

SUPREME COURT OF QUEENSLAND

CITATION: *Miller v. Alpha Club Australia Pty Ltd & Anor* [2003] QSC 118

PARTIES: **MATTHEW MILLER**
(applicant)
v
ALPHA CLUB AUSTRALIA PTY LTD
(ACN 014 482 010)
(first respondent)
and
JOHN SPARKES
(second respondent)

FILE NO: S4767 of 2001

DIVISION: Trial

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 12 May 2003

DELIVERED AT: Brisbane

HEARING DATE: 22 July and 2 September 2002, 7 and 17 February 2003

JUDGE: Helman J.

CATCHWORDS: TRADE PRACTICES – FAIR TRADING – whether pyramid selling scheme – whether a trading scheme – whether compensation orders should be granted
Australian Competition and Consumer Commission v. Giraffe World Australia Pty Ltd (No. 2) (1999) 95 F.C.R. 302
Fair Trading Act 1989 ss. 5, 55A-55D, 98, 100

COUNSEL: Mr M.K. Stunden and Mr J. Horton for the applicant
No appearance by the first respondent
The second respondent in person

SOLICITORS: The Crown Solicitor for the applicant

[1] The applicant is the Commissioner for Fair Trading. In this proceeding, begun on 28 May 2001 by originating application, he alleges contraventions of the *Fair Trading Act* 1989 and, relying on s. 98 of that Act, seeks injunctions restraining the first and second respondents as follows:

1. A permanent injunction restraining the first and/or second respondents by their servants or agents or otherwise, from taking any steps to sell membership in the Alpha Club, the Alpha Club Australia, the alphaclub.com or any related organization which steps involve any reference to money that may be made by the purchaser of the membership

or other persons by selling a membership or memberships in the Alpha Club, the Alpha Club Australia, the alphaclub.com or related organization, within the State of Queensland;

2. A permanent injunction restraining the first and/or second respondents, by their servants or agents or otherwise, from promoting or taking part in the promotion of any scheme by which steps are taken to sell membership in the Alpha Club, the Alpha Club Australia, the alphaclub.com or any related organization which steps include any reference to money that may be made by the purchaser of the membership or other persons by selling a membership or memberships in the Alpha Club, the Alpha Club Australia or the alphaclub.com or related organization, within the State of Queensland;

3. A permanent injunction restraining the first and/or second respondents, by their servants or agents or otherwise, from conducting presentations or taking other steps by which it seeks to sell or otherwise receive money for membership of the Alpha Club, the Alpha Club Australia, the alphaclub.com or related organisation, within the State of Queensland.

- [2] Relying on s. 100 of the *Fair Trading Act*, the applicant also seeks orders that the first and/or second respondents compensate Rene Ansen, David Brown, Diane Erskine, Andrew Reibelt, and Joseph Miceli by paying each \$6,050.
- [3] The applicant delivered an amended statement of claim pursuant to an order made by Muir J. on 28 June 2001, and the first respondent delivered its defence to that amended statement of claim on 1 August 2001. The first respondent was then the only respondent to the application. On 12 October 2001 Mullins J. ordered the joinder of the second respondent and gave leave to the applicant to file and serve an amended originating application and a further amended statement of claim. The amended originating application and further amended statement of claim were filed on 17 October 2001, and further copies of those documents were filed on 21 November 2001. The first respondent has not pleaded to the further amended statement of claim, and so, by operation of rule 385(3) of the *Uniform Civil Procedure Rules 1999*, is taken to rely on its defence delivered on 1 August 2001 as an answer to the further amended statement of claim. The second respondent's defence to the further amended statement of claim was filed on 3 May 2002.
- [4] In the amended originating application the claim to compensation of the five people I have referred to is made, and in paragraph 6 of the further amended statement of claim payments of \$6,050 between December 1999 and December 2000 by 'the people listed Schedule A to this Statement of Claim' are alleged, and it is further alleged that '[t]he people listed in Schedule A to this Statement of Claim have paid to the first and second respondents the sum of money listed next to the names in Schedule A', but neither filed copy of the further amended statement of claim has a schedule to it. In paragraph 12 of the first respondent's defence and in paragraph 13 of the second respondent's defence admissions are made as to the payment of membership fees by certain members of the Alpha Club. I shall return to the subject of the claims for compensation later.
- [5] Interlocutory injunctions were granted by Mackenzie J. on 7 June 2001.

- [6] The application is brought in reliance on the provisions of Division 2A (Pyramid selling, ss. 55A-55D) of Part 3 (Trade Practices) of the *Fair Trading Act*. Section 55D provides:

55D.(1) A person commits an offence if –

- (a) the person is a promoter of, or participant in, a trading scheme (the ‘**payee**’) and
- (b) someone else who is, or has applied or been invited to become, a participant in the scheme (the ‘**payer**’) makes a payment to or for the benefit of the payee; and
- (c) the payment is made under an inducement of a prospect held out to the payer of receiving benefits for the introduction, by the payer or someone else, of other persons who become participants in the scheme.

Maximum penalty – 540 penalty units.

(2) A person commits an offence if the person –

- (a) is a promoter of, or a participant in, or is otherwise acting in accordance with, a trading scheme; and
- (b) by holding out to someone else (the ‘**payer**’) the prospect of receiving benefits for the introduction, by the payer or someone else, of other persons who become participants in the scheme, attempts to induce the payer –
 - (i) if the payer is already a participant in the scheme – to make a payment to or for the benefit of a promoter or participant in the scheme; or
 - (ii) if the payer is not already a participant in the scheme – to become a participant and to make a payment to or for the benefit of a promoter or participant in the scheme.

Maximum penalty – 540 penalty units.

(3) A person commits an offence if –

- (a) the person promotes or takes part in the promotion of a scheme (the ‘**payee**’); and
- (b) a payment under the scheme is to be made by someone else who participates, or has applied or been invited to participate, in the scheme (the ‘**payer**’) to or for the benefit of –
 - (i) the payee or someone else who takes part in the promotion; or
 - (ii) someone else who participates in the scheme; and
- (c) the inducement under the scheme for making the payment is the holding out to the payer the prospect of receiving benefits from other persons who may participate in the scheme

Maximum penalty – 540 penalty units.

- (4) For this section, an inducement or attempt to induce is made by holding out a prospect of a type mentioned in the section if the prospect is or would be a substantial part of the inducement.

[7] Section 55B provides, so far as it is relevant, that a ‘trading scheme’, as that expression is used in Division 2A, is a scheme that includes the following elements:

- (a) goods, services or both goods and services are to be provided by a promoter of the scheme;
- (b) the goods or services are to be supplied to or for other persons under transactions arranged or effected by participants in the scheme, not all of whom are promoters of it.

The word ‘provided’ in (a) has the general meaning of ‘made available’: see as to the corresponding provision in the *Trade Practices Act 1974* (Cth), the former s. 61(4), *Australian Competition and Consumer Commission v. Giraffe World Australia Pty Ltd (No. 2)* (1999) 95 F.C.R. 302 at p.313.

[8] Section 5 of the *Fair Trading Act*, the definitions section, provides, so far as it is relevant, that in the Act ‘services’ includes ‘any rights (including rights about, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce’.

[9] The applicant alleges contraventions of each of subsections (1), (2), and (3) of s. 55D of the *Fair Trading Act*.

[10] The first respondent, the correct name and Australian Company Number of which is Alpha Club Australia Pty Limited (ACN 084 698 171) is a registered Australian company, part of a group headed by Alpha Club International the head office of which is in Portugal. The first respondent uses, or used, the following other names: The Alpha Club, Alpha Club Australia, and the alphaclub.com. It began business in Queensland in late 1999. It promoted its business in Queensland as ‘The world’s leading Internet based lifestyle membership organisation’ by holding meetings to which ‘guests’ were invited by those already participating in its business. At the meetings, which were held at a number of places (various hotels in Brisbane, the Clunies Ross Centre, and the Brisbane Convention Centre), ‘presentations’ were made. Loud music, clapping, slides, and video clips were used in addition to oral explanations of the activities of the first respondent. Guests were not given details of what the meetings were about in advance, but they were told that a money-making scheme was involved. Men invited were required to wear suits and ties, and women were to be well-dressed. Casual attire was not permitted. Fees of \$50 or more per person were charged and a meal was provided. Forty or more people attended. The suggestion was forcefully conveyed that members of the Alpha Club – for that was what the guests were urged to become – enjoyed a luxurious style of life with high incomes and glamorous holidays. The atmosphere throughout the presentation was one of ‘hype’ - as one guest, Mr David Brown, painter, who attended a presentation at the Sheraton Hotel on 31 March 2000, described it. The signing of an application form for membership by a guest was followed by an announcement which was greeted with loud applause. Contrived applause was also employed to emphasize other parts of the presentations such as the membership fee and the benefits that flowed from membership.

- [11] An early part of the presentations was devoted to describing the discounts available to members of the Alpha Club from affiliated businesses from which goods and services in a number of categories could be purchased: travel, especially through what was described as ‘a member of the alpha club.com Group of Companies’ called Shears World Travel; business; household; leisure; motoring; and what were called ‘Personal Policies’. Then, commissions paid by the first respondent to those who recruited new members to the Club were explained. Large sums of money were mentioned – up to \$1,000,000 per annum, although generally the claims were not as extravagant as that. Guests were told that membership for ten years would cost \$5,500 plus goods and services tax, making a total payment of \$6,050 to the first respondent.
- [12] Guests were told that if they became ‘agents’ they could engage in the business of recruiting new members. There was no charge made for the acquisition of the position of agent, but until in or about May 2000 the choice of becoming a non-member agent was not part of the presentation to guests. Whether or not it was strictly a requirement that a guest be a member before becoming an agent for recruiting and earning commissions from that recruitment, the impression given to guests before in or about May 2000 was that it was a prerequisite for acquisition of agency status. From in or about May 2000 the choice of being a non-member agent was made a formal part of the presentation, but it was only a formal part; in practice, guests were encouraged to become member-agents and discouraged from becoming non-member agents. The reason given was that people approached as potential members were less likely to be induced to become members by someone who was not him- or herself a member of the Alpha Club (and so had not been prepared to pay for membership) than by someone who had made that commitment.
- [13] Although, as I have related, the presentations began by trying to entice guests into the Club by holding out the prospect of discounts on purchases of goods and services from affiliated businesses – many of which discounts proved illusory – the emphasis at the presentations to guests was on the sale of memberships. As Mr David Brown’s brother Mr Samuel Brown, said in giving evidence: ‘The main aim of the Alpha Club was obviously to sell memberships’. Mr Samuel Brown was an information technology consultant, a guest first approached in September 1999 who became an active member and recruiter after he attended a presentation at the Chifley Hotel on 22 January 2000.
- [14] Guests were given the opportunity to sign a membership application, but they were warned that if they failed to do so then they would be deprived of the opportunity to join the Club for twelve months. Those who did were interviewed by Executive Managers of the organization and the Executive Managers then considered whether to accept the applicants as members. The first level of agency was designated ‘Silver’. Silver agents received \$1,240 for each of the first two memberships sold. \$1,930 was paid on the third sale and the agent then attained ‘Gold’ status. A Gold agent received \$1,930 for each membership directly sold and \$690 on each of the first two direct sales made by a Silver agent he or she had introduced provided he or she had helped the Silver agent. Executive Managers, in a level above that of Gold agents, received \$660 and the Organization Director \$330. The first respondent received the balance: \$3,130 less goods and services tax. During the year 2000 approximately 530 people joined the Alpha Club and

paid membership fees, thus generating revenue of nearly \$3,000,000 after the payment of goods and services tax.

- [15] Not all of the guests who became members of the Alpha Club were induced to join by the prospect of receiving commissions from the recruitment of others, but a large number, probably a majority, were. In the former category was Mr Miceli, roofing consultant, who attended a presentation at the Sheraton Hotel on 23 September 2000. In the latter category were Messrs Samuel and David Brown, and Mr Alan Groves, salesman, who attended a presentation at the Sheraton Hotel on 29 April 2000. There is no doubt, however, that irrespective of which of the two categories I have referred to the guests fell into, an attempt was made on behalf of the first respondent to induce each guest to join the Club by holding out the prospect of receiving commissions from the recruitment of others. Not all guests were persuaded to join of course: e.g., Ms Marilyn Holness, senior financial consultant, who attended a presentation at the Brisbane Convention Centre on 3 June 2000.
- [16] The second respondent was the first respondent's 'Organisation Director' and, it appears, chief participant in, and moving force of, the Alpha Club in Queensland. He took an active part in the presentations, in particular in dissuading those who may have wished to become non-member agents from that course. He repeatedly told the guests that the Alpha Club had changed his life. He described the hardships he had endured before he became a member and the luxuries he enjoyed after joining.
- [17] The first respondent in paragraph 2(b) of its defence and the second respondent in paragraph 3(c) of his defence deny that the first respondent's activities constituted a 'trading scheme' within the meaning of that expression in s. 55B of the *Fair Trading Act*, but my conclusion on the evidence is that it was a trading scheme. Element (a) was present because services were to be provided by the first respondent to those guests who became members in that rights, benefits, and privileges provided, granted, or conferred in trade or commerce (discounts on the purchases of goods and services) were to be made available to members by the first respondent, the promoter of the scheme. Element (b) was present because those discounts were to be supplied to other persons (persons induced to join the Club), under transactions arranged or effected by participants in the scheme (the first respondent as promoter, and the participants who recruited those other persons).
- [18] Those guests who became members of the Alpha Club and thereby participants in the scheme after having been invited and having applied to do so made payments to the first respondent (\$6,050) for the benefit of the first respondent (\$3,130 less goods and services tax) and, indirectly, the second respondent (\$330). The first respondent, through its servants or agents, and the second respondent held out to persons who paid to become members the prospect of receiving benefits for the introduction by the member, or by those to whom the member had sold a membership, of other persons who became members of the Club and thereby participants in the scheme. The majority of those who paid to become members did so because they were induced by that prospect in that it was a substantial part of the inducement which led them to pay the membership subscription. The first and second respondents attempted to induce all guests to become members and so to make the payment of the membership subscription to the first respondent, and, indirectly, for the benefit of the second respondent.

- [19] The distinction between member and agent was not maintained in practice: the chief inducement held out to guests was that of becoming a member, which then enabled the guest to become an effective membership-selling agent for no further payment. Although after in or about May 2000 guests could theoretically become non-member agents that course was discouraged on the ground that it would not be possible for one not a member of the Club to recruit others to join it.
- [20] It follows from those findings that the respondents have engaged in conduct that constitutes contraventions of subsections (1) and (2) of s. 55D of the *Fair Trading Act*.
- [21] It is not an element of the offence provided for in s. 55D(3) that the offender promote or take part in the promotion of a trading scheme. A 'scheme' is all that is required under paragraph (a) of that subsection. Clearly enough the first respondent's activities constituted a scheme. Clearly enough also the element of the offence provided for in paragraph (b) was present: there was to be a payment under the scheme by guests who applied or had been invited to participate in the scheme to or for the benefit of the first respondent as promoter of the scheme and other people who took part in the promotion of the scheme. The element provided for in paragraph (c) was not, however, present in this case because the inducement under the scheme for making the payment of a membership subscription was not that of the prospect of receiving benefits 'from other persons who may participate in the scheme'. Those other persons do not, as I construe the section, include the promoter: see *Australian Competition and Consumer Commission v. Giraffe World Australia Pty Ltd (No. 2)* at p.314 concerning the former s.61(2A) of the *Trade Practices Act*. The prospect held out to guests was the receipt of commissions from the first respondent, to whom the membership subscriptions were paid.
- [22] There is no reason to withhold final injunctions directed at the respondents, but I shall invite further submissions on their wording.
- [23] I return now to the subject of the claims for compensation. What emerges is a somewhat confused picture.
- [24] Of the five people on whose behalf compensation is claimed in the amended originating application only three have sent letters to the applicant requesting, and consenting to, his recovery of compensation. Those three (Mr David Brown, Mrs Erskine, and Mr Reibelt) have sent letters to the applicant which, omitting formal parts, are as follows:

Alpha Club Australia Pty Ltd

I have paid \$6,050, inclusive of GST in order to become a member of Alpha Club Australia Pty Ltd.

I have since been informed that you are taking action to have Alpha Club Australia Pty Ltd cease trading in Queensland for breaching section 55D of the *Fair Trading Act 1989* which deals with pyramid schemes.

I also understand that you are attempting to recover compensation from Alpha Club Australia Pty Ltd on behalf of members of the public who joined Alpha Club Australia Pty Ltd.

I therefore request and consent to you recovering compensation from Alpha Club on my behalf.

It will be noted that there is no mention in the letter of a claim against the second respondent, and, as I read the letter, the request and consent relates to a claim for compensation from the first respondent only. Mrs Brenda Ansen sent a similar letter, but no claim was made on her behalf, although one was made on behalf of her husband Mr Rene Ansen. There is no evidence that Mr Miceli has sent a letter to the applicant, but I note that in an affidavit sworn by Mr Alan Groves and filed on 17 May 2002 he says in paragraph 46 that he consents to the applicant's seeking compensation on his behalf.

[25] To add to the confusion there is no explicit claim for compensation made in the further amended statement of claim. In paragraph 10 the applicant sets out the relief he seeks, and, after specifying the injunctions sought, he claims merely '[s]uch further or other orders as the court considers appropriate', and costs.

[26] I have already mentioned that a Schedule A is mentioned in the further amended statement of claim but that neither filed copy of the further amended statement of claim has a schedule to it. There was, however, a schedule to the amended statement of claim as follows:

SCHEDULE 'A'

<i>Name of Member</i>	<i>Membership Paid</i>
1. Rene Ansen	\$6,050.00
2. David Brown	\$6,050.00
3. Samuel Brown	\$5,500.00
4. Faye Hollyer	\$6,050.00
5. Ross Ormerod	\$6,050.00
6. Diane Erskin	\$6,050.00
7. Ross Burgess	\$6,050.00
8. Andrew Reibelt	\$6,050.00
9. Cynthia Matuschka	\$6,050.00
10. Casey Royal	\$6,050.00
11. Alan Groves	\$6,050.00

In paragraph 12(c) of the first respondent's defence it admits that each of the people named in that schedule 'paid to the respondent the sum of money listed next to their names' as shown in the schedule, with the exception of Mrs Holyer whom it alleges was refunded the \$6,050 she paid on or about 13 November 2000. In Mrs Holyer's affidavit, filed on 28 May 2001, that refund is confirmed: see paragraphs 42 and 43. In paragraph 13(c) of the second defendant's defence he admits that Messrs David Brown, Samuel Brown, Ormerod, Burgess, and Royal each paid to the first respondent the membership fee at the time they became members, but alleges that in the case of Mr Samuel Brown the payment was \$5,500 and that in the other cases it was \$6,050 inclusive of goods and services tax. In paragraph 13(d) of the second respondent's defence he denies that Mr Ansen paid any sum to the first respondent and alleges that Mr Ansen's wife Brenda became a member and a fee of \$6,050 was paid by Answill Pty Ltd.

- [27] I shall invite further submissions on the question whether orders for the payment of compensation should be made, and, if so, against whom and in favour of whom.
- [28] I shall also require further submissions on costs.