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Australian Vaccination Network v Taycare & Anor [2004] FMCA 625 (22 September 2004)

Last Updated: 14 October 2004

FEDERAL MAGISTRATES COURT OF AUSTRALIA

AUSTRALIAN VACCINATION NETWORK v TAYCARE & ANOR [\[2004\] FMCA 625](#)

TRADE PRACTICES - Where applicant amends pleadings - whether claims can be made out on evidence.

[Trade Practices Act 1974, s.52](#)

Applicant: AUSTRALIAN VACCINATION NETWORK INCORPORATED

(ACN 077 022 923) ALSO KNOWN AS AUSTRALIAN VACCINATION NETWORK

First Respondent: TAYCARE PTY LTD

(ACN 081 302 409) T/A VACCINATION INFORMATION SERVICE

Second Respondent: BRONWYN EDITH HANCOCK

File No: SZ 470 of 2004

Delivered on:

22 September 2004

Delivered at:

Sydney

Hearing date:

9 September 2004

Judgment of:

Raphael FM

REPRESENTATION

Counsel for the Applicant:

Mr Rollinson

Solicitors for the Applicant:

Carters Law Firm

Counsel for the Respondent:

Mr R Killalea

Solicitors for the Respondent:

Rob Makin & Associates

ORDERS

(1) Application dismissed.

FEDERAL MAGISTRATES

COURT OF AUSTRALIA AT

SYDNEY

SZ 470 of 2004

AUSTRALIAN VACCINATION NETWORK INCORPORATED

(ACN 077 002 923) ALSO KNOWN AS AUSTRALIAN VACCINATION NETWORK

Applicant

And

TAYCARE PTY LTD

(ACN 081 302 409) T/A VACCINATION INFORMATION SERVICE

First Respondent

BRONWYN EDITH HANCOCK

Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a charitable organisation carrying on the business of providing information concerning vaccination. Some of that information is provided for reward by way of instructional seminars or the sale of books. It is not disputed that the applicant is, in relation to its activities, acting in trade or commerce. The first respondent was until 2002 carrying on a similar business under the direction of the second respondent, its director. Since 2002 the second respondent has been solely responsible for carrying on this business. The second respondent was a member of the applicant until about 1998.

2. In the years 2000, 2001, 2002 and 2003 two entries were made in the Sydney Yellow Pages telephone directory listed under the heading "Information Services" and were:

a) Australian Vaccination Network

10 Ray (Street), Tmura (Turrumurra) 9244 6625

b) Vaccination Information Service

10 Ray (Street), Tmura (Turrumurra) 9244 6625

3. The applicant claims by way of a Further Amended Statement of Claim filed on the afternoon of the hearing in respect of these matters the following:

"5. The Applicant gave no permission for these entries to be made and had no knowledge until 2003 of the entries.

6. Persons who sought vaccination information from the Applicant and who telephoned the advertised telephone number (9244 6625) were led to believe and were under the impression they were speaking to officers and employees of or associated with the Applicant but were in fact speaking to officers and employees of the First Respondent and/or the Second Respondent.

7. Persons who believed they were telephoning the Applicant purchased and paid for books, information packs and videos from or on behalf of the Respondents in the belief that they were from or authorised by the Applicant.

8. By reason whereof the Applicant lost the monies and profits it would have made had it sold the books, information packs and videos."

In its Further Amended Application filed at the same time the applicant claimed:

"1. A declaration that the Respondents breached the provisions of [Section 52](#) of the [Trade Practices Act](#) ("TPA") and/or Section 42 of the Fair Trading Act (NSW) ("FTA") in that they engaged in conduct which was misleading and deceptive or which was likely to mislead and deceive contrary to the provisions of the said sections in that, knowing that from 2000 until 2003 (both years inclusive) the Yellow Pages directory recorded identical addresses and telephone numbers for the Applicant and the Respondents, each of them has represented, positively or by omission to speak, that the relevant telephone number and address were in fact those of the Applicant, knowing they were not.

2. Further and/or in the alternative a declaration that the Second Respondent aided, abetted, counselled or procured the contravention of Section 52 of the TPA and/or Section 42 of the FTA by the First Respondent and was directly or indirectly and knowingly concerned in and party to the

contravention of the said Section of the said Act."

4. These further amended applications and statements of claim were filed as a result of the applicant's accepted inability to establish its original claim that the respondents caused the entries in the Yellow Pages to be made.

5. The evidence called by the applicant was contained in three affidavits. The first from Fiona Kane exhibited entries in the Yellow Pages directory and confirmed that the applicant had not and never had given permission to the respondents or either of them to use the name or title in its advertising. The second affidavit was filed by Ms Te Rito. She was a person associated with the applicant and upon instructions from the secretary of the applicant made a telephone call to the number contained in the Yellow Pages which was answered by the second respondent. She deposed that the conversation was in the following form:

Te Rito: "Is that the Australian Vaccination Network?"

Hancock: "Sort of, I am a contact for them."

Te Rito: "I am looking for some information on vaccination, in particular that which relates to the connection between MMR vaccine and autism."

The witness deposed to the fact there was then a general discussion about available information and she had been recommended a number of books. The witness agreed to purchase a book by a Mr Wilson on vaccinations and behavioural disorders which cost \$16.50. They discussed how the money was to be paid and she was asked to provide a cheque to the address contained in the Yellow Pages. The witness did not provide a cheque, she provided a money order made out to "Australian Vaccination" and some weeks later she received the book. The second respondent confirmed that Ms Te Rito had made the telephone call but denies that she said words to the effect that her organisation was "sort of" the applicant. She stated that she had made it clear that her organisation was not the AVN although she admitted that she would have explained that the two organisations were promoting a similar cause.

6. The second respondent accepted that she received the money order and negotiated it. She says that she provided the book which had a wholesale cost of about \$9.30, paid for postage and handling \$5.00 and sent Ms Te Rito an information pack valued at approximately \$2.00. She said that there was effectually no profit in the sale of the book.

7. Evidence was called from Ms Greta Touzel, an employee of the applicant. She deposed to a telephone call made to the applicant on 6 September 2003. She asked the applicant if she was speaking to the Australian Vaccination Network and the applicant responded:

"No, I work closely with Australian Vaccination Network."

Ms Touzel then asked why her number was listed in the Yellow Pages as the number for AVN and the response was that it was there because there was no other listing for AVN and she gave out details for AVN if people asked for it. The discussion continued about vaccination issues and the second respondent agreed to send the witness an information pack which she did. The information pack only contained information emanating from the first respondent.

8. The second respondent gave evidence. She said she did not know until 2003 that there was the entry in the Yellow Pages. She produced some evidence (Exhibit "A") which appeared to indicate that the first respondent did arrange for entries in Yellow Pages under the names of other persons although the documents produced did not relate directly to the entry with the first respondent's name. Ms Hancock said that over the last four years she probably had calls on average once every six

months from callers asking for the AVN. She said that she always told them that she was not the AVN and would pass on to the callers the AVN telephone number. She admitted that she would try and engage people in conversation concerning vaccination matters and would give them information if it was requested. She considered that she was "connected with" or "close to" AVN because they were both advancing the same cause. Some evidence was later given under cross examination concerning a series of lectures which Ms Hancock organised with the person she believed was a regional representative of AVN. It is clear from the flyer for that seminar (Exhibit "C") that two of the seminars were for the respondents and the third was for AVN. Payment for that seminar was directed to AVN.

9. The applicant, through its counsel, accepts that if I am unable to find that the respondents knew about the entry in the Yellow Pages it will not have made out its case for breach of [s.52](#) of the [Trade Practices Act 1974](#). Ms Hancock's residential address is not the address of the applicant. Ms Hancock has not suggested that she was authorised by AVN to have their name and her address connected in the Yellow Pages but it is no longer alleged that she put it there. I have no reason not to accept Ms Hancock's evidence that she would not have received more than about two calls a year asking for AVN and that she included in that number the two trap calls about which evidence was given. It could not be said that these calls would have drawn her attention to the entries in the Yellow Pages until 2003 after which time the entries were removed.

10. I am simply unable to say that on the balance of probabilities Ms Hancock did know about these entries. It is the existence of the entries themselves that ground this cause of action. What Ms Hancock may have said to other persons when they did telephone about her connection with AVN is tied by the pleadings directly to her knowledge. It is not a separate cause of action. Mr Rollinson who appeared for the applicant accepted that this was the way in which the matter was pleaded.

11. Given the applicant's failure to prove to the required standard that Ms Hancock knew of the Yellow Pages entries before 2003 when something was done about them, and given the evidence from Ms Hancock, which I accept, that she always explained to callers that she was not AVN, I am unable to make a finding that in trade or commerce she engaged in conduct which was misleading and deceptive or was likely to mislead and deceive.

12. I would add that I am not satisfied that the applicant has established any loss from the alleged conduct. What we have is a trap order given to Ms Hancock after she told the orderer that she was not AVN. Putting the evidence at its highest she said "I am a contact for AVN." Ms Hancock deposed to the fact that if the caller had said that she wished to buy the book direct from AVN she would have been given the telephone number so that she could have telephoned them direct. I do not disbelieve her. It would not proper for a court to extrapolate from the evidence that has been given to a series of sales that would have led to a loss on the part of the applicant.

13. This is a most unfortunate case. It should never have been brought. There has been no loss established. The evidence is that once the entries were discovered to exist in 2003 they were removed for subsequent years. What possible point could there have been in pursuing the declarations sought or the damages based upon the evidence that I have described. When the proceedings came before me for directions I made the unusual step for me of ordering the parties to mediation because I believed that it was not a suitable case for the parties to expend costs upon. Regrettably, the mediation was unsuccessful.

14. The application is dismissed. At the request of the applicant's counsel I will hear the parties as to costs.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date:

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