SUPREME COURT OF QUEENSLAND

CITATION:	*Garda Capital Limited v Herron Todd White (Sydney) Pty Ltd* [2018] QSC 79
PARTIES:	**GARDA CAPITAL LIMITED ACN 095 039 366 (FORMERLY NAMED "OPUS CAPITAL LIMITED")** (Plaintiff) **v** **HERRON TODD WHITE (SYDNEY) PTY LTD ACN 089 112 416** (Defendant)
FILE NO:	SC No 12334 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	23 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2018
JUDGE:	Bowskill J
ORDER:	**The application is dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – Whether amendments made to a defence, in circumstances where leave was not required, ought to be disallowed *Uniform Civil Procedure Rules* 1999 (Qld) rr 5, 378, 379 *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *Hartnett v Hynes* [2009] QSC 225 *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd as trustee of the QC Trust & Ors* [2014] QCA 267
COUNSEL:	J W Peden QC with M Byrnes for the plaintiff (applicant) R P Jackson QC with M Jones for the defendant (respondent)
SOLICITORS:	Macpherson Kelley for the plaintiff (applicant) Hall & Wilcox for the defendant (respondent)

[1] In December 2013 the plaintiff, now called Garda Capital Limited, in its capacity as the manager of and responsible entity for a public managed fund, the Opus Income and

Capital Fund No. 21, commenced proceedings against the defendant, Herron Todd White (Sydney) Pty Ltd, valuers, claiming damages as a result of allegedly negligent valuations.

[2] There have been various iterations of the pleadings since then. A fairly significant amendment was made to the plaintiff's statement of claim in January 2017, followed by another amendment in May 2017. Amended defences were filed in June and October 2017. On 2 March 2018 defendant filed a third further amended defence. The plaintiff applies under r 379 of the *Uniform Civil Procedure Rules* 1999 for an order that amendments introduced by the third further amended defence be disallowed.

[3] As no request for trial date had yet been filed in this matter, the defendant did not require leave to make the amendments to its defence (r 378). However, r 379 enables the plaintiff to apply to disallow the amendments. Under r 379(2), on the application, the court may make the order it considers appropriate.

[4] Both the entitlement of a party to amend pursuant to r 378, and the discretionary power of the court to disallow an amendment, are subject to the overriding purpose of the rules, set out in r 5 of the UCPR, to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense, in the interests of the parties, the court and other litigants.[1]

[5] The relevant considerations, in determining the appropriate order to be made on an application to disallow amendments for which leave was not required were summarised by Applegarth J in *Hartnett v Hynes* [2009] QSC 225 at [12]-[22], and include:

(a) whether the prejudice caused by an amendment can be remedied by an order for costs; although the interests of justice and the purpose of the UCPR do not entitle a party to amend as many times as it likes without leave, and without regard to the personal and financial consequences to other litigants (at [12], [13] and [20]);[2]

(b) whether there is a satisfactory explanation for any delay in raising a significant amendment at an earlier stage (a matter which will assume greater importance in the case of an amendment on the eve of, or during, a trial) (at [14]);

(c) whether there is any prejudice to the other party, for example, as a consequence of having to deal with matters that are alleged to have occurred many years ago, and dated transactions, such as to affect the opportunity for a fair trial (at [16] and [17]);

(d) the nature and importance of the amendments (at [21]);[3] and

(e) the point the litigation has reached relative to a trial when the amendment is made (at [21]).

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1 *Hartnett v Hynes* [2009] QSC 225 at [11] and [19]; *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd as trustee of the QC Trust & Ors* [2014] QCA 267 at [73]. See also *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [93]-[95].

2 See also *AON* at [98].

3 Ibid, at [102].

[6] It is appropriate to have regard also to the 12 principles summarised by Applegarth J at [27] of *Hartnett v Hynes*, with respect to amendments for which leave is required, which include the matters just referred to.[4]

[7] Each case of course depends upon its own circumstances, and the application of the principles identified in *AON,* and summarised by Applegarth J, will vary from case to case.[5]

[8] For the plaintiff, particular emphasis was placed on the observations in *AON* at [98], [102] and [112]-[114], as to the limits appropriately placed on the ability of parties to effect changes to their pleadings, particularly if litigation is advanced, and whether it may properly be concluded that a party has had sufficient opportunity to plead their case, such that it is too late to make a further amendment.

The stage the proceedings have reached

[9] The proceedings were commenced on 20 December 2013, seeking to recover damages alleged to have been suffered as a result of the defendant's negligence in preparing valuations of a property the plaintiff acquired, in the exercise of an option to do so under a put and call option agreement entered into in May 2008.

[10] As originally pleaded, the plaintiff's case was a "no transaction" case, it being alleged that the plaintiff relied upon the valuations in entering into the put and call option agreement, and exercising the option, which, but for the valuations, it would not have done.

[11] The property was purchased for $25.2 million in September 2008. A valuation dated 7 March 2008 valued the property at $23.4 million. A valuation dated 8 May 2008 valued the property at $25.2 million. It was alleged that the true valuation of the property was about $13.2 million. The property was sold in August 2012 for just over $9 million. The plaintiff initially claimed loss and damage in the sum of $13,265,875, as the difference between the purchase price and the sum realised on sale (together with other fees and charges) ([43] of the statement of claim).[6]

[12] Following the filing of a defence in February 2014, the matter proceeded fairly slowly, eventually being placed on the case flow list in April 2015. As far as appears from the court file, nothing much happened, save for two lists of documents filed by the plaintiff in June 2014, and variations to case flow orders, until January 2017, when an amended statement of claim was filed.

[13] It is apparent from the chronology set out in [9] of Mr Davidson's affidavit that in May 2015 and October 2015 the plaintiff served further lists of documents.

[14] The parties participated in a mediation in February 2017, but the matter did not resolve.

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4 *Monto Coal* at [74].

5 *Monto Coal* at [74] and [100].

6 It is apparent, on the face of [43], but also from the amendment made to [43] in February 2017, that the amount in fact claimed, on this basis, was just over $16 million (the difference between the purchase price of $25.2 million and the amount realised on resale of just over $9 million).

[15] A further amended statement of claim was filed in February 2017 (the only amendments, from the January 2017 version, appear to be corrections to what seems to have been a mathematical error in [43], to claim the loss on resale of $16,110,551.57, and consequential amendments to [43A] and [43B] of the amended statement of claim).

[16] The January 2017 amendments to the statement of claim added two alternative claims for loss and damage, in the nature of "loss of opportunity" claims, in [43A] and [43B].

[17] To understand those alternative claims, it is necessary to refer briefly to other amendments made at this time. The focus in the original statement of claim was on the put and call option agreement entered into in May 2008. In the amended statement of claim, two put and call option agreements are pleaded:

(a) the first, entered into on 30 November 2007 (at [5A]) is alleged to have been exercised by the plaintiff on 7 March 2008, as a result of which the plaintiff entered into a contract in March 2008 to purchase the property for $23.4 million (at [21A]);

(b) the second, entered into on 29 May 2008 (at [34]) is alleged to have been exercised by the plaintiff, leading to the Public Trustee (as custodian of the 21st fund) entering into a contract to purchase the property for $25.2 million on 12 September 2008 (the March 2008 contract having been rescinded); and

(c) in between the first and the second option agreements, it is alleged that there were various negotiations between the plaintiff and the vendor, for variations of the March 2008 contract, which resulted in payments being made by the plaintiff to the vendor (at [21E], [21F], [21J], [21M], [21N], [21R]), in respect of which the plaintiff pleads it also relied upon the March 2008 valuation.

[18] In paragraph [43A] of the amended statement of claim, there are five alternative amounts claimed, reflective of the five points in time, between 11 April and 29 May 2008, at which it is alleged the plaintiff had (but lost) the opportunity to negotiate with the vendor of the property for an "orderly termination" of the March 2008 contract to purchase the property, upon payment of a settlement sum. On this analysis, the amount of loss claimed ranges from $13,970,551.57 down to $4,176,426.57 (as the amounts it alleges it would have paid to settle increase, from just over $2 million to almost $12 million).[7]

[19] In paragraph [43B] a further alternative is pleaded, that the loss suffered by the plaintiff is $1.8 million, being the difference in the purchase price of the property between the contracts contemplated by the first option agreement (that is the March 2008 contract) and the further option agreement entered into in May 2008 (the September 2008 contract).

[20] In the original defence, the defendant denied the plaintiff's claim to have suffered loss, putting in issue reliance and causation, principally on the basis that the plaintiff had

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[7] These are the figures pleaded in [43A] as it appears in the second further amended statement of claim, filed 15 May 2017 (which are different in some respects to the versions filed in January and February 2017).

already, by 7 March 2008, entered into the (first) put and call option agreement, and formed the intention to exercise the call option and had, prior to 8 May 2008, agreed upon the terms of a (second) put and call option agreement (at [6], [10], [25], [34], [38], [39], [40] and [43]). An alternative defence of contributory negligence was pleaded (at [44]), in terms that the plaintiff had contributed to its own loss by instructing the defendant to assume that the property would be leased to a long term tenant (Tretecnic Pty Ltd) and had done so despite not having an enforceable agreement for lease with Tretecnic.

[21] In the amended defence, filed in February 2017, the defendant also denied the plaintiff's claim, on the basis of the alternative formulation in [43A] and [43B] of the amended statement of claim. In addition, the defendant added to the pleading of the contributory negligence defence, in [44.3] of the amended defence, an allegation that the plaintiff contributed to its own loss in circumstances where it proceeded with the purchase of the property in its capacity as a responsible entity of a public managed fund in a manner which was inconsistent with best practice at the time, particularising that by reference to the plaintiff, inter alia, entering into an unconditional contract on 30 July 2007 without a supporting independent valuation, not undertaking comprehensive due diligence at the time it entered into either the March or September contracts, and failing to undertake an appropriate asset evaluation process.

[22] Since February 2017, as it appears from the court file, the following steps have been taken:

1. A further supplementary list of documents was filed by the plaintiff on 5 May 2017;

2. A second further amended statement of claim was filed on 15 May 2017;

3. A further amended defence was filed on 19 June 2017;

4. Particulars of the amended statement of claim (in response to a request made in January 2017) were filed on 15 June 2017;

5. An amended reply was filed on 21 July 2017;

6. A second further amended defence was filed on 27 October 2017;

7. Directions, including to vary previous case flow orders, were made on 12 May, 4 August, 14 September and 27 October 2017;

8. Notices of non-party disclosure were filed by the plaintiff in November 2017;

9. A further amended reply was filed on 10 November 2017;

10. Lists of documents were filed by the defendant in November 2017.

[23] Once again, it is apparent from the chronology in [9] of Mr Davidson's affidavit that during 2017 both parties served further lists of documents, which were not filed.

[24] In addition to addressing the second further amended defence, which was filed on 27 October, the case flow orders made on 27 October 2017 set out a timetable for filing a

further amended reply, any further disclosure (as well as any application for further disclosure), the parties to prepare and confer in relation to a trial bundle of documents, and the parties to sign and file a request for trial date by 8 December 2017.

[25] When the matter was reviewed on 8 December 2017, directions were made for the filing of expert evidence from a forensic accountant, further disclosure from the plaintiff in relation to a particular issue, in relation to the preparation of the trial bundle, and for a request for trial date to be filed by 9 February 2018. At this review, consideration was given to possible trial dates. The parties were subsequently advised, by email correspondence from my associate, that there were *reserve* dates available in some weeks in May and June 2018, but that no dates for the second half of the year could yet be advised.

[26] The plaintiff served its expert report on the defendant on 20 December 2017, as well as a further list of documents (being documents provided to, and referred to by, the plaintiff's expert) on 6 February 2018.

[27] No request for trial date was filed and the matter came back on for review on 16 February 2018. At this review, the defendant flagged that it intended to file a further amended defence. Directions were made about that, as well as further disclosure by the defendant, expert evidence to be filed by the defendant, an amended reply, further disclosure by the plaintiff and about the preparation of the trial bundle. An order was also made that the proceeding be set down for a 5 day trial, commencing on a date after 2 July 2018, with enquiries to be made as to what dates may be available. No dates have yet been raised with the parties.

[28] The third further amended defence, as foreshadowed, was filed on 2 March 2018. The present application was filed on 12 March 2018.

Nature of the amendments

[29] Having filed the present application, the plaintiff's solicitor wrote a lengthy r 444 letter to the defendant's solicitors.[8] In response to various objections to matters of form about the third further amended defence, the defendant has since provided a draft fourth further amended defence, in which it has endeavoured to address these things.[9] It is that version of the document that I refer to.

[30] The amendments, firstly, include new paragraphs [5C] to [5H] and [7A], in which it is alleged (in broad terms, and without including detailed reference to the particulars):

1. In [5C] that:

    (a) Mr Goakes, Mr Moody and Mr Kelly were directors of the plaintiff;

    (b) Mr Goakes and Mr Moody were co-chairmen of the plaintiff;

    (c) Mr Goakes and Mr Moody exerted significant influence over the investment decisions of the plaintiff (said to be inferred from their positions

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8 Mr Davidson's affidavit, commencing at p 154 of the exhibits.

9 Mr Castley's affidavit, commencing at p 711 of the exhibits (letter in response to the r 444 letter) and commencing at p 723 (draft fourth further amended defence).

as co-chairmen and the fact entities controlled by them were substantial shareholders in the plaintiff; and the fact that they, together with Mr Kelly, caused or procured the plaintiff to exercise the call option under the first agreement, nominating the 21st fund as purchaser, in the circumstances alleged in [5F], [5G] and 5H]);

(d) Mr Goakes, Mr Moody and Mr Kelly were investigating establishing a data centre business to be known as Tretecnic, through entities which they controlled in a joint venture with Jones Lang LaSalle (JLL), by the company Tretecnic Pty Ltd;

(e) Mr Goakes, Mr Moody and Mr Kelly required suitable real properties for Tretecnic to lease from which to carry on the proposed data centre business;

(f) Mr Goakes, Mr Moody and Mr Kelly anticipated that the proposed data centre business would be profitable and would generate income for: (i) the plaintiff in the form of fees generated from managing the ownership of real properties leased to Tretecnic; JLL in the form of property management fees; and themselves, in the form of dividends and other payments and benefits to themselves or to their related entities;

(g) Mr Goakes, Mr Moody and Mr Kelly anticipated that the proposed data centre business would be sufficiently profitable that Tretecnic would be able to pay rent which was above the market rate and still have the proposed data centre business profitable;

(h) None of the plaintiff, Mr Goakes, Mr Moody or Mr Kelly had sought a valuation of the subject property prior to agreeing a price at which the plaintiff would purchase the property, in the event that either the call option or the put option under the first option agreement was exercised;

(i) The plaintiff, Mr Goakes, Mr Moody and Mr Kelly arrived at the proposed purchase price of $23.4 million for the subject property based on their own enquiries, including as to the potential rental of the property and appropriate capitalisation rates;

(j) Until shortly prior to the plaintiff's exercise of the call option under the first option agreement nominating the 21st fund as purchaser, Mr Goakes, Mr Moody and Mr Kelly intended for the property to be purchased by the plaintiff in its capacity as responsible entity of a new scheme to be styled "Opus Technical Infrastructure Fund No 1" or similar.

2. In [5D] that, in the premises pleaded in [5C], Mr Goakes, Mr Moody and Mr Kelly, as directors of the plaintiff, committed the plaintiff to purchase the property without seeking or obtaining a valuation of the property; without undertaking any (or any adequate) due diligence in relation to the property, including its suitability for use as a data centre; and so as to secure real property which another business which they controlled, Tretecnic, could potentially lease.

3. In [5E] that the proposed data centre business was not sufficiently developed to commit to a lease of the property prior to the call option expiry date under the first option agreement of 10 March 2008.

4. In [5F] that as the call option expiry date under the first option agreement of 10 March 2008 approached, none of the plaintiff, Mr Goakes, Mr Moody and Mr Kelly had caused the "Opus Technical Infrastructure Fund No 1" (or any similar new fund) to be established.

5. In [5G] that as the plaintiff was committed by the first option agreement to either exercise the call option or face the exercise of the put option under the first option agreement, Mr Goakes, Mr Moody and Mr Kelly caused the plaintiff to nominate the plaintiff in its capacity as responsible entity of the 21st fund as the purchaser of the property.

6. In [5H] that the plaintiff determined, by Kerrie Davies, on or about 6 March 2008 to obtain a valuation of the property because it was a requirement of the 21st fund that a valuation be obtained prior to the 21st fund acquiring any real property and because the plaintiff needed to ascertain how much of the purchase price of the property could be obtained from a new facility from Suncorp secured over the subject property and how much of the purchase price needed to be obtained from other sources.

[31] The already existing [6] of the defence pleaded that as at 7 March 2008 (when the defendant was engaged to prepare a valuation of the property) the plaintiff had already entered into a put and call option to purchase the property for $23.4 million; the plaintiff intended, by Ms Kerrie Davies, to exercise the call option on 7 March 2008; and had the plaintiff not exercise the call option, the vendor would have exercised the put option. This was pleaded in response to [6(a)] of the statement of claim, which simply pleads the engagement of the defendant in March.

[32] The amendments add a new [7A] which pleads (again, in broad terms, without the particulars) that as at the date of the March engagement (of the defendant to prepare a valuation):

(a) the plaintiff was committed to acquire the property, regardless of the valuation of the property produced by the defendant, because the first option agreement was unconditional;

(b) the plaintiff was committed to acquire the property, regardless of the valuation of the property produced by the defendant, because if the plaintiff did not exercise the call option under the first agreement, the vendor would have exercised its put option and, in any case, the plaintiff had exercised the call option on 7 March 2008;

It may be observed that these paragraphs reflect the existing pleading in [6].

(c) Mr Goakes, Mr Moody and Mr Kelly were determined for the plaintiff to secure the property so that it could be leased to Tretecnic for the purpose of the proposed data centre business;

(d) Mr Goakes, Mr Moody and Mr Kelly anticipated that the proposed data centre business would be sufficiently profitable that it could meet the cost of a lease in favour of the plaintiff at terms which were above market as to rent which would cause the market value of the property (once leased to Tretecnic) to be not less than the consideration which the plaintiff was paying to the vendor for the property (relying upon [5C(g)]);

(e) It would have been damaging to the business of the plaintiff and to the professional reputations of Mr Goakes, Mr Moody and Mr Kelly had:

(i) the vendor exercised the put option under the first option agreement;

(ii) the plaintiff breached the terms of the first option agreement by failing to enter into or complete the contract for sale; and

(iii) the vendor sued the plaintiff for specific performance or damages for breach of contract,

in circumstances where Mr Goakes, Mr Moody and Mr Kelly had caused or procured the plaintiff to enter into the first option agreement – in the circumstances set out in subparagraphs (iv) to (xi) including: without obtaining a valuation, without undertaking due diligence, where the stock market and general investment market were weak, where they knew or ought to have known Tretecnic had no funds or income and was incapable of complying with any lease, where JLL might claim an entitlement to a buyer's fee of $351,000 if the plaintiff breached the first option agreement, where breach of the first option agreement might cause JLL to cease negotiations with them about a proposed joint venture in relation to the proposed data centre business, where the plaintiff stood to gain a "due diligence fee" of approximately $882,000 if the 21st fund acquired the property, where the plaintiff stood to gain an "equity raising fee" of approximately $645,750 if the 21st fund acquired the property, and where the defendant was instructed to provide a valuation report dated 7 March 2008, by email dated 7 March 2008 (in circumstances where plaintiff already intended to exercise the call option, having resolved to do so on 4 March 2008, and it was not possible for the defendant to produce a valuation prior to the exercise of the option, and the plaintiff had no expectation to the contrary).

[33] In subsequent paragraphs of the defence, in which reliance upon the valuations was already denied, the amendments add cross references to [5C] to [5H] and [7A]: for example, in [10.1.2], [21G(b)(vi)], [21H(c)], [21K(d)], [21P(c)], [21T(c)], [38.6], [39.9], [43.5], [43A(c)], [43B(d)].

[34] In addition, reference is also made to the circumstances pleaded in [5C] to [5H] and [7A] in relation to [44.3] (the pleading of contributory negligence, for proceeding with the purchase of the property in a manner inconsistent with best practice).

[35] Finally, there are new [46]-[68], which raise a proportionate liability defence, on the basis of allegations in respect of each of the plaintiff (in its personal capacity, as opposed to the capacity in which it brings the proceeding against the defendant), Mr

Goakes, Mr Moody and Mr Kelly, that by the conduct pleaded at [5C] to [5H] and [7A], they each breached the duties owed by them to the members of the 21st fund; which breach caused some or all of the loss alleged in the statement of claim; and that by reason of s 31 of the *Civil Liability Act* 2003, the liability of the defendant is limited to an amount reflecting the proportion of loss suffered by the members of the fund that the court regards as just, having regard to the extent of the defendant's responsibility, and the extent of each of the plaintiff's, Mr Goak's, Mr Moody's and Mr Kelly's responsibility.

[36] In the defendant's written submissions at [3], [5] and [6] the amendments are described as follows:

> "The Defendant's central contention, by the amendments, is that the Plaintiff would have proceeded to purchase the Subject Property even if the Defendant had delivered valuations which accorded with the Plaintiff's expert reports; namely at figures some millions of dollars lower than the valuations in fact provided in 2008. The Defendant submits the Plaintiff would have proceeded because, for various reasons, directors of the Plaintiff were both legally and commercially committed to the purchase of the Subject Property. They were legally committed because they had caused the Plaintiff to enter into a put and call option agreement and caused the call option to be exercised in the name of the fund on whose behalf the Plaintiff sues, without a valuation or any due diligence. They were commercially committed because, first, the Subject Property was to be used for a profitable side business (referred to as 'Tretecnic') to be run by three directors which it was anticipated would be able to pay rental above market and, second, because failing to complete the purchase as a result of the directors having caused the Plaintiff to grossly overpay would have been so damaging to the Plaintiff's business that, in light of the anticipated profits from Tretecnic, the directors were more likely to have caused the purchase to proceed, even if at substantial overvalue.
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> …
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> The evidence demonstrates very curious and self-interested conduct by the directors which supports a conclusion that they would have caused the Plaintiff to proceed with the purchase of the Subject Property in order to advance their self-interest. It is also apparent that they anticipated the Tretecnic business would be profitable and able to pay rental above market rates for the Subject Property so that an appropriate return would be enjoyed by the owner.
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> The amendments therefore go to questions of reliance, causation and contributory negligence, all of which were already substantial issues in dispute on the earlier pleadings. The amendments also introduce proportionate liability defences because of the Plaintiff's former directors' unusual conduct. In a real sense, the amendments seek to explain conduct of the Plaintiff which was otherwise inexplicable."

[37] The plaintiff submits the amendments "introduce wholly new allegations" and are "substantially different from" the existing defence, emphasising in particular a difference between the previous pleading that the plaintiff was "bound" to proceed with the March contract (for example in [21G(b)(iii)]) and the use of the word "committed"

in the amendments, which it is said raises an issue of subjective intent; and the new proportionate liability allegations.

[38] In addition to complaints about the form of the pleading as to proportionate liability, in its written submissions the plaintiff contended the plaintiff is not a "concurrent wrongdoer" under the proportionate liability regime, and that this is properly a question of contributory negligence. The defendant responds by submitting that the proportionate liability defence operates in relation to the plaintiff in its personal capacity, rather than the capacity in which it sues, and that the members have actionable rights against a responsible entity of a managed investment scheme for breach of duty. It seems to me that the defendant's contention is at least reasonably arguable, such that on this application I would not disallow the amendment on this basis.

[39] Having now considered the pleadings in more detail, I accept the submission for the defendant that the amendments do not substantially alter the case which was already pleaded. The amendments plead allegations which expand upon the circumstances in which the plaintiff, as it is alleged, had become bound by the (first) put and call option agreement, and already formed the intention to exercise the option to purchase the property, before engaging the defendant in March 2008, and plead a case which seeks to explain why that was (or may have been) the case, in [5C] to [5H] and [7A], including by reference to the commercial motivations of the plaintiff, and its directors. In that sense, the amendments raise allegations that are clearly related to issues already in dispute in the proceedings: whether the plaintiff relied upon the valuations, or whether it would have purchased the property in any event; whether any alleged negligence in preparing the valuations caused the (variously analysed) loss which the plaintiff alleges it suffered; whether the plaintiff, by its conduct, contributed to its own loss.

[40] Mr Castley's affidavit has annexed to it the draft trial bundle index proposed by the defendant, as well as the documents themselves, which are said to be documents disclosed by the plaintiff. In order to demonstrate the factual and evidentiary basis of the allegations contained in the amended pleading the defendant has, in its submissions, gone through each of the new (sub)paragraphs and identified the document(s) relied upon to make the allegation. The merits of the allegations now pleaded is not a matter for me on this application. I do not propose to address those parts of the defendant's submissions here, other than to say that I accept that the defendant has identified a factual basis for the amendments, by reference to documents disclosed in this proceeding.

Explanation for the amendments being made now

[41] As explained by Mr Castley, the solicitor for the defendant, the amendments arose in part from disclosure in relation to certain fees referred to in the plaintiff's expert report served in December 2017, which were not referred to in the statement of claim, or particulars provided prior to service of the report. The fees were:

(a) a "property acquisition and due diligence fee" of $882,000; and

(b) "buyers agents fees" of $351,000.

[42] Mr Castley says that the fact those fees were payable, and were alleged to have been paid, "focussed attention on what incentive the plaintiff had (whether in its personal capacity or in its capacity as responsible entity) to proceed with the purchase of the Subject Property in the event the plaintiff obtained a valuation in an amount lower than the valuations which the defendant provided. That was particularly so given the plaintiff had committed to purchase the Subject Property without any valuation and in circumstances where it appeared to believe that a business to be conducted from the Subject Property and other properties would be very profitable".

[43] Mr Castley says the amendments also arose in part from review of the disclosed documents, as part of preparing the draft tender bundle index, including documents disclosed during 2017.

[44] Mr Castley says that those two matters "focussed attention on the question of what motivations or incentives the plaintiff had to proceed with the purchase of the Subject Property". He says following discussion between counsel and solicitors for the defendant, there was a concern as to whether the defendants' existing pleas as to reliance and causation sufficiently clearly raised the defendant's likely contentions at trial (based on the plaintiff's disclosed documents) about the Tretecnic data centre business project and whether the conduct of Mr Kelly, Mr Goakes and Mr Moody might have been such that proportionate liability defences could be pleaded.[10]

[45] It appears, from the procedural chronology in this matter, that disclosure has taken place in a number of tranches, starting in 2014, then in 2015, and mostly in 2017. At [185] of the defendant's submissions there is a table listing the "most critical" of the documents proposed by the defendant to be included in the trial bundle, and the dates they were disclosed. It is clear from that, that it includes a number of documents disclosed in August 2017. I accept the contention that in a substantial case, where there are large numbers of documents disclosed at varying times, it is not unreasonable that their meaning, effect or significance (including in combination) may not completely emerge at the time of disclosure.

[46] It is also relevant, in terms of the timing of the amendments, that the substantial amendments to the statement of claim, to add the "loss of opportunity" claims, occurred in January 2017. In that context, and given the continued disclosure of documents during the course of 2017, this is not a case in which it can be said there has been unreasonable delay on the part of the defendant.

Prejudice to the plaintiff

[47] The prejudice which the plaintiff says it will suffer, if the amendments are not disallowed, arises from:

1. The **need to revisit disclosure**, which Mr Davidson, the in-house counsel for the plaintiff, describes as involving a complete revisiting of the disclosure task already undertaken, involving a cost of about $50,000 and taking about 2 to 3 months to complete.

2. Accordingly, a trial date in July 2018 will not be achievable.

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[10] Affidavit of Mr Castley, filed 29 March 2018 at [8]-[14].

3. **Potentially destroyed** documents, since the amendments deal with events over 10 years ago (relating to negotiations with JLL prior to 30 November 2007 and the status of the proposed data centre business to be operated by the company, Tretecnic, which was deregistered in January 2010).

4. The **faded memories** of Mr Goakes, Mr Kelly and possibly Mr Moody.[11]

[48] In terms of the need for further disclosure, I accept that this may be required, in relation to at least some parts of the amendments. I am circumspect about accepting the contention that it will be necessary to, in effect, "redo" disclosure, as submitted by counsel for the plaintiff, given that, as submitted by the defendant, the new allegations have been drawn from documents already disclosed by the plaintiff (including documents in relation to Tretecnic and the data centre business proposed to be operated by it from the property). I am also circumspect about the extent of disclosure that may be required. For example, the submission by counsel for the plaintiff that in order to meet the allegation now pleaded in [5C(c)] that the directors exerted significant influence over the investment decisions of the plaintiff means reviewing all investment decisions of the plaintiff, appears an overstatement of what would be required (given the particularisation of the allegation, and that it is the defendant that bears the onus). There are other respects in which the defendant, fairly in my view, submits that if the plaintiff has not already undertaken various searches, it ought to have (for example, in relation to what JLL did to earn the $351,000 apparently paid to it), and the need to do that now is not a consequence of the amendments.

[49] But having said that, it is a matter for the plaintiff, as properly advised, what steps it undertakes in order to discharge its obligation to disclose relevant documents. This is not a basis upon which I would disallow the amendments. If the process has to take two to three months, so be it. The estimated costs, whilst substantial, are not excessive in the context of the overall scope of the plaintiff's claim. And in relation to those additional costs, this is a matter that can be addressed by an order for costs, to be addressed at the end of the trial.

[50] As for the possibility of documents having been destroyed, given the passage of time, as the defendant submits, it is necessary to consider this argument (and the next one, as to faded memories), in the context of this proceeding being commenced in December 2013, some 5 years after the property was acquired. The loss of opportunity amendments were not made to the statement of claim until January 2017. The amended damages claims, in [43A] and [43B] themselves make relevant conduct which took place in 2008. It is not the case that the present amendments to the defence make relevant, for the first time, conduct from ten years ago. The risk that there may have been relevant documents held by third parties, which are no longer in existence, is one that was already a live one as at January 2017.

[51] The same point applies in relation to the contention regarding faded memories. Mr Goakes and Mr Kelly are on the plaintiff's list of witnesses (according to the draft trial plan which appears at p 33 of the exhibits to Mr Davidson's affidavit). Mr Davidson deposes to having spoken to Mr Goakes and Mr Kelly, and being informed that without access to specific documents, they, effectively, cannot recall specific detail from "the 2007 period". There are of course a number of specific documents, disclosed by the

[11] Affidavit of Mr Davidson filed 23 March 2018 at [34]-[51]

plaintiff, and included in the defendant's index for the trial bundle, by reference to which these people could be asked about the matters alleged in the newly amended defence. They must, one would reasonably infer, already have been asked their recollections of events in late 2007 and 2008, which were already subject of the existing pleadings, in particular the amendments to the statement of claim in January 2017. To the extent their memories have faded, again, that is a consequence of the timing in this matter in any event, not merely due to the amendments now made to the defence.

[52] Both as regards memories and documents which may no longer exist, it is fair to observe that in many proceedings there will be such obstacles, to varying degrees. In some circumstances, such obstacles may result in the opportunity for a fair trial having been lost.[12] But that is not this case, for the reasons already referred to – the fact that a trial will proceed, about events in 2007 and 2008, is not the consequence of the recent amendments. As the High Court observed in *R v Edwards* (2009) 255 ALR 399 at 405 at [31]:

> "Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair."[13]

[53] It may be accepted that a trial date in July this year will not be achieved. But the matter has not yet been set down for trial. There are no specific trial dates which have been allocated. There had been a request for dates *after* 2 July 2018, and the material indicates the parties had exchanged availability of counsel for trial dates extending beyond July. In all the circumstances, this is not a case in which a delay beyond that date presents as unreasonable, either in terms of prejudice to the parties, or to other litigants in the court.

Conclusion: not appropriate to disallow the amendments

[54] It is apparent that, since the unsuccessful mediation in February 2017 the progress of the matter has picked up pace, in comparison to the lack of activity in the three years prior to that. It is also the case, I accept, that since the 8 December 2017 case flow review, the plaintiff has been requesting the matter be progressed in a concrete way towards a trial.

[55] The explanation for why the amendments have been made now is deposed to on oath by the solicitor for the defendant. There is no basis for that not to be accepted. It is not unreasonable for the significance of documents to emerge, or take on a different

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[12] As in *Page v Central Queensland University* [2006] QCA 478, a case in which proceedings were commenced in 1997, seeking relief for conduct which occurred in 1991, and which were then dismissed in 2006 for want of prosecution, it being accepted, among other reasons for dismissal, that the delay in prosecuting the action had prejudiced the respondent, since the proceeding put in issue the process of scrutiny and evaluation of the appellant's application for admission to the university, by officers of the respondent, 15 years before (see at [24] per Keane JA).

[13] References omitted.

perspective, as further documents are disclosed and, as here, once other evidence is produced (such as the expert report).

[56] There has not been unreasonable delay. In the circumstances, in my view this is not a case where it may properly be concluded that the defendant has had sufficient opportunity to plead its case, such that it is too late for the amendments now to be made.

[57] There is presently no trial listed. The delays which will result from the amendments are not significant, amounting to a matter of months. This is to be considered in the context of a very substantial claim, in monetary terms, against the defendant – at its highest, a claim for over $16 million. It would be a very serious step, in my view, given all the circumstances of this case, for the court to prevent the defendant pleading and advancing at trial a case which it has shown has emerged from documents disclosed by the plaintiff in the proceedings.

[58] Any prejudice caused by the amendments can be remedied by an order for costs. In so far as there may be costs thrown away by the amendments, that is addressed by r 386 UCPR. The costs associated with the further disclosure are appropriately addressed after the trial, depending upon the outcome.

[59] In my view, the appropriate order to be made is to dismiss the application.

[60] Separately, the plaintiff has also raised a number of objections based on deficiencies in the manner or form in which the amendments have been pleaded. These are not matters which would lead to the amendments being disallowed, but may be matters to be addressed by amendments (for example, to the draft fourth amended defence annexed to Mr Castley's affidavit, prior to it being filed), or by a request for particulars.

[61] In terms of the parts of the pleading emphasised in oral submissions, I note the following:

1. In relation to [5C(c)], the plaintiff complains about the words "Mr Goakes and Mr Moody exerted significant influence over the investment decisions of the plaintiff", in two respects: first, that the meaning is clear; second as to the scope of disclosure that it triggers. I have dealt with the second point above. As to the first, the defendant submits the words "significant influence" bear their natural and ordinary meaning, and that the allegation is sufficiently particularised. I accept that. The allegation is a specific one, with the position of influence said to be inferred from the particularised matters. It is not an allegation at large, so to speak.

2. In relation to [5C(f)], the plaintiff submits there is a structural problem, in relation to the matters set out below (iii) (articulating the matters from which it is to be inferred Mr Goakes, Mr Moody and Mr Kelly anticipated that the proposed data centre business would be profitable and would generate income), because it is not clear if they are material facts or particulars. The defendant says the matters pleaded below (iii) are pleaded to comply with r 150(2) of the UCPR, to plead facts from which a state of mind is to be inferred. It also says that it removed the heading "particulars" in response to a complaint from the plaintiff in the r 444 letter. Perhaps as a matter of form, those matters could bear their own (sub)

paragraph number – but otherwise there does not seem to be a basis for complaint.

3. In relation to [5C] generally, the plaintiff submits there is a temporal illogicality, given the opening words "at all material times to this proceeding". It seems those words were added to the draft fourth amended defence, in response to a complaint by the plaintiff in its r 444 letter to the opening words "as at and prior to the date of the First Option Agreement". The primary complaint of the plaintiff seems to be that material times to this proceeding extends up to 2012 when the property was sold – but it is illogical to consider the allegations in [5C] by reference to that time frame. It seems to me that is the answer to the plaintiff's complaint. However, it would not be difficult for the defendant to be more specific about the time frame focussed on in [5C].

4. In relation to [7A(e)], the plaintiff complains about the form of this sub-paragraph, which pleads a cascading set of (three) circumstances. This is a somewhat convoluted part of the pleading, which I accept would be difficult, from a pleading perspective, to respond to. It would be fair to require the defendant to re-plead this in a more straightforward way.

5. In relation to [44.3], the plaintiff suggested there was some confusion about the words which have been added to the end, and which part of [44] they relate to. On my reading of that paragraph, I regard it as clear that the words "each of those matters in the circumstances pleaded at paragraphs 5C to 5H and 7A above" relate only to [44.3] and, further, that the allegation of contributory negligence at [44.3] remains at it was previously pleaded, an allegation of acting in a manner inconsistent with best practice, in the three respects identified. The addition of the cross-reference to the new paragraphs [5C] to [5H] and [7A] is a pleading that that occurred in a particular factual context. Counsel for the defendant confirmed this.

[62] There are other matters of form addressed in the plaintiff's written submissions. They were not addressed in oral argument. I will leave those for the parties to address, as I have said, either in terms of further amendments before the fourth amended defence is filed, or by a request for particulars.

[63] I will hear the parties as to costs, although would anticipate that the appropriate order is that costs follow the event.