

1 MR SANTAMARIA: If Your Honour pleases I appear on behalf of
2 the plaintiff with my learned friend Mr Waller.

3 HIS HONOUR: Yes.

4 MR BORNSTEIN: If Your Honour please I appear for the first,
5 third, fourth and fifth defendants.

6 HIS HONOUR: Yes Mr Bornstein.

7 MR GRONOW: If Your Honour pleases I appear with Mr Gronow and
8 Mr Thomson for the seventh to ninth and fourteenth to
9 seventeenth defendants.

10 HIS HONOUR: Seventeenth defendants, yes. Thank you. Well
11 gentlemen I've read all of the material and I think the
12 best way to proceed is to call on the defendants. I've
13 read the plaintiff's justification for the documents and
14 I think it's best to call on the defendants and then to
15 hear the plaintiffs in reply.

16 MR DREYFUS: If Your Honour pleases.

17 HIS HONOUR: First, third, fourth and fifth, that's
18 Mr Bornstein, you've got a number of different positions.

19 MR BORNSTEIN: Yes I do Your Honour.

20 HIS HONOUR: Yes well that's all right we can handle those.
21 I've read your argument.

22 MR BORNSTEIN: While we sort this out Your Honour. I think
23 we're more or less ready now Your Honour.

24 HIS HONOUR: Yes.

25 MR BORNSTEIN: Your Honour you indicated you'd read the outline
26 of argument.

27 HIS HONOUR: Yes.

28 MR BORNSTEIN: There isn't an enormous amount to add to that.
29 Significantly though I would wish to start with the - as
30 I have in the outline the situation for the third and
31 fourth defendants, Mr Hanson and Ms Minshull.

1 HIS HONOUR: Yes.

2 MR BORNSTEIN: The situation that they find themselves in, in
3 particular in relation to Mr Hanson is the same position
4 he has been in right from the start of this particular
5 proceeding. My learned friends may not be aware of it
6 but Your Honour will recall that complaint has been made
7 upon his behalf that at no time during the proceeding has
8 anybody dared to indicate to the defendants, in
9 particular to the third defendant just what it is that he
10 is alleged to have done. Each and every form of the
11 pleadings and every particular - form of particulars that
12 have been provided have failed to articulate anything
13 that the third defendant is alleged to have done.

14 In previous versions of the proceeding Ms Minshull
15 was alleged to have done various things in relation to
16 parts of the sub-cause of action which have now been
17 abandoned. Insofar as the remaining alleged action
18 against her, that being Styx' claim, her position is or
19 her situation is the same as that of Mr Hanson.

20 HIS HONOUR: Well let's deal with Mr Hanson and just see what
21 the statement of claim does say about him.

22 MR BORNSTEIN: Indeed Your Honour. Now Mr Hanson - - -

23 HIS HONOUR: Firstly he's mentioned in Paragraph 6 and it says
24 he's a member of the Wilderness Society and the CEO since
25 1996.

26 MR BORNSTEIN: That's so.

27 HIS HONOUR: Right. Well then where do we - where's the next
28 mention of him?

29 MR BORNSTEIN: He's next mentioned in relation to the Styx
30 claim. He was not mentioned in relation to anything
31 else. The Styx claim is articulated in Version 4,

1 commencing at Paragraph 178.

2 HIS HONOUR: So you say his name is not mentioned before
3 Paragraph 178 except for the definition section?

4 MR BORNSTEIN: That's so Your Honour unless I've missed
5 something. My learned friend will correct me if I'm
6 wrong but insofar as I've been able to detect that's the
7 only place he's mentioned prior to the Styx claim. He's
8 not mentioned in relation to any other claim.

9 HIS HONOUR: Yes.

10 MR BORNSTEIN: Now the Styx claim commences by dealing with the
11 various contracts and questions of occupation and the
12 like. A variety of other things said, and the next -
13 first place in relation to the Styx claim that Mr Hanson
14 gets a mention, Ms Minshull being mentioned in the same
15 place, is Paragraph 190 which is the allegation of
16 knowledge of the various contracts. It's probably a
17 familiar pleading, it indicates that you ought to have
18 known or you knew because you're carrying on business
19 there that you ought to have known.

20 Very well sir. One assumes that almost anybody
21 would have known that you've got employees working. OK
22 the next place it's mentioned is Paragraph 191 the
23 following paragraph, and then says, this is really the
24 plea of knowledge in relation to the second and third
25 plaintiffs which is, they were harvesting timber, they
26 were the TH contracting.

27 HIS HONOUR: Yes.

28 MR BORNSTEIN: Whether or not that be so I don't know, it's a
29 matter of being completely obvious but be that as it may
30 nothing much turns on that other than it's indicated as a
31 forerunner to the allegation of interference with

1 contractual relations and the like. It's obviously the
2 purpose of the pleading. The pleading then pleads the
3 various alleged wrongful acts which from Paragraphs 192
4 through to 199. Paragraph 198 is not alleged to be a
5 wrongful act of something that the general manager of the
6 Forestry Commission did.

7 Then Paragraph 200 says that they were wrongful.
8 Very well, now neither Mr Hanson nor Ms Minshull was
9 mentioned anywhere in the alleged wrongful act. They're
10 not alleged to have done anything at all. We then go to
11 the next time they appear, and it's then an allegation
12 against Ms Douglas. Your Honour will recall that whilst
13 obviously it will be defended we can see that there's a
14 proper cause of action pleaded against Ms Douglas in
15 relation to Styx, also in relation to Hampshire. It then
16 says, "Douglas had the intention of doing these various
17 things."

18 HIS HONOUR: Wait on what are you looking at now?

19 MR BORNSTEIN: Paragraph 201.

20 HIS HONOUR: Yes.

21 MR BORNSTEIN: Now that's Douglas who is alleged to have done a
22 number of the acts complained of and it's alleged she did
23 so with various intention. Then you have the allegation
24 at Paragraph 202 against Hanson and Minshull that they
25 intended that those various acts would interfere with
26 contractual relations et cetera and each of the
27 plaintiffs.

28 Paragraph 203 then goes on to say that it did
29 interfere then interestingly Paragraph 204 - this is the
30 only paragraph on which it could be said that any
31 liability might possibly arise in that of Mr Hanson or

1 Ms Minshull. Interesting it's pleaded not as an act on
2 their part but rather acts of the Wilderness Society.
3 What's pleaded is that each of the acts set out in the
4 paragraphs where the alleged wrongful acts are pleaded,
5 was planned, coordinated and supported by the Wilderness
6 Society.

7 Now beneath that, subjoined to that are particulars,
8 and this as a matter of pleading would cause my clients
9 real difficulty if the matter were - well if the pleading
10 were permitted to be advanced in this form too. It then
11 says that, "Meeting in about mid-November, meetings, an
12 unspecified number were held at the premises Marr, Law,
13 Hanson, Minshull, Douglas, various others attended those
14 meetings and agreed to do various things." No
15 particulars being provided and indeed no real details
16 being given. It's then alleged that various people under
17 Paragraph B provided various equipment to carry out the
18 activities, under Paragraph B of the particulars.

19 HIS HONOUR: Subject though to your complaint about
20 particulars, that's a relevant allegation against
21 Mr Hanson isn't it?

22 MR BORNSTEIN: It is, but it's not pleaded as an allegation
23 against Mr Hanson, it's only there as particulars.

24 HIS HONOUR: Well - - -

25 MR BORNSTEIN: One of the things which my client - this one
26 saying would cause real difficulty in pleading to it if
27 it were permitted to be advanced in that form because
28 that's the only basis on which Mr Hanson or Ms Minshull
29 could possibly be alleged to be acting in constant with
30 the people who actually did the acts because there was
31 some kind of agreement. Nothing else is advanced. They

1 weren't there. They're not alleged to have in any way
2 supported or done anything else in relation to it. It
3 can only be because - - -

4 HIS HONOUR: You say the only allegation is made against the
5 corporate defendant the Wilderness Society, and there's
6 no allegation in the pleading itself against Hanson?

7 MR BORNSTEIN: No there isn't. How do we plead to it?

8 HIS HONOUR: Yes.

9 MR BORNSTEIN: How can it be - how can Mr Hanson plead to the
10 allegation? He might actually agree that this whole
11 protest activity was organised by the Wilderness Society
12 but not with the particulars beneath it. Who knows?
13 It's in effect impossible to plead to a pleading like
14 that for Mr Hanson or Ms Minshull. Indeed the complaint
15 is in terms of the absence of particulars of the
16 particular meetings or the alleged meetings which are so
17 vague, it's essentially just a conclusionary pleading.

18 Now the pleading of (indistinct) is in Paragraph 205
19 and the pleading refers back to those particulars in
20 Paragraph 204 and then says that, "It can also be
21 inferred from the nature, location, timing and results of
22 the acts done and the persons involved." Well there
23 can't be any inference as against Mr Hanson or
24 Ms Minshull from the acts done and the persons involved
25 because they weren't involved. They didn't perform any
26 of the acts. No inference can be drawn there. So it is
27 only by reference back to the loose, vague,
28 unparticularised allegation of a meeting - of meetings
29 and of meetings and agreement at those meetings that any
30 liability could lie with either Mr Hanson or Ms Minshull.
31 There simply isn't any possibility - - -

1 HIS HONOUR: If an allegation was made that they were at a
2 meeting and that an agreement was made at the meeting,
3 that would be enough though wouldn't it?

4 MR BORNSTEIN: It would be enough but one would expect
5 particulars of that meeting would arise.

6 HIS HONOUR: Well those particulars might have to await
7 discovery.

8 MR BORNSTEIN: They might have to wait.

9 HIS HONOUR: There'd be nothing wrong with the pleading, it'd
10 be a question of whether it could still stand up after
11 discovery. There's nothing wrong with the pleading in a
12 case like this which says there was a meeting at which an
13 agreement was reached, and if ultimately the evidence of
14 that agreement is lead by the actions of the persons who
15 were at the meeting, immediately after the meeting or in
16 sufficient proximity to it. That's a common - in the
17 criminal jurisdiction that's - you don't have to produce
18 the minutes of the meeting between Mr Williams and
19 Mr Foray or whoever these people are to say that they did
20 something.

21 MR BORNSTEIN: Ordinarily though Your Honour there would be
22 something from which you could infer that the meeting
23 took place and that various people were involved and
24 participated - - -

25 HIS HONOUR: But the allegation is that the meeting took place
26 and that has to be proved, but the fact that a meeting
27 took place and something occurred after it might be
28 sufficient in a - particularly a civil case to raise a
29 case against a person who was there.

30 MR BORNSTEIN: It might be sufficient if the individuals
31 concerned had actually done something, had been present

1 or had done something. That's not alleged to be the case
2 here. Here in relation to Mr Hanson and Ms Minshull it
3 is only that agreement or the alleged agreement which is
4 contained in particulars. There's nothing else. What
5 Your Honour refers to is a situation where one can of
6 course infer it because they've done something. Perhaps
7 they were present. Perhaps they provided something. It
8 was somebody's knife that was used even though they
9 weren't there. They've done something. Here they're not
10 alleged to have done anything at all, save for the
11 allegation of an agreement.

12 Now the plaintiffs complain that we're seeking
13 particulars of particulars. That's not really the case.
14 This is a material of fact so far as Mr Hanson and
15 Ms Minshull are concerned indeed, it could be argued it
16 is the only material of fact and yet it's not pleaded as
17 such. It is only from that meeting or the so-called
18 agreements, their attendance and agreement that any
19 inference can be made against them or indeed can be
20 alleged - said that they acted in constance with the
21 others because nothing else is alleged from it. No
22 inference can be made from conduct because they didn't -
23 there's (indistinct) conduct alleged. They're not
24 alleged to have provided a knife. They're not alleged to
25 have attended and done - or done anything at all.

26 In effect Your Honour, what's been pleaded or rather
27 now put as particulars rather than as a plea of what is a
28 material fact and ought to be pleaded as such is a revamp
29 of what appeared in the previous pleadings as conspiracy
30 allegations. Allegations for which inadequate
31 particulars were provided or none at all. Insofar as the

1 alleged involvement of my clients and in particular those
2 of Mr Hanson and Ms Minshull in relation to these alleged
3 trespasses. Previous forms of the pleading indicated
4 that yes, there was an agreement and you can infer the
5 agreement from the overt acts. Well that's fine for
6 those who've actually committed any overt acts. In this
7 case, as regards to Mr Hanson and Ms Minshull, there are
8 no overt acts if you can call it that.

9 My learned friend's submission is right in the sense
10 that it is still possible of course to be liable because
11 if for example you were the head of a criminal
12 organisation you ordered, directed your underlings to go
13 and do the work or whatever, you yourself would do
14 nothing further. You would most certainly be liable if
15 you were caught. But there needs to be some, there would
16 have to be some evidence of that.

17 Well I'm not seeing evidence but you'd need to know
18 what meetings, what's been done. What's not alleged here
19 is anything of any specificity. What isn't said is what
20 it is that either of those two of my clients are meant to
21 have done. And we've been seeking that now throughout
22 this proceeding. It's not the first time. We've sought
23 to have proper particulars or proper pleadings of what it
24 is that the third defendant in particular is meant to
25 have done throughout this proceeding. It was issued in
26 2004, in December, it's now January - sorry February 2007
27 and we still don't know what it is that the plaintiffs
28 say that the third defendant did wrong or what are they
29 complaining about. Similarly of course in relation to
30 the fourth defendant, we don't know either.

31 HIS HONOUR: Well now, all right, well I understand what you

1 say about Hanson, what about Minshull? Is there - - -

2 MR BORNSTEIN: Minshull, Minshull was previously alleged to
3 have done various things wrong in those various
4 (indistinct) of action which have now been dropped.

5 HIS HONOUR: Yes.

6 MR BORNSTEIN: Which is to say the Japanese customers' actions,
7 the Banks action and the Banksia Award action. She was
8 alleged to have been involved in and indeed they were
9 quite specific in some of the actions as to what she was
10 meant to have done.

11 HIS HONOUR: Yes, well what's the allegation against her now?

12 MR BORNSTEIN: Identical with those of Mr Hanson. Nothing
13 more. Only the Styx action and the only paragraphs where
14 she is named save of course for the introduction,
15 introductory paragraph which says what it is she does
16 within the Wilderness Society or did within the
17 Wilderness Society. I don't think she's employed by them
18 anymore. What she did at the time, her name appears
19 alongside Mr Hanson's in each of the paragraphs
20 articulating the Styx action and nowhere else. So for
21 practical purposes, her position, her situation is the
22 same as Mr Hanson's. There's nothing to add in relation
23 to that because their names will appear side by side in
24 each of the paragraphs.

25 HIS HONOUR: Yes.

26 MR BORNSTEIN: The only difference being what her particular
27 position within the Wilderness Society was, alleged I
28 think in Paragraph 7. That she was a member, she was an
29 employee, position of corporate campaigner between 2000
30 and 2005 as opposed to being the chief executive.

31 HIS HONOUR: Yes.

1 MR BORNSTEIN: And there's no other difference between them,
2 their position was identical in terms of the pleading and
3 complaints about it. Now Your Honour, that leads on from
4 the third and fourth to the first defendant. There are -
5 he's alleged to be liable both in relation to the Styx
6 action claim and the Triabunna 2004 claim. The
7 allegation against Mr Marr, the first defendant in
8 relation to Styx is the same as that for the - Mr Hanson
9 and Ms Minshull save for one allegation of him actually
10 doing something. And that allegation is to be found in
11 Paragraph 195. He is alleged to have done something and
12 this allegation has appeared in one form or another in
13 every form of the pleading, one version or - - -

14 HIS HONOUR: I can't see it in 195?

15 MR BORNSTEIN: One, nine - I'm sorry, it's 196.

16 HIS HONOUR: It's 196 I think, yes.

17 MR BORNSTEIN: That's a typo in my outline and yes, I've
18 mislead myself and you. I thank my learned friend for
19 that. The allegation is that on 24 and 25 November,
20 Marr, the first defendant and Law the second, directed
21 Emma Briggs and Shannon Lorrigo to remain in the Styx for
22 a tree sit in breach of s.46(1)(a) of the Crown Land Act
23 1976. That allegation has appeared in every version of
24 the statement of claim. Particulars have been requested
25 of it in the first and third. Your Honour of course will
26 recall there wasn't any opportunity to request
27 particulars of the first amended statement of claim, the
28 second version because of course that was delivered only
29 a couple of days before the original hearing.

30 HIS HONOUR: Yes.

31 MR BORNSTEIN: No particulars have been provided of that

1 allegation or nothing adequate. This is the sixth
2 opportunity for the plaintiffs to provide particulars for
3 that particular allegation as regards to Mr Marr.

4 HIS HONOUR: Well yes.

5 MR BORNSTEIN: If they haven't been provided, the allegation
6 ought to fall away or not be permitted in the absence of
7 it. This is not something Your Honour which will be
8 assisted by discovery. It's not something that's going
9 to be dealt with in terms of notes. This is something
10 that the first and second defendants are meant to have
11 done, out in the open field. They can either get
12 particulars of it or they can't. They've got something
13 or they don't.

14 They can say what it is that Mr Marr is meant to
15 have said or - - -

16 HIS HONOUR: But Mr Marr can be asked what he said.

17 MR BORNSTEIN: No, he presumed that - well, if the answer is I
18 wasn't saying anything at all, I don't know what you're
19 talking about.

20 HIS HONOUR: That's all right.

21 MR BORNSTEIN: Well, where's the - - -

22 HIS HONOUR: Well, then - then - then the plaintiff's got a
23 particulars problem but until that happens - - -

24 MR BORNSTEIN: Your Honour, they've been requested on two
25 occasions - - -

26 HIS HONOUR: Yes.

27 MR BORNSTEIN: - - - say, what is it you said he did? They
28 haven't been able to do it.

29 HIS HONOUR: Well, that might be a problem that they've got
30 with evidence, but that - that's not a - I mean, they've
31 got the right to interrogate. They can ask Mr Marr. I

1 mean, at this stage what we're concerned with is whether
2 there's available pleading and that as it stands there,
3 sparse and all as it is, and the fact that it's being put
4 four times and particulars haven't yet been provided,
5 leave those aside, we're dealing with this statement of
6 claim. Why doesn't it stand up as a pleading?

7 MR BORNSTEIN: Well, Your Honour, in my submission if you'd
8 been asked the particulars and you've had six
9 opportunities it shouldn't be (indistinct) to the court.
10 The allegation must fall away. As I said, this is not
11 something which discovery is going to assist.

12 HIS HONOUR: But discovery by way of interrogation might.

13 MR BORNSTEIN: Did you say - - -

14 HIS HONOUR: I mean - - -

15 MR BORNSTEIN: Well, one doesn't know - we don't even know what
16 it is they allege that he's meant to have said.

17 HIS HONOUR: I mean, well, no, but if - you could ask - you
18 could draw an interrogatory which said on 24 or 25 of
19 November stating which did you say words to Emma Briggs
20 and/or Shannon Lorrigo to the effect that they should not
21 come down from the tree or whatever the thing is. I
22 mean, that question could be asked. Mr Marr has to
23 answer it.

24 And that's why - I mean, he may say, "I don't know"
25 or "I don't remember" or - but he's got to answer it.
26 And until that happens, the pleading doesn't fail, does
27 it? Or it mightn't even fail then because there might be
28 other evidence available?

29 MR BORNSTEIN: Well, of course there might be other evidence.

30 HIS HONOUR: That becomes available in some way.

31 MR BORNSTEIN: But in my submission, they ought to be able to

1 tell us - - -

2 HIS HONOUR: Yes, all right, I understand - I understand what
3 you - - -

4 MR BORNSTEIN: - - - what constitutes the direction - - -

5 HIS HONOUR: Yes. Is that the only allegation against Mr Marr?

6 MR BORNSTEIN: That's the only positive allegation in relation
7 to that. There are other matters of course, the same
8 allegations as against Mr Hanson and Ms Minshull which is
9 to say that he attended meetings and came to an agreement
10 on unspecified dates at unspecified times. But that is
11 the one positive allegation of him alleged - - -

12 HIS HONOUR: So there's not a - apart from being mentioned in
13 particulars, he's not - there's no specific allegation
14 made against him?

15 MR BORNSTEIN: Similar, yes. It's exactly the same. That is
16 the only specific allegation made against him - - -

17 HIS HONOUR: Yes.

18 MR BORNSTEIN: - - - of course made against Mr Law as well for
19 whom I don't act.

20 HIS HONOUR: Yes.

21 MR BORNSTEIN: Now - - -

22 HIS HONOUR: Right, well, now I understand that.

23 MR BORNSTEIN: That's Styx. Triabunna. Triabunna 2004, that
24 particular claim is articulated earlier in the pleading.
25 It's - Triabunna is divided into two sections a 2003 for
26 which it's not alleged that Mr Marr is liable and a 2004
27 for which it is. The wrongful acts complained of or the
28 allegedly wrongful acts in relation to Triabunna 2004 are
29 set out in Paragraph 76-80.

30 But I should indicate first, it follows a similar
31 theme. I should indicate that the Triabunna 2004 claim

1 commences at Paragraph 68, Your Honour. It then pleads
2 the contracts and the fact that people were working. It
3 then pleads in Paragraph 3 that Marr, because he's the
4 only one of my clients alleged to be involved here, knew
5 of the contracts - - -

6 HIS HONOUR: Wait, I'm - where are you reading here?

7 MR BORNSTEIN: Paragraph 73.

8 HIS HONOUR: Yes.

9 MR BORNSTEIN: And Marr knew of the contracts along with
10 others. The wrongful - allegedly wrongful acts pleaded
11 between Paragraph 76 and 80. The heading is prior to 74
12 but they're not pleaded obviously with wrongful acts.
13 Seventy-four and 75, the alleged wrongful acts of 76 to
14 80.

15 Mr Marr is not alleged to have committed any of
16 them. In 76 to 80, we then go to the acts that's in a
17 way similar to that of the Styx claim in Paragraph 82,
18 what is alleged is that Morrow, not someone for whom I
19 act, is alleged to have done these various wrongful acts
20 with the intention of interfering with contract and the
21 (indistinct). And then we come back to Paragraph 83. It
22 says the intention of Marr, Law, Morrow, Wilderness
23 Society was to interfere with contractual relations
24 (indistinct) first plaintiff.

25 And what is contained in the - - -

26 HIS HONOUR: So 83 is - - -

27 MR BORNSTEIN: Eight-three is where they seek to have - fix
28 liability on Marr.

29 HIS HONOUR: Yes.

30 MR BORNSTEIN: It's again only done really in terms of the
31 allegations of discussions, agreements and the like under

1 Paragraphs (a), (b) and (c) of the particulars. It's
2 divided up somewhat in relation to this. And this is the
3 allegation as to various - as to what agreement was
4 reached as to their being meetings. Meetings which are
5 meant to have occurred between November 2003 and February
6 2004 so it's somewhat spread.

7 And the allegation of agreement in this case, and
8 that Paragraphs (a), (b) and (c) deal with these meetings
9 and discussions for which no particulars are given but
10 which in my submission quite clearly are material facts
11 because again it's the basis of the alleged liability.

12 HIS HONOUR: Yes, well, the allegation of intention in 83 is
13 sufficient allegation, isn't it? The particulars might
14 be deficient but the allegation's sufficient.

15 MR BORNSTEIN: Well, certainly one would have to plead
16 intention.

17 HIS HONOUR: And that's what they've done.

18 MR BORNSTEIN: Yes, they have or they've pleaded intention in
19 every case of course. But this is a situation slightly
20 different from the pleading in relation to Styx where of
21 course what was pleaded, the agreements of pleaders
22 particulars to an allegation against the Wilderness
23 Society rather than individuals and in this case it's a
24 slightly different situation.

25 HIS HONOUR: Yes. Well, it's different in the sense that when
26 you're looking at it from the point of view of your
27 client, he has an allegation against him that he can
28 plead to it.

29 MR BORNSTEIN: He could plead to that because he can just
30 simply say no whereas he can't plead to an allegation in
31 relation to the Wilderness Society at all. There is one

1 other basis on which it's sought to affix liability and
2 it's contained in Paragraph (i) which is Paragraph (i) of
3 the particulars on p.37. This in my submission is an
4 improper plea against (indistinct) about December 2003 to
5 February 2004. Marr, Law, the Wilderness Society, Morrow
6 "provide or will organise for others to provide audio
7 visual equipment", et cetera, et cetera to enable Morrow
8 and others to do what they did. This is one of those
9 pleadings which, in my submission conceals more than it
10 reveals. He doesn't tell you what each or any of them
11 specifically are meant to have done.

12 This particular paragraph is clearly intended to
13 affix my client and others within that second branch of
14 what my learned friend has outlined, as submissions
15 indicated which is to say that you've aided them, you've
16 provided equipment (indistinct).

17 HIS HONOUR: Yes, well, if - if - - -

18 MR BORNSTEIN: And it's far too loose - - -

19 HIS HONOUR: Well, it may be deficient, but if it was
20 subsequently proved that Marr, Law and Morrow and the
21 Wilderness Society for example went to raise tent city
22 and bought ropes and harnesses and rubber duckies and
23 padlocks and all sorts of things, that would be extremely
24 relevant material.

25 MR BORNSTEIN: Of course it would.

26 HIS HONOUR: Well, the problem - your complaint really is about
27 the word provided. What did they actually do?

28 MR BORNSTEIN: "Provided or organised for others to provide",
29 what the complaint has been from my part of the Bar table
30 throughout, is I want to know what my people are meant to
31 have done.

1 HIS HONOUR: Sorry?

2 MR BORNSTEIN: What my people - my defendants are meant to have
3 done. Not what a whole group of others may have done.

4 HIS HONOUR: No. Well, that's all right. (Indistinct) about
5 what is it that my client is alleged to have done because
6 that's what we've got to deal with and that's what we
7 have to plead to, but we have to know what's alleged.

8 HIS HONOUR: But at the moment - at the moment, that's a
9 deficiency in particularisation. It's not a deficiency
10 in the pleading. I mean, it may turn out that, for
11 example, say for instance on discovery, there was an
12 invoice discovered which your client had signed for the
13 delivery of rubber duckies. Well, that would be
14 something he did. He signed for the delivery of rubber
15 duckies. Now, that could then be particularised. But
16 that'd be something that could only be particularised
17 after documentary discovery but after discovery by
18 interrogatory's by interrogation, there might be other
19 things that can be said.

20 Did you telephone Ray's Tent City or whoever it is
21 that sells these things to order - and order three rubber
22 duckies? And that'd be - he'd have to answer that
23 question.

24 MR BORNSTEIN: Well, he would have to answer that question if
25 it's a (indistinct) permitted to be pleaded in that form,
26 Your Honour. The - or others - only particular - - -

27 HIS HONOUR: Yes, well that's - that's the point I mean. It's
28 - the - what the plaintiff says is that this is an
29 allegation of intentions supported by these particulars
30 which taken as red are the best particulars that can be
31 provided until after discovery which is, you know, an old

1 fashioned expression that used to be put at the bottom of
2 every set of particulars but it doesn't much matter
3 whether it is or it isn't.

4 MR BORNSTEIN: Well, it's a question of whether there's
5 anything to answer and how it could be pleaded to - - -

6 HIS HONOUR: Well, the plea is to the - did - the question your
7 client's got to answer is did I intend to interfere with
8 contractual relations or injure the first plaintiff and
9 it's trade of business, that's all. That's the pleading.

10 MR BORNSTEIN: Yes, it would be in relation to that. But if
11 all that's supported is put in support, allegations for
12 which particulars have been requested over and over are
13 not provided. In my submission, it should be permitted
14 to - - -

15 HIS HONOUR: Well, that's a different - yes, I - I see how - I
16 see what you're saying.

17 MR BORNSTEIN: See what I say in relation to it Your Honour,
18 yes, the allegation of giving direction, yes, of course
19 it would form a basis for which - for inferring it
20 was - - -

21 HIS HONOUR: Yes.

22 MR BORNSTEIN: - - - and we've asked for those particulars.
23 They've had two years to give them to us. This is their
24 sixth try. They've had - this is their fourth version of
25 statement of claim. They've been specifically requesting
26 (indistinct) particulars and (indistinct). They've been
27 specifically requested to give allegations of particulars
28 of what (indistinct) my clients, are alleged to have
29 done. Where it has been alleged that they or a group of
30 people including one or more of them has a (indistinct)
31 has provided or arranged for others to provide equipment

1 for the purpose. They haven't done it and said what
2 we're meant to have done.

3 The complaint that we have is that what we're not
4 told in having to defend these proceeding is what it is
5 that we are alleged to have done. Not the whole group.
6 But what the Wilderness Society are alleged to have done
7 or various officers within the wilderness society, what
8 each of my particular clients are alleged to have done is
9 - the Wilderness Society is being represented and they'll
10 look after themselves. Mr Law is being represented and
11 he will be looked after. It's not my task.

12 What I have to know for my specific clients is what
13 they are alleged to have done. And that's what they
14 haven't told us in four versions of the statement of
15 claim. Now, we know what it is that Ms Douglas, the
16 fifth defendant's alleged to have done. Save for the
17 addition of an allegation that she is liable for the acts
18 of Lucaston in 2004, not previously alleged against her,
19 but what we don't know is what it is said my clients have
20 done and that's the complaint and it's continuing and
21 it's continued for a long period of time.

22 There's been ample opportunity to provide
23 particulars of these allegations. It hasn't happened.
24 We haven't even had something - the best we can do is X,
25 pending discovery because or this is what we know about
26 it. Yes, here's the minutes of the meeting or resolution
27 which we published on the web site. There's something.
28 We don't know the basis of the allegation. We don't even
29 know the dates, when their set for (indistinct),
30 presumably as with any other organisation people have
31 meetings all the time. Whether that's a meeting over the

1 cappuccino machine or coffee machine, or whether its an
2 informal meeting, well who knows. But they don't tell us
3 and we don't know how to deal with that, other than of
4 course to give a blank denial which isn't much help to
5 the court or anybody else in managing the proceeding.

6 Your Honour that's the situation as regards - in
7 relation to Triabunna 2004. The only other complaint we
8 have is in relation to Ms Douglas in relation to
9 Lucaston. There is of course sufficient pleading in
10 order to enable the court to draw an inference if it so
11 chose - - -

12 HIS HONOUR: Sorry, 149 let's just go to that.

13 MR BORNSTEIN: In relation to Lucaston Your Honour, previous
14 versions of the statement of claim that Your Honour
15 alleged that Ms Douglas was (indistinct) Ms Douglas did
16 not attend (indistinct). What is alleged it would seem
17 now is that there was an agreement made between various
18 people and that protests would take place both at
19 Lucaston and at Hampshire on the one day and that
20 Ms Douglas by going to Hampshire was acting in accordance
21 with that agreement and hence was acting in concert with
22 those who were conducting a protest or engaging in
23 activities at Lucaston that were complained of. That's a
24 new feature of this claim. It has not appeared in any of
25 the previous claims. It's purportedly supported again by
26 reference to an unparticularised set of agreements
27 although given as particulars of intention to interfere
28 with contracts that appears in Paragraph 149 I think it
29 is.

30 If the plaintiffs put their case on the basis that
31 there was such an agreement, if such an agreement could

1 be established, it is drawing something of a long bow to
2 say one thing infer an agreement to engage in a protest
3 simultaneously by the fact that a person happened to
4 appear at one of the sites.

5 HIS HONOUR: Well it might or it might not, but that would
6 depend on the evidence. You could easily have - if you
7 decided to commit three criminal acts - take a group of
8 highly organised and professional bank robbers, they said
9 the best way to knock off the National Bank is to do
10 three branches at once. "We'll do Essendon, you and
11 Dreyfus can do Hawthorn and Santamaria and Waller can do
12 St Kilda and we'll time our - we'll do it at exactly 11
13 o'clock" - they'd all be liable for each of the
14 robberies.

15 MR BORNSTEIN: Yes of course they would but what's critical is
16 the agreement there and the agreement of course
17 (indistinct) and this isn't something that's been raised
18 previously either.

19 HIS HONOUR: But it would be sufficient wouldn't it to raise an
20 inference of an agreement to lead evidence that the three
21 robberies occurred at the same time, all on the same
22 defendant, the same victim, that the six of them had been
23 at a meeting the night before. That would be getting
24 pretty close to an in concert arrangement wouldn't it?

25 MR BORNSTEIN: It would be getting fairly close to an in
26 concert arrangement but that's not really what's pleaded
27 here.

28 HIS HONOUR: But again what they've said about Ms Douglas is
29 that she intended, and they've given particulars. Now if
30 the particulars are inadequate, they can be supplemented
31 after discovery. If they're not - subsequently if they

1 don't end up proving the case, they don't prove the case,
2 but that's really not a pleading point is it, it's a
3 particulars point.

4 MR BORNSTEIN: Your Honour it, in my submission falls into the
5 same sort of category, being something that could have
6 been given proper particulars that has existed for a
7 couple of years, or more than two years in relation to
8 this proceeding. It's a vague allegation, albeit one
9 that is now raised for the first time. It's in the same
10 sort of formula. It is simply said the meetings were
11 conducted. We're told on four occasions but we're not
12 told when any of these meetings occurred. We were told
13 there were four meetings. What's put is conclusionary in
14 relation to it and insofar as there's any act, the act is
15 of course an act at a different location and that's why
16 it's critical in my submission that such a pleading be
17 supported (indistinct) proper particulars because there
18 can't be any inference by the fact that the protests
19 occurred in two different places on the one day.

20 Your Honour mentioned three but two has never been
21 enough for example for a similar fact situation. You
22 need at least three, two is a coincidence. You need at
23 least three for a similar fact argument. Two, two
24 protests or two activities in one place, one of which has
25 obviously been ongoing in any event. The Lucaston matter
26 has been, is pleaded as something which has occurred over
27 a prolonged period of time from 2003 onwards, over quite
28 some substantial period. Hampshire appears to have been
29 a single day. Something that happened in the morning and
30 then somebody came in according to the plaintiffs, locked
31 themselves onto some piece of machinery and the police

1 cleared people out according to various things and
2 eventually whoever was locked on was removed and that was
3 that. It was a single day situation. Lucaston is an
4 ongoing thing which has been occurring for over a year.

5 So in my submission, the fact there happened to be
6 protests or activities occurring at those sites, it
7 doesn't mean anything. There might have been all sorts
8 of other things that occurred whilst the Lucaston matter
9 was proceeding over the period because it was quite a
10 long time frame.

11 HIS HONOUR: Yes.

12 MR BORNSTEIN: I've nothing further to add unless Your
13 Honour - - -

14 HIS HONOUR: Yes, thank you Mr Bornstein. I might, it might be
15 helpful if I called on Mr Santamaria now to deal with
16 that because it allows my relatively limited attention
17 span to concentrate on what we're arguing about.

18 MR SANTAMARIA: Yes, yes. Yes.

19 HIS HONOUR: As it's argued.

20 MR SANTAMARIA: And perhaps at the same time I might
21 (indistinct) if it's convenient, that part of
22 Mr Dreyfus's submissions which also raise - - -

23 HIS HONOUR: Similar things?

24 MR SANTAMARIA: About particulars.

25 HIS HONOUR: Yes.

26 MR SANTAMARIA: Mr Dreyfus will forgive me if I say that the
27 greater proportion of his submissions is directed to
28 matters of joinder of different claims in the one
29 proceeding.

30 HIS HONOUR: Yes.

31 MR SANTAMARIA: And perhaps whether the matter might usefully

1 be determined in one proceeding. But the first part of
2 his submissions do also address the matter of particulars
3 and so if I can respond to that part of his submissions
4 and what my friend has just said.

5 HIS HONOUR: Yes, yes.

6 MR SANTAMARIA: If that's convenient to Your Honour. Your
7 Honour we address our summons which as you will recall
8 dated 2 November seeks leave to remove the stay which is
9 in place.

10 HIS HONOUR: Yes.

11 MR SANTAMARIA: As a matter of formality I don't believe that
12 the stay has ever formally being removed and we
13 understand that if the court is satisfied of the form of
14 the statement of claim unless there are other reasons of
15 which are not aware to be relied upon by our opponents,
16 the stay would be removed. So that if it's the fact from
17 the pleading of these claims it can rightly be said that
18 the remaining defendants know from the pleadings the
19 cases which they must meet at trial, we would say that it
20 is now appropriate to remove the stay.

21 For the reasons which we've expressed in our written
22 outline to you and which I don't intend to repeat, in our
23 submission the defendants know well, know very well what
24 cases they must meet. The tenor of submissions made
25 principally by Mr Bornstein in his outline and what he
26 said this morning seem to us to mount an argument that
27 the law does not countenance a claim against someone in
28 tort where that person did not actually participate or
29 was not present when the tort was committed. He
30 addressed his submissions in this regard this morning in
31 relation to Messrs Minshull, Marr and - - -

1 HIS HONOUR: Hanson.

2 MR SANTAMARIA: Hanson. We've set out in our written
3 submissions why we say this is plainly not so. But we
4 suspect that the submissions made by Mr Bornstein do
5 accept in terms that it is possible that one can be
6 liable as a joint feasor where those who committed the
7 acts did so in concert to a common end. I think that's
8 in Paragraph 5 of the submissions.

9 HIS HONOUR: Yes.

10 MR SANTAMARIA: Your Honour the - - -

11 HIS HONOUR: My concern just so that you know what I'm getting
12 at, Mr Hanson for example - now let me go to 190, there's
13 an allegation that Hanson knew about the contractual
14 relations, well that's, that's - have you got your copy
15 of the statement of claim?

16 MR SANTAMARIA: Yes, yes, you're talking about the Styx matter?

17 HIS HONOUR: Yes.

18 MR SANTAMARIA: Yes.

19 HIS HONOUR: One, nine - yes, the Styx matter, 190. It's said
20 that Law, Marr - sorry, Hanson and others, Hanson and
21 others knew certain things. Knew the plaintiff, first
22 plaintiff et cetera contracted with contractors to
23 harvest and cut timber. Now that allegation doesn't seem
24 to be a problem. It's an allegation of knowledge, there
25 are particulars, the particulars are either adequate or
26 they're not. And they can be either supplemented or not
27 as the case may be. The next paragraph is also an
28 allegation of knowledge but I think that's all there is -
29 they're the only allegations against Mr Hanson.

30 MR SANTAMARIA: If you look only at those paragraphs but you've
31 got - - -

1 HIS HONOUR: How do you get, how do you get a claim against
2 Hanson?

3 MR SANTAMARIA: All right. Let me approach it in this way? As
4 if by a flowchart of how you get to Hanson.

5 HIS HONOUR: Yes?

6 MR SANTAMARIA: And my learned friend draws a dichotomy between
7 the Wilderness Society represented by someone else and
8 his clients. How sound is the dichotomy? At meetings
9 pleaded in mid November 2003 - - -

10 HIS HONOUR: Where's this pleading?

11 MR SANTAMARIA: It's in the, Paragraph 204. In fact, yes,
12 start of 204, this is the section on joint liability.

13 HIS HONOUR: Yes.

14 MR SANTAMARIA: It's accepted that at Styx the actual
15 trespasses were Ms Douglas and some of the people with
16 her. She is the only trespasser defendant. Hanson and
17 Minshull are alleged to be liable only under the Styx
18 claim and we accept that neither is sued because of any
19 physical acts undertaken by them. But we plead that the
20 tortious liability of Hanson and Minshull arises firstly
21 from their attendance at meetings in mid November 2003 at
22 the premises of the Wilderness Society in Hobart and
23 Canberra at which in agreement, it's criticism of the use
24 of the word, "Agreement" but we would say that a plain
25 reading of the use of the word, "Agreement" in a claim in
26 relation to tort is that one is talking about an
27 agreement, arrangement or understanding was reached at
28 those meetings to commit the tort.

29 Now in the course which is, and we've quoted in our
30 outline, which remains one of the leading authorities on
31 acting in concert, what's said there is, by Lord Justice

1 Sergeant that, "Persons are said to be joint tortfeasors
2 when their respective shares in the commission of the
3 tort are done in the furtherance of a common design. All
4 persons in trespass who aid or counsel, direct or join,
5 are joint trespassers. If one person employs another to
6 commit a tort on his behalf, the principal and the agent
7 are joint tortfeasors and recovery of a judgment against
8 them" - - -

9 HIS HONOUR: None of this is contentious. What, my concern is
10 form here. I'm not and I don't normally get concerned
11 about form but there is a form problem, isn't there?
12 Because there's no allegation in the pleading that
13 Mr Hanson and for that matter, I think is it Ms Minshull?

14 MR SANTAMARIA: Ms Minshull.

15 HIS HONOUR: Ms Minshull did anything - - -

16 MR SANTAMARIA: Well there is - - -

17 HIS HONOUR: - - - apart from knowing, apart from knowing
18 things, they knew - - -

19 MR SANTAMARIA: No, there's more than that.

20 HIS HONOUR: In 190 and 191 they were said to have known things
21 but there's no allegation is there?

22 MR SANTAMARIA: In 204 you have - - -

23 HIS HONOUR: No, but the only allegation in 204 is against the
24 Wilderness Society.

25 MR SANTAMARIA: Well in that paragraph that is so. But what is
26 particularised in that is the presence of the meeting at,
27 of the Wilderness Society by Messrs Marr, Law, Hanson,
28 Minshull and the others and then in 205, each of the
29 acts, the trespasses which are pleaded in Paragraphs 192
30 to 197 and 199 was done by the person or persons alleged
31 acting in concert with each of Marr, Law, Hanson,

1 Minshull, Douglas, the Wilderness Society, Morris and
2 Morrow to a common end. There is a material fact pleaded
3 in - - -

4 HIS HONOUR: Well that's the material fact though, isn't it?

5 MR SANTAMARIA: Yes, yes. It's 205 which my learned friend
6 perhaps concentrated overly on 204 for his purposes but
7 205 must be read also in the context of the particulars
8 to 204 and further the early parts of the pleading where
9 the status of Marr, Law, Hanson and Minshull as the
10 senior officers of the Wilderness Society is set out.

11 HIS HONOUR: But that couldn't, just I'm talking as a matter of
12 form. The pleading absent particulars has to make
13 allegations of material facts sufficient to constitute a
14 cause of action. In this case you say there was
15 knowledge in each of them and you've pleaded that.
16 That's clear. You then, you then - the only other
17 pleading that implicates them is 205 where you say that
18 all the things from 192 to 197 and 199 were acts which
19 they did in concert with the people who actually did
20 them. Now it seems to me that that's got to be the
21 ground you stand on, isn't it?

22 MR SANTAMARIA: Yes, yes.

23 HIS HONOUR: It's not, I mean the fact that they went to
24 meetings at the Wilderness Society - - -

25 MR SANTAMARIA: On its own.

26 HIS HONOUR: - - - for the purpose of pleading is not a - that
27 may be good evidence later of something but it's not, it
28 doesn't save the pleading if this doesn't save it. It's
29 really the efficacy of 205.

30 MR SANTAMARIA: Well - - -

31 HIS HONOUR: It either - it either gets up on that or it

1 doesn't.

2 MR SANTAMARIA: Well that may be so Your Honour but you must
3 look at the fact of there being prime movers for want of
4 a better word in the Wilderness Society. That meetings
5 of the Wilderness Society were held at which they attend.
6 That decisions are made at those meetings which are
7 directed to the actual trespass which occurs. That's the
8 meetings in mid November 2003 which are pleaded. And
9 what is pleaded is that they attend and decisions are
10 made in their presence.

11 Of course we can't give particulars at this stage as
12 to what was said because we weren't there. There can be
13 no surprise about that. Then what is pleaded pursuant to
14 the plan which is conceived at the meeting of the
15 Wilderness Society, the officers who are present, is the
16 implementation of the plan as it related to the trespass
17 in the Styx Valley. And the tree sits which were to be
18 constructed and occupied by members or supporters or
19 volunteers and equipment is provided.

20 And then the trespass occurs on 24 November 2003 but
21 Douglas as I've indicated to you, the only defendant
22 against whom it is alleged that there was an actual
23 trespass, although she trespasses with others who we say
24 are as volunteers or whatever, are the foot soldiers of
25 the army for want of a better word, under the direction,
26 all acting together, common end. We don't name them as
27 defendants because it would be a phone book by the time
28 the schedule of the parties would be completed, so we
29 concentrate on the important players.

30 Marr gives directions we plead as a material fact.
31 We also plead as a material fact, or in the particulars

1 directions given by the police and non compliance with
2 the directions given by the police. Law is in the same
3 boat as Marr and when it comes to inference about the
4 involvement of the Wilderness Society and its officers of
5 whom Marr, Law, Hanson and Minshull are important ones.
6 What happens that day and the following day is that the
7 Wilderness Society, principally through Law goes on to
8 the television or the web site or whatever, and proclaims
9 that it's been a great win for the Wilderness Society and
10 Greenpeace.

11 Now the court at trial we will submit will draw from
12 the collection of these events, of the meetings, the
13 planning, the implementation, the designation of who did
14 what, that they did it and then proclaimed what had
15 occurred under the corporate banner as being sufficient
16 to find that there had been trespasses by individuals who
17 bear personal liability to the trespass the first thing.
18 By the Wilderness Society as a body that acted in concert
19 of itself and by Marr, Law, Hanson and Minshull as
20 individuals who acted in concert with those who actually
21 committed the trespasses and again against the Wilderness
22 Society precariously because for some of those involved
23 in trespasses and I speak now of the various incidents
24 which occurred, were at the relevant time employees of
25 the Wilderness Society, or vicariously as principals
26 responsible for the conduct of agents which would
27 comprehend, not just employees but the volunteers and
28 supporters as well.

29 Now, in our submission in so pleading the matters in
30 the way we have, we have addressed what must be addressed
31 in terms of pleading the viable cause of action, the

1 cornerstone being to enable those parties against whom
2 these allegations are made to note fairly, the claims
3 which are put. We really can't see how it could be said
4 reasonably, from the particulars that have been provided,
5 how a defendant really doesn't know the allegations
6 against them, good or bad, but they can prepare for trial
7 accordingly. If the evidence isn't there to make good
8 the allegations the plaintiffs fail. If the evidence is
9 there in our case, we will urge that they can succeed.

10 HIS HONOUR: Yes.

11 MR SANTAMARIA: So I don't know Your Honour whether I've
12 covered - - -

13 HIS HONOUR: Yes I think I understand what you say. Dealing
14 with this document as a matter of pleading, you say that
15 205 makes the necessary material allegation against
16 Hanson and Minshull to lock them in to the Acts from 192-
17 197. Whether you come up to proof eventually, that's a
18 matter of to weight to less.

19 MR SANTAMARIA: Yes that's so.

20 HIS HONOUR: In 192 and 197 and for that matter 199, I
21 understand how you put that and I don't think you need to
22 say anymore about it.

23 MR SANTAMARIA: I won't say any more about that. Your Honour
24 can I say very quickly - - -

25 HIS HONOUR: That leaves Douglas doesn't it? It is Douglas.

26 MR SANTAMARIA: Douglas is Lucaston and Hampshire.

27 HIS HONOUR: The Triabunna claims - - -

28 MR SANTAMARIA: Would you like me to deal with Lucaston and
29 Hanson?

30 HIS HONOUR: Yes whatever order you like but - - -

31 MR SANTAMARIA: (Indistinct) - - -

1 HIS HONOUR: I think Minshull's situation was virtually the
2 same as Hanson's. Now Marr is a bit different.

3 MR SANTAMARIA: Marr is Styx and Triabunna 2004 and if I
4 can - - -

5 HIS HONOUR: There's a criticism by Mr Bornstein about
6 Paragraph 196.

7 MR SANTAMARIA: Right, well I'll come to 196. That's the
8 direction.

9 HIS HONOUR: Yes.

10 MR SANTAMARIA: That's immaterial fact. He says particulars
11 haven't been provided. Well we are entitled to do two
12 things. We're entitled to obtain discovery and
13 interrogate about the direction. If at trial nothing is
14 provided by way of discovery by which I include
15 interrogation, the matter becomes more problematic for a
16 plaintiff. However, the plaintiff is not restricted to
17 discovery and interrogation as the courts have said time
18 and time again.

19 A plaintiff, even if one assumes it has a difficult
20 case, is entitled to go to trial and adduce whatever
21 evidence it can from whatever quarters it can. It can be
22 direct evidence or it can be circumstantial evidence.
23 One suspects in a case like this where the plaintiff
24 isn't privy to the steps which led up to the trespasses
25 that there'll be a relatively high degree of inference to
26 be borne.

27 HIS HONOUR: Well, Sir Isaac Isaacs said all this in 1931
28 or whatever it was.

29 MR SANTAMARIA: In the (indistinct) case.

30 HIS HONOUR: Yes. So it's not - - -

31 MR SANTAMARIA: So, and nothing's been said further. There is

1 one authority though just to jump away from Mr Marr. I
2 will come back to him, but we turned up one authority,
3 Your Honour, in Adsteam which - - -

4 HIS HONOUR: Is it in this book that I've - - -

5 MR SANTAMARIA: No, no, it's not in the book but it's referred
6 to in Bateman's case that the decision of Justice Barrett
7 which followed many years after (indistinct) and Your
8 Honour, if I could just - - -

9 HIS HONOUR: I think I've - we've looked at Adsteam once before
10 I think.

11 MR SANTAMARIA: Have we? Well - where's my copy of it. Here
12 it is. Can I just refer Your Honour to - - -

13 HIS HONOUR: Adsteam's (indistinct).

14 MR SANTAMARIA: Yes, do you have a copy there? It was reported
15 in 1985. It's one - reports of 127. But the passage
16 that I wanted to take Your Honour to really begins at the
17 bottom of 131 and continues over to 132 and it's really
18 useful for two reasons. Not only - - -

19 HIS HONOUR: 131, yes?

20 MR SANTAMARIA: Beginning of 131. Let me just tell you very
21 quickly what this case was about. It concerned the
22 Queensland company's acquisition of shares code. And
23 it's an authority on point because it was a strike out
24 application brought by various defendants on the grounds
25 that the plaintiff had not provided sufficient
26 particulars of an allegation of acting in concert.

27 The issue was in that case whether the parties had
28 acted in concert to acquire a number of shares in a
29 company in a manner which contravenes s.74 of the code.
30 And the passage that is of greatest relevance is that on
31 p.132 starting with the words "Much the same conclusion".

1 First of all the paragraph - I just want to read that
2 paragraph.

3 "Much the same conclusion is true of the allegation
4 of acting in concert ... (reads) ... incidents of separate
5 acts is insufficient" et cetera. He then recites the
6 particulars that had been pleaded in that statement of
7 claim and then over the page, he summarises them in the
8 first full paragraph by saying, "Stripped of all it's
9 unnecessary ... (reads) ... extremely likely that the
10 plaintiffs" - - -

11 HIS HONOUR: "Unlikely".

12 MR SANTAMARIA: "Extremely unlikely that the plaintiffs will be
13 in a position ... (reads) ... established by direct
14 evidence". I won't read the following paragraph.

15 HIS HONOUR: Yes.

16 MR SANTAMARIA: Bottom of the page. So, that when our friend,
17 Mr Bornstein complains about no particulars, about what
18 was said at meetings, no particulars about who was sitting
19 where et cetera, with respect, that would be an entirely
20 artificial and unrealistic enterprise. The very nature of
21 this case is of a public interest group which has strongly
22 held convictions about the undesirability of logging in
23 particular forests and woodchips and whatever else.

24 Opinions which it is perfectly entitled to hold and
25 to debate vigorously, but from the nature of the thing,
26 it's not likely that the defendant organisation would
27 broadcast it's plans abroad as to the conception of the
28 plan, how it would be implemented et cetera, because that
29 would undo the very surprise which gives the trespasses
30 their novelty, interest, advantage and all the rest.

31 So, that if our friend is expecting that we would be

1 in a position to provide an advance of discovery or
2 interrogation or obtaining evidence in other ways, then I
3 suspect we're bound to disappoint him. But that does not
4 mean that there is not a viable cause of action and the
5 case which the defendants have to meet is properly
6 articulated in a fair and proper manner.

7 HIS HONOUR: Yes.

8 MR SANTAMARIA: Just for the sake of completion, the authority
9 of Adsteam was picked up by Justice Hedigan in the Linter
10 Group case, Linter Group v. Price Waterhouse. That's an
11 unreported decision of this court of 1 October 1993. We
12 have the Butterworths extract if that's of use to Your
13 Honour. Also the State of Queensland v. Pioneer Concrete
14 Queensland Pty Ltd reported at 1999 A.T.P.R. 41-691.

15 HIS HONOUR: Just a moment? 1999 A.T.P.R.?

16 MR SANTAMARIA: 41-691.

17 HIS HONOUR: Yes.

18 MR SANTAMARIA: And whilst the decision of Porteous v. Rinehart
19 and others is a decision of a Master of the Supreme Court
20 in Perth, nevertheless that decision is reported at 1997
21 22 A.C.S.R. 364 and we refer Your Honour to the comments
22 of the Master, I believe an experienced Master at p.376
23 at about Point 6 of the page. We'll hand copies of each
24 of those authorities to Your Honour in case they're of
25 some assistance.

26 HIS HONOUR: Yes.

27 MR SANTAMARIA: But they don't add to what really Justice
28 Isaacs said a long time ago reiterated in the Adsteam
29 case as to - - -

30 HIS HONOUR: Is Queensland v. Pioneer, that's Justice Barrett,
31 isn't it?

1 MR SANTAMARIA: No.

2 HIS HONOUR: No.

3 MR SANTAMARIA: That's Justice Drummond in Queensland.

4 HIS HONOUR: Drummond, that's, yes.

5 MR SANTAMARIA: And the paragraphs that - - -

6 HIS HONOUR: Yes, what are the paragraphs there?

7 MR SANTAMARIA: 12 to 22 and 34 to 36.

8 HIS HONOUR: Yes.

9 MR SANTAMARIA: Paragraph 22 is - - -

10 HIS HONOUR: I think I referred to this in Gunns No.1.

11 MR SANTAMARIA: Look Your Honour - - -

12 HIS HONOUR: It seems familiar. 12 to 22, yes?

13 MR SANTAMARIA: Especially Paragraph 22 and 34 to 36.

14 HIS HONOUR: Yes.

15 MR SANTAMARIA: I'm sorry to burden you with more authorities

16 Your Honour but it's something that arose out of the

17 submissions made by, principally by our friend

18 Mr Bornstein and touched upon to a lesser extent by our

19 learned friends at the far end of the Bar table. I was

20 in the middle of addressing Your Honour on the

21 involvement of was it Marr? Mr Marr. Mr Marr's

22 involvement arises in relation to two claims. The Styx

23 Valley claim which occurred on 24 November 2004. What

24 I've said about Hanson and Minshull applies to Marr as

25 well.

26 HIS HONOUR: Yes.

27 MR SANTAMARIA: In relation to the Styx Valley. In relation to

28 Triabunna 2004, what is pleaded is that at meetings

29 attended by Mr Marr and Law and Morrow of the Wilderness

30 Society in November 2003 to February 2004, a decision was

31 made that there would be another trespass and lock in,

1 lock on at the Triabunna Mill and wharf facility which is
2 in South East Tasmania from memory and that this would
3 occur in February 2004. At the meeting, Paragraph 83, we
4 set out the decisions which were taken at that meeting to
5 give flesh to the bone of the material allegations that
6 Marr, Law, Morrow and the Wilderness Society each
7 intended that they would interfere with the contractual
8 relations and the first plaintiff's trade and business.
9 So there are Sub-paragraphs A and B.

10 HIS HONOUR: Yes.

11 MR SANTAMARIA: Marr is referred to again in C. And our
12 learned friend was good enough to refer you to Sub-
13 paragraph I which is part of the implementation stage as
14 it were following the initial decision that there would
15 be another trespass and lock on at the mill and wharf
16 facility. Now with respect, these particulars aren't too
17 bad because they tell these defendants exactly what is
18 said about them.

19 HIS HONOUR: Yes.

20 MR SANTAMARIA: Now he says well, he's not sure whether it's
21 said about him that he got the audiovisual equipment, the
22 cameras, the ropes or is it the case that Law did it.
23 With respect as a matter of pleading, that's artificial.
24 What the pleading does is to describe the conception of
25 the plan and its implementation, those who were present
26 throughout including Marr. The trespass occurs on
27 15 February 2004. Morrow an employee of the Wilderness
28 Society, someone we will invite the court to infer at
29 trial was closely involved with Marr, a senior officer of
30 the Wilderness Society. Morrow commits the trespass, he
31 does it with others whom we don't join as parties to the

1 proceeding.

2 But it's, one might say admirably organised because
3 you've got some people driving the rubber duckies who
4 don't come on and then after the trespass occurs on
5 16 February you've got the Wilderness Society swiftly and
6 efficiently publicising photos of the trespass on the
7 website and various statements of proclamation about the
8 success of the activity. It's all well and good. The
9 question is, is it a tort? And does a plaintiff going
10 about its business have an entitlement to come to court
11 to seek compensation for actual loss and damage which
12 occurs as a result of torts being committed and about
13 Marr, we say he is right in the middle of it as a person
14 who acted in consort with Morrow who committed the
15 trespass.

16 Paragraph 83(P) is the incidental clause as Your
17 Honour has said of most pleadings but in this case it
18 will only be after discovered interrogation that one can
19 provide further and better particulars, one would say if
20 necessary, that's deliberately put, if necessary because
21 in our submission it's properly particularised as it is.

22 HIS HONOUR: Yes.

23 MR SANTAMARIA: But we won't - we do not intend that our
24 friends will be under any doubt at the time of trial - by
25 the time of trial as to the evidence which will be led
26 against them. Your Honour the fact of the matter is in
27 this case both sides of the argument filmed just about
28 all of the trespasses so we wouldn't have thought in
29 terms of the management of the trial and the hearing of
30 the trial that it will actually take all that long.
31 There's no shortage of film.

1 Ours might be a little bit more rustic than our
2 friends' which are more polished productions for
3 promotional purposes but the question as to who did what,
4 when and how at the sites will not take this court very
5 long at all. The real issue of the trial will be about
6 the matters we're touching on now and that is whether the
7 evidence establishes that these events took place because
8 of the planning, implementation and support of the
9 Wilderness Society and its officers. That's going to be
10 the issue in the press.

11 HIS HONOUR: Yes.

12 MR SANTAMARIA: As against Marr, just to replicate what was
13 said in the case of the Styx matter against Marr, it's
14 pleaded that each of the acts set out in Paragraphs 76 to
15 80 - I'm now looking at Paragraph 85 - was done by the
16 person or persons alleged acting in consort with each of
17 Marr, Law, Morrow and the Wilderness Society to a common
18 end.

19 HIS HONOUR: Yes that's the material allegation.

20 MR SANTAMARIA: That is the material allegation.

21 HIS HONOUR: I understand how you - - -

22 MR SANTAMARIA: The particulars to 83 are picked up under
23 Paragraph 85.

24 HIS HONOUR: Yes.

25 MR SANTAMARIA: So that - if I've covered - - -

26 HIS HONOUR: Well that's all. I think Douglas, Mr Bornstein
27 concedes - his complaint about Douglas is a complaint
28 about particulars but I'm concerned today to determine
29 the efficacy of this statement of claim as a pleading and
30 that's all. I hear what people have said about
31 particulars and Mr Beach made the point in his written

1 submissions and briefly last time that he complains about
2 particulars as well.

3 MR SANTAMARIA: Yes he does. But he doesn't contest.

4 HIS HONOUR: He doesn't contest that the pleading establishes a
5 valid cause of action against his clients or a viable
6 cause of action against his clients.

7 MR SANTAMARIA: Nor does Mr Murdoch. In fact no one else does.

8 HIS HONOUR: No one else does yes. So that's all right, I
9 understand he - you put that note - I don't think I need
10 to trouble you anymore about Mr Douglas or Ms - is it
11 Ms Douglas or?

12 MR SANTAMARIA: Ms Douglas.

13 HIS HONOUR: Ms Douglas yes. Very well. Yes well I think I'll
14 hear Mr Dreyfus now.

15 MR SANTAMARIA: Yes and Your Honour I wanted perhaps after
16 Mr Dreyfus has - - -

17 HIS HONOUR: Then you can reply again. I was wanting to
18 separate it simply - this case has management problems
19 because of its size. Even though it's considerably
20 smaller than it was it's still not a small case, it's got
21 lots of things in it and it's easier for me as I say with
22 my limited attention span to concentrate on one bit of it
23 at a time so - - -

24 MR SANTAMARIA: Can I give you a present before I sit down Your
25 Honour. We've redone the table of representation which
26 includes some of those whom we left out on the last
27 occasion but it's actually useful to have when you
28 consider the management of this proceeding.

29 HIS HONOUR: Yes.

30 MR SANTAMARIA: Thank you Your Honour.

31 HIS HONOUR: So this is as at today yes?

1 MR SANTAMARIA: Yes.

2 HIS HONOUR: Yes Mr Dreyfus? Yes?

3 MR DREYFUS: In a sense Your Honour the very confusion that

4 Your Honour's experiencing is something created by the

5 form of the proposed pleading. It's very important we

6 would say Your Honour not to allow to allow the number of

7 names or the number of details that the plaintiff has

8 chosen to pile into this case to distract attention from

9 the position of individual defendants and we don't want

10 to go over the same ground that Mr Bronstein's already

11 gone over, we adopt the submissions he's made in respect

12 of the inadequacy of particulars being in itself a reason

13 to decline to give the lead that its sought at present.

14 What I did want to do was to take Your Honour

15 through just the pleading about Styx. The Styx matter as

16 it relates to Ms Morris and Mr Morrow - - -

17 HIS HONOUR: What paragraph are you on?

18 MR DREYFUS: Well it's the same paragraphs to which Your

19 Honour's already been taken, 204 and 205 but it's

20 starting at 192. Advice is that neither Ms Morris nor

21 Mr Morrow are alleged to have been present Your Honour at

22 any of the actions that are identified if Your Honour

23 just looks at Paragraph 204, if Your Honour looks at the

24 acts there referred at Paragraphs 192-197 and 199,

25 various people are said to have been involved in those

26 acts starting with Mr Douglas and unspecified others in

27 192, Mr Douglass and unspecified others but including Ms

28 Lorrigo - Ms Douglas, I'm terribly sorry, Ms Douglas and

29 others - unspecified others including Ms Lorrigo and

30 Ms Briggs, at 193. Similar personnel at 194.

31 Again Ms Briggs and Ms Lorrigo at 195, Marr and Law

1 with Briggs and Lorrigo at 196. Douglas again with
2 unspecified others at 197. Not - and ending at 199 again
3 Mr Douglas and unspecified others - sorry Ms Douglas and
4 with particulars given, Lorrigo, Shaw, Briggs Hubbard and
5 Nunn. Now I appear here for Ms Morris and Mr Morrow and
6 they are not said - - -

7 HIS HONOUR: That's - what numbers are they?

8 MR DREYFUS: I'm being confused here. Honest to God I have the
9 trouble with acting for seven people. I don't appear for
10 Mr Morrow.

11 HIS HONOUR: You appear for the seventh to the ninth?

12 MR DREYFUS: In this particular part of the claim, the Styx
13 claim, the only one of the defendants involved whom I
14 appear with Mr Morrow and Mr Thomson - Mr Gronow and
15 Mr Thomson, is Ms Morris and Mr Gronow was trying to
16 explain to me that it's Ms Morris is in the same position
17 as Mr Morrow in that neither of them are said to have
18 been present at any of the acts or conduct that's
19 referred to in this part of the - - -

20 HIS HONOUR: The pleading has to stand or fall on Paragraph 205
21 doesn't it?

22 MR DREYFUS: And just as 204 rests on a conclusion, it doesn't
23 plead any material facts, it simply asserts a conclusion
24 that at meetings on unspecified dates in both Hobart and
25 Canberra, persons there named agreed certain things.
26 That's a conclusion, so too in 205 - - -

27 HIS HONOUR: But that doesn't necessarily - in circumstances
28 such as this - I mean for the reasons set out by Justice
29 McPherson in the case that Mr Santamaria went to and the
30 long and somewhat 1930s type statements of Sir Isaac
31 Isaacs in Colvin they say the same thing don't they?

1 It's what Justice McPherson - it's improbable they'll be
2 able to prove the undertaking was allied there on a
3 particular day or days. To identify individuals acting
4 on behalf of names companies" et cetera. That's it isn't
5 it?

6 MR DREYFUS: The distinction between what's described by His
7 Honour Justice Isaacs in the 1911 decision of Associated
8 Northern Collieries - the Colvin case, Justice
9 McPherson's judgment in Adsteam is another example, are
10 both situations where particular acts are alleged against
11 the defendants, particular conduct is alleged against the
12 defendants and identified from which it is then said it's
13 possible to infer either an agreement or to use the
14 phrase that His Honour Justice McPherson is using, an
15 understanding.

16 Now if I can go quickly to the Adsteam decision His
17 Honour Justice McPherson makes the point immediately
18 before the passage that Your Honour's just referred to
19 about the improbability of the plaintiff being in a
20 position to allege with particularity what the
21 understanding was, if Your Honour sees in the immediately
22 preceding paragraphs at 133, but earlier in the judgment
23 as well, reference to what the defendants had done and
24 what QCL, Sumetco, Sweet and Holderbank had done was to
25 acquire shares, taking them already substantial
26 shareholders in the company, to a position of control.

27 Now, clearly you've got in that situation just as in
28 the matter that Your Honour put forward of the robberies
29 on three banks at the same time on the same day with the
30 meeting in the pub the night before, you've got
31 particular conduct on the part of the defendants from

1 which it's then said, we invite the court to infer an
2 understanding or to infer that an agreement was reached.

3 So too in the Colvin passage that's in fact set out
4 in the plaintiff's written submission, Justice Isaacs -
5 it's at numbered Paragraph 16 on p.7 of the submission,
6 Your Honour has read it many times.

7 HIS HONOUR: I've read that, yes.

8 MR DREYFUS: His Honour is referring to, "Proving a community
9 of purpose by independent facts, or" - and this is the
10 other example - "if the other defendant is shown to be
11 committing other acts tending to the same end, then
12 though primarily each set of acts is attributable to the
13 person whose acts they are and to him alone, there maybe
14 such a concurrence of time and character direction and
15 result as naturally to lead to the inference that these
16 separate acts were the outcome of a preconcert".

17 HIS HONOUR: But you don't need to have - I mean that's just a
18 method of proving something which if proved or admitted.
19 I mean the allegation that they did something with a
20 common purpose is sufficient for a pleading, it has to
21 be.

22 MR DREYFUS: Except that no acts are alleged against Ms Morris.

23 HIS HONOUR: But they don't need any acts, I mean you can be a
24 part of a joint tort without doing anything yourself.

25 MR DREYFUS: With respect Your Honour, there must be some
26 conduct on the part of the defendant that is alleged, and
27 to - - -

28 HIS HONOUR: Why can't it simply be a meeting between three
29 people who all agree to go out and assault someone and
30 one person doesn't go, he's disabled, he's in a
31 wheelchair and he can't assault anybody but he says, "Go

1 out, do it, do it fellas, beat him up". He's as much a
2 tortfeasor as the others.

3 MR DREYFUS: That's so, Your Honour, and in the example Your
4 Honour has just given there's conduct on the part of the
5 defendant in the wheelchair which was, "He said go out
6 and do it".

7 HIS HONOUR: That's right, but that conduct is not material to
8 the cause of action, it might be evidence which will
9 prove the cause of action.

10 MR DREYFUS: With respect, no Your Honour, it's the material
11 fact from which the agreement that is the conclusion is
12 to be inferred. And we say what's missing in this
13 pleading in relation to the Styx claim against Ms Morris
14 only from the defendants who we represent, is any
15 allegation of any conduct. All she's told is that she
16 attended unspecified meetings on dates unspecified in
17 November 2003 in two places, that's it. There's no
18 allegation of any conduct by her at all beyond the
19 attendance at a meeting and linked to it a conclusion
20 that's put forward, not a fact but a conclusion, that at
21 that meeting she agreed certain things.

22 Now the same complaint is to be made Your Honour, to
23 a lesser extent because some of the defendants - it's
24 most stark in relation to the Styx claim, because only
25 Ms Morris of the seven defendants who we appear for, is
26 the subject of that claim, and she's not present or
27 performing the acts that give rise to the claim.

28 HIS HONOUR: That's Ms Morris?

29 MR DREYFUS: Mr Morris, that's right. Her position is the same
30 as Hanson and Minshull. Now to a lesser extent but the
31 same problem occurs in the Hampshire and Lucaston claims

1 where there haven't been put forward against persons not
2 said to have been present. So if Your Honour is to look
3 at - I can just give Your Honour the paragraphs.

4 HIS HONOUR: Yes.

5 MR DREYFUS: The paragraph numbers for Lucaston, the acts are
6 at Paragraphs 114-142.

7 HIS HONOUR: Just let's look at those.

8 MR DREYFUS: The significance is only that there's no mention
9 of Ms Morris - - -

10 HIS HONOUR: Yes.

11 MR DREYFUS: - - - in any of those paragraphs.

12 HIS HONOUR: But the case made against her is made in respect
13 of those claims, those cases, by reference to an
14 allegation of common intention in each case.

15 MR DREYFUS: Yes, which Your Honour will see at 148 and 149.

16 Now we would agree Your Honour, that the particulars
17 proffered in respect of the Lucaston events are better
18 than those put forward for Styx, but they're still not
19 sufficient.

20 HIS HONOUR: Yes.

21 MR DREYFUS: For the Hampshire claim, if Your Honour could look
22 at 256 is probably sufficient. It's at a similar level
23 of vagueness to the Styx claim where Your Honour will see
24 from the particulars under 256, reference to various
25 undated meetings and a conclusion about agreement rather
26 than any conduct on the part of the relevant defendants.
27 Now we would say to Your Honour this is no ordinary case,
28 it is the position that this plaintiff has had more than
29 two years to get its case right, it is as Mr Bornstein
30 has pointed out to Your Honour, the position that many
31 requests for particulars have been made and not answered.

1 Probably thousands of pages of particulars have been
2 provided but not meeting the deficiency that still
3 remains. We really have no more information now against
4 those who we represent than was the case when the
5 proceeding started.

6 The other matter we sought to agitate, Your Honour,
7 was the position in respect of the joinder, which we say
8 is improper, of five claims which should be separate.
9 It's hard to see that it says anything other than a
10 continued oppression of the seven defendants for whom we
11 appear. By the plaintiff with of course vastly greater
12 financial strength. We've got the position and I hope
13 we've made this clear, Your Honour, that Mr Funnell is
14 involved on the present proposed pleading and the one
15 only of the remaining five claims. So, he's the person
16 who's in this - who presents the problem most starkly.
17 He's alleged to have been involved in the Triabunna
18 2003 - - -

19 HIS HONOUR: This is Mister - - -

20 MR DREYFUS: Mr Funnell.

21 HIS HONOUR: What number's he?

22 MR DREYFUS: The 15th defendant.

23 HIS HONOUR: And he's only alleged to have been in the - - -

24 MR DREYFUS: That - these numbers that the old numbers, Your
25 Honour, that is in the proceeding as it presently stands.

26 HIS HONOUR: Yes.

27 MR DREYFUS: Mr Funnell's been given another number in the
28 proposed pleading.

29 HIS HONOUR: Has he? Have we - I see. So he's 15 in the
30 current pleading then?

31 MR DREYFUS: Yes.

1 HIS HONOUR: Yes.

2 MR DREYFUS: The one that was last struck out and the chart
3 that's been put forward both last time and today, Your
4 Honour, the - uses the numbers from the last struck out
5 pleading.

6 HIS HONOUR: But the people have still got - what's happened
7 with the - with what's it RAM4 - that's got - - -

8 MR DREYFUS: Mr Funnell in that proposed pleading is the 14th
9 defendant.

10 HIS HONOUR: I see. So, they've dropped down - dropped - the
11 numbers have been dropped? Only one, is it?

12 MR SANTAMARIA: I'm sorry if this - this was meant to assist
13 rather than confuse. The earlier numbered defendants are
14 I suspect are the same throughout Marr, Law, Hanson,
15 Minshull, Douglas.

16 HIS HONOUR: Yes.

17 MR SANTAMARIA: The others who were dropped out, tended to be
18 at the bottom part of the list and so that their
19 numbering might have - - -

20 HIS HONOUR: The numbers changed about 14.

21 MR SANTAMARIA: - - - if it's convenient, we'll renumber this
22 in any way our friends or the court would like, but I
23 suppose the point is that Funnell, it's true to say, is
24 in only one proceeding Triabunna 2003, but is represented
25 by - Mr Dreyfus will be here in every one of the other
26 proceedings with his team of counsel.

27 HIS HONOUR: Yes. Yes, I see. So - right - so the numbers
28 that have turned up in V4, what we're presently talking
29 about are new numbers. Even though there's not much
30 change but there is some change?

31 MR SANTAMARIA: Yes.

1 HIS HONOUR: It's all right, it doesn't matter. I'm - - -
2 MR SANTAMARIA: I think that's right, Your Honour.
3 HIS HONOUR: Yes, I think it's probably - but the proceeding
4 itself has never been amended to delete anyone, has it?
5 Not yet?
6 MR SANTAMARIA: Well, you have given leave to discontinue
7 against somebody.
8 HIS HONOUR: Yes, but they're still - yes, that's the one that
9 - 20 I think he was.
10 MR SANTAMARIA: Yes, and the reconstitution of the numbering
11 will await the orders which Your Honour will make in the
12 other matters which are presently before you where the
13 plaintiffs have said they are discontinuing against the
14 seven, eight or so defendants.
15 HIS HONOUR: Yes.
16 MR SANTAMARIA: So that at some point - - -
17 HIS HONOUR: There'll need to be an order correcting the
18 heading - the title of the action as well.
19 MR SANTAMARIA: Yes, there will.
20 HIS HONOUR: Yes, I see. All right, well, I understand that.
21 Well, I think Mr Dreyfus is not misled by this. He knows
22 Mr Funnell is No.15 and is only involved in Triabunna.
23 MR DREYFUS: We weren't making any complaint at all.
24 HIS HONOUR: No, no.
25 MR DREYFUS: It's good to have been able to clarify Your
26 Honour's concern that they are different numbers, but we
27 found the chart helpful.
28 HIS HONOUR: Yes, so you say that Mr Funnell is only in one
29 proceeding. One action?
30 MR DREYFUS: Yes.
31 HIS HONOUR: One part of it. One course of action and - - -

1 MR DREYFUS: And I can quickly, it's helpful to do this looking
2 at the table of representation the plaintiff's provided,
3 Your Honour. Of the seven defendants for whom we appear,
4 none of them is in the Triabunna 04 action.

5 HIS HONOUR: Yes.

6 MR DREYFUS: Six of them are alleged to have been involved in
7 the Lucaston dispute. One - that's Ms Morris, is alleged
8 to have been involved in Styx, and four are alleged to
9 have been involved in Hampshire. So in no sense - for
10 each of the five disputes that are now included in this
11 proposed pleading is there an identity of the group of
12 seven for whom I appear, nor is there an identity of
13 course of defendants for any one of them.

14 HIS HONOUR: Yes. This is one of the reasons, I think back at
15 - in - when we were arguing V2, I think I at one stage
16 floated the idea of there being separate statements of
17 claim.

18 MR DREYFUS: Yes.

19 HIS HONOUR: And to some extent the plaintiffs took that up but
20 not - not to the ultimate extent. But Mr Santamaria in
21 his submission suggests that this is a management
22 question more than anything else and it can be dealt with
23 by appropriate orders under Order 9 for separate trials,
24 can't it?

25 So that people aren't brought along unnecessarily.
26 There won't be any necessity for people who aren't
27 involved in a case to be here while the case against
28 somebody else is running. It will be able to be managed
29 in that way, won't it?

30 MR DREYFUS: We say there are inherent - looking at it from the
31 point of view of the rules of the court, that it's

1 neither just nor convenient to adopt this course.

2 HIS HONOUR: Well what's the justice point? Where does the
3 injustice arise? That's what - - -

4 MR DREYFUS: Mr Funnell should not be asked to endure a trial
5 at all that involves a whole range of events and causes
6 of action and different liability of other defendants
7 that involves him not one jot.

8 HIS HONOUR: He won't be. I mean that will be able to be fixed
9 by appropriate management orders. I mean there'll be,
10 there'll be able to be, there will be - part of this case
11 will involve evidence concerning the plaintiff and its
12 operations and how it works and what its structures are.
13 They'll be common presumably to all of these claims.
14 That evidence can be taken in the presence of anyone who
15 wants to be here. At that point, the matter can be, this
16 is speaking now without having heard anybody but my idea
17 would be that at that point the trials would be split and
18 one trial would deal with Triabunna and the next one
19 would deal with Lucaston or whatever. And the parties
20 involved in them would be the only ones involved. I mean
21 why wouldn't, why couldn't that be both - well firstly,
22 would there be any injustice in that? I mean what
23 would - - -

24 MR DREYFUS: Potentially Your Honour. There's a concern on the
25 part of any defendant naturally enough that they form but
26 part of a larger trial.

27 HIS HONOUR: Yes, well I can see that but there's no jury in
28 this case.

29 MR DREYFUS: There's no jury but nevertheless it's a risky
30 course, we've actually asked for a jury Your Honour and
31 that matter has not been yet resolved.

1 HIS HONOUR: Well we'll hear that application whenever you want
2 to bring it on. It won't take long Mr Dreyfus, I can
3 tell you.

4 MR DREYFUS: We haven't been heard on that.

5 HIS HONOUR: No, I know.

6 MR DREYFUS: There is always a concern on the part of any
7 defendant to think that a trial is proceeding in their
8 absence as it were, albeit that it is said the matters
9 which are being now heard by the court don't concern the
10 claim against you. If there is to be an ongoing hearing
11 it's really an invitation to the defendant to accept what
12 could well be a greater risk that something will occur in
13 the course of the trial at which he or she is not
14 present, the other part of the trial that nevertheless
15 affects his or her interests. And that can be wholly
16 cured by simply requiring that as should have occurred
17 here, there be separate statements of claim and indeed
18 separate proceedings for each of the claims that are
19 brought.

20 The only real convenience arising here is a
21 convenience for the plaintiff. We've got the ironic
22 position that the plaintiff is seeking to take comfort
23 and urge the court to take comfort from the fact that the
24 seven defendants for whom we appear have been able to
25 secure representation by the same team of legal
26 representatives. But that happy coincidence is not
27 something that ought distract the court's attention from
28 their position as individuals.

29 HIS HONOUR: I think I can say to you that I don't, that -
30 such, if that has any weight I'm not sure it should have
31 any, it has so little that I wouldn't worry about it.

1 MR DREYFUS: I'm happy to hear that Your Honour. I mention it
2 only because it's been repeatedly referred to by the
3 plaintiffs.

4 HIS HONOUR: It may be that your clients will change solicitors
5 or change counsel or something.

6 MR DREYFUS: Indeed.

7 HIS HONOUR: But that, I'm more concerned about the - you say
8 that the justice question really relates to what, an
9 unconscious assumption by the tribunal of fact as to
10 facts taken from one hearing into another?

11 MR DREYFUS: That and we've got in a sense now hovering but not
12 articulated, hovering in this proceeding what in a sense
13 sounds a bit like the conspiracy that's now said to have
14 been abandoned in references to similar conduct. And
15 there is a concern Your Honour that if all five of these
16 proceedings are heard together, even if hypothetically
17 they're to be managed in the way Your Honour's indicated
18 which is separate trials, it's still assumed that that
19 would be before the same court. Be that a court
20 constituted by a judge and jury or a judge alone.

21 HIS HONOUR: Yes.

22 MR DREYFUS: And that's a concern. I wanted to hand to Your
23 Honour a judgment of the Court of Appeal in CE Heath in
24 which their Honours Justices Tadgell, Ormiston and
25 Phillips looked at the operation of Rules 902 and 906.
26 The prime judgment in this area was delivered - the
27 primary judgment here was delivered by Justice Phillips.
28 Your Honour will see that Justice Tadgell agreed with the
29 reasons of Justices Ormiston and Phillips. The
30 particular passages and I don't think I need take Your
31 Honour through them are first of all in the judgment of

1 Justice Ormiston at the foot of p.272 in the sentence
2 commencing, last sentence on the page Your Honour, "As to
3 joinder"?

4 HIS HONOUR: Yes.

5 MR DREYFUS: And going through to about Line 24 on the
6 following page where His Honour explained why it was that
7 it wasn't appropriate to allow the claims against the
8 insurers to proceed as part of this case. Perhaps also
9 at page, the same p.273 at about Line 40 where His Honour
10 Justice Ormiston said this: "As I consider that there
11 are no proper disputes which should be resolved whether
12 by joinder in the principal action or separately, it's
13 not appropriate to allow the dispute as presently
14 formulated to proceed".

15 But it's really the consideration of the joinder
16 issue in the judgment of His Honour Justice of Appeal
17 Phillips at 292 that we'd refer Your Honour to. Where at
18 292 in the first complete paragraph, Justice of Appeal
19 Phillips said, "It's useful to turn now to the rules of
20 the court to see what's required in order to justify the
21 joinder of the appellants although little or no attention
22 was given to the rules in argument".

23 The sorts of questions - this is a very different
24 case - - -

25 HIS HONOUR: Yes, I can see that, it's - there might have been
26 questions of binding other parties by results of other
27 questions.

28 MR DREYFUS: Yes, and that's again not a question which arises
29 here.

30 HIS HONOUR: Yes, no.

31 MR DREYFUS: But nevertheless, it is necessary to focus on, and

1 this judgment makes this clear, on what are the questions
2 that are sought to be agitated in the proceeding. So
3 you'll see in the middle of that p.292, His Honour
4 saying, "Those insurance questions scarcely arise out of
5 the 'same transactions or series of transactions' as to
6 the issues of primary liability of the auditors to the
7 plaintiff ... (reads) ...however leave will be given only
8 if the justice of the case so requires".

9 We'd commend, Your Honour, the consideration that
10 follows on p.293, you'll see that His Honour's referring
11 to the requirement for the joinder to be just and
12 convenient, that's at Line 37 on 293, and over the page
13 on 294, I'm not going to keep reading, because it's a
14 very lengthy passage, but I wouldn't want it thought,
15 because I'm not reading it out, Your Honour, that I'm
16 skipping over it.

17 HIS HONOUR: Yes, I haven't got - I see, yes - - -

18 MR DREYFUS: It's photocopied on the reverse side, Your Honour.

19 HIS HONOUR: Yes.

20 MR DREYFUS: At the - - -

21 HIS HONOUR: Two nine four.

22 MR DREYFUS: We're trying to be environmentally friendly.

23 HIS HONOUR: Yes.

24 MR DREYFUS: It's very difficult, given the forests have been
25 cut down for this case.

26 HIS HONOUR: For this case already, yes. Where does - - -

27 MR DREYFUS: At the foot of 294, Justice of Appeal Phillips
28 continued, "One is left then with the general discretion
29 that obtains under 9.02B, if Rule 9.02B may be invoked in
30 the circumstances of this case, it is not to be thought
31 that joinder would be ordered, unless it were shown to be

1 just and convenient. In this instance, to add to this
2 proceeding, the further issue's sought to be raised by
3 the prayer for declarations ... (reads) ... parties must
4 necessarily be put against their wishes", and His Honour
5 goes on in the last paragraph there, before the
6 conclusion, to refer to the separate representation
7 problem.

8 We do say to Your Honour, and the table really makes
9 it sharply clear, that it is neither just nor convenient
10 to rope Mr Funnell into a lengthy trial, when he's only
11 said to have been involved in one of the incidents, or
12 the same comment could be made for Mr Brian Dummich in
13 the Lucaston action, that being the only one of the
14 actions that he is said to be involved in.

15 HIS HONOUR: Dummich's only in Lucaston?

16 MR DREYFUS: Dummich is only in Lucaston, and Mr Funnell's
17 only - - -

18 HIS HONOUR: Funnell's only in Triabunna - - -

19 MR DREYFUS: - - - Oh three.

20 HIS HONOUR: Yes, yes. There's a decision of Sir John Young's
21 about 9.02, I'm trying to think of it - - -

22 MR SANTAMARIA: Glenwood.

23 HIS HONOUR: What was it called?

24 MR SANTAMARIA: Glenwood v. Mayo, is that the - - -

25 HIS HONOUR: Yes, I think it was, where His Honour was somewhat
26 less - - -

27 MR DREYFUS: Glenwood Management Group v. Mayo.

28 HIS HONOUR: Yes, I think that's it.

29 MR DREYFUS: It's unreported, Your Honour, but referred to in
30 the Williams annotations.

31 HIS HONOUR: Yes, I think I obtained a copy of that in a matter

1 that I was dealing with.

2 MR DREYFUS: And but - - -

3 HIS HONOUR: His Honour was very keen to express the discretion
4 conferred by 9.02 very widely, as I recall. But that
5 doesn't matter, in the end, it's really a question of
6 whether I think in this case, because it's not a case
7 where you could say that there are matters of conformity
8 or requirement to bind parties to judgments, it's really
9 a question of whether there is any justice or undue
10 inconvenience, whether there's any injustice or undue
11 inconvenience to any party, given the capacity of the
12 court to order the hearing of trials differently.

13 The point you make, that a party may or may
14 perceive, I suppose, may be sufficient if a party
15 perceived that by not being present at the whole trial,
16 or the trial of everything, that they would suffer a
17 disadvantage, that could itself be a matter of some
18 concern.

19 MR DREYFUS: I can give Your Honour an immediate and concrete
20 example, which is the trial presently proceeding before
21 His Honour Justice Byrne in the 13th court.

22 HIS HONOUR: Yes.

23 MR DREYFUS: It's in Day 57 today.

24 HIS HONOUR: I've heard a lot about it.

25 MR DREYFUS: No doubt Your Honour has, I'm briefed in that
26 trial, I'm not present at it today, because today there
27 is evidence being given that relates to causes of action
28 that have no relevance whatsoever to my client's interest
29 in the proceeding.

30 HIS HONOUR: Yes.

31 MR DREYFUS: My client's one of the property owners adjacent to

1 the plaintiff's land, whose land was also contaminated,
2 and within this action, which is concerned with the
3 Environment Protection Act, notices from the EPA, the
4 claims of negligence and nuisance - - -

5 HIS HONOUR: Well, I managed it until I was disqualified, so.

6 MR DREYFUS: Indeed, Your Honour. Within this action, there
7 are two entirely discrete professional negligence claims
8 against, respectively, a firm of soil testers and a firm
9 of planners.

10 Those two professional negligence actions have not
11 any interest at all for my client as a landowner whose
12 seeking compensation from Spotless as a polluter to -
13 compensation in respect of expenses under the Environment
14 Protection Act for the cleanup notices. We face the
15 forensic choice every day of the 57 days of this trial as
16 to what level of representation our client is required to
17 have on that day, what level of work is required to be
18 done in respect of many volumes of the court book that
19 relate to the professional negligence claims, whether or
20 not some work, if any, should be done on the various
21 witness statements that relate only to the professional
22 negligence claims, because of course it's the position
23 that there might yet be facts or issues emerging from all
24 of that other material that has some implications for our
25 clients' claim. That problem can be entirely avoided
26 Your Honour by separate trials - - -

27 HIS HONOUR: The difference though is that Justice Byrne hasn't
28 - as I understand it he hasn't ordered separate hearings
29 - separate trials of these issues.

30 MR DREYFUS: And no one's sought them. I'm simply saying to
31 Your Honour that it's a concrete example of the problem

1 that arises when you've got multifarious claims within
2 the same trial. Saying there can be separate trials
3 arising from this one statement of claim is simply
4 putting off, we'd say wrongly, the decision that ought to
5 be made now, which is there should be separate pleadings.
6 They are simply too different - - -

7 HIS HONOUR: Do you say that there should be separate pleadings
8 in as sub-proceedings of this main proceeding? That was
9 what I - - -

10 MR DREYFUS: No, we say there should be five separate
11 proceedings, and that Gunn's attempts to get this
12 proceeding on foot to date should be put out of its
13 misery and they should be told to start again. But
14 Triabunna 03 as Your Honour can see readily from this
15 table involves different parties from Triabunna 04, none
16 of the seven defendants who we appear for are involved in
17 Triabunna 04, the events occurred a year apart and
18 there's simply no reason why we should be required, any
19 one of the seven defendants for whom we appear, should be
20 required to involve themselves in a proceeding that
21 raises events occurring that we've given the label
22 Triabunna 04 to. One can make the same point for each of
23 the other.

24 HIS HONOUR: Yes, the Wilderness Society's the common link in
25 each of them.

26 MR DREYFUS: That's so, but that's of no concern to us.

27 HIS HONOUR: No - yes all right, thank you Mr Dreyfus I - is
28 there anything else that you - - -

29 MR DREYFUS: As Your Honour pleases.

30 HIS HONOUR: Mr Santamaria I've read your outline, I understand
31 your argument on the substantive points. What about this

1 joinder problem?

2 MR SANTAMARIA: Well I think I can be very brief. Can I say
3 this - I had the pleasure of being with my learned friend
4 Mr Dreyfus in the Spotless case for only a few days, but
5 the Spotless case is an entirely different one from this.
6 These are - - -

7 HIS HONOUR: I don't think he was suggesting it was - he was
8 simply saying that there are problems - - -

9 MR DREYFUS: Just that it's on mind at the moment Your Honour.

10 MR SANTAMARIA: Well he's lucky to have had it on his mind for
11 two or three months I think by now but this is an
12 entirely difference case as was the (indistinct) Coleman
13 case which was managed by His Honour Mr Justice Hansen
14 but no shortage of examples that one can think of where
15 trials are broken up into manageable proportions fairly
16 so that no one's interests are prejudiced, and certainly
17 that there would be no prospect of any injustice to a
18 party. A couple of things might be said.

19 Firstly that you really don't have to decide now
20 whether at trial there will be the one matter all heard
21 together, that might be something which by the time the
22 matter is ready to be fixed for trial something might
23 have occurred which would indicate to the trial judge
24 that the case should be tried in some segments that lend
25 itself to the just and convenient disposition of the
26 matter so that you really with respect do not now have to
27 bind yourself as to how the matter will be tried. When
28 you asked my learned friend to articulate injustice we
29 would say that none was actually identified. The case of
30 Mr Dummich is not a bad case we would say an example for
31 us because - - -

1 HIS HONOUR: Which case?

2 MR SANTAMARIA: Mr Dummich I think was the - - -

3 HIS HONOUR: He's in Lucaston?

4 MR SANTAMARIA: Find my table - - -

5 HIS HONOUR: He's only in Lucaston - - -

6 MR SANTAMARIA: Funnell - I beg your pardon, Funnell.

7 HIS HONOUR: Funnell is only in Triabunna 2003.

8 MR SANTAMARIA: Only in Triabunna 2003 - now, yes, that's

9 right, Triabunna 2003 we would have thought would be

10 neatly heard together with Triabunna 2004. It is the

11 case that Mr Funnell is fortunate to have acting for him

12 the same firm of solicitors and barristers who appear for

13 Ms Morris and Mr Brown - - -

14 HIS HONOUR: I'm not sure thought that that - can that really

15 be a consideration? He might - if a decision was made

16 based on that, that may tie him effectively to retaining

17 those solicitors continuously, he may not want to.

18 MR SANTAMARIA: But Mr Murdoch's position is perhaps a better

19 one. Mr Murdoch doesn't complain, he's Mr Morrow's

20 counsel.

21 HIS HONOUR: He's Mr - yes - - -

22 MR SANTAMARIA: Maurice Blackburn Cashman.

23 HIS HONOUR: He's acting only for Mr Morrow?

24 MR SANTAMARIA: Mr Morrow, and we don't understand Mr Beach for

25 the Wilderness Society who of course is in every claim.

26 HIS HONOUR: He's in everything so he's - - -

27 MR SANTAMARIA: We don't understand Mr Bornstein to have

28 complained either, so our point is that when the

29 statement of claim is looked at whilst we're not relying

30 on similar fact evidence there is a compelling case that

31 the circumstances giving rise to the separate claims

1 involve common questions of law and fact which attract
2 the jurisdiction of the court under Rule 9. But
3 that - - -

4 HIS HONOUR: The common questions of fact are what the -
5 they're the set up of Gunns' business and its
6 subcontractors and things.

7 MR SANTAMARIA: Contractors. The planning of each separate
8 trespass by the Wilderness Society, the modus operandi
9 which were employed - - -

10 HIS HONOUR: But isn't the fact that you say that - the fact
11 that you say that raises the problem, doesn't it? That
12 if in fact the modus operandi of the Wilderness Society
13 is a relevant fact in every case, well, then evidence
14 going to that modus operandi in every case is relevant to
15 every case.

16 MR SANTAMARIA: But it's not, with respect, too complicated.
17 All it is, is the organisation of the rubber duckie who
18 goes onto the land, who locks on, who takes the pictures,
19 that's it.

20 HIS HONOUR: But what - what happens to Mr Funnell when, for
21 example, Hampshire's being litigated and evidence about
22 the way the Wilderness Society's set up and deals with
23 that - - -

24 MR SANTAMARIA: Well, with respect to Mr Funnell, it's
25 inevitable that in dealing with Triabunna 2003, the
26 evidence of the conception of the plan and implementation
27 of the plan as against the Wilderness Society will be
28 given. He'll be present for that. He does not need to
29 be present for any other claim involving Triabunna 04,
30 Lucaston, Styx or Hampshire and of course he's got
31 nothing to do with (indistinct) either.

1 Now, if he wants to be present throughout because
2 he's interested, terrific. But, there's no necessity for
3 him to be there. There's no prejudice that would be
4 occasion to him if these other matters were heard and
5 determined as it were within - phases within a trial.
6 The evidence about Triabunna 2003 v. The Wilderness
7 Society is not the same evidence against the Wilderness
8 Society in relation to Triabunna 2004.

9 The events occurred a year later as our friends have
10 told you.

11 HIS HONOUR: Yes, but if you were - if you're trying one of
12 these claims, one of these cases, and evidence about the
13 way the Wilderness Society publicises itself or the way
14 in which the Wilderness Society recruits members becomes
15 relevant. I could imagine upon writing the judgment that
16 the Tribunal of fact or upon coming to the conclusion,
17 the Tribunal of fact might say well that - say things
18 like, "The Wilderness Society as was evident in relation
19 to the Hampshire matter and the Lucaston matter recruited
20 members in such and such a way and it did the same with
21 respect to Triabunna 2003". Mr Funnell may not have
22 heard of what the evidence was in the first two of those
23 propositions. It mightn't have been any.

24 MR SANTAMARIA: Well, then no findings could be made in
25 relation to Mr Funnell.

26 HIS HONOUR: Well, that's right, but that might create a
27 problem for the trial. I mean, that's right. You -
28 otherwise he'd be entitled to complain. But how do you -
29 in theory what you're saying - I've got - I don't have
30 any difficulty with. As a broad - but once you begin to
31 examine it closely, I just wonder whether it - whether it

1 can work.

2 MR SANTAMARIA: Well, may I say two things. Firstly, we are
3 not asking Your Honour to do any more at this
4 stage - - -

5 HIS HONOUR: Deal with the question now.

6 MR SANTAMARIA: - - - than to allow the - to remove the stay
7 and allow the proceeding to proceed constituted as it
8 presently is.

9 HIS HONOUR: Yes.

10 MR SANTAMARIA: The question of how it may be conveniently
11 heard and determined, we would have thought will be more
12 usefully addressed once discovery and interrogation and
13 those processes premised by the defences have been
14 obtained. So one can really at that stage weigh up and
15 identify what's truly an issue and then one might be in a
16 position to identify true prejudice if prejudice exists.

17 HIS HONOUR: What if you - if you then - but by the time you
18 get to that point, you might have a situation where
19 Mr Dreyfus makes the same submission he's making today,
20 the court might decide that the only way that the matter
21 can be dealt with is to - is to in effect stay the
22 proceeding and allow the plaintiff to commence five other
23 proceedings.

24 MR SANTAMARIA: Well - - -

25 HIS HONOUR: That's what Mr Dreyfus is effectively saying.

26 He's saying, "Well, at this point, I should - if I was to
27 allow this statement of claim to be delivered, it should
28 be - to be filed, it should be on the basis that it's
29 split up into sections and filed as a statement of claim
30 in five separate proceedings.

31 MR SANTAMARIA: Well, I can't imagine why a party would - and

1 this is presumably why the Wilderness Society doesn't
2 press the point that was raised by Mr Dreyfus. Why
3 anybody would want in a case like this five sets of
4 proceedings, five sets of defences, discovery,
5 interrogation or - - -

6 HIS HONOUR: Well, Mr Funnell will know because he's not there.
7 He's only - he - speaking for - only for Funnell, he said
8 he would have a legitimate interest in saying, "I want
9 this to be as small as it possibly can" and I'm only in
10 one of these things. I don't want to - I don't want to
11 be the slightest bit concerned with Styx or Lucaston and
12 Hampshire.

13 MR SANTAMARIA: But a court can accommodate Mr Funnell's
14 interests at trial. We would have - submitted - - -

15 HIS HONOUR: Subject only to this - I - I'd - yes, so - well, I
16 think - I think the question then for me to determine is
17 whether I determine the question now or whether I put it
18 off until after the - till the matter is effectively
19 ready for trial and then deal with it.

20 MR SANTAMARIA: We've got no hard and fast view about it. We
21 accept with respect the point that Mr Dreyfus raises.

22 We say about it that it's really something which
23 occurs at an abstract level at the present stage, it
24 maybe that with the passage of time some prejudice to
25 Mr Funnell might be identified, but we also emphasise
26 that there is only one party that is pressing, given all
27 that's gone on in this case to date, that there be a
28 division of the proceeding into five matters. And I
29 would remind Your Honour as well that when we first came
30 back to the court in November, soon after our involvement
31 in the matter, we actually did draw three statements of

1 claim to divide it up because - - -

2 HIS HONOUR: Yes, somebody complained about that.

3 MR SANTAMARIA: And then someone complained about it, so that

4 it really is difficult for a plaintiff in a case like

5 this to satisfy everybody, and one has learnt from

6 experience that one should not try. However - - -

7 HIS HONOUR: All right, well I understand how you put it

8 Mr Santamaria - - -

9 MR SANTAMARIA: I don't think there are any other matters that

10 are not in our written submissions which our learned

11 friend - - -

12 HIS HONOUR: Very well, well I shall consider these matters. I

13 will deliver a judgment which will deal with the costs'

14 issues that are outstanding in respect of which I've

15 received I think everybody's submissions, and I will deal

16 with these pleading questions in due course.

17 MR SANTAMARIA: Thank you Your Honour.

18 MR DREYFUS: If the court pleases.

19 HIS HONOUR: Adjourn the court.

20 - - -