SUPREME COURT OF QUEENSLAND

CITATION:	*Boost Foods Pty Ltd v Blu Oak Pty Ltd & Ors* [2014] QSC 171
PARTIES:	**BOOST FOODS PTY LTD (Subject to Deed of Company Arrangement)** Plaintiff **And** **BLU OAK PTY LTD** First Defendant **BRADLEY WARDROP-BROWN** Second Defendant (Respondents) **And** **JULIE VAN EPS** Third Party (Applicant)
FILE NO/S:	S2038/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	1 August 2014
DELIVERED AT:	Rockhampton
HEARING DATE:	28 July 2014
JUDGE:	McMeekin J
ORDERS:	**1. Leave to bring the application is refused;** **2. The application is dismissed;** **3. The third party is ordered to pay the defendants' costs of the application on the standard basis.**
CATCHWORDS	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES – PLEADING – GENERALLY – where the applicant seeks to strike out the

third party notice and statement of claim brought against her by the defendants – where the applicant contends that the statement of claim discloses no reasonable cause of action – where the applicant contends that the statement of claim is frivolous or vexatious – where the applicant contends that the statement of claim is an abuse of process – where the applicant brings the application without the leave of the Court – whether leave should be given to the applicant – whether the third party notice and statement of claim should be struck out

Civil Liability Act 2003 (Qld), s 32A
Corporations Act 2001 (Cth)
Law Reform Act 1995 (Qld) s 6, s 8
Trade Practices Act 1974 (Cth)
Uniform Civil Procedure Rules 1999 (Qld) r 5, r 171, r 467

ASIC v Adler (2002) 41 ACSR 72 cited
Dawnlite Pty Ltd v Riverwalk Realty Pty Ltd [2010] QSC 249 cited
Dey v Victorian Railway Commissioners (1949) 78 CLR 62 cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 cited
Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors [2008] VSCA 208; (2008) 21 VR 84 cited
National Australia Bank Limited v Troiani and Anor [2002] QCA 196
Robert Bax & Associates v Cavenham Pty Ltd [2011] QCA 53 cited
Thiess v FFE Minerals Australia Pty Ltd [2007] QSC 209 cited
Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd

(2006) 33 WAR 1; [2006] WASC 161 cited

COUNSEL: Mr van Eps for the Applicant

Mr Savage QC for the Respondents

SOLICITORS: Self represented

Moray & Agnew Lawyers for the Respondents

[1] **McMeekin J:** This is an application under r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") by the Third Party, Mrs Julie van Eps, to strike out the Third Party Notice and Statement of Claim brought against her by the defendants – Blu Oak Pty Ltd ("Blu Oak") and its director Mr Wardrop-Brown. In the alternative she seeks that certain paragraphs of the pleading be struck out.

[2] The applicant contends that the Statement of Claim:

(a) Discloses no reasonable cause of action;
(b) Has a tendency to prejudice or delay the fair trial of the proceedings;
(c) Is unnecessary;
(d) Is frivolous or vexatious; and
(e) Is otherwise an abuse of process.

[3] The respondents argue:

(a) The applicant requires leave to bring the application pursuant to r 467(1) UCPR, the applicant having previously certified that she is ready for trial, and no leave has been given, is sought or ought to be given;
(b) The relief sought should be refused on discretionary grounds, because the time and expense involved is disproportionate to the "just, expeditious and cheap resolution of the case" particularly having regard to the following:
    (i) The witnesses and evidence called will "continue to feature in the case";
    (ii) The complaints made by the plaintiff against the defendant and the defendants make against the third party will continue;
    (iii) Any deficiencies in the particularisation of the defendants' case against the third party reflects the lack of particularity in the plaintiff's case against the defendants - and the third party is responsible for the plaintiff's case;
    (iv) The risk of further disputes or interlocutory appeals will prevent the matter being tried.

[4] What Mr Savage of Queens Counsel, who appeared for the defendants, meant by the submissions in paragraphs (i), (ii) and (iv), he explained, is that in essence the issues in the third party proceedings mirror the issues in the principal proceedings, no complaint is made by the plaintiff Boost Foods Pty Ltd (in essence the third party wearing her corporate hat) about the state and degree of particularity of the defendants' pleadings, and so there is no practical point to the application so far as concerns the identification of the issues and the preparation of the evidence.

[5] Further Mr Savage effectively submitted that if the third party wearing her corporate hat as plaintiff can properly prepare for trial then it rings somewhat hollow to assert that she cannot prepare on the identical issues in the third party proceedings.

[6] I raised this issue of the contrasting positions of the plaintiff and the third party on several occasions and received no satisfactory explanation. Mr van Eps[1] repeatedly told me that he could not speak for the plaintiff. Given that his client was sitting next to him and is presumably instructing the plaintiff's lawyers I cannot see why he could not tell me what her instructions were when wearing her corporate hat.

[7] I am conscious that the plaintiff brings suit under a deed of arrangement. Presumably its creditors are funding the proceedings. I am not told of the arrangements but no doubt the third party is privy to them. The plaintiff's pleading relates that the third party was the sole director and shareholder of the plaintiff at material times and that "all acts done by [the third party] were for and on behalf of [the plaintiff]". I mention this as instructions as to the contentious factual matters, it would seem, can only come from the third party, and in that sense she is responsible for the position taken by the plaintiff.

Is Leave Necessary?

[8] Rule 467 UCPR provides that if a party is served with a request for trial date and is itself ready for trial they must sign it and return it. Rule 470(c) provides that after filing the request for trial date a party may only make an application in a proceeding with the court's leave.

[9] On 2 June 2014 the third party signed and filed a request for trial date.

[10] The proceedings came before Boddice J on the supervised case list on 11 June 2014. His Honour ordered that the plaintiff and third party serve on the defendants any request for particulars by 18 and 20 June respectively. He also ordered that the third party file any strike out application on or before 4 July 2014. I was told that the order was made by consent although that is not evident from the order itself.

[11] On 23 June the third party served a request for particulars of the defendant's statement of claim. On 4 July this application was filed. On 15 July and under protest the defendants filed and served their response to the third party's request for particulars. The response was largely unhelpful. They also filed a response to the plaintiff's request two days later. The third party was served with both documents.

[12] The third party argues that she does not need leave as Boddice J has effectively given leave by making the order that he did.

[13] The defendants argue that is not so. I was informed by Mr Savage that on 11 June he submitted to Boddice J that leave would be required if an application was brought. Mr Savage submitted to me that the only effect of the order was to require that any such application – necessarily including one for leave - must be made by the date nominated.

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1 The name of the counsel and the third party (who it transpires are husband and wife) is spelt both "van" and "Van" in the various documents. Mr van Eps appears in the Bar Association records as I have indicated and has signed his submission in this way. I assume that the spelling in the plaintiff's Statement of Claim is wrong.

[14] In my view the defendants' submission is correct.

[15] The issue of leave was not before Boddice J. No material was filed on which his Honour could have determined the issue, as I understand matters. Indeed the defendants point out that there is no material before me going to the issue. By the terms of the order leave was not granted. There is nothing to indicate that his Honour turned his mind to the issue.

[16] The only argument advanced by the third party to justify her stance is that the other orders made also required leave, that is, the order that any request for particulars be delivered by a stated date. That is so because for the purposes of r 467 a party is "ready for trial", inter alia, if as far as that party is concerned "all necessary steps in the proceedings (including steps to obtain …admissions, particulars…) are complete" (r 467(d)) and "the proceedings is in all respects ready for trial" (r 467(f)). So an application for particulars is in the same category as any other.

[17] But I was told that the order was advanced to Boddice J as a consent order. He could therefore assume that the parties had waived any reliance on the rules in relation to the obtaining of leave for the request for particulars. Parties are entitled to do that. Parties can supply particulars after a request for trial date is signed if they wish and not trouble the court with an unnecessary application for leave. Obviously the defendants took a pragmatic approach to the issue of particulars. One could hardly assume, without more, that they would take the same approach to a strike out application. It involves a much more fundamental attack than the giving of particulars.

[18] However the question of possible waiver or consent cannot apply on this issue in circumstances where the defendants' counsel expressly raised the issue as remaining outstanding when first given notice of the intention to apply and when the orders were made. So leave is required. The third party asked for leave if I came to that conclusion.

Should Leave be Given?

[19] There are good reasons why leave should not be granted.

[20] If I acceded to the third party's application then it would have the peculiar result that the very same issues would be litigated in the principal action on pleadings containing no greater particularity than here but these proceedings would be struck out. More likely, if the complaint is about lack of particularity, leave to re-plead would be given, and so consequent delay caused to the principal proceedings where neither of the litigants seek that that occur.

[21] The matter has already dragged on. It was commenced in March 2011. There was a prompt defence filed. The third party notice issued a month later on 24 May 2011. The matter came on to the case flow intervention list in 2012 because of a failure on the plaintiff's part to diligently prosecute the matter.

[22] The third party complains that the defendants have been dilatory in complying with timetables laid down by court order. But that, at best, only goes to the principal action not these third party proceedings. No order was made concerning the third party proceedings through case flow intervention. Just how valid the third party's

complaint is, is difficult to judge. Furthermore the plaintiff significantly changed its case on the loss and damage allegedly suffered by an amended pleading filed 7 November 2013. This followed an already amended pleading (to which the defendant was ordered to respond by 19 April 2103) and orders that the plaintiff deliver an amended statement of claim – presumably because of an indication to the Court that it needed to – made on 26 July 2013 (to be delivered by 9 August) and 24 October 2013 (to be delivered on 1 November). Changes to the plaintiff's case necessarily involve changes to the case against the third party.

[23] The third party brought a strike out application on 23 May 2013 but it was adjourned on 29 May 2013 and has not been proceeded with. The pleadings containing the essential matters complained of have been in place since 13 June 2013 when an Amended Third Party Statement of Claim was filed, apparently in response to the strike out application. An Amended Defence was filed by the third party on 27 June 2013. There was a later amended statement of claim filed 23 May 2014 but that was prompted by changes in the plaintiff's pleading and, even so, no substantive change was made.

[24] There was no reference made by the third party in correspondence of any intention to bring this application. The defendants assert that the first notice they had of the application was on 11 June at the hearing before Boddice J. The application was filed on 4 July 2014.

[25] So the third party has stood by for 12 months and not made this complaint.

[26] The point made in paragraph [5] above is relevant.

[27] These factors all go against the granting of leave. The best that can be said for the third party is that until 2 June she could bring the application as of right albeit her delaying for 12 months would remain an issue. It is startling to say the least that a Statement of Claim could fail to reveal a cause of action, as is now alleged, and yet remain unchallenged until after a request for trial date had been signed.

[28] I observe that the delay since the filing of the request has been modest – indeed obviously flagged by 11 June, nine days later. As well complaint was made of the lack of particularity in the defence to the third party statement of claim. That raises the question of why in these circumstances the request was signed. I received no satisfactory answer to my enquiry on that point. Mr van Eps responded effectively that the court kept putting in place deadlines for the parties to meet, the inference presumably being that in the meeting of the deadlines this point was left for later. But the whole point of case flow intervention is to prompt early applications to define the real issues.

[29] The third party has not advanced any material on the leave issue. She is self represented in the sense that she has not retained solicitors. Normally that might result in some leniency. However she was given fair notice of the point by the defendants both at the hearing before Boddice J and subsequently in correspondence. And her counsel is her husband.[2]

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[2] I did not raise the matter in the course of the hearing but on reading through the material I have serious concerns about Mr van Eps' ethical position in acting for his wife. He acted on a direct brief. Mr van Eps is named in the plaintiff's pleading as a witness to meetings that the plaintiff pleads were material to the issues (see paragraphs 55, 61 and 64 of the Further Amended Statement of Claim). By

[30] The standing by for so long a time, the inconsistent positions taken by the third party and the plaintiff who have effectively the same interest, the lengthy delays that have occurred, the certification that the matter was in all respects ready for trial, the lack of any satisfactory explanation for the delay in bringing the application or for the signing of the request, and the inevitable further delay and costs if the order sought was acceded to, all go strongly against the granting of leave.

[31] All circumstances are relevant of course and that includes the cogency of the complaint. If the third party was to be exposed to a claim that was plainly untenable then that circumstance would overcome these discretionary considerations. It would be unjust to permit the claim to continue and so waste further time and money. Complaints about the adequacy of particulars at so late a stage do not arouse the same sympathy. The third party felt able both to plead to the allegations made and to certify that she had all necessary particulars, that all witnesses were ready, and that the trial would take 12 days on the particulars that she had. As well, as Mr Savage submitted, the failure of the plaintiff to complain raises the question of whether the third party is truly embarrassed.

[32] So, in my view, leave should be declined unless I am persuaded that the statement of claim does not reveal a cause of action. I turn to that question.

The Merits

[33] The plaintiff was the producer of food products which it supplied to retailers. The third party is and was the plaintiff's sole director and shareholder.

[34] The defendant Blu Oak specialises in the development of food products. The second defendant was its sole director.

[35] The plaintiff alleges that it retained the Blu Oak to develop a milk additive product known as "Nutri Boost"; that Blu Oak breached its retainer and the duties owed to the plaintiff at common law and under the *Trade Practices Act* 1974 (Cth); and that as a result the plaintiff suffered losses in the order of $4.5 million. It pleads that four representations were made by the defendants on which the plaintiff relied, that those representations (which went to the date of delivery of the product, compliance with nutritional requirements, cost and the defendants being "happy" with the revised product) were false, misleading and deceptive and caused the plaintiff the loss complained of.

[36] The defendants deny the allegations that it breached any duties owed and assert that the defects in the product were caused by the third party.[3]

[37] More particularly, the defendants allege against the third party that:

(a) She owed a duty of care to the plaintiff by reason of her position as sole director under the *Corporations Act* 2001 (Cth) and at common law and in equity;

(b) as a result the third party is liable to indemnify the plaintiff for any loss that she caused by breach of the duties owed;

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the third party proceedings his wife is potentially exposed to a loss of over $4.5 million. Rules 95(d) and (g) of the Barristers' Conduct Rules 2011 are potentially relevant. I urge him to re-consider his position.

3 I summarise a 57 page statement of claim and a 35 page defence

(c) she did certain acts (which are particularised in the defendants' defence to the plaintiff's statement of claim) which were in breach of duty as no reasonable and prudent director would have so acted;
(d) those acts caused the loss pleaded by the plaintiff in its statement of claim against the defendants;
(e) if the plaintiff proves the facts it alleges against the defendants then the defendants and the third party are joint or several tortfeasors liable in respect of the same damage suffered by the plaintiff within the meaning of s 6(c) of the *Law Reform Act* 1995 (Qld);
(f) if the defendants prove the facts alleged against the third party then the third party's conduct was the sole or primary cause of the plaintiff's damage;
(g) in the premises the defendants are entitled to recover contribution amounting to a full indemnity for the plaintiff's claim and costs pursuant to ss 6(c) and 8 of the *Law Reform Act* 1995 (Qld).

[38] So far as it goes the claim seems entirely unremarkable. The third party has responded denying or putting in issue all relevant matters alleged.

[39] Several specific arguments are advanced as to why the third party proceedings should be struck out.

The Overlap Argument

[40] First, it is alleged that the proceedings constitute an abuse of process or are frivolous or vexatious because the third party statement of claim "repeats and goes no further than the points of law pleaded by the defendants in paragraph 56 of their [defence]".

[41] In paragraph 56 the defendants assert that the third party performed certain acts and thereby caused the plaintiff the loss it complains of and allege that as a consequence the third party is a "concurrent wrongdoer" (with the defendants) within the meaning of s 30 of the *Civil Liability Act* 2003 (Qld) and s 87CB(3) of the *Trade Practices Act* 1974 (Cth) and hence the liability of the defendants "must be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just and equitable…". The plaintiff puts these allegations, both as to fact and law, in issue: see paragraph 52 of the Further Amended Reply filed 29 May 2014. There is no admission that if the basal facts are as the defendants assert then the consequence is as pleaded by the defendants.

[42] This has the result that in the principal proceedings the plaintiff disputes that the third party is a "concurrent wrongdoer", presumably based on the third parties' instructions at least in the sense of what she has said occurred, and in the third party proceedings the third party asks that she should be assumed to be a "concurrent wrongdoer" and the pleading struck out as a result. In my view the defendants are quite entitled to say: if we are wrong in our views on the law – as you contend wearing your corporate hat – then we ask for this relief against you personally. Such proceedings do not constitute an abuse of process nor are they frivolous or vexatious.

[43] Further it is difficult to see how the third party is vexed, in terms of her preparation, by the third party proceedings given that she will be giving and, so far as I can see,

the plaintiff calling, precisely the same evidence whether the proceedings are struck out or not. There was certainly no proof or submission that there would be any alteration to the case presented if the proceedings remained on foot or did not.

[44] It is true that if the defendants make out their claim factually and are correct in their pleading of the legal consequence then there may be no damages against which any indemnity could operate. No authority was cited on the point but I think it highly likely that the principles under which the Court would determine what was "just and equitable" would be the same in the proportionate loss argument under the *Civil Liability Act* and the *Trade Practices Act* as in the contribution argument under the *Law Reform Act*.

[45] That however is not the end of the matter as the defendants' claim against the third party extends beyond any loss suffered by the plaintiff and includes losses suffered by the defendants. Mr Savage submitted: "Apart from anything else the defendant's cost of defending the principal proceedings – [which are] damages claimed in the third party proceedings [-] are plainly not an apportionable loss."[4] Mr van Eps protested that the costs to which the defendants might become entitled would be determined in the principal proceedings and it would be extraordinary to allow third party proceedings merely to recover such costs. The answer to that submission is that the defendants' entitlements against the plaintiff may not be the same as their entitlements against the third party.

[46] Mr Savage made a further submission: "Moreover a concurrent wrongdoer who, as here, is a defendant in a proceeding who settles on (*sic*) apportionable claim before trial (if the defendant makes out that basal allegation) – is not a person against whom a judgment has been given and so in present circumstances absent judgment is a person who can claim contribution until the trial: *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors*."[5]

[47] *Spowers* is authority for the proposition that a defendant who has settled with a plaintiff can pursue third parties for contribution under the Victorian equivalent of the Queensland *Law Reform Act* provisions despite that defendant's pleading that the parties were all "concurrent wrongdoers" in relation to an "apportionable claim".

[48] Ashley JA (Nettle and Neave JJA agreeing) said:

> 98 Related to what I have just said is the fact that Part IVAA[6] is wholly silent about the compromise of claims between plaintiff and defendant. The key to the operation of the Part is the finding of relevant facts and the entry of judgment. The determination that a defendant is a concurrent wrongdoer in an apportionable claim triggers the limitation upon the amount of the judgment which can be entered against that defendant, and in turn protects the defendant against claims for contribution or indemnity by other concurrent wrongdoers.

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4 Paragraph 21 of the defendants' outline

5 (2008) 21 VR 84; [2008] VSCA 208

6 Of the *Wrongs Act* 1958 (Vic) wherein the proportionate liability provisions are found

> 99 Part IV,[7] on the other hand, specifically addresses compromise. A conclusion that Part IV applies to a contribution proceeding which arises out of a compromise between plaintiff and defendant in a case which, if it went to judgment, might turn out to be a claim by the plaintiff falling within Part IVAA, and a claim in respect of which the defendant was a concurrent wrongdoer, is in my opinion consistent with the interaction of ss 24AJ[8] and 24AO[9].[10]

[49] In short the statutory preclusion from pursuing contribution where there is an apportionable claim as defined in the Victorian legislation – which has its equivalent in s 32A of the *Civil Liability Act* 2003 (Qld) ("CLA") – is dependent on there being a judgment on those claims. Assuming *Spowers* was correctly decided then, absent a judgment, there remains a right to pursue contribution in accordance with the rights given, in Queensland, under Part 3 of the *Law Reform Act* 1995 (Qld).

[50] So far as I am aware there is no decision in Queensland on the point. Section 24AO of the Victorian provisions is not identical to s 32H of the CLA and so the interaction between s 32A (the equivalent of s 24AJ) and s 32H may arguably be different. I do not determine the matter here. I observe that the statutory construction point, and so the proper interaction of the two provisions, was not the subject of argument before me, apart from the mention that appears in the defendants' written outline that I have quoted. This is an interlocutory strike out application – it is not the occasion for determination of potentially difficult questions of law that might preclude one parties' rights: *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130 per Barwick CJ.

[51] Suffice to say that the defendants can cite authority on analogous legislation which is not shown to be wrong that supports their right to pursue contribution proceedings against the third party. That circumstance in turn supports their contention that the third party proceedings cannot be described as an abuse of process.

[52] What I have said largely disposes of the further submission "…that, in the circumstances, the proceedings against the third party are predominantly intended to oppress and vex Mrs van Eps by way of unnecessarily adding undue expense and technicality, which is in breach of the defendants' implied undertakings pursuant to r 5 of the UCPR."[11]

[53] In the circumstances it is not shown that the proceedings "unnecessarily" add expense and technicality. The "predominate intention" is not shown to be as argued.

Causation

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7 Again of the *Wrongs Act* wherein the contribution provisions are found

8 The analogue of s 32A of the *Civil Liability Act* 2003 (Qld)

9 Section 32H of the *Civil Liability Act* 2003 (Qld) is the approximate equivalent

10 (2008) 21 VR 84 at pp 102-103

11 Paragraph 69 of the outline of the third party

[54] The second argument advanced relates to the alleged failure by the defendants to plead an essential element – the causal link between the third parties' alleged actions and the loss sustained by the plaintiff. The submission is that the pleading:

(a) fails to plead the responsibilities of the third party within the company and, consequently, how it can be alleged that she breached any duty thereby establishing a causal link between the plaintiff's loss and any alleged breach;

(b) fails to plead any causative link between the conduct of the third party complained of and the existence of the defects in the product, which was the cause or reason for the plaintiff's loss and damage;

(c) fails to plead any causative link between the conduct of the third party complained of and the alleged delay in production of the product, the alleged deletion of the product lines by the retailers or how the product was made unattractive to retailers;

(d) fails to plead any causative link between the conduct of the third party complained of and the alleged 'unmarketability' of the product that led the plaintiff to suffer loss.

[55] The first point is entirely without merit. This was a single shareholder/director company. There is no suggestion in this case that there were any other company officers who had responsibility for any relevant matter. Mrs van Eps does not plead or depose that she is in any way embarrassed by any failure to plead what her responsibilities were. The whole tenor of the plaintiff's pleading is that she was the sole person on the plaintiff's side connected with every material step in the production and marketing of the product the subject of the dispute. Reliance on authorities[12] that assert the need to plead the directors' "position and responsibilities" in cases involving substantial public companies, as was done, is not apposite here.

[56] The defendants argue, in relation to the complaint generally, that if there is any lack of particularity it simply mirrors the plaintiff's pleading.

[57] To understand the point it is necessary to look more closely at the detail of the various pleadings.

[58] By paragraph 5 of the third party statement of claim the defendants assert:

> 5. The third party also did the acts alleged by the defendants in paragraphs 29(a), (b), (d) and (f), 30(h), 30A(d)(ii), 34(b), 35(g)(iii), (vii), (viii), (j) and (k), … 36B, 36C(e), 36C(e)(i) to (ix), 41(i)(i) to (vii), 42(b), 42(b)(i) to (iii), 48(h) and 49(h) of their second further amended defence…."

[59] The conduct referred to in the paragraphs of the defence nominated varies but a reference to paragraph 29 of the defence will illuminate the point for present purposes. There the defendants relevantly assert:

> "29. The defendants state that between 26 February and 5 March 2009:

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12 *Re HIH Insurance; ASIC v Adler* (2002) 41 ACSR 72 at 166-167 per Santow J

> (a) Van Eps independently sourced alternative suppliers and raw materials without the defendants' input in order to further reduce the cost of producing Nutri Boost;
>
> (b) Van Eps sourced fish-based DHA from Nu-Mega Ingredients Pty Ltd, as a cheaper alternative to the algal-based DHA from Martek Biosciences that the defendants had specified in the true initial formulation and the second formulation;
>
> (d) Van Eps indicated that she was relying on advice received from Nu-Mega and instructed the defendants to use the fish-based Nu-Mega DHA instead of the algal-based Martek DHA originally specified by the defendants;
>
> (f) Van Eps sourced maize-based Maltodextrin 17 DE from Penfords, as a cheaper alternative to the tapioca-based Maltodextrin 20 DE from MedChem the defendants had included in the true initial formulation and the second formulation."

[60] By paragraph 9 of the pleading the defendants assert the causal link between the conduct and the loss pleaded by the plaintiff in this way:

> "(e) the third party's conduct was the sole or primary cause of the plaintiff's damage because as appears by the defendants' defence in the paragraph at 5 above:
>
> (i) all formulations of the product produced by the defendants met the third party's instructions and allowed for production of the product of a quality and at a cost which would have allowed the plaintiff the chance to market the product profitably - which the third party caused the plaintiff not to pursue;
>
> (ii) the alleged delay in production of the product and/or consequential deletion of the product line by retailers was caused solely by the conduct of the third party pleaded in paragraphs 29(a), (b), (d) and (f), 30(h), 30A(d)(ii), 34(b), 35(g)(iii), (vii), (viii), (j) and (k), … 36B, 36C(e), 36C(e)(i) to (ix), 41(i)(i) to (vii), 42(b), 42(b)(i) to (iii), 48(h), 49(h) of the second further amended defence which as the third party knew or ought to have known would cause the plaintiff loss - the effect of which was to delay production of the product or to make it unattractive to retailers; and
>
> (iii) any defects in the product were caused solely by the matters pleaded in paragraphs 29(a), (b), (d) and (f), 30(h), 30A(d)(ii), 34(b), 35(g)(iii), (vii), (viii), (j) and (k), … 36B, 36C(e), 36C(e)(i) to (ix), 41(i)(i) to (vii), 42(b), 42(b)(i) to (iii), 48(h), 49(h) of the second further amended defence which the third party knew or ought to have known would cause the plaintiff loss the effect of which was that the product was unmarketable."

[61] It seems to me that the pleading is perfectly explicable. The defendants assert that the plaintiff did not follow its advice, that if it had the plaintiff would have achieved

its aims, that the plaintiff did not follow the defendants' advice because the third party did the things pleaded in the various paragraphs of the defence nominated (for example substituting raw materials not approved by the first defendant), and "the effect of which was to delay production of the product or to make it unattractive to retailers" and "unmarketable" as the plaintiff itself pleads.

[62] Despite the prolixity of the pleadings the dispute is in fact a very narrow one – did the plaintiff follow the advice and recommendations of the first defendant or did the third party intervene, as is alleged against her? For the purposes of the third party proceedings the defendants assume what the plaintiff asserts – that the product eventually produced was "unattractive to retailers", "unmarketable" and delayed. The issue is: who was responsible for the product produced?

[63] Contrary to the argument put there is an express pleading of the necessary causative link between the conduct of the third party complained of and the existence of the defects in the product, the delay in production of the product, the deletion of the product lines by the retailers, how the product was made unattractive to retailers, and the 'unmarketability' of the product (all matters alleged by the plaintiff presumably on the instructions of the third party).

[64] There is no substance in the point.

The Degree of Particularity

[65] There is a further complaint that the defendants refused to give particulars that they should have given. The relevant principle appears in *Dawnlite Pty Ltd v Riverwalk Realty Pty Ltd*[13] where White J (as her Honour then was) said:

> "Rule 157 requires a party to include in a pleading particulars necessary to:
>
> "(a) define the issues for, and prevent surprise at, the trial; and
>
> (b) enable the opposite party to plead; and
>
> (c) support a matter specifically pleaded under rule 150."
>
> The purpose of particulars is to add context and depth to the pleaded material facts and to[14]:
>
> "…fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on guard as to the case he has to meet and to enable him to prepare for trial."

[66] There is some merit in this complaint.

[67] For example at various places the defendants allege a communication being made by the third party. An example is in paragraph 29(d) that I have quoted where the defendants plead that "Van Eps indicated that she was relying on advice received from Nu-Mega and instructed the defendants to use the fish-based Nu-Mega DHA instead of the algal-based Martek DHA originally specified by the defendants." The third party would normally be entitled to know whether the allegation was that she "indicated" or "instructed" orally or in writing and if orally by telephone etc. or if in

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13 [2010] QSC 249 at [44]

14 Citing Lord Justice Scott in *Bruce v Oldhams Press Ltd* [1936] 1 KB 697 at 712-713

writing ask that the document be identified. Those particulars were sought subsequent to the signing of the request for trial date and not given.[15]

[68] In my view there was no good reason to refuse to supply particulars of this type[16] save that the request was made so late and the third party had certified that she had the particulars that she needed.

[69] It is not that the third party is without particulars. Mr Savage submitted that the defendants have in fact given what they say are the best particulars that they can on the crucial issue of what instructions were given by the third party to manufacturers in their response to the request for particulars of their second amended defence, a document served on the third party. An example is at paragraph 15 of the particulars of the second further amended defence.

[70] I do not propose to go through each of the complaints. The adequacy of the particulars given is best known to the parties. The defendants assert, and it was not disputed before me, that the plaintiff is yet to plead or disclose the "actual formulations" of the product that the third party manufacturers were instructed to prepare by the plaintiff. If that is right then the plaintiff, and inferentially the third party, are in no good position to complain. The best indication I have of the adequacy of the particulars given is that the plaintiff does not complain and the third party signed and filed the request for trial date knowing precisely what particulars she had.

[71] These complaints do not go to whether there is a cause of action pleaded. As I have indicated I have little sympathy for such complaints brought so late in the proceedings and after the request for trial date has been signed. Delay in taking a point is always a relevant consideration: see *National Australia Bank Limited v Troiani and Anor*[17] where, in relation to a summary judgment application and the terms of the relevant rule that an application could be brought "at any time", Fryberg J said (McPherson JA and Helman J agreeing):

> "To say that is not to say that delay is irrelevant. It remains an important discretionary consideration, particularly in cases where the application could just as easily have been brought at an earlier date."[18]

[72] Like considerations apply here.

[73] As to the adequacy of the pleading and the role of r 171 UCPR the relevant principles were explained in the authorities cited by Mr van Eps. They include *Robert Bax & Associates v Cavenham Pty Ltd*[19] where White JA said (McMurdo P and Fraser JA agreeing):

> "Rule 171 closely resembles the language of former O 22 r32 *Rules of the Supreme Court* 1991 (Qld) which enabled a judge to strike out or amend any matter in the pleading which tended "to prejudice, embarrass, or delay, the fair trial of the action". The word "embarrass" has not been retained. Nonetheless any pleading which is difficult to follow or objectively

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15 See paragraph 8 of the request to the defendants by the plaintiff and paragraph 2(c) of the request by the third party

16 The defendants' response included an assertion that as the third party denied doing the things that the defendants allege there was no duty to supply particulars. That is not right. While it is improper to seek particulars of something admitted on the pleadings it is perfectly proper to seek particulars of something denied. That enables the party to better prepare on the issues.

17 [2002] QCA 196

18 *Ibid at* [36]

19 [2011] QCA 53 at [16]

> ambiguous or creates difficulty for the opposite party insofar as the pleading contains inconsistencies, is liable to strike out because it can be said to have a tendency to prejudice or delay the fair trial of the proceeding rather than "embarrass" the opposite party."

[74] In my view the pleading complained of is not "difficult to follow or objectively ambiguous or creates [any] difficulty" for the third party. Similarly White J's remarks in *Thiess v FFE Minerals Australia Pty Ltd*[20] which were also cited are not apposite here:

> "a pleading may still be struck out if it is … unintelligible, ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him."

[75] The third party knows well enough what is alleged here.

Conclusion

[76] The third party seeks the exercise of a discretion in her favour. Mr Savage referred me to *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd*,[21] a case involving a strike out application, where Martin CJ said:

> "Before dealing with this specific application, I would observe that both I and the other members of this Court are firmly of the view that interlocutory disputes of this kind must be actively discouraged. In many cases, interlocutory disputes, particularly disputes relating to pleading issues, consume very substantial amounts of time and expense on the part of both the parties and the Court. In many cases, the time and expense involved in the consideration and resolution of the interlocutory dispute is entirely disproportionate to its significance to the just and effective resolution of the case as a whole by mediation or trial."[22]

[77] I suspect that his Honour's remarks reflect the common experience of the Courts - it is certainly mine. As Martin CJ went on to remark and adapting his Honour's remarks to render them apposite here: What the third party needs to show, is that "the interests of justice [require that the order she seeks be made] because of, for example, irreparable prejudice to [her] or prejudice to the trial process or the efficient utilisation of the resources of the parties and of the Court".[23]

[78] Far from being so persuaded I suspect that if I acceded to the orders sought I would be interfering with the just disposition of the case. I understand that Boddice J who is supervising the case is already seeking to set the matter down if time can be found. It may be that time cannot be found until next year but if some time becomes available then the parties should have their trial.

[79] Leave to bring the application is refused.

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20 [2007] QSC 209 at [37]
21 (2006) 33 WAR 1; [2006] WASC 161
22 *Ibid* at [2]
23 *Ibid* at [19]