Legal notes

Private action

Gisborne Garden & Building Supplies Pty Ltd v Australian Workers' Union & ors [1998] 1323 FCA

Federal Court of Australia
Marshall J
16 October 1998

The Federal Court has dismissed an application for interlocutory relief in which the applicant sought to prevent the respondents from engaging in conduct in alleged breach of s. 45D of the Trade Practices Act.

Background

In October 1998 Gisborne Garden & Building Supplies Pty Ltd, a supplier of retail garden products, made application under ss 80(1) and 82(1) of the Act in which it alleged that Australian Workers' Union and two of its organisers, Messrs Henderson and Rae, had contravened s. 45D of the Act.

The application followed the termination of employment of a Gisborne employee (and member of the union), Mr Partridge. Several days after the dismissal, Messrs Henderson, Rae and other union officials (including Mr Partridge) attended the company premises, in the words of Mr Henderson:

> to bring to the attention of persons who were entering the applicant's premises the fact that the AWU was extremely concerned at the applicant's dismissal of (the employee).

In order to promote the union's position in its dispute with the company, a brochure was prepared for distribution to customers of the company.

The company alleged that the union officials were hindering or preventing third parties from supplying goods or services to the company, in contravention of s. 45D, and that this conduct was causing substantial loss.

Section 45D relevantly provides:

> In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:
>
> (a) that hinders or prevents:
>
> (i) a third person supplying goods or services to a fourth person (who is not an employee of the first person or the second person).

In considering whether to grant an injunction to the company the Court had to consider whether there was a serious question to be tried regarding the claimed contravention of s. 45D.

The evidence

Mr Henderson gave affidavit evidence that:

> at no time did I or any of the other persons who attended at the applicant's premises stand across the entrance to the applicant's premises, hinder or prevent entrance to the applicant's premises.

According to Mr Henderson, his instructions to the union officials were not to hinder in any way the entrance of those who attended the applicant's premises but to explain to them the AWU's concern about the dismissal. He maintained that there were no banners, signs or placards of any type displayed at any time during their attendance at the applicant's premises.

Mr Henderson explained that whenever a vehicle came to enter the applicant's premises, the driver was to be approached and nobody was to stand in front or to the other side or to the rear of the driver's vehicle. He said the dismissed employee did not attempt to hinder the driver or threaten to hinder them, or make any threat of retribution against them if they were to enter.

Mr Greenshields, a director of the company, gave evidence that a truck was stopped at the company's front gate and the driver entered and spoke to him. According to Mr Greenshields, the driver told him that the 'picketers' insisted that he take his truck home and that he refused, that his registration number was taken and that he was told he was crossing an official picket line.

In response Mr Henderson gave evidence that he had spoken to Mr Rae about this episode and been told that at no time did he tell the driver to go home.

Mr Greenshields also gave evidence that another truck attended the premises and that it was 'surrounded by picketers'. The truck remained out the front for about an hour and then left without attempting to enter the premises.

In response Mr Henderson said that the vehicle was not surrounded and that at the time there were only Mr Partridge and himself there. Mr Henderson claimed that he told the driver he was not being hindered or prevented from going inside, and that the decision to enter was 'up to him'.

Mr Greenshields gave further evidence that a representative of Excel Quarries, the company's largest supplier, had visited the premises and told him that Excel had been advised that Gisborne would be picketed the following week and that Excel had been asked to refuse to supply the company. Mr Greenshields also gave evidence that he received a call from the sales manager of Excel, Mr Lee, who said that he had received a call from Mr Henderson advising him not to cross the picket line and threatening him with words to the effect that 'we know you (Excel) deliver to other sites'.

Mr Henderson, in response, denied making any request to Excel to refuse to supply the company although he admitted telephoning Mr Lee. According to Mr Henderson the purpose of calling Excel was for courtesy reasons, that he did not want to get into trouble with the ACCC and he did not want to interfere in any way with any contract Excel had with anybody. Mr Henderson denied threatening Mr Lee.

Other episodes of trucks approaching the premises and the drivers being spoken to by union officials were recounted by Mr Greenshields and were responded to by Mr Henderson.

Decision

The Court was referred to Sackville J in *Farah (Australia) Pty Ltd v National Union of Workers NSW Branch* (No 1) 1997 ATPR 41-583 in which the activities of a:

> picket affected to an appreciable extent the ease of the usual way the supply of goods and services to the applicant at its premises, and, therefore, hindered that supply within the meaning of s. 45D(1).

There was evidence of 'possible future ramifications' for persons who crossed the 'picket line'.

The Court was also referred to the latest relevant Full Court decision of *Australian Builders' Labourers' Federation Union of Workers (WA Branch) v J-Corp Pty Ltd* (1993) 42 FCR 452. The salient facts were:

- the union had authorised the establishment of an assembly of its members which was accepted by those involved as a 'picket line';
- there was a sign announcing the existence of the picket;
- many persons intending to deliver to the site did not persist because they believed there would be a 'hassle' in delivery; and
- there was fear of the consequences of crossing the picket including the black banning of some union members.

The activities in J-Corp and the evidence of possible future ramifications in Farah were contrasted with the current evidence. In Marshall J's view, the officials were not 'hindering' or 'preventing' in the context of s. 45D on the current state of evidence. This would be occurring if, as Lockhart and Gummow JJ said in J-Corp (at 461–462), persons arriving at the premises 'had turned away because, or partly because' of what they believed would be a 'hassle' in entering, 'and that it was best not to persevere'.

Both counsel submitted that the Court should not focus on whether what was happening was a picket. As Spender J said in J-Corp (at 468),

> ...a picket can have many and different meanings... (and) in my respectful opinion it is wrong to start from the premise that... a picket line involves a prima facie contravention of s. 45D... Such a contravention can be avoided if there is sufficient disclaimer that access is not prevented or hindered.

In Marshall J's view, as the evidence stood, the officials were engaged in a protest about the dismissal by distributing a brochure outlining their concerns. In contrast to J-Corp there was no direct evidence from any person who was allegedly hindered. Further, in contrast to Farah, there was no direct evidence of any ramifications which might flow from persons who had supplied Gisborne.

His Honour found Mr Greenshield's evidence about 'pickets' as having 'confronted' people at the premises unconvincing. No specific names or instances were provided. This evidence was considered inconsistent with the evidence that suggested a small peaceful protest by a group of men. Consequently, His Honour found that, on the current evidence, there was no serious issue to be tried. Leave, however, was reserved for the company to supply evidence that would disclose that a serious issue to be tried did exist. As the claim that there was a serious issue to be tried was regarded as extremely doubtful, His Honour did not consider the issue of balance of convenience.

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