FEDERAL COURT OF AUSTRALIA

PR Polymers Pty Ltd v MTI Group Pty Ltd [2015] FCA 768

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| Citation: | PR Polymers Pty Ltd v MTI Group Pty Ltd [2015] FCA 768 |
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| Parties: | **PR POLYMERS PTY LTD (ACN 097 405 984) v MTI GROUP PTY LTD (ACN 137 112 326);****MTI GROUP PTY LTD (ACN 137 112 326) v PR POLYMERS PTY LTD (ACN 097 405 984)** |
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| File number(s): | WAD 276 of 2015 |
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| Judge(s): | **SIOPIS J** |
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| Date of judgment: | 2 July 2015 |
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| Catchwords: | **CONSUMER LAW** – interlocutory injunctions – misleading or deceptive conduct in contravention of s 18 and s 29(a) of the Australian Consumer Law – whether packaging of blastbag product was misleading by representing that the product was not flammable – whether statements in material safety data sheet about the product were misleading or deceptive – balance of convenience – weight to be given to claim that the alleged misrepresentation as to the flammability of the product posed a risk to public health and safety – where documents disparaging rival’s productswere distributed to customers.  |
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| Legislation: | Australian Consumer Law ss 18, 29(a)  |
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| Cases cited: | *AAP Telecommunications Pty Ltd v Telstra Corporation Ltd* (1997) 38 IPR 650  |
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| Date of hearing: | 2 July 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 55 |
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| Counsel for the Applicant: | Mr M Howard SC and Mr W Zappia |
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| Solicitor for the Applicant: | Jackson McDonald |
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| Counsel for the Respondent: | Mr K de Kerloy and Ms M Guy |
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| Solicitor for the Respondent: | Herbert Smith Freehills |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 276 of 2015 |

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| BETWEEN: | PR POLYMERS PTY LTD (ACN 097 405 984)ApplicantMTI GROUP PTY LTD (ACN 137 112 326)Cross-Claimant |
| AND: | MTI GROUP PTY LTD (ACN 137 112 326)RespondentPR POLYMERS PTY LTD (ACN 097 405 984)Cross-Respondent |

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| JUDGE: | SIOPIS J |
| DATE OF ORDER: | 2 JULY 2015 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

1. The applicant’s interlocutory application dated 9 June 2015 is dismissed.
2. Costs in the cause of the application.
3. The cross-claimant’s interlocutory application dated 22 June 2015 is dismissed.
4. Costs in the cause of the cross-claim.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

1. There are two applications for interlocutory injunctions before the Court today.

# the APPLICANT’S application for an INTERLOCUTORY injunction

1. The first is an application by the applicant, PR Polymers Pty Ltd, for an interlocutory injunction against the respondent, MTI Group Pty Limited. The applicant and the respondent are competitors in a market for the production and sale of products referred to as blastbags. As I understand it, a blastbag is a self-inflating plastic bag which contains an aerosol can and is widely used in the mining industry to seal off blast holes.
2. The applicant’s complaint is about a product marketed and sold by the respondent under the brand name “Blastbag Hero”. The “Blastbag Hero” products come in a number of different sizes depending on the size of the blast hole which is to be sealed off by the use of the blastbag. Each of these sizes of blastbag is marketed and sold under its own sub-name. Thus the largest of the blastbags is sold under the name of “Emu”, the next in size is “Wombat”, then “Platypus”, then “Koala” and finally the smallest bag is sold under the sub-name of “Quokka”. The particular “Blastbag Hero” product which is the subject of this proceeding is the “Platypus” which is the product to be used for blast holes 230 mm wide.
3. The applicant claims that the respondent has engaged in misleading or deceptive conduct in contravention of s 18 and s 29(a) of the Australian Consumer Law, being Sch 2 to the *Competition and Consumer Act 2010* (Cth), by reason of the manner in which the respondent has described the characteristics of the “Platypus” product in the material safety data sheet (MSDS) issued in June 2015 for that product and on the packaging for the product.
4. The first complaint is that the MSDS states that the liquid in the aerosol can in the “Platypus” product does not contain solvent. The applicant contends that this statement is false because the liquid in the aerosol can in the “Platypus” product contains a portion of acetone, which is a solvent.
5. The applicant’s second complaint is that the respondent has on the “Platypus” packaging misrepresented the flammability of the product. The “Platypus” product is sold in packaging which contains the internationally recognised green diamond non-flammable symbol thus representing that the “Platypus” product is non-flammable. The applicant contends that this conduct is misleading or deceptive because the product is flammable and should actually carry the internationally recognised red diamond symbol to indicate that it is flammable.
6. Mr Howard, senior counsel, who appeared for the applicant, handed up to the Court a minute of proposed orders which the applicant seeks by way of interlocutory relief today.
7. First, the applicant seeks an order preventing the respondent from:

(a) advertising for sale, selling or supplying any “Blastbag Hero” “Platypus” product fitted with 100 g aerosol cans which are labelled and classified as non-flammable;

(b) applying a non-flammable label to any 100 g “Platypus” product intended for sale or supply or selling or supplying any such product, and

(c) publishing the MSDS issued in June 2015 as being applicable tothe 100 g “Platypus” product.

1. Secondly, the applicant seeks an order that the respondent notify in writing any party to which it has sold or supplied the “Platypus” product that was labelled in the impugned way that the Court has determined that there is a serious question to be tried as to whether that product was non-flammable and whether the MSDS issued by the respondent in June 2015 for the product, was misleading or deceptive insofar as it related to the “Platypus” product.
2. In deciding whether to grant an interlocutory injunction, the Court has regardto two main issues, namely, whether the applicant has demonstrated a prima facie case, and the balance of convenience.
3. The first issue is whether the applicant has demonstrated a prima facie case. In determining whether this element has been satisfied, the Court has regard to the nature and extent of the interlocutory relief sought - in this case, the fact that the injunction sought would adversely affect the respondent’s ability, until trial to advertise or sell in its current packaging one of its products. The merits of the applicant’s case, bearing in mind the interlocutory nature of the hearing, would be assessed by reference to the extent of that intrusion into the respondent’s business activities.
4. In support of its claim that the liquid in the aerosol can used in the “Platypus” product contains acetone; and also that the product should be sold in packaging containing a flammable rather than non-flammable symbol, the applicant relied upon the evidence of two experts, namely, Dr Armand Zurhaar and Dr David Stone.
5. In his report, Dr Zurhaar said that he tested the composition of four aerosol cans of the “Platypus” product to determine the extent to which the liquid in each of the aerosol cans contained acetone. He found that there were variations in the results, and that between 10% and 13% of the liquid in the aerosol cans was acetone. Dr Zurhaar also said that he tested another three aerosol cans of “Platypus” product by reference to the ignition testing process set out by the United Nations in Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria, which is prescribed by the *Australian Dangerous Goods Code* (the Code); and found that the “Platypus” product was flammable when tested within certain of the prescribed distances from the aerosol cans.
6. Dr Stone said in his report that he found that two out of the three aerosol cans of the “Platypus” product which he tested were flammable and also two out of the three aerosol cans which he tested failed the acetone test.
7. The respondent relied upon two expert reports.
8. The first report was produced by the ChemCentre. The ChemCentre tested the “Platypus” product and other products sold under the “Blastbag Hero” brand name. The ChemCentre did not report specific results in relation to the acetone content of the liquid in each of the aerosol cans of the “Platyus” product that it tested, but rather provided a generalised result to the effect that the acetone content of the liquid in the aerosol cans was approximately 6%. In relation to the flammability tests, the ChemCentre reported that the “Platypus” product passed the tests and was, therefore, properly recorded and packaged as a non-flammable product.
9. The second expert report was produced by Dr Paul Wynn-Hatton. This is a much more detailed report than that prepared by the ChemCentre. Dr Wynn-Hatton also tested other “Blastbag Hero” brand name products in addition to the “Platypus” product. Dr Wynn‑Hatton did not, however, test the acetone content in the liquid in the aerosol cans for each product but referred to some quality control records which had been kept by the respondent. Dr Wynn-Hatton’s conclusion was that there was more than 1% acetone in all the “Blastbag Hero” products, but, as Mr Howard pointed out, there was no maximum percentage acetone content disclosed in Dr Wynn-Hatton’s report.
10. Dr Wynn-Hatton also found that, on applying the ignition testing process as prescribed in the Code to the liquid in the aerosol cans, those cans proved to be not flammable. Dr Wynn‑Hatton’s conclusion was that the aerosol cans and the products were properly labelled as non-flammable.
11. The question, therefore, is whether the applicant has demonstrated that there is a prime facie case, in the sense of a serious issue to be tried of sufficient merit on whether the impugned conduct of the respondent is misleading or deceptive in the respects alleged, having regard to the interlocutory relief sought.
12. Mr de Kerloy, who appeared on behalf of the respondent, sought to persuade me that Dr Wynn-Hatton had particularly good qualifications in relation to the testing of aerosol cans when compared to the qualifications of the other experts relied on by the applicant. However, the question of an expert’s qualifications is just one factor to which regard may be had. In the absence of cross-examination, the respective merits of each of the expert reports cannot be fairly assessed.
13. As the matter stands, therefore, it is not possible for the Court to conclude that one expert is to be preferred over another expert in relation to the question of whether the “Platypus” product is truly flammable or whether the aerosol cans of the “Platypus” product contain an amount of acetone which would render the representation in the MSDS misleading or deceptive.
14. I conclude, therefore, that there is a serious question to be tried of sufficient merit on the state of the evidence as it exists at the moment.
15. The second issue is the question of the balance of convenience.
16. There were two elements upon which the applicant relied in relation to the balance of convenience.
17. The first element is that the applicant is losing market share because of the respondent’s unlawful conduct. The applicant contends that it is losing customers because the respondent has gained a competitive advantage over the applicant by using acetone as a diluent of HCF134a, the primary component in the respondent’s aerosol cans, when it does not, and that acetone is cheaper than HCF134a.
18. Mr Michael Martin, the chief executive officer of the applicant, gave evidence of a specific instance where he says customers have been lost by the applicant to the respondent. Mr Martin said that he had a meeting with Mr Simon Horrocks of Glencore Rolleston on 21 January 2015 and Mr Horrocks said to him that the respondent had made a low price pitch for a trial pallet of 600 gas bags of 270 mm “Blastbag Hero” bags at $6 per bag compared to the applicant’s price of $12.95 per bag. Mr Martin deposed that the applicant could not match that offer with a green diamond product and, in his opinion, that was the reason the applicant lost the business.
19. Mr Martin also deposed to two or three other instances where the applicant had lost business to the respondent in similar circumstances.
20. The applicant said that the respondent would continue unfairly to erode the applicant’s market share until trial, if an injunction was not granted.
21. Secondly, the applicant said that it is not only concerned about its loss of business, but also about the risk of injury which the respondent’s “Platypus” product poses to persons handling the product. In para 53 of the written outline of submissions, the applicant submitted:

There is, however, a much greater and more obvious public interest, being public safety. It is reasonable to assume that those involved in handling, transport and storage of MTI’s products will handle those products in a manner appropriate to their classification to ensure the risk of harm to person, property and the environment is minimised. This assumption is based on the fact that those involved in such operations have a duty under s 8 of the *Dangerous Goods Safety Act 2004* (WA) to minimise the risk to people, property and the environment. So, if the products are marked as non-flammable they will be handled, stored and transported using procedures appropriate for non-flammable goods. (Footnote omitted.)

1. In response to the applicant’s argument as to the loss of business, Mr de Kerloy pointed out that some of the instances of loss of business referred to by Mr Martin in his affidavit did not relate to the “Platypus” product but, in fact, one of the other “Blastbag Hero” named products in respect of which the applicant has not objected, namely, the “Koala” product.
2. Further, and, in any event, in my view, the fact that the applicant is at risk of losing some business to the respondent pending trial is not, of itself, a basis to find that the balance of convenience will flow in favour of the grant of an injunction. This is because, the nature of the applicant’s anticipated damages is quantifiable, and this supports the conclusion that damages would be an adequate remedy.
3. As to the applicant’s argument that an interlocutory injunction should be granted because the “Platypus” product poses a risk to public safety, this is not, in my view, a factor which in the particular circumstances of this case, weighs heavily in favour of the grant of the injunction sought by the applicant. I say this for the following reasons.
4. First, it should be observed that this is an injunction which is sought by a competitor rather than by an instrumentality charged with acting in the public interest; and, in those circumstances, there is an alternative, and more effective way open to the applicant to seek to protect the safety of workers exposed to the respondent’s “Platypus” product.
5. The effective protection of workers from dangerous goods, is too serious a matter of public policy for it to depend upon a manufacturer of a rival product taking action to obtain an interlocutory injunction to withdraw the impugned product from public circulation. Rather, the legislature has recognised the importance of this aspect of public safety by empowering the executive government to take steps to protect effectively the safety of persons exposed in the workplace to dangerous goods. The *Dangerous Goods Safety Act 2004* (WA) (which is part of a national legislative scheme) vests in the Department of Mines and Petroleum (the department) in Western Australia, extensive powers to intervene summarily in relation to circumstances where it is alleged that a product may pose a risk to the safety of workers. The legislature provides for the effective protection of workers by empowering the department summarily to subject the impugned product to the department’s own scientific tests to test whether the product is indeed dangerous. The department also has summary power to issue orders to remove the product or otherwise take steps to reduce the risk to safety posed by that product.
6. By contrast, there are limitations on the invocation of the interlocutory injunction process as a means of obtaining a speedy and fair assessment of the dangers posed to the public by the respondent’s product. This is because at this interlocutory stage, the Court has before it two competing sets of affidavits and the Court is unable, and indeed is not called upon, to determine conclusively, whether the “Platypus” product is truly a dangerous product which justifies its removal from sale in its current packaging. Further, in deciding whether to grant an interlocutory injunction, the Court must also have regard to the impact of the grant of that injunction on the respondent. In this case, if granted, the injunction would result in the respondent having to withdraw the product in its current packaging from sale, even though it has not been proved that it is flammable.
7. Secondly, Mr Bodley’s evidence was that the “Blastbag Hero” product range, including the “Platypus” product, does not constitute a risk to the safety of the public. At para 30 of his affidavit, Mr Bodley deposed as follows:

Since the products were first introduced into the Australian market in 2009, there has been over five million of the products manufactured and supplied by the respondent. There has never been an incident in which the products have caused harm or injury during the use in accordance with the product labelling or directions for use. There has never been a product recall in relation to the products. There has never been a complaint from a customer in respect of the safety of the products and there has never been a test procured by the respondent which has determined that the products are flammable.

1. In my view, the applicant’s concerns for public safety are more effectively able to be pursued through the invocation of the processes under the WA Act.
2. In summary, therefore, in my view, damages would be an adequate remedy in relation to the applicant’s claim against the respondent. The balance of convenience does not support the grant of the interlocutory injunction sought.
3. Therefore, I decline to grant the interlocutory injunction sought by the applicant.

# the cross-claimant’s application for an INTERLOCUTORY injunction

1. The respondent and cross-claimant, MRI, also seeks an interlocutory injunction in a cross‑claim against the applicant and cross-respondent, PR Polymers.
2. The cross-claim alleges that the cross-respondent has engaged in misleading or deceptive conduct. That claim is based on allegations that the cross-respondent had circulated a document called an “information sheet” dated 27 May 2015 to its and the cross-claimant’s customers. The information sheet refers to the tests undertaken by Dr Stone and Dr Zurhaar, and, relying on those tests, says that the “Blastbag Hero” products should be classified as red and not green diamond products, that they are flammable and that the MSDS for “Blastbag Hero” products is misleading. The cross-respondent also sent related circulars on 5 June 2015 and 8 June 2015 to its and the cross-claimant’s customers.
3. The cross-claimant also alleges that the information sheets were circulated to its customers with the intention of disparaging the “Blastbag Hero” products. The disparaging statements made in the information sheets, said the cross-claimant, did not distinguish between the different products in the “Blastbag Hero” range of products and, accordingly, claimed that the negative characteristics revealed by Dr Zurhaar and Dr Stone in their tests applied to all of the products in the “Blastbag Hero” range.
4. The information sheets, therefore, says the cross-claimant, contain information which is misleading or deceptive insofar as they purport to attribute those same characteristics revealed in Dr Zurhaar’s and Dr Stone’s tests of the “Platypus” product, to all of the other products in the “Blastbag Hero” range of products.
5. Once the cross-claimant learned about the circulation of the information sheets, it complained to the cross-respondent. The cross-respondent responded to the cross-claimant’s complaint. On 25 June 2015, the cross-respondent published a statement which I presume it circulated to all of the persons to whom the previous information sheets had been sent. The statement stated:

PR Polymers wishes to provide you with an update to earlier information presented to you, namely our fact sheets dated 27 May, 5 June and the final amended copy on 8 June 2015, in relation to PR Polymers’ statements as to the MTi Blastbag HERO.

PR Polymers wishes to make clear that the tests conducted by SGS and ZEDCON (copies of these reports filed with the previous information sheet) were only conducted on samples of the MTi Blastbag Hero 230 mm Platypus product. SGS and Zedcon found the Blastbag Hero Platypus product to be flammable under ADG7 and that samples tested contained acetone levels of between 4% and 13.4%.

PR Polymers notes that MTi contests these findings.

Any views previously expressed by PR Polymers were only in relation to the MTi Blastbag Hero 230 mm Platypus product (samples of which were obtained from batch numbers 632459-100 and 632468-100) based on the above testing.

PR Polymers has commenced proceedings in the Federal Court of Australia in relation to the MTi Blastbag Hero 230 mm Platypus product. MTi has brought a cross-claim against PR Polymers. Both parties are seeking injunctions against the other in those proceedings and those injunctions are listed in the Federal Court of Australia on 2 July 2015. No date has yet been set for a trial.

1. Mr de Kerloy, on behalf of the cross-claimant, sought an interlocutory injunction which would prevent the cross-respondent from contacting the cross-claimant’s customers and making assertions to them in the form of the statements released and restraining the cross‑respondent from distributing the statements and the two expert reports referred to above. The cross-claimant also sought an order requiring the cross-respondent to disclose to the cross‑claimant all customers of the cross-claimant that the cross-respondent had contacted and distributed the statements and expert reports to.
2. On the question of whether the cross-claimant has demonstrated a prima facie case that the cross-respondent has engaged in misleading or deceptive conduct, my previous observations about the state of the expert evidence apply.
3. I, therefore, find that there are serious questions of sufficient merit to be tried, as to whether by circulating the statements the cross-respondent has engaged in misleading or deceptive conduct.
4. This leaves the question of the balance of convenience.
5. In relation to the balance of convenience, Mr Jeffery Anderson, a manager of the cross‑claimant, deposed to some of the difficulties the cross-claimant is having in dealing with customers to whom the cross-respondent had sent its information sheets. Mr Anderson said that the distribution of the information sheets has resulted in the need for the cross‑claimant to increase communication with their customers in order to put the alternative point of view and to seek to calm the customers who, in Mr de Kerloy’s words, have become “spooked” by the content of the cross-respondent’s information sheets. Mr Anderson also said that the distribution of the information sheets has a potential to affect adversely the cross-claimant’s sales.
6. Mr de Kerloy also referred me to *AAP Telecommunications Pty Ltd v Telstra Corporation Ltd* (1997) 38 IPR 650 (*AAPT*) in respect of the balance of convenience. In that case, Telstra had made and distributed statements which said, among other things, that AAPT was not solvent and would be going out of business. AAPT sought an interlocutory injunction to restrain the making and distribution of the statements. In weighing the balance of convenience, Einfeld J compared the position of Telstra, with that of AAPT, and said that if he was to grant the interlocutory injunction precluding Telstra from continuing to publish those statements, the only damage to Telstra would be that it would be unable to use the representations to poach AAPT’s customers pending a final hearing, and, therefore, would not suffer any real damage, whereas AAPT was liable to suffer unquantifiable loss to its reputation and business.
7. In my view, the circumstances of the *AAPT* case are very different from the circumstances in this case. In this case, the cross-claimant’s complaint is limited to the potential loss of sales in respect of a specific product. The cross-claimant would have financial records of historical sales of that product and would be able to make an assessment in relation to any diminution in sales which it may have suffered during the period from the commencement of the distribution of the information sheets until trial. Further, the cross-claimant will, in due course, get the benefit of discovery and it will, therefore, be able to determine whether there was any increase in sales from the other side.
8. In my view, a fairly accurate assessment of any loss or damage suffered by the cross-claimant will be possible. The fact that damages is an adequate remedy, is, therefore, a factor which weighs against the balance of convenience falling in favour of the cross-claimant.
9. In addition, the cross-claimant is able to and, has been, approaching its customers with the object of putting its response to the allegations made by the cross-respondent. The cross‑claimant is, therefore, able to engage, to some extent, in the process of self-help.
10. So, in my view, the balance of convenience does not favour the grant of an interlocutory injunction.
11. The consequence is that I will dismiss both of the applications for interlocutory injunctions.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis. |

Associate

Dated: 27 July 2015