SUPREME COURT OF QUEENSLAND

CITATION:	*Biltun Pty Ltd v Karageozis* [2026] QCA 107
PARTIES:	**BILTUN PTY LTD** ACN 009 821 818 (appellant) **v** **BILL KARAGEOZIS AND JONATHAN PAUL McLEOD** (first respondent) **BESSE CONSTRUCTION PTY LTD (IN LIQUIDATION)** ACN 628 631 667 (second respondent)
FILE NO/S:	Appeal No 5494 of 2025 SC No 7134 of 2023
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 5 November 2025 (Treston J)
DELIVERED ON:	12 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2026
JUDGES:	Mullins P, Doyle JA, Freeburn J
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – AMENDMENT – ORIGINATING PROCESS, PLEADINGS ETC – where the first and second respondents commenced proceedings against the appellant to recover voidable transactions under s 588FF of the *Corporations Act 2001* (Cth) – where the court granted leave for the respondents to file a third statement of claim – where the respondents filed a fourth statement of claim nearly two months later without obtaining leave under r 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld) – where the fourth statement of claim included substantive alterations to the allegations of voidable uncommercial and unreasonable director-related transactions under s 588FB and s 588FDA of the *Corporations Act 2001* (Cth) – where the appellant applied for orders striking out parts of the fourth statement of claim and for orders that the pleading be disallowed on the basis that the respondents added new causes of action outside a limitation period without first

obtaining leave pursuant to r 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld) – where the primary judge dismissed the appellant's application on the basis that the fourth statement of claim did not add new causes of action but better particularised the respondents' existing claims – where the appellant appeals the dismissal of its application – whether the fourth statement of claim introduced new causes of action and required leave of the court under r 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – where the third statement of claim pleads voidable uncommercial and unreasonable director-related transactions under s 588FB and s 588FDA of the *Corporations Act 2001* (Cth) – where the respondents plead material facts in support of the conclusion that certain individuals were shadow directors of the appellant and second respondent – where the appellant seeks for those parts of the third statement of claim to be struck out – whether the third statement of claim sufficiently pleads material facts to support the allegation of shadow directorship as required by r 149(1)(b), r 149(1)(c) and r 149(2) of the *Uniform Civil Procedure Rules 1999* (Qld)

Corporations Act 2001 (Cth), s 9AC, s 588FA, s 588FB, s 588FDA, s 588FE
Uniform Civil Procedure Rules 1999 (Qld), r 149(1), r 376

Borsato v Campbell [2006] QSC 191, applied
Commonwealth of Australia v Winston (2024) 116 NSWLR 111; [2024] NSWCA 277, considered
Firstmac Ltd v Hunt & Hunt (a firm) [2018] QSC 258, applied
Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd (2024) 20 QR 1; [2024] QCA 74, cited
Murdoch v Lake [2014] QCA 216, considered
Thomas v State of Queensland [2001] QCA 336, applied
Wolfe v State of Queensland [2009] 1 Qd R 97; [2008] QCA 113, considered

COUNSEL:	D D Keane KC, with A J Schriiffer, for the appellant P E O'Brien for the respondents
SOLICITORS:	McCarthy Durie Lawyers for the appellant McInnes Wilson for the respondents

[1] **MULLINS P:** I agree with Freeburn J.

[2] **DOYLE JA:** I have read and agree with the reasons for judgment of Freeburn J and with the order his Honour proposes.

[3] **FREEBURN J:** The first respondents, Mr Karageozis and Mr McLeod, are the liquidators of the second respondent, Besse Construction Pty Ltd. On 14 June 2023,

the liquidators commenced proceedings against the appellant company, Biltun Pty Ltd, claiming that certain payments made by Besse Construction to Biltun were voidable transactions.[1] The liquidators sought orders that Biltun repay the sum of $3,109,601 to Besse Construction.

[4] Within five days of the liquidators commencing the proceedings, the statement of claim was amended. A defence to that second version of the statement of claim was filed and served the following month – July 2023.

[5] Two years later, on 8 August 2025, Ryan J heard an urgent application by the liquidators to further amend the statement of claim. Her Honour granted leave to further amend. Thus, a third version of the statement of claim was filed and served on 8 August 2025. Nearly two months later, on 29 September 2025, the liquidators filed and served a fourth version of the statement of claim.

[6] In October 2025, Biltun applied for orders that the fourth version of the statement of claim be disallowed and for orders striking out certain parts of the statement of claim. The disallowance was sought on the basis that the liquidators had added causes of action outside a limitation period without first seeking leave pursuant to rule 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld) ('**UCPR**').[2]

[7] The application was heard by Treston J on 5 November 2025. Her Honour delivered judgment with *ex tempore* reasons that day. Biltun's disallowance application was dismissed. Her Honour concluded that the fourth version of the statement of claim did not have the character of a pleading that added a new cause of action but rather better particularised a claim that was already on foot.[3]

[8] Biltun, now the appellant in this court, appeals the orders made by her Honour dismissing the application. There are three related grounds of appeal, namely that the primary judge should have determined:

(a) The fourth version of the statement of claim introduced a new cause of action requiring leave under rule 376(4) of the UCPR.

(b) Accordingly that pleading should be disallowed pursuant to rule 379 of the UCPR because the liquidators failed to obtain leave pursuant to rule 376(4) of the UCPR before filing the pleading.

(c) The liquidators have failed to plead the material facts to support the conclusion that Mr Ian Boettcher was a shadow director of Besse Construction, and that Mr Brenton Knight was a shadow director of both Besse Construction and Biltun, and for those reasons a number of paragraphs of the pleading should be struck out.

[9] The question that is central to the first and second grounds is whether the fourth version of the statement of claim introduced a new cause of action and therefore required the court's leave under rule 376(4) of the UCPR. The resolution of that central question involves a comparison of the third and fourth versions of the statement of claim.[4] The third ground involves some overlapping issues.

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1 It is convenient to refer to the proceedings as having been commenced by the liquidators even though Besse Construction is also a plaintiff.

2 The plaintiffs cross-applied for orders joining two further defendants to the proceeding, namely, Mr Ian Boettcher and Mr Brenton Knight – an application that ultimately was not pressed.

3 Reasons at 1-6 line 10 to 12.

4 What is required is a broad comparison between the original claim and what is sought to be amended: *Thomas v State of Queensland* [2001] QCA 336 at [19].

[10] As explained, to resolve the first and second grounds it is necessary to compare the third and fourth versions of the statement of claim. Before performing that exercise, it is necessary to consider the principles relevant to the application of rule 376(4) of the UCPR.

The Principles

[11] Rule 376 of the UCPR provides as follows:

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

[12] The liquidators have not made an application for leave under rule 376(4). The liquidators' stance is that the amendments they made in version four of the statement of claim did not introduce a new cause of action and so they are not required to seek leave under rule 376(4). In that sense the appeal in this court is a narrow one – does the fourth version of the statement of claim introduce a new cause of action? Or does the new pleading merely introduce, as the liquidators contend, some further particulars of an existing cause of action?[5]

[13] For that reason, some caution is needed in drawing principles from those cases where the court considered both the issue of whether a proposed new statement of claim pleaded a new cause of action and, if so, whether that added cause of action arose out of the same or substantially the same facts as had been previously pleaded.[6]

[14] In *Borsato v Campbell*,[7] McMurdo J considered three Queensland Court of Appeal decisions, namely *Allonnor Pty Ltd v Doran*,[8] *Thomas v State of Queensland*,[9] and *Central Sawmilling No. 1 Pty Ltd v State of Queensland*.[10] From those cases his Honour drew these conclusions:

(a) Whilst the term "*cause of action*" has been defined as being "*every fact which is material to be proved to entitle the plaintiff to succeed*",[11] that is not

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5 Thus, it is unnecessary to consider the two requirements for leave to be given under rule 376(4)(a) and (b).

6 Examples of cases where both aspects were considered is *Murdoch v Lake* [2014] QCA 216 and *Commonwealth of Australia v Winston* (2024) 116 NSWLR 111 (both are discussed below).

7 [2006] QSC 191 at [8] and following.

8 [1998] QCA 372.

9 [2001] QCA 336.

10 [2003] QCA 311.

11 *Cooke v Gill* (1873) LR 8 CP 107 at 116. In *Murdoch v Lake* [2014] QCA 216 at [17] Peter Lyons J adopted a similar formulation, namely "*the combination of facts which gives rise to a right to sue*".

a definition which has been applied literally. That is because a literal application would mean that any new fact to be added to a plaintiff's case would be treated as raising a new cause of action which required leave in the context of a rule such as rule 376(4).

(b) And so, the Court of Appeal has endorsed a "fairly broad brush comparison between the nature of the original claim and that to which it is sought to be amended".[12]

(c) The dividing line is between the addition of facts which involve a new cause of action and those which are simply further particulars of the cause already claimed, and its location, involves a question of degree which can be argued, one way or the other, by the level of abstraction at which a plaintiff's case is described.[13]

[15] McMurdo J's reasoning in *Borsato v Campbell* was accepted by Keane JA in *Wolfe v State of Queensland*.[14] In *Wolfe v State of Queensland* Keane JA reasoned as follows:

> "[11] On no fair reading of the allegations pleaded prior to the amendment could it be said that they were apt to alert the defendant that the case made against it comprehended a complaint of breach of duty in relation to the State's obligation to exercise reasonable care to maintain the highway other than as to the inadequacy of the State's efforts to maintain the surface of the highway. It is not accurate to say that the allegation added by the amendment was merely a further particular of the cause of action already pleaded in relation to the negligent maintenance of the surface of the highway. The allegations made in para 5(a) and (b) related to work which should have been done to the surface of the roadway to correct welts which had already formed: the amendment related to work which should have been done in relation to the sub-surface of the road in order to prevent the welts forming at all.
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> [12] One may test the point by considering what would have happened if, at trial, Mr Wolfe's counsel sought to lead evidence of the failure to maintain the sub-surface drainage of the highway, without having made the amendment in question. That evidence would clearly be objectionable on the ground of surprise. It would also be objectionable on the ground that the evidence was simply irrelevant to the case of breach of duty raised by the pleading against the State. It was not part of Mr Wolfe's pleaded case to put in issue the condition of the sub-surface of the highway and the acts of maintenance which should have been taken by the State in respect of that sub-surface area in order to prevent welts from forming on the surface…

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12 *Borsato v Campbell* [2006] QSC 191 at [8] citing *Thomas v State of Queensland* [2001] QCA 336 at [19].

13 Ibid.

14 [2009] 1 Qd R 97; [2008] QCA 113 at [17] (Muir JA and Douglas J agreed). The reasoning was also accepted in *Murdoch v Lake* [2014] QCA 216 at [91].

> [18] In the light of these authorities, I consider that the cause of action raised by the amendment involving, as one of its elements, an alleged breach of duty on the part of the State in relation to the maintenance of the condition of the sub-surface of the highway, is a new cause of action. A breach of duty involving acts or omissions relating to the condition of the sub-surface of the highway, and the arrangements necessary for its efficient drainage, was not previously part of Mr Wolfe's case. The factual basis for the alleged breach of duty is substantially different from that previously pleaded; it does not arise out of substantially the same facts as the previously pleaded cause of action."[15]

[16] The appellant's counsel relied on a passage from *Murdoch v Lake* where Peter Lyons J said:

> "A cause of action is the combination of facts which gives rise to a right to sue. In *Bruce v Odhams Press Ltd* Scott LJ identified material facts as those necessary for the purpose of formulating a complete cause of action, the omission of one having the consequence that a statement of claim is bad. However, his Lordship also noted that it is often difficult to distinguish between a material fact, and a particular piece of information which it is reasonable to give to the defendant, in order for the defendant to know the case to be met. His Lordship also noted the common practice of including in a pleading, facts which are not material facts. It follows from these observations that, **if an amendment introduces a new material fact, then a new cause of action is introduced,** even if the cause of action is of the same type or category as one pleaded before the amendment. However, if the material facts remain the same, then no new cause of action is introduced. That is consistent with the general approach taken by courts to the application of limitations statutes. A new cause of action does not arise simply because some relevant fact occurred after the cause of action accrued. A common example, in a case of negligence, is further loss occurring after some loss was first suffered."[16]
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> [counsel's emphasis]

[17] In my view, whilst in many cases the introduction of a new material fact will mean that there is a new cause of action, it is important not to regard the words emphasised above as a prescriptive formula. As will be explained, the question is whether in substance the new pleading propounds a new cause of action. That inquiry is not a confined focus on whether the amendment introduces a new material fact.

[18] The broader focus of the inquiry is illustrated by *Firstmac Ltd v Hunt & Hunt (a firm)*.[17] In that case Bond J explained the broader focus of the inquiry:

> "[18] First, a cause of action is the combination of the facts which are material to be established for the plaintiff to succeed.

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15 [2009] 1 Qd R 97; [2008] QCA 113 at [11], [18].
16 [2014] QCA 216 at [17].
17 [2018] QSC 258.

> [19] Second, not every amendment which seeks to add to or alter that combination of facts should be regarded as an amendment which raises a new cause of action.
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> [20] Third, if an amendment merely adds detail or particularity which it is reasonable to give to the defendant, then the amendment does not introduce a new cause of action. **Similarly, if it was reasonably apparent from a party's pleading that the party sought to raise a particular cause of action, an amendment which sought to remedy the fact that not all of the material facts which should have been pleaded for the plaintiff to succeed had already been pleaded, would not be regarded as a pleading which raised a "new" cause of action in this context**. So, for example, an additional head of damage or a change to some aspect of damages might not be a new cause of action, but an alteration which completely changed the damages case such that it involved a different assessment of damages might be.
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> [21] Fourth, locating the dividing line between (1) an amendment which introduces a new cause of action; and (2) an amendment which does not, may involve questions of degree and fine judgment which may not be straightforward and can turn on the level of abstraction at which a plaintiff's case is described.
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> [22] Fifth, in locating the dividing line, the pleading should not be analysed too critically, nor read pedantically, but broadly, resolving ambiguities or doubtful expressions in favour of the pleader, and allowing inferences to be drawn from incomplete facts. Nevertheless, the required analysis should be informed by an appreciation that the policies underlying the limitations statute may be inappropriately undermined by conducting the analysis at too high a level of generality."[18]
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> [emphasis added]

[19] Counsel for the appellants relied on *Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd* where the Court of Appeal referred to both *Borsato v Campbell* and *Murdoch v Lake* and stated:

> "There is a need to distinguish between the addition of facts which involve a new cause of action and further particulars of an already pleaded cause of action. The distinction between material facts and particulars, although easily stated, is not always easily applied. In a different context, it has been observed that where, in a complex case, a pleader adopts a narrative style of pleading, as distinct from a material fact model of pleading, '*the would-be analyst of the pleading is left swimming in a sea of evidentiary facts while trying to identify the material facts for each cause of action*'."[19]

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18 [2018] QSC 258 at [18]-[22].

19 (2024) 20 QR 1; [2024] QCA 74 at [159], citing *Mio Art Pty Ltd v Macequest Pty Ltd* (2013) 95 ACSR 583; [2013] QSC 211 at [60].

[20] Finally, there is the New South Wales Court of Appeal's decision in *Commonwealth of Australia v Winston* where Leeming JA analysed the cases and said:

> "[130] It is plain that in determining whether there is the same '*cause of action*' and whether the new cause of action arises on '*the same (or substantially the same) facts*', there is a question of qualitative evaluation, which will involve questions of degree.
>
> [131] From time to time this has been expressed by asking whether '*in real substance*' there is a '*new departure*' or a '*new basis of claim*' or a '*new set of ideas*' — for the most part this occurring in connection with applications of the rule in *Weldon v Neal* on unreformed versions of the power to amend. Sometimes it is expressed as the distinction between a new cause of action and a mere further particularisation. In *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jaques (No 2)* [2018] 3 Qd R 28; [2017] QSC 251 at [26], mention was made of differently formulated discrimen, namely, whether the additional facts '*arise out of substantially the same story*'…"[20]

[21] Leeming JA went on to say that it was preferable to resist the temptation to formulate and apply differently worded language. His Honour took the view that metaphors may illuminate, but often they are unhelpful[21] and that the matter is to be approached as a matter of substance, rather than form.[22]

The Submissions

[22] Biltun's counsel articulated the central question as whether the liquidators had pleaded a new material fact.[23] I do not accept that submission. The cases surveyed above do not support the idea that the inquiry has such a narrow focus. The question is not whether there is a new pleaded material fact but rather whether, in substance, the new pleading propounds a new cause of action.

[23] Of course, a poor pleading can obscure that inquiry. As counsel for the appellant points out, a party cannot escape the effect of rule 376(4) by deploying pleadings with a broad or vacuous character.[24]

Version Three of the Pleading

[24] It is therefore necessary to compare the two relevant versions of the statement of claim, the third and fourth versions, to see if the later version, in substance, introduced a new cause of action.

[25] As explained, the third version of the pleading was filed on 8 August 2025 pursuant to the orders of Ryan J made that same day. That pleading prosecutes four alternative claims:

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20 (2024) 116 NSWLR 111; [2024] NSWCA 277 at [130], [131] (Gleeson and Adamson JJA agreed).

21 In this respect his Honour cited *Sydney Trains v Argo Syndicate AMA 1200* (2024) 422 ALR 189; [2024] NSWCA 101 at [117]-[120]; and W Gummow and A Mohseni, "*The use and misuse of metaphors*" (2024) 98 *Australian Law Journal* 738.

22 (2024) 116 NSWLR 111; [2024] NSWCA 277 at [137].

23 Transcript 1-14 line 7.

24 *McQueen v Mount Isa Mines Ltd* [2018] 3 Qd R 1; [2017] QCA 259 at [58] citing *Draney v Barry* [2002] 1 Qd R 145; [1999] QCA 491 at [32].

Unfair Preferences

(a) Certain payments[25] made by Besse Construction to Biltun between August and December 2021 totalling $3.1 million were voidable because they were:

(i) '*unfair preferences*' within the meaning of s 588FA of the *Corporations Act 2001* (Cth) ('**the Act**'); and

(ii) '*insolvent transactions*' because Besse Construction was insolvent at the time of the payments; and

(iii) the payments occurred within the relevant relation back period.

Uncommercial Transactions

(b) Those payments to Biltun were:

(i) '*uncommercial transactions*' for the purposes of s 588FB of the Act because Besse Construction received little or no benefit by reason of making the payments to Biltun and suffered a detriment in making the payments;[26] and

(ii) made in circumstances where each of the payments were made to Biltun – a related entity of Besse Construction and/or a company controlled by the grandfather of the director of Besse Construction; and/or

(iii) '*insolvent transactions*' because Besse Construction was insolvent at the time of the payments; and

(iv) the payments occurred within the relevant relation back period – four years from the relation-back day (9 August 2022).

Unreasonable director-related transactions

(c) Those payments by Besse Construction to Biltun were:

(i) '*unreasonable director-related transactions*' given by Besse Construction to Biltun within the meaning of s 588FDA of the Act in that, at the time each of the payments, Mr Ian Boettcher was a director and/or a close associate of Besse Construction;[27] and

(ii) Biltun benefited from the payments in that it received the total amount of the payments; and

(iii) Besse Construction suffered a detriment as a consequence of the each of the payments; and

(iv) the payments occurred within the relevant relation back period – four years from the relation-back day (9 August 2022).

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25 The *Corporations Act 2001* (Cth) speaks of a 'transaction' of the company, but the payments by the company are within the definition of 'transaction' in s 9 of the Act. For convenience I have used the expression payments.

26 The pleading of the elements in (b)(i) and (b)(ii) seems to confuse or at least fuse the requirements of s 588FB and s 588FDA of the Act.

27 There may be an overlap in the claims of an uncommercial transaction involving a related entity and an unreasonable director-related transaction.

Unfair Preferences - Loans

(d) In or around December 2021, April 2022 and May 2022 Biltun and Besse Construction and Mr Benjamin Boettcher entered into loan and variation deeds which were '*unfair preferences*' within the meaning of s 588FA of the Act.

[26] Those four claims were alleged to be voidable transactions under section 588FE of the Act and therefore provided the basis for the liquidators' claim to return of the payments and orders discharging the loan documents.

The 'connection' dispute

[27] It can be seen that, in the third version of the statement of claim, the liquidators prosecuted causes of action based on section 588FB (uncommercial and related transactions) and section 588FDA of the Act (unreasonable director-related payments). The material facts pleaded as a part of those two causes of action were that, at the time of each of the payments, two of Biltun's directors, Mr Ian Boettcher and Mr Brenton Knight, were also directors (or shadow directors) of Besse Construction. Under a heading '*Shadow Directors*' the respondents asserted that, at all material times:

(a) Mr Ian Boettcher was a director of Besse Construction, and acted as a director of that company, even though he had not been formally appointed as a director of Besse Construction;

(b) Mr Brenton Knight was similarly a 'shadow' director of Besse Construction; and

(c) Mr Benjamin Boettcher, who had been formally appointed as a director of Besse Construction, was accustomed to act in accordance with the instructions or wishes of Mr Ian Boettcher (his grandfather) and Mr Brenton Knight.

[28] And so, in version three of the statement of claim the allegation was that there was a sufficient connection between Biltun and Besse Construction so that the payments were 'related' transactions or 'director-related' transactions.

Related Entity?

[29] Section 588FE(4) of the Act specifies that transactions are voidable if:

(a) it is an insolvent transaction of the company; and

(b) a *related entity* of the company is a party to it; and

(c) it was entered into, or an act was done for the purpose of giving effect to it, during the 4 years ending on the relation-back day.

[30] Section 9 of the Act defines a '*related entity*' in relation to a body corporate as meaning any of the following:

"(a) a promoter of the body;

(b) a relative of such a promoter;

(c) a relative of a spouse of such a promoter;

(d) a director or member of the body or of a related body corporate;[28]

(e) a relative of such a director or member;

(f) a relative of a spouse of such a director or member;

(g) a body corporate that is related to the first-mentioned body;

(h) a beneficiary under a trust of which the first-mentioned body is or has at any time been a trustee;

(i) a relative of such a beneficiary;

(j) a relative of a spouse of such a beneficiary;

(k) **a body corporate one of whose directors is also a director of the first-mentioned body**;

(l) a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first-mentioned body because of any other application or applications of this definition."

[emphasis added]

[31] Thus, the connection alleged by the liquidators is that Biltun and Besse Construction had common directors – that is, Mr Ian Boettcher and Mr Brenton Knight. Their directorship of Besse Construction is alleged to be as 'shadow' directors because the definition of a 'director' includes not only those persons who are formally appointed as directors but also:

(a) those persons who act in the position of a director; or

(b) where the directors of the company or body are accustomed to act in accordance with a person's instructions or wishes – that person.[29]

[32] For the purposes of the Act the concept of a director includes a de facto or shadow director.

Director-Related?

[33] For the claim that the payments were unreasonable director-related payments, the connection required by the Act is that the payments were made by the company to:

(a) a director of the company; or

(b) a 'close associate' of a director of the company;

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28 The expression 'related body corporate' is defined as a body corporate that is related to the first-mentioned body, as determined in accordance with s 50: *Corporations Act 2001* (Cth) s 9. Section 50 defines a related body corporate as (a) a holding company of another body corporate; or (b) a subsidiary of another body corporate; or (c) a subsidiary of a holding company of another body corporate; the first-mentioned body and the other body are related to each other.

29 See s 9AC in the present version of the *Corporations Act 2001* (Cth). In the period 2016 to 2022 the definition was part of the dictionary in s 9. On 20 October 2023, on the commencement of the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* (Cth), that definition was repealed and replaced by s 9AC. There are no differences in the two definitions that are material to the present appeal.

(c) a person on behalf of, or for the benefit of, a person mentioned in sub-paragraph (a) or (b) above.[30]

[34] A 'close associate' of a director is a relative of the director or a relative of the spouse of the director.[31]

[35] Oddly, the third version of the statement of claim asserts that the connection here was that, at the time of each of the payments, Mr Ian Boettcher was a director and/or a close associate of Besse Construction. That would appear to be beside the point given that the focus of a claim of an unreasonable director-related transaction is that the payment is made by the company *to* a director or a close associate (i.e. a relative) of a director. The issue in this case is whether the payments made by Besse Construction to Biltun qualify as payments to Besse Construction's director or directors. The payments to Biltun were certainly not payments directly to a director or to a close associate of a director. The question is whether the payments to Biltun qualify as indirect payments to a director or, to use the language of s 588FDA, to Biltun on behalf of or for the benefit of a director of Besse Construction.

[36] Under the narrow approach adopted in *Ziade Investments Pty Ltd (in liq) v Welcome Homes Real Estate Pty Ltd*, section 588FDA(1)(b) does not apply to a mortgage given by the company to another company in which the director's parents were the sole shareholders.[32] However, more recent cases have adopted a wider interpretation of section 588FDA(1)(b).[33] For example, in *Re IW4U Pty Ltd (in liq)* Gleeson J held that a payment is made "*for the benefit of*" a director within the meaning of section 588FDA(1)(b) if the payment legally or financially advantages the director, regardless of whether it is paid or directed to a close associate of the director.[34]

Version Four of the Pleading

[37] Version four of the pleading makes some alterations to the allegations in the pleading.

[38] The *first* substantive alteration is the addition of new paragraphs 7A, 7B, 7C and 7D under the heading "*Relationship between the Second Plaintiff and Defendant*". In summary, those paragraphs make these allegations:

(a) Mr Ian Boettcher was the 'patriarch' of the Boettcher family and provided direction and made decisions with respect to six specified entities which formed part of the family group;

(b) Besse Construction and Biltun were both members of that family group of entities;

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30 Section 588FDA(1)(b) of the *Corporations Act 2001* (Cth). This subsection was expanded slightly by amendments to the Act which took effect in September 2023. The relevant date here is when the payments were made – in August to September 2021.

31 Section 9 of the *Corporations Act 2001* (Cth).

32 (2006) 57 ACSR 693; [2006] NSWSC 457 at [86]. The narrow approach was also adopted in *Re Lawrence Waterhouse Pty Ltd (in liq); Shaw v Minsden Pty Ltd* (2011) 29 ACLC 11-064; [2011] NSWSC 964 at [281] and in *Re Great Wall Resources Pty Ltd (in liq)* (2013) 31 ACLC 13-007; [2013] NSWSC 354. The cases on the narrow approach, as well as the broader view discussed below are usefully collected by the authors of *Robson's Annotated Corporations Legislation*, Thomson Reuters/Westlaw at [588FDA.50].

33 See, for example, *Re Gondon Five Pty Ltd (in liq)* [2020] NSWSC 1769 at [18]-[19]. See also the cases discussed by *Robson* (supra) at [588FDA.50].

34 (2021) 150 ACSR 146; [2021] NSWSC 40 at [83]-[86].

(c) there were regular Monday 'group' meetings involving Mr Ian Boettcher, Mr Benjamin Boettcher and Mr Knight where matters concerning group entities were discussed;

(d) there were group directions made at group meetings on 18 July (two), 25 July, 1 August, and 8 August 2022 as well as action lists arising from the meetings; and

(e) in about 2016, Mr Knight became the financial controller or chief financial officer of the group.

[39] Those factual allegations are evidently designed to show that Mr Ian Boettcher and Mr Brenton Knight were exercising some dominion over Besse Construction and were therefore shadow or de facto directors of Besse Construction. A de facto director is a person not validly appointed as director who acts in the position of director.[35] A shadow director is a person in accordance with whose instructions or wishes the directors are accustomed to act.[36]

[40] The claim that Mr Ian Boettcher and Mr Brenton Knight were directors, or more precisely, shadow or de facto directors, was an allegation of a material fact that was present in the third version of the statement of claim. The allegations in paragraphs 7A, 7B, 7C and 7D of the fourth version of the pleading were merely further factual allegations to support a material fact that had already been pleaded.

[41] The *second* substantive alteration to the pleading effected by the fourth version is the addition of Schedule A. The previous version of the pleading contained an allegation that, although Mr Ian Boettcher had not been validly appointed as a director of Besse Construction, he acted as a director of that company. The fourth version added a claim that Mr Ian Boettcher's conduct in acting as a director is to be inferred from the facts and circumstances set out in Schedule A. Schedule A is as follows:

> "1. From a date unknown to the [liquidators] Mr [Ian] Boettcher would hold weekly meetings with Ben Boettcher where the business of [Besse Construction] was discussed;
>
> 2. Mr [Ian] Boettcher made decisions regarding the cash flow and payment of creditors of [Besse Construction] and Ben Boettcher would act in accordance with those decisions;
>
> 3. Mr [Ian] Boettcher made decisions about the payment terms offered by [Besse Construction] to its clients and Ben Boettcher would act in accordance with those decisions;
>
> 4. Mr [Ian] Boettcher engaged JHK Lawyers to act on behalf of [Besse Construction] as legal advisers for [Besse Construction];
>
> 5. Mr [Ian] Boettcher would provide instructions to JHK Lawyers on behalf of [Besse Construction];
>
> 6. Lawyers from JHK Lawyers would seek instructions and act on those instructions from Mr [Ian] Boettcher from time to time;

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35 *Austin & Black's Annotations to the Corporations Act*, LexisNexis, at [2D.201A].

36 Ibid, citing *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236; (1978) 22 ALR 161; (1978) 53 ALJR 144; (1978) 3 ACLR 760. As to the matters to be taken into account when considering whether someone is a de facto or shadow director, see *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [64]-[69].

7. Mr [Ian] Boettcher was aware of the projects/jobs being undertaken by [Besse Construction] including what work had been undertaken, what progress claims had been issued and paid by the clients and there was a dispute about those works;

8. In accordance with an expectation that he do so, Ben Boettcher would provide updates to Mr [Ian] Boettcher about the progress of projects/jobs that [Besse Construction] was undertaking;

9. Mr [Ian] Boettcher and Mr Knight would discuss the day to day operations of [Besse Construction] and make decisions for and on behalf of [Besse Construction];

10. Mr [Ian] Boettcher and/or companies controlled by him provided funding to [Besse Construction]."

[42] The pleading places equivalent reliance on Schedule A as supporting the allegations that the appointed director, Mr Benjamin Boettcher, was accustomed to act in accordance with Mr Ian Boettcher's wishes and that Mr Ian Boettcher made or participated in decisions that affected the whole or a substantial part of Besse Construction's business.

[43] Thus, as with paragraphs 7A, 7B, 7C and 7D, Schedule A also serves the purpose of demonstrating that Mr Ian Boettcher and Mr Brenton Knight were exercising some dominion over Besse Construction and were therefore shadow or de facto directors of Besse Construction. They are further particulars of a material fact that had been already pleaded. Indeed, there is a good argument that Schedule A is a pleading of evidence and need not be a part of the pleading.

[44] The *third* substantive alteration to the pleading in the fourth version is an allegation that, although Mr Brenton Knight had not been validly appointed as a director of Besse Construction, he acted as that company's director. The fourth version of the pleading added a claim that:

(a) Mr Brenton Knight acted in the position of a director of both Biltun and Besse Construction which was to be inferred from the facts and circumstances set out in Schedule B;

(b) Mr Benjamin Boettcher, the formally appointed director of Besse Construction, was accustomed to act in accordance with Mr Brenton Knight's instructions or wishes;

(c) Mr Brenton Knight made or participated in decisions that affected the whole or a substantial part of Besse Construction's business which, again, was to be inferred from the facts and circumstances set out in Schedule B; and

(d) Mr Brenton Knight participated in making decisions that affected the whole, or a substantial part of, Biltun's business as he was involved in the day to day running of Biltun and the other companies in the Boettcher Group.

[45] Schedule B is similar to Schedule A. It pleads facts that are intended to support the claim that Mr Brenton Knight acted as a shadow or de facto director of Besse Construction. Again, these are in the nature of further particulars of a material fact that had been already pleaded.

Conclusions on the Central Issue

[46] And so, adopting a fairly broad brush comparison between the nature of the third version of the statement of claim, and the nature of the fourth version of that pleading, this is not a case where the liquidators seek to add facts which involve a new cause of action. The relevant causes of action were a claim of a voidable uncommercial transaction under section 588FE(4) of the Act, and a claim of a voidable unreasonable director-related transaction under section 588FDA of the Act. Those two causes of action were pleaded in the third version of the statement of claim, and they continue to be pleaded in the fourth version.

[47] What was added by the fourth version are simply further details or particulars of the causes of action already pleaded. In particular, what the pleader has attempted to do is to bolster the material facts relevant to both of those causes of action, namely, that Mr Ian Boettcher and Mr Brenton Knight acted as directors of Besse Construction – even though they had not been formally appointed as directors of that company.

[48] It follows that the fourth version of the statement of claim did not introduce a new cause of action requiring leave under rule 376(4) of the UCPR.

[49] In my view the primary judge's decision on that central issue was correct. The fourth version of the pleading better particularised a claim that was already on foot. The first and second grounds of appeal must fail.

The Third Ground of Appeal

[50] Biltun's submissions explain its third (and overlapping) ground of appeal in this way:

> "In essence, if the Court finds that [the liquidators] have failed to plead the material facts to support the conclusion that Mr Ian Boettcher was a shadow director of [Besse Construction] and Mr Knight was a shadow director of [Biltun] and [Besse Construction], then paragraphs 6 (the words "and defendant"), 6A, 8A, 8B and 8C should be struck out for failing to comply with rule 149(1)(b) and (2) of the UCPR."

[51] Here, Biltun's contention is that the pleading of shadow directorship in the third version of the statement of claim is inadequate because the plea does not comply with rule 149(1)(b) and (2).[37] The pleading of shadow directorship is in these terms:

> "8A From at least August 2020, Mr [Ian] Boettcher is and was a director of [Besse Construction] for the purposes of sections 9 and 9AC of the Act in that, although he was not validly appointed as a director of [Besse Construction]:
>
> (a) he acted in the position of a director of [Besse Construction];
>
> (b) Mr Benjamin Boettcher, being the formally appointed director of [Besse Construction] was accustomed to act in accordance with his instructions or wishes; and/or

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[37] Those rules require that a pleading contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved and that a party may plead a conclusion of law or raise a point of law if the party also pleads the material facts in support of the conclusion or point.

(c) he made, or participated in making, decisions that affected the whole, or a substantial part of [Besse Construction's] business.

8B From at least August 2020, Mr Knight is and was a director of [Besse Construction] for the purposes of sections 9 and 9AC of the Act in that, although he was not validly appointed as a director of [Besse Construction]:

(a) he acted in the position of a director of [Besse Construction];

(b) Mr Benjamin Boettcher, being the formally appointed director of [Besse Construction] was accustomed to act in accordance with his instructions or wishes; and/or

(c) he made, or participated in making, decisions that affected the whole, or a substantial part of [Besse Construction's] business.

8C From at least August 2020, Mr Knight is and was a director of [Biltun] for the purposes of sections 9 and 9AC of the Act in that, although he was not validly appointed as a director of [Biltun]:

(a) he acted in the position of a director of [Biltun];

(b) Mr Boettcher, being the formally appointed director of [Biltun] was accustomed to act in accordance with his instructions or wishes; and/or

(c) he made, or participated in making, decisions that affected the whole, substantial part of [Biltun's] business."

[52] That is a sufficient plea of the material facts. When a state of facts is relied on, it is enough to state it simply without setting out the subordinate facts which are the evidence sustaining the allegation.[38] The facts which tend to prove the fact in issue will be relevant for the trial, but they are not material facts for pleading purposes.[39] Ultimately, in the fourth version of the statement of claim, the liquidators' pleading descended into detail of meetings and other evidence that supports the allegation that the two men were shadow directors.

[53] However, so far as the third version of the statement of claim is concerned, the allegation cannot be regarded as a bare allegation of shadow directorship.[40] Here, in summary, the liquidators plead that each of Mr Ian Boettcher and Mr Brenton Knight were shadow directors of Besse Construction because they acted as directors of that

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38 *Williams v Wilcox* (1838) 8 Ad & E 314; *Stewart v Gladstone* (1879) 10 Ch D 626 at 664; see the discussion of these principles in Jacob & Goldrein, *Pleadings: Principles and Practice*, Sweet & Maxwell, 1990, at 49.

39 Jacob & Goldrein (*supra*) at 49.

40 A 'bare' allegation of shadow directorship was considered in *Modakboard Australia Pty Ltd v Brady* [2018] NSWSC 399 at [66], [67]. In that case Ward CJ in Eq was principally concerned with a plea of shadow directors that referred to affidavit evidence which the opposite party would have to trawl through to try and ascertain the case made against it.

company, and Mr Benjamin Boettcher was accustomed to act in accordance with their wishes, and because they made or participated in Besse Construction's important decisions.

[54] In any event, even if the court were to accept that the plea of shadow directors in the third version of the statement of claim was inadequate, the liquidators have moved to bolster that plea and to provide further detail in the fourth version of the pleading. To adopt the language of Bond J in *Firstmac Ltd v Hunt & Hunt (a firm)*,[41] it was reasonably apparent from the liquidator's third version of the pleading that the liquidators sought to raise causes of action for voidable uncommercial transactions and voidable unreasonable director-related transactions. The amendment in the fourth version sought to remedy the lack of particularity. Those circumstances cannot be regarded as a pleading which raised a "*new*" cause of action in this context.

[55] The third ground of appeal fails.

Conclusion

[56] The appeal should be dismissed with costs.

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41 [2018] QSC 258 at [20].