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-2019-485-000759
[2021] NZHC 269

BETWEEN	PQW Plaintiff
AND	T C Mallard Defendant

On the Papers

Counsel:	M F McClelland QC and A J Romanos for Plaintiff L Clark and S Jones for Defendant
Judgment:	24 February 2021

JUDGMENT OF CHURCHMAN J

Introduction and background

[1] The plaintiff (PQW) commenced defamation proceedings against the defendant (Mr Mallard) by statement of claim dated 13 December 2019, alleging that the defendant had defamed him on 22 May 2019.[1] Interim suppression orders prohibiting publication of the name and identifying particulars of the plaintiff and his family, and the name and details of the complainant, were granted on 16 December 2019 by this Court.

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1 The factual background to the alleged defamatory statements made by the plaintiff is set out in *PQW v Mallard* [2021] NZHC 126.

[2] On 18 December 2020, the plaintiff filed a notice of discontinuance of the defamation proceedings, and counsel filed a joint memorandum seeking orders by consent that the interim suppression orders made on 16 December 2019 be made permanent, and that the Court file be sealed permanently.

[3] 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. The next day, counsel for the plaintiff applied to recall the Court's decision.

[4] 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.

[5] Following that hearing, the Court issued a judgment on 11 February 2021 granting leave for a second interlocutory application concerning the suppression orders to be heard under r 7.52 of the High Court Rules 2016, and directing that those suppression orders be made permanent and final, on the basis that publication would have potential adverse effects on a family member of the plaintiff. The application for the Court file to be sealed permanently was declined.

The current application

[6] A third party, Mr Chris Bishop (Shadow Leader of the House and member of the Governance and Administration Select Committee for the 52nd New Zealand Parliament) has now applied for access to Court documents relating to these proceedings under the Senior Courts (Access to Court Documents) Rules 2017 (the Rules). In particular, Mr Bishop seeks:

> …a copy of any statement of defence or amended statement of defence filed by Mr Mallard in this matter. In particular, I wish to see Mr Mallard's pleaded defences to the claim. I do not wish to see any identifying details about the plaintiff as I understand there may be an ongoing suppression order and so I am content to receive the statement of defence (and any amended statement) with appropriate redactions to remove any identifying details on the plaintiff.

[7] Mr Bishop's reason for accessing these documents is that this case has a "significant degree" of public interest as it involves the current Speaker of the House of Representatives. According to Mr Bishop, Mr Mallard appeared before the Governance and Administration Select Committee of the 52nd New Zealand Parliament to answer questions about the case, his conduct and the timeline leading up to the settlement of these proceedings. Mr Bishop was a member of that committee at the time, and notes that the item of business in question remains open, as the committee has not yet concluded its examination of the issue.

[8] As a member of that committee and as Shadow Leader of the House, Mr Bishop states that he is seeking to "assess the veracity and appropriateness of comments made by Mr Mallard before the committee", and that access to these documents would "greatly aid" his assessment of Mr Mallard's action in order to understand what he intended to argue before this Court should the defamation proceedings had gone ahead.

Position of the parties

[9] Counsel in these proceedings first filed a joint memorandum in response to Mr Bishop's application. Their joint position was that the application should not be determined until the Court's decision on permanent name suppression was issued, and that if the application was to be considered notwithstanding this judgment, the defendant sought leave to make further submissions on the substance of the application.

[10] Because the judgment had already been issued by the time the joint memorandum was filed, in a minute dated 12 February 2021 I directed the parties to file memoranda in response to Mr Bishop's application.

[11] On 18 February 2021, counsel for the plaintiff filed a memorandum indicating that they had no submissions to make on the matter, and that they would abide the decision of this Court.

[12] On the same day, counsel for the defendant filed a memorandum setting out his position as to Mr Bishop's application. The defendant does not oppose Mr Bishop

being granted access to the amended statement of defence. Counsel submitted this document represented the complete response to the plaintiff's claim and summarises the case that would have been presented had the matter proceeded to a substantive hearing. Access to this amended statement of defence would therefore fully satisfy Mr Bishop's purpose of accessing Court documents to understand what the defendant intended to argue before the Court had the claim gone to a substantive hearing, and maintain transparency and confidence in the Court's processes.

[13] The defendant opposes access to the original statement of defence. Counsel submitted that the original statement contained allegations that would not have been considered or tested in the substantive hearing, and was therefore no longer a document that was relevant to the proceedings. Granting a third party access to a document containing untested allegations would lead to further adverse publicity for both parties that would cast doubt on and undermine the settlement, and disclose more private information than is necessary to satisfy the principle of open justice.

Relevant law and analysis

[14] Under r 11 of the Rules any person may ask to access court documents, provided their request conforms with the requirements set out in r 11(2). Under s 11(7), a Judge may:

> (a) Grant a request for access under this rule in whole or in part –
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> > (i) Without conditions; or
> >
> > (ii) Subject to any conditions that the Judge thinks appropriate; or
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> (b) Refuse the request; or
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> (c) Refer the request to a Registrar for determination by that Registrar.

[15] In determining a request for access under r 11, the Judge must consider the following matters under r 12:

(a) the orderly and fair administration of justice:

(b) the right of a defendant in a criminal proceeding to a fair trial:

(c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:

(d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:

(e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):

(f) the freedom to seek, receive, and impart information:

(g) whether a document to which the request relates is subject to any restriction under rule 7:

(h) any other matter that the Judge thinks appropriate.

[16] In applying r 12, the Judge must have regard to the following:[2]

(a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:

(b) during the substantive hearing, open justice has—

(i) greater weight than at other stages of the proceeding; and

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2 Senior Court (Access to Documents) Rules 2017, r 13.

(ii) greater weight in relation to documents relied on in the hearing than other documents:

(c) after the substantive hearing,—

(i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but

(ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing

[17] Counsel for the defendant noted that in this case, as the parties have discontinued the proceeding and settled before the substantive hearing, r 13(a) applies, and therefore in terms of the balancing process, the protection of confidentiality and privacy interests and the orderly and fair administration of justice arguably hold greater weight than the principle of open justice. I also note the Courts have indicated that where a proceeding has been discontinued at a very early stage, this will be a factor weighing against disclosure.[3]

[18] In applying r 12, the Court of Appeal has stressed that there is no hierarchy between the r 12 factors.[4] Instead, as observed by Edwards J in *A2 Corporation Ltd v The Fonterra Co-operative Group Ltd*, the starting point in balancing the r 12 factors is assessing the nature of, and the reasons given for, the request.[5]

[19] In this case, two important factors to be balanced in relation to r 12 are the principle of open justice, and the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or

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3 *Paterson v Registrar-General of Land* [2019] NZHC 2356 at [20].

4 See *Crimson Consulting Ltd v Berry* [2018] NZCA 460 at [32]; and *Schenker AG v Commerce Commission* [2013] NZCA 114 at [29] and [37].

5 *A2 Corporation Ltd v The Fonterra Co-operative Group Ltd* [2018] NZHC 3073 at [10].

matters that are commercially sensitive, than is necessary to satisfy the principle of open justice.

[20] In a recent decision, I faced similar circumstances whereby a third party was seeking access to court documents after the proceedings had been discontinued. In that case, I noted:[6]

> The principle of open justice is an important one. In *Erceg v Erceg*, the Supreme Court explained that:
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> > 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 the Court. … 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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> The primary focus of the principle of open justice is therefore the entitlement of the public to see how the Court disposes of applications before it.
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> Consistently with the focus of the principle of open justice, the Courts have drawn a distinction between the conduct of the hearing itself and the situation that exists prior to a substantive hearing.
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> The Court of Appeal put it this way in the case of *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo*:
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> > … during the substantive hearing open justice has greater weight, in particular in relation to documents admitted in evidence. When a Court is engaged in hearing a dispute its workings, including documents referred to or relied on, should be open to full scrutiny by all members of the public, unless there are particular and strong reasons to the contrary. The public should be able to follow and understand the hearing process. However, prior to and after the substantive hearing, the importance of public scrutiny is less, as the Court is not hearing and resolving the dispute. Prior to the hearing there is no guarantee the case will go to hearing at all. Therefore open justice has less weight. The parties are entitled to the protection of confidentiality and privacy within reasonable limits, given that they have not at that point aired the dispute in public. After the substantive hearing the need for public scrutiny diminishes in importance as time moves on.

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6 *Mau Whenua Incorporated v Mulligan & Ors* [2021] NZHC 141 at [14]-[17]. See also *Erceg v Erceg* [2016] NZSC 135 at [2] (footnotes omitted); and *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZCA 490 at [25].

[21] I reiterate that the Court's primary focus in applying the principle of open justice is to consider the entitlement of the public to see how the Court disposes of applications before it. Here, as in *Mau Whenua*, the critical feature of this case is that there will be no public hearing, or opportunity of the public to consider how the Court would have disposed and considered the proceedings. The defences put forward by counsel for Mr Mallard in this case are untested, and have not undergone the scrutiny of the Court hearing process to determine whether they would have been successful.

[22] Therefore, the interests of confidentiality, privacy and sensitivity have significant weight in this case.

[23] However, I also note the Court of Appeal decision in *Crimson Consulting Ltd v Berry*, where the Court of Appeal observed:[7]

> As we have set out, parties may be deterred from issuing proceedings that they should be able to put before a court because they are fearful of immediate and damaging publicity relating to recently formed and untested allegations. That endangers the orderly and fair administration of justice. When matters are still at the pleadings stage, there is an element of unfairness on parties in the publication of one side of the story. The allegations in the statement of claim have not yet been tested by the giving of evidence. There being no hearing in court, the need for transparency and public scrutiny is less, because pre-trial the court is generally not determining substantive issues.
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> However the principle of open justice, and the freedom to seek information, remain important factors which do not cease to work in the pre-trial stage. In the related area of suppression of names the courts have endorsed the concept that there is a high threshold before any suppression order can be made. This is because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression. There is no suppression of name in this case, and it is important the public know generally what type of business is being conducted in the courts of New Zealand. Transparency of the court process at all stages is in the public interest.
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> Reporting on a statement of claim and a statement of defence, providing it is fairly done, is one way of informing the public so that the business of the courts is known and transparent. Thus the publication of a statement of claim which sets out a contract dispute between parties, which has no commercially sensitive information or matters unduly intruding into the private lives of individuals, can be permitted.

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7 *Crimson Consulting Ltd v Berry*, above n 4, at [39]-[41].

[24] Taking into account the above observations from the Court of Appeal, I consider that despite similar circumstances, this case can be distinguished from *Mau Whenua*, for the following reasons.

[25] First, although the defences presented by counsel for the defendant are untested and will not be considered before this Court, they are somewhat different to unfounded allegations made by a plaintiff. This is because the defendant's allegedly defamatory statement, and at least some of the context to why the statement was made by the defendant, is already public knowledge. The defendant has already made a public apology about his allegedly defamatory statement and conceded that he was mistaken in his particular characterisation of the plaintiff.

[26] Second, as noted by the Court of Appeal in *Crimson Consulting*, reporting on a statement of defence, provided it is fairly done, is one way of informing the public so that the business of the courts is known and transparent. Given the public office that the defendant holds, there is a public interest which arguably augments the weight of open justice in this case.

[27] Third and finally, the issue of sensitivity and privacy is partly alleviated by granting Mr Bishop access to only the amended statement of defence, rather than the original statement of defence, and ensuring that it is sufficiently redacted so as to prevent publication of the name and identifying particulars of the plaintiff, the plaintiff's family, and the complainant. This allows a balance to be struck between the principles of open justice, and privacy, confidentiality and sensitivity.

[28] I accept counsel for the defendant's submission that access to the amended statement of defence should be granted for the reasons of providing transparency, ensuring open justice and maintaining confidence in the court's processes, and that granting access to this document only will uphold the privacy and sensitivity interests of the plaintiff.

[29] I also agree that granting access to the original statement of the defence would be tipping the balance too far in favour of transparency, in that the statements and allegations (despite some of the allegations being public knowledge) contained in the

original statement of defence would not necessarily have been considered by this Court.

[30] Counsel for the defendant referred to the case of *Minister of Education v James Hardie New Zealand Ltd*, where Asher J made the following observation:[8]

> I am reluctant also to grant access to an earlier statement of claim that contains causes of action or material that have been abandoned by the plaintiffs. The primary focus of the principle of open justice insofar as it applies to court proceedings, is in relation to what happens in the courtroom. This is reflected in the High Court Rules which distinguish between the substantive hearing phase of proceedings and other phases. There is a more permissive regime that applies to access once the substantive hearing in underway. The principles of open justice and freedom to receive information have less force when they are applied to earlier discarded pleadings that will not be relied on or used in the courtroom phase. It will often be the case that prior to trial a plaintiff withdraws allegations which the defendant has denied, and the plaintiff can no longer support. The Court will hesitate before directing that court records relating to such discarded and disputed allegations be made available.

[31] I consider that the same approach can be applied in this case. The more effective way to balance the interests of open justice and transparency with issues of privacy and sensitivity is to grant access to the most recent pleadings, in order to avoid publication of untested statements that may have never been brought to the Court had a substantive hearing occurred.

[32] Counsel for the defendant also indicated that if either or both of the pleadings are to be released, that the following material be redacted on the basis that it may lead to the identification of the complainant by individuals who work in Parliament:

(a) Paragraph 7.1 – the date on which the complainant made the complaint against the plaintiff; and

(b) Paragraph 7.2 – the dates between which the complaint was investigated.

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[8] *Minister of Education v James Hardie New Zealand Ltd* [2013] NZHC 3258 at [21] (footnotes omitted).

Result

[33] Mr Bishop's application for access to Court documents is partly allowed. I order that:

(a) Access to the amended statement of defence is granted, following redaction of the material set out at (a) and (b) of paragraph [32] above;

(b) Access to the original statement of defence is denied.

Churchman J

Solicitors:
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