



## Summary of Judgment

*Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)* [2022] VSC 13

28 January 2022

The plaintiff, Cargill Australia Ltd (“Cargill Australia”) is a wholly owned subsidiary of Cargill, Incorporated (“Cargill, Inc”) (together, “Cargill”). Cargill, Inc is a global supplier of food and food products based in Minneapolis, Minnesota.

The first defendant, Viterra Malt Pty Ltd, is wholly owned by the second defendant, Viterra Operations Ltd, which is wholly owned by the third defendant, Viterra Ltd<sup>1</sup> (collectively, “Viterra”). Viterra Ltd is a wholly owned by the fourth defendant, Glencore International AG (“Glencore”).

Joe White Maltings Pty Ltd<sup>2</sup> (“Joe White”) is an Australian company which produces malt from barley. In 2013, Joe White was the largest maltster operating in the Asia Pacific region.

Viterra acquired Joe White in September 2009. In December 2012, Glencore purchased the corporate group that included Viterra Ltd (“the Viterra Group”) with all of its subsidiaries, including Joe White. Following the acquisition of the Viterra Group, Glencore sold Joe White through a 2 phase auction process.

In phase 1 of the sale process, Glencore provided prospective purchasers it had selected with an information memorandum containing financial and operational information about Joe White and imposed a strict regime for any indicative bid, including confidentiality obligations. In phase 2, prospective purchasers as chosen by Glencore were able to ask questions and were given access to a data room that contained further commercial, financial and legal information about Joe White. This further information was provided to allow a due diligence to be conducted before making a final bid.

Cargill participated in the sale process and conducted due diligence before making a final bid. Soon after, Glencore contacted Cargill and as a result of further discussions the final bid was increased by \$15 million. On 4 August 2013, Cargill Australia entered into an agreement with Viterra (“the Acquisition Agreement”) to purchase all the shares in Joe White, as well as some additional assets which were used by Joe White. The purchase price was \$420 million. The acquisition was completed on 31 October 2013.

In this proceeding, Cargill Australia made a number of claims against the defendants.

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<sup>1</sup> Later known as Viterra Pty Ltd.

<sup>2</sup> Later known as Cargill Malt Asia Pacific Pty Ltd.

Speaking broadly, Cargill Australia made claims under the Australian Consumer Law,<sup>3</sup> as well as for breach of contract and in tort for deceit.

Cargill Australia alleged that the defendants engaged in misleading and deceitful conduct, including failing to disclose material information about Joe White prior to Cargill Australia entering into the Acquisition Agreement. This material information was not discovered by Cargill during the due diligence process.

Specifically, Cargill Australia alleged that the defendants made a series of misrepresentations and did not disclose that Joe White routinely, and without informing customers, supplied malt that did not comply with customers' contractual requirements and specifications, and supplied certificates of analysis to customers that misstated the results of analytical testing of malt supplied. The result of many of these misstatements was that these certificates reported that malt complied with contractual requirements and specifications when it did not. It was further alleged that in some instances the certificates misstated the barley varieties used or failed to disclose that malt had been produced from barley varieties which were not approved by the customer to whom the malt was supplied. Furthermore, it was alleged that gibberellic acid had been used as an additive in the malting process when some customers prohibited its use.

Cargill Australia alleged that if it had been aware of the practices set out above, it would not have entered into the Acquisition Agreement, or (if it became aware after entering into the Acquisition Agreement) would have terminated the Acquisition Agreement prior to completion. Cargill Australia claimed the difference between the amount it paid for Joe White and the true value of Joe White at the date of completion, which Cargill Australia contended was substantially less.

As well as denying the claims brought by Cargill Australia and raising numerous defences and counterclaims, the defendants brought third party claims against Cargill, Inc, Joe White and a number of executives who were formerly Viterra Ltd employees engaged in the Joe White business up to completion of the Acquisition Agreement. The defendants broadly alleged that, if Cargill Australia established its claims, it was because the third parties made misleading representations or failed to disclose material information to the defendants about Joe White's business practices prior to the sale. Claims were made under the Australian Consumer Law and for breach of contract.

Cargill Australia has successfully established that Glencore and Viterra made misleading representations at various stages of the sale process, as well as upon entering into the Acquisition Agreement and again before completion of the Acquisition Agreement. In the absence of those representations, Cargill Australia would not have entered into the Acquisition Agreement or completed it (as the case may be). It has also been found that conduct giving rise to some of those representations was fraudulent and that Viterra is liable for deceit. Accordingly, on various grounds Cargill Australia is entitled to an award of

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<sup>3</sup> Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

damages in the amount being the difference between the purchase price of \$420 million and the true value of the Joe White business as at 31 October 2013.<sup>4</sup>

In addition, independent of its other claims, Cargill Australia has established that representations which falsely and misleadingly represented the state of competition in the blind auction process induced Cargill Australia to increase its purchase price by \$15 million. However, this loss is subsumed in the compensation to be awarded for the primary claims.

Cargill Australia failed to make out its contractual claims against Viterra for breached warranties as set out in the Acquisition Agreement. Those claims were extinguished by an express term of the Acquisition Agreement upon the sale of Joe White by Cargill Australia in 2019.

Viterra's counterclaim against Cargill Australia and third party claim against Cargill, Inc will be dismissed. Although Viterra was successful in demonstrating that Cargill Australia made misleading representations (that it had not relied on information provided by Viterra in the sale process other than to the extent stated in the Acquisition Agreement itself) at the time the Acquisition Agreement was entered into, Viterra was unable to establish any loss arising from this conduct.

The third party claims against Joe White and various former employees of Viterra Ltd have failed, save for a claim that the third third party, Gary Hughes ("Hughes"), breached his employment contract. It has been found Hughes failed to act ethically, honestly and in the best interest of Viterra by making certain misleading representations and failing to disclose relevant information to Viterra. However, Viterra failed to prove it suffered loss as a result of Hughes's breaches, as it was not proved that if Hughes had acted in accordance with his contract, Viterra would have taken certain steps it alleged it would have. Accordingly, there will be judgment for all the third parties, except Hughes.<sup>5</sup>

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NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the court's reasons or to be used in any later consideration of the court's reasons. The only authoritative pronouncement of the court's reasons and conclusions is that contained in the published reasons for judgment.

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<sup>4</sup> The specific amount is yet to be finalised as the key parties have contended that further submissions on this limited issue are required.

<sup>5</sup> In relation to the third party claim against Hughes, the relevant parties will be directed to make further submissions on the appropriate orders in light of the findings made.