
Legal notes

Private action

Telstra Corporation Ltd v First Netcom Pty Ltd

*Federal Court of Australia
Lockhart, Beaumont & Hill JJ
2 September 1997*

The Full Federal Court has set aside an interlocutory injunction that prevented Telstra from ending an agreement to supply a reseller, First Netcom Pty Ltd, with local call telephone services. However, the Appeal Court upheld a separate injunction restraining Telstra from communicating with First Netcom's customers about its proposed termination of services to First Netcom.

Background

Following partial deregulation of the telecommunications industry in 1994, First Netcom became a reseller of telecommunications services. In July 1995, First Netcom began to purchase local call services from Telstra at a bulk wholesale rate which it would then resell to its own customers. To enable Telstra to bill First Netcom for the calls made by its customers, First Netcom had provided Telstra with details of its customers in the form of a customer list. First Netcom would invoice its customers direct.

A dispute arose in respect of the bills rendered by Telstra in that First Netcom alleged that Telstra's bills were deficient, inaccurate and not provided in a timely fashion. Where an account appeared to contain an error, First Netcom would treat the bill as under dispute and would withhold payment in respect of the whole of the account. Sometime in 1996, First Netcom ceased to pay most of the bills it received from Telstra.

According to First Netcom, a further reason for the non-payment of accounts was that Telstra had failed to transfer, or had delayed in transferring, customers to First Netcom which had resulted in damages to First Netcom. Furthermore, it alleged that a division of Telstra known as the 'Winback Team', had used confidential information in the customer list to approach First Netcom's customers to seek to have them transfer their services to Telstra.

Telstra asserted that First Netcom was not creditworthy, accordingly it had sought security from First Netcom for the unpaid charges. First Netcom denied problems as to its creditworthiness and continued to refuse to pay the amount allegedly owed. Telstra commenced proceedings in the Supreme Court of New South Wales claiming the sum of \$13 863 962 for unpaid charges.

In June 1997, Telstra notified First Netcom of its intention to discontinue services to First Netcom. Further, it informed First Netcom of its intention to send to First Netcom customers a letter advising of the discontinuance of services and inviting them to instead allow Telstra to provide the services.

As a result, First Netcom filed a cross-claim against Telstra, seeking damages of more than \$30 000 000 as well as interlocutory injunctions to restrain Telstra from discontinuing the supply of telephone services to First Netcom and from sending the letter to First Netcom's customers. The proceedings were cross-vested to the Federal Court because of the range of issues raised in the cross-claim.

Trial judge's decision

Einfeld J granted the interlocutory relief sought. In doing so, His Honour observed that a major question raised in the application was whether,

discontinuance (of the services) would be a bona fide and proper use of the contractual right, whether it would in the circumstances represent a prejudgment of the issues to be raised in the

litigation which Telstra itself commenced ... (and) whether Telstra's use of the discontinuance weapon is a legitimate exercise of its rights and powers in the light of its summary effect on First Netcom's business and profitability.

On the issue of First Netcom's solvency, His Honour noted that this was an issue that required 'full litigation, not summary conclusions on an interlocutory basis'.

His Honour understood Telstra's concerns about the non-payment of its bills, but his view was that at such an early stage, it would be inappropriate to force the result as to the disputed claims by permitting a change of the status quo. It was recognised that Telstra could lose further funds. Conversely, First Netcom might be forced out of business if an injunction was not granted. In these circumstances, this led His Honour to only one result — to grant the injunction.

On the issue of the proposed letter to First Netcom customers, His Honour queried the legitimacy of such an action by Telstra, apart from whether it was actually necessary in order to pursue Telstra's contractual rights. Einfeld J noted that the use of the confidential information by one part of Telstra, where it was received by another, might amount to a possible breach of Part IV of the Trade Practices Act.

Full Court decision

Telstra sought leave to appeal Einfeld J's decision to grant an interlocutory injunction restraining it from discontinuing the provision of services and restraining it from sending the proposed letter to First Netcom's customers.

A significant matter which led the Court to conclude that leave to appeal should be granted, and that the appeal should in part succeed, was the fundamental maxim of equity that 'he who seeks equity must do equity'. A Court of Equity will not make an order for a mandatory injunction unless the party seeking that order is ready, willing and able to perform its side of the bargain.

In circumstances where there is dispute as to an amount owing, a court can determine that the amount to be paid into court is a lesser sum

so that no injustice flows from the court's orders. In determining the amount to be paid into court, the court must have regard to the financial circumstances of the applicant for injunctive relief.

The Court held that the trial judge had erred in not directing attention to the requirement that First Netcom do equity as a condition of a grant of injunctive relief and thus pay an amount into court. It was incumbent upon the trial judge to seek to secure the position of Telstra. The financial situation of First Netcom was an important issue in this application and First Netcom was given the opportunity to prove its financial position; however, it declined. In these circumstances the Court concluded:

It would be quite wrong in principle to require Telstra to continue to perform its side of the agreement with First Netcom, when that company has neither offered to pay, paid into court or offered to secure payment, of the amounts in dispute.

On this issue, leave to appeal was granted and the injunction dissolved.

On the question of Telstra proposing to communicate to First Netcom customers that the Telstra/First Netcom service agreement had been terminated, the Court found there to be no doubt that the customer information was supplied solely for the purpose of the service agreement.

Their Honours ascertained that it was possible for First Netcom to strike an agreement with another third party supplier for the provision of the services so that the termination of the Telstra/First Netcom agreement would not in any way affect First Netcom customers. Due to this, the Court found that it could not be said that it was necessary for the purposes of the agreement between Telstra/First Netcom for customers of First Netcom to be notified of the termination. To use the list to communicate the fact of termination of the services agreement would be using the list for a purpose for which it was not supplied.

On this issue the Court allowed the injunction to stand.

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