SUPREME COURT OF QUEENSLAND

CITATION:	*Texas-Australia Power Inc v Clements & Ors* [2006] QSC 082
PARTIES:	~~**AUSTRALIAN ENERGY & ELECTRICAL HOLDINGS PTY LTD (ACN 094 046 090)**~~ ~~(first plaintiff)~~ **TEXAS-AUSTRALIA POWER INC** (~~second~~ plaintiff) v **STEVEN ALEXANDER CLEMENTS** (first defendant) **ROSEWOOD FARMS & MANAGEMENT PTY LTD (ACN 088 201 665)** (second defendant) ~~**YELLOWBARK PTY LTD (ACN 010 833 851)**~~ ~~(third defendant)~~ ~~**RAINBOW QUEENSLAND PTY LTD (ACN 088 235 164)**~~ ~~(fourth defendant)~~ ~~**MACAILER INVESTMENTS PTY LTD (ACN 088 235 125)**~~ ~~(fifth defendant)~~ **TAWNEY INTERNATIONAL PTY LTD (ACN 088 235 152)** (sixth defendant) ~~**OCTOBER ENTERPRISES PTY LTD (ACN 088 235 164)**~~ ~~(seventh defendant)~~ **ANGEL HEIGHTS PTY LTD (ACN 088 235 134))** (eighth defendant)
FILE NO/S:	1606 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 April 2006
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2006
JUDGE:	McMurdo J
ORDERS:	**1. Paragraphs 14, 16 through 21, 24, 31(e) through 31(i)**

and paragraphs 46 through 50 of the defence and counter-claim filed on 7 December 2005 will be struck out.

2. The plaintiff file and serve an amended statement of claim within twenty-eight days.

3. The defendants file and serve an amended defence and counter-claim (if any) within twenty-one days of the service of an amended statement of claim.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – GENERALLY – where the plaintiff alleges that it was induced by misrepresentations made by or on behalf of the defendants to lend money to a company which had no means of repaying it – where the plaintiff alleges that it has lost the money it lent and any income that would have been made from that money – where the plaintiff applies to strike out the first, second, sixth and eight defendants' defence and counter-claim which was filed on 7 December 2005 and for a judgment for damages to be assessed – whether the first, second, sixth and eight defendants' defence and counter-claim should be struck out under r 171 UCPR – whether the pleading discloses no reasonable cause of action or would prejudice a fair trial

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – GENERALLY – where alternatively the plaintiff applies to strike out certain paragraphs of the first, second, sixth and eight defendants' defence and counter-claim – whether certain paragraphs of the first, second, sixth and eight defendants' defence and counter-claim should be struck out under r 171 UCPR – whether specified parts of the pleading disclose no reasonable cause of action or would prejudice a fair trial

Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 166(4), r 292, r 444

Australian Energy & Electrical Holdings Pty Ltd & Anor v Clements & Ors (2003) QSC 048, cited
Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79, cited
O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359, cited

COUNSEL: D A Savage SC, with N Andreatidis, for the plaintiff
S Russell (solicitor) for the first, second, sixth and eighth defendants

SOLICITORS: Boulton Cleary & Kern for the plaintiff
Russell and Company for the first, second, sixth and eighth defendants

Background

[1] **McMURDO J:** The plaintiff, which is Texas-Australia Power Inc, is now suing four defendants. Originally they were the first, second, sixth and eighth defendants. The plaintiff applies to strike out their most recent defence and counter-claim, which was filed on 7 December 2005, and for a judgment for damages to be assessed. Alternatively the plaintiff applies to strike out certain parts of the pleading.

[2] The plaintiff's pleaded case is relatively simple, although, as I will discuss, it is complicated by the pleading of matters which may have been relevant when first pleaded but are no longer so. The plaintiff says that it was induced by misrepresentations by or on behalf of the defendants to lend money to a company which had no means of repaying it, and it has lost what it lent and the income it would otherwise have made from that money. The borrower was the company which, until recently, was the first plaintiff in these proceedings and which I will call "AEEH". The defendants are alleged to have misrepresented that AEEH was or was about to become the holding company of a group of companies called the GSS Group. The plaintiff says that the first defendant, Mr Clements, used the money lent by the plaintiff to acquire the GSS Group, but not for AEEH but instead for his own company, the second defendant, which I will call "Rosewood".

[3] The loan by the plaintiff and the conduct of which it complains occurred in August 2000. The background to those matters seems to involve no substantial controversy. The GSS Group was involved in the manufacture and supply of electrical power generation equipment. As the plaintiff pleads and the defendants admit, the GSS Group was directed by Mr Clements until about June 1999, when all of the shares in the Group companies were sold to an entity called Growthpac Pty Ltd. In April 2000, Growthpac was placed under administration and the administrators looked to sell the GSS Group. In that context there were dealings between Mr Clements and the plaintiff's representative, Mr Isbell. That resulted in the loan by the plaintiff to AEEH which the defendants admit was made on or about 18 August 2000.

The defence

[4] According to what agreement or understanding was that loan made? The plaintiff's case, as pleaded in paragraphs 8 through 11 of its statement of claim, was that it was an agreement between the plaintiff and Rosewood, made in writing on 17 August 2000 and varied on the following day, when the loan was then made. There is a one page document headed "Purchase Agreement" which begins with the statement that "the parties to this agreement are (the plaintiff) and (Rosewood)" and which the defendants admit was signed by Mr Clements. By this document it was apparently agreed that Rosewood would sell to the plaintiff fifty per cent of the shares in AEEH, which was expressed to be the holding company owning various other companies which seem to be those within the GSS Group. A further term was that in consideration for that fifty per cent interest, the plaintiff was to guarantee a loan

of $2.7 million to AEEH by the Commonwealth Bank. The plaintiff then pleads that this agreement was varied on the following day, 18 August 2000, in this respect: that instead of the plaintiff guaranteeing a loan from the Commonwealth Bank, the plaintiff would lend to AEEH the sum of US$1,604,610 on the terms of a promissory note which was then signed by Mr Clements as the then sole director of AEEH.

[5] The defendants admit that he signed the note and in that capacity, and that it evidences the loan which was made on that day. But they deny that the so called "Purchase Agreement" had any contractual or other effect. The critical effect, according to the plaintiff, is that it contained the representations upon which the plaintiff says it relied to its ultimate loss. The statement of claim contains an alternative claim for damages for breach of contract and there is a plea that the Purchase Agreement was a contract which was breached by Rosewood. But ultimately damages are not claimed upon a contractual basis and the plaintiff's claim is for damages for misrepresentation, either at common law or under s 52 of the *Trade Practices Act* 1974 (Cth).

[6] The first significant difficulty with the defendants' pleading is in its response to the allegation that Mr Clements and Rosewood made certain representations within the Purchase Agreement, to the effect that AEEH was or had the right to become the holding company of the GSS Group. That response is in paragraph 14 of the defence, which begins with a denial of that allegation of representations within the Purchase Agreement, but which then purports to explain that denial by reference to a number of allegations which provide no such explanation. It is unnecessary to set out what is there pleaded in paragraph 14. It is sufficient to say that its effect is that the representations, if made, could not have been true. It is no answer to an allegation that a representation was made in a document to say that the document should not have been so understood because such a representation would have been untrue. If, for example, the defendants are meaning to say that there was no such alleged representation by the Purchase Agreement, because the document has to be read in the context of something else, by which the plaintiff knew or should have known that what was said in the document was not in all respects true, then that is not a case which is presently pleaded.

[7] In my view the terms of paragraph 14 tend to prejudice or delay the fair trial of this proceeding because they do not state the defendants' case, if any, in answer to what appears from the Purchase Agreement, which is that it does contain a representation that AEEH was the ultimate holding company of what, broadly speaking, had been the GSS Group.

[8] The next problem concerns the response to the allegation that the representations about AEEH being the holding company were false. From what is pleaded in paragraph 14, it might be thought that the defendants would agree that if the representations were made, then they were false. But falsity is denied in paragraph 16 of the defence. The denial of the falsity of the representation would seem to indicate a case that the representation, if made, was true. Yet that is not pleaded. At the hearing of this application, I asked the solicitor appearing for the defendants, Mr Russell, to outline his clients' case to be advanced at a trial of this proceeding. He succinctly described the defence as being that the representations were not made, the loss complained of did not result from the representations if they were made, and that by supervening events, any loss which had been suffered has now been

"remedied". That summary of the issues does not include any issue of whether the representations, if made, were false. So the basis for the denial of the allegation of falsity is not explained. The terms of paragraph 16 tend further to prejudice or delay a trial of this case.

[9] The same goes for paragraph 17 of the defence, which is a purported response to the allegation[1] that insofar as the representations as to the future conduct of AEEH, each was made without a reasonable basis". Paragraph 17 of the defence denies that, but "because the representations were not made, and for the reasons pleaded in paragraphs 14 and 15 herein". This is no explanation for the denial. In particular there is no plea of any reasonable basis for the representation, if it was made. Assuming that the pleader is able to deny the allegation that the representations were made, that does not provide an excuse for not pleading according to the rules to the allegation that the representations, if made, were false or otherwise misleading or deceptive.

[10] Paragraph 18 of the statement of claim alleges that Mr Clements and Rosewood made the representations fraudulently. Paragraph 18 of the defence denies this allegation, and gives an explanation which begins with the statement "the allegation (of fraud) is embarrassing". Just why that is so (in the pleading sense) does not appear. The denial is further explained by reference to other paragraphs of the defence which I have discussed already, which is a further problem with this paragraph 18. Paragraph 18 also asserts that Mr Clements and Rosewood did not know of the untruth of the representations, so in that way, it does properly respond to the statement of claim. Still, because of its reference to and reliance upon other paragraphs of the defence which are objectionable, it too is objectionable.

[11] Paragraph 19 of the statement of claim relevantly alleges that the plaintiff made the advance to AEEH in reliance on the representations and paragraph 20 pleads that but for them it would not have done so. This allegation is also denied. But within the relevant paragraphs of the defence, which are 19 and 20, that denial is not explained, as required by r 166(4) of the UCPR.

[12] Then comes the allegation in paragraph 21 of the statement of claim which is that:

> "In breach of the Purchase Agreement and contrary to the representations, Clements and Rosewood used the advance to purchase for Rosewood the shares in the GSS group companies and did not disclose that fact to (the plaintiff)".

Paragraph 21 of the defence pleads in response:

> "The defendants deny the allegations in paragraph 21 of the second amended statement of claim because:
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> (a) for the reasons pleaded in paragraphs 8, 10 and 11 herein no Purchase Agreement was entered into;
> (b) for the reasons pleaded in paragraphs 14 and 15 herein, no representations were made;

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[1] Paragraph 17 of the statement of claim

(c) the allegation that Clements 'used' the Advance is irrelevant and embarrassing;
(d) Clements did not 'use' the Advance;
(e) otherwise, despite request the second plaintiff has refused to provide particulars of the allegation that Clements and Rosewood 'hid' the alleged use of the Advance."

[13] The reference to their having "hid" that use of the money was to a previous version of the statement of claim. The defendants now must be taken to be denying the allegation of non-disclosure, a denial which suggests that there was disclosure. Yet no such disclosure is pleaded. There is also the matter of their denial of the allegation in paragraph 21 that the advance was used to purchase the GSS Group not for AEEH but for Rosewood. What the defence case is which underlies that denial is not revealed. Is it that the group *was* purchased for AEEH? Or do the defendants concede that Rosewood purchased the GSS Group but contest that the price was paid by the plaintiff's loan? Or is the real issue as to paragraph 21, if there be any, that Mr Clements was not involved? The defendants' assertion that the allegation that Mr Clements "used" the advance is irrelevant and embarrassing, is itself irregular. The plaintiff's allegation is plainly relevant to a case that on the day in question, Mr Clements and Rosewood engaged in misleading or deceptive conduct, and in fraud, and there is nothing embarrassing in the pleading sense in that allegation. For many reasons then paragraph 21 of the defence is improperly pleaded.

[14] Paragraphs 22 and 23 of the statement of claim and the response in paragraphs 22 and 23 of the defence are inconsequential and need not be discussed here. But then comes the important allegation in paragraph 24 of the plaintiff's pleading which is:

> "AEEH did not pay the sums due and owing for interest under the (promissory) Note given in respect of the Advance in November 2000 and thus was in default under that Note. It has subsequently not repaid the advance or any interest due under the Note and has no capacity to do so."

The response, in paragraph 24 of the Defence is this:

> "The defendants deny the allegation in paragraph 24 of the second amended statement of claim because:
>
> (a) despite making enquiries, they have been unable to establish the truth of the allegation ((the plaintiff) being in possession of all of AEEH's documents);
> (b) they believe the allegation to be untrue."

The defendants then say they believe the "allegation" to be untrue, although sub-paragraph (a) suggests that the defendants have been unable to determine whether the "allegation" is true. There are indeed several allegations within paragraph 24 of the statement of claim. The first is a default by AEEH in November 2000. Given Mr Clements' association with AEEH, which appears from the evidence and other parts of the pleadings, it is difficult to see why that allegation would be put in issue. Then there is the more general allegation that AEEH has never paid anything back to the plaintiff, about which the same comment can be made. There is also the

important allegation that AEEH has no capacity to repay, to which the defendants have not pleaded. However paragraphs 40 and 41 of the respective pleadings are also relevant to that question. Those paragraphs of the statement of claim allege that AEEH has not repaid the plaintiff and that AEEH is now in liquidation, is insolvent and has no capacity to repay, and those paragraphs are admitted in the defence. The result is that for several reasons, paragraph 24 is irregular.

[15] Paragraph 25 of the respective pleadings need not be discussed at this point. From paragraph 26 through paragraph 38, the plaintiff then pleads a number of matters under the heading "Mitigation of Loss". Just why these matters were pleaded, or at least still appear in the statement of claim, is not entirely clear. The plaintiff's case is pleaded sufficiently in the paragraphs already discussed.

[16] Paragraphs 26 through 30 of the statement of claim refer to some alleged events of January 2001. The plaintiff pleads that it then discovered that AEEH did not own and had no right to any of the "assets of the GSS Group of companies" and that in order to mitigate its loss (from making the loan) it made an agreement with AEEH and Rosewood under which Rosewood would transfer its ownership of the GSS Group to AEEH and certain assets of the companies within that group would also be transferred to AEEH. Paragraph 30 then pleads that this agreement has not been performed. There seems to be no claim for damages for that breach. The relevance of this part of the statement of claim is therefore not apparent. The defendants' response is to deny that any agreement was concluded and to admit that none of the assets or shares were transferred to AEEH. Significantly, there is no pleading that AEEH already owned the shares or the assets or that Rosewood did not own the shares in those companies in the GSS Group.

[17] The second part of this "mitigation" case is in paragraphs 31 through 33 of the statement of claim. Paragraph 31 alleges that in December 2002, the plaintiff made an agreement with Mr Clements and Rosewood under which they were given an opportunity to seek refinance in order to have the plaintiffs' loan repaid. Paragraph 32 pleads that on or about 13 February 2003, in consequence of a default under that December 2002 agreement, the plaintiff as the appointed attorney of Rosewood transferred to the plaintiff all of Rosewood's shares in AEEH and thereby became the sole shareholder. Paragraph 33 pleads that Mr Clements and Rosewood "now contend that the said transfer was unauthorised and constituted a forfeiture of Rosewood's interest in AEEH".

[18] The defendants' pleading in response to those paragraphs is extensive. They plead that there was a purported transfer to the plaintiff of Rosewood's shareholding in AEEH. The defendants go on to plead, in paragraph 31(h), that the plaintiff, through its solicitors, wrote to the solicitors for Mr Clements and Rosewood in April 2003 to the effect that certain conditions precedent to the plaintiffs' entitlement to a transfer of Rosewood's shares had not been fulfilled, so that as at April 2003, the plaintiff was not the sole shareholder of AEEH.

[19] Within paragraph 31 the defendants then plead a further matter on which they base part of the counter-claim. They complain that the plaintiff obtained an interlocutory injunction within these proceedings, which I granted in March 2003, by misrepresenting to the court that AEEH was wholly owned by the plaintiff. The interlocutory injunction was sought in these circumstances. The present proceedings were originally commenced by an originating application in which the

first applicant was AEEH and the second applicant was the present plaintiff. They complained that the present defendants, together with some four other companies said to have been under Mr Clements' control, were engaging in misleading and deceptive conduct by falsely representing that AEEH was not the entity which was providing electrical power to a mining company at a certain mine site called the Eloise mine, but that instead it was being provided by some company under Mr Clements' control. The applicants' case was that this was interfering with a valuable contract or arrangement which AEEH had at the Eloise mine and it was likely to cause it loss. On 13 March 2003 I made orders until trial or further order that the respondents, who are now the defendants, be restrained from representing in the respects of which the plaintiffs had complained. I noted[2] that AEEH was then a subsidiary of what is now the sole plaintiff, and that the applicants' case that the present plaintiff had become entitled to acquire Rosewoods' shareholding on or about 13 February 2003 and had then done so.

[20] The defendants plead that the applicants misrepresented the position, and that there is an entitlement to damages under the usual undertaking as to damages. In essence, the defendants' case is that whether or not there were causes of action upon which the application for interlocutory relief was brought, and whether or not the applicants then had an entitlement to final injunctions corresponding with the interlocutory injunctions which were granted, the suggested misconduct of the plaintiff in misrepresenting to the court AEEH was wholly owned by it, warrants an award of damages pursuant to the undertaking to damages. Before discussing further that counter-claim I will discuss the balance of the defence.

[21] In paragraphs 34 through 38 (and perhaps 39) of the statement of claim there is pleaded the distinct misrepresentation case upon which that application for an interlocutory injunction was brought. Paragraph 39 pleads that the plaintiff has by misleading or deceptive conduct of the defendants, by reason "injurious falsehoods above pleaded" and by reason of Rosewood's breach of the Purchase Agreement suffered loss and damage. Some particulars are then given, one of which is that in consequence of those matters AEEH became insolvent, its business is worthless and the plaintiff's share in AEEH is of no value. It is not entirely clear whether paragraph 39 is referring to all of the matters complained of in the statement of claim or only some of them, such as the distinct case about the Eloise mine.

[22] Then follow paragraphs 40 and 41 which, as I have mentioned, plead that AEEH cannot repay the advance. Paragraph 43 pleads that Mr Clements was a party to contraventions of s 52 by Rosewood although it does not plead the facts from which is made the allegation that he was knowingly concerned in those contraventions. Then in paragraph 44, it is pleaded that the plaintiff

> "quantifies the loss and damage suffered by reason of Clements and Rosewood's deceit and contravention of s 52 ... and for Rosewood's breach of the Purchase Agreement as follows:
>
> Particulars
>
> (a) It has lost the sum of the Advance which has not been repaid. AEEH is insolvent and the funds advanced will not be recovered.

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2 (2003) QSC 048 at [3], [7]

(b) It has lost the use of the Advance which it would otherwise have used for profit and upon which it would have accrued no less than 9% per annum;
(c) It has incurred legal costs in attempting to obtain for AEEH assets of the GSS Group companies by the steps in mitigation pleaded above."

[23] So in paragraph 44 the plaintiff ultimately makes a claim which is quantified by adding the amount of its unpaid loan, the loss of use of that money and its legal costs. Although that is said to be a claim for, amongst other things, a breach of the purchase agreement, it is not a claim made upon a contractual basis. If it were a claim for breach of a warranty that AEEH was entitled to the GSS Group, the claim would be quantified by reference to the value of the GSS Group and hence the benefit to the plaintiff as a lender to AEEH of that warranty being true. Instead it claims upon the basis that it should be put into a position it would enjoy had the alleged misrepresentations not been made, which is that it would not have lent this money or incurred those legal fees. This indicates, as the plaintiff's outline of argument confirmed, that the plaintiff's case is simply that it lent money, induced by a misrepresentation, which will not be repaid and which has thereby caused a loss.

[24] It is no longer part of the plaintiff's case that it should be given final relief by way of injunctions or damages, for the distinct case about the Eloise mine. The apparent explanation for the abandonment of that distinct case is that, only two months after the interlocutory injunctions were granted (in May 2003), the assets of AEEH were transferred to a company related to the plaintiff and called Australian Texas Energy Pty Ltd ("ATE"), and that the contract for the Eloise mine was taken up by the plaintiff. That transfer is pleaded by the defendants in this defence, and rightly so, at least because of its relevance to the distinct case about the mine. After pleading extensively to the allegations in paragraphs 34 through 44 of the statement of claim, the defendants plead paragraph 45 as follows:

"45. Further, Texas has suffered no loss of the kind alleged, or at all, since:-
(a) It has succeeded to the contract for the supply of power to the Eloise Mine for no consideration; and
(b) A related company, ATE, has, with the acquiescence and assent of Texas (by their common director, Isbell) succeeded to the whole of the business of AEEH for no consideration –
in each case, in the circumstances now pleaded by AEEH in its proceedings against Texas, Isbell and others (BS9980 of 2005)."

The counter-claim

[25] Then follows the counter-claim, for which the defendants repeat each and every paragraph of their Defence before pleading these matters:

"47. In the premises, Texas acted for each of [*sic*] its fiduciary duties and/or was not entitled to act as it did:-

(a) in executing a transfer of the Second Defendant's shares in AEEH;

(b) in securing registration of such transfer in the Register of Members of AEEH; and

(c) in thereby becoming the registered owner with 98% of the shares in AEEH.

48. Texas contends that it is the lawful owner of 98% of the shares in AEEH, having acquired one half of those shares from the Second Defendant.

50. The defendants claim the following relief:-

(a) relief against forfeiture of the second defendant's shares in AEEH;

(b) further, or alternatively, a declaration that the Second Plaintiff was not entitled to acquire the Second Defendant's shares in AEEH;

(c) if necessary, an order for rectification of the Register of Members of AEEH;

(d) an enquiry or an order for the assessment of damages pursuant to the said undertaking as to damages; and

(f) interest on damages and other moneys payable;

(g) further or other relief;

(h) costs."

[26] As to paragraph 47 of that counter-claim, the "fiduciary duties" are not identified. Nor do the defendants plead facts from which it might be concluded that the plaintiff was not entitled to cause Rosewood's shares in AEEH to be transferred to it, except in one respect, which is, as the defendants plead in paragraph 31, that the provision for the transfer of Rosewood's shares to the plaintiff (in the event of a failure by AEEH to repay a $1,000,000 instalment on the plaintiff's loan) was a penalty and unenforceable. The defendants plead (in paragraph 31(k)) that the right to this transfer of shares "was not a genuine pre-estimate of any loss and damage suffered by (the plaintiff) in the event of a failure by AEEH to pay the money" so that it was penal in effect and unenforceable. Relevant to that plea is whether what the plaintiff was to receive, which was Rosewood's shares in AEEH, was "out of all proportion, or extravagant, exorbitant or unconscionable in comparison with the greatest loss that could be proved to flow from the breach": *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*[3]; *O'Dea v Allstates Leasing System (WA) Pty Ltd*[4]. But the defendants do not plead what was the value of the shares in AEEH in December 2002. At least for this reason the pleading of this part of the counter-claim is defective.

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3 [1915] AC 79

4 (1983) 152 CLR 359

[27] As already mentioned, the defence pleads that at one point, which was April 2003, the plaintiff claimed that the shares had not passed to it, because certain conditions precedent to the plaintiff's right to a transfer had not been fulfilled. But it is not clear from the defendants' pleading whether it is their case that there were such unfulfilled conditions, and that this is a further reason why they should have the relief sought in respect of the shares.

[28] Apart from the claim for the shares, the remainder of the counter-claim is for "an enquiry or an order for the assessment of damages pursuant to the said undertaking as to damages". I have mentioned already the pleaded case in that respect. I accept that the court has power to award damages, pursuant to the usual undertaking as to damages, even where the plaintiff had been entitled to a final injunction. In Spry's *The Principles of Equitable Remedies* (6th edition) at p 656, it is said that even where a final injunction is granted, a court might in a special case, such as where the interlocutory injunction was obtained through the non-disclosure of a material fact, award damages as long as it is just that the defendant be compensated. It is claimed that the injunction was wrongly sought because in seeking it, the plaintiff misled the court by stating that the plaintiff then wholly owned AEEH. But the problem with this counter-claim upon the undertaking as to damages is that none of the defendants claims to have suffered any loss from the granting of the interlocutory injunctions. There needs to be a pleaded case of some compensable loss caused by the defendants being restrained by those orders.

[29] For these reasons, the counter-claim is defectively pleaded and ought to be struck out.

The other proceedings

[30] Effectively the same interests are involved in other proceedings in this court which were commenced late last year. Rosewood obtained leave on 2 November 2005 to bring proceedings in the name of AEEH against Mr Isbell, ATE, the present plaintiff (Texas-Australia Power Inc) and Christine Gilbert. AEEH is now in liquidation. Part of the claim concerns the contract for the supply of power to the Eloise mine site. As already discussed, the interlocutory injunction was sought upon a case that the Clements' side of the argument had falsely represented that AEEH was not entitled to that contract (or to the equipment used for that purpose). In these recent proceedings, the Clements side, through a derivative action brought by Rosewood as a former shareholder of AEEH, is now claiming that AEEH was indeed entitled to the contract and that the Isbell side wrongly deprived AEEH of it. The claim on behalf of AEEH is that Mr Isbell and his other co-director of AEEH, Ms Gilbert, wrongfully caused the company to be replaced by the plaintiff in the present proceedings, Texas-Australia Power Inc, as the supplier to the mine. It is also alleged that the directors breached their duties by causing the assets of AEEH to be sold to ATE, a company associated with Mr Isbell, at an undervalue.

[31] On 13 February last, Philippides J heard an application for security of costs in those proceedings, and on 3 March, her Honour ordered that AEEH give security in the sum of $80,000 failing which the proceedings would be stayed.

[32] There is no application before me in relation to these other proceedings, but they have an impact upon the present applications as I will explain.

The plaintiff seeks judgment

[33] The plaintiff argues that the defendants have been guilty of continuous and contumelious disregard of the rules in the conduct of the present proceedings and that their conduct is so serious that it is appropriate that it be visited with the consequences of a judgment for the plaintiff with damages to be assessed. Part of that submission is that "[e]ven casual attention to the defence pleaded demonstrates an absence of significant prospects of success on the question of liability".

[34] The complaints as to the defendants' conduct have considerable force. In December 2004 the defendants delivered a very lengthy request for particulars before abandoning most of this request after criticism of it by Holmes J in the course of a hearing on 15 February 2005. The matter of particulars had been put forward as an explanation for the defendants' failure to plead to the amended statement of claim filed and served in November 2004. Eventually, on 29 April 2005, a defence to that pleading was filed. Indeed on that day two amended defences and counter-claims, in succession, were filed and served. The plaintiff forwarded a rule 444 letter dated 31 May 2005 setting out why much of the second of those pleadings should be struck out. On 8 June 2005 the defendants conceded that this third pleading was defective and I ordered them to file and serve a (fourth) amended defence and counter-claim within twenty-one days. That time was subsequently extended to 20 July 2005. No pleading was filed by then.

[35] At a review of these proceedings in the supervised case list on 22 July 2005, when the prospect of the derivative proceedings was mentioned, I ordered the defendants to file and serve any application for an order to bring those proceedings by 2 September 2005. As already mentioned that application was not brought until November. The defendants also defaulted in other respects in complying with orders I made on 22 July.

[36] Because the defendants further delayed in filing an amended defence and counter-claim in lieu of their pleading of 29 April 2005, the plaintiff had to apply to strike out that pleading, which it did by an application returnable on 23 August 2005. The hearing of that was adjourned to 2 September 2005 at the defendants' request, with an order that they pay the costs. It was again adjourned to 19 September 2005. By that stage the defendants had still not filed an amended defence and counter-claim as I had ordered on 8 June 2005. On that date, 19 September, there was no argument that the then present pleading could not stand. The defendants consented to orders striking out all of the impugned paragraphs of the defence and counter-claim (of 29 April 2005) and for costs. That occurred only after an unsuccessful application by the defendants for a further adjournment. By consent they were also ordered to file and serve an amended defence and counter-claim by 31 October. They failed to do so. At a review of these proceedings on 24 November 2005 I ordered that the defendants file and serve this pleading by 5 December 2005. Eventually, on 12 December, the pleading the subject of the present application was filed. Some of the paragraphs which had been struck out (by consent) from the previous pleading have been repleaded in the present defence: paragraphs 6(a), 8(a), 13(a), 18(a), 24, 25, 31(e), 31(g), 31(h), 31(i), 31(j), 35(f)(i), 35(f)(ii), 35(f)(iii), 35(f)(iv) and 50.

[37] There is no application for summary judgment pursuant to r 292. Yet the plaintiff argues that the defendants' case is demonstrably without merit: that they have no

answer to the plaintiff's claim, which is said to be the real explanation for their failure to deliver a proper pleading. That could be the explanation but there could be others. Notably neither the pleading presently under attack nor its predecessor (the second of those filed on 29 April 2005) was settled by counsel. And much of the delay to this point has been due to the attempts by the Clements' side to raise matters in these proceedings which are now the subject of those other proceedings, commenced in the name of AEEH.

[38] Those proceedings, and the merit or otherwise of the claims within them, have potential relevance for the present proceedings. The claim in those proceedings is that AEEH had assets to the value of $7,000,000 to $8,000,000 when its entire undertaking was transferred to ATE in May 2003. When considering the application for security for costs, Philippides J was not persuaded that the case had no prospects. The case is supported by a valuation which was used to persuade Wilson J to give leave to bring the claim. As to that, the present plaintiff points to Mr Clements' testimony in March 2003, at the hearing of the application for interlocutory injunctions, in which he appeared to give evidence which would make that valuation unreliable. It also seems to have been the stated position of his side at that hearing that AEEH was then insolvent. These matters do not appear to have been disclosed to Wilson J. Still a judge has been persuaded to give leave to bring this derivative claim and another judge was at least unpersuaded that it has no prospects. If the merits of the derivative proceedings are with the Clements side, then at one stage AEEH did have substantial assets, sufficient to repay the present plaintiff, and it was only through conduct attributable to the present plaintiff that AEEH received for its assets approximately $770,000, and not at least $7,000,000. If so, there is at least the prospect of a defence being made out in the present case, to the effect that the plaintiff's loss from making a loan which now cannot be repaid, has not been caused, in the relevant sense, by the defendants' conduct.

[39] In these circumstances I am not prepared to conclude at present that there is no merit in the defendants' case. Notably, despite the argument that the merits are so obviously in the plaintiff's favour, the plaintiff has chosen not to make a summary judgment application over the years since it commenced these proceedings.

[40] Undoubtedly the conduct of this litigation on the defendants' side falls seriously short of what is required of any litigant. The faults are many but a particularly serious one, in my view, is the defendants' attempt to re-plead within the amended defence and counter-claim presently under review those matters which, by consent, were struck out of the previous pleading. Yet overall, I am unpersuaded that the interests of justice require the outcome for which the plaintiff argues. The defendants' conduct has been continuously and seriously non-compliant, but it is another thing to shut the defendants out of a possible defence, particularly where a judge has recently been persuaded to permit them to bring the derivative proceeding which, if it has merit, is likely to provide an answer to the present claim. It is said that Wilson J was misled, because although her Honour had evidence of the valuation of AEEH's assets and undertaking at $7,000,000 to $8,000,000, her Honour was not informed of what Mr Clements had said about it in his evidence before me in March 2003. But the defendants in those other proceedings have not moved to strike them out on that basis or otherwise.

The plaintiff's alternative application

[41] In the alternative the plaintiff applies to strike out the paragraphs which on 19 September were ordered by consent to be struck out of the previous pleading. For the most part, they are paragraphs which I have held within this judgment to be irregular. For the reasons I have given, paragraphs 14, 16 through 21, 24, 31(e) through 31(i) (which plead the undertaking as to damages point), and paragraphs 46 through 50 will be struck out.

[42] The plaintiff also applies to strike out paragraphs 6(a), 8(a) and 13(a) upon the argument that the defendants have irregularly pleaded in each case that the relevant allegation in the statement of claim is "irrelevant and embarrassing". In each case the relevant allegation in the statement of claim is relevant and is not embarrassing. In particular paragraph 8 of the statement of claim is relevant to the plaintiff's case for damages for misrepresentations within the purchase agreement. Although the plaintiff's claim is not, upon analysis, a claim for breach of that contract, the representations relied upon are said to be within the terms of that contract and the plaintiff says that the representations were made by Rosewood by its signing the contract.

[43] The plaintiff also applies to strike out paragraph 25 and certain parts of paragraph 35 of the defence, they having been struck out of the earlier pleading. Paragraph 25 is a response to the allegation in paragraph 25 of the statement of claim that Rosewood sold for its profit and that of Mr Clements the business of a certain company within the GSS group and its subsidiaries without accounting to the plaintiff. That paragraph in the statement of claim seems to be unnecessary in the pleading of the plaintiff's claim. Similarly paragraph 35 of the defence responds to what is now an irrelevant paragraph in the statement of claim, (paragraph 35) which pleads the distinct case about the Eloise mine. And as I have discussed earlier, there are other parts of the statement of claim which should now be deleted, especially because AEEH is no longer a party to these proceedings. In several respects then, the plaintiff should amend the statement of claim. On the expectation that the plaintiff will amend by at least deleting paragraphs 25 and 35, I will make no order in relation to the corresponding paragraphs of the defence. In addition to orders striking out those paragraphs of the defence and counter-claim already mentioned, I will order that the defendants file and serve an amended defence and counter-claim (if any) in accordance with these reasons for judgment, within twenty-one days of the service of an amended statement of claim. The plaintiff will be ordered to file and serve an amended statement of claim within twenty-eight days of this judgment.

[44] I will hear the parties as to costs.