

1 HIS HONOUR: Yes, Mr Howells.

2 MR HOWELLS: If Your Honour pleases, could I first deal with
3 the question concerning the two proceedings in Tasmania
4 that were referred to on Friday. Could I hand to Your
5 Honour a copy of a writ. This I am instructed, Your
6 Honour, was issued on 20 May 2003 concerning events at
7 Triabunna in 2003 and it included as one of the
8 defendants Mr Brown and Mr Simon Brown is the 9th
9 defendant in this proceeding, Your Honour. An appearance
10 was entered by Mr Brown but there were three of the
11 defendants in the Tasmanian proceeding for whom no
12 appearance was entered and an interlocutory judgment
13 based on non appearance was entered on 4 May 2004. No
14 further step as I am instructed was taken - - -

15 HIS HONOUR: That's in this action?

16 MR HOWELLS: No. In the Tasmanian proceeding, non appearance
17 by three of the defendants in the Tasmanian proceeding
18 resulted in an interlocutory judgment against those three
19 defendants who didn't appear. No further step was then
20 taken in the proceeding. I hand to Your Honour a copy of
21 the interlocutory judgment. As at Friday, that left a
22 defendant, namely Mr Simon Brown, who is a defendant to
23 the proceeding before Your Honour still a defendant to
24 the proceeding in the Tasmanian court.

25 HIS HONOUR: In respect of which judgment has been entered
26 against him.

27 MR HOWELLS: No, not against him. He was not one of the non
28 appearances.

29 HIS HONOUR: I see, he's the 1st defendant, I see.

30 MR HOWELLS: He is, yes. An appearance was entered for him.

31 HIS HONOUR: No further steps were taken.

1 MR HOWELLS: No further steps were taken and I am instructed
2 that it was understood by our client that they had given
3 instructions for the withdrawal of the matter generally.

4 HIS HONOUR: But that hasn't been done.

5 MR HOWELLS: Because of a change of solicitors, that hadn't
6 been done but it has been done this morning, I am
7 instructed, Your Honour, and we will of course provide to
8 the court if we might have 24 hours, a copy of the
9 discontinuance.

10 HIS HONOUR: It's a matter for the parties. If there's no
11 argument, nothing arises out of it, well then it can be
12 put to one side. If somebody wants to raise some
13 argument about it, well then - - -

14 MR HOWELLS: Can I hand to Your Honour two provisions and
15 unfortunately I don't have authorised copies of them, but
16 first of all, the Victorian Wrongs Act. 24AA, Your
17 Honour, you will see alters what would otherwise have
18 been the common law position so that there is no bar to
19 an action where there are joint tortfeasors and some of
20 them are sued. As Your Honour says, if it's withdrawn,
21 no issue arises unless somebody wants to make an issue of
22 it, but that 24AA makes clear there's no bar. 24AB
23 limits the position as to costs so that costs - if there
24 were two proceedings against concurrent or joint
25 tortfeasors, well, but unless it was said in the opinion
26 of the court there was reasonable ground for bringing the
27 action, then there wouldn't be costs.

28 HIS HONOUR: That's only where judgment is first given.
29 Mr Brown, you say has never had judgment against him and
30 the other - what was the other case, we had? We had
31 another one.

1 MR HOWELLS: The other one which I can now hand to
2 Your Honour - - -
3 HIS HONOUR: I had a writ, a copy of writ here somewhere. Have
4 you got another copy of it there?
5 MR HOWELLS: I have there were actual in the one proceeding it
6 appears, two writs, one against two defendants and one
7 against three were issued. How that happened - - -
8 HIS HONOUR: With the same proceeding number?
9 MR HOWELLS: Same proceeding number. In that case Your Honour
10 will see that there were two writs, one proceeding
11 number. The first against Welsh, Critchley & Moore, the
12 second against Shaw and Nunn. Sorry, Welsh, Critchley,
13 Moore, Nunn and Morrow.
14 HIS HONOUR: No it's the same - they're the same action. It's
15 just that the copies of the writs have been addressed in
16 a particular way.
17 MR HOWELLS: Exactly Your Honour.
18 HIS HONOUR: But all the same defendants are in each writ.
19 MR HOWELLS: That's right, but two versions with different
20 addresses.
21 HIS HONOUR: I think that was a - - -
22 MR HOWELLS: It might have - - -
23 HIS HONOUR: That was done here. That used to be done here
24 years ago. That was - if you issued a writ against four
25 people, copies which were served were individually
26 addressed. So you'd have - - -
27 MR HOWELLS: Of course - - -
28 HIS HONOUR: The action would mention the four defendants. The
29 first copy would be addressed to the first defendant and
30 the second copy would be addressed to the second,
31 et cetera. That seems to be what they've done here, but

1 they've put more than one on each, they've put Mr Shaw
2 and Ms Nunn on one and they've put Mr Welsh, Mr Critchley
3 and Mr Moore on the other.

4 MR HOWELLS: Yes Your Honour that's - - -

5 HIS HONOUR: Are these - these weren't the ones I had on
6 Friday?

7 MR HOWELLS: In a different form, but Your Honour certainly the
8 first of them, the one that has Welsh, Critchley and
9 Moore on the front was handed to Your Honour on Friday.

10 HIS HONOUR: I'll simply hold those documents and if anyone
11 wants to make an issue of it then they can, but it's now
12 be withdrawn - - -

13 MR HOWELLS: Can I just indicate to Your Honour they both have
14 today and we'll provide copies of the withdrawals, but
15 Your Honour the other thing about that one is that no
16 appearance was entered for Mr Morrow who is the only
17 defendant who is relevant here.

18 HIS HONOUR: Yes.

19 MR HOWELLS: And the Tasmanian provisions provide of course for
20 the writ having currency for one year, if not served.
21 Our instructions are that service wasn't achieved - we
22 believe service wasn't achieved and so it may be that in
23 any event it lapsed by April of last year.

24 HIS HONOUR: Well the actin would be still on foot, but the
25 writ would be stale for service.

26 MR HOWELLS: Service, but as I say, we're instructed again it
27 was understood that it had been - instructions had been
28 given for its withdrawal but change of solicitor - and
29 that's been attended to this morning I'm instructed Your
30 Honour.

31 HIS HONOUR: Well everyone's heard what you've said and

1 probably nothing more will happen, but if somebody wants
2 to raise it they can. I'll simply mark that bundle of
3 Tasmanian court documents, I'll just mark them A for the
4 sake of identification.

5
6 #EXHIBIT A - Bundle of Tasmanian court documents.

7 So that A consists of a bundle of documents being a copy of a
8 writ directed, a writ in Action No. 251 of 2003 in the
9 Supreme Court of Tasmania, an interlocutory judgment in
10 that action, that proceeding, and copies of writs in
11 Action No.178 of 2004 in the Supreme Court of Tasmania.
12 They will just simply be held by my associate.

13 MR HOWELLS: Your Honour, does Your Honour have our outline
14 nearby.

15 HIS HONOUR: Yes.

16 MR HOWELLS: Could I ask Your Honour to go to p.14 of that.

17 HIS HONOUR: Yes I have that.

18 MR HOWELLS: Dealing there with the question of knowledge as to
19 the contracts, Your Honour might recall that I went to
20 those authorities on Friday, including the Transport
21 Workers' case. Over on p.15 could I also refer Your
22 Honour to an authority which we've included in Volume 2
23 of our bundle of authorities. It's Vershare v.
24 Greenpeace. Does Your Honour have Volume 2 of those
25 authorities.

26 HIS HONOUR: Yes.

27 MR HOWELLS: It's the second last case and it's behind Tab 34.
28 It may be Volume 3, I am sorry, Your Honour, it's been
29 divided up into three there. In Vershare v. Greenpeace
30 Canada, unfortunately we don't have the authorised report
31 there, Your Honour. Could I ask Your Honour to go to the
32 p.5 of the proof, and in particular to Paragraph 34,

1 dealing with this question of knowledge, Your Honour and
2 what's required to be - - -

3 HIS HONOUR: This is a decision of the Supreme Court of British
4 Columbia.

5 MR HOWELLS: Yes, Your Honour.

6 HIS HONOUR: Madam Justice Sinclair Prowse.

7 MR HOWELLS: Yes, Your Honour. Page 5, Paragraph 34, "The
8 defendants on the (reads) the personal
9 plaintiffs". Then 37 over the page, "If the defendants
10 had the means (reads) knowledge of the
11 contract" and that together with the other authorities,
12 Your Honour, that we've gone to we say is consistent with
13 the manner in which we've pleaded the question of
14 knowledge of the contracts, the pleadings descend to
15 assertions that there was a means of the defendants
16 knowing about the contracts and they ought to have - that
17 they were in a position to appraise themselves of that.
18 Just going back to the outline, Your Honour, on p.15,
19 we've identified in Paragraph 21 of the outline how we've
20 pleaded knowledge, over onto p. 16. In Paragraph 22, the
21 pleading says specifically who it was that had that
22 knowledge and what was the text of the knowledge, namely
23 that the 1st plaintiff had contracts with the employees
24 for specific identified work. The date at which that
25 knowledge was held is also specified in the paragraph.

26 As to the source, three alternatives are
27 particularised that they knew and we've referred to the
28 ITWF v. Merka Shipping case towards the foot of Paragraph
29 23 and over onto 24, "Secondly as an alternative basis of
30 the knowledge (reads) working for
31 remuneration". And then thirdly, as another basis, it's

1 asserted in the pleading that the defendants were
2 recklessly indifferent to ascertaining the existence of
3 those contracts and we refer to Mengel again, which I've
4 already taken Your Honour to.

5 In the same way, Your Honour, in the same way over
6 on p.18 dealing with other knowledge there are a number
7 of other matters as to knowledge which were the subject
8 of criticism in the common grounds and I don't need to
9 take you to those in detail. They weren't the subject of
10 pressing submissions and we say we've answered them
11 there.

12 On p.19 we deal with knowledge and the pleading of
13 fraud. In the common grounds the defendants also allege
14 knowledge there is insufficiently pleaded. Paragraph 181
15 which is the example we give. The context in which the
16 pleading arises is as follows. "During the course of the
17 Lucaston action there was a protest on 28 May 2003 on
18 Bakers' Creek Road. A blockade was established in front
19 of a truck that was being used in the logging operations.
20 A protestor, Emily McNally-Smith used a device to purport
21 to lock herself onto the truck."

22 She was not in fact locked onto the truck. Emily
23 McNally-Smith and the seventh defendant both untruthfully
24 told the owner of the truck and police officers that she
25 was locked onto the truck. It's alleged in the pleading
26 that the two of them both knew at the time that they made
27 the above statements that McNally-Smith was not in fact
28 locked onto the truck. As to McNally-Smith's knowledge
29 it's axiomatic that she knew she wasn't locked on, as she
30 was not in fact locked onto the truck.

31 This is an allegation that McNally-Smith knew that

1 what she herself was physically doing at that particular
2 location. No further particulars are necessary because
3 the allegation and knowledge is made about a person who
4 actually undertook the act complained of. As to the
5 seventh defendant's knowledge that McNally-Smith was not
6 locked onto the truck, he was told by McNally-Smith that
7 she was not locked onto the truck. That's as it is
8 pleaded.

9 As to Paragraph 445 about which criticism was made,
10 the context in which the pleading arises is similar to
11 that in respect of the Lucaston protest referred to
12 above. The eighth defendant climbed the north crane at
13 Hampshire Mill and purported to lock herself onto the
14 crane. She was not in fact locked onto the crane, and so
15 on. A similar thing.

16 HIS HONOUR: Yes same sort of thing.

17 MR HOWELLS: Yes Your Honour. Can I take Your Honour to
18 Paragraph 36. I've dealt with Your Honour, the general
19 submissions that have been made in the common grounds
20 about the discursive nature of the pleading and that it
21 is embarrassing by virtue of its length and the nature of
22 the detail to which it descends.

23 HIS HONOUR: Yes.

24 MR HOWELLS: Your Honour will be familiar with the paragraphs
25 there that we've addressed, and in particular going onto
26 p.37 we've set out a chronology of the allegations as
27 they arise in the pleading, extending from late 2000,
28 down to early 2004. A succession of protest actions of
29 various kinds, all directed at our clients, about which I
30 made submissions on Friday Your Honour. I don't need to
31 go to that in detail.

1 HIS HONOUR: That's all right.

2 MR HOWELLS: But I do ask that if I might, that Your Honour
3 have particular regard to what's said in two cases that
4 are extracted on p.23 of the outline. First of all
5 Justice von Doussa in Beach Petroleum No Liability v.
6 Johnson reported in 1991 - - -

7 HIS HONOUR: Yes I'm familiar with that. I've virtually read -
8 I looked at that in your bundle. I think it's in your
9 bundle isn't it?

10 MR HOWELLS: It is Your Honour. I don't need to take Your
11 Honour to it, and in Paragraph 40 there's a reference to
12 two cases, Elders and Westgate in which Justice
13 Mansfield echoes the observations of Justice von Doussa
14 in Beach Petroleum. But also Pan Continental Mining
15 Limited where Justice Beaumont observed, "Under the
16 modern system of pleading the question is not whether the
17 facts pleaded are in themselves sufficient to give rise
18 to a cause of action, rather the question is whether it
19 would be open to the applicant upon the pleadings to
20 prove facts of the trial which would constitute a cause
21 of action."

22 HIS HONOUR: I don't know whether that - that seems to be
23 taking it perhaps one step too far doesn't it?

24 MR HOWELLS: Well it will depend in each case as to which of
25 the traditional rules is being spoken of. But what we
26 say Your Honour is that the - we say we've complied with
27 the requirement that the material facts in relation to
28 each cause of action are pleaded. What - yes.

29 HIS HONOUR: I'm not quite sure what - I haven't looked at Pan
30 Continental Mining, but whether the facts pleaded
31 sufficient to give rise to a cause - not that, but rather

1 whether it would be open to applicant on the pleadings to
2 prove facts which would constitute a cause of action.
3 There seems to be a logical difficulty with that doesn't
4 there, but if it's open to you to prove facts at the
5 trial, those facts must be relevant. If they're relevant
6 they've got to have been pleaded.

7 It may be a matter of degree in some cases, where a
8 fact is a rubbery thing. If you say I was hit by a tram
9 in Bourke Street, you would be entitled to prove that it
10 was in Bourke Street near the corner of Queen Street.
11 Now Queen Street mightn't have been pleaded, so it's -
12 it's a very - I mean it's obviously going to depend on
13 the facts in any given case. But a question, "Where were
14 you in Bourke Street" met by the answer, "I was near
15 Queen Street" wouldn't be inadmissible on the ground of
16 relevance on that pleading.

17 MR HOWELLS: Yes Your Honour.

18 HIS HONOUR: But you could posit a different example very
19 easily where a question would be (indistinct) - it's
20 going to depend on the individual case. Whether the - in
21 the end whether the defendant has been given appropriate
22 notice of the case he has to meet. That is really what
23 it's about.

24 MR HOWELLS: Yes Your Honour. Over on - - -

25 HIS HONOUR: Anyway, I've noted what Justice Brown said.

26 MR HOWELLS: On p.24 Paragraph 42 Your Honour, it's alleged
27 against us that the pleading reflects a fishing
28 expedition and we say the submissions in relation to that
29 are set out in Paragraph 16 and following, down to 24 of
30 the outline advanced by Norton White. The submission is
31 that because the pleading is long and detailed and

1 because in respect of some of the requests for
2 particulars, the response was that further particulars
3 would be provided following discovery and/or
4 interrogation, that therefore the pleading is a fishing
5 expedition. The pleading in the present case is not
6 analogous to any of the pleadings referred in the Norton
7 White submission. The pleading is lengthy, however it
8 details specifically each and every episode of conduct
9 relied upon by the plaintiffs. But that detail is
10 accompanied by assertions as to which episodes of conduct
11 were unlawful and which of them gave rise to inferences
12 relating to conspiracy. The detail extends to actual
13 events, conduct and actions, statements made and observed
14 facts. Each cause of action is properly pleaded
15 including the relevant elements. There is no bar as a
16 matter of principle we say, to a party seeking to prove
17 allegations which it asserts to be true on the basis of
18 evidence obtained through discovery and interrogation.
19 Pleadings cannot properly be described as general of
20 speculative in nature nor is it accurate to say that the
21 pleading has been cast in the broadest possible terms.
22 It's both specific and detailed and has been supplemented
23 by the provision of further and better particulars.

24 And much of Version 3 we say Your Honour has not
25 been the subject of request for particulars or specific
26 objection. I've already made on Friday Your Honour, the
27 submissions in Paragraph 43 and 44. Also 45.

28 HIS HONOUR: Yes.

29 MR HOWELLS: And 46 Your Honour.

30 HIS HONOUR: Yes.

31 MR HOWELLS: As to joinder, which is - we commence to deal with

1 at Paragraph 47 Your Honour, and this is the question
2 about - on the top of p.26 of the outline, the question
3 concerning the fact that there might be a number of
4 persons joined particularly in the conspiracy actions,
5 who were not major players as it might be described. The
6 plaintiffs say that the events, the subject of the claims
7 are not disparate allegations nor are they appropriate
8 for separate proceedings. As the chronology makes clear
9 and as the overt act set out in the pleading make clear,
10 the plaintiffs' case is that from 2000 through to mid-
11 late 2004 a series of protest actions of one sort or
12 another were conducted against our clients and their
13 business and interests, aimed at achieving the outcomes
14 pleaded. There is a significant overlap in the
15 allegations as to the persons involved in the various
16 protest actions.

17 In Paragraph 48, "The connection between the
18 defendants is not just their actions or concern of the
19 first plaintiff. On the contrary the principal
20 connection between the defendants and the activities
21 involved is that they were conformable with the aims and
22 objectives of the 6th defendant. Those connections
23 include office holding or employment with the 6th
24 defendant." We say the joinder is neither inconvenient
25 nor inappropriate and indeed will ensure that there is
26 not the duplication of proceedings, the duplication of
27 the adduction of evidence, additional use of court time
28 and duplication of costs which would result if there were
29 three of more proceedings issued.

30 HIS HONOUR: What - I can understand your point in relation to
31 the individual actions. The Styx, the Triabunna 2003,

1 Triabunna 2004 et cetera, but I'm concerned about the
2 over-arching conspiracy, the campaign against Gunns, as
3 being creating perhaps a difficulty in terms of
4 management and how on earth you're going to run it. It
5 seems to - that would envisage - I mean if the campaign
6 against Gunns is an appropriate cause of action to
7 remain, it means that this would have to be processed as
8 one complete trial at some point, and how?

9 MR HOWELLS: Your Honour could we make this suggestion? We
10 don't want to be taken to be making any concession that
11 there is a structural integrity about the pleading and
12 all of the elements that are included in it.

13 And it arises because our clients took a number of
14 years adopting all of the traditional and conservative
15 approaches to non litigious approaches to some of these
16 protests and so on, and there were a number of protests,
17 significant protests at places like the Blue Tear and
18 Mother Coming and various other places that are not
19 included in this pleading. And police action has been
20 taken and some circumstances it can be successful, in
21 others perhaps not.

22 MR WALTERS: We object to evidence from the Bar table.

23 HIS HONOUR: Well I will hear - I understand, you can sum it up
24 in a word.

25 MR HOWELLS: Indeed Your Honour.

26 HIS HONOUR: You can say this is how you want to put your case.

27 MR HOWELLS: This is what - however and we don't concede that
28 it's from that point of view Your Honour inappropriately
29 contained in - - -

30 HIS HONOUR: Well how do you say I'm going to - - -

31 MR HOWELLS: Indeed Your Honour.

1 HIS HONOUR: - - - try it, I mean this is what's troubling me.

2 MR HOWELLS: That's right. I just want to be clear about Your
3 Honour that we don't make a concession about whether or
4 not things are severable and whether or not that might
5 then give rise to a submission that's going to be made
6 against us, that it ought to be broken up or these are
7 disparate causes of actin, we say they're not. But we
8 also are very conscious about what Your Honour has said
9 about the question of management and in the Major Torts
10 list of course there is a special discretion in the court
11 to deal with these things in a particular way.

12 Your Honour may take the view that with the campaign
13 against Gunns that that might be deferred, that parts of
14 this proceeding might be listed to be dealt with in a
15 particular way. For example Your Honour may say well
16 just take Hampshire and Lucaston, which are linked in a
17 particular way but Hampshire and Lucaston are not picked
18 up in for example Japan and Banks, whereas Styx and
19 Triabunna is.

20 Your Honour may say, and we are Your Honour ready to
21 run these actins, these component parts of the
22 proceeding, and if Your Honour gives us a timetable, even
23 a short timetable, we will of course cooperate with that
24 and we will comply with it. Because of the way in which
25 the pleading is structured Your Honour and the nature of
26 the claims, discovery might well be a more narrow and
27 confined exercise than it might be indicated at first
28 blush.

29 But if for example Lucaston and Hampshire were run
30 or if the Styx and Triabunna 04 with Japan and Banks were
31 listed to be heard first, as questions. Not suggesting,

1 and we don't suggest that there isn't a relevant overlap
2 or that there wouldn't ultimately be duplication in some
3 way because particularly the common involvement of the
4 sixth defendant necessarily means that there's a
5 substratum of evidence that would be common across all of
6 them. But that might be able to be dealt with by an
7 acceptance that certain parts of the transcript might be
8 able to be received from the hearing at one portion of
9 the case to another.

10 If Your Honour were disposed as a matter of
11 management to defer the question whether the campaign
12 against Gunns aspect gives rise to an outcome in the form
13 of relief, well such a direction would be a direction
14 that the parties would have to come to grips with and
15 deal with. That might be an appropriate way Your Honour
16 but I'm simply suggesting that Your Honour on the basis
17 of management.

18 It maybe Your Honour that certain questions that
19 would be determined in relation to Hampshire and Lucaston
20 would then reflect in a constructive way upon the
21 management of the later parts. Your Honour - - -

22 HIS HONOUR: Yes, well I see what - I mean I understand you -
23 I've read particularly this material about joinder of the
24 claims and I understand how you put it.

25 MR HOWELLS: Yes Your Honour and we've dealt with that in
26 paragraphs - not only in Paragraphs 47-49 but also in 50
27 through - sorry it's 52 through 3, 4, 5, and 6. Now just
28 looking Your Honour at the question of - if I could take
29 Your Honour to Paragraph 50, we've dealt with the
30 question of the interrelationship between those parties
31 involved in Burnie and the campaign against Gunns.

1 Similarly Your Honour with Burnie, we don't accept
2 Your Honour again that these are properly severable
3 claims and we would only accept the proposition that
4 there might be a removal of say the Burnie claims perhaps
5 to Tasmania. The difficulty with Tasmania Your Honour is
6 that the Magistrates' Court jurisdiction is 20,000 as we
7 understand it at present. Now we might have to check
8 whether there has been some statutory rule passed to see
9 whether that's been altered but it would be a Supreme
10 Court matter.

11 Id that was referred there and if the campaign
12 against Gunns was deferred Your Honour well that might
13 make again - it might have some impact upon management,
14 and we would of course comply with that and pursue it.

15 HIS HONOUR: It would be difficult to within the - certainly
16 I've never looked at the cross-vesting legislation with a
17 view to transferring part of an action, I don't know that
18 it contemplates that, I don't think it does.

19 MR HOWELLS: Your Honour there are ways in which that might be
20 essayed but what I'm suggesting Your Honour is that we
21 don't make a concession about the cogency of the
22 propositions that have been put variously about what
23 should be done with it. And we make that in this context
24 Your Honour, the pleading in relation to Burnie is not
25 that it is simply a conspiracy to defame or that it is a
26 simple defamation, it's pleaded as a conspiracy to
27 injure, the unlawfulness is the defamation Your Honour
28 and the conspiracy to injure takes it further.

29 HIS HONOUR: Is there any difference between it though and the
30 journalist and the subeditor saying, "We will publish
31 this story"? I mean isn't that a conspiracy to injure by

1 defamation when it's done in a newspaper?

2 MR HOWELLS: Yes there is Your Honour, it's about the nature of
3 the injury that's sought to be achieved. You see the
4 subeditor and the journalist may just say, "We want to
5 run the story, we've agreed to do it" - - -

6 HIS HONOUR: There may not be any intention to injure, it maybe
7 just be by accident but say there is a malicious - say
8 it's a malicious attack.

9 MR HOWELLS: Well then Your Honour depending again upon the
10 facts, there maybe such a sufficient fusion that the
11 concerns that are held in the criminal jurisdiction about
12 simply tacking on conspiracy as a way of getting
13 additional evidence in, might prompt a court to say no,
14 not appropriate. But Galland for example wasn't adopted
15 in the Queensland case and McKellar deals with a very
16 specific circumstance. Against that one has to see
17 Dresna Nominees where the court says and the observations
18 of Justice Heydon in the passage that I've referred to in
19 our submissions, where a whole series of tortious acts
20 are listed as being viable as the unlawfulness
21 underpinning a plea of conspiracy to injure, unlawful
22 means, and that's where the difference is we say.

23 HIS HONOUR: Yes where are we going to now then?

24 MR HOWELLS: Your Honour could I then take Your Honour to - and
25 I've made the submissions in Paragraph 51 and 57 in
26 relation to Burnie. In Paragraph 58 we've dealt with the
27 authorities about - and 59 - about the plea of conspiracy
28 and the underpinning unlawfulness. I think Your Honour
29 has already gone to Sorrell v. Smith and I don't need to
30 take Your Honour to those authorities that again that are
31 listed in Paragraph 59. Nor what was submitted on the

1 last occasion extracted from O'Brien v. Dawson. Your
2 Honour would recall those submissions that are referred
3 to in Paragraph 60.

4 HIS HONOUR: Yes.

5 MR HOWELLS: In Paragraph 61 Justice Heydon has also said extra
6 judicially that, "Unlawful means in the tort of
7 conspiracy by unlawful means includes crimes, torts,
8 assault and battery, inducement of breach of contract,
9 defamation, trespass to the plaintiff's goods, trespass
10 to land".

11 And it's specifically taken up in Dresna Nominees,
12 Your Honour. Does Your Honour desire that I take Your
13 Honour to any of those authorities?

14 HIS HONOUR: No, I will look at them all.

15 MR HOWELLS: In Paragraph 63, Your Honour, we refer to the
16 submission advanced by Phillips Fox that there have been
17 no properly particularised and pleaded causes of action
18 against the 1st, 3rd, 4th and 5th defendants. We set out
19 there after, Your Honour, over several pages precisely
20 what has been pleaded and particularised and that - I
21 don't need to take Your Honour to those pages in detail.

22 HIS HONOUR: Yes, I can deal with those.

23 MR HOWELLS: That's over onto p.36, right through, Your Honour,
24 to Paragraph 72 on p.40. In Paragraph 72, Your Honour,
25 as to Paragraph 6 of the Phillips Fox submission the
26 pleading identifies that the Banksia defendants
27 wrongfully and maliciously conspired and combined amongst
28 themselves to injure the plaintiffs by unlawful means.
29 That plea is contained in Paragraph 511 and is
30 particularised there. In Paragraph 512 - does Your
31 Honour have the pleading?

1 HIS HONOUR: Yes.

2 MR HOWELLS: At 512.

3 HIS HONOUR: Yes, I've got 512.

4 MR HOWELLS: It's in Paragraph 512, it's also pleaded that the
5 Banksia defendants wrongfully and maliciously persuaded,
6 induced and procured a breach of agreement, namely the
7 Banksia awards agreement. So again, it's not just a
8 question of defamation, Your Honour, it's the inducement
9 to breach contract and the breach. In Paragraph 513,
10 it's pleaded that the Banksia defendants wrongfully and
11 maliciously interfered with the 1st plaintiff's trade and
12 business with the intention of causing injury to it. The
13 acts relied upon there are the Banksia overt acts. In
14 Paragraph 515, it's pleaded that the Banksia defendants
15 wrongfully and maliciously interfered with the
16 performance of the Banksia award agreement by unlawful
17 means with the intention to injury. The overt acts
18 pleaded in Paragraphs 516 include the acts of the 6th
19 defendant and the other Banksia defendants which involved
20 seeking to injure the business of the 1st plaintiff by
21 making statements in the media and to officers of the
22 Banksia Environment Foundation of a derogatory kind.
23 These are set out in Sub-paragraphs (c) and (d). It's
24 made clear in Sub-paragraph (d) that the 1st, 2nd, 3rd
25 and 6th defendants stated to the Banksia Environment
26 Foundation that having the 1st plaintiff as a finalist
27 for the Banksia Awards would harm the credibility of the
28 Banksia Awards. That of itself was arguably defamatory.
29 It might even have been defamatory, Your Honour, of the
30 judges of the Banksia Foundation or of it itself. The
31 important point here is, Your Honour, the cause of action

1 in relation to Banksia is not defamation. Defamation -
2 what is simply asserted is that in the course of
3 committing those torts of interference with contractual
4 relations, interference with trade and business, what's
5 pleaded is that the underpinning unlawfulness was various
6 and it's set out in Paragraph 523. If Your Honour looks
7 at 523 we say that the Banksia overt acts were wrongful
8 and unlawful in that they constituted defamation,
9 threatening to target and obstruct, interference with
10 performance of the agreement and persuading - - -

11 HIS HONOUR: That for the setting is it? That's Dollar Sweets
12 type stuff.

13 MR HOWELLS: Yes, Your Honour. So the cause of action not
14 being defamation, Your Honour, and given the reliance
15 upon the material what's said being defamatory, we say
16 that the first proposition is we say that we're not
17 required to plead it in the way that would ordinarily be
18 required in the defamation action but what we have done
19 is to provide further particulars which were served late
20 last week, the amended further particulars, and they set
21 out what we say the defendants and each of them - the
22 Banksia defendants and each of them said. They're a
23 series of assertions contained there about what precisely
24 what was said so we say the defendants are on notice
25 about it, but the defamation, Your Honour, might've been
26 a defamation of persons other than the plaintiffs, the
27 1st plaintiff. So that the notion that you'd plead it in
28 the way you plead a cause of action in defamation, we say
29 is not what's required here.

30 HIS HONOUR: You still have to establish - if the wrongful act
31 is a defamation, you've got to establish the defamation.

1 MR HOWELLS: We've particularised it, Your Honour, but we say
2 that the notion that somehow the pleading is faulty
3 because we haven't pleaded it as it would've been pleaded
4 if it were an action in defamation, we say no, not flawed
5 for that reason, we've particularised it.

6 HIS HONOUR: Yes.

7 MR HOWELLS: There are some particulars given on p.41 extracted
8 from further particulars that were provided. But Your
9 Honour might recall that there were additional
10 particulars provided which I handed up to the court and
11 which Your Honour directed we would incorporate into the
12 particulars document and the further particulars of the
13 defamatory nature of the communications is set out in the
14 Paragraph 1 of those further particulars which will now
15 be incorporated in the particulars provided. We've
16 indicated in Paragraph 74 of our outline on p. 42, Your
17 Honour, that what we intended was that we would provide
18 those further particulars. In relation to the Herbert
19 Geer and Rundle submissions, Your Honour, at Paragraph 75
20 of our outline, we've dealt with the argument that
21 somehow the pleading fails to plead particulars of
22 malice. What those submissions refer to 18 paragraphs
23 about which complaint is made of which 14 concern the
24 leading of one or more of the economic torts. The four
25 other pleadings of malice arise from the pleading seeking
26 aggravated and exemplary damages in the form of pleadings
27 recommended in Bullen v. Leecom which the paragraphs are
28 based conspiracy to injure is pleaded as follows. You
29 will see the rubric that's used. "For interference with
30 contractual (reads) not a separate element of
31 the tort" and again we've referred to Justice Hayden's

1 observations in relation to malice and James v. The
2 Commonwealth which is approved, Your Honour in Tzu v. The
3 Commonwealth, "Sometimes malice is said (reads)
4 at Paragraph 114", an extract of Tzu v. The Commonwealth
5 is in our volume of authorities, Your Honour. "In the
6 economic torts therefore (reads) Hampshire
7 claims as follows" and we set out the way that's been
8 particularised.

9 "An analysis of the particulars (reads)
10 can be drawn" and we've set out what the inferences are,
11 Your Honour, the allegations are. I've also already
12 taken Your Honour to what we say about the prayer for
13 relief, Your Honour and that's in Paragraph 84 of the
14 outline. To some extent, Your Honour, dealing with the
15 submissions made by - Your Honour, in relation to the
16 submissions on behalf of the 10th and 11th defendants,
17 we've set out, Your Honour, our response in relation to
18 Lange v The ABC, but Your Honour, that's been dealt with
19 in argument already and we've set it out in detail. I
20 don't need to take Your Honour to that. Could I take
21 Your Honour to Paragraph 91, however?

22 HIS HONOUR: Yes.

23 MR HOWELLS: The points in relation to Lange we say, are
24 illustrated by examining some of the conduct of the 10th
25 defendant in the Lucaston action. It's alleged that on
26 24 May there was a meeting held at Carmel Hall. It's
27 said that, "The 10th defendant attended and participated
28 in the meetings with the 7th, 8th, 9th, 10th, 14th and
29 16th defendants. That he held discussions with those
30 defendants and they made decisions about timing method
31 and personnel to be involved in certain interferences

1 with machinery and a blockade. Those acts included
2 ramming mud into the exhaust of a dozer, forming a
3 blockade across the road in front of a locking truck and
4 placing a rag in the hydraulic system of a dozer. Some
5 of those acts were serious criminal offences. If the
6 contention of the 10th defendant is correct, then he's
7 free to conspire to enable vandals to engage in serious
8 damage to property. There could be no valid - " in that
9 last sentence it should read, "there could be no valid
10 tortious liability to that extent."

11 Your Honour in Paragraph 92 in the final sentence
12 there's an error. It's my error. It should read, "As a
13 joint tort visa and it would be inconvenient we say to
14 bring separate proceedings." It was incorrect for us to
15 say that it was not possible because of the Wrongs Act
16 provisions Your Honour.

17 HIS HONOUR: Yes.

18 MR HOWELLS: In relation to the Coadys' submission Your Honour
19 as to Paragraph 1 of the Coadys' outline which complains
20 - this is the 20th defendant is only referred to in 22
21 paragraphs that has put against it the entire Campaign
22 against Gunns. "The plaintiffs submitted the allegations
23 in the statement of claim are that the 20th defendant was
24 involved in a conspiracy and action at the Burnie Wood
25 Chip Pile action and it together with others, joined in
26 the Campaign against Gunns at a particular time." As to
27 Paragraph 2(a) of Coadys' position the pleading alleges,
28 "That the 20th defendant became part of the Campaign
29 against Gunns conspiracy and the Campaign against Gunns
30 as a result of its participation in meetings concerned
31 with those matters. And this may also be inferred from

1 the nature, timing, location and results of the overt
2 acts." As to 2(b) Your Honour, Paragraphs 706 (n), (o)
3 and (p) identify the way in which the 20th defendant was
4 an actor in the Campaign against Gunns' overt acts."
5 Version 3, Paragraphs 7(10) to 7(13) also asserts that
6 "The 20th defendant is liable is a co-conspirator and as
7 having acted in concert with other conspirators. As to
8 the acts which were alleged to have occurred prior to the
9 20th defendant's alleged decision to join the Campaign
10 against Gunns, and the Campaign against Gunns'
11 conspiracy, a co-conspirator may be liable for such
12 action once that person joins a conspiracy or joins in
13 action in concert."

14 Nice question though Your Honour about what the
15 damage be said to be, and what the extent of the
16 liability might be that would be attributed. That's an
17 argument that we'd have to have, but we say it's not
18 excluded as a matter of pleading. As to Paragraph 2(c)
19 of the Coadys' submission, "The 18th and 19th defendants
20 are asserted to have been members of the 20th defendant
21 at the relevant times." There's some criticism in
22 Paragraph 2(d) of the Coadys' submission about terms that
23 we've used in the pleading Your Honour, and we just deal
24 with those in Paragraph 97.

25 HIS HONOUR: Yes.

26 MR HOWELLS: As to Paragraph 98 Your Honour we provided further
27 particulars of Paragraph 706AA but we also note that
28 706AA does not include the 18th, 19th and 20th defendants
29 because it refers to the Campaign against Gunns'
30 defendants. In Paragraph 99 as to Subparagraph 2(f) of
31 the Coadys' submission, Version 3, Paragraphs 701, 702,

1 703 and 704 are made part of the Campaign against Gunns'
2 conspiracy quite clearly in the pleading. "The Campaign
3 against Gunns' conspiracy is defined in Version 3,
4 Paragraph 7, first of all as an alternative to Paragraph
5 697. The particulars sub-joined to Paragraph 700 should
6 refer to - " and we've corrected that Your Honour in the
7 proof reading corrections that we made and that Your
8 Honour directed that we reflect in the pleading.

9 "This in turn picks up the meetings and discussions
10 referred to in Paragraphs 697, 698 and 699. Paragraph
11 701 through 704 in turn refer to meetings and discussions
12 in Paragraphs 698 and 699 and give detail of certain
13 decisions taken at those meetings." As to Subparagraphs
14 2(g) of the Coadys' submission, Subparagraph 714,
15 asserts, "That the 20th defendant was established, funded
16 and auspiced by the 6th defendant." We say auspiced
17 means that the 20th defendant was under the influence of
18 and given patronage by the 6th defendant. And we say
19 that gave rise to agency by implication. 2(h) of the
20 Coadys' submission which refers to Paragraphs 714 and
21 706P are consistent we say, because it's entirely
22 possible for the 18th and 19th defendants to be agents on
23 behalf of the 20th defendant and also on behalf of the
24 6th defendant while the 20th defendant itself is also
25 agent on behalf of the 6th defendant. We say nothing
26 impermissible about that.

27 There was a matter that was raised Your Honour by
28 our learned friend about 706Z and I, in my opening
29 submissions said to Your Honour that 706Z was not
30 referred to elsewhere. And my friend's corrected me. It
31 is indeed referred to in Hampshire in Paragraph 432.

1 Hampshire is not one of the logging operations disruption
2 campaign protests that is picked up specifically in the
3 Campaign against Gunns Your Honour, but he's quite
4 correct to say it's not a new matter. But as we say
5 Campaign against Gunns may be a matter for management
6 Your Honour. As to Subparagraphs 2(i) and (j) of the
7 Coadys' submissions, this is Paragraph 102 of our
8 outline, the overt acts are specified in the relevant
9 provisions of the pleading. Subparagraph (k), 708 and
10 709, should be read as a reference to the first
11 plaintiff, and we've corrected that also in the proof
12 reading corrections and that impacts upon the fact that
13 the damages are claimed in the alternative and they are
14 damages that differ from the damages from the damages
15 which are claimed in the primary claims.

16 HIS HONOUR: Yes.

17 MR HOWELLS: As to Subparagraph 2(l) of the Coadys' submission,
18 "The 20th defendant is not embarrassed by Paragraph 696
19 referring as it does to Paragraphs 22 to 30, merely
20 because it is not called upon to plead to those
21 paragraphs. In any event the matters alleged in
22 Paragraph 696 include reference to the incorporation of
23 the 6th defendant and other matters concerning what are
24 alleged to be the 20th defendant's co-conspirators." In
25 that sense it would be open to the 20th defendant to
26 plead to those matters we say.

27 As to Subparagraph 2(m), "The 20th defendant is not
28 embarrassed by the allegation that in 2002 it decided to
29 do certain acts in pursuance of the conspiracy which
30 commenced in 2000 because what is alleged is that the
31 20th defendant joined the conspiracy in 2002 and the

1 conspiracy was ongoing." That Your Honour also
2 identifies what we say was perhaps an unfair submission
3 made by Mr Bornstein about for example, Japan, where it's
4 said, under the overt acts a letter written by the
5 President of one of the Japanese corporations to the
6 Premier of Tasmania couldn't be an overt act relating to
7 any of the defendants. But the preamble to each of the
8 overt acts sections throughout the pleadings says, "That
9 the following acts alleged to have been done by" the
10 relevant defendants. It refers to it as being - because
11 there are acts referred to in a number of the overt acts
12 which are either done by co-conspirators or are done by
13 persons other than the named defendants. But they've
14 been included to make sense of subsequent acts that are
15 done. To explain why a particular response might have
16 been given.

17 The preamble makes it clear that it's not alleged
18 that a defendant did that act. And that's why we've
19 defined the defendants in the way we have. The Japan, or
20 the Campaign against Gunns defendants are defined. It's
21 simply a question of the definition Your Honour, not a
22 major point. In Paragraph 105 we say in response to
23 Paragraph 3 of the Coadys' submission, "Inferences can be
24 drawn about the Burnie Conspiracy because it's alleged in
25 Subparagraph 490(b) that the defendant exhibited or
26 otherwise communicated a media release which asserted,
27 and it asserts, Doctors for Forests are calling for
28 immediate independent assessment of potential health
29 risks."

30 HIS HONOUR: I think that's been amended hasn't it? My - I've
31 written a note on my copy, "The four forest group."

1 MR HOWELLS: Yes Your Honour, that's right.

2 HIS HONOUR: I think on Friday you amended that.

3 MR HOWELLS: Let me just check, Your Honour.

4 HIS HONOUR: I've certainly crossed out "Doctors" and put the
5 word "Group" after "Forests".

6 MR HOWELLS: Sorry, it's a bit further down it should be - I
7 think it's three lines down where it says "The Doctors
8 for Forests Group", the word "Doctors" was deleted.

9 HIS HONOUR: I see, but it remains in in that first - - -

10 MR HOWELLS: Yes, because this group is Doctors For Forests,
11 Your Honour. If it's said, at some stage, and said
12 clearly by way of defence or some other communication,
13 well, this group is not the 20th defendant, Your Honour,
14 well, we will have something to say about that having
15 regard to the branch structure that is operated but we
16 might also be then in a position, Your Honour, where what
17 happens is that if there is an unincorporated group
18 operating in Tasmania who are referred to in this
19 publication and upon which adopt the - the 19th defendant
20 said he was a spokesman for them. Then there might be a
21 question about whether all of the members of that group
22 will need to be joined in the Burnie action. That is the
23 sort of thing which gets dealt with, Your Honour,
24 following a defence filed and the point being taken about
25 identity, corporate personality and so on.

26 We, in Paragraph 5 say, when this is seen in the
27 context of the assertion in Paragraph 489(b) that other
28 protestors were involved in the conspiracy, it may be
29 inferred that the For Forests Group elsewhere described
30 in the pleading had conducted a meeting or a discussion
31 which gave rise to the issuing of a media release. Sub-

1 paragraph 489(a) asserts that these discussions conducted
2 at a meeting held some time between beginning of April
3 and 8 April but prior to the issue of the press release.

4 In Paragraph 106, Your Honour, the reference to the
5 plaintiffs in the particular sub joined to Paragraph 495
6 should read "The first plaintiff", we've made that
7 correction, Your Honour, but we say it's clear from
8 Paragraph 12 of the further and better particulars.

9 HIS HONOUR: Yes, that's - yes.

10 MR HOWELLS: In Paragraph 107 of the outline, Your Honour, as
11 to Paragraph 5 of the Coadys submissions, it's our
12 submission that the 20th defendant is not embarrassed by
13 Paragraphs 34, 35 and 36. The paragraphs dealing with
14 the manner in which the For Forests Group is operated and
15 the role of the 20th defendant explain what is in effect
16 a fluid form of agency and particular manner in which the
17 organisations associated with it choose to operate. The
18 mere fact that this manner of operation enables
19 individuals to evade responsibility or liability for
20 actions of the group ought not to be an impediment to an
21 affected party seeking redress for action taken against
22 it.

23 HIS HONOUR: The phrase in the third line there should be the
24 For Forests Group, that's correct is it? It's not
25 Doctors for Forests there?

26 MR HOWELLS: In Paragraph 105?

27 HIS HONOUR: 107.

28 MR HOWELLS: Yes, no, that's the For Forests Group, Your
29 Honour, that's as it should be.

30 HIS HONOUR: It's contrasting or referring separately to the
31 role of the 20th defendant, yes.

1 MR HOWELLS: Indeed, Your Honour. I don't need to take Your
2 Honour to Paragraph 108. That's a matter already dealt
3 with and neither that nor 109 nor 110, Your Honour.
4 Those are the submissions, Your Honour.

5 HIS HONOUR: Thank you, Mr Howells. Round the defendants. Mr
6 Beach.

7 MR BEACH: Your Honour, on Friday our learned friend in an
8 exchange with Your Honour, about the sufficiency of the
9 particularisation of the allegation of various meetings,
10 said that another way it can be done and is done in the
11 statement of claim is to plead specific and well
12 particularised overt acts from which one might then infer
13 the conspiracies and he relied specifically as an example
14 on the Japan Customers action. Your Honour, could I take
15 you to the overt acts so far as they concern our client,
16 the 6th defendant in the Japan Customers action and
17 specifically to Paragraph 556 of the statement of claim,
18 on p.181 of the document in which it's pleaded that "In
19 or about April 2001, the 6th defendant", remembering the
20 6th defendant is not an individual but the Wilderness
21 Society, "sponsored and arranged for (reads)
22 various things" and this is one of the well
23 particularised overt acts from which the conspiracy can
24 occur but notwithstanding that, we sought particulars of
25 the sponsoring and arranging and a response to that was
26 given in Paragraph 917 of the further particulars, Your
27 Honour. If I can take you to those.

28 HIS HONOUR: I haven't got those here now. I will get them
29 back. Yes.

30 MR BEACH: If I could ask Your Honour to turn to p.234 of the
31 plaintiff's further particulars, Paragraph 917.

1 HIS HONOUR: I have that.

2 MR BEACH: Your Honour will recall the allegation in the
3 statement of claim is that in or about April 2001, the
4 6th defendant sponsored and arranged for a group to come
5 and do various things and we asked for particulars of
6 sponsoring and arranging and the response we get is
7 particulars of the tour referred to in Paragraph 556 and
8 the involvement of the 6th defendant in sponsoring and
9 arranging that tour are set out in Paragraph 556 and may
10 be inferred from the nature, timing and location of the
11 results of the actions referred to in Paragraph 556 and
12 the persons involved and the plaintiff will provide
13 further and better particulars. So contrary to the
14 submission made on Friday that here you have well
15 particularised overt acts, albeit that the meetings and
16 the conspiracies aren't well pleaded, you can in fact
17 infer the meetings and the conspiracies from the well
18 particularised overt acts but in fact, when one goes to
19 the documents, even the overt acts aren't well
20 particularised, they are to be inferred from other vague
21 terms such as the nature, timing, location and results of
22 the actions, whatever they might be.

23 HIS HONOUR: Yes.

24 MR BEACH: Your Honour, the second point we wish to make is in
25 relation to the line of authority that our learned
26 friends rely upon and I touched upon this in our
27 submissions in chief. But the line of the authority to
28 the effect that in certain circumstances a court permits
29 the provision of particulars to be given after discovery
30 and the passage cited in greatest detail, I think, in our
31 learned friend's outline of submissions occurs in

1 Paragraph 9 of the plaintiff's outline on p.7 of the
2 plaintiff's outline. If I could take Your Honour to the
3 quote that is there extracted.

4 HIS HONOUR: On p.7 of - - -

5 MR BEACH: Page 7, Paragraph 9 of the plaintiff's submissions.

6 HIS HONOUR: Yes.

7 MR BEACH: Your Honour will see a block quote. From a decision
8 of Posselt v. Wolfenden, does Your Honour have that?

9 HIS HONOUR: Yes.

10 MR BEACH: It appears to be a block quote save for the three
11 little dots in the middle of it and appears to be
12 supportive of the proposition that our learned friends
13 wished to advance that their particulars, whatever
14 defects might exist in them, are adequate and they can be
15 corrected after discovery and interrogation. Your Honour
16 if you go to Tab 3 of the plaintiff's folder of
17 authorities, where the case of Posselt is set out, it's
18 in Volume 1 of the plaintiff's authorities, Your Honour.
19 If you go to p.2 of 9 Your Honour will see - - -

20 HIS HONOUR: Page 2 of 8, I've got 3 of 9, you better give me
21 the paragraph number.

22 MR BEACH: Paragraph Nos.4-6 Your Honour.

23 HIS HONOUR: Mine hasn't got paragraph numbers.

24 MR BEACH: This is Posselt behind Tab 3 Your Honour.

25 HIS HONOUR: Justice Nicholson?

26 MR BEACH: Yes.

27 HIS HONOUR: I've got that, it's - - -

28 MR BEACH: There's a heading, "Preliminary " Your Honour.

29 HIS HONOUR: Yes, Paragraph 1(a) and he's referring to the
30 paragraphs in the pleading.

31 MR BEACH: Yes under the heading - there's a court order which

1 has Paragraphs 1, 2 and 3, and then Judge 1 is Nicholson
2 J, there's Nicholson J, the judgment begins, "This is a
3 second strike out application".

4 HIS HONOUR: Yes, got that.

5 MR BEACH: If Your Honour goes three further paragraphs on.

6 HIS HONOUR: You get Paragraph 1(a), "For the fourth respondent
7 it's said".

8 MR BEACH: Well it's Paragraph 4 on my copy Your Honour but
9 from that paragraph to the next one to the next one is
10 where the quote comes from in the outline of argument, on
11 mine it's numbered 4, 5, and 6, and does Your Honour have
12 the paragraph that beings, "In my opinion this is not a
13 case"- - -

14 HIS HONOUR: Yes, what paragraph is that?

15 MR BEACH: That's Paragraph 6 on my copy Your Honour. This
16 sentence has left out of the middle of what's been quoted
17 in the outline, "In my opinion this is not a case where
18 the pleadings can be characterised as containing vague,
19 general allegations and assertions in the absence of
20 particulars:. We would say what the case Justice
21 Nicholson is dealing with is a vastly different case from
22 the case Your Honour is dealing with and no doubt because
23 our learned friends did not wish to rely on that sentence
24 it was not extracted in the passage that's in the outline
25 of argument. But we would say this case is the exact
26 opposite of the case being considered.

27 HIS HONOUR: Now I'm just trying to find - I'm to sure - - -

28 MR GRONOW: Your Honour it's p.3 of 9 and it's about a third of
29 the way down the page, there's a paragraph that ends with
30 "provided the further particulars of agency" and Mr Beach
31 is referring you to the next sentence, "In my opinion

1 this is not a case where".

2 HIS HONOUR: Yes I've got that but when I look back at the

3 plaintiff's extract - - -

4 MR BEACH: Well the plaintiff's extract starts - - -

5 HIS HONOUR: Yes it goes down to - - -

6 MR BEACH: It starts in Paragraph - I think Your Honour it's

7 1(a) for the fourth respondent and you will see - - -

8 HIS HONOUR: The bit left out of the - - -

9 MR BEACH: They leave out all of - - -

10 HIS HONOUR: The next paragraph.

11 MR BEACH: Yes.

12 HIS HONOUR: And the next line of 6, the first sentence of 6.

13 MR BEACH: Indeed Your Honour.

14 HIS HONOUR: Yes that's all right, I've got it now. So it

15 leaves out from the words, "in Paragraph 5" down to,

16 "absence of particulars".

17 MR BEACH: Exactly Your Honour, exactly, and we would say

18 Posselt is no authority which supports our learned

19 friend's position. Your Honour the third point we wish

20 to make is the suggestion this morning of a management

21 regime which might obviate the concerns that have been

22 expressed by Your Honour throughout the course of this

23 hearing is no more than with respect smoke and mirrors.

24 One can deal with the topic at a number of levels.

25 First of all as Your Honour knows the High Court have

26 said on many occasions that severing trials and splitting

27 trials and trying preliminary questions is a dangerous

28 course and indeed Justice Brooking before the High Court

29 I think had already said that on a number of occasions.

30 HIS HONOUR: I think though, I think there's a - I'm aware of

31 that and Justice Byrne in fact wrote a judgment in which

1 he set out at great length - I know the name I can't
2 remember it - but the pros and cons of doing it but as a
3 modern technique of trial management it's - - -

4 MR BEACH: But this is my smallest point, my real point Your
5 Honour is it doesn't work anyway. What our learned
6 friend is in effect saying, if Your Honour was to conduct
7 these separate trials one after the other, you would in
8 fact have a longer process. All he's in fact saying is
9 that there could be times when individual defendants
10 could say, "They're dealing with an action which has no
11 relevance to me".

12 That of course isn't a luxury that would be
13 available to the Campaign against Gunns defendants
14 because those defendants also have to deal with matters
15 like the Styx action, so those defendants who are
16 Campaign against Gunns' defendants, who are not involved
17 in the Styx or the Japanese customers' overt actions,
18 still have to attend those actions because they must be
19 worried at the end of the day involving they're in a
20 trial in the Campaign against Gunns and if they haven't
21 cross-examined a Styx' defendant, having regard to the
22 fact that Styx overt acts and Japanese customers' overt
23 acts and all of those, so it's illusory, the benefit is
24 illusory, in fact it will make the thing go longer
25 because each trial will have a start up and an end time
26 where the parameters are set where there's debate as to
27 what went on in the previous actions. It's illusory.

28 The final matter Your Honour is it was said this
29 morning in respect of the complaints made in respect of
30 defamation and the reference to defamation being an
31 unlawful act in the pleading. An example of that is at

1 Paragraph 523(a) of the pleading that it was not
2 necessary because what was being sought was damages for
3 interference with trade or some other more esoteric tort,
4 it was not necessary to set out the words.

5 Your Honour there's simply no authority for that.
6 In order to come to the conclusion that the words spoken
7 were defamatory and thus unlawful it is necessary to
8 plead the material facts of the defamation, and the
9 material facts being the words spoken. One can't now
10 whether what is described by our learned friends as a
11 defamation and therefore an unlawful act is in fact such
12 until you see the precise words, identify whether it's a
13 comment, identify whether it's justifiable, identify
14 whether it's fair comment and there is simply no force
15 that one can get around what is a plethora of authority
16 which says that the words in the defamation allegation
17 are the material facts and must be pleaded. If the court
18 pleases.

19 HIS HONOUR: Thank you Mr Beach.

20 MR BORNSTEIN: I think probably me next Your Honour.

21 HIS HONOUR: Yes Mr Bornstein.

22 MR BORNSTEIN: Your Honour just a couple of small matters that
23 I wanted to raise. The first was in relation to the
24 Banksia Award's matter.

25 HIS HONOUR: You will have to speak up a little bit
26 Mr Bornstein.

27 MR BORNSTEIN: I'm sorry Your Honour. Just one or two small
28 points I wanted to raise Your Honour. The first was in
29 relation to the Banksia Award's matter that my learned
30 friend addressed this morning. He said that the further
31 particulars provided and which are now incorporated, say

1 what each of the so called Banksia defendants said.
2 That's precisely what they do not do Your Honour. I took
3 Your Honour to that on Thursday.

4 What in fact they do is they say that each of them
5 said one or more of the following things without
6 identifying what each and every one of them is meant to
7 have said and when and how. It comes back to the
8 question that my learned friend Mr Beach just referred to
9 is the particulars of the defamatory words used.
10 Ultimately no matter what cases are referred to, each of
11 the defendants is entitled to know the case that they
12 have to meet.

13 The matters in the outline where some specifics are
14 given of course relate to statements made by the second
15 defendant which as I've indicated previously is a matter
16 of academic interest only to my client. And also
17 statements made by two other employees or alleged
18 employees of the sixth defendant but not being any of my
19 particular clients, but they maybe matters that are of
20 concern to my learned friend Mr Beach but they're not
21 matters of concern to me.

22 Now my learned friend didn't address at any length,
23 but my general complaint which is the lack of pleading in
24 particularity of the case to be met by my particular
25 clients, he preferred simply to rely on the matters dealt
26 with in his outline of submissions. Your Honour has of
27 course my outline of reply which deals with that.

28 HIS HONOUR: Yes.

29 MR BORNSTEIN: The particulars and pleading are totally
30 inadequate. The difficulty which runs through it is that
31 we have what my learned friend concedes are allegations

1 of conspiracies formed at meetings of which they're
2 incapable of providing particulars they say because of
3 the nature of it, and then they say well you can infer
4 from the over acts but what are the overt acts, they're
5 the very meetings in many cases for which they can't
6 provide any particulars. And there's little more than
7 that in some cases.

8 Your Honour will find a convenient outline of what
9 is said to have been done by each of my clients and
10 indeed by others, although not in response to requests
11 that my client made in Paragraph 2 of the notice of
12 amendment. You will see in Paragraph 2 it says for
13 example, "The first defendant involved himself in the
14 protest activities at the Triabunna Mill site by
15 committing a Triabunna 2004 over acts that he is alleged
16 to have done, and he says in particular he committed the
17 acts alleged in Paragraphs 340 and 347.

18 Now of course others have commented about the
19 inadequacy of that kind of particularity. But what it
20 really shows if you actually look at the specific
21 paragraphs is that there's nothing that's actually been
22 particularised there so you keep coming back to the
23 circular position. Finally, in discussion with Your
24 Honour about the question of whether acts were torts or
25 crimes or the like, Your Honour noted that there are
26 pleaded a number of tortious acts and some of which may
27 or may not be criminal. The majority of those acts are
28 in relation to Triabunna 2003 and in relation to
29 Lucaston.

30 These are acts where there are fairly clearly
31 identifiable and identified torts alleged to have been

1 committed. Neither of those particular sub actions
2 involve any of my clients. They're not asserted to be
3 involved in any way shape or form in any - either of
4 those and they don't form any part of the Campaign
5 against Gunns either. The alleged over arching
6 conspiracy so what's left as regards my clients are
7 extremely nebulous unparticularised allegations. One
8 final point which is a general point and applicable to
9 almost everything, I think, is that the my learned friend
10 referred you to the Associated Northern Collieries case
11 for various purposes and indeed he read you a fairly
12 lengthy quote starting at p.400. He didn't read you one
13 - an earlier statement by Justice Isaacs on that page,
14 p.400.

15 I won't take Your Honour to it but Your Honour will
16 see it easily enough and that's that two things have to
17 be kept distinct. One is the fact of the combination and
18 the other are the acts done in pursuance of the
19 combination. Here we have a blurring and a merging and
20 an allegation that meetings of both and again aren't
21 particularised as to either or both, they're not kept
22 distinct here. You have meetings which are alleged to be
23 both the very fact of combination and the overt acts
24 which are relied upon. Unless Your Honour has something
25 further.

26 HIS HONOUR: No, thank you, Mr Bornstein. Mr Gronow.

27 MR GRONOW: If Your Honour would just give me a moment. Your
28 Honour, I have three points to make. The first of them
29 concerns the pleading of the conspiracy. I accept that
30 as a result of what Justice Isaacs said in the Associated
31 Northern Collieries case and what the High Court said in

1 O'Hearn's case, it is open to a person pleading or
2 alleging conspiracy to do it one or both of two ways.

3 They can either allege an agreement or combination
4 or they can say there are overt acts which have a
5 concurrence of time character direction or result from
6 which one can infer a combination to do whatever it is
7 the conspiracy is alleged. In my respectful submission,
8 a plaintiff alleging conspiracy must do at least one of
9 those things properly. These plaintiffs have alleged
10 meetings but given no intelligible particulars about what
11 was said at the meetings so in my submission, they have
12 not pleaded or particularised properly any allegation
13 which could sensibly go to trial of an agreement or
14 combination.

15 Nor for that matter, have they defined the scope of
16 the combination or conspiracy they allege. So on Option
17 A, as it were, they simply haven't done it. They say "We
18 don't need to because we rely on the overt acts", well,
19 two points to that. Firstly, if they plead the meetings
20 and say there was an agreement, they must particularise
21 them. If those allegations are not relevant to their
22 cause of action, then they shouldn't be there. But
23 they've chosen to make those allegations therefore they
24 must particularise them. We've asked for particulars and
25 we haven't got them. Secondly, - - -

26 HIS HONOUR: If you take a situation where the window of a
27 jeweller shop is broken by a brick, and there are three
28 men involved in this enterprise. One is seen to throw
29 the brick, one is seen to be sitting in the car waiting
30 to drive away and the third is shovelling jewellery into
31 a bag. Those facts are pleaded. The plaintiff knows

1 that the three men were in a pub 150 metres away from the
2 jeweller's shop for an hour that night. Doesn't know
3 what they said but they were in the pub. If the matter
4 is pleaded the way you say it should be pleaded, you
5 plead the three men what they actually did, the overt
6 acts that they did, and you say that there was a
7 conspiracy to be inferred from the commission of those
8 particular acts by three men at the same time. On the
9 trial, would you be entitled to lead evidence that the
10 three men were in the pub an hour before?

11 MR GRONOW: Not without more, Your Honour. They may have been
12 discussing the football at the pub.

13 HIS HONOUR: How would you plead that?

14 MR GRONOW: They might not have been talking about robbing the
15 jeweller's shop at all. It might be completely
16 irrelevant.

17 HIS HONOUR: It might be but it might not and if you - you say
18 that you wouldn't be entitled to lead evidence of the
19 mere fact that they had a drink together in a pub 150 or
20 100 metres away?

21 MR GRONOW: You might as part of the overt act. Let's say they
22 did it immediately prior to going together to the
23 jeweller's shop. That would be an overt act and you
24 might well say that's one of - that's a chain of events,
25 those overt acts taken together have the concurrence of
26 time character, direction or result spoken of by the High
27 Court which lead to an irresistible inference they were
28 in it together.

29 HIS HONOUR: But the meeting in the pub's not an overt act.

30 MR GRONOW: It might though be said to be part of the chain of
31 events. If the meeting had been a week earlier and all

1 you could do was produce a witness that said, "I saw
2 these three blokes in the pub together" without more,
3 that would be entirely irrelevant and would rightly be
4 ruled inadmissible. If on the other hand, you had a
5 witness who said, "I sat at the next table and I heard
6 them talking about robbing the jeweller's shop and
7 Defendant A said 'Why don't we break the window and take
8 the jewellery' and Defendant B said 'That's a jolly good
9 idea' and Defendant C said, 'I agree, can I come too'",
10 then you would be obliged to particularise what they
11 said. If the plaintiff is going to lead evidence about
12 the agreement at the pub, it must follow that the
13 plaintiff - they're not obliged to tell you what the
14 evidence is. They don't have to say, "We're going to
15 call Joe Bloggs who will say he was sitting at the next
16 table and overheard you", but they do have to say what
17 they allege was said by each of these three people to
18 form the combination.

19 If they can't do that, then they can just rely on
20 the overt acts and that's fine, I accept that as a matter
21 of law you can do that but that then brings me to my next
22 point. The overt acts here alleged do not have the
23 concurrence of time, character, direction or results that
24 are required to satisfy the test and I won't read it out
25 to you, but I particularly draw Your Honour's attention
26 to O'Hearn's case and the passage is 165 C.L.R. at pp.94-
27 95 where they discuss this and just to use two examples
28 which Mr Howells discussed in the transcript at pp.180-
29 185, you've got on the one hand people who were said to
30 have attached a car to a bridge, I think to prevent
31 access to the bridge and cause disruption, and that's

1 said to be unlawful and then you've also got people at
2 the same protest who are holding up signs before the
3 cameras in Japanese.

4 Now with respect it is absurd to say that those two
5 acts have the concurrence of time, character, direction
6 or result that can be said to infer a combination. So
7 you can say the person holding up the signs is liable in
8 conspiracy for the damages caused by the persons who
9 attached the car to the bridge or assaulted a police
10 officer or trespassed on land or whatever else. Just
11 because you are at the same protest does not without law
12 mean that you have necessarily conspired or combined with
13 everybody else at the protest to commit unlawful acts.

14 I would submit, Your Honour, that even if you know
15 that some people may get a bit out of control and commit
16 lawful acts - it would be a bit like saying if I go to
17 the grand final this year I know that the police are
18 going to arrest people for assault and drunken and
19 disorderly. It's happened every other year I've ever
20 been so I'm pretty confident that will happen. It would
21 be, however, absurd to suggest that if I go along I'm
22 involved in a conspiracy to do those things.

23 It would also be absurd to suggest that somebody
24 who's arrested for being drunk and disorderly is
25 therefore in a conspiracy with somebody else sitting in
26 the same stand who decides to assault the vociferous
27 supporter of the opposing team standing in front of them.
28 The fact that they're all there without more is not
29 enough. Those acts do not have the concurrence of time,
30 character, direction or result required.

31 Now if the pleading is Defendant A and Defendant B

1 both pushed the car on to the bridge and then Defendant A
2 pulled out a chain and Defendant B, you know, put on the
3 padlock. I accept that that may well have that
4 concurrence but attaching a car to a bridge and holding
5 up a sign in Japanese are entirely different things. So
6 in my respectful submission the overt acts pleaded by the
7 plaintiffs cannot on any view have that concurrence
8 therefore they can only get up if they properly plead a
9 combination or agreement to do them together and they
10 haven't.

11 Lastly on that point, Your Honour, it is with
12 respect circular to plead as the plaintiffs have done
13 that when we say what's the scope of the conspiracy, what
14 did they agree, you say they agreed to do all the overt
15 acts we've set out. In my submission they should have to
16 say what the scope is. Now it may not have to involve
17 every last detail. In Your Honour's example of the
18 jeweller's shop robbery it might be enough to say they
19 agreed to rob the jeweller's shop at, you know, 35 High
20 Street.

21 You might not need to plead it was agreed that
22 Defendant A would throw the brick and Defendant B would
23 drive the getaway car and Defendant C would scoop the
24 jewellery into the bag, but you'd have to have something
25 which was enough to encompass all the acts they did.
26 Then you can say at trial is this evidence admissible or
27 not? Does it fall within the scope of the alleged
28 conspiracy or is it outside that?

29 The next point, Your Honour, is the level of
30 particularisation required. Mr Howells said, and I'm
31 quoting from the transcript at p.197 starting at Line 7 -

1 I will go to the beginning of the sentence starting at
2 Line 14, "There are some examples given in the text and
3 we've got an extract from it from Your Honour and I'll go
4 to it but no doubt Your Honour there would be a deal of
5 debate about what might properly comprehend. But on a
6 pleading point, Your Honour, when the evidence isn't" -
7 it says it but I think he means in - "we ask Your Honour
8 to give us the benefit of the position that we simply
9 have to plead facts which as pleaded would fall within
10 the rubric of the cause of action even if there might be
11 a debate about how far the cause of action goes".

12 Over the page at p.198 starting at Line 3 he said,
13 "The test for pleading is whether or not what's pleaded
14 is capable of giving rise to a cause of action if the
15 evidence sustains it". Now in my respectful submission
16 that's not right. The test is whether it does give rise
17 to a cause of action if you assume that each fact alleged
18 is true. I cannot - - -

19 HIS HONOUR: I won't trouble you about that particular
20 proposition. I think what Mr Howells was doing was
21 taking that somewhat opaque statement of Justice Beaumont
22 that what you've got to plead is - whatever it was. I
23 forget it now.

24 MR GRONOW: In the Pan Continental case I think, Your Honour.

25 HIS HONOUR: Yes. With all due respect to His Honour I find
26 that a bit difficult to comprehend. I think the one
27 thing that we can't have an argument about in this case
28 any more is what constitutes a sufficient pleading. I
29 think that's put to bed. It's got to be every material
30 fact which is necessary to prove to give rise to the
31 cause of action and if you don't - - -

1 MR GRONOW: Yes, Your Honour.

2 HIS HONOUR: If you don't prove every necessary fact the
3 pleading is defective.

4 MR GRONOW: Yes, Your Honour, and that's what Rule 13.10(1)
5 says. There are lots of common law authorities but it's
6 in the rules so you don't need to go further.

7 HIS HONOUR: Yes.

8 MR GRONOW: Sub-rule (2) says the particulars - without
9 limiting Paragraph 1, "Particulars shall be given as
10 necessary (a) to enable the opposite party to plead,
11 (b) to define questions for trial". Now that's really a
12 matter for the court because if the questions are not
13 properly defined at trial - there's been various talk
14 about whether this will take months or years. That's
15 assuming the questions are well defined. If they're not
16 it might take decades for all we know.

17 It might be like the trial of Warren Hastings which
18 I think went for 16 years and didn't produce a result.
19 So on this statement of claim in my respectful submission
20 the matter just can't proceed to trial because we just
21 don't know with sufficient precision what the allegations
22 are and lastly of course it's to avoid surprise at trial
23 which is a natural justice requirement. I will move on
24 from that Your Honour.

25 Specifically on that with respect to the agency
26 points Mr Howells said employment is sufficient, look at
27 Lepore's case which is in fact a vicarious liability
28 case. Firstly, agency and vicarious liability are not
29 the same. They are different doctrines. I accept that
30 they overlap often in certain factual situations and
31 indeed they may be both given rise to by the same factual

1 situations. The plaintiffs have chosen to plead agency
2 therefore they must particularise it and if it's not
3 necessary for their case then they shouldn't have pleaded
4 it.

5 Secondly, in Lepore's case the employment
6 relationship was defined. He was employed as a teacher.
7 In the passage from the judgment of Justices Gummow and
8 Haynes which Mr Howells took you during argument they
9 actually speak of what a teacher is employed to do. Now
10 you can say what a teacher is employed to do. A teacher
11 is employed to, you know, conduct classes in particular
12 subjects and teach students.

13 If necessary you could hear evidence about what the
14 normal duties of a teacher were at a particular school,
15 but it's a defined relationship. It tells you something
16 about the scope of the employment. You can say the
17 teacher has the authority to teach history, but on the
18 other hand if say the teacher had purported to sell the
19 school premises to a property developer you might say its
20 way outside the scope of the authority. Just to pick an
21 absurd example.

22 Similarly in Deatons v. Flew which was referred to
23 she was employed as a barmaid. I think to paraphrase,
24 one of the High Court judges said she's employed to serve
25 the beers not to throw them, one might say. So you can
26 say what she's employed to do. I think the other case
27 was a case called Lloyd which was an English case about a
28 law clerk who committed fraud. Again you know what a law
29 clerk is supposed to do and you can argue about whether
30 defrauding people is inside or outside the scope.

31 Now in this case we don't have that. I already

1 during argument read out to you the particulars which we
2 have been given of the eighth defendant's alleged
3 employment by the sixth defendant and they with great
4 respect don't give you any clue about what the scope of
5 her employment is. Then we move to the volunteers and at
6 Paragraph 29 there's set out a statement from the sixth
7 defendant's website - that's Paragraph 29 of the Version
8 3 statement of claim. They've set out a statement from
9 the sixth defendant's website about volunteers.

10 On no view can the scope of what's in there be said
11 to encompass authorising volunteers to commit unlawful
12 acts on behalf of the sixth defendant. The situation is
13 even less satisfactory when you move to the seventeenth
14 defendant for whom I act. There's nothing said about any
15 statement we've put out about volunteers. It's alleged
16 in Paragraph 100 for example that various people are our
17 volunteers. We've asked for particulars. We've got
18 nothing that makes any sense to us anyway. In my
19 submission we're entitled to more.

20 The seventeenth defendant can only act through
21 agents. It's an incorporated body. It doesn't have any
22 physical personality, and it is said constantly through
23 the statement of claim, including the paragraphs I took
24 you to during argument and as set out in my outline, to
25 have acted through agents, we are nowhere told proper
26 particulars about how we're said to have authorised
27 people. Or if they do want to refloat the previous one
28 of dipterous liability, how we're said to be vicariously
29 liable for the actions of these volunteers.

30 And without knowing the scope of the employment of
31 volunteering, you just can't say. In my submission

1 that's quite plain from Lepore's case. The High Court
2 said there, a teacher has teaching and pastoral care
3 duties but they do not extend - the scope does not extend
4 to intentional unlawful acts such as sexually assaulting
5 pupils, on those facts.

6 Now there might be another case where you might say,
7 one exceptions spoken about in some of the judgments
8 might apply, but in that case it's said it's just not
9 within the scope. Everyone accepted that, Justice McHugh
10 did. The scope would be different. If for example the
11 person said to have assaulted the students was the school
12 cleaner, it would be a different case. Because the
13 school cleaner's duties apply (indistinct) the school
14 cleaner's duties might involve having no contact with
15 students whatsoever on the facts. But that's why you
16 need to say and particularise what the scope of the
17 employment is. Still more, you need to define what the
18 scope of volunteering is, because it's an even vaguer
19 relationship than employment.

20 HIS HONOUR: Yes.

21 MR GRONOW: Lastly Your Honour, on this point, with great
22 respect, the plaintiffs appear to have missed the point
23 about the knowledge of contracts. They have pleaded
24 knowledge of contracts to certain levels, therefore under
25 the rules of this court, including Rule 13.10 they were
26 obliged to particularise them. It may well be that as a
27 matter of substantive law, what is said by the Greenpeace
28 Canada case and other authorities that you've been taken
29 to by the plaintiffs, show that that's a relatively low
30 level of knowledge. But whatever they allege they must
31 particularise. Our point is that even on that low level

1 of knowledge that they say as a matter of law they need,
2 they still haven't given us enough particulars so that we
3 can know what they say we're said to have known, and how
4 that knowledge is said to have arisen. Again, if they
5 don't need to allege it, then why have they. What's it
6 doing there? If they do allege it, then they are obliged
7 under the rules to particularise it properly.

8 My last point Your Honour is that the jurisdiction
9 of the Magistrates' Court of Tasmania is indeed \$20,000
10 and the authority for that is the Magistrates' Court
11 Civil Division Acts 1992 Tasmania at ss.3 and 7.

12 HIS HONOUR: Thank you.

13 MR GRONOW: Thank you Your Honour.

14 MARGARET ANDERSON:

15 MR MAHER: Your Honour I've just two matters to - - -

16 HIS HONOUR: Yes.

17 MR MAHER: Emphasise. The first - can I just ask Your Honour
18 to go to p.47 of Mr Howell's outline about which he spoke
19 this morning. Just for the sake of completeness, p.47
20 and Paragraph 91. Your Honour my learned friend's
21 outline doesn't land a blow on either of the 10th or the
22 11th defendants and there's a fallacy in Paragraph 91 and
23 it's demonstrated by Your Honour going to the passage
24 about half way through the sentence commencing, "Those
25 acts included, ran in mud the exhaust of the dozer,
26 forming a blockade" and so on. Your Honour despite all
27 the effort that's gone into fashioning this pleading,
28 there's nothing in it that would enable that premise to
29 have any application in this case. There's not a single
30 suggestion, there's not a skerrick of an allegation that
31 would support the proposition that by attending the

1 meeting at the Cygnet Hall, Senator Brown was in any way
2 in advance combining to carry out any such act. It's
3 just - it simply cannot be derived despite all the
4 attempts that have been made to link him with any such
5 activities.

6 The second point Your Honour is just to echo both my
7 learned friends Mr Beach and Mr Gronow had said about
8 case management. This really arises out of what my
9 learned friend Mr Howells said this morning. My learned
10 friend in my respectful submission, he can't seriously
11 suggest that this action as it's presently constituted,
12 in the form in which he's seeking to defend it, is
13 amenable for case management. And with all due respect
14 to Your Honour it ought to become, or in my respectful
15 submission it would be plain by now from everything
16 that's been encompassed in the exchanges between Bench
17 and Bar table so far, this is very clear. And in all
18 seriousness Your Honour the risk that presents itself
19 through the assertion that this case can be managed, is
20 that it's like trying to apply the principles of case
21 management to Dickens' case of Jarvis v. Jarvis in Bleak
22 House which droned on, as Dickens said. Unless anybody
23 thought Dickens was making it all up, I just end on this
24 note Your Honour. In the preface to Bleak House which
25 was published all the way back in 1853, but the message
26 is still very salutary in my respectful submission. He
27 said, "At the present moment" - this is in 1853, "there
28 is a suit before the court" - that's the Court of
29 Chancery as (indistinct), "which was commenced nearly 20
30 years ago in which from 30 to 40 counsel have been known
31 to appear at one time. In which costs have been incurred

1 to the amount of 70,000 pounds", which would have been a
2 very sizeable amount if converted into dollars today".
3 Which he says, "Which is a friendly suit and which is I
4 am sure, no nearer to its termination now than when it
5 was begun."

6 My learned friend Mr Gronow referred to the trial of
7 Robin Hastings. The problem with the case as it's now
8 constituted is there's no assurance as to when it would
9 commence, let alone how long it would last and be finally
10 disposed of at trial. In my respectful submission my
11 learned friend Mr Howells attempt this morning to urge on
12 Your Honour some kind of surgical approach to it, is an
13 acknowledgement that the plaintiffs, principally the
14 first plaintiff, realise what an unmanageable beast this
15 is, and in my respectful submission the court would be
16 well justified in approaching this statement of claim as
17 it's presently constituted, with all the reams and reams
18 of particulars, on that footing. If Your Honour pleases.

19 HIS HONOUR: Thank you Mr Maher.

20 MR MITCHELL: Your Honour I have just one point to make.

21 HIS HONOUR: Yes.

22 MR MITCHELL: In relation to my learned friend's submissions
23 this morning. My learned friend Mr Howells has insisted
24 that this proceeding is one that should be kept together,
25 and this morning took Your Honour to Paragraphs 47 and
26 following as something of a justification for why that
27 should be the case.

28 If I can take Your Honour to Paragraph 55 of my
29 learned friend's submission which pertains to my client
30 the 12th defendant, and just to look through each of the
31 allegations in there. It's alleged there that Lucaston

1 and the Triabunna 2003 actions overlap. There is a
2 temporal overlap and also one of location. However, when
3 these comments are looked at in detail and in fact looked
4 behind, you'll see that any connection between the
5 Lucaston and the Triabunna 2003 actions appears just to
6 be an invention of my learned friend's. Apparently in
7 response to the inconvenient joinder arguments that have
8 been raised by the defendants.

9 To take Your Honour through. "The protest action
10 taken" and presumably that should be, as part, "of the
11 Lucaston action overlapped with the Triabunna 2003
12 action." The reference for that is Paragraph 147 of the
13 statement of claim. I remind Your Honour that at this
14 point that the Triabunna 2003 action is alleged to have
15 taken place on 15 April 2003. There were meeting that
16 occurred, alleged to have occurred in November to January
17 2003 in Hobart to form the conspiracy for the Triabunna
18 2003 action. Now the Lucaston meetings are alleged to
19 have taken place in Huonville, not in Hobart.

20 HIS HONOUR: In where?

21 MR MITCHELL: Huonville. Which is also in Tasmania, on 29

22 January was the first of those meetings, 12 February and
23 26 February so all meetings which are said to have found
24 the conspiracy were after all of the allegations of the
25 Triabunna 2003 action had ceased. The only things
26 referred to in Paragraph 147 which my learned friend
27 references are three statements that were made on
28 9 and 10 January, 2003, so before the Triabunna 2003
29 action but who were they made by, the 7th defendant in
30 Sub-paragraph A, the 7th defendant in Sub-paragraph B and
31 Michael Higgins in Sub-paragraph C.

1 Your Honour, neither Michael Higgins or the 7th
2 defendant are in any way involved in the Triabunna 2003
3 action. It's pleaded as a separate conspiracy, there's
4 no allegation that my client has been in any way involved
5 in the Lucaston Action and it's submitted that as a
6 result, there is simply no overlap and there is no
7 overlap of the overt acts whatsoever. But there is
8 simply no overlap between the Triabunna 2003 and the
9 Lucaston Actions, that being the case, there is simply no
10 reason why they couldn't be heard in separate
11 proceedings. Those are my submissions.

12 HIS HONOUR: Thank you very much. Now, yes, thank you,
13 Mr Murdoch. Mr Walters.

14 MS BENSON: Your Honour, I don't seek to be heard, thank you.

15 HIS HONOUR: You were next, yes, very well.

16 MR WALTERS: Your Honour, in our learned friends oral
17 submissions it appeared largely to be based around the
18 written submission that our learned friend had provided.
19 As we apprehend it, our learned friend did not grapple
20 with the written replies to that submission and we don't
21 seek to - - -

22 HIS HONOUR: I didn't expect him to otherwise we'd go on
23 forever. You'd want to reply to that and we'd keep going
24 around - I've got your replies and I've read them, I've
25 looked at them and I will read them carefully, of course.

26 MR WALTERS: That's what I was going to ask Your Honour to do.
27 There is one matter that I wanted to note, Your Honour.
28 In Paragraph 17 of our written reply, that's all in
29 response to Paragraph 97. I think we variously refer to
30 Paragraph 96 and 95 at different points within that, but
31 it should in all cases be Paragraph 97, that follows

1 logically in order, but lest there be confusion.

2 HIS HONOUR: Yes. Just let me find it. Your solicitors are
3 Coadys.

4 MR WALTERS: Coadys.

5 HIS HONOUR: What page are you actually looking at?

6 MR WALTERS: If Your Honour looks at pp.6,7,8 of that
7 submission, first line of Paragraph 17 should read, "As
8 to Paragraph 97" and then for example A should be 97(I),
9 B should be 97(ii), C should be 97(iii) and E should be
10 97(iv). I know that when there's a lot of documents, a
11 little thing like that can be annoying.

12 HIS HONOUR: Annoying, yes.

13 MR WALTERS: Your Honour, we say that the plaintiff's counsel
14 on two occasions said it's not as if the defendants have
15 said none of these things happened and that was said at
16 p.183 of the transcript and p.225 of the transcript.
17 Also the plaintiffs have said that in respect of some of
18 these things there hasn't been a request for particulars.
19 Now, Your Honour, at the same time on a number of
20 occasions, the plaintiffs assert, an example would be at
21 pp.201-202 of the transcript, "We're not at the stage of
22 proving this case or leading evidence. It's about the
23 pleading". Your Honour, this is the stage of the
24 pleading. We say that the pleading utterly fails to
25 inform us of the case we have to meet and it's not -
26 we're not at the stage where denials are appropriate.
27 We're looking at the pleading itself. Nor is it
28 appropriate to say, well there hasn't been a request for
29 particulars.

30 There should have been particulars in this pleading
31 to adequately deal with the matter. Your Honour, it was

1 said by the plaintiffs that all of this has been going on
2 for a long period of time and they need redress but if
3 that be so, we ask why have they not sought an
4 interlocutory injunction which they assert they are
5 entitled to in the prayer for relief and sought it on
6 proper material. Your Honour, there was some reference
7 by our learned friend here to Paragraph 706 and in
8 particular, Your Honour, he conceded that Particular Z
9 related to the Hampshire Action. Could we just say this,
10 when our learned friend is saying they should be given
11 the benefit of the doubt in relation to pleading, it's
12 said that this Campaign against Gunns doesn't relate to
13 Hampshire but several of the paragraphs in this - in
14 Paragraph 706, several of the overt particulars are
15 derived with modification from Version 2 and from the
16 past - the 99s in Version 2 - remember there's 99 various
17 letters.

18 An example of this is the Pullinger meetings which
19 are pleaded in Version 2. In Version 3 they how relate,
20 it is said, only to Styx but that wasn't the way they
21 were put in Version 2.

22 HIS HONOUR: That's a mater you can deal with in cross-
23 examination. You cross-examine someone about that
24 ultimately, perhaps. It goes to credit, doesn't it? If
25 you make an allegation and withdraw it or don't persist
26 with it and say something else later on.

27 MR WALTERS: It goes to whether the benefit of the doubt should
28 be accorded at this stage, Your Honour, but that's what
29 was asserted. Matters are put one way and then without
30 explanation put another way, the same matters in a
31 subsequent pleading. That removes the entitlement to any

1 benefit of the doubt in our submission. Your Honour,
2 we're not comforted by the suggestion as to management
3 which as we apprehended it, it wasn't a proposal of a
4 separate question being tried. At least not of the kind
5 of question which would have the effect of disposing of
6 the proceedings or a large part of it. Rather it was a
7 dealing with the case piece by piece.

8 We adopt what our learned friend, Mr Beach said in
9 that respect. Your Honour, our learned friend Mr Howells
10 asserted at p.226 of the transcript, "I think we've also
11 pleaded or particularised that the only staff member in
12 the case of Doctors for Forests is an employee of the 6th
13 defendant". Assuming that Doctors for Forests is to be
14 taken as a reference to our client, this has not been
15 pleaded or particularised, Your Honour.

16 Your Honour, we're still left with the situation
17 that there has been reference in numerous of our learned
18 friend's submissions to the particulars that have been
19 provided and it seems to us apparent, even though we've
20 made a modest request for particulars, that all of the
21 hundreds of pages of particulars will be, as it were,
22 thrown against us.

23 And that makes this a case where the sheer volume of
24 particulars adds to the complexity, not only must one go
25 to a very lengthy pleading, but even a much longer set of
26 extrinsic particulars and presumably further and better
27 particulars of the particulars will be sought ultimately.

28 Your Honour in our submission the twentieth
29 defendant is joined in this case where no contract is
30 alleged in the Burnie Woodchip Pile action. It's not
31 alleged that the twentieth defendant knew of any

1 contract, the only overt act put against our client as an
2 actor is that it operated a website. The twentieth
3 defendant has not been informed as to how it became part
4 of the Burnie conspiracy or for that matter the Campaign
5 against Gunns conspiracy, and the time has really passed
6 for the plaintiffs to have the opportunity to set out the
7 connection that they say must arise between all of these
8 disparate matters.

9 One other point Your Honour, there are numerous
10 instances within the pleading of unequivocal allegations
11 of knowledge, not alternative. Now we've particularised
12 some of them in Footnote 12 to our submissions in reply.
13 I don't need to trouble Your Honour with the detail of
14 that now but they're all set out with page and paragraph
15 numbers.

16 Your Honour it's clear that the plaintiffs see the
17 alleged Campaign against Gunns as the conceptual centre
18 of their claim and that seems to have been adhered to.
19 But their net is cast so wide that to use the words of
20 Yates, the pleading falls apart, the centre cannot hold.
21 In our submission the pleading should be struck out. If
22 Your Honour pleases.

23 HIS HONOUR: Thank you Mr Walters.

24 MR GRONOW: Your Honour just one of the matters is, I haven't
25 raised anything the Tasmanian Supreme Court actions but I
26 don't want it be taken to preclude me from doing so
27 later. I failed to raise them because they're not within
28 the scope of the present strike out application but I do
29 reserve my right as a right.

30 HIS HONOUR: I specifically reserved anyone's right this
31 morning by marking those documents and holding that they

1 can be dealt with at any time if someone wants to raise
2 them.

3 MR GRONOW: Thank you Your Honour. There's one other matter
4 about the form of orders which Your Honour should make if
5 you do decide to strike it out and Mr Beach is about to
6 put you a position with which I respectfully agree.

7 MR BEACH: I wasn't actually, I wasn't going to say anything,
8 unless Your Honour wants to hear - - -

9 HIS HONOUR: No I don't, I think I understand what orders are
10 sought, some people seek judgment, others seek the
11 statement of claim be struck out but I think you can take
12 it that whatever relief is appropriate one way or the
13 other will be moulded and I will hear counsel ultimately
14 on the question of any refinement of any relief assuming
15 any is granted. It will be put as a proposal unless it's
16 so simple that it's beyond argument. Yes thank you,
17 everyone has now replied.

18 Mr Howells, I'm concerned about the particulars and
19 I wonder whether - you may want to say something about
20 this but I'm minded to direct you to provide the
21 particulars that you have provided in one document. Now
22 that would involve electronically moving paragraphs
23 around but I assume without having studied them in any
24 detail that you've got - when one defendant asks you for
25 particulars of Paragraph X, what you give him is
26 basically the same as what you give someone else when
27 they ask the same question.

28 MR HOWELLS: Except that sometimes the requests differed
29 somewhat, but we gave some thought Your Honour to
30 producing one document and we can do that. Might I
31 propose this Your Honour, that we will correspond with

1 Your Honour's associate and with the other parties about
2 the way we will do it so that if the request is
3 sufficiently similar, there wouldn't be duplication, but
4 where they differ we probably err on the side of - - -

5 HIS HONOUR: Is it possible to produce - I mean it's possible I
6 suppose, to produce a document so that by looking at
7 Paragraph 704 of it - - -

8 MR HOWELLS: Yes.

9 HIS HONOUR: I will be able to see all of the particulars that
10 you've provided pursuant to that paragraph.

11 MR HOWELLS: Yes we can do that Your Honour, it might take a
12 little while.

13 HIS HONOUR: I'll request you at this stage to do it and I
14 think I need it in order to properly understand what this
15 is about. Whether it's about Mr Morrow - I just - and
16 that would be a document which would provide all of the
17 particulars you've provided to everybody in respect of
18 any particulars.

19 MR HOWELLS: Yes Your Honour.

20 HIS HONOUR: You want to say something Mr Beach?

21 MR BEACH: Your Honour if all that's going to be done is a cut
22 and paste job which, say for example, of Paragraph 706
23 identifies 57 of Maurice Blackburn particulars and then
24 20 pages of Coadys' particulars, we have no objection to
25 a cut and paste job - - -

26 HIS HONOUR: That's what I mean.

27 MR BEACH: We were just a little concerned that our learned
28 friend might have understood Your Honour to mean that he
29 could have another go at it.

30 HIS HONOUR: No, no these are documents which - - -

31 MR BEACH: It's composite - - -

1 HIS HONOUR: Have already been delivered and it's simply so
2 that from the point of view of my position of having to
3 grapple with particulars in respect of paragraphs which
4 are disparate and the point, indeed the point that
5 Mr Gronow I think put, it might have been Mr Walters,
6 just raised, to the effect that there are particulars
7 which will be more extensive in answer to some requests
8 than they are in answer to others.

9 MR BEACH: We would not envisage then that our learned friend
10 needs to correspond with Your Honour's associates or the
11 parties. A composite - a cut and paste document can be
12 put together and it will be filed and served and that
13 will be the end of it.

14 HIS HONOUR: Yes that's probably right.

15 MR HOWELLS: Well Your Honour just this. If in doing it we
16 encounter some problem, we don't want to be taken - - -

17 HIS HONOUR: That can be done by an appropriate email to
18 everybody, but otherwise - - -

19 MR HOWELLS: It will be a composite document as Your Honour
20 indicated, yes.

21 HIS HONOUR: Yes. There was another - I received an email also
22 concerning the costs orders. I haven't brought it with
23 me and I can't now remember - I have brought it with me.
24 This is from Coadys. I assume this has been served on
25 everybody.

26 MR WALTERS: I believe it has Your Honour. Can I say while I
27 can understand about this, this has not been done by
28 counsel in fact.

29 HIS HONOUR: Yes.

30 MR WALTERS: Your Honour made orders and there was a dispute
31 between costs consultants engaged by different of these

1 defendants as to what that would cover. We would thought
2 that Your Honour made the orders, and if that order
3 together with the Rules, enabled it to be sufficiently
4 interpreted. There were other costs consultants that
5 said different things. And our (indistinct) my
6 instructor was asked by others to raise the issue. I
7 don't urge anything on Your Honour. It seems to us that
8 the order that Your Honour made covered the matter and it
9 - the Rules provided costs thrown away and a court file
10 the order immediately.

11 HIS HONOUR: I won't - no I'm not going to get into an argument
12 about this or deal with it again. I've made orders. If
13 somebody's got an application to make in respect of - a
14 proper application in respect of costs orders they can
15 make it on proper material and proper notice. But
16 otherwise I don't propose to take the matter of the email
17 of 16 February from Coadys to my associate, which I
18 assume has been - yes it says, all the defendants'
19 solicitors have been copied in the email, as have the
20 plaintiffs' solicitors. I might say as a general
21 comment, that one of the developments, the unfortunate
22 developments which has occurred in relation to
23 litigation, is that some solicitors seem to think they
24 can communicate with judges' associates on a one to one
25 basis for the purpose of getting advice. I'm not
26 suggesting anyone in this case has, but we've had it in
27 other major torts cases where it seems that some
28 solicitors and their employees communicate with
29 associates for the purpose of getting advice, and even on
30 some occasions bordering on impropriety. I shouldn't
31 have to - the court shouldn't have to remind anybody that

1 any communication with a judge's associate by one party
2 must always be copied to anyone else. And in any event
3 there shouldn't be anything other than communication in
4 circumstances where it's absolutely necessary.

5 In any case that comment has nothing to do with this
6 case. This email was appropriately copied to everybody
7 else. Having done that and having directed Mr Howells to
8 provide me with that document, I might ask you to provide
9 two copies. One for filing and one for me, Mr Howells.

10 MR HOWELLS: Of course, Your Honour.

11 HIS HONOUR: When that's done, I will then consider the
12 decision in this case. Adjourn until 10.30 tomorrow.

13 ADJOURNED UNTIL WEDNESDAY 15 MARCH 2006