ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF THE THIRD APPELLANT PENDING FURTHER ORDER OF THE HIGH COURT.

ORDER THAT THE HIGH COURT ORDERS PROHIBITING PUBLICATION OF THE NAMES, ADDRESSES AND IDENTIFYING PARTICULARS OF THE PARTIES AND THAT THE DISPUTE INVOLVES DINOSAUR SPECIMENS OR AUCKLAND MUSEUM — [2023] NZHC 456 — REMAIN IN FORCE FOR A PERIOD OF 10 WORKING DAYS FROM THE DATE OF THIS JUDGMENT. IF THE APPELLANTS MAKE AN APPLICATION FOR LEAVE TO APPEAL THIS JUDGMENT, THE HIGH COURT ORDERS WILL REMAIN IN FORCE PENDING ANY DETERMINATION BY THE SUPREME COURT.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF THE MATTERS IDENTIFIED AT [51] OF THAT JUDGMENT — [2023] NZHC 537 — REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA167/2023
[2023] NZCA 469

BETWEEN	PETER T. REX LLC First Appellant
	BARBARA T. REX LLC Second Appellant
	AB Third Appellant
AND	NZME PUBLISHING LIMITED Respondent

Hearing:	6 September 2023
Court:	French, Goddard and Wylie JJ
Counsel:	D H McLellan KC, N L Walker and J Edwards for the Appellants T C Goatley for the Respondent
Judgment:	28 September 2023 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed in relation to the name, address and identifying particulars of the third appellant. The third appellant's name, address and identifying particulars are not to be published pending further order of the High Court.

B In all other respects the appeal is dismissed.

C The non-publication orders made in [2023] NZHC 456 remain in force for a period of 10 working days from the date of this judgment, to give the appellants the opportunity to apply for leave to appeal to the Supreme Court. If the appellants make such application, those orders remain in force until final determination of the application for leave by the Supreme Court.

D There is no order as to costs.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

The appeal

[1] This appeal is of limited scope. It concerns a non-publication order, ancillary to a pre-publication interim injunction granted on a without notice basis in favour of the appellants, restraining the respondent, NZME Publishing Ltd (NZME), from publishing allegedly defamatory statements.[1] The order was subsequently rescinded, and the appellants appeal this decision.[2] What is in issue is whether the names and identifying particulars of the appellants and the subject matter of the underlying dispute can be published pending an on notice hearing of the injunction application.

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1 *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZHC 456 [without notice judgment].

2 *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZHC 537 [rescission judgment].

The underlying dispute

[2] The statements concern two Tyrannosaurus Rex (T Rex) skeletons currently on display at Tāmaki Paenga Hira Auckland War Memorial Museum (the Museum). The skeletons have been named. The male T Rex skeleton is named Peter. It is owned by the first appellant. The female T Rex skeleton is named Barbara. It is owned by the second appellant. The third appellant is the "managing member" of the first and second appellants. All of the appellants are based or reside offshore.

[3] The T Rex skeletons each comprise fossilised bone elements and cast elements. According to the evidence before us, both skeletons have been identified as "real, original, single-specimen [T Rex] dinosaurs" by two leading academic palaeontologists. That cast elements have been used to complete the skeletons for exhibition is not considered to detract from their authenticity. The evidence suggests that there is not a single T Rex skeleton exhibited in any museum in the world that does not contain cast elements.

[4] Peter and Barbara are said to be very valuable. Both are insured for substantial sums.

[5] Peter and Barbara have been lent to the Museum by the appellants at no cost to the Museum. The two skeletons have no relationship to one another save for the fact that they are being exhibited together. The exhibition has been a cultural coup for the Museum. It is the first museum in the world to display male and female T Rex skeletons together. Peter and Barbara have proved to be very popular and there has been a significant increase in the number of visitors to the Museum resulting from the exhibition.

[6] The Museum is confident that each of the skeletons is a single specimen and not a composite. It has not sought to conceal the fact that each skeleton contains cast elements. Rather, to assist visitors, the Museum displays educational panels that outline the bone fossil elements and the cast elements. The Museum has relied, in this regard, on information it has received from the experts who have investigated the skeletons. According to the Chief Executive of the Museum at the time the exhibit

was installed, it is also "very obvious [when handling the skeletons] which are casts and which are actual fossil bone".

The statements

[7] On 27 February 2023, a blog post was published on the internet by a Dutch blogger. Various assertions were made regarding Peter and Barbara and their exhibition at the Museum which the appellants and the Museum considered were untrue and highly damaging. Essentially it was alleged in the statements that the skeletons were not legitimate or "real" because of the use of cast elements to complete the skeletons for display. Aspersions were cast on the role and motives of some of the individuals and entities concerned.

[8] The blog post came to the attention of NZME. One of its senior journalists contacted the Museum regarding the post. The Museum responded to NZME's requests for information. It also brought the blog post to the attention of the appellants. The appellants' lawyers promptly wrote to NZME to explain the harm they considered would result from any republication of the statements. NZME responded but it was not prepared to confirm that it would not republish the substance of the statements.

[9] The appellants' lawyers also contacted the Dutch university with which the blogger was associated. That university has since confirmed that the blog post and references to it on the blogger's social media account have been removed.

[10] Because NZME would not confirm that it would not republish the statements, the appellants engaged New Zealand lawyers and sought a without notice interim injunction to restrain any republication. They took this step to prevent what they asserted would be significant reputational and financial harm to them. The appellants also sought confidentiality orders, arguing that publication of their names in relation to the proceedings would exacerbate the reputational damage to them.

[11] The appellants' application came before Venning J on the papers on 9 March 2023. The Judge made the interim without notice orders sought by the appellants.[3]

[12] On 17 March 2023 these orders came back before the High Court on NZME's urgent on notice application to either rescind or vary them. NZME's application was heard by Whata J. He granted the application in part.[4]

The High Court judgments and the leave judgments

Venning J's judgment

[13] After reciting the relevant facts, Venning J referred to the principles relevant to the grant of interim injunctions. He noted that where an interim injunction is sought to prevent the publication of allegedly defamatory material, a "higher standard" applies.[5] He referred to s 14 of the New Zealand Bill of Rights Act 1990 and noted that injunctive relief will be granted only for clear and compelling reasons.[6]

[14] For the purposes of the application before him, the Judge accepted that:[7]

(a) it was arguable that the statements were defamatory of the appellants;

(b) NZME would not be able to establish the defences of truth, honest opinion or public interest; and

(c) there was arguably no public interest in further publishing the statements; and to do so, or to base an article on the statements, would involve the republication of serious allegations, which were not verified and, on the material before the Court, had been refuted.

The Judge noted that there was no particular topicality in any article and that the interim injunction sought would preserve the appellants' position in the short term.

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3 Without notice judgment, above n 1.
4 Rescission judgment, above n 2.
5 Without notice judgment, above n 1, at [8].
6 At [8].
7 At [9]–[12].

He considered that if an article were to be published, "the cat would be out of the bag" and it would be very difficult to redress the potential harm to the appellants.[8] He considered that it was a case where damages would likely not be an adequate remedy.[9] The Judge accepted that an interim injunction should issue and that given the "very preliminary stage" that the matter was at, confidentiality orders should be made as well.[10]

[15] The Judge inter alia made orders in the following terms:[11]

> (a) until further order of the Court the respondent, NZME … be restrained from publishing:
>
> (i) in any form any article containing, relying on or referring to statements made in the Blog Post … ; and
>
> (b) until further order of the Court, as to non-publication:
>
> (i) preventing publication of names, addresses or identifying particulars of the parties, and that the dispute involves dinosaur specimens or Auckland Museum; and
>
> (ii) to protect the third [appellant] … that the plaintiffs are only required to provide to the respondent versions of all pleadings (including affidavits) with the third [appellant's] name and identifying particulars redacted (at least at this interim interim stage);
>
> …

Whata J's judgment

[16] After discussing the background facts and Venning J's judgment, Whata J turned to consider the evidence before him, including additional affidavits which had not been before Venning J.

[17] The Judge dealt first with the non-publication order made by Venning J. He discussed the applicable principles, including the judgment of the Supreme Court in *Erceg v Erceg*.[12] After citing from *Erceg*, the Judge noted as follows:[13]

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8 At [12].
9 At [12].
10 At [15].
11 At [16].
12 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].
13 Rescission judgment, above n 2.

> [18] While the privacy considerations can sometimes favour suppression and or non-publication of litigants, I can see no reason to suppress or otherwise not publish the names of the parties in this case. There is no obvious harm to them other than the fact they are engaged in injunctive proceedings, provided any potentially defamatory material is injuncted. The fact that something might have been said that is defamatory is not a qualifying harm of the type that would ordinarily outweigh the importance of the principle of open justice. Conversely, if the potentially defamatory material is not injuncted, then suppressing the names of the parties is a pointless exercise in any event.

On this basis, Whata J rescinded the non-publication orders made by Venning J.[14] He stayed the rescission order pending the hearing of an application for leave to appeal.[15]

[18] Whata J then turned to consider whether there had been a failure by the appellants to disclose material matters in their without notice application, including matters going to show the reasonable possibility of defences to the alleged defamation. He discussed the principles relevant to the grant of injunctive relief in defamation proceedings, noting that the test is "highly restrictive" — the publication must be obviously tortious to qualify for an interim injunction.[16]

[19] The Judge then addressed each of the arguments raised by NZME. He considered that:

(a) the appellants' application had not failed to meet any of the prerequisite thresholds for being made on a without notice basis;[17]

(b) the appellants had not intentionally or knowingly breached the duty of upmost good faith they owed to the Court as applicants for a without notice order (although they had broadened the relief sought by way of the interim order from that sought in the statement of claim);[18]

(c) the appellants had not misinformed the Court about the possibility of legal defences to the alleged defamation, in particular:

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14 At [19].
15 At [77].
16 At [24].
17 At [26]–[27].
18 At [35]–[37].

(i) The Judge was satisfied that there will be an audience familiar with the owners of Peter and Barbara.[19]

(ii) While the Judge considered that there is a reasonable possibility that NZME will be able to establish a defence of truth in relation to some of the assertions made in the blog post,[20] other statements in the blog post made "very serious allegations".[21] On the information before him, the Judge was not satisfied there is a reasonable possibility that, at a full hearing, NZME will be able to show that these very serious allegations can be justified on the grounds of truth or explained in such a way as to distance any broader article from the allegations.[22]

(iii) Nor was the Judge satisfied that the defence of honest opinion is a reasonable possibility in relation to the very serious allegations. He expressed the view they are "manifestly lacking in objective corroborative material".[23] The Judge considered that at the "interim-interim" stage, a cautious approach was justified — namely preventing publication of the very serious allegations but not preventing publication of an article dealing with the provenance of Peter and Barbara in a "careful, balanced and informed way".[24]

(iv) On the materials before him, the Judge was not satisfied that reproduction of the very serious allegations in the blog post would be responsible, nor that there is a reasonable possibility of the defence of reasonable communication being made out.[25]

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19 At [41].
20 At [50].
21 At [53]. The very serious allegations were summarised at [51].
22 At [57].
23 At [65].
24 At [66].
25 At [72].

[20] The Judge was satisfied that the appellants' application was deficient in some respects. As already mentioned, he rescinded the without notice order made by Venning J. The Judge was nevertheless satisfied that an order should be made preventing NZME from publishing the very serious allegations contained in the blog post, pending a full hearing of the appellants' application for an injunction.[26] He stayed his rescission order pending the hearing of any application for leave to appeal. For the avoidance of doubt, he recorded that there was to be a suppression order suppressing the name of the third appellant and the contents of the judgment, pending the hearing of the application for leave to appeal.[27]

[21] There has been no appeal by either party against Whata J's orders in relation to the terms of the interim injunction.

The application for leave to appeal

[22] The appellants applied to the High Court for leave to appeal from parts of the judgment of Whata J. They wished to challenge his orders in so far as they permitted publication of the names, addresses and identifying particulars of the appellants and that the dispute involves dinosaur specimens or the Museum.

[23] The application for leave to appeal came before Whata J.[28] He considered that the order proposed by the appellants was in effect a blanket order suppressing any and all expression whatsoever about the existence of the underlying dispute, including the parties and the subject matter of the dispute.[29] The Judge considered that, in reality, the appellants, through the order, were seeking to achieve what they could not achieve via the injunction — suppression of the proceedings, except for the fact that NZME had been sued. He considered that this was an infringement on freedom of expression and on the principle of open justice, and that such infringements were reserved only for cases where the likely publication harm was very serious or where fair trial rights might be jeopardised.[30]

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26 At [76].
27 At [77].
28 *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZHC 625 [High Court leave judgment].
29 At [11].
30 At [11].

[24] In the Judge's view, the appellants were seeking simply to conceal the fact that they were in a dispute about allegedly defamatory comments that would not be published in any event as a result of the interim orders he had made. He considered that this was not a qualifying harm or reason for suppression of the blanket kind sought.[31] The Judge considered that the proposed grounds of appeal (that privacy considerations and/or reputational interests were not considered) were meritless and that the appellants' prospect of success was remote.[32]

[25] The Judge did have a residual concern concerning the third appellant. The Judge observed that he could not completely discount the possibility that the third appellant's personal privacy considerations might be such as to persuade this Court that open justice and freedom of expression should yield at what was an "interim, interim" stage.[33] He granted leave to appeal on a limited basis — namely whether the third appellant's name should be anonymised.[34] He extended the existing non-publication orders, to give the appellants the opportunity to seek special leave to appeal.[35]

The application for special leave to appeal

[26] The appellants sought special leave to appeal. The application was dealt with on the papers by Miller and Goddard JJ.[36] They considered that the application was finely balanced, but they were nevertheless persuaded that the issues raised by the proposed appeal were of some public importance and important to the parties. They recorded that, in some exceptional situations, of which this was arguably one, disclosure of the identity of a party to defamation proceedings risks undermining the very purpose of the proceedings and the public interest in upholding the efficacy of the processes of the Court.[37] They noted that there are some cases in which the Court's processes can be undermined if the fact that relief has been sought by a particular named plaintiff becomes public.[38] Accordingly, the Court granted leave to appeal

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31 At [12].
32 At [13].
33 At [15].
34 At [16].
35 At [17].
36 *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZCA 262.
37 At [15]–[16].
38 At [16].

against Whata J's decision rescinding the without notice non-publication order made by Venning J in relation to the names, addresses and identifying particulars of the first and second appellants and that the dispute involves dinosaur specimens or the Museum.[39]

Submissions

The appellants

[27] Mr McLellan KC, appearing for the appellants, submitted that Whata J was wrong to rescind the non-publication orders. He argued that, in the circumstances of this case, publication of the appellants' identities and identifying particulars would undermine the very purpose of the proceedings. He noted that the appellants have obtained interim injunctive relief in regard to the very serious allegations made by the blogger and that Whata J's decision in this regard has not been appealed. He argued that if the names of the appellants were to be put in the public domain, it would lead to serious adverse effects for them and for others. Citing from a decision of Nicklin J in the High Court of England and Wales,[40] Mr McLellan argued that unless some derogation is made from the principles of open justice, the Court would, by its processes, effectively destroy that which the claimant is seeking to protect. He also submitted that there is a risk of harmful speculation and that the appellants' concerns are not academic. It was argued that there is the risk of a "springboard effect", if their identities are put in the public domain, and that they could become linked with future defamatory publications. It was noted that the third appellant in particular is a private person, with no online presence or public profile, who has chosen to be an anonymous benefactor to the Museum.

[28] Mr McLellan acknowledged that injunctions preventing the publication of material of the kind here in issue are rare in New Zealand and that the threshold test is high. He noted however that the appellants have met the threshold twice — once before Venning J and once before Whata J — and submitted that the judicial balancing exercise in considering the non-publication orders should, in such circumstances, tilt

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39 At [17]–[18] and [21].

40 *Various Claimants v Independent Parliamentary Standards Authority* [2021] EWHC 2020 (QB) at [37], cited in *XXX v Persons Unknown* [2022] EWHC 2776 (KB).

more readily in favour of an applicant. He submitted that this applies even more so where the proceeding is at a very early stage and that the harm and interests identified by the appellants should be given comparatively more weight than might otherwise be the case. He accepted that the appellants are seeking an exception to the fundamental principle of open justice and that the various authorities ultimately turn on their own facts and involve a balancing of competing values and interests. He submitted that this is one of the rare cases in which non-publication orders are appropriate.

NZME

[29] Ms Goatley, for NZME, submitted that the without notice suppression orders sought are equivalent to blanket suppression of essentially everything about the proceeding. She submitted that the appeal concerns the exercise of a discretion, pursuant to the court's inherent jurisdiction, and argued that in order to succeed the appellants must show that Whata J acted on a wrong principle, failed to take into account some relevant matter, took into account some irrelevant matter, or was plainly wrong. She argued that the appellants cannot establish any of these matters.

[30] Ms Goatley put it to us that the starting point must be the fundamental principle of open justice and that there is a presumption in favour of disclosure of all aspects of civil court proceedings, including the names of the litigants. She submitted that to warrant suppression and anonymity, the appellants have to show specific adverse consequences that are sufficient to justify a departure from the principle of open justice and that, in this case, they are unable to do so. She argued that there is nothing distinct or novel about NZME reporting the fact of the proceedings. She noted that the blog post is in large part injuncted and not otherwise in the public domain and she submitted that publication of the identities of the appellants and the broad detail of the dispute cannot crystalise the harm sought to be avoided by the proceedings. She asserted that the harm alleged by the appellants does not amount to specific adverse consequences sufficient to override the public interest in open justice.

Analysis

Relevant law

[31] The starting point is the principle of open justice and the related right of freedom of expression confirmed in s 14 of the New Zealand Bill of Rights Act.[41]

[32] The principle of open justice requires that the courts, in so far as is consistent with the interests of justice, administer justice in public, thus enabling public scrutiny and ensuring public confidence in the administration of justice.[42] The principle is of constitutional importance and "an almost priceless inheritance".[43]

[33] The media are the surrogates of the public and reporters present at public hearings are the conduit through which most members of the public receive information about court proceedings.[44] The principle of open justice is inextricably linked with the freedom of the media to report on court proceedings.[45] As a result, there is a strong presumption in favour of the publication of court proceedings.[46]

[34] This presumption is confirmed in s 14 of the New Zealand Bill of Rights Act.[47] It provides as follows:

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

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41 *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512 at [25].

42 At [26].

43 *Erceg v Erceg*, above n 12, at [2], citing *Scott v Scott* [1913] AC 417 (HL) at 447 per Earl Loreburn; and see *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 122.

44 *Y v Attorney-General,* above n 41, at [28].

45 *A v British Broadcasting Corporation* [2014] UKSC 25, [2015] AC 588 at [26], cited in *Y v Attorney-General*, above n 41, at [28].

46 *Y v Attorney-General*, above n 41, at [26]; and see Rosemary Tobin and David Harvey *New Zealand Media and Entertainment Law* (Thomson Reuters, Wellington, 2017) at [4.3].

47 *R v Liddell* [1995] 1 NZLR 538 (CA) at 546; and *Television New Zealand Ltd v R* [1996] 3 NZLR 393 (CA) at 396.

[35] The right guaranteed by s 14 is not however absolute,[48] and the media does not enjoy unqualified freedom of expression.[49] The right is subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[50]

[36] The law of defamation has long prescribed one such reasonable limit. The courts can restrict pre-publication the freedom of one person to publish false and defamatory statements about another.[51] As Venning and Whata JJ noted in their respective judgments, this jurisdiction is exercised only for clear and compelling reasons.[52] It must be shown that defamatory material is likely to be published, for which there is no reasonable possibility of a legal defence.[53] Applying these principles, Whata J held, following an on notice hearing, that the publication of the very serious allegations he identified in his judgment should be restrained pending a full hearing.[54] As noted, neither the appellants nor NZME have challenged this aspect of his judgment.

[37] It is well established that New Zealand courts can make orders to protect confidential or private information in civil proceedings in the exercise of their inherent powers.[55]

[38] In *Y v Attorney-General* this Court undertook a comprehensive review of the law and the principles relating to suppression in civil cases.[56] This Court confirmed that the courts have an inherent power to suppress details in civil cases.[57] There is a

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48 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [113] per Gault and Blanchard JJ and [231]–[232] per Tipping J.

49 *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC) at [42]–[43].

50 New Zealand Bill of Rights Act 1990, s 5.

51 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [6]; *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [90]; and see *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315.

52 Without notice judgment, above n 1, at [8] and rescission judgment, above n 2, at [23], citing *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA) at 407.

53 *Auckland Area Health Board v Television New Zealand Ltd*, above n 52, at 407.

54 Rescission judgment, above n 2, at [58].

55 *Y v Attorney-General*, above n 41, at [17] and [23]; see also Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (8th ed, LexisNexis, Wellington, 2021) at [1.3.2]. Doubts about this power have been expressed in England and Wales (and echoed by the Privy Council): *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 at [59]–[68].

56 *Y v Attorney-General*, above n 41, at [22]–[34].

57 At [23].

starting presumption of openness in respect of all aspects of civil court proceedings.[58] While there is no particular threshold for suppression in civil cases, the courts must strike a balance between open justice considerations and the interests of the party seeking suppression.[59]

[39] The leading decision dealing with the topic is now that of the Supreme Court in *Erceg v Erceg*.[60] The litigation before that Court concerned disputes between family members as to the operation of various trusts. Some family members, as trustees of the trusts, applied for an order preventing publication of various matters, such as the amounts settled on the trusts, the value of trust assets, the identities of beneficiaries and the like. The Court said:[61]

> [13] … We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers. The need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised, are obvious examples of situations where such orders may be justified. However, the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.

The Supreme Court declined to make the orders sought. It did not consider that the applicants had demonstrated to the requisite high standard that the interests of justice required a departure from the principle of open justice.[62]

[40] Although a large number of cases were cited to us, we did not find them particularly helpful. Many were from overseas jurisdictions and were set against statutory contexts rather different from those applicable in this country. Other than as

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58 At [25]–[26].

59 At [30]–[31], citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4 at [3].

60 *Erceg v Erceg*, above n 12.

61 Footnotes omitted.

62 *Erceg v Erceg,* above n 12, at [21].

noted in *Erceg*, that a party seeking an order must show "specific adverse consequences" that are sufficient to justify an exception to the fundamental rule,[63] there is no fixed threshold requirement to obtain a non-publication order. As this Court has noted, previous decisions stating that the threshold is "exceptional circumstances", or "extraordinary circumstances" incorrectly stated the law.[64] Extraordinary circumstances are not required to justify suppression in a civil case.[65] The threshold is high, because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression.[66] But that is all that need be said. The court must seek to strike a balance between open justice considerations and the interests of the party who seeks suppression.[67] Given the almost limitless variety of civil cases, the balancing exercise is necessarily fact dependent.[68]

[41] Before dealing with the application of the law to the facts in the present case, there is one other matter that we need to deal with.

The appropriate standard of appellate review

[42] Ms Goatley submitted that an appeal against a non-publication order involves a challenge to the exercise of the court's inherent jurisdiction, that such an appeal falls to be treated as one against the exercise of a discretion and that the Court should apply the established approach set out in *May v May*,[69] namely ask whether or not the Judge below erred in principle, failed to take into account some relevant matter, took into account some irrelevant matter, or was plainly wrong.

[43] Mr McLellan submitted that the principles applicable to general appeals discussed in *Austin, Nichols & Co Inc v Stichting Lodestar* should apply, namely that while the appellant bears the onus of satisfying the appellate court that it should differ from the decision under appeal, it is for the appellate court to come to its own view on

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63 At [13].
64 *Y v Attorney-General*, above n 41, at [30].
65 At [30].
66 *Erceg v Erceg*, above n 12, at [13] and [18]; and *Y v Attorney-General*, above n 41, at [30], citing *McIntosh v Fisk* [2015] NZCA 247, [2015] NZAR 1189 at [1].
67 *Y v Attorney-General,* above n 41, at [31].
68 At [32].
69 *May v May* [1982] 1 NZFLR 165 (CA) at 169–170.

the merits of the case.[70] Mr McLellan acknowledged that appeals against civil non-publication orders have historically been treated as appeals against the exercise of a discretion but submitted that this approach is no longer appropriate in light of recent authorities and a shift in the governing principles.

[44] In *Y v Attorney-General*, this Court held that the discretionary nature of the jurisdiction means that an appeal against the making or refusal of a suppression order is subject to the principles this Court laid down in *May v May*.[71] A similar approach has been taken in other cases in the same or similar situations.[72]

[45] We nevertheless agree with the appellants that the classes of case properly classified as discretionary are dwindling. In *Taipeti v R*, this Court acknowledged this and identified three possible indicia of a true discretion:[73]

(a) The extent to which the decision-maker can apply his or her "personal appreciation" to the matter in issue is a "key indication", while the greater the level of prescription, the more likely it is that the decision is an evaluative process.[74]

(b) Procedural decisions are more likely to be an exercise of discretion than wider issues of principle involving the application of the law to the facts.

(c) If only one view is legally possible, that points away from a discretion. Where there is scope for choice between multiple legally right outcomes, that points towards a discretion.

[46] In our judgment, there is no scope for "personal appreciation" when considering non-publication orders. Rather, consideration of such orders involves

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70 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5].
71 *Y v Attorney-General*, above n 41, at [24] and n 27.
72 See for example *McIntosh v Fisk*, above n 66, at [19]; and *Attorney-General v J* [2019] NZCA 499, [2020] 2 NZLR 176 at [16]–[18].
73 *Taipeti v R* [2017] NZCA 547, [2018] 3 NZLR 308 at [49]–[50].
74 Citing *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [37].

evaluation. The courts have to apply the law and balance the competing rights and interests in any given factual context. The balancing of the competing interests entails evaluation and judgment, not the exercise of a discretion. A decision to make a non-publication order is not a procedural decision. We consider that the better approach is that only one view is legally open in relation to a non-publication order, even though judicial minds might reasonably differ as to what that view is.

[47] As a result, we have concluded that decisions on non-publication orders are not exercises of discretion but rather are evaluative decisions. We have approached this appeal by way of rehearing.

[48] We acknowledge that in reaching this view on the appropriate appellate approach, we are not following previous decisions of this Court. This Court can however review its earlier decisions in appropriate cases.[75] We consider that this is such a case and we decline to follow *Y v Attorney-General* and similar decisions in regard to this issue.

Should the non-publication orders have been rescinded in this case?

(a) The context

[49] First, we consider the context.

[50] We agree with Mr McLellan that most civil proceedings involve events that have already occurred, creating a dispute requiring judicial resolution. The remedy sought is generally damages, or some other form of executory relief. The aim is to right a wrong.

[51] In the present case, non-publication orders were sought ancillary to a pre-publication interim injunction. The purpose of the proceeding was not to right a wrong, but rather to prevent a wrong from occurring in the first place. The appellants' objective was to prevent publication of statements they considered could damage their reputations. As has been noted in the United Kingdom, it would be unfair to an applicant seeking a non-publication order that, "as the price of preventing the

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75 *R v Chilton* [2006] 2 NZLR 341 (CA) at [83]–[100].

publication of allegations that (*ex hypothesi*) he is entitled to prevent, he (and his family) [are] exposed to invasive speculation".[76] In our view, there was force in Mr McLellan's submission that an applicant who has obtained a pre-publication interim injunction restraining a defamatory publication (and has therefore demonstrated that there is no reasonable possibility of a defence) should not be exposed to greater harm than if he or she had not taken reasonable steps to protect his or her reputation.

[52] It is also relevant that the non-publication orders that are the subject of the appeal are without notice interim orders — a form of "interim, interim" order. If made, the orders will apply until the injunction application is heard by the High Court. They will then be revisited by the High Court judge in light of the evidence before the Court. At the pretrial stage, the courts can place more weight on privacy concerns and less weight on open justice than at the trial phase where matters are being argued in open court.[77]

(b) Specific adverse consequences

[53] We now turn to the specific adverse consequences asserted by the appellants and said to justify a non-publication order. Broadly, they submitted that publication would:

(a) undermine the purpose of the proceeding and risk harm to their reputations;

(b) risk harm to third party interests (the Museum and the palaeontologists); and

(c) undermine access to justice by risking harm to the third appellant's privacy interests.

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[76] *ZAM v CFW* [2011] EWHC 476 (QB) at [28].

[77] *H v S* [2016] NZHC 433, [2016] NZAR 405 at [9], referring to the discussion in *Rice v Heaney* [2014] NZHC 1311, (2014) 22 PRNZ 159 at [17]–[19] per Ellis J.

[54] We deal first with the reputation of the first and second appellants. As noted, both are corporate entities. There is very little evidence before us of any harm to them. The third appellant, in his affidavit filed inter alia on their behalf, simply says that publication would cause substantial financial harm to the first and second appellants. He asserts that the T Rex skeletons are very valuable and that if there is even "a hint of 'taint'" to the skeletons, their market value will plummet.

[55] We do not accept this argument. First, it is clear from the materials before us that there has been prior controversy about the authenticity of other T Rex skeletons. That controversy has been well covered in the media and on the internet. We consider that any astute purchaser of a T Rex skeleton is very likely to be aware of the underlying issue and can be expected to make his or her own enquiries. Secondly, this is a purely financial issue and any damage the first and second appellants might suffer as a result of publication of defamatory material can be readily met by an award of damages. Thirdly, there is no evidence before us suggesting that the first and second appellants have any reputation, other than in relation to their ownership of Peter and Barbara respectively.

[56] We cannot see that there is any harm to the first and second appellants in being identified as litigants in the defamation claim at issue in this proceeding. There is little or no inherent harm in being identified as litigants, particularly when an interim injunction prevents publication of the most damaging allegedly defamatory assertions. It is not clear to us that there are any specific adverse consequences for the first and second appellants flowing from publication of their names, let alone specific adverse consequences sufficient to justify a departure from the principle of open justice and the right to freedom of expression. Accordingly, we uphold the judgment of Whata J in this regard.

[57] We now turn to consider whether NZME (or others) should be able to publish detail of the nature of the defamation proceedings and/or identify the Museum. We note Ms Goatley's submission that, in this case, it would be difficult if not impossible to publish much if anything without identifying the nature of the underlying dispute.

[58] We repeat that NZME is restrained from republishing the very serious allegations identified by Whata J pending further order of the High Court. There are various other statements made by the blogger which can be published. Any publisher will have to show some journalistic responsibility in publishing some of the remaining statements from the blog post, given the nature of the allegations made and the restraining orders in place. We can take into account that NZME is a responsible media organisation. It will have to ensure that publication of the unrestrained statements is not undertaken in a defamatory way. Any publication that made assertions equivalent to those made in the very serious allegations would breach the interim injunction, with the consequences for NZME that follow from breach of court orders. Other publishers in New Zealand will have to show similar restraint. Orders made by the New Zealand courts do not bind overseas media organisations. What occurs elsewhere is beyond our control.

[59] Subject to these comments, we cannot see that there is any reputational or other harm to the first and second appellants or to the Museum in allowing NZME to refer to the fact that the underlying dispute involves the dinosaur specimens.

[60] Nor can we see that there are any specific adverse consequences for the Museum if its name is referred to in the context of these proceedings. Its former Chief Executive Officer, who was involved in setting up the exhibition, has filed an affidavit asserting that there could be potential harm to the Museum. He says that several of the Museum's staff will experience serious anxiety and stress if publication occurs, and that there is a risk of damage to the Museum's reputation, a risk of financial harm to the Museum if visitation is adversely affected and a risk that, in future, the Museum may not be able to attract loan exhibits of a similar kind.

[61] The Museum is a public institution, publicly funded. Its exhibitions are a legitimate subject of public interest and public comment. As noted above, it has display panels beside the skeletons indicating what elements are fossil and what are cast. The very serious allegations identified by Whata J cannot be published at this stage. We are not persuaded, on the basis of the limited material before us, that there is any real risk of significant adverse consequences for the Museum or its staff. Its reputation is unlikely to be tarnished by publication of the fact that some elements

of the specimens are casts. The principle of open justice and the right to freedom of expression must prevail. Accordingly, we uphold the judgment of Whata J in this respect as well.

[62] We now turn to the interests of the palaeontologists. As noted, two expert palaeontologists have examined Peter and Barbara and prepared reports in relation to each skeleton. It was suggested by the appellants that publication would risk causing harm to their reputations.

[63] We do not accept this submission. There is no evidence to suggest that there is any risk of significant adverse consequences for the palaeontologists if publication occurs. They are not parties to, nor have they sought to join, the proceeding. When the NZME journalist pursuing the story contacted the palaeontologists, neither responded. Nor did they suggest that the publication of an article might have adverse consequences for them. The very serious allegations are still restrained. We are not prepared to assume that there will be adverse consequences for the palaeontologists from publication of other information about the specimens, in the absence of any evidential foundation for that submission, let alone adverse consequences sufficient to overcome the principle of open justice and the right of freedom of expression. Again, we uphold Whata J's judgment in this regard.

[64] Finally, we turn to the interests of the third appellant. The third appellant is an individual. He is described as the managing member of the first and second appellants. He is a collector of dinosaur fossils and he has specimens on display at a number of museums around the world. On the evidence before us, his motives are altruistic. He seeks to inspire children and adults, as well as to preserve the specimens as palaeontological treasures for future generations. There is nothing before us to gainsay this. He describes himself as a private person. He is concerned that his privacy would be intruded on, and his reputation could be irrevocably compromised, were his name to be put in the public domain along with the allegedly defamatory statements.

[65] Whether or not there should be a non-publication order in respect of the third appellant's name and identifying particulars is finely balanced. The evidence before

us is succinct, but we take into account the fact that it is contained in an affidavit which was filed at short notice in an endeavour to obtain an interim injunction restraining publication of allegedly defamatory material. Notwithstanding that it is succinct, some matters are clear:

(a) The third appellant is a private person.

(b) The third appellant's name cannot be identified by searching public records relating to the first and second appellants.

(c) The third appellant has not sought publicity in relation to the Peter and Barbara exhibition. While he has been identified as a benefactor to the Museum in one of its publications, there is no link between his name and the T Rex skeletons.

(d) The third appellant has a confidentiality agreement with the Museum with regard to the Peter and Barbara exhibition.

(e) The third appellant has a very limited online and media presence. There is evidence that he was named and associated with dinosaur fossils (including Peter) in an article published in mid-2022, but that article has been taken down and it is no longer accessible.

[66] We accept the point made by NZME that there will be people in the dinosaur fossil community who will be able to identify the third appellant by reference to Peter and Barbara. It seems that NZME obtained the third appellant's name in the course of making enquiries about the blog post from a person within that community, prior to and independently from the proceedings. However on the basis of the material before us, it appears unlikely that members of the general public would be able to find out the identity of the third appellant if the names of the first and second appellants, the nature of the dispute and the identity of the Museum, are put in the public domain.

[67] We agree that the starting point must be the principle of open justice and the right to freedom of expression. However we consider that at this "interim, interim"

stage, sufficient grounds have been made out to justify orders ensuring that irreversible publicity about the third appellant's identity as owner of the specimens is not permitted. In our judgement, it is preferable to allow the third appellant to retain the anonymity he has maintained and contracted for to date, pending the substantive hearing on the injunction application in the High Court. This will give the third appellant the opportunity to more fully explain why he says that there could be significant adverse consequences for him if his name is put in the public domain. It will give NZME the opportunity to test any claims made by the third appellant. Accordingly, we allow the appeal against Whata J's judgment in this respect.

Result

[68] The appeal is allowed in relation to the name, address and identifying particulars of the third appellant. The third appellant's name, address and identifying particulars are not to be published pending further order of the High Court.

[69] In all other respects the appeal is dismissed.

[70] We record that the appellants indicated that they might seek leave to appeal this judgment. Accordingly, we direct that the non-publication orders made in [2023] NZHC 456 are to remain in force for a period of 10 working days from the date of this judgment, to give the appellants the opportunity to apply to the Supreme Court for leave to appeal. If the appellants make such application, those orders remain in force until final determination of the application for leave by the Supreme Court.

[71] Both parties have had a measure of success on the appeal. There is no order as to costs.

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