

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

No 9575/2004

BETWEEN

GUNNS LIMITED & Ors

Plaintiffs

- and -

ALEXANDER MARR & Ors

Defendants

**TWENTIETH DEFENDANT'S OUTLINE OF SUBMISSIONS IN REPLY
TO PLAINTIFFS' SUBMISSIONS DATED 15 FEBRUARY 2006**

Delivered pursuant to the Directions of the Honourable Justice Bongiorno
given 8 December 2005

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PART – A: REPLY TO PLAINTIFFS' RESPONSE TO COMMON GROUNDS

1. The principle that a statement of claim must properly inform the Defendants of the case that each has to meet underpins the grant of leave to re-plead. That is the standard against which Version 3 should be assessed, not whether it is shorter or has been re-arranged.
2. Version 3 fails to properly inform the Twentieth Defendant of the case it has to meet: that is its real vice.
3. Version 3, still contains vague allegations on very significant matters, and, it should now be inferred that those allegations are speculative "*in the hope that, when it comes to trial, [the Plaintiffs] may be able to reconstitute [their] case*

and make good what [they] then [feel] able to plead and substantiate”¹ or use them as a basis for fishing discovery and interrogatories. Additionally, it contains many inconsistent allegations and still makes use of extensive internal referencing both of which render it embarrassing.

4. The alleged “*Campaign against Gunns*” still incorporates the whole of the other sets of claims², now by duplication as well as reference, and the case which is to be presented is still unclear.³
5. What paragraph 706(aa) alleges is not that some of Campaign against Gunns defendants were involved in some “*protest activities*” and some in other “*protest activities*” but that all were “involved” in all the named “*protest activities*”. This allegation is put as an overt act done by the Twentieth Defendant.
6. In a number of instances in their submissions, the Plaintiffs refer to particulars which they say have been provided in response to certain requests for particulars by other defendants⁴. The fact that they seek to do so underscores the need for the statement of claim itself to contain complete particulars. It is nowhere to the point to say, as the Plaintiffs do, that “[m]uch of Version 3 has not been the subject of requests for particulars or specific objection”⁵, particularly in circumstances where the whole of Version 3 is sought to be struck out.

¹ *Wharf Properties Ltd v Eric Cumine Assoc* (1991) 52 BLR 1 at 23, per Lord Oliver of Aylmerton, cited in *Gunns v Marr* [2005] VSC 251 at §59

² See §706(aa), 706(bb), 707(a), 707(b). See also the unreferenced duplication of paragraphs from the Styx Action, the Hampshire Action and the Japanese Customers Action listed in Twentieth Defendant’s Outline dated 31 January 2006 §2(i), fn.15 and §2(j)fn.16.

³ Cf. Plaintiffs’ Submissions §36 [21]

⁴ E.g., Plaintiffs’ Submissions §19 [13]

⁵ Plaintiffs’ Submissions §42 [24]

7. In response to criticisms as to lack of particularity as to knowledge of contracts, the Plaintiffs assert⁶ that “*the authorities establish*” that it is not necessary for the alleged interferer to know of the actual contract or of its precise details and that it is enough that the alleged interferer ought to have known of the contracts interfered with or shut its eyes to them, or knew of the manner in which the Plaintiff carried on business. The Plaintiffs refer to certain paragraphs⁷ which precede claims of interference with the performance of specified contracts⁸. In those paragraphs, the Plaintiffs allege that the relevant Defendants were aware of the manner in which the First Plaintiff carried on business⁹, or, alternatively, “*could have ascertained the existence of*” the relevant contracts¹⁰, or, alternatively, “*were recklessly indifferent to ascertaining the existence of*” the relevant contracts¹¹.
8. However in those same “actions” in the conspiracy claim and also the interference with trade and business claim the Plaintiffs unequivocally allege

⁶ Plaintiffs’ Submissions §20 [13-15]

⁷ Plaintiffs Submissions: §21 [15] referring to - Triabunna 2003: §45[15]; Lucaston: §140 [48]; Styx: §264[93]; Triabunna 2004: §337 [115] and Hampshire: §428 [141]

⁸ Triabunna 2003: §46 [15]; Lucaston: §141 [49]; Styx: §265 [94] (First Plaintiff) §266 [94] (Second and Third Plaintiffs); Triabunna 2004: §338 [115] and Hampshire: §429 [141-142]

⁹ Triabunna 2003: §45, particulars (a) [15]; Lucaston: §140 particulars (a) [48]; Styx: §264 particulars (a) [93] (First Plaintiff), there is no corresponding allegation in relation to the Second and Third Plaintiffs; Triabunna 2004: §337 particulars (a) [115] and Hampshire: §428 particulars (a) [141]

¹⁰ Triabunna 2003: §45, particulars (b) [15]; Lucaston: §140 particulars (b) [50]; Styx: §264 particulars (b) [93] (First Plaintiff), there is no corresponding allegation in relation to the Second and Third Plaintiffs; Triabunna 2004: §337 particulars (b) [115] and Hampshire: §428 particulars (b) [141]

¹¹ Triabunna 2003: §45, particulars (c) [15]; Lucaston: §140 particulars (c) [50]; Styx: §264 particulars (c) [93] (First Plaintiff), there is no corresponding allegation in relation to the Second and Third Plaintiffs; Triabunna 2004: §337 particulars (c) [115] and Hampshire: §428 particulars (c) [141]

“[t]he [name of action] Defendants and each of them knew of the [specified] Contracts”¹².

9. The Plaintiffs seek to rely on authorities which might assist them if they had made less specific allegations; however, when they have made unequivocal allegations of actual knowledge of specific contracts, those cases do not assist them.
10. In pleading the various conspiracies alleged in Version 3, save for “*the Campaign against Gunns Conspiracy*”, the Plaintiffs allege that the conspiracy (or in some of the actions, the agreement which seems to be alleged to be the conspiracy) may be inferred from certain matters. Thus:
- (a) in Triabunna 2003, Lucaston, Styx, Triabunna 2004 and Hampshire, the Plaintiffs allege:¹³

“The [name of action] Conspiracy may also be inferred from the nature, timing and results of the [name of action] overt acts set out in paragraphs ¹⁴ [paragraphs specified in conspiracy allegation paragraph] and the persons involved”.

- (b) in Burnie, the Plaintiffs allege¹⁵:

“The agreement may also be inferred from the occurrence of the meetings and the nature, timing, location and results of the overt acts and the persons involved.”

¹² Triabunna 2003: (§42(c)(ii) [13] – conspiracy; §44(c)(ii) [14] – interference with trade and business; Lucaston: §138(c)(ii) [47] – conspiracy; §139(c)(ii) [48] – interference with trade and business; Styx: §260(c)(ii) [91] – conspiracy; §262(c)(ii) [92] – interference with trade and business (of First Plaintiff), §263(c)(ii) [93] – interference with trade and business (of Second and Third Plaintiffs); Triabunna 2004: §334(c)(ii) [113] – conspiracy; §336(c)(ii) [115] – interference with trade and business; Hampshire: §425(c)(ii) [139] – conspiracy; §427(c)(ii) [141] – interference with trade and business.

¹³ Triabunna 2003 §42 particulars (a) [12]; Lucaston §138 particulars (a) [47]; Styx §260 particulars (a) [91]; Triabunna 2004 §334 particulars (a) [113]; Hampshire §425 particulars (a) [139] and Banksia §511 particulars (a) [169].

¹⁴ §511 in Banksia only refers to one paragraph, namely, §516 which comprises 5 sub-paragraphs.

¹⁵ §489, particulars (a)

- (c) In the Japanese Customers Action and the Banks Action, the Plaintiffs adopt a different formulation. The “*Japan Conspiracy*” is alleged in paragraph 544¹⁶. Paragraph (a) of the particulars state, *inter alia*, “[t]he conspiracy is set out and particularised in paragraph 545”¹⁷. Paragraph 545 alleges, “[d]uring 2000 the Japan Defendants agreed amongst themselves to compel the Japanese Customers to cease purchasing woodchips and similar products from the First Plaintiff”¹⁸. Paragraph (a) of the particulars to paragraph 545 states, *inter alia*, [t]he agreement may also be inferred from the nature, timing and results of the overt acts set out in paragraphs 549 to 622 and the persons involved.”¹⁹
11. But, the Plaintiffs do not rely on inference, they simply allege that the relevant conspiracy “may also be inferred”. Accordingly, the Plaintiffs’ reliance²⁰ on *State of Queensland v Pioneer Concrete Queensland Pty Ltd*²¹ is misplaced.
12. If the “*detail of the discussions among the conspirators is not known to [the Plaintiffs]*”²² they should not have made the allegations they have. Nor is it appropriate, in the circumstances of this proceeding, for the Plaintiffs to suggest that complaints of the Defendants ought to be dealt with “*on an application for specific relief as to the particulars*”²³.

¹⁶ Banks Action §642 [198]

¹⁷ Banks Action §643 [199-200]

¹⁸ The allegation in the Banks Action at §643 [199-200] is that “[d]uring 2001 the Banks Defendants agreed amongst themselves to compel the Banks to cease investing in or providing banking services to the First Plaintiff”.

¹⁹ The relevant particulars (a) to §643 of the Banks action are in the same terms save that the paragraphs referred to are “*paragraph [sic.] 648 to 678*”.

²⁰ Plaintiffs’ Submissions §

²¹ (1999) ATPR 41-691

²² Plaintiffs’ Submissions §46 [25]

²³ Plaintiffs’ Submissions §46 [25]

PART – B: REPLY TO PLAINTIFFS’ RESPONSE TO TWENTIETH DEFENDANT’S FURTHER SUBMISSIONS DATED 31 JANUARY 2006

13. As to paragraph 94²⁴, the complaint is that the Twentieth Defendant is not properly informed of the alleged “decision”. Moreover, the Plaintiffs assert matters not alleged, namely that the Twentieth Defendant became part of the Campaign against Gunns and the Campaign against Gunns conspiracy “*as a result of its participation in meetings concerned with those matters*” (emphasis added).
14. Version 3 alleges no such meetings.
15. As to paragraph 95²⁵, the Twentieth Defendant - an incorporated association - is not informed how it “*did*” any of the overt acts alleged in paragraph 706.
16. As to paragraph 96²⁶, the criticism is that the Twentieth Defendant is not informed *how* the Eighteenth and Nineteenth Defendants did the things they are alleged to have done. In any case, the allegations that the Eighteenth and Nineteenth Defendants were members of the Twentieth Defendant at relevant times are not allegations made in the Campaign against Gunns.
17. As to paragraph 96²⁷, the Plaintiffs ignore the substance of the Twentieth Defendant’s complaint:
 - (a) As to 95(i), paragraph 706(aa) puts the “*Japan overt acts*” against the Twentieth Defendant. The term “*Japan overt acts*” is, as the Plaintiffs note, defined in paragraph 548 [180] which defines them as the acts

²⁴ Plaintiffs’ response to Twentieth Defendant’s Outline §2(a).

²⁵ Plaintiffs’ response to Twentieth Defendant’s Outline §2(b).

²⁶ Plaintiffs’ response to Twentieth Defendant’s Outline §2(c).

²⁷ Plaintiffs’ response to Twentieth Defendant’s Outline §2(d).

alleged in paragraphs 549-622²⁸. But there is another paragraph which contradicts or is at least inconsistent with that definition and therefore embarrassing. Paragraph 625 [193] alleges: “[t]he acts done by the Japan Defendants in furtherance of the Japanese Customers Action and which are referred to in **paragraphs 546 to 624** constituted interference with the First Plaintiffs contractual relationships with the Japanese Customers and were unlawful”. (emphasis added);

- (b) As to 95(ii), paragraph 543 defines “the Japanese Customers Action” and alleges that the Japan Defendants interfered with the First Plaintiff’s trade and business by “unlawful means” but does not specify the nature of the unlawfulness. The particulars to paragraph 543 allege “[t]he unlawfulness is particularised in paragraph 623, 624 and 625” but they are not, save that paragraph 625 baldly alleges that all acts alleged in paragraphs 546 to 624 were unlawful, but does not specify the nature of the unlawfulness.
- (c) As to 95(iii), paragraph 641 defines “the Banks Action” and alleges that the Banks Defendants interfered with the First Plaintiff’s trade and business by “unlawful means”. The particulars to paragraph 641 simply allege unlawfulness in the broadest terms and also state “**[t]he unlawfulness is also that set out in the particulars given of the Styx Action**”. (emphasis added)

²⁸ Additionally, (i) paragraph (a) of the particulars to paragraph 544 (which defines “the Japan Conspiracy”) states, *inter alia*, “[t]he conspiracy is set out and particularised in paragraph 545 and the overt acts done in furtherance and pursuance of the conspiracy are set out in paragraphs 549 to 622” and (ii) paragraph (a) of the particulars to paragraph 545 (which is said in paragraph 544 to be the paragraph which particularised and sets out the “Japan conspiracy”) states, *inter alia*, “[t]he agreement may also be inferred from the nature, timing and results of the overt acts set out in paragraphs 549 to 622”.

- (d) Additionally, the Banks Conspiracy is alleged to be an “unlawful means” conspiracy²⁹. Its particulars are similarly broad as to how the alleged overt acts are unlawful³⁰.
- (e) As to 95(iv), the issue is not one of alleged liability of a party but how the Twentieth Defendant – an incorporated association - “*did the following overt acts*” as alleged in paragraph 706, sub-paragraph 706(bb) of which incorporates by reference the Japan overt acts and the Banks overt acts.
18. As to paragraph 98³¹, the Plaintiffs say they will provide “*further particulars*”; but particulars could not solve the problem. Nor should the Plaintiffs by their submission attribute to paragraph 706(aa) a meaning which it does not bear. The issue is inconsistency between the language of 706(aa) and 706(bb) and 707(a) and (b) and embarrassment which is caused by that inconsistency. If by, “*various protest activities which occurred at the Triabunna Mill site and the Styx and campaigns directed at the Japanese Customers and Banks*”, the Plaintiffs had meant all or any of the following defined terms: “*Triabunna 2003 protest*”, “*Triabunna 2004 protest*”, “*Styx overt acts*”, “*Japan Overt acts*” or “*Banks overt acts*” it could have used those terms. The inclusion of paragraph 706(bb) suggests that “*campaigns directed at the Japanese Customers and Banks*” mean something other than “*Japan Overt acts*” or “*Banks overt acts*”.
19. As to paragraph 99³², no “*detail*” is pleaded of the decisions alleged in paragraphs 701, 702, 703 and 704 all of which are alleged to have occurred at “*several meetings during 2000*”. The Plaintiffs say that “*the particular subjoined to paragraph 700 should refer to paragraphs 697 to 699*”: that

²⁹ §642 [198-199]

³⁰ Save for §677 [206] which alleges an unlawful entry.

³¹ Plaintiffs’ response to Twentieth Defendant’s Outline §2(e).

³² Plaintiffs’ response to Twentieth Defendant’s Outline §2(f).

would be a significant amendment. It would extend the “*Campaign against Gunns Conspiracy*” from one which occurred in 2000 to one which is ongoing.

20. As to paragraph 100³³, if the words “*under the influence of and given patronage*” were substituted for (or added to) “*auspiced*” the Twentieth Defendant would be no better informed.
21. As to paragraph 101³⁴, the Plaintiffs have not identified any basis on which the Eighteenth and Nineteenth Defendants are its agents, nor the basis on which it is the agent of the Sixth Defendant.
22. As to paragraph 102³⁵, the incorporation both by reference and unreferenced duplication – with differences – has created embarrassing results. Many of the Styx overt acts are repeated³⁶, with differences, in the Campaign against Gunns but are also incorporated by reference³⁷. The criticisms have not been met by the Plaintiffs. The fact that the duplication is unreferenced goes to the oppressiveness of Version 3.
23. As to paragraph 103³⁸, paragraph 696 refers to and repeats “*paragraphs 1, 2, 4 to 7, 12, 13 and 22 to 30*” of Version 3: it does not allege the incorporation of the Sixth Defendant, nor do any of the paragraphs referred to in it.
24. The Plaintiffs then say³⁹ that “*the matters alleged in paragraph 696 include ... other matters concerning what are alleged to be the Twentieth Defendant*

³³ Plaintiffs’ response to Twentieth Defendant’s Outline §2(g).

³⁴ Plaintiffs’ response to Twentieth Defendant’s Outline §2(h).

³⁵ Plaintiffs’ response to Twentieth Defendant’s Outline §2(i), (j) and (k).

³⁶ See Twentieth Defendant’s Outline dated 31 January 2006, §2(i) & fn.15 and see §2(j) fn.16 for further repetition from other actions.

³⁷ §707(a) and (b) [218] and *cf.* §706(aa)

³⁸ Plaintiffs’ response to Twentieth Defendant’s Outline §2(l).

co-conspirators". The only alleged "co-conspirator" of the Twentieth Defendant referred to in any of the paragraphs specified in paragraph 696 is the Sixth Defendant. The only other defendant referred to is the Seventeen Defendant in paragraph 30. Paragraph 30 alleges that the Sixth Defendant "*established the following groups **“which have in turn conducted campaigns on behalf of the Sixth Defendant”***" (emphasis added), the "following groups" include the Twentieth and Seventeenth Defendants. It is difficult to imagine an allegation more vague.

25. As to paragraph 104⁴⁰, Version 3 does not allege that the conspiracy, as distinct from the "campaign" was ongoing: the Plaintiffs now say it is.
26. As to paragraph 105⁴¹, Version 3 does not allege that the "*Doctors For Forests Group elsewhere described in the pleading had conducted a meeting or discussion which gave rise to the issuing of the media release*".
27. There is no allegation that the Nineteenth Defendant was a spokesman for the Doctors for Forests – let alone Doctors For Native Forests Inc. Setting out what is said to be the text of an alleged media release does not, without more, make that text an allegation in the statement of claim.
28. The Plaintiffs have only responded to 4(e) of the Twentieth Defendant's Outline. As to the Twentieth Defendant's other criticisms set out in paragraph 4 of its Outline, the Plaintiffs say, "*the matters complained of in that paragraph are set out in the pleading*". Of those other complaints the most significant is that the Twentieth Defendant - an incorporated association - is not properly informed of the formation of the alleged conspiracy. Particulars were requested, those provided were non-responsive and circular and stated,

³⁹ Plaintiffs' Submissions §103 [50]

⁴⁰ Plaintiffs' response to Twentieth Defendant's Outline §2(m).

⁴¹ Plaintiffs' response to Twentieth Defendant's Outline §3.

“[f]urther particulars of the discussions will be provided after discovery and interrogation”.

29. As to paragraph 107⁴², paragraph 105 shows how the Plaintiffs might use the relevant paragraphs as the “launch pad” for further vague allegations.

PART C - CONCLUSION

30. The Plaintiffs agree⁴³ that on the basis of the Twentieth Defendant being referred to in only 22 paragraphs of Version 3 it has put against it not only the alleged “*Burnie Conspiracy*” but the entire weight of the alleged “*Campaign against Gunns*”.
31. But at the end of Version 3’s 221 pages and 714 paragraphs:
- (a) no contract is alleged in “*the Burnie Woodchip Pile Action*”;
 - (b) it is not alleged that the Twentieth Defendant knew of any contract;
 - (c) the only overt act put against the Twentieth Defendant is that it “*operated*”⁴⁴ a website;
 - (d) the Twentieth Defendant has not been informed how it became part of the “*Burnie Conspiracy*”, or, for that matter, the “*Campaign against Gunns Conspiracy*”.
32. If the Plaintiffs were ever able to say how “*a series of unrelated acts will be presented by the Plaintiffs as acts which are closely related by their purpose and by those who organised and perpetrated them*”⁴⁵, the time to do so was in Version 3 – that time has passed.

⁴² Plaintiffs’ response to Twentieth Defendant’s Outline §5.

⁴³ Plaintiffs’ Submissions §93 [48]

⁴⁴ Version 3: §490, particulars (b)

⁴⁵ Plaintiffs’ Submissions §36 [21]

1 March 2006

Brian E Walters, SC

Noel A Russell

**Chambers
Melbourne**