
Private action

News Limited & ors v Australia Rugby Football League Limited & ors 'The Super League appeal'

Full Federal Court of Australia

Lockhart, von Doussa and Sackville JJ
Sydney

4 October 1996

On 4 October 1996 the Full Court overturned on appeal the decision of Burchett J in *News Limited v Australian Rugby League Limited* ('the Superleague case') ((1996) ATPR 41-466).

In a judgment spanning over 200 pages, Lockhart, Von Doussa, and Sackville JJ allowed the appeal and ordered that all orders made by the trial judge be set aside. The judgment is lengthy, partly because the Court considered it necessary to set out the course of events in considerable detail (which it did for over 100 pages). It did so because on many issues the Court differed from the trial judge in the inferences drawn from the primary facts.

Background to the litigation

The Court outlined in detail the background to the litigation. The litigation arose out of an attempt by News Ltd to establish a new rugby league competition, known as 'Super League' or 'Superleague', to operate in competition with the established national competition which has been conducted for many years under the auspices of the New South Wales Rugby League Ltd or the Australian Football League Ltd (hereafter referred to collectively as 'the League').

During 1995, News Ltd or its associated Superleague companies entered into contracts with over 300 players and coaches to participate in the Superleague competition. The signing of the players and coaches took place after the League had executed Commitment and Loyalty Agreements with the 20 clubs that comprised the national competition. These agreements precluded the clubs from participating for five years (until the end of the 1999 season) in any competition not conducted or approved by the League. In return, each of the clubs was admitted to the national competition for five years.

News Ltd claimed, amongst other things, that the Commitment and Loyalty Agreements were void on the basis that they contravened the Trade Practices Act, as they contained 'exclusionary provisions' (resulting in a breach of s. 45(2)(a)(i) or s. 45(2)(b)(i) of the Act), and that they had the purpose or effect of substantially lessening competition in various markets (in contravention of s. 45(2)(a)(ii) or s. 45(2)(b)(ii) of the Act). News also claimed that the League had abused its significant market power by preventing the entry of the proposed Superleague (in breach of s. 46 of the Act).

The League filed cross-claims including that the 'rebel clubs' (those clubs prepared to release players and coaches from their existing contracts to participate in the Superleague) had breached contractual obligations to the League; that the rebel clubs had breached fiduciary duties arising from a 'joint venture' between the clubs and the League; that News Ltd and the Superleague companies had induced the rebel clubs to breach their contractual and fiduciary duties; and that News Ltd and the Superleague companies had engaged in misleading and deceptive conduct, passing off and had infringed the League's trade marks.

The trial judge's decision

The League and loyal clubs succeeded before the trial judge, who rejected News Ltd's claims that the Commitment and Loyalty Agreements contravened the Trade Practices Act. Burchett J rejected the claim that there was a contract, arrangement or understanding that had the purpose or effect of substantially lessening competition in breach of s. 45(2)(a)(ii) or s. 45(2)(b)(ii) of the Act. News Ltd's claim that the League had breached s. 46 of the Act was also rejected. Burchett J found that none of the markets pleaded by News Ltd had been established, and rejected the contention that the relevant market should be confined to rugby league; rather the market included at least some other sports, such as rugby union, Australian rules football, soccer and basketball.

The trial judge also rejected the claim that the parties to the Commitment and Loyalty Agreements made or gave effect to 'exclusionary provisions' in breach of s. 45(2)(a)(i) or s. 45(2)(b)(i) of the Act. It was this aspect of the appeal judgment on which the legality of the agreements turned. In fact, the Full Court did not find it necessary to consider the other competition issues raised by Burchett J, including his broad interpretation of the market definition.

The trial judge added that, even if News Ltd had established contraventions of s. 45 and s. 46 of the Act, he would have refused relief on discretionary grounds, because of the role played by News Ltd in inducing breach of contract and his view that News Ltd had engaged in conduct outside the norms of proper and commercial behaviour.

Regarding other claims, Burchett J found that the rebel clubs had breached their contractual and fiduciary obligations to the League, and found that News Ltd and the Superleague companies had induced the clubs to breach their obligations. Burchett J made a number of orders which, in substance, prevented News Ltd and the Superleague companies from organising or participating in a rugby league competition, other than one authorised by the League, until the year 2000. Previously the clubs were required to apply annually for admission to the competition.

The Full Court's judgment

The judgment is divided into several parts. Following a comprehensive examination of the major events leading to the litigation, the Court looked at a number of issues in turn. This article will concentrate primarily on the competition issues that the Court discussed, although for the sake of completeness the Court's other major findings are briefly mentioned.

The Court addressed claims by the League that the rebel clubs had breached **contractual obligations**. The Court rejected some of the claims, but found that the clubs breached an implied obligation arising under the contract constituted by their admission to the 1995 competition. The obligation required them to do everything reasonably necessary to enable the 1995 competition to be carried on in a manner that allowed the League to receive the benefit of that competition. The Court said that the remedies available to the League should be confined to an award for damages, and referred the matter back to the trial judge for assessment.

With regard to certain **other claims of relief**, the Court referred back to the trial judge for further examination some unresolved claims, including those based on misleading or deceptive conduct, passing off and infringement of intellectual property rights.

The Court then dealt with the contention that some of the trial judge's orders would directly affect the rights and obligations of Superleague players and coaches who had not been joined by the League as **parties to the litigation**. The Court held that these orders, whether supportable or not, had to be set aside.

The Court then looked at the contention that the rebel clubs owed **fiduciary duties** to the League and other clubs. These obligations were said to arise out of a 'League Joint Venture', which was defined as a joint venture for the carrying out of the respective objects of the League and the clubs. The Court found that there was not that degree of 'mutual trust and confidence' that is found among partners in a commercial venture. The League and clubs each had conflicting commercial interests.

Furthermore, the right of clubs to withdraw from the competition (which could be exercised by choosing not to apply for admission) was inconsistent with a fiduciary obligation to use the club's assets for the benefit of the national competition. Since no fiduciary duties were owed, the rebel clubs could not have been in breach of them, nor could they have been induced to breach them.

Competition issues

Despite the attention given by the trial judge to the issue of market definition, the Court found it unnecessary to discuss the issue. The Court did not find it necessary to consider the argument put forward by News Ltd that the League had misused market power in contravention of s. 46 of the Trade Practices Act, nor did it find it necessary to consider whether the Commitment and Loyalty Agreements constituted contracts, arrangements or understandings which contained provisions having the purpose or effect, or likely effect, of substantially lessening competition in a market, thereby contravening s. 45(2)(a)(ii) and s. 45(2)(b)(ii) of the Act.

Instead, the competition issues discussed by the Court centred on the prohibition in s. 45(2)(a)(i) or s. 45(2)(b)(i) of the Trade Practices Act against making or giving effect to agreements containing **exclusionary provisions**. The Court found that the appellants had established that the Commitment and Loyalty Agreements contained exclusionary provisions as defined in s. 4D of the Act and were therefore void.

Agreements containing exclusionary provisions are per se contraventions of the Trade Practices Act. Exclusionary provisions are defined in s. 4D as provisions of a contract, arrangement or understanding having the purpose of preventing, restricting or limiting the supply or acquisition of goods or services by persons in competition with each other in relation to those goods or services.

Before examining the Full Court's decision in this respect, it is useful to recap the trial judge's thinking on this issue. First, Burchett J found that the clubs were not in competition with each other, either in relation to the supply of rugby league teams or in relation to the acquisition of the services of a competition organiser.

Secondly, while the clubs were in fact in competition with each other to secure the services of players, this kind of competition was expressly excluded from the scope of the Act by the definition of 'services' in s. 4(1) of the Trade Practices Act.

Thirdly, given that the principal purpose of the Commitment and Loyalty Agreements was to preserve the quality of the rugby league competition through the joint participation of the clubs, there was no proscribed purpose of preventing, restricting or limiting the supply or services to, or the acquisition of services from, particular persons.

Fourthly, there was no contract, arrangement or understanding within the meaning of the Act since it had not been shown that the parties had the necessary 'meeting of minds'; rather the trial judge found that the clubs had no more than a hope or expectation that others would execute the Commitment or Loyalty Agreements.

The Full Court did not accept that the clubs and the League were engaged in joint activities and disagreed with the trial judge's contention that the clubs were not set up to compete, as commercial entities, to supply their teams or to acquire a competition organiser. The Court placed weight on the fact that each year the clubs have to apply to the League to enter the league competition for that year, and that in support of this application each club was required to meet financial requirements the satisfaction of which required clubs to attract spectators, sponsorship and television viewers. These were clearly matters in respect of which the clubs competed with each other.

The Court held that at least some of the clubs which had executed the Commitment and Loyalty Agreements were in competition or likely to be in competition with each other to retain their position within the national competition. The Court gave some weight to the fact that admission to the League competition was for one year only, that some of the clubs had long requested the League to change its policy on admissions, and that over several years the question of rationalising and reducing the number of clubs had been raised.

The Court held that the clubs were in competition with each other for the acquisition of the services of News Ltd as an alternative

competition organiser. It viewed the Commitment and Loyalty Agreements as being designed, in large measure, to prevent any of the clubs from choosing to participate in the rival competition, which the Court considered was very much at the forefront of the minds of the League representatives.

The Court also held that in the competition between clubs for premier players there was a real chance or possibility that there could be competition to engage players other than under a contract of service. Although the League adopted a standard form of contract of service between players and clubs (as did Superleague), there was nothing that required the contracts to take that form. It was open to a club to engage the services of a player otherwise than under a contract of service. The clubs were therefore likely to be in competition with each other for the 'services' of premier players (as defined in the Act) at the time the Commitment and Loyalty Agreements were executed.

The Court rejected the trial judge's finding that there was no more than a hope or expectation that others would execute the Commitment and Loyalty Agreements, and held that the agreements entered into by each club with the League collectively constituted an arrangement or understanding between each of the clubs and the League. The Court noted that the trial judge's view was heavily influenced by the characterisation of the objectives of the League and the clubs as essentially non-commercial. The Court rejected this characterisation of the relationship between the clubs and the League, and found that the evidence pointed to a common understanding of the clubs to take concerted action to adopt the provisions of the agreements.

In effect, the Commitment and Loyalty Agreements provided that the clubs would be bound to the League for the next five years and would not have any dealing with any competition organised by any other person. The Court held that the facts established that the clubs and the League entered the agreements for the purposes of preventing, for five years:

- the supply by the clubs of rugby league teams to any competition organiser other than one approved by the League; and

- the acquisition by the clubs of the services of a competition organiser other than one approved by the League.

The Court held that, while the clubs and the League may have had other objectives in entering the agreements, these were substantial purposes **on any view** of the word 'substantial' for the purposes of s. 45(2). Accordingly, the Court held that the arrangement contained an exclusionary provision and therefore contravened the Act.

There was some discussion that the relationship between the League and the clubs existed outside the sphere of business activity, and that they were therefore not caught by the Act because they did not engage in trade or commerce. The Court held that both the League and the clubs were engaged in trade or commerce — they derived money from sponsorships, merchandising rights, television rights, game entry fees, they hired grounds and organised competitions.

The Court, having found that the Commitment and Loyalty Agreements were void as containing exclusionary provisions, set aside the orders of Burchett J preventing participation in a Superleague competition. The Court noted that the trial judge had regarded the conduct of News Ltd as 'well outside the norms of proper and commercial conduct'. It also noted that the trial judge would have exercised his discretion under s. 87 of the Trade Practices Act not to grant relief by setting aside the agreements *ab initio*, if he had found that contraventions of the Act were established by News Ltd. The Court disagreed with this interpretation of the discretionary nature of the remedies provided by this section: 'the powers in s. 87 do not alter the ordinary rule, that where a statutory provision such as s. 45 provides that a contract is contrary to law, the contract is void'.

Immediately following the handing down of the judgment, the League announced that it would seek leave to appeal the decision to the High Court of Australia. On 15 November 1996 the League's application for special leave to appeal to the High Court was refused.