

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter No S238/2001

WOOLWORTHS LIMITED

PLAINTIFF

AND

ALLAN HERBERT MILLER FELS & ANOR

DEFENDANTS

Matter No S249/2001

COLES MYER LIMITED & ANOR

PLAINTIFFS

AND

ALLAN HERBERT MILLER FELS & ANOR

DEFENDANTS

Woolworths Limited v Fels
Coles Myer Limited v Fels
[2002] HCA 50
7 November 2002
S238/2001 and S249/2001

ORDER

IN EACH CASE

Question reserved on case stated answered as follows:

Question

Can the production of documents to which legal professional privilege attaches and is maintained be compelled by the Second Defendant pursuant to section 155 of the Trade Practices Act 1974 (Cth)?

Answer

No.

Order as follows:

- 1. Declare that s 155 of the Trade Practices Act 1974 (Cth) does not require the production of documents to which legal professional privilege attaches.*
- 2. Dissolve the injunction granted by Gaudron J on 7 November 2001 and continued by the Full Court on 15 February 2002.*
- 3. Defendants to pay the costs of the plaintiff(s) of the action and the stated case.*

Representation:

Matter No S238/2001

S J Gageler SC with P R Whitford for the plaintiff (instructed by Clayton Utz)

J C Sheahan SC with P J Renehan for the defendants (instructed by Australian Government Solicitor)

Matter No S249/2001

S J Gageler SC with P R Whitford for the plaintiffs (instructed by Allens Arthur Robinson)

J C Sheahan SC with P J Renehan for the defendants (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Woolworths Limited v Fels Coles Myer Limited v Fels

Evidence – Legal professional privilege – Statutory notice to produce documents
– Whether statute abrogated legal professional privilege.

Trade practices – Notice to produce documents to Australian Competition and Consumer Commission – Commission investigating whether *Trade Practices Act* 1974 (Cth) contravened – Whether documents to be produced included those for which legal professional privilege claimed.

Trade Practices Act 1974 (Cth), s 155.

- 1 GLEESON CJ, GAUDRON, GUMMOW AND HAYNE JJ. These matters were heard at the same time as *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*. In each matter, a case was stated pursuant to s 18 of the *Judiciary Act 1903* (Cth) in which the following question was reserved for the consideration of the Full Court:

"Can the production of documents to which legal professional privilege attaches and is maintained be compelled by the Second Defendant pursuant to section 155 of the *Trade Practices Act 1974* (Cth)?"

- 2 As a result of amendments effected by Sched 2 to the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2) 2001* (Cth), the provisions of s 155 are in a slightly different form from those considered in *The Daniels Corporation*. However, it is common ground that nothing turns on those amendments. Accordingly, for the reasons given in *The Daniels Corporation*, in each case the question reserved for the consideration of the Full Court should be answered "No".

- 3 At the conclusion of the hearing of these matters, the parties agreed that, if the questions reserved were answered "No", the Court could finally dispose of the matters by dissolving the injunctions previously granted and making a declaration as sought in the Statement of Claim in each case. Accordingly, the following orders should be made in each matter:

1. Declare that s 155 of the *Trade Practices Act 1974* (Cth) does not require the production of documents to which legal professional privilege attaches.
2. Dissolve the injunction granted by Gaudron J on 7 November 2001 and continued by the Full Court on 15 February 2002.
3. The defendants to pay the plaintiff(s)'s costs of the action and the stated case.

4 McHUGH J. The Court heard these two matters at the same time as it heard *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*. As in *The Daniels Corporation*, the two matters concerned the construction of s 155 of the *Trade Practices Act 1974* (Cth) and the extent to which, if at all, that section abolished the right to claim legal professional privilege in respect of documents required to be produced by a notice given under the section. There were, however, certain differences between *The Daniels Corporation* and these two cases. *The Daniels Corporation* involved an appeal from a judgment of the Full Court of the Federal Court; these two matters involved a question reserved for the Full Court of this Court under s 18 of the *Judiciary Act 1903* (Cth). As a result of amendments to s 155 made in 2001, the terms of s 155 applicable to these two cases are slightly different from those considered in *The Daniels Corporation*. However, nothing turns on any of these differences.

5 Accordingly, for the reasons that I gave in *The Daniels Corporation*, the answer to the Question Reserved is "No". At the hearing, the parties agreed that, if the question was so answered, the Court should dissolve the injunction granted and make declarations as sought by the plaintiffs in their Statements of Claim. Accordingly, I would dissolve the injunction granted, make declarations as sought by the plaintiffs and order the defendants to pay the plaintiffs' costs of the actions and the cases stated.

3.

6 KIRBY J. These matters come before the Court on cases stated by Gaudron J. They were returned before a Full Court and heard together with the appeal in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*¹.

7 The same issue arose in these cases as in the *Daniels* appeal. That is: "Can the production of documents to which legal professional privilege attaches and is maintained be compelled by the Commission pursuant to section 155 of the Trade Practices Act 1974 (Cth) [(the TPA)]?"

8 In substance, the considerations relevant to the disposal of the appeal in *Daniels* govern the outcome of these proceedings, except that legislation applicable to each is different. The outcome in *Daniels* was governed by s 155 of the TPA as it stood before amendments to that Act effected by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2) 2001* (Cth). The outcome of the stated cases is governed by the TPA following such amendment.

9 The Commission, and Professor Fels, the defendants in both proceedings, contended that the amendment reinforced the limited nature of the exemption provided by s 155(5) of the TPA. However, the amendment cannot alter the answer to the substantial questions that were argued in, and determined by the outcome of, the *Daniels* appeal. The meaning of the notion of capability and whether it is subject to legal professional privilege remain as stated in that decision.

10 The outcome in *Daniels* requires a like outcome to the cases stated by Gaudron J. I therefore agree in the orders proposed in the joint reasons.

1 [2002] HCA 49.

11 CALLINAN J. Gaudron J stated the facts and reserved questions of law as follows in the first of these actions:

- "1. On 17 August 2001 the Defendants served on the Plaintiff a notice issued pursuant to section 155 of the Trade Practices Act 1974 (Cth). A copy of the notice is annexed and marked 'A'.
2. The notice purports to require the Plaintiff to produce to the Second Defendant [the ACCC] documents to which legal professional privilege attaches.
3. The Defendants subsequently extended time for compliance with the notice to 20 February 2002.
4. The Plaintiff has in its possession documents falling within the terms of the notice:
 - (a) which comprise and record confidential communications:
 - (i) by the legal advisors of the Plaintiff (in their professional capacity) for the dominant purpose of obtaining instructions, or giving legal advice or assistance, in relation to or preparing for or conducting actual or anticipated proceedings;
 - (ii) by employees or representatives of the Plaintiff for the dominant purpose of providing instructions to the Plaintiff's legal advisors in relation to actual or anticipated proceedings;
 - (iii) by employees or representatives of the Plaintiff for the dominant purpose of seeking legal advice or assistance;
 - (iv) by legal advisors of the Plaintiff for the dominant purpose of providing legal advice or assistance to the Plaintiff; or
 - (v) passing between the Plaintiff, its legal advisors, other persons or their legal advisors, where the parties to those communications have a common interest in the outcome of actual or anticipated proceedings; and
 - (b) in respect of which the Plaintiff claims legal professional privilege.
5. Can the production of documents to which legal professional privilege attaches and is maintained be compelled by the Second

5.

Defendant pursuant to section 155 of the Trade Practices Act 1974 (Cth)?"

12 The case stated and questions reserved in the second action are relevantly identical with those in the first action and the facts and questions arising in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*. I did not take the defendants to be suggesting otherwise.

13 At the dates of issue of the notices in these cases, s 155 of the Act was in the same form as it was when the notices were issued in *Daniels* which was heard at the same time as these cases. With effect from 15 December 2001, s 155 was amended by items 23 to 26 of Sched 2 to the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2) 2001* (Cth). Section 4 of that Act makes the amendments applicable to "acts and omissions that take place after the amendment commences". As to the intention of the amendment, this appears in the revised explanatory memorandum:

"1.40 Some provisions in the [Act] are being amended to ensure that the defences and the applicable burden of proof imposed on the defendant are stated clearly. The provisions in question currently contain offences and defences in the same section, subsection or paragraph. The amendments separate the defences from the offences and place them in a separate subsection to ensure the defence is stated clearly. The new provision includes a note explaining that the defendant bears an evidential burden for the matters in the subsection.

1.41 Section 13.3 of the *Criminal Code* explains when an evidential burden of proof is imposed on the defendant. An evidential burden of proof means that the onus is on the defendant to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. A defendant who wishes to rely on a defence, being an exception, exemption, excuse, qualification or justification, bears an evidential burden of proof. This applies whether the exception, exemption, excuse, qualification or justification is within the offence provision itself or is separated from it.

1.42 Section 152DE of the [Act] obliges a person to answer a summons and attend as a witness before the ACCC and establishes offences if a person fails to appear, or attend as required. A new subsection (2) will provide that an offence does not occur if the person has a reasonable excuse for a failure to appear or attend. Similarly section 152DF establishes offences if a person appearing as a witness before the ACCC refuses or fails to be sworn or to make an affirmation, or to answer a question or produce a

document as required. A new subsection (1A) will provide that an offence does not occur if the person has a reasonable excuse for their failure. A consequential amendment is required to subsection 152DF(2) of the [Act] to replace a reference to subsection (1) with subsection (1A). [Schedule 2, items 17 and 18 section 152DE; items 19, 20 and 21, section 152DF]

1.43 Section 155 empowers the ACCC, in connection with its enforcement of the Act generally, to require among other things – the production of information and documents and establishes offences where a person refuses or fails to comply with a notice given under the section. A new subsection (5A) will provide that an offence does not occur to the extent that the person is not capable of complying with the requirement. [Schedule 2, items 23 and 24 section 155] Subsection 155(7A) presently provides a defence in relation to Cabinet documents of a State or Territory and a note is to be added that the defendant bears the evidential burden. [Schedule 2, item 26, section 155(7A)]"

14 The amendments consisted relevantly of the substitution of a different form of sub-s (6A) and an addition of a note to sub-s (7A).

15 Sub-section (6A) now provides:

"A person who contravenes subsection (5) or (6) is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units."

16 The amendments do not alter the operation of s 155 in any relevant respect. On the contrary, if anything, they reinforce the limited nature of the exemption provided by s 155(5). Their evident purpose was to ensure that the defendant in a prosecution under s 155(5) would bear the evidential onus of proof of incapacity. It seems to me that they do not apply to the notices in question in these cases. Nor does it matter that here the notices were given to the clients, and not, as in *Daniels*, to the solicitors for the clients.

17 For the reasons stated in *Daniels* therefore, the outcome in these cases should be the same. The answer to the reserved question in both cases should be no. The defendants should pay the plaintiffs' costs of the actions and the stated cases.