

TOP PERFORMANCE MOTORS PTY LTD V IRA BERN [1975] 24 FLR 286

Australian Industrial Court – 3 April 1975

FACTS

Top Performance (Top) was the holder of a dealership to sell Datsun Motor Vehicles in the Gold Coast region. Ira Bern was the wholesale distributor of Datsun Motor Vehicles in Queensland and had granted the Gold Coast dealership to Top.

Ira also sold Datsun Motor Vehicles at the retail level. Ira terminated the dealership after giving the appropriate notice. Top sued Ira pursuant to sections 45(2)(b) and 46 of the Trade Practices Act.

ISSUE

Was there a market for the sale of Datsun Motor Vehicles in the Gold Coast?

Had Ira and the new dealer entered into an arrangement or understanding in restraint of trade or commerce?

Had Ira abused its market power by terminating the dealership?

FINDING

There was a market for the sale of Datsun Motor Vehicles in the Gold Coast region as each brand of motor vehicle was different in many aspects.

There was no evidence that Ira and the new dealer had agreed to restraint trade and commerce.

Ira had not abused its market power as it was exercising its contractual rights for the genuine purpose of protecting its business interests.

QUOTE

Joske J said:

“So far as concerns the construction of section 46, the submission put forward on behalf of the applicant, which is in effect that to exercise a power is to take advantage of a power, is in my opinion not the proper construction of the section. In my view, exercise of its contractual right to terminate a contract for the genuine purpose of protecting legitimate trade and business interests is not taking advantage of a power of controlling a market within the meaning of section 46, and providing that there is this genuine purpose, that is enough, though it may be there would always be people who would not regard it as reasonable to exercise the power in the circumstances of any particular case. Unreasonable behaviour may go to show absence of bona fides, but it goes no further than this.”

Smithers J remarked:

“It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.”

IMPACT

When a person with substantial market power exercises its contractual rights to the disadvantage of another person they would not be breaching the Trade Practices Act provided there is a genuine business reason for their actions.

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