IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 334/97

BETWEEN **TV3 NETWORK SERVICES LTD**

Appellant

AND **CRIMINAL BAR ASSOCIATION OF NEW ZEALAND INCORPORATED**

Respondent

Hearing 18 October 1999

Counsel No appearance for the Appellant
No appearance for the Respondent
Mr A Scott-Howman for the Broadcasting Standards Authority

Judgment 20 OCT 1999

JUDGMENT OF GODDARD J

Solicitors
Grove Darlow & Partners, Auckland, for Appellant
Chris Reid, Auckland, for Respondent
Bell Gully Buddle Weir, Auckland, for the Broadcasting Standards Authority

This is an application by the Broadcasting Standards Authority ("the Authority") pursuant to Rule 718B(2) of the High Court Rules to dismiss an appeal from its decision delivered on 25 September 1997. The decision related to a complaint about an item broadcast by the appellant in June 1997 The Authority upheld the complaint and also ordered the appellant to pay costs to the Crown in the sum of $500 The appellant subsequently filed an appeal against the Authority's decision on 6 October 1997 Since that time the appellant has taken no steps whatsoever to prosecute its appeal Accordingly the Authority has applied to the Court for dismissal of the appeal on the grounds of failure to prosecute with due diligence and by reference to the basis of the principles and scheme of the Broadcasting Act 1989

The Facts

On 10 June 1997 the President of the Criminal Bar Association of New Zealand referred a complaint to the Authority alleging breach of privacy in respect of an item broadcast by TV3 Network Services Limited on "3 National News"

Specifically, the complaint related to the use of an interview recorded with the solicitor acting for Tukuroirangi Morgan, MP Part way through the recorded interview the solicitor told the broadcaster that his comments were "confidential" Notwithstanding that advice, the whole of the interview, including the "confidential" comments, was broadcast on "3 National News"

Consistent with practice, the Authority received and considered written submissions from the complainant which it then forwarded to the appellant seeking comment Submissions were received in response from the appellant and the Authority then sought and received further written submissions from each party

The Authority issued its written decision on 25 September 1997 It upheld the respondent's complaint that the broadcaster had breached the requirement to deal justly and fairly with a person referred to in its programme Pursuant to s 16(4) of the Broadcasting Act 1989 ("the Act") it also ordered the appellant to pay costs to the Crown in the sum of $500.

The appellant then filed an appeal dated 6 October 1997 In the appeal it alleged in broad terms, that the Authority had erred in fact and law

On 13 October 1997 the Authority filed a Notice of Intention to appear and be heard on the appeal As a consequence, the Authority was thereafter served with all documents filed. So far as it is aware, there have been no communications between the parties nor any documents filed and served since the original appeal was filed in October 1997

Appeals from Decisions of the Authority

Complaints to the Authority are pursuant to Part II of the Act Section 18 of the Act allows a dissatisfied broadcaster or complainant to appeal to the High Court against a decision of the Authority Appeals are brought pursuant to Part X of the High Court Rules

Rule 703 requires an appellant to file a notice of appeal and serve a copy on the appropriate officer of the Tribunal from which an appeal is sought Rule 708 requires the appellant, either before or immediately after such filing and service, to serve a copy of the notice of appeal on every other party interested in the decision given.

Rule 710 provides that the bringing of an appeal shall not operate as a stay of the decision against which the appeal is brought unless the presiding Court or Tribunal so orders This provision does not, however, apply to appeals from decisions of the Authority Section 18(6) of the Act provides that the operation of a decision or order of the Authority appealed against is suspended until the final determination of the appeal

Authority May Apply for Dismissal

The Authority brings this application pursuant to Rule 718B(2) of the High Court Rules, which provides for a party or tribunal whose decision is appealed from to make application to dismiss that appeal if the appellant does not prosecute it with due diligence Expressly, Rule 718B(2) provides

> (2) If the appellant does not prosecute the appeal with due diligence, the Court may, on the application of any other party or of the tribunal or person whose decision is appeal from, dismiss the appeal

Although the application of Rule 718B(2) has been infrequently considered by the Court, three authorities proved relevant assistance

The first is *Lake Rotoaira Trust Board v Valuer-General* [1976] 2 NZLR 556 That case concerned an appeal from a decision of the Land Valuation Committee relating to the valuation of the bed of Lake Rotoaira. The decision was issued on 22 September 1972 and an appeal filed (with leave) on 14 November 1972 Effectively, nothing occurred to progress the appeal until the end of 1975, at which time the respondent's solicitor refused to sign a "ready list" letter The Land Valuation Committee brought an application to dismiss the appeal pursuant to Rule 40(2) of the Supreme Court (Administrative Division) Rules 1969 (which provision is virtually identical to Rule 718B(2) of the High Court Rules).

Referring to the facts, Barker J found that no prejudice had arisen either to the Land Valuation Committee or to the respondent as a result of the delay and refused the application for dismissal At 561 he considered the possible circumstances in which an application by a tribunal to dismiss an appeal would be allowed, as follows·

> I think some clue as to the likely occasions for the exercise of the court's power is to be found from a perusal of the various pieces of legislation which confer jurisdiction on this division One can postulate occasions when a tribunal, charged with some greater responsibility in a general field, could be inhibited in the proper exercise of its function by the existence of an unheard appeal. To take merely one example, the Local Government Commission, the functions of which are set out in the Local Government Act 1974 section 23 confers a right of appeal to this division of the court on a point of law against any determination or decision of the Commission Without going into detail, it is possible to envisage a situation where a scheme for reorganisation of local government over a large region is completely at a standstill because of the existence of a perhaps minor appeal on a question of law

The second decision is *Portage Licensing Trust v Auckland District Licensing Agency* (High Court, Auckland, HC79/96, 29/8/96, Elias J) In that case, the appellant sought to appeal from a decision of the Liquor Licensing Authority dated 13 December 1995 The appeal, the effect of which was to stay the Authority's decision, was filed on 18 December 1995. No steps were taken to progress the appeal until June 1996, at which time production of documents was sought. Three of the respondents brought an application to dismiss the appeal pursuant to s 143 of the Sale of Liquor Act 1989, which provision has similar effect to Rule 718B(2)

Elias J found the appeal raised an important point of law, with implications going beyond the subject proceeding She was satisfied that s 143 should be construed consistently with comparable provisions in other legislation and under the High Court Rules She referred to the principles governing the exercise of the Court's discretion in relation to delay and cited relevant authorities in particular, *Cheng v Trustees of the Monckton Charitable Trust* (High Court, Hamilton, AP17/95, 21/12/95, Hammond J), *Heyford v Christchurch District Licensing* (High Court, Christchurch, AP201/92, 3 December 1993, Holland J), *Porirua Licensing Trust v Lindale International Distillery* [1996] NZAR 261 At page 8 of the judgment, she summarised the principles succinctly, thus

> The court will consider whether the delay is inordinate and inexcusable and whether the other parties are likely to be prejudiced by the delay To that I would add, accepting the submission in respect of Mr Langton, that the question of prejudice is also to be assessed in terms of the objectives of the legislation

On the facts in the subject case however Elias J found that the delay of four months had not caused prejudice to any of the respondents Further, that neither the delay nor the issue were sufficiently significant to have undermined the system of licensing generally

The third relevant decision is *Saunders v The Far North District Council and Barry & Others* (High Court, Whangarei, AP8/93, 18/12/96, Master Gambrill) In that case the second respondents sought to dismiss an appeal brought (purportedly) pursuant to s 71 of the District Courts Act 1947 against a judgment of the District Court dated 23 December 1992 (which, in turn, was a decision on an appeal from a decision of the Far North District Council under the Local Government Act 1974) The grounds advanced were inordinate and inexcusable delay resulting in prejudice to the respondents The appellants had filed their notice of appeal on 5 March 1993 but they effectively took no steps until late 1996

The case was complicated by the fact that new legislation required a de novo hearing before a new Council (and new Water Authority) and thus effectively rendered the decision of the Far North District Council of negligible effect

Based on the particular facts, Master Gambrill found the interests of justice would be best served by dismissing the appeal, given there had been no move to prosecute it and because the jurisdictional basis was doubtful

Relevant Test for the Court

The Authority submitted, on the basis of the above authorities, that the Court should generally apply the principles of strike out when considering an application under Rule 718B, having due regard to the following three matters and in light of the context of the Act in question

a) whether there has been inordinate delay,

b) whether such delay is inexcusable,

c) whether delay is such that it has, or will cause prejudice either to parties to the appeal or to the tribunal from which appeal is sought

The Broadcasting Act

The Act in this case provides for the prompt determination of complaints with strict timeframes for consideration of complaints prescribed Complaints about programme standards are required, in the first instance, to be referred to a broadcaster within 20 working days following the date of the broadcast The broadcaster must then issue a decision on a complaint referred to it within 20 working days of receipt (although that time may be extended in certain circumstances) A complainant dissatisfied with a broadcaster's decision may then refer the complaint to the Authority within 20 working days of receiving notice of the broadcaster's decision Complaints about breach of privacy standard must be made directly to the Authority within 20 working days of the broadcast

The complaints procedure which the Authority itself adopts was detailed in an affidavit signed and filed by the Complaints Manager of the Authority, Ms Phillipa Ballard It is clear from Ms Ballard's affidavit that the Authority regards promptness in dealing with complaints referred to it as an integral part of its function For that reason, it has adopted

internal policy procedures ensuring the prompt disposition of all matters In the normal course of events written submissions will be received and the matter considered by the members of the Authority within six weeks of referral

The tight nature of timeframes for considering and disposing of complaints prescribed by the Act clearly contemplates that complaints should be determined expeditiously Therefore, any unreasonable or unjustified delay in consideration of a complaint or imposition of an order following a decision by the Authority will inevitably frustrate this statutory requirement

Of further relevance is s 15 of the Act, which requires the Authority to give public notice of its decisions An important feature of the complaints process is the requirement for the Authority's determinations to be made available to the public The Authority correctly submitted that this provision serves to emphasise the public interest in its complaints procedure and in the disposition of complaints The statutory scheme and the public interest in the complaints procedure was recently considered by Gendall J in *TV3 Network Services v Broadcasting Standards Authority & Others* (High Court, Wellington, CP91/99, 30/7/99) At page 20 of his decision Gendall J said

> There may be a legitimate public interest in the exposure of misconduct or breach of broadcasting standards on the part of TV3, or on the other side of the coin the vindication of it The public interest aspect is clearly emphasised in the functions of the Authority, given the scheme of the Act which provides for a tight timetable for commencement of resolution of complaints and a statutory requirement that the determination of the Authority be published This is not only so that the public can see that standards are being upheld and enforced, but to deter others should there be a similar breach of standards Deferral of publication on an indefinite basis until defamation proceedings are taken and a trial completed will be a substantial prejudicial barrier to the intent and scheme of the statutory provisions
>
> It must be borne in mind that the Broadcasting Act 1989 is the only statutory basis on which any television broadcaster may operate But for the provisions of the Act it cannot broadcast The broadcaster may lawfully transmit or publish a television programme only in compliance with the Act, which includes compliance with the complaints procedures and submission to the jurisdiction of the Broadcasting Standards Authority (subject to a right of appeal to the High Court) The statutory process clearly envisages that a complainant can have a complaint dealt with quickly and a decision of the Authority transmitted, together with an appropriate statement, quickly

It is clear then that the statutory scheme of the act and the public interest in the complaints procedure require the Court to weigh the following factors in considering the Authority's application for dismissal:

a) the requirement for complaints pursuant to the Act to be made within strict timeframes,

b) the fact that the Authority imposes upon itself strict standards to ensure the swift determination of complaints,

c) the legitimate public interest in receiving decisions of the Authority within a short time following the broadcast about which complaint is made

The expectation that complaints referred to the Authority will be considered swiftly and a decision issued promptly is frustrated if an appeal languishes unprosecuted This is because an appeal under the Act operates as a stay pursuant to s 18(6) Where a situation of lengthy stay arises, it is axiomatic that the memories which viewers and listeners have of the programme under complaint will fade It is not unduly cynical to suspect that this outcome may have been the very goal behind the unprosecuted appeal in this case and in similar cases To use a right of appeal as a matter of tactics only diminishes the effectiveness of the Authority's orders (particularly those requiring publication of corrective statements) and they inevitably become increasingly irrelevant I therefore accept the Authority's submission that failure to prosecute an appeal under the Act is contrary to the very public interest which the Act seeks to protect

Delay in the Present Case

Applying the relevant test to the facts in the present case, I am satisfied that there has been an inexcusable delay which is inordinate and has resulted in prejudice to the complainant, to the Authority and to the public interest

The appellant filed this appeal more than two years ago It has not taken any step in prosecuting the appeal nor even so much as made a communication in relation to it since then In all the circumstances, the delay is inordinate and on the facts inexcusable Indeed, no appearance was even entered at the hearing of this application to offer an explanation No credible excuse therefore presents to justify the delay of over two years The only inference to be drawn is that the appellant has deliberately used its right of appeal as a tactical measure to incur delay and for no other reason If the appellant's inaction is so deliberate, it can only have been for the purpose of depriving the respondent of the benefits of due process and amounts to an abuse of process Of further significance supporting that inference is the fact that appeals under the Act are essentially pro forma and no difficult procedural issues arise

The resultant prejudice caused by the appellant's delay has already been detailed under the previous head and does not require repeating I am satisfied that it is palpable however and contrary to the public interest because it affects the public' right to freely seek, receive and impart information Legitimate public interest in the maintenance of programme standards and in knowledge of decisions issued by the Authority, is a part of that right to freedom of information

Judgment

The application is granted and the appeal is dismissed The appellant is ordered to pay the sum of $750 towards the Authority's costs in bringing this application