IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-001312
[2016] NZHC 2542

UNDER	the Defamation Act 1992
BETWEEN	JOHN DOUGLAS SELLMAN First Plaintiff
	BOYD ANTHONY SWINBURN Second Plaintiff
	SHANE KAWENATA FREDERICK BRADBROOK Third Plaintiff
AND	CAMERON JOHN SLATER First Defendant
	CARRICK DOUGLAS MONTROSE GRAHAM Second Defendant
	… cont

Hearing:	On the papers
Counsel:	D M Salmon and D Nilsson for Plaintiffs B P Henry for First Defendant E J Grove for Second Defendant W Akel for Proposed Fourth and Fifth Defendants
Judgment:	25 October 2016

JUDGMENT NO 2 OF PALMER J
(ACCESS TO THE COURT RECORD)

This judgment is delivered by me on 25 October 2016 at 3 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Counsel/Solicitors:
Lee Salmon Long, Auckland
B P Henry, Barrister, Auckland
E J Grove, Barrister, Auckland
Simpson Grierson, Auckland
Ruth Brown, Auckland

FACILITATE COMMUNICATIONS LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant

NEW ZEALAND FOOD & GROCERY COUNCIL INCORPORATED
Fifth Defendant

Summary

[1] The principle of open justice, and the right to seek, receive and impart information guaranteed under the Bill of Rights, is relevant to court consideration of requests to access documents on court files. Where a jury trial is in prospect, that principle and right must be balanced against the right to a fair hearing by an independent and impartial court, also guaranteed under the Bill of Rights. Care must be taken with what information is made publicly available from court files to ensure potential members of a jury do not become less impartial because of the information released. Not all the material on a court file will necessarily be admissible at trial. Trial by jury is not the same as trial by media.

[2] These proceedings, which are likely to be of public interest, may be the subject of a jury trial. I direct that all pleadings be released to the journalist, Ms Ruth Brown, once they are filed and served and can be reasonably anticipated not to need significant amendment – which will be when a trial date has been allocated in these proceedings.

Facts

[3] Ms Ruth Brown, a journalist from the publication New Zealand Doctor, has requested access to the file for this matter. She says the reason is so she can get context for the discussion at the argument over joinder of the fourth and fifth plaintiffs on 5 October 2016. She wishes to report on the case for her newspaper and website. Several of the defendants have relatively high public profiles and there is likely to be public interest in this trial.

[4] The plaintiffs and the second defendant oppose open access at this stage. The plaintiffs note the matter may be heard by a judge or a jury. They favour the general approach of deferring access to the court file until pleadings are finally settled, referring to *Hotchin v APN New Zealand Ltd*.[1] The second defendant also opposes access. He points to the risk media coverage could influence potential jury members' perceptions of the merits of the case. The first defendant has no objection.

---

1 *Hotchin v APN New Zealand Ltd & Anor* HC Auckland CIV 2011-404-2464, 3 June 2011.

Law

Open justice, the right to receive information and access to court records

[5] The importance of the principle of open justice was emphasised recently by Arnold J on behalf of the Supreme Court in *Erceg v Erceg*:[2]

> The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance,[3] and has been described as "an almost priceless inheritance".[4] The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges".[5] The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court.[6] Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language.[7]

[6] Related to the principle of open justice in this context is the freedom to seek and receive and impart information, guaranteed as part of the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights). Under s 3(a) that binds the judiciary as much as any other branch of government.

[7] As the Supreme Court also recognised in *Erceg,* "it is well established that there are circumstances in which the interests of justice require that the general rule

---

2 *Erceg v Erceg* [2016] NZSC 135 at [2].

3 This is confirmed in the criminal context by s 25(a) of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides that those charged with offences have "the right to a fair and public hearing by an independent and impartial court".

4 *Scott v Scott* [1913] AC 417 (HL) at 447 per Earl Loreburn.

5 *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 132 per Richardson J.

6 Section 14 of NZBORA protects the right to freedom of expression, which includes the right to impart information about court proceedings, although that is subject to "reasonable limits" in terms of s 5: see the discussion in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [156]–[159] per McGrath, William Young and Glazebrook JJ. Fair and accurate reports of court proceedings attract qualified privilege: Defamation Act 1992, s 16 and pt 1 of sch 1.

7 See, for example, *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL), in particular at 449–450 per Lord Diplock; *R v Tait* (1979) 46 FLR 386 (FCA) at 401–405; *Broadcasting Corporation of New Zealand*, above n 3, at 122–123 per Woodhouse P, at 127–128 per Cooke J and at 132–133 per Richardson J; *Hogan v Hinch* [2011] HCA 4, (2011) 243 CLR 506, in particular, at 530–535 per French CJ; and *R (on the application of C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444 at [1] and [16]–[17].

of open justice be departed from, but only to the extent necessary to serve the ends of justice".[8] Just because the material disclosed would be embarrassing or unwelcome, from the perspective of one or other party, is not a reason to deny release, unless there are exceptional specific adverse consequences.[9] Similarly, under s 5 of the Bill of Rights, the right to receive information is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Privilege for proceedings and pleadings

[8] As Fogarty J noted in *Hotchin v APN New Zealand Ltd*, the principle of open justice is reflected in the Defamation Act 1992. Section 14(1) extends absolute privilege for the purposes of defamation law to anything said, written or done in judicial proceedings. And s 16(1) and cl 5 of Part 1 of Schedule 1 of that Act extends qualified privilege to reports of pleadings in court proceedings after a certain point.

[9] Notably, the extension of qualified privilege to pleadings only applies in relation to "fair and accurate report of the pleadings" and only after "a praecipe" has been filed, in the case of High Court proceedings.[10] A praecipe used to be a form filed under r 426 of the High Court Rules that were in force from 1986. It was signed by all parties to a proceeding when the proceeding was ready for trial. That procedure was replaced in 1994 with a new approach to case management. Now, under r 7.6 of the High Court Rules, a judge is required immediately to allocate a hearing date if it appears a proceeding can be readied for hearing or trial. That in turn involves it being reasonably anticipated that there will be no need for any significant amendment of pleadings (r 7.6(3)(a)). I consider the allocation of a hearing date now constitutes the step equivalent to filing a praecipe for the purposes of cl 5(a) of Schedule 1 of the Defamation Act.

[10] The Defamation Act provisions do not bear directly on access to documents on a court file. But they do illustrate a policy about when fair and accurate reporting of pleadings are protected at law.

---

8 *Erceg*, above n 2, at [3].
9 At [13].
10 *Hotchin v APN New Zealand Ltd & Anor,* above n 1, at [14].

High Court Rules

[11] There is a general right of access to the formal court record under r 3.7 of the High Court Rules and a power to inspect the court file or any document relating to a proceeding under r 3.8. Both are subject to a judge's discretion to direct documents not be accessed without permission of the court.

[12] There are different rules depending on the stage of a proceeding. Rule 3.9 provides any person with a power to access specified documents on a court file during the hearing of a substantive proceeding and up until discontinuance or 20 working days of final judgment being given. These documents include pleadings, applications, affidavits, statements or documents admitted into evidence, and transcripts. Again the parties may object and a judge may direct any document not be accessed without permission. But, as Fogarty J stated in *Hotchin*, "[a]t the hearing the principle of open justice has full play".[11]

[13] Other than during a hearing, however, under r 3.13 the permission of a judge is required to access a court file. The request may be made informally. In considering it, r 3.16 requires that a judge:

> . . must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:
>
> (a) the orderly and fair administration of justice:
>
> (b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
>
> (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:
>
> (e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:
>
> (f) any other matter that the Judge or Registrar thinks just.

---

[11] *Hotchin v APN New Zealand Ltd & Anor,* above n 1, at [11].

[14] The Court of Appeal in *Schenker AG and Schenker (NZ) Ltd v Commerce Commission* has found a discretionary balancing approach is required, depending on the context of each application.[12]

[15] One reasonable limit on access to a court record, serving the interests of justice, can be the right to a fair and public hearing by an independent and impartial court, which is also guaranteed by s 25 of the Bill of Rights. That right is relevant under r 3.9(f), as it is explicitly under r 6.10(2)(a) of the Criminal Procedure Rules. Where a jury trial is in prospect care must be taken with what information is made publicly available from the court record to ensure potential members of a jury do not become less impartial because of the information released. And not all the material on a court file will necessarily be admissible at trial. Trial by jury is not the same as trial by media.

Should access to the court file be granted?

[16] At this stage of these proceedings, the court file here does not include much more than pleadings and memoranda of counsel. I do consider the provision of information in the pleadings is likely to facilitate more accurate reporting of the proceedings than may occur otherwise.

[17] To facilitate the prospect of balanced reporting, the pleadings should be released to Ms Brown once all sets of pleadings have been filed and served and can be reasonably anticipated not to need significant amendment. Consistent with r 7.6 I consider that point will be reached when a trial date has been allocated.

[18] I do not consider access to affidavits or other evidence, or intimations of possible evidence that may be contained in memoranda of counsel, should be provided. Reporting of such material may impinge on the perceptions of potential jury members and then not be admitted as evidence at trial.

---

[12] *Schenker AG and Schenker (NZ) Ltd v Commerce Commission* [2013] NZCA 114.

[19] If Ms Brown seeks further documents from the court files before trial, that request will need to be the subject of response by the parties and further consideration by the Court.

Result

[20] I direct that all pleadings be released to Ms Brown once they have all been filed and served and a trial date has been allocated in these proceedings.

Palmer J