Federal Court of Australia

Re Adrian Allan Warner and Julie Francis Warner v Elders Rural Finance Limited; Keith Richardson; Queensland Industry Development Corporation; Goddard Wool Marketing Pty Limited and St George Meat and Livestock Pty Limited [1992] FCA 473 (23 September 1992)

FEDERAL COURT OF AUSTRALIA

Re: ADRIAN ALLAN WARNER and JULIE FRANCIS WARNER

And: ELDERS RURAL FINANCE LIMITED; KEITH RICHARDSON; QUEENSLAND INDUSTRY

DEVELOPMENT CORPORATION; GODDARD WOOL MARKETING PTY. LIMITED and ST. GEORGE

MEAT AND LIVESTOCK PTY. LIMITED

No. G109 of 1992

FED No. 733

Injunction

COURT

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY

GENERAL DIVISION

Cooper J.(1)

CATCHWORDS

Injunction - statement of claim struck out - leave to replead - interlocutory relief sought to prevent exercise of rights under a stock mortgage - dispute as to the condition of the livestock - draft statement of claim - credit creation - seasonal overdraft facility - application for finance - securities given - credit book entries - no money in form of legal tender of the Commonwealth of Australia - whether misleading and deceptive conduct - whether serious question to be tried - where does the balance of convenience lie.
Trade Practices Act Section 52

Eyles v. Ellis [1827] EngR 409; (1827) 4 Bing 112.

Momm v. Barclays Bank International Ltd. (1977) 1 QB 790

Active Leisure (Sports) Pty. Ltd. v. Sportsman's Australia Ltd. (1991) 1 Qd R 301

Magna Alloys Research Pty. Ltd. v. Coffey [1981] VicRp 3; (1981) VR 23.

HEARING

BRISBANE

23:9:1992
Applicant in Person: Julie Francis Warner

Counsel for First Respondent: P. O'Shea

Solicitors for First Respondent: Corrs Chambers Westgarth

ORDER

The applicants' notice of motion for interlocutory relief is dismissed.
The applicants pay the first respondent's costs of and incidental to the notice of motion, including reserved costs, to be taxed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

The applicants operate a grazing and wool property in the Charleville District. On 28 July, 1992 the applicants commenced proceedings against the first and second respondents and others. The applicants were not then legally assisted and had prepared their own application and statement of claim. The relief sought was in relation to securities given over stock and the grazing property to the first and third respondents.
2. On the first directions hearing on 19 August, 1992 undertakings were given by the first and third respondents not to exercise any rights under the securities for a limited time.

3. On 27 August, 1992 Beaumont J. struck out the statement of claim and gave leave to the applicants to re-plead. The first respondent would give no undertaking not to exercise its powers under a stock mortgage because of concern as to the condition of the livestock which it claims is subject to the stock mortgage. The grazing property is seriously drought affected.

4. On 5 September, 1992 the applicants, in the belief that the first respondent intended to enter the property and remove the stock on the weekend of 5-6 September, 1992 filed a notice of motion seeking injunctive relief preventing the first respondent entering the property, removing stock or otherwise exercising any rights under the stock mortgage pending trial.

5. The notice of motion was heard on Saturday 5 September, 1992. On the hearing of the motion it became clear that there was a major dispute as to the condition of the livestock and whether they could be moved without catastrophic losses. At that time the applicants had not prepared a new statement of claim. Because there was no material to determine whether or not there was a serious question to be tried, and also because it was impossible to determine where the balance of convenience lay, the matter was adjourned to 9 September, 1992 and the first respondent was restrained from removing the livestock until that date. On 9 September, 1992 the first respondent was further restrained until 21 September, 1992. The applicants were also directed to swear an affidavit of merits or provide a statement of claim by 12 midday on Friday 18 September, 1992 and the notice of motion was listed for further hearing on 21 September, 1992.

6. On 16 September, 1992 the parties by consent adjourned the hearing of the motion until today.

7. On the hearing the applicants tendered a draft statement of claim. As against the first respondent the applicants seek damages for misleading and deceptive conduct under section 52 of the Trade Practices Act. They also seek declarations that the security held by the first respondent is void and unenforceable. The statement of claim was apparently drawn by Counsel in Sydney. The applicants appeared in person to argue the notice of motion.

8. The allegations against the first respondent are:

"12. The First Respondent and its Manager the Second

Respondent knew or ought to have known that the verbal representation that the First respondent would lend the First Applicant "money" was misleading and deceptive and was made without informing the First Applicant of the ramifications involved in the First Applicant accepting a facility provided by a financial institution which provided such facility for an amount in excess of the capital reserves then held by such institution.

PARTICULARS

In agreeing to make the loan to the First Applicant the First Respondent did not inform the First Applicant that :-

(a) what the First Respondent was intending to provide to the First Applicant was substantially credit, not Legal tender money of the Commonwealth of Australia;

(b) the provision of such credit would result in an increase in the deposits of the Australian monetary system;

(c) such an increase in loans and deposits would inject into Australian community only sufficient credit to constitute the principal amounts of any such loans and did not provide the means to repay either interest or charges;

(d) the repayment of all or any part of any such credit destroyed the credit to the extent of such repayment;

(e) the only means by which the interest and charges could

be served by the First Applicant would be if other

persons or corporations continued to obtain similar

credits from Australian financial institutions of

which the First Respondent forms a part such that

those additional funds were available to some

borrowers;

(f) the contraction of credit by the Australian financial

system would result in an inability of borrowers

generally and, the First Applicant in particular, to

service borrowings as to either interest or charges;

(g) an increase in interest rates by the Australian

financial system would result in an inability of

borrowers generally and, the First Applicant in

particular, to service borrowings as to either

interest or charges;

(h) whilst the First Respondent was proposing to provide

the loan substantially by way of credit, the First

Respondent would require repayment from the First

Applicant in Legal tender money of the Commonwealth of

Australia.

.....

16. The First Respondent knew or ought to have known that

the verbal representation that the First Respondent had or

would lend "money" was misleading and deceptive and was made

without informing the Applicants of the ramifications involved in the Applicants accepting a facility provided by a financial institution which provided such facility for an amount in excess of the capital reserves then held by such institution.

PARTICULARS

The representations were made by the Second Respondent on behalf of the First Respondent. The representations were made orally by the Second Respondent who was then the Manager of the First Respondent's branch at Charleville in the State of Queensland

In agreeing to make the loan to the Applicant the First Respondent did not inform the Applicants that:-

(a) what the First Respondent was intending to provide to the Applicants was substantially credit, nor Legal tender money of the Commonwealth of Australia;

(b) the provision of such credit would result in an increase in the deposits of the Australian monetary system;

(c) such an increase in loans and deposits would inject into Australian community only sufficient credit to constitute the principal amounts of any such loans and did not provide the means to repay either interest or charges;

(d) the repayment of all or any part of any such credit

destroyed the credit to the extent of such repayment;

(e) the only means by which the interest and charges could be serviced by the Applicants would be if other persons or corporations continued to obtain similar credits from Australian financial institutions of which the First Respondent forms a part such that those additional funds were available to some borrowers;

(f) the contraction of credit by the Australian financial system would result in an inability of borrowers generally and, the Applicants in particular, to service borrowings as to either interest or charges;

(g) an increase in interest rates by the Australian financial system would result in an inability of borrowers generally and, the Applicants in particular, to service borrowings as to either interest or charges;

(h) whilst the First Respondent was proposing to provide the loan substantially by way of credit, the First Respondent would require repayment from the Applicants in Legal tender money of the Commonwealth of Australia.

.....

19. Alternatively, to the extent that any advance or

facility within the meaning of the said Stock Mortgage was made by the First Applicant (the provision of which advance or facility is denied), there was no consideration which the First Respondent provided in respect of any such facility or advance to the Applicants.

PARTICULARS

Any facility or demand which may have been provided by the First Respondent was a book entry demand deposit which the First Respondent itself created effortlessly and at no cost to the First Respondent. To the extent that the First respondent represented that such an advance or facility had been made the First Respondent did make a misleading and deceptive representation as the First Respondent merely transferred book entries and never intended to redeem the said entries in legal tender money of the Commonwealth of Australia or to cause the same to be so redeemed.

20. Alternatively, the First Respondent did fail to lend the Applicants legal tender money of the Commonwealth of Australia to the full value of the said loan.

PARTICULARS

The actual legal tender money which the First Respondent risked for the said loan, estimated to be no more than 5% of the face value of the said loan, the First Respondent did charge an interest rate which was 20 times greater than what was represented by the First respondent, and the First

Respondent did so deliberately and to the detriment and damage of the Applicants. By virtue of the First Respondent's action, the First Respondent has collected an annual interest rate estimated to be 20 times greater than the amount of interest which the First Respondent represented and to which the Applicants agreed in that the actual amount of legal tender of the Commonwealth of Australia risked by the First Respondent and of which the First Respondent was denied the use during the term of the loan, was less than 5% of the said loan's face value.

21. Alternatively, the First Respondent engaged in misleading and deceptive conduct by failing to inform the Applicants that the First Respondent was engaged in a barter contract which comprised the exchange by the First Applicant of book-entry credit created at no cost to the First Respondent for legal tender currency of the Commonwealth of Australia from the Applicants.

22. The First Respondent engaged in misleading and deceptive conduct by failing to inform the Applicants of the nature and content of the said Stock Mortgage and precluding the Applicants from having the opportunity to inform themselves of the nature and content of the said Stock Mortgage.

PARTICULARS

The misrepresentations were made by the Second Respondent on

behalf of the First Respondent. The misrepresentations were

made orally by the Second respondent at the First

Respondent's branch at Charleville in the State of

Queensland. The Second respondent misrepresented to the

Applicants that the First respondent had provided advances

and facilities in respect of Mt. Morris and that the

document which constituted the said Stock Mortgage was

required in connection with the said advances and

facilities".

9. Keith Robert John Richardson, the Branch Manager of the first respondent deposed that in 1985 the applicants applied to Elders Limited for a seasonal overdraft facility in connection with their property. The purpose of the facility was to obtain funds for the applicants' living expenses and the general running expenses of the property until the money from the wool clip came in. Payment of these expenses was made by Elders to the creditors of the applicants. The debt to Elders was reduced when income was received by the applicants. The stock mortgage was given to secure this facility. Elders maintained an account in the applicants' name wherein payments on the applicants' behalf were entered as debits and payments received were entered as credits. Interest was charged on the outstanding debit balance.
10. In November, 1990 the applicants made a further application for finance and Elders continued to meet a number of the operating expenses incurred by the applicants. In July, 1991 there was a shortfall of approximately $35,000.00 in the anticipated income of the applicants from the sale of wool. On 22 November, 1991 the applicants made a new finance application. Listed in that application as a debt due is $87,611.00 as the balance due to Elders and secured by stock mortgage. The last payment made by the applicants to Elders was on 2 August, 1991.

11. The applicants argue that no money in the form of legal tender of the Commonwealth of Australia was paid to them by Elders and that all that occurred was the granting of a credit book entry in the circumstances pleaded.

12. On the material, I am satisfied that money was paid by Elders for and on behalf of the applicants to discharge their debts and that such payment was an advance for the purposes of the stock mortgage. Such advance having been made the security interest attached to the livestock the subject of the mortgage.

13. There is no doubt that the first respondent did not advise the applicants of the matters pleaded in paragraphs 12 and 16 of the draft statement of claim. However, there is nothing to suggest that the matters of fact or opinion contained in those paragraphs are arguably correct and that if they are, in the circumstances of the facility sought and its intended means of operation to fail to disclose those matters would constitute false and misleading conduct in breach of section 52 of the Trade Practices Act. Insofar as the allegations in paragraphs 18, 19 and 20 assert that the advances were not made because legal tender was not paid directly to the applicants, I consider that the assertion is misconceived and ignores the payments made on behalf of

the applicants and which they received the material benefit of. Similarly, I consider the allegation in paragraph 21 misconceived. A debit or credit by a banker or financial institution even though no money is transferred in specie operates as a payment (Eyles v. Ellis [1827] EngR 409; (1827) 4 Bing 112 at 113-114; Momm v. Barclays Bank International Ltd. (1977) 1 QB 790 at 800-803).

14. On the evidence of Mr Richardson advances and facilities were made in respect of Mt. Morris (the grazing property) and the stock mortgage was taken to secure those advances. There is no evidence to make out the allegation in paragraph 22 of the draft statement of claim.

15. It was not argued by the applicants and it is not pleaded that any of the transactions between the applicants and the first respondent were tainted by unconscionability.

16. I am not persuaded that the applicants have made out a serious question to be tried. If a serious question to be tried has not been made out, the question of balance of convenience does not arise (Active Leisure (Sports) Pty. Ltd. v. Sportsman's Australia Ltd. (1991) 1 Qd R 301 at 311; Magna Alloys Research Pty. Ltd. v. Coffey [1981] VicRp 3; (1981) VR 23 at 29).

17. The Court orders that:

1. The applicants' notice of motion for interlocutory relief is

dismissed.

2. The applicants pay the first respondent's costs of and

incidental to the notice of motion, including reserved

costs, to be taxed.