

attention. (This does not mean we are ignoring the remaining sexual content of any of the magazines but rather that we are considering the cumulative effect of the photographic sections on articles such as *Forum*, *Sweet Chastity* and *Call Me Madam*, in assessing whether the publication crosses the boundary of decency).

In the September issue of *Penthouse* the multiple scene concerns a young couple depicted in various positions in a beach setting. While some of the photographs run close to the line of indecency we are not prepared to say that the scenes are so offensive that they are injurious to the public good.

The October issue is more objectionable. In a pictorial section entitled *Mud and Money* 2 young women are seen fighting in a mud pit. In our view *Penthouse* is providing a bizarre and tasteless context for the usual set of photographs that one might expect to see of naked models. While we find this segment also runs very close to the line we are not prepared to condemn the whole issue because of it. We note however that had there been lesbian overtones to the portfolio of photographs we would probably have found the material to have progressed from the crude and tasteless to that which was injurious to the public good. Indeed, in a context where that further element was provided (i.e. in the *Caligula* section of the June 1980 issue of *Penthouse*) we declared the publication to be unconditionally indecent.

The November issue however, in our view, crosses the line. The particular segment of concern is 13 pages in length and entitled *To Rush in with Love*. It is a pictorial article using a *James Bond—From Russia with Love* scenario. The first photographs are concerned with scenes of violence, but are only a lead into scenes between a male and 3 female models.

We find that the scenes are not only offensive and tasteless but also that they are injurious to the public good because:

- (a) of the mixture of sex and violence depicted;
- (b) of the needless multiplicity of models and the degree of intimacy among them;
- (c) of the lesbian and prurient aspects of sex presented.

Although the series of photographs is clearly meant to depict a fictitious incident, we are unable to say that the impact of the pictures is lessened in any way by the nature of the scenario. We make this comment because we note that in decision No. 881 (which concerned the February and July 1976 issues of *Penthouse*) the Tribunal referred to a section of photographs which set out, albeit fantastically, a sadistic and lesbian episode. The Tribunal stated:

"The presentation of nudity is not indecent if it is not prurient or salacious. Fantasy or fantastic presentation can lessen the indecency and sadism or other sexual matters which, in other ways of presentation, are obscene and pornographic".

We would be unimpressed in respect of such an argument applying to the November 1981 issue, as we see nothing in the sequence to indicate that the photographs were taken in an artistic way to present the viewer with a scene containing elements of imagery or fantasy not normally to be found in the straight photography of nude models.

From the above it must be apparent that we would not be prepared to classify the September/October issues unconditionally indecent as a result of a consideration of their content. The remaining factors to be considered under section 11 (1) do not adversely or beneficially affect the classification we are considering imposing on those issues and so we do not find it necessary to discuss those matters in detail.

The situation for the November issue is different, because unless there are other factors in section 11 (1) in this issue's favour, it is likely to be classified unconditionally indecent. We therefore turn to consider the remaining points in some detail.

The persons likely to read the issue: the likelihood of corruption.

We accept that *Penthouse* is directed largely at adult readers (this point having been noted in previous decisions, e.g. Nos. 830 and 936) although we think because of its presentation and price it has considerable appeal to younger and less mature readers. On the most favourable view to the publisher we bear in mind that a relatively high level of tolerance is to be exercised if adult New Zealanders are not to be unduly inhibited in the material they wish to read. We have therefore exercised as much restraint as we could in relation to the September/October issues.

We are not inclined to accept an argument that there is little likelihood of corruption because the material in the November issue is only slightly worse than other material which has appeared in *Penthouse*. We have inspected many of the previous U.S. issues of *Penthouse* that have come before the Tribunal. In our view the November 1981 issue

is clearly distinguishable from other issues in that it falls well below the normal standard of the magazine. We also accept with respect Lord Wilberforce's dicta on the subject of corruption in *D.P.P. v Whyte* (1972) 3 All E.R. 12. That case concerned charges brought pursuant to the Obscene Publications Act 1959 in England and one of the defences raised was that the readers of the pornography were already in such a state of depravity or corruption that there would, or could, be no further deterioration. Lord Wilberforce stated (p. 19 letter g):

"The Act's purpose is to prevent the depraving and corrupting of men's minds by certain types of writing; it could never have been intended to except from the legislative protection a large body of citizens merely because, in different degrees, they had previously been exposed, or exposed themselves, to the 'obscene' material. The Act is not merely concerned with the once for all corruption of the wholly innocent, it equally protects the less innocent from further corruption, the addict from feeding or increasing his addiction."

In our view the portfolio of photographs referred to portrays a prurient and salacious view of sex likely to affect even adult readers (especially those in the 18 to 25 age group).

The price at which the issue is to be sold.

Mr Heron who appeared for the distributors, Messrs Gordon and Gotch submitted that with a contemplated increase in price for the new issues of *Penthouse* the volume of sales was likely to decrease as indeed it had over the part year or two.

The figures that Mr Heron produced to us show that *Penthouse* has risen in price from \$2.70 in November 1978 to \$5.55 in February 1982. The circulation figures (which Mr Heron asked us to keep confidential) support his submission that sales have dropped significantly as the price of the publication has increased. We think that Mr Heron's submission is correct, even although the American figures (which we requested) show that although *Penthouse* has risen in price from \$1.25 in 1975 to \$2.50 in 1981, the circulation figures have remained buoyant.

Although there has been a drop in circulation in New Zealand, the sales are nevertheless still substantial enough to show that a considerable degree of interest exists in the content of the publication. We do not feel that the circulation figures have dropped to the stage where *Penthouse* is unlikely to need close attention from the Tribunal because of its limited appeal to readers.

Although we accept that recent price rises could and have acted as deterrents to regular subscription to the magazine, its purchase price of \$5.50 is still within the range of almost all New Zealanders. We do not accept that *Penthouse's* price level is a significant factor in influencing our view of the November issue of the publication. In our opinion none of the factors to be considered under section 11 assist the Tribunal to classify the November issue of *Penthouse* as anything other than indecent.

For all the above reasons the Tribunal refuses to make a section 15A ruling, and makes the following classifications:

(1) That the September and October issues of *Penthouse* be declared indecent in the hands of persons under the age of 18.

(2) That the November issue of *Penthouse* is indecent.

W. M. WILLIS, District Court Judge Chairman.

Decision No. 1037

Reference No. Ind. 14/82

*Before the Indecent Publications Tribunal*

IN the matter of the Indecent Publications Act 1963, and in the matter of an application by the Comptroller of Customs for a decision in respect of the following publication: *The Hite Report on Male Sexuality*, published by MacDonald Futura Publishers, London:

Judge: W. M. Willis (Chairman); Mesdames H. B. Dick, L. P. Nikera; Messrs J. V. B. McLinden, I. W. Malcolm.

Hearing: 25 May 1982.

Decision: 6 October 1982.

Appearances: M. J. McNeice for Comptroller of Customs. No appearance of Importer, Wholesale Book Distributors.

DECISION

We have before us the uncorrected proof (two volumes) and final edition of the above publication. We were informed by Mr McNeice that this publication was imported commercially