IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2016
[2016] NZSC 135

BETWEEN	IVAN VLADIMIR JOSEPH ERCEG Appellant
AND	LYNETTE THERESE ERCEG AND DARRYL EDWARD GREGORY AS TRUSTEES OF ACORN FOUNDATION TRUST First Respondents
	LYNETTE THERESE ERCEG AND DARRYL EDWARD GREGORY AS TRUSTEES OF INDEPENDENT GROUP TRUST Second Respondents

Hearing:	1 September 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	C R Carruthers QC and R B Hucker for Appellant G M Coumbe QC and F C Monteiro for First and Second Respondents
Judgment:	14 October 2016

JUDGMENT OF THE COURT
[Non-publication order]

The respondents' application for a non-publication order is dismissed.

REASONS
(Given by Arnold J)

[1] The first and second respondents applied for an order preventing publication of certain matters if they were referred to in oral argument in the course of the

substantive appeal. Having heard argument on the application at the outset of the hearing, we dismissed it. We now give our reasons for doing so.

Open justice

[2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance,[1] and has been described as "an almost priceless inheritance".[2] The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges".[3] The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court.[4] Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language.[5]

[3] However, it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. So, a court may order that proceedings be heard in camera, either in whole or in part, in the exercise of the

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1 This is confirmed in the criminal context by s 25(a) of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides that those charged with offences have "the right to a fair and public hearing by an independent and impartial court".

2 *Scott v Scott* [1913] AC 417 (HL) at 447 per Earl Loreburn.

3 *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 132 per Richardson J.

4 Section 14 of NZBORA protects the right to freedom of expression, which includes the right to impart information about court proceedings, although that is subject to "reasonable limits" in terms of s 5: see the discussion in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [156]–[159] per McGrath, William Young and Glazebrook JJ. Fair and accurate reports of court proceedings attract qualified privilege: Defamation Act 1992, s 16 and pt 1 of sch 1.

5 See, for example, *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL), in particular at 449–450 per Lord Diplock; *R v Tait* (1979) 46 FLR 386 (FCA) at 401–405; *Broadcasting Corporation of New Zealand*, above n 3, at 122–123 per Woodhouse P, at 127–128 per Cooke J and at 132–133 per Richardson J; *Hogan v Hinch* [2011] HCA 4, (2011) 243 CLR 506, in particular, at 530–535 per French CJ; and *R (on the application of C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444 at [1] and [16]–[17].

court's inherent power.[6] While the common law recognised very limited exceptions to the principle of open justice,[7] the legislature has seen the need to confer on the courts wider powers to hear evidence in closed court[8] or to prohibit reporting of proceedings or aspects of proceedings, generally to protect those who are seen as vulnerable. Obvious examples relate to the identity of the victims of sexual offending[9] and protection of children in family proceedings.[10]

[4] There has been some controversy about whether the courts have the power at common law to make non-publication orders binding on the public at large in proceedings heard in open court. In 2004, the Privy Council concluded in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* that there was no power at common law to make orders effective against the general public which sought to postpone the publication of reports of proceedings in open court – such a power could be conferred only by legislation.[11] The Privy Council did accept, however, that a court could properly order, for example, that a particular witness give evidence under a pseudonym rather than under the witness's proper name; if a member of the public then published the witness's proper name, that person might well commit a contempt of court.[12] This would not be because the person was bound by the court's order but because he or she interfered with the proper administration of justice.[13] In their judgment, the Privy Council considered the decision of the New Zealand Court of Appeal in *Taylor v Attorney General*, where the Court held that the courts had the inherent power to make non-publication orders in proceedings heard in open court that were effective against the general public.[14] The Privy

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6 See, for example, *Leveller Magazine Ltd*, above n 5, at 450 per Lord Diplock, at 457 per Viscount Dilhorne and at 464–465 per Lord Edmund-Davies. Often the term "inherent jurisdiction" is used. We prefer the term "inherent power": see *Siemer*, above n 4, at [113]-[114] per McGrath, William Young and Glazebrook JJ.

7 For example, to prevent disruption of a trial by protesters, to protect commercially secret processes and to protect the victims of blackmail.

8 Criminal Procedure Act 2011, s 197.

9 Criminal Procedure Act, s 203.

10 Family Courts Act 1980, s 11B.

11 *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 at [67].

12 At [68].

13 See, for example, *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (NSWCA) at 477 per McHugh JA.

14 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA). All members of the Court agreed that the courts have inherent power to make non-publication orders against non-parties if the administration of justice required it, although they differed as to the application of that principle on the particular facts.

Council concluded that the decision was inconsistent with other Commonwealth authorities and was not soundly based.[15]

[5] These conflicting decisions of the Privy Council and the Court of Appeal were discussed, along with other authorities, by this Court in *Siemer v Solicitor-General*.[16] In that case, Mr Siemer, who was not involved in the proceedings, had published a judgment dealing with pre-trial matters in a criminal case despite the fact that the Judge had made an order prohibiting publication until after the final disposition of the case in order to protect the accused persons' fair trial rights. All members of the Court agreed that, as far as the common law of New Zealand is concerned, courts have inherent powers to protect the administration of justice and these include the power, where necessary, to make non-publication orders that are binding on third parties.[17] That is, they adopted the analysis of the Court of Appeal in *Taylor* and in the subsequent case of *Broadcasting Corporation of New Zealand v Attorney-General*[18] rather than that of the Privy Council in *Independent Publishing*.[19] The majority, McGrath, William Young and Glazebrook JJ, considered that this power was not excluded by s 138 of the (now repealed) Criminal Justice Act 1985, which dealt with the courts' power to clear the court and forbid reporting of criminal proceedings;[20] the minority, Elias CJ, considered that it was.[21]

[6] *Siemer* dealt with the inherent power of a court in a criminal case to make a non-party suppression order to protect a defendant's fair trial rights. However, the Court noted that the courts have exercised non-party suppression powers in civil cases as well.[22] Nothing the Court said raises any doubt about the existence of such powers in civil cases – quite the reverse in fact.

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15 *Independent Publishing*, above n 11, at [60]–[65].
16 *Siemer*, above n 4.
17 At [56] and [60] per Elias CJ and at [169], [171] and [174] per McGrath, William Young and Glazebrook JJ. The joint judgment of McGrath, William Young and Glazebrook JJ contains a full discussion of the relevant case law: see [115]–[122].
18 *Broadcasting Corporation of New Zealand*, above n 3.
19 *Independent Publishing*, above n 11.
20 *Siemer*, above n 4, at [148].
21 At [46].
22 *Siemer*, above n 4, at [124] per McGrath, William Young and Glazebrook JJ.

[7] The principle accepted in *Taylor* that the courts have the inherent power to make non-publication orders binding against the public at large has been applied by the Court of Appeal in the civil context,[23] as well as by the High Court on numerous occasions.[24] As noted, this Court in *Siemer* acknowledged the existence of the power in civil cases. While New Zealand may be something of an outlier in relying on inherent powers in this way, we consider that what has been understood to be the position in New Zealand for more than 35 years is soundly based and should be maintained.

This case

[8] The appeal in the present case concerns the operation of two trusts that were settled by the late Michael Erceg, a wealthy businessman. The orders sought would prevent publication of:

(a) details of the amounts settled by Lynne Erceg, Michael Erceg's wife, on various trusts;

(b) the identities of the beneficiaries of the Erceg Family Trust and the amounts distributed to one of them;

(c) the allegation that distributions had been made to some beneficiaries to the exclusion of others;

(d) the value of the assets received by the appellant, Ivan Erceg, under Michael Erceg's will (Ivan is Michael's brother);

(e) the range of beneficiaries under the Independent Group Trust;

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23 Recent examples are *Clark v Attorney-General [Name Suppression]* (2004) 17 PRNZ 554 (CA); and *McIntosh v Fisk* [2015] NZCA 247, (2015) 22 PRNZ 609.

24 For examples, see Asher J's judgment in *Peters v Birnie* [2010] NZAR 494 (HC) at [23]. Further examples are *ASB Bank Ltd v AB* [2010] 3 NZLR 427 (HC) at [9]; *Ridge v Parore* [2013] NZHC 2335, [2013] NZAR 1355 at [26] and [38]; *White v Hewett* [2015] NZHC 1749, (2015) 22 PRNZ 692 at [22]; and *Fisk v McIntosh* [2015] NZHC 827, upheld on appeal: *McIntosh v Fisk*, above n 23.

(f) Ivan Erceg's views as to the value of the funds of the trusts at issue; and

(g) Ivan Erceg's suggestion (which the respondents' say is unsupported) that Lynne Erceg had a conflict of interest and/or had benefitted herself through a shareholding in Independent Liquor Ltd.

[9] The grounds on which the orders are sought are that:

(a) the issues in the appeal relate to private, family matters and to confidential family trusts;

(b) publication could create or increase disharmony in the wider family and undermine confidentiality;

(c) publication would create concerns for the personal safety of beneficiaries and trustees, including in particular Michael Erceg's mother, Millie Erceg, and Lynne Erceg;

(d) publication may result in the trustees being unnecessarily burdened with requests for information or explanation from beneficiaries or people believing they might be beneficiaries; and

(e) the contested allegations referred to in [8](g) above are unfairly prejudicial and may attract unfair negative publicity.

[10] For the respondents, Ms Coumbe QC, indicated that additional matters might arise in the course of the hearing which should be suppressed. She suggested that one option for dealing with this would be for the Court to indicate that there was to be no reporting at all until the end of the hearing, when it would be clear what the extent of the suppression order would need to be.

[11] For his part, the appellant did not oppose the making of the orders sought.

[12] In her submissions in support of the application, Ms Coumbe acknowledged that the starting point must be the fundamental principle that justice should be administered in open court, subject to the full scrutiny of the media. She argued that where non-publication is sought on the ground that prejudice would result from publicity, the Court must undertake a balancing exercise to assess whether the potential risks are sufficiently high to displace the fundamental principle. Ms Coumbe accepted that the threshold is a high one.

[13] As we have noted, we declined to make the orders sought. We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers.[25] 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.[26] 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,[27] but agree that the standard is a high one.

[14] In *John Fairfax Group v Local Court of New South Wales*, Kirby P, as he then was, explained the reasons for this "stringent" approach as follows:[28]

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25 We agree with Asher J in *Peters v Birnie*, above n 24, that s 69 of the Evidence Act 2006 does not address situations where the allegedly confidential material is available to the Court and the parties and what is sought is a non-publication order: see [17]–[20].

26 See, for example, *Peters v Birnie*, above n 24, at [25]; *Ridge v Parore*, above n 24, at [22], [27] and [35]; and *White v Hewett*, above n 24, at [25].

27 See *ASB Bank Ltd v AB*, above n 24, at [12]–[14].

28 *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 142–143. The issue in the case was whether a local magistrate hearing committal proceedings had implied power to make an order protecting the identity of an alleged victim of extortion. The majority concluded that he did have that power; Kirby P dissented.

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: … . A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

[15] The issue of confidentiality arose in circumstances similar to those in the present case in the Australian case of *Rinehart v Welker*.[29] There was a dispute between Gina Rinehart, the Australian mining magnate, and three of her four children in relation to the operation of a trust established by her late father, Lang Hancock.[30] In 2011, the three children, all beneficiaries under the trust, brought proceedings against their mother, as trustee, alleging breach of trust and seeking various orders in relation to the trust, including removing Ms Rinehart as a trustee and splitting the trust into two, one trust being for the benefit of Ms Rinehart and the other for the benefit of the children. Ms Rinehart sought a stay of the proceedings, on the ground that they were an abuse of process as they had been commenced without prior compliance with the confidential alternative dispute resolution process provided for in a deed agreed between the parties in 2006 following other well-publicised family disputes. Ms Rinehart also sought a broad suppression order in respect of the details of the case under a New South Wales statute, the Court Suppression and Non-publication Orders Act 2010 (the New South Wales Act).[31]

[16] The first instance Judge initially took the view that Ms Rinehart had a strong argument that the alternative dispute resolution provisions in the deed applied, and made a suppression order to protect the position until that issue could be determined.[32] After full argument, however, the Judge concluded that the deed did

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29 *Rinehart v Welker* [2011] NSWCA 403.

30 The fourth child supported her mother in the dispute.

31 This legislation was enacted to resolve the uncertainty about whether courts had the inherent power to make non-publication orders effective against the public at large: *Rinehart*, above n 29, at [25] per Bathurst CJ and McColl JA.

32 *Welker v Rinehart* [2011] NSWSC 1094.

not apply, but he continued the suppression order on an interim basis as Ms Rinehart indicated that she wished to seek leave to appeal his decision and he considered that the appeal was arguable.[33] The question of continuing the suppression order was then considered by a single Judge of the New South Wales Court of Appeal, who decided to extend the order until Ms Rinehart's application for leave to appeal was determined or until further order of the Court.[34] The beneficiaries, supported by media interests, applied for a review of that decision by three members of the Court. They quashed the order even though Ms Rinehart's leave application remained to be determined.[35]

[17] The Court emphasised the fundamental importance of the principle of open justice, both at common law and under the New South Wales Act. In their joint judgment, Bathurst CJ and McColl JA cited the following passage from McHugh JA's judgment in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*[36] as accurately stating the approach to be applied when considering the need for a suppression or non-publication order:[37]

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.

[18] Although in this extract McHugh JA was discussing a non-publication order binding on the parties, witnesses and others in court, rather than an order binding on the public at large, Bathhurst CJ and McColl JA applied it to the broader power conferred on the courts by the New South Wales Act. We consider that the approach

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33 *Welker v Rinehart (No 2)* [2011] NSWSC 1238.
34 *Rinehart v Welker* [2011] NSWCA 345.
35 *Rinehart*, above n 29.
36 *John Fairfax & Sons Ltd*, above n 13, at 476–477 per McHugh JA.
37 *Rinehart*, above n 29, at [29].

encapsulated in the extract is also applicable in the New Zealand context, subject to clarification of one point. McHugh JA said that a non-publication order by a court was only valid "if it is really necessary to secure the proper administration of justice in proceedings before it". It is important to emphasise that the phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of particular cases. In *John Fairfax Group v Local Court of New South Wales*, Kirby P identified some of the exceptions to the principle of open justice at common law and then said:[38]

> The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.

The administration of justice standard is capable of accommodating the particular circumstances of individual cases as well as considerations going to the broader public interest.

[19] Bathurst CJ and McColl JA considered that the fact that the matters at issue in *Rinehart* were "inherently confidential" was not, of itself, sufficient to justify a suppression order.[39] Their Honours referred to the decision of the High Court of Australia in *Hogan v Australian Crime Commission*, where the High Court accepted that the fact that documents or information could be so described was not sufficient to justify a suppression or non-publication order under s 50 of the Federal Court of Australia Act 1976 (Cth).[40] Rather, it had to be shown that an order was necessary to prevent prejudice to the administration of justice. That test might be met where, for example, the publication of information would involve a breach of a duty of confidence, or the value of personal or commercial information as an asset would be seriously compromised by disclosure.

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38 *John Fairfax Group*, above n 28, at 141. See also *Hogan*, above n 5, at [21] per French CJ.

39 *Rinehart*, above n 29, at [31].

40 *Hogan v Australian Crime Commission* [2010] HCA 21, (2010) 240 CLR 651 at [38]–[39].

[20] Bathurst CJ and McColl JA also considered that the nature of the allegations in the proceedings – breach of trustee duties – was a feature supporting openness.[41]

[21] We acknowledge that Ms Rinehart was seeking a wide-ranging suppression order whereas the respondents are seeking much more limited non-publication orders. But we do not consider that the respondents have demonstrated to the requisite high standard that the interests of justice require a departure from the usual principle of open justice. In particular:

(a) The mere fact that the proceedings deal with matters that some family members would prefer be kept private is insufficient to justify an order. We note that the family has been identified on the National Business Review's Rich List for some years, and that the activities of various family members have been the subject of media attention from time to time. We consider that this analysis applies even if there is a risk that relationships within the family will be strained as a result of disclosure.

(b) If unfounded allegations against particular trustees or beneficiaries were to be made in the course of the hearing, the respondents would have the opportunity to counter them. Any fair and accurate report of the proceedings would have to reflect that response.[42]

(c) Concerns have been raised about the safety and security of family members, particularly Millie Erceg. If sufficiently grave, concerns of this type may justify an order. But in the present case, all that has happened is that security consultants have been called in as a result of media interest in the family's affairs. That is not sufficient to displace the usual principle.

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41 *Rinehart*, above n 29, at [52].

42 Bathurst CJ and McColl JA made the same point in *Rinehart*, above n 29, at [54].

[22] For these reasons, we declined the application for non-publications orders.

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