Legal notes

ACCC v Chats House Investments Pty Ltd & others

Federal Court
Branson J
20 December 1996

This legal note deals with the entitlement of the Commission to bring representative proceedings under Part IVA of the *Federal Court Act 1976 (Cth)*.

On 20 December 1996 Justice Branson of the Federal Court found that foreign exchange broker Chats House Investments Pty Ltd and its director, Albert Chan, had breached s. 51AA, s. 52 and s. 53(d) of the Trade Practices Act in relation to its foreign exchange margin trading operation.

The Court ordered that Chats House and Chan pay $894 217, to be distributed between 26 former Chats House clients on whose behalf the Commission had taken representative action. (See also *ACCC Journal* 7, pp. 22–3.)

The Federal Court considered, among other things, whether the Commission was entitled to bring representative proceedings under Part IVA of the Federal Court Act.

The interests of the Commission in bringing this action were the public interests in the enforcement of the Trade Practices Act, the protection of Australian consumers, and the provision of compensation for consumers who had suffered loss or damage by conduct in contravention of the Trade Practices Act. The interests of the group members on whose behalf the Commission brought the proceedings were private: they sought awards of damages in compensation for financial harm suffered by them. It was argued by the Commission that these differing interests did not disentitle it to commence proceedings representing all of the group.

Section 33C of the Federal Court Act specifies the circumstances in which a representative proceeding may be brought. It does not explicitly require that all group members should have a common interest in the proceedings. The section requires that the claims of all members of the group should be in respect of, or arise out of, the same or similar or related circumstances. Justice Branson accepted that this was the case in these proceedings.

Section 87(1B) of the Trade Practices Act authorises the Commission, in circumstances in which a person has suffered loss or damage by conduct engaged in by another person in contravention of Part IV or V of the Trade Practices Act, to make an application on behalf of one or more persons who has or have suffered such loss or damage for compensation.

The Court had to consider the question of whether the terms of s. 87 of the Trade Practices Act compel the reading down of Part IVA of the Federal Court Act so as to require a proceeding by the applicant for the recovery of loss or damage suffered by a person or persons as a result of conduct engaged in contravention of a provision of Part IVA or V of the Trade Practices Act to be brought under s. 87(1B) of the Trade Practices Act.

The Court held that there was nothing to suggest that the legislature intended Part IVA of the Federal Court Act to be read down by reason of an existing provision such as s. 87(1B) of the Trade Practices Act. In the Court's view, although Part IVA of the Federal Court Act has a wider application than s. 87(1B) of the Trade Practices Act, it should not be regarded as the sort of 'general' provision such that where there is a conflict between a 'general' and a 'specific' provision, the 'specific' provision should prevail on the ground of repugnancy (*Lyons v Registrar of Trade Marks* (1983) 50 ALR 496 at 507–508 per Beaumont J).

In this case, the Court considered that the later enactment, Part IVA of the Federal Court Act, was applicable, notwithstanding the provision of s. 87(1B) of the Trade Practices Act which specifically authorises the institution of proceedings of this nature by the Commission.

The Court consequently held that the Commission was entitled to commence this representative proceeding under Part IVA of the Federal Court Act.

ACCC v The Shell Company of Australia

Federal Court
Drummond J
13 February 1997

This legal note deals with procedural issues and time limitations on representative proceedings instituted by the Commission under s. 87 of the Trade Practices Act.

The Commission instituted proceedings on 11 November 1996 in the Federal Court against The Shell Company of Australia, alleging breaches of s. 51AA and s. 53 of the Trade Practices Act in relation to a Shell FORCE Franchise Agreement. (See also *ACCC Journal* 6, pp. 8–9.)

The Commission's original application sought, among other things, orders under s. 87(1A) of the Trade Practices Act directing Shell to pay certain persons the amount of loss or damage suffered by them by reason of the alleged conduct of Shell in contravention of certain sections of the Act. The application, although making reference to s. 80 of the Act, did not expressly seek injunctive relief. The Commission subsequently filed an amended application which claimed injunctive relief under s. 80 of the Act.

Shell filed a notice of motion seeking orders that the proceedings be dismissed or permanently stayed or, alternatively, that the proceedings be dismissed or permanently stayed insofar as the proceedings related to relief under s. 87(1A) of the Act.

Shell contended in its strike-out application that the relief sought by the Commission under s. 87(1A) of the Act was incompetent because there had not been a finding in ancillary s. 79 or s. 80 proceedings that a person had engaged in conduct in contravention of a provision of Part IVA or V of the Act.

Drummond J agreed and struck out paragraph one of the Commission's amended application.

The decision of Drummond J has two significant implications for the Commission in proceedings under s. 87 of the Act.

First, Drummond J held that an application under s. 87(1A) of the Act must be made by notice of motion in s. 79 or 80 proceedings *after* the relevant findings of the kind identified in s. 87(1B) (that is, contraventions of Part IVA or V of the Act) have been made.

Second, as a consequence of this, the Judge held that the cause of action for instituting proceedings under s. 87(1A) accrues only when a finding of a contravention has been made. Thus the time limitation period of two years for Part IVA contraventions and three years for Part V contraventions only begins to run following a finding of a contravention under an application under s. 79 or 80 of the Act. Matters which may previously have been considered time barred for proceedings under s. 87(1A) will no longer be so constrained. This time extension is, however, subject to the Court's discretion.

Australian Competition Tribunal

Interlocutory ruling 4 April 1997 in review of authorisation of AGL Cooper Basin natural gas supply arrangements (No VI of 1996)

Lockhart J, Dr M Brunt, Dr BI Aldrich

This ruling indicates the access which the Commission Chairman, members and staff should have to confidential evidence given to the Tribunal by other parties. It supports the principle that the Chairman, the Commission member responsible for the Commission's submissions in the proceeding and the relevant Commission staff should have such access: (1) in order to assist the Tribunal; and (2) in view of their broader statutory role under the Trade Practices Act. The question of access is a

matter preliminary to resolution of the substantive issue for review itself. The Act gives to the Tribunal the discretion to determine the confidentiality of its proceedings.

The Cooper Basin matter involves many commercial parties and has given rise to complex issues concerning confidentiality. The need to resolve these issues, at least in relation to the Commission, was a motivating force behind the Tribunal's ruling. The Tribunal has adjourned to consider its decision in its substantive review of the Cooper Basin authorisation. That review arose from an appeal from the Commission's revocation determination of 27 March 1996 (see *ACCC Journal* 3, pp. 55–8).

Several submissions were considered by the Tribunal as possibly supporting a decision to continue to deny the Commission access to certain confidential evidence (access to most of the material had already been granted to the Commission's legal representatives). These submissions included:

- the fact that the Commission had completed its adjudication of the authorisation (i.e. made the determination presently under review) and thus now had a more limited role and a lesser need for access to the confidential evidence;
- the highly sensitive nature of some of the evidence, given its relationship to commercial negotiations and plans in the rapidly changing gas industry;
- the view that the Commission, by gaining access to the confidential evidence, would incidentally have an access to documents, and an awareness of possible breaches, that it would not otherwise have had; and
- the possibility that the Commission representatives granted access to the confidential evidence in this case would make use of it more generally in their administration and enforcement of the Act.

Against these matters, the Tribunal weighed several considerations favouring access by the Commission. The first of these is that, in the Tribunal's view, it is in the public interest that the relevant Commission officers should have access to material of this kind, so as to inform themselves of matters which they may not have been informed about before. This could have a very real bearing on how they then approach matters. The Tribunal noted that the material before the Commission in a revocation decision is not nearly as full as the material before the Tribunal in a revocation hearing.

The Tribunal also noted that the Trade Practices Act gives the Commission a particular role in assisting the Tribunal in its review of determinations. Section 102(6) of the Act gives the presiding member of the Tribunal the power to 'require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies'. The Tribunal found that strong public interest considerations supported the granting of access to the confidential material by the Commission. Not only would such access allow the Commission to contribute to the expeditious handling of the Tribunal review, but would aid in the broader fulfilment of the Commission's role under the Act.

Further, it is evident from the transcript that the Tribunal viewed the Commission's interest as intrinsically different from that of the commercial parties before it. It accepted an argument, drawing on *Esso Australia Resources Ltd v Ploughman* (1995) 183 CLR 10, that the material at issue had a confidential character as against other commercial competitors, but not as against the Commission. This would appear to be an appropriate outcome, given that Commission members and staff do not have the same commercial interests as do private parties, and are bound by particular statutory responsibilities in their handling of information.

The ruling of the Tribunal permitted access to the confidential material by the Chairman, the Deputy Chairman (who is overseeing the matter) and by three named officers within the Commission. The Tribunal indicated that this would be its general approach to all confidential material in the proceeding already given (or to be given) to the Tribunal, while reserving its further consideration of specific material.

As appropriate, the Commission will likely ask the Tribunal at an early stage in future reviews to apply this general rule concerning access to confidential material.

Private action

State Bank of New South Wales Ltd v Burke & anor

New South Wales Supreme Court
Court of Appeal, CA 40674/94
Priestley JA, Cole JA, Grove AJA
4 April 1997

Part IVA of the Trade Practices Act proscribes corporations from engaging in unconscionable conduct. Section 51AA[1] of the Trade Practices Act provides:

> A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

An understanding of the concept of unconscionability under Part IVA of the Trade Practices Act is thus dependent upon common law judicial pronouncements as to its meaning. It is in this context that it is important to have regard to common law decisions that, although not directly related to the Trade Practices Act, discuss the principles of unconscionability.

State Bank of New South Wales Ltd v Burke & anor was an appeal by the State Bank of New South Wales against a judgment of Santow J on 17 October 1994, by which he limited to $151 901.65 the amount payable by the respondents to the appeal under a mortgage they had executed in favour of the bank. The bank argued that the facts of the case as found by Santow J did not support a finding of unconscionability.

Background

The respondents, Mr V. Burke and his wife Mrs H. Burke (the Burkes senior) were the parents of Mr R. Burke. On March 1987 the bank granted Mr R. Burke and Mrs V. A. Burke (the Burkes junior) an interest only term loan of $150 000 for three years, on the security of a mortgage by the Burkes senior over their home. The bank's loan to the Burkes junior was to enable them to purchase a 49 per cent interest in a real estate business in which Burke junior worked.

Between 1987 and 1990 the financial position of the Burkes junior deteriorated. Further advances were made to them by the bank during this period. The bank was of the view that the mortgage over the Burkes senior's home (the third party mortgage) secured only the loan of $150 000 and not the further advances. The bank advised the Burkes junior that it would advance further moneys to them only if the Burkes senior specifically gave the bank authorisation in writing.

After having been persuaded by their son, the Burkes senior agreed in June 1990 to enter into a new mortgage as security for a $200 000 loan to the Burkes junior. The mortgage documents indicated that the earlier $150 000 mortgage was discharged and that the new mortgage secured the new loan of $200 000.

The Burkes junior later fell into arrears on their $200 000 loan. The bank wrote to the Burkes senior in July 1991 demanding that they meet the arrears on the loan, failing which it would commence legal action. It was only after the receipt of this letter that the Burkes senior learned the real purpose and effect of the documents they had signed in June 1990.

Soon afterwards, the Burkes senior began proceedings claiming orders and declarations seeking the setting aside of the 1990 transaction. They acknowledged that they were

1 Various pieces of State consumer protection legislation such as the *Fair Trading Act (NSW) 1983* have provisions similar to s. 51AA of the *Trade Practices Act 1974*.

responsible for guaranteeing the original advance of $150 000 but denied responsibility for any additional amounts. The Burkes senior attacked the 1990 transaction as unconscionable under general equitable principles and upon other grounds, viz *Contracts Review Act (NSW) 1980* and *Fair Trading Act (NSW) 1987*, upon which Santow J found it unnecessary to decide. As to the 1987 mortgage, their principal claim was that it would be unconscionable for the bank to rely on it as security for advances made to the Burkes junior on or after March 1990.

Elements of unconscionability

In order to successfully impugn a transaction as unconscionable it is necessary for the party claiming relief to show that:

- the party suffered from a special disadvantage in dealing with the other party;
- the other party had knowledge of the special disadvantage of the party;
- the other party took unconscientious or unfair advantage of the situation.

Decision of Santow J at first instance

Santow J held that he should limit the extent to which the bank could rely on the mortgage as security for the entire debt of the Burkes junior. He came to this conclusion by alternate ways: (a) by construction of the mortgage documents so as to limit the liability of the Burkes senior and (b) on general unconscionability principles.

Santow J found that the bank relied upon the son to arrange the execution of the mortgage documents. He also found that the bank

> entrusted the explanation of their (i.e. the mortgage documents) purpose and any other material matter to them as guarantors to the son, who had a keen interest in continuing the guarantee for his own benefit, as the bank must have realised. Such a material matter would include the deteriorating financial position of the Burkes junior.

Santow J further found that it was

> clear beyond doubt that these matters were most material for the Burkes senior to be informed about if they were to agree to a further extension of their mortgage for an increased principal amount of $200 000.

He was satisfied that they were ignorant of that fact. Santow J also found

> that the bank failed to take steps which would disabuse them of that ignorance but rather left informing them to the person with greatest interest in not doing so, namely the financially burdened son.

Santow J found that the Burkes senior signed the new mortgage documents at their home without being given an opportunity to read them and that they did not have any contact with the bank. The only explanation they received was from their son who assured them that it was not a mortgage but a loan for two years. Burke junior told them that he needed the funds to purchase the other half of the real estate business. Santow J accepted that the Burkes senior did not know of the deterioration in their son's financial position or that the purpose of the loan was to consolidate business debts. Santow J also accepted that neither of the Burkes senior would have signed the mortgage documents if they had known the true situation.

Santow J said that if he were wrong about the construction of the mortgage documents limiting the liability of the Burkes senior, his view was that the 1990 transaction was unconscionable and thus would still deny the bank the benefit of that security, to the extent that such denial was required to negate the effect of the unconscionable conduct. He held that the extent of the Burkes senior's liability should be limited to the amount under the 1987 mortgage.

Decision of Court of Appeal

On appeal the bank argued, among other things, that the facts of the case as found by Santow J did not support a finding of unconscionability as explained in the leading case, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. In short, the bank argued that before unconscionability of the *Amadio* type could be found it was necessary that the party claiming relief should show that that party had been in a position of special disadvantage, that this was known to the other party and that the other party took

unconscientious advantage of the situation. The bank submitted that these requirements were not fulfilled.

Priestley JA, with whom Cole JA and Grove AJA concurred, dismissed the bank's appeal.

In relation to the element of special disadvantage, Priestley JA was of the opinion that there was no doubt the Burkes senior were in a position of special disadvantage. The facts that went to prove the element of special disadvantage included the fact that they had no knowledge of the true situation concerning their son and that the conduct of the bank and the son combined to keep them in the dark. It was also clear that the bank wanted to improve its security position and left it to the son to persuade his parents to give further security than the bank already had. Priestley JA was of the opinion that the bank 'obtained what was, in fact, an unfair advantage'.

As to the element of the bank's knowledge of the special disadvantage on the part of the Burkes senior, Priestley JA noted that this was an aspect open to argument. Could it be said that the bank had knowledge of the Burkes senior's special disadvantage to make it a party to the unconscionability?

Santow J analysed the case law on this point and came to the conclusion that 'the principle of constructive notice should apply to any situation where the "surety reposes trust and confidence in the principal debtor in relation to his financial affairs" (*Barclays Bank Pty Limited v O'Brien* [1994] 1 AC 180 at 198) so long as the likelihood of that is or should be known to the creditor, in circumstances where the transaction of guarantee was not to the guarantor's advantage'. Priestley JA agreed with this conclusion.

This reasoning meant that the second element of knowledge was satisfied. The bank had 'constructive knowledge' of the special disadvantage of the Burkes senior because the bank knew that the Burkes senior trusted their son, that Burke junior was in a parlous financial position and the guarantee was not to the advantage of the Burkes senior.

The 1990 transaction constituted the bank taking an unconscientious advantage of the Burkes senior's special disadvantage and hence was upheld on appeal as an unconscionable transaction.