NEW SOUTH WALES SUPREME COURT

CITATION: Cauvin v Philip Morris Limited and Ors [2002] NSWSC 528

CURRENT JURISDICTION: Equity

FILE NUMBER(S): 2625/02

HEARING DATE{S): 12 June, 2002

JUDGMENT DATE: 13/06/2002

PARTIES:
Myriam Cauvin - Plaintiff
Philip Morris Limited - First Defendant
Philip Morris (Australia) Limited - Second Defendant
British American Tobacco Australia Services - Third Defendant
W.D. & H.O. Wills Holdings Limited - Fourth Defendant
British American Tobaco Australasia Limited - Fifth Defendant
British American Tobacco Australia Limited - Sixth Defendant
Coles Supermarkets Pty Limited - Seventh Defendant
Coles Myer Limited - Eighth Defendant
Darren Johnston Barker - Ninth Defendant
Gina Joanne Barker - Tenth Defendant

JUDGMENT OF: Palmer J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
N.F. Francey - Plaintiff
N.C. Hutley SC - 3rd to 6th Defendants
P.K. Cashman (Solicitor) - 9th and 10th Defendants

SOLICITORS:
Maurice May & Co - Plaintiff
Clayton Utz - 3rd to 6th Defendants
Maurice Blackburn Cashman - 9th & 10th Defendants

CATCHWORDS:
INTERLOCUTORY INJUNCTION - CLASS ACTION - Plaintiff seeks to represent all people in Australia who bought cigarettes at a price which included a component reflecting an invalid tax - Plaintiff seeks injunction restraining wholesalers of cigarettes from repaying to retailers amounts of invalid tax collected from retailers which the High Court has held the wholesalers must repay to the retailers. HELD: Plaintiff's application for interlocutory injunction refused.

ACTS CITED:
Trade Practices Act, 51AA, s.51AB, s.84(4), s.87

DECISION:
Plaintiff's Notice of Motion dismissed.

JUDGMENT:

Introduction

1 Before the Court is a Motion for an injunction founded upon highly unusual circumstances. The issues cannot be summarised in a nutshell. A preamble is necessary.

2 Up to mid-1997 a legislative scheme relating to the sale of tobacco products was in force in the States and Territories of Australia. The scheme in effect imposed an indirect tax, in the form of a licence fee, upon tobacco products. I will refer, for the sake of brevity, to the payments to be made under the scheme as a tax although that is not, strictly speaking, a correct description.

3 Wholesalers of tobacco products paid to the revenue authorities each month under the scheme an amount of tax calculated by reference to the value of sales of tobacco products to retailers; in turn, the wholesalers included in their invoices to retailers for sales to them a separate item showing the amount payable in respect of the tax. The price of cigarettes sold to consumers included an amount which recouped to the retailers the payments of tax which they had to make to the wholesalers. Thus, in the end, the consumers bore the burden of the tax although, of course, the sale price to consumers did not disclose what proportion was referable to the tax payable by the retailers to the wholesalers.

4 In *Ha v State of New South Wales* (1997) 189 CLR 465, the High Court held that the legislative scheme implemented by the States and Territories was invalid because it imposed an excise. The judgment was delivered on 5 August 1997. Very shortly thereafter the Federal Government enacted legislation which validly reimposed the tax and restored the scheme, but only from the date of that legislation.

5 Under the earlier invalid scheme retailers would pay to wholesalers the amounts of tax shown on their purchase invoices and a month later the wholesalers would pay to the revenue authorities the tax for which they were liable. When the High Court's judgment in *Ha* was delivered, wholesalers had received from retailers payments of tax for the month of July 1997 and for August up to 5 August, but they had not yet paid to the revenue authorities the tax for which they themselves were liable for sales during that period. The result of the judgment in *Ha* was that the wholesalers were not liable to pay to the revenue authorities the amounts of tax which they had received from the retailers between 1 July and 5 August. The wholesalers had reaped a windfall in the amount, so it is said, of some $230M.

6 In *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203, the High Court held that because the amount of the invalid tax was separately stated in each sales invoice rendered by a wholesaler to a retailer, it was a separate and severable part of the purchase price for the products sold. The Court held that the consideration in respect of that part of the purchase price had failed because the legislation under which it was payable was invalid. Accordingly, so the Court held, the law imposed on the wholesalers an obligation to make restitution to the retailers of the amounts of tax which the retailers had paid for purchases from 1 July to 5 August 1997.

7 I should observe at this point that no question of trust law was involved in the reasoning of the High Court. The money paid by consumers for cigarettes was received as part of the ordinary revenue of the retailers and no part of it was ear-marked or separately accounted for as payable, in turn, to wholesalers in respect of the tax. Likewise, the payments of tax by the retailers to wholesalers were received as part of the ordinary revenue of the wholesalers so that when the

wholesalers came to pay the tax to the revenue authorities they were, like the retailers, making payments out of their own monies.

8 As a result of the decision in *Roxborough*, the wholesalers regard themselves as obliged to make substantial repayments to the retailers of the tax paid by the retailers during the period 1 July to 5 August 1997. The decision of the High Court in *Roxborough* is confined to rights and obligations as between the wholesalers and retailers; the question was: who had the better claim as between those two classes: see *Roxborough* (ibid) para.27. Whether the retailers, when they receive the repayments of tax amounts from the wholesalers, will be liable to repay anything to the consumers who ultimately bore the burden of that tax is not decided by *Roxborough*.

These proceedings

9 The Plaintiff in the present case claims to represent people throughout Australia who purchased cigarettes in respect of which retailers had paid tax to wholesalers between 1 July and 5 August 1997. The First to Sixth Defendants ("the Wholesalers") are the wholesalers of tobacco products who received payments in respect of tax from retailers during that period. The Seventh to Tenth Defendants ("the Retailers") are retailers and are said to be sued also as representing all retailers of tobacco products in Australia at all material times.

10 By her Amended Statement of Claim the Plaintiff pleads three causes of action against the Wholesalers and the Retailers. First, the Plaintiff alleges that the monies received by the Wholesalers from the Retailers in respect of tax payments during the period from 1 July to 5 August are monies had and received to the use of the Retailers and to the use of the Plaintiff and those she represents. The Plaintiff also alleges that such payments are monies had and received by the Retailers to the use of the Plaintiff and those she represents: Amended Statement of Claim, para.2.10.

11 Second, the Plaintiff alleges that the retention of the tax payments received by the Wholesalers or by the Retailers would constitute unjust enrichment as against the Plaintiff and those she represents: Amended Statement of Claim para 2.11.

12 Third, the Plaintiff alleges that retention of the tax payments by the Wholesalers or the Retailers is, or would be, unconscionable conduct in contravention of s.51AA or s.51AB of the *Trade Practices Act* and the equivalent sections in the corresponding State legislation.

13 The Plaintiff claims loss and damage, being payment to the Retailers of that part of the purchase price of cigarettes which enabled the retailers to pay amounts of tax to the Wholesalers in respect of sales to Retailers between 1 July and 5 August 1997.

14 The Plaintiff claims by way of final relief declarations as to the respective entitlements of the parties to the tax payments received by the Wholesalers and by the Retailers, a declaration that those monies should be paid for the benefit of the Plaintiff and those she represents *"in a manner to be determined by the Court"*, an order that an amount equal to the tax payments be paid into Court and, finally, such order under s.87 of the *Trade Practices Act* and the equivalent State legislation as the Court thinks is appropriate to compensate the Plaintiff and those she represents for the loss suffered or likely to be suffered by the Defendants' contraventions of the *Trade Practices Act* and the equivalent State legislation.

The Motion for an injunction

15 In the Motion now before the Court the Plaintiff seeks an interlocutory injunction restraining the Wholesalers from making any repayments to the Retailers of the tax monies received by the Wholesalers between 1 July and 5 August 1997, such injunction to continue up to the hearing of various Motions in these proceedings which have been set down before Windeyer J commencing on 18 July 2002.

16 In support of the Motion Mr Francey, who appears for the Plaintiff, submits that there is a serious question to be tried as to whether the Plaintiff's claims against the Defendants will succeed and, further, that the balance of convenience favours the grant of the injunction because there is a possibility, not dispelled by the Wholesalers during the hearing of this Motion, that they will pay to the Retailers, numbering some 25,000, the amounts of tax monies to which *Roxborough* indicates the Retailers are entitled. Mr Francey says that if the Plaintiff's claims succeed, it will be far easier to enforce the Court's orders against the six Wholesalers than against the 25,000 Retailers so that the Court should ensure, by granting the injunction, that the monies which the Defendants may be liable to pay are not disbursed. Mr Francey also relies upon the powers conferred on the Court under s.84(4) of the *Trade Practices Act* to grant an injunction pending determination of the proceedings.

17 This matter came on for hearing yesterday afternoon and it is important to the parties that I give a decision quickly. Accordingly, without disrespect to the extensive and careful arguments of Mr Francey, Mr Hutley SC who appears for the Wholesalers, and Dr Cashman who appears for the Retailers, I will state my decision and my reasons, as briefly as I may.

18 In my view, the injunction should be refused, first because the Plaintiff's case against the Wholesalers is extremely weak and, second, because the balance of convenience is against the granting of the injunction sought. The principal factors which I have taken into account in concluding, even at this very early stage of the proceedings, that the Plaintiff's case against the Wholesalers is extremely weak are as follows.

19 First, it is very difficult, if not impossible, to see how the Plaintiff's claim against the Wholesalers for money had and received can succeed. As *Roxborough* made clear, the payments which the Wholesalers received were payments out of the Retailers' own money; no part was made up of the consumers' money or was money paid by the Retailers for or on behalf of consumers. I appreciate that *Roxborough* does not create an issue estoppel against the Plaintiff because she and those she claims to represent were not parties. However, there is a very strong argument that an attempt by the Plaintiff to re-litigate the issue whether the money paid to the Wholesalers was the Retailers' own money, when that very issue has already been tried all the way to the High Court, would be struck down as frivolous and vexatious under Part 13 R.5(1): see *Stephenson v Garnett* [1898] 1 QB 677, at 680-681 per A.L. Smith LJ; *Reichel v Magrath* (1889) 14 App Cas 665, at 668 per Lord Halsbury LC; *Hunter v Chief Constable* [1982] AC 529, at 542 per Lord Diplock.

20 Second, for the same reason, it is difficult, if not impossible, to see how the Plaintiff's claim against the Wholesalers for unjust enrichment can succeed. The Wholesalers have received no money at all from the consumers; how can they have they have been enriched at the expense of the consumers?

21 Third, it is very difficult, if not impossible, to see how the Plaintiff's claim against the Wholesalers under s.51AA or s.51AB of the *Trade Practices Act* can succeed. The "unconscionable conduct" alleged against the Wholesalers is a failure to repay the tax monies to consumers. However, the only liability which the Wholesalers presently have to repay any tax money is a liability which the High Court in *Roxborough* has held they have to the Retailers. It is very hard to see how it could be "unconscionable" within the meaning of s.51AA or s.51AB for a corporation to discharge an obligation which the Courts have held it owes.

22 Fourth, underlying all of these difficulties is the fact that so far as the evidence presently indicates it will be virtually impossible for the Plaintiff and any person she claims to represent to prove entitlement to pursue any of the causes of action pleaded or entitlement to any of the proceeds of any judgment which may be recovered in the proceedings. This is so because the claim of a plaintiff depends upon showing that that plaintiff purchased cigarettes in respect of which tax payments had been made by the relevant Retailer to a Wholesaler between 1 July and 5 August 1997. The evidence so far shows – and, in any event, it is inherently likely – that when a Retailer purchased cigarettes from a Wholesaler in respect of which a tax payment was made between 1 July and 5 August, the stock purchased was placed with the Retailer's existing stock for sale, without differentiation. There was no change in the price of cigarettes immediately before, during or immediately after the period from 1 July to 5 August. It would be impossible to say of any person who purchased cigarettes from 1 July 1997 onwards whether that person had purchased cigarettes from a retailer's "old stock" or from stock in respect of which that retailer had made a relevant tax payment to a wholesaler. It was for this reason that Mr Francey very fairly and properly conceded at the commencement of the hearing that the persons whom the Plaintiff seeks to represent in the proceedings are unidentified and are incapable of being identified. I think it must follow that the very same problem confronts the Plaintiff herself.

23 The principal factors which I have taken into account in determining that the balance of convenience is against granting of the injunction are as follows.

24 First, there is no suggestion that the Wholesalers intend to make payments to Retailers in order to avoid the claims of the Plaintiff and those she seeks to represent. There is no suggestion that if the Wholesalers make the tax repayments to the Retailers, the Wholesalers will be unable to pay any claims which the Plaintiff may succeed in establishing against them.

25 Second, as I have mentioned, the Wholesalers have a present liability to the Retailers to repay the tax payments. The Retailers may well be entitled to claim that interest is accruing on that liability. Bearing in mind that the total amount said to be involved in is in the order of $230M, significant losses may well be suffered by the Wholesalers if repayment to the Retailers is delayed.

26 Third, as against the losses which may be suffered by Wholesalers if an injunction is granted, the prejudice to the Plaintiff and those she seeks to represent, considered severally rather than as an amorphous mass whose members are unidentifiable, is very small indeed if the injunction is not granted. Even assuming that a plaintiff could be found who could prove that, at some after 1 July 1997, he or she purchased on a regular basis cigarettes in respect of which tax payments had been made by a Retailer to a Wholesaler during the period 1 July to 5 August 1997, the amount recoverable by that plaintiff if the claim succeeded could not possibly amount to more than a few hundred dollars.

27 Fourth, it is said that if the Plaintiff and those she seeks to represent succeed in their claims it will be far more convenient to recover payments from the six Wholesalers rather than from the 25,000 Retailers. The strength of that submission depends, to a large extent, on the strength of the Plaintiff's case against the Wholesalers. As I have said, I find it hard to see how the Plaintiff can succeed against the Wholesalers. The Plaintiff's claims against the Retailers are in a different category and I do not need to consider them for the purposes of this application. However, what the Plaintiff seems to be seeking is that the Wholesalers be prevented from discharging their obligations to the Retailers so that the case against the Retailers may more conveniently be pursued. In my opinion, this is not a legitimate reason to grant the injunction. If the Plaintiff has a sufficient case against the Retailers, she must pursue that case directly against the Retailers, for better or for worse.

28 In my view, these reasons are sufficient to warrant the dismissal of the Plaintiff's Notice of Motion, and I so order.

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LAST UPDATED: 13/06/2002