

SUPREME COURT OF QUEENSLAND

CITATION: *Carlton & Anor v Grazag Pty Ltd & Anor* [2026] QSC 253

PARTIES: **JOHN ANTHONY CARLON**
(first plaintiff)

ANNE MAREE CARLON
(second plaintiff)
v

GRAZAG PTY LTD A.C.N 141 098 142
(first defendant)

BARENBRUG AUSTRALIA PTY LTD A.C.N 007 614 379
(second defendant)

FILE NO/S: 4743/22

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 24 September 2026. Further written submissions of the first defendant filed 29 September 2026.

JUDGE: Smith J

ORDER:

- 1. The first defendant's application for a stay of the proceedings is dismissed.**
- 2. Paragraphs 27 to 39 of the further amended statement of claim are struck out.**
- 3. I dismiss the first defendant's application to strike out paragraph 26 of the further amended statement of claim.**
- 4. I dismiss the second defendant's application to strike out paragraphs 3(d), 44 and 48 of the further amended statement of claim.**
- 5. I dismiss the second defendant's application to strike out paragraph 54 of the further amended statement of claim.**

6. Pursuant to UCPR r 376(4) I grant leave to the plaintiffs to bring a claim under ss 271 and 272 of the *Australian Consumer Law* against the second defendant.
7. I will hear the parties on any further directions to be given.
8. I will hear the parties on the question of costs.

CATCHWORDS: CIVIL PROCEDURE – COURTS AND JUDGES GENERALLY – STAY OF ACTION – FAIR TRIAL – whether action should be stayed as an abuse of process – whether the first defendant is prejudiced by the continuation of the proceeding – whether the first defendant is precluded from claiming contribution or indemnity from the second defendant

CIVIL PROCEDURE – SUPREME COURT PROCEDURE – STRIKING OUT PLEADINGS – whether the plaintiff should be given leave to amend a statement of claim – whether new causes of action are added out of time – whether the causes of action arise substantially out of the pleaded facts

Civil Liability Act 2003 (Qld)

Civil Proceedings Act 2011 (Qld) s 16

Competition and Consumer Act 2010 (Cth) s 18, s 54, s 55, s 56, s 236, s 259, s 271, s 272

Judiciary Act 1903 (Cth) s 79

Limitation Act 1985 (ACT)

Limitations of Actions Act 1974 (Qld) s 10

Sale of Goods Act 1923 (NSW)

Uniform Civil Procedure Rules 1999 (Qld) r 376, r 378, r 452

Allonnor Pty Ltd v Doran [1998] QCA 372, applied

Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 [2022] HCA 38; (2022) 277 CLR 445, applied

Barker v Duke Group Ltd (in liq) [2005] SASC 81; (2005) 91 SASR 167, considered

Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27; (2006) 226 CLR 256, applied

Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors (No 2) [2011] QSC 42, considered

Borsato v Campbell & Ors [2006] QSC 191, considered

Burke v LFOT Pty Ltd [2002] HCA 17; (2002) 209 CLR 282, applied

Cockburn v GIO Finance Ltd (No 2) [2001] NSWCA 177; (2001) 51 NSWLR 624, cited

Commonwealth v Verwayen [1990] HCA 39; (1990) 170 CLR 394, considered

Cooke v Gill (1873) LR 8 CP 107, cited

Ezy-Fit Engineering Group Pty Limited v Microm Nominees Pty Limited [2024] FCA 441, cited

Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd [2024] QCA 74; (2024) 20 QR 1, cited
GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32; (2023) 280 CLR 442, applied
Harnett v Hynes [2009] QSC 225, considered
Harnett v Hynes [2010] QCA 65, cited
HIH Claims Support Ltd v Insurance Australia Ltd [2011] HCA 31; (2011) 244 CLR 72, applied
Jago v The District Court of New South Wales and others [1989] HCA 46; (1989) 168 CLR 23, applied
Jetcrete Oz Pty Ltd v Conway & Anor [2015] QCA 272, cited
Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd [1988] FCA 88; (1988) ATPR 40-853, distinguished
Mahoney v McManus [1981] HCA 54; (1981) 180 CLR 370, applied
Motor Terms Co Pty Ltd v Liberty Insurance Ltd (in liq) [1967] HCA 9; (1967) 116 CLR 177, applied
Owners – Units Plan 4321 v Victory Homes Pty Ltd [2024] ACTSC 337, not followed
R v Edwards [2009] HCA 20; (2009) 83 ALJR 717; (2009) 255 ALR 399, applied
Ramsay v McElroy [2003] QCA 208; [2004] 1 Qd R 667, applied
Rogers v The Queen [1994] HCA 42; (1994) 181 CLR 251, applied
Ryan v Gold Coast Hospital and Health Service [2025] QSC 181, cited
Thomas v State of Queensland [2001] QCA 336, cited
Thompkins v Medical Board of Australia [2018] SASC 72, cited
Tycho Pty Ltd v Trustworthy Nominees Pty Ltd [2026] QSC 89, cited
UBS AG v Tyne [2018] HCA 45; (2018) 265 CLR 77, applied
United Airlines Inc v Sercel Australia Pty Ltd [2012] NSWCA 24; (2012) 260 FLR 37, applied

COUNSEL: P G Jeffery for the plaintiffs
 K Horsley for the first defendant
 A Crawford for the second defendant

SOLICITORS: Wonderley & Hall solicitors for the plaintiffs
 Hall & Wilcox solicitors for the first defendant
 Moray & Agnew solicitors for the second defendant

INTRODUCTION

- [1] This matter concerns an action brought by the plaintiffs relating to the purchase in 2016 of defective seed for use on their grazing property from the first defendant and manufactured by the second defendant. The plaintiffs claim losses, namely remediation costs of \$141,735 and production losses of \$430,885.
- [2] The plaintiffs apply for an order pursuant to r 376(4) of the UCPR to rely on a further amended statement of claim (**FASOC**).
- [3] The first defendant applies for an order for a permanent stay of the proceedings. Both defendants oppose any application by the plaintiffs to further amend the statement of claim (**SOC**) to plead new causes of action.
- [4] For the reasons to be given, it is determined that the proceedings not be stayed and further the plaintiffs be given leave pursuant to r 376(4) to amend parts of the SOC.

BACKGROUND

- [5] On 26 April 2022, the plaintiffs issued proceedings against the first defendant and the original second defendant¹ claiming damages for breaches of the *Competition and Consumer Act 2020* (Cth) (**ACL**), the *Sale of Goods Act 1923* (NSW) (**SGA**), breach of contract and negligence.
- [6] The plaintiffs grazed sheep and cattle at a property at Uralla, New South Wales for the purpose of sale. They bought BTF Seed from the first defendant which was manufactured by the second defendant to plant for pasture improvement in 2016. Representations were made that the seed would improve the pasture. However, in September 2016, the second defendant advised the plaintiffs that the seed contained an endophyte i.e. a fungus which was toxic to grazing stock. The plaintiffs were advised to remove their livestock, not use the pastures for hay or silage and were told all reasonable costs would be reimbursed.
- [7] As a result, the plaintiffs had to re-establish the pasture. The plaintiffs allege loss was caused as fences were damaged, there was a loss of cattle production, they had to agist cattle elsewhere, there were other feed costs, livestock died, they incurred re-establishment of pasture costs and there was the cost of slashing and burning of affected paddocks.

EVIDENCE

- [8] Mr Carlon has provided an affidavit which explains the delay. Mr Carlon says that the purchase of the seed occurred between April and June 2016.
- [9] On 14 September 2016, an agent of the second defendant advised the plaintiffs of the defect in the BTF seed and advised the plaintiffs to avoid grazing or making hay or silage from the BTF.
- [10] On 20 September 2016, the second defendant advised the plaintiffs that Crawford Agriculture (**CA**) had been appointed to assist in the voluntary recall and remediation of BTF pastures, that farmers should remove livestock from the pastures, and they should not cut the pastures for hay or silage.

¹ This name has been substituted with the present second defendant.

- [11] Mr Carlon says that after he received the notifications from the second defendant, he removed all cattle from the affected paddocks and followed the instructions given by the second defendant. He also met with the second defendant's agents over the succeeding months and complied with their requests.
- [12] Various calls and meetings took place between Mr Carlon, CA, QBE (the second defendant's insurer) and Moray and Agnew in 2016 and 2017 as to remediation and cost.
- [13] Mr Carlon started to slash paddocks in December 2016. The slashing continued in 2017.
- [14] In February 2017 he received an offer to settle from CA in the sum of \$53,975.90, which was rejected. A further offer was made in March 2017. Mr Carlon continued slashing the affected paddocks and doing fence repairs in August 2017. He continued with discussions with Moray & Agnew concerning compensation.
- [15] On 27 September 2017, Mr Gallaher of CA met the first plaintiff to assess the plaintiff's loss.
- [16] In December 2017, Mr Carlon wrote to Moray & Agnew noting that his damages had increased, and he was prepared to settle for \$1,049,383.
- [17] In 2018 Mr Carlon attended to remediation.
- [18] In May 2019, CA wrote to the first plaintiff advising that the mitigation management scheme was in its final stages.
- [19] In May 2019, Mr Carlon engaged Creevey Russell Lawyers for advice who corresponded with CA and Moray & Agnew. Various documents were requested by Creevey Russell Lawyers and there was correspondence between the parties up to and including 2022.
- [20] Also, Mr Carlon fell into a deep depression because of the BTF issue, and he felt unable to deal with anything related to it. Twelve months passed between contacts with his lawyers.
- [21] In March 2022, he had a telephone conversation with the lawyers and there was a discussion about the need to progress the matter. Instructions were given to issue proceedings. As a result, in April 2022 the claim and SOC were filed in the Supreme Court.
- [22] By August 2022, Mr Carlon was dissatisfied with the work done by Creevey Russell. He told Mr Creevey of the impact the depression was having on him. There was a dispute about which expert should be used. In early 2023, Mr Carlon again lapsed into a period of depression and felt it was too difficult to deal with the matter in any capacity.
- [23] In December 2023, there were discussions about engaging Mr Tancred as the expert to calculate losses. In February 2024, there was a discussion about a draft letter of instruction to him.

- [24] Ultimately in March 2024, the plaintiffs engaged Wonderley & Hall solicitors to take over the conduct of the proceeding. Since 5 July 2024, the matter has been case managed by an acting deputy registrar and the resolution registrar.
- [25] Mr Carlon says that over the years there have been unresolved mediation attempts and protracted negotiations with CA, Heritage Seeds and QBE Insurance. The ongoing strain has caused him severe depression. Proceedings were ultimately commenced in 2022 and with new lawyers the proceeding has remained under registry case management since July 2024.
- [26] Natalie Clark, a solicitor for the first defendant, swears that on 5 July 2024 the first defendant's solicitor wrote to the plaintiffs' lawyers foreshadowing an application for a stay of the proceedings. She also refers to a history of the proceedings.
- [27] With respect to the plaintiffs' claim she refers to the report of Mr Tancred which does not justify the claim of \$430,885 for loss of production. She says that the plaintiffs have not justified their claim for damages.
- [28] She also claims that actions in negligence and for breach of s 18 of the ACL have been made out of time.
- [29] Mr Van de Poll, a solicitor for the first defendant, swears that in 2016 the second defendant commenced to supply the defective seed to the first defendant. He also swears that at no time between 26 April 2022 and 20 February 2023 was the first defendant or its insurer advised of the proceedings. It is further alleged that any claim by the first defendant against the second defendant under the SGA has expired.
- [30] Mr Coloe, a solicitor for the second defendant, swears as to the history of the proceedings. He swears that the FASOC reformulates the negligence claim and introduces allegations of breaches of ss 54, 55 and 56 of the ACL. These amendments impact the second defendant. The causes of action accrued in 2016 with the limitation periods expiring in 2022. The amendments are well outside the limitation period. He swears that the passage of time has diminished the availability and the reliability of the evidence, although he does not have instructions as to specific prejudice.

LITIGATION HISTORY

- [31] The original claim and SOC were filed on 26 April 2022. They were served on 20 February 2023.
- [32] On 5 July 2024, a consent order was made that the defendants file their defences, that replies be filed, and disclosure be provided.
- [33] On 2 December 2024, a consent order was made that the plaintiffs be granted leave to amend the second defendant's name.
- [34] On 8 December 2025, the matter was adjourned for a case flow management conference not before 10 February 2026.
- [35] On 16 February 2026, by consent, it was ordered that the plaintiffs file any expert evidence by 9 June 2026; they file and serve a FASOC by 23 June 2026; the first

defendant file and serve its amended defence by 21 July 2026 and the second defendant file and serve its defence by 21 July 2026.

- [36] On 6 August 2026, by consent, the dates for the filing of the expert evidence were amended to 14 July 2026 and the date for the filing of the FASOC was amended to 15 July 2026.
- [37] On 10 July 2026, the plaintiffs sought to file a FASOC in which amendments were made to the SOC. Soon after, these applications were filed.

SUBMISSIONS

First defendant

- [38] It is submitted that the plaintiffs have repeatedly failed to progress this claim. It is submitted they have failed to quantify their loss notwithstanding that more than 10 years have passed since the cause of action accrued. The first defendant has suffered irreparable prejudice. The cumulative consequence of the plaintiffs' actions is that the continuation of the claim is an abuse of process.
- [39] The action was not brought until the last day of the six-year limitation period and the statement of claim was only served on 20 February 2023. It is submitted that any claim by the first defendant against the second defendant is statute barred and was when the proceedings were served.
- [40] In respect of a submission that the right of contribution is statute barred, the first defendant filed further written submissions. It is accepted that if the first defendant is found liable then rights of contribution could arise at the suit of the first defendant against the second defendant, but this could give rise to unequal apportionment. Also, if the breach of contract claim succeeded, liability would not be apportionable.
- [41] It is accepted that the first defendant's cause of action against the second defendant has not yet accrued. However, when an equitable claim has an analogous claim at law, a limitation period can be applied by analogy. It is accepted that the claim for contribution is not statute barred.
- [42] An amended SOC was filed on 15 October 2025, which did not properly articulate the damages claimed. Expert evidence was meant to be filed by 9 June 2026, but this date was missed. On 8 July 2026, the expert report was filed, and submissions were made about the adequacy of this. It is submitted the report does not support the plaintiffs' claim for ongoing losses and indeed is contrary to it.²
- [43] On 10 July 2026, a FASOC was filed. This pleaded a new claim under s 18 of the ACL and a claim in negligence. It is submitted these are new causes of action which are statute barred. It is submitted the causes of action do not arise substantially out of the same facts pleaded under r 376. Even if they do, it remains in the court's discretion as to whether leave is given. The interests of justice do not permit the amendment to be made.
- [44] It is further submitted that the ACL overrides r 376 and therefore the ACL action cannot be brought.

² It is accepted there a valid claim for \$141,735 for remediation costs.

- [45] It is submitted the claim should be stayed as an abuse of process because the claim itself was brought on the last day of the limitation period and the rights of the first defendant are significantly prejudiced.

Second defendant

- [46] The second defendant submits that the court should dismiss the plaintiffs' application to amend the SOC. It is submitted that the amendments include new causes of action which require the court's leave. It is submitted that the claim was commenced on 26 April 2022. The events underpinning the claim took place many years ago.
- [47] The first question is whether the effect of the amendment is to include a new cause of action. The second question is whether the new cause of action arises out of substantially the same facts as the cause of action for which relief is sought in the claim. The third issue is whether it is appropriate to give leave.³
- [48] The second defendant submits that paragraph 54 of the further amended statement of claim pleads a cause of action that the statutory guarantees under the ACL have been breached. This was never previously pleaded. If the amendment is allowed, this would require the second defendant to investigate the additional allegations. Additionally, with respect to the cause of action now alleged, the second defendant is not able to plead contributory negligence. Mitigation may be pleaded but this will require investigation and because of the passage of time the second defendant is materially disadvantaged.
- [49] With respect to paragraph 44 it is alleged that damage was foreseeable, and a proper eradication plan should have been devised. This changes the allegations and significant investigation is required.
- [50] With respect to paragraph 48 it is alleged that the plaintiffs were vulnerable. This materially disadvantages the second defendant.
- [51] It is submitted that the plaintiffs first engaged lawyers in early 2019. Having regard to the principles in *Harnett v Hynes*,⁴ it is submitted that the court's discretion should not be exercised to allow the amendments. There is no adequate justification for the proposed amendments and no adequate reason for the delay. The facts alleged will be increasingly difficult to verify.
- [52] For these reasons, the plaintiffs should be refused leave to make the amendments to paragraphs 44, 48 and 54.

Plaintiffs

- [53] As to the permanent stay application it is submitted this is an exceptional remedy and mere delay will not justify a stay. It is only where there is unjustifiable oppression, or the administration of justice is brought into disrepute that a stay should be ordered.⁵

³ *Harnett v Hynes* [2009] QSC 225 at [27].

⁴ [2009] QSC 225; [2010] QCA 65.

⁵ *Thompkins v Medical Board of Australia* [2018] SASC 72.

- [54] With respect to the allegation that any claim by the first defendant against the second defendant is statute barred, this is not entirely correct as there is a notice of contribution filed and served and there is also the regime of proportionate liability.
- [55] It is relevant that the plaintiffs are natural persons, and the first defendant is backed by an insurer.
- [56] It is relevant that in 2016, the first defendant knew or ought to have known that it had purchased the seed from the second defendant and that the seed was infected. It could have brought proceedings against the second defendant at that stage or at least within the limitation period.
- [57] There is no inordinate delay by the plaintiffs and any delay is explained.
- [58] The plaintiffs submit it is relevant that on 5 July 2024, consent directions were made. Further on 16 February 2026, consent orders were made as to disclosure and the filing of amended pleadings and evidence. These were varied by consent on 6 August 2026.
- [59] The first defendant foreshadowed the stay application in 2024 and then waited for over two years before bringing it. The conduct amounts to waiver/election.⁶ The stay application should be dismissed.
- [60] With respect to the strike out application it is submitted that under r 378 of the UCPR a party can amend as often as necessary and r 376(4) permits an amendment to include a new cause of action if it arises out of the same facts or substantially the same facts.
- [61] It is submitted that the consent orders had the effect of granting leave.⁷
- [62] In any event leave should be granted. The cause of action for negligence has always been claimed and is now fully pleaded. Likewise, a claim for breaches of s 18 of the ACL have always been in the prayer for relief.⁸

DISCUSSION

Permanent stay

- [63] There is a power in the court to stay a civil action on the grounds a proceeding is an abuse of process.
- [64] In *UBS AG v Tyne*⁹ the High Court noted that the power to permanently stay proceedings as an abuse of process of the court is enlivened where the use of the court's procedures occasions unjustifiable oppression to a party or where the use serves to bring the administration of justice into disrepute.
- [65] The categories of case in which a stay may be ordered are not closed.¹⁰

⁶ *Commonwealth v Verwayen* [1990] HCA 39; (1990) 170 CLR 394 at p 429, 496, 499.

⁷ *Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd & Ors (No 2)* [2011] QSC 42.

⁸ *Jetcrete Oz Pty Ltd v Conway & Anor* [2015] QCA 272; *Ryan v Gold Coast Hospital and Health Service* [2025] QSC 181.

⁹ [2018] HCA 45; (2018) 265 CLR 77 at [1].

¹⁰ *Rogers v The Queen* [1994] HCA 42; (1994) 181 CLR 251 at p 286.

- [66] In *Batistatos v Roads and Traffic Authority of New South Wales*¹¹ it was said that the failure to take procedural steps and other delay in the conduct of proceedings are capable of constituting an abuse of the process of the court.
- [67] That said, *Jago v The District Court of New South Wales and others*¹² is authority for the proposition that a stay should only be granted in exceptional circumstances. The onus of establishing that there has been an abuse of process is a heavy one.¹³
- [68] In cases of delay the mere possibility of prejudice is usually insufficient and the party seeking the stay must establish that if the trial were to proceed there is actual prejudice.¹⁴ The High Court decision of *R v Edwards*¹⁵ provides an example.
- [69] In *Edwards*, the Crown successfully appealed the decision of the Tasmanian Supreme Court which had granted a permanent stay of proceedings. In that matter, the two respondents had been charged with reckless operation of an aircraft contrary to the *Civil Aviation Act 1988* (Cth). The respondents were the pilot and first officer of a Qantas Boeing 737-400 aircraft on a flight to and from Launceston in 2001. The airport was unmanned at the time of the landing and subsequent take-off. It was the responsibility of the respondents to remotely activate the airport lighting via an established system. When the aircraft executed its take-off, a number of people observed the airport lighting was not activated. There was lost evidence in the form of the electronic record of the activation of the lights on a monitor of the aircraft and additionally, the information recorded on the aircraft's flight data recorder. The records of both were unavailable. It was argued that the contents of those records would have involved an independent record of the events giving rise to the charge and the loss of it was said to produce unfairness of the kind which would lead to a stay.
- [70] The High Court set aside the stay. The Court noted that the primary judge misstated the relevant test, namely whether the loss of the primary data and delay could constitute unacceptable injustice or unfairness. The test was whether it would so constitute.
- [71] The Court noted at [33] that the content of the lost data was unknown and it was not correct to characterise the loss as occasioning unacceptable prejudice to the respondents. The Court noted that the lost evidence served to neither undermine nor to support the Crown case.
- [72] More recently in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*, the High Court noted that if a fair trial can be held, the Court ordinarily must hear and determine the case.¹⁶ A stay is an order of last resort.¹⁷

¹¹ [2006] HCA 27; (2006) 226 CLR 256.

¹² [1989] HCA 46; (1989) 168 CLR 23.

¹³ *UBS AG v Tyne* [2018] HCA 45; (2018) 265 CLR 77 at [136].

¹⁴ *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 280 CLR 442 at [21]; *Thompkins v Medical Board of Australia* [2018] SASC 72 at [33].

¹⁵ [2009] HCA 20; (2009) 83 ALJR 717; (2009) 255 ALR 399 at [23]-[24] and [33]-[34].

¹⁶ *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 280 CLR 442 at [15].

¹⁷ *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 280 CLR 442 at [3].

- [73] In *GLJ* the claim was brought some 55 years after the events in question. It concerned whether civil proceedings alleging child sexual abuse by a priest in 1968 should be permanently stayed because the alleged perpetrator and other possible witnesses had died.
- [74] The appellant, GLJ, alleged that Father Anderson sexually assaulted her when she was 14. She sued the Diocese decades later. The Diocese argued that, because Father Anderson had died in 1996 and other relevant witnesses were also unavailable, a fair trial was impossible. The primary judge refused a stay, but the NSW Court of Appeal granted one.
- [75] By majority, the High Court allowed GLJ's appeal. The plurality held that a permanent stay is an exceptional remedy and should be granted only where a fair trial is impossible, or the proceedings would be so unfair or oppressive as to be an abuse of process. Although Father Anderson had died, there was documentary and circumstantial material about his history, and the Diocese was not so disadvantaged that a fair trial was impossible. The proceedings were therefore allowed to continue. The long delay and the death of the alleged perpetrator did not automatically make the proceedings an abuse of process.
- [76] In this matter, the first defendant has not established exceptional circumstances such as to warrant a permanent stay for the following reasons.
- [77] First, the action here was brought within the limitation period. The plaintiffs were entitled to issue the proceedings when they did.
- [78] Second, this is not a case where the events were unknown to the parties prior to the issue of proceedings. The material discloses that it became common knowledge that there was a defect with the BTF seed in September 2016. It may be concluded that the first defendant was aware of this and was involved in discussions about the defects and remediation that time for the following reasons:
- (a) The material discloses that there was a contractual relationship between the first defendant and Heritage Seeds in May 2010.¹⁸
 - (b) The agreement noted that Heritage was to provide seed of the best available quality.¹⁹
 - (c) Matt Foster is referred to as the signatory for the first defendant.²⁰ Mr Van de Poll says that Mr Foster is an employed agronomist for the first defendant.
 - (d) The first defendant sold the defective seed to the plaintiffs.
 - (e) The letters sent by Heritage Seeds in September 2016 note that the details of the plaintiffs had been passed on. A copy of this was sent to Tony Stewart. Tony Stewart was the person from the second defendant dealing with the first defendant. I infer it was the first defendant who passed on Mr Carlon's details to the second defendant.

¹⁸ Affidavit of Mr Van de Poll exhibit JWV1, 2 and 3.

¹⁹ Affidavit of Mr Van de Poll exhibit JWV3 page 197.

²⁰ Affidavit of Mr Van de Poll exhibit JWV 1 page 193.

- (f) There was another letter to the customer about the defects.
 - (g) Matt Foster is also referred to in the CA document as the agronomist.²¹
 - (h) There is also a CA note to speak to the “reseller.”²²
 - (i) Matt Foster appears to be a party to the relevant discussions.²³
 - (j) Mr Van de Poll does not suggest that the first defendant was unaware of the issue as at 2016.
- [79] I conclude that the supply of the defective seed was a significant issue at the time for both the first and second defendants and would have been the subject of investigation and inquiry at that time. This is not a case where the first defendant was entirely unaware of the details of the issue until after the limitation period had expired.
- [80] I also note that in its defence, the first defendant was able to make admissions and denials concerning the allegations made by the plaintiff. Equally, in the amended defence the first defendant was able to plead as to the allegations made by the plaintiff including as to the alleged statements of Mr Foster. This tells against actual prejudice.
- [81] Third, the first defendant has not led any evidence of actual prejudice because of the delay such as lost documentary evidence or lost witnesses.
- [82] Fourth, the first defendant is not prevented from claiming contribution or indemnity from the second defendant.
- [83] When two parties share a common obligation and one party discharges the obligation, that party has the right to claim equitable contribution from the other.²⁴
- [84] The relevant liability must be co-ordinate before the right to seek contribution arises,²⁵ but the search for the common obligation is not too technical.²⁶ It is possible to have an obligation arising from two different sources provided the obligations can be characterised as “of the same nature and to the same extent.”²⁷
- [85] In this case, if the first defendant is found liable for breach of contract or for breaching s 18 of the ACL, it is most likely that a right of contribution will arise as against the second defendant. The relevant obligations as between the two seem sufficiently similar so that the right of contribution arises.²⁸
- [86] In my view there is no time limitation issue regarding the right of contribution. This is because:
- (a) The cause of action for contribution does not arise until the payment for compensation is made. In *United Airlines Inc v Sercel Australia Pty Ltd*,²⁹ an

²¹ Affidavit of Mr Carlon Exhibit JAC 04 page 9.

²² Affidavit of Mr Carlon Exhibit JAC 04 page 14.

²³ Affidavit of Mr Carlon Exhibit JAC 04 page 17.

²⁴ *Burke v LFOT Pty Ltd* [2002] HCA 17; (2002) 209 CLR 282 at [14]-[15] and [38].

²⁵ *Burke v LFOT Pty Ltd* [2002] HCA 17; (2002) 209 CLR 282 at [43]-[44].

²⁶ *Mahoney v McManus* [1981] HCA 54; (1981) 180 CLR 370 at p 378.

²⁷ *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31; (2011) 244 CLR 72 at [39].

²⁸ See [15] of the first defendant’s further submissions.

²⁹ [2012] NSWCA 24; (2012) 260 FLR 37 at [76].

employee of Sercel had been injured on a United Airlines flight. Article 17 of the relevant convention provided that the right to claim damages was extinguished if an action were not brought within two years of the date the carriage stopped. Workers' compensation payments had been made by Sercel to the employee and it sought to recover those payments from United Airlines. United submitted the claim for indemnity was out of time. United's argument was rejected. *Allsop P* held that the right of indemnity did not accrue until payment of the compensation was made. It would be an unjust operation of the law if a time limit could extinguish a right to sue before it even arose. The right of indemnity was not subject to the two-year time limit. Similarly in the present case any right of contribution or indemnity does not arise until after judgment.

- (b) Further, there is no time limit on an equitable claim *per se*. Section 10 of the *Limitations of Actions Act 1974* (Qld) provides that for an action for breach of contract or in tort the limitation period is six years from the time the "cause of action arose." However, s 10 (6) provides:

"This section... (b) does not apply to a claim for specific performance of a contract or deed or for an injunction or other equitable relief, save so far as any provision thereof may be applied by the court by analogy in the same manner as the corresponding enactment repealed by this Act has heretofore applied."

- (c) Contribution is a common law and equitable right. It is based on general principles of justice.³⁰ It may be considered as "other equitable relief."
- (d) Even if that approach is not correct and by analogy a limitation period does arise with respect to contribution, a court is not obliged to enforce a time limitation where it is unjust to do so.³¹

[87] In any event, the trial judge in this matter will most likely affix proportionate liability as against the parties under the provisions of Part 2 of the *Civil Liability Act 2003* (Qld). There is an argument that the lion's share of liability (if not all) should be borne by the second defendant as it was arguably the manufacturer and original supplier of the defective seeds. A Bullock order can be made as to costs.

[88] Fifth, is the question of the delay of the first defendant in bringing this application. It foreshadowed a stay application over two years ago. It has agreed on a number of consent orders. It has significantly delayed the bringing of this application. This fact is to be weighed in the balance in deciding whether to grant a stay as against the plaintiffs.

[89] On the issue of whether the conduct of the first defendant amounts to waiver or an election, I do not accept the plaintiffs' arguments. The High Court made it clear in *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788*³² that a right can initially be waived (or not relied upon) and can then be reasserted. Waiver of a

³⁰ *Cockburn v GIO Finance Ltd (No 2)* [2001] NSWCA 177; (2001) 51 NSWLR 624 at [23].

³¹ *Motor Terms Co Pty Ltd v Liberty Insurance Ltd (in liq)* [1967] HCA 9; (1967) 116 CLR 177 at 184; *Barker v Duke Group Ltd (in liq)* [2005] SASC 81; (2005) 91 SASR 167 at [84].

³² [2022] HCA 38; (2022) 277 CLR 445 at [29].

right is rarely irrevocable. I do not consider the evidence sufficient to establish an estoppel of the kind mentioned in *Commonwealth v Verwayen*.³³

[90] Sixth, the plaintiffs have explained the reason for delay. The affidavit material shows that there were detailed negotiations with representatives of the second defendant, QBE and their lawyers. It may be accepted that the first plaintiff suffered depression by reason of the supply of the faulty seed and it may also be accepted that attempts were made to resolve the matter prior to the issuing of proceedings. Having said this, it must be accepted there has been some delay. However, since the matter was served some three and a half years ago, the matter has been case managed by a deputy registrar or resolution registrar and the parties have voluntarily agreed to consent orders as to the progress of the matter.

[91] The stay application is refused.

The strike out/leave application

Relevant principles

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

“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.
- (2) The court may give leave to make an amendment correcting the name of a party, even if the effect of the amendment is to substitute a new party, only if—
 - (a) the court considers it appropriate; and
 - (b) the court is satisfied that the mistake sought to be corrected—
 - (i) was a genuine mistake; and
 - (ii) was not misleading or likely to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (3) The court may give leave to make an amendment changing the capacity in which a party sues, whether as plaintiff or counterclaiming defendant, only if—
 - (a) the court considers it appropriate; and
 - (b) the changed capacity in which the party would then sue is one in which, at the date the proceeding was started by the party, the party might have sued.

³³ [1990] HCA 39; (1990) 170 CLR 394.

- (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.”

- [93] It is common ground that if a new action has been brought, it is outside of the limitation period.
- [94] The first issue to be considered is whether a new cause of action has been brought. In *Cooke v Gill*³⁴ it was held that a “cause of action” means every fact which is material to be proved to entitle the plaintiff to succeed.
- [95] In *Borsato v Campbell & Ors*,³⁵ McMurdo JA noted, with respect to r 376(4) that not every new fact added would be treated as raising a new cause of action for which leave is required. A fairly broad-brush comparison between the nature of the original claim and that which is sought to be amended is to be conducted.
- [96] Regard should be had to the essential elements of the claim and if the elements of the new cause of action rely on the facts pleaded.³⁶
- [97] The Court of Appeal in *Jetcrete Oz Pty Ltd v Conway & Anor*,³⁷ considered a case where the plaintiff had sued for damages he sustained in a road accident. The original claim was for negligence. He sought to add further particulars of the breach of duty including reference to statute. It was held that the primary judge was correct in concluding the amendments were more in the nature of further particulars and with respect to the new cause of action for breach of statutory duty, this arose substantially out of the same facts already pleaded.
- [98] The next issue to be considered is whether the new cause of action arises out of the same facts or substantially out of the same facts. This involves a consideration of whether the new cause of action arises out of the same “story” as the existing cause of action.³⁸
- [99] The final issue is whether it is appropriate for the court to give leave to make the amendment. In *Harnett v Hynes*,³⁹ Applegarth J noted that:
- “1. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation.

³⁴ (1873) LR 8 CP 107 at p 113; *Allonnor Pty Ltd v Doran* [1998] QCA 372 at [3].

³⁵ [2006] QSC 191 at [8].

³⁶ *Thomas v State of Queensland* [2001] QCA 336 at [16].

³⁷ [2015] QCA 272 at [21], [29], [30].

³⁸ *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd* [2024] QCA 74; (2024) 20 QR 1 at 165-166.

³⁹ [2009] QSC 225 at [27]; [2010] QCA 65.

2. The discretion is guided by the purpose of the rules of civil procedure, namely the just and expeditious resolution of the real issues in dispute at a minimum of expense.
3. There is a distinction between amendments which are necessary for the just and expeditious resolution of “the real issues in civil proceedings” and amendments which raise new claims and new issues.
4. The Court should not be seen to accede to applications made without adequate explanation or justification.
5. The existence of an explanation for the amendment is relevant to the Court's discretion, and “[i]nvariably the exercise of that discretion will require an explanation to be given where there is a delay in applying for amendment.”
6. The objective of the Court is to do justice according to law, and, subject to the need to sanction a party for breach of its undertaking to the Court and to the other parties to proceed in an expeditious way, a party is not to be punished for delay in applying for amendment.
7. Parties should have a proper opportunity to plead their case, but justice does not permit them to raise any arguable case at any point in the proceedings upon payment of costs.
8. The fact that the amendment will involve the waste of some costs and some degree of delay is not a sufficient reason to refuse leave to amend.
9. Justice requires consideration of the prejudice caused to other parties, other litigants and the Court if the amendment is allowed. This includes the strain the litigation imposes on litigants and witnesses.
10. The point the litigation has reached relative to a trial when the application to amend is made is relevant, particularly where, if allowed, the amendment will lead to a trial being adjourned, with adverse consequences on other litigants awaiting trial and the waste of public resources.
11. Even when an amendment does not lead to the adjournment of a trial or the vacation of fixed trial dates, a party that has had sufficient opportunity to plead their case may be denied leave to amend for the sake of doing justice to the other parties and to achieve the objective of the just and expeditious resolution of the real issues in dispute at a minimum of expense.
12. The applicant must satisfy the specific requirements of rules, such as UCPR 376(4) where it seeks to introduce a new cause of action after the expiry of a relevant limitation period.”

- [100] The test is whether it is in the interests of justice to allow the amendments.⁴⁰ Prejudice is another factor to be considered.⁴¹

The first defendant

- [101] As indicated previously, the first defendant submits that the effect of the amendment to the statement of claim is to add two causes of action out of time. The plaintiffs, on the other hand, submit that r 376(4) applies as any 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.
- [102] It is further argued by the plaintiffs that the first defendant has waived its rights and/or elected not to proceed with its objection to the amendments. I have dealt with this argument earlier and do not accept it.
- [103] Another issue that was raised by the plaintiffs is that the procedural consent orders had the effect of granting the requisite leave under r 376(4).
- [104] In *Body Corporate for Sun City Resort v Sunland Constructions Pty Ltd (No 2)*,⁴² the plaintiff applied for an amendment of its claim. This was opposed. It is true that Applegarth J made general comments about the effect of consent orders where a matter is on a supervised case list, but his Honour noted it depends on the circumstances of the case.
- [105] In this matter, the nature of the amendments sought to be made do not appear to have been foreshadowed to the defendants. It is hard to see that in the circumstances there was an agreement for these particular amendments to be made. Additionally, as the second defendant submits there is doubt that the Registrar can make orders pursuant to r 376. Rule 452(2)(b) permits the Registrar to make orders as prescribed by a practice direction. Practice Direction No 11 of 2023 does not invest a power in the Registrar to make a r 376 order. I therefore do not accept the plaintiffs' submissions as to the effect of the consent orders.
- [106] I now turn to the claims made as against the first defendant.
- [107] In the original claim, damages were claimed for breaches of the ACL; the SGA; breach of contract and for negligence.
- [108] In the prayer for relief, damages were claimed against the defendants pursuant to ss 236 and 259 of the ACL by reason of the contravention of ss 18, 54 and 55 ACL; damages for breaches of ss 16 and 17 of the SGA; damages for breach of contract and damages for negligence.
- [109] The two claims sought to be raised against the first defendant are negligence and breaches of s 18 of the ACL.
- [110] I am satisfied the negligence claim is a new cause of action. In the SOC there were no material facts pleaded giving rise to the negligence claim. The new paragraph 26 seeks to plead insofar as negligence is concerned:

⁴⁰ *Tycho Pty Ltd v Trustworthy Nominees Pty Ltd* [2026] QSC 89 at [9].

⁴¹ *Harnett v Hynes* [2010] QCA 65 at [40].

⁴² [2011] QSC 42 at [37] and [41]-[43].

- (a) Knowledge or constructive knowledge.
 - (b) Recklessness.
 - (c) A failure to conduct testing.
 - (d) Risk of harm.
 - (e) Foreseeability.
 - (f) Vulnerability.
 - (g) Breach of the duty of care.
- [111] I am satisfied a new cause of action has been pleaded. Therefore, leave is necessary under r 376(4) to make the amendment.
- [112] The next question is whether the negligence action arises out of the same story. I do not consider it does.
- [113] The FASOC⁴³ alleges that at the time the BTF was sold to the first plaintiff, the first defendant knew or ought to have known that it was necessary to scientifically test the BTF in order to determine whether it did contain an endophyte or other contaminant. It is alleged the first defendant was reckless in selling the BTF without warning it may be contaminated. It is further alleged that the first defendant was reckless in that it did not know one way or the other whether the BTF produced or sold was free of endophyte. It is alleged there was a risk of harm to the plaintiff which was foreseeable, and the first defendant owed to the plaintiffs a duty to take reasonable precautions to avoid a risk of harm to the plaintiffs through the sale of the BTF. It is alleged that the duty was breached as the first defendant failed to implement a proper process for the production of the BTF or cause tests to be undertaken of it and as a result of the breach of the duty of care, the plaintiffs suffered the loss and damage.
- [114] None of these details are pleaded in the SOC. The proposed amendment is a completely new story of what the first defendant did. I do not consider it arises out of the same facts or substantially out of the same facts pleaded in the SOC.
- [115] I disallow this amendment.
- [116] I consider the claim for breaches of s 18 of the ACL to be different. Taking a broadbrush approach, I do not consider this is a new action for the following reasons.
- [117] First, in the original claim, there was a claim for damages for breaches of the ACL.
- [118] Second, in the prayer for relief there was a claim against the first defendant for damages pursuant to s 236 of the ACL by reason of the contravention of s 18 of the ACL.
- [119] Third, one must consider what was pleaded in the SOC. It was alleged:
- (a) The first defendant was a company and carried on business in trade and commerce as defined in s 2 of the ACL.⁴⁴

⁴³ Paragraphs 27-39 of the FASOC.

⁴⁴ Paragraph 2 of the SOC.

- (b) That between April and June 2016 the plaintiffs purchased the BTF seed from the first defendant.⁴⁵
- (c) That in the weeks leading up to the purchase the first plaintiff spoke with Matt Foster, an agent of the first defendant, who made representations as to the quality of the product.⁴⁶
- (d) That the first plaintiff made known, expressly or by implication, that the purpose for which the BTF was being acquired was for use as improved pasture for grazing and the first defendant was aware of this purpose.⁴⁷
- (e) The first plaintiff planted the BTF on the affected paddocks from on or around 30 April 2016.⁴⁸
- (f) The first plaintiff was advised the BTF contained an endophyte which can be toxic to livestock.⁴⁹
- (g) That the first defendant guaranteed the goods were of acceptable quality and reasonably for the purpose.⁵⁰
- (h) That the first plaintiff suffered losses.⁵¹
- (i) Damages for a contravention of s 18 of the ACL were claimed.⁵²

[120] The FASOC particularises the claim already brought by:

- (a) Clarifying the effect of the already pleaded representations.⁵³
- (b) Pleading there was reliance.⁵⁴
- (c) Clarifying that the statements made by Mr Foster were representations, which was obvious.⁵⁵
- (d) Pleading that the representations were false or misleading or likely to mislead or deceive contrary to s 18 of the ACL⁵⁶ and as a result the loss and damage was suffered.⁵⁷

[121] I form the view that the claim already existed, and these were particulars of it (which could have been sought by the first defendant if it had wished).

[122] I would allow the amendment on this ground.

[123] In any event, even if I was wrong as to this conclusion, I would give leave under r 376(4) for the cause of action to be added for the following reasons.

⁴⁵ Paragraph 6 of the SOC.

⁴⁶ Paragraph 7 of the SOC.

⁴⁷ Paragraph 9 of the SOC.

⁴⁸ Paragraph 10 of the SOC.

⁴⁹ Paragraphs 11 and 12 of the SOC.

⁵⁰ Paragraph 22 of the SOC.

⁵¹ Paragraphs 37 and 38 of the SOC.

⁵² Prayer for relief of the SOC.

⁵³ Paragraph 7 of the FASOC.

⁵⁴ Paragraph 9 (c) and 26 (b) of the FASOC.

⁵⁵ Paragraph 26 (a) of the FASOC.

⁵⁶ Paragraph 26 (c) of the FASOC.

⁵⁷ Paragraph 26 (d) of the FASOC.

[124] First, I consider the amendments arise from the already pleaded “story.”

[125] Second, I did not accept the first defendant’s arguments that the claim is time barred. Rule 376 operates to allow a cause of action to be joined after the limitation period has expired. It is consistent with s 16 of the *Civil Proceedings Act 2011* (Qld). This section provides:

“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.”

[126] It was argued by the first defendant that r 376 is inconsistent with s 236 of the ACL and therefore the Commonwealth law should prevail. Section 236 of the ACL provides:

“236 Actions for damages

- (1) If:
 - (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
 - (b) the conduct contravened a provision of Chapter 2 or 3; the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.”

[127] In this case it must be accepted that the action accrued in September 2016.

- [128] I am of the view that state law conforms with the commonwealth law by reason of s 79 of the *Judiciary Act 1903* (Cth). Section 79 provides:

“State or Territory laws to govern where applicable

- (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

...”

- [129] In *Ramsay v McElroy*⁵⁸ the Court of Appeal was concerned with a case where the plaintiff entered into a contract to purchase a restaurant in 1996. The business was unsuccessful. The trustee in bankruptcy sued the defendants for damages for deceit and breaches of the *Trade Practices Act 1974* (Cth) (TPA). An issue was raised as to whether the TPA claim was out of time. White J held that r 376 is procedural and therefore is not irreconcilable with the time limitation in the commonwealth law.
- [130] I am bound by this decision. The ACL does not provide for the matter of the amendment or proceedings. The state procedural law applies.
- [131] The first defendant relied on an ACT Supreme Court case of *Owners – Units Plan 4321 v Victory Homes Pty Ltd.*⁵⁹ In this case, Mossop J considered a situation where an owners corporation sued a builder for alleged defective work. A claim was brought under the ACL which the defendants sought to strike out as it was out of time. His Honour held that the court had no power to extend time under the *Limitation Act 1995* (ACT). His Honour held the section could not operate concurrently with the ACL.
- [132] There are two difficulties with relying on this decision. The first is that his Honour did not refer to *Ramsay v McElroy* and second, his Honour did not refer to s 79 of the *Judiciary Act*. I decline to follow it.
- [133] The first defendant also relied on *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd.*⁶⁰ In that case the applicants had sued with respect to representations as to a proposed shopping centre. After the three-year limitation period the applicants brought the action. Pincus J dismissed the action as it was out of time. This case has no direct relevance to the present matter as the application of r 376 was not an issue.
- [134] The final point to be considered is whether in the exercise of the discretion the court should permit the amendment. I consider it should be allowed for the following reasons.
- [135] First, as I have noted the claim was always specified in the claim and the prayer for relief. Particulars could have been sought.

⁵⁸ [2003] QCA 208; [2004] 1 Qd R 667 at [26]-[34].

⁵⁹ [2024] ACTSC 337 at [44].

⁶⁰ [1988] FCA 88; (1988) ATPR 40-853.

- [136] Second, the delay has been explained. Creevey & Russell are no longer acting for the plaintiffs. Wonderley & Hall now act for the plaintiffs. As Mr Jeffery submitted the amendments have been made to regularise the pleading.
- [137] Third, although I have found the consent orders do not prevent objection to the amendments, the fact is the parties contemplated that amendments would be made.
- [138] Fourth, for the reasons I have given concerning the stay application, no actual prejudice has been demonstrated. The fact is the first defendant was aware of the defective seed which it supplied in 2016 and was able to plead to the allegations made in the SOC in particular as to the statements made by Mr Foster. Issues on reliance were already effectively pleaded in the SOC and can be the subject of cross examination. As to whether the statements were false or misleading or likely to mislead or deceive, was already a matter of conclusion from the facts already pleaded. Also, the proportionate liability provisions of the *Civil Liability Act* apply here.
- [139] I allow the s 18 ACL claim to be brought against the first defendant under r 376(4).

Second defendant

- [140] With respect to the second defendant there are two amendments sought to be made, the first being amendments to the existing negligence claim and the second being the addition of claims under ss 271 and 272 of the ACL.
- [141] I first turn to the negligence amendments. In my view, the amendments to paragraphs 44 to 48 do not amount to the addition of a new cause of action. They are merely amendments to the particulars of the negligence action already pleaded.
- [142] In the SOC, a negligence action was clearly pleaded. It was alleged:
- (a) That the BTF was manufactured or produced by the second defendant and commercialised by the second defendant on the basis that it was endophyte free.⁶¹
 - (b) That at the time when the BTF was sold to the first plaintiff, the second defendant knew or ought to have known that the BTF would be sold to consumers, and it was unlikely to be further tested.⁶²
 - (c) Any contamination would cause loss and damage; it was necessary to scientifically test it, and endophytes can be harmful to livestock.⁶³
 - (d) That the second defendant was reckless in producing and selling it or making it available for distribution or sale without warning that the BTF may be contaminated with an endophyte.⁶⁴ The second defendant was reckless in the circumstances.⁶⁵

⁶¹ Paragraph 8 of the SOC.
⁶² Paragraph 26 of the SOC.
⁶³ Paragraph 26 of the SOC.
⁶⁴ Paragraph 27 of the SOC.
⁶⁵ Paragraph 28 of the SOC.

- (e) There was a risk of harm to the plaintiffs that if the BTF was not scientifically tested that it might contain an endophyte and if it did, it would be difficult and expensive to eradicate.⁶⁶
- (f) It was foreseeable by the second defendant that it would be difficult or impossible to eradicate it and the land on which it was grown could not be used to its full commercial potential.⁶⁷
- (g) In the circumstances, the second defendant owed a duty of care to the plaintiff to avoid a risk of harm.⁶⁸
- (h) The second defendant failed to take precautions with respect to the risk of harm and breached the duty by failing to implement a proper process for the production of BTF and failing to undertake or cause to be undertaken any scientific testing of it in order to determine whether it contained an endophyte.⁶⁹
- (i) The second defendant breached the duty of care.⁷⁰
- (j) As a result, loss and damage was suffered.⁷¹

[143] The proposed amendments include:

- (a) An amendment as to the foreseeability issue (paragraph 44(b)).
- (b) An allegation the plaintiffs were likely to suffer loss by reason of the breach of duty (paragraph 46).
- (c) An allegation that the second defendant was in a position to control the production of BTF (paragraph 47).
- (d) An allegation that the plaintiff's interests were vulnerable (paragraph 48).

[144] First, by reason of the consent orders these are the sorts of amendments which the parties contemplated would be made. They do not bring a new cause of action.

[145] Second, as to paragraph 44, even though it does change the issue of "foreseeability" to an extent, I consider this is limited. The issue of foreseeability will be an inference based on the facts to be proved. It is hard to see the amendment would require much additional evidence than was already required. Additionally, on the material I have seen, the agents of the second defendant were heavily involved in the remediation plans from 2016. The issue is not a surprise. Also, no specific prejudice is alleged in the affidavit filed by the second defendant.

[146] Third, as to paragraph 48, the issue of vulnerability will involve an inference from proved facts. This will be the subject of evidence and can be explored in cross-examination. Also, no specific prejudice is alleged in the affidavit filed by the second defendant.

⁶⁶ Paragraph 29 of the SOC.

⁶⁷ Paragraph 30 of the SOC.

⁶⁸ Paragraph 31 of the SOC.

⁶⁹ Paragraph 32 of the SOC.

⁷⁰ Paragraph 33 of the SOC.

⁷¹ Paragraph 35 of the SOC.

[147] I give leave for these amendments to be made.

[148] I now turn to paragraph 54 of the FASOC. This paragraph seeks to add a cause of action pursuant to ss 271 and 272 of the ACL. These sections provide as follows:

“271 Action for damages against manufacturers of goods

(1) If:

- (a) the guarantee under section 54 applies to a supply of goods to a consumer; and
- (b) the guarantee is not complied with; an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.

(2) Subsection (1) does not apply if the guarantee under section 54 is not complied with only because of:

- (a) an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer; or
- (b) a cause independent of human control that occurred after the goods left the control of the manufacturer; or
- (c) the fact that the price charged by the supplier was higher than the manufacturer’s recommended retail price, or the average retail price, for the goods.

(3) If:

- (a) a person supplies, in trade or commerce, goods by description to a consumer; and
- (b) the description was applied to the goods by or on behalf of the manufacturer of the goods, or with express or implied consent of the manufacturer; and
- (c) the guarantee under section 56 applies to the supply and it is not complied with; an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.

(4) Subsection (3) does not apply if the guarantee under section 56 is not complied with only because of:

- (a) an act, default or omission of any person other than the manufacturer or an employee or agent of the manufacturer; or
- (b) a cause independent of human control that occurred after the goods left the control of the manufacturer.

- (5) If:
 - (a) the guarantee under section 58 or 59(1) applies to a supply of goods to a consumer; and
 - (b) the guarantee is not complied with; an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.
- (6) If an affected person in relation to goods has, in accordance with an express warranty given or made by the manufacturer of the goods, required the manufacturer to remedy a failure to comply with a guarantee referred to in subsection (1), (3) or (5):
 - (a) by repairing the goods; or
 - (b) by replacing the goods with goods of an identical type; then, despite that subsection, the affected person is not entitled to commence an action under that subsection to recover damages of a kind referred to in section 272(1)(a) unless the manufacturer has refused or failed to remedy the failure, or has failed to remedy the failure within a reasonable time.
- (7) The affected person in relation to the goods may commence an action under this section whether or not the goods are in their original packaging.”

[149] And s 272 of the ACL provides:

“272 Damages that may be recovered by action against manufacturers of goods

- (1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:
 - (a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates, below whichever of the following prices is lower:
 - (i) the price paid or payable by the consumer for the goods;
 - (ii) the average retail price of the goods at the time of supply; and
 - (b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.

(2) Without limiting subsection (1)(b), the cost of inspecting and returning the goods to the manufacturer is taken to be a reasonably foreseeable loss suffered by the affected person as a result of the failure to comply with the guarantee.

(3) Subsection (1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods.”

[150] When I consider the SOC and paragraph 54 of the FASOC I conclude that the plaintiffs are seeking to bring a new cause of action against the second defendant. However, the next point is whether the cause of action arises out of the same story. I consider it does.

[151] The SOC pleaded the following:

- (a) That the second defendant was engaged in the commercial production of seed for sale and distribution.⁷²
- (b) That the second defendant produced or caused to be produced the BTF.⁷³
- (c) That the second defendant sold and distributed the BTF in New South Wales through authorised merchants.⁷⁴
- (d) That between April and June 2016 the plaintiffs purchased the BTF seed from the first defendant.⁷⁵
- (e) That in the weeks leading up to the purchase the first plaintiff spoke with Matt Foster, an agent of the first defendant, who made representations as to the quality of the product.⁷⁶
- (f) That the BTF was manufactured or produced by the second defendant.⁷⁷
- (g) The first plaintiff planted the BTF on the affected paddocks from on or around 30 April 2016.⁷⁸
- (h) The first plaintiff was advised by the second defendant the BTF contained an endophyte which can be toxic to livestock.⁷⁹
- (i) That by reason of ss 54, 55 and 56 of the ACL, the first defendant guaranteed the goods were of acceptable quality and reasonably for the purpose.⁸⁰
- (j) The BTF was not of an acceptable quality contrary to s 54 of the ACL, it was not fit for its intended purpose contrary to s 55 of the ACL and it did not correspond with its description contrary to s 56 of the ACL.⁸¹

⁷² Paragraph 3(d) of the SOC.

⁷³ Paragraph 3(e) of the SOC.

⁷⁴ Paragraph 3(g) of the SOC.

⁷⁵ Paragraph 6 of the SOC.

⁷⁶ Paragraph 7 of the SOC.

⁷⁷ Paragraph 8 of the SOC.

⁷⁸ Paragraph 10 of the SOC.

⁷⁹ Paragraphs 11, 12 and 13 of the SOC.

⁸⁰ Paragraph 22 of the SOC

⁸¹ Paragraph 25 of the SOC.

- (k) That at the time when the BTF was sold to the first plaintiff, the second defendant knew or ought to have known that BTF would be sold to consumers, and it was unlikely to be further tested.⁸²
- (l) Any contamination would cause loss and damage; it was necessary to scientifically test it, and endophytes can be harmful to livestock.⁸³
- (m) That the second defendant was reckless in producing and selling it or making it available for distribution or sale without warning that BTF may be contaminated with an endophyte.⁸⁴ The second defendant was reckless in the circumstances.⁸⁵
- (n) There was a risk of harm to the plaintiffs that if the BTF was not scientifically tested that it might contain an endophyte and if it did, it would be difficult and expensive to eradicate.⁸⁶
- (o) It was foreseeable by the second defendant that it would be difficult or impossible to eradicate it and the land on which it was grown could not be used to its full commercial potential.⁸⁷
- (p) The BTF had a safety defect as defined in ss 9 and 141 of the ACL.⁸⁸
- (q) That the first plaintiff suffered losses.⁸⁹
- (r) Damages pursuant to ss 236 and 259 for contraventions of ss 54 to 56 of the ACL were claimed.⁹⁰

[152] In paragraph 54 of the FASOC the plaintiffs plead, “Alternatively [to the negligence action] in the premises of the matters pleaded in paragraphs 6 to 16:

- (a) the plaintiffs are affected persons within the meaning of s 271 of the ACL;
- (b) the guarantees pleaded in paragraph 22 were not complied with;
- (c) pursuant to s 271 of the ACL, the plaintiffs may, by action against the second defendant, recover damages from the second defendant; and
- (d) pursuant to s 272 of the ACL the plaintiffs are entitled to recover damages from the second defendant for losses pleaded in paragraphs 55 and 56 herein.”

[153] I consider the amendments should be allowed for the following reasons.

[154] First, the amendments arise out of the same story. It was clear from the SOC that it was alleged that the second defendant produced and supplied to the first defendant BTF seed which contained an endophyte. It was clear that it was alleged the ACL guarantees in ss 54, 55 and 56 of the ACL applied to the sale. The liability under

⁸² Paragraph 26 of the SOC.

⁸³ Paragraph 26 of the SOC.

⁸⁴ Paragraph 27 of the SOC.

⁸⁵ Paragraph 28 of the SOC.

⁸⁶ Paragraph 29 of the SOC.

⁸⁷ Paragraph 30 of the SOC.

⁸⁸ Paragraph 36 of the SOC.

⁸⁹ Paragraphs 37 and 38 of the SOC.

⁹⁰ Prayer for relief of the SOC.

ss 271 and 272 of the ACL arises from that story. They are a legal conclusion from it.

- [155] Second, contrary to the submissions made by the second defendant it was clear in the SOC that it was alleged that the second defendant was a producer of the BTF.⁹¹ The allegation it was the manufacturer would come as no surprise.
- [156] Third, the delay has been explained. Creevey and Russell are no longer acting for the plaintiffs. Wonderley & Hall now act for the plaintiffs. As Mr Jeffery submitted the amendments have been made to regularise the pleading.
- [157] Fourth, although I have found the consent orders do not prevent objection to the amendments, the fact is the parties contemplated that amendments would be made.
- [158] Fifth, no actual prejudice has been demonstrated. The fact is the second defendant was aware of the defective seed, which it supplied in 2016. On the evidence available, the second defendant through its insurer was involved with remediation of the land from an early stage after becoming aware of the defect in the BTF. This is not a case where the action would have come as some surprise in 2023. Inquiries and investigations would have occurred in 2016. I do not consider material prejudice has been established.
- [159] Finally, I do not accept the second defendant's submissions as to the inability to raise contributory negligence as a defence to the ACL claim. The fact is they can raise mitigation of damage as an issue. From the material attached to the plaintiffs' affidavit the second defendant's agents were heavily involved with the attempts at remediation. It is hard to see there is prejudice raised. The fact is the plaintiffs cannot claim for a loss which they could have reasonably mitigated.⁹² Similar investigations were required for the defence for the negligence action.
- [160] I permit the amendments as against the second defendant to be made.

ORDERS

1. The first defendant's application for a stay of the proceedings is dismissed.
2. Paragraphs 27 to 39 of the further amended statement of claim are struck out.
3. I dismiss the first defendant's application to strike out paragraph 26 of the further amended statement of claim.
4. I dismiss the second defendant's application to strike out paragraphs 3(d), 44 and 48 of the further amended statement of claim.
5. I dismiss the second defendant's application to strike out paragraph 54 of the further amended statement of claim.
6. Pursuant to UCPR r 376(4) I grant leave to the plaintiffs to bring a claim under ss 271 and 272 of the *Australian Consumer Law* against the second defendant.
7. I will hear the parties on any further directions to be given.

⁹¹ See paragraphs 27, 28, 32 and 33 of the SOC.

⁹² *Ezy-Fit Engineering Group Pty Limited v Microm Nominees Pty Limited* [2024] FCA 441 at [978].

8. I will hear the parties on the question of costs.