

1 HIS HONOUR: Mr Howells where were we up to?

2 MR HOWELLS: Your Honour could I take Your Honour to p.109?

3 HIS HONOUR: Yes. We're still on Lucaston here are we?

4 MR HOWELLS: Yes Your Honour and the next set of torts that are

5 alleged after the interference with trade and business

6 and conspiracy are trespass and there are a series of

7 them, Your Honour, I don't need to take Your Honour to

8 them in detail. They, like many of the allegations that

9 are made have not been contested in the strike-out

10 applications. They are listed from 144 through to 159.

11 Then there are claims for in 160 - 159 is on p.112.

12 HIS HONOUR: Yes.

13 MR HOWELLS: In Paragraph 160, claims for and particulars in

14 relation to aggravated and exemplary damages arising from

15 the trespasses.

16 HIS HONOUR: Yes.

17 MR HOWELLS: There are particulars given and in 161.

18 HIS HONOUR: Yes. One of the problems that I find in reading

19 this document, Mr Howells, is if you take Paragraph 3 on

20 p.113, why would it not be more convenient to delete

21 those numbers and put in the numbers of the actual

22 defendants?

23 MR HOWELLS: Your Honour, we could do that Your Honour there

24 are a - - -

25 HIS HONOUR: It just seems as - a lot of the problem I've had

26 with the document has been this cross referencing which

27 all works if you follow it through, but it's a very

28 arduous task, and I wonder whether, particularly, I mean,

29 taking that case, "The defendants referred to in" da dum,

30 da dum, da dum, "Planned the acts". Why couldn't it

31 simply by, the third, fourth, seventh, eleventh,

1 twenty-oneth whatever defendants planned the acts?

2 MR HOWELLS: That could have been done, yes Your Honour.

3 HIS HONOUR: Well I'll leave that, I mean - we'll leave that
4 for the moment, yes, go on.

5 MR HOWELLS: Then in Paragraph 161, the claims for aggravated
6 and exemplary damages are set out.

7 HIS HONOUR: Yes.

8 MR HOWELLS: Then starting on p.115, conversion is alleged in
9 relation to various items of property from Paragraph 161
10 through to 165.

11 HIS HONOUR: Yes.

12 MR HOWELLS: Then in Paragraph 166, Your Honour, we've alleged
13 agency, and true it is, Your Honour, we could have left
14 the claim, the assertion of agency, just in the form that
15 it is in the paragraph and not attached the particulars
16 and provided those particulars by way of a response to a
17 request and we might there, and if that was the case in
18 relation to a number of the paragraphs, we might have had
19 a shorter pleading and then some hundreds, if not
20 thousands of pages of particulars. But we would at some
21 stage have to identify, Your Honour, that there are a
22 significant number of people, and we've certainly not
23 mentioned anything like the majority of them, who've
24 acted as agents for the Wilderness Society in these
25 various instances of conduct. What we have included is
26 the main ones. The particulars are divided up into an
27 assertion as to who are the principle agents, the main
28 agents and then in Paragraph B - - -

29 HIS HONOUR: Yes, just before you leave A, you've got, first to
30 fifth, seventh to eleventh, fourteenth to sixteenth, a
31 whole lot of individuals who are not named - - -

1 MR HOWELLS: Yes Your Honour - - -
2 HIS HONOUR: Not sued.
3 MR HOWELLS: Not - exactly Your Honour.
4 HIS HONOUR: The Wilderness Society South Australia, a number
5 of other wilderness societies.
6 MR HOWELLS: Yes.
7 HIS HONOUR: Then more individuals and then - - -
8 MR HOWELLS: Representatives of the groups - - -
9 HIS HONOUR: - - -representatives of the groups, who are the
10 groups in 10K.
11 MR HOWELLS: In 10K, Your Honour, those groups, they're listed
12 on p.10, sorry p.11.
13 HIS HONOUR: Yes, "The representatives of the groups identified
14 in Paragraph 10K, the other protestors referred to in
15 Paragraph 47 of the statement of claim".
16 MR HOWELLS: The other protestors in particular Your Honour
17 include those in the middle of p.33.
18 HIS HONOUR: Yes.
19 MR HOWELLS: Where specific names are mentioned.
20 HIS HONOUR: What you're really saying is that the agents were
21 all of those people set out in A?
22 MR HOWELLS: Yes Your Honour.
23 HIS HONOUR: And the other protestors referred to in Paragraph
24 47 they are included because they are alleged to have
25 been at meetings between January and June 2003 and August
26 2003 and March 2004.
27 MR HOWELLS: Indeed Your Honour or that they may have been - or
28 where they are referred to in specific paragraphs about
29 for example the positioning of a vehicle and it's said
30 that a defendant and other protestors did certain things.
31 HIS HONOUR: Again I make a comment about the cross referencing

1 which varies in its intensity in various places. Some of
2 it's harmless, some of it's annoying, some of it's
3 labyrinthine, but anyway we will deal with that I think
4 ultimately. What's Paragraph B?

5 MR HOWELLS: B deals with branches or organisations that are
6 said to be branches or are styled as branches of the
7 Wilderness Society which act as the local campaign
8 centres for the Wilderness Society and coordinate and
9 direct campaign activities partly through committees, the
10 committees that are referred to in Paragraph 10H.

11 HIS HONOUR: The word, "Committees" appears in line 2.

12 MR HOWELLS: Yes Your Honour.

13 HIS HONOUR: Yes.

14 MR HOWELLS: Then C we've asserted that the agency of natural
15 persons arises either from employment or for from another
16 relationship and we've indicated specifically which
17 persons were employees of the Wilderness Society and
18 asserted that those persons did act within the scope of
19 their employment. Then in D we've identified that the
20 other natural persons who are referred in A were engaged
21 by and acted as volunteers for the Wilderness Society or
22 one of its branches. We could have provided particulars
23 here Your Honour about how the volunteer system works but
24 of course that can also be done by way of a response to
25 particulars and in order not to include a whole lot of
26 other additional material, what we've asserted is that
27 there is a volunteer system of people who agree to
28 perform actions on behalf of the Wilderness Society and
29 its branches in the manner agreed between the volunteer
30 and the wis. There are quite specific agreements that
31 apply to volunteers Your Honour.

1 They perform acts like being involved in tree sits
2 and placing impediments on roads, being a buddy for a
3 person who is doing an act of that kind. Doing what they
4 call police liaison, being a person who is a scout, being
5 a person who stands as sentry as it were to warn those
6 who are engaged in the protest about the arrival of
7 police and so on and so forth. People who volunteer to
8 raise money to do publicity provide that kind of activity
9 and they operate as volunteers and we say in relevant
10 respects that they are agents for the Wilderness Society
11 and where there is wrongful conduct Wilderness Society is
12 liable for it.

13 HIS HONOUR: Ultimately you're going to have to give
14 particulars of how their agencies arise.

15 MR HOWELLS: Indeed Your Honour, and we've gone a fair way
16 here, but one thing we could have done would be simply to
17 have asserted the agency and then dealt with it in
18 particulars, and like a lot of these matters that are in
19 the pleading, that could have been done and it would
20 simply have meant a shorter pleading and then extensive
21 particulars. There it is Your Honour, in E we've
22 referred to - - -

23 HIS HONOUR: Natural persons referred to in A.

24 MR HOWELLS: Yes Your Honour.

25 MR HOWELLS: We said that in respect of all of those - - -

26 HIS HONOUR: Why are they being mentioned again in E?

27 MR HOWELLS: In E, because Your Honour, what they did was among
28 the - in addition to acts that they did themselves on
29 behalf to the Wilderness Society, they also all of them,
30 whether employees or volunteers did acts which either
31 contributed to or completed acts which had been directed

1 or coordinated or recommended by the Wilderness Society
2 through it's committees and through its organisers.

3 HIS HONOUR: I'm not sure I follow that. In Paragraph A, a
4 whole lot of people are set out and they are said that
5 they did the acts as agents for the Wilderness Society?

6 MR HOWELLS: Yes Your Honour.

7 HIS HONOUR: The acts alleged, mean presumably the Lucaston
8 action?

9 MR HOWELLS: Yes, or the - - -

10 HIS HONOUR: The Lucaston action acts?

11 MR HOWELLS: The elements of it, yes Your Honour.

12 HIS HONOUR: What's added by E?

13 MR HOWELLS: The fact that those persons contributed to or
14 perfected those courses of action within the scope of
15 employment or agency and conformably with the purposes,
16 objectives and techniques accepted by the Wilderness
17 Society and it's branches.

18 HIS HONOUR: How does that advance what's said in A? It says -
19 in A it says, "Did the acts as agents for the Wilderness
20 Society", isn't that enough?

21 MR HOWELLS: Yes, Your Honour, it's giving particularity of the
22 way in which particular directives are carried out. It
23 might be said to be subsumed within A and C Your Honour,
24 and if that's said, well then we accept that.

25 HIS HONOUR: All right. F?

26 MR HOWELLS: In F there is reference to the training, this is
27 specifically dealing with a substantial aspect of what is
28 done and that is to provide training of those who are
29 encouraged to be involved in activities. Then Your
30 Honour, to say in relation to those who acted as agents,
31 whether they had a special authority or not and how they

1 got that authority. Because extensive requests for
2 particulars were made of this, and criticism was made of
3 the pleading for not specifying how it is that the
4 organisers, particularly the organisers and employees got
5 special authority.

6 The specification of that authority is set out at
7 the top of p.119, if one goes down to the second line at
8 the top of 119, "The natural persons referred to in
9 Paragraph C assume positions of leadership and
10 responsibility. Some of the persons referred to in
11 Paragraph C held positions of authority within the
12 Wilderness Society or its branches" then we've set out in
13 relation to the first, the second, the third, the fifth,
14 the eighth and then a series of other people, and what it
15 was that they had by way of special authority that could
16 support a conclusion that when they did something and did
17 it on the basis of what's said to be an authority, that
18 there was a sound basis for it. And that would support
19 the assertion that the Wilderness Society is liable for
20 it.

21 HIS HONOUR: Yes. Moorecroft's referencing at the bottom of F

22 MR HOWELLS: Yes Your Honour.

23 HIS HONOUR: I can see why - I mean I can follow what the
24 pleading is seeking to do, but I still find myself
25 confused by the verbiage which is used and the lack of
26 setting out in such a way as to make it immediately
27 apparent what's being directed. It might be considered
28 nit picking, but if the particulars were in some way
29 paragraphed dealing with separate, I mean apart from the
30 (a), (b) and (c), so that each of them, the eye was not
31 tending to glaze over by seeing so much in the way it is,

1 but anyway, that's just a form matter, which can be dealt
2 with if we need to. Yes, go on.

3 MR HOWELLS: In 166A, we've dealt with the agency in relation
4 to the seventeenth defendant. Which is the Huon Valley
5 Environment Centre, and you'll see at the end of that
6 opening paragraph, "That those persons did the acts as
7 agents for the Huon Valley Environment Centre which is
8 the seventeenth defendant".

9 HIS HONOUR: Yes. Was there any reason why the two or three,
10 it looks like, principal defendants weren't put first? I
11 mean the Wilderness Society is clearly a principal
12 defendant, and this body is a similarly or slightly
13 subsidiary one and perhaps the Doctors against Forests,
14 is there any - again it's a matter of form, but it - - -

15 MR HOWELLS: You mean in the order in which we've listed the
16 defendants?

17 HIS HONOUR: Yes, it might have made it easier for us - - -

18 MR HOWELLS: It would have been - to stand, because you'd have
19 the three corporations as it were first, and then list
20 people, Your Honour. Yes, look that's - yes we could do
21 that Your Honour and we thought about alphabetical order
22 by reference to surname Your Honour and various things of
23 that kind, but it's always tricky Your Honour. We also
24 tried to group them by reference to people, for example,
25 if one looks at the list, the generals of the Wilderness
26 Society are listed first, as number 1 to fifth defendant
27 and then the Wilderness Society and thereafter, the
28 generals of the Huon Valley Environment Centre - - -

29 HIS HONOUR: Well, it may have a different logic about it, I
30 didn't appreciate that logic I was - - -

31 MR HOWELLS: Your Honour we could change it around - - -

1 HIS HONOUR: No I'm not going to tell you how to - my concern
2 is only that, where form - form is of little importance
3 except where it has an effect on comprehension and I
4 think some of this in some instances form intrudes on
5 comprehension, but for the moment, I think if you keep
6 explaining it, well at the end - - -

7 MR HOWELLS: Your Honour in 166A, I won't take you through the
8 detail of it, but it is the same formula that we used in
9 166. That is to say, these people did things on behalf
10 of the Huon Valley Environment Centre that they had
11 authority, that it arose either from employment or
12 because they were volunteers and that their authority was
13 good because they had a particular position within the
14 organisation or had been associated with it in a very
15 specific way over a period of time. When they gave
16 instructions, those who acted in response to those
17 instructions, had good reason to do so, because of the
18 position that these people. Thereby, buttressing what's
19 said about agency.

20 That takes us over to p.123 Your Honour. The next
21 action is the Hampshire action, does Your Honour have
22 that?

23 HIS HONOUR: Yes.

24 MR HOWELLS: We've set out first of all the agreements or
25 contracts - - -

26 HIS HONOUR: These follow the same form as they did in the
27 other?

28 MR HOWELLS: The same formula Your Honour, and also an
29 assertion at the top of p.126, you'll see Your Honour
30 that the first plaintiff was occupier and in possession
31 of the Hampshire Mill and it had an obligation to

1 maintain safety.

2 Then there are further contracts for - the first
3 Skilled Engineering contract for example Your Honour. We
4 included all the detail of these contracts.

5 Theoretically, Your Honour that also could have been,
6 this could have been a bald assertion of there being a
7 series of contracts and waiting for the request for
8 particulars but we provided it in detail and identifying
9 all of the contracts which are alleged to have been
10 interfered with.

11 HIS HONOUR: They go through to where?

12 MR HOWELLS: They go right through Your Honour to 198 on p.131
13 and then - and in 198 it's said that those contracts were
14 entered in to in the course of conducting trade and
15 business. Does Your Honour have that?

16 HIS HONOUR: Yes.

17 MR HOWELLS: In 199 the cause of action of interfering with
18 trade and business by unlawful means with the intention
19 of causing injury and that's alleged against the
20 Wilderness Society, the Huon Valley Environment Centre,
21 the fifth, seventh, eight, ninth, fourteenth and
22 eighteenth defendants Your Honour.

23 HIS HONOUR: Yes.

24 MR HOWELLS: And the particulars we refer then to in the first
25 line there to some subsequent paragraphs and the
26 subsequent paragraphs are the overt acts Your Honour.
27 That's Paragraphs 202 and 204-212. Does Your Honour have
28 that at the top?

29 HIS HONOUR: Yes.

30 MR HOWELLS: We've done that Your Honour because we could have
31 said nothing about it and led the reader on to the next

1 two days later overt acts but we've identified that
2 they're the ones that are relied upon, together with Your
3 Honour, a series of other acts which we've added in
4 because the overt acts that were pleaded in respect of
5 each of these actions in the original pleading were
6 primarily ones about which there was a specific
7 unlawfulness. What we've sought to include by way of the
8 amendments is the additional overt acts which might not
9 themselves been unlawful, looked at in isolation but as
10 part of the conspiracy, they form part of it and they
11 also form part of the basis upon which we say an
12 inference can be drawn that there was an interference,
13 that there was a conspiracy. Those in the underlined
14 passages include reference to those additional overt acts
15 including the participation by various persons in
16 meetings where the Hampshire Action was planned and
17 coordinated, training was provided, recruitment
18 undertaken.

19 There are also particulars there of the intention
20 Your Honour, because a request was made and criticism was
21 made that we hadn't particularised intention. As Your
22 Honour has said we could have broken those particulars up
23 into paragraphs, one said to be dealing with overt acts
24 and the other dealing with intention, that would have
25 made it easier to read Your Honour.

26 HIS HONOUR: Yes.

27 MR HOWELLS: Over on p.133, Paragraph 200, knowledge of the
28 contracts Your Honour.

29 HIS HONOUR: This is - Paragraph 200 is a specific pleading of
30 knowledge.

31 MR HOWELLS: Knowledge of the contract. We could have simply

1 pleaded that Your Honour and said, they must have known
2 that there were some contracts because on the basis of
3 what's said by the Court and Daily Mirror and Torquay
4 Hotels, you don't have to have detailed knowledge of the
5 contracts.

6 HIS HONOUR: But you've already said it in the particulars
7 under 199. You've said the same thing.

8 MR HOWELLS: Your Honour we've said - - -

9 HIS HONOUR: They knew the contracts pursuant to which the
10 first plaintiff conducted its trade and business.

11 MR HOWELLS: That's right Your Honour but the request for
12 particulars and the criticism said, we want to know more
13 than that, we want to know how it is that that knowledge
14 arose and on what basis. Do you assert for example that
15 people actual saw them or how did it arise, so what we've
16 done in 200 is to say, they either knew about it
17 expressly or they be taken to have known about it because
18 they saw people doing work and I think one of our learned
19 friends said something along the lines, "I suppose it
20 might be said that if people are doing work, more than
21 certain conclusions can be drawn about that". We've also
22 said Your Honour that they had a means of ascertaining if
23 they wanted and we've also said that they were recklessly
24 indifferent in reliance upon the decision in the McFadyen
25 case we've said, directed to this question of the
26 significance of knowledge, we've said, "Well, recklessly
27 indifferent to the consequences". Again that could have
28 been left out and dealt with in answers for request for
29 particulars.

30 In 201 we've pleaded, and specifically identified
31 the defendants said to be liable for wrongful and

1 malicious interference with the performance of, and we've
2 listed which contracts Your Honour, quite specifically.
3 HIS HONOUR: Is that difference to 199?
4 MR HOWELLS: Yes Your Honour because 199 is an allegation of
5 interference with trade and business by unlawful means
6 and 201 is an allegation of interference with the
7 performance of contracts.
8 HIS HONOUR: Same Tort.
9 MR HOWELLS: No Your Honour, but if it is it would constitute,
10 we say, the unlawfulness element of the Tort of
11 interference with trade and business by unlawful means.
12 HIS HONOUR: Yes, I see.
13 MR HOWELLS: Because you could interfere with business in a
14 range of different ways.
15 HIS HONOUR: Yes.
16 MR HOWELLS: One, by inducing a breach of contract as we say in
17 Banksia or by interference with the performance of
18 contracts as we say in Hampshire, or by doing other
19 unlawful acts with impede or by diverting the resources
20 of an organisation or by providing a threat which affects
21 its market. There would be all sorts of things that could
22 be done and I think in the Dresna v. Misu case, in
23 relation to conspiracy the full court says there might be
24 a whole host of acts which would underpin, or might be
25 said to constitute the unlawfulness and the conspiracy so
26 also with interference with trade and business. There
27 might be a number of unlawfulness that would sustain that
28 you've interfered with trade and business and that's what
29 we've pleaded here in 201.
30 HIS HONOUR: Yes. Are these allegations made in the Lucaston
31 case, did we go through these?

1 MR HOWELLS: I think - yes in Lucaston we did Your Honour, yes.

2 Interference - - -

3 HIS HONOUR: In the same way.

4 MR HOWELLS: Yes and again under 201 we've sought to

5 particularise it, not only as, not only as to the
6 interference but also because there was request for
7 particulars and complaints about it we've particularised
8 what the level of knowledge was and what the intention
9 was based upon what they expected would happen and we've
10 made detailed assertions about that. We could divide
11 that one up into paragraphs too also and put a sub
12 heading for each one Your Honour and as Your Honour says
13 that would assist in comprehension perhaps.

14 HIS HONOUR: Then 202.

15 MR HOWELLS: 202 is the conspiracy allegation and that's

16 conspiracy to injure by unlawful means and in the
17 particulars - can I take Your Honour in a little bit of
18 detail to this because what we've asserted there again in
19 the particulars is we've listed the defendants as you
20 will see in the first three lines and we've said - the
21 assertion is they became involved in discussions with one
22 another and other protestors and agreed that they would
23 engage in certain interference activities which would
24 have - - -

25 HIS HONOUR: It's the agreement that's the essential thing,
26 whether they had discussions before they agreed is
27 irrelevant isn't it?

28 MR HOWELLS: Yes Your Honour but again criticism was made,
29 particulars were sought of how the agreement was arrived
30 at, and that could happen in two ways Your Honour, as we
31 know from the authorities, it could either be said, well

1 there was a discussion during which an agreement occurred
2 or the overt acts themselves, looking at them, give rise
3 to a presumption that that occurred.

4 HIS HONOUR: Yes.

5 MR HOWELLS: We make a third proposition in a number of cases
6 where we say that in addition to that there was a common
7 understanding amongst the people who had been involved in
8 these activities over a long period of time. The common
9 understanding of how they would go about these
10 interference activities and a simple direction or a
11 signal from one of the generals would gather than
12 altogether and have them behaving according to their
13 usual - the pattern.

14 HIS HONOUR: Yes.

15 MR HOWELLS: And that we say is enough to give rise to the - an
16 inference of a compact. Over on p.136 we've again
17 particularised attempting to deal with all the criticisms
18 and requests for particulars that were made about this.

19 HIS HONOUR: Again there are some cross-references here.

20 MR HOWELLS: There are Your Honour, yes, and those acts - - -

21 HIS HONOUR: The first lot are the overt acts, 202 et cetera.

22 MR HOWELLS: Yes Your Honour. The second lot are the crimes,
23 because what is said is the requests and the criticism
24 said, "On what basis do you say the conspiracy was to
25 injured by unlawful means."

26 HIS HONOUR: Yes.

27 MR HOWELLS: So in the particulars we've attempted to say,
28 there were certain unlawful acts and there were crimes
29 involved.

30 HIS HONOUR: Where are the crimes?

31 MR HOWELLS: If you go to the bottom of p.135 Your Honour the

1 crimes are - at the very bottom there Your Honour.

2 HIS HONOUR: Yes.

3 MR HOWELLS: The crimes are the acts alleged in.

4 HIS HONOUR: In 202 and 204 to 212?

5 MR HOWELLS: No at the very bottom of p.135.

6 HIS HONOUR: The crimes, sorry. 202, 204 et cetera. Yes I

7 see.

8 MR HOWELLS: Yes. We could leave out the references and just

9 say there are crimes, but all - - -

10 HIS HONOUR: As I said to yesterday all cross-referencing is

11 not objectionable but some of it is. This probably

12 isn't, but the other protesters included - who - what's

13 that referring to?

14 MR HOWELLS: That's referring to the fact that what was said

15 was who was involved and people did things in a number of

16 ways. They either did them directly themselves as

17 co-conspirators who in many case, are unindicted as Your

18 Honour has pointed out. Or they might be persons who

19 acted pursuant to directions of either the sixth

20 defendant or other defendants who were the senior

21 organisers, the generals. We've asserted also because

22 intention is a relevant, a highly relevant element of the

23 conspiracy to injure, we've said, "You know about the

24 intention because the defendants well knew of the

25 contracts pursuant to which the first plaintiff conducted

26 its trade and business" as alleged in Paragraph 200.

27 They did the acts in concert pursuant to a common

28 purpose, common agreement and a common understanding.

29 Which is alleged in 213(b) and 214.

30 HIS HONOUR: Yes.

31 MR HOWELLS: Some of them were involved in the publication of

1 statements during the course of the protest, that the
2 protestors were at Hampshire to stop work and prevent the
3 first plaintiff conducting Hampshire Mill. The
4 inevitable consequences of the acts were that there would
5 interference with trade and business and injury. Again,
6 relevant to intention. "The defendants and protestors
7 referred to in Paragraph 202 wished to so interfere with
8 the trade and business and for the first plaintiff to
9 suffer injury. The defendants and protestors referred to
10 in 202 conducted themselves knowing that the unlawful
11 conduct would occur. That it would interfere with trade
12 and business. Harmful the interests of the first
13 plaintiff and they positively associated themselves with
14 that conduct and its consequences and encouraged others
15 to do likewise." On that basis Your Honour we are
16 asserting it's a basis for an inference of intention.

17 HIS HONOUR: Yes.

18 MR HOWELLS: Alternatively, "the defendants and protestors
19 referred to in 202 so conducted themselves knowing that
20 unlawful conduct would occur and were recklessly
21 indifferent to the interference and the harm that would
22 be caused and they positively associated themselves with
23 that conduct." Again, responsive to criticisms and
24 request of the particulars about intention.

25 HIS HONOUR: Yes.

26 MR HOWELLS: Then Your Honour we've pleaded in 203 which is at
27 the bottom of Paragraph 136, "In furtherance in pursuance
28 of the conspiracy" and unfortunately the expression,
29 "furtherance in pursuance" - we got it out of Bullen &
30 Leake and there's no excuse for that sort of behaviour.
31 But - call us old fashioned, but we quite like Bullen &

1 Leake. But the - we've listed there then that the
2 Wilderness Society, Huon Valley Environment Centre and
3 the defendants, and they are again the persons listed in
4 202, did the acts which are then set out. We've started
5 off by referring to the meetings. Your Honour will
6 recall that the 99A to R meetings were the ones that
7 occurred later.

8 HIS HONOUR: Yes.

9 MR HOWELLS: They were the later meetings and they include
10 training sessions, raising funds and also an assertion
11 that funds were provided to protesters for them to be
12 involved in protests. In 203(b) - - -

13 HIS HONOUR: I might say that Bullen & Leake or at least my
14 edition of it, which I think is 1915, has no paragraph in
15 a pleading running for more than about six words.

16 MR HOWELLS: Or more than a sentence Your Honour.

17 HIS HONOUR: Yes certainly no more than a sentence and I think
18 six or seven words is the usual, but anyway there you
19 are.

20 MR HOWELLS: We could do that Your Honour and respond to
21 request for particulars with thousands of pages,
22 but - - -

23 HIS HONOUR: They didn't have word processors.

24 MR HOWELLS: That's one of the problems or huge amounts of
25 paper Your Honour.

26 HIS HONOUR: Very well, 203(b) - - -

27 MR HOWELLS: Deals with specific acts in relation to the
28 provision of equipment and it highlights what we say Your
29 Honour about the inferences that can be drawn from overt
30 acts, because if a clutch of people turn up at an obscure
31 site with a lot of equipment, and then proceed to climb

1 on scaffolding or block a road or do something like that,
2 we say the court can infer an agreement, pre-concert.
3 Then in 203(c) - - -
4 HIS HONOUR: What's the significance of that general statement?
5 MR HOWELLS: In 203(b) Your Honour?
6 HIS HONOUR: In (c)?
7 MR HOWELLS: In (c) the conduct of that protest Your Honour, it
8 refers back to the Lucaston pleading.
9 HIS HONOUR: Yes.
10 MR HOWELLS: It was on precisely the same day as action that
11 was conducted at Lucaston and that gave a added filler we
12 say, to the sort of controversy and publicity that was
13 able to be amassed.
14 HIS HONOUR: What was happening at Hampshire was on the same
15 day?
16 MR HOWELLS: Yes Your Honour. On that occasion. A number of
17 these acts occurred over various days, but there are days
18 when a series of acts occurred at the one time, all got a
19 lot of publicity, lots of banners with Japanese written
20 on them, so you can send them to the Asahi (indistinct)
21 and that of itself we say is part of the plan. Yes and
22 Mr Irving reminds me that the same organisers from the
23 Huon Valley Environment Centre and the Wilderness Society
24 were involved, the same organisers were involved in both.
25 HIS HONOUR: When you refer to 100 to 117, they're the overt
26 acts that relate to Lucaston?
27 MR HOWELLS: Yes Your Honour, yes. In (d) we've said that
28 arising from the material that we obtained in relation to
29 the meetings, that in the weeks leading up 24 March the
30 eighteenth defendant, Mr Pullinger provided support,
31 encouragement, assistance, accommodation and facilities

1 to some of the trespassing protesters.

2 HIS HONOUR: Yes.

3 MR HOWELLS: Then in 204, "Entry upon the Hampshire site." In
4 205, "Climbing on the north crane and purporting to lock
5 themselves on." In the particulars there, there were
6 films, 20 metres above the ground Your Honour, and the
7 fifth defendant filmed the eighth defendant and made
8 various statements about that. It's asserted in 206 Your
9 Honour that there intentionally recklessly and without
10 reasonable cause and involved interference with plant at
11 a workplace. In 206(a) it's asserted that there was a
12 videoing and the videoing of this was distributed to news
13 services and in 206(b) they refused to leave. Some of
14 them were escorted from the site. Then at 207 later on,
15 I'm sorry - about the same time, a blockade was form,
16 stopping access, standing across the road with banners
17 and placards. In 208 the eighth defendant falsely stated
18 that she was locked on and couldn't unlock herself
19 without the device being cut away.

20 Then we've set out in the particulars detail, who
21 said what to whom. Because we have it Your Honour. Not
22 always do we have it. We might have photographs and
23 films of people doing things. We might not have - and
24 you see what they've done by seeing that the act is done
25 but you might not have the detail of who said what, but
26 here we do.

27 HIS HONOUR: Yes.

28 MR HOWELLS: So it's been provided. Again Your Honour, that
29 could have been left to particulars, but it was thought
30 best to be as specific as we could, consistent with
31 what's said in State of Queensland v. Pioneer.

1 HIS HONOUR: Now 209 - - -
2 MR HOWELLS: Telling police officers that they were locked on.
3 HIS HONOUR: Yes and 210's the same.
4 MR HOWELLS: Yes Your Honour. The consequences of it was that
5 the police officers had to arrange for the cutting away
6 of the devices using an angle grinder, and the angle
7 grinder you'll see in C Your Honour was being used to cut
8 metal a few centimetres from the arms of the eight
9 defendant and Ms Ilett. While they were on a platform 20
10 metres from the ground and serious risk Your Honour.
11 We've got - and Ms Ilett is a minor Your Honour, a minor
12 an o-r and - - -
13 HIS HONOUR: Yes.
14 MR HOWELLS: There's film of this, and that's the basis upon
15 which it's - - -
16 HIS HONOUR: Yes. All right, well now - - -
17 MR HOWELLS: 211, risks - - -
18 HIS HONOUR: So these are all allegations of things that
19 occurred at Hampshire?
20 MR HOWELLS: Yes, Your Honour and so also with 211A, 212 -
21 211B, 211C, picketing, having media spokesmen there to
22 get the press involved.
23 HIS HONOUR: What's Mary Crane - how does 211A sound against
24 the defendants, Mary Crane liaised with them?
25 MR HOWELLS: She's listed in, I think it's in 202A as a person
26 who is - she's as it were - - -
27 HIS HONOUR: An agent of the - - -
28 MR HOWELLS: - - -an invited co-conspirator, she's also
29 asserted to be an agent. We deal with that in agency.
30 She's involved in a number of them, I think Your Honour,
31 the name appears. She's the police liaison person.

1 HIS HONOUR: Yes.

2 MR HOWELLS: Then in 212 there's an assertion of the
3 discussions that were held between the parties in
4 relation to those unlawful acts. That's to some extent,
5 Your Honour, repetitious of what's said in the pleading
6 as to conspiracy.

7 HIS HONOUR: This is actually another conspiracy isn't it?

8 MR HOWELLS: Yes Your Honour.

9 HIS HONOUR: They decided, they would - they and other
10 protestors would engage in interference activity?

11 MR HOWELLS: Well, I'm sorry, no it's not alleged as another
12 conspiracy, it's discussions indicating an intention to
13 interfere. It may - it's not pleaded that way - - -

14 HIS HONOUR: Well that's - no - - -

15 MR HOWELLS: Because there is the primary conspiracy pleading
16 earlier on. It's said Your Honour, that in 213 that
17 those acts were done on behalf of themselves and their
18 co-conspirators in furtherance of the conspiracy, that's
19 again Bullen & Leake Your Honour, it might be said not to
20 be necessary if one looked at the primary conspiracy
21 pleading and we've then dealt with concert Your Honour.
22 And Your Honour will recall that I indicated yesterday
23 that in Lucaston we pleaded the two key elements of
24 concert and then the conclusion that there was action in
25 concert and that's in 213A, 213B and 214. Does Your
26 Honour desire that I go in any detail that, because we've
27 been through that formula?

28 HIS HONOUR: No I can - it was the same propositions as
29 yesterday. 215 - - -

30 MR HOWELLS: And 215 is the assertion that there was - that the
31 conduct was unlawful and then there is a detail of what

1 was unlawful and how. In 216 an assertion of injury to
2 trade and business.

3 HIS HONOUR: Yes.

4 MR HOWELLS: In 217 an assertion that the contracts were
5 interfered with and then loss and damage.

6 HIS HONOUR: That \$25,000 figure again, you say can be
7 calculated by reference to a logical extrapolation.

8 MR HOWELLS: A logical if not precise, yes Your Honour. That's
9 loss and damage in relation to injury in trade and
10 business. 219 is loss and damage arising from the
11 interference with the contracts.

12 HIS HONOUR: Yes, same - - -

13 MR HOWELLS: And 220 the conspiracy - the loss and damage
14 arising from the conspiracy. In 221 is aggravated and
15 exemplary damages and - - -

16 HIS HONOUR: That's similar to the Lucaston?

17 MR HOWELLS: Similar again. And again all those particulars
18 Your Honour could theoretically be included in response
19 to request for particulars, there's been criticism of it
20 and in other cases there's been observations of the court
21 saying, well the particulars should be included in the
22 primary pleading and they should be detailed, well we've
23 done that. We've added to it in Sub 8, but there we are.

24 HIS HONOUR: Again those figures are what you say are arguable
25 from the authorities as being appropriate?

26 MR HOWELLS: Yes, yes Your Honour. In 222 there's the
27 allegation of the trespass again, as a separate tort.
28 That's in 222 and 223, and again aggravated and exemplary
29 damages in relation to those torts, the trespass. It's
30 the same formula again Your Honour as you saw in
31 Lucaston.

1 HIS HONOUR: Yes.

2 MR HOWELLS: In 225, on p.153, the conversion, as it were Your
3 Honour of the crane, or interference with the possessory
4 right in relation to the crane. Again, the detail of
5 that is in 225, 226 and 227. 228, Your Honour, is fraud.
6 Does Your Honour have 228?

7 HIS HONOUR: Yes.

8 MR HOWELLS: As a separate tort, misleading which had the
9 consequence of prompting officers to have to take steps
10 to dismantle the devices and there were consequences in
11 terms of the delay caused and loss and damage caused.
12 223, the eight defendant knew that the representations
13 were false and what was done in reliance upon the
14 putative truth of them, 223. And in 234 the loss and
15 damage. Then in 235, aggravated and exemplary damages in
16 relation to that.

17 HIS HONOUR: Yes.

18 MR HOWELLS: Then on p.156, 236 is the pleading of agency.
19 Your Honour we could have cross-referenced again I
20 suppose Your Honour in relation to the particulars and
21 said, "Well look we just refer to what was said before"
22 but they have been altered slightly to meet the different
23 actions, but I won't - do I need to take Your Honour
24 through them?

25 HIS HONOUR: They're essentially the same, I mean the same
26 concept?

27 MR HOWELLS: Yes Your Honour and the same with 236A.

28 HIS HONOUR: Yes.

29 MR HOWELLS: That takes us to the Triabunna 203 action on
30 p.162.

31 HIS HONOUR: Yes.

1 MR HOWELLS: In Triabunna 203, contracts again are set out.

2 HIS HONOUR: Well is there anything materially different
3 between the way in which this is pleaded and the
4 Hampshire and Lucaston are pleaded?

5 MR HOWELLS: No Your Honour, no. And the same for Triabunna
6 2002, 2004 and Styx. I'm happy to take Your Honour
7 through - - -

8 HIS HONOUR: I don't think there's any need to - at my looking
9 at them they seem to be the same.

10 MR HOWELLS: But one thing I should not Your Honour about them
11 is that it was said by I think Ms Batrouney and perhaps
12 other counsel that in relation to a number of these
13 logging interference actions, that is other than Lucaston
14 that we hadn't pleaded overt acts other than some
15 unlawful acts. We have done that, what we've done is to
16 include them in various places but we've also picked up
17 the meetings activities and refer to them - if I can just
18 give Your Honour an example - an example of it in
19 Triabunna 203 is at p.169 you will see 243A, this is in
20 the overt acts about Triabunna 03, the plaintiffs
21 referred to and repeat Paragraphs 50A to 50H.

22 HIS HONOUR: And 50A to 50H are meetings.

23 MR HOWELLS: The earlier set meetings because Triabunna 2003 of
24 course was one of the earlier protests whereas 04 and
25 Styx were later and they're - - -

26 HIS HONOUR: Let's just look at 50A, this might be one of the
27 cross references that causes people to scratch their
28 heads. There were meetings so if you look at 50A and the
29 particular in (c) 245 to 252 is Triabunna 2003.

30 MR HOWELLS: That's right, yes Your Honour.

31 HIS HONOUR: I can see that now but in reading this pleading

1 serially when I looked at it at the weekend, by the time
2 I got to here my eyes were glazing over trying to work
3 out what - - -

4 MR HOWELLS: The definition should have been the Triabunna
5 overt acts, there should have been a definition that
6 those paragraphs or instead said the Triabunna are overt
7 acts paragraphs.

8 HIS HONOUR: Yes, 255 to 258 are also Triabunna 2003.

9 MR HOWELLS: Yes Your Honour.

10 HIS HONOUR: So (c), you see that if (c) had said, those
11 defendants and persons planned, organised and coordinated
12 the overt acts concerned with the Triabunna 2003 action
13 as alleged in Paragraphs would have certainly clear it.
14 That could be said to be nit picking in one way but if
15 the document is to be intelligible it really needs
16 some - - -

17 MR HOWELLS: I understand that Your Honour, we were working
18 with some ensigencies including the way in which the
19 material has come to us over time and sporadically and
20 we've added in and we had a time constraint.

21 HIS HONOUR: That's all right.

22 MR HOWELLS: Those sorts of things could be done in a number of
23 places, we accept that Your Honour.

24 HIS HONOUR: You go back to p.169.

25 MR HOWELLS: Yes Your Honour.

26 HIS HONOUR: You've pleaded 50A to 50H.

27 MR HOWELLS: And we've also then included in 243B and C and D
28 some additional overt acts which at the time of making
29 these amendments we now had information and they're
30 things like turning u-p with the equipment, people
31 turning up with cameras, a banner, rubber ducky, lock on

1 devises and so on and then in the weeks leading up to
2 15 January, the twelfth defendant who has a lot to do in
3 relation to Triabunna 2003 providing support,
4 encouragement, assistance and accommodation Your Honour,
5 an important part - - -

6 HIS HONOUR: This is what paragraph?

7 MR HOWELLS: 243C on 169, the twelfth defendant providing
8 support, encouragement, assistance and accommodation to
9 protestors and then the media releases and so on.

10 HIS HONOUR: How does 243D, how does that relate as an overt
11 act.

12 MR HOWELLS: By doing the media releases and having the media
13 which is able to be transmitted to the community, not
14 only within Australia but also in Japan or other places
15 in Europe where the first plaintiff has its customers,
16 that provides a potent commercial pressure. It's very
17 clever Your Honour, it's very skilful and it's done very
18 cleverly by these people and very difficult to do
19 anything about as you saw with the reference to the
20 Magistrates' Court proceedings and it also has the affect
21 of prompting other action to take place. Once the media
22 releases are out, police and others may take certain
23 action, that impedes work further and might make, for
24 example, other shipping contractors reluctant to send a
25 ship in. There might be all sorts of knock-on effects,
26 it's part of the overall plan. Publicity being crucial
27 and particularly publicity coming from not only the
28 people like the eighth defendant but also crucially from
29 the tenth and eleventh defendants in a number of these
30 actions.

31 HIS HONOUR: Tenth and eleventh are?

1 MR HOWELLS: Browne - Robert Browne and Margaret Putt and these
2 are people who'd have - these are politicians and they
3 are members of the Parliament and they have a public
4 profile and that carries its own effect, not only in
5 terms of people and media taking notice of it but also as
6 we assert in the pleading it tends to galvanize and
7 encourage other protestors to come along and participate.
8 HIS HONOUR: Is Mrs Putt a member of the State Parliament?
9 MR HOWELLS: She is in the Tasmanian Parliament Your Honour,
10 yes.
11 HIS HONOUR: Yes go on.
12 MR HOWELLS: Then in 244 we've said that those acts already
13 referred to plus the following were done in pursuance of
14 the conspiracy.
15 HIS HONOUR: Just looking at the 244, did the acts - - -
16 MR HOWELLS: It's just a reference to all of them because
17 what's said is that earlier on we say that certain of
18 these - these overt acts are done in furtherance of the
19 interference trade and business, we also have to say it's
20 in furtherance of the conspiracy, it might well have
21 solicit have occurred before those acts Your Honour, and
22 we could have put it there but - - -
23 HIS HONOUR: Then you set out 245 to 261 - - -
24 MR HOWELLS: Yes Your Honour, again - - -
25 HIS HONOUR: - - - which are more - - -
26 MR HOWELLS: Again overt act.
27 HIS HONOUR: - - - overt act.
28 MR HOWELLS: Disembarking from a rubber dinghy on the wharf
29 without lawful and reasonable excuse.
30 HIS HONOUR: Yes.
31 MR HOWELLS: Locking on to equipment, police coming along,

1 protestors climbing on to the maintenance cradle, taking
2 possession of a two-way radio owned by the first
3 plaintiff, destroying property and then in 255 on p.74
4 Your Honour, again fraudulent representations about
5 whether or not and so on.

6 HIS HONOUR: I understand that, we can go to 261 and then to
7 262, each of the acts done - were done by as alleged on
8 behalf of themselves and their co-conspirators in
9 furtherance of the conspiracy.

10 MR HOWELLS: Is Your Honour referring to p.261?

11 HIS HONOUR: No, 181. Paragraph 261 and then 262.

12 MR HOWELLS: Yes Your Honour. As I say Your Honour it's the
13 same formula.

14 HIS HONOUR: Yes.

15 MR HOWELLS: I can take Your Honour to the fact that there are
16 - that in each case we've referred to the meetings but
17 Your Honour has seen now the formula that's used and
18 we've done that in Triabunna 2004 and in the Styx as
19 well.

20 HIS HONOUR: Well, where do we finish this one?

21 MR HOWELLS: Triabunna 2003 finishes Your Honour at p.198. and
22 there's Triabunna 2004.

23 HIS HONOUR: Right.

24 MR HOWELLS: That index that I gave you yesterday Your Honour
25 sets those pages out. It breaks it up into Lucaston,
26 Hampshire, Triabunna 2003, Triabunna 2004, Styx, Burnie,
27 Banksia, Japan and Banks. Then the campaigns against
28 Gunns. Can I then take Your Honour just to the end of
29 the Styx. Towards the end of the Styx action because a
30 specific point was made about Paragraph 359?

31 HIS HONOUR: Yes.

1 MR HOWELLS: On p.235. Does Your Honour have 359?
2 HIS HONOUR: Yes, yes.
3 MR HOWELLS: My learned friend Mr Bornstein said there wasn't
4 really - it's wrong to say there was a trespass there
5 because it wasn't until the day after or some time after
6 that the prohibition was imposed upon persons, members of
7 the public entering the place. Your Honour we say that's
8 just wrong.
9 HIS HONOUR: But that's not a pleading.
10 MR HOWELLS: I thought it was a point of evidence quite frankly
11 from the Bar table Your Honour, but it's well known Your
12 Honour. I can give you the authorities that mere
13 possession is enough to justify an action against a
14 trespasser. The jus tertii can't even be pleaded in
15 relation to that, and for example, Mason v. Clarke. Can
16 I give Your Honour - - -
17 HIS HONOUR: What's the point though. You've asserted in 359
18 that there was a certification by the general manager
19 that it was closed 24 November and 30 April. Then that's
20 set out and then at 4 p.m. on 24 November the fifth
21 defendant remained in the area specified.
22 MR HOWELLS: Yes Your Honour.
23 HIS HONOUR: Why is - - -
24 MR HOWELLS: I don't know Your Honour. It's not my point it
25 was Mr Bornstein's - we - - -
26 HIS HONOUR: There may be argument about whether the
27 certificate existed, whether it was valid. They're only
28 matters that can be raised.
29 MR HOWELLS: There not pleading points, yes Your Honour.
30 HIS HONOUR: No.
31 MR HOWELLS: We say in the pleading that we were in possession

1 in any event Your Honour, regardless of the certificate.

2 HIS HONOUR: So that would entitle - - -

3 MR HOWELLS: Us to bring an action about trespass, based on
4 trespass Your Honour, yes.

5 HIS HONOUR: After asking someone to leave.

6 MR HOWELLS: Exactly.

7 HIS HONOUR: At least.

8 MR HOWELLS: Yes Your Honour.

9 HIS HONOUR: Yes.

10 MR HOWELLS: So that's the Styx Your Honour. Then in relation
11 to the Burnie Wood Chip Pile.

12 HIS HONOUR: Where does that start?

13 MR HOWELLS: That's at the end of the Styx, so all of the
14 interference with logging operations are dealt with up to
15 p.250.

16 HIS HONOUR: Yes.

17 MR HOWELLS: At 250 Your Honour will see the Burnie Wood Chip
18 Pile action and Your Honour I think from the earlier
19 discussions, is familiar with the way this has been
20 pleaded.

21 HIS HONOUR: Yes.

22 MR HOWELLS: We simply say Your Honour - - -

23 HIS HONOUR: This is under a general heading, "Corporate
24 Vilification Campaign"?

25 MR HOWELLS: Yes Your Honour.

26 HIS HONOUR: Does the word, "vilification" have any legal
27 meaning?

28 MR HOWELLS: It does in Victoria Your Honour. There's
29 legislation. We've not used it - we've not sought to use
30 it in that context Your Honour, and the act itself would
31 have some difficulties about that anyway.

1 HIS HONOUR: Sporting journalists use it with great abandon,
2 throwing it around all the time, but it doesn't - it's
3 used here as meaning what?

4 MR HOWELLS: There are two kinds of action that are complained
5 of. There's first of all what is referred to within the
6 area as - referred to by the protesters as "direct
7 action" and we have described that as the logging
8 operations disruption campaign. Your Honour will
9 remember in Paragraph 10(g) we set out the various parts
10 of the campaign against Gunns.

11 HIS HONOUR: Yes.

12 MR HOWELLS: The logging operations disruption campaigns are
13 one part of it. The other part is corporate
14 vilification. That is to attack the commercial interests
15 of the corporation by a number of means. Some are about
16 representations about it and what it's doing. Others are
17 simply by exhorting people to have nothing to do with it.
18 Others are by threats both express and implied, that if
19 you do there will be consequences for you commercially.
20 So customers can be targeted for example, consumers and
21 customers. Not only primary customers but secondary and
22 tertiary customers. For example in this case we've got
23 the Japan customers are paper manufacturers who purchase
24 product from the first plaintiff. They in turn sell
25 their paper to for example companies that produced
26 photographic paper. We say - we've pleaded in relation
27 to the Japan customers, those kinds of activities and
28 what is said is, by going to the primary and secondary
29 customer and administering a threat to them, that
30 involves an interference with the trade and business of
31 the first plaintiff because of the way it's effected.

1 It might be by a range of means. Some of them
2 misleading, some of them not. The truth or otherwise
3 might not matter at all Your Honour, but it's a way of
4 casting a taint or some kind of stigma upon a corporation
5 in order to achieve an outcome.

6 HIS HONOUR: I think before we get onto that, we'll have a
7 short break.

8 MR HOWELLS: If Your Honour pleases, yes.

9 (Short adjournment.)

10 HIS HONOUR: Yes Mr Howells? 376.

11 MR HOWELLS: Yes Your Honour I don't need to take Your Honour
12 to the preliminary paragraphs, Your Honour's been taken
13 to those a number of times, but in 384, Your Honour,
14 what's said is that in or about March, April 2002, the
15 sixth, eighteenth, nineteenth and twentieth conspired and
16 combined. The we particularise the agreement - the
17 discussions and agreement that defamatory statements
18 would be published and that there was an intention to
19 injure and we've also particularised the common purpose
20 and design, relevant to intention Your Honour. What's
21 significant here Your Honour is that it's asserted that
22 statements were made, the timing here's important Your
23 Honour - is that statements were made on 8 and 9 April
24 2002.

25 HIS HONOUR: Yes.

26 MR HOWELLS: So 8 and 9 April 2002 and that in March and April
27 the discussions occurred.

28 HIS HONOUR: So there's - yes.

29 MR HOWELLS: So that the discussion and agreement occurred
30 before, it's asserted, before the publication, just
31 before it, and as a result, we say inference can be drawn

1 of a connection between the discussions and the
2 publication.

3 HIS HONOUR: What's the - what do you say as to the point that
4 was raised yesterday that the tort, the conspiracy and
5 the tort merge?

6 MR HOWELLS: Well Your Honour we say that Dresner v. Misu makes
7 that very clear. What we're talking about here is not a
8 proceeding where it's alleged that there was a conspiracy
9 to defame and then alleged the defamation. This is a
10 conspiracy to injure and to injure the trading business
11 by unlawful means and there is an unlawfulness pleaded
12 which is the defamation. That's different Your Honour,
13 and in Dresner v. Misu - does Your Honour have that? We
14 have copies of - can I hand one up to you.

15 HIS HONOUR: I think I've got one somewhere. Is that in - can
16 you hand it?

17 MR HOWELLS: Yes I can hand it up Your Honour.

18 HIS HONOUR: Thank you.

19 MR HOWELLS: Paragraph 16 on p.9, "The intimidation" - does
20 Your Honour have Para 16?

21 HIS HONOUR: Yes.

22 MR HOWELLS: "The intimidation of an employer inducing a breach
23 of contract and a breach of statutes dealing with the
24 restrictive trade practices, been held to involve the use
25 of unlawful means" then reference to Torquay Hotels and
26 Sweet & Maxwell. In addition to crimes and torts, the
27 learned it lists, defamation, trespass, breach of rules
28 of natural justice, abuse of confidential information and
29 misstatements as unlawful means. It's said that the
30 unlawful means may be constituted by actions which are
31 improper, though not actionable in themselves. Clarke

1 and Lindsell that the it is a general approach appears to
2 be that a person is using unlawful if they're doing an
3 act which they are not at liberty to commit, therefore be
4 arguing that a breach of undertaking might constitute
5 unlawful means.

6 We say, there's a difference, there's a plea of
7 conspiracy to injure by unlawful means, the defamation is
8 relied upon as the unlawful means. It's not a case of
9 simply saying, well we're pleading conspiracy to defame
10 and the defamation. They are different Your Honour, and
11 a key element in the conspiracy to injure by unlawful
12 means is the intention. Here it's the intention to harm
13 trade and business.

14 That's even assuming the point about the merging of
15 the two is a good point, and we say it's not, because we
16 say neither McKellar nor what was said in first instance
17 in Dresner make that point one that is sound.

18 HIS HONOUR: Yes, well in any event I suppose, for present
19 purposes, that can be argued as a question of law, can't
20 it? If it's a good point it can be run.

21 MR HOWELLS: If it's a good point Your Honour, yes Your Honour.
22 Now we do accept Your Honour that in Paragraph 386A the
23 reference to 384 should be removed. Your Honour pointed
24 this out yesterday that because that would involve a
25 reference to both the discussions and the conspiracy and
26 then the acts done in furtherance. It would be
27 repetitious, so 384 goes out from 386A and it would have
28 to also go out from 386B. Did Your Honour recall that?

29 HIS HONOUR: Yes I do, I remember that.

30 MR HOWELLS: Also Your Honour in 387 and 389.

31 HIS HONOUR: Yes.

1 MR HOWELLS: But not in 388 or 390.

2 HIS HONOUR: Yes.

3 MR HOWELLS: In 390 we've pleaded the additional elements
4 relevant to aggravated and exemplary damages.

5 HIS HONOUR: Yes.

6 MR HOWELLS: And in 390A, agency again Your Honour and 390B
7 Your Honour asserts that this like the other activities
8 were done in furtherance of the campaign against Gunns.

9 HIS HONOUR: What's the significance of the phrase, "The
10 campaign against Gunns", it's a collection of Torts?

11 MR HOWELLS: Well Your Honour the way we've pleaded it starts
12 in Paragraph 10 - we've said these things were done and
13 they were done as a campaign of interference and
14 disruption against the first plaintiff by unlawful means
15 aimed to injure trade and business and we say that the
16 collection of not only Torts but other activities were
17 themselves, and the planning of them and what was
18 involved in its totality was itself an interference with
19 trade and business.

20 HIS HONOUR: Just let me see if I understand it. You say that
21 the campaign against Gunns is itself a source - I'll
22 start again. The campaign against Gunns consists of a
23 series of Torts committed by various people for
24 themselves and on behalf of others which themselves were
25 designed to injure the business of Gunns and that the
26 combination of all of them had a separate affect?

27 MR HOWELLS: Yes Your Honour.

28 HIS HONOUR: An affect greater than some of the parts.

29 MR HOWELLS: Over a period of time and by virtue of a
30 collection of them greater than some of the parts.

31 HIS HONOUR: By what legal principle do you aggregate and reach

1 the conclusion that you are entitled to damages for an
2 aggregation of the some of the whole greater than some of
3 the parts?

4 MR HOWELLS: Simply by saying that there was a plan to conduct
5 this campaign in toto and of course in looking at damages
6 it would have to be accepted that a court would take into
7 account, if for example the courses of action were made
8 out, there might be damages awarded in relation to
9 Hampshire, that might have an affect on what would be
10 award in relation to the campaign against Gunns, but we
11 say the plan and the carrying out of it are on first
12 principles, amenable to an action for that Tort of
13 interference for trade and business.

14 HIS HONOUR: Isn't that then a reintroduction of the over
15 arching conspiracy that was - - -

16 MR HOWELLS: It's not pleaded as a conspiracy Your Honour.

17 HIS HONOUR: But it's done by way of plan.

18 MR HOWELLS: To a plea of concerted action, yes Your Honour.

19 HIS HONOUR: I still have some difficulty in seeing the
20 difference between conspiracy and concerted action but we
21 will eventually get to argue that I suppose. You say
22 that it's not suggested that there was an over arching
23 conspiracy involving.

24 MR HOWELLS: There may well have been Your Honour, but we're
25 not pleading it Your Honour, no.

26 HIS HONOUR: You say that they all acted together, pursuant to
27 an arrangement - - -

28 MR HOWELLS: A plan.

29 HIS HONOUR: Isn't that just saying conspiracy in another way?

30 MR HOWELLS: Well as to matters of fact that may be a
31 conclusion that can be drawn but what's pleaded - the

1 relief that is sought is directed to the Tort of
2 interference with trade and business. We just say that
3 these are not disparate sets of actions and campaigns,
4 they are part of an overall plan and we do seek to
5 advance that before the court and we do seek relief in
6 relation to it because it's not a matter of saying, we
7 will go off and sue about that particular action here and
8 that one there, and that one there, it's part of an
9 overall campaign that's been run and - - -

10 HIS HONOUR: But the essential point is that at the end you say
11 that you would be entitled to damages if you succeeded in
12 respect of each of the Torts and then you'd be entitled
13 to some other award of damages for the campaign against
14 Gunns.

15 MR HOWELLS: That's right but obviously the court would be in a
16 position of making, if we were successful, would make an
17 assessment of how to apportion that and - - -

18 HIS HONOUR: Yes, I'm not talking about - - -

19 MR HOWELLS: - - - one would impact upon another and it would
20 impact differently for different defendants Your Honour,
21 because for example, you might have, may be, and I'm just
22 simply putting this putatively that for the first to
23 third defendants who are the general senior office
24 holders and decision makes, control the purse strings of
25 the sixth defendant and did certain acts, they may not
26 have been present - may not have been at specific sites
27 when particular action took place. It may have had a
28 role, and as we assert it, they did, a substantial role
29 in relation to the overall campaign against Gunns and so
30 damage that might be said to be able to be awarded
31 against them would differ.

1 HIS HONOUR: Yes all right, having gone into that, that's how
2 you put the Burnie Wood Chip case?

3 MR HOWELLS: Yes Your Honour, then at p.259, the Banksia Awards
4 action.

5 HIS HONOUR: What is the Banksia Environment Foundation?

6 MR HOWELLS: Your Honour foundations get set up as Your Honour
7 knows, for all sorts of reasons and in all sorts of ways,
8 I think Mr Vizard has a foundation that's been in the
9 press and then there are - these are popular in America
10 for certain taxation purposes some times and they're said
11 sometimes to be philanthropic, this particular one is as
12 we understand it and we're not - our knowledge of it is
13 not extensive but it seems to be directed to making
14 awards and making assertions about the conduct of
15 individuals and corporations in relation to what is said
16 to be environmental benchmarks and it's one of the number
17 of mechanisms, like for example, the organisations which
18 are set up to try to encourage particular behaviour of
19 municipal authorities in relation to what is said to be
20 environmental benchmarks and they make awards and give
21 prizes and have a competition and so on and people
22 participate and hope to get the benefit of an award that
23 might be made and it is said Your Honour, that these
24 things can be commercially very, very advantageous and
25 misconduct in relation to them - or misuse of them can be
26 very, very damaging, so it's said.

27 HIS HONOUR: I suppose if you win a Nobel Prize and you're the
28 chief chemist at Monsanto, Monsanto benefits.

29 MR HOWELLS: Exactly Your Honour.

30 HIS HONOUR: That sort of thing. So it conducted a
31 competition?

1 MR HOWELLS: Yes and what's said is that there was a process
2 whereby the first plaintiff was in a position of claiming
3 to be a finalist and it's asserted that those persons in
4 paragraph referred to - the defendants who are referred
5 to in Paragraph 399 - - -
6 HIS HONOUR: Just before you get to there, there's an
7 allegation that there was an agreement which your client
8 paid a fee to the foundation and then presumably received
9 a Banksia \$2 for awards entry kit to enter the
10 competition. It did so, at 393.
11 MR HOWELLS: Then we've pleaded alternatives as to what the
12 terms are to be taken to be Your Honour.
13 HIS HONOUR: Yes. Have you provided copies of the Banksia 2004
14 awards entry kit to those defendants who wanted one?
15 MR HOWELLS: No Your Honour. I'm instructed that we provided
16 the kit Your Honour, yes.
17 HIS HONOUR: Yes that's - there are term alleged in 394, an
18 implied term in 395, is it said that the term in 394 was
19 express.
20 MR HOWELLS: Your Honour no it's not.
21 HIS HONOUR: So that was an implied term as well?
22 MR HOWELLS: Yes Your Honour.
23 HIS HONOUR: Yes, very well. There's a couple of alternative
24 terms, further term 397 I think. Yes.
25 MR HOWELLS: And then in 398, finalists were announced and
26 there was a publication of that.
27 HIS HONOUR: Yes.
28 MR HOWELLS: That's over onto p.262. In 399 we pleaded the
29 sixth - sorry the first, second, third, fourth, sixth,
30 tenth and eleventh, interfered with trade and business
31 and we've given the particulars of that.

1 HIS HONOUR: What were 403 to 405, what are we?

2 MR HOWELLS: 403 to 405 are the entering into a conspiracy to
3 provide information and to apply pressure to the Banksia
4 Awards Foundation to change a decision that they'd made.

5 HIS HONOUR: That's in 405 to 410?

6 MR HOWELLS: Yes Your Honour. So in 399 a plea of interference
7 with trade and business. Then 400, knowledge of the
8 contract. 401 interference with the performance of the
9 agreement and 402 inducement of breach of the agreement.
10 So it's pleaded those three ways, Your Honour.

11 HIS HONOUR: Yes.

12 MR HOWELLS: Then the conspiracy is pleaded in 403.

13 HIS HONOUR: Isn't that the same as 399? Well, sort of, well I
14 see - - -

15 MR HOWELLS: Interference with trade and business and the
16 conspiracy by unlawful means and the unlawful means
17 included the procure of a breach of the agreement.

18 HIS HONOUR: Yes.

19 MR HOWELLS: In 404 we say that the acts that were done are
20 thereafter set out and they're set out from 405 to 410.

21 HIS HONOUR: Yes.

22 MR HOWELLS: They include delivering defamatory material,
23 threaten to target and obstruct the awards ceremony and
24 other means.

25 HIS HONOUR: Then 412's the announcement that Gunns was no
26 longer - - -

27 MR HOWELLS: That's right. 413 and 14 the instances of the
28 breach.

29 HIS HONOUR: You say induced by the conduct of the defendants.

30 MR HOWELLS: Induced we say Your Honour. Again 417, the
31 pleading of those acts being done on behalf of themselves

1 and their co-conspirators and an allegation that they
2 were done pursuant to the discussions that are referred
3 to in 405. Then the concert pleading, as well.

4 HIS HONOUR: 417's got the same syntactical defect, hasn't it
5 that - - -

6 MR HOWELLS: Yes Your Honour.

7 HIS HONOUR: For what it's worth, yes?

8 MR HOWELLS: Then 417B and 418 the concert pleading. Then
9 specification of the wrongfulness in 419. Then a claim
10 in relation to injury.

11 HIS HONOUR: What's the crime?

12 MR HOWELLS: Entering into a conspiracy Your Honour is itself
13 a - - -

14 HIS HONOUR: Conspiracy to commit a tort's a crime.

15 MR HOWELLS: Yes Your Honour.

16 HIS HONOUR: Yes.

17 MR HOWELLS: Then in 422, the plea of loss and damage.

18 HIS HONOUR: That figure there, how's that arrived at?

19 MR HOWELLS: Comparable again Your Honour. Then there's the
20 plea of inducement to breach and at - - -

21 HIS HONOUR: That's at 424?

22 MR HOWELLS: Yes Your Honour, they're consequential pleas as to
23 the making out of the court and in 426 is the aggravated
24 and exemplary damages.

25 HIS HONOUR: Yes.

26 MR HOWELLS: In 427, agency again Your Honour. We make the
27 same submissions again about the agency plea in 427.

28 HIS HONOUR: Yes. So that's the - what's it called? The
29 Banksia Environment Awards.

30 MR HOWELLS: The Banksia Awards, yes Your Honour. Then on 277,
31 the Japanese customer's action. There's an assertion

1 first of all about the nature of the trade and business,
2 which includes the particulars that there are certain
3 customers of the first plaintiff. That then in 429, an
4 assertion the defendants, and that should read Your
5 Honour in 429, "At all material times the defendants
6 referred to in Paragraph 430".

7 HIS HONOUR: The friends referred to in Paragraph 430?

8 MR HOWELLS: Yes Your Honour.

9 HIS HONOUR: Yes.

10 MR HOWELLS: Particulars given about the knowledge and in 430,
11 the primary plea that the 6th defendant and the first to
12 fourth and the tenth and the eleventh, interfered with
13 trade and business with the intention of causing injury
14 to trade and business. In this action, Your Honour,
15 what's pleaded is not only acts done to bring a grievance
16 and exhortations and pressure and threats to the
17 customers by specific means, which are specifically set
18 out in the overt acts, but also meetings whereby that was
19 planned and publication, particularly by the tenth and
20 eleventh defendants of these matters. In addition to
21 that the conduct of the Styx protest. The Styx protest
22 was important Your Honour, because at a key time, those
23 involved in the Styx protest had banners in the Japanese
24 language and signs up in the Japanese language. They
25 were photographed or filmed and then transmitted to media
26 outlets in Japan, it's asserted and also to the
27 customers. It's - in 430, we've specifically referred to
28 this, under the particulars, does Your Honour have that
29 on p.278?

30 HIS HONOUR: Yes.

31 MR HOWELLS: The first lot of amendments to the particulars

1 there, does Your Honour have the sentence, "It was an
2 essential part"?

3 HIS HONOUR: Yes.

4 MR HOWELLS: "It was an essential part of the intended
5 interference with the first plaintiff's trade and
6 business that there would be logging operations
7 disruption campaigns and actions being undertaking during
8 the course of the Japanese Customers action, so that
9 media coverage and other publicity arising from those
10 logging disruption activities could be obtained and used
11 to pursue and promote the Japanese Customers action".
12 The unlawfulness is there, particularised in Paragraph
13 433 and following and in the particulars given of the
14 Styx and Triabunna 2003 and 2004 actions. And then we've
15 pleaded the intention, being a relevant part of the
16 interference with trade and business, but using as the
17 similar formula to the intention that's particularised in
18 the other actions.

19 In 431, in 431 we've pleaded the conspiracy and
20 again we mention specifically which defendants it's said
21 conspired and again provided particulars of that. In 432
22 we've pleaded that those defendants agreed amongst
23 themselves to force Japanese customers to cease
24 purchasing woodchips and similar products from the first
25 plaintiff. We've said that the agreement was reached
26 during discussions between the said defendants during
27 2000 at Hobart and in Melbourne. The agreement is to be
28 inferred from the overt acts and then some essential
29 terms of the agreement, namely that other organisations
30 would be enlisted to lend their support and that
31 customers would be approached. That demands would be

1 made and threats would be used, both express and implied.

2 HIS HONOUR: Yes.

3 MR HOWELLS: In 433 on p.281, we've identified that - asserted
4 that those defendants referred to in 430 promoted,
5 coordinated and participated in the campaign of attack.
6 And that the promotion, coordination and participation is
7 then particularised in a summary way under there Your
8 Honour.

9 HIS HONOUR: Yes.

10 MR HOWELLS: And that in 434, what commences from there is the
11 particularisation of the overt acts, the pleading of the
12 overt acts. There recited in some detail, including with
13 extracts from the publications Your Honour, the letters
14 and press releases and emails and other missives. That
15 goes on for a number of pages Your Honour and does Your
16 Honour desire my - - -

17 HIS HONOUR: I'm just looking at that Paragraph 434. Why has
18 that been pleaded the way it has? Is it - - -

19 MR HOWELLS: Your Honour because giving the detail of the sorts
20 of things that were said and advanced includes the
21 background or circumstantial information that is
22 transmitted, because we say Your Honour, or we'll be
23 asking the court to draw an inference about threats,
24 particularly implied threats based upon there being a
25 huge volume of material information transmitted, not only
26 to those customers, the primary customers, but to
27 secondary and tertiary customers and to the media and to
28 media outlets in Japan for example, with particular
29 circulation.

30 That within the communications sent to the primary
31 customers, the paper manufacturers, we say there were

1 statements like for example, "If you know what's good for
2 you, you'll stop sourcing your product from the first
3 plaintiff, and remember that we have the capacity to harm
4 - we've already stopped certain things from happening by
5 the use of the various techniques we have and if you
6 don't realise the importance of this issue then the same
7 thing could happen to you." That kind of thing.

8 But what we've done for that reason is to set out a
9 goodly proportion of the material and to set it out
10 rather than simply summarise it because necessarily in
11 the summaries, we presumed it would be said, there's some
12 interpretation that may not be of assistance to the
13 court.

14 HIS HONOUR: Yes. So then in 435, that spans out the
15 particulars doesn't it?

16 MR HOWELLS: All of these Your Honour have been - sorry, I
17 withdraw that Your Honour. Some of these have been the
18 subject of a request of particulars. Some of the
19 particulars have been provided but not all Your Honour.
20 Certainly a deal of the particulars can be provided.

21 HIS HONOUR: Yes.

22 MR HOWELLS: Does Your Honour desire to go through all of
23 these?

24 HIS HONOUR: Yes, just let me, I'm just - - -

25 MR HOWELLS: Yes Your Honour.

26 HIS HONOUR: I'd not looked at this with any detail before and
27 I'm - 435, 36, 37, 38 - how do they constitute tortious
28 action, that's - - -

29 MR HOWELLS: Your Honour the tort is the interference with
30 trade and business by interfering with the Japanese, but
31 by applying pressure to the Japanese customers and

1 forcing a situation where there was some destabilisation
2 of relationships between the first plaintiff and its
3 customers. A substantial destabilisation and that's to
4 be - that was achieved, by as I said, a whole host of
5 material, delegations, representations being made.
6 Threats both express and implied about what might happen
7 to the primary customers, the secondary customers and the
8 tertiary customers, and creating a situation where there
9 might be some unease, if I can put it in as understated a
10 way as I might Your Honour, about the situation, forcing
11 - and that of itself Your Honour is an interference with
12 the contractual relations. That interference with the
13 contractual relations is wrongful and will sustain we
14 say, the claim, the tort of interference with trade and
15 business handset.

16 HIS HONOUR: There are a lot of statements in these paragraphs
17 which are extremely general.

18 MR HOWELLS: Yes Your Honour.

19 HIS HONOUR: And could be the subject of objection. 435 for
20 example, "The Wilderness Society, first, second and
21 third, fourth, tenth and eleventh defendants continued
22 their campaign of attack including by attacking the
23 Tasmanian wood chipping industry." That's a
24 conclusionary term.

25 MR HOWELLS: It is Your Honour.

26 HIS HONOUR: What did they do, did they publish advertisements,
27 did they make radio broadcasts. What - it asks the
28 question what does that mean and the same thing occurs in
29 436.

30 MR HOWELLS: But 436 refers specifically to an article.

31 HIS HONOUR: To an article - - -

1 MR HOWELLS: What's said is that there was a - - -
2 HIS HONOUR: He assisted, again, the word in that case is
3 assisted.
4 MR HOWELLS: Yes Your Honour.
5 HIS HONOUR: What does that mean. 437, "news reports
6 circulated in Tasmania suggested". This is not the stuff
7 of pleadings, it's the stuff of argument isn't it?
8 MR HOWELLS: Your Honour it's been styled the particulars in
9 the sub-heading. But Your Honour certainly those
10 assertions can be particularised.
11 HIS HONOUR: They need to be - the word attack is pejorative.
12 MR HOWELLS: Yes Your Honour.
13 HIS HONOUR: It may be that they published an article in one of
14 the Japanese newspapers. That's the allegation, not
15 whether the article attacks or not, is a matter for the
16 court ultimately I suppose.
17 MR HOWELLS: Well Your Honour - - -
18 HIS HONOUR: What I'm getting at it's the lack of precision in
19 the pleading.
20 MR HOWELLS: Yes Your Honour but those are in a way, they are
21 summations of conduct.
22 HIS HONOUR: Yes.
23 MR HOWELLS: They aim to describe what follows thereafter.
24 HIS HONOUR: Yes very well.
25 MR HOWELLS: But the point is taken in relation 435 and the
26 need for specificity in 436.
27 HIS HONOUR: Well then 438, "obtained management advice on the
28 question of certificates of export wood chips, the
29 overall financial performance of Gunns." How does that -
30 how does the seeking of advice constitute - - -
31 MR HOWELLS: The advice itself, the text of the advice is set

1 out in Paragraph 439. If you get advice Your Honour from
2 somebody who styles themselves as an expert in management
3 or financial matters which says that the first plaintiff
4 is vulnerable to certain changes in either economic
5 circumstances or in marketing.

6 HIS HONOUR: Yes.

7 MR HOWELLS: And says, all that has to happen is that certain
8 customers be closed off and this will destroy the first
9 plaintiff. That might be very encouraging to people it's
10 desired by the sixth defendant, should be recruited to
11 activities in connection with the Japanese customers
12 action. Because what would be said is, here's evidence
13 that if we manage to stop this customer from continuing
14 to purchase, it will have a shocking effect upon the
15 first plaintiff. The other way - - -

16 HIS HONOUR: In the opinion of Mr Tippler?

17 MR HOWELLS: Yes Your Honour. If it might galvanise people to
18 action and we say it's certainly part of working out what
19 the target should be and how the target should be
20 approached. Similarly, information of that kind if it's
21 conveyed to the customers themselves, together with other
22 information about whether or not the sixth defendant is
23 capable, having regard to its history in the early 80s,
24 of being able to stop certain things from happening, that
25 that might impact upon whether the first plaintiff would
26 continue to be Your Honour, a viable supplier to the
27 primary customers.

28 HIS HONOUR: Yes.

29 MR HOWELLS: Those claims of techniques Your Honour.

30 HIS HONOUR: Yes. I might say that by saying, "yes" I don't
31 want to imply that I - I can see what your argument is

1 and ultimately it will be argued and - - -
2 MR HOWELLS: Of course it will - - -
3 HIS HONOUR: May or may not be - - -
4 MR HOWELLS: That's basically Your Honour, yes, yes.
5 HIS HONOUR: Yes 440, "distributed the advice."
6 MR HOWELLS: Including to organisations who the sixth defendant
7 hoped to enlist in its campaign, including the
8 organisation referred to there in 440.
9 HIS HONOUR: Yes, 441, well, that's a report of a meeting, is
10 it, between the fourth defendant - - -
11 MR HOWELLS: It is - - -
12 HIS HONOUR: - - - and somebody at Mitsibushi.
13 MR HOWELLS: That's right. Yes, Your Honour, including the
14 things that are alleged to have been said.
15 HIS HONOUR: Again, that might be evidence ultimately of
16 something, but what's the pleading point being made here?
17 What's the - - -
18 MR HOWELLS: Last sentence, Your Honour.
19 HIS HONOUR: Yes.
20 MR HOWELLS: And the pleading point is, Your Honour, that there
21 isn't - by this means, which has been substantially
22 particularised over several pages, the intention was to
23 interfere with the contractual relations and thereby to
24 do injury to trade and business.
25 HIS HONOUR: The way in which this part of the case is being
26 pleaded, it seems to me to be quite different to the way
27 the rest of it's been pleaded.
28 MR HOWELLS: It is, Your Honour, because the nature of the act
29 is different, it's a different kind of technique. A very
30 ingenious one and no doubt in some circumstances quite
31 effective. It's pleaded differently, Your Honour,

1 because the importance is rather than simply asserting,
2 "Well, threats were administered", it relies upon the
3 fact that there is a whole barrage of representations,
4 threats, both express and implied, information being
5 communicated, photographs of demonstrations going on at
6 the Styx and elsewhere, with Japanese banners explaining
7 what people are doing and reports in newspapers, media
8 releases and the like, management advice, representations
9 to government, attacks on government and so on for
10 their - - -

11 HIS HONOUR: It would seem to me that at first glance and
12 without fully considering it that really these are
13 particulars, aren't they? They're particulars of
14 conduct.

15 MR HOWELLS: And Your Honour in the sub-heading on p.281.

16 HIS HONOUR: Yes, but by doing it this way the plaintiff hopes
17 to get a pleading to it, is that the point? I mean, why
18 wasn't it simply done as particulars, the way that
19 everything else has been particularised.

20 MR HOWELLS: I'm trying to say - Your Honour will recall that
21 having particulars in lengthy paragraphs in typed text
22 under "Particulars" is difficult to follow and each of
23 these events is, apart from looking at 435 and 436, and
24 we take Your Honour's point about that (indistinct), but
25 the others and what follows, each one is a separate
26 interaction, a separate missive or transaction, a
27 separate exaltation on either a separate day or by a
28 separate document and in many cases we've recited the
29 documents themselves. And we could have simply put it in
30 a summary way, Your Honour, and request particulars, but
31 I've been criticised for that before, Your Honour, in

1 these kinds of actions where it's said, "Well, it would
2 have been helpful to have it all set out in the
3 pleading". And, we've attempted to do that.

4 HIS HONOUR: Yes.

5 MR HOWELLS: But, true it is, Your Honour. They are
6 particulars. And the point you make, we understand.

7 HIS HONOUR: 442, 443 - yes. When it goes on it really sets
8 out a whole series of events going right through to - - -

9 MR HOWELLS: To p.311 Your Honour is the next.

10 HIS HONOUR: Yes, so - - -

11 MR HOWELLS: On 478A, because we now have the information in
12 relation to meetings, we've included in 478A a reference
13 to those defendants, referred in 431 being involved in
14 planning, organising and coordinating the action and
15 encouraging others to be involved in it. Then we've
16 referred specifically to, in the particulars to the
17 Paragraphs 50D, E, H - - -

18 HIS HONOUR: These are all meeting paragraphs?

19 MR HOWELLS: Meetings Your Honour, yes. There is an error at
20 the last one, it says 99S, does Your Honour have that?

21 HIS HONOUR: Yes.

22 MR HOWELLS: It should be R. Then there's a series of other
23 paragraphs giving particulars of communications and
24 responses that are made. On 322 Your Honour, at 322,
25 Paragraph 488, Your Honour is the claim that the Japanese
26 Customers action constituted interference with the first
27 plaintiff's trade and business. Then in 489, conspiracy
28 and then 489A, the plea of in concert. In 489A, B and C,
29 that's done in - using the formula that we've already
30 taken Your Honour to.

31 HIS HONOUR: Yes. Yes, yes.

1 MR HOWELLS: And 490, an assertion of the consequential
2 interference. And 491, the response that was required to
3 try to shore up the position. There is, even today,
4 continuing material being distributed about these
5 matters, hasn't found it's way into the pleading of
6 course, because the last lot of it we got yesterday or a
7 day or so ago. Other publications by the sixth defendant
8 claiming, making certain claims about what it is that the
9 Japanese customers are now going to do or not do. It's
10 continuing conduct.

11 HIS HONOUR: Yes. 492 is a claim for damages?

12 MR HOWELLS: Yes Your Honour.

13 HIS HONOUR: Presumably can be quantified in some way?

14 MR HOWELLS: As to travel to and from Japan, Your Honour, by
15 senior officers to attempt to shore up the position with
16 customers and also the secondary and tertiary customers
17 and consumers, but also approaches to government and all
18 of the costs of obtaining consultants reports and advice
19 and writing to and continuing to communicate with people
20 to shore up the position, yes Your Honour. A very
21 significant element of trouble and inconvenience.

22 HIS HONOUR: Yes.

23 MR HOWELLS: And then - - -

24 HIS HONOUR: Then there's a claim for aggravated exemplary
25 damages.

26 MR HOWELLS: Basically using the same formula, and then the
27 495, the assertion in relation to agency and we make the
28 same submissions in relation to that arising from one of
29 Your Honour's observations.

30 HIS HONOUR: Yes.

31 MR HOWELLS: Then there's the Bank's action Your Honour. In

1 Banks at 496, again an assertion about the manner in
2 which trade and business is conducted.

3 HIS HONOUR: Yes.

4 MR HOWELLS: And 497 that the defendants referred to in 499,
5 well knew that the plaintiff conducted its trade and
6 business in that manner. Then 498 is the claim that the
7 defendants wrongfully and maliciously interfered with
8 trade and business, which is set out in the ensuing
9 paragraph and particularised in a summary way in the
10 particulars sub-joined to Paragraph 498.

11 HIS HONOUR: How do you - what you've said there, the wrongful
12 interference - is it 503 to 517. What's that?

13 MR HOWELLS: Yes 503 to 517 includes organising a series of
14 protests outside Bank offices and erupting into the
15 offices of banks both in Australia and in London, and
16 trespassing and creating havoc in those situations.

17 HIS HONOUR: Right, leave that aside. We'll come to that. The
18 disruption and interference in relation to the Styx
19 action. Why is that relevant to - - -

20 MR HOWELLS: Because that was used again Your Honour as part of
21 the way of publicising with the banks themselves that
22 this was something that they should have nothing to do
23 with. What was said to the banks was, "Do not have
24 anything to do with the first plaintiff, don't have
25 investments with it, don't provide banking facilities"
26 and also said to the customers of those banks. By
27 approaching those people and providing them with
28 publicity outside banks and in connection with an
29 exploitation to them, not only to withdraw their support,
30 but also to express that opinion in a range of ways,
31 including by having shareholders promote resolutions. So

1 again, it was essential to the campaign in relation to
2 Banks that there should be protests going on at logging
3 coops with pictures of trees and people up them, and
4 pictures of cut logs and so on.

5 HIS HONOUR: Yes.

6 MR HOWELLS: Aims to provide that enhancement to the
7 exploitation.

8 HIS HONOUR: Yes and then 499 is the conspiracy.

9 MR HOWELLS: Yes Your Honour and 500 the agreement.

10 Discussions and agreement and you'll see under 500 Your
11 Honour, on p.332 in the particulars again in the middle
12 of it, in the amended passage, "It was an essential part
13 of the intended interference with the first plaintiff's
14 trade and business that there would be logging operations
15 disruptions campaigns and actions being undertaken during
16 the course of the Banks' action to give immediate
17 coverage and other publicity arising from these logging
18 disruption activities to be obtained and used to pursue
19 and promote the Banks' action." In particular I think
20 Styx is referred to there Your Honour.

21 HIS HONOUR: Who are the defendants in 500, yes I see.

22 MR HOWELLS: Then the aim of the Banks' action set out in 501
23 and that Your Honour will see in 501, that the aim was to
24 force those outcomes in order to cause financial
25 embarrassment, public embarrassment, embarrassment with
26 shareholders and potential investors and financial and
27 commercial loss.

28 And then in 502 we say that the following acts were
29 done and again Your Honour will see that from 503
30 onwards, we've provided particulars in a similar way to
31 the way they were provided in relation to the Japanese

1 Customers Action because it involves a lot of
2 communication, missives, letters and what have you -
3 other forms of communication, they've been set out in
4 that way to identify the collective affect of it Your
5 Honour. From 510 onwards there is reference to the
6 proposal, proposing a resolution and the aim of that it's
7 asserted is to propose a resolution to alter the
8 constitution of the bank concerning its practices and its
9 investments for the purposes that are focussing attention
10 and to apply commercial pressure to make it unpalatable
11 for that bank to continue to provide the services or
12 investment or to cease providing the investment and
13 banking facilities which it had hitherto provided by
14 contract.

15 HIS HONOUR: Yes.

16 MR HOWELLS: Then in 515A Your Honour we've there inserted the
17 references to the meetings. Does Your Honour have that?

18 HIS HONOUR: Yes this is the one that Mr Maher dealt with
19 yesterday.

20 MR HOWELLS: Yes Your Honour and we say - - -

21 HIS HONOUR: We might come to that after lunch I think.

22 MR HOWELLS: Yes Your Honour.

23 HIS HONOUR: We will adjourn until 2.15.

24 LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.16 P.M.

HIS HONOUR: Yes Mr Howells? We're up to 515(a), subject of the chart that Mr Marr created.

MR HOWELLS: Your Honour we're content with, in relation to the paragraphs that are specified under particulars, for a number of them to be deleted.

HIS HONOUR: Sorry?

MR HOWELLS: For a number of them to be deleted.

HIS HONOUR: Which ones do you want to delete?

MR HOWELLS: Yes 10(h).

HIS HONOUR: Yes.

MR HOWELLS: Then 99(b) and then 99 (h),(i),(j)and (l).

HIS HONOUR: And S becomes R anyway.

MR HOWELLS: And S is R. As I said before the luncheon adjournment, yes.

HIS HONOUR: Right.

MR HOWELLS: What that does in relation to 99 is to simply pick up a series of meetings, including national meetings and planning meetings at which a number of the defendants were involved.

HIS HONOUR: Yes.

MR HOWELLS: What's asserted is that in those meetings they, as is said in the paragraph itself, 515(a), they planned, organised, coordinated the Banks' action and encouraged others to be involved in it, and provided training and other support to them.

HIS HONOUR: You say - what this means is that they're the meetings referred to in Paragraphs 99(a), 99(c), (e) - now what does (e) and (d) mean. We had a debate about that yesterday. There's an ellipses in 99 I think,

1 because you've used two sets of lower case bracketed and
2 letters.

3 MR HOWELLS: Yes Your Honour. As it happens Your Honour we
4 don't actually need (e) either. Small e.

5 HIS HONOUR: So it's 99C(d)?

6 MR HOWELLS: Yes Your Honour.

7 HIS HONOUR: So just read that back to me, as you see it.

8 MR HOWELLS: So it would be 99A, 99C and that's 99C(d).

9 HIS HONOUR: Small d right.

10 MR HOWELLS: Then 99D(a),(d),(f) and (g) and then 99E(a),(e)
11 and (f) and 99F, 99K and 99R.

12 HIS HONOUR: Yes, they're all meetings?

13 MR HOWELLS: We say so Your Honour, yes.

14 HIS HONOUR: That makes it easier certainly.

15 MR HOWELLS: Your Honour it would of course had been open to us
16 to recite in a summary way, in 515(a) as or 203(a),
17 478(a) and so on in summary way the meetings that they
18 were involved for example, in a number of meetings
19 including national meetings and so on, over a period of
20 time, aimed at planning and then waited for the request
21 for particulars.

22 HIS HONOUR: Yes, well I suppose that's right but if the
23 essence of the cause of action is the meeting, that's got
24 to be pleaded.

25 MR HOWELLS: There will be no question about doing that. It
26 will be just the question of the particularity that's
27 given in those paragraphs - - -

28 HIS HONOUR: Now what you're saying is that - in terms just of
29 reading the document if under particulars it said
30 "particulars of the meetings are set out in", you'd then
31 - as you read it there it created for me at least some

1 difficulties, until I now understand how you're putting
2 it. But anyway that's what you've said. So you say that
3 - very well, where do we go from there, 516?

4 MR HOWELLS: Yes 516 is further overt acts distributing
5 material, encouraging shareholders to support a
6 resolution and then - - -

7 HIS HONOUR: Just before you go there I want to go back to
8 515(a) for a moment. If we go to 99C, we now take out
9 99C(d), right. Just go to 99C(d). So what you're saying
10 in 515(a) is no more than that by organising the Styx
11 action that was part of the Banks' action as well?

12 MR HOWELLS: Yes Your Honour but we say that there were in A,
13 99A there were national meetings, so the meetings it's
14 asserted did more than just organise Styx, but certainly
15 when one goes to 99C(d) that's about Styx Your Honour,
16 yes that's right. That's certainly the case, but the
17 plea in 515(a) speaks of planning, organising and
18 coordinating the whole of the Banks' action.

19 HIS HONOUR: When is it that it's said that occurred. Did it
20 occur at the 99A meeting or the 99C meeting?

21 MR HOWELLS: Well the paragraph itself says, "During 2003 the
22 people involved in 499 were involved in a series of
23 meetings at which they planned, organised and coordinated
24 the Banks action and encouraged others to be involved in
25 and provided training and other support" then reference
26 is made to - the details about the meetings that we have.

27 HIS HONOUR: But the details of the meetings don't refer to the
28 Banks action do they? They talk about other things?
29 Pleading 99A talks about providing funds and resources to
30 groups who would act as campaign, training and
31 recruitment cells - - -

1 MR HOWELLS: Cells for the Wilderness Society through whom it
2 would direct, organise and coordinate campaigns.

3 HIS HONOUR: From the point of view of a defendant, it's very
4 vague, isn't it?

5 MR HOWELLS: Well Your Honour, we rely upon what's said by
6 Justice Drummond in Pioneer, clandestine arrangements
7 Your Honour, and we've pleaded what we've got about it,
8 and we've pleaded overt acts that are carried out
9 pursuant to it. As we have further information we'll of
10 course, particularise it and provide it. But what we've
11 said is, certain acts were carried out, overt acts,
12 directed towards interfering with our trade and business
13 and we say that what we do know is that there were a
14 series of meetings conducted. We know a bit about those
15 from material that's on the Internet, some of which has
16 disappeared. From that, we can say there national
17 meetings, national committee meetings, coordinating and
18 campaign meetings and then some local meetings. That's
19 what we've got, Your Honour.

20 HIS HONOUR: So you've got the meeting in 99A, the meeting in
21 99C(d) - - -

22 MR HOWELLS: Meetings Your Honour.

23 HIS HONOUR: Meetings, yes. 99D?

24 MR HOWELLS: Yes.

25 HIS HONOUR: You see well you get from - when you start putting
26 in 99D, 99D, (a), (b), (f) and (g), you get cross-
27 references then to a number of other paragraphs. A large
28 number of them, actually. From Mr Marr's chart, you've
29 got 100, 111, 113, 114, they're more meetings.

30 MR HOWELLS: They are Your Honour.

31 HIS HONOUR: Then 204, 205, 207, 289 and all those, they're

1 Lucaston, Hampshire, Triabunna and Styx. They're all the
2 meetings. Why don't you - I mean what you're simply
3 saying is that sometime at some meeting somewhere, or
4 more than one meeting, these agreements were reached,
5 isn't that right?

6 MR HOWELLS: Could Your Honour just excuse me just a moment?

7 99D, Your Honour, (a) refers to the people, that is
8 defendants and (b) refers to more people, (f) only refers
9 to Styx and (g) only refers to Styx.

10 HIS HONOUR: But it - yes, but it picks up - no I think - - -

11 MR HOWELLS: The chart's wrong, Your Honour. 99D(a), (e), (f)
12 and (g) only refer to Styx and people.

13 HIS HONOUR: (a), (b), (f) and (g) - what's 356 to 358?

14 MR HOWELLS: Styx Your Honour.

15 HIS HONOUR: The same with 353, 351 are all Styx as well?

16 MR HOWELLS: No 47 includes - 47 is Lucaston and 202 is
17 Hampshire Your Honour. And 287 is Triabunna. We would
18 accept that (g) is not necessary Your Honour.

19 HIS HONOUR: So (g) goes out, small (g). What this boils down
20 to Mr Howells is isn't it, is that what you're saying is
21 that at some time one or more of these occasions, the
22 details of which you don't know and you say for good
23 reason you don't know them, but on one or more of the
24 occasions on which various people met, they discussed the
25 Banks' action. That's what it ends up that pleading
26 means isn't it?

27 MR HOWELLS: On more than one occasion Your Honour. On a
28 number of occasions, yes.

29 HIS HONOUR: But why - - -

30 MR HOWELLS: But did more than discuss it Your Honour. Planned
31 and coordinated - - -

1 HIS HONOUR: Yes very well, planned and - why isn't it - why
2 then have this torturous course of bringing in meetings
3 you've already pleaded when you don't know which of them,
4 if any of those, it might have been other meetings
5 altogether at which - - -

6 MR HOWELLS: Your Honour we've heard what you say about the way
7 in which that might be recast, and if Your Honour gives
8 us a direction it will be recast, but Your Honour we have
9 actually understood very clearly what you've said about
10 the difficulties created by some cross-referencing. Some
11 of it's difficult, some of it's not, as Your Honour says.
12 We've understood that and if Your Honour were to direct
13 us then we'd of course do that, and we could do that now
14 Your Honour, but it may be that - - -

15 HIS HONOUR: I don't want you to do it now, we'll - - -

16 MR HOWELLS: We say it doesn't interfere with the substance and
17 we say that the attack that's made about it exaggerates
18 the significance of it. If something - certainly it can
19 be corrected and it can be corrected by the use of a
20 narrative and definitional expression in a way that
21 doesn't involve those cross-references. But Your Honour
22 we also say this. Material that has become available to
23 us is voluminous and it deals with all of these various
24 campaigns and acts that are done and we have pleaded the
25 overt acts, and there are a series of unlawfulness that
26 are pleaded, unlawful conduct that is pleaded. With
27 respect to the meetings we've done our best in the time
28 available to at least make sure that, rather than simply
29 make a simple statement and wait for a request for
30 particulars, it's there. Certainly an adjustment of that
31 can be made and we understand that.

1 HIS HONOUR: But am I correct in saying that what you're really
2 saying is that the Banks' action was planned,
3 coordinated, invented et cetera at one or more of a
4 number of meetings, at which one or more of a number of
5 the defendants were present on one or more occasions, the
6 dates of which you don't know.

7 MR HOWELLS: More than one in every case.

8 HIS HONOUR: Yes more than one.

9 MR HOWELLS: Yes on several occasions over a period of time.
10 That's the proposition Your Honour.

11 HIS HONOUR: So that to link them back to meetings which you
12 sort of know occurred because again you can't put dates
13 on them, but you can - is really doing no more than
14 saying we know as much about that as we know about other
15 things. We don't really know much about any of this,
16 but - - -

17 MR HOWELLS: No Your Honour we don't agree with that
18 proposition. No, that's not what we're saying. We're
19 not making any concession of that - - -

20 HIS HONOUR: Why do you pin the planning of the Banks' action
21 to other meetings where other things were discussed.
22 What's the basis for that?

23 MR HOWELLS: Because the way in which it works is that the
24 documents that we have seen indicate that at any
25 particular meeting a number of matters are discussed, and
26 in some cases the planning of one campaign, one
27 particular action, one particular demonstration or
28 protest or interference, is dependent upon planning in
29 another one. Because certain advantages are obtained.
30 For example Your Honour if within the radius of 100 miles
31 of Burnie, three actions are planned for a particular

1 time, it means the police and other resources available
2 to meet them are dispersed. That provides an advantage
3 to those who wish to do what they're doing.

4 HIS HONOUR: Yes.

5 MR HOWELLS: That's not the only thing Your Honour. There are
6 a number of other ways in which they're interdependent
7 and the planning for them one can see, even from the
8 minutes such as they are on, or the reports of meetings
9 that were on the Internet and seem to have been removed.
10 The number of ways in which that's linked. We could have
11 particularised all of that Your Honour and set it all out
12 in horrible detail and Your Honour we would have been
13 criticised for that. If particulars are sought about
14 these things, particularly in relation to documents which
15 are in the possession of the defendants themselves and
16 within their knowledge, well if they want to request
17 particulars we'll do our best to comply with it. But it
18 will take some time.

19 HIS HONOUR: Yes. We'll get back to 515(a). Well I take what
20 you've said and in the course of my ruling I will say
21 something about it and you'll take that up.

22 MR HOWELLS: Indeed Your Honour and we understand keenly the
23 reasons that Your Honour makes those - - -

24 HIS HONOUR: Yes I think we can then go to 516.

25 MR HOWELLS: In 516, further activity, 516(a), circulars. The
26 fourth and the sixth defendant and 516(b) further
27 publication on the Internet. The same with 516(c) and in
28 (d) encouraging people to attend at protests outside bank
29 offices.

30 HIS HONOUR: How does the Tarkine Action Group get into this?

31 MR HOWELLS: Your Honour in Paragraph 10 on p.7, 10(f) we

1 listed as part of the manner in which the Wilderness
2 Society goes about its activities and its campaigns, it
3 uses a number of groups.

4 HIS HONOUR: Yes and that's one of them is it?

5 MR HOWELLS: That's one of them Your Honour, yes. On p.7,
6 middle of the page, the Tarkine National Coalition, the
7 Sydney Tarkine Action Group, the Melbourne Tarkine Action
8 Group, the Brisbane Tarkine Action Group and so on. They
9 operate as front organisations of the group.

10 HIS HONOUR: Yes.

11 MR HOWELLS: Then there's a - - -

12 HIS HONOUR: So it's in effect, you plead it as part of the
13 Wilderness Society?

14 MR HOWELLS: It's pleaded in that way and they're also pleaded
15 as an agent and it's pleaded that they did things on
16 behalf of, in other ways or that their officers or their
17 members did things on behalf of the sixth defendant.

18 HIS HONOUR: Yes.

19 MR HOWELLS: In 516(e) the fourth and sixth defendants
20 encouraged customers to express their objection to any
21 dealings with the first plaintiff.

22 HIS HONOUR: Is that said to have been done pursuant to any
23 agreement or again, it's an overt act which you - - -

24 MR HOWELLS: An overt act of the fourth and sixth defendants as
25 part of the tort alleged and the conspiracy Your Honour,
26 yes. The same with 516(f), a national day of action
27 planned and then 516(g) a publication claiming victory
28 because one of the banks it was alleged had sold shares.

29 HIS HONOUR: This will all have to argued I suppose ultimately
30 but it seems to be the essence of your case that once
31 somebody went to one of these meetings, from then on

1 every expression of free speech that they engaged in
2 could be linked back to a conspiracy.

3 MR HOWELLS: No Your Honour.

4 HIS HONOUR: For example, take 516H, the eleventh defendant
5 made public statement to the effect that the protest
6 aimed at the Commonwealth Bank had been successful
7 because the Commonwealth Bank had sold shares it held in
8 the first plaintiff". On its face, that's - if you were
9 to have said, you wouldn't incur any liability for it
10 would you.

11 MR HOWELLS: Your Honour it depends on the circumstances, but
12 Your Honour can I ask Your Honour to recall that what was
13 first said in the submissions and the claims about the
14 need for desire to have parts of the pleading or all of
15 it struck out was that where are all the unlawful acts,
16 where are all the overt acts giving rise to the
17 conspiracy. Some of them looked at in isolation of
18 themselves, might not attract any liability. The
19 question is, what was the conspiracy and what was done in
20 furtherance of it and what was the harm caused. What
21 we've sought to do is to identify that where the group of
22 people aimed to achieve particular outcome and that of
23 itself is Tortious, then all of the acts are relevant to
24 two things. First of all determining whether there was a
25 conspiracy and whether there was the Tort of interference
26 with trade and business and who was involved in it but
27 then there will be a question about who it is that's
28 liable and in respect of what acts. Because Your Honour
29 it may be that what will be said is, well in terms of the
30 harm that it has caused, affixing liability for some of
31 them is not open. That will be an argument to be had and

1 it will depend upon the way it was done, just drawing a
2 distinction of course between the proposition that
3 somebody may make a statement about whether or not a bank
4 had sold some shares. On the other hand somebody or a
5 group of people erupting in to an office without
6 permission, breaking down a door, barging through it and
7 causing a commotion and frightening people.

8 All of those acts we say are relevant to identify
9 what was the conspiracy, what was the plan because
10 clearly, we say, it doesn't just happen by focussing on
11 one particular act because the strength of the effect of
12 one of those acts might depend upon the extent of
13 publicity and whether or not those in decision making
14 positions considered it to be a threat.

15 HIS HONOUR: Yes, very well, so there are more of those acts
16 516 down to J.

17 MR HOWELLS: Yes Your Honour.

18 HIS HONOUR: Now, 517 defendants referred to in 499, who are
19 they?

20 MR HOWELLS: Page 330 Your Honour.

21 HIS HONOUR: Yes, the Wilderness Society first to five, seven
22 to eleven and seventeen, yes I see. Then the Styx action
23 is 517A.

24 MR HOWELLS: Yes Your Honour and then B we say that those acts
25 were done in concert and pursuant to discussions and
26 pursuant to a common purpose and desire.

27 HIS HONOUR: You say that 517A you put that as being a - the
28 Styx Action is related to the bank's action because it
29 creates - - -

30 MR HOWELLS: An important media focus when they're having a
31 national day of action or another protest or seeking to

1 draw it or seeking to put pressure upon the directors of
2 the bank, having the Styx action going on, people in
3 trees, or impeding machinery and so on and creating a
4 disturbance and getting media coverage for it, the
5 combined affect of that is no doubt thought to be better
6 than simply writing to people saying this is our view.

7 HIS HONOUR: All right, 517D is for common purpose and design?

8 MR HOWELLS: Yes Your Honour.

9 HIS HONOUR: 518?

10 MR HOWELLS: Interference with contractual relations.

11 HIS HONOUR: Which contractual relations are we talking about
12 there?

13 MR HOWELLS: Those in existence between the banks and the first
14 plaintiff.

15 HIS HONOUR: That should be made clear shouldn't it,
16 that's - - -

17 MR HOWELLS: Yes Your Honour and particulars could be given of
18 that.

19 HIS HONOUR: Well it's the contractual, it's particular
20 contractual relations which you're alleging, it's with
21 the various banks and the trustee company presumably.
22 519, "The bank's action constitutes interference with
23 trade and business". The interference with the
24 contractual relations - that's with the banks themselves.
25 "The acts and matters referred to in 332".

26 MR HOWELLS: That's Styx Your Honour.

27 HIS HONOUR: That's Styx is it?

28 MR HOWELLS: Yes and we could have used a formula for that.

29 HIS HONOUR: Styx, 350 to 352, they're all Styx are they?

30 MR HOWELLS: Yes they are Your Honour.

31 HIS HONOUR: What does 521 mean?

1 MR HOWELLS: It reviewed and questioned a facility Your Honour.
2 HIS HONOUR: I don't know if that caused it to review and
3 question the loan facility. Something less than threaten
4 to withdraw the loan facility. Something less than
5 withdrawing the loan facility, something less than
6 threatening to withdraw the loan facility.
7 MR HOWELLS: As Your Honour said it might prompt any action
8 described in that way and not described as a threat to
9 withdraw would have a range of possible impacts and would
10 have to be addressed.
11 HIS HONOUR: Wouldn't you have to plead what the bank did, not
12 the conclusion that it caused it to review and question.
13 The bank wrote a letter to Gunns saying, "Because of
14 what's happened we're reviewing our loan facility with
15 you".
16 MR HOWELLS: Caused it to review Your Honour.
17 HIS HONOUR: That's the point but to work out what it is that's
18 said the bank did, you've got to have more information
19 than is in 521 haven't you.
20 MR HOWELLS: And if there are request for particulars or it was
21 required Your Honour then we could provide particulars of
22 that.
23 HIS HONOUR: It should be required. Surely that should be
24 provided without the necessity for a request. As it
25 reads there it's a coy statement. "The interference
26 referred to in Paragraph 519 caused the ANZ Bank to
27 review and question", I suppose that's its loan facility
28 with the first plaintiff, "And to apply commercial
29 pressure to the first plaintiff". I think that paragraph
30 would be embarrassing in its current form. I can have a
31 guess at what it might mean, but I don't know what it

1 really means. "Apply commercial pressure", it must mean
2 - I don't know, calling the general manager in for a chat
3 or threatening to not advance money next year, or
4 threatening to bounce their cheques or something. I
5 don't know what that means and I think it needs to be
6 clarified. Do you want to say anything further about
7 that? What it is, it's really a pleading of damage isn't
8 it?

9 MR HOWELLS: Yes Your Honour.

10 HIS HONOUR: Really saying the interference referred to in
11 Paragraph 519 caused the plaintiff damage. Particulars.
12 "(a) the ANZ Bank wrote a letter saying it would review
13 its loan facilities with the company. (b) The ANZ Bank
14 through its manager said it might not do business with
15 the company next year." That's - the damage somehow has
16 to be expressed. You've heard what I've said - - -

17 MR HOWELLS: Certainly, it also reflects upon whether or not
18 there's an interference. It's relevant to the question
19 of interference Your Honour, not just to damage.

20 HIS HONOUR: Yes, that's right. Yes there has to be something
21 that occurred which constituted - well it's not the
22 interference it's the result of the interference, cause
23 it's not as if the protester has done anything.

24 MR HOWELLS: But clear upon whether there was an interference
25 Your Honour.

26 HIS HONOUR: Yes, yes. It would, if the bank did nothing there
27 would be no interference.

28 MR HOWELLS: That's all I say, that was the submission, yes
29 Your Honour.

30 HIS HONOUR: Yes, yes.

31 MR HOWELLS: We certainly hear that Your Honour and understand

1 it.

2 HIS HONOUR: Very well, now 522, "required a substantial
3 response from the plaintiff in order to protect its trade
4 and business." The particulars might be criticised as
5 being vague. They give some idea of what happened but
6 they don't really say what happened. The representation
7 to the ANZ Bank could have been a phone call to the
8 manager saying, "She'll be right mate" or it could have
9 been a production of a full submission refuting
10 everything that's been said. That could mean anything
11 from a very minor approach to a very major one and
12 everything in between couldn't it?

13 MR HOWELLS: No Your Honour.

14 HIS HONOUR: You don't think it could?

15 MR HOWELLS: No, we say that's sufficient Your Honour. If
16 there's a request of course if there's a direction, but
17 Your Honour we say it's sufficient.

18 HIS HONOUR: Yes.

19 MR HOWELLS: We say it's manifest what would be the effect of
20 that and what would be required with a publicly listed
21 company, major corporation, those sorts of circumstances
22 Your Honour. Information well known to the defendants
23 because they have it, and as we said in the pleading,
24 they had access to information because they were either
25 shareholders or members of the organisations were
26 shareholders. A good deal of information - - -

27 HIS HONOUR: Of Gunns?

28 MR HOWELLS: Yes Your Honour.

29 HIS HONOUR: Some of the defendants are shareholders of Gunns?

30 MR HOWELLS: Indeed. Yes Your Honour, we assert that either
31 they are or other members of the sixth defendant for

1 example. So a good deal of information Your Honour, and
2 would know what the significance would be if there was
3 some interference with those kinds of financial
4 relationships.

5 HIS HONOUR: Yes. Very well, 523, that's loss and damage.

6 MR HOWELLS: And then 524, aggravated and exemplary Your
7 Honour.

8 HIS HONOUR: Yes a similar way.

9 MR HOWELLS: Then agency 525 and we make the same submissions
10 about that. We understand what Your Honour says about
11 the agency paragraph.

12 HIS HONOUR: Yes.

13 MR HOWELLS: Then 526.

14 HIS HONOUR: No 525(a) first, which is?

15 MR HOWELLS: Agency in relation to the Huon Valley Environment
16 Centre Your Honour.

17 HIS HONOUR: Yes. Then there's 526.

18 MR HOWELLS: Yes Your Honour. 526 pleads that the first to
19 fourth, sixth, tenth, eleventh, seventeenth, eighteenth,
20 nineteenth and twentieth defendants conducted the
21 campaign against Gunns in the manner set out in
22 Paragraphs 10, 12 and 15. Your Honour will recall they
23 described the manner in which those organisations - the
24 three corporate organisations operated and conducted
25 their campaigns and by planning, encouraging and being
26 involved in the acts set out in the particulars sub-
27 joined to - here again as Your Honour said if there was a
28 reference to particular campaigns and the paragraphs were
29 defined as such, then that might be easier to read. But
30 we've set out the paragraphs which we say form part of
31 those activities and we say that it, that is the campaign

1 against Gunns, involved interfering with trade and
2 business with the intention of injuring by - - -
3 HIS HONOUR: Those paragraphs are Lucaston, Hampshire, the two
4 Triabunnas and Styx?
5 MR HOWELLS: Yes Your Honour.
6 HIS HONOUR: Or are they?
7 MR HOWELLS: And also Burnie Your Honour.
8 HIS HONOUR: And Burnie?
9 MR HOWELLS: Yes Your Honour.
10 HIS HONOUR: Can they all fit in that number of paragraphs?
11 MR HOWELLS: Sorry, 405 which is referred to is Banksia and 430
12 is Banks.
13 HIS HONOUR: Yes.
14 MR HOWELLS: No, 430 is Japan and 499 is Banks.
15 HIS HONOUR: Where is 430?
16 MR HOWELLS: Four thirty is, 431 sorry Your Honour, towards the
17 bottom of 526.
18 HIS HONOUR: You've - I think the same comments can be made
19 about that as - I can see with some difficulty what
20 you're getting at, but I can see it after you've
21 explained it. I think it needs some clarification in one
22 way or another.
23 MR HOWELLS: Yes and Your Honour has indicated the ways in
24 which that might be done.
25 HIS HONOUR: It can be done in a number of ways, but I'll put
26 them in - if I get to that point I'll put them in the
27 ruling. Very well, 527?
28 MR HOWELLS: It's asserted that the campaign against Gunns
29 constitutes interference with trade and business by
30 unlawful means and damage is claimed. Loss and damage is
31 claimed.

1 HIS HONOUR: Yes.

2 MR HOWELLS: Then 527(a) the tenth and eleventh defendants
3 repeatedly made public statements supporting direct
4 action against the first plaintiff and its operations,
5 and encouraging others to be involved in action forming
6 part of the campaign against Gunns. Then in 527(b),
7 those acts done pursuant to discussions, common purpose
8 and desire, and concert.

9 HIS HONOUR: Yes. But in effect the campaign against Gunns is
10 the over - the umbrella allegation which incorporates
11 everything else that's occurred. That's really
12 what - - -

13 MR HOWELLS: It incorporates the fact that there has been an
14 ongoing, longer than - over time than any of the
15 individual actions.

16 HIS HONOUR: Yes.

17 MR HOWELLS: A number of which were very short, but an ongoing
18 campaign over a number of years involving those
19 defendants named, particularly the senior officers and
20 the leaders as it were, in doing a number of things
21 together with making public statements and promoting the
22 campaign in the manner set out in Paragraph 10 Your
23 Honour.

24 HIS HONOUR: Yes.

25 MR HOWELLS: Your Honour there were a number of specific points
26 made on behalf of some of the defendants, could I go to
27 those specifically?

28 HIS HONOUR: Yes.

29 MR HOWELLS: First of all I think that there was a submission
30 made about paragraph - I think p.48 Paragraph 66 and the
31 reference to Mr Steed, Paul Steed.

1 HIS HONOUR: P.66.

2 MR HOWELLS: Paragraph 66 on p.48 Your Honour.

3 HIS HONOUR: Yes.

4 MR HOWELLS: I think that the answer might have emerged from an
5 exchange earlier Your Honour about whether or not
6 Mr Steed was, or what his status was within the
7 proceedings and I think Your Honour described him as
8 being one of the those persons who might be said to be
9 an - - -

10 HIS HONOUR: Unindicted co-conspirator.

11 MR HOWELLS: That's our answer to the submissions made about
12 that. Another submission was made to the effect that in
13 the Banks action there was no calling up of - in the
14 pleading it was submitted on behalf of the
15 Herbert Geer and Rundle defendants that in the Banks
16 action there was no calling up of the Styx action and
17 there were no paragraphs identifying it and we've taken
18 Your Honour to those in 517A. Sorry, 515A and 517A.

19 HIS HONOUR: Yes.

20 MR HOWELLS: That's as we understood the submission. The next
21 proposition that we need to deal with Your Honour was the
22 assertion that the loss claimed is not compensable in a
23 number of cases, particularly the responsive action taken
24 in relation to investors, banks, customers and the like.
25 We've referred Your Honour to Ansett No.2 and I think
26 we've handed up a copy of that yesterday.

27 HIS HONOUR: Yes.

28 MR HOWELLS: The relevant passages are at 645 but we've also
29 dealt with that in our written outline Your Honour and I
30 think we might have made a reference to Salvadori also.
31 It was next submitted that there were no allegations

1 against the seventh defendant and we say that's simply
2 not right, we've taken Your Honour to a number of those
3 but - - -

4 HIS HONOUR: Who is the seventh defendant?

5 MR HOWELLS: To put it simply Your Honour, Burling. He's a
6 senior office organiser with the Huon Valley Environment
7 Centre and in the agency passages and also variously
8 elsewhere in a number of the campaigns, principally in
9 Lucaston, not only asserted to have done particular acts
10 but also being involved in meetings and organising
11 Your Honour.

12 It was submitted that there's - I think for the
13 Phillips Fox defendants that there's no specific
14 allegations against the third defendant Hanson. Hanson
15 is the CEO of the sixth defendant Your Honour.

16 HIS HONOUR: Third defendant is - - -

17 MR HOWELLS: Hanson.

18 HIS HONOUR: Yes, Russell Hanson, yes.

19 MR HOWELLS: Yes Your Honour.

20 HIS HONOUR: He's the CEO of - - -

21 MR HOWELLS: Of the sixth defendant.

22 HIS HONOUR: Of the Wilderness Society?

23 MR HOWELLS: Yes Your Honour, and referred to in various
24 specific acts in relation to Styx and Japan but also
25 - the Japanese customers' action, but also in the
26 meetings. Particularly the national meetings, organising
27 and providing instructions to protestors and
28 encouragement. There is one other authority that I
29 should refer, or one of the paragraphs of Pioneer
30 Your Honour that I should refer Your Honour to in
31 relation to the question of the merging argument, tort

1 and conspiracy to commit. In Pioneer at Paragraph 112.
2 I omitted to make this submission earlier Your Honour in
3 connection with - - -
4 HIS HONOUR: Yes, what - - -
5 MR HOWELLS: Paragraph 112.
6 HIS HONOUR: Yes.
7 MR HOWELLS: Does Your Honour have that?
8 HIS HONOUR: What's Gallon?
9 MR HOWELLS: Gallon's the Western Australian case - - -
10 HIS HONOUR: The Western Australian case.
11 MR HOWELLS: Which is entitled to the fullest respect.
12 HIS HONOUR: Yes. "Chief Justice Burt had found that he could
13 find no authority to support his conclusion that the
14 plaintiff's confined to suing on the tort itself", and
15 that there's no, effectively, "No cause of action for a
16 conspiracy to commit a tort that was actually carried
17 into effect where the defendants are jointly liable.
18 There's nothing to the tort", well Justice Drummond
19 didn't follow that is that right?
20 MR HOWELLS: No Your Honour. That's right.
21 HIS HONOUR: Was it a Full Court decision or?
22 MR HOWELLS: Not Pioneer Your Honour, no.
23 HIS HONOUR: No but Gallon.
24 MR HOWELLS: It's - - -
25 HIS HONOUR: Was it Sir Francis sitting alone or was he with
26 two others?
27 MR HOWELLS: It doesn't appear from - - -
28 HIS HONOUR: It doesn't appear from what's there, yes.
29 MR HOWELLS: - - - this paragraph Your Honour, but maybe
30 there's a reference to it in McKellar, I'm not sure.
31 HIS HONOUR: That's all right. Anyway, Justice Drummond didn't

1 think much of it.

2 MR HOWELLS: I don't know about that Your Honour, he perhaps

3 just declined to follow it. My learned friend Mr Walters

4 submitted to Your Honour that there was no reference in

5 Hampshire in relation to the twentieth defendant and we

6 refer Your Honour to 203A which in turn refers to the

7 meetings and can I hand to Your Honour a table that we've

8 prepared.

9 HIS HONOUR: Did I ask you yesterday to email material you

10 already - - -

11 MR HOWELLS: Yes Your Honour and we will if Your Honour will

12 receive this, we'll make sure it's emailed - - -

13 MR HOWELLS: If you do the same for this if you could please.

14 MR HOWELLS: It was submitted that there was little if any

15 reference to the twentieth defendant, also to the

16 nineteenth, and we prepared a table setting out where the

17 references are and what they are Your Honour. That's

18 first cause of action, defamation, conspiracy to injure

19 by unlawful means and then interference with trade and

20 business and then there is a series of, on the third page

21 Your Honour you will see causes of action in which the

22 twentieth defendant is relevant to the outcome in the

23 sense that it's alleged to act as an agent on behalf of

24 the sixth defendant.

25 HIS HONOUR: That's Dr Forrester, isn't it?

26 MR HOWELLS: Yes Your Honour. Similarly for the nineteenth.

27 HIS HONOUR: I've been deserted have I?

28 MR HOWELLS: I'm sorry Your Honour - - -

29 HIS HONOUR: No that's all right.

30 MR HOWELLS: - - - I should have signalled to Your Honour's

31 tipstaff - - -

1 HIS HONOUR: That's all right.

2 MR HOWELLS: - - - I am sorry. In relation to the nineteenth
3 defendant again we've identified the action and the
4 references to paragraphs and then those causes of action
5 in which the nineteenth defendant is relevant to the
6 outcome, because of either having been referred to as an
7 agent or having done acts in concert with and so on. I
8 think we made the submission yesterday in relation to the
9 criticism that the claim for 150,000 pounds in damages
10 for loss of credit and reputation in relation to - - -

11 HIS HONOUR: I think that figure appears more than once,
12 doesn't it?

13 MR HOWELLS: Yes, Your Honour, it does, and I think we've made
14 our submissions in relation to how that's arrived at.
15 Then, Your Honour, it was submitted against us that there
16 should be not only striking out but in some cases
17 dismissal and judgment. Your Honour, those submissions,
18 we say, really invites Your Honour to fall into error and
19 in the circumstances, particularly having regard to for
20 example in Beach v. Johnson. I think it's referred to in
21 the list. Justice von Doussa in the Federal Court of
22 Australia - it's at (1991) 105 A.L.R. 456, where
23 criticism was made of cross-references and complexity
24 arising as a result. The order that was made there was
25 one to permit the proposed amendment to be further
26 amended in light of indications that were given and the
27 motion for striking out be stood down with an indication
28 that striking out was not the appropriate order and we
29 commend that.

30 HIS HONOUR: Striking out the action?

31 MR HOWELLS: Yes, exactly, Your Honour, or the pleading.

1 HIS HONOUR: Well, the pleading - I mean, permitted amendments,
2 striking out, I don't think there's much difference - - -
3 MR HOWELLS: We submit that the appropriate order is the one
4 that's - if there are to be - - -
5 HIS HONOUR: Justice von Duossa - - -
6 MR HOWELLS: - - - there are to be alterations, Your Honour.
7 Yes, Your Honour. We note also, Your Honour, in light of
8 the submissions that were made about judgment and
9 dismissal, the Maurice Blackburn defendants, Your Honour,
10 have not involved themselves in the claims for strike out
11 and those arguments that are put and the submission that
12 there ought to be judgment or a striking out, we say,
13 wouldn't be cogent before the court in circumstances
14 where the sixth defendant and those other defendants for
15 whom Maurice Blackburn appears have not joined in the
16 strike out applications as they have been advanced. Your
17 Honour, we - - -
18 HIS HONOUR: They may've accepted my invitation to - or not
19 accepted the invitation to consider the amended statement
20 of claim, because I put it on the basis in that ruling
21 that anybody who didn't come in at this point would not
22 lose any right to come in at some other time.
23 MR HOWELLS: Indeed, Your Honour, yes.
24 HIS HONOUR: They may do that.
25 MR HOWELLS: They may do, Your Honour, they may do, yes. Your
26 Honour, the other matter we wish to raise is that we've
27 been left in a situation where the order for the
28 provision of particulars given on the eighth of - the
29 directions given on 8 April still subsists and - - -
30 HIS HONOUR: When were they supposed to - when did that - - -
31 MR HOWELLS: Yes, 10 June, Your Honour. We indicated before

1 that time that we sought to amend and that some
2 particulars would be able to be provided but not all.
3 Now, we would ask Your Honour to vacate that direction
4 and to consider the prospect that if there are to be
5 amendments made or depending on the way in which Your
6 Honour deals with the matter, that requests for
7 particulars might need to be amended and for us to have
8 sufficient time to deal with them, Your Honour. But, we
9 do ask for that direction to be vacated. Those are the
10 submissions, Your Honour.

11 HIS HONOUR: Thank you, Mr Howells. Mr Burnside?

12 MR BURNSIDE: Just a couple of points in reply, Your Honour.

13 We were disappointed to learn in Mr Howells' address that
14 the nineteenth defendant is sought to be drawn in on -
15 effectively on everything. The document handed to us
16 just a few minutes ago makes it plain that it is now said
17 that the nineteenth defendant was involved in many of the
18 actions, not just the Burnie Woodchip action. That
19 simple proposition illustrates the real vice with the
20 current form of pleading. Can I hand up a document which
21 I hope will help make the point. It's not a very elegant
22 document. Let me explain.

23 HIS HONOUR: It looks like a Housie Housie game.

24 MR BURNSIDE: Yes, that's probably right. First of all, the
25 starting point is Paragraph 526 which you see on the
26 left-hand end. The way to understand this document is
27 that tracing along the row from 526 are the principal
28 paragraphs to which Paragraph 526 refers. If you then
29 look at the various paragraph numbers that are
30 highlighted in yellow, going up on the diagonals, those
31 are each paragraph numbers which are referred to in

1 Paragraph 526 and each of them, in turn, refers to other
2 paragraphs. Now this is not a comprehensive exercise but
3 we've taken some of the most striking examples. So,
4 Paragraph 526 refers to Paragraph 10, it refers to
5 Paragraph 15, it refers to Paragraph 15, it refers to
6 Paragraph 47 and it refers to Paragraphs 99D and E.
7 You'll see each of those is present on the chart
8 highlighted in yellow. Likewise, it refers to Paragraphs
9 50A to 50I, 202 and 243, all of which are on the diagonal
10 going upwards. In each case the numbers which follow in
11 the row, following a yellow highlighted number, are
12 paragraphs referred to in that paragraph. OK?

13 Now, what follows from this - and I should mention
14 one other thing. You'll see that there are a few
15 paragraph numbers that are also greyed out; 526 is one,
16 99D and E is another and 384 and 385. They're greyish.
17 The ones that are grey are the only paragraphs which in
18 the body of the paragraph make an allegation against the
19 nineteenth defendant. They are therefore the only
20 paragraphs to which the defendant can respond in his
21 defence. All of the other references - all of the other
22 paragraphs on that piece of paper have indirect relevance
23 to the nineteenth defendant but do not refer to him.
24 They are therefore not paragraphs to which a defence can
25 make an answer. And what that - - -

26 HIS HONOUR: Or putting it another way, they're paragraphs to
27 which he's got to be - having identified this question,
28 the nineteenth defendant has got to be super vigilant to
29 ensure that he doesn't inadvertently miss an allegation
30 against him which slips by because he didn't pick up the
31 number.

1 MR BURNSIDE: Yes, and that's certainly right and it's actually
2 more subtle than that, because in a couple of places the
3 reference is to the eighteenth to twentieth defendants.
4 So a search for nineteenth doesn't even pick up those.

5 HIS HONOUR: Yes.

6 MR BURNSIDE: I think there's half a dozen of those references.
7 But this is not just a matter of requiring us, who act
8 for the nineteenth, to be super vigilant. This is a
9 question of how you are going to handle this action. The
10 purpose of pleadings, after all, is to have a clear
11 statement of facts against the relevant defendants in a
12 form which is capable of being answered by each relevant
13 defendant, so that by comparing statement of claim with
14 defence, a person can see what facts are in issue.

15 We can't respond to any of these allegations except
16 the three sets of paragraphs that are greyed out, because
17 those paragraphs - the other paragraphs don't refer to
18 us, don't make allegations against us and in many
19 instances the substance of what is said, and what is
20 alleged to draw us in, is contained in the particulars
21 but not in the body of the paragraph itself and therefore
22 doesn't call for an answer.

23 HIS HONOUR: Yes?

24 MR BURNSIDE: I hope not to make this too tedious, but I want
25 to illustrate the process by tracking you through just
26 one or two of these branches so you can see how it works
27 in practice. Can I - - -

28 HIS HONOUR: I think I'm very much awake to it, Mr Burnside,
29 but do it anyway.

30 MR BURNSIDE: The detail is really alarming. If you start at
31 Paragraph 526, Your Honour. It's said that - and I'll

1 abbreviate this so as to only refer only to the
2 nineteenth defendant. It's said that the nineteenth
3 defendant conducted the campaign against Gunns in a
4 manner set out in Paragraphs 10, 12 and 15 and by
5 planning, encouraging and being involved in the acts set
6 out in the particulars sub-joined to 47, the Lucaston
7 conspiracy. Hampshire, 202, the Hampshire conspiracy,
8 243 the Triabunna conspiracy 2003, 287 which is the
9 Triabunna conspiracy 2004, 332 which is Japanese
10 customers' and 384 the Burnie Wood Chip Pile. So he is
11 said to have planned, encouraged and been involved in the
12 acts set out in the particulars to all of those
13 paragraphs.

14 Let's just go for a start to Paragraph 47. It
15 alleges that in January to June 2003, August 2003 and
16 March 2004 the Wilderness Society, Huon Valley
17 Environment Centre, the seventh to eleventh, fourteenth
18 and sixteenth defendants conspired and combined with
19 other protesters to injure the first plaintiff. No
20 reference to the nineteenth defendant. In the
21 particulars which go for the next page and a half, there
22 is the assertion at about point three on p.33, "the
23 agreement is to be inferred from the overt acts. The
24 unlawful acts of those specified in Paragraphs 47" which
25 is this paragraph, 49, 51 to 99, and 100 to 127". So no
26 one can plead to these particulars, because you don't
27 plead to particulars, but we have to then go to
28 Paragraphs 51 to 99, so approximately - - -

29 HIS HONOUR: Is he mentioned in any of those?

30 MR BURNSIDE: No, no.

31 HIS HONOUR: Forty nine, 51 to 99 and 100 to 127 - he's not

1 mentioned?

2 MR BURNSIDE: No, nothing about it. But he's supposed to be
3 involved in all of this and he cannot possibly join issue
4 with any of the assertion of facts contained in these
5 particulars or in the - however many, 50, 60 paragraphs
6 referred to in the particulars, each of which would have
7 to be looked through with some care to see what it is
8 that is said to have been done. If you go to Paragraphs
9 51 to 99, perhaps we can have a cursory look at them.
10 Paragraph 51 begins at p.43 and you'll see that it makes
11 allegations about the seventh, ninth, fourteenth and
12 sixteenth defendants. Paragraph 52 does likewise, and
13 these are specific things that particular people are said
14 to have done. Fifty three makes more specific
15 allegations against the same defendants. Fifty four
16 likewise, 55 likewise and so on and so on, all the way
17 through to 99. Again, it picks up in 100 to 127, but no
18 reference in any of those to the nineteenth defendant.

19 How are you as trial judge meant to have any
20 understanding at all of what issues of fact are joined
21 between the first plaintiff and the nineteenth defendant.
22 It's absolutely impossible on this document because
23 although he is said to be involved in all of those
24 things, nothing is alleged against him about them, except
25 a general conclusory statement that he was involved in
26 organising them, encouraging them, supporting them and so
27 on. Then it gets more - you can do the same exercise if
28 for example you go from Paragraph 526 to Paragraph 243,
29 that is equivalent to Paragraph 47. Again, it refers in
30 the particulars to vast range of other paragraphs. A
31 vast range of particular actions by particular people,

1 none of them are allegations against the nineteenth
2 defendant. Again. We are apparently to be drawn in on
3 all of this and it is not possible for us to join issue
4 because no allegation is made that directly involves us.

5 There are also, as I mentioned a few minutes ago,
6 references not to the nineteenth defendant, but to the
7 eighteenth to twentieth defendants and I want to take you
8 to a couple of instances of those, because you'll see
9 once again the difficulty. Yes 166 is an example.

10 HIS HONOUR: Page 166?

11 MR BURNSIDE: I'm sorry, Paragraph 166. The problem is this.

12 The allegation in Paragraph 166 is, "Each of the acts set
13 out in the Lucaston action", which is dealt with between
14 Paragraphs 16 and 166, "were done by the persons
15 alleged", not including the nineteenth defendant, "as
16 agents for the Wilderness Society." Then the
17 particulars, paragraph (a), the first to fifth, seventh
18 to eleventh, fourteenth to sixteenth, eighteenth to
19 twentieth defendants and various other people,
20 "representatives of the groups identified by the above,
21 and the other protesters, did the acts alleged as agents
22 for the Wilderness Society." It's not something we can
23 plead to because it's in particulars. But it's
24 particulars supporting assertions that we did things
25 referred to in the previous paragraphs, as agent for the
26 Wilderness Society, but there's no allegation against us
27 in the previous paragraphs. Nowhere in Paragraphs 6
28 through to 166 relevant to the Lucaston action are we
29 said to have done anything.

30 I need to qualify that in one respect. If the
31 Lucaston action is said to include the interpolated

1 Paragraphs 99A to 99R there is reference to the
2 nineteenth defendant there.

3 HIS HONOUR: They're meetings aren't they?

4 MR BURNSIDE: They're meetings, and it's not - it's not clear
5 that those paragraphs are intended to be caught up within
6 the expression, "the Lucaston action." They're there
7 because the way the pleading was re-jigged. An
8 equivalent problems happens in Paragraph 236. This is in
9 connection with Triabunna 2003. That paragraph starts at
10 p.156. Paragraph 236 says, "each of the acts set out in
11 the Hampshire action which were done by the person or
12 persons alleged as agents for the Wilderness Society.
13 Particulars, (a)" - there's a reference in the second
14 line to the eighteenth to twentieth defendants. The
15 Hampshire action runs from Paragraph 167 to 236A. No
16 reference in any of those paragraphs to the nineteenth
17 defendant. So a suggestion that the interpolated
18 Paragraphs 99A to 99R explain in any way, doesn't work.
19 At least didn't work for this.

20 So here's an allegation in particulars, something to
21 which we can't plead, which refers to us and says that we
22 did all these things as agents for the Wilderness
23 Society, but there's no allegation against us as having
24 done anything, unless you go back to Paragraph 526, which
25 says, that we are in a general sense involved in
26 everything.

27 Your Honour, it's just not possible to plead to
28 allegations like this. And if we can't plead to it, then
29 the purposes of pleadings will completely fail in an
30 action which more than most desperately needs tight
31 pleadings.

1 Exactly the same phenomenon occurs in Paragraph 308,
2 375 and 495, and I needn't take you to those. The way,
3 apparently that the plaintiffs seek to draw in the
4 nineteenth defendant is by the vague, general allegations
5 made in 99D and 99E.

6 HIS HONOUR: 99E?

7 MR BURNSIDE: Capital D.

8 HIS HONOUR: D and E.

9 MR BURNSIDE: And E, those paragraphs, amongst others are
10 referred to in Paragraph 526 and they seem to be the
11 pathway through which the plaintiff tries to drag the
12 nineteenth defendant into the vast bulk of the earlier
13 pleading. The difficulty with 99D and 99E is that
14 neither of those paragraphs makes a specific allegation
15 about the nineteenth defendant. They are couched in the
16 vaguest, most conclusory language imaginable.

17 Paragraph 99B for example, over the course of that
18 six months identified there were informal weekly meetings
19 conducted by the Wilderness Society. In Paragraph (b)
20 it is said that, "Various people, including the
21 nineteenth defendant occasionally attended" and it is
22 then said in (c), (d), (f) and (g) that those people
23 mentioned in (a) and (b), "Planned organised and
24 coordinated the various actions". Now it's impossible to
25 think of any language in pleading that could be more
26 general than that. He's said to have occasionally
27 attended meetings and from that, it is said, he planned,
28 organised and coordinated all of the other actions in
29 relation to which he's never mentioned again.

30 HIS HONOUR: That might be so, but the point can be made, can't
31 it, that if in fact this is a conspiracy, that the nature

1 of it is going to be that that plaintiff's not going to
2 know the details at this stage?

3 MR BURNSIDE: Well then let them plead at least one overt act
4 on the part of the nineteenth defendant which draws him
5 into each of the alleged sub-campaigns.

6 HIS HONOUR: Well they say, for example, that he went to
7 meetings at which things were planned, that's an overt
8 act.

9 MR BURNSIDE: But with respect, they don't say that, because
10 they don't allege anything specific at all.

11 HIS HONOUR: Well if you take 99D(c), "Those defendants and
12 persons referred to in (a) and (b) planned" leave out
13 organised and coordinated, "The blockade, trespasses and
14 lockout alleged in the Lucaston action".

15 MR BURNSIDE: And what is it that he did by way of planning?

16 HIS HONOUR: Sorry?

17 MR BURNSIDE: What is it he is said to have done by way of
18 planning?

19 HIS HONOUR: Well they don't know.

20 MR BURNSIDE: Is he said to have leant his support to the idea
21 of a lock-on? Is he said to have simply shared in the
22 objective of wanting to help preserve - - -

23 HIS HONOUR: The plaintiff says he doesn't - it doesn't know.

24 MR BURNSIDE: Well then they shouldn't plead it. If they do
25 not know - - -

26 HIS HONOUR: Well that's not entirely so Mr Burnside is it? I
27 mean a plaintiff who's placed in the position of this
28 plaintiff who says, "Things happened to me, dreadful
29 things happened, criminal things happened and there were
30 meetings at which people who were involved in those
31 things - which we know attended, we allege attended" why

1 isn't that a start?

2 MR BURNSIDE: If they say, first of all you see they refer to
3 meetings generally and only some of those meetings were
4 attended by the nineteenth defendant. Let it be
5 supposed, for the sake of argument, that a particular
6 action constituted an unlawful conspiracy, an unlawful
7 conspiracy to injure. That unlawful conspiracy to injure
8 has been pleaded in relation to each of the sub-campaigns
9 that are referred to. The nineteenth defendant is not
10 alleged to have been a co-conspirator in any of them. So
11 plainly enough - - -

12 HIS HONOUR: Isn't he - - -

13 MR BURNSIDE: No the only - - -

14 HIS HONOUR: Isn't that what this is saying?

15 MR BURNSIDE: Well it's - well it's a very strange way of
16 saying it Your Honour, because, take 47 for example - - -

17 HIS HONOUR: Why isn't 99D(c) on p.64, why isn't that an
18 allegation against the nineteenth defendant that he was -
19 that he conspired in respect of Lucaston?

20 MR BURNSIDE: If they want to allege that, then they should
21 plead it against him in a way that can be traversed.
22 They should say for example that he performed, you know,
23 carried out this or that overt act. They've got to show
24 something. They haven't even identified any meeting at
25 which he's said to have attended. If they have got some
26 evidence, if they do want to make actual allegations, if
27 they're going to put a witness in the witness box and say
28 this is what happened, surely they should tell us
29 specific facts, rather than conclusions. For example, if
30 they say, "He attended a meeting on 1 January 2003 at
31 which A, B and C were present and it was agreed that

1 there would be a lock-on at Lucaston". That would be a
2 permissible pleading. But to say that meetings were held
3 and he occasionally attended and was involved in planning
4 is not to allege anything that's capable of being
5 answered.

6 HIS HONOUR: Well he can deny that he attended meetings with
7 these others, that he planned the Lucaston action, he can
8 deny that?

9 MR BURNSIDE: Let it be supposed he did attend some meetings
10 and let it be supposed that what was discussed at the
11 meetings was, "We need to do something about what's
12 happening at Lucaston, what are the things that are
13 possible, what should we do" but no one suggests, for
14 example that there's going to be a - I'm making up the
15 details - - -

16 HIS HONOUR: Yes.

17 MR BURNSIDE: No one suggests there's going to be an unlawful
18 act, no one suggests that there's going to be littering
19 in the forests, this or that or the other thing. He has
20 not thereby made himself party to a conspiracy to injury
21 by unlawful means.

22 HIS HONOUR: That's right and he can say that.

23 MR BURNSIDE: But the trouble is, he doesn't know what to
24 answer, because it's not said which meetings he went to
25 or what was done, said or agreed at those meetings. I
26 mean, you know, they could draw the tea lady in on this
27 basis.

28 HIS HONOUR: Well except they haven't alleged that she - the
29 operative verb in that sentence is - well there are three
30 of them, but using one for the moment will do, planned.

31 MR BURNSIDE: Yes.

1 HIS HONOUR: There is an allegation that between October 2003
2 and March 2004 your client attended informal weekly
3 meetings at which he, because a person's referred to,
4 planned, along with others, the Lucaston action. Now
5 that's an allegation isn't it?

6 MR BURNSIDE: Yes, an allegation that relates to a conspiracy
7 which is said to have occurred between January and August
8 of 2003 and again in March of 2004. Now if they're that
9 specific they should be capable of saying - - -

10 HIS HONOUR: When was the Lucaston action?

11 MR BURNSIDE: Well Lucaston, according to Paragraph 47 was
12 January to June 2003 and August 2003 to March 2004. So
13 if we read between the lines of Paragraph 99D(c) he's a
14 late comer to a conspiracy which it is said is already
15 formed, and he has in someway planned it. Now in order
16 to be able to say that he has taken part in planning, a
17 conspiracy to injure, there must be demonstrated that he
18 knew something about what the conspiracy about, I mean,
19 otherwise the tea lady does get drawn in. He's got to be
20 fixed with some knowledge of things which would make it a
21 conspiracy to injure and he must be fixed with some
22 actions by which he becomes a participant in it.

23 Let's be blunt about it, the rule in O'Hearn's case
24 would say that none of the evidence against any of the
25 other people is admissible against him until there is
26 cogent evidence that he himself participated. There has
27 to be independent evidence of his participation and with
28 respect, that independent evidence will have to be facts
29 about what he did. Coupled, perhaps with facts about
30 what he knew. Those things need to be pleaded, because
31 otherwise all that's pleaded is the conclusion, very

1 close to being a legal conclusion and it's in
2 sufficiently broad terms as to be impossible of a cogent
3 answer. Our learned friends have either got the goods on
4 the nineteenth defendant or they haven't. If they have
5 they should plead that he can answer.

6 It's as simple as that Your Honour, but the broader
7 point that I wanted to make in taking you to these
8 paragraphs is that whatever answer he would wish to make
9 none of this pleading enables him to make it because it
10 is not - nothing is alleged against him in the vast range
11 of paragraphs drawn in by Paragraph 526, with the
12 exception of those that I've indicated.

13 Your Honour the only other thing I want to say is
14 that this case obviously has special features which mean
15 that managing it carefully will be important. In our
16 submission it would be appropriate if Your Honour accepts
17 the submissions that we've made but if you decide that
18 leave to replead should be given, it is our submission
19 that leave to replead should only be given contingently
20 on an acceptable document being presented to the court so
21 that we don't have to go round the loop again and again.

22 HIS HONOUR: It should be rather leave to provide a draft.

23 MR BURNSIDE: Yes, but it shouldn't be unconditional leave to
24 replead and in our submission unless something dramatic
25 can be done to improve the nature of the plea of the
26 overarching tort, in our submission that overarching tort
27 should not be the subject of any leave - - -

28 HIS HONOUR: Do you mean the campaign against Gunns?

29 MR BURNSIDE: The broad campaign against Gunns that draws in
30 everyone at all times and is really found in the vibe.

31 HIS HONOUR: Yes.

1 MR BURNSIDE: In fact I could take that a step further
2 Your Honour. I think the justification Mr Howells has
3 put forward for the overarching, the campaign against
4 Gunns, was a suggestion that in some way the damage to
5 Gunns was greater because there was a long term campaign,
6 greater than the - - -

7 HIS HONOUR: I think he accepted my proposition that the total
8 is greater than the sum of the parts.

9 MR BURNSIDE: Yes, that's their assertion. It's difficult to
10 understand conceptually why that would be so but let's
11 accept it as face value for the moment. It's only the
12 presence of an overarching plea like that provides any
13 justification at all for holding all of these defendants
14 together in a single action. Take away the overarching
15 allegation and what you've got is a number discrete
16 actions, with some common elements, but actions which can
17 be dealt with more conveniently as separate actions and
18 dealt with in a way that is much less oppressive for the
19 individuals who will be sitting there for months
20 listening to evidence about other people.

21 In our submission it ought to be a condition of any
22 leave to replead in any form an overarching tort, it
23 should be a condition of that leave that the plaintiffs
24 provide sworn evidence that demonstrates what their
25 damage is and demonstrates why it is greater because of
26 the existence of the overarching tort than merely the sum
27 of the individual torts that are alleged.

28 HIS HONOUR: In other words you say they should be required to
29 put on evidence that makes good the proposition that the
30 total is greater than the sum of the - - -

31 MR BURNSIDE: Yes.

1 HIS HONOUR: - - - individual parts.

2 MR BURNSIDE: Because that's the only justification for holding
3 together this juggernaut instead of letting it form into
4 natural smaller actions that can be heard separately.
5 Really the plaintiffs are asking you to undertake a
6 massive task, you ought to be persuaded on evidence why
7 it's necessary to do it the hard way rather than the easy
8 way. Those are our submissions.

9 HIS HONOUR: Yes thank you Mr Burnside. Does anyone else have
10 something to say?

11 MS BATROUNEY: If Your Honour please I first have some
12 homework that I promised the court. We will with
13 Your Honour's leave now hand up a summary.

14 MR HOWELLS: Your Honour we've not seen any of this.

15 HIS HONOUR: Have you not given it to Mr Howells?

16 MS BATROUNEY: There's no intention to take our learned friends
17 by surprise. It is simply as promised to Your Honour
18 yesterday a summary of paragraph by paragraph of how we
19 say the amended statement of claim is deficient.

20 MR HOWELLS: Your Honour shouldn't receive this. We will need
21 considerable time to check it - - -

22 HIS HONOUR: Yes, Ms Batrouney I think. This is itself a 20
23 odd page, 34 page document which - - -

24 MS BATROUNEY: It was simply Your Honour, rather than myself
25 going through it and telling Your Honour all of it
26 yesterday it was a matter where we - one of my juniors
27 worked effectively all night setting out the document so
28 as not to waste the court's time. I can assure the court
29 there's no intention of taking - - -

30 HIS HONOUR: No I can understand that but this was the subject
31 of a direction as to written submissions by I think the

1 10th, or whatever it was, 12 June - - -

2 MS BATROUNEY: Your Honour this responds to the amended

3 statement of claim that was delivered on Friday - - -

4 HIS HONOUR: Yes, I understand that. For the moment I'll

5 receive it and I'll look at it and I'll certainly give

6 Mr Howells, of course, if he needs a longer opportunity

7 than overnight to look at it, I'll give him that time.

8 It looks like we're not going to finish today, we'll get

9 close to it, but I'll look at this tonight and I'll

10 indicate whether I propose considering it in the course

11 of this matter tomorrow morning. If I do I'll give

12 Mr Howells the opportunity of making any application he

13 wishes in relation to it but I think that's the best I

14 can do at the moment.

15 MS BATROUNEY: It's simply a matter of convenience for the

16 court and we didn't want to waste the court's time by

17 going through it paragraph by paragraph.

18 HIS HONOUR: I am indebted to you for the thought. I'll have a

19 look at it and if I think it's appropriate I'll accept it

20 and then I'll give Mr Howells leave to make whatever

21 application he likes and deal with that. If I decide not

22 to accept it then it won't be necessary for him to

23 respond to it.

24 MS BATROUNEY: It's simply an aide-memoire that's all - - -

25 HIS HONOUR: Is there anything else you wanted to - - -

26 MS BATROUNEY: We do have submissions in reply which I'll hand

27 up to the court. A lot of the - - -

28 MR HOWELLS: Your Honour we are receiving written submissions

29 in reply and how would Your Honour foresee that we ought

30 to deal with them.

31 HIS HONOUR: Let me have a look at them first and I'll.

1 MS BATROUNEY: Many of the matters that we were going to raise
2 in reply have already been raised by Mr Burnside and in
3 that respect we would gratefully adopt what he has said.
4 At Paragraph 3, 4 and 5 we refer simply to the issue of
5 meetings and the point that Mr Burnside was making, that
6 is that in these each and every paragraph that refers to
7 these meetings there's no actual allegation as discussed
8 by Mr Burnside that any of the defendants actually said
9 or did anything at any particular meeting or even that
10 any defendant actually attended any meeting - - -

11 HIS HONOUR: You heard my discussion with Mr Burnside - - -

12 MS BATROUNEY: That being said, I'll move on - - -

13 HIS HONOUR: Yes. I think so far as this document is concerned
14 against it's another nine pages. Just before you go any
15 further, are there any other defendants who have matters
16 in reply?

17 MR BORNSTEIN: I do Your Honour. I'll be very quick, I don't
18 have nine pages to hand you.

19 HIS HONOUR: Ms Batrouney I think I'll defer your reply for the
20 moment and I might deal with it tomorrow morning.

21 Mr Howells has now got a copy of this I take it?

22 MS BATROUNEY: Yes.

23 HIS HONOUR: I'll hear from defendants who have only short
24 submissions and I'll then - I'll read this but it may be
25 that I'll hear you tomorrow morning.

26 MS BATROUNEY: If Your Honour pleases. I'm not able to attend
27 tomorrow morning but my junior will be more than happy to
28 do it.

29 HIS HONOUR: Yes very well. I'll defer the reply by those
30 other defendants. Who is next, Mr Bornstein?

31 MR BORNSTEIN: Your Honour indicated in your date with - - -

1 HIS HONOUR: I'm sorry, I can't hear you.

2 MR BORNSTEIN: Your Honour, in your discussion with my learned
3 friend Mr Howells you indicated that the plaintiff case
4 seemed to be one of the - that once you've been to a
5 meeting, you're liable for any act of free speech
6 exercised thereafter. In fact, the plaintiff's case goes
7 further than that. In effect, what the plaintiff is
8 saying is that once you've been to a meeting, you're
9 liable even if you've done nothing at all and haven't
10 expressed any free speech at all. You're liable simply
11 because you happened to be the Chief Executive, for
12 example, of the Wilderness Society.

13 My learned friend indicated that his reference to
14 overt acts - there were references to him and Japanese
15 customers' action. That's simply not so. The Japanese
16 customers' action refers only to acts done by the fourth
17 defendant, Ms Minshull. He indicated also there was a
18 matter of directions being given by the third defendant.
19 In fact, the only directions being given by any of my
20 particular clients is the bare reference to directions
21 being given by the first defendant in relation to the
22 Styx action. The third defendant is not alleged anywhere
23 in the pleading to have done anything at all other than
24 to have attendance in meetings.

25 Now, my learned friend sought to put to you based on
26 Justice Ashley's decision, quoting a passage from
27 Fleming's text that you could be liable on that basis by
28 simply being present at meetings. That's not so, it's a
29 misinterpretation or a misstatement of what Fleming says.
30 What Fleming says, and I quote, and indeed which was
31 quoted by His Honour, "Merely being present" - and the

1 critical words are, "as a conspirator at the commission
2 of the wrong would suffice. There has to be more than
3 mere attendance, you have to be there as a conspirator
4 and you have to be there at the commission of the wrong".

5 Your Honour went through the situation with two
6 people in effect coming to agreement to belt the living
7 daylights out of somebody outside a pub. And if one
8 starts, another one continues, obviously they're both
9 liable. Consider then the position of a third person
10 who's there while they plan to do it. Might have been
11 well and truly about it, might have even been asked,
12 "Well, have you got any problem with that?" "No, he's a
13 pig, he deserves it." What if he then goes home, doesn't
14 take part, has nothing to do with it? Overt act? No.
15 There isn't - hasn't done anything. He's not liable.

16 If he goes out with them and watches, says, "Yeah,
17 go for it, put the boot it", well yes he is.

18 HIS HONOUR: He might be able to be complicit if by standing
19 there he gives some encouragement.

20 MR BORNSTEIN: If he stood there, yes, if at present. But I
21 was saying he went home - - -

22 HIS HONOUR: I see, yes.

23 MR BORNSTEIN: Him going home. "Then I don't care if you belt
24 the living daylights out of him, that's fine by me", but
25 he goes home. He doesn't come out with them. He doesn't
26 take part, he's not present.

27 HIS HONOUR: Yes.

28 MR BORNSTEIN: In this particular case, I'll take Lucaston for
29 the example, because in fact none of my clients save for
30 this question of meetings which is very difficult to
31 plead to, the sort of situation that Mr Burnside has

1 taken me through, none of my clients are actually alleged
2 to be involved in this particular conspiracy, or at least
3 no relief is sought against them other than as part of
4 the over-arching conspiracy as it were. Sorry,
5 over-arching interference with contractual relations as
6 it's now called.

7 Paragraph 130 goes through the things which are
8 meant to be wrongful. At the meetings alleged in
9 Paragraphs 51A through to about I think it's I and 99A
10 through to 99R are not alleged to be wrongful. There's
11 no allegation that there's any wrongfulness or
12 unlawfulness. There's no allegation of a wrong involved
13 in the meetings. So, presence at a meeting, if they're
14 not present as a conspirator at a commission of any
15 wrong, because there's no wrong pleaded in relation to
16 those meetings.

17 HIS HONOUR: Just say that again. You say there's no
18 allegation - - -

19 MR BORNSTEIN: Of wrongfulness about the meetings.

20 HIS HONOUR: Well there is in the sense that they incorporate -
21 if you take the one I was discussing with Mr Burnside,
22 99D. It alleges that the various numbered defendants and
23 other people occasionally attended meetings at which for
24 example, the Lucaston Blockade, trespassing and lock ons,
25 were planned, organised and coordinated. That's an
26 allegation of illegality isn't it?

27 MR BORNSTEIN: Well except for the fact that there's as my
28 learned friend Mr Burnside indicated for example, in
29 relation to the first, third and fourth here, are alleged
30 to have occasionally attended a meeting. They're not
31 alleged in Paragraph 47 which names the conspirators to

1 Lucaston, as being conspirators for example. You see you
2 have in Paragraph 47, it indicates who the conspirators
3 are meant to have been, not including one, three, four or
4 five. The conspirators for the Lucaston action are
5 alleged in Paragraphs 47 to be the Wilderness Society,
6 the sixth defendant, Huon Valley Environment Centre,
7 which I think is the thirteenth. The seventh to
8 eleventh, fourteenth and sixteenth. No reference to one,
9 three, four or five.

10 Indeed that sort of problem arises in many different
11 places. It's not alleged that my clients are
12 conspirators in relation to the sub-conspiracy. Yet it's
13 said there's meant to be some meeting which it does. No
14 illegal act is alleged, or rather it's not alleged to
15 illegal, the meeting, or it's not incorporated, that me
16 be a deficiency in the pleading. But the commissions of
17 the various wrongs surely must be the actual torts
18 committed. It's not alleged for example that my clients,
19 any of them, were involved at Lucaston, so far as that
20 goes. My learned friend says it's terribly difficult
21 for him because relying on Pioneer that it's clandestine
22 activities. What could be more open.

23 The parties concerned here publicise everything on
24 the Internet and indeed that's where they seem to get
25 most of their information. Does a company for example
26 publish its minutes of meeting on the Internet. Of
27 course not. But this is a body or a group of bodies who
28 do publicise what they do. They're information is freely
29 available, unlike what would normally be the situation in
30 a commercial context. Even in the case of a normal
31 company which might indicate publicly what certain

1 decisions had been made in their annual report and the
2 like, certainly isn't going to publicise for example
3 decisions made by a finance committee for example. A
4 meeting as between the finance director and several of
5 his financial controllers at a national or international
6 company. That's not going to be publicised nor should it
7 be. Nor should anyone expect it to be. But in this case
8 you have a situation where far from being clandestine
9 activities, it's all open. Indeed it's the very part of
10 the plaintiff's case. It should be open to publicise
11 things and to encourage other protesters. They want it
12 open.

13 So to say that they can't give proper particulars of
14 who was wherever, or to indicate what meetings occurred,
15 and who was present and what the actual supposed
16 encouragement, planning, involvement, organisation, call
17 it what you will, or conclusionary verbs, was, is in my
18 submission it's just completely inadequate. It should be
19 struck out and pleaded properly so that my clients know
20 what case they have to meet. In the case of the third
21 defendant in my submission, it should be struck out
22 entirely. Not to be granted leave to re-plead, because
23 the only actual acts alleged as against him, is in
24 relation to the Banksia Awards matter, which for the
25 reasons I indicated in my original submission, should be
26 struck out entirely, and as to which my learned friend
27 Mr Howells has made no submission at all. Which is to
28 say there's no particulars at all of the defamation
29 alleged, which is the only real act alleged.

30 There's a lot of talk about what was done and
31 conspired, but at the end of the day what's alleged is

1 that they were defamed. That caused the Banksia Awards
2 Foundation to withdraw it. But there's no identification
3 of publication, by whom, whatever. Nothing can be drawn
4 from it.

5 Now so far as Paragraph 515A, that was the reference
6 to the defendants being involved in the various meetings
7 to support the Japanese customers' action and the various
8 paragraphs are referred to in 99B. I think what was to
9 be left was 99A, and various others simply don't refer to
10 the Japanese customers' - sorry the bank's action, I
11 should say. They don't refer to the Japanese customer's
12 action either, I should indicate, and indeed there was
13 one of the other paragraphs which referred back to them
14 for those purposes. They refer almost exclusively to the
15 various actions involving, we'll call it the interference
16 actions, the lock-ons and that sort of matter. Those
17 meetings don't refer in any way to either the bank's
18 action or the customers' action.

19 The other matter I wanted to raise with you was the
20 question of Paragraph 521 which was the allegation as to
21 the commercial pressure which was supposedly applied to
22 the first plaintiff to Gunns. Your Honour's already
23 raised that in discussion with Mr Howells, but Mr Howells
24 said particulars could be requested and the like.
25 Particulars were requested in February and they haven't
26 been provided. What was provided was, "Well, we need to
27 have discovery and interrogation." As I said in my
28 original submissions who better than the plaintiff to
29 know what commercial pressure - whatever that might mean
30 - was applied to the plaintiff. It doesn't need
31 discovery or interrogation.

1 In my submission that particular allegation should
2 simply be struck out along with the allegation
3 unparticularised to the effect - and I'll find the
4 paragraph - that the defendants, in particular the fourth
5 defendant on behalf of the sixth, sought to have the ANZ
6 Bank cut off the facility. It's Paragraph 514. And that
7 is - again, particulars have been requested of that, not
8 provided and combined with the absence of the inability
9 to provide particulars of the so-called commercial
10 pressures such that Your Honour ought to conclude that
11 they're incapable of making the allegation.

12 HIS HONOUR: Thank you, Mr Bornstein.

13 MR BORNSTEIN: If Your Honour pleases.

14 HIS HONOUR: Mr Browne? Mr Estcourt? No? Mr Walters?

15 Mr Browne seems to have - - -

16 MR BROWNE: I'm not jumping the queue, I've been accorded some
17 priority, Your Honour, by Mr Walters and Mr Estcourt on
18 the basis that I'm returning to Tasmania tonight and so
19 they're happy for me to go before them, and I appreciate
20 that. And Your Honour, can I indicate, of course, that I
21 won't be here tomorrow and ask you not to take that as a
22 discourtesy and that Mr Estcourt and Mr Maher will appear
23 for the twelfth defendant tomorrow.

24 HIS HONOUR: Very well.

25 MR BROWNE: Your Honour, I simply by way of reply wish to refer
26 Your Honour to the decision of Justice Drummond in the
27 Federal Court that has been relied upon by the
28 plaintiffs. Reported in (1998) 157 of the A.L.R.s.

29 MR GRONOW: Your Honour I have a copy of it here. I don't
30 think it's actually in the materials.

31 HIS HONOUR: No, I've got - it is.

1 MR GRONOW: There are two Pioneer cases, Your Honour.

2 MR HOWELLS: There are two Pioneer cases - - -

3 HIS HONOUR: This is the other one, is it?

4 MR HOWELLS: The one he refers you to is one that Your Honour

5 has, but there is another one which is at 157 A.L.R.

6 HIS HONOUR: Thank you.

7 MR BROWNE: Your Honour, in this case - this was a strike out

8 application in the Federal Court on the basis of a

9 pleading that was described as an umbrella pleading and

10 can I take Your Honour to Paragraph - I'm sorry, to the

11 bottom of p.139, where His Honour says, "Faced with

12 complaints of the allegations in Paragraph 12 of entry

13 into six different lots of arrangements and understanding

14 in the cartel period is embarrassing.

15 Given that the cartel period is defined as not

16 covering a period of the price war, the council both in

17 correspondence and in submissions to the hearing by its

18 counsel put a gloss on the pleading. By asserting that

19 it's primary case was that there was one umbrella

20 arrangement and understanding entered into, either prior

21 to or at the beginning of the cartel period, which

22 continued through out the relevant period". Then at Line

23 10 His Honour says, "It is said that the council is

24 unable, until after discovery, to particularise when each

25 of these arrangements and understandings, the subject of

26 the alternative case was entered into". Then to the

27 bottom of the page, Your Honour at Line 47, it was

28 acknowledged by the respondents who mounted - - -

29 HIS HONOUR: Sorry at?

30 MR BROWNE: At Line 47, at the bottom of p.140.

31 HIS HONOUR: Yes.

1 MR BROWNE: It was acknowledged by the respondents that mounted
2 the strike-out application. His Honour says, "The
3 respondents also" - - -

4 HIS HONOUR: Wait on, I've lost you.

5 MR BROWNE: Still at the last paragraph, Line 47 on - - -

6 HIS HONOUR: On p.140?

7 MR BROWNE: Yes. The respondents also argue - - -

8 HIS HONOUR: Yes.

9 MR BROWNE: That this being a case based on a clandestine
10 arrangement or arrangements between the respondents and
11 the applicant who can be expected to be unable to give
12 precise particulars of the arrangement or understanding
13 should still particularise the overt acts it intends to
14 rely on, to justify the inference that that arrangement
15 or understanding was made.

16 Reference was made to the decision in Queensland v.
17 Adsteam and on p.141 His Honour his says, "I agree that
18 this should be accepted as a general rule". His Honour
19 then refers to another defect in the pleading and His
20 Honour then says, "I would ordinarily strike out a
21 pleading such as is found in Paragraph 12 because of
22 these deficiencies".

23 But then His Honour goes on and in the next
24 paragraph to say, "None of the respondents, as I
25 understand their submissions, suggest the s.45 case is
26 without foundation. The explanation for this is clear,
27 during the hearing, the Trade Practices Commission's
28 statement of claim against the first three respondents
29 and others was put in evidence, together with the
30 parties' joint written submissions to Lockhard J and the
31 penalty proceedings. The main allegations in Paragraph

1 12 of the applicants pleadings are plainly taken from the
2 allegations in the Commission's statement of claim".

3 So Your Honour in this case there were prior
4 proceedings in the Federal Court, by way of a prosecution
5 for pecuniary penalties - - -

6 HIS HONOUR: Well - yes, a claim for penalties.

7 MR BROWNE: Yes, I'm sorry, a claim for penalties and the
8 statement of claim and the submissions by the respondents
9 in these current proceeding were before the court and on
10 the basis of that Justice Drummond was prepared to
11 consider the strike-out application. The decision was
12 based on the existence of the joint submission. And His
13 Honour at p.142, Line 41 considering Order 11, Rule 16 of
14 the Federal Court Rules said, "In these unusual
15 circumstances, I do not consider that any of the
16 respondents would suffer any of the disadvantages which
17 is the object of Order 11" - - -

18 HIS HONOUR: What's Order 11, Rule 16?

19 MR BROWNE: I don't have it with me Your Honour, but Order 11's
20 to do with pleadings and I believe it empowers the court
21 to strike out a pleading that's embarrassing.

22 HIS HONOUR: I see, yes.

23 MR BROWNE: His Honour said that, "In effect, an order directed
24 to confining the applicant to much the same case that the
25 Commission relied on against the respondents. At p.143,
26 the third line down, His Honour said, "Rather do I
27 consider that a case so confined will provide the
28 respondents with a proper pleading, one that will
29 sufficiently put them on notice of the case to be met and
30 sufficiently define the issues of the decision, so that
31 preparation of the case and the trial can be controlled."

1 At the bottom of that page His Honour said the key
2 paragraph which at the moment sets up only the umbrella
3 case, should be struck out.

4 So Your Honour in this decision a claim based on a
5 series of clandestine meetings and an umbrella
6 arrangement which was regarded as difficult to establish
7 in a pleading prior to discovery, was not acceptable in
8 those terms to justify the pleading not being struck out.
9 His Honour moved to consider it on the basis that he had
10 some reasonable evidence before him, the factual basis of
11 the claim, which of course we don't have here. That's
12 all I wish to say.

13 HIS HONOUR: Thank you Mr Browne, you're excused from
14 attendance tomorrow.

15 MR BROWNE: Thank you Your Honour.

16 MR BURNSIDE: Your Honour can I just help out, for 11.16 is the
17 equivalent of Rule 23.01.

18 HIS HONOUR: I think that's what Mr Browne said.

19 Thanks Mr Burnside.

20 MR WALTERS: Your Honour I can start. I won't finish in the
21 available time.

22 HIS HONOUR: That's all right. I wonder whether we'll even
23 bother. I think we won't Mr Walters.

24 MR WALTERS: As Your Honour pleases.

25 HIS HONOUR: I will deal with, I will read that material that
26 Ms Batrouney has handed up. Have you had a chance to
27 have a look at it Mr Howells while you've been sitting
28 there?

29 MR HOWELLS: I found two parts of it that we would join issue
30 with, but no, Your Honour I've been reading - - -

31 HIS HONOUR: That's all right. We'll deal with it tomorrow

1 morning. I would hope to be able to finish inside an
2 hour tomorrow morning if we - is that likely to be the
3 situation. Will you be very long?
4 MR WALTERS: I think about 20 minutes Your Honour.
5 MR ESTCOURT: It's too (indistinct) Your Honour.
6 HIS HONOUR: Very well. Do you want to, did you want to get
7 back to Tasmania Mr Estcourt?
8 MR ESTCOURT: No I've got other commitments here in Melbourne
9 thank you.
10 HIS HONOUR: Very well. We'll adjourn then until 10.30
11 tomorrow morning.
12 ADJOURNED UNTIL THURSDAY 7 JULY 2005