

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
2004
COMMERCIAL LIST

No. 9575 of

BETWEEN:

GUNNS LIMITED & OTHERS

Plaintiffs

and

ALEXANDER MARR & OTHERS

Defendants

**FIRST, THIRD, FOURTH AND FIFTH DEFENDANTS' OUTLINE OF
SUBMISSIONS IN REPLY TO PLAINTIFFS' OUTLINE OF SUBMISSIONS
ON APPLICATION FOR STRIKE-OUT OF STATEMENT OF CLAIM
(VERSION 3)**

Date of document: 1 March 2006

Filed on behalf of: First, Third, Fourth & Fifth Defendants

Prepared by:

Phillips Fox

Solicitors Code: 274

Lawyers

DX 147

140 William Street

Tel. No.: 9274 5000

Melbourne Vic 3000

Ref: HOB:0378613 Ms H. O'Brien

-
1. This outline relates to the matters raised in paragraphs 63 to 74 of the plaintiffs' outline of submissions dated 15 February 2006.
 2. Contrary to the plaintiffs' submissions, the statement of claim fails to plead any properly particularised cause of action with respect to any of the first, third, fourth and fifth defendants save for possible actions for trespass against the fifth defendant in relation to Styx and Hampshire.
 3. At the outset, it should be noted that the plaintiffs' submissions appear to rely upon a fundamental misunderstanding of the effect of the decisions in *Ahern v R* (1988) 165 CLR 87 and *ACCC v Leahy Petroleum* [2004] FCA 1678.
 4. Whilst the *Ahern* principle permits a statement by a conspirator, insofar as it is an admission, to be used as an admission against co-conspirators, it cannot be used as evidence of the conspiracy itself nor as evidence of the participation in a conspiracy by an alleged co-conspirator. The alleged conspiracy and participation in it by each other alleged co-conspirator must be proved by other means.
 5. The statement of claim and the plaintiffs' submissions with respect to it appear to assume that it is sufficient for the plaintiffs merely to allege

conspiracy to bring the *Ahern* principle into play and, indeed to rely upon it to "prove" the alleged conspiracies. Such is not the case.

6. The plaintiffs' submissions also appear to rely upon an unfounded assumption that all defendants have identical interests and ought not have separate representation (paragraph 50 of Plaintiffs' Outline of Submissions), a view that has already been rejected by the Court.
7. Further, it appears that the statement of claim and the plaintiffs' submissions also rely upon an unstated and unwarranted assumption that the first plaintiff is entitled to some form of immunity from public or private criticism of or public debate about its activities merely because those activities are lawful. Plainly, that is not the case.
8. If it were so, then the tobacco companies would have a myriad of claims against the AMA and other professional medical and pharmaceutical bodies, most if not all of the Commonwealth and State governments, nicotine patch manufacturers and marketers, etc., etc., etc.
9. In effect, what the plaintiffs appear to be saying is that all defendants, or whichever of them the plaintiffs choose with respect to any of the separate sub-actions, are all in it together and so they do not have to establish participation of any particular defendant in any of the alleged conspiracies or for that matter the conspiracy itself. The plaintiffs appear to take the view that it is sufficient for them to allege a conspiracy and then to rely upon some act or statement of an alleged conspirator as "proof" not only of the conspiracy but also of the participation of all other alleged co-conspirators in it. This is clearly wrong in law.
10. No proper particulars have been given of any of the alleged conspiracies nor have proper particulars been given of overt acts and, in many cases, no allegation is made of any overt act save for allegations of attendance at meetings for which no proper particulars have been provided.
11. In relation to Styx-
 - a) the overt acts alleged against the first, third and fourth defendants consist solely of attendance at meetings and "support and encouragement" for which no proper particulars have been provided;
 - b) the overt acts alleged against the first, third and fourth defendants also relate solely to a protest to be and conducted on public land (paragraph 281 of statement of claim);
 - c) a protest on public land cannot cause or give rise to any actionable loss to the plaintiffs.

12. In relation to Triabunna 2004-

- a) the only overt acts alleged against the first defendant, the third fourth and fifth defendants not being alleged to be involved, are attendance at a meeting (paragraph 340 of the statement of claim) and providing (or organizing others to provide) equipment to be used in the protest (paragraph 347 of the statement of claim);
- b) no proper particulars have been provided of either of the alleged overt acts of the first defendant.

13. In relation to Banksia Awards-

- a) no proper particulars have been provided of any of the discussions alleged to found the conspiracy;
- b) no particulars have been provided of any overt act alleged to have been committed by any of the first, third and fourth defendants, there being no allegation of involvement by the fifth defendant;
- c) the reference to statements made by the second defendant and Vica Bailey referred to in paragraph 72 of the plaintiffs' outline of submissions, even if they could be construed as admissions which is doubtful, do not constitute particulars of any involvement of any of the first, third and fourth defendants in the alleged conspiracy;
- d) as referred to in paragraphs 4 and 5 above, the first plaintiff cannot rely upon such statements as proof, evidence or particulars of the alleged conspiracy nor of the alleged participation of any of the first, third and fourth defendants in it;
- e) the first plaintiff does plead that the overt acts were defamatory (paragraph 523(a) of the statement of claim) without providing any particulars of the alleged publication;
- f) insofar as the plaintiffs' outline asserts in paragraph 74 that the first plaintiff will provide formal particulars of various statements alleged to have been made, those particulars, if they exist, ought to have been provided in the statement of claim itself or at the very latest in response to the first, third, fourth and fifth defendants' request;
- g) further, any such particulars would need to state what each of the first, third and fourth defendants is alleged to have done for the claim to be good as against them even as a matter of

pleading; it cannot rely upon statements of the second defendant and others.

14. In relation to the Japanese Customers-

- a) no proper particulars have been provided of the agreement alleged to found the conspiracy;
- b) the first defendant is not alleged to have done any overt act save for attendance at meetings and for which no proper particulars have been provided;
- c) the third defendant is not alleged to have done any overt act save for having arranged and attended meetings (for which no proper particulars have been provided) and that he and the sixth defendant are alleged (paragraph 624 of the statement of claim) to have wrongfully expended money from the Wilderness Fund no particulars of which have been provided despite request;
- d) the statements of the fourth defendant constitute nothing more than public and private criticism of the first plaintiff's activities;
- e) it is not alleged in the statement of claim that anything said by the fourth defendant was untrue; as stated in paragraph 7 above, the first plaintiff is not entitled to any immunity from public or private criticism of its activities;
- f) the fifth defendant is not alleged to be a co-conspirator in this action;
- g) there is no pleaded and particularised causal connection between the conduct complained of and the damage alleged;
- h) the first plaintiff has failed to provide any particulars of any threat by its Japanese customers either to break their existing contracts or to cease purchasing from the first plaintiff;
- i) no particulars have been provided of any express threat and the statements referred to in other paragraphs of the statement of claim in the particulars subjoined to paragraph 626 cannot be construed as any implied threat by the Japanese customers or any of them to cease purchasing from the first plaintiff, save perhaps in the mind of a paranoid lunatic.


15. In relation to the Banks-

- a) no proper particulars have been provided of the agreement alleged to found the conspiracy;

- b) the first defendant is not alleged to have done any overt act save for attendance at a meeting for which no proper particulars have been provided and for the general allegations against all the Banks defendants contained in paragraphs 653, 654, 656, 657, 664, 665 and 666 and for which no particulars have been provided of his alleged involvement;
- c) the third defendant is not alleged to have done any overt act save for those alleged against the first defendant (and with the same deficiencies in pleading and particularity) and that he and the sixth defendant are alleged to have wrongfully expended money from the Wilderness Fund (paragraph 678 of the statement of claim) no particulars of which have been provided despite request;
- d) no particulars have been provided of the alleged demand that the ANZ Bank withdraw its facilities (paragraph 663 of the statement of claim);
- e) no action can lie for the defendants exercising their rights as shareholders of the Commonwealth and ANZ Banks nor for them encouraging others to exercise such rights;
- f) there is no pleaded and particularised causal connection between the conduct complained of and the damage alleged;
- g) the first plaintiff has failed to provide any particulars of the reviews and questioning of facilities by the Commonwealth and ANZ Banks and the communication thereof to the first plaintiff; such communications by their very nature being within the knowledge of the first plaintiff.

16. The pleading of the so-called Campaign Against Gunns suffers from all the same vices as the pleadings of the various and disparate sub-actions.

Dated: 1 March 2006


.....

Phillips Fox
Solicitors for first, third, fourth
and fifth defendants