SUPREME COURT OF QUEENSLAND

CITATION:	*Mathiesen v Lawson & Ors* [2018] QSC 154
PARTIES:	**RODRICK GORDON MATHIESEN** (plaintiff) **v** **ALAN JOSEPH LAWSON** (first defendant) **GRAHAM FARREN** (second defendant) **TONNIJ JOHANNES BOBELDYK** (third defendant) **FARREN AND LAWSON PTY LTD** ACN 010 027 559 (fourth defendant) **COMPACTOR HIRE (TOWNSVILLE) PTY LTD** ACN 077 355 447 (sixth defendant) **ROD MATHIESEN PLANT HIRE PTY LTD (in liquidation)** ACN 011 006 447 (seventh defendant)
FILE NO:	SC No 410 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	4 July 2018
DELIVERED AT:	Townsville
HEARING DATE:	10 and 11 April 2017
JUDGE:	North J
ORDER:	**1. The proceeding by the plaintiff against the first, second, fourth and sixth defendants be dismissed.** **2. Judgment for the first, second, fourth and sixth defendants against the plaintiff.** **3. The plaintiff pay the costs (including reserve costs) of the first, second, fourth and sixth defendants of the application and the proceeding to be assessed on the**

standard basis.

4. **The plaintiff and the first, second, fourth and sixth defendants have liberty to apply for a different or varied cost order provided an application is filed within 21 days.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION – where the defendants seek that part of the plaintiff's amended statement of claim be struck out – where the defendants raise limitation issues – whether the statement of claim sets out the causes of action or basis for relief

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – WANT OF PROSECUTION OR LACK OF PROGRESS – where the defendants seek that the proceedings be dismissed for want of prosecution pursuant to r 280 or alternatively the court's inherent jurisdiction – where the plaintiff had not taken a step for more than two years – where the plaintiff contends that an order made in a related proceeding constitutes a step in the current proceeding – whether the proceedings should be dismissed

LEGISLATION: *Corporations Act* 2001 (Cth), s 181, s 182, s 183, s 237
Trade Practices Act 1974 (Cth), s 52, s 75B, s 82
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 150, r 154, r 155, r 157, r 158, r 171, r 280, r 370, 371, 375, r 376, r 389
Limitation of Actions Act 1974 (Qld), s 10

CASES: *Batistatos v Road Traffic Authority (NSW)* (2006) 226 CLR 256, cited
Derry v Peek (1889) 14 App Cas 377, cited
Gerace v Auzhair Supplies Pty Ltd (in liq) (2014) 310 ALR 85, cited
Gerard Cassegrain & Co Pty Ltd v Cassegrain & Ors [2010] NSWSC 91, distinguished
Grahame Allen & Sons Pty Ltd v Water Resources Commission [2001] 1 Qd R 523, cited
Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (1978) 140 CLR 216, cited
Hutchins v Robinson [2012] QSC 411, cited
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494, cited
Re Auzhair Supplies Pty Ltd (in liq) [2013] NSWSC 1, cited
Tyler v Custom Credit Corp Ltd [2000] QCA 178, cited
Ure v Robertson & Ors [2016] QSC 210, cited
Ure v Robertson [2017] QCA 20, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, applied

COUNSEL: DB Fraser QC for the applicant/first, second, fourth and sixth

	defendants T Matthews QC with S Kelly for the respondent/plaintiff
SOLICITORS:	Connolly Suthers for the applicant /first, second, fourth and sixth defendants Cohen Legal for the respondent /plaintiff

Introduction

[1] **NORTH J**: These reasons should be read together with my reasons and orders of 6 October 2016 when I ordered that a number of paragraphs of the plaintiff's statement of claim filed 22 July 2015 be struck out. In that order I gave the plaintiff leave to re-plead and I adjourned the further hearing of the application by the first, second, fourth and sixth defendants ("the defendants") filed 17 August 2015.[1]

[2] Subsequently the plaintiff filed a second further amended statement of claim on 18 November 2016[2] and amended defences were filed.[3] On 14 February 2017 directions were made to enable any complaints concerning the new statement of claim to be identified and for any application for strike out to be heard with the adjourned application filed 17 August 2015.[4]

[3] The matters for determination are:

a) the application to dismiss the plaintiff's proceedings for want of prosecution (para 6) or for non-compliance with the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") (para 4) under the adjourned application filed 17 August 2015; and

b) the application to strike out parts of the plaintiff's second further amended statement of claim filed 18 November 2016.

[4] Both applications are pressed by the first, second, fourth and sixth defendants. The third defendant is separately represented. He has pleaded to the amended statement of claim but did not join in the application. It may be mentioned that the plaintiff filed an application for leave to use in this action documents filed in another proceeding,[5] but at the hearing it was adjourned to a date to be fixed after the determination of the defendants' application.

[5] I propose to address the strike out issues first and then turn to the issues raised by the application filed on 17 August 2015. There are several reasons for this. It is the order in which matters were addressed in the written outlines and submissions. On several occasions after the filing of the second further amended statement of claim ("the statement of claim") the plaintiff expressly disavowed any intent to make any further amendment to the statement of claim.[6] Consequently the fate of the statement of claim has some consequence for the dismissal application. Further the pleading, what is alleged, and the nature and extent of the allegations and the

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1 Document 46.
2 Document 54.
3 Amended defence of first, second, fourth and sixth defendants filed 23 December 2016 (document 58), further amended defence of third defendant filed 23 December 2016 (document 59) and amended reply filed 18 January 2017 (document 83).
4 See Order dated 14 February 2017 (document 89).
5 Application filed 30 November 2016 (document 55).
6 At the directions hearing on 9 December 2016 and at the hearing of the applications.

matters raised, goes some way to inform my consideration of the dismissal application. Indeed in the way in which the strike out issues were framed and presented by the defendants I gained the impression the strike out contentions were not so much an end in themselves but intended as an introduction to the application for dismissal. Some of the strike out contentions were short and discrete points, some raised typographical issues, some trivial but a number of the more substantial issues went to the issue of whether in the state of the pleading the defendants could fairly meet the case set up. I will consider the strike out contentions in the order addressed by counsel in their written outlines.

Brief overview of the plaintiff's case

[6] Derivative proceedings are brought by the plaintiff on behalf of the seventh defendant (a company in liquidation) pursuant to leave granted by an order made on 10 December 2008.[7] Leave was granted nunc pro tunc as these proceedings had commenced on 22 June 2007. The making of the orders in separate proceedings and the circumstances of the hearing have some significance as will be seen later.

[7] In what follows I shall refer only to the claims against the first, second, fourth and sixth defendants. It follows submissions made by the plaintiff and is not intended to be taken as accepted. The plaintiff claims relief for the following:[8]

a) Relief is claimed for the following causes of action:

i. damages for passing off, including exemplary damages, against the sixth defendant;

ii. damages under s 82 of the *Trade Practices Act* 1974 (Cth)[9] against the sixth defendant for a contravention of s 52;

iii. damages under s 82 of the *Trade Practices Act* against the first defendant and the second defendant, by reason of their involvement in the contravention of s 52 by the sixth defendant;

iv. damages for breach of fiduciary duty and corresponding statutory duties under the *Corporations Act* 2001 (Cth)[10] alleged against the first defendant and the second defendant; and

v. further or alternatively to the claims for damages for passing off, an Order for an account of profits against the sixth defendant, the first defendant and the second defendant.

b) The pleaded case is that:

i. prior to 4 December 1989 when the seventh defendant was incorporated the plaintiff had his own business as did the first defendant and the second defendant which businesses were carried on by various entities;

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7 Order Cullinane J dated 10 December 2008 in proceedings (Townsville) S303/2007.

8 What follows is drawn from the plaintiff's written outline of 6 April 2017 (document 96).

9 Hereinafter referred to as the *Trade Practices Act*.

10 Hereinafter referred to as the *Corporations Act.*

ii. on 4 December 1989 the plaintiff, the first defendant, the second defendant and the third defendant incorporated the sixth defendant to carry on a business of hiring rollers;

iii. the plaintiff, the first defendant and the third defendant were the directors of the sixth defendant and accordingly owed fiduciary duties and equivalent statutory duties to the sixth defendant;

iv. from 2 May 1995 the sixth defendant traded under the registered business name "Compactor Hire NQ" but was promoted and advertised as "Compactor Hire";

v. prior to 4 February 2007 the sixth defendant had established good will and a customer base, was generating income and had purchased a number of items of plants and equipment;

vi. unbeknownst to the plaintiff on 4 February 1997 the sixth defendant was incorporated, its directors were the first and second defendants who were controlling minds of the sixth defendant and directed its actions;

vii. from incorporation the sixth defendant carried on the same type of business as the seventh defendant under names "Compactor Hire", "Compactor Hire Pty Ltd" and "Compactor Hire (Townsville)";

viii. the sixth defendant did a number of acts with the intention of causing people to think that its business was the seventh defendant's business by reason of which;

(i) the sixth defendant passed off its business as the seventh defendant's business;

(ii) the sixth defendant contravened s 52 of the *Trade Practices Act*; and

(iii) the first and second defendants were persons involved in the sixth defendant's contravention of the *Trade Practices Act*.

ix. the sixth defendant also did a number of acts, styled "offending acts" which culminated in the sixth defendant taking the seventh defendant's good will, income and assets for itself;

x. the first and second defendants breached their fiduciary and equivalent statutory duties by reason of the incorporation of the sixth defendant, its carrying on of the same business as the seventh defendant and their failure to disclose these facts to the plaintiff, also by reason of the sixth defendant's passing off and by reason of the sixth defendant's contravention of the *Trade Practices Act* and by reason of the offending acts;

xi. on 2 September 2004 the business name "Compactor Hire NQ" was cancelled and on 18 July 2007 the seventh defendant was wound up;

xii. by reason of the passing off by the sixth defendant, the contravention of the *Trade Practices Act* by the sixth defendant, the involvement by the first and second defendants in the sixth defendant's contravention of the *Trade Practices Act* and their breach of fiduciary and statutory duties the

sixth defendant was able to earn profits, pay dividends to its directors and eventually sell his business. The seventh defendant simultaneously suffered loss and damage equivalent to the value of the sixth defendant's profits, dividend payments and sale proceeds. It is alleged this is in the sum of $4,801,780.

c) Three components of the loss and damage suffered by the seventh defendant are pleaded as:

i. the sum of $1,601,451 after income tax for the true operating profits of the sixth defendant for the period from 4 February 1997 to 30 June 2008 foregone by the seventh defendant;

ii. the total amount of the dividends paid by the sixth defendant to the first, second and third defendants in the sum of $406,161; and

iii. the proceeds of the sale of the business insofar as they are attributable to the sale of the sixth defendant's business in the sum of $2,794,168.

[8] It will appear from what follows that the defendants[11] do not accept that in important respects the pleading sets up the causes of action or pleads the basis for relief or the relief claimed with the clarity that the summary I have adopted from the plaintiff suggests.

[9] One matter might conveniently be mentioned at this juncture that will be returned to later. The statement of claim expressly alleges passing off, a factually related contravention of s 52 of the *Trade Practices Act*, breaches of fiduciary duty and breaches of statutory duty. Earlier statements of claim contain references to causes of action by the same name or upon the same statutory provision. The defendants contend that, however, entirely new causes of action are pleaded. It is fair to say that the statement of claim pleads entirely new or substantially reformulated allegations of fact going to the alleged breaches or contraventions, and to the circumstances of loss and damage and the methodology of how that loss or damage is to be calculated.

The striking out contentions

[10] Paragraph 35 of the statement of claim provides:[12]

> "CHT made the Representation knowing it to be untrue or alternatively, recklessly indifferent as to whether the Representation was true or not."

The allegation resembles a pleading intending to allege fraud.[13] Concerning the earlier statement of claim I ordered allegations of what were held to be fraud to be struck out because they had not been properly pleaded.[14] The plaintiff has disavowed any allegation of fraud and submits that paragraph 35 should be understood in its context in the pleading where the allegations of misleading and deceptive conduct in breach of s 52 of the *Trade Practices Act* appears. As a consequence the plaintiff submits that the allegation is relevant to whether there has

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11 When referring to the defendants I refer to the first, second, fourth and sixth defendants who pressed the applications.

12 Further amended statement of claim filed 18 November 2016 (document 54).

13 *Derry v Peek* (1889) 14 App Cas 377 at [367] and [374].

14 See [12] of my reasons concerning the earlier further amended statement of claim (document 53).

been a breach of s 52 and whether there has been a passing off, notwithstanding that intent is not a necessary element of a contravention of s 52.[15] Further it is submitted that it is material to the plaintiff's claim for exemplary damages for passing off.[16]

[11] The impugned paragraph is included amongst the allegations alleging a contravention of s 52 of the *Trade Practices Act* yet it is not an allegation material to that cause of action. Nor can it be relevant to the recoverable damages for that cause of action as exemplary damages cannot be recovered for a contravention of s 52.[17] If the allegation had been intended as part of a claim for exemplary damages for passing off it should have expressly been pleaded as part of the allegations material to that cause of action and with particularity.[18] In the context of the pleading as a whole and where paragraph 35 appears, the only fair reading in my view is that it raises an allegation against the defendants of fraud. It offends UCPR 171(1) and it should be struck out.

[12] The defendants submit that the proceedings should be dismissed as against the fourth defendant and that the allegations concerning it should be struck from the statement of claim. It is submitted, correctly in my view, that the statement of claim is devoid of any material facts either giving rise to a cause of action or to a right to any of the relief claimed. There are references to the fourth defendant in the statement of claim[19] including an allegation that it competed with the business of the seventh defendant.[20] But the allegation leads nowhere in the statement of claim. The reference to the fourth defendant in paragraph 48, that its business or part of it were sold in April 2008, is not accompanied by a subsequent allegation that the seventh defendant suffered loss and damage as a consequence of that sale by the fourth defendant.[21] No cause of action is pleaded against it. The references to the fourth defendant in the statement of claim should be struck out (UCPR 171(1)(a)) and if necessary the proceedings against it should be dismissed.

[13] The defendants complain that the claim for exemplary damages in paragraph a of the prayer for relief should be struck out. The defendants accept that exemplary damages can be recovered for the tort of passing off. Nevertheless the defendants submit that UCPR 150(1)(b) and 155(4) require that exemplary damages should be pleaded and done so specifically and with particularity. To these Rules reference in this context should be made to UCPR 158(2). In support of the pleading the plaintiff points to paragraph 30 of the statement of claim which alleges the facts relevant to the passing off claim and to paragraph 31(a) of the statement of claim:

> "31. By reason of the matters pleaded in paragraph 30 above:
>
> (a) CHT intended that people in the Industries would take it that Plant Hire's Business and CHT's Business were one and the same business."

Further in support of the pleading the plaintiff pointed to and relied upon paragraph 35 of the statement of claim. Thus, it was submitted, the combination of paragraphs

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15 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216.

16 See eg, paras [30] and [31] of the further amended statement of claim (document 54) and the prayer for relief at a.

17 See *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494.

18 See UCPR 158(2).

19 See eg, paras [5]-[6], [16], [21], [29] and [48] (document 54).

20 See para [21].

21 Contrast the allegations concerning the sixth defendant.

30, 31(a) and 35 constituted a pleading of a claim for exemplary damages for the alleged passing off complying with the requirements of the UCPR.

[14] But the plaintiff's submission fails for a number of reasons. First, paragraph 35 of the statement of claim is to be struck out for the reasons I have given. But there is a more fundamental reason. The combination of UCPR 150(1)(b), 155(4) and 158(2) require that a pleading must identify specifically that exemplary damages are sought, for what conduct, and the particular allegations of all the facts, matters and circumstances relied upon to support the claim. The statement of claim fails to do that. The only reference to exemplary damages is in the prayer for relief which is at the conclusion and is singularly uninformative. A reader is forced to intuit what cause of action the allegation may concern. Nowhere does the statement of claim identify which allegations, or combination of allegations, are relied upon to support the prayer for relief. The claim for exemplary damages in paragraph a of the prayer for relief should be struck out.

[15] The defendants complain that the prayer for relief at paragraph a of the statement of claim fails to identify the amount which is claimed, nor against which defendant any particular claim is made. The defendants submit that this stems, in part, from a failure to plead and particularise what any particular defendant did. The defendants' complaint concerning the prayer is accurate. But the pleading itself is more informative. In paragraph 41 of the statement of claim it is alleged that as a consequence of conduct of the sixth defendant there was a reduction in the good will of the business of the seventh defendant and its income and assets, and a corresponding increase in that of the sixth defendant. Then it is alleged that at material times the first and second defendants (and the third defendant) were the controlling minds of the sixth defendant and directed its actions (paragraph 42). The plaintiff, in his written submissions explains the scheme of the pleading of damages:[22]

> "24. … In a nutshell, because of the passing off, breach of the TPA and the Offending Acts, CHT took the income, assets and goodwill of Plant Hire (paragraph 41 SOC). By reason of this wrongful conduct, CHT:
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> a. Earned income, which was simultaneously lost to Plant Hire (paragraphs 47(1), (b) and (c) and 49 SOC);
> b. Paid dividends to Lawson, Farren and Bobeldyk (paragraphs 47(e) and 49 SOC); and
> c. Was put in a position where it could sell its business at a net profit of $2,794,168 (paragraphs 48 and 49 SOC).
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> 25. The damages pleaded in paragraph 49 arise out of each of the causes of action. That is, the quantum of damages is the same for each cause. Paragraph 49 refers to paragraphs 47 and 48 of the SOC. Paragraphs 47 and 48 plead the three heads of damage and the basis of calculation for each. These paragraphs also refer back to the paragraphs in which each of the respective causes of action are pleaded."

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22 Plaintiff's submissions filed 7 April 2017 at [24] - [25] (document 96).

The statement of claim is not easy to follow but the thrust of the plaintiff's submissions I accept. The statement of claim does reveal the basis for the claims alleged in paragraph 49 and exposes its particularity and the methodology of its calculations. I do not accept the defendants' complaints on this point.

[16] In paragraph 6 of his amended reply[23] the plaintiff admits paragraphs 6(a) to (h) of the amended defence.[24] The consequence of this, it is submitted, is that paragraph 6 of the reply is inconsistent with paragraph 8 of the statement of claim, offending UCPR 154(2). The plaintiff submits that neither a "new allegation" nor "a new claim" within UCPR 154(2) has been made by the admission. But nevertheless there is an embarrassing inconsistency between what is alleged in paragraph 8 of the statement of claim and the admission made in the reply. The narrative of the history of the dealings between the plaintiff and the first three defendants may assume significance at a trial as it may inform or assist in informing a view or conclusion about the dealings between them. Assuming the plaintiff intended the admission made by the reply the following from paragraph 8 of the statement of claim should be struck out:

> "…to carry on the plant and equipment hire business arm of Rod Mathiesen Truck Hire, then being conducted by the partnership of Mathiesen and his wife."

[17] The defendants complain that in a number of paragraphs the material facts are insufficiently pleaded to prevent solicitors obtaining instruction.[25] The defendants have not requested particulars nor suggested a particular ground within the use of the UCPR for a strikeout. It is not clear whether the defendants' concern relates to a fear of surprise at trial (UCPR 157(a)) or to be able to plead (UCPR 157 (b)). The defendants do not develop their argument in support of the complaint. I am not persuaded that a strike out is the proper course in the absence of a request for particulars.

[18] There is an admitted error in paragraph 30(f) of the amended statement of claim, the reference to "Department of Transport" should be to "Burdekin Shire Council". This has caused no one any confusion, and has been effectively remedied in paragraph 37(b)(ii) of the reply. The complaint is trivial.

[19] The defendants complain that paragraphs 28 and 29 of the statement of claim should be struck out as irrelevant to any pleaded cause of action. On its face this submission seems well made. Paragraph 28 concerns the incorporation of a company Norload Pty Ltd and paragraph 29 concerns an allegation as to the registered office of Norload Pty Ltd and each of the fourth, sixth and seventh defendants. The company Norload Pty Ltd was once the fifth defendant but is no longer a party. But in paragraph 28 it is alleged that the first and second defendants were directors of it and the plaintiff contends that, for a number of reasons, the paragraphs aid in an understanding of the factual context of the plaintiff's passing off and *Trade Practices Act* claims. I agree. I will not strike the paragraphs out.

[20] There is an error also in paragraph 12(d) of the statement of claim where it is alleged that from 4 December 1989 the third defendant was a director of the sixth

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23 Filed 18 January 2017 (document 83).
24 Filed 23 December 2016 (document 58).
25 See paras [12(c)], [17], [20], [26], [31], [32], [37] (document 54).

defendant within the meaning of that term as defined in the *Corporations Act*. But that Act only commenced in 2001. Nothing turns on this. The complaint is trivial.

[21] I have already noted that this proceeding is a derivative action brought by the plaintiff on behalf of the seventh defendant. The proceedings were commenced on 22 June 2007 when the claim and statement of claim were filed.[26] Leave to bring the proceedings pursuant to s 237 of the *Corporations Act* was not granted until 10 December 2008 when Cullinane J made an order "nunc pro tunc".[27] Materially the order stated:

> "2. Pursuant to s.237 of the *Corporations Act* 2001 and the inherent jurisdiction, leave is granted to the Applicant to bring proceedings on behalf of the Respondent against Alan Joseph Lawson, Graham Farren, Tonnij Bobeldyk, Compactor Hire (Townsville) Pty Ltd, Farren and Lawson Pty Ltd, Norload Pty Ltd, and such other persons or entities as the Court may from time to time consider it necessary or desirable to join as parties thereto. Without limit to the foregoing, leave is granted to the Applicant to bring Townsville Supreme Court proceedings no 410/07 ("the Proposed Proceedings")."

[22] The defendants submit that paragraphs 8, 16, 25, 30 to 39, 40 to 43 and 44 to 49 introduce new causes of action for which the limitation period has expired and for which leave has not been granted under UCR 376(4), and to the extent a new cause of action is introduced arising after 22 June 2007 leave has not been granted under UCPR 375(2).

[23] The defendants point out that the order contemplated the continued supervision of the "proposed proceedings", which included this proceeding as it was then pleaded and thus, it was submitted, s 237 (and in particular s 237(2)) required the Court to be satisfied there was a serious question to be tried. But before further considering this submission and considering a related submission that certain causes of action are statute barred it is relevant to consider the claim and statement of claim filed on 22 June 2007.

[24] That 2007 claim and statement of claim attached to it are, in terms of the prayers for relief, noteworthy for being uninformative. Claims for damages for compensation including exemplary damages are asserted without any quantification. An account of profits is sought. No cause of action is identified in either prayer for relief. The statement of claim is also uninformative. The pleading was deficient in specifying or particularising what it was that either defendant did, how it caused loss or damage or entitled the plaintiff to compensation or an account of profits. Contained within the statement of claim however are allegations (rather baldly asserted) that the sixth defendant passed itself off as the seventh defendant's business, and by that conduct it mislead and deceived in contravention of s 52. It did contain allegations that the first and second defendants owed and breached fiduciary and statutory duties to the seventh defendant and were knowingly concerned in the sixth defendant's contravention of s 52. But the pleading is uninformative. The statement of claim contains no quantification or calculation of any loss or damage. In both form and content it bore no similarity with the pleading now under consideration. It

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26 Document 1.

27 Order Cullinane J dated 10 December 2008 in TS303/2007. See a copy at "SAC27" in the Affidavit S.A. Cohen filed 29 March 2017 (document 94).

can fairly be said that faced with the statement of claim as it stood in December 2008 when leave was given to proceed, a defendant would have not been able to appreciate what case was being set up and what was specifically asserted. Since 2008 the statement of claim has undergone amendments. An earlier version, filed on 22 July 2015, was substantially struck out by my order of 6 October 2016. One of the orders I made was to give the plaintiff leave to re-plead. The order was made without the opportunity to consider a draft. It was not intended, nor is it submitted, that that order was made either under s 237 of the *Corporations Act* or under UCPR 375(2) or 376.

[25] Each of the impugned paragraphs[28] is a new pleading making allegations of fact different from the earlier pleadings. The names of the causes of action, passing off, the contravention of s 52 of the *Trade Practices Act* and the breaches of fiduciary duty and statutory duty mentioned in earlier statements of claim remain. Broadly speaking paragraphs 30 to 39 plead the allegations relevant to the passing off and s 52 contravention claims, paragraphs 40 to 43 plead those relating to the breaches of fiduciary duty and statutory duty, and paragraphs 44 to 49 plead matters relating to the loss or damage and how it is quantified or calculated. But they are pleaded by entirely new or substantially reformatted allegations of fact designed to address the deficiencies in the statement of claim the subject of the order of 6 October 2016.

[26] One further observation might be made. Both paragraphs 47 and 48 include allegations relating to events in 2008 after the proceeding was commenced in June 2007. But in substance they refer to events where, it is alleged, the financial benefits to the defendants, particularly the first and second defendants, crystallised consequent upon the alleged wrongful conduct.[29]

[27] To this the plaintiff submitted that the pleadings had always alleged causes of action of the description in the current statement of claim. Further, it was submitted, that the amended statement of claim, having been filed and served consequent upon the leave contained in the order I made in October 2016, was a "clarifying amendment" responding to judicial "observations" consistent with the observations of Austin J in *Gerard Cassegrain & Co Pty Ltd v Cassegrain & Ors*.[30] But that case and his Honour's observations are distinguishable. The application for amendment his Honour considered was made "at an early stage in the proceedings" and in the "absence of evidence of prejudice." This last factor raises an issue that will arise in the context of the application to dismiss the proceedings. Paragraph 8 has already been struck out. As to the balance of the impugned paragraphs (subject to one issue) I postpone the further consideration and determination of the defendants' contention until I consider the complaints concerning the limitation issues and in the context of the application for dismissal.

[28] The matter I just adverted to in the context of this issue is the specific complaint that was made by the defendants concerning paragraphs 38, 42 and 44 concerning the first and second defendants. Paragraph 38 alleges that, in breach of s 75B of the *Trade Practices Act* both the first defendant and the second defendant:

> "(a) aided, abetted, counselled or procured;
>
> (b) induced;

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28 See para [8], [16], [25], [30] – [39], [40] – [49] (document 54).
29 Notably the "North Sheridan" sale alleged in para [48].
30 [2010] NSWSC 91 at [24].

(c) were knowingly concerned in or party to,"

the contravention alleged in respect of s 52. Paragraph 42 alleges that at all times from 4 February 1997 the first and second defendants "directed the action and conduct" of the sixth defendant. And paragraph 44 alleges that they breached fiduciary duties and statutory duties. In each paragraph it is alleged that this followed by "reason of" matters alleged in earlier paragraphs of the statement of claim.[31] The defendants complain that the plaintiff has failed to set out specifically what each is said to have done and that the pleading should not be permitted.[32] There is substance in this complaint. None of the defendants can tell from the pleading what, in any given instance, they did or what, it is alleged, either one did and how, in the narrative of the preceding paragraphs of the pleading, it is said that what they did (or did not do) amounted to participation in the wrongdoing. The response by the plaintiff is that his difficulty in particularising acts flows from the conduct of the defendants in concealing matters from him and the seventh defendant. But for the present I shall postpone a further consideration of this.

[29] Pursuant to UCPR 171 the defendants seek to strike out the causes of action relying upon paragraphs 13, 30 to 39, and 42 to 44 of the statement of claim on the grounds they are statute barred. The paragraphs refer to or support one way or the other the causes of action for passing off, contravention of s 52, breach of fiduciary duty and breach of statutory duty. The defendants set up their defences upon this issue in paragraph 2 of their amended defence:

> "2. Further, or in the alternative, the Defendants say that the causes of action relied upon by Mathiesen in this proceeding are statute barred.
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> **Particulars**
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> (a) The proceedings herein were issued on 22 June 2007;
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> (b) The causes of action alleged to be maintainable by the Plaintiff in this proceeding were relevantly subject to the following limitation periods:
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> (i) Claims for passing off made in paragraphs 30 – 31 of the Statement of Claim – 6 years by virtue of s 10(1)(a) of the *Limitation of Actions Act* 1974 (Qld);
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> (ii) Claims for contravention of s 52 of the *Trade Practices Act* made in paragraphs 30 to 39 of the Statement of Claim – 3 years by virtue of s 82(2) of the *Trade Practices Act* 1974 as it then applied to the alleged cause of action; or, alternatively, 6 years after the *Trade Practices Act* 1974 was amended in 2001;
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> (iii) Claims for breach of fiduciary duty and/or statutory duty pleaded in paragraphs 13 and 42 to 44 of the Statement of Claim – 6 years by virtue of s 27(1)(a) of the *Limitation of Actions Act* 1974 (Qld) and by analogy as applied in equity, s 1317K of the

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31 The third defendant is the subject of allegations as well.

32 See *Hutchins v Robinson* [2012] QSC 411 at [25], [41].

Corporations Act 2001 (Cth) and its statutory predecessor;

(c) In each case, and in the event that the pleaded contentions of Mathiesen are established (which is denied) the limitation period for the alleged cause of action expired prior to the commencement of these proceedings as appears in the Statement of Claim from the dates upon which loss or damage is alleged to have occurred." [33]

[30] The defendants point to instances such as paragraph 30 where it is alleged that conduct occurred "after 4 February 1997" or paragraph 40 which commences "from 4 February 1997" which, it is submitted, supports the contention that on the face of the pleading the pleaded causes of action occurred before 22 June 2001. Further the defendants point to many of the particulars of conduct pleaded in paragraph 40 which concerned alleged loss to the seventh defendant involving payments or actions before 22 June 2001.

[31] In his amended reply[34] the plaintiff pleads:

"4. In respect of paragraph 2 of the Amended Defence, Mathiesen:

(a) Denies the allegations therin and believes them to be untrue;

Direct explanation for denial

i. None of the causes of action pleaded in these proceedings by Mathiesen are statute barred.

(b) Says further that in respect of the allegation that any of the causes of action pleaded in these proceedings are statute barred, Mathiesen is entitled to, and relies upon the fact that:

i. as pleaded by paragraph 25 of the Statement of Claim, Farren, Lawson and Bobeldyk failed to disclose to Plant Hire any of the matters pleaded by paragraphs 21, 22 and 23 of the Statement of Claim; and

ii. as pleaded by paragraph 43 of the Statement of Claim, at no time after 4 February 1997 until in or about December 2002, did Mathiesen have any knowledge of the actions and conduct of CHT, Farren, Lawson and Bobeldyk as pleased by paragraphs 30 and 40 of the Statement of Claim, insofar as those actions and conduct occurred within that period; and

(c) Is unable to plead further to the allegations until such time as the Defendants provide proper particulars in accordance with Rule 157 of the UCPR."

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33 Filed 23 December 2016 (document 58).

34 Filed 18 January 2017 (document 83).

[32] In submissions the counsel for the plaintiff acknowledged that the limitation period for the tort of passing off was six years. It was contested that the passing off was factually statute barred but it was acknowledged that some of the dealings concerning the claim for loss of operating profit occurred outside the limitation period. Counsel referred to and relied upon s 38(1)(b) of the *Limitation of Actions Act* 1974 (Qld)[35] and, consistently with the pleading, they submitted that the concealment of the matters referred to in the reply entitled the plaintiff to a postponement of the limitation period until discovery of the conduct. Specifically counsel has submitted that the use of the word "fraud" did not mean that his client was raising the issue of "fraud" that had been previously struck out. He submitted that in this context it meant actions or dealings that were in a sense unconscionable.[36]

[33] With respect to the claim for damages for contravention of s 52 of the *Trade Practices Act* counsel referred to the pleaded claim in paragraph 48 for damages calculated by reference to the "North Sheridan" sale which occurred on 1 April 2008. It was submitted that this plainly fell within the limitation period of six years, the sale having occurred after the commencement of proceedings. Further it was submitted that the claim for loss of dividends made in paragraph 40(b) as pleaded in paragraph 47 of the statement of claim showed that the earliest dividend payment impugned in respect of which damages was claimed was 7 August 2001, within six years of the commencement of proceedings. Counsel submitted that the limitation period was six years as a consequence of amendments to the *Trade Practices Act* which commenced on 26 July 2001. He referred and relied on observations by the High Court in *Wardley Australia Ltd v Western Australia*[37] where their Honours said:

> "We should, however, state in the plainest of terms that we regard it as undesirable limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question…"

[34] With respect to the claim for the breach of fiduciary duty counsel pointed out that the Court in the exercise of its equitable jurisdiction had a discretion to apply the provisions of s 10 of the *Limitation Act* by reason of s 10(6)(b). Therefore, it was submitted, by "analogy" a six year limitation period might apply.[38] But that if it could be shown by the plaintiff that the conduct of the defendants showed "a consciousness on the part of the defendant that what is being done is wrong or that to take advantage of a particular situation involves wrongdoing"[39] it was submitted that in light of the alleged conduct of the defendants and the concealment the issue of whether the limitation period of six years should be applied was a matter for a trial.

[35] With respect to the claim for damages for breach of statutory duty it was submitted that the pleaded claim relied upon duties breached under sections of the

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35 Hereinafter referred to as the *Limitation Act.*

36 See eg, *Grahame Allen & Sons Pty Ltd v Water Resources Commission* [2000] 1 Qd R 523.

37 (1992) 175 CLR 514 at 533.

38 See *Re Auzhair Supplies Pty Ltd (in liq)* [2013] NSWSC 1.

39 See *Gerace v Auzhair Supplies Pty Ltd (in liq)* (2014) 310 ALR 85 at [75].

Corporations Act including s 181, s 182 and s 183, all of which are civil penalty provisions.[40]

[36] It was submitted that a Court can order a person who has breached those provisions to pay compensation to a company that has suffered damage as a result of the contravention.[41] Counsel submitted that the time limit for commencing proceedings for compensation for the contravention is "no later than six years after the contravention".[42] By reference to the pleadings counsel submitted that the facts and circumstances relied upon to support a claim for contravention of the statutory duties occurred at various times but notably there were alleged contraventions within six years prior to commencement of proceedings. In the circumstances it was submitted that in this case it was open to the plaintiff to prove ongoing contraventions during the period of six years prior to commencement of proceedings and rely upon those contraventions to recover damages or compensation for contraventions so proven.

[37] The amended statement of claim is a complex document. In a number of respects it appears to allege conduct occurring earlier than six years prior to the commencement of proceedings whether one applies the limitation period under a statute or the six years is applied as is contended in the case of the breach of fiduciary duty. So too it appears that some of the claimed damages or loss occurred or accrued prior to 22 June 2001. But the determination of what occurred, when it occurred and when loss accrued is properly a matter for trial. The issues raised by the competing contentions with respect to the limitation arguments are factually and legally complex. The cautionary observation by members of the High Court in *Wardley Australia Ltd v Western Australia* quoted above[43] should be applied here in the view I take. In the exercise of my discretion I decline to further entertain or rule upon the limitation issues. The determination should occur at a trial, if any, in light of the findings made.

[38] Notwithstanding, one observation can be made. The history of the dealings relied upon in the pleadings, the complexity of the factual allegations and the circumstances that relevant or impugned conduct dating from many years ago are relevant to the issue of the application for dismissal of the proceedings for want of prosecution to which I now turn.

Dismissal for want of prosecution

[39] In the adjourned application filed 17 August 2015[44] the defendants made two applications:

> "4. Further, or in the alternative, an order, pursuant to Rule 371(2) of the Rules, and as a consequence of the Plaintiff's failure to comply with the Rules as detailed in the schedule hereto, that the Amended Statement of Claim and the Further Amended Statement of Claim of the Plaintiff in these proceedings be set aside and/or be declared to be ineffectual.
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> …

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40 s 1317E(1) of the *Corporations Act*.
41 s 1317H(1) of the *Corporations Act.*
42 s 1317K of the *Corporations Act.*
43 (1992) 175 CLR 514 at 533.
44 Document 46.

> 6. Further, or in the alternative, an order, under the inherent jurisdiction of this Honourable Court, or, alternatively, pursuant to Rule 280 of the Rules, that the Plaintiff's claim herein be dismissed for want of prosecution."

[40] In the submissions, written and oral, at the hearing before me the focus tended to be upon issues raised by paragraph 6. The application under paragraph 4 was not formally abandoned but it was, in a sense, pressed on a different footing from that contemplated by the application as filed. Concerning paragraph 6 the defendants pressed for an order that the proceeding be dismissed on both grounds, that the plaintiff had failed to take a step within a time required by the Rules or alternatively within the inherent power of the Court.

[41] It was not in dispute that if the circumstances were proven establishing a ground for considering whether to exercise a power to dismiss for want of prosecution under UCPR 280(1), then the exercise of the power or the discretion should be guided by the matters identified by Atkinson J in *Tyler v Custom Credit Corp Ltd*.[45] The defendants also invoked the inherent power of the Court to dismiss proceedings where, because of lapse of time, a fair trial (it was submitted) was not possible and to permit the case to proceed would inflict an injustice.[46] The prominent thread of the defendants' submission was that the action concerned events that occurred many years ago, some as far back as 1997, that there had been significant periods of delay over the years, and that in November 2016 the defendants were confronted with a new statement of claim which recast the basis for the plaintiff's claims and the calculation or articulation of the damages or compensation recoverable for the impugned conduct. Further the defendants asserted specific instances of the loss of evidence or potential sources of evidence which supported its contention of prejudice.

[42] Further to these issues at the hearing the defendants developed a submission that there had been an extensive period of delay for which the Court had not made an order for leave to proceed or some other order under UCPR 389(2). The solicitor for the defendant in his affidavit[47] swore that there had been many instances of significant delay where the plaintiff had taken no step **involving his clients.**[48] He pointed to a period of delay of greater than 15 months between 13 August 2007 and 17 November 2008.[49] A delay of greater than nine months from 11 December 2008 to 6 October 2009.[50] A period of in excess of 10 months from 26 February 2010 to 21 January 2011.[51] A period in excess of 11 months from 26 October 2011 until 8 October 2012[52] and a period in excess of 13 months from 9 September 2013 to 19 October 2014.[53] This totals a period in excess of 58 months or approximately five years. He was not cross-examined. The plaintiff however relied upon their own comprehensive chronology[54] designed to indicate how much

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45 [2000] QCA 178 at [2].
46 *Batistatos v Road Traffic Authority* (NSW) (2006) 226 CLR 256 at [69].
47 See Affidavit P.J. Radford filed 17 August 2015 (document 47).
48 Emphasis added.
49 Affidavit P.J. Radford filed 17 August 2015 at [35] (document 47).
50 Ibid at [39].
51 Ibid at [55].
52 Ibid at [65].
53 Ibid at [83].
54 See Affidavit S.A. Cohen filed 24 August 2016 (document 49) and the copy attached to the plaintiff's written submissions filed 7 April 2017 (document 96).

activity there had been over the many years. The defendants responded, by reference to that chronology, and pointed to the period from 27 September 2007 to 28 October 2009, a period of more than two years, when no step was taken in the proceedings. The consequence of this, so it was submitted, was that UCPR 389(2) was engaged, the action was stayed and no effectual step could be taken without and until an order made under UCPR 371(2).[55]

[43] To meet this the plaintiff pointed to the order made by Cullinane J in proceeding TS303/2007 on 10 December 2008 contending that the order served the purpose of conferring leave to proceed for the purpose of both s 237 and s 500 of the *Corporations Act*, and further for the purpose of UCPR 371(2). To this end it was submitted that the order was a step in the proceeding within UCPR 389. Alternatively the plaintiff sought, in stanta, an order for leave to proceed under either or both UCPR 371(2) and UCPR 389(2).

[44] The order made on 10 December 2008 was made in proceedings between the plaintiff and the seventh defendant which, by that time, was in liquidation. The defendants were not joined as parties to that proceeding. The defendants' solicitor, aware of the proceeding, was not told that the matter had been listed for hearing on 10 December so the order was made in the absence of the defendants.[56]

[45] I find it difficult to accept that an order made in one proceeding can be a "step in the proceeding" within the UCPR in a differently constituted proceeding. The purpose of UCPR 5, 280, 370 and 389 as they have been interpreted and applied in *Ure v Robertson*[57] is to ensure that the Court is to supervise the granting of leave to proceed in circumstances where there may have been a breach of the Rules or delay. I readily accept that an order of the type made on 10 December 2008 may be a relevant factor or matter to note in the context of an application for leave to proceed under the UCPR. But the Court, when it made the order in issue, did not have to consider the question of leave from the perspective of taking into account the interests of the defendants. It was not considering the proceeding from the prospect of the issues joined between the parties. Moreover when the order was made it was made under and for the purposes of legislation unrelated to the UCPR and at a hearing that did not involve the opposed parties who are not joined in the first proceeding. It seems to me that it would run counter to the drafting and intent of the UCPR for the phrase "step in the proceedings" to include orders of the type made in the circumstances. There was delay from 2007 to 2009 for a period of more than two years without a step. The consequence is the proceeding is stayed until an order for leave is given. The further consequence is that all the steps that have been taken after that date in 2009 are ineffectual.

[46] The failure of the plaintiff to take a step for two years in breach of UCPR 389(2) enlivens the power to dismiss the proceedings for want of prosecution under UCPR 280(1). What follows are my reasons for my conclusion that the proceedings should be dismissed. They also serve as my reasons for the conclusion that I have reached that the proceedings should also be dismissed under the inherent power. By reason of the delay, the loss of evidence, and the difficulty in preparing to meet a case

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55 See *Ure v Robertson & Ors* [2016] QSC 210 at [6]-[18] and *Ure v Robertson* [2017] QCA 20 at [37]-[44].

56 Affidavit P.J. Radford filed 17 August 2015 at [37] - [38] (document 47).

57 See *Ure v Robertson & Ors* [2016] QSC 210 at [6]-[18] and *Ure v Robertson* [2017] QCA 20 at [37]-[44].

formulated only as late as November 2016 (when the recent statement of claim was filed and served) I conclude that a fair trial cannot be had.

[47] The statement of claim pleads matters of history going back as far as 1989.[58] As best I can judge from the amended defence[59] much of the early history may not be particularly controversial. But as I have noted above material allegations concern matters "prior to February 1997",[60] "from 4 February 1997",[61] "after 4 February 1997",[62] and "between 2000 and 2003".[63] The pleadings concerning damage or compensation[64] raise a complex reconstruction of the business and financial dealings of the sixth defendant from 1997 to 2007.

[48] The likely occasion for prejudice may not seem significant if one knew only that the proceedings had been commenced on 22 June 2007 and that leave to proceed with the derivative action had been given on 10 December 2008. But the circumstance that the case to be met was only pleaded and thereby notified when the entirely new pleading was filed on 18 November 2016 raising conduct so long before is concerning.

[49] There has not been any disobedience of court orders or directions but the litigation has been characterised by periods of delay.[65] The obligations imposed by UCPR 5 have not been met. Much of the delay I have identified appears to be attributable to the plaintiff as opposed to the defendants. [66]

[50] There is no satisfactory explanation for the delay. On the evidence I am not able to say whether the delay is attributable to the plaintiff or his lawyers. In the recent past the plaintiff's lawyers have displayed a high degree of competence and industry in moving to prepare the recent statement of claim. Notwithstanding its deficiencies it is a vast improvement on its predecessors. The timelines met by my directions order subsequent to the striking out of the earlier statement of claim in October 2015 were met by both sides.

[51] It is not possible to reach a reliable conclusion about the prospects of success. The limitation issues, which may defeat the plaintiff's claims (or some of them), will depend upon the evidence and findings. I am mindful that if the plaintiff's allegations are true they raise serious allegations of misconduct for which, if made out, substantial damages for the loss or compensation might be recoverable. But the facts are complex and require an examination of conduct over many years leading to the sale in 2008. Credit issues will be at the forefront. In their amended defence[67] the defendants set up by way of a defence to the plaintiff's claims, and as a justification of the business activities of the sixth defendant, an agreement between the plaintiff and relevant defendants.[68] In submissions counsel for the plaintiff made pointed submissions because of the lateness of this seemingly important allegation.

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58 See para [10] (document 54).
59 Filed 23 December 2016 (document 58).
60 See para [20] (document 54).
61 Ibid at [21], [40].
62 Ibid at [30], [43].
63 Ibid at [30(e)(i)].
64 Ibid at [47] - [48].
65 My observations at [42] above are relevant.
66 Subject perhaps to the complaints made by the plaintiff about the delay in the disclosure by the defendants discussed below.
67 Filed 23 December 2016 (document 58).
68 See eg, amended defence filed 23 December 2016 at [16]-[23] (document 58).

This issue reinforces that credit will be at the heart of the resolution at any trial. In such a trial the extent to which the documents corroborate any witness will be important. So will the evidence from available non-party witnesses. This reinforces the importance of the integrity of the documentation and the recollection of available witnesses.

[52] It is apparent that the litigation has only reached the stage where it might be said that pleadings had, subject to current disputes, closed and that disclosure was in an advance state of completion. There seem to remain some disputes concerning disclosure. Certainly there is a live dispute whether the loss of documents that is asserted can be the occasion of prejudice to the defendants.

[53] The issue of disclosure is a matter of contention between the parties. The plaintiff complains that the defendants have not complied with the obligations of a party under the rules of Court, resulting in the supplementary list of documents taken 23 March 2017[69] which disclosed more than 400 new documents.

[54] In considering the evidence from the first defendant concerning the defendants' claim to have lost documents and the related submissions by the plaintiff that the defendants had failed in their obligation concerning disclosure it should be kept in mind that at all material times the pleadings have controlled the ambit and content of the obligation of disclosure. The original statement of claim filed and served in June 2007 was particularly uninformative.[70] And it remained as the plaintiff's pleading until an amended statement of claim was delivered in May 2015,[71] which was replaced by the further amended statement of claim of July 2015,[72] which in turn was almost entirely struck out by my orders of 6 October 2016. Given the state of the pleadings for more than nine years after the proceedings commenced it would have been very difficult for a party to be confident of the ambit and extent of the disclosure obligations required by the circumstances of the case. For example it was not until the 4 November 2014 that the plaintiff sought from the defendants disclosure of the documents relevant to the 2008 "North Sheridan" sale.[73]

[55] The defendants claim to have lost documents relevant to the causes of action as they have been pleaded and particularised in the statement of claim of 18 November 2016. In respect of that the first defendant swore an affidavit.[74] He was called and cross-examined. In his affidavit he identified a number of documents that were missing and deposed to circumstances suggesting that the passage of time occasioned prejudice to the defendants in meeting and responding to the plaintiff's claim. He identified financial statements and other records relevant to the circumstances of the sixth and other defendants, some of which were still available and some that were lost. In addition to financial statements he said that some work diaries, invoices and invoice books and ledgers were lost. These documents were relevant to some of the plaintiff's claim of wrongful conduct and relevant to some issues raised by the claims for damages or compensation. The first defendant said that the likely occasion of the loss of documents was as a result of Cyclone Yasi in February 2011, when water penetration ruined documents stored in a mezzanine storage area in the premises at 454 Woolcock Street. He also said it was possible

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69 See Exh 4.
70 Recall my comments at [24] above.
71 See Document 41.
72 See Document 45.
73 See Affidavit P.J. Radford filed 17 August 2015 at [88] (document 47).
74 Filed 20 March 2017 (document 93).

that documents were dumped and lost in the aftermath of the sale in 2008. Concerning the damage done in Cyclone Yasi he said that the water damaged documentary records and as a result they were dumped. He referred also to repair log books which are relevant to one aspect of a claim made by the plaintiff. He said that these records were passed on to the purchaser when the 2008 "North Sheridan" sale of the business was settled in April 2008. When the significance of the documents came to his attention he approached a representative of the purchaser only to be told the purchaser did not keep the records. The first defendant said that a potentially relevant witness had died on 2 January 2015 (before any of the amended statements of claim of 2005 or 2016 were filed). He said Mr David Haynes was his counterpart in the negotiations leading to the sale of the business in April 2008. He was experienced in the industry generally and knowledgeable concerning the "industry situation" in and before April 2008. Further he would have been able to give evidence about the sale, the negotiations and the state of the equipment sold in 2008. It was suggested that the defendants had lost the opportunity because of his death in January 2015 for their solicitor to obtain a proof of evidence concerning the allegations made in the November 2016 statement of claim.

[56] Mr Lawson was extensively and vigorously cross-examined which was designed to discredit his claim that the documents may have been dumped inadvertently in 2008 and others lost as a result of damage caused by Cyclone Yasi in 2011, and to suggest that the defendants had not been attentive to their obligations of disclosure. He was challenged that no mention had been made of the Yasi possibility in an affidavit he had sworn in 2013.[75] It was pointed out that request for disclosure had been made even before proceedings were filed, yet it was as late as March 2017 when more than 400 previously undisclosed documents were disclosed. He was reminded of the list of documents dated 10 March 2010[76] and it was pointed out that Yasi had occurred after that disclosure. Mr Lawson's response was to the effect that he relied upon his lawyers and disclosure had been made in accordance with what was asked for.

[57] It is apparent from the evidence that over the years the legal representatives for the plaintiff have raised issues to do with disclosure with the defendants' solicitors. But I am not prepared to conclude that the defendants deliberately withheld documents or that they consciously delayed in looking for documents or disclosing available documents. I have already noted the state of the pleading for many years. I paid close attention to Mr Lawson when he gave evidence. He appeared intelligent and alert when he gave his evidence. It was apparent that he was afflicted with a hearing impairment. He appeared to have a good recollection of matters, so far as he was questioned. I am not prepared to reject his evidence. I am persuaded that it is likely that a significant number of documentary records of the business of the defendants, particularly the sixth defendant, were lost as a result of Cyclone Yasi more than five years before the current statement of claim was filed and served. It is also possible some were thoughtlessly dumped in 2008. Other passed out of the control of the defendants at the settlement of the sale in 2008.

[58] One other matter should be mentioned. The defendants have commissioned a report from a forensic accountant, Mr Elia Lytras.[77] On its face it suggests that to forensically consider and examine and even critique the plaintiff's claim will be

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75 See Exh 2.

76 See Exh 1.

77 Dated 7 April 2017. See Exh "NMP1" to Affidavit NM Pearce filed 7 April 2017 (document 97).

difficult because of missing records. But the plaintiff complained that Mr Lytras may not have been provided with all the available documents. Consequently I am cautious about drawing conclusions from the report of Mr Lytras. For instance, the plaintiff has a large report from Mr Wood. But two things are apparent from it, the cost of forensically examining the plaintiff's claim for loss and damage will be significant and there appear to be contestable issues concerning the methodology and calculation of the claim.

[59] Because of the effluxion of time by 18 November 2016 when the statement of claim was filed the compelling inference is that the defendants would be considerably prejudiced in preparing for and meeting the pleaded claim at trial. The pleading is factually complex, particularly upon questions of loss and damage. Issues of business management and conduct and the state of the "industry" going back before 2000, and even to the mid 1990's, arise. The examination of the statement of claim, from my consideration of the strike out issues, demonstrates that evidence may be desirable from, not only the defendants, but past employees, customers and others familiar with the defendants' business and industry circumstances from the mid-1990s to 2008. This is particularly important in the context of the alleged conduct related to the passing off and the s 52 claims. The likelihood is that potential witnesses may be un-locatable or have died. Further it is likely that available witnesses will, because of the passage of time, have lost memory or have a poor recollection. The lost documents, the death of Mr Haynes and the other matters mentioned by Mr Lawson may, individually, not appear to be circumstances of overwhelming prejudice but, whether viewed individually or collectively, they are instances of the prejudice I mentioned supporting my conclusions. When this issue is considered in light of the criticisms I have made of the statement of claim, and its want of particularity or specificity as to who did what and when, in light of the passage of time I consider a fair trial upon the issues raised by the pleading of 18 November 2016 is not possible. To permit the proceeding to go forward to trial would be unjust and be an abuse of the process of the Court.[78]

[60] To avoid any doubt, earlier I indicated that the defendant should be entitled to an order dismissing the proceeding under UCPR 280 or the inherent power. If my conclusion that the plaintiff's claim was stayed as a consequence of the delay between 2007 and 2009 is incorrect[79] and an order under UCPR 280 is not available, then the order is made in the inherent power.

Conclusion

[61] Whether or not my holding that the plaintiff's claim is and has been stayed since October 2009 is correct, I consider that the defendants are entitled to the finality of a dismissal of the proceeding and that matters not be left with a contestable stay in place. For completeness, for the reasons I have given, I refuse the application made in stanta by the plaintiff for leave to proceed.

[62] It is not necessary for me to further consider or rule upon the strike out contentions I postponed relying upon.

[63] The orders I would make therefore are:

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78 See *Batistatos v Road Traffic Authority* (NSW) (2006) 226 CLR 256 at [69].

79 See [42]-[46] above.

1. The proceeding by the plaintiff against the first, second, fourth and sixth defendants be dismissed.

2. Judgement for the first, second, fourth and sixth defendants against the plaintiff.

[64] The defendants have been successful and prima facie are entitled to an order for costs but the parties may have different contentions. The orders I will make therefore are:

3. The plaintiff pay the costs (including reserved costs) of the first, second, fourth and sixth defendants of the application and the proceeding to be assessed on the standard basis.

4. The plaintiff and the first, second, fourth and sixth defendants have liberty to apply for a different or varied cost order provided an application is filed within 21 days.