NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

16/7

CL.8/92

LOW PRIORITY

1030

BETWEEN: **BRENMOSS TEXTILES PTY LIMITED** (formerly Zuglaw Holdings Pty Limited) a duly incorporated company under the laws of New South Wales, having its registered office at Sydney, New South Wales, carrying on business as a textile manufacturer, printer and distributor

First Plaintiff

AND **BRENMOSS INVESTMENTS LIMITED** a duly incorporated company having its registered office at Sydney, Australia, and carrying on business as an investment company

Second Plaintiff

AND **BRENMOSS HOLDINGS PTY LIMITED** a duly incorporated company having its registered office at Sydney, Australia, and carrying on business as a holding company

Third Plaintiff

A N D: **FREDERICK BART** of Sydney, Australia, company director

First Defendant

AND **AUSTRALASIA DYERS LIMITED** a duly incorporated company having its registered office at 20 Chelsea Avenue, Otahuhu, carrying on business as a textile importer and manufacturer

Second Defendant

AND

LYNCAL LINENS LIMITED
a duly incorporated company having its registered office at 271 Richmond Road, Auckland, carrying on business as a textile manufacturer and exporter

Third Defendant

AND

SLEEPYHEAD BEDDING COMPANY 1935 LIMITED a duly incorporated company having its registered office at 275 Richmond Road, Auckland, and carrying on business as a printer and dyer of textile materials

Fourth Defendant

AND

HALLCO GROUP LIMITED (formerly WOOLREST HOLDINGS LIMITED) a duly incorporated company having its registered office at 5 Bank Street, Mt Eden, Auckland, and carrying on business as a textile manufacturer and exporter

Fifth Defendant

AND

WOOLREST INTERNATIONAL LIMITED a duly incorporated company having its registered office at 5 Bank Street, Mt. Eden, Auckland, and carrying on business as a textile manufacturer and exporter

Sixth Defendant

AND

FLAXALL PACIFIC LIMITED
a duly incorporated company having its registered office at 274 Richmond Road, Grey Lynn, Auckland, and carrying on business as a distributor and exporter of textile materials

Seventh Defendant

Hearing: 6 May 1993

Judgment: 28 June 1993

Counsel: L L Stevens and M L Whineray for Plaintiffs
B D Gray for First and Second Defendants
J A Farmer QC and L McEntegart for Third, Fourth and Seventh Defendants
N J Carter for Fifth and Sixth Defendants

JUDGMENT OF HENRY, J.

This hearing concerned applications brought by all defendants for orders striking out the amended statement of claim dated 4 November 1992. Three causes of action are pleaded. The first is against the first defendant only for breach of a restraining covenant contained in an agreement dated 4 September 1987. The second cause of action is directed against all defendants and pleads what is known as an unlawful means conspiracy. The third cause of action is also against all defendants and alleges the tort of unlawful interference with the finances of the plaintiffs. Both the second and third causes of action require the establishment of the first defendant's breach of covenant in the terms pleaded in the first cause of action. Accordingly if the pleading does not support the alleged breach of covenant, all causes of action must fail.

In June 1986 the plaintiffs entered into a joint venture agreement with the first defendant (Mr Bart) and others to manufacture print and

sell textiles throughout Australia. On 4 September 1987 a further agreement was entered into whereunder the plaintiffs sold their shareholding in the company which had been incorporated to carry on the joint venture business. It is the latter agreement which contains the restraint of trade covenant the subject of this action. The relevant clause provides :

> "7.01 The Vendor and each of the Bart Directors severally covenant and agree that they shall not after the Completion Date either solely or jointly with any other person, firm or company (whether as principal agent employee director shareholder partner consultant adviser or otherwise whatsoever) directly or indirectly carry on or be engaged or interested (excluding being interested as the holder of not more than 5% of the issue capital of any company whose shares are listed on a recognised stock exchange in the Commonwealth of Australia) in any business of importing, manufacturing or selling of sheeting for bed linen and other bed linen products.
>
> 7.02 The restraint contained in sub-clause 7.01 shall operate from and after the Completion Date during each specified period and within each specified area, as defined in sub-clause 7.03 and 7.04.
>
> 7.03 In this Clause 7 "specified period" means :
>
> (i) Five years
> (ii) Four years;
> (iii) Three years;
> (iv) Two years; and
> (v) One year,
>
> after the Completion Date.

7.04 In this Clause 7 "specified area" means :

(i) the whole of the Commonwealth of Australia;

(ii) the whole of the Commonwealth of Australia excluding the Northern Territory and the Australian Capital Territory;

(iii) the whole of the Commonwealth of Australia excluding the Northern Territory, the Australian Capital Territory and Western Australia;

(iv) the whole of the Commonwealth of Australia excluding the Northern Territory, the Australian Capital Territory, Western Australia and Queensland;

(v) the whole of the Commonwealth of Australia excluding the Northern Territory, the Australian Capital Territory, Western Australia, Queensland and Tasmania;

(vi) the whole of the Commonwealth of Australia excluding the Northern Territory, the Australian Capital Territory, Western Australia, Queensland, Tasmania and Victoria; and

(vii) the whole of the Commonwealth of Australia excluding the Northern Territory, the Australian Capital Territory, Western Australia, Queensland, Tasmania, Victoria and South Australia.

7.05 The restraint contained in sub-clause 7.01, insofar as it relates to :

(i) any period referred to sub-clause 7.03 is separate, distinct and severable from any other period referred to therein;

(ii) any area referred to in sub-clause 7.04 is separate, distinct and severable from any other area referred to therein, and any finding of invalidity in respect of:

(iii) any one or more of such periods shall not affect the validity of the said restraint in respect of any of the others of such periods;

(iv) any one or more of such areas shall not affect the validity of the said restraint in respect of any of the others of such area."

It will be seen that the restraint has now expired.

The clause has already been the subject of proceedings issued by Mr Bart and other parties associated with him in the Commercial Division of the Supreme Court of New South Wales under which issues not directly relevant for present purposes have been decided. In October 1992 Brenmoss also issued proceedings out of the Supreme Court of New South Wales alleging breach of the restraint of trade covenant by Mr Bart. Those have been discontinued.

The statement of claim alleges that Mr Bart through a series of related companies has a proprietary interest in the second defendant (Australasia), which in turn has a 50% interest in the third defendant (Lyncal). Lyncal is also owned as to 50% through a company owned by

the Turner family interests, which also effectively own the fourth defendant (Sleepyhead), and the seventh defendant (Flaxall) and other associated companies including Woolrest Australia Pty Limited (Woolrest Australia). The fifth and sixth defendants are under the ownership and control of the Hall family interests. The sixth defendant sold its New Zealand operations in December 1990 to Lyncal, and its Australian operations in September 1991 to Woolrest Australia, which is not a party to this proceeding. Paragraphs 23-26 of the statement of claim are relevant :

> "23. Australasia, Lyncal, Sleepyhead, Hallco, Woolrest (sixth defendant) and Flaxall have been established for the purpose of engaging in the manufacture and distribution of sheeting for bed linen and the export of bed linen from New Zealand and its importation into *inter alia* Australia.
>
> 24. Australasia's business principally relates to :
>
> (a) importing of sheeting material into New Zealand;
>
> (b) Cutting, cleaning and dyeing of that sheeting material for the manufacture of bed linen by Lyncal, Sleepyhead, Hallco and Woolrest;
>
> (c) Exporting sheeting material to Australia.
>
> 25. The operations undertaken by the defendants within New Zealand are as follows :
>
> (a) Sleepyhead or Australasia takes delivery of unprocessed linen from overseas. Australasia dyes the linen at its premises at 18 Weka Street.

(b) The linen is printed at Sleepyhead's premises then sent to the premises at 18 Weka Street, Otahuhu, where Australasia and Lyncal further process and package the linen for export.

(c) Flaxall then uplifts the linen by truck for export from the premises at 18 Weka Street.

26. After the linen has been uplifted by Flaxall the linen is exported to Australia by consignment to Woolrest Australia, the company described in paragraph 10 herein. The linen is imported into Australia and Woolrest Australia takes delivery of the linen for distribution and sale in Australia."

Paragraph 28 contains particulars of the alleged breach of covenant by Mr Bart, namely :

"28. The first defendant has, *inter alia*, either solely or jointly, directly or indirectly carried on, been engaged or interested in a business of either importing or selling bed linen and other bed linen products in Australia in breach of the covenant. The first defendant is directly interested in Australasia, Lyncal and Woolrest. The first defendant, Australasia, Lyncal and Woolrest and the other defendants are all directly or indirectly interested in, carrying on or engaged in a business of importing sheeting for bed linen and other bed linen products.

Particulars

The plaintiffs rely on the following :

(a) The nature of the operations set out under paragraphs 23-26 above and the close links between the defendants and between the defendants and Woolrest Australia.

(b) The fact that Lyncal and Australasia carry on business from the same premises at 18 Weka Street, Otahuhu.

(c) The fact that Bart is a director of both Lyncal and Australasia.

(d) The fact that through Diveni and Tenezo, Bart has significant interests as a shareholder in Australasia.

(e) The fact that, through Australasia, Bart has significant interests as a shareholder in Lyncal.

(f) The fact that the sixth defendant was until September 1991 a holding company of Woolrest Australia, a company which imports bed linen into Australia.

(g) The fact that since December 1990 Lyncal has owned the sixth defendant.

(h) The fact that one man, Peter David Elliott, is the manager of both Australasia and Lyncal and that both companies employ a common staff.

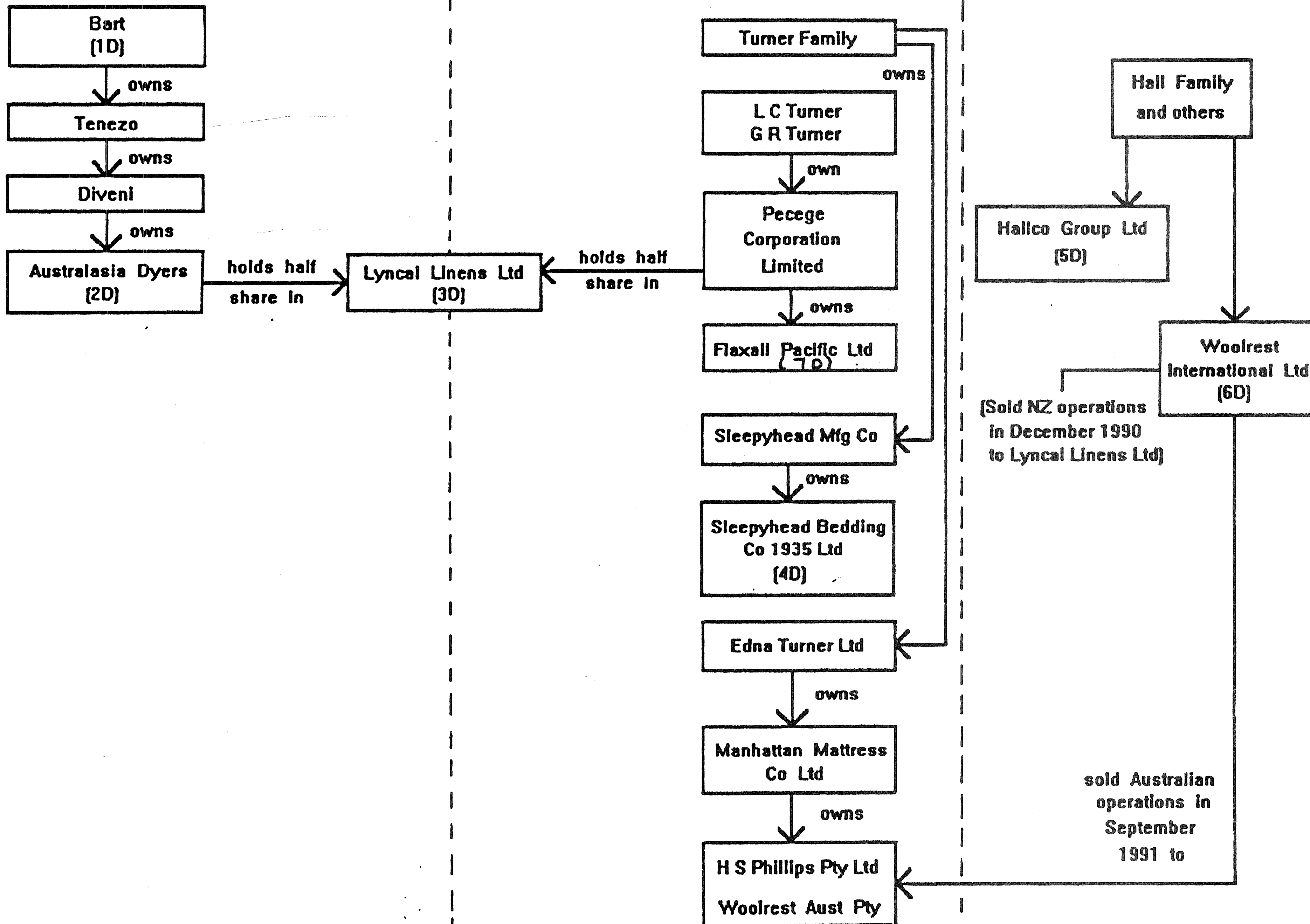
(i) Two invoices raised by Flaxall dated 5 March 1992 for Woolrest Australia which contain printed provisions referring to "Lyncal Order No."

(j) Packaging for linen sent to Woolrest Australia for sale in Australia marked with the name of Lyncal together with the name of Woolrest Australia.

Further particulars of the involvement of the defendants in activities in breach of the covenant including the importation of sheeting for bed lien and other bed linen products into Australia will be provided after discovery."

The primary ground of the present applications to strike out is that no reasonable cause of action is disclosed.

The relationship of the three groups of company interests (Mr Bart, the Turner family and the Hall family) and of the individual companies within each group, is conveniently depicted in a chart which is now set out :



Bart
(1D)
owns
Tenezo
owns
Diveni
owns
Australasia Dyers
(2D)
holds half
share in
Lyncal Linens Ltd
(3D)
holds half
share in
Turner Family
owns
L C Turner
G R Turner
own
Pecege
Corporation
Limited
owns
Flaxall Pacific Ltd
(7D)
Sleepyhead Mfg Co
owns
Sleepyhead Bedding
Co 1935 Ltd
(4D)
Edna Turner Ltd
owns
Manhattan Mattress
Co Ltd
owns
H S Phillips Pty Ltd
Woolrest Aust Pty
Hall Family
and others
Hallco Group Ltd
(5D)
Woolrest
International Ltd
(6D)
(Sold NZ operations
in December 1990
to Lyncal Linens Ltd)
sold Australian
operations in
September
1991 to

Two of the particulars pleaded as being relied on to establish the breach are challenged as to their correctness. Sub-paragraph (f) states that the sixth defendant was the holding company for Woolrest Australia, which appears on the evidence to be factually incorrect. In September 1991 the sixth defendant sold its Australian operations, which included the business of importing bed linen into Australia, to H S Phillips Pty Limited, now following a change of name Woolrest Australia Pty Limited. Sub-paragraph (g) states that Lyncal has owned the sixth defendant from 1990. The documentary evidence establishes that the December 1990 sale to Lyncal was of the sixth defendant's New Zealand business operations, and it appears that Lyncal did not obtain and has not obtained any proprietary interest in the sixth defendant. In the circumstances I think it proper to have regard to the affidavit evidence in order to see whether there could be substance in the particular allegations (***Cameron v Minister of Foreign Affairs*** CA.11/90, 9 August 1990).

The statement of claim makes no allegation of activity in Australia on the part of any defendant. The thrust of the plaintiffs' case is that the defendants were engaged in a joint manufacturing operation carried out in New Zealand which resulted in product being sold or introduced into Australia, with delivery being taken by Woolrest Australia for distribution and sale in Australia. The defendants' submission is that such activity does not come within the prohibition laid down in cl.7 of the agreement as properly construed. Although under the provisions of the agreement the proper law governing its interpretation is expressed as being that applicable in the State of New South Wales, Mr Stevens for the plaintiffs has accepted as a fact that the relevant law is identical to

that of New Zealand. At this hearing, counsel for the defendants all agreed that the New Zealand law should be applied and accordingly I will proceed on that basis.

On the facts not in dispute the only relevant entity operating within Australia was up until September 1991 the sixth defendant, and thereafter Woolrest Australia. The allegation that Mr Bart had some indirect proprietary interest by way of ownership in the sixth defendant through Lyncal is now refuted, and I did not understand Mr Stevens to contend that could be relied on for present purposes, except perhaps to reserve the possibility that some undisclosed trust may exist of which Mr Bart is the beneficiary. I do not think conjecture of that nature, unsupported even by the pleading, would be sufficient to hold an allegation of ownership and accordingly I proceed on the basis that it has no substance. It follows that for the purposes of cl.7, Mr Bart is not directly or indirectly interested in the sixth defendant or in Woolrest Australia. It is in my view clear that the word "interested" in the context of cl.7 is used in the sense of a proprietary interest. That is in accord with authority as to the construction of the word in a covenant of this kind (***Hunt v Pascoe*** (1990) 21 NSWLR 10, per Young J. at p.14) In ***Hunt v Pascoe*** Young J. noted at p.14 that to be common ground, and referred to earlier authorities to that effect. That case raised the question whether a landlord could be interested in the business of his tenant, and Young J. held for the purposes of an interim injunction application that on the facts before him the contention was arguable, and the determination could only be made from a consideration of all aspects of the particular relationship. There was evidence of a close business relationship, and of an excessive rent stipulation in the lease. In the present case what is alleged in the pleading is a business venture carried

out by a number of companies jointly whereby bed linen is manufactured in New Zealand and then exported to Australia by consignment to Woolrest Australia. Woolrest Australia, Sleepyhead and Flaxall, are all owned by the Turner family interests, which also own an interest in Lyncal in common with (indirectly) Mr Bart. The precise nature of the individual relationships and of the business venture operations which result in the product being introduced into Australia is not within the present knowledge of the plaintiffs and is therefore not pleaded. However in its general terms, paragraph 26 taken in conjunction with the particulars in paragraph 28 (after allowing for the factual challenges in respect of sub-paragraphs (f) and (g) earlier discussed) are in my view insufficient to establish that a claim of indirect interest on the part of Mr Bart in Woolrest Australia is arguable.

Mr Bart does have an interest in both Australasia and Lyncal, and that gives rise to the plaintiffs' primary contention that Australasia and Lyncal engaged in and carried on the business of importing into Australia. The argument on that issue turns largely on the meaning of the word "importing" in the context of cl.7. In its ordinary commercial usage the word is to be contrasted with "exporting" and connotes the bringing in or introduction of goods from a foreign country. In that sense Woolrest Australia is undoubtedly an importer of bed linen. The New Zealand companies would also be described as being engaged in the business of exporting bed linen from New Zealand. Generally speaking the commercial roles of exporter and importer will not overlap, but in particular circumstances they may well do so. What is alleged here is a form of joint enterprise with the end of the chain, but still part of it, being the importation of product to Australia. That is achieved, it is claimed, in part by the intentional conduct of Australasia and of

Lyncal in association with *inter alia* the Turner family interests including Woolrest Australia. If that chain is established, and the Bart interests are shown as being links instrumental in bringing about the end result then in my view that, depending upon the true nature of the arrangements and the inter-relationship amongst all the participants, their respective rights and obligations and their respective actions, may constitute an engagement or taking part in the business of importing bed linen into Australia within the meaning of cl.7.

The word "import" was considered in ***Saxton v Police*** [1981] 2 NZLR 186 in the context of the Misuse of Drugs Act 1975. It was there held that the accused's actions in posting a parcel of drugs from England to a New Zealand address but intercepted in New Zealand by enforcement officers amounted to an importation by him of the drug. The Court expressed itself in giving the word its ordinary meaning, which included "to introduce from abroad". It follows that actions carried on outside Australia may (not must) constitute an importation or an engagement in an importation into Australia. It is engaging in importation into Australia which is one of the activities prohibited by cl.7.

Mr Gray drew attention to the word "indirectly" and submitted that it qualified the method by which Mr Bart may not participate, and not the nature of the business itself. The distinction (if properly drawn) is a fine one, but I think not of significance to the present question which is simply whether the companies in which Mr Bart has an interest can be said to be taking part in the business of importation if the pleading is substantiated by evidence. An effective taking part, whether described as direct or indirect, is what is required and is sufficient to constitute a

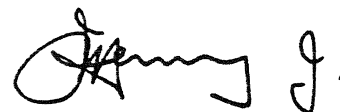
breach. The effect of the allegations is that all the named entities were involved in and to a greater or lesser extent actively taking part in the importation by Woolrest Australia, that being the end result and an integral part of the New Zealand operations. In my view, the fact that a company's physical activities are confined to New Zealand and that it is an exporter of a particular product does not necessarily preclude it from also being engaged in or taking part in importing that product into Australia. Conversely, the fact that one company by exporting goods makes it possible for another to import these goods, does not necessarily mean that the former is engaged in importing. It is a matter of degree, and whether the necessary links can be established is dependent upon the particular circumstances as established by the evidence - for present purposes it must be assumed that the allegations in this form can be sustained. Accordingly in my judgment sustainable causes of action are disclosed by the pleading, and they cannot be classed as wholly untenable.

Mr Gray also submitted in respect of the second and third causes of action that the pleading was defective because of the lack of adequate particulars. Although as counsel stressed this pleading is the fourth statement of claim filed, I do not think this complaint could justify striking out. Some of the matters in question (in particular that relating to the quantum of damages) may not be capable of further elaboration at this time - others, if further particulars are properly required, may need to be addressed following discovery. In any event the defendants are able to pursue this aspect further in the normal manner, with adequate remedies available to them if appropriate. The adequacy of the pleaded particulars was not addressed in detail in argument, and I make no findings on that question. I observe however that the general principle

to be applied is that a party should be properly informed of the nature of the case it has to meet, but not of the mode in which it will be proved. If the present pleading is insufficient, it is not in my view so defective, even as a fourth statement of claim, as to constitute an abuse of process. It is sufficient to disclose causes of action, and of course also operates to define and confine the case of the plaintiffs with the consequences which flow from that.

Mr Carter on behalf of the fifth and sixth defendants sought to have those parties struck out on the alternative ground that they were not within the primary allegations as pleaded. A similar submission was also made on behalf of Sleepyhead, supported in that case by affidavit evidence as to its sphere of activities. I do not see it as appropriate for the Court to take that action as matters now stand. The pleading does embrace their activities, and if eventually that is shown as unsound then costs will follow. In the light of what has been submitted, if those parties are pursued and their lack of involvement in the pleaded activity becomes clear, the level of costs awarded will no doubt reflect any lack of substance in the case against them.

For the reasons set out above the applications to strike out are dismissed. Costs are reserved.



Solicitors:
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Corry Carter, Auckland, for fifth and sixth defendants