AUSTRALIA / JUDGMENT

Johen Pty Ltd v Lambear Pty Ltd [1987] FCA 69

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IN THE FEDERAL COURT OF AUSTRALIA)

QUEENSLAND DISTRICT REGISTRY)

GENERAL DIVISION

BETWEEN:

JUDGE MAKING ORDER:

DATE OF ORDER:

WHERE MADE:

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JOHEN PTY. LTD.

JOHN RICHARD COOPER

Second Applicant HELEN MAREE FRANCES COOPER

Third Applicant LAMBEAR PTY. LTD.

First Respondent

WALHIND PTY. LIMITED Second Respondent

MINUTES OF ORDER

PINCUS J. 12 FEBRUARY 1987 BRISBANE

THE COURT ORDERS THAT:

1. The application for an interim injunction be refused, with costs.

Settlement and entry of orders is dealt with in

Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)

QUEENSLAND DISTRICT REGISTRY) QLD G12 of 1987 GENERAL DIVISTON)

BETWEEN: JOHEN PTY. LTD. First Applicant

AND: JOHN RICHARD COOPER Second Applicant

AND: HELEN MAREE FRANCES COOPER Third Applicant

AND: LAMBEAR PYY. LTD. First Respondent

AND: WALHIND PTY. LIMITED

Second Respondent

PINCUS J. 12 February 1987

EX TEMPORE REASONS FOR JUDGMENT

There is an application in this Court for a declaration that the first applicant is entitled to rescind an agreement dated August 1984, a declaration that the first applicant is entitled to rescind a certain sublease and guarantees, damages under the Trade Practices Act and in the alternative damages for

misrepresentation.

There is also sought an injunction restraining the prosecution of two suits brought in the District Court of Queensland at Brisbane, which were instituted in August and October last year. There is an affidavit before me by Mr. Brian

Halligan, solicitor for the applicants, and counsel appears today

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seeking an interim injunction to restrain the prosecution of applications for summary judgment which have been made in the

District Court proceedings I have mentioned.

Mr. Halligan's affidavit discloses that in District Court proceedings, no. 3192 of 1986, the defence was filed on 15 October 1986 and in the other suit, no. 3670 of 1986, a defence was filed on 6 November 1986. The applications for summary judgment seem to have been filed rather late. That is, they were filed only on 28 January 1987 but that is, no doubt, a matter Which the District Court could consider and not really a matter

for me.

The affidavit of Mr. Halligan explains that the case is about a tenancy in a_éeshopping centre at Aspley called the Pick-N-Pay Hypermarket, which commenced in November 1984. It says that at a meeting between prospective tenants of the hypermarket

and representatives of the developers and landiord it was said that the hypermarket would not compete with the speciality shops and that the turnover was 30 per cent higher for speciality shops

adjacent to a hypermarket, or words to that effect.

Mr. Halligan's affidavit further indicates that his instructions are that both of these assertions were falsified by events, in that the turnover was unsatisfactory and in that the speciality stores located about the hypermarket did not enjoy such a turnover as had heen promised and in that the hypermarket actively competed with the speciality shops. The affidavit goes

on to give some small amount of detail as to the competition.

Counsel for the applicants has candidly drawn attention to the fact that the defences which I have mentioned, filed in the District Court, do not raise these suggestions of misrepresentation. They merely rely upon the legal point, about the validity of which it is not necessary to say anything, that

the leases in question were not registered.

The application having been filed in this Court it is a question, it seems to me, whether I should enjoin the further prosecution of the matters in the District Court or leave it to the Judge of the District Court who hears the applications to determine whether he should, in the light of the proceedings having been commenced here, adjourn or proceed with the applications for summary judgment. It is by no means in every case that a proper exercise of the discretion of this Court to grant such an injunction as is sought would require the granting of an injunction merely because a suggestion 1s made that the

matter falls within s.52 of the Trade Practices Act.

I have, despite the able argument of Mr. Batch, come to the conclusion that I should refuse the application and leave it to the District Court to proceed, or not proceed, with the applications to that court, as it sees fit. The reasons are as follows: firstly, and unusually, there is no suggestion made in the proceedings in the District Court that there was any misrepresentation made; secondly, the character of the misrepresentations made, according to the instructions given to Mr. Halligan, is not such as to generate any great confidence in

the prospects of success. I appreciate, as Mr. Batch has pointed

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out, that there has not been time to give much detail, but the expectation as to a high turnover is not, prima facie, a representation of anything other than opinion and the statement as

to competition, on the face of it, is merely promissory.

The case is one, in my opinion, in which the court should not interfere. That is not to say, of course, that if the application in this Court is pursued it must necessarily fail. It

does not, on the face of it, look overwhelmingly promising.

The order of the court will therefore be that the application for an interim injunction made orally by counsel today

be refused, with costs. ce. tha Uy, anctrhe Ao a eetdreg

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