IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-4596

UNDER	the Declaratory Judgments Act
IN THE MATTER OF	the interpretation of the Radio Communications Act 1989
BETWEEN	THE ATTORNEY-GENERAL ON BEHALF OF THE MINISTRY OF ECONOMIC DEVELOPMENT Plaintiff
AND	CANWEST RADIOWORKS LTD First Defendant
AND	NATIONAL PACIFIC RADIO TRUST Second Defendant
AND	THE RADIO BROADCASTERS ASSOCIATION Third Defendant

Hearing: 20 April 2005

Appearances: W G Liddell and A J Williams for Attorney-General
TJG Allan for First Defendant
No appearance for Second Defendant
C L Elliott for Third Defendant

Judgment: 31 August 2005

JUDGMENT OF RODNEY HANSEN J

Solicitors: Crown Law Office, PO Box 2858, Wellington
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Introduction

[1] In 2002, pursuant to its powers under the Radiocommunications Act 1989, the Ministry of Economic Development (the Ministry) issued the National Pacific Radio Trust (NPRT), a licence to broadcast on 104.1 MHz to listeners in the Christchurch area. Canwest Radioworks Limited (Canwest) complained that broadcasts by NPRT's radio station, Niu FM, interfered with broadcasts by its station, More FM, which, since 1991, had broadcast in Christchurch on 92.1 MHz.

[2] It emerged that the interference arose from the use of band expanders fitted to the radios of motor vehicles imported from Japan. Band expanders shift the frequencies used in New Zealand in the FM range 88-108 MHz to enable transmissions on those frequencies to be received by radios designed for use in the FM range 76-90 MHz in Japan. The band expanders reduced the frequency on which Niu FM broadcast by exactly 12 MHz to coincide with the frequency of More FM.

[3] Canwest applied in the High Court at Christchurch for judicial review of the decision to issue the licence to NPRT and also issued civil proceedings against the Ministry and NRPT claiming an injunction and damages. By agreement the judicial review application was heard first. It was dismissed by Chisholm J on 29 June 2004.

[4] Chisholm J's judgment contained reasoning which the Ministry considered to be wrong and which created uncertainty about renewing Niu FM's licence and otherwise in the exercise by the Ministry of its rights of spectrum management and licensing of other applications. Believing that, as the successful party, it had no right of appeal, the Ministry issued this proceeding against Canwest, NPRT and The Radio Broadcasters Association (RBA) seeking a declaration as to the proper interpretation of the relevant provisions of the Act.

[5] Canwest applied to strike out or have stayed the proceeding or for it to be transferred to Christchurch and consolidated with the damages proceeding. It withdrew the application (and discontinued the Christchurch proceeding) when a technical solution to the interference problem emerged. Canwest (and NPRT) also

advised that they would not be actively defending proceedings. However, the RBA then filed an application seeking substantially the same orders as had been sought by Canwest and an order appointing Mr Timothy Allan (Canwest's counsel) *amicus curiae* to assist the Court and represent other members of the radio broadcasting industry.

[6] The issues I am required to determine are therefore:

a) Whether this proceeding should be struck out or stayed;

b) If not, whether the proceeding should be transferred to Christchurch;

c) Whether an *amicus curiae* should be appointed.

Strike-out application

[7] The application is brought on the ground that in terms of rule 186(c) of the High Court Rules, the proceeding should be struck out as an abuse of process. As formulated in the application and refined in argument, the abuse is said to arise because:

a) The proceeding seeks the same determination as is sought in the civil proceeding filed in Christchurch.

b) The Ministry could (and should) have appealed those parts of the judicial review proceeding with which it takes issue.

c) The proceeding seeks to relitigate matters finally determined in the judicial review proceeding.

[8] The first of these grounds cannot be maintained as the damages proceeding has been discontinued. That ground appears to have been inadvertently included in the application as a result of RBA adopting verbatim the earlier application of Canwest. The argument under this head is therefore concerned with whether the

Ministry should have sought a remedy by way of appeal and whether it is an abuse to challenge in this proceeding findings made in the judicial review proceeding.

Right of appeal

[9] The right of appeal in respect of an application for review is conferred by s 11 of the Judicature Amendment Act 1972 which provides as follows:

> **11. Appeals—**
>
> Any party to an application for review who is dissatisfied with any final or interlocutory order in respect of the application may appeal to the Court of Appeal; and section 66 of the principal Act shall apply to any such appeal.

Section 66 of the Judicature Act 1908 provides:

> **66. Court may hear appeals from judgments and orders of the High Court—**
>
> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order save as hereinafter mentioned, of the High Court, subject to the provisions of this Act and to such rules and orders for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.

[10] Any right of appeal must therefore be against the order made by Chisholm J. The successful party, satisfied with the result, has no right to challenge his reasoning by way of appeal. The point was considered in *Walls v Calvert & Co*. [1994] 1 NZLR 424 (CA) in which the respondents to an unsuccessful application for review sought to appeal against the judgment in order to challenge observations made by the Judge. The Court said at 426:

> Jurisdiction to appeal in judicial review proceedings arises under s 11 of the Judicature Amendment Act 1972: any party to an application for review who is dissatisfied with any final or interlocutory order in respect of the application may appeal to this Court. That reference to "order" relates back to s 4 which provides that on an application for review the High Court may "by order grant" any appropriate relief; and s 4(2) goes on to provide that where on an application for review the applicant is entitled to an order declaring that a decision is unauthorised or otherwise invalid, the Court may instead of making such a declaration set aside the decision.

The Court went on to say at 427:

> Importantly for present purposes and as reflected in the distinction drawn in R 539 between judgment and reasons for judgment, the reasons are not themselves orders.

The Court concluded that the Judge had made no declarations or other orders on which the intending appellants could rely.

[11] To similar effect is *Amalgamated Builders Ltd v Nile Holdings Ltd* (2000) 14 PRNZ 652 (CA) where the Court held that it had no power to consider an appeal in relation to comments by a Master which were not part of his decision. The Court said at [24]:

> Consequently everything which was said thereafter cannot constitute a judgment, decree or order within the meaning of s 66 and thus there is nothing about which an appeal can properly lie. Those subsequent comments and findings would not appear to be binding on the parties or influential in any subsequent proceedings between the parties.

[12] The findings of the Judge with which the Ministry take issue are part of his reasoning but are not orders and could not have been the subject of appeal.

Relitigation

[13] RBA contends that the matters in issue in the declaratory judgment proceeding were determined in the judicial review proceeding and that an issue estoppel arises which would make it an abuse of process if the later proceeding were allowed to continue.

[14] The conditions required to give rise to issue estoppel are summarised in the following passage from *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28, at 37 (CA):

> Issue estoppel arises where an earlier decision is relied upon, not as determining the existence or non-existence of the cause of action, but, as determining, as an essential and fundamental step in the logic of the judgment, without which it could not stand, some lesser issue which is necessary to establish (or demolish) the cause of action set up in the later proceedings.

[15] The issues with which the present proceeding is concerned and which RBA contends are the subject of issue estoppel are:

a) Whether "interference" as defined in the Radiocommunications Act includes reception difficulties caused by band expanders; and

b) Whether "technical incompatibility" under the Act may arise by reason only of reception difficulties caused by band expanders.

[16] In the judicial review proceedings Canwest claimed there had been harmful interference to rights conferred by its licence and that Niu FM's transmissions were technically incompatible with the services it operated. It relied on the provisions of s 25 of the Act which, by subs (4) provides that the Registrar of Radio Frequencies must not register a spectrum licence unless he receives a certificate from an approved radio engineer. Subsection (5) relevantly provides:

> (5) The radio engineer's certificate must certify that, in the opinion of that engineer, the exercise of rights to which the spectrum licence relates -
>
> …
>
> (c) will not cause harmful interference to rights conferred by registered spectrum … licences; and
>
> (d) is technically compatible with services authorised to be operated under existing spectrum licences …
>
> … .

[17] In terms of subparagraph (c), Chisholm J was required to consider whether the operation of band expanders should have been taken into account by the certifying engineer. Canwest submitted that they should have been and the engineer should not have given a certificate under s 25(5). The Ministry argued that interference could only be caused by radio waves and the reception difficulties which Canwest was complaining about were not caused by radio waves but by unsophisticated band expanders.

[18] The Judge rejected the Ministry's argument on this point. He said at [51]:

> … a band expander forms part of the radio receiver involved in the reception of radio communications. If that is so sound waves being emitted by Niu FM must be contributing to the reception problem being experienced by More FM listeners. Without those radio waves there would be no interference, regardless of the use of band expanders. It follows that the plaintiff can establish *"interference"* within the statutory definition.

Chisholm J concluded at [55] that the certifying engineer was not entitled to disregard the effect of band expanders.

[19] However, although finding for Canwest on this issue, Chisholm J rejected Canwest's claim based on harmful interference under s 25(5)(c) because he found (at [56]) More FM's right to have no harmful emissions to be restricted to co-channel emissions, that is emissions produced by two or more radio transmitters transmitting on the same frequency. As More FM and Niu FM were transmitting on different frequencies, there had not been harmful interference under the Act.

[20] In relation to the requirement in s 25(5)(d) for technical compatibility, the Judge implied, without making an express finding, that the effect of band expanders should be taken into account. It was unnecessary for him to go further because he dismissed the claim under this head on the ground that at the time the Niu FM licence was issued the Ministry did not know that band expanders could cause problems. He went on to say, at [71]:

> I note, however, that the Niu FM licence will expire later this year. Presumably a new licence will be sought and further certification pursuant to s25(5) will be necessary. Given my conclusions as to the interpretation of s25(5)(d) and the information concerning band expanders that is now available, it is difficult to see how the problem involving More FM and Niu FM could be disregarded by the certifying engineer. Perhaps the parties will consider it prudent to continue the existing temporary arrangement until these matters can be addressed.

[21] The Judge's findings and comments on these two issues are not accepted by the Ministry and because of the uncertainty they have created in relation to the renewal of Niu FM's licence and spectrum management and licensing generally, it has sought declarations in this proceeding in the following terms:

> A declaration that "interference", as defined in the Radiocommunications Act 1989, does not include reception difficulties caused by band expanders, because those reception difficulties are not attributable to an "effect of radio waves owing to 1 or more emissions, radiations, or inductions, or any

> combination of 1 or more of those things, on the reception of radiocommunications".
>
> A declaration that, in terms of section 25(5)(d) of the Radiocommunications Act 1989, the exercise of rights to which one spectrum licence relates is not technically incompatible with a service authorised to be operated under another spectrum licence, by reason only that band expanders cause reception difficulties in relation to either or both of the services authorised to be operated under those spectrum licences.

[22] I accept Mr Liddell's submission that no issue estoppel arises by reason of the declarations sought. That is because the findings which the Ministry seeks to challenge in this proceeding were not an essential and fundamental step in the logic of the judgment. They were not fundamental to the decision because the Judge rejected the claim against the Ministry for other reasons. Spencer Bower and Turner make the point succinctly in *The Doctrine of Res Judicata*, p 186, para 215 (quoted in *Talyancich* (*supra*) at 38):

> Thus, a decision of fact or law against the party in whose favour the substantive dispute was ultimately decided cannot found an estoppel in a later proceeding; and this because it cannot have been necessary to the substantive decision …

[23] I conclude that it is not an abuse of process for the Ministry to seek declarations in relation to the two issues which were the subject of findings adverse to it by Chisholm J. The application to strike out or stay the proceeding accordingly fails.

Transfer to Christchurch

[24] The application for transfer to Christchurch is brought under rule 107(4) which provides:

> Where it appears to the Court on application made to it that the statement of claim has been filed in the wrong office of the Court or that any other office of the Court would be more convenient to the parties, it may direct that the statement of claim be filed in such other office, or that all documents filed in the proceeding be transferred to the proper office or, as the case may be, to such other office which shall thereupon be deemed to be the proper office.

[25] It is not suggested that the proceeding is filed in the wrong Court; the head offices of all defendants are in Auckland. RBA's case is that it would be more

convenient to the parties for the proceeding to be heard in Christchurch. The key factors relied on in support were:

- The facts giving rise to the dispute arose in Christchurch.

- There would be advantages and efficiencies in having all proceedings heard and determined by Chisholm J who is familiar with the evidence and the issues.

- If the proceeding remains in Auckland there is an enhanced risk of inconsistent decisions.

[26] None of these factors have any real bearing on the convenience of the parties which is the determinative question under rule 107(4): *National Bank of NZ Ltd v Glennie* (1992) 6 PRNZ 292 at 295. This is to be compared with an application for change of venue under rule 479 which requires a consideration of where the proceeding can be more conveniently or more fairly tried.

[27] But even if a broader approach is taken, the arguments relied on by RBA are unpersuasive. The factual origin of the litigation is of little consequence. The primary questions to be considered are of statutory interpretation, not of fact. There is an assumption that, if transferred to Christchurch, the proceeding would be heard by Chisholm J. That does not necessarily follow as the transfer is to the Registry not to a particular judge. Nor is it to be assumed that it would be desirable for the same judge to hear what would be in effect a challenge to certain of his earlier findings.

[28] The risk of inconsistent decisions is an irrelevance. One way or another the current proceeding will result in a final determination of the remaining contentious issues. They can be the subject of appeal. This proceeding will lead to the certainty which both parties seek.

[29] The application to transfer the proceeding also fails.

Amicus curiae

[30] An *amicus curiae* may be appointed in a wide range of circumstances although the basis on which they are appointed and the functions they may be called upon to perform are not entirely clear – see the discussion of Williams J in *Registered Securities Ltd (In Liquidation) v C* (1999) 13 PRNZ 699 at 704-706 and the further discussion by the same Judge in *Mulvaney v Commissioner of Inland Revenue* (2000) 14 PRNZ 176 at [12]-[16].

[31] Conventionally an *amicus* is appointed when necessary to ensure that both sides of an argument are heard on an important issue - *Commissioner of Inland Revenue v Taxation Review Authority* (2003) 16 PRNZ 1003 at [20] - or when the Court, for other compelling reasons, will be assisted by the presence of independent counsel.

[32] Mr Elliott submitted that an *amicus* should be appointed to represent the interests of broadcasters who do not belong to the RBA. They include smaller radio stations and Radio New Zealand. Counsel said they may have a different view to the mainstream commercial broadcasters who are represented by the RBA. He said the Court would benefit from the wider perspective an *amicus* could provide in what he described as a test case. Counsel also relied on the complex and technical nature of the evidence.

[33] I am not persuaded that there is a case for the appointment of an *amicus*. I agree with Mr Liddell that the RBA is an appropriate industry representive which is well able to argue the case in opposition. The issues for determination are primarily legal ones. I cannot see how broadcasters who are not members of the RBA would add anything which would assist in the resolution of the critical issues. Both sides of the argument will be presented, one of them at the cost of the taxpayer. In such circumstances, I share the view of Wild J in *Commissioner of Inland Revenue v Taxation Review Authority* (supra) at [27], that it is doubly inappropriate to appoint an *amicus*.

Result and consequential orders

[34] The application fails in its entirety.

[35] In accordance with para 2(e) of the Minute of Cooper J of 16 December 2004, RBA must file its statement of defence within 20 days. A case management conference should be arranged at the earliest available date after 1 October 2005.