NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAMES AND IDENTIFYING PARTICULARS OF CONNECTED PERSONS PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 123/2022
[2023] NZSC 19

BETWEEN	M (SC 123/2022) Applicants
AND	THE KING First Respondent
	DUNCAN JOHN NAPIER Second Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: R J Hollyman KC, M Heard and E D Nilsson for Applicants
I S Auld for First Respondent

Judgment: 14 March 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicants apply for leave to appeal against a decision of the Court of Appeal dealing with name suppression.[1]

[2] The applicants are interrelated companies carrying on a land development business. They employed the second respondent, Mr Napier, in 2017.

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1 *M (CA486/2022) v R* [2022] NZCA 502 (Goddard, Ellis and Dunningham JJ) [CA judgment].

[3] Mr Napier has now been convicted of 45 dishonesty charges and sentenced to imprisonment for four years and 10 months. The offending is completely unrelated to the applicants, having occurred some years before they employed Mr Napier. At the time he was employed, Mr Napier informed the applicants that he had been the subject of civil proceedings by the victim of the frauds and also alerted them to the possibility that he may be charged with criminal offending in relation to the frauds. Mr Napier became an important staff member for the applicants and dealt with third parties on their behalf.

[4] The applicants applied for, and were granted, interim name suppression on the day before Mr Napier's trial. Subsequently, both the applicants and Mr Napier applied for permanent suppression of their names. The application was dismissed.[2]

[5] The applicants appealed to the Court of Appeal against the decision declining to suppress their names and Mr Napier's name. The Court of Appeal allowed the appeal in relation to the applicants, and their names remain suppressed. However, the Court declined to suppress Mr Napier's name.

[6] The applicants say that if Mr Napier's name is published, his association with them will become obvious. They say this will be damaging to their business.

[7] Section 200(2)(a) of the Criminal Procedure Act 2011 (the Act) provides that a court may make a suppression order in relation to a convicted person if publication would be likely to cause extreme hardship to the convicted person or any person connected with the convicted person. In addition, s 202(2)(a) provides that a court may make a suppression order in relation to a person connected with the convicted person if satisfied that the publication would likely cause undue hardship to the connected person. And s 200(2)(f) permits a court to suppress a convicted person's name if satisfied that publication of the name would be likely to identify a person whose name is suppressed.

[8] The High Court Judge refused to suppress Mr Napier's name as he found that the extreme hardship criterion was not met. Even if the criterion had been met, his

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2 *R v N* [2022] NZHC 2115 (Brewer J) [HC judgment].

Honour would not have exercised his discretion to grant name suppression. The Judge also refused to suppress the applicants' names. Mr Napier did not appeal to the Court of Appeal against the refusal to suppress his name, but the applicants did appeal, seeking suppression of both their own names and also that of Mr Napier. As noted earlier, the Court of Appeal suppressed the applicants' names but not that of Mr Napier.

[9] The applicants now seek leave to appeal to this Court against the decision of the Court of Appeal refusing suppression of Mr Napier's name.

[10] The applicants wish to raise an argument about the appeal standard that applies in relation to appeals against decisions refusing to make a suppression order. The Court of Appeal dealt with the appeal on the basis that the suppression decision involved two elements: namely, the legal analysis as to whether the criteria in ss 200(2) or 202(2) of the Act were met, followed by a discretion as to whether a suppression order should be made. The appeal focused on the second of these, which the Court of Appeal treated as a true discretion. The Court cited its earlier decision in *Parker v R*, where it had observed that, for an appeal against the exercise of a discretion to be allowed, the decision must involve an error of law or principle, a failure to take into account a relevant matter, a taking into account of an irrelevant matter, or be plainly wrong.[3]

[11] The applicants wish to argue, if leave is granted, that the appeal standard should in fact be that as set out in the decision of this Court in *Austin Nichols & Co Inc v Stichting Lodestar*, which sets out the appeal standard for general appeals.[4] They argue that this is a point of public importance because appeals in relation to similar "discretionary" decisions have been found to be subject to the *Austin Nichols* appeal standard. They say a decision of this Court in relation to the appeal standard for the present case would clarify the position not only in relation to appeals against the refusal of the grant of suppression (and such appeals are frequent), but also in relation to a number of statutory provisions containing similar discretions.

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3 CA judgment, above n 1, at [26] citing *Parker v R* [2020] NZCA 502, (2020) 29 CRNZ 536 at [30]. That reflects the standard set out in *May v May* (1982) 1 NZFLR 165 (CA) at 170 and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Blanchard, Tipping and McGrath JJ.

4 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[12] The first respondent points out that the appeal standard was not in issue in the Court of Appeal in the present case, and that this Court declined leave in relation to an application for leave raising a similar issue in *Rowley v Commissioner of Inland Revenue*.[5] The first respondent also emphasises that the Court of Appeal in the present case made it clear that the standard adopted for the conduct of the appeal made no difference to the outcome.[6]

[13] In addition, the applicants wish to argue that the Court of Appeal decision was wrong on the merits. They emphasise that, as they gave Mr Napier a second chance by employing him despite his background, they should not suffer harm from having done so.

[14] We accept that the appropriate appeal standard is potentially a point of public importance. But we do not consider it is appropriate to give leave in this case for two reasons. The first is that we do not have the benefit of the Court of Appeal's considered analysis of the point. The second is that it is clear that the appeal standard was not determinative of the outcome in the present case.

[15] We do not consider that the arguments on the merits justify the granting of leave: we see no appearance of a miscarriage in the way the merits were addressed by the Court of Appeal.

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

Solicitors:
LeeSalmonLong, Auckland for Applicants
Crown Law Office, Wellington for First Respondent

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5 *Rowley v Commissioner of Inland Revenue* [2011] NZSC 76, (2011) 25 NZTC 25,438.

6 The Court said that even if the appeal were a general appeal rather than an appeal from the exercise of a discretion, it would still uphold the High Court decision not to suppress Mr Napier's name: CA judgment, above n 1, at [47].