

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

No 9575 of 2004

BETWEEN:

GUNNS LTD AND ORS

Plaintiffs

-and-

ALEXANDER MARR AND ORS

Defendants

OUTLINE OF REPLY SUBMISSIONS OF 7<sup>TH</sup>-9<sup>TH</sup> AND 14<sup>TH</sup>-17<sup>TH</sup> DEFENDANTS  
ON STATEMENT OF CLAIM V3 STRIKEOUT APPLICATION

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Date of document: 1 March 2006

Filed on behalf of the 7<sup>th</sup>-9<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> defendants

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**Agency**

1. Notwithstanding the arguments set out at paragraphs 5-14 of the plaintiffs' outline of submissions dated 15 February 2006, agency has still not been properly alleged or particularized. Not every employee or volunteer of an entity can be said to be its agent. Therefore, more is required concerning how the agency arose than is set out at paragraph 6(d) ff of the plaintiffs' submissions. As paragraphs 7-14 of their submissions make clear, the plaintiffs have yet to allege or particularize sufficient facts which, if true, would make agents of the various defendants against whom that is alleged, or what they allegedly did was within their authority.

2. Though conspiracy and agency can arise from related factual circumstances, they are not the same thing, and need to be pleaded and particularized separately. It is accordingly inadequate for the plaintiffs to say (as they appear to at paragraphs 15-19 of their submissions) that they are not required to plead and particularize the alleged agencies properly because they flow from the alleged conspiracy.

### **Conspiracy**

3. In any event, for the reasons given in the defendants' grounds and outlines, the plaintiffs have not pleaded or particularized their conspiracy allegations properly.
4. Among other things, even if the elements required to be established to make out the conspiracy claim are as set out by the plaintiffs at paragraph 82 of their submissions, those elements have not been properly pleaded and particularized. In particular, it is still not clear how each combination said to give rise to the alleged conspiracies are said to have arisen.
5. If, as the plaintiffs appear to argue at paragraphs 75-81 of their submissions, malice is not a necessary element of the conspiracy claim that they have alleged, it ought not to have been pleaded. If it is pleaded, it should be particularized.

### **Knowledge**

6. Even if all that is required for a claim of wrongful interference with contractual relations is the general level of knowledge set out at paragraph 20 of the plaintiff's submissions, that level of knowledge must be alleged and properly particularized. Simply asserting knowledge in a different way, by use of phrases such as 'well knew' (plaintiff's submissions paragraphs 21, 27), does nothing to assist the defendants (or the Court) in knowing what the plaintiffs' case is that will have to be met.

7. Contrary to what is said by the plaintiffs at paragraphs 21-29 of their submissions, particulars of states of mind such as knowledge (or intention or malice) cannot be provided by simply asserting, in different terms, the same thing. Nor can it be correct to say (as the plaintiffs do at paragraph 27 of their outline) that “[n]o other material fact connected with the knowledge is necessary other than the assertion that there was knowledge”. What rule 13.10 requires is that the material facts in respect of which evidence will be led at trial to make out the cause of action alleged be set out.
8. The 7<sup>th</sup>-9<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> defendants are entitled to be given proper particulars of the allegations made against them, in response to their detailed requests. They should not be required (as the plaintiffs appear to assert at paragraph 82 of their submissions and the accompanying footnotes) to trawl through hundreds of paragraphs of particulars given in response to requests from other defendants. In any event, as set out above, merely asserting the existence of an alleged fact in different words is not the same as properly particularizing it.

### **Damages**

9. If not all the damages claimed are claimed against each defendant (as the plaintiffs say in paragraph 83 of their outline), that should be made clear in the prayer for relief.

### **Conclusion**

10. The 7<sup>th</sup>-9<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> defendants otherwise rely on the common grounds and submissions and their own outline of submissions already filed.

Counsel for the 7<sup>th</sup>-9<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> defendants,  
1 March 2006.

Dated:

1 March 2006.

  
HERBERT GEER & RUNDLE  
Solicitors for the 7<sup>TH</sup> - 9<sup>TH</sup> AND 14<sup>TH</sup> - 17<sup>TH</sup>