



Unreported Judgments/Unreported Judgments - current week/FEDERAL COURT/2009/Australian Competition and Consumer Commission v Vassallo, [2009] FCA 954 - 20 August 2009

**Australian Competition and Consumer Commission v Vassallo, [2009]
FCA 954**
Federal Court of Australia
20 August 2009
Graham J

PRACTICE AND PROCEDURE – circumstances in which it is appropriate to grant declaratory relief Trade Practices Act 1974 (Cth) ss 80(1AA) and 83 Federal Court of Australia Act 1976 (Cth) s 21



FULL TEXT OF JUDGMENT

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Vassallo [2009] FCA 954

PRACTICE AND PROCEDURE circumstances in which it is appropriate to grant declaratory relief

Trade Practices Act 1974 (Cth) ss 80(1AA) and 83

Federal Court of Australia Act 1976 (Cth) s 21

Australian Competition & Consumer Commission v Knight [2007] FCA 1011

Australian Competition & Consumer Commission v Chen (2003) 132 FCR 309

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v LEANNE RITA VASSALLO and AARON DAVID SMITH

NSD 756 of 2009

GRAHAM J

20 AUGUST 2009

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
general division

NSD 756 of 2009

BETWEEN: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

AND: LEANNE RITA VASSALLO

First Respondent

AARON DAVID SMITH

Second Respondent

JUDGE: GRAHAM J
DATE OF ORDER: 20 AUGUST 2009
WHERE MADE: SYDNEY

THE COURT:

1. Orders that the matter stand over for short minutes of order to be brought in at 2pm on Monday 24 August 2009.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

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AND: LEANNE RITA VASSALLO

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JUDGE: GRAHAM J
DATE: 20 AUGUST 2009
PLACE: SYDNEY

REASONS FOR JUDGMENT

1 These proceedings were commenced by an application filed 24 July 2009. An amended application was filed on 29 July 2009. The amended application detailed the applicant's claim as one for declaratory relief, injunctive relief, findings of fact for the purposes of section 83 of the *Trade Practices Act 1974* (Cth) ('the Act') and costs. In addition, the amended application included a claim for interlocutory relief. On 30 July 2009 the duty judge granted interlocutory injunctive relief, including mandatory injunctive relief, until further order.

2 The matter was before the Court for first directions referable to the ultimate hearing, on 17 August 2009. On that day the Court was informed that the respondents consented to the final relief sought. However, it was indicated that it would be necessary for the Court to consider the evidence by reference to which the applicant sought the declaratory relief, so that it might be persuaded to make the declarations sought.

3 The matter was listed for final hearing on 20 August 2009.

4 When the matter was called for hearing today, Senior Counsel for the applicant handed up proposed orders which, in paragraphs numbered 1 - 8 inclusive, sought the same relief as was set out in paragraphs 1 - 7 of the Amended Application filed 29 July 2009, but split the injunctive relief sought in paragraph 3 into two paragraphs which became paragraphs 3 and 4 in the draft orders. The draft orders did not propose any relief under s 83 of the Act. They did, however, include a proposed order that the respondents pay the applicant's costs in an amount to be agreed or, in lieu of agreement, as taxed. Such an order was not opposed by the respondents.

5 In relation to the proposed injunctive relief s 80(1AA) of the Act provides for the granting of injunctions by consent. It provides:

'80(1AA) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).'

6 Subsection (1) empowers the Court to grant injunctive relief where a person has engaged, or is

proposing to engage, in conduct which constitutes, or would constitute, a contravention of, amongst other things, provisions of Part V of the Act.

7 It is apparent that the word 'from' was missing from the proposed orders numbered 6 and 7 in the Amended Application, and leave was granted to the applicant to amend the Amended Application to insert that word before the word 'representing' in each of those paragraphs. The draft orders proposed by the applicant corrected the omission.

8 The question arises as to whether or not, in the circumstances, the Court should order declaratory relief as sought, or at all.

9 Section 21 of the *Federal Court of Australia Act 1976* (Cth) ('the Federal Court Act') empowers the court in relation to a matter in which it has original jurisdiction to make binding declarations of right whether or not any consequential relief is or could be claimed.

10 In *Australian Competition & Consumer Commission v Knight* [2007] FCA 1011, Mansfield J said, in relation to the making of declarations in cases such as this:

'[65] The Court has a wide discretion under section 21 of the Federal Court of Australia Act 1976 (Cth) to make binding declarations of right (see, for example: Trade Practices Commission v Santos Limited (1993) ATPR 41-221; Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89; RAI Insurance Brokers Limited v FAI General Insurance Co Limited (1993) 41 FCR 164; Australian Competition & Consumer Commission v Target (2001) ATPR 41-840 at [14] ...'

11 In *Australian Competition & Consumer Commission v Chen* (2003) 132 FCR 309, Sackville J addressed the grant of declaratory relief under s 21(1) of the Federal Court Act. At [35], his Honour said:

'[35] ... Sheppard J specifically recognised (at 100) [referring to Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89] that the policy of the TP Act, concerned as it is with the public interest, warrants the court, in an appropriate case, exercising its power to grant declaratory relief to mark its disapproval of particular conduct contravening the TP Act.'

12 Senior Counsel for the applicant has submitted that, in the circumstances of this case, it would be appropriate for the Court to grant declaratory relief to mark its disapproval of the conduct of the respondents which has led to the respondents consenting to the injunctive relief sought by the applicant in this case.

13 The respondents are purveyors of quack medical advice and quack medicine. They have, through websites on the world wide web, offered for sale e-books which have addresses suggesting that, by reference to those websites, one may learn how to defeat asthma, endometriosis, fibromyalgia, genital herpes, hemochromatosis, Lyme Disease, menopause, myastheniagravis, sarcoidosis, scleroderma, sebaceous cyst, shingles, prostate cancer, 'MM', Addison's Disease, anemia, cellulite, colitis, diverticulitis, endometriosis, genital warts, hemochromatosis, multiple sclerosis, reflux, staph infection, Tourettes-Disorder, tuberculosis, breast cancer, heartburn, ringworm, ulcers, scabies, cysts, hives, ganglion cyst, mononucleosis, Gullian Barre Syndrome, schizophrenia, dyslexia, impetigo, gonorrhoea and larangitis.

14 If one accesses the several websites at which these cures and treatments are said to be offered, one may purchase, for approximately \$US25, an e-book containing the medical advice offered, and for \$US32.00 one may acquire a 'Miracle Mineral Solution', being 'WATER PURIFICATION DROPS', the label bearing the words 'PGL International', 'MMS Professional™'.

15 The bottle has around its lid a wrapper endorsed with words to the effect, 'Sealed for your protection'.

The label identifies the contents as:

'Formula consists of distilled water and 28 per cent mixture of sodium salts in solution. Sodium chlorite content 22.4%.'

The label also contained a statement reading:

'THESE STATEMENTS [referring to statements endorsed on the label above the notation] HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO TREAT, DIAGNOSE, CURE OR PREVENT ANY DISEASE.'

Sufficient has been said about the bottle of 'WATER PURIFICATION DROPS' to suggest that it contains nothing other than salt water.

16 A distinguished Professor of Medicine, Emeritus Professor John Michael Dwyer AO, has debunked the claims made in the several e-books which he was called upon to consider. It is clear that a number of representations contained in the material on the websites and in the e-books is false, misleading and deceptive.

17 The website material includes testimonials, some of which are included with a depiction of a particular author who, on different sites, is given a different name. In relation to asthma a photograph appears, said to be that of 'Debbie DeAngello'. In relation to Addison's Disease, the same photograph appears, said to be that of 'Marsha Menendez'. In relation to endometriosis, the same photograph appears, said to be that of 'Sharon Cresler'. In relation to fibromyalgia, the same lady's photograph appears, said to be that of 'Kiera Clarkson'. When used in relation to Lyme Disease, the same photograph is said to be that of 'Amielle Archer'.

18 The inclusion in the websites of the testimonials said to have been given by people who have followed the advice or utilised the recommended treatment is plainly contrived.

19 Given that the websites are accessible internationally, it is not surprising that the deceit perpetrated has operated internationally. It would appear that the respondents were responsible for the deceit, and that they have profited financially from it. They are the sole directors of Spectaz Pty Limited, whose registered address is unit 16, 7 Mead Drive, Chipping Norton, NSW. They are the co-owners of a property at Cecil Hills in New South Wales.

20 The evidence which is before the Court includes records of two payment collection organisations which were apparently used for processing sales of the e-books and of the salt water. These included an organisation known as 'PayPal' and another known as 'ClickBank'. Records referable to bank accounts maintained by the respondents with St George Bank Limited demonstrate regular and substantial credits into the various accounts which emanated from 'PayPal Australia' and 'Clickbank'.

21 One PayPal document in respect of the first respondent includes, under the heading 'Financials', details of an 'Account Balance', an account of amounts received in the 'Last 3 Months', and a 'Total Amount Received'. The PayPal document created on 21 October 2008 suggests that the amounts received in the preceding three months were \$US60,957.32, \$US83,160.76 and \$US78,602.02. Under the heading 'Total Amount Received', the figure of \$US1,044,205.99 appeared.

22 The uncontested hearsay evidence placed before the Court included advice from Senior Counsel at the Washington State Attorney General's Office in the United States of America suggesting that there had been 66 Australian customers who purchased e-books referable to colitis, 112 Australian customers who purchased e-books referable to diverticulitis, 203 Australian customers who purchased e-books referable to genital warts, one who purchased an e-book referable to genital herpes, 440 Australian customers who purchased e-books referable to menopause and 229 Australian customers who purchased e-books referable to shingles between December 2008 and 3 June 2009.

23 The applicant asks the Court to make declarations descending into, if I may say so, minute detail in respect of the claims made by the respondents through the websites and referable to the salt water which are said to be false, misleading and deceptive. Whilst I am reluctant to make declarations in the absence of a contradictor and in circumstances where some of the evidence relied upon is no more than hearsay, I consider that it would be appropriate to grant declaratory relief to the effect that, between about June 2008 and July 2009, each of the first and second respondents made representations by the various websites, which should be listed, that if a person followed the advice contained in the e-books, listing them, and undertook the treatment proposed therein, including the use of 'WATER PURIFICATION DROPS' labelled 'MMS Professional™', a person's health would improve, and that such representations were false, misleading or deceptive.

24 I propose to dissolve the interim injunctions which have been ordered and to grant injunctions in the terms proposed in the draft order, which the applicant has handed up, and I am willing to make a declaration generally along the lines of the declaration which I have just proposed. I will, of course, make an order for the payment by the respondents of the applicant's costs in an amount to be agreed or, in lieu of agreement, as taxed.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Graham.

Associate:

Dated: 25 August 2009

Counsel for the Applicant: S T White SC
Solicitor for the Applicant: Australian Government Solicitor
Solicitor for the First and Second Respondents: A K Jawas of LAC Lawyers

Date of Hearing: 20 August 2009

Date of Judgment: 20 August 2009

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