Commercial Dispute Resolution

Newsletter

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Comparative advertising: Tabcorp Holdings Limited & Anor v Sportingbet Australia Pty Limited [2010] FCA 1123

This decision of the Federal Court looks at comparisons made with a competitor's betting services in Sportingbet's advertising.

Background - competitor's form

Sportingbet takes bets on various events, including horse racing, by telephone and over the internet. In the lead up to, and during, the Spring Racing Carnival Sportingbet ran a series of television, radio, on-line and print advertisements encouraging punters to use its betting services instead of using the TAB.

Sportingbet claimed to offer punters the best bet

The Sportingbet advertisements included statements such as -

"Putting your bets on at the TAB means letting them take around 16% of your money – which is a big chunk to lose when you win"

"But with Sportingbet MaxiDiv you'll get the best of the three totes and the official starting price, you'll get all your winnings untouched and you can place your bets online or on your mobile. I say there is no better bet than a Sportingbet"

"0% COMMISSION, EVERY RACE, EVERYDAY"

"DON'T LET THE TAB TAKE A CHUNK OUT YOUR MONEY".

Tabcorp on the offensive

Tabcorp (and its subsidiary TAB) sought to restrain Sportingbet from running the advertisements on the basis that representations made in the advertisements were misleading or deceptive, or likely to mislead or deceive, in breach of section 52 of the *Trade Practices Act*.

Important tips for race day

When seeking urgent interim relief, a party has to provide an undertaking as to damages and satisfy the Court that:

- there is a serious question to be tried
- damages would not be an adequate remedy (or that it would suffer irreparable harm were the injunction not granted), and

- the balance of convenience favours the grant of interim relief.

Justice Edmonds considered whether representations made by Sportingbet presented a serious question to be tried. In other words, were they misleading or likely to mislead?

The following summary of His Honour's analysis of some of those representations may be a useful guide when next you are looking at using comparative advertising:

- "Putting your bets on at the TAB means letting them take around 16% of your money - which is a big chunk to lose when you win "

  The statement may be misleading. In context, this statement would be understood by an ordinary reasonable member of the class of consumers to whom the advertisements are directed to mean that: TAB would take 16% of your winnings. However, TAB's business model does not include any deduction or "take out" from winnings.

- "DON'T LET THE TAB TAKE A CHUNK OUT YOUR MONEY"

  Like the first statement, this may be misleading when taken in context and particularly given the accompanying sentence "with Sportingbet MaxiDiv you'll get the best of the three totes and the official starting price, you'll get *all your winnings untouched".*

- "0% COMMISSION, EVERY RACE, EVERYDAY"

  The statement is not misleading. Sportingbet does not charge any commission on winnings. "Absent any comparative context" the statement does not carry any representation about Tabcorp's take out commission on winnings

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Mediation Reminder: *Pihiga & Ors v Roche & Ors [2011] FCA 240 (17 March 2011*).

A timely warning as to the need to be honest in commercial dealings arises from the decision of Lander J in the Federal Court of Australia.

This decision arose from a settlement reached at mediation which one of the parties sought to set aside. The parties who wanted to give effect to the agreement reached at mediation sought to prevent the other parties relying on information which had been supplied as part of the mediation in reliance on the terms of the mediation agreement, the without prejudice rule and the *Evidence Act 1995 (Cth)*.

Lander J held in the Federal Court that they could not prevent evidence being given about such matters where what was being asserted was that those parties had engaged in misleading and deceptive conduct under (what was formerly) section 52 of the *Trade Practices Act* (now section 18 to Schedule 2 of the *Competition and Consumer Act 2010*).

As Hill J had said in an earlier Federal Court case:

> "A party cannot with impunity engage in misleading or deceptive conduct resulting in loss to another under the cover of "without prejudice negotiations"."

This is a timely reminder that parties need to beware in the conduct of negotiations that they act ethically and morally and cannot seek to rely on the common law without prejudice rule, or express terms in mediation agreements, or indeed the *Evidence Act 1995*, if they engage in misleading or deceptive conduct.

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A bite from the Big Apple… a new approach to determining substantial questions of New York State law in the Supreme Court of New South Wales

Chief Judge Lippman (of the New York State Court of Appeals) and Chief Justice Spigelman (of the Supreme Court of New South Wales) have pioneered a reciprocal system for cooperation and consultation when issues of either New York or New South Wales law arise in their respective courts.

The agreement

On 28 October 2010, Chief Judge Lippman and Chief Justice Spigelman signed a memorandum of understanding (MOU) allowing substantial legal issues arising in a matter before the Supreme Court of NSW involving the law of New York State, to be determined with assistance from judges from New York, and vice versa in the case of questions of New South Wales law considered in a New York State court.

Chief Justice Spigelman said:

> "In an era when a sense of collegiality has developed amongst judges at an international level, mutual cooperation is possible to a degree that was not true in the past. Parties to legal proceedings in which an issue of foreign law must be determined are entitled

to that determination being both correct and authoritative. The new procedures instituted within the NSW Supreme Court, now to be reflected in the practices of at least two other international jurisdictions, will enable that objective to be attained."

What has changed?

Previously, parties engaged an expert to give evidence as to New South Wales or New York law and the Court then made a determination based on that evidence.

Chief Justice Spigelman noted that this method had numerous inadequacies, including having shown on many occasions to be costly, prone to delays and other difficulties and, and most significantly, would often lead to conclusions that were just plain wrong.

How it will work

If a substantial question of New York law arises in proceedings in the NSW Supreme Court:

- The NSW Supreme Court will refer the question to a panel of five volunteer judges in New York who will offer a joint response
- the NSW Supreme Court will have discretion to adopt, modify or reject the response in whole or in part.

The NSW Supreme Court will provide similar assistance in respect of questions of Australian law arising in proceedings in New York State.

Other jurisdictions

A similar MOU exists between the NSW Supreme Court and the Supreme Court of Singapore.

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New dispute resolution requirements for litigants

On 24 March 2011, Federal Parliament passed the *Civil Dispute Resolution Bill 2010,* the purpose of which is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted in the Federal Court of Australia or the Federal Magistrate's Court. The aim is to reduce the number of cases filed with the Courts and

therefore save time, cost and distress for all parties involved. Practitioners have welcomed the Bill which makes it compulsory for the parties to take "genuine steps" in an attempt to resolve the dispute. Whether or not it will, in the long term, save the parties time and costs is unclear.

What are parties contemplating litigation required to do?

At the time of commencing civil proceedings in the Federal Court of Australia or the Federal Magistrate's Court, the applicant will be required to file a "Genuine Steps Statement" which sets out the "genuine steps" that have been taken by the applicant and the respondent to try to resolve the issues in dispute.

In response, a respondent to those proceedings must file its own "Genuine Steps Statement" before the hearing date. This response must state that the respondent either agrees with the statement filed by the applicant or alternatively if the respondent disagrees with whole or part of that statement, then specify the reasons why the respondent disagrees.

What are "genuine steps"?

The Bill provides some guidance to the parties as to what could be considered "genuine steps". For instance, the following will be considered "genuine steps" to resolve a dispute with another party:

- notifying the other party of the issues that are in dispute with a view to resolving the dispute (and responding to such notification)
- negotiating with the other party in an attempt to resolve the dispute
- providing relevant information and documents to the other party to enable that party to understand the issues involved and how the dispute might be resolved
- considering and attending an ADR process such as mediation or conciliation

When is a "Genuine Steps Statement" not required?

An applicant and respondent would not be required to file "Genuine Steps Statements" for the following:

- ex parte proceedings
- appeals
- proceedings for pecuniary penalties for contravention of civil penalty provisions
- proceedings brought by the Commonwealth for Orders in connection with criminal offences
- proceedings that relate to decisions made by statutory bodies such as the Administrative Appeal Tribunals or the Australian Petition Tribunal

- proceedings commenced under Acts such as the *Fair Work Act 2009* (Cth) and the *Native Title Act 1993* (Cth).

What if a "Genuine Steps Statement" is not filed?

Importantly under the Bill, a failure to file a "Genuine Steps Statement" in proceedings does not invalidate the application instituting the proceedings. So the Court cannot prevent the commencement of proceedings just because a party has not filed its "Genuine Steps Statement". However, the Court will have discretion to take a party's noncompliance into account when making orders for the future management of the case including when awarding costs.

The Bill is intended to benefit both the parties to the dispute and the Court; by narrowing the real issues in dispute, there will be a reduction in court time and therefore costs borne by the parties. The Bill does not however go so far as to force the parties to settle their dispute. Parties can still exercise their entitlement to commence proceedings in the Court. So whether or not the Bill will achieve its goal of reducing costs and time for parties is uncertain.

The Bill is currently awaiting Royal Assent and will become the *Civil Dispute Resolution Act 2011* (Cth). We will keep you informed of its progress in future newsletters.

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CDR congratulates Lindsay Lau and her husband Phillip on the birth of baby Ellie Jane on 7 April 2011.