

AUSTRALIA / JUDGMENT

Green, A. v Ford, J.A. [1987] FCA 29

COURT

assessing penalties - role of appellate court -

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THIS FIRST JUDGEMENT 29 WAS
SENT OUT IN ERROR THIS IS
THE CORRECT ONE. THANK YOU
PRINCIPAL REGISTRY SYDNEY.

JETCHNORDE

Adequacy of penalties imposed under 3.79 of the Trade
Practices Act for offences proved under s.52(c) and
s.83(d) of that Act - discretion of primary judge in
assessing penalties - role of appellate court -
Principles applicable.

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Pv. Tait (1979) 24 ALR 473 appl.

House v. The King (1956) 55 CLR 499 appl.

Norbis v. Norbis (1986) 65 ALR 12 con.

Quinn v. Given (1980) ATPR 40-148 appl.

ALAN GREEN v. JOHN ANTHONY FORD

No. G.296 of 1985

CORAM: Woodward, Beaumont, Gummow JJ.

25 February 1987

Sydney

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IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY No. G.296 of 1985

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GENERAL DIVISION

On appeal from a single

Judge of the Federal

Court of Australia

BETWEEN: ALAN GREEN

Appellant

Cross Respondent

AND: JCHN ANTHONY FORD

Respondent

Cross Appellant

MINUTE OF GRDER

JUDGES MAKING ORDER : Wececwara, Beaumont, Summow JC.

DATE Cr ORDEP Fy 26 February 1987

WHERE: MADE : Syaney

THE COUPT ORPERS

THAT:

i. The appeal be dismissed.

=. There be no order as to costs of the appeal or the cross appeal.

Note: Jettlement and entry of crders is dealt with by Order 36 of the Federal Court Rules.

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BETWEEN : ALAN GREEN

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Respondent

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CORAM: Woodward, Beaumont, Gummow JJ.

REASONS FOR JUDGMENT

This is an appeal by the prosecutor in respect of allegedly inadequate penalties imposed by a single judge of this Court in proceedings for offences under s.79 of the Trade Practices Act 1974 ("the Act"). The respondent had filed a cross appeal but when the appeal was called on before us counsel for the cross appellant indicated that the cross appeal would not be proceeded with. We then, by consent, dismissed the cross appeal and reserved the question of costs of the cross appeal.

The hearing below continued over five days. The

prosecutor was represented by senior and junior counsel and the

defendant by junior counsel. After he had delivered a reserved judgment on the issues as to liability, his Honour received other evidence and submissions on the question of penalty and

delivered an extempore judgment in which penalties were imposed

in the total sum of \$1,350.

The prosecutor had alleged the commission of fifteen offences under s.79 of the Act. As the Act stood at the material time, the maximum fine in respect of each offence was \$10,000. In eight cases the offences were alleged to be constituted by contraventions of s.53(c) of the Act and the other seven offences were alleged to be constituted by contraventions of s.53(d) of the Act. His Honour found eleven offences proved and entered findings of not guilty in respect of the others.

The defendant had carried on a business as a member of a partnership known as Barford Printing and Publishing ("Barfords"). The charges concerned, in broad terms, false representations in an issue of a magazine published and distributed by Barfords under the title "Waves". The magazine was designed to be of interest to boat-owners and people in the small boat industry. The defendant not being a corporation, and no other head of jurisdiction being appropriate, the

operation of the Act was attracted, as his Honour found, by the
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small boat industry. The defendant not being a corporation, and no other head of jurisdiction being appropriate, the

operation of the Act was attracted, as his Honour found, by the circumstance that, in respect of the charges found proved, distribution of

copies of the magazine had been by post.

Accordingly, s.6(3) of the Act founded jurisdiction. s.6(3) was amended by the Trade

to these proceedings in its previous form. Before the amendment, s.6(3) provided:

"In addition to the effect that this Act, other than

Part

X, has as provided by sub-section (2),

Division 1 of Part V has, by force of this sub-section, the effect it would have if -

(a)

(b)

(c)

Section 53 1s in Division I of Part V of the Act.

that failed did so

that Division (other than section 55) were, by express provision, confined in its operation to engaging in conduct to the extent to which the conduct involves' the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast;

in section 60 the words "cause or permit a

servant or agent of the corporation to" were omitted; and

subject to paragraph (b), a reference in that Division to a corporation included a reference to a person not being a corporation."

by post was not made out.

The orders in respect of penalty, against which

appeal is brought, were in the following terms:-

"1,

In relation to each of the charges G19 of 1984, G21 of 1984; G22 of 1984; G25 of 1984

Practices Revision Act 1986, and applied

The charges

because the necessary step of distribution

the

and G27 of 1984 the defendant pay a pecuniary penalty of \$200.00.

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In relation to each of the charges G20 of 1984; G22 of 1984; G24 of 1984; G26 of 1984 and G28 of 1984 the defendant pay a pecuniary penalty of \$20.00.

3. In relation to charge G48 of 1984 the defendant pay a pecuniary penalty of \$250.00.
4. The defendant pay to the District Registrar of this Court for the Commonwealth the amount of the pecuniary penalties within twenty-one (21) days from the date of this order." All charges concerned the same issue of "Waves". With the exception of charge G48, which stood by itself, the charges were grouped in five pairs, G19 with G20, G21 with G22, G23

with G24, G25 with G26 and G27 with G28.

Thus, charge G19 concerned the representation that the publication titled "Waves", magazine of the New South Wales Squadron, Australian Volunteer Coast Guard Association, Volume 1, No. 3 September 1982, had a sponsorship which it did not have, namely the sponsorship of the said Squadron and that in contravention of s.53(c) of the Act the copy of that publication was received through the post by a Mr William Brian Darnell. The companion charge, G20, was in respect of the receipt of the same publication by the same gentleman, but in alleged contravention of s.53(da) of the Act, by the making of a representation that the defendant's business "Barford Printing and Publishing" had the approval of the Squadron to the publication, contrary to the fact. The other pairs of charges

were in each case based respectively on paras(c) and (d) of

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3. In relation to charge G48 of 1934 the defendant pay a pecuniary penalty of 5250.00.
- 4, The defendant pay to the District Registrar of this Court for the Commonwealth the amount of the pecuniary penalties within twenty-one (21) days from the date of this order."

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Thus, charge G19 concerned the representation that the publication titled "Waves", magazine of the New South Wales Squadron, Australian Volunteer Coast Guard Association, Volume 1, No. 3 September 1982, had a sponsorship which it did not have, namely the sponsorship of the said Squadron and that in contravention of 3.53(c) of the Act the copy of that

publication was received through the post by a Mr William Brian

Darnell. The companion charge, G20, was in respect of the receipt of the same publication by the same gentleman, but in alleged contravention of s.53(d) of the Act, by the making of a representation that the defendant's business "Barford Printing

and Publishing" had the approval of the Squadron to forward

or

publication, contrary to the fact. The other pairs of charges

were in each case based respectively on paras(c) and (d) of

s.53 and each was in respect of the receipt of the same publication by a particular individual. In the case of some of the charges there was also an allegation that the publication

was received through the post with a statement of account.

Charge G48 also concerned the same issue of the magazine but stood in a special position. It alleged a breach of s.53(c) of the Act by the inclusion in the same issue of the magazine of an advertisement purportedly by a company named Olnet Pty. Ltd., whereas in truth the advertisement was not

printed or published with the authority of that company.

Early in 1982 the Squadron had entered into an agreement with Barfords for the publication of a magazine to appear quarterly. The issue the subject of the charges was identified by the learned primary judge as the "fourth issue". The history of the relationship of the Squadron and Barfords is set out in the reasons for judgment of the learned primary judge and it is not appropriate to repeat it here beyond indicating that early in December 1982 the Squadron notified Barfords that the agreement was terminated for breach by Barfords. The third issue, for September, had been delivered to the Squadron early in November. At the time of the termination of the agreement Barfords had on foot some orders for advertising in the magazine which had not been fulfilled.

In addition, Barfords had produced colour covers for four

issues. Barfords decided to produce another issue and claimed that the agreement was still on foot. This decision was implemented without any reference to the Squadron which first heard about the further issue, (the "fourth issue" to which we

have referred) some time after publication.

The editorial matter in the fourth issue was exactly the same as that which appeared in the third issue but the advertising matter was different. The third issue had been dated "September 1982" and the front cover of the fourth issue bore the same identifying endorsement "Magazine of the New South Wales Squadron Australian Volunteer Coast Guard Association". Some requests for advertisements, additional to those on hand at the time of the termination of the agreement with the Squadron were obtained after that termination. One or two of the earlier advertisements were reprinted, seemingly without any request from advertisers. His Honour found that so far as concerned the advertisers, it could readily be inferred that the sponsorship of the Squadron was important to them and that they expected the advertising material in the fourth issue would be accompanied by current editorial matter. Further, rather than the fourth issue being distributed to members of the Squadron as an advertiser was entitled to expect, issues were left mainly with hotels and clubs. In these circumstances

his Honour said:-

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his Honour said:-

"It is difficult to escape the conclusion that counsel for the prosecutor does not overstate matters when he says that by their actions Barfords were committing a fraud on most, if not all, their advertisers."

The defendant had asserted that if any false claim of sponsorship or approval was made in respect of the fourth issue this was done in circumstances where Barfords had a reasonable belief that the agreement with the Squadron was still on foot. Reliance thus was placed upon s.85 (1)(a) of the Act, namely

that the contraventions of s.53 were due to a _ reasonable

mistake. As to this his Honour held:-

"There could be no reasonable belief that the agreement, even if assumed to be of continuing operation, authorised what was done. The so called fourth issue was patently quite outside the scope of the agreement."

In his judgment as to penalty his Honour referred to the findings of fact in the reserved judgment and considered a number of further matters. He found that the profit derived by the partnership in respect of the fourth issue was in the order of \$3000 to \$5000. (It appears that advertisers were billed for some \$20,000 worth of advertising but only some \$12,500 was actually received by Barfords). His Honour referred to the circumstance that all these charges related to the one issue of the one journal, saying that there was no point in trying to treat the particular offences separately when assessing the

appropriate penalties. He referred to the absence of evidence

as to the precise manner of distribution of the fourth issue,

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to the maximum penalty being \$16,000 and to the circumstance

that, though he had treated it as unreasonable, there had been

a claim of justification in respect of what had been done.

In respect of the second of each of the pairs of charges his Honour expressed the view that the second charge was a work of supererogation and that in each case it should

properly not have been laid. Consequently, in respect of those secondary offences his Honour decided that the penalties should

be little more than nominal.

In respect of the charge G48, concerning the publication of the advertisement without authority, his Honour had regard to the fact found by him that there had been a checking procedure which had been followed and that the

documents in use for that purpose had showed that authorisation

had existed at the time of publication.

Finally, his Honour took into account the circumstance that the defendant was to pay most of the costs of the proceedings. There was no evidence before us as to the quantum of those costs but given the duration of the hearing they would

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As we indicated, the appeal is brought by the prosecution, which challenges the exercise of his Honour's discretion in fixing the penalties we have described. There was no disagreement between counsel as to the applicable

principles of law, the disagreement being as to the result of their application to the present case.

In R. v. Tait (1979) 24 ALR 473 on 476, a decision of this Court, Brennan, Deane and Gallop JJ., said :-

"An appellate court does not interfere with the sentence imposed merely because it is of the view that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, Skinner v. R (1913) 16 CLR 336 at 339-40; Rv. Withers (1925) 25 SR (NSW) 382 at 394; Whittaker v. R (1928) 41 CLR 2350 at 249; Griffiths v. R (1977) 15 ALR 1 at 15-17)."

These observations were made on an appeal from the Supreme Court of the Northern Territory. The appeal was brought by the Crown against sentence and was before the Full Court under ss.24 and 28 of the Federal Court Act. What was said in R v. Tait (Supra) is also applicable to an appeal against penalties

imposed, as in this case, under s.79 of the Act. The Full

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Court of this Court has so held in Quinn v. Given (1980) ATPR 40-148 at 42,135.

We were reminded also of the well known passage in the leading High Court authority upon appellate interference with the exercise of judicial discretion, *House v. The King* (1936) 55 CLR 499 at 504-5. Counsel pointed out that this case was an appeal against a sentence imposed by the Federal Court of

Bankruptcy in respect of offences against the Bankruptcy Act

1924. We were also referred to the recent discussion of *House*

- v. *The King* by the High Court in *Norbis v. Norbis* (1986) 65 ALR 12 at 14-15, 27. The passage from *Tait's Case* which we have set out reflects what Dixon, Evatt and McTiernan JJ had said in *House v. The King* (1936) 55 CLR 499 at 505, when they emphasised the necessity for an appellant in this type of case to show that the trial judge acted upon a wrong principle, was guided

or affected by extraneous or irrelevant matters, mistook the facts or failed to take into account some material

consideration.

Counsel for the appellant did not, in his oral

submissions, criticise the primary judge for omitting to consider any particular matter. Rather he drew attention to

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judge to take into account sufficiently various matters tending

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against the respondent. He stressed the passage in the reserved judgment as to the commission of fraud by Barfords, which we have set out earlier in this judgment. Counsel for the respondent disputed the strength of the finding against his client in that passage. Counsel for the appellant stressed that the false claim to sponsorship or approval was wilful and the defendant had not shown contrition. Counsel for the appellant also pointed to the quantum of the penalties imposed as being manifestly insufficient thereby, within the meaning of *Tait's Case*, manifesting an error in acting on a wrong principle. Counsel also invited the attention of the Court to the greater quantum of penalties imposed in other reported cases of contravention of 5.53 of the Act, whilst very properly indicating as he did so that most of these were cases of corporate rather than individual defendants. As to the burden of costs, it was submitted that this had been brought by the

defendant upon himself by the decision to defend all charges.

We have considered all these matters but remain unpersuaded that in his approach to the question of penalty the learned primary judge fell into any error. The penalties awarded here may well have been, in all the circumstances, at the lower end of the permissible range. But to say that is not to say that the appeal should be upheld. The clear meaning of the authorities to which we have referred is that an appellate

court in such a case as this is not to substitute its views for

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those of the primary judge. The question for us is whether in the exercise of his discretion his Honour fell into error in the sense laid down by the authorities. We have described the process of reasoning which guided his Honour to his conclusions on the issue of penalty and, after taking into account the criticisms made by the appellant, we are left with no stronger feeling than that other minds might attach different weight and importance to some of the issues involved. That means that no error of the necessary quality or character has been shown.

Accordingly, the appeal should be dismissed.

There remains the question of costs, both of the appeal and cross appeal. The respondent has succeeded on the appeal but, as we indicated, did not press the cross appeal when the matter was called on for hearing. In the circumstances we make no order as to costs of the appeal or the cross appeal.

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I certify that this and the twelve(12)

preceding pages are a true copy of the Reasons for Judgment herein of the Court.

Associate: ,M#fare hint -

Date: 26 February 1987

Counsel and Solicitors for Appellants:

Counsel and Solicitors for Respondents:

Date of Hearing:

Date of Judgment delivered:

Mr J. McCarthy anstructed by Director of Public Prosecutions.

Mr A. Sullivan instructed by Messrs Colin W. Love and Co.

hb

1 Vebruary 1987

26 February 1987

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