

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v IVF Finance Pty Limited [2021] FCA 1266

File number: VID 587 of 2021

Judgment of: **MOSHINSKY J**

Date of judgment: 14 October 2021

Catchwords: **PRACTICE AND PROCEDURE** – interim injunction – application by the Australian Competition and Consumer Commission for interim injunction (until the hearing and determination of application for interlocutory injunction) to restrain the first respondent from acquiring an IVF business from the second respondent – where the Commission contended that the acquisition would contravene s 50 of the *Competition and Consumer Act 2010* (Cth) – whether prima facie case established – whether balance of convenience favoured grant of injunction – interim injunction granted

Legislation: *Competition and Consumer Act 2010* (Cth), ss 50, 80

Cases cited: *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* (2011) 253 ALR 324
Australian Competition and Consumer Commission v Pacific National Pty Ltd (2020) 277 FCR 49
Australian Competition and Consumer Commission v Pacific National Pty Ltd [2018] FCA 1221

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Economic Regulator, Competition and Access

Number of paragraphs: 29

Date of hearing: 14 October 2021

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Solicitor for the Applicant: DLA Piper

Counsel for the First
Respondent:

Mr AJL Bannon SC with Mr C Colquhoun

Solicitor for the First
Respondent:

Gilbert + Tobin

Counsel for the Second
Respondent:

Mr JA Arnott SC

Solicitor for the Second
Respondent:

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ORDERS

VID 587 of 2021

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**
Applicant

AND: **IVF FINANCE PTY LIMITED**
First Respondent

HEALIUS LIMITED
Second Respondent

ORDER MADE BY: MOSHINSKY J

DATE OF ORDER: 14 OCTOBER 2021

THE COURT ORDERS THAT:

1. Subject to further order, until 5.00 pm on 19 October 2021, the first respondent, whether by itself, its officers, servants, agents or otherwise howsoever, is restrained from acquiring directly or indirectly any shares in, or assets of, Adora Fertility Pty Ltd (ACN 616 422 818), Darlinghurst Day Hospital Pty Ltd (ACN 639 120 291), Greensborough Day Hospital Pty Ltd (ACN 639 120 899), and Craiglee Day Hospital Pty Ltd (ACN 639 116 500).
2. The further hearing of the applicant's interlocutory application dated 13 October 2021 be adjourned to 10.15 am on 19 October 2021.
3. By 8.00 pm on 14 October 2021, the applicant file and serve a redacted copy of the affidavit of Simon Uthmeyer dated 13 October 2021.
4. Costs be reserved.
5. There be liberty to apply.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 The applicant (the **ACCC**) seeks an interim injunction under s 80(2) of the *Competition and Consumer Act 2010* (Cth) (the **Act**) to restrain the first respondent, IVF Finance Pty Ltd (**IVF Finance**), which is a wholly-owned subsidiary of Virtus Health Ltd (**Virtus**), from acquiring any shares in or assets of Adora Fertility Pty Ltd (**Adora**) and three day-hospitals from the second respondent, Healius Ltd (**Healius**).

2 The application is brought on an urgent basis in circumstances where the proposed acquisition is due to complete tomorrow, Friday, 15 October 2021.

3 I should clarify at the outset the nature of the application that I am dealing with today. By paragraph 1 of its interlocutory application dated 13 October 2021, the ACCC seeks an *interim injunction* to restrain the proposed acquisition until the hearing and determination of its application for an *interlocutory injunction* (which is sought in paragraph 2 of the interlocutory application and which would, if granted, restrain the proposed acquisition until the hearing and determination of the proceeding). I am dealing today with paragraph 1 of the interlocutory application, that is, the application for an interim injunction. It may be expected that the application for an interlocutory injunction could be heard within about a week and determined within a short period of time after the hearing. Accordingly, I am concerned with whether or not there should be an interim injunction for a period of about one week.

The proceeding

4 The proceeding was commenced by originating application filed yesterday, 13 October 2021. The substantive final relief sought by the ACCC is an injunction pursuant to s 80(1) of the Act that IVF Finance be restrained from acquiring any shares in or assets of Adora, Darlinghurst Day Hospital Pty Ltd, Greensborough Day Hospital Pty Ltd and Craiglee Day Hospital Pty Ltd.

5 The basis of the ACCC's claim for this relief is set out in its concise statement dated 13 October 2021. In broad outline the ACCC contends as follows:

- (a) The ACCC contends that the proposed acquisition would contravene s 50 of the Act because it would have the effect, or be likely to have the effect, of substantially

lessening competition for the supply of *low cost fertility services* in the Brisbane metropolitan region and in the Melbourne metropolitan region (defined by the ACCC as the “Low Cost Markets”).

- (b) In particular, the ACCC contends that the proposed acquisition would remove the substantial competition between Virtus and Adora for the provision of low cost fertility services in the Low Cost Markets and would substantially increase the concentration of suppliers in the Low Cost Markets. The ACCC contends that, in contrast, in the likely future without the proposed acquisition, Adora would continue to operate independently from Virtus and compete aggressively for the provision of low cost fertility services in the Low Cost Markets.
- (c) In the alternative, the ACCC contends that the proposed acquisition would contravene s 50 of the Act because it would have the effect, or be likely to have the effect, of substantially lessening competition for the supply of *fertility services* (including low cost fertility services) in the Brisbane metropolitan region and in the Melbourne metropolitan region (defined by the ACCC as the “Fertility Services Markets”).

6 In paragraphs 5 to 11 of its concise statement, the ACCC sets out its contentions concerning the industry background as follows:

- 5. Infertility is the inability to conceive or maintain a pregnancy to the point of a live birth. It affects about one in six Australian couples of reproductive age.
- 6. There are two types of infertility: medical infertility and social infertility. The causes of medical infertility are varied and include problems with the production of sperm or eggs, the structure or function of male or female reproductive systems, or hormonal and immune conditions. Social infertility refers to single individuals and LGBTQI couples who wish to conceive children but are unable to do so because of their social circumstances. For many people suffering from infertility, the only opportunity to have children is with the assistance of fertility services.
- 7. The core form of fertility services in Australia is in vitro fertilisation (**IVF**). Generally, IVF treatment refers to a series of procedures in which eggs (or oocytes) and sperm or embryos are handled outside of the body (in vitro) with the purpose of achieving a pregnancy. This series of procedures usually takes between four and six weeks and is generally referred to as a cycle of treatment. The IVF cycle starts on the first day of a woman’s period and ends when a pregnancy blood test is taken after the embryo has been transferred into the patient’s uterus.
- 8. Fertility specialists are qualified doctors whose role it is to manage and oversee the patient’s engagement with the IVF process, typically following a referral from a General Practitioner. Fertility specialists can operate independently, be affiliated with a supplier of fertility services, or be employed directly by a supplier of fertility services.

9. The supplier of fertility services provides diagnostic testing services (for example, genetic testing), laboratory services carried out by fertility scientists, nursing and administration related to the IVF treatment, and the facilities used for medical procedures associated with IVF treatment (generally through privately owned day surgeries or through existing relationships with hospitals).
10. There is a spectrum of different fertility services at different price points, catering to the priorities of different patients. However, the industry typically categorises these broadly into two types of service:
 - (a) **Low cost:** Low cost services do not include all of the additional treatments that form part of full-service treatment and patients are typically offered a standardised service. The service is structured to bulk bill Medicare eligible expenses and minimise out-of-pocket costs for patients. Low cost clinics often have stricter eligibility criteria than full-service clinics, relating to patient characteristics such as weight, and are more likely to share patient care among a team of specialists.
 - (b) **Full-service:** Full-service is a comprehensive and individualised offering that will typically include a number of ‘add-on’ services not covered by Medicare (such as genetic screening, additional diagnostic testing and access to donor egg programs). Patients using full-service clinics are still eligible to receive Medicare rebates, however, their aggregate costs will often be significantly higher than the aggregate value of their Medicare rebates because they are paying for additional services. For this reason full-service fertility services are more expensive than low cost fertility services.
11. A patient’s decision whether to seek full-service or low-cost services will often be influenced by their particular financial circumstances. Patients who are not financially constrained will generally choose a full-service provider, due to a perceived greater likelihood of success. Some patients choose a full-service provider initially, then switch to a low-cost provider after one or more unsuccessful cycles, because they cannot afford to continue with the full-service provider. However, for some patients low-cost services will be their only chance to have a child. For these patients, full service options are not substitutable for low cost services.

7 The ACCC’s contentions concerning competition between the merger parties are set out in paragraphs 12 to 14 of the concise statement, which state (omitting confidential parts):

12. Virtus is an ASX-listed global provider of fertility services. Virtus operates clinics throughout Australia. In Brisbane, Virtus operates a full-service fertility clinic group branded as Queensland Fertility Group (**QFG**). Virtus also operates a low-cost clinic branded as The Fertility Centre (**TFC**) in Brisbane. Virtus engages fertility specialists as independent contractors to assist in providing fertility services through Virtus’ clinics.
13. Adora is owned by healthcare company Healius Limited (**Healius**). Adora commenced operations in Australia in 2014 and has been an aggressive low-cost competitor rapidly building market share. Adora operates four low-cost clinics across Australia, including a clinic in Brisbane.
14. Virtus and Adora are close and substantial competitors in the Low Cost Markets / Fertility Services Markets, in Brisbane and Melbourne:

- (a) they each have a substantial share of the relevant markets. The table below sets out the ACCC’s estimate of each party’s market share, having regard to the number of IVF cycles. While the ACCC does not have data for Melbourne low cost services alone, as there are few [low] cost providers in Melbourne, the parties’ market shares in the Melbourne Low Cost Market are likely to be substantially higher than their shares in the Fertility Services Market;

Fertility Clinic / Group	Estimated market share (% of total cycles)
Brisbane Low Cost Market	
Virtus	
Adora	
Brisbane Fertility Services Market	
Virtus	
Adora	
Melbourne Fertility Services Market	
Virtus	
Adora	

[Estimated market shares omitted from table due to confidentiality.]

- (b) a significant number of fertility patients are likely to consider Virtus and Adora as alternates, in deciding which fertility service provider to use;
- (c) Virtus competes directly with Adora in the supply of substantially similar low-cost services in Brisbane and Melbourne; and
- (d) Adora’s growth in providing fertility services in the Brisbane and Melbourne regions has come at the expense of other providers, including Virtus (Virtus, being the largest provider of fertility services in the Brisbane and Melbourne regions).

8 The ACCC’s contentions regarding barriers to entry and substantial lessening of competition are set out in paragraphs 15 to 23 of its concise statement, which state (omitting confidential parts):

Barriers to entry

15. Barriers to entry or expansion into the Low Cost Markets (alternatively the Fertility Services Markets) in Brisbane and Melbourne are significant, with new entrants facing:
- (a) the need to build an established reputation and evidence of success;
- (b) significant establishment costs, including
- (i) the establishment of clinical facilities, including the establishment of laboratories; and

- (ii) marketing costs needed to establish a presence in an industry which is largely driven by word-of-mouth recommendations;
- (c) onerous regulatory requirements that differ state-to-state;
- (d) the need to attract qualified specialists, embryologists and other clinical staff;
- (e) prevalent restraint of trade clauses preventing fertility specialists from establishing a practice (sometimes within a certain geographical boundary from their previous practice) and within specified time periods, and competing fertility clinics with a track record of bringing proceedings to enforce those restraint of trade clauses; and
- (f) a time-lag before operations become profitable, due to the need to build economies of scale, especially in the lower margin Low-cost Market.

Substantial lessening of competition

16. The Proposed Acquisition would:
 - (a) substantially increase the level of concentration of suppliers in the Low Cost Markets (alternatively the Fertility Services Markets) in Brisbane and Melbourne, which are already highly concentrated;
 - (b) remove the substantial competition between Virtus and Adora in the Low Cost Markets (alternatively the Fertility Services Markets); and
 - (c) significantly reduce choice for patients seeking fertility services in the Brisbane and Melbourne region, particularly in the Low Cost Market.
17. The market share of the combined entity will be approximately []% of the Low Cost Market ([]% of the Fertility Services Market) in Brisbane and approximately []% of the Fertility Services Market (and likely higher in the Low Cost Market) in Melbourne.
18. The Herfindahl-Hirschman Index (**HHI**) is a measure of market concentration calculated by squaring the market share of each entity competing in a market and then summing the resulting numbers. The ACCC's merger guidelines explain that the ACCC will generally be less likely to identify horizontal competition concerns when the post-merger HHI is less than 2000, or greater than 2000 with a delta of less than 100. Similarly, the US Department of Justice Horizontal Merger Guidelines provide that mergers resulting in highly concentrated markets (with an HHI of above 2500) that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.
19. The Proposed Acquisition substantially exceeds these thresholds. In Brisbane, the HHI for the Low Cost Market after the Proposed Acquisition would be [] and the transaction would increase the HHI by []. The HHI for the Fertility Services Market after the Proposed Acquisition in Brisbane would be [] and the transaction would increase the HHI by []. In Melbourne, the HHI for the Fertility Services Market after the Proposed Acquisition would be [] and the transaction would increase the HHI by [].
20. The Proposed Acquisition would also be likely to substantially diminish the extent to which Adora competes to supply fertility services in Brisbane and

Melbourne. After taking control of Adora, Virtus has strong incentives to cease the current aggressive price competition offered by Adora for fertility services, which has historically dented Virtus' profitability.

21. In the likely future with the Proposed Acquisition, the removal of a successful low-cost competitor that has acted as an effective pricing constraint on the market, would in turn reduce the competitive response from Virtus and other fertility clinics that supply fertility services in the Fertility Service Markets / Low Cost Markets in Brisbane and Melbourne.
22. Any likely entry into the Low Cost Markets / Fertility Services Markets in Brisbane and Melbourne will not be of a sufficient scale or sufficiently timely to ameliorate the loss of competitive rivalry resulting from the Proposed Acquisition.
23. In contrast, in the likely future without the Proposed Acquisition, Adora would continue to impose a substantial and effective competitive constraint on Virtus in the supply of fertility services, and in particular low-cost services.

The present application

- 9 In support of its application for an interim injunction, the ACCC relies on two affidavits of Simon Uthmeyer, dated 13 October 2021 and 14 October 2021. Mr Uthmeyer is a partner of DLA Piper Australia, the solicitors acting for the ACCC. To the extent that objection was taken to Mr Uthmeyer's first affidavit on the basis that the sources of certain information were not disclosed, this has been addressed in the second affidavit.
- 10 IVF Finance relies on an affidavit of Kate Munnings dated 14 October 2021. Ms Munnings is the CEO and Managing Director of Virtus.
- 11 Healius relies on an affidavit of Mark Ellis dated 14 October 2021. Mr Ellis is the General Manager – Corporate Development of Healius.
- 12 Parts of the affidavit material and other documents filed by the parties contain commercially confidential material. I consider it appropriate to make confidentiality orders regarding that material.
- 13 The principles applicable to the present application are well established. It is sufficient for present purposes to refer to the summary of those principles in *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 at [5]-[15] per Beach J.
- 14 As noted earlier in these reasons, I am presently dealing with an interim injunction application seeking to hold the status quo for a period of about a week until the hearing and determination of the application for an interlocutory injunction. The principles are to be applied in that context.

Consideration

15 There are, broadly, two issues to be considered:

- (a) whether the ACCC has made out a prima facie case; and
- (b) whether the balance of convenience favours the grant of an interim injunction.

16 In relation to the first issue, I am satisfied on the basis of the material currently before the Court that the ACCC has established a prima facie case that the proposed acquisition would contravene s 50 of the Act, that is, that it would have the effect, or be likely to have the effect, of substantially lessening competition for the supply of fertility services in the Fertility Services Markets. (It is sufficient for present purposes to refer to this aspect of the ACCC's case, being its alternative case.) In forming this view, I have had regard to the principles applicable to s 50 of the Act, including the discussion of the meaning of the expressions used in s 50 by the Full Court in *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49.

17 I note, in particular, the following aspects of the evidence presently before the Court.

18 First, I note the evidence concerning *market concentration*, in particular that set out in Mr Uthmeyer's first affidavit at paragraphs 59 to 66. I also refer to the material concerning the effect that the proposed transaction may have on market concentration set out at paragraphs 103 to 113 of Mr Uthmeyer's affidavit.

19 Secondly, I note the evidence regarding the competition or rivalry that exists between Virtus and Adora as set out in paragraphs 67 to 70 of Mr Uthmeyer's first affidavit. Some of these paragraphs draw on statements made by Virtus in publicly available documents.

20 Thirdly, I refer to the evidence currently before the Court concerning barriers to entry in relation to the markets contended for by the ACCC. This material is set out in paragraphs 71 to 73 of Mr Uthmeyer's first affidavit. I note that this issue is contested in the material filed by the respondents.

21 In light of these matters, I considered that a prima facie case is established.

22 I turn now to the balance of convenience.

23 An important consideration is that settlement of the transaction is due to take place tomorrow. This is a substantial commercial transaction, and interfering with the time for settlement that

has been agreed between the parties is a significant step and not to be done lightly. As submitted by the respondents, the grant of an injunction, even for a few days, creates uncertainty and risk.

24 That said, the material presented by the respondents for the purposes of today's hearing does not suggest that, if an interim injunction were granted for a period of about a week, there is any real risk that the transaction would for that reason not go ahead.

25 One of the matters raised by the respondents concerns delay. It is submitted that the ACCC delayed in bringing the application for injunctive relief and this should count against it. However, I am not satisfied that there has been any substantial delay. In September 2021, Virtus through its lawyers, indicated that the transaction was unlikely to proceed before the end of October. Virtus was not prepared to provide an undertaking not to complete until the ACCC had completed a review of the transaction, but stated that it would provide notice to the ACCC five business days' prior to completion. On Friday, 8 October 2021 (last Friday) Virtus gave the ACCC notice of its intention to complete the transaction on 15 October 2021. There was a further exchange of correspondence between the parties on 9 and 10 October 2021. On Tuesday, 12 October 2021, the ACCC wrote to Virtus stating that it would commence a proceeding, which it did on Wednesday, 13 October 2021.

26 A relevant consideration is that Virtus has offered to give an undertaking to the Court to the effect that it will operate the Adora Fertility Clinic business separately and independently from Virtus's existing operations and hold its interest in the Adora Fertility Clinic business separately from Virtus's other assets. The undertaking is subject to there being a speedy trial of the proceeding. Various versions of the proposed undertaking have been provided in the course of communications between the parties, and a further version was provided by Virtus to the Court at about 1.30 pm today. The respondents submit that the preferable course in all the circumstances is to refuse the application for an injunction and accept the proposed undertaking. It is submitted that this course would enable a divesting order to be made in due course if the ACCC is successful in its contention that the transaction contravenes s 50 of the Act. Submissions were also made today about the commercial disadvantages that would flow from the grant of an injunction and as to the various different potential outcomes at trial. In my view, the proposed undertaking and those submissions are best considered in the context of the application for an interlocutory injunction.

- 27 Many of the submissions made by the respondents were directed to an injunction lasting until the hearing and determination of the proceeding, rather than an injunction lasting only about a week. Further, I note that in several places in Mr Ellis’s affidavit he refers to detriment if the proposed sale were delayed for “two or three months” (see, eg, paragraphs 19, 20, 22). That material does not suggest that there will be any significant detriment if an injunction is granted for a period of about a week.
- 28 A further factor that I note is that, under s 80 of the Act, the Court cannot require the ACCC to give an undertaking as to damages. In this regard, I refer to the observations of Foster J in *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* (2011) 253 ALR 324 at [26].
- 29 In all the circumstances, in my view, the balance of convenience favours the grant of an interim injunction, which will hold the status quo for a relatively short period of time, most likely about one week. I will therefore make an order substantially as sought in paragraph 1 of the ACCC’s interlocutory application.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 18 October 2021