HIGH COURT OF AUSTRALIA

Public Information Officer

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JAMES HOUGHTON AND JAMES STUDENT v SIMON ARMS

Two website designers who misled an internet wine business about the operation of a bank's financial transactions facility were liable for misleading and deceptive conduct under the Victorian *Fair Trading Act* even though they were employees, the High Court of Australia held today.

Mr Arms set up an internet business, Australian Cellar Door, marketing wines from small wineries. Direct cellar door sales would attract low sales tax and avoid a 30 per cent margin charged by retail agents or distributors. He engaged WSA Online Limited to set up and run his website. Mr Houghton and Mr Student were WSA employees. In 2000, Mr Houghton recommended to Mr Arms a financial transactions product called ANZ e-Gate. It would enable customers to pay by credit card with funds clearing directly into the account of the winery, in return for payment by the winery of a small transaction fee. Mr Arms was told that wineries only needed to fill in a form and pay a small set-up fee. However the ANZ Bank told WSA it should obtain an e-Gate licence from the bank and sub-license Australian Cellar Door. The bank said each winery would need an ANZ credit card merchant facility and would be subject to an approval process.

Several months later, Mr Student told Mr Arms that there had been a mistake about the operation of ANZ e-Gate and that Australian Cellar Door would have to arrange for each winery to become a merchant accredited by the ANZ Bank and to obtain similar accreditation for American Express and Diners Club. Each winery would need to provide the three entities with profit-and-loss statements and a business plan. Australian Cellar Door had already signed up 30 wineries and its website was to launch in five days, leaving no time to arrange for the wineries to comply with the conditions to become individual merchants. To preserve goodwill, Mr Arms converted Australian Cellar Door into a retailer with a mark-up of five per cent which he would have charged under his original system. Sales tax now had to be paid at the higher rate. Mr Arms operated at a loss for 12 months until June 2001. He then adopted a different business structure and became profitable. If he had known the true position he could have changed the website to a profitable trading method by November 2000 and would not have lost $58,331 from the seven-month setback.

In the Federal Court of Australia, Mr Arms sued WSA, Mr Houghton and Mr Student to recover this amount. The Court ordered WSA (now subject to a deed of company arrangement) to pay Mr Arms $58,331, but dismissed claims against Mr Houghton and Mr Student. It held that neither Mr Houghton nor Mr Student could be said to be engaged in trade or commerce. The Full Court of the Federal Court allowed an appeal by Mr Arms against the dismissal of his claims against the two employees, on the basis that in circumstances such as those of the present case an employee could be liable. The orders of the primary judge were altered to so as to enter judgment for $58,331 against WSA, Mr Houghton and Mr Student. The employees appealed to the High Court.

The Court unanimously dismissed the appeal. It held that while Mr Houghton and Mr Student were not themselves business proprietors, they nevertheless engaged in conduct in the course of trade or commerce and were thus within the ambit of the *Fair Trading Act*. They had contravened section 9 of the Act, which provides that a person must not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive. The Court held that whether or not the acts of the employees were also the acts of WSA, they were the conduct of persons which contravened the prohibition in section 9.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6909
Email: fhamilton@hcourt.gov.au