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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2003-485-1655 & 1816

UNDER Section 18 Broadcasting Act 1989

IN THE MATTER of an appeal against a decision of the
Broadcasting Standards Authority

BETWEEN TV3 NETWORK SERVICES
LIMITED
Appellant

AND THE PRIME MINISTER (RT HON.
HELEN CLARK)
First Respondent

AND MIKE MUNRO
Second Respondent

AND THE LIFE SCIENCES NETWORK
INCORPORATED
Third Respondent

AND DAVID COY
Fourth Respondent

AND I B OWEN
Fifth Respondent

Hearing: 3-4 February 2004

Appearances: C Bradley for appellant
H B Rennie, QC, for first and second respondents
No appearance for third respondent
No appearance for fourth respondent
J W Tizard as amicus curiae for fifth respondent
A Scott-Howman for Broadcasting Standards Authority

Judgment: 10 February 2004

JUDGMENT OF RONALD YOUNG J

Introduction

[1] This appeal challenges the conclusions of the Broadcasting Standards Authority (“BSA”) that the appellant breached Standards 4, 5 and 6 of the Broadcasting Code of Practice in its broadcasts in relation to allegations of distribution of genetically modified corn and Government cover-up. Some brief background is necessary. A useful summary of the issue is contained in the BSA’s decision as follows:

Summary

- [1] Allegations that the Government had been aware of the distribution of genetically modified (GM) corn, made in a book published on 10 July 2002, were the subject of a *3 News Special* programme broadcast on TV3 between 7.00 pm and 7.30 pm on that day. Interviews with the book’s author and the Prime Minister were broadcast during the programme. The interview of the Prime Minister was recorded the day before the book was published and no mention of the book was made during the interview.
- [2] Mr Mike Munro, the Chief Press Secretary in the Office of the Prime Minister, the Rt Hon Helen Clark, the Prime Minister, the Life Sciences network Inc (LSN), Mr Yuri Wierda, Mr David Coy, Mr I B Owen and Ms Janet Rutherford each complained to TV3 about aspects of the broadcast. The complainants alleged, in particular, that the programme contained inaccuracies, was unbalanced and was unfair to the Prime Minister.
- [3] TV3 declined to uphold any aspect of the complaints.
- [4] Dissatisfied with TV3’s decisions, each of the complainants referred their complaints to the Broadcasting Standards Authority under s.8(1)(a) of the Broadcasting Act 1989.

For the reasons given below the Authority upholds a number of aspects of some of the complaints that the broadcast was unbalanced, that it was inaccurate and lacked impartiality and objectivity, and that it was unfair.

[2] “The Programme” was identified in the Authority’s decision as:

- [7] The book “Seeds of Distrust” was published on 10 July 2002. The book alleged that the Government had been aware, in November-December 2000, of the accidental distribution of

genetically modified (GM) contaminated corn seeds, and had allowed the seeds to be planted, harvested and processed.

- [8] The matters raised in the book, written by investigative journalist Nicky Hager, featured in a *3 News Special* broadcast on TV3 between 7.00-7.30 pm on 10 July 2002. The item was presented by news reader and interviewer, John Campbell. The broadcast occurred during New Zealand's general election campaign, which took place on Saturday 27 July 2002.
- [9] The *3 News Special* comprised three sections. In the first section, the interviewer, alternatively set in the Marlborough countryside, in a cornfield, in Parliament and in a studio, outlined the arguments advanced in the book. The section also included excerpts from an interview with Mr Hager in which he was asked to summarise and confirm some of the findings contained in the book. The second and third sections involved a pre-recorded studio interview with the Prime Minister. When introducing these sections, the presenter stated that the interview was recorded the previous evening. The book, not then published, was not referred to. The contentions in the book had received wide coverage by the time the interview was broadcast.
- [10] Towards the conclusion of the pre-recorded interview, the Prime Minister stated that she would be available to be interviewed again after she had been fully briefed on the issues raised. The presenter stated that the Prime Minister had later declined to participate in a second interview.

[3] The Authority grouped the complaints received about the programme into alleged breaches of three standards in the Code of Broadcasting Practice (that Code effective 1 January 2002). The preparation and compliance with a code of broadcasting practice is anticipated in s 4 of the Broadcasting Act 1989 ("the Act"), which, at ss (1) provides as follows:

- (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with—
- (a) The observance of good taste and decency; and
 - (b) The maintenance of law and order; and
 - (c) The privacy of the individual; and
 - (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable

opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and

(e) Any approved code of broadcasting practice applying to the programmes.

[4] The Authority first considered complaints of a breach of Standard 6. The Authority in its summary in relation to this said:

[323] In its assessment of the complaints that the broadcast failed to deal justly and fairly with the Prime Minister, the Authority has considered separately the processes during the "preparation" and "presentation" of the broadcast.

[324] For the reasons given in paras [280] to [294], the Authority declines to uphold the aspects of the complaints which alleged that the Prime Minister had been dealt with unfairly during the preparation apropos the adequacy of TV3's briefing of the Prime Minister before the interview.

[325] The Authority upholds the complaint that the fairness requirement in Standard 6 was breached on the grounds that the presentation of the interview was unfair because the Prime Minister was not advised of the source of the specific allegations. It was also unfair that the Prime Minister was not told that the person who advanced the allegations had presented his conclusions in the same programme as the interview with the Prime Minister, but before her. Accordingly, the Authority upholds aspects of the complaints which alleged a breach of Standard 6 from the Prime Minister and the Chief Press Secretary, the LSN, Mr Coy and Mr Owen.

[326] In summary, in respect to other matters determined as issues of fairness, the Authority declines to uphold or declines to determine the aspects of the complaints which related to:

- The alleged inadequacy of TV3's briefing of the Prime Minister before the interview which included the omission by TV3 of any reference to Mr Hager's forthcoming book "Seeds of Distrust" or to allegations in the book.
- Interviewer's challenge to the Prime Minister's recollection of the events detailed in "Seeds of Distrust".
- The conduct of the interview.
- The time taken by TV3 to respond to the complaints from the Prime Minister and the Chief Press Secretary.

[5] As to the complaints of a breach of Standard 4, the Authority in its summary concluded:

[357] When determining issues of balance, the Authority notes that it is not necessary to decide the factual issues which are being debated. Rather, the balance requirement means that competing arguments must be advanced with sufficient purpose to enable a viewer to arrive at an informed and reasoned opinion.

[358] In weighing the competing arguments as to whether balance was achieved during the period of current interest on this occasion, the Authority concludes that there were two elements in the programme complained about. The Authority also took into account the high impact of the presentation. The first element was scientific concerns about the possibility of contaminated seed, and the second focused on Government accountability and trustworthiness. As the Authority considers that viewers were left to reach their own conclusion in regard to scientific issues, the first element is not upheld. However, as the Authority is of the view that reasonable efforts were not made to present significant points of view on the issue of Government accountability and trustworthiness, it finds that the second element is upheld. Accordingly, the Authority concludes, Standard 4 was breached by the broadcast as significant viewpoints were not advanced during the period of current interest to the extent necessary to counter the high impact of the strong allegations which called into question the accountability and trustworthiness of the Labour Government raised by the publication of "Seeds of Distrust". This aspect of the complaint from Mr Owen which referred to Standard 4 is upheld.

[6] As to the complaint of a breach of Standard 5, the Authority stated:

[413] Putting "allegations as facts" to the Prime Minister during the interview was a principal focus of the complaints which alleged that the broadcast breached Standard 5. In response, TV3 contended, first, that the allegations were "opinion, analysis and comment" to which Standard 5 did not apply. Second, it acknowledged that the interviewer accepted the contents of "Seeds of Distrust" were factual as he had examined all the source material available to Mr Hager, the book's author.

[414] The Authority does not consider that it has the skills to determine the accuracy of the scientific issues raised in the book and discussed in the programme. It notes that these questions still remain in debate. As there is no readily

available source to establish without question the accuracy of the allegations, the Authority declines to determine those aspects of the complaints.

[415] While the requirement for “accuracy” might be a summary of the requirement of Standard 5, it also requires that news, current affairs, and other factual programmes “be impartial and objective at all times”. The Authority concludes that the broadcast was not impartial and objective, and upholds that aspect of the LSN complaint, given the differential treatment apparent in the interviewer’s approach to Mr Hager and to the Prime Minister.

[416] It also upholds the Prime Minister’s and the Chief Press Secretary’s complaints that the omission of any reference to the press conference given at 4.30 pm on 10 July in the *3 News Special* broadcast at 7.00 pm that day breached the requirement in Standard 5 for impartiality and objectivity.

This Appeal – the Legal Issues

[7] Sections 18(4) and 18(5) of the Act provide legislative guidance to this Court on its approach to such an appeal. They state:

(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.

[8] It was common ground that to succeed an appellant must therefore establish that the Broadcasting Standards Authority either

(a) Acted on a wrong principle;

(b) Failed to take into account a relevant matter or had regard to an irrelevant matter; or

(c) Was plainly wrong.

[9] The appellant submits that with respect to the BSA's decisions relating to Standards 5 and 6 it was "plainly wrong".

[10] The Court of Appeal in *Hawkins v Minister of Justice* [1991] 2 NZLR 530 considered this ground of appeal in another context. Richardson J (as he then was) at p 538 said:

If then the [Securities] Commission in its consideration of the case asks itself the correct legal questions and addresses the relevant facts, its decision to recommend that the Minister apply the Act must stand, unless it is one of that rare category of cases where it can be said that its conclusion was so extraordinary that the only proper inference is that the power itself must have been misused.

I keep that principle in mind in this case.

[11] As to the Standard 4 finding, the appellant alleges a lack of jurisdiction to consider the complaint; the application of a wrong test; and a failure to provide the appellant with an opportunity to respond to the alleged breach as formulated by the Authority.

[12] The "complaints" proceeding is programme-based. The complainant is, where there is to be a formal complaint, required to put the complaint in writing (s 5(f)). The complaint must be about a programme and allege a breach of s 4 (s 6(1)(a)). And "programme" is defined in the Act (s 2). Section 6(2) sets time limits for complaints.

[13] The intention is that the complaint will be first considered by the broadcaster (ss 5, 6 and 7), and the right of a dissatisfied complainant to have his complaint further considered by the BSA is confirmed in s 8. The BSA is given some of the powers under the Commissions of Inquiry Act when considering complaints (see s 12). Sections 21(1)(e), (f) and (g) describe relevant functions of the Authority in relation to the development of codes of practice.

[14] The "programme" complained about by all three complainants was the 7 p.m. "News Special" (variously described by TV3) shown on 10 July 2001.

[15] I now turn therefore to the first of the appeals.

Appeal in breach of Standard 4 - Mr Owen's Complaint

[16] Mr Owen appeared unable to instruct counsel on his own behalf to respond to TV3's appeal. After pre-trial discussion with counsel, Mr Tizard was appointed as amicus. His instructions were to act as if instructed by Mr Owen to respond to this part of the appeal.

[17] I propose to quash the finding of the BSA and refer Mr Owen's complaint back to the BSA for reconsideration. I propose to do so because I consider TV3 were not given sufficient opportunity to respond to the way in which the Authority formulated Mr Owen's complaint.

[18] Mr Owen made a formal complaint about the 7 p.m. programme on the same day it was shown, 10 July. Initially Mr Owen identified his complaints under a previous broadcasting code. This was subsequently resolved, and it was clear amongst other complaints that Mr Owen complained that the 7 p.m. broadcast failed to comply with Standard 4. Standard 4 states:

In the preparation and presentation of news, current affairs and factual programmes, broadcasters are responsible for maintaining standards consistent with the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest.

And the Guidelines state:

- 4a Programmes which deal with political matters, current affairs, and questions of a controversial nature, must show balance and impartiality.
- 4b No set formula can be advanced for the allocation of time to interested parties on controversial public issues. Broadcasters should aim to present all significant sides in as fair a way as possible, it being acknowledged that this can be done only by judging each case on its merits.
- 4c Factual programmes, and programmes shown which approach a topic from a particular or personal perspective (for example,

authorial documentaries and those shown on access television), may not be required to observe to the letter the requirements of standard 4.

[19] Mr Owen did not identify in what way he considered Standard 4 had not been met. Pursuant to the statutory process, TV3 was then required to respond to Mr Owen's complaint. TV3 did not ask Mr Owen to provide any further detail of his complaint. Thus the response from TV3 was predictably general.

[20] The appellant said the "period of interest" in Standard 4 was defined from 10 July to 15 July and that overall the coverage was balanced. Mr Owen was dissatisfied with TV3's conclusion and referred his complaint to the BSA (s 8). Although there followed some correspondence between Mr Owen and the BSA regarding details of his complaint of breach of Standard 4, none was provided. Mr Owen said he was content to let the BSA investigate the matter itself.

[21] The BSA in its decision embarked on a broad consideration of whether Standard 4 had been breached in the 7 p.m. programme. It considered the "period of interest" and appeared to accept it could consider material through until 15 July. It considered the original 7 p.m. programme raised two issues against which Standard 4 matters needed to be assessed: the scientific issues and Government accountability and trustworthiness. The BSA concluded that there was no breach of the standard as far as the scientific issues were concerned and that there was a breach of Standard 4 as far as the issue of Government accountability and trust was concerned.

[22] I consider that there was nothing objectionable in law in the BSA embarking on a broad enquiry regarding compliance with Standard 4 in the circumstances of this case. The Authority had a formal complaint by Mr Owen alleging a breach of s 4 of the Act and his dissatisfaction with TV3's decision to reject his complaint. The BSA was therefore statutorily bound to proceed. While the lack of specific detail of complaint may have made their task more difficult, it is important to recall that the complaint system is intended to be a straightforward, "non-technical" process for lay people (see s 10). The "complaint" itself need be no more than a complaint that the broadcaster has failed to comply with s 4 of the Act. While it is clear the BSA has no originating complaint authority itself, where, as here, there is a

complaint to a broadcaster of a breach of s 4 and referral by a dissatisfied complainant to the BSA, the statute obliges (with narrow exceptions) the BSA to “investigate and review the broadcaster’s decision”. Mr Owen’s complaint of a breach of Standard 4 was general and therefore gave the BSA in turn potentially a broad opportunity to review TV3’s decision and programme. I can therefore see no impediment in the BSA undertaking a broad review of TV3’s performance and comparing that with Standard 4 in these circumstances. It may be preferable for the BSA to ask complainants to specify why they consider a standard is breached. However, I repeat: the need to provide detail should not become an impediment to complaint. In as important and serious a matter as this the BSA was right, in my view, to undertake their broad review.

[23] However, in such circumstances the provisions of s 10(2)(c) become of particular importance. Section 10(2)(c) states:

- (2) In considering every complaint referred to it under section 8 of this Act, the Authority shall provide for as little formality and technicality as is permitted by—
 - (a) ...
 - (b) ...
 - (c) The principles of natural justice.

[24] I have detailed already how the Authority identified the issues when considering the Standard 4 complaint. This approach was not referred to the appellant to respond to prior to the BSA’s decision. To comply with natural justice in such circumstances as these, fairness required the BSA to refer its intended approach to both Mr Owen and TV3 and to seek a response on both the tentative analysis and tentative views as to compliance with Standard 4. I did not understand Mr Tizard to challenge this proposition.

[25] Given, therefore, the Authority failed to comply with s 10(2)(c) of the Broadcasting Act, the question is now what, if any, remedy there should be for such a breach. Mr Tizard invited me to dismiss the appeal on the basis that the appellant had essentially failed to identify any matters which could have convinced the BSA to reach a different conclusion. In other words, even if offered the opportunity, there is

nothing TV3 could have said which would possibly have resulted in a different conclusion by the Authority.

[26] Ms Bradley on behalf of TV3 submitted that she could identify relevant material which the BSA should have taken into its account in its assessment. She submitted I should either allow the appeal and reject the complaint or allow the appeal and refer the matter back to the Authority to reconsider with the benefit of submissions from Mr Owen and TV3.

[27] Section 18(5) and (7) are relevant, and they provide:

18 Appeal against decision of Authority

....

(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.

[28] I consider the fair course in this case is to quash the decision of the BSA on this aspect of the complaint and invite it to reconsider Mr Owen's complaint again in light of any further submissions from both Mr Owen and TV3. As Ms Bradley pointed out, Standard 4 requires a consideration of whether reasonable efforts were made or reasonable opportunities given to present other points of view. The standard requires consideration also of what is the period of interest during which this should be done. TV3 believes it has material bearing on these topics which the BSA has not considered. In that situation, and in fairness to them, they should have their opportunity to present this material to the BSA.

[29] I wish to make it clear, however, that on the material as considered by the BSA to date under Standard 4 their conclusions were fairly and properly open to

them and no error of law can be seen in my view. On the facts the conclusions reached by the BSA could not be challenged. Because this conclusion is not essential to my decision, I do not consider in detail in this judgment why.

[30] The Authority's decision upholding Mr Owen's complaint of a breach of Standard 4 is therefore modified in that I set the conclusion aside. I consider that implicit within ss 18(5) and 18(7) is the right to send a decision back to the Authority for reconsideration, in particular on an appeal successfully argued based on breach of natural justice. The order for costs in relation to this finding is also modified and set aside. I discuss this aspect further at the conclusion of this judgment.

Standard 6 Appeal – The Right Honourable Helen Clark and Mr Muñro

[31] The BSA concluded that Standard 6 had been breached because the Prime Minister was not told the source of the specific allegations in her interview of 9 July. The complaints of the Right Honourable Helen Clark, Mr Munro, LSN, Mr Coy and Mr Owen were therefore upheld. The BSA rejected complaints of breach of Standard 6 relating to adequacy of briefing of the Right Honourable Helen Clark, the interviewer's challenge to the Prime Minister, the conduct of the interview and the time taken by TV3 to respond to the complaint.

[32] Standard 6 and its Guidelines state:

In the preparation and presentation of programmes, broadcasters are required to deal justly and fairly with any person or organisation taking part or referred to.

Guidelines

- 6a Care should be taken in the editing of programme material to ensure that the extracts used are a true reflection, and not a distortion, of the original event or the overall views expressed.
- 6b Contributors and participants in any programme should be dealt with fairly and should, except as required in the public interest, be informed of the reason for their proposed contribution and participation and the role that is expected of them.

- 6c Programme makers should not obtain information or gather pictures through misrepresentation or deception, except as required in the public interest when the material cannot be obtained by other means.
- 6d Broadcasters should acknowledge the right of individuals to express their own opinions.
- 6e Broadcasters should take particular care when dealing with distressing situations, and with grief and bereavement. Discretion and sensitivity are expected.
- 6f Broadcasters should recognise the rights of individuals, and particularly children and young people, not to be exploited, humiliated or unnecessarily identified.
- 6g Broadcasters should avoid portraying persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, sexual orientation, race, age, disability, or occupational status, or as a consequence of legitimate expression of religious, cultural or political beliefs. This requirement is not intended to prevent the broadcast of material which is:
 - i) factual, or
 - ii) the expression of genuinely held opinion in news, current affairs or other factual programmes, or
 - iii) in the legitimate context of a dramatic, humorous or satirical work.
- 6h Broadcasters should avoid causing unwarranted distress to surviving family members by showing library or archival footage of bodies or human remains. This guideline is not intended to prevent the use of material which adds significantly to the understanding of an issue of public interest.

[33] It is important to keep in mind that a complaint about a breach of Standard 6 is a complaint about fairness in preparation and/or presentation of a particular programme. The BSA's conclusion relates to unfairness in presentation in the 7 p.m. news special. The appellant's submissions in part are based on the proposition that in considering whether the 7 p.m. programme was in breach of Standard 6 the BSA should have considered all other material broadcast by TV3 relating to the topic through to at least 15 July. I reject that submission. Standard 6 is clear. It is concerned with fairness in the preparation and presentation of a programme. It is the programme itself which must be judged, along with the preparation for the

programme, against the standard. This can be contrasted with Standard 4, which is concerned with reasonable opportunities and efforts to present significant points of view within a period of interest. In Standard 4 compliance is to be judged over a period of time and will involve a broader assessment when compared with Standard 6.

[34] The appellant also submitted that the identity of the Prime Minister's accusers was irrelevant and that "disclosure of the fact of the book, the content and its author are all irrelevant considerations". I agree with the assessment of the Authority in relation to this point. It said:

[296] Throughout the interview that was conducted with her, the Prime Minister was unaware of, one, the previous interview, two, Mr Hager's allegations, and, three, the book that contained the allegations. The viewers, however, knew the nature of the allegations, who had made them, and the existence of the book which was covered extensively during the preceding *3 News*. Furthermore, the book was referred to as part of the reintroduction to the interview with the Prime Minister after the commercial break. The Authority concludes that this was unfair. In effect, the Prime Minister was accused of a number of practices – including dishonesty – but was not told the identity of her accuser.

[35] Clearly the identity of the accuser was relevant both to the Prime Minister and to a viewer. The identity of an accuser in such a situation may well assist in part in assessing what weight the allegations should have. And, as the BSA observed, the context in which the 7 p.m. programme was shown (after the release of the book) was both confusing and unfair. The 7 p.m. news special began with an introduction by the presenter. It included essentially a summary of Mr Hager's allegations, although, as I will discuss under the Standard 5 complaint, allegations were presented as established facts. At the end of this section of the programme the presenter said, "Well, there we have it, the thrust of Nicky Hager's controversial book. After the break we hear from the P.M., Helen Clark". When the interview with the Prime Minister was introduced, it was not made clear that at the time of the interview Ms Clark did not know of the existence of the book, the author or its contents. The BSA's conclusion that this was unfair again is a finding properly and reasonably open on the facts. It identified the facts and applied the correct law.

Certainly it could not possibly be described as plainly wrong. The conclusions were clearly open to the BSA on the facts of the case.

[36] The appellant also submitted that the public interest was “in hearing the P.M.’s unrehearsed reaction to an allegation ...”. The BSA as to this said:

[307] The Authority believes that the public interest claimed by the broadcaster on this occasion in adopting the approach taken – by not referring to the book or informing the Prime Minister that she was answering specific allegations made by Mr Hager and put to her by the interviewer as fact, and by including in the interview with the Prime Minister – is not outweighed by the broadcaster’s obligation to deal with a participant justly and fairly in the presentation of a programme.

This conclusion again was properly open to the BSA and the detail of TV3’s submission was properly considered. The BSA’s finding related only to the identity of the accuser and did not include any obligation to advise the Prime Minister beforehand of the allegations.

[37] My conclusion is therefore there was ample factual material on which the BSA could reach the conclusion it did. It is the expert tribunal whose function is to find the facts on which to reach judgements about fairness and balance in the presentation of programmes. This it has properly done. The appeal on these grounds therefore will be dismissed. The decision of the BSA is confirmed.

Standard 5 Appeal

[38] The BSA found that the 7 p.m. news special breached Standard 5 in two ways relating to impartiality. It found:

- (i) In treating Mr Hager and the Prime Minister differently, the requirement for impartiality was breached; and
- (ii) In omitting reference to the 4.30 p.m. news conference on 10 July in the 6 p.m. or 7 p.m. news, impartiality and objectivity was breached.

[39] Standard 5 provides:

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

The Guidelines state:

- 5a Significant errors of fact should be corrected at the earliest opportunity.
- 5b Broadcasters should refrain from broadcasting material which is misleading or unnecessarily alarms viewers.
- 5c Broadcasters must ensure that the editorial independence and integrity of news and current affairs is maintained.
- 5d Factual reports on the one hand, and opinion, analysis and comment on the other, should be clearly distinguishable.
- 5e Broadcasters must take all reasonable steps to ensure at all times that the information sources for news, current affairs and documentaries are reliable.

[40] Some further factual background material is necessary before I consider this appeal.

[41] On 10 July, after the release of Mr Hager's book, a press conference was called by the Government. The Prime Minister and Mr P Hodgson, a Cabinet Minister, attended. Both spoke. Mr Hodgson concentrated on the scientific issues relating to the testing of corn for genetic modification. The Prime Minister spoke about Government responsibility issues. Early in the day the Minister responsible for the testing programme, Ms Marion Hobbs, had herself released a press statement regarding the science and Government responsibility issues.

[42] At the end of the Prime Minister's interview on 9 July there had been a discussion, between herself and the interviewer, regarding her return for a further interview when fully briefed on the corn/GE issue. TV3 has maintained that it expected the Prime Minister to appear for such an interview up until 5.45 p.m. on 10 July when she declined. During the 6 p.m. news on 10 July some time was spent on the corn/GE release issue. It was described as the most important news issue of the day. Mr Hager's allegations were presented. As to the Government's response from their 4.30 p.m. conference, no detail was included in the 6 p.m. 10 July news or

in the 7 p.m. news special. The only quote from the 4.30 p.m. conference was the Prime Minister stating:

I predicted correctly that the election campaign would be dirty. This is dirt without precedent. The dirt is not now confined to the National Party, it spreads to elements of the Green Movement.

[43] As with its approach to Standard 6, the appellant submitted that material broadcast over the following few days, at least up until 15 July, should have been considered by the BSA in assessing impartiality. They submitted that the inclusion of the words “at all times” in Standard 5 indicated that compliance with the standard was to be considered over a broad period while the issue was current.

[44] I reject this approach to Standard 5. The addition of the words “at all times” is for emphasis. The complaint process in Standard 5 is focused on, amongst other matters, impartiality of a programme. The broadcaster will be judged on the programme itself. It is for the broadcaster to ensure each such programme is impartial. The perspective will be given by considering what the broadcaster knew or ought reasonably to have known at the time the programme goes to air.

[45] The BSA’s conclusion that the interviewer’s failure to robustly question Mr Hager, given the approach to the Prime Minister, is described by the appellant as plainly wrong. The reasons for this claim include: thorough journalistic investigation of the allegations; that this was a current affairs investigation; forceful questioning of someone who was accused is fair; and, finally, the interviewee was allowed to respond to the allegations without significant editing.. I consider each in turn.

Journalistic Investigation

[46] I consider that much of this approach misses the essential point made by the BSA. When the programme was shown at 7 p.m. on 10 July, the broadcaster knew there was a serious dispute about the facts claimed by Mr Hager. The “investigation” by the journalist was not an independent verification of Mr Hager’s allegations from a different source. It was confirmation that documents on which Mr Hager’s allegations were based were genuine documents. However, the

4.30 p.m. press conference in any event seemed to make it clear that it was not the genuineness of the documents that was in issue but what they meant and what conclusions could be drawn from them. I reject the proposition therefore that the journalist's enquiries somehow excused the need for impartiality by robust challenge also to the allegations made by Mr Hager.

News v Current Affairs

[47] However the 7 p.m. programme was categorised, the requirements under Standard 5 are the same. There is no substance to this part of the appeal.

Challenging and Forceful Style of Accuser

[48] The Authority concluded that the style used in challenging the Prime Minister was not in breach of any standard. If it is the appellant's submission that a similar standard of forceful challenge to those who accuse was not required in this case, then I reject that proposition. Obviously, in such circumstances much will depend upon context. The context here clearly required forceful challenge of both accuser and accused. These were serious allegations of Government failure of trustworthiness. They were made at the most sensitive time possible, during an election campaign. They had the potential to affect the result of an election and therefore which political parties might be able to form a Government. The need for scrupulous impartiality was heightened. This is the context the BSA correctly identified. In such circumstances even-handedness of challenge was required.

First Airing of Issue

[49] Nor do I consider this factor is of relevance in this case, especially when one considers the fact that TV3 knew when it screened the programme there was a serious debate about Mr Hager's allegations and conclusions.

Reasonable Viewer

[50] The appellant maintains that "no reasonable viewer would have considered the programme partial because of the style of questioning". This proposition cannot

be correct. The 7 p.m. programme put Mr Hager's allegations as fact. The questions asked of Mr Hager were leading, or he was simply left to tell his version of the events, or the interviewer reinforced what Mr Hager had himself already said. The whole tenor of the 7 p.m. programme was that Mr Hager's allegations were the true facts. There was no question of Mr Hager in the 7 p.m. programme which challenged his allegations. This is in stark contrast to the questions asked of the Prime Minister by the interviewer in the 7 p.m. programme. As to this the BSA said:

[397] The Authority begins its consideration of this aspect by noting that the interviewer displayed two contrasting interview techniques. The questions to the Prime Minister were forceful, challenging and prosecutorial. In contrast, Mr Hager was asked, in a restrained manner, either to advance the findings contained in his book, or to confirm a summary of a finding given by the interviewer. The issue for the Authority is whether the contrast displayed a degree of partiality or a lack of objectivity which contravened Standard 5.

[398] TV3 contended that the forceful questions to the Prime Minister were acceptable given that she has considerable skill in dealing with the media, and she was the Prime Minister during an election campaign. TV3 argued that special conditions attach to particular people in specific roles.

[399] The Authority considers that reasoning should also apply to Mr Hager. As Mr Wierda pointed out as an aspect of his Standard 4 complaint, Mr Hager is a skilled publicist and has considerable expertise in television. In addition, while not standing for political office, Mr Hager published his book during an election campaign. In the Authority's opinion, he should have been exposed to similarly robust questioning in the interests of impartiality. Instead, in the *3 News Special* and subsequent programmes submitted by the broadcaster as being in the period of current interest, Mr Hager was treated in either a deferential or neutral manner in the segments of the interview which were broadcast.

[51] I agree with the BSA's analysis and approach. It had clearly established the facts on which it reached its conclusion, and its conclusion was, in my view, inevitable given those relevant facts. There was neither error of law nor error of factual analysis.

[52] The appellant also submitted that it had reflected the Government's position adequately and accurately by its coverage in the 6 p.m. news that preceded the 7 p.m.

news special on 10 July. Although I doubt the relevance of this proposition given the programme to be judged was the 7 p.m. programme, the submission in any event does not stand up to an analysis of the facts. I have read, as did the BSA, a copy of the transcript of the 4.30 p.m. press conference. Both the Prime Minister and Mr Hodgson dealt extensively with both Government accountability and the science issues. Although TV3 maintained they were separate and no breach was found by the BSA with respect to coverage of the scientific issues, I consider they are linked. After all, if the Government was correct about the science issues, then accountability questions hardly arose, and vice versa.

[53] The coverage of the 4.30 p.m. press conference by TV3 consisted of one brief sentence by the Prime Minister relating to the politics of the issue. This coverage could not possibly be described as adequate. It did not deal in any sense with the substance of the Government's reply either as to the science or accountability. And I reject the suggestion, as did the BSA, that because TV3 considered the Prime Minister had cancelled an interview at the last minute it did not have time to include the material in its 6 p.m. or 7 p.m. coverage that night. I accept and agree with the BSA's conclusion TV3 would have had sufficient time to include material from the 4.30 p.m. press conference. This proposition is reinforced by the fact that TV3 did include some limited coverage from the 4.30 p.m. press conference in its 6 p.m. coverage. More importantly, even if it did not have time to edit the 4.30 p.m. material for its 6 p.m. coverage, it knew the contents of the Government's response and yet it chose to continue with the 7 p.m. pre-recorded special as if the Government response did not exist; indeed, as if there had been no response.

Offer of Subsequent Interview

[54] The two points made by the BSA with respect to the appellant's proposition that the offer of a second and further interviews to the Prime Minister cured any impartiality present in the 7 p.m. news special are correct. The offer of another interview does not "fix" any lack of impartiality in the original interview. And the rejection of the offer later on 10 July by the Prime Minister was, as the BSA have observed, in quite different circumstances with quite different knowledge from that which pertained at the interview on 9 July. At the end of the interview on 9 July the

Prime Minister did not know that the allegations were based on a book by Mr Hager which was to be released the following day. In any event, I repeat: subsequent interviews could not affect the partiality of the 7 p.m. programme. It was for the broadcaster to ask itself the question, when looking at the 7 p.m. programme: have we breached Standard 5? Is this programme impartial in the way it presents various viewpoints?

[55] The conclusions by the Authority that the differential treatment apparent in the interviewer's approach to Mr Hager and the Prime Minister at the 7 p.m. news special breached the impartiality provisions of Standard 5 in my view are based on an accurate analysis of the facts and law. And I am satisfied that the conclusion of the BSA that the omission of proper coverage of the 4.30 p.m. news conference on 10 July while continuing with the 7 p.m. programme breached Standard 5 for impartiality and objectivity. This conclusion was based on the proper analysis of the facts and law and in my view nothing the appellant has said has challenged that proposition. The two appeals therefore by Television 3 with regard to the findings that it breached Standards 6 and 5 are dismissed.

Costs Appeal

[56] The BSA in a separate decision made two costs awards. Firstly, it awarded costs of \$3,500 in favour of the Crown with respect to each of the four complaints it found established, a total of \$14,000. And it awarded costs to The Honourable Helen Clark and Mr Munro of \$11,000 as a contribution towards their legal fees.

[57] Section 16(1) and (4) of the Broadcasting Act authorise such costs. They state:

16 Power to award costs

(1) Subject to subsection (2) of this section, the Authority may, in any proceedings, order any party to pay to any other party such costs and expenses (including expenses of witnesses) as are reasonable, and may apportion any such costs between the parties in such manner as it thinks fit.

....

(4) Without limiting subsections (1) to (3) of this section, where the Authority finds a complaint against a broadcaster to be justified, in whole or in part, the Authority may order the broadcaster to pay to the Crown by way of costs, within one month after the date on which notice in writing of the decision is given to the broadcaster under section 13(2) of this Act, such sum not exceeding \$5,000, as the Authority thinks fit.

[58] The appellant appealed against both these costs awards. The statute does not provide for an appeal directly from an award of costs by the BSA. Section 18, the relevant section relating to appeals, states:

18 Appeal against decision of Authority

(1) Where the Authority makes—

(a) A decision under section 11 of this Act; or

(b) A decision or order under section 13 [or section 13A] of this Act,—

the broadcaster or the complainant may appeal to the High Court against the whole or any part of the decision or order.

(2) Repealed

(3) Every appeal under this section shall be made by giving notice of appeal within one month after the date on which the appellant was notified of the decision or order appealed against or within such further time as [] the High Court may allow.

(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.

(6) Repealed

(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.

[59] Noticeably absent from the rights of appeal is an appeal from s 16 of the Act. I am satisfied, however, that where a substantive finding of the BSA is modified or reversed by the High Court pursuant to s 18(5) then there would be the ancillary power to modify or reverse any costs order made relating to the finding successfully appealed from. That situation is not the case here, except for the successful appeal with respect to the alleged breach of Standard 4. A costs order of \$3,500 was made pursuant to s 16(4) by the BSA with respect to this complaint. That costs order is now properly set aside. It can be reconsidered when the Authority reconsiders the Standard 4 complaint. Because this was a complaint by Mr Owen, no issue of legal fees or any adjustment arises.

[60] The appellant recognised at the hearing that there was no jurisdiction to appeal the other costs orders. It therefore made application to amend the proceedings to treat them as judicial review proceedings. The first and second respondents opposed the application. I heard argument on the merits as if the application for leave had been granted and propose to deal with the application itself by considering therefore the merits of review.

[61] The appellant submits that the BSA failed to consider the following relevant factors in awarding both sets of costs:

- (i) That the conclusions of the BSA only partially upheld the complaints;
- (ii) The complaints upheld were not the principal focus of the complainants;
- (iii) Mr Owen's complaint was not detailed and the Authority itself embarked on an investigation. This submission is no longer relevant given I have set aside the costs award relating to Mr Owen's complaint; and
- (iv) Inconsistency – the appellant claims that it is very rare for the BSA to award costs to the Crown (s 16(4)) and virtually unknown

where complaints are only partially upheld. And the appellant says the amount awarded is well above any "normal" range.

[62] I consider the two costs awards, to the Crown and partial reimbursement for legal fees, to be well within the BSA's discretion. The Authority found that the programme breached Standards 4, 5 and 6 of the Code. While every complaint made alleging a breach of these standards was not accepted by the BSA, a breach of the standards of balance, impartiality and fairness in a programme as significant as this (given it was broadcast during an election campaign) was a serious lapse by the broadcaster. The complaints of breach of standards were upheld. Whether the breach of standards upheld was or not was the principal focus of the complaints may be subject to debate. The essential point is that complaints of breaches of Standards 4, 5 and 6 were upheld. Taking account of time and circumstance, these were serious.

[63] As to inconsistency, the appellant has extracted from the BSA's annual reports the following statistics. In the 42 cases where a complaint was upheld no order was made in 19 cases; a statement of correction only in 12 cases; costs to the Crown in three cases; and costs to the complainant in seven cases. This crude analysis of previous decisions does not establish any lack of consistency.

[64] While consistency may be important, in the end it is the facts of the individual case which will matter. As the Authority said,

The programme complained about broadcast during a general election campaign dealt with a highly controversial issue. The issue was dealt with in part in a way which contravened the standards relating to balance, fairness and accuracy.

stressing again the importance of context.


[65] And, as to the legal fees, the BSA said:

The Prime Minister and the Chief Press Secretary sought costs incurred for legal expenses amounting to \$16,250. Taking into account that representation by counsel was not unreasonable given the nature of the complaints and, although some aspects of the complaint were not upheld, the Authority considers an order to pay the complainants costs in the sum of \$11,000 is appropriate.

I note also that Television 3 were represented by counsel throughout.

[66] The appellant, in my view, therefore, has not established any inconsistency or that the BSA failed to consider any relevant factors in reaching its conclusions regarding costs. The application for leave to amend these proceedings to judicial review is refused, there being no merit in the substantive grounds for review. I set aside the \$3,500 costs award with respect to Mr Owen's complaint of a breach of Standard 4 for the reasons already given.

[67] I invite counsel for the first and second respondents to file submissions on costs within 14 days and the appellant within a further 14 days.


Signed at 3:30 a.m./p.m. this 10th day of February 2004

Solicitors

C Bradley, TV3 Network Services Limited, Auckland, for appellant
Morrison Kent, Wellington, for first and second respondents