14/93

SUPREME COURT OF VICTORIA

PANASONIC AUSTRALIA PTY LTD v BURSTYNER

Harper J

20, 21 January 1993 — (1993) ATPR 41,083; (1993) ASC 58,227

CIVIL PROCEEDINGS – LIABILITY OF MANUFACTURER – SPARE PARTS – NOT AVAILABLE – WHETHER MANUFACTURER ACTED UNREASONABLY – STATUTORY CAUSE OF ACTION – ELEMENTS OF CLAIM TO BE PROVED BY CONSUMER: *TRADE PRACTICES ACT* 1974 (Cth.), S74F.

1. In a claim for compensation under s74F of the *Trade Practices Act* 1974 (Cth.) ('Act'), a consumer must prove by admissible evidence that (i) spare parts are required to effect a repair to goods; (ii) such spare parts are not reasonably available; (iii) the manufacturer acted unreasonably in not ensuring such availability; and (iv) the consumer suffered loss.

2. Where a consumer failed to prove by admissible evidence that the manufacturer's inability to repair a device was unreasonable, a magistrate was in error in finding that a breach of the Act had occurred and awarding compensation to the consumer.

HARPER J: **[1]** In January, 1982, Mr Henry Burstyner, the respondent, purchased a television set which, I take it, was manufactured by the Japanese company of which Panasonic Australia Pty Ltd, the appellant, is a subsidiary, At the same time, he also purchased a remote control device ('the unit'), by use of which the television set could be operated from a distance. The unit, like the set itself, was until March 1991 manufactured by the holding company in Japan. Production thereafter ceased. The unit broke down in late 1991. It was therefore in use for almost 10 years. The respondent did not regard this as good enough. He brought proceedings in the Magistrates' Court of Melbourne alleging, among other things, breach of the *Trade Practices Act* 1974. The relevant provision in that Act is s74F. For present purposes, it is sufficient to say that it requires a manufacturer of consumer goods to ensure that spare parts are reasonably available for the repair of those goods. If the manufacturer acts unreasonably in failing to ensure that a spare part is reasonably available, and if the consumer suffers loss thereby, the manufacturer is liable to compensate the consumer, who may recover such compensation by action in a court of competent jurisdiction. In determining whether a corporation acted unreasonably, the Court shall have regard to all the circumstances of the case.

If a consumer in the position of the respondent is to succeed in a claim under s74F, he or she must by admissible evidence prove each of the elements of the **[2]** statutory cause of action. These are, relevantly, that a spare part or spare parts is or are required to effect a repair or repairs to consumer goods; that such part or parts is or are not reasonably available; that the manufacturer acted unreasonably in not ensuring such availability; and that the consumer thereby suffered loss. There was no evidence before the Magistrate of the nature of the fault which caused the unit in this case to break down. There was conflicting evidence, which in my opinion was inconclusive, about the appellant's ability to provide the spare part or parts with which it might have been possible to repair the unit. There was no evidence that repairs could or could not be effected with or without the use of spare parts. The nearest the respondent came to providing this part of his case was his evidence based upon hearsay material that his repairer could not repair the unit. But the repairer was not called. In any event, there was no evidence of loss. The respondent was able to purchase a substitute remote control device. It is true that this cost him $128, but he would have been required to pay something for any replacement unit supplied by the appellant. There was no evidence that the replacement unit thus supplied would have cost the respondent less than $128. The Magistrate nevertheless upheld the claim.

In my opinion, for the reason that the respondent failed to prove all the elements of the cause of action, the burden of proof being, of course, on the respondent, this result was wrong; but in arguing the appeal before me, counsel for the appellant relied upon different **[3]** grounds. First, he submitted that no reasonable Magistrate could have concluded on the evidence before

the Court that the appellant had acted unreasonably in failing to ensure that the relevant part was reasonably available to the respondent at the relevant time. This assumes that the appellant did fail to ensure such availability or, at the least, that the unit was beyond repair. In my opinion, based upon the evidence as disclosed in the affidavit material prepared for this appeal, that assumption is one which the appellant was not bound to make.

Counsel for the appellant submitted, in effect, that in any event, his client would not have acted unreasonably even if no spare parts were available and even if the unit could not be repaired. He relied upon a Code of Practice which in evidence before the Magistrate was said to operate in the television industry. The Code is in printed form and was tendered during the hearing below. It provides, so far as is relevant, that "functional spare parts will in normal circumstances be available on all products for 7 to 10 years after production ceases". In the present case, as has already been noted, production of the unit ceased in March 1991.

In my opinion, the appellant cannot here rely upon the Code of Practice. In the first place, the Magistrate was not in a position to accept the Code as setting the standard of reasonableness for the purposes of s74F of the Trade Practices Act. The electronic services industry cannot by itself impose upon consumers standards for reasonable compliance with a requirement passed into legislation by the Parliament of Australia. There was no **[4]** admissible evidence before the Magistrate that this Code was anything other than a creation of the industry acting alone. It is true that its foreword indicates otherwise. This states, among other things, that "the Code has been developed as a joint venture by the New South Wales Department of Business and Consumer Affairs, the Trade Practices Commission and certain industry representatives." It goes on to say that it "has been endorsed by the Minister for Business and Consumer Affairs of New South Wales". All this is, of course, hearsay. It was inadmissible before the Magistrate as evidence of the truth of its contents. It is similarly inadmissible before me. Proof of what is reasonable compliance with s74F nevertheless remains a problem. The time and money required to call evidence to establish reasonableness in the typical case would doubtless be prohibitive, at least in relative terms. For this and other reasons it seems to me to be arguable that evidence of adherence to a Code accepted by the industry, by consumer representatives and by government could be received by a court as evidence of reasonableness in a particular case. But I do not need for the purposes of this appeal to determine this issue. In any event, its determination requires more careful consideration than could be given in this case.

Accordingly, I have reached no final conclusion in relation to it. It is sufficient for present purposes to say that in my opinion, the Code even if applicable here, was probably not adhered to by the appellant. Certainly, the Magistrate could not conclude that the appellant would, 7 to 10 years after 1991, have been in a position **[5]** to supply spare parts for the unit. The appellant submitted that the unit itself was a spare part: a spare part in relation to a television set. I am not attracted by this argument, but need reach no final conclusion about it. In giving his reasons for his decision, the Magistrate, referring to the Code, said, among other things:

> "If the defence is correct and the television was bought in early 1988, then by early 1989, a request for parts may be met with the reply that the unit is obsolete. I do not think that even though within the Code of Practice this is reasonable."

But the point was not whether the Code might or might not in theory produce an unreasonable result. The point here was whether the respondent had proved that inability to repair a remote control device manufactured at least 9 years earlier was unreasonable. In my opinion, the respondent failed to put before the Magistrate evidence upon the basis of which he could be satisfied on the balance of probabilities that that conclusion had been established. The Magistrate also said, in giving his reasons for his decision, that he was satisfied that it was reasonable for the requirement by the plaintiff for a whole or part-replacement unit. According to the affidavit material, the Magistrate said this in giving his reasons for judgment:

> "I am satisfied that it was reasonable for the requirement by the plaintiff for a whole or part-replacement unit. He was met with the reply that it was not available. It was a breach of the Act and damages follow."

This portion of His Worship's reasons for his decision was also the subject of appeal. The appellant **[6]** submitted that in taking into account the conclusion of fact that it was reasonable

for the respondent to require a whole or part-replacement unit, the Magistrate had mis-directed himself. In my opinion, this submission is correct. The test under the Act is not what is reasonable for the consumer; the test is whether it is reasonable for the manufacturer to place the consumer in a position in which repairs or spare parts are not available. It is apparent from that part of his reasons from which I have quoted that the Magistrate applied the incorrect test in this case.

For these reasons, it seems to me that the appeal should be allowed. I accordingly allow the appeal and in doing so, refrain from commenting upon the arguments put to me in relation to costs. Having allowed the appeal, there is no point in considering those arguments.

APPEARANCES: For the appellant Panasonic Australia: Mr PR Whitford, counsel. Minter Ellison, solicitors. The respondent Mr H Burstyner appeared in person.
