SUPREME COURT OF QUEENSLAND

CITATION:	*Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd & Ors* [2011] QCA 252
PARTIES:	**BARR ROCK PTY LTD** ACN 092 300 680 (applicant) **v** **BLAST ICE CREAMS PTY LTD ACN 128 535 571 in its own capacity and as trustee for the C & S ROTOLONE FAMILY TRUST** (first respondent) **CAMILLO JOSEPH ROTOLONE** (second respondent) **SUZANNE ELIZABETH ROTOLONE** (third respondent)
FILE NO/S:	Appeal No 3734 of 2011 DC No 3598 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2011
JUDGES:	Chesterman JA, Philippides and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the applicant leave to appeal,** **2. Set aside the orders of the District Court,** **3. Allow the appeal by striking out:** **(i) paras 11, 12, 13, 14, 18 of the counterclaim and paras 29 and 30 (to the extent that they refer to paras 11, 12 and 13),** **(ii) para 31 of the counterclaim,** **(iii) paras 26 and 28(a) of the counterclaim,** **(iv) para 35(iv) of the counterclaim.** **4. Grant the respondents leave to re-plead,** **5. The respondents pay half the appellant's costs of and incidental to the application at first instance, and the appellant's costs of this application and appeal on the standard basis.**

CATCHWORDS: APPEAL – RIGHT OF APPEAL FROM INTERLOCUTORY DECISION – LEAVE TO APPEAL – PROCEDURE – where applicant sought leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) – where learned primary judge refused to strike out specified paragraphs in the respondents' counterclaim in respect of an application brought pursuant to r 171 *Uniform Civil Procedure Rules* 1999 (Qld) – whether leave should be granted – whether orders of the primary judge gave rise to a substantial injustice – whether primary judge's discretion not to strike out the specified paragraphs miscarried – where discretion required to be exercised anew – whether specified paragraphs of counterclaim should be struck out

Acts Interpretation Act 1954 (Qld), s 36
District Court of Queensland Act 1967 (Qld), s 118
Federal Court of Australia Act 1976 (Cth), s 31A
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 171

Banque Commerciale SA (In liq) v Akhil Holdings Ltd (1990) 169 CLR 279; (1990) 92 ALR 53; [1990] HCA 11, cited
Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1987) 14 FCR 215; [1987] FCA 84, cited
Bruce v Odhams Press Ltd [1936] 1 KB 697, cited
Colston v McMullen [2011] QSC 60, cited
Dawnlite Pty Ltd v Riverwalk Realty Pty Ltd [2010] QSC 249, cited
Gould v Mount Oxide Mines Ltd (In liq) (1916) 22 CLR 490; [1916] HCA 81, cited
H 1976 Nominees Pty Ltd v Galli (1979) 40 FLR 242; [1979] FCA 74, cited
Meckiff v Simpson [1968] VR 62; [1968] VicRp 7, cited
Mohareb v Lambert & Rehbein (SEQ) Pty Ltd [2010] QSC 126, cited
Pickering v McArthur [2005] QCA 294, cited
Pioneer Electronics Australia Pty Ltd v Edge Technology Pty Ltd [1999] FCA 142, cited
QIC Logan Hyperdome Pty Ltd & Anor v Briridge Pty Ltd & Anor [2011] QSC 43, cited
Smith v Ash [2010] QCA 112, considered
Spencer v The Commonwealth (2010) 241 CLR 118; [2010] HCA 28, considered
Thiess Pty Ltd v FFE Minerals Australia Pty Ltd [2007] QSC 209, cited

COUNSEL: A J H Morris QC, with V G Brennan for the applicant
A W Duffy for the respondents

SOLICITORS: Dibbs Barker for the applicant
Sciaccas Lawyers for the respondents

[1] **CHESTERMAN JA**: I agree with the orders proposed by Philippides J, and with her Honour's reasons for proposing those orders.

[2] **PHILIPPIDES J**:

Background

Barr Rock Pty Ltd has brought an application for leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld) against the decision of the learned primary judge refusing to strike out certain paragraphs in the respondents' counterclaim. It also sought leave to extend time in which to appeal, should it be the case that leave is not required.

[3] The application was brought pursuant to r 171(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") on the basis that the impugned paragraphs of the counterclaim had a tendency to prejudice or delay the fair hearing of the proceeding, were irrelevant and therefore unnecessary, and in one respect did not disclose a reasonable cause of action. It was conceded before the primary judge that the respondents ought to be given liberty to re-plead, except in one respect where it was argued a reasonable cause of action was not shown.

The pleadings

[4] The applicant is the plaintiff in the primary proceeding in the District Court which arises from a loan agreement dated early 2008 between it as lender and the first respondent as borrower. By its statement of claim, it alleges that the first respondent failed to repay moneys due and owing pursuant to the terms of the loan agreement. As against the second and third respondents, it seeks to enforce a guarantee and indemnity executed by each of them indemnifying it against any loss resulting from the first respondent's default.

[5] The first respondent's default is admitted by the respondents, but liability is denied by reason of the matters set out in the respondents' counterclaim, which advances two causes of action against the applicant by way of set-off, one being for misleading and deceptive conduct under the *Trade Practices Act* 1974 (Cth) ("TPA") and the other for breach of contract.

[6] The respondents' claims concern an agreement in writing dated 22 November 2007 (the "Business Sale Agreement"), pursuant to which the applicant sold its business referred to therein as an "Ice Cream Manufacturing Facility" to the first respondent for $1.5 million (para 15 counterclaim).

[7] The crux of the respondents' case appears to be that, when the first respondent purchased the applicant's Ice Cream Manufacturing Facility under the Business Sale Agreement, it assumed it was also purchasing the right to manufacture ice cream pursuant to "Cold Rock" recipes and supply it to specified Cold Rock stores (para 26).

[8] It is alleged that by the express terms of the Business Sale Agreement, the applicant "represented" to the respondents:

(a) by item J, that the first respondent was purchasing a "manufacturing facility" and as a result that it would "acquire all of the associated rights to manufacture ice cream" made pursuant to Cold Rock recipes and supply it to specified Cold Rock stores (para 16);

(b) by cl 5.1, that the applicant would assign "all documentation that would allow the first respondent to operate an 'Ice Cream Manufacturing Facility' and thus manufacture ice cream (made pursuant to Cold Rock recipes)" and supply it to the specified Cold Rock stores (para 17).

[9] The respondents also allege that:

(a) a written agreement dated 20 August 2007 for the manufacturing rights referred to as "the Manufacturing Agreement" had in fact been assigned (on an unknown date) to a third party, Franchised Food Company, by Cold Rock Management Pty Ltd (para 22(a)).

(b) the applicant did not assign the Manufacturing Agreement to the first respondent with the result that Franchised Food Company was entitled to charge the first respondent for the manufacturing rights (para 22(b)).

[10] The respondents assert that prior to the execution of the Business Sale Agreement, the applicant failed to disclose to the respondents what is described as the "true facts" relating to the existence of a Manufacturing Agreement (para 27). The essence of the non-disclosure is that the applicant failed to disclose that:

(a) the first respondent would not receive any "manufacturing rights",

(b) the applicant had a licence agreement with another entity, which held the manufacturing rights, which entitled it to manufacture Cold Rock ice cream.

[11] That non-disclosure and the representations pleaded in paras 16 and 17 (together with the representations pleaded in paras 11, 12, 13 and 18 dealt with below) were said to be part of "conduct" by the applicant which was misleading and deceptive (para 33).

[12] In the alternative, the respondents plead that it was an express term of the Business Sale Agreement that the applicant would assign the Manufacturing Agreement to the first respondent (para 31). Further or alternatively, the respondents plead an implied term to that effect (para 32).

[13] The applicant pleads in response to the allegation concerning non-disclosure that the Management Agreement was brought into existence at the second respondent's request and was given to the second respondent prior to the execution of the Business Sale Agreement (para 14 defence to counterclaim). That factual dispute was of course not a matter for consideration on the strike out application.

The application at first instance

[14] At first instance, the applicant's complaints with respect to the counterclaim fell into three discrete categories.

[15] The first category concerned paras 11, 12, 13 and 18 of the counterclaim which pleaded certain "representations" (and para 14 which pleaded reliance). The pleaded representations were said to be objectionable because they:

(a) alleged that representations were misleading and deceptive, without pleading any facts which made them misleading or deceptive; and

(b) were irrelevant to the respondents' case with respect to the Manufacturing Agreement.

[16] The second category concerned the respondents' plea in para 31 of an "express term", which the applicant contended was simply not contained in the Business Sale Agreement and could not sustain a reasonable cause of action.

[17] The third category concerned paras 26, 27(a), 28(a) and 35(iv) of the counterclaim, which contain disparate allegations and were said to:

(a) be vague to the point of embarrassment,
(b) fail to plead any material facts,
(c) be irrelevant, and
(d) generally not comply with the UCPR.

The reasons of the judge at first instance

[18] The pertinent part of the learned primary judge's reasoning in dismissing the whole of the applicant's application is expressed in brief terms and may be set out in full:

> "In my view the structure of the pleading in terms of pleading a cause of action pursuant to section 52 of the *Trade Practices Act* is adequate. The representations are pleaded. Reliance on the representations is subsequently pleaded in paragraph 14. That this constituted conduct is subsequently pleaded at paragraph 29 and causation in terms of the conduct resulting in the first defendant suffering, or being likely to suffer, loss and damage is pleaded at paragraph 35.
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> Other allegations relating to the counterclaim are made so far as it is alleged in paragraph 31 that the term 'ice cream manufacturing facility' in the business sale agreement, being one which enabled the defendant to manufacture ice cream pursuant to Cold Rock recipes and supply that ice cream and ice cream related products to Cold Rock stores, was an essential term is put in issue. It is asserted by the plaintiff that this allegation discloses no cause of action.
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> On behalf of the defendant it is submitted that this term is pleaded in paragraph 31 as an essential [sic][1] term and alternatively in paragraph 32 as an implied term and that the proper construction of it is a matter for evidence at trial.
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> It is also alleged by the defendant that allegations made in paragraph 27(a) are so vague as to deprive the plaintiff of knowing the case made against it and that where in paragraph 35(iv) the quantum of damages is stated to be subject to further particulars 'of which cannot be provided until completion of interlocutory steps in this proceeding' does not sufficiently identify the quantum of the claim.
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> The contentions of the plaintiff must be considered in light of what was said by the High Court in *Spencer v The Commonwealth* (2010) 241 CLR 118 at 131 where French CJ and Gummow J observed that the exercise of powers to summarily terminate proceedings must always be 'attended with caution'.
>
> It is true that aspects of the paragraphs under consideration are broadly pleaded. However, the plaintiff has not sought particulars of these allegations. In my view, not only is the plaintiff apprised of the case it has to meet pursuant to section 52 of the *Trade Practices Act*, but it is also apprised of the two bases for the contractual claim made against it in the counterclaim.

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1 His Honour presumably meant 'express'.

> I do not find paragraph 27(a) to be so vague as to deprive the plaintiff of knowing the case made against it in this regard and I note that the plaintiff has been informed that the quantum pleaded in paragraph 35(iv) is the subject of a forensic accounting report and that this is in the process of being prepared."

The grounds of appeal

[19] The applicant summarised the grounds of appeal sought to be raised should leave be granted as follows:

(a) The test applied to summarily terminate proceedings is inapt on applications to strike out specific paragraphs of a pleading as being irrelevant or otherwise defectively pleaded.

(b) A party seeking to rely upon a claim pursuant to s 52 of the TPA is required to plead:
   (i) what was misleading and deceptive about the representation at the time it was allegedly made; and
   (ii) material facts in support of the causal connection between the alleged misleading and deceptive conduct and the claimant's damage.

(c) A pleading which asserts the existence of an express term which is not contained in a written agreement – complete on its face – discloses no reasonable cause of action.

(d) The learned primary judge failed to give any, or any adequate, reasons for dismissing part of the strike out application.

(e) A party responding to a pleading ought not to be called upon to plead (and where necessary, disprove) irrelevancies in the claimant's pleading.

Leave to appeal

[20] The respondents raised in their submissions the issue of whether leave was required pursuant to s 118 of the *District Court of Queensland Act*, given the amendments to that provision. It was said that it was arguable that leave was not required in the circumstances of the present case because the judgment in issue could be said to be related to a claim for or relating to property[2] that has a value above the Magistrates Court jurisdictional limit, although in that case an extension of time would be required in which to bring the appeal. It is not necessary to determine that matter for the purposes of the present case, as it is abundantly clear that, in any event, leave to appeal ought to be given in this case.

[21] It is recognised that s 118(3) of the *District Court Act* confers a general discretion on this Court to grant or refuse leave to appeal, which is exercisable according to the nature of the case, but leave will ordinarily only be granted where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected: *Smith v Ash* [2010] QCA 112 at [50]. And while it will usually be difficult to show that an appeal is necessary to correct a substantial injustice where the exercise of discretion in question concerns a matter of pleading or procedure, especially where the discretion is exercised to permit the continuation of proceedings towards a hearing on the merits (*Pickering v McArthur* [2005] QCA 294 at [3]), this case is one which comes within that category of cases where substantial injustice will ensue if leave is not granted. As is apparent from

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[2] Reference was made to the definition of "property" in the *Acts Interpretation Act* 1954 (Qld), s 36 which extends the meaning of property to "things in action".

what follows concerning the merits of the application, the applicant's complaint concerning the manner in which the primary judge applied *Spencer* is valid, as is the submission that the primary judge's discretion plainly miscarried.

[22] A party confronted with a pleading which does not coherently articulate the case it is required to meet is denied the basic requirement of procedural fairness that a party should have an opportunity of meeting the case against them (*Banque Commerciale SA (In liq) v Akhil Holdings Ltd* (1990) 92 ALR 53 at 58-59). In such cases, the party is exposed to additional expense and inconvenience in preparing for a trial on the basis of issues which are legally irrelevant, do not assist in the just determination of the true controversy between the parties and may significantly lengthen the duration of trials. That injustice ought not to be lightly dismissed. Additionally, an important matter of practice and procedure is raised concerning the proper approach to be applied in applications to strike out deficient pleadings and the scope of the application of *Spencer's* case. That matter has wider importance given the recent enlargement of the District Court's jurisdiction which now brings before that Court more complex civil cases involving significantly greater quantums. It is opportune to underline the established principles as to the duty of parties to formulate the real issues in dispute by coherent and relevant pleadings. Accordingly, I would grant leave. For completeness, I note that were leave to appeal not required, but an extension of time to file the appeal instead required, I would, on the basis discussed, grant the extension.

Error in adopting the *Spencer* test

[23] The appellant's complaint is that in dismissing the application the learned primary judge erroneously proceeded on the express basis that all the appellant's "contentions … must be considered in light of what was said by the High Court in *Spencer* … that the exercise of powers to summarily terminate proceedings must always be 'attended with caution'."

[24] I agree with the appellant's submission that the application of *Spencer's* case to the issues for determination on the strike out application in so far as it concerned alleged deficiencies in the pleaded counterclaim was fundamentally misconceived. *Spencer's* case involved an application for summary judgment. The dicta from that case which the primary judge relied upon came from the joint judgment of French CJ and Gummow J where they explained at [24]:

> "The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-130 per Barwick CJ) or on the basis that the action is frivolous or vexatious or an abuse of process (*Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J). The same applies where such a disposition is sought in a summary judgment application supported by evidence."

[25] However, French CJ and Gummow J also expressly noted (at [23]) that the power in s 31A of the *Federal Court of Australia Act* 1976 (Cth), which was the provision before the court, was entirely different in its application from the power to strike out deficient pleadings, stating:

> "Accepting that there are a number of ways in which s 31A may be applied to empower the Federal Court to dismiss a proceeding, it is to be distinguished, in its application to deficient pleadings, from

> rules (such as O 11, r 16 of the *Federal Court Rules*) which provide for the striking out of pleadings."

[26] The appellant correctly submitted that, save for an application brought under r 171(1)(a) UCPR on the basis that a pleading revealed no reasonable cause of action or defence[3], *Spencer's* case has no relevance to the balance of the grounds on which an appellant may rely to strike out parts of an adversary's pleading under r 171(1)(b)-(e) UCPR. Indeed, counsel for the respondents did not seek to sustain the submission that had been made to the contrary on behalf of the respondents at first instance (by other counsel). It seems that the primary judge was led into error by the submission made at first instance[4] that the dicta in *Spencer's* case had application not only in respect of "the exercise of powers to summarily terminate proceedings", but also where, as in the present case, the appellant was applying to strike out parts of a pleading on the condition that leave to re-plead be permitted.

[27] The judge at first instance by wrongly applying *Spencer's* case, failed to have sufficient regard to considerations pertinent to the task at hand when considering deficient pleadings. Counsel for the appellant listed the well established principles that are relevant in determining whether a pleading will be regarded as being "deficient". Considerations relevant in deciding if a pleading is deficient include whether it fails to fulfil the function of pleadings, which are "to state with sufficient clarity the case that must be met" and thus define the issues for decision thereby ensuring procedural fairness (*Banque Commerciale SA (In liq) v Akhil Holdings Ltd* (1990) 92 ALR 53 at 58-59). A pleading will lack sufficient clarity if it is "ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him" (*Thiess Pty Ltd v FFE Minerals Australia Pty Ltd* [2007] QSC 209 at [37], applying *Meckiff v Simpson* [1968] VR 62 at 70). Likewise a pleading will be deficient if the pleader's case is not "advanced in a comprehensible, concise form appropriate for consideration both by the court, and for the purpose of the preparation of a response" (*QIC Logan Hyperdome Pty Ltd & Anor v Briridge Pty Ltd & Anor* [2011] QSC 43 at [10], see r 149 UCPR).

[28] A pleading must contain all the material facts relied upon (r 149(b) UCPR) and a deficiency in pleading material facts needed to establish a cause of action may not be remedied through the use of particulars, which are intended to meet a further and quite separate requirement (r 157 UCPR, *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712, *Dawnlite Pty Ltd v Riverwalk Realty Pty Ltd* [2010] QSC 249 at [44]). On the other hand, a pleading may be liable to be struck out where it includes irrelevant allegations which, by their nature, will affect the expeditious determination of the proceeding (*Colston v McMullen* [2011] QSC 60).

[29] Given the fundamental error made by the primary judge in applying the approach espoused in *Spencer* to the application as a whole, and the failure to have proper regard to relevant principles, the exercise of the discretion plainly miscarried. I would allow the appeal and exercise the discretion anew.

Pleading the representations and the misleading and deceptive character (paras 11, 12, 13 and 18) and reliance (para 14)

[30] By para 11, it is alleged that the following "representations" were made to the respondents in July 2007:

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[3] In the present case, that basis for striking out the pleading was confined to the respondents' complaint in respect of the plea of an express term in para 31.

[4] Appeal Record 32, 33.

(a) the appellant's business was for sale.
(b) the business "makes a lot of money", the respondents "should consider buying it".
(c) the business was "highly sought after", "there were other potential buyers" and the first respondent "must act quickly or it will miss out".
(d) the international arm of Cold Rock would expand into various international destinations.

[31] By para 12, it is alleged that the following "representations" were made to the respondents between July and September 2007:
(a) Philippine investors were "looking at buying the Australian Cold Rock Ice Creamery".
(b) that sale would lead to them "purchasing the First [Respondent's] Aspley Cold Rock Ice Creamery" and the plaintiff's business.
(c) Blast Ice Creams would "triple its money in three (3) years".

[32] By para 13, it is alleged that the following "representations" were made to the respondents between August and October 2007:
(a) since 2000, the appellant had "been contracted to Cold Rock Ice Creamery for the provision of ice-cream to Cold Rock stores";
(b) the appellant had made a profit of $432,028.26 in the year ending 30 June 2006 and $647,131.99 in the year ending 30 June 2007;
(c) the value of the appellant's business was based "on the Super Profits methodology";
(d) a third party valuation valued the appellant's business at $1.6 million.

[33] By para 18, it is alleged that by "the 'Business Valuation' – Barr Rock Pty Ltd" the appellant represented to the respondents that the appellant was making the profits pleaded in para 13. (This paragraph was not specified in the application but was dealt with in submissions at first instance and before this Court).

[34] By para 29, it is alleged that the respondents entered into the loan agreement and guarantees in reliance on the "conduct" which, as pleaded, includes the representations pleaded in paras 11, 12, 13 and 18 and the representations alleged to be contained in the contract (paras 16 and 17), in addition to the alleged non-disclosure (in para 27).

[35] Clearly, in order for a pleading to disclose a cause of action for misleading and deceptive conduct, it is necessary to plead what is alleged to be misleading and deceptive about the representations (see, for example, *Pioneer Electronics Australia Pty Ltd v Edge Technology Pty Ltd* [1999] FCA 142 at [4] applied in *Mohareb v Lambert & Rehbein (SEQ) Pty Ltd* [2010] QSC 126 at [22] to [24]).

[36] As the respondents' case was articulated by counsel before this Court, the real complaint is that the appellant misrepresented that the first respondent would receive the benefit of the Manufacturing Agreement. But the respondents have failed to plead how the representations in paras 11, 12, 13 and 18 are connected to that complaint. The respondents' counterclaim does not plead any material facts by which it is said the representations pleaded in paras 11, 12, 13 and 18 are misrepresentations. As counsel for the appellant submitted, there is no single fact, or combination of facts, advanced in the counterclaim to negate the truth of those representations (indeed, the representations in para 11(a) were clearly true). The paragraphs thus appear to raise "phantom issues". Moreover, to the extent that that

is not the case, the submission made by counsel for the respondents that the deficiency in the pleading may be remedied by the provision of particulars overlooks the fact that the deficiency lies in failing to plead material facts. What was required was for the respondents to plead the material facts said to give the representations alleged in paras 11, 12, 13 and 18 their misleading and deceptive character. In the circumstances, those paragraphs should be struck out.

[37] Paragraph 14 expressly pleads reliance on the representations in paras 11, 12 and 13. Since it has no other apparent purpose, it also should be struck out. Paragraphs 29 and 30 similarly rely on those paragraphs and should be struck out to the extent of that reliance.

Express term (para 31)

[38] Paragraph 31 pleads that it was an express term of the Business Sale Agreement that:

> "the Manufacturing Agreement … be assigned to the First Defendant upon purchase of the Ice Cream Manufacturing Facility and thus be able to manufacture ice cream (made pursuant to Cold Rock recipes) and supply that ice cream and ice cream related products to the Cold Rock stores pleaded in paragraph 6(e)(i) of this Amended Counterclaim".

[39] The appellant submitted that the respondents have pleaded an express term that is not contained in the Business Sale Agreement and as such the plea cannot be sustained. It is indeed true that the Business Sale Agreement in fact contains no such express term and the respondents' argument that the appellant's contentions had insufficient regard to the application of principles concerning contractual construction is misconceived. As the appellant correctly submitted, those principles, while relevant to the respondents' allegation that the Business Sale Agreement contained an implied term to the effect pleaded in para 32, have no application to the assertion of an express term in circumstances where the respondents plead that the only agreement between the parties was the Business Sale Agreement which was in writing. Moreover, the respondents do not purport to rely on any of the surrounding circumstances, or the intention of the parties (objectively ascertained), to make out the express term on the basis of a "construction case". If regard is to be had to the surrounding circumstances known to both parties at the time of the Business Sale Agreement, it must be for the purpose of implying the relevant term.

[40] It follows that any cause of action relying on an express term as alleged has no reasonable prospects of success. Paragraph 31 ought to be struck out.

Other matters

[41] The other paragraphs which were the subject of submissions by the appellant were paras 26, 28(a) and 35(iv). The appellant did not press any complaint concerning para 27(a) before this Court.

Paragraphs 26 and 28(a)

[42] A complaint made before the primary judge but not addressed by him was the appellant's objections to paras 26 and 28(a) of the counterclaim. The appellant's

submission is that both paragraphs are objectionable because they plead an unexpressed subjective "entitlement" of the respondents to "assume" a certain state of affairs. Such an entitlement is irrelevant to either the breach of contract claim or the claim under the TPA. I accept the submission that in their present form those paragraphs are objectionable and should be struck out.

Damages claim – para 35(iv)

[43] Damage is an essential element of a cause of action for misleading and deceptive conduct and the causal link between the conduct and the loss or damage must be pleaded. As the appellant submitted, that link, however strong or tenuous, cannot be left to particulars to which the opposing party is not required to plead (*Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215 at 223).

[44] In para 35 of the counterclaim, the respondents have pleaded that by the appellant's "conduct", the first respondent "has suffered and is likely to suffer loss and damage". The respondents purport to provide particulars in subparagraphs (i), (ii) and (iii) of the loss and damage.

[45] The pleading asserts that the manufacturing rights became available to be purchased by the first respondent and that the first respondent did so (paras 23, 24, 25). The first respondent claims as damages payments so made (paras 35(i), (ii), (iii)). But additionally, the first respondent claims as damages $450,000, being the difference between the price paid for and the market price of the "Ice Cream Manufacturing Facility", stating that further particulars "cannot be provided until completion of interlocutory steps in this proceeding" (para 35(iv)).

[46] Given that the first respondent purchased the rights it alleges it understood to be acquiring under the Business Sale Agreement, the basis for the further claim in para 35(iv) is not readily apparent. No material facts are pleaded to indicate the relationship between that additional loss and the conduct of the appellant. As the appellant submitted, there is no single fact or combination of facts which supports any causal link between the extensive number of "representations" alleged and the loss or damage said to have been so suffered by the first respondent. An expert report will not rectify that defect. I also note (though it is a matter of less concern) that the pleading does not distinguish between the loss and damage suffered as a result of the statutory cause of action and that alleged to have arisen by virtue of the contractual claim. Paragraph 35(iv) should be struck out.

Costs

[47] In its application the appellant initially sought two orders. One concerned orders to strike out parts of the counterclaim. The other was an order that the respondents' solicitors cease to act on behalf of the respondents. The allegations raised in that aspect of the application were significant and were abandoned a few days before the hearing of the application before the primary judge. In the circumstances, while the appellant has been successful before this Court, it should not have all its costs of and incidental to the application at first instance. In my view, the respondents should only be required to pay half of those costs.

Orders

[48] In the circumstances, the orders I would propose are:

1. grant the applicant leave to appeal,
2. set aside the orders of the District Court
3. allow the appeal by striking out:
   (i) paras 11, 12, 13, 14, 18 of the counterclaim and paras 29 and 30 (to the extent that they refer to paras 11, 12 and 13),
   (ii) para 31 of the counterclaim,
   (iii) paras 26 and 28(a) of the counterclaim,
   (iv) para 35(iv) of the counterclaim.
4. grant the respondents leave to re-plead,
5. the respondents pay half the appellant's costs of and incidental to the application at first instance, and the appellant's costs of this application and appeal on the standard basis.

[49] **NORTH J**: I agree with the orders proposed by Philippides J, and with her Honour's reasons for proposing those orders.