

# FEDERAL COURT OF AUSTRALIA

## Director of Consumer Affairs Victoria v Gibson (No 2) [2017] FCA 366

File number: VID 535 of 2016

Judge: **MORTIMER J**

Date of judgment: 7 April 2017

Catchwords: **CONSUMER LAW** – contraventions of ss 18 and 21 of the Australian Consumer Law – injunctions, declaratory relief, costs

**PRACTICE AND PROCEDURE** – form of orders

Legislation: Australian Consumer Law (Vic), ss 246, 247

Cases cited: *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240

Date of hearing: Determined on the papers

Date of last submissions: 24 March 2017

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Category: Catchwords

Number of paragraphs: 9

Counsel for the Applicant: Ms CG Button

Solicitor for the Applicant: Consumer Affairs Victoria

Counsel for the Respondents: Respondents did not appear

## **ORDERS**

**VID 535 of 2016**

**BETWEEN:**           **DIRECTOR OF CONSUMER AFFAIRS VICTORIA**  
Applicant

**AND:**               **MS ANNABELLE NATALIE GIBSON**  
First Respondent

**INKERMAN ROAD NOMINEES PTY LTD (ACN 164 850 748**  
**(IN LIQUIDATION)**  
Second Respondent

**JUDGE:**             **MORTIMER J**

**DATE OF ORDER:**  **7 APRIL 2017**

## **PENAL NOTICE**

**NOTICE PURSUANT TO RULE 41.06 OF THE FEDERAL COURT RULES 2011**

**TO:**    **Annabelle Natalie Gibson**  
          **Inkerman Road Nominees Pty Ltd (ACN 164 850 748)**

**IF YOU:**

- (A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**
- (B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU TO ABSTAIN FROM DOING,**

**YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.**

**ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.**

**THE COURT DECLARES THAT:**

*Misleading or deceptive conduct (s 18 Australian Consumer Law (Cth) and Australian Consumer Law (Vic))*

1. Annabelle Natalie Gibson engaged in conduct in trade or commerce which was misleading or deceptive or likely to mislead or deceive contrary to s 18 of the Australian Consumer Law (Vic) in that, from approximately July 2013, she made claims in connection with the development, promotion and sale of the Whole Pantry App and the Whole Pantry book that she:
  - (a) had been diagnosed with brain cancer in 2009;
  - (b) was given four months to live; and
  - (c) had taken and then rejected conventional cancer treatments in favour of embarking on a quest to heal herself naturally.
  
2. The Second Respondent engaged in conduct in trade or commerce which was misleading or deceptive or likely to mislead or deceive contrary to s 18 of the Australian Consumer Law (Cth) and s 18 of the Australian Consumer Law (Vic) in that, from about July 2013, it made claims in connection with the development, promotion and sale of the Whole Pantry App and the Whole Pantry book that Annabelle Natalie Gibson:
  - (a) had been diagnosed with brain cancer in 2009;
  - (b) was given four months to live; and
  - (c) had taken and then rejected conventional cancer treatments in favour of embarking on a quest to heal herself naturally.
  
3. Annabelle Natalie Gibson engaged in conduct in trade or commerce which was misleading or deceptive or likely to mislead or deceive contrary to s 18 of the Australian Consumer Law (Vic) in that between December 2013 and March 2015 she represented that:
  - (a) a portion of all revenue from sales of the Whole Pantry App would be donated to charities or good causes, when in fact that was not the case, as the only donation from sales of approximately \$308,000 was the sum of \$2,790 to the

Bumi Sehat Foundation, attributable to App sales and forming part of a \$5,000 donation to that Foundation;

- (b) the donations from the sale of the Whole Pantry App would be made within a reasonable time of receipt, when in fact the only donation was made over a year later;
- (c) a large part of everything the Second Respondent earned would be donated to charities or good causes, when in fact that was not the case, as under \$10,000 was donated from its earnings of approximately \$420,000;
- (d) the proceeds of the sale of “virtual tickets” to the launch of the Whole Pantry App would be donated to:
  - (i) the Birthing Kit Foundation;
  - (ii) One Girl;
  - (iii) the Asylum Seeker Resource Centre; and
  - (iv) the Schwarz family;

when in fact that was not the case as One Girl received \$1,000 over a year later and the remaining three groups received no donation from the sale proceeds;

- (e) one hundred percent of the proceeds of the sales of the Whole Pantry App for a week in December 2013 would be donated to the Schwarz family, when in fact no such donation was ever made; and
- (f) the full amount of each purchase of the Whole Pantry App, and an additional \$1 for posts with a family theme for a week around Mother’s Day 2014 would be donated, within a reasonable period of time following 22 May 2014, to:
  - (i) The 2h Project; and
  - (ii) the Bumi Sehat Foundation;

when in fact no donations were made within a reasonable period to either cause, and the donation to the Bumi Sehat Foundation was made more than a year later, from funds that were not attributable to the Mother’s Day week sales.

4. The Second Respondent engaged in conduct in trade or commerce which was misleading or deceptive or likely to mislead or deceive contrary to s 18 of the Australian Consumer Law (Cth) and the Australian Consumer Law (Vic) in that between December 2013 and March 2015 it represented that:
- (a) a portion of all revenue from sales of the Whole Pantry App would be donated to charities or good causes, when in fact that was not the case, as the only donation from sales of approximately \$308,000 was the sum of \$2,790 to the Bumi Sehat Foundation, attributable to App sales and forming part of a \$5,000 donation to that Foundation;
  - (b) the donations from the sale of the Whole Pantry App would be made within a reasonable time of receipt, when in fact the only donation was made over a year later;
  - (c) a large part of everything it earned would be donated to charities or good causes, when in fact that was not the case, as under \$10,000 was donated from its earnings of approximately \$420,000;
  - (d) the proceeds of the sale of “virtual tickets” to the launch of the Whole Pantry App would be donated to:
    - (i) the Birthing Kit Foundation;
    - (ii) One Girl;
    - (iii) the Asylum Seeker Resource Centre; and
    - (iv) the Schwarz family;when in fact that was not the case as One Girl received \$1,000 over a year later and the remaining three groups received no donation from the sale proceeds;
  - (e) one hundred percent of the proceeds of the sales of the Whole Pantry App for a week in December 2013 would be donated to the Schwarz family, when in fact no such donation was ever made; and
  - (f) the full amount of each purchase of the Whole Pantry App, and an additional \$1 for posts with a family theme for a week around Mother’s Day 2014 would be donated, within a reasonable period of time following 22 May 2014, to:
    - (i) The 2h Project; and

(ii) the Bumi Sehat Foundation;

when in fact no donations were made within a reasonable period to either cause, and the donation to the Bumi Sehat Foundation was made more than a year later, from funds that were not attributable to the Mother's Day week sales.

*Unconscionable conduct (s 21 Australian Consumer Law (Cth) and Australian Consumer Law (Vic))*

5. Annabelle Natalie Gibson engaged in unconscionable conduct in trade or commerce in contravention of s 21 of the Australian Consumer Law (Vic) in that between December 2013 and March 2015 she made claims that:

- (a) a portion of all revenue from sales of the Whole Pantry App would be donated to charities or good causes, when in fact that was not the case, as the only donation from sales of approximately \$308,000 was the sum of \$2,790 to the Bumi Sehat Foundation, attributable to App sales and forming part of a \$5,000 donation to that Foundation.
- (b) the donations from the sale of the Whole Pantry App would be made within a reasonable time of receipt, when in fact that was not the case as the only donation was made over a year later;
- (c) a large part of everything the Second Respondent earned would be donated to charities or good causes, when in fact that was not the case, as under \$10,000 was donated from its earnings of approximately \$420,000;
- (d) the proceeds of the sale of "virtual tickets" to the launch of the Whole Pantry App would be donated to:
  - (i) the Birthing Kit Foundation;
  - (ii) One Girl;
  - (iii) the Asylum Seeker Resource Centre; and
  - (iv) the Schwarz family;

when in fact that was not the case as One Girl received \$1,000 over a year later and the remaining three groups received no donation from the sale proceeds;

- (e) one hundred percent of the proceeds of the sales of the Whole Pantry App for a week in December 2013 would be donated to the Schwarz family, when in fact no such donation was ever made; and
- (f) the full amount of each purchase of the Whole Pantry App, and an additional \$1 for posts with a family theme for a week around Mother's Day 2014 would be donated, within a reasonable period of time following 22 May 2014, to:
  - (i) The 2h Project; and
  - (ii) the Bumi Sehat Foundation;

when in fact no donations were made within a reasonable period to either cause, and the donation to the Bumi Sehat Foundation was made more than a year later, from funds that were not attributable to the Mother's Day week sales.

6. The Second Respondent engaged in unconscionable conduct in trade or commerce in contravention of s 21 of the Australian Consumer Law (Cth) and the Australian Consumer Law (Vic) in that between December 2013 and March 2015 it made claims that:

- (a) a portion of all revenue from sales of the Whole Pantry App would be donated to charities or good causes, when in fact that was not the case, as the only donation from sales of approximately \$308,000 was the sum of \$2,790 to the Bumi Sehat Foundation, attributable to App sales and forming part of a \$5,000 donation to that Foundation;
- (b) the donations from the sale of the Whole Pantry App would be made within a reasonable time of receipt, when in fact that was not the case as the only donation was made over a year later;
- (c) a large part of everything it earned would be donated to charities or good causes, when in fact that was not the case, as under \$10,000 was donated from its earnings of approximately \$420,000;
- (d) the proceeds of the sale of "virtual tickets" to the launch of the Whole Pantry App would be donated to:
  - (i) the Birthing Kit Foundation;

- (ii) One Girl;
- (iii) the Asylum Seeker Resource Centre; and
- (iv) the Schwarz family;

when in fact that was not the case as One Girl received \$1,000 over a year later and the remaining three groups received no donation from the sale proceeds;

- (e) one hundred percent of the proceeds of the sales of the Whole Pantry App for a week in December 2013 would be donated to the Schwarz family, when in fact no such donation was ever made; and
- (f) the full amount of each purchase of the Whole Pantry App, and an additional \$1 for posts with a family theme for a week around Mother's Day 2014 would be donated, within a reasonable period of time following 22 May 2014, to:
  - (i) The 2h Project; and
  - (ii) the Bumi Sehat Foundation;

when in fact no donations were made within a reasonable period to either cause, and the donation to the Bumi Sehat Foundation was made more than a year later, from funds that were not attributable to the Mother's Day week sales.

**THE COURT ORDERS THAT:**

7. Pursuant to s 232 of the Australian Consumer Law (Vic), Annabelle Natalie Gibson is prohibited from making any or all of the following claims, in connection with the development, sale or promotion of health and wellbeing advice:
  - (a) that she had been diagnosed with brain cancer at any time prior to 24 May 2016;
  - (b) that she was given four months to live; and/or
  - (c) that she had taken and then rejected conventional cancer treatments in favour of embarking on a quest to heal herself naturally.
8. Pursuant to s 232 of the Australian Consumer Law (Cth) and s 232 of the Australian Consumer Law (Vic), the Second Respondent is prohibited from making any or all of



the following claims, in connection with the development, sale or promotion of health and wellbeing advice:

- (a) that Ms Gibson had been diagnosed with brain cancer at any time prior to 24 May 2016;
  - (b) that Ms Gibson was given four months to live; and/or
  - (c) that Ms Gibson had taken and then rejected conventional cancer treatments in favour of embarking on a quest to heal herself naturally.
9. Annabelle Natalie Gibson pay a contribution towards the applicant's costs, fixed in the amount of \$30,000, such amount to be payable within 60 days of the date of these orders.
10. A copy of these Orders be served personally on Annabelle Natalie Gibson in accordance with s 41.07 of the *Federal Court Rules 2011* (Cth).

**THE COURT DIRECTS THAT:**

11. The proceeding be adjourned to a date to be fixed for consideration of penalty and orders relating to public notices.

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

## REASONS FOR JUDGMENT

### MORTIMER J:

1 On 15 March 2017, I delivered judgment on liability in relation to the Director of Consumer Affairs Victoria's (Director) allegations against the respondents: see *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240. I gave directions for the Director to file proposed minutes of orders reflecting the Court's reasons for judgment, and any submissions the Director wished to make about the proposed orders, and about costs.

2 As has been the case throughout this proceeding, Ms Gibson, who has elected not to take an active role in the proceeding, was sent the relevant documentation electronically.

3 The Court's orders broadly reflect those submitted by the Director, and I propose to deal in these reasons only with a few substantive matters where the orders depart from the Director's proposal. I accept the Director's submissions that injunctive and declaratory relief are appropriate.

4 First, as to the injunctions, the Director proposed the representations Ms Gibson and her company should be restrained from making in the future should relate to a diagnosis with brain cancer in 2009. It is correct that is how the representation was pleaded, and I found that representation to have been made. However, if the injunction were framed in that way, Ms Gibson would be free to make a representation that she was diagnosed with brain cancer in 2010, given four months to live and had taken and rejected conventional cancer treatment in favour of embarking on a quest to heal herself naturally, and she would not, in terms, be in breach of the restraint placed upon her by the Court. That would in substance frustrate the purpose of the injunction and undermine the Court's findings.

5 At [147]-[148] of the reasons, I found that on the evidence the representations were "obviously false" because Ms Gibson had not been living with brain cancer at any stage of her life. Given that finding, I consider it is appropriate, and within the terms of the Court's findings, that Ms Gibson be restrained from representing that she had been diagnosed with brain cancer at any time prior to the date on which this proceeding was commenced: namely, 24 May 2016.

6 Second, I have made some amendments to paragraphs 3, 4, 5 and 6 of the declarations as proposed by the Director, to more closely reflect my findings about the total sales from the

Whole Pantry App through both Apple and Google, and the single donation made to the Bumi Sehat Foundation.

- 7 Third, I have accepted the Director's submission that it is appropriate Ms Gibson pay a contribution towards the Director's legal costs in this proceeding. A costs order would usually be made in circumstances such as this, as the Director has been successful in almost all of the allegations made and there are no countervailing factors tending against a costs order. Since the Director has asked for only a contribution, rather than that Ms Gibson pay the Director's entire costs on a party/party basis, I consider the order is justified even though Ms Gibson did not actively defend the proceedings. I have given Ms Gibson 60 days to pay the Director's costs. If she does not do so, she will be in default of the Court's orders and further consequences may follow.
- 8 The Director has confirmed in his submissions that he continues to seek pecuniary penalties against Ms Gibson personally. The Director further submits that the Court should order Ms Gibson to publish what he describes as "a non-punitive/adverse publicity notice" in each of the *Herald Sun* and *The Australian* newspapers. He submits such orders can be made under ss 246 or 247 of the Australian Consumer Law (Vic). Since the Director submits that the quantum of any pecuniary penalties imposed by the Court should be included as part of the notice, he accepts that such an order should only be made after the Court has determined the appropriate pecuniary penalty to be imposed, if any.
- 9 Accordingly there will be a direction that the matter be listed for hearing on penalty and any associated relief. Whether or not Ms Gibson seeks to appear and participate in that stage of the proceeding will be a matter for her.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.



Associate:

Dated: 7 April 2017