
Private action

Karedis Enterprises Pty Ltd and Greenfriars Pty Ltd v Rita Antoniou and Michael Antoniou

Full Federal Court

5 July 1995

Section 82(2) of the Trade Practices Act limits to three years the time in which a plaintiff can bring an action for damages under the Trade Practices Act. This three years runs from the time the action accrues. An action under s. 82(1) accrues when loss or damage is suffered.

The main question which arose from this appeal to the Full Federal Court was: When is a loss incurred for the purposes of s. 82(2) in a situation where the disadvantageous character or effect of an agreement giving rise to an action could not be ascertained until some future date?

Background

The action arose from the entry into a lease by the respondents, Mr and Mrs Antoniou, with the appellants, Karedis Enterprises Pty Ltd and Greenfriars Pty Ltd. The lease allowed the Antonious to operate a coffee lounge owned by the appellants.

The Antonious claimed that they had been induced to enter the lease by a representation on the part of Mr Karedis (the principal of both appellant companies) to the effect that the business would yield a take of \$14 000–\$15 000 a week.

The lease was signed on 14 October 1988. The coffee lounge opened for business on

12 December 1988 and traded until 17 February 1991. The appellants entered into possession on 20 February 1991, being owed over \$90 000 in arrears in rent.

On 20 November 1994, the Antonious brought an action for damages under s. 82 of the Trade Practices Act for breach of s. 52 of the Act. They also brought an action for damages at common law.

Conflicting evidence was tendered at the trial as to the date on which the representation regarding the weekly takings was given. After considerable deliberation, Einfeld J found that the appellants had engaged in misleading and deceptive conduct in breach of s. 52 and awarded the respondents damages under s. 82.

The appellants lodged this appeal to the Full Federal Court on three grounds.

1. The trial judge had erred in finding that the representations had been relied upon by the respondents and so caused them loss.
2. The trial judge had erred in awarding damages.
3. The trial judge should have found the proceedings under the Act were out of time, and therefore statute barred.

The appellants were successful on the third ground, with the matter being remitted to the trial court for reconsideration.

Trial judge's findings as to statutory limitation

At trial, Karedis Enterprises Pty Ltd and Greenfriars Pty Ltd claimed that the Antonious' action was out of time. Thus the relevant question was: When was the relevant loss suffered, so causing the action to accrue?

Einfeld J found that the entry into the lease did not of itself incur the loss. His Honour was of the opinion that the applicants were 'obliged to wait at least 12 months to see if projections regarding takings were realised before they could show a misrepresentation upon which to base an action'.

On this premise, Einfeld J found that the three years began to run on December 1989 — 12 months after the Antonious commenced trading. This precluded a finding that the plaintiff was out of time.

On appeal

Burchett and Hill JJ

In their joint judgment Burchett and Hill JJ accepted that time should not run from the time the lease was entered into, as the entry into the lease should not be considered as the time when loss was sustained. They agreed that in a simple case where a plaintiff purchases an asset on the faith of a misrepresentation and that asset is shown to be worth less than it was represented to be, generally the loss or damage will be considered to have been sustained at the time the contract was entered into. However, their Honours stressed that this is not necessarily always the case, with the question being one of fact.

Burchett and Hill JJ proceeded to discuss the decision of the High Court in *Wardley Australia Limited v The State of Western Australia* (1992) 175 CLR 514, which they considered to 'make clear that in other cases the disadvantageous character or effect of an agreement entered into on the faith of a misrepresentation might not be ascertained until a future date'.

Their Honours discussed the various judgments in *Wardley* and quoted extensively from Brennan J, including the passage in which the current Chief Justice states:

no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is worse off than if he had not entered into the transaction.

On the strength of such findings, their Honours concluded that in this case the loss was

incurred, and the cause of action accrued for the purposes of s. 82(2), only when their loss became *reasonably ascertainable*. The entry into the lease gave rise to potential loss and damage only. Time should be considered to run when events had 'sufficiently unfolded' to allow the respondents to become aware of their loss or pending loss.

Burchett and Hill JJ then discussed the facts available to them relevant to this question. They noted that in June 1989 an accountant had concluded that the Antonious could trade out of their financial problems, but that the accounts would require regular monthly review. However, after this time no review had been undertaken. Their Honours remarked that it would therefore appear that the loss suffered by the Antonious would have been reasonably ascertainable at some time before December 1989. As a question of fact the issue was not for them to decide. The matter was remitted to the court of first instance.

Sackville J

Sackville J agreed with the conclusions and reasoning of the majority, but wished to make a few pertinent points about the question of limitations.

In His Honour's opinion the principle of *Wardley* is that:

where a person is induced by misrepresentation to enter an agreement which creates an executory and contingent liability, that person does not suffer a loss for the purpose of s. 82 [of the] Trade Practices Act until the contingency is fulfilled.

His Honour observed that it was *not* a case in which the party had sustained a loss but was unable to ascertain that the loss had occurred until a later date. However, Sackville J did see this decision of the High Court as extending support to the proposition that in a case where the disadvantageous character of a transaction cannot be ascertained at the time of the transaction, a loss is not sustained until the plaintiff 'ascertains or has the means to ascertain' the prejudicial nature of the transaction.

Sackville J identified three approaches which could be used to determine the time at which the loss is incurred in cases where an asset is acquired on faith of false representations, and that asset is subsequently shown to have been worth less at the time of purchase than the price paid:

1. The approach advocated by the 'English decisions' referred to in *Wardley*. Under this approach the plaintiff is deemed to first suffer loss on entry into the contract. Time therefore runs from the moment of entry into the contract.
2. The approach whereby the date that damage is sustained is determined by reference to the nature of the interest infringed. This is in accordance with the judgment of Gaudron J in *Hawkins v Clayton*. In this case, Her Honour used an example of economic loss sustained through the purchase of a property with a latent physical defect, where the interest infringed is the value of the property, or, alternatively, the physical integrity of the property.
3. The approach whereby the reasoning in *Wardley* is extended to cases involving the purchase of an asset, even where there are no apparent countervailing benefits or detriment as the result of the transaction.

However, Sackville J distinguished the situation at hand from one in which an asset is purchased. He viewed the situation as one in which the Antonious had obtained both advantages and disadvantages from the lease transaction. Sackville J said that:

the losses claimed by the Antonious flowed from the pursuit of a particular business which they were encouraged to undertake by the appellants' representations. Only when the course of events allowed the lessees the opportunity to ascertain that the business could not succeed was loss sustained in the relevant sense.

Sackville J also expressed the opinion that the Antonious could have reasonably ascertained their loss at a date earlier than December 1989, but agreed that the matter should be remitted to the court of first instance.