IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 81/99

IN THE MATTER	**of an application for a review under Part 1 of the Judicature Amendment Act 1972 and/or interim injunction**
BETWEEN	**TV3 NETWORK SERVICES LIMITED an incorporated company having its registered office at Auckland and carrying on business there and elsewhere as a television broadcaster**
	Plaintiff
AND	**BROADCASTING STANDARDS AUTHORITY constituted under and by virtue of Section 20 Broadcasting Act 1989, Wellington**
	First Defendant
AND	**THE DIOCESE OF DUNEDIN IN THE ANGLICAN CHURCH IN AOTEAROA NEW ZEALAND AND POLYNESIA being a constituent Diocese of the Anglican Church and having its principal office in Dunedin and JONATHAN RICHARD KIRKPATRICK of Dunedin, Anglican Priest**
	Second Defendants
AND	**CARL JOHN SOMERS-EDGAR of Dunedin, Clerk in Holy Orders**
	Third Defendant

Hearing: 7 July 1999

Counsel: J G Miles QC with K L Miles for Plaintiff
J M Mallon with A E Scott-Howman for First Defendant
H B Rennie QC for Second Defendant
C Medlicott for Third Defendant

Judgment: 30 July 1999

RESERVED JUDGMENT OF GENDALL J

Solicitors:

Grove Darlow & Partners, Auckland for Plaintiff
Bell Gully, Wellington for First Defendant
French Burt Partners, Invercargill for Second Defendants
C Medlicott, Dunedin for Third Defendant

The plaintiff (TV3) is a company operating a television broadcast network in New Zealand. On the evening of 28 June 1998 it telecast a programme under the style "20/20" which it titled "Sex Lies and Videotape". The programme contained visual and audio footage of certain persons and its presenter, dealing with the dismissal or resignation of a choirmaster at St Paul's Cathedral, Dunedin. TV3 says the programme was concerned with, inter alia, "apparent hypocrisy" surrounding the choirmaster's dismissal. In the course of the broadcast statements of fact, comment and opinion are made by diverse interviewees and the presenter, the detail of which I do not need to enter. Suffice if it is said its content and impact was hard hitting. The presenter in introducing the programme said:

> "They sing to the glory of God - but the heavenly voices of Dunedin's St Paul's Cathedral Choir are now involved in a hellish dispute. This saga of blackmail and deceit began with the sacking of a man who for 20 years was musical director of the all-male choir. As Matt Conway reports, it's a story of hypocrisy and hidden agendas, of sex and scandal, and one which raises the question, what is acceptable behaviour for the men of God?"

Following upon the telecast of the programme the Broadcasting Standards Authority ("the Authority") received a total of 15 complaints from 9 different individuals and the Anglican Diocese of Dunedin. These were received between 13 July 1998 and 29 September 1998. The complainants included the Anglican Diocese of Dunedin ("the Diocese"), the Very Reverent Jonathan Kirkpatrick, Dean of the Church ("the Dean") and the third defendant, Canon Somers-Edgar ("the Canon"), and there were two others who are not defendants in the proceedings, but were named in the documentary. In addition five other persons not named in the broadcast, but generally members of the Anglican Church in the Otago/Southland area complained. Thus, 15 complaints emanated from 10 different sources or persons. The Authority proceeded to inquire into the complaints. Exercising its powers under the Broadcasting Act 1989 it sought to obtain from TV3 certain documents and videotapes and received a 34 page affidavit dated 7 December 1998 made by the presenter of the programme. The Authority continued to exercise its function by obtaining responses from the complainants as well as seeking from TV3 provision of field videotapes which apparently the broadcaster had in its possession but had not earlier made available.

For completeness, at a very early stage on 3, 5 July and 5 August 1998, solicitors for the Diocese, the Dean, the Canon and one other person named in the documentary, wrote to TV3 seeking an undertaking that there would be no further publication of similar material and advising that civil proceedings may be in contemplation depending upon further advice. TV3 declined to give any undertaking as to further publication. At a somewhat later stage solicitors for another named in the programme, wrote to TV3 complaining about the publication and advising that their client, now resident overseas, was considering whether or not to issue civil proceedings. That person is not a party to these proceedings. No civil proceedings by any of the parties, or other complainants who are not parties, have been issued. In relation to the overseas complainant, his solicitors advised, on 25 March 1999, that he had not instructed them to pursue any action other than the complaint to the Authority.

The Authority's inquiry proceeded from September 1998 until early this year and it was not until 24 March 1999 that TV3's solicitors advised the Authority that it required an assurance that the Authority would cease to take any further action in consideration of the complaints pending an election by the complainants as to whether they chose to pursue defamation actions, or to proceed with the complaints to the Authority. TV3 were challenging the complainants to choose civil litigation or the Authority's jurisdiction. In essence TV3 contended that a determination of the complaints by the Authority could result in prejudice to it should it be that any of the complainants issued defamation proceedings. It required the complainants to either abandon any claims to future civil proceedings so as to enable the consideration of the complaints to continue, or to take such proceedings. The complainants, through their counsel, and one individually, declined to respond to such demand to elect. The Authority declined the request of TV3 to cease its inquiry, which had been completed, and proceeded to determine the complaints.

Issue

The issue in this case is the extent to which a media broadcaster may prevent determination and publication to the public of a decision of the Broadcasting Standards Authority after it has investigated complaints made to it by members of the public. TV3 brings these proceedings seeking an order to restrain the Authority from determining or continuing to investigate the complaints:

> "until the complainants have elected not to issue defamation proceedings or in the event any one of the complainants chooses to do so then until those proceedings have been determined or until further order of the Court."

TV3 relies upon the decision in its favour by this Court in ***TV3 Network Services Limited v Broadcasting Standards Authority*** [1992] 2 NZLR 724 to support its application. It says that the Authority was wrong in not following that decision when it decided that it would not withhold the delivery of its findings on the various complaints. I shall return to consider ***TV3 Network Services Limited*** (supra) later.

Statutory Provisions

The Broadcasting Act 1989 established the Broadcasting Standards Authority. Its functions include to receive and determine complaints against a broadcaster who fails to comply with certain responsibilities and standards set out in s4. A person who has made a complaint direct to the broadcaster about a programme, the outcome of the complaint being unsatisfactory to the complainant, may refer the complaint to the Authority pursuant to s8 of the Act. There is a right of direct complaint to the Authority if a privacy complaint is made. The Authority may, if it finds a complaint to be justified whole or in part, make any one or more of the following orders (s13(1)):

> "(a) An order directing the broadcaster to publish, in such manner as shall be specified in the order, and within such period as shall be so specified, a statement which relates to the complaint and which is approved by the Authority for the purpose:
>
> (b) An order to direct the broadcaster to refrain -

(i) From broadcasting; or

(ii) From broadcasting advertising programmes (including any credit in respect of a sponsorship or underwriting arrangement entered into in relation to a programme), -
for such period, not exceeding 24 hours, in respect of each programme in respect of which the Authority has decided the complaint is justified, and at such time as shall be specified in the order:

(c) An order referring the complaint back to the broadcaster for consideration and determination by the broadcaster in accordance with such directions or guidelines as the Authority thinks fit:

(d) If the Authority finds that the broadcaster has failed to maintain, in relation to any individual, standards that are consistent with the privacy of that individual, an order directing the broadcaster to pay to that individual, as compensation, a sum not exceeding $5,000."

Where a complaint is referred to the Authority by a complainant pursuant to s8, and the Authority decides that the complaint is justified in whole or in part, or is not justified in whole or in part, the Authority shall give notice in writing of the decision, (s13(2)) -

"(a) To the broadcaster by which the programme was broadcast; and

(b) To the complainant."

In addition if a complaint is found to be justified in whole or in part then the broadcaster is required to, (s13(3) -

"(a) Comply with any order made under subsection (1) of this section; and

(b) Give notice in writing to the Authority and the complainant of the manner in which the order has been complied with."

Section 15 of the Act provides that the Authority shall give public notice of its decision on each complaint referred to it under s8 and copies of the Authority's decision on such complaint, including the Authority's reasons, may be purchased from the Authority. The Authority has power to order any party to pay reasonable costs and expenses as

well as costs to the Crown. There is a right of appeal against the decision of the Authority to the High Court, which determination is final.

The Authority does not need to conduct a formal hearing or hear oral evidence and may regulate its own procedure. It has the powers of a Commission of Inquiry when considering any complaint referred to it under s8. A new s19A was inserted by s4 of the Broadcasting Amendment Act (No 2) 1990 which provides:

> "19A ADMISSIBILITY OF EVIDENCE - Except in any proceedings for perjury within the meaning of the Crimes Act 1961 in respect of sworn testimony given before the Authority or in any proceedings for the enforcement of an order made under this Part of this Act, -
>
> (a) No response made by a broadcaster to any complaint made under this Part of this Act; and
>
> (b) No statement made or answer given by any person -
>
> (i) In the course of the consideration of any complaint made under this Part of this Act; or
>
> (ii) In the course of any proceedings before the Authority in relation to any complaint made under this part of this Act; and
>
> (c) No decision of the Authority on any complaint made under this part of this Act; and
>
> (d) No determination of the High Court on any appeal made under section18 of this Act, -
>
> shall be admissible in evidence against any person in any Court or in any inquiry or other proceedings."

Under the earlier Broadcasting Act 1976, where the complaints tribunal was called the Broadcasting Complaints Committee, a complainant had to declare to the Committee that legal action (apart from judicial review) would not be taken in respect of the subject matter of the complaint before the Committee could hear or determine any complaint. That provision was not re-enacted in the 1989 Act.

Section 4 of the Broadcasting Act 1989 sets out the provisions relating to the responsibility of broadcasters for programme standards. It provides:

> "(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -
>
> (a) The observance of good taste and decency; and
>
> (b) The maintenance of law and order; and
>
> (c) The privacy of the individual; and
>
> (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interests; and
>
> (e) Any approved code of broadcasting practice applying to the programmes.
>
> (2) ....
>
> (3) No broadcaster shall be under any civil liability in respect of any failure to comply with any of the provisions of this section."

Relief sought

Although framing its proceedings as being for judicial review, TV3 proceeded to seek an injunction based upon the Court's inherent contempt jurisdiction to protect its own proceedings. That was the appropriate course to follow. TV3 seek injunctive relief in the form of an order restraining the Authority from "determining or continuing to investigate the complaints" until the complainants have elected not to issue defamation proceedings. Further, if any one complainant chooses to issue such proceedings, then TV3 seeks such restraining order, in relation to all complainants, until such proceedings have been determined.

The relief sought can be seen to be far reaching. Factually, the Authority has investigated the complaint and drafted its decisions on the 15 complaints and is in a position now to issue its decisions unless restrained by Court order. TV3's application

therefore relates to restraining the Authority from issuing its decisions on all 15 complaints by 10 complainants until (so it pleads) all 10 complainants have elected not to issue defamation proceedings.

The Plaintiff's Submissions

TV3 argue that the Authority erred in distinguishing and failing to follow the decision of McGechan J in ***TV3 Network Services limited*** (supra). It contends that the Authority ought not continue to determine the complaints when it knows that four of the principal complainants had advised TV3 that they considered the programme to be defamatory of them and that they "reserved their rights". It is said that a determination of the complaints, to a stage where one or more was upheld, would lead to the likelihood of publicity to the extent that there would be a real risk of injustice in the event of defamation proceedings being issued. There is no doubt that the Court has inherent jurisdiction to intervene to restrain a statutory inquiry where a decision will, as a matter of practical reality, have a tendency to interfere with the due course of justice. Because the Authority has a statutory duty to publish its conclusions, findings and reasons, then TV3 submits that such publication would be widely reported in many media sectors including television, and its impact would have an effect on an uninformed public, which is said to be incapable of making fine distinctions between breaches of broadcasting standards and matters relevant to defamation, or to the defences to that cause of action. TV3 argues that even some years hence a juror may recall publicity and the result of the Authority's determination, and this would carry an unacceptable risk of interference with justice.

TV3 says that some complainants initially referred in their complaints to it of allegations of defamation, malice and significant damage to them. It points to the maximum penalties available under s13 of the Act including public statements and retractions to be broadcast, a possible award of solicitor/client costs, damages and other punitive measures including orders removing the right to advertise for up to 24 hours or even requiring the broadcaster to cease transmission for a similar period. TV3 argue that the complainants were given the option by it to either abandon the right

to seek damages for defamation or to defer complaints until defamation proceedings had been determined, but as they chose not to do so and have formally reserved their rights until after complaints had been determined, they cannot have it "both ways".

TV3 submits that it did not do anything at any stage to lead the complainants or the Authority to believe that it had abandoned its right to apply to the Court for an injunction if it thought necessary and further that the complainants would not be significantly prejudiced by the granting of the injunctive relief sought. It contends that, just as an injunction was granted in the previous case where defamation proceedings had actually been issued, it was a "logical incremental step" for an injunction to be granted where proceedings had not been issued but might be "in the wings". It submitted that any election by potential defamation plaintiffs to proceed to trial before a Judge alone, should they issue proceedings, did not cure the objection because TV3 itself would, if sued, be insisting upon trial by jury. Counsel submitted that it would be wrong in principal to remove from TV3 that right simply by the unilateral actions of one group of potential litigants.

Submissions by the Authority

The Authority confined its submissions to policy issues rather than matters specifically relating to the individual complaints. It advised the Court that its deliberations and investigations had been completed and it is now in a position to release its decisions, whatever they may be. The Authority referred to the ***TV3 Network Services Limited*** (supra) decision and the competing public interests there dealt with, and earlier articulated in ***Thompson v Commissioner of Inquiry into Administration of District Court at Wellington*** [1983] NZLR 98. It refers to the later approach of the Court of Appeal which emphasised the need to balance the public interest in freedom of speech against the public interest of a fair trial as discussed in ***Gisborne Herald Co Limited v Solicitor-General*** [1995] 3 NZLR 563 and ***TV3 Network Services Limited v Fahey*** (1998) 12 PRNZ 443. The Authority urges the Court to adopt a realistic approach in determining whether there is likely to be substantial prejudice to any party, balanced against the public interest in allowing the Authority's decisions to be issued. It points

to matters of policy including the legislative intent that complaints be determined without delay; that the effectiveness of Authority's orders diminish over time; that the Act itself does not require complainants to elect common law action as a pre-requisite to a consideration of a complaint; the inquiry or investigation involved multiple complainants many of whom could not be parties to a common law action; no common law proceedings have been issued; and if there be a requirement for the Authority to defer consideration of complaints, pending advice from complainants as to future intentions, then this would serve to impose an unreasonable burden upon the Authority.

Further the Authority submits that it has proceeded to investigate and deal with the complaints for 6 months with the concurrence of TV3 which, eventually, provided the necessary submissions, videotapes, materials and documents. It says that steps now taken to delay issue of the Authority's determinations frustrates the statutory intention, which is designed to protect the public and enhance the public interest through the enforcement of proper broadcasting standards.

Generally, the Authority submitted that a decision to defer determination of a complaint in recognition of common law proceedings should only be made where those proceedings have actually been brought, as in ***TV3 Network Services Limited*** (supra), and any restraining order on the Authority where common law proceedings have not been brought or are not imminent would be an improper interference with the public interest in maintaining broadcasting standards.

Submissions by the Diocese, Dean and Canon

These defendants are not the only complainants to the Authority. They refer to the clear intent of the legislation being to require broadcasters, licensed under the Act, to meet the standards contained therein. They say that the rights of complaint to the Authority cannot be subject to a pre-requisite that a complainant should undertake not to take defamation proceedings in the future. They submit that they are entitled to make no decision as to future action, or no action, and simply reserve their rights in the meantime.

It is inevitable that the creation and receipt of complaints under the Act will arise within a limitation period which applies to other legal rights a person may hold. However, the scheme of the Act provides for a tight timetable for commencing and resolving of complaints, and recognition must be given to the rights of complainants. These defendants emphasise that it is by no means certain that defamation or other proceedings will follow and, at least from the point of view of the Diocese, it is doubtful whether it would, in any event, have any standing to bring such proceedings. It was submitted, at least on behalf of the Diocese and the Dean, that a finding by the Authority of breach of standards, with imposition of penalties accompanied by an apology and retraction, if required by the Authority, would be a much more meaningful vindication of the complainants than could be achieved in any defamation proceedings. But if the complaints were dismissed, or if a complainant was not satisfied with the decisions of the Authority, a complainant may see a need to take further action. The defendants submit that TV3 entered into the investigation process by reply and responding in detail, as well as providing interview videotapes. They argue that the attempt to stop the Authority determining the complaints did not arise until the eleventh hour, on 24 March 1999, despite TV3 being repeatedly advised that the complainants reserved their rights. They say TV3's actions are an improper step to "gag" the Authority. They say that the improper actions of TV3 are highlighted by it trying to prevent the second and third defendants being joined in these proceedings.

These defendants say that TV3 is in error in framing its argument on the basis that complainants may take defamation proceedings which would proceed to a jury trial and therefore, it is said by TV3, will result in prejudice to it. The defendants submit that even if proceedings were to be taken (which is by no means certain) then some of the complainants have already signified that they would seek trial by Judge alone; or could be issued in a District Court where no jury trial is available; there is now the procedural step available of proceeding by way of summary judgment; or they may seek remedies such as declaration or correction without a pecuniary claim. Furthermore the defendants submit that in a hypothetical case, the High Court may order trial before Judge alone. TV3 counters this by saying that it would insist on trial

by jury (notwithstanding its claim that it would be prejudiced by such a trial), and it would certainly be able to resist a summary judgment application.

The question is raised as to why the seven other complainants, not represented before the Court, should be subjected to the effect of an order for injunction. TV3 says that it is not asking the various complainants to do anything, but is simply seeking to restrain the Authority. I observe at this stage that that seems to be somewhat a matter of sophistry and semantics bearing, as does much of the correspondence, "the hoof print of legal advice and tactics" by TV3 (to use the words of McGechan J in ***TV3 Network Services Limited*** (unreported original version of the judgment, at p9)).

Counsel highlight differences between the 1992 case and the present one including the absence of any pending litigation and that privacy complaints are included in the present matters which were not involved in the earlier matter, as it involved a complaint for breach of programme standards; here personal rights of complainants are involved as contrasted with the claims for injurious falsehood and disparagement of goods where no issues of individual reputation arose; in the 1992 proceedings the issue of stay arose immediately where TV3 had not entered into any realistic acceptance or concurrence with the investigation process, whereas in the present case the Authority's procedures and investigation have taken place without challenge and the matter has reached the stage where the complaints have been fully investigated, a determination made, and all that awaits is its release.

It is argued on behalf of these defendants that no grounds in law exist for the purported action that TV3 requires the Authority to take, which is to seek to put each of the complainants to an election as to whether or not they would take defamation proceedings. As to any hypothetical later proceedings being tried before a Judge alone, the defendants submit that they have elected by their affidavits to proceed by trial by Judge alone if there should be later proceedings. They submit that TV3, by now claiming that it has an absolute right to seek trial by jury, fails to recognise the position that it is TV3 which now seeks to remove rights from the complainants, to its own legal and tactical advantage, whereas the real issue is what if anything needs to be done

by the Court to prevent any future contempt arising. Further these defendants do not concede there would be any prejudice in a jury trial.

Counsel emphasised that the event that is sought to be injuncted is the issue of the determination and release of its decisions by the Authority, but as there are a number of grounds of complaint and complainants, there may also be a number of determinations. (For example the Dean has both privacy and standards complaints). Counsel submits that TV3 simply attempts to describe as a contempt issue the policy issue that Parliament determined in favour of complainants, namely that they should not be required to give any undertaking as to future common law action or not. Counsel submits that TV3 is not entitled to relief not only on its pleadings and the facts, but also because of compelling policy reasons. TV3's claim that it would seek jury trials involves seeking to impose its own interests on the complainant; deferral of the Authority's decisions would be a major prejudice to all complainants and disproportionate advantage to one who is said to be a wrong doer; is an attempt to obtain judicial reversal or modification of the express provisions of the Broadcasting Act 1989; and individual rights of complainants would be deferred or affected by any one decision to sue.

It is said that if the complainants had not volunteered that they reserved their rights, but simply been silent, then TV3 could not raise the claims it now makes.

Legal Principles

In ***TV3 Network Services Limited*** (supra) McGechan J reviewed the authorities including the general approach to potentially prejudicial publications, as discussed in ***Attorney-General v Times Newspapers Limited*** [1974] AC 273 and the Commission of Inquiry cases such as ***Fitzgerald v Commission of Inquiry into Marginal Lands Board*** [1980] 2 NZLR 368 and ***Thompson v Commission of Inquiry into Administration of District Court at Wellington*** [1983] NZLR 98. His Honour observed that the Court will intervene to restrain a statutory inquiry where such will amount to "interference with the course of justice" on the basis that a substantial risk of serious injustice might arise. The

Commissions cases, of course, dealt with the process of the inquiry, as well as publication of any conclusions reached by the Commission. But as McGechan J observed (at p733) each case will depend on its own circumstances and:

> "A close examination of the issues which will arise in each, of the inquiry in the Court proceeding, and of the realities involved, is required in each case. There must be an ultimate estimation of risk of prejudice, and balancing of the public interests involved."

That case concerned an application by TV3 to restrain the Authority from investigating, as well as determining, a complaint made to it by commercial companies, which arose out of a television programme critical of a product being manufactured by the complainants. The programme was screened on 7 October 1990 and proceedings were issued in the High Court by the complainants on 16 October 1990 based on injurious falsehood and defamation of the commercial distributors. Before a statement of defence was filed the plaintiff made a complaint to the Authority on 1 November 1990 alleging false statements and visual effects/overall bias and unfairness/distortion and editing process. TV3 responded to the Authority by not answering the allegations on the merits but contending that as the complainants had made a choice to sue in the High Court that they should stay there. TV3 requested that the Authority decline to determine the complaint and made no substantive response to it. When the Authority declined such request, the High Court application was filed by TV3. The decision in that case is relied upon by the plaintiff as authoritatively defining and limiting the role of the Authority where a complainant has launched defamation proceedings, as well as making a complaint to the Authority, out of the same programme, but the plaintiff further says that that decision applies even where complainants have not issued defamation proceedings but where they have simply reserved their rights to do so.

In the present case the issue is the risk of possible public prejudgment of any defamation allegations that a future jury may be called upon to decide if such a situation should ever arise. The real question is whether justice may be interfered with in the event that civil proceedings should later be commenced. There may be

competing matters such as public interest or policy and freedom of speech which must fall onto the scales.

> "The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuse is, actual or supposed, cannot be required to be suspended merely because the discussion or denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant." ***Ex Parte Bread Manufacturers Limited; Re Truth and Sportsman Limited*** (1937) 37 SR (NSW) 242 at p249; per Jordan CJ.

In ***Attorney General v Times Newspapers*** (supra, at p309) Lord Diplock said:

> "The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; *secondly*, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and *thirdly* that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed in contempt of court.
>
> The commonest kind of conduct to come before the courts on applications for committal for contempt of court has been conduct which has been calculated to prejudice the second requirement. This is because trial by jury has been, as it still is, the mode of trial of all serious criminal offences, and until comparatively recently has also been the mode of trial of most civil cases at common law which are likely to attract the attention of the public. Laymen, whether acting as jurymen or witnesses (or, for that matter, as magistrates), were regarded by the judges as being vulnerable to influence or pressure which might impair their partiality or cause them to form preconceived views as to the facts of the dispute, or, in the case of witnesses, to be unwilling to give evidence with candour at the trial. The conduct most commonly complained of was the publication, generally in a newspaper, of statements or comments about parties to pending litigation or about facts at issue in the litigation; so the discussion in the judgments tends to be directed to consideration of the question whether the publication complained of involved a risk of causing someone who might be called upon to serve as a juror to be prejudiced against a party or to form a preconceived view of the facts before the evidence was adduced in

> court, or a risk of influencing someone who might be called as a witness to alter his evidence or to decline to testify."

Yet there must be a serious or realistic risk that improper influence may arise upon a juror or decision maker. In ***Re Winneke; Ex parte The Australian Building Construction Employees & Builders Labourers Federation*** (1982) 56 ALJR 506, which was a "Commission" type case, the High Court of Australia emphasised this point and the necessity of balancing conflicting principles of public policy. There Gibbs CJ said (at p516):

> "there is a contempt of Court of the kind relevant to the present case only when there is an actual interference with the administration of justice, or "a real risk" as opposed to a remote possibility" that justice will be interfered with: cf. ***Attorney General v Times Newspaper Limited,*** at p299. The essence of this kind of contempt is a "real and definite tendency to prejudice or embarrass pending proceedings": ***John Fairfax & Sons Pty Limited v McRae*** (1955), 93 CLR 351, at p372. The law as to contempts of Court of the kind now under consideration reflects two conflicting principles of public policy: on the one hand, the need to safeguard the proper administration of justice and on the other the protection of freedom of speech (and this principle must extend to freedom of inquiry). .... The law strikes a balance; in the interests of the due administration of justice it will curb freedom of speech, but only to the extent that it is necessary to prevent a real prejudice to the administration of justice."

The Court of Appeal has considered questions of contempt and fair trial issues in the criminal trial sphere; ***TV New Zealand Limited v Solicitor General*** [1989] 1 NZLR 1; ***Gisborne Herald Co Limited v Solicitor General*** [1995] 3 NZLR 563; emphasising that the freedom of the press and other media is not lightly to be interfered with. Before there can be contempt it must be shown that there is a real likelihood of a publication that will seriously prejudice the fairness of the trial. Delay between publication and trial is a consideration:

> "Contempt is directed to the protection of the public interest in the due administration of justice by an impartial Court. Fair trial values are a protection both to the public and respect of the generality of cases as well as the particular case and to the [party] in the particular case. Fair trial is not purely private benefit for [a party]. The public's confidence in the integrity of the justice system is crucial. The law of the contempt is concerned with preventing prejudicial publicity rather than minimising its impact at trial.

> Leaving aside for the moment any balancing of free speech/fair trial values, whether a publication is a contempt turns on whether it creates a real risk that the trial is likely to be prejudiced. Both the contents of the publication and the circumstances in which it is published are important. One important consideration is the likely delay between publication and trial. That impact may in turn be affected by the timing of the original publication, the audience reached, and the likely nature, impact and duration of its influence;" ***Gisborne Herald Co Limited v Solicitor General*** (supra at p569).

In that case the Court of Appeal expressed the view that while the exact lapse of time is not the touchstone,

> "where the expected lapse of time between a publication and trial is beyond six or eight months, difficult questions will always arise as to the justification for concluding that the influence of the article would have survived the passage of time." (At p570-571)

Another illustration of the balancing protection of freedom of expression and fair trial issues, where the balance favoured the media's right to publish, can be seen in the Court of Appeal's decision in ***TV3 Network Services Limited v Fahey*** (supra). There TV3 succeeded in the Court of Appeal in having set aside an injunction which restrained it from publishing certain material. Of course the publication of such material, if defamatory of the plaintiff/respondent, would have served to aggravate the damages sought by him, he having already issued defamation proceedings. To that extent the issue may not be the same as the question of whether a fair trial could have been obtained before a jury by any party, but it was there argued that the programme intended to be screened had the potential to prejudice a fair trial and the existing defamation proceedings. The Court of Appeal said, (at p447-448):

> "[T]hat where both free expression and other rights and values are raised the Court must seek to accommodate and balance both sets of values. In that situation, too, the same general principles should apply, namely that the jurisdiction to restrain the proposed publication is exercisable only for clear and compelling reasons. In that regard, in ***Gisborne Herald Limited v Solicitor-General*** [1995] 3 NZLR 563, 567; (1995) 13 CRNZ 244, 256 (CA) the Court said that it is only "where on the conventional analysis freedom of expression and fair trial rights cannot both be fully assured, [that] it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.""

At that stage no criminal proceedings had been started or intimated in relation to that respondent - despite there being allegations of "sexual violation", (although these have now been commenced) but the Court of Appeal said:

> "In ***TVNZ Ltd v Solicitor-General*** [1989] 1 NZLR 1, 3 (CA) the Court said that "where the commencement of criminal proceedings is highly likely the Court has inherent jurisdiction to prevent the risk of contempt of Court by granting an injunction", but, the Court continued, "the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial.""

Discussion

I earlier recorded in some detail the respective submissions made on behalf of all parties so as to fully illustrate the competing arguments. I have considered them.

Media interests jealously regard their right to publish material without interference with their freedom of speech. In this case TV3's solicitors wrote to one of the complainants stating:

> "TV3 takes seriously its obligation recognised under the New Zealand Bill of Rights Act and at common law to promote and foster the free flow of information in a democratic society."

And, further in its letter in response to the complaint by R J M Simm, when addressing the standard G5, namely *to respect the principles of law which sustain our society* it said:

> "the whole issue surrounding Dr White in his dismissal was already in the public domain. The matter had been raised in church.
>
> Discussing these issues in the media does not compromise any legal proceedings. The programme published nothing that was prejudicial to any proceedings, current or imminent. .... Indeed TV3 has been advised that it is not contempt to publish facts in connection with matters to be determined in a Judge alone trial. They understand the Employment Courts are presided by Judge alone.

> The public programme published nothing that was prejudicial to any proceedings, current or imminent. In the event that it had the Crown Solicitor's office is in a position to take what action it may feel is appropriate."

Correspondingly, statutory Authority have an obligation and duty to publish findings as a requirement to promote and foster free flow of information so as to serve the public interest. The argument can cut both ways. Media rights can in some circumstances be equated with the rights of a statutory authority, if the public interest is to be served.

It is true that TV3's argument is that publication of matters critical of it by the Authority (if such occurred) in response to the complaints might be said to pre-judge any defamation issue, and to that extent it says the position is different.

Generally contempt arises only if proceedings exist or are imminent (a very imprecise term which may suggest that the relevant event will follow fairly quickly), but at least in the criminal proceedings context, there are circumstances where contempt can arise by pre-trial media publications where proceedings are neither pending or imminent: ***Attorney-General v News Group Newspapers Limited*** [1988] 2 All ER 906; ***Television New Zealand Limited v Solicitor General*** (supra, at p3). But there must still be a real likelihood that publication will seriously prejudice a fair trial. In the present case there is nothing imminent, or pending or even certain as to whether there will be a defamation action by any defendant or other complainant.

The possibilities are unlimited. There may not be any defamation proceedings issued by any defendant, or other complainant. If such occurred, they may be issued in the District Court where there is no right to jury trial. If issued, there may be one, two, three, or even four plaintiffs with different proceedings Some may issue proceedings in different jurisdictions. Some may not be parties to the current litigation. They may issue in the same jurisdiction and be consolidated so as to be disposed of at one trial with inevitable complexities including a ruling that trial by Judge alone is dictated. Questions arise as to whether individual complainants who do not bring, or intend to bring, any proceedings should have the proper determination of their complaints by the Authority put on hold indefinitely simply because some other complainant may not be prepared to give an

undertaking at this stage not to issue proceedings. These are all matters which fall into the balancing exercise of whether a realistic risk of prejudice arises.

The real complaint of TV3 is that it does not wish to take the risk that the Authority's decisions, ready but yet to be released, would be adverse to it. Of course, on the other hand it might be favourable to it. Whatever the outcome, it will surely assist in enabling complainants to determine whether the Authority's decision satisfies their need for justice so that no further action would be contemplated. If the decisions vindicate TV3 then there can be no possible prejudice to it. There may be many situations in which the findings of a statutory body (for example, a professional disciplinary committee, a Coroner or the Police Complaints Authority) make and publish findings critical of certain individuals, so as to lead to later claims for exemplary damages (for example) being brought against those individuals. But that alone cannot be a reason for the Courts exercising their injunctive powers to prevent the statutory body publishing its findings. Very much more is required before it could be said that a fair trial at some time in the future cannot be obtained, where proceedings have not even been issued or may never be issued.

A special factor to be weighed in the balancing exercise must be the public interest in receiving the information and findings of the Authority, whatever those findings may be. There may be a legitimate public interest in the exposure of misconduct or breach of broadcasting standards on the part of TV3, or on the other side of the coin the vindication of it. The public interest aspect is clearly emphasised in the functions of the Authority, given the scheme of the Act which provides for a tight timetable for commencement and resolution of complaints and a statutory requirement that the determination of the Authority be published. This is not only so that the public can see that standards are being upheld and enforced, but to deter others should there be a similar breach of standards. Deferral of publication on an indefinite basis until defamation proceedings are taken and a trial completed will be a substantial prejudicial barrier to the intent and scheme of the statutory provisions.

It must be borne in mind that the Broadcasting Act 1989 is the only statutory basis upon which any television broadcaster may operate. But for the provisions of the Act it cannot broadcast. The broadcaster may lawfully transmit or publish a television programme only in compliance with the Act, which includes compliance with the complaints procedures and submission to the jurisdiction of the Broadcasting Standards Authority (subject to a right of appeal to the High Court). The statutory process clearly envisages that a complainant can have a complaint dealt with quickly and a decision of the Authority transmitted, together with an appropriate statement, quickly. Defamation proceedings cannot achieve that. There will be cases where, realistically assessed, a real risk of prejudice might arise in the disposal of existing litigation by the Authority proceeding to investigate and to publish its findings. However, in my opinion, it is taking matters too far to accept that a television broadcasting company may demand and require of a complainant an undertaking that proceedings will not subsequently be issued, in return for an acceptance of the statutory authority and powers of the Authority. Why should complainants to the Authority, generally, be put to such election (as may arise whenever a complaint is made) when the Act itself indicates that such election is not a prerequisite to the determination of a complaint?

Such an express provision was contained in the previous legislation under the Broadcasting Act 1976 (s95B(3)). But the present Act contains no equivalent provision. It was removed from the 1989 legislation, and complainants are no longer required to make any such election. What the new statutory scheme provides is that evidence considered by the Authority and its decisions are not admissible as evidence in any other common law proceedings. It was a matter to which McGechan J turned his attention in ***TV3 Services Limited*** (supra) when he said, at p734:

> "Evidently it was envisaged the new Authority at least in the usual run of cases would be able to proceed with concurrent complaint's disposition, given protection afforded to litigants by the new inadmissibility provisions. Significantly, however, there was no accompanying mandatory direction that the Authority must proceed in all cases. Such direction would have been a simple matter if inadmissibility was considered a universally sufficient protection. Parliament was silent. Indeed, it left s11 power to decline to consider complaints at all in tact. I do not find that silence surprising. I think it likely that Parliament intended the Authority, even with the advantage given by the new s19A, to use common sense and a feeling for fair play in exceptional situations. Such approach foreseeably

> might require delayed disposition by the Authority, not the least when published material despite technical inadmissibility might have prejudicial affects upon a jury."

Section 19A of course does not give the Authority a mandate to proceed and it must use common sense, and wise judgment in considering each individual case. However it cannot be the law that a television broadcasting company can dictate to complainants that which they must do in order to have their complaint properly heard and determined by the Authority. To permit this is to reintroduce, in effect, the previous provisions of the 1976 Act which were not reinstated.

Prejudice, says TV3, will arise if there is a jury trial. It will not otherwise arise. It says that it would insist upon trial by jury should defamation proceedings be taken against it, and rely upon the provisions of s19A of the Judicature Act 1908. The second and third defendants say that even if they were to take defamation proceedings, which has not occurred, they are content to proceed to trial before Judge alone. TV3 therefore base their claim to prejudice arising upon the exercise, it says, by it of its right to trial by jury if sued. Of course s19A(5) gives the Court power to order trial by Judge alone in certain circumstances but TV3 argue that none of those would apply. Whilst it is all very much hypothetical at this stage, the law is discussed in ***X v Y*** [1996] 2 NZLR 196 and in ***Lindon v James Hardy & Co Pty Limited*** [1994] 1 NZLR 592 and does not need further discussion by me. In ***Lindon's*** case, although there were "difficult questions of law" arising which on their own would not have resulted in trial by Judge alone, what tipped the balance was the complexity of the claim, discovery, problems of causation and joinder of the Crown as a third party. Trial by Judge alone was ordered. For present purposes there may be no civil proceedings, or there may be multiple proceedings taken by various different plaintiffs, or in various jurisdictions or the same Court which may, if multiple, be heard together involving the one publication. There may be different considerations, or defences, affecting different plaintiffs. All this is speculative but it cannot be said with any certainty that TV3's claim to trial by jury would be acceded to. I do not consider that a plaintiff in a case such as this can claim to be prejudiced in proceedings which are not yet and which may never be issued, on the basis that the course of justice would be interfered with

through prejudice in the minds of a jury when a demand for such jury trial would emanate only from the present plaintiff itself.

Conclusion

In my view the decision of McGechan J in ***TV3 Services Limited*** (supra) does not lay down an inflexible rule to apply in circumstances such as these. It cannot, despite counsel's submission, be automatically extended to situations where proceedings have not been issued and may never be issued. Matters such as these must be decided on a case by case basis. In the present case there are other distinguishing features including the multiple complainants, some of whom are not parties to these proceedings; some could not even remotely be parties as plaintiffs in any defamation proceedings; trial by jury is said to have been waived (even if proceedings be issued) but it is TV3 who say they will demand such trial; privacy complaints require determination; in this case the process of investigation has proceeded to such an extent that it has been completed and the Authority is now simply wishing to release its findings. In the previous case investigation had not even commenced. The issue of prejudice to TV3 is speculative and when viewed against public interest falls into the description of "academic" rather that "realistic".

I do not think it is open for TV3 to require complainants to be put to an election as to whether or not they will take defamation proceedings before the Authority can release its decision.

When balancing all factors I am of the clear view that the publication of the Authority's determination, whatever it may be, could not "as a matter of practical reality [have] a tendency to interfere with the due course of justice in [this] particular case;" ***John Fairfax & Sons Pty Limited v McRae*** (1955) 93 CLR 351, 370. I regard it as wrong that the operation of the statutory process should be stopped, at this late stage, by this Court granting injunctive relief on a speculation as to what may occur after the process has been completed, whether the outcome be critical, or a vindication, of TV3. Broadcasters who justifiably espouse freedom of expression and freedom of

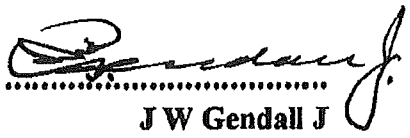
press to report matters in the public interest, must also in cases such as these submit to the same principle where a statutory body has a duty to publish so as to further the public interest.

Delay

I am not persuaded at all that the delay on the part of TV3 in now trying to stop the release of the Authority's determination, arose out of the reasons that it puts forward. The delay is a very persuasive feature, in my judgment, pointing against the granting of an injunction. Quite apart from my being satisfied that there is no practical reality of contempt occurring through the course of justice being prejudiced or interfered with, TV3 in participating and co-operating with the investigation of the complaints, for a period of 6 months, has gone far beyond now being able to prevent the Authority performing its statutory function. The wider public interests far outweighs any concerns or anxiety TV3 may have.

Judgment

The application for an injunction fails. The matter proceeded, not by way of judicial review, but rather on the basis of a common law application for interim injunction. Accordingly there will be judgment for the first, second and third defendants against the plaintiff. Each defendant is entitled to costs against the plaintiff. I will fix those if agreement as to costs cannot be reached, in which event counsel shall submit memoranda.



J W Gendall J