CASE NOTE

SOUTHS V NEWS LTD

INTRODUCTION

News Ltd v Australian Rugby Football League Ltd and Others[1] [2] (the Super League cases) involved a battle for the television rights and control of the major rugby league competition in Australia. While News Ltd succeeded in their court case, both their Super League and the Australian Rugby League's (ARL) competition proved uneconomical, leading to negotiations to form a unified competition in late 1997. One of the agreed terms of the merger was that the competition would be restricted to 14 teams, meaning some of the teams from the two competitions would either have to merge, or face possible exclusion from the competition.

In the end only one team, South Sydney, a founding member of the New South Wales Rugby League (NSWRL) and the team which had won the most premierships, failed to be admitted for the 2000 season. This situation led to legal action and the subsequent emotive scenes of red and green clad supporters swamping the Federal Court. The case itself, just as the *News Ltd* cases, rested on issues pertaining to s45 of the *Trade Practices Act* (1974) (Cth) (TPA), as well as breach of contract.

Thus, the case provides further insight into how the court will view the application of Part IV of the TPA (Restrictive Trade Practices) to specific sport situations. This note, therefore, examines the decisions rendered in the *South Sydney v News Ltd*[3] [4] cases, in particular the recent Full Federal Court decision,[5] and the ramifications of the decision for rugby league and sporting leagues in general.

FACTS

After two seasons of running two separate competitions, the ARL and News Ltd announced on 19 December, 1997, an intention to enter into a partnership that would unite their respective rugby league competitions to form a National Rugby

---

[1] No1 (1996) 135 ALR 33
[2] No2 (1996) 139 ALR 193
[3] No1 (1999) 169 ALR 120
[4] No2 (2000) 177 ALR 611
[5] [2001] FCA 862

League (NRL).[6] A document was also released on that date stating that the competition would be reduced over a three year period to 14 teams,[7] and that all things being equal, the licences would be allocated on the following order of priority: (i) Merger clubs, (ii) Regional Clubs, and (iii) Stand alone Sydney clubs.

On 23 April, 1998, a first draft of the admission criteria was presented to the clubs' Chief Executor Officers (CEOs), setting out the three classes of criteria, namely:
Basic criteria dealing with playing facilities, club administration, clubs solvency and input into the development of the game.

Qualifying criteria that were applied only to Brisbane, Auckland, and Newcastle which required, *inter alia*, that each demonstrate a minimum revenue of $8m.
Selection criteria applying to all clubs which consisted of crowd numbers at home and away games, competition points, gate receipts, sponsorship and other income and profitability. Gate receipts were given a weighting of 1.25, sponsorship 2, with all the other criteria being rated as 1.[8]

On the 6 March the ARL forwarded a form of franchise agreement to Souths which the club refused to sign. A letter intending to replace the franchise agreement was therefore sent to Souths on 11 March, clause 6 of which confirmed the club's agreement to the NRL competition having no more than 14 clubs participating in the 2000 competition. Souths replied on the 23 March, stating the terms on which they were prepared to sign the 11 March letter, the main one being that they reserved the right to challenge any of the rules relating to Souths participation in the year 2000 competition. The following day the NRL replied to Souths letter, stating that Souths had not relinquished any such rights if decisions were made improperly or illegally.[9]

Then, on the 28 April, 1998, the NRL forwarded a memorandum to the clubs which included a statement that all clubs would be dealt with equally and in a consistent manner. On 8 May the NRL forward a document styled "Draft Admission Criteria for the National Rugby League Competition" with its stated aims of creating a viable national competition, and setting the criteria for inclusion in the competition in a fair and reasonable manner.[10] On the 17 June, 1998, the Souths' board replied to the 8 May document, stating that their clear position was that they would seek relief in the courts to prevent their exclusion.[11]

On the 8 September the finalised selection criteria were published. In the meantime, both the Gold Coast and Adelaide had indicated they were withdrawing from the competition, while firstly St. George and Illawarra, then Wests and

---

[6] *Supra* n.4 at 615.
[7] *Id* at 620.
[8] *Id* at 627.
[9] *Supra* n.3 at 123-4.
[10] *Id* at 124.
[11] *Id* at 125.

Balmain agreed to a merger.[12] When North Sydney subsequently failed the basic criteria on the grounds of insolvency, Souths became the only excluded club on the basis of the selection criteria as they were the team ranked fifteenth.[13]

Souths immediately commenced interlocutory proceedings in the Federal Court on the 12 November, 1999 which were subsequently heard by Hely J.

THE SOUTHS CLAIMS

The main points of their statement of claim were that:[14]

(i) The 14 team term was an exclusionary provision within the meaning of ss4D (1) and s45 of the TPA.

(ii) The criteria used were contrary to those implied into the Souths contract, were not fair and reasonable, did not treat all clubs equally and consistently, and favoured clubs in which News Ltd had a pecuniary interest.

(iii) NRL was in breach of an implied term of Souths contract that the club would not be refused the right to participate in the NRL competition from 2000 unless it failed to qualify in accordance with the published admission criteria and that the NRL had not done this in regards to question of sponsorship and profitability.

(iv) An interlocutory relief primarily to restrain the NRL from excluding Souths from the competition and for the court to rule in its favour to participate in the year 2000 competition.[15]

S45 Trade Practices Act

The *Trade Practices Act* (TPA) claims were based on the s45 prohibition against a corporation, or other corporate entity, from making an exclusionary provision. Under s4D of the TPA defines an exclusionary provision as a provision of a contract, arrangement or understanding which is arrived at between persons, any two or more of whom are *competitive with each other,* and where the provision has the *purpose of* preventing, restricting, or limiting the supply of goods or services to, or the acquisition of goods or services from, *particular persons or classes of persons.* (Emphasis added)

Thus a contract, arrangement or understanding could be an exclusionary provision even if the identities of the individual persons on whom it might operate were not known as long as the persons could be identified as being members of an identified, or identifiable class.[16] Section 4F explains that a contract, arrangement or understanding is deemed to have the necessary 'purpose' if that purpose is a substantial purpose of the contract etc.

---

[12] *Supra* n.4 at 628-9.
[13] *Id* at 630.
[14] *Supra* n.3 at 126.
[15] *Id* at 127.
[16] *Supra* n.5 at para [191].

THE FEDERAL COURT INTERLOCUTORY APPLICATION

In Hely J's view there was a serious question to be
tried as to whether the arrangements were made between persons who were competitive with each other under s4D (1) (a) or 2 of the TPA, though he questioned whether the 14 team term had a proscribed purpose under s4D (1) (b) of the TPA.[17] His Honour did not think there was anything peculiar about the excluded class for them to be considered a particular class of persons,[18] but he accepted that the unifying characteristic of a group can include the fact of exclusion itself. [19]Although it was His Honour's opinion that there was a serious question to be tried as to whether the giving effect to the 14 team term would involve a contravention of s45, he was of the view that the Souths' case could not be assessed as a strong one, for although the Restrictive Trade Practices claim could be seriously argued, "it would be an exaggeration to elevate it any higher than that."[20]

His Honour also expressed doubts about Souths' ability to pay any subsequent damages should he grant the interlocutory relief, and took note that Souths only took legal action after participating in the selection criteria, and only sought to have the process characterised as being inherently unfair after they failed to obtain admission.[21] Hely J therefore concluded that the Souths case could not be assessed as a strong one,[22] and on the balance of convenience, felt interlocutory relief should not be granted.[23]

THE FEDERAL COURT SINGLE JUDGE DECISION

In the proceedings before Finn J, the statement of claim was based on the same s45 and breach of contract claims as before Hely J, with the further claim that the various representations made as to the formation and application of the selection criteria for the 2000 competition were misleading or deceptive, and therefore in breach of s52 of the TPA.

The claim in respect of breach of s52 of the TPA, however, failed, with Finn J finding that the four representations suggested as being misleading or deceptive, either did not have the particular meaning suggested by Souths, as with the 28 April revised timetable, or it was reasonable for the NRL to focus on the profitability of the years 1998 and 1999 in the 8 May document. His Honour also felt that no-one had considered, let alone relied upon, the equally and consistent

[17] *Supra* n.3 at 130-1.
[18] *Id* at 132.
[19] *Id* at 133.
[20] *Id* at 145.
[21] *Id* at 139.
[22] *Id* at 145.
[23] *Id* at 148.

manner term to even be a representation. Finally in Finn J's opinion the NRL had reasonable grounds for making the 8 September representations.[24]

The contract alleged was a part written, part oral one entered into on 24 March, 1998. The alleged breaches therefore arose primarily from implied terms.[25] The implied terms related to the clubs being dealt with equally and consistently and that the criteria would be set and applied fairly and reasonably. The express terms pleaded by Souths were that they agreed to participate in the 1998 competition on terms that they would be offered participation in the 1999 season and, if solvent, would be considered for participation in the 2000 competition. This competition for 2000, subject to any successful legal challenge South might make, would consist of 14 teams. It was Finn J's view that, with respect to those express terms, Souths were offered and accepted the right to participate in the 1998 and 1999 competitions. However, His Honour was not satisfied that there was a term that the 2000 competition, subject to a successful legal challenge by Souths, consisted of 14 teams.[26]

With regard to the implied terms, Finn J's opinion was that the contract could operate reasonably and effectively without their intrusion, and that the implied terms would have changed its intended character. His Honour's findings, therefore, were that the 24 March contract was only concerned with participation in the 1998 and 1999 seasons, and that it had no contractual effect in so far as it related to the 14 team term. This was fatal to Souths' contract claims, though the letter did acknowledge that Souths had a right to challenge the make up of the 14 team competition if it was made improperly or illegally.[27]

As in the interlocutory application, it was argued that the ARL and News Ltd entered into a sequence of agreements that either contained, or impliedly gave effect to, an exclusionary provision. Finn J agreed that the evidence supported the view that News Ltd and ARL were not in competition with each other as regards to competition organising services and team services.[28] However it was His Honour's view that at the time of the 19 December understanding, they were in actual competition in relation to entertainment services. The intention of the parties was to secure an enhancement in the quality of those services, and so, even if the exclusion of a team would involve the foreseeable loss of fans, a purpose of the inclusion of the 14 team term in the 19 December understanding was not to deprive those fans of the supply of entertainment services.[29] In Finn J's opinion, therefore, the 14 team term had no purpose other than one of achieving the viability and sustainability of a national competition.

---

[24] *Supra* n.4 at 712-3.
[25] *Id* at 683.
[26] *Id* at 698.
[27] *Id* at 702, *Supra* n.3 at 124.
[28] *Id* at 654.
[29] *Id* at 678.

On the question of what constitutes a class of persons it was Finn J's view that there was no s4D (1) class and at best, there was a class defined only by the characteristic of not being selected to participate in the 2000 competition.[30]

Thus Finn J was of the opinion that the 14 team term was not of the proscribed type alleged by Souths. His Honour also noted that the NRL could still determine what teams it would admit into the competition, and that Souths had no right to be admitted and even if they could not be excluded in reliance of the 14 team term, it could still be excluded for any other lawful reason.[31]

THE FEDERAL FULL COURT DECISION

In the subsequent appeal, the only part of the original judgment challenged was in regard to the 14 team term not being an exclusionary provision. As Merkel J noted, the two issues here where in relation to the purpose and particular class of persons.[32]

Proscribed Purpose

It was Moore J's view that central to Souths case was that the 14 team term was a provision of the proscribed type.[33] He was satisfied that it had a substantial purpose operating in December, 1997, on the clubs who had earlier that year participated in the two competitions. The central question posed then by s4D (1) (b) was, in his opinion, whether a substantial purpose of the 14 team term was to effect a restriction or limitation. In this regard 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 was the two competitions, there was such a limitation and restriction of the services.[34]

It was also Merkel J's opinion that Finn J had failed to distinguish between the purpose of the club merger, joint venture and regional participation provisions on the one hand, and the purpose of the 14 team term on the other.[35] He was also critical of the trial judge for not determining the immediate purpose of the term before seeing whether it had a substantial and proscribed purpose. In Merkel J's view, while the ultimate end purpose was the creation of viable national competition, its immediate purpose was to exclude clubs,[36] and since the 14 team figure was dogmatically insisted upon by News Ltd, it was clear that the exclusionary purpose of the provision, was a significant operative purpose, and therefore a substantive purpose.[37] Despite the fact that the 14 team term had been

[30] *Id* at 671.
[31] *Id* at 682.
[32] *Supra* n.5 at para [242].
[33] *Id* at para [148].
[34] *Id* at para [186].
[35] *Id* at para [264].
[36] *Id* at para [278].
[37] *Id* at para [283].

reluctantly agreed to by the ARL, it was nevertheless, in his view, also a substantial purpose of the ARL.[38]

Heerey J (in dissent) stated that critical to Finn J's findings was the state of minds of those making the decisions that none had wanted or sought to have Souths excluded from the 2000 competition.[39] 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.[40]

Particular Classes of Persons

In respect to the second issue as to whether there was a particular class involved, Moore J stated that the provision would only be an exclusionary provision if it was to operate on identified or identifiable persons, but it would not be if it only operated on the generality of persons.[41] In His Honour's opinion, the expression, particular class of persons, referred to identified or identifiable persons, whether or not there are other identified persons or otherwise on whom the apparently exclusionary provision is not intended to operate.[42] However as His Honour concluded that the 1997 clubs were particular persons, he held it was unnecessary to consider the contention that the 14 team term represented a particular class.[43]

In Merkel J's view there was such a class. His Honour went on to hold that the characteristic that identified and distinguished the class was that they were all top level rugby league clubs eligible to participate but who did not achieve the requisite level in the selection criteria. The clubs, therefore, in His Honour's opinion, had a distinguishing or identifying characteristic in addition to the mere fact of exclusion.[44]

On the issue of identity, Heerey J also held that a particular class cannot be defined by the mere fact of exclusion, as this would mean in effect that the "class becomes the whole world because anybody has the potential to be excluded." [45]

CONCLUSION

The most significant aspect of the *South Sydney v News Ltd*, it is suggested, is that it illustrates the courts' willingness to apply Part IV of the TPA, namely Restrictive Trade Practices, to agreements and understandings involving even the organising bodies of sporting leagues and their constituent clubs. However, the case does represent varying judicial opinions from the five Federal Court Judges

[38] *Ibid.*
[39] *Id* at para [68,69].
[40] *Id* at para [71].
[41] *Id* at para [197].
[42] *Id* at para [200].
[43] *Id* at para [207].
[44] *Id* at para [294].
[45] *Id* at para [91].

who heard the matter as to whether or not the 14 team term in question actually represented an exclusionary provision. The Full Federal Court held by majority of 2-1 that it was, while Finn J and Hely J either expressly held, or at least impliedly stated, that the term was not such a provision.

Looking at the constituent elements of the exclusionary provision, namely 'proscribed purpose' and 'particular class of persons', both Finn J and Heerey J, unlike the Full Federal Court majority, were of the view that the proscribed purpose was the formation of a viable and sustainable competition. It would appear, therefore, that no authoritative statement on the meaning of proscribed purpose of the 14 team term emerges from the case, and so the decision does little to help elucidate what is a proscribed purpose as defined in the TPA.

With regard to particular class, Hely J indicated that the particular class excluded could be the fact of exclusion itself. However, Finn J in the original trial disagreed with this categorisation. In the Full Federal Court Merkel J suggested that more was required, and that in the case before the Court, the particular class had a distinguishing characteristic above mere exclusion. Moore J's opinion was that it had to operate on identified or identifiable persons, while Heerey J expressed the opinion that it was wrong to have a class defined by the fact of exclusion alone. It is therefore suggested that the usefulness of the case in clarifying definitions in relation to exclusionary provisions rests on what might constitute a particular class, and that it has to involve more than just the unifying aspect of exclusion. In this regard a different conclusion was reached than that which may be implied from *ASX Operations v Pont Data Australia*.[46]

As far as the TPA is concerned, the other significant factor was the *obiter* statements made in the Full Federal Court with regard to authorisation under Section 88. While emphasising that it was something that needed to be obtained at the time the 14 team term was formulated, the comments by the Full Federal Court at least support the concept of authorisation being sought by sporting bodies.[47]

One final question arising from the case is whether, in a practical sense, Souths actually won the case. As Merkel J stressed in the Full Federal Court, their finding did not give Souths the right to be readmitted, and thus they were in essence agreeing with what Finn J had said in the original trial, namely that if they could not be excluded by use of the 14 team term, they could still be excluded on the basis of other legal reasons.[48] This would also appear to be consistent with the earlier *News Ltd v ARL* case where the Full Federal Court had held that clubs were only bound to the league, by an implied contractual term, for just the one season. Conversely, therefore, the league has a right to invite the clubs to apply for the

[46] (1990) 27 FCR 460, 97 ALR 513. See Hely J, *supra* n 3, at p133, para [76]

[47] *Supra* n.5, per Heerey J at [131], per Merkel J at [273]. It should also be noted that authorisation was successfully obtained by the New Zealand Rugby Union under s58 of their *Commerce Act* in relation to their quota and transfer system.: *Rugby Union Players' Association v Commerce Commission (No 2)* [1997] 3NZLR 301.

[48] *Supra* n.4 at 682

following season's competition, and then to decide on which would be allowed to participate.

It is suggested, therefore, that it was public opinion rather than the actual Full Federal Court decision that saw South Sydney re-admitted to the NRL for the 2002 season. In regard to this crucial implied contract matter the South Sydney case has not changed the existing legal principle that clubs can leave a league at the end of a season, and a league can also decide not to invite a particular club back for the following season. The decisions by the Full Federal Court in both *News Ltd v ARL* and *South Sydney v News Ltd* are also consistent with the High Court decision in *Wayde v NSWRL*.[49] This case involved the New South Wales Rugby League wanting to exclude Western Suburbs from the competition, and it was subsequently held that the League's Articles of Association did confer upon the Board the power to determine which clubs should and should not be entitled to enter teams in the premiership competition.

It is also this writer's opinion that, given the scenario that occurred during the 2000-1 season in the National Soccer League (NSL) where two clubs had to stop playing in mid-season on account of them being insolvent, a contractual right of a league to invite clubs on a yearly basis is a crucial one. Without it, a league would be forced to allow financially strapped clubs to field teams in a competition they may not be able to finish, thus creating chaos within the fixtures that remain, as what occurred in the NSL.[50]

In conclusion, therefore, it could well be argued that if the NRL had simply chosen to decide for themselves which 14 clubs it would invite back for the 2000 season, then they would have had the legal right to do so. However, once they chose to rely on a term that could be defined as constituting an exclusionary provision, they placed themselves in the position for the courts to enforce the TPA.

Chris Davies*
Assistant Lecturer
James Cook University
Townsville

---

[49] (1985) 61 ALR 225 at 230-1

[50] The financial situation of the two clubs in question meant that the players refused to play, which meant the clubs could not field a side, or were forced to field inexperienced youth teams, neither of which were satisfactory.

* Chris Davies is the present recipient of the Julian Small Foundation Scholarship for employment law and industrial relations. The writer acknowledges the support of the Foundation in the completion of this article.