JURISDICTION	**:**	DISTRICT COURT OF WESTERN AUSTRALIA IN CHAMBERS
LOCATION	**:**	PERTH
CITATION	**:**	DRAY -v- BAE SYSTEMS PLC [No 2] [2015] WADC 60
CORAM	**:**	REGISTRAR KINGSLEY
HEARD	**:**	23 APRIL 2015
DELIVERED	**:**	4 JUNE 2015
FILE NO/S	**:**	CIV 2601 of 2002
BETWEEN	**:**	MELISSA ANN DRAY Plaintiff AND BAE SYSTEMS PLC Defendant

Catchwords:

Practice - Application to strike out the statement of claim, or parts thereof

Legislation:

Nil

Result:

Application dismissed

Representation:

Counsel:

Plaintiff	:	Mr K Tang
Defendant	:	Ms C Brown

Solicitors:

Plaintiff	:	GV Lawyers
Defendant	:	Holman Fenwick William

Case(s) referred to in judgment(s):

Barclay Mowlem Construction Ltd v Dampier Port Authority [2006] WASC 281

1 **REGISTRAR KINGSLEY**: In 1996 the plaintiff (Dray) was assigned as a flight attendant on domestic routes within Australia and regularly worked on Ansett's fleet of BAE 146 regional aircraft (the aircraft). Dray pleads that in April 1999, whilst working as a flight attendant aboard the aircraft, she was exposed to oil fumes (the fumes) which caused an onset of incapacitating symptoms and injuries.

2 The technical aspect of how breathing air goes to the passenger cabin of the aircraft is pleaded: that it is supplied from compressed air which was 'bled off' from the compressor section of the aircraft engines (bleed air), fed through air conditioning packs, and finally into the passenger cabin.

3 On 11 April 1999 (the material date) Dray alleges engine oil leaked from engine bearing seal number 1 in engine number 3, entered the compressor section of the engine, resulting in the formation of the fumes. The fumes contaminated the bleed air supply and entered the passenger cabin.

4 At par 7 of the further amended substituted statement of claim (FASSOC) dated 13 January 2015, Dray pleads:

> The fumes comprised thermal degradation products of mobile jet oil to including the substances such as carbon monoxide, volatile organic compounds, formaldehyde and organophosphates (tricresyl phosphates and its isomels) which are capable of causing adverse health effects upon inhalation.

5 Dray goes on to plead that the defendant (BAE Systems), the designer and manufacturer of the aircraft, had a duty to exercise reasonable care, skill and diligence in the design and manufacture of the aircraft, and had a continuing duty from the date of manufacture, to protect her from reasonably foreseeable risks of injuries.

6 At par 9 of the FASSOC, Dray pleads that BAE Systems knew that the bleed air supply was being contaminated by engine oil. Particulars of that knowledge are provided in pars 9.1 - 9.3.

7 At par 10, Dray goes on to plead that BAE Systems knew or ought to have known that engine oil leaking into the bleed air supply may be thermally degraded, resulting in the formation of toxic fumes. Particulars are given at par 10.1.

8 At par 10A Dray goes on to plead that BAE Systems knew, or ought to have known, that the contamination of the bleed air supply may

adversely impact on the health of passengers, flight attendants and pilots and particulars are given at pars 10A.1 to 10A.3.

9 Dray then pleads that BAE Systems breached its duty of care, primarily in failing to design, develop, incorporate, utilise or implement systems to prevent contamination, to detect system failures, to incorporate filtration technologies, utilise alternative air conditioning systems, or monitor air quality. Dray also particularises the breach as BAE failing to properly inform itself in relation to the risk of harm to human health arising from the exposure to the fumes or thermal degradation products.

10 As a consequence of the exposure, Dray pleads that she has sustained injuries which are further pleaded out in par 12. As a consequence of those injuries, Dray pleads she has sustained loss and damage.

11 By a chamber summons dated 20 February 2015, BAE Systems seeks to strike-out the FASSOC on the basis that it discloses no reasonable cause of action, and that the pleading may prejudice, embarrass or delay the fair trial of the action (O 20 r 19(1)(a) and r 191(c) *Rules of the Supreme Court 1971*). Alternatively, BAE Systems seeks that pars 7, 9, 10, 10A, 10B, 11, 12.2, 12.3, and 12.5 of the FASSOC be struck out.

12 The essential requirement of a pleading is that it fulfils the basic function of identifying the issues, disclosing an arguable cause of action, and apprising the other party of the case it has to meet at trial. But that basic function must be viewed in the context of contemporary case management and pre-trial directions. Well before trial there is the exchange of documents and experts reports, or substance. There is often little opportunity for surprise. This enables a more robust approach to pleading disputes (see ***Barclay Mowlem Construction Ltd v Dampier Port Authority*** [2006] WASC 281).

13 Turning to par 7, BAE Systems complains that not only must all material facts be pleaded, but they must be pleaded with a sufficient degree of specificity to convey to the opposite party the case that party has to meet. BAE Systems submits that there is such an inadequate description of what the fumes comprise that it does not understand the case that has been put against it. BAE Systems resorted to the Oxford Dictionary (UK) to highlight that there are thousands of chemicals that potentially fall within the substances pleaded in par 7. Thus, BAE Systems submits that not only should the plaintiff identify the specific substance or substances but, as it is a basic principle in toxicology that

'the dose makes the poison', the plaintiff must identify and quantify the chemicals alleged to be causative of the plaintiff's injuries.

14 In my opinion, the real issue is the lack of the exchange of expert evidence. In my opinion, the diversity and quantity of the chemicals alleged to be causative of the plaintiff injuries are not material facts which should be pleaded with reasonable precision. Those matters are of evidence and it is for the experts to provide an opinion on.

15 This issue was canvassed before Deputy Registrar Hewitt in November 2012. The deputy registrar commented there needs to be an exchange by the plaintiff of its expert evidence so that the defendant fully understands the case it must meet.

16 Whilst par 7 may be pleaded in a less than optimal manner, the pleading does focus attention on the issues to be determined. In my opinion par 7 does not warrant being struck out for failing to disclose a reasonable cause of action or for being embarrassing and prejudicial.

17 BAE Systems complains that pars 9, 10 and 10A of the FASSOC allege a state of knowledge of BAE Systems over an unspecified period of time, potentially 40 years. BAE Systems complains that these paragraphs are not supported by any proper particulars of the allegations made.

18 BAE Systems submits that the only allegation in par 9.2 is that following the investigation into the fume events reported by Pacific SouthWest Airlines, BAE Systems became aware in 1984 that the fume events were the result of contamination of the bleed air supply by oil leaking from the engines and auxiliary power unit. BAE Systems submits that this allegation does not go to BAE Systems knowledge prior to or during the design phase. However the plea against BAE Systems includes the allegation of a continuing duty, from the date of manufacture, to protect Dray from harm. Paragraph 9.2 needs to be read in context of the particulars as a whole. Taking the particulars as a whole, it is apparent how BAE Systems became aware and their state of knowledge and, in my opinion, is adequately particularised.

19 BAE Systems further submits that Dray has not pleaded any material facts the injuries suffered by her was of a class, type, or character that was foreseeable by BAE Systems at the time of the breach. In my opinion, a reading of pars, 9, 10, 10A do point to knowledge on the part of BAE Systems that the fume events could impact on the health of passengers, flight attendants and pilots. The complaint of BAE Systems is that the particulars only mention reports of minor, temporary, short-term

symptoms and none concern the foreseeability of a permanently disabling condition.

20 Again, in my opinion, this is more of a question of evidence then material fact. Dray must establish that her injury was of a foreseeable kind, type, or character of injury. If Dray can establish negligence in that injury, the consequences then become one of causation.

21 As for par 10B, BAE Systems submits Dray must plead the material facts which establish that BAE failed to take the steps a reasonable person in the position of BAE systems would have taken. The submission of BAE Systems is that Dray must clarify whether she is alleging that BAE Systems ought to have taken steps to prevent all engine fumes from entering the cabin or only harmful levels of engine oil fumes.

22 Again, in my opinion, this comes back to the expert evidence. Read within the context of the pleading at par 10A, the pleading at par 10B pleads and particularises what steps BAE could have taken to prevent contamination of the air supply to the aircraft cabin by engine oil fumes. In my opinion, in the context of the pleadings, and in particular, the particulars given at par 10.1 and pars 10A.1 – 10A.3, BAE Systems should not be embarrassed by the phrase contamination of the air supply to the aircraft cabin by engine oil fumes.

23 Turning to pars 11 and 12 of the FASSOC, BAE Systems submits that Dray does not identify any material facts to support the plea that the alleged breaches were causative of the alleged exposure to toxic fumes, that the alleged exposure to fumes was causative of the alleged injuries, and the alleged injuries are causative of the damages.

24 In my opinion, Dray clearly puts in issue at par 11 that the exposure to the fumes was caused by BAE System's breach of duty and as a consequence of that exposure, injury has been suffered. Particulars of the injuries are given at par 12. It is obvious, in my opinion, that the plea is that as a result of Dray's exposure to the fumes, Dray suffered injuries and those injuries are particularised at pars 12.1 - 12.8.

25 In the end, I am of the opinion that the issues raised by Dray give rise to an arguable cause of action and they sufficiently apprise BAE Systems of the case they have to meet on the pleadings. In the context of a complex case such as this, apprising BAE of the case they have to meet includes the timely exchange of expert evidence which I understand from submissions from the bar table have not yet occurred.

26 For these reasons I am of the opinion that the application by BAE Systems ought to be dismissed. I will hear counsel further on the question of the exchange of expert evidence, and on the question of costs on the application.