Fallcourt

Brennan J
18.3.
BR86-009

IN THE MATTER OF AN APPLICATION FOR A WRIT OF PROHIBITION AGAINST TREVOR REES MORLING, A JUDGE OF THE FEDERAL COURT OF AUSTRALIA; EX PARTE THE AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION, JACK O'TOOLE, TREVOR SURPLICE, DICK ANNEAR AND PAT ROUGHAN

ORDER

Appeal dismissed with costs.

13 Mar 86

IN THE MATTER OF AN APPLICATION FOR A WRIT OF PROHIBITION

AGAINST TREVOR REES MORLING,

A JUDGE OF THE FEDERAL COURT OF AUSTRALIA;

EX PARTE THE AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION,

JACK O'TOOLE, TREVOR SURPLICE, DICK ANNEAR AND

PAT ROUGHAN

JUDGMENT
(oral)

GIBBS C.J.
WILSON J.
BRENNAN J.
DEANE J.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF PROHIBITION AGAINST TREVOR REES MORLING, A JUDGE OF THE FEDERAL COURT OF AUSTRALIA; EX PARTE THE AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION, JACK O'TOOLE, TREVOR SURPLICE, DICK ANNEAR AND PAT ROUGHAN

This is an appeal from a judgment of Dawson J. who, on 22 November 1985, refused an application by the present appellants for an order nisi for a writ of prohibition directed to Morling J., a judge of the Federal Court. Morling J. was hearing an application made by Mudginberri Station Pty. Ltd. ("Mudginberri") for injunctive relief and damages for an alleged contravention of s.45D(1)(b)(i) of the Trade Practices Act 1974 (Cth), as amended, by the present appellants (the Australasian Meat Industry Employees Union and Messrs O'Toole, Surplice, Annear and Roughan), and three other persons. The material parts of s.45D of the Trade Practices Act are in the following terms:

> "Subject to this section, a person shall not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person (not being an employer of the first-mentioned person), or the acquisition of goods or services by a third person from a fourth person (not being an employer of the first-mentioned person), where -

> ...
>
> (b) the fourth person is a corporation and the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing -
>
> (i) substantial loss or damage to the business of the fourth person or of a body corporate that is related to that person ..."

The case was that the present appellants were the first and second persons and Mudginberri was the fourth person within the meaning of that provision. The evidence clearly showed that there was a boycott and the main question in issue at the first stage of the proceedings before Morling J. was whether the conduct of the appellants was justified under s.45D(3), which provides a defence sometimes described as "legitimate industrial action".

On 5 July 1985, during the course of the hearing counsel for Mudginberri asked Morling J. to proceed with the claim for a permanent injunction and submitted that the question of damages should be dealt with separately at some later time. Counsel for the appellants said that he offered no objection to this course and the learned judge indicated that he would proceed accordingly.

On 12 July 1985 Morling J. granted a permanent injunction. In the course of his reasons there appear two passages upon which the appellants now rely. The first of those was as follows:

> "In June 1984 the union set up a picket line on the road leading to Mudginberri Station. Because of the picket, members of the MIA [the Meat Inspectors Association] refused to enter the premises to perform their inspection duties and, as a result, production at the abattoir ceased. Subsequently, in July 1984, the applicant sought and obtained from this Court orders under s.45D of the Act. According to Mr Pendarvis, who I find to be a reliable witness, he explored with Mr O'Toole the possibility of resolving the dispute between the applicant and the union."

Mr Pendarvis was the managing director of Mudginberri. The second passage was as follows:

> "The effect of the picket line was to shut down the applicant's export operations. There is evidence, which I accept, that the shut down has caused and is causing the applicant substantial losses. Meat may not be exported unless it has first been inspected by appropriately qualified meat inspectors. It is the responsibility of the Department of Primary Industry to allocate inspectors to the Mudginberri abattoir. Three meat inspectors have been assigned to it. The evidence established that the inspectors have declined to cross the picket line. There is evidence, which I accept, that Mr Roughan told one inspector that, if

> necessary, physical force would be used to prevent inspectors working if they crossed the picket line. There is also evidence, which I accept, that the transport of goods to the abattoir has been impeded because of the picket line. In the last few weeks the applicant has been able to carry on limited operations at the abattoir by producing meat for the domestic market but I am satisfied that it is still suffering continuing loss and damage to its business."

After he had given his decision, Morling J. raised with counsel the question whether the claim for damages should be heard by another judge since he could not fix an early date for that purpose. No counsel submitted that any other judge should hear the matter. The hearing in relation to the issue of damages commenced on 16 October in Darwin and after three days was adjourned to Sydney where it continued for a further two days. One witness for Mudginberri was Mr Pendarvis, and it may be supposed that his evidence was of importance on the issue of damages.

The appellants then, on 13 November 1985, submitted to Morling J. that he should withdraw from the further hearing of the damages claim. The learned judge refused to do so. In the course of his reasons for refusing this application, Morling J. said:

> "I cannot forbear from observing that the respondents [that is, the present appellants] have at all times been represented by competent counsel who, if I may say so, have conducted every aspect of their clients' case with skill and diligence. The applicant's claim for damages is now reaching its conclusion. The hearing will resume either in Darwin in the week commencing 2 December or in Sydney in the week commencing 9 December. I find it difficult to accept that, had the respondents entertained the suspicion which they now say they entertain, they would not have asked their counsel to voice it at a much earlier point in time. It is now several weeks since I granted the respondents the considerable indulgence of permitting them to hear the applicant's evidence in chief, and to defer cross examination of the applicant's witnesses and the calling of their own evidence until 9 December. At no stage, before to-day, have they indicated the slightest objection to me continuing to hear the claim for damages. In all the circumstances, I think it is my duty to continue to hear the claim and I propose to do so."

The submission made to Dawson J. and repeated to us was that the observations made by Morling J. in the three passages already quoted were of such a nature that the public or the parties might have entertained a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matters before him and that he ought not to have proceeded to hear the matter further: see Livesey v. The New South Wales Bar Association (1983) 151 C.L.R. 288, at pp.293-294.

The question then is whether the fact that Morling J. made the remarks that he did, gave rise to a reasonable apprehension that he would be partial or prejudiced in the determination of the damages claim. It was submitted that the judge expressed views which went beyond what was necessary to determine the claim for an injunction. To sustain the claim for an injunction, it was said, it was necessary to prove only that the conduct would be likely to have the effect of causing damage, whereas to establish a claim for damages under s.82 of the Trade Practices Act, it would be necessary to prove that the conduct actually caused loss. That, of course, omits to mention the issue of purpose raised by s.45D(1)(b)(i). The views which Morling J. expressed were relevant to the question which he had to decide. If it appeared to him, on the evidence before him, that the appellants' conduct had in fact caused loss or damage, that assisted the conclusion that the conduct was engaged in for that purpose and was likely to have that effect. In any case, the views which Morling J. expressed were based on the evidence then before him and, assuming that no issue estoppel arose, would of course be reviewed and revised if necessary in the light of further evidence. Further, the observations were not directed to

the particular questions that fall for decision on the second hearing, namely, whether the heads of damage alleged were established and if so, how the damage should be quantified. Any apprehension of bias based on these remarks of the learned judge would be fanciful, not reasonable.

The same may be said of the apprehension said to be based on the finding that Mr Pendarvis was a reliable witness. That was a relevant finding but the fact that it was made does not mean that Morling J. would not change his mind if further evidence or cross-examination justified a different view.

The circumstances upon which the appellants now rely arose simply because the matter was heard in two stages. There was nothing surprising in that course which, in any case, was taken without objection.

The third passage relied on, which casts some doubts on the genuineness of the suspicion belatedly voiced by the appellants, again contains a relevant and understandable comment, having regard to the delay of the appellants in raising the point. An explanation has been given for their delay and we, of course, express no opinion on the question whether the suggestion made by the learned judge would

prove, on fuller examination, to be right or wrong. But this matter also provides no reasonable apprehension of bias.

We agree with the conclusion reached by Dawson J. and will accordingly dismiss the appeal.