SUPREME COURT OF QUEENSLAND

CITATION:	*Hartnett v Hynes* [2009] QSC 225
PARTIES:	**BEAU TIMOTHY JOHN HARTNETT** (plaintiff/applicant) **v** **ROBERT MARK HYNES** (defendant/respondent)
FILE NO/S:	BS 7747 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	11 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2009 Supplementary written submissions 7 August 2009
JUDGE:	Applegarth J
ORDER:	**On the application for leave to amend:** **1. The plaintiff be granted leave to file and serve an amended claim and a third amended statement of claim in a form to be prepared in draft by the plaintiff in accordance with these reasons for judgment, delivered to the defendant and reviewed by Applegarth J at a further review of the matter;** **2. The parties prepare draft minutes of order including orders as to costs;** **3. The parties prepare draft minutes of order in relation to the completion of interlocutory steps and the preparation of the matter for trial.** **4. The application be adjourned to a date to be fixed for the making of further orders, including orders as to costs.** **On the application for disclosure and inspection:** **1. The application regarding disclosure and inspection filed 22 May 2009 is dismissed.** **2. There be no order as to costs in relation to the application.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where the plaintiff seeks to amend his claim and statement of claim – where leave is required to amend – whether leave should be

granted

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – where application for disclosure and inspection resolved – whether the applicant acted reasonably in bringing the application – whether the respondent acted reasonably in resisting it

Partnership Act 1891 (Qld), s 27(1)(i)
Uniform Civil Procedure Rules 1999 (Qld), r 5(1), r 5(2), r 5(3), r 5(4), r 149, r 157, r 171(1)(b), r 375, r 376(4), r 377, r 379, r 386, r 444

Aon Risk Services Australia Ltd v Australia National University [2009] HCA 27, applied
Australian Securities Commission v Aust-Home Investments Ltd (1993) 44 FCR 194, applied
The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2008] QCA 224, cited
Birkett v James [1978] AC 297, cited
Borsato v Campbell [2006] QSC 191, applied
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Central Sawmilling No 1 Pty Ltd v State of Queensland [2003] QCA 311, cited
Cohen v Cohen (1929) 42 CLR 91, cited
Draney v Barry [2002] 1 Qd R 145, cited
Hewitt v Henderson [2006] WASCA 233, cited
Ketteman v Hansel Properties Ltd [1987] AC 189, cited
Page v The Central Queensland University [2006] QCA 478, applied
R v Lawrence [1982] AC 510, cited
The Salvation Army (South Australia Property Trust) v Graham Rundle [2008] NSWCA 347, cited
State of Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146, cited
Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd (2005) 30 WAR 290, cited
Zonebar Pty Ltd v Global Management Corporation Pty Ltd [2009] QCA 121, considered

COUNSEL: K E Downes SC and S R R Cooper for the plaintiff/applicant
P J Roney for the defendant/respondent

SOLICITORS: Hartnett Lawyers for the plaintiff/applicant
Hynes Lawyers for the defendant/respondent

Introduction

[1] The plaintiff and the defendant were in partnership as solicitors between 3 August 1998 and 3 September 2001, when the partnership was dissolved by notice. On 14 September 2001 they entered into a written Dissolution Agreement ("the Dissolution Agreement") which addressed various matters about "the mechanics" of how to effect the dissolution. It included terms for unbilled work in

progress as at 3 September 2001 to be billed, and for proceeds from debtors to be deposited into a bank account and paid out equally. They agreed that, subject to the landlord's consent, the existing signage was to be split into two equal parts, and each would have the right to one half. The Dissolution Agreement also provided for the defendant to pay $100,000 to the plaintiff for his interest in the partnership in addition to his share of the money to be recovered from work in progress and debtors, which was addressed in clauses 2, 3 and 4 of the document.

[2] The simplicity of the Dissolution Agreement, which consists of slightly over four pages and 29 terms, may be contrasted with the complexity of the present proceedings. They were commenced on 3 September 2007, exactly six years after the dissolution of the partnership. Several editions of the statement of claim have been produced, protracted disputes over disclosure continue and an enormous amount of costs have been incurred by the parties.

[3] The plaintiff applies pursuant to r 377 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*") for leave to file an amended claim and a "third amended statement of claim". Such is the complexity of the matter, including its procedural history, that the parties are in dispute about the amendments to the pleading that require leave, and about which amendments were authorised by the grant of leave given by Wilson J on 25 November 2008. Ms Downes SC and Mr Cooper of Counsel, who recently came into the matter and who appeared for the plaintiff on the present applications, fairly acknowledged that the leave granted by Wilson J did not extend to making amendments which introduced new causes of action for which specific leave was required, for instance, because leave to amend the claim was necessary or because the amendments might include a cause of action that is out of time.[1]

[4] The determination of the application requires identification of the matters in respect of which the plaintiff requires leave under the rules. It will be necessary to address in greater detail in respect of each such matter the plaintiff's justification for leave, and the defendant's grounds of opposition to leave being granted. In general terms the defendant opposes leave, save for certain minor amendments, on the grounds that there are "entirely new claims" based on conversations that are alleged to have occurred in late 2001, that the proposed amendments are prejudicial, that the delay in making the amendments is unexplained, that the allegations lack particularity, that despite ample opportunity and time, the plaintiff has not advanced material to support the proposition that the claims are arguable and that the plaintiff should not be allowed to agitate new claims several years after the events in question. He also submits that the new claims for breach of agreement and breach of fiduciary duty are outside the limitation period.

Background to the application

[5] The first statement of claim was filed on 3 September 2007. An amended statement of claim was filed on 30 November 2007 and a defence was filed on 5 December 2007. The plaintiff's pleading at the time was the subject of complaint and letters were written pursuant to *UCPR* 444. A proposed third statement of claim was delivered and was the subject of a strike out application that was heard and determined by Mullins J on 28 July 2008.[2] Her Honour struck out several paragraphs of the plaintiff's then pleading (including parts described for

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1 Transcript 19 June 2008, 1-14 ll 43-52; *UCPR* 375-377.

2 See Exhibit 4 before Mullins J.

convenience as the Migration Clients Agreement) and made directions for the delivery by the plaintiff of a further pleading. The draft of a new statement of claim was delivered on 17 September 2008.[3] At that stage the plaintiff's pleading that remained on the court's file, being the amended statement of claim filed 30 November 2007, save for parts of it struck out by Mullins J, essentially relied upon the written and implied terms of the Dissolution Agreement. The plaintiff claimed the unpaid balance of the $100,000 payable under that Agreement. He also sought an order for all necessary accounts and inquiries as to the sums due and owing by the defendant to the plaintiff pursuant to clauses 2, 3 and 4 of the Dissolution Agreement (which relate to work in progress and debtors), and an order for payment of what was found to be due to the plaintiff on taking of the account. He sought, in the alternative, damages for breach of the Dissolution Agreement. He also claimed damages for a separate breach of cl 6 of the Dissolution Agreement, which is the term that relates to the division of the business sign.

[6] On 13 November 2008 the plaintiff applied for orders in relation to disclosure.[4] The matter came on for hearing before Wilson J on 25 November 2008 and, as appears from the defendant's outline of submissions,[5] the focus of the hearing was in relation to disclosure. The application made returnable that date did not seek leave to amend the claim or statement of claim. However, a proposed "second amended statement of claim" was annexed to the plaintiff's affidavit material. It was in the incomplete form of the pleading that had been delivered on 17 September 2008. The application for disclosure was unsuccessful. An order was made that it be adjourned, and that the plaintiff pay the defendant's costs of and incidental to the application. Wilson J also made orders:[6]

1. That the plaintiff have leave to file and serve a further amended statement of claim on or before 9 December 2008;

2. That if the defendant proposed applying to strike out such further amended statement of claim in whole or in part, he provide the plaintiff with a letter in accordance with r 444 of the *UCPR* on or before 16 December 2008;

3. That the plaintiff respond to that letter on or before 14 January 2009;

4. That any application by the defendant to strike out the further amended statement of claim be filed and served on or before 19 January 2009.

[7] A new document styled "second amended statement of claim" was filed on 9 December 2008.[7] The defendant wrote a lengthy *UCPR* 444 letter in relation to it on 16 December 2008.[8] His complaints included the introduction of new claims, including a new claim based upon a General Account Retainer Agreement, without the claim being amended. The plaintiff responded on 15 January 2009.[9] At the same time he sent to the defendant a proposed amended claim and a proposed third amended statement of claim and sought the defendant's consent to an order that he have leave to file the amended claim. This was not forthcoming. On 20 January

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3 Exhibit GES-5 to affidavit of Grant Edward Spedding, Court File Index ("CFI") 25. The draft pleading was incomplete.
4 Application CFI 12.
5 CFI 24.
6 Order of Wilson J dated 25 November 2008 - CFI 27.
7 CFI 15.
8 Exhibit 1 in these proceedings.
9 Exhibit 2 in these proceedings.

2009 the defendant wrote to the plaintiff identifying complaints with the latest edition of the statement of claim.

[8] On 27 March 2009 Atkinson J ordered the plaintiff to deliver a proposed statement of claim by 3 April 2009 and apply for leave and for any further disclosure by 9 April 2009. This did not occur and an extension of time to do so was obtained. On 21 May 2009 the plaintiff served a further revised pleading[10] and a proposed amended claim. The proposed form of the third amended statement of claim delivered on 21 May 2009 has been further revised in two minor respects to delete two paragraphs. The version of the statement of claim in respect of which the plaintiff seeks leave was served on 16 June 2009.[11] It is convenient to refer to this document as the plaintiff's proposed pleading.

[9] The plaintiff's proposed pleading includes many of the allegations contained in the second amended statement of claim filed on 9 December 2008. The plaintiff's initial contention at the hearing before me was that leave was not required to make amendments which had already been made in the 9 December 2008 version of the pleading (described in the plaintiff's written submissions as "the existing pleading") because these were made pursuant to the grant of leave given by Wilson J on 25 November 2008, and the defendant did not apply to strike out the pleading as contemplated by the orders made by Wilson J. On this basis, the plaintiff contended that the application for leave related only to a more limited number of amendments. The defendant's response was that a number of the amendments were not authorised by the grant of leave given by Wilson J or *UCPR* 378 because they introduced new causes of action, and that it fell to the plaintiff to seek leave to amend the claim and the statement of claim. The plaintiff has now done so. The defendant did not apply to strike out all or part of the 9 December 2008 pleading on the basis of an absence of leave to introduce new causes of action, or by an application to disallow amendments in respect of which leave was not required. However, the defendant raised substantial objections in December 2008. The course of events, the objectives of the rules,[12] and the necessity of pleadings that define the issues for, and prevent surprise at, trial[13] and that do not prejudice or delay the fair trial of a proceeding[14] make it appropriate to deal with the substantial points of complaint in relation to the plaintiff's proposed pleading, including its alleged lack of particularity.

Relevant principles

[10] I shall refer to the relevant rules and principles that apply in determining the plaintiff's application and the defendant's objections to the plaintiff's proposed pleading. A distinction exists between amendments to a pleading that may be made without leave pursuant to the *UCPR* and amendments that require the exercise of a judicial discretion. *UCPR* 378 permits a party before the filing of the request for trial date to make an amendment for which leave from the Court is not required under the rules. Another party may, within eight days after the service of the amendment, apply to the Court to disallow all or part of the amendment.[15]

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10 JFL-2 exhibited to the affidavit of Ms Latimer filed on 22 May 2008: CFI 32.
11 Affidavit of Ms Latimer, Exhibit JFL-6: CFI 43.
12 *UCPR* 5.
13 *UCPR* 149, 157.
14 *UCPR* 171(1)(b).
15 *UCPR* 379.

[11] The entitlement of a party to amend pursuant to *UCPR* 378 and the power of the Court to disallow an amendment made under that rule are subject to the overriding purpose of the rules which is to facilitate the "just and expeditious resolution of the real issues in civil proceedings at a minimum of expense"[16] and the requirement that the rules be applied with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the rules.[17] Each party impliedly undertakes to the Court and to the other parties to proceed in an expeditious way[18] and the Court may impose appropriate sanctions if a party is in breach of the implied undertaking.[19]

[12] Justice is the paramount consideration in determining an application to amend pleadings.[20] Lord Griffiths stated in *Ketteman v Hansel Properties Ltd*:[21]

> "...justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties that are occasioned by facing new issues, the raising of false hopes…"

This statement commands acceptance in this country.[22] In this case there are personal litigants, and there is evidence of the consequences to the defendant of allowing amendments in the form proposed by the plaintiff. Consideration is required as to whether the prejudice caused by an amendment made pursuant to *UCPR* 378 can be remedied by an order for costs. The rules provide that the costs of and resulting from an amendment made under *UCPR* 378 are to be paid by the party making the amendment unless the Court orders otherwise.[23] However, the Court's consideration of an amendment made pursuant to *UCPR* 378 is not undertaken solely by reference to whether any prejudice to the other party can be compensated by costs. The right to amend pursuant to *UCPR* 378 is qualified by a party's obligations under *UCPR* 5 and the Court's own obligation to facilitate the just and expeditious resolution of the real issues in proceedings at a minimum of expense. Amendments made pursuant to *UCPR* 378 may not comply with the rules of pleading or have a tendency to prejudice or delay the fair trial of the proceeding, in which event the Court may disallow the amendments on application, or direct a party to further amend the pleading so as to comply with the rules of pleading or to avoid such prejudice.

[13] In the light of *UCPR* 5 I do not accept that a plaintiff is entitled to make amendments that are arguable simply on the basis that the prejudice arising from them can be remedied by an order for costs. In some cases, prejudice to the respondent may be remedied and justice served by an order for costs. However, the interests of justice and the purpose of the rules of civil procedure, namely the just and expeditious resolution of the real issues at a minimum of expense, do not entitle

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16 *UCPR* 5(1).
17 *UCPR* 5(2).
18 *UCPR* 5(3).
19 *UCPR* 5(4).
20 *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155 ("*JL Holdings*"); *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [30], [98] ("*Aon*").
21 [1987] AC 189 at 220.
22 *Aon* (supra) at [100]-[101].
23 *UCPR* 386.

a party to amend as many times as it likes without leave, and without regard to the personal and financial consequences to other litigants.

[14] The absence of a satisfactory explanation for a significant amendment, at least on the eve of trial, may be regarded as a breach of the undertaking referred to in r 5(3) of the *UCPR*.[24] *JL Holdings* was never authority for the proposition that a late grant of leave to amend is invariably in the interests of justice.[25] In *JL Holdings* the applicant for leave to amend had filed an affidavit explaining the reason for the delay in raising the proposed defence. The absence of a satisfactory explanation for a late amendment may assume greater importance in the case of an amendment on the eve of, or during, a trial.[26] However, the existence or absence of a satisfactory explanation for the applicant's delay in making an amendment pursuant to *UCPR* 378 or in applying for leave to make an amendment is a relevant matter on an application of the present kind in the light of the undertaking referred to in r 5(3) of the *UCPR*.

[15] An explanation for delay is not required in order to make an amendment authorised by *UCPR* 378, notwithstanding *UCPR* 5 and the implied undertaking. To require such an explanation at the time of making such an amendment would add to costs, contrary to the objective of the rules. However, where the Court hears an application to disallow amendments made pursuant to *UCPR* 378, the absence of an explanation may be a relevant consideration. In appropriate circumstances the Court may disallow amendments authorised by *UCPR* 378 as a sanction for a breach of a party's implied undertaking to proceed in an expeditious way, to uphold the objectives of the rules and to achieve justice.

[16] The proposed amendments open up new issues and require the parties and their witnesses to address conversations that are alleged to have occurred several years ago, dated transactions and the defendant's intentions at the time. The present case involves an individual litigant and justice requires regard to the strain that litigation imposes on litigants, particularly individual litigants.[27] This includes the anxiety occasioned by new issues being raised, without explanation, several years after the events in question.

[17] In respect of particular amendments that involve the contents of conversations that occurred in late 2001 and transactions that occurred in the few years thereafter, there may be prejudice to a party in being required to recall conversations and transactions that occurred so long ago. In *Page v The Central Queensland University*[28] Keane JA, with whom Williams JA and White J agreed, stated:

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

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24 *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2008] QCA 224 at [50].

25 *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd* (2005) 30 WAR 290 at 315 [93].

26 This is, in part, because the entitlement to amend without leave pursuant to *UCPR* 378 applies only before the filing of a request for trial date: *UCPR* 380.

27 *Aon* (supra) at [100]-[101].

28 [2006] QCA 478 at [24] (emphasis in original).

> which have long since disappeared. Such a trial would not be fair for either party."

[18] Unexplained delay in instituting proceedings that are commenced within the limitation period is one thing. Prior to the institution of proceedings recollections may have faded and documents been lost, to the prejudice of a party. Delay, after proceedings have commenced, with consequential prejudice to the defendant, is a different matter, given the undertaking in *UCPR* 5(3) to the Court and to the other parties to proceed in an expeditious way. In addition, as was stated in *Birkett v James*:[29]

> "A late start makes it more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed."

[19] *Aon Risk Services Australia Ltd v Australia National University* ("*Aon*") concerned amendments to a pleading for which leave was required and which were sought during a trial. However, the High Court's statements of principle and its consideration of a rule in similar terms to *UCPR* 5 provide guidance in determining an application to disallow amendments made without leave, particularly in cases involving unexplained delay in making amendments. There is "an irreparable element of unfair prejudice in unnecessarily delaying proceedings".[30] Undue delay can undermine confidence in the rule of law, and the modern common law adversarial system is not a system which permits disregard of undue delay.[31] Case management principles do not supplant the objective of doing justice between the parties according to law. However, the interests of justice are not served by courts acceding to late amendments without explanation or justification. Rules such as *UCPR* 5 that have been enacted since *JL Holdings* indicate that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the Court and upon other litigants.[32]

[20] The amendments in *Aon* were dependent on the exercise of the Court's discretionary power. However, as I have observed, the right to amend pursuant to *UCPR* 378 is qualified by *UCPR* 5, and *UCPR* 5 resembles r 21 of the *Court Procedure Rules* 2006 (ACT) that was considered in *Aon*.[33] *UCPR* 5 seeks to facilitate the just and expeditious resolution of "the real issues in civil proceedings" at a minimum of expense. The just resolution of proceedings remains paramount, but speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings.[34] Parties should have a proper opportunity to plead their case, but limits may be placed upon re-pleading when delay and costs are taken into account.[35] The need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It

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29 [1978] AC 297 at 322.
30 *Aon* (supra) at [5].
31 Ibid at [24].
32 Ibid at [93].
33 Rule 21 of the ACT Rules was based upon *UCPR* 5 and similar rules: *Aon* at [7].
34 *Aon* at [98].
35 Ibid.

cannot be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.[36]

[21] The objectives of the rules of civil procedure do not require that every application for amendment should be refused, or amendments for which leave is not required should be disallowed, because the amendment involves the waste of some costs and some degree of delay.[37] The nature and importance of the amendment is relevant.[38] The extent of the delay and the costs associated with it, together with the prejudice which might reasonably be assumed to follow and that which is shown, are to be weighed against the grant of permission to a party to alter its case.[39] Much depends upon the point the litigation has reached relative to a trial when the amendment is made or application to amend is made.[40]

[22] These and other considerations apply where, in an application of the present kind, the plaintiff seeks leave to amend a pleading in which some of the amendments would be authorised by UCPR 378 and others require leave. Amendments made prior to a request for trial and which, if allowed to stand, will not result in a trial being adjourned to the prejudice of the other party and other litigants awaiting trial dates do not raise all of the considerations that arose in *Aon*. However, *UCPR* 5 and the principles stated in *Aon* do not support the proposition that a party has a right to amend as many times as it likes before a request for trial date, without explanation or justification. Such a course may involve a breach of the party's undertaking to the Court and to the other party, cause prejudice to the other party that cannot be remedied by an order for costs and be inconsistent with the just resolution of the real issues in civil proceedings at a minimum of expense.

[23] I turn to consider amendments for which leave is required. Save for certain exceptions which are not presently relevant, an originating process may not be amended without leave of the Court.[41] The Court has a power under *UCPR* 375 to allow or direct a party to amend a claim or a pleading in the way and on the conditions the Court considers appropriate. That rule is subject to r 376 which applies in relation to an application for leave to make an amendment mentioned in *UCPR* 376 if a relevant period of limitation, current at the date the proceeding was started, has ended. *UCPR* 376(4) provides:

> "The Court may give leave to make an amendment to include a new cause of action only if –
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> (a) the court considers it appropriate; and
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> (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 amendments."

[24] The parties are agreed that although the term "cause of action" has been defined as being "every fact which is material to be proved to entitle the plaintiff to succeed",

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36 Ibid.
37 Ibid at [102].
38 Ibid.
39 Ibid.
40 Ibid.
41 *UCPR* 377.

such a definition should not be applied literally in the context of a rule such as *UCPR* 376(4). They cite, and I respectfully adopt, the statement of McMurdo J in *Borsato v Campbell*[42] that:

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

Amendments that amount to "the refashioning or redesignation or further particularisation of a claim on the basis of facts already pleaded"[43] will not involve the inclusion of a new cause of action. The situation is otherwise where the "new case" made by an amendment is one "varying so substantially from what has previously been set up that it would involve investigation of matters of fact or questions of law, or both, different from what have already been raised and of which no fair warning has been given".[44]

[25] If the amendments include a new cause of action and the relevant period of limitation was current at the date the proceeding was started, but has since ended, the Court may give leave only in the circumstances referred to in *UCPR* 376(4). It will not be "appropriate" to allow the amendment if the plaintiff has not established an absence of prejudice from the cause of action being claimed so late.[45] Issues of prejudice analogous to those which arise in respect of applications for extensions of time under the *Limitations of Actions Act* 1974 arise.[46] In determining whether it is "appropriate" to give leave to make an amendment, the objectives stated in *UCPR* 5 and the principles discussed by the High Court in *Aon* also arise for consideration.

[26] The term "substantially the same facts" in *UCPR* 376(4)(b) have been considered in numerous authorities. In *Draney v Barry*[47] Thomas JA stated that this particular requirement should not be seen "as a straightjacket". If the necessary additional facts to support the new cause of action "arise out of substantially the same story as that which would have been 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".[48] The position may be otherwise where the plaintiff relies upon a distinct and different duty to that already pleaded. This is illustrated in the recent decision in *Zonebar Pty Ltd v Global Management Corporation Pty Ltd*.[49] Keane JA, with whom White and Wilson JJ agreed, rejected the approach that "in a case where a contract imposes two separate obligations, A and B, upon a defendant, an allegation of a breach of obligation B will be held to arise out of substantially the same facts as were previously pleaded simply because the previous pleading referred to the contract and alleged breach of A".[50] To accept such an outcome was said to "make

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42 [2006] QSC 191 at [8].
43 *Central Sawmilling No 1 Pty Ltd v State of Queensland* [2003] QCA 311 at [10].
44 Ibid at [15] quoting *Hall v Hall* (Tasmanian Supreme Court, unreported, 3 December 1996).
45 *Borsanto v Campbell* (supra) at [17].
46 Ibid.
47 [2002] 1 Qd R 145 at 164 [57].
48 Ibid.
49 [2009] QCA 121.
50 Ibid at [23]. See also *Wolfe v Queensland* [2008] QCA 113 at [17]-[19].

a mockery of the requirement in s 376(4)(b) of the *UCPR* that the new cause of action must arise out of substantially the same facts as those already pleaded."[51]

[27] The principles discussed by the High Court in *Aon* inform the exercise of the discretion to grant leave to amend a claim pursuant to *UCPR* 377 and the discretion to allow or direct a party to amend a claim or a pleading pursuant to *UCPR* 375. I have already referred to some of these principles in discussing the operation of *UCPR* 5 in the case of amendments made without leave pursuant to *UCPR* 378 and the Court's power to disallow such amendments or make directions concerning further amendment of a claim or a pleading in order to avoid prejudice to the other party and to comply with the rules of civil procedure and their purpose. In the context of the present application and in respect of amendments to the claim or the statement of claim for which leave is required, the following principles assume importance:

1. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation.[52]

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

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

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

5. The existence of an explanation for the amendment is relevant to the Court's discretion, and "[i]nvariably the exercise of that discretion will require an explanation to be given where there is a delay in applying for amendment".[53]

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

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

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

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51 Ibid.

52 *Aon* at [5]; [111].

53 Ibid at [102].

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

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

11. Even when an amendment does not lead to the adjournment of a trial or the vacation of fixed trial dates, a party that has had sufficient opportunity to plead their case may be denied leave to amend for the sake of doing justice to the other parties and to achieve the objective of the just and expeditious resolution of the real issues in dispute at a minimum of expense.

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

The amendments in contention

[28] It is convenient to briefly describe and group the contentious amendments that have emerged in recent times and which appear in the plaintiff's proposed pleading and related proposed amendments to his claim.

1. A proposed oral term of the Dissolution Agreement, and a consequential amendment to paragraph 1 of the claim.

2. A proposed implied term of the Dissolution Agreement and a consequential amendment to paragraph 1 of the claim.

3. Allegations that the defendant did not invoice certain clients, issued credit notes to certain clients, and wrote off sums owing to the partnership by certain clients in breach of the terms of the Dissolution Agreement.

4. Allegations that the defendant received benefits by, amongst other things, not invoicing certain clients, issuing credit notes and writing off sums, with the intention that his clients should receive benefits so as to generate goodwill between the defendant and the clients. This conduct is alleged to have breached an implied term of the Dissolution Agreement to not prefer his interests over the interests of the partnership in relation to the collection of the assets of the partnership and also to have constituted a breach of fiduciary duty. This is reflected in the proposed amendment to the claim to introduce an alternative claim for "equitable compensation or damages for breach of fiduciary obligation".

5. A proposed new agreement styled "General Account Retainer Clients Agreement" which is based on an alleged oral agreement reached on an unspecified date between 3 September and 17 October 2001. This is

reflected in a proposed amendment to the claim to introduce a claim for payment of the sum of $62,736.11 pursuant to the General Account Retainer Clients Agreement.

6. Amendments to the statement of claim in relation to the claim for damages for breach of clause 6 of the Dissolution Agreement, which relates to the agreement for dividing the sign. These amendments relate to the process of obtaining the landlord's consent and the quantification of damages, and are reflected in an amendment to the claim which specifies the quantum of the damages claimed as $57,157.

[29] There are other proposed amendments, including amendments of substance, that are not in contention which I will address in due course.

General observations on the amendments that are in contention

[30] There has been no satisfactory explanation by the plaintiff for his delay in respect of the amendments that are in contention, save for an affidavit that addresses very recent delays in complying with the orders made by Atkinson J.[54] The plaintiff has not explained why, for instance, he seeks to bring forth claims based on oral agreements alleged to have been made in late 2001, and why these matters were not pleaded earlier, consistent with his implied undertaking to the Court and to the defendant. The plaintiff has filed some material that addresses the affidavit material filed by the defendant concerning the plaintiff's access to records and information.[55] Most of the material filed by the defendant about access to records and information is uncontradicted. The absence of an adequate explanation from the plaintiff for his delay calls into question whether the interests of justice require the defendant to be prejudiced by having to address the circumstances in which numerous transactions occurred between September 2001 and June 2003, by which date, for all practical purposes, activity on the partnership account ceased. In addition, the material filed by the defendant indicates that any breach of the recently asserted duties occurred more than six years ago. Most, if not all, relate to alleged breaches of duty which are outside of a limitation period which was current at the date the proceeding was started, but which has since expired.

[31] The defendant swears that the late raising of the claims will cause him significant and irreparable prejudice, both because of the costs associated with raising them at this late stage and also because of the passage of time that has occurred since the events to which they relate. He refers to the problems associated with recalling the precise detail of each and every partnership account transaction which took place between September 2001 and "the last time there was any activity on the partnership account, which for all practical purposes occurred in June 2003, but in

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54 The delays in complying with directions made at the Managed Case Review on 27 March 2009 concerning the delivery of a further amended statement of claim are addressed in para 4 of Ms Latimer's affidavit sworn and filed on 22 May 2009 (CFI 32) which relate to delays in counsel settling the pleading. The pleading was settled by different counsel to the counsel who appeared on the application.

55 Ms Latimer deposes on information and belief that the plaintiff had a "secretarial level" password to access the QuickBooks' records for the firm to 3 September 2001 that he was provided in October 2001 but does not have the "administrator password" that provides functionality. The plaintiff has not had an electronic version of the firms' QuickBooks records for any period after 3 September: Latimer affidavit filed by leave 19 June 2009 paras 4 and 5. However the defendant has made disclosure of individual entries from QuickBooks: Latimer affidavit filed 22 May 2009 CFI 34, para 5(c).

every respect was by June 2005".[56] I observe that some of the prejudice arising from fading recollection would have been suffered if the claims had been brought within the limitation period and at the time the proceeding was started in September 2007.

[32] As to the billing of accounts and the collection of debts, the defendant says that unbilled work was billed up to 3 September 2001 in accordance with the Dissolution Agreement and that the majority of bills were completed in each section by October 2001 with the exception of cottage conveyancing, some property matters and some litigation matters that were billed at the conclusion of the matter. These were billed and paid proportionally to the plaintiff and the defendant. He says that the collection of those amounts occurred in respect of the clients he retained by his office administrator, Ms Gai Mills and in respect of those retained by the plaintiff by the plaintiff or his staff. He says that between 3 and 14 September 2001 the plaintiff had worked through the work in progress QuickBooks printouts which showed the work in progress in respect of client files, and records in relation to work in progress provided the basis for draft accounts which were subsequently amended. He says there has been full disclosure of all work in progress ledgers which he has in his possession, power or control.

[33] The defendant deposes to the fact that in the period between September 2001 when the partnership was dissolved, until the final reconciliation of all of the partnership accounts and the final closing of its accounts and files in May 2005, the plaintiff was provided, at the defendant's direction, initially with weekly, then fortnightly, then monthly and then finally quarterly statements of all relevant activity concerned with the former partnership. The defendant's staff were instructed to answer, and to the defendant's knowledge answered, any queries that the plaintiff had in relation to the manner in which the balance of the affairs of the partnership were conducted up until June 2003.[57] An accountant, Mr Revie, and the defendant conducted an analysis of the books of account of the partnership for each of the years 2001, 2002 and 2003, and financial statements for the partnership were prepared and tax returns lodged with the Australian Taxation Office.[58] An open offer was made on 25 November 2008 to allow the plaintiff to inspect client files on certain conditions, including appropriate confidentiality and access arrangements, despite the defendant's contention that there was no pleaded issue to which those files were directly relevant.[59] There was a significant amount of work and expense involved in recalling from archives these files and separating parts of them which came into existence after the dissolution of the partnership. The partnership files were available for five months between 10 December 2008 and 12 May 2009, however the plaintiff apparently believed that they had been returned to archives much earlier.[60] The plaintiff's employed solicitor inspected them on 22 January 2009 and did not make arrangements to return to resume his inspection.

[34] As to QuickBooks, the defendant deposes that in or about October 2001 the most up to date QuickBooks accounting package files relating to the partnership, including those relating to the collection of partnership assets after 3 September 2001, was

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56 Affidavit of Hynes filed 18 June 2009 CFI 45 para 8.
57 Ibid para 38.
58 Ibid para 39.
59 Ibid para 51.
60 Affidavit of Gai Mills filed 10 June 2009 CFI 46, paras 5-7; Affidavit of Joanne Latimer filed by leave 19 June 2009.

provided to the plaintiff. The computer server on which the QuickBooks electronic record was stored was provided to the plaintiff pursuant to the terms of the Dissolution Agreement, and after the partnership dissolved the defendant acquired a new server for the conduct of his practice and ceased using QuickBooks software for his practice.

[35] The electronic records concerning the management and collection of partnership assets after 3 September 2001 were maintained by the partnership administration manager, Ms Mills. The defendant deposes that most remaining unpaid debts were written off on 28 June 2002 so there was little or no activity recorded after that date. The defendant swears, and the plaintiff does not contest, that the plaintiff was kept fully informed, on the defendant's instructions, of all the activities which occurred in relation to the balance of partnership affairs up until the last relevant event in June 2005. Ms Mills was directed to provide the plaintiff with any information that he required. She was instructed to provide him with weekly, then fortnightly, then six monthly reports as to all activity in relation to the partnership affairs in the period up to approximately two years after the partnership dissolution, and thereafter the plaintiff was given quarterly reports of these matters. The defendant deposes that at no time prior to the commencement of the proceedings did the plaintiff request any access to the QuickBooks database relating to the partnership.

[36] The plaintiff was supplied with QuickBooks records in September 2001, and does not dispute that he received the financial statements and reports deposed to in the defendant's affidavits, including reports about the writing off of bad debts. However, he says that he was not provided with electronic copies of QuickBooks records in relation to the management and collection of debtors after September 2001. The defendant agreed at the hearing on 19 June 2009 to provide copies of the same. However, even without these electronic records the plaintiff has been able to prepare as a schedule to his proposed pleading a spreadsheet of 1412 line items which contains details of unbilled work in progress as at 3 September 2001, invoices and the writing off of partnership debts.

[37] In relation to the proposed pleading of additional claims in paragraphs 7LA to 7LL alleging breach of fiduciary duty, the defendant says that at no time prior to the service of the plaintiff's proposed pleading was any such allegation made to this effect. He says that the claims now sought to be raised concerning breaches of contract and breaches of fiduciary duties in paragraph 7A to 7L, 7LA to 7LI, 7M and 7N raise issues which "because of the passage of time since any of the incidents of the partnership to which they relate refer will be ones which will involve considerable expense, and prejudice associated with the necessity to recall the circumstances of numerous individual incidents going back to 2001".[61] The defendant denies the allegation that he breached his fiduciary duties, and says there was no preferring of his interests to those of the partnership. He deposes that the affairs of the partnership were wound up conventionally and according to proper practices and overseen by an accountant, Mr Revie, who reviewed and completed the firm's accounts. He says that the firm's administrator essentially administered the winding up of the last activities of the partnership and Mr Revie prepared the annual returns of the partnership, to which the plaintiff took no objection at the time. The defendant says that he is unable to further respond to the allegations concerning breach of fiduciary duty because the clients who are alleged to have

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[61] Ibid para 67.

received certain benefits are unparticularised and unidentified, and there has been no particularisation of the circumstances in which they allegedly received the benefits complained of. He says that had the plaintiff previously, that is until January 2009, claimed that there were inappropriate or unauthorised transactions of that kind, or more particularly made the complaint that the manner in which the financial affairs of the partnership were wound up was inappropriate, these matters could easily have been answered at the times up until June 2005 by reference to the contemporaneous decisions being made. The defendant asserts that it would be oppressive to allow the proposed amendments, particularly having regard to the likely cost of opening up such a line of inquiry.

[38] The defendant also refers to the proliferation of costs and says that since parts of the statement of claim were struck out by Mullins J in July 2008 he has incurred costs of approximately $105,205 in defending the claim, which include costs in seeking to compel compliance with orders of the Court in relation to the provision of further pleadings and that for all practical intents and purposes, the costs which he has incurred since July 2008 in seeking to ensure that the proceedings advance in accordance with the directions of the Court have been thrown away. He notes that there have now been four versions of the proposed statement of claim since parts of the initial statement of claim were struck out and that the plaintiff has not met any of the costs thrown away by reason of the making of or attempted making of those amendments.

[39] Mr Revie deposes that he acted for the firm for a number of years both before and after the dissolution of the partnership in 2001, and was familiar with the records of the partnership. He says that after the dissolution of the partnership he continued to prepare both tax returns and a detailed management account for the practice for the financial years ending June 2001, June 2002 and June 2003. He had unrestricted access to the books. The books for the year ended June 2002 included an adjustment for bad debts and at that time there were only $8,000 of debtors for the firm outstanding. The final return that he prepared was for the year ended June 2003 and at that stage all of the debtors had been brought in or been written off as legitimate bad debts because the partnership was taxed on an accruals basis, which meant that they needed to be written off once they became irrecoverable. He says at that stage the only outstanding matters in relation to the winding up of the partnership related to a questionable asset identified as Bartercard dollars and $2,500 approximately in a bank account. There were no ongoing profit or loss items to warrant any further returns to be prepared and he did not prepare any such returns.

[40] Mr Revie swears that each of the returns that he exhibits to his affidavit were provided jointly to the plaintiff and his accountant and to the defendant and at no stage did he receive any complaint from the plaintiff or his accountant which suggested that he was in any way dissatisfied with the manner in which those financial statements had been prepared or as to their accuracy or validity. He received no complaint from the plaintiff that implied that improper decisions had been made by the defendant or that in the period after September 2001 there had been any abuse of position by the defendant, or breach of duty which led to the financial statements disclosing a false position.

[41] Mr Revie wrote to the plaintiff on 16 July 2003 advising him that the 2002 statement should be amended to write off remaining debtors and asking that he

approve this. Mr Revie was concerned at the late lodgement and interest penalties that were accruing and he had earlier received letters from the plaintiff's accountant and solicitor directing that he not lodge the partnership tax return without the plaintiff's express written authority. He was never given that authority and eventually he was compelled to explain the position to the tax office as the plaintiff did not respond to his requests that the signed tax returns be returned to him for lodgement.

[42] The plaintiff's evidence[62] is that whilst Mr Revie acted as the firm's accountant during the term of the partnership, after its dissolution he was not jointly appointed to act for the former partnership, and that the financial accounts provided to him by Mr Revie for the years ended June 2001, June 2002 and June 2003 were never accepted and approved by him.

[43] Ms Gai Mills deposes to the costs and expenses previously incurred in retrieving partnership files from archives in order to facilitate the plaintiff's access to them. She facilitated this process between December 2008 and May 2009. She confirms that a CD of the QuickBooks accounting package files for the former partnership was provided to the plaintiff in the week after the dissolution of the partnership on 3 September 2001. She also says that she provided full and detailed reports to the plaintiff to keep him fully apprised of any transactions in relation to the partnership matters:

(a) from 3 September to 31 December 2001 at intervals that were usually not greater than a fortnight apart;

(b) monthly from 1 January 2002 to 30 June 2004; and

(c) quarterly from 1 July 2004 to 1 July 2005.

She swears that:

- from the dissolution until the final report dated 1 July 2005 was provided to the plaintiff she was fully co-operative with him in providing whatever information he required concerning the winding up of the last of the partnership matters;

- her handling of the winding up of the partnership affairs was proper, without any preference to the interests of the defendant over those of the plaintiff;

- the winding up was unremarkable and proceeded in a normal, business-like fashion, assisted by advice from the firm's accountant, the plaintiff and the defendant.

This affidavit was not contradicted.

[44] Despite earlier requests, none of the defendant's deponents were required for cross-examination. Their evidence highlights the substantial prejudice, both in terms of cost and recollection of detail, in reviewing transactions that occurred on the partnership account principally between September 2001 and June 2003. The material indicates that the collection of debts due to the partnership occurred principally in the period immediately after the dissolution and that most remaining

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62 Given on information and belief in Ms Latimer's affidavit filed by leave 19 June 2009 paras 7 and 8.

unpaid debts were written off on 28 June 2002 and that there was little or no activity after that date. As Mr Revie explains, as at June 2002 there were only $8,000 of debtors for the firm outstanding. These aspects of the evidence, which are unanswered, suggest that the new claims for breach of duty which the plaintiff seeks to agitate concerning the writing off of debts are statute-barred, save for relatively small amounts that may have been written off after June 2003.

[45] Against that background, I turn to consider the categories of amendments that are in contention.

The new oral term in the Dissolution Agreement: paragraph 7A and 7B

[46] As previously noted, the plaintiff seeks to amend his claim and his pleading to assert that there was an oral term of the Dissolution Agreement. The term is that:

> "(a) the defendant, by himself or Mills, as agent for and on behalf of the Partnership would cause the Partnership to invoice and collect from clients of the Partnership:
>
> (i) unbilled work in progress in accordance with the terms of the Dissolution Agreement identified at paragraphs 5(b) and (d) above; and
>
> (ii) unbilled sundries as at 3 September 2001 on files of clients of the Partnership Business;
>
> (b) the defendant, by himself or Mills, as agent for and on behalf of the Partnership would cause the Partnership to collect sums owing by debtors and aged debtors in accordance with the terms of the Dissolution Agreement identified at subparagraph 5(d) above;
>
> and account to the Partnership for such sums."[63]

This oral term is alleged to have been agreed during the course of conversations between the plaintiff and the defendant at face to face meetings at the premises of the partnership between 3 September 2001 and 17 October 2001.[64] The defendant complained about the lack of particularity of precisely when the agreement was reached and the contents of the conversations. The plaintiff simply alleges that the substance and effect of what was said is constituted by the oral term, and provides no further particulars.

[47] The plaintiff does not address this amendment in an affidavit, and does not swear to these conversations. However, this is not a case in which the defendant says that he has no recollection of any such conversation. In paragraph 14 of his affidavit filed 18 June 2009 he says that no such term about invoicing unbilled work was agreed, and he did not have any obligation of the kind alleged. As to the collection of debts, as I have noted, he says the collection of these amounts occurred in respect of clients he retained by Ms Mills, and in respect of those clients retained by the plaintiff by the plaintiff or his staff.

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63 The plaintiff's proposed pleading para 7A.

64 The plaintiff's proposed pleading para 7B.

[48] Despite the highly unsatisfactory delay in asserting that the Dissolution Agreement was partly oral, I do not consider that the late amendment prejudices the defendant in a way that cannot be adequately remedied by an order for costs.

[49] The new contention that the Dissolution Agreement was not simply in writing, but also consisted of the oral term, is an amendment which includes a new cause of action requiring investigation of what was said around the time the document dated 14 September 2001 was signed. It is not simply the further particularisation of the terms of a written agreement. However, the new cause of action arises out of substantially the same facts as the original cause of action, and concerns the mechanics of invoicing and collecting sums due from clients. The defendant is not prejudiced since he does not claim that he has no recollection of reaching such an agreement about the invoicing and collection process. He denies there was an agreement, and points to the fact that the process of collection occurred in a different way.

[50] I consider that the appropriate course is to allow the plaintiff to plead the oral term pleaded in paragraphs 7A and 7B and to grant him leave to amend paragraph 1 of the claim so as to plead that the agreement was partly oral. The grant of leave should be subject to:

1. The plaintiff providing within 10 days further and better particulars of the actual dates between 3 September 2001 and 17 October 2001 that the oral terms referred to in paragraph 7A were agreed and, so far as he is able to, the words spoken on each such occasion, the substance and effect of which is pleaded in subparagraphs 7A(a) and (b).

2. If the plaintiff is unable to provide those particulars he should swear and file an affidavit within 10 days verifying his inability to do so.

The new implied term in the Dissolution Agreement: paragraphs 7C and 7D

[51] The plaintiff's proposed pleading pleads in the alternative to such an oral term that there was an implied term to the same effect. These matters are said to be inferred from the earlier pleaded terms of the Partnership Agreement and the Dissolution Agreement and the conduct of the plaintiff and defendant after 3 September 2001 and before 17 October 2007 in relation to the invoicing of clients and the collection of sums owing to the partnership.

[52] The defendant objects to this amendment and says that the pleaded term is inconsistent with the express terms of clauses 2, 3 and 25 of the written Dissolution Agreement which provide for the invoicing and collection from clients of the partnership. Although the defendant has an argument in this regard, I consider that it is arguable that such a term is to be implied. The clauses of the written Dissolution Agreement proposed that "we bill all matters up to 3 September 2001" and there is not a necessary inconsistency between this term and the proposition that Ms Mills, who continued to work for the defendant and who had been the partnership's administrator, would cause the partnership to invoice clients and collect debts from clients of the partnership. The Dissolution Agreement contemplated that Ms Mills would be responsible for depositing the proceeds of all debtors into the bank account and that the plaintiff and the defendant would "assist one another in collecting all of our debtors". The process was not specified and the document dated 14 September 2001 stated "I am sure that we can agree that process as we go along, say, should we need to institute recovery proceedings against any of

the debtors". In the circumstances, there is no necessary inconsistency between the written Dissolution Agreement and the proposition that the collection process was to be undertaken by Ms Mills, who continued to work for the defendant, as agent for and on behalf of the partnership. The defendant's case, of course, is that no such agreement was reached and that the plaintiff and the defendant collected amounts from their respective clients. However, the implied term that the plaintiff proposes to plead is arguable.

[53] The defendant submits that an allegation to the same effect was struck out by Mullins J and that the current proposed amendment is indistinguishable from that paragraph that was previously struck out. However, paragraphs 6(b), (c) and (d) of the draft pleading considered by Mullins J were in different terms and the implication of such a term was not supported by the detailed pleading of the express and implied terms of the Partnership Agreement and the conduct which since has been pleaded.

[54] The new implied terms arguably involves the inclusion of a new cause of action, as distinct from the further particularisation of the existing claim concerning the express and implied terms of the Dissolution Agreement. If a new cause of action is involved it arises out of substantially the same facts as the causes of action for which relief has already been claimed. They relate to the terms of the Dissolution Agreement concerning the invoicing of clients and collection of debts.

[55] I consider that it is appropriate to allow leave to amend to introduce new paragraphs 7C and 7D and to grant leave to amend the claim to allow reliance upon the implied term.

Allegations that the defendant did not invoice certain clients, issued credit notes and wrote off sums in breach of the Dissolution Agreement

[56] Paragraphs 7F, 7G and 7H of the plaintiff's proposed pleading contain allegations that the defendant did not invoice certain clients of the partnership for unbilled work in progress, issued credit notes to certain clients and wrote off sums owing to the partnership by certain clients, respectively. These paragraphs give particulars of clients, unbilled work, credit notes and write offs as appear in Schedule 1 to the proposed pleading and continue "further particulars of the same are unknown by the plaintiff until after supplementary disclosure herein". The pleading then continues with allegations that the defendant collected sums owing to the partnership by certain clients (7I) and did not account for the sums (7J). The defendant's alleged conduct in these respects is alleged to have constituted a breach of the terms of the Dissolution Agreement (7L).

[57] The alleged breaches arising from the conduct alleged in paragraphs 7G and 7H are based upon the recent inclusion of proposed implied terms that the defendant would not write off any unbilled work in progress or write off sums owing by debtors of the partnership or give any such clients a credit note "without the consent of the plaintiff".[65] There are additional implied terms including one that the defendant "would not prefer his interests over the interests of the partnership in relation to the collection of the assets of the partnership".[66]

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65 The plaintiff's proposed pleading paras 6(g)-(h).

66 The plaintiff's proposed pleading para 6(j).

[58] I observe that the unqualified contention that sums could not be written off "without the consent of the plaintiff" is highly debatable and such a term may not be necessary to give the Dissolution Agreement business efficacy. It seems unlikely that a term would be implied that sums could only be written off with the consent of the other partner, including consent that was unreasonably withheld. One can imagine circumstances in which there would be good reason not to pursue an unpaid debt (for instance, a client's complaint about overcharging or the quality of the service provided, or where there was no realistic prospect of recovering the amount). It would not seem just and equitable to make the writing off of such a debt conditional upon the consent of a party, however unreasonable he may be in withholding his consent.

[59] As appears from the defendant's affidavit material, the conduct in question in invoicing, collecting debts and writing off debts appears to have occurred in late 2001 and early 2002 with most of the unpaid debts having been written off on 28 June 2002, with little or no activity recorded in the accounts after that date.

[60] The proposed pleading has attached to it four voluminous schedules including Schedule 1 which is a spreadsheet of clients, unbilled work in progress and whether the client was billed or not. The defendant complains about the form of the schedules because of the lack of identification of the transactions which are sought to be impeached. This is a valid criticism. The defendant should not be required to trawl through the schedules and to do his best, at considerable expense, to identify the particular transactions that are impeached and to guess the precise grounds upon which they are being impeached.

[61] It is also highly unsatisfactory, at this late stage, for the plaintiff to not give complete particulars. In various parts of the proposed pleading the plaintiff simply asserts "particulars of the clients and the invoices are unknown by the plaintiff until after supplementary disclosure herein". These particulars are given in relation to the allegation that the defendant caused the partnership to invoice certain clients before 17 October 2001 for unbilled work in progress and unbilled sundries on file to those clients as at 3 September 2001. Given the plaintiff's previous access to documents both informally and on disclosure, it is unsatisfactory for him to say that he cannot provide such particulars until after supplementary disclosure. In other places the plaintiff's proposed pleading provides, as I have mentioned, particulars in the form of Schedule 1 and continues "further particulars of the same are unknown by the plaintiff until after supplementary disclosure herein". The defendant submits that when the matter was argued before Mullins J similar speculative pleas were contained in the draft pleading and were not permitted.

[62] The plaintiff has not explained why, even without resort to electronic copies of the QuickBooks records relating to activities after 3 September 2001, he has been unable to better particularise his claim.

[63] The breaches of the Dissolution Agreement which the plaintiff wishes to introduce by these extensive amendments to the pleading are materially different to the breaches pleaded in earlier editions of the pleading and which were struck out by Mullins J. They involve new causes of action based on recently pleaded implied terms.[67] Although the plaintiff had previously pleaded that there was an implied

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[67] Compare paras 6 and 20 of the draft pleading which was Exhibit 4 before Mullins J and the terms of the plaintiff's proposed pleading.

term that the defendant would bill partnership clients for unbilled work in progress and that the defendant would take "all steps reasonably necessary" on his part to recover unpaid fees and that he failed to take "all steps reasonably necessary on his part to collect sums from clients", the new allegations are different and contain differently-framed specific terms in relation to the invoicing, collection and writing off of debts.

[64] The new causes of action that the plaintiff wishes to advance concerning the failure to invoice clients, the writing off of debts and the issuing of credit notes appear to relate to transactions that occurred principally in late 2001 and the first half of 2002. By 30 June 2002 only $8,000 remained unpaid and there was little or no activity after that date. Although the last relevant entry in the partnership records appears to have occurred in June 2005 when the bank account was closed with a 50/50 split on the balance,[68] the uncontested evidence is that, for all practical purposes, activities on the partnership account had ceased in June 2003. The matters about which the plaintiff now complains appear to have occurred prior to 30 June 2002 when most of the remaining unpaid debts were written off. The plaintiff has not advanced an affidavit or argument which suggests that the conduct of which he complained concerning the writing off of unpaid debts and the like occurred at any later date. In the circumstances, the breaches complained of occurred more than six years ago and are now statute-barred. However, they were not statute-barred when the action was commenced on 3 September 2007.

[65] The uncontradicted affidavit material to which I have earlier referred indicates that many years ago and at about the time that the transactions in question occurred the plaintiff knew, or had means at his disposal to know, the substance of the matters about which he now complains in his proposed pleading such as the writing off of unpaid debts. He has not explained in an affidavit or otherwise why it has taken until now to formulate the new claim in relation to these transactions.

[66] The provisions of *UCPR* 376 permit amendment after the limitation period in certain circumstances. The Court may give leave to make an amendment to include a new cause of action if a relevant period of limitation, current at the date the proceeding was started, has ended 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.

[67] The plaintiff has not persuaded me that it is appropriate to give leave to make amendments which would include new causes of action for which the limitation period has now expired. I have already remarked upon the plaintiff's knowledge or means of knowledge. Another factor is that he has not explained his delay in advancing these new claims. At a level of abstraction, the new causes of action arise out of the same general subject matter as the existing causes of action for which an account or damages for breach of contract have already been claimed in the proceeding, namely the carrying into effect of the Dissolution Agreement. However, the allegations concerning the alleged failure to invoice clients, the

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[68] Hynes' affidavit CFI 45 para 19.

issuing of credit notes and the writing off of debts relate to numerous specific transactions and involve substantially different facts as to the obligation being breached and the relevant conduct. There is a difference between the collection of debts and a failure to account for what was collected, and a failure to collect debts by writing them off, or not invoicing them in the first place.

[68] The new claims for breach of contract relate to the fact of these acts or omissions occurring, as distinct from the defendant's alleged motivation in respect of these acts and omissions, being a matter which is raised in connection with the next group of amendments which relate to breach of fiduciary duty. However, great expense will be incurred in locating and analysing numerous partnership transactions which are alleged to have occurred almost eight years ago. The material relied upon by the defendant makes it highly likely that if the proposed amendments were allowed then the necessary contention by the plaintiff that he did not consent to the defendant's conduct in writing off unpaid accounts will be met by the contention that the requirement for consent was waived or that he is estopped from relying upon the absence of consent.

[69] The proposed amendments are not limited to those alleged breaches which are alleged to have occurred after June 2003 and, on the material, any such claim would be a relatively trivial one.

[70] The plaintiff's unexplained delay in advancing the causes of action for breach which have only recently been formulated, their lack of particularity, the cost that will be occasioned to the defendant in having to investigate these matters and the policy which underlies periods of limitation[69] raise substantial reasons as to why it is not appropriate to give leave to make these amendments. The plaintiff has failed to persuade me that it is appropriate to grant leave.

[71] I decline to grant leave in respect of the allegations of not invoicing certain clients, issuing credit notes to certain clients and writing off sums that are alleged in paragraphs 7F, 7G and 7H. Other paragraphs in the plaintiff's proposed pleading which rely upon these matters will need to be modified.

Breach of duty and breach of fiduciary duty: paragraph 7LA to 7LG

[72] The plaintiff acknowledges that the proposed inclusion of paragraphs 7LA to 7LG are substantive amendments. They essentially plead that by doing the things alleged in paragraphs 7F, 7G and 7H (not invoicing certain clients, issuing credit notes to certain clients and writing off sums owing to certain clients) the defendant "intended that" the clients should receive certain benefits so as to generate goodwill between him and the said clients. By reason of these things he is alleged to have preferred his interests to the interests of the partnership and to have breached the terms of the Dissolution Agreement pleaded in paragraph 6(j). In addition, by reason of these matters and a new pleading that each partner owed the other "an equitable duty of good faith"[70] and the express term of the Partnership Agreement that they would each be just and faithful to the other in all matters relating to the Partnership Business[71] the defendant is alleged to have owed a fiduciary obligation not to prefer his interests to the interests of the plaintiff or alternatively the

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69 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551.

70 The plaintiff's proposed pleading para 2B(a).

71 The plaintiff's proposed pleading para 2B(c).

partnership in winding up the affairs of the partnership.[72] By reason of matters identified earlier in the pleading the conduct of the defendant identified in paragraphs 7F, 7G, 7H, 7I,[73] and 7J[74] the defendant is alleged to have engaged in conduct in breach of his fiduciary obligation. As previously noted, the proposed amended claim includes for the first time a claim for "equitable compensation or damages for breach of fiduciary obligation".

[73] The plaintiff submits that the pleading of the matters contained in paragraphs 7LA to 7LG of his proposed new pleading merely expand upon matters already alleged in the existing pleading and do not plead a new cause of action. The proposed amendments are described as a "refashioning or redesignation or further particularisation of a claim on the basis of facts already pleaded" as distinct from a "new case varying so substantially from what has previously been set up that it would involve investigation of matters of fact or questions of law, or both, different from what has already been raised and of which no fair warning has been given".[75] I do not accept these contentions. Even if the existing pleading for which leave had been granted included allegations that the plaintiff failed to invoice clients, issued credit notes or wrote off debts, the new pleading is of a different character. As paragraph 37 of the plaintiff's submissions and the proposed pleading make clear, the conduct of the defendant is alleged to have been undertaken intentionally so as to create goodwill between the defendant and clients of the partnership. This new section of the pleading involves the pleading of new causes of action, being causes of action which arose from conduct that occurred more than six years ago.

[74] The fundamental objection to them is that they require the defendant to recall the precise circumstances in which numerous transactions occurred between September 2001 and some unspecified later date which, in all likelihood, was either before 30 June 2002 by which time most of the remaining unpaid debts had been written off or June 2003 when, for all practical purposes, activity on the partnership account had ceased. The matter extends beyond unearthing documents and making inquiries in relation to these transactions, including the circumstances under which debts were written off. It requires the defendant to meet an allegation that each debt was written off with a specific intention.

[75] Again, the plaintiff has advanced no explanation for his delay in not advancing such a claim much sooner. I accept the uncontested evidence of the defendant that he will be prejudiced by the problems associated with recalling the detail of these old transactions. It is not in the interests of justice for the defendant, without any adequate justification for the plaintiff's delay being advanced, to be required to recall and give evidence about his reasons for numerous transactions which occurred so many years ago.

[76] Although the application is for leave to amend, rather than one for the extension of time within which to bring a claim, the observations of McHugh J in *Brisbane South Regional Health Authority v Taylor*[76] are apposite. His Honour remarked that for nearly 400 years the policy of the law has been to fix definite time limits for

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72 Proposed pleading para 7LH.

73 Which relates to the collection of sums owing to the partnership.

74 Which alleges a failure to account for the sums.

75 Plaintiff's submissions para 36 citing *Central Sawmilling No 1 Pty Ltd v State of Queensland* [2003] QCA 311 at [10] and [15].

76 (Supra) at 551.

prosecuting civil claims. The enactment of time limitations has been driven by the general perception that "where there is delay the whole quality of justice deteriorates".[77] Prejudice may exist without the parties or anybody else realising that it exists. In the present case the defendant, and the interests of justice, are prejudiced by requiring the defendant to recall the reasons why he did not pursue or wrote off certain debts. There may be many legitimate reasons why a solicitor may decide to not pursue unbilled work or not persist with attempts to recover an unpaid debt. To prepare for a trial in relation to these matters the defendant would be required to unearth client files and to do his best to recall the precise circumstances under which transactions in relation to the billing of clients took place. The file and other records may not adequately record his reasons for not pursuing a claim. The client's recollection of the matter may be non-existent or impaired. The defendant will be required to do his best to recall his interaction with clients in respect of whom he is alleged to have written off accounts and to recall the reasons why sums were written off or otherwise not pursued.

[77] Whilst I am reluctant to deny the plaintiff with an arguable case the opportunity for a fair trial of such a new claim, the opportunity is for a *fair* trial. It is not the opportunity to conduct "solemn farces in which parties and witnesses are invited to attempt to reconstruct recollections which have long since disappeared".[78]

[78] I conclude that the proposed amendments would prejudice the defendant in a manner that could not be adequately compensated by an order for costs in respect of the costs associated with investigating and meeting these allegations at this late stage. The prejudice is the prejudice that is occasioned by requiring the defendant to recall the detail of numerous transactions which are still not fully particularised, and to face a trial in which he is required to defend his reasons for the transactions in question and to explain what his intentions were at the time. It is not in the interests of justice for the defendant to now be required to face a trial on those issues and to attempt to reconstruct recollections of his intentions in respect of these transactions.

[79] The plaintiff submitted that if, contrary to its principal submission, the proposed amendments introduced a new cause of action and r 376 applied, then I should grant leave under r 376(4) because the new cause of action would clearly arise out of the same facts or substantially the same facts as the cause of action already pleaded in paragraph 7L. I have not permitted the plaintiff to rely upon the breach of contract claim that appears in paragraph 7L insofar as it is based upon the conduct identified in paragraphs 7F, 7G and 7H. However, if I had, I would not have acceded to the plaintiff's submission. The alternative claim based upon new paragraph 7LA to 7LG raise additional, important facts concerning the defendant's intentions at the time. For the reasons that I have given I am not satisfied that it is appropriate for leave to be given to make an amendment to include the new causes of action for breach which rely upon paragraphs 7F, 7G and 7H and the new cause of action for breach of fiduciary duty.

[80] The plaintiff's alternative submission concerning the granting of leave under r 376(4) implicitly accepts that the new claims are statute-barred. The fact that the plaintiff has not given an adequate explanation for the late advancing of these new

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77 Ibid, quoting *R v Lawrence* [1982] AC 510 at 517.

78 *Page v The Central Queensland University* (supra) at [24].

claims provides an additional reason as to why leave should not be granted. However, my principal reasons for not granting leave are the prejudice to the defendant, which cannot be adequately remedied, and the prejudice to the interests of justice by permitting the plaintiff to raise new issues and new causes of action which relate to the defendant's intentions in respect of numerous transactions that occurred at unspecified dates between September 2001 and, it would appear, June 2003 in circumstances in which the defendant has not been required during the previous course of these proceedings to recall his reasons for engaging in the conduct alleged in paragraphs 7F, 7G and 7H. It is oppressive and prejudicial for him to be required to do so now.

[81] Insofar as the new cause of action is one for "equitable compensation or damages for breach of fiduciary obligations", the *Limitations of Actions Act* 1974 does not prescribe a time limit. Equity may apply a limitation period by analogy.[79] There is authority to the effect that it will not apply a statutory limitation period by analogy to equitable remedies where it is "unjust to do so" or where there are circumstances that make the application of the statute unconscionable.[80] The plaintiff did not contend that the claim for "equitable compensation and damages for breach of fiduciary duty" was intended to provide a different measure of compensation than the claim for breach of contract which relied on the same acts and omissions, being those pleaded in paragraphs 7F, 7G and 7H. He did not advance any argument as to why it would be unjust or unconscionable to apply a limitation period by analogy.

[82] While it is true that the plaintiff has not had access to certain electronic copies of QuickBooks records relating to transactions that post-date 3 September 2001, the evidence is that he has had ample opportunity to investigate the conduct of partnership accounts between 30 September 2001 and 30 June 2003 including the opportunities referred to in the defendant's affidavit material, which is relevantly uncontradicted. Although contentious issues concerning whether a breach of fiduciary duty claim is time-barred should not be determined at an interlocutory hearing, the plaintiff has not advanced any material or substantial argument to suggest that the breaches of fiduciary duty which he wishes to plead did not occur well prior to 30 June 2003 and the evidence suggests that most, if not all of them, occurred prior to 30 June 2002.

[83] Even if *UCPR* 376 does not apply, the plaintiff requires leave to amend his claim to include a claim for "equitable compensation and damages for breach of fiduciary duty". He has not explained his delay in applying for leave to amend and I have concluded that it is not in the interests of justice for leave to be granted.

[84] In the circumstances, the plaintiff has not established a proper basis for leave to be granted to amend the claim to claim "equitable compensation or damages for breach of fiduciary obligation" based upon the conduct alleged in paragraphs 7F, 7G and 7H of the plaintiff's proposed pleading. I decline to grant leave to amend the claim to introduce a claim for "equitable compensation or damages for breach of fiduciary duty" and to amend his pleading to insert paragraphs 7LA to 7LG.

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79 *Cohen v Cohen* (1929) 42 CLR 91 at 99-100; *The Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347 at [91]; *Hewitt v Henderson* [2006] WASCA 233 at [16]-[25]; Meagher Gummow and Lehane's "Equity Doctrines & Remedies" 4th ed [34-075].

80 *Hewitt v Henderson* (supra) at [23]-[25].

The general account retainer clients agreement

[85] This is an entirely new claim which was drafted in late 2008[81] and it appeared in the "third amended statement of claim" sent on 15 January 2009.[82] It was objected to by the defendant. That it advances an entirely new claim which requires leave to amend the claim is apparent from the form of the proposed amended claim which in paragraph 4 seeks a claim for the payment of $62,736.11 pursuant to the General Account Retainer Clients Agreement.

[86] The claim depends upon an alleged oral agreement which is said to have been made on an unspecified date between 3 October 2001 and 17 October 2001. Relevantly, the alleged agreement is that the partnership would account to the plaintiff by paying him the difference between the General Account Retainers paid by his "Retained Clients" to the partnership and the total value of unbilled work in progress and sundries on the files of those clients as at 3 September 2001.[83] The alleged agreement is poorly particularised in terms of the precise date upon which the agreement was reached or the conversations which led to the agreement.

[87] No explanation is given by the plaintiff as to why this entirely new claim has not been advanced earlier. Although the new claim might be said to be arguable on the face of the pleading, the circumstances under which leave is sought are not ordinary. Almost eight years after the oral agreement is alleged to have occurred, and without explanation for the delay in not advancing it earlier, the defendant is required to meet a poorly-particularised claim which, if allowed, would turn upon the resolution of the issue of whether the alleged conversations occurred. Incidentally, the plaintiff has not given any sworn evidence to support the existence of such a claim by addressing the circumstances of the alleged conversations that led to the oral agreement.

[88] On any view, the claim for damages for breach of the General Account Retainer Clients Agreement is brought outside of the limitation period. The plaintiff has not advanced grounds as to why it is appropriate for him to be given leave to bring such a statute-barred claim at this stage.

[89] I decline to grant leave to amend the statement of claim to introduce the claims set out in paragraphs 9A to 9J or to amend the claim to introduce a claim for payment of the sum which is alleged to be due pursuant to it.

[90] In addition to the plaintiff failing to establish why it is in the interests of justice for such a claim to be advanced, the defendant has a strong argument that the alleged agreement is inconsistent with the express terms of clause 25 of the Dissolution Agreement which provides that "in exchange for that payment (the payment of $100,000) I shall make no claim upon you for monetary consideration arising out of the dissolution of our partnership (aside from our continuing relationship to realise WIP and debtors)". The defendant submits that the new claim resembles the previous claim called "the Migration Clients Agreement" which was struck out by Mullins J on the basis that the claimed agreement could not arise because of the express provisions of the Dissolution Agreement. The defendant's essential argument then, as now, is that the Dissolution Agreement that provided for the

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81 It appears in the draft pleading exhibited to Mr Spedding's affidavit filed by leave before Wilson J on 25 November 2008.

82 Exhibit 2.

83 Plaintiff's proposed pleading para 9B(b).

payment to the plaintiff of $100,000 reflected amounts that were in the general account of the partnership by reason of the payment of general account retainers. For the reasons advanced by the defendant in his outline of submissions, there is a strong argument that the alleged oral General Account Retainer Client Agreement is inconsistent with, and cannot stand with, the express written terms of the Dissolution Agreement. This provides an additional reason as to why a claim with such poor prospects should not be the subject of leave at this late stage.

[91] A view that a claim is weak is not sufficient to warrant its summary determination and even a weak case is ordinarily entitled to the time of the Court in the interests of justice. However, for the reasons I have given, the interests of justice are not served by permitting leave to amend to the plaintiff to advance, outside the limitation period, a new claim based upon an oral agreement in circumstances in which the plaintiff has not explained his reasons for the late amendment and his delay, in apparent breach of his undertaking to the Court and to the other parties to proceed in an expeditious way.

The amendments in relation to the signage agreement

[92] The plaintiff has always advanced a claim based upon breach of clause 6 of the Dissolution Agreement which relates to the division of the area of the business sign on the air-conditioning column at the front of the premises. Clause 6 of the Dissolution Agreement provided for the sign to be divided into two areas of equal size with the plaintiff and the defendant being entitled to use one half of the area. That agreement was subject to the landlord giving consent. The matter was complicated by the fact that a service company, Oceanthorpe Pty Ltd, was involved and after 14 September 2001 the defendant became the sole director of Oceanthorpe. Recent amendments to the pleading in respect of the claim for breach of clause 6 revised the basis upon which it is alleged that the defendant refused his consent to allowing the plaintiff use of one half of the area of the sign. They assert that the defendant did not take any, or any reasonable, steps to cause Oceanthorpe within a reasonable time after 14 September 2001, and prior to 3 June 2004 to obtain the consent of the landlord to the plaintiff using one half of the sign and, after 3 June 2004, did not take any reasonable steps to obtain the consent of the new owner. The revised claim is based, in part, upon a newly-pleaded implied term of the Dissolution Agreement to the effect that the defendant would cause Oceanthorpe to do all things necessary on its part to obtain the consent of the owner to the plaintiff using the sign. Although the revised pleading has this additional basis, contrary to the defendant's submissions I do not regard it as "an entirely different claim". No specific or general prejudice is identified by the defendant that would be caused by allowing the amendments.

[93] The defendant contends that the newly-pleaded term is doomed to failure because it is "demonstrably inconsistent" with the express terms of clause 6 of the written Dissolution Agreement. I am not persuaded that the clause contended for is not arguable and that the implication of the pleaded term is doomed to failure.

[94] The plaintiff has also revised the basis upon which he measures the loss which is alleged to have been caused by the defendant's conduct in breach of clause 6.[84] I do not consider that the proposed amendment to the pleading of loss and damage is one which requires leave.

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[84] See plaintiff's proposed pleading para 38(b), (ba) and (bb).

[95] Since the plaintiff requires leave to insert the monetary amount claimed in paragraph 7 of the claim, namely the sum of $57,157 leave should be granted for such an amendment.

[96] In summary, to the extent that the claim for breach of clause 6 of the Dissolution Agreement constitutes a new cause of action by reason of the new pleading of the term that appears in paragraph 6(f) of the plaintiff's proposed amendment the plaintiff should have leave to make that amendment and the other amendments which relate to his claim for breach of clause 6 of the Dissolution Agreement.

Miscellaneous amendments

[97] The plaintiff pleads for the first time an express term of the Partnership Agreement that each of the partners would give the other full information concerning the affairs of the partnership business[85] and this term is then pleaded in paragraph 7J as one of several sources of the defendant's obligation to account to the plaintiff for sums collected from clients upon the winding up of the Partnership. I consider that this additional basis for the obligation to account is clearly arguable and should be allowed in the absence of a basis to conclude that the defendant will suffer prejudice as a consequence of it that cannot be remedied by an order for costs. Leave should be granted for the amendment to paragraph 2 of the claim which omits references to clauses 2, 3 and 4 of the Dissolution Agreement so as to rely upon this additional basis for an account.

[98] Paragraph 9J of the plaintiff's proposed pleading pleads that by reason of several matters identified earlier in the pleading, the plaintiff and the defendant have not wound up the partnership. The justification that is submitted for the introduction of this paragraph is that it "simply pleads a further basis upon which the plaintiff claims the relief identified in paragraphs 1, 2, 3 and 4 of the Amended Claim". The fact that the partnership has not been fully wound up is advanced as an additional basis upon which the relief should be granted and the winding up completed in accordance with the terms agreed upon between the parties. The amendment raises a new factual issue, but it is not one which is likely to prejudice the defendant or prolong or prejudice the trial of the action. It should be permitted.

[99] There are various other amendments that appear in the plaintiff's proposed pleading which are not opposed by the defendant. They include amendments in relation to the first claim for breach of clause 25 and a number of formal or stylistic amendments that appear in a schedule to the plaintiff's submissions. These amendments do not require leave under the rules and the defendant does not advance a basis upon which to disallow them.

Conclusion: Application for leave to amend

[100] Despite the absence of an explanation by the plaintiff as to why substantial amendments appearing in paragraphs 7A, 7B, 7C and 7D of his proposed pleading have not been made sooner, I grant leave to make these amendments and leave to amend paragraph 1 of the claim so as to identify that the Dissolution Agreement is alleged by the plaintiff to have been partly in writing, partly oral and partly implied by conduct. Leave to amend is made conditional upon the plaintiff providing further and better particulars of the oral agreement referred to in paragraph 7B or

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[85] Plaintiff's proposed pleading para 2(b)(c)(a).

verifying by affidavit within 10 days that the particulars are the best particulars which he can give of the oral agreement.

[101] I have not been persuaded that the plaintiff should be given leave to advance new causes of action for breach of contract based upon the conduct alleged in paragraphs 7F, 7G and 7H of the proposed pleading.

[102] I have not been persuaded that the plaintiff should be given leave to advance new causes of action "for equitable compensation or breach of fiduciary duty".

[103] I decline to grant leave to amend the claim and the statement of claim to permit a claim pursuant to the General Account Retainer Clients Agreement.

[104] I grant leave to the plaintiff to make amendments to the claim and to his pleading in respect of his claim for damages for breach of clause 6 of the Dissolution Agreement.

[105] I otherwise grant leave to amend to allow non-contentious amendments.

[106] In general terms, and for the reasons given by me, I have concluded that it is not in the interests of justice to allow the plaintiff to make amendments which would allow him to advance entirely new claims and new causes of action in circumstances in which the prejudice to the defendant caused by those amendments cannot be adequately remedied by an order as to costs, and where the amendments would prejudice the fair trial of the proceedings. This particularly applies in relation to new claims that are based upon causes of action that are statute-barred and which, if allowed, would require the plaintiff to investigate and to attempt to recall the detail of transactions which took place between September 2001 and June 2003. These include claims which put in issue the defendant's intentions in making those transactions. The plaintiff has not advanced any satisfactory explanation for his delay in advancing these new claims, and the defendant has relied upon affidavit material to the effect that the plaintiff knew, or had means at his disposal to know, of the transactions at or about the time they occurred. In any event, in circumstances in which the amendments, if allowed, would prejudice the defendant's preparation for trial and his ability to give evidence at trial concerning these transactions, and in which the plaintiff has not provided a satisfactory explanation for his delay, I have concluded that it is not in the interests of justice to allow the amendments.

[107] I direct that the plaintiff prepare in draft the form of an amended claim and a third amended statement of claim that reflect the extent to which I have granted leave to amend and which otherwise incorporate amendments that have not been opposed. The amended claim will generally reflect the form of the proposed amended claim save for the omission of proposed paragraph 4 (payment pursuant to the General Account Retainer Client Agreement) and paragraph 6 (which sought to advance a claim for equitable compensation for damages for breach of fiduciary obligation). Proposed paragraph 9 will also not include reference to equitable compensation. These draft documents should be delivered to the defendant in advance of a further review of this matter so that the precise form of the amended claim and the third amended statement of claim can be settled and further interlocutory steps completed without delay.

[108] The defendant is entitled to be paid the costs that are occasioned by the amendments and also the costs associated with considering and opposing amendments which I have not allowed.

[109] The plaintiff has enjoyed limited success on the application and the fact that I have allowed certain amendments does not alter the fact that they are in the nature of an indulgence in circumstances in which the plaintiff has not provided an adequate explanation for his delay.

[110] Subject to further submissions, I consider that an appropriate order is that the plaintiff should pay the defendant's costs of and incidental to the application.

[111] The defendant is entitled to have the prejudice caused to him by the amendments that I have allowed remedied by an appropriate order as to costs. Costs resulting from amendments made under *UCPR* 378 are addressed by *UCPR* 386. I should also determine, if possible, issues of costs in relation to costs that had been generated by earlier proposals for amendments, save where such costs are already the subject of existing orders for costs made by Mullins J, Wilson J and Atkinson J. To facilitate the determination of any outstanding issues as to costs, I direct that the defendant prepare and deliver to the plaintiff a draft minute of order in relation to costs and that if the order for costs is not agreed, the plaintiff prepare his own draft order in relation to costs.

[112] The parties are also directed to consult in relation to directions for the further conduct of the action and the preparation of the matter for trial. The orders of the Court will be:

1. The plaintiff be granted leave to file and serve an amended claim and a third amended statement of claim in a form to be prepared in draft by the plaintiff in accordance with these reasons for judgment, delivered to the defendant and reviewed by Applegarth J at a further review of the matter;

2. The parties prepare draft minutes of order including orders as to costs;

3. The parties prepare draft minutes of order in relation to the completion of interlocutory steps and the preparation of the matter for trial.

4. The application be adjourned to a date to be fixed for the making of further orders, including orders as to costs.

Application for disclosure and inspection

[113] The plaintiff filed an application regarding disclosure and inspection of documents. During the hearing before me access to the two remaining categories of documents that were in dispute was offered, without concession that the applicants were entitled to them. The parties are agreed that the only issue for my determination is the question of costs.

[114] The application for disclosure was filed on 22 May 2009.[86] By letter dated 9 June 2009 the plaintiff advised that he would "not be pressing" for the relief identified in paragraphs 2 and 3 of that application. The defendant complained of the late notice

[86] CFI 33.

of the plaintiff's abandonment of that relief and advised that he had incurred considerable expense in relation to the preparation of material in answer to those aspects of the application. Despite request, the plaintiff did not undertake to pay the costs thrown away by his abandonment of his claims to relief sought in paragraphs 2 and 3 of the application. The plaintiff has not explained why paragraphs 2 and 3 of the application (which were previously the subject of the application returnable on 25 November 2008) were brought, then abandoned on 9 June 2009. The defendant's affidavit filed 18 June 2009 addressed these aspects of the application. These parts of the affidavit had been substantially prepared in conference with counsel on 3 June 2009. They indicate that paragraphs 2 and 3 of the application were without merit.

[115] After 9 June 2009 and prior to the hearing before me the application for disclosure and inspection was concerned with two categories of documents:

(a) A CD or DVD of the current or most up to date QuickBooks accounting package files relating to the partnership including data concerning the management and collection of partnership assets after 3 September 2001; and

(b) The production for inspection of the partnership files (i.e. client files) kept by the former partnership.

During the course of the hearing counsel for the defendant made an offer, without concession, to provide an electronic copy of the QuickBooks data, and inspection of the client files on similar conditions to those previously offered in December 2008.[87]

[116] It is unnecessary to repeat the evidence concerning the plaintiff's access to records relating to the financial affairs of the partnership and its winding up, including financial statements in relation to income and the writing off of bad debts. The defendant obtained access to certain QuickBooks records in September 2001. The defendant made disclosure of entries from QuickBooks from both before and after the dissolution,[88] but did not disclose the QuickBooks package as a whole. Electronic copies of the most up to date QuickBooks accounting records relating to the partnership are directly relevant to the collection of outstanding debts and the plaintiff's claim for an account. They were not requested prior to the commencement of the proceeding from the defendant,[89] and it appears that the plaintiff has been able to formulate his claims to a substantial extent without them. However, the plaintiff had reasonable grounds to contend that they were "directly relevant" to at least the issue of what partnership fees were collected and what, if any, amount remains due to him in accordance with the Dissolution Agreement, as pleaded in his current claim and his existing pleading.[90]

[117] The plaintiff also had reasonable grounds to contend that he was entitled to access the requested QuickBooks electronic records pursuant to s 27(1)(i) of the *Partnership Act* 1891 (Qld).

[118] The client files may also contain billing and other records concerning work in progress as at 3 September 2001 and the collection of debts. An open offer, without

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87 Exhibit GMM-2 to affidavit of Mills CFI 46.

88 See, for example, Item 67 in section 1E of his list of documents.

89 Hynes' affidavit CFI 45 para 65.

90 By this I mean his pleading insofar as it stood prior to my grant of leave to further amend.

concession, to produce them for inspection was made upon terms when the matter was before Wilson J, and arrangements were made for an inspection of them to occur in January. A partial inspection occurred on 22 January 2009. On 6 February 2009 the defendant communicated by email to the plaintiff that his firm would give the plaintiff's solicitor and an "accounts person" access to the files currently held in the defendant's Gold Coast office under the same conditions which applied on the first visit. This offer was not availed of, and on 12 May 2009 the files were archived because they took up considerable space in a meeting room and the defendant's administrator reasonably assumed that the inspection of them had been concluded. I find that the plaintiff did not avail himself of the opportunity to continue inspection up until 12 May 2009. The plaintiff apparently misunderstood that the files had been returned to archives before that date.

[119] On the question of costs, the major considerations are:

(a) The application for disclosure was too wide, and parts of it were abandoned, without explanation, after the defendant had incurred substantial costs in preparing to meet the parts which were abandoned.

(b) The plaintiff was entitled to pursue disclosure and inspection of electronic copies of the most up to date QuickBooks accounting package in relation to data concerning the management and collection of partnership assets after 3 September 2001. The defendant unreasonably resisted this part of the application.

(c) The application for a further order in relation to inspection of partnership files was necessitated by the plaintiff's unreasonable failure to make arrangements for access prior to 12 May 2009.

[120] In determining the question of costs it is appropriate to consider whether the applicant acted reasonably in bringing the application and whether the respondent acted reasonably in resisting it.[91] I conclude that the applicant acted reasonably in bringing part of the application, but acted unreasonably in bringing other parts and then abandoning them without explanation and without offering to pay the costs incurred by the defendant in defending the relief sought in paragraphs 2 and 3 of the application. The defendant acted unreasonably in resisting that part of the application that related to the electronic QuickBooks records, including data concerning the management and collection of debts after 3 September 2001.

[121] I consider that the appropriate order, in the circumstances, is that there be no order as to costs in relation to the application for disclosure.

[122] Finally, I should refer to the costs that have been incurred to date in relation to these proceedings, including disclosure and inspection. I leave aside the costs of retrieval of partnership files from archives. It is said on behalf of the plaintiff that inspection of these files comprises some 1,412 files and would take a minimum projected 235 hours (at 10 minutes per file) to undertake. The costs of disclosure and inspection should not be disproportionate to the amount in issue in the proceedings. The costs incurred by the parties to date in these proceedings appear to be completely disproportionate to the size of the claim, and the future conduct of the proceedings

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[91] *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194 at 201.

will need to be focussed upon the expeditious resolution of the real issues in the proceedings at a minimum of expense.

[123] I order:

1. The application regarding disclosure and inspection filed 22 May 2009 is dismissed.

2. There be no order as to costs in relation to the application.