

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

COMMERCIAL COURT
CORPORATIONS LIST

No 10078 of 2007

RE AWB LIMITED (ACN 081 890 459)

BETWEEN:

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION**

Plaintiff

v

ANDREW ALEXANDER LINDBERG

Defendant

JUDGE: ROBSON J
WHERE HELD: Melbourne
DATE OF HEARING: 26 August 2010
DATE OF JUDGMENT: 8 October 2010
CASE MAY BE CITED AS: Re AWB Limited No 12
MEDIUM NEUTRAL CITATION: [2010] VSC 453

CORPORATIONS - civil penalty proceedings - pleadings -whether allegations should be struck out for not containing a material allegation of fact - application refused - r 23.02 *Supreme Court (General Civil Procedure) Rules 2005*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr N J O'Bryan SC and Mr C H Truong	The Australian Securities and Investments Commission
For the Defendant	Mr D G Collins SC and Ms M Tittensor	Galbally & O'Bryan Solicitors

INTRODUCTION AND SUMMARY

- 1 By this proceeding, the plaintiff (ASIC) seeks leave to file and serve an amended consolidated statement of claim. The defendant (Mr Lindberg) resists that application and applies to strike out certain paragraphs of the earlier consolidated statement of claim dated 24 February 2010 and the particulars thereto.
- 2 The history of these proceedings is canvassed in earlier judgments given in this proceeding. There is no need to traverse this history, save to mention the steps that have been taken recently.
- 3 The first proceeding no. 10078 of 2007 was commenced on 19 December 2007. That proceeding came on for trial on 19 October 2009. The trial commenced and ASIC completed its opening. For reasons shortly explained, the further hearing of the trial has been adjourned to a date to be fixed.
- 4 Prior to the commencement of the trial, there had been a series of applications made by ASIC to extend the allegations against Mr Lindberg to include alleged acts and omissions after the Government of Iraq collapsed in about March 2003 and in particular to allege contraventions of the *Corporations Act 2001* in relation to Project Rose, the Independent Inquiry Committee and the Tigris Agreement (the post war allegations). Leave to make these amendments had been refused.
- 5 After the trial had commenced, on 6 November 2009, ASIC commenced a second proceeding against Mr Lindberg which sought civil penalties arising out of alleged contraventions of the *Corporations Act 2001* in respect of the post war allegations. Mr Lindberg sought an order that the second proceeding be permanently stayed. On 9 December 2009, I made an order permanently staying the second proceeding as an abuse of process.¹ ASIC appealed and on 9 February 2010, the Court of Appeal allowed the appeal and set aside the order that the second proceeding be

¹ *Re AWB Ltd No 10* (2009) 76 ACSR 181; [2009] VSC 566 (*Re AWB No 10*).

permanently stayed.²

6 On 24 February 2010, the Court made consent orders that the second proceeding be consolidated with the first proceeding and the consolidated proceeding continue as the first proceeding. The Court also ordered that by 24 March 2010 ASIC file and serve a consolidated statement of claim, and Mr Lindberg file and serve a limited defence to the consolidated statement of claim. Provision was made for a reply and the trial of the consolidated proceeding was adjourned sine die.

7 A directions hearing was fixed for 7 May 2010 but held on 3 June 2010. Mr Lindberg indicated that he had objections to the consolidated statement of claim. I requested the parties to continue their discussions to resolve as many as possible of Mr Lindberg's concerns. On 13 July 2010, at a further directions hearing, the Court was informed that many of Mr Lindberg's concerns had been addressed and were incorporated in a proposed amended consolidated statement of claim, but that several objections to the consolidated statement of claim that were retained in the amended consolidated statement of claim were still in issue between the parties.

THE PLEADINGS IN DISPUTE

8 The objections of Mr Lindberg fall into three categories. First, he initially objected to the amendments incorporated in paras 12B to 16B which deal with the nature and purpose of the inland transportation fees that it is alleged AWB paid to the Iraqi Grain Board (IGB). These objections have now been withdrawn in view of a statement by ASIC confirming certain matters that it is not alleging. Mr Lindberg no longer objects to the amendments. Mr Lindberg has sought that I construe these pleadings in light of the confirmations made by ASIC. ASIC submits that I should not give any advisory decision.

9 The second objection relates to allegations that Mr Lindberg knew certain things because he met with company officers who knew these matters and it can be inferred that these officers told Mr Lindberg what they themselves knew.

² *ASIC v Lindberg No 2* [2010] VSCA 19; (2010) 265 ALR 517.

10 Thirdly, objection is taken to pleadings relating to Project Rose.

11 Recently J Forrest J considered the purpose of pleadings in *Cohen v The State of Victoria*.³ I can do no better than to quote what he said:

(11) Nearly a century ago the High Court in *Gould v Mount Oxide Mines Ltd* said:

Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest. There is abundant authority for this even if the matter were required to rest on authority only.

(12) Seventy-five years later, in *Banque Commerciale SA, En liquidation v Akhil Holdings Ltd*, the High Court said:

The function of pleadings is to state with sufficient clarity the case that must be met. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities.

(13) In *Multigroup Distribution Services Pty Limited v TNT Australia Pty Limited*, Burchett J said:

The primary function (*of a statement of claim*) is to tell the defending party what the claim is that he has to meet. That is a matter of elementary and natural justice; the claim cannot be answered until it is known. When a sufficient defence has been filed to a sufficient statement of claim, a further function will generally have been performed – that of defining the question or questions for decision. This definition is required, of course, from an early stage, or else discovery and other interlocutory procedures are likely to prove misdirected, wasteful and unproductive. In order to achieve these fundamentals, a statement of claim must set out clearly, not just the

³ [2010] VSC 371.

bare claim that is made, but also 'the material facts on which it is based', including facts that, if not specifically pleaded might take the other party by surprise.

(14) In *Gunns Ltd & Ors v Marr*, Bongiorno J said of the rules of this Court and the role of pleadings:

The fundamental rule of pleading is contained, for this Court, in RSC r.13.02(1)(a) which requires every pleading to contain, in a summary form, a statement of all the material facts upon which a party relies, but not the evidence by which those facts are to be proved. That the pleading must allege material facts is fundamental. That they must be alleged with certainty follows from the principle stated that the pleading must convey a clear conception of the case being made. If it does not, it will be embarrassing in the sense that that word is used in this area of legal discourse and, in particular, for present purposes, in RSC r.23.02 and its predecessors both here and in England. The full Court of this Court has described a pleading as being embarrassing -

where the pleading is unintelligible, ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him.

(15) Finally, I should mention the recent scholarly and detailed analysis of the purpose and function of pleadings of Refshauge J in *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd*. In particular, his Honour said:

Whatever the result of this controversy, the system of formal pleadings is currently the way each party is given notice, reasonably precisely, of the case that it has to meet. Further, however, the pleadings do more, much more, than merely give notice of the case of the other party. Second, and equally importantly, they apprise the court of the issues so that it can manage the trial and all pre-trial interlocutory proceedings.

(16) In light of these statements of principle, in determining whether to permit Mr Cohen to rely upon V4 I need to be satisfied that:

(a) The defendants and the court have a clear understanding of the causes of action relied upon by Mr Cohen;

(b) The material facts giving rise to Mr Cohen's claim are alleged with sufficient clarity to enable the defendants and the Court to understand the case that is to be made out at trial by Mr Cohen;

(c) That the claim is made out with sufficient precision to enable the defendants not only to know the case that they have to meet, but also to negate any prospect of ambush at trial;

(d) That the "group" represented by Mr Cohen is identified as precisely as is practicable. (citations omitted).

12 In my opinion, for the reasons given below, the case against Mr Lindberg is made

with reasonable clearness. ASIC have clarified the pleadings in its memorandum of 12 August 2010. In my view, Mr Lindberg does know what is alleged against him. The pleading is not embarrassing in the sense referred to by Bongiorno JA.

13 Mr Lindberg may be of the view that the allegations do not disclose conduct by AWB that if revealed would damage AWB. In my view, that is a matter for the trial. The pleading summons is not the place to fight the trial.

14 I accept that the pleadings may not be easy to follow as there is not perfect symmetry between the conduct alleged against AWB, the conduct of AWB which, if revealed, would damage AWB and the conduct of AWB that Mr Lindberg is alleged to have known. I accept that careful analysis has to be carried out to reconcile these pleas. Nevertheless, so far as the proposed amendments are concerned, for the reasons given below I grant leave to ASIC to make the amendments sought.

PARAS 12B TO 15D

15 Mr Lindberg initially objected to the amended paragraphs 12B to 15D as he contends they were ambiguous and uncertain. He says that ASIC has clarified the ambiguities and uncertainties and on the basis of the clarifications made by ASIC he is prepared to withdraw his objections to the amendments.

16 Para 12B alleges that IGB imposed on AWB a fee “described as an inland transportation or trucking fee” in relation to the supply of wheat by AWB to Iraq that was payable in an internationally traded currency to an entity nominated by Iraq and not to the IGB. It is further alleged that the amount of the fee was not negotiated with, or otherwise explained or justified to, AWB by reference to any costs actually incurred in transporting wheat within Iraq. The fee is defined as “the purported inland transportation fee.”

17 Para 13 alleges that IGB also imposed a fee on AWB that was described as a payment for “after sales service” in relation to the sale of wheat by AWB to Iraq that was payable in cash in an internationally traded currency to an entity nominated by Iraq and not to the IGB. It is alleged that it was not negotiated with, or otherwise

explained or justified to, AWB by reference to any costs actually incurred in the provision of “after sales service” in relation to wheat supplied by AWB to Iraq. The fee is defined as “the purported after sales service fee.” Both fees were referred to as the purported fees.

18 Para 14 alleges that the written terms of each contract for the sale of wheat under certain phases of the Oil-for-Food Programme (the OFFP contracts) used expressions which suggested AWB had an obligation to deliver or transport wheat to all silos within the governorates of Iraq (the purported inland transport obligation).

19 Para 15 alleges that the purported inland transport obligation was a sham, in that contrary to the written terms of the OFFP contracts, neither AWB nor the IGB intended that AWB would deliver or transport or arrange to deliver or transport wheat within Iraq. Mr Lindberg says the alleged sham is the suggested contractual obligation *on AWB* (my emphasis) to deliver or transport wheat to all silos within the governorates of Iraq. He says there is no allegation that the fee described as an inland transportation fee was a sham obligation.

20 Para 15A alleges that the price payable to AWB pursuant to each of the OFFP contracts included the amount of the purported fees.

21 Para 15B alleges that AWB was paid out of the UN Escrow Account amounts that reflected the full contract price inclusive of the purported fees. It further alleges that AWB did not deliver or transport or arrange to deliver or transport any wheat to any silo within any Governorate of Iraq; and neither AWB nor any other person acting on its behalf provided any “after sales service” to Iraq in consideration for AWB’s receipt from the UN Escrow Account of the amount of the purported after sales service fees. Mr Lindberg says these allegations relate to AWB not doing things.

22 Para 15C alleges that in addition to, or as part of the OFFP contracts, AWB agreed to pay and in fact paid the purported fees to or at the direction of IGB.

23 Para 15D alleges that by reason of the matters alleged in paragraphs 12B to 15C:

- (a) the purported inland transportation fee was not a genuine fee for transport services provided to or by AWB; (Mr Lindberg says it is not alleged that these fees were not used for the purpose of funding the transport of wheat to silos within the governorates of Iraq);
- (b) the purported after sales service fee was not a genuine fee for any services provided to or by AWB; (Mr Lindberg says it is not alleged that it was not a fee to fund services associated with the discharge and transport of wheat to silos within the governorates of Iraq);
- (c) the purpose and effect of the purported fees was to enable the Government of Iraq to obtain payments of internationally traded currency from AWB, which payments the UN had called on its member states to prevent; and
- (d) the purpose and effect of the purported inland transportation obligation was to enable AWB to inflate the contract prices in the OFFP contracts by amounts equal to the purported fees paid to or at the direction of the IGB, and thereby to enable AWB to recover from the UN Escrow Account the amount of the purported fees paid, such recovery constituting payments that the UN had called on its member states to prevent.

24 In Mr Lindberg's submissions concerning the proposed amended consolidated statement of claim filed and served 5 August 2010 (Mr Lindberg's submissions), after referring to paragraph 15D he asserted that "it is not alleged that these fees were not for the purpose of funding the transport of wheat to silos within the governorates of Iraq." ASIC in its reply submissions filed and served 12 August 2010 (ASIC's reply submissions) says in response to this assertion by Mr Lindberg:

Such allegations are neither necessary nor relevant to the plaintiff's case against the defendant. The wrongdoing was complete when Iraq received the payments of internationally traded currencies from AWB. What Iraq did with the cash it received from AWB is irrelevant to the plaintiff's case. If, contrary to the plaintiff's submission, the defendant considers it relevant, it

is open to him to allege in his defence what Iraq did with the hard currency supplied to it by AWB and why what Iraq did with that currency provides him with a defence. He has not done this to date, despite the fact that this has been open to him since he first filed his defence.

25 This clarification is of some importance to Mr Lindberg. He contends:

ASIC has alleged in paragraph 10B(b) that the UN Resolutions called on member states to ensure nationals obtained payment from the Escrow account “only on account of goods supplied to the people or Government of Iraq under the Oil-for-Food Programme, to meet the humanitarian needs of the people of Iraq”. This inaccurately records the terms of the relevant UN Resolution 986 which establishes the Escrow Account and states that it is to be used to meet the humanitarian needs of the Iraqi population and for other specified purposes: see recitals and paragraphs 7-8 [ACB p.10]⁴

26 Mr Lindberg contends that if the inland transportation fee was in fact as it was described, which was a fee to cover the cost of transporting, then the payment of the cost of inland transporting of wheat to the Iraq people from the UN Escrow Account would not fall foul of the UN resolution as the distribution of the wheat would meet the humanitarian needs of the Iraqi population and not be prohibited by the UN resolution. Mr Lindberg points to the fact that ASIC does not allege the fees were not used for inland transportation of the wheat sold by the AWB to the IGB.⁵ Mr Lindberg contends that in the absence of such an allegation there is no allegation that the contractual allegations did enable recovery from the UN escrow account other than for the humanitarian needs of the people of Iraq.⁶ Mr Lindberg further contends that whether the inland transportation was performed by AWB or IGB has no bearing on whether or not the purpose of the payments out of the Escrow Account was for humanitarian purposes.⁷

27 ASIC for its part states that it is no part of its pleaded case that Mr Lindberg knew or ought to have known how the Government of Iraq spent the hard currency provided to it by AWB.⁸

28 Now whether or not Mr Lindberg’s contention is correct is not for me to decide at

⁴ It is not clear what ACB refers to.

⁵ Transcript 59 line 13.

⁶ Transcript 52 lines 14-23.

⁷ Transcript 57.

⁸ ASIC’s reply submission [11].

this point. What is relevant is that Mr Lindberg contends that now that the uncertainties about what was meant to be pleaded by the words “described” and “purported” have been clarified by ASIC that Mr Lindberg withdraws his objection to the amendments to these paragraphs.

29 Mr Lindberg also sought clarification about whether or not the UN was misled by the contracts presented to them. In Mr Lindberg’s submissions he asserted to ASIC:

It is not alleged that the UN did not know that transportation and after sales service fees were being paid and were included in the contracts throughout the relevant period. It is not alleged that Mr Lindberg knew that the UN had not been told that transportation fees and service fees were being paid. In the opening of this proceeding Mr O’Byrne confirmed that it is not alleged that Mr Lindberg knew that the UN had not been told certain things. (See 17 December 2009 T892).

30 ASIC clarified its case in its reply where it said:

Complaint: *It is not alleged that the UN did not know that transportation and after sales service fees were being paid or that the defendant knew that the UN had not been told that transportation fees and service fees were being paid.*⁹

10 Again, the plaintiff does not allege these things because these allegations are neither necessary nor relevant to the plaintiff’s case against the defendant for the same reasons as given above.

11 More generally, paragraphs 9 to 18 of the defendant's submissions are premised on a false understanding of ASIC's pleading. It is no part of ASIC's pleaded case that the defendant knew or ought to have known how the Government of Iraq spent the hard currency provided to it by AWB. The purpose of Resolution 661 was to ensure that the Government of Iraq did not have hard currency to spend. AWB's payment of the purported fees undermined that purpose. This 'vice' was complete once the Government of Iraq received the purported fees, as it did.

12 Similarly, the 'vice' attaching to AWB's extraction of funds from the UN Escrow Account on account of the purported fees does not depend upon the ultimate use to which those purported fees were put by the Government of Iraq. Resolution 986 made clear that the funds in the UN Escrow Account were only to be used (relevantly) for the purchase of humanitarian goods under the Oil-for-Food Programme.¹⁰ Payment to AWB on account of fictional fees and fictional transport obligations was not for that purpose.

13 Whether or not the UN was aware that funds were being siphoned out of the UN Escrow Account and given over to the control of the Government of Iraq is irrelevant. The relevant question is whether the revelation of AWB's

⁹ See paragraph 15 of the defendant’s submissions.

¹⁰ See paragraph [10B] of the CSOC.

participation in these 'vices' was likely to cause harm to the company.

14 ASIC does not seek to prove that the defendant was aware of the precise contractual terms submitted to the UN¹¹, nor of every matter giving rise to the matters alleged in paragraph 15D of the ACSOC. It is sufficient to allege (as ASIC does) that the defendant knew that the purported fees were being paid to the Government of Iraq in internationally traded currencies and then recovered by AWB from the UN Escrow Account, and that he took no adequate steps to prevent this occurring, or to ensure that the UN was aware of this and approved of it.

31 Thus Mr Lindberg contends that this clarification makes it clear that it is not alleged by ASIC that the UN was misled by AWB.

32 Mr Lindberg also submitted to ASIC that ASIC has not alleged that Mr Lindberg was aware of all these pieces of knowledge; and that there is no basis to allege that the contractual arrangements enabled recovery from the Escrow account other than for the humanitarian needs of the people of Iraq as alleged in paragraph 15D(d).

33 ASIC responded as follows:

Complaint: ASIC has not alleged that the defendant was aware of all these "pieces of knowledge".¹²

(4) The matters set out in the preceding paragraph are repeated. It is not necessary for ASIC to plead or to prove that the defendant was aware of all aspects of the 'OFFP vices' alleged in paragraphs 12B - 15D.

(5) The plaintiff has pleaded that the defendant knew or had the means of knowing the matters which are essential to its allegations of breach of duty, namely AWB's payment to Iraq of internationally traded currencies through the imposition and payment of the purported fees (i.e. it supplied Iraq with wheat and cash in various international currencies) and its recovery of those improper cash payments from the UN Escrow Account¹³. The plaintiff's case is that the defendant's knowledge of those matters alone is sufficient to give rise to the breaches of duty alleged.

34 Mr Lindberg submits that ASIC does not allege that Mr Lindberg knew of the matters alleged in paragraphs 14 and 15. Rather, of the elements of AWB's alleged misconduct alleged in paragraphs 12B to 15D, ASIC only allege Mr Lindberg knew

As an aside, and contrary to [12] of the defendant's submissions, the matters now sought to be pleaded at paragraph 14 of the ACSOC are not pleaded 'for the first time' - substantially the same matters have previously been pleaded in ASIC's replies dated 27 October 2009 and 4 May 2010.

¹² See paragraphs 11(a) and 16 of defendant's submissions.

¹³ See paragraphs 30(e) and 40(a) to (e) of the ACSOC.

essentially the matters alleged in paragraph 30(e) and 40(a)-(e) and that is essentially that payments were being made to Iraq other than in Iraqi dinars and that payments were being made other than for humanitarian goods as opposed to other than for humanitarian needs.¹⁴

35 ASIC has urged me not give an advisory opinion. I do not propose to do so. I do find, however, that the pleading in the proposed amended consolidated statement of claim should be read and construed in light of the exchange of memoranda between Mr Lindberg and ASIC as referred to above. Mr Lindberg is entitled to understand the case against him. That case has been clarified by ASIC and that is the case he now has to meet and no other.

EXTRACT TO AMENDED CONSOLIDATED STATEMENT OF CLAIM

36 At the hearing on 26 August 2010, ASIC indicated it might seek to make further amendments to the Amended Consolidated Statement of Claim (ASOC) to clarify its allegation that the alleged purported fee was not a genuine fee.

37 On 27 August 2010, ASIC filed and served the proposed amendments along with a submission of that date. On 31 August 2010, Mr Lindberg filed supplementary submissions in opposition. Mr Lindberg indicated he did not wish to make further oral submissions.

38 ASIC wishes to add to paragraph 12B: “that was not a genuine fee for transport services provided to or by AWB”; and to paragraph 13: “that was not a genuine fee for any service provided to or by AWB.” ASIC seeks to delete from paragraph 15D the allegations that (a) the purported inland transportation fee was not a genuine fee for transport services provided to or by AWB; and (b) the purported after sales service fee was not a genuine fee for any service provided to or by AWB.

39 The amendments are significant, as paragraph 40 alleges that Mr Lindberg knew of the matters pleaded in paragraph 12B, 13 and 16B(a) (which allege Alia played no

¹⁴ Transcript 81.

role in the transport of wheat) and thus that the ultimate effect of the purported fees was to enable the IGB and/or the Government of Iraq to obtain internationally traded currency from the UN Escrow Account to which they were not entitled.

40 ASIC submits that it is deeply concerned by Mr Lindberg's oral submissions on 26 August 2010 to the effect that he understands that ASIC has conceded that the purported fees were not a sham and were in fact genuine fees for transportation and related services.

41 ASIC says that it appears that because the word "sham" or the words "not genuine" or something similar do not appear in the descriptions of the purported fees in paragraphs 12B and 13 of the ACSOC, Mr Lindberg considers that ASIC no longer alleges that the fees were not genuine. On this basis, ASIC says that the defendant erroneously submits that the characteristics of the purported fees pleaded at paragraphs 12B(a) to (c) and 13(a) to (c) of the ACSOC are irrelevant to ASIC's case.

42 ASIC contends that the characteristics of the purported fees pleaded at paragraphs 12B(a) to (c) and 13(a) to (c) of the ACSOC were added by ASIC in response to the defendant's complaint that the pleading did not identify in what respects the purported fees were alleged to be a 'sham' or 'not genuine'. That is, instead of merely alleging that the fees were 'not genuine', and that the defendant knew that the fees were 'not genuine', ASIC now pleads in greater detail the characteristics of the fees that meant they were not genuine. In later paragraphs (e.g. paragraph 40) it is alleged that the defendant knew those characteristics.

43 Mr Lindberg contends that the 27 August amendments to paragraphs 12B and 13 are embarrassing. He says paragraph 12B(a) pleads that the IGB imposed a fee "that was described as an inland transport fee in relation to the supply of wheat by AWB to Iraq." He argues that the new allegation that AWB was not to provide or receive transport services in paragraph 12B(d) adds nothing to the allegations in paragraph 12B. He says that the allegation that AWB was not providing or receiving transport services is not inconsistent with the inland transport fee being used to cover the cost

of transport of wheat to silos in the governorates of Iraq to satisfy the humanitarian needs of the people of Iraq. Accordingly, it does not constitute an allegation that the inland transport fee was not genuine or was not a sham and ought not be included in paragraph 12B for that purpose.

44 He contends that the allegation sought to be added to paragraph 12B(d) is properly pleaded in paragraph 15D(a) as it relates to the “sham” obligation pleaded in paragraphs 14 and 15, of which it is not alleged the defendant had knowledge. It is not appropriate to move that allegation to paragraph 12B where ASIC alleges that the defendant had actual knowledge of the matters alleged in paragraph 12B.

45 He says that the same comments apply in relation to paragraph 13(d) of the 27 August amendments in respect of the after-sales service fees associated with the distribution of wheat within Iraq.

46 He contends that in paragraphs 3 and 5 of its 27 August submissions, ASIC asserts that it now alleges that the fees were not genuine (in paragraph 12B and 13) and that the defendant knew they were not genuine (in paragraph 40). However, for the reasons set out above, the proposed amendments to the consolidated claim do not allege that inland transport fees were not used in relation to the transport of AWB wheat within Iraq. This is consistent with ASIC’s statement and submission in paragraph 9 of its reply submissions dated 12 August 2010 that it is not part of ASIC’s case that the inland transport fees were not used in relation to the transport of AWB wheat within Iraq.

47 Mr Lindberg contends that in these circumstances, the 27 August amendments should not be allowed. He says that the court should only grant leave to amend paragraph 12B and 13 of the proposed consolidated claim on the basis that those paragraphs do not allege that the inland transport fees and after sales service fees were not genuinely to be used for the transport of wheat, or other after sales services, within Iraq.

DISCUSSION

48 In order to consider the competing submissions, it is convenient to examine alleged relevant contraventions of the *Corporations Act 2001*. The alleged contraventions of the *Corporations Act 2001* are broken up under several headings. The first are under the heading of the “Arthur Andersen Report.” Under that heading ASIC alleges that Mr Lindberg has contravened ss 180 and 181 of the *Corporations Act 2001*. Both alleged contraventions rely on the same alleged conduct.

49 Each contravention itself relies on two alternate allegations of conduct. The first rely on the allegation that he had knowledge of certain matters and the alternate on the basis that if he did not have knowledge of each of those matters.

50 Accordingly, for simplicity’s sake I will deal with the alleged contravention of s 180 on the basis that he had knowledge of certain matters as alleged.

51 It is alleged that Mr Lindberg contravened s 180 of the *Corporations Act 2001* as he failed to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they were an officer of a corporation in AWB’s circumstances and occupied the office held by Lindberg and had the same responsibilities as Lindberg.

52 ASIC alleges he did so by failing to:

- (a) investigate and follow up on the material findings made by the Arthur Andersen Report;
- (b) ensure that AWB was not engaging in conduct that the UN Resolutions had called on member states to prevent, and in particular conduct that would, or would be likely to, result in:
 - (i) the payment of internationally traded currency to the Government of Iraq by means of transactions of the kind alleged in paragraphs 12B and 13 above; or
 - (ii) the receipt by AWB of payment from the UN Escrow Account other

than on account of OFFP humanitarian goods; and

- (c) inform or advise the audit committee, the CRRC or the Board, or any member of the audit committee, the CRRC or the Board, of the existence of and/or the material findings of the Arthur Andersen Report as alleged in paragraph 29 above.

53 ASIC alleges that by reason of his position as Managing Director, the matters alleged in paragraphs 3 to 3D inclusive above, the circumstances pertaining to AWB alleged in paragraphs 4 to 26 inclusive above, and his knowledge alleged in paragraphs 30 to 32 inclusive above, at all times from February 2001, Lindberg had the duty to do so.

54 ASIC alleges that at all times in and after mid 2000, Mr Lindberg knew:

- (a) Each of the matters alleged in paragraphs 24 to 26 inclusive above; and that
- (b) AWB's wheat sales to Iraq constituted a substantial part of AWB's overall annual wheat sales and were highly profitable for AWB and that therefore, commercially, Iraq was a crucial market for AWB;
- (c) The United Nations had called on Australia, as a member state, to ensure that Australian nationals (including corporations registered in Australia) acted in accordance with the UN Resolutions including by:
 - (i) preventing the payment by Australian nationals of internationally traded currency to the Government of Iraq;
 - (ii) ensuring that Australian nationals obtained from the UN Escrow Account only on account of OFFP humanitarian goods;
- (d) AWB had chosen to participate in the Oil-for Food Programme as a supplier of OFFP humanitarian goods, whereby AWB's sales of wheat to Iraq under the Oil-for-Food Programme were subject to scrutiny and authorisation by the United Nations; and

(e) In the circumstances alleged in subparagraphs (a), (b), (c) and (d) above, the revelation of any conduct by AWB that had resulted in:

(i) the payment of internationally traded currency to the Government of Iraq by means of transactions of the kind alleged in paragraphs 12B and 13 above; or

(ii) the receipt by AWB of payment from the UN Escrow Account other than on account of OFFP humanitarian goods;

would cause, or would be likely to cause, substantial and enduring harm to AWB of the kind alleged in paragraph 27 above.

55 ASIC alleges that Arthur Anderson produced a report and that it stated various matters about wheat sales to Iraq. It is not expressly alleged that Mr Lindberg knew that the report stated those matters. There are no allegations that he read the report or was informed of its contents. On the other hand, the particulars of the matters he is alleged to have known rely on the matters particularised in paragraph 29.

56 It can be seen therefore that the alleged contravention of the *Corporations Act 2001* does rely on Mr Lindberg knowing that the revelation of either matters about *payments* to the Government of Iraq or matters about the *receipt* by AWB of payments from the UN Escrow Account would, or was likely to, cause damage to AWB.

57 As to the revelation of matters about payments to the Government of Iraq, ASIC relies on two elements being the *payment* of internationally traded currency to the Government of Iraq and secondly the *means* by which the payments were made, in particular by means of transactions of the kind alleged in paragraphs 12B and 13.

58 The kind of transactions that it is alleged Mr Lindberg knew if revealed would or was likely to cause damage to AWB are ones where IGB imposed a fee on AWB:

(a) that was described as an inland transportation or trucking fee in relation to the supply of wheat by AWB to Iraq;

- (b) the amounts were denominated in internationally traded currency fixed from time to time in steadily increasing amounts and not negotiated with or otherwise explained or justified to AWB by reference to any costs actually incurred in transporting wheat within Iraq; and
- (c) that was payable in cash or in an internationally traded currency to an entity nominated by Iraq and not to the IGB.¹⁵

59 Similar allegations are made in paragraph 13 about the “after sales service fee”.

60 I understand ASIC to be alleging that so far as the *payment* to the Government of Iraq was concerned the damage would, or was likely to, be caused to AWB by not merely the revelation of the payment but also necessarily the means by which the payments were to be made. As discussed above, the means were as defined in paragraph 12B. In other words, both elements need to be revealed before ASIC alleges damage would, or was likely to, be caused to AWB.

61 ASIC now proposes to amend paragraph 12B so that the means of payment also include the characteristic that the fee imposed was not a genuine fee for transport services provided to or by AWB. In other words, to make good the alleged contravention by Mr Lindberg ASIC must also establish that Mr Lindberg knew that revelation of the *means of payment*, including this characteristic, would, or was likely to, cause damage to AWB.

62 ASIC, in its written submissions of 27 August 2010, make clear that its case, in so far as it relies on Mr Lindberg’s knowledge, relies in establishing Mr Lindberg knew not only of the payment but also of the means of payment and that these means included that the fee imposed was not a genuine fee for transport services provided to or by AWB.

63 The importance of the allegation is made clearer in relation to the contraventions of the Act alleged under the heading “The Iraq Trip Report and purported fees.” In

¹⁵ [12B].

that plea it is alleged that Mr Lindberg knew of the matters alleged in paragraph 12B.¹⁶

64 Thus ASIC make it clear that its case relies on Mr Lindberg not only knowing of the payments but of the means by which the payments were made including the proposed amendment that the fee imposed was not a genuine fee for transport services provided to or by AWB.

65 As indicated above, Mr Lindberg contends in his written submissions of 31 August 2010 that the amendments to paragraphs 12B and 13 are embarrassing. He says paragraph 12B(a) pleads that the IGB imposed a fee “that was described as an inland transport fee in relation to the supply of wheat by AWB to Iraq.” The new allegation that AWB was not to provide or receive transport services in paragraph 12B(d) adds nothing to the allegations in paragraph 12B. Mr Lindberg contends the allegation that AWB was not providing or receiving transport services is not inconsistent with the inland transport fee being used to cover the cost of transport of wheat to silos in the governorates of Iraq to satisfy the humanitarian needs of the people of Iraq.

66 That may be the case. But ASIC is entitled to allege the contravention of the Act, in this instance, involves Mr Lindberg knowing two matters. That is, it was the revelation of the payments to the Government of Iraq and of the means of payment, that would likely cause damage to AWB. ASIC is entitled to allege that those means include the characteristic that the inland transportation fee imposed was not a genuine fee for transport services provided to or by AWB.

67 I do not accept the plea is embarrassing.

OBJECTION TO PARAGRAPHS 13 & 14 OF PARTICULARS

68 Mr Lindberg objects to the amendments to the particulars in schedule A. In Schedule A the plaintiff relies on the matters set out therein to support an inference that Mr Lindberg knew, or alternatively had the means of knowing, various matters

¹⁶ [40(d)].

alleged in the consolidated statement of claim.

69 In summary, ASIC alleges that:

- (a) Flugge, Geary, Ingleby and Stott (*the senior executives*) were each aware of the separate matters alleged in paragraphs 40, 51 and 63 (paragraph 13 of the proposed Schedule A); and
- (b) because the defendant “met regularly with each of [the senior executives]...to discuss matters associated with AWB’s trade to Iraq”, the court should infer the defendant was told by one or more of the senior executives each of the separate matters alleged in paragraphs 40, 51 and 63 during the relevant period: see paragraph 14 of the proposed Schedule A.

70 Particular 13 provides:

Each of Trevor Flugge, Peter Geary, Paul Ingleby and Charles Stott knew the matters alleged in:

(a) paragraph 40 of the consolidated statement of claim, at all times in and after February 2001; and

each of Geary, Ingleby and Stott knew the matters alleged in

(b) paragraph 51 of the consolidated statement of claim, at all times in and after November 2002, and

(c) paragraph 63 of the consolidated statement of claim, at all times in and after November 2002.

71 Thereafter there are 58 pages of particulars. For example, it is particularised that Flugge’s knowledge of the matters particularised in paragraph (a) is to be inferred from further matters particularised (and which are then identified in certain paragraphs from the 239 that follow). This procedure is followed for each of the named officers.

72 Particular 14 provides:

During the period in which Lindberg was an officer of AWB, he met regularly with each of Flugge (until at least March 2002), Geary, Ingleby and

Stott (the senior employees) to discuss matters associated with AWB's trade with Iraq, which was a crucial market for AWB. The Plaintiff refers to and repeats the matters alleged at paragraphs 3(b), (d), (e) and (g), 11A, 12, 49A and 50 of the Amended Consolidated Statement of Claim including the particulars thereto, and the matters particularised at paragraphs 2, 3, 4, 5, 8, 9, 10, 20, 35, 41, 43, 56, 57, 59 and 63 of this Schedule A.

Having regard to the subject matter addressed at those meetings, as recorded in the minutes and other records thereof; the matters known to the senior employees, as particularised in paragraph 13 above; and the content of other communications passing between the senior employees and Lindberg, as particularised at paragraphs 15, 17A, 51 and 62 herein, it is to be inferred that:

(a) from February 2001, Lindberg was told by one or more of the senior employees of the matters alleged in paragraph 40 of the statement of claim;

(b) from November 2002, Lindberg was told by one or more of the senior employees of the matters alleged in paragraphs 51 and 63 of the statement of claim.

73 It can be seen therefore that it is alleged that Mr Lindberg was told by one or more of the senior employees of the matters alleged in paragraph 40 of the statement of claim and that from November 2002 Mr Lindberg was told certain things. The particulars allege that the fact of Mr Lindberg being told is to be inferred. There is no allegation of any communication whereby any of these senior employees so told.

74 The particulars also make clear that the knowledge of the senior employees is also to be inferred. There are several pieces of knowledge alleged in paragraphs 40 and 51 of the CASOC. Nevertheless, the particulars do not purport to identify which particulars are relied on to establish knowledge of each pleaded piece of knowledge alleged to be held by a particular senior officer.

75 The second further amended statement of claim, which was the pleading of ASIC at the commencement of the trial, included a Schedule A being particulars of Mr Lindberg's knowledge of material matters. The particulars did not include an allegation that Mr Lindberg knew something, because it could be inferred that he was told that piece of information by a senior employee, who it was alleged knew that piece of information by reason of it being inferred from other matters. Although the allegation that Mr Lindberg knew the matters pleaded in para 40 is not new, the

proposed amendment to the particulars to include 13 and 14 are new.

76 Mr Lindberg submits that the allegations in these paragraphs cannot be maintained. He says ASIC are seeking to allege that the court should infer that the defendant acquired actual knowledge of particular matters because of what he “was told” by Flugge, Geary, Ingleby and Stott. However, ASIC has not alleged, in respect of each item of knowledge, what the defendant was told, when he was told, by whom he was told or in what circumstance.

77 It is evident from ASIC’s opening that there were a number of other senior executives at the meetings, for example Messrs Beaumont and Goodacre and Ms Scales. There is no evidence from Mr Beaumont in relation to these matters at all. The statements of Mr Goodacre and Ms Scales do not indicate they were made aware of any such matters or that they informed the defendant of them during their meetings with him.

78 Mr Lindberg contends ASIC is asking the court undertake the impermissible task of speculating or engaging in conjecture about what might have been discussed at unspecified meetings and what the defendant might have learnt from them.¹⁷

79 Mr Lindberg contends that paragraphs 13 and 14 introduce over 60 pages of new particulars (239 individual paragraphs) from 1995 to 2005 involving the alleged knowledge of four different people in addition to the defendant. He says the investigation of all these matters will delay significantly this matter coming on for trial.

80 In my opinion, the particulars are not objectionable. Mr Lindberg knows the case he has to meet. He is alleged to have known certain matters. It is alleged he was told these matters. One of the basis upon which this allegation is to be made out is that senior executives who he met with knew and it may be inferred they told him.

¹⁷ Mr Lindberg refers to *Caswell v Powell Duffry Associated Collieries Ltd* [1940] AC 152; *Nicholson v Knaggs* [2009] VSC 64.

81 Mr Collins says that is mere speculation. In my view that is a matter for trial. The
evidence led may lead to that inference being open. It may not. What is important is
that Mr Lindberg knows the allegation against him. He knows the officers who it is
alleged told him certain matters. He knows the basis on which their own knowledge
is alleged.

THIRD OBJECTION:

82 Mr Lindberg objects to leave being granted to amend paragraphs 73, 78 and 84 of the
proposed claim.

83 In oral submissions, Mr Lindberg conceded paragraph 73 in itself probably is not
objectionable.

84 He argues that 78 is objectionable as it alleges that Mr Lindberg knew the matters
alleged in paragraph 75. The particulars of knowledge to paragraph 78 in the second
paragraph refer to the matters particularised in, inter alia, paragraph 75.

85 Mr Lindberg submits that particulars of knowledge of a matter can not include the
very allegation of knowledge.

86 This may very well be correct. To that extent ASIC have not given a meaningful
particular. Other particulars are given and Mr Lindberg has been informed of the
allegation he has to meet.

87 In my opinion, the objections made do not give rise to any prejudice to Mr Lindberg.
He has been informed of the case he has to meet. The fact that in the opinion of
Mr Lindberg some particulars alleged do not advance ASIC's case is a matter he can
raise at the trial.

CONCLUSION

88 For these reasons, I allow the proposed amendments including those in the extract.

CERTIFICATE

I certify that this and the 22 preceding pages are a true copy of the reasons for Judgment of Robson J of the Supreme Court of Victoria delivered on 8 October 2010.

DATED this eighth day of October 2010.

.....
Associate