

HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

MOBIL OIL AUSTRALIA PTY LIMITED

APPELLANT

AND

TRENDLEN PTY LIMITED

RESPONDENT

Mobil Oil Australia Pty Limited v Trendlen Pty Limited
[2006] HCA 42
30 August 2006
S523/2005

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Supreme Court of New South Wales made on 27 July 2005 and in their place order that:*
 - (a) *the plaintiff's notice of motion filed on 13 May 2005 be dismissed with costs;*
 - (b) *the proceedings not be continued as representative proceedings; and*
 - (c) *the plaintiff pay the defendant's costs of the defendant's notice of motion filed on 7 October 2003.*

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with J K Kirk for the appellant (instructed by Blake Dawson Waldron Lawyers)

S J Gageler SC with M J Leeming for the respondent (instructed by Robert Richards & Associates)

Intervener

H C Burmester QC with R A Pepper for the Attorney-General of the Commonwealth intervening (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

Mobil Oil Australia Pty Limited v Trendlen Pty Limited

Practice – Representative proceedings – Supreme Court Rules 1970 (NSW), Pt 8 r 13 – Representative proceedings brought by petroleum retailer to recover licence fees paid to wholesaler – Proceedings financed by litigation funder – Whether proceedings champertous – Whether provisions for representative proceedings in the Supreme Court Rules were validly engaged – "Same interest" – Common interest of fact or law – Whether there were, at the time the proceedings were commenced, numerous persons who had the same interest in the proceedings – Proceedings intended to be conducted on behalf of those retailers who subsequently "opted-in" – None had "opted-in" when proceedings commenced.

Practice – Representative proceedings – Stay of proceedings – Abuse of process – Public policy – Proceedings financed by litigation funder – Litigation funder sought out possible claimants – Retailer gave up to funder one-third of its claim – Whether the representative proceedings should be stayed as contrary to public policy or an abuse of process – *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW).

Words and phrases – "abuse of process", "maintenance and champerty", "public policy", "representative proceedings", "same interest", "trafficking in litigation".

Maintenance, Champerty and Barratry Abolition Act 1993 (NSW).
Supreme Court Rules 1970 (NSW), Pt 8, r 13.

1 GLEESON CJ. Subject to one qualification, this appeal raises substantially the same issues as were raised by *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*¹. The qualification concerns the rejection by McDougall J of certain evidence concerning the conduct of the promoter of the litigation. The evidence is referred to in the reasons of Kirby J. I agree that the evidence, even if admitted, would not have altered the conclusion to be drawn on the matter of abuse of process. Viewed in one way (but not the only possible way) it is an example of the less attractive features of commercial promotion and funding of litigation, but nobody suggests there are not such features. The Supreme Court of New South Wales has the capacity to recognise, and the power to guard against, abuse of its process.

2 The appeal should be dismissed with costs.

1 [2006] HCA 41.

3 GUMMOW, HAYNE AND CRENNAN JJ. This appeal was heard at the same time as the several appeals dealt with in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*².

4 The appellant, Mobil Oil Australia Pty Limited ("Mobil"), sold petroleum products by wholesale. Immediately before this Court decided *Ha v New South Wales*³, legislation in five States⁴ and the Australian Capital Territory⁵ provided for the licensing of sellers of petroleum products in terms that the respondent to the present appeal, Trendlen Pty Limited ("Trendlen"), contends were not materially different from the legislation considered in *Ha*. (It is not necessary to decide whether, or to what extent, the legislation relevant to these proceedings does differ from that considered in *Ha*.)

5 Immediately before *Ha* was decided, Trendlen was a retailer of petroleum products. It alleges that it bought petroleum products from Mobil, that pursuant to the impugned legislation, Mobil paid licence fees to the State of New South Wales referable to the value of petroleum products sold, that Mobil passed that fee on to its retailers, including Trendlen, and that Trendlen is entitled to recover the amount that Mobil charged it for fees but which Mobil did not have to pay to the State because of the decision in *Ha*. Trendlen brought proceedings in the Equity Division of the Supreme Court of New South Wales against Mobil. The proceedings were commenced as representative proceedings pursuant to Pt 8 r 13 of the Supreme Court Rules 1970 ("the 1970 Rules"). Two other representative proceedings were commenced in the Equity Division by petroleum retailers at the same time as the proceedings commenced by Trendlen.

6 All three proceedings were commenced by retailers whom Mr Adrian Firmstone, the sole director of Firmstones Pty Ltd ("Firmstones"), said that his company represented. Mobil contends that the proceedings begun by Trendlen (and the other two proceedings commenced by petroleum retailers) were promoted and maintained by Firmstones on champertous terms. Firmstones was to receive 33¹/₃ per cent of any amounts received by the plaintiffs from the

2 [2006] HCA 41.

3 (1997) 189 CLR 465.

4 *Business Franchise Licences (Petroleum Products) Act* 1987 (NSW), *Business Franchise (Petroleum Products) Act* 1979 (Vic), *Petroleum Products Regulation Act* 1995 (SA), *Transport Co-ordination Act* 1966 (WA), *Petroleum Products Business Franchise Licences Act* 1981 (Tas).

5 *Business Franchise (Tobacco and Petroleum Products) Act* 1984 (ACT).

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defendants, would meet any costs orders made against the plaintiffs, but would retain any amounts awarded as costs.

7 The proceedings commenced by Trendlen took substantially the same form as the proceedings considered in *Fostif*. That is, the summons recorded that Trendlen claimed the relief set out in the summons on behalf of itself and a class of unnamed persons that was described in the summons. The summons provided for an opt-in procedure and the persons whom Trendlen sought to represent were those petroleum retailers who would later choose to be represented.

8 Trendlen sought discovery revealing the names and addresses of those petroleum retailers with whom Mobil had dealt between 1 July 1997 and 5 August 1997. Mobil gave notice of motion for orders that the proceedings be dismissed, struck out or stayed, or that the proceedings not continue as representative proceedings.

9 These applications were heard by a single judge (McDougall J) after the Court of Appeal of New South Wales had decided *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*⁶. In the light of what had been decided by the Court of Appeal in *Fostif*, McDougall J dismissed Mobil's application for orders terminating the proceedings, and dismissed Mobil's application for an order that the proceedings not continue as representative proceedings. An order was made obliging Mobil to provide Trendlen with a verified list of the names and last-known business addresses of the petrol retailers to whom Mobil had supplied petroleum products in New South Wales, Victoria, South Australia, Tasmania, Western Australia and the Australian Capital Territory during the period 1 July 1997 to 5 August 1997.

10 By special leave, Mobil appealed directly to this Court. Mobil contended that the proceedings "are tainted by maintenance and champerty ... constitute trafficking in litigation [and] an abuse of process". The proceedings being in federal jurisdiction (as a matter arising under the Constitution or involving its interpretation⁷), Mobil further contended that the circumstances surrounding the commencement of the proceedings, and in particular the role played by Firmstones, were "inconsistent with the requirement that the judicial power of the Commonwealth be exercised in accordance with the judicial process".

6 (2005) 63 NSWLR 203.

7 Constitution, s 76(i).

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11 Mobil made a number of further, more particular, challenges to the primary judge's decision. It complained of the primary judge's rejection of evidence of the content of a without prejudice offer made by Firmstones to compromise all claims that petroleum retailers may have had against Mobil for sums allegedly due to them in respect of fees paid under the impugned legislation. Mobil further contended that the primary judge should have found that by making this offer Firmstones breached a fiduciary duty owed to those retailers whom it represented. In this connection, Mobil pointed to some other compromises that Firmstones had reached with other suppliers of petroleum products which, so Mobil contended, revealed other breaches of fiduciary duty and thus revealed that Firmstones and Trendlen were inappropriate persons to have control of the proceedings.

12 It is unnecessary to consider these particular complaints, or to consider Mobil's further complaint that the primary judge erred in finding that there was no basis in the evidence for concluding that Firmstones would be unable to meet certain undertakings as to costs. These complaints need not be considered because, for the reasons given in *Fostif*, the proceedings commenced by Trendlen did not meet the requirements of Pt 8 r 13(1) of the 1970 Rules. When the proceedings were instituted and considered by McDougall J there were not numerous persons having the same interest in the proceedings that had been commenced. The relief sought was confined to Trendlen. The only person who then had an interest in the proceedings was Trendlen. That being so, Mobil was entitled to an order that the proceedings not continue as representative proceedings and no order should have been made in the proceedings, as then constituted, requiring Mobil to provide a verified list of retailers with whom it had dealt.

13 It is not necessary to consider Mobil's contentions about the exercise of the judicial power of the Commonwealth. As presented, the arguments founded in Ch III of the Constitution raised no consideration separate from those examined in *Fostif* but it is neither necessary nor appropriate to decide how, if at all, those considerations intersect with Ch III.

14 Mobil's appeal should be allowed with costs. The orders of McDougall J made on 27 July 2005 should be set aside and in their place there be orders that:

1. The plaintiff's notice of motion filed on 13 May 2005 is dismissed with costs.
2. The proceedings not continue as representative proceedings.
3. The plaintiff pay the defendant's costs of the defendant's notice of motion filed on 7 October 2003.

- 15 KIRBY J. This appeal was heard concurrently with *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*⁸. Exceptionally, the appeal was brought directly from orders made by the primary judge in the Commercial List of the Equity Division of the Supreme Court of New South Wales (McDougall J)⁹. This unusual course was taken because the primary judge had dismissed the application before him by Mobil Oil Australia Pty Ltd ("the appellant"), by the application of the principles stated in the decision of the Court of Appeal of New South Wales in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*¹⁰.

The issues in this appeal

- 16 As appears from the reasons of Gummow, Hayne and Crennan JJ¹¹, most of the issues raised in this appeal repeat the arguments advanced for the appellants in the *Fostif* litigation. That is why this Court granted special leave to the appellant so that it would be heard before those questions were decided by us, affecting the appellant's interests¹².

- 17 Originally, there were two additional issues in this appeal, beyond those argued in the *Fostif* proceedings. One of these was a constitutional issue, presented by the appellant's challenge to the constitutionality of the proceedings brought against it. Initially, no constitutional objection was raised in the *Fostif* proceedings, either at first instance or in the Court of Appeal. However, when special leave was granted to the appellant in this appeal, the appellants in the *Fostif* proceedings sought, and were granted, leave to add the same constitutional challenges to their proceedings. Indeed, they relied, in large part, upon the oral submissions advanced for the appellant in these proceedings, to support the constitutional objections advanced in theirs.

- 18 This left only one separate issue in this appeal. It concerned the appellant's challenge to the conduct of Mr Adrian Firmstone and the evidence of a "without prejudice" letter which his company, Firmstones Pty Ltd ("Firmstones") had written to the appellant, offering to compromise the proceedings on specified terms. The primary judge rejected the tender of this letter. The appellant contested that ruling. It sought to rely on the letter to advance both its common law and constitutional arguments that the conduct of

8 See [2006] HCA 41.

9 *Trendlen Pty Ltd v Mobil Oil Australia Pty Ltd* [2005] NSWSC 741.

10 (2005) 63 NSWLR 203 ("*Fostif*").

11 Reasons of Gummow, Hayne and Crennan JJ at [11]-[13].

12 [2005] HCATrans 680.

Firmstones, as the litigation funder in the proceedings, constituted a serious abuse of process or abuse of the jurisdiction that the proceedings purported to invoke.

19 Although the issues that arise in this appeal can be traced to the invalidation of the business franchise licensing legislation concerned with petroleum products¹³ and not the tobacco products considered in *Ha v New South Wales*¹⁴ and *Fostif*, it is proper to assume that the point of constitutional principle that invalidated the tobacco licensing fees as an invalid duty of excise reserved by the Constitution to the Federal Parliament, applies equally to similar licensing fees in State and Territory legislation enacted in respect of petroleum products. The design and purpose of the respective State and Territory laws was the same. There may be points of particularity and difference that warrant scrutiny in the particular circumstances of this case. However, the proper place for such scrutiny would be in the litigation as it unfolds, not in these proceedings where the appellant seeks peremptory termination of the litigation.

Common issues: common resolution

20 So far as the common issues in the respective appeals are concerned, it is my view that the primary judge correctly decided those issues in favour of the respondent. Because I would uphold the decision of the Court of Appeal in *Fostif*¹⁵, it follows that I would uphold the primary judge's orders refusing to terminate these proceedings on the grounds that they constituted an abuse of process at common law; or fell outside the requirements of Pt 8 r 13 of the Supreme Court Rules (NSW) then applicable; or because the remedies of discovery and interrogatories were oppressive or should otherwise be denied to the respondent outright¹⁶.

21 Similarly, I would reject the appellant's submissions that the proceedings were constitutionally invalid. My reasons for these several conclusions are sufficiently stated in the reasons published concurrently in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*¹⁷. There is no need for me to repeat,

13 Notably the *Business Franchise Licences (Petroleum Products) Act* 1987 (NSW) and equivalent State and Territory licensing schemes.

14 (1997) 189 CLR 465.

15 (2005) 63 NSWLR 203.

16 (2005) 63 NSWLR 203 at 260 [289] per Mason P (Sheller and Hodgson JJA concurring).

17 [2006] HCA 41.

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elaborate upon or distinguish them for the purposes of the present appeal. Particular residual points of distinction (if any) would remain open to the appellant to be argued in the representative proceedings and to be decided (and made the subject of appeal) in the usual way.

Separate issue: the "without prejudice" letter

22 This leaves the separate argument that was pressed upon this Court in relation to the complaint about the refusal of the primary judge to receive into evidence the "without prejudice" letter written by Firmstones. I am not convinced that the primary judge erred in his ruling in this respect. In any case, the letter is ultimately relevant, if at all, only to the issue of whether the proceedings constitute an abuse of process, or abuse of jurisdiction, because of Firmstones' involvement with them. Explanations of the letter, understood at the time it was written, have been advanced for the respondent. The letter has no relevance for any real constitutional issue. Its only significance is that it might strengthen the arguments for relief at common law against an abuse of process. That issue raises larger and more fundamental questions which I would decide against the appellant. Nothing in the "without prejudice" letter would cause me to revise or change that conclusion.

23 Furthermore, this Court is a court of error. It would not ordinarily concern itself in a contest over the admission of a particular item of evidence. Such questions rarely engage appellate courts, still less a final court, unless the admission or rejection of the evidence in question would have resulted in a different outcome at the trial¹⁸. On the issue for which the letter was arguably relevant, that is not, in my view, the case here. It follows that the submissions on this separate issue should be rejected.

Orders

24 It also follows that the appeal should be dismissed with costs.

18 cf *Balenzuela v De Gail* (1959) 101 CLR 226 at 233 per Dixon CJ, 239 per Menzies J.

25 CALLINAN AND HEYDON JJ. The circumstances are set out in the reasons for judgment of Gummow, Hayne and Crennan JJ.

Part 8 r 13(1) of the Supreme Court Rules (NSW)

26 The summons relied on before the primary judge had the same characteristics as those of the summonses in the seven proceedings considered in *Campbells Cash & Carry Pty Limited v Fostif Pty Limited*. For that reason the respondent failed to satisfy Pt 8 r 13(1) as it then was, and the orders proposed in the joint judgment should be made.

Abuse of process

27 Although, in view of that conclusion, it is not necessary to decide this issue, most of the characteristics which made the seven proceedings considered in *Campbells Cash & Carry Pty Limited v Fostif Pty Limited* an abuse of process exist here, and with the same result.

Other issues

28 In view of what has been said about Pt 8 r 13(1), it is not necessary to deal with the submissions advanced about other aspects of Pt 8 r 13, about whether there was a "matter" within the meaning of Ch III of the Constitution, about whether the proceedings are statute barred, about whether the letter of 9 March 2005 was properly excluded, and about whether, if it was not, it demonstrated that the true character of the proceedings from the outset was that they were an abuse of process.

Orders

29 We agree with the orders proposed by Gummow, Hayne and Crennan JJ. The respondent submitted that the appellant should bear the cost of any time by which the hearing of the appeal was extended by reason of intervention on the constitutional argument. There is no need for this order, since both this appeal and the appeals in *Campbells Cash & Carry Pty Limited v Fostif Pty Limited* were heard together and completed within a single day.