REVISED

Copy for Master Evans

TOBACCO INSTITUTE OF AUSTRALIA LIMITED — Plaintiff/ Respondent

v

ANTI-CANCER COUNCIL OF VICTORIA — Defendant/ Applicant

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JUDGE:	HAYNE J
WHERE HELD:	Melbourne
DATE OF HEARING:	18 November 1992
DATE OF JUDGMENT:	18 November 1992

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APPEARANCES	Counsel	Solicitors
For the Plaintiff/ Respondent	J S Winneke, QC with A L Cavanough	Arthur Robinson & Hedderwick
For the Defendant/ Applicant	N J Young, QC with B N Caine	Minter Ellison

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HIS HONOUR:

This is an appeal brought from a Master's order made under Rule 47.04 directing trial of two questions separately from the rest of the trial. The order was made on an application made by the defendant which originally sought in its summons the trial of four questions separately. The defendant now seeks only to maintain the order below; it does not persist in seeking the orders which it originally sought.

The action is brought by Tobacco Institute of Australia Limited, a body which has among its objects the promotion of understanding of the tobacco industry in Australia by the public and the representation of and assistance to the tobacco industry in the legitimate maintenance, support and furtherance of its interests.

The action arises from the preparation and publication by the Anti-Cancer Council of Victoria of a report and a supplementary report which it made to a body called the Ministerial Council on Drug Strategy - Tobacco Task Force. The report was entitled: "Health Warnings and Contents Labelling on Tobacco Products". The supplementary report was called: "Public Approval of Proposed Tobacco Pack Labelling and Other Modifications".

The plaintiff alleges that those reports contained misleading and deceptive representations about the research undertaken and reported upon in the documents and that the Anti-Cancer Council thereby engaged in misleading or deceptive conduct contrary to s.52 of the Trade Practices Act 1974 and s.11 of the Fair Trading Act 1985.

The defendant denies the allegations and alleges among other things that neither s.52 of the Trade

Practices Act nor s.11 of the Fair Trading Act applies because the publication of the reports was in each case a prescribed publication by a prescribed information provider within the meanings of s.65A of the Trade Practices Act and S.10B of the Fair Trading Act.

By his order, the Master directed that -

> "The following questions be tried before the trial of this proceeding, to wit, whether or not -
>
> (a), the defendant is a prescribed information provider and the publication of the report and supplementary report was a publication of prescribed matter within the meaning of s.65A of the Trade Practices Act 1974 (Cth) and s.10B of the Fair Trading Act 1985 (Vic);
>
> (b), the report and the supplementary report or the contents thereof fall within the class of publications defined in s.65A(1)(a)(i) and (iii) of the Trade Practices Act 1974 (Cth) and/or s.10B(1)(a)(i) and (iii) of the Fair Trading Act 1985 (Vic) and are relevant services for the purpose of those provisions."

In Dunstan v Simmie & Co Pty Ltd [1978] VR 669, Young CJ and Jenkinson J said, at 671, of the provision of the Rules that then dealt with the separate trial of questions (Order 36, Rule 8) -

> "Some of the early English cases dealing with the occasions when the power in Order 36, Rule 8 might be exercised, may have expressed somewhat too restrictive a view. (See Emma Silver Mining Company v Grant (1879) 11 Ch D 918; Piercey v Young (1880) 15 Ch D 475; and Smith & Company v Hargreave & Company (1885) 16 QBD 183). Nevertheless, it remains true that it is a power to be exercised with great caution. It is not desirable to circumscribe the exercise of the discretion to make an order under the power and it is perhaps particularly desirable that the power should be invoked in building cases, so long as there are appropriate issues to be isolated. Nevertheless, although every case must depend upon its own facts, it will as a general rule only be appropriate to order that a preliminary issue be isolated for determination before trial where the determination of the issue in favour of the plaintiff or the defendant will put an end to the action or where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issues in the

> case is likely to save inconvenience and expense. (cf Polskie v Electric Furnace Company Limited [1956] 1 WLR, especially at 569). Subject to these considerations, we would agree with what Hudson J said in Geo. Wimpey & Company Limited v Territory Enterprises Pty Limited [1966] VR 312 at 316, that there is no reason to differentiate between an application by a plaintiff and one by a defendant."

In my view, it is clear that generally similar principles should be applied in considering an application made under Rule 47.04 of the present Rules.

I should note in passing that the defendant in this case has sought trial by jury and that therefore it might have been said that similar problems arise in this case as were considered by the Full Court in one of the Verwayen cases, Verwayen v Commonwealth of Australia [1988] VR 203, concerning the trial of issues in different ways but I did not understand counsel for the Tobacco Institute to lay emphasis on this if only because it was thought unlikely that in the end in this case there would be trial by jury.

Considerable attention focused in the argument upon the terms of s.65A of the Trade Practices Act and the equivalent provision of the Fair Trading Act, with a view to identifying what factual and legal issues would have to be determined if the order for separate trial of questions were allowed to stand. That attention was given because, as I understood it, it was accepted by both sides that a consideration relevant to the exercise of the discretion to order separate trial of questions is not only whether the determination of the questions in one way would end the proceedings but also whether the issues truly are discrete issues. It can be said, as was said on behalf of the Anti-Cancer Council, that the determination of the

questions ordered by the Master in this case (if determined in its favour) would bring the action to an end because the only causes of action alleged against it are causes of action under s.52 and s.11. Again, it can also be said, as was said on behalf of the Anti-Cancer Council, that the questions identified by the Master's order are questions that can be identified as separate questions of law raised squarely by the pleadings. However, the central area for debate was whether the trial of separate questions thus identified would overlap in any, or any significant way with factual issues which would fall for determination if the other issues raised in the proceeding as a whole ultimately had to be determined. As I have said, that led to consideration of the meaning that ought to be given to s.65A of the Trade Practices Act and its State equivalent.

So far as presently relevant, that section reads -

> "Nothing in s.52 . . . . applies to a prescribed publication of matter by a prescribed information provider other than -
>
> (a) a publication of matter in connection with -
>
> (i) the supply or possible supply of goods or services;
> . . . .
> (iii) the promotion by any means of the supply or use of goods or services
> . . . . where -
> (v) the goods or services were relevant goods or services."

A "prescribed information provider" is defined in the Acts as being "a person who carries on a business of providing information".

"Relevant goods or services" are defined in the Acts "in relation to a prescribed information provider" as meaning "goods or services of a kind supplied by the prescribed information provider".

The section also provides that

> "for the purposes of this section a publication by a prescribed information provider is a prescribed publication if -
>
> > (a) in any case the publication was made by the prescribed information provider in the course of carrying on a business of providing information."

Thus the structure of the provisions is that they give an exemption from the operation of the prohibition against misleading and deceptive conduct (and also from the application of certain other provisions) except in certain identified circumstances.

The provisions of the Federal Act have been considered in a number of cases and I was referred to Horwitz Grahame Books Pty Limited v Performance Publications Pty Limited [1987] ATPR 48271; Advanced Hair Studio Pty Limited v TVW Enterprises Limited [1987] ATPR 48845; Lovatt v Consolidated Magazines Pty Limited [1988] ATPR 49717; and Sun Earth Homes Pty Limited v Australian Broadcasting Corporation [1991] ATPR 52028. In none of those cases was it necessary for the court to give any definitive exposition of the operation of the provision or of the effect of the excepting provisions. Although it is possible to identify the general intention underlying s.65A the exact ambit of its operation especially the excepting provisions is, I think, by no means clear.

It is undesirable in an interlocutory application coming on as in the Practice Court, where there has been no extensive time for argument or for consideration of the matter, that I express any view on the matter beyond what is strictly necessary for the disposition of the appeal before me.

Counsel for the Tobacco Institute submitted that the exception applied if the publication in question was intended to promote the interests of the information provider and that in order to prove that characterisation of the report as one having that intention, it would be necessary on the trial of these questions to embark upon an examination amongst other things of whether the report was misleading or deceptive or had that tendency.

The Anti-Cancer Council's response was to the effect that s.65A required consideration of three questions, and only three questions. First, was the Anti-Cancer Council a prescribed information provider, that is, was it in the business of providing information? Second, were the reports prescribed publications? And third, so far as the exception was concerned, was the publication in connection with the supply or possible supply by the Anti-Cancer Council or the promotion of the supply or possible supply by the Anti-Cancer Council of services, being its research services? It was these issues that were said to be separate issues capable of determination in isolation both factually and legally from the issues raised in the proceeding as a whole.

As I have said, I think it is inappropriate for me to express any view, let alone any concluded view, on the construction of s.65A(1)(a)(i) and (iii) and in particular, upon what is meant by "promotion by any means" when that expression is used in s.65A(1)(a)(iii). It is, I think, enough for me to say that I am not persuaded that it is shown that there is a clear and definite demarcation between the issues sought now to be raised as separate questions and the issues that will arise on the trial of

the proceeding. In particular, I do not think that it can be said clearly and definitely that evidence concerning the alleged misleading and deceptive character of the reports could not or might not go to the issue of whether the publication was a publication in connection with the promotion by any means of the supply or use of the Anti-Cancer Council's research services.

There not being that clear and definite demarcation of issues sought to be raised by separate questions from those that would fall for determination were the matter to be tried as a whole, I am of the clear view that this is not an appropriate case in which to order separate trial of questions.

It follows that in my opinion the appeal should be allowed and the defendant's summons should be dismissed.

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CERTIFICATE

I certify that this and the preceding six (6) pages are a true copy of the reasons for judgment of HAYNE J of the Supreme Court of Victoria delivered on Wednesday, 18 November 1992

Dated this 20th Day of November 1992

Associate