

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

No. 5526 of 2007

BETWEEN

GUNNS LIMITED

Plaintiff

and

FRANK NICKLASON

Defendant

AMENDED STATEMENT OF CLAIM

(Filed pursuant to the order of Master Evans made on 17 September 2007)

Date of document: 1 October 2007

Prepared by:

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Attention: Richard Mereine

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1. The Plaintiff is and was at all material times:
 - (a) a corporation duly incorporated in accordance with the *Corporations Act 2001* (Cth); and
 - (b) engaged in the business of processing timber in Tasmania and exporting timber including wood chips to Japan and other countries.
2. On or about 8 April 2002 the Defendant spoke and thereby published the following words to a television reporter in the State of Tasmania for Hobart WIN Television news ("**the Words**"):

"The Gunns woodchip pile on the Burnie wharf has developed into a health risk. Conditions at the bottom of the stack are right to

breed the Legionella bacteria. The bottom of the woodchip piles, I've been told, or at least one of them hasn't been moved here in seven years so it will be compost and it will almost certainly have Legionella and fungal organisms which can be blown across the town."

3. Further, on 8 April 2002, the Defendant, by the conduct referred to in paragraph 2 above, caused the Words to be communicated, and thereby published the Words, in a television news broadcast by WIN Television to a wide and extensive audience in the State of Tasmania.

Particulars

- (i) The Plaintiff refers to and repeats paragraph 2 above.
 - (ii) A transcript of the relevant broadcast is annexed hereto and marked "A". The Plaintiff will rely at trial on the transcript, and on a video recording of the broadcast.
 - (iii) The Defendant caused the Words to be communicated, and thereby published the Words, as alleged in that:
 - (A) he spoke and thereby published the Words to a television reporter;
 - (B) he knew or had the opportunity of knowing from the identity of the reporter and the presence of a television camera that the Words were being recorded for broadcast on a television news service;
 - (C) alternatively, it was a natural and probable consequence of the publication of the Words as alleged in paragraph 2 above that they would be so broadcast.
4. In their natural and ordinary meaning the Words conveyed the following imputations concerning the Plaintiff:
- (a) the Plaintiff, by neglecting to move the bottom of one or more of its

woodchip piles on the Burnie wharf, was responsible for almost certainly exposing the people of Burnie to the risk of infection from Legionella;

- (b) the Plaintiff showed disregard for the health of the people of Burnie by neglecting to take action to prevent the bottom of one or more of its woodchip piles at the Burnie wharf from reducing to compost almost certainly containing Legionella which could be blown across the town,

("the Imputations").

Particulars

- (i) The word "Gunns" was and was understood to be a reference to the Plaintiff.
- (ii) The words "woodchip pile" and "woodchip piles" were and were understood to be references to woodchip piles under the Plaintiff's control at the Burnie wharf.

5. The Imputations were defamatory, and the matters of the Imputations were defamatory matters, within the meaning of section 5 of the *Defamation Act 1957* (Tas) ("the Defamatory Matters").

6. In the premises:

- (a) the publications referred to in paragraphs 2 and 3 above were unlawful publications of the Defamatory Matters under section 8 of the *Defamation Act 1957* (Tas); and
- (b) in respect of each of those publications of the Defamatory Matters the Defendant has committed an actionable wrong under section 9 of the *Defamation Act 1957* (Tas).

7. As a result of the unlawful publications of the Defamatory Matters as alleged in paragraphs 2 to 6 above, the Plaintiff has been injured in its trading reputation and has thereby suffered loss and damage.

Particulars

The publications of the Defamatory Matters have damaged the goodwill of the Plaintiff. Further particulars will be provided before trial.

8. Further, the unlawful publications of the Defamatory Matters as alleged in paragraphs 2 to 6 above occurred in the following circumstances which entitle the Plaintiff to an award of exemplary damages:

- (a) the Defendant had no genuine belief in the truth of the Imputations at the time the Defamatory Matters were published;

Particulars

The absence of a genuine belief is to be inferred from the fact that the Defendant had no reasonable basis for believing the Imputations to be true at the time he published the Defamatory Matters. The fact that the Defendant had no reasonable basis for believing the Imputations to be true is to be inferred from the matters referred to in paragraphs (c) and (d) below.

- (b) alternatively, the Defendant was recklessly indifferent to the truth or otherwise of the Imputations at the time the Defamatory Matters were published;

Particulars

The Defendant's reckless indifference is to be inferred from:

- (i) the fact that he published the Defamatory Matters despite having no reasonable basis for believing the Imputations to be true at the time of publication; and
- (ii) the matters referred in paragraphs (c) and (d) below.

- (c) the Defendant undertook no reasonable research to ascertain the truth or falsity of the Imputations prior to publication;

Particulars

That the Defendant undertook no reasonable research to ascertain the truth or falsity of the Defamatory Matters prior to publication is to be inferred from:

- (i) the fact that, at the time of publication, the Defendant did not know whether or not the Plaintiff had neglected to move the bottom of one or more of its woodchip piles on the Burnie wharf in seven years;
 - (ii) the fact that, at the time of publication, the Defendant had no evidence that any people of Burnie had been exposed to Legionella bacteria by reason of the Plaintiff having neglected to move the bottom of one or more of its woodchip piles on the Burnie wharf;
 - (iii) the fact that, at the time of publication, the Defendant had conducted no investigation of or tests on the composition of the bottom of the woodchip piles on the Burnie wharf;
 - (iv) the fact that, at the time of publication, the Defendant had conducted no investigation of or tests on the ability of Legionella and fungal organisms from the bottom of a wood chip pile on the Burnie wharf to be blown across the town; and
 - (v) the matter referred to in paragraph (d) below.
- (d) the Defendant made no inquiry of the Plaintiff as to the truth or falsity of the Imputations prior to publication;
- (e) the Defendant deliberately used provocative and sensational language (“Legionella and fungal organisms which can be blown across the town”) which was calculated to maximise the damage to the reputation of the Plaintiff;
- (f) the Defendant was motivated in publishing the Defamatory Matters by an improper purpose, namely to advance the political platform of the

association known as Doctors for Forests of which he was the spokesman at all costs:

- (i) despite the fact that he had no evidence to justify the Imputations;
- (ii) irrespective of the truth or falsity of the Imputations;
- (iii) at the expense of the trading reputation of the Plaintiff; and
- (iv) in the premises, with a view to causing, opportunistically and deliberately, very great damage to the trading reputation of the Plaintiff.

Particulars

- (A) The Plaintiff refers to and repeats sub-paragraphs (a) to (d) above.
- (B) The Defendant was a spokesman for an association known as Doctors for Forests.
- (C) Doctors for Forests was and is implacably opposed to clear felling and wood chipping old growth and native forests in Tasmania and the political platform of Doctors for Forests is to oppose in any circumstances the clear felling and wood chipping of old growth and native forests in Tasmania.
- (D) The Defendant published the Defamatory Matters in his capacity as spokesman for Doctors for Forests.
- (E) The Defendant published the Defamatory Matters in furtherance of the political platform of Doctors for Forests.
- (F) The Defendant knew that the Imputations conveyed very serious allegations concerning the conduct of the Plaintiff and thereby intended to inflict very great damage to the trading reputation of the Plaintiff.

9. The Defendant has, despite request, failed and refused to apologise to the Plaintiff for the publication of the Defamatory Matters in circumstances where an apology is self-evidently called for.

Particulars

The Plaintiff relies on the letters dated 4 and 15 October 2002 from the solicitors for the Plaintiff to the Defendant, the email dated 15 October 2002 from the Defendant to the solicitors for the Plaintiff and the statement of the Defendant on 24 October 2002 in a telephone call with the solicitors for the Plaintiff that he would not apologise. Copies of the letters and email referred to may be inspected by appointment.

AND THE PLAINTIFF CLAIMS

- A. Damages.
- B. Exemplary damages.
- C. Interest pursuant to Statute.
- D. Costs.

Dated 1 October 2007

JEREMY RUSKIN QC

MJ COLLINS

Clayton Utz
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CLAYTON UTZ
Solicitors for the plaintiff

Annexure "A"

Hobart WIN TV State Television News

8 April 2002, 6.13 p.m.

Forestry Giant Gunns has strenuously denied claims its woodchip pile at Burnie is at risk of carrying the Legionella bacteria.

Interviews with Frank Nicklason, Doctors for Forests; Paul O'Halloran, Tasmanian Greens.

NEWSREADER:

Forestry giant Gunns has strenuously denied claims its woodchip pile at Burnie is at risk of carrying the Legionella bacteria.

REPORTER:

Doctors for Forests claim the Gunns woodchip pile on the Burnie wharf has developed into a health risk. They say conditions at the bottom of the stack are right to breed the Legionella bacteria.

FRANK NICKLASON - DOCTORS FOR FORESTS:

The bottom of the woodchip piles, I've been told, or at least one of them hasn't moved here in seven years so it will be compost and it will almost certainly have Legionella and fungal organisms which can be blown across the town.

REPORTER:

The group wants an environmental management plan but their claims have been rubbished by Gunns managing director, John Gay. He says the woodchip piles are turned over every three months.

It hasn't been a good weekend for the company on the coast, beginning with Saturday's street theatre adaption of D Seuss' The Lorax.

FEMALE VOX POP:

It tells exactly what's happening in the forests with the destruction of the forests for greed and for short-term gain.

REPORTER:

While the launch of the Braddon Green candidates for the next state election heard claims Tasmanians have only eighty per cent of the average national income, the lowest in fifty years, pointing to Gunns exports from the Burnie wharf as an indicator of where things are going wrong.

PAUL O'HALLORAN - TASMANIAN GREENS:

High volume, low value woodchips, soft wood timber and now hard wood timber to places that are creating jobs with those resources.

REPORTER:

Meanwhile, at Moorleah near Wynyard residents are angry about Gunns purchase of one hundred and forty-one hectares of fertile farm land.