

Franchising Alert

Franchisors take notice - Theft accusations can prove very costly

July 2012

A recent NSW Court decision in *Clarke v Coles Supermarkets Australia Pty Ltd*¹ provides a very timely reminder for those franchisors and franchisees alike in the retail industry. The Court ultimately found that a customer had been defamed after accusations were made by the Coles store manager that a customer had been thieving prawns. The matter cost Coles Supermarkets over \$50,000 in damages, not to mention significant legal costs and negative media publicity.

The decision highlights the need for clear policies and procedures for staff when dealing with customers that are thought to be thieving or otherwise acting unlawfully.

Brief facts

Mr Clarke was shopping at his local Coles supermarket in 2009 and had ordered about 500g of raw prawns. After filling his trolley with further items, he later returned to the delicatessen counter to request the prawns be 'topped up' to 1kg. Soon after Mr Clarke was confronted by the store manager who accused him of consuming the prawns while shopping. The store manager said to Mr Clarke 'you've been stealing prawns...'. Mr Clarke tried to explain his position however the manager replied 'We're going to keep you - I will keep you here as long as it takes. You've been stealing prawns and we want to see them'. The manager also claimed that he had seen Mr Clarke eat some prawns, drop the shells on the floor and secreting the wrapper of the prawns.

The confrontation between the men was heated, lasted between 10 and 20 minutes and was witnessed by about 30 bystanders. One bystander who gave evidence at the trial described both Mr Clarke and the store manager as being 'very distressed' and felt the need to intervene before the situation escalated further. Eventually the

police were called, though no charges were laid against Mr Clarke.

Mr Clarke claimed the confrontation had left him feeling hurt, humiliated and shocked. He brought a claim against Coles Supermarkets for defamation, injurious falsehood, assault, intimidation, harassment and wrongful imprisonment. The case was vigorously defended by Coles Supermarkets.

Decision

In total 7 witnesses (including 5 Coles employees) gave evidence over the course of the multi day hearing each with differing accounts and recollections of the incident. The Coles employees recounted that Mr Clarke had been the aggressor rather than the store manager who they said spoke in a calm manner. This was obviously at odds with Mr Clarke's version of events.

During the course of cross examination the store manager also admitted that he hadn't in fact seen Mr Clarke shell or eat any prawns but had made various assumptions to that effect.

The Judge, having listened to the contradictory evidence, had to make findings on credibility and the reliability of the testimonies. The judge favoured Mr Clarke's version of events over that of the store manager (and other Coles staff). His Honour found 'the words spoken by [the store manager] did imply the [Mr Clarke] had either stolen or was in the process of stealing prawns while still within the store' and the 'comments were made within the hearing of a number of Coles employees and within the hearing of numerous customers of Coles who were also present'.

His Honour noted that the store manager was able to raise concerns he had with Mr Clarke's behaviour but the

¹ [2012] NSWDC 107

manner in which he approached Mr Clarke by *'making his accusatory remarks loudly and in public, and in such an aggressively confrontational manner'* went *'too far'*. He further noted that the other customers had no interest in hearing the accusations which could have been made far more discreetly.

His Honour found Mr Clarke had been defamed because some of the shoppers and other staff may have recognised him and the accusations that were being made may have been spread along the *'grapevine'*. Mr Clarke was awarded \$40,000 in compensatory damages and \$10,000 aggravated compensatory damages because of the *'prolonged and repeated nature of the embarrassing and humiliating accusations'*.

The other causes of action brought by Mr Clarke were not successful.

Lessons that can be learned?

Theft in a retail environment is unfortunately a fact of business. Franchisor and franchisee staff should have training and clear written guidelines and procedures for how any customer should be approached where there are concerns of theft within a store. This case highlights that:

- any concerns should be raised discreetly and calmly, without immediate aggressive accusations;

- staff should listen and obtain an account from the customer before accusations are made; and
- the customer should be afforded an opportunity to defend himself against the allegations.

Staff should also be mindful that situations can escalate very quickly. All customers should be approached with some caution as a person could become distressed and possibly violent.

For Coles, this was a very costly and ultimately an embarrassing situation. Not only was Mr Clarke awarded significant damages, but Coles also has to pay his costs of the proceedings as well as their own legal/insurance costs. The case was reported in the major print media, and in the age of social media any negative publicity travels quickly and can prove damaging to your brand. For those systems whose brand is still developing, a situation like this can be financially crushing.

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