**ORDER SUPPRESSING THOSE MATTERS SUPPRESSED BY ORDER OF GRICE J DATED 16 DECEMBER 2019**

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

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

**CIV-2019-485-759**
**[2021] NZHC 126**

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

Hearing: 4 February 2021

Counsel: M F McClelland QC and A J Romanos for Plaintiff
L Clark for Defendant

Judgment: 11 February 2021

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**JUDGMENT OF CHURCHMAN J**

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## Introduction and background

[1] The plaintiff commenced defamation proceedings against the defendant by statement of claim dated 13 December 2019. The plaintiff alleged that the defendant had defamed him.

[2] The defamation was said to have occurred on 22 May 2019.

[3] On 21 May 2019, a report entitled "Bullying and Harassment in the New Zealand Parliamentary Workplace" by Debbie Francis (the Francis Review) had been published.

[4] The Francis Review had found that incidents of bullying and harassment, including sexual harassment had occurred. It did not name any complainants in respect of such matters nor any persons said to have been perpetrators.

[5] The statement of claim in these proceedings submits that on 22 May 2019, the defendant took part in a series of media interviews in relation to the Francis interview. It was alleged that Susie Ferguson, an RNZ reporter, had asked the defendant the question:

> Now, some of the most serious offending that we are talking about here – sexual assault – Debbie Francis identified three alleged incidents that she described as "extremely serious and some appeared to be part of a multi-year pattern of predatory behaviour". Are you aware whether those alleged perpetrators are MPs or staff, and they are still there?

[6] The defendant is said to have replied by saying that he was not aware whether the perpetrator of the offences was an MP or staff, but that, "Reading the report carefully, I get the sense that the man is still on the premises."

[7] When asked by the reporter about the level of seriousness of the incidents described in the Francis Review, the defendant is alleged to have said, "Well, we're talking about serious sexual assault. Well that, for me, that's rape."

[8] The statement of claim alleges that the defendant made similar comments on the same day in an interview with TVNZ reporter John Campbell.

[9] The statement of claim alleges that following these two interviews, the defendant had been informed about an allegation of sexual assault made against the plaintiff, and that the information given to the defendant was in sufficient detail so that, as from that time "… the defendant was aware that the Complaint was not, and did not concern, an allegation of rape."

[10] The statement of claim alleged that following receipt of this information, when the defendant was addressing the media in Parliament's foyer later that day, and a journalist (Barry Soper) asked the following question, "Do you stand by your view that this morning that the sexual, the serious sexual assaults were tantamount to rape?",

the defendant allegedly replied, "Yes, and anyone who's been involved in looking at the rape law would be aware of the definition of rape in New Zealand."

[11] In response to a question from another journalist, Jessica Mutch McKay, asking whether in relation to the three allegations of serious sexual assault in the Francis Review, one person was responsible for all three, the defendant is alleged to have said, "That is my understanding, yes."

[12] The statement of claim did not allege that the defendant ever identified the plaintiff personally but, because the defendant referred to the plaintiff as "a member of Parliamentary Service", and as someone who had been "stood down", the plaintiff's colleagues and the team that the plaintiff worked in, and many other people working at Parliament, would be able to draw an inference that he was the person being referred to.

[13] On a without notice basis, on 13 December 2019, the plaintiff sought orders anonymising the intituling to the proceeding. That application was granted.

[14] On 16 December 2019, the plaintiff sought more extensive suppression orders in relation to various allegations including a suppression order in relation to the name of the complainant who had made the allegation of sexual assault against him. She had been named by the plaintiff in the statement of claim. On 16 December 2019, the Court made those further orders.

[15] The defendant applied to set aside the without notice interim suppression orders that the plaintiff obtained, and by a decision dated 20 July 2020, the Court dismissed that application.

[16] On 18 December 2020, the plaintiff filed a notice of discontinuance. That notice contained the following wording:

> This notice is intended to become effective once the orders sought by consent in the joint memorandum filed with this notice have been made.

[17] The joint memorandum filed by counsel for both parties confirmed that the matter had been settled and that:

As part of that settlement, the parties seek the following orders by consent:

> that the interim suppression orders made by Her Honour Justice Grice on 16 December 2019, be made permanent; and
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> that the Court file is sealed permanently.

[18] No information was provided explaining why the Court should make either of the orders sought.

[19] In a judgment dated 22 December 2020, the Court agreed to make some limited suppression orders but refused to make either of the orders referred to in the joint memorandum of counsel. This was done on the basis that now that the defendant had publicly acknowledged that the use of the terms "rape" and "rapist" was incorrect, the plaintiff had achieved the vindication he had sought by issuing the proceedings and that no "specific adverse consequence" of not making the orders had been drawn to the Court's attention.

[20] On 23 December 2020, counsel for the plaintiff applied to recall the Court's decision of 22 December 2020. This was done by way of a memorandum rather than a formal application. No supporting affidavit was filed.

[21] In a judgment dated 24 December 2020, the Court directed that the plaintiff file a formal application detailing the specific orders sought and the grounds relied on, and directed that to the extent that legal propositions to be advanced turned on questions of fact, then those assertions of fact were to be supported by evidence. A timetable order was made leading to the hearing on 4 February 2021.

**Further application**

[22] On 18 January 2021, the plaintiff filed two applications:

(a) first, for recall of the 22 December 2020 judgment; and

(b) second, that the plaintiff be given leave to seek, by way of a second application, the requested substantive orders.

[23] According to counsel, their erroneous assumptions that the Court would make the two orders originally sought (in that those assumptions led to the failure to file detailed evidence and submissions), as well as the unusual fact of the orders being sought by consent and the proceeding having been settled, amounted to "special circumstances" under r 7.52 of the High Court Rules 2016, which I will consider in greater detail below.

[24] In the alternative, the application also sought leave to appeal.

**Procedural ruling**

[25] Rule 7.52 of the HCR provides:

> **Limitation as to second interlocutory application**
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> (1) A party who fails on an interlocutory application must not apply again for the same or a similar order without first obtaining the leave of a Judge.
>
> (2) A Judge may grant leave only in special circumstances.
>
> …

[26] The rule recognises that it is generally undesirable for an issue decided by an interlocutory ruling to be relitigated in the same proceeding.[1]

[27] There is limited authority on what amounts to "special circumstances" in cases such as this. The plaintiff relied on the decision of the Court of Appeal in *Cortez Investments Limited v Olphert & Collins*[2] where, in the context of the Law Practitioners Act 1982, the words "special circumstances" were said to be mean something less than a serious risk of prejudice. The words were said to be wide, comprehensive and flexible, and that the interests of justice was governing consideration.[3] In that case, Richardson J specifically noted that synonyms such as "unusual", "out of the ordinary run", "uncommon", "abnormal", or "striking" convey the same flavour but really add nothing except to emphasise that "special" is something *less* than extraordinary or unique; a factor or combination of factors which

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1 *Stephenson v Jones* [2014] NZHC 1604 at [7].
2 *Cortez Investments Limited v Olphert & Collins* [1984] 2 NZLR 435.
3 At 439-441.

may properly be characterised as not ordinary or common or usual may constitute a "special circumstance".[4]

[28] In *Hargreaves v The Radio Network Limited*,[5] Chisholm J made obiter comments to the effect that the availability of a new precedent not available at the time of the first application might have constituted "special circumstances". Fresh evidence and the absence of any other opportunity to address the subject of the interlocutory application at the substantive hearing has also been held to amount to special circumstances. For example, in *Mike Pero (New Zealand) Limited v Krishna*, van Bohemen J considered a second application by the plaintiff for arrest and contempt orders against the defendant following an alleged breach of the interim orders made by Hinton J on July 2015 enforcing a restraint against the defendant from engaging in mortgage broking in the Auckland region[6] The plaintiff had made a first application for arrest and contempt orders on the basis of the defendant breaching interim orders, which was dismissed by Faire J in June 2016. Therefore, because this was a second interlocutory application, r 7.52 was engaged, and van Bohemen J granted leave under this rule on the basis that there was no longer any opportunity to address the subject of the application at any substantive hearing.[7] The Judge held:[8]

> …Absent leave being granted, there would be no opportunity to address the substance of the issue at a main hearing — as would be the case if leave were not granted for a normal interlocutory application. I was satisfied this amounted to special circumstances for the purposes of r 7.52.

[29] In the present case, the interests of justice justify the granting of leave for a second interlocutory application. Given that the main hearing (the defamation proceeding) has settled and the parties seek joint orders by consent, there is no opportunity to address the substance of the application in this case – name suppression – if leave was not granted.

[30] Furthermore, both parties' counsel acknowledged and apologised for their erroneous assumption that the Court would simply rubberstamp their consent

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4 At 439.
5 *Hargreaves v The Radio Network Limited* HC Christchurch CIV-2002-409-725, 16 March 2010.
6 *Mike Pero (New Zealand) Limited v Krishna* [2018] NZHC 40.
7 At [36]-[38].
8 At [38].

memorandum without the need for any explanation to the Court as to why the two orders were sought. I am therefore satisfied that there are sufficiently unusual or 'special' circumstances in this case to justify granting leave for a second interlocutory application in this case.

[31] Accordingly, leave is granted.

**Suppression order**

[32] As indicated in the decision of 22 December 2020,[9] the starting point in civil matters in the Court is the principle of open justice, and there is a presumption of disclosure of all aspects of civil Court proceedings.[10]

[33] The principle of open justice can be departed from but only to the extent necessary to serve the ends of justice.[11]

[34] It is unusual that in defamation proceedings, a plaintiff would wish to have his or her own identity suppressed. The reason for that is that a principal purpose of bringing proceedings in defamation is to vindicate the reputation of the plaintiff by establishing that the alleged defamatory statements are wrong. If the identity of the plaintiff is suppressed, then the purpose of public vindication is not achieved.[12]

[35] The argument advanced by the plaintiff in this case was that the defendant did not ever publicly identify him, so the public at large have no idea who he is.

[36] It was said that the people to whom he had been defamed were people at his workplace who would have been able to draw an inference as to his identity from the information that was made public by the defendant.

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9 *PQW v Mallard* [2020] NZHC 3527.

10 *Y v Attorney-General* [2016] NZCA 474 at [26].

11 *Erceg v Erceg* [2016] NZSC 135 at [2]-[3].

12 See, for examples of vindication as an underlying purpose in defamation suits, *Siemer v Stiassny* [2011] NZCA 106 at [37]; *Uren v John Fairfax & Sons* (1966) 117 CLR 118 (HCA) at 150; and Alistair Mullis, Richard Parkes and Godwin Bustill (eds) *Gatley on Libel and Slander* (12th ed, Thomson Reuters, London, 2013) at 327 (footnotes omitted). See also Eady J in *Cleese v Clark* [2003] EWHC 137 (QB) at [37] where he stated that one of the purposes of libel damages is to "serve as an outward and visible sign of vindication".

[37] In response to the proposition that the apology and comprehensive acknowledgement by the defendant that he had been wrong to describe the allegations against the plaintiff as rape, the plaintiff's counsel submitted that there would still be some stain on the plaintiff's reputation as having been the person publicly described as a rapist, notwithstanding that the allegation had been publicly retracted. In oral submissions, counsel asserted that the public would assume that there was "no smoke without fire".

[38] To the extent there is any ongoing stain on the plaintiff's reputation, it seems to me that this is more likely to arise from the fact that it appears that there were complaints of sexual assault (falling short of rape) that were made in relation to him.

[39] If all the defendant had done was to have said, in the media conferences, that a person against whom allegations of sexual assault had been made, had been stood down, that would not have amounted to defamation.

[40] If the only ground advanced by the plaintiff justifying suppression of his name was that, notwithstanding the full apology and retraction, there might be some lingering taint or suspicion in the mind of the public about what he was alleged to have done, then I would not grant the order.

[41] However, the plaintiff relies on other grounds. Counsel referred to the possibility that the complainant might be identified if the plaintiff's identity was published. I have already suppressed the complainant's identity so that a further suppression order involving the plaintiff is not required to achieve that objective.

[42] It was inferred by counsel for the plaintiff that work colleagues of the plaintiff would be able to identify the complainant if his name was published. It was not explained how this could be. The plaintiff's case is that his work colleagues would have been able to identify him as the person who was referred to by the defendant as having been stood down. However, in order to be able to identify the complainant, the work colleagues would need to know that she was the person who had complained about him. There was nothing in the Francis Review that identified any complainant, nor has the defendant identified any complainant. If work colleagues already know

the identity of the complainant, then publishing the plaintiff's name is not going to change that. If they do not know the identity of the complainant, then they are not going to learn it simply because the plaintiff's name is published. I therefore conclude that no further suppression order is required beyond that already made suppressing any reference to the complainant's identity.

**Health issues**

[43] In the hearing held in relation to the application to rescind the interim orders,[13] information was placed before the Court about the health of one of the plaintiff's family members. Beyond the fact that such evidence was put before the Court, any other reference to it was suppressed.[14]

[44] No further evidence in relation to this matter was adduced by the plaintiff at the hearing on 4 February 2021. However, counsel referred at some length to the evidence that had been presented in the prior hearing.

[45] Counsel submitted that, notwithstanding the fact that it had been established that the allegations against the plaintiff were not allegations of rape, the mere fact that the allegations had been made was such that, if the plaintiff's family member got to know about them, that would have a serious adverse effect on their health.

[46] In the decision of 24 December 2020, the Court had indicated that submissions based on assertions of fact should be supported by affidavit evidence. Although a further affidavit from the plaintiff was filed, there was nothing in it that took the issues of the plaintiff's family member any further than the information that had previously been before the Court. This is unsatisfactory.

[47] However, there is some evidence that at least as at six months ago, publication of the plaintiff's name may have an adverse effect on a family member.

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13 *PQW v Mallard* [2020] NZHC 1749.
14 At [49].

[48] In assessing where the interests of justice lie, I can take account of the fact that the defendant abides the decision of the Court, and that his counsel had signed the initial joint consent memorandum consenting to both orders sought.

[49] The plaintiff asserts that I can also have regard to the fact that there do not appear to have been any requests from the media for the disclosure of the identity of the plaintiff. I place little weight on that factor. Where there are two parties to litigation, and one is a public figure and the other is not, the media are always going to be more interested in the identity of the public figure.

[50] The plaintiff relied on the decision in *ASB Bank Limited v AB*[15] where the Court considered the grounds for publication of the name of a defendant in proceedings brought by the ASB Bank. The publication application was opposed on the basis that publication of the defendant's identity would be detrimental to the mental or psychological health and welfare of her teenage daughter. There was a level of what was described as "moral opprobrium and stigma" relating to activities that the defendant had been involved in. The Court held:[16]

> Mr Jones has produced expert evidence, if support is needed for the proposition, that disclosure of a mother's identity and occupation in these circumstances might have traumatic and far-reaching effects on a teenage girl who is at a vulnerable and impressionable age. I am satisfied that those effects are indeed likely and that BC's daughter risks becoming a victim by association because of forced disclosure to her social environment – her peers, teachers and local community.

[51] The Court concluded that what was described "as the marginal public benefit" from the publication of the defendant's name was outweighed by the obvious risk of lasting psychological and emotional harm to a child who would be the innocent victim of publicity and the non-publication order was upheld.[17]

[52] Ultimately, and solely on the basis of the potential adverse effects on the plaintiff's family member, I have come to the conclusion that the interests of justice are best served by a continuation of the suppression orders made by the Court in December 2019, and I make those orders final.

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15 *ASB Bank Limited v AB* [2010] 3 NZLR 427.
16 At [16].
17 At [18].

**Sealing the file**

[53] The second of the two orders sought in the consent memorandum was a direction that the file be sealed.

[54] Little attention was given to this part of the application in either the written or oral submissions of counsel for the plaintiff.

[55] In view of the suppression orders that I have made, there seems to be little justification for an order sealing the file, and counsel did not seriously attempt to argue otherwise.

[56] Accordingly, the application for the file to be sealed is declined.

**Result**

[57] Leave for a second interlocutory application under r 7.52 of the HCR is granted.

[58] The second application for interim suppression orders made on 16 December 2019 to be made permanent is granted.

[59] The second application for the file to be sealed permanently is denied.

**Churchman J**

Solicitors:
Bartlett Law, Wellington for Plaintiff
Dentons, Kensington Swan, Wellington for Defendant

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M F McClelland QC and A J Romanos, Wellington for Plaintiff
R K P Stewart, Barrister, Auckland for Defendant