JUDGMENT No. 656 / 94

CATCHWORDS

CUSTOMS - anti-dumping - canned tuna from Thailand and Indonesia - finding by Anti-Dumping Authority of dumping but no material injury to domestic producers - normal value - deduction of advertising expenses - apportionment of expenses proportionately to sales - whether reasonable treatment - material injury - economic analysis of domestic canned tuna producers - whether only profitability considered to the exclusion of sales and market share

Customs Act 1901 (Cth) ss.269TAC (2) and (6)

Anti-Dumping Authority Act 1988 (Cth)

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Judiciary Act 1903 (Cth)

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

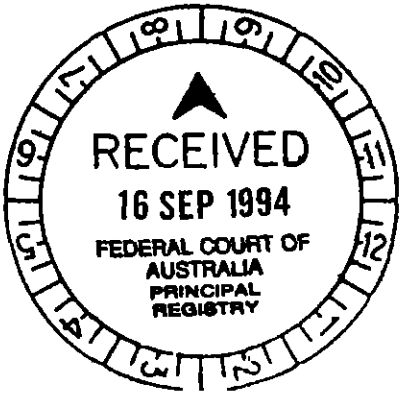
Dart Industries Inc v The Decor Corporation Pty Ltd (1993) 179 CLR 101

Enichem Anic Srl v Anti-Dumping Authority (1992) 39 FCR 458

ICI Australia Operations Pty Ltd v Fraser (1992) 34 FCR 564

H J Heinz Company Australia Ltd and Canned Food Information Service Inc v The Comptroller-General of Customs and The Anti-Dumping Authority
No. NG707 of 1993

Judge: Heerey J
Date: 14 September 1994
Place: Adelaide (heard in Sydney)



IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. NG707 of 1993
)
GENERAL DIVISION)

B E T W E E N:

H J HEINZ COMPANY AUSTRALIA LTD
First Applicant

- and -

CANNED FOOD INFORMATION SERVICE INC
Second Applicant

- and -

THE COMPTROLLER-GENERAL OF CUSTOMS
First Respondent

- and -

THE ANTI-DUMPING AUTHORITY
Second Respondent

JUDGE: Heerey J

DATE: 14 September 1994

PLACE: Melbourne (heard in Sydney)

MINUTE OF ORDERS

The Court orders that the application be dismissed with costs, including reserved costs.

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

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THE ANTI-DUMPING AUTHORITY
Second Respondent

JUDGE: Heerey J

DATE: 14 September 1994

PLACE: Melbourne (heard in Sydney)

REASONS FOR JUDGMENT

The applicants challenge under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and the *Judiciary Act* 1903 (Cth) a decision of the Anti-Dumping Authority (ADA) concerning canned tuna imported from Thailand and Indonesia.

The Australian Customs Service (ACS) on 31 March 1993 made a negative preliminary finding. In June 1993 the ADA confirmed that finding and in doing so concluded that:

1. Canned tuna had been exported to Australia at dumped prices from Indonesia and Thailand.
2. There was no evidence that exports of canned tuna from

either Indonesia or Thailand have been subsidised to any significant degree.

3. The Australian industry producing like goods had not suffered material injury.

4. Imports of canned tuna at dumped prices from Indonesia and Thailand have not caused material injury to the Australian industry producing like goods.

5. There is not a threat of material injury to the Australian industry from future dumped imports of canned tuna from Indonesia and Thailand.

Normal Value - Thai Union Advertising Expenses

The investigation of ACS established that there was an Australian industry processing and selling canned tuna chunks and canned sandwich tuna in brine, oil, water or spring water for human consumption. Goods of that kind were exported to Australia from Indonesia and Thailand. Domestic sales of canned tuna in Indonesia and Thailand included canned tuna of the kind sold in Australia ("ordinary tuna") and also products specifically designed to appeal to the traditional tastes of consumers in those countries, for example, in Thailand, tuna in curry, coconut cream and peanuts. I shall refer to the latter kind of tuna as "Thai cuisine tuna". The investigation of "normal value" for exports of canned tuna from Thailand were calculated on the basis of information supplied by three Thai manufacturers, namely Thai Union, Ta Kong and Southeast Asian (Kingfisher).

In relation to Thai Union, domestic sales were too small to be considered representative and normal value was assessed under s.269TAC (2)(c) using Thai Union's costs to make and sell.

The complaint is that the ACS, in dealing with the advertising expenses in Thailand of Thai Union as a selling expense, calculated that figure in relation to ordinary tuna by taking the same proportion of total advertising costs as the sales of canned tuna bore to total sales (i.e. ordinary tuna plus Thai cuisine tuna). It was said that there was no evidence to support this assumption and thus it was a decision based on no evidence and therefore an error of law, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358. The process was also said to involve a decision so unreasonable that no reasonable decision-maker could make it and a failure to take into account relevant considerations, namely that there was no reason to suppose that the ratio for advertising would be the same as for sales, and also the alleged relevant consideration that if insufficient information was furnished or available to enable the normal value to be ascertained under the sub-sections of s.269TAC preceding sub-s.(6) normal value was to be valued under the latter sub-section. It was also said that the amount of advertising expenses incurred in domestic sales of all types of canned tuna was an irrelevant consideration.

I do not think any of the alleged errors are made out. As Hill J said in *Enichem Anic Srl v Anti-Dumping Authority*

(1992) 39 FCR 458 at 469:

> "Decision-making is a function of the real world. A decision-maker is not bound to investigate each avenue that may be suggested to him by a party interested. Ultimately, a decision-maker must do the best on the material available after giving interested parties the right to be heard on the question."

The comments of his Honour are particularly apt in the context of the anti-dumping regime where Australian authorities have to make decisions on the basis of material obtained in foreign countries without any power to compel the disclosure of information.

Moreover, the evidence showed that tuna is not a traditional Thai food product and the Thai producers were endeavouring to establish a domestic market both for ordinary tuna and Thai cuisine tuna. In the absence of some specific evidence to the contrary, it seems a reasonable treatment to apportion the advertising costs between the two different types proportionately to the amount of sales, especially as the advertising invoices obtained by the ADA did not distinguish between the two (cf *Dart Industries Inc v The Decor Corporation Pty Ltd* (1993) 179 CLR 101). Advertisers in Australia often promote in the one advertisement different flavours, styles or degree of luxury of what is essentially the one product; it does not seem an unreasonable assumption that the same might occur with the two types of tuna products in Thailand.

Normal Value - Kingfisher Advertising Expenses

As to Kingfisher, the applicants made the same complaint about

apportionment of advertising expenses. The same response applies.

However there is an internal inconsistency in the ADA's report in that its calculation of Kingfisher's advertising expenses was based on certain sales figures which are inconsistent with sales figures appearing elsewhere in the report.

The respondents accept that the determination of normal value for Kingfisher product was defective by reason of this disconformity, which affected the calculation of advertising expenses and thus may have affected normal value. However the respondents say that this defect would only be of significance if the applicants succeed on their attack on the finding of no material injury, the issue to which I now turn.

Material Injury

The complaint here is that the ADA looked only at the questions of profit and profitability and failed to take into account its own findings of fact of harm done to the local industry in terms of lost sales, lost market share, price under cutting, price depression and price suppression.

The Australian industry producing canned tuna consisted of H J Heinz Company Australia Ltd (Heinz), Port Lincoln Tuna Processers Pty Ltd (PLTP) and Kailis & France Pty Ltd (K & F). By the time of the inquiry K & F no longer produced large volumes. Until 1991 K & F produced under the John West label

but that contract has since been taken over by PLTP.

Sales by the local industry decreased steadily between the 1989 and 1992 financial years. (Except where otherwise indicated, references hereafter to years are to financial years.) Sales in 1992 were 12.5 per cent lower than 1989 and 6 per cent lower than 1991. Participants fared differently. Between 1989 and 1991 PLTP's sales increased by 31 per cent and Heinz's sales by 18 per cent but K & F's sales declined by 85 per cent.

The Australian industry share of the Australian market fell from 48 to 41 per cent between 1989 and 1992 while the share held by imports from Thailand increased from 45 to 57 per cent. Imported canned tuna has been consistently sold at prices significantly below the Australian products throughout the period. The Australian industry suffered some limited instances of price depression and also some price depression on certain lines in 1992. Profits and profitability for the industry as a whole could not be measured because K & F did not supply the necessary data. PLTP's profits declined between 1989 and 1991 but recovered strongly in 1991-92 with the taking over of the John West contract. Heinz increased profit between 1989 and 1991 but profits fell by 15 per cent in 1992. Heinz profitability rose strongly between 1988 and 1989 but fell by 4 percentage points in 1992. Profitability had fallen further in the period to the end of calendar 1992. The combined profits of Heinz and PLTP increased between 1989

and 1992. Profitability measured on the same basis increased until 1991 but declined largely in 1992. The combined profits of Heinz and PLTP had risen continually throughout the period despite the presence of dumped imports on the market and there was no evidence to suggest that an imminent change of profit trends in the industry was likely.

The ADA's conclusion were expressed in Chapter 7.8 of its report as follows:

> **"7.8 Conclusions on the economic condition of the industry**
>
> Customs concluded that the local industry had suffered material injury in the form of lost sales, lost market share, declining production and loss of profits.
>
> The Authority's analysis shows that the local industry has experienced lost sales and lost market share.
>
> There was also evidence of consistent price undercutting of local prices by imported canned tuna.
>
> The Authority found only limited instances of price depression.
>
> Evidence of price suppression was found for Heinz in 1991-02. PLTP's prices were found to be suppressed in 1990-91 and to a lesser extent in 1991-92.
>
> There was insufficient evidence for the Authority to analyse profits and profitability for the industry as a whole, since K & F did not provide Customs with evidence on its profits and profitability.
>
> The Authority found that Heinz's profits fell by 15 per cent and its profitability by 4 percentage points in 1991-92.
>
> On the other hand, PLTP's profits and profitability, which had been declining, recovered strongly in 1991-92.
>
> The combined profits of the two companies increased over the period under review as did their combined profitability until 1991-92 when it declined marginally.
>
> In assessing whether or not injury is 'material', the Authority is mindful of the Ministerial Direction of 4 September 1990 which stated inter alia:
>
> > The Authority shall ensure that it recommends that anti-dumping or countervailing action be taken only when dumping or subsidisation has caused, or is threatening, 'material' injury to the Australian industry producing like goods - that is, injury which is not immaterial, insubstantial or insignificant; injury which is greater

> than that likely to occur in the normal ebb and flow of business.
>
> The Government expects that material injury, or the threat thereof, will only rarely be taken as proven when the Australian industry producing like goods has not suffered, or is not threatened with, a 'material' diminution of profits or when the dumped or subsidised imports do not hold (or threaten to hold) a sufficient share of the Australian market to cause or threaten 'material' injury, in the sense in which 'material' is defined above.
>
> In this case, the evidence before the Authority does not support the view that the Australian canned tuna industry has suffered a material diminution of profits.
>
> Accordingly the Authority concludes that the local industry producing canned tuna has not suffered injury that could be considered to be material in the sense defined above."

The ADA reference is to the Ministerial Direction given on 4 September 1990 under s.12 of the *Anti-Dumping Authority Act* 1988 (Cth). The applicant pointed out that the Ministerial Direction also included the following:

> "Nevertheless the Government acknowledges that (rare) cases may occur in which material injury may indeed be caused or threatened even though the Australian industry's profits have not been "materially" produced and even though the dumped or subsidised imports hold only a small share of the Australian market."

The function of this Ministerial Direction is discussed by the Full Court in *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564 at 577.

In my opinion the applicants' attack in this part of the case is based on a misreading of what the ADA said in its chapter 7.8. In the last paragraph commencing "Accordingly" a fair reading indicates that the authority is referring to all the matters discussed in chapter 7.8 and not just the immediately preceding topic of diminution of profits. Therefore the ADA has expressly taken into account its findings as to the other

matters mentioned, for example lost sales and lost market share.

Finally it was urged that the combined profits of Heinz and PLTP was an irrelevant consideration as being not a meaningful measure of profits in the industry when it excluded K & F. I agree with the respondents' answer that this fact was not irrelevant since K & F did not provide evidence of profits and profitability and in any case no longer produced large volumes of canned tuna.

The application will be dismissed with costs, including reserved costs.

I certify that this and the preceding eight (8) pages are a true copy of the reasons for judgment of his Honour Mr Justice Heerey.

Dated: 14 September 1994

Associate

Appearances

Counsel for the applicant:	Mr B Walker SC and Mr M Speakman
Solicitor for the applicant:	C G Gillis & Co
Counsel for the respondent:	Mr A Robertson
Solicitor for the respondent:	Australian Government Solicitor
Date of hearing:	28 July 1994