IN THE HIGH COURT OF AUSTRALIA

FRANKLINS FOOD PTY. LIMITED

V.

CADBURY-FRY-PASCALL PTY. LIMITED
AND OTHERS

REASONS FOR JUDGMENT

60 cents

Judgment delivered at SYDNEY

on Friday, 26th August 1966

A. C. Brooks, Government Printer, Melbourne
C.7639/60

FRANKLINS FOOD PTY. LIMITED

v.

CADBURY-FRY-PASCALL PTY. LIMITED AND OTHERS

ORDER

Statement of claim struck out. Reserve liberty to the plaintiff to deliver a further statement of claim within twenty-one days from the date of this order. Costs of the application to be paid by the plaintiff. Certify for counsel.

FRANKLINS FOOD PTY. LIMITED

v.

CADBURY-FRY-PASCALL PTY. LIMITED AND OTHERS

JUDGMENT
(ORAL)

MENZIES J.

FRANKLINS FOOD PTY. LIMITED

v.

CADBURY-FRY-PASCALL PTY. LIMITED AND OTHERS

The pleading of a claim under the Australian Industries Preservation Act is without question a complicated and a difficult matter. It has proved so in other cases and is proving so in this case, and I consider that in determining a pleading summons, some allowance must be made for the inevitable complications of such a pleading. Furthermore, I have a strong reluctance to see litigation held up by protracted and expensive interlocutory proceedings. Nevertheless, despite these considerations, I have come to the definite conclusion that I must accede to the application which the defendants now make.

The crux of the pleading under consideration is in pars. 59, 60 and 61 where the combination complained of is pleaded.

In my opinion, these paragraphs do not allege with sufficient precision either the combination of which the plaintiff complains, or what the plaintiff complains has been done by the defendants pursuant to that combination. Particular matters of uncertainty concern the extent to which retail trade and its control are within the combination and whether or not the combination is alleged to exist in relation to all chocolate manufactured by the defendants or whether merely packeted chocolate that is manufactured by the defendants. This lack of precision does, I think, infect the whole of the statement of claim.

I have also come to the conclusion that, unless par. 11 and the other paragraphs corresponding with it are

directed to alleging inter-State trade - and I have previously held them inapt to do that - they are irrelevant and embarrassing. Paragraph 14 and paragraphs corresponding with it fall with the paragraphs to which I have just referred.

Paragraph 12 and the other paragraphs corresponding with it not only lack precision, they do not allege any trade to which the combination as pleaded relates. These paragraphs are therefore also objectionable.

In my opinion, par. 13 and paragraphs corresponding with it are, too, unnecessary and embarrassing.

I have felt some difficulty about the allegation relating to subsidiaries, but the more I have considered these allegations the more satisfied I have become that they are substantially embarrassing and it would not be sufficient to attempt to deal with the embarrassment which they cause simply by ordering particulars. To avoid misunderstanding, I would add that the substantial and difficult questions of the extent to which a plaintiff may rely upon acts of persons who are not defendants and who are not alleged to be members of a combination complained of are matters that I would not think it proper to decide upon a pleading summons.

Turning to another matter, while observing that it is, of course, open to a plaintiff to allege acts done to his detriment in the course of carrying out a combination of which he complains, the governing control again must be the particular allegation of the combination. Acts cannot be regarded as done in carrying out a combination unless the combination is pleaded in terms sufficient to show that the acts complained of could be done in carrying out what is alleged to be the combination.

The combination as it is alleged in pars. 59 to 61 does not, I think, cover what is referred to in par. 68 and in these circumstances it cannot be sufficient merely to

include in par. 68 itself an allegation that what is there alleged is done in the course of engaging in the aforesaid combination; the question is always what is the aforesaid combination, which takes one back to what is alleged in pars. 59 to 61. The same is true, I think, of par. 70.

I have dealt in some particularity with the matters that have brought me to the conclusion that I should strike out the statement of claim, both so that the plaintiff may know what is in my mind and, if it wishes to do so, it can contest the correctness of my decision. I would add that, looking at the statement of claim overall, it seems to me that it must be substantially simplified before it can afford a satisfactory basis for the trial of what will inevitably be a heavy and difficult action.

Accordingly, I have decided to strike out the statement of claim and to give the plaintiff leave to deliver a fresh statement of claim within twenty-one days.

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

FRANKLINS FOOD PTY. LIMITED

V.

CADBURY-FRY-PASCALL PTY. LIMITED
AND OTHERS

ORIGINAL

REASONS FOR JUDGMENT

Oral *Judgment delivered at* SYDNEY
Thursday 25th
on ~~Friday~~, ~~2~~th August 1966

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C.7039/60

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