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IN THE HIGH COURT OF NEW ZEALAND 24/11
AUCKLAND REGISTRY HC 176/94

[redacted]

UNDER the Broadcasting Act 1989

IN THE MATTER of a determination of the Broadcasting Standards Authority Decision No. 70/94 dated 22 August 1994

BETWEEN JARDINE INSURANCE BROKERS LIMITED

Appellant

A N D TELEVISION NEW ZEALAND LIMITED

Respondent

HC 189/94

BETWEEN TELEVISION NEW ZEALAND LIMITED

Appellant

A N D JARDINE INSURANCE BROKERS LIMITED

Respondent

Hearing: 9 March, 21 July 1995

Counsel: M.G. Ring for Appellant (HC 176/94) and Respondent (HC 189/94)
H. Wild for Respondent (HC 176/94) and for Appellant (HC 189/94)

Judgment: 03 NOV 1995

JUDGMENT OF TEMM J.

Solicitors: McElroys, Auckland

Simpson Grierson, Auckland

These are appeals filed under s.18 of the Broadcasting Act 1989 arising out of a decision of the Broadcasting Standards Authority ("the Authority") on a complaint made by Jardine Insurance Brokers Limited ("Jardines") against two "Fair Go" programmes broadcast by Television New Zealand Limited ("TVNZ").

The Authority upheld various aspects of the complaint describing the relevant parts of the programmes as "unbalanced and in breach of Standard G.6" (Doc. 152); and ruling that "Jardines was treated unfairly and ... that there was a breach of Standard G.4" (Doc. P.153); that "attributing blame to Jardines in the manner in which the programme did was unfair and ... was in breach of Standard G.4", (Doc. 154); that (by a majority of the Authority) "the brief and ambiguous explanations of (the growers') refusal to appear on the programme was inadequate and unfair to Jardines" (Doc. 155); that "it was dishonest to edit out the highly significant comment that (a grower) was not unhappy with Jardines" (Doc. 155); that "it was possible that viewers were led to an unfair conclusion about what was meant and that it would have been open to them to draw a number of unreasonable inferences which were unfair to Jardines" (Doc. 156); and then (by a majority) "Fair Go's explanation of why Jardines would not respond to its queries was an inaccurate summary of Jardine's position and accordingly was in breach of Standard G.1" (Doc.157).

The editing which was described as "dishonest" was also described in the Authority's summary as "a serious distortion of the truth" (Doc. 157).

The Standards of the Television Code of Broadcasting Practice which the Fair Go programmes breached were as follows:

"G.1 To be truthful and accurate on points of fact.

G.4 To deal justly and fairly with any person taking part or referred to in any programme.

G.6 To show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial nature.

G.14 Care must be taken in the editing of the programme material to ensure that the extracts used are a true reflection and not a distortion of the original event or the overall views expressed.

The Authority ordered TVNZ to broadcast "a brief summary" of its decision making particular reference to the following points:

"(i) In Programme One it was unfair and unbalanced to suggest that Jardines did not look after the Rushtons and to blame Jardines solely for the Rushtons' failure to know about the 48 hour clause in their contract without including other relevant information.

(ii) In Programme Two it was unfair to suggest that growers were severely disadvantaged because their policies were worded differently.

(iii) In Programme Two the editing of an interview with a grower did not reflect what was actually said because it edited out his negative answer when asked if he was unhappy with Jardines.

(iv) Overall, while it was recognised that Jardines' refusal to answer the questions put to it made it difficult, *Fair Go* had a duty to present fair and balance programmes." (Doc. 159)

The brief summary eventually approved by the Authority and broadcast by TVNZ was as follows:

"Presenter A:

Back to last year for a moment ... two stories *Fair Go* ran on crop insurance and the insurance brokers, Jardines, who complained to the Broadcasting Standards Authority. The Authority decided that the first programme was unfair and unbalanced when it blamed Jardines solely for the featured grower's lack of awareness of the clause which laid down the time during which a claim must be made.

Presenter B:

As for the second programme, the Authority has rejected some of Jardine's complaints but did say we were unfair in suggesting they didn't look after their clients property . . the clients who complained to Fair Go.

Presenter A:

The Authority says it wasn't right to suggest growers were disadvantaged because their policy had different wording. And an interview with a crop grower should not have been edited to exclude his denial when asked whether he was unhappy with Jardines.

Presenter B.

But the Authority acknowledged that Jardines' refusal to answer *Fair Go's* questions made it difficult for us to fulfil our duty to present a balanced programme " Doc 165-166

Jardines appealed arguing that the statement broadcast by TVNZ was inadequate, and in particular that it did not include an express reference to the Authority's finding that the broadcaster's editing in the second programme had been "dishonest".

After the Authority's decision was delivered on 22 August 1994, Jardines made an application for costs, saying that it had incurred expenses from legal and other advisers "of over $40,000" and enclosing relevant invoices supporting that claim. The Authority gave TVNZ an opportunity to reply and on 20 September 1994, ordered the broadcaster to pay Jardines costs of $5,000.

Jardines appealed against both orders on the grounds that the Authority should have penalised TVNZ by prohibiting it from broadcasting any advertisements for a specified period under s.16(1)(b)(ii) of the Broadcasting Act, and that the award of costs was inadequate.

TVNZ appealed against the costs order on the grounds that the power to award was linked to the course of a proceeding which had ended on 22 August when the decision was announced. Thereafter no proceedings existed and the power to award costs ceased once the Authority had delivered its decision. It also argued that there was no right of appeal against an order fixing costs under s.16 of the Act, because the only right of appeal was in respect of an order made under s.11 (where the Authority declined to determine a complaint) or s.13 (where it made an order such as was made in this case). The order for payment of costs was not made under either of those two sections, but under the provisions of s.16 from which no right of appeal exists.

BACKGROUND

The background facts are quite simple. Crop growers on the East Coast wanted insurance against weather damage after experiencing Cyclone Bola, and approached Jardines as insurance brokers to obtain insurance cover. It was difficult to get, but eventually one company, State Insurance, agreed to insure and laid down various conditions including the duty to report any claim within 48 hours of the event giving rise to it.

The cover was not agreed until after crops had been planted and the policies were not sent out to the insured until after a storm which damaged crops. There were delays in accepting liability because the growers did not know they had to give notice within 48 hours.

Fair Go investigated their complaints and broadcast its programmes casting aspersions upon Jardines. The reporter and the producer compiled their programmes so as to give part of the story, but did not broadcast

footage which undermined the general theme that Jardines were to blame for the difficulties that delayed payment of the insurance cover, (which was eventually paid in accordance with the insurance contracts, notwithstanding the delays in notification). One grower in particular was interviewed and said on film that he "was not unhappy" about the way that Jardines had acted. This statement was edited out, no doubt because it got in the way of an otherwise "good story". It was this decision that led the Authority to decide that the second programme was "dishonest" in this regard.

Jardines took the view that the statement broadcast by TVNZ nearly a year later did not fairly reflect the Authority's decision. Because it made no mention of the fact that Fair Go in this matter had indulged in "a serious distortion of the truth", and that it had failed "to be truthful and accurate on points of fact" (Std. G1), the remedy for the wrong Jardines had suffered was said to be inadequate.

They therefore appealed seeking an order from the Court directing the broadcaster TVNZ to refrain from broadcasting advertising programmes "for such period, not exceeding 24 hours, in respect of each programme in respect of which the Authority had decided the complaint is justified, and at such time as shall be specified in the order" (Sec.13(1)(b)(ii)). Such an order could cost the broadcaster a very large amount of money in lost advertising revenue.

It was said in the course of argument that the Authority had exercised this power once only and had awarded costs on two previous occasions, in each case much lesser amounts of $500 and $1,250. The

award of $5,000 in this case is therefore unusual, both in its granting and in its amount.

THE LAW

The Statute gives to both the complainant and the broadcaster a right of appeal against a decision of the Authority.

> "18. Appeal against decision of Authority - (1) Where the Authority makes -
>
> (a) .
>
> (b) A decision or order under section 13 of this Act, - the broadcaster or the complainant may appeal to the High Court against the whole or any part of the decision or order
>
> (2) *repealed*
>
> (3) *repealed*
>
> (4) The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.
>
> (5) In its determination of any appeal, the Court may -
>
> (a) Confirm, modify, or reverse the decision or order appealed against, or any part of that decision or order
>
> (b) Exercise any of the powers that could have been exercised by the Authority in the proceedings to which the appeal relates.
>
> (6) ...
>
> (7) ...
>
> 19. Decision of High Court to be final - The determination of the High Court on any appeal under section 18 of this Act shall be final."

The jurisdiction of this Court on hearing an appeal is very narrow. Section 18(4) directs that the case shall be heard and determined as if the decision appealed against "had been made in the exercise of a discretion".

This means that the Court can only intervene if the discretion has been wrongly exercised. An appellant must prove as part of its case that the Authority has made an error of law, or that it has failed to take into account some relevant consideration, or that it has wrongly taken into

account some irrelevant consideration, or that the decision is unfair or so unreasonable that no reasonable Authority could have so decided.

What the Court is not allowed to do is simply to substitute its own view for that reached by the Authority. Hence my earlier observation that the statutory right of appeal under s.18 is a very narrow one.

The thrust of Jardines' argument on appeal was that the statement which the Authority directed TVNZ to broadcast was too mild, and that the only reasonable and appropriate penalty was to order TVNZ to refrain from broadcasting advertising programmes for a specified period.

When a broadcaster has presented not one, but two programmes that are derogatory in nature, parts of which being found by the Authority to be unfair, unbalanced, dishonest and a serious distortion of the truth, reasonable minds might well agree with Jardines that the statement intended to rectify the false impressions created by the programmes was indeed too mild and not adequate for the occasion. There is no mention anywhere in this published statement that the second "Fair Go" programme included material that was a serious distortion of the truth.

But whether or not the statement was adequate was a matter for the Authority to decide, and the Court cannot intervene unless it be proved that the decision was invalid for one or other of the reasons justifying interference with a discretionary decision.

That TVNZ and "Fair Go" maligned the insurance brokers is beyond question. The television programmes were neither truthful nor fair. But unless invalidity is proved this Court has no power to intervene.

The record of the case shows that TVNZ drafted a statement as instructed by the Authority and that draft, after some amendments, was approved by the Authority.

The appellant now asks the Court in effect, to make a finding that the penalty was too light and that a more severe sanction should be imposed to punish TVNZ and the somewhat mis-named "Fair Go" for their unfairness and dishonesty.

But the argument did not identify any error of law, nor irrelevant considerations wrongly taken into account, nor did it point out any relevant consideration that was overlooked when the Authority made its decision to order the broadcast of its finding upholding the complaint. The only legal ground that might have been advanced was that the statement was so mild and inadequate that no reasonable Authority could reasonably have decided to approve it.

Such an argument could not be sustained on the facts of this case. The Authority is a specialist tribunal, its members chosen for their expertise in their field of broadcasting. They have experience of a particular kind that qualifies them to carry out the statutory duties that the Act obliges the Authority to discharge. It must be assumed that the possibility of ordering that no advertising be broadcast for a specified period was considered and put to one side. That was a matter for the Authority to decide and the

Court has no power to substitute its own views for those of the Authority unless the decision was invalid for one or other of the reasons already mentioned.

There being no such invalidity proved, the appeal by Jardines must be dismissed.

COSTS

TVNZ filed an appeal against the Authority's order that it pay costs of $5,000 to Jardines. The grounds expressed in the notice of appeal were that the award was made after the decision had been announced, it being argued that the Authority had jurisdiction to award costs only while proceedings were extant. The decision on Jardine's complaint was delivered on 22 August 1994; on 2 September Jardines wrote to the Authority asking for an award of costs, and the costs order was made on 20 September following.

The Act empowers the Authority to award costs as follows:

> "16. Power to award costs - (1) Subject to subsection (2) of this section, the Authority may, in any proceedings, order any party to pay to any other party such costs and expenses (including expenses of witnesses) as are reasonable, and may apportion any such costs between the parties in such manner as it thinks fit.
>
> (2) No award of costs shall be made under subsection (1) of this section against the complainant unless -
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> (a) In the opinion of the Authority, the complaint is frivolous or vexatious or one that ought not to have been made, or
>
> (b) The Authority considers it proper to do so by reason of the failure of the complainant to prosecute any proceedings related to the complaint at the time fixed for its hearing or to give adequate notice of the abandonment of any proceeding related to the complaint.
>
> (3) Where, through failure to prosecute any proceeding at the time fixed for its hearing or to give adequate notice of the abandonment of any proceeding, the Authority considers it proper to do so, the Authority may order the party in default to pay to the Crown such sums for costs as it considers reasonable."

TVNZ argues that this power is limited in time because of the wording of the section which says that "the Authority may, in any proceedings order any party" to pay costs. The argument is that once the Authority had delivered its decision on 22 August, the proceedings were at an end. Thereafter, since no proceedings existed, the Authority had no power to make a costs award.

This argument calls for an interpretation of the phrase "in any proceedings" in the context in which that phrase appears in s.16(1).

The power to award costs exists quite apart from any application for costs; whether a party applies for costs or not, the Authority has a discretion to make an award subject to the limitations imposed by s.16(2) giving to a complainant a broad protection against being ordered to pay costs.

A relevant consideration in deciding whether to award costs and if so, the amount to be paid, may be the conduct of the broadcaster against whom complaint has been made. If the Authority decides that a broadcaster has failed to comply with one or other of the Broadcasting Standards, but that the breach is only a minor infraction of a technical kind, that fact may well lead to the conclusion that the breach does not deserve to be punished by a costs award. On the other hand if the breach is serious, perhaps even blatant and deliberate, that fact may be very relevant in deciding whether to order the broadcaster to pay costs to the complainant.

It is not uncommon in ordinary court proceedings for the Court to hear argument as to a costs award after judgment has been delivered when the relevant facts of the case have been decided. Until the Authority has made and delivered its decision neither the complainant nor the broadcaster can know what facts have been found.

In this case the complainant Jardines made an application for costs (Doc. 169) in which it was said:

> "The BSA (correctly in our respectful view) characterised Fair Go's editing as *"dishonest"* and *"a serious distortion of the truth"* The BSA also found that Fair Go breached its duty to present a fair and balanced programme These findings are about as serious an indictment as can be levelled against a responsible journalist or a television programme, particularly involving current affairs. They are even more damning when applied to a programme which purports to and should embody the very essence of fairness and credibility.
>
> We have spent over $40,000 in professional fees and at least the same in senior management time in pursuing the complaint to TVNZ and then to the BSA. Copies of the individual accounts are available on request In the circumstances we seek a substantial award of costs " (Doc 169-170)

The application was made promptly and, not surprisingly, emphasised the finding of fact that the "Fair Go" programme had been edited dishonestly. The seriousness of that breach of the Code of Broadcasting practice was a relevant consideration in deciding whether to award costs, but the complainant could not advance it until the decision had been announced. After giving full opportunity to TVNZ to make representations in opposition to the application the Authority delivered the following decision on 20 September 1994:

> "Pursuant to its powers under s.16 of the Broadcasting Act 1989 to award such costs and expenses as are reasonable, the Authority has exercised its discretion to award costs to Jardine Insurance Brokers Ltd.
>
> The Authority records that it invited and received submissions from Jardines and from Television New Zealand Ltd on the question of costs and, after careful

consideration of the arguments from both parties, it decided an award of costs was appropriate in all of the circumstances of the case

COSTS

Under s.16 of the Broadcasting Act 1989, the Authority orders Television New Zealand Ltd to pay costs to Jardine Insurance Brokers Ltd in the sum of $5,000." (Doc. 186)

I do not uphold the argument by TVNZ that the Authority's power to award costs is extinguished when its decision on the complaint has been made. There is no limitation as to time in s.16, and s.16(3) expressly authorises the Authority to award costs when proceedings have been abandoned if there has been a failure to give adequate notice of abandonment. It is necessary for the Authority to hear both sides if a costs award is in issue, and, as in this case, that may best be done after the decision on the complaint has been made known.

In my judgment the phrase "in any proceedings" in s.16(1) is not to be restricted to mean "up until a decision is made in any proceedings" for which TVNZ contends, and the decision of the Authority to make a costs award on 20 September 1994 was valid and lawful. TVNZ's appeal is dismissed.

Jardines sought an order increasing the award from $5,000 to "a figure closer to the company's actual expenses" (said to be just over $40,000). The Authority knew Jardines actual expenses because it was supplied with the appropriate invoices. The amount of costs to be awarded under s.16 is a matter for the discretion of the Authority. Its decision shows, on its face, that it took into account "all the circumstances of the case", and no argument has been advanced to justify any finding that the award was unreasonably low. Full costs as between solicitor and client are

rarely awarded and there has been nothing advanced in this appeal to show any special reason why full costs should be paid by TVNZ to Jardines. The most that has been said is that Jardines are out of pocket and should be reimbursed. The answer to that is that the Authority was aware of that fact, but decided, as it had full power to do, that an appropriate award was $5,000 as fixed. It is not for the Court on an appeal in respect of an order made under s.16 of the Act, to substitute its own opinion for that of the Authority. On this matter, as on the main argument, the Court cannot intervene unless the decision was in some way invalid in the sense already described.

Apart from that, there is no right of appeal against a costs order made under s.16. The only right of appeal is in s.18 (above p.8) which authorises an appeal against an order made under s.11 or s.13, but does ot authorise an appeal against a costs award made under s.16.

Both appeals having failed costs must lie where they fall.