Federal Court of Australia

Re Action On Smoking and Health Limited v Australian Broadcasting Tribunal; Tcn Channel Nine Pty Limited and Philip Morris Limited [1992] FCA 218; (1992) 27 ALD 709 (Extract) (20 May 1992)

FEDERAL COURT OF AUSTRALIA

Re: ACTION ON SMOKING AND HEALTH LIMITED
And: AUSTRALIAN BROADCASTING TRIBUNAL; TCN CHANNEL NINE PTY LIMITED and PHILIP
MORRIS LIMITED
No. G668 of 1991
FED No. 294
Administrative Law
[1992] FCA 218; (1992) 27 ALD 709 (extract)

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Davies J.(1)

CATCHWORDS

Administrative Law - judicial review - report by Australian Broadcasting Tribunal into advertising of tobacco products during broadcasting of the 1990 Australian Grand Prix - finding that any such advertising was an "incidental accompaniment of the broadcasting of other matter" within the Broadcasting Act - interpretation of these words as ordinary words of the English language - question of fact - whether the Tribunal applied the correct test - whether test may have a subjective element - whether Tribunal failed to take relevant matters into account.

HEARING

SYDNEY
20:5:1992

Counsel for the Applicant: Mr M.H. Tobias QC and Mr M.K. Minehan

Solicitors for the Applicant: Cashman and Partners

Counsel for the Second Respondent: Mr A. Robertson

Solicitor for the Second Respondent: Mr J. McLachlan

Counsel for the Third Respondent: Mr D.E.J. Ryan

Solicitors for the Third Respondent: Arthur Robinson and Hedderwicks

ORDER

THE COURT ORDERS THAT:
1. The application be dismissed.

2. The Applicant pay the First and Second Respondents' costs.

3. The Third Respondent abide its own costs.
Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

This is an application brought by Action on Smoking and Health Limited ("ASH") seeking orders by way of judicial review against a determination of the Australian Broadcasting Tribunal ("the Tribunal"), entitled "Public Inquiry Report" issued on 2 October 1991. The application is opposed by the second respondent, TCN Channel Nine Pty Limited ("Channel 9"), and the third respondent, Philip Morris Limited ("Philip Morris"), which produces Marlboro cigarettes, and on its motion was joined in these proceedings.

2. At the hearing, Mr M.H. Tobias QC, with him Mr M.K. Minehan of counsel, appeared for ASH. Mr A. Robertson of counsel appeared for Channel 9 and Mr D.E.J. Ryan of counsel appeared for Philip Morris. The Tribunal entered a submitting appearance.

3. The decision of the Tribunal was given after an inquiry into alleged cigarette advertising during the broadcast of the 1990 Australian Grand Prix held in Adelaide on 3-4 November 1990.

4. Section 100 of the Broadcasting Act 1942 (Cth) provides inter alia:-

"(5A) A licensee shall not broadcast an
advertisement for, or for the use of:
(a) cigarettes;
(b) cigarette tobacco; or
(c) other tobacco products.
...
(10) A reference in subsection (5A) or (6) to
the broadcasting of advertisements or of an
advertisement shall be read as not including a
reference to the broadcasting of matter of an
advertising character as an accidental or
incidental accompaniment of the broadcasting of
other matter in circumstances in which the
licensee does not receive payment or other
valuable consideration for broadcasting the
advertising matter."

5. The issues considered in the inquiry were as follows:-
"1. Whether the telecast of the 1990 Australian Grand Prix, broadcast by TCN and Television stations in the Nine Network and some regional stations over the weekend of 3 and 4 November 1990, included matter which is prohibited by s.100(5A) of the Broadcasting Act, 1942 (the Act), namely an advertisement for, or for the use of, cigarettes, cigarette tobacco or other tobacco products, and if so;
2. Whether the advertising matter broadcast in the program is allowed under s.100(10) which defines advertisements prohibited by s.100(5A) to exclude `the broadcasting of matter of an advertising character as an accidental or incidental accompaniment of the broadcasting of other matter in circumstances which (sic) the licensee does not receive payment or other valuable consideration for broadcasting the advertising matter', and if not;
3. Whether the licensee of TCN, other Nine Network stations, and the other licensees who broadcast the program, have failed to meet a condition of their licences by broadcasting material prohibited under s.100 of the Act. If so;
4. Whether action is required by the Tribunal in respect of the licensees who broadcast the material (as set out under items 1 and 2), and if so, what form this action should take;
5. Such other matters as the Tribunal considers relevant to this Inquiry."
6. The Tribunal held:-
"7.1 ISSUE ONE
We have found that the telecast of the 1990 Australian Grand Prix, broadcast by TCN and Television stations in the Nine Network and some regional stations over the weekend of 3 and 4 November 1990, included matter which is prohibited by section 100 (5A) of the Broadcasting Act (1942). That is an advertisement for, or for the use of, cigarettes, cigarette tobacco or other tobacco products.
7.2 ISSUE TWO

We have further found that the advertising matter broadcast was allowable under section 100(10) although it was not an accidental accompaniment to the broadcast it was an incidental accompaniment of other matter in circumstances which (sic) the licensee does not receive payment or other valuable consideration for broadcasting the advertising matter.
7.3 ISSUE THREE, FOUR AND FIVE
In view of the above findings it is not necessary to make further comment on issues three, four and five."

7. The substance of the view taken by the Tribunal was that, although the televising of the practice sessions on 3 November 1990 and of the three races, the Saloon Car Race, the Celebrity Race and the Formula One Race, on 4 November 1990 broadcast cigarette and tobacco advertisements on billboards around the track, on the clothing of the drivers and pit staff and on the cars themselves, nevertheless, such broadcasting was an incidental accompaniment of the sporting events including the practice session and was exempted by s.100(10).

8. Many of the submissions of counsel seemed to proceed upon the footing that the words "incidental accompaniment of the broadcasting of other matter" had a meaning in law and therefore that the Court could state what that meaning was. However, the words "incidental accompaniment" are ordinary words of the English language and are used in the ordinary sense. The question before the Tribunal was primarily, if not exclusively, a question of fact. The basic principle is that the meaning of an ordinary word of the English language which is used in its ordinary sense is a question of fact, as also is the question whether the facts and circumstances under consideration fit that description. Thus in Lombardo v. Federal Commissioner of Taxation (1979) 28 ALR 574, Bowen C.J. said at 576:-

"The position where a statute uses words which are not technical was elaborated by Jordan C.J. in Australian Gas Light Co v Valuer-General (1940) 40 SR (NSW) 126 as follows, at 137:-
`(1) The question what is the meaning of an ordinary English word or phrase as used in the statute is one of fact not of law ... This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence ... although evidence is receivable as to the meaning of technical terms ... and the meaning of a technical legal term is a question of law ...
`(2) The question whether a particular set of facts comes within the description of such a word or phrase is one of fact ...': see also FC of T v Broken Hill South Ltd [1941] HCA 33; (1941) 65 CLR 150 at 160; 2 AITR 257 at 263; and Brutus v Cozens (1956) AC 854 at 861.
In the above situations where application of the statute is clearly a question of fact, a question of law will only arise if there was no

evidence to support the conclusion of fact or it is obvious from the transcript of the case that the Board has misunderstood the law in some relevant particular: Edwards (Insp of Taxes) v Bairstow [1955] UKHL 3; (1956) AC 14 at 33 per Lord Radcliffe. On the other hand a question of law will be involved where technical legal words must be construed before the statute can be applied to the found facts. Also, as stated previously, where the facts must fall clearly within or without the statute."
See also Hope v. Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1 at 7-8 per Mason J.

9. An error of law may also result if a decision-maker states its own definition of a term used in a statute and then considers the matter by reference to that definition, not by reference to the statutory term. An example of such a circumstance may be seen in The Benson and Hedges Company Pty Limited and Ors v. The Australian Broadcasting Tribunal (Fox J., 10 October 1984, unreported) ("the Benson and Hedges case") in which Fox J. rejected the test which had been expounded by the Tribunal and against which the facts of the case had been considered. At p 24, his Honour said:-

"The test, or a principal test posed (by the Australian Broadcasting Tribunal) was expressed as follows:
`A judgment must be made as to whether the advertising matter dominates or forms a substantial feature of the program, scene or segment, having regard to the emphasis, tone and frequency or repetition of the advertising matter in question.'
A test thus expressed, as to whether the `advertising matter ... forms a substantial feature of the program ...' is not one stated in the legislation, and can lead to error."
This is because the words used in the statute are the words which Parliament has adopted to express its will. Therefore, the facts and circumstances should be judged against those words, not against words which the statute does not use. See Attorney-General's Department v. Cockcroft (1986) 10 FCR 180 at 190 per Bowen C.J. and Beaumont J.

10. The words "incidental accompaniment" are well known words of the English language and the concept which they convey is relatively clear. It is not in doubt that the word "incidental" has the meaning given to it is the Macquarie Dictionary, namely "happening or likely to happen in fortuitous or subordinate conjunction with something else." But even so, as Fox J. said at p 26:-

"The word `incidental' is not one of precise meaning; what is to be understood by it depends very much upon the context."
It follows that a tribunal would be likely to fall into error if it adopted as the test the words of the dictionary meaning rather than the words which the statute uses. Reference to a dictionary is useful to elucidate a meaning. But the facts and circumstances should generally be considered against the statutory words as read in their context.

11. Nevertheless, the issue before the Tribunal was primarily if not exclusively a question of fact. This is so notwithstanding that, in the Benson and Hedges case in the judgment of Fox J. and in the appeal from that

decision Rothmans of Pall Mall (Australia) Limited v. The Australian Broadcasting Tribunal (1985) 58 ALR 675 ("the Rothmans case") in the judgments of Bowen C.J., Toohey and Wilcox JJ., much was said concerning the meaning and application of the words used in s.100(10). Once a court considers that there has been an error of law because words used in a statute have been misunderstood, as Fox J. found in the Benson and Hedges case, the court is likely to go on to make observations which will assist the decision-maker in a reconsideration. However, such guidance should be understood in that light and not as binding a decision-maker in law.

12. The significant reasons of the Tribunal were stated as follows:-

"6.4 `Incidental' has been defined as meaning `happening ... in fortuitous or subordinate conjunction with'. See DPP v. United Telecasters Sydney Ltd [1990] HCA 5; 91 ALR 1 of 14 (sic) and Rothmans and Benson and Hedges v Australian Broadcasting Tribunal 58 ALR 675 of 691 (sic).
6.5 We accept the view of Counsel Assisting that the fortuitous aspect of the definition is otiose in determining its meaning given the use of the word `accidental' in s.100 (10).
6.6 It is clear from the evidence that a significant amount of broadcasting time exposed the brand name of cigarette and tobacco products, particularly Marlboro.
6.7 We accept the view of Counsel Assisting that it is an objective test as to whether or not the broadcast of such material was, or was not, incidental to the broadcast of the event.
6.8 A further matter which we wish to mention, although not a matter on which our decision turned, is the obvious need in many cases to obtain the actual contracts and/or written agreements between the relevant parties dealing with signage, placement and consideration for product promotion at the event. Given the judicial and regulatory activity in recent years, it is perhaps understandable that our pursuit of these details in this inquiry led inevitably, off shore. The point needs to be made however, that in most cases the absence of the evidence will be a restraint on the capacity to successfully

determine some key issues in view of the legislative provisions and the interpretation placed on them to date.

6.9 In applying a proper interpretation of `incidental accompaniment' we consider that the licensee was operating within the provisions of the Act in providing coverage of the Grand Prix, notwithstanding the fact that it also meant that incidental to that coverage it broadcast effective and contrived advertising for tobacco products, organised and orchestrated by other parties.

6.10 The present provisions of the Act provide only an illusory restriction. If the legislature intended or now considers that these provisions form an effective restraint to the advertising or televising of tobacco products, it is not achieving its objective or intent. The inclusion of the words `or incidental accompaniment of the broadcasting of other matter ...' provide a powerful and effective mechanism for the use of sporting and other special events by sponsors and advertisers to exploit to advantage their products which otherwise could not be advertised on television.

6.11 There are at least two instances where such incidental advertising may breach the existing provisions. If it were shown that the broadcaster had co-operated with the tobacco company or others acting on their behalf in some positive way so as to ensure or maximise the extent of the advertisements broadcast.

6.12 Second, it will always be a matter of judgment as to whether the advertising material so dominates or forms a substantial feature of the program so that by its nature it results in the broadcast event no longer being the dominant subject of the telecast. Neither of these instances applied in this inquiry."

13. These reasons can be taken to have been expanded by a policy document entitled "Advertising Matter Relating to Cigarettes, Cigarette Tobacco or Other Tobacco Products" which the Tribunal issued on 29

December 1983 and reissued on several occasions thereafter and a copy of which was attached to the Public Inquiry Report, inferentially because it set out the Tribunal's general approach to questions arising under s.100. Paragraph 3.4 of that policy document read:-

"3.4 Where advertising matter for cigarettes, cigarette tobacco or other tobacco products is not an accidental accompaniment of other matter, it may still be an `incidental accompaniment', and thus permissible to transmit.

Advertising matter which forms an integral part of the principal subject of the transmission will not be regarded as an `incidental accompaniment'. Matter will only be regarded as an `incidental accompaniment' if it is subordinate to the main matter being transmitted. Thus, if advertising matter for these products dominates or forms a substantial feature of a particular radio or television program, scene or segment it will not be regarded by the Tribunal as an `incidental accompaniment' of that program, scene or segment.

Ultimately, this is a question of judgment which must be made having regard to the facts of a particular case. It is not possible to provide any precise or comprehensive test on the matter (see also the judgment of Mr Justice Fox in The Benson and Hedges Company Pty Limited v Australian Broadcasting Tribunal, 10 October 1984, unreported, especially pp 24 and 26). However, emphasis, tone and frequency of repetition of the advertising matter in question are relevant factors. The fact that the advertising matter occupies only a small part of a particular transmission is not conclusive of whether it is an `incidental accompaniment'. (See also DPP v United Telecasters Sydney Ltd, 15 February 1990, High Court)"

14. In interpreting the Tribunal's reasons for judgment, it is necessary to note that the Tribunal's general finding was made in paragraph 6.9. It is therefore clear that the Tribunal thought that the broadcast fell within the general pattern of the broadcast of sporting events which, in the Benson and Hedges case and the Rothmans case had been considered not to constitute an infringement of s.100.

15. The Tribunal then went on to set out in paragraphs 6.11 and 6.12 "at least two instances" where advertising of that type could breach s.100. But the Tribunal did not suggest that either of those circumstances or any like circumstance applied in the broadcasting of the Grand Prix in Adelaide.

16. Mr Tobias submitted that, although no error of law could be identified in either paragraph 3.4 of the policy document or in paragraphs 6.4 to 6.9 of the Public Inquiry Report, nevertheless paragraph 6.12 enunciated a test which was too limited. Mr Tobias submitted that the Tribunal made an error of law because that was the only test which it applied.

17. I do not read the Tribunal's reasons in that way. In paragraph 3.4 of the policy document, which was incorporated into the reasons because of its attachment to the Public Inquiry Report, and in paragraphs 6.4 to 6.9 of the Public Inquiry Report, the Tribunal correctly enunciated the test which it was required to apply. The only point which concerns me is the reference to "an objective test" in paragraph 6.7. A deliberate intention on the part of the broadcaster to broadcast an advertisement could be a factor to be taken into account in determining whether or not the broadcast of the advertisement was "an incidental accompaniment" of some other matter. Although s.100(5A) specifies an objective test, as to which see the Rothmans case at 687, nevertheless, the words "accidental or incidental accompaniment" would not seem to describe an event which had been deliberately contrived by the broadcaster. Section 100(10) specifies a test which to that extent may have a subjective element. Nevertheless, that issue does not arise in the present case and it is clear from paragraph 6.11 that the Tribunal accepts the point I have made.

18. I do not perceive any relevant error of law in the exposition by the Tribunal of the test to be applied.

19. It was put by Mr Tobias that the Tribunal failed to consider and to give any reasons with respect to a significant aspect of the matter. Mr Tobias pointed to the submissions which ASH had made to the Tribunal. ASH had submitted that several of the cars involved in the Grand Prix Race were heavily covered with advertisements for Marlboro cigarette. Cars carrying the Marlboro advertisements were amongst the most successful in the race. Accordingly, these Marlboro advertisements were frequently seen as the cameras focussed on the leading cars. ASH also submitted that, when televising the practice session on 3 November, Channel 9 had given prominence to the cars driven by Senna and Berger, both of which were prominently displayed Marlboro advertisements. Apparently, the cameras lingered on these two cars for several minutes at a time. Mr Tobias accepted that this was not done deliberately for the purpose of televising the advertisements but rather because of the interest which Senna and Berger and their cars had to the viewers.

20. The submission of ASH and of Mr Tobias was that the advertisements on these cars were such an integral and significant part of the televised event that the televising of the cars constituted the broadcast of an advertisement for the purpose of s.100(5A) but not the broadcasting of material which was an incidental accompaniment of other matter for the purposes of s.100(10). The submission was that the televising of the cars constituted not the broadcasting of matter incidental to another matter, the sporting event, but constituted the broadcasting of advertising matter in its own right.

21. Undoubtedly, some events have the character of an advertisement in this sense. The pre-game dance sequence was found to be such in the Benson and Hedges case and in the Rothmans case. So also was the Winfield Spectacular considered in Director of Public Prosecutions v. United Telecasters Limited [1990] HCA 5; (1990) 168 CLR 594.

22. The Tribunal did not discuss this aspect of the matter. However, it is plain from an overall reading of the Public Inquiry Report, including the attachments thereto, that the Tribunal had this distinction in mind and considered that the televising of the Grand Prix was analogous to the televising of the football matches considered in the above cases and not to the televising of the dance sequence or of the Winfield Spectacular.

23. I see no error in law, or for that matter in fact, in the Tribunal's finding in this respect. It was open to the Tribunal to hold that the subject of the broadcast was a sporting event and that the broadcasting of advertising material such as occurred was an incidental accompaniment of the broadcasting of that event, including the practice sessions which were a part of the event.

24. I cannot draw the conclusion that the Tribunal failed to take any relevant matter into account or failed to give adequate reasons explaining the basis on which it came to its decision. It is clear from the Tribunal's reasons that it considered that the televising of the Grand Prix, of the associated races and of the practice sessions fell within the general category of cases which were exempted by s.100(10). Indeed, a Grand Prix event is such a major event having worldwide interest and involving such speed and danger that **it seems to me that it and the associated events could not seriously be characterised as being other than matter to which the advertising on the cars was an incidental accompaniment.**

25. The Tribunal perhaps failed to perceive the importance which ASH placed on this submission, though the Tribunal referred to the submissions of ASH and of its counsel Mr Minehan. Thus, paragraphs 3.8, 5.18 and 5.20 read:-

"3.8 ASH believes that the licensee would have been aware of the cigarette advertising from previous Grand Prix events, that the licensee had control over the placement of cameras during the event, and that the likelihood of cigarette advertising was brought to the licensee's attention before the event.
...
5.18 The evidence fails to show that the broadcaster took any steps to raise a concern regarding the exposure of tobacco related images through consultation with other parties involved in the organisation of the event, to ensure compliance with the requirements of the Act.
...
5.20 The cars participating in the race cannot be said to be incidental. The cars are the subject matter of the broadcast and can be incidental to nothing. Therefore the advertising placed on the cars cannot be said to be an incidental accompaniment."

The Tribunal rejected this approach, consistently with the remarks of Fox J. in the Benson and Hedges case at pp 26-27 and with the remarks of Bowen C.J., Toohey and Wilcox JJ. in the Rothmans case at pp 691-693.

26. The Tribunal did not specifically set out some submissions of ASH of which paragraph 11 is an example:-

"ASH submits that the broadcast of a race car painted and designed in colours associated with a brand of cigarette and bearing a logo, trademark or name associated with a brand of cigarettes or a cigarette manufacturer is an advertisement for cigarettes or for the practice of smoking. ASH submits that ordinary viewers would regard such an image as an advertisement

as it `is likely to cause many or all of those
people instantly to bring to mind the product
with which it has become associated': Rothmans v
ABT at 684."
Similarly, the final submissions put by counsel for ASH read, inter alia:-
"Meaning of `Incidental accompaniment'
Incidental means occurring in fortuitous or
subordinate conjunction with something else:
Rothmans v. ABT at 691, DPP v United Telecasters
at 612. If a camera rested on an advertisement
for an undue time, or a number of times, the
particular screening may not be regarded as an
incidental accompaniment: Fox J. Benson and Hedges
v ABT at 27.
...
In light of the evidence adduced and the
relevant case law, it is our submission that the
Tribunal should make the following findings:
1. That in broadcasting images of
cars displaying cigarette
advertising in the saloon car
race, the practice session and
the formula one race, the
licensee was in breach of
s.100(5A) and that s.100(10)
is of no application in
respect of the cars because
the broadcast of the cars was
incidental to nothing.
2. That in respect of signage and
other cigarette images the
licensee is in breach of
s.100(5A) and the cigarette
advertising material was in
excess of an incidental accompaninet."

27. However, to compare the Marlboro advertisements on the cars of the leading contenders for the Grand Prix race as the equivalent of the dance sequence considered in the Benson and Hedges case and the Rothmans case or of the Winfield Spectacular considered in Director of Public Prosecutions v. United Telecasters, cited above, seems to me to be drawing a very long bow. Even when Mr Tobias had explained the point to me in the clearest of terms, I had difficulty grasping it.

28. On a fair reading of the Tribunal's Report, it is apparent that those submissions were rejected on the facts.

29. Mr Tobias submitted that the Tribunal in its Public Inquiry Report did not sufficiently discuss the nature of the advertisements or explain how the Tribunal came to its decision or what were the factors which it took into account. However, the Public Inquiry Report explained the substance of the reasoning by which the Tribunal came to its decision. I have not identified any relevant factor which the Tribunal did not take into account or any lack of explanation as to the substance of the reasons which led the Tribunal to its decision.

30. Mr Tobias submitted that the reasons of the Tribunal were in general inadequate. The reasons certainly suffer in that they dwell at length on introductory matters and on the submissions put to the Tribunal and the evidence before the Tribunal. As so often happens when this course is taken, the vital reasons are brief.

But in the end, the question is whether the Tribunal made it clear how it arrived at its decision and what were the matters it took into account. In my opinion, the Tribunal did so.

31. The final submission put by Mr Tobias was that the Tribunal did not discuss each piece of advertising matter separately. However, it does not appear that individual matters were isolated out for the Tribunal's attention, other than those to which I have already referred, namely the televising of Senna's car and Berger's car during the practice sessions and the televising of the leading cars carrying the Marlboro advertisements during the Grand Prix race.

32. When it commenced its inquiry, the Tribunal was aware that Dr D.S. Martin had published an article in the August 1990 issue of "Media Information Australia" which analysed the coverage of the 1989 Australian Grand Prix. Dr Martin reported that tobacco advertising was visible between 8% and 36% of the time in a sample of three segments. Such an analysis was undertaken on behalf of the Tribunal with respect to the broadcast of the Grand Prix Race itself. That was an interesting and informative analysis. It was on material of that nature that the matter proceeded.

33. The issue does not appear to have been raised that some part of the broadcast before the Tribunal fell into a different category because, e.g., the televiser had deliberately concentrated on an advertisement. Mr M. Minehan of counsel who appeared for ASH before the Tribunal, appears to have eschewed that contention. Indeed, he submitted that:-

"5.16 It is not for the Tribunal to inquire into the intentions of
the broadcaster, the Tribunal must make their decision on
what is presented through the broadcast."

34. In this light, it seems to me that the Tribunal dealt with the matter sufficiently, having regard to the way in which it was put to the Tribunal by those appearing before it. No particular advertising matter or broadcast thereof, other than the advertising on the cars to which I have already referred, was isolated out for separate consideration. The Tribunal dealt fairly with the matter as raised before it.

35. In brief, therefore, I see no error of law in the Tribunal's approach. The Tribunal considered that all the advertising material fell into the same category and that the broadcasting thereof was an incidental accompaniment to the televising of the Grand Prix, the other races and the practice sessions. These were matters of fact for the Tribunal.

36. I shall dismiss the application and shall order that the applicant pay the costs of the first and second respondents. The third respondent should, as intervener, abide its own costs of the proceedings.
