SUPREME COURT OF QUEENSLAND

CITATION:	*Project Company No 2 Pty Ltd v Cushway Blackford & Associates Pty Ltd & Anor* [2011] QCA 102
PARTIES:	**PROJECT COMPANY NO 2 PTY LTD** ACN 051 834 309 (appellant) **v** **CUSHWAY BLACKFORD & ASSOCIATES PTY LTD** ACN 010 522 988 (first respondent) **ACN 066 045 645 PTY LIMITED** ACN 066 045 645 (second respondent)
FILE NO/S:	Appeal No 13097 of 2010 SC No 5192 of 2006 SC No 7296 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2011
JUDGES:	Muir and White JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed with costs.** **2. Project Company No 1 Pty Ltd (ACN 107 480 375) be added as a plaintiff in the proceedings.** **3. The plaintiffs have leave to make consequential amendments to the claim within seven days of today's date.** **4. The plaintiffs make such amendments to the statement of claim last filed in the proceedings as they may be advised within fourteen days of today's date.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PARTIES – JOINDER AND ADDITION OF PARTIES – where the appellant entered into a contract for the construction of an abattoir and associated facilities – where the respondents were engaged as subcontractors for the

construction of the abattoir and associated facilities – where there was a fire in the main switchboard of the abattoir – where the appellant brought claims in negligence and breach of contract against the respondents – where the appellant's parent company suffered the loss claimed in the proceeding – whether the primary judge erred in dismissing the appellant's applications for leave to join its parent company as a party to the proceeding and to amend the claim and statement of claim to effect the proposed joinder

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – WHERE ECONOMIC OR FINANCIAL LOSS – where the appellant's parent company suffered loss through the interruption of its business as a result of a failure in the switchboard of an abattoir – where the parent company was not a party to the relevant contract – whether a designer or builder of a commercial premises owes a duty of care to persons with whom they have no contractual relationship – whether the primary judge erred

Uniform Civil Procedure Rules 1999 (Qld), r 69(1)(b), r 377

Barrett v Enfield London Borough Council [2001] 2 AC 550, considered
Bryan v Maloney (1995) 182 CLR 609; [1995] HCA 17, distinguished
Caltex Oil (Australia) Pty Ltd v Dredge Willemstad (1976) 136 CLR 529; [1976] HCA 65, considered
Fangrove Pty Ltd v Tod Group Holdings Pty Ltd [1999] 2 Qd R 236; [1998] QCA 404, distinguished
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2002] ANZ ConvR 381; [2002] QCA 88, distinguished
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515; [2004] HCA 16, distinguished
Zumpano v Montagnese [1997] 2 VR 525, cited

COUNSEL: D J S Jackson QC, with M Brady, for the appellant
C Wilson for the respondent

SOLICITORS: DLA Phillips Fox for the appellant
Minter Ellison Lawyers for the respondent

[1] **MUIR JA**: **Introduction**
The appellant/plaintiff, Project Company No 2 Pty Ltd ("DDF") applied for leave to join Project Company No 1 Pty Ltd ("KRC") as a plaintiff in the proceedings pursuant to r 69(1)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld) and for leave for DDF and KRC to amend the consolidated statement of claim pursuant to r 377 of the *Uniform Civil Procedure Rules* in accordance with a particular draft. On 5 November 2010, the application was dismissed with costs. DDF appeals against that order.

Summary of underlying facts

[2] The following facts are extracted from DDF's outline of argument. Counsel for the respondent agreed with them "for the purposes of this appeal".

> "7. In March 1999, the appellant ("DDF") entered into a contract with BLL in March 1999 (sic) for the construction of an abattoir and associated facilities ("the facility") at Toowoomba. BLL engaged CBA and third respondent Harwal as subcontractors. CBA supplied electrical design, inspection and certification services. Harwal designed and constructed switchboards for the abattoir. In particular, CBA and Harwal are both alleged to have roles in the design of the main switchboard for the abattoir.
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> 8. In December 2003, KRC purchased 100% of the shares in DDF.
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> 9. In June 2004, DDF granted a licence to KRC for it to operate the abattoir. DDF continued to own the land, plant and equipment.
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> 10. On 17 June 2005, there was a fire in the main switchboard which caused extensive damage to it. The switchboard and associated equipment had to be replaced. The facility could not be used for a period of about five weeks. Significant losses were incurred as a result of the interruption to the business conducted from the facility.
>
> 11. DDF alleges that the respondents were negligent in failing to provide proper protection on the switchboard against over currents. As well as the claims in negligence against CBA and Harwal, there is a contractual claim against BLL.
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> 12. During the course of 2010, it became apparent to the parties that it was KRC that had suffered certain of the losses claimed in the proceeding, rather than DDF." (citations omitted)

The pleadings before the primary judge

[3] The proposed amended statement of claim before the primary judge was different in substantial material respects from the document on which DDF and KRC sought to rely on the appeal ("the final pleading"). It was argued on their behalf that it was appropriate to decide the appeal by reference to the final pleading as it was "clear that no different outcome would have ensued below based on the form of the proposed statement of claim." Both versions of the statement of claim are lengthy and it is unnecessary to quote at length from them.

The primary judge's reasons

[4] The primary judge referred to the following passage from the reasons of de Jersey CJ, with which the other members of the court agreed, in *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd*:[1]

> "*Bryan v. Maloney*[2] represented an extension to the availability in this country of recovery for pure economic loss. There is strong reason for thinking that any further extension should lie within the

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1 [1998] QCA 404 at [14].

2 (1995) 182 CLR 609.

> province of the High Court. To allow this claim would involve further extension. The House of Lords authority I have mentioned sufficiently indicates that. It would be inimical to certainty, and responsibility, for this court to accede to the claim, even if otherwise persuaded that it would be socially desirable to do so. Policy considerations regulate the development of the law in this general area. They are multifarious. To my mind, the relevant considerations have to this point been sufficiently considered by the High Court to warrant the rejection of this claim: to resolve otherwise would involve this court's adopting an unduly legislative role. Following the law which binds us, and the trends which should influence us, I believe the claim must be rejected. Neither of the submissions agitated by Mr McMurdo should be upheld."

[5] The primary judge observed that *Fangrove* was followed by the Court of Appeal in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[3] and that an appeal against the decision in *Woolcock* was dismissed by the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[4] His Honour concluded that the High Court in affirming the Court of Appeal's decision, which was consistent with *Fangrove*, did not extend the principles in *Bryan v Maloney* to commercial buildings. His Honour then said:

> "[30] It follows, then, that I remain bound by the decision in *Fangrove* which means that I must dismiss this application on the basis that the proposed pleading does not demonstrate a cause of action by KRC against [BLL]."

Consideration

[6] The Court of Appeal in *Woolcock* concluded that the ability to recover damages for pure economic loss should not be extended by an intermediate appellate court beyond the position recognised in *Bryan v Maloney*. The members of the court accepted, either expressly or by necessary implication, that the principles in *Bryan v Maloney* did not extend to commercial buildings.

[7] On appeal,[5] Gleeson CJ, Gummow, Hayne and Heydon JJ made it plain in their joint judgment that *Bryan v Maloney* was not to be regarded as setting the outer limits for the potential liability of a builder of premises to a subsequent purchaser of the building for economic loss suffered by that purchaser through faulty work or design. Their Honours also cast doubt on the general authority of *Bryan v Maloney*.

[8] It was said in the joint judgment:[6]

> "… At least in terms, however, the principles that were said to be engaged in *Bryan v Maloney* did not depend for their operation upon any distinction between particular kinds of, or uses for, buildings. They depended upon considerations of assumption of responsibility, reliance, and proximity. Most importantly, they depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner."

[9] Their Honours had earlier detailed four considerations identified in *Bryan v Maloney* "as warranting the conclusion that a relationship of proximity also existed with the subsequent owner."

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3 [2002] QCA 88.
4 (2004) 216 CLR 515.
5 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.
6 At 527.

[10] A little later, when dealing with criticisms of *Bryan v Maloney* by commentators and in *Zumpano v Montagnese*,[7] their Honours said:[8]

> "First, for the reasons given earlier, it may be doubted that the decision in *Bryan v Maloney* should be understood as depending upon drawing a bright line between cases concerning the construction of dwellings and cases concerning the construction of other buildings. If it were to be understood as attempting to draw such a line, it would turn out to be far from bright, straight, clearly defined, or even clearly definable."

[11] In relation to the value of *Bryan v Maloney* as a precedent it was said:[9]

> "Secondly, the decision in *Bryan v Maloney* depended upon the view that 'the overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another'. It was the application of this 'conceptual determinant' of proximity that was seen as both permitting and requiring the equation of the duty owed to the first owner with the duty owed to the subsequent purchaser. Decisions of the Court after *Bryan v Maloney* reveal that proximity is no longer seen as the 'conceptual determinant' in this area."

[12] Kirby J, who dissented, confined the *ratio decidendi* in *Bryan v Maloney* to "the duty of a builder (or like person) to subsequent purchasers of a dwelling house." McHugh J said that he did not:[10]

> " …think that the ratio decidendi of *Bryan v Maloney* applies to the case of commercial premises. The ratio can be put no higher than that the builder of a dwelling house owes a duty to a subsequent purchaser to take reasonable care to avoid reasonably foreseeable decreases in its value arising from the consequences of latent defects caused by the house's defective construction. Neither the stated reasons of the Court nor the material facts of the case justify any wider conclusion. Certainly, they do not justify the conclusion that the ratio of the case covers commercial premises. That is not to say that the reasoning in *Bryan v Maloney* – or by analogy its material facts – may not lead to the conclusion that the common law recognises an identical or similar duty in respect of the builder of commercial premises."

[13] McHugh J considered that a further reason for finding that the ratio in *Bryan v Maloney* did not cover the case under consideration was that its reasoning was based on the then orthodox view that the doctrine of proximity governed the Australian law of negligence.[11] Callinan J expressed a similar view.[12] His Honour also questioned the correctness of *Bryan v Maloney*.[13]

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7 [1997] 2 VR 525 at 528-536.
8 At 528.
9 At 528.
10 At 546.
11 See (2004) 216 CLR 515 at 546.
12 At 587.
13 At 589-590.

[14] It is clear from the High Court decision in *Woolcock* that *Bryan v Maloney* is a decision of doubtful authority which cannot be taken as excluding claims against builders of commercial premises for economic loss suffered by subsequent owners of the premises. Not surprisingly, the decisions of this court in *Fangrove* and *Woolcock* were based on the now discredited principles stated in *Bryan v Maloney*. In holding, in effect, that the principles stated in *Fangrove* prevented a subsequent purchaser of commercial premises recovering from the builder damages arising from the faulty construction of the building, the primary judge exercised his discretion on an erroneous basis. Consequently, it is open to this court to exercise the discretion afresh.

[15] There are other reasons why cases such as *Bryan v Maloney* and *Fangrove* provide a less than satisfactory guide to liability in this case. *Bryan v Maloney*, as the above discussion shows, insofar as it is to be regarded as authoritive, established principles applicable to residential dwellings. The decision in *Fangrove* concerned the structural failure of a parapet of a commercial building and the reasoning of each of the members of the court was influenced substantially by the reasons in the now discredited *Bryan v Maloney*. The issues to be determined in this case are significantly different in nature. What failed in this case was a switchboard in an abattoir. The failure caused a fire which so damaged the switchboard and associated equipment that they had to be replaced. The abattoir was rendered inoperable for a substantial period and significant trading losses accrued.

[16] Another substantial difference between the subject facts and those of *Fangrove*, *Bryan v Maloney* and *Woolock* is that, here, the land and improvements continued throughout in the ownership of DDF, the original contracting party, but as a result of the arrangement of the internal affairs of KRC and its subsidiary DDF, KRC came to operate the abattoir and suffered loss through the interruption of its business. Merely to state these factual matters is to demonstrate that the principles stated and applied in *Fangrove* and *Bryan v Maloney* offer, at best, an indifferent basis upon which to determine liability in this case.

[17] In his oral submissions, counsel for the respondent accepted that *Fangrove* and *Bryan v Maloney* did not operate as a bar to the appellant's success. He submitted that there were two reasons why the pleadings (whether the ones before the primary judge or the further amended pleadings) did not disclose an arguable cause of action. The first may be summarised as follows: *Woolcock* established the principle that a subsequent purchaser of commercial premises could not recover from the builder damages caused by defects in the building resulting from faulty construction, unless it demonstrated vulnerability as explained in the joint judgment in *Woolcock*. With respect to vulnerability, their Honours stated: [14]

> "Since *Caltex Oil*, and most notably in *Perre v Apand Pty Ltd*, the vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed. 'Vulnerability', in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, 'vulnerability' is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant."

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[14] (supra) at 530.

[18] KRC could not establish vulnerability on its pleaded case. In that regard, the respondents argue that KRC could have obtained a warranty from its subsidiary DDF or an assignment of its rights. It is further asserted that if, for reasons arising from the internal arrangements of the companies, KRC chose not to seek a warranty, that is not a basis for saying that such a warranty could not have been obtained. That submission addressed allegations in a version of the statement of claim. Another related argument advanced by the respondents was that allegations in the statement of claim that users would have no opportunity to inspect, or would be unable to inspect, the quality of CBA's services and that defects in the switchboard could not have been identified with the exercise of reasonable care were contradicted by the appellant's own expert report. It was submitted that the report demonstrated that an expert examination of the electrical drawings and switchboard prior to the commencement of use by KRC would have revealed the matters which DDF alleged to be defective.

[19] It is apparent that liability in this case falls to be determined by reference to facts which depart significantly from those considered in *Woolcock* and it is far from obvious how the concept of vulnerability is to operate in the present circumstances. It is one thing to expect a purchaser of valuable commercial premises at arms length from the vendor to take steps to protect itself against economic loss should the acquired property prove to be defective and for it to bear the loss if it fails to do so. But what is reasonable for parties at arms length in a transaction of sale and purchase may not be reasonable or even appropriate for dealings between companies in the same group engaged in a quite different transaction.

[20] The other principal basis of challenge to the pleadings was what was said to be "the question of the indeterminancy of the amount, time and class" of persons likely to suffer damage in the event of negligent works by CBA or Harwal.[15] Reference was made to the following passage from the reasons of Stephen J in *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad*:[16]

> "No doubt to discard the element of physical injury to person or property as a prerequisite to the recovery of damages in negligence means that its effect of tending to ensure that compensable damage is restricted to that which is immediately consequential upon the tortious act also disappears; there then looms the spectre, described by Cardozo C.J. in *Ultramares Corporation v. Touche* as that of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. However to counter this spectre by rejecting all recovery for economic loss unless accompanied by and directly consequential upon such physical injury is Draconic; it operates to confer upon such physical injury a special status unexplained either by logic or by common experience. No reason exists for according to it such special status other than its character of tending to ensure a reassuringly proximate nexus between tortious act and recoverable damage; to this alone does it owe such merit as it may have as a necessary element in the recovery of damages in negligence." (citations omitted)

[21] Emphasis was placed on the observation of Gibbs J in *Caltex*:[17]

> "In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential

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15 T1-53.

16 (1976) 136 CLR 529 at 568.

17 At 555.

> upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act. It is not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed; to borrow the words of Lord Diplock in *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt*: 'Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them.' All the facts of the particular case will have to be considered. It will be material, but not in my opinion sufficient, that some property of the plaintiff was in physical proximity to the damaged property, or that the plaintiff, and the person whose property was injured, were engaged in a common adventure." (citations omitted)

[22] In developing the argument that KRC, under the final pleading, was merely a member of an indeterminate class which was likely to suffer indeterminate loss for an indeterminate period, reliance was placed on paragraph 11.3A of the final pleading which relevantly provided:

> "11.3A At the time when it entered into the CBA Agreement and in providing the services under it CBA ought to have been aware that:
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> …
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> 11.3A.11 failure to incorporate adequate and reasonable protection against damage due to excessive temperature or electromagnetic stresses caused by overcurrents likely to arise in live conductors within the Main Switchboard would be likely to result in a major fire in the switchboard;
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> 11.3A.12 in the event of a major fire in the switchboard the person or persons owning the stock of carcasses and meat products located there or utilizing the facility for the throughput of meat products for commercial sale ("the users") would be likely to suffer economic loss as a result of the interruption of the electrical supply to the facility;
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> …
>
> 11.3A.16 the users would not reasonably be expected to have obtained a warranty from DDF as to the availability of the switchboard;
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> …
>
> 11.3A 18 the users were vulnerable to the risk of economic loss in the event that CBA failed to exercise reasonable care as alleged;
>
> 11.3A.19 the users were a determinate class of entities who might suffer economic loss in the event that CBA failed to exercise reasonable care as alleged."

[23] It is apparent, I think, that whether the relationship between KRC and the respondents is of such a kind as to prevent KRC recovering damages on the basis of indeterminancy is very much a question of fact. The allegations in the pleading may be unnecessarily broad. The kernel of the relevant pleaded allegations is that the respondents would have been aware, or ought reasonably to have been aware, that the operator of the subject plant in the course of a business of processing meat products for sale would be likely to suffer economic loss. That, in itself, gives a reasonably confined description to the class of affected persons. The extent of the loss will be limited by the nature of the product, and the capacity of the plant, as well as the likely duration of interruption to the plant's operations as a result of the failure of one of the plant's component parts.

[24] Other attacks on the pleading were made by the respondents but it is unnecessary and undesirable to deal with those for present purposes. They were not addressed by the primary judge and it is preferable that DDF and KRC be in a position, having regard to the criticisms made by the respondents and to these reasons, to make such amendments to the statement of claim as they may be advised.

[25] DDF's application at first instance was brought under s 69(1) of the *Uniform Civil Procedure Rules* 1999 (Qld). It provides:

> "**69 Including, substituting or removing party**
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> (1) The court may at any stage of a proceeding order that—
>
> …
>
> (b) any of the following persons be included as a party—
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> (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;
>
> (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding."

[26] KRC could bring its own claim against the respondents. The claim is not statute barred. It is surely desirable though that it become a plaintiff together with its subsidiary DDF in the existing proceedings which have been on foot for some time. KRC appears to meet comfortably the description in r 69(1)(b)(ii).

[27] The area of law involved in KRC's and DDF's claims is evolving. That is a good reason why the appropriateness of the joinder should be determined more by reference to general principles than by a detailed analysis of the pleaded allegations. In his reasons in *Woolcock*, Kirby J observed:[18]

> "Where the law is uncertain, and especially where it is in a state of development, it is inappropriate to put a plaintiff out of court if there

[18] At 566.

> is a real issue to be tried. The proper approach in such cases is one of restraint. Only in a clear case will answers be given, and orders made, that have the effect of denying a party its ordinary civil right to a trial. This is especially so where, as in many actions for negligence, the factual details may help to throw light on the existence of a legal cause of action – specifically a duty of care owed by the defendant to the plaintiff."

[28] A similar approach was articulated in the joint reasons.[19]

[29] In *Barrett v Enfield London borough Council*,[20] Lord Browne-Wilkinson said:

> "In my speech in the *Bedfordshire* case [1995] 2 AC 633, 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a *certain* answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

[30] This is not a strike out case like *Barrett* or a decision on a case stated like *Woolcock*, but the principles to which I have just referred are relevant. It is difficult to accept that DDF and KRC could not formulate a statement of claim which would survive a strike out application. That may have been done already but I do not wish to express any view on the new proposed pleading which was not before the primary judge. To my mind, it is preferable for leave to be given for KRC to be joined as a plaintiff and for an order be made that an amended statement of claim be delivered. If, having regard to these reasons and other considerations, the respondents wish to seek to have all or part of the amended statement of claim struck out, they can bring an application in the trial division in the usual way.

Conclusion

[31] I would not disturb the costs order at first instance. The appellant effectively conceded that the pleading before the primary judge could not be defended successfully by choosing not to rely on it on appeal.

[32] I would order that:

(a) the appeal be allowed with costs;

(b) Project Company No 1 Pty Ltd (ACN 107 480 375) be added as a plaintiff in the proceedings;

(c) the plaintiffs have leave to make consequential amendments to the claim within seven days of today's date;

(d) the plaintiffs make such amendments to the statement of claim last filed in the proceedings as they may be advised within fourteen days of today's date.

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19 At 525.

20 [2001] 2 AC 550 at 557.

[33] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with his Honour that the appeal should be allowed with costs. I agree with the other orders proposed by his Honour.

[34] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Muir JA, with which I agree. I also agree with the orders proposed by his Honour.