SUPREME COURT OF QUEENSLAND

CITATION:	*Althaus v Australia Meat Holdings P/L & Anor* [2006] QSC 056
PARTIES:	**JOHN EDMOND ALTHAUS** (plaintiff) **v** **AUSTRALIA MEAT HOLDINGS PTY LTD** (ACN 011 062 338) (first defendant) **CONAGRA INC.** (second defendant)
FILE NO/S:	SC No 7975 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	24 March 2006
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2006
JUDGE:	de Jersey CJ
ORDER:	**1. that the plaintiff have leave to deliver a statement of claim in the form of Ex 2, but amended:** **a) to remove any causes of action by Redmeat Pty Ltd as plaintiff, other than equitable claims;** **b) to remove Leroy Lochmann as a defendant;** **c) to include reference to the variation agreement dated 30 May 1998 between the plaintiff and Redmeat Pty Ltd;** **d) to allege the circumstances said to give rise to fiduciary obligations; and** **e) in other respects as the plaintiff may be advised.** **2. that Redmeat Pty Ltd be added as second plaintiff in the proceeding.** **3. Costs reserved**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – GENERALLY – leave to deliver statement of claim where pleadings struck out – raising time barred claims – whether those claims arise out of substantially same

facts as those which previously claimed relief – whether proposed pleadings are sufficiently particularised

Trade Practices Act 1974 (Cth), s 52, s 82, s 87
Uniform Civil Procedure Rules 1999 (Qld), r 69, r 367, r 376

Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd (1967) VR 37, cited
Corrs Pavey Whiting and Bryan v Collector of Customs (VIC) (1987) 14 FCR 434, cited
Draney v Barry (2002) 1 Qd R 145, cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Heyl-Dia v Edmunds (1899) 81 LT 579, cited
Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd (2001) 114 FCR 108, cited
Paragon Finance plc v D B Thakerar & Co (1999) 1 All ER 400, cited
Potters-Ballotini Ltd v Weston-Baker (1977) RPC 202, cited
Ramsay v McElroy (2004) 1 Qd R 667, cited
Rex & Co & Rex Research Corp v Muirhead and Comptroller-General of Patents (1926) 44 RPC 38), cited
Under Water Welders & Repairers Ltd v Street and Longthorne (1968) RPC 498, cited

COUNSEL: M M Stewart SC with J T Stevens for the plaintiff
D J S Jackson QC with A M Pomerenke for the first defendant
S D Anderson for the second defendant

SOLICITORS: Barwick Stevens for the plaintiff
Allens Arthur Robinson for the first defendant
Lindwall Schweikert for the second defendant

[1] **de JERSEY**: The plaintiff ("Mr Althaus") filed a claim and statement of claim on 14 September 2004. He sought, against the first defendant ("AMH") and the second defendant ("Conagra"), a declaration that he was the owner of the confidential information referred to in the statement of claim, and a declaration that they had misused it. He sought an account of profits, and an order for payment of amounts found due to him. He also sought a declaration that Conagra held the patents referred to in the statement of claim on a constructive trust for him. Mr Althaus was then representing himself.

[2] Challenges to the statement of claim led, on 6 December 2005, to orders that the then amended statement of claim (Ex 1) be struck out, and that Mr Althaus not file a further statement of claim "without leave or direction of the court". Mr Althaus filed the present application on 27 February 2006, seeking that leave in respect of the draft statement of claim (settled by Counsel) which I have marked Ex 2.

[3] The issue of leave to deliver the pleading should be approached in similar fashion to a striking-out application (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130).

Original statement of claim

[4] In the original statement of claim, which was some 51 pages long, Mr Althaus set out his factual basis for a claim in equity. That characterization of the claim is presently significant because, as was common ground, no particular limitation period applied to the claims.

[5] Mr Althaus alleged his disclosure, in 1993, to AMH, of confidential information in relation to a novel process he had developed; by deed AMH agreed to preserve the confidentiality of the information; the company Redmeat Pty Ltd became Mr Althaus' licensing arm; AMH was granted a licence, and it granted a sub-licence to its parent company Conagra; without the consent of Mr Althaus or Redmeat, Conagra took out registered patent rights over the process in the United States of America; in the course of negotiations, Mr Althaus disclosed details of the process to various officers of AMH and Conagra, including a director of Conagra, Mr Lochmann; those companies misused the confidential information to obtain patents and other intellectual property of substantial worth and "produced goodwill in their various businesses by utilizing the confidential information…(and) have made profit". That statement of claim generally described the process as "converting on an industrial scale waste and low grade food products of little monetary value into commercial high value mass produced shelf stable food products for human consumption".

Draft statement of claim (Ex 2)

[6] It is necessary to examine the draft statement of claim in respect of which leave is sought in some detail, because of a fundamental issue whether, in terms of R 376(4) of the Uniform Civil Procedure Rules, the new causes of action included in it – for breach of contract, negligent misstatement and breach of the *Trade Practices Act* – "arise out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding".

[7] Mr Stewart SC, who appeared for Mr Althaus, compared the draft statement of claim Ex 2 with Ex 1, the statement of claim struck out on 6 December 2005, in an effort to demonstrate that the test under that Rule is satisfied. I return to this question.

[8] The proposed new statement of claim includes further parties, Redmeat as second plaintiff, and Mr Lochmann as third defendant. The application to join Mr Lochmann could not proceed before me because Mr Lochmann had not been served with the application. That part of the application therefore stands adjourned.

[9] The respondents contend that Redmeat cannot be joined, with a view to its pursuing any claim other than in equity, because the relevant limitation periods have expired and the requirements of R 69(2) cannot be satisfied.

[10] In addition to the claims originally made for equitable relief arising from the alleged breach of confidentiality, the draft statement of claim raises new claims which are at least generally related to the same factual matrix: for breach of contractual stipulations for confidentiality; breach of fiduciary duty arising from that contract; breach of s 52 of the *Trade Practices Act*, concerning representations made about confidentiality; and negligent misrepresentation.

Whether "new" causes of action time-barred

[11] Mr Jackson QC, who appeared for AMH, demonstrated that the contractually based claims are being raised after the expiration of the applicable six year limitation period.

[12] He referred to the breach of contractual obligations for confidentiality pleaded in para 42 of the statement of claim particularized by reference to communications up until February 1999, so that any claim became barred from about February 2005. As to negligent misstatement, the loss pleaded in para 55 may be traced to the particulars in para 59(iii) on p 42 of the pleading, concerning the registered patent granted to Conagra in September 1998, so that any claim became time-barred from September 2004.

[13] As to the claim under the *Trade Practices Act*, Mr Stewart submitted that no time limitation applied, because the claim under s 87(1) was for ancillary relief, and he relied on *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd* (2001) 114 FCR 108.

[14] This is one example of the *Trade Practices Act* claims. Mr Althaus pleads that AMH, when providing confidential information to Conagra, undertook to him that it would comply strictly with its obligation to ensure secrecy. It is pleaded that was a representation which AMH made recklessly, founding an allegation of misleading and deceptive conduct causing loss for which the plaintiff claims damages.

[15] The claim for damages should be regarded as made under s 82 of the *Trade Practices Act*, for reasons explained in *Mayne Nickless* at p 123, rather than under s 87. That is the way that claim is in fact advanced: see para D of the prayer for relief in the statement of claim. Accordingly, a three year time limitation applied because of s 82(2).

[16] Mr Althaus also claims orders under s 87(1) of the *Trade Practices Act* "adjusting the rights of the parties so as to compensate the plaintiffs for the loss of the worth of their confidential information". It is difficult, however, to regard this as a "proceeding instituted under or for an offence against part 6 of the Act", and therefore, to identify any role for s 87(1). I need not however determine that definitively, because of the view I take in any event in relation to the application of R 376(4), which can apply to that part of the claim brought by reference to the *Trade Practices Act* (*Ramsay v McElroy* (2004) 1 Qd R 667, 668). For the following reasons, my conclusion is that R 376(4) does apply.

Whether time-barred causes of action fall within R 376(4)

[17] That is because I am satisfied that those new claims, which are apparently out of time, arise out of substantially the same facts as those for which relief has already been claimed. That emerges from a comparison between Ex 2, the proposed new pleading, and Ex 1, the pleading struck out.

[18] As an example of their comparability, each of those pleadings deals with the following matters of fact:

1. the development by Mr Althaus of the novel process, with detailed descriptions of it (para 3 Ex 1, paras 2 and 4 Ex 2);

2. the deed between Mr Althaus and AMH for disclosure of the process to AMH, with AMH undertaking to preserve its confidentiality (para 4 Ex 1, para 5 Ex 2);
3. the development of the relationship between Mr Althaus and AMH and Conagra, and the delivery of the document entitled "Overview of a meat operation for AMH to be based in Brisbane" (para 10 Ex 1, para 12(c) Ex 2);
4. negotiations between Mr Althaus and AMH and Conagra as to licensing, and further disclosure in the course of those negotiations (para 16 Ex 1, para 15 Ex 2);
5. Mr Althaus' grant of an exclusive licence to Redmeat (para 25 Ex 1, para 18 Ex 2);
6. the deed of confidentiality between Redmeat and AMH (para 27 Ex 1, para 20 Ex 2);
7. the non-exclusive licence granted by Redmeat to AMH, permitting confidential disclosure to Conagra as possible sub-licensee (para 28 Ex 1, para 22 Ex 2);
8. disclosures by Redmeat to AMH as to the pilot plant, and its specifications and technical manuals (para 37 Ex 1, para 26 Ex 2);
9. AMH's exercise of the option to use the process for commercial production (para 48 Ex 1, para 32 Ex 2);
10. the wrongful disclosure of confidential information by Conagra (para 60 Ex 1, para 59 Ex 2);
11. Conagra's US patent application (paras 87 and 117 Ex 1, para 59(iii) Ex 2);
12. loss to the plaintiffs through the defendants' misuse of the confidential information for their own profit (para 143 Ex 1, para 107 Ex 2).

[19] It is true that the former statement of claim did not allege representations, by AMH for example, that when disclosing confidential information to others, it would take steps to preserve that confidentiality (for example, Ex 2, para 10(d)(iii)). But I do not consider that excludes the applicability of R 376(4). What is being done through Ex 2 is substantially a further characterization of the legal claims which it is said emerge from a factual scenario largely there from the beginning.

[20] As to the question of coincidence, or lack of it, between the facts then and now, I note what was said in the Court of Appeal in *Draney v Barry* (2002) 1 Qd R 145, 164 (per Thomas JA):

> "Rule 376 provides a structure within which courts may regulate such procedural applications with due regard to the interests of all parties. Subrule (4)…allows a fairly wide discretion in that the court will not allow such an amendment unless it considers it 'appropriate' to do so and also considers that the new cause of action arises at least substantially out of the same facts as the existing cause of action. I do not think that 'substantially the same facts' should be read as tantamount to the same facts, and consider that <u>the need to prove some additional facts is not necessarily fatal to a favourable exercise of the discretion under r 376(4). If the necessary additional facts to support the new cause of action arise out of substantially the same story as that which would have been told to support the original</u>

> cause of action, the fact that there is a changed focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts. In short, this particular requirement should not be seen as a straitjacket." (emphasis added)

[21] It was submitted for AMH that R 376(4) could not apply because, the previous pleading having been struck out, there was nothing with which to compare the proposed new statement of claim. I could not accept that submission. The rule invites attention to the claim, to identify any "cause of action for which relief has already been claimed"; and then to any statement of claim setting out the factual basis for that cause of action. In this case, one looks for that to Ex 1, and notwithstanding it was struck out in anticipation of a further attempt by Mr Althaus to elucidate the factual foundation for his claim.

[22] Mr Althaus alternatively relied on s 38(1)(b) of the *Limitation of Actions Act*, which provides that where a proposed defendant fraudulently conceals a right of action, the limitation period does not commence to run until the proposed plaintiff has discovered the fraud. Mr Althaus relied on his affidavit sworn on 17 March 2006. It would be impracticable to reach a concluded view on whether the relevant fraud occurred, at an interlocutory hearing of this nature. That question should preferably be left for determination in a separate proceeding, for reasons covered in *Paragon Finance plc v D B Thakerar & Co* (1999) 1 All ER 400, 404, 418. But because of my conclusion as to the application of R 376, it is not necessary to pursue the issue of fraud any further in determining this application.

The joinder of Redmeat as second plaintiff

[23] The causes of action to be raised by Redmeat are in breach of contract, breach of confidentiality, negligent misstatement, breach of fiduciary duty and breach of the *Trade Practices Act*. There is no limitation issue attending the claims in equity, but the claims in contract, tort and under the *Trade Practices Act* are all subject to potential limitation problems.

[24] The defendants raise R 69 of the Uniform Civil Procedure Rules. In terms of sub-rule (1)(b)(i) and (ii), the presence of Redmeat in the proceeding is "necessary to enable the court to adjudicate effectually and completely in all matters in dispute"; and would be "desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding".

[25] But where the relevant limitation period has ended, sub-rule (2) limits the court's discretion, and Mr Stewart conceded – rightly – that none of its paragraphs was satisfied. Therefore the joinder of Redmeat would not be justified, except in relation to the claims it brings in equity.

[26] Consequently, I was informed, Redmeat would intend commencing a separate proceeding in relation to those other claims, which the court may ultimately be asked to deal with concurrently with this proceeding. Presumably a question under s 38(1)(b) of the *Limitation of Actions Act* may have to be dealt with in any such separate proceeding.

[27] There is no sufficient reason why Redmeat should not be joined in this proceeding to permit it to pursue in this proceeding its claims in equity.

[28] The statement of claim Ex 2 will therefore have to be amended to delete the non-equity claims by Redmeat, and the court would on that basis order Redmeat be joined as second plaintiff.

[29] The other issues debated before me go to the adequacy of particularization in the draft pleading Ex 2, and the sustainability of some limbs of the proposed claims.

Whether the confidential information has been adequately particularized

[30] Ms Anderson who appeared for Conagra, strongly submitted that Mr Althaus had failed to particularize which parts of the information disclosed about the process are confidential.

[31] The pleading itself, and its four substantial schedules, contain an undoubtedly large amount of information about the process. Counsel submitted however that it could not all be confidential, and that it falls to Mr Althaus to piece out and specify those matters which are confidential, and only those matters.

[32] But in this case, it is the whole process which is being presented as confidential. Mr Stewart likened this process, in principle, to others described as commercial secrets attracting equitable protection (*Under Water Welders & Repairers Ltd v Street and Longthorne* (1968) RPC 498, *Heyl-Dia v Edmunds* (1899) 81 LT 579, *Potters-Ballotini Ltd v Weston-Baker* (1977) RPC 202, *Rex & Co & Rex Research Corp v Muirhead and Comptroller-General of Patents* (1926) 44 RPC 38). See also *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* (1967) VR 37, 49.

[33] In *Corrs Pavey Whiting and Bryan v Collector of Customs (VIC)* (1987) 14 FCR 434, 443 Gummow J affirmed a requirement, previously expressed by Lord Greene MR, that a plaintiff must identify confidential information "with specificity". I am satisfied that because the process is the subject of the claimed confidentiality, it sufficed for the plaintiff to particularize that process. He has done so in considerable detail, and, I consider, adequately.

[34] Ms Anderson made one specific criticism arising from para 59(c)(iii) of Ex 2, which alleges Mr Althaus' process is relevantly the same as that involved in Conagra's US patent. Yet the latter involves treatment of frozen food whereas Mr Althaus' is a drying process. The proposed pleading makes clear that Mr Althaus' process involves both freezing and drying (para 2). I do not accept the contention Ex 2 is "internally inconsistent". While Conagra would seek to present this sort of criticism as illustrating a lack of precision and clarity in Ex 2, I have to say that I see it rather as impermissible nit-picking.

Whether the basis of confidentiality has been alleged

[35] The pleading alleges that the process was "secretly devised"; that the related information and know-how were "confidential to, and known only by, the first plaintiff and Anderson"; and that by the confidentiality agreement between Mr Althaus and AMH, the latter was to "hold (the information) in confidence". The allegations aggregate to a contention that the information was devised in secret and communicated only under strict obligations of confidentiality. That provides a sufficiently arguable basis for a claim that the information is confidential.

Adequacy of particulars of misuse of confidential information

[36] Paragraphs 39 and 42 of the draft statement of claim set out particulars of misuse by AMH, and para 59 in the case of Conagra. I am informed further particulars may follow the disclosure of documents. The current particulars are for present purposes adequate.

Whether Mr Althaus has alleged his ownership of the confidential information

[37] Mr Althaus pleads the information, prior to disclosure to AMH and Conagra, was "confidential to and known only by the first plaintiff and Anderson". There is also an allegation that in December 1993 the first plaintiff "acquired all of Anderson's legal interest in the confidential information". Further, the pleading incorporates the "Althaus-Redmeat Licence", in which a recital says Mr Althaus as head licensor "is the legal and beneficial owner of the confidential information". That combines to amount to a sufficient – indeed abundantly clear – claim to ownership.

Whether the licence agreement of 23 June 1994 renders all but the *Trade Practices Act* claims unarguable

[38] AMH contends that all claims save those under the *Trade Practices Act* "depend on the continued existence of obligations in favour of Mr Althaus under the earlier confidentiality agreement", and that "those obligations were released and replaced by obligations in favour of Redmeat under the confidentiality deed and licence agreement made on or about 23 June 1994". The claim builds on an implied turn of the Althaus-AMH confidentiality agreement alleged in para 7 of the statement of claim, which Mr Jackson submitted would be inconsistent with cl 7 of that agreement, and he described the case based on contract as therefore "not promising". Such a challenge is not in my view appropriate for summary determination of this character.

[39] A related point, going to the standing of Mr Althaus, was ventilated by Ms Anderson, concerning the variation agreement between Mr Althaus and Redmeat dated 30 May 1998, converting Redmeat's exclusive licence into a non-exclusive licence. A copy of that agreement is exhibited to Mr Althaus' affidavit sworn 17 March 2006. Mr Stewart conceded that the draft statement of claim Ex 2 would have to be amended to plead that variation agreement, and a grant of leave should be subject to that qualification.

Whether para 29(d)(iii) of the draft pleading excludes the prospect of any breach by AMH

[40] That paragraph of the pleading alleges:

> "29 At the conclusion of the Pilot Plant 1 Inspection Mr Lochmann on behalf of ConAgra represented to the First Plaintiff by himself and/or as agent for the Second Plaintiff that:
>
> ……
>
> (d) ConAgra:
>
> was bound by, undertook to and would in fact strictly observe obligations of confidence concerning the PD Process and all related confidential information to the same extent as required of AMH pursuant to the

> Althaus – AMH Confidentiality Agreement and/or the Redmeat – AMH Confidentiality Deed.

That is alleged to have been a misrepresentation. Mr Althaus' case is simply that Conagra misrepresented that it was, as a matter of fact, bound by an obligation of confidentiality. On the plaintiff's case, AMH was obliged to secure an obligation of confidentiality from Conagra, but failed to do so. Through Mr Lochmann, Conagra misrepresented that it was so obliged.

[41] I do not accept that this aspect of the draft statement of claim renders the plaintiff's claim "obviously futile", or that I could properly make a determination to that effect in a summary way on this application.

Whether a fiduciary obligation could arise

[42] Mr Jackson pointed to cl 19 of the agreement of 23 June 1994 between Redmeat as licensor, AMH as licensee, and Mr Althaus. That clause provides that their agreement was not to create any relationship of agency, partnership or joint venture between licensor and licensee. Mr Jackson also pointed out that the agreement is incorporated into the statement of claim, which otherwise contains no allegation that there was a joint venture relationship. Without more, those considerations would tell powerfully against Mr Althaus in relation to these parts of the claim.

[43] On the other hand, however, Mr Stewart submitted it was arguable that Mr Althaus and/or Redmeat were associated in such a way as to give rise to a joint venture relationship. I accept that clause 19 of the agreement, although relevant, may not necessarily prevail over other aspects of a relationship which may combine to warrant the conclusion they were fiduciaries. Acknowledging the constraints on the court's approach at this summary, interlocutory stage, there is no need to examine Mr Stewart's approach further.

[44] But that said, the plaintiff obviously must plead the circumstances giving rise to the fiduciary relationship alleged.

Conclusion

[45] The plaintiff should have leave to deliver a statement of claim in the form of Ex 2, but amended:

(a) to remove any causes of action by Redmeat Pty Ltd as plaintiff, other than equitable claims;
(b) to remove Leroy Lochmann as a defendant;
(c) to include reference to the variation agreement dated 30 May 1998 between the plaintiff and Redmeat Pty Ltd;
(d) to allege the circumstances said to give rise to fiduciary obligations; and
(e) in other respects as the plaintiff may be advised.

There should by an order that Redmeat Pty Ltd be added as second plaintiff in the proceeding.

Costs

[46] The plaintiff has been substantially, although not completely, successful.

[47] But having regard to the history of the proceeding, which persuaded the court in December 2005 to require the plaintiff to demonstrate the adequacy of any new statement of claim before delivering it, costs should, notwithstanding the plaintiff's substantial success, remain reserved for further consideration later in the proceeding.

[48] Consistently, I would not at this stage impose a condition on the grant of leave, as sought by AMH, that Mr Althaus pay to AMH the costs which were the subject of the order of 6 December 2005.

[49] I acknowledge that I have not heard submissions as to costs, which I will entertain should the parties wish me to take that course. But as presently advised, I believe that reserving the costs at this stage is the appropriate course.

[50] I thank Counsel for facilitating the streamlined completion of what could have become an awkwardly protracted hearing. That will remain a prime consideration as the proceeding moves forward.