Casenote

Holloway v Gilport Pty Ltd (1995) ATPR 41–408

Holloway v Gilport Pty Ltd[1] is an important precedent decision on the interpretation of s 46 and s 71(1)(a) of the *Fair Trading Act* 1987 (NSW) ('FTA (NSW)'). Given the nature of transgressions in this area, it is quite possible that there will be few future cases and few appellate decisions in the field. The case is thus of greater importance than that of most single judge decisions.

The above sections are the equivalent, for all relevant purposes of s 53B and s 85(1)(a) of the *Trade Practices Act* (Cth).

Section 46 FTA (NSW) prohibits conduct:

> "... that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to employment [that is to be, or may be offered by the person to another person]."

The Court noted in its judgment that there had been no prior prosecution under s 46 FTA (NSW) nor under s 53B of the Tra*de Practices Act* (Cth). The case thus represents a precedent decision in the area of misleading advertising of employment availability and conditions.

Section 71(1)(a) FTA (NSW) gives a defence to a prosecution. It should be immediately noted that this section provides no defence to civil proceedings. Although the title to the case gives every indication of being a civil proceeding (the first named party being Mr Holloway and not a government instrumentality or the Crown) the case was in fact a prosecution, Mr Holloway being the informant on behalf of the Department of Business and Consumer Affairs.

[1] Supreme Court of NSW: Hunt CJ at CL,

Section 71(1)(a) FTA (NSW) reads:

> "(1) ... it is a defence if the defendant establishes —
> (a) that the contravention in respect of which the proceeding was instituted was due to a reasonable mistake ..."

An Outline of the Proceedings

Gilport Pty Ltd ('Gilport') was prosecuted under s 46 FTA (NSW). One Mr Zygaldo was also prosecuted on the basis that he had aided, abetted, counselled or procured Gilport to engage in the relevant conduct the subject of the proceedings against Gilport. Mr Zygaldo was described in the Court's judgment as the "alter ego" of the Company.

The prosecution was based on two classified advertisements in The *Newcastle Herald* "Positions Vacant" column and upon Gilport"s subsequent failure to make clear to persons responding to the advertisement the nature of the relationship which was to be entered into with it.

The advertisements involved the following statements:

> "Trainees needed immediately." (The first advertisement said that nine trainees were needed. The second advertisement said that six trainees were needed).
> No experience necessary
> Company training
> No deliveries or cold canvassing
> Management opportunity for qualified applicants
> Average earnings $400 to $650 per week (in the first advertisement) and $400 to $600 per week (in the second advertisement).

The prosecution alleged in three sets of charges that, the nature of the employment did involve "cold canvassing" in relation to the sales of vacuum cleaners door to door; no employment was offered at $400 to $600 or $400 to $650 per week; Gilport failed promptly to inform persons answering the advertisement that no contract of employment was to be offered by it or by any other person.

Characterisation of the Offence

The Court first turned its attention to characterising the offence charged under s 46 FTA (NSW).

The Court accepted (and it was not argued to the contrary) that the offence was one of absolute liability. The Court elaborated on this point noting that where an offence is one of absolute liability, the prosecution does not need to establish that the defendant knew the act was wrong. The prosecution will be successful even where the defendant had no such

knowledge. Further, the Court noted that absolute liability is contrasted with strict liability. In a case involving strict liability, where an issue arises as to whether the defendant was honestly and reasonably mistaken as to those facts which (if true) would have made his act innocent, the prosecution will succeed only where it establishes that such was not the defendant's state of mind.

The Court pointed out that, although the terminology in some of the previous cases interpreting sections akin to that before the Court in the present case had referred to liability as "strict", it was abundantly clear in those cases either that the prosecution did not have to establish mens rea or that the defendant knew that the acts involved were unlawful. In other words, notwithstanding the inconsistency of the terminology used, prior akin cases had held that the offences were ones of absolute liability as that terminology was described by the Court and as the Court believed that term to be presently understood.

The Decision in the Proceedings Against Gilport

The Nature of the "Employment" to Which s 46 Refers

At the end of the prosecution case, the defendants sought a ruling that there was no case to answer. The Court did not so rule, basing its reasoning upon certain factual evaluations. However, one question of law was raised in the *'no case to answer'* submission. This involved the proper interpretation of s 46 FTA (NSW). The defendant's "no case to answer" submission on the correct interpretation of s 46 FTA (NSW) was that it related only to employment in the sense of the performance of work under a contract of service ie, the section related only to parties who were in an employer/employee relationship. The advertisements in question were for commission agents. So, the defendants' argument ran, there was no employment involved.

The Court, however, did not accept that s 46 FTA (NSW) was so limited. The section certainly applied to employer/employee contracts. But it also applied much more widely. The Court said that the verb 'employ' means "to engage or to make use of the services of a person in return for money". Nothing required an interpretation that the word employ relates only to a contract of service. The Court also rejected the argument that s 46 FTA (NSW) should be limited to employer/employee relationships on the basis that other sections in the FTA (NSW) also dealt with the conduct in question. The Court felt that "courts should not readily assume that words of apparently general application are to be narrowly confined."

It was also submitted by the defendants that the invitation in the advertisement was no more than an invitation to apply for an interview and did not relate to the employment itself. This submission failed on the

basis that s 46 FTA (NSW) did not talk about actual employment. It was sufficient, in terms of the wording of the section, if the conduct in question related to the terms of employment "that is to be, or may be, offered." It was thus enough that an advertisement led a reader to the belief that he or she may be offered employment on the terms and conditions stated in the advertisement if the advertisement were answered. Alternatively, the prosecution could allege (as it did in the case) that the terms of the advertisement were incorporated as terms or conditions of the employment which was in fact entered into.

"No Cold Canvassing" — What Does this Mean?

The prosecution alleged that the advertisement breached s 46 FTA (NSW) in that it promised, contrary to actuality, that no cold canvassing was involved. The door-to-door selling of vacuum cleaners was the basic nature of the employment offered. This, the prosecution alleged, was cold canvassing. The Court held that there was no settled meaning within the general community of the phrase "cold canvassing". Whether there was an established meaning of the term in any particular industry was irrelevant to the case. The advertisement was expressly directed at unskilled persons. Persons in need of training may well be concerned as to whether it would be necessary in their employment to confront strangers without introduction in an endeavour to sell them such goods or services.

The ordinary meaning of 'canvassing', thought the Court, was "soliciting". In the context of an advertisement concerned with employment in the sale of goods or services, the term would reasonably be interpreted as meaning soliciting for sales, that is, soliciting as a means of attempting to effect sales. The addition of the adjective 'cold' would inevitably be interpreted by readers as referring to attempting to effect sales without any prior introduction to the customer involved. Thus the phrase "no cold canvassing" would be understood as a representation that salespersons employed by the advertiser would not be required to do work involving confrontations with strangers without introduction.

However, the Court rejected the prosecution's submission that the advertisement meant that the employment offered would not involve any cold canvassing at all — even as a voluntary means of effecting sales. The reference to "no deliveries" in the advertisement, for example, clearly meant, in the opinion of the Court, that no deliveries would be required. In the opinion of the Court, to suggest that the advertisement was misleading because a salesperson may voluntarily choose to deliver goods which had been sold in the course of his or her employment demonstrated the error of the prosecution's view. On the evidence, the Court's view was there was nothing to suggest that salespersons were *required* to confront strangers without introduction in an endeavour to sell them the company's products.

It was suggested that salespersons could demonstrate products to family and friends and attempt to sell products to these people. But these people could hardly be described as cold. Methods were also suggested as to how leads could be obtained through handing out cards door-to-door or in shopping centres, such cards offering the chance to win a trip to Hamilton Island in return for particulars as to age, employment, home ownership and the like. Participation in the competition would be dependent upon agreement to a home demonstration with no obligation to buy. Persons most likely to purchase were then selected and called in order that a no obligation home demonstration could be conducted. The practice of obtaining sales leads by handing out cards door to door or in shopping centres was known as 'carding'. The Court held carding was to be regarded as solicitation for "information which may lead to sales." The Court regarded this as quite different to confronting a person initially in an attempt to win a sale.

The Court, on the above logic, held, therefore, that there was no breach of s 46 FTA (NSW) in relation to that part of the advertisement which stated that there would be no deliveries or cold canvassing".

The "Wages" Offered

The prosecution argued that the advertisement in question meant that persons employed should earn $400 to $650 (or $650) from the very first week.

The Court, however, did not agree. It believed that to interpret the advertisement in this way would be pushing the terms of the advertisement to "absurd extremes". The reasonable expectation of a person responding to the advertisement would, thought the Court, be that such a wage would be paid only after an employee had settled down as a salesperson. The Court, however, also rejected the view that the advertisement meant only that a person had the *potentiality* of earning $400 to $650 (or $650). Under this view, actual earnings would depend upon an individual's performance, potential and degree of application. The Court steered a middle road between the two above views. It held that it was necessary to select an arbitrary period of time within which an agent would settle down. Even on this view, however, the Court believed that it could not make findings based upon a strict mathematical formula which was dependent upon any selected arbitrary period. An arbitrary period of six weeks was selected by the Court for earnings assessment. This period was selected because the attrition rate slowed down substantially at that stage.

The Court then looked at the actuality of payments. It examined the records of the defendant concluding from these records that:

> "... it was only those who progressed far beyond the position of a mere commission agent who earned in particular weeks anything near to even the lower

limit of the figures stated in the advertisements, and even their earnings were hardly consistent."

Mr Zygaldo conceded that, with hindsight, the advertisement could have more accurately read "potential average earnings". The Court concluded on this point:

"That ... is inexorably correct. Without such a qualification, there were no reasonable grounds for the representation made as to earnings, and the advertisements were necessarily misleading."

The Defence of Mistake

Mr Zygaldo gave details of what he believed agents could earn. This belief was not in accordance with the actuality of his business. The Court said that, even if Mr Zygaldo's estimates could be regarded as a mistake, the mistake was not a reasonable one. The representation was made to persons with no experience at all. It was a mistake as to a vital matter in attracting trainees. At best, it was a mistake made with an indifference as to its consequences. It could not be regarded as a reasonable mistake.

Failure to warn those answering advertisements that no contract of employment was to be offered

The prosecution's third charge was based on a "failure to warn". The prosecution submitted that persons answering the advertisement should have been told that no contract of employment was being offered. Its case was based on the submission that silence, in these circumstances, constituted a misrepresentation.

The Court accepted that persons phoning in relation to the advertisement should have been told that what was being offered was a commission and not a wage. Silence, said the Court, may amount to a misrepresentation when the circumstances involved give rise to an obligation fully to disclose the relevant facts. An obligation to disclose did arise, said the Court, from the circumstances of the case. There was no doubt that the term 'employment' was ambiguous. The reason, said the Court, that the ambiguity was not resolved when parties called in relation to the advertisement was that:

"Mr Zygaldo knew that readers of the advertisement and those who telephoned in response to it would not even attend for an interview if they knew that it was a commission, and he would be able to convince them to undergo the company's training only if they attended the company's initial interview when he would personally be able to persuade them to do so."

However, said the Court, these charges were technical only. In fact, applicants were given the relevant information when they attended the interview and the detriment caused to someone who did not wish to stay was small. Accordingly, these charges were dismissed without proceeding to conviction.

The Question of Aiding and Abetting

The charges against Mr Zygaldo were, in essence, that he had aided and abetted the commission of offences by Gilport.

The Court held Mr Zygaldo liable, along with Gilport, in relation to those charges involving a failure to warn. However, as with Gilport, these charges were technical only and they were dismissed without proceeding to conviction. There was no breach by Gilport in relation to the representation that no deliveries or cold canvassing was required. Therefore, there was no aiding and abetting breach by Mr Zygaldo and these charges against him were dismissed. In relation to the statement regarding earnings, Gilport was found liable. But Mr Zygaldo was not. The Court held that the prosecution had to show that Mr Zygaldo was aware that the advertisements were liable to mislead the persons at whom they were directed. This conclusion was said to be drawn from the High Court decision in *Yorke v Lucas*.[2] The Court, whilst not very impressed by Mr Zygaldo's explanations in relation to earnings of agents, nonetheless was not prepared to hold that Mr Zygaldo knew when he inserted the advertisements that they were liable to mislead or deceive the persons at whom they were directed. The Court concluded:

> "The strongest argument against taking such a step is the failure of the prosecution to suggest any credible reason why Mr Zygaldo (as the alter ego of his company) would want to mislead the very people in which the company would invest time and expense in training and from whom it hoped to gain from their success as salespersons. The reasonable doubt raised by such an absence of motive has not been eliminated by the prosecution."

Observations on the Judgment

The writer believes that there can be no argument with the Court's conclusions on the following issues:

(i) that s 46 FTA (NSW) involves absolute liability;
(ii) that "employment" covers "the performance of work under a

[2] (1985) 156 CLR 661; (1965) 61 ALR 307.

contract of service" rather than being limited to the narrow context of employer/employee relationships;

(iii) that the defence of reasonable mistake was not available;

(iv) that there was a failure to warn. It seems to the writer that the Court was, however, overly generous to the defence in regarding the failure to warn as being only a "technical" breach.

The main issues of contention in the judgment appear to the writer to be, therefore, whether the court was correct in its conclusions on the questions of:

(i) no cold canvassing;

(ii) the wages offered; and

(iii) the general issue of aiding and abetting.

It is to these points that we now turn.

"No Cold Canvassing"

The Court's interpretation of the term 'cold canvassing' is, in the writer's view, clearly correct.

The difficulty, however, lies in the application of the Court's interpretation to the facts of the case. The Court concludes that an advertisement stating no cold canvassing does not prohibit an employee being asked voluntarily to engage in certain activities. The delivery example used by the Court may seem fairly innocuous and innocent. The problem, of course, is the difficulty, in an employment context, of distinguishing between voluntary actions and required actions. The Court seems to have applied an apparently innocuous example across the board to incorporate what may well be far less benign practices. Other examples could be used to reach the opposite conclusion.

The writer's view is that the representation "no cold canvassing" more reasonably means that the position involves no cold canvassing *at all* rather than meaning that no cold canvassing is required, but may be requested to be performed voluntarily.

The view of the Court that 'carding' is not 'cold canvassing' is also marginal, in the writer's view. Handing out cards on the street or in a supermarket can hardly be regarded as canvassing because the recipient of the card is not requested to buy anything. To this extent, carding can be regarded as a solicitation for information. However, many may believe that attempting to sell articles to someone who has previously filled in a card is not much different to attempting to sell to cold customers. Whilst, clearly enough, family members and friends are not cold, it may well be thought that a customer hardly becomes hot, or even warm, simply because he or she has completed a card which offers a holiday trip.

Undoubtedly the incentive to complete the card is the trip, not the product involved, and the customer is no more warmly disposed towards the product by virtue of his or her card completion. In terms of the Court's interpretation of the words "cold canvassing", one might well conclude that a person remains cold in relation to the selling of vacuum cleaners notwithstanding that he or she may have previously completed a card expressing hot interest in a tropical holiday.

It thus seems to the writer that the Court's interpretation that 'carded' customers are not 'cold' is at odds with reality. The salesperson still has to call to the house of an unknown person and attempt to sell to such person. Only when cards are used to bring customers to a venue (such as a shop or trade promotion) can 'carded' customers be regarded as 'warm.' The Court does not, however, limit its interpretation in this manner.

The "Wages" Offered

The writer believes that the prosecution's submission that the advertised wages should be offered in the first week is correct and that the case is wrongly decided on this point. Certainly the prosecution's submission by no means pushes the interpretation of the advertisement to "absurd extremes", as the Court suggests.

Why is it absurd to find as the prosecution submitted? Presumably, the Court felt that $400 to $600 (or $650) was an unreasonable expectation on the behalf of job applicants. Yet this was the carrot offered. Indeed, of course, there are many positions which do pay full wages from the time of joining an organisation. In a number of cases, industrial awards do not distinguish between degrees of training but are based on, for example, age. In such cases, full pay from day one is a legal requirement. Far from being an absurd representation, full pay from the date of employment is a situation not infrequently found. If the Court thinks that $400 to $600 (or $650) is too much of an expectation, the obvious way of reducing this expectation is for the advertiser to reduce the size of the carrot or clearly to state the true position. To say that an intending employee is not entitled to expect to receive the carrot which is offered appears to the writer to be looking at the advertisement from the wrong viewpoint.

The interpretation submitted by the prosecution would, of course, overcome the difficulty faced by the Court in selecting an appropriate settling down period. The selected period was, in fact, described by the Court as "arbitrary". Even when an appropriate period was selected, the Court still had problems in making findings based on it. The Court expressed the view that it was reluctant, even after selection of the arbitrary period, to make findings based upon a strict mathematical formula based on such period.

Whilst the facts of the case permitted the Court to find that, in any event, the promised wages did not eventuate, the case leaves open the

possibility in future that various arbitrary periods will be argued as being applicable before promised wages are required to be paid — and this even when an advertisement makes no reservations in relation to the date of salary commencement. This introduces uncertainty in the law. Such uncertainty is not required. There seems to be no reason why an advertiser offering certain wages should not be required to pay these wages from the date of employment. As we have seen, payment of full wages from date of employment is not either an unreasonable or an unusual situation. An advertiser who makes such a representation should, in the writer's view, be required to live up to the representation made. If full wages are not to be paid from day one, it is an extremely simple matter for the advertiser to make this clear.

Was Mr Zygaldo "Aiding and Abetting"?

The aspect of the decision which is perhaps hardest to understand is that Mr Zygaldo, who was described as Gilport's "alter ego" was found not to have aided and abetted the offences of which Gilport was found guilty.

The Court based its reasoning on *Yorke v Lucas*[3] concluding from that case that, before a person can be found guilty of aiding and abetting a misrepresentation offence, such person must not only know the facts of the conduct involved but must also know that the misrepresentation was liable to mislead or deceive. The Court commented that this seemed a strange conclusion because an offence by a principal party involves absolute liability ie, the prosecution has only to establish the relevant facts. It does not have to establish that the defendant knew the act was wrong. A defendant can be convicted of an absolute liability offence even if he or she had no such knowledge. But, said the Court, in *Yorke v Lucas* the High Court had held differently as regards an aiding and abetting party and the Court was bound to follow that High Court decision in evaluating the liability of Mr Zygaldo.

The question is whether *Yorke v Lucas* so held.

The answer is no.

Yorke v Lucas was a prosecution of Mr Lucas for aiding and abetting misleading or deceptive conduct on the part of an incorporated real estate company of which he was managing director. It was found at trial that Mr Lucas had, at all times, acted in accordance with instructions given to him by a business vendor. It was further found at trial that Mr Lucas was not aware, and had no reason to suspect, that the information given him was incorrect. The decision against the company in relation to its breach of s 52 covering misleading or deceptive conduct was not appealed to the High Court. The sole question before the High Court was that of

[3] Above, at n 2.

the liability of Mr Lucas for aiding and abetting a breach of s 52 by the corporation of which he was managing director.

In *Yorke v Lucas*, the High Court in a joint judgment of Mason ACJ and Wilson, Deane and Dawson JJ found that Mr Lucas had no knowledge of the falsity of the information given to him. He could thus not intentionally have participated in the s 52 breach of the corporation. The Court held that:

> "There can be no question that a person cannot be knowingly concerned in a contravention *unless he has knowledge of the essential facts constituting the contravention*"(present writer's emphasis).[4]

Further, the Court held that the participation of an accessory:

> "... requires a party to a contravention to be an intentional participant, *the necessary intent being based upon knowledge of the essential elements of the contravention*" (present writer's emphasis).[5]

The High Court also noted in its judgment that s 52 does not mean that a party which purports to pass on information supplied by another is necessarily in breach if that information turns out to be false. If the circumstances are such that it is apparent that the person passing on the information is not himself or herself the source of the information but is merely "passing it on for what it is worth", then the party passing the information is not himself or herself engaging in conduct which is misleading or deceptive.

Applying *Yorke v Lucas*, it is certainly the law that Mr Zygaldo could not be convicted of aiding and abetting unless he was aware of the essential facts necessary to establish the conviction or unless he knew of the essential elements of that contravention. Mr Zygaldo, however, did know the essential facts. The essential elements necessary to convict Mr Zygaldo lay in the publication of the advertisement. He was intimately involved in this. He was the alter ego of the company. *Yorke v Lucas* would exonerate Mr Zygaldo if the advertisement had, for example, been placed without his knowledge, for example, by a company employee acting without authority. In such a case, the corporation would be in breach, as it is responsible for the acts of its employees, but a party having no knowledge of the relevant conduct could not be aiding and abetting such a breach. But *Yorke v Lucas* does not exonerate Mr Zygaldo when it is he who placed the advertisements, on the ground that he did not know that the advertisements would mislead readers. As the offence under s 46 FTA (NSW) is one of absolute liability, knowledge of the misleading effect of

---

[4] (1985) 156 CLR 661, at 670.

[5] Above, at n 2.

the advertisement is not, in terms of the joint majority judgment in *Yorke v Lucas*, "an essential element of the conviction."[6] Knowledge of the misleading effect of the advertisement, as distinct from the placement of it, is thus not a necessary element in a breach by an aider and abetter.

The case of Mr Zygaldo is, of course, quite different from that of Mr Lucas. Mr Lucas merely passed on information provided by another. By not adopting the information as his own, he was not himself engaging in misleading conduct. Any misleading conduct involved was that of the original author of the information. In Mr Zygaldo's case, he was himself the author of the information in the advertisement. Without his activity, the information would never have come into existence.

It seems to the writer that the Court has misinterpreted *Yorke v Lucas* to exonerate Mr Zygaldo. One could also argue, contrary to the view expressed by the Court, that there were plenty of credible reasons why Mr Zygaldo acted as he did. The Court thought that Mr Zygaldo would not want to mislead persons in whom he had invested money. This is perhaps true. But it is the wrong question to ask when seeking Mr Zygaldo's motive in placing the advertisement. The reason for the advertisement was to attract applicants. The motive of Mr Zygaldo must be addressed to the question of the tactics used to attract applicants not to what Mr Zygaldo did once the applicants were attracted.

Though the Court may have misapplied the majority judgment of the High Court in *Yorke v Lucas* to exonerate Mr Zygaldo it could not have reached the conclusion it did if it had applied the separate concurring judgment of Brennan J (as he then was). His Honour said:

> "... actual misleading or deception of a person is not an element of a contravention of s 52 ... in determining who is ... liable for s 52 contravention under s 75B(a) (which imposes liability on a person who has "aided, abetted, counselled or procured the contravention") *no question arises as to whether the person upon whom liability is sought to be imposed knew that another person would or might be misled or deceived by the contravening conduct*" (present writer's emphasis).

In Conclusion

Holloway v Gilport Pty Ltd is a precedent decision in relation to misleading employment advertisements. In the writer's opinion, it is wrongly decided on a number of crucial issues both in relation to the applicable substantive law and in relation to the liability of accessories.

Because cases in this area are few, it is likely that *Holloway v Gilport Pty Ltd* will remain the sole precedent in relation to misleading employment advertisements for some time. The decision leaves wide scope for future

[6] Above, at n 2.

misleading conduct in employment advertising. It is to be hoped that subsequent decisions will either apply the facts differently or, preferably, overrule a number of the findings of law in the case. If the case remains the sole precedent for some time, however, or is confirmed in future on all points, the legislature may well have to return to the drafting board if the statutory prohibition on misleading employment advertising is to be even partially effective.

Warren Pengilley
University of Newcastle