[2021] QCA 208

COURT OF APPEAL

McMURDO JA

Appeal No 10153 of 2021
SC No 7109 of 2020

NESTLE AUSTRALIA LTD **ACN 000 011 316**	**First Applicant**
AUSTRALASIAN FOOD GROUP PTY LTD **ACN 154 314 913**	**Second Applicant**
v	
OM BUSINESS GROUPT PTY LTD **ACN 147 861 229**	**First Respondent**
PRATAP NARSEY	**Second Respondent**
VINEET MANOT	**Third Respondent**

BRISBANE

THURSDAY, 30 SEPTEMBER 2021

JUDGMENT

McMURDO JA: This is an application made pursuant to r 772 of the *Uniform Civil Procedure Rules* for the appellants to provide security for the respondents' costs of the appeal in an amount of $88,000. A further order is sought, in the usual terms, that the appeal be stayed until that security is provided.

The dispute between the parties arises from a franchise granted by Nestlé Australia to OM Business Group under which it was permitted to operate a store selling a certain brand of

ice-cream. The franchise agreement was in writing and dated 1 May 2012. The franchise was for a period of five years which, it appears, had the store opening in June 2012. The franchisee operated the business under that agreement until the expiry of the period in 2017. The business was unsuccessful, and the franchisee incurred substantial losses. Its losses continued, in varying amounts, over each of the financial years within the franchise period.

This proceeding was commenced in the Trial Division by a claim and statement of claim filed on 30 June 2020. The plaintiffs were OM Business Group, together with two individuals, Mr Narsey and Mr Manot, who were its directors. The defendants were Nestlé Australia Ltd as well as another company called Australian Food Group Pty Ltd.

The plaintiffs were not legally represented, and their claim and statement of claim had a number of defects, insofar as the pleading rules were concerned. Nevertheless, some things were sufficiently clear. OM Business Group was complaining of losses over the years of the franchise period, including an alleged loss of $250,000 as "loss of goodwill at the end of [the] franchise term …". The directors claim that they were worse off because they were required to work many hours in this business, without pay and foregoing wages which they would otherwise have earned elsewhere.

The causes of action which were pleaded fell into three categories. Firstly, there were claims of breaches of the franchise agreement. Secondly, there were claims of breaches of an alleged fiduciary duty owed by the franchisor to the franchisee. And, thirdly, there were claims of unconscionable conduct in contravention of the *Australian Consumer Law*. The case was pleaded by reference to ss 20 and 22 of the *Australian Consumer Law* but it may be accepted for present purposes that by the reference to s 22 the appellants were intending to advance a case of contraventions of s 21.

In different ways, the defendants sought a summary disposal of the proceeding on an application which came before the primary judge in March. The contractual claims and the equitable claims were challenged under r 171, upon the ground that nothing had been pleaded which supported what was said to have been that misconduct. The judge accepted that

argument and struck out those parts of the pleading which contained the contractual and equitable claims.

The statutory claim was challenged on a different basis. The defendants argued, and the judge accepted, that this was a case in which the statutory claims were commenced so clearly out of time that they should not be allowed to go forward. In that respect, the judge was persuaded to determine, as a preliminary question pursuant to r 483, whether the plaintiffs were barred by reason of subsections 236(2) and 237(3) of the *Australian Consumer Law*, or otherwise, from obtaining any of the relief sought in the proceeding. His Honour ordered, it would appear by a declaration, that the plaintiffs were barred by those provisions from obtaining any of the relief under the *Australian Consumer Law*.

There is no appeal against his Honour's disposal of the contractual and equitable claims. The appeal is against the determination of the statutory claims. On one view of the notice of appeal the only appellant is OM Business Group and the only respondent is Nestlé Australia. However, in this application, it was made clear by the appellants that their intention was that each of the parties in the Trial Division should be parties to this appeal and for the purposes of this application I will proceed upon that basis.

In essence, the primary judge held that any cause of action under the *Australian Consumer Law* accrued more than six years prior to the commencement of this proceeding. He characterised the plaintiff's case as being that, in reliance upon representations said to have been made by Nestlé, the franchise agreement was entered into, and a guarantee was given by Mr Narsey, which they would not have done had the alleged misrepresentations not been made. As I have said, the franchise agreement was entered into in May 2012, more than eight years prior to the commencement of this proceeding. Further, his Honour said, the evidence clearly demonstrated that prior to 30 June 2014, "the unprofitable nature of the business was known to the plaintiffs and they were complaining loudly about it".

The terms of r 772 confer a broad discretion in an application for security for costs of an appeal. In the decision of three judges of this court in *Natcraft Pty Ltd & Anor v Det Norske*

Veritas & Anor [2002] QCA 241 Justice Davies said that it was impossible to state comprehensively the factors which are relevant to an assessment of an application of this kind. Nevertheless, there are some considerations which usually arise, as they do here.

The first is the financial position of the appellants. Clearly, their position is poor. OM Business Group has a paid up share capital of $400 and has granted registered interests to a bank over all of its present and after acquired property (if any). None of the appellants is the registered owner of any real property in Australia and in their outline of submissions for this application the appellants did not dispute their impecuniosity.

A further consideration is whether an order for security for costs would stifle the appeal. As it is common ground that the appellants have no assets, that is likely to be the consequence of an order for security and, in turn, that would put paid to what remains of the proceeding. It is submitted that there is no evidence, however, that this would occur. There is no suggestion here, as there is often in other cases, that there is some person standing behind this case on the plaintiff's side who would benefit from success in the appeal and in the proceeding and who is able to provide the security. If there is at least a fairly arguable case for the appellants in this appeal, the prospect that the appeal would be stifled is a weighty consideration against an order for the provision of security for costs in this case.

The respondents, however, submit that the appeal has no merit. Whilst acknowledging that it is not for the court to pre-judge the outcome of an appeal in this context, it is submitted that this is a case where the appellants' prospects are "bleak" which, as has been said in this court, provides a powerful factor in favour of ordering security.

In my opinion, the appellants' prospects in the appeal are not bleak as I will now explain.

The primary judge characterised the statutory claim or claims as essentially complaints of loss and damage by a reliance upon misrepresentations. On his analysis of the pleading, all of the misconduct occurred prior to the commencement of the operation of the appellants' business and any reliance upon those misrepresentations pre-dated 30 June 2014 because, by then, the appellants were aware that they were the victims of the alleged misrepresentations.

That is not, at least on one view, how the statement of claim should be understood. The plaintiffs' case was that there had been unconscionable conduct contrary to the *Australian Consumer Law* and that some of that conduct had occurred during the franchise period. Importantly, it was not sufficiently clear from the pleading at least that all of it has occurred prior to 30 June 2014.

Paragraph 7 of the pleading alleged that there had been unconscionable conduct by the conduct pleaded in paragraph 6. A large amount of ground was covered in paragraph 6 and some of the allegations there made were that representations were false at the time they were made, or that they were made without reasonable grounds insofar as they were representations made with respect to future matters. However, there were also several allegations to the effect that the franchisor failed to do things within the franchise period which caused loss to the plaintiffs. For example, there were allegations that the franchisor did not promote the brand and the franchisee's shop, it did not "look after" the franchisee and provide it with assistance such as marketing, that it did not make the brand a recognisable household name, and that it failed to provide adequate levels of training and assistance to the franchisee. It was alleged that the franchisor failed to hold meetings of franchisees, and it was alleged that the franchisor approached the franchisee so late in the period "to discuss … options", that there resulted in a loss of the goodwill of the business.

At least on one view of the pleading these are allegations of conduct which are distinct from one another in the sense that there was not simply a continuous course of misconduct in contravention of the statute.

It must be said that this was a very poorly drafted pleading. But it is well established that a case should not be decided against a plaintiff, as fatally statute barred, in advance of a trial of the whole of the plaintiff's claim except in the clearest of cases: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533.

The present question is not whether this part of the case was deficiently pleaded according to the procedural rules. Nor is the present question whether a claim for a contravention or

contraventions of s 21 would be bound to fail on its merits. It is whether such a case was bound to fail as time barred according to s 236 and s 237. It seems likely that some of the conduct and any loss from it pre-dated 30 June 2014, but it is far from clear that this was the position with all of the conduct which is pleaded in paragraphs 6 and 7, at least as the case appears from the pleadings.

This interpretation of the plaintiffs' case may not have been explained to the primary judge and this is suggested by the fact that his Honour did not deal with it. But, in my view, such an interpretation is fairly arguable and, therefore, the statutory claim or claims were not, in their entirety, so clearly out of time.

It is submitted, nevertheless, that the evidence which was before his Honour did not support a case of the kind which I have described; in other words, that the evidence would have established or did establish that any cause of action of the nature that I have described had still accrued before 30 June 2014. I do not have the evidence before me and in an application of this kind it would be unusual to conduct a review of it. It is sufficient to say that because the judge did not consider such a case, he made no findings about it and that the absence of such findings would at least provide a difficulty in supporting the judgment on that basis.

It is further submitted that, particularly by reference to the decision of the High Court in *Hawkins v Clayton*, a cause of action of this kind accrues as soon as the alleged loss is first incurred and that the loss in this case was first incurred well before 30 June 2014. However, that depends upon a premise of when the conduct itself occurred, because the loss from the conduct or misconduct could not occur prior to the misconduct itself, it is obvious to say. So the question again is whether, according to a tenable interpretation of the plaintiffs' pleaded case, there were several events of contraventions of s 21 in the way which I have described.

In summary, it is my view that it is fairly arguable in this appeal that upon the basis of this interpretation of the pleaded case, the statutory claim or claims were not, in their entirety, so clearly out of time that according to the authorities it was appropriate to dispose of them in advance of the trial of the entire proceeding. That, in turn, affects the consideration of the

prospect that by the appellants being ordered to provide security, their appeal would be effectively denied to them.

In my view, therefore, the interests of justice in this case require the refusal of the present application and it will be ordered that the application filed on 23 September 2021 be refused.

…

It will be further ordered that there be no order for costs of this application.