

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2014-409-733
[2018] NZHC 1093**

BETWEEN

CROSSFIT, INC.
Plaintiff

AND

EXERCISE INDUSTRY ASSOCIATION
LIMITED
First Defendant

RICHARD GRAHAM BEDDIE
Second Defendant

Hearing: On the Papers

Counsel: A L Ringwood for the Plaintiff/Respondent
D Salmon for First and Second Defendants/Applicants

Judgment: 17 May 2018

**JUDGMENT OF NICHOLAS DAVIDSON J
(APPLICATION FOR LEAVE TO APPEAL)**

Background

[1] The defendants, Exercise Industry Association Limited (“**the Association**”) and Mr Beddie, seek leave to appeal against this Court’s judgment of 5 May 2017.¹ That judgment upheld Associate Judge Osborne’s refusal to strike out two aspects of the plaintiff’s statement of claim.²

¹ *CrossFit, Inc v Exercise Industry Association Ltd & Anor* [2017] NZHC 899.

² *CrossFit Inc v Exercise Industry Association Ltd* [2016] NZHC 1028.

[2] The parties agreed I should address the leave application on the papers. Their submissions did not reach me until a short time ago, hence the delay in delivery of this judgment.

Judgment of 5 May 2017

[3] The plaintiff, CrossFit, Inc (“**CrossFit**”), licenses the CrossFit brand of exercise techniques. Mr Beddie is the Chief Executive Officer and sole director of the Association.

[4] Mr Beddie was critical of CrossFit in interviews published in various forms. In essence, he called into question the safety of CrossFit’s techniques and the training of its instructors.

[5] CrossFit says that criticism was false and damaging to the CrossFit brand. It takes particular exception to suggestions that CrossFit’s exercise techniques had resulted in incontinence, serious injuries, and worse.

[6] CrossFit sues Mr Beddie and the Association in defamation, malicious falsehood, and breach of the Fair Trading Act 1986 (“**FTA**”).

[7] Associate Judge Osborne made an order striking out aspects of CrossFit’s claim. These included defamatory meanings pleaded by CrossFit. However, Mr Beddie and the Association were otherwise unsuccessful. They brought a review 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 given the “media exception” in s 15 of the FTA; and
- (ii) Whether CrossFit’s claim of a breach of s 23 of the FTA is reasonably arguable as pleaded.

[8] The review proceeded by way of rehearing. The burden lies on the applicants to persuade the court that the judgment was wrong and rested on unsupported findings

of fact and/or applied wrong principles of law. The reviewing court must come to its own opinion whether the earlier judgment is right or wrong.

[9] While discussed in the context of this application for leave to appeal, the two issues were addressed by this Court as follows.

Are CrossFit's claims in breach of ss 9 and 11 of the FTA untenable in light of s 15 of the FTA?

[10] Mr Beddie was “in trade” when making statements about CrossFit, and it is not disputed that his statements were misleading or deceptive under ss 9 and 11 of the FTA.

[11] The question is whether claims against Mr Beddie and the Association for misleading or deceptive conduct are barred by s 15 of the FTA. That section provides:

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.
- (2) Nothing in sections 9 to 14 applies to the broadcasting of any information or matter by a broadcaster, 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 broadcaster, or where that broadcaster 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 broadcaster relating to the content, nature or tenor of the information or matter.
- (3) For the purposes of this section—
- (a) broadcasting and broadcaster have the same meanings as in section 2(1) of the Broadcasting Act 1989:
 - (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.

[12] The substantive issue is whether the statutory protection or immunity from an FTA claim applies *to all those involved* in the publication of such statements, or only to the “publisher” or “broadcaster”, as defined. The Associate Judge and this Court concluded the legislature had not wanted to protect *any* publication and republication, given the definition of the “*publisher of that newspaper*” and “*by a broadcasting body*”, but only publication by *those particular entities*. Section 15 of the FTA is intended to ensure freedom of the press, being the news media, not a platform or conduit for misleading or deceptive statements through a publication or broadcaster.³

[13] This “narrow” construction was challenged by Mr Salmon for the defendants. He submitted that it is inconsistent with the approach taken by the legislature and the Courts to reputational harm cases brought in the torts of defamation and injurious falsehood, where defences are available. Many of those defences are not available under the FTA. He submitted:⁴

³ At [32].

⁴ At [35].

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.

[14] The Court concluded that the policy behind the difference between the FTA principles and the law of defamation is clear and defensible, and is explained by the FTA's concern about statements made "in trade". It is reasonable to expect those who present themselves as experts or insiders in trade to make sure they do not make misleading or deceptive statements in that trade setting.

[15] The news media bring information to public attention drawn from different sources in trade. They do so with the shadow of defamation firmly in mind. However, they are not to know the truth or accuracy of information drawn from trade sources, hence they have statutory immunity.

[16] Mr Salmon for the defendants, submitted s 6 New Zealand Bill of Rights Act 1990 ("NZBORA") directs the answer, but the Court held that freedom of expression has limits. One justifiable limit restricts people from abusing the freedom, to mislead or deceive. The right to freedom of expression is tempered, so the "narrow" interpretation of s 15 of the FTA is not inconsistent with NZBORA.

Is CrossFit's claim for breach of s 23 of the FTA reasonably argued as pleaded?

[17] The second ground of review related to CrossFit's claim of breach of s 23 of the FTA which proscribes harassment and coercion in connection with the supply of goods and services:

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.

[18] CrossFit alleges what Mr Beddie's statements reported in the print and television media falls within s 23. He has business and administrative roles in the Association. CrossFit says that Mr Beddie was motivated to coerce CrossFit trainers into registering on the New Zealand Register of Exercise Professionals and paying the membership fee, in order to avoid criticism of CrossFit training and CrossFit trainers,

or otherwise to coerce CrossFit into requiring its trainers to register, to the same effect. CrossFit says that the defendants made these comments to persuade CrossFit, against its preferred course, to have CrossFit trainers register.

[19] Mr Salmon submitted coercion under s 23 of the FTA means a “threat” as that is usually understood. The Court held that coercion for the purposes of s 23 of the FTA will encompass implied as well as direct threats. The former are often more effective, not having to be spelt out. Therefore, it was arguable that the defendants’ actions constituted coercion and whether it could be proved as such was a matter for trial.

[20] The overall judgment was that the Associate Judge did not err in refusing to strike out CrossFit’s FTA claims. The application on review was dismissed.

Leave to appeal

[21] The defendants seek leave to appeal to the Court of Appeal against the judgment of this Court, which upheld on review the judgment of Associate Judge Osborne.

[22] Applications for leave to appeal to the Court of Appeal in this case was brought under s 26P(1AA) of the Judicature Act 1908.

[23] Mr Salmon submits that the wording of s 15 is ambiguous, allowing two competing interpretations, one protecting any person involved in the publication or broadcast against an FTA claim (ss 9 to 14), and the other protecting only the publisher or broadcaster. He says no New Zealand appellate court has considered the issue. He submits that reference to other jurisdictions is of limited value and there are policy considerations as to freedom of expression, especially in the news context, and in the intersection between the law of defamation and other causes of action which relate to defamation or reputational harm.

[24] Section 23 of the Act raises the question of what in law may constitute “coercion” and that too has not been considered by the appellate courts in New Zealand.

[25] The proposed appeal is submitted to be of significant public interest in the regulation of freedom of expression in a free society, and of significance to the parties. The judgment as it stands, without an appeal, will bind the parties irrespective of the factual findings. On the other hand, the outcome of the proposed appeal will more authoritatively define the shape of trial, its duration and available defences. Mr Salmon submits that the issues on appeal are narrow and can be dealt with efficiently and it is in the interests of justice to grant leave.

[26] Mr Salmon refers to the applicable principles.

The principles relating to applications for leave to appeal to the Court of Appeal under s 26P(1AA) are well settled:

- (a) The fundamental question for the Court is whether it is in the interest of justice to allow a second appeal.⁵
- (b) Generally the proposed appeal will need to:⁶
 - (i) Raise a question of law or fact that is capable of *bona fide* and serious argument; and
 - (ii) Involve a case of some public or private interest.
- (c) Leave is more readily granted where the determination of the appellate court will create instructive precedent, and where the issues of law raised have never been considered at an appellate level.

Section 15

[27] Mr Salmon says there is a *bona fide* and serious interpretation argument. He submits that *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd*,⁷ which is associated with the comparable Australian provision,⁸ is not binding or persuasive. He notes it was only a first instance judgment on an application for an interim injunction in which there was only brief discussion of the construction of s 65A. The judgment pre-dates NZBORA, s 14 of which enshrines the freedom to “seek, receive, and impart information and opinions of any kind in any form”.

⁵ *Gregory v Gollan* HC Auckland CIV-2005-404-3845, 4 July 2007 at [5].

⁶ *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413-414.

⁷ *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* (1987) 19 FCR 1.

⁸ Section 19, Schedule 2 of the Competition and Consumer Act 2010 (Cth), formerly s 65A of the Trade Practices Act 65A.

[28] That judgment also pre-dates the judgment in *Bell-Booth Group Ltd v Attorney-General*.⁹ The Court of Appeal there expressed concern about the use of causes of action other than defamation to seek compensation for harm to reputation.¹⁰ The Court noted that the law of defamation, unlike other areas of the law, had developed over the centuries to balance the competing interests of the right to an untarnished reputation, and freedom of expression. This included the development of defences such as honest opinion and qualified privilege, which are not available in the context of other causes of action.

[29] Mr Salmon submits that the purposes of the FTA are relevant as it is a consumer protection statute intended to increase confidence in the quality and safety of goods and services. Professionals and others should be able to comment on such in the context of news reporting and issues which relate to them. Mr Salmon submits that raising questions about safety is particularly important. Those who can comment should not be at risk of being sued by the suppliers of goods and services, such as CrossFit, without the right to engage defamation defences. It is submitted that policy issues, including the NZBORA, are relevant.

[30] Mr Salmon says that a “narrow” interpretation of s 15 will leave trade commentators uncertain and expose professionals or others who make critical comment to potential liability, given the breadth of “in trade”. Without defamation related defences, those who can comment will be guarded and discouraged from sharing their opinions. This would constrain the publication of information the public should know about.

[31] Appellate authority will clarify the position of, and for, industry experts as to the protective effect of s 15 and assist news media organisations when seeking to interview people with something to say. It will also influence the way interviews are conducted if the interviewee is not protected under s 15.

[32] The pleading relates to statements by Mr Beddie in two TVNZ news items, pleaded in defamation, to which the defendants have pleaded qualified privilege.

⁹ *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA).

¹⁰ *Bell-Booth* at 156 per Cooke P.

Some defamation pleading was removed after the Associate Judge struck out most of the defamatory meanings pleaded. CrossFit will, under the judgment of this Court as it stands, be able to maintain a claim under the FTA for harm to reputation for statements that have been held to be incapable of bearing pleaded defamatory meanings, while depriving the defendants of defamation related defences. The interpretation of s 15 is a matter of law. Judgment in the final appellate court will be binding and may or may not preclude the defendants from seeking to rely on s 15 at trial.

[33] CrossFit, through Mr Ringwood, opposes the application for leave and says the would be points on appeal are “weak” and “not sufficiently serious to warrant a further appeal”. He submits it is not clear that a successful appeal would dispose of either cause of action and otherwise would cause further unjustified delay, and is not in the interests of justice.

[34] Mr Ringwood says that CrossFit’s FTA claim has not been properly analysed and described by the defendants. The defendants describe it as “improper” and say that CrossFit is in effect bringing a defamation or reputational claim under the FTA.

[35] Instead, Mr Ringwood says that CrossFit alleges breaches under ss 9, 11 and 23 of the FTA, quite distinct from the defamation cause of action which seeks general damages for damage to goodwill and reputation. The FTA cause of action seeks no compensation for harm to reputation but rather recovery of specified mitigation costs.

[36] Mr Ringwood says that the defendants suggest CrossFit should not be permitted to pursue an FTA claim as that would deprive them of defences available in a defamation context, such as qualified privilege and honest opinion. He submits that is wrong as they are not so deprived *in the context of defamation*. Misleading or deceptive statements in trade fall under the FTA and Parliament has not provided for such defences under that Act, as it plainly intended to protect those who consider engaging or engage in a transaction for goods or services.

[37] Claims for defamation *and* for breach of the FTA are identified by Mr Ringwood in several cases. He refers to a Court of Appeal judgment where there

was no suggestion of there being anything inappropriate about such pleading.¹¹ There was no judicial indication adverse to such pleading in a judgment of Tipping J.¹² The High Court found some statements to be both defamatory, and misleading and deceptive, without any suggestion these were incompatible.¹³ Hence, Mr Ringwood submits there is nothing improper in claims brought in defamation and for breach of the Fair Trading Act where the conduct alleged is in a trade setting.

[38] The defendants seek leave to appeal with the aim of achieving an appellate court ruling that s 15 of the Act confers an exemption from suit for “trade” defendants who are not members of the news media. Mr Ringwood describes this as “counter intuitive and unlikely”. He notes the argument has been rejected in the judgment of Osborne AJ and in the judgment from which an appeal is now sought to be mounted.

[39] Mr Ringwood refers to other authority in New Zealand and Australia.¹⁴ In *New Zealand Apple and Pear Marketing Board v Apple Fields Limited*, Master Thomson (as he then was) held that:¹⁵

Sections 5 and 6 of the New Zealand Bill of Rights Act 1990 do not allow the defendant to cut down the meaning of s.9 of the Fair Trading Act (at least arguably so). Further s.9 should not I think be given a meaning that could allow Apple fields to make false statements in trade with impunity. That I think follows from s.15 of the Fair Trading Act which provides that s.9 shall be of only limited application to the news media (see *Pharmaceutical Management Agency Limited v. Research Medicines Industry Association New Zealand Inc* (supra)). By necessary implication, I think the source of any statement in trade (whether or not reproduced by the news media) must be subject to the full force of s.9, or at least again, arguably so.

[40] Mr Ringwood submits that, despite the defendant’s reference to NZBORA, freedom of expression and the public interest, the interpretation of s 15 is not in such serious contention to warrant a second appeal on an interlocutory issue. A “poor interpretation” argument does not turn into a serious one by calling in aid such

¹¹ *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No.2)* [1989] 3 NZLR 520 (CA).

¹² *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488.

¹³ *CPA Australia Ltd v The New Zealand Institute of Chartered Accountants* [2015] NZHC 1854.

¹⁴ *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd* HC Wellington, CP211/96, 24 July 1997 and *Advanced Hair Studio Pty ltd v TVW Enterprises Ltd* (1987) ALR 615.

¹⁵ *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*, above n 14, at 17.

principles, submitted Mr Ringwood. Neither is it saved by saying it is a matter of public interest.

[41] The defendants have failed twice in their interpretation argument and Mr Ringwood says that leave should be refused because s 15 is not truly ambiguous. Parliament's intent is clear and the interpretation contended for is contrary to authority. Some of the pleaded conduct concerns Mr Beddie's emails and telephone discussions, not what was said in the broadcasts. These would not be exempt even if the defendants' interpretation was upheld on appeal. The relevant conduct is not found just in two TVNZ news items, and therefore a ruling in the defendants' favour, allowing leave to appeal, would not dispose of this part of CrossFit's claim.

[42] The principal claim is in defamation. Mr Ringwood says the Court is here concerned with a peripheral issue. A further decision on the FTA issues will not have a major impact on the case as a whole, one way or another. He submits it is not sufficiently serious or of sufficient import to the public or the parties to require a second appeal at the interlocutory stage of the proceeding. He submits that it is not in the interests of justice to allow a second appeal.

Discussion

[43] Judgment must be reached on the fundamental question of whether it is in the interests of justice to allow a second appeal. Generally, that requires identification of a question of law or fact capable of bona fide and serious argument that involves some public or private interest. Leave is normally granted where the appellate court's determination will create instructive precedent and where the issue of law has not been considered at an appellate level. Working backwards, there is no senior appellate authority on the contested interpretation.

[44] I distinctly favour the interpretation for which CrossFit contends, based on what I consider the plain and unambiguous language of s 15, but I must consider whether there is a bona fide, sufficiently tenable and therefore serious argument for the interpretation for which Mr Salmon contends.

[45] I have come to the conclusion that the interpretation contended for by the defendants simply cannot be right and there is no serious argument available. The plain wording of s 15 speaks against it. The further argument on appeal, although on the papers, reinforces my earlier reasoning.

[46] Section 15 addresses misleading and deceptive conduct in trade. It is all about “fair trading”. The defendants’ position is that their conduct is protected as it is subsumed in the immunity of a publisher or broadcaster. It seeks to attach someone in their position to the immunity afforded by s 15. If that is correct, then the illogical outcome is illustrated by the hypothesis drawn by Mr Ringwood.

[47] Mr Ringwood made what I consider a strong point. If the defendants are right, they may be sued under the FTA for misleading or deceptive conduct when they publish or disseminate by a mail drop, but if the same material is provided by them to a publisher or a broadcaster, then they secure the statutory protection that s 15 gives the media. That simply does not ring true as an outcome which Parliament intended. Indeed, this Court’s interpretation, as of Associate Judge Osborne, is that this interpretation would provide cover for misleading or deceptive conduct, the antithesis of Parliamentary intent. Parliament has simply carved out an element of statutory exception for the media in the FTA context, not in the law of defamation.

[48] I extend the analogy if someone disparages a commercial competitor in a misleading or deceptive way, they will be liable under the FTA. If they do so by speaking outside the competitor’s commercial premises, or by a mail drop, they clearly do not have the benefit of s 15. If they take that same content to a publisher or broadcaster, and it is published or disseminated under that banner, they cannot claim the protection of s 15 as there is no reason why the protection would extend in that circumstance, but not in the prior setting. I think it is important to recognise that the media, while in their own trade, are not involved in the trading activity which gives rise to the hypothetical breach. The media are not the watchdog of the FTA. The watchdog *is* the FTA, chilling or preventing misleading or deceptive conduct. It is aimed at those in trade, not the media (unless it involves its *own trade*).

[49] The immunity allows the media to report information of a commercial or trade nature, and it does this as a matter of course. It cannot be expected to know the background or content of all that material and it will always publish with an eye to the law of defamation. It cannot, however, be expected to know the truth or accuracy of what may turn out to be misleading or deceptive conduct, particularly in the news context where there is such immediacy.

[50] The information provided by someone in trade, even if misleading or deceptive, will reach the public and the publisher or broadcaster will have statutory protection. There is no reason for the person or party in breach of the FTA to have the same immunity. Indeed, it is quite to the contrary, as such a person should not engage in misleading or deceptive conduct.

[51] The media remain subject to the law of defamation, whereas they are immune from an FTA action. Those in trade are not so immune. This is a logical and consistent outcome and the “chilling effect” is based on knowledge that there are consequences when they do not engage in fair trade.

[52] I conclude it is not in the interests of justice to allow a second appeal as I do not consider it raises a question of law capable of bona fide and serious argument. I do not find any public or private interest in further appeal on a straightforward interpretation issue.

Disposition

[53] Leave to appeal with regard to the application of s 15 is refused. The effect is that the pleading of breach of ss 9 and 11 of the FTA stands.

Section 23

[54] Mr Salmon says the correct interpretation of s 23, and the legal test of coercion, remains capable of bona fide and serious argument on appeal. The Act provides no definition of coercion and there is no appellate authority. There are significant policy and Bill of Rights considerations which support a high threshold being established for coercion in respect of expert commentary on matters of public interest and where no

express threats are made. There is therefore significant public interest in appellate guidance as to “coercion”.

[55] Section 15 of the Act does not, however it is interpreted, protect the news media or organisations from claims of coercion under s 23 of the Act. Mr Salmon says a wide definition of “coercion” may expose news media organisations and interviewers to claims by commercial entities who challenge their reporting. These are really defamation claims which he says are based on concerns about criticism of commercial practices. Defamation defences would not be available to the defendants nor the safeguards in defamation be available, which include a general prohibition on extrinsic evidence of what a statement means.

[56] If coercion is to have a low legal threshold, he submits it will allow CrossFit to pursue what is in effect a defamation claim under the Act, including statements which Associate Judge Osborne held were incapable of bearing the defamatory meanings that CrossFit attributed to them. That may be the case, but it would fall under a different legal test for liability. There would be no undue cost or delay (other than that which has unfortunately occurred through administrative error).

[57] Mr Ringwood submits the issue is narrow as to whether CrossFit has pleaded a tenable cause of action for coercion under s 23 of the FTA. This is a fact specific issue, whether paragraphs 26 and 27 of the fourth amended statement of claim pleads a form of “coercion”. This is not a matter of general public importance, but relevant only to this case.

[58] The defendants say an appellate definition of coercion is warranted, but Mr Ringwood says the appellate court is highly unlikely to do that. Rather it would decide whether this Court was correct to conclude that the current pleading is of a form of coercion which s 23 contemplates. That is really to be drawn from the facts of the case, given the infinite possible forms of coercion.

[59] Mr Ringwood says a successful appeal would not dispose of this aspect of the case as CrossFit could re-plead to address any deficiency. The defendants are really saying that coercion must have an “or else” element. If the Court of Appeal were to

agree with the defendants, then the plaintiff will simply do that to say is was an “or else” factual setting. This is submitted to demonstrate the semantic nature of the defendants’ argument and the futility of further appeal. It shows this is a peripheral issue to the case. It is not a point which requires a second appeal at the interlocutory stage of the proceeding. Therefore, it is not in the interests of justice for leave to be granted for a further appeal in relation to coercion and s 23.

Discussion

[60] Coercion for the purpose of s 23 should be read in the context and purpose of the FTA as a whole. It is expressed in the context of *physical force, harassment or coercion* in connection with the supply, or possible supply of goods or services or the payment for them. It is directed at wrongful pressure being applied to influence a decision about some aspect of trade. It thus has a distinctly factual element to it, but there is nothing in the section to complicate its interpretation, as I decided in reaching judgment of 5 May 2017 and again here.

[61] To put the pleading in context, CrossFit pleads a series of statements by the defendants which contain entrenchment criticism of CrossFit’s exercise programme and are critical of its training. One example is a statement that to become a certified CrossFit trainer takes two days compared with three months or even years to become a personal trainer.

[62] CrossFit says the many statements were expressly and/or implicitly critical of CrossFit and CrossFit trainers. It argues that the defendants made these statements to coerce CrossFit trainers into registering as members of the New Zealand Register of Exercise Professionals and paying a membership fee to avoid further criticism by the defendants. The coercion is pleaded to have been undertaken to negate the freedom of choice of CrossFit trainers as to whether to register as members of the New Zealand Register of Exercise Professionals, and otherwise to compel CrossFit to require such.

[63] CrossFit here simply alleges that there was an element of wrongful coercion in the defendants’ conduct. I do not think there can be any doubt that coercion may be express or implied. The behavioural elements of s 23 could, in my view, be satisfied by an intimidating presence or, on the other hand, “or else” conduct which left no

doubt as to the physical force or the threat of it. It is intended to protect the freedom of choice of consumers unsullied by commercially unfair and despicable conduct. The coercion ranges from the subtle to the overtly threatening. CrossFit pleads coercion on the facts, and a determination can only be made when those facts are tested at trial.

[64] To be clear, I do not think there is any case to confine coercion to an express “or else” type of behaviour. It is implicit in the meaning of coercion. As Mr Ringwood says, all he has to do is include a pleading of “or else” to meet the point raised by Mr Salmon. He has not done so because it is not necessary in his view, and I agree. There is nothing in this point to make it seriously arguable on further appeal.

[65] I therefore do not consider there is a seriously arguable interpretation to preclude the pleading under s 23 as the defendants contend and although it does in a broad sense involve the public interest and to a limited extent the private interest of the defendants, it is not overall in the interests of justice to allow a second appeal. This Court has clarified what coercion means generally and in this context. For that reason, leave to appeal is refused.

Disposition

[66] Leave to appeal is refused against the judgment of this Court which held that CrossFit’s claim of a breach of s 23 of the FTA should stand.

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Nicholas Davidson J

LeeSalmonLong, Auckland