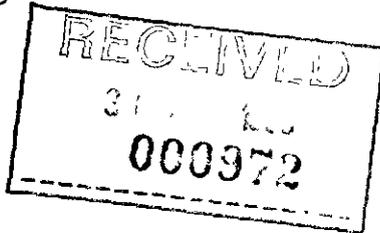


9/6

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP.139/94

635



BETWEEN COMALCO NEW ZEALAND LIMITED
Plaintiff

A N D THE BROADCASTING STANDARDS
AUTHORITY
First Defendant

AND TELEVISION NEW ZEALAND LIMITED
Second Defendant

Hearing: 11 May 1995

Counsel: J.E. Hodder and P.A. Cashmore for Plaintiff
No Appearance for First Defendant
P.J. Bartlett for Second Defendant

Judgment: 29 MAY 1995

JUDGMENT OF MASTER J.C.A. THOMSON

Mr Hodder advised the Court that the first defendant would abide the decision of the Court. This proceeding concerns a September 1993 "Frontline" television programme which was broadcast by the TV1 Channel operated by the second defendant (TVNZ). It dealt with, among other things, electricity supply and pricing to the plaintiff. The plaintiff claims that the programme was unbalanced, misleading and outrageous. It complained under the Broadcasting Act 1989 initially to TVNZ and thereafter to the first defendant, the Broadcasting Standards Authority. Being dissatisfied with the Authority's decision, it commenced this judicial review. It has also appealed.

Comalaco claims that:-

- (a) The programme was unbalanced, misleading and outrageous.
- (b) The Authority fell into error in (generally concluding otherwise), i.e. error over relevant and irrelevant considerations.
- (c) The Authority was wrong to refuse to hold a formal hearing into Comalco's complaint.

The plaintiff served an order for general discovery, and the second defendant discovered the documentation which it had already put before the first defendant. For its part, the second defendant has filed an application seeking limited discovery; in effect seeking an order that the documentation which it has already produced to the Authority, is sufficient to dispose of the proceeding, upon the grounds that the discovery of other documents now or previously in the possession of the second defendant would -

- (i) Serve no useful purpose; and
- (ii) Be oppressive;
- (iii) Involve the parties in needless expense or delay;
- (iv) Be an "unnecessary discovery" within R.295 of the High Court Rules.

Being dissatisfied with the second defendant's discovery, the plaintiff seeks an order for particular discovery against the second defendant. It wants discovery of eight categories of pre-programme documents which are listed in a schedule to its application for particular discovery. The plaintiff's application for particular discovery and the second defendant's application for limited discovery, are opposed. Counsel agreed however that both should be heard together because the same issues arise.

It seems to me that the applications have to be considered against the following background.

1. That the case is said to be a major one, dealing with the issue of how far the Broadcasting Authority provides redress to a major corporate complaining that it has been the subject of an unbalanced, misleading, or outrageous TV programme. Such corporation would of course have an alternate remedy in defamation.

2. In New Zealand substantive unfairness is a legitimate ground for judicial review. Further, substantive unfairness shades into but is not identical with unreasonableness. Its merit is that it allows a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked. Its limits or categories can never be defined with exhaustive precision - Thames Valley Electric Power Board v. NZFP Pulp and Paper Limited [1994] 2 NZLR 641. That is a wider statement of the law as to judicial review, than that expounded by Lord Brightman (and relied on by Mr Bartlett) in Chief Constable of the North Wales Police v. Evans [1982] 3 All ER (HL) 141, 154, where he said:-

"Judicial review is concerned, not with the decision, but with the decision-making process."

3. That discovery in judicial review is different in New Zealand than in England. In the English courts, discovery is not automatically available in a judicial review proceeding. In New Zealand, a judicial review proceeding is one in which all parties are entitled to discovery in the ordinary course in terms of the High Court Rules, Judicature Amendment Act 1972, s.9 (7), R.628 (4) and R.293. That being so, Mr Hodder relies on the test of relevance well settled by the English Court of Appeal decision in The Compagnie Financiere Et Commerciale Du Pacifique v. The Peruvian Guano Company [1882] 11 QB 55. The obligation on a party who is served with an order for discovery, is to discover all documents which are or may be relevant. It is contended that the pre-broadcast materials, including film footage edited out, may at the very least assist Comalco to show that objectively (perhaps deliberately), that the programme was unbalanced. If so, it is argued that would in turn be likely to assist in establishing Comalco's two causes of action, (a) that the Authority erred in its conclusions and; (b) that it should have permitted a formal hearing which would have permitted the canvassing of the pre-broadcast material.

It is submitted that on the pleadings, there is a contested issue as to whether the programme was in fact unbalanced. That is denied in the second defendant's statement of defence. The Authority's refusal to hold a formal hearing is also contested in the second defendant's statement of defence.

The second defendant argues that on the first cause of action whether in reaching its decision the Authority failed to have regard to all relevant considerations and/or had regard to irrelevant considerations, the classes of documents the plaintiff lists in its schedule cannot be regarded as relevant to that cause of action for the very straightforward reason that none of that material was before the Authority. It is submitted that the Authority's decision cannot sensibly be challenged as being "unreasonable or irrational" for not taking into account material which was never put before it in the first place. Consequently as the listed material in the plaintiff's schedule all falls within that category, it is irrelevant to the issue on the first cause of action.

As to the second cause of action, it is submitted that the Authority has a statutory right to consider and determine any complaints without a formal hearing. Pursuant to s.10 (1) of the Broadcasting Act 1989, that statutory right is not qualified by any constraints. It is also submitted that it is of some significance that Comalco apparently did not regard the classes of documents now being sought as being of sufficient importance to its complaint to warrant a request to the Authority to disclose such documents under s.4C (3) of the Commissions of Inquiry Act 1908 (made applicable by reason of s.12 of the Broadcasting Act 1989). It is submitted that the Master should be slow to attribute relevance to classes of documents when Comalco itself apparently did not regard them as relevant to its complaint at any time when it was before the Authority.

Despite Mr Bartlett's submission, I conclude that the documents sought by the plaintiff will or may be relevant. Apart from anything else, I think they may well be relevant to decide whether or not,

if they had been available to the Authority, it would still have determined not to hold a formal hearing.

Further, I think that such documentation may be relevant to the claim made by the plaintiff in 10.3 of its statement of claim that "the Authority failed to censure TVNZ's use of various editing techniques which distorted the fundamental facts relevant to the programme subject." It seems to me that the Court in deciding that issue, may wish to have regard to what material was edited out and what material was available but not used.

On the question of whether discovery would be oppressive, Mr Barlett fairly conceded that the documents are apparently available in accordance with the initial request that they be preserved which was made by the plaintiff to the second defendant immediately after the programme was shown. Accordingly there should not be any great expense or delay in providing the list, although Mr Barlett did say that some of the documents requested relate to an earlier programme and will put the second defendant to some trouble. If that is so, it can be met in due course by an order for costs.

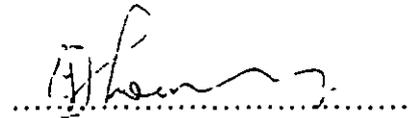
In my view, the basic issue is whether the application made by the plaintiff will result in unnecessary discovery within R.295. I think the onus is on the second defendant to demonstrate that discovery should be limited and that wider discovery is unnecessary. For the reasons previously canvassed (and given that *prima facie* the documents appear relevant), I do not think a case has been made out by the second defendant on the grounds advanced of relevancy, oppression or unnecessary cost. I think there should be little problem in producing the documentation and it is likely that it will be beneficial to the Court in determining the substantive action.

Accordingly I order the documentation be discovered in accordance with the plaintiff's application for particular discovery and the schedule attached thereto.

The plaintiff seeks that such order be complied within five working days, but I think Mr Bartlett is correct when he submitted that

for whatever reason, there has been a certain tardiness up to date in progressing this claim, which has been the responsibility of the plaintiff. In any discovery exercise, problems invariably arise which with the best will in the world, result in some delay. Mr Bartlett said that if an order is made that 20 working days should be allowed. I think that is a reasonable time.

The second defendant is therefore ordered to produce the list sought within 20 working days. Its application for limited discovery is dismissed. In the circumstances, I think that the plaintiff is entitled to costs and costs are ordered against the second defendant in the sum of 500 dollars.

A handwritten signature in cursive script, appearing to read 'A. H. ...', is written over a horizontal dotted line.

Solicitors for Plaintiff:

Messrs Chapman, Tripp, Sheffield,
Young, Wellington

Solicitors for Second
Defendant:

NJ Vautier Esq., Television New Zealand
Limited, Auckland
