HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S116/2023
File Title:	Wills v. Australian Competition and Consumer Commission &
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondents
Date filed:	08 Feb 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Blake Wills
Appellant

and

Australian Competition and Consumer Commission
First Respondent

Productivity Partners Pty Ltd (t/as Captain Cook College) ACN 085 570 547
Second Respondent

Site Group International Ltd ACN 003 201 910
Third Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST RESPONDENT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Question 1 – The knowing concern test for s 21 of the ACL does not require proof that a person determined subjectively that conduct offends conscience (FRS [15]-[41])

2. ***Mr Wills' fundamental error***: In order for a primary contravention under s 21 of the ACL to occur, conduct must be "in all the circumstances, unconscionable". The meaning of the word "unconscionable" in that provision is not at large; its content is informed by the values reflected in s 22(1): *ASIC v Kobelt* (2019) 267 CLR 1 **(Vol 5, Tab 32)** at [155], [302].

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3. If an alleged accessory is required to know that the primary contravener's conduct is unconscionable because it is an essential fact or element of the primary contravention, then he or she must subjectively believe that the conduct is unconscionable in the sense in which that word is used in s 21 of the ACL. A requirement that an accessory must know or believe that conduct is unconscionable in some <u>different</u> or <u>more general</u> sense would not partake of the asserted rationale: it would require knowledge of something that is not an element of the primary contravention. It follows that Mr Wills' approach must ultimately entail that an alleged accessory must know that conduct is contrary to s 21: cf *Giorgianni* (1984) 156 CLR 473 (**Vol 5, Tab 33)** at 506; FC [299] (**CAB 338**); AS [34].

20 4. ***Rural Press should be applied***: Mr Wills' argument closely resembles a submission that was advanced in *Rural Press Ltd v ACCC* (2003) 216 CLR 53 (**Vol 5, Tab 37**) which was emphatically and unanimously rejected: see page 57, [16], [22]-[26], [48]. The appellant has not sought leave to re-open that decision, which the Full Court majority correctly held to be directly inconsistent with his argument: FC [301]-[304], **CAB 339-340**. Further, Mr Wills' contention (at AS [35]-[36]) that *Rural Press* stands only for the proposition that an accessory need not appreciate that the primary contravener is contravening the law is irreconcilable with the arguments that were advanced and with the words used in the judgments of the High Court and Federal Court in rejecting those arguments: see *Rural Press Ltd v ACCC* (2002) 118 FCR 236 (**Vol 8, Tab 55**) at [154], [156], [162]-[163].

30 5. ***No facts/evaluation dichotomy***: The ACCC accepts that in some cases the "essential facts" that must be known may be facts that are deduced from other facts, or arrived at by comparison with other facts: contra AR [6]-[8]; cf FRS [29]. The relevant distinction is between: (i) having knowledge of the essential facts; and (ii) having a subjective belief about how those facts are evaluated against the values or norms embodied in the statute.

As the latter evaluation involves a legal question, the result of that evaluation is not an "essential fact" that makes up the contravention: *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [24]-[25]; *Minister for Immigration v SZVFW* (2018) 264 CLR 541 at [46].

6. ***Section 21 cases***: The ACCC's approach is consistent with the limited case law concerning accessories to contraventions of s 21: *Coggin* [2006] FCA 191 (**Vol 7, Tab 46**) at [72]-[73]; *Colin R Price & Associates Pty Ltd* (2017) 251 FCR 404 **(Vol 7, Tab 47**) at [89]. As pointed out in *Coggin*, requiring an accessory to have determined subjectively that a primary contravener's conduct offended conscience would perversely allow the "morally obtuse" to avoid liability: FC [313] (**CAB 344**); cf AS [39], AR [5].

10 7. ***Section 18 cases***: This Court should not enter into the debate that has arisen in cases concerning s 18 of the ACL in relation to the knowledge pre-condition for accessorial liability for that provision. It need not do so because, although the test stated in *Yorke v Lucas* (1985) 158 CLR 661 (**JBA 5, Tab 38**) is constant, the essential facts that it requires an accessory to know "depend upon the terms of the provision that has been contravened": *Rafferty v Madgwicks* (2012) 203 FCR 1 (**Vol 8, Tab 54**) at [253]. The decisions concerning s 18 of the ACL are apt to distract as many of them concern circumstances in which a representation was alleged to be false. Those authorities are distinct from the present case because whether a representation is false is a question of fact.

8. ***Correct approach distilled***: The essential matters that constitute a contravention of s 21
20 of the ACL are the facts that are proved at trial that establish that the primary contravener's conduct breached the statutory norm. The court's conclusion as to whether those facts amount to a contravention of s 21, which is arrived at by application of the values and norms enshrined in that provision, is not itself such a fact. Nor is an accessory's speculation about how a court might go about such an evaluation.

9. It follows that it is not necessary to show that the alleged accessory: (i) knew that there was a contravention of the law; or (ii) had determined or believed subjectively that the primary contravener's conduct could be characterised as offensive to conscience having regard to the norms and values in s 21 of the ACL.

30 **Question 2 – did Mr Wills have the requisite knowledge from 7 September 2015 onwards, or only from 20 November 2015 onwards? (Wills CAB 497-498; FRS [42]-[46])**

10. The majority in the Full Court at FC [340]-[341] (**CAB 357-358**) made two errors in concluding that Mr Wills did not have "sufficient awareness" as at 7 September 2015 of the extent to which the Outbound Call and campus driven withdrawal procedures were

important safeguards to protect unwitting or unsuitable students from the consequences of enrolment. ***First***, their Honours failed to have regard to the full gamut of findings made by the primary judge (and not disturbed on appeal) about Mr Wills' knowledge of the relevant risks, the nature of the enrolment process changes (and what drove them) and the College's business: PJ [204] (**CAB 63**), [220] (**CAB 67**), [282], [284] (**CAB 82-83**), [564] (**CAB 151**). ***Second***, the effect of the "Sero campus investigation" on Mr Wills' knowledge about the removed safeguards was impermissibly down-played at FC [340] in a manner that is incompatible with the findings at FC [323(a)] (**CAB 347-348**), which should be preferred.

Question 3 – was Mr Wills' conduct from 20 November 2015 sufficient to amount to participation in the College's contravention? (FRS [47]-[50])

11. Mr Wills "participated in, or assented to" or was "implicate[d] or involve[d]" in the College's primary contravention in two ways: *Rural Press* at [48]; *Ashbury v Reid* [1961] WAR 49 (**JBA 6, Tab 42**) at 51.

12. ***First***, against the wishes of Mr Cook (the CEO) and as the culmination of his increased involvement in the affairs of the College, Mr Wills became the College's acting CEO on 20 November 2015 because he wanted to manage the changes that he already knew had been planned and were being implemented: PJ [567]-[568] (**CAB 151-152**). Mr Wills was a "key driver" of those changes (PJ [573] (**CAB 152**); FC [127] (**CAB 274**); he continually supported and concurred with them FC [293]-[295] (**CAB 336-337**). In becoming acting CEO (that is, the senior executive responsible for running the College, with management and oversight) in these circumstances, Mr Wills associated himself with the College's continuing contravention.

13. ***Second***, specific examples of Mr Wills' conduct after 20 November 2015 include: (i) his provision of feedback in November 2015 on the College's admissions checklist (PJ [371] (**CAB 103**)); (ii) his oversight of progressing uncontactable and/or disengaged students (PJ [574] (**CAB 153**)); and (iii) his endorsement in December 2015 of the decision of the College to continue to claim and retain VFH revenue in respect of students enrolled between September and December 2015, even after enrolments had ceased (PJ [401] (**CAB 109**), [552] (**CAB 148**); FC [126(d)], (**CAB 274**)).

Dated: 8 February 2024

Stephen Donaghue Oren Bigos Stephanie Patterson Luca Moretti