

CASE NOTE

NEWS LTD V SOUTH SYDNEY DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED: THE HIGH COURT DECISION

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INTRODUCTION

The year 2003 witnessed the fourth and final instalment of the legal saga involving the South Sydney District Rugby League Football Club and News Ltd. The High Court, by a four to one majority, overturned the decision in the Full Court of the Federal Court that South Sydney had been excluded from the National Football League (NRL) by a term that was an exclusionary provision under section 4D and section 45(2) of the *Trade Practices Act 1974* (Cth). The High Court's decision provides judicial reasoning on how these sections of the *Trade Practices Act* are to be interpreted and also raises the issue of the role of the Australian Consumer and Competition Commission (ACCC) as intervener. In this case note, a brief overview of the three Federal Court cases involving South Sydney and News Ltd precedes an analysis of the High Court's decision.

I SOUTH SYDNEY V NEWS LTD

A *Background*

The case involving South Sydney and News Ltd resulted from the merging of the Winfield Cup competition run by the Australian Rugby League (ARL) and the Super League competition run by News Ltd. The formation of Super League was the subject of litigation in *News Limited v Australian Rugby Football League Limited*.¹ The decision of the case was dependent on whether the loyalty and commitment agreements that the ARL forced the clubs to sign were exclusionary provisions under section 45 and section 4D of the *Trade Practices Act 1974* (Cth). The original trial judge,

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¹ (1996) 135 ALR 33, (1996) 139 ALR 193.

Burchett J, held that they did not breach section 45(2)(a) of the Act as the loyalty and commitment agreements did not amount to an exclusionary provision.²

However, on appeal to the Full Court of the Federal Court it was held that the commitment agreements had been entered into for the purposes of preventing the supply by the clubs of teams to other competitions, and the acquisition by the clubs of the services of another competition organiser, and the Court concluded that these were substantial purposes.³ It was therefore held that there was a contravention of section 45(2)(a)(i) of the *Trade Practices Act* since the agreements contained exclusionary provisions within the meaning of section 4D of the Act.⁴ Another significant conclusion of the Full Court of the Federal Court was that the clubs were only bound to the League by their annual commitment to the League and not by some longer term.⁵

This decision by the Full Court enabled Super League to be established, but the economics of running two competitions in a small market like Australia necessitated discussions between the ARL and News Ltd in regard to the formation of a joint competition after just two seasons. An announcement was subsequently made on 19 December 1997 that the ARL and News Ltd intended to enter into an agreement that would unite their respective competitions and form one national competition, the NRL. The parties also agreed that the competition would over a three-year period be reduced to 14 teams⁶ — a compromise between the 16 teams suggested by the ARL and the 12 that News Ltd had requested. It was this 14-team term in the agreement that was central to the subsequent litigation.

As a consequence of the selection and merger process, North Sydney failed to obtain admission to the NRL on the basis of its insolvency. When the Gold Coast and Adelaide indicated they would not be seeking admission, and firstly St George and Illawarra, then Wests and Balmain, agreed to mergers, South Sydney became the only team excluded on the basis of its ranking as the fifteenth team under the selection criteria.⁷ South Sydney immediately commenced interlocutory proceedings in the Federal Court on 12 November, with the matter being heard by Hely J.

² *News Limited v Australian Rugby Football League Limited* (1996) 135 ALR 33.

³ *News Limited v Australian Rugby Football League Limited* (1996) 139 ALR 193, 249.

⁴ *Ibid* 252.

⁵ *Ibid* 282.

⁶ *South Sydney District Rugby League Football Club Limited v News Limited* (2000) 177 ALR 611, 620.

⁷ *Ibid* 629–30.

B *The Interlocutory Application*

The interlocutory relief sought by South Sydney was to restrain the NRL from excluding it from the competition.⁸ The main points of the statement of claim were that the 14-team term was an exclusionary provision under section 4D and section 45 of the *Trade Practices Act*, and that there were breaches of contract by the NRL.⁹ The contract claims were dismissed, and in regard to the claims under section 45 of the Act, it was the opinion of Hely J that there was a serious question to be tried as to whether the arrangements were made between persons who were competitive with each other under section 4D.¹⁰ His Honour questioned, however, whether the 14-team term had a proscribed purpose under section 4D(1)(b) of the *Trade Practices Act*.¹¹

Another crucial problem in his Honour's view was the doubt as to whether South Sydney would be able to pay subsequent damages should he grant the interlocutory injunction being sought.¹² Hely J also noted that South Sydney had participated in the selection process and had only commenced legal action after being unsuccessful.¹³ As his Honour concluded that South Sydney's case was not a strong one, on the balance of convenience, he declined to grant an injunction.

C *The Federal Court Single Judge Decision*

Despite the failure to secure an interlocutory injunction, South Sydney commenced formal trial proceedings before Finn J. With regard to the claim¹⁴ that there were agreements between the ARL and News Ltd that amounted to exclusionary provisions, Finn J agreed that the evidence supported a finding that News Ltd and the ARL were not in competition with each other in relation to competition-organising services and team services.¹⁵ It was his Honour's view, however, that, at the time of the 19

⁸ *South Sydney District Rugby League Football Club Limited v News Limited* (1999) 169 ALR 120, 127.

⁹ *Ibid* 126.

¹⁰ *Ibid* 130.

¹¹ *Ibid* 131.

¹² *Ibid* 148.

¹³ *Ibid* 139.

¹⁴ Note that the breach of contract argument that had been raised in the interlocutory application, as well as breach of s 52 of the *TPA*, were both argued. Both were dismissed by Finn J.

¹⁵ *South Sydney District Rugby League Football Club Limited v News Limited* (2000) 177 ALR 611, 654.

December understanding, they were in actual competition in regard to entertainment services.¹⁶ The intention of the parties was to secure an enhancement in the quality of those services.¹⁷ Therefore, even if the exclusion of a team would involve the foreseeable loss of fans, a purpose of the 14-team term in the 19 December understanding was not to deprive those fans of the supply of entertainment services.¹⁸ Thus, Finn J was of the opinion that the 14-team term had no purpose other than one of achieving a viable and sustainable national competition.

On the question as to what constituted a class of persons, Finn J's view was that there was no section 4D(1) class; there was, at best, a class defined only by the characteristic of not being selected to participate in the 2000 competition. Finn J's opinion was that the 14-team term was not of the proscribed type alleged by South Sydney. His Honour also noted that the NRL could still determine what teams it would admit into the competition. South Sydney, therefore, had no right to be admitted, and even if it could not be excluded in reliance of the 14-team term, it could still be excluded by any other lawful reason.¹⁹

D The Full Court of the Federal Court Decision

Undaunted by its second failure in the courts, South Sydney launched an appeal to the Full Court of the Federal Court, with the only challenge to Finn J's judgment being in regard to the 14-team term not being an exclusionary provision.²⁰ As Merkel J noted, the two issues were in regard to the purpose and the particular class of persons.²¹

In Moore J's view, central to the claim made by South Sydney was that the 14-team term was a provision of the proscribed type.²² His Honour was satisfied that it had been a substantial purpose operating in December 1997 on clubs who had competed in the two competitions during the winter of that year. The central question then posed by section 4D(1)(b) was whether a substantial purpose of the 14-team term was to effect a restriction or

¹⁶ Ibid 657.

¹⁷ Ibid 658.

¹⁸ Ibid 678.

¹⁹ Ibid 682.

²⁰ For a casenote on the Full Court of the Federal Court decision see C Davies, 'Souths v News Ltd', (2001) 8 *JCULR* 121-9.

²¹ *South Sydney District Rugby League Football Club Limited v News Limited* (2001) 181 ALR 188, 246.

²² Ibid 218.

limitation.²³ Moore J held that as the services to be acquired by the operation of the 14-team term would not be the same as those acquired when there were two competitions, there was such a limitation and restriction of the services.²⁴

Merkel J was also of the opinion that Finn J had failed to distinguish between the purpose of the club merger, joint venture and regional participation provisions and the purpose of the 14-team term.²⁵ In Merkel J's view, while the creation of a viable national competition was the ultimate end purpose of that term, its immediate purpose was to exclude clubs.²⁶ Since the 14-team term had been dogmatically insisted upon by News Ltd, and agreed to by the ARL, it was clear that the exclusionary purpose of the provision was a significant operative purpose and therefore a substantive one.²⁷

In his dissenting judgment Heerey J stated that critical to Finn J's findings was the state of mind of those making the decisions, namely that none had wanted or sought to have Souths excluded from the 2000 competition.²⁸ His Honour also expressed the view that while it was foreseeable that clubs would be excluded, the recognition of a possible outcome detracting from the desired purpose does not alter the nature of the purpose.²⁹

Moore J stated, in regard to the issue of whether there was a particular class involved, that the provision would only be an exclusionary provision if it was to operate on identified or identifiable persons, but not if it only operated on the generality of persons.³⁰ The expression 'particular class of persons', in his opinion, referred to identified or identifiable persons, but as his Honour concluded that the 1997 clubs were particular persons, it was unnecessary to consider the contention that the 14-team term represented a particular class.³¹ The view of Merkel J, however, was that there was such a class: top-level rugby league clubs that were eligible to participate but that had not met the requisite level in the selection criteria.

²³ Ibid 230.

²⁴ Ibid 231.

²⁵ Ibid 251.

²⁶ Ibid 254.

²⁷ Ibid 255.

²⁸ Ibid 203.

²⁹ Ibid.

³⁰ Ibid 234-5.

³¹ Ibid 237.

Thus, the clubs had a distinguishing or identifying characteristic in addition to the mere fact of exclusion.³²

On the matter of identity it was the view of Heerey J that a particular class cannot be defined by the mere fact of exclusion as this would mean that, in effect, the class would become the whole world as anybody would then have the potential to be excluded.³³

E *The High Court Decision*

After the Full Court of the Federal Court had overturned the original decision of Justice Finn, News Ltd was granted special leave to appeal to the High Court. By a majority of four to one (Gleeson CJ, McHugh, Gummow, Callinan JJ; Kirby J dissenting), the decision of the primary judge was restored.

1. *The Majority*

Gleeson CJ commented on the organisation of sporting competitions, noting that, like most sporting competitions, both the Super League competition and the Winfield Cup run by the ARL were, of their nature, exclusive as they were not open to any club which wished to join the competition.³⁴ Thus, if a greater number of clubs wished to compete than competition organisers were willing to accept, exclusion was inevitable.³⁵ His Honour also pointed out that rugby league was only one form of sporting contest that competed for the attention of the public³⁶, and that the need for the united competition was based on commercial reasons.³⁷

In regard to section 45 of the *Trade Practices Act*, Gleeson CJ noted that the real question to be addressed by Finn J was whether the 14-team term used by the NRL was included for the purpose of preventing, restricting or limiting the supply of goods or services from particular persons or classes of persons. His Honour pointed out that Justice Finn had answered this question in the negative³⁸, and also noted that in section 4D there is a significant difference between effect and purpose. It was the subjective purpose of News Ltd and the ARL in including the 14-team term — that is,

³² Ibid 259.

³³ Ibid 207.

³⁴ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515, 1517.

³⁵ Ibid 1519.

³⁶ Ibid 1518.

³⁷ Ibid 1517.

³⁸ Ibid 1519.

what they had in mind — that had to be determined.³⁹ Gleeson CJ agreed with Finn J that it was possible to think of circumstances in which the selection of the clubs could demonstrate a purpose which had as its objective a particular club. This, in his Honour's opinion, was not the situation in the case, and it was, from a legal perspective, no different from choosing the clubs by lot. Specifying the number of clubs that were to be admitted to participate in the new competition was simply a necessary part of the definition of the new business venture, and therefore the 14-team term was not aimed at Souths, or any club.⁴⁰ As the purpose of the 14-team term was not to exclude any particular club or clubs, or limit or restrict the supply of services,⁴¹ it was deemed to be legal by the Chief Justice. His Honour also noted that News Ltd and the ARL were under no legal obligation to accept any particular clubs to participate in the new competition.⁴²

The main point addressed in McHugh J's judgment was whether the term 'purpose' in section 4D meant that it was the subjective purpose of News Ltd and the ARL that had to be examined, or whether the purpose of the parties was to be determined objectively, without reference to their mental states. If it was the subjective purpose then the findings of Finn J compelled the conclusion that News Ltd and the ARL did not have the purpose that was alleged by Souths.⁴³ McHugh J pointed out that since 1986 the Federal Court had accepted that the test of purpose in section 4D was a subjective one,⁴⁴ but noted the problems in determining whether the purpose is subjective or objective due to the contrasting wording of sections 4D and 4F. It was his Honour's opinion that the terms of section 4D tend to suggest an objective purpose because it refers to the purpose of the provision, not to the purpose of those who actually made the provision. On the other hand section 4F(1)(b), which refers to a person, and section 4F(1)(a), which refers to the purpose to which the provision was included, suggest a subjective test.⁴⁵

Justice McHugh went on to state that if section 4D was being interpreted for the first time he would conclude that the test was objective. His Honour accepted, however, that it was impossible to hold that the subjective interpretation was plainly wrong, and as the Federal Court had approved

³⁹ Ibid 1520.

⁴⁰ Ibid.

⁴¹ Ibid 1521.

⁴² Ibid 1522.

⁴³ Ibid.

⁴⁴ Ibid. His Honour here referred to the judgment of Deane J in *Hughes v Western Australian Cricket Association* (1986) 19 FCR 10, 38.

⁴⁵ Ibid 1523.

such a test for 17 years, he was not willing to overrule the subjective interpretation of the section.⁴⁶ As his Honour noted, questions of construction can generate opposing answers, none of which are clearly right or wrong, as frequently there is simply no right answer to the question of construction. Section 4D of the *Trade Practices Act*, in his Honour's view, fell into this category.⁴⁷ Thus, given the facts found by Finn J and the application of the subjective test, the appeal by News Ltd was allowed by McHugh J.⁴⁸

Justice Gummow stated that he was in general agreement with the approach to the issue of construction of the *Trade Practices Act* taken by both Justice Finn and Justice Heerey.⁴⁹ His Honour also noted that section 4D(1) contains two relevant primary elements, namely the character of the relevant actors and the purpose of the provision. In relation to the question of purpose Justice Gummow noted that section 4D refers to the purpose of the contract, arrangement or understanding, rather than any deleterious effect that it may have on competition.⁵⁰ His Honour also suggested that the wording of section 4F requires examination of the purposes of the individuals who included the provision, and that a provision may be included for a number of reasons, and in such circumstances, the relevant purpose must be 'substantial'.⁵¹ Gummow J then agreed with Finn J that the 14-team term had not been included for the purpose of preventing the supply of competition organising services or the acquisition of team services, and therefore the 14-team term did not satisfy the second of the two primary elements of section 4D. This conclusion, in his Honour's opinion, was sufficient to uphold the appeal.⁵²

In regard to the question of particular class, it was held by his Honour that there can be such a group, even if at any one time the identity of all its members is not readily ascertainable.⁵³ Justice Gummow then pointed out that the critical point was not found in pondering such questions as the defining characteristics that make a class particular. What was more important was the notion that a selection process involving more applicants than available positions will necessarily result in 'winners' and 'losers'. In his Honour's opinion there was an absence in the evidence of

⁴⁶ Ibid 1524.

⁴⁷ Ibid.

⁴⁸ Ibid 1525.

⁴⁹ Ibid.

⁵⁰ Ibid 1526.

⁵¹ Ibid 1527.

⁵² Ibid 1528.

⁵³ Ibid 1529.

indications that the purpose of the 14-team term was to prevent the supply of services to or the acquisition of services from the clubs which, under the operation of the selection process, would turn out to be one of the 'losers'.⁵⁴

Justice Callinan examined the reasoning behind the NRL wanting a 14-team term, noting that it enabled the competition to have a regular season where each team played each other twice, and that it would help to establish a financially stable national competition of the highest possible standard.⁵⁵ Like Gleeson CJ, his Honour noted that rugby league also competes with the other codes of football for players, sponsors and spectators.⁵⁶

His Honour then examined the judgment of Finn J, and agreed that an exclusionary provision was one that would have made Souths a target for exclusion in a selection process designed to produce such an outcome, rather than merely being the unsuccessful contender in a selection process which did not pre-ordain that outcome.⁵⁷ Justice Callinan, noting that Heerey J had referred to passages in Finn J's judgment which indicated that the primary judge had carefully distinguished between purpose and effect,⁵⁸ went on to say that he was in general agreement with the reasoning of Justice Finn.⁵⁹ His Honour then stated that a provision did not have to be read in isolation as sometimes ascertaining its true meaning required that it be read in the context of the whole agreement or arrangement, and in his Honour's opinion, Justice Finn had not failed to distinguish between the purpose of the 14-team term and the purpose of the merger provisions as a whole.⁶⁰ Justice Callinan also concluded that as the case was concerned with the prevention of supply, a class cannot be defined by the mere fact of non-supply or exclusion, and that Souths was not a particular person or member of a class for the purposes of section 4D.⁶¹

2. *The Minority*

Kirby J noted at the outset of his judgment that this was a case where once again he was in disagreement with the majority of the High Court who had again adopted a more limited application of the *Trade Practices Act* than

⁵⁴ Ibid 1530.

⁵⁵ Ibid 1545.

⁵⁶ Ibid 1556.

⁵⁷ Ibid 1551.

⁵⁸ Ibid 1553.

⁵⁹ Ibid 1556.

⁶⁰ Ibid 1557.

⁶¹ Ibid 1557-8.

that taken by the Full Court of the Federal Court.⁶² His Honour went on to point out that the task of the courts is to give effect to an Act according to the purpose that is expressed in the language of the statute, and, in his opinion, the majority judges in the Full Court had simply given effect to the purpose of Parliament as disclosed in the words adopted. They were therefore correct to construe it as they did, namely as a wide Act.⁶³ However, Justice Kirby was of the opinion that the judges of the Federal Court were wrong in their application of a subjective test, but that in the present case this did not constitute a critical error.⁶⁴

Justice Kirby stated that the two issues in the case were whether the majority in the Full Court of the Federal Court had erred in concluding that the 14-team term had a proscribed purpose, and that Souths had constituted a 'particular class of persons'.⁶⁵

In regard to the question of purpose, the issue was not whether the overall objective of the arrangement was rational or beneficial or in the best interests of the game, supporters or sport generally. It also did not involve the question of whether, subjectively, the people involved in running rugby league had hoped or expected to avoid the exclusion of a traditionally successful team like Souths. The only issue was the purpose of the impugned clause that contained the exclusionary provision that limited the number of teams in the competition.⁶⁶ His Honour also held that in ascertaining the purpose of the provision, it was critical to focus on the provision in its context, as that was what the language of the *Trade Practices Act* required. Justice Kirby then held that when the attention of the decision making was focused in this precise way, the only conclusion that could be reached was that the 14-team term was an exclusionary provision. Justice Kirby was also of the opinion that such a conclusion would also be reached even if the sporting context of the case was removed. He reasoned that the 'best interests of the market' argument would not protect other business competitors under the Act, so why should it protect News Ltd and the ARL.⁶⁷

In regard to the issue of particular classes of persons, Justice Kirby held that there was a clearly identifiable class, namely the club or clubs that

⁶² Ibid 1531.

⁶³ Ibid 1538. Justice Kirby also made criticism of commentators who had themselves criticised the majority in the Full Court of the Federal Court, pointing out that the majority had merely been interpreting the words of the statute.

⁶⁴ Ibid 1539.

⁶⁵ Ibid 1540.

⁶⁶ Ibid 1542.

⁶⁷ Ibid.

were 'supernumerary to 14', and which would therefore lose the right to supply and acquire services in the relevant market in 2000.⁶⁸ Justice Kirby also agreed with Justice Gummow that there were dangers in dissecting the concepts in the *Trade Practices Act*, and reading them in isolation. Instead they represented a compound idea with each word and phrase taking its meaning from the entire provision.⁶⁹

It should be noted that despite Justice Kirby's conclusion that section 45(2) of the *Trade Practices Act* had a wide operation in regard to exclusionary provisions, he also pointed out that specific exceptions were envisaged, and that specific authorisation could be obtained from the ACCC. His Honour noted that the public benefit relevant to such an authorisation by the ACCC included the achievement of efficiencies, rationalisation or financial viability, but when the merger parties pressed on without authorisation, their arrangement was governed by the *Trade Practices Act*.⁷⁰

II ACCC AS INTERVENER

The ACCC also successfully sought special leave to intervene in the appeal.⁷¹ Gummow J noted that the ACCC submitted that both the subjective purpose of the parties and objective purpose of the provision are relevant when determining whether or not the provision falls within section 4D. His Honour, however, stated that such a construction was not the product of reasoned statutory interpretation, and fell foul of the provisions in section 4F.⁷²

It was also submitted by the ACCC that if the clear and foreseeable effect of a provision is to prevent, restrict or limit supply, then it is open to a finding that a substantial purpose of the provision is to prevent, restrict or limit supply. This claim, however, was rejected by Justice Callinan⁷³, as was the claim that Finn and Heerey JJ had adopted too narrow a construction of the expression 'particular classes of persons'.⁷⁴ Justice

⁶⁸ Ibid 1544.

⁶⁹ Ibid 1543.

⁷⁰ Ibid. For a discussion on the possible use of authorisation see C Davies, 'News Ltd v ARL, South Sydney v News Ltd — and the Question of Authorisation Under s 88 of the *Trade Practices Act*' (2002) 10 *Trade Practices Law Journal* 215–25.

⁷¹ Ibid 1533.

⁷² Ibid 1527.

⁷³ Ibid 1558.

⁷⁴ Ibid 1559.

Callinan also stated that if the ACCC had wished to attack the arrangement it should have done so at the time of the proposed merger, and that intervention could have been sought at or before the trial itself. In the circumstances, therefore, it was his Honour's opinion that the ACCC should not have been permitted to intervene and to argue the issues it raised.⁷⁵

CONCLUSION

The High Court's decision strongly supported that of the primary judge, Justice Finn. The significance of the case lies in the High Court's interpretation of section 4D and section 45 of the *Trade Practices Act* and in the effect the Act may have in determining how governing bodies of sporting organisations can make decisions regarding the running of their competitions.

With regard to the interpretation of the *Trade Practices Act*, the High Court's decision confirmed the long-established view of the Full Court of the Federal Court that a subjective test should be applied in assessing whether a provision is an exclusionary one under the Act. However, Kirby J's dissent and McHugh J's reservations on this matter should also be noted. In relation to the question of what constitutes a class under section 4D(1), Justice Callinan held that it cannot be defined by the mere fact of non-supply or exclusion. Gummow, Kirby and Callinan JJ all held that a provision did not have to be read in isolation, but instead should be placed in the context of the agreement as a whole. The decision, it is suggested, also indicates that the ACCC, if it wishes to be effective as an intervener in a case involving exclusionary provisions, needs to take action at an earlier point in the proceedings.

The High Court overturned the decision of the Full Court that appeared to dictate to organisers of sporting competitions how their sport should be organised. Sporting organisations, as corporate entities, must still comply with the requirements of the *Trade Practices Act* if they choose to employ an agreement that may fall within the meaning of section 4D and section 45. However, the High Court decision means that, as long as the subjective intent of any agreement is not, for instance, designed to exclude certain teams, then the agreement will be valid under the Act.

It is also suggested that the decision does not take away the opinion of Finn J that even if the 14-team term was an exclusionary provision, Souths could have been excluded by other legal means. The implied one-year contract that had been held to exist in the *News Limited v Australian Rugby*

⁷⁵ Ibid.

Football League Limited would appear to have been one such method as this implied term allows organisers to invite clubs to compete in their competition on a yearly basis. It is further submitted that the High Court decision does not alter what was also held in *News Limited v Australian Rugby Football League Limited*, namely that the loyalty agreements used by the ARL to try and prevent teams defecting to Super League were an exclusionary provision.

Finally, an unusual aspect of the High Court appeal was that News Ltd made it clear before the proceedings began that it would not seek to remove Souths from the competition should the decision be made in its favour. Thus the proceedings before the High Court could be viewed as nothing more than an academic exercise. However, News Ltd's wish to take the matter to the High Court might indicate that News Ltd may, at some time in the future, seek to reduce the number of teams in the NRL. If so, a clarification on the legality of the 14-team term was far from a mere academic exercise as the decision would allow it to use a similar provision in order to reduce the number of teams. This author has reservations as to whether the NRL is sustainable in its present 15-team format, given the competition from both the Australian Football League (AFL) and rugby union for players, spectators and the sponsorship dollar. For that reason the High Court decision may well prove to be an important one for News Ltd in its role as a partner in the NRL.