IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-485-001609

UNDER	The Broadcasting Act 1989
IN THE MATTER OF	a determination of the Broadcasting Standards Authority dated 27 June 2007 Decision No. 2006-087
BETWEEN	TELEVISION NEW ZEALAND LIMITED Appellant
AND	K W Respondent
	(intituling continued over)

Hearing: 7 May 2008

Appearances: W Akel for Appellant
D Webster for Respondent in CIV-2007-485-001609 and First Respondent in CIV-2007-485-001610
A Scott-Howman for First Respondent in CIV-2007-485-001610

Judgment: 18 December 2008

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 18 December 2008 at 4:45 pm
pursuant to r 540(4) of the High Court Rules

Registrar / Deputy Registrar
Date……..

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CIV-2007-485-001610

AND UNDER	The Judicature Amendment Act 1972
IN THE MATTER OF	An application for judicial review of a decision of the Broadcasting Standards Authority
BETWEEN	TELEVISION NEW ZEALAND LIMITED Applicant
AND	THE BROADCASTING STANDARDS AUTHORITY First Respondent
AND	K W Second Respondent

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Introduction

[1] On 19 June 2006 Television New Zealand Limited (TVNZ) screened a programme about unlicensed brothels operating in the suburbs. The purpose of the programme was to examine whether there had been an increase in such establishments and whether there was cause for concern about associated issues such as people trafficking, exploitation of women and money laundering. The second respondent, KW, owns a property that featured in the programme. TVNZ used a hidden camera to film KW's wife opening the front door, scenes inside and a conversation between the reporter and another woman.

[2] KW complained to the Broadcasting Standards Authority (BSA). He maintained that his house was not a suburban brothel and the only services his wife provided were Chinese massage and foot reflexology. He complained that the programme was inaccurate, unbalanced and an invasion of privacy. The BSA upheld KW's complaint. It found that TVNZ had breached Standard 5 of the Broadcasting Code by inaccurately portraying KW as a brothel owner and his wife as a prostitute. It also found that the covert filming inside KW's home breached Standard 3 by intruding on KW and his wife. The BSA made orders requiring TVNZ to pay compensation and costs to KW and his wife.

[3] TVNZ has appealed the decision pursuant to s 18 Broadcasting Act 1989, which confers a general right of appeal, subject to the requirement in s 18(4) that the appeal be heard and determined as if the decision or order appealed against had been made in the exercise of a discretion. As a result the correct approach on the appeal is as stated in *May v May*[1] namely that:

> …An appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter, or that he was plainly wrong.

[1] (1982) 1 NZFLR 165 (CA) at 169-170

[4] TVNZ asserts that the BSA's decision was plainly wrong and that it erred in failing to take relevant matters into account and in taking irrelevant matters into account. The following issues arise:

a) Did Standard 5 require TVNZ's assertions to be accurate or was it sufficient for TVNZ to have taken reasonable care to ensure that they were accurate? This issue turns significantly on the extent to which New Zealand Bill of Rights Act 1990 (BORA) applies.

b) If Standard 5 did require the assertions to be accurate, did TVNZ bear the onus of proving that?

c) Did the information available to the BSA support the assertions TVNZ had made? This issue encompasses the question of whether the BSA's decision was against the weight of evidence and therefore plainly wrong and whether the BSA took account of irrelevant matters or failed to take account of relevant matters.

d) Was the use of the hidden camera a breach of Standard 3 and, if so, was TVNZ entitled to rely on the public interest defence in Privacy Principle (vi)?

e) Was the BSA plainly wrong in imposing a penalty that could deter the media from investigating hard stories and fulfilling its function of exposing wrongdoing in society?

[5] TVNZ has also applied for judicial review. It asserts that the BSA breached the principles of natural justice by:

a) Not advising it that it had spoken to a potential witness (Mr Robertson) but did not intend to obtain evidence from him;

b) Failing to properly consider the complaint by not taking into account certain relevant evidence and information. This ground raises some of the same issues as arise in the appeal.

First issue on appeal – Did Standard 5 require TVNZ's assertions to be accurate?

[6] Standard 5 provides that:

> News, current affairs and other factual programmes must be truthful and accurate on points of fact, and be impartial and objective at all times.

[7] The BSA proceeded on the basis that Standard 5 required factual assertions to be accurate. Mr Akel, for TVNZ, submitted that this approach was wrong in principle because it was inconsistent with ss 5 and 14 BORA. His submission was essentially that because of the frequent difficulties journalists encounter in producing evidence to prove their assertions, requiring all reporting to be objectively accurate would impose an unreasonable limit on the right of freedom of expression conferred by s 14 BORA. He said that if the BSA's approach had been "Bill of Rights focused" it would have found that TVNZ had made reasonable efforts in difficult circumstances to establish the accuracy of what it asserted and that was sufficient i.e. that the BSA should have treated the issue as being whether reasonable journalistic standards had been met rather than whether the assertions were objectively accurate.

[8] The extent to which the BSA's determinations are subject to BORA has been considered in a number of recent High Court decisions. I have also been assisted by the Supreme Court's decision in *R v Hansen*[2] and by the article by Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification: The Bill of Rights and the Broadcasting Standards Authority"[3].

[9] Section 14 relevantly provides that everyone has the right to "impart information and opinions of any kind in any form". The breadth of this freedom was described by the Court of Appeal as being "as wide as human thought and imagination"[4]. Taken alone there can be no dispute that s 14 protects the right to convey information of any type and in any form. This necessarily includes false information[5]. Section 5, however, acknowledges that this right may be subject to limitations:

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[2] [2007] 3 NZLR 1
[3] Todd & Finn (eds) Law, Liberty and Legislation (2008 forthcoming)
[4] *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9
[5] See the discussion in the Geiringer/Price article at p27

> Subject to s 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[10] It is not in dispute that, in making a determination as to compliance with the Code the BSA performs a public function, power or duty for the purposes of s 3 BORA. Nor can it be in dispute that the Standards impose limits on BORA rights; the requirement in Standard 5 that factual reports be truthful and accurate obviously limits the otherwise unfettered right to freedom of expression in s 14. However, nor can it be disputed that the limits imposed are reasonable for the purposes of s 5. The limitation is only imposed in relation to factual reporting (not expressions of opinion) and the fact that broadcasters, including TVNZ, approved the Code in its current form, indicates that they did not regard a requirement for accuracy in the reporting of facts as unreasonable.

[11] There is, however, some divergence between the decision in *TV3 Network Services Limited v Holt*[6] and later decisions as to whether the BSA is required to specifically consider the BORA rights and whether any limit on those rights resulting from its determination is a reasonable limit for the purposes of s 5. In *TV3 Network Services Limited v Holt* Rodney Hansen J held that the Standards alone were the limits prescribed by law for the purposes of the s 5 BORA so that the BSA's decision was not to be subject to analysis as to whether it constituted a reasonable limit. That approach was specifically rejected by Wild J in *Television NZ Limited v Viewers for Television Excellence Inc*[7] and again in *Browne v Canwest TV Works Limited*[8]. Wild J considered that a s 5 BORA analysis should be undertaken in respect of the BSA's actual decision because of the possibility of it adopting a particular meaning or interpretation of a standard that, in the context of the particular case, did not represent a reasonable limit. Subsequent cases have followed this approach[9].

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[6] [2002] NZAR 1013
[7] [2005] NZAR 1 at [52] – [56]
[8] [2008] 1 NZLR 654 at [30] – [42]
[9] *Television NZ Limited v Broadcasting Authority* HC WN CIV-2004-485-001299 and CIV-2004-485-001300 13 December 2004 Miller J; *Canwest TV Works Limited v XY* HC AK CIV-2006-485-002633 22 August 2007 Harrison J; *Television NZ Limited v David and Heather Green* HC WN CIV-2008-485-24 11 July 2008 Mallon J

[12] Unless there is an attack on the reasonableness of the Standard, a finding of non-compliance with a Standard based on a correct interpretation of that Standard could not, in itself, amount to a limit on the s 14 freedom for the purposes of s 5. Such a decision does no more than state the effect of the existing limit. Nevertheless, a decision by the BSA clearly has the potential to limit the broadcaster's s 14 right to freedom of expression through an incorrect interpretation of the Standard. One might also envisage that an unreasonable limit could result from the penalty imposed in the particular case.

[13] In this case the complaint is that the BSA wrongly interpreted Standard 5 so as to require objective accuracy whereas, if interpreted consistently with BORA, it would require only reasonable efforts to achieve accuracy, such reasonableness to be judged against acceptable journalistic practice. Discussion about the interpretation of a provision in accordance with BORA generally occurs in relation to s 6 which provides:

> Wherever an enactment can be given a meaning that is inconsistent with the rights and freedoms contained in this Bill of Rights that meaning is to be preferred to any other meaning.

[14] Clearly, the Code is not an enactment for the purposes of s 6. However, as Ms Geiringer and Mr Price point out in their article, even though s 6 does not apply directly to the Code, the fact that the Broadcasting Act 1989, which authorizes the Code, is subject to BORA, necessarily means that the Code must be interpreted consistently with BORA the alternative being that it would be *ultra vires* the Broadcasting Act 1989. I therefore consider that where the BSA upholds a complaint on grounds that involve interpretation of the Standards a s 5 analysis will be needed to ensure that the decision does not have the effect of imposing a limit on the s 14 right that exceeds the existing limits imposed by the Standard.

[15] In *R v Hansen*[10] Tipping J described the s 5 analysis as involving a difficult balance, with judges expected to uphold individual rights but at the same time show restraint when policy choices arise[11]. He went on to conclude:

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[10] [2007] 3 NZLR 1
[11] At [117]

> [123] Whether a limit on a right or freedom is justified under s 5 is essentially an enquiry into whether a justified end is achieved by proportionate means. The end must be justified and the means adopted to achieve that end must be proportionate to it. Several sub-issues inform that ultimate head issue. They include whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom. The Court's function is not immutably to substitute its own view for that of the legislature. If the Court agrees with the legislature that the limit is justified, no further issue arises. If the Court does not agree, it must nevertheless ask itself whether the legislature was entitled, to use Lord Hoffman's word, to come to the conclusion under challenge. It is only if Parliament was not so entitled that the Court should find the limit to be unjustified.

[16] In this case the competing rights are the broadcaster's right of freedom of expression under s 14 BORA, the public's interest in being able to have confidence in the reliability of factual media reporting and the interest that both the broadcaster and the public have in an independent and vigorous media which will pursue issues affecting the community. Clearly, the BSA was required to consider these competing rights in deciding whether a broadcast that was not accurate could nevertheless comply with Standard 5. However, the BSA did not do that.

[17] Having identified its approach to the onus of proof (which I discuss later) and briefly analysing the evidence the BSA concluded at [47] that:

> In these circumstances, where the broadcaster has not provided any information to support the claims it has made in the item, the Authority considers that the accuracy standard was breached. It upholds this part of the complaint.

[18] Later, at [66] the BSA added:

> For the avoidance of doubt, the Authority records that it has given full weight to the provisions of the NZ 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 NZ Bill of Rights Act.

[19] However, the reasons given by the BSA do not include any reference to the purpose of Standard 5, the difficulties faced by broadcasters in obtaining evidence to support their assertions and the importance of the right of free expression. It appears that [66] was a "boiler plate" paragraph of the kind discussed at pp10-13 of Ms Geiringer's and Mr Price's article. Whilst it was unnecessary for the BSA to

undertake a detailed analysis of the factors relevant to s 5 there must be at least some indication in the decision that such factors were taken into account. The complete absence of any reference to them means that I cannot be sure that the assertion at [66] actually means that the BSA undertook the kind of analysis required. A formulaic statement of the kind that appears at [66] is sufficient, in itself, for this Court to be satisfied that consideration was given to the competing factors.

[20] However, I consider that the BSA's interpretation of Standard 5 was correct and therefore its failure to consider s 5 would not have affected the outcome. The expression "truthful and accurate on points of fact" conveys two different concepts. In relation to statements "truthful" means "full of truth, sincere"[12]. Truthfulness therefore connotes an honest belief. It is a trite observation that a person may be honest but mistaken; the fact that an assertion is incorrect does not preclude it from being truthful. However, the same cannot be said for the requirement that the broadcast be accurate. In its ordinary meaning "accurate" means "exact, precise, correct"[13]. Although it can also bear the meaning "executed with care", used together with "truthful" the drafter clearly intended a different meaning from that conveyed by "truthful". I therefore consider that the ordinary meaning of Standard 5 is that broadcasters are required to be both truthful and objectively correct in factual reporting.

[21] In coming to this conclusion I have not overlooked the guidelines, which can properly be taken account of in interpreting Standard 5, particularly guideline 5(e) which provides:

> Broadcasters must take all reasonable steps to ensure at all times that the information sources for news, current affairs and documentaries are reliable.

[22] A guideline cannot, however, be interpreted so as to significantly detract from the Standard it is intended to illuminate. This guideline does not have the effect of altering the requirement for accuracy that I consider the Standard imposes.

[23] Since the BSA correctly proceeded on the basis that Standard 5 require objective accuracy there can be no basis on which to assert that its decision in that

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[12] Shorter Oxford English Dictionary 5th ed
[13] Shorter Oxford English Dictionary 5th ed

regard constituted an unreasonable limit prescribed by law. That limit already existed in the form of the Standard and the BSA's decision did not add anything to it. It follows that the BSA's failure to undertake a s 5 analysis had no effect on the outcome. This ground of appeal therefore fails.

Second issue on appeal - did TVNZ have the onus of proving that the assertions it made were accurate?

[24] The BSA viewed TVNZ as bearing the onus of proving that the assertions made in the programme were accurate:

> [40] The first step for complainants who allege a breach of Standard 5 (accuracy) is to provide sufficient evidence for the Authority to conclude that the disputed facts *may* be inaccurate; they are not required to prove their case. Where the broadcaster has made allegations against a person, that person's denial of the allegations will generally be sufficient for the Authority to question the accuracy of the broadcast.
>
> [41] Once the accuracy of the broadcast has reasonably been thrown into question, the broadcaster must satisfy the Authority, on the balance of probabilities, that the disputed facts are true. If the broadcaster cannot prove the truth of what it broadcasts, the Authority will find a breach of the code.

[25] The issue of onus of proof was touched on in an affidavit by Ms Morris, the chair of the BSA. Having noted that the BSA has a broad discretion as to the way in which it considers complaints and also has some of the powers of a Commission of Inquiry, Ms Morris explained the possible approach that might be taken in more detail:

> [14] A complaint about breach of accuracy almost always involves a disputed issue of fact. The Authority is, in effect, given some choice about the way in which it might approach such complaint.
>
> [15] On one hand, it can act as an investigative tribunal and conduct its own independent enquiries. On this approach, the Authority would consider what information is required to determine the disputed issue of fact, and it would request this information directly from the appropriate source. If necessary, the Authority could use its Commission of Inquiry powers to require the production of evidence. Any information received by the Authority that it considered was probative to the determination of the complaint would then be provided to the parties for comment…
>
> [16] On the other hand, it can approach such a complaint on an adversarial basis. With the complainant having put a point of accuracy in issue, it may require the respondent (the broadcaster) to produce evidence to rebut it. There is some attraction to this latter approach because, by the nature of the situation, it is the broadcaster which is in possession of the

> information which was used as the basis of the programme about which the complaint is made…This approach is still subject to the reservation of the Authority's powers to require production of evidence if and when thought appropriate or necessary.
>
> [17] The Authority does not necessarily prefer one approach over another – nor does it see one approach as necessarily being superior.

[26] Mr Akel submitted that the BSA erred in requiring TVNZ to prove that its assertions were accurate because such an approach was contrary to the intent and spirit of the Broadcasting Act 1989 and failed to recognise the difficulties facing a broadcaster in producing evidence that would satisfy a legal onus of proof. In response, Mr Scott-Howman referred to the fact that either an adversarial or inquisitorial approach (as described in Ms Morris' affidavit) was open to the BSA and that, with TVNZ's extensive experience it would be naïve to think that it was not pro-active in gathering evidence.

[27] The question of which party, if any, bears an onus of proof is not specifically provided for in the Broadcasting Act 1989. Sections 10 and 11 provide:

> **10 Consideration and determination of complaints by Authority**
>
> (1) The Authority may, if it thinks fit, consider and determine any complaint referred to it under section 8 of this Act without a formal hearing, but, in that case,—
>
> (a) Shall give the complainant and the broadcaster a reasonable opportunity to make submissions to it in writing in relation to the complaint; and
>
> (b Shall have regard to all relevant submissions made to it in writing in relation to the complaint.
>
> (2) In considering every complaint referred to it under section 8 of this Act, the Authority shall provide for as little formality and technicality as is permitted by—
>
> (a) The requirements of this Act; and
>
> (b) A proper consideration of the complaint; and
>
> (c) The principles of natural justice.
>
> **11 Power of Authority to decline to determine complaint**
>
> The Authority may decline to determine a complaint referred to it under section 8 of this Act if it considers—
>
> (a) That the complaint is frivolous, vexatious, or trivial; or

(b) That, in all the circumstances of the complaint, it should not be determined by the Authority.

[28] There is little authority to assist in determining the question of whether a legal onus of proof exists under the Broadcasting Act 1989. A helpful starting point is the observation about the BSA's role made by the Full Court comprising Randerson and Miller JJ in *Radio New Zealand v Ellis*[14]:

> [42] The Authority's role is not that of a tribunal settling private disputes between an injured party and a broadcaster. Its role is to ensure that broadcasting standards are established and observed. The Authority's jurisdiction under s 13 is invoked on complaint, but the complaint need not be made by a person injured. Any member of the public may refer a complaint to it…[t]he Authority is not confined to the sanctions sought by a complainant.

[29] The BSA's role described in this way suggests an inquisitorial rather than an adversarial process. In civil proceedings where one party bears an onus of proof the process ordinarily provides for parties to adduce evidence, summons witnesses and cross-examine witnesses called by the other party. But the Broadcasting Act 1989 anticipates a relatively informal process that may proceed without any hearing. Although compliance with the principles of natural justice may require that a party be permitted to adduce evidence, the only specific provision relating to evidence is s 12 which confers on the BSA the powers provided by ss 4B, 4C, 4D, 5, 6, 7, 8 and 9 of the Commissions of Inquiry Act 1908, including the power to obtain evidence and information of its own motion and to summons witnesses.

[30] It is also significant that under s 11 the BSA may decline to determine a complaint, either because it is frivolous, vexatious or trivial or because "in all the circumstances of the complaint, it should not be determined by the Authority". This is not an option for a court or tribunal charged with determining a dispute and is inconsistent with the existence of a legal burden of proof. The option of declining to decide may be compared with the course described by Lord Brandon in *Rhesa Shipping Co SA v Edmunds & Anor: The Popi M*[15]:

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[14] [2006] NZAR 1 at [42]
[15] [1985] 2 AllER 712 at 718

> No Judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

[31] Finally, s 13, which confers the power to make certain orders provides that the BSA may do so "If….the Authority decides that the complaint is justified". This wording is, in my view, inconsistent with either party bearing an onus of proof. In its ordinary meaning "justified" means "warranted, having good cause or reason; correct; supported by evidence"[16]. This falls short of actually being proven to a legal standard.

[32] Taking into account the function of the BSA and the manner provided for complaints to be determined I consider that the Broadcasting Act 1989 does not impose an onus of proof on either the broadcaster or the complainant. It is for the BSA to determine the complaint, if it is able to do so, on the basis of the information that is provided by the complainant and the broadcaster. It may seek further information or evidence of its own volition. If it decides that the complaint is justified in the sense of being supported by evidence then it may proceed to consider possible sanctions. But whether it decides a complaint is justified is a matter for its own assessment of the evidence and information available, not for proof by the broadcaster. I therefore consider that the BSA did err in requiring TVNZ to prove that the assertions were accurate.

Third issue on appeal - was the complaint justified?

[33] TVNZ asserts that the evidence plainly showed that the premises were being used as a brothel and, in coming to the opposite conclusion, the BSA failed to take relevant evidence into account and wrongly took irrelevant information into account. The information on which the BSA reached its decision on this point was identified at [44] – [47]:

> [44] In the Authority's view TVNZ has not provided any evidence by which it could reasonably conclude that KW's property was a brothel at the time of the broadcast. In responding both to the initial complaint and then to the Authority, TVNZ justified the allegations by referring first, to an unidentified source "familiar with [the] premises", second, to the observations of the *Close Up* team who saw a "stream of men" entering the

[16] Shorter Oxford English Dictionary 5th ed

> premises, and finally to the observations of the undercover reporter who took a hidden camera onto the property. None of this information contained any direct evidence to support the allegations made; the majority of it was instead broadly consistent with the more innocent explanation offered by KW. Nevertheless, the Authority requested comprehensive affidavits from KW and the TVNZ undercover reporter…
>
> [45] The Authority notes that the affidavit from TVNZ's undercover reporter – which simply repeated the information he had earlier provided, but this time in the form of a sworn statement – still did not suggest that either FW or Monica agreed to perform sexual services for payment. The reporter's assertion that Monica seemed surprised that he only wanted to talk, and that FW encouraged him to remove his clothes, are entirely consistent with the women working as massage therapists.
>
> [46] TVNZ subsequently suggested that the affidavit from Monica's ex-husband, in which he states that Monica admitted to providing "full service", adds credibility to the view that the property was being used as a brothel. However, the Authority places little weight on this evidence, as it was not in TVNZ's possession at the time of the broadcast. In addition, it is second-hand information from a person who had been involved in a confrontation with KW and FW, and whose evidence is accordingly of limited value.
>
> [47] In these circumstances, where the broadcaster has not provided any information to support the claims it has made in the item, the Authority considers that the accuracy of the standard was breached. It upholds this part of the complaint.

[34] In essence, the BSA found that the information that it accepted was consistent with a legitimate massage business. Although the BSA did not refer directly to all of this evidence, much of the evidence available to the BSA could fairly be regarded as consistent with the kind of business that KW maintained was operated from the premises. This included the fact that FW held a licence for beauty therapy from the North Shore City Council and had advertised her business in the North Shore Times and the way the house was set up; although TVNZ asserted that there were beds in the rooms rather than massage tables the reporter's statement only referred to furniture that resembled beds. KW maintained that they were massage tables and produced photographs (admittedly taken well after the event) showing the rooms set up with massage tables. On the state of the evidence the BSA was entitled to find that the rooms were set up in way that was consistent with a massage business.

[35] On the other hand, the BSA characterised some evidence as consistent with a legitimate massage business when it was properly viewed as consistent with either a massage business or a brothel. This evidence included the fact that 'TVNZ's team spent several hours outside KW's house and saw only men entering the house and

the fact that the woman spoken to inside encouraged the reporter to take his clothes off.

[36] However, there were two significant pieces of information about the premises that were not consistent with a normal massage business and which TVNZ says the BSA wrongly rejected or ignored. Although some of these were referred to in the narrative of TVNZ's response to the complaint, they were not referred to by the BSA in its finding on this point and the fact that the BSA specifically characterised the evidence it was relying on being consistent only with a massage business suggests that these other pieces of information were not taken into account in the decision making process.

[37] First, the undercover reporter who went into the house with the hidden camera was preceded by another person, who asked whether "extras" were available and received an affirmative response. In everyday language the expression "extras" is generally regarded as having the meaning contended for by TVNZ, namely additional sexual services beyond straight massage. So the offer of "extras" was an important piece of evidence because it was inconsistent with the operation of a legitimate massage business. It is something that the BSA should have taken into account.

[38] The other piece of information that TVNZ says should have been taken into account and was not was provided by the team leader Environmental Protection for North Shore City, Mr Robertson. As part of its investigation, the BSA's Complaints Manager, Mr Sneyd, telephoned Mr Robertson. Although there was consideration given by the BSA to obtaining an affidavit from Mr Robertson ultimately this was not done. Mr Sneyd swore an affidavit for the purposes of the appeal explaining that Mr Robertson had told him that he had a collection of evidence from various sources which led him to the belief that the property was a brothel but that he (Mr Sneyd) reached the view that any information from Mr Robertson would represent only his personal view and be of little probative value in addressing the disputed issue of fact. This was the reason that Mr Robertson was not asked to provide an affidavit.

[39] Mr Robertson swore two affidavits. In the first he referred to a website called "Sex in New Zealand" which he had checked as part of his enquiries into unlicenced

brothels in the North Shore City area. One of the telephone numbers listed on the website was the telephone number held on the Council's records as relating to KW's address. In a subsequent affidavit, responding to Mr Sneyd's affidavit, Mr Robertson said that when he was talking to Mr Sneyd he specifically referred to the website and its name and that he had suggested to Mr Sneyd that he look at the website so that he could see how sex services were advertised, though he thought that by then KW's telephone number would have been removed as a result of TVNZ's programme.

[40] Mr Sneyd did not provide any further affidavit in response and, for the purposes of this appeal, I proceed on the basis that Mr Robertson did tell Mr Sneyd about the website and the fact that he had seen the phone number for KW's address on it. The significance of this piece of information is undeniable. Just as the advertisement in the North Shore Times for a beauty therapy business is consistent with a legitimate business so, too, an advertisement on a website advertising sex services must be regarded as consistent with the operation of a brothel. There is, however, no mention at all in the BSA's decision of this piece of information.

[41] I consider that the BSA did err in failing to take account of the reporter's claim that he was told that "extras" were available and the fact that Mr Robertson had seen KW's phone number on the "Sex in New Zealand" website. The BSA was therefore wrong to proceed only on the basis of evidence that was consistent with a legitimate massage business.

[42] I also consider that the BSA wrongly rejected evidence about an admission by the woman identified in the footage as Monica that she was providing sexual services. This was contained in an affidavit from Mr Aldred, Monica's ex-husband. KW was given the opportunity to respond to this affidavit and did so in a letter that relayed Monica's denial to KW's wife that she had made this admission. The BSA rejected Mr Aldred's evidence for two reasons. The first, that it was not in TVNZ's possession at the time of the broadcast, was not a legitimate basis for rejecting the evidence. The BSA's enquiry was whether TVNZ's broadcast was accurate. It would be wrong to ignore evidence that emerged subsequent to a broadcast tending to confirm its accuracy merely because it was not in the broadcaster's possession at the time.

[43] The second reason given for rejecting Mr Aldred's affidavit evidence was that it had limited value because it was "second-hand information from a person who had been involved in a confrontation with KW and FW". This assessment of Mr Aldred's affidavit is flawed. Whilst the affidavit did contain hearsay evidence in the form of a statement allegedly made by Monica, that fact in itself would not preclude it being accepted by the BSA. Indeed, much of what KW told the BSA was hearsay because he did not play any active part in his wife's business.

[44] Viewing Mr Aldred as unreliable on the ground that he had been involved in a confrontation with KW and FW has a degree of circularity about it. Whether there had been a confrontation depended on which version of events one accepted; Mr Aldred's affidavit does not describe a confrontation but merely a discussion. It was KW's subsequent undated letter that reported his wife's claim of Mr Aldred being aggressive. However, KW was not present at that time and his description of the situation when he was present could hardly be described as a confrontation. Even if there had been a confrontation between KW and Mr Aldred, that in itself does not necessarily mean that Mr Aldred was lying in his affidavit. Further, the BSA appeared to give no weight to the fact that Mr Aldred's assertions were contained in an affidavit whilst KW's statement was unsworn, in the form of his letter.

[45] I consider that it was an error to reject this evidence outright. Whilst Monica's reported denial was obviously relevant, on the information it had there was no means by which the BSA could resolve the conflict. TVNZ criticised the BSA for failing to obtain or seeking to obtain any statement from FW or Monica. Mr Akel submitted that if the Authority was not prepared to take steps to obtain this evidence the appropriate course would have been to decline to determine the complaint pursuant to s 11(b) Broadcasting Act 1989, which it had done on previous occasions where there were no means of determining which version of events was more likely to be correct[17]. I do not consider that the BSA had any obligation to require Monica to provide evidence. But I do agree that if it did not do so it was not in a position to determine the issue of accuracy.

[17] This approach was taken by the BSA in *Dujmovic v Canwest* (2004-216) and *Cleave v Television NZ Limited* Decision No. 2007-096 24 January 2008

[46] I note that at a relatively early stage the BSA recognised that it was dealing with a difficult factual dispute and that it might not be possible to make a determination. In its letter 6 November 2006 to TVNZ the BSA requested a copy of the field tape from the hidden camera footage because:

> The Authority considers that, because much of the information provided by TVNZ and the complainant is in direct conflict, it requires further evidence in order to be able to determine the relevant issues.
>
> In particular, there are conflicts about the interaction between the undercover reporter and the women working at 29 Peach Road, and also about what the reporter saw while he was on the premises.

[47] TVNZ was unable to provide a copy of the tape because it had been destroyed. In a subsequent internal BSA memorandum Ms Sophocleous asked Ms Morris "do you still consider that the complaint cannot be determined on the basis of the information currently before the Authority?" and went on to ask whether it would assist determination of the complaint to request affidavits from TVNZ, Mr Wilding and the North Shore City Council and, if not, whether a formal hearing should be held. It is clear that the information that was subsequently obtained did not significantly alter the position as it existed when Ms Sophocleous wrote her memorandum. Indeed, the factual dispute intensified as a result of Mr Aldred's affidavit. It is unclear why the BSA moved from a view that the complaint could not be determined on the basis of the information it had to being able to reach a decision when the further information it had received only added to the areas of dispute.

[48] In the circumstances, there was no means by which the BSA could have resolved the conflict on the information it had. It could have convened a formal hearing. It could have sought evidence from Monica. Or it could have declined to determine the complaint. What it could not do on the basis of the information and evidence that it had was to make a determination that the complaint was justified. I therefore find that the BSA made errors that had a material effect on the outcome.

Fourth issue on appeal – did the use of a hidden camera breach Standard 3 and, if so, did the public interest defence in Privacy Principle (vi) apply?

[49] KW complained that the use of a hidden camera to film at the front door and later inside the house breached Standard 3 of the Code which provides:

> In the preparation and presentation of programmes, broadcasters are responsible for maintaining standards consistent with the privacy of the individual.
>
> Guideline
>
> 3a Broadcasters must comply with the privacy principles developed by the Broadcasting Standards Authority [Appendix 2].

[50] Appendix 2 contains the following relevant Privacy Principles:

> (iii) 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…..
>
> (vi) 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 to privacy.

[51] The BSA held that KW and FW did have an interest in solitude or seclusion that was protected by the Privacy Principle (iii), that TVNZ's use of a hidden camera was an intentional interference with that interest in the nature of prying and that the resultant intrusion would be offensive to an ordinary person.[18] It rejected TVNZ's reliance on the public interest defence in Privacy Principle (vi).

[52] Mr Scott-Howman relied heavily on the decision of the Supreme Court of California in *Shulman v Group W Productions*[19], which was decided in relation to the tort of invasion of privacy identified in The Restatement of the Law, Second Torts (2nd ed) (1977). Notwithstanding the different context he submitted that the principles enunciated in that case had direct relevance to the application of the Privacy Principles in Appendix 2 of the Code.

[53] Mr Akel resisted any such reliance on the ground that the context in which *Schulman* was decided (private tort law) was entirely different from the application of a voluntary code by the BSA whose function is to ensure that broadcasting standards are established and observed[20]. However, in *TV3 Network Services v*

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[18] BSA decision [54] – [58]
[19] 18 CAL.4th 200; 995 P.2d 469 (1 June 1998)
[20] *Radio New Zealand v Ellis*[2006] NZAR 1 at [42]

BSA[21] Eichelbaum CJ accepted the BSA's reliance on US case law in the context of the Broadcasting Standards. The rationale was, in part, the absence of New Zealand authority to assist the BSA, given that the law of privacy was very much in its early stages here. Notwithstanding that there has been some development of the law since that decision, I accept that such reliance is still permissible and that the decision in *Schulman* provides valuable guidance in relation to the application of Privacy Principle (iii). I turn, then, to consider the various aspects of Privacy Principle (iii) and the defence provided for in Privacy Principle (vi).

Did KW and FW have an interest in solitude or seclusion that was protected by Privacy Principle (iii)?

[54] The BSA decided that:

> [55] …Even though KW was not present, hidden camera filming took place inside his private home. Although parts of the home were being used as a business premises, access was restricted and visitors had to be let into the property by one of the owners or employees. The property was not a commercial business where any person could walk in from the street uninvited. The Authority finds that, even when he was not present, KW's interest in solitude or seclusion extended to the inside of his home.
>
> [56] The Authority considers that the reasoning above also applies to FW. In addition, the programme included hidden camera footage of FW opening the front door to her home. The Authority is of the view that she also had an interest in solitude or seclusion in those circumstances.

[55] In relation to the breach of this interest the Court in *Shulman* said that:

> To prove actionable intrusion the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.

[56] One point can be disposed of shortly; the BSA was clearly wrong to conclude that either KW or FW had any interest in solitude. Harrison J considered this point in *Canwest TV Works Limited v XY*[22] and found that inviting the company of a third party is the antithesis of an interest in solitude, which is the state of being alone[23]. The position is the same here. It is simply not possible in the circumstances asserted

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[21] [1995] 2 NZLR 720
[22] HC AK CIV2006-485-002633 22 August 2007 Harrison J
[23] See [40]

by KW, namely of a business being run from the premises that involved the frequent attendance of clients to assert an interest in solitude.

[57] Harrison J applied that statement in *Canwest,* which involved the use of a hidden camera by a model during photographic sessions where the photographer was unaware of the covert filming. One photographic session occurred in the photographer's own bedroom and the other in the bedroom of an apartment said to belong to the model. The Judge referred to the dictionary definition of "seclude", being to "..enclose, confine, or shut off as to prevent access or influence from outside…hide or screen from public view…", with "seclusion" meaning "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"[24]. On the basis of those definitions Harrison J found that the photographer had a reasonable expectation of seclusion in his bedroom, even though it was being used for employment purposes because it was an enclosed area shut off from view and the property was not a commercial business that could be accessed by the general public. He also had a reasonable, albeit lower, expectation of privacy in relation to the second photo shoot, given that the apartment was not available for access by the general public.

[58] Mr Akel submitted that whether the property was being used for beauty therapy or as a brothel, the fact that it was being used for commercial purposes meant that FW and KW did not have an interest in seclusion in respect of the premises. He sought to distinguish *Canwest* on the basis of Harrison J's observation that XY had not been engaged in criminal activity or presented a threat to the models involved.

[59] Mr Scott-Howman responded that the mere fact that premises might be used wholly or partly for business purposes did not preclude a reasonable expectation of privacy and that each case should be considered individually. He acknowledged that there may be parts of a workplace open to the public but said that others, by their nature, necessarily retain a natural expectation of privacy. Further, some activities have a reasonable expectation of privacy by their nature, even though they occur in a workplace, such as a client receiving a massage or consulting a solicitor.

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[24] The New Shorter Oxford English Dictionary 4th ed 1993

[60] I accept Mr Scott-Howman's submission that the use of premises for commercial purposes should not, in itself, determine whether the occupier had a reasonable expectation of privacy. Plainly, a question will arise wherever premises are used for commercial purposes as to whether, and to what extent, the occupiers had a reasonable expectation of seclusion. Each situation should be considered individually and in relation to the relevant time because, even with commercial premises that are open to the public, there may be a reasonable expectation for privacy outside business hours. In terms of the use of premises, the continuum might range from areas to which the public has unrestricted access during business hours such as shopping malls to premises where access is permitted only by appointment. I also accept that there are some activities which, even though commercial, carry a reasonable expectation of privacy such as of a person consulting a doctor or solicitor.

[61] KW's property was used partly for commercial purposes and partly for private purposes. A plan produced by him showed that part of the house was set aside for his and his wife's private living but about half of the house appeared to have been given over to FW's business. Two of the three bedrooms were used for massage and an area, apparently accessed through the kitchen, was designated as a waiting area. There can be no question that, because of the nature of the activity conducted in the massage rooms (whether beauty therapy or other services), there was a reasonable expectation of privacy in relation to those areas by both the staff and the clients of the business. However, the covert filming was not done in these areas so the question is what expectation of privacy existed in relation to the entry and waiting areas.

[62] I start with the question of whether there was an expectation of privacy at the front door. In *TV3 Network Services v BSA*[25] Eichelbaum CJ considered the situation of both filming and recording at private premises. He pointed out that it is not unlawful to photograph someone's private property. As a result there can hardly be any expectation of privacy in terms of what can actually be seen from the street. Therefore any filming of KW opening her door taken from the street would not have been a breach of the privacy.

[25] [1995] 2 NZLR 720 at 732

[63] The position is different however in relation to the covert recording of KW speaking with the reporter at her front door. Under the doctrine of implied licence any member of the public (including a reporter) on lawful business could knock on KW's door and seek to be admitted[26]. However, as Eichelbaum CJ discussed in *TV3 Network Services v BSA*, where a reporter is aware that the occupier would not agree to him or her coming onto the property and being interviewed no such implied licence will exist. It must be inferred that TVNZ knew that if its reporter asked to come in and interview staff for the purposes of a programme about unlicensed brothels entry would have been refused. I therefore consider that, whilst TVNZ was entitled to film the premises from the street, its reporter was not entitled to go onto the property and seek entry knowing, as he must have, that if the true reason for the visit were made known KW would refuse him entry.

[64] That was the position inside the house as well. FW advertised her business in the local newspaper with only a phone number. There was no mention of signage on the street. This meant that prospective clients would have to call to find out the address, unless they had been there before or heard of the business by word of mouth. The general set-up of the business was clearly such that FW and her staff only expected to see clients who had an appointment or, possibly, who knew from a previous visit where to come. Once there, they could only enter the house with FW's consent. The areas used for private and business purposes were in very close proximity; a curtain separated the area immediately inside the front door from the private lounge and the waiting area was accessed from the kitchen.

[65] In these circumstances I find that there was a reasonable expectation of privacy by both KW and FW in relation to the waiting areas inside the house. However, it was not an expectation at the level one might have in relation to premises used solely for private living. The reality was that strangers came to the property frequently. Although they usually had appointments, someone who turned up without an appointment, like TVNZ's reporter, might nevertheless be admitted without difficulty. The entry and waiting areas were not private or shut off. They were areas that might be accessed by both KW (who did not work in the business)

[26] *Robson v Hallett* [1967] 2 QB 939; [1967] 2 All ER 407

and by clients arriving or departing. I would therefore characterise the expectation of privacy as only moderate.

Would the intrusion have been offensive to an ordinary person?

[66] This brings me to the second aspect of the standard, which requires that any intrusion be "offensive to the ordinary person". In *Shulman* the Court identified the following relevant factors in considering this aspect:

> [26] …All the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element. Motivational justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material. Although, as will be discussed more fully later, the First Amendment does not immunise press from liability for torts or crimes committed in an effort to gather news…the 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…
>
> [27] Deciding, therefore, whether a reporter's alleged intrusion into private matters (i.e., physical space, conversation or data) is "offensive" and hence actionable as an invasion of privacy, courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering news. Information gathering techniques that may be highly offensive when done for socially unprotected reasons – for the purposes of harassment, blackmail or prurient curiosity, for example – may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story…
>
> [28] The mere fact the intruder was in pursuit of a "story" does not, however, generally justify an otherwise offensive intrusion; offensiveness depends as well on the particular method of investigation used. At one extreme, "routine…reporting techniques" such as asking questions of people with information ("including those with confidential or restricted information") could rarely, if ever, be deemed an actionable intrusion…At the other extreme, violation of well-established legal areas of physical or sensory privacy – trespass into a home or tapping a personal telephone line, for example – could rarely, if ever, be justified by a reporter's need to get the story. Such acts would be deemed highly offensive even if the information sought was of weighty public concern…
>
> Between these extremes lie difficult cases, many involving the use of photographic and electronic recording equipment. The equipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for news gathering but may also be used in ways that severely threaten personal privacy…[the] law provides no bright line on this question; each case must be taken on its facts.

[67] On the basis of *Shulman*, the factors to be considered include both the means of the intrusion and the motive for it. But before I consider the application of these statements to the present case, I note that the formulation of the offensiveness element in the tort of intrusion discussed in *Schulman* was different to the formulation used in Privacy Principle (iii). The formulation of the tort being considered in *Schulman* required that the intrusion be "…highly offensive to a reasonable person". This is similar to Privacy Principle (i) which requires the public disclosure of private facts to be "highly offensive and objectionable to a reasonable person of ordinary sensibilities" and to Privacy Principle (ii) which requires the public disclosure of public facts to be "highly offensive to a reasonable person". In comparison, the requirement in Privacy Principle (iii) requires only that the intrusion be "offensive to the ordinary person".

[68] These differences appear not to have been considered previously. I consider that the formulation used in Privacy Principle (iii) creates a lower threshold that that created by Privacy Principles (i) and (ii). "Offensive" may convey varying degrees of seriousness; ranging from "hurtful, harmful, injurious" to "displeasing, annoying, insulting"[27]. Since any intrusion in the nature of prying will be inherently displeasing or annoying, the only meaningful construction that I can give to "offensive" in the context of the Code is the more serious one of being "hurtful, harmful, injurious". "Ordinary" in relation to people means "average, without exceptional knowledge or experience". In contrast, "reasonable" means "having sound judgment, sensible". One would therefore expect that an "ordinary" person may be more easily hurt than a "reasonable" one, who might be expected to exhibit a degree of analysis and judgment of the conduct in question.

[69] There are no relevant judicial meanings that would detract from these definitions. I therefore proceed on the basis that Privacy Principle (iii) requires only that an ordinary person in the position of the complainant would suffer hurt, harm or injury as a result of the intrusion. The reason for the difference is readily explicable by the distinction discussed in *Shulman* between the broadcasting of material already in the hands of the broadcaster and the actual gathering of material through intrusive means, the latter to be viewed much more seriously.

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[27] Shorter Oxford English Dictionary 5th ed

[70] Looking at the circumstances relevant to the issue of offensiveness I note that in *Canwest* Harrison J took into account both the broadcaster's motive and also the fact that the photographer was not alleged to have been acting unlawfully, inappropriately or dishonestly. The present case has a number of distinguishing features from *Canwest*. In terms of motive, it is relevant that the story being investigated had genuine newsworthiness. It was dealing with an issue that was not only of legitimate concern to the general public but was also the subject of attention by the North Shore City Council as a possible breach of its by-laws. The weight to be given to the motive of the broadcaster in this case is therefore significantly greater than the motive attributed to the broadcaster in *Canwest*, where there was no illegal activity alleged and the issue did not have the same level of public interest as that being tackled in the present case.

[71] Secondly, TVNZ was acting on the basis of a source which it claimed to be reliable and only undertook the covert filming once it had established through the earlier undercover reporter that "extras" were available. So the covert filming could not be described as a mere fishing expedition in the hope that something worth of reporting would turn up. I also take into account that there was no effort made to record any activity but only discussion.

[72] As against these factors is the fact that covert filming is an unquestionably intrusive method of gathering information. On the *Schulman* approach it is not to be regarded as the most intrusive method compared, for example, with telephone interception but it is to viewed with caution because of the threat it poses to personal privacy. However, balancing the intrusion against the moderate expectation of privacy, genuine motive, initial reconnaissance without use of a camera and the fact that without such footage the usefulness of any report would be limited because any conversation could easily be denied, I consider that an ordinary person would not regard the use of a hidden camera in this case as offensive. The BSA was therefore wrong to find that TVNZ had breached Privacy Principle (iii).

The public interest defence in Privacy Principle (vi)

[73] Given my conclusion above it is, strictly, unnecessary to discuss the "public interest" defence provided for in Privacy Principle (vi). However, I do so, for the

sake of completeness because TVNZ asserts an error by the BSA in its approach it took.

[74] Privacy Principle (vi) provides:

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

[75] The issue in relation to the public interest defence in this case is whether its application should be determined by reference only to the footage taken or to the programme as a whole. In rejecting the defence in this case the BSA adopted the former approach:

> [63] On this occasion, the footage of FW simply showed her opening the door to her property. The footage did not amount to evidence of her being a prostitute or running a brothel. Accordingly, the Authority concludes that there is no legitimate concern in broadcasting that hidden camera footage in breach of her privacy. Similarly, the other footage filmed inside the home did not disclose anything of legitimate concern to the public. The segment involving Monica did not provide any evidence that she was providing sexual services for payment.

[76] This is the same approach that Harrison J took in *Canwest*, where he considered that "the matter" which was to be the subject of the public interest defence related to the factual situation giving rise to the claim for privacy rather than the programme as a whole i.e. one would consider only the hidden camera footage that was used and decide whether that alone attracted the public interest defence.

[77] Mr Akel submitted that this approach was wrong and that the defence should be considered in the context of the programme as a whole because the words "discussing the matter" has a wider ambit than merely showing hidden camera footage and the hidden camera footage was part of the discussion about unlicenced suburban brothels not separate from it. Mr Akel submitted the approach suggested by Allan J in *obiter* comments in *Andrews v Television New Zealand Limited*[28] was to be preferred. That case involved an unsuccessful claim in tort for invasion of privacy resulting from the filming of a car accident scene in which the plaintiffs had been injured. Allan J viewed the issue of public interest in relation to the filming in a broad sense in the context of the programme generally, noting that:

[28] HC AK CIV2004-404-003536 15 December 2006

> The Court will ordinarily permit a degree of journalistic latitude, so as to avoid robbing a story of its attendant detail, which adds colour and conviction.

[78] Mr Scott-Howman, however, contended for the approach taken in *Canwest* of considering the public interest defence only by reference to the specific footage correct. He submitted that the approach in *Andrews* should not be applied so as to lead to a conclusion that where a programme generally has a legitimate public interest objective, the broadcaster should thereby be free to pursue any footage as a means to that end.

[79] I agree that the public interest defence cannot be applied on the basis that the ends justify the means. Any defence to such inherently intrusive conduct should be construed strictly, so as not to support or encourage it more than necessary. This means that a programme that explores a matter of genuine public interest should not, by virtue of that fact alone, be permitted to broadcast material obtained through a breach of the Privacy Principles. Although the significance of the footage can be determined by reference to its context, the actual footage must contain something that it is in the public interest to know in that context.

[80] The programme did raise issues of public interest. TVNZ was asserting that KW's property was being used as an unlicenced brothel in contravention of the local by-laws. If the premises were being used as a brothel that would have raised issues of public health and safety and potentially harmful effects on the local community. I consider that it would have been in the public interest to show where the premises were, who the operator was and who was working there. However, as I have already concluded that there was insufficient information to enable the BSA to form a view on that issue, I need not go further.

Fifth issue – was the BSA plainly wrong in the penalty it imposed?

[81] Having upheld KW's complaint the BSA made various orders pursuant to ss 13 and 16 Broadcasting Act 1989. These orders required TVNZ to:

a) Broadcast a statement within a month of the BSA's decision that contained a comprehensive summary of those aspects of the decision that upheld the complaint;

b) Pay $1,000 to KW and $1,500 to FW by way of compensation for the breaches of privacy;

c) Pay costs to KW of $1,152.50 and costs to the Crown of $3,000.

[82] Mr Akel submitted that the penalty imposed by these orders was punitive and would inhibit broadcasters from investigating and reporting on hard stories. He pointed out the difficulties facing broadcasters in obtaining direct evidence; there is no procedure by which they can compel people to give evidence, resources are limited and a broadcast story cannot go into the same detail as a print report. In summary, he suggested that the penalty imposed would create a chill effect on the media in carrying out its function of investigating and exposing wrongdoing in society and, in particular, the cost award to the Crown is tantamount to a fine.

[83] Mr Akel suggested that, even allowing for the BSA's finding that Standard 3 had been breached in relation to the accuracy of the report, it should have taken into account the fact that TVNZ clearly had good reason to believe that sexual services were being provided and that fact should have been viewed as a mitigating factor in terms of penalty. Mr Akel also submitted that the BSA made an error in failing to consider the issue of penalty in terms of s 14 BORA.

[84] Had the complaint been justified, however, I consider that the penalties imposed were not so high as to be regarded as punitive or having a chilling effect on the operations of a major broadcaster. The allegations being made about KW and his wife in this programme were most serious and the compensation and costs awarded well below the maximum possible.

Judicial review application

[85] TVNZ also applies for judicial review of the BSA's decision. Under s 10(2) the BSA is required to consider every complaint referred to it with as little formality and technicality as is permitted by, among other things, a proper consideration of the complaint and the principles of natural justice. TVNZ raises two grounds. First, a breach of natural justice by the BSA in failing to advise it of its discussions with Mr Robertson. Secondly, TVNZ asserts that the BSA failed to properly consider the

complaint because it did not take into account the information provided by Mr Robertson.

Breach of natural justice

[86] What is required to satisfy the principles of natural justice will not be the same in every case, as Tucker LJ explained in *Russell v Duke of Norfolk*[29]:

> There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

[87] Randerson and Miller JJ recognised this principle in *Radio New Zealand v Ellis*[30], where the broadcaster contended that there had been a breach of natural justice in the BSA failing to give notice of its intention to require the broadcaster to make an apology. They considered that the principles of natural justice do not, as a general rule, require the BSA to give notice of sanctions that it may be considering; the question in any given case was whether circumstances were such that the broadcaster should have been put on notice and whether the BSA did enough to put it on notice.

[88] In this case the question is whether the principles of natural justice required the BSA to notify TVNZ that it had made inquiries of Mr Robertson and decided against obtaining evidence from him. Mr Akel submitted that the requirements in this case were those expected of a commission of inquiry because s 12 Broadcasting Act 1989 confers on the BSA some of the powers enjoyed by commissions of inquiry under the Commissions of Inquiry Act 1908 (to require evidence, summons witnesses and inspect documents) and that when Mr Sneyd contacted Mr Robertson it was exercising its powers as a commission of inquiry.

[89] Mr Scott-Howman submitted, in response, that the inquiries of Mr Robertson were not made in the exercise of those powers but were merely a decision-making process preceding the decision whether to exercise the powers of a commission of inquiry and because the BSA decided not to require evidence from Mr Robertson it

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[29] [1949] 1 All ER 109 at 118, applied in *Peters v Collinge* [1993] 2 NZLR 554 at 566
[30] [2006] NZAR 1, 11

never actually exercised those powers. As a result, there was no information obtained pursuant to those powers about which the BSA was required to put TVNZ on notice. I do not accept this; it is clear from the wording of s 12 that the BSA has the powers conferred by s 12 from the outset of any consideration into a complaint and that they apply "as if the Authority's consideration of the complaint were an inquiry for the purposes of the Commissions of Inquiry Act 1908".

[90] The requirements of natural justice are to be identified in the context of a tribunal having those powers. Mr Akel submitted that the requirements of natural justice were those relevant to the exercise of an investigative jurisdiction as described by the Privy Council in *Re Erebus Royal Commission*[31]:

> The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the enquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
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> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.
>
> The second rule requires that any person represented at the enquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce material of probative value which, had it been placed before the decision maker, *might* have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.

[91] However, even accepting that the BSA should be treated as exercising an investigative jurisdiction of the kind being discussed in *Re Erebus Royal Commission*, the requirements in this case need to be considered in the context of the nature and function of the BSA. The functions of the BSA (identified in s 21) relate primarily to the determination of complaints and the development and observance of codes of broadcasting practice. It can impose penalties on a broadcaster but the

[31] [1983] NZLR 662 at 671

penalties are modest, namely requiring the broadcaster to make a statement, refrain from broadcasting for up to 24 hours, reconsider the complaint or pay a fine not exceeding $5,000. The BSA's function is not to determine private disputes between parties and its decisions do not preclude other action being taken by affected parties such as actions for defamation. Its decisions are unlikely to have any permanent effect on the broadcaster and there is a right of appeal. Not only is it clear from s 10 that the process of determining complaints is intended to be relatively informal, the BSA can decline to determine a complaint.

[92] I consider that, rather than falling within the scope of the second rule articulated in *Re Erebus Royal Commission*, as Mr Akel contends, this case is better viewed as similar to *Kioa & Ors v Minister for Immigration Ethnic Affairs*[32], on which Mr Scott-Howman relied. The High Court of Australia held that the right to be notified of matters that might be relevant to the tribunal's decision was not absolute. Having recognised the need for a person whose interests were likely to be affected by the exercise of the power to be given an opportunity to deal with relevant matters adverse to his interests that might be taken into account Brennan J observed, however, that:

> The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision making is not to be clogged by enquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made.

[93] The BSA was required to notify the parties of information that it intended to take into account in making its decision and it did so. However, to require it to notify of the inquiries it had made but did not intend to take into account would go beyond what is required by the principles of natural justice.

[94] TVNZ knew from the outset that an adverse finding against it was possible. It was given more than one opportunity to provide information and evidence that might persuade the BSA that such a finding should not be made. The BSA's failure to notify did not relate to any piece of adverse information. To the contrary, any

[32] (1985) 62 ALR 321 at 380 (Brennan J)

information that Mr Robertson held tended to support TVNZ's position rather than detract from it. Further, TVNZ had actually spoken to Mr Robertson (he was referred to in the programme) and not taken any steps to obtain information from him to put before the BSA. In these circumstances, there is no basis on which to assert a breach of natural justice by the BSA in not telling TVNZ that it had spoken to Mr Robertson but did not consider the information he had provided to be useful.

Failing to properly consider the complaint

[95] The second ground for judicial review is that the BSA failed to properly consider the complaint. TVNZ asserts three particular failings (either individually or cumulatively), namely not properly considering:

a) What Mr Robertson told Mr Sneyd and the further evidence that he could provide;

b) The evidence provided by TVNZ to support its claim that the premises were being used as a brothel;

c) Section 14 BORA.

[96] It is apparent that this ground raises issues identical to those raised on the appeal. I have already found on the appeal that the BSA did err in not properly considering the information provided by Mr Robertson, the evidence of the reporter that "extras" were offered and the affidavit evidence of Mr Aldred. Proper consideration of this evidence did not necessarily mean that the BSA would have accepted TVNZ's assertions. However, it should have led the BSA to consider whether it was possible to actually determine the complaint either at all or without a formal hearing. I am therefore satisfied that the outcome would have been different.

[97] I turn, then, to Mr Akel's submission that where civil or political rights are involved the Court has greater scope on judicial review to take a "hard look" at the tribunal's decision[33] and in the context of this case that meant that, whilst acknowledging the inherent limitation that the Broadcasting Code imposes on the s 14 BORA right of freedom of expression, the approach must nevertheless be as

[33] *Pharmac v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58,66

consistent with or the least possible interference with that right. However, I agree with Miller J's observation in *Television New Zealand Ltd v BA* [34] that a "hard look" approach is unlikely to attract a degree of scrutiny more searching than the "plainly wrong" formula in *May v May*[35], being the approach adopted for the purposes of the appeal.

[98] For the reasons I have already identified in relation to the appeal, whilst I accept that the Broadcasting Code is to be interpreted consistently with BORA, that does not meant that Standard 5 will be satisfied merely by the broadcaster making reasonable efforts to ensure the accuracy of its assertions. The Standard requires accuracy in an objective sense and that requirement is not an unreasonable limitation on the s 14 BORA right of freedom of expression.

Conclusion

[99] In relation to TVNZ's appeal I have found that:

a) Standard 5 required TVNZ's assertions to be objectively correct.

b) TVNZ did not bear the onus of proving that the assertions it made were accurate. The Broadcasting Act 1989 does not impose an onus of proof on either the broadcaster or the complainant. It is for the BSA to determine the complaint, if it can, on the basis of the information that is either provided to it or which it obtains itself.

c) On the basis of the information that the BSA had it was not possible for it to resolve the factual conflicts that were necessary to determine whether the complaint was justified. It therefore erred in reaching the conclusion that the complaint was justified.

d) The use of the hidden camera, although intrusive, was not a breach of Standard 3 because, balancing all the circumstances surrounding the covert filming, I do not consider that an ordinary person would have regarded it as offensive.

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[34] High Court Wellington CIV 2004-485-1299 13 December 2004 Miller J
[35] (1982) 1 NZFLR 165 (CA) at 169-170

e) The public interest defence in Privacy Principle (vi) is to be considered by reference to the actual footage itself rather than the programme as a whole in the sense that the footage itself must contain something that it is in the public interest to know, however, the significance of the footage may be determined by reference to the subject matter of the programme.

[100] In relation to the judicial review application I have found that:

a) There was no breach of the principles of natural justice in the BSA failing to notify TVNZ of its inquiries with Mr Robertson and its decision not to obtain evidence from him.

b) The BSA did fail to properly consider the complaint because it did not consider the information provided by Mr Robertson, the evidence of the reporter and the affidavit evidence of Mr Aldred. This is effectively the same issue as arose on the appeal.

[101] It follows from these conclusions that both the appeal and the judicial review application succeed.

[102] It would also follow from my conclusions that the orders for costs and compensation made by the BSA should be set aside. I make an order now that the order for costs in favour of the Crown be set aside. However, I do not yet make any orders in relation to payments that may already have been made to KW and FW. I am concerned that issues may arise relating to the receipt of that money in good faith. I invite counsel to make any submissions on that issue when they file memoranda as to costs, which they may do in support of any application by 20 February 2009 and in response fourteen days after that with memoranda in reply a further seven days after that.

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P Courtney J