

IN THE NEW ZEALAND DISTRICT COURT
HELD AT AUCKLAND

CIV No. 08/004/2516

Under the *Fair Trading Act 1986*

BEWTEEN

D.V. Kelly Pty Ltd
24 Wendlebury Rd
Chipping Norton,
NSW, 2170
Australia
Plaintiff

AND

Magis S.p.a
via Magnadola
15 - 31045 Motta di Livenza
Treviso, Italy
1st Defendant

And

ECC Living & Lighting Ltd
39 Nugent Street
Grafton, Auckland
2nd Defendant

And

Nick Quy
56 Fordyce Ave
Pakuranga, Auckland
General Manager ECC Living & Lighting
3rd Defendant

AMENDED STATEMENT OF CLAIM

Filed By : CRAIG KELLY 

Address for Service : DV Kelly
P.O Box 1242
Pukekohe
Auckland, 2120

THE PLAINTIFF SAYS:

1. The Defendants, have obtained and have sought to protect an illegitimate monopoly, enabling them to exploit New Zealand consumers, and to deny New Zealanders the same rights to purchase lawfully made goods that Americans and Australians enjoy, by engaging in conduct that is in violation of the *Fair Trading Act 1986*
2. In contravention of **Part 1, section 9** of the *Fair Trading Act 1986*, the 1st, 2nd and 3rd Defendants have in trade, engaged in conduct that was misleading and/or was likely to mislead.
3. In contravention of **Part 1, section 10** of the *Fair Trading Act 1986*, the 1st, 2nd and 3rd Defendants have in trade, engaged in conduct that was likely to mislead the public as to the characteristics of goods.
4. In contravention of **Part 1, section 13(i)** of the *Fair Trading Act 1986*, the 1st, 2nd and 3rd Defendants have in trade, in connection with supply or possible supply of goods and/or with the promotion of the supply of goods, made false and/or misleading representations, concerning the; existence, exclusion, effect of conditions, and rights in relation to those goods.
5. In contravention of the **Part 1, section 22** of the *Fair Trading Act 1986*, the 1st, 2nd and 3rd Defendants have used harassment and/or coercion in connection with the supply and/or possible supply of goods

JURISDICTION

Section 38 of the *Fair Trading Act*, provides jurisdiction to the District Court to hear and determine the following matters—

- (a) Proceedings for offences against sections **40** and **47J** of this Act:
- (b) Applications for orders under sections **40A**, **42**, and **43** of this Act.

PARTICULARS

The Plaintiff relies on the following facts and assertions;

Parties

1. The Plaintiff, (DV Kelly Pty) is a body corporate incorporated pursuant to the laws of Australia.
 - i) The Plaintiff is a manufacturer, importer and exporter of furniture and lighting, and supplies furniture and lighting products to the New Zealand market.
2. The 1st Defendant (Magis S.p.a) is a body corporate incorporated pursuant to the laws of Italy.
 - i) The 1st Defendant is Italian manufacture of furniture and supplies goods worldwide, including to the New Zealand market
3. The 2nd Defendant (ECC Living & Lighting) is a body corporate incorporated pursuant to the laws of New Zealand.
 - i) The 2nd Defendant is a importer and retailer of furniture with shops in Auckland, Wellington, Christchurch, Sydney, Melbourne and Brisbane.
 - ii) The 2nd Defendant is the New Zealand agent of the 1st Defendant.
4. The 3rd Defendant (Mr Nick Quy) was at all material times the General Manager of the 2st Defendant.

Parties in Competition with each other

5. The Plaintiff is in competition with the 1st Defendant and 2nd Defendant in the New Zealand market for the supply furniture.
6. The Plaintiff distributes a barstool known as the "Jet" to the Harvey Norman retail chain of stores in New Zealand.
7. The 'Jet' barstool is a lawfully made item, and it's design is lawfully made by numerous furniture manufacturers in China, and is lawfully sold by retailers worldwide including the world's largest retailers such as; Wal-Mart and Target.
8. The 1st Defendant manufactures a range of furniture called the "Bombo" in Italy. In this range of furniture the 1st Defendant produces a barstool known as the "Bombo Barstool".
9. The 'Bombo' and the 'Jet' barstools are of similar shape and style.

Representation No.1

10. A letter dated 29th Jan 2003, was sent to Harvey Norman Auckland, attention Raymond Skippen and Neil Berryman by the 1st and 2nd Defendants through their attorneys 'Pipers'.
- i) In this letter, the 1st and 2nd Defendants represented that Harvey Norman was "infringing copyright, under the New Zealand Copyright Act 1994" by engaging in competitive conduct by selling a barstool of similar shape to the 'Bombo' in competition with 2nd Defendant.

Representation No.2

11. From on or about the 15th Dec 2005 until some time in 2008, the 2nd Defendant maintained a website which created the impression as to the existence of rights that enabled the 2nd Defendant to suppress competition by excluding barstools with shapes similar to the Plaintiff's "Jet" and "Solaro" barstools from the New Zealand market.
- i) The 2nd Defendant's website, also contained an admission by the 3rd Defendant that he spends "more than 30%" of his time engaging in conduct aimed at suppressing competition in the New Zealand market, and the 2nd Defendant states that such conduct "is a vital investment".
 - ii) The 2nd Defendant's website also contained a photograph of 3 unidentified individuals engaging in the willful and deliberate destruction of property thereby creating an impression with regards to; "the existence, exclusion, effect of conditions, and rights" in relation to goods.

Representation No.3

12. A letter dated 5th Dec 2007 was forwarded to Harvey Norman New Zealand (attn: Mr. Jason Nesbitt) by the legal firm 'James & Wells' on behalf on the 1st and 2nd Defendants. In this letter, the 1st and 2nd Defendants made representations which led Harvey Norman to believe that;
- i) The "Jet" Barstool was an unlawful, counterfeit article, which infringed copyright.
 - i) The 1st and 2nd Defendants had monopoly rights on the shape of the "Jet" barstool.
 - ii) Harvey Norman were acting illegally by advertising and selling the Jet barstools
13. In paragraph 12.2 of the same letter of the 5th Dec 2007, 1st and 2nd Defendants used "harassment and/or coercion in connection with" the Plaintiff's supply of the Jet Barstool to Harvey Norman, by demanding that Harvey Norman;

"Immediately withdraw from sale all examples of the subject stools that are in your possession, power or control and destroy them on oath or deliver them up to this firm for destruction"

Representation No.4

14. On the 3rd Jan 2008, by email copied to Mr. Nesbitt, (the Managing Director of Harvey Norman) the Defendant's made representations which created the impression to Harvey Norman that the 'Jet' barstool supplied by Plaintiff was made by an "unlicensed manufacturer".

Representations being false and/or misleading

15. The above representations made by, or on behalf of the 1st and 2nd Defendants are false and/or misleading as;

- a) The 1st Defendant does not have exclusive monopoly privileges over the shape of the 'Jet' barstool in New Zealand (nor anywhere else in world) under the provisions of the New Zealand *Copyright Act 1994*, and/or
- b) The 'Jet' barstool can be lawfully made and sold in USA, Australia, China, Italy or the UK, without the permission of the 1st Defendant, and therefore is **not** an infringing article under the provisions of the New Zealand *Copyright Act*, and/or
- c) The 'Jet' barstool is not made by "unlicensed manufacturers".

Jet Barstool lawfully made

16. By the provisions of the New Zealand *Copyright Act*, the Jet Barstool is **not** an infringing article and can be lawfully sold in New Zealand, as it is lawfully sold elsewhere throughout the world, as;

- i) The Jet barstool is an imported object, and
- ii) The "making of" the 'Jet' barstool would not have infringed any copyright if it were made in;
 - a) USA, or
 - b) Italy, or
 - c) China, or
 - d) Australia, or
 - e) The UK, or
 - f) Anywhere else in the world

And,

- iii) If the Jet barstool was made in New Zealand by the Plaintiff, its making would **not** infringe copyright in the Bombo barstool, as;
 - a) No copyright exists in New Zealand for any item in the Bombo range of furniture (including the Barstool) as;

1. "The term of protection" of the copyright in the Bombo in Italy has either expired or never existed, therefore under the provisions of the Berne Convention (the Rule of the

Shorter Term) there is no copyright protection available in New Zealand, and/or

2. The Bombo range of furniture is “not original” and/or is a “derivative work” copied from the “Tulip Pedestal” range of furniture of designed by Eero Saarinen which has been produced by Knoll Furniture in the USA since the 1950’s, and/or
3. The Bombo stool is not a “work of artistic craftsmanship” with the meaning of the term in NZ *Copyright Act*, and
4. The Bombo stool is not a “sculpture” or model within the meaning of the terms in the NZ *Copyright Act*.

In addition, or in the alternate;

- b) No “causal links” would exist in the making of the Jet Barstool and any copyright that exists in the Bombo

In addition, or in the alternate;

- iv) No person owns the copyright in the design of the Bombo barstool in;
 - a) USA, or
 - b) Italy, or
 - c) China, or
 - d) Australia, or
 - e) The UK, or
 - f) Anywhere else in the world.

In addition, or in the alternate;

- v) No person owns “any other intellectual property right” (such as; a ‘design patent’, ‘unregistered industrial design’, or ‘trademark’) in the design of the Bombo stool anywhere in;
 - a) USA, or
 - b) Italy, or
 - c) China, or
 - d) Australia, or
 - e) The UK, or
 - f) Anywhere else in the world.

In addition, or in the alternate;

- vi) The copyright protection (or “any other equivalent intellectual property right protection” – such a design patent, unregistered industrial design or trademark) formerly afforded to the design of the ‘Bombo’ stool, in the above listed countries has either expired (or never existed) anywhere in;
 - a) USA, or
 - b) Italy, or
 - c) China, or

- d) Australia, or
- e) The UK, or
- f) Anywhere else in the world.

In addition, or in the alternate;

- vii) The Jet barstool is a copy in 3 dimensions of an artistic work that has been industrially applied in China by the making of more than 50 pces.

Contraventions of the Fair Trading Act

17. By the representations identified in paragraphs 10 to 14 of the these Particulars, made by, or on behalf of, the 1st and 2nd Defendants, the 1st and 2nd Defendants have engaged in conduct that is in contravention of;

- a) Part 1, section 9 of the *Fair Trading Act 1986*,
- b) Part 1, section 10 of the *Fair Trading Act 1986*
- c) Part 1, section 13(i) of the *Fair Trading Act 1986*
- d) Part 1, section 22 of the *Fair Trading Act 1986*

18. The 1st and 2nd Defendants have liability for the above contraventions of the *Fair Trading Act 1986*, as by the provisions of the section 43 of the Act, as the 1st and 2nd Defendants were persons that ;

- a) Aided and/or abetted, and/or counselled, and/or procured the contraventions as detailed in paragraph 17, and/or
- b) Induced the contraventions of the provisions as detailed in paragraph 17, and/or
- c) Were either directly or indirectly knowingly concerned in, and/ or party to, the contraventions as detailed in paragraph 17.

19. The 3rd Defendant has liability for the contraventions (as detailed in paragraph 17) of the *Fair Trading Act 1986* by the provisions of the section 43 of the Act, as the 3rd Defendant was a person that;

- a) Aided and/or abetted the contraventions of the Act (as detailed in paragraph 17), and/or
- b) Was a person directly or indirectly, knowingly concerned in, and/or party to, the contraventions of the (Act as detailed in paragraph 17).

Loss and Damage to the Plaintiff

20. The Defendants' contraventions of the *Fair Trading Act*, caused Harvey Norman to be misled, and a consequence, Harvey Norman;

- a) Returned stock of the Jet Barstool that it had purchased from the Plaintiff, and
- b) cancelled orders it had placed with the Plaintiff, and
- c) refused to purchase any Jet barstools from the Plaintiff, and
- d) perceived the Plaintiff as an unreliable supplier.

21. As a consequence of the Defendants' contraventions of the *Fair Trading Act* the Plaintiff has suffered loss and damage including;

- a) A reduction and limitation on the sales made by the Plaintiff in the New Zealand market.
- b) A reduction, limitation and restriction of the Plaintiff's access to economies of scale within the New Zealand market.
- c) Additional costs and expenses being incurred by the Plaintiff.
- d) A reduction in the value of the goodwill in the Plaintiff's business in New Zealand.
- e) A restriction of the growth of the Plaintiff's business in the New Zealand market.
- f) A restriction of the financial resources available to the Plaintiff.
- g) The loss of business opportunities available to the Plaintiff.
- h) A reduction and limitation on the profits of the Plaintiff.

Wherefore the Plaintiff seeks the following ORDERS

1. Orders to Publish Corrective Statement and Advertisement

Section 42 of the *Fair Trading Act 1986* "Order to disclose information or publish advertisement" provides;

(1) Where, on the application of the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of any of the provisions of Parts 1 to 4 of this Act, the Court may (whether or not that person has previously engaged in such conduct), make either or both of the following orders:

(a) An order requiring that person, or any other person involved in the contravention, to disclose, at that person's own expense, to the public, or to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that person has access:

(b) An order requiring that person, or any other person involved in the contravention, to publish, at that person's own expense, in such manner and at such times as are specified in the order, corrective statements the terms of which are specified in, or are to be determined in accordance with, the order.

(2) The Court may hear and determine an application under subsection (1) in conjunction with any other proceedings under any of sections 40, 40A, 41, or 43.

(3) In this section, Court includes a District Court.

Under the Provisions of s42 of the *Fair Trading Act 1986*, the Plaintiff seeks the following orders;

a) A corrective statement be made by the Defendant's addressed to Harvey Norman New Zealand stating;

1. New Zealand consumers should not be discriminated against.
2. New Zealand consumers have the same equal rights as consumers in Australia and the USA to pay "internationally competitive prices" for "lawfully made" barstools such as the "Jet", "Space" and "Solaro" sold by DV Kelly Pty Ltd.

3. The Barstools known as "Jet", "Space" and "Solaro" and the "Jet Bar table" sold by D.V.Kelly Pty Ltd would not be "unlawfully made" if they were made in the USA.
 4. The Barstools known as "Jet", "Space" and "Solaro" and the "Jet Bar table" would not be "unlawfully made" if they were made in Australia.
 5. The Barstools known as "Jet", "Space" and "Solaro" and the "Jet Bar table" would not be "unlawfully made" if they were made in England
 6. The Barstools known as "Jet", "Space" and "Solaro" and the "Jet Bar table" would not be "unlawfully made" if they were made in China.
 7. Furniture retailers in New Zealand have the same equal rights to offer to the public lawfully made imported furniture, as Wal-Mart, Target & Sears do in the USA, and as Harvey Norman does in Australia.
 8. That the "Jet", "Space" "Retro" and "Solaro" barstools and the "Jet Bar table" are not "infringing articles" within the meaning of the word in the New Zealand Copyright Act.
- b) A corrective advertisement, placed in all New Zealand newspapers, paid for by the Defendants, of no less than one half page in size that includes the following;
1. A picture of the Jet barstool with its retail price.
 2. A statement saying that the Jet Barstool supplied by DV Kelly is lawfully made and therefore is available to New Zealand consumers.
 3. A list of all furniture retailers in New Zealand where the article is available from.
 - The art work for the corrective advertisement to be provided to Plaintiff.
 - The Defendants to give a minimum of 4 months notice to the Plaintiff of when such corrective advertisement will appear and in what newspapers.
 - The corrective advertisement to be published within 6 months from the Courts order.

2. An order under the provisions of section 43(2) of the *Fair Trading Act* directing the Defendants to pay to the Plaintiff a sum of \$174,420 for the loss and damage suffered by the Plaintiff, resulting from the Defendant's contravention of section 9, and/or section 10, and/or section 13(i) and/or section 23 of the *Fair Trading Act*.

Section 43 of the *Fair Trading Act 1986* provides;

(1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—

- *(a) A contravention of any of the provisions of Parts 1 to 4 of this Act; or*
- *(b) Aiding, abetting, counselling, or procuring the contravention of such a provision; or*
- *(c) Inducing by threats, promises, or otherwise the contravention of such a provision; or*
- *(d) Being in any way directly or indirectly knowingly concerned in, or party to, the contravention of such a provision; or*
- *(e) Conspiring with any other person in the contravention of such a provision—*

the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the Court may make the following orders—

- *(d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage the amount of the loss or damage:*

Section 9 of the *Fair Trading Act 1986* "Misleading and deceptive conduct generally" provides;

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 10 of the *Fair Trading Act 1986*, "Misleading conduct in relation to goods" provides;

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

Section 13(i) of the *Fair Trading Act 1986*, "False or misleading representations" provides;

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (i) *Make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy;*

Section 23 of the *Fair Trading Act 1986*, "Harassment and coercion" provides;

No person shall use physical force or harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services

3. Interest.

As provided for by section 65A of the District Court Act

4. Costs.

On an indemnity basis from the 31st Dec 2007

5. For the Court to consider the imposition of a statutory fine, payable by 1st & 2nd defendants under Section 40(1)(b) and by the 3rd Defendant under section 40(1)(a) of the *Fair Trading Act* for contravention of Part 1, section 10 and/or section 13(i) of the *Fair Trading Act*.

Section 40(1) of the Fair Trading Act provides;

(1) Every person who contravenes any of the provisions of Part 1 (except sections 9, 14(2), 23, and 24), or Part 2, or Part 3 or Part 4 of this Act, commits an offence and is liable on summary conviction—

(a) In the case of a person other than a body corporate, to a fine not exceeding \$60,000; and

(b) In the case of a body corporate, to a fine not exceeding \$200,000.

The document is filed by
Director for the above-named Plaintiff.

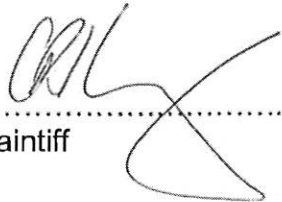
Address : 24 Wendlebury Rd
Chipping Norton,
NSW, 2170
Australia
Fax : + 61 2 9755 2158
Email : craig@dvkelly.com.au

The New Zealand Address for Service for the above named plaintiff is;
5 Keith Place
Pukekohe
Auckland 2120

P.O Box 1242
Pukekohe
Auckland, 2120

Alternatively, documents for service may transmitted by facsimile to
+ 61 2 9755 2158

Dated this 27th day of FEB 2008


Plaintiff

 This document is filed by : Craig Kelly
Director of the above named Plaintiff.

Address :
24 Wendlebury Rd
Chipping Norton,
NSW, 2170
Australia
Fax : + 61 2 9755 2158
Email : craig@dvkelly.com.au

The New Zealand Address for Service for the above named plaintiff is;
5 Keith Place
Pukekohe
Auckland 2120

P.O Box 1242
Pukekohe
Auckland, 2120

Or

**24 Wendlebury Rd
Chipping Norton, 2170
Australia**

Alternatively,

Documents for service may transmitted by facsimile to;
+ 61 2 9755 2158

or

via email to

craig@dvkelly.com.au

IN THE NEW ZEALAND DISTRICT COURT
HELD AT AUCKLAND

CIV No.08/004/2516

Under the *Fair Trading Act 1986*

BEWTEEN

D.V. Kelly Pty Ltd
24 Wendlebury Rd
Chipping Norton,
NSW, 2170
Australia
Plaintiff

And

Magis S.p.a
via Magnadola
15 - 31045 Motta di Livenza
Treviso, Italy
1st Defendant

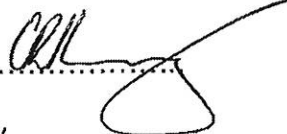
And

ECC Living & Lighting Ltd
39 Nugent Street
Grafton, Auckland
2nd Defendant

And

Nick Quy
56 Fordyce Ave
Pakuranga, Auckland
General Manager ECC Living & Lighting
3rd Defendant

**MOTION FOR
SUMMARY JUDGEMENT ON LIABILITY**

Filed By : GRAIG KELLY 

Address for Service : DV Kelly
P.O Box 1242
Pukekohe
Auckland, 2120