IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 108/2019
[2019] NZSC 146

BETWEEN	ADAM RAPHAEL GREENBAUM Applicant
AND	SOUTHERN CROSS HOSPITALS LIMITED Respondent

Court:	Winkelmann CJ, Glazebrook and O'Regan JJ
Counsel:	J Long and J K Grimmer for Applicant A S Ross QC and L C Bercovitch for Respondent
Judgment:	13 December 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the respondent.

REASONS

[1] The applicant commenced proceedings against the Waikato District Health Board (the DHB) and its former chief medical officer, Dr Watson, claiming damages for interference by unlawful means.

[2] The background to the applicant's claim is as follows. The applicant is a plastic surgeon, and was accredited to practice in the United Kingdom and Europe. He came to New Zealand and worked for the DHB. There was a dispute between him and the DHB and, after mediation, there was a settlement which allowed the applicant to remain employed with the DHB until he obtained vocational registration which would allow him to work in private hospitals. He obtained vocational registration and applied

to be "credentialled" by four private hospitals in the Waikato area. His applications were declined by all of them. The applicant says this is because the DHB and Dr Watson spread misinformation about him to the private hospitals which led them to decline his applications to be credentialled.

[3] The applicant applied for third party discovery against the respondent to the present application, Southern Cross Hospitals Ltd (Southern Cross). Initially he sought both comparative material (intended to enable him to compare the way in which the private hospitals determined his application for credentialling against the way they dealt with applications by others) and evaluative material.[1]

[4] Southern Cross opposed the making of a non-party discovery order against it and its opposition was upheld by the High Court.[2] The applicant then appealed to the Court of Appeal, but his appeal was dismissed.[3] The applicant now seeks leave to appeal to this Court against the Court of Appeal decision.

[5] Southern Cross' opposition to the application for non-party discovery was based on s 69 of the Evidence Act 2006, which gives the court an overriding discretion that confidential information not be disclosed in a proceeding.

[6] The applicant has now abandoned his application in relation to comparative material, so only evaluative material (that is material about him) is in issue in relation to the present application.

[7] Section 69 requires a balancing exercise or proportionality analysis, weighing the public interest in disclosure (to ensure that litigation can be conducted fairly) against some other public interest. In this case, the "other" public interest is the interest in keeping confidential references and similar communications that are given in confidence to ensure that there is no disincentive to providing full and frank information.

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1 The applicant also applied for a similar order against another private hospital provider, but that application is not the subject of the present appeal.

2 *Greenbaum v The Waikato District Health Board* [2018] NZHC 1273 (Toogood J).

3 *Greenbaum v Southern Cross Hospitals Ltd* [2019] NZCA 438 (Williams, Peters and Gendall JJ).

[8] The Court of Appeal upheld the High Court decision to make an order under s 69 that the information sought by the applicant not be disclosed to him. The essence of the Court of Appeal's decision was that credentialling was an important process for private hospitals to ensure that doctors working in private hospitals were suitably qualified to work in that environment. The Court noted that the private hospital environment differs from that of the DHB, where the employment model means there is support around particular doctors and a degree of supervision. Southern Cross said it needed to be able to obtain information on a confidential basis from doctors, nurses and others who had worked with the doctor in question. It argued that if it were forced to disclose material that had been provided to it for the purposes of credentialling, there would be a risk that people would no longer provide frank information and that the credentialling process would be adversely affected.

[9] The importance of the confidentiality of communications for credentialling purposes was a matter of dispute in the High Court. Both Dr Baird of Southern Cross and an expert witness, Professor Paterson, formerly the Health and Disability Commissioner, gave evidence as to the importance of confidentiality. Against this was evidence from Professor Gorman of the Auckland Medical School, who argued that the need for confidentiality was overstated, and emphasised the importance of full transparency.

[10] When applying for credentialling, the applicant acknowledged that the credentialling procedure would be undertaken on the basis that Southern Cross would seek information on a confidential basis. This was considered to be significant by Peters and Gendall JJ in the Court of Appeal.[4] In a concurring judgment, Williams J said the applicant's acknowledgment of confidentiality was relevant only in a derivative sense, in that it indicated that he must have implicitly accepted that confidentiality between the hospital and its credentialling sources was important because of the public interest in the free flow of honest information between those parties.[5]

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4 At [63]–[68].
5 At [84].

[11] The applicant argues that leave should be given because this Court has not dealt with a case engaging s 69 in a substantive appeal and the way in which the section is applied is a matter of public importance. Earlier this year the Court dismissed an application for leave to appeal in a case involving s 69 in a very different context.[6] In that leave judgment, the Court accepted that there may be room for argument about how s 69 should have been applied on the facts of that case, but said that it saw the case as essentially factual and did not consider there was sufficient prospect that the Court of Appeal decision would be disturbed to justify granting leave.[7]

[12] The applicant argues that the Court should give leave in the present case as it would provide an opportunity for it to consider the methodology surrounding the application of s 69 and provide an opportunity for the Court to give guidance for future proceedings. In particular, it would enable the Court to consider the role of s 69 in the discovery context and the effect of an earlier acceptance of confidentiality. He also argues that the issues raised on the facts of the present case concern the integrity of the private hospital system as well as the safety of patients, a consideration he says justifies the grant of leave.

[13] As the Court accepted in *D (SC 26/2019) v R*, there may be room for argument about how s 69 should have been applied in the present case. But we see the arguments that the applicant wishes to pursue as essentially taking issue with the assessments and weighing exercise undertaken by the Court of Appeal in balancing the competing public interests identified earlier. It does not seem to us that the case raises any issue of principle in relation to s 69, which is clear in its terms, albeit that it requires a court to undertake a difficult exercise of balancing different public interests and determining the appropriate outcome. We do not see the present case as providing an opportunity for more general guidance and we do not see any prospect of a miscarriage of justice arising if leave is not granted.[8]

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

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6 *D (SC 26/2019) v R* [2019] NZSC 72.

7 At [9].

8 Senior Courts Act 2016, s 74(2); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5]. We also note that this is an appeal from an interlocutory application. We do not consider that the additional requirement for granting leave in s 74(4) – that it is necessary in the interests of justice – is satisfied.

[15] We award costs to Southern Cross of $2,500.

Solicitors:
Braun Bond & Lomas, Hamilton for Applicant
Chapman Tripp, Auckland for Respondent