SUPREME COURT OF QUEENSLAND

CITATION:	*Althaus & Anor v Australia Meat Holdings Pty Ltd & Anor* [2009] QSC 5
PARTIES:	**JOHN EDMOND ALTHAUS** (first plaintiff) and **REDMEAT PTY LTD (ACN 064 838 982)** (second plaintiff) **v** **AUSTRALIA MEAT HOLDINGS PTY LTD (ACN 011 062 338)** (first defendant) and **CONAGRA FOODS INC (formerly CONAGRA INC)** (second defendant)
FILE NO:	S7975 of 2004
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	2 February 2009
DELIVERED AT:	Brisbane
HEARING DATE:	18 December 2008
JUDGE:	Chesterman JA
ORDER:	**Order that the plaintiffs' application for leave to deliver its statement of claim be dismissed. On the defendants' applications I order that the action be dismissed and that the plaintiffs pay the defendants' costs of and incidental to the action to be assessed on the standard basis.**
CATCHWORDS:	APPLICATION TO FILE A STATEMENT OF CLAIM – where first and second defendants seek orders that the plaintiff's claim be dismissed – whether the statement of claim should be allowed
COUNSEL:	Mr B Caine SC with Mr Wallace for the plaintiffs Mr DJS Jackson QC with Mr Pomerenke for the first defendant Mr Doyle SC with Ms Anderson for the second defendant
SOLICITORS:	Slater & Gordon for the plaintiffs Clayton Utz for the second defendant Allens Arthur Robinson for the first defendant

[1] By an application dated 7 August 2008 the plaintiffs seek leave to file a statement of claim in the action which commenced in 2004 and which has not yet progressed to the point where a defence is required. By applications filed respectively on 6 and 8 November 2008 the first and second defendants ('AMH' and "Conagra' respectively) seek orders that the plaintiffs' action be dismissed.

[2] The plaintiffs' need for leave to file the proposed pleading ('statement of claim') is a consequence of past orders made by judges of the Court. They reflect the plaintiffs' inability to articulate an acceptable statement of their claim which is one for injunctions and damages, or an account of profits, for misuse of confidential information.

[3] The history of the litigation is relevant to the defendants' applications and also to some extent, to the plaintiffs' application.

[4] The proceedings were commenced by the first plaintiff on 14 September 2004. On 17 March 2005 he was ordered to give particulars of the then statement of claim. They were delivered on 23 March 2005 but were thought to be deficient and, on 2 June 2005, Helman J ordered the plaintiff to give greater particularity of his claims. This was done. I infer that the particulars given were voluminous because they were provided by way of a CD Rom late in June 2005.

[5] On 11 July 2005 during the course of a directions hearing Philippides J ordered the plaintiff to reformulate his particulars because of an accepted deficiency in them. The reformulation was provided on 11 August 2005.

[6] On 22 August 2005 when the directions hearing was resumed Philippides J ordered the plaintiff to deliver an amended statement of claim, with full particulars, to be contained in one document. The amended statement of claim and particulars were delivered on 28 September 2005.

[7] On 6 December 2005 Philippides J struck out the amended pleading and ordered that the plaintiff not file any further pleading without leave.

[8] On 24 March 2006 the Chief Justice made an order joining the second plaintiff ('Redmeat') and giving both plaintiffs conditional leave to deliver a further amended statement of claim in a form put into evidence before him.

[9] On 20 October 2006 the Court of Appeal set aside the orders of the Chief Justice. Keane JA (with whom McMurdo P and Holmes JA agreed) said (*Althaus v Australian Meat Holdings Pty Ltd* [2007] 1 Qd R 493 at 504):

> '... The learned judge should not have given leave to deliver exhibit 2 but should have allowed the plaintiffs a further opportunity to prepare a draft statement of claim which properly pleaded the ... breach of confidence case. This should now be done on the basis that the plaintiffs might seek leave to file a further amended statement of claim within a limited time. ... The plaintiffs should be directed to seek the leave of the judge of the Trial Division to file a further amended statement of claim within 21 days.'

[10] The suggested application was made to Byrne J on 16 November 2006. His Honour refused the leave sought and dismissed the application.

[11] On 23 February 2007 the plaintiffs filed another application for leave to deliver a further pleading. The application was heard on 23 April 2007 when the plaintiffs abandoned the statement of claim which had founded their application of 23 February 2007, and instead produced a different version of the document. The application was adjourned with costs being ordered against the plaintiffs on an indemnity basis.

[12] On 16 November 2007, 19 December 2007, and 10 April 2008, the plaintiffs delivered further proposed amended pleadings.

[13] The adjourning application of 23 February 2007 came on again before Byrne J on 21 April 2008, seeking leave in respect of the latest pleading. It was dismissed with indemnity costs. His Honour ordered that the action also be dismissed unless a further amended statement of claim was delivered by 31 July 2008. A further pleading was delivered on that day for which, by the 7 August 2008 application I mentioned, they now seek leave to deliver.

[14] The defendants point out that the statement of claim is the plaintiffs' tenth attempt to plead their case. If one counts as separate attempts the particularisation of the case in 2005, then the present pleading is the thirteenth attempt to explain their case in a manner which complies with the rules of pleading.

[15] Earlier pleadings included claims for breach of fiduciary duty but the statement of claim in question is limited to misuse of confidential information.

[16] In dealing with that cause of action the Court of Appeal said (*Althaus* at 502-3):

> '[46] ... The complaint made by (the plaintiffs) related to the misuse of confidential information in respect of the PD process, considered as a **process**. It was also said ... that the information relating to the PD process which was confidential concerned both the manufacture of particular components of the process, and the use of these and other components, in association with a novel configuration to achieve a new food manufacturing process. But while one may readily accept that the plaintiffs might be able to advance such a case, exhibit 2 does not contain a clear and precise statement of what was confidential about the process, as such, or its individual components, and what specific information concerning the manufacture of particular components which was confidential was misused by (the defendants).
>
> [47] In considering the sufficiency of the pleaded case ... one must bear in mind, as Mason J said in *O'Brien v Komesaroff* ... "one needs to know not only what was the information conveyed but also what part of that information was not common knowledge."
>
> [48] In exhibit 2 the plaintiffs seemed to say that **all** information about the process was secret. That plainly cannot be the case having regard to the schedules to exhibit 2 which confirm that aspects of the process and the relevant componentry are well

> known and have been in use in industry for many years. The confidential information was identified in exhibit 2 by reference to schedules which described inter alia the PD process at such a high level of generality that it is difficult to discern in what way it could be regarded as confidential. ... The pleading lacks a precise and concise statement of "the particular contents of the documents which (the plaintiffs assert) constitute information the confidentiality of which (the plaintiffs are) entitled to protect". Exhibit 2 does not, in terms, state what it is about the configuration of components or the design or construction of particular components which is said to be of his own secret devising. This deficiency is not remedied by pointing to all the information ever used or collated by Mr Althaus in relation to every aspect of the PD process because, as those documents themselves recognise, many of the integers of the process were well known apart from his inventive efforts. In the identification of the respects in which the components, or the association of components, were novel and confidential, the pleading lacks that "specificity" which is required in the presentation of a claim for misuse of confidential information.'

[17] I have set out these passages at length because the defendants submit that they are entirely apposite to the pleading in question which shares all the deficiencies and vices of its predecessors and has not addressed the Court of Appeal's criticisms.

[18] The elements of a claim for misuse of confidential information were explained by Gummow J in *Corrs Pavey, Whiting and Byrne v Collector of Customs* (1987) 14 FCR 434 at 443:

> 'It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to impart an obligation of confidence; and (iv) there is actual or threatened misuse of that information ...'

[19] The statement of claim relevantly pleads:

> '4. Between about 1992 and about March 1999 ... Althaus and Redmeat acquired, developed and maintained a body of confidential information relating to a method for processing large quantities of raw food into a form that can be readily and efficiently stored for long periods of time before being reconstituted and consumed, whilst retaining the food's natural flavour, texture and nutritional value ("PD method information").

Particulars

(i) The ... method is set out in confidential Annexure A ... . Insofar as the ... method information is contained in documents and embodied in plant and equipment those documents and the plant and equipment are set out in confidential Annexure B ... .

(iii) In about 1993 Althaus and AMH entered into an agreement in writing by which Althaus agreed to disclose the ... information to AMH for the limited purpose of allowing AMH to undertake a preliminary evaluation of the ... method and AMH agreed to maintain the confidentiality of the ... information ("AMH confidentiality agreement").

(iv) On or about 23 June 1994:

(A) Althaus and Redmeat entered into an agreement ... by which Althaus granted Redmeat an exclusive licence to use and disclose the ... information ... .

(B) Redmeat and AMH entered into an agreement in writing by which Redmeat granted AMH an exclusive licence to use and disclose the ... information in accordance with the terms of the licence and the confidentiality deed referred to in subparagraph (C) ...

(C) Redmeat and AMH entered into a confidentiality deed ...

5. At all material times the PD method information constituted valuable commercial information of Althaus and Redmeat which had not been published.

6. Between about 1993 and about March 1999 Althaus and Redmeat made the PD method information available to AMH and Conagra for the limited purposes of enabling (them) to;

(a) Work with Alhaus and Redmeat to further develop the ... information in accordance with the terms of the AMH licence; and

(b) Use and disclose the ... information in accordance with the terms of the ... licence.

7. ... AMH and Conagra received the ... information in circumstances in which they knew or ought to have known:

(a) The limited purpose for which the ... information was made available to them ...

(b) That the ... information was valuable commercial information ... which was confidential to Althaus and Redmeat.

8. By reason of the matters referred to in paragraphs 4 to 7 ... from about 1994 AMH and Conagra and each of them have at all material times been under a duty of trust and confidence towards Althaus and Redmeat in respect of the ... information and each part thereof and were not entitled to use or disclose the ... information or any part thereof for any purpose other than for the limited purpose set out in paragraph 6 above.

9. On ... dates not presently known ... but after 1994 ... wrongfully and in breach of the duty referred to in paragraph 8 ... AMH used the ... information or part thereof ... or ... disclosed the ... information or part thereof without the licence authority or consent of Althaus and Redmeat.

Particulars

(i) Between about 1996 and at least 2001 AMH used and disclosed the ... information for the purposes of the proposed construction of a food processing plant in Brisbane ... . The use and disclosure ... was for a purpose other than the limited purposes set out in paragraph 6 ... . By reason of the following matters:

A. On 25 January 2001 Paul Kenny of AMH had a telephone conversation with Althaus in which he told Althaus that AMH was not using the ... information and ... did not require any ongoing licence ...

B. Despite AMH's stated position ... AMH:

(1) Continued to hold discussions ... in relation to the proposed construction of the food processing plant ...

(2) Has not terminated the AMH licence ...

(ii) Between about 1994 and at least 19 September 2002 AMH:

A. Disclosed the ... information to Conagra; and/or

B. Requested Althaus and Redmeat to disclose the ... information to Congagra.

(iii) The disclosures by AMH, Althaus and Redmeat to Conagra ... are set out in confidential Annexure C ... .

(v) The conduct of AMH referred to subparagraph (ii) ... took place in circumstances where Conagra was using and disclosing ... the ... information in the USA and elsewhere ... other than for the limited purposes set out in paragraph 6 ... .

(vi) At all material times AMH knew of the matters referred to in subparagraph (v).

(vii) The knowledge of AMH arises by reason of the following matters:

C. At all material times ... AMH was subject to close financial supervision by Conagra and all spending by AMH on plant and process upgrades ... was closely supervised and subject to approval by Conagra.

D. At all material times ... Conagra and AMH, under the direction, supervision and control of Conagra worked closely together to develop the PD method for proposed use ... in both Australia and the USA.

(viii) The use and disclosure of the ... information by Conagra referred to in subparagraph (ii) is as follows:

... Conagra filed a United States patent application ... Australian patent application ... disclosed the ... information to a subsidiary ... (which) shortly after ... used the ... information to process various fruit and vegetables ... filed a United States patent application ... collectively ... referred to as the "Conagra patents". ... which disclose the information in the manner set out in confidential Annexure D ... .'

[20] Annexure A which sets out the 'PD method information' contains the 'body of confidential information relating to a method for processing ... raw food into a form that can be readily and efficiently stored for long periods of time ... retaining the food's natural flavour, texture and nutritional value.' The annexure runs to 14 pages and contains much that, on its face, is commonplace. It commences with an 'overview':

'1. The pressure differential (PD) method information consists of a body of information that describes an efficient industrial method for processing large quantities of raw food into a dried, frozen or partially dried and partially frozen (... dehydrofrozen) form. ...

2. The principle underlying the PD method is the use of pressure differentials to remove water and heat from food during processing. The pressure differentials are created in two general ways. First, mechanical pressure is applied ... by the use of ... a centrifuge or press. Secondly, separately or combined, thermal, kinetic and electromagnetic (microwave) energy and dehumidified or cold air are applied to the food ... so as to create a difference in pressure between the inside of the food particles and the surface ... .

3. The maximisation of the ... pressure differentials results in the efficient and economical removal of water and heat ... . It also results in the food ... having very low levels of bacteria. ...

4. The PD method can be used to process all types of food ... .

6. The pre-processing stage of the ... method involves converting the food ... from its raw form into a form suitable for processing. This involves grinding, shredding or chopping ... into a juice, pulp or pieces ... between .1mm to 10mm diameter and then separating the food into its juice serum ... and its fibres ... . The ... serum is then concentrated by removing most of the water.

7. The concentrated juice serum may then be added back to the fibres prior to processing or ... retained for spraying onto or mixing with the fibres during processing. Additional flavours or enzymes may also be added to the fibres prior to processing.

8. The processing stage of the PD method involves either drying, freezing or dehydrofreezing the food. The process utilises a series of vessels (known as applicators) that use either a moving floor or fluid ... bed through which the fibres (and concentrated juice serum if added back ... during pre-processing) are processed. Firmly conditioned air is applied to the fibres to freeze, dry or dehydrofreeze the fibres. The use of mechanical agitators and the application of the thermally conditioned air keeps the fibres in a constant state of motion so that they do not agglomerate ... .

11. The post-processing stage of the ... method involves the cooling (in the case of dried food) packaging of the particles of food. The particles of food can then be stored for long periods of time and then readily reconstituted for consumption ...

12. The PD method described above may also be adapted to:

    (a) produce wet, concentrated fruit and vegetable products, such as tomato paste;

    (b) process large extruded or encased food pieces such as salami, pepperoni or beef jerky.'

[21] The annexure then moves to a description of 'stage 1: pre-processing' which is described:

'15. The pre-processing stage requires the following equipment:

    (a) A refrigeration unit;

(b) ... apparatus for directly injecting steam onto the surface of the food ...;

(c) A grinding, shredding or chopping or like apparatus;

(d) Optionally a tank in which enzymes are mixed with the ground, shredded or chopped food;

(f) A pump;

(g) A flow meter ...;

(h) ... a microwave generator;

(i) Apparatus for separating the juice serum (and ... fat) from the fibres of the food such as a juicer, decanter, centrifuge, roller, screw press or fibre press

(j) Apparatus for concentrating the juice serum such as a falling film evaporator, a spinning cone, a membrane filter, a mechanical vapour heat recompression pump or a fractionating column;

(k) A hopper and vacuum pump;

(l) ... a mixer ...;

(m) A dough mixing apparatus.

31. In the case of ... products such as tomato paste, depending on the desired product characteristics, the fibres ... may be mixed with the concentrated juice serum ... so as to produce the final product without the need for any further processing.'

[22] Stage 2 (processing) is then described:

'34. The processing stage requires the following equipment:

(a) An extruder, conveyor, moving floor, air conveyor or other means of introducing the food into the applicators ...

(c) A supply of fluid, most commonly air or nitrogen, oxygen or brine-like substance

(e) A series of refrigerators ...

(f) Optionally a microwave generator and microwave guide applicator

35. The processing stage involves the following steps utilising the equipment ... First the fibres ... or ... food pieces ... are introduced

> to the first applicator ... secondly the fluid to be applied to the fibres is thermally treated ... where the fibres are to be dried the fluid ... is dehumidified and heated ... to a minimum relative humidity of ... five per cent and ... a maximum temperature of 62 degrees C ... thirdly the thermally treated fluid is applied to the fibres in the first applicator ...'

I interpolate my understanding that 'thermally treated' means heated or cooled and to 'dehumidify' is to dry.

[23] Stage 3 is 'post-processing' and about it the annexure says:

> '59. The steps set out above result in the production of small discrete particles of dried, frozen or dehydrofrozen food.
>
> 60. In the case of food that has been dried, the food is cooled to an appropriate temperature for packaging ...
>
> 65. The ... food produced by the PD process can be readily reconstituted for consumption or further processing by the addition of water ... and of thawing ... .'

[24] The annexure, of course, contains much more than I have quoted and part of its contents may qualify for the designation 'confidential'. I have set out those passages to which the defendants drew attention in the course of submissions as indicating, plainly enough, that not all of Annexure A can arguably be given the designation. The existence of everyday articles such as microwave generators, refrigerators, mixing bowls, conveyor belts, heaters and air dryers are not confidential. Nor is their use in food processing. Without the benefit of expert evidence it is obvious that for very many years processed foods have been manufactured by the application or removal of heat and moisture and the use of such articles as I have mentioned.

[25] What Annexure A does not do is to describe in any discernible or coherent form a particular combination of commonplace components, or the description of a different kind of component not found in everyday use, or a particular process which goes beyond common experience. It is clear that not all of Annexure A can be confidential, that is not known to the general body of mankind interested or involved in food processing. Yet the statement of claim makes that assertion.

[26] The problem with Annexure A is that it, as it says, contains a 'body of information ... *relating* to a method for processing food ... efficiently for industrial purposes. It identifies the 'principle underlying the ... method' as being 'the use of pressure differentials to remove water and heat from food during processing.' If one supposes that the plaintiffs possessed secret knowledge enabling food to be processed and preserved better than others could do it, the legal principle I have mentioned requires them to reveal their secret in the statement of claim. The requirement is not satisfied by pleading a great deal of other information which 'relates to' the secret or even to reveal the principle underlying the secret. It is the secret, the confidential information, which must be pleaded.

[27] Annexure B identified 32 documents in which 'the PD method of information was embodied'. Each of the documents was 'created by or under the direction of John Althaus.' The documents fill a complete lever arch file. Not all of the contents of the documents are said to 'embody' the confidential information. The plaintiffs' advisers have gone to the trouble of highlighting in yellow those parts of the documents which are alleged to contain that information. This is an inconvenient and cumbersome method of pleading a case and alerting an opponent to what is alleged against it. Nevertheless taking the form as it is, one can still see that not all of what is asserted to be confidential justifies the appellation.

[28] Document 5 in Annexure B is the minutes of a meeting of 9 May 1994 attended by Mr Althaus and some employees of AMH. The highlighted passage reads:

> 'Agreed should provide for input at number of points e.g. mincer with hot water input auger or dry product. Could add at same time as salt and sugar?
>
> Manner and angle of input auger entering machine. Preferably horiz. because of need to have air input just below the product entry.'

[29] The minutes of another meeting on 30 May 1994, Document 7, are similar. They contain a highlighted phrase 'David tabled a Thompson brochure and also a meat grinder brochure. It is possible to buy a standard model pretty well ex-stock for around $5,000 ...'.

[30] Document 9 is the minutes of a meeting of 11 July 1994 attended by (with one exception) the same people. The highlighted passages are:

> 'The mincer ordered will be delivered by the end of the month. ... A ... dicer slicer with the capacity of 500kg per hour is available for $5,000. ... David to check on a pump for the pasteurising unit. On pick up all pipes will be numbered and marked on the appropriate drawing and all associated pipe work. This is to be discussed with Peter Briggs. The centrifuge and associated equipment to arrive at the end of this month. The feeder – David is to follow up on the system so that first product in is first product out. A schematic of all valves into the tank will be drawn. ... Injection of stick water concentrate into the product. This must be able to be blended. David will contact Alex Graham ... re the concentration of stick water. The preferred method is to extract the concentrate immediate. The continuous screw extraction method will be trialled by the end of this month by placing it on the end of the mincer. The microwave generators by the end of this month. The refrigeration should be completed by the end of August.'

[31] Document 31 is described as a 'free-flowing frozen fresh protein flyer' prepared by Mr Althaus. The only parts highlighted as containing confidential information are:

> '• Produces a free-flowing frozen product.
>
> • Allows a percentage of the fat to be removed before freezing and transporting.'

[32] Document 32 headed 'Capability overview' contains such highlighted passages as:

> 'The pre-processing area has the capability of grinding, sizing and de-fatting.
>
> The produce is then passed through an array of applicators with a dwell time of five minutes.
>
> The process produces product with a particle size of 3mm to 8mm in diameter.
>
> Reduces the cost of maintaining large onsite cold storage.
>
> Reduces packaging costs by utilising bulk containers.'

[33] Annexure C contains the detail of the communication by Althaus to the defendants of the 'PD method information'. According to the annexure Mr Althaus provided the information 'in the following documents and/or at the meeting set out below.' There are 69 listed documents, some of which are the minutes of meetings. The documents are not incorporated in the statement of claim or particulars but were put into evidence. They fill four lever arch files and run to over 2,000 pages. Document 36 consists of a number of manuals which it is said Mr Althaus prepared between 1995 and 1998 and gave to an AMH employee. The manuals themselves run to more than 700 pages. It is impossible to know what, if any, parts of them constitute the 'PD process' or contain information relevant or descriptive of the process or which identify the process. It is an undifferentiated, indigestible morass of material that performs no obvious part in the depiction of the plaintiffs' case.

[34] Document 39 is a draft agenda for a meeting with Conagra employees in March 1995. It is a one page document which contains a list of topics intended to be discussed. It is not possible to regard it as conveying confidential or, indeed, any other sort of information about food processing.

[35] Document 40 is the record of a meeting held on 27 March 1995 attended by Mr Althaus and a number of employees of American food processing companies. The record of the meeting includes the following:

> 'AMH was able to present the drying technology process and market potential to the meeting. It was explained that the technology was applicable to other proteins, e.g. chicken, turkey, pork and eggs.
>
> ...
>
> Subsequent discussions were held by J Althaus with ... Susan Edwards of IFF. Susan is a director of IFF and her brief is to find natural flavourings. They are the largest flavouring group in the US. She tasted our product and was most enthusiastic.'

[36] Annexure D is a table which is said to compare the 'Conagra patents' with elements of the 'PD method information' set out in Annexure A. The format of the table compares paragraphs in Annexure A with the disclosure of confidential information

in the patents. The following comparisons emerge. They are said to show misuse of the confidential information.

No.	PD Method Information	Disclosure in Conagra Patents
4.	The PD Method can be used to process all types of food, including but not limited to fruit and vegetables; meat, fowl, fish, grains and legumes. The PD Method is varied in the manner described in detail below according to the desired product outcome for the food type being processed.	US451 discloses a process for producing pastes and purees from various fruits and vegetables, including tomatoes, chilli and applies (pages 7.3 and 13.5)
6.	The pre-processing stage of the PD method involves converting the food to be processed from its raw form into a form suitable for processing. This involves grinding, shredding or chopping the food into a juice, pulp or pieces of between 0.1mm to 10mm diameter and then separating the fold into its juice serum (including fat, in the case of meat) and its fibres (sometimes known as cake). The juice serum is then concentrated by removing most of the water from the juice serum.	US451 discloses the use of various techniques for pulping or juicing fruit and vegetables (including repeated chopping, crushing or other actions to form juice) (page 11.5). US330 discloses the processing of pieces of food as small as rice and as large as about 3 inches in all directions (page 7.3). US451 discloses that a juice stream is separated or fractionated into two portions: a serum portion and a cake portion, in which the cake portion is thicker and more resistant to flow relative to the serum portion (page 5.8). US451 discloses that after the serum and cake portions are separated, the serum portion is concentrated using, for example, an evaporator (page 5.9).
8.	The processing stage of the PD Method involves either drying, freezing or dehydrofreezing the food. The process utilizes a series of vessels (known as applicators) that use either a moving floor or fluid (or sprouted) bed through which the fibres (and concentrated juice serum, if added back to the fibres during pre-processing) are processed. Thermally conditioned air is applied to the fibres to freeze, dry or dehydrofreeze the fibres. The use of mechanical agitators and the application of the thermally conditioned air keeps the fibres in a constant state of motion or	US107 discloses a process using forced airflow systems for food treatment facilities, including drying and freezing (page 9.2). US451 discloses that a drying mechanism can be used to concentrate the cake portion of the tomato or other food item (page 6.2). US 107 discloses the use of a multi-tier food processor that may be configured as an oven, chiller, cooler, dryer or

	agitation so that they do not agglomerate and are uniformly dried or frozen during the process. In the case of drying or dehydrofreezing, radio frequency or microwave energy may also be applied to assist in the drying of the fibres.	combinations thereof (page 12.5). US107 discloses the configuring of the gas flow system to reduce undesired thermal clustering in the apparatus (hot or cold spots) to provide a processor with increased thermal efficiency (page 13.3). US330 discloses the use of a coating vessel in which frozen food pieces are tumbled or otherwise agitated so as to expose the surfaces of the free-flowing pieces and to maintain the pieces in a free-flowing state (page 6.4).
15.	(c) a grinding, shredding, chopping or like apparatus;	US451 discloses the use of a chopping mechanism or device capable of cutting fruit and vegetables (page 7.5).
	(d) optionally, a tank in which enzymes mixed with the ground, shredded or chopped food can be stored;	US451 discloses the use of an enzyme processor (page 74.).
	(e) low dialectic food grade pipes, through which the food can be passed in a closed system	US451 discloses the supply of tomato juice via a conveyor or other transport system (page 7.2). US107 discloses the sue of an environmentally protected processing space (page 16.6).
	(f) a pump to move the food through the pipes;	US451 discloses the use of a pump to move chopped fruit and vegetables (page 7.4).
	(g) a flow meter to monitor and control the flow of the food through the pipes;	US 451 discloses the addition of concentrated serum at a consistent flow rate into the combiner (page 9.9).
	(i) apparatus for separating the juice serum (and, in the case of meat, the fat) from the fibres of the food, such as a juicer, decanter, centrifuge, rollers, screw press or fibre press;	US451 discloses that a decanter configured as a centrifuge can be used to separate the tomato juice into cake and serum portions (page 6.3). US451 discloses the use of a decanting centrifuge that separates or fractionates juice into a serum portion and a cake

		portion (page 8.3).
	(j) apparatus for concentrating the juice serum, such as a falling film evaporator, a spinning cone, a membrane filter a mechanical vapour-heat recompression pump or a fractionating column;	US451 discloses the use of an evaporator to concentrate the serum portion of the juice (page 8.5). US 451 discloses the use of a rising film evaporator, a falling film evaporator, a thin film evaporator and other concentrating units to concentrate the serum portion of the juice (page 12.1).
	(l) optionally, a mixer, such as a drum mixer (sometimes known as a combiner); and	US451 discloses the use of a combiner to re-combine the cake and serum portions of the juice (page 8.8).

[37] The defendants complain that the errors which plagued the earlier versions of the statement of claim and which led them to being struck out or withdrawn reappear in the latest version. The basic problem is submitted to be that the plaintiffs have been unable to, or at least do not, identify and describe with any precision the information which they allege is confidential. Paragraph 4 of the statement of claim contains only a general statement of what 'the information' relates to. It is not a statement of what the information was. That is said to be contained in Annexure A. But that annexure, as I have explained, contains much information which is self-evidently not confidential and is common knowledge. The documents do not identify what parts of Annexure A are said to be confidential.

[38] The error in this approach was explicitly condemned by the Court of Appeal in *Althaus* in the passages earlier set out. The statement of claim lacks, as the earlier one also did:

> 'A precise and concise statement of the particular contents of the documents which ... constitute information entitled to protection.'

[39] The plaintiffs' case appears to be that all information, however peripheral, concerning food processing is confidential. The proposition has been expressly rejected in *Althaus* and is contrary to the summary of the authorities expressed by Gummow J in *Corrs*.

[40] An egregious difficulty with the pleading is that it does not explain whether it is the process or the componentry which is confidential. If it is the process there should be a description of that process sufficient to show what makes it different from other publicly known methods of drying and preserving food. The statement of claim does not do so. The components mentioned in Annexure A are themselves in common use. If the confidential information is some particular or special combination of components, or some configuration of them, or some sequence in their performance that was known to Mr Althaus but not to others that too could have been explained, but was not.

[41] Annexure A describes in general terms the whole of a process of preserving food and each of the components used in that process. The components are, as I have said several times, not unique to the plaintiffs' method of preserving food. Part at least of the process described in the annexure is also commonplace. Grinding, shredding, chopping or dissecting food prior to drying or freezing it is neither novel nor confidential. One reads Annexure A without understanding in any way what it is about the plaintiffs' process or choice of components which distinguishes it from other modes of preserving food so as to understand what information the plaintiffs had to impart that might be confidential.

[42] A further difficulty the plaintiffs face is that not only do they not identify what part of Annexure A contains information properly characterisable as confidential they assert that the whole of the contents of the annexure are confidential and eligible for equitable protection. This follows from paragraph 8 which claims that confidence was owed with respect to 'each part' of the information set out in Annexure A. This cannot be right and was categorically rejected by the Court of Appeal.

[43] Annexure B does not overcome the problems to which Annexure A gives rise. It lists the documents which 'embody' the confidential information. It is only those parts of the documents shaded in yellow which express the information but the examples I extracted earlier show that in a number of instances the documents do not contain or convey anything it is possible to regard as confidential.

[44] What is required is the specific identification of the information and that Annexure B does not essay. The information must not be described in global terms, or abstractions or in terms of results the plaintiffs' application might achieve. It is the information itself which must be set out in a pleading, and it is not.

[45] Moreover the very prolixity of the annexures gives rise to another ground for criticism. In *Ipex ITG Pty Ltd v Melbourne Water Corporation (No 2)* (2005) VSC 258 Byrne J said:

> 'I would not accept a plea upon an important matter where the material allegations of fact are expressed in terms of great generality and where the particulars provided are simply a reference to a mass of evidentiary material which the reader is expected to pick over in the hope that some part of it may be supportive of the allegation in the plea.'

Later his Honour said:

> 'It is not sufficient that ... somewhere in their snowstorm of detail an informed reader may be able to find something which may be useful.'

These descriptions are entirely apposite to the statement of claim, its annexures, and the documents referred to in the annexures.

[46] The second element in the cause of action is that the information be communicated to the defendants in such circumstances as to import an obligation of confidence. This element necessitates the identification of what information was given to the defendants. The information must, necessarily, be confidential. The allegation of communication to the defendants appears in paragraph 6 of the statement of claim.

It is that the plaintiffs made the 'PD method information' available to both defendants for the limited purposes of developing the information and using it 'in accordance with the terms of ... licence' agreements.

[47] Paragraph 6 alleges disclosure of all of the "PD method information". This is the entirety of Annexure A. I have pointed out that the annexure does not contain a specific identification of any confidential information so that an allegation that the whole of the contents of Annexure A were disclosed cannot satisfy the second element of the cause of action. Paragraph 6 does not begin to identify what information which might be confidential was passed on by the plaintiffs to the defendants.

[48] A further problem is that the paragraph treats the defendants as though they were one and the same. It does not distinguish between communications to one of them rather than to the other.

[49] The problems are not solved by reference to Annexure C which is said to be 'provision of the PD method information ... to AMH and Conagra.' The annexure lists, as I mentioned, 69 records of meetings or other documents which are not included in the pleading. Neither the statement of claim nor the annexure attempts to distil the substance of the information conveyed during each of the meetings or documents handed over. As I mentioned one of the documents runs to more than 700 pages. Not all of it can possibly contain confidential information conveyed in confidence to the defendants, or one of them, but no attempt is made to isolate what part or parts might qualify for the designation. Some parts of the documents which I gave by way of example are clearly not confidential.

[50] The first defendant submitted, in terms I accept, that:

> 'The substance of the confidential information conveyed is the material fact at the very heart of the proceeding. In the absence of an allegation setting out the substance of the confidential information conveyed, the pleading is bad.'

As the second defendant's submissions point out it is the receipt of confidential information which gives rise to a duty of confidence and it is the use of that information which constitutes breach of the duty. The statement of claim does not tell the defendants what the plaintiffs assert they were told that was *confidential*. It does not tell them what case they have to meet.

[51] The third element in the cause of action is that the defendants misused the information passed to them in confidence. Although the statement of claim contains such an allegation in paragraph 9 it suffers from the drawback that earlier paragraphs did not identify what information was confidential and what of it was passed to the defendants. A pleading that the information was misused is thus devoid of proper content.

[52] There are other difficulties. One is that paragraph 9 is concerned almost exclusively with complaints against AMH. The complaints in this regard against Conagra are limited to Particular (viii) and Annexure D which compares the 'PD method information' with the contents of Conagra's patents. But, again, the examples I gave of the comparison show that the alleged misuse is of information described at a

very high level of generality and abstraction. To repeat one example (from Annexure A):

> 'The pre-processing stage of the PD method involves converting the food to be processed from its raw form into a form suitable for processing. This involves grinding, shredding or chopping ... into a juice pulp or pieces of between 0.1mm to 10mm diameter and then separating the food into its juice ... and ... fibre.'

Compared to (the patent):

> 'US451 discloses the use of various techniques for pulping or juicing fruit and vegetables (including repeated chopping, crushing or other actions to form juice) ... US 330 discloses the processing of pieces of food as small as rice and as large as about three inches in all directions ... US451 discloses that a juice stream is separated or fractionated into two portions: a serum portion and a cake (fibre) portion ...'

[53] This is meant to be a particular of misuse by Conagra of confidential information. It fails on two fronts: the confidential information is not specified and the description of the content of the patents is so generally summarised as to make it impossible to know what, if any, part of what was said to be confidential information has in fact been appropriated. The same holds true for the other examples I gave earlier. The annexure does not allow one to compare the information in the patent specification with anything which the plaintiffs might properly contend was their confidential information. A comparison would call for a specific analysis of detail. What is offered is a general description of common techniques.

[54] There is another problem which is identified in paragraph 6 of the statement of claim. This reveals the existence of licence agreements between the plaintiffs and AMH pursuant to which Mr Althaus and Redmeat provided information, which they now described as confidential, to AMH to be used for the purposes of the agreements.

[55] The agreement referred to in paragraph 4(iii) of the statement of claim was between Mr Althaus and one Anderson, described as 'the owners', and AMH. The copy in the evidence is undated. It recites that:

> 'AMH shall acquire from the owners such information, drawings, descriptions, processes and other data (hereinafter called "the information") as is necessary to facilitate the use of a pressure differential drying process ... invented by the owners together with the know-how associated therewith ...'.

and that:

> 'AMH shall have disclosed to it information and know-how relating to the process for the purpose of enabling it to manufacture dried products through the use of the process and for that sole purpose only.'

[56] The agreement referred to in paragraph 4(iv) was dated 23 June 1994 and was made between Redmeat, AMH and Mr Althaus. It defined 'confidential information' to mean:

> 'All know-how, information, technical advice, ideas, concepts, processes and formulae of any kind, in any form or medium in respect of the Process, the tooling or any innovation.'

'Process' was defined to mean:

> '... that part of a pressure differentiated food drying process which utilises a dryer in accordance with the confidential information ...'

'Product' was defined to mean dried red meat manufactured using the process and 'Pilot Plant' meant such a plant to be constructed in accordance with the agreement.

[57] By a separate agreement also dated 23 June 1994 Mr Althaus granted Redmeat an exclusive licence to use the confidential information described in the agreement as:

> 'All know-how, information, technical advice, ideas, concepts, processes and formulae of any kind, in any form or medium ... within the knowledge of (Althaus) relating to the process ... tooling or ... innovations.'

'Innovations' were defined to include any discovery, intention or improvement relating to the process or tooling. 'Process' was described in the same terms as in the licence agreement between Redmeat and AMH. 'Tooling' was described to mean any tool, equipment or machinery used in the process.

[58] It was pursuant to this exclusive licence that Redmeat made the agreement, referred to in paragraph 4(iv), with AMH.

[59] By clause 3 AMH was obliged to:

> 'Construct the pilot plant at its own expense on its land at Dinmore and may utilise any part of the confidential information ... and the process disclosed by (Redmeat) at that time.'

[60] By clause 5.1 Redmeat granted AMH an exclusive right to manufacture, distribute and sell product and to sub-licence the manufacture, distribution and sale of the product to Conagra and any of its related companies.

[61] By clause 23.1 the agreement constituted the entire agreement between the parties relating 'in any way' to the use of the confidential information.

[62] The unlawful disclosure of confidential information alleged against AMH is found in the particulars to paragraph 9:

> 1. Between 1996 and 2001 AMH disclosed the PD method information for the purposes of the proposed construction of a food processing plant in Brisbane. The disclosure was beyond the limited purposes allowed by the licence agreement because on 25 January 2001 AMH

told Mr Althaus that it had no further use for the information but it did not terminate the agreement.

2. Between 1994 and 19 September 2002 disclosed the PD method information to Conagra.

[63] The purpose of the disclosure alleged in the first particular was to build a pilot plant. The second disclosure was to Conagra. Both communications were expressly authorised by the agreement.

[64] The allegation that the disclosure otherwise authorised by the licence agreement went beyond 'the limited purposes allowed by the licence agreement' is expressly predicated on the fact that on 25 January 2001 AMH decided to abandon the pilot plant and make no further use of Mr Alhaus' information. But, until that time, AMH was authorised by the licence agreements to disclose the information. The statement of claim does not allege use of Mr Althaus' information after the decision to abandon the pilot plant. The fact that AMH decided not to make further use of the information does not, of course, mean that information revealed by it pursuant to the agreement during its currency was not authorised by the agreement.

[65] The allegation of disclosure to Conagra does go beyond January 2001, the pleaded date on which the pilot plant was abandoned. On its face this allegation does take the alleged disclosure beyond the terms of the licence agreement. The allegation of disclosure to Conagra is between 1994 and 19 September 2002. However a perusal of Annexure C which contains the particulars of the disclosures does not reveal any disclosure subsequent to 1999.

[66] One further matter should be mentioned. The statement of claim contains some assertions that the plaintiffs cannot provide full particulars prior to disclosure and inspection of documents. Their lack of access to the defendants' documents is not, however, a reason for excusing the deficiencies in their pleading. It appears that in 2005 AMH did disclose the documents in its possession directly relevant to the allegations then in issue and Mr Althaus inspected them and was given such copies as he requested. The allegations were relevantly identical to those now in issue. A complaint that disclosure was inadequate was insinuated but upon meeting stern opposition from AMH to his application for better disclosure, Mr Althaus gave it up.

[67] It is I hope clear from what I have said that the statement of claim exhibits the vices identified by the Court of Appeal in an earlier version of the pleading. Those errors are destructive of the document as a statement of claim. It should be struck out. The question remains whether the plaintiff should be given a further indulgence or whether, as the defendants contend, the action should be dismissed. The latter is a drastic remedy not lightly to be imposed.

[68] During the course of the argument and during my review of the material for this judgment it seemed to me that the plaintiffs could distil from their mass of material a statement of their case that would meet the requirements of a valid pleading of breach of confidence. There are documents amongst the hundreds of pages of material which seem to be capable of containing a description of components or mechanisms that might have been secret and were known only to the plaintiffs. The problem with the statement of claim is its appeal to universalism, and a resolute

refusal to concentrate and analyse the general and the abstract into the specific and particular.

[69] If there were a basis for any confidence that the plaintiffs could perform the task and compile, at last, a concise pleading which specifically identified information properly confidential to the plaintiff, revealed to the defendants in specified circumstances, misused by them on particularised occasions, it may well have been a case for granting a further indulgence.

[70] In the end I have decided that there is no basis for that confidence and that it would be unfair to the defendants to prolong their exposure to the plaintiffs' claims. Enough is, I think, enough. The Court has been extraordinarily benevolent to the plaintiffs and their advisors. The time has long past when Mr Althaus should have pleaded his case, if he has one, in accordance with the rules. It is not as though the observations I have just made are novel. They have been uttered by judges who struck out the plaintiffs' pleadings in the past. The need for specificity and clarity was expressly conceded by the accomplished senior counsel who appeared for the plaintiffs before Byrne J on 21 April 2008. He sought 'one more opportunity' to prepare 'painstakingly' a pleading which 'exactly identified what ... is confidential about each drawing ... and manual ... that (Mr Althaus) wrote.' It was on the basis of that understanding and commitment that his Honour did not dismiss the action but rather imposed a guillotine order which would have led to the dismissal of the action had a statement of claim, of the type described by senior counsel, not been delivered on or before 31 July 2008.

[71] As I have found, the statement of claim (not settled by senior counsel who appeared before Byrne J) is not of the appropriate description. Not to dismiss the action now would be to ameliorate the effect of Byrne J's order and put the plaintiffs in a better position than they were, after another failure. That should not be done without good reason.

[72] The need to plead the claims specifically was expressly pointed out by the Court of Appeal which allowed the plaintiffs 'a further (i.e. *one* more) opportunity' to prepare a statement of claim 'within a limited time', which was fixed at 21 days. Two years and several attempted drafts later the plaintiffs have still not produced such a pleading.

[73] It is more than four years since the proceeding started. The events the subject of the action occurred as long as 15 years ago. In 13 attempts the plaintiffs have been unable to plead their case in any appropriate and intelligible form. These circumstances give rise to a real apprehension that the plaintiffs cannot do so.

[74] In a very real sense the plaintiffs' persistent, incompetent and ineffectual attempts to describe a case against the defendants is an abuse of process. It is not, I think, an exaggeration to describe the conduct of the action by the plaintiffs as scandalous. The attempts are a misuse of the rules which permit and control the institution of proceedings; and subject the defendants to repeated, defective processes which they must answer or apply to strike out. There is a responsibility on plaintiffs and those who advise them to put their cases in proper form and get on with them. These plaintiffs have been signally unable to discharge that responsibility. The time for indulgence has passed. They must suffer the consequence of their own failures.

[75] There is, moreover, prejudice to the defendants in having to stand ready to resist a further attempt by the plaintiffs to extract substantial sums of money from them. There is that general prejudice of which McHugh J spoke in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552 and the more particular prejudice identified by AMH. Of five former employees named in the statement of claim, one has died and two have been dismissed in circumstances which disincline them to assist AMH in the litigation. The other two have left in less acrimonious circumstances but are not within AMH's control and may not assist.

[76] The Court has power, both inherent and statutory, to strike out an action for want of prosecution. The plaintiffs have completely disregarded the implied undertaking imposed on them by *UCPR* 5(3). Accordingly UCPR 280 would authorise dismissal of the action. In any event the inherent power of the Court to control its own process and dismiss for want of prosecution is clearly appropriate. One can scarcely imagine a more egregious example of a failure to prosecute a case: after the lapse of four years the plaintiffs have not yet delivered a valid statement of claim.

[77] The dismissal of an action for want of prosecution involves an exercise of discretion. An action should be dismissed only if the interests of justice so require. See *Cooper v Hopgood and Ganim* [1999] 2 Qd R 113 at 119. The discretion is to be exercised having regard to the balancing of relevant factors which include delay, reasons for it, and prejudice to the defendants, among others.

[78] In this case the relevant factors are the plaintiffs' serial failures to articulate their statement of claim and the inference to which the history of the action gives rise that they are incapable of doing so: the prejudice to the defendants and the fact that the precondition set by Byrne J for allowing the action to continue has not been satisfied.

[79] I accordingly order that the plaintiffs' application for leave to deliver its statement of claim be dismissed. On the defendants' application I order that the action be dismissed and that the plaintiffs pay the defendants' costs of and incidental to the action to be assessed on the standard basis.