

NOTE: ORDER MADE IN [2021] NZHC 1090 PROHIBITING PUBLICATION OF THE NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE APPELLANTS AND THIRD RESPONDENT IN SC 58/2019 PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

NOTE: ORDER MADE IN [2020] NZSC 97 PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL REMAINS IN FORCE. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

NOTE: ORDER CONFIRMED IN [2019] NZSC 97 THAT NO SEARCH OF THE COURT FILE IS PERMISSIBLE EXCEPT BY ANY OF THE PARTIES WITHOUT THE PERMISSION OF A JUDGE REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC MA 6/2021
[2021] NZSC 50**

IN THE MATTER OF Application by VINCENT ROSS SIEMER
to vary suppression orders

Court: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and
 Williams JJ

Counsel: Applicant in person
 J R Billington QC and A C Skelton for Appellants in SC 58/2019
 D P H Jones QC and S S McMullan for First Respondent in
 SC 58/2019
 T M Molloy for Third Respondent in SC 58/2019

Judgment: 28 May 2021

JUDGMENT OF THE COURT

**The application to vary the order prohibiting publication of the judgment
(*S (SC 58/2019) v Vector Ltd* [2020] NZSC 97) pending final disposition of the
trial is dismissed.**

REASONS

Introduction

[1] In a judgment delivered on 21 September 2020 the Court addressed the approach to be taken where a person seeks to file a charging document in the District Court to commence a private prosecution and, in particular, the grounds on which a District Court Judge may give a direction under s 26(3) of the Criminal Procedure Act 2011 that such a document not be accepted for filing.¹ The effect of our judgment was that the private prosecution initiated by Vector Ltd against S, M and H Ltd be accepted for filing. Because of fair trial considerations, an order was made prohibiting publication of the judgment pending final disposition of the trial but allowing publication in a law report or law digest.

The present application

[2] Mr Siemer has now filed an application seeking a variation of the non-publication order to allow public dissemination of information in the judgment which could not jeopardise fair trial rights. The application is made on two main grounds, namely:

- (a) the Court has no power to order “blanket” suppression, only temporary suppression of trial-related information (referring to s 199C of the Criminal Procedure Act); and
- (b) the current order creates an unnecessary infringement of the right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 in order to achieve the protection of fair trial rights.

[3] In addition, Mr Siemer says there is a significant and ongoing public interest in the findings in the judgment.²

¹ *S (SC 58/2019) v Vector Ltd* [2020] NZSC 97.

² Mr Siemer suggests information has been released publicly which breaches the suppression order.

[4] S and M oppose the application. They argue that as the Court completed its judgment and the matter is back before the High Court, where the trial is to take place in February 2022, the Court has no power to vary the orders.³ Even if there is jurisdiction to vary the order, it is submitted that there is no proper basis to vary the order made. Vector Ltd and the liquidators of H Ltd abide the Court’s decision on the application.

[5] Having considered the application made by Mr Siemer and having obtained the views of the parties, we have decided we can determine the application without hearing further from Mr Siemer or the parties. Determination of the application requires applying principles settled by the Court in *Siemer v Solicitor-General* to the current facts.⁴

Our assessment

[6] It is logical to address first the submission for S and M that we have no power to vary the suppression order. We do not accept that the Court is functus because either in terms of the informal procedure recognised by this Court in *Siemer v Solicitor-General*⁵ or, where s 208(3) of the Criminal Procedure Act applies, the court has power to vary such an order at any time.

[7] In *Siemer v Solicitor-General* the Court agreed in principle that, subject to any legislative provision, New Zealand law should continue to permit “any member of the public, who wishes to publish material” subject to a suppression order “to approach the registrar of the court which made the order, seeking its variation or rescission”.⁶ Where a suppression order within the definition applicable to subpart 3 of Part 5 of the Criminal Procedure Act is made, s 208(3) (relied on by Mr Siemer) states that a suppression order may be reviewed and varied by the court at any time.⁷ As the present

³ In *S (SC 58/2019)*, above n 1, we made an order prohibiting publication of the names or identifying particulars of S and M until further order of the High Court. The High Court has recently ordered that suppression of the names and identifying particulars of S, M and H Ltd is to continue until final disposition of trial: *Vector Ltd v [H Ltd] (in rec and liq)* [2020] NZHC 1090 at [34].

⁴ *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

⁵ At [181]–[183] per McGrath, William Young and Glazebrook JJ. See also at [72] per Elias CJ.

⁶ At [181].

⁷ A “suppression order” in subpart 3 of Part 5 of the Criminal Procedure Act 2011 is defined as an order made under ss 199C, 200, 202, 205, 199A(3) (where the order varies the effect of automatic suppression in any proceedings), 199B(1) or 199D(2); s 194 definition of “suppression order”.

order was not one made under the specified sections in the Criminal Procedure Act, we do not need to decide whether, as a non-party to the original decision, Mr Siemer can avail himself of s 208 or for that matter, s 210 of the Criminal Procedure Act, to which he also refers.⁸ Section 210 provides that members of the media with the specified qualifications have standing to initiate and be heard in relation to, amongst other matters, applications to vary a suppression order. Rather, as any question of standing is not dispositive, we treat Mr Siemer's application as one made under the informal procedure.

[8] We can then address Mr Siemer's proposition that s 199C operates to constrain the Court's power to make the order it did. As we shall explain, we disagree.

[9] Section 199C provides as follows:⁹

199C Court may temporarily suppress trial-related information

- (1) If a court is satisfied that publication of the information would be likely to create a real risk of prejudice to a fair trial, the court may make an order forbidding publication of any of the following information for any period that the court thinks necessary for that purpose:
 - (a) any specific information relating to matters of character of the defendant:
 - (b) any specific information relating to the previous convictions or matters of character of any person who—
 - (i) may be called as a witness; or
 - (ii) may be a victim of the offence; or
 - (iii) is connected with the defendant:
 - (c) any other offence that the defendant is also currently charged with:
 - (d) any other specific information in relation to any trial.
- (2) Despite subsection (1), the court may make an interim order of the kind described in subsection (1) if the defendant advances an arguable

⁸ See Simon France (ed) *Adams on Criminal Law — Procedure* (online looseleaf ed, Thomson Reuters) at [CPA208.02]; and *NZME Publishing Ltd v R* [2018] NZCA 363 at [16].

⁹ Section 199C of the Criminal Procedure Act 2011 was inserted in August 2020 by s 29 of the Contempt of Court Act 2019.

case that publication would be likely to create a real risk of prejudice to a fair trial.

- (3) An interim order under subsection (2)—
- (a) may be made or renewed only in the absence of an order made under subsection (1); and
 - (b) may be renewed only if the court is satisfied that publication would be likely to create a real risk of prejudice to a fair trial; and
 - (c) expires at the defendant's next court appearance for the offence.

[10] The court's power to make suppression orders to protect fair trial rights was discussed by the Court in *Siemer v Solicitor-General*.¹⁰ Addressing the statutory provisions empowering a court to make suppression orders which applied at the time,¹¹ the Court said the legislation did not codify the extent of the court's powers in this respect. There remained an inherent power to make orders of the sort in issue here.¹²

[11] In a recent judgment, Cooke J in the High Court addressed whether the addition of s 199C allowing the court to temporarily suppress certain trial-related information, amongst other changes, had altered the position in terms of the court's inherent powers.¹³ We agree with the Judge's assessment that s 199C was not intended to exclude the inherent power of the court to make such orders protecting the due administration of justice.¹⁴ Accordingly, as Cooke J found, the approach in *Siemer v Solicitor-General* remains apt.

[12] We turn then to Mr Siemer's final submission that the order unnecessarily infringes the right to the freedom of expression in s 14 of the Bill of Rights Act.¹⁵ As the Court said in *Siemer v Solicitor-General*, whether a suppression order is a justifiable limit on freedom of expression complying with s 5 of the Bill of Rights

¹⁰ See also *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 relied on by Mr Siemer in his application.

¹¹ Specifically s 138(1)–(6) of the Criminal Justice Act 1985. The Court also noted that the provisions in the Criminal Procedure Act referred to in the judgment did not “purport to provide a code”: at [169].

¹² *Siemer v Solicitor-General*, above n 4, at [146]–[148].

¹³ *Stuff Ltd v AK* [2020] NZHC 3010.

¹⁴ At [34].

¹⁵ Mr Siemer also relies on *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [120].

depends on the particular circumstances.¹⁶ The Court went on to note that where there is a real risk that fair trial rights may be infringed, “a pre-emptive but temporary publication ban is a reasonable and proportionate limit”.¹⁷ The scope of the order (including the material suppressed or the duration) “should be defined in such a way that ensures freedom of expression is limited only to the extent reasonably necessary to preserve fair trial rights”.¹⁸ Finally, the authorities make clear that where the pre-trial suppression order is limited as to time, the court can take into account the fact that the restriction on freedom of speech is temporary, and that the order is imposed to secure the right to a fair trial, another right affirmed by the Bill of Rights.¹⁹

[13] We are satisfied that the order was properly made in the present case because of the nature of material in the judgment and the resultant real risk of prejudice to a fair trial. We have considered the possibility of publishing a redacted version of the judgment but that is not without its practical difficulties. In particular, we are conscious that the management of the trial is with the High Court. We do not have access to the material on the High Court file which may affect the sensitivity or otherwise of factual material in our judgment. Experience also tells us that the nature of the issues for trial can often shift and that possibility may need to be brought into the equation in order to ensure there is no risk of prejudice to a fair trial.

[14] Further, in terms of the appropriate balance between the two interests, we note that the order is limited as to duration, lapsing on final disposition of trial. Finally, as S and M point out, the order allows for publication in a law report or law digest. Access to the legal principles discussed in the judgment, which must be the primary material of general importance, is available via those avenues.

¹⁶ *Siemer v Solicitor-General*, above n 4, at [157].

¹⁷ At [159].

¹⁸ At [159].

¹⁹ New Zealand Bill of Rights Act 1990, s 25(a). For the authorities, see: *Siemer v Solicitor-General*, above n 4, at [18]–[20] per Elias CJ and [156]–[159] per McGrath, William Young and Glazebrook JJ; *R v Burns* [2002] 1 NZLR 387 (CA) at [7]–[11]; *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA) at 571–575; and *R v Liddell* [1995] 1 NZLR 538 (CA) at 546–547.

Result

[15] For these reasons, the application to vary the order prohibiting publication of the judgment (*S (SC 58/2019) v Vector Ltd* [2020] NZSC 97) pending final disposition of the trial is dismissed.

Solicitors:

Kensington Swan, Wellington for S and M

Gilbert Walker, Auckland for Vector Ltd

Spencer Legal, Auckland for H Ltd