JUDGMENT No. 1621 of 92

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G448 of 1991
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: EASTERN EXPRESS PTY LIMITED
Appellant

AND: GENERAL NEWSPAPERS PTY LIMITED
First Respondent

DOUBLE BAY NEWSPAPERS PTY LIMITED
Second Respondent

BREHMER FAIRFAX PTY LIMITED
Third Respondent

JOHN B FAIRFAX
Fourth Respondent

JOHN HANNAN
Fifth Respondent

FRANK HANNAN
Sixth Respondent

NICKELBY PTY LIMITED
Seventh Respondent

COURT: Lockhart, Beaumont and Gummow JJ.
DATE: 2 April 1992
PLACE: Sydney

CORRIGENDUM

Reasons for judgment of the Honourable Mr Justice Lockhart and the Honourable Mr Justice Gummow be amended as follows:

Page 67, certification clause to read:

> I certify that this and the preceding sixty-six (66) pages are a true copy of the reasons for judgment herein of the Honourable Mr. Justice Lockhart and the Honourable Mr. Justice Gummow.
> Associate: Dated: 2 April 1992

D Scaglov
Associate to Lockhart J.
15 April 1992

CATCHWORDS

TRADE PRACTICES - Section 46 *Trade Practices Act* - misuse of market power - market definition - whether market limited to a publication of display advertising of real estate in eastern suburbs of Sydney - meaning of a "corporation" - whether corporation in s. 46 limited to a single corporation to determine market power - consideration of market power derived from two or more corporations in a partnership - meaning of "purpose" - whether predatory pricing or legitimate commercial reaction - appropriateness of injunctive relief involving Court monitoring continuing business activity.

Trade Practices Act 1974: s. 46.

Acts Interpretation Act 1901: s. 23(b).

EASTERN EXPRESS PTY LIMITED v GENERAL NEWSPAPERS PTY LIMITED, DOUBLE BAY NEWSPAPERS PTY LIMITED, BREHMER FAIRFAX PTY LIMITED, JOHN B FAIRFAX, JOHN HANNAN, FRANK HANNAN, NICKELBY PTY LIMITED

G448 of 1991

RECEIVED
2 APR 1992
FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

LOCKHART, BEAUMONT and GUMMOW JJ.

2 APRIL 1992

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G448 of 1991
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: EASTERN EXPRESS PTY LIMITED
Appellant

AND: GENERAL NEWSPAPERS PTY LIMITED
First Respondent

DOUBLE BAY NEWSPAPERS PTY LIMITED
Second Respondent

BREHMER FAIRFAX PTY LIMITED
Third Respondent

JOHN B FAIRFAX
Fourth Respondent

JOHN HANNAN
Fifth Respondent

FRANK HANNAN
Sixth Respondent

NICKELBY PTY LIMITED
Seventh Respondent

COURT: Lockhart, Beaumont and Gummow JJ.
DATE: 2 April 1992
PLACE: Sydney

MINUTE OF ORDER

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the costs of the respondents of the appeal, including any reserved costs.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G448 of 1991
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: EASTERN EXPRESS PTY LIMITED
Appellant

AND: GENERAL NEWSPAPERS PTY LIMITED
First Respondent

DOUBLE BAY NEWSPAPERS PTY LIMITED
Second Respondent

BREHMER FAIRFAX PTY LIMITED
Third Respondent

JOHN B FAIRFAX
Fourth Respondent

JOHN HANNAN
Fifth Respondent

FRANK HANNAN
Sixth Respondent

NICKELBY PTY LIMITED
Seventh Respondent

COURT: Lockhart, Beaumont and Gummow JJ.
DATE: 2 April 1992
PLACE: Sydney

REASONS FOR JUDGMENT

LOCKHART and GUMMOW JJ.

Introduction

This is a dispute between the proprietors of two newspapers circulating in the Eastern Suburbs of Sydney: the "*Wentworth Courier*" and the "*Eastern Express*". Each of the newspapers is delivered to residents of the eastern suburbs free of charge.

The only source of revenue of each is advertising, most of which is derived from display advertising of real estate which is situated predominantly in the eastern suburbs.

The ultimate question in the appeal is whether the proprietors of the *Wentworth Courier* have contravened s. 46 of the *Trade Practices Act* 1974 ("the Act") by offering reduced advertising rates since 1988. The first three respondents (General Newspapers Pty Limited, Double Bay Newspapers Pty Limited and Brehmer Fairfax Pty Limited) are the proprietors of the *Wentworth Courier*; they carry on business in partnership as Eastern Suburbs Newspapers. We shall sometimes refer to those respondents as "ESN" for convenience, but one of the questions which arises as to the construction of s. 46 is whether the reference in the section to its contravention by "a corporation" may include a plurality of corporations. This question is considered later, and we do not intend by use of the letters "ESN" to obscure it; so where appropriate, we shall refer to the first three respondents as "the respondents". This reference is not intended to include the fourth, fifth and sixth respondents, who were not the subject of any submissions on this appeal.

For the ultimate question to be answered against the respondents each of the necessary elements of s. 46 must be established, namely, that at material times:

1. there was a market for the relevant goods or services;

2. each of the respondents had a substantial degree of power in that market; and

3. each of them took advantage of that power for the purpose of eliminating or substantially damaging the appellant, Eastern Express Pty Limited, a competitor of ESN in that market.

Section 46 reads as follows:

> *"46(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -*
>
> *(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
> *(b) preventing the entry of a person into that or any other market; or*
> *(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*
>
> *(2) If -*
>
> *(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or*
> *(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market;*
>
> *the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.*

(3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of -

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

(4) In this section -

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

(5) Without extending by implication the meaning of sub-section (1), a corporation shall not be taken to contravene that sub-section by reason only that it acquires plant or equipment.

(6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, by reason that an authorization is in force or by reason of the operation of section 93.

(7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in sub-section (1) notwithstanding that, after all the evidence has been considered, the

> *existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances."*

The appellant instituted this proceeding in the original jurisdiction of the Court claiming that the respondents had engaged in misleading or deceptive conduct contrary to s. 52 of the Act with respect to advertising rates, advertising costs and circulation rates. As the learned trial Judge (Wilcox J.) observed in his reasons for judgment (now reported at 30 FCR 385), the s. 52 claims disappeared from the case at an early stage and he dismissed them by consent. After the commencement of the proceeding the appellant amended its statement of claim alleging that the respondents had contravened s. 46 of the Act. The respondents cross-claimed against the appellant and sixteen other cross respondents, all of whom were either shareholders in the appellant or persons having such an association with corporate shareholders that they might properly be regarded as being knowingly concerned in any breach of Part IV of the Act by the shareholder (see s. 75B of the Act), an association that was not disputed. The respondents put their cross claim in a variety of ways, relying on ss. 45, 45D and 47 of the Act. This cross claim had its genesis in article 4A(2) of the articles of association of the appellant which in essence required the "A" class shareholders, who were real estate agents or persons associated with them, to advertise in the proposed publication of the appellant intended to compete with the *Wentworth Courier*.

His Honour held that the relevant provisions of the article had the effect or likely effect of substantially lessening competition for the purposes of s. 45(2)(a)(ii) of the Act and thus contravened that provision. In the circumstances his Honour did not find it necessary to deal with the alternative claims made by the respondents based on ss. 45D and 47. The appellant and the other cross respondents to the respondent's cross-claim did not appeal from his Honour's judgment with respect to the cross claim. The provisions of Article 4A(2) are relevant to the appeal both as forming part of the factual matrix of the case and, in particular, as bearing upon the question of whether the respondents had market power (s. 46(1)) at relevant times.

The essential findings of the trial Judge on the appellant's claim under s. 46 were that:

1. The relevant market was the market in which real estate agents, predominantly in the eastern suburbs, acquired services from local newspapers circulating in the eastern suburbs, such services being the publication of display advertisements for real estate;

2. ESN had a substantial degree of power in that market; but

3. ESN had not taken advantage of that power for the proscribed purpose of eliminating or substantially damaging the appellant, and that the reduced advertising rates were

dictated by a perception on the part of ESN that they were necessary to defend the *Wentworth Courier* and ESN's commercial interests against the competition offered by the *Eastern Express*.

The Facts

It is necessary to state the material facts, most of which we take from his Honour's reasons. Some of his findings of fact were disputed by one or more of the parties, but in the end the appeal does not turn on them.

The *Wentworth Courier* was first published in 1961. For the whole of its history, the *Wentworth Courier* has been published by a partnership, although the composition of that partnership has changed from time to time. The partnership carries on business as Eastern Suburbs Newspapers and assumed its present form in 1988. The third respondent ("Brehmer Fairfax"), with which the fourth respondent ("Mr Fairfax") is associated, receives a 50% share of the profits of the partnership. The first and second respondents ("General Newspapers" and "Double Bay Newspapers" respectively) are subsidiaries of F. Hannan Pty Limited and each receives a 25% share in the profits. The fifth and sixth respondents ("Mr John Hannan" and "Mr Frank Hannan" respectively) are associated with General Newspapers and Double Bay Newspapers. ESN presently publishes three newspapers circulating in various suburbs of Sydney including the *Wentworth Courier* which is distributed in the municipalities of Woollahra

and Waverley. It is delivered to householders and other persons within its area of distribution and, as mentioned earlier, it is provided free of charge, the only source of revenue being advertising. Each of the three newspapers is printed for ESN by Hannanprint, a division of the ESN partnership. Hannanprint is the second largest newspaper printer in Australia. It prints not only for ESN newspapers but also publications produced by publishers in which the ESN partners have no proprietary interests. Hannanprint charges ESN for printing its newspapers at the same rate as it charges strangers. These charges involve some profit, so that in assessing the profitability of the *Wentworth Courier* to its proprietors his Honour found it necessary to consider the printing profit earned by Hannanprint, especially since the principal complaint by the appellant arising under s. 46 was that ESN had engaged in predatory pricing.

The circulation of the *Wentworth Courier* is approximately 50,000. Traditionally most of ESN's advertising revenue is derived from the *Wentworth Courier*. In recent times ESN has attempted to build up the *Wentworth Courier's* advertising with some success, but its strength has always been with respect to its display advertisements, the bulk of which have been those relating to the sale of real estate. Local agents in the Woollahra and Waverley municipalities frequently advise their clients to offer their properties for sale by auction because of the value of much of the housing there. The evidence indicates that the real estate agents are influential in determining the

placement of advertisements; and it is usual for vendors to accept the recommendations of their agents. From the time of its establishment until February 1990 (when the *Eastern Express* first appeared) the *Wentworth Courier* was the primary advertiser of real estate situated within its distribution area. Such properties were often advertised in national newspapers, in particular the Sydney Morning Herald, and sometimes in the Australian Financial Review, the Australian or the Daily Telegraph; but vendors generally thought it necessary also to advertise in the *Wentworth Courier*. For some years before February 1990 the only local competitors had been two newspapers with small circulation and for which payment was required: the "Australian Jewish Times" and the "Australian Spectator". It was generally thought important to advertise a local property of any significant worth in the *Wentworth Courier*.

Until 1987 the *Wentworth Courier* was printed entirely in black and white. In that year ESN commenced to insert colour pages in some issues. Very often there would be only four colour pages: the front and back cover and the inside pages of those covers. The front cover did not carry display advertising, so this arrangement permitted only three pages of colour display advertisements. If three pages were insufficient in any particular issue the colour segment might be inserted inside the newspaper so as to give four pages of colour advertisements or more rarely there might be eight colour pages. For technical reasons the colour component had to be a multiple of four pages.

At that time colour advertisements were extremely expensive. The price was $4,000 for a full page calculated on the basis that only three revenue pages would normally be available to cover the cost of the colour section.

In mid June 1988 Mr Solomon, a marketing consultant who resided in the eastern suburbs area, and Mr Spira, a business associate and friend of Mr Solomon, discussed the possibility with at least eleven local real estate agents of publishing a colour magazine devoted entirely to the advertising and promotion of eastern suburbs real estate and thus competing with the *Wentworth Courier*. Mr Spira had an association with a printer called *Diamond Press*. Each of the real estate agents involved in the discussions was required to enter into a secrecy agreement with Mr Solomon. The discussions confirmed Mr Solomon's perception that the *Wentworth Courier* was vulnerable to competition in respect of its real estate advertising. In particular he felt that a rival publication ought to be able to provide more colour advertisements than the *Wentworth Courier* but at a cheaper cost. Mr Solomon and Mr Spira decided to proceed with the venture a fundamental element of which was that a number of major real estate agents hold shares in the company which was to be formed to publish the new publication and that they would be contractually bound to advertise in it.

Over the ensuing months there were numerous discussions about the proposed new publication. News of the proposal spread

quickly amongst eastern suburbs real estate agents and excited considerable interest and at times acrimony.

The management of ESN became aware of the proposed new publication not later than early August 1988. In a memorandum sent to some ESN sales staff on 5 August 1988 Mr Michael Hannan, chief executive of Hannanprint, expressed concern about Diamond Press "coercing" real estate agents to leave the *Wentworth Courier* and to join the new paper by "offering shares in the paper". He said:

> *"Well gentlemen, it is not on. They are attempting to attack the flagship of the group and I am not prepared to even see the 'flagship' dented."*

The memorandum proceeded to speak of retaliative measures:

> *'I am sick and tired of Diamond Press. If they want to persist in pinching our staff, undercutting our prices and generally lowering the market prices and now the final straw, the attack on the 'Wentworth Courier' - it is now time we reacted.*
>
> *Here is where you come into the picture.*
>
> *Until now as you well know, I have resisted a price cutting war with Diamond Press. Well gentlemen, it is 'no holds barred' now.*
>
> *You are to identify their clients, you have my authority to quote work that they are doing and win it for this group, always of course at the maximum price you can achieve."*

The price cutting mentioned in the memorandum related to printing costs. Mr Hannan was authorising a price cutting war by Hannanprint, as a printer, against Diamond Press, as a printer. The memorandum had nothing to do, as his Honour found, with price cutting for advertising in the *Wentworth Courier*. The appellant relied on this evidence as demonstrating Mr Michael Hannan's willingness to use Hannanprint's strength to damage Diamond Press and therefore prevent the birth of the prospective rival. This willingness was said by the appellant to lend support to the suggestion that ESN was actuated by a similar purpose, at a later stage, in reducing the advertising charges of the *Wentworth Courier*.

ESN sought to sever the link between Messrs Solomon and Spira and the other real estate agents involved in the proposal to establish a rival newspaper and to dissuade others from joining them. One of the measures adopted to achieve this purpose was that the management of ESN gave a dinner for about 100 real estate agents in August 1988 in which the virtues of the *Wentworth Courier* were extolled, but his Honour found that the dinner seemed to have no influence on those who were involved with the discussions with Mr Solomon and Mr Spira.

During the period July to November 1988 a fundamental change was made to the concept contemplated by Mr Solomon and Mr Spira, namely, it was decided that the new publication should be a full local newspaper rather than a magazine relating only to property.

It was to be modelled upon the *Wentworth Courier,* though with a greater editorial content; but like the *Wentworth Courier* it would be distributed free of charge once each week.

The appellant was incorporated in November 1988 and in mid 1989 the Articles of Association were amended to provide for the issue of "A" and "B" class shares. Article 4A(2) specified certain of the rights attaching to the "A" class shares which were to be held by real estate agents or persons associated with them and which gave rise to the cross claim with respect to the provisions of Article 4A(2)(e). There were to be 175,000 "A" class shares and 75,000 "B" class shares which were to be held by interests associated with Mr Solomon, Mr Spira and a Mr Orum. In the result it meant the real estate agents would hold 70 percent of the issued share capital. Decisions about the number of parcels of shares to be held by each A class shareholder and the extent of that shareholder's obligations were related directly to the amount of advertising which that shareholder had customarily placed at the *Wentworth Courier*. His Honour found that article 4A(2)(e) contained, what were described in submissions of the parties and the reasons for judgment of his Honour, as the quota provisions which in essence bound the "A" class shareholders (eastern suburbs real estate agents) to advertise in it to a value calculated by reference to a quota, provided that any such shareholder who failed to meet his or her quota was liable to be debited for any shortfall as if advertising to the value of the quota had been lodged, and

further provided that any such shareholder who failed to pay for advertisements placed or deemed to have been placed was liable to pay interest on the debt at a penal rate and that any such shareholder who placed advertisements above his or her quota had an expectancy of a bonus.

There was a meeting of shareholders of the appellant held on 28 September 1989 when arrangements for the new publication proceeded. The appellant entered into a printing agreement with Spika Trading Pty Limited trading as Diamond Press and a consultancy agreement with a company associated with Mr Solomon. Premises were leased at Double Bay and staff were recruited.

Having failed to influence the key real estate agents ESN decided to take the contest to the readers of the *Wentworth Courier*. In August 1989 for the first time the newspaper was issued in a waterproof wrapping. In a letter of 16 August to the readers of the *Wentworth Courier* ESN said that the paper was the only home-delivered flat waterproof-wrapped newspaper in Australia. Shortly afterwards Mr John Hannan, the managing director of ESN, issued a circular letter to readers of the *Wentworth Courier* headed "Important Notice to Real Estate Vendors" and "Beware of Imitations". The letter read:

> *"Some real estate agents are getting together shortly to produce a new local newspaper in which they will be shareholders.*

These real estate agents will use your advertising money to help finance their newspaper venture. They are not satisfied to earn a profit from selling your home but seek to make further profits by directing your advertising into their newspaper. They have set themselves up to make a profit out of your advertising money regardless of whether they sell your house.

One of the most important financial and personal decisions you will make is the sale of your own home.

You can maximise the price you get for your property by choosing the right real estate agent and the best possible advertising medium to promote your property.

There is no doubt the 'Wentworth Courier' has been and continues to be without equal in delivering readership and buyers for quality real estate in the Eastern Suburbs and beyond.

There is no other newspaper like the 'Wentworth Courier'. It has been judged the best suburban newspaper in Australia in 1987 and 1989. Potential buyers of real estate seek out the 'Wentworth' from all parts of Sydney and interstate.

If the real estate agent you have chosen to sell your property in the Eastern Suburbs is encouraging you to support 'his' newspaper as a substitute for the 'Wentworth Courier' you could run a grave risk of not achieving the maximum return on the sale of your property.

You only get one go, do it right with the proven performer. Support the real estate agents that support the 'Wentworth Courier'. Insist that your real estate agent advertises your property in the 'Wentworth Courier' - you pay the bill - see that your money is spent wisely."

At about this time (late 1989) ESN expanded the distribution area of the *Wentworth Courier* so as to take in the whole of the

municipality of Waverley instead of only the northern half of that municipality as before. Circulation increased to about 50,000 per week. For a period in November-December 1989 the newspaper was published twice a week instead of weekly; but this innovation was not well received by the local real estate agents and it was abandoned after only six weeks when weekly publication was resumed.

In December 1989 ESN decided to offer a concession to real estate advertising. In a circular letter to real estate agents dated 8 December 1989 Mr John Hannan referred to the existing black and white full page rate of $1,330 and announced that, from 1 January 1990 and until further notice, for each two pages placed and paid for in the same issue valued at $2,660 ESN would allow a third page free in the same issue, thus reducing the cost to advertisers who placed at least three pages to $887 per page. ESN also offered a concession for repeats of the same advertisement in the following week's issue of the "*Weekly Southern Courier*" distributed by ESN in the municipalities of Randwick and Botany.

However ESN soon considered that this would not be enough. With the first issue of the *Eastern Express* obviously imminent, it decided to reduce the black and white rate generally. The circumstances of the decision as deposed to by Mr Michael Hannan were expressed by him in an affidavit which formed part of the evidence at the trial in these terms:

"2. In January 1990 I convened a meeting of various executives of ESN to consider our response to the new competitor, the Eastern Express ...

3. From enquiries I had caused to be made throughout the real estate and advertising industry I was informed and I then believed that:-

(a) The Wentworth Courier would have a competitor which would produce a competing product to the Wentworth Courier on a superior quality paper with more extensive use of colour throughout the paper;

(b) The circulation of the new competitor would be 60,000 copies;

(c) The black and white advertising rate would be approximately $1,190 per page;

(d) There would be extensive use of editorial colour throughout the publication;

(e) A high quality editorial staff would be employed.

4. At that time the contract advertising rate for a full black and white page in the Wentworth Courier was $1,340. We regarded that price as not competitive with the price which we believed the competitor was to introduce namely, $1,190 contract rate for a full page black and white advertisement with a circulation of approximately 60,000 because the competitor would be using superior quality paper and with higher profile editorial and with extensive use of colour throughout the magazine.

5. After some discussion a suggestion was made that we strike a contract rate for black and white advertisements of $1,000 for a full page. After further discussion it was agreed that for better marketing a rate of $995 would be preferable and the meeting generally

agreed with that figure. I had earlier made some very rough costing calculations based upon my knowledge of the production costs of the Wentworth Courier and the fixed and variable costs of the ESN newspapers and determined that if we were able to achieve similar volumes of advertising pages to those previously enjoyed the paper would still make a profit of approximately $200 per page at the rate of $995.

6. *I understood that some of the real estate agents who had advertised in the Wentworth Courier would be shareholders in the Eastern Express and would probably be committed to it in some way, however at that time, I was not aware of and I did not appreciate the effect of the quota system in the articles in relation to the required level of advertising to be placed with the Eastern Express in any one year. I believed that there would remain a substantial degree of vendor choice and loyalty to the Wentworth Courier as a newspaper established in the area for over 30 years. My costings previously referred to in ascertaining the profit the Wentworth Courier would make on a rate of $995 per black and white page assumed we would maintain comparable volume of advertisements to allow the economies of scale that had always applied to the Wentworth Courier to be maintained.*

7. *At the meeting in January 1990 I was aware of comparable contract rates for full page black and white advertisements in other newspapers. In particular I was aware that the Eastern Herald published by John Fairfax & Sons Limited charged approximately $700 contract rate for a full page black and white advertisement and claimed a circulation in excess of 50,000 copies per week. I regarded it as necessary to lower our rate closer to the Eastern Herald because my view at that time was that that paper was likely to benefit from the competition between the Wentworth Courier and the Eastern*

Express."

The *Eastern Herald* is a free newspaper inserted into those copies of the *Sydney Morning Herald* which are distributed in Sydney's eastern suburbs.

The evidence of Mr Michael Hannan was not challenged in cross examination subject to what his Honour described as the possible qualification arising out of the circumstance that it was put to Mr Hannan that the lower rate was struck with the purpose of discouraging advertisers from using the *Eastern Express* and instead advertising with the *Wentworth Courier*. Mr Hannan replied:

> *"We struck a rate which reflected the difference in the two products. The perceived difference in the two products, from readers and advertisers. You can't expect to get a rate in a newsprint publication that is higher than the rate in a gloss publication. "*

Following the meeting referred to by Mr Hannan, on 19 January 1990 ESN announced its revised display advertising rates effective from 31 January 1990 as follows:

> *"Full Page .... $995 was $1,330*
> *Half Page .... $500 was $665*
> *Quarter Page $300*
> *Colour Page .... $2,500"*

Although these new rates did not affect the existing colour

arrangements, Mr Michael Hannan had that rate under review. His affidavit proceeded:

> *"8. Later in January 1990 I was informed by sources within the industry and believed that the Eastern Express planned to introduce a full page contract colour rate of $2,000. I also believed that the Eastern Express intended to use colour extensively for editorial purposes. I decided that it might become necessary for the Wentworth Courier to reduce its colour rate from an average of $2,500 a page inclusive of costs to approximately $1,600 a page including costs. At an informal management meeting held a short time later it was decided that if it did the full colour page contract rate should be $1,565 including processing costs. It was my belief that the competitor would have a circulation in excess of the Wentworth Courier and therefore, in accordance with standard industry practice, it would be able to charge higher colour advertising rates per page to reflect the higher circulation. I also believed from the information I had received that the competitor would be able to place colour full page advertisements at random throughout its publication. The Wentworth Courier was limited to placing such colour advertisements in eight page blocks either around the cover or in the centre of the paper. The rate of $1,565 was not adopted for actual colour advertisements until June 1990 ie $1,295 plus $270 for processing costs."*

ESN did not confine itself to revising its advertising. It decided to directly attack the main source of support for the new newspaper, namely, the real estate agents in the eastern suburbs. In successive issues, on 10 and 17 January 1990, ESN inserted

full page notices in the *Wentworth Courier* relating to the relationship between a property vendor and his or her retained real estate agents. The first notice was entitled "Important Notice to Vendors" and asked the qustion "Is your Real Estate Agent breaching his Code of Ethics?" An extract from the Code of Ethics of the Real Estate Institute of New South Wales was printed. This extract states that:

> *"A member must not have any interest in any transaction in which he acts as agent otherwise than in his capacity as agent, unless his principal has given prior written consent."*

The notice concluded as follows:

> *"As a vendor, you are the principal. You pay the advertising bill. Make sure that your money is spent in a paper with audited circulation and guaranteed readership, so that you will achieve maximum awareness.*
>
> *If your Real Estate Agent places your ad in a paper in which HE HAS SHARES, he is obliged by his Code of Ethics to obtain your prior written consent to do so. Don't give it lightly.*
>
> *Instruct him to consider the Courier."*

The second notice was described by the trial Judge as being even more "hard-hitting". It replayed the same theme, but contained a reference to the possibility that failure by an agent to disclose a shareholding in a recommended newspaper might constitute an offence under the *Crimes (Secret Commissions)*

Amendment Act 1987 (NSW).

During January 1990 Mr John Hannan gave an interview to Mr Tony Burrett, a journalist preparing an article for a publication called "Ad-News". In his article Mr Burrett attributed the following statement to Mr Hannan:

> *"Managing director John Hannan said the paper had already taken steps to make it more difficult for the newcomer to succeed, including wrapping the Courier in clear plastic, giving readers free cookbooks and offering deals to real estate agents.*
>
> *Hannan said the Courier has weathered competition before and indicated the winner of the battle would be the surviver (sic) of extended advertising rate-cutting.*
>
> *He also said the attitude of real estate vendors would be a key factor in the war.*
>
> *'If you're selling your house in Point Piper you are going to say to your estate agent 'why isn't my ad in the Wentworth Courier''*
>
> *As well, he said some vendors might question the idea of paying for ads in a newspaper partly owned by their estate agents."*

Mr Hannan disputed some elements of this attribution. In answers to interrogatories he agreed that he referred to the *Wentworth Courier* being wrapped in clear plastic and to free cookbooks and deals with real estate agents, but he denied that he stated that these steps had been taken to make it more difficult for the newcomer to succeed. He also conceded that the reference to the *Wentworth Courier* having weathered competition before was made by him, but denied saying that the winner of the

battle would be the survivor of extended rate-cutting. His Honour noted that Mr Burrett was called to the witness box by counsel for the applicant to say that his story was correct as printed and that he had checked it in draft form against his notes of the interview which he had since destroyed. His Honour said:

> *"I have no reason to doubt this evidence; but I do not think that it much matters whether or not Mr Hannan made the disputed statements. Whether or not he admitted them, the disputed elements of the interview were obviously correct in point of fact."* (at 397)

This finding was the subject of submissions before us to which we shall refer later.

On 31 January 1990, the day before the launch of the *Eastern Express*, ESN offered a further concession in relation to real estate black and white advertising. Under this concession agents would be entitled in each month to January 1991 to take at the concession rate of $695 per page the number of pages of advertising taken in the month of February 1990. Excess pages would be at the rate of $995 per page.

The advertising charges made by the *Eastern Express* in respect of its first issue on 1 February 1990 were:

> *"Black and white - full page $1,295*
> *- half page $745*
> *- quarter page $397*

Colour - full page	*$2,390*
- half page	*$1,750"*

These rates have remained unchanged since that date.

As at the date of the first issue of the *Eastern Express* it claimed a distribution greater than that of the *Wentworth Courier*: 55,000 as against 50,000. But the distribution of the *Eastern Express* dropped to 41,500 in May 1990. At that time the distribution area of the *Eastern Express* was reduced by deleting deliveries to properties in a number of areas which had yielded little revenue: Woolloomooloo, Darlinghurst and parts of Kings Cross and Surry Hills. According to Mr Solomon the circulation of the *Eastern Express* at the date of trial was about 43,000.

On 1 February 1990 Mr John Hannan sent a circular letter to local real estate agents in which he commented on the cost of the *Eastern Express*. In particular, he noted that the newcomer used glossy paper which cost almost twice as much as the newsprint used by the *Wentworth Courier*. He posed a series of questions about the likely cost of, and profits derived by Diamond Press from, the printing of the paper. His Honour found that the letter was obviously designed to make real estate agents cautious about committing themselves to the *Eastern Express*, especially as shareholders.

On 5 February 1990 there was a meeting of the board of direction of ESN (the partnership's equivalent of a company's

board of directors). The minutes of that meeting contain an entry relied upon by ESN. Against the side-note "Opposition Paper" the minute says:

> *"A long discussion took place re the first issue of Eastern Express (Feb 4th)(sic). Over twenty of the shareholders are real estate agents who used to support Wentworth Courier. All possible steps are being taken and will be taken to restrict its share of the market."*

The next few issues of the *Wentworth Courier* all carried notices, in the form of advertisements, concerning the *Eastern Express*. The notices criticised the distribution of the *Eastern Express*, many copies of early issues being said to have gone astray in the delivery process or to have been spoilt by rain and reference was made to the newspaper's higher advertising rate. Some of the notices contained endorsements of the *Wentworth Courier* by advertisers and well known personalities. During this early period the *Wentworth Courier* ran a series of notices listing the names of the local agents who were currently advertising in that newspaper and those who were not. According to these notices there was a rapid decline in the number of agents in the latter category; that category being entirely eliminated by the end of February 1990. The *Eastern Express* continued to carry a considerable volume of real estate advertising; most of which, the management of ESN believed, would otherwise have come to the *Wentworth Courier*. Mr John Hannan continued to lobby the agents.

By not later than 7 February 1990 reductions on an ad hoc basis in the costs in the *Wentworth Courier* of full colour page advertisements was reduced to $1,500 for a full page and $750 for a half page and this reduction continued to June 1990.

On 26 February 1990 Mr John Hannan wrote a lengthy circular letter in which he emphasised the merits of the *Wentworth Courier,* especially its distribution, efficiency, lower printing costs and lower advertising rates. In that letter he announced that the reduced black and white full page rate of $995 would be held firm until 30 June 1991.

It was not until May 1990 that the management of ESN learned of the quota provisions in the Articles of Association of the appellant. ESN executives had been aware that many real estate agents had taken shares in the appellant, but they had not previously realised that this step involved any commitment to advertising in the *Eastern Express* as distinct from an obvious financial interest in doing so. Mr John Hannan wrote to the shareholders of the appellant who were also real estate agents a letter of 4 May 1990 in which he said that ESN had legal advice that the quota did not prevent the agents advertising in the *Wentworth Courier*. He made certain other statements which are not relevant for present purposes.

On 1 June 1990 Mr Hannan sent a further letter to those shareholders withdrawing certain of the suggestions made in his

letter of 4 May 1990 that shares in *Eastern Express* might be forfeited.

Shortly after a board of direction meeting of 8 June 1990 ESN decided to reduce its colour advertising rate to $1,295 per page. If an advertisement was booked for three weeks or more no production cost was added; if for a lesser run, a production charge of $270 was payable.

On 30 June 1990 a circular was issued by ESN stating that rates for advertising in its newspapers other than the *Wentworth Courier* were due to rising production costs.

On 13 July 1990 a magazine named "*B & T*" published what purported to be the text of an interview given by Mr John Fairfax, the fourth respondent who is associated with Brehmer Fairfax Pty Limited, one of the three partners in the partnership constituting ESN The interview concerned many subjects including the battle between the two newspapers. In answer to interrogatories tendered at the trial Mr Fairfax conceded that in the course of the interview he made statements to the effect of each of the following:

> *"It's been a very vigorous fight. Some real estate agents have been offended by the aggressive nature of the Wentworth Courier over this, which is unfortunate because in the past they have also been advertisers. In competition we are used to fighting vigorously, and that's certainly the attitude of the Hannan family.*

> *The Hannans are good publishers, and the competitor is getting itself into a bind by being almost too good, producing on high quality paper. The Wentworth Courier is produced on newsprint, on fully depreciated presses and charging advertising rates which we really can't afford. But we will charge those rates simply because it's a bigger company which has a printing, magazine and distribution side. Therefore we can afford to take it on the nose."*
>
> *"Q. 'What you are saying is that there's a discount war going on out in Sydney's eastern suburbs and you can last longer.'*
>
> *A. 'That's right.' "*

In July 1990 the *Wentworth Courier* commenced its campaign of comparative advertising doubtless to publicise its new full page colour advertisement. The initial advertisements overstated some of the rates charged by the appellant and his Honour found this led directly to the institution of litigation on 23 August 1990 where the appellant alleged contraventions by ESN of s. 52 with respect to this advertising. Almost immediately after the institution of the proceedings ESN accepted its errors and published a correction, but it continued its comparative advertising.

The colour advertising rate published by the *Wentworth Courier* on 3 October 1990 existed to at least the conclusion of the trial. The agents who are shareholders in the appellant directed most of their advertising to the *Eastern Express*. In the period 1 February 1990 to 29 January 1991 shareholders in the appellant who were also agents placed advertising worth $676,670

with the *Wentworth Courier*. In the period 1 February 1990 to 10 January 1991 (his Honour said on one view it could be 31 December 1990 - the January data being confused and incomplete) the same agents placed $3,941,454 worth of advertising with the *Eastern Express* (at 400). That is to say over 85% of all expenditure by or through those agents was directed towards the paper in which they held shares. This direction was substantially at the expense of the *Wentworth Courier*. In the twelve months from 1 February 1988 to 31 January 1989 twenty-three listed agents who are shareholders in *Eastern Express* lodged with the *Wentworth Courier* advertisements worth $3,606,264 at an average cost of $4.30 per column centimetre. In the following twelve months to 31 January 1990 their expenditure rose to $4,400,193 at $4.90 per column centimetre. But in the first year of the *Eastern Express*'s existence to 31 January 1991 they inserted advertisements in the *Wentworth Courier* worth only $676,676 even though the cost was down to $3.98 per column centimetre.

Submissions of the Parties

The trial Judge accepted the appellant's definition of the relevant market as being the market in which real estate agents, predominantly in the eastern suburbs of Sydney, acquire services from local newspapers circulating in the eastern suburbs, such services being the publication of display advertisement for real estate. The appellant did not dispute his Honour's finding that ESN had a substantial degree of power in that market. The appellant contended before us that his Honour erred in finding

that ESN did not take advantage of that market power for the purpose proscribed by s. 46(1)(a) of eliminating or substantially damaging the appellant a competitor of ESN. The only paragraph of s. 46(1) which was said by the appellant to apply was paragraph (a).

The appellant did not challenge the construction attributed by his Honour to the phrase in sub-section (1) of s. 46 "shall not take advantage of" market power, namely, that there is "no prerjorative connotation" in the words "take advantage of" which means no more than "use" market strength, the suggestion made by Toohey J in *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited* (1989) 167 CLR 177 at 213-214.

The essential thrust of the appellant's submissions was that his Honour erred in various respects (principally three to which reference shall be made later) in assessing the evidence when concluding, erroneously so it was said, that when cutting the price of advertising rates for the *Wentworth Courier* from 1988 onwards, ESN's action was not "other than a genuine reaction to the predicament in which the partnership found itself" and that "the price cuts were not dictated by anything other than a perception that they were necessary to defend the *Wentworth Courier* and ESN's commercial interests" (at 408). In the end the appellant's submissions came down to a criticism of findings of fact by the trial Judge and they concluded with the proposition

that this Court as an appellate court is "in as a good a position to draw those inferences (inferences from the totality of the circumstances to constitute the proscribed purpose) as was the trial Judge".

The respondents raised a number of questions of law in their notice of contention. First, they submitted that the trial Judge erred in his definition of the relevant market. Second, it was argued that his Honour erred in various respects in finding that ESN had "a substantial degree of power" in the relevant market. It was said that he was led astray in his ultimate findings of fact of the existence of a substantial degree of power by a number of errors of law. In particular, it was submitted that he wrongly held that "a substantial degree of power in a market" for the purposes of s. 46 meant power "which is more than trivial or minimal, which is real and of substance", that he failed to give full effect to the phrase "a substantial degree of power" in the relevant market as discussed by the High Court in *Queensland Wire* at 188 and by a Full Court of this Court in *Arnotts Limited v Trade Practices Commission* (1990) 24 FCR 313 at 335 et seq.; and that he ought to have held that for the purposes of s. 46 a "substantial degree of power in a market" means a power, the taking advantage of which may achieve any one or more of consequences mentioned in s. 46(1)(a), (b) or (c) of the Act.

Market Definition and Market Power

As was pointed out in *Queensland Wire* and again in *Arnotts*, the identification of the relevant market and the assessment of dominance in the sense of market power cannot be separated. Part IV of the Act is designed to promote competition, and the role of s. 46 is to maintain competitive markets by restraining misuses of market power that will produce a non-competitive market. In *Queensland Wire* Mason C.J. and Wilson J. said at 187-188:

> *"In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated. Accordingly, if the defendant is vertically integrated, the relevant market for determining the degree of market power will be at the product level which is the source of that power ... After identifying the appropriate product level, it is necessary to describe accurately the parameters of the market in which the defendant's product competes: too narrow a description of the market will create the appearance of more market power than in fact exists; too broad a description will create the appearance of less market power than there is."*

See also *Australian Meat Holdings Pty Limited v Trade Practices Commission* [1989] ATPR 40,932 at 50,091 and 50,104; *Arnotts* at 328 and *Singapore Airlines Limited v Taprobane Tours W.A. Pty Limited* (1992) 104 ALR 633 at 648-654. The following oft cited passage from the decision of the Trade Practices Tribunal in *Re*

Queensland Co-operative Milling Association Limited ("the QCMA Case") (1976) 25 FLR 169 at 190-191 provides a useful elucidation of the definition of market:

> *"We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... . Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.*
>
> *It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were 'to give less and charge more' would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, i.e. a relatively high cross elasticity of demand or cross elasticity of supply?"*

It has often been said that "market" is an instrumental concept, designed to assist in the analysis of processes of competition and sources of market power (see for example *Dowling v Dalgety Australia Limited*, Lockhart J., 10 February 1992, unreported at 53).

The respondents contended that the trial Judge ought to have found that the relevant market was the market in Sydney (not just the eastern suburbs) for advertising real estate located in the eastern suburbs of Sydney. If this definition were accepted then the relevant market would include, not only local newspapers circulating in the eastern suburbs, but newspapers circulating generally throughout the Sydney Metropolitan Area and national newspapers, examples of which are the *Sydney Morning Herald*, the *Financial Review*, the *Australian* and the *Daily Telegraph*. The Sydney Morning Herald also publishes the *Eastern Herald* which is inserted into those copies of the *Sydney Morning Herald* which are distributed in Sydney's eastern suburbs and includes a section advertising real estate for sale. If the respondents' definition is preferred, then the task confronting the appellant in establishing the requisite market power of the respondents would be much greater than it would be if the definition of market preferred by his Honour is correct. Doubtless it is true that as a general proposition the wider the market the less likely it is that each of the respondents has a substantial degree of power in that market. The respondents concede that the only relevant

real estate to consider for the purposes of market delineation is real estate located in the eastern suburbs of Sydney, but they point to other matters such as the fact that potential purchasers of that real estate live not only in the eastern suburbs, for example in Sydney's North Shore and elsewhere in Sydney and other parts of Australia and overseas. An indication of this is the fact that advertisements for eastern suburbs real estate are placed in national publications such as the *Financial Review* and in the real estate sections of the *Sydney Morning Herald.*

The trial Judge said that having regard to the unchallenged evidence of numerous real estate agents as to the importance of locally advertising properties intended to be presented at auction using display advertisements, he preferred the definition of the appellant, but recognised that there was some overlap. He said (at 402) that:

> *"Generally speaking, display advertisements in the Eastern Suburbs are directed to a different audience than advertisements - generally classified advertisements - in national newspapers."*

It has not been established to our satisfaction that his Honour erred in his assessment of this evidence or in the conclusion which he drew from it that the definition of market proffered by the appellant was to be preferred. The adoption of the appellant's definition by his Honour carries with it as an essential element that market is for the *acquisition of services*

by real estate agents predominantly in the eastern suburbs from local newspapers circulating there. Whether it is the acquisition of those services by real estate agents in the eastern suburbs or the offering of them by the local newspapers to those agents or both is perhaps open to some argument, but in the end nothing turns on this.

His Honour found (at 402) that, whether the definition of market is that proffered by the appellant or by the respondents, it made no difference to the outcome of the case because on any view:

> *"provided that the definition of the market refers to real estate within the eastern suburbs of Sydney, as distinct from real estate in Sydney generally or some wider geographical area, ESN has a substantial market share."*

His Honour recognised that market share is not the same as market power, the latter being the concept critical to s. 46. We do not understand his Honour's reasons for judgment as indicating that he regarded market share and market power as bearing no relation to each other. Indeed, plainly the identification of the relevant market and the existence of market power are interrelated. Market share must be examined, but this alone is generally not determinative of market power as "the relative effect of percentage command of a market varies with the setting in which that factor is placed": per Mason C.J. and Wilson J. in *Queensland Wire* where their Honours adopted the language of Reed

J. in *United States v Columbia Steel Co* (1948) 334 US 495 at 528. We approach this matter on the footing therefore that the trial Judge's delineation of the relevant market was correct.

Market Power

Section 46 prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for any one of the purposes proscribed by sub-section (1). The reference to power in s. 46 is a reference to market power (s. 46(4)(a)).

An important question that arises is whether the party against whom a complaint is made of contravention of s. 46 of the Act is a "corporation", that is to say, a foreign corporation, a trading or financial corporation formed within the limits of Australia, a body corporate incorporated in a Territory, or a holding company of any of the above bodies corporate (see the definition in s. 4 (1)). Section 46 is given, by paras. 6 (2) (b), (h), an additional operation in respect of conduct in the course of or in relation to the supply of goods or services to the Commonwealth or authorities or instrumentalities of the Commonwealth, trade or commerce between Australia and places outside Australia, trade or commerce among the States, and trade or commerce with a Territory, between a State and a Territory, or between two Territories. It was not suggested that s. 46 had any such additional operation in relation to the facts of the present case. Therefore, the question was whether, in accordance

with s. 46 (1), "a corporation" had a substantial degree of power in the relevant market. It is here, as was pointed out in the course of argument on the appeal, that a difficulty arises. The issue is one of jurisdictional fact and cannot be bypassed: *The Queen v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Incorporated)* (1979) 143 CLR 190.

It is apparent from the trial Judge's reasons for judgment that his Honour was invited to approach the matter on the footing that the partnership ESN was to be treated as itself a sufficient entity for the determination of whether there had been a contravention of s. 46. In our view, that is not the proper operation of the Act.

The appellant submitted that the term "corporation" in s. 46 (1) might be read, in accordance with para. 23 (b) of the *Acts Interpretation Act* 1901, as including the plural. The result would be that the conduct forbidden by s. 46 (1) includes conduct by a plurality of corporations which, only when taken together, have a substantial degree of power in a market. Those corporations, presumably acting collectively, as if joint tortfeasors, would then be forbidden from taking advantage of that power for any of the purposes spelled out in s. 46 (1). Those purposes would include (para. 46 (1) (b)) eliminating or substantially damaging a competitor of all the corporations in question, not merely of one or more of them.

In determining whether this submission should be accepted, it is appropriate to consider s. 46 (1) in its setting in the Act, and to consider as a whole the substance and tenor of Part IV, and also Part VI which deals with enforcement and remedies: *Blue Metal Industries Limited v R W Dilley* [1970] A.C. 827 at 846-7.

The following considerations, if taken together, in our view point decisively away from acceptance of the appellant's submission:

(i) s. 46(2) makes specific but limited provision for aggregation between related corporations (a term given content by s. 4A(5)) and produces the result that it is only one of these corporations which shall be taken to have a substantial degree of power in the market;

(ii) s. 46(3), when it speaks of bodies corporate having a degree of power in a market, is not speaking at large, but is directed to the determination of whether, when taken together as permitted by s. 46(2), the corporation to which the bodies corporate are related, has a substantial degree of power; the use in both sub-sections of the expressions "body corporate" and "bodies corporate" helps to emphasise that linkage;

(iii) Subject to the extended operation provided for by

s.6, each of s. 45(2), and ss. 47, 48, 49 and 50 (in addition to s. 46) is directed to "a corporation", and whilst authorizations may be granted to a party to a "joint venture" (a term defined in s. 4J so as to include certain partnerships) it is apparent from s. 88 (1) and (3), and from s. 90(15), that each party, and not the joint venture as an entity, seeks and obtains its own authorization for what otherwise would be contravention by it of the Act; and

(iv) Provisions such as ss. 75B, 76, 78, 80 and 82 suggest a careful distinction is drawn between the party who contravenes the Act, and those who are sufficiently involved (with knowledge) in the contravention as to warrant accessorial liability: *Yorke v Lucas* (1985) 158 CLR 661

Accordingly, we agree with the following statement by Lockhart J. in *Dowling v Dalgety Australia Limited* (10 February 1992) unreported at p. 72:

> *"A corporation charged with contravention of s. 46 must itself have a substantial degree of market power. It cannot be liable under the section on the basis of a shared position of substantial market power with another unrelated corporation. The only circumstance in which the aggregation of market power may be considered is where a corporation occupies its position of substantial market power acting through or together with its related corporations as defined in ss. 46 (2) and 4A (5) of the Act.*

> *In my opinion, it is permissible, however, when considering the market power of a corporation, to have regard not only to its individual power but to additional power which it has through agreements, arrangements or understandings with others. While aggregation of the market power of a number of unrelated corporations is impermissible, it is important to recognise that a corporation can gain a position of substantial market power through its agreements, arrangements or understandings with others; and market power gained through acting in concert with others must add to the corporation's individual market power. Additional market power thus gained must enhance a corporation's individual market power. An individual corporation may have, as one of the weapons in its armoury, gained through agreements, arrangements or understandings, a facility to increase its market power and this must be considered as relevant to the factual matrix involved in determining the extent of that corporation's market power in a market. In this sense jointly held power and control in relation to a market is a matter which must be taken into account when considering the individual market power of a corporation for the purposes of s. 46."*

It is accepted by all parties that the congeries of circumstances comprising a substantial degree of power in a market may include the benefit enjoyed by the corporation in question from agreements (which would include partnerships), arrangements and understandings, whether or not legally binding upon other parties. The advantages or benefits so enjoyed by the corporation are to be considered with other relevant circumstances in determining the existence of market power and the substantiality of the degree of power.

In the present case, the concerted co-operation by General Newspapers, Double Bay Newspapers and Brehmer Fairfax in carrying on in partnership the one trading enterprise (albeit in unequal shares as to participation in profits) indicates that each of them may be treated as having a substantial degree of power in the relevant market if the position enjoyed by "The Wentworth Courier" otherwise answers that description. The result would be that each of the first, second and third respondents would itself be directly liable for contravention of s. 46(1) and not liable, as it were, as a joint tortfeasor each with the others.

Accordingly, this issue should be determined favourably to the appellant.

Market power is concerned with power which enables a corporation to behave independently of competition and of the competitive forces in a relevant market.

The primary consideration in determining market power must be taken to be whether there are barriers to entry into the relevant market. This is the fundamental point made in *Queensland Wire*; see also *Arnotts* at 336, 339 and *Dowling* at 67, 68. To what extent is it rational or possible for new entrants to enter the market in this case? That is the primary question in considering whether each of the respondents has a substantial degree of market power. Other factors to be taken into account in defining and identifying market power are referred to in the

judgment in *Queensland Wire*, in particular per Mason C.J. and Wilson J. at 188-190, namely:

- "the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product";

- "the extent to which the conduct of [any of the respondents] in that market is constrained by the conduct of ... competitors, or potential competitors ..." (s. 46(3));

- Market share of each respondent must be examined but this alone is generally not determinative of market power as "the relative effect of percentage command of a market varies with the setting in which that factor is placed" (per Mason C.J. and Wilson J. when adopting the language of Reed J. in *United States v Columbia Steel Co.*);

- The presence of vertical integration is another factor, but its presence does not necessarily mean that a substantial degree of power exists.

The question of whether any of the proprietors of ESN has market power must be considered also in light of the fact that s. 46 requires that there be a <u>substantial</u> degree of market power.

For a corporation to have a substantial degree of market power it must have a considerable or large degree of such power. The difficulty lies, not in defining the word "substantial", but in applying the concept of a substantial degree of market power to the circumstances of each case and in identifying whether the requisite degree of market power exists. This is a relative concept.

We turn to the question whether each of the respondents had a substantial degree of market power in the relevant market.

In concluding that ESN had a substantial degree of market power before the advent of the Eastern Express the trial Judge found that there were "formidable" barriers to entry (at 403) constituted by the following:-

- the substantial reputation of the *Wentworth Courier* within the eastern suburbs community;

- significant reader loyalty;

- strong support from advertisers, especially local real estate agents;

- the vertically integrated operation of ESN (publishing, printing and distribution);

. economies of scale

. ESN's virtual monopoly of "a desired form of advertising" and

. the ability of ESN to raise its display advertising charges up to the point where vendors would decide to dispense altogether with local advertising.

His Honour said that even after 1 February 1990, when the *Eastern Express* was first published, ESN retained substantial market power however the market be defined (at 405). He pointed to the fact that ESN retained the ability, by drastically dropping its prices, to damage the appellant.

There is one element highly relevant to the consideration of any market power of the respondents which his Honour did not consider and which we regard as critical. The market in this case is special and unusual. It is a market for the supply and acquisition of services, namely, the publication of display advertisements for real estate. The suppliers are the local newspapers circulating in the eastern suburbs of Sydney and the acquirers are the real estate agents predominantly in the eastern suburbs. The capacity of those agents or some of them to combine and form a rival newspaper to the *Wentworth Courier* is an inherent element in the market forces at all relevant times. Those agents are not numerous and the ability to marshal their

forces in combination against the *Wentworth Courier* is illustrated by the events that in fact occurred. They were the customers of the *Wentworth Courier*, they booked the advertising space and had the power by combination to deprive or diminish the *Wentworth Courier* of its advertising revenue by directing their advertising elsewhere, as they in fact did. The only source of revenue of the *Wentworth Courier* is advertising, most of which is derived from the display of advertising of real estate in the eastern suburbs.

This potentiality of the agents who were customers of ESN to remove or reduce their advertising from the *Wentworth Courier*, place it with a rival newspaper and thereby extinguish or diminish the revenue of ESN is strikingly illustrated by the advertising revenue derived by the *Wentworth Courier* mentioned earlier, but it bears repetition. In the twelve months from 1 February 1988 to 31 January 1989 twenty-three listed real estate agents who are now shareholders of the appellant lodged with the *Wentworth Courier* advertisements worth $3,606,264 at an average cost of $4.30 per column centimetre. In the following twelve months to 31 January 1990 their expenditure rose to $4,400,193 at $4.90 per column centimetre. But in the first year of existence of the *Eastern Express* to 31 January 1991 they inserted advertisements worth only $676,676, notwithstanding that the cost was reduced to $3.98 per column centimetre.

This potentiality started to become a reality in about June

1988 when Mr Solomon and Mr Spira had conversations with at least eleven local real estate agents about the prospect of publishing a colour magazine devoted entirely to the advertising and promotion of eastern suburbs real estate in competition with the *Wentworth Courier*. There followed numerous discussions about the proposed new publication, and news of the proposal spread quickly around the real estate community in the eastern suburbs. The management of ESN became aware of the proposed new publication not later than early August 1988. In November 1988 the appellant was incorporated and in about mid 1989 the articles of association of the appellant were amended as mentioned earlier, including the addition of a quota provision so that a substantial number of major real estate agents were to become shareholders in the appellant and be contractually bound to advertise in it.

The conduct of ESN said to be a misuse of its market power proscribed by s. 46(1) (offering reduced advertising rates in the *Wentworth Courier*) commenced after the incorporation of the appellant in November 1988. Although the price cutting mentioned in the memorandum sent by Mr Michael Hannan to some ESN sales staff dated 5 August 1988 occurred earlier it may be put aside as it related to printing costs, not the reduced advertising rates under attack in this case. Also, it was written after ESN's management became aware of the proposed new publication which in due course became the *Eastern Express*.

Whether the potentiality of agents to divert their

advertising from the *Wentworth Courier* supports the conclusion that the respondents did not have a substantial degree of market power before the commencement of the cutting of advertising rates for the *Wentworth Courier* need not be decided because the potentiality had become a reality by then; and that is the time when it is necessary to decide whether the respondents had the requisite degree of market power and commenced to take advantage of it for a purpose proscribed by s. 46(1). Although the potentiality existed before the commencement of price cutting by the respondents, it could have been realized in many ways including the particular form which it took in fact, and it is not possible, in our opinion, to say, before the formation of the combination of real estate agents in this case, whether the potentiality to divert advertising from the Wentworth Courier would have been likely to have assumed any particular form Indeed, what actually happened, though one of the possible manifestations of the potentiality, would not, we think, have been regarded as likely, possible though it undoubtedly was.

From at least November 1988 onwards the respondents did not have a substantial degree of market power in the relevant market. The real estate agents in the eastern suburbs who were the major real estate advertisers with the *Wentworth Courier* had entered into an arrangement to place significant levels of their advertising with the *Eastern Express* and not the *Wentworth Courier*. The reduction in the advertising revenue of the *Wentworth Courier* from the twenty-three listed agents who are now

shareholders of the appellant in the first year of the publication of the *Eastern Express* from $4,400,193 in the previous year to $676,676 graphically illustrates the effect of the arrangement, in which the quota system and shareholding arrangement of the appellant was critical. The practical effect of the arrangement, as found by his Honour (at 423-424) was that, due to the commitment of the estate agents who were shareholders in the appellant to place advertising in the *Eastern Express*, a large proportion of the available custom in the market was tied to the one real competitor of the *Wentworth Courier*, namely, the *Eastern Express*. Also, because those shareholders could substantially influence the placing of advertisements by their client vendors, a further large proportion of the available custom was tied or likely to be directed to the *Eastern Express*.

As mentioned earlier, market power is concerned with power which enables a corporation to behave independently of competition and of the competitive forces in a competitive market. To what extent is it rational or possible for new entrants to enter the relevant market? This is the primary consideration in determining market power. The customers of the respondents upon whom their revenue from the *Wentworth Courier* depended were the limited number of real estate agents carrying on business in the eastern suburbs, the same people who had the potential to join together and form a rival newspaper with power to thereby extinguish or reduce the revenue of the respondents from the *Wentworth Courier*. They were the very people who

through their "A" class shareholding in the appellant were potential new entrants to enter the market. This is precisely what they did. It is therefore not rational to say that new entrants were unable to enter the market and participate in it.

Another factor to be taken into account in identifying market power is "the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply costs being the minimum costs an efficient firm would incur in producing a product" (*Queensland Wire* at 188). The respondents did not have this ability or power.

Did the respondents have the power to raise advertising rates for the *Wentworth Courier* by restricting output in a sustainable manner (*Queensland Wire* at 200)? The answer must be that they did not.

Whatever market power the respondents may have enjoyed before arrangements were in place which led in due course to the publication of the *Eastern Express* because of the quota and shareholding arrangement of the appellant introduced in 1989, the *Wentworth Courier* did not enjoy a substantial degree of market power and could not determine its advertising rates irrespective of the actions of its competitor (the *Eastern Express*) and it could not act independently of it. A significant matter is that the *Wentworth Courier* faced strong competition from the *Eastern Express* and the advertising space in the latter was being offered

at prices significantly below those offered by the *Wentworth Courier*.

If a corporation has a substantial degree of power in the relevant market the question then arises whether the corporation has taken advantage of that power for one or other of the purposes proscribed by s. 46(1)(a), (b) or (c). It is permissible to infer the relevant purpose under s. 46 (s. 46(7)). Further, a corporation shall be deemed to have engaged in conduct for a particular purpose if it engaged in conduct for purposes that included that purpose, and that purpose is a substantial purpose (s. 4F(b)). The determination of purpose for the operation of s. 46 is to be ascertained subjectively, in the sense that what is to be ascertained is the intent of the corporation engaging in the relevant conduct; see *Hughes v Western Australian Cricket Association* per Toohey J. at 37-8; *Queensland Wire* per Toohey J. at 214; *ASX Operations* at 474-5; *Tillman Butcheries Pty Ltd* at 349 and *Dowling* at 80. "Purpose" in s. 46 is not concerned directly with the effect of conduct, but with "purpose" in the sense of motivation and reason, although, as mentioned earlier, purpose may be inferred from conduct; see *Hughes v Western Australian Cricket Association* per Toohey J. at 37-8.

Alleged Contravention of s. 46

The conclusion we have reached that from at least November 1988 onwards ESN did not have a substantial degree of market

power in the relevant market means that the question of whether ESN engaged in the activity prohibited by s. 46(1)(a) did not properly arise before the primary Judge.

We heard full argument upon the challenge by the appellant to the findings of his Honour upon this question. Nevertheless, there is a conceptual difficulty in our expressing any concluded views upon this branch of the case because both the findings of the primary Judge upon the question of misuse of market power and the criticism by the appellant of those findings are posited upon the existence of a substantial degree of power in the relevant market, contrary, as we have held, to the fact.

However, in the circumstances of this appeal, we should briefly state what our position would have been had we concluded that at the relevant time there did exist the relevant substantial degree of market power.

The primary Judge said (at 406) that it was necessary for *Eastern Express* to establish that the conduct complained of, the cutting of advertisement prices by ESN with little consideration of the financial effect of those cuts, was conduct undertaken for the purpose of eliminating or substantially damaging *Eastern Express*, within the meaning of s. 46(1)(a). His Honour held that ESN had been presented with "a dire threat" (at 408) and that the steps taken by ESN were reactions to the predicament in which the partnership found itself, such that the price cuts were not

dictated "by anything other than a perception that they were necessary to defend *Wentworth Courier* and ESN's commercial interests".

The appellant submitted that his Honour reached this conclusion without considering whether the price cuts were made for purposes which, in the sense of s. 4F, included as a substantial purpose one of the proscribed purposes. We would not accept that submission. The primary Judge was well seized of the significance of s. 4F, as is apparent from the terms in which he framed the ultimate issue before him, terms which controlled his Honour's later treatment of subsidiary issues. The passage in question (at 406) is as follows:

> *"I also appreciate that it is not necessary that the purpose of ESN be confined to a proscribed purpose. Section 4F (b) of the Act provides that a person shall be deemed to have engaged in conduct for a particular purpose if that person engaged in the conduct for purposes that included that purpose and that purpose was a substantial purpose. Nonetheless, it is necessary for the applicant to establish that the conduct complained of, the cutting of advertisement prices by ESN with little consideration of the financial effect of those cuts, was conduct undertaken for the purpose of eliminating or substantially damaging Eastern Express. As a matter of logic, the possibility exists that the prices were cut for other purposes, although the decision was made with less calculation than might otherwise have been the case because ESN management was aware of the partnership's market strength and other resources."*

We turn to the next head of criticism by the appellant of

the judgment.

His Honour pointed out (at 407) that predatory pricing may be established in one of a number of ways, by "express admission", by inference from facts other than the extent of the price cuts themselves, or by analysis of the effect of the price cuts, giving rise to an inference as to the purpose behind their adoption.

After considering the evidence, his Honour concluded that it did not include any express admission of a proscribed purpose. Before us, the appellant criticised that finding. In particular, it was said that his Honour gave no consideration or insufficient consideration to what were put forward as contemporaneous declarations by ESN or its officers as to the purpose of ESN. Counsel for the appellant referred us, in particular, to four matters.

The first and second matters arise from the minutes of two meetings of the "board of direction" of the partnership. The meetings were held on 22 December 1989, and 5 February 1990. At the December meeting, there was discussion of the competition to commence in February with the appearance of the rival newspaper. The following passage appears in the minutes:

> *"Real estate rates will be slashed with one free page for every two pages booked."*

In the minutes for the meeting of 5 February 1990, held shortly after the appearance of the first issue of the *Eastern Express*, the following appears:

> *"Over twenty of the shareholders are real estate agents who used to support Wentworth Courier. All possible steps are being taken and will be taken to restrict its share of the market."*

Thirdly, counsel referred to the interview given by Mr John Hannan to a journalist, Mr Tony Burrett, in January 1990. We have described this in some detail earlier in these reasons. It will be recalled that his Honour left open the issue whether Mr Hannan in fact said that the winner of the battle would be the survivor of extended rate cutting.

Fourthly, on 13 June 1990, there appeared the magazine interview given by the fourth respondent, Mr John Fairfax, the material portion of which has been set out earlier in these reasons. In addition to the passages there set out, it is to be noted that they were preceded by the following statement attributed to Mr Fairfax:

> *"However, when you are fighting another proprietor who happens also to be your client, in the form of the real agents, it's a sensitive issue. It has distressed them, but we on the other hand find it unusual that the real estate agents want to become publishers."*

That statement, if anything, serves to underscore the conclusion we have reached on the question of market power. However, counsel for the appellant fixed upon other statements to the effect that the *Wentworth Courier* was charging advertising rates which it really could not afford, that it was a bigger company which could "take it on the nose", and that there was a "discount war" going on and that the *Wentworth Courier* could last longer.

The primary Judge found (at 407) that the evidence did not include what he called "any express admission of a proscribed purpose". The appellant challenges that finding.

As a general proposition, an informal admission as to a matter of fact, by words or conduct which is made by a party or a privy, is admissible evidence against that party of the truth of its contents. The complexity of the construction given in the case law to the ordinary words of s. 46 must mean, at the very least, that in this area what is tendered as an express admission is likely to be a statement as to matters of mixed law and fact, rather than simply of fact. In the case of alleged contraventions of s. 52 of the Act, admissions by a trader in the course of cross-examination that his conduct was "misleading" and "deceptive" cannot be relied upon to usurp the task of the Court to judge the legal quality of that conduct: *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 at 487-8, 504.

It is unsettled whether admissions may be made of matters of mixed law and fact: *Grey v Australian Motorists & General Insurance Co. Pty Limited* [1976] 1 NSWLR 669 at 675, 684-5; *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 231. In the first of these cases, Glass J.A. described various decisions accepting admissions by a party as to questions of mixed law and fact as having been given with no regard to principle. In his view, when a standard, measure or capacity is fixed by law, a party cannot be asked to admit a conclusion depending upon the legal standard; however, the witness may be asked to admit facts from which the conclusion of law may be drawn by the Court.

In our view, that is how the pieces of evidence in issue here should be considered, the question being whether the statements provide material from which his Honour should have drawn a conclusion as to predatory purpose for the purposes of s. 46. In any event, the materials with which we are dealing were received into evidence and to that no challenge was made before us.

But the reception into evidence of an alleged admission must be distinguished from the sufficiency of that evidence to establish or support an affirmative conclusion in favour of the party who tenders it and bears the relevant onus of proof. It does not follow that because the evidence of the various statements in question here was admissible this is enough to prove the issue of predatory purpose. The probative force of the

statements must be determined with regard to the circumstances in which they were made: *Lustre Hosiery Limited v York* (1935) 54 CLR 134 at 138-9, 143-4; Stone and Wells "*Evidence, Its History and Policies*", 1991, pp. 329-331.

The four matters to which we have referred above, the two sets of minutes and the interviews with Mr Hannan and Mr Fairfax, must be considered in the light of the events we have described in detail earlier in these reasons. In that setting, we would characterize them, whether considered individually or taken collectively, at best, as relevant rather than compelling evidence upon the issue of proscribed purpose. In particular, accepting that Mr Hannan made to the journalist all the statements attributed to him, the bellicose imagery employed in both interviews is more indicative of swagger, braggadocio and the presentation of a "strong" image to readers of the magazines in question, than of the existence of a purpose proscribed by s. 46.

His Honour also rejected the submission that the nature, extent and effect of the price cuts themselves gave rise to an inference as to the purpose behind their adoption. He held that a charge of contravention of s. 46 by conduct amounting to "predatory pricing" must be related to the costs incurred by the price cutter (at 413). The primary Judge referred to the allegation in the Amended Statement of Claim (para. 30) that ESN had reduced the prices charged by the *Wentworth Courier* for the

publication of advertisements to prices less than the cost to ESN of providing that service, or to prices equivalent to that cost or to a price which returned to them a lesser profit than was received before the reductions in prices. His Honour then found (at 416) that in seeking to make out its case against ESN on this issue, *Eastern Express* had selected the measure of cost most likely to demonstrate unprofitable trading by ESN, but had succeeded only in showing that the price cuts did not make the *Wentworth Courier* unprofitable. His Honour continued (at 416):

> *"There being nothing else to support a finding that the conduct of ESN was taken for the purpose of damaging or eliminating 'Eastern Express' as a competitor, the s. 46 claim must fail."*

The primary Judge noted (at 411) that in earlier decisions in this Court, *Victorian Egg Marketing Board v Parkwood Eggs Pty Limited* (1978) 33 FLR 294 and *Trade Practices Commission v CSBP and Farmers Limited* (1980) 53 FLR 135, in which predatory pricing had been in question, there had been no need to consider what degree of price cutting was indicative of predation. However, his Honour referred to various United States authorities as indicating that for the purposes of the antitrust legislation of that country it is inherent in the notion of a "predatory price" that it is below cost, and that the measure of "cost" most commonly adopted in the United States decisions appears to be "average variable cost", rather than "average total cost" or "marginal cost". He observed that *Eastern Express* had chosen to

carry out an analysis of the *Wentworth Courier's* average total costs, including its share of fixed costs, but that any of the measures of "cost" adopted in the United States would necessarily have produced a result even less favourable to the case put by *Eastern Express*.

Eastern Express submitted that his Honour fell into error in treating as fatal to its claim its failure to establish that the price cuts resulted in the production of the *Wentworth Courier* at a loss. On the other hand, the respondents submitted that, "as a general rule" the Court should not regard pricing conduct which still involves the making of profits, albeit at a reduced level, as indicative of conduct proscribed by s 46. Reference was made by both parties, as it had been by the primary Judge, to a range of United States decisions.

In view of the conclusions we reached earlier in these reasons, it is unnecessary to rule upon these rival contentions. However, we would observe that the expression "predatory pricing" is not a statutory expression in this country, nor, it would appear, in the United States. Caution is required in translating United States judgments, which place glosses upon the text of the United States antitrust laws, to the interpretation of the Australian law. Our law evinces a somewhat different approach to legislative drafting.

In delivering the judgment of the majority of the Supreme Court of the United States in *Cargill, Inc. v Monfort of Colorado, Inc.* 479 US 104 at 117-8 (1986) Brennan J. observed that most commentators reserved the term "predatory pricing" for pricing below some measure of cost, although they differed on the appropriate measure. He also said:

> *"Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. It is a practice that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is as a practice 'inimical to the purposes of [the antitrust] laws,' Brunswick, 429 U.S. at 488, and one capable of inflicting antitrust injury."*

It is to be recalled that the primary operation of s. 2 of the *Sherman Act* is to create a serious felony. The provisions of s. 2 have been interpreted in such a way that in order to contravene the section the monopolist must have both the power to monopolise and the intent to do so. Further, putting to one side cases in which equitable relief is sought, the issue of predatory intent will be for a jury. The result of the authorities appears to be that predatory intent may be inferred from below-cost prices. That inferred predatory intent bears upon the likelihood of injury to competition and is evidence to go to the jury on that issue: *Utah Pie Co. v Continental Baking Co.* 386 U.S. 685 at 702-3 (1967). Matters were then taken

further by a line of authorities which distinguished a competitive price from a predatory price by adopting a standard of "marginal cost" which applied on a per se basis. The authorities applying this standard and the more recent authorities expressing reluctance to rely solely on marginal cost or average variable cost and stating a preference for a "rule of reason" are discussed in Ms Nagarajan's article "*The Regulation of Predatory Pricing Within Section 46 of the Trade Practices Act 1974*" (1990) 18 ABLR 292 at 307-312. Professors Areeda and Caplow ("*Antitrust Analysis, Problems, Text, Cases*", 4th Ed., 1988, para. 327) refer to the many complications, in many contexts, raised by the overwhelming "outpouring of academic commentary and judicial decisions on predatory pricing".

An illustration is provided by *Barry Wright Corp. v ITT Grinnell Corp.* 724 F 2d 227 (1st Circ.) (1983). Section 2 of the *Sherman Act* is directed in its terms against monopolisation (and conspiracies to monopolize) any part of interstate or foreign trade and commerce. In the case in question, Pacific Scientific Company ("Pacific") had agreed with Grinnell to sell its product (shock absorbers used in building pipe systems for nuclear power plants, and known as "mechanical snubbers") to Grinnell at a specially low price, which still remained above total cost. The monopoly power of Pacific in the relevant market was conceded. The issue was whether Pacific maintained that monopoly position against the threat of Barry's entry, by "improper" means. A practice or means is relevantly "improper", on the authorities,

if "exclusionary". That term, as used in the authorities, identifies conduct, "other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power": Areeda and Turner, "*Antitrust Law*", Vol. 3, §626c (1978).

In the instant case, Barry pointed to what it alleged was "predatory pricing" by Pacific in dealings with Grinnell as showing that Pacific acted in an "exclusionary manner" against it. It then became necessary to determine whether pricing might be "predatory" even though prices remained above total cost. Barry asserted that it might be so. The Court of Appeals, whilst acknowledging the existence of contrary decisions in other Circuits (e.g. *Transamerica Computer Co. v International Business Machines Corp.* 698 F 2d 1377 (9th Circ.) (1983)), affirmed the District Court finding against Barry. Breyer C.J. observed (at 234) that whilst technical economic discussion helps to inform the antitrust laws, those laws could not precisely replicate the sometimes conflicting views of economists. Rather, his Honour concentrated upon the question of why and to what extent the *Sherman Act* should be read as ever forbidding price cutting, given its objective of low price levels in well-functioning competitive markets.

We have devoted some attention to this authority because it shows, by way of illustration, that the United States decisions

as to what is meant by "predatory pricing" are judge made law which does not focus directly upon the specific terms of the antitrust laws.

In what appears to be the most recent decision of the Supreme Court of the United States upon the subject, *Cargill, Inc. v Monfort of Colorado, Inc.*, supra, the question of "predatory pricing" arose in circumstances where the fifth largest beef packer in the United States sought to enjoin a proposed merger of the second and third largest beef packers. It was contended that the merger would violate s. 7 of the *Clayton Act* (as amended in 1950) because, in the terms of s. 7, its effect might be substantially to lessen competition or to tend to create a monopoly. Section 16 of the *Clayton Act* entitled a private party to seek injunctive relief against "threatened loss or damage by violation of the antitrust laws". This somewhat restrictive provision may be compared with the generous terms of s. 80 of the Australian Act. The question before the Supreme Court of the United States was whether the applicant's allegation of a "price-cost squeeze" was not simply one of injury from competition, but was a claim of injury by predatory pricing, so that, within the meaning of the decisions construing s. 16, there was a threat of injury to the plaintiff of the type which the antitrust laws were designed to prevent. Essentially, the case was concerned with the existence of sufficient standing for injunctive proceedings under s. 16 of the *Clayton Act*.

We mention this case further to emphasise that the concept of "predatory pricing" appears in various contexts in the United States decisions, not all of which have immediate analogues in the Trade Practices law of this country. It would be, in our view, an error to translate into the operation of s. 46 the United States decisions dealing with "predatory pricing" at the expense of an independent examination of the Australian legislation as it applies to each case.

A fundamental issue in these cases as they occur in Australia is whether the corporation in question used its market power for a purpose proscribed by s. 46. The issue will be tried by a Judge of the Court sitting alone. It will be for the Judge to decide whether the existence of the proscribed purpose may properly be inferred, with or without the aid of other evidence, from evidence of the conduct of the corporation in relation to the prices it charged. No pre-ordained and fixed categories as to the level of pricing or economic theory or practice of costing necessarily controls the drawing of that inference in any particular case. Whether the finding as to purpose which is sought against the corporation should be inferred from the evidence as to pricing must be judged by considering not only the logic of the matter. The Court must also consider whether "general human experience" would be contradicted if the conduct which occurred were unaccompanied by the purpose sought to be proved: *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163 at 173;

Director of Public Prosecutions v Boardman [1975] AC 421 at 444.

There is one further matter upon which we should comment. In cases of contravention of s. 46, there may be considerable difficulty in framing an appropriate injunction. The matter is discussed by Brennan J. in *Victorian Egg Marketing Board v Parkwood Eggs Pty Limited* (1978) 33 FLR 294 at 315-6, with particular reference to interlocutory injunctions. In its Notice of Appeal *Eastern Express* seeks an order:

> *"[T]hat the first second and third Respondents be restrained from, whether by themselves, their servants, their agents or otherwise, in trade or commerce, charging a price for the provision of the service of the publication of advertisements ("the service") in the Wentworth Courier:*
>
> *(i) less than the cost to them of providing the service in the Wentworth Courier;*
>
> *(ii) the equivalent to the costs to them of providing the service in the Wentworth Courier; or*
>
> *(iii) which returns to them less profits than a percentage return determined by the Court."* [Emphasis supplied].

This Court should be vigilant to ensure that its jurisdiction is not invoked to interfere with normal and legitimate competitive pricing activities in the relevant market under the guise that such activities are predatory. The respondents submitted that, in the context of the particular circumstances of this case, particularly when consideration was given to the relief claimed in the Notice of Appeal, there would be considerable difficulties

in formulating appropriate orders to prohibit the alleged contravention of s. 46. Counsel submitted that, in substance, the Court was being asked to interfere with normal and legitimate price competition. In the light of our earlier findings, it is not necessary further to consider this submission; it is sufficient to say that we see considerable force in it.

We would dismiss the appeal with costs.

I certify that this and the preceding sixty-six (66) pages are a true copy of the reasons for judgment herein of the Honourable Mr. Justice Lockhart.

Associate David Scott

Dated: 2 April 1992

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G 448 of 1991
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: EASTERN EXPRESS PTY LIMITED

Appellant

AND: GENERAL NEWSPAPERS PTY LIMITED

First respondent

DOUBLE BAY NEWSPAPERS PTY LIMITED

Second respondent

BREHMER FAIRFAX PTY LIMITED

Third respondent

JOHN B. FAIRFAX

Fourth respondent

JOHN HANNAN

Fifth respondent

FRANK HANNAN

Sixth respondent

NICKELBY PTY LIMITED

Seventh respondent

CORAM: LOCKHART, BEAUMONT AND GUMMOW JJ.

DATE; 2 APRIL 1992

REASONS FOR JUDGMENT

BEAUMONT J.

I have had the benefit of reading the reasons of Lockhart and Gummow JJ. In my opinion, it has not been shown

that the ESN Partnership had, at any material time, a substantial degree of power in a relevant market. As Lockhart and Gummow JJ. point out, there were no significant barriers to entry into the market, at least so far as concerned the local real estate agents. Once the agents decided to join together to compete against ESN, it became apparent that, in fact, ESN had no substantial degree of power in this market. For that reason alone, I would have dismissed the application and it must follow, I think, that the appeal cannot succeed.

I would add that even if a contravention of s.46(1) had been established, I would need to be convinced that the specific relief sought by the appellant was appropriate. Although the Court has a wide discretion with respect to the form of the relief it may grant, it is difficult to justify the grant of an injunction which in substance, if not in form, is mandatory and seeks to regulate on-going commercial transactions in very specific terms. There are obvious practical difficulties and objections in principle involved here, especially if the Court were required to supervise ESN's business activities on a continuous basis. This is not to say that, if there were a contravention, no relief should be granted.

As Lockhart and Gummow JJ. also point out, there was raised in argument before us, for the first time, the possibility that, as a preliminary objection, s.46(1) could not apply here because ESN was a partnership consisting of

more than one corporation. On behalf of ESN the submission was put to us that s.46(1) applied only to the case of a single corporation exercising a substantial degree of market power. Since I have come to the conclusion that the ESN partnership did not, in any event, have a substantial degree of market power, it is not necessary for me to express a final view on this question. It may be one thing to construe s.46(1) so as not to permit the aggregation of market power exercised by separate bodies in distinct business activities; it may be another thing to hold that the exercise of market power by several corporations in joint activities, as here in a partnership, falls outside s.46(1). My tentative view is that s.46(1) is not capable of application to the several distinct activities in the former example, at least in the absence of concerted action by the corporate players. But I am provisionally of the opinion that s.46(1) was capable of application in the latter example, by reason of the joint character of the activities of the corporations acting together through the vehicle of their partnership. In this special context, I am inclined to think that the provisions of s.23(b) of the Acts Interpretation Act could operate.

I certify that this and the preceding two pages are a true copy of the Reasons for Judgment herein of his Honour Mr Justice Beaumont.

Associate

Dated: 2 April 1992

Counsel for the Appellant	:	P.G. Hely Q.C. D.K. Catterns
Solicitors for the Appellant	:	Solomon & Partners
Counsel for the Respondents	:	R.J. Ellicott Q.C. D.M. Yates
Solicitors for the Respondents	:	Phillips Fox
Date of Hearing	:	10, 11 February 1992
Date of Judgment	:	2 April 1992