SUPREME COURT OF QUEENSLAND

CITATION:	*Paul v Westpac Banking Corporation* [2016] QCA 252
PARTIES:	**JEFFREY DAVID PAUL** (appellant) **v** **WESTPAC BANKING CORPORATION** ACN 007 457 141 (respondent)
FILE NO/S:	Appeal No 9369 of 2015 SC No 1603 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 25 August 2015
DELIVERED ON:	7 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2016
JUDGES:	Fraser and Gotterson JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the order dismissing the application.** **3. Order instead that the appellant have leave pursuant to r 376(4) of UCPR to amend his claim and statement of claim in the form exhibited to the affidavit of Darrell Adam Heperi Kake filed on 4 August 2015.** **4. Order the respondent to pay the appellant's costs of the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – OTHER MATTERS – where the appellant was refused leave to amend his claim and statement of claim to include a new cause of action for which the period of limitation had ended – where it was found that the new cause of action did not arise out of the same or substantially the same facts as the causes of action for which relief had already been claimed – where the respondent's additional argument that other matters made it inappropriate for the court to grant leave was rejected – where the appellant contends that the primary judge erred in finding that the new cause of action did not arise out of

substantially the same facts as the existing causes of action – where the respondent contends that the primary judge was correct in so finding – where the respondent further contends that it was not an appropriate case for leave to be granted – whether the new cause of action arises out of substantially the same facts as the original causes of action – whether it is appropriate under the circumstances to allow the amendment – whether leave granted to the appellant to amend his claim and statement of claim

Australian Securities and Investments Commission Act 2001 (Cth), s 12CC, s 12GD, s 12GF
Trade Practices Act 1974 (Cth), s 51A, s 51AC, s 82, s 87
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 376, r 376(4)

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
National Australia Bank Limited v Smith [2014] NSWSC 1605, cited
Zonebar Pty Ltd v Global Management Corporation Pty Ltd [2009] QCA 121, distinguished

COUNSEL: K A Barlow, with D J Thomae, for the appellant
G D Sheahan for the respondent

SOLICITORS: Quinn and Scattini Lawyers for the appellant
McKays Solicitors for the respondent

[1] **FRASER JA:** Rule 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') provides:

> "The court may give leave to make an amendment to include a new cause of action only if–
> (a) the court considers it appropriate; and
> (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment."

[2] A judge in the trial division refused the appellant leave to amend his claim and statement of claim to include a new cause of action for which the period of limitation had ended. The primary judge decided that the new cause of action did not arise out of the same or substantially the same facts as the causes of action for which relief had already been claimed in the proceeding. The primary judge did not accept the respondent's additional argument that other matters made it inappropriate for the court to grant leave to amend. The appellant contends that the primary judge erred in finding that the new cause of action did not arise out of substantially the same facts as the existing causes of action. The respondent contends that the primary judge was correct in so finding, and that in any event it is not an appropriate case for the grant of leave to amend.

[3] I will first address the issue upon which the primary judge's decision turned, namely, whether the cause of action sought to be added by amendment arises out of

substantially the same facts as the causes of action pleaded in the original statement of claim.

[4] The appellant's claim seeks relief from a guarantee and associated mortgages the appellant gave the respondent to secure repayment of money the respondent lent to a company of which the appellant's son is the sole director and shareholder. The purpose of the loan was to enable the borrower to complete the purchase of a motel. The original claim sought an order under s 87 of the *Trade Practices Act* 1974 (Cth) that the appellant be discharged from all liability under the guarantee and awarded damages pursuant to s 82 of the *Trade Practices Act* 1974, or an injunction pursuant to s 12GD of the *Australian Securities and Investments Commission Act* 2001 (Cth) to preclude enforcement of the guarantee and damages pursuant to s 12GF of that Act. (I will refer to these claims collectively as "the statutory claim".)

[5] The original statement of claim alleged that the appellant entered into the guarantee as a result of representations by the respondent. The relevant alleged representations are that:

(a) The borrower did not have any financial problems and the income from the motel meant it would not default under the loan to the respondent ("the financial capacity representation").

(b) Because of the position and value of the motel there was no likelihood that the guarantee would be called upon ("the viability representation").

(c) The appellant's son had sufficient management expertise to satisfy the respondent that he could operate the motel so as to meet the obligations of the borrower under the loan ("the management capability representation").

[6] The statement of claim alleged that those representations were misleading and deceptive because, so far as is presently relevant, the appellant's son was unemployed and had no assets, the annual loan repayments exceeded the motel's current net annual income stated in a valuation obtained by the respondent before it lent the money, that valuation stated that the motel required a reasonable degree of management skills to maintain good occupancy but the appellant's son had no experience or formal qualifications in managing a motel or other like business, and (paragraph 17) "so far as [those representations] were as to a future matter, the Defendant had no reasonable basis for making the said representations." (In this respect the statement of claim invoked the provision in s 51A of the *Trade Practices Act* 1974 that a representation by a corporation "with respect to any future matter" is to be taken to be misleading if the corporation does not have reasonable grounds for making the representation.) The statement of claim also alleged that it was unconscionable for the respondent to enforce the guarantee against the appellant and that the respondent's conduct contravened s 51AC of the *Trade Practices Act* 1974 or s 12CC of the *Australian Securities and Investments Commission Act* 2001.

[7] The proposed amendments to the claim and statement of claim abandon the unconscionable conduct claim and pleading, and add a claim and pleading of damages for breach of contract. The existing statement of claim alleges that the Code of Banking Practice applies to the guarantee but it does not refer to any particular clause or allege a breach of any provision of it. The amendments allege that:

(a) Clause 25.1 of the Code of Banking Practice, which is incorporated as an express term of the guarantee, provides that; "[b]efore we offer or

give you a credit facility … , we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and in forming our opinion about your ability to repay it."

(b) In certain "premises" (which substantially repeat, with some additional details, the allegations about the borrower's financial capacity, the viability of the motel, and the appellant's son's management expertise) the respondent "did not exercise the skill and care of a diligent and prudent banker when it approved the Loan because…". The pleaded reasons for that conclusion state in summary form the facts alleged for the existing claim that the respondent's representations to the appellant were misleading and deceptive, and that the borrower and the appellant's son could not meet their monthly repayment obligations under the loan from the motel's cash flow, the borrower and the appellant's son could not meet their obligations to repay the loan, and the respondent "applied its credit assessment methods and formed an opinion that [the borrower and the appellant's son] had the ability to make the repayments under the Loan and repay the Loan when… they could not."

(c) That breach of contract caused the appellants to suffer the same loss pleaded in the existing statement of claim.

[8] It became apparent during the course of argument in the appeal that this pleading was intended to advance a case that the respondent breached cl 25.1 of the Code of Banking Practice, incorporated as a term of the guarantee, by not exercising the care and skill of a diligent and prudent banker in selecting and applying the respondent's credit assessment methods and in forming its opinion about the borrower's ability to repay the loan to the respondent. This case was said to be inspired by a case decided in the Supreme Court of Victoria in 2014, *Commonwealth Bank of Australia v Doggett*.[1] Hargrave J found that the incorporation of cl 25.1 as a term of the guarantee in that matter comprehended a promise to guarantors that, before the bank offered the borrower a credit facility, the bank would exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the borrower's ability to repay, that the bank had breached the duty upon the facts of that case, and that this was causative of the loss incurred by the guarantors as a resulting of entering into the guarantee. Those conclusions were affirmed on appeal: *Doggett* v *Commonwealth Bank of Australia*.[2] Some apparent deficiencies in the appellant's pleading of that case were discussed during the hearing of this appeal but any such pleading deficiency was not a ground of the primary judge's decision. For the purposes of this appeal, it should be assumed that the amendment pleaded an arguable claim for damages for breach of cl 25.1 as it was construed in the Victorian Court of Appeal. I did not understand the respondent to contend for a different approach in this appeal, although it would not be precluded from adopting a different stance at a later stage of the litigation.

[9] The primary judge held that the new cause of action for breach of contract did not arise out of the same facts as the existing causes of action. The material facts were the contractual term, the breach of that term, and the damage caused by the breach. Although the existing statement of claim alleged that the guarantee provided that the Code of Banking Practice applied to the guarantee, it did not allege that cl 25.1 was

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1 [2014] VSC 423 at paras 142 paras 129 – 133, 142, and 156.

2 [2015] VSCA 351. An application for special leave to appeal from this decision was refused: [2016] HCASL 114.

a term of the contract, it did not allege a breach of that term or facts to prove breach, and it did not allege that the appellant's liability under the Guarantee was caused by a breach of that term. The primary judge regarded it as a difficult question whether the new cause of action arose out of substantially the same facts. Whilst that might be so in relation to the allegation that the guarantee incorporated the Banking Code of Practice, there was no specific or full equivalent of the allegation of breach of cl 25.1. On a paragraph - by - paragraph basis, a substantial number of the facts relied upon in support of the allegation of a breach of contract appeared in the existing pleading, but there was no real equivalent of the allegation of breach of cl 25.1. The allegations that the borrower and the appellant's son did not have the capacity to meet loan repayments and the appellant's son did not have management experience came close to the allegation of breach of cl 25.1, but the "sting" of the new cause of action also included reference to the standard required of a diligent and prudent banker in selecting and applying its credit assessment methods and forming its opinion about the borrower's ability to repay. The primary judge accepted submissions for the respondent that this required a factual enquiry and preparation by the bank about the basis of those credit assessment methods in 2008 which was likely to require expert evidence about matters not previously raised. The primary judge concluded that, whilst the question whether the new cause of action arose out of substantially the same facts was finally balanced, the "change of focus" for the new cause of action was such that it did not arise out of substantially the same facts.

[10] The appellant contended that the primary judge erred in that conclusion by taking into account possible facts the respondent might allege and seek to prove in the absence of any evidence about those possible facts, concluding that the suggested "change of focus" meant that the new cause of action did not arise out of substantially the same facts as the pleaded causes of action, and failing to address the question whether the additional facts pleaded to support the new cause of action arose out of substantially the same "story" as that which would have to be told by the appellant to support the original causes of action.

[11] The appellant cited Thomas JA's statement in *Draney v Barry*[3] that, "[i]f 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." (reference omitted.) In *Thomas v State of Queensland*[4] the Court regarded a previous judicial statement as encouraging "a fairly broad brush comparison between the nature of the original claim and that to which it is sought to be amended", so much accorded with Thomas JA's statement in *Draney v Barry*, and his Honour's reference to "the story" was "a shorthand reference to the matters the plaintiff has to prove". The appellant acknowledged that the allegation of a contractual duty of care in selecting and applying credit assessment methods and forming an opinion about the borrower's ability to repay the loan was new (although the term was part of the Code of Banking Practice which always had been alleged to be incorporated into the guarantee), and that the allegation of a breach of that term was new, but the appellant argued that it was a reasonable inference from the existing allegations that the respondent had applied its credit assessment methods and formed a reasonable opinion about the capacity of the borrower to repay before the appellant entered into the guarantee. Although the respondent might seek to raise

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3 [2002] 1 Qd R 145 at [57] (McMurdo P agreeing).

4 [2001] QCA 336 at [19] (McMurdo P, Thomas JA and Holmes J).

new facts in its defence about its assessment of the loan, nearly all of the facts the appellant had to prove to establish the new cause of action were already pleaded.

[12] The respondent argued that there was no error in the exercise of the discretion by the primary judge. The primary judge was not obliged to restrict his consideration only to the facts required to be pleaded by the plaintiff. *Zonebar Pty Ltd v Global Management Corporation Pty Ltd & Anor*[5] supported the primary judge's consideration of the "change of focus" involved in the appellant's reliance upon an obligation which was separate from the obligations in the existing pleading. The core of the proposed new cause of action concerned what a reasonably prudent lender would have done in assessing the original loan application, what the respondent in fact did, and whether the differences between those matters could amount to a breach of a contractual obligation. This was not within the original pleading. No contractual term or breach had previously been alleged. The new claim would require reference to broader lending practices within the financial industry and within the respondent. It would convert a dispute about a limited conversation between the appellant and the respondent's bank manager into a much broader dispute. The respondent argued that, the proposed amendment had no relation with the pleaded case. The respondent referred to cases in which expert banking evidence had been adduced in similar situations[6] and argued that it would be necessary for the appellant to adduce expert evidence to establish the proposed new cause of action.

[13] The respondent argued that the current pleading did not require or permit an investigation of the respondent's assessment process for the loan. The proposed pleading would create a new issue about the standard of care and skill owed by a diligent and prudent banker both in selecting and applying the respondent's credit assessment methods and in forming its opinion about the borrower's ability to repay the loan. It raised a new issue about the bank's credit assessment methods and required identification of its relevant policies. The respondent acknowledged that the existing allegations inferentially comprehended allegations about the manner in which the bank performed its credit assessment, but that was a much narrower case than that which was proposed by the amendment. The respondent argued that this was a "distinct and different duty to that already pleaded" of a kind referred to in *Hartnett v Hynes*.[7]

Does the new cause of action arise out of substantially the same facts as an existing cause of action?

[14] Like the primary judge, I regard the question whether the new cause of action arises out of substantially the same facts as difficult and finally balanced. For the following reasons I consider that the better view is that the contractual cause of action should be regarded as arising out of substantially the same facts as the existing statutory cause of action.

[15] In an appropriate case leave to amend to add a new cause of action which is statute barred may be granted even though it involves reliance upon facts in addition to those out of which a pleaded cause of action arises, provided that those additional facts are substantially the same as facts already pleaded.[8] The question in each case is whether the facts out of which a new cause of action arises are substantially the

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5 [2009] QCA 121.
6 For example, *National Australia Bank v Smith* [2014] NSWSC 1605 at [190].
7 [2009] QSC 225 at [26].
8 *Draney v Barry* [2002] 1 Qd R 145 at [57]; *Thomas v State of Queensland* [2001] QCA 336 at [19].

same as facts relied upon in a cause of action for which relief has already been claimed in the proceeding. As has been mentioned in other cases, this may involve questions of degree and fine judgment, but the answer to that question should be informed by an appreciation that the policies underlying the applicable statute of limitation may be inappropriately undermined if the required analysis is conducted at too high a level of generality. If those underlying policies are not threatened by a proposed amendment, the test in UCPR r 376(4)(b) may be found to be satisfied even though the new claim involves some variation in the facts.[9] This approach is consistent with the careful way in which the rule has generally been applied since it was enacted.

[16] The alleged facts out of which the contractual claim arises may be broadly summarised as follows:

(a) The contract included an express term (cl 25.1 of the Code of Banking Practice) by which the respondent promised to exercise the care and skill of a diligent and prudent banker in selecting and applying the respondent's credit assessment methods and in forming its opinion about the borrower's ability to repay the loan.

(b) The respondent failed to exercise the care and skill of a diligent and prudent banker in selecting and applying the respondent's credit assessment methods and in forming its opinion about the borrower's ability to repay the loan.

(c) That failure caused the appellant loss.

(d) The amount of that loss so caused is as set out in the statement of claim.

[17] As to (b), the primary judge considered that the alleged breach of contract might be said to rely upon substantially the same facts as those already pleaded in support of the statutory claim. The respondent did not challenge that view and I record my agreement with it. As to (c), although the allegation that the appellant suffered the pleaded loss by reason of the alleged breach of contract is new, that allegation does not rely upon any fact in addition to the facts already pleaded. (The hypothesis appears to be that, if the respondent had exercised the care and skill required by cl 25.1, it would not have formed an opinion that the borrower was able to repay the loan and for that reason it would not have advanced the loan or, perhaps, the respondent would not have made the representations alleged in the statement of claim as being a cause of the appellant entering into the guarantee.) Again, the respondent did not challenge this view. As to (d), the amendment relies upon the particulars of the loss in the existing statutory claim. This too is not in issue.

[18] The nub of the primary judge's decision was that, although a substantial number of facts relied upon in support of the new contractual claim were already pleaded in support of the statutory claim, the contractual cause of action did not arise out of substantially the same facts because the focus or sting of the amendment included new allegations about the standard required of a diligent and prudent banker in selecting and applying its credit assessment methods and forming its opinion about the borrower's ability to repay. I have reached the contrary conclusion that the obligation which is now sought to be derived from an express term of the contract finds a close analogue in the facts relied upon for the existing statutory claim.

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9 J Fleming, *Civil Procedure* (1992, Little, Brown & Company, 4th ed) para 4.23, at 226, quoted by McPherson JA in *Allonnor Pty Ltd v Doran* [1998] QCA 372 at 6.

[19] The original statement of claim included allegations to the following effect. The respondent procured a written valuation of the motel which included statements about the motel's income and the necessity for certain management skills in the operator. The respondent, by its manager, said words to the effect that "he had looked at the figures of the [motel] and it was a good proposition and the bank would not be lending the money unless it was a viable venture" and that "the income from the motel accommodation alone would cover the loan repayments on the purchase of the [motel]". By those and other statements the respondent represented to the appellant that the borrower would not default under the loan, there was no likelihood that the guarantee would be called upon, and the appellant's son had satisfied the respondent that he could operate the motel so as to meet the obligations of the borrower under the loan. The respondent had no reasonable basis for making those alleged representations so far as they were about future matters. The last mentioned allegation, in paragraph 17 of the statement of claim, implied that at least some of the representations concerned future matters, and that is a viable view. The effect of that allegation is that the representations should be taken to be misleading because there were no reasonable grounds for them, in terms of s 51A of the *Trade Practices Act* 1974.

[20] In short, a focus of the existing pleading is that representations to the appellant by the respondent's bank manager that the borrower was able to and would repay the loan were misleading or deceptive because the facts revealed that the contrary was true and the respondent did not have reasonable grounds for making those representations. In *National Australia Bank Limited v Smith*,[10] Slattery J construed cl 25.1 as incorporating into finance facilities an objective, contractual standard of prudent conduct in the terms expressed in that provision. What amounts to reasonable grounds in terms of s 51A of the *Trade Practices Act* 1974 for the alleged representations presumably would be decided with reference to the standard of care and skill expected of a reasonable banker in the same position as the respondent's manager. If there is any difference between that standard and the contractual standard of a diligent and prudent banker in selecting and applying its credit assessment methods and forming an opinion about the borrower's ability to repay the loan on the other hand, the difference would appear to be quite subtle.

[21] In *Brisbane South Regional Health Authority v Taylor*[11] McHugh J referred to four rationales for the enactment of limitation periods:

> "First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. … The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible."

[22] As to the first rationale the substantial identity between facts already pleaded and the facts invoked for the contractual claim, including the similarity between the standard applicable in deciding whether the respondent did not have reasonable grounds for making the representations and the contractual standard expressed in cl

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10 [2014] NSWSC 1605 at [193].

11 (1996) 186 CLR 541 at 552 – 553. Footnotes omitted.

25.1, make it seem unlikely that the introduction of the contractual claim should introduce any substantial difficulty for the respondent in adducing relevant evidence in defence of the latter claim. The respondent emphasised its intention to adduce expert evidence, but the factual assumptions underlying any such evidence would apply in relation to the pleaded claim and no reason appears to think that the amendment would otherwise introduce any new difficulty in adducing relevant expert evidence. The substantial identity of the facts out of which each claim arises also suggests that allowing the amendment would not undermine the second or third rationale for limitation periods. The fourth rationale seems likely to be significant in this case only in relation to the question raised by r 376(4)(b) whether it is appropriate to allow the amendment, but the matters mentioned so far suggest that it is appropriate.

[23] The differences in this case between the facts underlying the statutory claim and the facts underlying the contractual claim are less significant than the differences between the facts underlying the breach of the contractual duty of care originally pleaded in *Zonebar Pty Ltd v Global Management Corporation Pty Ltd* and the proposed amendment to plead a different breach of the same contractual duty of care. This is not a case in which the "substance of the new cause of action is different in terms of the acts or omissions which give rise to it, and the adverse consequences for which damages are claimed", as was said in relation to the new claim in *Zonebar*.[12] Keane JA's rejection of the proposition that an allegation of contractual breach necessarily arises out of substantially the same facts as a different contractual breach already pleaded "simply because" the existing pleading alleges breach of the same contractual obligation does not imply that, in a different case, an allegation of breach of the same, or a different, duty may not be shown to arise out of substantially the same facts as the facts upon which an existing allegation of breach arises. As I have mentioned, the question must always be whether or not the new cause of action arises out of the same or substantially the same facts as a cause of action for which relief has already been claimed.

[24] I accept that the appellant has established his ground of appeal that the primary judge incorrectly concluded that a change of focus in the proposed amended statement of claim meant that the proposed new cause of action did not arise out of substantially the same facts as the pleaded causes of action.

[25] I would add that, whilst r 376(4)(b) does seem to refer to facts upon which the claimant for relief relies as support for the claim and the proposed amended claim (which may in some cases comprehend facts alleged in a defence), I do not accept that the primary judge erred by referring to what the respondent might seek to prove in defence of the proposed new claim. That is certainly a relevant consideration under r 376(4)(a) which the primary judge could consider together with the other jurisdictional question raised by r 376(4)(b). In any event, consideration of the likely impact of an amendment upon the defence might shed light upon the question under r 376(4)(b) whether the factual basis of the new claim is "substantially" the same as the factual basis of an existing claim for relief, including by reference to the policies underlying the relevant limitation statute.

Rule 376(4)(a) and the discretionary issues

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12 [2009] QCA 121 at [23].

[26] Whilst, as the respondent argued, the amendment comes very late, the proceeding has not yet been set down for trial. The limitation period expired about one year before the application to amend was made. The appellant filed an affidavit which explained his delay in advancing the contractual claim by reference to the developments of the law in 2014 and 2015 which were favourable to the claim (see [8] of these reasons). Furthermore, an affidavit by an employee of the respondent's lawyer exhibited a complaint made by the appellant to the Financial Ombudsman Service in about May 2011, and related documents. A letter from the Financial Ombudsman Service to the respondent dated 2 September 2011 enclosed a Dispute Form signed by the appellant and dated August 2011. The Dispute Form (which was given within the applicable limitation period) contended that the respondent breached its code of conduct in relation to the guarantee, it referred to details obtained from the valuation concerning the income of the motel and the management skills required of a motel operator, and it alleged that the respondent breached "cl 25.1 of the Code of Banking Practice". A copy letter from the respondent to the appellant dated 18 July 2011 stated that the respondent's external lawyers had completed their investigation and "found that the Code of Banking Practice has been complied with in the issuing of and the acceptance of the loan, guarantee and ancillary document".

[27] When the evidence of the respondent's investigation in 2011 of the appellant's claim of contravention of cl 25.1 is taken together with the absence of any evidence by the respondent upon the topic and the allegations in the statement of claim (filed in February 2013) of facts which do not differ substantially from those relied upon for the proposed contractual claim, the appropriate conclusion is that the appellant proved that the respondent was unlikely to be materially prejudiced by the addition of the new cause of action. That is a very significant consideration. It is not unreasonable to regard it, taken together with the appellant's explanation for his delay, as outweighing the respondent's point that the appellant's complaint to the Financial Ombudsman suggested that the appellant originally made a forensic decision not to advance the contractual claim in the original statement of claim. The respondent emphasised the aspect of the overriding philosophy of the procedural rules, expressed in UCPR r 5 of expedition, but the overarching purpose of the rules, expressed in r 5(1) comprehends justice as well as expedition: it is "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". The fact that the amendment will add some delay is certainly relevant but it is not necessarily inconsistent with rule 5; r 5(2) expresses the objective of avoiding "undue" delay. These were all matters for the primary judge to consider and there is no reason to think that they were not given such weight as they deserved.

[28] The respondent argued that the burden of its defence to the existing pleading was to deny that the representations as alleged were made, so that, if the contractual claim is not added, the respondent will not need to find and adduce evidence about its credit assessment methods. However, paragraph 24 of the defence pleads in response to paragraph 17 of the statement of claim that the respondent "denies the same on the basis that it is untrue in fact and in law and repeats and relies upon paragraphs 3(c) …". The plea goes on to refer to other paragraphs of the defence which deny that the respondent made the representations. The explanation for the denial which the respondent emphasised in argument was that some of those paragraphs deny that it made the representations, but paragraph 3(c) of the defence expressly denies allegations in the statement of claim relied upon to prove that the

representations were false (that the appellant's son had no relevant experience, had no formal qualifications in respect to management of food services, was unemployed and had no assets) and it advances a positive case in support of that denial. Furthermore, paragraph 24 of the defence also explains that paragraph 17 is untrue in fact. The respondent did not go so far as to suggest that its denial was not supported by the explanation required by UCPR r 166(4), such that it must be taken to have admitted under r 166(5) that it did not have reasonable grounds for making the alleged representations. So much is consistent with the absence of any evidence by the respondent that it had confined its conduct of the defence to the existing claim in a way which would be prejudicial to it if the amendment were allowed.

[29] I would hold that there was no error in the primary judge's view that (putting aside the question discussed under the previous heading) it is appropriate to allow the amendment. Looking at the issue afresh, my conclusions are that the test in r 376(4)(b) is satisfied, it is appropriate to allow the amendment in terms of r 376(4)(a), and for those reasons the discretion to allow the amendment should be exercised.

Proposed orders

[30] The appellant disclaimed any challenge to the order made by the primary judge that the appellant pay the respondent's costs of the application in the Trial Division. I propose the following orders:

1. Allow the appeal.
2. Set aside the order dismissing the application.
3. Order instead that the appellant have leave pursuant to r 376(4) of UCPR to amend his claim and statement of claim in the form exhibited to the affidavit of Darrell Adam Heperi Kake filed on 4 August 2015.
4. Order the respondent to pay the appellant's costs of the appeal.

[31] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[32] **DOUGLAS J:** I also agree with the orders proposed by Fraser JA and with his Honour's reasons.