

SUPREME COURT OF QUEENSLAND

CITATION: *Gatley v Rockhampton Cab Company Limited* [2011] QSC 260

PARTIES: **LEO GATLEY**
(Plaintiff)
V
ROCKHAMPTON CAB COMPANY LIMITED
(ACN 009 718 807)
(Defendant)

FILE NO/S: 13394/10

DIVISION: Trial

PROCEEDING: Claim – Damages – Unlawful interference with trade or business
Claim – Declaratory or injunctive relief – Restraint of trade

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 26 August 2011

DELIVERED AT: Brisbane

HEARING DATE: 6/5/2011 and 10/5/2011. Subsequent written submissions on 9/6/2011, 17/6/2011, 23/6/2011, 4/8/2011, 9/8/2011.

JUDGE: Byrne SJA

CATCHWORDS: **RESTRICTIVE TRADE PRACTICES – RESTRAINT OF TRADE – REASONABLENESS OF RESTRAINT OF TRADE – GENERAL ISSUES CONCERNING REASONABLENESS** – where the plaintiff was a taxi driver – where the defendant was responsible for the administration of taxi services in the Rockhampton area – where the defendant was responsible for promulgation of By-laws for the administration of taxi services in the Rockhampton area and for the authorisation of drivers and operators to provide those services – where the plaintiff had been involved in a number of incidents while working as a taxi driver – where the Board of the defendant imposed disciplinary measures – where the Board of the defendant withdrew the plaintiff's access to the defendant's communication facilities - whether the Board's decisions constituted a denial of procedural fairness – whether the decision to withdraw the plaintiff's access to the defendant's communications facilities by withdrawal of the

plaintiff's PIN was an unlawful restraint of the plaintiff's trade

DISCIPLINARY TRIBUNALS AND ADMINISTRATIVE PROCEDURES – NATURAL JUSTICE – RIGHT TO NOTICE OF CHARGES – NOTICE REQUIREMENTS – where the Board of the defendant was a private association – where the Board imposed discipline on the plaintiff for his involvement in incidents contravening the By-laws promulgated by the defendant – whether the Board's decision involved a denial of procedural fairness – whether the doctrine in *Buckley v Tutty* extended to a decision under rules that were otherwise sound that was afflicted with a denial of procedural fairness

RESTRICTIVE TRADE PRACTICES – RESTRAINT OF TRADE – CONSTRUCTION AND REMEDIES – REMEDIES – whether declaratory or injunctive relief was available to remedy the decision of the defendant to withdraw the plaintiff's access to the communication facilities

TORTS – TRESPASS AND INTENTIONAL TORTS – ECONOMIC TORTS – INTENTIONAL INTERFERENCE WITH CONTRACT – where the plaintiff contended that the defendant's actions in withdrawing his access to the defendant's communication facilities was an unlawful intentional interference with his contract with the operator of his taxi – whether there was an unlawful interference

Property Law Act 1974, s 55 cited.

Adamson v New South Wales Rugby League Pty Ltd (1991) 31 FCR 242, cited.

Aerial Taxi Cabs Co-Operative Society Ltd v Lee (2000) 102 FCR 125, cited.

Battle v Bundagen Co-operative Ltd (No 2) [2011] NSWCA 38, cited.

Bradley v Jockey Club [2005] EWCA Civ 1056, cited.

Buckley v Tutty (1971) 125 CLR 353, considered.

CECA Institute Pty Ltd & Anor v Australian Council for Private Education and Training [2010] VSC 552; (2010) 245 FLR 86, cited.

Hardie Finance Corporation Pty Ltd v Ahern (No. 3) [2010] WASC 403, cited.

McClelland v Burning Palms Surf Life Saving Club [2002] NSWSC 470; (2002) 191 ALR 759, cited.

Rush v WA Amateur Football League (Inc) (2007) 35 WAR 101, cited.

Sanders v Snell (1998) 196 CLR 329, cited.
Stininato v Auckland Boxing Association (Inc) [1978] 1
 NZLR 1, considered.

COUNSEL: R E Reed for the Plaintiff
 D B Fraser QC for the Defendant

SOLICITORS: Robert Downey Lawyers for the Plaintiff
 Macpherson & Kelly Lawyers for the Defendant

Becoming a Rockhampton Taxi Driver

- [1] The plaintiff works as a taxi driver in Rockhampton. Last year, he was driving A & K Ramm’s taxi. As remuneration, he received half the fares. He had no other employment.
- [2] The defendant provides administrative services for taxis in Rockhampton. Within the defined area, the defendant is the only organisation supplying such services, which include taking bookings from customers and allocating them to drivers.
- [3] Drivers access the defendant’s communication facilities through a mobile data terminal installed in the vehicle. Without a personal identification number (“PIN”), a driver cannot use the booking system. And without access to the booking system, a driver “cannot drive a cab in Rockhampton”, as Mr Davey, the defendant’s Chairman of Directors, summarised the situation.
- [4] In February 2009, the plaintiff wrote to the defendant asking “to operate within your organisation” as a taxi driver. The letter continued:

“I agree, should such authority be given, to observe all your rules and operating conditions, which may be subsequently introduced during the currency of such authority.

I also agree to operate within Queensland Transport Regulations and not to bring your Company into disrepute or to jeopardize your performance contract with them [sic].

I acknowledge that should I breach any of the said rules or operating conditions, such authority may be revoked or withdrawn at any time by you.

I also acknowledge that I have received a copy of the Company By-laws.”

- [5] The proposal was, it seems, accepted, and the plaintiff was assigned a PIN to enable him to use the communications network.

Ceasing to be a Rockhampton Taxi Driver

- [6] On 31 August last, the defendant’s Board of Directors (“Board”) resolved that the PIN be withdrawn.¹

¹ As the result of an interlocutory order, the PIN has been restored pending trial: *Leo Gately v Rockhampton Cab Company (ACN 009 718 807)*(unreported, Supreme Court of Queensland, Brisbane, Daubney J, 24 December 2010).

Central Issue

- [7] That decision is challenged in these proceedings. Invoking *Buckley v Tutty*,² the plaintiff contends³ that the withdrawal of his PIN effected an unlawful restraint of trade that should be remedied by declaratory and injunctive relief.
- [8] In view of its inevitable impact on the plaintiff's ability to work as a taxi driver in Rockhampton, withdrawal of his PIN operated as a restraint of trade. So the fundamental issue is, put shortly, whether the Board's decision constituted an *unreasonable* restraint of trade.

First step towards PIN withdrawal

- [9] On 27 August last, Mr Alexander, the defendant's manager, wrote to the plaintiff in these terms:

“Re: Incident Denham Street rank 14th August 2010

The Rockhampton Cab Company has been made aware of an incident between taxi 25 driven by you and taxi number 7, at approximately 11:30pm on 14th August 2010.

As a result of the information on hand at the Rockhampton Cab Company, you are required to attend the meeting of the Board of Directors, situated at 163 East Street Rockhampton, at 10:00am on Tuesday 31st August 2010.

Failure to attend this meeting will result in your PIN being suspended indefinitely.”

- [10] On reading the letter, the plaintiff realised that the Board wanted to discuss an episode about a fortnight earlier.⁴

The 14 August Incident

- [11] Not long before midnight on 14 August, the plaintiff had been involved in an incident at the Denham Street rank with Mr Mahajan and his taxi.
- [12] The plaintiff found himself positioned behind Mr Mahajan's taxi on the rank. He thought that Mr Mahajan had got ahead of him unfairly by using a route forbidden by the defendant.
- [13] The plaintiff got out of his vehicle, walked to Mr Mahajan's taxi, and complained to him that he should have approached the rank only after driving through a nearby roundabout.

² (1971) 125 CLR 353.

³ The plaintiff does not: suggest that there was a contract between the parties; propose that s.55 of the *Property Law Act 1974* matters on the footing that he is the beneficiary of a contract between the Ramms and the defendant by virtue of which the plaintiff was entitled some particular protection; or rely on English conceptions of entitlements to procedural fairness in disciplinary proceedings arising independently of contract or statute exemplified in *Bradley v Jockey Club* [2005] EWCA Civ 1056.

⁴ The letter made no mention of the prospect that the Board might take the PIN away if he did attend the meeting.

- [14] As the taxi ahead of Mr Mahajan's left the rank, the plaintiff tried to manoeuvre his vehicle into the vacated space. At slow speed, his taxi and Mr Mahajan's collided.
- [15] Mr Mahajan got out of his taxi. Words were exchanged. Mr Mahajan pushed the plaintiff and kicked his taxi.
- [16] Both drivers went to the defendant's headquarters. They spoke with Mr Davey. At Mr Mahajan's insistence, the police attended. They took no action.

Board Meeting on 31 August

- [17] Just before the plaintiff arrived at the meeting on 31 August, Board members looked at a DVD that showed CCTV footage of the 14 August incident.
- [18] When the plaintiff joined the meeting, Mr Davey "outlined the incident", as the Minutes record things.
- [19] The DVD CCTV footage was played to the plaintiff.⁵
- [20] Next, as Mr Davey's statement put it, "the plaintiff was informed that his actions may have brought the cab company into disrepute".⁶
- [21] At the Board's invitation, the plaintiff gave his version of the episode. He also said that if he could have his time over again, he would not have reacted as he had and would instead have contacted the base to report what had happened.
- [22] At this stage, a Board member adverted to an earlier incident involving the plaintiff and a member of the public. Mr Davey described it as "boxing in" someone at a service station. According to the Minutes, the plaintiff, in summary, responded: "Refute incident". Mention was also made of an episode at Rockhampton airport. The Minutes described this as a "toilet issue". Once again, according to the Minutes, the plaintiff's reaction was to "refute same".⁷
- [23] The plaintiff was then informed, in effect, that he had the opportunity to advise the meeting of whatever he wanted to say. He responded by characterising the Denham Street episode as a minor incident that should not have involved the company. He, it seems, and not unreasonably, understood the invitation as a last chance to supplement what he had already said about the significance of the episode. Although that would have been apparent to the Board members, none of them suggested that he might also like to address what could happen to him were the Board to conclude that his conduct had brought the defendant into disrepute.
- [24] The plaintiff, who had not been alerted that the Board might withdraw his PIN, was asked to retire while the Board considered what to do.
- [25] When the plaintiff returned to the meeting, a letter signed by Mr Davey was handed to him. It said:

⁵ The plaintiff denies having had the CCTV footage played to him at the meeting. Even though the Minutes do not record the event, the evidence of Mr Davey and Mr Keily persuades me that this did occur.

⁶ The plaintiff's Amended Reply puts this in issue: see para 4(d). In testifying, the plaintiff initially equivocated about this. He finished up by saying, hesitantly, that he did not believe that such a thing had been said to him.

⁷ It is not necessary to consider whether the Board took the earlier incidents into account.

“Re: Incident Denham Rank 14/08/10

Following the Board’s investigation and your attendance at the Board Meeting today the Board has found your actions contributed to this incident and has brought the Company into disrepute.

The Board had decided to withdraw your pin to drive in the Rockhampton Cab Company Limited fleet. Should you wish to have your pin reinstated you must show cause in writing by close of business on Monday 20th September 2010 and your case will be considered by the Board at their next meeting on Tuesday 21st September 2010.”

- [26] The Board gave no reasons:⁸ not for its conclusion that conduct of the plaintiff had brought the defendant into disrepute; nor for imposing the severe sanction of immediately withdrawing the PIN.
- [27] Mr Davey, however, has given evidence of a motivation for withdrawing the PIN: “regard was had to the fact that the plaintiff was serving a good behaviour period of 12 months”. This relates to a sanction imposed for an incident a few months earlier.
- [28] After a Board meeting in April, Mr Alexander had written to the plaintiff in these terms:

“Re: Incident – Mobil – George Street 26th March 2010

I refer to the above incident and your attendance at the Board meeting yesterday.

After consideration of the evidence presented by all parties, the Board dealt with the matter in accordance with the Company bylaws.

The Board also considered that your input provoked the situation and as a result, the Board had found that you are in breach of Company bylaw 4.1(q) which states as follows:-

- *A driver shall not by act, default, omission or utterance do anything which might or is likely to prejudice the reputation and the good name of the Company or the taxi industry generally or which is likely to be contrary to the best interests of the Company or the taxi industry generally.*

The Board has decided that the following penalty will apply to you in this instance:-

- 5 points on the 12 point system, to be wholly suspended for a period of 12 months provided you do not breach the Company bylaws during this period.”

⁸ It may well be that the Board was not obliged to give reasons: *CECA Institute Pty Ltd & Anor v Australian Council for Private Education and Training* (2010) 245 FLR 86, [151]-[152]; but see JRS Forbes, *Justice in Tribunals*, 3rd ed, (2010), [13.12] p 254 (“When a domestic authority wields substantial economic power, a failure to give reasons may be an unreasonable restraint of trade, in that it prejudices rights of appeal”).

Company By-laws

- [29] The defendant's By-laws purport to regulate the conduct of drivers and their relationship with the defendant. As examples, By-law 4.1(a) requires a driver to be "courteous in manner and speech"; 11.17 stipulates that a driver "must not argue or act abusively on any rank...with a fellow driver"; 11.22 forbids a driver from "verbally" abusing a "fellow driver"; and 4.1(q) requires that a driver:

"shall not by act, default, omission or utterance do anything which might ... prejudice the reputation and the good name of the Company ... generally or which is likely to be contrary to the best interests of the Company ..."

- [30] The By-laws also prescribe procedures for dealing with complaints against "company personnel". This expression is defined⁹ to include "Rocky Cab Drivers". The plaintiff is such a driver.¹⁰

- [31] Part 2 provides:

"PROCEDURES IN ESTABLISHING BREACH OF BY-LAWS BY BOARD OF DIRECTORS OR BY-LAWS COMMITTEE

2. GRIEVENCE PROCEDURES:

2.2 Upon receipt of any written complaint made against any company personnel in respect of an alleged breach of the By-Laws the Supervisor through the direction of the Board of Directors may adopt any of or a combination of the following procedures:

- (a) In the case of a public complaint or a matter the Supervisor considers serious enough and not limited to any one matter referred to in the By-Laws or the Schedule of Offences and Penalties, refer the matter to the By-Laws Committee for their direct action as per Part 5 herein;
- (b) Take no action...
- (c) Personal informal interview of the alleged offender ... by the Supervisor...
- (d) Letter to the alleged offender informing he/her of the situation and asking he/her to make a choice of having "demerit points" marked against his or her personnel file, or hearing by a By-Laws Committee...

2.6 AFTER 12 months 1st offence points drop off. If during the 1st 12 months a 2nd offence occurs these points must cover a further 12 months...

2.9 When twelve (12) points have been reached in any twelve (12) month period a letter shall be sent to the person involved advising that they have a choice –

- \$500.00 Penalty to be paid by (date/time)

OR

⁹ See By-law 1.1.

¹⁰ Or at least he was before his PIN was withdrawn: see By-law 1.1 definition of "Driver".

- Five (5) consequential working shifts comprising a 12 hour period – Off the air – (suspension) – starting at (date/time)

OR

- refer to the Board of Directors as per Part 5 here in;
- or failing an election by the alleged offender to any of the above
- - withdrawal by Rockhampton Cab Company Limited of Company endorsement of Driver Authorisation.

NOTE: The By-Laws Committee or the Board of Directors however reserve the right to impose a period of bond in the matter of “good behaviour” and may implement the same at their sole discretion; ...”

[32] Part 5 provides:

“PROCEDURES IN ESTABLISHING BREACH OF BY-LAWS BY BOARD OF DIRECTORS OR BY-LAWS COMMITTEE

5. PROCEDURES FOR BOARD HEARING FOR DETERMINATION OF ALLEGED SERIOUS OFFENCES or PROCEDURES FOR BOARD HEARING FOR WITHDRAWAL OF COMPANY ENDORSEMENT OF DRIVER AUTHORISATION

- 5.1 The Secretary ... shall lodge a written report with the Board of Directors to advise the Board that a hearing is requested to be convened to address a serious complaint which necessitates a Board Hearing as per 2.2(a) or a hearing for Withdrawal of a Drivers Authorisation as per 2.9. Such report shall contain full details of the alleged serious offence and include such information as to a Driver Authorisation endorsement who has allegedly transgressed Rockhampton Cab Company Limited By-Laws.
- 5.2 The Board of Directors or such agent as they appoint shall give notice to the alleged offender directing him/her to attend a Board of Directors meeting of not less than three (3) days notice for a hearing to show cause why the Drivers Authorisation endorsement by Rockhampton Cab Company Limited should not be withdrawn. Such notice shall include reference to the procedure of such a hearing as outlined in Part 5.3.
- 5.3 At the Board of Directors hearing –
- a character reference, referee or interpreter may be present and the evidence either written or verbal may be considered;
 - procedures to be taken in Minute form and will be signed at the conclusion of the hearing. Such Minutes to remain the property of Rockhampton Cab Company Limited;
 - the Board of Directors may make a decision which is final.

- 5.4 Upon the Board of Directors being satisfied by majority of Directors present at the Board hearing constituted pursuant to this division, that:
- (i) any Company Personnel is guilty of a serious matter; or
 - (ii) that any Company Personnel has failed to make an election Pursuant to Section 2.9 of this Disciplinary Procedure

THEN

The Board may resolve to invoke the Procedures set out in Division 6 of this Disciplinary Procedure in respect of the withdrawal of Company Endorsement or such Company facilities as the Board may seem appropriate, for such period as the Board may determine.”

[33] Part 6 provides:

“6. PROCEDURES FOR WITHDRAWAL OF COMMUNICATION FACILITIES OR DRIVER AUTHORISATION

- 6.1 Notice in writing must be given to the Secretary or his/her appointed agent by the Chairperson of the Board of Directors to implement the Withdrawal of Communication Facilities or Withdrawal of Rockhampton Cab Company Limited endorsement of a licence. Such notice must have affixed to it the evidence for such a direction.
- 6.2 In the matter of the Withdrawal of Communication Facilities or Withdrawal of Rockhampton Cab Company Limited endorsement of a licence the Secretary of [sic] his/her appointed agent shall advise the alleged offender in writing that the Board of Directors has issued a direction in this regard and advising the nominated date and time that such a direction will be implemented.
- ...
- 6.4 In the matter of the Withdrawal of Endorsement of a Drivers Licence the Supervisor at the direction of Board of Directors shall advise Queensland Transport in writing on the date such withdrawal took place.
- 6.5 If in the opinion of two (2) Directors an incident has occurred that warrants immediate action, these Directors may suspend Communication facilities of withdraw Rockhampton Cab Company Limited endorsement of a licence, for a period determined by these Directors.

ANY HEARING OF AN ALLEGED BREACH OR BREACHES OF BY-LAWS, OTHER COMPLAINT, APPEAL OR BOARD HEARING SHALL BE CONDUCTED WITH ALL DUE PROPRIETY ...”¹¹

By-laws Influential?

[34] Mr Alexander’s 27th August letter does not mention the By-laws. No reference was made to them while the plaintiff was with the Board on 31 August. The letter

¹¹ The paragraph proceeds to add “in accordance with standing orders for Board meetings of Rockhampton Cab Company Limited.” There are no such “standing orders”.

notifying PIN withdrawal is silent on the issue. And Mr Davey testified that the plaintiff was not dealt with under the Part 5 procedure,¹² indicating that he supposed that his Board had been engaged in some less formal process than the By-laws called for. However, the defendant's solicitors, by letter dated 9 September, asserted that the decision to withdraw the PIN was made "under Part 5 of the Company By-laws". Part 5 does not confer such a power. Part 6 purports to do that, which no doubt explains the defendant's latest position – that the By-laws envisage a two phase process for PIN withdrawal: a "Part 5 process"; and if a By-law contravention is proved, then a "further process under Clause 6.2 before an initial decision withdrawing the PIN is given effect to".¹³

[35] In view of the befuddling obscurity of those By-laws that relate to withdrawal of communication facilities, this confusion is understandable.

[36] In any event, the Board was, the defendant accepts,¹⁴ conducting a hearing about an alleged breach of a By-law or other complaint.

[37] On this basis, the addendum in capitals to By-law 6.5 required that the hearing be "conducted with all due propriety..."

[38] What happened scarcely met that standard.

Denial of Procedural Fairness

[39] The hearing on 31 August was not fair.¹⁵

[40] Mr Alexander's 27th August letter had not foreshadowed investigation of a By-law contravention let alone that a severe sanction might be imposed. When the plaintiff was with the Board, nobody mentioned the By-laws. And the Plaintiff is not shown to have recalled the 21 April letter, with its reference to By-law 4.1(q), when Mr Davey said that the 14 August incident may have brought the defendant into disrepute.

[41] More importantly, the plaintiff was never informed that he was in jeopardy of losing his PIN. He did not realise that he confronted such a threat to his livelihood. He was not invited to address the question of sanction contingently in case an adverse finding on By-law contravention were to be made.¹⁶ And he did not address the issue.

¹² Even so, Mr Davey maintained that the plaintiff had lost his PIN "for bringing the company into disrepute".

¹³ Defendant's written submissions para 60. As it happens, this was not done. The withdrawal of the PIN was, as the defendant's solicitors letter of 9 September put it, "...final...". This departure from what the defendant now says the By-laws required is not, however, relied on by the plaintiff.

¹⁴ Outline of Argument para 60.

¹⁵ Leave was sought, after the trial, to amend the particulars of the allegation of denial of procedural fairness to add in paragraph 16(a) of the Statement of Claim: "The plaintiff was not, prior to the imposition of the penalty of withdrawing his PIN, given an opportunity to be heard on the penalty to be imposed." Ultimately (see Exhibit 24 p 2), the only ground on which the amendment was resisted is that it would be pointless because the new contention was bound to fail. As it has prevailed, leave to amend is given. The defendant has, as requested, consequential leave to amend its pleading to add as paragraph 8(c)(va): "The Defendant gave the Plaintiff the opportunity to be heard on the penalty to be imposed prior to the imposition of any penalty."

¹⁶ See *Rush v WA Amateur Football League (Inc)* (2007) 35 WAR 101, 114-115 [71]-[76], 125-127 [123]-[126].

- [42] The plaintiff lost his only source of income from employment without any opportunity to put his case in respect of the disciplinary sanction that might be imposed where it found that his conduct at the Denham Street rank had brought the defendant into disrepute.
- [43] The Board apparently envisaged that the plaintiff might apply, after three weeks, to have his PIN restored. The 31 August decision, however, was no temporary suspension.¹⁷ Unless an application for restoration was made, and succeeded, the plaintiff could never work again as a taxi driver in Rockhampton.
- [44] In view of the impact on the plaintiff's livelihood, the decision to withdraw his PIN immediately without affording him a reasonable opportunity to say why the Board should not take that step¹⁸ means that the process was neither "conducted with all due propriety...", as the addendum to By-law 6.5 required,¹⁹ nor – which is to say much the same thing in different words – procedurally fair.²⁰

Does *Buckley v Tutty* comprehend denial of natural justice?

- [45] The defendant contends that the *Buckley v Tutty* doctrine is solely concerned with rules that, in terms, operate in unreasonable restraint of trade. A restraint of trade that is effected by a decision afflicted with a denial of procedural fairness is said to be beyond the scope of the doctrine.
- [46] In *Buckley v Tutty*, the question was about rules of an organisation: whether transfer restrictions on a professional rugby league player constituted such a fetter on the right of the player to engage in employment as to constitute an unreasonable restraint of trade. The High Court was not there concerned with the different question that arises where the rules do not establish a regime that is inherently in unreasonable restraint of trade but, instead, a decision that works a restraint of trade is challenged as being attended by denial of procedural fairness.
- [47] On the defendant's case, although its By-laws are susceptible of challenge under *Buckley v Tutty*, a decision that involves a misapplication of them or a denial of procedural fairness is not.

An author's perspective

- [48] That narrow view of the reach of the doctrine would not accord with the views of Dr J R S Forbes who, in his valuable work *Justice in Tribunals*, 3rd ed, (2010), writes:²¹

¹⁷ Anyhow, the defendant does not suggest that the circumstances were so urgent or otherwise such as to make it impracticable to have heard the plaintiff before withdrawing his PIN.

¹⁸ The question here is not whether procedural fairness can be satisfied by one hearing in which both guilt and sanction are addressed: cf *Battle v Bundagen Co-operative Ltd (No 2)* [2011] NSWCA 38, [64]-[67]. Here the deficiency in procedural fairness lies in the omission to extend any opportunity to address sanction before the PIN was withdrawn.

¹⁹ As the case has been pleaded, no contract is propounded. The addendum is, therefore, not an obligation that the plaintiff may enforce directly. It does, however, support the notion that, in the circumstances, the general law required the Board to hear the plaintiff before depriving him of his PIN immediately and (potentially) permanently: cf *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759, 790 [113]; JRS Forbes, *supra*, [12.97] at pp 244-245.

²⁰ Afterwards, the plaintiff made unsuccessful representations, more than once, asking that his PIN be restored, putting forward his case. Understandably, the defendant does not suggest that those opportunities cured the denial of procedural fairness.

²¹ Para [4.7] at p 54-55; para [4.22] at p 62, omitting footnotes.

“...*Buckley* enables a plaintiff to attack the validity of the defendant’s *rules*, if need be, as well as decisions made under them...the rules themselves may be a restraint of trade...alternatively, it may be held that the rules are reasonable, while a particular application of them is not. A decision may be unreasonable because it is based on a misinterpretation of the rules, an irrational view of the evidence, a denial of natural justice, or because it imposes a sanction that is manifestly excessive...

A rule that is reasonable in itself may be applied in an unreasonably restrictive manner. For example...the rule may be...applied without procedural fairness...

While the law of restraint of trade is not doctrinally connected with natural justice, unfair procedure may lead to an unreasonable restraint.”

Persuasive authority

[49] *Stininato v Auckland Boxing Association (Inc)*²² concerned a professional boxer who was refused a licence necessary to take part in boxing contests in New Zealand. The boxer challenged the decision as an unreasonable restraint of trade, contending that the boxing association had acted unfairly in failing to tell him, before reaching a decision whether to grant him a licence, that the association had it in mind to take into account allegations of prior misconduct.

[50] Richmond P said:²³

“The authorities...demonstrate that if the rules of the...association had expressly stated that when considering an application for a licence the council had the right to act...unfairly then...a professional boxer with a sufficient interest could have asked the court to declare that the rule itself was void as an unreasonable restraint of trade...if the actual rule is saved from being void as an unreasonable restraint of trade because...it is inherent in the nature of the discretion conferred on the council that it must not be exercised...unfairly, then it would be an absurdity if a plaintiff, whose application had not in fact been fairly dealt with, could not also come to the court and ask for a declaration that a decision unfairly arrived at under a valid rule should be declared a nullity. That cannot be the law, and I accordingly hold that the lack of contractual relationship between Stininato and the council is not fatal to his claim.”

[51] Cooke J said:²⁴

“A plaintiff should be able to limit his attack and to claim simply that a decision under power delegated by a rule is in unreasonable restraint of trade. And, taking the point one stage further, I think a plaintiff can say ‘it may be reasonable in this professional sport for the Council to have a wide discretion to refuse a licence, but it certainly is not reasonable for them refuse a licence on the ground of misconduct without giving me any chance of being heard’...

²² [1978] 1 NZLR 1.

²³ At pp 8-9.

²⁴ At p 28. See also Woodhouse J in *Stininato* at pp 11-12.

The jurisdiction of the courts over vocational associations is not dependent on technicalities of contract or property...Blackler is for us an important affirmation...of the need to mould public policy to protect the right to work. When one adds the traditional concern of the common law to ensure that a man is not condemned without an opportunity of being heard, there is strong reason for holding that the court has a power of review in the present kind of case. That does not mean that the court can compel licensing...But I think the court can declare past decisions invalid...And in some cases a mandatory injunction to compel proper consideration of a pending application would be available. Both remedies, of course, are essentially discretionary.”

[52] That reasoning is persuasive. It is also consistent with Australian authority.²⁵

Unreasonable restraint

[53] *Stininato* supports my conclusion that withdrawal of the PIN in circumstances where the plaintiff was denied procedural fairness effected an unreasonable restraint of trade that may be remedied by declaratory and injunctive relief.

[54] The defendant contends, however, that those remedies should be refused on discretionary grounds.

Discretionary Bar?

[55] When the plaintiff obtained an interlocutory injunction on Christmas Eve last, he undertook to the Court “to abide by the defendant’s By-laws”. Those By-laws include an obligation to obey all road regulations.

[56] On 5 February, at about 1.30am, the plaintiff was involved in an accident when his vehicle collided with another taxi at the intersection of Upper Dawson Road and Lanarch Street, Rockhampton.

[57] The plaintiff had not stopped his vehicle at the stop sign at the intersection. He had also failed to give way to the other taxi, which had travelled along Upper Dawson Road from his right.

[58] The plaintiff gave the defendant a report of the incident in which he said that he had stopped his vehicle at the stop sign, looked both ways, and then turned right into Upper Dawson Road without noticing any vehicle coming towards him. He also wrote that he believed that his vision of the other taxi had been obscured by part of his vehicle. The report was inaccurate. The plaintiff had driven through the stop sign, without stopping, at 31km/h.

[59] The accident and false report are said to warrant refusal of declaratory and injunctive relief.

[60] The dangerous driving, and that the plaintiff lied about it, show that he is not fit to be a taxi driver, the defendant contends.

²⁵ *Aerial Taxi Cabs Co-Operative Society Ltd v Lee* (2000) 102 FCR 125, 131 [17], 143-144 [76]-[79]; *McClelland v Burning Palms Surf Life Saving Club* at [111].

- [61] The traffic infringements – not stopping at the stop sign and failing to yield right of way – are relied on as contraventions of the undertaking; and this is said to mean that he lacks “clean hands”.
- [62] The plaintiff denies lying in his report. He claims to have been dazed by a head injury sustained in the accident. This is plausible. So not a lot can be attached to the false report.
- [63] The driving was negligent; and it had potential for serious personal injury and substantial property damage. The incident, however, needs to be evaluated in a wider context, especially to assess whether the plaintiff is a danger to others.
- [64] The plaintiff returned to driving after the January 2011 floods. The February incident is the only blemish since.
- [65] Moreover, it is not as if appropriate relief would mean that the plaintiff may retain his PIN indefinitely.
- [66] Declaratory and injunctive relief would not inhibit the defendant from initiating fresh steps to withdraw the PIN in a process that conforms with the By-laws and is fair.
- [67] The plaintiff’s success today may not secure access to the communications facilities for long.²⁶
- [68] What of the contravention of the undertaking?
- [69] The non-compliance with the By-laws inherent in the traffic infringements resulted from negligence. The plaintiff was not deliberately flouting the undertaking, which is a material consideration when evaluating the significance of the breach.
- [70] All considered, there is no sufficient reason to exercise the discretion against granting relief.

Unlawful interference with business damages claim

- [71] The plaintiff seeks compensation for lost income resulting from the termination by the Ramms of his employment as their taxi driver after he lost his PIN. His case is that the restraint of trade resulted in compensable unlawful interference with his employment.
- [72] Assuming that a tort of unlawful interference with trade or business is recognised in Australian law,²⁷ the claim must fail.
- [73] For one thing, the tort depends upon establishing unlawful means. An absence of procedural fairness – the essence of the unreasonable restraint of trade in this case – is not unlawful means for the purposes of the tort.²⁸ More to the point perhaps, an arrangement or outcome that is unenforceable because it is in unreasonable restraint

²⁶ In adverting to this prospect, I am not expressing an opinion on whether the several incidents mentioned during the trial, or any other of the plaintiff’s conduct, could justify permanent deprivation of his PIN.

²⁷ *Hardie Finance Corporation Pty Ltd v Ahern (No. 3)* [2010] WASC 403, [675],[703]-[720].

²⁸ *Sanders v Snell* (1998) 196 CLR 329, 342-344, [34]-[36].

of trade has yet to be regarded judicially as such unlawful means or as otherwise compensable in damages in the absence of breach of contract.²⁹

[74] The damages claim³⁰ is dismissed.

Disposition

IT IS DECLARED THAT:

The defendant's decision on 31 August 2010 to withdraw the plaintiff's access to the defendant's radio and computer booking system and communication facilities via Mobile Data Terminal by withdrawing the plaintiff's personal identification number was an unreasonable restraint of the plaintiff's trade as a taxi driver in Rockhampton and is unenforceable.

IT IS ORDERED THAT:

The defendant, whether by itself, its employees or agents, be and is hereby restrained from giving effect to that decision.

Otherwise, the parties will be heard further with respect to the forms of order, and costs.

²⁹ cf. *Adamson v New South Wales Rugby League Pty Ltd* (1991) 31 FCR 242, 288 and in the context of third party claims, J.D. Heydon, *The Restraint of Trade Doctrine*, 3rd ed, (2008), p 283 ("contracts in restraint of trade...are not illegal means" for the purpose of the tort of "causing loss by illegal means").

³⁰ A claim for damages for inducing breach of contract was abandoned post-trial.