

UNDER the Judicature Amendment Act 1972
and Part 7 of the High Court Rules

BETWEEN P F DUNNE
First Plaintiff

AND J P ANDERTON
Second Defendant

AND CANWEST TVWORKS LIMITED
Defendant

Hearing: 10 and 11 August 2005

Counsel: D Goddard QC and M Palmer for Plaintiffs
J W Tizard and A Hughes for Defendant

Judgment: 11 August 2005

ORAL JUDGMENT OF RONALD YOUNG J

[1] The plaintiffs are members of Parliament and leaders of the United Future New Zealand Party (“United Future”), and the Progressive Party respectively. United Future currently has eight members of Parliament, the Progressive Party, two. They seek a mandatory interim injunction to order the defendant company, the broadcaster of TV3 to include both the plaintiffs in its leaders’ debate to be held tonight, 11 August 2005, on TV3.

[2] The plaintiffs say the TV3 decision to exclude them is contrary to the public interest. They say the decision to exclude them from the debate made during the course of an election campaign when TV3’s public law responsibilities breaches TV3’s obligation to refrain from acting arbitrarily; breaches their duty to take into account relevant matters and not to take into account irrelevant matters; and breaches

their obligation to refrain from discriminating between political parties on unreasonable, arbitrary, irrational or disproportionate grounds.

[3] The defendant in response submit that the statement of claim identifies no arguable case. They submit the defendant is not a public body and is not exercising any statutory power of decision or determination and therefore should not be subject to review. Secondly, they submit that granting the application would be tantamount to determining the ultimate proceedings. Thirdly, there has been unfair delay by the plaintiffs. And finally, that they have now properly reconsidered the decision to exclude the plaintiffs.

[4] Although this of course is an application for an interim injunction, given the orders sought I approach the case on the basis that my decision today will effectively determine the case and therefore the plaintiffs must establish the case to that appropriate standard.

[5] In September 2005 New Zealanders will vote at their three yearly general election. Part of the election process, for at least the last three elections, has been the broadcasting on television of what had been come to be called “Leaders’ Debates”. Professor Levine, a Professor of Political Science has sworn an affidavit in these proceedings as an expert who summarised the position as follows:

Shortly after the debate of the election was announced, TV3 announced that it would hold its leaders debate on 11 August. TV3 also announced that only six leaders would be participating, and that the selection of those leaders would depend on the outcome of a forthcoming TV3 poll to be published on Thursday 28 July. The leaders of the six highest polling parties in that poll would be invited to appear.

[6] The contents of the poll are annexed to Mr Dunne’s affidavit and show United Future in 7th place at 1.4%, two decimal percentage points behind ACT in 6th place with 1.6%, and the Progressive Party at 0.4% in 9th place.

[7] Both Mr Dunne and Mr Anderton wrote to TV3 on 3 August expressing their concern about the basis upon which the selection had been made. In the meantime it seems that other television broadcasters proposed to have at least one of the leaders’ debates involving all parties which currently have members of Parliament. This,

therefore, will include Mr Dunne and Mr Anderton. TV3 in its final advice to Mr Dunne and Mr Anderton that they will not be part of the leaders' debate said:

TV3 is aware of its obligation to facilitate the opportunity to present significant points of view with the period of interest. TV3 expects to achieve this within the range of news and current affairs programmes available to the TV3 Network.

[8] Subsequently, Mr Jennings at TV3 is reported to have said "space and time meant TV3 wanted only six parties at the table for a debate amongst the party leaders". Space is now apparently not an issue given the debate is shifted to a more commodious theatre.

[9] Mr Dunne and Mr Anderton's case can be summarised in this way. They believe that these televised debates are of particular importance to smaller political parties especially given the MMP system of electing New Zealand's Parliament. They point to the fact that these debates attract large audiences and that they are therefore recognised as being of importance in the electoral process. Both leaders point out that they have tried to find alternative ways of confronting TV3's decision. They have written to TV3 without response (at least as far as Mr Dunne is concerned), complained to the Broadcasting Standards Authority who considered that they do not have jurisdiction and to the Electoral Commission who takes a similar view.

[10] Both leaders stress the importance of this opportunity to their electoral success. Mr Dunne points to the 2002 election where he says as a result of his performance (at least in part) his percentage of the vote went from 0.4% as revealed in the polls, to 6.9% on election night. Both leaders point out that their parties have members of Parliament in the current Parliament and that alone should assure their presence at such a debate. Both assert that:

It is not fanciful to suggest that this decision could influence the outcome of the election, representation in the next Parliament and formation of the next Government.

[11] They quote both the Prime Minister and Mr Prebble of the ACT Party as saying that the decision will have a significant effect on both political parties. They

say TV3's suggestion of alternative coverage does not address the position that these debates are pivotal to the electorate and the election because they allow a comparison between leaders and policies. They claim the basis of the decision to exclude them is arbitrary and irrational. Mr Dunne says that his party has been consistently polling above ACT and the Maori Party both of whom have been invited to speak based on this poll.

[12] Professor Levine, previously referred to in this judgment is a Professor of Political Science at Victoria University and has given his evidence as an expert witness by way of affidavit.

[13] He stresses from research available the importance of televised debates in the last three MMP elections especially. The leaders' debate has in the past been described as a "turning point in the campaign", and one that has produced "dramatic change" in voting patterns. And television is now accepted as a critical medium at election time. Professor Levine records that an influence in shifting voter judgments is the television coverage of the campaign including the leaders' debates. In 2002 he acknowledged that the televised leaders' debates had an even more important influence on election results especially influencing the result for Mr Dunne.

[14] Professor Levine has observed:

The debates held thus far, in each of the three MMP elections, have given views opportunities otherwise unavailable to them to assess the leadership capacities of the respective party leaders, to compare and contrast them, and also to obtain further information about the likely policy directions to be pursued by the various parties offering themselves for election. In a broad sense, therefore, television is a 'public good' (irrespective of ownership or regulatory considerations) and the televised leaders' debates in particular perform an important, useful and, at least or some voters, critical function that gives them a greater degree of confidence as they approach the electoral act – the most important single act of public participation that most New Zealanders will make during the three-year period from one election to the next.

[15] The second point of Professor Levine's evidence relates to the use of opinion polls. Professor Levine has particular experience in this field. As he points out in such polls margins of error are often considerably larger than the margins separating the smaller parties. His assessment is that at least the following parties have a high

probability of representation in the new Parliament. Labour, National, New Zealand First, the Progressive Party, United Future and the Maori Party. The latter three based on the probability of success in an electorate. He observes of the other two parties currently represented in Parliament based on polling over a period, the Green Party seem to have “a better chance” than ACT of gaining representation in the new Parliament.

[16] Mr Jennings the Director of News and Current Affairs for TV3 has also now filed an affidavit. He explains that for the 2002 election TV3 had the leaders of five political parties participating. In 2005 TV3 decided to increase the number to six on the basis that polling showed the Maori Party could win more than two seats and therefore might be a significant factor in determining which of the larger parties could form a Government. TV3 decided that in order to present an intelligible debate in one hour would require limiting the participants to six. Mr Jennings says the six members were selected on the basis of an opinion poll which he says was the most recent result available to TV3 and thus TV3 could not be accused of possible bias in selection. He points out TV3 are conscious of their obligation as free to air broadcasters and will abide s4 Broadcasting Act 1989. He says TV3 will provide the plaintiff parties with opportunities of regular news and current events programmes to present their point of view. Mr Jennings rejects the position that the leaders’ debate is unique, or even a particularly valuable forum for political parties. This lack of value, he says, will be accentuated if eight leaders are to take part and is behind the reason to restrict it to six.

[17] He denies such programmes are a “make or break” from a participants’ point of view. He says the claim with respect to the TV3 debate overlooks the other debates also being held in other media. Finally, he says, TV3 have reviewed their decision and conclude that there are no compelling reasons to depart from their original decision.

[18] I note that Mr Jennings in his affidavit identifies a series of justifications for including the six leaders currently included and excluding the two plaintiffs. Of course none of these justifications in fact informed TV3’s decision not to invite

Mr Dunne or Mr Anderton. That was done as Mr Jennings said solely based on the poll result.

[19] The rationale provided now by Mr Jennings is of course a post event rationale. It uses longer term poll results in part to justify the decision and other reasons. It could be said it identifies a number of factors which might support participation of the plaintiff. I will return to this issue later in the judgment.

[20] The first question I have to decide is: Is the decision susceptible to review? The plaintiffs submit that TV3 is performing a public function and exercising powers of national importance and of a public nature.

[21] They submit that TV3 as a public broadcaster on a free to air basis who covers 98% of the population of New Zealand is performing a public function when it decided to hold a leaders' debate immediately prior to the election. They submit that TV3's status, in appropriate cases, as a public broadcaster was recognised by Cooke P in *TV3 Network Ltd & Anor v Eveready New Zealand Ltd & Anor* [1993] 3 NZLR 435 when he said at 441:

By s 3(b) the Bill of Rights applies to acts done by any person or body in the performance of any public function, power, or duty conferred or imposed on the person or body by or pursuant to law. In this case it is admitted that the first defendant is a duly licensed television broadcaster under the Broadcasting Act 1989. Certain responsibilities, including some relating to balance in controversial issues of public importance, fall on it under s 4 of that Act. The first and second defendants plead inter alia that the statements in the programme were made bona fide and without malice in the discharge of a duty to communicate the information to the New Zealand public, which had a corresponding legitimate interest in receiving the statements and the words and images complained of. On that ground they seek qualified privilege. In the circumstances I think it a tenable view that, if the plaintiffs establish malicious falsehood or unlawful defamation, the Bill of Rights may provide a basis for an order that corrective information be broadcast to the viewing public.

[22] They submit the proposition that television is the prime medium through which the public receive information about an election campaign is supported by the significant controls on broadcasting at election time reflected in Part VI of the Broadcasting Act. The plaintiffs submit, therefore, by broadcasting material relating to a general election and in particular by choosing to hold a leaders' debate shortly

before an election TV3 has thrust itself into the public arena. And thus the plaintiffs say in deciding to hold a self declared leaders' debate and in deciding who will participate TV3 are exercising powers of national importance and of a public nature. The plaintiffs point out in relation to s4 Broadcasting Act that it provides for responsibilities for broadcasters and requires them to maintain in the programme and in presentation standards consistent with those set out in s4(d).

[23] This is a case, they submit, of a private company taking for itself the role of a public function in deciding to broadcast a leaders' debate and in doing so it takes on public responsibilities. They submit that in exercising the powers to decide who participates in the debate they are likely to influence who ultimately makes up the Government of New Zealand after the election. They say the "impact test", as revealed by the Court of Appeal in *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, applied to what TV3 propose to do illustrates that their decision will have important public consequences. They ask what could be more important than electoral matters which go the heart of democracy. They submit that analogous with the *Phipps* case (supra) TV3 are also exercising the statutory power of decision here. TV3 is incorporated and the decisions made arise from, in the course of, or in the exercise of its own constitution.

[24] The plaintiffs stress that the test is not whether the body is a public body, nor whether it necessarily exercises any statutory function, but whether it is performing the public function of exercising powers of a public nature. In this test they say the defendant is performing a public function by deciding to have such a debate and in choosing who they will have at the leaders' debate they are exercising powers of a public nature.

[25] The defendant submits that they perform no public function at all. They say the fact that TV3 is a national broadcaster is not determinative. They submit that TV3 is exercising the right of any citizen to conduct its own business and theirs happens to be the business of a publisher facilitating the right to freedom of expression. This they say is not a power relevant to judicial review. They submit the fact that an act or decision may have public consequences does not mean the decision-maker is performing a public function power or duty. The fact that an act

or decision may affect national interest does not mean, they submit, that a decision-maker is performing a public function. The fact that television is a medium through which parties compete for votes is not, they say, determinative.

[26] The question they say is whether TV3 is performing a public function or duty. They submit that in these circumstances they should not be subject to judicial review. They say it is irrelevant whether or not broadcasters are of great power because that does not determine whether they perform a public function. Others in the community exercise great power but that does not mean they exercise such a function.

[27] They point out that TV3 is not a monopoly and that the other leaders' debates available for the public to watch. They say that s4 of the Broadcasting Act does not impose on broadcasters a public duty. In this regard they are no different in principle from electricians who have imposed standards by statutory regulations. This does not create a public function. They say that Part VI of the Broadcasting Act shows that the legislature has already addressed the issue of broadcasters obligations and essentially in respect of elections and say essentially that this has ousted the jurisdiction of the Court in such circumstances. It is not for the Court, they say, to impose the duty when Parliament has seen fit to remove it. They say the necessary conclusion, therefore, is that broadcasters are under no duty to broadcast political programmes, that there is no longer a regime where broadcasters may be required to broadcast election programmes and in those circumstances simply because TV3 proposes to broadcast such a programme it cannot be said that they are performing a public function. The analogy was drawn with private, health and education provision and with others whom the defendant says are clearly not performing public functions and have no public duties. This is similar to the position of TV3 they say.

[28] I am satisfied that TV3's decision is susceptible to review. Review is not limited to public bodies exercising statutory functions. It is concerned with bodies performing what are essentially public functions or the exercise of public powers. I am satisfied that TV3 in its election coverage is performing a public function and exercising a public power.

[29] Firstly, I accept the relevance of the fact that TV3 is a public free to air broadcaster. This alone of course could not possibly be sufficient but it is relevant. Secondly, public broadcasters are subject to statutory control. I have already recounted s4 Broadcasting Act. It places public responsibility on broadcasters to act in certain ways. In particular, s4 requires broadcasters when matters of public importance are discussed to ensure balanced points of view are presented at the time or within the period of interest involved.

[30] I adopt the reasoning of Cooke P in *TV3 Network Ltd & Anor v Eveready New Zealand Ltd & Anor* (supra). All broadcasters need some form of Government authority to broadcast. This authorisation comes within statutory responsibility. This is a recognition that in certain functions performed by broadcasters they will be subject to statutory control because of the public function and its importance in a free and democratic society.

[31] The importance of identifying the particular function being performed is underlined in the *TVNZ Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91 where Blanchard J considered and rejected the proposition that the plaintiff was performing a public function relating to copyright over its programmes.

[32] In *Royal Australasian College of Surgeons v Phipps* (supra) the Court of Appeal briefly described the expansion in the last 25 years or so of those organisations that may be susceptible to review. The change has been from a focus on the nature of the body the subject of challenge, to the nature of the decision-making the subject of challenge. So the focus has turned to the power being exercised and the function being performed. The Court said:

Over recent decades Courts have increasingly been willing to review exercises of power which in substance are public or have important public consequences, however their origins and the persons or bodies exercising them might be characterised.

[33] Further support for the proposition that private organisations exercising public functions may be subject to review is in the observations of Mr P A Joseph, in his Administrative Law text when he said:

The courts may also review commercial bodies whose decisions have public impact. It is a question of degree the point at which a private commercial operation may merge into a public one attracting review.

And further:

Private organisations may be reviewable of ordinary public law principles.

[34] In this case TV3 has decided it will undertake, immediately before New Zealand's general election, a leaders' debate. The evidence clearly establishes that television coverage of the election and especially the leaders' debate has the prospect of significantly influencing the outcome of the election. And so TV3 has put itself, in this sense, into the public arena. It does so in part no doubt to assist all voters to inform themselves of the leaders and the policies of the political parties contesting the election. In this again a vital public function is being performed. Applying the *Phipps* "impact test" TV3's exercise of power, namely its decision to include only particular leaders in its leaders' debate will have important public consequences. It does so with a background that it is a national free to air broadcaster. It covers virtually all of New Zealand. The effect of what it chooses to do regarding election coverage is significant in a national context. What it does can influence voters' decisions and thus is a vital part of democracy. And the Broadcasting Act makes it clear that broadcasters are not free to do as they choose. They have public responsibilities relating to fairness and balance. This is especially highlighted at this sensitive time given democratic rights are being exercised.

[35] I accept the plaintiffs' submissions that TV3 has chosen to enter the arena. It has chosen to have a leaders' debate and thereby thrust itself into the public arena in this way. Finally, I accept the proposition by the plaintiffs that there is no alternative way of challenging this decision.

[36] I am satisfied, therefore, that this is one of those comparatively rare cases where a private company is performing a public function with such important public consequences that it should be susceptible to review.

Is there a breach?

[37] The plaintiffs submit that the fundamental flaw of the defendant's decision is that it has based its decision upon an unreliable and essentially arbitrary basis. It says that one poll result, especially where the margin of error exceeds the total percentage of votes of some parties and well exceeds the difference between the parties is no rational basis on which to base any such decision.

[38] In particular they submit that TV3 must take into account relevant considerations, and has failed to take into account the following relevant considerations:

- (i) the status of UFNZ and the Progressive Party in having eight and two respectively, members, as members of the current Parliament, thereby enabling them to, as they have, participate in constitutionally significant decisions to form the current Government;
- (ii) the status of UFNZ and the Progressive Party in currently holding a constituency seat and being likely to continue to do so.

[39] The plaintiffs submit that a good guide as to what is relevant is to consider the basis upon which the Electoral Commission allocates funds to political parties (see s75 Broadcasting Act). They say that TV3 failed also to take into account in arriving at an adverse decision the results of more than one public opinion poll on one arbitrarily chosen debate.

[40] The second ground on which the plaintiffs attack this decision is an allegation that TV3 must act without bias and must not act unreasonably or arbitrarily. In particular, they submit, that in basing its decision on a single poll where a margin of error was 3.1% and the differential in support of 0.2% between an invited party leader and an uninvited party leader, TV3 is acting unreasonably and arbitrarily.

[41] The response of the defendant is rather than deal with the question of whether or not TV3's original decision was arbitrary, they say Mr Jennings has illustrated

that TV3 have now reviewed the matter and based their decision on a proper basis and have reached the same conclusion.

[42] Dealing briefly with that latter issue. Firstly, I have previously made it clear that this decision reviews TV3's original decision and not the decision said to have been most recently made in the last day or so, perhaps only last night. Secondly, I accept the submission made by Mr Goddard that a review of the decision must be made in goodfaith with the benefit of the views expressed by the Court taking into account all of the issues and conclusions of a Court. In my view it is simply not good enough in such circumstances for what seems to be something of a post event justification for the original decision now to be reviewed. I do not accept that I can or should properly take into account paragraph 32 of Mr Jennings' affidavit regarding his review.

[43] I am satisfied the decision made is arbitrary and failed to take into account what are relevant factors. Primarily, it is the arbitrariness of the decision which concerns me. Courts have made it clear that where fundamental rights are affected the levels of arbitrariness or in another context, irrationality required by a plaintiff to establish their case will not be high. Courts are anxious to protect fundamental rights. And here this Court is anxious to protect what I see as a fundamental right of citizens in a democracy to be as well informed as possible before exercising their right to vote and to ensure the electoral outcome is as far as possible not subject to the arbitrary provision of information.

[44] There is little to commend the basis on which TV3 decided to select the six leaders. It is clearly established that a single poll with small percentages and high levels of error provides little or no guidance on actual relative electoral support. This was TV3's rationale for their selection process.

[45] A selection process might of course be based on a number or a variety of criteria. Existing Parliamentary numbers may be one, if to be poll based then it seems clear figures over a significant period may provide some rational basis with care needed to resolve the error factor. Here, however, as between the fifth, sixth, seventh and eighth polling parties, there was no rational choice to be made based on

the 28 July poll. The error rate well exceeds even the difference between the fifth and eighth parties, and thus in this sense their electoral support is effectively indistinguishable in this poll. Given that proposition it is the essence of arbitrariness to select two but not the other two of the four parties involved to participate in the leaders' debate based on current electoral support. I am therefore satisfied that there has been a breach of the obligation not to act unreasonably or arbitrarily.

[46] Two further matters before I consider remedy. Firstly, delay. The defendant complain that there has been disqualifying delay in this case given the need for urgency in the circumstances. As I understand the chronology, TV3 orally notified the leaders of their decision on 28 July. The two plaintiffs tried to convince TV3 to change its mind. Its decision was confirmed, however, by TV3 in a letter of 3 August to the leaders. On 3 August the leaders wrote to TV3 asking for reconsideration and also notifying the Broadcasting Standards Authority and the Electoral Commission and inviting them to intervene. TV3 did not reply to one of the plaintiff's but did to the other. The other two institutions advised that they have no power to intervene. Based on that chronology the plaintiffs properly exhausted all alternatives and have hardly delayed coming to Court.

[47] Secondly, detrimental effect. There can be no question in my view both plaintiffs have established at least potential detrimental effect. I have already extensively dealt with this topic.

Remedy

[48] I have no difficulty in making appropriate declarations here as sought by the plaintiffs. They are an integral part of my conclusions. The real issue is making a mandatory interim injunction which would require TV3 to have the plaintiffs in its leaders' debate tonight. Courts are, for very good reasons, most reluctant to make such orders. The effect is that essentially a Judge is deciding how a television programme is to be presented. Typically once breach is established in such circumstances this Court would grant an injunction to prevent the programme being shown and provide the opportunity for TV3 to reconsider its decision based on proper grounds and goodfaith. Each parties' proper functions are thereby preserved.

This is not possible in this case because of time constraints. The plaintiffs do not seek the postponement, effectively the cancellation of the debate. They properly say that this would be the antithesis and in contradiction with their view that the public should be able to inform its voting choice by hearing all the parties currently represented in Parliament.

[49] If I refuse the order then the plaintiffs success will be hollow, they will have a right without a remedy.

[50] TV3 have said in their letter of 3 August that they propose to provide a balanced coverage of the election overall, and Mr Jennings has said in his affidavit that they will provide other opportunities for the plaintiffs. However, this statement, the plaintiffs say, is of little use to them. The Broadcasting Act complaint process is retrospective, but a lost chance in an electoral sense can have serious consequences. Nor is there anything equivalent for them to the leaders' debate.

[51] I consider the proper course in such a difficult situation is to consider the effect of making or refusing to make the mandatory injunction as sought. On the one hand if I agree to the order as sought I will effectively be directing TV3 how to run its business at least in part. This is in principle objectionable. In a practical sense it is likely to cause no more than inconvenience to TV3.

[52] For the plaintiffs, if I refuse to grant the order they will, based on expert evidence, potentially suffer significant electoral disadvantage, irrecoverable which has the capacity to effect the makeup of the next Parliament and therefore the Government of New Zealand. The potential effect in my view therefore falls far more heavily on the plaintiffs.

[53] The next and final relevant consideration is posed in the question: On what basis can I decide who is to be present at the leaders debate?

[54] While I have concluded the decision to base who is to be on the leaders' debate by TV3 was arbitrary if based on one poll, that does not necessarily mean that the plaintiffs must therefore be invited. Again, because of time constraints I am

thrust into the unfamiliar and typically inappropriate territory for a Judge. Because of the conclusions I have reached to refuse to act would, it seems to me, create a further injustice to the plaintiffs. I accept, therefore, I must decide whether TV3 should be required to invite the plaintiffs to the debate. I accept the basis of the plaintiffs' case that by inviting the plaintiffs, and therefore all leaders of political parties in Parliament, and thus inviting leaders of all parties who Professor Levine considers will probably be represented in the next Parliament there at least is a rational and logic to the list. It may not make for ideal television but that may be the least important consideration here. No other alternative to me seems sensibly available. In those circumstances, therefore, I am prepared to make a mandatory interim injunction which requires TV3 to invite the two plaintiffs to participate in its leaders' debate this evening.

“Ronald Young J”