

SCHEDULE

OTAGO LAND DISTRICT—QUEENSTOWN-LAKES DISTRICT

7663 square metres, more or less, being Section 140 (formerly part Section 107), Block XX, Shotover Survey District. Part certificate of title 109/294. S.O. Plan 22016.

1.7663 hectares, more or less, being Section 141 (formerly part Section 107), Block XX, Shotover Survey District. Part certificate of title 109/294. S.O. Plan 22016.

Dated at Wellington this 18th day of August 1987.

C. R. MARSHALL, Minister of Conservation.

(D.O.C. CO. Res. 12/2/181; R.O. 8/22/7)

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Decision No. 12/87

Reference No. IND 3/87

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 decisions in respect of the following publication: *The Girls of Penthouse*, November/December 1986, No. 21, published by Penthouse International Ltd.:

Chairman: Judge R. R. Kearney.

Members: H. B. Dick, R. Barrington, A. J. Graham, and K. Hulme.

Hearing at Wellington on the 6th day of April 1987.

Appearances: P. J. Eggleton for Comptroller of Customs. G. F. Ellis for Importer. Gordon and Gotch.

DECISION

THIS publication was part of a commercial shipment imported by airmail through the Port of Auckland in October 1986. The publication was seized by the Collector of Customs in Auckland and the importer has disputed forfeiture. The publication was referred to the Tribunal for classification prior to the commencement of condemnation proceedings pursuant to the Customs Act 1966.

The publication is in magazine form and consists almost entirely of photographic portfolios of seven nude or partly clad females. Typical of many such magazines featuring the female nude many of the photographs show the models in contrived positions which have considerable emphasis on the genitalia. Mr Ellis in his submission on behalf of the importer anticipated that aspect of the publication which caused the Tribunal concern, namely, the multiple model scenes. In a submission Mr Ellis invited the Tribunal to accept that the portrayal of nude females in multiple model scenes was no longer sufficient to justify an unconditionally indecent classification. In that regard Mr Ellis relied principally on the test to be applied in respect of indecency as set out in the majority decision in the Court of Appeal in *Howley v. Lawrence Publishing Co.* 6 NZAR (1986) p. 193. The test to be applied was stated by Woodhouse P at p. 197 where he said:

“When all these provisions are taken together, including of course the important qualifying words of the definition in s. 2, I am left in no doubt that whatever might be the influence of any one or more of them in some particular case, or the possible difficulty which might arise when attempting to weigh some of them in a sufficiently objective way against others, there is a clear statutory intention to withhold the censorship weapon from material which falls short of being actually injurious. As McCarthy P put it in the *News Media* case (at p. 615), material is not to be banned unless there is ‘discernible injury.’”

It was Mr Ellis’ submission that the criteria which the Tribunal had previously applied in assessing indecency and which had become known as the tripartite test was no longer relevant or applicable in view of the *Howley* decision.

In a decision of the full court of the High Court *The Comptroller of Customs v. Gordon & Gotch (NZ) Limited* M648/86 High Court Registry, Wellington delivered on 2 July 1987 Their Honours indicated that the tripartite test was (subject to the exercise of caution in its application) still available to the Tribunal as a valid assessment of indecency in respect of any particular publication. In that regard His Honour Jeffries J had this to say on pages 28 and 29 of his decision:

“The Tripartite Test

In deciding whether a publication is indecent or not the Tribunal before making a finding it is indecent must discern injury to the public good. Section 11 directs in generalised terms what the Tribunal is bound to take into account in the task of

classification. On a scale ranging from concrete to abstract the statutory directions are very much closer to abstract. The decision-making of such a Tribunal is a continuum always engaged basically in the same task; indecent or not. Understandably the Tribunal has sought to ensure there is observable consistency in its decisions because that is a desirable end in itself, a valuable guide to those engaged in publishing and importing of materials, as well as being important to the public. To overcome development incrementally of inconsistency, and as a practical tool in its habitual work the Tribunal under different personnel has sought to concretise the statutory directions by establishment of categories which spell out in easily understandable language what is acceptable or not (i.e. indecent). The *Waverley* decisions (No. 93–103, *New Zealand Gazette*, 1968, Vol. 2, p. 1251) were early examples. I made comments on the subject in *Waverley Publishing Co. Ltd v. Comptroller of Customs* [1980] 1 NZLR 631 at 641–642 from which I do not resile. In 1981 the so-called tripartite test was developed which has not been rigid as evidenced by altered language in the decisions themselves. In Decision 1054 the Tribunal referred to the test as setting ‘broad guidelines’ which I think is a proper approach.

One can only express a view but I do not believe such a test is wrongful *per se* and I think the Tribunal, by its decisions, has obviously been aware of the possible dangers mentioned in *Waverley* (supra). I would think no harm results from its continued use so long as it does not itself deteriorate to pigeon holing into sealed compartments unrefreshed by the statutory directions which must never be departed from.”

In considering whether adherence to that test was wrong in principle His Honour Quilliam J stated the position at page 5 of his judgment in this way:

“For myself I see no objection to the establishment by the Tribunal of criteria which are designed to assist it to a conclusion as to whether a document is injurious to the public good. I do not accept that there can properly be any slavish adherence to a formula in such matters. The danger of using a formula is that it tends to become ‘in itself the test without reference to the principle which alone can be the proper basis of a decision. I therefore consider that the use by the Tribunal of the tripartite test is not in itself wrong in principle, but that the use made of that test could become wrong if it is not appropriately adapted to the particular case or to changing standards and attitudes within the community.”

The tripartite test which Their Honours were considering has been expressed in various decisions of the Tribunal in a number of ways and His Honour Quilliam J set out in his judgment the test enunciated by the Tribunal in Decision No. 1054 of 17 March 1983 which was:

“In summary, the Tribunal indicated that issues were likely to be classified as indecent if, in addition to their normal content, they contained pictorial scenes including the following:

1. Scenarios involving more than two models, and in which sex and violence and intimacy and/or deviant aspects of sex are depicted among the models;
2. Multiple model scenes which depict lesbian acts;
3. Heterosexual scenarios in which there are a high degree of intimacy (e.g., fellatio or cunnilingus or intercourse) depicted in the couples actions.”

The Tribunal finds that two of the portfolios contain depictions of matters which come within the matter of concern as expressed in the tripartite test.

From pages 42–57 inclusive a sequence of photographs depict two female models in scenes of intimacy and some scenes of lesbian acts. In another sequence between pages 88–101 a male and a female model are portrayed in scenes of intimate touching and fondling in a way which concerns the Tribunal when considering whether such portrayals are indecent.

In applying the statutory directions contained in the Indecent Publications Act and measuring those very carefully against the decision in *The Comptroller of Customs v. Gordon & Gotch (NZ) Limited* the members of the Tribunal are unanimous that this publication is injurious to the public good. The publication is classified as unconditionally indecent.

Dated at Wellington this 1st day of September 1987.

Judge R. R. KEARNEY, Chairman.