

PARTIES: AYERS ROCK RESORT CORPORATION

v

BRIGHT CAST PTY LTD

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: Supreme Court of the Northern Territory  
Exercising Territory Jurisdiction

FILE NO: 9408687 72/94

DELIVERED: 19 December 1996

HEARING DATES: 11/11/96 and 12/11/96

JUDGMENT OF: Thomas J

**REPRESENTATION:**

*Counsel:*

Plaintiff: J. Wilkinson  
Defendant: H.A.L. Abbott

*Solicitors:*

Plaintiff: Clayton Utz as agents for Cowell Clarke  
Defendant: Ward Keller

Judgment category classification: C  
Judgment ID Number: tho96015  
Number of pages: 15

tho96015

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

No. 72/94 (9408687)

BETWEEN:

**AYERS ROCK RESORT  
CORPORATION**  
Plaintiff

AND:

**BRIGHT CAST PTY LTD**  
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 December 1996)

This is an application by summons dated 17 June 1996 by the plaintiff heard on 11 and 12 November 1996 applying for:

1. An order that the defendant's defence be struck out, and judgment be ordered, for the defendant's failure to provide further and better particulars in default of the orders made by this Court on 3 August 1995;
2. Alternatively, an order that the Court determine a procedure for the pleadings to be properly completed and closed in a timely manner; and

3. An order that the plaintiff have the costs of and incidental to this proceeding and application.

On the day allocated for the hearing of this application, Mr Abbott, counsel for the defendant, sought to have an application by the defendant on summons dated 7 November 1996 heard first. The defendant sought the following orders:

1. This application be heard and determined prior to the plaintiff's application of 17 June 1996.

2. Judgment be given summarily for the defendant pursuant to Order 23.03.

3. In the alternative, the statement of claim be struck out or

4. In the alternative the action be permanently stayed pursuant to Rule 23.01(b) and/or (c).

5. Further or in the alternative, the statement of claim or in the alternative paragraphs 6 and 11.1(I) thereof be struck out pursuant to Rule 23.02(b) and/or (c) and/or (d).

6. In the alternative that the plaintiff provide the particulars requested in paragraphs 5, 7 and 10 of the defendant's request dated 11 July 1994 and 26 May 1995.

7. Such further or other order as to this honourable Court seems meet.

8. The defendant have the costs of this application.

Mr Wilkinson, counsel for the plaintiff, opposed the defendant having its application determined prior to the plaintiff's application on summons dated 17 June 1996.

I declined to deal with the defendant's application prior to the plaintiff's application on summons dated 17 June 1996 on the basis that the defendant had given very late notice to the plaintiff of its intention to make such application and to proceed with the defendant's application would cause prejudice to the plaintiff.

I ruled that the plaintiff's application on summons dated 17 June 1996, should proceed and the defendant's application be adjourned to another date. By consent I allowed the defendant to rely on the affidavit of Cecily Jane Andrews sworn 7 November 1996 and the affidavit of Robert Alexander Walter sworn 6 November 1996. Following objection by counsel for the plaintiff I refused the application by the defendant to rely on the affidavit of Renton Phillips Kelly sworn 10 November 1996 for the purpose of the present hearing. The reason for refusal being the late notice to the plaintiff of the affidavit and the indication by counsel for the plaintiff that they may require Mr Kelly to be available for cross examination in respect of his affidavit.

On 3 August 1995, Mildren J made an order on the plaintiff's application by summons dated 28 June 1995. The orders made were as follows:

1. The defendant provide further and better particulars in the terms of paragraph 1 of the summons within 1 month with liberty to apply.

2. The defendant make discovery by sworn affidavit of a duly authorised officer of the defendant company within one month, with liberty to apply. Such affidavit to comply with the requirement of Order 29 Rule 08(1) of the Supreme Court Rules.

3. The defendant pay the plaintiff's cost of and incidental to this application.

Paragraph 1 of the summons issued by the plaintiff on 28 June 1995 reads as follows:

1. that the defendant provide further and better particulars of its defence first sought 17 August 1994 and further sought in the plaintiff's solicitors letter of 9 May 1995.

Copy of the letter dated 9 May 1995 is annexure JCC10 to the affidavit of Jonathan Charles Clarke sworn 26 June 1995 seeking the following particulars.

1. The date when each business activity commenced.

2. The number of times and dates on which the business activity has been carried out since the time of its commencement to date, and

3. The resources used to operate each such business activity on each such occasion on which it has been carried out.

The substantial issue between the parties to be heard at trial of this matter relates to s19 of the *Yulara Tourist Village Management Act* which provides as follows:

**“19. CORPORATION TO APPROVE BUSINESS ACTIVITIES**

(1) Subject to subsection (2), a person shall not carry on business of any kind at Yulara except with the approval in writing of the Corporation established by the *Ayers Rock Resort Corporation Act 1992*.

Penalty: In the case of a natural person - \$5,000 and \$100 for each day during which the offence continues.

In the case of a body corporate - \$250,000 and \$10,000 for each day during which the offence continues.

(2) Where immediately before the commencement of this section a person was carrying on business at Yulara, the person is not prevented by subsection (1) from continuing to carry on business in the same manner as he or she was then carrying on business.”

The plaintiff asserts that under this provision the defendant is prohibited from carrying on business at Yulara unless it carried on that business as at 19 June 1992 and continued to carry on that business in the same manner that it then carried on that business. The plaintiff’s case is that the defendant has added a number of business activities since that date which has changed the

manner in which the business was carried on at 19 June 1992. The defendant has pleaded that it carried on those business activities prior to 19 June 1992. The plaintiff seeks particulars of the facts on which the defendant maintains its conclusion that it did carry on all its present business activities prior to 19 June 1992.

In response to the orders of his Honour, Mildren J, on 3 August 1995, the defendant filed a further and better response by defendant to plaintiff's request for particulars dated 26 September 1995 and a further and better particulars of defence dated 29 February 1996.

The defendant asserts that the particulars ordered by Mildren J on 3 August 1995 have been adequately answered and to insist on more detailed answers would be oppressive to the defendant. The defendant relies on the affidavit of Cecily Jane Andrew sworn 7 November 1996 and affidavit of Robert Alexander Walter sworn 6 November 1996.

In the affidavit of Ms Andrew, who is a solicitor employed as a consultant with Daenke O'Donovan solicitors for the defendant, she deposes to the amount of work involved in analysing invoices which have been discovered by the defendant. Her conservative estimate is three weeks work for one solicitor on a full time basis with assistance from solicitor Mr John Daenke on an occasional basis. Legal fees incurred would be in the vicinity of \$20,000. Ms Andrew further deposes that the costs incurred in the preparation of answers to request for further and better particulars to date exceeds \$9000.

I have read both the further and better response to request for particulars dated 26 September 1995 and the further and better particulars of defence dated 29 February 1996.

With respect to each of the activities now conducted by the defendant the defendant asserts that these were being conducted by the defendant company prior to 19 June 1992. However, the defendant states it cannot state the precise date when each of these activities commenced or the specific occasions prior to 19 June 1992 when each activity was performed.

In its amended statement of claim the plaintiff asserts in paragraph 6:

“Since 19th June 1992 **the defendant** has carried on the business which it then carried on at Yulara but has changed the manner in which the business was carried on at 19th June 1992 by adding business activities which were not carried on at that date and which are described by the defendant as:”

The plaintiff then proceeds to particularise 18 business activities.

The defendant maintains in its further and better particulars of defence, dated 29 February 1996, that in respect of each of the activities that they were being conducted by the defendant prior to 19 June 1992. The defendant states by way of general response that the business conducted by the defendant since 1990 is a continuation of the business conducted by the defendant’s directors or companies associated with them prior to that date. The defendant states it cannot specify each occasion prior to 19 June 1992 when these activities were conducted. With respect to the majority of the activities the defendant

indicates the average number of times per month when these activities were provided and the approximate dates prior to 19 June 1992 when these activities were advertised in brochures produced on behalf of the defendant company.

From the eighteen business activities the plaintiff alleges have changed in manner since 19 June 1992, I have as an example selected three of those activities particularised by the plaintiff and set those out together with the respective further and better particulars of defence filed by the defendant on 29 February 1996:

“6.1.1 Toyota 4WD vehicles as described in a brochure distributed by the defendant on or before September 1993 which sets out photographs of Toyota Sahara 4WD vehicles and describing them as such. This is referred to at paragraph 25 of Kirkpatrick’s Affidavit.”

further and better particulars of defence in response:

**“1. 4 Wheel Drive Vehicles**

- (a) The defendant says that it used 4WD vehicles at least in April 1991 on the Top Team Tour. It is not able to be more precise at present as to the commencement date.  
The defendant advertised 4 wheel drive tours in its advertising brochure ‘V.I.P. Chauffeur Cars Limousine Sightseeing Package Tours 1991/92’ headed ‘Special Interest’ which brochure was produced in February 1991.
- (b) The use of 4WD vehicles was part of the defendant’s charter tour business which involved providing 4WD vehicles when clients requested the same for tours. In relation to the Top Team Tour in April 1991 it involved tours around Alice Springs, travel from Kings Canyon to Ayers Rock and a base tour of Ayers Rock.
- (c) The defendant is not able to specify each occasion prior to 19 June 1992 when 4WD vehicles were used or quotations were provided for their use. Apart from the Top Team Tour in April

1991 and a quotation given for their use to Tour Hosts Pty Ltd on 29 November 1991 [Document 157 966]) the defendant used 4WD vehicles about an average of 4 times per month. In some weeks up to 20 4WD vehicles would be in use and in other weeks none.

- (d) Prior to 19 June 1992 the defendant hired 4WD vehicles when required. The defendant is not able to specify each occasion when vehicles were hired by the defendant but says that in relation to the Top Team Tour the defendant hired 25 4WD vehicles.”

#### Particularised Amended Statement of Claim:

- “6.1.5 Silver Service Dinner in the Desert as described in a brochure distributed by the defendant on or before September 1993 which says in part:-

‘The finest cuisine served in the biggest restaurant in the world with a ‘million star’ rating. For that special occasion, or just because, this is superb. Our chefs will prepare a menu that you will never forget. Full silver and crystal service in the middle of the desert. Premium Australian wines. Menu and costs by consultation.’ This is referred to at paragraph 25 of Kirkpatrick’s Affidavit.”

Further and better particulars of defence in response:

#### “5. Silver Service Dinner

- (a) The defendant commenced to provide silver service dinners for clients soon after commencing business in 1990 but is not able to more precisely specify a date when it commenced to provide silver service dinners to clients. The defendant took over the business operations in succession to the defendant’s directors and their associated companies in 1990. The defendant refers to discovered document 156 being an entry by VIP Tailgate Catering (a business name owned by the defendant) which was an entry in the Northern Territory Brolga Awards in 1989 referring to the catering of silver service dinners. The

defendant further says that it provided a silver service dinner to the Top Team Tour in April 1991.

The defendant advertised Silver Service Dinners in its brochure entitled 'Confidential Inbound Operator Nett Rates 1992/93' which was produced in July 1991 and circulated to inbound tour operators from in or about August 1991.

- (b) The activity was part of the defendant's charter business and involved providing a silver service dinner when clients requested the same.
- (c) The defendant is not able to specify each occasion prior to 19 June 1992 when a silver service dinner was provided but it was about an average of 3 times per month.
- (d) The defendant provided silver service dinners as required including table, cutlery, plates food and beverages."

Particularised Amended Statement of Claim:

"6.1.12 VIP Multi Lingual Guide Service as described in a brochure distributed by the defendant on or before September 1993 which says in part:-

'A professional multi lingual guiding service for Ayers Rock and Central Australia. Linguists for most languages are available at Ayers Rock. Special concessional travel rates available for guides to be located at any other Northern Territory Town. Airport transfers, half day and full day tours. Special group tours, hotel and airline check-in assistance, meal and tour bookings arranged. Discounts available for guiding services when used in conjunction with VIP ground transport. Limited Japanese word processing and translation services, 24-hour Japanese emergency service available.' This is referred to at paragraph 25 of Kirkpatrick's Affidavit.

Further and better particulars of defence in response:

**"12. Multi Lingual Guide Service**

- (a) The defendant commenced to provide a Multi Lingual Guide Service for clients soon after commencing business in 1990 but it is not able to more precisely specify a date when it commenced to provide such a service.
- (b) The activity is part of the defendant's charter business and involves providing a foreign language speaking guide to accompany a tour group.
- (c) The defendant is not able to specify each occasion prior to 19 June 1992 when a tour of the Ayers Rock area with a foreign language speaking guide was provided but it was on a daily basis with 6 or 8 foreign language speaking guides with different languages.
- (d) The defendant provided a guide able to speak the language of the tour group, other than English, when required prior to 19 June 1992 frequently hired such guides from Yulara Resort Corporation."

In her affidavit sworn 7 November 1996, Ms Andrews deposes to the difficulties in complying with the order for further and better particulars. I have set out paragraph 3 of Ms Andrews affidavit sworn 7 November 1996.

"The defendant has discovered approximately 10 archive boxes of original documents in this matter. Included within the discovered documents are 15 lever arch folders of invoices for the period August 1991 to July 1992 which are not a complete record of all invoices for that period because the balance have been lost or destroyed. Each folder contains approximately 70 to 100 invoices, each relating to individual tourist groups. Having perused the invoices and attempted to analyse them I am able to say that in many instances I am not able to provide from analysis of those invoices the degree of particularity which Mr Clarke says is required in order to comply with the orders made by His Honour Justice Mildren herein. In many instances I would require clarification of the information contained in the invoice from Mr Kelly, who in any event would have to confirm that any analysis I carried out was correct. I note that Mr Clarke says that an analysis of one folder by a member of his firm required 3 weeks work. I estimate that conservatively to conduct such an analysis of 15 folders would take approximately 3 weeks of my time working on a full time basis and the assistance of Mr John Daenke on an

occasional basis, and that I would require Mr Kelly to be present in Adelaide to provide me with instructions and to assist me with that analysis for a period of an additional 5 days. I estimate that in legal fees alone, being my time and that of Mr John Daenke who is the supervising partner handling this matter, and who has had the care and conduct of the matter to date, the legal fees incurred by such an exercise would be something in the vicinity of \$20,000.”

I adopt with respect the principle expressed by Hunt J in *Sims v Wran* [1984] 1 NSWLR 317 at 321:

**“Particulars generally:**

The fundamental principle in relation to particulars in defamation, as in any other case, is that a party must be made aware of the nature of the case he is called upon to meet: *Saunders v Jones* (1877) LR 7 Ch D 435 at 451; *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740; *Dare v Pulham* (1982) 148 CLR 658 at 664. The object of particulars is to save expense in preparing to meet a case which may never be put: *McSpedden v Harnett* (1942) 42 SR (NSW) 116 at 119; 59 WN 98; *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228 at 229; and to make the party’s case plain so that each side may know what are the issues of fact to be investigated at the hearing: *Kelly v Kelly* (1950) 50 SR (NSW) 261 at 265; 67 WN 193 at 196; *Bailey v Federal Commissioner of Taxation* (1977) 136 CLR 214 at 219. See, generally, *Phillopini v Leithead* [1959] SR (NSW) 352 at 358, 359; 76 WN 150 at 152; *Commercial Bank of Australia Ltd v Thomson* (1964) 81 WN (Pt 1) (N.S.W.) 553 at 557, 558; *Ellis v Grant* (1970) 91 WN (NSW) 920 at 924, 925. It is not a question of whether one party has adequate knowledge of the actual facts; it is a question of whether he has adequate knowledge of what the other party alleges are the facts, for that is the case which he must meet; *Turner v Dalgety & Co Ltd* (at 229); *Phillopini v Leithead* (at 359; 152); *Emmertson v University of Sydney* [1970] 2 NSWLR 633 at 635; *Bailey v Federal Commission of Taxation* (at 219, 220, 221).”

The issue of particulars was also considered by the Full Court of the Supreme Court of New South Wales in the matter of *Philliponi v Leithead* [1959] SR (NSW) 352 at 358 the Court said:

“The principles upon which the Court exercises its discretion are well settled. In *Spedding v. Fitzpatrick* ((1888) 38 Ch. D. 410, at p. 413) Cotton L.J. said: “The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.”

This statement has been adopted and acted upon for many years. It must also be kept in mind that the function of particulars is not to enlighten a party as to the true facts of the case. It is to let him know what case he will have to meet and to enable him to know what evidence he ought to be prepared with. It is with this function in mind that the question must be decided in any individual case, whether it is a case in which particulars ought to be furnished: *Atkinson v. Stewart and Partners Ltd.* per Black L.J. ((1954) L.R. N. Ir. 146, at p. 170.); *Elkington v. London Association for Protection of Trade* ((1911) 27 T.L.R. 329, at p. 330.)”

and at 360

“... An applicant for particulars must always show that circumstances exist which make it desirable and proper that particulars should be furnished. If there is reason to suppose that a party may be in doubt as to the nature of the claim made and that he may be embarrassed or put to unnecessary expense if the claim is not further particularized, then particulars should be ordered. ....”

These authorities were canvassed and cited with approval by Gallop J in *Thistlewaite v Federal Capital Press of Australia Pty Ltd & Anor* (1992) 111 FLR 218 at 223. His Honour also made reference to *Bailey v Commissioner of Taxation (Cth)* (1977) 136 CLR 214 Gibbs J at 219:

“Particulars fulfil an important function in the conduct of litigation. They define the issues to be tried and enable the parties to know what evidence it will be necessary to have available and to avoid taking up time with questions that are not in dispute. On the one hand they prevent the injustice that may occur when a party is taken by surprise; on the

other they save expense by keeping the conduct of the case within due bounds.”

I have come to the conclusion that the further and better particulars of the Defence filed by the defendants on 29 February 1996 adequately complies with the order for further and better particulars made by Mildren J on 3 August 1995. These particulars together with the documents discovered by the defendant are I consider adequate for the plaintiff to identify and prepare to meet the defence that will be put forward by the defendant.

To insist on the provision of further and better particulars by the defendant would, in my opinion, be oppressive to the defendants and that the time and cost involved in such an exercise would not materially advance the purpose for the provision of such particulars.

For these reasons the plaintiff’s application that the defendant’s defence be struck out for the defendant’s failure to provide further and better particulars in default of orders made by this Court on 3 August 1995 is dismissed.

At the hearing of the application counsel for the plaintiff submitted that in the alternative I fix a time by which the defendant provide further and better particulars. For the reasons already stated I would not be prepared to make such an order.

This matter has been listed as a category C. The parties are at liberty to apply in respect of any other interlocutory applications to be dealt with or for the purpose of having the matter proceed to trial.

I will hear the parties on the question of costs in respect of the plaintiff's application on summons filed 17 June 1996 and the preliminary argument on the defendant's application on summons filed 7 November 1996 which application has been adjourned to a date to be fixed.

I summarise these orders as follows:

1. Plaintiff's application for judgment on summons filed 17 June 1996 is dismissed.
2. Parties are at liberty to apply in respect of other interlocutory applications or to list this matter for trial.
3. I will hear the parties on the question of costs.