

proceedings and in other cases counsel for Gordon & Gotch appeared also to represent the interests of the publisher. In decision 13/84 released in April 1984 the Tribunal classified issues of *Penthouse (U.S.)* unconditionally indecent. Since that time it is understood that importation of *Penthouse (U.S.)* by Gordon & Gotch has been suspended. In the meantime Gordon & Gotch has imported and distributed *Penthouse* from Australia and has not sought to import the regular *Penthouse (U.S.)* title, although it has continued to distribute other titles from *Penthouse (U.S.)*, including *Penthouse Forum*. The subject issues in these proceedings (as indicated earlier) were private imports and Gordon & Gotch brought to the attention of the international publisher their seizure and referral to this Tribunal. Gordon & Gotch continues to distribute *Penthouse* titles sourced from Australia. The Australian title has consistently been classified R18 in recent Tribunal decisions and is distributed under a section 15A serial restriction order currently renewed for a further 2 years.

Decision No. 881 dated 23 December 1976 noted that *Penthouse* magazine had been before the Tribunal on 6 occasions, namely 1966, 1969, March and October 1972, 1974 and June 1975. The Tribunal noted that the English editions had generally fallen within the classification of indecent while the American editions had been held to be suitable for those over 18 years.

The Tribunal in decision 881 found the 2 editions of *Penthouse (U.S.)* then before it indecent in the hands of persons under 18 years.

In decision 883 dated 2 June 1977 the Tribunal again classified 3 issues of *Penthouse (U.S.)* as indecent in the hands of persons under the age of 18 years and made a 2-year restriction order.

In decision 936 dated 21 December 1979 the Tribunal classified the 3 editions of *Penthouse (U.S.)* which were before it as indecent in the hands of persons under the age of 18 years and made another 2-year restriction order.

In decision 1038 the Tribunal classified the May and June 1980 editions ("Caligula" editions) of *Penthouse* indecent. In doing so the Tribunal drew attention to 2 particular features (referred to at pages 4 and 5):

"(a) A 13-page portfolio in June 1980 featuring lesbian love scenes, described as 'grossly explicit' and 'having no literary or artistic merits' in the context in which they appeared; and

(b) In the May 1980 issue—the sex and violence depicted in the 'Caligula' excerpts described as 'pictures shown out of context' and as 'highlights from a film that itself in the finish lacks honesty of purpose'."

It should be noted that the "Caligula" portfolios depicted numerous scenes of an orgiastic nature with themes of rape, incest, violent abuse of women (and men) in the position of slaves.

In decision 1033 the Tribunal considered *Penthouse (U.S.)* of September, October and November 1981. In addition to those sections featuring explicit genital detail the Tribunal noted the emergence of pictorial sequences with 2 or more models as "another major step forward in the kind of photographs it is presenting to its readers" (page 2). In the Tribunal's view the November 1981 issue "crossed the line" with a pictorial article using a *James Bond—From Russia With Love* scenario. The scenes described in that issue the Tribunal found "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."

This marked the origins of the "tripartite" test. The 3 limbs of this test were cumulative in relation to the picture sequence in

the November 1981 issue. Not all of the "multiple model" scenes were considered indecent (i.e., September and October issues). Apparently none of the separate elements alone were regarded as sufficient to condemn the September and October issues of that year (nor earlier issues considered by the Tribunal in decision 881 in 1976).

In decision 1053 the Tribunal considered 12 consecutive issues of *Penthouse* for that year. At page 2 of the decision, in referring to a portfolio of photographs entitled "The Bank Robbery" in the August 1982 edition, the Tribunal reiterated the formulation of the test which had been stated in decision 1033. That formulation was applied to scenes from the August 1982 edition in relation to which it was said:

"Mr Heron initially submitted that none of the 1982 publications had the aggressive element combining violence and lesbianism which the November 1981 had but conceded, when asked to comment on this particular portfolio (a male and 2 female models in various settings as a bank robbery) that it appeared to fall within that category".

In other of the 1982 issues, the Tribunal found a variety of heterosexual scenes depicting various degrees of intimacy, some of which were described as "explicit" but still with "some restraint" while others were described as "so offensive as to be injurious to the public good".

Much of decision 1053 was then devoted to the convenience and administrative practicality of section 15A serial restriction orders and the usefulness to both Customs and importers of some guidelines which would signal particular issues which might require referral for classification. Stressing (at page 7) that it hesitated "to lay down hard and fast rules" the Tribunal went on to say that the danger of an unconditionally indecent classification was present "when the normal content of *Penthouse* is embellished by:

1. Scenarios involving more than 2 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 is a high degree of intimacy (e.g., fellatio or cunnilingus or intercourse) depicted in the couple's actions."

The Tribunal stressed (as it had earlier) that such a "test" could never be enough on its own and that the Tribunal must refer to the criteria in section 11 of the Act.

In the last significant Tribunal decision on *Penthouse* (decision No. 13/84) the Tribunal reviewed the origins of what by then was referred to as the "tripartite test". It said that in decision 1053 it expressly refrained from laying down hard and fast rules. In decision 1054 the Tribunal said it described the tripartite test as setting broad guidelines, expressly because of what was said in the judgment of Jeffries J in the High Court in *Waverley Publishing Co v. Comptroller of Customs* (1980) 1 NZLR 631. It concluded:

"Because the 3 issues before us contain multiple scenes they are classified as indecent."

Central Issues

In Mr Ellis' view *Penthouse* material is not indecent *per se*, a view with which we are in substantial agreement. Mr Ellis reminded the Tribunal that, historically in New Zealand, the majority of *Penthouse* material, including that in *Penthouse (U.S.)*, has not been considered indecent except in the hands of persons under the age of 18 years. We agree with Mr Ellis that this is an important starting point for these proceedings because, so far as we are aware, the present editorial policy, publishing standards, graphic and textual quality, dominant theme and philosophy of *Penthouse* are the same internationally. Apparently what varies from country to country is the degree of explicitness in the sexual content. We uphold Mr Ellis' submission that the sole distinguishing feature