SUPREME COURT OF QUEENSLAND

CITATION:	*Body v Mount Isa Mines Ltd & Ors* [2014] QCA 214
PARTIES:	**SIDNEY BODY by his litigation guardian SHARLENE BODY** (appellant) **v** **MOUNT ISA MINES LIMITED** ACN 009 661 447 **XSTRATA PLC (INCORPORATED IN ENGLAND AND WALES UNDER THE COMPANIES ACT 1985 REG NO 4345939)** **XSTRATA QUEENSLAND LIMITED** ACN 009 814 019 (respondents)
FILE NOS:	Appeal No 7895 of 2013 SC No 1247 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2014
JUDGE:	Margaret McMurdo P and Holmes JA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**The appeal is allowed to the extent of** **1. setting aside the orders that:** **(a) the fifth further amended statement of claim filed on 31 May 2013 be struck out;** **(b) the plaintiff pay the defendants' costs of and incidental to the amended application filed 7 June 2013;** **(c) the plaintiff pay the defendants' costs of and incidental to the application filed 3 July 2012;** **(d) the plaintiff pay the defendants' costs of and incidental to the application filed 22 December 2011 in so far as they relate to the strike-out of the plaintiff's reply;**

2. dismissing the application for orders contained in paragraph 1 of the application filed 3 July 2012 and amended 7 June 2013;

3. ordering that:

(a) the plaintiff pay the defendant's costs of the application filed 3 July 2012 up to its amendment on 7 June 2013;

(b) the plaintiff pay the defendants' costs thrown away by reason of the adjourned hearings on 9 July 2012 and 16 October 2012;

(c) the defendants pay the costs of the appeal;

(d) the defendant pay the plaintiff's costs of the application filed 3 July 2012 after its amendment on 7 June 2013;

4. reserving the costs of and incidental to the application filed 22 December 2011 in so far as they relate to the strike-out of the plaintiff's reply, including the costs of the adjournment on 8 February 2012.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the appellant plaintiff brought an action for personal injuries alleging that he was injured by the absorption of lead from emissions from the respondent defendants' mining operations and that the defendants had breached a duty to warn of the risk of lead absorption and measures by which it could be reduced – where the pleadings alluded to other sources of lead emission – where, at first instance, the defendants argued that the plaintiff had failed to plead that it was ingestion of lead from their emissions, as opposed to lead from any other source, which had caused his injury – where the primary judge accepted the defendants' argument and struck out the pleading – where the plaintiff appeals against that order – where the defendants contend that other grounds for strike-out ought also to have been upheld – where the defendants contend that their statutory obligation to operate the lease under the *Mount Isa Mines Limited Agreement Act* 1985 (Qld) excluded any other duty – where the defendants further contend that where it was pleaded that there were emissions from a number of sources, there could be no duty on their part to warn of the associated risk – whether the pleadings were adequate – whether the additional grounds for the strike-out should have been upheld

COSTS – INTERLOCUTORY PROCEEDINGS –

ADJOURNMENT AND AMENDMENT – where the appellant plaintiff brought an action for personal injuries – where the defendant has made applications to strike out different iterations of the pleadings – where those applications were amended and adjourned – where the plaintiff appeals against orders that he pay the defendants' costs of all applications, as well as costs thrown away by the adjournments and amendments to the pleadings – where the plaintiff contends that the primary judge did not properly consider the merits of the applications and adjournments and failed to give separate reasons in respect of each costs order – where some of the defendants' amendments resulted from changes to the pleadings – where some of the applications in respect of which costs were awarded have not been determined – whether the primary judge's costs orders should stand – whether the plaintiff should have his costs of the appeal

Mount Isa Mines Limited Agreement Act 1985 (Qld), s 3A
Uniform Civil Procedure Rules 1999 (Qld), r 386

Dey v Victorian Railways Commissioners (1949) 78 CLR 62; [1949] HCA 1, applied
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69, applied
Sullivan v Moody (2001) 207 CLR 562; [2001] HCA 59, applied

COUNSEL: B W Walker SC, with G R Mullins, for the appellant
W Sofronoff QC, with A Stumer, for the respondent

SOLICITORS: Slater & Gordon for the appellant
DLA Piper Australia for the respondent

[1] **MARGARET McMURDO P:** I agree with Holmes JA's reasons for allowing this appeal and with the orders her Honour proposes.

[2] **HOLMES JA:** The appellant plaintiff appeals against an order striking out his fifth further amended statement of claim and orders that he pay the respondent defendants' costs of that and earlier applications, as well as costs thrown away by adjournments and amendments to the pleadings. The case he sought to make out on the contentious statement of claim was, in essence, that he, a child living in Mount Isa, had absorbed lead from emissions from the defendants' mining operations, which had caused him injury, and that the defendants, knowing of the risks associated with their lead emissions, had breached a duty to warn him and his mother of that risk and measures by which it could be reduced, in consequence of which failure he was injured. The defendants mounted three arguments at first instance as to why the pleading did not make out a cause of action; they succeeded on one, and now argue on a Notice of Contention that the remaining grounds for strike-out ought also to have been upheld.

The fifth further amended statement of claim

[3] The plaintiff pleaded in paragraph 5 of the relevant statement of claim that the defendants occupied and controlled a property at Mount Isa referred to as "the

Lease". The following were the salient parts of the pleading concerning the defendants' emission of lead and the risk the emissions posed:

"7. At all material times during the period 1 January 1990 until the present day:

7.1 The Defendants conducted mining and smelting operations from the Lease, including the mining of lead and other metals;

7.2 During the process of its mining and smelting operations, the Defendants caused emissions containing lead to be released from the Lease into the atmosphere ("**the Emissions**").

…

7.3 The lead in the Emissions was capable of ingestion, absorption and inhalation ("**Absorption**") by persons who were living within the Town of Mount Isa (including, in and after 2004, the Plaintiff).

…

8. At all material times in and after 2004 the Emissions were a significant source of lead which was capable of Absorption by persons living within the Town of Mount Isa (including the Plaintiff).

Particulars

(i) Mount Isa soils contain both geogenic soil grains and anthropogenic soil grains. The morphology and composition of the anthropogenic grains in Mount Isa soils is consistent with their having originated from the Defendants' mining and smelting process either as settled particles from stack emissions or as fugitive slag residues;

(ii) Lead isotope compositions from surface soils (at a depth of 0-2cm), air filters and dust wipe samples from the Mount Isa urban area closely approximate isotope ratios of the Mount Isa ore body;

(iii) Surface soils in Mount Isa are enriched in other heavy metals at levels not found naturally in surface soils. By way of example, the copper ore body is located several hundred metres below the surface, but high-grade and elevated concentrations of copper are found in surface soils. The Emissions contained copper. Surface soils concentration ratios of lead and copper are highly correlated indicating that these were deposited atmospherically and co-deposited. To the Plaintiff's knowledge, there no significant sources for those deposits apart from the Emissions;

(iv) From the matters set out at (i)-(iii) above, it may be inferred that surface soils and dust in the Town of Mount Isa were significantly enriched with lead emitted by the Defendants;

…

9. At all material times in and after 2004:

9.1 people living in the Town of Mount Isa, including children, were at risk of Absorption of lead from the Emissions;

9.2 the Absorption of lead could cause personal injury including irreversible brain damage; and

9.3 children, particularly those under the age of five years, who absorbed lead such that their blood lead levels exceeded 0.72µmol/L [15 µg/dL] were at risk of suffering irreversible brain damage, severe illness and/or interference with intellectual development."

[4] Paragraphs 10–15 of the statement of claim detailed investigations and reports concerning lead levels in Mount Isa children and the occurrence of lead through the town. As to the defendants' state of knowledge and foresight, the following was pleaded:

16. By 1996, the Defendants:

16.1 knew of the contents of the [relevant reports] and had possession of the documents comprising those reports;

16.2 believed the facts and opinions contained therein to be true;

16.3 knew that people within Mount Isa were at risk of absorbing lead emitted by the Defendants;

16.4 knew that if children, particularly those under the age of 5, absorbed lead such that their blood lead levels exceeded 0.72 µmol/L [15 µg/dL] that they were at risk of suffering irreversible brain damage, severe illness and/or interference with intellectual development;

16.5 knew that 15% of children in Mount Isa could reasonably be expected to have blood lead levels exceeding 0.72 µmol/L [15 µg/dL];

16.6 knew that many children under the age of 5 from the town of Mount Isa who had undergone blood tests in the preceding 10 years had demonstrated blood lead levels exceeding 0.72umo1/L [15 µg/dL];

16.7 knew that children living in Mount Isa were particularly vulnerable to the Absorption of lead and were at risk of serious injury as a consequence; and

16.8 knew that practical steps could and should be taken by parents to reduce the risk of the Absorption of lead including the steps described at sub-paragraph 31.1(b).

17. At all material times in and after 2004 the Risk of Injury was reasonably foreseeable by the Defendants.

By way of particularisation, the plaintiff relied on the allegations in paragraphs 5–7 that the defendants had controlled the Lease, conducted mining and smelting operations there and had caused the Emissions containing lead to be released from it into the atmosphere, and on the allegations in paragraphs 9–16 concerning risk of lead absorption, investigations and reports, and the defendants' knowledge.

[5] Paragraphs 18–25 gave details of various addresses at which the plaintiff had lived near the defendants' property. Paragraph 26 alleged that he was vulnerable to absorption of lead from the Emissions and consequently at risk of serious injury. The following paragraph, significantly, asserted:

> "27. During the period November 2004 to present, the Plaintiff has, without his knowledge or consent, absorbed into his body lead from the Emissions."

That allegation was particularised by reference to the paragraphs concerning the defendants' emitting lead and the "Risk of Injury" and those as to the plaintiff's residence in the area.

[6] The results of certain blood tests were pleaded in paragraphs 28 and 29, after which followed:

> "30. As a consequence of his Absorption of lead and subsequent blood contamination, the Plaintiff:
>
> 30.1 has suffered impairments in fine motor functioning, expressive and receptive language, verbal memory and social perception;
>
> 30.2 suffered brain damage and dysfunction;
>
> 30.3 suffered significant impairment of neuropsychological function, including executive function; and
>
> 30.4 suffered significant impairment to neuropsychological function including attention and executive functions."

[7] The following paragraph identified the duty of care said to be owed:

> "31. By reason of the matters alleged at paragraphs 5 to 26, the Defendants owed the Plaintiff a duty to take all reasonable steps to ensure that the Plaintiff was not injured as a consequence of the Emissions, in particular, to take all reasonable steps:
>
> 31.1 to warn and inform the Plaintiff (by his mother, as a member of the class of persons living within the Town of Mount Isa):
>
> a. of the Risk of Injury;
>
> b. that children's exposure to lead may be decreased or mitigated by:
>
> [certain measures were set out].

[8] Paragraph 32 detailed the steps which the defendants could have, but had not, taken in order to meet that duty, while paragraph 33 alleged that as a result, the plaintiff's mother had not taken the steps she might have to ensure he was not exposed to the risk.

The ruling on the strike-out application

[9] The defendants' successful contention at first instance was that paragraph 30 alleged that the plaintiff's harm was the consequence of absorption of lead generally, as opposed to absorption of lead from the "Emissions", so that effectively there was no allegation of harm resulting from any conduct of the defendants. His Honour accepted that argument, noting firstly that "the Risk of Injury" as defined in paragraph 9 encompassed both an allegation that there was a risk from absorption of lead from the "Emissions" and a more general allegation that absorption of lead could cause injury. It was that risk which was pleaded to be reasonably foreseeable.

Although the plaintiff had pleaded in paragraph 27 that he had absorbed lead from the "Emissions", the distinction in other parts of the pleading between absorption of lead from the defendants' emissions and the absorption of lead generally meant that paragraph 30 should be read as an allegation that his injuries were the consequence of his absorption of lead generally.

[10] That was insufficient to establish a cause of action against the defendants, particularly where the plaintiff's pleading that the defendants' emissions were "a significant source of lead…capable of absorption" by Mount Isa residents accepted, by implication, that there were other significant sources of lead capable of absorption. It did not, therefore, follow that the plaintiff's pleaded absorption of lead as the cause of his injuries resulted from the defendants' emissions, as opposed to absorption from another "significant source" of contamination. The failure to plead the causal link between the defendants' alleged breach of duty and the plaintiff's injuries meant that the pleading should be struck out, with leave to re-plead.

[11] The defendants had also argued that they had a statutory obligation to operate the lease under the *Mount Isa Mines Limited Agreement Act* 1985 (Qld). The Act by s 3A gives the force of law to a formal agreement between the State and Mount Isa Mines Limited which governs the latter's operation of its mining lease. The agreement is a schedule to the Act and in turn, contains schedules setting conditions for the conduct of the mining lease, one of which sets limits for quarterly running average concentrations of lead at various locations. The defendants maintained that their obligations were to conduct the operation in accordance with the terms of the statute. There could be no additional common law requirement to take steps to ensure that there was no risk to others from the mandated activities.

[12] The primary judge took the view that whether such a duty was incompatible with the defendants' statutory obligations had to be determined having regard to all the circumstances, including any evidence led as to the operation of the defendants' activities. It was not, therefore, a question which so clearly had to be determined in the defendants' favour that the court ought to strike out the pleading.

[13] The third of the defendants' arguments was that the plaintiff had not pleaded facts sufficient to establish a duty of care requiring the defendants to give warnings. The pleaded case was merely that the defendants were "a significant source" of lead: they had caused some lead to be emitted with the plaintiff absorbing some of it in circumstances where lead in the environment also emanated from other sources. If others were also responsible for emissions, the defendants could have no unique obligation to warn about lead in the environment. The primary judge held that the fact others might have a duty to warn could not lead to a conclusion that the defendants did not owe a duty of care, so as to warrant striking out the pleading.

The plaintiff's submissions on appeal

[14] The appellant plaintiff pointed to the allegation in paragraph 27 that the plaintiff had absorbed into his body lead from the "Emissions"; those emissions, by virtue of the pleading in 7.2, were those which the defendants had caused to be released from the lease. There was no other pleading of absorption of lead by him, so it followed that when, in paragraph 30, it was alleged that he had sustained injuries "as a consequence of his Absorption of lead and subsequent blood contamination", the allusion could only be to the "Absorption" pleaded in paragraph 27.

[15] So far as the primary judge had referred to the allegation in paragraph 8 that "the Emissions were a significant source of lead", a proper inference was that there were other sources which were not necessarily significant. In any event, the plaintiff had only to show that the harm he suffered was materially contributed to by the defendants' negligent acts. He had an arguable case that the defendants, as "a significant source" of the lead in his body, caused or materially contributed to his injuries.

The defendants' submissions on appeal

[16] The respondent defendants argued in support of the primary judge's reasoning that the plaintiff had failed to plead that it was ingestion of lead from the defendants' emissions, as opposed to lead from any other source, which had caused his injury. By way of contention, the defendants re-argued the points on which they were unsuccessful at first instance.

[17] Firstly, the plaintiff's original pleadings had made a direct case that the defendants had disseminated the lead to which he had been exposed without reference to any other agency. That state of affairs had changed and the plaintiff now alleged, in paragraph 8 of the statement of claim, that there were other sources of lead. Paragraphs 12 and 15 concerned reports which dealt generally with investigation of lead exposure in Mount Isa. Sub-paragraphs 16.5, 16.6 and 16.7 spoke in general terms abut the blood lead levels recorded in Mount Isa children, their vulnerability and consequent risk.

[18] It was clear (it was submitted) that the plaintiff did not contend that the only significant source of lead was that which the defendants emitted. If there were sources of lead in Mount Isa other than the defendants, raising a risk to children inherent in its absorption, it could not be the case that the defendants had a duty above and beyond all other sources to warn in relation to the matter. It was, moreover, unclear from paragraph 31 whether the risk about which the defendants were required to warn extended beyond the risk of absorption of lead from the emissions to include absorption of lead generally.

[19] The second ground of contention was that the defendants' activities were permitted and required under the *Mount Isa Mines Limited Agreement Act* 1985. They argued that they had a duty under the agreement to carry out mining activities on the Lease. The plaintiff had not alleged that they had carried out their activities in a way unauthorised by the Act or negligently; nor was it alleged that the operations could reasonably have been carried out with lower concentrations of lead. It could not, it was submitted, be consistent with the Act to require the defendants to take steps which the Act did not mandate, such as requiring warnings, before they could exercise their statutory rights and carry out their statutory duties. There was no duty on the part of a person carrying out activities in the performance of a statutory duty to give warnings to those who might be affected by its due and proper performance.

Conclusions on the strike-out order

[20] It hardly needs saying that only in a clear case will a court be justified in striking out a pleading as disclosing no reasonable cause of action.[1] In my respectful view, the primary judge erred in reading paragraph 30 of the statement of claim in isolation from paragraph 27. The expression in paragraph 30 "as a consequence of

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1 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62.

his Absorption of lead" could only refer back to the absorption described in paragraph 27; nowhere else was there any allegation that the plaintiff had absorbed lead. The absorption of lead referred to in paragraph 27 was from the "Emissions"; that is to say, the emissions containing lead which, according to the allegation in paragraph 7.2, the defendants had caused to be released from the Lease into the atmosphere.

[21] Whether it could be supported by evidence or not, that was an allegation that the plaintiff had been injured by absorbing lead emitted from the defendants' mining and smelting operations. More general references to the risk of lead absorption by the residents of Mount Isa elsewhere in the pleading were irrelevant when paragraph 30 dealt specifically with the plaintiff's absorption of lead earlier identified as originating from the defendants' emissions. The learned primary judge erred in accepting the defendants' argument on this ground and striking out the fifth further amended statement of claim.

Conclusions on the notice of contention grounds

[22] The defendants' contention that there were not sufficient pleaded facts to give rise to a duty to warn requires a reading of the sub-paragraphs of paragraph 9 as if they were disconnected. It is clear, however, that they are not; that the content of the three sub-paragraphs must be read together, as collectively amounting to "the Risk of Injury". That risk was of absorption of lead from the defendants' emissions, with the attendant potential for personal injury. The class identified at risk was one which included the plaintiff: residents of Mt Isa, particularly children under the age of five. Paragraph 9 thus described a particular risk of injury which the defendants' emissions had created.

[23] Sub-paragraphs 16.3 and 16.4 pleaded that the defendants knew of the risk of Mt Isa residents' absorbing their emissions and of the risk to young children of blood lead beyond a specified level; it was in that context that the balance of the paragraphs to which the defendants referred spoke generally about the blood lead levels of Mount Isa children. Paragraph 17 pleaded that the risk was reasonably foreseeable by the defendants, while paragraph 31 alleged the duty to warn and its content. The risk the subject of the duty to warn in paragraph 31 was not some general risk from emissions at large but the "Risk of Injury" pleaded in paragraph 9: the risk of absorption of lead from the defendants' emissions, with the prospective ill-effects identified in that paragraph. While there were general (and perhaps inconsequential) references to the emission and absorption of lead in Mount Isa, there was a specific allegation as to the risk which the defendants' emissions had created, on which a finding of a duty on their part to warn could be based.

[24] The argument that the defendants could not be required to take steps (such as giving warnings) which the Act did not mandate before they could exercise their statutory rights and carry out their statutory duties mischaracterises the plaintiff's case. It is not that the giving of warnings was a prerequisite to the exercise of statutory rights but that it was an independent duty, one which did not impede the defendants in carrying out their activities under statute. There is no reason to suppose that a duty to warn could not co-exist with the defendants' statutory rights and obligations:

> "The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of

> itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable."[2]

[25] The primary judge was correct in not upholding the defendants' additional grounds for the strike-out.

[26] The plaintiff here sought an order that the application be dismissed. However, the application also seeks alternative relief, in the form of orders for the striking out of particular paragraphs of the statement of claim, which may turn on arguments not determined by these conclusions. Accordingly, it should be dismissed only to the extent that it seeks the striking out of the whole of the statement of claim.

The costs orders

[27] The primary judge made the following costs orders:

"The plaintiff [is to] pay:

(a) the defendants' costs of and incidental to the amended application filed 7 June 2013;

(b) the defendants' costs of and incidental to the application filed 22 December 2011 in so far as they relate to the strike-out of the plaintiff's reply;

(c) the defendants' costs of and incidental to the amended application filed 23 March 2012[3] in so far as they related to the strike-out of the plaintiff's FASOC filed 1 April 2011;

(d) the defendants' costs of and incidental to the application filed 3 July 2012;

(e) the defendants' costs thrown away by reason of the adjourned hearings on 8 February 2012, 27 April 2012, 9 July 2012 and 16 October 2012;

(f) the defendants' costs thrown away by reason of its [sic] amendments to the statement of claim on 26 April 2012, 20 June 2012, 26 March 2012 and 31 May 2013,

such costs to be agreed, or failing agreement, to be assessed on a standard basis.

The costs referred to above are to be paid by the plaintiff in any event but are not to be assessed until the proceeding ends.

The defendant[4] is given leave to appeal the costs order."

[28] His Honour observed:

> "Whilst the defendants' application in respect of the plaintiff's pleadings changed, that change must be viewed in the context of the plaintiff having amended his statement of claim on numerous occasions, including after the filing of the first application. Further, adjournment of the application occurred in circumstances where the hearing would take longer than the time allowed in applications or subsequent to amendments to the plaintiff's pleading, or following a compromise to the plaintiff's claim against the then second and third defendants. All of those events led to the defendants incurring

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2 *Sullivan v Moody* (2001) 207 CLR 562 at [60].

3 The filing date is an error: the amended application was filed on 26 March 2012.

4 In context, plainly a typographical error, the intent, clearly enough, being to grant the plaintiff leave.

> significant costs in respect of an application, which was ultimately successful in having the plaintiff's statement of claim against the defendants struck out, albeit with liberty to re-plead."

[29] The plaintiff appealed against all of the primary judge's costs orders, arguing that his Honour had not properly considered the merits of the applications and adjournments in respect of which he ordered the plaintiff to pay costs; and that he had failed to give separate reasons in respect of each application and adjournment.

The background to the defendants' applications

[30] It is necessary to set out the background to and history of the various applications, amendments and adjournments. On 1 April 2011, the plaintiff filed an amended statement of claim which alleged that he had absorbed into his body lead emitted from the defendants' Lease in various ways; that he had suffered injury; and that his injury was the result of the defendants' negligence in permitting the escape of lead and failing to take proper steps to warn the plaintiff and his parents of the risks entailed in exposure to lead. The statement of claim was further amended in some minor respects in June 2011.

[31] An amended defence was filed and the plaintiff filed an amended reply on 9 December 2011. In paragraph 15(b) it alleged that the primary source of lead ingested by "residents and workers of, and visitors to, Mount Isa, and specifically the Plaintiff" was soil and dust enriched by emissions from the defendants' mining and smelting activities, and in 15(c) it made allegations very similar to those contained in paragraph 8 of the current statement of claim as to the composition of soils in Mount Isa and the defendants' contribution to lead enrichment in them through their emissions.

[32] On 22 December 2011, the defendants filed an application to strike out the reference to "residents and workers of, and visitors to, Mount Isa" in 15(b) and the whole of 15(c) of the plaintiff's amended reply and to be relieved from performing certain searches in the context of disclosure. The plaintiff sought, by cross-application, disclosure of certain documents and an order that information as to the results of certain keyword searches be provided. The applications were set down for hearing on 8 February 2012, but were adjourned until 27 April 2012, when the plaintiff's counsel advised that the hearing of the defendants' application was likely to extend beyond two hours. There is dispute between the parties as to whose fault that was: the defendants say that it was because the plaintiff had filed a lengthy affidavit largely to do with the scientific issues in the case, and contended that an understanding of the science was necessary in the determination of the application; the plaintiff says that it was because of the defendants' late filing of material.

[33] The defendants' original complaint of the reply was that the soil results detailed in 15(c) encompassed too broad an area, with a lack of connection between the sites tested and the plaintiff's residences, and would force it to obtain, unnecessarily, reports from experts in a number of fields. After their application was adjourned, the defendants put to the plaintiff that the allegations in the reply were more properly pleaded in a statement of claim. In the same correspondence, they articulated their view that the existing amended statement of claim did not plead a duty of care or its content. Subsequently, on 26 March 2012, the defendants filed an amended application which sought the striking out of the amended statement of claim, with the relief concerning the reply now merely an alternative.

[34] The day before the applications were due for hearing on 27 April 2012, a second further amended statement of claim was delivered. It contained additional allegations as to the defendants' mining activities disseminating lead through Mount Isa, the foreseeability of the exposure of residents to it, and the defendants' knowledge of children's vulnerability, and alleged a duty of care which involved an obligation to warn people in Mount Isa, including the plaintiff, of the risk of harm from lead exposure and to advise as to how such exposure could be limited. The Applications Judge noted that the plaintiff had changed his position to plead a specific duty, including the content of the duty. The plaintiff's application, so far as it concerned disclosure, could not proceed because the pleadings thus remained open. The applications were adjourned.

[35] The second amended statement of claim was replaced by a third amended statement of claim filed on 20 June 2012, which now included paragraph 8 in its present form, incorporating the allegations from the reply as to soil composition in Mount Isa and the implication as to the role of the defendants' emissions. It also pleaded the defendants' failure to meet their duty of care in a new way: it consisted, firstly, of the defendants' failure to take reasonable steps to warn the plaintiff of risk; and secondly their failure to ascertain whether any sufficient warnings were given by the other defendants in the case, Mount Isa City Council and State of Queensland, and if not, to give the warnings themselves.

[36] On 3 July 2012, the defendants filed an application to strike out the third amended statement of claim. That application was adjourned on 9 July 2012 because the parties estimated that the hearing of the strike-out applications could take up to two days. The defendants' argument, as set out in written submissions provided in August 2012, was that the particulars of the failure to meet their duty of care amounted to a contention that there was some sort of default duty arising if the governmental agencies failed to warn. On the fresh hearing date, 16 October 2012, the court adjourned the application until after the hearing of an application for sanction of the plaintiff's settlement with the Mount Isa City Council and State of Queensland.

[37] In the first half of 2013, the plaintiff filed a fourth and then a fifth further amended statement of claim. The latter merely corrected paragraph numbers, but the former made amendments to reflect the settlement with the other defendants and removed the particular concerning the failure to ascertain whether those defendants had given warnings and to act if they had not. On 7 June 2013, the defendants filed an amended version of their 3 July 2012 application, now seeking orders striking out the fifth further amended statement of claim. That application was determined in July 2013, resulting in the present appeal.

The costs of the application filed on 3 July 2012 and amended 7 June 2013

[38] The application which the primary judge decided, and on which the plaintiff has now had success, was that filed on 3 July 2012 and amended on 7 June 2013. However, the costs orders which his Honour made, which were those sought by the defendants, included separate orders in respect of the application as filed and in its amended form as though they were distinct applications. That was presumably because different considerations were argued as to costs before and after the amendment. However, both orders are properly re-considered now, not as a review of the primary judge's exercise of discretion but as consequential to the decision of the appeal.

[39] The plaintiff sought an order that the costs of the application be paid to him if he were successful on the appeal. The defendants in their submissions again drew a distinction between the application as filed and as amended. They argued that even if the appeal were decided against them, the costs of the amended application filed on 7 June 2013 should be their costs in the proceedings, because it was only at the hearing of that application that counsel for the plaintiff made it clear that the words "Absorption of lead" in paragraph 30 of the statement of claim was a reference to absorption of lead from the "Emissions".

[40] The defendants' second submission was that the plaintiff should pay their costs of the application as filed on 3 July 2012. The statement of claim at that time particularised the defendants' failure to warn as dependent on whether the Mount Isa City Council and State of Queensland had given adequate warnings, giving rise to the defendants' argument that there was no such thing as a "default duty". The plaintiff had conceded its merit, and that of the strike-out application, by filing the amended statement of claim on 26 March 2013, which removed the particular concerning the Council and State.

[41] There is, I think, a distinction properly to be drawn between the costs of the application as filed and up until the filing of the fourth further amended statement of claim on 26 March 2013 and those incurred after the amended application was filed. The former were incurred because of a pleading which the plaintiff appears to have accepted, by withdrawing it, was untenable, and should be paid by him. The adjournment of the application on 9 July 2012 was because of the parties' agreement as to the length of time the applications would take, while that on 16 October 2012 was of the court's own motion, because of the impending sanction hearing. While neither was the product of any unreasonable conduct on the plaintiff's part, they were unremarkable contingencies of the application; there is no reason to make a different order in respect of them.

[42] However, the plaintiff should have the costs of the application from the point at which it was amended on 7 June 2013. It did not require counsel's statement at the hearing of the application to make it clear that the only reading of the statement of claim which the plaintiff could rationally advance was that "Absorption of lead" was to be read as absorption of lead from the defendants' emissions; a reading which this Court has accepted as viable.

The costs of the application of 22 December 2011 and the amended application of 26 March 2012, the adjournments of 8 February 2012 and 27 April 2012 and the costs thrown away by amendments to the statement of claim

[43] Consideration of the remaining costs orders entails an examination of the primary judge's exercise of discretion. The plaintiff maintained that no order should have been made in respect of the costs of the application filed 22 December 2011 and amended 26 March 2012, because it had not (and has not) been determined. The defendants contended that there was no reason to interfere with orders made by the learned trial judge. The plaintiff had conceded that the original application had merit by moving disputed allegations from the reply to the statement of claim. The amended application similarly was the subject of a concession in the form of the plaintiff's filing an amended statement of claim on 26 April 2012. The plaintiff responded by pointing out that that reasoning did not find any reflection in the primary judge's findings.

[44] The primary judge did not say expressly that the applications of 27 December 2011 and 26 March 2012 were unresolved because of the fact of concessions by the appellant; but that was the effect of his remark about the need for changes in the defendants' application because of the amendments to the statement of claim. The point has some validity in relation to the application so far as it concerned (as it did from March 2012) the statement of claim, but it is not really true of the application to strike out parts of the amended reply. That application primarily turned on whether the allegations which are now found in paragraph 8 of the fifth further amended statement of claim were too broad; a point which has not been determined. (The defendants maintained it in later applications by seeking to have paragraph 8 of the statement of claim struck out as an alternative to having the entirety of the pleading struck out.) It did not turn on whether the allegation was properly in the reply or the statement of claim, although the plaintiff eventually accepted the defendants' proposition in that regard. There was no change which warranted the awarding of costs against the plaintiff, nor was the argument which led to the application resolved against him. The costs of the application up to its amendment in March 2012 should have been reserved.

[45] The application as amended in March 2012, though, did concern the statement of claim. It was based on the well-founded concern that there was no pleading of a duty of care, and was frustrated by the plaintiff's amendment on 26 April 2012 to correct that deficiency. There is no reason to interfere with his Honour's exercise of discretion as to the costs of the application from that date or the costs thrown away by adjournments of it.

[46] The order that the plaintiff pay the defendants' costs thrown away by reason of its amendments to the statement of claim of 26 April 2012, 20 June 2012, 26 March 2013 and 31 May 2013 was entirely unremarkable. As the respondent pointed out, that was the position which would obtain under Rule 386 of the *Uniform Civil Procedure Rules* 1999, absent a different order by the court. There was no reason for the primary judge in this case to make a contrary order.

The costs of the appeal

[47] The plaintiff maintains that the defendants should pay his costs of his appeal. The defendants argued that if the plaintiff were unsuccessful in having the costs orders made below overturned, resulting in mixed success on the appeal, no order as to costs should be made. In my view, the plaintiff should have his costs of the appeal, given his partial success on the costs orders and, more importantly, his success as to its critical element, the question of the adequacy of his pleading.

Orders

[48] I would allow the appeal to the extent of

1. setting aside the orders that:

    (a) the fifth further amended statement of claim filed on 31 May 2013 be struck out;

    (b) the plaintiff pay the defendants' costs of and incidental to the amended application filed 7 June 2013;

    (c) the plaintiff pay the defendants' costs of and incidental to the application filed 3 July 2012;

(d) the plaintiff pay the defendants' costs of and incidental to the application filed 22 December 2011 in so far as they relate to the strike-out of the plaintiff's reply;

2. dismissing the application for orders contained in paragraph 1 of the application filed 3 July 2012 and amended 7 June 2013;

3. ordering that:

(a) the plaintiff pay the defendant's costs of the application filed 3 July 2012 up to its amendment on 7 June 2013;

(b) the plaintiff pay the defendants' costs thrown away by reason of the adjourned hearings on 9 July 2012 and 16 October 2012;

(c) the defendants pay the costs of the appeal;

(d) the defendant pay the plaintiff's costs of the application filed 3 July 2012 after its amendment on 7 June 2013;

4. reserving the costs of and incidental to the application filed 22 December 2011 in so far as they relate to the strike-out of the plaintiff's reply, including the costs of the adjournment on 8 February 2012.

[49] The rest of the primary judge's orders should remain in place. To avoid doubt, I set them out below, with typographical errors corrected.

The plaintiff is to pay:

(a) the defendants' costs of and incidental to the amended application filed 26 March 2012 in so far as they relate to the strike-out of the plaintiff's FASOC filed 1 April 2011;

(b) the defendants' costs thrown away by reason of the adjourned hearings on 27 April 2012, 9 July 2012 and 16 October 2012;

(c) the defendants' costs thrown away by reason of his amendments to the statement of claim on 26 April 2012, 20 June 2012, 26 March 2012 and 31 May 2013,

such costs to be agreed, or failing agreement, to be assessed on a standard basis.

The costs referred to above are to be paid by the plaintiff in any event but are not to be assessed until the proceeding ends.

The plaintiff is given leave to appeal the costs order.

[50] **MARTIN J:** I agree with Holmes JA.