SUPREME COURT OF QUEENSLAND

CITATION:	*Murphy Operator & Ors v Gladstone Ports Corporation (No 9)* [2023] QSC 35
PARTIES:	**MURPHY OPERATOR PTY LTD (ACN 088 269 596) & ORS** (plaintiff) **v** **GLADSTONE PORTS CORPORATION LIMITED (ACN 131 965 896)** (defendant)
FILE NO/S:	7495/17
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 March 2023
DELIVERED AT:	Rockhampton
HEARING DATE:	12 December 2022, 13 December 2022
JUDGE:	Crow J
ORDER:	**1. The parties are to provide minutes of orders consistent with these reasons.**
CATCHWORDS:	PROCEDURE – CLASS ACTIONS OR GROUP PROCEEDINGS – PLEADINGS – TIME, EXTENSION AND ABRIDGMENT – PARTICULARS – where the plaintiffs seek leave to amend the further amended statement of claim - where a proposed second further amended statement of claim sought to include causes of actions for which time limitation periods have expired – whether applicant ought to be granted leave to amend the FASOC to include new cause of action according to the proper construction of s 103Z and 103ZA of the Civil Proceedings Act 2011 (Qld). PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – REPRESENTATIVE PARTY OR PROCEEDINGS – whether it is unnecessary to comply with r 376(4) of the *Uniform Civil procedure Rules* 1999 (Qld) due to suspension of limitation period in s 103Z of the *Civil Proceedings Act* 2011 (Qld) – whether group members can obtain a broader time limitation relief that what is available to representative parties.

Civil Proceedings Act 2011 (Qld) s 16(2), s 16(3), s 103A, s 103B, s 103H, s103M, s 103N, s 103V, s 103XB, s 103Z, s 103ZA, s 103ZB
Federal Court of Australia Act (1976) s 33C(1)
Federal Court of Australia Amendment Act 1991 (Cth)
Fisheries Act 1994 (Qld) s 37(2), s 78, s 79
Fisheries Regulations 2008 (Qld) (repealed)
Limitation of Actions Act 1974 (Qld)
Uniform Civil Procedure Rules 1999 (Qld) r 5, r 149(1)(b), r 150(1)(k), r 150(2), r 376(4), r 375, r 376(1)
Baldwin v Icon Energy Ltd [2018] QSC 233
Ball v Consolidated Rutile Ltd [1991] 1 Qd R 524
BHP Group Ltd v Impiombato (2022) 405 ALR 402
BMW Australia Limited v Brewster [2009] 269 CLR 574
Bright v Femcare Ltd [2002] FCAFC 243.
Cook v Cook (1986) 162 CLR 367 *Gala v Preston* (1991) 172 CLR 243
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540
Harper v Minister for Sea Fisheries (1989) 168 CLR 314
Hill v Van Erp (1997) 188 CLR 159
Ipex ITG Pty Ltd v Melbourne Water Corporation (*No 2)* [2005] VSC 258
Lee v Westpac Banking Corporation [2015] FCA 467
Mobil Australia Pty Ltd v Victoria [2002] 211 CLR 1
Murphy Operator & Ors v Gladstone Ports Corporation Ltd & Anor (No 4) [2019] QSC 228
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Pyrenees Shire Council v Day (1998) 192 CLR 330*Quinlan v ERM Power Ltd No 1* [2021] QSC 35
Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd [2018] QSC 308
Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 4) [2019] QSC 199
Southern Shire Council v Hayman (1985)157 CLR 424
Thomas v State of Queensland [2001] QCA 336
University of Sydney v ObjectiVision Pty Ltd [2016] FCA 1199
Wolfe v State of Queensland [2008] QCA 113
Wotton v State of Queensland [2009] FCA 758
Young Investments Group Pty Ltd & Ors v Mann & Ors (2012) 91 ACSR 89

COUNSEL: J P Tomlinson for the plaintiff
D Clothier KC & J Green for the defendant

SOLICITORS: Clyde & Co for the plaintiff
King & Wood Mallesons for the defendant

[1] By application filed 11 November 2022 the plaintiffs seek leave to amend the further amended statement of claim (FASOC) filed 27 July 2018 by a proposed second further amended statement of claim (2FASOC).

[2] The factual background of the plaintiffs' claim is set out in *Murphy (No 4)* [1]. The plaintiffs' claim and statement of claim was filed 21 July 2017. An amended statement of claim was filed 9 May 2018. The plaintiffs applied for and obtained leave on 19 July 2018 to file a further amended statement of claim (FASOC). The FASOC was filed 27 July 2018. The defendants sought and the plaintiffs provided further and better particulars of the FASOC on 25 October 2019.

[3] Since the filing of the FASOC there has been case management and a series of orders intended to progress matters in a timely way. Orders have been made for the provision of evidence of the plaintiffs' lay witnesses by way of affidavit on 7 May 2020, and there have been multiple orders designed to assist with the disclosure process, which has been an extremely large undertaking.

[4] By orders made 13 July 2020, the plaintiffs were obliged to provide responses to Gladstone Ports Corporation's (GPC) request for disclosure, and to serve its expert evidence by 6 November 2020. Paragraph 9 of the order of 14 July 2020 deals with amended pleadings and required the plaintiffs to file and serve a second further amended statement of claim (2FASOC) on 20 November 2020. As it transpired, for various reasons largely related to the obtaining of expert evidence, the 2FASOC was not filed on 20 November 2020.

[5] By orders by way of case management on 9 December 2020, 23 February 2021, 24 April 2021, 24 May 2021, 1 July 2021, 18 August 2021, 8 April 2022 and 1 August 2022 the parties, by consent, sought orders requiring the plaintiffs to provide their lay evidence and expert evidence prior to the determination of what was anticipated to be, at least since 13 July 2020, a contested pleadings application.

[6] By reference to ordinary litigation, it is most unusual that expert evidence and lay witnesses evidence be required to be filed and served prior to the completion of the pleadings, however, class action litigation is by no means ordinary litigation. By the series of aforementioned orders, it was acknowledged that the case is complex and

---

1 *Murphy Operator & Ors v Gladstone Ports Corporation Ltd & Anor (No 4)* [2019] QSC 228.

the final pleading could not effectively be determined until at least the receipt of the vast amount of expert evidence which the plaintiff seeks to adduce to prove its case. The application raises various issues and the parties urge these should be determined sequentially.

Issue – Time Limits, s 103Z and s 103ZA

[7] The first issue is whether the applicant ought to be granted leave to amend the FASOC to include causes of action for which time limitation periods have expired. At the heart of the issues between the parties is the proper construction of s 103Z. In *Project Blue Sky* the plurality said[2]:

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos,* Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove

---

2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 to 382 paragraphs [69]-[71] per Brennan CJ, McHugh, Gummow, Kirby and Haynes JJ.

> superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".” [footnotes omitted]

[8] Part 13A of the *Civil Proceedings Act* 2011 (Qld) is entitled “Representative Proceedings in the Supreme Court”. The twenty-nine sections which constitute Pt 13A (section 103A to section 103ZC) are based upon and closely analogous to Pt IVA of the *Federal Court of Australia Act* 1976 (Cth)[3].

[9] As pointed out by Kiefel CJ and Gageler J in *BHP Group Limited v Impiombato & Anor* (2022) 405 ALR 402[4] , Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) was inserted into the Act in 1992 and has been in operation for more than 30 years. It has been considered by the High Court on multiple occasions (see *Impiombato* at [5]).

[10] In *Impiombato,* Kiefel CJ and Gageler J said at paragraphs [6]-[7]:

> “[6] Part IVA, as was explained soon after its insertion, “assumes the investment by another law of the Parliament of [the Federal Court] with jurisdiction to entertain the subject matter of the representative proceeding” and “creates new procedures and gives the court new powers, in relation to the particular exercise of that jurisdiction”. The distinction between the jurisdiction of the Federal Court, assumed by Pt IVA, and procedures and powers of the Federal Court relating to the particular exercise of that jurisdiction, created by Pt IVA, needs to be borne firmly in mind when considering BHP’s argument about the construction of Pt IVA.
>
> [7] The procedures which Pt IVA creates, and the powers which it gives to the Federal Court, do not stand alone. Part IVA is framed on the assumption that it will operate concurrently with the procedures and powers of the Federal Court which relate generally to the exercise of jurisdiction conferred on it. Important amongst the procedures assumed by Pt IVA are rules of practice and procedure which make provision for a proceeding to commence by an applicant filing an originating application and for the service of that originating application on a respondent. Those rules of practice and procedure are in turn framed against the background of certain precepts of the common law…”

---

3 As well as the Part 4A of the Supreme Court Act 1986 (Vic) and Part 10 of the Civil Procedure Act 2005 (NSW). See explanatory memorandum for Limitations of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016.

4 *BHP Group Ltd v Impiombato* (2022) 405 ALR 402.

[11] As Keifel CJ and Gageler J stated at [17] with reference to s 33C(1) of the *Federal Court Act of Australia*, the Queensland analogue being s 103B(2), it is clear that any person from within the pool (established by reference to s 103B(1)) who thereby becomes a group member can choose to become a representative party.

[12] Section 103A defines a group member as "a member of a group of persons on whose behalf proceedings has been started."

[13] Representative party is defined as "a person who starts a representative proceeding" with representative proceeding being defined as "a proceeding started under s 103B".

[14] Section 103B of the *Civil Proceedings Act* 2011 (Qld) provides:

> "**103B Starting proceeding**
>
> (1) A proceeding may be started under this part if—
>
> (a) 7 or more persons have claims against the same person; and
>
> (b) the claims of all the persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all the persons give rise to a substantial common issue of law or fact.
>
> (2) The proceeding may be started by 1 or more of the persons on behalf of some or all of the other persons.
>
> (3) The proceeding may be started—
>
> (a) whether or not the relief sought—
>
> (i) is, or includes, equitable relief; or
>
> (ii) consists of, or includes, damages; or
>
> (iii) includes claims for damages that would require individual assessment; or
>
> (iv) is the same for each person represented; and
>
> (b) whether or not the proceeding—
>
> (i) is concerned with separate contracts or transactions between the defendant and individual group members; or
>
> (ii) involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members."

[15] Section 103Z provides:

> "**103Z Suspension of limitation periods**
>
> (1) On the starting of a representative proceeding, the running of any limitation period applying to the claim of a group member to which the proceeding relates is suspended.
>
> (2) The limitation period does not start running again unless—
>
> (a) the member opts out of the representative proceeding under section 103G; or
>
> (b) the representative proceeding, and any appeal from the proceeding, is decided without finally disposing of the member's claim.
>
> (3) This section applies despite anything in the *Limitation of Actions Act* 1974 or any other law or rule of law."

[16] Section 103ZA provides:

> **"103ZA General power of court to make orders**
>
> In any proceeding, including an appeal, conducted under this part, the court may, on its own initiative or on application by a party or group member, make any order the court considers appropriate or necessary to ensure justice is done in the proceeding."

[17] In *BHP Group v Impiombato* (supra), Gordon, Edelman and Steward JJ succinctly summarised the class proceedings regime at 17 to 18 paragraphs [52]-[53]:

> "[52] Part IVA of the *Federal Court of Australia Act* operates within the scheme of the whole of that Act and the Acts which vest the Federal Court with jurisdiction. Part IVA permits a person or persons to commence a representative proceeding in the Federal Court on behalf of group members where certain statutory criteria are met. Section 33C(1) is the foundational provision, setting out the criteria: seven or more persons must each have claims against the same person that are in respect of or arise out of the same, similar or related circumstances, and the claims of all seven or more of those persons must give rise to a substantial common issue of law or fact. Where those criteria are satisfied, "a proceeding may be commenced by one or more of those persons as representing some or all of them". It will be necessary to return to this aspect of s 33C(1).
>
> [53] Other provisions of the Part set out various notice requirements, create an opt out process for group members, provide for matters relating to determination, settlement and discontinuance of proceedings, and confer on the Court broad discretionary powers to manage the running of a representative proceeding or order that the proceeding no longer continue as

> a representative proceeding. Section 33ZB sets out the effect of judgment: a judgment given in a representative proceeding binds all such group members who are identified by the Court to be affected by it, except for those group members who have opted out of the proceeding." [footnotes omitted]

[18] Gordon, Edelman and Steward JJ then point out four important matters:

> "First, like the other Parts of the *Federal Court of Australia Act* (which should be read as a harmonious whole), Pt IVA is procedural, not substantive…"[5]

[19] Of the second point, their Honours said:

> "[55] Second, the *Federal Court of Australia Act* distinguishes between a "matter" and the claim or claims that are properly brought forward by the parties to the matter. All group members must have "claims" under s 33C of the Federal Court of Australia Act. Such claims are an integral part of the "matter" in respect of which the Federal Court has jurisdiction. Put in different terms, the "claims" to which s 33C refers have an existence prior to and separately from the commencement of the class action and encompass the facts and circumstances which are said to give rise to the action and the legal rights that are asserted as the basis for the action.
>
> [56] As Murphy and Colvin JJ stated in *Dyczynski v Gibson*:
>
> [T]o say that a class member has a 'claim' is not to say that the person has a right or entitlement to relief; but rather that there exists facts, circumstances and legal rights anterior to and independent of the class action, which may ground a right or entitlement to relief when that person's claim is ultimately heard and determined by the Court.
>
> In short, Pt IVA does not create the justiciable issue between the respondent and the group members; the "matter" and the claims that make it up necessarily exist independently of the representative proceeding. Part IVA is a procedural mechanism that allows for the grouping of existing claims."
>
> [footnotes omitted]

[20] Third, the Court does not need to separately establish personal jurisdiction over the group members in representative proceedings as the court has personal jurisdiction over the respondent.[6]

[21] Of the fourth matter, their Honours said at [58]:

---

5 *BHP Group Ltd v Impiombato* (2022) 405 ALR 402 at [54].
6 *BHP Group Ltd v Impiombato* (2022) 405 ALR 402 at [57].

> "[58] Fourth, Pt IVA provides for a process that enables unwilling group members to opt out of the proceeding. Parliament did not, when enacting Pt IVA, alter the bases of the jurisdiction of the Federal Court. Instead, Parliament chose the opt out provisions as the statutory mechanism to ensure that persons are not made subject to the Court's jurisdiction (or bound by a judgment given in a representative proceeding) if they are unwilling to participate. The integrity of Pt IVA "depends upon group members having the right to opt out". The opt out mechanism has a central place in the scheme: the hearing of a representative proceeding must *not*, except with the leave of the Court, commence earlier than the date before which a group member may opt out of the proceeding. The Court has a power to order notices at any stage, and certain notices are mandatory, including the notice of group members' right to opt out before a specified date that is prior to the hearing of the representative proceeding. Although "the reality is that … notice[s] may not have come to the attention of, or been fully appreciated by, all group members", the Court is given flexible powers to ensure that notice is reasonably likely to come to the person's attention and to protect the integrity of the opt out process (for example, by ensuring that public representations made during the opt out period are not misleading)."
> [footnotes omitted]

[22] The applicants, being representative parties, submit by reference to paragraph 186 of the reasons of Murphy and Colvin JJ in *Dyczynski v Gibson*, cited with approval by Gordon, Edelman and Steward JJ in *Impiombato*, the effect of s 103Z is that there can be no post-commencement expiry of the limitation periods for "claims" to which representative proceedings "relate". The applicant representative parties argue that by virtue of the suspension of limitation period provided in s 103Z, it is unnecessary for the representative parties to comply with r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) in respect to the amendments adding causes of action out of time.

[23] GPC argues that the intent of s 103Z is to place the group members in the same position as the representative parties insofar as limitation period issues are concerned. GPC refers to the explanatory memorandum for the *Federal Court of Australia Amendment Act* 1991 (Cth) which provided in respect of the analogue of s 103Z, s 33ZE:

> "This section provides for the suspension of the limitation period that applies to the claim of a group member on the commencement of a representative proceeding. The

> suspension is lifted if the member opts out or [sic.] the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim. The provision is designed to remove any need for a group member to commence an individual proceeding to protect himself or herself from expiry of the relevant limitation period in the event that the representative action is dismissed on a procedural basis without judgment being given on the merits."

[24] In my view, the text of pt 13A leads to the conclusion that the GPC's submission upon the effect of s 103Z ought not be accepted. Importantly, the definitions in s 103A distinguish between a group member and a representative party.

[25] The distinction is also drawn in s 103ZB, which allows that a court may make orders only against representative parties and not against group members unless costs orders are made under ss 103M or 103N.

[26] Section 103M deals with cases where not all issues are properly said to be common issues, such that a court appoints a person other than a representative party to be a "sub-group representative party" and in those circumstances the sub-group representative parties are responsible for the costs associated with dealing with the issues common to the subgroup members.

[27] Section 103N is an important provision which allows an individual group member to appear and intervene in a proceeding for the purpose of deciding an issue which relates only to the claim of that member. Thus, the scheme of the class action proceedings may be observed, namely the representative parties take on the burden of conducting litigation and being responsible for costs, whereas the group members do not. The price that the group members pay is that they do not have control of the class action.

[28] The remedy for group members who are concerned with the manner in which the class action is being conducted or who wish to remove themselves from the class action is to opt out, or to intervene under s 103N and conduct the case that they wish to conduct, potentially as an individual issue within a class action.

[29] The use of the word "claim" in s 103B and s 103Z is deliberate, as it is used in a broad sense which can be compared to the use of the phrase "cause of action" in s 103H. Section 103H allows for the addition of group members whose cause of

action accrued after the start of the representative proceeding, but whose claim (in the broad sense) would have fit within the requirements of s 103B. The distinction between "cause of action" in s 103H and "claim" in 103Z is deliberate and can only have the effect (as submitted by the applicants) that the group members' claims in terms of their "facts, circumstances and legal rights anterior to and independent of the class action" are intended to benefit from a suspension of the time limitation period.

[30] Section 103B(3)(b) is also important as it makes it plain that claims may relate to several different types of causes of action available to group members (involving separate acts or omissions) as long as the requirements of s 103B(1) are satisfied, i.e. the circumstances are similar or related and they give rise to a substantial common issue.

[31] It seems correct to me to conclude that in respect of group members, s 103Z(3) provides those group members with sanctuary from the defence limitations which may be pled against them pursuant to the *Limitation of Actions Act* 1974 (Qld) with respect to any part of their claim that falls within s 103B(1), and furthermore group members are protected from "any other law or rule of law" which may be seen to impact the efficacy of the suspension provided for in s 103Z(1).

[32] Although s 103Z provides a suspension in favour of group members, it does not provide a suspension in favour of representative parties. This raises the difficult issue as to whether Parliament intended, in framing s 103Z, and s 103ZA that group members could obtain a broader time limitation relief than that which is available to the representative plaintiffs.

[33] The applicants submit that the application of s 103Z to claims of group members to which the proceedings relate must, as a matter of logic, also extend to the suspension of the limitation periods in respect of claims brought by the representative plaintiffs. If the plaintiffs come from a common pool of seven or more persons with claims in the nature described by s 103B, the applicants rely upon the reasons of Kiefel CJ and Gageler J in *Impiombato* at [17] where their Honours said:

> "…The concluding words of s 33C(1) make clear that a representative party and group members are all to come from within

> the common pool of "7 or more persons" who have claims of the nature s 33C(1) describes. Those words equally make clear that any person from within the pool who becomes a group member could have chosen to be a representative party. …"

[34] The applicants submit in the alternative that s 103ZA provides the court with ample power to avoid a bifurcation of determination of procedural issues as between issues affecting group members and issues affecting the plaintiffs in the present case. It seems to me, however, the plain words of s 103Z provide the suspension only to the benefit of group members and not to the benefit of representative plaintiffs. It is necessary therefore to consider r 376(4) and its interaction with and the purpose of s 103ZA.

[35] Rules 376(1) and (4) of the *Uniform Civil Procedure Rules* 1999 (Qld) provide:

> "**376 Amendment after limitation period**
>
> (1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.
>
> […]
>
> (4) The court may give leave to make an amendment to include a new cause of action only if—
>
> (a) the court considers it appropriate; and
>
> (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment."

[36] GPC argues that part of the amendments for which leave is sought add new causes of action in respect of design and construction of the bund wall in the period prior to July 2011. GPC contends that leave ought not to be granted as the application is constrained by r 367(4). The applicants contend that the 2FASOC does not allege new causes of action, or alternatively that leave to amend may be granted utilizing s 103Z and the general power provided in s 103ZA and in any event, r 376(4) is satisfied.

[37] The applicants rely upon the reasons of Rares J *Wotton v State of Queensland* [2009] FCA 758 at [41] where his Honour said:

> "[41] And, the power in s 33ZF(1) enables the court to make any order that it thinks appropriate or necessary to ensure that justice is done in a proceeding under Pt IVA. Wilcox J described the extent of the power in s 33ZF(1) as being "the widest possible" in *McMullin* 84 FCR at 4C-D. In *Courtney* 122 FCR at 182–184 [47]–[54] esp at [52] Sackville J examined the scope of the power, and cautioned that s 33ZF(1) should not become a vehicle for rewriting the rest of Pt IVA. This provision, like all provisions conferring jurisdiction or granting powers to a court, should not be construed narrowly by making implications or imposing limitations which are not found in its express words: *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ."

[38] GPC relies upon the plurality judgment of Kiefel CJ, Bell and Keane JJ in *BMW Australia Limited v Brewster* [2009] 269 CLR 574 where their Honours said at [46]-[47] and [70]:

> "[46] The power conferred by s 33ZF is broad, but it is essentially supplementary. And the words of limitation should not be ignored. In *McMullin v ICI Australia Operations Pty Ltd*, Wilcox J said:
>
> "In enacting Pt IVA of the [FCA], Parliament was introducing into Australian law an entirely novel procedure. It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties; the only limitation being that the Court must think the order appropriate or necessary to ensure 'that justice is done in the proceeding'.
>
> … The criterion 'justice is done', involves consideration of the position of all parties. An order preventing unfairness to a particular party may be necessary to ensure justice is done in the proceeding."
>
> [47] While it has rightly been acknowledged that the power conferred by each of ss 33ZF and 183 is broad, it is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court. Whether an action can proceed at all is a radically different question from *how it should* proceed in order to achieve a just result.

[…]

> [70] It was submitted on behalf of the first respondent in the BMW appeal that the topics addressed in ss 168, 169, 170 and 177 of the CPA (which are to the same effect as ss 33Q, 33R, 33S and 33Z of the FCA respectively) also fall within the scope of s 183. According to this submission, Pt 10 of the CPA is "redundant where it is convenient". That submission is not helpful in seeking to come to grips with the meaning to be given to the words of limitation "appropriate or necessary to ensure that justice is done in the proceeding". Further, it exalts the role of s 183 (and s 33ZF) above that of a supplementary or gap-filling provision, to say that it may be relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement77. The work which the respondents require s 183 (and s 33ZF) to do is beyond the scope of the other provisions of the scheme. As will be seen, those other provisions are engaged upon a different occasion and address materially different circumstances from those that are involved in the making of a CFO. Section 183 (and s 33ZF) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To accept this submission would be to use s 183 (and s 33ZF) as a vehicle for rewriting the scheme of the legislation."
>
> [footnotes omitted]

[39] As explained by the plurality of the High Court, section 103ZA is a supplementary or gap-filling provision intended to allow the court to fairly deal with all issues which might arise in relation to the operation of class action proceedings. Given that it was intended that class actions may be broad and therefore the individual causes of actions or rights of each of the class members differ in some respects, it was considered that it was impossible to foresee all things that might arise in class action proceedings such that a broad supplementary gap-filling power ought to be provided to enable justice to be done.

[40] In the present case, I consider that the correct analysis of s 103Z is that the group members who have had the time limitation period suspended in respect of any causes of action relating to the claim that group member may apply to amend a proceeding brought on their behalf to add causes of action that have arisen without having to comply with the requirements of r 376(4). However, absent s 103ZA, the representative plaintiffs are subject to the strictures of r 376(4).

[41] This dichotomy of rights arises because of the broad use of the word "claims" in s 103Z as opposed to the more concise and limited phrase "cause of action" as referred to in s 103H and r 376(4). An essential point of a class proceeding is to bind the group members to the judgment under s 103XB. The matters that the group members may be bound to are very broad as set out in s 103V.

[42] Given that the gateway provision, s 103B(1)(c), founds the class action procedure partly upon the commonality of issues of law or fact arising between seven or more persons, it is grossly inconsistent with the scheme as enacted by the legislation to allow some plaintiffs (group members) to seek to have determinations of common issues which may result in a judgment in their favour (and in respect of the new causes of action resulting from the design and construction of the bund) but deny that essential relief involving common issues to the representative plaintiffs.

[43] It seems to me correct to conclude that s 103ZA ought to be interpreted to avoid a bifurcation of determination of procedural issues. In my view it would be anomalous to allow the group members to proceed upon causes of action which are broader than the causes of action which are available to the representative plaintiffs. It is the representative plaintiffs that not only control the litigation but also have the burden of shouldering any adverse costs orders.

[44] In my view, it would not be ensuring that justice is done in the proceedings by allowing the group members to litigate upon broader causes of action than that available to the representative parties. The entire scheme of Pt 13A is based upon the efficiency in allowing substantially common issues of law or fact to be determined in one action by way of a class action proceeding[7].

[45] As Gordon, Edelman and Steward JJ said in *Impiombato* (supra), the class action regime provisions are procedural not substantive and as explained by Kiefel CJ and Gageler J, the class action regime provisions are framed on the assumption that they will operate concurrently with the procedures and powers of the Supreme Court which relate generally to the exercise of jurisdiction conferred on it.

---

7 See *Mobil Australia Pty Ltd v Victoria* [2002] 211 CLR 1 per Gleeson CJ at [22] and, Gaudron, Gummow and Hayne JJ at [34].

[46] It therefore seems to me that it is proper to conclude that s 103ZA allows the representative parties to avoid the strictures of r 376(4) and leave may be granted to make the amendments to include a new cause of action if they relate to the claim.

[47] If I am incorrect in my conclusion that by the combination of s 103Z and s 103ZA of the Act, s 376(4) is not engaged then it is necessary to consider whether the plaintiffs have satisfied the requirements of r 376(4).

If r 376(4) is engaged

[48] The FASOC filed 25 July 2018 contains 97 paragraphs, two annexures and in total is encapsulated in 58 A4 pages. The 2FASOC for which leave is sought runs to 160 paragraphs in 181 pages including five annexures. Importantly, Annexure E to the 2FASOC contains a list of 22 expert reports provided by 13 experts relied upon by the applicants. As each of the reports deal with complicated subject matter, the reports are not concise. For example, one report of Dr Knuckey and Dr Koopman is, with annexures, some 441 pages of information.

[49] In the FASOC at paragraphs 85 and 86, the representative plaintiffs allege negligence of GPC in fifteen particulars which all related to various means by which it is alleged GPC failed to cease dredging and/or bund-filling operations and/or implement adequate rectification works after the bund had been designed and constructed.

[50] In particular, and as alleged in paragraphs 59 to 83 of the FASOC, the actions said to constitute the cause of action occurred from on or around 1 July 2011 until August 2012.

[51] The 2FASOC, by paragraphs 45, 46, 48, 51(b), 54-56, 75-92, 93-112, 113-125, and 130 to 136, seeks to allege negligence in the design, construction and commissioning of the bund wall by reference to risks referred to as the modification risk, the mud wave/paleochannel risk and the sealing risk. Importantly by paragraph 51(b) an amendment is sought to allege that GPC ought to be responsible under a non-delegable duty of care regarding the actions of GPC's contractors in designing, constructing and commissioning the bund wall.

[52] GPC submits these amendments that seek to argue negligence on the basis of design, construction and commissioning of the bund wall and a non-delegable duty of care relating to actions of GPC's contractors are new causes of action and therefore subject to the requirements of r 376(4) as the relevant period of limitation current at the date the proceeding started, has ended.

[53] Although the phrase "substantially the same facts" in r 376(4)(b) requires little explanation as it appears to be a phrase which invites practical comparison between the existing pleading and the proposed pleading, some utility may be obtained from applying two tests, namely the same story test and the objection test.

[54] The same story test was explained by the Court of Appeal in *Thomas v State of Queensland* [2001] QCA 336 at [19]:

> "[19] That may be thought to encourage a fairly broad brush comparison between the nature of the original claim and that to which it is sought to be amended. It accords we think with Thomas JA's statement in *Draney v Barry* which might usefully be repeated here.
>
> "I do not think that 'substantially the same facts' should be read as tantamount to the same facts, and consider that the need to prove some additional facts is not necessarily fatal to a favourable exercise of discretion under R376(4). If the necessary additional facts to support the new cause of action arise out of substantially the same story as that which would have to be told to support the original cause of action, the fact that there is a changed focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts. In short, this particular requirement should not be seen as a straitjacket."
>
> Of course "the story" is a shorthand reference to the matters that the plaintiff has to prove. If it had to be proved, for example, that the road should have been differently constructed in the 1940s there would not only be a different case (ie cause of action) there would be a substantial difference in the material facts now requiring to be proved. Quite apart from this, further consideration would have to be given to the question of prejudice. There are therefore limits to which a broad brush approach can provide the necessary answer. There will commonly be three separate questions to consider -
>
> (a) Is there a new cause of action?
>
> (b) arising out of substantially the same facts?

(c) prejudice."

[55] The objection test was explained by Keane JA with whom Muir JA and Douglas J agreed in *Wolfe v State of Queensland* [2008] QCA 113 at [12] where his Honour said:

> "[12] One may test the point by considering what would have happened if, at trial, Mr Wolfe's counsel sought to lead evidence of the failure to maintain the sub-surface drainage of the highway, without having made the amendment in question. That evidence would clearly be objectionable on the ground of surprise. It would also be objectionable on the ground that the evidence was simply irrelevant to the case of breach of duty raised by the pleading against the State. It was not part of Mr Wolfe's pleaded case to put in issue the condition of the sub-surface of the highway and the acts of maintenance which should have been taken by the State in respect of that sub-surface area in order to prevent welts from forming on the surface."

[56] In the present case, I consider that the allegations of facts in the 2FASOC relating to a design, construction and commissioning (in the sense of the initial commissioning) and non-delegable duty of care regarding the actions of GPC's contractors can be said to arise out of substantially the same facts as the facts constituting the causes of action in the FASOC.

[57] The clearest indicator of this is the same timelines in the FASOC which focus upon the actions of GPC from 14 October 2005 (see paragraph 16(a) of the FASOC) until after the bund had been constructed, and the 2FASOC which also proposes facts prior to the design of the bund commencing on 29 September 2005 (see paragraph 9 of the 2FASOC).

[58] As to the proposed amendments identified as constituting new causes of action in paragraphs 45, 46, 48, 51(b), 54-56, 75-92, 93-112, 113-125, and 130 to 136 insofar as they relate to causes of action for negligence in design, construction and commissioning and the non-delegable duty of care regarding the actions of GPC's contractors with respect to design, construction and commissioning, these arise out of substantially the same facts.

[59] As discussed above, it has been contemplated by the parties because of the complexity of the plaintiffs' claims at least since the order of 14 July 2020 that there

would be a 2FASOC by which it would be expected that the plaintiffs' case is based upon the numerous and complex expert reports that have been obtained to be included in a comprehensive and significantly amended pleading.

Several Other General Issues

[60] There are, however, several other issues which can and should be subject to rulings at the present time intended to attempt to reduce the scope of further interlocutory proceedings regarding the 2FASOC.

Evidence and Pleadings

[61] As to the second matter, GPC complains that particulars are given by reference to evidence, in particular, expert evidence, in breach of r 149(1)(b) of *Uniform Civil Procedure Rules* 1999 (Qld). In *University of Sydney v ObjectiVision Pty Ltd* [2016] FCA 1199, the Federal Court concluded that the provision of particulars by reference to an expert report and exhibits in the expert report confounded the plaintiff's statement of claim and was therefore not permissible.

[62] Similar statements may be observed from Byrne J in *Ipex ITG Pty Ltd v Melbourne Water Corporation* (*No 2)* [2005] VSC 258 at [2]. There is, however, quite a distinct difference between complex case managed commercial litigation and litigation which does not fulfill those characteristics. This was well explained by Bond J in *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd* [2018] QSC 308, where his Honour said:

> "[29] The rules of pleading accommodate such concerns. Although there are others, critical rules include:
>
> (a) A plaintiff must plead the material facts which establish the causal link between the impugned conduct and the loss which is said to flow from it.
>
> (b) A plaintiff must plead the material facts, but not the evidence by which they will be proved.
>
> (c) The material facts must be pleaded and sufficiently particularised so that the defendant both knows the case it has to meet and has the plaintiff confined to that case, such that no change is permitted without first obtaining the leave of the court.
>
> [30] Compliance with these rules would require the plaintiffs to plead and to particularise the critical counterfactual proposition.

[31] Where, as this case does, establishing the critical counterfactual proposition turns on expert opinion, the pleader's task is a difficult one. Pleading at too high a level of generality will be an embarrassing pleading as the defendants will legitimately complain that they cannot sufficiently understand the case they have to meet, and they are unfairly being asked to respond to what can properly be described as a movable feast. On the other hand, pleading with too high a level of specificity will likely descend into pleading evidence not material facts, and have the potential downside of greatly confining the case to a particular mode of proving the material facts."

[63] In *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 4)* [2019] QSC 199, Bond J said:

"[13] Notwithstanding that pleadings do not state the evidence by which the pleaded material facts are to be proved, it has become commonplace in complex litigation that the Courts require the parties to disclose to each other before trial to a greater or lesser degree the evidence by which the parties will seek to prove the material facts they have pleaded (to the extent that proof is required because the material facts are disputed). Thus one sees case management orders and directions requiring parties to deliver in advance of a trial —

(a) affidavits, witness statements or witness summaries identifying the evidence their respective lay witnesses will give at trial; and

(b) expert reports expressing the expert opinion evidence which their respective expert witnesses will give at trial.

[14] Where the issues in a case have already been identified by the traditional process of pleadings (which for the most will not have stated the evidence by which the issues will be proved), what is the purpose of the superimposition of an order requiring the parties to identify to their opponents during the pre-trial process the evidence by which they intend to prove their pleaded cases?

[15] It is axiomatic that if case management orders have required the parties to disclose to their opponents the way they intend to prove their respective pleaded cases, that course was required because the Court determined that it would serve to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. But recitation of that sort of motherhood statement is not a sufficient articulation of the purpose of requiring such a course. The underlying purpose is to avoid surprise to the other party and to allow the issues to be narrowed, albeit at a more granular level than is achieved by the delivery of pleadings. It is to allow any eventual trial to proceed in a more efficient manner than it might otherwise have proceeded. In order to fulfil that

> purpose, it must follow that there is some degree to which the parties are confined to the manner of proving their case which they have flagged by the material which they have delivered in compliance with such case management orders. That is why such orders conventionally also specify that the parties may not deliver evidence outside the constraints of the orders concerned, except with leave of the Court. The extent of confinement which must be regarded as having been achieved by such orders and the attitude which must be taken to applications for leave will be very much a question of fact and degree, and will vary from case to case. The considerations which would be relevant to the exercise of a discretion to permit evidence to be adduced outside the constraints imposed by the case management orders of the type under discussion are similar to those applicable to pleading amendment: see *Sanrus No 2* at [12] to [15].
>
> This authority has been cited with approval in the Queensland Court of Appeal on many occasions, including *Bentleys (Sunshine Coast) Pty Ltd v Thomson* [2018] QCA 358 per Fraser JA at [42]; *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 per Philippides JA at [22]; *GO & MJT Nominees Pty Ltd v Hollywells Homewares Pty Ltd [*2010] QCA 368 per McMeekin J at [20]."

[64] As the present case falls into the former category, in my view it is not objectionable to plead particulars of the plaintiffs' claim by reference to specific passages of the expert reports. Absent of such an accommodation, the 2FASOC may be several hundred pages and, for all intents and purposes, incomprehensible.

[65] The reference to extracts from expert reports is therefore, largely in keeping with the objectives of the UCPR. An example of this is paragraph 109 of the 2FASOC with respect to the mud wave/paleochannel risk. On the other hand, some references to expert reports do not clarify the plaintiffs' case. An example of this may be seen by reference to paragraph 93(i)B which alleges:

> "The plaintiffs refer to the description of appropriate practice relating to FPS as set out in the expert report Beckett sections 5.1.3, 5.1.4, paragraphs 184, 186, 188-190, 194, 197-199, 210 and 213."

[66] According to Annexure E of the 2FASOC, the reference to Beckett is the report of the expert of Mr David Beckett dated 30 September 2020. An FPS is a Functional Performance Specification. Whilst Mr Beckett most certainly opines in paragraph 212 of his report that GPC failed to comply with an appropriate industry practice to create a comprehensive FPS, and provides detailed reasons for that opinion, the

referred paragraphs do not descend to the particularity to identify what was in fact the appropriate FPS for the project undertaken.

[67] It may well be that in other paragraphs of Mr Beckett's 585-paragraph report there is a description of what the FPS ought to have been for the particular project, however, I have been unable to locate it and that bears out the objection on principle that an opposing party ought not to be left to guess what case is being brought against it.

[68] Accordingly in a complicated case such as the present, while it is useful to make reference to particular paragraphs of expert reports to provide particulars, it is critical that they be accurate and be able to be understood. The allegations in Particular 'B' to paragraph 93(i) are not able to be comprehended and leave is not granted to plead it, rather the plaintiffs have leave to plead paragraph 91(i)B.

Public Nuisance

[69] The third issue relates to public nuisance. Paragraphs 93A to 93D of the FASOC plead a public nuisance claim against GPC by the first plaintiff, Murphy Operators, and the commercial fishing group members of an interference with a right to fish.

[70] Public nuisance was pled to be a substantial and reasonable interference with the right to fish causing particular damage to the first plaintiff, Murphy Operators, and the commercial fishing group members which was different in kind and degree from loss and damage suffered by other members of the public at large.

[71] The particulars of loss provided by paragraph 91 of the pleading are a loss of opportunity to catch commercial species and a loss of profit from catching of commercial species.

[72] Paragraphs 146 to 152 of the 2FASOC claim an interference with the public right to fish for Murphy Operators and the commercial fishing group members and add a case in public nuisance for damages suffered by Tabari (the second plaintiff), SPW (the third plaintiff) and the fish handling group members, based upon interference with the right to public waters.

[73] The addition of a claim by the second and third plaintiffs and the fish handling group members for public nuisance is a new cause of action. The cause of action is

framed by reference to the same facts and matters as the negligence claims and public nuisance claims brought on behalf of Murphy Operators and the commercial fishing group members. It is appropriate, therefore, that pursuant to r 376(4) leave be granted to amend the pleading to plead the public nuisance claim.

[74] On behalf of GPC it is argued that the pleadings do not disclose a cause of action in public nuisance because the commercial licenses issued to the plaintiffs and group members "authorised them to undertake activities in a commercial manner which they could not do, and the public at large could not do, pursuant to any public rights to fish or public right to use waters."[8]

[75] A plaintiff is entitled to a claim in public nuisance if a plaintiff proves it has suffered particular damage by reason of the interference with a public right (see *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524 at 536 per Ambrose J). The plaintiffs in *Ball* were licenced professional fisherman who fished Moreton Bay in the vicinity of North Stradbroke Island and were permitted to use nets to take prawns for commercial purpose. Consolidated Rutile Ltd conducted sand mining operations on the west coast of North Stradbroke Island. In the course of the operations a sand dune formed on the island abutting the waters of Moreton Bay which slipped into Moreton Bay, causing 114,000m^3 of root mass and other types of vegetation to contaminate the areas where the plaintiff caught prawns for commercial purposes. Ball's case, however, concerned determination of points of law raised upon pleadings with agreed facts.

[76] Question 4 posed by the parties was whether the loss alleged in the statement of claim was particular damage so as to result in the creation of a public nuisance. Ambrose J answered the question affirmatively with respect to damage to the plaintiffs fishing equipment and concluded that that damage was sufficiently particular to permit the nuisance action. However, Ambrose J concluded that the economic loss suffered as a result of the inability to trawl for prawns in that part of Moreton Bay was not sufficiently particular to permit recovery by damages under the tort of nuisance.

[77] In coming to that conclusion, Ambrose J said[9]:

---

8 Paragraph 294 of GPC's written submissions filed 29 November 2022.

9 *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524 at page 547 lines 38-41 per Ambrose J.

> "Both parties to this application have treated question 4 as raising a point of law. I have reservations as to whether the question of particularity upon the assumed facts is a question of law rather than a question of fact. However at the request and upon the submissions of both parties I treat it as one of law.

[78] Ambrose J answered question 3 in the negative, concluding that the actions of Consolidated Rutile Ltd did not amount to an interference with a public right to fish so as to constitute a public nuisance (notwithstanding that there was particular damage to the fishing equipment of the plaintiffs). Ambrose J's conclusion, however, with respect to public nuisance was reasoned as follows[10]:

> "I have already indicated that it is my view that in the present case there is not sufficient proximity between the plaintiffs and the defendant with respect to the foreseeable economic loss which would accrue to the plaintiffs should the sand dune under the control of the defendant slip into Moreton Bay to impose upon the defendant a duty in negligence to take reasonable steps to avoid causing such economic loss to the plaintiffs. It would be a quite unsatisfactory state of affairs if upon the same facts by pursuing an action for damages for public nuisance the plaintiffs were able to avoid satisfying the test of proximity and recover in nuisance damages for economic loss caused to them in their prawn fishing endeavours which would not be recoverable in negligence."

[79] Ball's case was decided when the High Court, by majority, accepted that proximity was the broad and flexible touchstone for determining the existence of a duty of care. Brennan J, as his Honour then was, did not accept the concept of proximity as having universal application for the existence of a duty of care[11]. In time, the views of Brennan J prevailed and the proximity test has subsequently been abandoned[12].

[80] In Ball's case his Honour said[13]:

> "In my view the fishing licences which permitted the holders thereof lawfully to catch prawns with nets cannot be said to give those holders any right whether public or private to have the fishing grounds where they fish pursuant to such licences kept free of material of the sort deposited in Moreton Bay by the slippage in issue. It cannot be said therefore that in any relevant sense the right of the plaintiffs to take prawns by commercial nets of designated size

---

10 *Ball* (supra) at page 545 line 50 to page 546 line 8.

11 See *Southern Shire Council v Hayman* (1985)157 CLR 424 at 481, *Cook v Cook* (1986) 162 CLR 367 and *Gala v Preston* (1991) 172 CLR 243.

12 See *Hill v Van Erp* (1997) 188 CLR 159, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.

13 *Ball* (supra) at page 543 lines 14 to 25.

> and design is any different from the right of any other members of the public to take prawns or fish without using such nets.
>
> I am unpersuaded upon the authorities that the depositing of material in fishing grounds which makes it more difficult to catch fish by using certain types of fishing gear so interferes with "a right" of a public nature as to constitute it a public nuisance."

[81] In the present case, GPC argues that s 37(2), 78 and 79 of the *Fisheries Act* 1994 (Qld) and regulations 130-138, 141-143, 627 and 627-630 and Schedule 2 of the *Fisheries Regulation* 2008 (Qld) (now repealed) impose statutory restrictions including a limitation on the number of fish which could be caught, a prohibition on the taking of fish for trade or commerce, save in specified circumstances.

[82] GPC submits that the right of fishing in the sea and in tidal navigable rivers is a public right that is freely amenable to abrogation by regulation by a competent legislator[14]. There is no suggestion that the right to utilise sea water in such places is also not a public right. Although the sections of the *Fishing Act* and *Fishing Regulations* referred to by GPC do place restrictions upon taking and selling of certain types of fish, it seems to me that the conclusion of Ambrose J at page 524 is correct that whilst the rights of the commercial fishers have been regulated by a competent legislator, it is the same right to fish that is in no way different from the right of any members of the public to take fish or other species by different means.

[83] Furthermore, unlike Ball's case, there is no agreed position on the facts. With respect to particular damage, I would agree with Ambrose J that that is a question of fact rather than law upon which determination ought to be made.

[84] I conclude that the plaintiffs' claim with respect to public nuisance as set out in paragraphs 146 to 152 inclusive is a new cause of action in respect of the additional claim in nuisance for the interference with the right to waters ought not to be struck out and the plaintiffs have leave to include the new cause of action.

The Pleading of Corporate Knowledge

[85] The fourth issue relates to the pleading of corporate knowledge. GPC argues that in respect of paragraphs 49(b)(iv), 49(c), (d), (e), 102(a), 153 and 155, the 2FASOC is deficient as the person whose knowledge is said to represent GPC is not identified.

---

[14] See *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330 per Brennan J (as his Honour then was).

[86] Rule 150(1)(k) and Rule 150(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) provide:

> "**150 Matters to be specifically pleaded**
>
> (1) Without limiting rule 149, the following matters must be specifically pleaded—
>
> […]
>
> (k) motive, intention or other condition of mind, including knowledge or notice;"
>
> […]
>
> (2) Also, any fact from which any of the matters mentioned in subrule (1) is claimed to be an inference must be specifically pleaded.

[87] The requirement to plead and prove the knowledge of an opponent has its difficulties. In *Young Investments Group Pty Ltd & Ors v Mann & Ors* (2012) 91 ACSR 89, the Full Court of the Federal Court (Emmett, Bennett, and McKerracher JJ) said:

> "[9] It has long been the case, in various jurisdictions, that particulars are to be provided of facts and circumstances relied upon to support a plea that something ought to have been known: see (2012) 91 ACSR 89 at 93 *Fox v H Wood (Harrow) Ltd* [1963] 2 QB 601 at 604 and *Smith v Littlemore* (1996) 15 WAR 289 at 300. Knowledge itself has usually been treated differently. Knowledge of, or recklessness towards falsity, by way of example, may usually be pleaded as the material fact without particularisation: see *Ritter v North Side Enterprises Pty Ltd* (1975) 132 CLR 301 at 304 ; 6 ALR 125 at 126–7 . Allegations of fraud, or the involvement of persons in statutory breaches sufficiently analogous to allegations of fraud, on the other hand, have required the provision of quite specific particulars.
>
> [10] The reason for not being required to particularise knowledge is not fully explained in the cases. It may be assumed that, on the one hand, there is the obvious difficulty of knowing what is inside another's mind. On the other hand, there may be instances where the evidence to be relied upon to establish knowledge *could* be identified by particulars. That evidence might be an admission or a communication, written or oral, that could only give rise to the relevant state of mind. In appropriate cases, the provision of particulars has been ordered when sought.

> [11] There are sound reasons for requiring knowledge to be particularised, at least in relation to the kind of allegations made in the statement of claim.

[88] In *Lee v Westpac Banking Corporation* [2015] FCA 467, Dowsett J said at [25]-[26]:

> "[25] It follows that a party pleading the imputed knowledge of a company must identify in its pleadings:
>
> - any agent, officer, employee or other person whose relevant knowledge the pleader seeks to attribute to the company, identifying such knowledge and otherwise complying with the requirements of r 16.43 of the Rules;
> - the basis for imputing such knowledge to the company by reference to each person's "closeness" and "relevance" to the company in question, again complying with r 16.43; and
> - if the party seeks to aggregate the knowledge of two or more employees, the basis for so doing.
>
> [26] The questions of closeness and relevance will frequently involve an examination of the relevant person's duties and functions within and/or on behalf of the company, including reporting and supervisory responsibilities and inter-relationships with other agents, officers or employees and, possibly, with external persons or entities. Such an enquiry may be further complicated by informal variations of formal arrangements.

[89] In *Baldwin v Icon Energy Ltd* [2018] QSC 233 at [150]-[151], Bond J said:

> "[150] First, *Uniform Civil Procedure Rules* 1999 (Qld) r 150(1)(k) requires the deceitful intention to be specifically pleaded and UCPR r 150(2) requires any fact from which the deceitful intention is claimed to be an inference also to be specifically pleaded. The defendants took objection during the trial to the admission of any evidence said to support the alleged inference as to intention, which went beyond the specific matters pleaded as supporting the inference. I admitted evidence, subject to that objection. I think the objection should be upheld. The UCPR provisions are clear, facts were pleaded as a basis for the alleged inference, and the defendants sought to hold the plaintiffs to the pleadings. It follows that the only evidence to which regard should be had in support of the alleged process of inference is that to which reference was made in the pleadings.
>
> [151] Second, companies act by natural persons. If a pleading alleges that a company has a particular state of mind, then the

pleading must be taken to have asserted that a particular person or persons had that state of mind and that it should be inferred that their state of mind should be attributed to the company. In breach of the rules of pleading BBAI did not identify the person or persons who had the deceitful intent as at 12 June 2008. However, BBAI's case at trial was that the intention of Icon and Jakabar could be established by reference to the intentions of Mr James. No objection was advanced in this regard and I would not refuse the plaintiffs the ability to advance that argument because of the inadequacy of this aspect of their pleading. But for the following reasons, I would not accept the underlying proposition that the intention of Icon and Jakabar could be established by reference to the intentions of Mr James alone:

(a) In *Stirling Resources NL v Capital Energy NL* (1996) 14 ACLC 1,005 Hill J explained:

> Views in the minds of individual directors not communicated to other directors nor made the subject of board decision, cannot be taken as being the plans of the company of which the proponents are directors. It is trite to say that a company can only act through its directors. Likewise a company's intentions can only be judged by reference to the intentions of the directors, not the directors singly but the directors acting as a board. There may be cases in which a particular person may be found as a fact to the governing mind of a company so that that person's intentions may be taken as being the intentions of the company.

(b) There is no pleading that the directors acting as a board had the alleged deceitful intention. But, in any event, there is no basis for drawing the inference that the directors acting as a board had the alleged deceitful intention. I agree with the defendants' submission that there had been no attempt by the plaintiffs to do this because, quite apart from the evidence of Mr James, there had been no attempt to establish the state of mind of Mr Pyecroft or Dr McNamara and, importantly, no relevant challenge to Mr Barry's statement evidence, the effect of which was that he as a director of Icon intended that the company would comply with its obligations under the MOU. The plaintiffs sought to make something from the defendant's failure to call Dr McNamara, but it is trite law that the *Jones v Dunkel* inference cannot be employed to fill gaps in the evidence, or to convert conjecture and suspicion into inference.

(c) Nor is there any basis for concluding that Mr James was the governing mind of Icon and Jakabar for the

> purposes of making the alleged deceitful representation. There was almost no attention paid at trial to establishing the levels of decision — making delegation which operated within Icon and Jakabar. Such evidence as there was suggested that the decision to enter into the MOU was a board level decision, rather than a decision within the sole purview of Mr James. And although the agency contract had been signed by Mr James as director, the MOU itself was executed "in accordance with s 127 of the Corporations Act" by both Mr James and Dr McNamara."

[90] In *Quinlan v ERM Power Ltd No 1* [2021] QSC 35, Bowskill J (as her Honour then was) said at [65]:

> "[65] It is not sufficient for a plaintiff simply to plead facts somewhere in the statement of claim; later to plead in a conclusory way that a party(ies) had a particular motive, intention or other state of mind; and contend that the other party(ies) are on notice, because of the general pleading, of what is to be alleged against them. It is incumbent on the plaintiff to be specific about the basis upon which they allege the motive, intent or other state of mind was held by each particular defendant. Contrary to the plaintiff's submissions, what r 150(1)(k) and (2) UCPR require is the "explicit linking" of facts to inferences; the drawing of an inference is not a matter of law for the court, but a matter of fact; and a party is required to "spell out in the statement of claim" the precise manner in which underlying facts are to be deployed so as to establish a matter alleged to be available as a matter of inference from those facts. That is the point of r 150(2). It is not appropriate to plead a whole lot of facts, and leave it for the other parties to guess which are relied upon to support the pleaded inference, and for the court ultimately to "reach the correct decision", irrespective of the parties' arguments: it is for the party making the allegations to identify the case which it seeks to make and to do that clearly and distinctly". This is all the more essential where the allegations are of fraudulent or serious misconduct, in respect of which more precision is required than in other cases."

[91] As the Full Court of the Federal Court reflected in *Young Investments v Mann*, one would expect there to be an obvious difficulty in knowing what is inside another person's mind. Absent the occasion when an admission is made or when there is a communication exposing another person's state of mind which can easily be specifically pled, there are the perhaps more common instances where state of mind

can only be inferred and r 150(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) accommodates that.

[92] The facts upon which an inference is to be founded ought to be specifically pleaded. I accept GPC's submissions that ordinarily the person or persons whose knowledge was said to represent GPC must be identified. The plaintiffs' case is knowledge based upon inference.

[93] Paragraph 47(c) of the 2FASOC alleges that GPC knew or expected that the spoil and free water mixing with the spoil in the lagoon would contain or was very likely to contain contaminants and PASS (Potential Acid Sulphate Soils). In paragraph 49(c)(A) the knowledge or expectation is pled to be inferred from GPC's obligation to prepare an Environmental Impact Statement (EIS) and the contents of the EIS.

[94] The plaintiffs then refer to numerous documents and specific references to the expert report of Mosley. It seems to me particularisation of the inference in this manner does fairly inform GPC as to the basis upon which an inference is pleaded against it and allows GPC to properly conduct its defence. In respect of Particular 'A' to paragraph 47(d) and Particular 'A' to paragraph 47(e) the actual or expected knowledge of GPC is particularised by reference to numerous construction documents and expert reports.

[95] By paragraph 49(b)(iv) the plaintiffs allege that GPC engaged in an inherently dangerous activity, being the bund works (as defined) which concerned the construction of bund for holding potential environmental contaminants in a waterway known to support diverse marine habitat including a longstanding commercial fishing industry that was subject to damage from the release of those contaminants and that GPC knew or ought to have known that no environmental impact assessment had been conducted in relation to the potential effects of a changed shape of the modified reclamation area relative to the original reclamation area.

[96] The facts underlying the inference of knowledge are particularised in paragraph 49(b)(iv)(A) being an obligation to ensure that environmental impact studies were undertaken and also that necessary assessments were undertaken.

Necessary assessments, despite the typographical error on page 178 describing them as "necessary amendments", are defined in paragraph 19(c)(i) of the 2FASOC.

[97] Particulars are then provided in respect of the necessary assessments in paragraph 19(c)(1) of the 2FASOC describing what was required in the necessary assessments including the project EIS and with reference to appropriate industry practice in the Australian construction industry as set out in the report of Beckett at paragraphs 108, 109, 149, 241 and 242.

[98] As to paragraph 102(a), the allegation is made that GPC was aware of the presence of deep trenches of soft sediment indicating paleochannels at all times relating to the design and construction of the perimeter wall. Paragraph 102(d)(ii)(A) alleges that GPC's knowledge ought to be inferred from a series of technical documents that are specifically identified. That is adequate particularisation.

[99] GPC's objection to paragraph 153, which concerns the pleading for exemplary damages, is not that the person was not named, as two persons were identified, but rather the facts from which the knowledge was to be inferred was not alleged. At paragraph 153, the plaintiffs alleged the two named employees or former employees of GPC were aware or should reasonably have been aware of the modification risks the mud wave/paleochannel risks and/or the sealing risks. Paragraph 153 therefore brings allegations of actual knowledge and a plea in the alternative that if the individuals do not have actual knowledge then they ought reasonably to have had the knowledge of the three specified risks.

[100] In my view, in respect of the allegation of actual knowledge, the paragraph is adequate. In circumstances where lay witness statements have been provided, the evidence will exist or it will not exist. If, however, the evidence of the actual knowledge does not exist, then the plaintiffs' case in pleading that the two named individuals ought to have known of the three specified risks presumably must arise by inference.

[101] In those circumstances, as is required by UCPR r 150(2), particulars ought to be provided of the facts upon which the plaintiffs raise the alternative allegation of the plea that the knowledge of risk ought to have been known. Although, as GPC argues, the plaintiffs had ample time to put their pleading in order, it seems to me

that it is a complicated pleading and the plaintiffs ought to be given leave to plead paragraph 153 if advised, to attempt to particularise any allegation that the two named individuals ought to have known of the three specified risks.

[102] With respect to paragraph 155, the plaintiffs allege that by no later than the bund closure on or about 23 July 2011, GPC was or ought to have been reasonably aware of the modification impacts, mud wave/paleochannel impacts or sealing impacts which were or likely to have occurred. Particulars are then provided in terms of paragraph (a) which refer to a number of studies undertaken by consultants and investigations being undertaken by GPC. That is sufficient particularisation.

[103] Paragraph 155(B) provides a particular that prior to the closure of the bund wall on or about 2 July 2011, GPC's management was informed by staff and contractors, including O'Neill and Broomhead, that the bund was incapable of preventing prohibited discharges and a method to prevent the discharges. In my view, the inclusion of the reference to "staff" and contractors other than O'Neill and Broomhead does create a difficulty for the defendant in meeting the case insofar as the "staff", or other "contractors" have not been identified.

[104] Whilst the contractor O'Neill and Broomhead has been identified, which may of itself be sufficient to provide the factual basis of the inference, reference to unparticularised persons being "staff" or other "contractors" is not a proper pleading and alternatively it ought to be removed, or if the staff or other contractors can be identified they should be identified.

[105] Presumably the specificity of the pleading referring to the contractor O'Neill and Broomhead informing GPC management of the difficulties would require a staff member from GPC to have been told by their contractor so as to identify the GPC staff member, however, reference to "staff" without further particularisation is capable of causing surprise as to which staff member, if any, may have had the knowledge alleged.

Other Deficiencies Relating to Particulars Proposed to 2FASOC

[106] The structure of the 2FASOC is to allege a modification risk and breach, a mud wave/paleochannel risk and breach, and a sealing risk and breach as being causative of the loss as sustained by the plaintiffs (see paragraph 140 of the 2FASOC). The

modification risk precautions and breach, mud wave/paleochannel risk precautions and breach, and sealing precautions and breach all are drafted with respect to the design and construction of the bund (see paragraph 75, 93 and 113 of the 2FASOC).

[107] Comparison then must be made to the FASOC, which by virtue of paragraph 86 pleads the breach of duty as particularised in paragraph 85 of the FASOC. Several of the particulars of negligence in paragraph 85 do relate to post-design and construction matters, e.g. paragraphs 85(a), (b), (f), (h), (i), (j), (k), (l), (m), (n), and (o), however, others do not.

[108] Paragraphs 85(c), (d), (e), (f), (g), (h), and (i) of the FASOC are, in my view, sufficiently broadly pleaded to raise causes of action relating to the design and construction of the bund. Furthermore, the circumstances pled in paragraph 85 are said to be the factual basis for the breaches as set out in paragraphs 59 to 83 of the FASOC and make numerous references to the provisions of further and better particulars being provided following completion of interlocutory processes, which, as discussed above, took a great deal of time.

[109] In my view, it is too narrow a reading of the FASOC to reach the conclusion that it brought causes of actions relating solely to post-design and construction of the bund wall. I would conclude that the amendments sought in the 2FASOC do not, but for the allegation of non-delegable duty of care, raise a new cause of action. The allegation, as particularised in paragraph 51(b) of the 2FASOC as raising a non-delegable duty of care, does, in my view, amount to an allegation raising a new cause of action.

[110] Section 16(2) of the *Civil Proceedings Act* provides general power to make amendments to a pleading. Section 16(3) of the Act allows a court to make rules that may limit circumstances in which amendments may be made.

[111] Rule 375 provides a general power to amend a pleading "in the way and on conditions the court considers appropriate". Subject to specific rulings upon objections, it seems to me it is appropriate that discretion under r 375 is exercised in favour of the plaintiffs to amend the further amended statement of claim.

[112] In exercising the discretion to allow the amendments, it is necessary to consider any prejudice which may be suffered by GPC. There is currently no persuasive evidence

of prejudice. As Ms Johnson frankly concedes in paragraph 58 of her affidavit filed 29 November 2022, it is not possible at the present time with any certainty or in any definitive way to identify any additional work which is required to be undertaken by GPC in responding to the amendments and it may ultimately be the case that GPC does not need to undertake any further investigations or obtain any further expert evidence.

[113] I conclude it is, subject to certain amendments discussed below, appropriate to allow the amendments, as the amendments do clarify and improve the 2FASOC in a way which fulfills the function of pleadings in a representative proceeding.

[114] The purpose of pleadings in a proceeding is to define the issues in dispute between the parties and to place each party in the position of knowing the other party's case at trial. There is, in the present case, as there are in many cases, a tension between the direction in r 149(1)(a) for a pleading to be as brief as the nature of the case permits, and r 149(1)(c) for a pleading to state any matter if not pleaded specifically may take another party by surprise.

[115] I accept the applicants' submission that the original cause of action for negligence comprised breach of a tortious duty to take reasonable care to avoid a risk of direct or indirect discharges from the bund causing contamination of the water ways, harm to marine life and consequential losses.

[116] The 2FASOC brings a case for breach of tortious duty in the same manner however it is more particularised and specific in pleading a case with reference to three defined risks, namely the modification risk, the mud wave/paleochannel risk, and the sealing risks.

[117] Furthermore, as discussed by Finkelstein J in *Bright*[15] at [152], allowance of the amendments will meet the principle object of a class action procedure by promoting a more efficient use of the court's time by bringing claims which in the interests of the group members may provide a remedy. The amendments also serve the principle of protecting the defendant's interest from multiple suits and the risk of inconsistent findings.

---

15 *Bright v Femcare Ltd* [2002] FCAFC 243.

Specific Paragraph Objections

[118] Pages 592 to 635 of Exhibit PAH1 to the affidavit of Mr Hopwood filed 15 November 2022 is a 44-page schedule of objections to the 2FASOC. The first objection is general and is to the effect that GPC submits that the 2FASOC fails to adequately plead a cause of action as it does not adequately plead aspects of the alleged breach of duty for the existing cause of action and does not plead a causative link between GPC's conduct and the claimed losses. I do not accept the general objection.

[119] The 2FASOC is an extremely detailed pleading which sets out facts said to cause a duty of care to arise, the breach of that duty, causation in terms of the breaches of duty causing damage to the representative plaintiffs and group members. There are numerous specific objections best dealt with by reference to the paragraphs in the 2FASOC.

Paragraph 3(a)(i) – amendment to enlarge affected waters

[120] The effect of the amendment is most vividly observed in annexure A to the 2FASOC, being an addition to the affected waters of grids R27, S27 and U29. GPC alleges the effect of enlarging the area of the affected waters is that it may add new group members in circumstances where, if that were so, the limitation period applicable to any claims of any such new members has expired.

[121] Paragraph 170(e) of Ms Johnson's affidavit concludes that one of her colleagues, Ms Dickinson, had identified eight fishing licenses which had caught one or more commercial species in one of the new grids but no catch of a commercial species in an existing grid, and in respect of those eight fishing licenses, five were held by persons who had not caught commercial species in any existing grid pursuant to any other fishing license.

[122] Accordingly, on GPC's analysis of the Department of Fisheries' records, the effect of enlarging the affected waters by the addition of three grids could cause five further persons to become group members. The plaintiffs assert that as far as they are aware, there are no persons to be added to the group. The plaintiffs point out that U29 is an area over 100km east of the coast, and accordingly it would be

unexpected that a person would fish only in the remote areas of U29 and not any of the other closer grid areas which are currently within the affected waters.

[123] The same cannot be said of grid references R27 and S27, which have a coastal connection outside of the Shoalwater Bay area. Grid reference R27 may be accessed from land, but in an area where there are no major ports. The solution to this dilemma is to allow the amendment to the definition of "affected waters" but to order that the amendments take effect "on a date to be later determined by the court" so that GPC's rights in respect of any time limitation defence are preserved until the issue can be determined, and which can only be determined by reference to the rights of GPC and any of the five fishing licenses referred to by Ms Dickinson.

Paragraph 3(a)(i) – date of effect of amendment

[124] Paragraph 1(h) of the order of 19 July 2018 provided that the court would determine at a latter date the time of the taking into effect of the amendments to paragraph 3 as set out in the FASOC. GPC argues that the amendments ought to take effect from 29 June 2018, that being the date that the plaintiffs applied for leave to make the amendments to paragraph 3(a)(i).

[125] Paragraph 3(a)(i) of the amended statement of claim defined group members as those persons that, during some or all of the period from on or around 6 September 2011 to date, "generated income from the use of a commercial fishing boat license…"

[126] The FASOC altered that, in paragraph 3(a)(i), to include group members who, for some or all of the period from on or around 6 September 2011 to date, generated income as the "licensee of, or owner of, or operator of, or profit-sharing skipper, or profit-sharing crew members, on a boat fishing under a commercial fishing boat licence…"

[127] In my view, the proposed amendment does not expand the class of group members, but rather more carefully defines them as each of the licensee, owner, operator, profit-sharing skipper or profit-sharing crew member and does fall within the category of those persons who may have generated income from the use of a commercial fishing boat licence.

[128] In my view, it is appropriate to conclude that the amendments take effect from the date of the commencement of the original proceedings in this action.

Paragraph 3(a)(ii) – commercial species

[129] The plaintiffs propose an amendment to narrow the definition of commercial species by excluding sole, herring, king salmon and trout as commercial species. GPC does not object to leave being granted for the amendment but raises concern that the narrowing of the definition for commercial species may entirely extinguish the claims of some group members so that they would no longer be a group member. GPC points out that amendments require the court's leave if the effect is to discontinue a group member's claim, see s 103K and/or 103R of the Act.

[130] GPC does not object to the amendment, provided the plaintiffs appropriately notify group members whose claims may be extinguished by the amendment, and that any such person have the opportunity to be heard in respect of such amendment. The plaintiffs argue that the nature of the fishing techniques or methods used by group members to catch sole, herring, king salmon or trout makes it virtually certain that there are no group members that only caught those species, such that they would be excluded from group members by the amendments.

[131] The plaintiffs point out that as all of the parties have the data provided by the Department of Agriculture and Fisheries, an analysis may be carried out to identify any person who may have had difficulty in no longer qualifying to be a group member if the amendment were allowed.

[132] The fact that no person has been identified supports the plaintiff's submission that not only should the amendment be allowed, but that it is unnecessary to require the plaintiffs to advertise the amendment that would cause a reduction in the commercial species to exclude the four fish species identified.

Paragraph 3(b)(i)

[133] The parties agree that the issue of 3(b)(i) is a similar issue to that determined with respect to paragraph 3(a)(i). The effect of the alteration is to define fish handling group members instead of fish processing group members to include not only those persons who conducted businesses in the processing of fish caught from the affected waters, but to include storage and transport as an aspect of the processing of fish

caught in the affected waters. It seems to me that it is difficult to envisage a situation where fish can be processed without being stored, at least for some period of time, and also transported, at least some distance.

[134] When reference is had to the objectives of class proceedings litigation, I conclude it is appropriate to allow the amendments and to allow them to have affect from the commencement of the original proceedings.

Numerous Paragraphs Relevant only to GPC's Objection to the Proposed New Causes of Action and Time Limitation Defences

[135] These paragraphs may be identified as 9(b), 9(c)(ii), 10(b), (e), (c), (d), (e), (f), (g)(ii), (g)(iii), 11, 13(a), (b), (c), (d), (e), 17, 18, 19, 24(a), 29, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 54 and 56, 75-92, 93-112, 113-125, 130-136, 137, 140, 156, 152.

[136] Specific objections to these paragraphs are based upon GPC's objection that the paragraphs seek to introduce a new cause of action for which the limitation period has expired and in respect of the requirements of r 376 have not been satisfied. I have ruled against GPC's objections in paragraphs [7] to [59] above.

Paragraphs 146-152 – Public Nuisance

[137] These specific paragraphs relate to GPC's objections concerning the cause of action for public nuisance for which I have ruled against GPC as set out in paragraphs [69] to [84] above.

Paragraph 18(c)(ii)(B)

[138] GPC's objects to paragraph 18(c)(ii)(B) which references appropriate industry practices in the Australian construction industry by specific reference to paragraphs 143-148 of the report of Beckett. Mr David Beckett holds a Bachelor of Science, Electrical and Electronic Engineering. Mr Beckett has worked for 30 years in commercial advisory in large scale project delivery involving engineering and construction, with a focus upon infrastructure, energy, utilities and transport. As a part of his work, Mr Beckett professes expertise in risk management. Paragraphs 143-148 of his report set out his opinion concerning industry practices as to risk management, in particular with reference to published Australian standards.

[139] Paragraph 18(c)(ii)(B) pleads as part of the plaintiff's case that it was appropriate industry practice that a person in GPC's position would recognise and manage risk. GPC submits in particular the evidence in Mr Beckett's report goes beyond the scope of the allegation in paragraph 18. In my view, it does not, as it directly relates to the appropriate industry standards with respect to recognising and managing risk and furthermore, if it did, it satisfies r 149(1)(b) as it prevents surprise at trial. For those reasons, leave is granted in terms of the amendments to paragraph 18.

Paragraph 19

[140] GPC's objection to paragraph 19 is similar to the objections to paragraph 18. The objection appears to be to paragraph 19(c)(ii)(4)(B), being the reference to appropriate industry practice in the Australian construction industry specified in Mr Beckett's report at paragraphs 108-109, 149, 241 and 242. GPC is correct in that paragraphs 108 and 109 do not contain any reference to industry standards and its particulars ought to be struck out. However, paragraphs 149, 241 and 242 are proper particulars and ought not to be struck out.

Paragraphs 21(a) to (e)

[141] GPC's objection is the same in respect of Mr Beckett's reports as to paragraphs 18 and 19 with specific reference to section 4.3 of Beckett's report. Again this objection concerns particulars, not pleadings *per se* and particulars do assist in preventing surprise at trial. Section 4.3 of Beckett's report does assist in setting out the plaintiff's case upon the issue of the plaintiff's allegations against GPC regarding the obligation of GPC to comply with project conditions. The amendments are therefore appropriate.

Paragraphs 28(d) and (e)

[142] GPC submits that the allegations in paragraphs 28(d) and (e) have no apparent relevance to any alleged cause of action and therefore ought not to be allowed. Paragraphs 28(d) and (e) refer to measures, being the provision of access to construction vehicles during construction of the bund (28(d)) and an outlet at the

intertidal channel on the western side of the bund, both measures being designed to prevent or minimise scouring of sediments.

[143] Scouring is specifically noted to be one of the risks of harm alleged in section E.1 of the 2FASOC. Whilst it appears GPC's submission that there is no allegation that GPC breached the obligations set out in paragraphs 28(d) and (e) and therefore the allegations would ordinarily have no apparent relevance to any cause of action, the allegations may be relevant to the assessment of the modification risk pled in E.1.1 as paragraph 45(a) and (b) include in modification risk, a reference to the effect on sediment. The allegations in 28(d) and (e) make reference to scouring of sediment. In these circumstances, it seems to me they are potentially relevant and ought to be allowed.

Paragraphs 31, 34, 36, 39

[144] Paragraph 31 alleges that GPC was required to ensure untreated PASS (Potential Acid Sulphate Soil) in the lagoon would remain in a saturated state at a particular level.

[145] Paragraph 34 alleges GPC was obliged to ensure spoil placed in the bund was sampled and met the requirements of a particular guideline.

[146] Paragraph 36 refers to a requirement for GPC to undertake sampling in a specific manner.

[147] Paragraph 39 is an allegation that GPC was required to undertake hydrodynamic and plume modelling between dredging to test the validity of water quality predictions. GPC submits the allegations have no apparent relevance to any cause of action in that there is no allegation that the requirements were not complied with.

[148] Paragraphs 31, 34, 36 and 39 fall within the topic D.4.4 Potential Acid Sulphate Soils (PASS) and Acid Sulphate Soils (ASS). Paragraph 114(e) defines the specific sealing precautions it alleges GPC was required to comply with concerning water quality levels. This includes paragraph 31, 34, 36 and 39.

[149] Further, paragraph 123(b) alleges that GPC did not take any or any adequate steps to take the specific sealing precautions alleged in paragraph 114.

[150] Finally, paragraph 132 alleges that GPC breached its bund-works duty together and severally being the sealing breaches by reference in part to the circumstances of paragraph 123. The allegations are therefore relevant and ought to be allowed.

Paragraphs 45(a)(iv), 45(b), 46(d), 46(d)(iii), 46(e)(iii), 47(c), 47(d), 47(e), 47(f), 68, 73, 78(b)(i), 89(e), 94(c), 94(d), 94(e), 94(g), 102(g), 102(h)(i), 104(f)(i), 104(f)(ii), (104(f)(iii), 106(c), 109(a), 109(c), 109(d), 109(f), 114(b)(i), 114(b)(iii), 114(c), 114(e), 121(c), 122, 126(a), 126(e), 139(h) – Expert Report Objection

[151] Essentially the complaint here is the objection to provision of particulars by reference to specific parts of the expert report of Professor Mosley. As discussed in [61] to [68] above, in this case it is appropriate to make reference to expert reports in the provision of particulars.

Paragraph 49

[152] GPC objects to paragraph 49(a)(C) which is a particular of the allegation in paragraph 49(a) that the risk of harm (defined in paragraph 48) was reasonably foreseeable to GPC. Paragraph 49(a)(C) is one of the five particulars of why the risk of harm was reasonably foreseeable to GPC and states "The information in the master plan, the FLPE project, EIS, the DDP EIS, conditions, the management plans and contract documents as described above."

[153] As it is a particular, it seems to me that it is inappropriate not to grant leave to the plaintiff to plead the particular as part of the 2FASOC. It does seem to me however that GPC is correct in its contention that it is not sufficient to rely upon all of the information and all of those documents which comprise many thousands of pages.

[154] Accordingly whilst I grant leave to include Particular 'C' to paragraph 49(a) in the 2FASOC, it seems to me that the plaintiffs are obliged to specify what information in each of the documents it relies upon is a particular of proving that the risk of harm was reasonably foreseeable to GPC.

Paragraphs 49(b)(iv), 71(c), 102(a),

[155] GPC complains of a deficiency as the plaintiffs have not identified the persons who are alleged to have the knowledge or ought to have had the knowledge or expectation. This has been dealt with in paragraphs [85] to [105] above.

Paragraphs 49(d)(B)(b) and 49(d)(B)(c)

[156] Paragraph 49(d)(B)(b) is an allegation that the location and persons likely to be directly impacted by any failure of GPC to take reasonable care in respect of the project was ascertainable by GPC. By reference in particular to 49(d)(B)(b) to the participation during 2010 and 2011 in discussions for potential compensation schemes for commercial fisherman and those adversely impacted by the projects, and 49(d)(B)(c) because of GPC's contacts with QSIA which represented a finite number of registered and licenced participants in the commercial activity.

[157] GPC submits that the identity of the participants ought to be particularised. The plaintiffs respond that as they have provided their lay evidence, GPC is not disadvantaged as it knows the case it must meet at trial and whilst GPC is obliged to respond to paragraph 49(d) in its defence, it does not need to plead to particulars. As the objections concern particulars and not pleadings, then leave ought to be granted to plead their paragraphs in their current form.

Paragraph 51

[158] GPC contends that paragraph 51 is ambiguous and leave ought not to be granted. Paragraph 51 provides:

> "By reason of the matters pleaded in Section [E], GPC in undertaking the bund works owed the Duty Class (including the claimants) a duty to take reasonable care
>
> (a) by its officers, servants and agents; and
>
> (b) as a non-delegable duty – to ensure reasonable care was taken by its contractors;
>
> to avoid the risk of harm (Bund Works Duty)."

[159] GPC alleges that paragraph 51 is ambiguous as it is unclear what the plaintiffs intend to allege as there is an inconsistency or at least an ambiguity in the allegation that GPC had a duty to take reasonable care and to ensure reasonable care was taken by its contractors.

[160] GPC alleges there is an ambiguity as to whether GPC is alleged to have breached its duty of care because it did not take reasonable care to avoid the risk of harm, or it failed to ensure contractors took reasonable care to avoid the harm.

[161] I do not accept these criticisms. Paragraph 51 alleges that GPC failed to take reasonable care for the actions of its officers, servants and agents which has been particularised and also under a separate non-delegable duty to ensure reasonable care was taken by its contractors. Whether or not the non-delegable duty case succeeds, is a matter for trial.

Paragraphs 75 and 77

[162] GPC alleges that general modification precautions at paragraph 75 are deficient because they lack particulars. Paragraph 75 contains six subparagraphs, four of which are particularised by reference to subsections D.1.1, D.1.3, D.1.5 and D.6 and are therefore adequately particularised.

[163] Similarly, paragraph 77 is particularised in respect to six subparagraphs, each having references to other paragraphs of the pleading.

Paragraph 78(b)(iv)

[164] GPC complains that the adverse environmental effects referred to in paragraph 78(b)(iv) are not particularised. The plaintiffs' response is that they are particularised in sections E.1 to E.4 of the 2FASOC. If that is so, then it would have been more helpful to include those particulars in 78(b)(iv) as the more consistent style of this large and complicated pleading is to make specific references where relevant to other parts of the pleading.

[165] Furthermore, paragraph 78(b)(iv) refers to "PASS disturbance, further or alternative increased turbidity as described in (iv) would cause adverse environmental affects…" It seems to me that the reference to paragraph 78(b)(iv) was meant to be a reference to paragraph 78(b)(iii) as it refers to displacement of PASS material and increased turbidity in Gladstone Harbour. This perhaps is an example of the pleading not being perfect and the plaintiffs will have leave to amend paragraph 78(b)(iv) to correct these minor deficiencies.

Paragraph 88

[166] GPC alleges there is ambiguity at paragraph 88. It attempts to demonstrate that by reference to paragraph 81, by which the plaintiffs set out that GPC owed a works

duty that required GPC to take general modification precautions as specified in paragraph 75 and specific modification precautions as defined at paragraph 76.

[167] In my view, there is no such ambiguity. Paragraph 88 pleads breach of duty specifically by reference to paragraphs 83, 85 and 87, each of which in turn refer to the preceding paragraphs. Each of the paragraphs 83, 85, and 87 plead the breach in terms of GPC failing to take adequate steps to implement the general modification precautions and/or failing to take any or any adequate steps to implement the specific modification precautions.

[168] In my view the plaintiffs' case is sufficiently particularised, that is, it is in regard to the general modification precautions GPC did not take adequate steps to implement those and in respect of the specific modification precautions, the allegation is that GPC did not take any steps to implement them, however, if they did, those steps were inadequate.

Paragraph 89(c)

[169] GPC alleges paragraph 89(c) is not particularised as it contains an allegation of increasing water flow velocity across mud waves on the northern and western perimeters of the bund being increased from about mid-2011 as the perimeter walls approached bund closure. It criticises that because the particulars referred to are particulars under paragraphs 45(b), (c) and (d), as those paragraphs do not concern themselves solely with the period of the bund closure in or about mid-2011.

[170] Whilst that is true, paragraphs 45(b), (c) and (d) all concern themselves with the problems it alleges are likely to arise as a result of gaps between the converging ends of the incomplete perimeter walls becoming narrower. In my view the plaintiffs' case is adequately particularised so that it would not surprise GPC at trial.

Paragraph 89(d)

[171] Paragraph 89(d) pleads in respect to the modification breaches, the cause of environmental harm by reference to the allegation of increased water flow velocities across the mud waves on the northern and western perimeters of the bund and across the mud flats from about mid-2011 as the perimeter walls approached bund closure. GPC complains that paragraph 89(d)(iii) refers to PASS and other contaminants, without defining what "other contaminants" were.

[172] Although Annexure D to the 2FASOC contains over five pages of definitions and references to the definitions, the word "contaminants" was not one of the defined terms. The plaintiffs' response is that contaminants are pleaded elsewhere, however, it is an extremely large pleading and it is inadequate for the plaintiffs to require GPC to search the extremely large pleading to attempt to discern what, if anything, is meant by the use of the word "contaminants" in paragraph 89(d)(iii). If contaminants can be defined by reference to other paragraphs of the pleading then that ought to be specifically particularised. Again, as it is a matter of particulars, leave may be granted to plead the paragraph, however, particulars ought to be supplied.

[173] As to the phrase "increased turbidity in harbour waters" as referred to in paragraph 89(d)(iv), GPC is entitled to reasonable particulars of the increased turbidity in harbour waters. It may be that the plaintiffs cannot specify the date and level of any alleged increase, however, particulars ought to be provided by the plaintiffs and, as GPC submits, if there are other allegations in the pleading which show the increased turbidity in harbour waters, then the cross references should be provided. Again, this is not a reason not to allow the paragraph. It is a matter for particulars.

[174] Paragraph 89(d)(v) makes reference to "Critical Waters" which it defines as those coastal waters important to the survival of commercial species in those or other parts of the affected waters. The impacts on Critical Waters are set out in paragraphs 89(e), (B) and (C) with reference to the second report of Associate Professor Hipsey, which suggests the Critical Waters are identified in paragraphs 24 to 29, 36, 37 and associated figures, however, that is not clear. I accept GPC's argument that it is reasonable that particulars be provided of the coastal waters said to be important for the survival of commercial species in those or other parts of the affected waters, so as to define where the Critical Waters are.

[175] I do not, however, accept GPC's criticism that prohibited discharge effects are not sufficiently defined, as they are defined in paragraph 27. GPC also argues that there is insufficient pleading of a causal connection between the increased velocity as pleaded in paragraph 89(c) and the prohibited discharge affects. In my view there is sufficient causal connection pleaded.

[176] The causal connection is that, as referred to in paragraph 89(c) as the perimeter wall approached bund closure, the velocity of the water flow across the mud waves on the northern and western perimeters of the bund and across the mud flats areas increased, and that caused or allowed prohibited discharge affects as defined in paragraph 27.

Paragraph 90(b)

[177] GPC alleges paragraphs 90(b)(ii)(1) and (2) are insufficiently particularised. In respect of 90(b)(ii)(1) the criticism levelled is that the "alternative footprint not creating an embayment area between the western side of the bund and natural shoreline" has not been identified. GPC seeks the details of the alternative footprint.

[178] In respect of that matter and in respect of the offsetting measures referred to in paragraph 90(b)(ii)(2), it seems to me this is a matter for particulars. That is, if requested, the plaintiffs are required to provide particulars as to the alternative footprint it says would have been appropriate. In respect of the offsetting environmental measures, paragraph 90(b)(ii)(2) particularises those measures as purchasing, planting or rehabilitating an equivalent area of mangroves, and in my view that is properly particularised. In summary, the environmental measures are properly particularised but the alternative footprint is not.

Paragraphs 93(a), (b), (d), (e) and (k)

[179] GPC submits that the general construction precautions are insufficiently particularised. I do not accept this criticism as each paragraph is referenced to other specific paragraphs in the pleading, i.e. it is appropriately cross-referenced.

Paragraph 95

[180] GPC submits that paragraph 95 is insufficiently particularised. I do not accept this criticism. Paragraph 95 simply alleges that specific mud wave paleochannel precautions were in all respects available and appropriate.

Paragraph 100

[181] GPC objects to paragraph 100 on the basis it is improperly particularised. Paragraph 100 alleges that GPC approved designs and construction practices for the perimeter wall that involved four matters. In my view it is sufficiently particularised as, despite the extensive discovery of documents in this matter, GPC is in the position of knowing what it approved and permitted during construction and what it did not.

Paragraph 104(e)

[182] GPC complains that paragraph 104(e) is not sufficiently particularised. Paragraph 104(e) is an allegation that on or about 29 April 2011, there was increased turbidity in the harbour waters in the flow path of the turbidity plumes in Particular (D) being a reference to the report of GPC to DERM, being the fortnight report of 29 April 2011. In my view, it is sufficient particularisation.

[183] Similarly, Particular (B) is sufficiently particularised by reference to paragraphs 109(a) to (d), as is Particular (C). Particular (C) relates to the turbidity plume spreading through the harbour waters and flushing into coastal waters. GPC seeks particulars of where the plume spread to.

[184] It seems to me that is a question which may be answered and has been answered by reference to the expert reports of Professor Hipsey and Dr Rowe, which are expressly included in the particulars of paragraph 104(e). The matter is therefore sufficiently particularised and pled.

Paragraph 106(a)

[185] Paragraph 106(a) is an allegation that GPC did not at any time prepare and provide to Abigroup or VODI a Functional Performance Survey (FPS) in respect of the bund works and the particulars make reference to the report of Mr Beckett. Mr Beckett's report refers only to the failing to provide the FPS to Abigroup and not VODI. Although that is the case, there does not seem to me to be any error in the pleadings. The plaintiff is entitled to argue its case on a broader basis than as put by the expert Beckett of provision of the FPS only to Abigroup.

Paragraph 109

[186] GPC brings numerous objections in respect of paragraph 109. Paragraph 109 contains seven subparagraphs. Subparagraphs (a), (b), (c), and (d) plead specific effects of the mud wave/paleochannel breaches. Paragraphs 109(e) then pleads, by reason of the matters alleged in paragraphs 109(a) to (d), that three types of prohibited discharges occurred.

[187] Paragraph 109(f) then pleads by reason of the prohibited discharges identified in paragraph 109(e), there were mud wave/paleochannel impacts, being a substantial and prolonged increase in the turbidity of harbour waters and prohibited discharge effects in critical waters, which has been particularised in the report of Professors Knuckey and Gordon.

[188] Paragraph 109(g) pleads that the mud wave/paleochannel risks eventuated because of the substantial and prolonged increase in turbidity of harbour waters and prohibited discharge effects in critical waters as set out in paragraph 109(f). GPC argues it is a rolled-up pleading. I do not accept the criticism.

[189] Paragraphs 109(a) to (d) particularise, with reference to expert reports, four specific effects of the mud wave/paleochannel breaches which, as set out in paragraph 109(e), combine to cause prohibited discharges, which pursuant to paragraph 109(f) caused mud wave/paleochannel impacts, with the result being as set out in paragraph 109(g), that the mud wave/paleochannel risks eventuated.

[190] Paragraph 109 informs GPC of the case it needs to meet in respect of the causation of environmental harm due to mud wave paleochannel breaches. GPC submits that there is an inconsistency in paragraph 104 which alleges by 29 April, mud waves along the bund wall were becoming substantial. The particulars at 109(b) complain of washout and backward erosion occurring from the early construction phase of the bund wall from March 2011. I do not consider the allegations inconsistent. Plainly the plaintiffs are trying to set out a case that as per paragraph 109(a) the bund wall was improperly constructed for the conditions in Gladstone Harbour, and from the early construction phase of the bund wall from March 2011, washout erosion and backward erosion was occurring and that it occurred prior to the formation of the substantial mud waves along the bund wall.

[191] GPC contends that the references in paragraphs 104 and 105 to paragraph 109 are circular. The criticism ought not to be accepted. Paragraph 105 does refer to the premise in paragraph 104. Paragraph 104(e)(B) provides paragraph 109(a) to (d) as a particular of increasing turbidity in the harbour waters in the flow path of the turbidity plumes.

[192] That does not detract from the causation pleading in paragraph 109 such that GPC is sufficiently aware of the plaintiffs' claims with respect to causation of environmental harm occasioned by mud wave/paleochannel breaches.

[193] GPC does however have a valid criticism with respect to the failure to identify critical waters, as discussed above, but this however remains a matter for particulars.

Paragraph 114(e)

[194] Paragraph 114(e) alleges the bund and sealing risk would likely be materially reduced if GPC complied with the obligations concerning water quality alleged in section D.4.4 including the precautions described in paragraph 114(c), including that the PASS was not exposed or oxidised and no contaminants were released from the bund to any waters.

[195] Further, paragraph 114(e)(iii) alleges that if the turbidity levels at sensitive receptors exceeded turbidity levels contained in a specified table, that action be taken to reduce the sediment suspension caused by the works.

[196] GPC's complaint is that by using the word "including" it suggests there might be steps other than those referred to in paragraph 114(e) upon which the plaintiffs will rely.

[197] It seems to me, however, that a fair reading of paragraph 114(e) is that the plaintiffs are alleging that the failure to comply with the obligations concerning water quality alleged in D.4.4 is to take the precautions referred to in 114(c) (ensuring proper design and construction of the bund backdoor sections and perimeter wall) and to take the three steps particularised in paragraph 114(e)(i), (ii) and (iii). These three steps are included in D.4.4 at paragraphs 31, 32, 33 and 37. Read in this fashion,

the allegation is not open ended as suggested by GPC. In my view that is the correct interpretation of 114(e).

Paragraph 115

[198] GPC alleges that paragraph 115 is deficient as it lacks particularity. Paragraph 115 has six subparagraphs which are sufficiently particular.

Paragraph 121(c)

[199] In paragraph 121(c) the plaintiffs allege that prior to the Abigroup contract, GPC did not undertake any or any adequate review of the suitability of the proposed Abigroup design for preventing the sealing risks. Particulars are then provided which assert that in a meeting on 12 October 2010 between GPC and Abigroup, geotextile specification was proposed, and the plaintiffs plead in paragraph 121(c)(B) a reference to paragraph 3.1.22(c) of the expert report of Dr Rowe.

[200] Professor Rowe is an experienced engineer who offers an opinion in paragraph 3.1.22(c) of his report that in the case of the GPC bund, the documents that have been provided to him show no evidence of any appropriate design consideration as to whether the role of the GPC bund was to retain water or release turbid water or any consideration for the potential for piping. That seems to be an allegation of failure to take steps to adequately review the suitability of the proposed Abigroup design. However, of course, it is dependent upon Dr Rowe being provided with all relevant documents.

[201] Given that there has been extensive discovery of documents, any relevant documents ought to have been discovered. To understand Dr Rowe's thesis, Dr Rowe explains in Chapter 3.1B of his report that there is a distinction between a bund and dyke or dam in engineering terms, in that a bund is designed to provide some resistance to the flow of water, but to release water, whereas a dam or dyke is specifically built to retain water. Professor Rowe then refers to the construction of large dams according to international standards which, according to his expert opinion, need to be designed with the principle in mind that all liners leak.

[202] Paragraph 3.1.18 of Dr Rowe's report says such that engineers are required to design recognising that liners will leak and to engineer designs to control the leaks. That is why Dr Rowe has said at paragraph 3.1.22(c) that a key design feature

consideration in the GPC project should have been to control the leaking and avoid piping fine grain materials out of the retained structure. Dr Rowe says that he could not find key design documents which showed the design attempt to control the leaking by avoiding the piping of the fine grain material out of the retained structure. Given in this context, paragraph 121(c) is sufficiently particularised.

Paragraph 124

[203] GPC brings a similar complaint in respect to paragraph 124 and in particular reference to paragraphs 124(a), (b), and (c). Paragraphs 124(a), (b), and (c) make extensive references to Dr Rowe's report. Paragraph 124 raises the allegation that GPC directed, approved or acquiesced in the design or construction of one particular section being the back door sections of the perimeter wall, omitting the installation of a geotextile.

[204] GPC seeks particulars of how it is alleged GPC directed, approved or acquiesced those matters. The particulars, however, provided in paragraph 124(a)(ii) allege that from the documents, being the design drawings and construction records that have been discovered, the back door section of the perimeter wall was designed and constructed without geotextile. Paragraph 124(a)(ii)(C) specifically alleges

> "That GPC directed approved and/or acquiesced in the manner alleged so as to be further inferred by reason of:
>
> (a) GPC's roles and responsibilities in relation to the project works as alleged in [14] herein and
>
> (b) GPC's performance of the Abigroup contract in relation to the geotextile, as alleged in [122] herein."

[205] I consider that paragraph 124 is sufficiently particularised insofar as it alleges direction, approval or acquiescence in the design and construction of the back door sections of the perimeter wall by reference to the design drawings and construction records which have been commented upon by Dr Rowe and pursuant to section 124(a)(ii)(C) may be inferred by GPC's role in relation to the project works and the allegations in paragraph 122.

Paragraph 126

[206] With respect to paragraph 126(a), GPC complains that the particulars make reference to the evidence as set out in the expert evidence report. That is so, but in the present complicated case that is rather helpful as it avoids surprise.

[207] By paragraph 126 the plaintiffs plead that all or most of the geotextile had, by no later than 1 August 2011, been damaged. GPC seeks particulars of the sections that had been damaged. The plaintiffs' case is that it is all or most of it, and in my view the plaintiff cannot be compelled to specify the extent of its alternative case of most of the geotextiles being damaged as opposed to all of it.

[208] It is a matter of logic that the geotextile is intended to be a layer to control the flow of water to contain turbidity. The fact that some of it is damaged may be expected to create a problem as to the efficacy of the balance of the geotextile as it is intended to be a barrier. It may well be impossible and would bear little utility to require the plaintiffs to specify the alternative case upon the extent of the damage to the geotextile liner. GPC's objection to paragraph 126 falls into the same category. In any event it is adequately particularised by the numerous references to Dr Rowe's report.

Paragraph 127(b)

[209] GPC complains that paragraph 127(b) does not give the identity of the person or persons who had made numerous reports of significant plumes of turbid water emanating from numerous points along the perimeter walls, arguing that the plaintiffs ought to provide particulars of the name of the persons who made the report and the points along the walls in respect of which the report was made.

[210] Paragraph 127(b) cannot be read on its own, however, and must be read with reference to paragraph 127(c) by which the plaintiffs have alleged GPC had received specific reports from three GPC officers. GPC is in a position to know whether there are other reports received and can plead to paragraph 127(b). Furthermore, as both expert evidence and lay evidence has been, by order, provided, GPC knows the plaintiffs' case. It is therefore unnecessary for the plaintiffs to provide the particulars as requested in respect of paragraph 127(b).

Paragraph 127(c)

[211] Paragraph 127(c) is a specific pleading that GPC had received reports of prohibited discharges being made to GPC's project manager Peter O'Sullivan and the environmental subcommittee of GPC by three named GPC officers providing reports. The reports were provided on sundry dates between March and October 2011 in respect of Mr O'Neill, and August and October 2011 in respect of Mr Broomhead, and during October 2011 by Mr Kettle. In respect to two of the officers, O'Neill and Broomhead, the plaintiffs have delivered affidavits and so the defendant is aware of their evidence.

[212] GPC seeks further and better particulars of the reports, being the number of occasions reports were made, the dates the reports were made, and the matters that were reported. In my view, it is unnecessary for the plaintiffs to provide any further particulars, as GPC has sufficient knowledge of the case it has to meet at trial to avoid surprise.

Paragraph 128(a)

[213] GPC's objection to paragraph 128(a) is not accepted for the same reasons, namely, paragraph 128(a) is specifically particularised with detailed reference to the expert reports of Dr Rowe and Mr Beckett.

Paragraph 128(d)(i)

[214] GPC's complaint in respect of paragraph 128(d)(i) was that the particulars of locations of all of the alleged compromised geotextile ought to be specified. I do not accept this argument for the reasons stated in paragraphs [207] to [208] above.

Paragraph 128(d)(ii)

[215] GPC complains in respect of paragraph 129(d)(ii) that the use of the vague term "such as" prior to the specification of seven remedial measures and the inclusion as the first remedial measure of "adopting multiple means of remediation" means that the plaintiffs' case is unparticularised. Whilst I accept the criticism that the phrase "such as" and in particular the remedial means number one of "adopting multiple means of remediation" does suggest that the remediation means are left open-ended such that in an ordinary case it would constitute a valid criticism.

[216] The difficulty in the present case is overcome by the fact that the defendant has all of the plaintiffs' evidence, that is, the plaintiffs' lay evidence and its expert evidence and the plaintiff will be constrained from improving its evidence beyond that which has been provided, without leave. In those circumstances, GPC cannot be caught by surprise as it has all of the evidence upon the issue. There is no need for a further and more careful particularisation to remove the words "such as" or to order that the "adopting multiple means of remediation" to mean anything other the means of remediation specified from two to seven inclusive.

Paragraphs 133 and 135

[217] GPC complains that the phrase "General Sealing Precautions" is not defined in the pleading. The plaintiffs accept there is a typographical error including the word "general" before sealing procedures. That ought to be corrected when the pleading is delivered. GPC makes further complaints about paragraphs 133(c), (d), (e) and paragraphs 135 (a) and (b). These objections cannot be sustained. The plaintiffs' case is particularised to a high degree and thereafter exposed by the delivery of both lay witness statements and expert evidence such that GPC cannot be caught by surprise.

Paragraph 137

[218] GPC complains that paragraph 137 is a rolled up causation plea which fails to plead a particularised causal pathway. I do not accept the criticism as, similar to paragraph [188] to [192] above, the causation and loss in respect of GPC's breach of duty cannot possibly be expected in a complicated case to be fashioned to one cause. Rather, as paragraph 137 puts the plaintiffs' case, the discharges are caused by a combination of the modification breaches, the mud wave/paleochannel breaches, and/or the sealing breaches.

Paragraph 138

[219] GPC brings a similar complaint in respect of the failure to particularise the causal pathway in paragraph 138. Paragraph 138(a) is an uncomplicated paragraph which alleges that the Particular Effects spread by reason of the natural tide and current flows around and throughout the harbour waters and out the mouth of the harbour to the affected waters.

[220] Paragraph 138(b) pleads that the Chemistry Effects spread again by the natural tide and current flows in and around the harbour and out of the mouth of the harbour to the oceanic affected waters. Importantly, particulars are provided in terms of the expert reports of Mosely, Hipsey and Wettle. GPC therefore knows the plaintiffs' case in respect of this element of causation.

Paragraphs 139 and 140

[221] GPC's objection to paragraphs 139 and 140 again is the objection that it is a rolled up plea of causation. Paragraphs 139 and 140 specifically refer to earlier paragraphs of the pleading and numerous paragraphs of the expert reports such that GPC knows the plaintiffs' case and will not be surprised at trial.

Paragraph 141

[222] GPC's objection to paragraph 141 is that in respect of Particular (C), that the loss and damage was a natural and foreseeable consequence of the breaches of the GPC bund works duty. Part of Particular (C) is an alternative is based on GPC's participation during 2010 discussions regarding the project compensation scheme as referred to in paragraph 49(d). I have dealt with paragraph 49(d) above. In my view it is unnecessary to provide particulars of whether the discussions were had or whether they were not had during 2010 and it is unnecessary and not in accordance with r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) for there to be particulars provided of discussions.

Paragraphs 143(b), (d), (g), (h), (i)

[223] Paragraph 143 is an allegation by the plaintiffs of factual causation based on s 11(2) of the *Civil Liability Act* 2003 (Qld) being the alternative plea of factual causation. GPC contends that the state of scientific knowledge referred to in paragraph 143(b) did not and does not permit the establishment of factual causation between the breaches and contamination affects. That is a matter that may be determined at trial.

[224] GPC further alleges that paragraph (C) is not sufficiently particularised in referring to numerous paragraphs of Professor Lonigan's report as it uses the abbreviation "esp.". That appears to be an error as the word "esp" has been removed. The word "esp" ought to be deleted from paragraph 143(b)(C) and the plaintiffs, by their response, have confirmed they will delete that reference.

[225] GPC complains that paragraph 143(d) is imprecisely pleaded, however, it is properly particularised by the reference to paragraphs 137 and 139. GPC complains the particulars in paragraph 143(g) do not provide proper particulars as they refer to the phrases "material increase", "other contaminants" and "marine flora and fauna on which commercial species pre-dated or to flora they inhabited." As GPC points out, there is extensive reference to six expert reports. As the expert reports have been discovered, GPC is sufficiently aware of the plaintiffs' case in this regard. Paragraphs 143(h) and (i) are similar. That is, with extensive reference to expert reports, GPC is aware of the plaintiffs' case.

Paragraph 145

[226] GPC complains that paragraph 145 does not particularise the loss of the plaintiff group members. As GPC points out, losses are set out in Mr Thynnes' report, but set out for three different amounts for different scenarios in respect of the first plaintiff, Murphy Operators. GPC submits it is entitled to know which amount is claimed.

[227] In my view, GPC's objection in respect of the lack of declaration of the plaintiff's losses is valid. The plaintiff ought to particularise its loss and of course may particularise it in the alternative based on the alternative scenarios.

Paragraph 153

[228] Paragraph 153 sets out the plaintiffs' claim for exemplary damages. It pleads that GPC was aware or ought to have been aware of the modification risk mud wave/paleochannel risks and sealing risks. The plaintiffs then plead the matters were known or ought to have been known by the two named individuals, namely the dredging project manager, Mr Jorgensen, and the project manager dredging and disposal project, Mr O'Sullivan.

[229] GPC's complaint is not with respect to the allegation of actual knowledge but rather that with respect to the allegation that GPC ought to reasonably have been aware of the risks. GPC argues that the factual matters from which the inference that GPC ought to have reasonably been aware of the risks has not been pled.

[230] The proposed paragraph commences that at all material times, after receipt of the FLPE, EIS, further or alternatively the dredging and disposal EIS, GPC ought to have been reasonably aware of the relevant risks.

[231] Based on one reading of the proposed paragraph 153, the allegation is that GPC ought to have reasonably been aware of the risks said to come from the receipt of the two EIS referred to. That is not patently clear. It seems to me GPC has a valid objection and that the facts by which it is alleged that GPC ought reasonably have been aware of the risks ought to be specified.

Paragraph 155

[232] A similar complaint is made in respect of paragraph 155, that is, the facts upon which GPC's knowledge ought to have been reasonably aware have not been particularised. It seems to me, however, that the particulars contained in paragraph 155 form very specific allegations as to the means by which GPC ought to have been aware of the risks. That is, the methodology is the knowledge ought to have been in GPC's custody by the engagement by GPC of the environmental consultants, Vision Environment, the aerial photographs taken by GPC, the research undertaken by the National Research Centre for Environmental Toxicology. Additionally, the fact that GPC was investigating the visible leaks and sediment discharges from the bund and that by September 2011, GPC had engaged contractors to investigate causes of turbidity in the harbour and engineers to advise upon options to decrease the permeability of the bund wall with the engagement of the contractors, O'Neill and Broomhead makes it sufficiently clear.

Paragraph 157(a)

[233] GPC complains that paragraph 157(a) is not sufficiently particularised. The particulars are provided at paragraph (A) with specific references to the witness statements of O'Neill and Broomhead. As the evidence has been disclosed, GPC cannot be taken by surprise at trial. Either the evidence which has been disclosed will or will not bear out the particular.

Paragraph 157(c)

[234] GPC complains that paragraph 157(c) is not particularised. Paragraph 157(c) is a particular of failures that the plaintiffs allege GPC made throughout the period of the bund works which caused environmental damage as an element of the plaintiffs' claim for exemplary damages.

[235] It seems to me that paragraph 157(c) is the allegation that GPC failed to take steps or any adequate steps to stop the discharge of water or things in the water around the bund from 1 July 2011 to mid-2012 until the modification impacts, mud wave paleochannel impacts and sealing impacts had been effectively mitigated. It must be read with reference to the steps and measures set out in the pleading to prevent discharge of water or things in the water in or around the bund and the modification, mud wave/paleochannel and sealing impacts. It would not be in compliance with r 149(1)(b) to require the plaintiffs to effectively re-plead their case in paragraph 157(c).

Conclusion

[236] GPC has succeeded in identifying some deficiencies in the draft 2FASOC but the plaintiffs have leave to re-plead in respect of paragraph 19(c)(4)(B), paragraph 49(a)(C), paragraph 78(b)(iv), paragraph 93(i)(B), paragraph 133, paragraph 143(b), paragraph 153, and paragraph 155(B). Furthermore, as discussed above, it is necessary for the plaintiffs to provide further particulars of paragraphs 89(d)(iii), (iv), (v), 90(b)(ii)(1) and paragraph 145.

[237] I will hear from the parties as to the form of the order to be made and upon the issue of costs.