**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-759**
**[2020] NZHC 3527**

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| BETWEEN | PQW<br>Plaintiff |
| AND | T C MALLARD<br>Defendant |

On the papers:

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| Counsel: | M F McClelland QC and A J Romanos for Plaintiff<br>R K P Stewart and L Clark for Defendant |
| Judgment: | 22 December 2020 |

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**JUDGMENT OF CHURCHMAN J**

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## Introduction

[1] By joint memorandum, counsel for PQW (the plaintiff) and for Mr Mallard (the defendant) seek orders by consent that an interim suppression order be made permanent, and that the file is sealed permanently.

[2] In that joint memorandum, the parties have indicated that they have reached a settlement in these defamation proceedings, and that as part of that settlement, the parties seek the following orders by consent:

(a) that the interim suppression orders made by Grice J on 16 December 2019 be made permanent; and

(b) that the Court file is sealed permanently.

[3] Alongside this joint memorandum, counsel for the plaintiff has filed a notice of discontinuance of the proceeding, on the basis that this notice will became effective once the above consent orders have been made.

**Relevant law for name suppression**

[4] Unlike in the criminal jurisdiction, which is governed by ss 200-211 of the Criminal Procedure Act 2011, the jurisdiction for suppression and non-publication in civil matters is an inherent, discretionary jurisdiction.[1] The starting point is the principle of open justice, which is intertwined with the right to freedom of expression guaranteed in s 14 of the New Zealand Bill of Rights Act 1990, which provides:

> **14 Freedom of expression**
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> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[5] The Court of Appeal aptly described the relationship between open justice and freedom of expression in the context of non-publication in civil court proceedings in *Y v Attorney-General*:[2]

> Together, these two tenets create a presumption of disclosure of all aspects of civil court proceedings. They are exemplified by the latter part of the truism that "justice must not only be done, it must be seen to be done". So the courts administer justice in public, enabling public scrutiny and thus ensuring public confidence in the administration of justice.

[6] Similarly, in *Erceg v Erceg*, the Supreme Court stressed the importance of open justice in both criminal and civil proceedings:[3]

> The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as 'an almost priceless inheritance'. 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'. 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.

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1 *Y v Attorney-General* [2016] NZCA 474 at [23].
2 At [26].
3 *Erceg v Erceg* [2016] NZSC 135 at [2]-[3] (footnotes omitted).

> 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.
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> However, it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. …

[7] In *Y v Attorney-General*, the Court of Appeal clarified the approach that the Courts should take to non-publication in civil proceedings.[4] After emphasising the importance of open justice, the Court observed:[5]

> Given that importance, a court will need to have sound reasons for finding that the presumption favouring publication is displaced. But we do not consider there is an onus or burden on an applicant for suppression, in the sense an onus rests on a plaintiff in a civil claim. In that respect we agree with the approach taken in *ASB Bank Ltd v AB*, where Harrison J stated "there is no onus on an applicant … the question is simply whether the circumstances justify an exception to the fundamental principle".

[8] Furthermore, the Court did not consider it correct to set any particular threshold for non-publication. There did not necessarily need to be "exceptional circumstances" present for a non-publication order to be granted:[6]

> Nor do we consider it correct to set any particular threshold for name suppression. In our view, previous decisions of this Court stating the threshold is "exceptional circumstances" or "extraordinary circumstances" have incorrectly stated the law, or no longer correctly state the law. We endorse this Court's judgment in *Jay v Jay*, that "'extraordinary circumstances' are not required to justify suppression in a civil case". However, as this Court explained in *McIntosh v Fisk*, "[t]he threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression". The aim of that passage was not to set any particular threshold.

[9] Therefore, the correct approach requires a Court to strike a balance between open justice considerations and the interests of the party who seeks suppression.[7] This will necessarily entail a case or circumstance-dependent analysis, given the "almost limitless variety of civil cases and the fact that every case is different".[8]

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4 This approach, set out at [29]-[31] of the judgment, was recently affirmed by the Court of Appeal in *A v Ardern* [2020] NZCA 144 at [33].

5 At [29]. See also *ASB Bank Ltd v AB* [2010] 3 NZLR 427 (HC) at [14].

6 At [30] (footnotes omitted). In deciding this point, the Court settled a divergence in the case law that had previously been present – see [22] and footnote 24 of the decision.

7 At [31].

8 At [32].

**Analysis**

[10] As set out in the cases discussed above, the question is whether there are circumstances in this case in respect of which the interests of justice require that the general rule of open justice be departed from. If there are, then any such departure can only be to the extent necessary to serve the ends of justice.

[11] The interim orders suppressing identifying particulars of the plaintiff were made by Grice J on 16 December 2019 on the application of the plaintiff. The plaintiff had sought the orders on the basis that publication of his name would inevitably result in the identification of the person who was the complainant in a case of sexual harassment against him.

[12] The defendant moved to set aside the interim orders obtained by the plaintiff and Associate Judge Johnston issued a decision on 20 July 2020 in respect of that application.[9] The plaintiff opposed that application although the grounds relied on were different to those advanced in the interim application.

[13] The decision records the plaintiff as advancing two arguments against the rescission of the suppression order.[10]

> … The first concerns the nature of the case itself. The second concerns the affect [sic] that identifying the plaintiff may have on his health and that of his [family member].

[14] In respect of the nature of the proceedings, the Court noted that "a defining feature"[11] of the case was that the plaintiff did not allege that the defendant had defamed him to the world at large. The allegation was that the defamation had only been to a limited number of individuals, presumed by the Court to be mostly Parliamentary employees, who had sufficient knowledge to have been able to identify the plaintiff from the comments of the defendant. The argument advanced by the plaintiff was that, if his name was published, that would effectively result in publication to the world at large.

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9 *PQW v Mallard* [2020] NZHC 1749.
10 At [17].
11 At [18].

[15] The Court addressed an argument advanced by counsel for the defendant to the effect that, although the plaintiff was only in fact alleging publication to a very limited number of people, the quantum of damages sought, when compared with damages awards generally, had the appearance of a claim where the plaintiff was seeking vindication of his reputation to the world at large. Although the Judge thought that such a contention was "too remote to affect the outcome here".[12] It is not irrelevant to a consideration of the concept of open justice.

[16] The quantum of the claim in this case has been published. The damages sought are much higher than would be likely to be awarded for a publication on such a limited basis as the plaintiff alleges. If the orders sought in the joint memorandum are made, then the public may be under a misapprehension as to the scope and seriousness of the defamation alleged.

[17] The Judge found that there was no relevant medical evidence in support of the plaintiff's claim as to any possible adverse implication on his own health,[13] but did think that there was "some modest level of risk that the publication of the plaintiff's name in connection with rape allegations" would exacerbate a family member's mental condition.[14] It was this factor that ultimately proved influential in the grant of an interim suppression order.

[18] The Judge concluded that because the increase in publication of the alleged defamatory material would essentially amount to a publication to the rest of the world, and there was the possibility of an adverse consequence of publication on the plaintiff's family member, that the interim suppression order should remain.[15]

[19] However, the case for the plaintiff clearly proceeded on the basis that what was being sought were interim orders only. The orders were sought only until commencement of the trial and the plaintiff said that he was "not seeking to shroud the case itself in secrecy – for the hearing to be conducted in camera".[16]

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12 At [23].
13 At [26] and [30].
14 At [30].
15 At [44].
16 At [15].

[20] The judgment records counsel as having submitted that:[17]

> … His only objective is to maintain the suppression of his name and identifying details, at least until the commencement of the trial.

*Analysis*

[21] The current situation is different from that considered by Associate Judge Johnston. As the parties have settled, there will be no trial. The anticipated full reporting will now no longer occur.

[22] In terms of identifying the needs of the plaintiff that might justify a formal suppression order of his identity, it is also relevant to note that the defendant did not plead the defence of truth. In other words that he did not assert that the plaintiff was indeed a rapist. The Court can take judicial knowledge of the fact that the defendant has publicly acknowledged that the defendant was incorrect in referring to the plaintiff as a rapist.

[23] These matters significantly reduce any weight that could be allocated to the possible adverse effects on either the plaintiff's mental health or that of any family member arising from publicity as to his identity. The defendant has publicly accepted that the use of the term rapist was unjustified.

[24] Perhaps the most significant factor to be considered is the argument that rescinding the suppression orders would effectively amount to publication of the defamation to the public at large rather than just the very limited group of people whom the plaintiff alleges would have actually been able to identify him.

[25] Another factor to be considered is that the defendant's position has now changed and from seeking to have the suppression orders lifted in July, the defendant now consents not only to the interim orders being made permanent, but to the sealing of the file permanently.

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17 At [15].

[26] A further potentially relevant factor is that it appears that the settlement reached between the parties in relation to these proceedings is contingent upon the making of the orders sought in respect of suppression.

[27] I acknowledge the public interest of litigation being settled and the significance of the fact that all parties to the litigation are agreed as to the making of final suppression orders. They are factors that might support the orders sought.

[28] However, the private interests of the parties are not the sole consideration here. As the Court noted,[18] plaintiffs who elect to commence defamation proceedings are in the weakest of positions to obtain suppression orders as compared to witnesses or strangers to the litigation, and plaintiffs seeking public vindication of their reputation are in an especially weak position.

[29] One of the factors that influenced Associate Judge Johnston in refusing to rescind the interim orders was that there appeared to be "indications that the media did not perceive there to be a significant public interest in the publication of the plaintiff's name, as opposed to the case itself."[19] The Court has no information upon which it could assess whether that remains the situation or not.

[30] There are some aspects of the evidence in this matter that I am prepared to make permanent suppression orders in respect of. Those are in references to the plaintiff's health or that of his family members.

[31] However, in the absence of any evidence showing a "specific adverse consequence" sufficient to justify an exemption to the fundamental rule of open justice,[20] the presumption of open justice has not been displaced.

[32] Now that the defendant has publicly acknowledged that the use of the word "rapist" was incorrect, the plaintiff has achieved the vindication that he sought by issuing these proceedings. The sting has been taken out of the stigma that might otherwise have attached to someone wrongly accused of being a rapist.

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18 At [9](h).
19 At [43].
20 See *Erceg v Erceg*, above n 3, at [13].

[33] I am unable to discern any specific adverse consequence that will flow to the plaintiff if he is identified as the person who issued defamation proceedings against the defendant.

[34] The commencement of the case has generated significant publicity. There is widespread public knowledge that the proceedings have been instituted. Making the orders sought would give the appearance of justice being done in secret. That is a particularly important consideration where one of the parties is a public official. The Court would not want to create the impression that the fact that a public figure was involved in litigation meant that the principle of open justice was less important.

[35] I am not satisfied that the circumstances here justify an exception to the fundamental principle that justice should be dispensed in the open.

[36] Accordingly, I decline the application for continuation of the interim suppression orders, and for the "permanent sealing" of the Court file.

[37] I make an order suppressing publication of any information relating to the health of the plaintiff or his family members.

**Churchman J**

Solicitors:
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