

SUPREME COURT OF QUEENSLAND

CITATION: *Lenard's Pty Ltd v Gow Pty Ltd and Ors* [2007] QSC 377

PARTIES: **LENARD'S PTY LTD**
ACN 010 711 145
(First plaintiff)
THE POULTRY SHOP LEASING (NSW) PTY LTD
ACN 060 545 440
(Second plaintiff)
v
SAM GOW PTY LTD
ACN 105 809 825
(First defendant)
SAMANTHA CATHERINE GOW
(Second defendant)
LINDA JANE GOW
(Third defendant)
GREG SALMON
(Fourth defendant)
MARKETING MASTERS (QLD) PTY LTD
ACN 092 109 389
(Fifth defendant)

FILE NO: SC No 11002 of 2004

DIVISION: Trial

PROCEEDING: Application

COURT: Supreme Court

DELIVERED ON: 20 November 2007

DELIVERED AT: Brisbane

HEARING DATE: 20 November 2007

JUDGE: Fryberg J

ORDER: **1. Paragraph 10 of the further and better particulars filed 17 September 2007, including all sub-paragraphs thereof, be struck out;**

2. The time for compliance by the first, second and third defendants with the order of Justice Chesterman, dated 11 September 2007 be extended to 4 December 2007;

3. Any further amended defence and counterclaim be filed and delivered by the first, second and third defendants no later than 31 January 2008;

4. Any request for further disclosure on the part of the plaintiffs be made by the first, second and third

defendants in the form of a particularised letter to be delivered no later than 31 January 2008;

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5. The parties have liberty to apply on at least two business days notice to the other parties;

6. The first, second and third defendants pay the first and second plaintiff's costs of and incidental to this application on the indemnity basis.

CATCHWORDS: Procedure – Supreme Court procedure – Queensland – Procedure under rules of court – Pleading – Particulars – Purpose of particulars – Duty of drawer to assist parties and the court

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COUNSEL: Plaintiffs: S Farrell
Defendants: M Hall

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SOLICITORS: Plaintiff: Hall Lawyers
Defendants: DLA Phillips Fox

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SUPREME COURT OF QUEENSLAND

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CIVIL JURISDICTION

[2007] QSC 377

FRYBERG J

No 11002 of 2004

LENARD'S PTY LTD
(ACN 010 711 145)

First Plaintiff

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and

THE POULTRY SHOP LEASING (NSW) PTY
LTD
(ACN 060 545 440)

Second Plaintiff

and

SAM GOW PTY LTD
(ACN 105 809 825)

First Defendant

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and

SAMANTHA CATHERINE GOW

Second Defendant

and

LINDA JANE GOW

Third Defendant

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and

GREG SALMON

Fourth Defendant

and

MARKETING MASTERS (QLD) PTY LTD
(ACN 092 109 389)

Fifth Defendant

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BRISBANE

..DATE 20/11/2007

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ORDER

HIS HONOUR: This is an application by the plaintiffs for an order that a subparagraph of the amended counter-claim be struck out for non-compliance with an order of the Court. On the 11th of September, Chesterman J ordered the defendants to provide further and better particulars in response to, among other things, paragraph 10 of the plaintiff's request for particulars dated 16 March 2006. This was not the first time that particulars had been ordered. An earlier order made by Philippides J had not resulted in a satisfactory outcome.

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The plaintiffs seek orders now, because although the defendants purported to comply with Chesterman J's order, they submit that the particulars provided are not particulars which can properly be described as being in response to paragraph 10 of the request. That paragraph related to paragraph 25 (m) of the counterclaim. By that paragraph the defendants plead:

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"In breach of the implied terms and/or in breach of Section 51AC of the Trade Practices Act (1974), the plaintiff, the second plaintiff, the fourth and fifth defendants, acted in a manner that was harsh, unconscionable, and not in good faith."

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The particulars of that pleading were then given, and in paragraph (m), the defendants pleaded:

"The plaintiff's head office, failing to provide support and assistance; the plaintiff's head office never returning phone calls or addressing problems raised with them, but rather blaming and ridiculing the first, second and third defendants for the difficulties being experienced by them."

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It will be seen from the terms of that paragraph that the pleader has - in the manner that things seem to be so often

done these days - pleaded, under the heading "particulars", matters of fact which more properly ought to have been pleaded as allegations. It is plain enough that what is being alleged here will require a response in the Reply, and conventionally, pleadings do not respond to particulars.

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However, that technicality has not concerned the plaintiffs, and they press for further particulars of five sorts. They are: first, in relation to the alleged failure to provide support and assistance; second, in relation to the alleged failure to return phone calls; third, in relation to alleged problems not addressed by the plaintiffs; fourth, in relation to alleged instances of blame and ridicule of the first, second and third defendants, and finally, in respect of each of the four matters referred to, the manner in which the act or omission is said to have been causative of loss.

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The particulars, which have in fact been provided, occupy some 20 pages. They are discursive in form; they include a considerable amount of surplusage; they are numbered in a way which does not conform with the request for particulars, and thereby creates confusion; a number of the paragraphs are ungrammatical or contain obvious typographical errors like the repetition of phrases, and above all, in many cases they are non-responsive to the request. In terms of overall structure, the response constitutes a roughly chronological summary of a number of documents, and in parts, a listing of documents. That is not adequate. The task of the drawer of particulars is to reassemble the information which may come to him or her

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in chronological order into a sensible format responsive to the request for particulars, and easily able to be related to it. That is not something done for the benefit of the plaintiff, it is also done for the benefit of the Court, and in that regard it is very much in the defendants' own interests that the particulars be properly drawn.

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Sooner or later, a trial Judge may have to read the particulars and use them to help identify what the defendants' counterclaim is about. The counterclaim will be the first inkling a Judge has of the contentions being raised by the defendants, and it behoves their lawyers to put the particulars in as clear and persuasive a form as is possible. An inability to do this is often a sign of a confused case, or even one which is not going to be able to made out.

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In the present case, Mr Hall - the solicitor for the first three defendants, the respondents to this application - concedes that the document has a number of formatting difficulties, but submits that form should not prevail over substance. He submits that the substance of what was requested is all there. That does not seem to be so. Certainly, there is no statement indicating that the particulars are responsive and therefore limiting the claim in the way that particulars are supposed to do.

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Moreover, it is not possible - in reading the document in the way it is put forward - for anyone to be confident that the material is all there. It is necessary that the material be

sorted into categories, with repetition if necessary, in order
to match the pleadings of which the particulars are given.
This is not an empty struggle of form over substances, but is
a practical step designed to ensure that the litigation
progresses sensibly and is restricted to issues which the
parties are ready to meet.

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The form of the particulars at the moment is, in my judgment,
embarrassing. It ought to be possible to re-plead them in a
satisfactory form, and having looked at them in some detail,
it seems to me that there is enough there to hold out some
hope that the respondents will be able to do that. For that
reason, I am not inclined at this stage to order the striking
out of paragraph 25 (m) of the counterclaim. Rather, I
propose to order the striking out of the whole of paragraph 10
in that document including its sub-paragraphs. To enable the
matter to be redone, I propose to extend the time for
compliance with Chesterman J's order to the 4th of December,
on the basis that that will reinvigorate paragraph 2 of the
order insofar as it relates to paragraph 25 (m) of the
counter-claim.

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It is apparent that this litigation has been languishing, and
that costs are being built up in a way which may or may not in
the end result be productive. The solicitor for the
respondents contends that it may be necessary for his clients
to amend their defence and counterclaim in the light of a
decision of the Supreme Court of New South Wales, and also
that there are deficiencies in the disclosure provided by the

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plaintiffs. It seems to me that times should be set for these matters to be attended to, and in particular that any amendments to the defence and counter-claim ought to be filed and served on or before the 31st of January, and that any request for further disclosure ought to be made by letter and in detail by that date.

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What happens thereafter is a matter for the plaintiffs, but I record the fact that there would seem, once disclosure and pleadings are complete, no reason why they should not immediately file a request for trial date. Continual interlocutory applications against defendants who would seem to be impoverished from what I have been told from the Bar table, do not seem calculated to further the plaintiff's interests.

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I will ask counsel and solicitor to bring in a draft order embodying the matters which I have dealt with in these reasons. The order should also include liberty to apply. I will hear the parties on costs.

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HIS HONOUR: Mr Hall rightly concedes that his clients must pay the costs of the application. The plaintiffs seek those costs to be assessed on the indemnity basis. They wrote a letter pursuant to Rule 444 before bringing this application and foreshadowed that such an order would be sought. Given that this is not the first attempt at the provision of

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particulars, there is some merit in the plaintiff's application.

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In response, Mr Hall submits that the letter does not articulate the arguments relating to the particulars as clearly as counsel's outline did today. That is no doubt true, but it is not the function of a letter under Rule 444 to do that. The letter does set out the matters of complaint and the relevant circumstances, and in summary, makes the complaint which was the subject of counsel's submissions. In these circumstances, it seems to me appropriate that the costs be assessed on the indemnity basis. I ask that that order be included in the draft which is being prepared. I shall leave the question of mediation until another time before another Judge.

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