ORDERS MADE IN THE HIGH COURT AND THIS COURT RESTRAINING PUBLICATION OF THE ALLEGATIONS AND SUPPRESSING THE NAMES AND IDENTIFYING PARTICULARS OF THE PARTIES REMAIN IN FORCE FOR FIVE WORKING DAYS PENDING ANY APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT. IF AN APPLICATION FOR LEAVE TO APPEAL IS FILED, THE SUPPRESSION ORDERS ARE TO CONTINUE IN FORCE UNTIL THE APPLICATION IS DETERMINED.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA461/2023
[2023] NZCA 589

BETWEEN	JOHN ATCHERLEY DEW Appellant
AND	DISCOVERY NZ LIMITED Respondent

CA530/2023

BETWEEN	R (CA530/2023) Appellant
AND	DISCOVERY NZ LIMITED Respondent

CA529/2023

BETWEEN	H (CA529/2023) Appellant
AND	DISCOVERY NZ LIMITED Respondent

Hearing:	14 September 2023
Court:	Cooper P, French and Goddard JJ
Counsel:	P A McKnight and A J Romanos for Appellant in CA461/2023 M E Hubble for Appellants in CA530/2023 and CA529/2023 D M Salmon KC and T F Cleary for Respondent
Judgment:	23 November 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The appellants must pay costs calculated for a standard appeal in band A in accordance with [181]. We certify for second counsel.

C The existing suppression orders continue to apply in accordance with [182] for the purposes of any application for leave to appeal to the Supreme Court.

D We direct the Registrar to provide a copy of this judgment to the Solicitor-General.

REASONS OF THE COURT

(Given by Cooper P)

Introduction

[1] In these three appeals the appellants seek to prevent the broadcast on television of a programme alleging serious sexual abuse by Cardinal John Dew and others who at relevant times were priests and sisters in the Roman Catholic Church (the Church). The appellants were unsuccessful in applications for an injunction to restrain the broadcast in the High Court, but interim relief was granted to enable them to appeal to this Court.[1]

[2] The victims of the alleged abusive behaviour are Mr Steven Carvell and his sister Ms Linda Carvell. They were aged seven and eight at the time of the events, which are said to have occurred at St Joseph's Orphanage in Upper Hutt (the Orphanage) where they stayed over a 12 day period from 1 to 12 November 1977, some 46 years ago. Mr Carvell gave evidence to the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions (the Royal Commission) about what he said happened. The Royal Commission referred his evidence to the Police who are currently engaged in an investigation of the complaints.

[3] Over a period of two days Mr Carvell, Ms Carvell and Mr Carvell's wife, Mrs Silvana Carvell, were interviewed by Mr Michael Morrah, a prominent journalist employed as the investigations correspondent of Newshub. The interviews or extracts from them are intended to be aired on TV3 (as well as on other media platforms associated with the respondent, Discovery NZ Ltd (Discovery)), as part of a programme in which Mr Morrah will also describe the steps he took to investigate the complaints over a period of some two months.

The parties

[4] Cardinal Dew was ordained as a priest in 1976 and became a Cardinal in 2015. Until his retirement on 5 May 2023 he was the Archbishop of Wellington, a role which he had since 2005. In that capacity he was also the Metropolitan of New Zealand, and a member of Te Rōpū Tautoko, which has coordinated engagement between

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1 *Dew v Discovery NZ Ltd* [2023] NZHC 2105; and *[R] v Discovery NZ Ltd* [2023] NZHC 2533.

the Church and the Royal Commission. As a recently-ordained priest in 1977 he served at St Joseph's Parish in Upper Hutt. The St Joseph's community comprised a convent, an orphanage and a nearby school, all of which were under the auspices of the Wellington congregation of what is now Ngā Whaea Atawhi o Aotearoa | Sisters of Mercy New Zealand (the Sisters of Mercy).

[5] Sister H is named by Mr Carvell as having been involved in some of the offending.[2] At the relevant time Sister H was a teacher at a school in Palmerston North, but the High Court found it was possible she was present at the Orphanage as claimed by Mr Carvell.[3] She is now 82 years old and has severe dementia. She resides in a secure dementia ward at a residential facility and, as Palmer J found, is "not … able to defend herself due to her medical condition".[4] She is represented in this litigation by Sister Sue France, presently the congregation leader of the Sisters of Mercy, who was made her litigation guardian by the High Court.

[6] Mrs R was a member of the Wellington congregation of the Sisters of Mercy between 1967 and 1986.[5] After she left the Sisters of Mercy she married. Between 1967 and 1969 she was a novice alongside Sister H. She trained as a teacher and in 1977 she went to work at the Orphanage, looking after children there until 1985. In 1977 she was responsible for the boys' dormitory, which accommodated boys from the age of seven upward. She slept in a bedroom at the end of the dormitory. She says in an affidavit that she never initiated, participated in or facilitated conduct of the kind alleged by Mr Carvell.

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2 As we note below at [42], Discovery has undertaken not to name Sister H in the programme. In the circumstances, we have considered it appropriate to anonymise Sister H's name to protect her privacy.

3 *[R] v Discovery NZ Ltd*, above n 1, at [24(b)] and [34].

4 At [39].

5 There is no suggestion that Mrs R will be named in the programme. Accordingly, we have also anonymised her name to protect her privacy.

Relevant facts

[7] Mr Carvell sent an email on 5 May 2023 addressed to a professional standards group maintained by the Church. After stating his name and giving his age of 52 years, Mr Carvell continued:[6]

> I wish to report sexual crimes that were committed against me as a child. The crimes occurred when I was a student at St Joseph's School in Upper Hutt, Wellington. In 1977 I was sent, along with my sister, by our parents for a short term stay at St Joseph's Orphanage, operated by the Sisters of Mercy. The orphanage was located within walking distance of the School.
>
> During my stay, I became the victim of a repeated series of sexual assaults and physical and psychological torture committed by the adults charged with my care. I was raped (sodomised) and forced to perform oral sex against my will. I was also forced to witness both another boy and my sister being raped.
>
> The perpetrators of the crimes were Sister [H], Father Noel Donoghue, Father John A Dew and [another priest]. The crimes were perpetrated in the male dormitory of the Convent and in the priests' residence next door.
>
> I have prepared a witness statement that has been submitted to the Royal Commission of Inquiry outlining the chronology of events and a detailed description of the crimes committed against me and others and by whom. I am happy to provide information from this statement to accompany my reporting of these crimes.
>
> I also submitted details of the above on your website earlier today at the following address: https://safeguarding.catholic.org.nz/
>
> Regards,
> Steve

[8] Mr Morrah said in an affidavit filed in the High Court that he was made aware of the complaint by a Christchurch-based mental health counsellor, who recommended he contact the leader of a group called SNAP (the Survivors Network of those Abused by Priests). Mr Carvell had copied his 5 May email to SNAP. Mr Morrah learned from contacting SNAP that Mr Carvell alleged he had been sexually abused by Cardinal Dew at the Orphanage, and Ms Carvell had been raped by him there.

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[6] As can be seen, Mr Carvell's allegations include that he was forced to witness "another boy" being raped. Although the details of this are not particularised in this email, in his affidavit evidence Mr Morrah explained that in Mr Carvell's interview, he said that this abuse was perpetrated by the priest whose name we have redacted. Mr Morrah noted that despite attempts to do so he had been unable to locate the victim of this alleged offending. Because the allegations were not therefore able to be verified, Mr Morrah said they would not be included in the proposed broadcast, and nor would the priest be named.

[9] After initial telephone contact, Mr Morrah met with Mr Carvell and Ms Carvell on 9 June when they told him "the background of their story". After further telephone, text and email contact, Mr Morrah met with Mr Carvell and Mrs Carvell for several hours on 12 June, interviewing them on camera. He interviewed Ms Carvell the following day, also on camera.

[10] Mr Morrah said that during the interview, Mr Carvell was obviously nervous, stressed and upset when recalling the events. Mr Morrah asked to see Mr Carvell's statement to the Royal Commission and complaint to the professional standards group of the Church, to verify that they aligned with what Mr Carvell said in the interview. Mr Morrah said that Ms Carvell could not recall her alleged violation, but "she supports her brother and the complaint he has made". He added that Ms Carvell "does not recall much from her time at the orphanage apart from a game with a nun which was sexual in nature and an occasion when a nun pulled her hair".

[11] Following the interviews, Mr Morrah and a senior colleague, Mr Todd Symons, investigated the complaints over almost a two month period, attempting to verify them. Mr Morrah explained that one of the first things he did to check the credibility of Mr Carvell and Ms Carvell was to research "memories and trauma in historic sexual abuse cases". This included reading a witness statement submitted to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse by Associate Professor Carolyn Quadrio of the School of Psychiatry at the University of New South Wales.

[12] Mr Morrah also spoke to Professor Martin Dorahy, a clinical psychologist at the University of Canterbury. He wanted to understand whether it was conceivable that someone such as Ms Carvell would be unable to recall historic abuse. Mr Morrah said that Professor Dorahy explained to him that it was possible Ms Carvell was experiencing dissociative amnesia, which is when the mind blocks out deeply traumatic stressful events. Professor Dorahy also explained that the way in which Mr Carvell's memories of abuse had "resurfaced later in life" was consistent with other cases of which the Professor was aware. In this respect, Mr Morrah noted that Mr Carvell's recollection of events started as flashbacks or fragments of memories that began in late 2019. Eventually, he was able to remember the events that he now alleges

occurred. Mr Morrah said Professor Dorahy told him that "wholesale fabrication of sexual abuse is uncommon in his experience".

[13] Mr Morrah recounted that Mr Carvell had provided him with the copy of his attendance record for his stay at the Orphanage in 1977. It confirmed he was there between 1 and 12 November. Ms Carvell later provided him with her attendance record which showed that she was at the Orphanage for the same time period as Mr Carvell.

[14] While he was meeting with Mr Carvell and Ms Carvell, they prepared affidavits for the purpose of requesting that their automatic right to name suppression be lifted by the District Court. They applied under s 203(3)(b) of the Criminal Procedure Act 2011 on 13 June 2023, and Judge Davidson granted their application on 2 August 2023 in terms which it will be necessary to discuss below.[7]

[15] Mr Morrah says he sought to verify as much information as possible in relation to the Orphanage and those who stayed there in 1977 for the purpose of checking whether the allegations were credible. He was able to identify and speak to 10 people who had stayed at the Orphanage in 1977. Four of those remembered a Sister H as having been there "in or around 1977". One woman "vividly" recalled Sister H being there in 1977 and told Mr Morrah that Sister H worked in the kitchen and gave her a cup of gravy. She remembered it because it was the first time she had ever tried gravy. The other six people to whom Mr Morrah spoke could not recall Sister H.

[16] Church records obtained by Mr Symons established that Cardinal Dew had served at St Joseph's 1976 to 1979 and Father Donoghue had been there between 1976 and 1980. Cardinal Dew and Father Donoghue were also mentioned in clergy directories from 1979 (Mr Symons was not able to access the directories from before 1979).

[17] An attempt by Mr Morrah to obtain records of the Sisters of Mercy about staff members at St Joseph's in 1977 was unsuccessful: his request was declined on "privacy grounds".

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7 *Re Carvell* DC Wellington CRI-2023-085-1778, 2 August 2023 [District Court judgment].

[18] On 3 August 2023, Mr Morrah visited the facility where Sister H now resides, with the intention of seeking her response to the allegations made by Mr Carvell. He was advised that she had dementia and, on the following day, that she was not fit to answer questions for medical reasons.

[19] On 3 August 2023, Mr Morrah also contacted police seeking confirmation that they were investigating Mr Carvell's complaint. The police confirmed that an allegation of historical abuse had been made and that they were making enquiries. Mr Morrah was in fact already aware of the police investigation because Mr and Mrs Carvell had shown him emails they had received from Detective Senior Sergeant Steven Williamson, who was involved in the investigation at that stage.

[20] Also on 3 August, Mr Morrah attempted to contact Cardinal Dew by telephone, leaving a message on his answer machine and sending a text message and email. On 4 August, Mr Morrah was contacted by the Church communications manager, Mr David McLoughlin, who told him that Cardinal Dew had engaged a lawyer. As a result of a subsequent exchange, Mr Morrah learned directly from Cardinal Dew that he had instructed Mr David Dewar to act for him. Mr Dewar, and another partner at his firm, Ms Louise Sziranyi, spoke to Mr Morrah by telephone on 5 August. They told him that neither they nor Cardinal Dew had seen Mr Carvell's statement to the Royal Commission, and requested more information about the allegations. Mr Morrah responded later that day by sending further details of what Mr Carvell had told him. His email was in the following terms:

> Hi Gerard and Louise
>
> Thanks for your time on the phone.
>
> Here is some additional information as promised. Please let me know if you need anything clarified.
>
> Steven Carvell, who lives in Adelaide with his wife, has made a complaint to Police, the Royal Commission and the National Office of Professional Standards.
>
> Steven's complaint to police was initially made last year in Brisbane. It was eventually transferred to police in New Zealand who after some months started an investigation.
>
> The complaint relates to alleged sexual abuse while Steven was a seven-year-old at St Joseph's Orphanage in Upper Hutt in 1977.

Steven Carvell was at the orphanage with his sister, Linda, for a short stay in late November. Their admission records confirm this.

1. Steven has alleged then Father John Dew woke Steven up in the middle of the night at the Orphanage's dormitory. Steven was told he'd been naughty but that he would be let off and he shouldn't worry about getting [into] trouble. John Dew suggested they play a game of tag or "catch me if you can" which Steven found unusual as he thought he'd been naughty but he agreed to the game as he liked playing tag.

2. Steven alleges this game quickly became sexual in nature.

3. Sister [H] was also involved in this game of tag.

4. Steven alleges he was encouraged to touch Sister [H's] crotch area and that he was also encouraged to touch John's crotch area through his pants. Steven alleges he was told this was a "normal" game of tag.

5. Eventually Steven was carried back to bed by John Dew. It is at this stage that John Dew is alleged to [have] removed Steven's [pyjama] pants and licked and fondled Steven's crotch area. Steven found this uncomfortable and wanted it to stop.

6. Steven Carvell has also alleged he was raped by Noel Donoghue. Donoghue is deceased.

7. Steve alleges he felt isolated and upset in the days that followed his alleged abuse by Dew and Donoghue, and that John Dew made him feel that what happened was his fault, telling him he'd been naughty.

8. On another night, he was woken by Noel Donoghue and taken to an office. It was there he alleges he witnessed his sister, Linda Carvell, being raped by John Dew. Again, Steven was told what was happening to his sister was his fault, and it (the alleged rape) was happening because of Steven.

9. Linda Carvell supports her brother and the complaint he has made. She was aged 8 years old at the time of the alleged abuse.

We would greatly appreciate a response to the allegations as outlined above. I will be in the office tomorrow and available on the phone or by email this afternoon if you need anything clarified.

Regards,
Michael

[21] On Sunday 6 August, Mr Dewar sent an email to Mr Morrah thanking him for his response. Mr Dewar also sought clarification, recording an understanding that Mr Carvell's sister "had no memory" of the events. Mr Dewar noted that Mr Morrah had said that Ms Carvell supported Mr Carvell and the complaint. Mr Dewar asked

whether it was the case that she had no memory of the assaults alleged. Mr Morrah responded as follows:

> Morning Gerard,
>
> That is correct. Linda does not recall her alleged assault. However, she does not doubt that it occurred, and she believes her brother's recall of events. She supports the complaint he has made.
>
> All Linda does recall from her time at the orphanage is a feeling of not wanting to be there - that it was a scary place to be. She remembers an occasion when a nun pulled her hair, and a game with a nun that was sexual in nature. The game with the nun is alleged to have involved Linda being encouraged to touch the nun's breasts. She does not remember the name of the nun alleged to have taken part in this game.
>
> I know yesterday's phone call was off the record and private, but as part of your response, can you please clarify exactly when John Dew was notified by the Catholic Church of the complaint against him and when he was asked to step aside from his various church roles (Administrator for the diocese in Palmerston North, roles with Tautoko and NOPs etc). It would also be useful to know who exactly communicated this information to John.
>
> You said it was the day after John resigned as Archbishop that he was notified of the complaint. I assume this is May 6?
>
> Regards,
> Michael

[22] Mr Dewar wrote a letter to Discovery for the attention of Mr Morrah later on 6 August. He attached statements made by Cardinal Dew, Mrs R (formerly one of the three full time sisters looking after the children at the Orphanage in 1977) and Ms Denise Fox who lived at the convent and was employed as a teacher at St Joseph's School in 1977. In his statement Cardinal Dew said:

> …
>
> On 6 May 2023 I was informed that an allegation of sexual assault which was said to have occurred in 1977, had recently been made against me.
>
> No specific details were given to me and while I understand a written statement has been made and provided to the Royal Commission and the New Zealand Police it has not been provided to me
>
> I was deeply shocked to hear of this allegation and am very distressed by it. I deny that any such events involving me ever occurred. I have never had an allegation of any misconduct made during my career.

> I strenuously deny the allegations. These events alleged simply did not happen. I am concerned for this person and I hope, for their sake too, that these matters can be resolved as soon as possible."
>
> I stood aside from my duties as the Archbishop of Wellington, the Administrator of the Diocese of Palmerston North and as a member of Tautoko immediately. I understand the matter is in the hands of the New Zealand Police who have not spoken to me. I will fully cooperate with their inquiry. I would ask that their process and my privacy be respected until that is concluded.
>
> In view of that I do not feel I can make any further comment at this time.
>
> …

[23] On the basis of Cardinal Dew's statement, and those of Mrs R and Ms Fox, Mr Dewar wrote in his letter of 6 August that the allegations against Cardinal Dew were "demonstrably false". He continued:

> There is no present justification in any form of publication. Public interest cannot possibly be said to be served by your proposed dissemination of this material. In fact quite the contrary. Further there is no urgency in this matter.

[24] The letter noted that "the woman alleged to have participated in the alleged criminal activity was not at St Joseph's Orphanage in 1977". Mr Dewar referred in addition to the ongoing police investigation which he said should be left to occur. Airing the matter now would usurp Cardinal Dew's rights in that regard and compromise the important role of the police. Mr Dewar sought confirmation that the broadcast would not proceed, and the allegations would not be referred to.

The proceedings

[25] Not having received that assurance, proceedings were commenced in the High Court on 7 August. The statement of claim alleged causes of action in defamation and invasion of privacy. The latter claim was advanced in the context of the ongoing police investigation, and Cardinal Dew's reasonable expectation of privacy in respect of that investigation.

[26] At the same time, Cardinal Dew applied for an interim injunction, restraining the defendant from publishing the allegations. Palmer J dealt with it urgently in the circumstance that a news item was intended to be aired about the allegations in Newshub's 6.00 pm news programme on 7 August. The Judge declined the application

for an interim injunction but, having been told that in the event of that outcome Cardinal Dew would wish to appeal, he granted an interim injunction pending determination of an appeal, as long as the appeal was filed in this Court within three working days and prosecuted without delay. The Judge gave written reasons for his decision on the following day.[8]

[27] Cardinal Dew appealed to this Court on 10 August 2023. In the circumstances, the appeal was entered on the fast track and a hearing date was allocated for Thursday 14 September. In the meantime, Mrs R and Sister H (the latter through her litigation guardian, Sister France) sought to be joined as parties to Cardinal Dew's appeal. The Court declined that application on the basis that they had not been parties in the High Court and were seeking orders to protect their own legal interests. Subsequently, those parties commenced separate proceedings in the High Court, which were again dealt with by Palmer J expeditiously. He declined their application for interim injunctions, but again granted limited interim relief to enable them to appeal to this Court.[9] They did so and their appeals were able to be dealt with by this Court in one hearing together with the appeal of Cardinal Dew.

[28] This Court has considered it appropriate to deal with all matters on the fast track because of the nature of the case, in which the respondent wishes to proceed with serious allegations that are defamatory in nature, but on the basis that it will rely on defences of justification and responsible communication on matters of public interest. The procedures followed have not allowed time for discovery, but two matters should be mentioned:

(a) The Court ordered production of an unredacted version of the District Court judgment in which orders were made allowing publication of the complainants' names, subject however to an order for non-publication of parts of the judgment which summarised the complaints made against Cardinal Dew. The unredacted version of the judgment had not been before the High Court. The unredacted version founded an argument by counsel for Cardinal Dew (addressed below)

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8 *Dew v Discovery NZ Ltd*, above n 1.
9 *[R] v Discovery NZ Ltd*, above n 1, at [43] and [45].

that the effect of the orders made in the District Court was to prevent publication of the substance of the complaints, notwithstanding the fact that the High Court had declined relief.

(b) We asked Discovery to provide a copy of Mr Carvell's statement to the Royal Commission. That drew the response from Mr Cleary that while Mr Morrah had seen it, he had not retained a copy. Mr Cleary also advised us that Mr Carvell was not prepared to provide a copy of the statement to the Court.

[29] In the result, we have the 5 May 2023 complaint (sent to the professional standards group maintained by the Church and copied to SNAP) reproduced above, and the summary of events given to Mr Morrah and recounted in his affidavit. We also have the very brief account given in the District Court judgment based on affidavits sworn in that Court, but not the affidavits on which it was based.

Evidence for the appellants

[30] Cardinal Dew swore an affidavit in the High Court proceeding. Cardinal Dew said that he served at the St Joseph's Parish in Upper Hutt during 1977. He said that throughout his career he had never had an allegation of sexual misconduct made against him. He recounted having been approached by Mr Morrah for the first time on Thursday 3 August. He described Mr Carvell's allegations as "entirely untrue".

[31] In the High Court, Sister H relied on an affidavit by Sister Patricia Clare Vaughan, another vowed sister of the Sisters of Mercy. Now 75 years of age, she was formerly a school teacher and taught at a school in Palmerston North between 1977 and 1987. In 1977, she taught in a classroom adjacent to a class taught by Sister H. They travelled to and from the school together from a communal home where they lived with about eight other sisters. Sister Vaughan was responsible for organising relief teachers, and said that she could not remember any time when Sister H was away so that cover had to be organised for her. It was her evidence that the school year ended in the first or second week of December and there were no holiday periods during the first two weeks of November.

[32] Sister Vaughan also swore an affidavit in this Court in which she gave further details about her involvement at the school in Palmerston North with Sister H. She described their living circumstances as a community in which the sisters attended mass together every morning, prayed together morning and evening, and were together at communal meals. Absences were rare and had to be arranged in advance. They attended to domestic duties every Saturday, and on Sunday mornings they attended mass at the local parish church. Their routine was such that free time was limited to a few hours in the afternoon of each Saturday and Sunday. They were not at liberty to travel away from the community without prior permission from their supervising sister. She noted the sisters had a small monthly allowance of not more than about five dollars. She rejected the idea that Sister H could have travelled from Palmerston North to Upper Hutt because there would not have been enough free time for her do so. The entire community had only one car and none of the sisters had a personal vehicle. Similarly, the community shared access to one telephone.

[33] Three affidavits were sworn by Sister France. In her first affidavit, Sister France confirmed that Sister H is now 82 and residing in a secure dementia ward at a residential facility. Sister France said that on 11 June 2023 she received an email sent to a large number of people involved in Catholic institutions criticising their processes for dealing with allegations of sexual abuse. The email attached the 5 May 2023 complaint by Mr Carvell naming Sister H as having been involved in sexual abuse in the "male dormitory of the Convent" which she inferred must have been a reference to the dormitory where young boys slept in the Orphanage. It was Sister France's evidence that the allegations against Sister H are "demonstrably untrue". Sister H taught at St Joseph's School and lived in the convent at St Joseph's in 1976, but from the beginning of 1977 she was living and working full time in Palmerston North. In Sister France's words it was:

> … so unlikely as to be virtually impossible that Sister [H] was able to take leave from her community and teaching duties in order to visit and stay at Upper Hutt during the relevant period.

The period of 1 to 12 November would have been during the third term, when she would have been engaged in teaching. She had not at any point been responsible for

the care of young children in any of the Sisters of Mercy's homes whether in Upper Hutt or elsewhere.

[34] In a subsequent affidavit, Sister France gave further details about St Joseph's, noting it comprised a convent, the Orphanage and the nearby primary school, all of which were operated by the Sisters of Mercy. She claimed that unless identifying details of the location were omitted, publication of the intended programme would potentially "smear all of the Sisters present at the location at the relevant time", by implying they were responsible for enabling if not actually participating in the criminal conduct alleged. There were 13 sisters living at St Joseph's at the relevant time. It was Sister France's evidence that their presence and identities were widely known in the community, and most of them were now dead.

[35] Sister France gave evidence about the records of attendance at the Orphanage in 1977. The register showed that Ms and Mr Carvell had been present between 1 and 12 November 1977. There was, she inferred from the names, a total of 22 boys and 16 girls in addition to Ms and Mr Carvell. The ages of the children ranged from five to 14 years. The children slept in three different areas depending on age and gender, the boys' dormitory accommodating the boys who were seven or older. When Mr Carvell was there, there were about 19 boys of that age group, each with a cubicle within the larger dormitory.

[36] In her final affidavit, Sister France explained that while Sister H returned to St Joseph's in 1979, she had obtained copies from the 1977 yearbook of the Palmerston North school at which Sister H worked together with Sister Vaughan. The yearbook contained photos of Sister H and recorded the form class she was responsible for.

[37] Further affidavits relied on by the Sisters were sworn by Mrs R and Ms Fox. Mrs R left the Sisters of Mercy in 1986 although she has preserved her connection with them. In 1977 she was responsible for the boys' dormitory at the Orphanage. She confirmed Sister France's evidence that there were three dormitories in the home at that time. One was for the youngest children, both boys and girls, aged five and six; another housed the older girls (who she thought ranged from seven to 14 years of age);

and the third dormitory, over which she had responsibility, was for boys of seven years and older.

[38] Mrs R said that she had never initiated, participated in or facilitated sexual abuse of the kind which is the subject of Mr Carvell's complaint, and she had never turned a "deaf ear" to anything of that kind so as to be able to claim ignorance. She had never witnessed any assault or physical interference with any child under her care at the Orphanage. She continued:

> The physical setup of the dormitory was that each boy had his own space, which we called a 'room' but was perhaps more accurately described as a 'cubicle', with partitions of about adult height, perhaps a little more, and a curtain over the front which I would pull closed when I had checked the occupant was asleep each night. These were arranged down either side of the larger space with a corridor in the centre. I think we had 12 'rooms' on each side so a maximum of 24 boys could be accommodated at any one time. There was no soundproofing, so I learned to walk very quietly over the creaky boards when I was checking on everyone and going to attend to my own ablutions after they were all asleep.

[39] According to Ms R's evidence, boys did not get up and wander around in the dormitory, nor were they ever woken up to be taken out of the dormitory at night. She recorded that Sister H was teaching at a school in Palmerston North in 1977 and, though Sister H returned to St Joseph's in 1979, having finished her university studies, she never looked after the children at the Orphanage.

[40] Ms Fox also confirmed that Sister H was not resident in the community at St Joseph's or on the staff at St Joseph's School in 1977 and 1978, and nor was she a member of the staff of the Orphanage during that period. She also noted that there were no priests resident on the site, nor could she recall a building near the dormitories that could be construed as a priests' residence of any sort. According to her, the convent and the Orphanage "were a large standalone complex". She said "[i]t would be very difficult if not impossible for one perpetrator, let alone four, to access a dormitory and assault one or more children … without being heard by one of the three Sisters or the other children".[10]

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[10] We infer the reference to "four" perpetrators is responding to Mr Carvell's original complaint of 5 May 2023, which named four people.

[41] Mr Michael Ellis, who also swore an affidavit, lived at the Orphanage with two brothers and a sister in 1977 after their mother had died. Mr Ellis spoke with Mr Morrah telling him he had no recollection of a priest ever being inside the Orphanage. With reference to Mr Carvell's complaint (as relayed by Mr Morrah to Mr Dewar) Mr Ellis has said that he and his two brothers were in the boys' section of the Orphanage in November 1977, and if an event such as was described had occurred, they would have been aware of it and would have remembered it. According to him, it was possible to hear conversations between other boys in the dormitory. He said it would not be possible for a game of tag to have been played in the dormitory in the middle of the night, without everyone being woken up.

[42] We have set out this evidence at some length because taken together there are aspects of it which are difficult to reconcile with Mr Carvell's complaint in the summary form which is before the Court. The sworn evidence provided by the appellants shows that there are aspects of Mr Carvell's complaint which might be difficult to sustain, such as the claim that Sister H was present and one of those involved in the alleged abuse. And there are difficulties too with the scenario in which the abuse evolved from a game that apparently involved vigorous movement around the dormitory. On the face of it that would have disturbed others present, namely the other boys and Mrs R who was responsible for their care overnight. We say that without having the benefit of a sworn statement by Mr Carvell, or the witness statement that he submitted to the Royal Commission in which, in the words of his complaint, he gave a detailed description of the crimes committed against him and others. It is not possible in the context of an interlocutory appeal to resolve factual issues that might arise at a trial. But we note that, given potential uncertainties surrounding Sister H's alleged involvement, Discovery has undertaken not to name her in the programme.

Evidence concerning the police investigation

[43] We mention finally that in this Court an affidavit has been provided by Assistant Commissioner Schwalger of the New Zealand Police | Ngā Pirihimana o Aotearoa. Her affidavit was obtained by the solicitors acting for Cardinal Dew. It is largely general in nature and acknowledges the importance of media coverage of a

crime because it helps protect the public against ongoing risk and informs individuals who might come forward to the police when they might otherwise not have reported what they know.

[44] On the other hand, the Assistant Commissioner acknowledges that it might be important that information about a crime that is known only to those involved in the offending is not published. That can help to preserve important lines of inquiry for the police and enhance their ability to bring an investigation to a successful conclusion. The Assistant Commissioner also gave general evidence about ensuring an investigation is not impeded by media coverage, and about the possible compromise of the right of silence of a person under investigation where allegations are the subject of such coverage. The Assistant Commissioner said that it is unusual and exceptional for media to publish the identity of someone suspected of serious criminal offending where an investigation is underway, and the police are not actively searching for that person. With reference to the present case, the Assistant Commissioner confirmed that the investigation is ongoing and said:

> … Publicity of the nature intended by the respondent will not assist Police's investigation. Police are concerned that it has the potential to adversely impact inquiries.

[45] Discovery filed four affidavits in response, including one from the director of Police legal services, Mr William Peoples. Mr Peoples outlined approaches made to him by Mr Dewar and Ms Sziranyi essentially seeking that the Police adopt a position in relation to the proposed programme. It was in response to those approaches that the Police decided Assistant Commissioner Schwalger should provide an affidavit. He declined to go into the reasons for the Police's decision, on the basis that they were "privileged".

[46] Discovery also relied on an affidavit by Ms Sarah Bristow, the director of news for Newshub. Ms Bristow is a very experienced journalist particularly in the field of news journalism. She took issue with some aspects of Assistant Commissioner Schwalger's affidavit, including her evidence that it was "unusual and an exception for the media to publish the identity of a person suspected of serious criminal offending" where police are not searching for them. She gave examples of where that had been done. She also challenged the Assistant Commissioner's statement that

publicity of the nature intended by Newshub would not assist the police investigation and may have adverse consequences. Ms Bristow expressed her surprise that the Assistant Commissioner had commented that publicity would not assist the police investigation and recorded her understanding that the police officer involved in the investigation had expressed a contrary view to Mr and Ms Carvell. She confirmed Newshub had no intention of interfering with the police investigation and noted that Mr Morrah had assisted the police by sharing information he had gathered in preparing the Newshub story.

[47] Mr Morrah swore a further affidavit in which he outlined contact he has had with the police during his investigations and the extent to which he had cooperated with police during the process. Mr Morrah also attached correspondence he had received from experienced former police detectives (now private investigators) referring to ways in which media publicity about allegations may assist an investigation, by bringing further pertinent information to light.

[48] Mrs Carvell swore an affidavit in which she confirmed that the police had known in advance of Mr Carvell's intention to tell his story in public, and referred to correspondence she had sent to the investigating officer, Detective Stewart-Black, informing him that Mr Carvell had spoken to Mr Morrah about his intention in early August. She also said that the Detective had agreed that publicity might be helpful in cases of historical complaints if others come forward as a result of publicity.

[49] We have not had any evidence from the police investigators who have been directly involved in the investigation. The general nature of the evidence which has been filed by Discovery on this issue does not persuade us that we should go behind Assistant Commissioner Schwalger's evidence that the Police are concerned that airing the programme at this stage "has the potential to adversely impact inquiries". She is a senior officer, and we doubt that she would have expressed that view without making an appropriate inquiry. We are reinforced in that view by the inference we draw from the affidavit of Mr Peoples that the content of her affidavit was in fact carefully considered.

[50] The lack of detail given in Assistant Commissioner Schwalger's affidavit about the basis for concern about an adverse impact on the investigation might be thought to weaken its impact. But having reflected on that, we do not think we should discount the affidavit. There is no reason to doubt Assistant Commissioner Schwalger's expression of concern. And given the fact that the investigation is ongoing, there might very well be reasons for the Police to be reluctant to particularise reasons for the concern in litigation in which a subject of the investigation is a party.

[51] Accordingly, the issues which we have to determine must be addressed against the background of the expressed police concern.

The High Court judgments

Dew v Discovery NZ Ltd

[52] Palmer J considered he had to assess whether there were "exceptional, clear and compelling reasons to restrain publication of a defamatory matter contrary to the right to freedom of expression".[11] Applying *Auckland Area Health Board v Television New Zealand Ltd*, the "key question" was whether a defamation for which there is no reasonable possibility of a legal defence is likely to be published.[12]

[53] The Judge first addressed the potential for a defence of truth. He noted that, given the effluxion of time, it was very difficult to prove that the alleged conduct did or did not occur; the information provided by the appellant did not on its own disprove the allegations. Proving the allegations would depend on assessing the testimony of everyone involved, together with other relevant evidence, at a trial. He referred to the observations of Tipping J in *Television New Zealand v Rogers* that a responsible news media organisation which undertakes to prove the truth of a defamatory statement is seldom, if ever, subject to prior restraint by interim injunction, and held that there was a reasonable possibility that a defence of truth could succeed.[13]

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11 *Dew v Discovery NZ Ltd*, above n 1, at [19], relying on *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [152].

12 At [19], citing *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA) at 407.

13 At [20], citing *Television New Zealand v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [66].

[54] The Judge then turned to consider the defence of responsible communication on a matter of public interest. In his view that too had a reasonable prospect of success. Applying the elements of that defence as set out by this Court's decision in *Durie v Gardiner*, he concluded:[14]

(a) The allegations are of public interest, given that Cardinal Dew was until very recently the head of the Catholic Church of New Zealand and a member of Te Rōpū Tautoko, which coordinates engagement between the Church and the Royal Commission.

(b) The proposed communication is responsible. Newshub is a responsible news media organisation, and two senior reporters went to "some lengths" to verify the allegations over a period of two months. The Judge noted that the tone of the publication is unknown but that Newshub has incentives to ensure it is balanced and reasonable. He considered there was no evidence that Newshub's object was to tarnish the reputation of Cardinal Dew.

[55] The Judge next considered whether the publication could be restricted on the grounds it involves an invasion of privacy. He noted that the threshold for issuing an interim injunction on this ground is less certain than it is in the context of defamation. He relied on the statement of this Court in *Hosking v Runting* that there must usually be "compelling evidence of most highly offensive intended publicising of private information" about which there is "little legitimate public concern".[15]

[56] The Judge noted that the allegations were definitely "highly offensive" if they were untrue, but that, as noted, there were difficulties at this early stage establishing their truth. Cardinal Dew's denial of the allegations suggested, in the Judge's view, that they were not his private information. However, the Judge considered that the fact that the police are investigating the allegations "could be" private.[16] A reasonable expectation of privacy in such information might be a legitimate starting point,

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14 At [21]–[23], citing *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [58].
15 At [24], citing *Hosking v Runting*, above n 11, at [158].
16 At [25].

following the United Kingdom Supreme Court's decision in *ZXC v Bloomberg LP*.[17] However, that case together with *Hosking v Runting*, demonstrated that freedom of expression of information of legitimate public concern can effectively override such a starting point. It did so here, for the same reasons that the defence of responsible communication on a matter of public interest had a reasonable prospect of success.[18]

[57] Turning to the overall balance of convenience, the Judge considered that Discovery and the public's rights to freedom of expression about a matter of public interest outweighed the reputational interests of Cardinal Dew not to be exposed to adverse publicity.[19]

[58] He considered there was "something" in Mr McKnight's submission for Cardinal Dew that publication would subvert the Contempt of Court Act 2019 and the ability to make suppression orders if criminal charges are brought. However, he did not consider this was sufficient to tip the balance.[20] Neither s 7 of the Contempt of Court Act nor the Court's name suppression jurisdiction were yet engaged, since there are no charges. He considered Mr McKnight had not identified grounds for name suppression for Cardinal Dew if charges were to be laid. The Judge noted that the threshold for suppression is high and must be weighed against the presumption of open justice.[21]

[59] The Judge held that it could not be said that criminal proceedings were a "highly likely" prospect. Nor was it clear that the threshold for name suppression would be met, although the Judge accepted that publication now might affect the assessment of name suppression in the future.[22] The Judge ultimately did not consider that this "uncertain potential future scenario" outweighed the "rights to freedom of expression now".[23]

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17 At [26], citing *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158 [*Bloomberg* (SC)] at [125] and [146].
18 At [27].
19 At [29].
20 At [30].
21 At [31].
22 At [32].
23 At [33].

[60] Given the cautious approach appropriate for applications for interim injunctions for prior restraint against responsible media organisations and the public interest engaged by this particular programme, the Judge concluded that it would not be a justified limit on freedom of expression for the Court to grant the application. Nor would it be in the overall interests of justice.[24]

[61] Consequently, he declined to grant an interim injunction save insofar as was necessary to preserve Cardinal Dew's position on appeal.[25]

R v Discovery NZ Ltd

[62] Palmer J heard Mrs R and Sister H's applications on 5 September 2023 and released his judgment on 8 September.[26] They sought injunctions on the basis that the news story would defame them. The Judge largely relied on the same principles and authorities he had relied on in relation to Cardinal Dew's defamation claim. He also referred to a line of authorities concerning when defamation of a group can constitute defamation of individuals, quoting from this Court's judgment in *Hyams v Peterson*, where Cooke P noted:[27]

> Where there is an attack on a group and the plaintiff is not named, the question whether the material was published of and concerning the plaintiff turns on whether the words published would themselves reasonably lead people acquainted with the plaintiff to the conclusion that he was a person referred to. If a defamatory statement made of a class or group is reasonably to be understood to refer to every member of it, each one has a cause of action …

[63] The Judge first considered whether defamatory statements were likely to be published. He noted Discovery proposed not to name Sister H and that there was no suggestion that Mrs R would be named. If Discovery's story were interpreted to involve a statement about a group, the Judge noted that, applying *Hyams v Peterson*, the question is whether that statement would "reasonably lead people acquainted with each of the applicants to the conclusion that she was a person referred to".[28] He concluded that was not the case. There were 13 nuns at St Joseph's at the relevant

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24 At [34].
25 At [35]–[37].
26 *[R] v Discovery NZ Ltd*, above n 1.
27 At [20], citing *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 654–655 (citations omitted).
28 At [27], citing *Hyams v Peterson,* above n 27, at 654–655.

time and a person who knew Mrs R or Sister H could "do no more than wonder whether either of them might have been the nun concerned".[29] That was not enough to attract liability in defamation. That was especially so with respect to Sister H as she lived and worked in Palmerston North at the relevant time.[30]

[64] The Judge rejected an argument made by Mr Finlayson KC that Discovery's enquiries of various people about their memories of Sister H would quickly link her to the allegations, if published. He noted that there was no evidence as to the questions which Mr Morrah had asked interviewees and there is no indication the allegations were mentioned. The interviewees could equally have understood that Sister H was being ruled out or sought as a witness.[31]

[65] In terms of Mrs R, the Judge noted there was no evidence about what the story proposed to say about the circumstances of the alleged offending, and whether it would implicate whoever was responsible for the care of boys at night. If Discovery said "enough" about the circumstances of the offending so as to give rise to an implied statement that Mrs R was involved, then a suit in defamation might be available to her. The Judge considered that as Discovery is now on notice of that possibility, it could "be expected to be responsibly careful not to do so".[32]

[66] The Judge concluded, accordingly, that it was not clear that Mrs R and Sister H would be identified and therefore defamed.[33] In the event he was wrong, the Judge went on to consider Discovery's proposed defences to any defamation suit by Mrs R and Sister H.

[67] The Judge noted that the test regarding the defence of truth was not, contrary to Mrs R and Sister H's submissions, whether on the balance of probabilities, that defence could succeed.[34] In relation to Sister H, he considered it might be correct to say that she is unlikely to have been involved in the alleged offending. In relation to Mrs R, he considered that the offending was unlikely to have occurred without her

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29 At [27].
30 At [27].
31 At [28].
32 At [29].
33 At [30].
34 At [32].

knowing about it. However, in relation to both, he considered there was a reasonable possibility a defence of truth would be successful:[35]

(a) Sister H could have travelled from Palmerston North to Upper Hutt over a weekend.

(b) Evidence as to Mrs R's hearing, how heavily she slept and whether she was at the boys' dormitory every night would need to be tested, and her credibility assessed.

[68] The Judge also found that there was a reasonable possibility that the defence of responsible communication on a matter of public interest might succeed. Although Mrs R and Sister H did not have the public profile of Cardinal Dew, Discovery's story regarding the abuse allegations was of public interest.[36] He considered that, for similar reasons as applied to Cardinal Dew's application, Mrs R and Sister H had not shown the proposed story is not responsible.[37]

[69] The Judge held that the balance of convenience and overall interests of justice weighed against granting an injunction. Neither Mrs R or Sister H would be defamed and in any event, Discovery had a reasonable possibility of a defence to their defamation claims.[38]

[70] Accordingly, the Judge declined the applications, though he granted interim injunctions to enable Mrs R and Sister H to appeal to this Court.[39]

Cardinal Dew's appeal

Appellant's argument

[71] Mr McKnight and Mr Romanos pursued four principal arguments on appeal. They relied first on the terms of the orders made by Judge Davidson in the

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35 At [34]–[35].
36 At [36].
37 At [37].
38 At [39]–[41].
39 At [42]–[43] and [45].

District Court which Mr Romanos argued operated to forbid publication of substantially the same evidence as Discovery now intends to broadcast. The orders had been made for the purpose of protecting fair trial rights and should be respected. Counsel claimed the judgment was effectively dispositive of the appeal.

[72] Secondly, Mr Romanos submitted that the proposed broadcast would interfere with the administration of justice for a number of reasons. First, the proposed broadcast would undermine Cardinal Dew's right to seek name suppression under the Criminal Procedure Act were he to be charged following the police investigation. The allegations would achieve such prominence in the public mind that any subsequent application for suppression would be futile. On the other hand, in the absence of publicity, there would be a clearly arguable case for suppression of the Cardinal's name under s 200 of the Criminal Procedure Act. The implications for the right to silence, and the ongoing reputational damage would create a strong case for name suppression up to the day of the trial. Second, because the allegations involve sexual abuse against children, the allegations would be likely to register with the public and remain in the public mind with an inevitable compromise of fair trial rights if charges were brought.

[73] Mr Romanos submitted that once there is a significant risk to fair trial rights, the principles of freedom of expression and open justice should yield. He emphasised the statements made by this Court in *R v Burns (Travis)* that once it has been determined there is a significant risk that a defendant will not receive a fair trial:[40]

> … the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from; not balanced against. There is no room in a civilised society to conclude that, "on balance", an accused should be compelled to face an unfair trial.

[74] Further, counsel submitted that in the event there was a trial and acquittal, having regard to the inherent stigma attaching to child rape, permanent suppression orders might well be made. The proposed broadcast would subvert the Cardinal's right to pursue that outcome.

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[40] *R v Burns (Travis)* [2002] 1 NZLR 387 (CA) at [11].

[75] The next argument advanced by Mr Romanos was that a person under criminal investigation should have a reasonable expectation of privacy in respect of information relating to the investigation. Mr Romanos relied for this submission on the decision of the United Kingdom Supreme Court in *ZXC v Bloomberg LP*.[41] Mr Romanos also referred to *Driver v Radio New Zealand Ltd* where there was expert evidence that the New Zealand media would be unlikely to name a suspect in the midst of a police investigation and, after a charge had been laid, might show restraint in naming a person before a first court appearance. Clark J in that case considered such evidence might "support the existence of a reasonable expectation of privacy for individuals prior to being charged".[42] Mr Romanos invited us to follow *ZXC v Bloomberg*, and establish clearly that an individual has a reasonable expectation of privacy in respect of information relating to a police investigation.

[76] Mr Romanos was critical of Palmer J's apparent acceptance that, if the allegations were untrue, they would not be private information. He contrasted this with the approach in *ZXC v Bloomberg* which was to recognise that the privacy tort seeks to protect dignity and autonomy, and may apply whether the information is true or false.[43] Here, by its very nature, the proposed publication to a nationwide audience and the gravity of the allegations made about matters which are the subject of a police investigation would be highly offensive and cause very significant distress to the appellant.

[77] Mr Romanos also took issue with the Judge's conclusion that the public interest would be served by naming Cardinal Dew in connection with the allegations under investigation. Referring to *Richard v British Broadcasting Corp*, Mr Romanos submitted that while the "actual conduct" of public figures is of public interest, that is not necessarily so of "unsubstantiated allegations, or investigations, into unproved conduct".[44] Here, in Mr Romanos' submission, there are no "legitimate operational concerns" for the purposes of the investigation that would justify publishing Cardinal Dew's identity as opposed to the fact of the investigation.

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41 *Bloomberg* (SC), above n 17.
42 *Driver v Radio New Zealand Ltd* [2019] NZHC 3275, [2020] 3 NZLR 76 at [106].
43 *Bloomberg* (SC), above n 17, at [111].
44 *Richard v British Broadcasting Corp* [2018] EWHC 1837 (Ch), [2019] Ch 169 at [285].

[78] Mr McKnight claimed that in view of the gravity of the allegations, and the sworn evidence filed by the appellants (including the new evidence adduced on appeal), the Court should conclude that Discovery's defences of truth and responsible public interest communication did not have a reasonable possibility of success. He was critical of the fact that Discovery had not placed Mr Carvell's statement to the Royal Commission before the Court and noted there was no sworn evidence verifying the allegations. He complained about the appellants' inability to effectively challenge the complaints in the absence of direct evidence. And he questioned how the Court could properly assess Discovery's ability to establish the allegations, emphasising the length of time that has elapsed since 1977, and issues about identification that would inevitably arise. The importance of such considerations was underlined by the controversies concerning the possibility that Sister H could have been involved, Mrs R's evidence about the layout of the dormitory at the Orphanage and the regime that was followed under her supervision.

[79] Mr McKnight also claimed that, for the purposes of the defence of responsible comment on a matter of public interest there is no public interest specifically in naming the Cardinal in connection with the allegations. Moreover, the fact that Discovery has chosen to proceed without providing full details of the allegations, and while a police investigation is ongoing, raises issues about whether Discovery is acting responsibly.

Discovery's argument

[80] For Discovery, Mr Salmon KC submitted that the District Court judgment did not amount to a suppression order preventing publication of the proposed programme: properly construed, the order only prevented two paragraphs of the District Court judgment from being published in circumstances where, as that Court had recognised, the application was being made to enable the complainants to "go public" about the allegations.

[81] Further, Mr Salmon argued freedom of expression should not yield to claims of prejudice to fair trial rights in circumstances where the allegations are currently being investigated but there is no indication that charges are imminent and where, if charges were laid, the trial would likely take place in over a year's time. In addition,

claims of prejudice to any potential name suppression application, in which Cardinal Dew could not show that name suppression would likely be granted, could not properly justify prior restraint.

[82] Insofar as the invasion of privacy claim is concerned, Mr Salmon submitted it rests in this case on the same reputational factors as a complaint of defamation, so that the principles of prior restraint should apply in the same way: it must be shown that the proposed defence is so weak as to justify prior restraint. He contended it is not the fact of a police investigation that Cardinal Dew seeks to conceal, but the allegations themselves, which should not be regarded as private facts. Further, it could not be said that Discovery's proposed defence to the privacy claim — that there is a legitimate public concern in the information — would not succeed. Given Cardinal Dew's position in the Church and his role for the Church in the Royal Commission, the public interest and concern was clearly legitimate. He contrasted Cardinal Dew's position with that of a "mere celebrity" as in *Richard v British Broadcasting Corp*, relied on by the Cardinal.[45] In the circumstances, Cardinal Dew could not demonstrate he would succeed in an invasion of privacy claim at trial.

[83] Finally, Mr Salmon submitted that Discovery has arguable defences of truth and public interest communication to a potential claim of defamation. It has not been shown that those defences must fail, which is the necessary threshold for granting prior restraint. Even on the evidence advanced in support of the appeal, there would be a credibility contest on the truth of the allegations. But the evidence was sufficient to show that Discovery had acted responsibly in the way it had investigated and sought comment on a matter of plain public interest.

Analysis

The threshold for prior restraint of defamatory material

[84] In *Quartz Hill Consolidated Gold Mining Co v Beall* it was decided, in the face of submissions to the contrary, that the High Court had power to grant interlocutory relief by way of interim injunction to prevent the publication of defamatory

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[45] *Richard v British Broadcasting Corp*, above n 44.

statements.[46] In his judgment, Sir George Jessel MR warned that the jurisdiction was one which must be "very carefully exercised".[47]

[85] This was confirmed in *Bonnard v Perryman,* in which, unusually, six Judges sat in the Court of Appeal.[48] All of the Judges agreed that the Court could grant injunctions before the trial of an action for libel.[49] In a passage that is often referred to, Lord Coleridge CJ said:[50]

> … it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.

[86] This approach has been consistently followed in New Zealand, as may be demonstrated by reference to a number of decisions of this Court. It is not necessary for present purposes to refer to all of them, but we mention three.

[87] We refer first to *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* in which the appellant sought to restrain the publication of newspaper articles said to be defamatory and inaccurate.[51] This Court upheld a decision of the High Court refusing to extend an interim injunction in circumstances in which the newspaper said it would plead the truth of the statements to be made.

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46 *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 Ch D 501 at 507. There is a comprehensive and interesting account of the history of the power to grant interlocutory injunctions restraining publication of defamatory material in the judgment of Heydon J in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, (2006) 227 CLR 57 at [188]–[209].

47 At 508.

48 *Bonnard v Perryman* [1891] 2 Ch 269 (CA).

49 At 283–284 per Lord Coleridge CJ, Lord Esher MR and Lindley, Brown and Lopes LJJ and at 285 per Kay LJ. Kay LJ dissented, not on the jurisdictional issue, but because he thought grounds had been established for an injunction: at 285 and 288–289.

50 At 284.

51 *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 (CA).

Writing for the Court, Cooke P approved the following principle relied on by the High Court:[52]

> There is an old and well established principle … that no interlocutory injunction will be granted in defamation proceedings, where the defendant announces his intention of justifying, to restrain him from publishing the alleged defamatory statement until its truth or untruth has been determined at the trial, except in cases where the statement is obviously untruthful and libellous. That was established towards the end of the last century and it has been asserted over and over again.

[88] The Court observed that principle was established in other common law jurisdictions, including England, Australia and Canada. After referring to *Bonnard v Perryman*, the Court referred (clearly with approval) to a succinct statement of the position in *Halsbury's Laws of England*:[53]

> It is well settled that no injunction will be granted if the defendant states his intention of pleading a recognised defence, unless the plaintiff can satisfy the court that the defence will fail.

[89] The Court concluded on the affidavit evidence before it that it could not be said the material was obviously untruthful and libellous, or that there was no reasonable foundation for the defence of justification.[54]

[90] We refer next to *Auckland Area Health Board v Television New Zealand Ltd.*[55] In that case, the High Court had declined to order the production of the script of a television programme in advance, or to renew or continue an interim injunction against the broadcast of a programme concerning the Ōtara Spinal Unit of the Auckland Area Health Board. The programme was apparently going to include criticism of the services provided in the Unit. Noting that the appellant sought to invoke the jurisdiction of the court to restrain the publication of defamatory matter, Cooke P, writing for the Court observed:[56]

> That there is such a jurisdiction is well established. … By reason of the principle of freedom of the media, which has been emphasised by this Court … and which is reinforced by s 14 of the New Zealand Bill of Rights Act 1990

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52 At 5–6, citing *Bestobell Paints Ltd v Bigg* [1975] FSR 421 (Ch) at 429–430 (citation omitted).
53 At 6, citing *Halsbury's Laws of England* (4th ed, 1979) vol 28 Libel and Slander at [168] (footnotes omitted).
54 At 7.
55 *Auckland Area Health Board v Television New Zealand Ltd*, above n 12.
56 At 407 (citations omitted).

> as to the right of freedom of expression, it is a jurisdiction exercised only for clear and compelling reasons. It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published.

[91] In summary, the "wholly exceptional jurisdiction" was to be exercised "only in cases where there is a well-grounded fear that the publication will be clearly unlawful".[57]

[92] The final case that we mention is *TV3 Network Services Ltd v Fahey*, in which a programme had been screened on television accusing the respondent, Dr Fahey, of sexual improprieties and professional misconduct.[58] Dr Fahey was well known in Christchurch as a public figure and medical professional, and was intending to stand for the mayoralty of Christchurch in the imminent local government elections. He issued defamation proceedings against TV3, which raised the defence of truth in response, together with other defences. Richardson P, who wrote the judgment of this Court, confirmed the approach taken in previous decisions of this Court.[59]

[93] Mr Salmon submitted there is no obligation on the party wishing to publish a statement which is defamatory on its face to put forward evidence to prove that a defence will succeed. He relied for this submission on *Z v Z*, claiming it showed that it was sufficient to identify a general basis of pleading the defence.[60] Once that was done, it was for the applicant for the interim injunction to establish conclusively that there is no reasonable possibility of the defence succeeding. To do that, there must be evidence demonstrating that the allegations were false or otherwise showing that the defence, as pleaded, could not succeed. The way in which it was put in *Z v Z* was that once the court was satisfied a defendant would assert the truth of the impugned statements, it was incumbent on the plaintiff "to show that there was no reasonable possibility of that defence succeeding".[61]

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57 At 407.

58 *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA).

59 At 132–133 citing *Bonnard v Perryman*, above n 48; *Bestobell Paints Ltd v Bigg,* above n 52; *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd,* above n 51; and *Auckland Area Health Board v Television New Zealand Ltd,* above n 12.

60 *Z v Z* [2017] NZCA 94, [2017] NZAR 660.

61 At [18]. The language used in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd*, above n 51, was that "when justification is to be relied on as a defence an injunction will not be granted except in cases where the statement is obviously untruthful and libellous": at 7.

[94] We accept that it is not necessary for a defendant to establish a defence of truth will succeed, but there must be something to show that there is a reasonable possibility that it will. There may be cases where evidence will be necessary for that purpose, and a mere assertion of the intention to run a defence is not enough. We do not think there is anything in *Z v Z* or any of the other cases we have discussed that suggests otherwise. In any event, Discovery has called evidence to establish a basis upon which it can advance the defence of truth.

[95] The case has proceeded to this point without Discovery filing a statement of defence. However, both in the High Court and in this Court it opposes the application for interim injunction on the basis that it intends to establish at the trial that the allegations in the programme are true. At the heart of the defence will be the evidence of Mr Carvell. In circumstances already explained, we have not seen a copy of the statement that he made to the Royal Commission, nor the affidavit he filed in the District Court, and he has not sworn an affidavit in the present proceeding. But we have been advised of the substance of the allegations and his complaint to the Church is in evidence. If the programme is broadcast, and Mr Carvell's allegations are presented, there will be statements from him about Cardinal Dew's conduct as well as that of the others to whom he referred in his complaint. And if the proceedings go to trial, it will be for the trier of fact to determine whether Mr Carvell's allegations or Cardinal Dew's denials should be accepted. That is a factual question which it is impossible for us to resolve at this stage. It is clear, however, that we cannot conclude that there is no reasonable possibility of the defence of truth succeeding.

[96] The other defence on which Discovery intends to rely is that of responsible communication on a matter of public interest, the defence established and explained by this Court's judgment in *Durie v Gardiner*.[62] The foregoing discussion has focused on the defence of truth, but the same approach is appropriate where other defences are intended to be advanced. The cautious approach to the grant of interim relief is founded on the concepts of freedom of speech and the public interest, and it would be anomalous if other defences were subjected to a broader discretionary judgment about their merit. This is reflected in the language used in *Auckland Area Health Board v*

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62 *Durie v Gardiner*, above n 14.

Television New Zealand Ltd in the passage quoted above, where the Court referred to the need to show that a defamation is likely to be published for which there is "no reasonable possibility of a legal defence".[63] Plainly, that statement was not intended to be limited to cases where the defence raised is that of truth. And the passage from *Halsbury's Laws of England*, adopted by Cooke P, said it is well settled that no injunction will be granted if the defendant states his intention of *pleading a recognised defence*, unless the plaintiff can satisfy the court that the defence will fail.[64] To similar effect are the statements in *Gatley on Libel and Slander* that "[t]he court will not normally grant an interim injunction where the threatened publication will on its face attract qualified privilege" (except where the defendant is clearly malicious) and that a similar position seemingly applies where the defence raised is honest opinion.[65]

[97] The defence of responsible communication on a matter of public interest applies when the subject matter of a publication is of public interest and the communication intended to be published is responsible.[66] It is for the defendant to establish both aspects of the defence.[67] If the proceeding is before a judge and jury, it is for the judge to assess each element, based on primary facts found by the jury.[68]

[98] The Court in *Durie v Gardiner* acknowledged that defining what is a matter of public interest in the abstract with any precision is a difficult exercise. However, it adopted the approach of the Supreme Court of Canada in *Grant v Torstar Corp* on this issue, which held that a matter will be of public interest if it is one which invites public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or to which considerable public notoriety or controversy has attached.[69] We are in no doubt that the subject matter of the proposed broadcast would be of public interest in terms of this approach: it would

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63 *Auckland Area Health Board v Television New Zealand Ltd*, above n 12, at 407.

64 *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd*, above n 51; and *Halsbury's Laws of England*, above n 53, at [168].

65 Richard Parkes and Godwin Busuttil (eds) *Gatley on Libel and Slander* (13th ed, Thomson Reuters 2022) at [27-008]–[27-009], referring, in the latter paragraph, to the defence in s 3 of the Defamation Act 2013 (UK).

66 *Durie v Gardiner*, above n 14, at [58].

67 At [59].

68 At [63].

69 At [65], citing *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 at [99]–[106].

both invite public attention, and involve a subject matter about which there is substantial public concern, analogous to the very kinds of concern that led to the establishment of the Royal Commission. The sexual abuse of children by adults in a position of trust and with the enhanced moral authority that accompanies religious ordination is plainly something that affects the welfare of those affected. It is also an issue of considerable public notoriety in many societies around the world.

[99] In this context, we cannot agree with the submission on behalf of Cardinal Dew that it is not in the public interest to name the Cardinal as an alleged perpetrator, presumably as opposed to publishing the allegations at a more abstract level. As Mr Salmon pointed out, Cardinal Dew is no mere celebrity. It would be unreal to divorce from our inquiry the leading position Cardinal Dew occupied in the Catholic Church in New Zealand and as a member of Te Rōpū Tautoko, which were the capacities in which he publicly apologised to victims and survivors of abuse on behalf of the bishops and congregational leaders of the Catholic Church in New Zealand.[70] It is clear that public interest attaches to his identity as well as the allegations more generally.

[100] Turning to the issue of whether a communication is responsible, the Court in *Durie v Gardiner* said this was to be determined by the Judge having regard to all the relevant circumstances of the publication.[71] The Court gave a list of relevant but non-exhaustive circumstances, which were said to include:[72]

> (a) The seriousness of the allegation – the more serious the allegation, the greater the degree of diligence to verify it.
>
> (b) The degree of public importance.
>
> (c) The urgency of the matter – did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.
>
> (d) The reliability of any source.
>
> (e) Whether comment was sought from the plaintiff and accurately reported – this was described in *Torstar* as a core factor because it speaks to the essential sense of fairness the defence is intended to

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70 John Dew "To victims and survivors of abuse, on behalf of bishops and congregational leaders" (press release, 26 March 2021).

71 *Durie v Gardiner*, above n 14, at [66].

72 At [67] (footnotes omitted).

> promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy. The target may well be able to offer relevant information beyond bare denial.

(f) The tone of the publication.

(g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

[101] Because of the limited information we have about the programme, it is not possible for us to evaluate some of these considerations. Plainly, the allegations made are extremely serious, and, as we have just noted, they may be thought to be of considerable importance because of the prominence of the person against whom they are made. It appears there have been efforts made to investigate and verify the claims made, but there is uncertainty about some of the circumstances alleged, including the claimed participation of one of the Sisters of Mercy in some of the offending. We are not currently persuaded of the need for urgency and cannot make any findings about reliability, the tone of the programme or its balance. Those are issues that would need to be assessed in deciding at the trial whether the broadcast was responsible.

[102] In this case, we expect that it would also be relevant, at the trial, to take into account the fact that the broadcast is intended to take place in the context of an ongoing police investigation and, now, in the face of the concerns expressed in Assistant Commissioner Schwalger's affidavit. In that context the court might want to consider the views expressed by Tipping J who, writing for a court of five in *Vickery v McLean*, in the course of explaining whether the privilege asserted might be established by reference to first principles, said:[73]

> It is, in our view, demonstrably not in the public interest to have criminal allegations, even if bona fide and responsibly made, ventilated through the news media. That could only encourage trial by media and associated developments which would be inimical to criminal justice processes. Society has mechanisms for investigating crime and determining guilt or innocence. It is not in the public interest that these mechanisms be bypassed or subverted.

[103] We are not to be taken as expressing any view on these matters. We are simply identifying issues potentially relevant to the decision that would need to be made at the trial about whether the programme has been responsibly broadcast. Our present

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[73] *Vickery v McLean* [2006] NZAR 481 (CA) at [19].

task is the limited one of deciding whether the defence of responsible communication on a matter of public interest is one that could not succeed at the trial. We do not consider we could properly reach that conclusion now. This is a further reason for denying interim injunctive relief.

[104] We turn now to the other matters raised by Mr McKnight and Mr Romanos said to justify the grant of an interim injunction in the circumstances of this case, beginning with their reliance on the District Court judgment.

District Court judgment

[105] As we have earlier explained, Mr Carvell and Ms Carvell applied to the District Court under s 203(3)(b) of the Criminal Procedure Act to have their automatic right to name suppression lifted.[74] Their application was granted by Judge Davidson on 2 August 2023, on the papers. It had been accompanied by a memorandum of counsel and affidavits from each applicant. We have not seen the memorandum or the affidavits.

[106] Mr McKnight told us that Discovery's lawyers acted for the Carvells for the purpose of the application and we do not understand that to be disputed. The application appears to have been advanced so as to facilitate the intended publicity about the complaint and avoid the possible application of automatic suppression under s 203 of the Criminal Procedure Act. Section 203 provides as follows:

> **203 Automatic suppression of identity of complainant in specified sexual cases**
>
> (1) This section applies if a person is accused or convicted of an offence against any of sections 128 to 142A or 144A of the Crimes Act 1961.
>
> (2) The purpose of this section is to protect the complainant.
>
> (3) No person may publish the name, address, or occupation of the complainant, unless—
>
> (a) the complainant is aged 18 years or older; and
>
> (b) the court, by order, permits such publication.
>
> (4) The court must make an order referred to in subsection (3)(b) if—

[74] District Court judgment, above n 7.

(a) the complainant—

(i) is aged 18 years or older (whether or not he or she was aged 18 years or older when the offence was, or is alleged to have been, committed); and

(ii) applies to the court for such an order; and

(b) the court is satisfied that the complainant understands the nature and effect of his or her decision to apply to the court for the order; and

(c) in any case where publication of the identity of the complainant may lead to the identification of the person who is charged with or convicted of the offence, no order or further order has been made under section 200 prohibiting publication of the identity of that person.

(5) An order made under subsection (3)(b) ceases to have effect if—

(a) publication of the identity of the complainant may lead to the identification of the person who is charged with or convicted of the offence; and

(b) that person applies to a court for an order or further order under section 200 prohibiting publication of his or her identity; and

(c) the court makes the order or further order under section 200.

[107] It can be seen that the automatic prohibition in s 203(3) ceases to have effect if a complainant applies to the court under s 203(3)(b) and the court makes an order permitting publication. It should also be noted that s 203(1) states that the section applies if a person is accused or convicted of specified sexual offences in the Crimes Act, which are set out in the subsection. The statutory language indicates that the section is only intended to apply if a criminal process has been commenced. The words "if a person is accused",[75] the various references to "the complainant",[76] and use of the phrase "the person who is charged",[77] all point in that direction. It should also be noted that, as stated in s 203(2), the purpose of this section is to protect the complainant.

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75 Criminal Procedure Act 2011, s 203(1).
76 Section 203(2)–(5).
77 Section 203(4)–(5).

[108] Judge Davidson summarised the affidavits very briefly in the following terms:[78]

> [4] They both say in 1977, when they were children, they were sent by their parents for a short-term stay at St Joseph's Orphanage in Upper Hutt. Both attended the associated nearby primary school. Both the orphanage and the school were run by the Sisters of Mercy, a Roman Catholic religious institute.
>
> [5] Steve Carvell says he was repeatedly subjected to sexual assault and physical and psychological torture. He says this included anal rape and forced oral sex. He also says he saw his sister and an unidentified boy being raped. He is able to specifically name the alleged perpetrators. He eventually submitted a witness statement to the Royal Commission of Inquiry into Abuse in State Care.
>
> [6] Linda Carvell's memory is less clear. She recalls her stay as unpleasant. She does not dispute what her brother says he saw happening to her.
>
> [7] Both want to *"go public about these events to expose the perpetrators and those that hid these crimes"*. They have been interviewed by a news reporter.
>
> [8] Both depose they understand the nature and effect of their decision to seek this order.
>
> [9] Steve Carvell says:
>
> > I am not going into this with my eyes closed. I know that my story will confront many, including those in the Roman Catholic Church, and may garner considerable public and media interest. I also understand that I may be the subject of adverse claims or attacks from those who would prefer my sister and I remain silent.
>
> [10] Linda Carvell says:
>
> > I understand … that I may be the subject of public interest once the abuse becomes public. I also appreciate that some supporters of the perpetrators will refuse to believe what my brother and I experienced and may try to disparage both of us.

[109] The Judge then noted that no one had been formally accused or convicted of any specified sexual offence arising from the allegations.[79] He recorded that he was not confident that the Court's permission was required and that a "plain reading of

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78 District Court judgment, above n 7.
79 At [12].

s 203 would suggest the court's power to give permission is only engaged when someone is formally accused".[80]

[110] He then said that he was nevertheless prepared to proceed on the basis that permission might be required because it seemed to him that if he were to conclude it was not required, the applicants would nevertheless proceed.[81] He made the order, permitting publication of the name, address or occupation of the applicants.[82] But he concluded:

> [20] In the circumstances, however, there is an order under s 205 [of the] Act forbidding publication of paragraphs [5] and [6] of these reasons; the order is made so as not to jeopardise any potential fair trial rights.

[111] It is on that final paragraph that the argument advanced by counsel for Cardinal Dew rests. The order was purportedly made under the authority of s 205 of the Criminal Procedure Act. Section 205(1) provides:

> **205 Court may suppress evidence and submissions**
>
> (1) A court may make an order forbidding publication of any report or account of the whole or any part of the evidence adduced or the submissions made in any proceeding in respect of an offence.

[112] Mr Romanos noted that Mr Morrah's evidence in the High Court had made no mention of the condition that Judge Davidson had imposed, inviting us to infer this was deliberate, and complained about the fact that requests for the details of what had happened in the District Court were initially resisted, followed by provision of a redacted version of the judgment, omitting [5]–[6]. Discovery had also opposed the application made to this Court for an order that the judgment be made available in unredacted form, wrongly claiming, in Mr Romanos' submission, that the information in the redacted paragraphs was "completely irrelevant".

[113] Mr Romanos submitted that the actual and intended effect of the order was to prevent publication of the allegations recorded in [5] of the District Court judgment,

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80 At [16].
81 At [17].
82 At [19].

likely in substance to be the very allegations that would be repeated in the proposed broadcast. In the circumstances, broadcasting the programme would breach the order.

[114] For a number of reasons, we do not accept that the District Court judgment can have this effect. First, we do not consider there was jurisdiction to make the order. We have set out above s 205(1) of the Criminal Procedure Act. It applies only to reports or accounts of evidence given or submissions made in any "proceeding in respect of an offence". The order was not made in such a proceeding, and no such proceeding has been commenced. We see s 205 as being deliberately restricted in its application, in much the same way as s 203 is limited to circumstances arising in the context of an actual criminal proceeding. Both sections are part of a suite of provisions dealing with restrictions on reporting of criminal proceedings in sub-pt 3 of pt 5 of the Criminal Procedure Act. These provisions, commencing with the power to clear the court in s 197, all concern different circumstances that can arise in the course of criminal proceedings. Some of the provisions impose automatic suppression of identities, for example ss 201, and 203–204.[83] Others confer powers on the court to suppress names, evidence and identifying particulars, for example ss 202 and 205.[84] But the sections all apply to criminal proceedings that have been commenced: they do not apply unless a proceeding is underway, or has been concluded.

[115] Consistent with this reasoning is the fact that the principal purpose of the Criminal Procedure Act is to "set out the procedure for the conduct of criminal proceedings".[85] And under s 14(1) a "criminal proceeding in respect of an offence" is commenced by filing a charging document in the District Court. We consider that the words "any proceeding in respect of an offence" used in s 205(1) must be construed consistently with s 14(1) to connote a proceeding that has been commenced as provided by that subsection. Accordingly, the power to suppress evidence and submissions conferred by s 205(1) only arises when a charging document has been filed in the District Court.

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83 These sections respectively suppress the identities of those accused or convicted of incest or sexual conduct with a dependent family member; complainants in specified sexual cases; and child complainants and witnesses.

84 Respectively, ss 202 and 205 confer these powers in respect of witnesses, victims and connected persons; and evidence and submissions.

85 Criminal Procedure Act, s 3(a).

[116] Here, despite doubts about whether s 203 applied, the Judge was prepared to make the order sought so as to allow publication of the Carvells' names. But we do not consider he had power to restrict publication under s 205(1) of the Act because the purported order did not relate to evidence or submissions made in a proceeding in respect of an offence.

[117] Second, given that the Judge was plainly intending to allow the Carvells' names to be published, and knew he was being asked to do so to enable them to "go public" having spoken to a news reporter, the suggestion that he was intending at the same time to prevent them doing so under s 205 is untenable. This consideration leads us to the view that he did not want publication of the fact there was a judgment repeating the evidence recorded at [5] and [6], not that he was intending to prevent the Carvells saying what they wanted to say about the complaint.

[118] No other power was available to the District Court to make the order purportedly made under s 205(1). Consequently, we conclude that the District Court judgment cannot be regarded as preventing broadcast of the Discovery programme. We add finally that we are not prepared to infer impropriety from the fact that Discovery did not bring the District Court judgment to the attention of the High Court.

Interfering with the administration of justice

[119] We turn next to the claim that the broadcast would interfere with the administration of justice by undermining Cardinal Dew's right to seek name suppression were he to be charged as a consequence of the police investigation, and unjustifiably impacting his fair trial rights.

[120] The right to apply for name suppression would arise under s 200 of the Criminal Procedure Act. Section 200(1) empowers the court to make an order "forbidding publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of, an offence". The court may make an order under the section if it is satisfied that publication would be likely to have one or more of eight consequences set out in s 200(2)(a)–(h). Of those, Mr Romanos highlighted the

real risk of prejudice to a fair trial.[86] On the face of it, the section does not apply here, because there has been no charge. But, as we apprehend it, Mr Romanos raised the issue on the basis that if there were a charge, Cardinal Dew's right to seek suppression would be undermined because of the intense and lasting publicity that would surround the accusations once the programme was broadcast. Were he to be tried and acquitted, the right to seek permanent suppression would also be undermined. We are essentially invited to consider the position prospectively.

[121] We accept that the shocking nature of the allegations, the Cardinal's career as a leader of the Church and his role for it before the Royal Commission are all matters that are likely to result in intense and lasting publicity. We also accept that, if charges were brought, the trial date would likely be a long way off. But this is not a case where it is likely the impact of the programme would be greatly diminished by the delay between the broadcast and the trial, a consideration mentioned in this Court's judgment in *Gisborne Herald Co Ltd v Solicitor-General*.[87] The release of the Royal Commission's report, anticipated next year, would likely emphasise the public interest in the allegations. Allegations of sexual misconduct against high profile persons can have a profound impact and create an environment in which the person against whom the allegations are made has no effective response prior to the trial.[88] The right to silence is only exercised at further cost.

[122] Having said all that, trial by jury is characterised by the fact that juries promise to try the case according to law. They are instructed to put pre-trial publicity out of mind, to avoid prejudice and to decide the case based only on what they have heard in the courtroom. There are twelve jurors, who must strive for unanimity, and decide the case unanimously or by a margin of 11 to 1. The system is predicated on an assumption that juries comply with the instructions they are given.[89] In a case such as the present, there would be a very great emphasis on all these matters. We do not think it can be assumed that a fair jury trial could not take place; to do so would call into question the

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86 Section 200(2)(d).

87 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA) at 569.

88 *WFZ v British Broadcasting Corp* [2023] EWHC 1618 (KB) at [56]–[57].

89 See for example *Weatherston v R* [2011] NZCA 276 at [24]; *Taylor (Bonnett) v The Queen* [2013] UKPC 8, [2013] 1 WLR 1144 at [25] per Lord Hope, Lord Reed, Lord Carnwath and Sir John Chadwick; and *R v Glennon* (1992) 173 CLR 592 at 603 per Mason CJ and Toohey J.

essential premises on which trial by jury proceeds. We prefer to rely on the prospect that jurors would faithfully carry out their duty.

[123] We see this case as essentially different from *R v Burns (Travis)* on which Mr Romanos relied.[90] We do not depart from the principle expressed in that case, that where there is a significant risk that a defendant will not receive a fair trial open justice should not prevail over the right to a fair trial.[91] In that case, the risk to a fair trial arose in most unusual circumstances. Mr Burns was appealing against his conviction for the murder of Joanne McCarthy. In an unrelated murder case he had previously given evidence for the Crown in a preliminary hearing alleging that the defendant had confessed to him that he had killed the victim, Tiana Furlan. That defendant, who was committed for trial, took his own life in prison before the trial could commence. Before doing so, he wrote a book in which he stated that a person able to be identified as Mr Burns had in fact killed Ms Furlan. This Court concluded that the circumstances were so unusual that there was an inevitable risk that any retrial which he succeeded in securing on appeal would "involve the very real risk of substantial prejudice", and in fact "could virtually destroy any semblance of a fair trial".[92]

[124] Counsel for Cardinal Dew relied on *Teacher v Stuff Ltd,* in which Cooke J was prepared to consider the exercise of the Court's inherent jurisdiction to prevent publication, even though there was uncertainty as to whether charges would be laid.[93] He considered it was necessary to consider all the circumstances, including not only the likelihood of charges, but the potential harm arising from the proposed publication, and precisely what was sought to be suppressed. He also referred to the possibility that pre-charge publicity would undermine the court's ability to impose suppression orders if charges were subsequently laid.[94] Although it was not certain, Cooke J was satisfied that there was a "distinct prospect" that charges would be laid, and the case was one in which suppression orders would be likely if charges were laid because the case involved alleged sexual offending against young persons.[95]

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90 *R v Burns (Travis)*, above n 40.
91 At [11].
92 At [21].
93 *Teacher v Stuff Ltd* [2019] NZHC 1170, [2019] NZAR 902.
94 At [19].
95 At [14] and [19]. The Judge also referred to the particular circumstances relating to the applicant.

[125] The complainants in the present case are of course opposed to suppression, as already discussed, and we are not satisfied that suppression orders would be made if charges were brought. Moreover, we are not in a position to make any assessment of whether there will be a prosecution. In these circumstances to prevent the broadcast of the programme would be to guard against an eventuality that might never occur, and that is not an appropriate course having regard to the importance of the principle of freedom of speech. As was acknowledged in *Television New Zealand Ltd v Solicitor-General* the freedom of the press is not to be interfered with lightly, and can be justified only where there is a likelihood of publication of material that would seriously prejudice the fairness of the trial.[96]

[126] For these reasons we are not persuaded that the prospective right to apply for name suppression in the event of a prosecution being commenced would be a proper basis on which to restrain broadcast of the programme. Nor in the circumstances, including where the most that can be said is that it is possible a trial may occur at some future point in time, are we persuaded it would be appropriate to order prior restraint on the basis the programme would have a real likelihood of prejudicing fair trial rights.

Invasion of privacy

[127] We come now to the argument that a person under criminal investigation should have a reasonable expectation of privacy in respect of information relating to the investigation.

[128] Since this Court's decision in *Hosking v Runting* the law of New Zealand has recognised the tort of invasion of privacy.[97] The tort protects against giving publicity to private facts and, separately, intrusion into solitude and seclusion. This case engages the former. In such a case, under the formulation of the test consistently applied in New Zealand, the plaintiff must prove:[98]

> 1. The existence of facts in respect of which there is a reasonable expectation of privacy.

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96 *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1 (CA) at 3.

97 *Hosking v Runting*, above n 11.

98 At [117] per Gault P and Blanchard J. Tipping J was in general agreement with the judgment of Gault P and Blanchard J, but took the view that the level of the offensiveness of the publication went to whether there was a reasonable expectation of privacy: at [223] and [255]–[256].

2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[129] The second requirement stated in the judgment of Gault P and Blanchard J in *Hosking v Runting* is controversial.[99] As discussed by this Court in *Hyndman v Walker* and *Peters v Attorney-General* doubts have been expressed as to whether there must be a separate inquiry into whether the publicity is highly offensive.[100] It is not, however, necessary for us to re-examine that aspect of the tort for the purposes of this appeal.

[130] That is so, principally, because the predicate of the first element of the tort as formulated above is the existence of facts in respect of which there is a reasonable expectation of privacy. Here that can hardly be asserted in relation to Mr Carvell's allegations against Cardinal Dew: the Cardinal's response is that he was not responsible for the conduct alleged. It is not a case, on his account, of there being private facts in respect of which there is an expectation of privacy. Rather, it is said the facts do not exist. If the allegations are untrue, publicity given to the allegations would undoubtedly be offensive, but the remedy for that lies in the law of defamation. There is no need to consider, as the second stage, whether the publicity is highly offensive, because publicity has not been given to private facts and is not intended to be.

[131] There is another way of approaching the privacy issue, which leads to the same conclusion. That is that the allegations are notionally about conduct that occurred between Cardinal Dew, Mr Carvell and Ms Carvell. Even leaving aside the question of whether a reasonable expectation of privacy should avail those seeking to prevent

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99 See for example NA Moreham "Abandoning The 'High Offensiveness' Privacy Test" (2018) 4 CJCCL 161; and NA Moreham "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy in Tort" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in honour of John Burrows QC* (LexisNexis, Wellington, 2008) 231.

100 *Hyndman v Walker* [2021] NZCA 25, [2021] 2 NZLR 685 at [37]–[41]; and *Peters v Attorney-General* [2021] NZCA 355, [2021] 3 NZLR 191 at [111]–[115]. See too the observations of Elias CJ in *Television New Zealand v Rogers*, above n 13, at [25], stating that the Supreme Court should reserve its position on whether the tort of privacy "requires not only a reasonable expectation of privacy but also that publicity would be 'highly offensive'".

the publication of information about their own serious wrongdoing,[101] any privacy claim of Cardinal Dew must ultimately yield to Mr Carvell's right to speak about the conduct. If the allegations are true, given their nature, we consider Mr Carvell's right to speak would clearly outweigh any privacy interest attaching to the conduct.

[132] It is necessary then to consider Cardinal Dew's argument based on *ZXC v Bloomberg LP*.[102] In that case the United Kingdom Supreme Court upheld conclusions reached in the Courts below that the chief executive of one of the regional divisions of a company (referred to in the judgment as "X Ltd") under investigation for corruption in an overseas country had a reasonable expectation of privacy in respect of information contained in a letter of request sent to a foreign state by a United Kingdom law enforcement body (referred to in the judgment as the "UKLEB").[103]

[133] The private information on which the plaintiff relied was described by the Court as follows:

> [19] The private information which the claimant claims was misused as a result of the publication of the article (the "information") is as follows: (i) the fact that the UKLEB had asked the authorities of the foreign state to provide banking and business records relating to four companies in its investigations into the claimant (and others) and wanted the information about the claimant from the foreign government; and (ii) the details of the deal that the UKLEB was investigating in relation to the claimant, including that: (a) the UKLEB considered the claimant had provided false information to the X Ltd board on the value of an asset in a potential conspiracy to which another named officer of X Ltd may have been complicit; (b) the UKLEB believed that the claimant had committed fraud by false representation by dishonestly representing that [name] was a valuable asset based on data for an entirely different asset; and (c) the UKLEB was seeking to trace the onward distribution of [a substantial sum of money] paid into [a bank account] as it believed that these monies were the proceeds of a crime carried out by the claimant.

[134] It was found as a matter of fact that almost all of the information contained in the article had been drawn from the letter of request which had been obtained by a

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101 See for example *Lord Browne of Madingley v Associated Newspapers* [2007] EWCA Civ 295, [2008] QB 103 at [52]; and *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 at [21]. See also the discussion in NA Moreham "Privacy, freedom of expression and legitimate audience interest" (2023) 139 LQR 412 at 430–433.

102 *Bloomberg* (SC), above n 17.

103 At [1]–[5] and [144]–[146].

Bloomberg journalist.[104] It is not clear from the judgments how the information got into the journalist's hands, but Nicklin J found that the letter of request had been given to the journalist "in what must have been (and should have been recognised as) a serious breach of confidence".[105]

[135] In its judgment the Supreme Court identified a "general rule" or "legitimate starting point" that "a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation".[106] It is clear that in adopting that approach the Court was reflecting considerable concern in the United Kingdom about the negative impact on the reputation of innocent persons arising from publicity given to the fact they were under investigation by the police or other state agencies.[107] The Court noted these concerns have led to changed police practices in the United Kingdom.[108]

[136] The reference to a "legitimate starting point" reflects the Court's view that information about the fact and subject matter of criminal investigations is a category of information that should be characterised as private for the purposes of the "stage one" inquiry (as to whether there is a reasonable expectation of privacy) unless there are strong countervailing circumstances.[109] The Court explained that this was "not a legal rule or legal presumption, let alone an irrebuttable presumption". What is needed is a fact specific inquiry.[110] The Court emphasised that the starting point would not invariably lead to a finding that there was an objectively reasonable expectation of privacy in the information, and the claimant would still need to prove the circumstances establishing there was objectively a reasonable expectation of privacy.[111]

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104 At [4].

105 At [18], citing *ZXC v Bloomberg LP* [2019] EWHC 970 (QB), [2019] EMLR 20 [*Bloomberg* (HC)] at [125].

106 At [63] and [146].

107 At [80]–[99] and [108].

108 At [83]–[86].

109 At [72]–[73]. The stage one inquiry in the United Kingdom covers the same considerations as the first element of the tort of interference with privacy delineated in *Hosking v Runting*, above n 11, at [117] per Gault P and Blanchard J.

110 At [67].

111 At [68]–[69].

[137] Once it was established that the relevant information was that a person, prior to being charged, was under criminal investigation, the correct approach was for the court:[112]

> … to start with the proposition that there will be a reasonable expectation of privacy in respect of such information and thereafter consider by reference to all the circumstances of the case whether the reasonable expectation either does not arise at all or was significantly reduced. If the expectation does not arise then the information can be published. If the expectation is reduced it will bear on the weight to be attached to the article 8 rights at stage two …

[138] In analysing whether there was a reasonable expectation of privacy in the circumstances the Supreme Court was clearly influenced by the facts that:

(a) The case was not one involving the publication of information about an individual's wrongdoing resulting from the defendant's own investigations. Everything that was sought to be published was derived from the letter of request to the foreign state made by the UKLEB. This meant that the appeal was:[113]

> … confined to the impact of information derived from an investigation of a person by an organ of the state rather than the distinct and separate situation that might arise if Bloomberg wished to publish information as to the results of its own investigations.

(b) The letter of request was highly confidential in nature, and clearly expressed to be so.[114]

(c) While in some cases the nature of the plaintiff's activity plainly affected the question of whether there was a reasonable expectation of privacy in the relevant information, this was not such a case. Rather, it turned on the nature of the UKLEB's criminal investigation into the claimant's activities. The "activity in question was being subject to the UKLEB's

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112 At [70]. The reference to stage two is to the balancing of the rights to privacy and freedom of expression under arts 8 and art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which, in the United Kingdom, follows from the determination of whether there is a reasonable expectation of privacy: see Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), arts 8 and 10; and *Bloomberg* (SC), above n 17, at [26].

113 At [78].

114 At [11]–[17].

investigation".[115] The private nature of that information was not affected by the specifics of the activities being investigated.[116]

(d) The "reasonable expectation of privacy attached to the fruits, not of Bloomberg's own investigation … but of the UKLEB's ongoing confidential investigation into the claimant and the views the UKLEB had formed in that context as to the claimant's potential liability".[117]

[139] In the High Court in *ZXC v Bloomberg LP*, Nicklin J had drawn a distinction between "speculation about an individual's possible involvement in criminal activities" and "publication of ostensibly credible and genuine information" as to the investigating agency's own findings or allegations of offending.[118] That approach was affirmed by the Court of Appeal, where Simon LJ addressed it as follows:[119]

> In my view there is plainly a difference between a report about the alleged criminal conduct of an individual; and a report about a police investigation into that individual and preliminary conclusions drawn from those investigations. The latter may include the former; but it also conveys that the investigating authority regards the allegations as serious enough to warrant investigation and had drawn preliminary conclusions to the disfavour of the claimant. For the reasons set out above there is a significant distinction, and that is why the approach of the police in this country has changed. In the present case the Judge was right to identify the distinction. …

[140] This distinction was not departed from in the Supreme Court. However, it has been criticised by Professor Nicole Moreham on the basis that, because the Courts did not distinguish between situations where the defendant has obtained information about an investigation from the police themselves and where they did so through an independent third party, they left open the possibility that a victim might face liability for telling others that the police were investigating their allegations.[120] Here that

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115 At [133].

116 At [131].

117 At [133]. The published article included the fact that UKLEB had already formed views adverse to the claimant, including the view he had provided false information to the company's board about the value of an asset in a potential conspiracy with another person, that he had committed fraud by false representation and that UKLEB was seeking to trace money it believed were the proceeds of crimes he had carried out: at [19].

118 *Bloomberg* (HC), above n 105, at [133(ii)].

119 *ZCX v Bloomberg LP* [2020] EWCA Civ 611, [2021] QB 28 [*Bloomberg* (CA)] at [96] per Simon LJ, with whom Underhill LJ agreed: at [150]. Bean LJ agreed with both judgments: at [144].

120 NA Moreham "Privacy and Police Investigations: *ZXC v Bloomberg*" [2021] 80(1) CLJ 5 at 6. See also NA Moreham "Privacy, defamation and *ZXC v Bloomberg*" (2022) 14 JML 226 at 227.

concern is less significant, given the Supreme Court's statement that the appeal was confined to the impact of information derived from an investigation of a person by an organ of state,[121] and the fact that the proposed broadcast will be focused on allegations made by (and derived from) Mr Carvell, the victim of the claimed wrongdoing.

[141] In fact, none of the circumstances we have referred to above at [138] that seem to have been influential in *Bloomberg* are present. From what we are given to understand by Mr Morrah's evidence, the programme intended to be broadcast will be focused on the allegations that Mr Carvell makes. The fact that there is a police investigation will be mentioned, as will Cardinal Dew's denial. But there is no ground here for saying the programme will report on the nature of the police investigation or on any preliminary conclusions that might have been reached. Mr Carvell's right to freedom of expression, and Discovery's right to impart information, affirmed in s 14 of the Bill of Rights Act, cannot in these circumstances be displaced by the fact that the police are conducting an investigation. Unlike Bloomberg LP's article, Discovery's programme will concern its own investigation, and will not contain an account of suspicions and preliminary conclusions formed by an organ of the state. The absence in the programme of any details of the Police investigation makes this case fundamentally different to *Bloomberg*.

[142] We have already concluded that any potential privacy interest Cardinal Dew has insofar as Mr Carvell's allegations are concerned cannot avail him in the circumstances of this case. Given that, we see no room for a finding that the programme's reference to an ongoing police investigation amounts to an interference with a reasonable expectation of privacy. Rather, the rights of the parties fall to be considered on the basis of the right to freedom of speech and the protections afforded by the law of defamation, which is the context in which issues concerning personal reputation are generally addressed. In a case such as this where the potential defendant has signalled an intention to plead truth and the real nub of the publicity will not be a focus on the police investigation but on the alleged conduct, it would be no answer to a claim in defamation that the fact the police were investigating was true: rather, the defence has to be that the underlying conduct indeed took place.

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[121] *Bloomberg* (SC), above n 17, at [78].

[143] We do not need in these circumstances to reach any view about the extent to which *Bloomberg* should be regarded as a statement of the law applicable in this country. We think it is worth noting in this context, however, that New Zealand media and police do not have a record equivalent to that which animated the concerns referred to by the Supreme Court in *Bloomberg* and by Sir Brian Leveson in the *Inquiry into the Culture, Practices and Ethics of the Press*, which led to the recommendation in that report that:[122]

> … save in exceptional and clearly defined circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.

[144] By the same token, this country is unlikely to be immune from the concerns that the Supreme Court articulated in *Bloomberg* about the negative effects on an innocent person's reputation if the fact that they are the subject of an investigation by the police or an organ of the state is published. These concerns were said to have the support of the senior judiciary, the police, the Independent Office of Police Conduct, the Director of Public Prosecutions, the Home Affairs Select Committee and the Government,[123] and led to the formal adoption of a police policy that expressly recognised that the names of suspects should not be released prior to charge. The Supreme Court quoted in this respect from guidance published by the College of Policing on relationships with the media, which stated:[124]

> Decisions must be made on a case-by-case basis *but, save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of a crime should not be released by police forces to the press or the public*. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence.

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122 At [80]–[82] and [89]; and Sir Brian Leveson *An Inquiry into the Culture, Practices and Ethics of the Press* (Department for Digital, Culture, Media & Sport, HC 780-II, 29 November 2012) vol 2 at 791.

123 *Bloomberg* (SC), above n 17, at [80].

124 At [83], citing College of Policing *Guidance on Relationships with the Media* (May 2013) at [3.5.2].

[145] We have not been referred to, nor have we been able to find, any equivalent published policy of the New Zealand Police.[125] However, an approach such as that adopted in the United Kingdom has obvious advantages in the public interest, and we have no reason to suppose that a similar approach is not in fact taken here. In practical terms, were a different approach to be taken in this country we expect the courts would wish to consider whether the tort of invasion of privacy can or should be developed to embrace publicity about persons suspected of but not charged with criminal offending, unless some proper justification could be relied on.

[146] But any such development would need to acknowledge the central role of the law of defamation in protecting reputation, and the limited scope for claims alleging breach of privacy in respect of reputationally damaging claims made by a victim of serious crime. We are persuaded by the view expressed by Warby J in *Sicri v Associated Newspapers Ltd* that:[126]

> … there remains a good deal to be said today for the principle, identified long ago by the Court of Appeal in *Lonhro v Fayed (No 5*) … that reputational damages are only available in defamation and limited other torts which are premised on the falsity of the information … [T]here would … be merit in a general rule that a claimant who seeks to clear his name of a defamatory imputation arising from a wrongful disclosure of private information, and to recover damages for reputational harm, should be required to bring a claim in defamation.

[147] For all these reasons we have concluded that Cardinal Dew's appeal must be dismissed.

The R and H appeals

[148] We approach these appeals on the basis that Discovery has said it will not name Sister H in the programme. Had she been named it would have been necessary for Discovery to proceed on the basis that she was involved in the manner alleged by Mr Carvell, that is by participating in the game of tag which included sexual offending

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125 Historically, members of the Police were required to observe the "strictest secrecy" in relation to police information and business: see Police Regulations 1992, reg 7; and *The Stepping Stones Nursery Ltd v Attorney-General* [2002] 3 NZLR 414 (HC) at [33]. Those Regulations were repealed by s 130(5) of the Policing Act 2008 and reg 7 was not re-enacted.

126 *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB), [2021] 4 WLR 9 at [158], citing *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489. See also *Bloomberg* (HC), above n 105, at [150(i)].

on her part. It is not clear that the programme would have made any other allegation against her directly.

[149] However, the whole circumstances of the initial episode of offending in the dormitory, and the allegations that Mr Carvell was subsequently raped by another priest (now deceased) and on another occasion woken up and taken to an "office" where he witnessed Ms Carvell being raped by Cardinal Dew, carry possible implications for the conduct of the sisters responsible for the care of these children.

[150] The important question that then arises is whether the programme may properly be broadcast on the basis that a Sister of Mercy was involved in the initial offending without naming her, and with the potential implication that another unnamed sister, or unnamed sisters, took no action to prevent the alleged events. The principal issue is whether Sister H and Mrs R are to be considered as persons who will be identified in the programme, and so defamed by it (putting to one side possible defences).

Submissions

[151] Ms Hubble submitted that both Sister H and Mrs R would be able to be identified if the programme was broadcast containing information that enabled the public to ascertain the date range and location of the alleged abuse, by virtue of their previous association with the School and Orphanage. Sister H lived at the convent and taught at the nearby primary school in 1976 and returned in 1979. Mrs R lived and worked in the Orphanage for the nine years from 1977 to 1985. Ms Hubble submitted that in the minds of many both would be associated with allegations of abuse in that place at the time alleged. Even if not named in connection with any specific activity there would be an inference that the sisters in charge at the time must have at least turned a blind eye to abuse in or in the vicinity of the Orphanage.

[152] This was particularly so in the case of Mrs R given her strong connection with the Orphanage, and her role as the supervisor of the dormitory where the events took place or had their genesis. She could hardly be more closely linked to the allegations. In the case of Sister H, while the association is less strong, hers was the name mentioned by Mr Carvell, and brought up by Mr Morrah, when speaking to others

about whether they remembered her. His questions would have had the effect of associating Sister H with the allegations, and given the events are said to have occurred many years ago, it cannot be assumed people would have remembered that she was not there at the relevant time. In the circumstances both would be defamed if the programme were published whether by reference to the role of a sister in the abuse of Mr Carvell, or by virtue of the fact that children in the care of the Sisters of Mercy at St Joseph's had been abused.

[153] Ms Hubble submitted further that, on the facts as are now before the Court, the allegations made in respect of Sister H did not occur. This, in Ms Hubble's submission, undermines the credibility of the entire news story.

[154] In terms of the defence of responsible communication on a matter of public interest, she argued that Discovery have not shown why there is any public interest in associating either Mrs R or Sister H with the news story. Neither has been a leader within the Church or had a public profile.

[155] Mr Salmon submitted that the kind of reasoning relied on by Ms Hubble could not establish that the programme would reasonably lead people acquainted with Sister H and Mrs R to conclude that they were referred to. Further, he submitted that where reference is made to a group, it is not enough for a person who knows that the plaintiff is a part of the group to then think of the plaintiff; the question is whether there is anything in the publication or the admissible surrounding circumstances to identify them as one of the persons referred to in the publication.

[156] Mr Salmon accepted that it is possible to rely on facts extrinsic to a publication that will identify a plaintiff, but submitted the extrinsic facts relied on must identify the plaintiff as a subject of the publication: it is not possible to rely on speculation or innuendos from the extrinsic facts. For this he relied on what was said by Lord Donovan in *Morgan v Odhams Press Ltd*:[127]

> The plaintiff must prove that the words of the article would convey a defamatory meaning concerning himself to a reasonable person possessed of knowledge of the extrinsic facts. This requirement postulates (as the appellant

[127] *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (HL) at 1264.

> expressly accepted) not merely a reasonable person but also a reasonable conclusion. Mere conjecture is not enough.

[157] Mr Salmon submitted that while the presence or absence of someone at St Joseph's is an extrinsic fact that could be relied on, that fact would not identify either Sister H or Mrs R. There were 13 sisters there at the relevant time; something more would be required to show that any one of them was the unnamed person referred to in the programme. The suggestion that both could be identified when the programme was only going to refer to one unnamed person implied that neither would be sufficiently identified. Even though Mr Morrah had asked about whether people remembered Sister H, there was no evidence that in doing so he implied that she had been involved in any abuse. Nor would it be suggested that the unnamed person was necessarily one of the three sisters resident in the Orphanage. In the circumstances, association of the allegations with either Sister H or Mrs R could only be speculation or conjecture.

[158] Addressing what he saw as the secondary claim that the broadcast would suggest that Mrs R facilitated or witnessed and failed to stop the abuse, Mr Salmon argued that this imputation did not arise, since the news story made no suggestion that other sisters were aware of or enabled the abuse. As with the imputation that either of the sisters was the unnamed sister, there were insufficient extrinsic facts to establish that Mrs R was the sister referred to. Coming to that conclusion would require a significant logical leap, involving speculation or assumptions around how sexual abuse occurs and who should have been aware of it.

[159] Finally, Mr Salmon says no issue can be taken with the Judge's assessment of Discovery's defences to a potential defamation claim by the sisters.

Analysis

[160] We consider it is clear that the programme will impugn the group of sisters who were associated with St Joseph's and engaged in running the Orphanage in November 1977, leaving aside the issue of possible defences that might succeed. That, however, is insufficient to sound in liability for defamation. The fact that none of them will be named makes it necessary to consider whether, notwithstanding that fact, they

will nevertheless be able to be identified by what is said in the programme. In this context, the law applies a test which asks whether the words used are such as would reasonably lead people acquainted with them and with knowledge of any relevant extrinsic facts (that is, which are not general knowledge) to believe it is they who are referred to.

[161] In *Hyams v Peterson*, Cooke P writing for this Court said:[128]

> Where there is an attack on a group and the plaintiff is not named, the question whether the material was published of and concerning the plaintiff turns on whether the words published would themselves reasonably lead people acquainted with the plaintiff to the conclusion that he was a person referred to. If a defamatory statement made of a class or group is reasonably to be understood to refer to every member of it, each one has a cause of action …

[162] It is clear from this that the question of whether a person has been identified turns on whether the publication is such as would lead persons acquainted with the plaintiff to reasonably believe that he or she was the person referred to.[129]

[163] In stating the law in those terms, Cooke P referred to *Knupffer v London Express Newspaper Ltd* in which Lord Atkin said:[130]

> I venture to think that it is a mistake to lay down a rule as to libel on a class, and then qualify it with exceptions. The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him, and it is irrelevant that the two or more persons are called by some generic or class name … The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, … Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or, at any rate, of himself.

[164] Without seeing Discovery's programme, it is difficult for us to be sure what it will say. But on the basis of what we have been told, we think it is likely that the programme will describe the fact that the abuse took place at and in the vicinity of the

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128 *Hyams v Peterson*, above n 27, at 654–655 (citations omitted).

129 See also *David Syme & Co v Canavan* (1918) 25 CLR 234 at 238 per Isaacs J; and see Ursula Cheer "Defamation" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [15.4.1]–[15.4.2].

130 *Knupffer v London Express Newspaper Ltd* [1944] AC 116 (HL) at 121–122.

Orphanage known as St Joseph's in Upper Hutt, that it was run by the Sisters of Mercy, that one of the sisters is alleged to have taken part in an act of sexual abuse, and that there were various incidents occurring at night over a 12 day period involving Cardinal Dew and others in November 1977. It is possible that further details of the allegations may be included, such as the claim that the abuse involved a game of tag which, we infer, is said to have taken place in the middle of the night in the boys' dormitory.

[165] It is in this context we must address the two imputations identified by Ms Hubble. The first is that either Mrs R or Sister H was the unnamed sister who will be alleged to have participated in the abuse. The second is specific to Mrs R, being that she, as the person who oversaw the boys' dormitory of the Orphanage at the relevant time, must have known about what is said to have occurred, and failed to put a stop to it. We address each in turn.

First imputation

[166] Mrs R's unchallenged evidence is that many would be aware of her role as the person in charge of the boys' dormitory. Similarly, it is clear that many would remember Sister H's association with St Joseph's in the years either side of the time the abuse was said to have occurred. These are extrinsic facts that might, in the minds of some who are familiar with the situation, cause them to speculate that either might be the sister referred to in the programme as having participated in the alleged abuse. But as explained by Lord Donovan in *Morgan v Odhams Press Ltd* something more is required.[131] Where extrinsic facts are relied on for identification of an unnamed person who is part of a group, the extrinsic fact must make it plain that the person is indeed the one referred to.

[167] That is not the case here. Mr Morrah confirmed in his evidence that Discovery, as a responsible broadcaster, would fairly and accurately reflect the responses to his enquiries and the additional matters raised in these proceedings. The programme will not allege, as we were given to understand by Mr Salmon and based on Mr Morrah's

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[131] *Morgan v Odhams Press Ltd*, above n 127, at 1264. See also *McCormick v John Fairfax & Sons Ltd* (1989) 16 NSWLR 485 (NSWSC) at 491.

evidence, that the person responsible for the abuse was a sister who resided at the Orphanage (indeed, it is clear that Sister H did not reside there at the relevant time, and she was the person originally named by Mr Carvell). That means the pool of persons potentially implicated by the allegation about the unnamed sister is, on its face at least, wider than the 13 sisters who lived at the convent at the relevant time.

[168] With particular reference to Mrs R, we accept the evidence about the layout of the dormitory, and have no reason to doubt the evidence of Mrs R and Mr Ellis about the implications of that — but this falls well short of the kind of extrinsic evidence that would be necessary to establish that Mrs R is the unnamed sister who will be referred to in the programme. That is all the more so if, as Mr Morrah indicated would occur, the programme incorporates the response raised on behalf of Sister H that the unnamed sister did not live at St Joseph's at the relevant time. Provided Discovery makes it clear that the unnamed sister did not reside at St Joseph's at the relevant time we see no room for any inference that Mrs R was the unnamed sister involved in the first imputation.

[169] As for Sister H, unless the programme includes details which might reasonably lead people acquainted with her to believe she is the unnamed sister referred to, all persons familiar with her history could do would be to speculate. She was simply one of many members of the Sisters of Mercy across the country who, the evidence before us would suggest, did not live at St Joseph's in Upper Hutt at the relevant time.

[170] Nor are we persuaded that Mr Morrah's questions of the people he interviewed for the news story would identify Sister H as the unnamed sister referred to. As we have noted, Mr Morrah stated that four of the 10 people he spoke to who had been living at the Orphanage in 1977 remembered a Sister H. This is the only indication we have seen of the questions he asked. There is no suggestion he put it to interviewees that Sister H was a perpetrator of the abuse. Although interviewees might speculate that Sister H was the unnamed sister, that is all it would be. As Palmer J pointed out, the interviewees might equally wonder whether Sister H was being ruled out or being sought as a witness.[132]

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132 *[R] v Discovery NZ Ltd*, above n 1, at [28].

[171] A further difficulty with the appellants' argument is that the allegation about the unnamed sister relates, on its face, to one person. This is not an imputation where it is said that all of a class of persons were responsible for the impugned conduct, or that a number of them were. The allegation as it has been advanced to date is that there was one sister involved in the actual offending. This kind of situation was addressed in *McCormick v John Fairfax & Sons Ltd* in which there was an allegation that one of the members of a three-man firm of private investigators had been involved in perverting the course of justice.[133] Since the allegation was that only one person was involved it could not be said that the group of three had been defamed. Hunt J held:[134]

> As the matter complained of in the present action cannot, by its express wording, be interpreted as asserting that each member of the class was guilty of this particular conduct, and as there is nothing in the matter which points to the plaintiff as the one who is alleged to have been guilty of that conduct, it is incapable of conveying the imputation that it was the plaintiff who was guilty of that conduct.

[172] As with the Court in that case, we are satisfied for the reasons we have already explained that there is nothing in the intended programme that will allege more than one sister participated in the conduct which will be the subject of Mr Carvell's complaint. Accordingly, in respect of the first imputation we conclude that Palmer J was right to find that the programme would not identify either of the appellants as the unnamed sister, on the basis that there would not be sufficient information to do so.[135] The consequence is that neither would be defamed.

Second imputation

[173] We now come to the second imputation, specific to Mrs R. As Mr Salmon pointed out, there is no suggestion that the programme itself will state there were others there who were aware of and took no action in relation to the abuse. It is, however, possible that viewers with knowledge of Mrs R's role at the Orphanage would infer that she must have been aware of the alleged abuse, if the allegations are sufficiently particularised in the story. Relevant in this context is Mrs R's evidence,

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133 *McCormick v John Fairfax & Sons Ltd*, above n 131.
134 At 492.
135 *[R] v Discovery NZ Ltd*, above n 1, at [30].

and Mr Ellis's to similar effect, who both effectively claimed that the abuse described could not have occurred without them being aware of it. Mrs R stated unequivocally that "[b]oys did not get up and wander around, nor were they ever woken to be taken out of the dormitory at night". On its face, this appears to be the kind of evidence that Mr Morrah confirmed Discovery would include in the programme, as part of fairly and accurately reflecting the responses to his enquiries and the additional matters raised in these proceedings. We find it difficult, in the face of this evidence, to accept Mr Salmon's submission that identifying Mrs R in connection with the imputation would involve impermissible speculation.

[174] Reconciling the evidence from people who said they would have been aware of the offending with the nature of the allegations will be relevant in a criminal proceeding should charges be laid against Cardinal Dew and in the context of any defence to a defamation claim. But at this stage, we are prepared to say that Mrs R may, if the above details are included in the story, have a claim in defamation against Discovery.

[175] That conclusion means we must consider the potential defences that Discovery might have to a claim in defamation by Mrs R. It is not necessary or appropriate to do so for Sister H, who is not to be identified.

[176] As in the case of Cardinal Dew's appeal, two defences are relied upon: truth and responsible communication on a matter of public interest. In relation to the defence of truth it is clear that the allegations which potentially implicate Mrs R are substantially derived from what is alleged against Cardinal Dew. If Discovery succeeds in establishing the truth of its allegations against him, it will necessarily have gone a long way to establishing the truth of the imputation against Mrs R. The additional facts it would need to successfully claim truth against her would be that she knew of the Cardinal's conduct and did nothing to prevent it. In relation to those additional facts Discovery could rely on her own evidence, in which she effectively claims that if the Cardinal had acted as Mr Carvell alleges, she would have known: in fact, it could not have happened as described without her knowing.

[177] In the circumstances, and consistently with the reasoning we have set out in relation to the defence of truth against a claim by Cardinal Dew, we are not able to conclude there is no reasonable possibility of the defence of truth succeeding against a claim by Mrs R.

[178] Equally, the defence of responsible communication on a matter of public interest is advanced in relation to the same news story we have assessed above in relation to Cardinal Dew's appeal.[136] Ms Hubble noted that there was no particular public interest in naming the sisters in connection with the story when compared to the Cardinal. However, as this Court explained in *Durie v Gardiner*, a holistic approach must be taken when assessing whether a publication is in the public interest:[137]

> In determining whether the subject matter of the publication was of public interest, the judge should step back and look at the thrust of the publication as a whole. It is not necessary to find a separate public interest justification for each item of information … public interest is not confined to publications on political matters. It is also not necessary the plaintiff be a public figure.

[179] We considered above the thrust of the publication for the purposes of Cardinal Dew's appeal.[138] It follows from our conclusion there that, here too, the communication is on a matter of public interest. In assessing whether the communication is responsible, it should be noted that an additional consideration would need to be taken into account by the Court in dealing with this defence at the trial: the imputation has not been put to Mrs R at any stage for her response. However, that additional consideration does not persuade us at this interlocutory stage that the defence would have no reasonable prospect of success at trial.

[180] That conclusion means that the appeals by Sister H and Mrs R must be dismissed.

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136 Above at [100]–[103].
137 *Durie v Gardiner*, above n 14.
138 Above at [100]–[103].

Costs

[181] Discovery is entitled to costs calculated for standard appeals in band A. We certify for second counsel. All the appeals were dealt with together in one hearing lasting slightly less than one full day. It will be appropriate in the circumstances for the costs referable to the hearing to be calculated as if Cardinal Dew's appeal occupied half a day and the other appeals the other half day.

Suppression

[182] Counsel asked us at the conclusion of the hearing to provide for the continuation of the existing suppression orders made at the hearing to allow time for an application for leave to appeal to the Supreme Court. In accordance with Mr McKnight's request we order that the existing suppression orders made in the High Court, and continued and expanded on by this Court, remain in force for a period of five working days pending any application for leave to appeal to the Supreme Court. If an application for leave to appeal is filed, the suppression orders are to continue in force until the application for leave to appeal is determined.

Result

[183] The appeals are dismissed.

[184] The appellants must pay costs calculated for a standard appeal in band A in accordance with [181]. We certify for second counsel.

[185] The existing suppression orders continue to apply in accordance with [182] for the purposes of any application for leave to appeal to the Supreme Court.

[186] We direct the Registrar to provide a copy of this judgment to the Solicitor-General.

Solicitors:
Thomas Dewar Sziranyi Letts, Wellington for Appellant in CA461/2023
O'Regan Arndt Peters & Evans, Wellington for Appellants in CA529/2023 and CA530/2023
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