SUPREME COURT OF QUEENSLAND

CITATION:	*Graham & Linda Huddy Nominees Pty Ltd & Anor v Byrne & Ors* [2016] QSC 221
PARTIES:	**GRAHAM & LINDA HUDDY NOMINEES PTY LTD ACN 125 747 266** (first plaintiff) and **PINKENBA NO 1 PTY LTD ACN 145 682 748** (second plaintiff) v **GERARD LAURENCE BYRNE** (first defendant) and **GLB GROUP PTY LTD ACN 131 554 884** (second defendant) and **PINKENBA WASTE TRANSFER PTY LTD ACN 107 633 465** (third defendant) and **GLB MAIN BEACH RD PTY LTD ACN 145 508 201** (fourth defendant) and **GLB QUARRYING & LOGISTICS PTY LTD ACN 131 402 910** (fifth defendant) and **ROBYN ANN WELLNER** (sixth defendant)
FILE NO:	BS2/16
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	30 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2016

JUDGE: Jackson J

ORDER: **The order of the court is that:**

1. **The plaintiffs have leave to delete paragraph 45(g)(i) of the further amended statement of claim;**
2. **Paragraph 114 of the further amended statement of claim is struck out.**
3. **Paragraph 115 of the further amended statement of claim is truck out.**
4. **The plaintiffs have leave to replead paragraphs 114 and 115 of the further amended statement of claim as they may be advised.**
5. **The application to strike out the further amended statement of claim as against the sixth defendant is otherwise dismissed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – FORM OF PLEADING – where the sixth defendant was a solicitor alleged to have been acting for the plaintiffs in various transactions – where the plaintiffs pleaded that the sixth defendant's acts or omissions in relation to both a failure to complete an assignment agreement and in negotiations to acquire particular land were in breach of contract, negligent and in breach of fiduciary obligations – whether causation of loss was adequately pleaded in respect of the breach of contract and negligence claims for failure to complete the assignment agreement by alleging that particular loss was suffered "by reason of" breaches alleged in particular paragraphs – whether causation of loss was adequately pleaded in respect of the claims for loss of the valuable commercial opportunity to acquire particular land where what the plaintiffs would hypothetically have done to obtain that benefit was not pleaded

Civil Liability Act 2003 (Qld), s 11, Pt 2
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 149, r 150, r 155, r 157

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48, cited
Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1987) 14 FCR 215, cited
Chadwick v Bridge (1951) 83 CLR 314; [1951] HCA 11, cited
Cummins Generator Technologies Germany GMBH v Johnson Controls Australia Pty Ltd (2015) 326 ALR 556; [2015] NSWCA 264, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, cited

Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1; [1986] HCA 3, cited
Kambouris v Tahmazis (No 2) [2015] VSC 174, considered
Leadenhall Australia Ltd v Peptech Ltd (2001) 39 ACSR 265; [2001] NSWCA 272, cited
Mantonella Pty Ltd v Thompson [2009] 2 Qd R 524; [2009] QCA 80, cited
Nicholls v Michael Wilson & Partners Ltd [2012] NSWCA 383, cited
Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd (1984) 157 CLR 149; [1984] HCA 59, cited
O'Halloran v RT Thomas & Family Pty Ltd (1998) 45 NSWLR 262, cited
Philipps v Philipps (1878) 4 QBD 127, cited
Protec Pacific Pty Ltd v Steuler Services GMBH & Co KG [2014] VSCA 338, cited
Ramsay v BigTinCan Pty Ltd (2014) 101 ACSR 415; [2014] NSWCA 324, cited
Re Morgan (1887) 35 Ch D 492, cited
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, considered
Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2004] QSC 457, cited
Westpac Banking Corporation v Jamieson [2016] 1 Qd R 495; [2015] QCA 50, cited
Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484; [2003] HCA 15, cited

COUNSEL: P O'Higgins for the sixth defendant
P Dunning QC and S Williams for the plaintiffs

SOLICITORS: Bartley Cohen for the sixth defendant
Wilson Lawyers for the plaintiffs

[1] **Jackson J**: The sixth defendant applies to strike out the statement of claim in this proceeding as against her.

[2] Any student of pleading will recognise that there is a tendency in modern pleadings to tell a long story, narrative style, with not enough regard for the fundamental rule that material facts, but not the evidence by which the facts are to be proved, should be pleaded, together with necessary particulars of those facts.[1]

[3] What is the problem, the doubter asks? The answer is that sometimes the pleader, to use a venerable idiomatic expression, "can't see the wood for the trees". This expression is of unknown origin, although it appears in many European languages. It appears in 16th century writings. Sir Thomas More wrote in 1533 in the books of his fictional dialogue with William Tyndale and others, in the course of their furious debate over protestant reform:

1 *Uniform Civil Procedure Rules* 1999 (Qld), rr 149(1)(b) and 157.

> "And as he myght tell vs, that of Poules chyrch we may well se the stones, but we can not se the chyrce. And then we may well tell hym agayne, that he can not se the wood for the trees."[2]

The statement of claim

[4] The further amended statement of claim ("FASOC") in the present case is long[3] and complex, and it contains many allegations that are not material facts or necessary particulars. The facts summarised below are extracted from it.

[5] The plaintiffs are two companies associated with Mr Huddy. In 2010 and thereafter, Mr Huddy decided to go into business, through his companies, with Mr Byrne, through Mr Byrne's companies. There were a number of projects or ventures.

[6] There are six defendants. They fall into two groups. The first to fifth defendants are Mr Byrne and companies associated with him. The sixth defendant is a solicitor. This application only concerns the claim made against the sixth defendant.

[7] One project or venture related to the acquisition of land identified in the FASOC as the Eagle Farm Road Property. It was owned, or largely owned, by Queensland Rail ("QR"). The plaintiffs' case is that Huddy and Byrne collaborated to acquire existing leasehold interests in the Eagle Farm Road Property with a view to ultimately acquiring the fee simple from QR.

[8] The pleading detours through other transactions that took place between entities associated with Huddy and Byrne, including transactions for the acquisition of other land.

[9] For present purposes, however, the FASOC alleges that on 24 September 2012 relevant parties executed a Heads of Agreement under which, inter alia, the third defendant was to assist the second plaintiff in the latter's negotiations to purchase the freehold of the Eagle Farm Road Property (presumably from QR). The second plaintiff was to pay $6 million for the acquisition of the third defendant's leasehold interests in the same.

[10] That acquisition involved or required QR's consent as landlord to the assignment of the relevant leases. On 4 March 2013, the relevant parties entered into a deed, identified in the FASOC as the QR Assignment Agreement.

[11] On 11 September 2014, the second defendant agreed to buy part of the Eagle Farm Road Property from QR for $5.6 million. On an unknown date, the third defendant agreed to buy another part of the Eagle Farm Road Property from the Department of Main Roads for $1.54 million. The third defendant subsequently agreed to transfer that part of the land to the second defendant.

[12] On 26 June 2015, the second defendant became the registered owner of part of the Eagle Farm Road Property.

---

2 More, *The Confutation of Tyndale's Answer*, 1533, Book VIII, p. ccccxxxvii. More's work, in nine volumes, ran to half a million words.

3 It runs to 134 pages.

[13] The sixth defendant is alleged to have acted for the plaintiffs in connection with both the Heads of Agreement and the QR Assignment Agreement, including doing so by dealings with QR.

[14] The plaintiffs' alleged causes of action against the sixth defendant also fall into two groups. The first group stem from the sixth defendant's acts or omissions in relation to the second plaintiff's failure to complete the QR Assignment Agreement. The plaintiffs allege that the sixth defendant was in breach of contract, negligent and breached her fiduciary obligations to the second plaintiff (and Mr Huddy although he is not a party to the proceeding) by those acts or omissions.

[15] The second group stems from the sixth defendant's acts or omissions in relation to the negotiations for the acquisition of the fee simple estate in the Eagle Farm Road Property. The plaintiffs allege that the sixth defendant was in breach of contract, negligent and breached her fiduciary obligations to the second plaintiff (and Mr Huddy) by those acts or omissions.

[16] The plaintiffs allege that the second plaintiff suffered loss caused by the first group of causes of action as follows:

> "114. By reason of each of the breaches of duty pleaded in paragraphs 110 and 111 in relation to the completion of the QR Assignment Agreement [the second plaintiff] has suffered loss and damage being:
>
> (a) that part purchase price between [the second plaintiff] and PWT for the purchase of the leasehold interests in the Eagle Farm Road Property under the Heads of Agreement that has been paid in the form of the monies that Huddy by [the first plaintiff] and [the second plaintiff] caused to be advanced to Byrne and his various corporate entities as pleaded in paragraphs 19, 19A, 20, 23, and 36 above in anticipation of completion of the Heads of Agreement, which monies have not been repaid notwithstanding the QR Assignment Agreement has become impossible of performance and the Heads of Agreement is at an end;
>
> (b) the transaction costs incurred in attempting to complete the QR Assignment Agreement, being:
>
> (i) $90,637.50 Stamp Duty, the balance of money totalling $5,163.30 paid by Huddy to [the sixth defendant] pleaded in paragraph 43 above was returned to Huddy on 8 October 2014;
>
> (ii) $10,915.36 fees and costs as at June 2016 and ongoing annual fees and costs of $2,728.84 incurred with National Australia Bank in connection with the bank guarantee in favour of QR."

[17] The plaintiffs allege that the second plaintiff suffered loss caused by the second group of causes of action as follows:

> "115. By reason of each of the breaches of duty pleaded in paragraphs 112 and 113 in relation to the negotiations for the acquisition of the freehold to the Eagle Farm Property [the second plaintiff] has suffered

> loss and damage, in the sum of at least $14,500,000, being that lost opportunity to acquire the freehold to the Eagle Farm Road Property, particulars of the amount of loss and damage from losing such opportunity, in advance of expert evidence, include:
>
> (a) the estimated value of the Eagle Farm Road property as $27,665,413.23 based on a rate per square metre of $326.17, being the rate per square achieved on the 2016 sale of the Radio Street Property;
>
> (b) the cost to Huddy to acquire the Eagle Farm Road property would have been $13,140,000 being calculated at the purchases of the leases for $6,000,000, and the amounts paid by Byrne of the freehold from QR of $5,600,000 and the balance from the Department of Main Roads of $1,540,000."

[18] The FASOC also contains claims made by the plaintiffs against Mr Byrne (the first defendant) and against companies associated with him (the second, third, fourth and fifth defendants). The plaintiffs do so on the basis that there are common questions of law or fact or the rights to relief sought in the proceeding are in relation to or arise out of the same or series of transactions or events.[4] There may also be questions whether proportionate liability under Pt 2 of the *Civil Liability Act* 2003 (Qld) ("CLA") applies among or between some of the defendants.

Causation

[19] The sixth defendant submits that the plaintiffs' pleading of causation of loss is inadequate.

First group of causes of action and paragraph 114

[20] As to the first group of causes of action and the loss alleged in par 114, the sixth defendant submits that the plaintiffs fail to allege that, but for the breaches of contract or negligence, the QR Assignment Agreement would have been completed and that par 45(g)(i) of the FASOC is inconsistent with that fact. As well, the sixth defendant submits that par 80 of the FASOC alleges that the Heads of Agreement were abandoned, and that fact is inconsistent with completion of the QR Assignment Agreement.

[21] Paragraph 45(g)(i) pleads that Mr Byrne and the related companies were not in a position to be able to complete the QR Assignment Agreement. The plaintiffs apply for leave to amend to delete that allegation and submit that any problem created by it is thereby removed. That leave is granted.

[22] In par 80, the plaintiffs allege that once Mr Huddy became aware of the second defendant's acquisition of the Eagle Farm Road Property he and Mr Byrne by their conduct treated the Heads of Agreement as having been abandoned. In effect, the sixth defendant submits that such an abandonment operated in law as if it were an agreement to rescind the Heads of Agreement,[5] so that no loss by reason of the non-completion of the QR Assignment Agreement could have been caused by the breaches of contract or negligence alleged against the sixth defendant.

---

4 *Uniform Civil Procedure Rules* 1999 (Qld), r 60.

5 See, for example, *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.

[23] I do not accept that submission. Paragraphs 77 and 78 of the FASOC contain an allegation that the Heads of Agreement were frustrated by the second defendant's acquisition of the Eagle Farm Road Property. Paragraph 79 alleges (curiously not in the alternative) that the Heads of Agreement were terminated for breach of contract by the second plaintiff (the first plaintiff was not a party) by delivery of the statement of claim. Whatever the plaintiffs intend by the allegation in par 80 (and its role as a material fact is not apparent to me and was not explained), it does not seem to me that the plaintiffs allege facts inconsistent with the loss alleged in par 114 having been caused by the breaches of contract or negligence alleged against the sixth defendant.

[24] Yet, in my view, there is still a potential difficulty with the allegation that the loss alleged in par 114(a) was caused by the breaches of contract or negligence alleged against the sixth defendant in par 110. The purchase price paid referred to in par 114(a) is the purchase price referred to in paras 35 and 36 of the FASOC. It was paid when the Heads of Agreement were entered into. How that sum is a loss suffered by the acts or omissions alleged against the sixth defendant for the first group of causes of action, relating to the later QR Assignment Agreement, is not apparent.

[25] The sixth defendant relies on *Kambouris v Tahmazis (No 2)*,[6] as authority for the proposition that the plaintiff must plead a relevant counterfactual scenario to establish the alleged causal link between the breaches of contract or negligence and the loss. I do not read *Kambouris* or the other cases referred to in it as authority as to the extent of the pleading required.

[26] However, there is no shortage of relevant case law. In *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*,[7] Chesterman J said:

> "In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of (here the relevant non-disclosure) and the alleged later event (here the making of the dragline agreement) stand to each other in the relation of cause and effect. Douglas J put it this way in *LBS Holdings Pty Ltd v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229 (at para [3]):
>
> > '… The principle relied on is that facts must be set out which lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect and that the plaintiff must plead the necessary facts showing that causal link …'
>
> His Honour referred to *Dow Hager Lawrance v Lord Norreys & Ors* (1890) 15 App Cas 210 at 221 and *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215 at 221–222. In the first of those cases Lord Watson had said;
>
> > 'There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments.

---

6 [2015] VSC 174.

7 [2004] QSC 457.

> Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and injuries complained of stood to each other in the relation of cause and effect.'"[8]

[27] Another well-known judgment in this area is *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*,[9] where French J said:

> "The material facts establishing the necessary causal link should be pleaded. In cases of contravention of s 52 said to be constituted by misrepresentation this will generally require more than appears in the opening words of par 50: 'by reason of such conduct …'.
>
> Some guidance to the proper approach may be derived from the ordinary rule of pleading applicable in cases of fraud of which Lord Watson said in *Dow Hager Lawrance v Lord Norreys* (1890) 15 App Cas 210 at 221:
>
> > '… The ordinary rule of pleading applicable to cases of fraud, … was thus expressed by Earle Selborne in *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697: "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice." It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect.'
>
> A perusal of the relevant precedents in [Bullen, Leake & Jacob's *Precedents of Pleadings* 12th ed, pp 702–7] supports the view that the approach enunciated by Lord Watson is equally applicable to actions for negligent misstatement."[10]

[28] The first additional point to be mentioned is the application of the CLA. When dealing with a breach of contract or negligence which is a breach of duty, having regard to the meaning of "duty"[11] and "duty of care"[12] as those expressions are defined in the CLA, s 11 of that Act provides:

> "**11 General principles**

---

8 [2004] QSC 457, [15].

9 (1987) 14 FCR 215.

10 (1987) 14 FCR 215, 222.

11 As defined in Sch 2, "***duty*** means—
(a) a duty of care in tort; or
(b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or
(c) another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b)."

12 As defined in Sch 2 "***duty of care*** means duty of care means a duty to take reasonable care or to exercise reasonable skill (or both duties)".

> (1) A decision that a breach of duty caused particular harm comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the harm (***factual causation***);
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (***scope of liability***).
>
> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which cannot be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
>
> (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—
>
> (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."

[29] The loss alleged in par 114 of the FASOC is loss suffered "[b]y reason of each of the breaches of duty pleaded in paragraphs 110 and 111". The breaches of duty alleged in par 110 are breaches of tortious or contractual duties to take reasonable care or exercise reasonable skill. The factual causation element required under s 11 of the CLA must inform the facts to be pleaded by way of causation for a loss of the kind alleged in par 114.[13]

[30] The second additional point is that in the present case the plaintiffs allege that the loss alleged in par 114 was also caused by the breaches of fiduciary obligations alleged in par 111. The second plaintiff claims equitable compensation against the sixth defendant for breach of fiduciary obligation. There is an unresolved question as to the extent that a plaintiff must prove (and therefore plead) causation for those causes of action.[14] The question was not argued in this case. The focus in this case should be on the common law causes of action.

---

13 I pass by, as a question not argued, whether s 11 of the CLA applies to any of the breaches of fiduciary obligation alleged in par 111 as another duty that is "concurrent".

14 *Ramsay v BigTinCan Pty Ltd* (2014) 101 ACSR 415, 417 [5], 423 [33], 428 [58], 437 [120]-[123]; *Nicolls v Michael Wilson & Partners* [2012] NSWCA 383, [171]-[174]; *Mantonella Pty Ltd v Thompson* [2009] 2 Qd R 524, 547-553 [90]-[111], 559-560 [145]-[147]; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500-501 [38]-[40]; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 274.

[31] In my view, applying the principles discussed above, the current plea of causation for the loss alleged in par 114 that "by reason of" the breaches of duty alleged in par 110 the second plaintiff suffered the loss alleged in par 114(a) is inadequate. Accordingly, par 114 should be struck out with leave to replead.

Second group of causes of action and paragraph 115

[32] As to the second group of causes of action, and the loss alleged in par 115, the sixth defendant submits that the loss alleged involves the assumed counterfactual scenario that but for the alleged breaches of contract or negligence the second plaintiff would have acquired the Eagle Farm Road Property. However, that counterfactual scenario is not expressly alleged.

[33] The sixth defendant submits that the assumption is that the second plaintiff "could [and] would have acquired the freehold" but it is not alleged how that could or would have occurred.

[34] There are many facts alleged in the FASOC from which it might be inferred that the second plaintiff's case is that it could and would have acquired the land but for the breaches of contract or negligence alleged against the sixth defendant. First, as both parties submit, the measure of loss alleged is the full amount of the difference between the value of the Eagle Farm Road Property and the alleged (hypothetical) "cost to Huddy" to acquire the land. Second, the retainers alleged against the sixth defendant include a retainer to act on behalf of the second plaintiff in negotiations with QR for agreement of the second plaintiff to purchase the freehold interests of QR and the Department of Transport and Main Roads, until the second half of 2014.[15] Third, the plaintiffs allege that the Heads of Agreement were brought to an end as previously set out. Fourth, the plaintiffs allege that the acquisition of the Eagle Farm Road Property by the second defendant was completed by registration on 26 June 2015. The plaintiffs submit that this shows that the land could have been bought at the relevant time by the second plaintiff.

[35] The plaintiffs submit that the allegation in par 115 is a clear allegation of a "lost opportunity to acquire the freehold" and that the loss claimed values that opportunity of 100 per cent of the difference between the value of the land and the price that the plaintiff would have paid for it.

[36] The difference between the sixth defendant's submission that the model of loss claimed is that the second plaintiff "could and would" have acquired the land and the plaintiffs' submission that the model of loss claimed is a "lost opportunity to acquire" the land is one of legal significance.

[37] Prior to *Sellars v Adelaide Petroleum NL*,[16] a plaintiff claiming the loss of a hoped for or expected benefit under a contract that they might have made with a third party, suffered as a result of the defendant's negligence or misleading conduct, was required to prove on the balance of probabilities that they "could and would" have obtained the hoped for or expected benefit in order to obtain an award of damages.

---

15 I note that the second defendant is alleged to have entered into a contract to acquire the land on 11 September 2014.

16 (1994) 179 CLR 332.

[38] Thus, in *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd*,[17] the plaintiff alleged that the defendant, in breach of contract or negligently, failed to advise it as to the extent of cover provided under an insurance policy. The loss claimed was the amount that would have been payable under an effective policy. Brennan J said:

> "The onus was on Norwest to prove that that damage was caused by the Co-operative's negligence. It had to prove that it would have had effective insurance at the time but for the loss of one of the opportunities mentioned. It is one thing to say that it lost the opportunity to apply elsewhere for a policy, it is another thing to say that Norwest would have applied and would have obtained effective insurance before *The Sonoma* was lost. Again, it is one thing to say it lost an opportunity to have the machinery and equipment survey completed, a Survey Certificate issued and the conditions of the fleet policy satisfied before *The Sonoma* was lost, and another thing to say that those steps could and would have been taken. Before Norwest's cause of action was established it had to prove that it could have and that it would have taken steps which would have resulted in effective insurance of *The Sonoma* at the time of her loss."[18]

[39] Similarly, in *Gates v City Mutual Life Assurance Society Ltd*,[19] the plaintiff alleged that the defendant had misled him into taking a policy or policies of insurance that did not effectively cover him against disability. The plurality said:

> "… it is necessary to determine what the plaintiff would have done had he not relied on the representation. If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods on which he would have made a profit then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation. This may well be so if the plaintiff can establish that he could and would have entered into the different contract and that it would have yielded the benefit claimed …
>
> So in the present case if the [plaintiff] were able to establish that, but for his reliance on Mr Rainbird's representation, he could and would have entered into policies of insurance containing a disability clause of the kind represented by Mr Rainbird, he might then succeed in obtaining an award of damages equal to the benefits which would have been payable under such policies less the premiums paid or payable in respect of them."[20]

[40] Under this model of loss, a plaintiff who established on the balance of probabilities that they could and would have obtained the benefit was entitled to a measure of damages and judgment for the full amount of the value of the lost benefit.

[41] Not to put too fine a point upon it, this model of loss was swept aside by *Sellars* for cases where a loss of a commercial opportunity is alleged. Instead of the award of damages turning on whether the plaintiff "could and would" have obtained the lost benefit, the court adopted an analysis that begins with whether, on the balance of probabilities, there was a loss of a valuable opportunity. This appears from the following passage:

---

17 (1984) 157 CLR 149.
18 (1984) 157 CLR 149, 172.
19 (1986) 160 CLR 1.
20 (1986) 160 CLR 1, 13.

> "Notwithstanding the observations of this court in *Norwest*, we consider that acceptance of the principle enunciated in *Malec* requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued. The principle recognised in *Malec* was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind.
>
> On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable."[21]

[42] On this statement of the relevant type of damage, proof of causation and measure of loss, the plaintiffs in the present case are not required to plead or prove that the second plaintiff could and would have acquired the Eagle Farm Road Property. In the first place, it is enough to allege, to an extent that complies with the pleading rules, that they have lost the opportunity to acquire that land and that the opportunity was valuable.

[43] However, proof that there was a commercial opportunity to acquire the land and that it was valuable is not proof that the plaintiff has lost that opportunity. As a matter of logic, the necessary causal conditions which demonstrate that a plaintiff *has lost* a valuable commercial opportunity will almost always include that the plaintiff would have done the voluntary acts or omissions required on its part to pursue or avail itself of that opportunity. The same part of the necessary causal conditions was reflected in the "would" part of the now discarded formulation that a plaintiff was required to prove that it "could and would" have obtained the alleged lost benefit.

[44] In a case to which s 11 of the CLA applies, that part of the necessary causal condition is the requirement of factual causation, to be determined on a "but for" basis.[22] Accordingly, in a case like the present, where the breaches of contract and negligence alleged are breaches of duty within the meaning of s 11, and the relevant causal conditions include "what the [plaintiff] who suffered harm would have done if the [defendant] had not been so in breach" the question is what the particular plaintiff would have done. This part of the assessment must be made on the balance of probabilities.

---

21 (1994) 179 CLR 332, 355.

22 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [45].

[45] Once it is established that there was a valuable commercial opportunity that the plaintiff has lost, and the assessment is of the value of that opportunity on the possibilities as required by the *Sellars* approach, there is nothing that precludes a plaintiff from pleading and proving that the past hypothetical transaction they would have pursued, but lost the opportunity to make, would have occurred certainly so that they have lost a 100 per cent "possibility".

[46] Although these changes in principle as to the relevant type of damage, proof of causation and measure of loss are no longer recent, there has been no review of the required elements of pleading them in any judgment of authority of which I am aware. The parties did not refer to any such authority.

[47] The relevant requirements of pleading in this court are informed by both general and specific rules of court. Those rules operate under the "philosophy" of r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") that they are to be applied with the objective of avoiding undue delay, expense and technicality and to facilitate the just and expeditious resolution of the real issues at a minimum of expense.

[48] Within that "philosophy", a pleading must be as brief as the nature of the case permits, state the material facts as well as any matter that if not stated specifically might take another party by surprise, and state specifically any relief the party claims.[23] Every type of damage claimed must be specifically pleaded,[24] and the nature and amount of the damages claimed must be stated.[25] A party claiming general damages must include particulars of the nature of the loss suffered, the basis on which the amount claimed has been worked out or estimated and the circumstances in which the loss or damage was suffered.[26] A party claiming damages must specifically plead any matter relating to the assessment of damages that may take an opposing party by surprise, if not pleaded.[27]

[49] Given that so many cases of a commercial character are likely to fall within the scope of the changes in principle brought about by *Sellars* as to the relevant type of damage, proof of causation and measure of loss discussed above, it may be of assistance to articulate some relevant propositions.

[50] First, it is necessary for a plaintiff who alleges loss of a valuable commercial opportunity to plead that the loss it has suffered is a loss of a valuable commercial opportunity, identifying the opportunity with some particularity. Second, it is also necessary that the plaintiff pleads what it would have done, where what the plaintiff would have done if the defendant had not been in breach of duty is a necessary causal condition to deciding factual causation. Third, it is necessary for a plaintiff who alleges such a loss to plead the percentage or proportion of the opportunity that was lost, in assessing value on the possibilities, in order to plead the amount of the damages claimed, as is specifically required. Fourth, where a plaintiff alleges a loss of a 100 per cent possibility or the certainty that they would have obtained the hoped for or expected benefit under a transaction which did not occur, it is to be

---

23 *Uniform Civil Procedure Rules* 1999 (Qld), r 149.
24 *Uniform Civil Procedure Rules* 1999 (Qld), r 150(1)(b).
25 *Uniform Civil Procedure Rules* 1999 (Qld), r 155(1).
26 *Uniform Civil Procedure Rules* 1999 (Qld), r 155(2).
27 *Uniform Civil Procedure Rules* 1999 (Qld), r 155(4).

expected that the plaintiff will allege with some particularity the facts by which that certain outcome would have been achieved.

[51] There are two additional points. In a number of recent cases, courts have considered the extent of the proof and pleading required by way of causation and loss where a plaintiff alleges that as a result of the defendant's breach of contract, negligence or misleading conduct the plaintiff would not have entered into the actual transaction that was entered into. Where the plaintiff alleges that they would have entered into no transaction on the one hand, or a different transaction on the other hand, the pleading should clearly allege the counterfactual scenario.[28] In a similar vein, in my view, where a plaintiff alleges loss of a valuable commercial opportunity, the plaintiff should in most cases also allege the extent of the loss it says it suffered on the possibilities. It is not sufficient for a plaintiff simply to allege a 100 per cent possibility of obtaining the hoped for or expected benefit, leaving it open to contend that the issue to be decided by the court is the actual degree of likelihood anywhere between 100 per cent and 1 per cent. To require a plaintiff to formulate its case with all reasonable precision does not detract from the power of the court to grant relief generally other than that specified in the pleadings,[29] subject to the application of rules of procedural fairness.

[52] Against these standards, par 115 mostly measures up. It clearly enough alleges that the type of damage claimed is a loss of a valuable commercial opportunity and identifies the opportunity with some particularity. It also alleges the amount of the damage suffered and claimed, from which it may be inferred that the loss alleged on the possibilities is 100 per cent, but that is left to inference.

[53] Further, it does not allege specifically what the plaintiff would have done to obtain the hoped for benefit. It only uses the words "by reason of the breaches of duty" in the opening words of the paragraph and the reference to what "the cost to Huddy to acquire the Eagle Farm Road property would have been" in par 115(b). The reader is otherwise left to infer what the hypothetical past facts as to the relevant transactions that the second plaintiff would have entered into might have been. In my view, the plaintiffs should have pleaded more as to what those hypothetical past facts would have been.

[54] Accordingly, par 115 should be struck out with leave to replead.

Scope of duty

[55] Paragraph 107 of the FASOC alleges in part:

> "107. [The sixth defendant] was retained to act, in the premises of the matters pleaded in paragraphs:
>
> …

---

28 *Cummins Generator Technologies Germany GMBH v Johnson Controls Australia Pty Ltd* (2015) 326 ALR 556, 581-582 [131]-[135]; *Kambouris v Tahmazis (No 2)* [2015] VSC 174, [49]-[66]; *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495, 520 [44]; *Protec Pacific Pty Ltd v Steuler Services GMBH & Co KG* [2014] VSCA 338, [731]; *Leadenhall Australia Ltd v Peptech Ltd* (2001) 39 ACSR 265.

29 *Uniform Civil Procedure Rules* 1999 (Qld), r 156.

(c) 32-35 and 38-39, for, and on behalf of, Huddy and [the second plaintiff] in negotiations with QR for agreement for [the second plaintiff] to purchase the freehold interests in the Eagle Farm Road Property form QR and DTMR, from at least March 2012 until the second half of 2014 when Huddy learnt that [the sixth defendant] had acted for [the second defendant] and Byrne in the acquisition of the freehold of the Eagle Farm Property by [the second defendant];

(d) 41-43 and 45, for, and on behalf of, Huddy and [the second plaintiff] in the completion of the QR Assignment Agreement, and in particular the perfection of the assignment of the leases to [the second plaintiff], from March 2013 until the second half of 2014, when Huddy learned that the freehold of the Main Beach Road property had been transferred from QR and DTMR to [the second defendant], thus making completion of the QR Assignment Agreement impossible; …"

[56] Paragraph 108 alleges:

"108. In acting for, and on behalf of, Huddy, [the first plaintiff] and [the second plaintiff] in the respects identified, [the sixth defendant] owed Huddy, [the first plaintiff] and [the second plaintiff] a duty of care, in tort and contract, to;

(a) perform the services for which she was retained with reasonable care and skill;

(b) perform the services for which she was retained to the standards of a reasonably competent solicitor engaged in commercial and property transactions;

(c) keep them informed of any developments in relation to the transactions or proposed transactions on which [the sixth defendant] was retained which might adversely affect their interests in those transactions or proposed transactions;

(d) warn them of any risks in the transaction or proposed transactions on which [the sixth defendant] was retained which might adversely affect their interests in those transactions or proposed transactions;

(e) act at all times in their best interests in pursuing their interest in those transactions and proposed transactions."

[57] Paragraph 110 alleges:

"110. [The sixth defendant] breached her tortious and contractual duties to Huddy and [the second plaintiff] in relation to acting in the completion of the QR Assignment Agreement by:

(a) as pleaded in paragraph 44 above, not requesting Huddy and/or [the second plaintiff] to provide proof of insurance and to pay QR's costs, which were the only outstanding conditions of the QR Assignment Agreement, as pleaded in paragraph 42 and 45(a) above, and which they would promptly have done as pleaded in 45(b);

> (b) not taking steps to ensure all conditions of the QR Assignment Agreement were met and then taking steps to promptly have it complete;
>
> (c) the matters pleaded in paragraph 45 above and by not taking the steps alleged in (a) and (b) above;
>
> (d) not informing Huddy and [the second plaintiff] that QR was seeking completion and the only matters outstanding were those in (a) above;
>
> (e) not informing Huddy and [the second plaintiff] of the matters in paragraph 72 above so that steps could be taken to prevent the matters in paragraphs 73-74 from occurring and thereby rendering the QR Assignment Agreement incapable of completion."

[58] The sixth defendant submits that this pleading is inadequate because it does not properly identify what should or should not have been done by the sixth defendant. In support of that contention the sixth defendant relies on the circumstance that the plaintiffs do not allege that they did not know that there were conditions that QR required to be met and submits that more is required to understand the plaintiffs' case as to breach of duty.

[59] I do not accept those points. It is not always necessary for a plaintiff to allege that a defendant was negligent because of a particular omission and also to positively allege what should have been done instead. It depends on what the alleged negligent omission is. Here, for example, the plaintiff alleges that the sixth defendant was negligent in failing to request Mr Huddy or the second plaintiff to provide proof of insurance and to pay QR's costs. That part of the case would be no clearer if the plaintiff specifically alleged positive steps that the sixth defendant ought to have taken to make those requests.

[60] As to the absence of a positive allegation that the plaintiffs or Mr Huddy did not know that those things were required, in my view, the sixth defendant is confusing facts that might go either to whether any loss was suffered as a result of the alleged breach or to a plea of contributory negligence with a material fact necessary to allege a breach of duty.

[61] It is unnecessary to consider the other allegations of negligence on this point, as the sixth defendant did not make any specific complaint about their content.

Alternative claims

[62] As set out previously, par 114 of the FASOC alleges that sums paid under the Heads of Agreement have not been repaid, notwithstanding that the QR Assignment Agreement has become impossible of performance and the Heads of Agreement are at an end. That is part of the loss claimed against the sixth defendant.

[63] The sixth defendant submits that the plaintiffs claim the same amount or amounts from the other defendants under the allegations in paras 81 and 82 of the FASOC as money that became repayable on demand when the Heads of Agreement came to an end. It is convenient to assume the correctness of that submission for the purposes of this analysis.

[64] Second, as set out previously, par 115 of the FASOC alleges the loss of a valuable opportunity to acquire the Eagle Farm Road Property. The sixth defendant submits that the plaintiffs allege[30] and claim[31] against the second defendant that the plaintiffs have an equitable lien over the land or that the second defendant holds the land on constructive trust for the plaintiffs.

[65] The sixth defendant submits that the claims against her can only be alternative claims to those made against the other defendants. The rules of court permit inconsistent alternative claims, "but only if they are pleaded as alternatives", because of UCPR r 154. The sixth defendant submits that the claims pleaded against her must be struck out because they are not expressed as alternative claims.

[66] It is convenient to say something about the operation of r 154. It provides as follows:

> "**154 Inconsistent allegations or claims in pleadings**
>
> (1) A party may make inconsistent allegations or claims in a pleading only if they are pleaded as alternatives.
>
> (2) However, a party must not make an allegation or new claim that is inconsistent with an allegation or claim made in another pleading of the party without amending the pleading."

[67] The rule in that form was an innovation introduced by the UCPR. However, prior rules of court had been construed so as to permit inconsistent alternative claims to be made[32] and inconsistent alternative allegations to be pleaded by a plaintiff.[33] The same permission was allowed to inconsistent defences.[34] These rules did not permit a departure from the case made in an earlier pleading by a subsequent pleading, but that point may be put to one side. Rule 154 should not be seen, therefore, as reflecting a fundamental change. There are now express provisions in similar terms in the rules of court of other Australian jurisdictions.[35]

[68] There is complexity in the possible basis of the claim for damages for the loss alleged in par 114 as against the sixth defendant. I have already decided that paragraph should be struck out because it does not adequately plead that the sixth defendant's breaches of contract or negligence in par 110 caused the loss alleged in par 114.

[69] That point, for present purposes, makes it somewhat difficult to assess whether the claim for damages for the loss alleged in par 114 is alternative to the claim for repayment of the same amounts against the other defendants.

[70] The plaintiffs do not allege what would have happened had the sixth defendant not made the breaches of contract or negligent omissions alleged in paras 110 and 111. But if it is assumed that the QR Assignment Agreement would have been completed

---

30 See par 103(b) of the FASOC.
31 See par B(i) of the second plaintiff's claim.
32 *Chadwick v Bridge* (1951) 83 CLR 314, 320.
33 *Philipps v Philipps* (1878) 4 QBD 127, 134.
34 *Re Morgan* (1887) 35 Ch D 492, 499-500.
35 *Uniform Civil Procedure Rules* 2005 (NSW), r 14.18; *Supreme Court (General Civil Procedure) Rules* 2015 (Vic), r 13.09.

and the second plaintiff would have become the lessee of the relevant parts of the Eagle Farm Road Property, it is not alleged what might have followed from that.

[71] The apparent alleged crystallising event for the liability of the other defendants to pay the money alleged to be payable in paras 81 and 82 seems to have been that the Heads of Agreement "came to an end without completing". That seems to have occurred because some of the other defendants agreed to acquire the Eagle Farm Road Property from QR and the Department of Transport and Main Roads, thereby defeating the plaintiffs' intention to purchase that land.

[72] Whether or not either or both of the plaintiffs have an arguable causal basis for the sixth defendant to be responsible for the amounts of the loss alleged in par 114 as damages is one thing. However, whether such a claim is an alternative claim to an apparently restitutionary claim made by the plaintiffs against the other defendants is a separate question.

[73] At present, I am unable to find that they are clearly alternative claims.

[74] I note that the sixth defendant does not submit that the second plaintiff's claim for the loss alleged in par 114 must be an alternative claim to the claim for the loss alleged in par 115. However, had the second plaintiff acquired the Eagle Farm Road Property as assumed by the calculation in par 115, allowance is made in that calculation for the payment for "the purchases of the leases for $6,000,000". That amount appears to or may encompass the amounts alleged in par 114.

[75] If that be right, a fact assumed for the claim for damages in accordance with par 115 seems to be inconsistent with a fact assumed for the claim for damages in par 114, namely that but for the breaches of contract or negligence of the sixth defendant the plaintiffs would not have suffered the loss of paying away the amounts paid that are alleged to be the loss under par 114. However, the sixth defendant did not argue that point.

[76] It submits that the claim for a lien or constructive trust (and damages) against the other defendants in respect of the failure of the Heads of Agreement and the second defendant's acquisition of the Eagle farm Road Property and the claim against the sixth defendant for damages must be alternative claims.

[77] The starting point for the analysis of this question is that the plaintiffs' claims for an equitable lien or a constructive trust are made only against the second defendant. The factual basis for those claims against the second defendant is not entirely clear and was not addressed in argument. I note that par 69(b) alleges breach of fiduciary obligation by the first defendant, par 71 alleges a breach of fiduciary obligation by the second defendant and par 75 alleges that the funds used by the second defendant to complete the contracts to buy the Eagle Farm Road Property were sourced from the plaintiffs' funds.

[78] However, these claims are not necessarily inconsistent with the claim for damages made by the second plaintiff for the loss alleged in par 115 against the sixth defendant. If it ultimately appears that the second plaintiff has a proprietary interest in the land by reason of the claims made against the second defendant, that may go in diminution of any loss suffered by the second plaintiff as against the sixth defendant.

[79] But the claims are not thereby necessarily inconsistent and alternative, particularly before any judgment is obtained. The lien or constructive trust claimed may not come into effect until a judgment to that effect is pronounced by the court. Even if that result were obtained, it might not reduce the second plaintiff's claim to nil. The land may be encumbered so that the interest claimed does not reduce the plaintiffs' loss by the amount of the second plaintiff's claim for loss against the sixth defendant.

[80] There is no general rule of law that the liability of a solicitor to a client for breaches of contract or negligence is of a secondary kind to the client's claim for damages for breach of contract or in tort or for misleading conduct against a former contracting party, merely because the client's loss will be satisfied if the other contracting party discharges the amount of its liability. In many cases, the liabilities will be those of concurrent wrongdoers. Indeed it was because of that common state of affairs that proportionate liability for apportionable claims was introduced by the statutory reforms made in Pt 2 of the CLA and other equivalent statutes.

[81] Accordingly, in my view, the sixth defendant has not made good the submission that the plaintiffs may not plead their claims against the sixth defendant without pleading them as alternative to the claims against the other defendants.

[82] I will hear the parties on the question of costs.