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IN THE NEW ZEALAND DISTRICT COURT
HELD AT AUCKLAND

CIV No. 08/004/2516

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
39 Nugent Street
Grafton, Auckland
2nd Defendant

And

Nick Quay
56 Fordyce Ave
Pakuranga, Auckland
3rd Defendant

**Notice of Interlocutory
Application for
Separate decision on Questions**

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Notice of Interlocutory Application for Separate decision on questions

Take Notice that on.....the.....day of 2009, at.....am/pm the Plaintiff will move the District Court at Auckland for the following orders

RELIEF SOUGHT

- i) To secure the speedy and inexpensive determination of the proceeding, the Applicant, under the provisions of sections 417 and 418 the *District Court Rules 1992*, seeks a hearing date for separate decisions of four questions of fact or of law, or partly of fact and partly of law, that have been raised by pleadings.
- ii) That the Defendants pay the costs of and incidental to this application.

Upon the Grounds

1. Section 418 of the *District Court Rules 1992* "Orders for Decision" provides;

The Court may, whether or not the decision will dispose of the proceeding, make orders for—

(a) The decision of any question separately from any other question, before, at, or after any hearing or further hearing in the proceeding; and

(b) The formulation of the question for decision and, if thought necessary, the statement of a case.

2. Section 417 *District Court Rules 1992* "Definition of Question" provides;

In rules 418 to 424, question includes any question or issue in any proceeding, whether of fact or of law or partly of fact and partly of law, and whether raised by pleadings, agreement of parties, or otherwise.

3. Section 4 of the *District Court Rules 1992* "Construction" provides;

These rules shall be so construed as to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.

4. Section 422 of the *District Court Rules 1992* " Disposal of Proceeding" provides;

Where a decision of a question pursuant to an order made under rule 418—

(a) Substantially disposes of the proceeding or of the whole or any part of any claim for relief in the proceeding; or

(b) Renders unnecessary any hearing or further hearing in the proceeding or on the whole or any part of any claim for relief in the proceeding,—

the Court, at the time of deciding the question or at any subsequent time, may, as the nature of the case requires,—

(c) Dismiss the proceeding or the whole or any part of any claim for relief in the proceeding; or

(d) Direct the entry of any judgment; or

(e) Make any other order.

Question 1A – “Requirement of knowledge or intent that conduct was misleading”

If a person, that is in any way directly or indirectly knowingly concerned in, or is party to;

- i) conduct in trade that is “misleading or was likely to mislead” (in contravention of s9 of the *Fair Trading Act 1986*), and/or
- ii) conduct in trade that is liable to mislead the public as to ; the nature, manufacturing process, characteristics, or suitability for a purpose of goods (in contravention of s10 of the *Fair Trading Act 1986*), and/or
- iii) the making of false or misleading representation(s) in trade concerning the;
 - a. existence, or
 - b. exclusion, or
 - c. effect of any condition, or
 - d. right or remedy,

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 (in contravention of s13(i) of the *Fair Trading Act 1986*),

without the knowledge or intent that such conduct was “false or misleading or was likely to mislead”, can be liable to;

- a) Publish corrective statements and/or advertisements under the provisions of section 42 of the *Fair Trading Act 1986*, and/or
- b) Pay damages under section 43(2) of the *Fair Trading Act 1986*.

Question 1B

If a person;

- a) in trade or otherwise, is
- b) in any way, directly or indirectly knowingly concerned in or is party to,
- c) an act of harassment and/or coercion, concerning
- d) an alleged; existence, exclusion, or effect of any condition, right, or remedy, in connection with
- e) the supply or possible supply of goods, or the payment for goods,

can be in contravention of s23 of the *Fair Trading Act*, and liable to orders under s42 and s43 of *Fair Trading Act*, if

that person did not have the knowledge that an; existence, exclusion, or effect of any condition, right, or remedy in connection with the supply or possible supply of goods or the payment for goods, did not exist.

Orders Sought upon determination of question No.1a and No.1b

If the Court determines the answers to both question 1a and 1b in the negative, then this will render unnecessary any further hearing and the Court should dismiss the whole of the proceeding, and award costs to the Defendants.

Grounds for interlocutory hearing for separate decision on Question No.1a and 1b.

5. The Plaintiff's case as pleaded in the Amended Statement of Claim, is that the Plaintiff has suffered loss and damage, and seeks relief under the provisions of s42 and s43 of the *Fair Trading Act*, as a consequence of the Defendants being directly or indirectly knowingly concerned in, or party to; four representations, which were;
 - i) false or misleading or deceptive, or were likely to mislead or deceive, in contravention of s9, 10 and 13 of the *Fair Trading Act*, and/or
 - ii) "harassment and/or coercion", concerning an alleged; existence, exclusion, or effect of a condition, right, or remedy, in connection with the supply or possible supply of goods, or the payment for goods, in contravention of section 23 of the *Fair Trading Act*as the Plaintiff pleads that it's 'Jet Barstool' was a lawfully made article that could be lawfully sold in New Zealand, and there is no provision in the *Copyright Act 1994* which provides otherwise.
6. The Plaintiff's Amended Statement of Claim, does not plead that the Defendants "had reason to believe" that four representations made were false, misleading or were likely to mislead, at the time the representations were made. In addition, the Plaintiff does not plead that the Defendants had "the intent" to mislead.
7. In the Second and Third Defendant's Statement of Defence at paragraph 21.4 the Defendants plead;

"At the time of making the above representations, ECC Lighting & Living Limited and the Third Defendant had reason to believe that the Jet Barstool was an infringing copy pursuant to the Copyright Act"
8. Therefore, Question No.1a and 1b, partly of fact and partly of law arises from the pleadings – is lack of knowledge or lack of intent a defence to orders sought under s42 and s43 the *Fair Trading Act*.
9. If both questions 1a and 1b are answered in the negative, the Plaintiff has the evidentiary burden to prove on the balance of probabilities that the Defendants had "reason to believe" that the representations in question were false or misleading or deceptive, or were likely to mislead or deceive, at the time they were made. If proof of the Defendant's knowledge is required under the relevant provisions of the *Fair Trading Act*, such a substantial evidentiary hurdle will render unnecessary any further hearing in regards to the proceeding and therefore the Court should immediately dismiss the whole of the proceeding, and award costs to the Defendants.

Question 2 – If representations were made ‘in trade’

Whether the representations referred to in the Plaintiff's Amended Statement Claim in;

- a) Paragraph 10 (Representation No.1) and/or
- b) Paragraph 11 (Representation No.2) and/or
- c) Paragraph 12 (Representation No.3) and/or,
- d) Paragraph 13 (Representation No.4)

are conduct or representations;

- i) made **“in trade”** within the meaning of the term in sections; 9, 10 and 13 of the *Fair Trading Act* 1986, irrespective of whether the representations were false or misleading or likely to mislead,

and/or

- ii) are capable of being “harassment or coercion in connection with the supply or possible supply of goods or the payment for goods” if the representations were false or misleading, or likely to misled, irrespective of whether the representations were made in trade or otherwise.

Orders Sought upon determination of question No.2

If the Court determines that both parts of the question 2 in the negative, it will render any further proceedings unnecessary (even if the representation were found to be false or misleading) as the representations in question are not within the scope of the *Fair Trading Act*, and therefore the Court should dismiss the whole of the proceedings under rule 422 of the *District Court Act* 1992, and award costs to the Defendants.

Grounds for interlocutory hearing for separate decision on Question No.2

10. The Plaintiff's case is that Defendants, either directly or indirectly were involved in, or party to the making of four representations, which were;

- a) made “in trade”, and
- b) were false and/or misleading or were likely to mislead, in contravention s9, 10, and 13 of the *Fair Trading Act*.

And addition or in the alternative, the Representations were;

- c) made in trade **or otherwise**, and
- d) amounted to harassment or coercion in connection with the supply and/or possible supply of goods and/or the payment for goods, in contravention s23 the *Fair Trading Act*,

11. The Plaintiff's 'Amended Statement of Claim' outlines these four representations.
12. The Second and Third Defendant consents in their 'Statement of Defence' that representations No.1, No.2 and No.3 were made, and do not deny that representation no.4 was made. However, the Second and Third Defendant plead that Representation No.1 and No. 3 were not made "in trade".
13. In the 'Statement of Defence' of the First Defendant, by its solicitor, the First Defendant;

"in particular denies that any of its conduct was 'in trade' in New Zealand."

14. A question, therefore arises from the pleadings, partly of fact and partly of law if;
 - i. Representation No.1, and/or
 - ii. Representation No. 2, and/or
 - iii. Representation No.3, and/or
 - iv. Representation No.4

were made "in trade" (irrespective of whether they were misleading or were likely to mislead)

and/or if;

- v. Representations No.1, and/or
- vi. Representation No.3, and/or
- vii. Representation No.4, and/or
- viii. any combination of Representations No1. No.3 and No 4.

could amount to "harassment or coercion in connection with the supply and/or possible supply of goods and/or the payment for goods" if the representations are false and/or misleading or likely to misled.

15. If both parts of question No.2 are answered in the negative by the Court, then this will render unnecessary any further proceedings and Court should dismiss the whole of the proceeding, and award costs to the Defendants.

Question 3 – “Specific Approval of the wording of the Representations”

If a person, who was “in any way directly or indirectly knowingly concerned in, or party to” conduct in contravention of s9 and/or 10 and/or 13 and/or s23 of the *Fair Trading Act 1986*, even if that conduct was not carried out with “the specific approval” of that person, can be liable;

- a) under the provisions of section 43(2) of the *Fair Trading Act 1986* to pay to any persons whom suffered loss or damage resulting from the conduct, (being the amount of the loss or damage) where proceedings have been commenced within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered, and/or
- b) in conjunction with proceedings commenced against a person, by a Plaintiff seeking relief under sections 43 of the *Fair Trading Act*, that the Defendant be liable to publish corrective statements at the Defendants own expense, in such manner and at such times as are specified by the Court, under the provisions of section 42 of the *Fair Trading Act 1986*

Orders Sought upon determination of question No3

If the Court determines the answer on the question in negative, then the Plaintiff will discontinue proceedings against the 1st Defendant, but continue proceedings against the 2nd and 3rd Defendants.

Grounds for interlocutory hearing for separate decision on Question No.2

16. In the Plaintiff's ‘Amended Statement of Claim’, the Plaintiff seeks orders against the First Defendant, an Italian body corporate, under the provisions of s42 and s43 of the *Fair Trading Act*, resulting from the loss and damage which the Plaintiff pleads it has suffered as a result of four representations to which the First Defendant was directly or indirectly knowingly concerned in, or party to, and which were representations in contravention of sections 9,10,13 and 23 of the *Fair Trading Act*.

17. In the First Defendant's Statement of Defence, the First Defendant pleads;

- a) At par. 16.2 in relation to “Representation No.1” that;

“The letter [Representation No.1] was sent without its specific approval of the wording”

- b) At par 18.2 in relation to “Representation No.2” that;

“The letter [Representation No.2] was sent without its specific approval of the wording”

18. The Plaintiff's case is that the First Defendant was a person “directly or indirectly knowingly concerned in, or party to” the four representations in question and as such, if the representations are found to be in contravention of s 9,10,13 or 23 of the *Fair Trading Act*, the First Defendant is liable to orders under s42 and s43 of

the Act, and it is irrelevant as to whether the 1st Defendant gave "specific approval of the wording" of the representations.

19. Therefore, question no. 3, partly of fact and partly of law, have been raised by the pleadings.
20. Given that the First Defendant is an Italian body corporate, a separate decision by the Court on question 3 will assist to secure the just, speedy, and inexpensive determination of the proceeding.

Question 4

If the Plaintiffs or any other person's ability to lawfully make and/or lawfully sell the 'Jet Barstool' in either; the USA, Italy, China, Australia, China, the UK, (or anywhere else) is relevant to the proceedings ?

Orders Sought upon determination of question 4

If the Court answers the question in the affirmative, then court order the Defendants to plead a defence to paragraph 16(ii) in the Plaintiff's amended statement of claim.

Grounds for interlocutory hearing for separate decision on Question No. 4


21. In the Plaintiff's 'Amended Statement of Claim', in paragraph 15 and 16, the Plaintiff pleads that the 'Jet Barstool' can be lawfully made and lawfully sold in USA, Australia, China, Italy, the UK (and anywhere else in the world) and these factors are relevant factors in determining if the 'Jet Barstool' can be lawfully imported into New Zealand under the provisions of the *Copyright Act*, and hence, if the representations in question are false or misleading and in contravention of the *Fair Trading Act*.
22. In the Second and Third Defendant's Statement of Defence, they have neither admitted, denied, or stated they have no knowledge of the Plaintiff's assertions in paragraph 15(b) and 16(ii) of the Plaintiff's pleading, but at para 21.2 the Defendant's plead that;

"The ability to sell the Jet Barstool in the USA, Australia, China, Italy or the UK is irrelevant to the present proceeding. Copyright rights are territorial and it's the ability to distribute and sell the Jet Barstool in New Zealand which is the issue."
(emphasis added).

23. Therefore, a question, partly of fact and partly of law arises from the pleadings that if the ability to lawfully make and lawfully sell the 'Jet Barstool' in either; the USA, Australia, China, Italy or the UK is irrelevant to the proceeding ?

24. If the question is answered in the affirmative, and the Defendant's ordered to plead a defence to the assertions in paragraph 15(b) and 16(ii) of the Plaintiff's 'Amended Statement of Claim', and if in these pleadings the Defendants admit that the 'Jet Barstool' can be lawfully made and lawfully sold in the USA, Australia, China, Italy or the UK, this will substantially reduce the amount of evidence necessary at trial, and would assist to secure the just, speedy, and inexpensive determination of the proceeding.

Dated this 12th day of June 2008


.....
Craig Robert Kelly
On behalf of the Plaintiff



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