



Précis Paper

RB (Hygiene Home) Australia Pty Ltd v S.C. Johnson & Son Pty Ltd [2020] FCA 1783 – Representations in Advertisements

A discussion about the case *RB (Hygiene Home) Australia Pty Ltd v S.C. Johnson & Son Pty Ltd* [2020] FCA 1783, including a discussion about advertising campaigns, representations and injunction applications.

Discussion Includes

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- The Court's Approach to Representations
- The Ordinary and Reasonable Reader or Viewer
- Puffery in Advertisements
- Implicit Comparisons to Other Products
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RB (Hygiene Home) Australia Pty Ltd v S.C. Johnson & Son Pty Ltd [2020] FCA 1783 – Representations in Advertisements

In this edition of BenchTV, Kevin Andronos SC (Barrister, Eleven Wentworth Chambers, Sydney) and Sophie Dawson (Partner, Bird & Bird, Sydney) discuss the case *RB (Hygiene Home) Australia Pty Ltd v S.C. Johnson & Son Pty Ltd* [2020] FCA 1783.

Key Facts

1. In August 2020, S.C. Johnson & Son Pty Ltd (S.C. Johnson), manufacturer of the 'Raid' products, introduced an advertising campaign centered around a new delivery system on their domestic fly spray canisters involving a double nozzle applicator.
2. In December 2020, RB (Hygiene Home) Australia Pty Ltd (RB), manufacturer of the 'Mortein' products, brought an injunction to restrain the advertising campaign that accompanied the introduction of the double nozzle product. This included the point of sale material, television commercials and internet material on the S.C. Johnson website.
3. The television commercial involved a comical character, 'Steve', who was portrayed as unable to do certain things, such as killing a fly or throw a paper ball into a waste basket. He eventually uses the product advertised and all is well.
4. One of the images repeated was the use of crosshairs, with two of these being in close proximity to each other. It was argued that this conveyed an imputation of double efficacy. In addition, since RB produced a single nozzle product, the applicant argued that there was an implicit comparison by S.C. Johnson to all single nozzle products, including RB's.
5. Another representation concerned the use of phrase "kills on the spot". The question was whether these words were to be taken literally and if so, the next question was whether this representation was true.

The Court's Approach to Representations

6. Griffiths J's approach was to ask whether or not there was a prima facie case that those representations had been communicated. His Honour found that the representations were not in fact communicated. This was despite the fact that the representations that were pleaded were literal transcriptions of the words that were used in the material.
7. The court typically approaches such cases by looking at the whole of the circumstances of the case. One must look at more than the content of the advertisement itself; they must also look at the context in which the words or images (or combination of the two) are

used. This includes not only the context of the four corners of the advertisement but also the context in which the viewer or reader is going to view or read the advertisement.

8. In this case, the advertisements were to the public at large. They were for a product for which virtually everyone was a participant in the market. The Court has to look at everyone within that class of market participants and see whether a not insignificant group of people within that class have been or could be misled or deceived by the advertisements. This investigation is crucial to satisfy section 18 of the Australian Consumer Law.

The Ordinary and Reasonable Reader or Viewer

9. The question is: who is capable of being misled or deceived? The answer to this lies in understanding the ordinary and reasonable reader or viewer; this person can be thought of as someone who is an ordinary person in society and can exercise common sense. The ordinary, reasonable person often has basic characteristics such as having a wide range of education levels, experience, intelligence and credulity. In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, at 199, Gibbs CJ explained that 'ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute'.
10. In the present case, the ordinary, reasonable member of the public would be someone in the market for fly sprays; that is, virtually everyone. However, the characteristics of the person is not the only consideration and the circumstances in which that person is going to be viewing the advertisement also matters. When considering the television commercials, it must be noted that the commercials are an interruption. Television viewers are not watching for the purpose of viewing the advertisements. They are watching the television for the program that is running. Hence, viewers will not be watching the advertisements in a close and careful way. When the Court considers how the advertisement is perceived, the court will almost always take the aforementioned point into account.
11. In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, the issue considered was what is the 'dominant impression' left by the advertisement in the mind of the viewer or reader. For the advertisement to be misleading or deceptive, it must be apt to confuse; that is, confusion that is apt to lead at least a not insignificant part of the target audience to deal with the advertiser at the expense of a competitor. This is required to satisfy section 18 of the Australian Consumer Law.

Puffery in Advertisements

12. In advertising, courts have always taken a robust approach. Courts have always regarded a little bit of puffery to be expected; that is, it is an ordinary part of commerce. At common

law, puffery is not actionable as a representation. In section 18 cases, there is nothing which carves out puffery as not being subject to the prescription in section 18. This means advertisements must be viewed in the same way that viewers would look at it; that is, not taking it literally. In other words, if it is a general, laudatory statement it will be seen as puffery and not actionable. However, if it is sufficiently precise and clear that it conveys an actual false meaning or is misleading and deceptive, then it may still contravene section 18, notwithstanding that it is puffery.

13. In *REA Group Ltd v Fairfax Media Ltd* [2017] FCA 91, reference was made to *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715. In the latter case, there was some advertising material for some units in a development block. While the advertisement was in the nature of puffery, it was sufficiently precise that it conveyed actual representations that these units were going to be more sumptuous, larger and better in some quantifiable way than the other units in the competitors' blocks. Thus, even though the advertisements were puffery, they were still held to be misleading and deceptive.
14. In the present case, the nature of the representations was found not to be conveyed because they were so extreme and were communicated at such a high level of generality that you simply cannot miss. The Court found that the representations as they were pleaded had not been conveyed because they would not be taken literally by the ordinary, reasonable reader. The main point is that the whole of the context of the advertisement, the market and the medium that is being used must be taken into account in order to determine whether it is capable of being misleading or deceptive.
15. Thus, the humorous aspect of the television commercial must also be considered. Drawing from the judgment of Nicholas J in *Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd (No 2)* [2015] FCA 477, viewers understand that what they are seeing is not true to life and that it is an exaggeration which is meant to be entertaining and engaging. If the advertisement contains a joke and the joke lies in the exaggeration or parody, then the ordinary, reasonable reader will understand it as a joke.

Implicit Comparisons to Other Products

16. In the present case, there was an argument that there was an implicit comparison between the double nozzle product and all single nozzle products. However, based on the language and context of the advertisement, the Court did not find that such an implicit comparison was there. When presenting a comparative advertisement, one must be careful that they are comparing like with like and that the comparison is a real and meaningful one.
17. An implicit comparison did not arise in this case because if this was a case of comparative advertising, then almost every case would be one of comparative advertising. Griffith J did not find that there was a comparison or that the double nozzle representations connoted double efficacy.

The Balance of Convenience

18. The other key element of obtaining an interlocutory injunction is establishing that the balance of convenience favours obtaining the injunction. The balance of convenience is not taken in isolation as the strength of the prima facie case is also taken into account. The judge took into account the fact that the prospect of success was so slight that it impacted on the assessment on the balance of convenience. Apart from that, there was a level of equilibrium when assessing the balance. One of either the applicant and respondent stood to suffer loss if orders were made or not made. In both cases, it was quantifiable to some extent because there were campaigns on foot which would have to be mothballed, or there were sales which might be affected.
19. There were also some confidential evidence which went to those issues. In laying out the balance of convenience evidence, the applicant is essentially making the case that they are compensable in damages because the better they are able to articulate the actual loss they will suffer, the more likely it is that the judge will decide that if there is a substantial enough respondent, the applicant can be compensated in damages. His Honour found that the applicant could be left with their remedy in damages without ordering the injunction.

Other Considerations

20. Reputational harm and potential economic loss are other considerations a court may take into account. However, these were not material matters in the present case.
21. Where scientific claims are made in an advertisement, the advertising company must ensure that there is some body of knowledge which underpins those representations. For example, in a pharmaceutical context, comparative advertising and efficacy claims are highly scientific. Global companies will often have a suite of evidence and approved claims which they know they can support by way of evidence in advance.
22. When preparing to make or defend an injunction application, there are a few key considerations to take into account. One of these considerations is that there is often not going to be a lot of time to make an application. The longer one takes and the more time a competitor has been in the market making the representations in question, the more difficult it will be to obtain an injunction. Thus, one must swiftly formulate the representations, decide what evidence is needed, assemble that evidence, attempt to get the evidence into admissible form and make the application.
23. Before and during this process, you should also formulate some demands. The court will want to see that you have taken steps to resolve the issue without having to invoke the jurisdiction of the court. It will also be a necessary step for most applicants, in order to demonstrate that there is a risk that the conduct will continue, to seek undertakings that

the conduct stop. When the respondent refuses to stop the conduct, there is evidence that the undesired conduct will continue.

Related Cases and Legislation

24. Very early in the history of section 52 of the old *Trade Practices Act 1974* (Cth), it was realised that applying heavy restrictions to news and other media content could have dire ramifications for freedom of speech. Presently, section 19 of the Australian Consumer Law provides that for prescribed information providers and broadcasters, unless something is advertising material, or it is made pursuant to a commercial understanding or arrangement with the providers of goods and services, section 18 does not apply.
25. However, there is some crossover for the internet. In a broadcasting context, this was tested in *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* 239 CLR 305. The case involved some women who were promoting a "get rich" program for women, where they made some claims that were found by the Court to be misleading. The High Court found that Channel Seven had effectively adopted and endorsed the claims that the 'Wildly Wealthy Women' were making. Channel Seven had a commercial arrangement with them. The arrangement was not a clear advertising contract, but had more to do with making talent available for a competition. However, this was found to be sufficient to trigger an exception to section 19.
26. There are a number of other internet cases where courts have considered links to websites; that is, where people have associated links to their websites with other people's brands. Courts will look to links and search results specifically and consider whether ordinary, reasonable readers could be misled. For example, in *Veda Advantage Limited v Malouf Group Enterprises Pty Ltd* [2016] FCA 255, one link was found to be misleading and in breach of section 18 where it would have misled viewers into its marketing web. This is because they would have thought Veda's reports were on the site. This highlights the need to take care to consider the links and other measures taken to advertise material as they may be misleading or deceptive.

The Process of Working through an Advertising Case

27. Whether looking at an advertising case from a pre-publication stage or at the stage of apprehended or actual proceedings, the first thing that must be done is to analyse the copy to see what representations are there and can be extracted. Next, these representations must be properly articulated. Then, one must put themselves in the place of the ordinary reader or viewer of the advertisement and try to understand the overall context in which these representations are communicated. This requires setting aside one's own position and understanding others' positions when responding to the advertisement.

28. It must then be assessed as to whether these representations are defensible. This may include a lengthy interrogation of your client as to whether or not there is a scientific basis to the representations, as well as if there is a comparison with other products and whether or not that can be sustained. If puffery or humour is being invoked, it must still be asked whether a representation is misleading or deceptive. If commencing proceedings, a range of other issues need to be considered. Examples of matters to be considered are damages, the evidence, the extent to which you are prepared to disclose confidential material, and whether or not there are alternatives to initiating a court proceeding.

BIOGRAPHY

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Mr Andronos has a broad commercial and regulatory practice. He was appointed as Senior Counsel in 2014, having practised as a solicitor in commercial litigation for 10 years before coming to the Bar in 2000.

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Ms Dawson specialises in media and technology advice and disputes, including data protection and publication laws. She has also been on several boards and committees such as the Advisory Board for the UTS Centre for Media Transition and the Communications and Media Association Executive Committee.

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Legislation

Competition and Consumer Act 2010 (Cth), ss 18 and 19

Trade Practices Act 1974 (Cth), s 52