

SUPREME COURT OF QUEENSLAND

CITATION: *LK Smith Holdings Pty Ltd v FJA Holdings Pty Ltd* [2026]
QCA 209

PARTIES: **LK SMITH HOLDINGS PTY LTD AS TRUSTEE FOR
THE LKS FAMILY TRUST**
ACN 609 629 496
(first appellant)
LINDON KEITH SMITH
(second appellant)
**LK SMITH ENTERPRISES PTY LTD AS TRUSTEE
FOR THE SMITH FAMILY TRUST**
ACN 609 975 082
(third appellant)
v
FJA HOLDINGS PTY LTD
ACN 609 676 995
(first respondent)
TTQ HOLDINGS PTY LTD
ACN 610 009 811
(second respondent)

FILE NO/S: Appeal No 4180 of 2025
SC No 12 of 2021

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING
COURT: Supreme Court at Toowoomba – [2025] QSC 182 (Muir J)

DELIVERED ON: 20 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 12 March 2026

JUDGES: Bond JA, Boddice JA, Crowley J

ORDERS: **1. The appeal is allowed.**
**2. Order 1 of the orders made by the primary judge on
21 August 2025 is varied to the extent that it is made
pursuant to rule 375(1) of the *Uniform Civil Procedure
Rules 1999* (Qld) but is otherwise affirmed.**
**3. Order 2 of the orders made by the primary judge on
21 August 2025 is set aside.**
4. The Notice of Contention is dismissed.
**5. The respondents are to pay the appellants costs of the
appeal.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – AMENDMENT – OUTSIDE OR INVOLVING LIMITATION PERIOD – where the appellants commenced proceedings by a claim filed on 16 December 2021 – where various other steps were taken by the appellants between 16 December 2021 and 26 February 2025 – where the appellants filed an amended statement of claim on 26 February 2025 – where the amended statement of claim substantially changed the premise of the appellants’ claim and introduced a new cause of action – where the respondents applied for an order under UCPR r 379 to disallow the relevant amendments – where the appellants in turn applied for leave to amend the pleadings under UCPR r 387 – where the primary judge determined that the amended statement of claim did include a new cause of action that was ‘potentially out of time’ – where the primary judge granted leave to the appellants to amend the proceedings under UCPR r 376 but ordered that the amendments would have effect from 27 February 2025 pursuant to UCPR r 387 – where the appellants appeal that decision – where the respondents contend that as the primary judge was unable to determine whether the limitation period for the new cause of action had expired, leave to amend the statement of claim should have been considered under UCPR r 375 – whether the primary judge erred in granting leave to amend the statement of claim under UCPR r 376 – whether the primary judge erred in ordering that the amendments could have effect at a later date

Civil Proceedings Act 2011 (Qld), s 14, s 16
Uniform Civil Procedure Rules 1999 (Qld), r 375, r 376, r 379, r 387

Anderson v Anderson [2026] QCA 50, considered
Draney v Barry [2002] 1 Qd R 145; [1999] QCA 491, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Menegazzo v Pricewaterhousecoopers (A Firm) [2016] QSC 94, considered
Mineral Resources Engineering Services Pty Ltd as Trustee for the Meakin Investment Trust v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia [2015] QSC 62, followed
Mokrzecki v Popham [2013] QSC 123, considered
Pacific National Pty Ltd v Aurizon Network Pty Ltd [2016] QSC 218, cited
Sneade v Wotherton Barytes and Lead Mining Co Ltd [1904] 1 KB 295; [1904] UKLawRpKQB 16, considered
Stimpson v O’Toole (2022) 12 QR 27; [2022] QCA 194, cited
Westpac Banking Corporation v Hughes [2012] 1 Qd R 581; [2011] QCA 42, applied

Wigan v Edwards (1973) 47 ALJR 586; (1973) 1 ALR 497, considered

COUNSEL: G J Handran KC, with G W Dietz, for the appellants
J D McKenna KC, with P E O'Brien, for the respondents

SOLICITORS: Hallewell Law for the appellants
Murdoch Law for the respondents

- [1] **BOND JA:** I agree with the reasons for judgment of Crowley J and with the orders proposed by his Honour.
- [2] **BODDICE JA:** I agree with Crowley J.
- [3] **CROWLEY J:** The amendment of a pleading is a common occurrence in the course of litigation. In some instances, a pleading may be amended without the court's leave. In others, the court's leave is required. Where that is so, the court is inevitably required to exercise a discretion informed by the facts and circumstances of the case, and any applicable statutory provisions and principles of law.
- [4] One such instance where leave may be required is where the amendment in question will introduce a new cause of action in respect of which a relevant limitation period has expired since the proceeding was commenced. In those circumstances, the court may give leave in accordance with r 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**). The present appeal concerns a case of that kind.
- [5] By a claim filed on 16 December 2021, the appellants commenced a proceeding against the respondents. The principal relief sought by the appellants is the payment of certain sums of money for debts they claim are owed to them by the respondents. The case for the appellants was originally articulated in the Statement of Claim (**SOC**) filed with the claim. In short, the alleged debts were said to have been incurred through certain loan arrangements between the parties to facilitate the sale of an agricultural equipment manufacturing business owned and operated by the third appellant. The debt actions were premised on the alleged failure by the respondents to repay amounts of money loaned by the first appellant to the first respondent to enable the second respondent to purchase the business. The loans were said to have been made by way of journal entries recorded in the parties' respective accounts.
- [6] On 14 February 2022, the respondents filed a defence, and on 22 November 2022, they filed an amended defence and counterclaim. The matter went to mediation on 27 February 2023 but did not resolve. A period of inaction followed thereafter, until 26 February 2025, when the appellants filed an Amended Statement of Claim (**ASOC**). Amongst other things, the delay in pursuing the claim led to the respondents applying under UCPR r 371(2) for an order that the filing of the ASOC was an ineffectual step in the proceeding; and for an order that the proceeding should be dismissed for want of prosecution. The primary judge concluded that mediation was a step in the proceeding and determined that application in the appellants' favour. That ruling is not the subject of appeal, and it is not necessary to consider it further.
- [7] However, that was not the end of the issues raised by the ASOC. The amended pleading substantially changed the premise of the appellants' case in respect of the principal relief sought. The case was no longer pleaded as one where money had

simply been loaned by the appellants to the respondents. Instead, it was now styled as one where certain capital contributions were made under a shareholder agreement and, according to what was termed as “Assumed Facts” and a “Convention”, the parties agreed to treat those capital contributions as loans to be used for the purchase of the business.

- [8] The parties were at odds as to whether the appellants required leave to file the ASOC. The appellants’ contended leave was not required as the amendments did not introduce a new cause of action. The respondents maintained a contrary position.
- [9] Consequently, the respondents further applied for an order under UCPR r 379 to disallow the relevant amendments. The appellants in turn applied to the court for leave to amend the pleading under UCPR r 376. The appellants contended that if leave was granted the amendments would take effect from the date the proceeding was started, in accordance with UCPR r 387(1). The respondents argued, that if leave was granted an order should be made that the relevant amendments would take effect from 26 February 2025, being the date of the filing of the ASOC.
- [10] During the hearing of the applications there was argument about whether a relevant limitation period had in fact expired. Some uncertainty arose in that respect because of the different premise for the appellants case as set out in the ASOC. The amended case introduced a claim of estoppel by convention, by which it was said the respondents are estopped from denying the arrangements whereby the alleged capital contributions made by the first appellant were deemed to be loans. It was on that basis that a particular submission was made on behalf of the appellants before the primary judge, to the effect that there was no limitation period at all for that aspect of its cause of action in debt because of the equitable principles involved in the claim.
- [11] The primary judge determined that the ASOC did include a new cause of action, in respect of which there was a relevant limitation period which was “potentially out of time”. The primary judge further determined that the new cause of action arose out of the same facts or substantially the same facts as a cause of action for which relief had already been claimed in the proceeding. The primary judge ultimately concluded that it was appropriate to grant the appellants leave to amend the pleadings, but ordered, pursuant to r 387(3), that the amendments would have effect from 27 February 2025.
- [12] The appellants appeal against that order. They contend the primary judge erred in ordering that the effect of the amendments in the ASOC would take effect from a later date, rather than as from the date of the filing of the SOC, in circumstances where the primary judge had found that the requirements of r 376 were satisfied and had granted leave to make the amendments under r 376(4).
- [13] The appellants say the primary judge’s conclusion with respect to the new cause of action being “potentially out of time” can only be understood in context as a positive acceptance that the relevant limitation period had ended. Accordingly, they submit, the case is one where the primary judge clearly and correctly applied r 376. They further say that once the primary judge determined that the requirements of r 376(4)(a) and (b) were satisfied they were entitled to the benefit of r 387(1), and there was no residual discretion retained by the primary judge to order, as her Honour did, that the amendments would have effect from some later date.

- [14] The respondents argue that the primary judge did not err as the appellants contend. They say the case was not one within the scope of r 376 at all, because the primary judge was unable to determine whether the relevant limitation period had expired. They further say that in those circumstances, the question of leave should have been considered under r 375, not r 376, but that in any event the primary judge had ample power under either rule, or under other legislative provisions, to impose a condition on the grant of leave by fixing the later date as the date by which the amendments would have effect. They claim the primary judge correctly exercised her discretion in that regard, albeit under the wrong statutory rule. By Notice of Contention, they argue that the primary judge's decision should be affirmed on the ground that the primary judge correctly exercised her discretion under r 379(2). They otherwise submit that the appeal should be dismissed.
- [15] Thus, the two key issues that arise for consideration in this appeal are:
- (a) How are the primary judge's reasons and conclusions with respect to the limitation period and the granting of leave to be understood?
 - (b) Was it permissible for the primary judge to impose a condition on the grant of leave, by deferring the date by which the amendments were to have effect?

Relevant legislation

- [16] Section 16 of the *Civil Proceedings Act 2011* (Qld), (**CPA**), states:
- “16 Amendment for new cause of action or party**
- (1) This section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document in a proceeding.
 - (2) The court may order an amendment to be made, or grant leave to a party to make an amendment, even though—
 - (a) the amendment will include or substitute a cause of action or add a new party; or
 - (b) the cause of action included or substituted arose after the proceeding was started; or
 - (c) a relevant period of limitation, current when the proceeding was started, has ended.
 - (3) Despite subsection (2), the rules of court may limit the circumstances in which amendments may be made.
 - (4) This section—
 - (a) applies despite the *Limitation of Actions Act 1974*; and
 - (b) does not limit section 103H.”
- [17] Under s 14 of the CPA, “A court may impose on an order conditions it considers appropriate”. Similarly, under UCPR r 367(1), “The court may make any order or direction about the conduct of a proceeding it considers appropriate”, even though the order or direction may be inconsistent with another provision of the UCPR.

- [18] The general UCPR power to amend a document, including a pleading, is set out in r 375, which provides:

“375 Power to amend

- (1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in the way and on the conditions the court considers appropriate.
- (2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.
- (3) If there is misnomer of a party, the court must allow or direct the amendments necessary to correct the misnomer.
- (4) This rule is subject to rule 376.”

- [19] The specific power to amend a pleading after a relevant limitation period, current at the date the proceeding was started, has ended, is then found in r 376, which relevantly states:

“376 Amendment after limitation period

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

- [20] Rules 376(2), (3) and (4) deal with three different sets of circumstances in which the court may give leave for a party to make an amendment. However, it is important to note that in each case, r 376(1) stipulates an essential common pre-requisite for the exercise of the court’s discretion, namely that “a relevant period of limitation, current at the date the proceeding was started, has ended”.

- [21] Rule 379 provides for disallowance of an amendment made without the court’s leave:

“379 Disallowance of amendment

- (1) If a party makes an amendment without leave before the filing of the request for trial date, another party may, within 8 days after service on the party of the amendment, apply to the court to disallow all or part of the amendment.

- (2) On the application, the court may make an order it considers appropriate.”

[22] I pause to note here that the respondents’ application for disallowance under r 379 was effectively subsumed by the appellants’ r 376(4) application for leave to amend. That is because, in a case like this, an application under r 379 should be dealt with by reference to the rules and principles which govern the court’s discretion to give leave to amend.¹

[23] Rule 387 provides for when an amendment is to take effect:

“387 When amendment takes effect

- (1) If a document is being amended under this part, the amendment takes effect on and from the date of the document being amended.
- (2) However, an amendment including or substituting a cause of action arising after the proceeding started takes effect on and from the date of the order giving leave.
- (3) Despite subrule (2), if an amendment mentioned in subrule (2) is made, then, for a limitation period, the proceeding as amended is taken to have started when the original proceeding started, unless the court orders otherwise.”

[24] The general rule in r 387(1) reflects the common law “relation back” rule, under which an amendment to a pleading takes effect from the date of the original document it amends, rather than from the date when the amendment is made.² Subject to r 387(2) and (3), r 387(1) applies in all cases where an amendment is made under any of the provisions of UCPR Part 3, Chapter 10, which includes r 375 and r 376(4). The specific rules in r 387(2) and (3) apply only where the amendment includes or substitutes a cause of action that has arisen after the proceeding was commenced. That is not the case here and the parties are agreed that the primary judge’s Order 2 is wrong, at least insofar as it states that it was made pursuant to r 387(3).

The primary judge’s reasons and conclusions

[25] When considering the nature of the amendments made by the ASOC, the primary judge stated:³

“[67] I accept that ordinarily, estoppel by convention is a shield, not a sword, and it is not a cause of action in itself. The difficulty is that the plaintiffs accept this on the one hand, but then submit on the limitation issue that equitable remedies do not give rise to an applicable period of limitation.

[68] It is unnecessary for the purposes of this application to resolve this tension in the plaintiffs’ submission. I am satisfied that a new cause of action has been included by the plaintiffs, and

¹ *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581, 584.

² *Wigan v Edwards* (1973) 1 ALR 497, 515; *Sneade v Wotherton Barytes and Lead Mining Co Ltd* [1904] UKLawRpKQB 16; [1904] 1 KB 295.

³ *LK Smith Holdings Pty Ltd v FJA Holdings Pty Ltd* [2025] QSC 182 (**Reasons**), [67]-[72].

that there is an applicable limitation period, for the following reasons.

- [69] First, the newly articulated claim does more than just add a few details. It entirely recasts the plaintiffs' case. The agreement for the shareholder loans alleged to fund the business purchase has been changed from an agreement made orally and by email in November and December 2015 to a written shareholder agreement which required working capital contributions. Further, the allegation as to the First Plaintiff's Loan has changed from one arising from journal entries with consent and agreement, to one arising from the newly pleaded agreement and an assumption of facts and the convention. The amended statement of claim entirely changes the premise upon which the monies are said to be due and owing as a debt.
- [70] Second, the amended pleading relies on a series of new material facts which date back to 2016 and 2017. Two new sets of conversations have been pleaded which are not substantially the same as those previously pleaded. A new set of conduct, as well as a certain state of mind and knowledge, is now attributed to the parties.
- [71] Third, on 8 November 2023, the plaintiffs flagged their intention to amend their statement of claim to plead additional causes of action.
- [72] Finally, the newly alleged agreement dates back to March to June 2016, with the alleged indebtedness arising no later than 30 June 2016. That debt is said to be due on demand, and the limitation period for a claim for such a debt is six years. The cause of action relying upon the newly alleged agreement is potentially out of time as it was only raised for the first time as part of the amended statement of claim, filed 26 February 2025." (emphasis added)

[26] Aside from the differing views expressed about the meaning of the phrase "potentially out of time", there is no challenge to this aspect of the primary judge's reasons and findings.

[27] Next, in accordance with r 376(4)(b) and *Draney v Barry*,⁴ the primary judge considered whether the new cause of action arose out of the same facts or substantially the same facts as the originally pleaded case, concluding:⁵

"[74] I accept that there has been a significant recasting of the new material facts in the amended statement of claim. But the expression 'substantially the same facts' in r 376(4) does not make the need to prove some additional facts 'fatal to a favourable exercise of discretion under r 376(4)'. For the reasons that follow, I am satisfied that the new cause of action can be said to 'arise out of substantially the same story as that

⁴ [2002] 1 Qd R 145.

⁵ Reasons, [74]-[77].

which would have to be told to support the original cause of action’.

- [75] First, in essence, the loan sued upon is the same loan, arising out of the terms of the Business Sale Contract and the Shareholders Agreement.
- [76] Second, the plaintiffs continue to plead a liability arising under the same loan, at the same time and in the same amount, and that there was a failure, refusal or neglect to pay that loan by the first defendant to the first plaintiff which gives rise to the present indebtedness.
- [77] Third, leaving aside the quantum of amounts already claimed, no new relief is sought in the prayer for relief.”
- [28] Again, there is no challenge to the primary judge’s reasoning and conclusion on this point.
- [29] The primary judge then went on to consider whether, according to r 376(4)(a), it was appropriate to grant the appellants leave to make the amendments contained in the ASOC. After identifying issues of delay and prejudice to the respondents as factors relevant to the exercise of the court’s discretion, the primary judge concluded:⁶
 - “[81] Overall, I am satisfied on balance that leave ought to be granted because:
 - (a) The critical conversations now relied upon by the plaintiffs occurred between two individuals (Mr Smith and Mr Hudson) who have been involved in this case from the outset – indeed, it seems that they were both at the mediation;
 - (b) All or most of the remaining potential witnesses are contactable;
 - (c) Part of the case appears to be underpinned by documentary evidence such as emails and accounting records which are already in existence;
 - (d) Some of the amendments to the plaintiffs’ case appear to have arisen from the defence and counterclaim filed by the defendants;
 - (e) Aspects of the unfairness and prejudice can be dealt with by the defendants at trial in cross-examining the plaintiffs’ witnesses, including, for example, about the change in their case;
 - (f) The issue of the costs thrown away can be compensated to a large degree by an award of costs in the defendants’ favour; and
 - (g) The weight of the consequences of delay in raising this new claim and prejudice ought to be carried by the

⁶ Reasons, [81].

plaintiffs. Some of this prejudice can be adequately addressed by granting leave and ordering that the amendments take effect from 27 February 2025, pursuant to r 387 of the UCPR. This will allow the defendant to plead any limitation defences, and leaves the issue about whether or not the cause of action has expired to trial.” (emphasis added)

Submissions

- [30] The parties have different views about the effect of the primary judge’s conclusions and the passages emphasised in the above excerpts.
- [31] The appellants’ position is that notwithstanding the conclusion stated by the primary judge in paragraph [81(g)] of the reasons, her Honour correctly determined the application for leave to amend the pleading in accordance with r 376(4). They submit that when read in context and by reference to the reasons as a whole, the word “potentially” meant nothing more than “if the allegations are proven”. The appellants say this follows because the primary judge had already noted that r 376(4) was confined to a case where the amendment introduced a new cause of action where the “relevant period of limitation, current at the date the proceeding was started, has ended.”; her Honour judge found the applicable limitation period was six years, “with the alleged indebtedness arising no later than 30 June 2016”; that no alternative cause of action or limitation was posited to indicate that there was any uncertainty about the relevant limitation period, whether it was current when the proceeding started, or when it ended; and that her Honour did not consider any alternative power which permitted a new cause of action which was statute barred to be added, if r 376(4) was not engaged.
- [32] That being so, the appellants submit that it is apparent that the primary judge erred by ordering that the amendments would take effect from 27 February 2025. They argue that once the primary judge determined the application for leave to amend under r 376(4) in their favour, there was no scope for the primary judge to make an order or impose a condition deferring the date upon which the amendments in the ASOC would have effect. They say the ordinary incident of a successful application for leave to amend under r 376(4) is that the applicant obtains the benefit of the relation back rule in r 387(1), such that here the amendments would take effect from the date of the filing of the original SOC. They further say that if the primary judge’s order to the contrary were to stand, it would deprive them of the benefit of the leave granted pursuant to r 376(4).
- [33] The respondents’ position is that it is clear the primary judge did not determine the limitation period point at all, and that the primary judge had ample power to defer the date upon which the amendments would have effect. In a submission that is somewhat inconsistent with some of the other submissions they advance, the respondents seize upon the words “has ended” in r 376(1) to submit that r 376 is only engaged where the court makes a positive finding that a relevant limitation period has ended. If not, they argue, leave can only be granted under r 375(1) and the court would then be entitled to fix any condition considered appropriate upon the grant of leave, including deferral of the date from which the amendments are to have effect.
- [34] The respondents submits that the limitation period issue was complicated by the appellants plea of estoppel by convention and the submission made below by the

appellants that there was no applicable limitation period in respect of that aspect of the ASOC. The respondents argue that in circumstances where the limitation period defence had not yet been defined by reference to the pleadings, and where there were competing contentions as to the limitation period, the primary judge correctly decided that the limitation period issue ought to be left to trial. They further submit that it was this conclusion of the primary judge, and the issues of delay and prejudice, that led her Honour to consider that it was appropriate in the circumstances that the amendments take effect from the date of filing of the ASOC, rather than from the date of the initial filing of the claim.

- [35] The respondents say that the decision to defer the date upon which the amendments would have effect was a matter for the primary judge to determine in the exercise of discretion. They accept that the primary judge wrongly cited r 387 in promulgating Order 2 but submit that was of no consequence as there was ample power to be found elsewhere that permitted her Honour to impose such a condition upon the grant of leave to amend. In particular, the respondents point to s 14 of the CPA and UCPR r 375 and r 367 as provisions that allow such a condition to be imposed if considered “appropriate”. They further argue that a court may also impose such a condition as part of its consideration of whether it is “appropriate” to grant leave under r 376(4)(a). They further call in aid s 16 of the CPA and the overriding purpose of the UCPR expressed in r 5.

Consideration

- [36] There is a good argument to be had that, despite some of the expressions used in the emphasised passages from the above excerpts of the primary judge’s reasons, the primary judge did in fact find that the relevant limitation period had ended. It is abundantly clear that the primary judge determined the application for leave to amend in accordance with r 376(4). The application brought by the appellants sought leave under that rule; the parties argued their respective positions on that basis; the primary judge’s reasons cited r 376, and thereafter engaged with the matters of which the court was required to be satisfied in r 376(4)(a) and (b); the primary judge ultimately made findings in the appellant’s favour in respect of the r 376(4)(a) and (b) matters; and Order 1 of the formal orders of the court expressly states that leave was granted to the appellants to file the ASOC pursuant to r 376(4).
- [37] As I will later explain, I am satisfied that the primary judge erred, and the appeal should be allowed. However, contrary to the appellants’ assertion, the error does not flow from a positive finding by the primary judge that a relevant limitation period had ended. I am satisfied that the primary judge did not make any such finding.
- [38] There is obvious inconsistency within the primary judge’s reasons and conclusions. At paragraph [68] of the reasons, the primary judge accepted that the amendments included a new cause of action and that there was an applicable limitation period. At paragraph [72] of the reasons, the primary judge noted the alleged indebtedness arose no later than 30 June 2016; that the subject debt was said to be due on demand; and that the limitation period for such a debt was six years. Those conclusions were consistent with the respondents’ arguments below.⁷ They were also consistent with a conclusion that the relevant limitation period would have expired on 30 June 2022. That date was after the claim and SOC had been filed and the proceeding commenced

⁷ ARB 119-120.

(16 December 2021) but before the ASOC had been filed (26 February 2025). Despite noting these points, the primary judge ultimately concluded that the amended cause of action was “potentially out of time”.

- [39] In my view, the primary judge’s conclusion in that respect did not amount to a positive finding that the relevant limitation period had ended. As I read the primary judge’s reasons, her Honour plainly considered this was a case where the court was unable to determine the limitation issue at an interlocutory stage. That is consistent with the primary judge’s conclusion in paragraph [81(g)] of the reasons that determination of the issue of whether the limitation period had expired was to be left to trial. It is also consistent with the primary judge’s earlier observation at paragraph [68] of the reasons that it was unnecessary for the purposes to resolve the tension in the appellants submissions about whether there was any limitation period at all.
- [40] Despite the fact that the primary judge did not determine whether the limitation period had ended, her Honour went on to decide the matter as an application under r 376(4). In my opinion, that is where the primary judge erred. Leave can only be granted under r 376(4) where a relevant limitation period, current at the commencement of the proceeding, has ended. Where the court is unable to make that determination, the court cannot exercise the power under r 376(4).
- [41] However, in such cases it remains appropriate to proceed to determine an application for leave to amend by reference to r 376(4). Such an approach has been adopted and endorsed in several first instance decisions. It is necessary only to mention two such cases in any detail, being the decision of Philip McMurdo J (as his Honour then was) in *Mokrzecki v Popham*⁸ and the decision of Applegarth J in *Menegazzo v Pricewaterhousecoopers (A Firm)*.⁹
- [42] *Mokrzecki* concerned an application to strike out a number of paragraphs of the plaintiff’s amended statement of claim, which was said to plead new causes of action added outside the relevant limitation period. The defendants in that case claimed the amendments should be disallowed because the UCPR did not permit the addition of statute barred causes of action, except within the circumstances prescribed by r 376(4), which were said to be absent. The plaintiff accepted there were new causes of action which were added by the pleading but contended that the amendments were within the scope of r 376(4). The defendants conceded that it would be difficult for the court to fairly determine questions of whether or not various causes of action were statute barred. Citing *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 533, McMurdo J noted that concession was consistent with the well recognised difficulty and undesirability of determining questions of that kind in interlocutory proceedings in advance of the hearing of the action.
- [43] Having recognised the difficulty of persuading the court to make a positive finding that the new causes of action were statute barred, the defendants made an alternative application for the amendments to the pleadings to be declared to take effect from 22 May 2012, which was the date when the plaintiff had filed and served an earlier version of the statement of claim. That statement of claim had previously been struck out, but with the plaintiff given liberty to replead. On this point, McMurdo J stated:¹⁰

⁸ [2013] QSC 123 (*Mokrzecki*).

⁹ [2016] QSC 94 (*Menegazzo*).

¹⁰ *Mokrzecki*, [11]-[12].

- “[11] This alternative submission has some immediate appeal. However, it does not recognise the potentially beneficial operation of r 376(4), under which a cause of action, which was statute barred as at 22 May 2012, might be added with effect, according to r 387(1), ‘on and from the date of the document being amended.’ An amendment which is made under r 376(4) can effectively defeat a limitation defence.
- [12] The relevant rules of the UCPR do not appear to readily accommodate cases of the present kind, namely where there is a question of whether a limitation period has expired which cannot be fairly determined ahead of the trial. Instead, they operate to permit, or not permit, amendments according to whether, in truth, a limitation period has expired at a certain time. In many cases of course that question will be clear, but the present is not one.”
- [44] McMurdo J ultimately proposed that the issue could be approached in the following way:¹¹
- “[20] How then is r 376 to be applied where, as matters can be presently assessed, no more can be said that the cause of action is possibly out of time? To permit the amendment, but on condition that it be treated as taking effect only from a certain date, to the end of preserving a limitation defence, might unfairly defeat the operation of r 376, which could be beneficial to the plaintiff by relating the amendment back to the date of the original proceeding.
- [21] Where the new cause of action does arise out of the same facts or substantially the same facts as a cause of action already claimed, then allowing the amendment without any condition that it take effect from a certain date would allow the plaintiff the apparently beneficial operation of r 376. If, in truth, the rule does not apply (according to sub-rule (1)), then there is no relevant detriment to a defendant. In that event, the period of limitation either would not have ended (in which case no limitation defence would be available) or it would have ended prior to the commencement of the proceeding (in which case the limitation defence would still be available).
- [22] In cases which are outside r 376(4) where there may or may not be a new cause of action which is then out of time, the amendment may be permitted but on terms that it take effect from the order giving leave or from some other time, so as not to prejudice a possible limitation defence. The power to impose this condition is well established.”
- [45] The approach taken by McMurdo J in *Mokrzecki* has been adopted, applied or otherwise cited with approval in successive cases.¹² On each occasion, the court has

¹¹ Ibid, [20]-[22].

¹² *Perpetual Limited v Registrar of Titles* [2013] QSC 296; *Menegazzo v Pricewaterhousecoopers (A Firm)* [2016] QSC 94; *Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd* [2017] QSC 232; *Firstmac Ltd v Hunt & Hunt (a firm)* [2018] QSC 258; *Northern SEQ Distributor-Retailer Authority t/a Unitywater v Monadelphous Engineering Pty Ltd* [2025] QSC 253.

endorsed a practical and logical approach to dealing with an application concerning amendment to a pleading at an interlocutory stage where there is uncertainty about whether a limitation period has expired, and where the court cannot fairly decide the issue.

- [46] In *Menegazzo*, Applegarth J considered an application for leave to amend under r 376(4) and associated applications to strike out the subject amendments if leave was granted. Again, there was uncertainty about whether a relevant limitation period had expired. Citing *Mokrzecki*, Applegarth J stated:¹³

“[44] In some cases an applicant for leave to amend may not acknowledge that leave is required pursuant to r 376(4) and contend that any new cause of action is still within the relevant period of limitation. There may be scope for argument about that, for example, where it is not clear when the plaintiff first suffered loss and damage in cases in which the cause of action is not complete until loss and damage is suffered. In such cases the approach is often taken to proceed to the issues that arise under r 376(4), namely whether any new cause of action arises out of the same or substantially the same facts as the cause of action for which relief has already been claimed, and whether it is appropriate to make the amendment. This is because if the requirements in r 376(4) are satisfied, the plaintiff should be granted leave to make amendments, notwithstanding the expiry of the limitation period. If an applicant satisfies the requirements of r 376(4) then it should have the benefit of that rule, which permits the inclusion, by amendment, of a cause of action which otherwise would be out of time. If the court hearing the application is not in a position to fairly determine whether a relevant period of limitation, current at the date the proceeding was started, has ended, but the applicant satisfies the requirements of r 376(4), then there is no relevant detriment to the defendant in being deprived of a limitation defence. If, however, the requirements of r 376(4) are not satisfied, and it is not clear whether the new cause of action is out of time ‘the amendment may be permitted but on terms that it take effect from the order giving leave or from some other time, so as not to prejudice a possible limitation defence’.

- [45] In some cases it will be inappropriate to decide a contested issue of whether a relevant period of limitation has ended, and therefore whether r 376 applies, because that issue cannot be fairly determined. However, this does not mean that issues under r 376(4) cannot be determined. They should be so as to allow the effective date of the amendments to be determined. If the circumstances demonstrate that the requirements of r 376(4) are satisfied, then leave may be granted. If, on the other hand, they are not, then an order may be made that the amendments take effect, not from the date of the document which is being amended, but from some other date, such as the date when the amendments were foreshadowed or the date when the

¹³ *Menegazzo* at [44]-[45].

application to amend was made or the date that leave is granted to make them.”

- [47] I note that during argument at the hearing of the applications below, counsel for each of the parties referred the primary judge to the decision in *Mokrzecki*. In particular, counsel for the appellants urged the primary judge to apply the approach adopted by McMurdo J in *Mokrzecki* if her Honour concluded that the ASOC introduced a new cause of action but was unable to determine if a relevant limitation period had ended.¹⁴
- [48] Whilst the *Mokrzecki* approach makes sense and provides a pragmatic and fair solution for dealing with an application under r 376(4) where there is uncertainty about the expiration of a limitation period, the statutory prerequisite for the exercise of the power under r 376(4) stipulated in r 376(1) precludes the direct application of r 376(4) in such a case. By the clear and plain language of r 376(1), the court may only consider an application for leave to amend under r 376(4) where “a relevant period of limitation, current at the date the proceeding was started, has ended”. That being so, in cases where the court cannot decide whether the limitation period has ended, how can the court determine an application for leave under r 376?
- [49] The answer, in my opinion, is to appreciate that under the *Mokrzecki* approach the court is not actually exercising a discretion conferred by r 376(1). The court does not assume that it has, or will have, power to grant the amendment under r 376(4). Rather, the court determines the relevant application before the court, such as an application for disallowance of amendments, by reference to the questions posed by r 376(4), having regard to the purpose and intention of r 376, and on the contentious assumption that the relevant limitation period, current at the commencement of the proceeding, has ended.
- [50] A similar position was again taken by McMurdo J in *Mineral Resources & Engineering Services Pty Ltd v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia*.¹⁵ In that case, his Honour considered an application to disallow amendments to two statements of claim which added new causes of action. The parties there each accepted that it was undesirable to determine whether any cause of action was time barred. After noting various provisions of the UCPR, and reiterating that the defendant bank’s applications were for disallowance of the amendments under r 379, McMurdo J stated:¹⁶
- “[15] ...The bank argued that the subject amendments to the unconscionable conduct case in each pleading should be the subject of an order, made under r 379(2), that those amendments take effect only on the date of the filing of the amended statements of claim (3 October 2014).
- [16] The plaintiffs resist that order because of the potential for the benefit of r 376 to be lost to them. The evident intent of r 376(4) is to permit an amendment, where appropriate, which would add a cause of action, current at the date the proceeding started but now out of time, with the effect of depriving the defendant of

¹⁴ ARB 925-926.

¹⁵ *Mineral Resources Engineering Services Pty Ltd as Trustee for the Meakin Investment Trust v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia* [2015] QSC 62.

¹⁶ *Ibid*, [15]-[19].

a limitation defence (which it would enjoy if that new cause of action were prosecuted in a new proceeding).

- [17] Rule 376 is expressed to operate in the context of the court being asked to give leave to make an amendment. But as the present arguments accept, an application under r 379 should be determined by reference to the rules and principles which govern the court's discretion to give leave to amend.
- [18] A practical difficulty in cases such as the present is that because it cannot be fairly determined whether a relevant period of limitation has expired, it cannot be concluded that r 376 applies. The bank asked me to proceed as I did in *Mokrzecki v Popham & Ors*, by determining whether the amendments raised new causes of action and if so, whether those causes arose out of the same or substantially the same facts as a cause of action for which relief had been claimed in the proceedings. In other words, I should determine whether the element in r 376(4)(b) could be satisfied, if r 376 was applicable. If, as the bank argued, there were new causes of action which did not arise out of the same facts, then the plaintiffs could not lose the beneficial operation of r 376 by orders that the amendments should take effect only from the date on which they were made.
- [19] In response, one submission of the plaintiffs was that I should not consider whether r 376(4)(b) could be satisfied, but instead I should leave that to the trial judge, just as the question of limitation defences should be determined then. In my view however, the r 376(4)(b) question or questions could and should be determined now. It is preferable for the effective date of the amendments to be determined now because of the effect of that issue upon the pleading of the bank's case. The reasons for the desirability of leaving limitation questions to the trial do not apply to this different question of whether a new cause of action arises out of the same facts, a question which is to be answered by the facts which are pleaded, rather than by those which are ultimately found at the trial."

- [51] In my view, this is the correct approach to take in a case like this where the court cannot determine whether a relevant limitation period has expired. The application is determined by reference to the questions posed by r 376(4)(a) and (b) so that the plaintiff is not unfairly deprived of the benefit of r 376 and where, for the reasons variously explained in *Mokrzecki* and *Menegazzo*, there is no potential for any real prejudice to a defendant if it is assumed that the limitation period has ended. As those cases explain, there are three potential scenarios that may arise where there is doubt about the expiry of a relevant limitation period. First, the limitation period expired before the commencement of the proceeding. In that case, r 376(1) does not apply and any limitation defence would still be available to a defendant. Second, the limitation period has not yet expired. If so, r 376(1) does not apply and no limitation defence would be available. In either case, there is no relevant detriment to a defendant. Third, the limitation period has ended since the commencement of the proceeding. In that case, r 376(1) is engaged, but the court may only grant leave if first satisfied of the matters in r 376(4)(a) and (b), which requires the court to consider issues of delay and prejudice.

- [52] As the present case demonstrates, a fourth scenario may be that there is no limitation period at all. If so, a defendant would again suffer no relevant detriment if the matter was determined by reference to the questions posed by r 376(4)(a) and (b).
- [53] In my view, the position should be no different in a case where there is uncertainty about the expiry of a relevant limitation period and there is an application before the court for leave to amend under r 376(4). The *Mokrzecki* approach should still be applied, however it would be necessary for the court determining the application to acknowledge that r 376 does not apply and to make plain that the court is not purporting to exercise the discretion conferred by r 376(4). In such cases, the source of the court's power to grant leave to make the relevant amendments must derive from another source, such as the general power to grant leave to amend under s 16 of the CPA or UCPR r 375. Those provisions do not encounter the same obstacle to the exercise of a discretion to give leave to amend a pleading that arises under r 376 when r 376(1) is unable to be positively satisfied.
- [54] Pursuant to s 16(2) of the CPA the court may grant leave to a party to amend a pleading. Whilst s 16 appears to cover the same ground as r 376, there are some important distinctions. Notably, the circumstances in which the court may grant leave to a party to make an amendment, stated in s 16(2)(a) to (c), are expressed disjunctively, as indicated by the use of the word "or" between each subsection. Therefore, under s 16(2) leave may be granted to amend a pleading, even though the amendment will include or substitute a new cause of action; or even though a relevant period of limitation, current when the proceeding was started, has ended. Thus, leave to amend may be granted to add a new cause of action, regardless of whether a relevant limitation period, current when the proceeding was started, has ended. That could include a case where it appears to the court that it has ended, or may have ended, but the court cannot fairly determine the matter at an interlocutory stage.
- [55] Although s 16(2) is subject to s 16(3), that provision does not impede the exercise of the power conferred under s 16(2) to grant leave to amend a pleading in a case where there is uncertainty about whether a relevant period of limitation has ended. That is because the only rule that might limit the application of s 16(2) in a case like this is r 376 and, as already explained, because r 376(1) requires a positive finding that a relevant limitation period has ended it would not apply.
- [56] A similar position pertains to the general power to grant leave to amend under UCPR r 375. Although, r 375(4) provides that r 375 is subject to r 376, if the court cannot positively determine that a relevant limitation period, current when the proceeding commenced, has ended, then r 376 has no application.
- [57] In either case, for the reasons articulated in *Mokrzecki* and *Menegazzo*, in my opinion the matters in r 376(4)(a) and (b) would remain fundamentally relevant. The court would thus consider whether it ought to exercise the discretion conferred by s 16(2)(a) of the CPA or UCPR r 375 by reference to the questions required to be considered for an application for leave under UCPR r 376(4). Because s 16(2)(a) and r 375(1) confer a general power to grant leave to amend, there may well be other circumstances relevant to the exercise of the discretion. Obviously, much would depend on the facts of the particular case under consideration.
- [58] So much was acknowledged in *Stimpson v O'Toole*,¹⁷ where the Court stated:¹⁸

¹⁷ (2022) 12 QR 27 (*Stimpson*).

¹⁸ Ibid, [36]; [40].

[36] The forerunner of s 16 CPA was s 81 *Supreme Court of Queensland Act 1991* ('SCQA') that was considered in *Draney v Barry* [2002] 1 Qd R 145. That decision was concerned with the relationship between r 376 UCPR and s 81 SCQA. It was held by McMurdo P and Pincus JA (151–152 [2], 156 [23]) that where applications do not pass the test set out in r 376(4)(b) to add a new cause of action, the Court has a general discretion under s 81 SCQA to add a cause of action out of time, but that in exercising that discretion the Court should have regard to the fact that the effect of adding a new cause of action out of time is equivalent to an evasion of the provisions of the *Limitation of Actions Act 1974*, so some adequate ground will be required, in order to justify such an amendment. The reasoning of the majority in *Draney* with respect to the condition in r 376(4)(b) is equally applicable where r 376 does not apply, because the condition in r 376(1) is not satisfied.

...

[40] ...The decision of the majority in *Draney* was addressed by the Legislature's amendment of s 81 SCQA to make it clear that, if the rules of court limit the circumstances in which amendments may be made, there was not to be recourse to s 81 when the relevant rule of court providing for amendment to add a new cause of action or a new party applied. If the circumstances for r 376 UCPR to apply (pursuant to either r 376(1) or r 376(4)(b)) are not applicable to a particular case, then the general discretion under s 81 (now s 16 CPA) remained. It would usually be a relevant factor to take into account in the exercise of the discretion under s 16(2) CPA that r 376 UCPR was not applicable. How that factor is taken into account will depend on the circumstances of the case, so that it cannot be characterised as a factor that will affect the exercise of the discretion in one way only or the other way only."

[59] In the present case, the primary judge wrongly determined the application for leave to amend by purporting to exercise the discretion conferred by r 376(4). The power to exercise that discretion did not exist because the primary judge did not determine that the limitation period had ended. Nevertheless, the primary judge correctly proceeded in accordance with the *Mokrzecki* approach to address the questions in r 376(4)(a) and (b) and, on the basis that her Honour was satisfied of those matters, granted the appellants leave to file their ASOC. In the result, despite purporting to act under the wrong rule, the primary judge's reasoning and conclusion was correct.

Could the date for effect of the amendments be deferred?

[60] In my opinion, once the primary judge determined that the appellants ought to be granted leave to file the ASOC, it was not open to her Honour to then defer the date for when the amendments would take effect. The primary judge erred by doing so. Such an order or condition upon the grant of leave was contrary to the approach, logic and reasoning identified in *Mokrzecki* and *Menegazzo*. In terms of the classification

of discretionary errors identified in *House v The King*,¹⁹ I am satisfied the primary judge acted on a wrong principle or failed to take into account a material consideration. Either way, the discretion miscarried.

- [61] The evident intent and policy of r 376(4) is that a grant of leave will defeat a limitation period defence. That is achieved by application of the relation back rule in r 387(1). As McMurdo J stated in *Mineral Resources & Engineering Services Pty Ltd v Commonwealth Bank of Australia*; *Hay v Commonwealth Bank of Australia*:²⁰

“[16] ...The evident intent of r 376(4) is to permit an amendment, where appropriate, which would add a cause of action, current at the date the proceeding started but now out of time, with the effect of depriving the defendant of a limitation defence (which it would enjoy if that new cause of action were prosecuted in a new proceeding).”

- [62] It is to be borne in mind that r 376(4) is remedial and beneficial legislation, designed to address the common law rule of practice expressed in *Weldon v Neal* (1887) 19 QBD 394, pursuant to which an amendment of a pleading was not permitted where the effect of the amendment would set up a cause of action that was statute barred at the date of amendment, except in cases involving exceptional circumstances.

- [63] Recently, in *Anderson v Anderson*,²¹ the court considered the history of s 16, r 376(4) and the rule of practice in *Weldon v Neal*. The court doubted that the rule continued to have any application in Queensland in light of s 16 of the CPA and UCPR r 375 and r 376.²² In coming to that conclusion, the court considered a number of previous cases, including *Draney v Barry*, *Stimpson v O’Toole* and a decision of Jackson J in *Pacific National Pty Ltd v Aurizon Network Pty Ltd*.²³

- [64] In *Pacific National*, Jackson J had considered the origins of r 376, observing that it replaced former O 32, r 1(5) of the *Rules of the Supreme Court 1900* (Qld), which had been introduced in December 1965 to confer power on the court to permit an amendment after the relevant period of limitation had expired.²⁴ After further noting that r 376 was now supported by s 16 of the CPA, Jackson J stated:²⁵

“[18] ...The mischief or need for such a rule as r 376 stems from two circumstances. First, an amendment to a statement of claim operates in effect retrospectively, so that an amendment made after a proceeding is issued is treated as having been made from the date of issue or filing. Second, because an amendment so made would have the effect of permitting a new cause of action to be brought after the period of limitation has expired, an amendment of that kind could not be made if opposed. This was known as the rule in *Weldon v Neal* (1887) 19 QBD 394.

- [19] Since 1965, but more particularly since 1999 under the form of r 376, there have been made cases dealing with an amendment

¹⁹ (1936) 55 CLR 499, 504-505.

²⁰ [2015] QSC 62, [16].

²¹ [2026] QCA 50.

²² Ibid, [44].

²³ [2016] QSC 218 (*Pacific National*).

²⁴ Ibid, [15].

²⁵ Ibid, [18]-[21].

to add a new cause of action after expiry of the relevant period of limitation.

[20] It should not be forgotten, however, that the rule is facultative and has as its remedial purpose to permit amendment which would have been prohibited under the rule in *Weldon v Neal*. Nor should it be forgotten that where the conditions precedent to the application of the rule are met the court is granted an unfettered discretion to permit an amendment. That discretion is to be exercised having regard to the philosophy of the UCPR in r 5.

[21] Nevertheless r 376(4) applies only if 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. That requirement is a jurisdictional fact which must be proved before the court may give leave to make an amendment to add a new cause of action.”

[65] In my opinion, the foregoing observations about the policy, purpose and intent of r 376(4) apply equally to a case where there is uncertainty about whether a relevant limitation period has ended, and the court considers an application for leave to amend by reference to the r 376(4) factors according to the *Mokrzecki* approach.

[66] In the present case, the primary judge’s order deferring the date upon which the subject amendments would take effect to a time after the commencement of the proceeding cut across the policy, purpose and intent of r 376(4) and deprived the appellants of the benefit of the leave that had been granted. It was contrary to logic and principle to make such an order.

[67] As I have already noted, the respondents accept that the primary judge could not make an order to that effect under r 387(2) or (3), as the new cause of action had not arisen after the commencement of the proceeding. Rule 387(1) should have applied.

[68] I cannot accept the respondents’ arguments that sought to justify the primary judge’s order deferring the date of effect of the amendments on the basis that such a course was authorised by some other legislative provision. Whist it is true that other legislative provisions might enable a court to impose a condition upon a grant of leave to amend in other circumstances, where leave to amend is given under r 376(4) the corollary is that the amendments have effect from the date of the document that is amended, in accordance with r 387(1). In my opinion, the same result should follow where leave to amend is granted under the *Mokrzecki* approach.

[69] Even though r 376 did not directly apply in this case, it is necessary to address the respondents’ argument that the word “appropriate” in r 376(4)(a) should be read as meaning “appropriate unconditionally or conditionally”. In my view such constructions are not supported by the text, context or purpose of the statutory provision. Amongst other things, when determining whether it is appropriate to grant leave under r 376(4), the court must have regard to issues of prejudice that would be occasioned to a party by reason of the amendment, which necessarily includes the fact that if leave is granted to include the new cause of action it will defeat any applicable limitation period defence. When exercising the discretion under r 376(4) it is not open to a court to be satisfied that it is appropriate to grant leave, but only if

the effect of the amendments is postponed to a date that would render the grant of leave inutile. If a court is concerned that the degree of prejudice to a party is such that it cannot be overcome or that it would not be fair to grant leave, then the court would ordinarily refuse the r 376(4) application as it would not be “appropriate” to give leave. Again, in my view, the same approach should be taken where the court is unable to determine the limitation period question and deals with the application for leave according to the *Mokrzecki* approach.

- [70] As r 376 did not directly apply in this case, it would perhaps have been open to the primary judge to make an order of the kind her Honour did. In that regard, in *Stimpson*, the court noted:²⁶

“[43] ...Rule 387 UCPR which is for the purpose of determining when an amendment takes effect applies expressly when a document is being amended under Ch 10, Pt 3 UCPR (such as pursuant to r 376) and therefore does not apply to an amendment allowed by the Court in the exercise of the power conferred by s 16 (2) CPA which applies despite the *Limitation of Actions Act 1974*.”

- [71] The same might be said of r 375, where, under r 375(1), the court may grant leave to amend a pleading “in the way and on the conditions the court considers appropriate”. Nevertheless, in either case, even if the true source of the court’s discretion is other than under r 376(4), it would be contrary to logic and the policy and purpose of r 376(4) to defer the date upon which an amendment was to take effect, where an applicant had otherwise satisfied the requirements of r 376(4), simply because there was uncertainty as to the expiration of a relevant limitation period.
- [72] It remains to briefly deal with one final argument. The respondents submitted that in the event that the court found error on the part of the primary judge, that the court should then re-exercise the discretion in their favour. The respondents said that would be the appropriate disposition, in circumstances where the primary judge found that the consequences of delay in raising the new cause of action and the prejudice it caused ought to be carried by the appellants. The respondents stressed that it was for those reasons that the primary judge had made the order deferring the date upon which the amendments would take effect.
- [73] Whilst the exercise of the primary judge’s discretion miscarried and the discretion falls to be exercised afresh, I do not consider it necessary to set out a detailed analysis and assessment of the factors relevant to a re-exercise of the discretion. I would consider the matter as one involving the exercise of the general discretion to grant leave to amend under r 375 but, adopting the *Mokrzecki* approach, I would approach the matter by reference to the questions in r 376(4)(a) and (b). I would make the same findings in respect of the r 376(4)(a) and (b) matters, and would grant leave to the appellants, for the same reasons expressed by the primary judge at paragraphs [78]-[81] of her Honour’s reasons, save for paragraph [81(g)]. I would otherwise reach the same conclusions expressed by the primary judge on the issues of delay and prejudice.
- [74] Whilst there had been a period of delay in prosecuting the claim and before the filing of the ASOC, that does not appear to have resulted in any significant prejudice to the

²⁶ *Stimpson*, [43].

respondents. Indeed, the issues of prejudice to the respondents, as outlined in an affidavit affirmed by Mr Geraint Hudson, the director of the first and second respondents, largely concerned the prospect of potential prejudice rather than any actual prejudice caused by the late amendment of the appellants' case. Adequate explanation for the delay in prosecuting the claim was provided by the appellants' solicitor in an affidavit he affirmed for the purposes of the applications. In short, he confirmed that the bulk of the delay was attributable to his own workload and practice arrangements and not due to inaction on the part of the appellants.

[75] I am cognisant that the grant of leave may deprive the respondents of a relevant limitation period that was current at the time the proceeding commenced, but which had since expired before the ASOC was filed. Nevertheless, I consider it appropriate that leave be given.

[76] Even if I were satisfied that the primary judge positively found that the relevant limitation period had ended, I would reach these same conclusions and allow the appeal. The primary judge would still have erred by deferring the date upon which the amendments were to have effect, contrary to the policy, purpose and intent of r 376(4).

Conclusion

[77] For the reasons stated, the appeal should be allowed, and the Notice of Contention should be dismissed. I propose the following orders:

1. The appeal is allowed.
2. Order 1 of the orders made by the primary judge on 21 August 2025 is varied to the extent that it is made pursuant to rule 375(1) of the *Uniform Civil Procedure Rules 1999* (Qld) but is otherwise affirmed.
3. Order 2 of the orders made by the primary judge on 21 August 2025 is set aside.
4. The Notice of Contention is dismissed.
5. The respondents are to pay the appellants costs of the appeal.