Decision No. 1066
Reference No. Ind 1/83.

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 publications:

AC/DC House Guest and 341 Other Paperback Novels, published by Pleasure Books, New York, U.S.A.

Judge W. M. Willis (Chairman).
Mesdames H. B. Dick, L. P. Nikera.
Messrs J. V. B. McLinden, I. W. Malcolm.
Hearing: 15 June 1983.
Decision: 17 June 1983.
Appearances: Mr P. E. F. M. Leloir for Comptroller of Customs. Mr M. J. Brooks for importer, N. H. Nicholas.

INTERIM DECISION

WE were informed by Mr Leloir for the Comptroller of Customs that these books come before us as a reference from the District Court at Auckland. The reference comprises 341 individual novels seized by the Customs Department at Auckland on 30 April 1980 from one Norman Harvey Nicholas, of Auckland.

Mr Brooks appeared for the importer and informed us that he had been given agency instructions by Mr Travis of Auckland (the importer's solicitor), on Tuesday, 14 June 1983 (the day before the hearing) to seek an adjournment of these proceedings.

There were two main grounds advanced in support of the application. These were that the first notice Mr Travis had had of the present hearing date was on 7 June 1983 (approximately a week before the hearing) and secondly, that his client, Mr Nicholas, had been overseas for 2 weeks either at the time of Mr Travis receiving nctice on 7 June, or by the time of this hearing (we are not sure which is the correct position) and that Mr Nicholas will be away overseas for another 6 weeks.

The Tribunal was concerned at the importer's application for an adjournment, because as may be seen from the facts already mentioned, the books seized in this shipment had been seized as long ago as April 1980. Indeed, when Mr Travis had recently intimated to the Secretary of the Tribunal that he might seek an adjournment of the proceedings, he was informed orally and in writing that the hearing would be proceeding.

After hearing Mr Brooks' submissions, the Tribunal adjourned so that Mr Brooks could obtain some further instructions from Mr Travis in support of the application for an adjournment. From the information received it appears Mr Travis first received instructions to act for the importer on or about 15 February 1982 (some 16 months before this hearing). Although he has apparently attended some District Court remands in relation to that aspect of this case Mr Travis apparently did not, at that stage, receive a full list of all books that had been seized and subsequently referred to the Tribunal. However, the only correspondence the Tribunal was referred to in relation to Mr Travis making such an enquiry was a request made by him to the Crown Prosecutor at Auckland on or about 28 May 1982. Mr Travis apparently asked the Crown Solicitor for 13 of the books to be sent to him. These were sent to him on 10 June 1982.

In circumstances where an importer has instructed his solicitor on a case 16 months prior to an aspect of the matter coming on for hearing, we would normally have expected the solicitor to have taken some initiative to have obtained information as to the titles that had been seized, and to obtain copies of the books so that their contents could be perused. Indeed, we understand that an adjournment of the criminal aspect of these proceedings was granted on 22 February 1982, Mr Travis on the importer's behalf, so that he could inspect the allegedly indecent publications.

In those circumstances the Tribunal thought it advisable to seek further information from Mr Leloir about the history of the seizure of the present publications, before making any decision on an adjournment. That information was provided when the hearing resumed.

Annexed hereto is a chronology of events in relation to these books. It is subject to the qualification that neither Mr Travis nor the importer has had the opportunity to comment on the accuracy of the dates or the events alleged to have happened. The annexed chronology was supplied by the Comptroller of Customs but there are other dates which are of importance.

On 19 January 1983, Meredith Connell & Co enquired of the Tribunal asking whether the books had been received and whether a date for the preparation of submissions had been fixed. At this stage the Tribunal had no knowledge of the matter but on 28 January there was received from the District Court the books in question. The Chairman, who was proceeding to Auckland on other duties, then arranged with the Customs Department to have sent additional copies for members of the Tribunal and for Mr Travis.

In due course the books were received at Tribunals Division and distributed amongst members of the Tribunal for perusal. We were under the impression on the date of hearing that Mr Travis had not received more than 13 of the titles involved but since the hearing the Department has notified the Secretary that on 23 February 1983, 307 additional titles could be uplifted by Mr Travis who, on 24 February 1983, signed a receipt for 307 books as per a list attached. It is also relevant to record that on 21 October 1981 a complaint was made in writing by Mr Nicholas addressed to the Health Department.

In due course this found its way to the Customs Department which replied to Mr Nicholas on 5 November 1981. On 21 April 1983, Mr Stapleton, who appeared on the Court record as the solicitor for Mr Nicholas, was warned that a tentative date for hearing would be 16 June. Whether that was transmitted to Mr Travis, the Tribunal does not know. On 19 May 1983 a notice of sitting was despatched to Mr Stapleton but it was not until 7 June that actual notice was given to Mr Travis.

On 14 June, Mr Travis asked if he could be directed to a solicitor whom he might be able to instruct to appear ostensibly to seek an adjournment. He was told that an adjournment was unlikely. He was notified in writing on 7 June that an adjournment was unlikely. It should be recorded also that on 19 May notice of the hearing was sent to Mr Nicholas. This was returned marked "Gone, no address". Apparently he has shifted. He had changed his address but the Tribunal had not notice of his new address.

In the meantime suitable adjournments apparently have been made in the District Court.

Having set out that lengthy chronology, it is convenient now to consider some general principles in relation to adjournments. The administrative law section of *Halsbury* (4th edition) states (para 76):

> "Where there is an express or implied obligation to conduct an oral hearing, it is contrary to natural justice to fail to give a party any opportunity of getting heard at all on a relevant issue, or to prevent him from calling evidence, or to preclude him or his advocate from addressing the Tribunal or making submissions. It may also be contrary to natural justice to refuse an adjournment requested by a party who needs further time to prepare his case or to produce evidence."

We wish to refer to two of the many authorities concerning the granting of adjournments. In *Rose* v *Humbes* [1970] 2 All ER 519, Buckley J. said at p. 523:

> "I have been referred to authorities . . . which I think indicate that, although the adjournment of a hearing by any Tribunal is a matter *prima facie* for the discretion of the Tribunal and an exercise of that discretion will not be interfered with by an appellate court in normal circumstances, if the discretion has been exercised in such a way as to cause what can properly be regarded as an injustice to any of the parties affected, then the proper course for an appellate court to take is to ensure that the matter is further heard."

Another case was *M (J)* v *M (K)* [1968] 3 All ER 878 wherein in an appeal to the Chancery Division from a decision of the Manchester Magistrate's Court, Pennycuick J. in delivering the judgment of the Court held:

> "We were referred by counsel for the mother to certain authorities as to the principles on which the courts acts where the tribunal from which an appeal is brought has refused an adjournment. The leading case is *Maxwell* v *Keun* [1927] All ER Rep 335; [1928]1 KB 645, and I will read two short passages from the judgments. Atkin LJ said [at pp 338, 339; 653]:
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> "The other point made by the defendants was that this was a discretionary order and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree that the Court of Appeal ought to be very slow, indeed, to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

Lawrence LJ said [at p. 341; 659]:

> "Further, it is plain that if he is not present at the trial his case must fail, in other words, he will not have had an opportunity of having his case properly tried and thus of obtaining justice. I will assume for this purpose that his advisers commtited an error of judgment in applying [for the postponement of the trial] at the time when they did; that they ought to have applied some weeks earlier. I cannot myself think that the penalty for that error of judgment is that the plaintiff should not have his case heard."