

1 (RULING FOLLOWS)

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1 MR HOWELLS: Thank you Your Honour. There are two or three
2 matters, for example Paragraph 10 and a new point raised
3 in 15 and another point raised in 19.

4 HIS HONOUR: That's what I wanted you do to. If you point out
5 the new matters I'll deal with them.

6 MR HOWELLS: To some extent because I've spoken and Mr Gronow
7 helpfully indicated to me how he wished to proceed as he
8 did on the earlier occasion, helpfully. It may be best
9 if we hear how he addresses the document - - -

10 HIS HONOUR: Yes, and then you deal with it.

11 MR HOWELLS: Yes, I apprehend that there may be an attempt to
12 refer to authorities not previously referred to and if
13 they come into the heel of the hunt in reply well there's
14 a difficulty but I'm sure that won't be the case with
15 Mr Gronow, perhaps I could defer it until we hear what he
16 says.

17 HIS HONOUR: Yes. Where are we up to - we've - - -

18 MR GRONOW: Well Your Honour, the defendants have taken the
19 liberty of agreeing amongst themselves subject to of
20 course to Your Honour having a different view that we
21 would go next.

22 HIS HONOUR: Yes.

23 MR GRONOW: Mr Estcourt and Mr Maher would go after that and
24 then Mr Walters would bring up the rear.

25 HIS HONOUR: Yes.

26 MR GRONOW: We are mindful of Your Honour's comment expressed
27 yesterday that you hoped this would take no more than an
28 hour - - -

29 HIS HONOUR: Yes, I'd given this three days but obviously it's
30 gone slightly longer.

31 MR GRONOW: We will try and make it three and a bit, but no

1 more Your Honour.

2 HIS HONOUR: You're seven and eight and - - -

3 MR GRONOW: Fourteen to seventeen Your Honour.

4 HIS HONOUR: Yes Mr Gronow.

5 MR GRONOW: I should say the outline is only intended as an
6 aide-memoire and it is intended only to respond to things
7 raised by the plaintiffs. It's not intended to raise new
8 arguments and to the extent it does then like I say, we
9 didn't mean to. As the plaintiffs had said - they refer
10 to the R v. Associated Northern Collieries which is known
11 as the Colvin case. We respectfully agree with them and
12 that's Justice Isaacs judgment in the case is often
13 regarded as the classic statement of the law.
14 Notwithstanding that it was overturned on other points on
15 appeal and in particular he says, at p.400 and if you
16 want to read the whole thing it's in Tab 1(a) of the
17 folder.

18 There are two ways in which a plaintiff can prove a
19 conspiracy. The first one is by proving a community of
20 purpose by independent facts. To use Your Honour's
21 analogy of the person being assaulted outside the pub the
22 conspiracy there might be alleged and proved by saying
23 that the defendants were all sitting at the same table
24 inside the pub and they had a conversation in which one
25 of them said, "It's about time we assaulted X," and
26 someone else said, "Yes and you must make sure you stab
27 in the guts with your knife". Assuming you could allege
28 that and you say you had a witness who had overheard it
29 and who could give evidence about it, that would be
30 enough to prove a community of purpose to assault the
31 victim and to stab the victim and even the defendants who

1 didn't have the knife would still be liable for the
2 stabbing done by the one who did because the stabbing was
3 within the agreed community of purpose and it's proved or
4 alleged by an independent fact, namely the fact of the
5 conversation inside the pub before the assault.

6 That's one way of doing it. The second way is by
7 proving overt acts or as Justice Isaacs says, in
8 Paragraph 1B of the submissions, but also at p.400 of the
9 Commonwealth Law Reports, "Other acts tending to the same
10 end with such a concurrence of time, character, direction
11 and result as naturally led to the inference that these
12 separate acts were the outcome of pre concert or some
13 mutual contemporaneous arrangement or that they were
14 themselves the manifestations of mutual consent to carry
15 out a common purpose, thus forming as well as evidencing
16 a combination to affect the one object towards which the
17 separate acts are found to converge".

18 Now again to use Your Honour's example, that might
19 be if it could not be proved that there was any
20 conversation in the pub, or there might have been a
21 conversation but no one except the defendants knew what
22 they had said but if as Your Honour said, they go outside
23 the pub, there's the victim and they both start beating
24 him up and one person produces a knife and starts
25 stabbing and the other defendant, far from expressing
26 horror and moving away keeps on beating him up.

27 HIS HONOUR: Provided he's seen the knife.

28 MR GRONOW: Exactly Your Honour, he's seen the knife and assume
29 you can prove all that. You've got a bystander or
30 something who's seen all that then you would say that the
31 defendant who didn't have the knife is still liable for

1 the actions done by the one who did because you can infer
2 from their actions, and in particular his action in
3 continuing the assault after he saw the knife that it was
4 part of a common purpose and you wouldn't need to be able
5 to prove that they had discussed in the pub beforehand
6 and agreed to stab the guy.

7 In our submission, the plaintiffs in this case,
8 while they had attempted to do both, they in fact, we
9 would say haven't achieved either and in such a way that
10 their statement of claim in its present form is
11 unsustainable. They are entitled to say that the
12 conspirators had clandestine meetings, we don't know what
13 they said, but we'll infer it from their overt acts,
14 they're also entitled to say, "The conspirators had
15 meetings and at these meetings they discussed and agreed
16 to follow it", but we would say with respect, what
17 they're not entitled to say is there were meetings, all
18 these people went to them and things were agreed without
19 saying more than that, or saying who agreed, or what was
20 said, and then to say that there are all these overt acts
21 that were part of the conspiracy and people that had no
22 involvement in the overt acts are therefore part of the
23 conspiracy.

24 One example of that is at Paragraph 202 and that's
25 just one example and that's an allegation of a conspiracy
26 involving various defendants including my clients. If
27 you look at the particulars which have been given, first
28 it says that they were involved in discussions with one
29 another and with other protestors, not specified, in
30 which they agreed that they and other protestors would
31 engage in - and et cetera and it sets out what they'd

1 agreed to. That they and the other protestors would
2 engage in interference activities at the Hampshire mill
3 site and then it sets out what's said they agreed. With
4 respect Your Honour, that is conclusionary and it doesn't
5 say when or where the discussions took place or who said
6 what or who agreed to what. It may be that after hearing
7 full evidence of those discussions, a judge would say,
8 yes they did agree at those discussions that they would
9 do all those things - - -

10 HIS HONOUR: Hearing full evidence of the events.

11 MR GRONOW: Yes, and we say - - -

12 HIS HONOUR: Not evidence of the discussions?

13 MR GRONOW: Well there are two ways of proving it, with respect
14 they've tried to do both but not succeeded in either in
15 this example. They first attempted to allege that there
16 were discussions at which things were agreed but what's
17 said is simply there were discussions, this was agreed.
18 In my submission that is not enough for particularising
19 this kind of conspiracy allegation involving all of these
20 people. Among other things, the Wilderness Society and
21 Huon Valley Environment Centre are corporate entities,
22 they're not natural people and they can only do things by
23 agents and those agents must have authority. It's not
24 said who the people are or what authority they had.
25 Throughout the statement of claim you will find
26 allegations that meetings were attended by
27 representatives of the Huon Valley Environment Centre,
28 the seventeenth defendant.

29 It's not said who they were or what authority they
30 had and in my respectful submission if you're going to
31 say that a corporate entity is involved in a conspiracy

1 you've got to say that.

2 Then it goes on and after they've set out all the
3 things were allegedly agreed it says in the underlined
4 passage, "The agreement is to be inferred from the overt
5 acts" and then the unlawful acts are those alleged at
6 those paragraphs.

7 HIS HONOUR: Where are you reading from at the moment?

8 MR GRONOW: I'm in p.135 Paragraph 202, third last line of the
9 page in the particulars. "The agreement is to be
10 inferred from the overt acts" and then the unlawful acts
11 are then set out. They have in fact tried to do both
12 Your Honour. What I want to do now is address my
13 submission, they haven't actually succeeded to a
14 satisfactory standard in doing either as a matter of
15 pleading. I've already said that the pleadings of the
16 discussions and meetings are hopelessly vague, all that's
17 really said is there was a meeting. It's often not even
18 said when it took place, various people are said to have
19 been there and then it's asserted that things were agreed
20 at. In my submission that's just not enough and I've
21 given - in my Paragraph 4, I've set out paragraphs which
22 are example, I don't think I need to take Your Honour
23 through all those paragraphs. They're there for Your
24 Honour to have a look at, you can decide whether you
25 agree with me having read them.

26 HIS HONOUR: Yes.

27 MR GRONOW: In particular, I say it is insufficient to allege
28 merely that the defendants participated in meetings or
29 organised protests, they're conclusions and they've got
30 to be supported by allegations of attendance, speech and
31 activity at particular meetings.

1 Now it may or may not be able to be done. If the
2 whole thing is clandestine then the plaintiff might say
3 we can't do that but if that's the way it's going to be
4 put then they've got to make specific allegations about
5 what was said and done. Now if I could go on to
6 Paragraph 243A which is part of the Triabunna 2003 action
7 you'll see there they say they refer to and repeat
8 Paragraphs 50A to 50H. Now that is presumably because
9 the discussions referred to in those paragraphs are being
10 relied upon as part of the Triabunna 2003 action.

11 If you read the overt acts alleged at Paragraphs 237
12 right through to 278 - - -

13 HIS HONOUR: 237?

14 MR GRONOW: Yes, that's on p.162. That says on 15 January 2003
15 and then it makes various allegations. Then you go
16 through to Paragraph 278 you'll see that it's plain that
17 the overt acts which are said to constitute the Triabunna
18 action took place on 15 January 2003 and I think there
19 might have been one or two things that took place on
20 16 January. But it's said that it took place on one or
21 two days in January 2003.

22 Then if you go to the meetings alleged at Paragraph
23 50A through to 50H the meetings are said to have taken
24 place at various unspecified dates from December 2002 to
25 June 2003. Now they are said to be particulars of an
26 allegation of a common purpose or an agreement to do
27 things on 15 and 16 January 2003. Now I accept that to
28 the extent the meetings occurred on or prior to
29 15 January they could - they may or may not be that but
30 they could be. But after that time they couldn't
31 possibly be yet that is what is alleged and plaintiffs

1 that come to the court alleging this kind of conspiracy
2 in my submission have an obligation to be a bit more
3 precise and a bit tighter about their allegations than
4 these plaintiffs have been so far.

5 Otherwise my clients are expected to respond to
6 allegations that in February to June 2003 they conspired
7 to do something in January. In my submission that's just
8 absurd and they shouldn't be expected to have to plead to
9 those allegations. A further example is at Paragraph
10 515A but that's had so much attention from everyone else
11 that I don't think I'll trouble Your Honour with it.

12 HIS HONOUR: Just give me that paragraph again. The paragraph
13 that gives the particulars.

14 MR GRONOW: 243A that repeats Paragraphs 50A to 50H. Now one
15 can only imagine that that's done because these meetings
16 are said to have been when the conspiracy or whatever or
17 concerted action or whatever it was was agreed to, yet
18 the meetings apparently kept going for another five
19 months afterwards. In my submission if it's said that we
20 did something in January 2003 and we agreed to it
21 beforehand then we're entitled to have, you know, an
22 allegation of a meeting prior to the time when we're said
23 to have done it.

24 Now in my submission the plaintiffs either do or
25 don't have evidence to prove these allegations. We're of
26 course not entitled to ask for the evidence at this stage
27 and we don't but if they know enough about it to
28 ultimately prove it at trial in my submission they must
29 know enough about it to be able to give us proper
30 particulars of what was said and done in order to make
31 out those allegations.

1 HIS HONOUR: They could of course simply rely on the overt
2 acts.

3 MR GRONOW: And I'm coming to that with respect, Your Honour.

4 I accept that. That's the first thing, that they have
5 tried to rely upon the meetings and they're perfectly
6 entitled to do that, but if they do they've got to make
7 specific concrete allegations. They can't just say there
8 were discussions proceeding over a period of several
9 months in which all sorts of people, including possibly
10 you attended, which various things were agreed and then
11 specify what was said to be agreed.

12 Then I move to the overt acts and I accept that
13 according to Mr Justice Isaacs that is the second way you
14 can prove a conspiracy. The plaintiff can come along and
15 say we've got no idea what these people agreed. They all
16 did it in secret behind our backs. We weren't at the
17 meetings. We don't know what was said but look at what
18 they did afterwards. These acts can only led to the
19 inference, as Your Honour then said on Monday, on the
20 balance of probabilities that there was pre-concert aimed
21 at us by these defendants.

22 In my submission if they're going to do it that way
23 they are obliged to particularise the overt acts properly
24 and in such a way that the defendants can respond to them
25 and meet them and either seek to disprove them or seek to
26 say that the plaintiffs can't prove them on the balance
27 of probability or whatever. And Mr Roland Browne
28 yesterday referred to the Gold Coast v. Pioneer Concrete
29 case that Your Honour's got, and he did it at pp.140 to
30 141 and also p.143.

31 I don't intend to make further reference to it,

1 because he's already done it. But in my submission that
2 case stands as authority for that proposition. If you're
3 going to do it by (indistinct), that's fine you're
4 allowed to, but even if you say the meetings were
5 clandestine, you are still as a plaintiff, obliged to
6 give proper specific allegations of the overt acts and
7 the defendants' involvement in them. Because as the
8 plaintiff you are saying "from these overt acts we can
9 infer that these defendants were involved in a common
10 purpose against us." You can't do that from the overt
11 acts unless they are properly specified and you say what
12 each defendant's involvement was.

13 In this case the plaintiffs haven't often even
14 identified who was said to have committed the overt acts
15 or been involved in them. I just go to Paragraph 51 and
16 following. There is a phrase there used which occurs
17 dozens of times throughout the statement of claim.
18 Fifty one begins with the words, "On or about 3 March
19 2003 one or more of the seventh, ninth, fourteenth and
20 sixteenth defendants and other protesters, without lawful
21 authority" and then it alleges the blockade. In my
22 submission that pleading is hopeless and must be struck
23 out. It could be an allegation against any one of the
24 seventh, ninth, fourteenth and sixteenth defendants, or
25 it could be an allegation against none of them.

26 As it happens we act for all of those people. How
27 is the seventh defendant rhetorically to respond to that.
28 He says, "I didn't do that, I don't know whether the
29 ninth, fourteenth and sixteenth defendants did it, and I
30 certainly don't know whether other unspecified people did
31 it." There are some particulars given of various other

1 named protesters. I suppose the seventh defendant could
2 say, "I have or haven't met Jason Coles or Emily
3 McNally-Smith and I either did or didn't do this with him
4 or her", but in my submission that allegation simply
5 cannot be allowed to stand. Even if all of the
6 defendants named there got together and they all said,
7 "None of us did this. We can all say that together", it
8 would still be impossible to plead to, because we don't
9 know what the other protesters would say. They may or
10 may not have done, we don't know. I don't need to go on,
11 but in my submission if you go through the following
12 paragraphs there are lots of examples of that kind of
13 pleading. In my submission that is simply unacceptable.

14 Also in my submission as I said before, I won't read
15 it out to you but if you go to the Associated Northern
16 Collieries case and you read what Justice Isaacs says at
17 pp.400 to 401, it's plain that when he talks about other
18 acts committed by the other defendant, for which the
19 first defendant is liable due to the inference of the
20 conspiracy, they've got to be - there's got to be an
21 inference of the defendants having actually agreed in
22 terms to have the common design and pursue it by the
23 common means, and so to carry it in execution. In my
24 submission you can't infer that from overt acts, unless
25 you can unequivocally say this particular defendant was
26 involved in one or more of these acts. You don't
27 necessarily have to say that every defendant was involved
28 in every act. If the commonality and coincidence of the
29 acts is sufficient that it leads you to that inference,
30 but in my submission you do have to say that they were
31 alleged in at least some of them.

1 If you go for example what's called the Lucaston
2 action, and in my Paragraph 16 I've referred to
3 Paragraphs 45 to 99 and 100 to 128. There are all sorts
4 of allegations made there against various people,
5 including defendants. But in my submission you can't say
6 from those that there's a commonality on the part of all
7 the defendants said to be liable for Lucaston, because
8 some of them aren't mentioned. One example is the eighth
9 defendants. She's - there are probably allegations made
10 against her in other parts of the statement of claim, but
11 unless I've missed something, although she's referred to
12 as a potential conspirator in Paragraphs 47 and 118, as
13 part of the expression, "the seventh to eleventh
14 defendants", she's one of those. And she's also
15 mentioned in references to meetings in Paragraphs 99D,
16 99E(a), 99F, 99G and 99P. She's nowhere alleged to have
17 committed any of the overt acts. The overt acts are said
18 generally to have been done by the seventh, ninth,
19 fourteenth and sixteenth defendants or some combination
20 thereof.

21 The eighth defendant isn't mentioned and in my
22 submission you simply cannot infer against her a
23 conspiracy to do those acts even if you accept that they
24 have sufficient coincidence of time, place and activity
25 to imply a common purpose. It may well be a common
26 purpose for other people, but it cannot be said that you
27 can imply a common purpose for the eighth defendant for
28 actions which on the allegations, she had nothing to do
29 with.

30 HIS HONOUR: So you'd say that they'd have to plead and

31 ultimately prove that she was engaged in one, at least

1 one of the actions.

2 MR GRONOW: Or a sufficient number of them to suggest - - -

3 HIS HONOUR: Yes or a significant number - - -

4 MR GRONOW: That she's in on the common purpose.

5 HIS HONOUR: Yes.

6 MR GRONOW: For example, again to use Your Honour's analogy,

7 say that instead of assaulting one person the conspiracy
8 is to assault every member of a gang, assuming that you
9 could prove that there was a gang and it had a dozen
10 members, you may be able to prove that one defendant was
11 involved in three or four of the assaults and suggest
12 that since he was a member he could prove he was perhaps
13 a member of the gang that had committed, that he
14 therefore was in on a common purpose to assault everyone.
15 Just for an example, but you couldn't prove it just from
16 the overt acts if he wasn't at any of them. The court
17 would say, "We're not going to convict this defendant
18 unless you can prove he was at a meeting or a discussion
19 or something when he agreed to do this."

20 With respect to the - I don't need to refer you to
21 it because Mr Howells has already taken you to it.
22 There's a passage in Fleming talking about a further and
23 common design falling short of a conspiracy. In my
24 submission that still suffers the same problem. You've
25 got to do more than just say that all these things
26 happened and you were part of the common purpose. You've
27 got to either prove some sort of agreement to a common
28 purpose at a meeting or a discussion, or you've got to
29 say, "You were involved in at least some of these overt
30 acts and from that we can infer from the coincidence of
31 time and character and place, that you were involved in a

1 common purpose to do all of them." You'd also of course
2 have to establish that each of the acts was within the
3 common purpose, whatever it was.

4 Your Honour we've already said and I don't need to
5 emphasise it, but the plaintiffs have already been asked
6 to provide particulars and ordered to provide them. We
7 accept that it's a large claim and of course it's going
8 to take time, but it was commenced last year and they
9 have already had several months to provide the
10 particulars of the things that we and the other
11 defendants have requested. In my submission plaintiffs
12 who comes to court with this kind of allegation have an
13 obligation to plead it tightly, and to give proper
14 specificity to what they say. The court shouldn't allow
15 them to proceed further without having done so.

16 Next Your Honour, notwithstanding Mr Howells
17 abandonment of the conspiracy aspect of his claim, in my
18 submission there is still plainly a pursuance of an
19 overarching relief, if not a claim. You only have to
20 look at the concluding pages of the statement of claim
21 after the Campaign against Gunns heading, and then you go
22 on. Particularly if you look at the prayer for relief,
23 it still says without qualification, "and the plaintiffs
24 claim" and then there's a total sum of damages of 6.36
25 million which is apparently claimed against all
26 defendants. That appears to me to be an addition of all
27 the damages claimed for each of the nine actions alleged.
28 So in my submission it is still alleged against each
29 defendant that that defendant is liable for everything.

30 HIS HONOUR: For everything, yes.

31 MR GRONOW: In my submission there ought not to be permitted in

1 circumstances where the basis for liability of defendants
2 who weren't overtly involved in particular actions, has
3 not been properly specified. In my submission it just
4 plain hasn't. Just to deal with my clients, it's alleged
5 that some but not all of them were involved in various
6 actions, but they're certainly not all alleged to have
7 been involved in the Triabunna 2004 action, the Styx
8 action, the Burnie Wood Chip Pile action, the Banksia
9 Awards' action, the Japanese Customers' action or the
10 Banks' action, yet they're all said to be liable for
11 every penny of damages claimed for every one of them.

12 HIS HONOUR: The only way that can be put is by making the
13 campaign against Gunns itself a cause of action, which is
14 what - - -

15 MR GRONOW: Yes it could be pleaded as a conspiracy and they
16 could do it two ways. They could say we've had a meeting
17 at which you agreed this and give us proper specificity,
18 or they could say, "Here are overt acts which have such a
19 commonality and coincidence of time, place and character
20 that we can only infer that each of you participated in a
21 common action. But that hasn't happened with great
22 respect Your Honour.

23 For example I take Your Honour to Paragraph 308A
24 which is part of the Triabunna 2004 action. Until Friday
25 we thought our clients weren't involved in that. We
26 thought that is something we don't have to worry about
27 because we're not in it. Then of course low and behold
28 we read Paragraph 308A and we are involved in it. It's
29 said "That each of the acts alleged to have been done in
30 the Triabunna 2004 action by the" - and then it lists
31 various people, and then at the end, "were done by the

1 person or persons alleged as agents for the Huon Valley
2 Environment Centre". With respect, there are several
3 problems with that. The first one is the only I've
4 already adverted to. There are no proper particulars of
5 agency or authority. They have said that the seventh
6 defendant is secretary of the Huon Valley Environment
7 Centre. In my submission it does not follow even from
8 that allegation without more, that he had authority to
9 act on behalf of the Huon Valley Environment Centre in
10 every way.

11 A company secretary's authority is very limited. I
12 haven't found a case about the authority of an
13 incorporated association like the seventeenth defendant,
14 but in my submission it is well accepted as the law that
15 a company secretary's authority is limited. You couldn't
16 just say, the company contracted or did a tort or
17 whatever by its secretary, without saying a bit more.
18 Like for example, "the board by resolution authorised the
19 secretary to do it" or general - the managing director
20 pursuant to the managing director's powers to
21 (indistinct) to the secretary. Leave that aside, because
22 that's with respect the least of the problems. Then we
23 go on to all the other people alleged. Triabunna 2004
24 HVEC protesters, who are defined and they're listed,
25 they're the people listed in Paragraph 308A, "were agents
26 for the Huon Valley Environment Centre either due to
27 their employment by the Huon Valley Environment Centre or
28 a relationship arising outside of that employment
29 relationship." So it sort of covers the field with great
30 respect Your Honour. Either it was an employment or it
31 was something else.

1 In my respectful submission that is absurd. Except
2 for the fact that my clients are potentially liable for
3 millions of dollars as a result of this, it would almost
4 be amusing to say that they either did it in black or they
5 did it in white. One or the other, who knows. In fact
6 not even black and white, either they did it in black or
7 they did it in not black. But there if we go on to look
8 at the overt acts pleaded in respect of for example, the
9 Triabunna 2004 action, then the people who are actually
10 mentioned in Paragraphs 284 to 306 are the first, second,
11 tenth and thirteenth defendants and are the protesters,
12 which is a - - -

13 HIS HONOUR: Where are you reading now?

14 MR GRONOW: My Paragraph 26.

15 HIS HONOUR: Yes.

16 MR GRONOW: The paragraphs I'm referring to are Paragraphs 284
17 through to Paragraph 306. There various overt acts are
18 alleged, and the defendants mentioned are - I should say,
19 although I've left out, but I should say, The Wilderness
20 Society, the first, second, tenth and thirteenth
21 defendants. There various combinations of them are
22 alleged throughout those paragraphs to have done things
23 on the various dates that are given. Sometimes they're
24 said to have acted as agents for the sixth defendant. So
25 they might be in there.

26 MR HOWELLS: Your Honour I'll have to rise. These are not
27 matters of reply. They really are not Your Honour. We
28 had an earlier submission that was simply going over
29 slavishly, a matter already advanced by Ms Batrouney and
30 one other counsel and me rising. We have had that dealt
31 with at length again. Now we've got a matter which is

1 not a matter of reply and I don't have a right to respond
2 to it.

3 HIS HONOUR: I'll give you a right to respond Mr Howells. You
4 can - - -

5 MR HOWELLS: I'll look to Your Honour. Does it solve the
6 problem?

7 HIS HONOUR: At the moment I want to hear the rest of what
8 Mr Gronow's got to say and I'll give you ample
9 opportunity to respond to it.

10 MR GRONOW: Your Honour this is put in reply to Mr Howells'
11 submission that not withstanding a failure to specify the
12 common purpose agreement, the plaintiffs are entitled to
13 make out their conspiracy by reference to overt acts. I
14 say that Mr Howells' submission is wrong and I am now
15 giving you the reasons for saying so.

16 HIS HONOUR: Yes.

17 MR GRONOW: It is only as a reply to that submission.

18 HIS HONOUR: Yes.

19 MR GRONOW: The other protesters identified by name and not
20 defendants. No factual allegation is made against most
21 of the people listed as the agents in Paragraph 308A
22 including the seventh, eighth, fourteenth and sixteenth
23 defendants. So they are said in Paragraph 308A to have
24 done things as agents for the seventeenth defendant, but
25 they're not alleged in the substantive pleadings at
26 Paragraphs 284 to 306 to have done anything. In my
27 respectful submission again, that simply cannot follow,
28 and my clients ought not to be expected to respond to
29 that kind of allegation.

30 I won't take Your Honour through it, but similar
31 problems occur in relation to the Hampshire action at

1 Paragraph 236A. The allegations of overt acts are made
2 against the fifth, seventh, eighth, ninth, fourteenth and
3 eighteenth defendants. The tenth, eleventh and sixteenth
4 defendants are said to have been agents for the
5 seventeenth defendants, but are not alleged to have done
6 anything as agents. Rather they're said to have done
7 acts as agents, but then when you look at the specific
8 allegations of the acts, not there. Similar problems
9 also arise in respect to Paragraph 116A which relates to
10 the Lucaston action, and Paragraph 525A which relates to
11 the Banks' action.

12 Your Honour those paragraphs also suffer from the
13 problems which are commenced in Paragraph 12 where it's
14 said that various people have done things as agents to
15 Huon Valley Environment Centre and then it's said the
16 agency is said to be, because they were volunteers or
17 employees, or something like that. In my submission that
18 is not sufficient and you cannot say that overt acts were
19 committed by the seventeenth defendant through its agents
20 without specifying the agency properly. Your Honour in
21 my submission the deficiencies in the statement of claim
22 are such that you can't extricate the good from the bad
23 and I respectfully join in with what Mr Burnside has
24 said, that the whole statement of claim should be struck
25 out. I've given you some passages at my Paragraph 30
26 which I won't read out, where courts have discussed those
27 matters.

28 In at least two of those cases, namely Turner v.
29 Bulletin Newspapers and Cashin v. Craddock, while the
30 statements of claim at various points been struck out, it
31 was accepted by the courts that the plaintiffs had a

1 right to replead. But in my submission that was done on
2 the basis that they might be able to demonstrate an
3 arguable cause of action and I've given citations to the
4 pages where I say the court's made that clear. In the
5 present case if you accede to our application to strike
6 out the statement of claim and you decide that the
7 plaintiffs should have an opportunity to replead, I
8 respectfully join in Mr Burnside's submission that they
9 should only be allowed to do so on the basis that they
10 can demonstrate they have an arguable cause or causes of
11 action against the defendants that they can frame in an
12 intelligible and properly particularised statement of
13 claim.

14 HIS HONOUR: How do you propose - what order would you propose
15 that would achieve that?

16 MR GRONOW: The plaintiffs should be required to obtain leave
17 before they file and serve a further amended statement of
18 claim, and it should be made plain either in the order or
19 in other matters that the draft has to be fully
20 particularised. So they should have to produce it to the
21 court and to us before they are entitled to file and
22 serve it. They've already - - -

23 HIS HONOUR: It doesn't matter very much does it, because at
24 that point there may well be argument about it. Whether
25 there's argument about a proposed pleading or argument
26 about a pleading, doesn't - it's only a matter of - it's
27 like today, Mr Howells' application is to file this
28 amended statement of claim properly. The argument is
29 proceeded on the basis that either he doesn't get leave
30 to file it or he gets leave to file it and it's struck
31 out. It doesn't matter. Properly, it should be leave

1 refused I suppose, because that's - your submission would
2 be rather than it being struck out, it would be leave to
3 file it refused.

4 MR GRONOW: No, my submission - well, actually Your Honour as
5 against my clients pleadings have not closed. We have
6 never submitted a defence. Mr Howells has an absolute
7 right - - -

8 HIS HONOUR: Right to trial.

9 MR GRONOW: - - - under paragraph - I think it's Rule 36.03
10 Paragraph A to amend his statement of claim and he's done
11 it. So the document we were served with on Friday - - -

12 HIS HONOUR: Is the statement of claim against you.

13 MR GRONOW: - - - under the rules standard and amended
14 statement of claim and we are applying to have it struck
15 out. It is presently on the record of the court as the
16 plaintiff's statement of claim against my clients and if
17 it stays there - - -

18 HIS HONOUR: I'd forgotten that. There are four defendants I
19 think who are in the position where they'd in fact closed
20 pleadings.

21 MR GRONOW: Well, there are two views about that, Your Honour,
22 and I don't speak for them and as counsel I'm not
23 entitled to tell you what my opinion is so I won't.
24 Whatever the situation with the other defendants is as
25 against my clients Mr Howells had an absolute right to do
26 what he did and at present this is his statement of claim
27 unless and until it's struck out. You effectively get
28 one free amendment before the close of pleadings and this
29 is it.

30 HIS HONOUR: Yes, yes.

31 MR GRONOW: Now one doesn't get more than one free amendment so

1 even if you accept that he needed leave against some but
2 not others in either view he's had it, he's used it up by
3 this document. If he wants to file another one in my
4 submission he should have to obtain leave and it should
5 have to be obtained in the usual manner of producing the
6 draft amended statement of claim and coming along to the
7 court and getting leave in proceedings outside managed
8 lists, one would normally do that to a master.

9 I mean Your Honour has probably long forgotten this
10 but one would go along to see Master Evans with a draft
11 statement of claim and you'd try to persuade Master Evans
12 it was appropriate and he'd either give you leave or he
13 wouldn't or he might say you can have leave but Paragraph
14 14 has got to go.

15 HIS HONOUR: Yes. But what's the difference between that and a
16 strikeout application? There's no practical difference
17 is there?

18 MR GRONOW: No, Your Honour, because the document shouldn't in
19 my submission be on the court record and the plaintiff's
20 situation is such they've already had two goes at their
21 statement of claim, they shouldn't be entitled to have a
22 third unless they discharged the onus of satisfying the
23 court that they can frame an intelligible claim of causes
24 of action known to law against the defendants. In my
25 submission we shouldn't have the onus of coming along and
26 saying this should be struck out because it's hopeless or
27 it's an abuse of process or it doesn't raised a cause of
28 action or it's embarrassing.

29 The plaintiff should have to come along and say here
30 is a statement of claim which is none of those things
31 which is intelligible. So it's a reversal of the onus

1 and in my submission that is appropriate because they've
2 already had two goes and they ought at this point be in a
3 position where they have to satisfy the court that they
4 can frame their claim properly. I accept that a
5 plaintiff who may have an arguable cause of action is
6 entitled to bring it before the courts.

7 It's a basic right and the authorities I've listed
8 on my p.8 make that plain; one of them is the High Court.
9 But in my submission in the context of this case it
10 should have to be done on the basis of framing a proper
11 draft and then obtaining leave. Now that concludes my
12 submissions in reply, Your Honour.

13 HIS HONOUR: Yes, thank you, Mr Gronow. Now who else is to go
14 in reply? Mr Estcourt, are you next?

15 MR ESTCOURT: I'm going to be next after Mr Howells has
16 responded to Mr Gronow.

17 HIS HONOUR: Well, what would you like to do Mr Howells? Do
18 you want to go now or do you want to wait until you've
19 heard - - -

20 MR HOWELLS: Your Honour, we need to wait until we hear what's
21 said.

22 HIS HONOUR: I think I'll get you to - - -

23 MR HOWELLS: - - - said it would be done within the time.

24 HIS HONOUR: I'll hear Mr Estcourt and then I'll give you
25 whatever indulgence you need to make sure you can reply
26 properly.

27 MR ESTCOURT: Special leave day, Your Honour.

28 HIS HONOUR: Yes. There are three of them. I have to do all
29 the work myself here. Yes?

30 MR ESTCOURT: Yes, thank you, Your Honour. I trust not to add
31 to the burden of this morning's proceedings too much.

1 The first thing I wanted to do was to mention to Your
2 Honour the Galland case which was in argument yesterday.
3 Galland v. Mineral Underwriters [1977] W.A.R. 116 is in
4 fact a decision of the Full Court of the Supreme Court of
5 Western Australia. Justices Wallis and Jones sat with
6 Chief Justice Burt. Chief Justice Burt's decision was
7 concurred in by Justice Wallis.

8 I've also noted, Your Honour, that decision - I was
9 going to hand up a copy but it appears to be in the index
10 of authorities filed by Herbert, Geer & Rundle at Tab 9.

11 HIS HONOUR: It's in there, is it?

12 MR ESTCOURT: Yes.

13 HIS HONOUR: Thank you for that. Yes, it is. I'll have a look
14 at it.

15 MR ESTCOURT: Your Honour may recall I mentioned two days ago
16 that although His Honour the Chief Justice said that he
17 couldn't find any authority to support the view that he
18 took he was in fact referred in argument to Ward v. Lewis
19 which as a decision of Lord Denning in 1954 and it was
20 precisely to that effect. When Your Honour goes to the
21 judgment you will see in the Western Australian style of
22 reporting at the foot of the very first page it has a
23 section cases referred to. It's Tab 9.

24 HIS HONOUR: Yes, yes. Ward v. Lewis is there, is it? It is,
25 yes.

26 MR ESTCOURT: Ward v. Lewis is there. So it's not without
27 authority at all and in fact as Your Honour knows was
28 followed by Justice Weinberg in the McKellar case.

29 HIS HONOUR: Yes.

30 MR ESTCOURT: So we would submit that Your Honour would follow
31 that ordinarily unless you're in some way of the

1 view - - -

2 HIS HONOUR: Yes, well, Justice Drummond didn't apparently.

3 Normally the decision of a Full Court of a state you
4 would have to be convinced it was wrong.

5 MR ESTCOURT: Yes, well, even if that is not strictly so as a
6 matter of the doctrine it's certainly a matter of comity
7 I would have thought.

8 HIS HONOUR: Yes. Thank you for that reference.

9 MR ESTCOURT: Your Honour the next thing I wanted to do was to
10 embrace Mr Burnside's diagram. It's the second diagram
11 Your Honour has had. The first one was from Mr Maher so
12 I'm tempted to call them Maher diagrams, Your Honour. In
13 any event - - -

14 HIS HONOUR: That's the one with the numbers on it as a chart,
15 yes.

16 MR ESTCOURT: Yes. We would do the same for Your Honour but it
17 seems to be pointless and would simply burden Your
18 Honour. What we do is to ask Your Honour when
19 considering our position, that is the position of the
20 tenth and eleventh defendants, to conceptualise us as
21 imprecise to the same position as Mr Burnside's clients.
22 But if you were looking at a chart that we made out it
23 would appear very much the same but there would be a few
24 more greyed out boxes, that is a few more paragraphs
25 where we are explicitly referred to than is the case with
26 Mr Burnside's client, the nineteenth defendant.

27 Your Honour, Mr Burnside made the point that that
28 diagram demonstrates the voracious appetite of this
29 pleading for the consumption of all of the parties. We
30 say it's all very well to say that but one must
31 demonstrate that that isn't in some way unfair and we say

1 that it is unfair in this way. We will not know because
2 of the open ended nature of this pleading what the case
3 is we have to meet on behalf of the tenth and eleventh
4 defendants until we are in court at trial meeting it.

5 Your Honour, I wish to take you to one paragraph of
6 our defence in order to demonstrate how we are able to
7 plead in form to this document but not in substance. If
8 I could just hand up a copy of the defence to save Your
9 Honour searching for it. I know that it's on file.

10 HIS HONOUR: Yes.

11 MR ESTCOURT: If Your Honour just turns to p.2 you'll see the
12 heading "The Campaign Against Gunns". What we've done in
13 the first paragraph - - -

14 HIS HONOUR: This of course is the defence to the original
15 statement of claim.

16 MR ESTCOURT: Yes, Your Honour, but materially it's not
17 different.

18 HIS HONOUR: Yes.

19 MR ESTCOURT: What we've done is we've said is, insofar as and
20 to the extent that these first paragraphs, that the
21 explanatory paragraphs about the campaign against Gunns,
22 ten to 15 taken together or in any combination or joining
23 them up with the over arching allegations in Paragraph
24 526 or in combination with any other allegation in the
25 entire statement of claim, we say insofar as any of that
26 expressly raises, and here's the problem, that
27 Mr Burnside exposed with his diagram, or otherwise may be
28 taken to raise, any allegation against our client, they
29 don't disclose a cause of action, they're vexatious and
30 embarrassing, that was our first stand point and it was
31 always clear that we would follow that up with an

1 application to strike out but then we've endeavoured to
2 plead, in substance to the statement of claim and the
3 next plea is a denial of every such allegation and then
4 in the following paragraph - - -

5 HIS HONOUR: You've taken that position virtually all the way
6 through.

7 MR ESTCOURT: Yes and we've denied it and then we've said, well
8 further what's alleged against us by way of these
9 discussions couldn't possibly amount to any of the three
10 pleaded Torts. We'll have to deal with this new
11 statement of claim no doubt by pleading not only to the
12 discussions that are alleged against us but now our
13 occasional involvement in some meetings, but that still
14 leaves us in precisely the same position. We can plead
15 in form but we can't plead in substance.

16 HIS HONOUR: Yes.

17 MR ESTCOURT: Your Honour pen ultimately as they say, the
18 justification for the over arching joint Tort pleaded
19 from Paragraphs 526 onwards, is as I understand my
20 learned friend Mr Howells, that the whole is greater than
21 the sum of its pass. That's just not right Your Honour,
22 and it can't be right with respect to my learned friends
23 for two reasons. Firstly the over arching plea in
24 Paragraph 526 and following is not against all
25 defendants, it's only against some defendants,
26 specifically the Wilderness Society, it's on p.356 at
27 Paragraph 526, the Wilderness Society, first to fourth,
28 tenth, eleventh, seventeenth, eighteenth nineteenth and
29 twentieth defendants. That's the first point - - -

30 HIS HONOUR: So the fifth to ninth are not in there?

31 MR ESTCOURT: That's correct Your Honour. I haven't exactly

1 counted up who's missing but - - -

2 HIS HONOUR: The fifth - the Wilderness Society is in fact the

3 sixth so it is in there.

4 MR ESTCOURT: Yes Your Honour it's there but the fifth,

5 seventh, eighth and ninth are missing.

6 HIS HONOUR: Yes Heidi Douglas, Adam Burling, Louis Morris and

7 Simon Brown are not it would appear.

8 MR ESTCOURT: The twelfth is missing.

9 HIS HONOUR: That's Helen Gee.

10 MR ESTCOURT: That's Helen Gee, that's Mr Browne's client and

11 then the fifteenth and sixteenth are missing.

12 HIS HONOUR: Neil Funnell and Brian Dummich.

13 MR ESTCOURT: That's the first point I make about it but that's

14 not the major point Your Honour. The major point is that

15 specifically in this case, this over arching claim cannot

16 be greater than the sum of its parts because the

17 plaintiffs have chosen to plead out their damages and in

18 the prayer for relief they specify 6,360,000 now that's

19 the whole and that's the sum of the parts.

20 HIS HONOUR: That's the sum of each of the six actions.

21 MR ESTCOURT: And it's the whole.

22 HIS HONOUR: Yes.

23 MR ESTCOURT: Your Honour can I leave you with some words which

24 I respectfully adopt, I don't hand this case up to Your

25 Honour, for some principle that hasn't been exposed

26 previously in the hearing but rather some act words of

27 your brother judge, Justice Byrne, in managing the

28 building list in this court and I respectfully adopt

29 those words as abs et to Your Honour's task in dealing

30 with the strike out applications.

31 This was an application to strike out an action

1 which claimed damages which were difficult to quantify,
2 if not impossible and which embraced an interlocking
3 schedule of particulars of claim. In any event, the
4 facts are not important, it's the passage at p.693 of His
5 Honour's judgment at Paragraph 22 that I submit are apt.
6 His Honour said, "The question whether in a given case of
7 pleading based on a global claim or even a total cost
8 claim or some variant of this is likely to or may
9 prejudice, embarrass or delay a fair trial of proceeding,
10 must depend upon an examination of the pleading itself
11 and the claim which makes it.

12 The fundamental concern of the Court is that the
13 dispute between the parties should be determined
14 expeditiously and economically and above all, fairly",
15 and we say of course that we can't get a fair trial on
16 the basis of this pleading for the reasons I've just
17 explained. Where the proceeding's been managed in a
18 special list, which this of course is, the judge, Your
19 Honour, who's task it is to steer the case through its
20 interlocutory stages might, and perhaps should, explore
21 the claim to determine whether the form it takes is
22 driven by its nature and complexity or by desire to
23 conceal its bogus nature by presenting it in a snow storm
24 of unrelated and insufficiently particularised
25 allegations or by desire to disadvantage the defendant in
26 some way. We say that open to infer in this case that
27 there is a forensic advantage sought in the way with
28 which this claim is pleaded and it ought not to be
29 allowed. Thank you Your Honour.

30 HIS HONOUR: Thank you Mr Estcourt. Mr Walters, you're last.

31 MR WALTERS: I am Your Honour, in every sense, the twentieth

1 defendant as well as the last submitting. Your Honour
2 could I start by making reference to what our learned
3 friend Mr Howells said in relation to corporate
4 vilification because the twentieth defendant finds its
5 most explicit mention in that half of the statement of
6 claim which is under the heading of corporate
7 vilification and we are interested at what our learned
8 friend said at transcript 248 to 249 of yesterday as to
9 what we would submit this novel forensic term meant and
10 if we were to be told the elements of this Tort or group
11 of Torts, we were not exactly enlightened but it's clear
12 from what was said that it's very broad concept and at
13 the top of p.249 our learned friend said, "It might be by
14 a range of means, some of the misleading, some of them
15 not.

16 The truth or otherwise, might not matter at all Your
17 Honour, but it's a way of casting a taint or some kind of
18 stigma upon a corporation in order to achieve an
19 outcome". This concept with which we are confronted is
20 of the broadest possible nature, truth it appears,
21 truthful statements that are adverse to the interests of
22 a corporation are said to be actionable so that
23 aggressive but truthful advertising would now become
24 Tortious and a public statement truthful as to what a
25 corporation has done would not it seems, be Tortious and
26 unlawful.

27 In our submission the plaintiffs weren't content
28 with that because it went even further and at pp.266-7
29 Your Honour asked this question, "The way in which this
30 part of the case is being pleaded, it seems to me to be
31 quite different to the way the rest of it has been

1 pleaded", and Mr Howells says, "It is Your Honour,
2 because the nature of the act is different. It's a
3 different kind of technique, it's very ingenious one",
4 this is about the Japanese Customers' Action I think at
5 this point, "A very ingenious one and no doubt in some
6 circumstances, quite effective".

7 It's pleaded differently Your Honour because the
8 importance is rather than simply asserting, threats were
9 administered it relies upon the fact that there is a
10 whole barrage of representations, threats, both express
11 and implied. Information being communicated, photographs
12 of demonstrations going on, to Styx and elsewhere. With
13 Japanese banners explaining what people are doing and
14 reports in newspaper media releases and the like.
15 Management advice - here's the part that is absolutely
16 striking, "representations to government", attacks on
17 government and so on. So broad is the plaintiffs' claim
18 that even the fundamental democratic principles of being
19 able to make representations to government are said to
20 found claims of tortious liability.

21 HIS HONOUR: That raises questions of Lange?

22 MR WALTERS: Yes it does Your Honour.

23 HIS HONOUR: Don't lets complicate this - that was a joke. I
24 didn't mean that.

25 MR WALTERS: Your Honour we were also concerned that -
26 obviously we must as defendants approach this statement
27 of claim on the assumption that in a strike out
28 application at trial ultimately, the facts that are
29 pleaded can be proved. So we're not in a position to
30 stand before Your Honour and say this is all nonsense.
31 We have to deal with what we're confronted with and say

1 what does it mean.

2 But that situation doesn't give licence in our
3 submission, to the plaintiffs to lead evidence from the
4 Bar table as to allegations, some of them not pleaded,
5 about what they say the defendants did. The aspect that
6 caused us real concern in relation to this was the
7 statement made by our learned friends on the transcript
8 of 5 July, Tuesday, at p.196, Lines 3 to 11. "I say this
9 Your Honour with respect, is what we sought to do is
10 identify the main participants.

11 I know it's 20 people, 20 persons or entities and
12 we've also only dealt with the tip of the iceberg in
13 terms of the conduct Your Honour. The extent of the
14 conduct over many years and even with having done that as
15 Your Honour has critically pointed out to me and which we
16 understand, there's a lot of material."

17 Your Honour that is an indication of why we need to
18 be concerned. If it's said that there's the tip of the
19 iceberg and there's other allegations waiting in the
20 wings to be pleaded, all the more reason that they should
21 be pleaded properly. We don't want to be oppressed by
22 being fed a series of amendment statements of claim
23 making ever more bizarre allegations on the drift, in the
24 way that that kind of statement foreshadows. Even we've
25 had allegations by our learned friend that conduct is
26 continuing, no affidavit in support of it. No injunction
27 sought, but just airily said from the bar table, that
28 that's happening. I want to state clearly that that
29 evidence from the Bar table is in dispute, but - - -

30 HIS HONOUR: Well it's not relevant for the purposes of our
31 present - - -

1 MR WALTERS: Why I'm concerned is to see that this proceeding,
2 which is already substantial, is contained. Your Honour
3 let me deal with a couple of other discrete issues. At
4 p.218 our learned friend referred to - - -

5 HIS HONOUR: This is a transcript page?

6 MR WALTERS: Sorry, yes, yesterday Your Honour. Our learned
7 friend referred to Paragraph 166 and I want to quote what
8 he said and then take Your Honour to the pleading. My
9 learned friend said, "Then in Paragraph 66 Your Honour
10 we've alleged agency. True it is Your Honour we could
11 have left the claim, the assertion of agency just in the
12 form that it is in the paragraph and not attached the
13 particulars and provided those particulars by way of a
14 response to a request, and we might there, if that was
15 the case in relation to a number of the paragraphs, we
16 might have had a shorter pleading and then some hundreds,
17 if not thousands of particulars.

18 But we at some stage have to identify Your Honour
19 that there are a significant number of people and we've
20 certainly not mentioned anything like the majority of
21 them who've acted as agents for the Wilderness Society in
22 these various instances of conduct. What we have
23 included is the main ones. The particulars are divided
24 up into an assertion as to who are the principal agents,
25 the main agents and then in Paragraph (b)" and that was
26 where the statement ended.

27 Your Honour pleading agency matters in this case
28 particularly. It is of the most vital importance to the
29 way the case is put. To put it - let me put it strictly
30 from the point of view of my client. My client is said
31 to have engaged in a conspiracy. The two statements that

1 are attributed to my client in the Burnie Wood Chip Pile
2 action are both made by the nineteenth defendant. It's
3 said that the nineteenth defendant made them as agent for
4 us. We're a corporation. We only act through people.
5 It really matters what the agency is because if
6 Dr Nicholson is said to have said this on behalf of the
7 twentieth defendant and acting as its agent and within
8 the scope of that agency and authority, that's not a
9 conspiracy, because that's the company. That's trite
10 law.

11 So that's just one example of how there may be - - -

12 HIS HONOUR: It could be.

13 MR WALTERS: It promised conspiracy as between who. There
14 might be a conspiracy involving other people.

15 HIS HONOUR: Officers of the company could conspire with - - -

16 MR WALTERS: But as between the two of them that's not enough
17 and that's really important to know in this case, because
18 that's the way it appears to be put at the moment, or in
19 that general sense.

20 HIS HONOUR: You say that the allegation is that nineteenth
21 defendant in being created an agent of the
22 twentieth - - -

23 MR WALTERS: Yes.

24 HIS HONOUR: That that was the conspiracy. That's not what the
25 plaintiff says though.

26 MR WALTERS: No the plaintiff goes further than that, but we
27 are put into a conspiracy it appears, with the nineteenth
28 defendant. I do want to get to Paragraph 166. This is
29 by way of illustration, but you'll see at p.252 at
30 Paragraph 380, "the first and second statements were
31 published by the nineteenth defendant for and on behalf

1 of the twentieth defendant."

2 HIS HONOUR: Yes.

3 MR WALTERS: Paragraph 384 specifies a conspiracy which
4 involves the nineteenth and twentieth defendants. That's
5 by way of illustration as to how agency is very important
6 in this case. The nature and scope of that agency. At
7 Paragraph 166 which our learned friend said
8 particularised it, gives an example of the difficulties
9 that we face.

10 First of all at p.116 Your Honour we have each of
11 the acts set out in the Lucaston action were done by the
12 persons alleged as agents for the Wilderness Society. So
13 that's the conclusionary allegation of agency and one
14 then says, what are the material facts, what's the
15 nature, what's the scope. We're in our learned friend's
16 submission taken to the particulars. I want to ask Your
17 Honour to go through them.

18 First of all particular (a) lists a number of people
19 and four lines from the bottom of the paragraph at the
20 end of that list of people, it says, "the representatives
21 of the groups identified in Paragraph 10K". So there's
22 representatives, so there's another kind of agency
23 unspecified which is part of the particulars of this
24 agency, "and the other protesters referred to in
25 Paragraph 47 of the statement of claim", which is a claim
26 of conspiracy. What do they do to make them agents?
27 "They did the acts alleged as agents for the Wilderness
28 Society". That's just a repetition of the allegation.
29 It doesn't actually enlighten it.

30 But perhaps we get more from further on. Paragraph
31 (b) refers to various Wilderness Society branches and it

1 says, those bodies act as the local campaign centres for
2 the Wilderness Society and the Wilderness Society
3 coordinates and directs their campaign activities.

4 "Further particulars of the authorisation of those
5 bodies will be provided after discovery, interrogation
6 and return of subpoenas." So insofar as they are alleged
7 to have done anything we're no further enlightened.

8 Then we go to Paragraph C and the agency of natural
9 persons is said to have arisen either from their
10 employment or a relationship arising outside of their
11 employment. That's completely uninformative. It then
12 goes on to say that some persons were employees. That is
13 at least a statement that they're employees. Then it's
14 said that they performed the acts alleged as employees of
15 the Wilderness Society or one of the branches within the
16 scope of employment. Further particulars provided after
17 discovery.

18 Then alternatively to see they're volunteers and
19 there's a deal of things said about volunteers. Then in
20 E we've got natural persons in A did the acts as agents
21 by virtue of employment or a relationship outside of
22 employment again. Then in F during 2003 and 2004 - - -

23 HIS HONOUR: E is simply a repeat of C, isn't it?

24 MR WALTERS: It seems to be, Your Honour.

25 HIS HONOUR: The agency of the natural persons referred to in A
26 that's who you're talking about and that's in C. In E
27 it's slight different, the natural persons referred to in
28 Paragraph A. It seems to be the same in - - -

29 MR WALTERS: There is a slightly different formula of words
30 towards the end.

31 HIS HONOUR: Yes.

1 MR WALTERS: It doesn't refer to discovery interrogatories, for
2 example. F is the long part of this that actually
3 includes reference to the twentieth defendant because
4 Richard Hughes was the Wild Country campaigner and office
5 holder of the twentieth defendant. Now Your Honour the
6 point that we wish to make about this is that we are
7 entitled where there's an allegation of agency to the
8 material facts which give rise to that allegation. Let's
9 assume that they can plead material facts in the
10 particulars. That's form. But in substance we want to
11 have the material facts.

12 What this pleader has done here is think we want to
13 get a lot of people into this allegation. What are all
14 the permutations as how they might be agents as a matter
15 of law. Let's list them all out and that's what they've
16 done. That is not providing material facts. That is
17 merely an assertion of agency and telling us as a matter
18 of law here's all the ways it might in the end be proved.
19 That's an example not only of the great prolixity of the
20 pleading which we're left, but we're left to pleadings as
21 to agency which are conclusionary and entirely
22 uninformative. Of course pleadings like that provide a
23 launching pad for discovery and interrogatories which can
24 be of the most oppressive kind, to say nothing of the
25 trial itself.

26 A few other points we need to make, Your Honour.
27 I'm conscious of the time. I don't want the orange light
28 to go on as it does in special leave days. The
29 plaintiff's table of contents, Your Honour, we were
30 provided with is something we want to make a couple of
31 comments about. The table of contents doesn't

1 interestingly list the defendants in respect of each
2 allegation and the reason for that is obvious. That task
3 is far too complicated.

4 What it does show is that the plaintiffs are very
5 aware of the importance of identifying specific contracts
6 and of course they do that in Lucaston, Hampshire,
7 Triabunna, Styx, but we come to the Burnie action and
8 there's no contract identified nor is there any pleading
9 obviously of the relevant knowledge.

10 HIS HONOUR: There's no allegation of interference with
11 contracts in the Burnie action.

12 MR WALTERS: No, but there's an allegation of interfering with
13 trade and business. That's what concerns us because Your
14 Honour the tort is interfering - the tort assuming it is
15 against Australia is interfering with trade and business
16 by unlawful means and whatever else it requires it
17 clearly requires a contract. We're concerned by what our
18 learned friend said at p.229 of the transcript I think
19 yesterday about this because - we're going to take Your
20 Honour to the authorities but what concerns us is that
21 this goes a lot further than the law permits.

22 Our learned friend said at Line 16 of p.229 -
23 perhaps starting a bit earlier Line 13 he said, "Because
24 you could interfere with business in a range of different
25 ways." Your Honour said, "Yes." He said, "One, by
26 inducing a breach of contract as we say in Banksia".
27 Now, Your Honour, if one accepts Merkur Island which for
28 the purpose of this application one must, so far so good.
29 "Or by interference with the performance of contracts",
30 as we say in Hampshire so far so good according to Merkur
31 Island. "Or by doing other unlawful acts" - it says

1 "with" but it should be "which" I think - "which impede
2 or by diverting the resources of an organisation or by
3 providing a threat which affects its market."

4 Now let me just stop there. There's no authority
5 for that. That is contrary to the Merkur Island
6 authorities and the authorities to which it refers. That
7 is extending the tort to a point beyond which the law has
8 refused to go anywhere. That is a tort not known to the
9 law. Then what's important we see the elision that comes
10 immediately following, "There could be all sorts of
11 things ... (reads) ... interfered with trade and
12 business", and that's what we've pleaded here in 201.

13 Now it's one thing to say that the unlawful means
14 that need be proved as an element of the tort of
15 conspiracy can be a range of things. It's another thing
16 to say that interference with trade and business
17 otherwise than interfering with contractual relations
18 founds a tort. You can't just jump those two - take an
19 element from one cause of action and add it to another
20 cause of action which is what our friend was doing.

21 Your Honour, the passage of Merkur Island that
22 identifies the elements of the tort are to be found at
23 p.607 in the decision of Lord Diplock or the speech of
24 Lord Diplock I should say.

25 HIS HONOUR: I've got it.

26 MR WALTERS: Can I ask Your Honour to - - -

27 HIS HONOUR: What page was it, 607?

28 MR WALTERS: Page 607. I don't propose to read it but Your
29 Honour will see that His Honour quotes the judgment of
30 Lord Justice Jenkins in DC Thompson & Co v. Deakin. He
31 sets out at point (g) on the page the elements of the

1 tort as stated by Lord Justice Jenkins. Your Honour will
2 see they're numbered, first, second, third and fourth and
3 Your Honour will see that knowledge of the existence of
4 the contract is one of the things.

5 Lord Justice Jenkins in fact had statements in that
6 decision that it shouldn't go beyond that statement of
7 principle but of course the House of Lords did take it
8 beyond that principle because over the page they gave
9 recognition to interference with performance as distinct
10 from breach of the contract. Your Honour will see that
11 at about point (e) of that page they refer to the fact
12 that there was legislation in the United Kingdom and they
13 went on to say that interference with performance could
14 be substituted for the term "breach" in Lord Justice
15 Jenkins's analysis of the elements. So we can understand
16 those elements but we do not appreciate there being any
17 law extending it beyond - - -

18 HIS HONOUR: But what at this stage - what's the relevance of
19 this sort of argument here in relation to the pleading.
20 I mean if the - the pleading about the Burnie Woodchip
21 action seems to me to be confined to an allegation of
22 defamation, doesn't it.

23 MR WALTERS: No, Your Honour, because - the relevance of it -
24 can I say two things. First of all we say that we're
25 entitled as a matter of law to have a pleading that
26 pleads tort recognised by the law now.

27 HIS HONOUR: Yes.

28 MR WALTERS: If this is a defamation action we understand that
29 and that should be pleaded - - -

30 HIS HONOUR: I may have missed - I mean what - as I understand
31 the Burnie Woodchip action is that there's an allegation

1 of a conspiracy to defame which injured the plaintiff.

2 MR WALTERS: That part of it we understand.

3 HIS HONOUR: Yes.

4 MR WALTERS: It's going further - - -

5 HIS HONOUR: Where does it go further.

6 MR WALTERS: Your Honour will recall, although the chart my

7 learned friends provided doesn't do this, there are, in

8 fact, two allegations of damage. One is at 383.

9 HIS HONOUR: Yes.

10 MR WALTERS: That's the one with \$150,000 - - -

11 HIS HONOUR: That's a straight out defamation claim, I think.

12 MR WALTERS: It seems to us to be, Your Honour. Yes.

13 HIS HONOUR: Yes.

14 MR WALTERS: And the other one - - -

15 HIS HONOUR: And then the second one is the conspiracy in 384.

16 MR WALTERS: Yes.

17 HIS HONOUR: Then some overt acts in 385 which is the

18 defamations.

19 MR WALTERS: But what is of concern to us is this. As a

20 consequence of the matters alleged - - -

21 HIS HONOUR: What paragraph are - - -

22 MR WALTERS: Paragraph 389. This is a pleading which tried to

23 have it every way.

24 HIS HONOUR: Yes.

25 MR WALTERS: As a consequence of the matters alleged in

26 Paragraphs 384, that's the conspiracy paragraph and 385.

27 HIS HONOUR: Mr Howells took 384 out yesterday.

28 MR WALTERS: All right.

29 HIS HONOUR: So it's 385.

30 MR WALTERS: 385. Done in furtherance and pursuance of the

31 conspiracy. So it's in consequence to the acts done in

1 furtherance to the conspiracy and combination alleged the
2 first plaintiff was injured in its trade and business and
3 suffered loss and damage.

4 HIS HONOUR: Yes.

5 MR WALTERS: It's just not recognised injury in trade and
6 business unless there's contractual relations.

7 HIS HONOUR: Unless there are contractual relations.

8 MR WALTERS: One might bring a claim under s.52 of the Trade
9 Practices Act. One could think of various ways that what
10 that could mean but faced with a different - - -

11 HIS HONOUR: Well, the straight out claimant defamation would
12 cover - I mean if defamatory statements are made and a
13 corporation sues the damages it gets are the damages for
14 injury to its trade and business.

15 MR WALTERS: Well, 383 says injury to its credit and
16 reputation.

17 HIS HONOUR: Yes. Well, I suppose you could - - -

18 MR WALTERS: We are left - it's seriously ambiguous but it
19 appears to us to go beyond a mere conspiracy to injure by
20 unlawful means.

21 HIS HONOUR: Yes. Right.

22 MR WALTERS: The other thing we wanted to say is this, Your
23 Honour. We were provided with the document yesterday,
24 the allegations that form the basis - - -

25 HIS HONOUR: Of the claim against the twentieth - - -

26 MR WALTERS: We just want to make one point about that, Your
27 Honour.

28 HIS HONOUR: Yes.

29 MR WALTERS: I'm just trying to find the transcript passage.
30 In relation to Lucaston at p.189. This is yesterday -
31 no, it's not. Sorry, it's Tuesday, Your Honour. I'll

1 read your copy of the transcript. Thanks. Our learned
2 friend was going through dealing with Lucaston. A long
3 passage starting at about Line 6 and Your Honour asked at
4 Line 19, "The doctors aren't in here or are they?" "No,
5 they're not." "Mr Howell's not in that, Your Honour?"
6 "No."

7 We thought we'd had a win. That we weren't in the
8 Lucaston action as a result of that exchange. It's now
9 clear, Your Honour, or perhaps it has now been a change
10 of position as a result of this document that we are
11 because p.2, the first dot point - - -

12 HIS HONOUR: Yes.

13 MR WALTERS: - - - has us linked into Lucaston and we're linked
14 into everything. Whilst on the subject of that provision
15 99D which our learned friend raises, we do want to say a
16 couple of things about 99D that I think need be said.

17 HIS HONOUR: This is a meeting, isn't it?

18 MR WALTERS: Yes, it's the meetings one where we're -
19 representatives of us are said to have attended
20 occasionally. Your Honour, at Paragraph C which is over
21 the page at p.64, those defendants and persons referred
22 to in Paragraphs A to B above planned, organised and
23 coordinated. Now, that's not, we say, a material fact.
24 It's not a particular. It is conclusionary. To say that
25 someone planned a conspiracy is just to say that - or
26 planned a blockade in the context of a claim of
27 conspiracy is just to say that they conspired. It's not
28 to tell you what the material fact is.

29 Perhaps I should adopt what my learned friend,
30 Mr Gronow, and my learned friend, Mr Burnside, said on
31 this rather than - - -

1 HIS HONOUR: Yes. Well, they both dealt with it.

2 MR WALTERS: Yes. We would say that's just as a matter of
3 English. That's just not telling us anything more than
4 we already know from the allegation of conspiracy.

5 The other thing that we should say while we're
6 dealing with 99D is that Paragraph 128 alleges that those
7 acts, that's 99D and other paragraphs, were in
8 furtherance of the conspiracy in Paragraph 47. Of course
9 Paragraph 47 alleges the conspiracy involving a smaller
10 number of people but to plan and act is not an overt act
11 proving the conspiracy. It's just an allegation that
12 there was conspiracy. That's the problem with so much of
13 this statement of claim. The specifics just aren't
14 provided quite apart from anything else.

15 Paragraph 47 is, as a matter of law, inconsistent
16 with Paragraph 130 because there's two different things -
17 with Paragraph 128 because there's two different things
18 pleaded. Of course, it's not suggested in the statement
19 of claim that the meetings were unlawful and
20 Paragraph 130 makes that clear.

21 Could I say some things about the idea of - about
22 the approach in conspiracy of pleading a completed tort
23 as an alternative for a pleading to a conspiracy. Our
24 learned friend relied on what Justice Drummond had to say
25 about that in the Queensland v. Pioneer Concrete case.

26 However Your Honour, what Justice Drummond did not
27 do is refer to the binding High Court authority in the
28 case in the matter which is O'Brien v. Dawson which is
29 reported (1942) 55 C.L.R. at p.18.

30 HIS HONOUR: Is that in the bundle?

31 MR WALTERS: I don't think it is, Your Honour. It referred to

1 by Justice Weinberg in dealing with this issue in Dresna
2 and it's been referred to in a number of the cases which
3 have dealt with this but it wasn't referred to by Justice
4 Drummond.

5 There were four Justices in that case. The
6 presiding Justice was Justice Rich who agreed with
7 Justice Williams. All judges came to the same conclusion
8 and Justice Stark had some things to say about this issue
9 but it's perhaps most convenient to read the passage at
10 p.41 from the judgment of Justice Williams and His Honour
11 quotes from Lord Dunedin in Sorrell v. Smith at about
12 .7 of the page and if I could read from five lines from
13 the bottom. "Since it is unlawful for an individual,
14 wilfully and knowingly to induce and procure a breach of
15 contract, the allegation - - -

16 HIS HONOUR: I've lost you.

17 MR WALTERS: Sorry, five lines from the bottom of p.41, having
18 quoted from Sorrell v. Smith Justice Williams said,
19 "Since it is unlawful for an individual wilfully and
20 knowingly to induce and procure a breach of contract, the
21 allegation that more than one person acted in combination
22 to do so, is mere surplusage except to make them liable
23 as joint tortfeasors." It's that passage, together with
24 the passage of the discussion of the issue by Justice
25 Stark which is quoted in the authorities to which we've
26 earlier referred to Your Honour. Justice Stark deals
27 with this issue at pp.27-28.

28 HIS HONOUR: You say that this is effectively authority for the
29 proposition that you can't sue in conspiracy and a
30 completed Tort.

31 MR WALTERS: Yes it's surplusage to do it that way you've got

1 to effectively elect and it doesn't say that, the word,
2 "Elect" is my word, but it's that which is relied on and
3 of course it does provide an impermissible forensic
4 advantage to plead conspiracy as well. In our case the
5 twentieth defendant, very minimal over acts pleaded
6 against us but we are linked in to absolutely everything
7 and we are linked in to a whole lot of other people just
8 in relation to the Burnie Wood Chip Pile Action.

9 As a corporation we don't have the privilege against
10 self incrimination, there can be very wide ranging
11 interrogatories in discovery in respect of wide ranging
12 allegations if they're all put in dispute which is likely
13 to happen with this statement of claim so instead of
14 having the issue of - was this statement made, et cetera,
15 et cetera, which might be relevant for a defamation,
16 we've now got, what correspondence have you had with the
17 Wilderness Society, et cetera, et cetera and it just
18 blows right out to the point of being potentially very
19 oppressive in a case of this kind. That is an
20 impermissible forensic advantage.

21 Here we are confronted with allegations of
22 conspiracy to commit crimes and the crimes are identified
23 in the statement of claim against us and we're said to
24 have done so contumaciously and we're said to have done
25 this over a period of time and we are confronted with not
26 just a defamation, but a conspiracy to do a defamation
27 and that means that we're left in the position where we
28 have this action hanging over our heads in the Supreme
29 Court of Victoria for much longer than otherwise would be
30 the case.

31 A couple of other things that we wanted to say Your

1 Honour, just by way of conclusion. There are a number of
2 authorities for the proposition - a number of cases where
3 affidavits have been required where pleadings have been
4 struck out. Some of those are also, if not all of them,
5 are all cases where the court refused to tease out what
6 was left after striking out, but made the point that
7 everything is so inextricably combined that the whole
8 statement of claim should be struck out. I've already
9 taken Your Honour to Australian Iron and Steel. The
10 other authorities, and I propose Your Honour not to read
11 them or reading in passage but merely give Your Honour
12 the cases and they are Rochester Communications Group and
13 Ors v. Rodney Steven Adler and Ors which is a 1997
14 decision of Justice Beaumont (1997) 62 F.C.R.

15 HIS HONOUR: Rochester Communications v. Adler?

16 MR WALTERS: Yes Your Honour. That's a decision of
17 Justice Beaumont.

18 HIS HONOUR: Yes.

19 MR WALTERS: There is another decision of Justice Lockhart in
20 A&S Oayda, O-a-y-d-a Investments Pty Ltd and Ors v. Burns
21 Philp Trustee Company which is - it's BC 9400 - - -

22 HIS HONOUR: I've got it here, I have a copy of it anyway.

23 MR WALTERS: Then there's the decision of Justice Sackville in
24 Morton v. Vouris, V-o-u-r-i-s which is recorded in
25 volume 21 of the Australian Companies and Securities
26 reports at p.497. That's a case which states a number of
27 the principles and in fact there's a formal order at the
28 end of the judgment. We did want to hand up the response
29 that we received to our request for particulars. I don't
30 think it's on the court file but our request is,
31 and - - -

1 HIS HONOUR: I've got a big bundle of further and better
2 particulars, whether yours is here, just let me have a
3 look - no I think it may only be to the second, sixth and
4 the thirteenth, it's only one set.

5 MR HOWELLS: Your Honour the document was provided, it wasn't
6 filed or (indistinct) it can't assist Your Honour in that
7 way that it shouldn't be received at this stage because I
8 will have to respond to it. There are already
9 12 authorities not yet referred to and certainly not
10 notified for the last thing I've got to deal with in
11 reply. There are also a series of matters which although
12 they're very easy to respond to, require for providing
13 slavish references to paragraphs in the statement of
14 claim in response to what was we say, simply erroneous
15 references by Mr Gronow and now we've got to deal with
16 particulars Your Honour.

17 HIS HONOUR: Let me just see what Mr Walters - what's the point
18 about the particulars?

19 MR WALTERS: Our learned friend said that further particulars
20 could be provided at some future time, well we asked for
21 quite simple particulars and we got nothing and that's
22 what that document shows. There was an order in relation
23 to that. We don't have any confidence Your Honour that
24 particulars are going to solve the problem in this case.

25 HIS HONOUR: Yes, I think you can make that point. I won't
26 delve into it any further.

27 MR WALTERS: Yes thank you Your Honour. We would say a couple
28 of other things Your Honour. We don't want to reiterate
29 but we do adopt everything that's been said about
30 Paragraphs 526 and following and Paragraphs 10 to 15
31 which lead up to that, which lead to endless

1 possibilities. We do want to say this, that telling Your
2 Honour that there's things that might have been seen or
3 something on the Internet is not a basis of confidence
4 that there is a sound basis for the allegations made in
5 this case. Rumour, gossip, innuendo, whatever it is
6 found on the Internet is not a basis for making
7 allegations of the serious kind.

8 We do not have documents that we know about that our
9 friend seems to think are being referred to in the
10 pleadings. It's not good enough to say, "You know how
11 you are, you know what you did." There must be a proper
12 allegation and not just a shot gun confetti approach, a
13 snowstorm as the case that Mr Estcourt used the term -
14 providing us with a barrage of allegations. None of
15 which are in fact clear.

16 In conclusion Your Honour, I did refer to Davie v.
17 Garrett's case and as Lord Justice James said, "If the
18 defendant is embarrassed by the plaintiff's motive
19 stating his case, he is entitled to be relieved from his
20 difficulty." If Your Honour pleases.

21 HIS HONOUR: Thank you Mr Walters. Mr Howells, do you want
22 some time?

23 MR HOWELLS: I would Your Honour, and what we'd - can I propose
24 this. Take these authorities for example, and my friend
25 goes to Merkur Island. Merkur Island is a contracts
26 case. It's an interference with contracts case Your
27 Honour. There are some silly propositions put, but we do
28 have to deal with them.

29 HIS HONOUR: Yes that's all right.

30 MR HOWELLS: We can deal with them in reply in writing, and
31 we'd prefer to deal with it in writing. The difficulty

1 is Your Honour I don't want to trouble the court about
2 it, but it is going to take time and it will take more
3 time than simply today to deal with it.

4 HIS HONOUR: When can you provide me with that?

5 MR HOWELLS: Middle of next week Your Honour.

6 HIS HONOUR: I wanted to get this out for all sorts of reasons.
7 Could I say Tuesday - is Tuesday too early.

8 MR HOWELLS: Yes Your Honour, Tuesday will do. We'll try and
9 do it by Monday, but it's just a matter of responding to
10 things which are simply erroneous and - - -

11 HIS HONOUR: Very well I'll permit you having a go - - -

12 MR HOWELLS: It advances the heal of the hunt.

13 HIS HONOUR: Yes I'll permit you to file limited response to
14 those matters which you say were not - which you say were
15 not properly matters of reply by - - -

16 MR HOWELLS: It will be very limited Your Honour. Confined
17 only to those propositions where we say it was not a
18 matter proper for reply.

19 HIS HONOUR: Can I say by four o'clock Tuesday?

20 MR HOWELLS: Yes Your Honour.

21 HIS HONOUR: Very well. I will consider this matter and I hope
22 to have it decided quickly, but there is quite a lot in
23 it. It will take whatever time it takes. I'd like to
24 thank counsel for their very helpful submissions and the
25 confining of a matter that could have run a lot longer
26 than it has, to a little over the allocated time. These
27 sorts of things can get out of hand as one in this court
28 at the moment has it would appear. But certainly that
29 hasn't happened in this case, so despite Mr Howells'
30 having to do a bit more after the end of it, I'm grateful
31 to counsel for that. I'll simply adjourn and reserve my

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