

Shopping Centres and the Investigative Way — Unbalanced and Partial, but not in Contempt

Anthony Mrsnik examines another unsuccessful attempt to restrain *The Investigators*

The Federal Court recently ruled on the question of whether material, proposed to be broadcast by *The Investigators* program, was in contempt of civil proceedings underway in the Federal Court. In *P.T. Limited and Didus Pty Limited v Australian Broadcasting Corporation*, (Federal Court of Australia 9 October 1992), Mr Justice French refused to grant an application which sought to restrain the broadcast of certain material argued to be a contempt.

Westfield complaints

The *Investigators* proposed a story based on complaints that it had received from tenants occupying premises in several Westfield Shopping Centres. The complaints concerned variations in rental, relocation and refurbishment requirements, the renewal of leases and alleged oral representations made prior to the date of contract. Westfield management was approached for comment in mid-September of this year. However, they declined to comment in relation to one of the complainants to the program, a Mr Theoklis, who had recently instituted proceedings in the Federal Court against Westfield seeking relief pursuant to sections 52, 53A and 80 of the *Trade Practices Act*. Westfield is defending the matter. Westfield sought assurances from the ABC that it would not broadcast conclusions on those issues or materials which assumed that a particular version of the matter before the Court is correct. Westfield was willing to discuss all other non-confidential matters involving merchants in their centres.

Mr Theoklis commenced proceedings on 19 August 1992. On 18 September 1992, Foster J made various orders relating to the pleadings and adjourned the directions hearing to 30 October 1992. It was not until late September that *The Investigators*, having finalised their transmission schedule, advised Westfield of the revised date of the intended broadcast. Westfield then sought to restrain certain material from being broadcast.

After examining the proposed script of the broadcast, French J observed that "the

script undoubtedly conveys criticism by a number of tenants of the conduct of Westfield and tends to suggest a general acceptance of those criticisms by the presenters of the program". His Honour observed that the case did not concern the accuracy of the allegations or the impartiality of the presenters, but whether the material dealing with Mr Theoklis should be restrained as a potential contempt of court.

Effect of proposed broadcast

Issues considered by the Court were firstly the effect of the proposed broadcast on Westfield in the conduct of its litigation with Mr Theoklis. Through affidavit evidence, Westfield stated that a number of Westfield employees would be called to dispute various allegations made by Mr Theoklis. Further, if the ABC published material which followed those lines indicated by the ABC during the course of telephone conversations and written correspondence, then this would generate publicity adverse to Westfield. Westfield argued that "the expectation of that occurring would be a factor which would be taken into account in deciding whether or not to maintain (Westfield's) defence of the proceedings" instituted by Theoklis. Mr Justice French considered the relevant authorities and decided that as Westfield were not to be subjected to the kind of "media bath" described in *CBA v Preston*, there was no evidence of a serious possibility that Westfield would be deterred from maintaining their defences if the program went to air.

Potential witnesses

The effect on potential witness was also considered — whether once interviewed for broadcast, they would subsequently either "soft-peddle" or "seek to vindicate themselves". Given the length of time until the trial (approximately 6 months) and the requirement that the tendency to affect the attitude of witnesses must be established, Mr Justice French held that the evidence only demonstrated a "theoretical" risk to witnesses.

His Honour discussed the potential effect upon the impartiality of the court with respect to jury trials and judge alone trials. The significant factor is whether a publication criticises witnesses so as to "deter" or "influence" their acts. This extends to criticisms of a party which will be impugned because of their possible effect upon witnesses. To establish a contempt, a party must be able to point to something more than speculation — they must show a "concrete basis upon which there is a serious possibility that witnesses will be affected in one way or the other by the publication which is impugned".

The need for balance

Another course in establishing a contempt is whether media prejudice is such as to bring pressure to bear on a litigant to compromise claims brought against it, as illustrated in the *Sunday Times/Thalidomide* case. Mr Justice French stated that the question ultimately reduces to a balancing of the competing public interests of the due administration of justice and the freedom of public discussion. He was not satisfied that a serious case of prejudice would be derived from the impact of the publication upon Westfield itself or other parties to the litigation. His Honour further stated that "in any event the bulk of the adverse publicity affecting (Westfield) by publication of the program would arise whether or not the specific reference to the Theoklis complaint were included" and that such effect would not be mitigated to any significant degree by requiring the exclusion of the Theoklis segment.

Previous authority, as confirmed in this case, lays down that it is not a contempt to publish material unless it has a real or substantial tendency to prejudice proceedings.

In assessing whether a real or substantial tendency exists, the law engages in a balancing of conveniences. In this case, the balance favoured the freedom of discussion — even discussion which the Judge said may be "unbalanced or discussion which lacks impartiality ...".

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