

*RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors* [2012] NTSC 03

PARTIES: RTA PTY LTD AS TRUSTEE FOR THE  
RTA FAMILY TRUST  
First Plaintiff  
AND  
TRACEY-ANNE CHIN  
Second Plaintiff  
AND  
RANDALL SYDNEY CHIN  
Third Plaintiff  
v  
BRINKO PTY LTD  
First Defendant  
AND  
PHILIP GARY KOBELT  
Second Defendant  
AND  
DEBORAH ANNE KOBELT  
Third Defendant  
AND  
MARCELLO BRINI  
Fourth Defendant

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: 48 of 2009 (20909797)

DELIVERED: 16 January 2012

HEARING DATES: 14 DECEMBER 2011

JUDGMENT OF: MASTER LUPPINO

**CATCHWORDS:**

Practice and Procedure – Application to strike out Statement of Claim pursuant to r 23.02 – Pleading failing to disclose cause of action – Pleading embarrassing – Purpose of pleadings – Requirement to plead all material facts sufficient to notify Defendants of the case they must meet – Distinction between material facts and particulars – Material facts set out in particulars – Whether sufficient or appropriate – Extent of discretion to order particulars or excuse pleading defects – Whether application should be refused due to late application.

*Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279.

*Northern Territory of Australia v John Holland Pty Ltd & Ors* (2008) NTSC 4.

*Miller & Associates Insurance Broking Proprietary Limited v BMW Australia Finance Limited* (2010) 241 CLR 357.

*American Flange & Manufacturing Co Inc v Rheem Australia Pty Ltd* [1963] NSW 1121.

*Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* [1985] 2 NSWLR 340.

*Bruce v Odhams Press Ltd* [1936] 1 KB 697.

*Australian Automotive Repairers' Association (Political Action Committee) Inc v NRMA Insurance Ltd* [2002] FCA 1568.

*RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors* [2011] NTSC 103.

*Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175.

*United Super Pty Ltd v Randazzo Investments Pty Ltd* [2009] NTSC 50.

*Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd* [2010] NTSC 3.

*Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83.

*Winterton Constructions Pty Ltd v Hambros Australia Pty Ltd* (1992) 111 ALR 649.

*Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148.

*Supreme Court Rules* rr 13, 13.02, 23.02.

*Trade Practices Act* (Cwth).

*Consumer Affairs and Fair Trading Act* (NT).

## **REPRESENTATION:**

### *Counsel:*

Plaintiff:	Mr Christrup
First Defendant:	Not represented
Second Defendant:	Mr Roper
Third Defendant:	Mr Liveris
Fourth Defendant:	Not represented

### *Solicitors:*

Plaintiff:	Halfpennys
First Defendant:	De Silva Hebron
Second Defendant:	De Silva Hebron
Third Defendant:	Withnalls
Fourth Defendant:	Paul Maher

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IN THE SUPREME COURT  
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OF AUSTRALIA  
AT DARWIN

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BETWEEN:

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Third Defendant

AND

**MARCELLO BRINI**

Fourth Defendant

CORAM: MASTER LUPPINO

## REASONS FOR DECISION

(Delivered 16 January 2012)

- [1] The Second Defendant has applied by interlocutory summons seeking a number of orders. The only order left for determination by the Court is the application to strike out the Statement of Claim.
- [2] The application is made pursuant to Order 23.02 of the *Supreme Court Rules* (“the Rules”) which provides:-

### **23.02 Striking out pleading**

Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading:

- (a) does not disclose a cause of action or defence;
- (b) is scandalous, frivolous or vexatious;
- (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
- (d) is otherwise an abuse of the process of the Court,

the Court may order that the whole or part of the endorsement or pleading be struck out or amended.

- [3] The Second Defendant alleges that the Amended Statement of Claim does not adequately set out the case the Second Defendant must meet. The application is based on Rule 23.02(a) but Rule 23.02(c) also has application.
- [4] There are numerous authorities dealing with the purpose of pleadings.<sup>1</sup> The Rules also have specific requirements.<sup>2</sup> The combined effect is that the

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<sup>1</sup> *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, *Northern Territory of Australia v John Holland & Ors Pty Ltd* (2008) 22 NTLR 58 (“*John Holland*”)

<sup>2</sup> See Order 13

pleadings are required to set out the material facts relative to the claim, complying in that respect with any specific requirements set out in the Rules, and with sufficient particularity to enable the Defendant to ascertain the case it must meet. As such the pleadings are an essential aspect of the rule of procedural fairness. The pleadings also define the issues for decision by the Court.

[5] The Rules specifically provide that a pleading is to contain a statement of all the material facts on which the party relies.<sup>3</sup> In that context the material facts are those necessary to formulate the complete cause of action. They are not to be expressed in terms of great generality but must inform a defendant of the case the defendant must meet and are to be set out with sufficient particularity to enable the trial to be conducted fairly to all parties.<sup>4</sup>

[6] The cause of action in the subject claim is partly based on misleading and deceptive conduct pursuant to the *Trade Practices Act* and the *Consumer Affairs and Fair Trading Act*. Some specific requirements for pleadings in such cases were prescribed in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*.<sup>5</sup> In that case French CJ and Kiefel J said:-

“It [*Section 52 Trade Practices Act*] requires a clear identification of the conduct said to be misleading or deceptive. Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or

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<sup>3</sup> Order 13.02(1)(a)

<sup>4</sup> *Northern Territory of Australia v John Holland & Ors Pty Ltd* (2008) 22 NTLR 58

<sup>5</sup> (2010) 241 CLR 357

deceptive conduct or whether it is an element of conduct, including other acts or omissions, said to be misleading or deceptive.”<sup>6</sup>

[7] The required level of particularity can generally be addressed by particulars, whether set out in the Statement of Claim, or separately provided. There is some room for discretion in respect of an order for particulars as it is often a matter of judgment as to whether the appropriate level of particularity has been provided: *American Flange & Manufacturing Co Inc v Rheem Australia Pty Ltd*.<sup>7</sup>

[8] In *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd*,<sup>8</sup> when discussing particulars, Waddell J adopted and approved of the following passage from the judgment of Scott LJ in *Bruce v Odhams Press Ltd*<sup>9</sup>:-

“They are not to be used in order to fill material gaps in a demurrable statement of claim – gaps which have ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff’s cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff’s cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently, in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between ‘a material fact’ and a ‘particular’ piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence in the nature of things there is often overlapping. And the practice of sometimes putting particulars into the statement of claim and sometimes delivering them afterwards either voluntarily or upon request or order, without any reflection as to the true legal

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<sup>6</sup> *Miller & Associates Insurance Broking Proprietary Limited v BMW Australia Finance Limited* (2010) 241 CLR 357 at p364

<sup>7</sup> [1963] NSWLR 1121

<sup>8</sup> [1985] 2 NSWLR 340

<sup>9</sup> [1936] 1 KB 697 at 712-713

ground upon which they are given has become so common that it has tended to obscure the very distinction between them.

In a case where there is no omission of material facts under r 4, whether particulars should be ordered is very often a matter of pure discretion – because it depends on a view of fairness or convenience which is essentially a matter of degree.”<sup>10</sup>

- [9] The provision of particulars cannot cure defects in a statement of claim where the defects consist of the omission of material facts. In *Australian Automotive Repairers’ Association (Political Action Committee) Inc v NRMA Insurance Ltd*,<sup>11</sup> Lindgren J noted that a less strict view of the otherwise well established distinction between material facts and particulars seems to have been taken in current times. He observed that particulars are often taken into account to assess the sufficiency of the pleading of material facts. He added however that such an approach cannot cure the omission of material facts from the statement of claim regarded as a whole.
- [10] With that background I am required to determine whether the Plaintiffs’ claim is pleaded with the required level of clarity and containing all the material facts necessary to support the claimed causes of action such that the Defendants are able to sufficiently identify the case that must be met.
- [11] I recently dealt with an application in these proceedings by the Third Defendant which also sought an order for the strike out of the Amended Statement of Claim.<sup>12</sup> In that case the challenge was made solely on the basis of confusion as to whether the reference in the Amended Statement of

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<sup>10</sup> At p350

<sup>11</sup> [2002] FCA 1568

<sup>12</sup> *RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors* [2011] NTSC 103



Claim to “...*provided information and made representations...*” referred separately to information and representations or whether they were one and the same. I concluded that the pleading was ambiguous. I struck out the offending paragraphs of the Amended Statement of Claim and gave leave to amend once the current application was dealt with. The Third Defendant’s application was therefore more concerned with the question of whether the pleading was embarrassing within the meaning of Rule 23.02(c).

Notwithstanding that, the Third Defendant supports the position of the Second Defendant in the current application.

[12] In the course of the hearing of that application by the Third Defendant, I queried why the particulars which had been provided on 16 March 2011 (“the Particulars”) had not been incorporated into the Amended Statement of Claim as that was filed subsequent to the Particulars. The Particulars are extensive. As best I can discern, the reason they were not incorporated in the Amended Statement of Claim was that the parties were happy for the pleadings to be presented in this way. The Second Defendant was represented by different solicitors at that time. In these circumstances there is scope for the application of the principle in *Southern Cross Exploration NL v Fire & All Risks Insurance Co. Ltd*<sup>13</sup>, namely that a court will not usually interfere where a party is content to have facts pleaded by way of particulars rather than in the form of a statement of material facts.

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<sup>13</sup> [1985] 2 NSWLR 340

[13] That aside, to the extent that the Particulars contain allegations of material facts, had they been incorporated into the Amended Statement of Claim, that would have partly addressed the concerns raised in the current application. This has some bearing on the submission made by Mr Christrup for the Plaintiffs, complaining of the lateness of the current application and its effect on the timely disposition of the proceedings. Such issues, including normal case management issues, have taken a greater significance in recent times.<sup>14</sup>

[14] Mr Roper for the Second Defendant rightly points out that the Amended Statement of Claim is incomplete in any event and Mr Christrup acknowledged that some particulars were still to be provided. Discovery has only recently been completed. This has resulted in the Plaintiffs having access to some, but not all, necessary information to enable them to provide the requisite particulars. Further information is being presently pursued by way of subpoenas.

[15] All of that is relevant in the context of assessing the effect of any delay on the timely disposition of these proceedings were I to order the Amended Statement of Claim to be struck out and an amended pleading filed. The delay will not be as significant as would otherwise be the case and in my

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<sup>14</sup> See *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, *United Super Pty Ltd v Randazzo Investments Pty Ltd* [2009] NTSC 50, *Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd* [2010] NTSC 3.

view that brings the position squarely into the situation described by Mildren J in *United Super Pty Ltd v Randazzo Investments Pty Ltd*<sup>15</sup>.

- [16] The parts of the Amended Statement of Claim which are under challenge are paragraphs 16 and 17. It is now acknowledged and accepted by all parties that the particulars provided in respect of paragraphs 7 and 8 of the first Statement of Claim (those paragraphs are now paragraphs 16 and 17 in the Amended Statement of Claim), still apply and are still relied on. For the purposes of the argument, I read the Particulars together with the Amended Statement of Claim.
- [17] It is apparent from the Particulars that a number of obvious material facts have been provided as particulars in lieu of pleading them in the Amended Statement of Claim. If that were to be the only issue then there could be some scope for acceptance of Mr Christrup's argument that nonetheless the purposes of pleadings have been satisfied in that all the material facts have been provided in one form or another and therefore that the Defendants are informed of the case they must meet.
- [18] However I agree with Mr Roper that there remains an unacceptable flaw in the current pleadings even when read with the Particulars. To properly understand that requires consideration of the allegations and the pleadings as a whole. Paragraphs 4 and 5 of the Amended Statement of Claim plead an industry practice or arrangement whereby publishers have divided the

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<sup>15</sup> [2009] NTSC 50 at p 24

Darwin metropolitan area into areas and have appointed persons to be the exclusive agents in those areas for sales of various publications. Paragraph 9 of the Statement of Claim defines the “Business” sold by the First Defendant to the First Plaintiff by reference to one of those defined exclusive areas, specifically the Nightcliff exclusive area. Paragraphs 16 and 17 of the Amended Statement of Claim allege false representations as to turnover, profitability and the extent of the customer base of the Business. The Particulars elaborate and allege that representations were made based on the provision of sales and trading figures in various accounting documents. The falsity that is alleged in respect of those representations is indirect as apparently the figures provided were correct. The allegation is that the basis of the representations, specifically the extent of the customer base to which those figures related, is misrepresented. That is essentially what the representation defined as “the Customer Base Representation” in the Particulars purports to allege. The Plaintiffs allege that the net result is to render misleading the figures that were provided as the figures include sales outside the Nightcliff exclusive area.

[19] Mr Chrstrup argues that the pleading in paragraphs 4, 5 and 9 of the Amended Statement of Claim, coupled with the Particulars defining the Customer Base Representation and the definition of “Business” by reference to the Nightcliff exclusive area, set out all of the relevant material facts to notify the Defendants of the claim they have to meet.

[20] I do not agree. The overall effect of the Amended Statement of Claim and the Particulars is merely to allege representations as to turnover, profitability and the customer base of the Business. As to the turnover and profitability, there are no material facts as to the precise nature of the representations made, how they arise or the extent of the overstating. I note that to some extent the provision of further particulars awaits the obtaining of evidence which is currently being pursued by way of subpoenas. That will not necessarily or entirely satisfy the pleading requirements as in my view the Plaintiffs are required to plead all the material facts relevant to the alleged overstating of turnover and profitability. Ideally that should occur as an amendment to the pleadings and not by way of particulars. However given that the falsity alleged in the Particulars is with respect to the customer base, I would not expect this to remain a contentious issue once all the material facts have been pleaded.

[21] The allegation of falsity of the Customer Base Representation however is pivotal to the Plaintiffs' claim of misrepresentation. In my view the material facts pleaded in the Amended Statement of Claim as to how such a representation arises are either insufficient or unclear. On the available material, the Customer Base Representation could arise in a number of ways. It could be a specific representation (including in, or by the provision of, documents), or it could be by implication arising out of industry practice. The Defendants are entitled to know specifically how the Plaintiffs claim that the Customer Base Representation arises and until material facts to

demonstrate that are pleaded, it cannot be said that the Defendants know the case they have to meet. The relevance of the industry practice pleaded in paragraphs 4 and 5 of the Amended Statement of Claim is not sufficiently clear at present.

[22] The net result is that the Amended Statement of Claim contains only a bare allegation of a representation as to the customer base. The absence of pleading of material facts to establish how it arises makes that a plea of conclusion and that is insufficient.<sup>16</sup>

[23] Further, it is clear that the Plaintiffs rely on silence by the Second Defendant and the Third Defendant. Silence can give rise to actionable misrepresentation at common law and can also be the basis of a claim for statutory misleading and deceptive conduct under both Acts relied on when the circumstances of the case give rise to an obligation to disclose the relevant facts.<sup>17</sup> The pleadings must therefore set out the circumstances or material facts on which the Plaintiffs will rely to establish the duty to disclose.

[24] The pleadings are also insufficient to satisfy the requirements of pleadings in the case of statutory misleading and deceptive conduct based on silence in accordance with *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*.<sup>18</sup> Specifically the pleadings are required to set

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<sup>16</sup> *Northern Territory of Australia v John Holland & Ors Pty Ltd* (2008) 22 NTLR 58

<sup>17</sup> *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, *Winterton Constructions Pty Ltd v Hambros Australia Pty Ltd* (1992) 111 ALR 649

<sup>18</sup> (2010) 241 CLR 357

out whether silence is alleged to be only an element of the misleading or deceptive conduct or whether the silence itself is the conduct complained of.

[25] Although the Defendants have some knowledge of the facts, that is not relevant for the purposes of determining the sufficiency of the pleadings. The test is whether the Defendant knows what the Plaintiffs allege are the material facts.<sup>19</sup> The Amended Statement of Claim in its current form fails to satisfy that requirement. For those reasons in my view there is no scope for the exercise of any discretion in favour of the Plaintiff. I am satisfied that in all of the circumstances case management issues do not significantly impact on the making of the orders sought.

[26] For these reasons I order that the Plaintiffs' Amended Statement of Claim filed 9 June 2011 be struck out. I give leave to the Plaintiffs to file a Second Amended Statement of Claim.

[27] I will hear the parties as to the time to be allowed for that purpose, for directions as to subsequent pleadings and as to any other consequential orders.

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<sup>19</sup> *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148