

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

No. 9575 of 2004

BETWEEN

GUNNS LIMITED & ORS  
(according to the schedule attached)

Plaintiff

And

ALEXANDER MARR & ORS  
(according to the schedule attached)

Defendant

BRIEF OUTLINE OF SUBMISSIONS OF  
7<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> DEFENDANTS  
ON APPLICATION TO STRIKE OUT STATEMENT OF CLAIM

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Filed on behalf of: Seventh, Eighth, Fourteenth, Fifteenth, Sixteenth  
and Seventeenth Defendants

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**‘Campaign against Gunns’ conspiracy claim**

1. The statement of claim in this proceeding is in reality a claim for a few minor trespasses dressed up as a major conspiracy and economic tort claim.
2. The plaintiffs have been unable to allege or particularise any agreement or combination between the defendants that could support the ‘overarching’ conspiracy claim made in paragraphs 9-15 and 526-529 of the statement of claim.
3. Nor have they alleged or particularised any agreement or combination between the 7<sup>th</sup> - 8<sup>th</sup> and 14<sup>th</sup> - 17<sup>th</sup> defendants (or any other defendants) to the effect that they would conduct a

campaign against Gunns including each (or any) of the 'actions' alleged in the rest of the statement of claim.

4. The general pleadings at paragraphs 9-15 and 526-529 allege a vague 'campaign against Gunns', and are hopelessly inadequate to sustain an allegation that hundreds of specific acts subsequently alleged were part of a combination or conspiracy to injure by unlawful means. In many cases, no connection between the actions is alleged save for the commonality of some defendants in some actions. As Samuel Johnson might have put it, the claim is for 'heterogeneous torts by force yoked together'.
5. The plaintiffs' inability to particularise the agreements or combinations said to constitute the conspiracy suggests that they cannot establish an arrangement between the defendants of the nature they allege. In those circumstances, the plaintiffs ought not have the evidentiary and other advantages that accrue from a conspiracy allegation. Nor ought they be allowed to claim aggravated and exemplary damages on the basis that what are really a number of disparate alleged acts were part of a single conspiracy.
6. The 7<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> defendants say that the paragraphs dealing with the 'campaign against Gunns' conspiracy claim are also liable to be struck out for the reasons advanced by the other defendants.

#### **No particulars of agency, etc**

7. The allegations against the 17<sup>th</sup> defendant in paragraphs 12-13 are hopelessly vague, and impermissible. Similar comments apply to paragraphs 10-11 and 14-15.
8. No guidance is given as to where in the lengthy statement of claim actions are alleged to have been done by the 17<sup>th</sup> defendant, and, where they are so alleged, whether the 17<sup>th</sup> defendant was alleged to have done it itself, or through which kind of intermediary, who the person alleged to have done it on behalf of the 17<sup>th</sup> defendant was, and what authority he or she had. It is not sufficient to allege (e.g. at paragraphs 262 and 529) that, in doing alleged unlawful acts, persons acted 'on behalf of' 'themselves and their co-conspirators' or 'the Wilderness Society', without providing proper allegations and particulars of the agreement or agency alleged to constitute that relationship.

9. Nor are the alleged “officers, members, servants or agents” of the 17<sup>th</sup> defendant identified. The same is true of the allegations against the 6<sup>th</sup> and 20<sup>th</sup> defendants.

**No particulars of ‘conditions of mind’**

10. The plaintiffs are required under rule 13.10(3)(b) to particularise their allegations that various of the defendants had conditions of mind including knowledge or notice of contracts, fraud, malice or particular purposes or intentions in doing particular actions.
11. Paragraphs of the statement of claim making inadequately particularised allegations of conditions of mind include 10, 12, 44-47, 142, 160, 199-203, 229-230, 240, 243, 327, 328, 332, 498, 499. Particularly egregious are the inadequately particularised allegations at paragraphs 160, 221, 224, 235, 270, 273, 307, 373, 374, 390, 426, 493, 524 and 528 that the defendants have acted “wilfully, maliciously and contumaciously with the intention of injuring”.
12. Also, in the case of each ‘action’ where it is alleged that some of the defendants wrongfully interfered with the performance of contracts (e.g. paragraphs 132-138, 217, 219, 242, 266, 268, 331, 366 and 518), it is nowhere properly alleged or particularised how any of the defendants had notice of the relevant contract and its terms as required by rule 13.10(3)(b), notwithstanding that sufficient knowledge of the relevant contract to know that the defendant is hindering or preventing its performance is an essential element of the tort.
13. A bald assertion (e.g. at paragraphs 45, 200, 241, 329, 330) that some of the defendants ‘well knew’ of a contract or contracts is insufficient to satisfy this requirement. As a bare minimum, it must be alleged and particularised what each defendant knew about each contract and how he, she or it came to know it.

**Alleged Lucaston, Triabunna 03, Hampshire and Styx Actions**

14. The pleadings relating to each of the alleged Lucaston, Triabunna 03, Hampshire and Styx actions (e.g. at paragraphs 48-59, 64-65, 67-69, 74-84, 88-102, 111, 115-118, 129, 203-204, 222, 245-247, 252, 271, 273, 356, 360) do not make clear who is said to have done the acts

alleged, or the extent to which the alleged “other protestors” acted as part of the alleged conspiracy, or in a way for which any of the defendants should be responsible. In the absence of identification of the people said to be involved and their involvement, it is impossible to respond to the allegations made about them. Yet the defendants are said to be liable in respect of their actions.

15. No adequate pleadings or particulars have been given of a combination or agreement of the relevant defendants in each case to do the acts that are alleged to have been done as part of a conspiracy to injure Gunns and the other plaintiffs, or the facts from which such an agreement can be inferred. It is insufficient to assert (e.g. in paragraphs 214, 263 and 362) that defendants and unspecified others ‘acted in concert’ in doing certain acts. What must be pleaded and particularised is an agreement amounting to an unlawful combination or conspiracy to commit those acts and to harm the plaintiffs by doing so.
16. In the absence of such pleadings and particulars, the plaintiffs can only be seen to be seeking ‘an impermissible forensic advantage’ by alleging a conspiracy in respect of what are really a bunch of disparate alleged unlawful acts.
17. Also, tortious acts are alleged to have been committed by people who are not defendants (e.g. at paragraphs 85, 112-114, 118, 129, 249-251, 253, 255-259). It is not clearly or specifically alleged that those people were part of or agreed to be part of a combination with any of the defendants to injure any of the plaintiffs by doing the alleged wrongful acts, nor that any defendant encouraged or incited any of the non-parties to do the specific acts alleged. The paragraphs alleging such acts by non-parties should be struck out, because they cannot form part of any arguable cause of action against an existing defendant.
18. In addition, it cannot be said (as it is, for example, at paragraphs 85, 205, 226, 248-250) that defendants or others have wrongfully interfered with possession of vehicles or other things or places by merely ‘purportedly’ locking themselves onto them, without more.

### **Alleged Banks action**

19. The pleadings relating to the alleged banks action (paragraphs 496-525) do not support the allegation that it was a wrongful interference with business or an actionable conspiracy.

20. In any event, no compensable loss is alleged to have been suffered by any of the plaintiffs as a result: see paragraphs 521-523. Claims for damages for travel, engagement of experts, trouble and inconvenience are not compensable at law. Aggravated and exemplary damages cannot be claimed where there is no actionable claim to begin with.
21. Conspiracy by unlawful means descends from the 'action on the case', and like negligence is not actionable without proof of loss and damage that is recognised at law. No legally compensable economic loss has been alleged, still less particularised, and it is not alleged that any of the consequences said (at paragraph 501) to have been intended by the parties to the alleged 'banks' conspiracy was actually achieved: see paragraphs 521-523.
22. None of the acts alleged at paragraphs 503-516 is alleged to have been, or could be alleged to be, unlawful. The only unlawful acts alleged to have been done in pursuance of the conspiracy are the trespasses alleged at paragraph 517. The persons committing the alleged trespasses and their authority to do so on behalf of the 6<sup>th</sup> defendant are not properly particularised.
23. The trespasses in paragraph 517 are not alleged to have been done by or on behalf of any defendant except the 6<sup>th</sup>, or pursuant to any combination or agreement between any of the defendants, and are not mentioned in paragraph 500 (which purports to set out what it is alleged was agreed to be done pursuant to the conspiracy). In those circumstances, the first plaintiff can only succeed in its 'banks action' conspiracy claim if it alleges that the conspiracy was motivated by 'disinterested malice', which it has not done.

### **Particulars inadequate**

24. The particulars that have been provided by the plaintiffs are incomplete and inadequate, and do not rectify the problems outlined above. They are unforthcoming, repetitive, and often merely restate the allegation sought to be particularised without shedding any light on how it is put or what its content is. For example, see paragraphs 56 and 63 of the particulars provided in response to the requests made by the 1<sup>st</sup>, and 3<sup>rd</sup>-5<sup>th</sup> defendants, which appear merely to restate bald allegations made elsewhere in the statement of claim.

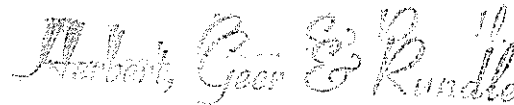
25. The particulars raise more questions than they answer, and themselves require the provision of further particulars to make them intelligible. For example, in the particulars provided in response to the requests of the 7<sup>th</sup>-8<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> defendants, it is said at paragraph 15 that the 7<sup>th</sup> defendant “sought, on behalf of the [6<sup>th</sup> defendant] and the [17<sup>th</sup> defendant] that funds be donated by environmental groups and supporters...”, without providing particulars of what acts it is alleged the 7<sup>th</sup> defendant actually did, or of his alleged agency or authority to do them ‘on behalf of’ other defendants.

### Conclusion

26. The 7<sup>th</sup>-8<sup>th</sup>, and 14<sup>th</sup>-17<sup>th</sup> defendants also rely on the submissions made by other defendants as to why parts of the statement of claim, including parts not expressly dealt with in this brief outline, should be struck out. The 7<sup>th</sup>-8<sup>th</sup> and 14<sup>th</sup>-17<sup>th</sup> defendants reserve the right to supplement this outline by oral argument.

Date: 21 June 2005.

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