FEDERAL COURT OF AUSTRALIA

Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd

[2000] FCA 131

TOBACCO CONTROL COALITION INC v PHILIP MORRIS (AUSTRALIA) LTD and PHILIP MORRIS LTD, W D & H O WILLS HOLDINGS LTD and W D & H O WILLS (AUSTRALIA) LTD and ROTHMANS HOLDINGS LTD and ROTHMANS OF PALL MALL (AUSTRALIA) LTD
N1089 of 1999

WILCOX J
SYDNEY
9 FEBRUARY 2000

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N1089 of 1999**

BETWEEN:	**TOBACCO CONTROL COALITION INC** **Applicant**
AND:	**PHILIP MORRIS (AUSTRALIA) LTD and PHILIP MORRIS LTD** **First Respondents**
	W D & H O WILLS HOLDINGS LTD and W D & H O WILLS (AUSTRALIA) LTD **Second Respondents**
	AND
	ROTHMANS HOLDINGS LTD and ROTHMANS OF PALL MALL (AUSTRALIA) LTD **Third Respondents**
JUDGE:	**WILCOX J**
DATE OF ORDER:	**9 FEBRUARY 2000**
WHERE MADE:	**SYDNEY**

THE COURT DIRECTS THAT:

1. Leave be granted to the applicant, pursuant to Order 4, Rule 14(2) of the Federal Court Rules, to carry on the proceeding without a solicitor; but limited to preparation for, and attendance at, the hearing of the motions listed for 21 February 2000 and limited, in point of time, to the conclusion of that hearing.

2. Leave be granted to the applicant to file in Court the notice of motion, dated 3 February 2000, signed by Dr Andrew Penman on behalf of the applicant. Friday, 11 February 2000 at 10.15am be appointed for the hearing of that motion. All affidavits in support of that motion are to be filed and served on the third respondent by 1pm on 10 February 2000.

3. The directions made on 17 December 1999 be varied so as to require the applicant to file its submissions in relation to costs first, and by 1pm on Monday, 14 February 2000.

All respondents' submissions are to be filed by 1pm on Friday, 18 February 2000.

4. The costs of the motion heard on 9 February 2000 be reserved.

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

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NEW SOUTH WALES DISTRICT REGISTRY **N1089 of 1999**

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AND:	**PHILIP MORRIS (AUSTRALIA) LTD and PHILIP MORRIS LTD** **First Respondents**
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JUDGE:	**WILCOX J**
DATE OF ORDER:	**9 FEBRUARY 2000**
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EXTEMPORE REASONS FOR JUDGMENT

1 **WILCOX J:** The matter I have before me today is a notice of motion filed by the applicant seeking leave, under Order 4, Rule 14(2) of the Federal Court Rules, for the applicant to carry on the proceeding otherwise than by a solicitor. The notice of motion is not limited as to the duration of the period within which it is sought to carry on the proceeding otherwise than by a solicitor. During the discussion today, it emerged that what is really sought at this time is leave to continue the proceeding otherwise than by a solicitor for the period that will elapse between today and the completion of a hearing set down for 21 February, that is to say Monday week, at which two matters are to be dealt with pursuant to directions made by me before Christmas, at a time when the applicant was represented by solicitors.

2 Those two matters are as follows:

(i) an application by the applicant to file an amended application in accordance with a document annexed to the affidavit of Stephen John Moss of 3 December 1999, and

(ii) applications made by each of the respondents for orders that the applicant provide security for their costs.

I emphasise these are the matters on the agenda for the hearing of 21 February (if it proceeds) and no more.

3 I note the amended application attached to Mr Moss's affidavit includes, by way of paragraph 2A, the following statement:

> *"The Applicant sues the Respondents in their own capacity and as representative of the companies set out in Schedules C1, C2, and C3 to this Amended Application respectively."*

Those schedules include the names of numerous companies, some apparently incorporated in Australia and some incorporated outside Australia. In order to maintain an action against the present respondents, in a representative manner against other respondents, it would be necessary for the applicant to procure from the Court an order pursuant to Order 6, Rule 13(2) of the Federal Court Rules. If the application to file the amended application is successful, and the document as filed includes para 2A, it will be essential for the applicants to obtain leave under Order 6, Rule 13(2). However, that is not a matter that will be considered on 21 February. The position would be the same as if a paragraph in the form of para 2A was included in an application filed in the Registry, without the necessity for leave, and then the applicant approached the Court by way of notice of motion for leave under Order 6, Rule 13(2). I emphasise this point because some concern has been expressed from the bar table that it will be necessary for the respondents to come to court on 21 February armed with evidence as to the relationship between the respondents named in the amended application and the companies listed in the three schedules to which para 2A refers. This is not so.

4 The discretion given under Order 4, Rule 14(2) is cast in wide terms. No criteria for the exercise of the discretion are specified by the sub-rule. The prima facie position, undoubtedly, is that a corporation should have a solicitor acting in a matter that it commences or wishes to continue. That prima facie position is not only implied by the sub-rule; it has been stated more than once by members of this Court.

5 It is also fair to say, I think, that the prima facia position ought to be regarded as

applying more strongly in the case of a corporation which is an applicant, and which has chosen to embark on the litigation, than in the case of a respondent, which may be in the position of having litigation forced upon it and, for one reason or another, be unable to procure the services of a solicitor.

6 In the present case, there is the further factor that the applicant sues on behalf of group members, defined in extremely wide terms both in the filed application and the proposed amended application. Where the action is a representative one on behalf of people who have not been identified, and cannot yet be identified with any certainty, it would not be appropriate for litigation to be conducted, to any significant extent, without the services of a solicitor.

7 Furthermore, in the present case, it is clear that, if the matter goes to a hearing on the merits, it will involve extensive evidence and complex questions of law. It would be most inappropriate for such an action to be litigated without the services of a solicitor.

8 For all the above reasons, if the question was whether I should grant leave in an open-ended way, the answer would be a resounding negative. I would not contemplate such a course. However, when the question becomes whether I should grant leave for a limited period and for a limited purpose, the answer is not so clear-cut. I think the issue is finely balanced. My mind has fluctuated somewhat during the argument.

9 On the one hand, it is true to say, as counsel for the respondents do say, that the explanation given by the applicant, for its failure to have a solicitor available at this stage, is inadequate. It appears that the solicitors who were on the record, when the action was started and up until the end of last year, withdrew as a result of a statement made in court by counsel for one of the respondents on 17 December. The solicitors were concerned that an application for costs might be made against them personally. So far, no other solicitor has come on to the record. I have not been provided with evidence as to the extent of inquiries amongst other solicitors or the reason why no solicitor has come forward. The criticism made by counsel for the respondents of the lack of such evidence is justified.

10 On the other hand, I must consider what is the practical effect of taking one course or the other. If I refuse the present application, the case will go into limbo. I would have to

cancel the hearing on 21 February, because there would be nobody at that hearing able to represent the applicant. It might or might not be possible for the applicant to obtain a solicitor in the future. The situation would remain uncertain for an uncertain period. If a solicitor were subsequently retained, then the case would come back to the position it is in at the present time. It would be necessary to fix a new hearing date to deal with the two matters I have mentioned, and which are fundamental to the course of the litigation. On the other hand, I suppose, if no solicitor came forward, then at some stage the respondents would make an application to dismiss the proceeding for want of prosecution. If that application was successful, the proceeding would be dismissed, not because of any finding by the Court about its legal validity or a ruling as to whether it ought to be allowed to proceed in the absence of security, but simply because no solicitor was prepared to come onto the record. This seems to me a somewhat unsatisfactory situation.

11 I have indicated to Mr Francey, counsel for the applicant, both on a previous occasion and today, that I see considerable problems about the action. Mr Francey concedes it has a number of novel aspects. It has been described by one respondent's counsel as hopeless. That may or may not be so. I am not prepared to reach a view about that question without full argument.

12 If I thought any significant solicitor's work were required to be done between now and 21 February, I would refuse the present application. However, I do not think this is the position. Directions have already been made for written submissions to be filed. In view of the concession made, today, by Mr Francey, that his client would be unable to comply with any order for costs made in favour of the respondents other than in a nominal amount, it is scarcely necessary to go into the detail of the applicant's resources. Mr Francey's case on the issue of security of costs starts from that factual premise. His task will be to persuade me that, notwithstanding the premise, I should not make an order for security for costs, except perhaps one in a very modest amount. This argument will need to draw heavily on submissions about the essential merit of the case.

13 So far as I can see, the only matter that requires attention, apart from the filing of written submissions which are for the barrister to prepare in any event, is a foreshadowed notice of motion seeking to set aside certain paragraphs of one notice to produce and three subpoenas served by one of the respondents. The notice of motion has been prepared and

handed to me. It could not be filed because of the lack of leave to proceed without a solicitor.

14 There is no difficulty about that notice of motion being filed instanter and fixed for hearing in the near future, perhaps next Friday. I can hear argument from Mr Francey and Mr Finch, or his substitute if he is not available, about the application to set aside those paragraphs and rule on it. It will then be for the recipients of the notice to produce and the subpoenas to comply with them in accordance with my ruling. There is no solicitor's work involved, so far as the applicant is concerned.

15 Given that there seems to be nothing that a solicitor would be required to do, if on the record, between now and Monday week, it seems a rather technical approach to refuse to allow the hearing of 21 February to go ahead simply because there is no solicitor on the record. Having regard to the unpalatable possible results of refusal, I think I should allow the matter to go to the hearing on 21 February, strictly limited to the issues I have stated. If the case survives (in a practical sense) that hearing, it will be essential for a solicitor to come on the record before any further action is taken. I wish to make it clear there is no possibility I will grant leave for the action to proceed, over a longer period, without a solicitor being on the record to represent the applicant's interests. I also wish to make it clear that, in expressing the views I have and in deciding to take the course I have outlined, I indicate no view about the legal viability of this action. I have raised doubts. Mr Francey has sought to assuage my doubts. I wish to hear full argument on those matters, and to give consideration to that argument, before I express myself any further.

16 I grant leave to the applicant, pursuant to Order 4, Rule 14(2) of the Federal Court Rules, to carry on the proceeding otherwise than by a solicitor; but limited to preparation for, and attendance at, the hearing of the motions listed for 21 February 2000 and limited, in point of time, to the conclusion of that hearing. I give leave to the applicant to file in Court the notice of motion, dated 3 February 2000, signed by Dr Andrew Penman on behalf of the applicant. I appoint Friday, 11 February 2000 at 10.15 am for the hearing of that motion. All affidavits in support of that motion are to be filed and served on the third respondent by 1pm tomorrow.

17 I vary the directions made on 17 December 1999 so as to require the applicant to file

its submissions in relation to security for costs first, and by 1pm on Monday, 14 February 2000. All respondents' submissions are to be filed by 1pm on Friday, 18 February. I reserve the costs of the motion heard today.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 9 February 2000

Counsel for the Applicant:	N F Francey and R Rana
Counsel for the First Respondent:	J L Sher QC and S O'Meara
Solicitor for the Respondent:	Arthur Robinson & Hedderwicks
Counsel for the Second Respondent:	C G Gee QC and D Beach
Solicitor for the Second Respondent:	Mallesons Stephen Jaques
Counsel for the Third Respondent:	S G Finch QC and I Jackman
Solicitors for the Third Respondent:	Clayton Utz
Date of Hearing:	9 February 2000