Private action

Racecourse Totalizators Pty Ltd v The Totalisator Administration Board of Queensland

Trade practices: *misuse of market power.*

Interlocutory injunction: *application to restrain respondent from imposing transactional limits on computer betting — difficulty in balancing interests of punters generally and loss of profits and custom to applicant — mandatory injunction — whether applicant must show that its case is strong — consideration of what is required to be done by the order.*

Trade Practices Act 1974 (Cth), s. 46

Racing and Betting Act 1980 (Qld)

Federal Court of Australia, Brisbane
Kiefel J
Order delivered 28 July 1995

Background

Racecourse Totalizators Pty Ltd is the operator of on-course totalisator betting facilities for four licensees in Queensland, being four horse racing clubs located at Rocklea, Gatton, Beaudesert and Redcliffe. On-course totalisator betting facilities are also provided or managed by the Totalisator Administration Board of Queensland (the TAB) and another company. However, the TAB is the only provider of off-course totalisator betting in Queensland.

The totalisator betting system is such that the bets placed by people are pooled and a dividend is paid from this pooled sum after administrative costs have been deducted. Kiefel J observed that the advantage obtained is a higher return to punters. Race odds are forecast from time to time prior to the race. These may be compared with fixed odds which are offered by bookmakers.

The TAB has had responsibility for the coordination of the on-course pool through its central computer system since May 1990, receiving details of all bets placed throughout Queensland on a particular race. The TAB offers a Customer Input Terminal and a Personal Betting Service. Racecourse Totalizators Pty Ltd offers a similar service which is known as Rapid Electronic Betting. The latter service allows punters to keep their files on their own personal computer. The desired combination of bets may be read by the punter's computer and passed on for entry into the TAB system as a betting transaction. Punters can factor information into their own computers, decide which bets ought to be placed and subsequently have the bets placed and accepted by the TAB. A substantial number of bets may be placed this way, which consequently affects the ultimate dividend to be paid.

The difference between the services offered by the TAB and Racecourse Totalizators Pty Ltd is that the TAB limits the number of transactions sent to its computer to 50 transactions per minute.

By letter dated 20 April 1995 the TAB advised that it intended to limit transactions from the Rocklea facility to 50 transactions per minute, although it has since undertaken to permit 100 transactions, which, it says, should suffice.

The applicant (Racecourse Totalizators Pty Ltd) alleged that the TAB had contravened s. 46 of the Trade Practices Act because it has a monopoly in off-course betting and further by reason of its control of the central computer. Hence it was alleged that the limit on transactions was an abuse of market power as it prevented Racecourse Totalizators Pty Ltd from effectively competing in the market.

The applicant sought an injunction restraining the respondent (the TAB) from imposing the 50 transactions per minute limit. However, the respondent pointed out that this would need to be converted to a mandatory order as the transactional limitation involved changes to the computer software used by the TAB.

Issue

Should an injunction be granted and, if so, is it necessary to convert this to a mandatory order?

Held

The Court granted an injunction which had the effect of removing the transactional limits imposed.

Rationale

Kiefel J did not believe that possible potential effects to the computer capacity of the TAB was a substantial reason for its decision to impose transactional limitations, and as such Her Honour did not believe that this should be a basis for refusing the injunction.

The applicant pointed to the experience of a few of the clubs' customers who had had transactions rejected and suffered loss. The applicant feared a loss of custom which it might not later be able to reverse and pointed to a potential loss of income. Her Honour had difficulty accepting that some profits were likely to be lost and pointed out that the information provided by the TAB did not suggest that the profits lost were at present great, and less so given its increase of the limits to 100 transactions per minute.

The respondent expressed its concern for the potential loss of confidence of punters since they might view the system operating without limit as unfair.

Kiefel J stated there was a difficulty in balancing the two interests if they were said to be the interests of punters generally on the one hand and the loss of profits and custom of the applicant on the other. In terms of practical consequences, Her Honour considered there were none for the TAB itself and she was unable to gauge the effect the limitations would have on the greater body of punters. However, Her Honour found the applicant's income would be affected (although the extent of it is unknown), as would its ability to effectively expand and it would be restricted in its commercial activities.

The respondent argued that because Racecourse Totalizators Pty Ltd sought a mandatory interim injunction, they (Racecourse Totalizators Pty Ltd) had to show that the case for this action was strong and that the Court had the requisite 'high degree of assurance' that the order was appropriate.

Her Honour disagreed with the decisions in *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1982) 82 ALR 499 and the comments of Megarry J in *Tito v Waddell (No. 2)* (1977) Ch 106 at 321 where it was held that a court may grant a mandatory interlocutory injunction, even though it does not feel a 'high degree of assurance' about the complainant establishing their right, where the case is one in which withholding the mandatory interlocutory injunction would carry a greater risk of injustice than granting it. Kiefel J preferred the approach taken by Cooper J in *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited* (1991) 1 Qd. R. 301 at 314 where it was held that 'a high degree of assurance was required'.

In the case at hand, Kiefel J held that the effects of the withholding or granting of an order should be taken into account when considering where the balance of convenience lies. The risk of irreparable harm was such an effect and no other principle was necessary for guidance.

However, Her Honour held that it is not the case that because an order is classified as 'mandatory', the court is automatically required to have any further examination of the strength of the applicant's case. What is necessary is that regard be had to what is required by the order and the effect that will have. Where the order may be seen to have a profound effect, then further assurance of the court is needed. For instance, where what is required is very expensive and time consuming, the making of

the order may not be justified without some other strong factor being weighed against these effects. A strong case for final relief may be such a factor.

Her Honour stated that often in cases involving s. 46 of the Trade Practices Act it is difficult to grant relief at an interlocutory stage because the factual background from which an inference as to purpose may be drawn does not exist. However, she held that was not the case here because the order, while requiring the TAB to undo what it had done in relation to the imposition of the 50 transactions per minute limit, did not involve a large amount of time, money or unreasonable technical difficulty. Indeed, the respondent had, since 20 April 1995, removed the limit and raised it by alteration to its software without apparent difficulty.

Therefore the requested order to remove transactional limitations was granted.