

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 AND OTHERS

Defendants

DEFENCE OF THE SECOND DEFENDANT

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Date of document:	22 February 2013	
Filed on behalf of:	The Second Defendant	
Prepared by:	Corrs Chambers Westgarth Lawyers Level 36 Governor Phillip Tower 1 Farrer Place Sydney NSW 2000 AUSTRALIA	Solicitors Code 9973 Tel: (02) 9210 6500 Fax: (02) 9210 6611 Ref: Christopher John Pagent CJP/SS MUSO17078-9079131

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To the amended statement of claim dated 21 December 2012, the second defendant (**Muso**) says:

1. It does not plead to paragraph 1 as it contains no allegations of material fact.
2. It does not plead to paragraph 2 as it contains no allegations of material fact.
3. It does not admit the allegations in paragraph 3.
4. It admits the allegations in paragraph 4.
5. To paragraph 5 –
  - (a) it admits that it was incorporated pursuant to the laws of Japan on 21 November 1986;
  - (b) it admits that since 21 November 1986 it has supplied soy milk to the first defendant (**Spiral Foods**) for importation into Australia; and
  - (c) otherwise, it denies the allegations therein.

6. It admits the allegations in paragraph 6.
7. It does not admit the allegations in paragraph 7.
8. To paragraph 8 –
  - (a) it admits the allegations in sub-paragraph 8(a);
  - (b) it admits the allegations in sub-paragraph 8(b); and
  - (c) it denies the allegations in sub-paragraph 8(c).
9. To paragraph 9 –
  - (a) it admits that, on or about 24 December 2009, Spiral Foods recalled Bonsoy from sale in Australia; and
  - (b) subject to production of a copy of the media statement, it admits the allegations in sub-paragraph (c);
  - (c) otherwise, it does not admit the allegations therein.
10. It denies the allegations in paragraph 10.
11. It denies the allegations in paragraph 11.
12. To paragraphs 12 to 37 –
  - (a) it does not plead to the allegations therein, as the allegations are expressed as being made in support of the claims against Spiral Foods; and
  - (b) it refers to paragraphs 13 to 43 hereunder in response to the claims made against it.
13. To paragraph 38 –
  - (a) it admits the allegations in sub-paragraph (b);
  - (b) it says that since 1986 it has from time to time and with the consent of Spiral Foods, exported quantities of Bonsoy branded soy milk, manufactured by the third defendant (**Marusan**), to some Western countries, including the Netherlands, Spain, Italy, Portugal and Germany;
  - (c) otherwise, it denies the allegations therein.
14. To paragraph 39 –

- (a) it admits that Muso supplied Bonsoy to Spiral Foods during the period which Spiral Foods then re-supplied to intermediate suppliers; and
  - (b) it says that Muso agreed to supply, and Spiral Foods agreed to buy, quantities of Bonsoy manufactured by Marusan pursuant to various agreements (**Agreements**); and
  - (c) otherwise, it does not admit the allegations therein.
15. To paragraph 40 –
- (a) it admits that the Bonsoy supplied by Muso to Spiral Foods was manufactured and packaged for importation by Spiral Foods into Australia;
  - (b) it says that in the period August 2003 to December 2009 the Bonsoy was manufactured by Marusan and supplied by Muso to Spiral Foods pursuant to the Agreements that included a term that the Bonsoy would contain ingredients, including kombu extract, as specified in a document endorsed by Spiral Foods and dated 16 May 2003 (**the Specification Term**);
  - (c) it says that the packaging of the Bonsoy was in accordance with the packaging specified by Spiral Foods;
  - (d) otherwise, it denies the allegations therein.
16. It admits the allegations in paragraph 41.
17. To paragraph 42 –
- (a) it admits that Muso was in the business of promoting and distributing natural foods;
  - (b) otherwise, it denies the allegations therein.
18. To paragraph 43 –
- (a) it says that in 2003 the manufacturer of Bonsoy, Marusan, substituted Kombu extract manufactured by Nikken Foods, for the kombu powder extract manufactured by Sato Food Industries, that had previously been contained in the Bonsoy;

- (b) it says that Marusan proposed the introduction of kombu extract as a result of a request by Spiral Foods to change the specifications of Bonsoy, and that Spiral Foods agreed to the change, resulting in its agreement to the Specification Term;
  - (c) otherwise, it does not admit the allegations therein.
- 19. It does not admit the allegations in paragraph 44.
- 20. To paragraph 45 –
  - (a) it admits that the composition of Bonsoy did not change materially between August 2003 and December 2009, after which it was reformulated to remove kombu;
  - (b) otherwise, it does not admit the allegations therein.
- 21. To paragraph 46 –
  - (a) it denies that it designed the packaging for the reformulated Bonsoy, and says that Spiral Foods designed the packaging;
  - (b) it admits that it supplied a copy of the proposed packaging that was designed by Spiral Foods to Marusan;
  - (c) otherwise, it denies the allegations therein.
- 22. It denies the allegations in paragraph 47.
- 23. It denies the allegations in paragraph 48.
- 24. To paragraph 49 –
  - (a) subject to production of the email and reference to its terms, it admits that on 9 June 2006, Muso received an email from Spiral Foods inquiring about the level of kombu in Bonsoy, the iodine level of kombu and the iodine level of Bonsoy ingredients altogether and which stated (inter alia), “this lady needs some information for her doctor about Bonsoy as she is being treated for a serious problem”;
  - (b) subject to production of the email and reference to its terms, it admits that by email dated 12 June 2006, it referred the request to Marusan; and
  - (c) otherwise, it does not admit the allegations therein.

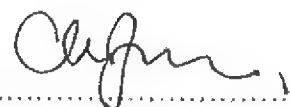
25. Subject to production of the report of the analysis, it admits the allegations in paragraph 50.
26. To paragraph 51 –
  - (a) subject to production of the email and reference to its terms, it admits that on 29 October 2007 it received an email from Spiral Foods inquiring about the iodine content in Bonsoy;
  - (b) subject to production of the email in response, and reference to its terms, it admits the allegation in sub-paragraph (c); and
  - (c) otherwise, it does not admit the allegations therein.
27. To paragraph 52 –
  - (a) subject to production of the email and reference to its terms, it admits that on 17 August 2009 it received an email from Spiral Foods inquiring about the iodine content in Bonsoy, and which stated that a lady who had made the enquiry apparently had an aversion to iodine;
  - (b) subject to production of the email dated 17 August 2009 and reference to its terms, it admits the allegation in sub-paragraph (c);
  - (c) subject to production of an email from Muso to Marusan dated 18 August 2009 and reference to its terms, it admits that it referred the inquiry to Marusan, in terms substantially to the effect alleged in sub-paragraph (d);
  - (d) subject to production of an email dated 19 August 2009 from Muso to Spiral Foods and reference to its terms, it admits the allegations in sub-paragraph (e);
  - (e) otherwise, it does not admit the allegations therein.
28. It denies the allegations in paragraph 53.
29. To paragraph 54 –
  - (a) it refers to paragraph 28 above; and
  - (b) it denies the allegations therein.
30. It denies the allegations in paragraph 55.
31. Alternatively –

- (a) the claim by the plaintiff was brought against Muso on the day the amended writ was filed, namely 21 December 2012;
  - (b) in so far as any claim is governed by the laws of the States and Territories of Australia Muso will rely on section 5(1AA) of the *Limitation of Actions Act 1958* (Vic) and corresponding limitations legislation in respect of any claim against it brought outside any relevant limitation period.
32. It says further that:
- (a) any award of damages for past or future economic loss is subject to the limitations in ss 28F and 28I of the *Wrongs Act* and any applicable corresponding legislation of other States and Territories;
  - (b) the plaintiff and group members are not entitled to any damages for non-economic loss unless they have suffered a ‘significant injury’ as that term is defined by s 28LF of the *Wrongs Act*; and
  - (c) alternatively to (b) above, any assessment of damages for non-economic loss for personal or bodily injury is subject to the limitations in ss 28G and 28H of the *Wrongs Act*.
33. It does not admit the allegations in paragraph 56.
34. To paragraph 57 –
- (a) it denies that the Product Liability Act (Japan) applies to the claims of the plaintiff and group members;
  - (b) otherwise, it does not admit the allegations therein.
35. It does not admit the allegations in paragraph 58.
36. It does not admit the allegations in paragraph 59.
37. It denies the allegations in paragraph 60.
38. It denies the allegations in paragraph 61.
39. It denies the allegations in paragraph 62.
40. It does not admit the allegations in paragraph 63.
41. It does not admit the allegations in paragraph 64.
42. It denies the allegations in paragraph 65.

- 43. It denies the allegations in paragraph 66.
- 44. To paragraphs 67 to 90 –
  - (a) it does not plead to the allegations therein, as the allegations are expressed as being made in support of the claims against Marusan; and
  - (b) it refers to paragraphs 13 to 43 above in response to the claims made against it.
- 45. It does not plead to paragraphs 91 to 94 as they contain no allegations of material fact.

Michael Wheelahan

Anthony Strahan



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Corrs Chambers Westgarth  
Solicitors for the second defendant

**DATE SERVED:** 22 February 2013