IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-004893

UNDER	Broadcasting Act 1989
IN THE MATTER OF	an appeal to the High Court of a decision of the Broadcasting Standards Authority
BETWEEN	NICHOLAS PAUL ALFRED REEKIE Appellant
AND	TELEVISION NEW ZEALAND LIMITED Respondent

Hearing: 26 October 2010

Counsel: Appellant in person
S B Kellett for Respondent
C M Sophocleous for Authority abiding the decision of the Court

Judgment: 3 November 2010

JUDGMENT OF ASHER J

This judgment was delivered by me on Wednesday, 3 November 2010 at 9.30am pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] The film "Until Proven Innocent" was broadcast on TVNZ channel one on 9 August 2009. The appellant, Nicholas Paul Alfred Reekie, challenges a decision of the Broadcasting Standards Authority ("the Authority") declining to uphold and declining to determine complaints he made about this broadcast. He claims that his complaints were correct and that the Authority, in reaching its decision, made a number of serious errors which justify allowing the appeal.

Background

[2] In 1993 Mr Reekie was convicted on charges of burglary, aggravated burglary and two charges of abducting young girls aged six and eight years. Mr Reekie was 22 years of age at the time. The Court of Appeal,[1] which considered an appeal against his sentence described his record as "appalling" while demurring from the trial Judge's description of the facts of the charges as "grave as they can be". The Court of Appeal nevertheless recognised the gravity of the offending. Mr Reekie was sentenced to a total of seven years' imprisonment on the charges.

[3] In 2004 Mr Reekie was sentenced in relation to 31 offences, including burglary, unlawfully entering premises, assault, indecent assault, abduction, sexual violation by unlawful sexual connection and sexual violation by rape. There were three victims of the sexual crimes; one, an 11 year old had been terrorised for five hours. Another man, David Dougherty, had been charged and convicted in relation to that victim and had served approximately three and a half years of his sentence. He had been released by the time of Mr Reekie's trial. On all charges Mr Reekie was sentenced to preventive detention, and ultimately the minimum term of imprisonment was 20 years.

[4] The trial Judge's sentencing remarks were quoted by the Court of Appeal.[2] He recorded:

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1 *R v Reekie* CA283/93, 15 November 1993.
2 *R v Reekie* CA339/03, 3 August 2004.

> [14] ... Mr Reekie, I cannot envisage a case which presents more aggravating factors. The facts largely speak for themselves. My words could never do justice to Complainant A's suffering. When she went to bed that night in October 1992 she was, in her own words, communicated through her victim impact report, "a normal happy 11 year old who was attending school and competing regularly at gymnastics". Again in her own words "this October I will be 22 years old and half of my life has been taken up with what happened to me when I was 11".
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> [15] Complainant A's victim impact report confirms what I observed of her demeanour at trial. She remains haunted by the five hours of your terror and the pain to which you subjected her. Her suffering has been compounded by the ordeals of having to give evidence at Mr Dougherty's two trials, and the guilt associated with his convictions. While, of course, you are not directly responsible for those miscarriages of justice, you must have known that your silence was condemning your victim to constantly reliving the horror of your crimes and an innocent man to at least three years imprisonment. It is consistent with my assessment of your character, confirmed from what I heard of you today, that you would stand by and let others suffer rather than accept responsibility for your conduct.

[5] In early 2009 a feature length film for television based on Mr Dougherty's story in relation to his wrongful conviction for abducting and raping the 11 year old was produced under the title "Until Proven Innocent". That film is the subject of this appeal. The film was largely about the campaign to overturn Mr Dougherty's conviction with considerable focus on those who had assisted Mr Dougherty, including his lawyer, a journalist and a scientist. The film was independently produced by Lippy Pictures Ltd and broadcast by TVNZ on the Sunday night theatre slot on channel one on 8 February 2009. The film was the subject of a complaint by Mr Reekie and an appeal heard in this Court by White J.[3] Mr Reekie's complaint and appeal were unsuccessful.

[6] I have viewed a DVD of the film. This included three brief fictional scenes involving actors assuming the characters of Messrs Dougherty and Reekie while they were still in prison. These scenes were:

a) First scene (45 seconds): the appellant approaches Mr Dougherty while they were both working with other prisoners under supervision:

   NR – I know how you feel man. Those guys just think it's a joke, but I know what it's like. I'm innocent too.

   DD – Is this a wind up?

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3 *Reekie v Television New Zealand Ltd* HC Auckland CIV-2009-404-3728, 8 February 2010.

NR – No way man. I know how it gets. It's hard to trust anyone after you've been falsely convicted. It does your head in.

DD – Yeh, it does.

NR – I'm Nick Reekie.

DD – David Dougherty.

Other prisoners – How cute, the two kiddie rapists have made friends.

DD – Is that what you're in for?

NR – No way man, just abduction. It's a total misunderstanding. The kids backed me up.

b) Second scene (1 min 16): both men are shown in the prison chapel singing a hymn (How Great Though Art). This follows the death of David Dougherty's father and the dismissal of his appeal.

c) Third scene (23 seconds): After Mr Dougherty heard he was to be released from prison, he was shown lying on the ground in the rain. The appellant is shown holding out his hand and pulling him up, and said, "Hey that's good news. You're getting out aye?"

[7] At the end of the programme, while the scene with Mr Dougherty in the rain is being repeated, the on-screen captions summarised the factual outcomes for the people involved in the story:

- On the 17 of April 1997 David Dougherty was found not guilty of the crime for which he had spent more than three years in prison.
- Murray Gibson, Donna Chisholm and Arie Geursen continued to support and fight for David.
- It took another four years before the government apologised and awarded him compensation.
- Dougherty holds no animosity towards the girl who claimed he had abducted and raped her.
- He says she told the truth as she saw it.
- She just had the wrong man.
- In 2003 Nicholas Reekie was convicted of the abduction and rape of "Kate". His DNA positively matched the semen sample taken from her pyjamas in 1992.
- Between the time of David's conviction and his own, Nicholas Reekie had abducted and raped two other women.
- He was caught while attempting to abduct a third.

[8] When the programme was ultimately rebroadcast on 9 August 2009 the word "while" in the final caption had been deleted and had been replaced by the word "after". The film proceeded to receive widespread critical acclaim and went on to win various television awards at the Qantas Film and Television Awards in September 2009.

[9] Mr Reekie made a formal complaint to TVNZ after the 8 February 2009 broadcast alleging that the programme was inaccurate, unfair, unbalanced and had breached his privacy and the programme information standard. TVNZ rejected that complaint. Mr Reekie then referred his complaints to the Authority under s 8(1B)(b)(i) of the Broadcasting Act 1989 ("the Act"). The Authority rejected his complaint in its decision of 10 June 2009. Mr Reekie then appealed to the High Court. That appeal was dismissed by the judgment of White J on 8 February 2010.

[10] Mr Reekie's appeal before White J had related only to the initial broadcast on 8 February 2009 (although the 9 August 2009 broadcast was referred to by White J in his judgment). After the broadcast of the programme on 9 August 2009 Mr Reekie had on 31 August 2009 filed a formal complaint in relation to that programme. He resubmitted his original complaint and made these additional comments:

> 5. Standard (3) in my original complaint, and the decision of the B.S.A., they would not consider if my privacy had been breached in regards to the substantial matter of the film, which was sixteen years ago, because it had not been put to the broadcaster first.
>
> I stated that:
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> (A) This was the main part of the film and my complaint, and did not have to be stipulated, as it was obviously what the bulk of my complaint was about.
>
> (B) It was in my "right of reply" to the broadcaster's decision sent to the B.S.A. under common law.
>
> (C) Matters of privacy can be referred straight to the B.S.A.
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> 6. So I now formally complain that those matters were sixteen years old. I finished serving my sentence for that crime in 1998, and the matter had become private to me again, some eleven years after that sentence had finished, and about 13-15 years since the events depicted as occurring (whether they did or didn't) in the film were shown. This is a breach of my privacy and the right of myself and my family not to have it dragged

up again and again, so many years on, now or in the future. My privacy and my right to move on with my life and seek rehabilitation, outweigh a broadcaster's right to make money out of my past, now and in the future.

7. As I have always said, this film was not meant to be about me. It could easily have been made without the fictional scenes of me in it, or any reference to me at all, since it was only meant to be a drama, not a documentary.

8. Not only was the original screening of this film a breach of my privacy, but so was this rescreening and so will any future rescreenings, until any and all mention or portrayal of me is edited out of the film. This will not affect the story that the broadcaster said he was meant to be telling anyway.

[11] Mr Reekie also argued that the programme discriminated against him. The complaint was ultimately referred to the Authority. It delivered the decision appealed against on 6 July 2010.

The Authority's decision

[12] The Authority, following a remark made by White J in his decision,[4] considered that Mr Reekie could not expect his 1993 convictions to become private given the serious nature of the offences and his later convictions and imprisonment. They declined to uphold that aspect of the complaint. They noted that in respect of the balance of Mr Reekie's privacy complaint and in relation to his complaints that related to breaches of Standard 4 (controversial issues), Standard 5 (accuracy), Standard 6 (fairness) and Standard 8 (responsible programming) in the Code of Broadcasting, the complaints essentially repeated his original complaint and that the issues had therefore been dealt with. The Authority found it appropriate in the circumstances to decline to determine those aspects of the complaint under s 11(b) of the Act.

[13] The Authority did deal with one other complaint on its merits, in addition to privacy. This was an allegation by Mr Reekie that he had been discriminated against through by the telling of lies on the programme. In relation to this complaint the Authority observed that the relevant standard (Standard 7) applied only to sections of

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4 At [55].

the community and not individuals and that it did not apply to Mr Reekie's circumstances and it declined to uphold that part of the complaint.

The approach of this Court

[14] Section 18 of the Act sets out the role of the High Court in relation to appeals against decisions of the Authority. The relevant parts provide:

> **18 Appeal against decision of Authority**
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> ...
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> (4) The Court shall hear and determine the appeal *as if the decision or order appealed against had been made in the exercise of a discretion.*
>
> (5) In its determination of any appeal, the Court may—
>
> (a) Confirm, modify, or reverse the decision or order appealed against, or any part of that decision or order:
>
> (b) Exercise any of the powers that could have been exercised by the Authority in the proceedings to which the appeal relates.
>
> ...
>
> (7) Subject to the provisions of this section, the procedure in respect of any appeal under this section shall be in accordance with rules of Court.
>
> (emphasis added)

[15] Section 20(4) therefore specifies that an appeal must be treated as an appeal against the exercise of a discretion. In *May v May*[5] it was observed in relation to an appeal against an exercise of a discretion:

> But in the end the proper role of this Court is not to reach an original conclusion on the application. Its function is that of an appellate Court. No authority requires to be stated for the proposition that in considering an appeal of this kind 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.

The appeal is therefore not a general appeal to which the judgment of the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar*[6] applies.

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5 *May v May* (1982) 1 NZFLR 165 (CA) at 169–170.

6 *Austin Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

[16] In accordance, therefore, with the traditional approach of Courts in appeals against exercises of a discretion, for the appellant to succeed it must satisfy the Court that the Authority acted on a wrong principle, or failed to take into account some relevant matter or took account of some irrelevant matter or was plainly wrong.

The Broadcasting Code

[17] In considering complaints the code issued by the Authority under the Act is relevant. The relevant code is the Free to Air Television Code of Broadcasting Practice issued in July 2009 ("the Broadcasting Code"). This contains a set of standards. The standards are expressed in summary form followed by guidelines. There are 11 standards.

[18] Section 4(1) of the Act provides that every broadcaster is responsible for maintaining its programmes and their presentation to standards that are consistent with the "privacy of the individual" (s 4(1)(c)) and are consistent with "any approved code of broadcasting practice applying to the programmes" (s 4(1)(e)). Under s 21(1)(e) the function of the Authority is to encourage the development and observance by broadcasters of codes in relation to, amongst other things, the privacy of an individual. Section 21(f) and (g) include amongst the Authority's functions:

> (f) To develop and issue codes of broadcasting practice of the kinds described in paragraph (e) of this subsection in any case where the Authority considers it appropriate:
>
> (g) To approve, for the purposes of this Act, codes of practice of the kinds described in paragraph (e) of this subsection:

[19] The Broadcasting Code does not have the force of a statute or regulation. However, it is the responsibility of a broadcaster under s 4(1)(e) of the Act to maintain programme standards that are consistent with any approved code of broadcasting practice applying to programmes. A failure to observe a standard is prima facie a proper basis for complaint. In relation to the guidelines, the Broadcasting Code states that they do not in themselves impose requirements on a broadcaster. They are there to provide interpretative assistance for broadcasters and

the public, and to indicate factors that the broadcaster should consider when assessing whether a programme complies with a particular standard.

[20] When a broadcaster fails to observe the requirements of a standard in an approved code, such as the Broadcasting Code, it is prima facie failing to meet its responsibilities under the Act. The Broadcasting Code must be seen as setting out standards of good conduct, the breach of which will justify a complaint. Mr Reekie did not raise any question as to the *vires* or adequacy of the relevant standards.

Mr Reekie's grounds of appeal

[21] The grounds of appeal refer to a breach of Mr Reekie's privacy. There is also the claim of discrimination. In addition to the matters raised on the first appeal, there are also further complaints revealed by Mr Reekie's submissions. He submits that the programme was not in fact a documentary, but that at least in part it was presented as a documentary. Those who watched the programme would assume that everything that was shown actually happened. He suggested that it should have been at least called a "docu-drama". He also submitted that there should have been a disclaimer attached to the programme making it clear that there are fictional scenes in the film. He said in the course of submissions that the only remedy he seeks, if successful, is a direction that henceforth disclaimers be displayed when there are fictional scenes in films that are based on true stories.

[22] In the course of submissions Mr Reekie made it clear that he was dissatisfied with many aspects of White J's judgment. He submitted that aspects of the judgment were wrong. His original complaint made it clear that he was raising the same objections to the programme that he had raised previously.

The repeated complaints

[23] Save for the minor change of wording in the end[7] the 8 February and 9 August 2009 programmes were identical. White J dealt with the alleged breaches

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7 See [8].

of Standard 3 (privacy), Standard 4 (balance), Standard 5 (accuracy), Standard 6 (fairness), Standard 7 (programme classification) and Standard 8 (programme information). His consideration of these issues was exhaustive. Moreover he specifically referred to the 9 August 2009 programme. In relation to the 1993 convictions White J observed:

> [54] Mr Reekie's submission in this Court that his 1993 convictions, which had provided the basis for the suggestion in the programme that he had been in prison at the same time as David Dougherty, had become private facts again was not raised in his complaint with TVNZ. The Authority decided that it had no jurisdiction to consider it.
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> [55] In my view the Authority was right not to consider this submission: Broadcasting Act 1989, s 8(1B). But even if the Authority had been wrong to decline jurisdiction, the same decision would have been reached in respect of the public nature of Mr Reekie's 1993 convictions. Those convictions also related to serious offences and were not protected by the Criminal Records (Clean Slate) Act 2004, especially in the absence of a District Court order under s 10(4) requiring them to be disregarded. Furthermore, the 1993 convictions were back in the public arena as a direct result of Mr Reekie's 2003 convictions.

[24] The Judge did not deal specifically with a claim of discrimination. However, he did deal with the issue of whether the programme was a drama or "docu-drama" and the issue of the inclusion of a disclaimer. He held that the programme was in fact a drama.[8] He went on to say at [64]:

> Mr Reekie's description of the programme as a "docu-drama" recognised that the programme was indeed a drama, albeit based on a true story. I agree with Mr Reekie that in this case the inclusion of a disclaimer which explicitly stated that the programme was not in all respects factually accurate would also have made it clear that Standards 4 and 5 were inapplicable, but at the same time the absence of a disclaimer to the effect that the programme was a dramatisation of a true story did not alter the conclusion that a reasonable viewer would have reached, namely that the programme, which was stated to be "based" on the true story of David Dougherty, was a drama and not a "factual programme".

[25] Section 11 of the Act provides:

> **11 Power of Authority to decline to determine complaint**
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> The Authority may decline to determine a complaint referred to it under section 8 of this Act if it considers—

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8 At [61].

(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.

[26] No guidelines are set out as to the basis upon which the Authority should not determine a matter under s 11(b). This is the section relied upon by the Authority in its refusal to consider the complaints save for the 1993 convictions and the claim of discrimination.

[27] Section 11(b) is an unusual provision. It gives a tribunal which has a quasi judicial function an apparently unfettered ability to refuse to determine a complaint. There appear to be no decisions which deal with the nature of the subsection and the jurisdiction to refuse to determine. Obviously a refusal to determine cannot be exercised on capricious grounds. There must be a proper basis for the refusal.

[28] The Authority did not offer any reason for its reliance on s 11(b) in declining to determine the complaint. Section 11(a) relating as it does to frivolous, vexatious and trivial complaints would appear to address complaints that for a substantive reason should be rejected. I would be inclined to the view that s 11(b) is reserved more for complaints where there is a gross problem in form, such as an unintelligible complaint, or a complaint not properly signed or authorised.

[29] Any complaint which is a repeat of an earlier complaint which relates to a later broadcast of the programme which is the subject of the complaint, runs the risk of being treated as frivolous and vexatious. This is because the legislation has set up a complaints procedure and it can be assumed that a determination by the final appeal Court, in this case the High Court, will be determinative. It is a fundamental precept upon which our legal system is based that dissatisfied litigants should not be able to relitigate at will, reflected in the common law concept of *res judicata*. A decision pronounced by a judicial or quasi judicial tribunal which finally disposes of an issue on the merits cannot be raised between the same parties in later litigation.[9] As Binnie J said in the Supreme Court of Canada: [10]

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9 Spencer Bower & Handley *Res Judicata* 4th ed paras 1.01–1.02.

10 *Danyluk v Ainsworth Technologies Inc* [2001] 2 SCR 44 at [18].

> The law rightly seeks finality to litigation ... it requires litigants to put their best foot forward ... when first called upon to do so. A litigant ... is only entitled to one bite of the cherry.

[30] Mr Reekie in his letter of complaint has made it clear that this may not be the only repeat of his complaint, and that he feels free to complain about rescreenings. I am of the view that it is plainly frivolous and vexatious for Mr Reekie to repeat a complaint because a programme has been rebroadcast. Indeed, I take the view that it is frivolous and vexatious to complain about a rebroadcast of the same programme even if there are new grounds not in the original complaint. Those who wish to complaint about a programme should only have one opportunity to do so. They cannot repeatedly attack the same footage. There is only one bite at the cherry.

[31] There will of course be exceptions. If some new material becomes available after the filing of the original complaint which constitutes a new ground of complaint not known at the time of the broadcast of the first programme, then such a complaint might not be frivolous and vexatious. But here Mr Reekie has regurgitated his original complaint with some added points.

[32] The Authority took the view that it would not hear the complaints that were the same as the earlier complaint, but would consider new grounds put forward. In my view the Authority should have declined to determine the complaint in its entirety under s 11(a) on the basis that it was frivolous and vexatious. It was a repeat of the earlier complaint with some new points that could have been made at the time of the earlier complaint. It is effectively an abuse of the Authority's procedure to seek to repeat a complaint in this way.

[33] However, the Authority did go on to consider the new points raised by Mr Reekie and because both counsel for TVNZ and Mr Reekie, and indeed counsel for the Authority, presented submissions on the basis that the appeal on the new points would be heard on its merits. I have had full submissions on these matters. I will therefore proceed to consider those new points on their merits rather than dismiss the appeal in its entirety. Nevertheless, it is clear to me that the Authority was right to decline to determine the complaints against Standards 4, 5, 6 and 8 and

could have declined to deal with the whole complaint on the basis that it was frivolous and vexatious.

Reporting of the 1993 offending

[34] Mr Reekie argues that the 1993 convictions have become "private again to him", and that who he meet or did not meet in prison in 1993 or during any other time was also a private fact to him and was never a public fact. He argued that after serving 10 years of imprisonment persons convicted of murder can, if they have a 10 year minimum term, apply for parole. He referred to the fact that under the Criminal Records (Clean Slate) Act 2004 persons convicted of certain offences can proceed on the basis that they have no criminal record (s 14).

[35] The standard in the Broadcasting Code relied on by Mr Reekie is Standard 3. It states that "Broadcasters should maintain standards consistent with the privacy of the individual". The guideline states that when considering an individual's privacy, broadcasters shall apply the privacy principles developed by the Authority and set out at Appendix 2. Paragraphs 1 and 2 of the relevant appendix provide:

> **Advisory Opinion: Privacy Principles**
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> 1. It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.
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> 2. It is inconsistent with an individual's privacy to allow the public disclosure of some kinds of public facts. The 'public' facts contemplated concern events (such as criminal behavior) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to an objective reasonable person.

[36] Under these principles the resurrection of an historic conviction after a lengthy passage of time could in certain circumstances be a breach of privacy. Relevant factors to be taken into account in assessing whether there was a breach would include the seriousness of the conviction, the time that had elapsed, and events since the conviction. In all cases the test adopted in paragraph 1 of the public disclosure of private facts being "highly offensive to an objective reasonable person" is useful. An objective reasonable person could well consider that the public

disclosure of a relatively minor conviction after a period of years when there had been no events that made that conviction again relevant, was inconsistent with an individual's privacy.

[37] However, this is not the position in relation to Mr Reekie's 1993 offending. This was very serious offending that resulted in the imposition of a lengthy term of imprisonment. It became highly relevant again in 2003 when Mr Reekie was convicted of a further round of very serious offending. The earlier offending was specifically taken into account in the 2003 sentencing process and treated as an aggravating factor. The 2003 convictions were and are a highly public event. The offences had involved the infliction of serious harm to various victims. No objective reasonable person would consider for a moment that the 1993 offending had become private by the effluxion of time. It was in itself serious offending, which was of public interest and in any event Mr Reekie's further crimes had legitimately kept it in the public spotlight.

[38] I note that in an aside, White J reached the same conclusion in relation to the programme. He was not applying the current Broadcasting Code but rather the August 2006 code in which the standard was expressed in a less compressed way, but where the advisory opinion on privacy principles, paragraphs 1 and 2, remained the same. He observed that the 1993 convictions were back in the public arena as a direct result of Mr Reekie's 2003 convictions.[11]

[39] The Criminal Records (Clean Slate) Act does not assist Mr Reekie's argument. Mr Reekie is not prima facie eligible under the Clean Slate scheme in relation to the 1993 convictions as only persons who have, amongst other things, had no custodial sentence ever imposed on them are so eligible (s 7(1)(b)). Mr Reekie with his convictions for serious crimes, cannot avail himself of the provisions of this Act.

[40] Mr Reekie's comparison to murderers serving parole after 10 years has no relevance to the present issue. Parole and privacy are entirely different concepts.

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[11] At [55].

The granting of parole does not equate to a right to privacy in relation to a relevant conviction.

[41] Thus, Mr Reekie's complaint that reference in the programme to the 1993 convictions breached his right of privacy is misconceived. Given Mr Reekie's very serious criminal offending, his past record is a matter of legitimate public interest. No objective reasonable person would find the 1993 disclosure highly offensive. The Authority was right to dismiss this complaint.

Discrimination

[42] Mr Reekie argued that he was being discriminated against by the telling of lies. The Authority dealt with this submission on its merits. It rejected the submission stating that "Standard 7 applies only to sections of the community, not individuals".

[43] Standard 7 provides:

> Standard 7 – Discrimination and Denigration
>
> Broadcasters should not encourage discrimination against, or denigration of, any section of the community on account of sex, sexual orientation, race, age, disability, occupational status, or as a consequence of legitimate expression of religion, culture or political belief.

[44] The guidelines to Standard 7 state that the standard is not intended to prevent the broadcast of material that is:

- factual, or
- the expression of genuinely held opinion in news, current affairs or other factual programmes, or
- legitimate humour, drama or satire.

[45] Discrimination is also prohibited by s 19 of the New Zealand Bill of Rights Act 1990 ("NZBORA") on the grounds of discrimination in the Human Rights Act 1993.

[46] Although it does not explicitly say so, Standard 7 is clearly aimed against programmes which encourage discrimination on the stated grounds. Mr Reekie's submission is therefore misconceived. The programme does not refer to him because of his sex, sexual orientation, race, age, disability, occupational status or as a consequence of legitimate expression of religion, culture or political belief. It does not refer to him because of any of the prohibited grounds of discrimination referred to in s 21 of the Human Rights Act 1993. Rather, it refers to him because he is a bad criminal who has committed serious crimes that have gravely affected a number of victims; and where the wrong person was convicted and imprisoned for one of his crimes. The public has a legitimate interest in this. There has been no discrimination and this submission must fail.

Publication of the disclaimer

[47] Mr Reekie's submission that there should have been a disclaimer was part of his claim that this was a programme broadcast in a way that would lead a viewer to assume that the portrayals of Mr Reekie and what he said and did in the programme were factual. He submits that a disclaimer was necessary to assist in removing this misconception.

[48] The issue of the nature of the programme was carefully and fully dealt with by White J. He considered the decisions of *Banks v Television New Zealand Ltd*[12] and *Accident Compensation Corporation v Television New Zealand Ltd*[13] and whether on an objective examination the content could be seen by a viewer as presenting facts or rather a drama. He observed that an examination of the programme showed that it was a drama, albeit based on a true story.[14] Like White J, I take the view that no reasonable viewer would have thought that the incidents shown in the programme, and the particular interchanges between various persons, were an exact presentation of past events. The programme was stated to be a "drama" and stated to be "based on a true story". There were various themes such as

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12 *Banks v Television New Zealand Ltd* Decision No 2003-141, 15 December 2003.

13 *Accident Compensation Corporation v Television New Zealand Ltd* Decision No 2006-126, 22 February 2007.

14 At [61].

the use of rain and the folding of clothing by Mr Dougherty, which had the mark of a true story that has been fictionalised.

[49] Mr Reekie seized on a reference by White J where he observed that a disclaimer "would also have made it clear that Standards 4 and 5 were inapplicable". However, White J went on to say that the absence of a disclaimer to the effect that the programme was a dramatisation of a true story "...did not alter the conclusion that a reasonable viewer would have reached, namely that the programme, which was stated to be 'based' on the true story of David Dougherty, was a drama and not a 'factual programme'."[15] I agree. No disclaimer was required.

Breach of NZBORA

[50] Mr Reekie asserts that he has been subject to double jeopardy. He relies on s 26(2) of the NZBORA which provides:

> **26 Retroactive penalties and double jeopardy**
>
> ...
>
> (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[51] Mr Reekie argues that the broadcast of the programme constituted a further punishment. This argument has no merit. The words "punished for it again" in s 26(2) do not extend to an offender being subjected to the consequences that naturally flow from a conviction for a crime such as ongoing publicity. That is not being punished "again". It is part of the ongoing legitimate consequences of being convicted for such serious offending.

Conclusion

[52] These complaints are a repeat of Mr Reekie's earlier complaint about essentially the same programme and are therefore frivolous and vexatious for that reason. The Authority could have declined to hear the complaint in its entirety on

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15 At [64].

that basis even though some new grounds were put forward. The Authority correctly rejected the complaints that it was prepared to entertain on their merits. The other points raised by Mr Reekie in this appeal and responded to by TVNZ were also without merit. Mr Reekie's submissions display a remarkable lack of comprehension of the enormity of his crimes. He stated frequently in the course of submissions that he did not accept that he had been properly convicted and wished to challenge those convictions. He cannot use the complaint procedure as a means of venting his dissatisfaction with those convictions.

Summary

[53] The appeal is dismissed.

Costs

[54] TVNZ seeks costs. In the ordinary course of events it would be entitled to those costs. However, I see no point in ordering costs against a person who will be in prison until at least 2023 and has no means. I therefore make no order as to costs.

Asher J