IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 155/02

UNDER	The Judicature Amendment Act 1972 and Part VII of the High Court Rules
IN THE MATTER OF	the Broadcasting Act 1989
BETWEEN	TV3 NETWORK SERVICES LTD Plaintiff
AND	BROADCASTING STANDARDS AUTHORITY First Defendant
AND	GRAEME EBBETT Second Defendant
AND	ADVERTISING STANDARDS AUTHORITY INC Third Defendant
AND	TELEVISION NEW ZEALAND LIMITED Fourth Defendant

Hearing: 30 June and 1 July 2003

Appearances: T J G Allan for Plaintiff
A E Scott-Howman and M B Banfield for First Defendant
P D McKenzie QC for Second Defendant
W M Wilson QC for Third Defendant

Ruling: 22 March 2005

COSTS RULING OF HAMMOND J

Introduction

[1] I have before me an application for a costs ruling.

[2] The substantive proceeding to which this ruling relates was delivered by me as long ago now as 25 July 2003.

[3] It will be sufficient for present purposes, by way of background, to set out the headnote to the reported judgment of that decision ([2004] NZAR 397):

> TV3 screened an advertisement for a drug (Viagra) during a news programme. The Advertising Standards Complaint Board (ASCB), a self-regulatory body established by the Advertising Standards Authority (ASA), dismissed complaints by the complainant and 97 others that the advertisement (which related to erectile dysfunction) breached broadcasting standards. The complainant then made a complaint to the Broadcasting Standards Authority (BSA). The BSA was established under the Broadcasting Act 1989 to hear complaints about programmes and advertising programmes but in 1993 the Act was amended so that the ASCB heard complaints about advertising programmes and the BSA complaints as to programmes and certain advertising such as political advertisements or where the advertiser and broadcaster did not recognise the jurisdiction of the ASCB. The BSA and the complainant relied on the case of *Watson v Television New Zealand Ltd* [2002] NZAR 524 to argue that the BSA had jurisdiction to consider complaints as to "programmes and their presentation" (s 4(1)(a) of the Act) which included the "conjunction" of programmes and advertisements. TV3 sought a declaration that the BSA had no jurisdiction to consider "conjunction complaints" about advertising programmes.
>
> **Held** (Granting the application)
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> The BSA did not have jurisdiction to consider a complaint as to the placing of television advertisements relative to the screening of television programmes because its jurisdiction was an issue of statutory construction; the meaning of an enactment was ascertained from its text and in light of its purpose (Interpretation Act 1999, s 5(1)) (ie a purposive approach); the 1993 amendment to the Act drew a clear jurisdictional line that in general advertisements were for the ASA and ASCB and television programmes were for the BSA; the ASCB could consider any "conjunction" issues within its jurisdiction; and the word "presentation" in s 4(1)(a) of the Act did not mean all that surrounded the programme.
>
> *Watson v Television New Zealand Ltd* [2002] NZAR 524 not followed.

[4] I apologise for the length of time it has taken to issue this ruling. Counsels' submissions on costs were filed between November 2003 and the first quarter of 2004. I should therefore make it plain that counsel responded appropriately, and timeously, to the Court's request for submissions.

[5] However, the High Court file did not reach me at the Court of Appeal until the middle of 2004. It then got caught up in the transference of papers between chambers consequent upon the ongoing alterations to the Court of Appeal, and effectively lay fallow for a time. It then came to my attention again just before the long vacation but I have only now been able to turn my attention to the issues requiring determination.

The various positions of the parties, as contended for

[6] Counsel for TV3 seeks costs of $21,580 together with disbursements of $2,059.58 from the Broadcasting Standards Authority (BSA) and Mr Ebbett, jointly and severally.

[7] Mr Allan argued that there is no good reason to displace the usual rule that costs should follow the event; that Mr Ebbett, in particular, had pursued the wrong course of action, in that his complaint was more properly directed to the Advertising Standards Authority (ASA); that the BSA did not take a neutral stance, but had taken a very active and adversarial role in the proceedings; and that the BSA had put TV3 in a position of having to "litigate at great expense". Mr Allan noted that the total sum incurred by TV3 has been $41,231.05 in legal fees and disbursements.

[8] Mr Scott-Howman, for the BSA, argued that, for public policy reasons, the Authority should not in this proceeding be made subject to a costs order. The case is said to be one of a "public litigation" variety in which the issues raised were as to the proper extent of the jurisdiction of the BSA and the ASA. Alternatively, if this Court determined that the BSA should be subject to a costs order, he argued it should not be liable to the full extent suggested by TV3.

[9] For Mr Ebbett, the second defendant, Mr McKenzie QC adopted the submissions put forward by the BSA in support of the proposition that this is a proper case for the Court to depart from the ordinary principle that costs should follow the event. Additionally, he urged on behalf of Mr Ebbett that Mr Ebbett, in exercising his "statutory right", had been caught up in a jurisdictional dispute between the BSA and the ASA. He said there is a public interest in a complainant

being free to pursue a complaint under the broadcasting legislation in accordance with the law as it was then stated by the High Court (in *Watson*). He suggested further that had both the BSA and Mr Ebbett adopted the course suggested for them by TV3, "there would have been no party to present opposing submissions to the Court on what was, it is submitted, an important matter of public interest". In the event that, contrary to this submission, costs should be awarded against Mr Ebbett, Mr McKenzie submitted that this is a proper case for the Court to depart from the scale, in the exercise of its discretion, and award costs at a level which do not unduly penalise a litigant who had acted in the public interest "and has no financial interests in the outcome of the litigation".

[10] Mr Wilson QC, for the ASA, suggested that in reality this judicial review proceeding had been a contest between TV3 and ASA on the one hand and the BSA and Mr Ebbett on the other. Effectively, the position of TV3 and the ASA was upheld and that of the BSA and Mr Ebbett rejected. Mr Wilson said that "it follows that [TV3 and the ASA] are each prima facie entitled to costs against [the other two parties]". He said this liability should be on a joint and several basis. Mr Wilson accepted that TV3 carried the greater burden of the argument, but said that "the quantum of the costs to be paid to the [ASA] should be say two thirds of those recoverable by [TV3]".

Resolution

[11] As the Court of Appeal noted in *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606, the usual rule is that costs follow the event; although, ultimately, all matters relating to costs in a proceeding are in the discretion of the trial court. However the discretion to exceed the new scale is to be sparingly exercised, in accordance with the observations in *Glaister*. In this case, Mr Allan does not seek to exceed the scale for his client save in one small respect (which is properly identified in the manner as suggested in *Glaister*).

[12] All of that said, as always, regard does have to be had to the circumstances of the particular litigation. The standard cost rules do not always sit entirely easily in judicial review proceedings, of a public character, and in that arena a court will occasionally have to resort to its undoubted general discretion.

[13] In this instance, I can see no reason why costs should not follow the event, in favour of TV3, and essentially for the reasons suggested by Mr Allan in his submissions. There was a determined "lis" between TV3 (supported by the ASA) on the one hand, and the two contending parties of the BSA and Mr Ebbett, on the other hand. It cannot be right that litigation is entirely "costless" to one party or the other - that is, that the usual rules be put aside altogether - save of course in truly unusual circumstances, which do not pertain here.

[14] The next issue is as to the quantum of the costs to be awarded to TV3. In my view, Mr Allan responsibly contended for the 2B scale, with one (appropriate) 2C adjustment. Normally, I would allocate a scale and have the Registrar fix the actual costs and disbursements, if counsel could not agree on them. In this instance, and particularly given the delays which have occurred, I fix the sums myself, and I do so in terms of Mr Allan's memorandum: that is, $23,639.78 in all ($21,580 costs plus $2,059.78 disbursements).

[15] The next issue is as to the parties who should bear that award. Mr Allan urged that the liability for this sum should be joint and several. But that would then raise issues between Mr Ebbett and TV3. Again in the interests of finality, I think it more appropriate in this case to apportion liability between Mr Ebbett and the BSA. Judgment will therefore be entered against Mr Ebbett for $5,000 in costs; judgment for the balance sum of $18,639.78 for costs and disbursements will be entered against the BSA.

[16] The next issue is whether there should be an award of costs in favour of the ASA, as against the BSA and/or Mr Ebbett. There is some force in Mr Wilson's submissions, but in the end I think that to make such a further costs award would be somewhat oppressive, in a matter which did have some importance to both of the

Authorities in determining the precise ambit of their respective jurisdictions. There will therefore be no costs order in favour of the ASA.

Rulings accordingly.

Delivered this 22nd day of March 2005.

R G Hammond J

Solicitors:
Grove Darlow & Partners, Auckland for Plaintiff and Fourth Defendant
Bell Gully, Wellington for First Defendant
Kesing McLeod, Lower Hutt for Second Defendant
W G T Wiggs, for Third Defendant