

FEDERAL COURT OF AUSTRALIA

Lynx Engineering Consultants Pty Ltd v The ANI Corporation Limited trading as ANI Bradken Rail Transportation Group (No. 2) [2009] FCA 363 (17 APRIL 2009)

May 2009

In 2006 Lynx commenced these proceedings by way of an application for pre trial discovery against Worley Parsons. Subsequently, Lynx issued a Statement of Claim against the Respondents variously claiming misuse of confidential information, infringement of copyright and misleading and deceptive conduct. After extended delays in the matter, these 2 applications were brought by the 2 Bradken company Respondents and Worley Parsons seeking to strike out substantial parts of the Statement of Claim. Collectively, the bases of the strike out applications were:

1. that the Statement of Claim:
 - (i) disclosed no reasonable cause of action; and
 - (ii) had a tendency to cause prejudice, embarrassment or delay in the proceedings;
2. that the claims for misuse of confidential information should be dismissed by reason of the disclosures of the relevant information made in the applicable patent application, a published journal article and otherwise by public use of Lynx's own railway wagon;
3. that the claims for copyright infringement be struck out by reason of application of the defence commonly referred to as the "copyright-design overlap" defence.

The Bradken parties claimed that despite many attempts on their part to secure adequate pleadings from Lynx, Lynx had after 3 years still failed to properly plead a cause of action.

The Court accepted the submissions of the Respondents in respect of the breach of confidential information and breach of copyright claims and ordered that the entire Statement of Claim be struck out. The Court did not make specific findings in respect of the Applicant's claims based on detinue, conversion or breaches of the *Trade Practices Act*.

In its reasons, the Court noted that the current summary judgment provisions of the *Federal Court Act* impose a lower standard than was previously laid down under a series of High Court decisions. The current test for a strike out application brought by a respondent is that the proceeding or relevant part of the proceeding may be struck out if it has "no reasonable prospect of [success]". Effectively the Court does not (now) need to be satisfied that the case is "hopeless" or "bound to fail" for it to have "no reasonable prospect of [success]".

The proceedings involved claims by Lynx against the various Respondents for misuse of confidential information and breach of copyright in drawings made available by Lynx to ANI and the Bradken companies during an earlier tender in which Lynx and these Respondents were involved.



In response to Lynx's Statement of Claim, the Bradken Respondents had issued requests for further and better particulars of the Amended Statement of Claim, Lynx's responses to which were found by the Court to have been "very incomplete". In response to the numerous requests for further and better particulars, Lynx had invariably responded with the statement that:

"The Applicant is presently unable to provide further particulars but may do so after discovery and/or interrogatories herein".

In essence, the Respondents' case for strike out was based on the following submissions:

1. The claim for breach of confidence must identify the information that is claimed as confidential and how it has been misused. Neither of these aspects was identified in the Statement of Claim.
2. A claim for copyright infringement must plead:
 - (i) the matters over which copyright is asserted, and
 - (ii) the exact manner in which the copyright has been infringed.
3. The claims for misleading and deceptive conduct (section 52) and misrepresentation (section 53) under the Trade Practices Act both require a misrepresentation to be conveyed. The pleadings do not reveal what the misrepresentation is and how it was conveyed.

Lynx submitted that it was not able to provide all of the detail required by the Respondents and that much of this information was solely within the knowledge of the Respondents.

The Court held in favour of the Respondents and ordered that the Statement of Claim be struck out. The Court did however grant leave to Lynx to replead its case within 6 weeks of the orders. On the basis of the deficiency in pleading considerations of the strike out applications, it was unnecessary for the Court to deal with the question of whether or not the Applicant's case was ultimately arguable.

This case makes clear a number of principles of pleading in cases involving claims of misuse of confidential information, infringement of copyright, misleading and deceptive conduct and misrepresentation.

1. In cases claiming misuse of confidential information, it is essential that the applicant identify with some precision or specificity the information said to be confidential and the content of use sought to be attacked. General or global claims of confidentiality will be insufficient to found relief.

Here the Court held that Lynx had failed to precisely identify what information was claimed to be confidential and what misuse of that information was alleged to have occurred. The Court did not make any specific findings based on what the Bradken Respondents claimed as being grounds for the relevant information claimed to be confidential not being confidential, namely the alleged disclosure of the information in the patent specification and published journal.

2. Where infringement of copyright is claimed, the applicant must identify those works in which copyright is claimed to subsist and the conduct or action which it is claimed infringes the applicant's copyright.

Here the Court held that Lynx had not pleaded the basis on which it contends that copyright subsists in the relevant works, what works had been reproduced or on what basis the Respondents' activities amounted to an infringement of copyright.

3. As for claims of misleading and deceptive conduct and misrepresentation under section 52 and section 53 of the Trade Practices Act, respectively, the pleadings must assert how it is that the alleged wrongful conduct constitutes a breach of each section.



As to Lynx's claims for misleading and deceptive conduct and misrepresentation (which were based on the conduct of the Respondents in producing a railway wagon which bore an alleged resemblance to Lynx's railway wagon) the Court held that the pleadings were deficient because they did not claim the falsity of any representation being made by the Respondents nor how any relevant representation was misleading.

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FURTHER INFORMATION

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