

**IN THE DISTRICT COURT
AT AUCKLAND**

CRI-2007-004-504409

MINISTRY FOR CULTURE AND HERITAGE
Informant

v

TVWORKS LIMITED
Defendant

Hearing: 10 June 2009

Appearances: Mr M Woolford and Mr R A McCoubrey for the Informant
Mr M Heron and Mr R Autogavaia for the Defendant

Judgment: 2 July 2009

RESERVED JUDGMENT OF JUDGE A A SINCLAIR
[on sentencing]

[1] In a reserved judgment dated 23 April 2009, the defendant, TVWorks Limited, being the broadcaster TV3, was convicted of three charges under s 81 of the Broadcasting Act 1989 ("the Act") of broadcasting advertising programmes on television during the hours between 6 am and noon on three consecutive Sundays being 7 October 2007, 14 October 2007 and 21 October 2007. These dates were the quarterfinals, semi-finals and finals of the Rugby World Cup. The defendant is liable to a fine not exceeding \$100,000 on each charge.

PURPOSES AND PRINCIPLES OF SENTENCING

[2] Section 7 of the Sentencing Act 2002 sets out the purposes of sentencing. In this case, the prime purposes are to denounce the conduct of the defendant and to deter it and others from committing the same or similar offence (s 7(1)(e) and (f) of the Sentencing Act 2002). With regard to deterrence, it is accepted that circumstances such as major overseas sporting events that may provide an incentive for a broadcaster to breach or circumvent the law would arise only rarely.

[3] Section 8 of the Sentencing Act 2002 sets out the principles of sentencing. Of those principles, s 8(a)-(d) are of particular relevance. These principles are as follows:

- “In sentencing or otherwise, dealing with an offender, the Court –
- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
 - (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
 - (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
 - (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offending make that inappropriate.”

[4] Section 9 of the Sentencing Act 2002 sets out aggravating and mitigating factors to be taken into account to the extent that they are appropriate. The informant submits that the only aggravating factor applicable is s 9(1)(i) being that of premeditation on the part of the offender. The informant submits that none of the mitigating factors set out in s 9(2) appears to be applicable.

[5] In its submissions, the defendant refers to a number of mitigating factors, which I will return to consider in detail.

INFORMANT'S SUBMISSIONS

(a) Gravity of offending

[6] The informant submitted that this offending was significant and attracted media attention at the time. The Rugby World Cup is held only every four years and the television audience in New Zealand is substantial, especially for the quarterfinals, semi-finals and finals. The defendant purchased the broadcasting rights for millions of dollars and significant income was derived from the offending advertisements.

[7] Furthermore, charges could have brought against the defendant for each of the advertisements screened on the three Sundays in question which would have exposed it to the possibility of a much greater maximum penalty than \$300,000.

(b) Culpability of Defendant

[8] The defendant had breached s81 of the Act once previously. That earlier breach had occurred in relation to the C4 station, which broadcast advertising interspersed with music videos on Sunday, 9 January 2005. On that occasion the informant investigated the matter and it was found that there had been an unintentional breach of the section. No further action was taken. It is accepted that this breach is of no particular significance in relation to the current offending and accordingly, no weight is put on it for sentencing purposes.

[9] The defendant was on notice prior to the broadcast of the advertisements that the informant considered the proposed broadcast to be in breach of s 81 of the Act. In a letter written to the defendant on 31 August 2007 (that is five weeks prior to the first broadcast on 7 October 2007), the informant stated:

“The advice I have received, based on the information you have provided is that TV3’s proposed broadcast is unlawful in terms of s 81 of the Broadcasting Act 1989. Given the economic significance to TV3 and the potential penalties (which may be up to \$100,000 for each advertisement) as well as the interest that this issue has generated in the media, I am writing

formally to invite you, on behalf of TV3, to consider the possibility of obtaining a declaratory judgment from the High Court as to the lawfulness of the proposed broadcast. I understand that the High Court may not be prepared to deal with this matter but an urgent declaration may resolve this issue before there are any broadcasts on Sunday morning.

If TV3 does not obtain a declaratory judgment holding that the proposed broadcast is lawful, I put you on notice that prosecution would be a real option and this correspondence may be put before the Court as a relevant factor for sentencing.”

[10] The defendant’s legal counsel replied to the informant on 5 September 2007 declining the invitation to seek a declaratory judgment, stating:

“Thank you for your letter of 31 August 2007. We appreciate your concern and note your invitation to consider making an application for a declaratory judgment.

In the circumstances, our legal opinion, which we accept differs from yours, is that our plans to broadcast coverage of the RWC do not contravene the provisions of the Act.

We have considered your letter but with respect, do not consider it necessary to ask the Court to take time to deal with a hypothetical situation and make a ruling on what the words of the section mean. The provisions of s 81 will require the Court dealing with any prosecution to consider the actual circumstances of the broadcast – no Court sitting in declaratory mode could make that assessment when the broadcast has not yet occurred.”

[11] The informant contended that it was up to the defendant to produce some credible evidence of the defendant’s belief in the lawfulness of its actions. In *Adams on Sentencing* it is noted at SA24.07subsection 2(c):

“In relation to a mitigating fact (one that may justify a lesser penalty than would otherwise be appropriate) relating to the offence, or the offender’s part in the offence, the offender has an evidential burden to put the fact in issue by pointing to some credible evidence to support it. The burden is then on the prosecution to disprove that fact beyond reasonable doubt”

[12] In this case the informant submitted such credible evidence would be the legal opinion referred to in the defendant’s letter of 5 September 2007. If the opinion is categorical that the proposed broadcast did not contravene s81 of the Act then that

would be credible evidence of the defendant's belief in the lawfulness of its actions and the informant would not be in a position to disprove it. The informant accepted that this would then be a substantial mitigating factor.

DEFENDANT'S SUBMISSIONS

(a) Gravity of offending

[13] The defendant submitted that its actions could not be seen as being at the serious end of the spectrum. The offending was committed only on three days. The broadcast consisted of standard commercial advertising shown during a sporting event of national significance, which was played once every four years.

(b) Mitigating factors

[14] The defendant submitted there were a number of mitigating factors which I summarise as follows: Apart from the unintentional breach in 2005, the defendant had not previously offended during the 20-year period it has been broadcasting. In terms of the hearing, it had co-operated fully with the informant so that the hearing could be focussed simply on the interpretation of s 81(5)(c) of the Act.

[15] The defendant was cognisant of the prohibition and made it clear at all times that it intended to comply with the Act. The defendant had initially lobbied the Minister to change the law and hoped that would occur. When a law change did not eventuate, the defendant then relied upon the exemption contained in s 81(5).

[16] The defendant informed the Ministry of its plans for broadcasting on Sunday morning, despite there being no requirement to do so. There was no precedent authority. In correspondence with the informant from May 2007, the defendant explained its intention to rely upon s 81(5) and in general terms, how it would do this. The informant's request for detailed documentation on 7 and 8 October 2007

came after the first broadcast. The defendant replied on 11 October 2007 with details of its legal argument and the Carriage Agreement entered into between the defendant and Fiji TV.

[17] With regard to the informant's suggestion of seeking a declaratory judgment the defendant submitted that there are limits on that jurisdiction particularly where potential offences are involved and the facts are uncertain. It would not have made sense for the defendant to bring such an uncertain and expensive proceeding.

[18] The defendant is unable to produce a legal opinion. It says that it relied upon the careful and considered opinion of the statutory exemption conducted by its in-house counsel Ms Clare Bradley and Chief Executive Officer Mr Brent Impy both of whom have extensive experience in media law. The opinion of the law was subsequently supported by external counsel as evidenced in arguments and submissions made at the defended hearing. That opinion is set out in the 11 October 2007 letter from Ms Bradley to the informant. The letter states in part:

“We refer to your letter of 7 October 2007. You have asked for an explanation regarding the screening of advertisements during the period, 6 am – 12 noon on Sunday 7 October 2007. We did so believing the broadcast to comply and in all respects with s 81(5) Broadcasting Act 1989. Section 81(5) requires the three criteria to be met:

The signal must originate outside New Zealand – the signal broadcast in New Zealand originated in France.

The signal must be produced and transmitted simultaneously to both NZ audiences outside New Zealand – the signal was produced and transmitted simultaneously world wide.

The signal must be primarily targeted at audiences outside NZ – the signal is targeted at a potential audience outside NZ which is significantly larger than the potential NZ audience.”

The letter went to elaborate on the defendant's view of the operation of s 81(5) and more particularly, s 81(5)(c) which was the focus of the defended hearing.

[19] The defendant submitted that it went to considerable effort and incurred considerable cost to put in place the arrangements detailed in my earlier judgment which it believed complied with the exemption contained in s 81 of the Act.

[20] The defendant further submitted that its aim was to provide to the New Zealand public “free to air” coverage of the Rugby World Cup 2007 finals in compliance with the law and with its own legitimate commercial aims. As the defendant operates a free-to-air channel, the defendant had to broadcast advertisements to be able to meet the cost associated with obtaining the rights to screen the Rugby World Cup matches. Rather than causing harm to the community by breaching the Act, the defendant contended that by broadcasting the matches free-to-air, incorporating ordinary commercial advertising, it was providing a service to all New Zealanders.

[21] There is no evidence that the advertisements resulted in any complaint or public outcry about the screening of advertisements on Sunday mornings. The Rugby World Cup matches were the highest ranking programmes for the defendant for the 2007 year with the quarter finals between the All Blacks and France achieving 26.3% of target audience rating points.

[22] The defendant acknowledged the Court’s finding that the right to freedom of expression is not engaged in considering the exemption in s 81(5). It submitted however, that the Sunday television advertising prohibition in s 81(1) restricts the right to freedom of expression contained in s 14 of the New Zealand Bill of Rights Act 1990 (“BORA”). It contended that there is no clear or compelling justification for such a restriction which covers only one advertising medium for a period of only six hours on a Sunday morning.

[23] The defendant contended that a comparison with the shop trading hours legislation further illustrates the unfairness and anachronistic nature of s81 of the Act. In respect to that legislation, the Shop Trading Hours Act Repeal Act 1990 repealed the Shop Trading Hours Act 1977 and removed restrictions on trading on Sundays, public holidays and between 9 pm and 7 am generally. Pursuant to s

3(1)(a) and (b) of the Repeal Act, trading is prohibited on Good Friday, Easter Sunday, Christmas Day and Anzac Day morning.

[24] The defendant further submitted that there is a connection between advertising and quality of programming. If advertising were permitted on Sunday mornings, the revenue earned would improve the quality and breadth of programmes during that time period.

[25] Finally it submitted that as the defendant has a high profile, a conviction is a significant penalty in itself. The defendant has also been the subject of much publicity over the case and this was another factor to weigh as part of an assessment of what (if any), additional penalty should be imposed.

SENTENCE

[26] Section 8(b) of the Sentencing Act 2002 provides that the Court must take into account the seriousness of the type of offence in comparison with other types of offences as indicated by the maximum penalties prescribed for the offences. The informant referred to the Shop Trading Hours Act Repeal Act 1990. The maximum penalty is a fine not exceeding \$1000. The prohibition has been criticised by some commentators as outdated and discriminatory but continues to be enforced.

[27] In *Department of Labour v Books & Toys (Wanaka) Ltd t/a Wanaka Paper Plus* (2005) 7 HRNZ 931, the defendant breached ss3 (1) and 5(1) of the Shop Trading Hours Act Repeal Act 1990 Act by opening on Easter Sunday when the “Wings over Wanaka” airshow was held. The defendant was a first offender and was convicted and discharged. The Judge noted that other first offenders in court that day for the same breach had also been convicted and discharged .One trader who had a previous conviction, was fined \$500 (being half the maximum fine).

[28] The informant submitted that the distinction between a shop trading hours prosecution and the present prosecution is the difference in scale between an event which only ever has limited local significance (the opening of a shop) and

advertising on three separate Sundays to one of the largest ever nationwide television audiences for substantial financial gain.

[29] The informant contended that the financial gain to the defendant is also relevant to the assessment of the fine. It submitted that in the absence of any evidence to the contrary, the Court is entitled to draw the inference that the financial gain to the defendant of broadcasting the advertisements over the three Sundays in question was substantial and may well have exceeded the maximum penalty.

[30] The informant referred to cases in the Fair Trading Act context. The amount of profit made from false or misleading representations was considered by Kean DCJ in *Commerce Commission v Weedons Poultry Farm Ltd* (Christchurch District Court CRN1009004163, 15 March 2001). That case involved a trader misrepresenting battery hen eggs as free-range eggs. The excess profit due to the misleading conduct was \$32,400. The fine imposed was \$35,000. The court noted at page 5:

A company or an individual in these sorts of circumstances cannot to be able to profit out of these sorts of actions. It would obviously be illogical and send totally the wrong message to people who may be prepared to give it a go, something of this sort, knowing that if they were caught they could still keep part of their ill-gotten profits.

[31] A similar approach was taken in *Commerce Commission v Sports Resources Ltd & Botica* (Auckland District Court CRN 600045004417- 20, 23 April 2007, Aitken DCJ). In that case which was a mislabelling case, the defendants were sentenced to a fine that was calculated as the profit made from the misleading conduct plus an additional 25% to achieve denunciation and deterrence.

[32] No evidence as to the profit made on the advertising was put before the Court. The evidence produced by the informant at the hearing was to the effect that the defendant only expected to break even on the screening of the World Cup matches (paragraph 41 of my judgment). The defendant submitted that the advertisements were part of ensuring that the defendant did not lose money and that any other conclusion in relation to the profit made from the particular advertisements would be speculation. In any case, I consider that the situation differs from offences

under the Fair Trading Act, which are concerned with conduct or representations that mislead or are likely to mislead members of the public. In the present case, there has been no misleading conduct or misrepresentations and accordingly no element of utilising such misleading behaviour for financial gain.

[33] While the defendant submits that the prohibition set out in s81 of the Act breaches the BORA and /or is anachronistic and unfair, this Court is required to apply the legislation as it exists. Accordingly these are not matters for the Court to take into account on sentencing in this case.

[34] The defendant was not able to produce a legal opinion which it had relied upon as to the meaning and effect of the exemption. Instead, it produced the letter sent by its in-house counsel to the informant on 11 October 2007 as recording that opinion. At the hearing the defendant maintained the same legal arguments as set out in the letter. The arrangements put in place by the defendant for the broadcasts were in accordance with the defendant's interpretation of the exemption. I am satisfied on the evidence before the Court that the defendant acted in good faith and was genuine in its belief as to the lawfulness of its actions in complying with the exemption.

[35] I do not consider that the defendant's decision not to apply for a declaratory judgment was unreasonable or reflective of a different position. The purpose of that procedure is limited and it is questionable whether the matter was suitable for a declaratory judgment. The informant appears to have recognised this as it noted in its letter making the suggestion, that the High Court might not be prepared to deal with the matter.

[36] I also take into consideration that the defendant cooperated with the informant in limiting the issues for determination at the hearing; it has no previous convictions and has already received considerable publicity as a consequence of its conviction on these charges.

[37] The nature of this prosecution is unique. It arises out of the defendant's reliance on the exemption contained in s 81(5) of the Act which had not previously been tested, and relates to the broadcast of a sporting event which occurs once every

four years and where on this occasion, the quarterfinals, semi-finals and finals all happened to be broadcast on Sunday mornings. The informant did not make any submission on the level of the fine instead, taking the position that it should be at the discretion of the Court.

[38] After careful consideration, I have come to the view, taking into account all the circumstances of the offending, that a conviction and discharge on each charge is an appropriate penalty. This penalty achieves the aim of denouncing the conduct which is in breach of s 81 and of deterring the defendant or any other broadcaster from in the future, endeavouring to use the same arrangements to come within the exemption contained in s 81(5) of the Act.

[39] I consider that it is appropriate that the defendant also pays costs towards the prosecution. Accordingly, the defendant is ordered to pay costs in the sum of \$5000.

DECISION

[40] On each charge, the defendant is convicted and discharged and ordered to pay court costs of \$130. It is further ordered to pay solicitor costs in the sum of \$5,000.

Dated at *Quilns* this *2nd* day of *July* 2009 at *9:00* am/pm



A A Sinclair
District Court Judge