IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-733
[2017] NZHC 899

BETWEEN	CROSSFIT, INC Plaintiff/Respondent
AND	EXERCISE INDUSTRY ASSOCIATION LIMITED First Defendant/First Applicant
	RICHARD GRAHAM BEDDIE Second Defendant/Second Applicant

Hearing: 5 April 2017

Appearances: D M Salmon for the First and Second Defendants as Applicants on Review
A L Ringwood for the Plaintiff as Respondent on Review

Judgment: 5 May 2017

JUDGMENT OF NICHOLAS DAVIDSON J

Introduction

[1] CrossFit, Inc ("**CrossFit**") is an American corporation that licenses the CrossFit brand of exercise techniques. Mr Beddie is the CEO and sole director of Exercise Industry Association Limited ("**the Association**").

[2] In 2014, Mr Beddie made statements about CrossFit in interviews that featured as news on television, in print, and online. In the interviews, Mr Beddie was openly critical of CrossFit, calling into question the safety of its exercise techniques and the adequacy of the process by which people can become CrossFit instructors. CrossFit takes issue with some of these statements, claiming they are false and damaging to the CrossFit brand. Of particular concern to CrossFit were statements made by Mr Beddie to the effect that its exercise techniques have resulted

in multiple deaths as well as serious injuries and incontinence in some of its users. As a result, CrossFit is suing Mr Beddie and the Association in defamation, malicious falsehood, and for breach of the Fair Trading Act 1986 ("**the FTA**").

[3] On 18 May 2016, Associate Judge Osborne ("**the Judge**") allowed in part applications to strike out aspects of CrossFit's claim.[1] Specifically, the Judge struck out various defamatory meanings pleaded by CrossFit. On the remaining points, however, Mr Beddie and the Association were unsuccessful, hence this review. They seek a review of the judgment on two discrete points:

(i) whether CrossFit's claims that Mr Beddie and the Association are in breach of ss 9 and 11 of the FTA are untenable in light of s 15 of that Act (the "media exception") and;

(ii) whether CrossFit's claim of breach under s 23 of the FTA is reasonably arguable, as pleaded.

Jurisdiction and approach on review

[4] There is a right of review of the judgment under what was, at all relevant times, s 26P of the Judicature Act 1908 and r 2.3 of the High Court Rules. The review proceeds by way of rehearing.

[5] The applicant on review has the burden of persuading the Court that the judgment was wrong, that it rested on unsupportable findings of fact and/or applied wrong principles of law.[2]

[6] The correct approach on review is set out in *Austin, Nichols & Co Inc v Stichting Lodestar*,[3] that the Court must come to its own view as to whether the

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1 *CrossFit Inc v Exercise Industry Association Limited* [2016] NZHC 1028.

2 McGechan on Procedure at at HR2.3.02 citing *Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd* (2002) 16 PRNZ 107 at [13]; *Poros v Bax* [2015] NZHC 2772.

3 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

original decision was wrong.[4] If the High Court Judge thinks the Judge was wrong, the reviewing Judge should say so in a forthright way.[5]

Review ground (a): are CrossFit's claims of breach of ss 9 and 11 of the FTA untenable in light of s 15 of that Act?

The claims

[7] The relevant sections of the FTA read:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> …
>
> **11 Misleading conduct in relation to services**
>
> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.
>
> …
>
> **15 Limited application of sections 9 to 14 to news media**
>
> (1) Nothing in sections 9 to 14 applies to the publication of any information or matter in a newspaper by the publisher of that newspaper, not being—
>
> (a) the publication of an advertisement; or
>
> (b) the publication of any information or matter relating to the supply or possible supply or the promotion of the supply or use of goods or services or the sale or grant or the possible sale or grant or the promotion of the sale or grant of an interest in land by—
>
> (i) that publisher or, where that publisher is a body corporate, by any interconnected body corporate; or
>
> (ii) any person who is a party to any contract, arrangement, or understanding with that publisher relating to the content, nature or tenor of the information or matter.

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4 *Burmeister v O'Brien* [2008] 3 NZLR 842 at [29].

5 *Teinangaro v Fastway Couriers (NZ) Ltd* HC Napier CIV-2009-441-751, 25 November 2011 at [23].

(2) Nothing in sections 9 to 14 applies to the broadcasting of any information or matter by a broadcasting body, not being—

(a) the broadcasting of an advertisement; or

(b) the broadcasting of any information or matter relating to the supply or possible supply or the promotion of the supply or use of goods or services or the sale or grant or the possible sale or grant or the promotion of the sale or grant of an interest in land by—

(i) that broadcasting body, or where that broadcasting body is a body corporate, by any interconnected body corporate; or

(ii) any person who is a party to any contract, arrangement, or understanding with that broadcasting body relating to the content, nature or tenor of the information or matter.

(3) For the purposes of this section—

(a) the expressions *broadcasting* and *broadcasting body* shall have the same meanings as they have in section 2 of the Broadcasting Act 1976:

(b) *newspaper* has the meaning given to that term by section 2 of the Films, Videos, and Publications Classification Act 1993:

(ba) *publisher*, in relation to a newspaper, means its proprietor:

(c) any 2 or more bodies corporate are to be treated as interconnected if one of them is a body corporate of which the other is a subsidiary (within the meaning of section 5 of the Companies Act 1993), or if both of them are subsidiaries (within the meaning of that section) of one and the same body corporate; and *interconnected body corporate* shall be construed accordingly.

[8] This ground of review raises an entirely legal question, so it is not necessary to set out in more detail the statements claimed to be misleading or deceptive. It is not disputed that Mr Beddie was "in trade" when making the statements, nor that they were misleading or deceptive. The question is simply whether or not s 15 provides an immunity so that no claim against Mr Beddie and the Association under ss 8 and 9 can succeed.

The Judge's decision

[9] The Judge noted that the application raises a fundamental issue as to the correct interpretation of s 15 of the Act, and that there is no authority on the point. The ambiguity in s 15 arises in particular from the words:

> (1) Nothing in sections 9 to 14 applies to the publication of any information or matter in a newspaper by the publisher of that newspaper …
>
> (2) Nothing in sections 9 to 14 applies to the broadcasting of any information or matter by a broadcasting body …

[10] Mr Beddie and the Association say the event of publication or broadcasting ousts the operation of ss 9-14, so no person involved in publishing the newspaper or broadcast, and anyone quoted in the newspaper or broadcast, can be liable. CrossFit says "the publisher of that newspaper" and "broadcasting body" are the key and directive terms in s 15, and no one other than those who fall within those terms is protected from liability.

[11] In essence the legal issue is whether the net of immunity is cast beyond the publisher and broadcasting body, leaving others who provide information or make statements utilised by the publisher or broadcaster exposed to suit.

[12] The Judge began the interpretive process by looking at the text of the legislation. There is some support for the applicants' interpretation in that the focus is on "publication" rather than on the "publisher" of a publication, but the text refers to a "publication… by the publisher…".

[13] On the other hand, his Honour accepted that on one reading the heading of s 15 lends itself to the opposite view, as it sets the section up as an exception in favour of the "news media", although s 15 provides for the "limited application of ss 9 to 15 to news media".

[14] However, this interpretation is not clear, as "media" could refer not to the media organisations but to the media by which such organisations publish their material.

[15] His Honour rejected the argument that the Court should have regard to a possible "chilling effect" that CrossFit's interpretation would have on the media. The Judge said there was no basis to ascribe to Parliament an intention based on such a concern, and that there is no reasonable analogy with the legal protection of anonymous sources.

Australia

[16] The Judge turned to the Australian equivalent to the FTA, the Trade Practices Act 1974 (now renamed "the Competition and Consumer Act 2011"). He found that the New Zealand provision is closely modelled on the Australian provision, and the Australian provision clearly provides an exception *only* for the broadcasting/publishing bodies, and that it has consistently been interpreted in this way. He concluded from his analysis of the parliamentary materials and case law that the equivalent provision in Australia created "an exemption for a defined class of persons (in relation to their publication) rather than to the *event* of publication" (my emphasis).

Academic commentary

[17] The Judge also considered the commentary by Professor Cheer on the scope of s 15 in *Burrows and Cheer: Media Law in New Zealand*:[6]

> … the protection of the section extends to the publication of information by the publisher of a newspaper. 'Publisher' is defined to mean proprietor. An argument might possibly be based on this that the section protects only the newspaper company and not the "contributor" of the piece in question. However, it is more likely that the intention was to protect all involved in the preparation of the piece once it has been published.

[18] His Honour rejected the submission that this supports the applicant's interpretation – saying that by "those involved" the Professor was referring to the proprietor of the broadcasting body and those involved in the production of the item such as reporters and producers. That is, the *media* components by the publication or broadcast.

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6 Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at [7.3.3].

[19] Dismissing the strike-out application on this point the Judge concluded:

> … the correct interpretation of s 15 Fair Trading Act is that it protects the identified entities (publisher of newspaper/broadcasting body) when there is a defined event of publication or broadcasting or publication. Others, such as those involved in other trades, whose statements are carried in the publication or broadcast, are not protected by s 15. The publication or broadcast constitutes a republication of their statements for which they may be held liable for any proved breach of ss 9-14 Fair Trading Act.

Submissions on review

[20] Mr Salmon for the applicants on this review submits that the Judge erred in adopting the narrow interpretation of s 15. He submits that the simplest interpretation of the words in the provision is that the immunity attaches to the *event* of publication, rather than the *identity* of the publisher.

[21] He submits that policy considerations support such an interpretation. As the expression "in trade" has been interpreted widely, the narrow interpretation of s 15 will place reporters and sources of information at risk of liability even when making comment on legitimate news platforms. News organisations, he argued, will find it more difficult to obtain comment on contentious issues from industry participants or experts.

[22] Mr Salmon disagrees with the Judge's interpretation of the passage from Professor Cheer's commentary, saying there is no basis for limiting the statement to the classes of people listed by the Judge.

[23] The Judge noted that the Select Committee report on the Fair Trading Bill said that s 15 was a "limited exception… provided to newspapers and broadcasting bodies to ensure that the Bill does not encroach upon the freedom of the Press."[7] Mr Salmon succinctly espouses the position that the freedom of the Press carries with it the ability to obtain information without the difficulty of sources being fettered for fear of action.

[24] Further, Mr Salmon says that the wide interpretation is directed by the New Zealand Bill of Rights Act 1990 ("**NZBORA**"). Section 6 of NZBORA

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7 (1 July 1986) 472 NZPD 2499.

requires the Court to interpret legislation consistently with those rights whenever possible. Here, where there is ambiguity, the wide interpretation should be preferred because it is most consistent with the right to freedom of expression recognised by s14 of NZBORA.

[25] Mr Salmon further submits that the wide interpretation is consistent with the Courts' cautious approach to claims relating to reputational harm. Referring to dicta of Cooke P (as he then was) in *Bell-Booth Group Ltd v Attorney-General*,[8] Mr Salmon traces the gradual evolution of the law of defamation and injurious falsehood through the Courts and, to a limited extent, through legislative modifications, which he says has struck the right balance between the competing values of freedom to speak and reputational harm. It has done this in part by establishing a well-known and defences. To adopt the narrow interpretation of s 15 would be to allow an analogous cause of action without the analogous defences (such as privilege and fair comment), and this would upset the balance for no apparent reason.

[26] Finally, Mr Salmon submits that the Judge placed too much emphasis on Australian authority, and that drawing analogies with the Australian context does not assist the court in interpreting s 15 of the FTA.

[27] Mr Ringwood for the respondent submits that s 15 provides a limited defence to the news media, and not to the human sources of statements published in the news media. When broadcasting or printing his statements members of the news media also publish, but this does not change the fact that Mr Beddie is, separately, a publisher of the statements. Mr Ringwood says "once it is recognised that Mr Beddie is separately a "publisher" himself, it is clear that the wording of section 15 does not apply to the publication by *him*. It applies (in the words of the section) to "the publisher of that newspaper". In this case that would be Fairfax".

[28] Mr Ringwood contests Mr Salmon's submission that the Judge was wrong to consider Australian authority, and affirms His Honour's analysis of those authorities. He points out that some of the conduct pleaded and relied upon, derive from

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8 *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA) at 156.

Mr Beddie's statements *to* the journalist, which cannot possibly be subject to the exception in s 15. Finally, on a strike out application, the Court must be certain that the cause of action is untenable and incapable of success. This high threshold cannot be said to have been met.

Discussion

[29] Put simply, the issue is whether the broad or the narrow interpretation of s 15 of the FTA is correct. Immunity either applies to the *event* of publication in which case it attaches to all those who are involved in publishing in the newspaper or by the broadcast, or it applies only to the publisher of the newspaper or broadcasting body.

[30] While there is some ambiguity in the wording of the section, I do not consider that the rival interpretations are equally tenable on the text alone. The wide interpretation, in my view, makes the words "by the publisher of that newspaper" and "by a broadcasting body" redundant. The meaning championed by Mr Davey for the applicants would be achieved by a text which read "nothing in sections 9 to 14 applies to the publication/broadcasting of any information or matter in a newspaper/broadcast…". If the extra words are to add anything to the section, it follows that where the information is published in the newspaper or broadcast by someone *other* than the publisher/broadcaster the immunity does not attach.

[31] At law the concept of multiple and simultaneous publications of the same information is not problematic. In defamation where a news media entity publishes a defamatory statement of another, it constitutes publication *by* the news media entity for which it is potentially liable *and* a republication of the statement by the original publisher, for which that original publisher is potentially liable. There is no reason to distinguish misleading and deceptive statements under the FTA. Here there have simultaneously been publications by the news media, and republications of statements by Mr Beddie. If the legislature had wished to protect both the publication and republication, as the respondents contend, it could have achieved this just as well, and more clearly, by excluding the words "by the publisher of that newspaper" and "by a broadcasting body". Their inclusion suggests that the

immunity applies *only* to the publication that can be ascribed to the publisher/broadcasting body.

[32] Furthermore, while I acknowledge the ambiguity in the heading to s 15 as noted by the Judge, the ordinary meaning of the term "news media" in my view refers to the *organisations* that make up the journalistic profession, and not the several "media" by which the news is conveyed. This is supported by the explanation from the Select Committee on the Bill referred to above that s 15 is a "limited exception… provided to newspapers and broadcasting bodies to ensure that the Bill does not encroach upon the freedom of the Press." The section was designed to ensure freedom of the Press, that is, freedom of the "news media", and not to provide a platform through which misleading and deceptive statements can be made by anyone, should a newspaper or broadcaster provide such platform.

[33] I consider that the Australian materials are relevant. The similarities between the two provisions and their contexts are evident. It is unnecessary to reconsider this in any depth: the Judge's exploration of the Australian authorities is sound and I adopt it. While in no way determinative, the choice of the Australian legislature and Courts to develop the law adopting the narrow interpretation is in line with the most tenable reading of the text in s 15 discussed above. The Australian experience also shows that the "chilling effect" that the applicants warn of is unlikely to occur. There has been no suggestion made that the limited immunity in the equivalent Australian provision has stifled open reporting and honest comment from experts, or those with relevant institutional knowledge.

[34] The matter could be left there, as the text and relevant surrounding materials lend themselves to the narrow reading of the section. However, Mr Salmon made two compelling, principled arguments in favour of the broad interpretation which must be addressed.

[35] The first is that the narrow construction is inconsistent with the approach that has been taken by the legislature and the courts to claims relating to reputational harm in defamation and injurious falsehood. A careful balance has been created in those areas through the development of a range of defences, many of which are not

available under the FTA. Allowing CrossFit to bring an action under the FTA is said to allow defamation-style liability to attach even when a defence to defamation is present.

[36] As an aid to interpreting s 15 this argument is limited, indeed, it is more an argument against the policy behind sections 9 and 11 of the FTA than it is for a broad interpretation of s 15. However my view is that the policy behind the departure from defamation and injurious falsehood is here clear and defensible. The key is that the departure only applies to statements made "in trade". There must be a nexus between the statement made and the area of professional competence of the statement-maker. The policy behind the FTA sections is that in their field of competence people should be held to a higher standard of reliability. When presenting themselves as experts or "insiders" it is reasonable to expect people to make sure that what they say is not misleading or deceptive. The exception for the media exists because the "trade" undertaken by members of the news media is not merely to convey information within their own expertise, but to bring to the attention of the public information of all kinds, and from people of all kinds of areas of expertise.

[37] Secondly, it is submitted that the wide interpretation is directed by s 6 of NZBORA:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[38] As there is ambiguity in s 15, Mr Salmon says, the interpretation must be preferred which is most consistent with the right to freedom of expression recognised by s 14 NZBORA.

[39] Following the Supreme Court's Judgment in *Hansen v R*, the standard for comparison is not the untrammelled right or freedom, but that right as reasonably limited as per s 5 NZBORA:[9]

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9 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

> **5 Justified limitations**
>
> …the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[40] Freedom of expression must be, and is, limited in a free and democratic society such as ours. One such justifiable limit is to restrict people from abusing the freedom in order to mislead or deceive. Restricting people from taking advantage of their position as an expert or "insider" in a particular field to mislead or deceive others regarding conduct and activity in that field is a justifiable limit on freedom of expression. For the purposes of s 6, then, the right to freedom of expression recognised by NZBORA must be seen as tempered, and as a result the narrow interpretation of s 15 cannot be said to be less consistent with NZBORA than the broad one.

[41] The text itself and the policy considerations surrounding it both point in favour of the narrow interpretation. This ground of review is dismissed.

Review ground (b): is CrossFit's claim for breach of s 23 of the FTA reasonably arguable as pleaded?

The claims as pleaded

[42] Section 23 of the FTA proscribes harassment and coercion in connection with the supply of goods and services. It reads:

> **23 Harassment and coercion**
>
> No person shall use physical force or harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.

[43] CrossFit alleges that the sequence of discussions Mr Beddie had with print and television media in 2014 constitutes coercion under this section.

[44] The background to this is that, in his roles as CEO and sole director of the Association and chairman of the International Confederation of Registers for Exercise Professionals, Mr Beddie allegedly promotes membership of the

New Zealand Register of Exercise Professionals (**"the Register"**). By paying a membership fee and committing to certain standards and ongoing education requirements, exercise professionals can be listed on the Register. The idea is that consumers can be confident that registered exercise professionals conform to a minimum standard of quality and professionalism.

[45] Specifically CrossFit pleads:

> 43. The second defendant's motivation in making the criticisms of CrossFit… was:
>
> (a) To coerce CrossFit trainers into registering as members of the New Zealand Register of Exercise Professionals and paying the membership fee, so that they could avoid further criticism by the defendants of CrossFit training and CrossFit trainers.
>
> (b) To coerce the plaintiff into requiring CrossFit trainers to register as members of the New Zealand Register of Exercise Professionals and paying the membership fee, so that the plaintiff and CrossFit trainers could avoid further criticism by the defendants of CrossFit training and CrossFit trainers.

[46] CrossFit pleads that the defendants share an interest in the promotion of membership of NZREPs, and that the comments were calculated to persuade CrossFit, against its preferred course, to have CrossFit trainers register with NZREPs.

The Associate Judge's Judgment

[47] The Judge said that the concept of coercion is not easily pigeon-holed. He referred to Peterson J in *Hodges v Webb*, who said that while an "ambiguous" word, in its legal meaning it "involves something in the nature of the negation of choice."[10]

[48] Section 23 of the FTA, the Judge found, was based on s 60 Trade Practices Act 1974 (Cth). The Australian authorities "serve to emphasise the evaluative nature of the exercise" in determining whether there has been coercion. His Honour quoted the following from an Australian text, cited with approval by the Court of Appeal in *Pharmacy Care Systems Ltd v Attorney General*:[11]

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[10] *Hodges v Webb* [1920] 2 Ch 70 at 85-87.

[11] *Pharmacy Care Systems Ltd v Attorney General* (2004) 2 NZCCLR 187 (CA) at [91]; G H

> Whether the threat actually gives rise to duress must then be considered by reference to its coercive effect in each case: no particular type of threat is regarded either as *ipso facto* having such an effect, or as being incapable, as a matter of law, of producing it.

[49] The Judge held that the applicants had failed to satisfy him that the cause of action is untenable. There are features of the case as pleaded such that a court might conclude after hearing the evidence that the conduct amounted to coercion. There was a relevant common interest held by Mr Beddie and the Association (in relation to membership of NZREPs), and although there was no express threat, negation of choice can be achieved through an implied threat. CrossFit's allegations, that the threat lay not in the statements themselves but the indication or intimation that damaging statements would continue to be made, may be influenced by "a number of developments between now and the close of the evidence at trial… through discovery, interrogatories, and cross-examination".

Submissions on appeal

[50] Mr Salmon submits that coercion for the purposes of s 23 means a threat in the form: "do x or else I will do y", so that an interpretation of the term to cover statements that raise questions or concerns about another person, on the basis that the motivation behind the statement was to persuade the other to act in a different manner, would impose an unjustifiable limit on free speech.

[51] Mr Beddie's statements, it is submitted, did not include any threat and did not put pressure on anyone to register as members of the New Zealand Register of Exercise Professionals.

[52] Mr Ringwood submits that the applicants' definition of "coercion" is too narrow, and that "coercion" takes a number of forms. Further, it is submitted that there is an implied threat that if CrossFit does not register, damaging statements will continue to be made. In a strike out application, Mr Ringwood says, all that needs to be shown is that a form of coercion has in fact been pleaded, not that it can be made out evidentially at trial.

Treitel *The Law of Contract* (9th ed, Sweet & Maxwell, London 1995) at 375.

Discussion

[53] I agree with the Judge that "coercion" for the purposes of s 23 must encompass implied as well as direct threats. Threats are often most effective when they do not need to be spelt out, because there is a common understanding about the demand or outcome sought, and the consequences of non-compliance. The threat may be expressed in a subtle way but it is real nevertheless, and understood as such. CrossFit have pleaded an implied threat in the form: join NZREPs or else we will continue to publish damaging statements. If proved, it is certainly arguable that this constitutes coercion under the FTA. Whether it can be proved is a matter for trial in light of all the evidence.

[54] This ground, too, is dismissed.

Conclusion

[55] The Judge did not err in refusing to strike out CrossFit's FTA claims. His Judgment is upheld in its entirety, and the application for review is dismissed.

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Nicholas Davidson J

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