

SUPREME COURT OF QUEENSLAND

CITATION: *Dominus P/L v Daydream Island Resort Investments P/L & Ors* [2003] QSC 044

PARTIES: **DOMINUS PTY LTD** ACN 009 968 665
(plaintiff/respondent)
v
DAYDREAM ISLAND RESORT INVESTMENTS PTY LTD ACN 089 615 136
(first defendant/applicant)
WILLIAMS CORPORATION RESORTS DIVISION PTY LTD ACN 072 464 889
(second defendant/applicant)
DAYDREAM ISLAND PTY LTD ACN 089 923 580
(third defendant/applicant)

FILE NO/S: SC 8447 of 2000

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 7 March 2003

DELIVERED AT: Brisbane

HEARING DATE: 24 June 2002

JUDGE: B W Ambrose J

ORDER: **I strike out the plaintiff's statement of claim. I give liberty to deliver another statement of claim properly pleading and particularising the facts upon which it will rely in pursuit of its claim against the defendants on or before 30 April 2003. Should a properly drafted and particularised statement of claim not be delivered within that period of time I give the defendants liberty to apply to strike out the plaintiff's action pursuant to their applications of 3 and 4 June 2002. I order that the plaintiff pay forthwith the defendants' costs of this application to be assessed prior to delivery of any further statement of claim pursuant to the leave I give so to make. I will hear submissions as to whether such assessment should be made on a standard or indemnity basis.**

CATCHWORDS: PRACTICE – Pleadings – applications for striking out of amended claim and statement of claim as disclosing no cause of action or being frivolous and vexatious – whether amended

claim and statement of claim properly pleaded or should be struck out

Corporations Act 2001 (Cth), Part 2 B.3
Trade Practices Act 1974 (Cth)
Uniform Civil Procedure Rules 1999 (Qld), r 150(1)(k), r 150(1)(m), r 150(2), r 161, r 171, r 194, r 371, r 375

Black v Smallwood (1966) 117 CLR 52, cited
Farrelly v Hircock (No 1) [1971] QdR 341, cited
Kelner v Baxter (1866) LR2CP 174, cited
Martinez v Rowland [1983] 1 QdR 496, cited
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146, cited
Trident General Insurance Co Pty Ltd v McNiece Bros Pty Ltd; McNiece Bros Pty Ltd v National Employers Mutual General Insurance Association Ltd & Anor (1987) 8 NSWLR 270, cited

COUNSEL: P W Hackett for the first and third defendant/applicants
 K Barlow for the second defendant/applicant
 K S Howe for the respondent

SOLICITORS: Redchip Lawyers for the first and third defendant/applicants
 Hopgood Ganim for the second defendant/applicant
 Delaney's Lawyers for the respondent

- [1] **AMBROSE J:** These are applications made by the first defendant (“Daydream Investments”) and the third defendant (“Daydream Island”) on 3 June 2002 and by the second defendant (“Williams Resorts”) on 4 June 2002 to strike out the further amended claim and statement of claim delivered by the plaintiff (“Dominus”) as disclosing no cause of action or alternatively as being frivolous or vexatious or alternatively as having a tendency to prejudice or delay a fair trial of the proceedings.
- [2] Daydream Investments was registered on 20 September 1999. Daydream Island was registered subsequently on 12 October 1999 presumably pursuant to cl 2.1 of the M.O.U. of 21 September 1999 between Bullivant and Williams which is Ex JARW7 to the affidavit of J.A.R. Walker filed 13 February 2002.
- [3] The action was commenced by Dominus against Daydream Investments (the sole defendant at that stage) on 27 September 2000.
- [4] A defence was filed to that claim on 17 October 2000.
- [5] On 14 November 2000 Daydream Investments sought further and better particulars and an order for security for costs.
- [6] On 22 November 2000 a director of Dominus undertook to pay any costs that might be ordered against it up to the sum of \$40,000.00.

- [7] On 3 May 2001 an amended statement of claim was delivered by Dominus with a reply and answer to Daydream Investment's defence. On the same day the further and better particulars sought by the defendant were provided.
- [8] On 17 July 2001 a further amended statement of claim was filed by Dominus. At this stage Daydream Investments still remained the only defendant.
- [9] On 3 August 2001 Daydream Investments filed an amended defence to this amended statement of claim.
- [10] On 26 October 2001 pursuant to UCPR 194, the solicitors for Dominus and the solicitors for Daydream Investments consented to an order that Daydream Investments have leave to take third party proceedings against Keith Williams, Ben Williams, Williams Corporation Pty Ltd ("Williams Corporation") and Williams Corporation Resorts Division Pty Ltd ("Williams Resorts").
- [11] On 30 October 2001 Daydream Investments, Vaughan Bullivant (a director of Daydream Investments, Daydream Island, and Cruising On International Investments Pty Ltd ("Cruising On")) issued third party proceedings against Keith Williams as director of Williams Corporation and Williams Resorts, and against Ben Williams alleged to be the servant or agent of Williams, Williams Corporation and Williams Resorts.
- [12] On 7 December 2001 the defendants to that third party claim filed a Notice of Intention to Defend.
- [13] On 13 February 2002 Daydream Investments applied to have a further amended statement of claim of Dominus filed on 9 July 2001 struck out as disclosing no cause of action or alternatively as frivolous and vexatious.
- [14] By the same application Daydream Investments sought the joinder of one or more of Williams, Williams Corporation, Daydream Island Pty Ltd ("Daydream Island") and Williams Resorts as defendants to the claim of Dominus.
- [15] Daydream Island initially had Bullivant and Williams as its co-directors and was the vehicle by which their respective interests managed and controlled the Daydream Island tourist resort. While in my view this is not pleaded very precisely, I infer from paras 42 and 43 of the statement of claim that to be the plaintiff's case.
- [16] On 20 February 2002 Philippides J ordered that the plaintiff's further amended statement of claim be struck out and that it have leave to deliver a second further amended statement of claim within 28 days.
- [17] By the same order both Dominus and Daydream Investments were given leave to join Williams, Ben Williams, Williams Corporation, Daydream Island and Williams Resorts as parties in the action. Dominus was ordered to pay the costs thrown away by Daydream Investments occasioned by Dominus repleading its case.
- [18] On 11 April 2002 Dominus filed a statement of claim, and on 15 April 2002 Dominus filed an amended claim adding Williams Resorts and Daydream Island. On 27 May 2002 Dominus filed two separate versions of further and better particulars to various statements of claim and "subsequent further and better particulars for the second defendant", Williams Resorts.

- [19] On 27 May 2002 Dominus also filed yet another amended statement of claim to which Daydream Investments was the first defendant, Williams Resorts the second defendant and Daydream Island the third defendant.
- [20] On 4 June 2002 Williams Resorts pursuant to UCPR 371 and/or 375 sought an order that the statement of claim of Dominus filed 15 April 2002 and the amended statement of claim filed 27 May 2002 was ineffectual because it had not been served within the time constraints imposed by Philippides J on 20 February 2002. Alternatively under UCPR 171 it made this application to have that amended statement of claim struck out on the ground that it disclosed no reasonable cause of action, had a tendency to prejudice and delay the trial etc. In the alternative an order was sought that various paragraphs of the amended statement of claim be struck out because they disclosed no cause of action etc.
- [21] By way of alternative relief an order was sought under UCPR 161 that Dominus provide to Williams Resorts further and better particulars of its amended statement of claim of 27 May 2002 in a response to its request for particulars made 22 April 2002.
- [22] On 3 June 2002 Daydream Investments and Daydream Island made one of these applications seeking to have the further amended claim and statement of claim of Dominus of 15 April 2002 struck out as disclosing no cause of action etc.
- [23] Both applications were argued on 24 June 2002.
- [24] I do not propose to attempt to analyse the content of the various pleadings and particulars delivered in connection with them over the period of 21 months or so which elapsed between the institution of proceedings on 27 September 2000 and the applications argued on 24 June 2002.
- [25] It suffices to say that one of the applications made in this action to strike out the latest statement of claim delivered by Dominus is made by Daydream Investments wholly controlled by the Bullivant interests, and by Daydream Island originally controlled by the Bullivant and Williams interests but now also wholly controlled by the Bullivant interests. The other application to strike out that statement of claim is made by Williams Resorts wholly controlled by the Williams interests.
- [26] I do not propose to analyse the assertions of fact in the third party proceedings commenced on 30 October 2001 by Daydream Investments, Cruising Investments and Bullivant all pursuing relief for the benefit of the Bullivant interests against Keith Williams, Ben Williams, Williams Corporation and Williams Resorts all of such third party defendants I infer having the same interest.
- [27] Doing the best I can on facts alleged in the multitude of pleadings and particulars and assisted by submissions of counsel I broadly summarise the factual issues pleaded by Dominus relevant to these applications as follows :—
- [28] In August 1999 Williams informed Miller, the sole director of Dominus, that he and Bullivant had agreed to purchase the Crown leasehold interest in Daydream Island.
- [29] On 1 November 1999 Daydream Investments and Williams Resorts acquired the Crown lease of the island as tenants in common. Daydream Island in which the co-owners were equal shareholders and Bullivant and Williams were co-directors was

selected as the corporate vehicle for their management and control of the holiday resort venture.

- [30] Dominus alleges that between August and October 1999 the eventual co-owners of the Crown leasehold interest in the Daydream Island tourist resort (Daydream Investments and Williams Resorts) agreed to lease and/or licence to Dominus various retail outlets and a departure lounge in existing tourist facilities constructed on Daydream Island. It is pleaded that the agreement was partly oral contained in conversations during the period August to October 1999 between Williams on behalf of the owners (ie Daydream Investments and Williams Resorts and ultimately Daydream Island) and Miller (as director of Dominus). It is pleaded that in so far as the agreement was in writing it consisted of a facsimile from Williams on behalf of Daydream Investments and Williams Resorts to Miller dated 18 October 1999 and a letter from Miller to Williams and Ben Williams dated 22 October 1999. Daydream Island was not registered until 12 October 1999.
- [31] Dominus alleges that in or about October 1999 (acting through its director Mr Miller) it “and the owners” of the holiday resort apparently through their agent Williams agreed that they would undertake certain refurbishment work on the Island tourist facilities and that Dominus would incur certain expenses on the basis that Dominus would obtain from the Williams and Bullivant interests – perhaps through Daydream Island controlled by them – a lease or licence to occupy part of the tourist facilities for a period of 5 years. The ability of the registered Crown lessees to sub-lease part of that Crown lease to either Daydream Island or Dominus was not debated upon these applications.
- [32] Part of the claim by Dominus seems to be based upon breaches of contract and obligations under the *Trade Practices Act* on the part of Daydream Island controlled by Daydream Investments and Williams Resorts and/or on the part of Daydream Investments and Williams Resorts. In contract it is asserted that there was an implied term in the agreement allegedly negotiated by Williams on behalf of the eventual co-owners of the Daydream Island holiday resort that they would continue to operate the tourist resort and that the various tourist facilities would be kept fully operational throughout the term of the lease and/or licence. Dominus asserts that it was an implied term or at least a representation that an expensive marketing and promotional campaign would be commenced by Daydream Investments (a Bullivant interest) and Williams Resorts (a Williams interest) and/or Daydream Island in the month of November 1999 with a view to increasing the number of tourists using the Daydream Island holiday resort.
- [33] Dominus alleges that on 1 November 1999 it took possession of parts of the holiday resort premises to be leased or licensed to it and expended money on fitting them out and providing trading stock for sale.
- [34] Dominus alleges that between November 1999 and February 2000 “at the direction of Williams” and “with the apparent knowledge of the owners” (ie Daydream Investments and Williams Resorts and/or Daydream Island) Dominus employed a chef and ordered furniture etc for use in the refurbished holiday resort facilities.
- [35] In paras 12 and 42 of the latest amended statement of claim it is pleaded that on 31 March 2000 Williams Resorts sold its interest in the Daydream Island tourist facility (ie the one that it held as co-owner with Daydream Investments) to Daydream

Investments and “assigned its interests in the said leases and/or licences” to Daydream Investments. Subsequent to Daydream Investments acquiring the interest of Williams Resorts as co-owner of the Island holiday facilities controlled by Daydream Island, Daydream Island presumably became a company wholly controlled by the Bullivant interests.

- [36] The lease register (Ex-JARW9) records that on 3 July 2000 Daydream Investments became the sole registered lessee of the Crown leasehold. The search discloses that the former registered lessees were Daydream Investments and Williams Resorts. It also discloses that those former lessees were registered as such on 3 February 2000.
- [37] In para 13 of the statement of claim it is alleged that in about May 2000 Daydream Investments (controlled by Bullivant) which then controlled Daydream Island commenced to “run down” the holiday island resort facilities. In June 2000 it closed down various retail and bar facilities and on 8 August 2000 informed Dominus that it intended to close down all operations temporarily. It did so on 23 September 2000 for the purpose of reconstructing and renovating the tourist facility. It was estimated that the facility would not be opened again for business for approximately 6 months. In paras 43 *et seq* similar allegations are made with respect to the actions of Daydream Island.
- [38] In para 15 of the statement of claim Dominus alleges that on or about 14 September 2000 it lawfully terminated the lease and/or licence agreement “and thereby accepted the First Defendant’s (ie *Daydream Investments*) repudiation of the Lease and/or Licence Agreements”. In para 45 similar allegations are made with respect to Daydream Island.
- [39] In para 17 of the last amended statement of claim it is alleged –
 “The First Defendant (ie *Daydream Investments*) is estopped from denying that Williams had express or ostensible authority to bind the First Defendant with respect to the said Leases and/or Licences, as at no time, during the term of the Lease and/or Licence, did the First Defendant object to or deny the plaintiff operating and/or having possession of the two (2) Southern Boutiques. The conduct of the First Defendant is inconsistent with any denial that Williams had the expressed or ostensible authority to bind the First Defendant and the Second Defendant (ie *Williams Resorts*) with respect to the said Leases and/or Licences. The Plaintiff repeats and relies on the allegations contained in ...”.
- [40] In para 47 a similar plea is raised against Daydream Island.
- [41] Dominus then claims damages in the sum of \$920,317.00 which includes a claim of \$606,790.00 for five years loss of profit and \$250,000.00 for loss of opportunity to renew the lease/licenses.
- [42] In paras 22 and 34 of the statement of claim relief in the alternative is sought against Williams Resorts should it be found that Williams as its agent and/or servant did not have express or ostensible authority to bind Daydream Investments and/or Daydream Island.

- [43] Stated very shortly and disregarding for the moment the various alter ego company structures alleged to have taken part in the rather complicated inter company arrangements on both the Bullivant side and the Williams side of those transactions the following basic allegations of fact seem to emerge in the latest statement of claim.
- [44] In about 1999 Bullivant and Williams through their corporations became the co-owners of a Crown lease on Daydream Island which included holiday facilities then in need of repair and/or renovation.
- [45] At about that time Williams negotiated with Dominus (through Miller) to lease or licence part of the resort premises to be renovated or refurbished. The arrangement was for a lease/licence for a period of at least five years.
- [46] Relying upon what had passed between Williams and Dominus, Dominus incurred expenses etc with a view to obtaining the financial benefits of operating the proposed lease/licence for at least five years.
- [47] The allegation seems to be that this agreement was partly oral and partly in writing or at least partly evidenced in writing. What part in the scheme of things Ben Williams (referred to in paras 5 (v) and 7 of the statement of claim) is alleged to have played does not emerge on the pleading.
- [48] Ben Williams is one of the defendants to the third party statement of claim delivered against him by Daydream Investments, Cruising On and Bullivant all of whom are apparently pursuing Bullivant interests against both the Miller interests and the Williams interests.
- [49] However that may be, it is inappropriate upon this application to consider the nature or content of any arrangement allegedly made between Dominus and Williams which occasioned Dominus any loss it now seeks to recover against both the Bullivant and Williams interests.
- [50] It suffices to say that it is not pleaded in the current statement of claim or as far as I can tell on a quick perusal of any of the other statements of claim that Bullivant as director of his various companies to which I have referred had any personal involvement in making of any of the alleged arrangements which are alleged to constitute representations leading to an agreement between Daydream Island or Daydream Investments and Williams Resorts to give to Dominus a lease or licence for whatever length of time or containing whatever terms or indeed which are alleged to constitute such an agreement.
- [51] The objection taken by Daydream Investments and Daydream Island – both of which are now Bullivant Corporations – is that no facts have been pleaded – either directly in the statement of claim or by way of particulars subsequently provided which would establish that when Williams made the alleged representations and/or purported to make the agreement for a lease/licence upon which Dominus relies he was acting as agent not merely for Williams Resorts but also for Daydream Investments and/or for Daydream Island.
- [52] It is clear on the authorities that in any proceedings where an issue arises as to whether or not in a commercial transaction one person has acted as the actual or ostensible agent of another, that is a material fact or the *factum probandum*, in the

proceedings and is determined upon evidence, the *facta probanda*, and its determination involves reaching a legal conclusion based upon such evidence. A pleading must not plead evidence it is proposed to lead to prove a material fact, it must plead only the fact to be proved by that evidence.

- [53] It is clear beyond argument on the authorities that where agency is an issue between an alleged principal and a person claiming relief against that principal based upon acts or omissions on the part of his alleged agent, that person may not establish agency by relying upon what the alleged agent has asserted to be the relationship between him and the alleged principal contemporaneously with those acts or omissions.
- [54] In such a case a person endeavouring to establish agency against an alleged principal must establish it by what the alleged principal has said or done or omitted to say or do with respect to the acts or omissions of the alleged agent for which it is sought to hold the principal responsible.
- [55] The first important consideration on this application is that a co-owner is not by the mere fact of such co-ownership deemed to give authority to another co-owner as its agent so as to bind it vicariously. In this respect I refer to *Farrelly v Hircock (No 1)* [1971] QdR 341 and *Martinez v Rowland* [1983] 1 QdR 496.
- [56] Undoubtedly on this issue of agency, co-ownership may be relevant evidence to be considered in light of other evidence or *facta probanda* pointing to actual authority. However without other evidence the mere circumstance of co-ownership does not of itself permit a legal conclusion to be drawn that one co-owner was the agent of the other or others to make representations, contracts etc.
- [57] To the extent that the statement of claim under attack pleads that Williams as co-owner asserted that he was agent for Bullivant's company or companies, the other co-owner(s), it does not plead a material fact but only a circumstance in which other admissible evidence to prove such agency against Bullivant (or his companies) may be considered. It is clear beyond argument that where agency is in issue, assertions made by the alleged agent himself at the time of his acts or omissions that he is acting as agent for a principal are not admissible to establish that he was the agent of the person he nominated as principal. In this respect I refer to *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.
- [58] In my view the statement of claim and particulars delivered in respect of it fail to plead or particularise any relevant *facta probanda* upon which the plaintiff may rely to establish against Daydream Investments and/or Daydream Island that any representations made by Williams to Dominus at any material times pleaded in the statement of claim were made as the agent of either Daydream Investments or Daydream Island.
- [59] It is quite insufficient in my view in a case of this sort for the plaintiff to plead merely that Williams was the actual or apparent or ostensible agent of Daydream Investments and/or Daydream Island. That bare allegation of fact merely pleads a legal conclusion. It does not plead the facts upon which such a conclusion might properly or arguably be reached. The material fact of agency properly particularised in this case must specify every material act or omission of the principal with reference to its time, place and persons involved in respect of which Dominus will seek to lead evidence upon trial and indeed in respect of which all parties must

disclose documents to support or refute the inference that Williams acted as agent for the Bullivant and/or Williams interests.

- [60] In my view the statement of claim is defective in this respect; it is embarrassing and does not plead the material facts or the particulars of the *facta probanda* upon which Dominus relies to seek a finding to be made at trial on either actual, apparent or ostensible agency as pleaded against the Bullivant interests.
- [61] The principal object of particulars is to enable the other party to know precisely what factual case it has to meet at trial and so avoid surprise and the incurring of unnecessary expense. That is why Dominus in this case must give specific details of times, places, persons and documents with reference to all acts or omissions on the part of Bullivant or persons acting on his behalf or on behalf of his companies upon which it will rely to establish that Williams acted as his or their agent.
- [62] The basis of the claim by Dominus is alleged agreements and representations by various parties to this action through their alleged agents Bullivant, Williams and Miller between unspecified dates between August and October 1999. However Daydream Investments was not registered until 20 September 1999 and Daydream Island was not registered until 12 October 1999.
- [63] The need for precise particularisation of dates, times, places and persons alleged to have been parties to the agreements and representations alleged in this case is highlighted by Part 2 B.3 of the *Corporations Act* and authorities such as *Kelner v Baxter* (1866) LR2CP 174, *Black v Smallwood* (1966) 117 CLR 52, and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*; *McNiece Bros Pty Ltd v National Employers Mutual General Insurance Association* (1987) 8 NSWLR 270 (affirmed on appeal (1987) 165 CLR 107).
- [64] In my view para 17 of the statement of claim – raising estoppel – is also defective. No authority was cited to support the proposition that the mere failure of Daydream Investments (then controlled only by the Bullivant interests) to “object to or deny the Plaintiff operating and/or having possession of the two (2) Southern Boutiques” without anything more could estop the Bullivant interests from contesting the actual authority of Williams to make an agreement and/or representations binding upon the Bullivant interests. At the very least knowledge of the plaintiff’s acts would need to be pleaded and particularised as required by UCPR 150(2).
- [65] In paragraphs 34 to 49 of the statement of claim Dominus pleads in the alternative that Williams made the representations, agreements etc previously pleaded against Daydream Investments and Williams Resorts as agent of Daydream Island. Again these pleadings need reformation and particularisation in accord with paras 58 and 59 hereof.
- [66] The gravamen of the complaint by both applicants is the pleading of agency in para 4 of the statement of claim.
- [67] In para 1 of the statement of claim it pleads that Bullivant was the sole director of Daydream Investments and Keith Williams was the sole director of Williams Resorts and Bullivant and Williams were the co-directors of Daydream Island.
- [68] In my view this pleading sufficiently pleads and particularises a fact to support the allegation that Bullivant was the agent of Daydream Investments, Williams was the

agent of Williams Resorts and Williams and Bullivant the actual and ostensible agents of Daydream Island while each was and remained a director of that company. It is silent however as to what if any consequences are alleged to flow from the effect of the matters raised in para 62 and 63 hereof.

- [69] Para 4 of the statement of claim alleges that Williams was the agent not merely of Williams Resorts but also of Daydream Investments and had the express or alternatively the ostensible authority to bind Daydream Investments with respect to the lease and/or licence of the tourist resort facilities on Daydream Island. It is pleaded that “should it be found that Williams did not have express authority to bind Daydream Investments, Bullivant on behalf of Daydream Investments held out Williams as having such authority.
- [70] In my view the fact that Williams is alleged to have been the director of Williams Resorts is a sufficient factual basis to support the allegation that he had the express or ostensible authority to bind Williams Resorts.
- [71] The assertion that Bullivant was a director of both Daydream Investments and Daydream Island is sufficient to establish that he had actual or ostensible authority from both of those companies to bind them with respect to arrangements he made while director for a lease or licence of property in which they were interested. On my reading of it, para 4 as particularised makes no allegation of fact that Bullivant or his companies expressly authorised Williams to act as their agent in the negotiation of the lease/licence of part of the Daydream Island tourist resort. If this be the contention of Dominus then this must be particularised in accord with paras 58 and 59 hereof.
- [72] The particulars of express authority and ostensible authority alleged in para 4(i) and (ii) are clearly insufficient in my view to particularise the facts from which the alleged authority given by Bullivant and his companies to Williams may be inferred.
- [73] With respect to a particular given in para 4(b), the fact merely that Williams was the director of Williams Resorts as co-venturer with Daydream Investments for the use of the tourist facilities conducted by Daydream Island is not a fact from which it can be inferred that Williams was authorised by Bullivant and his companies to lease and/or licence the tourist facilities conducted by Daydream Island. If that is the legal contention of Dominus it should be specifically pleaded and particularised with reference to documents such as the MOU of 21 September 1999 (*vide* para 2 hereof) and other documents to be relied upon.
- [74] The particulars in para 4(c) in my view do not relate to an allegation of fact admissible or even relevant to the issue of William’s authority from Bullivant and the companies in which he was interested to make agreements/representations concerning his agency.
- [75] Para 4(d)(i) of the statement of claim under the heading “Conduct of the Principal” while asserting the awareness of Bullivant and Daydream Investments that a lease and/or licence were made “on behalf of” Dominus amount merely to a bald assertion of a fact which is not particularised as required by UCPR 150(1)(k) and 150(2).

- [76] In my view knowledge may only be inferred from facts and UCPR 150(2) requires all such facts to be specifically pleaded.
- [77] No particulars have been specifically pleaded from which the awareness or knowledge on the part of Dominus and Miller pleaded in para 4(c) could be inferred.
- [78] Similarly no facts to support the awareness or knowledge alleged against Bullivant and Daydream Investments in para 4(d)(i) are particularised.
- [79] The fact pleaded in Para 4(d)(ii) said to ratify “the existence” of the “ostensible authority” of Williams to my mind is almost meaningless. There seems to be little doubt that it might be inferred that Williams as director of Williams Resorts had actual and/or ostensible authority to act for that company. Whether Williams had ostensible authority to act for Daydream Investments can be determined only upon the acts or omissions of Daydream Investments (Bullivant) at material times. No facts whatever are pleaded as to such acts or omissions. As I read the so called “particular”, ratification of “the existence” of Williams’s ostensible authority from Daydream Investments can mean no more than such conduct or lack of conduct was consistent with ostensible authority – on the assumption that Daydream Investments was aware of acts and omissions of Williams as co-venturer and as I have already indicated no particulars whatever are given of facts from which such awareness or knowledge alleged in para 4(d)(i) might be inferred.
- [80] With respect to the purported particular given in para 4(d)(iii), it has all the inherent vices of a double negative. To the extent that it is intended to plead that Daydream Investments and/or Williams Resorts and/or their agents accepted rent from Dominus with respect to the lease and/or licence of tourist facilities on Daydream Island, no particulars whatever are provided as to the dates when such rental was paid by Dominus in respect of such lease and/or licence the amounts of any such rental allegedly so paid or the persons who made and received such payments or how such payments were made. All such particulars must be provided.
- [81] In my view this pleading is also gravely deficient under UCPR 150(1)(m).
- [82] Particulars of such alleged payments have been sought but have not been provided.
- [83] With respect to para 4(d)(iii) the fact or particulars purportedly pleaded would more properly be characterised as a statement of evidence or contention than as a particularised fact which considered either alone or with other *facta probanda* might permit a conclusion of agency to be drawn.
- [84] No particulars are given as to the date or dates of the alleged television programme allegedly “viewed by” Dominus (presumably Miller). Accepting that the substance of this pleading is that on some unspecified date Miller watched a TV programme in which Bullivant said words to the effect that he had no idea how to run a resort but left that up to Williams, that could not conceivably in my view be described as a “fact” which in itself would permit an inference to be drawn that Williams had either the express or ostensible authority of Bullivant or Daydream Island Investments to negotiate a lease/licence agreement with Dominus (Miller) particularised in paras 5, 6 and 7 of the latest statement of claim.

- [85] Undoubtedly if evidence were given by Miller along the lines of this so called “particular”, it might well be relevant in the context of other evidence in determining whether at the end of the day the express or ostensible agency of Williams had been established; it could not however either standing alone or considered in the context of other evidence relevant to the ultimate conclusion on the issue of agency, be categorised as more than evidence of a statement made by Bullivant whether or not as agent of one of his companies which may or may not have some weight with other evidence in determination of the material fact of agency.
- [86] In any event in the absence of the date when any such TV programme is alleged to have occurred – in the context of the period August 1999 to October 1999 specified in paras 2 and 5 it becomes impossible properly to plead to this particular. I observe merely that if such an interview did take place in the year 2000 it would not be an evidentiary fact from which a legal conclusion of agency could be drawn. At most it might amount to evidence which might be relevant with other *facta probanda* depending upon the content of other evidence given by Miller and Bullivant – and perhaps Williams.
- [87] In my view however as the pleading stands at the moment it fails to plead with sufficient particularity whatever relevant evidentiary facts it purports to particularise.
- [88] It is with regret that I feel obliged to strike out yet again the plaintiff’s statement of claim. The costs already thrown away as a consequence of the plaintiff’s failure to properly plead and particularise its case has led me to conclude that although I should give it liberty to deliver yet another statement of claim properly pleading and particularising the facts upon which it will rely in pursuit of its claim against the defendants, I should require that it deliver such a statement of claim on or before 30 April 2003. Should a properly drafted and particularised statement of claim not be delivered within that period of time I give the defendants liberty to apply to strike out the plaintiff’s action pursuant to their applications of 3 and 4 June 2002.
- [89] I order that the plaintiff pay forthwith the defendants’ costs of this application to be assessed prior to delivery of any further statement of claim pursuant to the leave I give so to make. I will hear submissions as to whether such assessment should be made on a standard or indemnity basis.