after all, his interest in the Stanbroke Group (also referred to as the Menegazzo Group) which was the subject of the deal that was reached on 7 November 2007, based on valuations of the group's assets, not just the assets of the estate.

[63] According to the plaintiff, the subject matter of the claim is the same, namely the agreement he reached with his siblings to relinquish his interests in the properties held by "the Stanbroke Group"/"the Menegazzo Group". The obligations upon the second, third and fourth defendants, in the context of the fair dealing rule, are the same. The plaintiff contends that the only real difference between the two pleadings is that the original statement of claim proceeded on the erroneous basis that the assets held in the Stanbroke Investment Trust and the Peter Menegazzo Family Trust were held by the Estate of Peter

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[30] *Murdoch v Lake* [2014] QCA 216 at [17].

Menegazzo upon the trust created by the Will. The essential complaint is the same, and arises out of substantially the same facts as appear in the original statement of claim. In summary they are:

(a) The Stanbroke Group (referred to in the proposed pleading as the Menegazzo Group) comprised 15 companies and eight trusts, the names of which appear in Schedule 3 to the original statement of claim;

(b) The Stanbroke Group had a "synergistic value" as a unified collection of income producing assets;

(c) The fifth defendant provided an opinion as to the value of the pastoral and other properties of the Stanbroke Group;

(d) PwC provided a calculation of the potential net asset value of the properties of the Stanbroke Group;

(e) The "Exit Meeting" on 7 November 2007 considered those documents;

(f) The plaintiff also relied on those documents in reaching the agreement in principle at the "Exit Meeting";

(g) The plaintiff did not in fact get "full value" for his one quarter interest;

(h) This was because the PwC Asset Valuations were deficient in certain respects, including the fact that they did not take into account the synergistic value of the Stanbroke Group as a unified collection of income producing assets;

(i) The Deed of Release dated 31 December 2007 between the siblings (referred to as "the Exit Deed") and the other "Transaction Documents" gave effect to the agreement reached on 7 November 2007.

[64] The Transaction Documents referred to in the original statement of claim and the proposed pleading are the same. In general terms, in return for certain benefits, the plaintiff agreed to transfer his legal and beneficial interests in shares in certain companies, resign as a director and office bearer of the companies and resign as a trustee, and agreed to not make any claim whatsoever and to not receive any further payments. He was released from loans which had been made to him by certain entities and released from personal guarantees. Mowburn Nominees Pty Ltd was replaced as trustee of the Vanrook Trust by Vanrook Station Pty Ltd and the plaintiff was appointed sole principal of the Vanrook Trust. The second, third and fourth defendants became the sole principals of the Peter Menegazzo Family Trust. In short, the plaintiff relinquished his interests in the trusts, and gained substantial benefits, including Vanrook Station and the cattle upon it, a share of the Ballina properties, and forgiveness of a debt which then stood at $18,500,000.

[65] The agreement in principle reached at the meeting on 7 November 2007 and the Transaction Documents were about the ownership and control of pastoral and other assets held by the group of companies and trusts listed in Schedule 3 to the original statement of claim. They were about the plaintiff's "exit" from the Menegazzo/Stanbroke Group, not simply about his interest under the Will. They were about what the plaintiff received to relinquish his interests and entitlements in the group as a whole.

[66] In effect, the plaintiff submits that the new and broadened claim tells much the same story about how the value of properties was arrived at with the assistance of PwC and the fifth defendant, and how he did not get "full value" for his interests. The same transaction documents are pleaded. He submits that the factual matters pleaded in the proposed pleading have arisen "out of substantially the same story as that which would have to be told to support the original causes of action".

[67] He also submits that it would have been relevant to prove, as a matter of evidence, the facts alleged in the proposed pleading in order to establish the causes of action pleaded in the original statement of claim. The only new facts are pleas that correctly state the ownership of properties within the group, being the "Stanbroke Group" referred to in the original statement of claim. The eight trusts and 15 companies described in the originating statement of claim as the Stanbroke Group also feature in the proposed pleading, being referred to, for convenience, as the Menegazzo Group.

[68] The second, third and fourth defendants submit that the revised and broadened breach of trust/fair dealing claim does not arise out of substantially the same facts. They point to many new facts in the pleading, for example, the proposed pleading sets out in the body of the pleading the corporate and trust structure of the Stanbroke Group, whereas the body of the original statement of claim referred in general terms to these companies and trusts, and identified them by name in a schedule. Those changes as not significant, being the kind of matters which would have been provided, if particulars had been sought of the properties of the Stanbroke Group and the entities which owned them. The useful addition in the body of the statement of claim of details of the companies and trusts amounts to the "elicitation of additional details".[31] The same applies to the additional details in paragraph 6 of the proposed pleading that part of the property of the Menegazzo Group comprised assets of the estate of Peter Menegazzo that were held on trust by his executors under the trust created by his Will.

[69] The second, third and fourth defendants correctly point to the fact that the original statement of claim related to breaches of duty by the trustees of the trust created by the Will, which resulted in the plaintiff receiving less than the full value of his interests and entitlements under the trust created by the Will. The proposed pleading, although based on the same agreement in principle and Transaction Documents, includes alleged breaches of trust in respect of the Stanbroke Investment Trust and by Mowburn Nominees Pty Ltd as trustee of the Peter Menegazzo Family Trust, a company of which the siblings were directors. Instead of erroneously stating that the plaintiff gave up his interest and entitlements in the trust created by the Will in exchange for certain benefits, the proposed statement of claim correctly identifies the trusts in which he had an interest and which were the subject of the Exit Meeting and the Transaction Documents. The proposed pleading also includes greater detail about the benefits which the plaintiff agreed to accept in order to relinquish his interests, including the fact that he agreed to accept the cattle on Vanrook Station as well as the station itself. Whereas the original statement of claim said that he agreed to accept a one quarter share of the Ballina properties, the proposed pleading states that he agreed to receive one of the properties known as the Ballina properties. These details are not substantial and are part of the same story. The same may be said for the proposed pleading's additional detail about the terms of the Exit Deed. The proposed pleading sets out the material terms of this deed whereas the original statement of claim did not.

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[31] *Draney v Barry* [2002] 1 Qd R 145 at 164 [57].

[70] Account should be taken of the fact that, despite the original statement of claim's erroneous reference to the agreement being about what the plaintiff would accept in lieu of his entitlement "under the Will", rather than referring to his interests and entitlements in the trusts and companies that constituted the Stanbroke Group, the original statement of claim was concerned with the alleged erroneous valuation of the net assets of the Stanbroke Group (and not simply the assets held on trust under the Will). The valuations, and the role they played at the Exit Meeting and in the plaintiff's decision to relinquish his interests, were an essential part of the story.

[71] Part of the original fair dealing claim was about the plaintiff's interests in the pastoral and other properties of the Stanbroke Group, and his reliance upon the relevant valuations of those assets in executing the Transaction Documents. Many of the "new facts" pointed to by the second, third and fourth defendants can be seen as part of the same essential story. The "new fact" of most importance is that the pastoral holdings and other properties that were the subject of the 7 November 2007 deal and the subsequent Transaction Documents which formalised it were owned by some of the trusts and companies which appear in Schedule 3 of the original statement of claim. They were held in trusts in addition to the trust established by the Will.

[72] The revised claim for breach of trust, breach of fiduciary duties and other remedies as a result of the plaintiff's relinquishing his one quarter interest in the group adds, by way of correction, additional facts about the trust and company structure and the individual properties that were held by various trusts. Those trusts and companies were named in the original statement of claim which identified them as parties to some of the Transaction Documents.

[73] To use the metaphor coined by Thomas JA in *Draney v Barry*[32] and adopted in many cases, the additional facts pleaded in support of 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 an "elicitation of additional details" does not, of itself, prevent a finding that the new cause of action arises out of substantially the same facts.

[74] The story that would have been told to support the original cause of action is substantially the same story that would be told to support the revised claim for breach of trust/breach of the fair dealing rule. The cast of characters that is involved is the same with the same *dramatis personae* of the entities that constituted the Stanbroke Group/Menegazzo Group. In simple terms the story is:

> "Once upon a time there were pastoral and other properties owned by the Stanbroke Group in which four children, whose parents had died, each had an interest. The children did a deal and one of the children received valuable properties and the forgiveness of an $18.5 million debt for his interests. He now says he did not get enough."

The original statement of claim includes many details about the Stanbroke Group, the deal, how it came about and why the Stanbroke Group (and therefore the plaintiff's interest in it) was undervalued. Any lack of detail about some of these things has been improved by the proposed pleading. The key difference between the old story and the

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[32] [2002] 1 Qd R 145 at 164 [57].

new one is that the new story corrects the old story about the trusts which held the plaintiff's interest in the Stanbroke Group. The properties that were owned by the Stanbroke Group, and which were valued for the purposes of the deal, are the same in both pleadings

[75] On one view, the change is significant because the original statement of claim was wrong in adding the words "under the Will". However, the present issue is not whether the amendments make a difference. Clearly they do and that may be a reason why it is not appropriate to allow them. The present issue is whether the new cause of action arises out of substantially the same facts as a cause of action for which relief has already been claimed. The term "substantially" involves questions of degree about which views may differ. However, a comparison of the facts in the original statement of claim (including facts that were not particularised to the same degree as appear in the proposed pleading) and the facts in the proposed pleading leads me to conclude that the new causes of action for breach of trust/breach of the fair dealing rule and the facts which support them arise out of substantially the same story as that which would have to be told to support the original cause of action. An error about the trust which held the plaintiff's interest is corrected, but the story is substantially the same. The new cause of action arises out of substantially the same facts as a cause of action for which relief has already been claimed. The requirement of r 376(4)(b) is satisfied with respect to amendments which correctly identify the relevant trusts for the purpose of the breach of trust/fair dealing claim.

**Is it appropriate to give leave to make the amendments?**

[76] As noted in the general discussion about the requirement in r 376(4)(a), a number of matters may arise in considering whether amendments to include a new cause of action are appropriate. One is the question of prejudice. Another is whether there is an adequate explanation for any delay in applying for the amendment. Another is whether the amendments are futile because they plead a claim which is bad in law. In addition, it may be inappropriate to allow an amendment if its effect does not "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".[33] It may not be appropriate to allow amendments if they do not comply with the rules of pleading or otherwise have a tendency to prejudice or delay the fair trial of a proceeding.

[77] If, however, amendments which include a new cause of action and which satisfy the requirement in r 376(4)(b) are appropriate in the light of these matters, they do not cease to be appropriate because they overcome what otherwise would be a relevant period of limitation. This is because the benefit which r 376(4) confers upon a plaintiff is to overcome what otherwise would be a limitation defence.

[78] The second, third and fourth defendants do not call evidence that they are specifically prejudiced by the amendments which broaden the breach of trust claim to include the additional trusts. For example, they do not say that they are prejudiced by the correction of the error in the original statement of claim about which trusts held the properties that were the subject of the deal on 7 November 2007 and the Transaction Documents. The second, third and fourth defendants do not say that they ever thought that the deal that was struck and then documented was that the plaintiff should receive Vanrook Station and its cattle with their estimated value of $55.75 million, other properties and forgiveness of an $18.5 million debt in return for his equal interest in the trust created by the Will

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[33] *UCPR* r 5.

over the residue of the estate. They presumably appreciated that the deal was about the plaintiff's interests in the Stanbroke Group/Menegazzo Group, not just the deceased estate.

[79] The pleader of the original statement of claim seemingly was under the misapprehension that the assets being valued by PwC, and for which the plaintiff was prepared to relinquish his interest in exchange for Vanrook Station, other properties and forgiveness of the debt, were held on trust under the Will. The reason the pleader was under that misapprehension has not been explained to any extent. For example, it is not sworn that the pleader misapprehended when beneficial interests vested. The affidavit material relied upon by the plaintiff hints that the original statement of claim was settled in haste in October-November 2013 because of concerns about the pending expiry of the limitation period. The error seemingly was one made by the plaintiff's previous advisers, but who exactly made the mistake is not disclosed if those persons' identities are known to the plaintiff and his present advisers. The plaintiff's material, instead, suggests that any misconception may have been contributed to by the fact that after January 2006 the deceased's shares in Vanwarren Pty Ltd were recorded as being held by the plaintiff and his siblings "as executors of the estate" of Peter Menegazzo and the ASIC Register remained in that state when the pleading was filed.

[80] In deciding whether it is appropriate to allow amendments which correct the position in relation to the trust or trusts which owned the relevant property, it is important to recall that the purpose of the rules is the just and expeditious resolution of the real issues in civil proceedings. The real issues in the current proceeding (at the risk of simplification) are how the net value of the Stanbroke Group was estimated in November 2007, the agreement by which the plaintiff reached to relinquish (or on one view "sell") his interests in that group and whether he has a claim under the "fair dealing rule" insofar as his beneficial interest in trust property was purchased by a trustee. The just and expeditious resolution of those issues, as well as issues relating to the conduct of the first, fifth and seventh defendants, is advanced by the correction of an obvious mistake. The just and expeditious resolution of real issues in the proceeding will not be advanced by requiring the plaintiff and at least some of the defendants to adopt a fiction, namely that the deal was only about the plaintiff's interests under the Will. It would be highly artificial to conduct the litigation on that fictional basis, particularly when the case against the first defendant is about its valuation of the net assets of the group, rather than the value of the estate, and the case against the fifth defendant is about his valuation of pastoral and other properties owned by the relevant trusts and companies and not simply property that was subject to the Will.

[81] Presently, I am concerned with whether it is appropriate to allow amendments which correctly state the trusts in which the plaintiff had an interest, which were the subject of the agreement to relinquish at the Exit Meeting and which were documented in the Transaction Documents. The relevant defendants do not appear to be specifically prejudiced by amendments which remove what I have described as a fiction and state the correct position (being the position known to them). The explanation for the amendments is an apparent error by the plaintiff's previous legal advisers. In the circumstances, it seems appropriate to allow amendments which correct the error about which trusts held the relevant property, including the trusts of which the second, third and fourth defendants were trustees and the trustee companies of which the second, third and fourth defendants were directors and which held the property.

[82] The extent to which other amendments contained in the proposed pleading are allowed is a different matter. This includes amendments which plead, for the first time, the alleged use which has been made of the plaintiff's interest in the Menegazzo Group since 31 December 2007, and the raft of alternative remedies which the plaintiff seeks in new prayers for relief. A number of amendments contained in the proposed pleading and in the proposed amended claim upon which it is based have generated substantial arguments by the second, third and fourth defendants about the relief which is claimed, the need to join additional parties if orders setting aside transactions are to be pursued and the alleged confusing way in which the plaintiff has pleaded that the second, third and fourth defendants owed fiduciary duties to the plaintiff in respect of trustee companies of which they were directors. These matters require separate consideration because, if accepted, they make the proposed pleading an inappropriate one. They require consideration of the new basis upon which the plaintiff claims an account and whether it is appropriate to allow the plaintiff in the circumstances to claim relief which would, more than ten years after the events in question, seek to unravel a complex series of transactions. The plaintiff's pleading does not disclose whether it is even possible to do equity by setting aside the transactions and whether the plaintiff is prepared to do equity by, if possible, reversing the transactions by which he obtained Vanrook Station, other properties and the forgiveness of a debt. I will defer addressing these matters and the various grounds upon which the second, third and fourth defendants submit that it is inappropriate to grant leave to allow the proposed pleading and the amended claim to proceed.

[83] Presently, I simply have concluded that it is appropriate to allow amendments to correct the error about which trusts owned the relevant property, being the trusts in which the plaintiff had interests which he agreed to relinquish or sell and which were in fact relinquished or sold by virtue of the Transaction Documents. Expressed differently, I consider that it is inappropriate for the proceeding against the second, third and fourth defendants to proceed based on a fiction about the interests which were the subject of the relevant deal. That fiction seemingly arose through a misunderstanding of the plaintiff's previous legal advisers who appear to have settled the pleading in some haste in late 2013. In the absence of prejudice to the second, third and fourth defendants in having the fiction removed and the reality which those defendants presumably understood stated, the interests of justice are best served by the fiction being removed so that the real issues are the subject of a just and expeditious resolution.

**Limitation issues – breach of trust**

[84] Because I am satisfied that amendments which recast the plaintiff's fair dealing/breach of trust claim so that it is not confined to his beneficial interest in the trust created by his father's Will satisfy the requirements in r 376(4), it is not necessary to decide whether such a claim for breach of trust is subject to a relevant limitation period. However, since the limitation points were argued, they should be addressed in the interests of completeness.

[85] I turn to the question of whether the claim, originally styled as one for breach of trust, and subsequently restyled in the proposed amended claim as one concerned with "an unfair dealing in breach of fiduciary duty" was subject to a relevant period of limitation, current as at 6 November 2013 but which has since ended. The second, third and fourth defendants submit that leave was required under r 376 because the new breach of trust causes of action were brought outside of the relevant limitation period. They submit, in reliance on the English Court of Appeal decision in *Gwembe Valley Development Co Ltd*

*v Koshy*,[34] that the new claims for breach of trust are subject to s 27 of the *Limitation of Actions Act* 1974 (Qld). Section 27 relevantly provides:

> "**27 Actions in respect of trust property –**
>
> (1) A period of limitation prescribed by this Act shall not apply to an action by a beneficiary under a trust, being an action –
>
> (a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to the trustee's use.
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of a breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.
>
> (2A) Notwithstanding subsection (2), the right of action shall be deemed not to have accrued to a beneficiary entitled to a future interest in the trust property until the interest fell into possession.
> …"

[86] According to the second, third and fourth defendants the six year period stated in s 27(2) applies because neither of the exceptions in s 27(1) applies. No fraud is being alleged against the defendants, and the claim is not to recover "trust property" or its proceeds. Instead, the plaintiff claims the return of his beneficial interest in the trusts. A beneficiary's interest in a trust is not trust property. Expressed differently, a beneficial interest is not held by the trustee upon the terms of the trust. Trust property is held. A beneficial interest simply represents the nature of the beneficiary's interest in the trust property. A proceeding by a beneficiary for the return of his beneficial interest is therefore not an action to recover "trust property".

[87] The plaintiff responds to these limitation arguments by contending that his fair dealing claims against the second, third and fourth defendants as trustees:

(a) are not an "action by a beneficiary … in respect of a breach of trust" within the meaning of s 27(2);

(b) alternatively, fall within the exception in s 27(1)(b);

(c) fall within s 27(2A);

(d) are actions to which s 38(1)(c) of the Act applies; and

(e) are actions to which s 38(1)(b) of the Act applies.

[88] As to (a), the plaintiff submits that *Gwembe* should not be followed. The cause of action for breach of the fair dealing rule is said to not be based on a breach of trust. Reliance is

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[34] [2003] EWCA Civ 1048 at [103] – [109].

placed upon *Tito v Waddell (No 2)*[35] for the proposition that breach of the "self-dealing rule" and the "fair dealing rule" should not be classified as being "in respect of any breach of trust". Instead, equity subjects trustees to "particular disabilities" in cases falling within these rules.[36] However, the analysis in *Tito v Waddell* of the relevant statutory provision was rejected in *Gwembe* as resting on an unsound distinction between being afflicted with a disability from making a profit and a breach of a core fiduciary duty. The distinction between the two for limitation purposes could not be justified.[37] The appellant in that case was correct, in the view of the Court of Appeal, in not seeking to uphold the distinction in the light of subsequent authorities. Those subsequent authorities included *J J Harrison (Properties) Ltd v Harrison*.[38] In *Gwembe* Lord Justice Mummery (with whom Hale and Carnworth LJJ agreed) pointed out that the *Tito v Waddell* distinction would lead to an anomaly and that the distinction created a "needless complication".[39] The limitation issue and the correctness of the classification expounded in *Tito v Waddell* was the subject of carefully developed reasons in *Gwembe*. The fact that the appellant in that case did not seek to uphold the classification adopted in *Tito v Waddell* does not alter the force of the Court of Appeal's reasoning. Its analysis of relevant English provisions is persuasive, and concerns provisions which are materially the same as s 27 of the Queensland Act.

[89] There is some support for the proposition that a breach of the "self-dealing rule" as described in *Tito v Waddell* is a breach of trust.[40] A similar approach would apply to a breach of the fair-dealing rule. Whilst not every breach of duty by a trustee or other fiduciary may be "in respect of a breach of trust" for the purpose of limitations legislation, *Gwembe* strongly supports the view that, as a matter of characterisation, a breach of the self-dealing rule or a breach of the fair-dealing rule is a breach of trust for the purpose of a limitation provision such as s 27 of the Queensland Act. Such an approach avoids the anomalies identified in *Gwembe*. I do not accept that *Gwembe* is incorrect in its analysis or that it is distinguishable. The reasoning in *Gwembe* should be followed.

[90] The plaintiff next argues that a fair-dealing claim is one within s 27(1)(b) "to recover from the trustee trust property", so that the limitation in s 27(2) does not apply. However, the submissions of the second, third and fourth defendants that an action by a beneficiary for the return of his or her beneficial interest is not an action to recover "trust property" should be accepted. Such an action is one for the restoration of the plaintiff's beneficial interest in trust property, not an action to recover the trust property. The plaintiff seeks to rely upon certain paragraphs from *Lewin on Trusts*.[41] However, those passages are not particularly supportive of the plaintiff's position. *Lewin on Trusts* states that a breach of the self-dealing rule will attract the operation of s 21(1)(b), but a breach of the fair-dealing rule probably will not.[42] *Lewin* also expresses doubt as to whether s 21(1)(b) of the English Act has any application to the fair-dealing rule "since the beneficial interest was not itself held on trust and hence a claim to set aside the transaction is not a claim to recover 'trust property'."[43] At its highest, *Lewin* identifies an argument that s 21(1)(b)

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35 [1977] 1 Ch 106 at 246-250.
36 At 248.
37 At [107] – [109].
38 [2001] EWCA Civ 1467.
39 At [108] – [109].
40 *Doneley v Doneley* [1998] 1 Qd R 602 at 608.
41 19th ed Thomson Reuters, 2015, [44-012], [44-021], [44-077].
42 At [44-012].
43 At [44]077].

ought to apply on the ground that where the transaction is impeachable the objection to it is substantially the same as to a case of self-dealing. Therefore, I do not consider that *Lewin on Trusts* supports the plaintiff's argument that the limitation period in s 27(2) does not apply to his claim for a breach of the fair-dealing rule because the claim is one within s 27(1)(b). The defendants' position also derives support from the observation of Megarry VC in *Tito v Waddell* that:

> "… an action 'to recover trust property,' is open to the difficulty that an action to recover a beneficial interest in trust property cannot readily be described as an action to recover 'trust property': what a man owns beneficially is essentially different from what a man holds not beneficially but in trust."[44]

In summary, the plaintiff's claim for a breach of the fair-dealing rule is not an action to recover "trust property". Instead, it is an action which seeks to set aside a transaction so as to allow a *beneficial interest* in trust property to be recovered.

[91] The plaintiff next argues that his fair dealing claim falls within s 27(2A). His argument is that he is a residuary beneficiary under the Stanbroke Investment Trust and under the Peter Menegazzo Family Trust, and that both interests are "future interests" within s 27(2A) which have not fallen into possession. His entitlement to a share in the residue of the trust fund is contingent on survival to the vesting date. Reliance is placed upon *Johns v Johns*.[45] That case confirms the well-established proposition that the rationale behind a provision such as s 27(2A) in respect of future interests is that a beneficiary with a future interest "should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy."[46]

[92] The second, third and fourth defendants argue that s 27(2A) does not apply for at least two reasons. The first is that the plaintiff does not have a "future interest" or any interest for that matter, in the trust property since, on his case, he sold whatever interests he held, whether present or future. He is not presently a residuary beneficiary. His proposed pleading does not allege that he is and that the value of his future interest has decreased by reason of an alleged breach of trust. There is considerable force in that argument, and it is not deflected by the fact that the plaintiff is named in the relevant trust deed as someone who would participate in the distribution of capital on the "vest end date".

[93] The defendants' second argument, which follows from their first, is that the section does not apply because the plaintiff's interest in the trust property "fell into possession" when valuable trust property was distributed to him pursuant to the Exit Deed and the Transaction Documents in or around February 2008. This was when certain trust property was distributed to him in exchange for his interests under various trusts. The proposed pleading alleges as much. As a result, he became entitled to an interest in possession. In that respect, this case is unlike *Johns v Johns* in which the plaintiff had not received any distribution of trust property and, as a residuary beneficiary, had an interest which had not fallen into possession. As the New Zealand Court of Appeal observed, the expression "future interests" in the legislation is one in respect of which possession and enjoyment

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[44] [1977] 1 Ch 106 at 247. As to the nature of a beneficiary's interests under a trust, see Dal Pont *Equity and Trusts in Australia*, Thompson Reuters, 2011 at [20.95] – [20.135].

[45] [2004] 3 NZLR 202 at [43] – [63].

[46] *Armitage v Nurse* [1998] Ch 241 at 261; *Lewin on Trusts* 19th ed, Thomson Reuters, 2015 [44-036]; *Johns v Johns* at 219 [61].

is delayed or deferred. Once an interest falls into possession, time begins to run.[47] This is consistent with the rationale of the provision, discussed above. In this case, trust properties were distributed to the plaintiff. As a result of the relevant transactions he took possession of certain trust property and renounced any interest in the rest. He ceased to have a "future interest". To adopt the language of Millett LJ in *Armitage v Nurse*,[48] he lived to enjoy his interests under the trusts. What was a future interest in trust property fell into possession and time began to run in or around February 2008.

[94] Next, the plaintiff submits that his new fair dealing claims are claims to which s 38(1)(c) applies. That provision applies to an action "for relief from the consequences of mistake", and the period of limitation does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. The plaintiff seeks to rely upon this provision in respect of his fair dealing claims on the basis that the gist of the action is relief from the consequences of mistake. The argument is that he was mistaken as to the true value of the group's assets when the relevant transactions occurred and did not have knowledge of their true value until 2013 as a consequence of proceedings in the Family Court of Australia.

[95] I do not consider that s 38(1)(c) assists the plaintiff in respect of his fair dealing claims. This claim is not concerned with "relief from the consequences of mistake". An action is "for relief from the consequences of mistake" within the meaning of s 38(1)(c) when the mistake is an essential element of the cause of action.[49] The plaintiff's breach of trust claim is not of such a character. Mistake is not an element of it. Instead, the essence of the claim is that the second, third and fourth defendants as trustees, or as the alter ego of a trustee, purchased his beneficial interest at an undervalue, contrary to the fair dealing rule. The claim does not depend upon pleading or proof of a mistake. Section 38(1)(c) does not meet the defendants' contention that the plaintiff's claim for breach of trust based upon the fair dealing rule, advances new causes of action for which the relevant limitation period has expired.

[96] The plaintiff also relies upon s 38(1)(b). It provides that where the right of action "is concealed by the fraud" of the defendant the period of limitation shall not begin to run until the plaintiff has discovered the fraud, or could with reasonable diligence have discovered it.

[97] The phrase "is concealed by the fraud" in s 38(1)(b) does not confine fraud to its common law sense.[50] The term "fraud" in that context has been construed as comprehending conduct which was "unconscionable having regard to the relationship between the parties".[51] The plaintiff accepts that a breach of the fair dealing rule is not itself unconscionable. The relevant inquiry is whether the right of action is concealed by the fraud of a person referred to in subparagraph 38(1)(a), namely the defendant or the defendant's agent or of a person through whom he or she claims or his or her agent. In support of his s 38(1)(b) argument, the plaintiff raises the possibility that his siblings, the second, third and fourth defendants, had knowledge of the true values of the properties at the time of the November 2007 meeting or at the time the Transaction Documents were

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47 *Johns v Johns* at 216 [47] – 217 [49].
48 [1998] Ch 241 at 261.
49 *The Laws of Australia* at [5.10.2410].
50 *Tito v Waddell* at 245; *Lewin on Trusts* 19th ed Thomson Reuters, 2015, [44-141].
51 *Bartlett v Barclay's Bank Trust Co Ltd* [1980] Ch 515 at 537; *UBAF Ltd v European American Banking Corporation* [1984] QB 713; *Newgate Stud Co v Penfolds* [2004] EWHC 2993 Ch at [253] – [255].

executed and that a failure to disclose their knowledge of the true value of the properties constitutes unconscionable conduct.

[98] The proposed pleading does not allege that the defendants knew of the "true values" of the properties at the relevant time. One might say that the pleading does not need to plead such a matter, which could be raised by way of reply to a limitation defence. However, it is not simply a matter of the proposed pleading not alleging such a state of knowledge. The pleading is inconsistent with it. It pleads, in support of the proposed cause of action for equitable common mistake, that neither he nor his siblings knew the value of the assets and were under a "common fundamental misapprehension as to the value of the Menegazzo Group and as to their relative and respective rights thereunder". Of course, a plaintiff is entitled to plead causes of action, even inconsistent ones, in the alternative. However, the inconsistency between the proposed pleading and the argument concerning concealment by fraud is at least curious.

[99] In support of his argument based on s 38(1)(b), the plaintiff's submissions point to the contents of his present solicitor's affidavit which refers to the plaintiff's belief that his siblings, Brendan and Debra, knew that the true values of the group's assets were higher than the values attributed to those assets by the fifth defendant. This belief is said to be based on the following:

(a) that Brendan and Debra had dealings with RaboBank and the National Australia Bank ("NAB") in relation to the group's borrowings and security arrangements in 2006 and 2007;

(b) that the plaintiff's older brother, David, subsequently informed the plaintiff "to the effect that after the meeting on 7 November 2007, Debra had celebrated obtaining assets at under-value"; and

(c) that the plaintiff was joined as a respondent in proceedings in the Family Court of Australia which were commenced in 2013 by Brendan's former wife in which certain 2006 and 2007 financial documents were produced on subpoena.

The plaintiff subpoenaed documents from RaboBank for this application, but nothing was made of them. No other financial documents were produced to support the plaintiff's belief. The matter mentioned in (b) above does not provide an appropriate evidentiary foundation for an allegation of concealment by fraud and an argument that the relevant limitation period had not expired by virtue of s 38(1)(b). The second, third and fourth defendants properly object to the admissibility of the evidence in the form deposed to in the plaintiff's solicitor's affidavit and, in addition, question the weight to be attributed to the plaintiff's belief and the vague allegation in question. The information and belief affidavit does not descend into any detail about when the plaintiff was informed of the alleged matter by his brother David, let alone what Debra is alleged to have said or done to give the impression that she was celebrating obtaining assets at an under-value, as distinct from, for example, celebrating the resolution which had been reached. I leave to one side the interesting question of whether the plaintiff similarly celebrated obtaining Vanrook Station and the cattle on it at an under-value and whether he breached the fair dealing rule in acquiring the interests of his siblings as beneficiaries in that property.

[100] As for the plaintiff's solicitor's affidavit, and leaving aside questions of the admissibility of evidence in that form, the affidavit does not disclose when the period of limitation

began to run under s 38(1). It does not disclose when the plaintiff discovered the "fraud" or could, with reasonable diligence, have discovered it. I conclude that there is no proper evidentiary basis to support the conclusion that s 38(1)(b) was engaged or, if it was, that the limitation period had not ended at the time of the application for leave to amend.

**Conclusion on limitation issues**

[101] The foregoing discussion of limitation issues in respect of the amendments which correct the error regarding the trusts in which the plaintiff had an interest has been for the purpose of completeness. My conclusions on limitation issues are of a precautionary kind in the event my conclusion that the plaintiff has satisfied the requirements of r 376(4) is wrong.

[102] I conclude that the new causes of action in respect of proposed claims for breach of the fair dealing rule are causes of action to which s 27(2) applies so as to impose a six year limitation period. This is a case in which the limitation point may be fairly determined on an application of this kind. It is not the kind of case in which the question of whether a limitation period has expired cannot be fairly determined ahead of the trial. The issue turns on the terms of the statute, rather than uncertain questions of fact such as when loss and damage was first sustained. The new causes of action for breach of trust/breach of the fair dealing rule which the plaintiff seeks to introduce were subject to a period of limitation which had ended when the application was made. The amendments that introduced the new causes of action therefore required leave under r 376.

[103] If I did not think that the limitation issues could be fairly determined at this stage, then I still would have allowed the amendments to correctly state the trusts which owned the relevant property. This is because, assuming in the defendants' favour for the purpose of argument that the limitation period had ended and leave under r 376 was required, the plaintiff has satisfied the requirements of r 376(4), and should be allowed to amend in that regard. The relevant amendments would overcome an arguable and assumed limitation defence. The practical result would be the same which I have reached, having decided the limitation issues in the defendants' favour.

**Equitable account**

[104] The plaintiff submits that his claim for an account does not involve a new cause of action, and notes that the original claim and the original statement of claim sought an account. However, as the second, third and fourth defendants observe, the plaintiff's original claim sought an account on a different and much narrower basis than that set out in the proposed amended pleading. The plaintiff's original pleading alleged that the second, third and fourth defendants had entered into a "side agreement" whereby dividends and loans were to be paid to them, but not to the plaintiff. The alleged, secret side agreement was a basis for a claim for an account of all dividends, distributions and loans from the relevant group of companies. The apparent basis for seeking the account was those defendants' alleged role as executors and trustees under the Will. In any event, the plaintiff has now abandoned reliance upon the alleged side agreement and the claim for an account appears to be based upon allegations of breach of trust in respect of various trusts and alleged breaches by the defendants whilst acting as directors of 15 companies. In the circumstances, the claim for an account proceeds on a very different basis to the original one.

[105] The second, third and fourth defendants say that the new claim for an account is subject to the six year limitation period contained in s 10(2) of the *Limitation of Actions Act*, and rely upon the decisions in *Wheatley v Bower*[52] and *Feiglin v Ainsworth*[53] for the interpretation of such a provision.

[106] In response, the plaintiff submits that the limitation stated in s 10(2) does not apply to a claim for equitable relief by virtue of s 10(6), and that both cases are distinguishable.

[107] *Wheatley v Bower* concerned the *Limitation Act* 1935 (WA) which has no direct analogue of s 10(6) of the Queensland Act. However, the provisions considered in *Feiglin v Ainsworth* concerned Victorian legislation which is in practically identical terms to ss 10(2) and 10(6) of the Queensland Act. The Court concluded that the analogue of s 10(6) did not alter the usual six year limitation period, and reconciled the two positions as follows:

> "… if a statute says plainly that any proceeding in a court of law for an account shall not be brought in respect of a matter which arose more than six years before the commencement of the action, that means a proceeding in equity or at law. I would add, that does not undermine the 'equitable relief' exclusion in [the equivalent of s 10(6) of the Queensland legislation]. [The equivalents of ss 10(2) and 10(6) of the Queensland legislation] can be reconciled by seeing the former as revealing an intention to deal explicitly with any action for an account."[54]

[108] The decision in *Feiglin v Ainsworth* was followed in *Jane v Bob Jane Corporation Pty Ltd*.[55] There is no sound reason, in my view, not to follow the interpretation adopted in *Feiglin v Ainsworth* and *Jane v Bob Jane Corporation Pty Ltd*. Like the Victorian Act's definition of "action", the Queensland Act's definition of "action" includes any proceeding in a court of law. Section 10(2) subjects an action for an account to a six year limitation period.

[109] The result is that the plaintiff's proposed new causes of action for an account are subject to the limitation period of six years contained in s 10(2) of the *Limitation of Actions Act* 1974 (Qld). Leave is required pursuant to r 376(4) to make an amendment to include such a new cause of action. The new cause of action for an account is quite different to the claim for an account contained in the original statement of claim. It does not arise out of the same facts or substantially the same facts as the original cause of action for an account, which did not, or at least did not clearly, seek an account on the basis of a breach of the fair dealing rule in respect of the trust under the Will. As a result, r 376(4) does not authorise the granting of leave to make an amendment to include that new cause of action even if such an amendment was considered appropriate. There is no alternative source of power to grant leave to make such an amendment.

[110] In any event, I do not consider that it is appropriate to allow the plaintiff to amend his claim and his pleading to pursue now the factual matters raised in some of the paragraphs of his proposed pleading and many of the forms of relief, including an account, which appear in those new documents. I will return to those issues in considering further the

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52 [2001] WASCA 293 at [123].
53 [2011] VSC 454 at [32] – [34].
54 [2011] VSC 454 at [33].
55 [2013] VSC 406 at [73] – [75].

appropriateness of allowing the plaintiff to amend his breach of trust claim in the form of the proposed pleading and to claim the variety of relief, including an account, which appears in the proposed amended claim and the proposed pleading.

[111] I add that I would have concluded that it is inappropriate to allow the plaintiff to amend so as to pursue the different claim for an account even if I had concluded that:

(a) it was somehow covered in the original statement of claim's prayer for relief for an account;

(b) it arose out of the same or substantially the same facts as an existing cause of action; or

(c) it was not time-barred.

[112] In summary, I decline to grant leave to amend to claim an account.

**Cause of action for equitable common mistake**

[113] The plaintiff acknowledges that the cause of action advanced in the proposed amended claim and proposed pleading based on "equitable common mistake" is new. The proposed pleading alleges that at the time the parties entered into the transactions contained in the Deed and the Transaction Documents, the plaintiff, and the second, third and fourth defendants were under "a common fundamental misapprehension as to the value of the Menegazzo Group and as to their relative and respective rights thereunder". The alleged misapprehension is said to have had a material effect on the value of the subject matter of the agreement and the plaintiff pleads that if he had been aware of the true value of the Menegazzo Group he would not have signed the Deed or the Transaction Documents.

[114] This new cause of action, if subject to a limitation period at the date the application for leave to amend was made, clearly pleads new and important facts concerning the parties' respective understandings and those new facts compel the conclusion that the new cause of action does not arise out of the same facts or substantially the same facts as any cause of action for which relief had already been claimed. An argument, not explored to any extent in the parties' submissions, is that the relevant limitation period which applies to this new claim has not ended. This is because, pursuant to s 38(1)(c) of the *Limitation of Actions Act* 1974, the action is for relief from the consequences of mistake, and the period of limitation did not begin to run until the plaintiff had discovered the mistake or could with reasonable diligence have discovered it.

[115] The main response of the second, third and fourth defendants to this new claim is that it is misconceived. The plea is submitted to be patently bad and liable to be struck out because the law does not give a party to such a transaction a remedy for an alleged "common fundamental misapprehension" as to the value of things that are exchanged.

[116] The plaintiff submits that his cause of action based upon "equitable common mistake" is supported by the dicta of Denning MR in *Solle v Butcher*.[56] However, this aspect of *Solle v Butcher* was overturned by the Court of Appeal in England in *Great Peace*

[56] [1950] 1 KB 671.

*Shipping Ltd v Tsavliris Salvage (International) Ltd*.[57] After a comprehensive analysis of authority, the Court of Appeal found that it is impossible to reconcile *Solle v Butcher* with *Bell v Lever Bros Ltd*.[58] It declared that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of contract law.[59] That decision has been considered and followed by the Queensland Court of Appeal in *Australia Estates Pty Ltd v Cairns City Council*,[60] which preferred the decision in *Great Peace* to *Solle v Butcher*.

[117] I should follow the Court of Appeal's analysis of legal principle and authority in *Australia Estates*. The analysis of Atkinson J (with whom Jerrard JA agreed) is, with respect, correct. Even if it was open to me to take a different view of the law to that adopted in *Australia Estates*, I would not do so since the reasoning of the English Court of Appeal in *Great Peace* is compelling. No decision of the High Court supports a different conclusion. The plaintiff cites *Taylor v Johnson*,[61] but the references in that decision to *Solle v Butcher* were not concerned with equitable common mistake. They were concerned with unilateral mistake and the mistake in that case was of a fundamental kind as to whether the sale price was $15,000 per acre or $15,000 in total. The decision to set aside the transaction turned on the buyer's conduct in deliberately setting out to ensure that the seller did not find out about the mistake.[62] It was the buyer's inequitable conduct, rather than a common mistake as to value, which entitled the seller to relief.

[118] *HWG Holdings Pty Ltd v Fairlie Court Pty Ltd*[63] was cited by the plaintiff as suggesting that the analysis of Atkinson J in *Australia Estates* may not represent the current state of the law in Australia. That case was concerned relevantly with the position at common law.[64] *HWG Holdings* did not endorse the expansive doctrine of equitable common mistake upon which the plaintiff's proposed new cause of action depends concerning a mistake as to value. It did not suggest (and the point was not argued) that the doctrine of common mistake in equity extends beyond mistakes which are fundamental. Whatever the scope of the doctrine of common mistake is under Australian law, no authority extends it to a common mistake simply about the value of property. A more fundamental mistake is required, for example, as to the existence, identity or fundamental character of the subject matter of the contract.

[119] Counsel for the fourth defendant made persuasive oral submissions as to why the decisions of the High Court in *McRae v Commonwealth Disposals Commission*[65] and *Svanosio v McNamara*,[66] to the extent they referred to *Solle v Butcher*, did not endorse the doctrine of "equitable common mistake" articulated in that case.

[120] In any event, such a doctrine based upon a "common fundamental misapprehension" would need to be such a misapprehension "either as to facts or as to their relative and respective rights".[67] A misapprehension as to the value of property or the value of an

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57 [2003] QB 679.
58 [1932] AC 161.
59 [2003] QB 679 at 725.
60 [2005] QCA 328 at [63] – [64].
61 (1982) 151 CLR 422.
62 At 428, 432.
63 [2015] VSC 519.
64 At [47].
65 (1951) 84 CLR 377.
66 (1956) 96 CLR 186.
67 *Solle v Butcher* [1950] 1 KB 671 at 693.

interest in property is not of such a character, and cannot be equated with a fundamental misapprehension or mistake as to the terms of the contract or the subject matter of the transaction.[68] Generally speaking, it would be odd if the security of transactions could be undermined because both parties to a transaction had a mistaken view as to the value of the property being sold, for example, in circumstances in which both were unaware of some factor which placed a higher or lower value on the property than the value which the parties thought it had. Notably, Lord Denning MR, who decided *Solle v Butcher*, subsequently observed that a mistaken opinion as to the value of a house does not sound in equitable relief. So much was said to be "clear law".[69] That case concerned a matrimonial settlement. Both parties knew all the material facts and were both mistaken about the amount which the house would obtain at a sale. Their common misapprehension as to the value of the property was not a ground for upsetting the contract.

[121] The plaintiff cites *Grist v Bayley*[70] as authority for the proposition that a common misapprehension as to the parties' relative and respective rights encompasses a misapprehension as to the value of property and their interest in it. However, the parties in that case believed the property was occupied by a "protected tenant". This was not so since the property could have been sold with vacant possession. The relevant common mistake in that case was as to the existence of the protected tenant and was a common mistake as to an ascertainable fact, not a matter of opinion as to value.

[122] The decision in *Errichetti Nominees Pty Ltd v Paterson Group Architects Pty Ltd*,[71] which considered the authorities including *Taylor v Johnson*, does not support the plaintiff's position. In that case, the parties entered into a settlement deed in which they agreed that $102,000 was owing to the defendant. The plaintiff later ascertained that the most he could have owed to the defendant was $72,000. He sought to set aside the settlement deed on the basis of an equitable common mistake, namely that both parties were mistaken as to the amount owing, and also relied upon unilateral mistake. The court refused to set aside the settlement deed, concluding that the mistake alleged was "a long way indeed from a fundamental mistake of the kind required to render the contract voidable in equity for common mistake".[72] It was not a mistake "as to the nature or essential terms of the contract, or as to the existence of the subject matter of the contract, but simply as to the value of the subject matter".[73] Such a mistake was incapable of attracting the intervention of equity. The plaintiff also cites the unreported *ex tempore* single judge decision of *Paulus v Jones*,[74] in which counsel for the plaintiff accepted the correctness of *Solle v Butcher*. However, the later authorities which I have discussed should be preferred.

[123] If the plaintiff's argument was correct, then a shared mistaken view as to the value of a property, induced by a negligently-provided opinion in a valuation, would provide the basis for a party to set aside the transaction on the basis of an alleged equitable common mistake.

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68 c.f. *Taylor v Johnson* at 427, 433.
69 *Cooper v Cooper (Preece)* (1973) CAT 425 at 5-6.
70 [1967] Ch 532.
71 [2007] WASC 77.
72 at [66].
73 at [67].
74 Unreported, Queen's Bench Division, 16 April 1984.

[124] In summary, following the English Court of Appeal in *Great Peace* and the decision of the Queensland Court of Appeal in *Australia Estates*, I conclude that the proposed claim for equitable common mistake is bad in law. Those decisions are to be preferred to *Solle v Butcher* concerning equitable common mistake. In any case, such a claim would require a fundamental common misapprehension, either as to facts or as to the parties' respective rights. It would not extend to a mistaken opinion as to value. Such an extension of the principle of equitable common mistake derived from *Solle v Butcher* is not supported by the authorities. Such a doctrine would render insecure numerous transactions entered into by parties who have a shared, but mistaken view as to the value of the subject matter of the transaction, but are not mistaken as to the subject matter, the terms of the contract or as to their relative and respective rights.

[125] Because the plaintiff's new claim for equitable common mistake as to the value of properties and as to the parties' relative and respective rights is contrary to the law as stated by the English Court of Appeal and the Court of Appeal of this State, it is inappropriate to grant leave to include it in an amended claim and in the plaintiff's proposed pleading. The law in this area is not in a sufficient state of uncertainty or development so as to allow such a claim to stand. If such a claim had been included in the plaintiff's original statement of claim it would have been liable to be struck out. In short, I accept the submissions of the second, third and fourth defendants that the proposed new claim for "equitable common mistake" about the value of the subject matter of the agreement is bad in law. Leave to amend to include it should be refused on this ground.

[126] Even if I had not reached that conclusion, and thought that, as a matter of law, there was an arguable cause of action for such a claim, that would not have persuaded me that it is appropriate to allow the amendment in the circumstances. The existence of an arguable claim is not necessarily sufficient to allow a party to advance it by way of amendment, especially where the proceeding is started late and prosecuted poorly. Also, there is no explanation, let alone an adequate one, as to why the claim for equitable common mistake was not brought forward sooner. The plaintiff does not say when he first realised he and his siblings were under the alleged mistake. Some information and belief material suggests, in an uninformative and inadmissible fashion, that on some unstated date his older brother David "subsequently" informed the plaintiff "to the effect" that after the meeting on 7 November 2007 their sister Debra had celebrated obtaining assets at an undervalue. What Debra allegedly said or did in celebrating is vague. In addition, the date when David told the plaintiff is unstated. This begs the question of when the plaintiff learned of the alleged mistake as to value, and when time commenced to run. The unexplained delay in commencing a claim for equitable common mistake which seeks to set aside numerous transactions is a reason why amendments to include it should not be allowed at this stage, even if the claim was arguable as a matter of law, and viable on the basis of evidence. Instead, the plaintiff's material hints that, rather than being mistaken about the value of the Menegazzo Group on the basis of the PwC net asset calculation or for some other reason, at least some of his siblings were not. The claim does not have sufficient prospects in law or in fact to make it appropriate to launch at this stage, particularly when there has not been an adequate explanation of the plaintiff's delay in bringing the claim forward.

**Is it appropriate to give leave to make the other proposed amendments against the second, third and fourth defendants?**

[127] The second, third and fourth defendants advance a number of grounds as to why it is inappropriate to allow leave to amend in the form sought by the plaintiff and why, in the alternative, the amendments would be futile or otherwise liable to be struck out. They include:

(a) the addition of new pleaded facts about "the use of the Plaintiff's interest in the Menegazzo Group" by the second, third and fourth defendants and companies and trusts controlled by them;

(b) a claim that the second, third and fourth defendants are liable to account for and to pay to the plaintiff "all profits" made by their use of his share in the Menegazzo Group;

(c) a claim for the taking of all necessary accounts (a topic introduced above);

(d) a claim that, at the election of the plaintiff, the Deed of 31 December 2007 and the Transaction Documents be set aside;

(e) a claim, again at the election of the plaintiff, that his siblings hold one quarter of the property of the Menegazzo Group on trust for him;

(f) another claim, again at the plaintiff's election, that his interest in property and shares in companies be reconveyed to him.

[128] Some of the problems pointed to by the second, third and fourth defendants, and which make the proposed pleading inappropriate and defective are:

1. The required investigation into the use of his interests and the profit generated by their use.

2. The plaintiff's desire to set aside a complex series of transactions without even asserting in the pleading that it is possible to "do equity" or to restore the parties to the positions they were in before the transactions were entered into.

3. The absence of any offer by the plaintiff to do equity by restoring Vanrook Station, one of the Ballina properties and other benefits he received (including the forgiveness of an $18.5 million debt).

4. The pleading seeks to set aside transactions by entities that have not been joined as parties, such as Mowburn Nominees Pty Ltd and other trustee companies.

5. The absence of a pleaded basis to have shares in 15 companies reconveyed to him.

6. The defective, or at least confusing, way in which it is alleged that the defendants, in their capacity as directors, owed a fiduciary duty to beneficiaries.

[129] Some of these matters may be capable of being addressed by the joinder of necessary parties and amendments which clarify the basis upon which the defendants are alleged to have owed fiduciary duties to beneficiaries of trusts in which the trustee was a

corporation. However, they raise more fundamental issues about whether it is appropriate at this stage to allow the plaintiff to prosecute new claims to set aside a series of complex transactions. The original statement of claim and the original claim did not seek an order setting aside those transactions. It did not even seek an order that the "Exit Deed" be set aside. It only sought an order that it be set aside "to the extent it contains releases by Mark".

[130] It is sufficient to state for present purposes that if the plaintiff was permitted to seek the far more extensive relief sought by him, setting aside numerous documents and transactions, it would be at least appropriate, if not necessary, to join Mowburn Nominees Pty Ltd and other parties to transactions documents, and to address the standing of the plaintiff as a beneficiary (if he is one) to bring the proceeding in respect of the assets and constitution of relevant trusts.

[131] The second, third and fourth defendants' submission that the plaintiff does not assert that it is possible to equitably restore the parties (including entities not yet a party to this proceeding) to the position they were in in December 2007 is persuasive. There is a substantial argument that a plaintiff seeking such relief is required in his pleading to demonstrate an unequivocal intention to set aside a transaction.[75] In any case, the plaintiff simply does not plead whether it is possible to do equity, for example, by his giving back the property he acquired (together with improvements) and accounting for profit he made from its use, and resuming a liability of $18.5 million (with whatever adjustment would be required to reflect the monetary and other advantages he has enjoyed over the last decade in not being responsible for that debt).

[132] The plaintiff's proposed claim to set aside a complex series of transactions on equitable grounds and to have property transferred to him opens up inquiries into what use has been made by him and others over the ensuing years of various assets, and the extent to which changes in the value of properties and businesses that once were owned by different entities in the Menegazzo Group are attributable to different factors, including good fortune, the underlying quality of the assets and the hard work of those who have managed those assets.

[133] The need to "do equity", including, if it is possible, the practical and fair adjustment of interests so as to compensate for the use made by various parties of the beneficial interest which other parties once had in property held on trust (including the plaintiff's use of the beneficial interests he acquired in Vanrook Station) opens up the prospect of extensive investigations. Whether the plaintiff is prepared to offer to do equity as a condition of having transactions set aside, and whether it is practical and fair to reverse the December 2007 transactions, and, if so, on what terms, are issues which are not even broached in the proposed pleading, or in his material before me.

[134] Even if the plaintiff's delay in not launching the variety of new claims for relief he wishes to launch, and at some future time to elect between, had been better explained, I still would not be satisfied that it is appropriate to allow him now to plead many of the new facts which he proposes to plead, such as the use by others of his beneficial interest, and to claim the variety of relief he now seeks. In an application for leave to amend of the present kind, the delay in commencing proceedings is an important factor. A party which

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[75] *LHK Nominees Pty Ltd v Kenworthy* [2001] WASC 205 at [50] – [58]; O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission*, 2nd ed, Oxford University Press, 2014, at [11.16] [11.25].

waits about six years to sue is expected to honour the implied undertaking to the other parties and to the Court to proceed in a timely way. Here, the plaintiff's prosecution of the proceeding has been tortuous, and the proceeding is not yet properly constituted to include parties to transactions which the plaintiff seeks to set aside. Neither the plaintiff's proposed pleading nor his material asserts that it is practical to reverse the complex transactions in a fair and equitable manner, so as to reinstate the Menegazzo Group to the form it was before the plaintiff and his siblings went their separate ways in 2007, each with a share of properties that had once been held by entities in the group.

[135] If the pleadings open up these issues then there will have to be investigations into the conduct of a number of pastoral and other businesses over a period of a decade or more prior to trial. The potential cost of those investigations would be significant. The delay associated with them, including the need for expert accounting, forensic and taxation evidence, should not be disregarded. Litigation of issues of the kind which the new claims for equitable and other relief open comes at a great cost, including the distress caused to individual litigants. The history of delay in commencing and prosecuting his present claim, the vexation of the defendants by since abandoned pleadings and the potential of the proposed claims to further delay the proceeding bear upon the question of whether it is appropriate to permit them. I conclude that it is not. It is not in the interests of justice to open new issues to be litigated in pursuit of the plaintiff's proposed claims to set aside the transactions, or to account for the profits (if any) made by the second, third and fourth defendants, or, more precisely, by the corporate trustees and other entities, which the plaintiff says have made use of his share in the Menegazzo Group over the last ten years. The issues to be litigated would seem to include the use made (or which reasonably could have been made) by the plaintiff and entities he controls of the beneficial interests which he, in effect, purchased as part of the 2007 deal. The litigation of those issues, with its cost and inevitable lengthy delay, would not be consistent with the "just and expeditious resolution of the real issues … at a minimum of expense."

[136] In addition to the delay and distress which the second, third and fourth defendants would experience by such a course, assuming the proceeding was properly constituted as to parties affected by the orders sought, the delay would affect the timely resolution of the proceeding as against the first, fifth and seventh defendants. Such a delay is not in the interests of justice.

[137] For the reasons given above, it is appropriate to allow the breach of trust claim to be amended to correctly identify the trusts in which the plaintiff had an interest which he relinquished or, on one view, sold. It is not appropriate, however, to allow the plaintiff to pursue the range of relief and consequential orders he seeks in the proposed amended claim and the proposed pleading, or to pursue new issues about matters such as the use some defendants (and others) have made of his beneficial interest, and, for that matter, the use he has made of property and assets which were once owned by trusts and companies in the group. It is inappropriate in the circumstances to allow the plaintiff to seek orders to set aside the transactions, to declare that his siblings hold interests on trust for him, to reconvey property to him or to account for profits. These issues and such complex remedies should not be pursued given the history of the matter, and the injustice which would be caused by the additional delay to litigate them fairly (if this was possible).

[138] This will permit the plaintiff to pursue a claim for equitable compensation in respect of his corrected and expanded claim for breach of trust/breach of the fair dealing rule in respect of his interests in trusts that formed part of the Menegazzo Group.

[139] To avoid that claim involving issues about the rise and fall of property values, management decisions, business opportunities and the affairs of the former Menegazzo Group over the last ten years, the claim for equitable compensation should be confined (with appropriate precision in terms of pleading) to the difference in value between what the plaintiff relinquished or sold in late 2007 and the value of the benefits he obtained in return, with such values being assessed as at 31 December 2007, or possibly as at 7 November 2007. This removes the possibility of having the Court undertake the comparison at some later date closer to trial, but it avoids the cost and delay associated with investigating changes in values over a ten year period, their multiple causes and whether those changes should be to the benefit of particular parties in assessing equitable compensation.

[140] Requiring the plaintiff to plead his claim for equitable compensation by reference to values and sums as at November-December 2007 has the additional benefit of aligning, in terms of the date of assessment of compensation, the claims against the various defendants.

[141] I conclude that it is not appropriate to grant leave to amend against the second, third and fourth defendants in the form of the proposed amended claim and the proposed pleading. It is, however, appropriate to allow more limited amendments in accordance with these reasons.

[142] Those amendments should address a topic raised by the second, third and fourth defendants' strike out submissions. Shortly stated, the proposed pleading seemed to plead that they were being sued in their capacity as directors of seven trustee companies on the basis that as directors they owed a fiduciary duty to the plaintiff as a beneficiary of those trusts. In reply, the plaintiff clarified that the defendants were sued on the basis that they were an "alter ego" and agent of the trustee company. Any fresh pleading should plead the basis upon which each defendant is alleged to have owed a fiduciary duty (for example the facts which made them the alter ego of Mowbray Nominees Pty Ltd), the content of the fiduciary duty in respect of the fair dealing rule, how it was breached and the consequences of any breach.

[143] The form of amendments and how they are settled will be further addressed at the end of these reasons. They will require attention to detail. It seems appropriate that in addition to correcting the position in relation to the trusts in which the plaintiff had an interest, the new pleading include a number of the additional details which improved upon the original statement of claim, including a better description of the Menegazzo Group and the terms of the Transaction Documents and the Exit Deed. They should not include additional pleas which introduce matters which would only be relevant to equitable claims which I have declined to give leave to pursue. I expect, and, if necessary will direct, the plaintiff to plead a claim for equitable compensation based upon a claimed loss assessed at or about the date of the transactions, which are alleged to have breached the fair dealing rule.

**Proposed amendments affecting the fifth defendant**

[144] The allegations against the fifth defendant in the original statement of claim have been outlined above. The fifth defendant applied pursuant to r 171 of the *UCPR* to strike out the amended statement of claim filed 30 March 2015 to the extent it pleads allegations against the fifth defendant. The plaintiff does not seek to defend or to rely upon that pleading. The same pleading was the subject of an order of Flanagan J dated 4 December

2015 which ordered pursuant to r 371 that the filing of the amended statement of claim on 30 March 2015 be declared ineffectual as against the second, third and fourth defendants. However, that does not address the status of that pleading as against the fifth defendant. In circumstances in which the plaintiff does not seek to rely upon it, the appropriate order is that it be struck out to the extent it pleads allegations against the fifth defendant. If such an order was not made, the filing of the pleading would have a tendency to prejudice or delay the fair trial of the proceeding.

[145] The plaintiff submits that the required comparison for the purposes of r 376(4) of the *UCPR* is between the original statement of claim and the proposed pleading. He submits that:

(a) the subject matter of both pleadings was the same, namely the "Opinion of Value" document dated 5 November 2007;

(b) the subject matter of the alleged breach of duty against the fifth defendant was the same in each pleading: in a nutshell, that the fifth defendant breached its professional duty of care in preparing and providing that document;

(c) the proposed amendments provide more detailed particulars of the breach earlier pleaded, and are merely more detailed facts on the same "pathway to liability";[76]

(d) both pleadings assert that the plaintiff relied on the fifth defendant's document in agreeing to enter into the proposed transaction; and

(e) the fact that the transaction is differently pleaded, being in respect of the plaintiff's interest in the Menegazzo Groups assets, rather than the plaintiff's entitlement under the Will, is of no consequence because the same duty of care arose on the part of the fifth defendant to exercise due care and skill in providing the requested Opinion of Value in respect of the properties.

**A new cause of action?**

[146] To submit that the subject matter of both pleadings is the same, namely the fifth defendant's document dated 5 November 2007 (howsoever described), and that the amendments do not allege a different breach of duty, approaches the issues under r 376(4) at far too high a level of abstraction. The two pleadings are quite different, particularly in relation to allegations of breach of duty.

[147] Questions of breach of duty cannot be divorced from the alleged duty and its content. The case pleaded in the original statement of claim was that the fifth defendant undertook "Property Valuations", and had a duty of care to the plaintiff in giving his opinion about the value of the individual properties that his document addressed. The original statement of claim did not allege that the fifth defendant prepared a valuation of an integrated business.

[148] The allegations of breach in the original statement of claim are short and simple, namely that in giving an opinion of value as to the pastoral and other properties, the document "failed to properly identify the components of the assets being valued, the basis or methodology on which the valuation was conducted, and any underlying assumptions on which the valuations were based". There is no allegation that the fifth defendant valued

[76] Citing *Jetcrete Oz Pty Ltd v Conway* [2015] QCA 272 at [24], which, in turn, cited *James v The State of Queensland* [2015] QSC 65 at [34] which deployed the pathway metaphor.

the wrong subject matter or that it adopted the wrong methodology in giving an opinion of value about each property. The allegation is that the document failed to identify the methodology, not that it adopted the wrong one.

[149] Incidentally, and as the more detailed pleading of the "Opinion of Value" document contained in paragraph 23 of the proposed pleading indicates, Mr Douglas described each pastoral property, estimated its carrying capacity on a mixed herd basis and in the case of each property adopted a "beast area value" ("BAV"). The value of the land and fixed improvements was arrived at by multiplying the carrying capacity by the BAV. To this was added a value for the herd based upon actual cattle numbers multiplied by an amount per head. The value of the land and fixed improvements were added to the value of the cattle to provide an opinion of value on a "walk in walk out" basis. Thus, the methodology adopted in arriving at an opinion of value for each pastoral property was disclosed, at least to some extent. Importantly, the original statement of claim did not allege that an erroneous methodology was used in that regard.

[150] The original statement of claim did not allege that Mr Douglas' company, which traded as Rod Douglas Property Sales, lacked experience to provide such an opinion of value, notwithstanding Mr Douglas' experience in the rural industry, including his experience in major rural property sales, and his familiarity with the subject properties through his acting as a consultant to Mr Peter Menegazzo. The original statement of claim did not allege that he "assumed a responsibility to exercise the level of professional skill and care ordinarily to be expected of a valuer of pastoral properties and cattle". Paragraph 26 of the proposed pleading does. In doing so it introduces a new and different duty of care, namely that of a "professional valuer", rather than a standard of valuation expected from a reasonably competent valuer with the experience of Mr Douglas who was requested to provide the kind of short appraisal which he did.

[151] The proposed pleading contains new allegations about what the fifth defendant is alleged to have known, or reasonably ought to have known, about a diversity of matters, including the allegation that he knew that the Menegazzo Group comprised or included the companies and trusts specified in Schedules 1 and 2 of the pleading, which list 15 companies and eight trusts. It is unnecessary to determine whether these new allegations of knowledge give rise to new causes of action. It is sufficient to observe that they concern Mr Douglas' knowledge of matters in November 2007, and this has a relevance to the appropriateness of allowing the amendments.

[152] The most important issues in connection with the proposed amendments relate to the newly-pleaded breaches of duty. On a fair reading, they are different breaches, not simply further particulars of existing allegations of breach. Those allegations are contained in 15 sub-paragraphs, and bear little resemblance to the originally pleaded breaches. They occupy more than three pages of the proposed pleading, and I shall not set out all of them.

[153] The first allegation is that in purporting to value the properties the fifth defendant "attributed a value to each property individually without regard for the circumstance that, as a group, the pastoral holdings, feed lot and meatworks was an integrated business" which had certain specified qualities which "gave the properties as a collective holding greater value than the sum of the individual properties valued in isolation" (paragraph 33(a)). The plaintiff submits that this new allegation was included within the original allegation of having failed to properly "identify the components of the assets being valued". He notes that the "synergistic value" was specifically referred to elsewhere in

the original pleading. However, that last point cannot help the plaintiff because the allegation in the original statement of claim that the plaintiff points to was directed to the "Asset Valuations" prepared by PwC, not the "Property Valuations" prepared by the fifth defendant. Tellingly, the originally statement of claim complained that the Asset Valuations "did not take into account the synergistic value of the Stanbroke Group as a unified collection of income producing assets". No such allegation was made in respect of the fifth defendant's document.

[154] The new allegation of breach in paragraph 33(a) of the proposed pleading is quite different to the original pleading which alleged a failure to properly identify the components of the assets being valued. If the earlier allegation was so broad or vague as to cover the new allegation contained in paragraph 33(a) of the proposed pleading, then the plaintiff should not be able to rely upon such a vague allegation to meet the test in r 376(4)(b). The original allegation would have been understood, in its context, to refer to the components of the individual properties that were being valued, not the value of integrated businesses. The fifth defendant gave an opinion of value, and might be said to have purported to value individual pastoral properties and a meatworks. It did not purport to value an integrated business. The original pleading suggests that this was the task of PwC, having obtained the "short appraisals" which the fifth defendant provided of the value of each rural property and its cattle.

[155] The original statement of claim, and its allegations of breach of duty, are concerned with the content of the fifth defendant's document, and with its failure to identify certain matters. It does not allege that the fifth defendant failed to value an integrated business or adopted an erroneous methodology in valuing the individual properties about which he expressed an opinion on value.

[156] Paragraph 33(a) is a new and different plea of breach of duty. The material fact or facts pleaded in relation to that breach give rise to a new cause of action, and the cause of action pleaded is substantially different to the existing causes of action for breach of duty.

[157] Paragraph 33(b) of the proposed pleading alleges that the fifth defendant failed to have any, or any sufficient, regard to the sales of certain "comparable" properties. This also is a new and different allegation of breach of duty. Later paragraphs make allegations of a failure to undertake any, or any adequate, investigation of the carrying capacity of the pastoral properties, of having understated the cattle-carrying capacities of each and thus having failed to undertake any adequate investigation or assessment of the "beast area values" of the properties, and having understated them. Additional new allegations in later subparagraphs concern alleged inadequate investigation of another property and its associated feedlot complex and of the meatworks at Grantham. These and other allegations of failure to investigate or to make a proper assessment are concerned with errors in carrying out the alleged task of valuation, not a deficiency in the document's failure to properly identify certain matters. Again, these are different breaches of duty to those originally pleaded and give rise to new and different causes of action.

[158] New subparagraph 33(l) alleges that in expressing an opinion about the value of the meatworks the fifth defendant failed to consider or take into account five matters. Again, the allegation is one of specific errors in carrying out the required task, not of what the document failed to identify.

[159] The plaintiff notes that the original statement of claim, having alleged that the fifth defendant breached its duty to the plaintiff in the respects pleaded in paragraph 31 makes the alternate plea in paragraph 33 that the fifth defendant "negligently misrepresented the value of the pastoral and other properties…" It pleaded a misrepresentation of value, rather than a breach of duty in preparing the relevant document. However, the unparticularised allegation of negligent misrepresentation would have been reasonably understood as relying on the matters earlier pleaded in relation to breach of duty.

[160] The new allegations of breach of duty upon which the plaintiff relies in his proposed pleading cannot be equated with a different cause of action for negligent misrepresentation. They are different causes of action.

[161] Another new allegation of breach, pleaded in paragraph 33(n) of the proposed pleading, is that the fifth defendant failed to disclose that Mr Douglas had "no valuation qualifications and was not registered as a valuer". Again, nothing like this breach was pleaded as a breach of duty in the original statement of claim.

[162] Another new allegation of breach is that the fifth defendant undertook an assessment of carrying capacity and beast area value, without applying a summation or alternative check valuation method. Again, this is an allegation of applying the wrong methodology, not of a failure to identify methodology as was originally alleged.

[163] In summary, I do not accept the plaintiff's submission that the subject matter of the alleged breach of duty against the fifth defendant is the same in each pleading, and that the proposed amendments do not allege a different breach of duty.

[164] Even if it could be said that the short and simple allegations of breach in the original statement of claim were broad and vague enough to cover the new, many and specific allegations of breach contained in paragraph 33 of the proposed pleading, this would not assist the plaintiff. The inclusion in a pleading of a vague allegation cannot be relied upon to allege that a 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.[77]

[165] The proposed pleading contains allegations of breach of duty that are different, and substantially different, to the alleged breaches of duty contained in the original statement of claim. The new material facts pleaded in relation to the duty and its breach cannot be described as more detailed particulars of an existing pleaded material fact, and simply further particulars of a cause of action which has already been pleaded.

[166] Contrary to the plaintiff's submissions, the relevant amendments do not involve "more detailed pleading of the same pathway to liability already pleaded".[78] If one was to use such a metaphor then I would say that the proposed pleading maps a number of new pathways. It might even be said to have abandoned the old pathway and constructed instead a new six lane highway.

[167] The new causes of action based on new breaches of duty in support of the claim for negligence against the fifth defendant are causes of action for which a relevant period of

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[77] *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 588 [17] – 589 [18]; *Jetcrete Oz Pty Ltd v Conway* [2015] QCA 272 at [23].

[78] *James v The State of Queensland* [2015] QSC 65 at [34].

limitation was current at the date the proceeding was started. The relevant period of limitation has ended, and had ended prior to the filing of the application for leave to amend.

**Substantially the same facts?**

[168] The new causes of action do not arise out of the same facts, or substantially the same facts, as any cause of action for which damages had already been claimed in the proceeding. Many new facts are pleaded. Existing allegations of breach do not remain. The existing causes of action did not rely, even in general terms, upon many of the new facts which are pleaded. Shortly stated, the original statement of claim was concerned with what the document failed to identify. The new pleading alleges a variety of new matters, including a crucial error in methodology in not regarding each individual property as part of an integrated business, a breach in not undertaking adequate investigations in various respects, a breach in not taking into account certain matters and a breach in not disclosing the absence of valuation qualifications and registration.

[169] The inclusion of many new facts in support of new causes of action leads me to conclude that the new causes of action, based on new alleged breaches of duty, do not arise out of the same facts or substantially the same facts as a cause of action for which a claim in negligence had already been made.

[170] It is unnecessary to resort to the useful metaphor of asking whether that new pleading tells substantially the same story. However, I do not consider that it does, since so many allegations are new and the story is now more about the fifth defendant's methodology than what his document failed to identify. Nor is it necessary to apply the useful practical test of asking what would have happened if, at trial, the plaintiff sought to lead evidence of the matters raised in the proposed pleading without having amended to pleaded them. However, that test, if applied, would lead to the conclusion that an attempt to lead evidence of those matters against the fifth defendant or to cross-examine Mr Douglas about them, would have been objectionable on at least the ground of surprise. This would be because the original statement of claim did not suggest that the fifth defendant should have done the things which the proposed pleading pleads that it should have done, and the original statement of claim did not plead the variety of methodological errors and failures which the new pleading does.

[171] I conclude that the amendments for which the plaintiff seeks leave in respect of the fifth defendant include new causes of action for which a relevant period of limitation has ended, and that the new causes of action do not arise out of the same facts or substantially the same facts as a cause of action for which relief had already been claimed against the fifth defendant. The requirement stated in r 376(4)(b) has not been satisfied.

**Is it appropriate to give leave to make the amendments?**

[172] In submitting that the Court would not be satisfied, in any event, that it was appropriate to give leave to make the proposed amendments, the fifth defendant points to largely unexplained delay and the prejudice caused to the fifth defendant, more than eight years after the events in question, in being subjected to a trial in respect of newly-raised matters. These matters include his process in arriving at his opinions and his knowledge about the various matters which the plaintiff pleads he knew or ought reasonably to have known. The fifth defendant's submissions filed 22 February 2016 made these points. Nothing

was said about delay and prejudice in the plaintiff's outline in reply dated 1 March 2016. Instead, reliance was placed upon Ms Gleeson's affidavits about the history of the matter. However, neither that affidavit nor other material adequately explains why the new allegations concerning the fifth defendant's alleged methodological and other errors were not raised sooner. As noted, the original pleader was alive to the issue of whether an assessment of the value of the plaintiff's interest should take into account "the synergistic value of the Stanbroke Group as a unified collection of income producing assets". The issue was raised against PwC but, presumably advisedly, not against the fifth defendant.

[173] The fifth defendant's appraisals of the various properties set out the basis of his calculation of value. Ms Gleeson's affidavit shows that the plaintiff's potential claims against the various defendants were the subject of ongoing consideration by a variety of lawyers before the proceedings were commenced and the plaintiff seemingly was able to receive legal and other professional advice about suggested inadequacies in the work of PwC and the fifth defendant. There has been no adequate explanation as to why the recently-alleged errors in the fifth defendant's work were not identified sooner. The possibility exists that they were, but the points were thought to lack merit.

[174] Having waited about six years after the events in question to file proceedings against the fifth defendant and others, the proceedings were not served upon the fifth defendant until August 2014. The fifth defendant has since had to deal with other proposed pleadings upon which the plaintiff has subsequently abandoned reliance. P D McMurdo J noted on 8 May 2015 in respect of the amended statement of claim filed on 30 March 2015 that there was an "absence of any pleaded case as to what constituted the negligence of Jutland: all that is pleaded is that their valuations (or perhaps some of them) were not according to the true values."[79]

[175] In oral submissions, senior counsel for the plaintiff submitted that the defendants had not called evidence of specific prejudice. This is an important consideration. However, reliance has been placed by the fifth defendant upon the frequently cited observations of McHugh J in *Brisbane South Regional Health Authority v Taylor*[80] about the rationales for limitation periods and the general prejudice which may be suffered as a result of a stale claim. In considering an application for leave to amend, appropriate account should be taken of the strain that litigation has on litigants, particularly where, several years after the event, a party is required to attempt to reconstruct what he or she knew several years earlier, and is required to face, for the first time, specific allegations which have not been raised in the past. The practical difficulties which Mr Douglas will experience in doing so have not been sworn to by him, or on information and belief by his solicitors. In the absence of such evidence I do not accept the submission that it would be "oppressive and even cruel to allow the proposed case now to be run against Jutland". However, nor can I be satisfied that Jutland would receive a fair trial in circumstances in which Mr Douglas is required to reconstruct what he knew, and now explain why he did or did not do the things which the plaintiff now proposes to plead he should have done in November 2007. As was said in *Page v The Central Queensland University*:

> "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."[81]

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[79] *McCullough Robertson Lawyers (A Firm) v Menegazzo* [2015] QSC 109 at [23].
[80] (1996) 186 CLR 541 at 551-553.
[81] [2006] QCA 478 at [24].

[176] In determining whether it is appropriate to grant leave to make amendments of the kind proposed, the interests of justice are paramount. A plaintiff who has not been well served by legal advisers in the past should not be deprived of the opportunity to have the real issues brought forward to a trial and fairly resolved. However, the material relied upon by the plaintiff for the purpose of this application does not particularly identify how or when he was poorly served by previous legal advisers. In the case of the fifth defendant, there is no adequate explanation as to why the issues which the proposed pleading seeks to agitate were not raised sooner. It is not suggested that they depended upon the discovery of evidence which was not available to the plaintiff until recently. The plaintiff has had no shortage of legal advisers over the years and the reasons for his regular changes of legal and other advisers have not been adequately explained.

[177] The delays over the last two years in the plaintiff's progressing the proceeding come against the background of his taking almost six years after the events in question to commence proceedings. The fifth defendant has had to confront, or be vexed by, four versions of the pleadings. The fact that the most recent edition may be an improvement over earlier editions does not necessarily make it appropriate to allow the amendments. This is because no adequate explanation has been given as to why the amendments were not advanced sooner. The changes are substantial and, if allowed, would require the fifth defendant to respond to allegations about his knowledge and conduct. The changes have the potential to cause distress and prejudice to an individual in Mr Douglas' position. In the absence of an adequate explanation for why the changes were not brought forward sooner, I am not satisfied that it is appropriate to give leave to make the amendments.

[178] Therefore, in addition to the plaintiff failing to satisfy the requirement of r 376(4)(b), he has not satisfied the requirement of r 376(4)(a).

[179] Leave to make the amendments pleaded against the fifth defendant should not be allowed. As noted, the amendment statement of claim filed 30 March 2015 will be struck out to the extent that it pleads allegations against the fifth defendant. The result will be that the plaintiff's original pleading against the fifth defendant will stand, subject to directions being made about the preparation of a new pleading which suitably particularises the plaintiff's claim against the fifth defendant as well as his claims against the other defendants.

**Proposed amendments affecting the seventh defendant**

[180] The original statement of claim alleged that in the course of acting for the plaintiff after the Exit Meeting and in relation to the Transaction Documents, the seventh defendant breached its duty of care to him in that it failed to:

> "(a) advise that there might be methodologies that might be adopted to value the assets of the estate other than that used in the net pastoral assets calculation referred to in paragraph 15; *[this is a reference to the calculation of the potential net asset value of the properties of the Stanbroke Group provided by PwC dated 7 November 2007]*
>
> (b) advise whether there were mechanisms to effect transfers of, or changes to beneficial interests in the assets of the estate in such a way as to avoid taxation liabilities accruing;

(c) advise Mark to obtain independent accounting, valuation, and taxation advice, having regard to PwC acting for multiple clients with conflicting interests;

(d) advise Mark to not enter into, or execute any agreement except after obtaining independent accounting, valuation, and taxation advice; and

(e) advise Mark whether the agreement reached at the Exit Meeting was enforceable against him."

In my view, subparagraphs (c) and (d) should be understood to refer to the accounting, valuation and taxation advice provided by PwC and its alleged lack of independence. The subparagraphs, taken together, allege a failure to advise the plaintiff to obtain independent accounting, valuation and taxation advice, rather than act upon PwC's advice, and to not enter into a binding agreement until he had done so.

[181] The proposed pleading is substantially different in its claims against the seventh defendant. It pleads new matters about what allegedly was within the field of knowledge and experience of solicitors experienced in undertaking legal work and advising in relation to large pastoral property transactions, including four factors which are said to determine value, and what such solicitors would know about the value of a group of companies "involving an integrated business". Paragraph 72 of the proposed pleading alleges that such an experienced solicitor would have:

"(a) advised the Plaintiff to the effect that the value of his interest in the Menegazzo Group was dependent upon the accuracy of the valuation of the pastoral properties;

(b) obtained a copy of the valuation opinion prepared by the Fifth Defendant and familiarised him or herself with its terms and the circumstances in which that valuation opinion had been provided and, in particular that:

(i) the Fifth Defendant had been requested to provide the valuations on 31 October 2007, and based upon the number and nature of the properties which it purported to value, it was unclear what level of investigation the Fifth Defendant had undertaken;

(ii) the valuation opinion stated that it was not a 'sworn valuation';

(iii) on its face, the valuation opinion prepared by the Fifth Respondent did not identify that Rod Douglas was a registered valuer, did not identify what (if any) comparable sales had been relied upon and did not identify what valuation methodology (if any) had been applied by the Fifth Defendant in valuing the Meatworks and the feedlot;

(iv) the valuation opinion did not appear to address or attribute any value to any synergies or economic advantages arising from the Menegazzo's aggregation of large pastoral holdings and its integrated business operations;

(c) advised the Plaintiff that there was no binding agreement to sell his interest in the Menegazzo Group to the Second Defendant, the Third

Defendant, the Fourth Defendant until he executed the Deed and the Transaction Documents;

(d) advised the Plaintiff that he should obtain a further valuation of the Menegazzo Group before he executed the Deed and the Transaction Documents."

[182] By contrast, the original statement of claim simply pleaded that by reason of the seventh defendant's engagement it owed the plaintiff "a duty of care".

[183] Paragraph 73 pleads new, and different allegations of breach of duty. These are that the seventh defendant:

"(a) failed to advise the Plaintiff to the effect that the value of his interest in the Menegazzo Group was dependent upon the accuracy of the valuation of the pastoral properties;

(b) failed to inquire of the Plaintiff the basis upon which his share in the Menegazzo Group which was to be sold to the Second Defendant, the Third Defendant and the Fourth Defendant had been determined;

(c) failed to obtain a copy of the valuation opinion prepared by the Fifth Defendant;

(d) failed to advise the Plaintiff that it had not obtained a copy of the valuation opinion prepared by the Fifth Defendant;

(e) alternatively, if the Seventh Defendant did obtain a copy of the valuation opinion prepared by the Fifth Defendant, the solicitors on behalf of the Seventh Defendant with the conduct of the matter of behalf of the Plaintiff:

(i) failed to familiarised himself as to its terms and the circumstances in which that valuation opinion had been provided namely, as to the matters pleaded in subparagraph 72(b)(i) to (iv);

(ii) failed to advise the Plaintiff of the matters pleaded in subparagraph 72(b)(i) to (iv);

(f) failed to advise the Plaintiff that there was no binding agreement to sell his interest in the Menegazzo Group and under the Will of Peter Menegazzo to the Second Defendant, the Third Defendant, the Fourth Defendant and that he should not execute the Deed and the Transaction Documents before obtaining a further valuation of the Menegazzo Group;

(g) failed to advise the Plaintiff that he should obtain a further valuation of the Menegazzo Group on the basis that, as the pastoral properties were part of an integrated cattle breeding, backgrounding, fattening, feed lotting and slaughter business, that may give the Menegazzo Group a greater value than the sum of the individual properties valued in isolation."

**A new cause of action?**

[184] A comparison between paragraph 50 of the original statement of claim and paragraph 73 of the proposed pleading reveals a number of differences, apart from the fact that the allegation in subparagraph 50(b) of the original statement of claim about taxation liabilities is not pursued. In general, the focus of the original statement of claim was on the PwC "Asset Valuations" pleaded in paragraph 15 of that pleading. Paragraph 50 did not refer to the fifth defendant or the opinions of value given by the fifth defendant in respect of pastoral and other properties of the Stanbroke Group. The focus of the original claim against the seventh defendant was on PwC's lack of independence. There was no reference to any lack of independence on the part of the fifth defendant. Indeed, there was no reference in paragraph 50 or other parts of the pleading against the seventh defendant to the fifth defendant at all. There was no reference to alleged deficiencies in the fifth defendant's valuations.

[185] By contrast, the proposed pleading makes no express reference to PwC and PwC's possible lack of independence. The concern is with an alleged failure to obtain a copy of the fifth defendant's valuation opinion. There is an alternative allegation that if the seventh defendant obtained a copy of the fifth defendant's valuation opinion the relevant solicitors failed to familiarise themselves with its terms and failed to advise the plaintiff of the matters pleaded in proposed subparagraph 72(b)(i) to (iv) about the valuation's alleged shortcomings.

[186] The proposed case against the seventh defendant is quite different to the original case. As the seventh defendant submits, the proposed pleading sets up "multiple new breaches of duty and those breaches of duty are quite different from the breach previously pleaded". Originally, there was no direct and specific complaint about a failure to detect errors in the work of another consultant. Now, the plaintiff wishes to contend that the seventh defendant failed to do so. I accept the seventh defendant's submission that the effect of the proposed amendments is to add causes of action. The amendments cannot be said to simply be further particulars of a cause of action for breach of duty that has already been claimed. By the time the application to amend was made, the limitation period for these new causes of action, whether in contract or in negligence, had ended.

**Substantially the same facts?**

[187] I do not accept the plaintiff's submission that any new causes of action against the seventh defendant arise out of the same or substantially the same facts for which relief has already been claimed. As with his similar submissions in respect of the fifth defendant, the argument that the "essential breach" is the same in each pleading cannot be accepted. The plaintiff's submissions characterise the essential breach as "failing to properly advise the plaintiff in relation to the proposed transaction". However, this identifies the various breaches of duty, each of which constitutes a cause of action, collectively and at far too high a level of abstraction. Subparagraph 50(a) of the original statement of claim alleged a breach in failing to advise about possible alternative methodologies than that used *by PwC*. It did not refer to the fifth defendant's valuation or its methodologies. The original statement of claim did not suggest that there was a duty to obtain and critique the fifth defendant's opinions of value, and a correlative breach of duty for having failed to do so.

[188] As I have noted, subparagraphs 50(c) and (d) of the original statement of claim should be read together. If, however, subparagraph 50(d) might be thought to be sufficiently broad

or vague to extend to a valuation of pastoral properties by the fifth defendant then, as Pincus JA observed in *Draney v Barry*, one cannot evade the plain intention of the rule by inserting in a pleading an allegation which is vacuous or so vague as to be devoid of any ascertainable meaning.[82] Subsequent decisions have affirmed that a plaintiff cannot rely upon a broad and vague allegation so as to submit that any new cause of action arises out of the same facts, or substantially the same facts, as those which fell within such a content-free zone. If subparagraphs 50(c) and (d) were not to be properly interpreted as referring to the PwC advice and its alleged lack of independence, then the inclusion within those subparagraphs of the fifth defendant's valuation and its supposed inadequacies would depend upon the breadth and vagueness of the pleading, and its failure to plead within those subparagraphs material facts which would permit the comparison required by r 376(4)(b). In any case, the proposed subparagraph 72(d) is concerned with obtaining a further "valuation of the Menegazzo Group". The fifth defendant was not asked to provide a valuation of the Menegazzo Group, and did not do so. Therefore, to the extent that subparagraph 50(d) of the original pleading might be argued to extend to obtaining an independent valuation to replace that obtained from the fifth defendant (an interpretation which the subparagraph does not bear), subparagraph 73(d) of the proposed pleading is referring to advice to obtain a valuation of something quite different to a valuation of pastoral and other properties.

[189] Subparagraph 73(e) of the proposed pleading relates to the fifth defendant's methodology. Notably, the original statement of claim did not allege against the fifth defendant an error of methodology in failing to value the Menegazzo Group as a whole, and in doing failing to capture the value that it had as an "integrated business". Instead, this allegation of breach was levelled against PwC in subparagraph 60(d) of the original statement of claim. The original statement of claim's allegations against the seventh defendant concerning lack of independence on the part of PwC and the need to obtain independent advice before executing any agreement did not make any allegation about the methodology adopted by PwC, let alone any error in the methodology adopted by the fifth defendant, or that these errors of methodology should have been known to a solicitor in the seventh defendant's position.

[190] The plaintiff argues that if he had been requested to give further and better particulars of the allegation contained in subparagraph 50(d) of the original statement of claim then he would have answered that request by pleading the matters which now appear in subparagraph 73 of the new pleading. However, any such particulars would not have been about the need to obtain *independent* advice. Instead, they would have been about why the fifth defendant's advice was allegedly inadequate. The critical point is that the original statement of claim did not refer to such matters in framing the duty of care which the seventh defendant allegedly owed and the respects in which that duty of care was breached. If the plaintiff intended to rely on methodological deficiencies in the fifth defendant's valuation it was required to plead them as material facts. If the matter had gone to trial then an attempt to introduce evidence in this regard in the plaintiff's case against the seventh defendant would have been met by an objection on the grounds of surprise.

[191] The new pleading against the seventh defendant contains new material facts about the content of its duty. It contains new material facts about the seventh defendant's alleged breaches of duty. These are new causes of action which rely upon the new material facts.

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[82] [2001] QCA 336.

They are not further particulars of an existing cause of action. The following passage of the judgment of the Court of Appeal in *Pianta v BHP Australia Coal Ltd* is apposite:

> "The facts out of which each of the causes of action arose were those giving rise to the duty of care, those which constituted a breach of that duty and the fact of injury. The submission that the duties of care owed by the respondent to the applicant in each case were the same because the parties were the same and they were, in each case, in the relationship of employer and employee is correct only in a general sense. **Relevantly the precise duties owed are correlative to the breaches of those duties** and, as the applicant conceded, **the facts constituting the breaches of duty in each case were quite different**; neither the same nor substantially the same. And it follows that if the second accident gave rise to a new cause of action the damage was new and consequently different even though it may have been of the same kind.
>
> **As none of the facts constituting the essential elements of the two causes of action was the same and those constituting the elements of duty and breach of duty were not substantially the same** the learned District Court Judge was plainly right in concluding that the cause of action arising out of the accident which occurred on 22 January did not arise out of substantially the same facts as the cause of action pleaded."[83]

[192] In summary, the material facts which are pleaded for the first time in the plaintiff's case against the seventh defendant are quite different to those previously pleaded. As noted, they extend to methodological and other errors in the valuation opinions proffered by the fifth defendant and the seventh defendant's alleged failure to detect them. They extend to an alleged breach of duty in failing to give advice about the need to obtain a fresh valuation of the Menegazzo Group. The new breach of duty pleaded in paragraph 73(a) of the proposed pleading is a new allegation that the seventh defendant failed to state what was perhaps obvious, namely that the value of the plaintiff's interest in the Menegazzo Group was dependent on the accuracy of the valuation of the pastoral properties. New subparagraph 73(b) is about a failure to inquire about the basis on which the plaintiff's share in the Menegazzo Group had been determined. Each new cause of action relies on additional facts and substantially different facts to those previously pleaded. This is not a case of a "change of focus". Each new cause of action does not arise out of the same or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the plaintiff. This is not a case in which there has been a change of focus with "elicitation of additional details".[84] The new causes of action do not satisfy the requirement of r 376(4)(b).

**Is it appropriate to give leave to make the amendments?**

[193] This makes it strictly unnecessary to consider whether it is appropriate to grant leave to make the amendments which introduce new causes of action for which the relevant limitation period has expired. It is unnecessary to repeat in this context, the history of the proceedings. Relevantly, so far as the seventh defendant is concerned, the proceeding was not served upon it until 20 August 2014. It complained about the original statement of claim and eventually an amended statement of claim was filed on 30 March 2015. That statement of claim was struck out as against the seventh defendant on 8 May 2015.

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[83] [1996] 1 Qd R 65 at 68 (emphasis added)
[84] *Draney v Barry* [2012] 1 Qd R 145 at 164.

Another version of the statement of claim was formulated and then abandoned in October 2015.

[194] The plaintiff's solicitors have explained the somewhat tortuous history of the matter prior to its commencement, and the comings and goings of barristers and solicitors who have advised the plaintiff over a period of about eight years. General material about the history of the matter does not descend to any detail in explaining the significant change in direction of the plaintiff's case against the seventh defendant. I should add that the plaintiff in correspondence with the solicitors representing the fourth defendant responded to requests under r 222 for the production of documents on the basis that the rule was not engaged or that legal professional privilege applied to the documents. There has been no argument before me about waiver of legal professional privilege and the plaintiff is not to be criticised for maintaining it. However, the plaintiff has not disclosed in any informative way why the new allegations were not made much earlier. In the circumstances, one is left to speculate whether a case of the kind sought to be advanced in the proposed pleading against the seventh defendant (and, for that matter, against the fifth defendant) was ever considered by the plaintiff's previous legal advisers. One cannot say whether or not they did and whether or not they thought that it was unmeritorious. There appears, however, to have been no impediment in the period between late 2007 and November 2015 to the plaintiff and his legal advisers considering whether the content of the duty of care which the seventh defendant owed him extended to the matters which are now pleaded and whether the seventh defendant's duty of care was breached in the respects now alleged. This is not a case in which it is suggested that some evidence or documents have recently emerged, following which new investigations have been called for.

[195] In short, it was open to the plaintiff to formulate the kind of cases he now seeks to formulate against the fifth defendant and the seventh defendant in relation to alleged methodological errors in the fifth defendant's valuation and the failure of the seventh defendant to detect them. No adequate explanation has been given as to why these matters were not raised earlier. I am not prepared to infer that it was because no previous legal adviser (and there have been many) did not turn his or her mind to the methodology adopted by the fifth defendant, and whether or not the seventh defendant should have considered the adequacy of the fifth defendant's valuation. I am not prepared to infer that because the original pleader in paragraph 15 was critical of alleged methodological shortcomings in PwC's valuation exercise in failing to consider the value of an integrated business. No similar allegation was made against the fifth defendant and no allegation was made against the seventh defendant of having failed to detect some methodological shortcoming in the PwC valuation.

[196] There appears to have been no impediment over the years to the plaintiff seeking professional advice and expert opinion about these matters and about whether a reasonably competent solicitor would have advised about such matters. The plaintiff's material does not indicate when he sought and obtained expert opinion in relation to matters affecting his claim against the fifth defendant and, more importantly for present purposes, the seventh defendant. If he did not do so, there is no explanation as to why this was not done. If he did, there is no indication of why matters which are now pursued were not pursued then.

[197] In short, no adequate explanation has been given as to why the case which the plaintiff now seeks to prosecute against the seventh defendant was not brought forward sooner than it was.

[198] In circumstances in which:

(a) the proposed amendments advance a very different case against the seventh defendant;

(b) the proceeding was not commenced and served upon the seventh defendant until more than six years after the events in question;

(c) the conduct of the proceeding against the seventh defendant since then has not reflected the plaintiff's undertaking to proceed with expedition and in accordance with the principles contained in r 5; and

(d) there has been no adequate explanation as to why the new matters were not raised sooner;

I am not satisfied that it is appropriate to allow the amendments which introduce new causes of action against the seventh defendant.

**Summary – seventh defendant**

[199] In summary, the proposed pleading against the seventh defendant raises new causes of action which were current when the proceeding commenced but which had expired by the time the application was made. The new causes of action do not arise out of the same facts or substantially the same facts as a cause of action for which relief had already been claimed. I do not consider that it is appropriate to give leave to make an amendment to include the new causes of action. I will allow, however, an application to the amended claim to introduce, for what it is worth, a cause of action for breach of contract on the basis that the breach of contract claim reflects the concurrent duty of care alleged in the original statement of claim and that the allegations of breach of contract are the same as the allegations of breach of duty in tort.

**Orders and directions**

[200] On 15 March 2016, I made consent orders in relation to the application so far as it concerned the first defendant and the first defendant's strike-out application.

[201] For the reasons which I have given, I decline to make an order pursuant to r 377(1)(c) granting leave to amend the claim filed on 6 November 2013 in terms of the amended claim that was an exhibit to the affidavit of Ms Gleeson sworn 27 November 2015. I will grant leave to amend the claim to introduce a claim for breach of contract against the seventh defendant. I will grant leave to the plaintiff to amend his claim against the second, third and fourth defendants so that the declaratory relief which he claims and any claim for equitable compensation, equitable damages or breach of fiduciary duty as against the second, third and fourth defendants apply to the plaintiff's beneficial interest in the assets of the Menegazzo Group (as defined in a new pleading). For the reasons which I have given, I decline to grant leave to the plaintiff to amend his statement of claim to allege that the Exit Deed and the Transaction Documents were affected by equitable common mistake. The plaintiff's claim in respect of the alleged purchase of his

"beneficial interest in the assets of the Menegazzo Group and the estate of the late Peter Menegazzo" should be confined to a claim for equitable compensation or equitable damages or equitable damages for breach of fiduciary duty (the proposed amended claim uses each of these terms).

[202] I decline the plaintiff's application for leave to amend his pleading pursuant to r 375 and if necessary r 376 insofar as it relates to the fifth defendant and the seventh defendant either in the form of the further amended statement of claim exhibited to the affidavit of Ms Gleeson sworn 27 November 2015 or in the form of exhibit 1 to the extent that the pleading introduces new causes of action.

[203] I will, however, grant leave pursuant to r 375 to the plaintiff to amend his statement of claim in some respects. For the reasons which I have given, there is utility in terms of the just and expeditious resolution of the real issues in the proceeding for a number of the improvements which have been made by the proposed pleading to be introduced. These include the better identification in the body of the statement of claim of the corporate and trust structure of the Menegazzo Group. It would be retrograde to require the plaintiff and the other parties to proceed to trial on the basis of the original statement of claim. The improvements which have been made in very late 2015 and early 2016 should not be lost. However, any new pleading needs to be confined to causes of action for which relief has already been claimed in the proceeding, save for the expansion of the plaintiff's claim for breach of trust or breach of fiduciary duty in respect of the fair dealing rule in respect of the Menegazzo Group (properly defined). Whilst the plaintiff should be confined to the causes of action for breach of duty which have previously been claimed, this should not preclude the adoption of the improvements which I have already mentioned and the provision of such further and better particulars as are necessary to enable the defendants to file and serve defences and for the matter to be brought to an early resolution.

[204] As will be apparent from my reasons, the new pleading is not to include fresh allegations about the use which the second, third and fourth defendants are alleged to have made of the plaintiff's beneficial interest in the assets of the Menegazzo Group. Instead, the claim is confined to one for compensation and damages with such compensation or damages to be assessed as at a convenient date on or about the date of the relevant transactions.

[205] I will allow the plaintiff a reasonable time to formulate a proposed amended claim and proposed new pleading to reflect these reasons. Because of the need for care in the formulation of a new pleading and a proposed amended claim to reflect these reasons, I propose that the plaintiff prepare a draft amended statement of claim and circulate it to the defendants. Any constructive comments may be taken on board, and I trust that the form of the amended claim and the form of the amended statement of claim can be agreed. If not, I will review the matter before making orders granting leave in the respects which I have indicated.

[206] I also expect the parties to confer with a view to agreeing directions for the progress and early resolution of the proceeding. Given the number of parties, it may be cost-effective for such a conference to be in person or by telephone so as to avoid a whirlwind of legal correspondence. However, one party may wish to take the initiative and propose directions. I expect that the directions will address the following:

1. The close of pleadings.

2. A Document Plan which will lead to the identification and exchange of a limited number of critical documents that are likely to be tendered at any trial and are likely to have a decisive effect on the resolution of the matter either at trial or at a mediation.

3. That the parties defer disclosure until a Document Plan is agreed.

[207] I intend to direct the parties to adopt a proportionate and efficient approach to the management of both paper and electronic documents in the proceeding and that any document plan facilitate any trial being conducted in accordance with the Supreme Court's e-trial program.

[208] The parties should confer at an appropriate time about whether an expert or experts are to be appointed in relation to valuation or other issues. The parties are directed to avoid generating unnecessary costs in relation to the briefing of separate experts until the parties have conferred and the Court made appropriate directions in relation to expert evidence.

[209] Once the real issues in dispute are narrowed following the close of pleadings, the matter is one which might benefit from alternative dispute resolution. Therefore, the parties are directed to formulate directions for the mediation of the matters in dispute in the proceeding.

[210] The only direction which I propose to make at this stage is that by a date to be fixed the parties confer for the purpose of agreeing steps for the just and expeditious resolution of the real issues in the proceeding at a minimum of expense. That conference may be in person, by video conference or by telephone conference. Part or all of the conference may be held "without prejudice" by express agreement of the parties, and the parties may agree to the appointment of an independent person to facilitate the conference.

[211] Within seven days of that conference the parties should provide a brief joint report to my Associate as to how it is intended to progress the proceeding to resolution and propose directions. The matter will be listed for review, if required. Otherwise, I will make directions and orders in the form agreed by the parties.

[212] I will hear the parties, if necessary, on the question of costs. However, I expect the parties to resolve appropriate costs orders in the light of my reasons. I grant liberty to apply.