NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF THE THIRD APPLICANT PENDING FURTHER ORDER OF THE HIGH COURT REMAINS IN FORCE.

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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 112/2023
[2024] NZSC 10

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

Court:	Glazebrook, Ellen France and Kós JJ
Counsel:	D H McLellan KC, N L Walker, J Edwards and J A Tocher for Applicants T C Goatley and K M Wilson for Respondent
Judgment:	15 February 2024

JUDGMENT OF THE COURT

A **The application for leave to appeal is dismissed.**

B **The applicants must pay one set of costs of $2,500 to the respondent.**

REASONS

Introduction

[1] The applicants have applied for an injunction to restrain the respondent, NZME Publishing Limited (NZME), from publishing allegedly defamatory statements. The injunction application has not yet been heard. Pending the hearing of that application the applicants sought various interim orders including a non-publication order. The terms of the non-publication order made by the High Court[1] were the subject of a partially successful appeal by the applicants to the Court of Appeal.[2] As a result, publication of the third applicant's name, address and identifying particulars is prohibited pending further order of the High Court.[3]

[2] The applicants now seek leave to appeal to this Court. They say that the Court of Appeal was wrong not to suppress other details they argue will enable identification of the third applicant by the community in which he is involved.

Background

[3] The first and second applicants are the owners of two Tyrannosaurus rex skeletons currently on display at Tāmaki Paenga Hira Auckland War Memorial Museum (the Museum). The third applicant has managerial responsibilities in relation to both companies. The two skeletons have been lent to the Museum for exhibition by the applicants at no cost to the Museum. The Court of Appeal recorded the Museum has confidence that each of the skeletons is a single specimen and not a composite, and that the Museum has made it clear that each skeleton contains cast elements.[4]

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1 *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZHC 456 (Venning J) [HC interim order decision]; and *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZHC 537 (Whata J) [HC rescission decision].

2 *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZCA 469 (French, Goddard and Wylie JJ) [CA judgment]; special leave to appeal having been granted: *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZCA 262 (Miller and Goddard JJ); and see *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZHC 625 (Whata J) granting leave on a more limited basis.

3 CA judgment, above n 2, at [68].

4 At [6].

[4] In February 2023 a Dutch blogger posted a blog making various assertions about the skeletons. As the Court of Appeal said:[5]

> 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.

[5] The present proceedings were filed after the applicants were unable to obtain an assurance from NZME that they would not publish a story or article about issues referred to in the blog. In the High Court, Venning J granted a non-publication order ancillary to a pre-publication interim injunction (made on a without notice basis) in favour of the applicants which restrained NZME from publishing the allegedly defamatory statements. The non-publication order prevented publication of names, addresses or identifying particulars of the parties, and the fact that the dispute involved dinosaur specimens or the Museum. Further, information identifying the third applicant could be redacted in material provided to the respondent.

[6] The non-publication order was subsequently rescinded by Whata J. The Judge also found that the application for the pre-publication interim injunction was deficient in part for the purpose of an ex parte application. In its place and pending the full hearing of the injunction application, the Judge made an order preventing publication by NZME of what were described as the "desire laundering" statements in the blog—those which suggested intentional misleading and deceptive conduct for financial gain in relation to the skeletons.[6]

[7] As we have noted, the applicants' appeal to the Court of Appeal from the decision of Whata J was successful in part.[7]

The proposed appeal

[8] The applicants want the original non-publication order reinstated in respect of four details: the names of the first and second applicants; the fact that the dispute

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5 At [7].

6 HC rescission decision, above n 1, at [52]–[58]. See also HC interim order decision, above n 1, at [9].

7 CA judgment, above n 2.

involves dinosaur specimens; and the fact that the dispute involves the Museum. They say that publication of these details would identify the third applicant to, at least, a relevant subset of the public and possibly beyond, and would undermine the part of the non-publication order that was reinstated by the Court of Appeal.

[9] The applicants contend that the Court of Appeal did not address their argument about the possible identification of the third applicant from the other details in the public domain. They contend this raises issues about "jigsaw identification"[8] or the "mosaic effect"[9] of identifying parties where it is possible to piece information in the public domain together to identify someone else. They say the Court's reasoning did not engage with their submission that those within the dinosaur fossil community will be able to identify the third applicant from their prior knowledge of his association with Barbara and Peter. They wish to argue that the Court of Appeal wrongly assumed that only members of the general public were relevant to the analysis. It is also argued that drawing a link between the third applicant and the defamatory allegations would irreparably damage his reputation within the dinosaur fossil community. Allowing that harm to occur would undermine the purpose of the proceedings.

Our assessment

[10] In rejecting the submission that the non-publication order should reflect that initially made in the High Court, the Court of Appeal applied this Court's decision in *Erceg v Erceg*.[10] The Court quoted the following passage from *Erceg*:[11]

> We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers. … 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 … or unwelcome … 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.

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8 *Attorney General v British Broadcasting Corp (No 3)* [2022] EWHC 1189 (QB) at [24]–[25].
9 *Ontario v Canadian Broadcasting Corp* 2019 ONSC 1079, [2019] OJ No 1068 at [187].
10 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
11 At [13] (footnotes omitted) as cited in CA judgment, above n 2, at [39].

[11] The Court of Appeal went on to say that:[12]

> [40] The Court must seek to strike a balance between open justice considerations and the interests of the party who seeks suppression. Given the almost limitless variety of civil cases, the balancing exercise is necessarily fact dependent.

[12] In undertaking the exercise envisaged by *Erceg*, the Court of Appeal canvassed the specific adverse consequences identified by the applicants in relation to the third applicant, but did not accept that the *Erceg* threshold was met. Applying the *Erceg* approach to the case for the third applicant, the Court said this:

> [65] Whether or not there should be a non-publication order in respect of the third [applicant'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 [applicant] is a private person.
>
> (b) The third [applicant's] name cannot be identified by searching public records relating to the first and second [applicants].
>
> (c) The third [applicant] has not sought publicity in relation to the Peter and Barbara exhibition. …
>
> (d) The third [applicant] has a confidentiality agreement with the Museum with regard to the Peter and Barbara exhibition.
>
> (e) The third [applicant] has a very limited online and media presence.

[13] The Court accepted there would be people in the dinosaur fossil community who could identify the third applicant by reference to Peter and Barbara. But the Court said "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 material the applicants wanted suppressed was put in the public domain.[13] However, the Court considered it was preferable to permit the third applicant to keep the anonymity he had maintained and contracted for to date pending the substantive hearing on the interim injunction application in the High Court. That would give him the chance to more fully explain why it is said there could be significant adverse consequences for third applicant if his name is put in the public domain.

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12 CA judgment, above n 2 (footnotes omitted).

13 At [66].

[14] The proposed appeal would largely reprise the arguments in the Court of Appeal. It is not argued that in the context of a defamation claim there should be any standard other than that set out by this Court in *Erceg*.[14] Rather, on the proposed appeal the applicants would challenge the application of the *Erceg* principles to a set of very particular facts. No question of general or public importance accordingly arises.[15]

[15] In applying the *Erceg* principles, as we have noted, the Court of Appeal assessed the cogency of the specific adverse consequences raised by the applicants. The Court did acknowledge the potential for identification by those in the dinosaur fossil community, but its assessment was that the case for non-publication of all the details sought by the applicants was not made out. In reaching that view, the Court identified the relevant interests noting, amongst other factors, the public interest factors warranting publication. Nothing raised by the applicant indicates a material error in the assessment made by the Court of Appeal of these various matters. In these circumstances, we see no appearance of a miscarriage of justice, as that term is used in the civil context.[16] The criteria for leave to appeal are not met.

Result

[16] The application for leave to appeal is dismissed.

[17] The applicants must pay one set of costs of $2,500 to the respondent.

Solicitors:
Russell McVeagh, Wellington for Applicants
Bell Gully, Auckland for Respondent

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[14] We acknowledge the applicants refer, amongst other matters, to the fact that the present case involves balancing of open justice against reputational interests meaning there is a "distinct context" from *Erceg*; and they point to the fact this case involves a media defendant. But they do not ask the Court to re-visit *Erceg*.

[15] Senior Courts Act 2016, s 74(2)(a).

[16] Section 74(2)(b). See generally *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].