Pont Data Australia v. Asx

Stephen Menzies reports on this recent Trade Practices case which has wide-ranging implications for electronic information providers

On 9th February Justice Wilcox delivered a judgment in proceedings commenced by Pont Data against the Australian Stock Exchange and ASX Operations Pty Limited, a wholly owned subsidiary of the Exchange ("ASX").

Background

Stock exchanges throughout Australia are operated as subsidiaries of Australian Stock Exchange Ltd. As a result of operating the exchanges, information concerning trading and the bid and offer prices at which brokers will buy and sell securities is collected. That information represents a valuable commodity, which is distributed to broking houses, banks and other financial institutions by various data vendors, such as Reuters, AAP Information Services, Telerate and Pont Data. This case concerned an application by Pont Data for orders in respect of a contract for the supply of a data feed to Pont Data by the ASX. That data feed ("C signal") is the kind most ordinarily supplied by data vendors to their customers. The ASX had alleged that Pont Data was in breach of its distribution agreement, particularly in respect of an understanding that all of Pont Data's customers should sign a "tri-partite agreement" (between ASX, Pont Data and the customer).

Judgment

Justice Wilcox found that the ASX had breached the provisions of ss45, 46 and 49 of the Trade Practices Act ("the Act"), justifying the court to make declarations that various contractual terms were void. However, because such declarations or injunctions which the court may grant would require careful drafting in the light of further submissions by counsel, no final orders have yet been made at time of writing.

In relation to the balance of the contractual terms (being those elements of the supply contract which were not as such void for contravention of the Act), Pont Data sought an order declaring the contracts void except in so far as they provide for the supply to Pont Data of the ASX signal, with a further order requiring the ASX to refund to Pont Data all moneys paid pursuant to the Agreements other than $10.00. The question of fees arose because Pont Data contended that the ASX had failed to establish that the provision of the ASX C signal occasioned any cost at all, so that the imposition of any fee, particularly the $45,000 "storage fee" would involve monopoly pricing and an abuse of market power.

The Act only affects the validity of that portion of a contract which contravenes the Act (in so far as that provision is severable from the balance of the contract). Because the tainted terms of the contract were so connected with all other terms that their deletion would materially change the contract, Justice Wilcox thought it more appropriate that the court exercise its power to make an order varying the contract, so as to keep the contract on foot on reasonable terms but without provisios which transgress the Act. The most difficult matter, on which the court sought further submissions from the parties, concerned the nature and amount of the fees payable under the varied contract. Justice Wilcox thought that it would not be unfair to compel the ASX to supply the C signal at a price which reflected "the costs of supplying that signal together with a margin of profit similar to that charged by competitive suppliers in the data industry". Accordingly, he allowed the ASX the opportunity to submit further material to the court within one month of the date of judgment, demonstrating the cost of supplying the C signal.

Breach of Section 45

Section 45 of the Act prohibits a corporation from making a contract, arrangement or understanding if it contains an "exclusionary provision" or has the purpose, or would have or would likely to have the effect, of "substantially lessening competition".

Justice Wilcox found on the facts (as discussed below in relation to s.46) that the ASX had the purpose of preventing the entry of persons into market for data supply or deterring or preventing a person engaging in competition in that market and accordingly the contractual provisions had the effect of substantially lessening completion in both the stock exchanges market and in the information market.

In discussing s45, arguments arose concerning whether the data feed was in fact the supply of "goods" or "services". Justice Wilcox concluded that the data feed, being electrical impulses, constituted "goods" for the purposes of the Act. This conclusion was important, in respect of the application of s49 of the Act, as discussed below.

Section 46

Section 46 of the Act provides that a corporation that has a substantial power in a market shall not take advantage of that power for the purpose of:

"(a) eliminating or substantially damaging a competitor of the corporation .... in that or in any other market;
(b) preventing the entry of a person in that or any other market; or
(c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

The evidence in the case allowed Justice Wilcox to find:

1. The ASX had a substantial degree of power in two markets: the stock exchanges market (being the provision of stock market services in a manner permitted by the Securities Industry Code) and the information market (being the provision of information regarding sales made on various securities exchanges); Justice Wilcox did not think that the division of the information market into sub-markets by reference to wholesale and retail supply of information made any difference to the question as to whether or not the ASX had a substantial degree of power in the information market.
2. It was the purpose of the ASX to prevent anyone else entering the stock exchange market, on the basis of background planning documents of a Committee of four persons from the ASX (known as 'G4') and certain conduct being:
   - the ASX insistence on a tri-partite agreement,
   - the drastic limitations on data use contained in the agreement; and
   - the prohibitions in the contract on use of the information in "establishing, maintaining or providing a stock market" for trading in securities.
3. A purpose of the ASX was to prevent the entry of Pont Data and others into the information market, by preventing the materials supplied by ASX being wholesaled. Although the ASX was, on the evidence, motivated by self-interest (being an effective cross subsidy of its own JECNET services), rather than malice towards its competitors, that did

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Morosi instituted defamation proceedings against the broadcaster. The New South Wales Court of Appeal dismissed an appeal against a jury's award of $10,000 in Morosi's favour.

This case illustrates the first characteristic of the law: what the broadcaster intended his words to convey was irrelevant; his motive was irrelevant. It also illustrates the operation of the third characteristic. To take advantage of the defence of justification, the defendant would have to establish the truth of the defamatory imputations. So far as the "speculations" and "rumours" referred to in the broadcast were concerned, the defendant would have to prove the truth of the defamatory imputations arising from the speculations and rumours; it would not be sufficient to show that there had in fact been speculation or that the rumours were in fact circulating.

Fictional works

To succeed in a defamation action the plaintiff must prove that the material complained of was published "of and concerning" the plaintiff. The law is concerned with whether the material would lead persons acquainted with the plaintiff to believe that he or she was the person referred to. It follows that a work of fiction may defame a person if it could reasonably be understood to refer to that person.

In one case, a newspaper published what was intended to be an amusing article about a person described as "Artemus Jones". Unknown to the author and the editor there was a person of that name. Jones' friends gave evidence that they believed the article referred to him. The House of Lords held that the trial judge had correctly directed the jury that they must apply a two stage test. Firstly they must determine whether sensible and reasonable people reading the article would think it referred to an imaginary person or to a real person; if people supposed it to refer to a real person, the second question for the jury was whether people who knew the plaintiff would understand that he was the person referred to in the article.

Similar principles are applied where material describes fictitious events. A magazine published a story dealing with fictitious incidents involving the hijacking of an aeroplane. The aeroplane was, however, described as one belonging to that airline and its insignia. The airline commenced proceedings. It was held that it should be left to the jury to determine whether a reasonable reader would conclude from the story that there were dangers inherent in travelling in the plaintiff's aeroplanes.

These cases illustrate the second characteristic of Australia's defamation laws: the writers' knowledge regarding the existence of Artemus Jones and the airline was irrelevant. Furthermore, the writers' intentions were in accordance with the first characteristic, irrelevant.

Defamation of the dead

In Australia there is no liability for defaming a person who is dead. Thus, this provides another illustration of the third characteristic of the law.

A statement regarding a dead person may, however, form the basis of an action by a living person. For example, if you were to say that a dead person was illegitimate, the person's living parents might bring an action alleging that this defamed them. An imputation concerned the family, whether living or dead, of a living person may defame that living person. It is not sufficient that a deceased person's reputation has been injured. An imputation about a deceased person is defamatory only if the conditions for defamation are fulfilled in relation to a living person.

Some law reform bodies have suggested that there should be a limited right of action in respect of defamatory imputations regarding a deceased person, even if the imputation does not defame a living person. If the law is to find the truth, that is, to determine whether an attack on a person's reputation is "wrongful", regardless of whether the person happens to be alive or dead, these proposals should be implemented.

Conclusion

Most people judge the "wrongness" of a statement made by one person about another by reference to its veracity; they would probably also have regard to the mental state of the "wrongdoer" including his or her motive and state of knowledge. Australia's defamation laws pay insufficient regard to motive, knowledge and truth. In formulating proposals to amend the law, regard should be had to what the law aims to achieve.

** This article is based on a paper delivered at a Seminar conducted by The Australian Society of Authors in Melbourne on 3 February 1990.*

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not matter in that the relevant conduct was to deter or prevent competitive conduct.

Section 49

Section 49 prohibits a Corporation from engaging in price discrimination in relation to the supply of goods. Pont Data contended that, by the terms of the agreements it was obliged to sign with subscribers , the ASX discriminated between purchasers of "goods of like grade and quality" in relation to price. As Justice Wilcox found that the data feed constituted " goods" , he was satisfied that the ASX did discriminate, as between its subscribers in relation to the price charged for the C signal , because :

- the monthly fees varied according to the number of terminals which took the information;
- the fee varied as between subscribers for the same number of terminals, as to how many customers those subscribers had;
- the fees varied by reference to dynamic supply and non-dynamic supply of data to end-users; and
- the fees varied in relation to subscribers who pay for the right to store information and those who did not.

Justice Wilcox found that the differences were of a kind to which the various exempting provisions of s.49 had no application and that the breach of s.49 was therefore established

Clarification of issues

The judgment of Justice Wilcox will affect the business of data supply in Australia in a number of respects, aside from its impact on distribution of data by the ASX.

It was unnecessary for Justice Wilcox to determine whether copyright subsisted in either a data stream or its format, because of the admissions made by the ASX that legal advice had indicated the ASX did not own copyright in the data itself. However, the judgment seems to proceed on the basis that copyright in the data or format was not a relevant issue, because the exemption from the Act for conditions imposed in a copyright licence was not considered.

By finding that the data stream constituted "goods" for the purposes of the Act, Justice Wilcox was able to apply s.49 to the conduct of the ASX. However, the same conclusion may affect other conduct of data supply, including arrangements for resale price maintenance. Previously, a data or information service had been regarded as a "service" for the purposes of the Act.