IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-485-002633

	BETWEEN	CANWEST TVWORKS LTD Appellant
	AND	XY Respondent

Hearing: 6 July 2007

Appearances: Clare Bradley and Mary Peters for Appellant
Tim McBride for Respondent
Andrew Scott-Howman for BSA

Judgment: 22 August 2007

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 3:00 pm on 22 August 2007

SOLICITORS
CF Bradley, CanWest TVWorks Ltd, Auckland, for Appellant
Tim McBride, Auckland, for Respondent
Bell Gully, Wellington, for Broadcasting Standards Authority

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Introduction

[1] Last year TV3 screened a programme entitled *Inside New Zealand- Stakeout: Models Exposed*. It examined the apparent risks to young people wishing to work in the modelling industry and included footage of two photo shoots conducted by XY. He was then an editor of a men's magazine. The programme stated that the footage had been set up because 'word around the modelling industry' was that XY was 'luring young girls into his bedroom for trial photo shoots with the promise of getting work in his magazine'.

[2] The first photo shoot footage was of XY providing a female actor (posing as a would-be model) with underwear and photographing her in his own bedroom. The second shoot footage documented XY encouraging the same female actor to adopt sexual poses with a second female actor (also posing as a would-be model) and photographing them in those positions. This shoot was conducted inside a rented apartment, which XY was told belonged to one of the models.

[3] In both cases, the footage of XY's conduct was filmed by a hidden camera held by one of the model actors. XY complained to the Broadcasting Standards Authority (the BSA or the Authority) that the broadcast contravened privacy standards set by an approved code. The Authority decided that TV3 had intentionally interfered with XY's interest in solitude or seclusion for which there was no legitimate public interest and ordered payment of compensation. TV3 now appeals against the BSA's decision. It also challenges the legal validity of the relevant privacy principles.

Statutory Background

[4] The provisions of the Broadcasting Act 1989 (the Act) govern this appeal. The Act affirms the primary importance of every broadcaster's responsibility for maintaining certain standards in its programmes and their presentation: s 4(1):

> … which are consistent with—

…
(c) The privacy of the individual; and
…
(d) Any approved code of broadcasting practice applying to the programmes.

[5] Part II establishes a complaints procedure. Any person can bring a complaint and must first make it, in writing, to the broadcaster concerned. The complaint may be referred to the BSA if the complainant is dissatisfied with the broadcaster's decision or with the action taken by it: s 8. The BSA is a specialist tribunal whose functions include receiving and determining such complaints: s 21(a), with wide ranging powers if it decides a complaint is justified: s 13. The Authority may direct the broadcaster to pay compensation to the person whose privacy has been breached in a sum not exceeding $5,000: s 13(1)(d). There is a right of appeal to this Court, which must hear and determine the appeal as if the decision had been made in the exercise of a discretion: s 18(4).

[6] Another of the Authority's obligations is to encourage the development of and approve a Code of Practice by broadcasters: s 21(e) and (g). Once the Code is approved, broadcasters are responsible for ensuring that their programmes comply: s 4(e). The BSA has approved such a Code, which has been developed by the New Zealand Television Broadcasters' Council on behalf of free-air-television broadcasters including TV3. The Code's preamble repeats the principles enumerated in s 4 and prescribes 11 standards; it also affirms the statutory right to freedom of expression: s 14 New Zealand Bill of Rights Act 1990 (NZBORA).

[7] Standard 3 of the Code deals with privacy and requires a broadcaster to comply with the seven principles in Appendix 2. The first five principles provide grounds for alleging a breach of privacy. The sixth and seventh are defences, of public interest and consent respectively.

Authority's Decision

[8] The BSA's decision on XY's complaint was delivered on 19 October 2006. It comprehensively reviewed the circumstances and the competing arguments advanced by XY and TV3, before considering the relevant privacy principles. It

concluded that XY's privacy was not breached under *Principle (i) - Public Disclosure of Private Facts*, but held TV3 had breached *Privacy Principle (iii) - Interest in Solitude or Seclusion*: at [55]-[60].

[9] The BSA next considered whether it was in the public interest for TV3 to broadcast the footage notwithstanding the breach of XY's privacy: Privacy Principle (vi). It carefully assessed all possible grounds of defence, before concluding that it was not made out: at [61]-[69].

[10] The Authority then invited submissions on the appropriate orders. TV3 apparently used this invitation as an opportunity to revisit and challenge the substance of the decision: at [74]-[77]. The BSA chose to address and dismiss TV3's arguments: at [78]-[88]. In my view the Authority was under no obligation to do so, and I do not treat that part of the decision as relevant.

[11] Having found that the public interest did not outweigh TV3's breach of XY's privacy, the Authority ordered it to broadcast an approved statement containing a comprehensive summary of its decision and to pay XY $3,000.

[12] I shall consider the two primary grounds for the BSA's decision in more detail within the context of the BSA's specific grounds of appeal.

TV3's Appeal

[13] TV3's notice of appeal raised these six discrete issues for determination:

(1) What is the proper construction of Privacy Principle (iii) (Principle (iii), Appendix 2 of the Broadcasting Code of Practice (Code))?

(2) Did TV3 breach that principle and therefore s 4(e) of the Act?

(3) What is the proper construction of Privacy Principle (vi)?

(4) If the answer to (2) is in the affirmative, was the public interest defence available to TV3?

(5) Does the result on issues (2) and (4) comply with the NZBORA?

(6) Is Privacy Principle (iii) ultra vires?

[14] By way of introduction, Ms Clare Bradley for TV3 described this appeal as having an importance for broadcasters beyond its facts. She says it raises a number of important issues of principle and practice, and about the proper restraints to be imposed on commercial TV and the media generally today. She says hidden cameras are a legitimate tool for all investigative journalists, and the BSA's decision will impose a chill.

[15] Ms Bradley's overarching submission is that the Authority's approach has given a disproportionate effect to the privacy interests engaged in this complaint; that the result is an unreasonable and unjustified limitation on a broadcaster's freedom of speech, contrary to s 5 NZBORA, and is 'overly precious' about the importance of privacy interests; and that the Authority has set the bar at an unworkable level for journalists.

[16] Ms Bradley characterised the ethos of the Stakeout programme as a cautionary tale of the short and long-term consequences for young women of entering into modelling. It was designed to set out the risks. It did not attempt to highlight the so-called glamour and glitz. It was instead a serious and worthy inquiry, and the programme was packaged in a way which was designed to communicate its sobering message to a younger demographic.

[17] Against this general background, I shall now consider separately each of the six discrete issues raised by TV3's appeal, even though a degree of overlap exists.

Issues

(1) Proper Construction of Privacy Principle (iii)

(a) Privacy Principle (iii)

[18] Privacy Principle (iii) states:

> There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

(b) Authority's Decision

[19] The Authority's reasoning on this threshold element was brief, as follows:

> [56] CanWest conceded that the use of a hidden camera will always be 'prying', and an interference with an individual's solitude and seclusion. However, the broadcaster has misinterpreted privacy principle (iii) by stating that 'the prying must give rise to the offensive disclosure of facts'. In fact, it is the intrusion itself that must be offensive, not the disclosure of facts (see Decision No. 2005-129).
>
> [57] The Authority has previously determined privacy complaints about the use of hidden camera footage. In Decision No. 2000-108-113, a doctor who had been accused of misconduct was secretly filmed in his surgery by a former patient, and in Decision No. 1996-130-132, a reporter filmed a psychologist at his office with a hidden camera. In both cases, the Authority found that privacy principle (iii) was breached by the broadcast of the hidden camera footage, as it amounted to an intentional interference with the individuals' interest in solitude or seclusion.
>
> [58] On this occasion, the Authority concludes that the hidden camera footage was an intentional interference with XY's interest in solitude and seclusion. Further, the fact that the hidden cameras filmed inside XY's home, and inside an apartment where he had a reasonable expectation of privacy, amounted to an intrusion which the ordinary person would find offensive.

(c) TV3's Submission

[20] Ms Mary Peters, who led this part of the argument for TV3, submits that the Authority erred in its construction of Principle (iii). She says that it is the nature of the broadcast material which is the subject of Principle (iii); and that there can be no breach unless the complainant establishes the material would have been offensive to

the ordinary person. Accordingly, Ms Peters submits, the BSA erred in focusing on the means of collection as constituting the 'intrusion'; instead, the broadcast itself is the 'intrusion', and it must be proven to be offensive to the ordinary person: *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 732-733.

[21] In support Ms Peters submits that, first, the Code's concern is with standards of television broadcasting – it is not the Code's purpose to police how material is obtained but to respond to what is broadcast; second, the word 'intrusion' does not refer to the means of collection; third, the legislature recognises the fundamental right to freedom of expression: s 14 NZBORA (I shall consider this point separately under a later issue); and, fourth, New Zealand's statutory and common law stops well short of recognising a general right to privacy: *Hosking v Runting* [2005] 1 NZLR 1 (CA).

(d) Construction

[22] The BSA did not undertake an analysis of the meaning of Privacy Principle (iii). I sense that the arguments advanced by TV3 in that forum were of a more limited scope than those propounded on appeal. Nevertheless, I am satisfied that the Authority's construction of the Principle was correct.

[23] The answer to TV3's argument is, I think, found in the words of Privacy Principle (iii) itself. It provides a discrete ground for a complaint. The substantive compass is narrow. There must be a 'factual situation involving [an] intentional interference …'. The word 'factual' imports a duty on the Authority to consider the circumstances surrounding the complaint. The word 'involving' focuses the direction of that enquiry towards 'the intentional interference with an individual's interest in solitude or seclusion'. Nothing in that sentence requires the BSA to assess the broadcast's content and its effect on an objectively reasonable person.

[24] Thus, in order to uphold a complaint, the Authority must be satisfied of the existence of two factual elements: first, an intentional interference and, second, 'with an individual's interest in solitude or seclusion'. Principle (iii) treats these two

components compositely as amounting to an 'intrusion', defined as: *The New Shorter Oxford English Dictionary*, 4th Ed. 1993:

> The action or an act of entering forcibly or without invitation or welcome, or of introducing something inappropriately; uninvited or unwelcome entrance or appearance; encroachment on a person's property or rights.

[25] The word 'intrusion' appropriately describes the conduct complained of as constituting a breach or invasion of an individual's right to privacy: see *TV3 Network Services* at 727-729; it refers and is restricted to the physical act of appearing or doing something without permission or invitation. Its concern is with what happened in the particular 'factual situation'. The intrusion occurs immediately the material gathering exercise commences. If it is established, the Authority must then apply the objective test of 'the ordinary person' to determine whether or not that intrusion is offensive.

[26] The element of 'intrusion' is unrelated by time, place and circumstances to the conduct of the person who obtained the material and elects to include it within a later television programme. A broadcast is not a physical intrusion or interference but, in this context, is a form of public dissemination of material gathered earlier. Its publication is the manifestation of the preceding invasion of privacy: *Todd: The Law of Torts in New Zealand*, 4th Ed. at para 18.7.04 (Professor John Burrows QC).

[27] Ms Peters relies to the contrary on this passage from Eichelbaum CJ's judgment in *TV3 Network Services* at 733:

> The authority was of the view that the surreptitious filming of a discussion in what the complainant thought was the privacy of her own property amounted to prying which the ordinary person would regard as offensive. **I think this should be read as relating to the showing of a programme obtained in the manner stated.** Being satisfied that in reaching that conclusion the authority did not commit any error reviewable on this appeal and that the finding was open, I uphold the authority's finding of breach of principle (iii).
>
> [Emphasis added]

[28] Ms Peters submits that the highlighted sentence shows the Chief Justice treated the act of broadcasting as constituting the intentional interference. I do not read his words in the same way. I think the Judge was emphasising that the conclusion related specifically to a programme which had obtained material 'in the

manner stated'– that is, by intruding on the complainant's privacy of her own property. The immediately preceding passages from his judgment confirms this construction: at 732 (20-55) and 733 (5-18).

[29] While Ms Peters is correct that the Act and Code are concerned with standards of television broadcasting, this factor does not justify a different construction. It simply means that the Authority has no jurisdiction to consider whether the means used by a broadcaster constitute a breach of Principle (iii) unless and until the broadcaster publishes material obtained from the intrusion. In that way, the Authority's power is confined to the very purpose for its existence.

[30] Support for BSA's construction is found in the jurisprudential origins of Principle (iii), as Mr Tim McBride for XY submits. Principle (iii) is based largely on what is known as the Privacy Intrusion Tort in the United States of America. That tort was first recognised by Professor Prosser: 'Privacy' 48 California Law Review 383 (1960). His formulation of the tort was then incorporated into s 652 Second Restatement of Torts of American Law Institute, which has been adopted by American Courts in analysing privacy claims: see also *TV3 Network Services* at 729.

[31] Section 652B provides:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.
>
> Comments:
>
> *a.* **The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs**. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

[32] The commentary confirms that the tort does not depend on any publicity being given to the person whose interest in privacy is invaded. It consists solely of an intentional interference with a person's interest in solitude or seclusion. That was the approach adopted by the Authority, and in my view its construction was correct.

(2) Breach of Privacy Principle (iii) and s 4(e) of the Act

(a) Submission

[33] Ms Peters submits that, even if the Authority's construction of Privacy Principle (iii) was correct, it nevertheless erred in equating the facts of the model's presence and filming by a hidden camera with interference with XY's solitude and seclusion. XY used the bedroom as his workplace. He paid the model for providing services. In Ms Peters' submission, the activity, rather than the location, determines whether the principle of solitude or seclusion is inapplicable. XY's invitation to the model on both occasions shows that he wanted company, not seclusion or solitude. Thus there could be no intentional interference with those values.

[34] The Authority noted TV3's concession that the "use of a hidden camera will always be 'prying', and an interference with an individual's solitude and seclusion". Ms Peters denies such a concession. In support of it, Mr McBride refers to the decision of TV3's Standards Committee dated 4 April 2006, expressing agreement with the complainant that Principle (iii) applied in making a statement to the effect recited by the Authority.

[35] I doubt that a decision of TV3's own Standards Committee can bind the company; and I allowed Ms Peters to advance full argument upon it. I was also concerned that the Authority did not in any event articulate a basis for applying the objective test of the ordinary person. It simply stated that conclusion without reasoning.

(b) Analysis

[36] This inquiry is also of a predominantly factual nature. However, guidance is available from the American common law when considering whether TV3 breached Principle (iii) and thus s 4(e) of the Act. Our Court of Appeal has expressly recognised the 'real value' of that country's jurisprudence when considering common law causes of action for invasion of privacy: *Hosking.*

[37] The leading American authority, upon which Mr Andrew Scott-Howman for BSA places particular reliance, is *Shulman v Group W Productions* 18 Cal. 4th 200; 955 P. 2d 469 (1 June 1998). That decision of the Supreme Court of California arose from the telecast of footage of a mother and son, who were injured in an automobile accident, receiving treatment in a rescue helicopter. Among other things, the mother pleaded that taking the footage was an intentional interference with her solitude and seclusion. Drawing on earlier American jurisprudence and academic writings, the Court interpreted the tort as consisting of two elements.

[38] First, the Court must consider whether the defendant intentionally intruded, physically or otherwise, upon the solitude or seclusion of another (to a large extent mirroring the first limb of Principle (iii)): at 232. It must be shown that the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. Also, the plaintiff must have had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source. A relevant factor in *Shulman* was whether the plaintiff had the right of ownership or possession of the property where the alleged intrusion occurred.

[39] Second, the intrusion must be in a manner that would be highly offensive to a reasonable person (the second limb of principle (iii)). A consideration of all the circumstances of the intrusion is required including its degree and setting, the expectations of those whose privacy is invaded and the intruder's motives and 'objectives'. In this respect the Court in *Shulman* specifically spoke about media reporting: at 236-237:

> … [T]he constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may - as a matter of tort law - justify an intrusion that would otherwise be considered offensive…
>
> … In deciding, therefore, whether a reporter's alleged intrusion into private matters … is offensive … courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news. Information collecting techniques that may be highly offensive when done for socially unprotected reasons-for purposes of harassment … may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.

[40] Mr McBride accepts that the Authority's decision was wrong in fact in finding that TV3 intentionally interfered with XY's interests in solitude. XY expressly invited at least one model to his premises on both occasions. Inviting the company of a third party is the antithesis of an interest in solitude – the state of being alone.

[41] That leaves the question of whether or not, at the relevant times, XY had an interest in seclusion. The verb 'seclude' is defined as '… enclose, confine, or shut off as to prevent access or influence from outside … hide or screen from public view…' and 'seclusion' means 'the action of secluding something or someone … [or] … the condition or state of being secluded; retirement, privacy … a place in which a person is secluded': *The New Shorter Oxford English Dictionary*, 4th Ed. 1993.

[42] This definition is of a wider reach than solitude in that it allows or extends to a situation where the complainant is accompanied. Materially to this case, the definition suggests a state of screening or shutting off from outside access or public view. It creates the zone of physical or sensory privacy referred to in *Shulman*. The complainant's rights of ownership or possession are also relevant, because they inform reasonable expectations of seclusion. Those are the factors I shall take into account when considering whether TV3 intentionally interfered with XY's interest in seclusion on each shoot and, if so, whether it was in a manner which would be highly offensive to an ordinary person.

(i) First Photo Shoot

[43] XY had an unarguable right of possession and control of his home, in which the intrusion was said to occur. While his bedroom was being used for employment purposes, he had a right to restrict entry. The area was enclosed, confined or shut off from view, including one obtained by using a camera, except to invitees. The property was not a commercial business available for access by the general public.

[44] XY's invitation to a third party did not extend to a hidden camera; he had no knowledge of it and therefore had not permitted its presence. He retained an

objectively reasonable expectation of seclusion in his bedroom. The intrusion constituted an act of trespass; XY's lack of knowledge of the camera voided any implied licence for the actor model to occupy the premises: *TV3 Network Services* at 732-733. Thus the element of intentional interference has been established.

(ii) Second Photo Shoot

[45] XY did not have a right of possession and control of the apartment. Nor did he control access into the premises. Nevertheless, the apartment was not available for access by the general public. A zone of sensory or physical privacy existed for XY and his two companions. I am satisfied XY had a reasonable but lower interest in and expectation of privacy there; and that there was an intentional interference for the same reasons as for the first shoot.

[46] Again, were the intrusions in a manner which would be highly offensive to an ordinary person? TV3's motive is arguably relevant: *Shulman*. Ms Peters adopts the Stakeout programme's own rationale: the footage for both shoots had been set up because 'word around the modelling industry' was that XY was 'luring young girls into his bedroom for trial photo shoots with the promise of getting work in his magazine'.

[47] The degree of intrusion on both occasions was high, given XY's ignorance of the camera's presence. Ms Peters concedes, as did the producer of the programme on air, that XY's activities were not illegal. Nor was he being dishonest. And he did not present a risk to the safety of models. At best for TV3, the 'word' on which it relied was no more than an implication that XY did not deliver on promises of work for models. That factor hardly justified TV3's motive.

[48] I am satisfied the ordinary person would find the intrusions, in the form of using a concealed camera in a situation where XY had a reasonable expectation of privacy and acted accordingly, to be offensive. In this sense I distinguish between the act and the content of the material gained from the trespass. The end of exposing XY, when TV3 concedes he was not acting unlawfully, inappropriately or

dishonestly, does not justify the means. The news media do not enjoy a special right to trespass in the name of news gathering.

[49] I agree with Mr Scott-Howman that this passage from *Shulman* at 242 is apposite:

> But no constitutional precedent or principle of which we are aware gives a reporter general licence to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast…
>
> In contrast to the broad privilege the press enjoys for publishing truthful, newsworthy information in its possession, the press has no recognised constitutional privilege to violate generally applicable laws in pursuit of material. Nor, even absent an independent crime or tort, can a highly offensive intrusion into a private place, conversation, or source of information generally be justified by the plea that the intruder hoped thereby to get good material for a news story.

(3) What is the proper construction of Principle (vi)?

(a) Privacy Principle (vi)

[50] In view of my findings on the previous issues, it is now necessary to consider whether the Authority erred when dismissing the public interest defence. Privacy Principle (vi) states:

> Discussing the matter in the 'public interest', defined as of legitimate concern or interest to the public, is a defence to an individual's claim for privacy.

(b) Authority's Decision

[51] On this issue, the Authority found:

> [61] The breach of XY's privacy arose from the broadcast of hidden camera footage. Accordingly, the Authority's consideration of the public interest is limited to considering whether broadcasting the hidden camera footage was in the public interest, as opposed to whether broadcasting the entire story about XY was in the public interest.

[62] As a starting point, the Authority repeats its comments in Decision No. 2000-108-113 where it said that using hidden camera footage is an extreme measure and one which must be justified by exceptional circumstances. Further, in Decision No. 2005-129 the Authority said that for a matter to be of genuine public interest it 'would have to be of concern to, or have the potential to affect, a significant section of the New Zealand population'.

[63] For the reasons outlined below, the Authority concludes that XY's conduct was not of such a serious nature, and of sufficient concern to a significant section of the public, to justify broadcasting the hidden camera footage in breach of his privacy.

[64] First, the Authority notes that the hidden camera footage did not show XY engaging in any illegal conduct, or making inappropriate advances towards the models. While the presenter of the programme repeatedly referred to one of the models being only 16 years old, the parties agree that XY was not advised of her age prior to the photo shoot and that she told him she was 19 when he discovered one of the hidden cameras.

[65] Second, the programme claimed that XY was not being honest with the models about using their photos for his DVD/website project, and 'what started out as test shots for [the men's magazine]' would then 'become something else'. However, the Authority notes that the hidden camera footage did not support this claim, because the footage showed him telling the models about the DVD project prior to beginning the photo shoot.

[66] Third, the Authority notes that XY was the editor of a magazine which regularly featured semi-clad women in erotic poses. In this context, the poses which he was seen encouraging the girls to adopt in the hidden camera footage were not out of the ordinary. The Authority considers that any model who was interested in posing for this particular magazine would be well aware of the nature of the photographs that would be taken.

[67] Finally, the Authority observes that the Stake Out producer's justification for broadcasting the footage was that there was a public interest in showing XY's 'casual attitude' and 'unsafe methodology'. By the Stake Out producer's own admission, the programme did not claim that XY had deceived anyone or acted inappropriately.

[68] As stated above, using hidden camera footage is an extreme measure and one which must be justified by exceptional circumstances. The Authority finds that showing the 'casual attitude' of a former magazine editor is not a compelling reason to justify broadcasting the hidden camera footage in breach of XY's privacy.

(c) Construction

[52] Ms Bradley submits that the Authority's interpretation of the principle (vi) defence was unduly restrictive. First, she says the BSA should consider the entire programme as opposed to the hidden camera footage alone when counterbalancing

an individual's interest in seclusion against the public interest. I disagree. The hidden camera footage founds the complaint under Principle (iii), and is thus the only activity falling for consideration under Principle (vi). Any other approach would be artificial.

[53] This construction is supported by the wording of Principle (vi). The public interest defence is available to a discussion of 'the matter'. These words must relate back to the factual situation giving rise to 'an individual's claim for privacy'. It is not the programme as a whole which is the source of the claim, but only the two parts broadcasting the offending camera footage.

[54] Second, Ms Bradley contends the Authority was wrong to conclude that hidden camera footage would only attract the defence in exceptional circumstances. However, I think she has misconstrued the BSA's words: at [62]. What the Authority said is that 'using hidden camera footage is an extreme measure and one which must be justified by exceptional circumstances'. Thus the level of legitimate public concern would have to be high, arguably very high, to justify the means, such as where it constitutes the tort of trespass and a breach of an individual's right of privacy: see *Hosking v Runting* per Gault and Blanchard JJ at [134] and Tipping J at [257]. Use of footage taken from a hidden camera in a *private* place will necessarily involve a high degree of intrusion, meaning that the consent of the person whose privacy has been breached has not been obtained.

[55] Third, Ms Bradley questions the BSA's conclusion that the public interest would have to concern a 'significant' section of the New Zealand population: also at [62]. I think she has misconstrued the meaning of 'significant'. Significance is a relative concept. The word does not necessarily equate to a large number of persons. The defence is still available if only a small number of persons are affected by the actions of the individual(s) whose privacy has been breached.

[56] It is necessary for the Authority to consider both the number of people affected or potentially affected and the nature of that effect. That exercise is not undertaken in isolation; all the circumstances of the case must be taken into account. For example, a doctor in a small town whose practices are confirmed to be

substandard may only affect a relatively small number of persons. However, the consequences are likely to be sufficiently serious for that group (personal health being potentially at risk) to invoke the defence.

[57] I am not satisfied that the BSA erred in its construction of Principle (vi). Its task is to determine whether the material is 'within the public interest, in the sense of being of legitimate concern to the public [as opposed to] … merely interesting to the public on a human level': *TV3 Network Services* at 733. A matter of general interest or curiosity will not be enough to outweigh the breach in question. The Authority correctly identified a number of subjects that might be in the public interest in its Decision No 2005-129 dated 21 March 2006 at [59], being:

- Criminal matters
- Issue of public health and safety
- Matters of politics, government or public administration
- Matters relating to the conduct of organisations which impact on the public
- Exposing misleading claims made by individuals or organisations
- Exposing seriously anti-social and harmful conduct

[58] As the BSA correctly observed, the list is not exhaustive but 'provide[s] a good framework from which to assess issues of public interest… [E]ach situation must be determined on its own facts': Decision No 2005-129 at [60]-[61]. I would emphasise, to avoid doubt, that the matter must be the particular factual situation giving rise to the claim of breach of privacy, and not to the subject of the programme as a whole. If the Authority is satisfied the matter is something which falls within the public interest, then it must determine whether the public concern outweighs the nature and effect of the breach in question. As noted, the more substantial is the breach, the greater the degree of legitimate public concern necessary to justify publication.

(4) Was the public interest defence under Privacy Principle (vi) available to TV3?

(a) TV3's Submission

[59] Ms Bradley contends the BSA erred in finding that the public interest defence was not established. She submits that the programme's objective was to communicate to young people the importance of being careful when approaching modelling work and photographic shoots in particular. That objective, in her submission, could not have been realised without the hidden camera footage.

(b) Analysis

[60] TV3 faces a difficult task in establishing that the finding of breach was wrong given my satisfaction that the Authority did not err in law in construing Privacy Principle (vi). This was essentially a balancing inquiry. The BSA, in exercising its specialist knowledge, identified four grounds or reasons for its conclusion. It was satisfied that: (1) the hidden camera footage did not show XY engaging in any illegal conduct or inappropriate behaviour towards the models; (2) the hidden footage in fact showed XY giving honest advice; (3) a model who was interested in posing for XY's magazine would be well aware of the nature of the photographs to be taken; and (4) the footage also undermined the programme's own justification for broadcasting the footage based upon X's allegedly 'casual attitude' and 'unsafe methodology'.

[61] In my judgment these factors provided a proper evidential foundation for the BSA's finding that 'the matter' was not 'of legitimate concern or interest to the public' such as to justify TV3's breach of Privacy Principle (iii).

[62] In any case, as Mr McBride submits, TV3 could have pixillated XY's face. I repeat that TV3 did not allege XY engaged in criminal activity or presented a physical threat to the health or welfare of the models or of anybody else whom he photographed. Suppression of his identity would not have undermined the programme's integrity or its impact. The programme's objective, namely to warn models of the risks in the New Zealand modelling industry, would not have been compromised.

[63] Put another way, publication of XY's name was not necessary or even relevant to the message. It was an exercise in gratuitous vilification. Chambers J was of a similar view in relation to the telecast of images of a sex abuse victim: see *TV3 Network Services Ltd v ECPAT New Zealand* [2003] NZAR 501 at [38].

(5) Does the decision comply with the NZBORA?

[64] Both parties accept that the Code is not an enactment and therefore is not caught by s 6 NZBORA: *Television New Zealand v Viewers for Television Excellence Inc* [2005] NZAR 1 at 34 (the *VOTE* case). In that case Wild J concluded that the Authority is still required to take into account s 14 NZBORA (freedom of expression) as a mandatory relevant consideration, meaning: at [48]:

> the standards themselves … [cannot] … be misconstrued so as to produce a non [NZ]BORA compliant result … [and t]he meaning of the standard adopted i.e. the particular interpretation or application, ought to be justifiable in terms of s 5 …

[65] Ms Bradley contends the BSA's construction of Principle (iii) was an unreasonable limitation on TV3's freedom of expression. She says it requires the media to consider very carefully whether it could broadcast such footage, no matter how innocuous or inoffensive the content. Arguably, s 4 of the Act will always derogate from the right of freedom of expression to some extent: the *VOTE* case at [42].

[66] However, as Mr McBride submits, the BSA's decision does not constitute a limitation on or prior restraint of the s 14 right. This approach does not impose any prior restraint on the broadcaster. It can still proceed with the broadcast because the Authority's jurisdiction does not crystallise unless and until the item has been broadcast and a complaint made: the *VOTE* case at [42]. Furthermore, the sanctions available to the Authority are relatively minor; the maximum compensation for a breach of privacy is only $5,000.

[67] If I am wrong on that point and Principle (iii) does represent a limitation on the broadcaster's freedom of expression, I have no doubt that it is reasonable and

demonstrably justified in terms of s 5 NZBORA. The Court of Appeal has warned Courts: *TV3 Network Services v Fahey* [1999] 2 NZLR 129 at pp136-137:

> … [to] be careful to ensure that the rights of others are properly weighed and that the media is not simply provided with an incentive to engage in and benefit from unlawful conduct whenever it claims it is acting in the exercise of freedom of expression.

[68] In the *VOTE* case Wild J concluded that any decision made by the Authority on a complaint must comply with NZBORA, in particular s 14 (the freedom of expression): at [56]. The BSA's decision expressly considered the relevant NZBORA provisions: at [72]:

> For the avoidance of doubt, the Authority records that it has given full weight to the provisions of the New Zealand Bill of Rights Act 1990 and taken into account all the circumstances of the complaint in reaching this determination. For the reasons given above, the Authority considers that its exercise of powers on this occasion is consistent with the New Zealand Bill of Rights Act.

[69] In my judgment the Authority's conclusion was correct. Neither of TV3's intrusions could justify judicial approbation under s 14 NZBORA. I have already referred to their nature and their legal effects as acts of trespass. Categorisation of the broadcaster's conduct as breaching privacy did not limit TV3's freedom of expression. That freedom is vested in all, and is to be exercised in accordance with the law, and no special immunity is vested on a television broadcaster. This argument must fail.

(6) Is Principle (iii) ultra vires?

[70] Finally, if the Authority's construction of Principle (iii) is accepted, Ms Bradley contends that the principle is ultra vires. Ms Bradley submits that the BSA's function is to monitor and preserve proper *broadcasting* standards by broadcasters as provided by s 4 of the Act. Without a requirement for a public disclosure of offensive facts, she submits there is no nexus between 'broadcasting' and Principle (iii).

[71] Eichelbaum CJ answered this argument in *TV3 Network Services*, in terms which I respectfully adopt at 733 as follows:

> During the argument there was some discussion whether the authority's jurisdiction extended to conduct as distinct from broadcasting. The jurisdiction of the authority to deal with s 4(1)(c) complaints traces back to the reference in s 4(1) to '[standards] in … *programmes and their presentation*' (emphasis added). In cases where the complaint is routed through the broadcaster, s 6 requires broadcasters to receive and consider 'complaints about any *programme broadcast*' (emphasis added). Having regard to these expressions it seems clear that the broadcasting of a programme is a prerequisite to any complaint about it. But subject to this qualification **I do not see why the references to 'programmes' should be construed narrowly; and I would hold that where filmed or taped material has been televised, in adjudicating upon a complaint the authority is entitled to take into account not only the broadcast material itself but also how it was obtained. To restrict complaints to the content alone would significantly limit the authority's jurisdiction.**
>
> [Emphasis added]

[72] The references to 'programmes' should not be construed narrowly. The statute empowers the Authority to take into account not only the broadcast material itself but also the means or method by which it was obtained. As Mr Scott-Howman submits, to hold otherwise would offend the spirit of legislation which is remedial in nature.

[73] The significance of privacy to an individual's wellbeing is not to be underestimated in this context. Lord Nicholls has noted 'a proper degree of privacy is essential for the wellbeing and development of an individual': *Campbell v MGN Ltd* [2004] 2 AC 457 at [12]. Thomas J was to the same effect: *R v Brooker* [2007] NZSC 30 at [252]:

> Privacy … [involves] a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons. **This zone of privacy is imperative if our personal identity and integrity is to remain intact. Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society.**
>
> [Emphasis added]

[74] I am satisfied that Principle (iii) is intra vires. My reasoning on the preceding five issues has effectively answered Ms Bradley's argument. In brief, summary, the existence of Principle (iii) is central to the Authority's statutory duties of monitoring

and preserving proper broadcasting standards. They are not restricted to such things as the content or balance of a programme. They extend to and embrace the manner in which broadcasters acquire material. It would be artificial, and contrary to the purpose or rationale for the Authority's existence, to separate standards adopted in acquiring information for a broadcast from the broadcast itself. Both parts make up the relevant whole, and Principle (iii) is integral to the performance of the BSA's functions in that respect.

Result

[75] In the result I dismiss TV3's appeal.

[76] Costs must follow the event. Both XY and the Authority are entitled to an award of costs and disbursements (excluding travelling expenses) against TV3. They are to be calculated according to category 2B.

[77] I wish to express my appreciation for the quality of the informed submissions, both written and oral, made by all four counsel.

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Rhys Harrison J