

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

AP158/91



UNDER the Broadcasting Act 1989

IN THE MATTER of a determination by
the Broadcasting Standards
Authority

BETWEEN TELEVISION NEW
ZEALAND a duly
incorporated company
having its registered office
at Auckland

Appellant

A N D R. MANSELL

Respondent

Hearing: 2 February 1994

Counsel: C.H. Toogood for the Appellant
G.J. Kohler for the Respondent
Ms L. Boon for Broadcasting Standards Authority

Judgment: 7 February 1994

JUDGMENT OF ELLIS J.

This is an appeal against the decision of the Broadcasting Standards Authority against Television New Zealand Limited on the complaint of Mr Mansell that the Fair Go programme televised on 15 May 1990 breached Articles 1 and 6 of the Television Code of Broadcasting Practice. These require programmes:

1. To be truthful and accurate on point of fact.

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

The Programme

The purpose of the programme is captured by the opening words of the presenter:

"There's been alot of talk recently about increasing the personal liability of company directors whose failed businesses leave ordinary folk stranded".

"But it's just talk. The commercial reality is that limited liability remains very limited indeed. And until the laws change, companies can shut their doors when they get into debt, their owners can continue in the same line of business under another company name, leaving the victims of their actions to join the queue at the Liquidator's Office."

The programme then focussed on a situation where a couple contracted with Barr Cook Enterprises Limited for it to build them a home. They dealt with Mr Cook. Not only was the house incorrectly sited, but before completion Barr Cook Enterprises Limited went into voluntary liquidation with debts in the order of \$1 million. Before me it was common ground that Mr Cook comes out of the presentation badly and no issue is taken with that.

The critical passages after the above opening and in order of appearance are the comments by a neighbour who made the complaint to Fair Go:

"These people had just been left in the lurch by a builder who had gone into liquidation and seemingly had started up again with no problems and had literally just deserted them to sort out their own mess."

Then the "voice-over" said:

"It would be wrong to suggest that Graeme Cook hasn't been affected by the voluntary liquidation of his firm Barr Cook Enterprises. But, as they say, everything's relative.

He is now a director and a major shareholder of Cobarco a building firm with glossy premises in Auckland. His business and financial interests extend to a wide range of other companies in Auckland.

Graeme Cook lives in a large house in Remuera which he brought for \$360,000 two years ago. He drives an '86 Saab Turbo."

At counsels' request I have viewed the programme and confirm that it contains a shot of the "glossy premises" of Cobarco Homes Limited and the name board contains a list of what could be identified as Mr Cook's companies.

The Complaint

Mr Mansell complained to T.V.N.Z. on 23 May 1990 and formalised this on 11 June 1990. As some of his complaints were dismissed by the Authority and no longer in issue, I set out the relevant paragraphs:

- "1. The fairness and accuracy in which Cobarco Homes Ltd was presented. No mention of the fact was made that Cobarco Homes Ltd had been operating for three years before Barr Cook Enterprises Ltd went into liquidation. It was implied that Cobarco Homes Ltd had started operation immediately Barr Cook Enterprises Ltd had collapsed. This is totally incorrect."

- "7. Cobarco Homes Ltd have three Directors, Mr G Cook is not the major shareholder as stated in the programme. Libre Holdings Ltd and Dysart Timbers Ltd hold the remaining shares with Libre Holdings Ltd and Mr G Cook having equal share holdings, both less than 40% each."
- "8. Cobarco Homes have had no contractual agreement with Mr and Mrs Muira and it is totally unfair that the programme implies that we do or that we are in someway involved with the Muira's problems."

It is agreed that Mr Cook had 38.75% of the shares in Cobarco Homes Limited and Mr Mansell's interests, the balance. It is agreed too that Mr Cook was a director and that Cobarco was in the same line of business as Barr Cook Enterprises Limited. There is no doubt that the reference to Cobarco was damaging to it.

T.V.N.Z. rejected the complaint and so Mr Mansell took it to the Authority which received written submissions and gave its written decision on 17 June 1991. The conclusions it reached on the matters in issue on appeal is stated as follows:

"The Authority, after a careful viewing of the item, considered that to comply with the truth and accuracy requirement of standard 1, the programme should have either stressed the independence of the two named companies (Barr Cook Enterprises Ltd and Cobarco Homes Ltd) or not mentioned Cobarco Homes at all. By presenting only the bare facts that it did about Cobarco Homes, the item implied, the Authority decided, that Cobarco Homes rose, Phoenix-like, from the ashes of Barr Cook Enterprises. As a result the Authority concluded that the item implied that Cobarco Homes, as the reincarnated form of Barr Cook Enterprises, possessed questionable financial, if not moral, characteristics.

Beyond that, however, with regard to factual truth and accuracy (standard 1), the Authority considered that it had insufficient information about the past relationship which might have existed between Cobarco (formerly Dysart Homes) and

Barr Cook, or between Mr Mansell and Mr Cook, to reach a decision on the accuracy of the item's comments and implications about Cobarco Homes.

On the fairness issue on the other hand (standard 6), the Authority considered that the item, by implying that Cobarco Homes' structure and operations were of questionable merit but without producing evidence to substantiate this implication, had treated Cobarco Homes unfairly. For these reasons, the Authority upheld this aspect of the complaint.

For the reasons outlined above, the Authority upholds in part the complaint that by associating Cobarco Homes Ltd with Barr Cook Enterprises Ltd, the programme breached the truth and accuracy requirement of standard 1. Further, it upholds the complaint that by associating Cobarco Homes Ltd and Barr Cook Enterprises Ltd, the programme breached the fairness requirements of standard 6 of the Television Code of Broadcasting Practice."

The Appeal

The short point is the submission that the programme did not imply that Cobarco rose from the ashes of Barr Cook as a vehicle for Mr Cook's continued trading and that what was said was true. Mr Toogood submitted the statement by the "voice-over" that Mr Cook "is now a director and a major shareholder of Cobarco a building firm with glossy premises in Auckland" was true. On a literal reading of these words as said, Mr Toogood is correct. However, following hard on Mrs Russell's words that the builder had "seemingly started up again with no problems" made it, in my view, a possible and reasonable inference that Mr Cook had set up Cobarco on the collapse of Barr Cook. This was not true. While perhaps the Authority overstated the strength of the inference and was tempted by a colourful metaphor, the inference it drew is certainly one of those available on the contents of the programme. Indeed it is the most likely one.

Mr Toogood's collateral submission was that if Fair Go had explicitly stated that Mr Cook was a director of Cobarco, had 38.75% of the shares, and that Cobarco had already been operating in the same field for three years prior to the collapse of Barr Cook, then that would be a more adverse criticism of Cobarco, because it might have been inferred that it was in some way involved with the transaction described in the programme (which it apparently was not). In that case Fair Go was obliged to make that plain too.

In my view Mr Toogood is correct in maintaining that Fair Go was justified in referring to Mr Cook's involvement in Cobarco and that that must be damaging to Cobarco.

In my view the Authority found two propositions established. The first is that the item implied that Cobarco rose from the ashes of Barr Cook and so possessed questionable financial if not moral characteristics. I see no reason to disagree with that. However it also said that the programme did not produce evidence to substantiate the implication that Cobarco's structure and operations were of questionable merit. It is common ground that Mr Cook was a director and 38.75% shareholder. In my view that does support the implied criticism. Mr Kohler submitted the use of the term "a major shareholder" would be understood to mean "the majority shareholder". I do not agree. I think the description of Mr Cook's status is accurate and fair.

The Disposal of this Appeal

Section 18(4) of the Broadcasting Act 1989 provides that an appeal is to be determined as if the decision appealed from had been made in the exercise of a discretion. The principles to be applied are not in contest. In essence they are that an appellant must show an error of law, or that

relevant matters were not considered, or irrelevant ones taken into account, or that no reasonable authority could have reached the decision it did: *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 441.

Here the Authority is scarcely in any better position than an ordinary jury or laypersons to judge what a programme means or the inferences that can be taken from the words and visual presentation. On the other hand, it is experienced and expert at balancing the requirements of a free and courageous news medium and the need to protect citizens from unfair treatment and the unwarranted losses and harm that can result from the enormous impact on the public mind that the medium can have.

The final paragraph quoted from the reasons for the decision is in fact the decision appealed from. In my view the appeal must fail insofar as it challenges the finding that T.V.N.Z. breached the two articles of the Code by not stating that Cobarco was formed three years before the collapse of Barr Cook and that Cobarco was not involved in the subject transaction. On the other hand, the Authority went too far when it said the programme did not produce any evidence linking the criticism of Barr Cook to Cobarco. This finding will affect the contents of the summary of the decision that the Authority ordered T.V.N.Z. publish. Counsel indicated that they could agree on the form of such a statement.

The appeal is therefore allowed in part. Instead of the order made by the Authority, there will be the following order:

"Television New Zealand is to broadcast without delay in the current series of Fair Go a brief summary of the decision of the Authority as modified by this Judgment, as shall be approved by the Authority."

The matter is therefore remitted to the Authority to enable it to approve the summary. There will be no award of costs.

A.M. Gunn J
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Solicitors:

N.J. Vautier, Solicitor, Auckland for Appellant

Lovegrove Finn & Harborne, Solicitors, Auckland for Respondent

Bell Gully Buddle Weir, Wellington for Broadcasting Standards Authority