

**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION**

No. S CI 2010 05318

BETWEEN

**ERIN DOWNIE**

Plaintiff

and

**SPIRAL FOODS PTY LTD (ACN 006 292 780) & ORS**  
(according to the attached Schedule)

First Defendant

**FIRST DEFENDANT'S FURTHER AMENDED DEFENCE TO THE PLAINTIFF'S  
AMENDED STATEMENT OF CLAIM**

---

Date of document: 22 March 2013  
Filed on behalf of the first defendant

Prepared by:  
Hunt & Hunt  
Level 26, 385 Bourke Street  
Melbourne VIC 3000  
Contact: Nieva Connell  
Email: nconnell@hunthunt.com.au

Solicitor's code: 9325  
DX: 252 Melbourne  
Tel: (03) 8602 9200  
Fax: (03) 8602 9299  
Ref: NAC:9530127

---

In answer to the plaintiff's amended statement of claim dated 21 December 2012, the first defendant says as follows:

1. It does not plead to paragraph 1 thereof as it contains no allegations of fact.
2. It does not plead to paragraph 2 thereof as it contains no allegations of fact.
3. It does not admit the allegations made in paragraph 3 thereof.
4. It admits the allegations made in paragraph 4 thereof.
5. It does not plead to the allegations made in paragraph 5 thereof as it contains no allegation against it.
6. It does not plead to the allegations made in paragraph 6 thereof as it contains no allegation against it.
7. It does not admit the allegations made in paragraph 7 thereof.
8. As to paragraph 8 thereof:
  - (a) It admits the allegations made in paragraph 8(a).
  - (b) It admits the allegations made in paragraph 8(b).
  - (c) It denies each and every allegation made in paragraph 8(c).

9. As to paragraph 9 thereof:

(a) As to paragraph 9(a):

(i) It admits that on or about 24 December 2009 it voluntarily recalled Bonsoy from sale in Australia as a result of a request for it to do so by the Victorian Department of Health who informed it that tests had shown the presence of "very high levels of iodine" in Bonsoy.

**Particulars**

The request was written and constituted by a facsimile from the Victorian Department of Health to it dated 23 December 2009, a copy of which may be inspected at the offices of the first defendant's solicitors.

(ii) It otherwise denies each and every allegation made in paragraph 9(a).

(b) It refers to and repeats paragraph 9(a)(i) above and otherwise denies each and every allegation made in paragraph 9(b).

(c) It admits the allegations made in paragraph 9(c).

10. It denies each and every allegation made in paragraph 10 thereof.

11. It denies each and every allegation made in paragraph 11 thereof.

12. As to paragraph 12 thereof:

(a) It does not admit that the intermediate suppliers supplied Bonsoy to the plaintiff or group members, and otherwise admits the allegations made in paragraph 12(a).

(b) It does not admit that the plaintiff and group members acquired Bonsoy but admits that, if they did so, then they did so for the purpose of drinking or otherwise consuming it as alleged in paragraph 12(b).

(c) It does not admit that the plaintiff and group members acquired Bonsoy but admits that, if they did so, then the purpose for which the plaintiff and group members acquired Bonsoy was, by implication, made known to it as alleged in paragraph 12(c).

(d) It denies each and every allegation made in paragraph 12(d).

(e) It admits the allegations made in paragraph 12(e).

(f) It admits the allegations made in paragraph 12(f).

(g) It admits the allegations made in paragraph 12(g).

13. It admits the allegations made in paragraph 13 thereof.

14. It admits the allegations made in paragraph 14 thereof.

15. It denies each and every allegation made in paragraph 15 thereof.

16. It denies each and every allegation made in paragraph 16 thereof.
17. As to paragraph 17 thereof: It refers to and repeats paragraphs 12(a), 13 and 14 above.
18. It denies each and every allegation made in paragraph 18 thereof.
19. It denies each and every allegation made in paragraph 19 thereof.
20. It denies each and every allegation made in paragraph 20 thereof.
21. As to paragraph 21 thereof: It refers to and repeats paragraphs 12(a), 13 and 14 above.
22. It denies each and every allegation made in paragraph 22 thereof.
23. It denies each and every allegation made in paragraph 23 thereof.
24. It denies each and every allegation made in paragraph 24 thereof.
- 24.1 If a period of three (3) years from the date of discoverability, as defined in s87G of the TPA, of the injury suffered by any group member had expired by the date of the commencement of this proceeding, the court must not award personal injury damages in respect of the injuries suffered by that group member pursuant to s74B, s74D or s75AD of the TPA by reason of the operation of s87F of the TPA.
25. As to paragraph 25 thereof:
  - (a) It admits the allegations made in paragraph 25(a).
  - (b) It admits the allegations made in paragraph 25(b).
  - (c) It admits that during the period it promoted Bonsoy as a healthy product and otherwise denies paragraph 25(c). ~~It denies that it promoted Bonsoy as a safe product and otherwise does not admit the allegations made in paragraph 25(c).~~
26. It does not admit the allegations made in paragraph 26 thereof.
27. It denies each and every allegation made in paragraph 27 thereof.
28. Save that it admits that sometime after December 2009 Bonsoy was reformulated to remove kombu, it does not admit the allegations made in paragraph 28 thereof.
29. It denies each and every allegation made in paragraph 29 thereof.
30. As to paragraph 30 thereof:
  - (a) It admits that it was, during the period and for many years prior to the period, in the business of promoting and distributing food that it identified and described to the public as healthy and otherwise denies paragraph 30(a). ~~It does not admit the allegations made in paragraph 30(a).~~
  - (b) It denies each and every allegation made in paragraph 30(b).

- (c) It admits that it promoted Bonsoy to the public, intermediate suppliers, dieticians, nutritionists and naturopaths as healthy and otherwise denies paragraph 30(c). It does not admit the allegations made in paragraph 30(e).
- (d) It admits that it knew that Bonsoy contained kombu and otherwise does not admit the allegations made in paragraph 30(d).
- (e) It does not admit the allegations made in paragraph 30(e).
- (f) It does not admit the allegations made in paragraph 30(f).
- (g) It does not admit the allegations made in paragraph 30(g).
- (h) It does not admit the allegations made in paragraph 30(h).
- (i) As to paragraph 30(i):
  - (i) It admits that a press release dated 26 April 2004 issued by the New Zealand Food and Safety Authority titled "*NZFSA releases Total Diet Survey and other residue monitoring programme results*" stated, among other things, that "*A soy milk product line that used kelp as flavouring had high levels of iodine. However, proper procedures were followed and the relevant overseas authority alerted, which then dealt with the issue. The manufacturer immediately ceased production and re-formulated the product line*".
  - (ii) It did not distribute food products in New Zealand at the time the press release was issued.
  - (iii) It otherwise does not admit the allegations made in paragraph 30(i).
- (j) As to paragraph 30(j):
  - (i) It admits that an article by Ms O'Connell and others in the Australian and New Zealand Journal of Public Health 2005 (Volume 29 No. 6) at 511 titled "*A cluster of thyrotoxicosis associated with consumption of a soy milk product*" concluded that this "*cluster of thyrotoxicosis was found to be associated with the consumption of a soy milk product high in added iodine...*".
  - (ii) It otherwise does not admit the allegations made in paragraph 30(j).
- (k) It otherwise denies each and every allegation made in paragraph 30.

31. As to paragraph 31 thereof:

- (a) Save that on or about 8 June 2006, a Ms Megan Tudor sent an email to it in which she stated: "*Hi Paul, Not wanting to sound like a dog with a bone, however as a matter of priority I require some nutritional facts for my Endocrinologist who is treating my ongoing condition. Can you please advise a level of Komba [sic.] in Bonsoy the iodine content of Komba [sic.] itself plus iodine level of Bonsoy overall.*"

*Thankyou in anticipation of prompt response prior to next Wednesday”, it does not admit paragraph 31(a).*

**Particulars**

Marusan's discovered document 26.

- (b) It admits the allegations in paragraph 31(b) and says further that on or about 9 June 2006, it sent an email to Muso which included the words quoted in paragraph 31(b) and then also included the following words *“Can you tell me. – Level of Kombu in Bonsoy Iodine level of Kombu Iodine level of Bonsoy ingredients all together. Thanks very much for your help. I guess we will see you all here soon.”*

**Particulars**

Marusan's discovered document 26.

- (c) It admits the allegations made in paragraph 31(c).
32. As to paragraph 32 thereof:
- (a) On or about 7 July 2006, Japan Food Research Laboratories conducted an analysis of a sample of Bonsoy which recorded that the sample contained 3.0mg/100g of iodine.
  - (b) It otherwise does not admit the allegations made in paragraph 32.
33. As to paragraph 33 thereof:
- (a) On 29 October 2007, Kimberley Norton from the first defendant sent an email to Munemichi Matsuda from Muso stating, among other things *“Can you tell me the iodine content in Bonsoy? A customer is concerned because of the Kombu powder.”*

**Particulars**

Muso's discovered document 47.

- (b) Hiroshi Umemura from Muso replied to that email on 29 October 2007 substantially in the terms alleged in paragraph 33(c).
  - (c) It otherwise does not admit the allegations made in paragraph 33.
34. As to paragraph 34 thereof:
- (a) On 12 August 2009, Raphaelle Wilson from the first defendant sent an email to Avano Satogami and Munemichi Matsuda (both from Muso) stating among other things *“I have an enquiry from a lady here in Australia about iodine levels in Bonsoy. I was wondering if you have this information I may pass onto her? The lady apparently has an aversion to iodine.”*

**Particulars**

Muso's discovered document 52.

- (b) Munemichi Matsuda replied to that email on 17 August 2009 and used, among others, the words quoted in paragraph 34(c).

- (c) Munemichi Matsuda sent an email to Mr Ota from Marusan dated 17 August 2009 containing the statement quoted in paragraph 34(d).
- (d) Munemichi Matsuda sent an email to Raphaele Wilson on 19 August 2009 stating among other things "*Checking with Marusan, Iodine on Bonsoy or Kombu extract used in Bonsoy has not been analyzed before. However, the Kombu extract supplier has analyzed similar products and result of Iodine is: 1300ppm. If we simply apply this to Bonsoy, estimating 0.67% of Kombu extract is used, Iodine contents of Bonsoy is: 8.71ppm.*"

### Particulars

Muso's discovered document 52.

- (e) It otherwise does not admit the allegations made in paragraph 34.
- 35. It denies each and every allegation made in paragraph 35 thereof.
  - 36. It denies each and every allegation made in paragraph 36 thereof.
  - 37. It denies each and every allegation made in paragraph 37 thereof.
  - 38-90. It does not plead to the allegations made in paragraphs 38-90 thereof as they contain no allegation against it.
  - 91. As to paragraph 91 thereof:
    - (a). The questions in paragraph 91(a) and (b) would be common questions to the claims of the plaintiff and/or group members if the Bonsoy consumed by the plaintiff and/or group members throughout the period contained the same concentration of iodine, which is not alleged and is not admitted.
    - (b). It otherwise denies each and every allegation made in paragraph 91.
  - 92. As to paragraph 92 thereof:
    - (a) The questions in paragraphs 92(b)(c)(d)(e) and (f) would be common questions to the claims of the plaintiff and/or group members if the Bonsoy consumed by the plaintiff and/or group members throughout the period contained the same concentration of iodine, which is not alleged and is not admitted.
    - (b) It otherwise denies each and every allegation made in paragraph 92.
  - 93. It does not plead to the allegations made in paragraph 93 thereof as it makes no allegation against it.
  - 94. It does not plead to the allegations made in paragraph 94 thereof as it makes no allegation against it.
  - 95. Further, if the first defendant breached its duty as alleged in paragraph 36, which is denied, then the alleged breach took place in New South Wales.

**Particulars**

The first defendant's business was managed from premises located at Unit 4, 56-72 John Street, Leichardt in the State of New South Wales.

96. By reason of the matters alleged in paragraph 95 above, the actions of the group members in negligence are subject to the *Limitation Act 1969* (NSW), and in so far as the cause of action in negligence of any group member was discoverable more than three (3) years before the commencement of this proceeding it is not maintainable by reason of the operation of s50C of the *Limitation Act 1969* (NSW).
97. Further or alternatively to paragraphs 95 and 96 above, if the limitations legislation of another state or territory applies to a group member's action in negligence, the first defendant relies on the applicable corresponding legislation in that state or territory.

Dated: 22 March 2013

**David Collins**

**Richard Attiwill**

**Jordon Ross**

**Hunt & Hunt**  
Solicitors for the first defendant

**SCHEDULE OF PARTIES**

**ERIN DOWNIE**

Plaintiff

and

**SPIRAL FOODS PTY LTD**

First Defendant

and

**MUSO CO. LTD.**

Second Defendant/First Third Party

and

**MARUSAN-AI CO. LTD.**

Third Defendant/Second Third Party