

AUSTRALIA / JUDGMENT

Patrick v. Steel Mains Pty Ltd [1987] FCA 350

COURT
IN THE FEDERAL COURT OF AUSTRALIA

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CATCHWOPDS

TRADE PRACTICES ~ Alleged misleading statements - Statements made to employees of respondents in course of offers to transfer them to positions in new plant - Whether such statements are in principle covered by s.52 - Whether the statements were in fact true when made.

Trade Practices Act 1974 s.52

NSW G.420 of 1986

THOMAS JOSEPH PATRICK v_ STEEL MAINS PTY LIMITED

NSW G.429 of 1986

GARY JOHN WARBY v_ STEEL MAINS PTY LIMITED

NSW G.491 OF 1986

CHRISTINE WARBY v_ STEEL MAINS PTY LIMITED

NSW G.492 of 1986

MARGARET ALLISON BELL v STEEL MAINS PTY LIMITED

Wilcox J

Sydney

8 July 1987

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY No. NSW G.420 of 1986

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GENERAL DIVISION

BETWEEN: THOMAS JOSEPH PATRICK

Applicant

AND: STEEL MAINS PTY LIMITED

Respondent

CORAM: WILCOX J

PLACE: SYDNEY

DATE: 8 JULY 1987

MINUTES OF ORDER

THE COURT ORDERS
THAT:

1. The Application be dismissed.
Note: Settlement and entry of orders is dealt with in Order
36 of the Federal Court Rules.
IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY No. NSW G.429 of 1986
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GENERAL DIVISION
BETWEEN: GARY JOHN WARBY
Applicant
AND: STEEL MAINS PTY LIMITED
Respondent
CORAM: WILCOX J
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY No. NSW G.491 of 1986
GENERAL DIVISION
BETWEEN: CHRISTINE WARBY
Applicant
AND: STEEL MAINS PTY LIMITED
Respondent
CORAM: WILCOX J
PLACE: SYDNEY
DATE: 8 JULY 1987
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY No. NSW G.492 of 1986
GENERAL DIVISION
BETWEEN: MARGARET ALLISON BELL
Applicant
AND: STEEL MAINS PTY LIMITED
Respondent
CORAM: WILCOX J
PLACE: SYDNEY
DATE: 8 JULY 1987
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REASONS FOR JUDGMENT

These cases demonstrate an imaginative approach to the application of s.52 of the Trade Practices Act 1974; an attempt being made to use the section in order to obtain damages for two employees of the respondent, and for their wives, consequent upon the retrenchment of those employees. The approach seems sound in principle but, unfortunately for the applicants, the ingenuity of their lawyers was not matched by their care in ensuring that they had the necessary evidence available to make good their claims. In the result, as I stated at the conclusion of the argument, I am of the opinion that all four claims -- which, by consent, were heard together -- must be dismissed. At that time I indicated that I would defer making formal orders to that effect until my reasons were available.

The respondent, Steel Mains Proprietary Limited, was at material times jointly owned by Tubemakers of Australia Limited and Humes Limited. It carried on business in several States as a manufacturer of steel pipes. Most of its output was manufactured to meet the requirements of specific

contracts entered into by the company with government or semi-government authorities. As at December 1984 the company operated two pipe plants in New South Wales: at Hexham, near Newcastle, and at Regents Park in Sydney.

Gary John Warby, the applicant in matter G.429 of 1986, was in December 1984 employed by Steel Mains at its Hexham plant as a production foreman. Mr Warby had been employed by the company in various capacities for more than 10 years. In late November or early December 1984 he was called to the office of the Hexham works manager, Mr Neville Daley. In the office with Mr Daley was Mr Colin McLeod, State Manager of the company. Mr Warby was told that the Hexham plant was to be closed. Mr Warby was offered a position in a new plant being constructed by the company at Berkeley Vale, near Wyong on the Central Coast. He was told that he would be in charge of the unit upon which he presently worked, which was being transferred from Hexham to Berkeley Vale. Mr McLeod gave to Mr Warby details of a redundancy payment which the company would make to him if he did not take the position at Berkeley Vale. Mr Daley told Mr Warby to think over the matter of the redundancy payment because it would probably be the last time

he would receive one. Mr Daley said that Berkeley Vale "was going to be the factory in New South Wales". Mr Warby asked for time to think the matter over and to consult his wife.

This was agreed. Mrs Warby is the applicant in matter G.491 of 1986.

At this time Mr Warby lived with his wife and three children -- all of school age -- in a home in East Maitland owned by Mrs Warby's mother. Mrs Warby was employed as a medical receptionist, a position which she enjoyed and whose hours enabled her to be with the children after they returned home from school. Mr and Mrs Warby had recently made arrangements to erect a new home upon nearby land.

After discussion with his wife, during which discussion Mr Warby passed on to her what he had been told by Mr McLeod and Mr Daley, Mr Warby had a further conversation with Mr Daley. Mr Daley agreed to supply a company vehicle to allow Mr Warby temporarily to commute from East Maitland to Berkeley Vale and to pay travelling time. This arrangement was to end by 30 June 1985. He also agreed that the company would meet the family's household removal expenses from East

Maitland to Berkeley Vale.

The Berkeley Vale plant commenced production in February 1985, the first pipes being delivered from the plant in May. Mr Warby commuted for some months. In June 1985 he and his wife purchased an old home at Long Jetty, which is handy to Berkeley Vale, and moved to that house. As promised,

the respondent met the removal expenses.

The move occasioned considerable problems for the family which, having regard to my conclusion as to liability, it is not necessary to spell out in detail. Mrs Warby was

unhappy about moving and found considerable difficulty in

adjusting to life at Long Jetty. She could not find suitable work for a long time. Two of the children took time to accommodate themselves to the new environment and their absence from their friends at East Maitland. This added to the stress suffered by Mrs Warby who became ill. By the time of the trial she had obtained employment and appeared to be recovering her health but there is no doubt that she has

suffered considerably as a result of the decision to move.

The worst feature of that decision is that the job at Berkeley Vale turned out to be short-lived. In November 1985 Mr Warby heard unofficial talk about the plant closing down. This was confirmed to him officially in January 1986 but closure was not to be effected until the completion of the work required by the company's current contracts. The company subsequently informed the employees at Berkeley Vale of the redundancy payments to which they would be entitled when the plant closed but these payments were so calculated as to provide a strong incentive to the employees to stay until the current work was completed. Mr Warby did so. He received the appropriate redundancy monies but then experienced considerable difficulty in finding other work. He had one job for a few weeks, for which he appears not to have been really suitable, and only recently -- about twelve months after his retrenchment from Steel Mains -- has he found what appears to be a suitable permanent job. His salary loss, of course, has

been considerable.

Thomas Joseph Patrick, the applicant in matter G.420 of 1986, was employed in mid-1985 at the Regents Park plant of Steel Mains as a maintenance foreman. He was involved with the establishment of the Berkeley Vale plant, some equipment for which was sent from Regents Park. His immediate supervisor, Mr Ken Brown, had been spending a lot of time at Berkeley Vale. One evening in late June or early July Mr Brown telephoned him at home and asked him whether he would be interested in transferring to Berkeley Vale as the new plant would require a maintenance foreman to establish and to run the maintenance department. Mr Brown told him that this would be a long term and permanent position as Berkeley Vale would be the main New South Wales pipe manufacturing plant. [Mr Patrick already knew that the company planned to close Regents Park]. Mr Patrick told Mr Brown that he was very interested. Mr Brown told him to

mull it over for a couple of days and
give him an answer.

Mr Patrick immediately informed his wife, the applicant in matter G.492 of 198, of the proposal, repeating to her what Mr Brown had said. Within two days he confirmed to Mr Brown his interest and he arranged to visit the plant. He and his wife went to look at the area. In the result Mr Patrick accepted the offer. He was transferred to Berkeley Vale. Mr and Mrs Patrick rented accommodation in the area. For a time Mrs Patrick commuted to her work in Sydney but she found the travelling too tiring and left this employment. She

found considerable difficulty in obtaining suitable work on

the Central Coast. At the date of the trial she had not yet been successful in this regard, although she apparently had

something in prospect.

Following his transfer to Berkeley Vale Mr Patrick had two approaches made to him offering employment, or at least the prospect of employment. But he rejected these approaches, believing that he had a secure future with Steel Mains at Berkeley Vale. Unfortunately, it was not so. When the plant closed down in July 1986 he also was retrenched. Although he has made efforts to find another job he has not yet been successful. The loss of income suffered by Mr and

Mrs Patrick is obviously substantial.

The case put on behalf of the applicants is that each of the male applicants was invited to transfer to Berkeley Vale upon the basis that he would have the benefit of a permanent job in a new plant established to manufacture all of the pipes made by the company in New South Wales. In each case the offer was made in the knowledge that the recipient was married, that he would discuss the matter with his wife, that he would pass on to her what he had been told and that, if the offer were accepted, the recipient would relocate his home to the Central Coast. I infer that, in each case, it was known to the relevant company officer at the relevant time that the wife of the recipient was then employed and that the relocation would involve her giving up that employment and

attempting to find new work on the Central Coast.

I see no reason in principle to exclude cases such as this from the operation of s.52. In negotiating with employees, or prospective employees, about future employment a trading company acts "in trade or commerce". These are words of the widest import including all "The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery": see *W & A McArthur Ltd v State of Queensland* (1920) 28 CLR 530 at p.547 and *Re Ku-ring-gai Co-operative Building Society (No.12) Ltd* (1978) 36 FLR 134 at pp.139 and 166-167. A statement made in negotiations about employment is, in my opinion, capable of being conduct, in trade or commerce, that is misleading or deceptive or is likely to mislead or deceive. In a case where a statement is made to the prospective employee with the knowledge that the statement

will be passed on by him to his wife the statement is capable of being misleading or deceptive conduct via the wife, even though the employer does not communicate directly with her. In either case, if the misleading or deceptive

conduct occasions damage, damages may be recovered.

However, the critical question in the present case is whether the statements made respectively to Mr Warby and to Mr Patrick were misleading or deceptive. They warranted that description if they were false when made.

It is clear that, at all relevant times, Steel Mains intended to close down both Hexham and Regents Park and to concentrate its New South Wales pipe manufacturing activities

at Berkeley Vale. There was nothing false in the statements

to that effect made to Mr Warby and to Mr Patrick. In each

case the men were offered "permanent" -- that is indefinite, not temporary or casual -- employment at Berkeley Vale. They

were in fact employed on a permanent basis.

The gravamen of the complaint made against Steel Mains is that, at the time of the offers, those controlling the company knew that the Berkeley Vale plant was likely to close within a short time; so that to say that the job was "permanent", with an implication that it would continue for a long time and that -- upon this understanding -- family arrangements might reasonably be changed, was to mislead. Every case must depend upon its own facts, and in particular upon an analysis of exactly what was said; but I do not doubt that, under some circumstances, the word "permanent" may

contain such an implication and have such an effect.

However, the acceptance of the applicants' approach still leaves the necessity of showing that, at the time the relevant offers were made, it was known that Berkeley Vale would be short lived.

Two strands of evidence were relied

upon by the applicants in this regard.

The first strand of evidence was adduced in the applicants' own cases. Their counsel called Mr Peter Hansen, a mechanical engineer who was employed by Steel Mains from 1982 until June 1985. He was based at Regents Park but was seconded from time to time both to Hexham and to Berkeley

Vale. Mr Hansen gave evidence about two comments made to him

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about the possibility of Berkeley Vale closing down. The first was in January 1985, whilst he was working at Hexham.

He said that he had a conversation with Mr Daley in which reference was made to the prospective closure of Regents Park. According to Mr Hansen, Mr Daley added: "The next thing they will be closing after Regents Park will be Berkeley Vale", or words to that effect. He said that the conversation was a

very brief one as the two men passed in a hallway.

The second conversation referred to by Mr Hansen was said to have been with Mr Brown in April 1985. Mr Hansen was at the time working at Berkeley Vale. He said that, his curiosity having been aroused by what Mr Daley had said, he had asked Mr Brown about his own prospects with the company. At that time he knew that Regents Park would close before long. According to Mr Hansen, Mr Brown responded that he really could not say that he would have much future with the company. He said that it was likely that the Berkeley Vale plant would close as well. The two men agreed that Mr Hansen should look for another position and, when he found one, he would be free to leave Steel Mains, with the benefit of a

redundancy payment.

Both Mr Daley and Mr Brown gave evidence denying the comments about Berkeley Vale closing down which Mr Hansen attributed to them. Mr Daley said in evidence that he had no conversation with Mr Hansen about the prospects of Berkeley Vale and that in January 1985 he believed that this new plant

would operate indefinitely. His belief was such, he said,

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that he had indicated to the company a willingness, upon certain terms, to move to Berkeley Vale to manage the new works. His offer was not taken up, for reasons which do not appear in the evidence.

Mr Brown remembered a conversation with Mr Hansen in March or April 1985 concerning Mr Hansen's future in which he told Mr Hansen that he could not offer him a position at Berkeley Vale as a works engineer. Neither counsel asked him his reason. Mr Brown said that the conversation occupied about ten minutes, during which time no reference was made to the future of the Berkeley Vale plant. At the time, he said, he believed that the plant had an ongoing future, being a consolidation of the company's manufacturing facilities in New South Wales in a new plant upon which millions of dollars had been spent. He himself had accepted the position of production manager at Berkeley Vale, though -- for understandable personal reasons which he gave in evidence -- he did not relocate his home to the Central Coast. Mr Brown said that when production commenced at Berkeley Vale the company had three or four months work before it, all on new contracts with the Public Works Department. From May till September 1985 the company maintained full production, working two shifts, on these contracts. Some new orders

were obtained but the plant ran out of work in September and there was a period of six weeks without production. Efforts were made to expedite the letting of new contracts by the Public Works Department and the company sought additional orders. It met

with some success and production recommenced in early

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November, working two shifts, but about this time the company received pessimistic reports from their marketing personnel about future prospects. Mr Brown went on holidays at Christmas 1985. When he returned in January he learnt, for the first time, that a decision had been made to close down

the Berkeley Vale pipe plant.

I am not persuaded that either Mr Daley or Mr Brown had any knowledge, or even any belief, as to the likely early demise of Berkeley Vale at the date of the conversations attributed to them. In relation to Mr Daley the suggestion is of a casual remark, literally in passing in a corridor at Hexham. I suppose that it is possible that Mr Daley made some cynical comment about the position but it seems to me unlikely that he would have offered to move his home to Berkeley Vale if he really thought that it would close down in the near future. Nor do I think that he would have allowed Mr Warby, for whom he apparently had a high regard, to uproot his family from East Maitland for an ephemeral position. It would have been easy enough to warn him and to suggest that he continue

to commute a little while longer.

The position in relation to Mr Brown is somewhat similar. He had himself recruited Mr Patrick -- with whom he had a close working relationship -- to Berkeley Vale. I think that it is unlikely that, if he had believed in March or April 1985 that the plant was doomed to early closure, he would have

failed to warn Mr Patrick of the position.

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Moreover Mr Brown's evidence indicates that the company conducted itself as if Berkeley Vale had a future, not only in establishing production in the first half of 1985 but by pursuing further contracts in the second half of that year. The Berkeley Vale management, as late as October 1985, sought

approval for additional capital expenditure at the site.

The second strand of evidence relied upon by counsel for the applicants was adduced in cross-examination of Mr K T Cocks, a director of Steel Mains since 1971. Mr Cocks is a full-time employee of Tubemakers, with special responsibilities in connection with the subsidiaries of that company. Mr Cocks gave detailed evidence of the reasons for the closure of Hexham and of Regents Park and of the investment by Steel Mains on the Berkeley Vale property. He stated that

the decision to close Berkeley Vale was taken at a meeting of directors held on 18 November 1985, following a review initiated at the previous directors' meeting on 21 October 1985. The major element in this review was future market prospects. According to Mr Cocks, it was not until the October meeting that he personally had any concern about the prospects for continuation of the production of pipes at

Berkeley Vale.

There is no doubt that the company had experienced problems in setting up the Berkeley Vale works. A steel fabricating plant had been opened in about 1980. The pipe plant was to be the second stage of the development, in

separate buildings. But demand for fabrication was less than

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expected. So it was decided to defer the erection of the second stage and to locate the pipe plant in part of the existing buildings. Even so there were cost overruns which provoked criticism at board level. Counsel for the applicants relied upon these matters in arguing that the company knew that there were problems at Berkeley Vale such that it could not responsibly represent to Mr Warby and to Mr Patrick that

the positions they were being offered were permanent.

I do not accept this submission. The history of the matter, from the board's point of view, is made clear not only by Mr Cocks' oral evidence but also by the minutes of the various meetings of the board of directors, which appear to be comprehensive and which are consistent with what Mr Cocks said. Accepting, as I do, the existence of the problems just mentioned, they have nothing to do with the closure of the plant. It was not suggested that the disappointing demand for fabrication work should have alerted the company to the possibility that there would be insufficient orders to support the pipe plant. Any such suggestion would ignore the fact that the two plants served quite different markets. The cost overrun -- however irritating it might have been to the directors -- had nothing to do with the closure of the plant. It is significant that the review which led to the closure decision co-incided with the period, identified by Mr Brown, during which the plant was at a standstill. I see no reason to reject the account of events given by Mr Brown and Mr Cocks. They are consistent only with a conclusion that the

company commenced production at Berkeley Vale in the genuine

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belief that the plant was viable and would continue production indefinitely but that, unhappily and unexpectedly, the situation quickly deteriorated. As counsel for the applicants recognized in their submissions, it is not material to determine whether the company, with more thorough investigation, might have realized that demand would be inadequate. The fact is that the company did not so realise, at least until about September-October 1985. When the offers were made to Mr Warby and to Mr Patrick, nobody in authority in the company appears to have had

any reason to doubt that the offers were as they were represented, that is offers of employment of indefinite duration in a continuing plant.

I thought each of the applicants to be a truthful witness and an impressive person. Each of them has suffered considerable loss as a result of what has occurred. I regret that their losses have been exacerbated by the bringing of these Applications, for which the necessary evidence was simply not available,

When I indicated my view as to the result of the matters I invited argument regarding costs. I had in mind the possibility that some departure from the usual rule might be justified -- at least in the case of Mr Patrick -- by the circumstance that Mr Patrick refused one of the alternative job offers after the company had taken the decision to close Berkeley Vale but before the employees were informed of this fact. However, counsel for the respondent informed me that he

had instructions not to seek costs at this stage but that his

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client desired to reserve its right to apply for costs, in each case, in the event of an appeal being brought from my decision. Accordingly, it is not necessary for me to form any view whether this is a special case in relation to costs. The only order I shall make, in respect of each matter, is that the Application be dismissed.

I certify this and the fifteen (15) preceding pages to be a true copy of the Reasons for Judgment of his Honour Mr Justice Wilcox.

Associate:

Date: 8 July 1987

Counsel for the Applicants: Mr D E Andrews with Mr R F Driver

Solicitors for the Applicants: V Ranzetta & Co

Counsel for the Respondent: Mr A Ashburner

Solicitors for the Respondent: Dawson Waldron

Date(s) of hearing: 22, 23 and 24 June 1987

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