



Welcome to *Media Law Update*, a regular review of issues and developments in this area of New Zealand law from Bell Gully.

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Judicial overview of editorial decisions - the TV3 case, 11 August 2005

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The TV3 case

The High Court in Wellington has ordered a privately owned television channel to change the format of a programme in advance of it being broadcast.

TV3 decided to broadcast a "Leaders Debate". It announced that a poll would be held, and that the outcome would determine who would be invited to participate in the debate. The leaders of the six highest polling political parties would be invited to appear. The poll was conducted, and the leaders of the six highest polling parties were duly invited.

The United Future New Zealand Party (with 1.4% of the poll) placed 7th, and the Progressive Party (with 0.4%) placed 9th. Not content to accept either the process of selection of only six leaders, or the result of the public poll, the leader of the United Future New Zealand Party (Peter Dunne) and the leader of the Progressive Party (Jim Anderton) filed Court proceedings seeking an interim injunction to order Canwest (the owner of TV3) to include them both in the televised debate.

Mr Dunne and Mr Anderton claimed that such televised debates are of particular importance to smaller political parties in the MMP system, that they attract large audiences, are therefore important in the political process, and were important to the electoral success of their parties. They believed that their representation in the current Parliament should ensure their presence at such a debate. They also believed that the decision to exclude them could influence the outcome of the election and the formation of the next Government. They claimed that to exclude them from the debate would be contrary to the public interest. They argued that TV3 had public law responsibilities not to act arbitrarily or to discriminate between political parties on unreasonable, irrational or disproportionate grounds.

TV3 indicated that in order to present an intelligible debate in one hour would require limiting participants to six. It noted that as the selection was made on the basis of an opinion poll TV3 could not be accused of bias in the selection. It stated that it would give United Future and the Progressive Party opportunities of regular news and current affairs programmes to present their point of view. It stated that it had reviewed its decision and had concluded that there were no compelling reasons to depart from it. TV3 also pointed out that it is not a public body and that its decisions ought not therefore to be subject to judicial review by the Courts.

The Judge considered that although TV3 was a private company it had chosen to enter the public arena with its leaders debate and was performing a public function and exercising a public power in its election coverage. He therefore concluded that TV3's decision was susceptible to review. He considered that a single poll with small percentage differences and a high margin of error provided little or no guidance on actual relative electoral support. He considered that TV3's decision was arbitrary and failed to take relevant factors into account. He concluded that there had been a breach of an obligation not to act unreasonably or arbitrarily.

Although noting that Courts are reluctant to grant mandatory interim injunctions, which in this case would involve a Judge essentially deciding how a television programme is to be presented, the Judge considered that he should nevertheless do so in view of the time constraints (the programme was to be broadcast that night) and the consequences that would flow from not making the order (the position being significantly more disadvantageous to Mr Dunne and Mr Anderton if the order were refused than to TV3 if it were granted). He accordingly ordered TV3 to allow Mr Dunne and Mr Anderton to appear in the leaders debate.

The matter was determined urgently and on the basis of the evidence available at the time. It is nevertheless an important precedent as it demonstrates a willingness of the Court to intervene in areas that had previously been generally considered to be matters of private editorial discretion outside the reach of the Court's powers of judicial review. Two other minor parties have already indicated that they now expect to be included in such debates in future. It has been signalled that the decision may be appealed.

Need more information?

For more information on any of the cases, articles and features in *Media Law update*, please email alan.ringwood@bellgully.com or call on 64 9 916 8925.

Humour no defence to politically correct advertisement bans?

The Advertising Standards Complaints Board is generally a sensible and respected industry self-regulation body, but in two recent decisions the ASCB's rulings against advertisements may have surprised and concerned sections of the advertising industry and their clients.

Humorously risqué advertisements such as Toyota's "Bugger" and Pfizer's "erection problem" ads for Viagra treated the viewing public as mature adults. By a majority the ASCB also recently allowed Toyota's "Sheep Shagger" advertisement. But before advertisers conclude that the boundaries have been successfully pushed back they should note that there is no guarantee that humour will save an advertisement. Two other decisions of the ASCB suggest that on a different day there may be a different result, and that there remains a risk of what might be considered to be "politically correct" censorship of advertising themes.

Towards the end of last year, a Tui billboard advertisement featured the words "There's nothing wrong with Miriam: Yeah, right", alluding to a reality show in which unsuspecting men competed for the affections of a transsexual model named Miriam. The show had not been without controversy, with a contestant subsequently suing the producers.

The advertisement was one of a popular and successful series of irreverent, "hard case" and topical "Yeah, right" advertisements for Tui beer.

An early indication that the complaint may have been motivated by political correctness was that the Victoria University of Wellington Students Association was a complainant.

In a majority decision, the Advertising Standards Complaints Board ruled that the advertisement not only breached the Code for People in Advertising, but was also in contravention of a person's basic human rights, and was accordingly "seriously offensive". The majority did not consider that the advertisement was saved by its humour and the complaint was upheld.

More recently, retailer The Warehouse ran an advertisement for its popular 1kg Easter egg, which is packaged in a box featuring an open-mouthed pig's head and the words "What a PIG".

The advertisement showed a girl holding the box, and included the words "What a Pig easter egg 1 kg. You'll need a big appetite to get through this egg!"

These words were undoubtedly both amusing and true, but a complainant believed that the advertisement was marketed to young people and encouraged excessive consumption of chocolate.

It might be thought that the marketing of chocolate to young people is not particularly unusual or reprehensible, that it is traditional in New Zealand for children to be permitted to consume extra amounts of chocolate at Easter, and that an appropriate level of chocolate consumption is something that might safely be left to people to determine for themselves.

However, the advertisement was held by the Advertising Standards Complaints Board to have violated both Principles 2 and 3 of the Advertising of Food Code, as it had not been prepared with the requisite degree of social responsibility.

You might identify an inconsistency in the fact that you can sprinkle advertisements for utility vehicles with expletives referring to sodomy and references to sheep-shagging, but that your chocolate ad will be banned if it suggests that a child would need a big appetite to eat a large Easter egg all at once. This is something which will need to be taken into account by advertising agencies and their clients when devising amusing advertisements in future.

Need more information?

For more information on advertising issues, please email alan.ringwood@bellgully.com or call on 64 9 916 8925.

Defamation: Two recent examples of attempted strike outs

Two recent High Court cases involving well-known public figures considered the basis on which a defamation claim can be struck out.

In *Hubbard v Fourth Estate Holdings Limited*¹, Auckland City's mayor Dick Hubbard brought proceedings against the *National Business Review* (NBR) newspaper.

The proceedings concerned a story entitled "Hubbard's Triple Bottom Lie" and related to claims made during the Auckland mayoral campaign in October 2004.

At issue in this decision was the conduct of Mr Hubbard during the proceedings. In his statement of claim, Mr Hubbard claimed relief of \$1.5 million - in breach of section 43 of the Defamation Act, which provides that the amount of damages claimed must not be specified in proceedings against news media defendants.

Mr Hubbard was later reported as saying "I have been advised by my legal advisers that the case is both watertight and simple." The *NBR* sought to strike out/stay Mr Hubbard's action on the basis that he was in contempt of court.

The Court found that there had been a clear breach of section 43 and was also critical of Mr Hubbard's statements about the strength of his case, which were seen as inappropriate, unwise and objectionable.

The issue for the Court was whether, as a result, there was a real risk that there could not be a fair hearing of the defamation case.

The Court noted that the figure had been mentioned in error rather than as a deliberate breach and that an amended statement of claim had been filed as soon as Mr Hubbard and his lawyers realised the error.

Although section 43 exists to ensure that plaintiffs do not claim large damages to stifle or "gag" news media defendants, there was no evidence that the *NBR* felt intimidated or "gagged" by the plaintiff.

The court also took into account the nature of the comments made by the *NBR* about Mr Hubbard's integrity, the apology by Mr Hubbard, and that a lengthy time would pass before trial.

The Court found that the *NBR* had failed to satisfy the Court that Mr Hubbard's conduct was such that it required the ultimate sanction of striking out or staying these proceedings and the defendant's application was dismissed.

In *Peters v TVNZ*², New Zealand First MP Winston Peters brought proceedings against a number of parties, including TVNZ, Radio New Zealand, National Party MP David Carter and Act MP Ken Shirley regarding allegations concerning Mr Peters' relationship with Simunovich Fisheries. Mr Carter applied to have the claims against him struck out.

Mr Carter had been quoted on local media as saying that he had passed on allegations that he had received about Mr Peters to the Speaker of the House.

Mr Carter argued that the publications referred to were not capable of bearing a defamatory meaning and therefore did not disclose a reasonable cause of action against him.

He submitted that the only meanings that the statements made by him were reasonably capable of conveying were that he had an affidavit which contained serious allegations and which warranted further investigation by the Speaker and that Mr Carter was not able to say whether the allegations were correct or not.

The Court noted that statements imputing suspicion that a person may have committed an offence were capable of being defamatory and also that a statement that there was to be an inquiry might be defamatory in certain contexts and circumstances. However, that had not been pleaded.

Instead, it was alleged that Mr Peters was a party to serious misconduct and/or that he was in contempt of Parliament.

The Court took the view that the statements, whether taken individually or cumulatively, were not capable of conveying to the ordinary person these meanings. The causes of action against Mr Carter were struck out and Mr Peters was given leave to replead.

¹ *Hubbard v Fourth Estate Holdings Limited*, 16 February 2005, Venning J, HC Auckland, CIV 2004-404-005152

² *Peters v TVNZ*, 5 November 2004, Paterson J, HC Auckland, CIV 2004-404-3311

Need more information?

For more information on defamation, please email jenny.ryan@bellgully.com or call on 64 4 915 6801.

Marketing: Advertising health and nutritional benefits

We review progress on the Australia and New Zealand Food Regulation Ministerial Council's new policy for Health, Nutrition and Related Claims.

In December 2003, the Australia and New Zealand Food Regulation Ministerial Council (Council) agreed to a new policy for Health, Nutrition and Related Claims.

The new policy guideline will permit a wide range of health claims, introducing conditions to prevent misleading claims while ensuring that consumers can make informed healthy choices.

Since 2003, the Council has been developing the guidelines through consultation and review. External reviews were completed in May and the policy guideline is now being reviewed by the Council's scientific committee.

At present, nutrient content claims such as "*this food is high in fibre*" are permitted in advertising in New Zealand, as are some health maintenance claims (for example, "*calcium is important for healthy bones and teeth*").

However, the use of health claims (such as "*Avocado oil reduces absorption of cholesterol*") in advertisements for food and beverages are currently prohibited in New Zealand.

As a result, the benefits of nutritious foods which may be promoted to consumers are restricted to freshness and price. This enforced silence by food manufacturers on the healthy benefits of particular foods is particularly anomalous, given a society that is becoming ever more health conscious and in which consumers are actively seeking healthy food options.

Commercial success for new food products that promote good health relies upon informing consumers of such benefits through a permissive advertising structure. It is hoped that the policy guideline will facilitate innovation in the food and, consequently, advertising industries.

The claims classification framework sets out criteria for two levels of claims:

- (i) *General level claims*, which do not make reference to a serious disease or biomarker and will not be subject to pre-market assessment and approval by Food Standards (although manufacturers and advertisers will need to have evidence to support the claim).
- (ii) *High level claims*, which do make reference to a serious disease or biomarker will be assessed and pre-approved by Food Standards, with approved claims being listed in the standard.

General level claims will include two sub-categories:

- a. Content claims (i.e. absolute and comparative claims); and
- b. Function claims, enhanced function claims (i.e. "*This food contains omega-3 oils, which is good for...*") and risk reduction claims.

In order to ensure that all claims are true, scientifically substantiated and not misleading, the following safeguards are likely to be put in place:

- Claims will need to meet substantiation criteria which determine the evidence required for a proposed claim;
- Foods allowed to carry claims will be defined;
- Claims will have to be made in the context of the total diet, with consumers advised to seek the supervision of a health care professional where necessary; and
- Compliance with the new arrangements will be closely monitored.

The proposal would, therefore, result in:

- a. Health and nutrition claims being allowed in advertising.
- b. Certain health claims needing to be substantiated and approved in advance.
- c. A three-tier system for the pre-approval of health and nutrition claims.

The Advertising Standards Association Code for Advertising Food currently requires that advertisements for food and beverages:

1. Comply with the laws of New Zealand, which include the Food Standards Code, the Food Act 1981, the Food Regulations 1984 and the Fair Trading Act 1986.
2. Be prepared with a due sense of social responsibility to consumers and to society.
3. Containing nutrient, nutrition, health or therapeutic claims, or directed at children should observe a high standard of social responsibility.
4. Should not be misleading.

It is likely that the current Code for Advertising Food will be amended to take into account any changes in the law permitting health and nutrition claims. In particular, the Advertising Standards Complaints Authority has signalled that all advertisements with health and nutrition claims are likely to require pre-vetting (in much the same way as therapeutic and liquor advertisements currently undergo a pre-vetting approval process).

To stay updated on the development of the draft standard and to view the Nutrition, Health and Related Claims policy guideline, visit the Food Standards website at www.foodstandards.gov.au.

Need more information?

For more information on food labelling matters, please email tania.laird@bellgully.com or call on 64 9 916 8766.

Defamation: Leave to bring defamation proceedings out of time and absolute privilege

We review the High Court's decision in Gibson v Blunt.

In 2001, Mr Blunt wrote to the Dental Council of New Zealand complaining about the dental treatment he had received from Mr Gibson and the charges made for that work.

In later proceedings, Mr Gibson alleged that he was defamed by Mr Blunt's letter of 4 November 2001, claiming that the letter meant he was incompetent, untruthful and fraudulent in his dealings with Mr Blunt.

Mr Gibson did not issue the proceeding until 30 January 2004, outside the two-year time limit provided by the Limitation Act 1950 for defamation actions, so he applied for leave to bring the defamation action out of time under section 4 (6B) of the Limitation Act.

Section 4(6B) provides:

Notwithstanding anything in subsection (6A) of this section, any person may apply to the Court, after notice to the intended defendant, for leave to bring a defamation action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law (other than the provisions of subsection (6A) of this section), or by any other reasonable cause.

Mr Gibson said that there was a mistake of law which, at least in part, served to explain the delay in initiating the proceedings. He submitted that he had been given the wrong advice by a solicitor and that he should have been advised that a claim for qualified privilege could be defeated by proof of malice on the part of the defendant.

He also argued that leave could nevertheless be granted on the grounds that the delay in bringing the action was occasioned by "any other reasonable cause".

On this point, he relied particularly on the decision in *Wilson & Horton* where the Court of Appeal upheld a decision of Justice Robertson accepting (amongst other grounds) that the intending plaintiff had been involved with other pressing matters throughout the period of two years and beyond, leading up to the bringing of proceedings and on the basis that he understood he had done all that was necessary to bring the proposed action.

In other words, the plaintiff submitted that the delay was not excessive and, there being no material prejudice to the defendant, it was in the interest of justice that leave be granted.

By contrast, Mr Blunt submitted that the period of delay was substantial and had not been adequately explained. He also said that it would undermine the statutory intent of section 4(6) if inadvertence of the time limit were permitted to be relied upon as constituting "reasonable cause" for the delay.

Finally, Mr Blunt's lawyers submitted that overall justice militated against the grant of consent, as the defamation proceedings were designed to pressure the defendant over his complaint under the Dental Act 1988 and therefore amounted to a form of abuse of process.

Justice Randerson concluded that leave should be granted on the basis that the delay was occasioned by "other reasonable cause". His reasons were:

- the amount of delay was not great, particularly bearing in mind that time may be extended for up to six years from the date the cause of action arose.
- this was not a case where the plaintiff had slept on his rights. He had instructed his solicitor to proceed before the limitation period expired and he was entitled to expect that the solicitor would proceed and file the proceedings within any appropriate time limit.
- Once it became known that the claim was out of time, prompt steps were taken to make the necessary application for leave.

- There was no suggestion that the defendant would be prejudiced by the grant of leave.

Accordingly, Justice Randerson granted leave to extend the time for bringing the proceeding.

Justice Randerson then indicated to counsel for the plaintiff that it would seem arguable that absolute privilege applied to the complaint made by the defendant by virtue of section 14(1) of the Defamation Act 1992.

He referred counsel to *Teletax Consultants Ltd v Williams*, a decision of the Court of Appeal, in which a complaint made to a Law Society about the conduct of a solicitor was held to be part of a disciplinary process and subject to absolute privilege accordingly.

Perhaps unhelpfully (at least for the plaintiff) he then suggested that counsel might wish to consider whether the issue of privilege should be determined as a preliminary issue under rule 418 of the High Court Rules or on a strike-out application brought by the defendant.

Need more information?

For more information on defamation, please email garry.williams@bellgully.com or call on 64 9 916 8661.

Censorship: *Society for the Promotion of Community Standards v Elliot*

The High Court held that the President of the Film and Literature Board of Review had applied an incorrect test in reviewing the Classification Office rating for the French film Irreversible.

In finding that the President of the Film and Literature Board of Review had applied an incorrect test in reviewing a Classification Office rating, Justice MacKenzie upheld two of the five grounds advanced by the Society for the Promotion of Community Standards (SPCS) in their application for judicial review.

In light of those findings, Justice MacKenzie ordered the President to reconsider her decision not to grant an interim restriction order against the French film *Irreversible*.

Background

Despite having earned the Bronze Horse award for best film 2002 at the Stockholm International Film Festival and a nomination for the Palme d'Or at the 2002 Cannes Film Festival, *Irreversible* has attracted criticism for its inclusion of a graphic and extremely violent nine-minute rape scene.

In 2003, the Office of Film and Literature Classification (OFLC) had limited its exhibition to film festivals and tertiary institutions.

After failing to get an interim restriction order stopping the film's exhibition at Beck's Incredible Film Festival in 2003, SPCS withdrew its application to have the film's classification reviewed under s 47 of the Films, Videos and Publications Classification Act 1993.

In 2004, the film's distributor asked the Classification Office to consider allowing the film to be released for adult viewing in cinemas.

The OFLC reconsidered the classification and on 28 July 2004 it decided to reclassify the film "objectionable except if the availability of the publication is restricted to persons who have attained the age of 18 years and for the purposes of theatrical exhibition or study in tertiary institutions only."

In removing the limitation that the film only be shown at a film festival, the OFLC took into account, *inter alia* the film's international pattern of release - it was first exhibited at a film festival before going on to general theatrical release in Argentina, Australia, Germany, Spain, Japan, Sweden and the USA.

On 5 August 2004, SPCS lodged an application for the making of an interim restriction order by the President under s 49 of the Act in order to prevent the film's theatrical release. The President refused the application and declined to make an interim restriction order.

What are 'Interim Restriction Orders'?

An interim restriction order can be put on a film only when someone has asked the Film and Literature Board of Review to review the Classification Office's classification of the film.

As a temporary 'stop' on screening, an order has very specific effect: to preserve the position of the person seeking a review until the review hearing is held.

It is therefore at the review hearing, not the interim restriction order hearing, where argument on the film's classification can be properly considered.

In *the Society for the Promotion of Community Standards* [2002] NZAR 884 Hammond J. placed weight on "the need to use interim restriction powers in a way that preserves the statutory process", characterising an order of this kind as "a deferment of viewing until the due process of law is completed."

Judicial review of the President's decision - what can the President take into account?

Among the grounds for review, SPCS alleged that the President had applied the wrong test in requiring that there be an "obvious error" in the Classification Office rating.

Justice MacKenzie agreed and further held that it was not necessary for the President to view the publication itself in order to form some preliminary view as to the appropriateness of the classification, or to decide on whether the OFLC's classification was clearly wrong, as to do so would require the President to form a view on the merits of the film.

Justice MacKenzie felt that it was for the Board to consider the merits during the review stage, not the President during the preceding interim order stage.

He also held that the President was wrong to apply a high threshold test when making an order of this sort. Section 49(2) of the Act provides the President with a discretion to make an interim restriction order if satisfied that it is "*in the public interest to do so*". The only relevant test was therefore 'whether or not it is in the public interest to do so.'

'In the public interest'?

This case provided the Court with its first opportunity to fully consider the decision-making process by which interim restriction orders are made under s 49 of the Act.

Despite this, Justice MacKenzie was only prepared to give guidance on the considerations which are *not* relevant, concluding that:

"I do not consider that it is desirable to attempt to comprehensively list the type of considerations which might be relevant. . . .A decision as to what considerations, in any particular case, is, in the first instance, a matter for the President."

Bearing in mind that the appropriate test is "in the public interest" (a notoriously vague concept in itself), and that the President is unable to form a view on the merits of the film - it is difficult to see on what grounds one film could be restricted and not another.

Fortunately the President has since re-considered the application and defined 'in the public interest' as involving an assessment of *every* relevant factor affecting the interests of the public at large - including but not limited to:

- the fact that *Irreversible* had been screened the year before at a film festival
- compliance with the review process
- overseas ratings of the same film
- the Bill of Rights Act 1990 and the right of freedom of expression
- the fact that no screenings were planned between then and date set down for the Board's review hearing.

In balancing those interests against each other, the President ultimately refused the restriction order for *Irreversible*.

Need more information?

For more information on classifications, please email kirsty.newland@bellgully.com or call on 64 9 916 8785.

Free speech: Interviewing prisoners - Where does the balance lie?

In TVNZ v AG the Court of Appeal reviewed the factors that need to be assessed when the Chief Executive of Corrections considers media applications to interview prisoners..

This appeal concerned the refusal of the Chief Executive of the Department of Corrections to approve a request by TVNZ to interview an inmate of a penal institution, namely Mr Ahmed Zaoui.

As is well-known, Mr Zaoui arrived at Auckland International Airport having flown from Vietnam on a false passport. Since his arrival, the Refugee Status Appeals Authority has granted him refugee status.

However, at the time of this appeal he remained in detention in Auckland's central remand prison, pursuant to a warrant of committal issued because the Director of Security had made a security risk certificate in relation to him, on which the Minister of Immigration had made a preliminary decision to rely. Mr Zaoui's case has received substantial media coverage.

TVNZ wrote to the Department of Corrections seeking permission to interview Mr Zaoui pursuant to regulation 87 of the Penal Institutions Regulations 2000. Mr Zaoui consented to the proposed interview, but the Chief Executive declined to authorise it.

TVNZ then brought an action in the High Court challenging the decision on the basis of mistake of fact, unreasonableness, procedural impropriety and inconsistency with the right to freedom of expression contained in section 14 of the New Zealand Bill of Rights Act 1990.

At first instance, Justice Ronald Young held that the regulations were not inconsistent with the Bill of Rights Act and were clearly authorised by section 45 of the Penal Institutions Act.

He also held that the limits placed on prisoners' rights to freedom of expression by the regulations were reasonable under section 5 of the Bill of Rights Act.

Justice Ronald Young also emphasised that the integrity of the court system could be undermined by a parallel system of trial by media and noted that the interview was directed at an issue currently before the courts and the Inspector General of Intelligence and Security.

Given these factors, he held that the conclusion reached by the Chief Executive was reasonably open to him, even taking into account the right to freedom of speech.

On appeal, the Court of Appeal made it clear that while there are a number of sound policy reasons justifying limitations on news media interviews with prison inmates and the discretion that is given to the Chief Executive is therefore a wide one, it may, however, be qualified by the requirements of the New Zealand Bill of Rights Act which is applicable to all executive action other than to the extent that it is excluded by statute.

Importantly the Court of Appeal stated that:

In a case in which an inmate who is fully informed of the implications of doing so desires to be interviewed, the inmate's right to freedom of speech would support the application. In those situations the decision of the Chief Executive on an application for approval requires a balancing of that right against conflicting values. In the case of inmates who have been convicted of criminal offending the Chief Executive would have to take account of the interests of victims which is specifically addressed in reg 88(1)(a). It is also relevant that part of the effect of imprisonment as a punishment is curtailment of some freedoms including that of free speech.

The Court of Appeal went on to indicate that Mr Zaoui had not been detained because of criminal offending but rather for administrative reasons under the statutory requirements of Immigration Act 1987. He had not been convicted of any crime. Accordingly, the Court considered the ability to exercise the right of free speech was of particular importance for a person in his position.

The Chief Executive's reasons for refusing the application were set out as follows:

I concluded that an interview of the kind sought was not desirable in the public interest. Such an interview would involve Mr Zaoui directly in the media coverage of the various proceedings and would add to the controversy that had arisen in respect of those proceedings.

As with a remand inmate awaiting trial, I considered that an interview of Mr Zaoui could interfere with the integrity of and public confidence in the various processes that Mr Zaoui had put in train.

I also considered it relevant that, as I had noted, Mr Zaoui had been able to express his position through submissions made on his behalf in the proceedings and through media comments by his lawyers. I therefore decided to decline Mr van Wel's request.

The Solicitor General supported the High Court judgment on the basis that as the review of the security certificate by the Inspector-General of Intelligence and Security was a secret process, the risk of trial by media was particularly acute - as a balanced public discussion of Mr Zaoui's position would not be possible.

The Court of Appeal, however, stated that it could not reasonably be suggested that the determination of the Inspector-General would be influenced by the publicity that would be associated with Mr Zaoui exercising his right of free speech as a result of a television interview of the kind that TVNZ sought to undertake.

The Court was also of the view that it was not open to suggestion that permitting an interview such as the one which TVNZ wished to undertake could harm the process by diminishing public confidence in it.

The Court therefore did not consider that the reasons given by the Chief Executive for his decision to refuse approval could be sustained against the duty to take account of Mr Zaoui's right to free speech.

Need more information?

For more information on Bill of Rights Act issues, please email garry.williams@bellgully.com or call on 64 9 916 8661.

Advertising: Who reads the small print?

- other than lawyers and the Commerce Commission

Advertising obligations under the Fair Trading Act 1986

Terms and conditions are always in the small print, right?

Wrong. Terms and conditions relating to an offer of goods or services, especially critical conditions, must not be buried in the small print.

They must be in a sufficiently large font and strategically placed so as to be readily brought to the attention of potential punters.

It is no defence to say that everyone knows to look for the conditions where they're customarily found - at the bottom section of an advertisement in small print.

The Commerce Commission is particularly alert to hidden or undisclosed conditions in advertising which breach the Fair Trading Act (*"the Act"*).

This is especially so if a hidden or undisclosed condition hits Percy Public in the pocket, or which excludes readers, or some readers, from an offer.

Any condition in small print which means that purchasers will have to pay more than the advertised "headline rate" for goods or services will be targeted.

Last week, the Commission reached a settlement with Slingshot, an internet service provider, for an alleged small print condition which the Commission considered breached the Act. More commonly, the Commission prosecutes for such transgressions.

Slingshot had advertised one of its products on television at a headline rate, with an illegible condition in the small print which meant the headline rate would never be available.

The Commission received complaints about the advertisement for Slingshot's offer of *"unlimited dial-up internet plans from \$9.95"*. The condition in the small print required consumers to sign up for Slingshot's *Anytime 10 Plan* and spend an additional \$10 per month on toll calls in order to qualify for the deal. Consumers would have to pay a minimum of \$19.95 per month for the offer, not the "\$9.95" headline rate.

Despite Slingshot having modified its advertisement, by increasing the size of the graphics to show the conditions of the offer, the Commission was not satisfied.

In its media release about the settlement, the Commission's oft-repeated mantra was *"Ensuring that consumers are accurately informed about the total cost of a service or good is a priority for the Commission"*. It also stated *"Slingshot's advertisements were a graphic illustration [no pun intended] of the importance of this"*.

The Commission is generally keen to prosecute companies for advertising important conditions in the small print in breach of the Act. It has issued prosecutions against some of the major airlines, charging them with allegedly inadequately disclosing critical conditions about charges in their small print advertising. The headline rates in the airlines' advertising customarily exclude such charges as service fees, fuel and insurance charges and airport taxes. The insurance surcharges apparently vary, depending on foreign currency fluctuations and the number of sectors being travelled. In a media release at the time it filed recent prosecutions in this area, the Commission stated

"Consumers are entitled to be told one price. The advertised price should be the price they will pay for their tickets and should not have additional taxes, levies and costs disclosed only in small print or not at all. Through this action, the Commission is signalling its expectation that advertised prices should be the price you pay".

How are advertisers to get all of the critical information into, or at least pertinently close to, a headline rate? It's a complicated issue but one which must be constantly confronted by advertisers if allegations of breaches of the Act are to be avoided.

In television advertising, the situation can be covered, as Slingshot did in its corrective advertising, by including highly visible graphics and a voice-over disclosing relevant conditions. Of course, the graphics have to be on screen for a reasonable time - long enough for viewers to be able to read them.

In theory at least, it should be easier to ensure compliance with the requirements of the Act in print advertising than advertising on a transitory and expensive television screen. Advertisers, however, often have to include a mass of information in their advertisements, some of which inevitably ends up in the small print at the bottom.

Where critical conditions are going to cost the consumer, or exclude consumers from the offer, special care needs to be taken to ensure such costs or exclusions are up front.

There are invariably a number of ways in which advertising can be modified to ensure that the Act is not breached, without losing the impact of the key message of the advertiser.

It is important to get early advice about the issue - preferably well before a print deadline. Doing so could save a lot of time, money and the frustration of corrective advertising.

Need more information?

For more information on Fair Trading Act Issues, please email Wendy.Duggan@bellgully.com or call on 64 9 916 8989.

The Beckham litigation and the privacy rights of celebrities

Celebrities are having a hard time protecting their privacy. In New Zealand, Mike Hosking sued to protect the privacy of himself and his children, but predictably lost on the facts of the case, while in the process achieving recognition of the existence of a new tort of breach of privacy here. In England, the Beckhams are having similar difficulty succeeding in protecting their privacy and also in enforcing confidentiality agreements, with resulting calls for new privacy laws in the UK.

For the benefit of any readers from Mars (or the USA), David Beckham is the captain of the English soccer team and is the world's best-known sportsman, and his wife Victoria is a well-known pop singer who was formerly a member of the Spice Girls.

The Beckhams are fully aware of the public interest that they generate and of the commercial value of their images. They sensibly had their (now former) nanny sign a confidentiality agreement. In fact, she apparently signed four of them during the two years that she worked for the celebrity couple.

Despite the existence of the confidentiality agreements and the obligations of confidentiality she had assumed, the nanny proceeded to reveal to the press - and, via the press, the public - confidential aspects of the Beckhams' private lives, in particular the state of their marriage and family life. She reportedly received a very large sum of money from a newspaper for her story.

The Beckhams went to Court and sought an urgent interim injunction to restrain the breach of confidentiality and enforce the terms of the confidentiality agreement. The application was unsuccessful.

The newspaper (*The News of the World*) apparently argued that the intended revelations were in the public interest in view of the disparity between the reality of the nature of the Beckhams' private life on the one hand, and the public perception of it on the other hand, and because of the commercial advantage that the Beckhams were said to gain from the image they cultivated of a happy family.

Following the failure of the eleventh-hour injunction application, the newspaper proceeded to publish a seven-page exposé.

In a graphic illustration of the level of public interest in the Beckhams, and the consequent commercial value of this particular story, the newspaper reportedly sold an extra 100,000 copies of its newspaper that day.

The Court's decision takes the reasoning in supermodel Naomi Campbell's case one step further. Ms Campbell had attempted to prevent publication of revelations that she had attended a drug rehabilitation clinic, which contradicted her public denials of drug use. There was said to be a public interest in the truth being revealed. In that case, however, there was no written confidentiality agreement or other contractual obligation of confidentiality. The Beckhams' case has accordingly been highly controversial, and has prompted renewed calls in the UK from many quarters for new privacy laws, and public opinion polls supporting their enactment.

The Beckhams' failure to obtain an interim injunction to prevent their former nanny from disclosing details of their personal lives is unlikely to be the end of this story.

The injunction application was reportedly heard by the Court on a Saturday night, necessarily on the basis of incomplete evidence given the urgency. It is not clear how fully the matter was able to be argued that evening. The Judge had to give a decision immediately. There is no certainty that the result would be the same in another case, even with apparently similar facts.

As an illustration of that, the Beckhams subsequently sought to prevent repetition of the revelations in other newspapers and on television. They failed again, due to the fact that the material was already in the public domain and had been widely disseminated, but did succeed in preventing any fresh allegations being made.

The Beckhams are also continuing with their litigation against both the nanny and the newspaper, and the trial is likely to take place at the end of the year. The lawfulness of the publication, the extent to which the

confidentiality agreement is binding, and the Beckhams' entitlement to damages if their rights were infringed, are issues still to be considered by the Court at the final hearing. Watch this space.

Need more information?

For more information on issues, please email alan.ringwood@bellgully.com or call on 64 9 916 8925.

Journalists' sources - protection in the spotlight?

The issue of disclosure of journalists' confidential sources has been in the spotlight lately as result of the Peter Doone defamation saga.

This story began when the *Sunday Star-Times* published an article concerning statements allegedly made by the former police commissioner when his car was stopped by a police patrol in 1999.

When Mr Doone subsequently brought defamation proceedings against the newspaper, Prime Minister Helen Clark provided a brief of evidence for use in the proceeding.

Subsequently it was revealed that she had been a source for this story. As a result, a debate has ensued about the disclosure of journalists' confidential sources.

The law

There is no absolute legal right for journalists to keep their sources confidential. A judge does have the power to excuse a witness from answering any question or producing any document on the basis that it would be a breach of confidence (section 35 Evidence Amendment Act (No 2) 1980).

In deciding whether to exercise this discretion, the judge must consider whether the public interest in the preservation of confidences and the encouragement of free communication outweighs the public interest in disclosure.

In conducting this balancing exercise, the judge is to consider the likely significance of the evidence to the issues in the proceeding; the nature of the confidence and the special relationship between the confidant and the witness; and the likely effect of the disclosure on the confidant and any other person.

In addition, the High Court Rules provide that where a defendant pleads honest opinion or privilege as a defence to a defamation proceeding, no interrogatories as to a defendant's source of information or grounds of belief are allowed, except where necessary in the interests of justice.

Although there is no absolute right to protection, courts have recognised the importance of the principle that news media should not be compelled to reveal their sources. In each case, the court will weigh up the factors in favour of disclosure against the factors in favour of protection.

A recent case on the issue is *R v Cara* 2 June 2004, Potter J, HC Auckland, CRI 2004-004-006560. The Court had to consider whether the *New Zealand Herald* could be compelled to give evidence that would reveal its sources for a story about alleged Israeli spies.

The competing public interests that had to be weighed up were the recognition that journalists' sources may require protection to ensure that the flow of information on which freedom of speech relies is not curtailed; and the importance of ensuring a trial.

The judge concluded that requiring the *Herald* to reveal its sources was not relevant or essential to ensuring a fair trial for the accused but could place press freedom at risk.

In a leading House of Lords decision on the issue, *Ashworth Security Hospital v MGN Limited* [2002] UKHL 29, the Court noted that any disclosure of a journalist's sources had a chilling effect on freedom of the press. Therefore, courts would normally protect journalists' sources from protection and limitations on this would merit careful scrutiny by the courts.

Disclosure of a source was ordered in this case because of the exceptional circumstances. The article in question contained extracts from the medical records of a hospital patient and disclosure of patient records was thought to increase the difficulty and danger associated with the care of patients at the hospital.

To deter similar wrongdoing in the future, it was essential that the source was identified and punished. Disclosure was therefore proportionate and justified.

As well as the legal question of the extent to which a journalist can protect a source, there are also ethical considerations. For example, Principle 4 of the Press Council Principles provides: "Editors have a strong obligation to protect against disclosure of the identity of confidential sources. They also have a duty to take

reasonable steps to satisfy themselves that such sources are well informed and that the information they provide is reliable".

Reform

The proposed Evidence Bill contains a provision that would specifically allow journalists to keep their sources confidential. Clause 64 provides that if a journalist has promised a source that their identity will not be disclosed, neither the journalist nor their employer can be compelled in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.

A judge may overrule this protection if satisfied that the public interest in the disclosure of evidence of the identity of informant (including a criminal defendant's right to present an effective defence) outweighs:

- any likely adverse effect of the disclosure on the informant or any other person; and
- the public interest in the communication of facts and opinion to the public by the news media and in the ability of the news media to access sources of facts.

Although clause 64 would not make protection of journalists' sources absolute, it does start from the position of protection, and requires a judge to specifically order that the protection not apply.

The Bill had its first reading on 10 May 2005. Submissions can be sent to the Justice and Electoral select committee until 12 August 2005.

Need more information?

For more information on protection of journalistic sources, please email jenny.ryan@bellgully.com or call on 64 9 915 6801.