IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-002464

BETWEEN	M S HOTCHIN Plaintiff
AND	APN NEW ZEALAND LIMITED First Defendant
AND	B GAYNOR Second Defendant

Hearing: (On Papers)

Counsel: Heard on Papers Submissions from National Business Review as applicant to access Court documents
J G Miles QC and A S Ross - Counsel for the plaintiff in opposition

Judgment: 3 June 2011

JUDGMENT OF FOGARTY J

The judgment was delivered on 3 June 2011 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

[1] The National Business Review has applied to this Court to gain access to the statement of claim. The proceedings have only recently commenced. There is no statement of defence.

[2] The application relies on the discretion conferred in High Court Rule 3.13 to permit access to documents in a Court file or the formal Court record "*other than at hearing stage*".

[3] There are a number of matters to be taken into account in exercising that discretion. They are set out in r 3.16. The first criterion is the orderly and fair

administration of justice. The second is prevention of confidentiality and privacy interests. The third is the principle of open justice. The fourth is the freedom to seek and impart information. The other two matters I need not refer to.

[4] The third and fourth criteria are worth setting it out in full:

> (c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:
>
> (d) the freedom to seek, receive, and impart information:

[5] The principal arguments by the National Business Review for access to the statement of claim is that there is significant public interest in this litigation and that access to his statement of claim would uphold the principle of open justice without damaging Mr Hotchin in any substantial way.

[6] It may be noted immediately that r 3.16 distinguishes the principle of open justice from the freedom to seek and receive and impart information. McGrath J in the Supreme Court in *Television New Zealand Limited v Rogers* [2008] 2 NZLR 277 said:

> [117] Often freedom of speech and open justice march together as closely related factors in applications of this kind. This case, however, demonstrates that open justice is a distinct consideration. It is primarily concerned with the sound functioning of the judicial process in the public interest, whereas freedom of speech is more concerned with the free flow of information.

[7] I apprehend in this case when the National Business Review invokes the principle of open justice it is in truth arguing for the free flow of information as part of the freedom to seek, receive and impart information.

[8] There have been cases in which the Court has allowed access by non parties to the pleadings before the hearing has commenced. The Court of Appeal decision in *McCully v Whangamata Marina Society Inc* [2007] 1 NZLR 185 is one and is a leading case. That was a judicial review. The applicant was at that time a member of Parliament and the Opposition Spokesperson on Conservation. He had a direct interest in examining the decision of the Minister of Conservation which was under review.

[9] There is no doubt that there is considerable public interest in the subject matter of these proceedings. It is appropriate for the media to cover the case. I am not aware, however, of any case in which access has been given to a non party, let alone to a newspaper, to a statement of claim in a defamation case before the pleadings have closed.

[10] As I emphasised before, this discretion is intended to be exercised "*other than at the hearing stage*".

[11] At the hearing the principle of open justice has full play. The leading exposition of a principle of open justice is in the House of Lords case of *Scott v Scott* [1913] AC 417, adopted by our Court of Appeal in *Broadcasting Corporation New Zealand v Attorney-General* [1982] 1 NZLR 120 and referred to by the Supreme Court in *Television New Zealand v Rogers*.

[12] As McGrath J put it:

> [118] Open justice provides critical safeguards in the operation of the criminal justice process. **The ability of the public to attend, and the media to report on, what transpires during a criminal trial provides the transparency in the process that is crucial to fulfilment of the protected right to a "fair and public hearing by an independent and impartial court".**[94] But it has also been recognised that the public interest served by openness in the administration of justice goes beyond protecting the fundamental rights of those charged with a criminal offence. Openness also helps meet the need to preserve public confidence in the legal system. As Woodhouse P said in *Broadcasting Corporation of New Zealand v Attorney-General*:
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> > "The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes."

> [119] Open justice also provides incentives for self-discipline which foster the sound and principled exercise of judicial power. As well, it makes the judiciary accountable to informed public opinion. These effects lead to greater public understanding of the judicial process and, importantly, provide reassurance to both the community, and those close to the accused and victims, **that a trial has been conducted fairly and the accused treated justly.**
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> (Emphasis added)

[13] What he said in respect to the operation of the criminal justice process applies equally to civil justice.

[14] Open justice is also reflected in the Defamation Act 1992. Section 14 of that Act grants absolute privilege of freedom of expression in judicial hearings. That extends to pleadings. However, it is not presumed by the Defamation Act that content of pleadings can be accessed and reported in the media prior to trial. The qualified privilege in respect of pleadings triggers only after the case has been set down for hearing. Schedule 1 Part 1 of the Defamation Act provides:

> 5 The publication of a fair and accurate report of the pleadings of the parties in any proceedings before any Court in New Zealand, at any time after,—
>
> (a) In the case of proceedings before the High Court, a praecipe has been filed in those proceedings:
>
> (b) In the case of proceedings before a District Court, the filing of an application for a fixture for the hearing of those proceedings.
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> 6 The publication of a fair and accurate report of the proceedings of any Court in New Zealand (whether those proceedings are preliminary, interlocutory, or final, and whether in open Court or not), or of the result of those proceedings.

[15] Accordingly, it would be an extremely unusual step for this Court to allow a newspaper access to a statement of claim prior to a praecipe having been filed. Praecipe is the former term for an agreement between the parties that the case is ready for hearing. That agreement only takes place after the pleadings in reply have been filed and then only at a much later date. Fair and accurate report of the pleadings would have to cover both the claim and the reply were it to be protected by qualified privilege.

[16] As to any injury to Mr Hotchin, his counsel object also to the release of the statement of the claim to the National Business Review on the grounds that it might give that publication an opportunity to repeat what its client contends are the defamations. For the reasons I have explained, should the newspaper do that it would not be subject to qualified privilege under the Defamation Act.

[17] Counsel for Mr Hotchin are correct in saying that denying National Business Review access to the statement of claim does not "gag" the paper. Gagging can be a perceived consequence of a plaintiff suing a publisher in defamation.

[18] Another factor I take into account is that defamation proceedings are often resolved by jury trials. Where there is a prospect that proceedings will be judged by a jury, the principle of sub judice is of considerable importance. Care must be taken to avoid any "trial by media", which might contaminate the integrity of any subsequent trial by jury.

[19] For these reasons I am quite satisfied that this application is premature and cannot succeed. The application is dismissed.

[20] The applicant has put Mr Hotchin to expense. Costs are reserved.

Solicitors:
Chapman Tripp, Auckland

cc: National Business Review